ARIZONA APPELLATE DECISIONS 1976-77

For the tenth consecutive year, the *Arizona Law Review* presents the "Arizona Note" issue, a review of recent Arizona appellate decisions and a Ninth Circuit case. 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 in Arizona law.

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I. ADMINISTRATIVE LAW

A. RATE DECISIONS: JUDICIAL REVIEW OF THE ARIZONA CORPORATION COMMISSION

Public service corporations, for well-established policy reasons, are subject to governmental regulation.[1] Although public policy has, in the past, demanded the regulation of utilities to encourage the abundant use of services such as electricity,[2] the most frequently mentioned goal of regulation is economic efficiency.[3] The administrative body responsible for regulation of public service corporations in Arizona is the Arizona Corporation Commission.[4] The commission's powers include the determination of rates to be charged by public service corporations,[5] as well as the issuance of certificates of public convenience and necessity.[6] When parties are dissatisfied with commission decisions, they may appeal to the superior court.[7] The trial judge must be careful when reviewing a rate order not to usurp the constitutionally granted powers of the commission.[8]

In Arizona, the scope of judicial review of decisions by the Arizona Corporation Commission is largely determined by the state's constitution and statutes,[9] but the courts' varying interpretations of their proper role

1. J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 5-6 (1966). The policy reasons supporting regulation of public service corporations in Arizona include the elimination of duplicate facilities and cutthroat competition. Corporation Comm'n v. Peoples Freight Lines, Inc., 41 Ariz. 158, 165-66, 16 P.2d 420, 422-23 (1932). *See also* P. AREEDA, ANTITRUST ANALYSIS 26-27 (2d ed. 1974); W. MOSHER & E. CRAWFORD, PUBLIC UTILITY REGULATION 3-13 (1933); 1 A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 1-2 (1969).

2. J. BONBRIGHT, *supra* note 1, at 9.

3. *See* R. LEFTWICH, THE PRICE SYSTEM AND RESOURCE ALLOCATION 245-46 (5th ed. 1973). *See also* 1 A. PRIEST, *supra* note 1, at 1-6.

4. ARIZ. CONST. art. 15, §§ 3-4; *see* Arizona Corp. Comm'n v. Superior Court, 105 Ariz. 56, 59-60, 459 P. 2d 489, 492-93 (1969) (discussing the powers granted the commission over public service corporations).

5. *See* ARIZ. CONST. art. 15, § 3. Arizona Corp. Comm'n v. Superior Court, 105 Ariz. 56, 59-60, 459 P.2d 489, 492-93 (1969).

6. *See* ARIZ. REV. STAT. ANN. § 40-282(C) (1974). A certificate of public convenience and necessity is a "license which allows a person to enter those employments which are restricted for reasons of health, safety, and welfare of the people of this state and is regulated by the Corporation Commission." Sulger v. Arizona Corp. Comm'n, 5 Ariz. App. 69, 73, 423 P.2d 145, 149 (1967). Certificates are issued to street railroads, gas, electric, and telephone companies, and companies providing fire, sewer, and water services. *See* ARIZ. REV. STAT. ANN. § 40-381(A) (1974).

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

8. ARIZ. CONST. art. 15, § 3. See discussion note 9 *infra*.

9. Two constitutional provisions and one statutory provision contain most of the relevant guidelines pertaining to the commission. ARIZ. CONST. art. 15, §§ 3, 14; ARIZ. REV. STAT. ANN.

indicate that "scope of review" is a muddled concept under present Arizona law. In *Sun City Water Co. v. Arizona Corporation Commission*,[10] the Arizona Supreme Court may have raised more questions about the scope of review than it answered.

The controversy arose in 1973 when the Arizona Corporation Commission issued a rate order permitting a 6.72 percent rate of return on the value of the water utility's property.[11] This rate was based on comparisons of rates of return of other regulated water companies.[12] The company objected to the allowed rate of return, claiming that it was unreasonably low. When the commission denied a rehearing, the company filed suit in superior court,[13] where the commission's rate order was affirmed.[14] Sun City Water Company appealed.[15]

The Arizona Court of Appeals, after examining closely the evidence considered by the commission in reaching its rate decision, concluded that certain relevant factors, including the earnings of unregulated industries, had not been considered and therefore held that substantial evidence did not support the commission's rate order.[16] Accordingly, the court of appeals set aside the commission's order, reversed the superior court's decision, and

§ 40-254(A)-(F)(1974). Under the constitution, the commission is granted "full power" to set just and reasonable rates, ARIZ. CONST. art. 15, § 3, and is required to ascertain the "fair value" of the property of each public service corporation, *id.* § 14. Although the constitution says nothing specific about the scope of judicial review, these provisions have been interpreted to require a narrow scope of review in Arizona. Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P. 2d 378, 384 (1956); Ethington v. Wright, 66 Ariz. 382, 392, 189 P.2d 209, 216 (1948); State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 298, 138 P. 781, 783 (1914).

ARIZ. REV. STAT. ANN. § 40-254(A)-(F) (1974) deals with procedural matters such as standing, burden of proof, and the proper forum for judicial relief. Arguably, subsection C of the statute is relevant to the scope of judicial review because it provides that the trial in superior court be conducted like all other trials in civil actions. See text accompanying note 43 *infra*. Clearly, trials in most other civil actions are not restricted by a narrow scope of review. However, the courts have interpreted the statute to require a narrow scope of review. See text accompanying notes 46-50 *infra*.

10. 113 Ariz. 464, 556 P.2d 1126 (1976).

11. The commission's rate order was lower than that recommended by both its own experts and the company's experts. Sun City Water Co. v. Arizona Corp. Comm'n, 26 Ariz. App. 304, 306, 547 P.2d 1104, 1106, *vacated*, 113 Ariz. 464, 556 P.2d 1126 (1976). The commission, however, is not bound by the opinions of any of the experts which appear before it. *Id.* at 311, 547 P.2d at 1111; *see* Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154-55, 294 P.2d 378, 384-85 (1956) (noting that the commission would not have been compelled to adopt the figures of an engineer, even if the figures had been presented to the commission at a rate hearing).

12. Sun City Water Co. v. Arizona Corp. Comm'n, 26 Ariz. App. 304, 310-11, 547 P.2d 1104, 1110-11, *vacated*, 113 Ariz. 464, 556 P.2d 1126 (1976).

13. ARIZ. REV. STAT. ANN. § 40-254(A) (1974) provides that within 30 days after the commission has denied a rehearing, "any party in interest" may commence a suit in superior court to set aside the commission's decision on the ground that the rate set is "unlawful."

14. 26 Ariz. App. at 311, 547 P.2d at 1111.

15. Sun City Water Company claimed that the initial testimony of three expert witnesses recommending higher rates should have been controlling. *Id.* at 306, 547 P.2d at 1106. Furthermore, the company claimed that the calculations of the commission were erroneous because in estimating the cost of equity capital, the commission examined the rates of return of regulated water companies rather than focusing on other regulated and nonregulated industries that did not reflect the general depression of the water industry. *Id.* at 310, 547 P.2d at 1110.

16. *Id.* at 311, 547 P.2d at 1111.

remanded the matter for further proceedings.[17] The Arizona Supreme Court vacated the court of appeals' opinion,[18] noting only that it would not conduct a separate de novo hearing, but would affirm the trial court if its decision were supported by "any reasonable evidence."[19] The supreme court stated that the ruling of the trial court upholding the rate order was not lacking such evidence.[20]

This casenote will describe the characteristics and ambiguities of judicial review of rate decisions by the Arizona Corporation Commission. The purposes and means of judicial restraint first will be discussed. Second, procedural aspects of judicial review will be examined. Arizona case law then will be examined in order to aid the interpretation of *Sun City Water*. Finally, the problems of Arizona judicial review will be summarized, and a brief suggestion will be made for its improvement.

Characteristics of Judicial Review

In reviewing agency decisions, courts recognize not only that the agency possesses special expertise in its field, but also that time constraints prohibit judicial review of many technical issues that necessitate detailed explanation and expert testimony.[21] Because of the technical nature of rate proceedings, judges cannot be expected to have the knowledge and competence necessary to justify permitting courts to substitute their judgment for that of the commission experts.[22] Accordingly, courts defer to agency decisionmaking, with the result that the methods used by commissions in fixing rates often escape judicial review.[23]

The most common standards utilized for judicial review of administrative decisions are the "substantial evidence" test and the "arbitrary, capri-

17. *Id.* at 311-12, 547 P.2d at 1111-12. As the supreme court noted, however, the court of appeals lacked authority to direct the superior court to remand back to the commission any portion of the commission's decision. Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 466, 556 P.2d 1126, 1128 (1976). ARIZ. REV. STAT. ANN. § 40-254(C) (1974) provides that a commission order can only be affirmed, modified, or set aside.

18. 113 Ariz. 464, 466, 557 P.2d 1126, 1128 (1976).

19. *Id.* at 465, 556 P.2d at 1127. The court also noted that the commission did not abuse its "range of legislative discretion." *Id.*

20. *Id.*

21. While discussing the corporation commission and approving its broad powers, the Arizona Supreme Court in 1914 noted the "unwisdom and impracticality of imposing upon the courts" the burden of technical litigation which may require months merely to hear the evidence. State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 305, 138 P. 781, 785 (1914).

22. B. SCHWARTZ, ADMINISTRATIVE LAW § 204, at 579-80 (1976). *See also* Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 81-82, 89 (1944), stating that reviewing courts are more averse to upsetting administrative findings than they are to upsetting findings of fact by a judge. The reason for this aversion is that reviewing courts wish to take advantage of expertness and specialization. *Id.*

23. *See* Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944); Intermountain Gas Co. v. Idaho Pub. Utils. Comm'n, 97 Idaho 113, 120, 540 P.2d 775, 782 (1975); Nevada Power Co. v. Public Serv. Comm'n, 91 Nev. 816, 823, 544 P.2d 428, 435 (1975).

cious, or abuse of discretion" test.[24] Traditionally, the former test was considered to entail a broader scope of review than the latter.[25] Distinguishing between different standards of review may be unimportant, however, since it appears that the Arizona courts are content to apply a narrow scope of review in rate cases without expressly adopting the language of any single test. For example, in *Simms v. Round Valley Light & Power Co.*,[26] the court held that neither it nor the trial court could conclude that the commission's order was "without substantial support in the evidence or arbitrary."[27] In *Sun City Water*, on the other hand, the supreme court merely concluded that the commission had not "abused its range of legislative discretion."[28] In any event, specific standards may be irrelevant since, although the application of a particular test may be required,[29] what is most important is that judges understand that they may not substitute their judgment for administrative judgment.[30] Terms such as reasonableness, substantial evidence, and arbitrariness are only guides.[31]

Constitutional and Statutory Limitations on Judicial Review of Commission Ratemaking

Certain Arizona constitutional provisions and statutes impose general, but effective restraints on the courts' authority to review ratemaking decisions by the corporation commission. While no specific language constraining judicial review appears, the constitution imposes a duty on the commis-

24. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.00, at 646-47 (1976). According to the substantial evidence rule, a rate order will be upheld if it is supported by substantial evidence, meaning evidence which is "more than a mere scintilla" and which "a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Another popular definition of substantial evidence is evidence "affording a substantial basis of fact from which the fact in issue can be reasonably inferred." NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 299 (1939).

The Arizona Court of Appeals has defined substantial evidence as "evidence of substance which establishes facts and from which reasonable inferences may be drawn." City of Tucson v. Citizens Utils. Water Co., 17 Ariz. App. 477, 481, 498 P.2d 551, 555 (1972). Although substantial evidence is more than speculation, it does not constitute a preponderance of evidence. The substantial evidence test, which requires "something less than the weight of the evidence, . . . frees the reviewing courts of the time-consuming and difficult task of weighing the evidence." Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966).

The arbitrariness test, on the other hand, tests the reasonableness of an administrative decision under a less strict standard. A decision found arbitrary is probably "wrong in a greater degree" than a decision that lacks substantial evidence in its favor. K. DAVIS, *supra* at 648.

25. K. DAVIS, *supra* note 24, at 647.

26. 80 Ariz. 145, 294 P.2d 378 (1956).

27. *Id.* at 156, 294 P.2d at 385. Both the substantial evidence and arbitrariness tests signify narrow scopes of review. K. DAVIS, *supra* note 24.

28. 113 Ariz. at 465, 556 P.2d at 1127. See text & notes 35-38 *infra* for a discussion of the different functions of the commission which represent the three branches of government.

29. In Texas, for example, rate orders generally are required by statute to be reviewed under the substantial evidence test. TEX. REV. CIV. STAT. ANN. art. 1446C, § 69 (Vernon Supp. 1975).

30. K. DAVIS, *supra* note 24, at 653. The futility of precise definitions of various scopes of review is mentioned by Justice Frankfurter in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951): "[T]he precise way in which courts interfere with agency findings cannot be imprisoned within any form of words . . . ." *Id.* at 489.

31. K. DAVIS, *supra* note 24, at 653.

sion to find the fair value of public utility properties located in Arizona,[32] and grants the commission "full power to . . . prescribe just and reasonable rates and charges" based on that finding.[33] The reason courts are restrained from exercising broad judicial review is that the "full power" clause of the constitution grants to the commission a complete and plenary power to fix rates; this power is an exclusive power with but one limited exception.[34]

The Arizona Corporation Commission is unique in that it has been given such broad authority.[35] This is especially so in ratemaking, where the commission is like another branch of government,[36] exercising a constitutionally delegated legislative discretion to make fair value findings and fix rates based thereon.[37] Because only the commission has this constitutionally granted power to set rates, the courts must defer to its judgment.[38]

The statutory provision governing judicial review of commission pro-

32. ARIZ. CONST. art. 15, § 14.

33. *Id.* art. 15, § 3; *see* Ethington v. Wright, 66 Ariz. 382, 392, 189 P.2d 209, 216 (1948).

34. In making rates the commission has "full and exclusive power. In such field the Commission is supreme and such exclusive field may not be invaded by the courts . . . ." Ethington v. Wright, 66 Ariz. 382, 392, 189 P.2d 209, 216 (1948). An exception to the commission's exclusive power exists where ratemaking is conducted by municipal corporations. See discussion note 38 *infra*.

See also State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 298, 138 P. 781, 783 (1914); text & note 37 *infra*.

35. State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 304-05, 138 P. 781, 785 (1914). The Arizona Supreme Court has stated that "no other state has given its commission, by whatever name called, so extensive power and jurisdiction." *Id.* at 300, 138 P. at 783. The functions of the commission pervade the three departments of government (judicial, legislative, and executive). *Id.* at 305, 138 P. at 785. For example, the commission exercises judicial functions in cases involving certificates of public convenience and necessity, *see* Walker v. DeConcini, 86 Ariz. 143, 150, 341 P.2d 933, 938 (1959), and legislative functions in ratemaking, *see* Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956).

36. State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 306, 138 P. 781, 786 (1914).

37. Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956). In both *Sun City Water* and *Simms*, the supreme court stated outright that the superior court is concerned only with whether the commission abused its range of legislative discretion. Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 465, 556 P.2d 1126, 1127 (1976); Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956). The court in *Simms* stated that the commission has constitutionally delegated legislative power to fix rates which may not be usurped, *id.*, and it explained the broader scope of review in certificate cases, see text accompanying notes 44-49 *infra*, by noting that "[t]hese cases do not involve an express and specific constitutional grant of power." 80 Ariz. at 154, 294 P.2d at 384.

38. In construing ARIZ. CONST. art. 15, § 3, the Arizona Supreme Court has stated that the "full power" granted the commission is not necessarily exclusive power because § 3 provides that power can be divested to municipal corporations. State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 298, 138 P. 781, 783 (1914). The court emphasized, however, that this is the single exception to the commission's exclusive power to fix rates. *Id. See also* Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956) (authority to determine fair value is "delegated exclusively to the commission").

In at least one other state, an attempt to allow full de novo judicial review of agency decisions has been struck down as a violation of separation of powers because such review would allow the courts to perform nonjudicial functions. *See* Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699 (1959) (construing TEX. CONST. art. 11, § 1 requiring departmental independence). *See also* ARIZ. CONST. art. 3 (requiring departmental independence). Because the Arizona Corporation Commission exercises legislative power, this constitutional provision would prohibit judicial control of ratemaking. *See* Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956).

ceedings[39] permits an action challenging a corporation commission order to be commenced in superior court[40] and empowers the superior court to affirm, modify, or set aside the order.[41] The burden of proof is on the party adverse to the commission to prove by clear and satisfactory evidence that the agency determination is unreasonable or unlawful.[42] The statute also declares that the "trial shall conform, as nearly as possible . . . to other trials in civil actions."[43]

The Arizona courts have construed this statute to call for a trial de novo.[44] "De novo" usually means "anew" or "afresh"[45] in the sense that a trial is conducted as if the suit were original;[46] hence, the reviewing court in a de novo trial is usually free to exercise its independent judgment.[47] For example, when reviewing commission decisions concerning certificates of public convenience and necessity,[48] "de novo" means that the trial court weighs evidence and draws an independent conclusion subject only to the constraint that the burden of proving the invalidity of the commission's conclusion is on the party adverse to the commission.[49] As applied to superior court review of rate cases, however, "de novo" has a different meaning. In such cases, independent judicial review is prohibited—the court may disturb the commission's decision in a rate case only if it is not supported by substantial evidence, is arbitrary, or is otherwise unlawful.[50]

39. ARIZ. REV. STAT. ANN. § 40-254(A)-(F) (1974). The Arizona Administrative Procedure Act, *id.* §§ 12-901 to -914 (1956) is inapposite because it only applies to those situations where no right of appeal from administrative decisions has been statutorily provided. *See* County of Pima v. State, 114 Ariz. 275, 279, 560 P.2d 793, 797 (1977).

40. ARIZ. REV. STAT. ANN. § 40-254(A) (1974). This section also provides that the action may be commenced by "any party in interest." *Id.*

41. *Id.* § 40-254 (C).

42. *Id.* § 40-254(E). The phrase "clear and satisfactory evidence" has varying definitions. A fair definition is that it means greater than a preponderance of evidence. Chicago R.I. & P.I. v. Nebraska State Ry. Comm'n, 85 Neb. 818, 826, 124 N.W. 477, 481 (1910).

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

44. *See, e.g.*, Arizona Corp. Comm'n v. Fred Harvey Transp. Co., 95 Ariz. 185, 190, 388 P.2d 236, 239 (1964); Lofersky v. Needel, 26 Ariz. App. 231, 233, 547 P.2d 502, 504 (1976); Sulger v. Arizona Corp. Comm'n, 5 Ariz. App. 69, 72, 423 P.2d 145, 148 (1967). *But see* Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956); City of Tucson v. Citizens Utils. Water Co., 17 Ariz. App. 477, 480, 498 P.2d 551, 554 (1972) (both suggesting that in rate cases, the superior court proceeding is not truly de novo). For an explanation, see text & note 50 *infra*.

45. Lone Star Gas Co. v. State, 137 Tex. 279, 298, 153 S.W.2d 681, 692 (1941).

46. *Id.*

47. *Id.*

48. See discussion note 6 *supra*.

49. Arizona Corp. Comm'n v. Fred Harvey Transp. Co., 95 Ariz. 185, 190, 388 P.2d 236, 239 (1964); Lofersky v. Needel, 26 Ariz. App. 231, 233, 547 P.2d 502, 504 (1976).

50. Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154-55, 294 P.2d 378, 384 (1956); City of Tucson v. Citizens Utils. Water Co., 17 Ariz. App. 477, 480, 498 P.2d 551, 554 (1972). A minority of states, however, allow independent judicial review of rate decisions. Most, if not all of these states, agree that broad judicial review in rate cases is mandated by the United States Constitution because unreasonably low rates may result in confiscation of property without due process of law. In New England Tel. & Tel. Co. v. Department of Pub. Utils., 367 Mass. —, 354 N.E.2d 860 (1976), the court stated that in cases involving the issue of confiscation, there will be an independent review of both the facts and law. *Id.* at —, 354 N.E.2d at 863; *accord*, General Tel. Co. v. Alabama Pub. Serv. Comm'n, 335 So. 2d 151, 155-56 (Ala. 1976); Allied Chem. Corp. v. Georgia Power Co., 236 Ga. 548, 551, 224 S.E.2d 396, 399

In light of the Arizona Corporation Commission's broad ratemaking powers, however, the narrow scope of review in rate cases is understandable.

One of the reasons that such broad powers were granted to the commission is that experience with legislative efforts to regulate rates has been unsatisfactory;[51] legislatures tend to lack the information, time, and means of investigation required to weigh all the variables which must be examined to determine just and reasonable rates.[52] In addition, judicial deference to administrative ratemaking is a recognition that judges also lack the expertise necessary in this type of litigation,[53] and that time constraints prevent courts from hearing the overwhelming load of evidence often presented in rate cases.[54]

Nature of Superior Court Review

Arizona is not alone in labeling "de novo" a proceeding which in fact is much narrower in scope than a completely new trial.[55] The only justifica-

(1976). A Texas statute provides that the issue of confiscation will be determined "by a preponderance of the evidence" rather than the more narrow substantial evidence standard. *See* TEX. REV. CIV. STAT. ANN. art. 1446C, § 69 (Vernon Supp. 1975).

These states seem to follow the reasoning of the United States Supreme Court in Ohio Valley Water Co v. Ben Avon Borough, 253 U.S. 287 (1920), where the Court stated that independent judicial review is necessary in cases involving fundamental constitutional rights. *Id.* at 289. Fifteen years after *Ben Avon Borough*, the Court stated that although the ruling in that case was still valid, a court may not disregard the weight which attaches to findings upon hearings and evidence. St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 53 (1936). Although *St. Joseph* may only be a qualification of *Ben Avon Borough*, the latter was definitely weakened by Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944), where the Court stated that a reasonableness test is to be used in rate proceedings. *Id.* at 602-03.

The vast majority of states do not follow *Ben Avon Borough*, and it is generally agreed that the case is no longer influential precedent. *See* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 413 (6th ed. 1974). *See also* Glick, *Independent Judicial Review of Administrative Rate-Making, the Rise and Demise of the Ben Avon Doctrine*, 40 FORDHAM L. REV. 305, 313-14 (1971).

A narrow scope of review may, in any event, be constitutionally permissible even when the action involves constitutionally protected rights because due process may be served by no more than notice and an opportunity for a hearing. *See* Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570, 575-77 (1940); Trapp v. Shell Oil Co., 145 Tex. 323, 344-51, 198 S.W.2d 424, 438-42 (1946). *See also* Hamilton & Jewett, *The Administrative Procedure and Texas Register Act: Contested Cases and Judicial Review*, 54 TEX. L. REV. 285, 299 (1976).

In Arizona, the scope of review of the corporation commission is unaffected by constitutional claims such as confiscation. *See* Arizona Corp. Comm'n v. Arizona Pub. Serv. Co., 113 Ariz. 368, 370, 555 P.2d 326, 328 (1976). Faced with an allegation of confiscation, the superior court will likely apply its usual scope of review and inquire whether the commission's decision is supported by substantial evidence or is not arbitrary. This implies that the courts are extremely deferential to commission decisionmaking, and that due process is served by the availability of hearings and appeals. *See* Hamilton & Jewett, *supra*.

51. State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 305, 138 P. 781, 785 (1914).

52. *Id.*

53. B. SCHWARTZ, *supra* note 22, at 579-80.

54. *See* State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 305, 138 P. 781, 785 (1914).

55. Texas rate orders are reviewed under what has been called substantial evidence de novo review. According to this rule, administrative orders are reviewed by the substantial evidence rule, but the courts may consider any evidence regardless of whether it was considered by the agency. Hamilton & Jewett, *supra* note 50, at 299-300; *see* Comment, *Public Utility Commission: Appellate Procedure & Judicial Review*, 28 BAYLOR L. REV. 1001, 1023 (1976). *See generally* Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 SW. L.J. 239 (1969); *see also* TEX. REV. CIV. STAT. ANN. art. 1446C, § 69 (Vernon Supp. 1975).

tion for using the phrase "de novo" with respect to review of ratemaking decisions is that evidence which was not presented to the commission may be admitted at trial.[56] The superior court may consider both commission

56. Since both Arizona and Texas prohibit broad and independent judicial review of rate orders, *see* text & notes 35-38, 50, 52 *supra*, the only aspect of a trial "anew" is the introduction of new evidence. In Arizona, the superior court is required to review the corporation commission's transcripts, Sulger v. Arizona Corp. Comm'n, 5 Ariz. App. 69, 72, 423 P.2d 145, 148 (1967), and it may also hear new evidence, State *ex rel.* Church v. Arizona Corp. Comm'n, 94 Ariz. 107, 110, 382 P.2d 222, 224 (1963); Gibbons v. Arizona Corp. Comm'n, 75 Ariz. 214, 217, 254 P.2d 1024, 1027 (1953). In Texas, the transcripts of commission proceedings are usually not admitted into evidence in a de novo trial. Reavley, *supra* note 55, at 246. Instead, evidence is admitted at trial on its own merits under the rules of evidence. *Id.* at 241 n.14. The Texas procedure has been attacked as illogical because it is believed that the only way to judge the reasonableness of a commission decision is to examine the transcripts of the commission hearing. *Id.* at 253.

In Arizona, there has been controversy concerning not whether transcripts should be examined, but rather the type of evidence which is admissible in addition to commission transcripts. This is precisely one of the issues in Arizona Corp. Comm'n v. Citizen's Utils. Co., No. C-287873 (Super. Ct. Ariz. 1975), *appeal docketed*, No. 1CA-CIV 3168 (Ct. App. Aug 8, 1975). In that case the trial court set aside a commission decision basing its ruling partly upon evidence of events occurring subsequent to commission hearings. On appeal, the commission is arguing that the admission of this evidence was improper and constituted a usurpation of the commission's constitutional power. Opening Brief for Appellant at 23, Arizona Corp. Comm'n v. Citizens Utils. Co., No. C-287873 (Super. Ct. Ariz. 1975), *appeal docketed*, No. 1 CA-CIV 3168 (Ct. App. Aug. 8, 1975); *see* ARIZ. CONST. art. 14, § 3. The following discussion substantiates the commission's argument.

Although the Arizona Administrative Procedure Act, ARIZ. REV. STAT. ANN. §§ 12-901 to -914 (1956), does not apply to the corporation commission, see note 39 *supra*, it provides that new evidence may be heard "in cases where in the discretion of the court justice demands the admission of such evidence." ARIZ. REV. STAT. ANN. § 12-910(A) (1956). There appears to be no such flexible rule applicable to the Arizona Corporation Commission.

It is most probable that evidence available at the time of the commission hearing is admissible in superior court regardless of whether the commission considered it. In Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 294 P.2d 378 (1956), for example, the superior court considered an "appraisement" of fair value that was not before the commission, but the appraisement was an item that apparently could have been obtained at the time of the commission hearing. *Id.* at 154, 294 P.2d at 384. Although the court did not expressly address the question of its admissibility, the court acknowledged that, had the appraisement been before the commission, the commission would not have been required to adopt its figures. *See id.* at 155, 294 P.2d at 384.

For additional cases where evidence available to the commission, although not introduced, was held to have been properly admitted at trial, see State *ex rel.* Church v. Arizona Corp. Comm'n, 94 Ariz. 107, 110, 382 P.2d 223, 224 (1963); Gibbons v. Arizona Corp. Comm'n, 75 Ariz. 214, 217, 254 P.2d 1024, 1027 (1953).

Simms seems to indicate, however, that evidence of events occurring subsequent to a commission hearing is not admissible in court. Referring to fair value estimations, the court said that "[f]air value means the value of properties *at the time of the inquiry*." *Id.* at 151, 294 P.2d at 382 (emphasis added). Evidence that the value of company property increased subsequent to termination of commission proceedings may, therefore, be inadmissible in superior court. *See id.* The supreme court followed the logic of *Simms* in Arizona Corp. Comm'n v. Arizona Pub. Serv. Co., 113 Ariz. 368, 555 P.2d 326 (1976), where it held that the commission is not obliged to adopt a future test period in determining fair value, but may make its determination based upon an historic test year. *Id.* at 370, 555 P.2d at 328.

Also stating that evidence arising subsequent to commission hearings is inadmissible in superior court is Arizona Corp. Comm'n v. Gibbons, 85 Ariz. 210, 344 P.2d 167 (1959). There the commission approved two certificates of public convenience and necessity at the same time but dated one certificate a day earlier than the other. The recipient of the first certificate attempted to prove in court that the later certificate was invalid because the first certificate gave its holder priority in conducting business in the area concerned. The trial court agreed, cancelling the certificate with the later date. The supreme court reversed, stating that the propriety of issuing a certificate is to be determined by the commission under conditions existing at the time of the application. *Id.* at 213-14, 344 P.2d at 169-70. It concluded that the certificate was improperly cancelled based on evidence concerning the dating of the certificate. *Id.* at 214, 344 P.2d at 170. This evidence was inadmissible in court because it was not before the commission at the time of the hearing.

transcripts and certain additional evidence.[57] Evidence available at the time of the commission hearing, but not considered by the commission, apparently may be considered by the superior court,[58] while evidence arising subsequent to the commission hearing probably cannot be considered by the court because it was not available to the commission.[59]

Because the introduction of new evidence in the superior court is the sole characteristic of Arizona judicial review of rate cases which parallels a trial "de novo," the true function of superior court review of rate orders is not clear. Consideration of commission transcripts and new evidence in a trial that is bound by the formal rules of procedure of all "other trials in civil actions," as required by statute,[60] is time consuming and expensive in a ratemaking situation.[61] But the scope of review by the superior court is

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An inflexible rule prohibiting commission consideration of evidence not available to the commission seems to ignore the consequences of drastic changes in events (perhaps economic) that may occur merely one day subsequent to a commission decision. There is a remedy for such occurrences, however, since the complaining party need only apply for another hearing or adjustment by the commission. *See* Arizona Corp. Comm'n v. Arizona Pub. Serv. Co., 113 Ariz. 368, 370-71, 555 P.2d 326, 328-29 (1976). The aggrieved party may also apply for a rehearing. ARIZ. REV. STAT. ANN. § 40-253(A) (1974). On the other hand, if the commission is sympathetic to the problems of rapidly growing utilities during inflationary times, it may, in its own discretion, consider matters arising subsequent to the test year it has chosen as a basis for its fair value calculation. Arizona Corp. Comm'n v. Arizona Pub. Serv. Co., 113 Ariz. 368, 370-71, 555 P.2d 326, 328-29 (1976). In such a case, a request by the utility for a rehearing in the future may not be necessary.

The imposition of some restrictions on the admissibility of evidence in rate cases may be mandatory. Because the corporation commission has constitutionally delegated legislative power, admission of evidence unavailable to the commission may violate article 3 of the Arizona Constitution, which mandates that no department of government exercise the powers belonging to other governmental departments. Moreover, since conditions always change, permitting a trial court to set aside a commission order based upon evidence unavailable to the commission may seriously hamper the ability of a commission decision to survive superior court scrutiny. Use by the superior court of evidence available to, although not considered by, ratemaking bodies is permissible, however, because regulatory agencies are bound by the United States Constitution to consider all relevant factors to insure that rates are reasonable. Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679, 692-93 (1923); *see* Intermountain Gas Co. v. Idaho Pub. Utils. Comm'n, 97 Idaho 113, 125, 540 P.2d 775, 787 (1975) (citing *Bluefield*).

The United States Supreme Court also distinguishes between evidence available during and evidence available subsequent to a commission proceeding. *See* West Ohio Gas Co. v. Public Utils. Comm'n of Ohio, 294 U.S. 79, 81 (1935) (fourteenth amendment requires the commission to consider pertinent available evidence to accord fair play). *But see* United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 534-36 (1946) (evidence of events occurring after the close of commission proceedings does not require a commission to grant a petition for rehearing).

Various other states allow the courts in rate cases to consider evidence not adduced before the ratemaking bodies. *See* Allied Chem. Corp. v. Georgia Power Co., 236 Ga. 548, 551, 224 S.E.2d 396, 399 (1976); Southwest Stone Co. v. Railroad Comm'n, 184 S.W.2d 691, 694-95 (Tex. Ct. App. 1944).

57. Gibbons v. Arizona Corp. Comm'n, 75 Ariz. 214, 217, 254 P.2d 1024, 1027 (1953). See discussion note 56 *supra*.

58. *See* Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 155, 294 P.2d 378, 384 (1956). See discussion note 56 *supra*.

59. *See* Arizona Corp. Comm'n v. Arizona Pub. Serv. Co., 113 Ariz. 368, 370, 555 P.2d 326, 328 (1976); Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956).

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

61. Interview with Earl H. Carroll, Attorney at Law, Evans, Kitchel & Jenckes, P.C., in Tucson, Ariz. (April 7, 1977). For an extreme example of how costly and time consuming

narrow, and it will probably be difficult for the superior court to conclude that the commission's decision is not supported by substantial evidence or is arbitrary or unlawful.[62] Therefore, it is unlikely that additional evidence submitted at trial will be determinative of whether the commission has abused its discretion. The court cannot reweigh evidence or use its independent judgment,[63] and, if the admissibility of new evidence is limited to those facts that were available at the time of the hearing but not presented to the commission,[64] new evidence will likely be of little significance unless the hearing before the commission was a sham in which vital facts and issues were not considered.[65] In light of the unique powers of the commission in ratemaking, the most that can be said of judicial review of rate cases is that the superior court provides a summary check on the broad legislative power of the commission; superior court trial of rate cases is not a mirror image of the commission proceedings, but rather an insurance policy against flagrant abuses of discretion.[66]

Some confusion exists as to whether the superior court proceeding has a focus different from that of the court of appeals and supreme court.[67] One Arizona decision stated that the scope of review of the superior and appellate courts in rate cases is coextensive, with the exception of hearing new evidence.[68] If this is so, by the time a rate case is decided by the state supreme court, the commission's order will have been tested by the same standard of "reasonableness" in three courts. The supreme court in *Sun City Water*, however, by concluding that it will defer to the judgment of the superior court in rate cases if the trial court is supported by "any reasonable evidence,"[69] effectively holds that the scope of review in rate cases is not

judicial review of rate decisions can be, see Hamilton & Jewett, *supra* note 50, at 298 n.56 (discussing the eight and one-half year journey of a case through the courts that produced in excess of 40,000 pages of transcript).

62. *See* Walker, *The Application of the Substantial Evidence Rule in Appeals From Orders of the Railroad Commission*, 32 TEX. L. REV. 639, 645 (1964).

63. *See* Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 466, 556 P.2d 1126, 1127 (1976); Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956).

64. See discussion note 56 *supra*.

65. Because the scope of review of rate cases in Arizona is narrow, see text & notes 24-28 *supra*, new evidence in superior court is not as persuasive as otherwise possible. Furthermore, the most vital evidence sought to be admitted at trial may be evidence of events occurring immediately after commission decisions. *See generally* Arizona Corp. Comm'n v. Arizona Pub. Serv. Co., 113 Ariz. 368, 555 P.2d 326 (1976); *see also* discussion note 56 *supra*.

66. *See generally* Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 466, 556 P.2d 1126, 1127 (1976).

67. In cases involving applications for certificates of public convenience and necessity, the superior court proceeding is not an appeal but a new trial in which the superior court is required to reweigh the evidence and exercise its independent judgment as to the issue decided by the commission. Corporation Comm'n v. People's Freight Line, Inc., 41 Ariz. 158, 160-61, 16 P.2d 420, 421 (1932). On the other hand, the limited nature of the superior court trial in rate cases makes the proceeding more akin to an appeal.

68. City of Tucson v. Citizens Utils. Water Co., 17 Ariz. App. 477, 480, 498 P.2d 551, 554 (1972). Whereas the appellate courts examine the record created in the trial court, the trial court examines the record of the commission and considers certain new evidence. *See* discussion note 56 *supra*.

69. 113 Ariz. at 465, 556 P.2d at 1127.

coextensive at trial and appellate levels.[70] Instead, the superior court reviews the commission's decision, and the appellate courts review the superior court's decision.

The reason this distinction is crucial is that both parties in a rate hearing may present to the commission substantial evidence in favor of their respective positions.[71] The apparent result of *Sun City Water* is to invest the superior court's decision with presumptive validity comparable to that of a commission decision. This is a clarification of prior case law,[72] and it is unfortunate that the court failed to so indicate.

Examining the Evidence

Regardless of the label a court uses to describe its scope of review, an important issue is the extent to which the courts are willing or permitted to analyze the record created before the commission and instruct the commission to consider certain evidence. The court of appeals in *Sun City Water* found that the commission failed to give consideration to comparable earnings of unregulated industries and other investments, and that because its rate decision was based "soley upon a comparison of the rate of return on regulated water companies,"[73] its decision was not supported by substantial

70. It can be argued that the court in City of Tucson v. Citizens Utils. Water Co., 17 Ariz. App. 477, 480, 498 P.2d 551, 554 (1972) erred in stating that the scope of review is coextensive at the superior and appellate court levels. The court's conclusion may have been the result of misplaced reliance on language in *Simms* where the supreme court stated: "We are unable to say and the trial court cannot be allowed to say that the commission's finding . . . is without substantial support in the evidence or arbitrary." Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 156, 294 P.2d 378, 385 (1956).

In *Simms*, the superior court was reversed by the supreme court not because the supreme court disagreed with the superior court's application of the substantial evidence or arbitrariness test, but rather because the superior court usurped the commission's legislative powers by reweighing evidence and making an independent determination of fair value. *See id.* at 154-55, 294 P.2d at 384. Although *Sun City Water* may be correct in ruling that, as in all civil actions, the fact finding of the trial court should be respected by higher courts, 113 Ariz. 464, 465, 556 P.2d 1126, 1127 (1976), this general rule should, with *Simms* in mind, be qualified as follows: Provided the trial court has not clearly usurped the commission's power, its findings in a de novo proceeding will be upheld by appellate courts if supported by any reasonable evidence. By this interpretation, *Sun City Water* and *Simms* are consistent. Interview with Michael J. Meehan, Attorney at Law, Molloy, Jones, Donahue, Trachta & Childers, P.C., in Tucson, Ariz. (May 26, 1977).

71. Consider the following example:

a. The superior court sets aside a commission order, concluding that it is unreasonable.

b. On appeal, the appellate court asks whether the superior court's conclusion that the order is unreasonable is supported by any reasonable evidence.

c. If both sides of the controversy are supported by such reasonable evidence, the superior court will be upheld.

d. If the appellate court determines that the commission's findings are supported by substantial evidence or are not arbitrary, the superior court will be reversed. This example demonstrates how an appellate court can achieve a result it desires merely by deciding whether its focus will be on the actions of the trial court or on the decision of the commission. For a discussion of the meaning of this example in light of *Sun City Water*, see discussion note 80 *infra*.

72. *See* City of Tucson v. Citizens Utils. Water Co., 17 Ariz. App. 477, 480, 498 P.2d 551, 554 (1972). *See also* text & notes 67-70 *supra*.

73. Sun City Water Co. v. Arizona Corp. Comm'n, 26 Ariz. App. 304, 310, 547 P.2d 1104, 1110, *vacated*, 113 Ariz. 464, 556 P.2d 1126 (1976).

evidence.[74] The court thereby demonstrated a willingness to review the evidence presented to the commission and draw the conclusion that not all relevant factors had been considered.[75] The supreme court's opinion in *Sun City Water*, which did not address the alleged failure of the commission to consider all relevant factors, may indicate that the supreme court is not as willing as the court of appeals to require the superior court to evaluate the whole record.[76] Moreover, because the supreme court did not squarely adopt

74. *Id.*

75. *See id.*

76. The United States Supreme Court in 1951 addressed a similar issue in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The Court stated that in determining whether substantial evidence exists in support of an agency decision, evidence must be viewed on the basis of the "whole record," including evidence that contradicts the agency's findings. *Id.* at 488. "The court must weigh the evidence, both that in favor of and that opposed to the administrative decision, not for the purpose of determining the preponderance of the evidence, but for the purpose of making a 'fair estimate of the worth of the testimony,' . . . ." Walker, *The Application of the Substantial Evidence Rule in Appeals from Orders of the Railroad Commission*, 32 TEX. L. REV. 639, 645 (1954), *quoting* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

While courts may not substitute their judgment for the commission's, 340 U.S. at 488, facts should not be viewed in isolation. Nevertheless, although some state courts have adopted the "whole record" test, *see* L.S. Ayers & Co. v. Indianapolis Power & Light Co., 351 N.E.2d 814 (Ind. Ct. App. 1976); *In re* Maine Clean Fuels, Inc., 310 A.2d 736, 741 (Me. 1973). The Arizona courts have not announced such a rule in rate cases.

California provides for review of the "whole record" in certain proceedings, CAL. CIV. CODE § 1094.5(C) (West 1955), but it has been claimed that the courts still neglect to consider both sides of the controversy when determining whether substantial evidence supports the agency. *See* Netterville, *The Substantial Evidence Rule in California Administrative Law*, 8 STAN. L. REV. 563, 583 (1956).

Although the Arizona Administrative Procedure Act, ARIZ. REV. STAT. ANN. §§ 12-901 to -914 (1956), does not apply to the corporation commission, see discussion note 39 *supra*, § 12-910(A) requires review of the "entire record," thereby making *Universal Camera* a relevant consideration in nonrate cases.

The court of appeals' reexamination of the commission's decision in *Sun City Water* suggests that the court may have applied the "whole record" test of *Universal Camera*. By requiring that "all relevant factors" be considered, the court, in effect, applied the whole record test. The application of this test, however, may be impermissible.

In Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 294 P.2d 378 (1956), the court held that the corporation commission is not immune from judicial scrutiny just because the Arizona Constitution requires the commission to ascertain the "fair value" of a company's property and use that value in setting a fair rate of return. *See id.* at 151, 294 P.2d 378. In a later case, the supreme court stated that fair value is to be determined by considering "all relevant factors." Arizona Corp. Comm'n v. Arizona Water Co., 85 Ariz. 198, 201-02, 335 P.2d 412, 414 (1959). *See also* Arizona Corp. Comm'n v. Arizona Pub. Serv. Co., 113 Ariz. 368, 370-71, 555 P.2d 326, 328-29 (1976).

With regard to the actual rate determination, however, there is no supporting case law in Arizona requiring consideration of "all relevant factors." At the federal level, the Supreme Court stated in Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944) that the controlling consideration in rate fixing is the end result and not the method used. *Id.* at 602. One might argue, based on *Hope*, that if the end result is fair, the factors considered in reaching that result are immaterial. In rejecting *Hope*, however, and applying the "all relevant factors" standard to the calculation of the rate itself, the court of appeals in *Sun City Water* said it would be incongruous to forbid total autonomy on the part of the commission with regard to the fair value estimation, *cf.* Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 151, 294 P.2d 378, 382, (1956) (rejecting *Hope's* end result rule in setting fair value), while permitting such autonomy in setting the rate based upon that estimation. Sun City Water Co. v. Arizona Corp. Comm'n, 26 Ariz. App. 304, 308, 547 P.2d 1104, 1108, *vacated*, 113 Ariz. 464, 556 P.2d 1126 (1976). As further support for its position, the court of appeals cited Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679, 692-93 (1923), where the Supreme Court stated that "all relevant facts" should be considered in setting a fair rate of return. 26 Ariz. App. at 309, 547 P.2d at 1109. The *Bluefield* case should not only compel administrative agencies to consider all relevant factors, but it should compel state courts to review the whole record to determine whether, in fact, all relevant factors are being considered by agencies. Otherwise, the "all relevant factors" test cannot be effectively applied.

or reject the "all relevant factors" language of the court of appeals,[77] it is unclear whether the superior court can require the commission to consider factors claimed to be relevant, or whether the commission's findings will always be upheld unless clearly arbitrary.

Although the United States Supreme Court has mentioned the advisability of considering all relevant factors in ratemaking,[78] the Arizona Supreme Court appears hesitant to require the commission to consider any particular factor. In a recent case dealing with fair value determinations, the Arizona court emphasized that it was constitutionally precluded from directing the commission to utilize a particular formula or consider specific factors.[79] In *Sun City Water*, the supreme court may have been indicating that the courts are likewise powerless to require the commission to consider particular factors in the determination of the rate itself. Perhaps the supreme court was directing lower courts to always uphold commission decisions which are not grossly unjust. On the other hand, if the ruling in *Sun City Water* was merely that the findings of the trial court will be upheld if supported by any reasonable evidence, it remains unclear whether a trial court can require the commission to consider certain factors such as the earnings of unregulated companies.[80]

77. It is unclear, however, whether the commission failed to consider all relevant factors. The commission claimed to recognize the necessity of appraising the earnings of nonregulated companies, Abstract of Record at 31, Sun City Water Co. v. Arizona Corp. Comm'n, 26 Ariz. App. 304, 547 P.2d 1104, *vacated*, 113 Ariz. 464, 556 P.2d 1126 (1976), but it rejected the opinions of the experts who testified because of inadequate consideration of other regulated water companies and because of the use of "Moody's 125 industrials founded on averages of data that occurred between 1965 through 1969." Abstract of Record, *supra*, at 38-40. *See also* Sun City Water Co. v. Arizona Corp. Comm'n, 26 Ariz. App. 304, 310, 547 P.2d 1104, 1110, *vacated*, 113 Ariz. 464, 556 P.2d 1126 (1976), where the court concluded that the commission had not given consideration to returns of unregulated industries. While it is certain that consideration of all relevant factors involves more than a mere recognition of such factors, perhaps the commission did adequately consider nonregulated companies. If so, the court of appeals improperly substituted its judgment as to the weight to be given the data. *See* Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154-55, 294 P.2d 378, 384 (1956). The decision by the supreme court in *Sun City Water* may reflect these conclusions. In the face of an equivocal record, an appellate court should give the superior court the benefit of the doubt.

78. *See* Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679, 692-93 (1923). See discussion note 70 *supra*. In Arizona Corp. Comm'n v. Arizona Pub. Serv. Co., 113 Ariz. 368, 555 P.2d 326 (1976), the court quoted with approval the "all relevant factors" language of its earlier decisions regarding fair value determinations. *Id.* at 370, 555 P.2d at 328.

79. Arizona Corp. Comm'n v. Arizona Pub. Serv. Co., 113 Ariz. 368, 370-71, 555 P.2d 326, 328-29 (1976). The court indicated that it could not require consideration of particular formulas because "we are restrained by the provisions of the constitution" not to interfere with the legislative functions of the commission. *Id.* Because *Arizona Public Service* was heard by the supreme court on a special action petition, no trial court proceedings preceded the supreme court's decision. *Id.* at 369, 555 P.2d at 327.

80. Although the supreme court in *Sun City Water* deferred to the findings of the trial court, see discussion note 70 *supra*, if the latter had reversed the commission for the same reasons expressed by the court of appeals, the supreme court might have focused more upon the findings of the commission. If it did so and reversed the trial court, it would appear that the real rule of Arizona judicial review of ratemaking is that the supreme court will not permit itself or other courts to direct the commission to consider specific factors. Instead, the court will defer to the judgment of the corporation commission, unless the commission makes obvious or blatant errors. A rule requiring such deference may be constitutionally required by the legislative nature of the commission's ratemaking powers. *See* Arizona Corp. Comm'n v. Arizona

Because the commission represents a body of experts who have been granted broad legislative authority, the Arizona Superior Court should be permitted to require the commission to consider the earnings of unregulated utilities and other relevant factors. The superior court is the last place at which a summary check on the commission's powers can be made with the aid of new evidence.[81] The trial court should accept the commission's conclusions unless they plainly fail to reflect any consideration of the earnings of unregulated utilities and are, therefore, unsupported by substantial evidence or are arbitrary.[82] However, an appellate court should evaluate the superior court's decision and not the commission's.[83] An appellate court should not be able to order the commission to consider a relevant factor; rather it should determine whether the trial court's conclusion is supported by reasonable evidence based upon that court's consideration of the commission's conclusions.[84] By focusing on the trial court's decision at the appellate court levels, rather than on the commission's decision, fewer resources will be expended on duplicated effort. Also, unless the commission has seriously blundered, there is no need for it to be the focus of both superior and appellate court proceedings.

In any event, the court of appeal's contention that comparable earnings is a vital factor which must be considered merits examination. It is a common rule regarding judicial review of administrative rate decisions that the courts will not scrutinize each step of the rate fixing process;[85] the agency is usually free to adopt any method it finds appropriate.[86] This rule is not in conflict with the decision rendered by the court of appeals in *Sun City*

Pub. Serv. Co., 113 Ariz. 368, 370, 555 P.2d 326, 328 (1976); text & notes 35-38 *supra*. If, however, the commission is to be upheld unless grossly in error, the superior court proceeding is a costly and wasteful one. See text & notes 61-63 *supra*.

The appeal in Arizona Corp. Comm'n v. Citizens Utils. Co., No. C-287873 (Super. Ct. Ariz. 1975), *appeal docketed*, No. 1 CA-CIV 3168 (Ct. App. Aug. 8, 1975) may clarify these issues. In *Citizens Utilities*, the trial court set aside a commission decision concluding that its order was not supported by substantial evidence because the commission failed to give proper consideration to rates of return earned by unregulated companies. The trial court considered evidence that was not available to the commission. To be consistent with *Sun City Water* and *Simms*, the appellate court should ask whether the superior court's ruling which vacated the commission's order is supported by "any reasonable evidence," provided that the superior court has not usurped the commission's power. *See* Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 465, 556 P.2d 1126, 1127 (1976). If the record does not clearly reveal that a relevant factor was or was not considered, the appellate court should defer to the judgment of the superior court.

81. See discussion note 53 *supra*.

82. Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154-55, 204 P.2d 378, 384 (1956). *See also* text accompanying note 50 *supra*.

83. Sun City Water Co. v. Ariz. Corp. Comm'n, 113 Ariz. 464, 465, 556 P.2d 1126, 1127 (1976).

84. *See generally id.*

85. *See* Arizona Corp. Comm'n v. Arizona Pub. Serv. Co., 113 Ariz. 368, 371, 555 P.2d 326, 329 (1976). *See generally* Intermountain Gas Co. v. Idaho Pub. Utils. Comm'n, 97 Idaho 113, 122, 540 P.2d 775, 782 (1975); Nevada Power Co. v. Public Serv. Comm'n, 91 Nev. 816, 820, 544 P.2d 428, 435 (1975).

86. *See* Arizona Corp. Comm'n v. Arizona Pub. Serv. Co., 113 Ariz. 368, 371, 555 P.2d 326, 329 (1976); City of Evansville v. Southern Ind. Gas & Elec. Co., 339 N.E.2d 562, 572-73 (Ind. Ct. App. 1975).

Water. The court did not impose a method upon the commission. It merely ruled that, regardless of the method chosen by the commission, all relevant factors should be considered.[87] On the other hand, although it is unfair to base a rate decision upon earnings of financially distressed companies, the court of appeals may have gone too far in suggesting that unregulated industries be given considerable significance.[88] It is economically debatable whether regulated companies can be compared fairly with unregulated companies without taking into account the disparity of financial risk between the two types of companies.[89]

Conclusion

The supreme court's opinion in *Sun City Water* may mean either of two things. The court was either manifesting an unarticulated policy that commission decisions should always be upheld unless grossly unjust, or it was merely indicating that superior court rulings on the validity of commission rate decisions should be upheld if supported by any reasonable evidence. Because the trial of a rate case before the commission and the superior court review of that proceeding can be long and costly, the latter interpretation is preferable; it is also the more likely one because it is more consistent with the language of *Sun City Water*. It is still debatable, however, whether the superior court can require the commission, in light of the commission's peculiar constitutional powers in ratesetting, to consider particular factors which the court deems relevant. Nevertheless, even if the commission can be required to consider certain factors, the object of scrutiny in the appellate courts should be the superior court's decision.

The supreme court's opinion in *Sun City Water*, though brief, appears to establish rules for Arizona rate review that clarify rules laid down by the

87. 26 Ariz. App. at 311, 547 P.2d at 1111.

88. For the proposition that earnings of unregulated industries are a relevant factor in rate fixing, the court cited P. GARFIELD & W. LOVEJOY, PUBLIC UTILITY ECONOMICS 120 (1964), where it is stated that "there is a degree of circularity of analysis in looking to the earnings of other regulated utilities as an indication of what a fair return to a particular regulated utility may be." 26 Ariz. App. at 310, 547 P.2d at 1110. Furthermore, not only are various utilities regulated by different methods, but the earnings of regulated utilities likely to be used in test groups for comparison may be lagging adjustment to changed conditions. P. GARFIELD & W. LOVEJOY, *supra* at 121.

On the other hand, it is argued that unregulated companies cannot fairly be compared with regulated ones. It has been said that broad comparisons of financial data of a company "with a large number of other companies, without establishing the comparability of such companies, can be viewed only in the light of general information for guidance of the commission." *In re* Washington Gas Light Co., 24 P.U.R.3d 417, 437 (D.C. Pub. Utils. Comm'n 1958). *See generally* E. NICHOLS & F. WELCH, RULING PRINCIPLES OF UTILITY REGULATION 35-40 (Supp. A 1964). For example, regulated utilities can stabilize net investment on a somewhat lower level than can unregulated utilities because in depressed times regulated companies have recourse to relief from public bodies. *In re* Northwestern Bell Tel. Co., 92 P.U.R. N.S. 65, 73, 75 (S.D. Pub. Utils. Comm'n 1952).

89. *In re* Northeastern Bell Tel. Co., 92 P.U.R. N.S. 65, 73, 75 (S.D. Pub. Utils. Comm'n 1952). In any event, the court of appeals was apparently in error because it analyzed the record of the commission proceedings and did not limit itself to determining whether the trial court's decision was supported by reasonable evidence. *See* 113 Ariz. at 465, 556 P.2d at 1127.

landmark *Simms* case. Hopefully, future rate decisions will be consistent with *Sun City Water* and will respond to questions it failed to answer. Perhaps future decisions will clarify whether there exists a meaningful difference in Arizona between the terms "substantial evidence," "arbitrary," and "abuse of discretion." Also helpful would be a declaration of whether the courts can require consideration of relevant factors, and whether or not a commission decision need be grossly unjust before it may be set aside.

II. CONSTITUTIONAL LAW

A. CONSTITUTIONALITY OF THE ARIZONA DEATH PENALTY STATUTE

In 1972 *Furman v. Georgia*[1] effectively struck down under the eighth and fourteenth amendments all existing procedures for the imposition of the death penalty.[2] Many states, including Arizona, responded by enacting new death penalty statutes in attempts to correct the infirmities found in *Furman*.[3] In July 1976, the Supreme Court again examined the constitutionali-

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Editor's Note: Since this casenote went to press, Arizona's death penalty statute has been held by a federal court to be unconstitutional. In Richmond v. Cardwell, No. 77-703 (D. Ariz., Apr. 21, 1978), the United States District Court for the District of Arizona held that the Arizona death penalty statute, ARIZ. REV. STAT. ANN. § 13-454 (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-909, effective Oct. 1, 1978), violated the eighth and fourteenth amendments. The court stated that the statute failed to allow consideration of relevant mitigating circumstances. *Id.* at 14. See text & notes 136-52 *infra*. The court reasoned that the Arizona Supreme Court had limited consideration to only those mitigating factors listed in the statute, *see* State v. Richmond, 114 Ariz. 186, 195, 560 P.2d 41, 50 (1977), in an attempt to eliminate ambiguity and conform the statute to constitutional requirements as understood in light of then existing United States Supreme Court decisions. Richmond v. Cardwell, No. 77-703, 5-6 (D. Ariz., Apr. 21, 1978). The United States Supreme Court denied certiorari in State v. Richmond. State v. Richmond, 97 S. Ct. 2988, *application for suspension of order denying cert. denied*, 98 S. Ct. 8 (1977). No new United States Supreme Court decisions concerning factors which must be considered in sentencing have appeared since State v. Richmond was decided. How broad a scope of mitigating circumstances is constitutionally required is a debatable topic. *See* text & notes 136-52 *infra*. The Supreme Court has granted certiorari to consider this question in the case of Ohio's statute. Lockett v. Ohio, No. 76-6997, 22 CRIM. L. REP. (BNA) 4175 (1978); Bell v. Ohio, No. 76-6513, 22 CRIM. L. REP. (BNA) 4173 (1978). In balancing the requirement that relevant mitigating circumstances be considered, *see* text & notes 145-48 *infra*, with the requirement of *Furman v. Georgia*, 408 U.S. 238, 253, 310, 313 (1972), that arbitrary sentencing discretion be curbed, *see* text & notes 21-26 *infra*, the Arizona Supreme Court evidently balanced in favor of the latter by limiting the circumstances to those listed in the statute, State v. Richmond, 114 Ariz. at 195, 560 P.2d at 50, while the district court opted for the former in Richmond v. Cardwell, No. 77-703, 5-6 (D. Ariz., Apr. 21, 1978). Arizona's Attorney General has stated that the district court's decision will be appealed to the Ninth Circuit. Ariz. Daily Star, Apr. 22, 1978, § A, at 1, col. 4.

In view of the United States Supreme Court's refusal to grant certiorari and the effect of the Arizona statute to allow consideration of relevant circumstances of the offense and offender, though limited to some extent, it seems likely that the Ninth Circuit will reverse *Richmond v. Cardwell* and uphold the constitutionality of the Arizona statute. However, the outcome may depend on the decision rendered in the pending United States Supreme Court case concerning Ohio's statute. *See* note 144 *infra*.

1. 408 U.S. 238 (1972).

2. Citing *Furman*, the Supreme Court vacated without opinion 120 death sentences from various states. Stewart v. Massachusetts, 408 U.S. 845 (1972), and companion cases, 408 U.S. 932-41 (1972). Justice Blackmun, dissenting in *Furman*, believed that the Court's decision not only invalidated the capital punishment laws of 39 states and the District of Columbia, but also struck down all federal statutes authorizing the imposition of the death penalty. *See* 408 U.S. at 411.

3. *See* Gregg v. Georgia, 428 U.S. 153, 179-80 (1976); statutes cited notes 29-30 *infra*.

ty of capital punishment laws. In what will hereinafter be called the "death penalty cases,"[4] the Court upheld three of the new statutory procedures, while striking down two others. A few months later, the Arizona Supreme Court, in *State v. Richmond*,[5] upheld the constitutionality of the new Arizona death penalty procedure.[6]

This casenote will analyze the Arizona death penalty procedure in comparison with those held constitutional by the United States Supreme Court. First, the note will include a brief discussion of the historical growth of the meaning given the eighth amendment from the time of its enactment through *Furman*. Then the five death penalty cases will be analyzed relative to those procedures required by the Court for imposition of the penalty. Finally, Arizona's procedure will be analyzed in light of *Richmond* and compared to those procedures held constitutional by the United States Supreme Court.

History of the Eighth Amendment

The meaning given by the framers to the "cruel and unusual punishments" clause of the eighth amendment was that it proscribed "tortures" and "barbarous" methods of punishment.[7] The few Supreme Court cases discussing the clause in the 19th century dealt with methods of execution, holding that humane methods, and death per se, were not constitutionally proscribed.[8] In the landmark case of *Weems v. United States*,[9] the amendment was stated to be progressive and capable of acquiring "meaning as

4. Roberts v. Louisiana, 428 U.S. 325 (1976) (LA. REV. STAT. ANN. § 14:30 (West 1974), held unconstitutional); Woodson v. North Carolina, 428 U.S. 280 (1976) (N.C. GEN. STAT. § 14-17 (Supp. 1975), held unconstitutional); Jurek v. Texas, 428 U.S. 262 (1976) (TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon Supp. 1976-77), held constitutional); Proffitt v. Florida, 428 U.S. 242 (1976) (FLA. STAT. ANN. § 921.141 (West Supp. 1975-76), held constitutional); Gregg v. Georgia, 428 U.S. 153 (1976) (GA. CODE ANN. §§ 26-3102, 27-2503, 27-2534.1, 27-2537 (Supp. 1976), held constitutional).

5. 114 Ariz. 186, 560 P.2d 41 (1976).

6. ARIZ. REV. STAT. ANN. § 13-454 (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978).

7. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 839 (1969). The clause was taken from the English Bill of Rights of 1689 and proscribed punishments disproportionate to the offense. *Id.* at 860. Apparently this represented a broader construction than the framers of the eighth amendment desired. *Id.*

8. *See, e.g.*, O'Neil v. Vermont, 144 U.S. 323 (1892); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1879). The opinion in *In re* Kemmler, upholding use of electrocution as a means of imposing death, stated that "cruel" implies more than the "mere extinguishment of life"; the word connotes "torture," a "lingering death," or "inhuman and barbarous" treatment. *Id.* at 447. The Court in Wilkerson v. Utah, unanimously upholding a sentence of public execution by shooting imposed as a penalty for murder, stated:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.

99 U.S. at 135-36.

Prior to *Furman*, the Supreme Court had discussed the eighth amendment and death penalty at length only 10 times. Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 355 (1973).

9. 217 U.S. 349 (1910).

public opinion becomes enlightened by humane justice."[10] *Weems* was the first case where a sentence was struck down as excessive under the eighth amendment.[11] In the wake of *Weems*, attacks on sentences were decided on the basis of whether the punishment was excessive for the offense committed in light of progressive human standards.[12] In no case until *Furman v. Georgia*,[13] however, did the Court consider whether the death penalty itself was per se unconstitutional.[14]

Other cases, though not concerned with the eighth amendment, dealt with sentencing procedures.[15] Two in particular influenced the direction *Furman* and subsequent cases would take. In *Pennsylvania v. Ashe*,[16] the Court stated: "For the determination of sentences, justice generally requires that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[17] This phrase was

10. *Id.* at 378.

11. Furman v. Georgia, 408 U.S. 238, 325 (1972) (Marshall, J., concurring). Weems was tried and convicted for falsifying a public and official document as an officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands. He was sentenced to *cadena temporal, i.e.*, 12 to 20 years at hard labor with chains at the wrists and ankles, and a loss of many civil rights for life. In addition, all his acts were put under surveillance. Weems v. United States, 217 U.S. 349 (1910).

In O'Neil v. Vermont, 144 U.S. 323 (1892), the Court affirmed a sentence of 19,914 days imprisonment at hard labor on 307 counts of selling liquor in violation of Vermont law. By holding that the eighth amendment did not apply to the states, the Court did not reach the merits of the claim of excessive punishment. However, Justice Field, who would have applied the amendment to the states, believed that the inhibition of the eighth amendment was directed not only against punishments which inflict torture, "but against all punishments which, by their excessive length or severity, are greatly disproportionate to the offenses charged." *Id.* at 339-40 (Field, J., dissenting).

12. Powell v. Texas, 392 U.S. 514 (1968) (upholding a conviction and $20 fine for public drunkenness); Robinson v. California, 370 U.S. 660 (1962) (statute making mere addiction to narcotics criminal held unconstitutional); Trop v. Dulles, 356 U.S. 86 (1958) (expatriation of citizen convicted by court martial for desertion, where no attempt was made to give allegiance to the enemy, held excessive and beyond the war powers of Congress); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (second attempt to electrocute, where first attempt failed due to mechanical problems, held not excessive). For an analysis of proportionality review under the eighth amendment, see Note, *Constitutional Law—Eighth Amendment—Appellate Sentence Review*, 1976 WIS. L. REV. 655.

13. 408 U.S. 238 (1972).

14. *Id.* at 417 (Powell, J., joined by Burger, C.J., & Blackmun & Rehnquist, JJ., dissenting); *see* text & notes 21-30 *infra*. Dissenting to denial of certiorari in Rudolph v. Alabama, 375 U.S. 889 (1963), Justice Goldberg advocated consideration of whether the death penalty could be imposed on a convicted rapist consistent with constitutional guarantees. *Id.* He considered three questions relevant: whether the death penalty violated evolving standards of decency; whether it was disproportionate; and whether it was "unnecessary cruelty" because a less severe punishment would serve the permissible aims of punishment. *Id.* This issue has now been decided in Coker v. Georgia, — U.S. —, 97 S. Ct. 2861 (1977) (proscribing a death sentence for the rape of an adult woman if nothing more is involved.).

Even in *Furman*, the question of per se unconstitutionality of the death penalty was not decided by a majority of the Court. *See* text & notes 21-30 *infra*. Although prior to *Furman* the Court had often assumed the constitutionality of the death penalty in upholding its imposition, *see* cases cited notes 8, 12 *supra*, it was not until Gregg v. Georgia, 428 U.S. 153 (1976), that a Court majority first held that the death penalty is not per se unconstitutional.

15. *See generally* Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (death cannot be imposed by a jury chosen by exclusion of veniremen voicing general objections or conscientious scruples against infliction of death); Williams v. Oklahoma, 358 U.S. 576, 586 (1959) (consideration of a prior murder conviction as an aggravating circumstance in a kidnapping conviction does not violate due process as double punishment for one offense); Williams v. New York, 337 U.S. 241, 247 (1949) (like offenses do not require identical punishments without regard to the past life and habits of the offender); *see also* text & notes 153-67 *infra*.

16. 302 U.S. 51 (1937).

17. *Id.* at 55; *see* text & notes 153-67 *infra*. *See also* Williams v. New York, 337 U.S. 241, 247 (1949).

heavily relied on in *Furman* and the death penalty cases as supportive of procedural requirements in the imposition of sentence.[18] On the other hand, in *McGautha v. California*,[19] relied upon in the death penalty cases by those justices who opposed specific procedural requirements, the Court stated a position somewhat opposed to *Ashe*: "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."[20]

In 1972, in *Furman v. Georgia*,[21] the Court held in a per curiam opinion that the imposition and carrying out of the death penalty in the cases before it constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.[22] Each of the nine justices wrote a separate opinion, and these may be grouped into three broad categories. Justices Douglas, Stewart, and White reasoned that the degree of arbitrariness and uncontrolled discretion in the states' statutory procedures for the imposition of the death penalty violated the "cruel and unusual punishments" clause of the eighth amendment as applied to the states through the fourteenth amendment.[23] All three justices left open whether some procedure for the imposition of the death penalty might be devised which could be held constitutional.[24] Justices Brennan and Marshall concurred in the judgment and argued that the death penalty is per se unconstitutional.[25] In dissent, Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist argued that in light of historical precedent, and the current number of death penalty statutes in existence, the death penalty is not per se unconstitutional.[26]

18. *See* discussion notes 23, 105 *infra*. *See generally* Comment, *The Emergence of Individualized Sentencing*, 45 TEMP. L.Q. 351 (1972).

19. 402 U.S. 183 (1971); *see* discussion notes 26, 102 *infra*.

20. 402 U.S. at 207.

21. 408 U.S. 238 (1972).

22. *Id.* at 239-40.

23. Justice Douglas reasoned that the sentencing authority had "uncontrolled discretion" and there were no standards for selection of the death penalty. *Id.* at 253. Justice Stewart found the statutes unconstitutional because they permitted the penalty to be "wantonly and freakishly imposed." *Id.* at 310. Justice White reasoned that even for the worst crimes the death penalty is very infrequently imposed, and no "meaningful basis" existed for distinguishing the cases where the death penalty was imposed from those in which it was not. *Id.* at 313. The ideas in the "progressive meaning" language of *Weems* and the "particularized viewing" statement in *Ashe* were often relied on by these Justices in *Furman*. 408 U.S. 238, 242, 245, 253, 264-70, 277-78, 280, 286, 309, 311-12 (1972).

Although the Supreme Court in Robinson v. California, 370 U.S. 660 (1962), did not expressly hold that the eighth amendment is applicable to the states through the fourteenth amendment, *Robinson* has subsequently been construed by the Supreme Court as so holding. *See* Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963).

24. *See* Furman v. Georgia, 408 U.S. 238, 257, 310, 313 (1972) (Douglas, Stewart & White, JJ., concurring in separate opinions).

25. *Id.* at 305, 358-59 (Brennan & Marshall, JJ., concurring in separate opinions).

26. *Id.* at 375 (Burger, C.J., joined by Blackmun, Powell & Rehnquist, JJ., dissenting). The dissenting Justices often relied on the statement in McGautha v. California, 402 U.S. 183 (1971), that "untrammeled" jury discretion was not offensive, 408 U.S. at 381, 387-88, 401-02, 426-27, 448-49, in arguing or implying that the Court had overstepped its authority by considering and proscribing certain procedural methods for imposition of the death penalty. *See id.* at 399; Goldberg, *supra* note 8, at 366.

In effect, *Furman* struck down all existing death penalty statutes.[27] By July 1976, however, at least thirty-five states, in apparent responses to *Furman*, had amended existing or enacted new death penalty statutes.[28] These statutes may be broadly divided into two groups: those requiring a mandatory imposition of death for certain types of crimes,[29] and those requiring some form of guided discretion on the part of the sentencing authority in capital cases.[30]

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27. *See* Stewart v. Massachusetts, 408 U.S. 845 (1972), and companion cases, 408 U.S. 932-41 (1972); discussion note 2 *supra*.

28. Gregg v. Georgia, 428 U.S. 153, 179-80 (1976); *see* cases and statutes cited notes 29-30 *infra*.

29. The mandatory death penalty statutes in existence at the time of Gregg v. Georgia, 428 U.S. 153 (1976), were: DEL. CODE tit. 11, § 4209 (Supp. 1976) (held unconstitutional in part in State v. Spence, 367 A.2d 983 (Del. 1976)); IDAHO CODE § 18-4004 (Supp. 1976); IND. CODE ANN. § 35-13-4-1 (Burns Supp. 1976) (repealed and superseded 1976); KY. REV. STAT. § 532.030 (1975) (amended 1976); LA. REV. STAT. ANN. § 14:30 (West 1974) (held unconstitutional in Roberts v. Louisiana, 428 U.S. 327 (1976) (amended 1976)); MD. ANN. CODE art. 27, § 413 (Supp. 1976) (held unconstitutional in Blackwell v. State, 278 Md. 466, 365 A.2d 545 (1976)); MISS. CODE ANN. § 97-3-21 (Supp. 1976) (held constitutional by court construction that statute required discretion by court order, Jackson v. State, 337 So. 2d 1242 (Miss. 1976)); MO. ANN. STAT. § 559.009 (Vernon Supp. 1977) (held unconstitutional in State v. Duren, 547 S.W.2d 476 (Mo. 1977)); NEV. REV. STAT. § 200.030 (1975); N.H. REV. STAT. ANN. § 630:1 (1974); N.M. STAT. ANN. § 40A-29-2 (Supp. 1975) (held unconstitutional in State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976)); N.Y. PENAL LAW § 60.06 (McKinney 1974) (held unconstitutional in People v. Velez, 88 Misc. 2d 378, 388 N.Y.S.2d 519 (Sup. Ct. 1976)); N.C. GEN. STAT. § 14-17 (Supp. 1975) (held unconstitutional in Woodson v. North Carolina, 428 U.S. 280 (1976)); OKLA. STAT. ANN. tit. 21, § 701.3 (West Supp. 1975) (repealed 1976); R.I. GEN. LAWS § 11-23-2 (Supp. 1976) (the penalty is imposed for only the very narrow circumstance of conviction for murder while confined in prison); S.C. CODE § 16-52 (Supp. 1975) (held unconstitutional in State v. Rumsey, 267 S.C. 236, 226 S.E.2d 894 (1976)); TENN. CODE ANN. § 39-2406 (1975) (amended 1977); WASH. REV. CODE ANN. §§ 9A.32.045-046 (Special Pamphlet 1976).

30. Those state statutes with discretionary features at the time of Gregg v. Georgia, 428 U.S. 153 (1976), were: ALA. CODE tit. 15, § 342 (Supp. 1975) (separate sentencing hearing; jury recommends sentence to trial judge who is sentencing authority; at least one of enumerated aggravating and insufficient mitigating circumstances must be found for death imposition); ARIZ. REV. STAT. ANN. § 13-454 (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978); ARK. STAT. ANN. §§ 41-1301 to -1309 (1976) (separate hearing; jury is sentencing authority; must unanimously find beyond reasonable doubt at least one of listed aggravating circumstances which, in turn, must outweigh mitigating circumstances); COLO. REV. STAT. § 16-11-103 (West Supp. 1975) (separate proceeding; jury is sentencing authority; must find one of aggravating and no mitigating circumstances enumerated to impose death); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1977) (jury, in separate sentencing hearing, can only impose death if it finds at least one statutory aggravating circumstance and no mitigating circumstances); FLA. STAT. ANN. § 921.141 (West Supp. 1975-76) (see text & notes 84-89 *infra*); GA. CODE ANN. §§ 27-2537, 27-2534.1 (Supp. 1976) (see text & notes 44, 49-50 *infra*); MONT. REV. CODES ANN. § 94-5-105 (Special Crim. Code Supp. 1973) (repealed 1977) (if a listed circumstance is found to exist the sentence is mandatory death "unless there are mitigating circumstances"); OHIO REV. CODE ANN. §§ 2929.02-.04 (Page 1975) (one of listed aggravating circumstances must appear in the indictment and be proved at guilt stage of trial to impose death penalty; at a separate hearing the trial judge may hear evidence, and if any one of three listed mitigating circumstances are shown by a preponderance of evidence, the death penalty is not imposed); PA. STAT. ANN. tit. 18, § 1311 (Purdon Supp. 1976-77) (jury is the sentencing authority, and, at separate hearing, considers lists of aggravating and mitigating circumstances; it must find existence of at least one aggravating and no mitigating circumstances in order to impose death); TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974); TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon Supp. 1976-77) (see text & notes 68-69 *infra*); UTAH CODE ANN. §§ 76-3-207, 76-5-202 (Supp. 1975) (separate sentencing hearing before jury which considers lists of aggravating and mitigating circumstances in deciding what sentence to impose); WYO. STAT. § 6-54 (Supp. 1975) (if any of a list of aggravating circumstances is found at trial, death sentence is mandatory, but three of the circumstances involve past offenses and may be viewed by the jury at a separate hearing after the trial) (repealed and superseded 1977). *But see* ILL. ANN. STAT. ch. 38, § 1005-8-1A (Smith-Hurd Supp. 1977) (held unconstitutional in People *ex rel.* Rice v. Cunningham, 61 Ill. 2d 353, 336 N.E.2d 1 (1975) (separate hearing; three judge panel from circuit court is sentencing authority; list of aggravating circumstances is provided; at least two of the three judges must find an aggravating circumstance to exist to

The Death Penalty Cases

In July 1976, in *Gregg v. Georgia*,[31] *Jurek v. Texas*,[32] and *Proffitt v. Florida*,[33] the Supreme Court upheld the constitutionality of the Georgia, Texas, and Florida "discretionary" death penalty statutes as applied to first-degree murder cases. In the companion cases of *Woodson v. North Carolina*[34] and *Roberts v. Louisiana*,[35] the Court struck down North Carolina's and Louisiana's "mandatory" death penalty statutes.

The five death penalty cases involved state statutes mandating certain procedural methods for sentence imposition in capital cases. Subsequent to *Furman*, a great deal of controversy existed as to the type of procedure, if any, a Supreme Court majority would be likely to uphold.[36] About half of those states reenacting the death penalty required its mandatory imposition upon conviction of one of a limited class of crimes.[37] The other states set guidelines expected to control the sentencing authority's discretion.[38]

In the death penalty cases, the Supreme Court did not outline broad or abstract procedures which would pass constitutional muster, but rather addressed their opinions to the statutes under consideration. The following discussion will first cover the holdings in each of the cases by summarizing the important features of the statutes considered by the Court and the reasoning supporting the Court's decisions. Similarities and differences among the five procedures may then be drawn together to construct a framework with which to analyze the correctness of *State v. Richmond* and the validity of Arizona's death penalty statute.

In *Gregg*, the petitioner was convicted of armed robbery and murder.[39]

impose death unless they "determine that there are compelling reasons for mercy"). For discussions which attempt to categorize the new statutes, see Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651 (1974) (discussing 24 new statutes and concluding they are unwise in that they are unlikely to meet *Furman*); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974) (discussing 27 new statutes and concluding none meets *Furman*); Note, *Capital Punishment Statutes After Furman*, 35 OHIO ST. L.J. 651 (1974) (discussing 19 new statutes and concluding they do not satisfy *Furman*); 7 TEX. TECH. L. REV. 170 (1975-76) (discussing 31 new statutes, concluding the new Texas statute would probably fail under *Furman*).

31. 428 U.S. 153 (1976).
32. 428 U.S. 262 (1976).
33. 428 U.S. 242 (1976).
34. 428 U.S. 280 (1976).
35. 428 U.S. 325 (1976).
36. *Compare* Ehrhardt, Hubbart, Levinson, Smiley & Wills, *The Aftermath of Furman: The Florida Experience, I. The Future of Capital Punishment in Florida: Analysis and Recommendations*, 64 J. CRIM. L.C. & P.S. 2 (1973) (special study recommending that Florida not immediately enact any new death penalty legislation), *with* Letter from Gary K. Nelson, Arizona Attorney General, to Stan Akers, Speaker of the House-Designate (Dec. 27, 1972) (attached to and introducing the new proposed death penalty statute), *reprinted in* Appellee's Answering Brief, Appendix A, at 1, State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976) (noting that a substantial number of his colleagues believed the only way to comply with *Furman* was to impose mandatory penalties, but arguing that the Supreme Court is looking for "standards and procedures which insure a fair application regardless of the status of the accused").
37. *See* statutes cited note 29 *supra*.
38. Arizona's statute is of the discretionary type. ARIZ. REV. STAT. ANN. § 13-454 (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978).
39. Gregg v. State, 233 Ga. 117, 117, 210 S.E.2d 659, 661 (1974).

At the sentencing stage of Georgia's bifurcated procedure,[40] the death penalty was imposed. The Georgia Supreme Court affirmed the conviction and affirmed the sentence except as to robbery.[41]

The Georgia statutes,[42] amended in response to *Furman*,[43] require a sentencing hearing as a separate proceeding after the guilt determination stage.[44] In capital cases tried before a jury,[45] the jury will be the sentencing authority.[46] At the sentencing hearing, evidence may be presented in mitigation or aggravation of punishment, and both the defense and prosecution are given substantial latitude in the type of evidence they may present.[47] Evidence admitted at the guilt stage of the trial may be considered by the sentencing authority without being resubmitted.[48] In assessing the sentence to be imposed, the sentencing authority must consider any aggravating or mitigating circumstances otherwise authorized by law and the ten aggravating circumstances enumerated in the statute.[49] Before death may be im-

40. *See* text & notes 42, 44 *infra*.

41. Gregg v. State, 233 Ga. 117, 127, 210 S.E.2d 659, 667 (1974).

42. GA. CODE ANN. §§ 26-3102, 27-2503, 27-2534.1, 27-2537 (Supp. 1976).

43. The Georgia Supreme Court upheld the statutes' constitutionality in Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

44. GA. CODE ANN. § 27-2503 (Supp. 1976).

45. If, under any view of the evidence, a conviction for a lesser included offense could be authorized, the jury must be so instructed. Sims v. State, 203 Ga. 668, 670, 47 S.E.2d 862, 864 (1948); Linder v. State, 132 Ga. App. 624, 624, 208 S.E.2d 630, 631 (1974). In *Gregg*, the petitioner argued that such a discretionary choice was a constitutional infirmity under *Furman*. The plurality opinion expressly rejected that argument. 428 U.S. at 199. See discussion note 61 *infra*.

46. GA. CODE ANN. § 27-2503(b) (Supp. 1976).

47. *See* Brown v. State, 235 Ga. 644, 647-50, 220 S.E.2d 922, 925-27 (1975).

48. Chenault v. State, 234 Ga. 216, 222, 215 S.E.2d 223, 229 (1975); Eberheart v. State, 232 Ga. 247, 253-54, 206 S.E.2d 12, 17 (1974).

49. (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

posed, at least one of the ten statutory aggravating circumstances must be found to exist beyond a reasonable doubt,[50] and those found must be recorded.[51] In capital cases, the judge is bound by the jury's recommended sentence.[52]

If the death penalty is imposed, the Georgia Supreme Court is required to make an expedited review[53] in which it must consider whether the sentence was influenced by passion, prejudice, or any other arbitrary factor, whether the evidence supported the finding of a statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.[54] If the sentence is affirmed, the court must include in its decision reference to similar cases it has considered.[55]

In the Supreme Court's plurality opinion, Justice Stewart, joined by Justices Powell and Stevens, concluded that the death penalty is not violative of the eighth and fourteenth amendments under all circumstances,[56] and that the Georgia statutory procedure, on its face, satisfies *Furman*.[57] The opinion stated that the concerns underlying *Furman* were not present to a significant degree in the procedure applied here,[58] and that the new Georgia procedures focused jury attention on the "particularized nature of the crime and the particularized characteristics of the individual defendant";[59] wanton and freakish imposition of the penalty was circumscribed by the statute.[60] With respect to the prosecutor's discretion as to the charge, the jury's discretion to convict on a lessor included offense, and the possibility of sentence commutation, "[n]othing in any of our cases suggests that the

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

GA. CODE ANN. § 27-2534.1(b) (Supp. 1976).

50. *Id.* § 27-2534.1(c) (Supp. 1976).

51. *Id.*

52. *Id.* § 27-2503(b).

53. *Id.* § 27-2537.

54. *Id.*

55. *Id.*

56. 428 U.S. at 187. Considerable consideration was given to the justification underlying the death penalty. Although the modern view of penology is arguably that the principal purposes of sentencing are rehabilitation, deterrence and restraint, and that retribution is no longer a permissible purpose of punishment, *see* Comment, *The Emergency of Individualized Sentencing*, 45 TEMP. L.Q. 351, 351 (1972), the plurality opinion in *Gregg* note that retribution was a justifiable purpose for the death penalty. The opinion stated: "[I]n part, capital punishment is an expression of society's moral outrage at particularly offensive conduct." 428 U.S. at 183. The Court reasoned that capital punishment in extreme cases is an expression of society's feeling that certain crimes are "so grievous an affront to humanity" that no other response is adequate, *id.* at 184, and that it is essential in an "ordered society" which requests its members to accept "legal processes" rather than self-help, *id.* at 183. *But cf.* Furman v. Georgia, 408 U.S. 238, 303 (1972) (counter-argument raised by Justice Brennan); Williams v. New York, 337 U.S. 241, 248 (1949) ("[r]etribution is no longer the dominant objective of the criminal law").

57. 428 U.S. at 206-07.

58. *Id.*

59. *Id.*

60. *Id.*

decision to afford an individual defendant mercy violates the Constitution."[61]

Justice White, joined by Chief Justice Burger and Justice Rehnquist, concurred in the decision. They concluded that the death penalty is not per se unconstitutional[62] and that the Georgia statutory procedure overcame the deficiencies found in *Furman* by guiding the jury's discretion and by directing the Georgia Supreme Court to decide "whether *in fact* the death penalty was being administered . . . in a discriminatory, standardless, or rare fashion."[63]

Justices Brennan[64] and Marshall[65] dissented in separate opinions. They both concluded, as they had in *Furman*, that the death penalty is per se unconstitutional under the eighth and fourteenth amendments.[66]

In *Jurek*, the petitioner was convicted of murder and, in a separate procedure, sentenced to death.[67] Under the Texas statutory procedure, enacted in response to *Furman*, capital homicides are limited to intentional and knowing murders committed in five situations.[68] The death penalty may be imposed only if the jury finds that the state has proved beyond a

61. *Id.* at 199; *see id.* at 223-27 (White, J., joined by Burger, C.J., & Rehnquist, J., concurring). In response to the petitioner's argument that prosecutors behave in a standardless fashion, Justice White argued that, in his belief, prosecutors' decisions are based on the seriousness of the offense and adequacy of proof. *Id.* at 225. In closing he stated: "I decline to interfere with the manner in which Georgia has chosen to enforce . . . [its death penalty laws] . . . on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner." *Id.* at 226; *see* Roberts v. Louisiana, 428 U.S. 325, 347-50 (1976) (White, J., joined by Burger, C.J., Blackmun & Rehnquist, JJ., dissenting). *See also* State v. Murphy, 113 Ariz. 416, 555 P.2d 1110 (1976) (reversing a death sentence and upholding the prosecutor's discretion in presenting aggravating evidence, where the trial court ordered the prosecutor to present evidence in aggravation of sentence, pursuant to the Arizona death penalty statute, contrary to the prosecutor's wishes in regard to a plea bargain agreement).

62. 428 U.S. at 226.

63. *Id.* at 220-24 (emphasis in original).

64. *Id.* at 227.

65. *Id.* at 231.

66. *Id.* Justice Blackmun concurred in the Court's holding in all five death penalty cases, citing each time to his dissenting opinion in *Furman*.

67. 428 U.S. 262, 265-68 (1976).

68. (a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

4) the person commits the murder while escaping or attempting to escape from a penal institution; or

5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974).

reasonable doubt that the answer to each of three statutory questions[69] is yes.[70] The statute also provides for an expedited review by the Texas Court of Criminal Appeals.[71] Although Texas has not adopted a list of aggravating circumstances for the jury to consider, the Supreme Court's opinion stated that each of the classes of capital murder listed in the Texas statute was encompassed in the Georgia and Florida statutory procedures by one or more of their aggravating circumstances.[72] Also, although the Texas statute makes no reference to consideration of mitigating circumstances, the Texas Court of Criminal Appeals construed the second statutory question[73] to allow a defendant to introduce any mitigating circumstances at the sentence hearing.[74]

Justice Stevens, joined by Justices Stewart and Powell, stated that consideration of mitigating circumstances by the sentencing authority is essential to meet the requirements of the eighth and fourteenth amendments.[75] The opinion reasoned that the limited statutory categories of capital murders made inevitable the finding of at least one aggravating circumstance; and coupled with the authority for the defense to present mitigating evidence at the sentence hearing, at least in response to the second statutory question, the jury would have adequate guidance.[76] Moreover, the required prompt judicial review ensures that death sentences will be imposed in a rational and consistent manner.[77] In short, the plurality concluded that the Texas procedures do not violate the Constitution because they assure that death sentences will not be "wantonly" or "freakishly" imposed.[78]

The division of the Court was the same in *Jurek* as in *Gregg* and *Proffitt v. Florida*.[79] Justice White, joined by the Chief Justice and Justice Rehnquist, concurred in upholding the Texas statutory scheme for substantially the reasons they upheld *Gregg*.[80]

In *Proffitt*, the petitioner was convicted of first-degree murder and sentenced to death under Florida's capital sentencing procedures.[81] The

69. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1976-77). For a discussion of the Texas statute see Note, *Is the Death Penalty Dead?*, 26 BAYLOR L. REV. 114 (1974).
70. TEX. CODE CRIM. PROC. ANN. art. 37.071(e) (Vernon Supp. 1976-77).
71. *Id.* art. 37.071(f).
72. 428 U.S. at 270.
73. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1976-77).
74. In construing the statutory question, the Texas Court of Criminal Appeals listed the following as included for consideration: any significant criminal record; range and severity of prior criminal conduct; age of defendant; was defendant acting under duress or domination of another; was defendant under an extreme form of mental or emotional pressure, less than insanity, but more than the emotions of the average man, however inflamed, could withstand. Jurek v. State, 522 S.W.2d 934, 940 (Tex. Crim. App. 1975); *see* Jurek v. Texas, 428 U.S. 262, 272-73 (1976) (Stevens, J., joined by Stewart & Powell, JJ., citing the construction approvingly).
75. 428 U.S. at 271.
76. *Id.* at 276.
77. *Id.*
78. *Id.*
79. 428 U.S. 242 (1976).
80. Jurek v. Texas, 428 U.S. 262, 279 (1976). See text accompanying note 63 *supra*.
81. Proffitt v. Florida, 428 U.S. 242, 244-45 (1976).

sentencing statute[82] was enacted in response to *Furman* and was patterned in large part on the Model Penal Code.[83] It requires the trial judge to weigh eight statutory aggravating circumstances[84] against seven statutory mitigating circumstances[85] to determine whether the death penalty should be imposed. At the sentence hearing the jury is directed to consider whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found.[86] The jury's verdict, determined by majority vote, is only advisory to the trial judge who must determine the actual sentence.[87] The trial judge then must make a written record of the facts, demonstrating that sufficient aggravating and insufficient mitigating circumstances exist to impose the death penalty.[88]

The statute also provides for automatic review by the Florida Supreme Court if the death penalty is imposed.[89] Though no specific form of review

82. FLA. STAT. ANN. § 921.141 (West Supp. 1977). Florida was the first state to enact a new death penalty statute after *Furman*. Ehrhardt and Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L.C. & P.S. 10, 10 (1973). The state supreme court upheld the statute's constitutionality in State v. Dixon, 283 So. 2d 1 (Fla. 1973).

83. MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962). The Supreme Court cited this section of the Model Penal Code with approval in Gregg v. Georgia, 428 U.S. 153, 193-95 (1976) (Stewart, J., joined by Powell & Stevens, JJ.); Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. L. REV. 108, 109 & n.16 (1974).

84. 5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:
a) The capital felony was committed by a person under sentence of imprisonment.
b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
c) The defendant knowingly created a great risk of death to many persons.
d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
f) The capital felony was committed for pecuniary gain.
g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
h) The capital felony was especially heinous, atrocious, or cruel.
FLA. STAT. ANN. § 921.141(5) (West Supp. 1977).

85. 6) Mitigating circumstances.—Mitigating circumstances shall be the following:
a) The defendant has no significant history of prior criminal activity.
b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
c) The victim was a participant in the defendant's conduct or consented to the act.
d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
e) The defendant acted under extreme duress or under the substantial domination of another person.
f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
g) The age of the defendant at the time of the crime.
Id. § 921.141(6) (West Supp. 1977).

86. *Id.* § 921.141(1)-(2) (West Supp. 1977).

87. *Id.* § 921.141(3). The Florida Supreme Court has stated that a jury recommendation should be given great weight. The facts sustaining death imposition should be "so clear and convincing that virtually no reasonable person could differ" following a jury recommendation of life. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

88. FLA. STAT. ANN. § 921.141(3)(b) (West Supp. 1977).

89. *Id.* § 921.141(4).

is required, the Florida court has viewed its function as twofold: to independently review and reweigh the evidence of aggravating and mitigating circumstances,[90] and to review similar cases to assure consistent results under similar circumstances.[91]

The plurality opinion of the Supreme Court noted that a substantial difference between Florida's statute, and those of Georgia and Texas, was that the trial judge was substituted for the jury as the sentencing authority. Justice Powell, joined by Justices Stewart and Stevens, stated that the Court "has never suggested that jury sentencing is constitutionally required."[92] He concluded that the legislation provided an "informed, focused, guided, and objective inquiry into the question" of death imposition, and that the Florida Supreme Court "conscientiously" reviews the sentence[93] and "can assure consistency, fairness, and rationality in the evenhanded operation of the state law."[94]

In *Woodson v. North Carolina*[95] and *Roberts v. Louisiana*,[96] the Court held that the mandatory imposition of the death penalty upon conviction of first degree murder as defined by the statutes of North Carolina[97] and Louisiana[98] violated the eighth and fourteenth amendments.[99] In announcing the judgment of the Court in *Woodson*, Justice Stewart, joined by Justices Powell and Stevens, concluded that North Carolina's statute failed to curb arbitrary jury discretion and failed to provide a rationally reviewable process, thus failing to meet *Furman*.[100] He also concluded that a second constitutional infirmity existed due to the absence of any provision for

90. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); *accord*, Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975); Proffitt v. State, 315 So. 2d 461, 466-67 (Fla. 1975); Sullivan v. State, 303 So. 2d 632, 637-38 (Fla. 1974). The Florida court is not consistent with regard to stating which statutory aggravating or mitigating circumstances are found to exist by the trial court and are to be considered on review. *Compare* Darden v. State, 329 So. 2d 287, 291 (Fla. 1976), where the court failed to enumerate these factors, *with* Sawyer v. State, 313 So.2d 680, 682 (Fla. 1975), where the court listed four aggravating circumstances in affirming a death sentence, some of which fail to appear in the statutory list. The Supreme Court noted this in *Proffitt*, without stating whether a constitutional issue could exist if no statutory circumstances were included in the provisions supporting death. 428 U.S. at 250 n.8, 256 n.14. The plurality's strong support for circumscription of discretion by statutory guidelines appears to mandate that a statutory aggravating circumstance be found.

91. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

92. 428 U.S. at 252. The Court stated that sentencing by a trial judge should lead to even greater consistency due to experience. *Id.*

93. *Id.* at 259. Justice Powell did not make explicit what he meant by "conscientious" review, but he was apparently referring to an earlier statement that Florida, like Georgia, has not hesitated to vacate death sentences. *Id.* at 253.

94. *Id.* at 260. The division of the Court in *Proffitt* was the same, and the plurality reasoning substantially the same, as in *Gregg* and *Jurek*. *Id.* (White, J., joined by Burger, C.J., & Rehnquist, J., concurring).

95. 428 U.S. 280 (1976).

96. 428 U.S. 325 (1976).

97. N.C. GEN. STAT. § 14-17 (Supp. 1975).

98. LA. REV. STAT. ANN. § 14:30 (Supp. 1974) (amended 1975, 1976).

99. The Court left open the question of the constitutionality of a mandatory death sentence for extremely narrow categories of crimes, such as murder by a life-term prisoner, which are defined in part be the character or record of the offender. 428 U.S. at 287 n.7.

100. *Id.* at 302-03.

consideration of the characteristics of the particular offense and offender.[101] In *Roberts*, the plurality opinion concluded that the fact that Louisiana's statute contained a somewhat more narrow definition of first-degree murder than did North Carolina's statute was not of controlling constitutional significance. The statute failed for substantially the same reasons as in *Woodson*.[102]

From the five death penalty cases it becomes apparent that, in order to impose the death penalty under the eighth and fourteenth amendments, some discretionary procedure, strictly guided by statute, is necessary.[103] In summary, sentencing in capital cases must include some form of separate proceeding,[104] consideration by the sentencing authority of freely admissible evidence in aggravation and mitigation of the sentence,[105] some reasoned

101. *Id.* at 303.

102. 428 U.S. at 332-33. Justices Brennan and Marshall concurred in *Woodson* and *Roberts* for the reasons stated in their dissenting opinions to *Gregg*, *Jurek*, and *Proffitt*. See text & notes 65-66 *supra*. Justice Blackmun dissented for the reasons given in his *Furman* dissent. The Chief Justice and Justices White and Rehnquist dissented, basically concluding that the Court had overstepped in requiring a separate sentencing hearing to consider the character of the accused and circumstances of the offense, relying in large part on McGautha v. California, 402 U.S. 183 (1971). 428 U.S. at 347-48, 353.

103. Of the seven Justices who upheld the death penalty, only a plurality of three found some discretionary procedure required. Four would uphold some form of mandatory death penalty statute. *See* text & notes 56-66 *supra*. Thus, a change in Court composition of one Justice could result in a mandatory statute being upheld. But as long as only four Justices accept a mandatory procedure, the narrower requirement of discretionary features is required to pass constitutional muster by a majority.

104. Gregg v. Georgia, 428 U.S. 153, 189, 190-91, 195, 203-04 (1976) (Stewart, J., joined by Powell & Stevens, JJ.).

105. The separate sentencing hearing must involve a guided viewing of the individual offense and offender. *See* Roberts v. Louisiana, 428 U.S. 325, 333 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Jurek v. Texas, 428 U.S. 262, 273-74 (1976); Proffitt v. Florida, 428 U.S. 242, 251, 258 (1976); Gregg v. Georgia, 428 U.S. 153, 187, 197, 198, 206 (1976). Both Georgia and Florida provide for such analysis by directing attention to particular aggravating circumstances. FLA. STAT. ANN. § 921.141(5) (West Supp. 1977); GA. CODE ANN. § 27-2534.1(b) (Supp. 1976). Apparently, such a list need not be inclusive of any particular factor, although those factors which are included must necessarily be such that the punishment will not be excessive for the crime. *See* Weems v. United States, 217 U.S. 349, 378 (1910). Although Texas has no statutory list labeled "aggravating circumstances," the Supreme Court noted that the defined categories of murder, and questions to be answered, served the same function. Jurek v. Texas, 428 U.S. 262, 270 (1976); *see* text accompanying note 72 *supra*. All three procedures require that at least one of the circumstances be found before death may be imposed.

The other part of the individual viewing must involve consideration of mitigating circumstances. See text accompanying note 75 *supra*. These may or may not be listed, but wide latitude must be given the defense to present evidence in support of such circumstances. *See* FLA. STAT. ANN. § 921.141(1) (West Supp. 1977); GA. CODE ANN. § 27-2503 (Supp. 1976); TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon Supp. 1976-77). Since the death penalty cases, the California Supreme Court, in Rockwell v. Superior Court, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976), has struck down the California statute, CAL. PENAL CODE §§ 190-190.3 (West Supp. 1976). The court stated that the legislative intent was to write a mandatory statute, and it declined to construe the statute to allow consideration of mitigating circumstances, and thus conform the statute to the requirements of the death penalty cases. 18 Cal. 3d at 445, 556 P.2d at 1116, 134 Cal. Rptr. at 665.

Although both aggravating and mitigating circumstances may be susceptible of various constructions, the Supreme Court has accepted them on their face until construed by state courts. *See* Proffitt v. Florida, 428 U.S. 242, 254-58 (1976); Gregg v. Georgia, 428 U.S. 153, 200-04 (1976); discussion note 134 *infra*. *See also* State v. Dixon, 283 So. 2d 1, 9-10 (Fla. 1973), where the court stated that a man of ordinary intelligence and knowledge could easily conceive the concepts involved. The amount of discretion permissible is evident from the Court's discussion of Texas' second question, which the Court construed to permit consideration of all necessary mitigating circumstances. *See* discussion note 74 *supra*.

choice of sentence relative to the evidence considered,[106] a recording of the findings supporting that choice,[107] and a meaningful appellate review.[108] The more a capital sentencing procedure is circumscribed by the precise facets of one of the upheld procedures, the more likely the procedure will be held constitutional.

The Statutory Analysis

The new Arizona death penalty statute,[109] apparently enacted in re-

106. The Georgia and Florida statutes require consideration of aggravating and mitigating circumstances. Florida requires consideration of whether the mitigating circumstances "outweigh" the aggravating circumstances, FLA. STAT. ANN. § 921.141(2) (West Supp. 1977), while Georgia simply requires consideration of both in determining whether death shall be imposed, implying some form of discretionary balancing, GA. CODE ANN. § 27.2503(b) (Supp. 1976). In Texas, the entire balancing procedure must evidently take place in determining the answer to the second question. Jurek v. Texas, 428 U.S. 262, 274-76 (1976). Again, it appears the Court is permitting a wide degree of discretion, as long as the sentencing authority must consider individual characteristics of the crime and offender before imposition. *Id.*; *see* discussion note 105 *supra*; *cf.* Connelly, *The Proposed Federal Criminal Codes: A Prosecutor's Point of View*, 68 NW. U.L. REV. 826, 840 (1973) (a system where a finding of any enumerated mitigating circumstance means automatic life, but a finding of any enumerated aggravating and no mitigating circumstance means automatic death, appears to have best chance of being constitutional).

107. While the sentencing authority may be either a jury or a judge, *see* Proffitt v. Florida, 428 U.S. 242, 252 (1976), in either case some type of written record of the findings underlying a sentence of death may also be required; such findings would appear necessary to ensure the meaningful appellate review of death sentences which the plurality found lacking in *Woodson* and *Roberts*. Roberts v. Louisiana, 428 U.S. 325, 335-36 (1976). In Dixon v. State, 283 So. 2d 1 (Fla. 1973), the Florida Supreme Court stated:

> The fourth step required . . . is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

Id. at 8. And the United States Supreme Court in *Proffitt* stated: "Since . . . the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each such sentence is made possible." Proffitt v. Florida, 428 U.S. 242, 251 (1976) (plurality opinion). Such a requirement, then, is probably necessary to any procedure. The Supreme Court, without elaboration, indicated that a "meaningful review" was required, and by affirming the Georgia, Texas, and Florida cases has indicated that those reviewing procedures were sound. Each of these reviews includes an independent viewing of the circumstances considered by the sentencing authority and a proportionality review of similar factual cases to determine if the sentence imposed was excessive. *See* GA. CODE ANN. § 27-2537 (Supp. 1976); TEX. CODE CRIM. PROC. ANN. art. 37.071(f) (Vernon Supp. 1976-77). See text & notes 90-91 *supra*. In reference to the proportionality review, the Georgia Supreme Court has stated that it is not required to determine that a penalty less than death was never imposed in a similar case, but rather to assure that a death sentence is not affirmed unless death has been imposed "generally" for similar cases throughout the state. Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975). *See also* Alvord v. State, 322 So.2d 533, 540 (Fla. 1975).

108. In delineating the constitutional deficiencies in Louisiana's statute in Roberts v. Louisiana, 428 U.S. 325 (1976), Justice Stevens noted the lack of guiding standards for the jury and the lack of a "meaningful appellate review" of the jury's decision. *Id.* at 335-36.

109. ARIZ. REV. STAT. ANN. § 13-454 (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978), provides as follows:

> A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.
>
> B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the

sponse to *Furman*, is based in large part on the Florida statute[110] upheld in *Proffitt*; in fact, the basic procedural format required is substantially identical to Florida's. Broadly stated, section 13-454 of the Arizona Revised Statutes[111] requires that the judge in a capital case conduct a separate sentencing hearing at which relevant evidence may be entered by the prosecution and defense to support or controvert the existence of the six aggravating and four mitigating circumstances set forth in the statute.[112] If

mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

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

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

For a pre-*Gregg* discussion of Arizona's statute, see Note, *Resurrection of the Death Penalty: The Validity of Arizona's Response to Furman v. Georgia*, 1974 ARIZ. ST. L.J. 257.

110. Letter from Gary K. Nelson, *supra* note 36; *see* discussion note 36 *supra*. *Compare* ARIZ. REV. STAT. ANN. § 13-454 (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978), *with* FLA. STAT. ANN. § 921.141 (West Supp. 1977).

111. ARIZ. REV. STAT. ANN. § 13-454 (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978).

112. *Id.* § 13-454 (A),(B),(E),(F).

the judge finds that one or more of the aggravating circumstances exist and fails to find any mitigating circumstances which outweigh the aggravating factor(s), the death penalty must be imposed.[113] The court must, in its special verdict, set forth its findings as to the existence or nonexistence of each of the aggravating and mitigating circumstances.[114]

In *Richmond*, decided after the death penalty cases, the Arizona Supreme Court, in a relatively brief opinion, upheld the constitutionality of Arizona's statute.[115] The remainder of this note will analyze Arizona's statute in view of *Richmond*, prior Arizona decisions, and the five death penalty cases. The primary aim will be to analyze the extent of consistency between Arizona's procedure and those upheld in the death penalty cases.

While the Arizona Supreme Court has consistently held that the death penalty does not per se violate either the federal or state constitutions,[116] *Richmond* is the first case in which the court confronted the issue of the constitutionality of Arizona's newly enacted death penalty statute.[117] Richmond, with two accomplices, had driven the victim, Bernard Crummett, to a secluded area for the purpose of robbing him. Once there, the defendant beat Crummett to unconsciousness with his fists and rocks. The victim was then robbed. On leaving the scene the vehicle was twice driven over Crummett's body.[118] The victim died from his injuries. The defendant was convicted of first degree murder. After a separate sentencing hearing, the trial judge found two statutory aggravating circumstances[119] and an absence of any mitigating circumstances, and thus imposed the death sentence.[120] On appeal the defendant challenged the constitutionality of the Arizona death penalty statute and argued that the imposition of the death penalty in his case was excessive. The Arizona Supreme Court held that the statute was not violative of the eighth and fourteenth amendments to the United States Constitution, citing *Gregg v. Georgia*[121] and its companion cases, and further held that the trial court correctly applied the statute to Richmond's case.[122]

Most of the attacks on the constitutionality of the Arizona statute made by Richmond were identical to those raised and answered in the five death penalty cases.[123] In rejecting these arguments, the Arizona Supreme Court

113. *Id.* § 13-454 (D).
114. *Id.* § 13-454 (C).
115. State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976).
116. *Id.*; State v. Endreson, 108 Ariz. 366, 498 P.2d 454 (1972); State v. Malumphy, 105 Ariz. 200, 461 P.2d 677 (1969); *see* ARIZ. CONST. art. 2, § 15 (wording substantially identical to the eighth amendment).
117. 114 Ariz. at 189, 560 P.2d at 44.
118. *Id.*
119. The trial judge found that the defendant had a prior felony conviction and that the crime was especially heinous. *Id.*
120. *Id.*
121. 428 U.S. 153 (1976).
122. 114 Ariz. at 194-96, 560 P.2d at 49-51.
123. *See id.* at 194-96, 560 P.2d at 49-51.

merely cited portions of *Gregg* and its companion cases.[124] In reference to the defendant's argument that the legislative criteria are too vague and subjective under *Furman*, the Arizona court stated: "In Proffitt . . . the United States Supreme Court was faced with similar challenges to a capital sentencing procedure which, in this context, is indistinguishable from the Arizona statute."[125] It noted that the Supreme Court had found Florida's criteria "sufficiently clear and precise" and concluded that the Arizona statute satisfied "the requirements of due process and equal protection."[126] In reference to the defendant's contention that the statute does not delimit consideration of mitigating circumstances, the court construed the statute to authorize consideration of only the enumerated circumstances.[127] The court also rejected the argument that leaving the sentence determination to the judge was unconstitutional, stating that the United States Supreme Court had never held jury sentencing to be constitutionally mandated.[128]

Aggravating and Mitigating Circumstances

In *Richmond*, the Arizona court considered only two of the statutory aggravating circumstances. It upheld the finding of a prior felony conviction involving the use or threat of violence on another person[129] where evidence was submitted showing a previous conviction for kidnapping at knifepoint.[130] Although the trial judge also found the crime to have been committed in an especially heinous manner,[131] the supreme court found it unnecessary to resolve defendant's contention that this criterion was too imprecise and indefinite, since the other aggravating factor had already been upheld.[132]

A close comparison of Arizona's statutory aggravating circumstances

124. *Id.*

125. *Id.* at 195, 560 P.2d at 50. For a discussion of the Florida statute and the Court's reasoning in Proffitt v. Florida, 428 U.S. 242 (1976), see text & notes 81-94 *supra*.

126. 114 Ariz. at 195, 560 P.2d at 50.

127. *Id.* at 195-96, 560 P.2d at 50-51. It is unclear why the court chose to construe the statute in this way since it was not a constitutional requirement. *See* Jurek v. Texas, 428 U.S. 262, 271-73 (1976); Gregg v. Georgia, 428 U.S. 153, 197 (1976). Indeed, such a limiting construction may itself raise a constitutional issue by limiting considerations favorable to the defendant which may be considered in future cases. *See* text & notes 136-45 *infra*.

128. 114 Ariz. at 196, 560 P.2d at 51, *citing* Proffitt v. Florida, 428 U.S. 242 (1976). Although the Supreme Court has stated that jury sentencing is not constitutionally mandated, Proffitt v. Florida, 428 U.S. at 252, the Florida Supreme Court considers a jury sentencing recommendation to be an important right of the defendant under the statute. *See* Lamadline v. State, 303 So. 2d 17, 20 (Fla. 1974). *See also* Thompson v. State, 328 So. 2d 1, 5 (Fla. 1976); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (both stating that the jury's advisory opinion should be given great weight).

129. 114 Ariz. at 196, 560 P.2d at 51; *see* ARIZ. REV. STAT. ANN. § 13-454(E)(2) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978).

130. 114 Ariz. at 196, 560 P.2d at 51.

131. *Id.* at 189, 560 P.2d at 44; *see* ARIZ. REV. STAT. ANN. § 13-454(E)(6) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978), *quoted* note 109 *supra*.

132. The court did cite, however, the Florida Supreme Court's discussion of Florida's similar aggravating circumstance. 114 Ariz. at 196-97, 560 P.2d at 51-52. See discussion note 134 *infra*. The court has since defined heinous substantially similarly to the Florida court in State v. Ceja, No. 3102 (Ariz., filed May 16, 1977). *See* discussion note 134 *infra*.

with Georgia's and Florida's lists, and with Texas' five categories of capital homicide and three statutory questions, reveals that each of Arizona's circumstances, with two possible exceptions,[133] is substantially encompassed in one of the factors examined under the other states' procedures.[134]

133. Arizona's first enumerated aggravating circumstance concerns a prior conviction for an offense punishable by life imprisonment or death in Arizona. The other statutes do not include a prior conviction punishable by life imprisonment, but rather convictions punishable by death, or felonies involving the use or threat of violence to another person. *Compare* ARIZ. REV. STAT. ANN. § 13-454(E)(1) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978), *quoted* note 109 *supra*, *with* FLA. STAT. ANN. § 921.141(5)(b) (West Supp. 1977), *quoted* note 84 *supra; and* GA. CODE ANN. § 27-2534.1(b)(1) (Supp. 1976), *quoted* note 49 *supra*. Any nonviolent crimes carrying a possible life imprisonment sentence could conceivably be considered an aggravating circumstance for imposition of the death penalty. In this sense, Arizona's circumstance appears broader than those listed by Georgia or Florida. However, Texas' second question involves a determination of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1976-77), and the Texas court has construed this provision as permitting consideration of prior criminal convictions. Since the constitutionally acceptable Texas question would seem to comprehend any conviction, Arizona's aggravating circumstance, limited to life imprisonment, is narrower and thus also constitutionally valid.

Arizona also provides, in part, that the knowing creation of a grave risk of death to a person other than the victim in the commission of the offense, constitutes an aggravating circumstance. ARIZ. REV. STAT. ANN. § 13-454(E)(3) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). Florida, on the other hand, uses only the plural, "risk of death to *many persons*." FLA. STAT. ANN. § 921.141(5)(c) (West Supp. 1977) (emphasis added). *But see* Proffitt v. Florida, 428 U.S. 242, 256 n.13 (1976); Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975). Georgia defines knowing endangerment of "more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person" as an aggravating circumstance. GA. CODE ANN. § 27-2534.1(b)(3) (Supp. 1976). Arizona's circumstance seems to be much broader on its face. Georgia and Florida describe a situation in which the defendant has created a condition of grave danger to *many people*, or to more than one person in a *public place*, which implies such actions as planting a bomb, hijacking, or sniping into a public area. In discussing Florida's third aggravating circumstance, in regard to the requirement that the risk be created by use of a device normally considered hazardous to the lives of more than one person, the Supreme Court has stated: "While the state court has not focused on this situation, it seems reasonable to assume that if a great risk in fact is created, it will be likely that a weapon or device normally hazardous to more than one person will have created it." Gregg v. Georgia, 428 U.S. 153, 203 n.55 (1976). In Alvord v. State, the Florida Supreme Court held Florida's third aggravating circumstance to be applicable where the defendant "obviously murdered two of the victims in order to avoid a surviving witness to the [first] murder." 322 So. 2d at 540. The United States Supreme Court stated the provision was not impermissibly vague. Proffitt v. Florida, 428 U.S. 242, 256 (1976).

Arizona, on the other hand, would appear to include any situation where the defendant put only one other person, besides the victim, in grave danger in any place, public or private. *See* ARIZ. REV. STAT. ANN. § 13-454(E)(3) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). Absent judicial construction of Arizona's circumstance, any comparison is mere speculation, and the facial differences in wording are of doubtful constitutional dimensions.

134. Perhaps central to any new death penalty statutes are the aggravating and mitigating circumstances which provide the guidelines for particularized consideration of the individual offense and offender. In *Gregg*, the plurality opinion stated: "[W]hile such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary." 428 U.S. at 193-95. As to construction of the circumstances, the plurality opinion stated in *Proffitt*: "[T]hese provisions must be considered as they have been construed by the Supreme Court of Florida." 428 U.S. at 255. The Arizona Supreme Court has expressly dealt with only three of the circumstances in *Richmond*, so that some discussion of the construction and use given the similar provisions in the Georgia and Florida statutes may be applied to determine the possible construction of the Arizona provisions.

The Arizona statute expressly provides that one or more of the *enumerated* aggravating circumstances must be found to impose death. ARIZ. REV. STAT. ANN. § 13-454(D) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). The aggravating circumstances will be discussed individually.

(1) *The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.* ARIZ. REV. STAT. ANN. § 13-454(E) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902;

effective Oct. 1, 1978). This provision is relatively clear on its face. Georgia has found a prior conviction for a capital offense as an aggravating circumstance at least four times. Arnold v. State, 236 Ga. 534, 539 n.1, 224 S.E.2d 386, 391 n.1 (1976); *see* Mason v. State, 236 Ga. 46, 222 S.E.2d 339 (1976); Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1974). Florida's second aggravating circumstance also includes a prior conviction for a capital offense. FLA. STAT. ANN. § 921.141(5)(b) (West Supp. 1977). Although Arizona's provision that a prior conviction punishable only by life imprisonment constitutes an aggravating circumstance is broader than the Florida and Georgia statutes, it is narrower than the Texas statute. *See* discussion note 133 *supra*.

(2) *The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.* ARIZ. REV. STAT. ANN. § 13-454(E) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). This provision is substantially identical to Florida's second provision which was held applicable in Henry v. State, 328 So. 2d 430 (Fla. 1976). This circumstance was found to exist in *Richmond*, where evidence was submitted at the sentence hearing that the defendant had previously been convicted of a kidnapping at knifepoint. 114 Ariz. at 196, 560 P.2d at 51. It does not seem to suffer from the infirmities of Georgia's first circumstance which states that "[t]he offense of murder . . . was committed by a person . . . who has a substantial history of serious assaultive criminal convictions." GA. CODE ANN. § 27-2534.1(b)(1) (Supp. 1976). The Supreme Court of Georgia has stated that this provision does not provide "the sufficiently clear and objective standards necessary to control the jury's discretion in imposing the death penalty," in reference to the use of the words "substantial" and "serious," and has held this portion of the provision unconstitutional. Arnold v. State, 236 Ga. 534, 539, 224 S.E.2d 386, 391 (1976). Although Arizona's provision appears broader in scope than Georgia's, by not requiring a "substantial history," it does not seem to suffer from vagueness in the use of adjectives.

(3) *In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.* ARIZ. REV. STAT. ANN. § 13-454(E) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). The Supreme Court of Florida has stated, in reference to Florida's third aggravating circumstance, which is similar to that of Arizona: "[W]e feel that a man of ordinary intelligence and knowledge easily conceives of the concepts involved." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). In Proffitt v. State, 315 So. 2d 461 (Fla. 1975), the defendant stabbed the victim in his bed, while robbing his house, and then beat the victim's wife when she awoke after the stabbing. Florida's third circumstance was one of the aggravating factors found and upheld on review. *Id.* at 466-67. In Alvord v. State, 322 So. 2d 533 (Fla. 1975), the Florida Supreme Court upheld a finding of the circumstance where two of the three victims were murdered to avoid a surviving witness. *Id.* at 540. The Supreme Court's plurality opinion in *Proffitt* stated: "As construed by the Supreme Court of Florida these provisions are not impermissibly vague." 428 U.S. at 256. The Georgia Supreme Court upheld the finding of a substantially similar circumstance where the defendant fired indiscriminately into a crowd in a church. Chenault v. State, 234 Ga. 216, 225-26, 215 S.E.2d 223, 229-30 (1975); *see* Jarrell v. State, 234 Ga. 410, 424, 216 S.E.2d 258, 269 (1975) (reversed as to trial court's finding of this aggravating circumstance). Referring to this aggravating circumstance in the context of Chenault v. State and Jarrell v. State, the Supreme Court's plurality opinion in Gregg v. Georgia stated: "While such a phrase might be susceptible to an overly broad interpretation, the Supreme Court of Georgia has not so construed it." 428 U.S. at 202. In State v. Verdugo, 112 Ariz. 288, 541 P.2d 388 (1975), the Arizona Supreme Court reversed a death sentence where this aggravating circumstance was the only one found. In that case three men, including the defendant, robbed a convenience store and exchanged gunfire with the store proprietor, killing him. After running outside, one of the men put a gun to the back of a bystander and forced him inside the store before fleeing. On the basis of this contact with a bystander, the trial court found the creation of a grave risk of death to another. The Arizona Supreme Court reversed on the grounds of insufficient evidence in finding the existence of this circumstance. *Id.* at 290, 541 P.2d at 390. It is difficult to define with exactness what this provision may include, but it is apparent that the United States Supreme Court is at least willing to uphold the application of the provision under circumstances such as those in the Georgia and Florida cases discussed. For a discussion of the use of the singular and plural forms of "person," see discussion note 133 *supra*.

(4) *The defendant procured the commission of the offense by payment or promise of payment, of anything of pecuniary value.* ARIZ. REV. STAT. ANN. § 13-454(E) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). This provision is similar to Georgia's sixth aggravating circumstance, GA. CODE ANN. § 27-2534.1(b)(6) (Supp. 1976). Florida has no similar provision. No cases have yet applied this circumstance.

(5) *The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.* ARIZ. REV. STAT. ANN. § 13-454(E) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). Florida's sixth aggravating circumstance is substantially identical, FLA. STAT. ANN. § 921.141(5)(f) (West Supp. 1977), and in reference to this provision the Florida Supreme Court has stated: "[T]he definitions of the crimes intended to be included are reasonable and easily understood by the average man." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Georgia's fourth aggravating

circumstance is substantially similar, GA. CODE ANN. § 27-2534.1(b)(4) (Supp. 1976), and has been applied and upheld in at least eight cases. Arnold v. State, 236 Ga. 534, 539 n.1, 224 S.E.2d 386, 391 n.1 (1976). Although on its face it could be construed narrowly to mean only commission of a murder in order to receive money from a third party, only one case fits such a construction, Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976), implying the court has not so narrowly limited it. In most cases the provision's application has been broad enough to include murders committed for the purpose of, or leading to robbery. *See, e.g.*, Henry v. State, 328 So. 2d 430 (Fla. 1976); Hallman v. State, 305 So. 2d 180 (Fla. 1974); Birt v. State, 236 Ga. 815, 225 S.E.2d 248 (1976); Pulliam v. State, 236 Ga. 460, 224 S.E.2d 8, *cert. denied*, 428 U.S. 911 (1976); Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974). The Supreme Court's plurality opinion in *Gregg* merely noted the finding of this circumstance in one case, without comment. 428 U.S. at 201 n.53.

(6) *The defendant committed the offense in an especially heinous, cruel, or depraved manner.* ARIZ. REV. STAT. ANN. § 13-454(E) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). Georgia's seventh circumstance uses the words "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." GA. CODE ANN. § 27-2534.1(b)(7) (Supp. 1976). Florida's eighth circumstance states: "The capital felony was especially heinous, atrocious, or cruel." FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1977). These provisions have been among the most contested and have most often been found to exist. *See* State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Arnold v. State, 236 Ga. 534, 539 n.1, 224 S.E.2d 386, 391 n.1 (1976). In *Dixon*, the Florida Supreme Court construed the provision as follows:

> [W]e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

283 So. 2d at 9. In Gregg v. Georgia, 428 U.S. 153 (1976), the petitioner attacked the Georgia provision as overly broad. The plurality opinion stated that although any murder could be described in these terms, there was no reason to believe the state court would so broadly construe it, especially since the state court had only once applied this circumstance alone. 428 U.S. at 201. Various applications of the Florida provision may be found in cases where the death sentence was upheld by the Florida Supreme Court. *See, e.g.*, Dobbert v. State, 328 So. 2d 433 (Fla. 1976) (father murdered two children by beating, kicking, and choking, after long periods of torture and mutilation); Henry v. State, 328 So. 2d 430 (Fla. 1976) (death by suffocation; throat slit with razors; beatings); Douglas v. State, 328 So. 2d 18 (Fla. 1976) (forced victim and wife to perform various sexual acts; beat victim on head with sufficient force to shatter rifle stock and shot three times in back of head); Gardner v. State, 313 So. 2d 675 (Fla. 1975) (tore patches of hair out; beating and breaking bones and causing at least 100 bruises; sexual torture prior to death); Spinkellink v. State, 313 So. 2d 666 (Fla. 1975) (shot companions in their motel room); Alford v. State, 307 So. 2d 433 (Fla. 1975) (raped and injured victim; shot her five or six times; threw body on trash pile); Halman v. State, 305 So. 2d 180 (Fla. 1974) (slit barmaid's throat with a broken bottle). In *Proffitt*, the plurality opinion cited the above cases and stated: "[T]he circumstances of all these cases could be accurately characterized as 'pitiless' and 'unnecessarily torturous,' and it thus does not appear that the Florida Court has abandoned the definition that it announced in *Dixon* . . . ." 428 U.S. at 255 n.12. In reference to the construction given the Florida provision in *Dixon*, the plurality opinion stated: "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." 428 U.S. at 255-56.

The trial judge found this circumstance to exist in *Richmond*, and on appeal the defense argued that the terms of the provision are so "imprecise and indefinite as to leave the discretion of the sentencing authority virtually unfettered." 114 Ariz. at 196, 560 P.2d at 51. The Arizona Supreme Court refused to resolve this question since another aggravating circumstance had been established. *Id.* at 196-97, 560 P.2d at 51-52. In a more recent case, State v. Ceja, No. 3102 (Ariz., filed May 16, 1977), the Arizona Supreme Court construed this provision in a manner similar to the construction given by the Florida court above in *Dixon. Id.*

The Florida Supreme Court has reduced two death sentences to life where this provision was the only aggravating circumstance found by the trial court. In Swan v. State, 322 So. 2d 485 (Fla. 1975), the court reduced the 19-year-old defendant's death sentence, which had been imposed following conviction of robbing an old victim in poor health and beating the victim unconscious such that she later died of various health complications. In Halliwell v. State, 323 So. 2d 557 (Fla. 1975), the court reduced a death sentence for a conviction of murder arising out of a love triangle case, where the defendant had dismembered the body several hours later. The Florida court noted: "[I]f mutilation had occurred prior to death or instantly thereafter, it would have been more relevant in fixing the death penalty." *Id.* at 561.

Both Florida's and Georgia's statutory lists include circumstances covering situations not included in Arizona's statute. Examples of these situations, as interpreted by courts, include murder of a policeman in performance of his duties, *see* Songer v. State, 322 So. 2d 481 (Fla. 1975), murder while under a current sentence of imprisonment, *see* Darden v. State, 329 So. 2d

Likewise, Arizona's list of mitigating circumstances is substantially encompassed by Florida's list.[135]

287 (Fla. 1976), murder to effectuate an escape from lawful custody, *see* Spencer v. State, 236 Ga. 697, 224 S.E.2d 910 (1976), and murder during the commission of robbery or rape, *see, e.g.*, Dobbs v. State, 236 Ga. 427, 224 S.E.2d 3 (1976); Tamplin v. State, 235 Ga. 20, 218 S.E.2d 779 (1975); Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975).

135. The Arizona Supreme Court has limited consideration of mitigating circumstances to the four enumerated in the Arizona statute, ARIZ. REV. STAT. ANN. § 13-454(F) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). State v. Richmond, 114 Ariz. 186, 195, 560 P.2d 41, 50 (1976). For discussion of a possible constitutional issue in such a limitation, see text accompanying notes 136-52 *infra*. These mitigating circumstances contain many more descriptive adjectives than the aggravating provisions, such as "significantly," "unusual and substantial," "relatively minor," and "reasonably." Such words make these provisions facially less clear than the aggravating circumstances. *See* Note, *supra* note 109, at 285-88. Of the three statutes upheld in the death penalty cases, only the Florida statute has a list of mitigating circumstances, and few cases construe them. The four enumerated mitigating circumstances in Arizona's statute will be discussed in light of other states' cases on similar circumstances.

(1) *His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.* ARIZ. REV. STAT. ANN. § 13-454(F)(1) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). Florida's sixth mitigating circumstance is substantially similar. FLA. STAT. ANN. § 921.141(6)(f) (West Supp. 1977). Three Florida cases indicate possible situations where this provision is applicable. In Taylor v. State, 294 So. 2d 648 (Fla. 1974), the Florida Supreme Court reversed a death sentence where the defendant was shot five times by the proprietor of a store during an unsuccessful attempted armed robbery, and while on the floor, shot and killed a person. The court reasoned that the shots wounding the defendant could have *substantially impaired* his rationality, such that the jury's recommendation of mercy should not have been ignored by the sentencing judge. *Id.* at 652. In Songer v. State, 322 So. 2d 481 (Fla. 1975), in discussing possibly applicable mitigating circumstances, the court stated: "[T]here is sufficient evidence to justify the jury's finding that Appellant was not so intoxicated as to be unaware of what he was doing." *Id.* at 484. This statement may lead to the logical implication that intoxication could be sufficient at some point to substantially impair a defendant's capacity such as to become a mitigating factor. In Jones v. State, 332 So. 2d 615 (Fla. 1976), the court stated that death was excessive where the accused suffered from an undenied "paranoid psychosis" which contributed to his behavior such that he did not know the difference between right and wrong. *Id.* at 619. This provision was argued by the defendant in *Richmond*. For a discussion of the Arizona court's treatment, see text & notes 153-64 *infra*.

(2) *He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.* ARIZ. REV. STAT. ANN. § 13-454(F)(2) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). The Florida mitigating circumstance, FLA. STAT. ANN. § 921.141(6)(e) (West Supp. 1977), is substantially similar to Arizona's, and by case law, Texas has also provided for consideration of a similar circumstance under a statutory construction. *See* Jurek v. State, 522 S.W.2d 934, 940 (Tex. Crim. App. 1975). Again, apparently no cases have construed this provision, although on its face it seems to provide for some great degree of mental coercion. The degree of duress or coercion envisioned is difficult to predict and must await a factual situation relevant to its application.

(3) *He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.* ARIZ. REV. STAT. ANN. § 13-454(F)(3) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). This provision appears to apply to cases where the defendant is technically a participant in a capital crime, such as being the driver of the getaway vehicle in an armed robbery in which a death results, but was not involved in or even close to the actual murder. No case construction appears available, although the Florida statute includes a substantially identical provision. FLA. STAT. ANN. § 921.141(6)(d) (West Supp. 1977). One Florida case may be relevant to certain factual situations involving consideration of this provision. In Slater v. State, 316 So. 2d 539 (Fla. 1975), two men, one the defendant, committed a murder during an armed robbery. The other offender entered a plea of nolo contendere to first degree murder and received a sentence of life imprisonment, even though he was the "triggerman." The supreme court reversed the defendant's death sentence under an equal protection rationale. *Id.* at 542-43.

(4) *He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.* ARIZ. REV. STAT. ANN. § 13-454(F)(4) (Supp. Pamphlet 1957-

One possibly substantial difference between the Arizona statute, and those of Florida, Texas, and Georgia, is that consideration of mitigating circumstances is limited to the four enumerated.[136] Georgia provides for consideration of "any mitigating circumstances . . . authorized by law."[137] The Texas Court of Criminal Appeals has construed their second statutory question to allow consideration of mitigating circumstances, for which they cited examples as necessarily included, but not necessarily as exclusive of others.[138] The Florida statute requires consideration of any

77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). Florida has no similar provision, and Arizona's provision has not been applied or discussed in any case. On its face, it appears to be the mirror image of the third aggravating circumstance.

The Arizona statute fails to include four mitigating circumstances which are included in the Florida statute and may be considered under the Georgia and Texas statutes. The first circumstance, a lack of a prior history of significant criminal activity, FLA. STAT. ANN. § 921.141(6)(a) (West Supp. 1977), has been found to exist in several cases, but has been found as a reason for mercy only where other mitigating circumstances were also found. *See* Halliwell v. State, 323 So. 2d 557 (Fla. 1975) (finding of severe emotional strain and also finding that the aggravating circumstance found by the trial court was not applicable); Taylor v. State, 294 So. 2d 648 (Fla. 1974) (finding that the defendant's capacity could have been substantially impaired). In cases where an aggravating circumstance has been found, and the only mitigating circumstance found was absence of a prior criminal record, the imposition of the death penalty has been upheld. In Tamplin v. State, the Supreme Court of Georgia, in upholding a death sentence, stated: "[C]ases also show that juries have imposed the death penalty for murder notwithstanding the absence of a prior criminal record." 235 Ga. 20, 25 n.2, 218 S.E.2d 779, 784 n.2 (1975). *See also* Alford v. State, 307 So. 2d 433 (Fla. 1975).

The commission of the offense "while under the influence of extreme mental or emotional disturbance" is the second enumerated provision. FLA. STAT. ANN. § 921.141(6)(b) (West Supp. 1977). In State v. Dixon, 283 So. 2d 1 (Fla. 1973), the Florida Supreme Court, in reference to this provision, stated: "Extreme mental or emotional disturbance . . . is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed." *Id.* at 10. *See also* Jurek v. State, 522 S.W.2d 934, 940 (Tex. Crim. App. 1975). This mitigating circumstance appeared to be the source of commuting a death penalty to life in a case where the defendant killed his lover's husband in a rage. Halliwell v. State, 323 So. 2d 557 (Fla. 1975).

The third circumstance provides: "The victim was a participant in the defendant's conduct or consented to the act." FLA. STAT. ANN. § 921.141(6)(c) (West Supp. 1977). This provision has not been applied or construed in any cases.

Florida also provides for consideration of the age of the defendant. FLA. STAT. ANN. § 921.141(6)(g) (West Supp. 1977). In State v. Dixon, 283 So. 2d 1 (Fla. 1973), the Florida Supreme Court stated that age is a proper element of attention, allowing consideration of the defendant's inexperience, prior record, and "the length of time that the defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of life." *Id.* at 10. A 23-year-old appellant argued for consideration of this provision, and in finding it inapplicable, the Supreme Court of Florida noted: "[T]oday one is considered an adult responsible for one's own conduct at the age of 18 years." Songer v. State, 322 So. 2d 481, 484 (Fla. 1975). Although the provision requiring consideration of age is absent from the Arizona death penalty statute, the Arizona Supreme Court had taken consideration of age prior to the statute's enactment. In State v. Maloney, 105 Ariz. 348, 464 P.2d 793 (1970), the court reduced the sentence for a 15-year-old defendant from death to life under its power to reduce sentences pursuant to ARIZ. REV. STAT. ANN. § 13-1717(B) (1956) (to be renumbered as ARIZ. REV. STAT. ANN. § 13-4037(B), effective Oct. 1, 1978). The court reasoned that although the crime was brutal and heinous, and the death sentence would clearly have been proper had the defendant been older, because of his immaturity, the death sentence was improper; the court reduced the sentence to life imprisonment. 105 Ariz. at 360, 464 P.2d at 805. The Arizona legislature has recently revised the Arizona Code of Criminal Procedure. Ch. 142, §§ 1-188, 1977 Ariz. Legis. Serv. 669. The death penalty statute will contain consideration of age as a fifth mitigating factor. *Id.* § 58 (to be codified at ARIZ. REV. STAT. ANN. § 13-902(G)(5)).

136. ARIZ. REV. STAT. ANN. § 13-454(F) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). In State v. Richmond, the Arizona court held that "subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F." 114 Ariz. at 195, 560 P.2d at 50 (1976).

137. GA. CODE ANN. § 27-2534.1(b) (Supp. 1976).

138. Jurek v. State, 522 S.W.2d 934, 940 (Tex. Crim. App. 1975); *see* discussion note 74 *supra*.

mitigating circumstances enumerated in subsection (7) which are found to exist,[139] but that section includes seven circumstances.[140] The Supreme Court of Ohio, in a post-*Gregg* decision,[141] upheld that state's death penalty statute which includes only three enumerated mitigating circumstances.[142] Although only the statutory circumstances may be considered,[143] the court has stated that they must be construed as broadly as possible in favor of the defendant.[144]

The plurality opinions in the death penalty cases relied heavily on the language, first stated in *Pennsylvania v. Ashe*, that the imposition of sentence requires consideration of "the circumstances of the offense together with the character and propensities of the offender."[145] Since the Consitution has never been construed to compel any penal sanctions, including the death penalty, a state may be at liberty to include as narrow a list of aggravating circumstances as it sees fit.[146] On the other hand, since justice requires a particularized consideration of the offense and offender,[147] a lack of consideration of mitigating circumstances would apparently constitute a proscribed mandatory system.[148] It follows therefore, that consideration of mitigating circumstances must be inclusive of some as yet undefined mini-

139. FLA. STAT. ANN. § 921.141(2)(b) (West Supp. 1977); *cf.* Sawyer v. State, 313 So. 2d 680, 682 (Fla. 1975) (Irvin, J., concurring in part and dissenting in part) (arguing that only those circumstances enumerated should be considered); Note, *supra* note 83, at 139.

140. FLA. STAT. ANN. § 921.141(6)(a), (b),(c),(g) (West Supp. 1977). For a discussion of these circumstances, see discussion note 135 *supra*.

141. State v. Bayless, 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976).

142. The three mitigating factors include duress, mental deficiency, and victim participation. OHIO REV. CODE ANN. § 2929.02 (Page 1975).

143. State v. Bayless, 48 Ohio St. 2d 73, 83-84, 357 N.E.2d 1035, 1045-46 (1976).

144. In reference to the circumscribed mitigating circumstances, the court expressly confronted the issue of a limited list of mitigating circumstances and concluded they adequately direct inquiry to the individual crime and offender. The court concluded they could "perceive no distinction of Constitutional dimensions between Ohio's mitigating factors, so construed, and those upheld in *Proffitt*." *Id.* The United States Supreme Court has granted certiorari and heard arguments on the Ohio statute's constitutionality in two cases. *See* Lockett v. Ohio, No. 76-6997, 22 CRIM. L. REP. (BNA) 4175 (1978); Bell v. Ohio, No. 76-6513, 22 CRIM. L. REP. (BNA) 4173 (1978).

145. Pennsylvania v. Ashe, 302 U.S. 51, 61 (1937). In Woodson v. North Carolina, 428 U.S. 280 (1976), Justice Stewart made very clear the plurality requirement for individualized consideration in capital cases. He reasoned that while individualizing sentencing determinations is generally enlightened policy, in capital cases it becomes constitutionally imperative due to the "fundamental respect for humanity underlying the eighth amendment." *Id.* at 304-05. Since death is qualitatively different from life imprisonment, a corresponding need for greater reliability exists for the determination to impose the death penalty. *Id. Compare* Justice Stewart's discussion in *Woodson* of mandatory sentencing, 428 U.S. at 297-98 (arguing that the Court at least had agreed in *Furman* that mandatory sentencing was "regressive" and a return to the past, and that the United States had rejected it), *with* Justice Rehnquist's discussion in *Woodson*, 428 U.S. at 309-12 (arguing that mandatory death sentences per se have not been rejected; rather, the broad range of crimes for which such sentences were imposed was narrowed).

146. This seems obvious, since a state need not impose death at all.

147. *See* discussion note 145 *supra*.

148. Discretionary procedures are distinguished from mandatory procedures by the discretion not to impose death when a murder has been committed in a certain fashion, *i.e.*, an aggravating circumstance has been found, but mitigating circumstances are also found. *See* Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976).

mal limit.[149]

The United States Supreme Court has never expressly stated how inclusive or exclusive a list of mitigating circumstances need be. However, in *Jurek v. Texas*,[150] Justice Stevens stated: "A jury must be allowed to consider on the basis of all relevant evidence not only why a death penalty should be imposed, but also why it should not be imposed . . . . [A] capital-sentencing system must allow the sentencing authority to consider mitigating circumstances."[151] The Arizona court has expressly restricted the mitigating circumstances available for consideration. Although this does not conflict directly with any Supreme Court opinion to date, it could become a constitutional issue.[152]

Arizona's statute provides that if the defendant lacked the capacity either "to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law," this diminished capacity should be considered in mitigation of sentence.[153] The defense in *Richmond* argued that this mitigating circumstance was established by psychiatric testimony offered by the defendant, which characterized him as a sociopath.[154] Relying on comments to the Model Penal Code,[155] the court reasoned that sociopathy was a character disorder, not a mental disorder, and concluded that the legislature did not mean to include such disorders as mitigating circumstances.[156]

The court's reliance on the Model Penal Code and the Mental Health Code[157] is arguably misplaced.[158] The Model Penal Code deals with finding

149. It is conceivable that the Court could find certain circumstances, such as the age of the defendant, which is inherent in the offender rather than the offense, to be required for consideration under equal protection or due process. *See* Pennsylvania v. Ashe, 302 U.S. 51, 61 (1937).

150. 428 U.S. 262 (1976).

151. *Id.* at 271.

152. In a pre-*Gregg* decision striking down Illinois' death penalty statute, ILL. ANN. STAT. ch. 38, § 1005-8-1A (Smith-Hurd Supp. 1973), the court based its conclusion in part on the fact that the statute required consideration of the nature of the offense, but not the offender. People *ex rel.* Rice v. Cunningham, 61 Ill. 2d 353, 361, 336 N.E.2d 1, 6 (1975).

153. ARIZ. REV. STAT. ANN. § 13-454(F)(1) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978).

154. 114 Ariz. at 197, 560 P.2d at 52.

155. MODEL PENAL CODE § 4.01, Comments, at 160 (Tent. Draft No. 4, 1956).

156. 114 Ariz. at 197-98, 560 P.2d at 52-53. The argument first put forward by the court that sociopathy has never been a defense to criminal liability seems misplaced. By definition, mitigating factors are not defenses to liability, even if differing only in degree. The issue is not whether sociopathy can ever be a defense, nor whether it could or equitably should be included for consideration in mitigation of death, but whether it is included within the construction given ARIZ. REV. STAT. ANN. § 13-454(F)(1) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978). The Arizona Supreme Court has not so construed it.

157. ARIZ. REV. STAT. ANN. §§ 36-501 to -550 (1974).

158. In reference to this mitigating circumstance, ARIZ. REV. STAT. ANN. § 13-454(F)(1) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978), the court has stated it could be established by showing either "impairment of the capacity to appreciate wrongfulness or an impairment of the capacity to conform." State v. Richmond, 114 Ariz. at 197, 560 P.2d at 52. The court characterized the first as a "cognitive deficiency" and the second as an impairment of capacity to conform to legal requirements. *Id.* This in turn was said to authorize a court's inquiry into volitional aspects of the mind. *Id.* The court concluded

or absolving guilt of a criminal defendant at trial,[159] while the Mental Health Code deals with criminal commitments after finding a defendant not-guilty or unable to stand trial due to insanity.[160] The death penalty statute deals with mitigation after finding competency and criminal liability.[161] Nevertheless, the reasoning the court drew from the other codes, although debatable, is logically valid. Sociopathy refers to or identifies repeat conduct, not necessarily mental disorder,[162] although the two conceivably coexist. Sociopathy, then, could logically be considered in aggravation, rather than mitigation.[163] The term merely identifies a pattern of conduct and not a mental disorder.[164] *Pennsylvania v. Ashe*[165] suggests that the "character and propensities" of the defendant be considered.[166] Sociopathy is part of the character makeup of a defendant, and so should arguably be considered, but need not be if in aggravation rather than mitigation.[167]

As to balancing the circumstances, the Arizona statute[168] requires that the death sentence be imposed if the court finds at least one of the statutory aggravating circumstances and "no mitigating circumstances sufficiently substantial to call for leniency."[169] This language is taken directly from the

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that a "character disorder" does not qualify as an "impairment" within the meaning of this section. *Id.* at 198, 560 P.2d at 53. In its reasoning, the court included the fact that a psychopathic or sociopathic condition has never constituted a valid defense in Arizona, and that in the Mental Health Code, "the legislature has defined mental disorders as excluding character and personality disorders." *Id.* Finally, the court noted that the provision was very similar to a Model Penal Code provision, and quoted comments which included:

> The reason for the exclusion is that, as the Royal Commission puts it, psychopathy 'is a statistical abnormality that is to say, psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of abnormality.' Model Penal Code, Comments § 4.01 at 160 (Tentative Draft No. 4, 1956).

Id.

159. *See generally* MODEL PENAL CODE (Proposed Official Draft, 1962).

160. *See generally* ARIZ. REV. STAT. ANN. §§ 36-501 to -550 (1974).

161. *See generally* ARIZ. REV. STAT. ANN. § 13-454 (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978).

162. MODEL PENAL CODE § 4.01, Comments, at 160 (Tent. Draft No. 4, 1956).

163. The *Ashe* particularized viewing, adopted by the plurality in the death penalty cases, *see* discussion note 145 *supra*, mandates "consideration of the character and record of the individual offender," Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Since sociopathy is an indicium of past record, but not necessarily of any "disorder," it should be considered, but not in mitigation.

164. *See* discussion note 151 *supra*.

165. 302 U.S. 51 (1937).

166. *Id.* at 55.

167. For discussion of what must be considered, see text & notes 136-49 *supra*.

168. ARIZ. REV. STAT. ANN. § 13-454(D) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978).

169. The petitioner in Proffitt v. Florida, 428 U.S. 242, 254 (1976), argued that such a balancing requirement was so vague as to constitute an arbitrary discretionary feature found to be a constitutional infirmity in Furman v. Georgia, 408 U.S. 238 (1972). Justice Powell argued that it was not such an arbitrary feature. He reasoned that evaluation of such defenses as insanity or reduced capacity required the same considerations and "line drawing" by the fact finder. Proffitt v. Florida, 428 U.S. at 257. He added:

> [T]he requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Id. at 258.

Model Penal Code,[170] which the Supreme Court cited approvingly in *Gregg*.[171] The Supreme Court apparently allows a good deal of latitude in balancing the circumstances.[172] The constitutionality of Georgia's statute was upheld even though it does not expressly provide how the aggravating and mitigating circumstances are to be compared.[173] The Florida Supreme Court has construed Florida's statute[174] to require a presumption of death if aggravating circumstances are found, unless mitigating circumstances override them.[175] Thus, Arizona's procedure seems circumscribed by those of Florida and Georgia.

Sentencing Hearing

Under Arizona's procedures, the trial judge alone conducts the sentencing hearing.[176] As noted in *Richmond*,[177] such a procedure was upheld in *Proffitt*,[178] with the plurality stating that nowhere does the Constitution require jury sentencing, and in fact a judge may be better qualified to determine the imposition of the death penalty under the statutory procedure.[179]

The admission of evidence at the sentencing hearing is geared in the defendant's favor; any evidence may be admitted relevant to the mitigating circumstances, but the admission of information relevant to aggravating circumstances is subject to the rules governing admission of evidence at criminal trials.[180] This standard appears to benefit the defendant more than the Florida, Georgia, and Texas statutes, which prohibit only evidence obtained in violation of the state or federal constitutions.[181] Also, in Arizona, any material contained in a presentence report must be disclosed to the defendant if it is to be used in consideration of the sentence.[182] Evidence admitted at trial may be considered without readmitting it at the hearing.[183]

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170. MODEL PENAL CODE § 210.6(2) (Proposed Official Draft, 1962).
171. Gregg v. Georgia, 428 U.S. 153, 193-95 (1976).
172. All that may be required is "guided discretion." *See* Proffitt v. Florida, 428 U.S. 242, 258 (1976).
173. *See* GA. CODE ANN. § 27-2503(b) (Supp. 1976).
174. FLA. STAT. ANN. § 921.141(2) (West Supp. 1977).
175. Alford v. State, 307 So. 2d 433, 444 (Fla. 1975); State v. Dixon, 283 So. 2d 1, 9-10 (Fla. 1973).
176. *See* ARIZ. REV. STAT. ANN. § 13-454(A) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978).
177. 114 Ariz. at 196, 560 P.2d at 51. See discussion note 128 *supra*.
178. Proffit v. Florida, 428 U.S. 242, 252 (1976).
179. *Id.; see* text & note 92 *supra*.
180. *See* ARIZ. REV. STAT. ANN. § 13-454(B) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978).
181. *See* FLA. STAT. ANN. § 921.141(1) (West Supp. 1977); TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon Supp. 1976-77). *See also* Brown v. State, 235 Ga. 644, 647-49, 220 S.E.2d 922, 925-27 (1975).
182. ARIZ. REV. STAT. ANN. § 13-454(B) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978); *see* State v. Watson, 114 Ariz. 1, 12-13, 559 P.2d 121, 132-33 (1976). This is an exception to general criminal law, under which, even when disclosure is permitted, only those facts adverse to the defendant may be disclosed. "Standards for the Admission of Evidence at Sentencing," 17 ARIZ. L. REV. 639, 805, 805 n.6 (1975).
183. ARIZ. REV. STAT. ANN. § 13-454(B) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978); *accord*, Chenault v. State, 234 Ga. 216, 225, 215 S.E.2d 223, 229 (1975); Eberheart v. State, 232 Ga. 247, 253-54, 206 S.E.2d 12, 17 (1974).

This evidentiary procedure is substantially identical to those procedures upheld in *Gregg, Jurek*, and *Proffitt*.[184]

Subsection C of Arizona's statute requires the court to make a record of its findings as to the existence or nonexistence of each of the circumstances enumerated in subsections E and F, whether found to exist or not.[185] Georgia requires such a written record only when the death penalty is imposed, and then only of those circumstances found.[186] Though not entirely clear, Arizona apparently requires the record, even when the death penalty is not imposed.[187] Such a complete record could greatly facilitate the review function of the Arizona Supreme Court, especially when comparing a case where the penalty was imposed with other cases involving similar facts.[188]

Judicial Review

Under the Arizona Rules of Criminal Procedure,[189] and section 13-1711 of the Penal Code,[190] the Arizona Supreme Court must undertake a review of convictions if the death sentence is imposed. While no special statutory guidelines exist for the review, the court in *Richmond* stated that it must "necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances"

184. *Compare* ARIZ. REV. STAT. ANN. § 13-454(A)-(B) (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978), *with* FLA. STAT. ANN. § 921.141(1) (West Supp. 1977); GA. CODE ANN. § 27-2503 (Supp. 1976); *and* TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1976-77).

185. ARIZ. REV. STAT. ANN. § 13-454 (Supp. Pamphlet 1957-77) (amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978).

186. GA. CODE ANN. § 27-2534.1(c) (Supp. 1976). The Florida Supreme Court, in State v. Dixon, 283 So. 2d 1 (Fla. 1973), construed the Florida statute to require a sentence of life imprisonment, as well as death, to be supported by record. *Id.* at 8.

187. ARIZ. REV. STAT. ANN. § 13-454(C)(Supp. Pamphlet 1957-77)(amended, ARIZ. REV. STAT. ANN. § 13-902, effective Oct. 1, 1978).

188. In *Richmond*, the court concluded that a "meaningful appellate review" in each case is facilitated because of the required record. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976).

In assessing the value of the written record of findings, the plurality opinion in Proffitt v. Florida, 428 U.S. 242 (1976) stated it would aid the appellate court in its proportionality review, but glossed over the fact that records may not be available for many of the cases relevant to the review. Compare the following arguments by Justices Powell and Rehnquist respectively. Justice Powell reasoned that since imposition of the death sentence must be justified by written findings at the trial level, meaningful appellate review is possible, at the Florida Supreme Court level, and that court has also considered its function to be to perform a proportionality review. *Id.* at 251 (plurality opinion). Justice Rehnquist argued that since written findings need not be made when death is not imposed, even though a proportionality review is made with all other cases in which a capital sentence could have been imposed, the reviewing court cannot tell whether a jury found aggravating factors, but nevertheless decided to recommend mercy, and so the objective of the review cannot be achieved. Woodson v. North Carolina, 428 U.S. 280, 317-18 (1976) (dissenting opinion). Although the Court plurality apparently does not require records of all findings at a sentencing hearing when death is not imposed, Arizona does make this requirement and so apparently satisfies the concerns raised by Justice Rehnquist, *id.*, by providing records of all capital sentencing proceedings for review.

189. ARIZ. R. CRIM. P. 31.2(b).

190. ARIZ. REV. STAT. ANN. § 13-1711 (Supp. Pamphlet 1957-77) (to be renumbered as ARIZ. REV. STAT. ANN. § 13-4031, effective Oct. 1, 1978).

in order to determine whether the verdict was the result of "passion, prejudice, or any other arbitrary factors."[191] The court also noted a duty to perform a proportionality review with similar cases, but failed to list which other cases it considered.[192] Georgia explicitly appends a list of similar cases to its opinion, but neither Texas nor Flordia does.[193] This issue was not discussed in the death penalty cases, and apparently, since the only record required is at the trial stage, the reviewing court's word that it performs a proportionality review is all the Supreme Court requires.[194] Considering the qualitative difference between the death penalty and other penalties,[195] and the function of the proportionality review to assure some degree of consistency in death cases, it would seem that justifying upholding of death imposition by listing similar cases considered would not only ensure that the Arizona court has given careful consideration to these, but also aid in preparation for future cases and possible collateral attacks on sentencing. In *Proffitt*, the plurality opinion noted that the Florida statute did not specify guidelines for the review function, but upheld the state court's self-established view of its function.[196] The Arizona Supreme Court has similarly established its own guidelines,[197] substantially following those established for the Georgia Supreme Court, and upheld in *Gregg*.[198] As applied in *Richmond*, the court stated: "We have reviewed all of the rulings and the findings of the superior court on the convictions and sentence of the defendant. We find no reversible error."[199]

Arizona's death penalty procedure provides a discretionary consideration of each particular offense and offender, strictly guided by statute. It includes the two basic steps deemed significant in the death penalty cases—a separate sentencing hearing at which the "sentencing authority is apprised of the information relevant to the imposition of the sentence and provided with standards to guide its use of the information," and provision for a "meaningful appellate review."[200] The statute, in its particulars, and

191. 114 Ariz. at 196, 560 P.2d at 51. The court has also stated: "[T]he gravity of the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed." *Id.*

192. *Id.*

193. *See, e.g.*, Gregg v. State, 233 Ga. 117, 123, 210 S.E.2d 659, 666 (1974); Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 616 (1974).

194. *See* Roberts v. Louisiana, 428 U.S. 325, 335-36 (1976); discussion note 107 *supra*. It is not at all clear whether the reviewing court even need state that a proportionality review has been performed. It is possible that a precedential opinion by the same court that such a review is seen as required in each case is adequate to satisfy any constitutional demand that such review is required.

195. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion).

196. 428 U.S. at 251.

197. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976).

198. *Id.*; *see* Gregg v. Georgia, 428 U.S. 153, 198, 204-06 (1976); GA. CODE ANN. § 27-2537 (Supp. 1976).

199. 114 Ariz. at 198, 560 P.2d at 53.

200. *See* discussion note 188 *supra*.

the judicial review, are substantially circumscribed by those procedures constitutionally upheld in the death penalty cases.

Conclusion

Punishments currently proscribed by the eighth and fourteenth amendments have not been precisely defined. In view of the analyzed history of the amendments, culminating in the death penalty cases, the death penalty is not per se unconstitutional. Furthermore, mere imposition of the death penalty for first-degree murder under a statutory procedure which guides the sentencing authority's consideration to the particularized characteristics of the offense and offender in determining the sentence, such as Georgia's, Texas', and Florida's, certainly does not on its face violate the Constitution. Arizona's death penalty procedure is substantially similar to that of Florida and of the Model Penal Code and is substantially circumscribed by the procedures, taken together, upheld in the death penalty cases. The Arizona Supreme Court, therefore, correctly held the Arizona death penalty statute constitutional.

B. ARIZONA'S SODOMY AND LEWD AND LASCIVIOUS ACTS STATUTES: UNCONSTITUTIONAL INVASION OF THE RIGHT OF PRIVACY?

The act of sodomy has been proscribed as a morally aberrant act from Biblical times[1] to the present day.[2] Although variously defined,[3] it is

1. *See Genesis* 19:5-8, 24-26; *Deuteronomy* 23:17; *Leviticus* 18:22-23, 20:16.

2. *See, e.g.*, Doe v. Commonwealth's Att'y, 403 F. Supp. 1199, 1202 (E.D. Va.), *aff'd*, 425 U.S. 901 (1976); United States v. Brewer, 363 F. Supp. 606, 607 (M.D. Pa.), *aff'd*, 491 F.2d 751 (3rd Cir. 1973), *cert. denied*, 416 U.S. 990 (1974); Harris v. State, 457 P.2d 638, 648-49 (Alas. 1969). First prosecuted in the ecclesiastical courts as a religious offense, sodomy was not considered an offense at common law until buggery was proscribed by the Statute of Henry VIII. *See* 25 Henry VIII, c. 6 (1533). *See also* Harris v. State, 457 P.2d at 648-49. The incorporation of English common law into American common law and enactments of the colonial legislatures provided the basis for the prohibition of sodomy in America. *See* United States v. Brewer, 363 F. Supp. at 607; Harris v. State, 457 P.2d at 648-49.

3. In its broadest meaning, sodomy is the carnal copulation by human beings with each other against nature, or with a beast, in which sense it includes the crime against nature, bestiality (copulation between a human being and a brute of the opposite sex); buggery (carnal copulation of a man with beast); cunnilingus (the sex perversion committed with the mouth and the female sexual organ); and fellatio (an offense committed with the male organ and the mouth). In its narrower sense, sodomy is the carnal copulation between two human beings per anus, or by a human being in any manner with a beast.

Pruett v. State, 463 S.W.2d 191, 195 (Tex. Crim. App. 1970).

presently outlawed by statute in most states.[4] The validity of these laws, however, has been seriously questioned.[5] The issue of whether the state can constitutionally regulate the private sexual conduct of consenting adults was presented to the Arizona Supreme Court in the consolidated action of *State v. Bateman*.[6] Both defendants were charged with violating the Arizona sodomy[7] and lewd and lascivious acts[8] statutes. Bateman was charged with committing the acts upon his wife,[9] and Callaway was charged with committing the acts upon a single woman.[10] Both defendants were found

4. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-651 (Supp. Pamphlet 1957-77); N.J. STAT. ANN. § 2A:143-1 (West 1952); VA. CODE § 18.2-361 (Supp. 1977).

5. Sodomy statutes have been attacked as being unconstitutionally vague. *See, e.g.*, Perkins v. North Carolina, 234 F. Supp. 333, 336 (W.D.N.C. 1964); Harris v. State, 457 P.2d 638, 641 (Alas. 1969); State v. Rhinehart, 70 Wash. 2d 649, 655, 424 P.2d 906, 909-10, *cert. denied*, 389 U.S. 832 (1967). *See also* discussion note 43 *infra*. The establishment clause of the first amendment has also provided a basis of attack upon sodomy statutes, the argument being that since sodomy was first considered morally wrong by the Judeo-Christian religions, defining the act as a crime establishes a religious tenet as part of the criminal law, contrary to the first amendment. *See, e.g.*, Carter v. State, 255 Ark. 225, 228, 500 S.W.2d 368, 371-72 (1973), *cert. denied*, 416 U.S. 905 (1974); People v. Baldwin, 37 Cal. App. 3d 385, 388, 112 Cal. Rptr. 290, 291 (1974); United States v. Doe, 12 CRIM. L. REP. (BNA) 2531, 2533 (D.C. Super. Ct. 1973); State v. Rhinehart, 70 Wash. 2d 649, 655, 424 P.2d 906, 910, *cert. denied*, 389 U.S. 832 (1967). Another avenue of attack has been that proscription of sodomy involves cruel and unusual punishment. *See* Carter v. State, 255 Ark. at 232, 500 S.W.2d at 373; People v. Roberts, 256 Cal. App. 2d 488, 495, 64 Cal. Rptr. 70, 74 (1967). This attack has dual grounds. First, if the sentence imposed is substantial, it can be argued that the punishment is inordinately excessive in relation to the defendant's culpability. *See* Carter v. State, 255 Ark. at 232, 500 S.W.2d at 373. Second, homosexuality has been analogized to the status of drug addiction, in which case a criminal sanction for sodomy, and hence homosexuality, would be contrary to Robinson v. California, 370 U.S. 660 (1962), which prohibited criminal punishment of drug addiction. *See* People v. Roberts, 256 Cal. App. 2d at 495, 64 Cal. Rptr. at 74; Johnson, *Crimes Against Nature in Tennessee: Out of the Dark and Into the Light?*, 5 MEM. ST. L. REV. 319, 347-50 (1975). Most recently, sodomy statutes have been argued to be invasions of the right of privacy. *See, e.g.*, Cotner v. Henry, 394 F.2d 873, 875 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968); Buchanan v. Batchelor, 308 F. Supp. 729, 732 (N.D. Tex. 1970), *rev'd on other grounds*, Wade v. Buchanan, 401 U.S. 989 (1971); State v. Pilcher, 242 N.W.2d 348, 357-60 (Iowa 1976); State v. Elliott, 88 N.M. 187, 189, 539 P.2d 207, 209 (1975), *rev'd*, 89 N.M. 305, 551 P.2d 1352 (1976); State v. Saunders, 22 CRIM. L. REP. (BNA) 2293, 2293-94 (N.J. Sup. Ct. 1977). *See also* text & notes 44-107 *infra*. Until the right of privacy argument was formulated, there was little doubt that consent was not a defense to the crime of sodomy, nor was force an element. *See, e.g.*, Commonwealth v. Poindexter, 133 Ky. 720, 722, 118 S.W. 943, 944 (1909); State v. Langelier, 136 Me. 320, 322, 8 A.2d 897, 897-98 (1939); State v. Schmit, 273 Minn. 78, 90, 139 N.W.2d 800, 809 (1966); State v. Jernigan, 255 N.C. 732, 735, 122 S.E.2d 711, 713 (1961). The right of privacy, coupled with an awareness of an aggregate change in sexual attitudes among the American public, *see* Commonwealth v. Balthazar, 366 Mass. 298, 302, 318 N.E.2d 478, 480-81 (1974), has provided the groundwork for the constitutional argument that private sexual acts between consenting adults ought to be free from governmental regulation. *See* Note, *Privacy After Griswold: Constitutional or Natural Law Right*, 60 NW. U.L. REV. 813, 832 (1966); Note, *Extending the Right To Sexual Privacy*, 2 W. ST. U.L. REV. 281, 293-94 (1975).

6. 113 Ariz. 107, 547 P.2d 6 (1976).

7. ARIZ. REV. STAT. ANN. § 13-651 (Supp. Pamphlet 1957-77) provides in part: "A person who commits the infamous crime against nature, with mankind or animal, shall be punished by imprisonment in the state prison for not less than five nor more than twenty years . . . ."

8. ARIZ. REV. STAT. ANN. § 13-652 (Supp. Pamphlet 1957-77) provides in part:

> A person who wilfully commits, in any unnatural manner, any lewd or lascivious act upon or with the body or any part or member thereof of a male or female person, with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of either of such persons, is guilty of a felony punishable by imprisonment for not less than one nor more than five years.

9. State v. Bateman, 25 Ariz. App. 1, 2, 540 P.2d 732, 733 (1975), *vacated*, 113 Ariz. 107, 547 P.2d 6 (1976).

10. State v. Callaway, 25 Ariz. App. 267, 268, 542 P.2d 1147, 1148 (1975), *rev'd*, 113 Ariz. 107, 547 P.2d 6 (1976).

guilty on one count of sodomy and one count of lewd and lascivious acts.[11]

On appeal in *Bateman*, Division 1 of the Arizona Court of Appeals held that the Arizona statutes prohibiting sodomy and lewd and lascivious acts were unconstitutional as applied to the acts of consenting married couples.[12] The court refused to read the statutes as applying only to non-consensual behavior.[13] The court based its decision upon the right of privacy inherent in the marital relationship.[14] Less than two months later, Division 2 of the Court of Appeals, in *State v. Callaway*,[15] found the same statutes void as being violative of the constitutional right of privacy when applied to *any* consenting adults.[16] The Supreme Court of Arizona vacated the appellate court decision in *Bateman*, reversed the decision in *Callaway*, and upheld the constitutionality of the statutes.[17]

This casenote will first explore the threshold question presented to the Arizona Supreme Court—did the defendants have standing to assert the rights of consenting adults? The substantive issue of whether the private sexual behavior of consenting adults is protected by the right of privacy will then be addressed. This discussion will include an examination of the standards of judicial review to be applied in testing state proscription of such conduct. Finally, the *Bateman* decision will be examined, as well as the pertinent sections of the newly revised Arizona criminal code relating to sexual crimes.

Standing to Assert Rights of Consenting Adults

Private sexual conduct of consenting adults is seldom, if ever, prosecuted.[18] Since most cases prosecuted under sodomy statutes involve factors which preclude use of a consent defense, such as acts of force, public acts or acts involving minors, defendants are rarely held to have standing to assert the rights of consenting adults.[19] *Bateman*, however, presents a somewhat

11. 113 Ariz. at 109, 547 P.2d at 8. Following the jury's verdict in *Bateman*, the trial court granted the defendant's motion to dismiss on the grounds that the sodomy and lewd and lascivious acts statutes violated the right of privacy, and on an improper court instruction. 25 Ariz. App. at 2, 540 P.2d at 733.

12. 25 Ariz. App. at 6, 540 P.2d at 737.

13. The court concluded that the legislature did not consider consent to be a defense to these crimes, and to construe the statutes to include such a defense would be "rank judicial legislation." *Id.*

14. *Id.* at 5, 540 P.2d at 736.

15. 25 Ariz. App. 267, 542 P.2d 1147 (1975), *rev'd*, 113 Ariz. 107, 547 P.2d 6 (1976).

16. *Id.* at 271, 542 P.2d at 1151. The court noted that the statutes could not be enforced against consenting married couples based on State v. Bateman, 25 Ariz. App. 1, 540 P.2d 732 (1975), *vacated*, 113 Ariz. 107, 547 P.2d 6 (1976), and to enforce them against consenting unmarried persons would be violative of equal protection. 25 Ariz. App. at 272, 542 P.2d at 1152.

17. State v. Bateman, 113 Ariz. 107, 111, 547 P.2d 6, 10 (1976).

18. Private consensual acts are not witnessed except by the actors themselves. *See* Pruett v. State, 463 S.W.2d 191, 193 (Tex. Crim. App. 1970).

19. *See, e.g.*, Swikert v. Cady, 381 F. Supp. 988, 989 (E.D. Wis. 1974), *aff'd*, 513 F.2d 635 (7th Cir. 1975) (act of force); Lovisi v. Slayton, 363 F. Supp. 620, 629 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1977) (public act); Carter v. State, 255

different situation—although both defendants had presented the issue of consent of the other person at their trials, only Bateman's jury received an instruction that consent was a defense to the charges against him.[20] Callaway's jury received no such instruction.[21] Thus, each defendant stood on significantly different footing than the other.[22] Nonetheless, the Arizona Supreme Court found that *both* defendants had standing, comparing them to an individual who "may assert a right that cannot otherwise be raised and protected."[23]

Generally, standing is granted to a litigant to assert his or her own constitutional rights and immunities.[24] A party challenging a statute must show a real and concrete interest in invalidating the statutory restrictions.[25] An exception arises when the constitutional rights of a nonparty are jeopardized by the litigation, and such third party lacks any viable means of protecting those rights.[26] Under this exception, the litigant is given standing to assert the rights of the third party, provided the litigant can demonstrate a relationship between the third party and himself.[27]

Ark. 225, 229, 500 S.W.2d 368, 371 (1973) (public act); People v. Sharpe, 183 Colo. 64, 70, 514 P.2d 1138, 1141 (1973) (act of force); Hughes v. State, 14 Md. App. 497, 501-02, 287 A.2d 299, 303 (1972), *cert. denied*, 409 U.S. 1025 (1972) (act involving minor); Jones v. State, 85 Nev. 411, 412-14, 456 P.2d 429, 430-31 (1969) (act involving minor); State v. Karakoff, 84 N.M. 404, 405, 503 P.2d 1182, 1183 (1972) (act of force); Jones v. State, 55 Wis. 2d 742, 748, 200 N.W.2d 587, 591 (1972) (act of force). Simply stated, standing is a constitutional requirement that the party seeking relief have an appropriate adversary interest in the outcome of the controversy. *See* Flast v. Cohen, 392 U.S. 83, 99 (1968).

20. 113 Ariz. at 109, 547 P.2d at 8.

21. *Id.*

22. Because of the consent instruction, the guilty verdict returned against Bateman amounted to a factual finding that he acted without the consent of his wife. *See* People v. Sharpe, 183 Colo. 64, 70, 514 P.2d 1138, 1141 (1973). He did not challenge that factual finding. *But see* State v. Kasakoff, 84 N.M. 404, 405, 503 P.2d 1182, 1183 (1972) (where the defendant did challenge the factual finding). Therefore, he could not claim the status of a consenting adult. *Id.* His only possible basis for standing would be as a third party representative. *See* text & notes 26-27 *infra*. Callaway, on the other hand, should have been considered a consenting adult for the purpose of deciding the standing question. His conviction does not compel the conclusion that he acted without the consent of the other party. *See* State v. Pilcher, 242 N.W.2d 348, 356 (Iowa 1976).

23. 113 Ariz. at 109, 547 P.2d at 8.

24. *See* McGowan v. Maryland, 366 U.S. 420, 429 (1961); United States v. Raines, 362 U.S. 17, 21 (1960); Tileston v. Ullman, 318 U.S. 44, 46 (1943); text & note 19 *supra*.

25. In short, a claimant is required to demonstrate a direct and "personal stake in the outcome." United States v. Richardson, 418 U.S. 166, 179-80 (1974). *See also* Poe v. Ullman, 367 U.S. 497, 530 (1961) (Harlan, J., dissenting); Frothingham v. Mellon, 262 U.S. 447, 451-52 (1923); Texas v. Interstate Commerce Comm'n, 258 U.S. 158, 163 (1922).

26. United States v. Raines, 362 U.S. 17, 22 (1960). This exception is sometimes called the "impact exception." United States v. Brewer, 363 F. Supp. 606, 609-10 (M.D. Pa.), *aff'd*, 491 F.2d 751 (3rd Cir. 1973), *cert. denied*, 416 U.S. 990 (1974).

27. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 444-45 (1972) (advocate and dispenser of contraceptives asserting the rights of user and receiver of contraceptives); Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (doctor and accessory to a crime asserting rights of patient and principal); United States v. Doe, 12 CRIM. L. REP. (BNA) 2531, 2532 (D.C. Super. Ct. 1973) (homosexuals asserting the rights of other homosexuals). *See also* United States v. Brewer, 363 F. Supp. 606, 609-10 (M.D. Pa.), *aff'd*, 491 F.2d 751 (3rd Cir. 1973), *cert. denied*, 416 U.S. 990 (1974); State v. Elliott, 88 N.M. 187, 196-97, 539 P.2d 207, 216-17 (1975) (Hendley, J., dissenting), *rev'd*, 89 N.M. 305, 551 P.2d 1352 (1976). However, the required relationship is sometimes relegated secondary importance to the impact itself. *See* Eisenstadt v. Baird, 405 U.S. 438, 445 (1972); Sedler, *Standing to Assert Just Tertii in the Supreme Court*, 71 YALE L.J. 599, 627-28 (1962). In one case, State v. Elliott, 88 N.M. 187, 539 P.2d 207 (1975), *rev'd on other grounds*, 89

It is unclear which of the two criteria was used by the *Bateman* court to support its finding that both defendants had standing. Initially, the court noted that without standing to challenge the statutes as applied to consenting adults, the defendants would be unable to raise consent as a defense to their prosecution.[28] However, the *Bateman* court also stated that the defendants were not asserting the rights of an entirely hypothetical third party.[29] The United States Supreme Court in *United States v. Raines*[30] established the doctrine that one to whom application of a statute is constitutional will not be accorded standing to attack the constitutionality of the statute as it might be applied to other persons and other situations.[31] The *Bateman* court analogized the defendants' case to an exception to the *Raines* doctrine, and cited *United States v. Brewer*,[32] a case concerned with third party rights, for support.[33] The *Brewer* court held that although a convict in a federal penitentiary had standing to question the validity of a sodomy statute as applied to himself, he could not litigate the constitutionality of the statute as it applied to others.[34] However, the *Brewer* court also discussed recognized exceptions to the *Raines* doctrine.[35] One of these exceptions—the "impact exception"—was the probable basis upon which the *Bateman* court found the defendants to have standing.[36] The impact exception is pertinent because since private sexual acts between consenting adults are not prosecuted, there

N.M. 305, 551 P.2d 1352 (1976), the relationship requirement was ignored altogether. *Id.* at 191, 539 P.2d at 211.

28. 113 Ariz. at 109, 547 P.2d at 8. This language implies that the defendants had a personal interest in raising a consent defense at trial. *See* text & notes 22-25 *supra*. If this were so, the subsequent discussion of standing to assert the rights of third parties was unnecessary and inappropriate. As to Bateman, however, the court's statement was inaccurate. Bateman did raise consent as a defense at his trial, and his jury was instructed that consent was a defense to the charges against him. 113 Ariz. at 109, 547 P.2d at 8. Thus, denying Bateman standing to raise the issue of consent on appeal would not have been inappropriate. *See* text & note 19 *supra*.

29. 113 Ariz. at 109, 547 P.2d at 8.

30. 362 U.S. 17 (1960).

31. *Id.* at 21. *See also* McGowan v. Maryland, 366 U.S. 420, 429 (1961); Tileston v. Ullman, 318 U.S. 44, 46 (1943).

32. 363 F. Supp. 606 (M.D. Pa.), *aff'd*, 491 F.2d 751 (3rd Cir. 1973), *cert. denied*, 416 U.S. 990 (1974).

33. *See* 113 Ariz. at 109, 547 P.2d at 8.

34. 363 F. Supp. at 608-09.

35. *Id.* at 609-10. The exceptions are as follows: First, where the statute has a "chilling effect" on free speech and expression; second, where the third party whose constitutional rights may be injured by the statute has no viable means to preserve those rights; third, where the legislature would not want the challenged statute to stand unless it stands in all cases; and fourth, where the statute has already been declared invalid in a large number of cases.

One writer submits that these are not exceptions per se, but rather the result of a factor analysis. *See* Sedler, *supra* note 27. The analysis involves a consideration of various factors aimed at determining whether the assailant has an exceptional basis for standing. The factors are: First, the interest of the assailant; second, the nature of the right asserted; third, the relationship between the assailant and third parties; and fourth, the practicality of third parties asserting such rights in an independent action. Although none of these factors is conclusive in and of itself, the latter is perhaps the most significant. *See id.*

36. The "impact exception" is simply the title attached by the *Brewer* court to a situation where the rights of a third party are jeopardized by the litigation and the third party lacks any viable means of protecting those rights. United States v. Brewer, 363 F. Supp. 606, 609 (M.D. Pa.), *aff'd*, 491 F.2d 751 (3rd Cir. 1973), *cert. denied*, 416 U.S. 990 (1974).

is no practical means to judicially test those rights.[37] Moreover, there is a sufficient impact upon those rights because the threat of prosecution will remain if the statutes are found valid as applied to consensual behavior.[38] Thus, given the proper relationship between consenting adults as third parties and the defendants, there is an apparent basis for granting standing to assert the rights of consenting adults.

The *Bateman* court errantly considered both defendants alike for the purpose of deciding the standing question. Since Bateman was found guilty after an instruction by the trial court on the consent defense, he did not have standing to raise the issue on appeal.[39] Callaway's verdict, without a consent instruction, cannot be said to have rested on a finding that he acted with or without consent. Accordingly, Callaway did have standing to attack the constitutionality of the statute on the ground that it proscribed consensual behavior.[40] However, the court's reliance on third party rights was inappropriate. Callaway was asserting his own rights,[41] and Bateman failed to fulfill the relationship requirement under the impact exception.[42] Nonetheless, the defendants were found to have standing to present the major substantive issue facing the *Bateman* court—whether the private sexual conduct of consenting adults is protected from governmental intrusion by the right of privacy.[43]

37. *See* State v. Elliott, 88 N.M. 187, 191, 539 P.2d 207, 211 (1975), *rev'd on other grounds*, 89 N.M. 305, 551 P.2d 1352 (1976). Although the constitutionality of a statute may be attacked in a declaratory judgment action, such an action is not available unless there is a justiciable case or controversy. *See* Dawson v. Vance, 329 F. Supp. 1320, 1327 (S.D. Tex. 1971). Where there is no history of prosecution of private consensual acts, no case or controversy exists. *Id.* at 1328.

38. *See* State v. Elliott, 88 N.M. 187, 191, 539 P.2d 207, 211 (1975), *rev'd on other grounds*, 89 N.M. 305, 551 P.2d 1352 (1976). In other words, if the validity of the statute as it is applied to private, consensual behavior is sustained, the rights of consenting adults are injured because they have been placed in "a posture of dependence on a prosecutorial policy or prosecutorial discretion." Doe v. Bolton, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring), and, despite lax enforcement, many citizens will feel compelled to obey the statutes. United States v. Doe, 12 CRIM. L. REP. (BNA) 2531, 2532 (D.C. Super. Ct. 1973).

39. *See, e.g.*, Carter v. State, 255 Ark. 225, 233, 500 S.W.2d 368, 373 (1973); State v. Pilcher, 242 N.W.2d 348, 356 (Iowa 1976); State v. Kasakoff, 84 N.M. 404, 405, 503 P.2d 1182, 1183 (1972). *See also* text & notes 19-23 *supra*.

40. *See* State v. Pilcher, 242 N.W.2d 348, 356 (Iowa 1976).

41. *Id.*

42. *See* text & notes 26-27 *supra*. Had the court wanted to ignore the relationship requirement, it should have cited State v. Elliott, 88 N.M. 187, 191, 539 P.2d 207, 211 (1975), *rev'd*, 89 N.M. 305, 551 P.2d 1352 (1976), instead of United States v. Brewer, 363 F. Supp. 606, 609-10 (M.D. Pa. 1973), *aff'd*, 491 F.2d 751 (3rd Cir. 1973), *cert. denied*, 416 U.S. 990 (1974). The *Elliott* court ignored the relationship requirement, *see* 88 N.M. at 196-97, 539 P.2d at 216-17 (Hendley, J., dissenting), whereas the *Brewer* court stressed that a relationship between the party in court and the third party was necessary. *See* 363 F. Supp. at 609-10. It can only be speculated that the *Bateman* court viewed the defendants' advocacy of a consent defense as creating a sufficient relationship between themselves and consenting adults.

43. The defendants also raised two other arguments. First, the statutes were attacked as being violative of the freedom of expression. The contention was that sexuality is communicative conduct—expressing love, understanding, and communion—and that the statutes stifled such expression. The *Bateman* court found that there was no precedent for finding "sexual behavior of the kind alleged . . . within the ambit of the First Amendment." 113 Ariz. at 109, 547 P.2d at 8. Moreover, decisions in which such conduct was combined with speech were to the contrary. *Id.*

The defendants also argued that the statutes were void for vagueness. Such an argument is twofold. *See generally* Note, *Is Arizona's Lewd and Lascivious Acts Statute Void for Vague-*

State Regulation of Private Consensual Sexual Conduct

First advocated to give individuals a refuge from the invasions of modern life,[44] the right of privacy gained recognition through the law of torts.[45] Subsequently, the fourth amendment was found to prohibit any unjustifiable governmental intrusion on the "right to be let alone."[46] It was not until *Griswold v. Connecticut*,[47] however, that the right of privacy achieved unequivocal recognition. Even so, the constitutional source from which this right derives remains disputed.[48] In addition, the parameters of the right of privacy have remained largely undefined and defy categorization.[49] Nevertheless, the right has been found to protect the marital relationship,[50] the fundamental decisionmaking process of the individual,[51] and the sanctity of the home.[52]

The United States Supreme Court has restricted the rights encompassed within the zones of privacy to those deemed "fundamental" or "implicit in the concept of ordered liberty."[53] A fundamental right is based on those

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ness?, 13 ARIZ. L. REV. 438, 439-40 (1971). First, the defendants argued that the terms "crime against nature" and "lewd and lascivious acts" were too indefinite. To comport with due process, statutes must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). However, when a statute has been judicially interpreted to forbid identifiable conduct, such interpretation is incorporated into the statute for the purpose of adjudicating claims of vagueness. Wainwright v. Stone, 414 U.S. 21, 23 (1973). Since the statutes had already been construed to forbid identifiable conduct, *see* State v. Potts, 75 Ariz. 211, 213, 254 P.2d 1023, 1024 (1953) (Ariz. Rev. Stat. § 13-651 (1956), *amended*, ARIZ. REV. STAT. ANN. § 13-651 (Supp. Pamphlet 1957-77), held to prohibit anal copulation); State v. Farmer, 61 Ariz. 266, 268, 148 P.2d 1002, 1002 (1944) (Ariz. Rev. Stat. § 13-652 (1956), *amended*, ARIZ. REV. STAT. ANN. § 13-652 (Supp. Pamphlet 1957-77), held to prohibit fellatio and cunnilingus), the defendants had ample notice that their conduct was unlawful, and the *Bateman* court held that the statutes were not unconstitutionally vague because of indefiniteness. 113 Ariz. at 109, 547 P.2d at 8. Second, the defendants contended that the vagueness of the statutes resulted in overbroad application to constitutionally protected conduct. Specifically, they asserted that the statutes applied to consensual, private sexual conduct of adults—conduct which should be protected by the right of privacy. But this argument also failed. *See* text & notes 79-82 *infra*.

44. *See* Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 196 (1890).

45. *See* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

46. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

47. 381 U.S. 479 (1965).

48. [The right to privacy] has been viewed as emanating from the first amendment's guarantee of freedom of association, NAACP v. Alabama, 357 U.S. 499 (1958); and of speech, Stanley v. Georgia, 394 U.S. 557 (1969); the fourth amendment, Terry v. Ohio, 392 U.S. 1 (1968); the equal protection clause of the fourteenth amendment, Loving v. Virginia, 388 U.S. 1 (1967); the ninth amendment, Griswold v. Connecticut, 381 U.S. 479 (Goldberg, J., concurring); the penumbras of the Bill of Rights, *id.*; and the concept of liberty guaranteed by the due process clause of the fourteenth amendment, Roe v. Wade, 410 U.S. 113 (1973).

Lovisi v. Slayton, 363 F. Supp. 620, 624 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1977).

49. Paul v. Davis, 424 U.S. 693, 713 (1976).

50. *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

51. *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

52. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969).

53. Palko v. Connecticut, 310 U.S. 319, 325 (1937), *quoted in* Roe v. Wade, 410 U.S. 113, 152 (1973).

principles of liberty and justice imbedded in the "traditions and [collective] conscience of our people."[54] Some courts have therefore been reluctant to categorize consensual sodomy, having been traditionally considered wrong and prohibited, as a fundamental right.[55] Most courts agree, however, that after *Griswold*, private consensual marital relations are protected from state regulation and criminal sanction.[56] Nonetheless, some courts have found that illicit sex, even if within the marital relationship, is inimical to the institution of marriage and is not a fundamental right.[57] In *Eisenstadt v. Baird*,[58] the Supreme Court extended the right of privacy beyond the marital context and declared that this fundamental right is possessed by the individual, married or not.[59] Since *Eisenstadt*, the courts have split on the question of whether the right of privacy attaches to the private sexual activities of unmarried individuals.[60] In any event, resolution of whether consensual sexual conduct is protected by the right of privacy also determines the proper standard of review to apply to statutes proscribing sexual conduct.

54. Snyder v. Massachusetts, 291 U.S. 97, 105 (1933), *quoted in* Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring). *See also* Powell v. Alabama, 287 U.S. 45, 67 (1932).

55. *See, e.g.*, Doe v. Commonwealth's Att'y, 403 F. Supp. 1199, 1202-03 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976); People v. Baldwin, 37 Cal. App. 3d 385, 388-89, 112 Cal. Rptr. 290, 291-92 (1974).

56. *See, e.g.*, Cotner v. Henry, 394 F.2d 873, 875 (7th Cir. 1968); Lovisi v. Slayton, 363 F. Supp. 620, 624 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1977); Buchanan v. Batchelor, 308 F. Supp. 729, 732-33 (N.D. Tex. 1970), *rev'd on other grounds*, Wade v. Buchanan, 401 U.S. 989 (1971); State v. Lair, 62 N.J. 388, 396, 301 A.2d 748, 753 (1973).

57. *See, e.g.*, Hughes v. State, 14 Md. App. 497, 504-05, 287 A.2d 299, 303-05 (1972), *cert. denied*, 409 U.S. 1025 (1972); Pruett v. State, 463 S.W.2d 191, 195 (Tex. Crim. App. 1973).

58. 405 U.S. 438 (1972).

59. *Id.* at 453. The Court could find no logical basis for prohibiting the distribution of contraceptives to unmarried persons, but not to married individuals, and concluded that such discrimination denied unmarried persons equal protection of the law. *Id.* at 454.

60. *Compare* Lovisi v. Slayton, 363 F. Supp. 620, 625 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1977); State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976); Commonwealth v. Balthazar, 366 Mass. 298, 301, 318 N.E.2d 478, 480-81 (1974); People v. Rice, 80 Misc. 2d 511, 516, 363 N.Y.S.2d 484, 489 (Suffolk County Ct. 1975), *with* Doe v. Commonwealth's Att'y, 403 F. Supp. 1199, 1202-03 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976); State v. Lair, 62 N.J. 388, 397, 301 A.2d 748, 753 (1973); State v. Elliott, 89 N.M. 305, 306, 551 P.2d 1352, 1353 (1976).

Courts denying that the right of privacy attaches to the private sexual conduct between consenting adults have either ignored *Eisenstadt*, *see* Doe v. Commonwealth's Att'y, 403 F. Supp. at 1202-03; Canfield v. State, 506 P.2d 987, 988 (Okla. Crim. App. 1973), or found that "[t]he rationale of the *Griswold* holding flows from its eulogy of the marital status and lacking such status the rule has no foundation," State v. Lair, 62 N.J. 388, 397, 301 A.2d 748, 753 (1973), *quoting* Hughes v. State, 14 Md. App. 497, 505-06, 287 A.2d 299, 305, *cert. denied*, 409 U.S. 1025 (1972), and, therefore, there is no denial of equal protection to unmarried individuals. *Id.* However, the Court in *Eisenstadt* stated: "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two *individuals* each with a separate intellectual and emotional makeup." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis added). The right of privacy should shield from unjustified governmental intrusion intimate facets of people's lives, such as sex, on an individual, rather than marital basis. *See* Doe v. Commonwealth's Att'y, 403 F. Supp. 1199, 1205 (E.D. Va. 1975) (Merhige, J., dissenting), *aff'd*, 425 U.S. 901 (1976); State v. Bateman, 113 Ariz. 107, 110, 547 P.2d 6, 10 (1976); State v. Pilcher, 242 N.W.2d 348, 358-59 (Iowa 1976); State v. Saunders, 75 N.J. 200, 211-14, 381 A.2d 333, 338-39 (1977).

If conduct proscribed by statute is not protected by a fundamental right, a court need only determine if the statute proscribing such conduct bears some rational relationship to a legitimate state purpose.[61] In other words, the challenged statute must only have a "rational basis" to be sustained.[62] The regulation of health, welfare, and morals has traditionally been considered within the ambit of a state's police powers.[63] But a state is not permitted to restrict the conduct of its citizens unless it can show some societal harm flowing from their conduct.[64] The requisite harm which justifies the state exercising its police power must be general in effect, as well as public in nature.[65] The fact that conduct may be contrary to an individual's self-interest should not be a valid basis for prohibiting such conduct.[66]

Arguably, consensual sexual acts work no public harm, since whatever harm may flow from such conduct is restricted to the actors themselves.[67] Accordingly, such acts should be exempt from state regulation.[68] However, if the practice of sodomy is considered to adversely affect the physical integrity of a participant, the state may have a legitimate basis for exercising its police power.[69] Moreover, if the state has a "right . . . to maintain a decent society,"[70] it must have the power to judge that which has a tendency

61. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955); Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

62. *See* Dandridge v. Williams, 397 U.S. 471, 487 (1970); Women's Liberation Union, Inc. v. Israel, 379 F. Supp. 44, 49 (D.R.I. 1974).

63. *See* Lochner v. New York, 198 U.S. 45, 53 (1905); Chicago Park Dist. v. Canfield, 370 Ill. 447, 451, 19 N.E.2d 376, 378 (1939); Toms River Publishing Co. v. Borough of Manasquan, 127 N.J. Super. 176, 181, 316 A.2d 719, 722 (1974).

64. *See, e.g.*, Garaci v. City of Memphis, 379 F. Supp. 1393, 1399 (W.D. Tenn. 1974); Ravin v. State, 537 P.2d 494, 509 (Alas. 1975); State v. Lair, 62 N.J. 388, 398, 301 A.2d 748, 754 (1973) (Weintraub, J., concurring); Note, *The Right to Decide—Individual Liberty Versus State Police Powers*, 18 ARIZ. L. REV. 207, 208-12 (1976); Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others In The Enforcement of Morality*, 14 U.C.L.A. L. REV. 581, 586-94 (1967).

65. *See* Lawton v. Steele, 152 U.S. 133, 137 (1894), *quoted in* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962).

66. *See* State v. Lee, 51 Haw. 516, 527-28, 465 P.2d 573, 579-80 (1970) (Abe, J., dissenting); People v. Fries, 42 Ill. 2d 446, 450, 250 N.E.2d 149, 151 (1969). This argument reflects the influence of John Stuart Mill. Mill postulated: "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral is not sufficient warrant. . . . Over himself, over his own body and mind, the individual is sovereign." J. MILL, ON LIBERTY 13 (C. Shields ed. 1956).

Opposed to Mill's view on public harm is that of Lord Patrick Devlin. Devlin's position is that morality is an integral part of the cohesive factors which hold society together. Morality may, therefore, be criminally enforced because its derogation would lead to the ultimate demise of society. P. DEVLINE, THE ENFORCEMENT OF MORALS 6-7, 13 (1965). H.L.A. Hart, although allying himself with Mill, also advocates the enforcement of morals, but only when detrimental *physical* consequences flow from the immoral act. H.L.A. HART, LAW, LIBERTY AND MORALITY 32-33 (1963).

67. This proposition is, of course, consistent with Mill's approach to public harm and contrary to Devlin's. *See* discussion note 66 *supra*.

68. *See* Dixon v. State, 256 Ind. 266, 277, 268 N.E.2d 84, 90 (1971) (DeBruler, J., dissenting); State v. Lair, 62 N.J. 388, 398, 301 A.2d 748, 754 (1973) (Weintraub, J., concurring).

69. *See* Dawson v. Vance, 329 F. Supp. 1320, 1322 (S.D. Tex. 1971). This approach most nearly approximates Hart's position. *See* discussion note 66 *supra*.

70. Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting), *quoted in* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973).

to injure society.[71] Once that legislative judgment has been made, courts are reluctant to substitute their wisdom and judgment for that of the legislature.[72] Thus, under the rational basis test, once the state determines that the punishment of private acts of consensual sodomy is an appropriate means of maintaining decency in society, "it is not for the courts to say that the State is not free to do so."[73] The state need not establish that *actual* harm results from the proscribed conduct.[74] The rational basis test will be satisfied merely by a showing that there is a *likelihood* that some public harm results from the prohibited conduct.[75]

If conduct proscribed by statute is deemed a fundamental right, courts will strictly scrutinize the state interest which requires infringement of the right.[76] The state must show a compelling justification for the invasion of the right.[77] The means chosen to achieve the substantial state purpose must also be the least restrictive of the infringed right available.[78] Accordingly, sodomy statutes have been constitutionally challenged as overbroad.[79] By prohibiting *all* acts of sodomy, the state has regulated such conduct "by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[80] The state's compelling interest in regulating acts of force, public acts, or acts involving minors should not justify proscribing the consensual conduct of adults acting in private. Any alleged harmful impact upon the public from private consensual acts is not amenable to empirical evaluation and can be neither proved nor disproved.[81] It is thus far from

71. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973).

72. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 31 (1973); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

73. Poe v. Ullman, 367 U.S. 497, 550 (1961) (Harlan, J., dissenting), *quoted in* Doe v. Commonwealth's Att'y, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

74. Doe v. Commonwealth's Att'y, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

75. *Id.*

76. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

77. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); State v. Saunders, 75 N.J. 200, 217, 381 A.2d 341 (1977).

78. *See* Shapiro v. Thompson, 394 U.S. 618, 634-38 (1969); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

79. *See, e.g.*, Buchanan v. Batchelor, 308 F. Supp. 729, 732-35 (N.D. Tex. 1970), *rev'd on other grounds*, Wade v. Buchanan, 401 U.S. 989 (1971); State v. Pilcher, 242 N.W.2d 348, 353-54 (Iowa 1976); State v. Elliott, 88 N.M. 187, 194, 539 P.2d 207, 214 (1975), *rev'd*, 89 N.M. 305, 551 P.2d 1352 (1976). *See also* Note, *Right of Marital Privacy—Unconstitutional Overbreadth of the Texas Sodomy Statute*, 2 TEX. TECH. L. REV. 115 (1970).

The main thrust of the defendants' attack on the Arizona statutes in *Bateman* was that the statutes were invalid on overbreadth grounds. 113 Ariz. at 110, 547 P.2d at 9. Specifically, the defendants contended that the statutes were too broad in that they proscribed the private sexual practices of consenting adults which should be protected by the right of privacy, and should not be subject to state restriction. *Id.*

80. NAACP v. Alabama, 377 U.S. 288, 307 (1963); *accord*, Zwickler v. Koota, 389 U.S. 241, 250 (1967).

81. *See* H.L.A. HART, LAW, LIBERTY AND MORALITY 50, 51 (1963); Wheeler, *Sex Offenses: A Sociological Critique*, 25 LAW & CONTEMP. PROB. 258, 272 (1960).

clear that any state interest is in jeopardy. Nevertheless, the state must show a compelling interest based on evidence of public harm.[82] In light of the speculative nature of the alleged injury, it should be concluded that, under the strict scrutiny test, the state cannot sustain the burden of showing a compelling interest in proscribing private, consensual conduct.

The *Bateman* court arrived at the opposite conclusion[83] utilizing a somewhat obscure standard of review. Initially, the Arizona Supreme Court ruled that the right of privacy attaches to the private sexual relations between consenting adults.[84] Having made that finding, the court was bound to apply strict scrutiny to the challenged statutes.[85] However, the court then held that the legislature, acting in its proper capacity to regulate the moral welfare of its people, could constitutionally prohibit certain private sexual acts between consenting adults.[86] The difficulty raised by this holding is discerning what substantial state interest justifies the infringement of the right of privacy. The *Bateman* court first reasoned that the state has a compelling interest in protecting its citizens from violence.[87] Therefore, both statutes could properly be construed as prohibiting nonconsensual behavior and remain constitutional.[88] However, the state's compelling interest in the prevention of violent or forceful acts was never questioned—the real issue was whether the state possesses a compelling interest in regulating consensual acts.[89] To answer that question, the *Bateman* court balanced the right of privacy against "important" state interests.[90] The court found an "important" state interest arising from the fact that the regulation of sexual misconduct is within the state's police power, and that such conduct has been traditionally prohibited by law.[91] Based on that finding, the court deferred to the legislative policy of proscribing certain consensual behavior.[92] This approach is identical to the rational basis test and begs the real question to be answered under the strict scrutiny approach—can the prohibition of private, consensual conduct be justified by a *compelling* state interest?[93]

As noted by Justice Gordon in dissent, the majority opinion acknowledged that a right of privacy exists in the context of intimate sexual relations

82. Speculative or hypothetical threats to a valid state interest will not support infringement of fundamental rights. *See* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508-09 (1969). *See also* text & notes 66-67 *supra*.
83. 113 Ariz. at 110-11, 547 P.2d at 9-10.
84. *Id.* at 110, 547 P.2d at 9.
85. *See* text & notes 53, 76-78 *supra*.
86. 113 Ariz. at 111, 547 P.2d at 10.
87. *Id.* at 110, 547 P.2d at 9.
88. *Id.*
89. *See* text & notes 79-82 *supra*.
90. 113 Ariz. at 111, 547 P.2d at 10. The United States Supreme Court has indicated that "important" is synonomous with "compelling," and a host of other adjectives, in describing a state interest which can override a fundamental right. *See* Roe v. Wade, 410 U.S. 113, 154-55 (1973); United States v. O'Brien, 391 U.S. 367, 376-77 (1968).
91. 113 Ariz. at 111, 547 P.2d at 10.
92. *Id.*
93. *See* text & notes 79-82 *supra*.

between consenting adults in private, but then concluded that the legislature may, under the guise of moral welfare, determine what relations are distasteful and levy criminal penalties upon the participants.[94] It is apparent that the Arizona Supreme Court either failed to utilize the correct standard of judicial review or was too lenient in its application of the proper standard.[95] Despite the absence of a clear statement of the standard of review applied, the *Bateman* court sustained the constitutionality of the statutes,[96] leaving reform to the legislature.

The Arizona legislature has initiated reform by enacting a revised criminal code.[97] Included in that revision is a new approach to sexual offenses.[98] The revised statutes affecting sexual offenses are primarily aimed at public acts,[99] acts involving minors,[100] and acts performed without consent.[101] Perhaps in response to *Bateman*, consensual sodomy and lewd and lascivious acts remain prohibited, having been separately defined as class 3 misdemeanors.[102] Although the punishment for conviction of sodomy or lewd and lascivious acts has been drastically reduced, arguably these new statutes are unconstitutional violations of the right of privacy.[103] Once the right of privacy is said to exist within the context of private sexual

94. 113 Ariz. at 112, 547 P.2d at 11.

95. *See id.* at 111, 547 P.2d at 10, where the majority states: "We therefore hold that sexual activity between two consenting adults in private is not a matter of concern for the State except insofar as the legislature has acted to properly regulate the moral welfare of its people, and has specifically prohibited sodomy and other specified lewd and lascivious acts." This has the effect of deferral to legislative judgment, and if not a mistaken application of the rational basis test, it nonetheless subverts the purpose of strict judicial scrutiny to protect fundamental rights. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

96. Although the validity of the statutes was sustained, there was a further question as to whether the convictions could be sustained under the corroboration statute, ARIZ. REV. STAT. ANN. § 13-136 (1956) (repealed 1976). This statute required that a conviction could not be had on the testimony of an accomplice unless that testimony was corroborated by other evidence. *Id.* If the jury found the complaining witness consented to the acts alleged, that witness' testimony had to be corroborated to convict the defendant, since a consensual partner would be an accomplice. State v. Bateman, 113 Ariz. 107, 111, 547 P.2d 6, 10 (1976). Thus, since Bateman was convicted after the jury had been instructed on consent as a defense, the need for an accomplice instruction was obviated, and the judgment of conviction was reinstated. *Id.* Since Callaway's jury received no instruction with respect to consent, his conviction was reversed and the case was remanded for a new trial. *Id.* Not long after the *Bateman* decision, § 13-136 was repealed. Ch. 116, § 1, [1976] Ariz. Sess. Law 462.

97. Ch. 142, §§ 1-188, 1977 Ariz. Legis. Serv. 680-819 (to be codified at ARIZ. REV. STAT. ANN. §§ 13-101 to - 4147).

98. Ch. 142, §§ 63-69, 1977 Ariz. Legis. Serv. 731-35 (to be codified at ARIZ. REV. STAT. ANN. §§ 13-1401 to -1412).

99. Ch. 142, § 63, 1977 Ariz. Legis. Serv. 731-32 (to be codified at ARIZ. REV. STAT. ANN. §§ 13-1402 to -1403).

100. Ch. 142, §§ 63, 67, 1977 Ariz. Legis. Serv. 732, 735 (to be codified at ARIZ. REV. STAT. ANN. §§ 13-1405, 13-1410). *See also* Ch. 142, §§ 68-69, 1977 Ariz. Legis. Serv. 734-35 (to be codified at ARIZ. REV. STAT. ANN. §§ 13-1411 to -1412).

101. Ch. 142, § 63, 1977 Ariz. Legis. Serv. 732 (to be codified at ARIZ. REV. STAT. ANN. §§ 13-1404, 13-1406).

102. Ch. 142, §§ 68-69, 1977 Ariz. Legis. Serv. 734-35 (to be codified at ARIZ. REV. STAT. ANN. §§ 13-1411 to -1412). A class 3 misdemeanor carries a maximum term of imprisonment of thirty days. Ch. 142, § 57, 1977 Ariz. Legis. Serv. 718 (to be codified at ARIZ. REV. STAT. ANN. § 13-903).

103. If the fallacy of the *Bateman* decision is exposed, the statutes may be found to be an invasion of the right of privacy. *See* text & notes 83-96 *supra*.

behavior of consenting adults,[104] it is incumbent upon the state to produce a compelling justification for prohibiting such conduct when the statutes are challenged.[105] However, given the rarity of prosecutions for private, consensual acts of sex,[106] the state is not likely to have to meet that challenge.[107]

Conclusion

Although the *Bateman* court acknowledged that the right of privacy attaches to the private sexual conduct of consenting adults, that right is ultimately afforded little protection. While speaking in terms of strict scrutiny, the Arizona Supreme Court, in *Bateman*, deferred to legislative policy. The Arizona legislature has, in the new criminal code, reiterated the policy of regulating private consensual acts of sex. The statutes prohibiting consensual sodomy and lewd and lascivious acts are not likely to be enforced, and in any case, the classification of, and the punishment for such crimes has been substantially reduced. Nevertheless, the statutes still represent an invasion of the right of privacy.

C. A MIDDLE-GROUND APPROACH TO NONPROPORTIONAL REPRESENTATION

In *Reynolds v. Sims*,[1] the United States Supreme Court held that the equal protection clause requires that the seats in both houses of a bicameral state legislature be apportioned on a population basis.[2] The Court based its reasoning on the one man-one vote principle which requires that there be no dilution of the weight of a citizen's vote vis-a-vis the votes of citizens living

104. State v. Bateman, 113 Ariz. 107, 110, 547 P.2d 6, 9 (1976).
105. See text & notes 76-82 *supra*.
106. *See* State v. Elliott, 88 N.M. 187, 191, 539 P.2d 207, 211 (1975), *rev'd on other grounds*, 89 N.M. 305, 551 P.2d 1352 (1976); Pruett v. State, 463 S.W.2d 191, 193 (Tex. Crim. App. 1971).
107. The remaining provisions of the new chapter on sexual offenses may work an additional hardship in *failing* to proscribe acts of sodomy and lewd and lascivious acts committed with force by one spouse upon the other. *See generally* Ch. 142, §§ 63-69, 1977 Ariz. Legis. Serv. 731-35 (to be codified at ARIZ. REV. STAT. ANN. §§ 13-1401 to -1412). The spouse who is a victim of forceful acts of sex is without protection from the criminal law. The state has a compelling interest in protecting its citizens from violence, married or not. State v. Bateman, 113 Ariz. 107, 110, 547 P.2d 6, 9 (1976). That interest is best protected by proscribing sexual conduct based upon the nonconsensual aspect of the act, rather than the marital status of the actor and victim.

1. 377 U.S. 533 (1964).
2. *Id.* at 568.

in other parts of the state.[3] Although the application of the one man-one vote principle is established where the members of a particular body are selected by popular election,[4] the extent to which such proportional representation principles apply to appointed governmental bodies or bodies serving specialized advisory functions is not clear.[5] In *Babbitt v. Asta*,[6] the Arizona Court of Appeals held that the one man-one vote rule does not apply to the appointive method by which members are selected for the nonlegislative Pima County Planning and Zoning Commission.[7] The effect of this decision is to allow unequal representation on the commission of areas affected by its decisions.

This casenote will examine the present status of the one man-one vote principle as applied to appointed bodies. Its possible application to the statutory scheme establishing the county planning and zoning commission will be explored in light of the powers and duties of the commission. Finally, the equal protection analysis employed in *Asta* will be examined and a stricter middle-ground analysis suggested.

Nature and Function of the Planning and Zoning Commission

The legislature has entrusted county planning and zoning to the board of supervisors.[8] The general purpose of zoning is to promote the general

3. As stated by Mr. Justice Douglas, dissenting in South v. Peters, 339 U.S. 276 (1949): "The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount." *Id.* at 279, *quoted in* Reynolds v. Sims, 377 U.S. 533, 555 n.29 (1964). In Colegrove v. Green, 328 U.S. 549 (1946), Mr. Justice Black, dissenting, stated: "[T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designated to give approximately equal weight to each vote cast." *Id.* at 570.

The Court in *Reynolds* reasoned that in the area of legislative representation, the one man-one vote principal is mandatory:

> Legislators represent people, not trees or acres. . . . [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. . . . And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.

377 U.S. at 562-63 (footnote omitted).

4. *See, e.g.*, Hadley v. Junior College Dist., 397 U.S. 50 (1970); Roman v. Sincock, 377 U.S. 695 (1964); Reynolds v. Sims, 377 U.S. 533 (1964). *But cf.* Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719, 728 (1973) (apportionment of right to vote in water district election based on land ownership, where landowners are uniquely affected by district actions, is reasonably related to legitimate state interest and therefore constitutional).

5. In Sailors v. Board of Educ., 387 U.S. 105 (1967), the Court said that where the choice of members of the county school board did not involve an election, and since none was required for the nonlegislative offices there involved, the principle of "one man-one vote" had no relevancy. *Id.* at 111; *see* text & notes 66-74 *infra*.

6. 25 Ariz. App. 547, 545 P.2d 58 (1976).

7. *Id.* at 550, 545 P.2d at 61.

8. ARIZ. REV. STAT. ANN. § 11-802 (1977) provides:

> The board of supervisors of a county, in order to conserve and promote the public health, safety, convenience and general welfare, and in accordance with the provi-

welfare by providing a more stable environment for the orderly development of a community.[9] The balanced and planned development of a community is exclusively a matter for legislative, not judicial determination.[10] Courts have consistently held that zoning is a legislative function[11] which finds its justification in the police power.[12]

The purpose of a county planning and zoning commission formed under the Arizona statute[13] is to consult with and advise the county board of supervisors regarding matters of planning, zoning, and subdivision platting within the board's area of jurisdiction.[14] The commission is required to prepare and recommend to the board a comprehensive plan for the purpose of bringing about coordinated physical development in accordance with the present and future needs of the county.[15] The commission must also recommend to the board general rules and regulations governing plats and subdivisions of land within the board's area of jurisdiction.[16] Additionally, the commission is to formulate and adopt a comprehensive long term county

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sions of this chapter, shall plan and provide for the future growth and improvement of its area of jurisdiction, and coordinate all public improvements in accordance therewith, form a planning and zoning commission to consult with and advise it regarding matters of planning, zoning, and subdivision platting and in the manner provided in this chapter, adopt and enforce such rules, regulations, ordinances and plans as may apply to the development of its area of jurisdiction.

9. Rubi v. 49'er Country Club Estates, 7 Ariz. App. 408, 411, 440 P.2d 44, 47 (1968). Zoning is a "means of strengthening the character of a particular area in terms of its use." *Id.*

10. City of Tempe v. Rasor, 24 Ariz. App. 118, 123, 536 P.2d 239, 244 (1975). The exercise of discretion gives zoning its legislative character. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

11. *See, e.g.*, City of Scottsdale v. Superior Court, 103 Ariz. 204, 207, 439 P.2d 290, 293 (1968); City of Tempe v. Rasor, 24 Ariz. App. 118, 119, 536 P.2d 239, 240 (1975); Rubi v. 49'er Country Club Estates, 7 Ariz. App. 409, 411, 440 P.2d 44, 46 (1968); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1972). Since zoning is a legislative function, zoning ordinances are cloaked with a presumption of validity. Rubi v. 49'er Country Club Estates, 7 Ariz. App. at 412, 440 P.2d at 47.

12. City of Scottsdale v. Municipal Court, 90 Ariz. 393, 396, 368 P.2d 637, 640 (1962); Klensin v. City of Tucson, 10 Ariz. App. 399, 401, 403, 459 P.2d 316, 318, 320 (1969).

13. ARIZ. REV. STAT. ANN. § 11-802 (1977).

14. *Id.* Section 11-801(1) defines "area of jurisdiction" as "that part of the county outside the corporate limits of any municipality."

15. *Id.* § 11-806(A). Section 11-806(B) provides in part:

> The comprehensive plan shall be developed so as to conserve the natural resources of the county, to insure efficient expenditure of public funds, and to promote the health, safety, convenience, and general welfare of the public. Such comprehensive plan may include but not be limited to, among other things, studies and recommendations relative to the location, character and extent of highways, railroads, bus, and other transportation routes, bridges, public buildings, schools, parks, parkways, hiking and riding trails, airports, forests, wildlife areas, dams, projects affecting conservation of natural resources, and flood-plain zoning.

This plan is then submitted to the board of supervisors for approval, but before adoption, the board must hold a public hearing. *Id.* § 11-806(C). To ensure the most efficient development of the county, the commission is permitted to confer with the zoning and planning agencies of incorporated areas within its district, specifically concerning the coordinated use of public utilities which do not begin and end within the boundaries of any single town or city. *Id.* § 11-806(E).

16. *Id.* § 11-806.01(E). Furthermore, this statute authorizes the commission to modify the general rules and regulations in planned area development or specific cases where unusual topographical or other exceptional conditions may require such modification. *Id.*

Before the recording of a subdivision plat by the board, the plat must first be referred to the commission for its consideration and recommendation. *Id.* § 11-806.01(B).

plan, which shall show the commission's recommendations for development together with general zoning regulations, including the designation of districts appropriate for various classes of residential, business, and industrial uses.[17] The commission functions essentially in an advisory capacity, as the board must approve the commission's recommendations and proposals before they obtain force of law.[18]

Members are appointed to the commission to serve four year terms.[19] In the counties having five supervisorial districts, the commission consists of ten members.[20] Two members are appointed from each supervisorial district by the supervisor, but not more than one of the two may be a resident of an incorporated municipality.[21] This latter restriction gave rise to the dispute in *Asta*.

The Controversy in Babbitt v. Asta

Pima County Supervisor Ron Asta had appointed Dee O'Neill to a two-year term on the Pima County Planning and Zoning Commission to repre-

17. *Id.* § 11-821 (1977). The plan is adopted by the commission and then submitted to the board, but before any changes can be made in the plan, the board must refer the plan back to the commission for its recommendation. *Id.* § 11-823 (1977).

18. *See* Maricopa County Bd. of Supervisors v. Bell 51st Investors, 108 Ariz. 261, 264, 495 P.2d 1315, 1318 (1972); ARIZ. REV. STAT. ANN. § 11-823 (1977) (board may change or alter any part of county plan submitted by commission); *id.* § 11-824 (plan does not obtain force of law until approved by board); *id.* § 11-806.01(E) (rules and regulations governing plats and subdivisions recommended by commission must be approved by board); *id.* § 11-806(A) (commission shall act in an advisory capacity to the board); *id.* § 11-802 (commission shall act in an advisory capacity to the board).

Even though the commission is essentially an advisory body, the board of supervisors may still be required to obtain the commission's input. For example, a person desiring an amendment or change in a zoning ordinance which would alter the zoning district boundaries within an area previously zoned, or desiring a change in the zoning classification, must file a petition with the board, which must then be submitted to the commission. ARIZ. REV. STAT. ANN. § 11-829(A)-(B) (1977); *see* Maricopa County Bd. of Supervisors v. Bell 51st Investors, 108 Ariz. at 264, 495 P.2d at 1318. After holding a public hearing, the commission sends its recommendation to the board, which *may* then adopt the amendment or change of classification. ARIZ. REV. STAT. ANN. § 11-829 (B)-(C) (1977). Additionally, the commission itself may propose the rezoning and forward its recommendation to the board. *Id.* § 11-829(D). There is no provision enabling the board to initiate its own zoning changes without first obtaining the views of the commission, and without the commission's recommendation, the board has no jurisdiction to act. *See* Maricopa County Bd. of Supervisors v. Bell 51st Investors, 108 Ariz. at 264, 485 P.2d at 1318. In *Bell 51st Investors*, the court held that where a proposed zoning change was initiated by the commission and the commission recommended only that one portion of a tract zoned for high-density occupancy be rezoned for low-density occupancy and made no recommendation as to the remainder of the tract, the board was without jurisdiction to rezone the entire tract for low-density occupancy. *Id.* at 265, 495 P.2d at 1319. It is thus clear that the role of the planning and zoning commission is an essential part of the zoning process, even though the commission is only an advisory body.

19. ARIZ. REV. STAT. ANN. § 11-803(C) (1977).

20. *Id* § 11-803(B), which provides as follows:

> In the counties having five supervisorial districts, the county planning and zoning commission shall consist of ten members who shall be qualified electors of the county. Two members shall be appointed from each supervisorial district by the supervisor from that district and not more than one of the two shall be a resident of an incorporated municipality. Members of the commission shall serve without compensation except for reasonable travel expenses.

21. *Id.*

sent the unincorporated area of his district.[22] When O'Neill was appointed to the commission, she resided outside the corporate limits of Tucson, an area representing only three percent of Asta's district.[23] However, on February 25, 1974, the area surrounding O'Neill's home was annexed by the city of Tucson and O'Neill thereby became ineligible for reappointment to represent the unincorporated section of Asta's district.[24]

In a declaratory judgement action challenging the constitutionality of the statute creating O'Neill's ineligibility, the lower court found that the statute, by precluding Asta from appointing two residents of the incorporated area of his district to the commission, violated the equal protection guarantees of the federal and state constitutions.[25] Since ninety-seven percent of Asta's constituents resided in incorporated areas, and thus only three percent lived in unincorporated portions of his district, the trial court held that the statute disenfranchised residents of incorporated areas "on certain local issues."[26] On appeal, this decision was reversed.[27] The court of appeals determined that the issue involved was the power to appoint rather than the right to vote, and that the one man-one vote rule was, therefore, not applicable.[28] Having decided that a fundamental right was not involved, the court applied a rational basis analysis to the statute and found the preference given to residents of unincorporated areas reasonably related to the effectuation of the state's legitimate interest in ensuring residents of such areas input into commission matters.[29] The court predicated this finding on its conviction that the commission's actions "directly affect only the unincorporated areas in the county."[30]

Equal Protection

The reach of the equal protection clause is broad.[31] The Supreme Court has said that no state shall deny to persons within the state's jurisdiction the equal protection of the law.[32] The prohibitions of the fourteenth amendment extend to all actions of the state, "whatever the agency of the State taking

22. 25 Ariz. App. at 548, 545 P.2d at 59.
23. *Id.*
24. *Id.*; see text & notes 19-21 *supra*.
25. 25 Ariz. App. at 549, 545 P.2d at 60. The appellees argued that ARIZ. REV. STAT. ANN. § 11-803(B) (1977) offended both the equal protection clause of the fourteenth amendment to the United States Constitution, and art. 2, § 13 of the Arizona Constitution, 25 Ariz. App. at 549, 545 P.2d at 60, which has the same effect as the fourteenth amendment, *id.; see* Valley Nat'l Bank v. Glover, 62 Ariz. 538, 554, 159 P.2d 292, 299 (1945); Edwards v. Alhambra Elementary School Dist. No. 63, 15 Ariz. App. 293, 295, 488 P.2d 498, 500 (1971).
26. 25 Ariz. App. at 548-49, 545 P.2d at 59-60.
27. *Id.* at 551, 545 P.2d at 62.
28. *Id.* at 550, 545 P.2d at 61; *see* Hadley v. Junior College Dist., 397 U.S. 50, 58 (1970); Avery v. Midland Co., 390 U.S. 474, 485 (1968); Sailors v. Board of Educ., 387 U.S. 105, 111 (1967).
29. 25 Ariz. App. at 551, 545 P.2d at 62. For a discussion of the meaning of rational basis analysis, and when such analysis is applied, see text & notes 39-42 *infra*.
30. 25 Ariz. App. at 551, 545 P.2d at 62.
31. *See, e.g.*, Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 246 (1931).
32. Cooper v. Aaron, 358 U.S. 1, 16 (1958).

the action, . . . or whatever the guise in which it is taken."[33] To understand the equal protection analysis used by the court in *Asta*, a closer examination of this facet of constitutional law is required.

In equal protection cases, courts analyze both the nature of the interests affected by the statutory classifications and the governmental interests asserted in support of those classifications.[34] These cases involve application of either a rational basis analysis or a stricter form of judicial scrutiny.[35]

The Supreme Court has recognized that some interests are fundamental or that certain classifications are inherently suspect.[36] Accordingly, the Court has fashioned a strict standard of review which requires that a classification affecting the exercise of a fundamental right or creating a suspect category be necessary to the protection of some compelling state interest.[37] A statute will rarely pass this strict scrutiny test because of the

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33. *Id.* at 17. In *Ex parte Virginia*, 100 U.S. 339 (1879), the Court stated:

> We have said the prohibitions of the Fourteenth Amendment are addressed to the States. . . . They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.

Id. at 346-47.

34. In determining whether a state statute violates the equal protection clause, three factors are considered: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. Dunn v. Blumstein, 405 U.S. 330, 335 (1972); State v. Kelly, 111 Ariz. 181, 184, 526 P.2d 720, 723 (1974).

35. *See* Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 951 (1975).

36. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 482-83 (1973); Wilkinson, *supra* note 35; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-123 (1969). The Court has classified as fundamental the right to vote, *see* Dunn v. Blumstein, 405 U.S. 330, 335-37 (1972), the right of interstate travel, *see, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254-55 (1974); Dunn v. Blumstein, 405 U.S. 330, 338 (1972); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969), the right to counsel, *see* Douglas v. California, 372 U.S. 353 (1963), the right to procreate, *see* Skinner v. Oklahoma, 316 U.S. 535 (1942), and the rights specifically guaranteed by the first amendment, *see* Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972). *But see* Ross v. Moffit, 417 U.S. 600 (1974) (no right to counsel for discretionary appeal); Roe v. Wade, 410 U.S. 113 (1973) (woman has only qualified right to terminate pregnancy). In San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court recognized as fundamental only those rights which were "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34.

Statutory classifications based on race, *see* Loving v. Virginia, 388 U.S. 1 (1967), alienage, *see* Graham v. Richardson, 403 U.S. 365 (1971), or national origin, *see id.*; Hernandez v. Texas, 347 U.S. 475 (1954), are considered suspect and must be justified by a compelling state interest.

37. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to travel is fundamental); *see* Canby, *The Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism*, 1975 ARIZ. ST. L.J. 1, 5-7; Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-10 (1972); Wilkinson, *supra* note 35; *Developments in the Law, supra* note 36. *See generally* Goodpaster, *supra* note 36. The burden is upon the litigant challenging the statute to prove that the legislative classification deserves close scrutiny; once having made this requisite showing, the burden shifts to the state to show not only that the classification serves a compelling state interest, but that the classification is necessary to advance that interest. *See, e.g.*, Memorial Hosp. v. Maricopa

compelling interest which the state must show to justify the intrusion on a fundamental right.[38]

Where the rights in equal protection analysis are nonfundamental or the classifications are nonsuspect, courts have traditionally used a rational basis analysis, which involves exercising judicial restraint and applying a strong presumption of constitutionality in examining the validity of state actions.[39] Therefore, courts often attribute to legislation any conceivable purpose which could support the constitutionality of the classification.[40] The Supreme Court does not require that there be a close relation between the purpose and the means of the classification, since "[a] statutory discrimination will not be set aside if one state of facts reasonably may be conceived to justify it."[41] The rational basis test thus affords great deference to legislative decisions and is almost always met.[42]

Nominally, the Supreme Court adheres to this two-tier structure of equal protection analysis.[43] However, the Court has had difficulty in agreeing upon a standard of equal protection that can be applied consistently to the wide variety of legislative classifications which it confronts. Indicative of this problem has been the inconsistency in its results,[44] evident when the Court strikes down legislation using the rational basis approach.[45] In these

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County, 415 U.S. 250, 262 (1974); Dunn v. Blumstein, 405 U.S. 330, 337 (1971); Kramer v. Union Free School Dist., 395 U.S. 621, 626-27 (1969); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 806 (1969).

38. *See generally* Canby, *supra* note 37, at 6; *Developments in the Law, supra* note 36, at 1087.

39. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). The strong presumption of constitutionality is especially found in cases involving economic legislation. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961); Goesaert v. Cleary, 355 U.S. 464 (1948); *Developments in the Law, supra* note 36, at 1078.

40. *See, e.g.*, Two Guys from Harrisson-Allenton, Inc. v. McGinley, 366 U.S. 582, 591-92 (1961); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). *See generally Developments in the Law, supra* note 36.

41. McGowan v. Maryland, 366 U.S. 420, 426 (1961). Indeed, courts often do find a rational basis for a classification merely by tailoring an appropriate purpose to justify the classification. *See generally* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

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

43. *See* Wilkinson, *supra* note 35.

44. *See id.* at 950.

45. In Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), the Court struck down that portion of a workmen's compensation statute which relegated illegitimate children of the deceased to a lower status than that of legitimate children. The Court rejected what could have been the deceased's preference for his own offspring as being an insufficient reason to sustain that classification. *Id.* at 175-76.

However, in other cases this "active rational basis review," *see generally* Canby, *supra* note 37, was applied to strike down legislation against illegitimates, *see* Mathews v. Lucas, 427 U.S. 495 (1976); Gomez v. Perez, 409 U.S. 535 (1973), and indigents, *see* James v. Strange, 407 U.S. 128 (1972).

More recently, the Court in Craig v. Boren, 429 U.S. 190 (1976), which involved an Oklahoma law which prohibited the sale of 3.2% beer to males under 21 years of age and to females under 18, held that the law denied equal protection to males between the ages of 18 and 20. The Court required that gender-based classifications serve important governmental objectives and be *substantially related* to achievement of those objectives. *Id.* at 197. *Compare* Stanton v. Stanton, 421 U.S. 7 (1975) (striking down a classification by gender using "rational basis" scrutiny); *and* Reed v. Reed, 404 U.S. 71 (1971) (striking down a statute giving men preferential treatment for probate administrator assignments using rational basis), *with* Wil-

cases, the Court has ignored clearly plausible reasons for validity and has applied a more demanding standard of review than mere rationality.[46] Certain classifications such as sex,[47] illegitimacy,[48] and wealth[49] seem to require this heightened, middle-ground, level of scrutiny.[50] Middle-ground analysis employs in essence a balancing of the interests involved.[51]

One Man-One Vote, Equal Protection, and Local Government

In the area of voting rights, the Supreme Court has labeled the franchise a fundamental right,[52] and has applied the strict scrutiny test to determine the validity of classifications impacting on the right to vote in a discriminatory manner.[53]

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liamson v. Lee Optical Co., 348 U.S. 483 (1955) (upholding a statute making it unlawful to solicit sale of spectacles or eyeglasses by advertising using rational basis); *and* Dandridge v. Williams, 397 U.S. 471 (1970) (upholding legislation placing a $250 per month limit on AFDC grants regardless of family size as being rational).

46. Indeed, this standard of review, though not as strict as the compelling interest test, is more exacting than the rational basis analysis. *See* Craig v. Boren, 429 U.S. 190, 210-11. (1976) (Powell, J., concurring); Gunther, *supra* note 37, at 18-20.

47. *See* Schlesinger v. Ballard, 419 U.S. 498 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

48. *See* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973).

49. *See* Douglas v. California, 372 U.S. 353 (1963).

50. *But see* Mathew v. Lucas, 427 U.S. 495 (1976) (conditioning illegitimate child's social security benefits on showing that deceased was living with child or contributing to his support is reasonably related to the likelihood of dependency at death). *See generally* Canby, *supra* note 37, at 7-9; Wilkinson, *supra* note 35, at 951-52; *Developments in the Law, supra* note 36.

51. *See* Goodpaster, *supra* note 36, at 513; Wilkinson, *supra* note 35, at 989; text & note 34 *supra*. As stated by Justice Black in William v. Rhodes, 393 U.S. 23 (1968): "In determining whether or not a . . . law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Id.* at 30.

The court in Williams v. Osser, 350 F. Supp. 646 (E.D. Pa. 1972), recognized that, even though a less stringent standard of review is used than strict scrutiny, courts are still required to balance the interests served by the statutory provision against the burden on the individual interests involved. Though cases have indicated that a statute reviewed under the less stringent standard is to be sustained if the court can find any conceivable, legitimate basis to justify it, *see* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969), the court in *Osser* stated that courts should look to the actual purpose of the statute and balance the burden on the individual right. 350 F. Supp. at 652. Adoption of the less stringent standard should not lead to perfunctory acceptance of the statute's constitutionality. *Id.* at 652.

52. Reynolds v. Sims, 377 U.S. 533, 566 (1964) ("Diluting the weight of votes because of place of residence impairs basic constitutional rights . . . .").

53. *See id.* at 562. In Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966), the Court declared unconstitutional Virginia's annual $1.50 poll tax because the tax resulted in a classification based on wealth and "[l]ines drawn on the basis of wealth or property, like those of race . . . , are traditionally disfavored." *Id.* at 668. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969), involved both complete disenfranchisement of distinct community segments and wealth classifications. Bullock v. Carter, 405 U.S. 134 (1972), illustrates the application of strict scrutiny when a classification is based on wealth. In that case, appellees challenged a Texas statutory scheme which, without allowing either write-in or other alternative provisions, required fees ranging as high as $8,900 in order to become a candidate for local office in the Texas Democratic Primary. *Id.* at 137. The Court stated that the statutory scheme must be "closely scrutinized" and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster. *Id.* at 144. Reasoning that the Texas system created barriers to candidate access to the primary ballot, thereby limiting the field of candidates from which voters might choose, *id.* at 143, the Court found that the Texas filing-fee scheme had a "real and appreciable impact on the exercise of the franchise," *id.* at 144. The Court held that the proffered reasons for the scheme—regulation of the number and good faith of candidates on the ballot and obtaining financing for elections—were insufficient, and therefore rendered the scheme unconstitutional. *See id.* at 144-49. In substance, the Court

The Court held in *Reynolds v. Sims*[54] that a voter has a constitutional right to vote in elections for state representatives without having his vote wrongfully diluted.[55] In *Sailors v. Board of Eduction*,[56] on the other hand, the Court indicated that there was no constitutional reason why the members of a county school board, which performed what the Court characterized as administrative, nonlegislative functions, could not be chosen by appointment rather than election.[57] Since the elective process was not used, the Court concluded that the principle of one man-one vote had no relevancy.[58] The court in *Asta* determined that, because members of the planning and zoning commission are appointed and not elected, and perform functions which the court concluded are "wholly nonlegislative," the one man-one vote rule is, under the rationale of *Sailors*, inapplicable.[59] Hence, members of the commission are not required to serve geographic areas containing a substantially equal number of residents.[60] For the reasons set forth below, the court's conclusion in *Asta* is correct.

In *Sailors*, the Court did not reach the issue of whether the one man-one vote principle extended to a local government unit; it simply resolved the issue in that case by holding that the principle was inapplicable because the county school board was essentially administrative in nature and its members were appointed rather than elected.[61] The extension of the one man-one vote principle to local government was delayed until *Avery v. Midland County*[62] where the principle was applied to the election of county commissioners who exercised "general governmental powers"[63] over the county.[64] The Court held in *Avery* that the Constitution permits no substantial variation from equal apportionment in drawing voting districts for units of local government having general governmental powers over the entire geographic area served by the body.[65]

The problem which faced the courts after *Sailors* and *Avery* was in deciding which local governmental units possessed the requisite general governmental powers, thereby triggering the one man-one vote principle.[66]

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reasoned that, although the state has legitimate interests in regulating the number of candidates on the ballot, Jenner v. Fortson, 403 U.S. 431, 442 (1971); William v. Rhodes, 393 U.S. 23, 32 (1968), it cannot achieve this objective by totally arbitrary means, Shapiro v. Thompson, 394 U.S. 618, 631 (1964). *See* 405 U.S. at 144-49.

54. 377 U.S. 533 (1964).
55. *See* text & notes 1-3 *supra*.
56. 387 U.S. 105 (1967).
57. *Id.* at 108.
58. *Id.* at 111.
59. 25 Ariz. App. at 550, 545 P.2d at 61.
60. *See id.*
61. 387 U.S. at 108, 111. *See also* 21 VAND. L. REV. 153, 154 (1967).
62. 390 U.S. 474 (1968).
63. *Id.* at 485.
64. *See id.* 484-85.
65. *Id.*
66. In *Sailors*, the Court said that the one man-one vote principle was not applicable to appointed *administrative* officials. 387 U.S. at 111; *see* text & notes 56-58 *supra*. In *Avery*, the

In *Hadley v. Junior College District*,[67] the Court was faced with a scheme providing for the election of junior college district trustees which resulted in discrimination against voters in the more populous school district comprising the junior college district. The Court found that although the powers of the junior college district were not as broad as those possessed by the commissioners in *Avery*, they were general enough and had sufficient impact throughout the district to justify the application of the one man-one vote principle.[68] Therefore the Court held that, as a general rule, whenever a state or local government decides to select persons by popular election to perform general governmental functions, the equal protection clause requires that each qualified voter be given an equal opportunity to participate in the election.[69] Moreover, when members of an elected body are chosen from separate districts, each district must be established on a basis that will ensure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.[70]

Apart from these general rules regarding proportional representation, the Court has indicated that states have great latitude in organizing local government. In *Sailors*, the Court indicated that unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs.[71] The Constitution is not a roadblock in a state's path of innovation, experimentation, and development within and among its units of local government.[72] Moreover, the Court remarked in *Hadley* that where a state chooses to select members of an official body by appointment rather than election, and the choice itself does not offend the Constitution, the fact that each official does not represent the same number of people does not deny those people equal protection of the laws.[73] The court in *Asta* was, therefore, correct in upholding the constitu-

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Court determined that the rule was applicable to *elected* officials performing *general governmental powers*, which included such tasks as establishing a courthouse and jail, appointing minor county officials, letting contracts for the building of roads and bridges, adopting the county budget, and setting the county tax rate. *See* 390 U.S. at 476.

67. 397 U.S. 50 (1970).

68. *Id.* at 53-54. *But cf.* Oaks v. Board of Trustees, 385 F. Supp. 392, 394 (N.D. Miss. 1974) (one man-one vote not applicable to selection of Mississippi junior college trustees who are appointed by county supervisors rather than popularly elected).

69. 397 U.S. at 56. The Court recognized the possibility that some elections may not call for the one man-one vote rule: "It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds*, *supra*, might not be required . . . ." *Id.*; *see* Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719 (1973).

70. *See* Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970).

71. 387 U.S. at 109.

72. *See* Avery v. Midland County, 390 U.S. 474, 485 (1968).

73. 397 U.S. at 58; *cf.* Ortiz v. Hernandez Colon, 385 F. Supp. 111 (D.P.R. 1974), *vacated and remanded for consideration of possible mootness*, 421 U.S. 903 (1977). In *Ortiz*, a statute which allowed the winning gubernatorial candidate of Puerto Rico to appoint five members to the 17-member municipal assembly of San Juan, with the other 12 members elected by residents of San Juan proper, was held to be unconstitutional as a denial of equal protection to San Juan residents who did not support the winning gubernatorial candidate. *Id.* at 119. In effect,

tionality of a statute which allows for the appointment of members to the planning and zoning commission without application of the one man-one vote principle.[74]

Application of the Law to Babbitt

The planning and zoning commission in Pima County is an appointed advisory body, which performs specialized functions for the county board of supervisors;[75] therefore, its representative base need not be apportioned on a substantially equal base and one man-one vote does not apply.[76] Neverthe-

residents of San Juan, who in voting for the victorious candidate, found themselves in accord with a majority of Puerto Rico's electors—many of whom may have resided outside the city—had significantly more voting power in their own municipal assembly than residents of San Juan proper who supported a losing gubernatorial candidate. A local minority of voters in San Juan that happened to be part of the state-wide majority might have power, in effect, to select a majority of the members of the municipal assembly. *Id.* at 115.

The court in *Ortiz* reasoned that such a scheme diluted the voting power of those San Juan residents who did not support the winning candidate for governor, thus impinging upon fundamental rights of voting and association. *See id.* at 117. The court, therefore, applied strict scrutiny, requiring that the appointment by the governor of five members to the assembly be a "reasonably necessary" measure to achieve a "compelling state interest." *Id.* Although the court found a compelling interest in San Juan's unique relationship to the rest of the island of Puerto Rico, *id.* at 118, it concluded that the scheme was not reasonably necessary to the effectuation of that interest and, therefore, declared the appointive system unconstitutional. *Id.*

74. Although the *Sailors* Court, without finding it necessary to decide, posed the question of whether a state may constitute a local legislative body through appointive rather than elective means, 387 U.S. at 110, the Court in *Hadley* stated that to distinguish for apportionment purposes between elections for "legislative" officials and those for "administrative" officials would leave the courts with an unmanageable principle. 397 U.S. at 55. *See also* Ortiz v. Hernandez Colon, 385 F. Supp. 111, 117 n.5 (D.P.R. 1974), *vacated and remanded for consideration of possible mootness*, 421 U.S. 903 (1977). *Sailors* and *Hadley* together may thus mean that selecting an appointive means of choosing local governmental bodies eliminates any need to afford equal representation to districts or areas based upon population, regardless of whether the functions of such governmental bodies are categorized as legislative or administrative. *See* text & notes 56-58, 67-73 *supra*. This view was accepted by the California Supreme Court in *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971), where it was stated that the administrative-legislative distinction in appointive offices should be rejected. *Id.* at 505, 487 P.2d at 1209, 96 Cal. Rptr. at 569. The court concluded with the following: "We think the true meaning of *Sailors* and *Hadley* is that the legislative or administrative nature of the activities performed by an officer is irrelevant; if the officer is elected, 'one person, one vote' applies. If he is appointed, the principle does not apply." *Id.* The court in *Rosenthal v. Board of Educ.*, 385 F. Supp. 223 (E.D.N.Y. 1974), *aff'd without opinion*, 420 U.S. 985 (1975), reached the same conclusion reasoning that once it is determined that the members of a board are selected by appointment rather than by popular election, there is no need to determine whether they perform functions that may be better defined as legislative or administrative. *Id.* at 226. Further support for the soundness of the result reached in *Asta* is the case of Education/Instruccion, Inc. v. Moore, 379 F. Supp. 1160 (D. Conn. 1973), *aff'd per curiam*, 503 F.2d 1187 (2d Cir. 1974), *cert. denied*, 419 U.S. 1109 (1975). As already indicated, *see* text & notes 8-18 *supra*, the commission is an essentially advisory body, and *Moore* held that an advisory body not exercising general governmental functions need not be apportioned among areas represented on a strict numerical basis. 379 F. Supp. at 1167. The court indicated that the general duties of the so-called Regional Council of Governments were to render "advisory reports" and recommendations, study proposed zoning changes, and formulate development plans and recommendations for the general use of land which "in the opinion of the agency" would be beneficial to the area. *Id.* at 1166-67. These functions are similar to those exercised by the planning and zoning commission in *Asta*. *See* text and notes 14-18 *supra*. The law is, therefore, fairly clear that there is no requirement that the members of an appointive, advisory governmental body be selected to represent substantially equal numbers of constituents.

75. *See* text and notes 8-18 *supra*.

76. *See* text and notes 73-74 *supra*. The court in *Asta* relied on *Sailors* for the proposition

less, the equal protection clause reaches all discrimination made by state action.[77] However, since no fundamental right or suspect category is involved, rational basis analysis may be viewed as the appropriate standard for reviewing the alleged discrimination present in the statutory scheme in *Asta*.[78]

The interest involved in *Asta* is that of city residents who may conceivably be denied representation on the planning and zoning commission, yet who may also be affected by its decisions and recommendations as advisor to the county board of supervisors. Although the court of appeals' use of the rational basis analysis in *Asta* seems appropriate,[79] the court did not give sufficient consideration to the fact that the members of the commission perform functions which have considerable potential impact on incorporated areas of the county. It is suggested below, therefore, that a stricter, middle-ground equal protection analysis would have been a more appropriate standard of judicial scrutiny.[80]

The decisions of the commission and the board have a definite impact on residents of an incorporated area. A city is directly affected by county zoning decisions when, for example, the county zones an area for development but does not make provisions for water, sewer lines, sewer facilities, roads, and public utilities to accommodate development which could occur within the incorporated area.[81] For example, county sewer lines may traverse a portion of an incorporated area and eventually empty effluent into a county sewer treatment facility. Potential development within the city which would contribute effluent to such a facility may be restrained because

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that appointment of administrative officials does not require the application of the one man-one vote rule. 25 Ariz. App. at 550, 545 P.2d at 61.

77. *See* text and notes 31-33 *supra*.

78. At issue was the appointment of members to the planning and zoning commission. Because no fundamental rights were substantially burdened in *Asta*, strict scrutiny was not applicable. 25 Ariz. App. at 551, 545 P.2d at 62. *See also* Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719, 734-35 (1973) (apportionment of right to vote in water district election based on land ownership, where landowners are specially affected by district actions, is reasonably related to legitimate state interest and therefore constitutional).

79. *See* text & notes 75-78 *supra*.

80. For a general discussion of the content of such middle-ground analysis, see text & notes 43-51 *supra*.

81. In providing water services, the city might find itself required to furnish water to relatively undeveloped county areas at great expense. For example, in Robinson v. City of Boulder, — Colo. —, 547 P.2d 228 (1976), the court determined that the city acted as a public utility, and therefore could not deny service to an unincorporated area of the county, even though the city was without jurisdiction over the territory outside its municipal limits in absence of legislation. *Id.* at —, 547 P.2d at 232. The city of Tucson serves as a public utility by holding itself out to provide water to unincorporated areas. Interview with Steve Weatherspoon, Tucson City Attorney (in charge of water related problems in City Attorney's Office), in Tucson, Ariz. (March 3, 1977) [hereinafter cited as Weatherspoon Interview]. This is done both for efficiency, through basin-wide management, and discouragement of piecemeal delivery of water. *Id.* The city has also purchased or condemned county water companies in an effort to centralize control of water delivery and to insure effective and efficient service. *Id.* Should the county allow development in a certain area, the city, serving as a public utility, could be forced under the rationale of *Boulder* to provide this needed service to the residential area. In this respect, county zoning would have a direct impact on the city. *See also* text & notes 82-85 *infra*.

the county has not planned ahead to accommodate the extra effluent by providing for a larger capacity in the sewer line and at the county sewer treatment facility.[82] Additionally, where the county links its sewer lines to city sewer lines leading to city treatment facilities, problems arise where the county permits residential zoning in an outlying area. The increase in effluent emptied into the sewer lines taxes existing facilities in the incorporated area, requiring the city to spend money to increase existing capacity.[83]

The most direct effect that county zoning has on the city occurs where the city annexes parts of the unincorporated areas of the county.[84] Where city and county zoning regulations are not uniform, the city may be forced to choose between refusal to annex at all or absorption of nonconforming structures and uses.[85] However, in spite of the practical effects which the actions of the planning and zoning commission may have on incorporated areas of the county, residents of these areas may not be adequately represented on the commission.

The legislature recognized the legitimate interest that city residents have in representation on the commission by implicitly allowing one member of the incorporated area to be appointed to the commission.[86] However,

82. Interview with Ronald Green, Zoning Administrator for Pima County, in Tucson, Ariz. (March 2, 1977) [hereinafter cited as Green Interview].

83. *Id.*

84. *See* TUCSON, ARIZ. CODE § 23-506 (1965) (ordinance allows continuance of county zoning in areas newly annexed by the city).

85. Cities may have ordinances which allow for nonconforming uses of annexed property, and courts will generally uphold these prior local zoning determinations. *See* Robinson v. Lintz, 101 Ariz. 448, 452, 420 P.2d 923, 927 (1966) (established county subdivision lots are not subject to city zoning ordinances when later legally annexed by the city); Lewis v. Board of Adjustments, 6 Ariz. App. 494, 495, 433 P.2d 811, 812 (1968) (evidence sufficient to warrant finding that property owner had established a legal nonconforming use prior to city zoning).

Although prior to 1970 counties were prohibited from enacting building codes, they are now permitted to do so. ARIZ. REV. STAT. ANN. § 11-821 (1977). But if a county chooses to adopt zoning regulations and building codes not in conformity with city regulations and codes, the city may be more inclined to annex fringe areas to prevent substandard structures and nonconforming uses from developing in these county areas. The Arizona Republic, Dec. 18, 1971, at 31, col. 1. In doing so, however, city resources will be spent and the city may not be able to provide required municipal services. For example, in operating a water system, a city stands in the same position as a public service corporation. Town of Wickenburg v. Town of Sabin, 68 Ariz. 75, 78, 200 P.2d 342, 344 (1948). A public service corporation is under a legal obligation to render adequate service without discrimination to all members of the general public. *Id.* at 77, 200 P.2d at 343. Hence, if county zoning regulations do not provide for an adequate number of fire hydrants in a particular area, the city would presumably have to supply an adequate number of hydrants upon its annexation of the area by the city. Veach v. City of Phoenix, 102 Ariz. 195, 197, 427 P.2d 335, 337 (1967).

Moreover, the practical effects that county zoning would have on a city were it to allow development of a shopping center, subdivision, or industrial park just outside the city are easily illustrated. Traffic problems would manifest themselves, the need for housing in the city might be increased, and the construction of roads could have an effect on the amount of water flowing through the city streets and dust blowing through city air. Appellee's Answering Brief at 11, Babbitt v. Asta, 25 Ariz. App. 547, 545 P.2d 58 (1976).

86. *See* text & note 21 *supra*. Likewise, some members of the Arizona legislature have recognized the impact zoning has on the city. An attempt was made during the 1971 session to enact a bill giving municipalities extra-territorial zoning powers to prevent substandard structures and nonconforming uses in county areas that might be annexed in the future. *See* S. 176,

the legislature has never given any express assurance of representation for residents of incorporated areas.[87] Having determined that the commission's functions have considerable potential effects on incorporated areas, it is necessary to reexamine the interests of the city residents in the context of a middle-ground analysis.

Equal Protection Analysis Recommended for Asta

The apparent purpose of the scheme created by section 11-803(B) of the Arizona Revised Statutes is to guarantee residents of the unincorporated areas some form of representation on the county planning and zoning commission.[88] However, the statute leaves open the possibility that the incorporated areas will have no representation on the commission whose decisions affect this area.[89] This latter possibility was given too little attention by the *Asta* court.[90]

Section 11-803(B) on its face allows the members of a board of supervisors to decline to provide representation to city residents. If this result were to occur in the supervisor's district involved in *Asta*, an intolerable level of representation would exist, since ninety-seven percent of the district's residents lived in the city, whereas only three percent lived in the unincorporated area.[91] Since the statute allows for this possibility, it arguably is improperly tailored to its objective of insuring representation to residents of unincorporated areas.[92] Even though the commission performs

30th Ariz. Legis., 1st Sess. (1971). The bill failed to pass primarily because of opposition from builders and developers. *See* Comment, *Annexation—Key to Arizona's Regional and Local Planning Problems*, 1972 LAW & SOC. ORD., 645, 654-55 & 654 n.42.

87. *See* text & note 21 *supra*. By providing that not more than one of the two appointees may be a resident of the incorporated area, the statute allows for the possibility that neither of the appointees would represent the incorporated areas. *See* Ariz. Rev. Stat. Ann. § 11-803(B) (1977).

88. 25 Ariz. App. at 551, 545 P.2d at 62.

89. *See* discussion note 87 *supra*.

90. This argument could be treated by a court as being too speculative to consider. Such was the court's conclusion in response to the argument made by the appellees in *Asta*. Appellees argued that § 11-803(B) is invalid because it produces an "unreasonable situation" when applied to a scenario in which the city of Tucson annexes a supervisor's entire district. *See* 25 Ariz. App. at 549, 545 P.2d at 60. Since all the residents of his district would then be residents of an incorporated municipality, the supervisor would be limited by § 11-803(B) to appointing one member of the planning and zoning commission—in direct contradiction to his duty under the same section to appoint two. *Id.; see* ARIZ. REV. STAT. ANN. § 11-803(B) (1977). The court concluded that, although the situation as described would be anomalous, it was not within the power of the court to construe a statute on the basis of hypothetical conditions that have not yet occurred. 25 Ariz. App. at 549, 545 P.2d at 60; *see* Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972); Rescue Army v. Municipal Court, 331 U.S. 549, 584 (1947). In *Asta*, however, the impact the commission's decisions have on the incorporated areas is real, not hypothetical, and for this reason some form of representation on the commission should be guaranteed to those who reside in the incorporated areas. See text & notes 80-86 *supra*.

91. *See* 25 Ariz. App. at 548, 545 P.2d at 59.

92. The statute allows for the possibility that 97% of the population of the district will have no representation on the commission while 3% of the population will enjoy all the representation. However, the commission's decisions do have an impact on the incorporated areas. See text & notes 82-86 *supra*. Yet the purpose of the statute only requires that residents of the unincorporated areas be guaranteed some represenation on the commission. *See* text accom-

specialized, advisory functions, the possibility that it might afford no representation to the majority of the population in a district is dangerous. The decisions of the commission have a wide-reaching effect on the city residents. Yet if the two appointees are from the unincorporated area, three percent of the population could have total control of the commission, while ninety-seven percent would have greatly diminished input into this body. Their most direct recourse would be the ballot, which might be an ineffective remedy.[93] Judicial scrutiny beyond the rational basis analysis should have been utilized in *Asta*.

In *Craig v. Boren*,[94] the United States Supreme Court applied what may be termed a middle-ground equal protection analysis by requiring that a gender-based classification serve important governmental objectives and be substantially related to the achievement of those objectives in order to withstand constitutional challenge.[95] Had it applied the closer judicial scrutiny of *Craig*,[96] rather than a rational basis analysis, the court in *Asta* might have found that section 11-803(B) was not substantially related to its purpose.[97]

By ensuring that a member is appointed to the commission from the city, a tolerable level of representation would be guaranteed.[98] Moreover,

panying note 88 *supra*. It is therefore apparent that the statute is improperly constructed since the statutory purpose could still be achieved if the statute required that at least one representative be appointed from the incorporated area.

93. Although the people in the municipality can obtain relief through the political process because they comprise 97% of the electorate of the district, and could elect a supervisor who would appoint a member to the commission from their area, the commission could render decisions having a long-range impact adverse to the interests of municipal residents, see text & notes 15-17 *supra*, thus diluting the effectiveness of the electoral remedy to some degree. In addition, actions taken by the commission between elections could adversely affect municipal residents, in which case the ballot box would afford no relief. *Id.*

94. 429 U.S. 190 (1976).

95. *Id.* at 197.

96. *Craig* involved a gender-based classification. *See* discussion note 45 *supra*. The Court perceived that the rational basis standard of review takes on a sharper focus when an important interest such as a gender-based classification is involved. The Court impliedly recognized that in equal protection analysis important interests such as wealth and sex require more than the deferential treatment which is accorded in the rational basis analysis. *See* 429 U.S. at 210-11 (Powell, J., concurring); text & notes 39-42 *supra*. Likewise, in view of the effect that the planning and zoning commission can have on incorporated areas of the district, *see* text & notes 81-85 *supra*, a stricter standard than mere rational basis is called for. The middle-ground standard, used by the Court in *Craig*, should therefore be the applicable standard in *Asta*.

97. The Court has said that states cannot choose means which *unnecessarily* burden or restrict constitutionally protected activity. Dunn v. Blumstein, 405 U.S. 330, 343 (1972). Statutes affecting constitutional rights must be drawn with precision. NAACP v. Button, 371 U.S. 415, 438 (1967). If other reasonable means exist to achieve legitimate goals, while imposing a lesser burden upon the constitutionally protected activity, a state may not choose the way of greater interference. Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See generally* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969). Although the interest involved in *Asta* is not fundamental, see text & notes 52-73 *supra*, the court could have determined that the interest is of sufficient weight to require a relationship between the means and the purpose closer than that evidenced by the possible disparity in representation between the incorporated and unincorporated areas. The court may thus have found that statute not sufficiently related to its purpose in light of the interest involved. See discussion notes 73, 79 *supra*.

98. See discussion note 97 *supra*.

the anomalous situation posed by the appellees in *Asta*[99] would be avoided. Therefore, the statute should be amended to ensure that at least one member of the planning and zoning commission be appointed from the incorporated area of the supervisorial district.

Conclusion

In applying the rational basis test, the court in *Asta* did not give sufficient consideration to the important interest involved, but only determined that since a fundamental right was not impinged, any rational basis would justify the scheme. But by utilizing such a deferential approach, the court leaves the inherent deficiency in the statute uncorrected. By using a middle-ground analysis, necessary consideration would be given to the city residents' interest in being represented on the planning and zoning commission. Had this stricter equal protection standard been applied in *Asta*, the result would not have been different—section 11-803(B) should not permit the two appointees to be from the incorporated area. However, by using this method of analysis, the court could have concluded that representation of the incorporated area of the district should be mandatory.

99. See discussion note 90 *supra*.

III. CRIMINAL PROCEDURE AND EVIDENTIARY RULES

A. FOURTH AMENDMENT IMPLICATIONS OF ADMINISTRATIVE DORMITORY INSPECTIONS AT A STATE UNIVERSITY

Courts have, to widely varying degrees, recognized that dormitory residents at a state university[1] are protected from unreasonable searches of their rooms.[2] Decisions have ranged from allowing no warrantless searches of dormitory rooms by university officials[3] to allowing virtually unfettered discretion on the part of a dormitory administrator to consent to a police search.[4] Most university housing contracts contain provisions which grant university officials wide authority to search or inspect dormitory rooms.[5] It

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1. The scope of this casenote is limited to searches at state universities. Searches at private universities raise different issues, as the Constitution only protects individuals from government intrusions. *See generally* Note, *Admissibility of Evidence Seized by Private University Officials in Violation of Fourth Amendment Standards*, 56 CORNELL L. REV. 507 (1971). These issues are treated in recent cases dealing with searches at private universities. *See* People v. Haskins, 48 App. Div. 2d 480, 369 N.Y.S.2d 869 (1975); People v. Boettner, 80 Misc. 2d 3, 362 N.Y.S.2d 365 (Sup. Ct. 1974), *aff'd*, 50 App. Div. 2d 1074, 376 N.Y.S.2d 59 (1975). The *Haskins* court, however, suggested in dictum that there should be no distinction between searches at private universities and state universities, and that a student's fourth amendment rights should not vary with the type of institution he or she attends. 48 App. Div. 2d at 483, 369 N.Y.S.2d at 871-72. This dictum was questioned in the affirmance of *Boettner* on the grounds that no authority existed to support it. People v. Boettner, 50 App. Div. 2d 1074, 1074, 376 N.Y.S.2d 59, 60 (1975).

2. This protection is found in the fourth amendment which provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

3. Smyth v. Lubbers, 398 F. Supp. 777, 793 (W.D. Mich. 1975).

4. *See* People v. Kelly, 195 Cal. App. 2d 669, 677, 16 Cal. Rptr. 177, 182 (1961).

5. *See* Piazzola v. Watkins, 442 F.2d 284, 286 (5th Cir. 1971); Smyth v. Lubbers, 398 F. Supp. 777, 782 (W.D. Mich. 1975). Northern Arizona University General Catalog 1975-77 provides:

> *Room Search.* The University respects the personal privacy of a student's resident hall room. The University may enter a room to inspect for maintenance, repair or safety. No room shall be entered without knocking, except in an emergency. When a specific search is necessary, the person entering the room may do so only by obtaining a warrant from a court of law or a search authorization from the Dean of Students.

Id. at 34-35. The University of Arizona reserves the right "to enter and inspect residence hall rooms at any time, through authorized personnel." Terms and Conditions Governing Application to, and Occupancy of Residence Halls at the University of Arizona, University of Arizona Form RH-1-71, revised, § 14b (form given to prospective students and incorporated into housing contract in 1976). *But see* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1079 (1969) (University of Texas decided such a provision was unnecessary, and consequently adopted a rule denying the university such a power).

has been held that, pursuant to these provisions, a university may inspect dormitory rooms only to further the educational goals of the university[6] or to protect the university's property interests.[7] If the inspection or search is directed toward gathering evidence for use in a criminal trial, however, the regulation authorizing room inspections is usually found to be an invalid attempt to coerce a student into waiving his or her fourth amendment rights as a condition to attending a state university.[8]

The issues raised by dormitory searches were recently addressed by an Arizona court for the first time in *State v. Kappes*.[9] Gretchen Kappes was an eighteen-year-old freshman attending Northern Arizona University,[10] a state university.[11] She was the sole occupant of a room in a university dormitory.[12] The university housing agreement, which she had signed, incorporated by reference the rules and regulations of the university as set out in the university catalog.[13] One of these rules, which she claimed she had never read,[14] allowed the university to enter her room and inspect it for cleanliness, safety, and maintenance needs.[15] Student resident advisors,[16] pursuant to an internal university policy, routinely inspected dormitory rooms once a month, posting notice of each inspection twenty-four hours in advance.[17] The advisors had been trained by the university to identify contraband found during these inspections and had also been instructed to notify campus security immediately if contraband were found.[18]

6. *See, e.g.*, Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971); Morale v. Grigel, 422 F. Supp. 988, 997-98 (D.N.H. 1976); Moore v. Student Affairs Comm., 284 F. Supp. 725, 730 (M.D. Ala. 1968).

7. Morale v. Grigel, 422 F. Supp. 988, 998 (D.N.H. 1976).

8. *See, e.g.*, Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971); Morale v. Grigel, 422 F. Supp. 988, 999 (D.N.H. 1976); Smyth v. Lubbers, 389 F. Supp. 777 (W.D. Mich. 1975). This does not mean to imply that a search is proscribed by the fourth amendment only if it is intended to uncover criminal evidence. The fourth amendment may bar a search even though it is purely civil in nature. *See* Camara v. Municipal Court, 387 U.S. 523 (1967). "It is surely anomalous to say the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Id.* at 530.

9. 26 Ariz. App. 567, 550 P.2d 121 (1976).

10. *Id.* at 568, 550 P.2d at 122.

11. Northern Arizona University General Catalog 1975-77 provides: "Northern Arizona University is authorized to operate under the jurisdiction of the Arizona Board of Regents, a corporation composed of the Governor of the State of Arizona, the Superintendent of Public Instruction and eight members appointed by the Governor." *Id.* at 9.

12. 26 Ariz. App. at 568, 550 P.2d at 122.

13. *Id.*

14. *See* Appellant's Opening Brief at 11, State v. Kappes, 26 Ariz. App. 567, 550 P.2d 121 (1976).

15. 26 Ariz. App. at 568, 550 P.2d at 122. For the text of the rule as set out in Northern Arizona University General Catalog 1975-77, see note 5 *supra*.

16. A student resident advisor at Northern Arizona University is responsible for assisting the resident hall director and is expected to perform the duties of the director when the director is absent. Internal Document of Northern Arizona University, ch. II-A-03 (on file in the offices of the *Arizona Law Review*). A student resident advisor is compensated by being given a rent-free room in a university dormitory during the school year. Telephone interview with Dr. Robert C. Dickeson, Vice President, Student and University Relations, Northern Arizona University (Jan. 1978).

17. 26 Ariz. App. at 568, 550 P.2d at 122.

18. *See* Appellant's Opening Brief at 3, State v. Kappes, 26 Ariz. App. 567, 550 P.2d 121 (1976).

During one routine inspection, two student resident advisors entered Kappes' room with a master key and saw in open view a marijuana pipe and marijuana cigarette butts.[19] One advisor called her supervisor who, in turn, called campus security.[20] Two university employed campus security officers arrived at the defendant's room, accompanied by a state police officer.[21] The security officers left the room to procure a "search authorization"[22] from the dean of students. Before the document was issued, Kappes returned to her room, where she was arrested and given Miranda warnings[23] by the state police officer.[24] When the police officer told her that a "search authorization" was on its way, she became upset and took a bag of marijuana out of her closet and gave it to the police officer.[25] Moments later, the authorization arrived, the room was searched, and more contraband was found.[26] The trial court suppressed the evidence found in the latter search, but admitted the butts, the pipe, and the bag of marijuana.[27] Based on this evidence, Kappes was convicted of possession of marijuana.[28]

On appeal, the sole issue was whether the trial court should have also suppressed the evidence acquired prior to the search conducted pursuant to the "search authorization."[29] The court of appeals affirmed, holding that for purposes of the exclusionary rule, student resident advisors act as private persons, rather than as government agents, when inspecting dormitory rooms at a state university.[30] The court further held that resident advisors

19. 26 Ariz. App. at 569, 550 P.2d at 123.
20. *Id.*
21. *Id.*
22. A "search authorization" at Northern Arizona University is a document that is issued by a specified school administrator, for internal disciplinary purposes, when there is reason to believe that a particular room contains illegal drugs or narcotics; it is not intended to suffice as a search warrant for court purposes. *See* 26 Ariz. App. at 569, 550 P.2d at 123. It is questionable whether such an authorization would be constitutional even for internal disciplinary proceedings. One court has suggested in dictum that such an authorization will only be valid if it is based on probable cause. Smyth v. Lubbers, 398 F. Supp. 777, 792 (W.D. Mich. 1975). Another court, however, has stated that a "reasonable belief" which is something less than probable cause would be sufficient. Moore v. Student Affairs Comm., 284 F. Supp. 725, 730 (M.D. Ala. 1968). *See also* discussion note 130 *infra*.
23. Specific warnings must be given to an arrestee in order for post-arrest statements made by the arrestee to be admissible in a subsequent criminal proceeding. Miranda v. Arizona, 384 U.S. 436, 473 (1966).
24. 26 Ariz. App. at 569, 550 P.2d at 123.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* The conviction was based on ARIZ. REV. STAT. ANN. § 36-1002.05(A) (1961), which provides:

> Every person who knowingly grows, plants, cultivates, harvests, dries, or processes any marijuana, or any part thereof, or who knowingly possesses any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison for not less than one year nor more than ten years but for the first offense the court may impose a fine not exceeding one thousand dollars, imprisonment in the county jail not exceeding one year or both.

29. 26 Ariz. App. at 568, 550 P.2d at 122.
30. The exclusionary rule excludes evidence from a criminal defendant's trial when the evidence was obtained in violation of the defendant's fourth or fifth amendment rights. United States v. Janis, 428 U.S. 433, 443 (1976). Originally, only the fifth amendment's command, that no person "shall be compelled in any criminal case to be a witness against himself," U.S.

who discover contraband in plain view while conducting such an inspection may admit law enforcement officials into the room where the contraband was discovered.[31] The court stated that, even if the inspection had amounted to a government intrusion, there was no fourth amendment violation because the inspection procedure, in this instance, was reasonable.[32] The court concluded that the seizure of contraband in plain view, under these circumstances, did not violate the defendant's constitutional rights.[33]

This casenote will first examine the dispositive issue in *Kappes*—whether student resident advisors act as private persons or as government agents when inspecting dormitory rooms at a state university. The court's alternative holding—that a state university may routinely inspect its dormitory rooms—will then be analyzed. Finally, the issue of whether a student resident advisor may lawfully admit police into the room where he has found contraband will be considered.

CONST. amend. V, came within the purview of the rule, United States v. Janis, 428 U.S. 433, 443 (1976), and then only in a *federal* criminal trial. *See* Boyd v. United States, 116 U.S. 616 (1886). The rule was applied to federal criminal trials when the evidence in question had been seized by federal officers in violation of the defendant's fourth amendment rights. *See* Weeks v. United States, 232 U.S. 383, 398 (1914). The rule, however, did not apply to evidence unconstitutionally obtained by state officers. *Id.* at 398. Over the next 40 years, the fourth amendment was made applicable to the states through the due process clause of the fourteenth amendment. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 223-24 (1960); Rochin v. California, 342 U.S. 165, 172-73 (1952); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). Finally, the Court applied the exclusionary rule to exclude state court evidence which had been seized in violation of fourth amendment rights by state officers. Mapp v. Ohio, 367 U.S. 643, 660 (1961). Recently, the Court refused to apply the rule to exclude evidence which had been seized illegally by state officers from a federal civil proceeding. United States v. Janis, 428 U.S. 433, 453-54 (1976). The rule also does not apply when the evidence was obtained by private persons. *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921). Courts will, however, look to all the circumstances to determine whether the "private party" is in fact an agent of the state, in which case the exclusionary rule will apply. Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); United States v. Sherwin, 539 F.2d 1, 6 (9th Cir. 1976); *see* United States v. Canada, 527 F.2d 1374, 1377 (9th Cir. 1975), *cert. denied*, 429 U.S. 867 (1976) (airline security guard acted as government agent when she searched a suitcase about to be carried onto an airplane); United States v. Payne, 429 F.2d 169, 171 (9th Cir. 1970) (park ranger allowed policeman with no jurisdiction, and therefore acting as a private person, to search defendant's camper—search was under governmental authority). *But see* United States v. Burton, 475 F.2d 469, 471 (8th Cir. 1973), *cert. denied*, 414 U.S. 835 (1973) (private airline agent's search of a passenger's suitcase was held not to be government action). The exclusionary rule has come under sharp criticism lately and may be severely limited in the future. Stone v. Powell, 428 U.S. 465, 537-42 (1976) (White, J., dissenting); *see* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 412 (1971) (Burger, C.J., dissenting). *See also* State v. Lamb, 137 Ga. App. 437, 224 S.E.2d 51 (1976). *Lamb* held that a violation of the fourth amendment by a government agent should not trigger the exclusionary rule unless that agent is also a law enforcement agent. *Id.* at 438, 224 S.E.2d at 53. The exclusionary rule was not adopted to cure a particular fourth amendment violation but to deter future ones. United States v. Janis, 428 U.S. 433, 446 (1976); Elkins v. United States, 364 U.S. 206, 217 (1960). Following this reasoning, one court applied the exclusionary rule to a non-law enforcement state employee when it determined that so doing would deter future fourth amendment violations by other similarly situated government employees. Dyas v. Superior Court, 11 Cal. 3d 628, 635, 522 P.2d 674, 679, 114 Cal. Rptr. 114, 119 (1974). For an extensive discussion of the actual success of the exclusionary rule, see Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 679-754 (1970).

31. 26 Ariz. App. at 570, 550 P.2d at 124.
32. *Id.*
33. *Id.*

Student Resident Advisors

The court in *Kappes* relied on the California case of *In re Donaldson*[34] in holding that student resident advisors should be treated as private persons for fourth amendment purposes when they inspect dormitory rooms at a state university. In *Donaldson*, a public high school official had found contraband in a warrantless search of a student's locker.[35] The California Court of Appeals affirmed the trial court's decision to admit the contraband into evidence,[36] reasoning that the high school was in loco parentis[37] to its students, and, therefore, school officials took on the private role of parents when searching the student's locker.[38]

Donaldson, however, does not govern the instant situation, as courts have long since abandoned the notion that a university is in loco parentis to its students.[39] Even the most recent decisions involving searches at high schools have eschewed the in loco parentis rationale for fourth amendment purposes and have recognized that high school officials are government agents.[40] Similarly, the majority of decisions involving searches at state universities have recognized that dormitory personnel are government agents and that their official conduct is circumscribed by the fourth amendment.[41] This is the more persuasive view for the reasons advanced in *Morale*

34. 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969).
35. *Id.* at 510, 75 Cal. Rptr. at 221.
36. *Id.* at 513, 75 Cal. Rptr. at 223.
37. BLACK'S LAW DICTIONARY 896 (4th ed. 1951) defines in loco parentis as follows: "In the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities."
38. 269 Cal. App. 2d at 513, 75 Cal. Rptr. at 223.
39. *See* Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969); Moore v. Student Affairs Comm., 284 F. Supp. 725, 729 (M.D. Ala. 1968). Some parental type restrictions applied by universities to their students have nevertheless been sustained. For example, a state university has been allowed to place an evening curfew on its female students even though it did not place one on its male students. Robinson v. Board of Regents, 475 F.2d 707 (6th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974). A university may restrict intervisitation between members of the opposite sex in dormitory rooms. *See* Futrell v. Ahrens, 88 N.M. 284, 288, 540 P.2d 214, 218 (1975).
40. *See, e.g.*, Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976) (*Picha* accepted the classification of in loco parentis, but nevertheless held that school officials are government agents for fourth amendment purposes); State v. Baccino, 282 A.2d 869, 871 (Del. Super. Ct. 1971); State v. Mora, 330 So. 2d 900, 901 (La. 1976), *cert. denied*, 429 U.S. 1004 (1977); *In re* State in the Interest of G.C., 121 N.J. Super. 108, 114, 296 A.2d 102, 105 (1972); Doe v. State, 88 N.M. 347, 351, 540 P.2d 827, 831 (1974); People v. D., 34 N.Y.2d 483, 486, 315 N.E.2d 466, 467, 358 N.Y.S.2d 403, 405 (1974); State v. Walker, 19 Or. App. 420, 424, 528 P.2d 113, 115 (1974). *But see* Commonwealth v. Dingfelt, 227 Pa. Super. 380, 384, 323 A.2d 145, 147 (1974) (school officials are not government law officers and therefore are not governed by the fourth amendment). *See generally* Phay & Rogister, *Searches of Students and the Fourth Amendment*, 5 J.L. & EDUC. 57 (1976).
41. *See* Morale v. Grigel, 422 F. Supp. 988 (D.N.H. 1976). The *Morale* court expressly held that dormitory personnel are government agents for fourth amendment purposes. *Id.* at 996. Other courts have implicitly held likewise by assuming from the beginning that activities of state university officials are regulated by the fourth amendment. *See* Smyth v. Lubbers, 398 F. Supp. 777, 787 (W.D. Mich. 1975); Moore v. Student Affairs Comm., 284 F. Supp. 725, 730 (M.D. Ala. 1968). The search in *Moore* was conducted by a dean. *Id.* at 728. This, however, does not weaken *Moore* as authority for holding the fourth amendment applicable to a student resident advisor. Like a dean, a resident advisor is compensated by the state, *see* discussion note 16 *supra*, and consequently is properly considered a government agent. Furthermore, the fourth amendment applies to a resident advisor's actions when done under the direction and

v. Grigel,[42] which pointed out that student resident advisors are employees at state institutions;[43] they are compensated for their services by the state,[44] and their official activities are regulated by the state.[45] Each of these factors was present in *Kappes*.[46] The fact that room inspections are not intended "to collect evidence for criminal proceedings against the student"[47] does not remove the "taint" of governmental authority which will invoke the fourth amendment.[48] The Arizona court should have more closely examined the role of the student resident advisor at the university and concluded, as did *Morale*, that such students are agents of the state.[49] The court did find, however, that even if the inspection did amount to governmental intrusion, it did not violate the fourth amendment because it was not unreasonable.[50] The reasonableness of the search will now be considered.

Reasonableness of the Search

The fourth amendment bars only unreasonable searches.[51] One manner in which a search may be made reasonable is by a valid consent or waiver of fourth amendment rights.[52] Although the *Kappes* court did not explicitly find that the housing agreement signed by the defendant operated as a valid consent,[53] the issue with respect to student housing has been discussed widely elsewhere.[54] It is an important question in the *Kappes* case because,

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authority of the state. *See* discussion notes 16, 30 *supra*. *But see* State v. Wingerd, 40 Ohio App. 2d 236, 318 N.E.2d 866 (1974). The *Wingerd* court, in dictum, stated that residence hall personnel act as private persons when searching dormitory rooms at a state university. *Id.* at 240, 318 N.E.2d at 869. The court relied on State v. Bolan, 27 Ohio St. 2d 15, 271 N.E.2d 839 (1971), which held that a privately employed security officer does not have to give *Miranda* warnings after detaining someone for shoplifting. *Id.* at 20, 271 N.E.2d at 843.

42. 422 F. Supp. 988 (D.N.H. 1976).

43. *Id.* at 996.

44. *Id.*

45. *Id.*

46. *See* discussion note 16 *supra*.

47. 26 Ariz. App. at 570, 550 P.2d at 124.

48. *See* Camara v. Municipal Court, 387 U.S. 523, 530-31 (1967).

49. This would be consistent with decisions by the United States Supreme Court which have held that the actions of building inspectors, Camara v. Municipal Court, 387 U.S. 523, 534 (1967), health inspectors, Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 864 (1974), and Internal Revenue Service agents, Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970), are all governed by the fourth amendment.

50. 26 Ariz. App. at 570, 550 P.2d at 124.

51. *See, e.g.*, United States v. Biswell, 406 U.S. 311, 317 (1972); Wyman v. James, 400 U.S. 309, 318 (1971); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970).

52. Schneckloth v. Bustamonte, 412 U.S. 218, 221-22 (1973). Other situations in which a warrantless search may be made reasonable are "hot pursuit," Warden v. Hayden, 387 U.S. 294, 298-99 (1967), a search incident to an arrest, Agnello v. United States, 269 U.S. 20, 30 (1925) (the search in *Kappes* was not incident to the arrest because it was conducted before an arrest was even contemplated), a search of an automobile where there is probable cause, Chambers v. Maroney, 399 U.S. 42, 50-51 (1970), and where the object to be seized is inadvertently discovered in plain view of an officer who is present where he is allowed to be, Coolidge v. New Hampshire, 403 U.S. 443, 464-70 (1970).

53. The court stated that students "acknowledged" that the university had a right to enter their dormitory rooms for certain purposes. 26 Ariz. App. at 570, 550 P.2d at 124. It is unclear whether this was a finding that students thereby consented to inspections.

54. *See, e.g.*, Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971); Morale v. Grigel, 422 F. Supp. 988, 999 (D.N.H. 1976); Smyth v. Lubbers, 398 F. Supp. 777, 785 (W.D. Mich. 1975).

absent a valid consent, the search would have to be justified on some other basis.

Although the consent issue arose in a different context, *Zap v. United States*[55] presents a problem comparable to that in *Kappes*. In *Zap*, the Court upheld an inspection of company business records by federal agents[56] where consent had previously been obtained as a condition of doing business with the United States Navy.[57] *Kappes*, however, is distinguishable. Although places of business are protected by the fourth amendment,[58] the home has always been afforded greater protection.[59] In justification of lesser protection for some businesses, the Supreme Court has pointed to the special natures of particular businesses[60] and their voluntary existence.[61] More importantly, the fourth amendment was intended primarily to protect the strong interests of privacy in the home.[62] These interests, however, flow not from the home itself, but from the individual's strong expectations of privacy in the home.[63] These same expectations have been held to be present in a student's dormitory room.[64]

The Supreme Court has done much to define the concept of consent since it decided *Zap*.[65] Under the leading case of *Schneckloth v. Bus-*

55. 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1950).

56. *Id.* at 629.

57. *Id.* at 627. The government, however, also had a right to inspect the company records by statute. *Id.* at 626-27.

58. *See* G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977); See v. City of Seattle, 387 U.S. 541, 544-45 (1967). In United States v. Chadwick, — U.S. —, 97 S. Ct. 2476 (1977), the Court rejected a government contention that the fourth amendment only protects the home and interests directly related thereto. *Id.* at —, 97 S. Ct. at 2481.

59. G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977).

60. *Id.* In United States v. Biswell, 406 U.S. 311 (1972), the Court found that the special nature of a gun dealership warranted government intrusions that might otherwise be impermissible. *Id.* at 317. Similarly, in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), the Court held that the government interest in liquor dealers gave Congress the power to establish reasonable inspection procedures for these particular businesses. *Id.* at 77.

61. G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977).

62. *See* United States v. Chadwick, — U.S. —, —, 97 S. Ct. 2476, 2481 (1977). The fourth amendment was largely a result of the colonists' displeasure with the English writs of assistance which were issued by executive and not judicial authority. These writs gave broad powers to customs officials and other agents of the king and were often used to search private residences. *Id.*

63. In Katz v. United States, 389 U.S. 347 (1967), the Court stressed that the "[f]ourth amendment protects people, not places," *id.* at 351, and stated that the amendment may, in some circumstances, provide a constitutionally protected right of privacy in a place accessible to the public. *Id.*

64. *See, e.g.*, Morale v. Grigel, 422 F. Supp. 988, 997 (D.N.H. 1976); Smyth v. Lubbers, 398 F. Supp. 777, 786 (W.D. Mich. 1975); People v. Cohen, 57 Misc. 2d 366, 373, 292 N.Y.S.2d 706, 713 (Nassau County Ct. 1968). In *Cohen*, it was stated:

> University students are adults. The dorm is a home and it must be inviolate against unlawful search and seizure. To suggest that a student who lives off campus in a boarding house is protected but that one who occupies a dormitory room waives his Constitutional liberties is at war with reason, logic and law.

Id.

65. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (a consent must be voluntary as determined by examining the totality of all the circumstances); Frazier v. Cupp, 394 U.S. 731, 740 (1969) (a joint user of a duffel bag could validly consent to its search); Stoner v. California, 376 U.S. 483, 490 (1964) (a hotel keeper may not consent to the search of a guest's room).

tamonte,[66] a valid consent is one which is given voluntarily.[67] It would be unrealistic to construe Kappes' consent to room inspections as voluntary. Although Northern Arizona University does not require its students to live in a university dormitory,[68] the scarcity of off-campus housing may have that effect.[69] To live in a dormitory a student must sign a housing agreement[70] which, by reference, includes a regulation which allows the university to inspect dormitory rooms. Thus, as a condition to living in a dormitory and possibly to attending the university,[71] a student is required to consent to an inspection of his living quarters. Under all the circumstances,[72] a consent thus obtained results from a gross inequality of bargaining position and cannot realistically be called a voluntary consent. Not only is the blanket consent so obtained involuntary, but the university has no authority to demand the consent as a condition to the procurement of housing which, for many, is necessary to attend the university. Since the consent takes the form of the housing agreement which provides for searches absent the protection of a warrant, the student is effectively forced to waive his constitutional right to such protection. Therefore, the benefit of being educated at a state university is conditioned upon a waiver of fourth amendment rights. Such a coerced waiver is not valid.[73]

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66. 412 U.S. 218 (1973).

67. *Id.* at 222. This does not mean, however, that the person must know of his or her constitutional right to refuse to consent. This knowledge or lack thereof is only one of the various factors, particular to the situation, which will shed light on whether the consent was voluntary or not. *Id.* at 227.

In order to be voluntary, a search may not be coerced. In the context of searches for criminal evidence, a court should look at the totality of the circumstances to see if the consent was "essentially a free and unconstrained choice." *Id.* at 225. Under this standard, the consent in *Kappes* seems involuntary. *See* text & notes 68-73 *infra*. *But cf.* United States v. Thriftimart, Inc., 429 F.2d 1006, 1009 (9th Cir. 1970) (coercion may be more difficult to establish when the inspection is administrative; this may be true even when evidence found during the inspection leads to a criminal conviction).

68. Students are not required to live in a dormitory at Northern Arizona University unless the student is less than 18 years of age. Northern Arizona University General Catalog 1975-77, at 9. A university may, however, require a student to live in a university dormitory. Pratz v. Louisiana Poly. Univ., 316 F. Supp. 872, 885 (W.D. La. 1970), *aff'd*, 401 U.S. 1004 (1971). *See also* Cooper v. Nix, 496 F.2d 1285, 1287 (5th Cir. 1974) (state university regulation that only students over the age of 23 were permitted to live off campus was invalidated with regard to students aged 21 to 22 as having no rational basis). If Kappes had been less than 18 years old, it is arguable that the university could have exercised a greater degree of control over her. *See* Smyth v. Lubbers, 398 F. Supp. 777, 785-86 (1975). Cases involving searches at high schools would be somewhat analogous. *See, e.g.*, Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971); State v. Mora, 330 So. 2d 900 (La. 1976), *cert. denied*, 429 U.S. 1004 (1977). To the extent, however, that the high school cases rely on the in loco parentis doctrine to validate an otherwise illegal search, they may not be valid authority. *See* Picha v. Wielgos, 410 F. Supp. 1214, 1218 (N.D. Ill. 1976); text & notes 34-40 *supra*.

69. Northern Arizona University General Catalog 1975-77, at 9.

70. *See* Housing Agreement, Northern Arizona University (on file in the offices of the *Arizona Law Review*).

71. A student who is not able to find suitable off-campus housing and who is unwilling to submit to dormitory inspections would not be able to attend the university.

72. Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).

73. A more extensively treated problem has often arisen when a college education is conditioned upon the waiver of first amendment rights. At one time a college education at a state university was classified as a privilege and not a right and states were permitted to demand a waiver of first amendment rights in exchange for the privilege of a college education. *See*

A state does possess certain interests, however, which may render some non-consensual inspection procedures reasonable. Perhaps the most frequently cited case confirming a governmental right of inspection is *United States v. Biswell*.[74] The Court in *Biswell* upheld a federal statutory right of Internal Revenue Service agents to enter a federally licensed gun dealer's storeroom for inspection purposes.[75] Comparing that inspection procedure to a search conducted pursuant to a warrant, the Court stated:

> In neither case does the lawfulness of the search depend on consent; in both, there is lawful authority independent of the will of the householder who might, other things being equal, prefer no search at all. . . . [T]he legality of the search depends not on consent but on the authority of a valid statute.[76]

The *Biswell* Court reasoned that the federal interests furthered by the inspection procedure overcame the privacy interests of the licensed gun dealer and, therefore, the particular procedure, as authorized by statute, was not unreasonable under the fourth amendment.[77]

Steier v. New York State Educ. Comm., 271 F.2d 13, 16-17 (2d Cir. 1959). Courts eventually rejected that argument and have since held that a state may not condition the granting of an education on a waiver of first amendment rights. *See, e.g.*, Papish v. Board of Curators, 410 U.S. 667, 669-70 (1973); Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969); Soglin v. Kauffman, 295 F. Supp. 978, 990 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969). *See generally* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). It is irrelevant whether an education is seen as a right or a privilege. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 156 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 754 n.14 (W.D. La. 1968); *cf.* Graham v. Richardson, 403 U.S. 365, 374 (1971) (Arizona could not deny aliens welfare benefits); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969) (state could not require one-year residency before conferring welfare benefits). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). *But cf.* Arnett v. Kennedy, 416 U.S. 134, 153-55 (1974) (plurality of three held that in granting the privilege of government employment, the government may also prescribe the procedure by which that privilege may be taken away even if that procedure would not otherwise comport with due process). This does not mean that an educational institution may not impose some reasonable restrictions on first amendment rights when those restrictions are closely related to its educational function. *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 509 (1969). Under similar reasoning, it has been held that consent provisions in dormitory housing forms are coerced and therefore ineffective because they condition the granting of an education on a waiver of fourth amendment rights. *See, e.g.*, Piazzola v. Watkins, 442 F.2d 284, 289-90 (5th Cir. 1971); Morale v. Grigel, 422 F. Supp. 988, 999 (D.N.H. 1976); Smyth v. Lubbers, 398 F. Supp. 777, 788-89 (W.D. Mich. 1975); People v. Cohen, 57 Misc. 2d 366, 292 N.Y.S.2d 706, 707 (Nassau County Ct. 1968); Bible, *The College Dormitory Student and the Fourth Amendment—A Sham or a Safeguard?*, 4 U.S.F.L. REV. 49, 53-54 (1969). *But see* Wyman v. James, 400 U.S. 309 (1971), in which the Court upheld a New York welfare statute which required a potential beneficiary to submit to in-home visits by a social worker before benefits would be conferred. *Id.* at 326. It is arguable that the statute required the beneficiary to relinquish certain fourth amendment rights as a condition to obtaining a government benefit. *Id.* at 327-38 (Douglas, J., dissenting). For a discussion of *Wyman*, see text & notes 84-92 *infra*. Similarly, administrative disciplinary proceedings at state universities must conform to the due process requirements of the fourteenth amendment. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158-59 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Smyth v. Lubbers, 398 F. Supp. 777, 795-97 (W.D. Mich. 1975); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 758 (W.D. La. 1968). *See generally* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1059-89 (1969).

74. 406 U.S. 311 (1972).

75. *Id.* at 317.

76. *Id.* at 315.

77. *Id.* at 317. The government interests in the regulation of firearms are evidenced by the history of regulation to prevent violent crime and to assist the states in regulating firearms traffic. *Id.* at 315.

The Court in *Biswell* relied on *Colonnade Catering Corp. v. United States*,[78] in which a statute making it a crime for a federally licensed liquor dealer to refuse to allow the inspection of his premises by an authorized inspector was upheld.[79] The *Colonnade* Court reasoned that the important public interest[80] in the regulation of liquor dealers, coupled with the long history of such regulation, gave Congress "broad authority to fashion standards of reasonableness for searches and seizures"[81] in the liquor industry.[82] However, since both *Colonnade* and *Biswell* dealt with inspections of certain businesses, it may be argued that those cases do not control searches of dormitory rooms which more closely resemble homes than businesses.[83] Nevertheless, the Supreme Court has implicitly applied a similar line of reasoning to what may be called a home search. In *Wyman v. James*,[84] the Court upheld a statute requiring a potential welfare beneficiary to submit to an in-home visit by a social worker before benefits would be conferred.[85] The Court refused to call the visit a search, but said that even if it were a search, it was reasonable.[86] Because the case involved a mother who was receiving welfare payments to aid in the care of her child,[87] the *Wyman* Court reasoned that the state's interests in how its money was being spent[88] and in the well-being of the child[89] were sufficient to overcome the

78. 397 U.S. 72 (1970); *see* 406 U.S. at 313. *See also* State v. Wybierala, 305 Mich. 455, 459-60, 235 N.W.2d 197, 199-200 (1975) (upholding an ordinance providing for the warrantless inspection of pawnbrokers as a reasonable exercise of the police power).

79. 397 U.S. at 77.

80. The government's interest in the regulation of the liquor industry is protecting tax revenue from fraud. *Id.* at 75.

81. *Id.* at 77.

82. *Id. Biswell* and *Colonnade*, however, had dramatically different results, and *Biswell* may in fact have severely limited *Colonnade. See* text & notes 100-02 *infra*. For a general discussion of business inspections, see Note, *Administrative Searches and the Implied Consent Doctrine: Beyond the Fourth Amendment*, 43 BROOKLYN L. REV. 91 (1976). *See also* Barlow's Inc. v. Usery, 424 F. Supp. 437 (D. Idaho 1976). *Barlow's* held that the Occupational Safety and Health Act of 1970, § 8(a), 29 U.S.C. § 657(a) (1970), which provides for reasonable warrantless inspections of plants subject to the Act, was unconstitutional as violative of the fourth amendment. 424 F. Supp. at 442. A federal inspector had sought entry to Barlow's plant. Barlow refused to admit him because he did not have a search warrant. The inspector obtained a court order demanding that Barlow admit him. Barlow sought and obtained a permanent injunction enjoining the Act on the grounds that it was unconstitutional. *Id.* at 438-39. The court reasoned that Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), were applicable and that *Biswell* and *Colonnade* were distinguishable as Barlow's business was not part of "an industry long subject to close supervision and inspection." 424 F. Supp. at 440. The United States Supreme Court noted probable jurisdiction on April 14, 1977, Marshall v. Barlow's, 430 U.S. 964 (1977). The Court heard oral arguments on January 9, 1978, 46 U.S.L.W. 3445. The Solicitor General, arguing for the government, contended that an employer, by opening up the place of employment to employees, had precluded himself from making a claim of privacy with respect to the place of employment that would be protected by the fourth amendment. *Id.* Barlow's attorney argued that the situation was controlled by *Camara* and *See* and that a warrant based on probable cause and issued by a magistrate would be necessary to conduct an inspection. *Id.*

83. *See* text and notes 58-64 *supra*.

84. 400 U.S. 309 (1971).

85. *Id.* at 326.

86. *Id.* at 317.

87. *Id.* at 318.

88. *Id.* at 313.

89. *Id.* at 318.

fourth amendment rights of the mother.[90] The Court also pointed out that the procedure followed by the welfare department in visiting the beneficiary's home was reasonable[91] and amounted only to a minimal invasion of the mother's fourth amendment rights.[92]

By analogy, an argument can be made that a state university may set up a reasonable inspection procedure to further the state's significant interests in the educational environment of its universities[93] and in the protection of its own property.[94] A major distinction, however, is that the intrusions in

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90. *Id.*

91. *Id.* at 322.

92. *Id.* For a criticism of Smyth v. Lubbers, 398 F. Supp. 777, 786-88 (W.D. Mich. 1975) (holding that a warrantless search of a student's dormitory room at a state university for criminal evidence to be used in an administrative proceeding violated the fourth amendment), in light of *Wyman*, see Note, *The Legality of University-Conducted Dormitory Searches for Internal Disciplinary Purposes*, 1976 DUKE L.J. 770, 781-87.

93. *See, e.g.*, Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971); Morale v. Grigel, 422 F. Supp. 988, 997-98 (D.N.H. 1976); Smyth v. Lubbers, 398 F. Supp. 777, 789-90 (W.D. Mich. 1976); Moore v. Student Affairs Comm., 284 F. Supp. 725, 729-31 (M.D. Ala. 1968). It is unclear what falls within the state's interest in the educational environment of its universities. For instance, the court in *Morale* decided that a dormitory search for property stolen from a university dormitory resident was not designed to further an educational interest. 422 F. Supp. at 998. In *Smyth;* it was held that the use of illegal drugs did not have a sufficiently serious impact on a university's educational environment to justify extraordinary means to enforce drug laws. 398 F. Supp. at 790. The courts, however, do recognize that limited safety and health inspections of dormitory rooms are lawful. *See, e.g.*, Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971); Morale v. Grigel, 422 F. Supp. 988, 997-98 (D.N.H. 1976); Moore v. Student Affairs Comm., 284 F. Supp. 725, 729 (M.D. Ala. 1968); *cf.* Smyth v. Lubbers, 398 F. Supp. 777, 785 (W.D. Mich. 1976) (holding a particular search illegal but distinguishing the search from a health or safety inspection).

94. *See* Morale v. Grigel, 422 F. Supp. 988, 998 (D.N.H. 1976). At common law, a tenant had an absolute right to possession of the leased premises, and the landlord could only inspect the premises pursuant to a specific agreement in the lease. *See* Note, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79, 123 (1974). Most leases had such a clause. *Id.* The landlord's right of access is now recognized by statute in Arizona. ARIZ. REV. STAT. ANN. § 33-1343 (1974). The statute's provisions, however, do not apply to universities. ARIZ. REV. STAT. ANN. § 33-1308 (1974). *But see* Van Alstyne, *The Student as University Resident*, 45 DEN. L. REV. 582 (1968). Professor Van Alstyne argues that there is no distinction between the government as landlord and the government performing traditional governing functions and that consequently the university should have no power of inspection. Professor Van Alstyne fears that any rationale allowing inspection of university dorms could be expanded to allow similar inspections in government housing projects which would seriously jeopardize fourth amendment rights. *Id.* at 588.

Despite the courts' acquiescence to university assertions of educational and property interests sufficient to override the warrant requirement, *see, e.g.*, Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971); Morale v. Grigel, 422 F.2d 988, 997-98 (D.N.H. 1976); Smyth v. Lubbers, 398 F. Supp. 777, 789-90 (N.D. Mich. 1976); Moore v. Student Affairs Comm., 284 F. Supp. 725, 729-31 (W.D. Mich. 1976), it is questionable whether these interests are best served in this manner. Property interests could be served by inspecting the dormitory rooms after the student leaves and withholding transcripts until all damages are paid. Although health, safety, and educational interests could not be served in this manner, it is unclear how these interests are so much more compelling than the health and safety interests in Camara v. Municipal Court, 387 U.S. 523, 533 (1967), so as to require a warrant in the latter and not the former. Of course, the decision in Wyman v. James, 400 U.S. 309 (1971), argues against requiring a warrant here. *See* text & notes 84-92 *supra*. On one hand, it could be argued that the university inspection is a friendly visit by dorm officials in an effort to maintain the educational atmosphere of the dorms and, thus, is similar to the situation described in *Wyman*. *See* 400 U.S. at 323. On the other hand, the inspections at universities are similar to *Camara* to the extent that they are directed toward violations of dormitory rules and health and safety hazards. *See* Camara v. Municipal Court, 387 U.S. at 533. It should also be noted that both *See* and *Camara* emphasized that it was a criminal violation not to admit the inspectors. See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. at 525. This point was again stressed in *Wyman*. *See* 400 U.S. at 325. Anomalously, even if a warrant were required, it is arguable that students at

Wyman, Colonnade, and *Biswell* were all authorized by statutes,[95] while the university inspection procedures appear to be only internal rules of the university.[96] Although the Supreme Court has stated in dictum that a university may implement rules and regulations to protect its legitimate interests,[97] it is questionable whether that power should extend to situations where the rules infringe on the outer boundaries of constitutional rights.[98] When states have so infringed in other situations, the Supreme Court has generally required a compelling state interest as justification.[99] In any event, it would seem that courts would be more likely to defer to the express judgment of the state legislature than to the judgment of a university administrator.[100] Nevertheless, the courts have unanimously recognized that state universities may set up reasonable inspection procedures.[101] The only

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Northern Arizona University would have less protection than they do now. Northern Arizona University now posts notice of inspection 24 hours in advance. *See* text accompanying note 17 *supra*. Warrants do not require such notice. Interestingly, notice of inspection was required by statute in *Wyman*. 400 U.S. at 320. Indeed, it is arguable that if warrants similar to those required by *Camara* and *See* were required for dormitories, they would be issued rotely and in reality offer little protection. See v. City of Seattle, 387 U.S. at 554 (Clark, J., dissenting).

95. *See* United States v. Biswell, 406 U.S. 311, 311-12 (1972); Wyman v. James, 400 U.S. 309, 311 (1971); Colonnade Catering Corp. v. United States, 397 U.S. 72, 73 (1970).

96. *See* discussion note 5 *supra*.

97. "[A] college has the inherent power to promulgate rules and regulations; . . . it has the inherent power to discipline; . . . it has power appropriately to protect itself and its property; . . . it may expect that its students adhere to generally accepted standards of conduct." Healy v. James, 408 U.S. 169, 192 (1972), *quoting* Esteban v. Central Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). Justice Rehnquist concurred in *James*, stating: "The government as . . . school administrator may impose . . . on students reasonable regulations that would be impermissible if imposed by the government on all citizens." *Id.* at 203.

98. In Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968), the court found that a university rule authorizing dormitory searches was valid despite the fact that it arguably intruded on peripheral fourth amendment rights. *Id.* at 729. Other courts, however, have sustained inspection rules because they are reasonable and thus do not infringe at all upon the fourth amendment. *See* Piazzola v. Watkins, 442 F.2d 284, 287-89 (5th Cir. 1971); Morale v. Grigel, 422 F. Supp. 988, 998 (D.N.H. 1976) (both *Piazzola* and *Morale* invalidated the particular searches but nevertheless reasoned that the inspection rules were valid); *cf.* Picha v. Wielgos, 410 F. Supp. 1214, 1220-21 (N.D. Ill. 1976) (search for contraband in high school did not meet the fourth amendment standard of reasonableness when police became involved at the inception of the search).

99. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (state needs compelling state interest to limit a woman's fundamental right to an abortion); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (state failed to show compelling state interest to justify statute which denied welfare assistance to persons who had not resided in the state for at least one year). Court decisions which have discussed university inspection procedures, however, do not speak of compelling state interests or any similar term in finding the procedures lawful. Instead, they speak of the reasonableness of the inspections, perhaps alluding to the fact that the fourth amendment prohibits only unreasonable searches. *See, e.g.*, Piazzola v. Watkins, 442 F.2d 284, 287 (5th Cir. 1971); Morale v. Grigel, 422 F. Supp. 988, 997-98 (D.N.H. 1970); Moore v. Student Affairs Comm., 284 F. Supp. 725, 729-31 (M.D. Ala. 1968). *But see* Picha v. Wielgos, 410 F. Supp. 1214, 1220 (N.D. Ill. 1976) (the compelling state interest in education will permit certain limited searches of high school students by school authorities).

100. *Cf.* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (ordinance which gave city commissioner wide discretion to prohibit parades and demonstrations violated the first amendment because the ordinance did not establish sufficiently narrow standards to guide the commission). *But see* Tinker v. Des Moines School Dist., 393 U.S. 503, 509 (1969) (the state in the person of school officials may prohibit certain expression by students, if they have reason to anticipate that the expression would substantially interfere with the education of other students).

101. *See* discussion notes 93-94 *supra*.

qualification on this right has been that the inspections may not be a subterfuge to uncover evidence for use in a criminal trial.[102]

Northern Arizona University's inspection procedure, as presented to the *Kappes* court,[103] appears to be reasonable under the fourth amendment and the cases discussed above. The inspection, which was provided for by a university rule,[104] followed a notice posted twenty-four hours in advance[105] and was apparently limited to a cursory visual inspection of the room.[106] Thus, it seems that under the broad doctrine of *Biswell, Colonnade*, and especially *Wyman*, a reasonable inspection procedure, such as the one employed by Northern Arizona University, is lawful.[107] Given the legitimacy of the initial inspection, the authority of the student resident advisors to admit police officers still must be established.

Authority of Student Resident Advisors to Admit Law Enforcement Officers

The *Kappes* court held, without citing any authority, that the advisors could admit police officers into a dormitory room where marijuana had been found inadvertently during a lawful inspection.[108] If a state university is, in fact, in loco parentis to its students, this holding would arguably follow, as the university could be said to have taken on the private role of parents and,

102. *See, e.g.*, Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971); Morale v. Grigel, 422 F. Supp. 988, 998 (D.N.H. 1976); Smyth v. Lubbers, 389 F. Supp. 777, 786-87 (W.D. Mich. 1975). The *Kappes* court appeared to ignore the fact that student resident advisors were trained to recognize contraband and to immediately report it to their supervisors. See text & note 16 *supra*. If the search was, in fact, directed toward finding evidence for a criminal trial as well as for health, safety, and educational reasons, it is arguable that the inspection procedure had become irreparably tainted with an unreasonable function.

103. See discussion note 5 *supra*.

104. *See* text & notes 11-15 *supra*.

105. *See* text & note 17 *supra*.

106. The inspection appears to be limited because a "search authorization" is needed for any more penetrating search. *See* discussion note 22 *supra*.

107. It is also possible to read the alternative holding in *Kappes*, see text & notes 32-33 *supra*, to say that Kappes had no reasonable expectation of privacy. The opinion speaks of the routineness of the inspections and the fact that Kappes had advance notice of the inspection. 26 Ariz. App. at 570, 550 P.2d at 124. The court may be implying that Kappes had no subjective expectation of privacy—a person in her position could not reasonably expect privacy from inspections in her dormitory room. *Cf.* Katz v. United States, 389 U.S. 347, 361 (1976) (Harlan, J., concurring) (the fourth amendment protects a person when that person has a subjective expectation of privacy and when society recognizes that expectation as reasonable). A person's subjective expectation of privacy, however, is not the test. Smyth v. Lubbers, 398 F. Supp. 777, 786 (W.D. Mich. 1975). The fallacy of the subjective expectation of privacy test was exposed in United States v. Davis, 482 F.2d 893 (9th Cir. 1973):

> The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped, or that all homes would be searched. . . . In none of the Supreme Court decisions excluding searches or seizures from the Fourth Amendment on the authority of *Katz* was the result based on such a rationale. Rather, in each case the individual's alleged reasonable expectation of privacy was negated on some ground independent of the frequency of the challenged intrusion itself.

Id. at 905. Similarly, the facts that the university announced that it would inspect, and that it had inspected on previous occasions, would not be sufficient, standing alone, to make the inspections reasonable searches under the fourth amendment.

108. *See* text & note 31 *supra*.

as such, could consent to a police search of a student's room.[109] Since the in loco parentis doctrine no longer applies in the university setting,[110] however, the *Kappes* holding, to the extent it relies on the advisors being private persons, is not supportable.[111] Contrary to the *Kappes* holding, therefore, this discussion will assume that student resident advisors act as government agents, rather than as private persons, when they inspect dormitory rooms.

Although there is some support for prohibiting the seizure of contraband inadvertently found in plain view during a lawful inspection,[112] the better reasoned view appears to be that the contraband may also be seized.[113] It would be anomalous, indeed, if the fourth amendment would permit the intrusion but prohibit the consequences.[114] However, it does not necessarily follow that once contraband has been found, police may also be admitted to the room.[115] An analogous case is *United States v. Green*.[116] In *Green*, firemen had extinguished a fire in an apartment while the occupant

109. *Cf.* United States v. Deprima, 472 F.2d 550, 551 (1st Cir. 1973) (parent may consent to the search of a room of a minor child living at home); People v. Overton, 20 N.Y.2d 360, 362-63, 229 N.E.2d 596, 597-98, 283 N.Y.S.2d 22, 24-25 (1967), *vacated and remanded*, 393 U.S. 85 (1968), *original judgement aff'd*, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 522 (1969) (high school principal may consent to search of student's locker because of the special relationship between students and school authorities). *But see* cases cited note 40 *supra*.

110. *See* text & note 39 *supra*.

111. *See* text & notes 34-50 *supra*. If, however, private persons had in fact conducted the inspection, they would not have been able to admit the police officers. Stoner v. California, 376 U.S. 483, 489 (1964) (hotel keeper may not consent to a police search of a guest's room); Chapman v. United States, 365 U.S. 610, 611-12 (1961) (landlord may not consent to a search of tenant's rented house). In Krauss v. Superior Court, 5 Cal. 3d 418, 487 P.2d 1023, 96 Cal. Rptr. 455 (1971), a hotel maid, who had previously attended a seminar on drugs taught by police, discovered a substance she recognized as marijuana in a guest's room. The maid told the hotel manager of her discovery, whereupon he called the police. It was held that the maid and the manager could not admit police even though the maid had discovered contraband in open view. *Id.* at 422, 487 P.2d at 1026, 96 Cal. Rptr. at 458.

112. *Cf.* Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1972) (inspecting officers who were specifically authorized by statute to inspect were not allowed to seize contraband found during a forcible entry). *But see* Biswell v. United States, 406 U.S. 311, 317 (1972) (seizure was allowed under a statute and situation similar to that in *Colonnade*). *Biswell*, in this regard, appears to have overruled *Colonnade*. *See id.* (Blackmun, J., concurring); *id.* at 318 (Douglas, J., dissenting). The specific issue here, whether government inspectors may seize contraband found inadvertently in an administrative inspection, was raised but not answered in Wyman v. James, 400 U.S. 309, 323 (1971). Contraband may be seized when it is found in plain view by police officers in a place where they may legitimately be. Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).

113. *See* United States v. Biswell, 406 U.S. 311, 314 (1972) (despite the fact that a federal statute only allowed for inspection, a subsequent seizure was not barred by the fourth amendment).

114. Commentators on Wyman v. James, 406 U.S. 309 (1971), see text & notes 84-92 *supra*, have noted that this must be the result. Note, *Constitutional Law—Search and Seizure—Administrative Investigations of Welfare Recipients*, 22 CASE L. REV. 580, 588 (1971); Note, *Wyman v. James, Welfare Home Visits and a Strict Construction of the Fourth Amendment*, 66 NW. L. REV. 714, 732 n.88 (1972).

115. Resident advisors may not delegate their right of entry to the police. Commonwealth v. McCloskey, 217 Pa. Super, 432, 436, 272 A.2d 271, 273 (1970); People v. Cohen, 57 Misc. 2d 366, 369, 292 N.Y.S.2d 706, 709 (Nassau County Ct. 1968). To allow them to do so would create a presumption that the inspection is directed toward criminal evidence and would, therefore, violate the fourth amendment. *See* text & note 102 *supra*. It is, therefore, at least arguable that the resident advisors should not be able to admit police even after they have found contraband.

116. 474 F.2d 1385 (5th Cir.), *cert. denied*, 414 U.S. 829 (1973); *see* United States v. Brand, 556 F.2d 1312, 1317 (5th Cir. 1977) (once an individual's fourth amendment interest has been legally invaded by a government official, that official may admit other government officials to the extent of the initial intrusion).

was not at home.[117] A fire marshall entered the apartment to ascertain the cause of the fire and to ensure that the fire would not break out again.[118] He determined that the fire had started by spontaneous combustion in a box containing greasy rags and counterfeiting plates.[119] Upon discovering the plates, the fire marshall called the Secret Service and admitted an agent into the apartment.[120] The court could find no privacy interests that would have been served by requiring the Secret Service to get a warrant since the marshall was authorized by statute to make searches and seizures.[121] It was therefore held that the warrantless seizure by the Secret Service of the counterfeiting plates was lawful.[122]

It may be argued that, under *Green*, the student resident advisors could admit police to seize contraband that had been found in plain view. Although Kappes undoubtedly would have still felt that a legitimate subjective privacy interest[123] of hers had been invaded, it is doubtful that society would recognize that interest.[124] The intrusion had already occurred and the contraband had been found; the results would be the same whether it was the police or the resident advisors who seized the contraband.[125] To require a warrant after the contraband had already been lawfully discovered by government agents would be an unjustifiable bow to formality.[126]

There is, however, the possibility that the inspection procedures at some universities may in fact be a subterfuge to find evidence for criminal proceedings.[127] This fact must be balanced against the legitimate need of the university to inspect its dormitory rooms.[128] A possible solution would be to allow any evidence found during the inspections to be used in internal university disciplinary proceedings, but not in a criminal trial.[129] This

117. United States v. Green, 474 F.2d 1385, 1386 (5th Cir.), *cert. denied*, 414 U.S. 829 (1973).
118. *Id.* at 1388.
119. *Id.* at 1386-87.
120. *Id.*
121. *Id.* at 1389.
122. *Id.* at 1390; *accord*, Steigler v. Anderson, 496 F.2d 793, 797 (3d Cir.), *cert. denied*, 419 U.S. 1002 (1974). It is important to note that the fire marshall has a right of entry only immediately after the fire. People v. Tyler, 399 Mich. 564, 583, 250 N.W.2d 467, 477 (1977).
123. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). See discussion note 107 *supra*.
124. *See, e.g.*, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); Steigler v. Anderson, 496 F.2d 793, 797 (3d Cir.), *cert. denied*, 419 U.S. 1002 (1974); United States v. Green, 474 F.2d 1385, 1390 (5th Cir.), *cert. denied*, 414 U.S. 829 (1973).
125. *See* United States v. Green, 474 F.2d 1385, 1390 (5th Cir.), *cert. denied*, 414 U.S. 829 (1973).
126. *Id.*
127. *Cf.* Note, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521, 537-38 (1968) (there is a danger that housing inspectors may work surreptitiously in conjunction with police). Such an inspection would probably be unconstitutional. *See* text & note 102 *supra*.
128. See text & notes 93-94 *supra*.
129. This has been suggested in the context of housing code inspections. *See* Note, *supra* note 127. This, however, would demand an extension of the exclusionary rule. See discussion note 30 *supra*. The purpose of the exclusionary rule is to deter similar future unconstitutional conduct. *See id.* The irrebuttable presumption here would be that the inspectors had acted in bad faith; *i.e.*, they were searching for criminal evidence. It is doubtful that the present United States Supreme Court would be willing to expand the exclusionary rule in this manner. *See id.*

solution has implicitly been employed by most courts which have found dormitory searches to be illegal; the evidence has been suppressed for use in a criminal trial and yet has been allowed in disciplinary proceedings.[130] This would be consistent with a university's educational goals and at the same time would enable it to effectively protect its property.[131] It has been suggested that a similar solution might be effective when university regulations conflict with student's first amendment rights.[132] An administrative disciplinary sanction could serve the legitimate interests of the university and yet avoid inflicting the arguably greater criminal punishment.[133]

Conclusion

Administrative inspections of dormitory rooms at state universities appear to be lawful as long as they are designed to serve legitimate state interests such as protecting state property and providing an educational atmosphere for university students. If, however, the inspection is designed to uncover criminal evidence, it probably violates the fourth amendment. The validity of inspection procedures is not limited to situations where consent has been given or a warrant has been issued; rather, the procedures also may be valid because they are reasonable, and the fourth amendment prohibits only unreasonable searches. If during a lawful inspection, contraband is inadvertently discovered, there appear to be no recognizable privacy interests to be served by requiring a warrant, and the inspectors may either seize the contraband for use in a criminal trial, or they may admit police officers who may likewise seize it.

130. *See* Morale v. Grigel, 422 F. Supp. 988, 1001 (D.N.H. 1976); Moore v. Student Affairs Comm., 284 F. Supp. 725, 730 (M.D. Ala. 1968). *Contra*, Smyth v. Lubbers, 398 F. Supp. 777, 795 (W.D. Mich. 1975). Nevertheless, it is arguable that admitting illegally seized evidence at disciplinary hearings would be violative of due process. *See* discussion note 22 *supra*. It should be remembered, however, that the United States Supreme Court has thus far refrained from applying the exclusionary rule to civil proceedings. *See* United States v. Janis, 428 U.S. 433, 447 (1976). *But cf.* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701-02 (1965) (applying the exclusionary rule to a forfeiture proceeding where the forfeiture was a penalty for a criminal offense).

131. This assumes that the use of the evidence in the disciplinary proceeding furthers the university's educational goals and its interest in its property. Despite courts' acquiescence to university asserted interests and the procedures that serve them, it is at least arguable that less obnoxious methods might be equally effective. *See* discussion note 94 *supra*.

132. "[T]here can be a constitutional distinction between the infliction of criminal punishment, on the one hand, and imposition of milder administrative or disciplinary sanctions, on the other, even though the same First Amendment interest is implicated by each." Healy v. James, 408 U.S. 169, 203 (1972) (Rehnquist, J., concurring in the result).

133. One court, however, has indicated that the university imposed sanction may often be of much greater magnitude and effect than that imposed by a criminal court for a similar offense. Smyth v. Lubbers, 398 F. Supp. 777, 794 (W.D. Mich. 1975). For instance, under 21 U.S.C. § 844(b)(1) (1970), a federal court may place a first-time offender of marijuana laws on probation and eventually dismiss the charges. If a university, however, suspends a student for a similar offense, that student's education may be considerably delayed and the student may find himself evicted from his lodgings and separated from normal student society. 398 F. Supp. at 787-88.

B. CONFESSIONS OBTAINED BY DECEPTION: VOLUNTARINESS AND TRUSTWORTHINESS—WHICH STANDARD TO CHOOSE?

A criminal suspect's confession is not necessarily rendered inadmissible merely because it was obtained by police deception;[1] rather, the court generally must consider the totality of circumstances surrounding the acquisition of the confession in deciding whether to admit or exclude the incriminating statement.[2] In *State v. Denny*,[3] the Arizona Court of Appeals excluded a voluntary confession obtained through police trickery from use as either impeachment or substantive evidence.[4] In doing so, the court, in a somewhat puzzling opinion, appeared to fashion its own standard of admissibility based on the trustworthiness of the confession.

After a review of the facts and holding in *Denny*, this casenote will examine the standards used for excluding confessions generally and will trace the development of those standards by the United States Supreme Court. The admissibility of confessions obtained by trickery and deception will then be considered and followed by an analysis of the standards the court adopted in *Denny*. The apparent ambiguity of the court's reasoning will be discussed, as will the possible bases of the court's decision to exclude the confession. A more recent decision by the same court, *State v. Winters*,[5] will also be examined to assist in analyzing the law established by the *Denny* court.

Cynthia Denny was arrested for the shooting of her husband and was taken to the police station for questioning shortly after the incident. In response to her continuously expressed concern about her husband's condition, she was advised by one of the police officers that "he was going to be all right and was going to make it," when in fact the officer had already been informed that Gary Denny had died.[6] The admissibility of Ms. Denny's subsequent confession was at issue before the court of appeals.[7]

1. People v. Arguello, 65 Cal. 2d 768, 775, 423 P.2d 202, 206, 56 Cal. Rptr. 274, 278 (1967); People v. Connely, 195 Cal. 584, 597, 234 P. 374, 379 (1925); People v. Pereira, 26 N.Y.2d 265, 268-69, 258 N.E.2d 194, 195, 309 N.Y.S.2d 901, 904 (1970); People v. Everett, 10 N.Y.2d 500, 507, 180 N.E.2d 556, 559, 225 N.Y.S.2d 193, 197-98 (1962); State v. Oakes, 19 Or. App. 284, 290, 527 P.2d 418, 422 (1974); State v. Braun, 82 Wash. 2d 157, 161, 509 P.2d 742, 745 (1973).
2. *See* Frazier v. Cupp, 394 U.S. 731, 739 (1969); State v. Oakes, 19 Or. App. 284, 291, 527 P.2d 418, 422 (1974).
3. 27 Ariz. App. 354, 555 P.2d 111 (1976).
4. *Id.* at 357, 555 P.2d at 114.
5. 27 Ariz. App. 508, 556 P.2d 809 (1976).
6. 27 Ariz. App. at 357, 555 P.2d at 114.
7. *Id.* at 356, 555 P.2d at 113.

The trial court held a voluntariness hearing and found the confession to be voluntary.[8] Admitting that there was no *Miranda* violation,[9] the court concluded Ms. Denny was in full possession of her mental faculties.[10] Due to the police misrepresentation, however, the trial judge ruled the confession inadmissible for the state's case in chief for "public policy reasons."[11] Nevertheless, the confession was admitted for impeachment purposes under the authority of *Harris v. New York*.[12] Ms. Denny was convicted of voluntary manslaughter.[13]

The Arizona Court of Appeals rejected the trial court's use of the *Harris* doctrine in this situation and held the confession inadmissible for all purposes.[14] Although acknowledging that the confession was voluntary, the court felt it did not meet the legal standards of trustworthiness required by *Harris* and was, therefore, inadmissible.[15] The court's holding seems to establish a standard of admissibility for confessions based on reliability[16] rather than voluntariness. While reliability has always been one factor to be considered in the determination of voluntariness,[17] there is language in recent cases which suggests that, for purposes of the United States Constitution, reliability alone cannot be determinative in admitting a confession into evidence.[18]

Admissibility of Confessions Generally

There was no doctrine at early common law[19] by which self-incriminating statements were excluded from evidence; confessions of guilt were

8. *See id.* at 357, 555 P.2d at 114. There is some confusion as to the meaning of this ruling. *See* text & notes 73-77 *infra*. The Court in Jackson v. Denno, 378 U.S. 368 (1964), decided that the voluntariness of a confession should be determined in a proceeding separate and apart from the body trying guilt or innocence, so as not to unfairly bias that body's decision-making ability. *See id.* at 394; *accord*, State v. Owen, 96 Ariz. 274, 277, 394 P.2d 206, 208 (1964).

9. Miranda v. Arizona, 384 U.S. 436 (1966). The Court in *Miranda* held that the privilege against self-incrimination extended to police interrogation, and established certain procedural safeguards as prerequisites to the use of incriminating statements as evidence in a criminal trial.

10. 27 Ariz. App. at 357, 555 P.2d at 114.

11. Trial Transcript, Vol. V, at 157, State v. Denny, 27 Ariz. App. 354, 555 P.2d 111 (1976).

12. 401 U.S. 222 (1971); *see* State v. Denny, 27 Ariz. App. 354, 357, 555 P.2d 111, 114 (1976). The *Harris* Court held that evidence obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), is admissible to impeach the credibility of the declarant as long as that evidence satisfies legal standards of trustworthiness. 401 U.S. at 224. It reasoned that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226.

13. 27 Ariz. App. at 355, 555 P.2d at 112.

14. *Id.* at 357, 555 P.2d at 114.

15. *Id.*, *citing* Harris v. New York, 401 U.S. at 224. For a discussion of *Harris* and legal standards of trustworthiness, see text accompanying notes 50-54 *infra*.

16. As applied to confessions, "trustworthy" and "reliable" generally are used interchangeably. *See* 3 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 822, at 333 (J. Chadbourne rev. 1970).

17. *See generally* Ward v. Texas, 316 U.S. 547 (1942); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

18. Rogers v. Richmond, 365 U.S. 534, 543-44 (1961); United States v. Robinson, 439 F.2d 553, 570 n.8 (D.C. Cir. 1970). Once constitutional standards are met, however, reliability can be taken into account. 3 J. WIGMORE, *supra* note 16, § 823, at 336.

19. English common law traditions form the basis of much of our American law. *See* Hopt v. Utah, 110 U.S. 574, 584 (1884), where the Court cited almost exclusively English authority to

simply accepted without concern for the pressures which may have produced them.[20] Later, as common law developed, confessions were excluded strictly on their evidentiary value in the same way other narrations were tested and were excluded only when testimonially untrustworthy.[21] This "trustworthiness" standard, called the Wigmore test,[22] was whether "the inducement [was] such that there was any fair risk of a false confession."[23] The admissibility was determined by an evaluation of the subjective veracity of the individual defendant; the circumstances under which confessions were made were relevant only insofar as they affected probative value.[24] Thus, even if constitutional safeguards were violated by police in obtaining the confession, it was admissible if the court considered it trustworthy.[25]

In a long series of decisions from *Brown v. Mississippi*[26] to *Miranda v. Arizona*,[27] the United States Supreme Court has made it evident that the constitutional test for the admissibility of confessions is no longer trustworthiness.[28] Dissatisfaction with the common law evidentiary rule gave rise to tests which incorporated constitutional due process guidelines[29] and which

support its decision to admit a confession. *See also Developments in the Law-Confessions*, 79 HARV. L. REV. 935, 961 (1966).

20. 3 J. WIGMORE, *supra* note 16, § 821, at 308. A confession under this view was an acknowledgement in express words by the accused in a criminal case of the truth of the allegations against him or of some essential part of them. It was treated, for the most part, as a guilty plea. Consequently, guilty conduct, exculpatory statements, and acknowledgements of other subordinate facts were not considered to fall within the meaning of the term "confession" and were excluded as evidence because they did not go to the testimonial nature of a plea of guilt. *Id.* at 308-22. This is a separate consideration from that of trustworthiness, which became the important criterion at a later time. 3 J. WIGMORE, *supra* note 16, at 330. The modern view, however, extends the definition of "confessions" much further. The court in Miranda v. Arizona, 384 U.S. 436 (1966), rejected such distinctions, saying: "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any manner*; it does not distinguish degrees of incrimination." *Id.* at 476.

21. 3 J. WIGMORE, *supra* note 16, at 330. The principle of excluding testimonially untrustworthy confessions also operates to exclude statements based on memoranda, or testimony given while intoxicated, or testimony given upon the suggestion of a leading question. Although this doctrine is based more on judicial experience than statistically sound conclusions, it generally has been accepted since the introduction of the first doctrines on the admissibility of confessions. *Id.* at 329 n.1.

22. *Id.* at 330.

23. *Id.*

24. *See Developments in the Law, supra* note 19.

25. *See* 3 J. WIGMORE, *supra* note 16, at 330; Note, *"Trustworthy" Self-Incriminating Evidence Not Otherwise Admissible Under Miranda v. Arizona Is Admissible to Impeach an Accused's Trial Testimony*, 49 TEXAS L. REV. 1119, 1119-20 (1971). Under the "trustworthiness" test, confessions were not excluded because of any breach of confidence or bad faith, or any illegality in the method of obtaining it, or any violation of the privilege against self-incrimination. *See* 3 J. WIGMORE, *supra* note 16, § 823, at 337.

26. 297 U.S. 278 (1936).

27. 384 U.S. 436 (1966).

28. *See* 3 J. WIGMORE, *supra* note 16, § 820(d), at 306 n.1 (thorough chronology of this development); Lisenba v. California, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.").

29. State criminal cases began to rely on the due process clause of the fourteenth amendment to exclude confessions. *See, e.g.*, People v. Williams, 20 Cal. 2d 273, 125 P.2d 9 (1942); People v. Rodriguez, 58 Cal. App. 2d 415, 136 P.2d 626 (1943); People v. Spano, 2 N.Y.2d 256, 150 N.E.2d 226 (1958); Faulkner v. State, 149 Tex. Crim. 211, 193 S.W.2d 216 (1946). This reliance was based largely on cases like Brown v. Mississippi, 297 U.S. 278 (1936), where the Court held that the use of physical brutality in obtaining a confession rendered the subsequent

further evolved into an examination of the "totality of circumstances" to evaluate the "voluntariness" of the confession.[30]

It was unclear what role reliability played in the early due process cases because they were reasoned in broad terms.[31] Later, the Court verbalized its reliance on trustworthiness as one of the factors contributing to the voluntariness determinations.[32] However, as the Court has looked more to constitutional and procedural requirements in making voluntariness determinations,[33] trustworthiness has played a much less significant role. The Court in *Rogers v. Richmond*[34] demonstrated this change in focus when it ruled that reliability could not be the only test for the admissibility of a confession.[35]

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conviction void for want of the essential elements of due process. *Id.* at 286. *See also* Brown v. Allen, 344 U.S. 443, 475 (1953); Watts v. Indiana, 338 U.S. 49, 55 (1949); Lisenba v. California, 314 U.S. 219, 237 (1941). State confessions were also excluded on a sixth amendment right to counsel basis, relying on cases like Escobedo v. Illinois, 378 U.S. 478 (1964) and Massiah v. United States, 377 U.S. 201 (1964). *See* People v. Rollins, 65 Cal. 2d 681, 423 P.2d 221, 56 Cal. Rptr. 293 (1967); People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965). In federal criminal cases, however, the fifth amendment privilege against self-incrimination has governed the admissibility of confessions since Bram v. United States, 168 U.S. 532 (1897), where the Court held: "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by [the self-incrimination] portion of the Fifth Amendment . . . ." *Id.* at 542. It was not until 1964, in the case of Malloy v. Hogan, 378 U.S. 1 (1964), that the Court incorporated the fifth amendment privilege into the due process clause of the fourteenth amendment, making it and its underlying substantive principles applicable to the states. Finally, in Miranda v. Arizona, 384 U.S. 436 (1966), the Court held that the inherently coercive nature of police custody required the use of certain procedural safeguards as a prerequisite to the admission into evidence of inculpatory statements obtained during custodial interrogation. *See generally* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, BASIC CRIMINAL PROCEDURE 510-31 (4th ed. 1974); 3 J. WIGMORE, *supra* note 16, § 823, at 337-44; *see also* text & notes 46-49 *infra*.

30. The essence of voluntariness was succinctly stated by Justice Frankfurter in Culombe v. Connecticut, 367 U.S. 568 (1961):

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Id. at 602. *See generally* 3 J. WIGMORE, *supra* note 16, § 823, at 347-54; Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau & Reid's Criminal Interrogations and Confessions*, 17 RUTGERS L. REV. 728 (1963); *Developments in the Law, supra* note 19, at 963; Note, *Admissibility of Defective Confessions for Impeachment*, 11 HOUSTON L. REV. 193 (1973).

31. *See, e.g.*, Lyons v. Oklahoma, 322 U.S. 596, 605 (1944) (coerced confessions offend "basic standards of justice"); Chambers v. Florida, 309 U.S. 227, 239 (1940) (facts show "compulsion was applied"); Brown v. Mississippi, 297 U.S. 278, 287 (1936) (conviction "void for want of the essential elements of due process"); Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16, 19 (1953).

32. *See* Reck v. Pate, 367 U.S. 433, 447 (1961) (concurring opinion), where Justice Douglas agreed with the majority opinion's holding that the defendant's confession was coerced: "Experience however teaches that confessions born of long detention under conditions of stress, confusion, and anxiety are extremely unreliable."

33. *See* Gallegos v. Nebraska, 342 U.S. 55, 64 (1951) (" 'fundamental principles of liberty and justice' protected by Fourteenth Amendment"); Watts v. Indiana, 338 U.S. 49, 55 (1949) ("Due process clause bars police procedures which violate the basic notions of our accusatorial mode of prosecuting crimes."). *See also* 3 J. WIGMORE, *supra* note 16, § 822(c), at 332-36; *Developments in the Law, supra* note 19, at 962; Note, *supra* note 30, at 194.

34. 365 U.S. 534 (1961).

35. In *Rogers*, the Court stated: "To be sure, confessions cruelly extorted may be . . . untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration." *Id.* at 541. In Spano v. New York, 360 U.S. 315 (1959), the Court said: "[T]he abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness." *Id.* at 320.

Instead, voluntariness is a "complex of values,"[36] a convenient shorthand which reflects other societal considerations besides reliability.[37] It is construed in a legal, as opposed to a volitional, sense.[38] Preservation of the freedom of the will is, therefore, only one of several interests at stake. It is also important to ensure that police engage only in legal action, rather than reprehensible practices such as physical torture.[39] This focus on the police conduct, rather than on the motivation of the particular suspect, is rooted not only in the idea that the police must obey the law while enforcing the law,[40] but also in an underlying principle of our criminal law—our system is accusatorial and not inquisitorial.[41] The state must establish guilt by evidence secured independently of an accused's coerced confession.[42]

The voluntariness test has taken on an objectivity lacking in the common law determinations, in that it measures the likelihood that the circumstances surrounding the confession caused it to be coerced, rather than solely considering how the particular accused might have reacted to the situation. The Court in *Rogers v. Richmond*,[43] in fact, defined a permissible standard under the due process clause of the fourteenth amendment as one which makes the voluntariness determination with "complete disregard of whether or not petitioner in fact spoke the truth."[44] Thus, a confession under the voluntariness test may be coerced or involuntary even though true and completely substantiated by other evidence.[45]

Recognizing that the inherently coercive nature of police interrogation rendered inadequate the traditional voluntariness test's protection of the privilege against self-incrimination, the Court, in *Miranda v. Arizona*,[46] adopted an additional standard governing the admissibility of confessions.

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36. Jackson v. Denno, 378 U.S. 368, 386 (1963).

37. Blackburn v. Alabama, 361 U.S. 199, 207 (1960). *See also* People v. Sigal, 221 Cal. App. 2d 684, 696, 34 Cal. Rptr. 767, 775 (1963).

38. *See* A. BIESEL, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW 71 (1955). "Voluntary" in this legal sense does not mean simply that the confessor spoke with conscious choice. Except where a person is unconscious or drugged, or otherwise lacks capacity for conscious conduct, all incriminating statements—even if made under brutal treatment—are voluntary in the sense of representing a choice between alternatives. Neither does it mean that the statement would have been made even without questioning or other official action. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary on Article V, at 166-67, (Tent. Draft No. 1, 1966). *See also* 3 J. WIGMORE, *supra* note 16, § 826, at 349.

39. People v. Sigal, 221 Cal. App. 2d 684, 696, 34 Cal. Rptr. 767, 775 (1963). *See also* Allen, *supra* note 31.

40. Spano v. New York, 360 U.S. 315, 320-21 (1959). *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) (the Court discusses, in a consent to search context, the conflict between society's need for police questioning as a tool for effective enforcement of criminal laws, and society's deeply felt belief that criminal law cannot be used as an instrument of unfairness).

41. Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

42. *Id.*

43. 365 U.S. 534 (1961).

44. *Id.* at 544; *see* United States v. Robinson, 439 F.2d 553, 570 (D.C. Cir. 1970); Commonwealth v. Vento, 410 Pa. 350, 355-56, 189 A.2d 161, 164 (1963).

45. *See* Rogers v. Richmond, 365 U.S. 534, 541 (1960); J. MAGUIRE, EVIDENCE OF GUILT 127 (1959).

46. 384 U.S. 436, 457, 467 (1966). *See also* Note, *supra* note 30, at 194.

The Court set forth stringent procedural safeguards for custodial questioning,[47] and it placed the burden on the prosecution to show that these safeguards had been met and that the confessions obtained were voluntary.[48] If the state failed to meet this burden, the confession was inadmissible.[49] An exception to the *Miranda* exclusionary rule was created in *Harris v. New York*.[50] The Court in *Harris* held that confessions obtained in violation of *Miranda*'s procedural requirements, although inadmissible against the defendant as substantive evidence, were admissible for impeachment purposes if they satisfied legal standards of trustworthiness.[51] While this language seems to imply a return to the common law trustworthiness-reliability tests,[52] the courts seem to interpret "legal standards of trustworthiness" to mean the pre-*Miranda* totality of circumstances voluntariness test.[53] Thus, a voluntary statement would be admissible to impeach even though violative of *Miranda*, but an incriminating statement would be inadmissible for any purpose if found to be involuntary.[54]

In summary, the standards upon which the Court has relied to determine the admissibility of confessions have undergone substantial change, from the common law trustworthiness formulation, to the voluntariness and *Harris-Miranda* doctrines. Standards for the admissibility of confessions obtained by deception have evolved in a similar fashion.

Admissibility of Confessions Obtained by Deception

Historically, courts did not exclude a confession simply because it was obtained by trickery.[55] At early common law, when reliability was the

47. These safeguards are called the *Miranda* warnings and law enforcement officials must give them to an accused before any custodial interrogation. 384 U.S. at 468. The accused must be advised of his right to remain silent, and of the fact that anything he does say can and will be used against him in court. *Id.* at 469. In addition, the accused must be apprised of his right to have counsel present during questioning and of his right to have counsel appointed by the state if necessary. *Id.* at 473. These warnings must be received and effectively waived for a confession to be admissible. *Id.* at 467-79.

48. *Id.* at 479.

49. *Id.*

50. 401 U.S. 222 (1971).

51. *Id.* at 224.

52. *See* text & notes 21-25 *supra*.

53. *See* text & notes 29-45 *supra*. In Oregon v. Hass, 420 U.S. 714 (1975), a suspect who had been given and had accepted full *Miranda* warnings when taken into police custody, asked to telephone a lawyer but was told he could not do so until reaching the station. The inculpatory information he then provided, although inadmissible as evidence for the case in chief, was used as impeachment evidence under Harris v. New York, 401 U.S. 222 (1971). The Court concluded that the statements were admissible because there was no evidence that they were involuntary or coerced, and therefore, they satisfied legal standards of evidence required by *Harris*. 420 U.S. at 722. *See also* Michigan v. Tucker, 417 U.S. 433, 451 (1974); United States v. McQueen, 458 F.2d 1049, 1053 (3d Cir. 1972); United States v. Maddox, 444 F.2d 148, 151 (2d Cir. 1971); United States v. Ramirez, 441 F.2d 950, 954 (5th Cir. 1971); Comment, *Impeachment of Defendant-Witness by Use of Illegally Obtained Statements: From Walder to Harris—The Exception Becomes the Rule*, 22 SYRACUSE L. REV. 685 (1971).

54. See State v. Mincey, 115 Ariz. 472, 479-80, 566 P.2d 273, 280-81, *cert. granted*, 98 S. Ct. 295 (1977), for a recent application of the *Harris-Hass* doctrine in Arizona.

55. *See* Osborn v. Colorado, 83 Colo. 4, 32, 262 P. 892, 902 (1927).

principal standard for admissibility, a statement elicited by deception would be excluded only if the trickery were reasonably likely to render the confession untrustworthy;[56] while courts considered such police behavior reprehensible, they nevertheless admitted the confession into evidence if they believed it was reliable.[57]

As the voluntariness doctrine evolved,[58] however, many courts abandoned the trustworthiness test and began to evaluate confessions obtained by subterfuge in terms of possible violation of constitutional due process safeguards.[59] In this second test for admissibility, deception or fraud alone does not constitute a violation of principles of due process unless it amounts to mental coercion;[60] the deception is merely one of many factors considered in the court's analysis of the totality of circumstances.[61] Since it is the nature of the deception that is at issue,[62] rather than its effect on the reliability of

56. People v. Connelly, 195 Cal. 584, 597, 234 P. 374, 379 (1925); F. WHARTON, CRIMINAL EVIDENCE § 670, at 1378 (10th ed. 1912); H. UNDERHILL, CRIMINAL EVIDENCE § 227, at 327 (3d ed. 1923).

57. People v. Connelly, 195 Cal. 584, 597, 234 P. 374, 379 (1925).

58. See text & notes 26-45 *supra*.

59. *See, e.g.*, Leyra v. Denno, 347 U.S. 556, 561 (1953); Lisenba v. California, 314 U.S. 219, 238 (1941); Lester v. Wilson, 363 F.2d 824, 825-26 (9th Cir. 1966); Atchley v. Wilson, 300 F. Supp. 68, 71 (N.D. Cal. 1968); *In re* Graham, 132 F. Supp. 69, 71, (S.D. Cal. 1955). For cases which considered possible fourth and sixth amendment violations, see United States v. White, 401 U.S. 745, 753 (1971); Hoffa v. United States, 385 U.S. 293, 300-04 (1966).

60. *See* Leyra v. Denno, 347 U.S. 556, 561 (1963); People v. Atchley, 53 Cal. 2d 160, 171, 346 P.2d 764, 769 (1959). In United States *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955), the court indicated that deception by police would not, by itself, vitiate a confession as unconstitutionally obtained, but considered it as one of the totality of factors which made the confession involuntary and inadmissible. *Id.* at 700-01.

61. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969); States *ex rel.* Caminito v. Murphy, 222 F.2d 698, 700-01 (2d Cir. 1955); State v. Cooper, 217 N.W.2d 589, 597 (Iowa 1974); People v. Everett, 10 N.Y.2d 500, 507, 180 N.E.2d 556, 559, 225 N.Y.S.2d 193, 197-98 (1962); State v. Oakes, 19 Or. App. 284, 290, 527 P.2d 418, 421-22 (1974); State v. Braun, 82 Wash. 2d 157, 161, 509 P.2d 742, 745 (1973).

62. Deception in police interrogation can take many forms. It may consist of 'conning'—seeking to offset the suspect's reluctance to incriminate himself by displays of apparent sympathy, friendship, or moral indignation. It may consist of misrepresentations which make the case against him appear stronger than it is *or which understate the seriousness of his situation*. It may consist of misstating the suspect's legal position by statements relating either to the substantive crime or his procedural rights. It may involve the use of persons appearing to be in a special confidential relationship with the suspect for the purpose of eliciting statements which he would not make to the police. Or it may involve eavesdropping, or the use of undercover operations or informers.

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary on Article V, at 176, 178-81 (Tent. Draft No. 1, 1966) (emphasis added). Several cases illustrate the type of underhanded methods of obtaining confessions which are barred. *See, e.g.*, Leyra v. Denno, 347 U.S. 556 (1954) (doctor pretending to be acting for the arrested person as a family member or professional advisor); United States *ex rel.* Everett v. Murphy, 329 F.2d 68 (2d Cir. 1964) (deception with respect to facts or evidence, making the suspect believe the situation is hopeless); State v. Biron, 266 Minn. 272, 282, 123 N.W.2d 392, 399 (1963) (misstating law applicable to suspect by convincing him he would be treated as a juvenile offender rather than a felon if he confessed). Other cases suggest a broad rule requiring exclusion of an inculpatory statement if the deception which yielded it could produce an untrue statement. *See* People v. Connelly, 195 Cal. 584, 234 P. 374 (1925); People v. Watkins, 6 Cal. App. 3d 119, 125, 85 Cal. Rptr. 621, 624 (1970). Section 5.04(c) of the Model Code, *supra*, would forbid any "method which . . . unfairly undermines . . . [one's] ability to make a choice whether to make a statement."

the individual confession,[63] the mere presence of trickery or deceit need not control the outcome of a voluntariness hearing.[64]

Standards Applied by the Court in Denny

The trial court held Ms. Denny's confession to be voluntary,[65] excluded it as evidence for the state's case in chief for public policy reasons because of police trickery,[66] and allowed it to be used for impeachment purposes under *Harris v. New York*.[67] Rejecting this application of *Harris*,[68] the court of appeals seemingly accepted the voluntariness finding,[69] but ruled the confession totally inadmissible because it failed to satisfy some unarticulated "legal standards as to trustworthiness."[70] The court seemed to

63. For instance, a confession elicited by a policeman posing as a priest would be accepted as trustworthy, but the use of that confession as evidence in a criminal proceeding is condemned by our society. Kamisar, *supra* note 30, at 747. The Court in Miranda v. Arizona, 384 U.S. 436 (1966), gave the subject of trickery some attention in its consideration of police interrogation practices. *See id.* at 453. It stated in dictum that a waiver of rights obtained by trickery is involuntary, rendering a statement thereby obtained inadmissible as evidence. *Id.* at 476. This extended protection may exclude confessions that would have been protected by the trustworthiness and voluntariness standard. 3 J. WIGMORE, *supra* note 16, § 841, at 487.

64. While the "reasonable likelihood of unreliability" test and the due process-voluntariness test for the admissibility of confessions obtained by subterfuge are separate tests, they often overlap in practice. *See In re* Walker, 10 Cal. 2d 764, 776-78, 518 P.2d 1129, 1136-37, 112 Cal. Rptr. 177, 184-85 (1974) (court appears to state a totality of circumstances test to determine whether a confession induced by deception is reasonably likely to be false). *See also* People v. Atchley, 53 Cal. 2d 160, 171, 346 P.2d 764, 769 (1959) (court first dismissed a due process claim because there was no mental coercion caused by the deception, and then explained that the deception did not render the defendant's statements inadmissible because it was not a type reasonably likely to procure an untrue statement).

65. Trial Transcript, *supra* note 11.

66. *Id.*

67. 401 U.S. 222 (1971); *see* 27 Ariz. App. at 357, 555 P.2d at 114. For a discussion of *Harris*, see note 12 *supra*.

68. 27 Ariz. App. at 357, 555 P.2d at 114.

69. *Id.* The court accepted the voluntariness finding only as far as Ms. Denny's mental state was concerned. See text & notes 82-85 *infra*.

70. 27 Ariz. App. at 357, 555 P.2d at 114. The court in *Denny* felt the trial court's extension of *Harris v. New York*, 401 U.S. 222 (1971), was unwarranted since the *Denny* confession was obtained by police trickery rather than because of a *Miranda* violation. 27 Ariz. App. at 357, 555 P.2d at 114. *Harris* dealt only with confessions which technically breached the procedural safeguards of *Miranda* but satisfied some undefined legal standards of trustworthiness, which other courts have read as voluntariness requirements. See text accompanying notes 51-54 *supra*. As there was no *Miranda* violation in *Denny*, and since the confession was declared voluntary, *Harris* seemingly did not apply. *See* 27 Ariz. App. at 357, 555 P.2d at 114. The *Denny* opinion, however, does not make the distinctions between the cases clear; it merely dismisses the extension of the *Harris* doctrine to this type of case. *Harris* has been criticized as being one more step by the Burger Court toward the overruling of *Miranda* and its exclusionary rule. *See* Oregon v. Hass, 420 U.S. 714, 725 (1975) (Brennan, J., dissenting). *See also* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1210 (1971); Note, *The Collateral Use Doctrine: From Walder to Miranda*, 62 NW. U.L. REV. 912, 920 (1968); Note, *The Exclusionary Rule Under Attack*, 4 U. BALT. L. REV. 89, 96 (1974); 40 FORDHAM L. REV. 394, 399 (1971); 39 GEO. WASH. L. REV. 1241, 1245 (1971); 85 HARV. L. REV. 44, 44 (1971). While it did so in a rather summary fashion, the *Denny* court may have been taking an affirmative step to limit the effect of the *Harris* decision on Arizona law. If so, it would seem a wise step, since the rule in *Harris* merely reinforces detestable police activity by admitting illegally obtained evidence. The impact of *Harris* may depend on whether state courts follow it. 49 TEX. L. REV. 1119, 1125 (1971); *see* Butler v. State, 493 S.W.2d 190 (Tex. Crim. App. 1973), *discussed in* Note, *supra* note 30, (refusing to extend the *Harris* reasoning to non-*Miranda* violations of provisions of the Texas Criminal Code, TEX. CRIM. PROC. CODE ANN. art. 38.22 (Vernon Supp. 1972), dealing with unreliable oral confessions).

apply two different standards to come to its determination, with little clear explanation of why or how each applies. First, the method of analysis utilized by the court suggests that it may have applied its own voluntariness test. It is also possible, however, that the court relied solely on a reliability analysis.[71]

The court may have excluded the confession on reliability grounds by interpreting the language in *Harris* literally.[72] The opinion cites with approval the New York case of *People v. Utley*,[73] which states: "Where there are other reasons for the exclusion [reasons other than technical violations of *Miranda*], however, such as trick, promise, or coercion, the trustworthiness of the statement is placed in issue . . . ."[74] This focus on reliability as affected by deception suggests at least a partial reliance by the *Denny* court on the trustworthiness standard.[75] The *Utley* case, however, did not deal solely with reliability, but held that any doubt about the trustworthiness of a confession is to be resolved by a voluntariness hearing before the statement is admitted as evidence.[76] The *Denny* court used this holding to return to a trustworthiness basis by stating that since the confession had been excluded at the trial court hearing because of police deception, it was untrustworthy and, therefore, inadmissible.[77] If, indeed, the court was relying exclusively on a trustworthiness test, this would seem to resurrect an old ground for exclusion of a confession. Such a ruling is contrary to the weight of authority, since, although reliability is generally one factor to consider in determining admissibility,[78] the United States Supreme Court has said that reliability cannot be the only ground for excluding a fraudulently obtained confession.[79]

An interesting alternative to the extension of *Harris* would be a trial court's exclusion as substantive evidence, but admission for impeachment purposes, of a voluntary and trustworthy statement obtained by trickery. The court could penalize the state for using a fraud, for which there is no penalty now unless there is coercion or lack of reliability, see text & note 60 *supra*, while at the same time preventing the defendant from using the exclusion to enable his perjury. *See* Walder V. United States, 347 U.S. 62, 65 (1954). In Arizona law today, such confessions are admissible for any purpose. *See* State v. Winters, 27 Ariz. App. 508, 511, 556 P.2d 809, 812 (1976).

71. The trial court excluded the confession from use in the state's case in chief because of "public policy reasons." Trial Transcript, *supra* note 11, at 157. It is possible that the court of appeals found this compelling enough to justify its exclusion for impeachment purposes also. Unfortunately, the court never mentioned this explicitly.

72. *See* 27 Ariz. App. at 357, 555 P.2d at 114; Harris v. New York, 401 U.S. at 224.

73. 77 Misc. 2d 86, 353 N.Y.S.2d 301 (Nassau County Ct. 1974); *see* 27 Ariz. App. at 357, 555 P.2d at 114.

74. 77 Misc. 2d at 96, 353 N.Y.S.2d at 315.

75. See text & notes 21-25 *supra*.

76. 77 Misc. 2d at 96, 353 N.Y.S.2d at 315.

77. This seems to miss the point of *Utley* in that the court there would allow a finding of voluntariness to dissipate a fear of unreliability and permit the confession to be used as evidence. The trial court in *Denny*, in fact, found the confession voluntary; if it had followed *Utley*, it would not have ruled that the confession was untrustworthy.

78. *See* text & notes 59-64 *supra*.

79. *See* Rogers v. Richmond, 365 U.S. 534, 543 (1961).

It is more likely that without clearly saying so, the court was reading the *Harris* language as requiring some sort of a voluntariness analysis.[80] For example, the cases cited after the first mention of *Harris* all apply the totality of circumstances test.[81] More significantly, to find untrustworthiness, the court apparently applied a totality of circumstances analysis.[82] This is essentially the same type of test applied under a voluntariness standard.[83] The trial court's voluntariness finding was only expressly accepted as far as Denny's mental state was concerned;[84] in its further evaluation of the police practices involved, it is possible that the court decided the deception rendered the confession involuntary.[85] This conclusion is supported by the fact that, although the court of appeals did not mention it, the probable effect of the officer's lie was implicitly to mislead Ms. Denny as to the magnitude of the crime with which she was being charged.[86] Some courts have held this to

80. See text & notes 51-53 *supra*.

81. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478, 491 (1964); Haynes v. Washington, 373 U.S. 503, 513 (1963); Lynum v. Illinois, 372 U.S. 528, 534 (1963); Blackburn v. Alabama, 361 U.S. 199, 206 (1960), *cited in* State v. Denny, 27 Ariz. App. at 357, 555 P.2d at 114. For other cases applying the voluntariness test to determine the admissibility of a confession, see State v. Edwards, 111 Ariz. 357, 529 P.2d 1174 (1975); State v. Oakes, 19 Or. App. 284, 527 P.2d 418 (1974); State v. Braun, 82 Wash. 2d 157, 509 P.2d 742 (1973).

82. The court looked to Ms. Denny's mental state as indicated by the conflicting testimony of two psychiatrists who testified at the voluntariness hearing as to the severity of Ms. Denny's mental state. It also considered the fact that she was very concerned about her husband and did not remember much of what she had said. The court also considered the late hour and the police conduct which brought about her confession. 27 Ariz. App. at 356-57, 555 P.2d at 113-14. This raises the question of the admissibility of a voluntary but unreliable confession. The voluntariness test attempts to take into account all the circumstances that would force a defendant to confess against his will. Often, the same situations that would cause a court to rule a confession involuntary would cause it to rule the confession unreliable and vice versa. If a court says there is little likelihood or tendency to confess falsely created by police practices, the chances it will say those same practices made the confession involuntary or broke the defendant's will are slim. Kamisar, *supra* note 30, at 754. Of course, a suspect can always deliberately lie and there is no sure way to protect against that. See Note, *Voluntary False Confessions: A Neglected Area in Criminal Administration*, 28 IND. L.J. 374 (1953), for a brief treatment of the few protections our system has against false voluntary confessions.

83. For United States Supreme Court cases applying a totality of circumstances analysis, see Townsend v. Sain, 372 U.S. 293, 297-301 (1963); Gallegos v. Colorado, 370 U.S. 49, 49-55 (1962); Payne v. Arkansas, 356 U.S. 560, 562-68 (1958); Harris v. South Carolina, 338 U.S. 68, 69-70 (1949); Turner v. Pennsylvania, 338 U.S. 62, 67 (1949).

84. 27 Ariz. App. at 357, 555 P.2d at 114. The court does not explain what is meant by a confession that is voluntary in regard to mental state. It is possible that the court was considering whether Ms. Denny was hysterical or in full possession of her mental faculties, and concluded that she was, as the police described her, lucid, responsive, rational, and calm. *Id.* at 356, 555 P.2d at 113. This understanding of the word voluntary is quite different from that generally understood. *See* text & notes 36-39 *supra*.

85. The trial record shows a great deal of confusion at this point also. Immediately after declaring the confession to be "in all respects voluntary, as I think required by the Supreme Court," the judge asked whether the trickery made the confession involuntary or untrustworthy. Trial Transcript, *supra* note 11, at 157. Unfortunately, he never answered his own question. Perhaps this is what the court of appeals was attempting to do.

The court, citing Miranda v. Arizona, 384 U.S. 486 (1966), noted that the result of the officer's misstatement was to extend an interrogation which would otherwise have ended. 27 Ariz. App. at 357, 555 P.2d at 114. This may have been construed as an involuntary waiver of fifth amendment rights which necessitated exclusion of the confession.

86. If her husband had lived, Denny would probably have been guilty of assault with a deadly weapon. *See* ARIZ. REV. STAT. ANN. § 13-245 (Supp. Pamphlet 1957-77) (repealed and replaced by Ariz. Rev. Stat. Ann. § 13-1204, effective Oct. 1, 1978).

be a basis for exclusion.[87] It is therefore possible that the court simply reevaluated the facts and decided the confession should have been excluded because it was the product of an overborne will. If the court was, in fact, holding the confession involuntary, it would have been preferable to have couched its conclusion in voluntariness terms and to have expressly reversed the trial court's holding of voluntariness.

Most helpful in interpreting the result in *Denny* is a comparison with *State v. Winters*,[88] a post-*Denny* case decided by the same division of the court of appeals. In both cases, confessions were obtained by police misrepresentation. In *Winters*, the police told a defendant accused of robbery that his fingerprints matched those found at the scene of the crime, when, in fact, they did not,[89] whereas Denny was told that her husband would recover when the police knew he was dead.[90] However, Winters' confession was admitted into evidence,[91] while Denny's was totally excluded. The *Winters* court reconciled its result with the outcome in *Denny* by concluding that the two confessions were distinguishable; unlike what happened to Ms. Denny, Winters' will was "not overborne by police deception to a degree sufficient to render [his] statement false or unreliable."[92] It is fairly clear, therefore, that the court in *Denny* and *Winters* approached the confessions by looking at the totality of circumstances; it seemed to use both the trustworthiness and totality of circumstances tests to form a hybrid test which examines the totality of circumstances to determine whether the confession is reliable.[93]

The standard applied in *Denny* is not without weaknesses. In adopting a specie of trustworthiness test, the court adopted a very subjective evaluation of confessions. And, as the facts in *Denny* illustrate, this subjective approach is difficult to use. For example, the fact that the police led Ms. Denny to think her offense was less serious might arguably have caused her to make a more truthful statement. On the other hand, an equally good argument can be made that her worries about her husband might have caused

87. United States *ex rel.* Everett v. Murphy, 329 F.2d 68, 70 (2d Cir. 1964); State v. Biron, 266 Minn. 272, 282, 123 N.W.2d 392, 399 (1963). *Contra*, Commonwealth v. Johnson, 372 Pa. 266, 273, 93 A.2d 691, 694 (1953).

88. 27 Ariz. App. 508, 556 P.2d 809 (1976).

89. *Id.* at 510, 556 P.2d at 811.

90. 27 Ariz. App. at 357, 555 P.2d at 114.

91. 27 Ariz. App. at 511, 556 P.2d at 812.

92. *Id.*; *cf.* Davis v. North Carolina, 384 U.S. 737, 739 (1965) (suspect's confession constitutionally inadmissible because 'the confessions were not made freely and voluntarily but rather . . . Davis' will was overborne by the sustained pressures upon him").

93. Wigmore, in fact, raises the possibility of such a standard. "If a confession is not coerced or otherwise illegally obtained, the sole criterion of its admissibility may be trustworthiness. Thus, self-induced intoxication of the confessor (as distinguished from police-induced intoxication) may raise a question of volitional competency resolvable by the ultimate test of trustworthiness." 3 J. WIGMORE, *supra* note 16, at 336 n.22; *see* People v. Schompert, 19 N.Y.2d 300, 306, 226 N.E.2d 305, 308, 279 N.Y.S.2d 515, 519 (1967). *See also Developments in the Law, supra* note 19, at 968-69, which discusses the possibility of using both the reliability and due process tests simultaneously.

her to be careless and misstate the facts. The inability to know which of these views is correct demonstrates the difficulty of using subjective indications of reliability as the test of admissibility.

Interestingly, the trustworthiness test was originally replaced by the voluntariness standard because of the many problems in its application and because, like any subjective decision, it is subject to human abuses such as prejudice and favoritism.[94] Such a decision needs strong guidelines to help lower courts and law enforcers understand how the standard is to be applied.[95] The *Denny* and *Winters* opinions, unfortunately, provide no such assistance, as they simply designated one confession reliable, and the other unreliable, with very little indication of the criteria used in reaching those conclusions.

Conclusion

The *Denny* and *Winters* decisions established a hybrid rule which combines the use of both voluntariness and trustworthiness to determine the admissibility of a confession obtained by deception. In essence, the court used the traditional voluntariness-totality of circumstances test to determine the reliability of a suspect's confession. This combination of tests, which seems to satisfy constitutional standards of admissibility, also contains elements of the trustworthiness test rejected by the United States Supreme Court. The court of appeals unfortunately provided too little explanation of how it applied this test and how the test is to be applied in the future. The effect of these cases on Arizona law remains to be seen. If there is to be further development of this doctrine in Arizona, the Arizona courts will need to delineate more clearly the factors to be considered in the hybrid standard established in *Denny* and *Winters*.

C. THE ATTORNEY-CLIENT PRIVILEGE AND THE RIGHT TO PRESENT A DEFENSE

The attorney-client privilege is an exception to the fundamental principle that the public has the right to everyman's evidence.[1] The privilege

94. *See Developments in the Law*, *supra* note 19, at 963. This rejection was accelerated by the fact that the constitutional test, which provided adequate protection and used a more easily applied standard, was a ready substitute.

95. For example, the court could discuss what circumstances might operate to make a confession untrustworthy, or explain more fully the relationship between voluntariness and trustworthiness. It might also identify factors to which the lower courts should look in making these decisions.

1. Garner v. Wolfinbarger, 430 F.2d 1093, 1100 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *see* United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir. 1964); Jax v. Jax, 73 Wis. 2d

emerged at common law to encourage clients to confide in their attorneys; it was thought to enhance the client's legal representation by reducing apprehension that information might be disclosed by his attorney.[2] Although the privilege exists for the sake of this general public policy, it is nevertheless an obstacle to the ascertainment of the truth and constitutes a potential obstruction to the accomplishment of justice.[3] Nowhere is the conflict between the privilege and the unrestricted search for truth more patent than in the instance where the client has died and application of the privilege would exclude evidence relevant to absolving another of legal liability.[4] The Arizona Supreme Court recently faced this dilemma in *State v. Macumber*[5] and held that the privilege applies to exclude testimony after the death of the client, even though the privileged communication consists of evidence allegedly exculpating a criminal defendant.[6]

In September of 1974, an information was filed in the Superior Court of Arizona for Maricopa County charging Macumber with the murder of two persons in 1962.[7] During the trial, the defendant attempted to present evidence of a third party confession to the murders for which he was being tried.[8] The confession was allegedly made to two attorneys in 1968 when they were defending the third party against an unrelated murder charge. Since the person alleged to have confessed had died prior to the *Macumber* trial, the two attorneys were willing to testify on the defendant's behalf.[9] Accordingly, they applied to the Committee on Rules of Professional Conduct of the State Bar of Arizona for permission to release information concerning the confession. The committee, in a written opinion,[10] found that the attorneys not only were authorized to disclose the confidential

572, 579, 243 N.W.2d 831, 835 (1976); 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291, at 554 (J. McNaughton rev. 1961). The attorney-client privilege is a testimonial privilege which prohibits the examination of an attorney as to any communication by his client to him or his advice given thereon made in the course of professional employment. *See* ARIZ. REV. STAT. ANN. § 12-2234 (1956); *id.* § 13-1802(2) (Supp. Pamphlet 1957-77) (to be renumbered as ARIZ. REV. STAT. ANN. § 13-4062(2), effective Oct. 1, 1978); discussion note 27 *infra*.

2. *See* Fisher v. United States, 425 U.S. 391, 403, (1976); State v. Alexander, 108 Ariz. 556, 568, 503 P.2d 777, 789 (1972).

3. State v. Alexander, 108 Ariz. 556, 568, 503 P.2d 777, 789 (1972).

4. *See* Cohen v. Jenkintown Cab Co., 238 Pa. Super. Ct. 456, 357 A.2d 689 (1976); *cf.* Shornick v. Shornick, 25 Ariz. 563, 567, 220 P. 397, 399 (1923) (discussing difficulties surrounding the application of the physician-patient privilege after the death of the patient).

5. 112 Ariz. 569, 544 P.2d 1084 (1976).

6. *Id.* at 571, 544 P.2d at 1086.

7. Brief for Appellant at 1, State v. Macumber, 112 Ariz. 569, 544 P.2d 1084 (1976).

8. 112 Ariz. at 571, 544 P.2d at 1086.

9. *Id.*

10. ARIZONA COMMITTEE ON RULES OF PROFESSIONAL CONDUCT, ETHICS OPINIONS, NO. 74-30 (1974). The Committee ruled:

> [I]t is the ethical obligation of the attorney to disclose the confidential information of the past commission of a crime by his now-deceased client. The prosecution of the third party in the fact situation presented may constitute a fraud upon the courts and a gross denial of due process upon one who may be unjustly accused. As such, the failure to disclose the information by the inquiring attorney would constitute the continuance of the client's wrong by the bond of silence.

Id. at 2.

confession, but were under an ethical obligation to do so.[11] The attorneys then disclosed their information to the defense and the prosecution.[12] The trial court, however, ruled that the proffered evidence was protected by the attorney-client privilege and, therefore, was inadmissible.[13] Macumber was found guilty of two counts of first degree murder and appealed. Although the Arizona Supreme Court reversed Macumber's conviction on other grounds[14] and granted a new trial, the court affirmed the lower court's ruling as to the privileged nature of the third party's confession.[15]

This casenote will examine the problems surrounding the attorney-client privilege presented by *Macumber*. First, the rationale and policy of the privilege will be explored. The emergent doctrine of an accused's constitutional right to present a defense, particularly as articulated by the United States Supreme Court in *Chambers v. Mississippi*[16] and *Roviaro v. United States*,[17] will then be analyzed. Finally, consideration will be given to the merits of applying the privilege to the fact situation in *Macumber*.

The Attorney-Client Privilege: Justification and Policy

Communications made by a client to his attorney for the purpose of obtaining legal advice are privileged; the client and the attorney may, therefore, refuse to disclose the contents of such communications.[18] The modern concept of the attorney-client privilege was originally based on the honor of the attorney-barrister as a gentleman not to reveal the secrets of those whom he assisted.[19] By the 19th century, however, the privilege was considered to be that of the client rather than of the attorney.[20] It is widely acknowledged by courts today that the attorney-client privilege belongs to the client and exists to enable the client to have subjective freedom of mind

11. *Id.* at 2; *see* 112 Ariz. at 573, 544 P.2d at 1088 (concurring opinion).
12. 112 Ariz. at 572, 544 P.2d at 1087 (concurring opinion).
13. *Id.* at 571, 544 P.2d at 1086.
14. The court reversed Macumber's conviction because the trial court had erroneously excluded expert testimony. *Id.*
15. *Id.* On remand to the Maricopa County Superior Court, Macumber was reconvicted and sentenced to two consecutively running life terms. State v. Macumber, No. CR 83402 (Ariz. Super. Ct. Jan. 7, 1977).
16. 410 U.S. 284 (1973).
17. 353 U.S. 53 (1957).
18. *See* discussion note 26 *infra*.
19. *See* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 318 (7th Cir. 1963); State v. 62.96247 Acres of Land, 193 A.2d 799, 809 (Del. Super. Ct. 1963). Although the presence of an attorney-client privilege can be found as far back in time as the Roman Empire, *see id.* at 806, the modern privilege is generally considered to date from the reign of Elizabeth I (the latter half of the 16th century). Buell v. Superior Court, 96 Ariz. 62, 68, 391 P.2d 919, 923 (1964). An early acknowledgment of the privilege can be found in Berd v. Lovelace, Cary 62 (1650 ed.), 21 Eng. Rep. 33 (1577). *See generally* Radin, *The Privilege of Confidential Relation Between Lawyer and Client*, 16 CAL. L. REV. 487 (1928).
20. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 318 (7th Cir. 1963); Sedler & Simeone, *The Realities of Attorney-Client Confidences*, 24 OHIO STATE L.J. 1, 4 (1963). *See also* Buell v. Superior Court, 96 Ariz. 62, 68, 391 P.2d 919, 923-24 (1964). Under the original basis for the privilege, the privilege could be waived by the attorney and it could not be asserted by the client. 8 J. WIGMORE, *supra* note 1, § 2241, at 544-45.

in committing his affairs to the knowledge of an attorney.[21] The privilege may thus maximize the opportunity for adequate legal representation[22] by ensuring that the client has no reason to suppress what he thinks would be unfavorable facts.[23]

Moreover, there are justifications for the existence of the attorney-client privilege other than the benefits accruing solely to individual clients. As the privilege is encouraged and applied, the attorney-client relationship itself, often considered an integral facet of a well-organized, peaceful society, is promoted.[24] Nevertheless, because the attorney-client privilege is a block to the usual rule requiring maximum admissibility of evidence relevant to establishing the truth, the privilege is confined within narrow limits.[25] Accordingly, the courts have established a comprehensive set of requirements[26] which must be satisfied before a particular communication

21. Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956); *see* International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973). As a result of the late 19th century shift toward the policy that the privilege belongs to the client, the attorney can no longer waive the privilege and, in fact, has a duty to assert it. Buell v. Superior Court, 96 Ariz. 62, 68, 391 P.2d 919, 923-24 (1964). See discussion note 29 *infra*.

22. *See* International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973); City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951).

Another testimonial privilege, based on a similar need for full confidential disclosure, is the physician-patient privilege. *See generally* Note, *Protecting the Privacy of the Absent Patient: Rudnick v. Superior Court*, 27 HASTINGS L.J. 99, 112 (1975). The purpose of the physician-patient privilege is to ensure the best medical treatment possible by encouraging complete and frank disclosure of medical symptoms and history. Lewin v. Jackson, 108 Ariz. 27, 31, 492 P.2d 406, 410 (1972); *see* Shornick v. Shornick, 25 Ariz. 563, 569, 220 P. 397, 399 (1923). For a discussion of other testimonial privileges, see Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

23. *See In re* Busse's Estate, 332 Ill. App. 258, 263, 75 N.E.2d 36, 39 (1947). To ensure this full disclosure, the privilege provides a "cloak" of privacy over confidential communications made between the attorney and his client. With the privilege intact, the client can feel safe in confiding in his counsel because he is assured that disclosures made to his attorney will be as secret and inviolable as if they had never been disclosed. *See* Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956); Handguards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976).

If, on the other hand, the privilege did not exist, the client might be reluctant to confide in his lawyer, making it difficult for the client to receive fully informed legal advice. Fisher v. United States, 425 U.S. 391, 403 (1976). Furthermore, if the client did divulge his most intimate secrets in the absence of the privilege, the attorney would inevitably be a "mere informer" for the benefit of the opponent if called as a witness against his client. *See* City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951).

24. State v. 62.96247 Acres of Land, 193 A.2d 799, 807 (Del. Super. Ct. 1963). *See generally* MODEL CODE OF EVIDENCE rule 210, comment (a) (1942).

25. Valente v. PepsiCo, Inc., 68 F.R.D. 361, 367 (D. Del. 1975); Jax v. Jax, 73 Wis. 2d 572, 579, 243 N.W.2d 831, 835 (1976).

26. The requirements of the privilege are given in each of two frequently cited formulations. The first formulation is:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950); *see* United States v. Osborn, 409 F. Supp. 406, 409 (1975).

will be considered protected under the privilege.[27] In essence, to fall under

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The second formulation provides:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

8 J. WIGMORE, *supra* note 1, § 2292, at 554 (italics omitted); *see* United States v. Goldfarb, 328 F.2d 280, 281 (6th Cir. 1964); *In re* Langswager, 392 F. Supp. 783, 786 (N.D. Ill. 1975).

27. In establishing and interpreting these requirements, the touchstone is always that the privilege be confined to limits consistent with the underlying policy of promoting free disclosure during legal consultation. *See* United States v. Schmidt, 360 F. Supp. 339, 346 (M.D. Pa. 1973); International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 184-85 (M.D. Fla. 1973).

The first prerequisite is that the communication must be made while the attorney is serving in his professional capacity. *Id.* at 185; *see* Baird v. Koerner, 279 F.2d 623, 627 (9th Cir. 1960); M. UDALL, ARIZONA LAW OF EVIDENCE § 94, at 148 (1960). The privilege only extends to communications made in the context of the relationship, United States v. Schmidt, 360 F. Supp. 339, 347 (M.D. Pa. 1973), but its protection is available if the client reasonably believed that a confidential disclosure to an attorney related to obtaining legal services. Jax v. Jax, 73 Wis. 2d 572, 579, 243 N.W.2d 831, 836 (1976).

Another essential element of the privilege is that the particular communication be made, and maintained, in confidence. United States v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976); *In re* Horowitz, 482 F.2d 72, 81-82 (2d Cir. 1973); *see In re* Langswager, 392 F. Supp. 783, 787 (N.D. Ill. 1975). An intention of secrecy is necessary; the privilege does not apply where it can be shown that the client intended the content of the communication to be disseminated to the public, *see* Dorothy K. Winston & Co. v. Town Heights Dev., Inc., 376 F. Supp. 1214, 1220 (D.D.C. 1974), or that a third party was present during the conveyance of the communication. United States v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976). If, however, the third person is an agent of either the attorney or the client, the communication is still considered privileged. State v. Driscoll, 116 R.I. 749, 757, 360 A.2d 857, 861 (1976); *see* ARIZ. REV. STAT. ANN. § 12-2234 (1956) (quoted *infra*).

A final requirement, and one of particular concern in *Macumber*, is that the communication must relate to the subject matter of the employment of the attorney. Losavio v. District Court, 188 Colo. 127, 133, 533 P.2d 32, 35 (1975). The privilege, however, encompasses all communications made for the purpose of enabling the attorney to perform his professional duty in reference to that subject matter, Cranston v. Stewart, 184 Kan. 99, 102, 334 P.2d 337, 339 (1959), particularly if the information is related to the preparation of a defense. *See* Alexandar v. United States, 138 U.S. 353, 360 (1891). Under this reasoning, the confession of the third party in *Macumber*, even though unrelated to the crime for which he was being charged in 1968, was sufficiently connected with the preparation of his defense to fall within the protection of the privilege.

Rather than rely on common law, several states have enacted statutory provisions embodying the attorney-client privilege. *See, e.g.*, COLO. REV. STAT. § 13-90-107(1)(b) (1973); NEV. REV. STAT. §§ 49.035 to .115 (1973); WIS. STAT. ANN. § 905.03 (West 1975). Forty states have enacted statutes recognizing the attorney-client privilege. *See* 8 J. WIGMORE, *supra* note 1, § 2292, at 555-59; *id.* at 74-75 (rev. Supp. 1977).

The attorney-client privilege in Arizona has been codified under two such statutes; yet there is no indication that the Arizona legislature attempted to modify the common law privilege either by expanding or limiting its scope. ARIZ. REV. STAT. ANN. § 13-1802(2) (Supp. Pamphlet 1957-77) (to be renumbered as ARIZ. REV. STAT. ANN. § 13-4062(2), effective Oct. 1, 1978) sets forth the attorney-client privilege applicable in Arizona criminal cases:

A person shall not be examined as a witness in the following cases:

. . . .

2. An attorney, without consent of his client, as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

ARIZ. REV. STAT. ANN. § 12-2234 (1956) is the civil counterpart of § 13-1802:

In a civil action an attorney shall not, without consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional employment. An attorney's secretary, stenographer or clerk shall not, without the consent of his employer, be examined concerning any fact the knowledge of which was acquired in such capacity.

Most codifications of the attorney-client privilege are merely declaratory of the common law rule, and the Arizona statutes do not appear to be an exception. *See* Baird v. Koerner, 279 F.2d 623, 629 (9th Cir. 1960); 8 J. WIGMORE, *supra* note 1, § 2292, at 556. *See generally* Ladd, *Privileges*, 1 LAW & SOC. ORD. 555 (1969).

The Colorado attorney-client privilege statute, COLO. REV. STAT. § 13-90-107(1)(b) (1973), is almost identical in form and substance to ARIZ. REV. STAT. ANN. § 12-2234 (1956), and the

the protection of the privilege, the communication must have been made in the context of the attorney-client relationship and must have been maintained in confidence.[28] If the statement meets these requirements, the privilege may be invoked.[29]

Colorado Supreme Court has stated that the Colorado statute is merely a codification of the common law attorney-client privilege. *See* A v. District Court, — Colo. —, —, 550 P.2d 315, 323, *application for stay of mandate denied*, 427 U.S. 903 (1976).

Both of the Arizona statutes succinctly define the applicability of the attorney-client privilege, and a review of their use in Arizona case law points up no significant differences in the reasoning or scope of the two statutes. There is, however, a distinct textual difference. While the civil statute expressly states that various agents of the attorney may not be questioned as to allegedly protected communications, the criminal statute makes no attempt to extend the privilege to the attorney's agents. The common law makes no distinction between criminal and civil cases and follows the general principle that communications to agents of either the attorney or the client are included under the privilege. *See In re* Busse's Estate, 332 Ill. App. 258, 263, 75 N.E.2d 36, 38-39 (1947) (civil); State v. Driscoll, 116 R.I. 749, 757, 360 A.2d 857, 861 (1976) (criminal). For this extension of the privilege to apply, the agent must be essential to the transmission of the information, Hearn v. Rhay, 68 F.R.D. 574, 579 (E.D. Wash. 1975), and the client still must intend that the communication be confidential. *See* United States v. Bigos, 459 F.2d 639, 643 (1st Cir.), *cert. denied*, 409 U.S. 847 (1972).

28. *See* discussion note 27 *supra*.

29. In State v. Macumber, the communication excluded by the court was made by an individual who was a stranger to the *Macumber* proceedings. This individual had made the communication in 1968 in connection with his own prosecution for another murder, and he was deceased at the time of Macumber's trial in 1975. 112 Ariz. at 572, 544 P.2d at 1087. These circumstances give rise to three important questions regarding the nature of the attorney-client privilege.

First, if otherwise applicable, does the privilege extend past the lifetime of the client making the communication? The *Macumber* court stated that the privilege does not terminate with death, *id.* at 571, 544 P.2d at 1086, and this is the generally accepted rule. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 94, at 197 (2d ed. E. Cleary, 1972). Confusion has often resulted, however, when courts state that the privilege must be claimed by the client before any evidence will be excluded in reliance on the privilege or that only the client can invoke the privilege. The formulation of the privilege in United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950), see discussion note 26 *supra*, lends itself to such an interpretation. The court there stated that "[t]he privilege applies only if . . . (4) the privilege has been (a) claimed and (b) not waived by the client." *Id.* When the application of the privilege is couched in this language, it appears that the client is the only one who can claim the privilege, and when he dies the privilege must necessarily terminate because he is no longer present to claim it. The correct interpretation of such statements, however, is not that the privilege does not survive the death of the client, but rather, that if the client has an opportunity to object to the testimony and does not do so, this may be regarded as a waiver of the privilege; after such waiver no one else can assert the privilege. *See* O'Brien v. New England Mut. Life Ins. Co., 109 Kan. 138, 143, 197 P. 1100, 1102 (1921). *See generally* Ladd, *supra* note 27, at 558. The extension of the privilege into situations where evidence is offered or testimony is sought after the client's death is consistent with the policy underlying the privilege; the more permanent the privilege, the more absolute the protection offered the client, and the less inhibited the client will be in disclosing all relevant information to his attorney.

The client can always invoke the privilege whether or not he is a party to the action in which the privileged testimony is sought. C. MCCORMICK, *supra*, § 92, at 192. But the next question which must be answered is who can invoke the privilege in the client's absence? It is well established that when an attorney is called to testify as to the content of confidential communications made by a nonparty client, the attorney is duty bound to assert the privilege to protect those communications. Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967); Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1950); Buell v. Superior Court, 96 Ariz. 62, 68, 391 P.2d 919, 923-24 (1964). In *Macumber*, however, the privileged client's attorneys believed that the confession was not privileged and that they actually had a duty to reveal the information rather than a duty to protect it. *See* ARIZONA COMMITTEE ON RULES OF PROFESSIONAL CONDUCT, ETHICS OPINIONS, NO. 74-30 (1974), *quoted* note 10 *supra*. In such a situation—where the attorney is willing to disclose and the privileged client is not present to assert the privilege—the court make invoke the privilege to protect the confidential communication. C. MCCORMICK, *supra*, § 92, at 193; *see* State v. Macumber, 112 Ariz. 569, 571, 544 P.2d 1084, 1086 (1976); MODEL CODE OF EVIDENCE rule 210, comment (b) (1942). Thus, the trial court in the *Macumber* trial chose to exclude the relevant communication of its own volition, a decision which the Arizona Supreme Court upheld. 112 Ariz. at 571, 544 P.2d at 1086.

In *State v. Macumber*, the Arizona Supreme Court determined that the communication made by the third party, which would have allegedly exculpated the defendant, was of a character protected by the privilege, despite the fact that the third party was dead.[30] However, as Justice Holohan noted in his concurring opinion, when exclusion of evidence on grounds of the attorney-client privilege denies the accused the opportunity to present information bearing directly on his guilt or innocence, the exclusion appears to violate the defendant's constitutional right to present a defense.[31]

Chambers v. Mississippi and the Right to Present a Defense

When the Arizona Supreme Court upheld the trial court's ruling excluding the third party's alleged confession in *Macumber*, the accused was denied the opportunity to present a vital element of his defense. The right to present a proper defense is constitutionally based on the sixth and fourteenth amendments,[32] and the United States Supreme Court has increasingly

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The final problem warranting discussion concerns what happens when no one invokes the privilege or even calls it to the court's attention and the court does not exclude the evidence on its own motion. If the client whose communication is at issue is present as a party or witness, and he does not claim the privilege, then it is considered waived by him. C. MCCORMICK, *supra*, § 92, at 192-93. If the privilege belongs to a client who is a nonparty and is not present at the proceedings and the evidence is admitted without objection, the party against whom the testimony was used cannot complain on appeal if he loses, because the privilege is not his, and the only interest actually injured would have been that of the privileged client. Schaibly v. Vinton, 338 Mich. 191, 196, 61 N.W.2d 122, 124 (1953). *See generally* 8 J. WIGMORE, *supra* note 1, § 2196, at 112-13. The *Macumber* court, of course, did not need to decide this issue because the trial court chose to protect the communication on its own motion.

Once the issue of the privilege is raised, the burden of initially establishing the existence of the privilege rests with the party attempting to have the evidence excluded. *In re* Horowitz, 482 F.2d 72, 81 (2d Cir. 1973); International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 184-85 (M.D. Fla. 1973).

Regardless of who properly raises the issue of the privilege, the court must make the ultimate determination as to whether or not the allegedly protected information is admissible as evidence. Gordon v. Industrial Comm'n, 23 Ariz. App. 457, 459, 533 P.2d 1194, 1196 (1975). The determination of whether or not a proper waiver has been made is also left to the court. Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956). If the circumstances surrounding the communication show that all the prerequisites have been met to bring it within the scope of the privilege, see discussion note 26 *supra*, if there has been no waiver, and if none of the established exceptions to the privilege are applicable, see discussion note 60 *infra*, the court will exclude the evidence or testimony.

30. In choosing to exclude the third party's confession in *Macumber* because of the attorney-client privilege, the court may have been concerned about the reliability of the communication which the defendant wished to present. Excluding the evidence on this basis would demonstrate a misconception of the privilege; even though the testimonial privileges are rules of evidence, they are not grounded on the notion that the pertinent evidence is untrustworthy. The goal of excluding unreliable evidence at trial is achieved through the rules of exclusion, such as the hearsay rule and the opinion rule. *See* C. MCCORMICK, *supra* note 29, § 72, at 152. While the rules of exclusion are aimed at aiding the search for truth, the evidence excluded by privileges is omitted not because of unreliability, but rather to protect the interests and relationships which are regarded as sufficiently important to preclude the use of otherwise competent evidence. State v. 62.96247 Acres of Land, 193 A.2d 799, 806 (Del. Super. Ct. 1963); C. MCCORMICK, *supra* note 29, § 72, at 152. If the *Macumber* court was concerned about the truthfulness of the attorneys' statements, its reliance on the attorney-client privilege to exclude the evidence was misplaced.

31. 112 Ariz. at 573, 544 P.2d at 1088 (1976) (concurring opinion).

32. *See* Chambers v. Mississippi, 410 U.S. 284, 294 (1973); Washington v. Texas, 388 U.S. 14, 18 (1967).

looked to the guarantees of these amendments to determine whether or not a trial has been conducted with due process of law.[33]

Until the Supreme Court's decision in *Chambers v. Mississippi*,[34] the states' rules of evidence were generally assumed to be outside the purview of the United States Constitution unless the right allegedly violated was one traditionally guarded by the fifth or sixth amendment.[35] In one particularly significant pre-*Chambers* decision, *Roviaro v. United States*,[36] the Court spoke of an individual's "right" to present a defense, but failed to articulate any indicia of a constitutional basis for that right.[37] In *Chambers*, however, the Court acknowledged a right to defend grounded solely on constitutional due process principles, marking a major shift from the inherently limited nature of reliance on a specific fifth or sixth amendment provision. As a result, the opinion greatly increased the potential importance of the right to present a defense.[38] Moreover, the *Chambers* Court immediately tested the right to present a defense against two rules of evidence which threatened to preempt that right, and held that Mississippi's rules of evidence could not be applied to exclude evidence bearing directly on the guilt or innocence of the defendant.[39] The Supreme Court reversed Chambers' conviction because the

33. *See generally* Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713 (1976); Imwinkelried, *The Constitutional Right to Present Defense Evidence*, 62 MILITARY L. REV. 225 (1973); 62 ILL. B.J. 158 (1973).

34. 410 U.S. 284 (1973). *See generally* Comment, *Chambers v. Mississippi: The Limits of Due Process—The Voucher Rule and the Exception for Hearsay Declarations Against Interest*, 4 N.Y.U. REV. L. & SOC. CHANGE 191 (1974).

35. *See* Clinton, *supra* note 33, at 783. In Washington v. Texas, 388 U.S. 14 (1963), the Supreme Court held that a Texas statute providing that persons charged as principals, accomplices, or accessories in the same crime could not be introduced as witnesses for each other violated the defendants' sixth amendment right to have compulsory process for obtaining witnesses. By way of dictum the Court indirectly embraced a broad doctrine granting the accused the right to present a defense: "Just as an accused has the right to confront the prosecution's witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Id.* at 19. *See also In re* Oliver, 333 U.S. 257, 273 (1948) (stating that a defendant should have a reasonable opportunity to defend himself from charges, which includes the right to examine witnesses against him, to offer testimony, and to be represented by counsel).

36. 353 U.S. 53 (1957).

37. *Id.* at 62. *See* text & notes 50-57 *infra*.

38. The *Chambers* Court stated: "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." 410 U.S. at 294. *See also* Clinton, *supra* note 33, at 778. In *Chambers* the defendant had been arrested for the murder of a policeman; subsequently one MacDonald gave a sworn confession that he had shot the officer, only to repudiate the confession a month later. 410 U.S. at 287. Chambers asserted his innocence throughout his trial, and his main line of defense was to show that MacDonald had shot the policeman. When the state failed to call MacDonald as a witness, Chambers did so himself. But since Mississippi's voucher rule precluded a party calling a witness from impeaching his credibility, the trial court denied Chambers' motion to cross-examine MacDonald, even though cross-examination was necessary to discredit MacDonald's repudiation. *Id.* at 294. Chambers then sought to introduce the testimony of three witnesses to whom MacDonald had admitted the shooting. This testimony was also excluded, however, when the state's objection on hearsay grounds was sustained. *Id.* at 293. Chambers' subsequent conviction was reversed by the Supreme Court on the grounds that the combined effect of these two adverse rulings by the trial court denied him the fundamental standards of due process of law. *Id.* at 302.

39. 410 U.S. at 302; *see* discussion note 38 *supra*.

trial court had ruled (1) that he could not cross-examine a witness who had allegedly confessed to the crime for which Chambers was being tried, and (2) that he could not introduce the testimony of three individuals who purportedly heard the confession.[40] The Court, in effect, ruled that the state's interest in making and applying its own rules of evidence may be subordinated to an accused's right to defend when the rules are "'applied mechanistically to defeat the ends of justice.'"[41]

The Court in *Chambers* did not set up an exact standard for application of this newly articulated right. In reversing Chambers' conviction, however, the Court clearly weighed Mississippi's interest in making its own rules of evidence, and particularly of assuring the reliability of evidence at trial, against Chambers' right to present testimony crucial to his defense.[42] One important aspect of the balancing approach in *Chambers* concerns testimony excluded under the hearsay rule,[43] a rule developed to exclude evidence of dubious reliability.[44] However, the rejected evidence actually had a high degree of reliability.[45] Inherent in the Court's ruling, therefore, was the conclusion that the state's interest in ensuring the reliability of evidence used in criminal trials would not have been jeopardized in admitting the confession as an exception to the hearsay rule.[46] Thus, when the policy behind a particular rule of evidence would not be significantly impaired by allowing the accused's right to present a defense to prevail, the balance between the competing policies tilts in favor of allowing the defendant to present the evidence.

The Supreme Court has not limited the applicability of the right to present a defense solely to rules of evidence dealing with reliability.[47]

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40. 410 U.S. at 294-303.

41. *Id.* at 302. Although Justice Powell denied establishing any new principles of constitutional law in *Chambers*, 410 U.S. at 302, commentators agree that states' rules of evidence have been opened to constitutional testing by the opinion. *See* Clinton, *supra* note 33, at 796; Comment, *supra* note 34, at 206. Subsequent cases may have borne out the ineffectiveness of Justice Powell's attempt to break no fresh constitutional ground. *See* discussion notes 47, 49 *infra*.

Commentators, while attempting to point out the significance of *Chambers*, unfortunately have neglected to look to Roviaro v. United States, 353 U.S. 53 (1957), as an important precursor of the constitutional underpinnings given to the defendant's right to present a defense in *Chambers*. Viewed in light of the foreshadowing provided by the *Roviaro* court, *Chambers* appears more as a part of a natural progression and less as a sudden shift toward increased protection of an accused's rights at trial.

42. 410 U.S. at 298, 302.

43. *See* discussion note 38 *supra*.

44. *See* C. MCCORMICK, *supra* note 29, § 72, at 152.

45. 410 U.S. at 300. The *Chambers* Court stated that the alleged confessions were made shortly after the murder, that each was corrobated by other evidence, and that each was unquestionably against penal interest, all of which increased the reliability of the statements excluded by the trial court. *See* 410 U.S. at 300-01.

46. *See* Comment, *supra* note 34, at 204-05.

47. In Davis v. Alaska, 415 U.S. 308 (1974), the Court balanced Alaska's interest in protecting the anonymity of juvenile offenders through a statute barring disclosure of juvenile criminal records against the defendant's right to effectively cross-examine a juvenile who was a leading prosecution witness. The Court found that the state policy was subordinate to the rights to confront adverse witnesses and to present a defense. *Id.* at 317, 319-20.

Nevertheless, just how far the courts are willing to take the *Chambers* doctrine is not yet clear.[48] Moreover, one of the tenser conflicts between states' rules of evidence and the right of an accused to present a defense is sure to come in the area of testimonial privileges.[49]

When the *Chambers* doctrine is viewed in conjunction with the Supreme Court's decision in *Roviaro v. United States*,[50] the defendant's right to present evidence bearing directly on his guilt or innocence provides formidable opposition to the policies of an evidentiary privilege protecting such evidence from disclosure. In *Roviaro*, the defendant was indicted for illegal transportation of narcotics. The person with whom the drug transaction took place was an undercover employee of the government; the other two witnesses were positioned in the trunk of the undercover employee's car and in a pursuing vehicle.[51] When the defendant attempted to call the undercover informer as a witness, the trial court chose to withhold the identity of the employee under the informer's privilege, and Roviaro was convicted.[52] On appeal, the Supreme Court reversed the conviction, holding that the identity of the undercover employee should not have been withheld.[53] Three reasons were given for the Court's holding: First, the informer was the sole participant in the transaction other than the accused; second, the informer was the only person in a position to contradict the testimony of the other two government witnesses, and; third, a witness testified that the informer had denied ever having seen the defendant.[54]

In reversing Roviaro's conviction, the Supreme Court applied a balancing test which weighed the public interest in protecting and encouraging

48. Clinton, *supra* note 33, at 803-04.

49. The Court has yet to address the conflict between the attorney-client privilege and the right to present a defense. An analogous situation was presented, however, in United States v. Nixon, 418 U.S. 683 (1974), where former President Nixon asserted executive privilege to resist a subpoena duces tecum seeking to compel him to produce tapes of conversations for use during the prosecution of former governmental and presidential campaign officials on charges of obstructing justice. The Court applied a clear balancing test: "In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice." *Id.* at 711-12. The Court concluded that the privilege must yield to the integrity of a judicial system which requires the complete presentation of the facts. *Id.* at 709-10, 713.

50. 353 U.S. 53 (1957).

51. *Id.* at 57, 64.

52. *Id.* at 58. The Court precisely set out the justification for the informer's privilege: "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Id.* at 59; *see* C. MCCORMICK, *supra* note 29, § 111, at 236-37. Although the informer's privilege encourages disclosure of information to police, while the attorney-client privilege encourages disclosure of information by an individual to his attorney, the purposes behind the two privileges are similar. Both of these rules of evidence seek to protect communications but are limited in scope by their underlying purposes; they should be applied only when exclusion of the evidence would promote unthreatened disclosure by informers or clients.

53. 353 U.S. at 64-65.

54. *Id.*

citizens to inform police of the commission of crimes against the accused's "right to prepare his defense."[55] Justice Burton, writing for the Court, stressed the potential exculpatory impact of the informant's testimony on the defendant's case[56] and concluded that the exclusion of such testimony was prejudicial error.[57]

Macumber and the Right to Present a Defense

The trial court in *Macumber* chose to exclude a vital element of the accused's defense rather than disclose a communication considered protected under the attorney-client privilege. In such a situation, the application of the *Chambers* and *Roviaro* doctrines to require admission of possibly exculpatory evidence appears compelled. In both of these Supreme Court decisions, the Court balanced the state's interest in furthering the particular public policies underlying the evidentiary privilege against the defendant's right to prepare and present his defense. In order to apply this balancing test to the facts of *Macumber*, it is first necessary to determine the strength of the state's interest in maintaining the attorney-client privilege to exclude the third party's confession. A significant consideration in making this determination is the importance of the survival of the privilege after the attorney-client relationship has terminated. If the client dies,[58] the weight of the common law is that the protection given to the communications made during the relationship is perpetual and does not end at death.[59] The benefit reaped by this additional guarantee of protection to the client is nominal, however, and should give way when a more important policy interest suffers because of the permanency of the privilege.[60]

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55. *Id.* at 62.

56. *Id.* at 63-64. In McCray v. Illinois, 386 U.S. 300 (1967), the Supreme Court underscored the necessity that an informer's testimony relate directly to the defendant's innocence or guilt before the informer's privilege can be subordinated to the defendant's right to present a defense. Specifically distinguishing *Roviaro*, where the informer's privilege was involved at the trial itself and the issue was a fundamental one of innocence or guilt, the Court stressed that McCray was denied disclosure of the informant's identity at a preliminary hearing to determine probable cause for an arrest and search. Accordingly, the Court ruled that under the facts of *McCray*, the need for disclosure was not as pervasive as in *Roviaro* and that the public policy behind the informer's privilege should prevail over the limited benefit which the defendant would receive from disclosure. *Id.* at 311-12.

57. 353 U.S. at 65.

58. The relationship also terminates when the attorney ceases to be under the employ of the client. Under such circumstances the attorney is still required to honor the privilege, as long as the privileged character of the communication is otherwise maintained. United States v. Foster, 309 F.2d 8, 15 (4th Cir. 1962); *see* 8 J. WIGMORE, *supra* note 1, § 2323, at 630-31.

59. Baldwin v. Commissioner, 125 F.2d 812, 814 (9th Cir. 1942); *In re* Busse's Estate, 332 Ill. App. 258, 263, 75 N.E.2d 36, 39 (1947); C. MCCORMICK, *supra* note 29, § 94, at 197; *see* discussion note 29 *supra*.

60. *See* People v. Belge, 50 App. Div. 2d 1088, 376 N.Y.S.2d 771, 772 (1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

One type of fact situation which is widely recognized as an exception to the rule of the continued applicability of the attorney-client privilege after the death of the client is in litigation between parties claiming under the deceased client's will. McSpadden v. Mahoney, 431 P.2d 432, 440 (Okla. 1967); *see* Forbes v. Volk, 358 P.2d 942, 947-48 (Wyo. 1961). The state's interest in maintaining the privilege in such a situation is minimal; few clients would be reluctant to confide in their lawyers solely because otherwise privileged communications would be dis-

In a recent Pennsylvania case, *Cohen v. Jenkintown Cab Co.*,[61] the court was presented with a situation where a deceased third party had confessed to his attorney to having caused an auto accident, and the evidence was requested in a personal injury action concerning the accident. The court disposed of the case by balancing the necessity for revealing the substance of the communication against the likelihood of injury to the rights, interests, estate or memory of the deceased, and concluded that the communication was properly admitted at trial.[62]

In finding the communication admissible, the *Cohen* court concerned itself primarily with a discussion of the possible adverse consequences which would result if the evidence were disclosed. First, it was determined that the death of the third party substantially reduced the possibility that his

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closed in order to facilitate distribution under the client's will in accordance with the client's original intent. *See* Glover v. Patten, 165 U.S. 394, 408 (1897); United States v. Osborn, 409 F. Supp. 406 (D. Ore. 1975). The basic justification for the exception is simply that the need for disclosure when a will is being litigated is paramount to the relatively insignificant interest in maintaining an absolute privilege. *See generally* C. MCCORMICK, *supra* note 29, § 94, at 197-98.

In keeping with the inclination of the courts to confine the attorney-client privilege to narrow limits, see text & notes 25-26 *supra*, several other exceptions to the privilege have been recognized. The common thread to these limitations is that their imposition does little harm to the policy underlying the privilege while significantly protecting the due administration of justice.

Two of these exceptions have been justified as implied waivers by the client. First, when the client asserts that his attorney is incompetent or inadequate, and the attorney and client themselves become adverse parties in a lawsuit, courts deem the privilege impliedly waived and permit both sides to disclose freely. *See, e.g.*, Hearn v. Rhay, 68 F.R.D. 574, 580 (E.D. Wash. 1975); State v. Griswold, 105 Ariz. 1, 5, 457 P.2d 331, 335 (1969); State v. Kruchten, 101 Ariz. 186, 191, 417 P.2d 510, 515 (1966). Similarly, when the client offers testimony as to part of the privileged communication, he is considered to have waived the entire privilege, and both he and his attorney may be compelled to testify. *E.g.*, International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973); Tripp v. Chub, 69 Ariz. 31, 35, 208 P.2d 312, 314 (1949); Gordon v. Industrial Comm'n, 23 Ariz. App. 457, 459, 533 P.2d 1194, 1196 (1975). The interest to be served by limiting the privilege and admitting relevant evidence in both of these situations is strong, whereas enforcement of the privilege as an absolute would contribute little to the underlying policy. In each instance, the party asserting the privilege has placed privileged information in issue for his own benefit, and he is, therefore, not entitled to claim the privilege to protect against disclosure by the adverse party. *See* Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975).

Two other exceptions to the attorney-client privilege are applied when the client consults the attorney for advice that will serve him in the commission of a fraud, Clark v. United States, 289 U.S. 1, 15 (1933), and when concededly confidential communications pertain to contemplated criminal conduct or continuing present illegalities. United States v. Friedman, 445 F.2d 1076, 1085 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971). *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1976). The fraud and criminal purpose exceptions have been grounded on the view that under certain circumstances society's right to everyman's evidence supersedes the nominal policy interests that would be advanced by applying the privilege. *See* A v. District Court, — Colo. —, —, 550 P.2d 315, 324-25, *application for stay of mandate denied*, 427 U.S. 903 (1976).

It is apparent that the parameters of the attorney-client privilege have been established with careful consideration of the policy underlying the privilege, particularly when the need for relevant evidence at trial is substantial. *See* Garner v. Wolfinbarger, 430 F.2d 1093, 1100 (5th Cir. 1970). Because it is an exception to the fundamental principle of full disclosure at trial, the courts have strictly construed the attorney-client privilege where it would suppress the truth. Hogan v. Zletz, 43 F.R.D. 308, 312 (N.D. Okla. 1967). Nevertheless, in conflicts between the search for truth and the privilege, the privilege has been breached only when the interests in encouraging complete disclosure in the attorney-client relationship would suffer little harm as a consequence. *See* Baird v. Koerner, 279 F.2d 623, 631-32 (9th Cir. 1960).

61. 238 Pa. Super. Ct. 456, 357 A.2d 689 (1976).

62. *Id.* at —, 357 A.2d at 692-93.

rights or interests would be significantly affected by disclosure.[63] Second, there was no way the third party or his heirs could incur any liability in the case as a result of disclosure, because the decedent had left no estate. Finally, the court stressed that the communication would not "blacken the memory" of the third party, both because he could not be criminally prosecuted or civilly held accountable for his actions and because a deposition of the decedent's attorney already had disclosed portions of the communication.[64] Conversely, the court found that the need for disclosure was clearly established. The only other witness to the accident was the plaintiff, whose recollections were largely fragmentary. Concluding that application of the privilege would only frustrate the interests of justice, the court found the communication was properly admitted.[65]

The state's interests in applying the attorney-client privilege in *Macumber* is significant only to the extent necessary to vindicate the purposes of the privilege. Although *Cohen* referred to personal rights and interests of the decedent and his estate that also weigh in favor of applying the privilege, the reasoning behind the protection of these interests is bottomed on the purpose of the privilege itself—the more the interests of the deceased and his estate are protected by the privilege, the more likely a client will feel secure in confiding in his attorney.[66] But to hold that the privilege does not apply in situations where the client possessing the privilege has died and the concededly privileged communication is requested as evidence likely to prove the innocence of the accused would seem to do little harm to the policy underlying the attorney-client privilege. Persons seeking legal advice or assistance would not likely forego complete disclosure to an attorney merely because such a limitation on the privilege existed.[67]

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63. *Id.*
64. *Id.*
65. *Id.* at —, 357 A.2d at 693-94.
66. Justice Holohan, in a special concurrence in *Macumber*, stated that a significant element in whether or not the privilege should have applied was the "property interest" of the deceased client in keeping his disclosures private. 112 Ariz. at 575, 544 P.2d at 1088. Although Justice Holohan failed to elaborate on his statement, it may be that he was referring to an intangible interest of the deceased in maintaining his reputation. *See* Cohen v. Jenkintown Cab Co., 238 Pa. Super. Ct. 456, —, 357 A.2d 689, 693 (1976). The significance of this interest in the fact situation in *Macumber*, however, was negligible. The disclosure of the confession by the third party's former lawyers already revealed the statements to the prosecution and the defense. *See* 112 Ariz. at 572, 544 P.2d at 1087 (1976) (concurring opinion). Therefore, the confidentiality provided by the privilege was breached, and revealing the confession to the jury would have added little more to the decedent's injury. In contrast, exclusion of the evidence prevented the jury's consideration of facts directly bearing on Macumber's guilt or innocence.
67. In the Supreme Court's decision to deny the President's assertion of executive privilege in United States v. Nixon, 418 U.S. 683 (1974), the minimal impact on the policy underlying the privilege was a major consideration: "[W]e cannot conclude that [presidential] advisors will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Id.* at 712.

This is not to say that an interest will never be so significant as to require exclusion of a confession given in the context of an attorney-client relationship after the client has died. There will always be some humiliation and embarrassment to the decedent's name and to his survivors

In contrast, Macumber's interest in submitting evidence of the third party's confession to the trier of fact was manifest. The nature of the excluded confession bore directly on Macumber's guilt or innocence.[68] Had the confession been admitted by the court, it may have had major exculpatory impact.[69]

In upholding the trial court's exclusion of the confession in *Macumber*, the Arizona Supreme Court strictly applied the common law rule that the attorney-client privilege does not terminate with death.[70] Although aware that inherent in their decision to deny Macumber the opportunity to introduce evidence of the third party confession was the "possibility of hampering justice," the court reasoned weakly that the legislature had weighed such a possibility when originally providing for the privilege.[71] Furthermore, the court completely failed to acknowledge Macumber's constitutional right to present a defense.

The creation of a limitation to the attorney-client privilege in a fact situation such as *Macumber* seems compelled under the rationale used by the Supreme Court in *Chambers* and *Roviaro*.[72] Hence, although the exer-

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upon disclosure of such a confession. Furthermore, disclosure of the confession may lead to civil liability being imposed on the estate of a deceased client for harm caused by the client's negligent or intentional actions while still alive. Knowledge of such potential detrimental results may indeed deter a client from fully disclosing to his attorney. Nevertheless, the interest of society in protecting an accused from wrongful conviction outweighs these relatively nominal adverse results.

68. In *Cohen*, the information included in the third party's communication to his attorney had a direct effect on which party would be held liable for damages in a personal injury action. *See* 238 Pa. Super. Ct. at —, 357 A.2d at 693. Similarly, in *Macumber*, the third party's communication had a direct bearing on the defendant's guilt or innocence. The loss of such evidence to a criminal defendant is much more significant than the loss to a civil defendant, not only because of the criminal defendant's constitutional right to present a defense, *see* Chambers v. Mississippi, 410 U.S. 284, 294 (1973), but also because the civil defendant will suffer only pecuniary loss while the criminal defendant faces imprisonment or death. *See* "Collateral Estoppel, Criminal Proceedings, and the Prevention of Contradictory Results," 18 ARIZ. L. REV. 585, 668, 677 (1976).

69. At the time the Arizona Supreme Court found that the attorney-client privilege had been properly applied to exclude the third party confession in *Macumber*, the accused's fate was still in doubt because his conviction was reversed on other grounds and the case remanded for a new trial. 112 Ariz. at 572, 544 P.2d at 1087. The extreme importance of the confession to Macumber's defense was eventually borne out, however, in his subsequent conviction. See discussion note 15 *supra*.

70. The court cited M. UDALL, *supra* note 27, § 91, and C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 98 (1954), as authority for that proposition. 112 Ariz. at 571, 544 P.2d at 1086.

M. UDALL, *supra* note 27, § 91, at 136, states: "Privileges as to confidential communications do not terminate with the death of the person having the exclusionary right." C. MCCORMICK, *supra* note 29, § 94, at 197, states: "The accepted theory is that the protection afforded by the privilege will in general survive the death of the client."

71. 112 Ariz. at 571, 544 P.2d at 1086.

72. See text & notes 34-57 *supra*.

A limitation on the evidentiary privileges which would avoid the potential injustices of cases similar to *Macumber* and preclude clashes between the privileges and the constitutionally based right to present a defense is as follows: Whenever facts, otherwise protected from disclosure or admission into evidence by an evidentiary privilege appear reasonably likely to consist of information exculpating a criminal defendant, such facts may be introduced into evidence by the defendant, notwithstanding any assertion of the privilege, provided that the policy underlying the privilege is not seriously breached by the introduction of such facts.

cise of any constitutional right by an accused is ordinarily tempered by the state's rules of evidence,[73] the policy demands of the attorney-client privilege in *Macumber* must yield to the defendant's constitutional right to present a defense.

In some cases, the obstruction of justice from the exclusion of evidence under the privilege is not likely to be great because the confidential communications are of little importance and other means of getting the same evidence are available.[74] In *Macumber*, however, the third party's communication was a significant part of Macumber's defense and was not available to the triers of fact in any other form. Thus, the only way the jury could possibily have been informed of the confession was for the court to hold the attorney-client privilege inapplicable and admit the attorneys' testimony. Since the admission of the evidence offered by Macumber would have had little impact on the policy underlying the privilege,[75] the state's interest in applying the privilege in *Macumber* was minimal. On the other hand, the prejudice resulting to Macumber through exclusion of the evidence may have been extraordinarily great.[76]

Conclusion

When analyzed in light of *Chambers* and *Roviaro*, the Arizona Supreme Court's decision to uphold exclusion of the third party confession in *Macumber* appears to be in violation of the sixth and fourteenth amendments of the United States Constitution. In the guise of following a traditional rule of evidence, the court in *Macumber* sanctioned a denial of the defendant's right to present evidence necessary to make a complete defense to a serious criminal charge. A simple balance of the competing interests in *Macumber* weighs heavily on the side of requiring admission of the third party's confession. If a limitation were placed on the privilege for situations similar to *Macumber*, reliable, pertinent evidence would be admitted, the privilege would be vindicated, and justice would be more fully served.

73. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

74. Hearn v. Rhay, 68 F.R.D. 574, 582 (E.D. Wash. 1975); *see* United States v. Bigos, 459 F.2d 639, 643 (1st Cir.), *cert. denied*, 409 U.S. 847 (1972). In *Bigos* a statement made by a co-conspirator exculpating the defendant in a truck hijacking charge was excluded under the attorney-client privilege when invoked by the co-conspirator's attorney. The jury, however, had before it an affidavit of the co-conspirator almost identical to the excluded testimony.

75. *See* text & notes 59-60, 66-67 *supra*.

76. See discussion notes 15, 69 *supra*.

D. THE ROLE OF THE ATTORNEY-CLIENT PRIVILEGE WHEN CHALLENGING THE VALIDITY OF A GUILTY PLEA

In *Boykin v. Alabama*,[1] the Supreme Court of the United States established guidelines that state courts must follow in accepting guilty pleas. The Court held that the plea is not constitutionally valid unless it is entered voluntarily, with an understanding of its nature and consequences.[2] While the Court did not impose strict procedural requirements on the states in meeting these constitutional standards,[3] it did recommend that the judge personally discuss the matter with the defendant in open court.[4] This is intended to serve a dual function: first, the court will ensure that the plea was voluntarily made with a full understanding of its consequences;[5] and second, a record of the proceeding will be provided which could be used to settle a subsequent dispute over the validity of the plea.[6]

In cases where the trial court fails to establish a record that the defendant's plea of guilty was knowing and voluntary, the case may be remanded specifically to determine whether the defendant learned enough from his attorney to understand the nature and consequences of his plea.[7]

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1. 395 U.S. 238 (1969).

2. *Id.* at 242-43. To assist trial courts in determining what constitutes a voluntary and understanding plea of guilty, the Supreme Court indicated that there must be an absence of "ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats." *Id.* at 243. In addition, the Court stated that the defendant must be aware that he is waiving the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Id.*

3. The Court is ambiguous on this point. It states that where federal constitutional rights are involved, federal standards must govern. *Id.* Later, the Court distinguishes the strict adherence to Rule 11 of the Federal Rules of Criminal Procedure required by McCarthy v. United States, 394 U.S. 459 (1969), and the procedure state courts will be required to follow by stating that *McCarthy* applies only to the federal regime. 395 U.S. at 243 n.5, 244 n.7. In *Boykin*, the Court is unclear as to precisely what due process requires of a trial judge in a state court. *See* "Acceptance of Guilty Pleas," 14 ARIZ. L. REV. 409, 543, 546 (1972). However, in his dissenting opinion, Justice Harlan interpreted the majority opinion as placing strict procedural requirements on the states which were not constitutional necessities: "The Court thus in effect fastens upon the States, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure." 395 U.S. at 245.

4. *See* 395 U.S. at 244 n.7. The Federal Rules of Criminal Procedure require that the court address the defendant in open court and determine as a matter of record that the defendant understands specifically which rights he is waiving. FED. R. CRIM. P. 11 (c)-(d). The failure of a federal court to do this constitutes reversible error and entitles the defendant to replead. McCarthy v. United States, 394 U.S. 459, 472 (1969).

5. Boykin v. Alabama, 395 U.S. 238, 244 (1969).

6. *Id.* Fulfilling this dual function constituted the Court's rationale in requiring strict adherence to Rule 11 by federal courts. *See* McCarthy v. United States, 394 U.S. 459, 467 (1969).

7. State v. Hooper, 107 Ariz. 327, 330, 487 P.2d 394, 397 (1971). In *Hooper*, it was held that although the trial court had not addressed the defendant in open court concerning his guilty plea, the plea would still be valid if, on remand, it could be determined that counsel had adequately advised the defendant. *Id.*

While not specifically remanding a case, the majority of states have interpreted *Boykin* in a manner similar to Arizona, and have held that a guilty plea is valid where the defendant was

The attorney-client relationship[8] thus becomes increasingly important since inquiry into the information obtained by the defendant from his attorney arguably infringes on that relationship. The question of infringement on the attorney-client privilege was reached in the case of *State v. Lawonn*.[9]

In *Lawonn*, the defendant pleaded guilty to a charge of possession of a stolen check.[10] Subsequently, the defendant attempted to withdraw her plea of guilty, contending that the *Boykin* requirements had not been met.[11] The defendant argued she had not been informed that, by entering the plea, she was waiving her privilege against self-incrimination.[12] The Arizona Supreme Court remanded the case to the trial court for a determination as to whether the defendant learned through some other source that her plea of

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adequately advised of the rights waived by a guilty plea, even though such advise had not come directly from the court. *See, e.g.*, Bland v. State, 56 Ala. App. 547, 548, 323 So. 2d 730, 731 (1975); Fitzpatrick v. State, 338 N.E.2d 509, 511 (Ind. Ct. App. 1975); State v. Lambert, 266 S.C. 574, 578, 225 S.E.2d 340, 342 (1976). It is generally not required that the judge personally address the defendant with regard to each right mentioned in *Boykin*. Barrett v. State, 544 P.2d 830, 832 (Alas. 1975), *aff'd on rehearing*, 546 P.2d 161 (1976); State v. Laurino, 106 Ariz. 586, 588, 480 P.2d 342, 344 (1971). All that is required is that the court assure itself that the defendant's plea was entered voluntarily and understandingly. *See* People v. Lambert, — Colo. —, —, 539 P.2d 1238, 1240 (1975). Some states have imposed stricter requirements on their trial courts, but have acknowledged that some of these requirements are not constitutionally compelled. *See* Bunnell v. Superior Court, 13 Cal. 3d 592, 604, 531 P.2d 1086, 1094, 119 Cal. Rptr. 302, 310 (1975) (record shall reflect that defendent has been advised of the privilege against self-incrimination, of his right to a jury trial, and of his right to confront and cross-examine witnesses, that defendant understands the nature of the charges, and that defendant has expressly waived these constitutional rights). Further, while a full and complete colloquy between the court and the defendant is preferable, a failure to establish on the record that the plea was made in strict conformance to the *Boykin* requirements does not require an automatic vacation of the plea. *See* Moore v. State, 53 Ala. App. 93, 95, 326 So. 2d 157, 159 (1975); Williams v. State, 316 So. 2d 267, 273 (Fla. 1975). Nor does *Boykin* establish a particular procedure which judges must use in accepting a guilty plea. State v. Dicks, 57 Haw. 46, —, 549 P.2d 727, 731 (1976).

In Arizona cases, where a guilty plea is entered and the complete record is deficient as to some of the matters necessary for a valid plea, the case will be remanded to the trial court for further proceedings if it appears that the record could be expanded to reflect the defendant's true knowledge, such that the validity of the plea could be established. State v. Darling, 109 Ariz. 148, 152, 506 P.2d 1042, 1046 (1973); *see* State v. Church, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973); State v. Ponce, 106 Ariz. 420, 421, 477 P.2d 251, 252 (1970). The Arizona Supreme Court has construed the term "record" liberally. Thus, for purposes of satisfying the *Boykin* requirements, the record includes the presentence report, State v. Williker, 107 Ariz. 611, 615, 491 P.2d 465, 469 (1971), records of all hearings, including the preliminary hearing, the hearing at which bond was posted, and the probation revocation hearing, State v. Thompson, 109 Ariz. 47, 48, 504 P.2d 1270, 1271 (1973), and all other matters of record which were before the court prior to sentencing, State v. Durham, 108 Ariz. 327, 330, 498 P.2d 149, 152 (1972). The record, therefore, may be expanded on remand if the trial court can determine that the defendant gained the required knowledge from a source other than the trial judge. State v. Darling, 109 Ariz. 148, 152, 506 P.2d 1042, 1046 (1973).

8. For a discussion of the meaning of the attorney-client relationship, see text & notes 18-28 *infra*.

9. 113 Ariz. 113, 547 P.2d 467 (1976).

10. *Id.* at 115, 547 P.2d at 469 (Struckmeyer, V.C.J., specially concurring).

11. *See id.* at 113, 547 P.2d at 467.

12. The record indicates that the trial court personally addressed the defendant and inquired about the following: whether she discussed the plea with her attorney; whether she had any questions concerning the charges against her or her plea; whether any threats or promises of leniency had been made in an effort to force her to plead guilty; and whether she realized that by pleading guilty she waived her right to trial by jury, to testify in her own behalf, and to subpoena and cross-examine witnesses. However, the court failed to inform her that she waived her right against self-incrimination. *Id.* at 115-16, 547 P.2d at 469-70 (Struckmeyer, V.C.J., specially concurring).

guilty waived the privilege against self-incrimination. At the remand hearing, the deputy public defender who had represented the defendant at the guilty plea proceeding was subpoenaed.[13] The attorney declined to testify on the basis of the attorney-client privilege.[14] Based on the testimony at the hearing, the trial court found that the defendant was aware that her guilty plea waived the privilege against self-incrimination.[15] On appeal, the Arizona Supreme Court did not consider the defendant's objections, but instead addressed itself to whether the attorney-client privilege extends to advice given by an attorney concerning the consequences of a plea of guilty, when the client challenges the validity of the plea on the ground that she did not have a complete understanding of its consequences.[16] The court held that it does not.[17]

This casenote will analyze the position taken by the Arizona Supreme Court on the issue of the attorney-client relationship. Included in this analysis will be a determination of how the Arizona courts have applied the *Boykin* standards, and whether the Arizona application of *Boykin* is correct in light of subsequent United States Supreme Court decisions and decisions in other jurisdictions. The attorney-client relationship and the effect *Boykin* has on the viability of the attorney-client privilege will then be discussed. Finally, an examination will be made into the relative importance courts attach to the attorney-client privilege as opposed to the search for truth, with an eye toward determining whether the Arizona Supreme Court was correct in holding that the attorney-client privilege had been waived in *Lawonn*.

Requirement That a Guilty Plea be Made Voluntarily and Understandingly

The Arizona Supreme Court has stated that a plea of guilty must be entered by the defendant in the absence of physical or emotional duress and with a full knowledge of the nature and consequences of the plea.[18] Further, for such a guilty plea to be valid in Arizona, the defendant must be aware that a guilty plea waives the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers.[19] However, Arizona courts have held that neither *Boykin* nor Rule 17.2 of Arizona's Rules of Criminal Procedure[20] requires an express waiver of each of the rights waived

13. *Id.* at 113, 547 P.2d at 467.
14. *Id.* at 113-14, 547 P.2d at 467-68. Pursuant to stipulation, the attorney filed an affidavit in a sealed envelope containing the testimony he might have given. *Id.* at 114, 547 P.2d at 468.
15. *Id.* at 114, 547 P.2d at 468.
16. *Id.* at 113, 547 P.2d at 467.
17. *Id.* at 114, 547 P.2d at 468.
18. State v. Griswold, 105 Ariz. 47, 50, 457 P.2d 331, 335 (1969). *But cf.* State v. Irwin, 106 Ariz. 536, 538, 479 P.2d 421, 423 (1971) (no undue persuasion existed where a defendant pled guilty to second degree murder because he wanted to be relieved of the possibility of being found guilty of first degree murder).
19. State v. Miller, 110 Ariz. 304, 306, 518 P.2d 127, 129 (1974).
20. Rule 17.2 of the Arizona Rules of Criminal Procedure reads as follows:
Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him of and determining that he understands the

by entry of a guilty plea.[21] It is only necessary that the court address the defendant personally to ascertain whether the plea is voluntarily, intelligently, and knowingly made.[22] This is essentially in accord with the policy of a voluntary and understanding plea decreed by the United States Supreme Court in *Boykin v. Alabama*.[23]

By reading *Boykin* as requiring only a record showing a voluntary and knowing plea, and not as mandating that the judge obtain express waivers of specific rights before accepting a guilty plea,[24] the Arizona Supreme Court, in effect, rejects the assertion that the defendant knows only what the judge has told him.[25] Several federal and state courts have adopted the same or a similar position.[26]

If a defendant attempts to have a guilty plea set aside due to a lack of understanding that his entry of a plea waives a particular constitutional right, the failure to require the trial court to obtain a specific waiver of that right necessitates inquiry into the advice given by the defendant's lawyer.[27] The question in such a case is whether the attorney-client privilege will shield the defendant from this inquiry. Most of the courts which have considered the question have held that when a defendant claims that he was not informed that a plea of guilty would result in a waiver of constitutional rights prior to making the plea, the attorney-client privilege has been waived relative to communications concerning the plea.[28] For example, in *United States v.*

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following:
a. The nature of the charge to which the plea is offered;
b. The nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation imposed by statute;
c. The constitutional rights which he foregoes by pleading guilty or no contest, including his right to counsel if he is not represented by counsel; and
d. His right to plead not guilty.

ARIZ. R. CRIM. P. 17.2; *see* Note, *Arizona's New Rules of Criminal Procedure: A Proving Ground for the Speedy Administration of Justice*, 16 ARIZ. L. REV. 167, 198-99 (1974).

21. *See* State v. Laurino, 106 Ariz. 586, 588, 480 P.2d 342, 344 (1971); State v. Hudson, 17 Ariz. App. 338, 340, 497 P.2d 845, 847 (1972).

22. State v. Zaye, 108 Ariz. 13, 13, 492 P.2d 392, 392 (1972); *see* State v. Phillips, 108 Ariz. 332, 334, 498 P.2d 199, 201 (1972) (intelligently and knowingly); State v. Zarate, 106 Ariz. 450, 451, 478 P.2d 74, 75 (1970) (voluntarily).

23. 395 U.S. 238, 242 (1969). For a discussion of *Boykin*, see text & notes 1-6 *supra*.

24. The Arizona Supreme Court reads *Boykin* as applying the spirit of Rule 11 of the Federal Rules of Criminal Procedure without requiring strict compliance with that rule's terms. State v. Darling, 109 Ariz. 148, 151, 506 P.2d 1042, 1045 (1973). For a discussion of the United States Supreme Court's interpretation of Rule 11, see discussion note 4 *supra*. The Arizona rule governing the court's duty in accepting guilty pleas is Rule 17.2 of the Arizona Rules of Criminal Procedure and is substantively identical to Rule 11 of the federal rules. *See* text & notes 20-22 *supra*.

25. *See* State v. Darling, 109 Ariz. 148, 152, 506 P.2d 1042, 1046 (1973).

26. *See, e.g.*, United States *ex rel.* Hill v. United States, 452 F.2d 664, 665 (5th Cir. 1971); State v. Dicks, 57 Haw. 46, —, 549 P.2d 727, 731 (1976); Williams v. State, 263 Ind. 165, 178, 325 N.E.2d 827, 834 (1975). In addition, the United States Supreme Court has stated that a guilty plea is valid when it is determined at a state hearing on post conviction relief that the defendant had been fully informed by his attorney of the consequences of a plea of guilty. North Carolina v. Alford, 400 U.S. 25, 30 n.3 (1970) (dictum).

27. *See* State v. Hooper, 107 Ariz. 327, 330, 487 P.2d 394, 397 (1971).

28. United States v. Welton, 439 F.2d 824, 826 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971) (a hearing to determine the validity of the guilty plea will not be granted unless the defendant

Woodall,[29] the defendant appealed his sentence on the ground that his guilty plea was not intelligently made since he lacked knowledge of the consequences of the plea.[30] The court held that the attorney-client privilege was waived by the appeal, reasoning that the interests of truth and justice would best be served by refusing to permit the defendant both to invalidate his plea and at the same time to prevent his attorney from testifying as to the true extent of the defendant's knowledge.[31] *Lawonn* involved a fact situation similar to *Woodall*, and both decisions appear to reflect justifiable limitations on the attorney-client privilege.[32] The Arizona Supreme Court, therefore, is in line with the majority of jurisdictions in finding that the attorney-client privilege was waived in *Lawonn*. While this position does not come within any of the well delineated exceptions to the attorney-client privilege, the position is justified in light of the policies and purposes of the privilege.[33]

The Attorney-Client Privilege

The attorney-client privilege precludes forcing an attorney to reveal the content of communcations with a client made during the course of professional employment.[34] The basic purpose behind the attorney-client privilege is to encourage a client to consult freely with his legal advisor by removing apprehension that the lawyer will subsequently be compelled to disclose the

submits an affidavit from his attorney in support of his claim; and, in any event, the attorney-client privilege is completely waived on the subject of pleading guilty, the consequences thereof, and the reasons for the defendant entering the plea); Roberts v. Greenway, 233 Ga. 473, 477, 211 S.E.2d 764, 767 (1975). *Contra, In re* Guilty Plea Cases, 395 Mich. 96, 121, 235 N.W.2d 132, 141 (1975), *cert. denied*, 429 U.S. 1108 (1977) (attorney-client privilege does not allow questioning of the attorney to establish the true extent of the defendant's knowledge).

29. 438 F.2d 1317 (5th Cir. 1970), *cert. denied*, 403 U.S. 933 (1971).

30. *Id.* at 1324.

31. *Id.* at 1326.

32. See text & notes 42-73 *infra*. The attorney-client privilege has been codified in Arizona. ARIZ. REV. STAT. ANN. § 13-1802(2) (Supp. Pamphlet 1957-77) (to be renumbered as ARIZ. REV. STAT. ANN. § 13-4062(2), effective Oct. 1, 1978). This statute provides that an attorney shall not be examined as a witness "without consent of his client, as to any communication made by the client to him, or his advice given thereon in the course of professional employment." *Id.* The statute is controlling on questions concerning privileged communications since the Arizona Rules of Evidence state that the admissibility of privileged communications shall be controlled by the United States Constitution, the Constitution of the State of Arizona, or any applicable statute or rule. ARIZ. R. EVID. 501. Rule 501 also provides that problems not specifically covered by any of the above are governed by principles of common law.

When the attorney-client privilege was first recognized at common law, it was regarded as belonging to the attorney. *See* Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 487-89 (1928). However, subsequent developments have brought about a change in the ownership of the privilege, and it now belongs to the client, and may be waived by him at any time. Hunt v. Blackburn, 128 U.S. 464, 470 (1888); *see* Radin, *supra*, at 487-91. The client may waive the privilege either by conduct or affirmative consent. *See* State *ex rel.* Schuler v. Tahash, 278 Minn. 302, 308, 154 N.W.2d 200, 205 (1967) (privilege was deemed waived where client discussed the content of confidential communications, and also attacked the competence of his counsel).

33. *See* text & notes 34-73 *infra*.

34. ARIZ. REV. STAT. ANN. § 13-1802(2) (Supp. Pamphlet 1957-77) (to be renumbered as ARIZ. REV. STAT. ANN. § 13-4062(2), effective Oct. 1, 1978).

content of their discussion.[35] The greatest drawback of the attorney-client privilege is that it is an obstacle to the investigation and ascertainment of the truth.[36] For example, if the privilege would have been applied in *Lawonn*, it appears likely that the court would have been unable to ascertain the true extent of the defendant's knowledge.[37] Thus, in certain situations, the right of every person to freely and fully confide in an attorney must be weighed against the burden the rule imposes on the administration of justice.[38]

When a balance of the policies underlying the attorney-client privilege and the ascertainment of truth weighs in favor of the latter, courts frequently find a waiver of the privilege.[39] Generally, if permitting application of the privilege to a particular communication would constitute an abuse of its protection, confidentiality is waived.[40] For example, a client will be found to have waived the privilege where he charges his attorney with inadequate representation.[41] In *Lawonn*, the Arizona Supreme Court does not state explicitly what abuse of the relationship caused it to conclude that the defendant waived the attorney-client privilege. However, there are three

35. *See* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (J. McNaughton rev. 1961). *See also* Radin, *supra* note 32, at 490, which gives an excellent historical discussion of the attorney-client privilege. It should be remembered that the modern application of the attorney-client privilege extends to communications made by the attorney to the client as well as communications made by the client to the attorney. Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956).

36. 8 J. WIGMORE, *supra* note 35.

37. *See* 113 Ariz. at 114, 547 P.2d at 468.

38. Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960). The attorney-client privilege is not absolute and must be justified pragmatically by its ability to serve social needs. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1489 (1966). *See also* text & notes 38-41 *infra*.

Because the attorney-client privilege often hinders the search for the truth, courts have applied a restrictive interpretation to the privilege. *See* United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964). The privilege is accorded only in situations where its purpose can be accomplished, and is not applied in cases where some other value outweighs the importance of the privilege. *See id.*; 8 J. WIGMORE, *supra* note 35, at 554. The United States Supreme Court has also criticized the game playing function that has marred use of the privilege:

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. . . . [T]hat system . . . is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Williams v. Florida, 399 U.S. 78, 82 (1970). In addition to evidentiary rules governing the admissibility of privileged communications, the American Bar Association and the courts have attempted to balance the countervailing values and provide policy considerations for the assertion and waiver of the attorney-client privilege. *See* Clark v. United States, 289 U.S. 1, 15-16 (1933); Baird v. Koerner, 279 F.2d 623, 631 (9th Cir. 1960). It is a fundamental duty of a lawyer to preserve the confidences and secrets of his client. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON No. 4 (1976). It has been suggested that an attorney should protect the confidences of clients even if this involves peril to the attorney. *Id.* at n.11. Moreover, unless it is absolutely necessary to the ends of justice, an attorney should not testify in court on behalf of his client. *See id.* DR 4-101(C).

39. *See* United States v. Woodall, 438 F.2d 1317, 1324-26 (5th Cir. 1970), *cert. denied*, 403 U.S. 933 (1971); United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964).

40. Clark v. United States, 289 U.S. 1, 15-16 (1932).

41. *See* State *ex rel.* Schuler v. Tahash, 278 Minn. 302, 308, 154 N.W.2d 200, 205 (1967). *See also* text & notes 42-53 *infra*.

theories which, to some extent, support the court's conclusion: waiver due to the client's claim of inadequate representation; the "open door" waiver theory; and permitting the attorney to testify due to past or expected perjury by his client.

Inadequate Representation

One waiver of the attorney-client privilege recognized by both state and federal courts occurs when a client puts the legal advice given him in issue by raising questions regarding his attorney's ineffectiveness or incompetence.[42] The American Bar Association also recognizes this exception.[43] The waiver, however, is limited to matters pertaining to the accusation, which includes all facts relevant and material to the issues raised by the defendant.[44] A common justification for this exception is that the attorney's testimony is relevant and material to the truth or falsity of the accusations, and thus out of fairness to the attorney, the privilege should be waived.[45] The Arizona Supreme Court has added that an attorney is not only permitted to testify, but is under an obligation to disclose fully and freely in order to protect the due administration of justice.[46] This is true even in cases where the attorney does not feel threatened and there is no direct action being taken against the attorney.[47]

In Arizona, the duty to ensure that a guilty plea is knowingly and voluntarily entered is imposed upon both the court and counsel.[48] Since the

42. *See, e.g.*, Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974), *cert. denied*, 419 U.S. 1125 (1975); Sherman v. United States, 261 F. Supp. 522, 531 (D.C. Haw. 1966); State v. Krutchen, 101 Ariz. 186, 191, 417 P.2d 510, 515 (1966), *cert. denied*, 385 U.S. 1043 (1967); Lawson v. State, 492 P.2d 1113, 1116-17 (Okla. Crim. App. 1971). *See generally* "Effective Assistance of Counsel," 14 ARIZ. L. REV. 409, 532 (1972).

43. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1976). "A lawyer may reveal: Confidences or secrets necessary . . . to defend himself or his employees or associates against an accusation of wrongful conduct." *Id.*

44. *See* United States v. Monti, 100 F. Supp. 209, 212 (E.D.N.Y. 1951).

45. Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974), *cert. denied*, 419 U.S. 1125 (1975); United States v. Monti, 100 F. Supp. 209, 212 (E.D.N.Y. 1951); *see* Pruitt v. Peyton, 243 F. Supp. 907, 909 (E.D. Va. 1965).

46. State v. Griswold, 105 Ariz. 1, 3-5, 457 P.2d 331, 333-35 (1969) (defendant claimed he was coerced into pleading guilty because his attorney demanded more money for the trial); State v. Kruchten, 101 Ariz. 186, 189-91, 417 P.2d 510, 513-15 (1966) (defendant charged that he was not adequately informed about the nature of the charges against him prior to pleading guilty).

47. In *Lawonn*, the defendant's attorney was not under personal attack by his client and attempted to invoke the privilege to avoid testifying. 113 Ariz. at 113-14, 547 P.2d at 467-68 (1976). However, for the attorney's disclosure obligation to arise, it is not necessary that the attorney be threatened with action against him by his client; all that is needed is to have the adequacy of the attorney's representation questioned. *See* State v. Kruchten, 101 Ariz. 186, 191, 417 P.2d 510, 515 (1966), *cert. denied*, 385 U.S. 1043 (1967). Thus the waiver rule announced in *Lawonn* is necessary not because the lawyer needs to defend himself, but rather because the truth will otherwise elude the court in testing the validity of the guilty plea. The reason for this waiver of the attorney-client privilege is that the duty of an attorney to a client is subordinate to his responsibility for the due administration of justice. *See id.* Therefore, the attorney-client privilege must yield to the truth-seeking function of the court when the adequacy of the attorney's representation is called into question. *Id.*

48. *See* State v. Darling, 109 Ariz. 148, 153, 506 P.2d 1042, 1047 (1973).

court is not required to obtain express waivers of particular rights,[49] the duty devolves upon the defendant's lawyer to advise the defendant as to the specific waivers involved in a guilty plea.[50] Also, the Arizona Supreme Court has stated that it is the duty of the attorney as well as the court to make sure the record meets the *Boykin* requirements.[51] If the record is deficient and the defendant is not aware of all of the consequences of a guilty plea, the attorney necessarily did not adequately perform his function. Therefore, where a defendant challenges the validity of a guilty plea on the ground that she was not informed that her plea waived a particular right, she in effect claims a breach of the attorney's duty which is, in substance, a claim of inadequate representation. In such cases, the court may properly compel the attorney to testify as to matters related to the plea of guilty.[52] Therefore, the Arizona Supreme Court appears to have acted in accordance with established precedents by finding that the defendant in *Lawonn* waived the attorney-client privilege as a result of her attack on the adequacy of her former attorney's representation.[53]

"Open Door" Theory

There is another situation in which courts find a waiver of the attorney-client privilege which, by analogy, supports the holding in *Lawonn*. By voluntarily testifying about the content of communications with his attorney, a client waives the confidential character of those communications, and both the client and the attorney may be fully examined in relation thereto.[54] The policy behind finding a waiver of the attorney-client privilege where the client testifies as to the content of these confidential communications is based on two factors: first, the client has demonstrated an implied intention

49. *See* State v. Laurino, 106 Ariz. 586, 588, 480 P.2d 342, 344 (1971); discussion note 6 *supra*.

50. *Cf.* Boykin v. Alabama, 395 U.S. 238, 243-44 (1969) (the Court implied that a state court judge is not required to personally discuss with the defendant the rights waived by a plea of guilty). Since in order for a plea to be valid a defendant must be aware of the rights he is waiving, and the trial court is not required to obtain an express waiver of each of these rights, it follows that the duty to properly inform the defendant is shared by the defendant's attorney.

51. State v. Darling, 109 Ariz. 148, 153, 506 P.2d 1042, 1045 (1973).

52. State v. Kruchten, 101 Ariz. 186, 191, 417 P.2d 510, 515 (1966), *cert. denied*, 385 U.S. 1043 (1967).

53. See discussion notes 42-43 *supra*. The only specific reference to the inadequate representation exception is in Justice Struckmeyer's specially concurring opinion, where he refused to "extend the attorney-client privilege to instances where the client's position is an attack on the adequacy of the representation of the attorney." 113 Ariz. at 115, 547 P.2d at 469. By implication the majority's holding encompasses this exception.

54. *See, e.g.*, United States v. Woodall, 438 F.2d 1317, 1324 (5th Cir. 1970), *cert. denied*, 403 U.S. 933 (1971); Tripp v. Chubb, 69 Ariz. 31, 35, 208 P.2d 312, 314 (1949); People v. Ottenstror, 127 Cal. App. 2d 104, 110, 273 P.2d 289, 293 (1954). The reason for this rule is simple: a party cannot partially waive the privilege to afford himself an advantage over his adversary; once the client opens the door slightly, it must be opened all the way with reference to the particular communications under consideration. United States v. Woodall, 438 F.2d at 1321; *see* United States v. Pauldino, 487 F.2d 127, 130 (10th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974) (testimony concerning peripheral matters opens the door to all relating communications).

to waive the privilege by testifying;[55] and second, the privilege must be waived in the interest of fairness and consistency.[56]

The first policy supporting waiver in this situation seems to follow from the privilege itself. The privilege is designed to relieve the client of the apprehension that his attorney will be forced to reveal the content of their communications.[57] However, since the client has disclosed the content of those communications, he is presumably not concerned with secrecy. Therefore, once the confidential nature of the information is breached by the intended beneficiary of the privilege, its underlying justification no longer exists.[58] The second policy supporting a waiver of the attorney-client privilege is to protect the entire truth. Finding a waiver from the client's voluntary disclosure prevents a litigant from testifying as to favorable portions of the privileged communications while insisting that the privilege shield from disclosure other facts that may rebut his position.[59] Once a client enters upon a line of defense which involves communication between that party and the attorney, fairness requires that the privilege be considered waived.[60]

Although Lawonn apparently did not disclose the content of her attorney's advice when she testified,[61] the analogy between her case and those within the voluntary testimony exception is fairly clear. In *Lawonn*, the petitioner called into question the validity of her guilty plea and was entitled to a full evidentiary hearing. The burden of proof rested with her.[62] The defendant alleged on appeal that she was not adequately informed of her rights prior to her plea of guilty.[63] Since this allegation entails a denial that she was informed of her rights by her attorney, it is no different in effect than the situation which would have been presented if Lawonn had taken the

55. 8 J. WIGMORE, *supra* note 35, § 2327, at 636.
56. *Id.*
57. *See* text & note 35 *supra*.
58. *See* 8 J. WIGMORE, *supra* note 35, § 2327, at 636. This rationale has been adopted by the English courts since the late eighteenth century. *Id.*
59. Western Union Tel. Co. v. Baltimore & Ohio Tel. Co., 26 F. 55, 56-57 (S.D.N.Y. 1885).
60. Hunt v. Blackburn, 128 U.S. 464, 470-71 (1888). *See generally* Chirac v. Reinicker, 24 U.S. 280, 283 (1826).
The policies behind the physician-patient privilege are similar to those supporting the attorney-client privilege. If the patient testifies concerning the content of privileged communications, he has waived the privileged nature of these communications. Hudman v. State, 89 Okla. Crim. 160, 205 P.2d 1175, 1184 (1949). Also, a specific mental or physical condition placed at issue in the patient's pleading waives the privileged character of communications concerning that specific condition. *In re* Lifschutz, 2 Cal. 3d 415, 431, 467 P.2d 557, 567, 85 Cal. Rptr. 829 (1970). The rationale given for this is similar to that for the attorney-client privilege; waiver is compelled by notions of fairness and by the state's interest in the ascertainment of truth. *Id.* at 435-36, 467 P.2d at 568-69, 85 Cal. Rptr. at 842-43.
61. 113 Ariz. at 115, 547 P.2d at 469 (Struckmeyer, V.C.J., specially concurring).
62. Stetson v. United States, 417 F.2d 1250, 1253 (7th Cir. 1969). Where the defendant was represented by counsel at the guilty plea hearing, there is a heavy burden on the defendant to show, by a preponderance of the evidence, that the guilty plea should be set aside. Langdeau v. South Dakota, 446 F.2d 507, 509 (8th Cir. 1971); *see* Crail v. United States, 430 F.2d 459, 460 (10th Cir. 1970). In addition, the Arizona Rules of Criminal Procedure allow the state to compel the defendant to testify at an evidentiary hearing. ARIZ. R. CRIM. P. 32.8.
63. 113 Ariz. at 113, 547 P.2d at 467.

witness stand and disclosed the substance of any communications with her attorney—raising a question as to the adequacy of her legal advice opens the door to formerly privileged communications which touch on this issue.[64]

Both of the policies behind the open door theory apply in this case. By claiming that she was not informed that a guilty plea waived the right against self incrimination, the defendant demonstrated an implied intention to waive the attorney-client privilege. The desire to maintain secrecy was no longer a valid justification for leaving the privilege intact. Furthermore, the court's interest in protecting the entire truth necessitates waiver of the attorney-client privilege in this situation. The defendant cannot testify that she was not advised by her attorney and then invoke the privilege to prevent her former attorney from refuting the defendant's claim. To permit the defendant to do otherwise would allow a rule designed as a shield for the attorney-client relationship to be used as a sword by the client. The Arizona Supreme Court's result is a desirable one; it reinforces the policies behind the open door theory.

Perjury

Another general rule provides analogous support for the court's holding in *Lawonn*. It is well established in American courts that the attorney-client privilege does not extend to communications which contemplate a future crime or fraud.[65] In order for this exception to apply, it is only necessary that a prima facie case be established that a future crime or a present, continuing illegality is being contemplated.[66] Thus, a client's expressed intention to commit perjury is not included within the confidences which an attorney is bound to respect.[67]

The policy behind holding the attorney-client privilege inapplicable where advice refers to a contemplated fraud or crime arises from the desire to place reasonable limitations on the reach of the privilege. The privilege is designed to ensure the availability of complete legal advice even to one who has engaged in some wrongdoing.[68] However, its protection may not be

64. See text & notes 24-31 *supra*.

65. *See* United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975) (dictum indicating that attorney-client privilege does not protect communications dealing with plan to commit perjury); United States v. Aldridge, 484 F.2d 655, 658 (7th Cir. 1973), *cert. denied*, 415 U.S. 921, 922 (1974) (communications are not protected regardless of whether attorney knew of or joined in client's contemplation of future crime).

66. United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971), *cert. denied*, 404 U.S. 958 (1972). *But cf.* People v. Kor, 129 Cal. App. 2d 436, 277 P.2d 94 (1954) (court held that the privilege remains intact even though the client as a witness is allegedly not telling the truth). The *Kor* court stated that "the fundamental doctrine of privileged communications between attorney and client might become of no importance since the truth of the client's testimony could easily be brought into question." *Id.* at 446, 277 P.2d at 100.

67. United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975) (dictum); State v. Henderson, 205 Kan. 231, 237, 468 P.2d 136, 141 (1970).

68. *See* 8 J. WIGMORE, *supra* note 35, § 2298, at 572-73.

used to obtain advice as to how to commit a crime or fraud in the future.[69] The privilege cannot be used as a sword to carry out contemplated antisocial acts;[70] therefore, courts will not allow the privilege to be used for the intentional obstruction of justice.[71]

At the guilty plea proceeding in *Lawonn*, the defendant's attorney could not remember exactly what advice he had given the defendant; his affidavit indicated only that his customary practice was to inform clients of the constitutional rights relinquished by a guilty plea, including the privilege against self-incrimination.[72] The case, therefore, does not automatically fall within the perjury exception to the attorney-client privilege because the defendant's attorney did not know with certainty that the defendant committed perjury, even though he had reason to suspect the defendant was testifying falsely. The same concern for the due administration of justice which results in holding the privilege inapplicable to communications in contemplation of a crime[73] may support the conclusion that the privilege collapses where it appears reasonably likely that a client seeks post-conviction relief based on a false story about the substance of her past legal advice.

Conclusion

While the Arizona Supreme Court did not indicate specifically which exception to the attorney-client privilege was relied upon, there is ample justification for its ruling in *Lawonn*. By the defendant's claim that she was not advised that a plea of guilty waived her right against self-incrimination, she, in effect, charged her former attorney with inadequate representation,

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69. *See id.*

70. Gebhardt v. United Rys., 220 S.W. 677, 679 (Mo. 1920).

71. *See* Stover & Koesterer, *Attorney-Client Privilege in Wisconsin*, 59 MARQ. L. REV. 227, 232 (1976).

In regard to the attorney's ethical obligations, the American Bar Association has offered some direction in this area. In cases where counsel knows that perjury has been committed, that attorney must bring the matter to the attention of the prosecuting authorities. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON NO. 7, EC 7-26, DR 7-102(A)(4), DR 7-102(B)(1) (1976).

Upon the discovery of some past deception, a lawyer is under a duty either to urge his client to rectify it, or, if the client refuses or is unable to do so, to inform the affected person or tribunal either by persuading his client to forego the deceptive practice, or by informing the injured party. *Id.* DR 7-102(B)(1). If an attorney does not reveal the intention of his client to commit perjury, disciplinary action may be taken against him. *Id.* EC 7-26. Thus, this exception to the attorney's obligation not to disclose a client's confidences or secrets might come into play in a challenge to the validity of a guilty plea when the defense attorney knows with certainty that the defendant had knowledge of the rights waived by the plea. However, there are conflicting views in cases where the attorney merely has a suspicion that the defendant is aware that these rights are waived. Some attorneys feel that the lawyer's general obligation to protect the court requires a disclosure of his suspicions. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 7.7, Commentary at 276 (1971). Others take the view that the lawyer's obligation of confidentiality does not permit him to make such a disclosure upon mere suspicion. *Id.* The Arizona Supreme Court has held that it is proper for an attorney to withdraw as counsel when he has "reason to suspect" that his client has not told the truth under oath. State v. Lowery, 111 Ariz. 26, 28, 523 P.2d 54, 56 (1974). In *Lowery*, the court gave its approval since there was no prejudice, but indicated that in most cases the attorney should not withdraw. *Id.*

72. 113 Ariz. at 115, 547 P.2d at 469. See text & note 13 *supra*.

73. *See* United States v. Gordon-Nikkar, 518 F.2d 972 (5th Cir. 1975).

which provides an exception to the privilege. This exception seems to be the one most likely relied upon by the court in *Lawonn*. Also, by raising the issue of the validity of her guilty plea, the defendant opened the door to all communications she had with her former attorney relating to this matter. It is not clear whether the perjury exception to the attorney-client privilege applied, or, if it does, whether the court relied on it in *Lawonn*.

The preponderance of case law supports the Arizona interpretation of *Boykin*, which further strengthens the Arizona Supreme Court's position. It is the function of a court to determine the equities involved when weighing the ascertainment of the truth against protection of the attorney-client privilege. The court exercised its judgement in *Lawonn* in a manner consistent with social policy and case law in this area.

E. PROBATION CONDITIONS IN CONFRONTATION WITH THE FOURTH AMENDMENT

The fourth amendment of the United States Constitution guarantees the right of individuals to be protected from warrantless and unreasonable searches and seizures.[1] Many jurisdictions, however, have diluted this constitutional guarantee in the context of granting probation to criminal offenders. For example, it is common for the trial judge, acting under his discretionary authority to place a defendant on probation, to require a probationer to submit at any time to warrantless searches and seizures of his person or property by a probation or police officer.[2] Attempts at placing reasonable constitutional limitations on the judge's use of such probation conditions have met with little success in Arizona.

In *State v. Page*,[3] the Arizona Court of Appeals considered the constitutional validity of a probation condition authorizing warrantless searches and seizures. Page was charged by information with the crime of possession of heroin.[4] Pursuant to a plea agreement, she pleaded no contest

1. U.S. CONST. amend. IV provides:
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized.

This right has been incorporated into the fourteenth amendment due process clause and is applicable to the states. *See* Wolf v. Colorado, 338 U.S. 25, 27 (1949).

2. *E.g.*, United States v. Gordon, 540 F.2d 452 (9th Cir. 1976); United States v. Consuelo-Gonzalez, 521 F.2d 259, 261 & n.1 (9th Cir. 1975); People v. Mason, 5 Cal. 3d 759, 761, 488 P.2d 630, 631, 97 Cal. Rptr. 302, 303 (1971), *cert. denied*, 405 U.S. 1016 (1972); People v. Peterson, 62 Mich. App. 258, 265, 233 N.W.2d 250, 255 (1975); State v. Schlosser, 202 N.W.2d 136, 137 (N.D. 1972); Tamez v. State, 534 S.W.2d 686, 690 (Tex. Crim. App. 1976).

3. 115 Ariz. 131, 564 P.2d 82 (Ct. App. 1977), *vacated*, 115 Ariz. 156, 564 P.2d 379 (1977).

4. *Id.* at 132, 564 P.2d at 83.

to a charge of possession of dangerous drugs, and the trial judge placed her on probation for a period of three years.[5] The grant of probation was conditioned, however, on the requirement "[t]hat defendant submit to search and seizure of person or property at any time by any peace officer, or probation officer, without the benefit of a search warrant."[6] On appeal to the Arizona Court of Appeals, Page contended in part that this probation condition was overbroad and thus in violation of her fourth amendment right to be protected from unreasonable searches and seizures.[7] More specifically, while appellant did not argue that she was entitled to the full panoply of fourth amendment rights guaranteed to nonprobationers, she did argue that she was entitled to be protected from the carte blanche authority granted to police officers to make a warrantless search or seizure of her person or property.[8] The state, on the other hand, argued that probation is a matter of legislative grace and not a right, and that it is subject to any condition imposed by the trial judge acting pursuant to his statutory authority.[9]

The court of appeals ruled that a probation condition is overbroad and in violation of a probationer's fourth amendment rights if it does not limit the authority to search to the probation officer or to a peace officer acting at the probation officer's direction, or if it does not require the ascertainment, prior to the search, of any facts indicating that a breach of probation is occurring or is imminent.[10] The court thus adopted a relatively broad interpretation of the fourth amendment protection to be granted to probationers.[11] However, the court's decision was subsequently vacated by the Arizona Supreme Court in an opinion which expressly reserved the search and seizure issue for a later time.[12]

The supreme court's opportunity to decide the extent of probationers' fourth amendment rights soon arose in *State v. Montgomery*.[13] Appellant Montgomery pleaded guilty to the crime of second degree burglary after dismissal of a count of attempted grand theft under a plea agreement.[14] Montgomery's sentence was suspended on the conditions that he serve eleven months in jail and that he be placed on probation.[15] One of the terms

5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 133, 564 P.2d at 84.
9. *Id.*
10. *Id.* at 134, 564 P.2d at 85.
11. At the time *Page* was decided, only three jurisdictions had ruled that warrantless search and seizure conditions are an unconstitutional intrusion into a probationer's fourth amendment right of privacy. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975); People v. Peterson, 62 Mich. App. 258, 233 N.W.2d 250 (1975); Tamez v. State, 534 S.W.2d 686 (Tex. Crim. App. 1976). For a listing of cases from other jurisdictions which have considered the constitutional validity of probation conditions similar to that imposed on Page, see note 2 *supra*.
12. State v. Page, 115 Ariz. 156, 157, 564 P.2d 379, 380 (1977).
13. 115 Ariz. 583, 566 P.2d 1329 (1977).
14. *Id.*
15. *Id.*

of his probation was that he submit to warrantless searches and seizures of his person or property at any time by any police or probation officer.[16] Montgomery appealed, arguing that the probation condition was unconstitutionally overbroad and violative of his fourth amendment right to be free from unreasonable searches and seizures.[17] The supreme court ruled that the probation condition was not unconstitutionally overbroad, although similar provisions "should be sparingly given."[18] Yet the supreme court failed to specify any standards or guidelines which trial courts should apply in determining whether to impose probation conditions permitting warrantless searches and seizures of probationers and their property. Thus, the *Page* court's relatively broad interpretation of a probationer's fourth amendment rights, and the standards it announced for protection of those rights, were short-lived.[19]

This casenote will first examine, in a discussion of the traditional characterizations of probationary status, whether probationers are entitled to any of the rights protected by the fourth amendment. Next, a contrast will be made between the decisions in *Page* and *Montgomery*. This comparison will consider the manner in which the balance struck in *Page* between society's interests in the rehabilitation of offenders and the prevention of recidivism enables the trial court to further the purposes of probation, and to protect a probationer's fourth amendment rights. It will also show that the elliptical analysis in *Montgomery* fails to provide any guidelines by which a sentencing judge can define the extent of a probationer's fourth amendment rights and, therefore, belies the court's warning that warrantless search conditions should be imposed sparingly.

Traditional Characterizations of Probation

Courts have traditionally denied or restricted a probationer's fourth

16. *Id.*
17. *Id.*
18. *Id.* at 585, 566 P.2d at 1331.
19. Since the opinion of the court of appeals in *Page* has been vacated by the supreme court, the protections against warrantless searches and seizures of a probationer's person or property announced by the court of appeals had no effect at the time the supreme court decided *Montgomery*. In State v. Jeffers, 116 Ariz. 192, 568 P.2d 1090 (Ct. App. 1977) (decided in the interim between the supreme court's decisions in *Page* and *Montgomery*), the Arizona Court of Appeals in Division 2 made only a passing reference to the Division 1 opinion in *Page* to emphasize that its analysis of a probationer's fourth amendment rights had been expressly vacated. *Id.* at 194 n.2, 568 P.2d at 1092 n.2. The trial court in *Jeffers* had imposed a probation condition on the defendant requiring him to "submit person and property to search and seizure at any time of the day or night when so requested by a Probation Officer, with or without warrant and with or without probable cause." *Id.* at 194, 568 P.2d at 1092. Because this condition required police officers to first obtain the authorization of the probation officer before they could conduct a warrantless search and seizure upon suspicion of a probation violation, it guaranteed Jeffers a substantially greater degree of fourth amendment privacy and protection than that imposed on Page and Montgomery. *See* text & notes 6-11, 16-18 *supra*. The court of appeals in *Jeffers* upheld the constitutional validity of the probation condition because it was reasonably related to probation's goals of the defendant's rehabilitation and the public's protection, and was a necessary element of the probationary program. 116 Ariz. at 195, 568 P.2d at 1093.

amendment rights by relying on various characterizations of probationary status.[20] The majority of the court of appeals in *Page* examined three theories under which courts in other jurisdictions have upheld the constitutional validity of probation conditions similar to the one imposed in *Page*.

Under the custody theory, the courts view probation as an act of grace which places the defendant in a prison without walls.[21] The authority granted to prison officials to subject inmates to searches unimpeded by the fourth amendment[22] is extended to probation and to police officers outside prison.[23] Because probation is an act of grace granted at the trial court's discretion, the defendant has no basis for an objection to a probation condition restricting fourth amendment rights which would otherwise have been incidental to his imprisonment.[24] The *Page* court rejected this theory on the ground that it fails to recognize that the severe limitations on fourth amendment rights necessary for the orderly administration of a prison[25] are not necessary for the administration of probation.[26] Another relevant consideration is that acts of grace may not be extended by the government if conditioned upon the surrender of a fundamental constitutional right.[27] For this reason, even though probation is viewed as an act of grace, it cannot be conditioned upon the probationer's surrender of the right to be free from unreasonable searches and seizures.

The *Page* court also discussed the waiver theory, under which the defendant has the choice of accepting probation together with all the conditions attached to probationary status, or of rejecting probation and accepting the sentence.[28] The court of appeals also rejected this theory, reasoning that the choice presented is more nominal than real;[29] the "waiver" is merely a legal fiction, since a defendant would rarely choose imprisonment over probation even if he must accept restrictions on his constitutional rights.[30]

20. *See, e.g.*, State v. Montgomery, 115 Ariz. 583, 584-85, 566 P.2d 1329, 1330-31 (1977) (relying on the custody, waiver, and reasonable expectation of privacy theories to restrict a probationer's fourth amendment rights); People v. Mason, 5 Cal. 3d 759, 764-65, 488 P.2d 630, 632-33, 97 Cal. Rptr. 302, 304-05 (1971), *cert. denied*, 405 U.S. 1016 (1972) (relying on the waiver and reasonable expectation of privacy theories to restrict a probationer's fourth amendment rights); State v. Schlosser, 202 N.W.2d 136, 137-39 (N.D. 1972) (relying on the custody theory to deny a probationer's fourth amendment rights). *See also* Note, 1 AM. J. CRIM. L. 235, 236-39 (1972).

21. *See* White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. PITT. L. REV. 167, 177-81 (1969); Note, *supra* note 20, at 237-39.

22. *Cf.* Lanza v. New York, 370 U.S. 139, 143 (1962) ("In prison, official surveillance has traditionally been the order of the day.").

23. *See* White, *supra* note 21; Note, *supra* note 20, at 237-39.

24. *See* White, *supra* note 21, at 178. *See generally* "Admissibility at Probation Revocation Hearings of Incriminating Statements Made to Probation Officer," 15 ARIZ. L. REV. 593, 731, 733-37 (1973).

25. *See* White, *supra* note 21, at 180.

26. 115 Ariz. at 133, 564 P.2d at 84.

27. *See* White, *supra* note 21, at 178-79.

28. *See* 115 Ariz. at 133, 564 P.2d at 84; Note, *supra* note 20, at 239.

29. 115 Ariz. at 133, 564 P.2d at 84.

30. *See id. See generally* Note, *supra* note 20, at 239.

Furthermore, as noted by the Michigan Court of Appeals in invalidating a probation condition similar to that imposed on Page, the waiver of protection against unreasonable searches and seizures is coerced, and thus inconsistent with the spirit of the Bill of Rights.[31]

The third approach examined by the *Page* court, and the one which it adopted, is the reasonable expectation of privacy theory referred to by the California Supreme Court in *People v. Mason*.[32] Under this approach, a probationer has no reasonable expectation of privacy under a warrantless search and seizure probation condition which is reasonably related to probation's twin goals of fostering rehabilitation and preventing recidivism.[33]

Each of these characterizations of probationary status restricts a probationer's fourth amendment rights to some extent. The basic problem in each case, however, is to determine the permissible scope of these restrictions. If, for example, probation is viewed as a prison without walls serving primarily the functions of punishment and security, the grant of probation, in effect, results in the denial of fourth amendment rights.[34] However, this denial may unnecessarily interfere with probation's goal of rehabilitating offenders.[35] At the other extreme, the complete restoration of the probationer's fourth amendment rights may not adequately protect society's interest in preventing future crime. The issue becomes, therefore, how much freedom from

31. People v. Peterson, 62 Mich. App. 258, 266, 233 N.W.2d 250, 255 (1975). The court added: "Probation is a matter of grace and rejectable, we think, at the option of the probationer. But it is not a Bill of Attainder for the period of probation." *Id.* at 265, 233 N.W.2d at 255. *See also* Morrissey v. Brewer, 408 U.S. 471 (1972), which the Court of Appeals for the Ninth Circuit cited in United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n.15 (9th Cir. 1975), in rejecting the custody and contract-waiver theories of probation. Although *Morrissey* referred to parole revocation, the Ninth Circuit concluded that the principles enunciated in *Morrissey* applied equally to parole and probation on the grounds that they sought to achieve the same purposes. *Id.* at 265.

32. 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied*, 405 U.S. 1016 (1972).

33. 115 Ariz. at 133, 564 P.2d at 84; *see* Note, *supra* note 20, at 241. One possible reason for *Page's* adoption of a reasonable expectation of privacy theory may be found in examining Katz v. United States, 389 U.S. 347 (1967). *Katz* held in part that one has a reasonable expectation of privacy to be protected from unreasonable searches and seizures. *See id.* at 359. *See generally* Comment, *Eavesdropping, Wiretapping, and the Law of Search and Seizure—Some Implications of the Katz Decision*, 9 ARIZ. L. REV. 429 (1968). Justice Harlan, who concurred with the *Katz* majority, more clearly explained that the holding was based on two requirements: first, that one must exhibit an actual expectation of privacy; and second, that society must regard that expectation as "reasonable." 389 U.S. at 361.

34. *See* Lanza v. New York, 370 U.S. 139, 143 (1962); Note, *supra* note 20, at 236.

35. *See* People v. Mason, 5 Cal. 3d 759, 768, 488 P.2d 630, 635, 97 Cal. Rptr. 302, 307 (1971), *cert. denied*, 405 U.S. 1016 (1972) (Peters, J., dissenting). Justice Peters noted that a probationer may be entitled to a diminished expectation of privacy because of the necessities of the correctional system, but his expectation may be diminished only to the extent necessary for his reformation and rehabilitation. *Id.* Where a condition of probation requires a waiver of a fundamental constitutional right such as the protection of the fourth amendment, the condition must be narrowly drawn; to the extent that it is overbroad, it is not reasonably related to the compelling state interests in reformation and the prevention of recidivism, and is an unconstitutional restriction on the exercise of fundamental constitutional rights. *Id.*; *see* People v. Peterson, 62 Mich. App. 258, 266, 233 N.W.2d 250, 255 (1975). Thus, the question is the extent to which constitutional safeguards should be employed that will permit probationers a greater degree of protection without defeating the purposes of the probation system. Hink, *The Application of Consitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 485 (1962). *See generally* Tamez v. State, 534 S.W.2d 686 (Tex. Crim. App. 1976); White, *supra* note 21, at 183-85.

governmental intrusion probationers must relinquish in order to accommodate the competing interests involved.

Arizona's View of Probation

The Arizona legislature has given the judiciary discretion to impose probation conditions bearing some reasonable relation to the purposes of probation.[36] While the Arizona courts have traditionally viewed probationary status as a matter of legislative grace,[37] the supreme court in *State v. Smith* [38] described probation as a sentencing alternative imposed when, in the court's discretion, a defendant's rehabilitation can be achieved with restricted freedom rather than with imprisonment.[39] Hence, although the Arizona Supreme Court had not at the time of *Page* dealt with the propriety of probation conditions permitting searches and seizures, it had limited the custody theory by acknowledging that probationers cannot be totally deprived of constitutional rights even though probation is a matter of legislative grace, and that probation has the twin goals of rehabilitation and criminal deterrence.[40]

The supreme court in *Montgomery*, however, reverted to a more restrictive view of the purposes of probation, emphasizing that probation is a form of punishment, and that warrantless search and seizure probation conditions may be imposed on a defendant when, in the trial court's

36. *See* ARIZ. REV. STAT. ANN. § 13-1657(A) (Supp. Pamphlet 1957-77) (repealed, ch. 142, § 36, 1977 Ariz. Legis. Serv. 679, effective Oct. 1, 1978). The Arizona legislature, in revising the criminal code, has enacted new statutes dealing with the granting of probation. *See* ch. 142, § 49, 1977 Ariz. Legis. Serv. 709, effective Oct. 1, 1978 (to be codified at ARIZ. REV. STAT. ANN. §§ 13-801 to -804). However, there has been no significant change in the statutory authority given to the judiciary to impose probation conditions in its discretion. *See* ARIZ. REV. STAT. ANN. § 13-801(C) (effective Oct. 1, 1978). Although the statutory authority granted to the judiciary is broad and vague, the Arizona courts have construed the grant of power to uphold only those probation conditions which bear a reasonable relation to the purposes of probation. *See* Redewill v. Superior Court, 43 Ariz. 68, 78, 29 P.2d 475, 479 (1934), in which the petitioner sought a writ of prohibition against the Maricopa County Superior Court to restrain the sentencing judge from imposing a probation provision which conditioned the suspension of his sentence for nonsupport of a minor child upon his support of the child for three years after reaching majority. The supreme court stated that a probation condition will be upheld if it bears a reasonable relation to the purposes of probation, but when a probation condition does not serve those purposes, it is an invalid substitution by the court for a mandatory punishment fixed by the legislature. *Id.; see* State v. Douglas, 87 Ariz. 182, 187, 349 P.2d 622, 625 (1960) (defining discretion as "sound discretion," and indicating that an abuse arises when a decision is arbitrary or capricious or when a trial judge neglects to adequately inquire into the particular facts of a case). *See generally* State v. Bates, 111 Ariz. 202, 526 P.2d 1054 (1974); State v. Jackson, 107 Ariz. 371, 489 P.2d 8 (1971).

37. *See* State v. Smith, 112 Ariz. 416, 419, 542 P.2d 1115, 1118 (1975); State v. Goodloe, 107 Ariz. 141, 142, 483 P.2d 556, 557 (1971); State v. Maxwell, 97 Ariz. 162, 164, 398 P.2d 548, 549 (1965); State v. Sanchez, 19 Ariz. App. 253, 254, 506 P.2d 644, 645 (1973).

38. 112 Ariz. 416, 542 P.2d 1115 (1975).

39. *Id.* at 419, 542 P.2d at 1118. The court further acknowledged that at probation revocation hearings the primary concern is whether probation is still an effective means of rehabilitation and a sufficient deterrent to future crime. *Id. See also* Redewill v. Superior Court, 43 Ariz. 68, 78, 29 P.2d 475, 479 (1934), discussed in notes 36 *supra*, 42 *infra; see generally* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

40. *See* State v. Smith, 112 Ariz. 416, 419, 542 P.2d 1115, 1118 (1975). The court commented that "it is to be recognized that constitutional rights cannot be held inapplicable merely by labeling a proceeding as a privilege." *Id.*

opinion, "such conditions aid in the rehabilitation process or prove a reasonable alternative to incarcertation as punishment for the crime committed."[41] In other words, by emphasizing that probation is a form of punishment, and by permitting the trial judge to impose any conditions which reasonably punish the probationer without incarcerating him, the *Montgomery* court appears both to revive the custody theory of probationary status by imposing punishment in a prison without walls,[42] and at the same time to subscribe to the waiver theory by noting that a defendant may always

41. 115 Ariz. at 584, 566 P.2d at 1330.

42. *See also* Redewill v. Superior Court, 43 Ariz. 68, 29 P.2d 475 (1934), in which the supreme court stated that probation is a means of punishing the offender in lieu of inflicting the full legal penalty of imprisonment:

> Our theory is that punishment as such is never to be inflicted through mere motives of vengeance, public or private, but only for the protection of society against future crime, or reparation for the damage done. . . . The comparatively recent enactment of laws providing for the suspension of sentence can only be adequately protected and proper reparation made without the infliction of the full legal penalty. . . . Such being the purpose of the suspended sentence, it is apparent that any conditions annexed thereto which do not have some bearing on the protection of society against future crimes, either by the offender or others, or reparation by the former for the injury he has caused, are contrary to the fundamental principles of modern criminal jurisprudence and the purpose of the suspended sentence.

Id. at 78-79, 29 P.2d at 479. *Redewill* thus states that the aim of probation is to prevent future crime by the offender or some other person and to compel reparation by the offender. The *Montgomery* court echoed this analysis by recognizing that probation is a form of punishment and a reasonable alternative to imprisonment. *See* text & note 41 *supra*. On the other hand, *Montgomery* also states that the aim of probation is to prevent future crime and to promote rehabilitation. 115 Ariz. at 584, 566 P.2d at 1330. When examined together, the *Redewill* and *Montgomery* opinions raise two questions: First, whether reparation is still a permissible aim of probation as a form of punishment, and if so, how it can be implemented through probation conditions; and second, whether, if the criminal deterrent aim of probation is deterring persons other than probationers, the imposition of exemplary conditions designed to utilize the probationer as an "example" to others is a justifiable alternative to imprisonment as a means for punishing him. Reparation is primarily a civil remedy in damages for injuries inflicted by the tortfeasor probationer. *See* Best & Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 828 (1963). *See also* G. DOUTHWAITE, ATTORNEY'S GUIDE TO RESTITUTION § 10.12, at 462-70 (1977) (discussing restitution as a condition of probation). The determination of a specific sum in reparation might be made in a civil action subsequent to the imposition of probation so that the probationer would be allowed affirmative defenses. *See* Best & Birzon, *supra*. The question is reduced to a conflict between aims of criminal law and those constitutional rights retained by the probationer after his conviction. *See id.* Hence, reparation may conflict with constitutional safeguards especially in those cases when a probation condition requiring reparation bears no relation to the crime committed. *See id.* In those cases, a probation condition requiring reparation would seem to be unconstitutional under the *Redewill-Montgomery* analysis. *See* State v. Smith, — Ariz. —, 576 P.2d 533 (Ct. App. 1978), which ruled that a probation condition requiring the probationer to pay the sum of $210.00 to the Adult Probation Department in order to offset the cost of his incarceration was reasonably related to the purposes of probation:

> The condition imposed is a reasonable method of bringing home to him the fact that criminal behavior has consequences not only for the victim, but in a very real sense is costly to society as well. We certainly cannot hold that the condition bears 'no relationship whatever to the purpose of probation.' State v. Montgomery, 115 Ariz. at 584, 566 P.2d at 133.

Id. at —, 576 P.2d at 535. Similarly, exemplary probation conditions may contravene constitutional safeguards when such conditions bear no relation to the crimes committed. *See* text & note 53 *infra*. Furthermore, to require a probationer to submit to a warrantless search and seizure merely for the purpose of preventing others from committing future crimes may be an arbitrary and unconstitutional denial of a probationer's fourth amendment rights. *See* discussion note 91 *infra*. Such a probation condition might also damage a probationer's self-image, thus frustrating achievement of the probationer's rehabilitation. *See* text & notes 70-82 *infra*. *See generally* "Appellate Review of Sentences," 14 ARIZ. L. REV. 409, 477, 479 (1972) (discussion of the purpose behind criminal punishment).

"reject the terms of probation and ask to be incarcerated instead if he finds the terms and conditions of his probation unduly harsh."[43] Furthermore, the supreme court added to the confusion by stating that a probationer has a reasonable expectation of privacy, albeit restricted, because of the nature of the probation system.[44] Thus, not only did *Montgomery* fail to articulate any single theory of a probationer's status by which a trial judge might find some guidance in formulating search and seizure probation conditions, but also the *Montgomery* ruling was based upon three mutually exclusive theories of probationary status. The effect of *Montgomery* is to replace punishment within prison walls with punishment outside the walls, a form of punishment that cannot be waived by the offender except under the guise of a legal fiction. Moreover, the probation condition imposed in *Montgomery* cannot be accepted by a probationer without a substantial surrender of his reasonable expectation of privacy.[45]

Other jurisdictions have considered the extent of a probationer's fourth amendment protection under probation conditions similar to those involved in *Page* and *Montgomery*.[46] The California Supreme Court, in *People v. Mason*,[47] noted that probationers may have a reasonable expectation of privacy under the fourth amendment, but that a trial judge may, in the interest of preventing future crime, impose probation conditions which reduce this expectation.[48] In other words, a probationer has no reasonable expectation of privacy as to those probation conditions which are reasonably related to the administration of his probation or to the prevention of future crime.[49] When viewed in this manner, warrantless search and seizure probation conditions would help to deter further offenses and to ascertain whether

43. 115 Ariz. at 584, 566 P.2d at 1330.

44. *Id.* (quoting People v. Mason, 5 Cal. 3d 759, 764-65, 488 P.2d 630, 633, 97 Cal. Rptr. 302, 305 (1971), *cert. denied*, 405 U.S. 1016 (1972)).

45. *See* discussion note 35 *supra*.

46. The United States Supreme Court has not considered specifically the extent to which probationers may be guaranteed fourth amendment rights, but has noted in a general way that probation is an act of grace. *See* Escoe v. Zerbst, 295 U.S. 490, 492 (1935); Burns v. United States, 287 U.S. 216, 220 (1932). *See also* Morrissey v. Brewer, 408 U.S. 471 (1972); Note, *supra* note 21, at 242. The Fourth Circuit has also noted:

> There is no doubt that the Fourth Amendment protects all persons suspected or known to be offenders as well as the innocent, and it unquestionably extends not only to the persons but also to the houses of the people, whether they be residences or places of business. . . . The Amendment applies in this case to Martin, a probationer, and to his garage located near his home, although his status is a circumstance to be taken into consideration; but the question remains whether the search and seizure were unreasonable and therefore a violation of the right conferred upon him to be secured against such a search.

Martin v. United States, 183 F.2d 436, 439 (4th Cir.), *cert. denied*, 340 U.S. 904 (1950) (citations omitted).

47. 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied*, 405 U.S. 1016 (1972).

48. *Id.* at 764-65, 488 P.2d at 633, 97 Cal. Rptr. at 305. It should be noted that the *Mason* decision was based on a waiver theory, and the court's analysis of the reasonable expectation of privacy theory was raised in dictum. *See id.* at 764-65, 488 P.2d at 632-33, 97 Cal. Rptr. at 304-05. State v. Page, therefore, incorrectly interpreted *Mason* as applying the reasonable expectation of privacy theory in arriving at its decision. *See* 115 Ariz. at 133, 564 P.2d at 84.

49. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259, 265-66 (9th Cir. 1975).

the probationer is complying with the terms of his probation.[50]

In *United States v. Consuelo-Gonzales*,[51] the Ninth Circuit, like the court in *Page*, recognized that a probationer is entitled to a significant degree of privacy under the fourth amendment, and thus invalidated a probation condition similar to the one imposed on Page.[52] The *Consuelo-Gonzalez* court's holding was based on a ruling that probation conditions are valid only if they are designed primarily to affect the rehabilitation of the probationer or to insure the protection of the public.[53]

When confronted for the first time in Arizona with the question of determining the extent to which a probationer is protected by the fourth amendment, the court of appeals in *Page* relied extensively upon the reasoning expressed by the Ninth Circuit in *Consuelo-Gonzalez*. However, the rule developed in *Page* was short-lived. The Arizona Supreme Court, in reviewing *Page* and in deciding *Montgomery*, swept aside the careful balancing test applied by the court of appeals in *Page*, leaving the present state of the law in Arizona unclear.

The Search for a New Test in Arizona

After examining the various rationales under which other jurisdictions have upheld or rejected probation conditions which restrict fourth amendment rights, the court of appeals in *Page* adopted a reasonable expectation of privacy theory.[54] The court adopted the view that probationers have a right to be protected from unreasonable searches and seizures unrelated to probation's twin goals of furthering rehabilitation and preventing recidivism.[55] On the other hand, if one of these goals can be achieved by a search, the probationer has no reasonable expectation of privacy as to such a search conducted by the probation officer or a police officer acting under the probation officer's direction.[56]

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50. *Id.*
51. 521 F.2d 259 (9th Cir. 1975).
52. *Id.* at 262.
53. *See id.* at 265. The Arizona Supreme Court rejected the *Consuelo-Gonzalez* analysis on the ground that it was an interpretation of the Federal Probation Act § 1, 18 U.S.C.A. § 3651 (Supp. 1977). *See* 115 Ariz. at 585, 566 P.2d at 1331. Nevertheless, the *Montgomery* court conceded that warrantless search and seizure probation conditions should be imposed sparingly and will not be upheld if they violate basic fundamental rights or bear no relationship to the purposes of probation over incarceration. *Id.* at 584-85, 566 P.2d at 1330-31. The court further implied that warrantless search and seizure probation conditions are specifically related to society's interests in probation by furthering the objective of preventing recidivism and, therefore, are constitutional under the fourth amendment standards because they prove a reasonable alternative to incarceration as punishment for the crime committed. *Id.* at 584, 566 P.2d at 1330. Thus, if the *Montgomery* "reasonable relation" test is met, the sentencing judge is free to impose upon a probationer fairly intrusive warrantless search and seizure conditions and to severely restrict a probationer's expectation of privacy. For other Arizona cases discussing the extent of the sentencing judge's discretion to impose probation conditions, see discussion notes 36, 42 *supra*.
54. *See* 115 Ariz. at 133, 564 P.2d at 84.
55. *See id.* at 133-34, 564 P.2d at 84-85.
56. *See id.* at 133-34, 134 n.4, 564 P.2d at 84, 85 n.4. Once this connection between the condition imposed and the purposes of probation has been made, fairly intrusive seizures are

The courts in *Mason*, *Consuelo-Gonzalez*, *Page*, and *Montgomery* all seem to have agreed that probationers are entitled to some expectation of privacy. However, the primary dispute in these decisions appears to lie in their interpretation of the extent to which society is prepared to view that expectation as reasonable.[57] In any event, the more important inquiry is to determine whether probation conditions are reasonable by balancing the competing interests of probation.

To deny a probationer all fourth amendment rights in the interest of preventing recidivism may seriously impede his rehabilitation. On the other hand, a complete restoration of fourth amendment rights in this context may not adequately guard society's interest in preventing future crime.[58] While *Page* explores the problem of balancing these competing interests, *Montgomery* does not.[59]

Ideally, probation conditions should be designed to assist the offender in his rehabilitation. Practically, they are sometimes used by the courts to determine whether the probationer is complying with the terms of his probation and whether he has committed further offenses.[60] Furthermore, modern penology is premised on the notion that society as a whole gains from an offender's rehabilitation, and that rehabilitation should and must be achieved, whenever feasible, without resort to "the corrupting influence of institutional life."[61] Probation offers the defendant an opportunity to reorder his life within the conventional social framework, to preserve his family and social relationships, and to encourage a desire to assume familial responsibilities.[62] It would seem that the rehabilitative goal of probation would be emasculated if an intrusive search and seizure is conducted, justified by nothing more than the bare assertion that the offender's status as a probationer is one of conditional freedom.[63]

Society's interest in preventing crime, however, must also influence the degree of fourth amendment freedom granted to probationers.[64] The

permissible. For example, a drug offender placed on probation may be required to submit to urinalysis testing upon direction by his probation officer because that form of a search and seizure condition is imposed pursuant to the legislative authority granted to a probation officer to supervise the probation, and is directly related to preventing or discovering the type of proscribed behavior for which the defendant was convicted and probation was imposed. *See id.*

57. *See* text & notes 46-53 *supra*.

58. *See* discussion note 35 *supra*.

59. *See* text & notes 32-35 *supra*, 83-91 *infra*.

60. *See* Best & Birzon, *supra* note 42, at 810.

61. *Id.* at 809; Redewill v. Superior Court, 43 Ariz. 68, 29 P.2d 475 (1934).

62. *See* Best & Birzon, supra note 42, at 810; Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 STAN. L. REV. 129, 134-35 (1969).

63. *See* text & notes 74-79 *infra*.

64. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259, 266 (9th Cir. 1975). It is much more likely that a probationer will repeat as a criminal offender than it is that a nonprobationer will commit a crime. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 45 (1967). A study of adults granted probation by 56 of the 58 county courts in California from 1956 to 1958 showed that by the end of 1962, 28% of more than 11,000 probationers had their probation revoked because

court in *Consuelo-Gonzalez* recognized that reasonable restraints on probationers are necessary to the administration of probation as an alternative to incarceration.[65] Requiring warrants prior to every search of probationers or their property would intolerably increase the hazards to public safety resulting from the probation of criminal offenders.[66] On the other hand, society's interest in rehabilitating probationers should counterbalance to some degree the need to protect the public from criminal acts by probationers.[67]

Furthermore, because of his close association with the probationer, the probation officer is best able to balance these interests.[68] The objective of preventing the probationer from committing additional crimes may sometimes justify surprise searches by the supervising probation officer.[69] Probation authorities, however, have another purpose in invading the privacy of probationers[70] since, in the interest of rehabilitation, it is a proper function of the probation officer to ascertain whether the probationer is acting

almost half of the 28% had committed new offenses and others had absconded or would not comply with regulations. White, *supra* note 21, at 180-81 & 181 n.3.

65. 521 F.2d at 266. *See generally* State v. Schlosser, 202 N.W.2d 136 (N.D. 1972).

66. "Over half (53 percent) of all drug offenders arrested in 1960 were rearrested for some type of drug offense within the next five years." People v. Mason, 5 Cal. 3d at 764 n.2, 488 P.2d at 632 n.2, 97 Cal. Rptr. at 304 n.2, *quoting* STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, FOLLOW-UP STUDY OF 1960 ADULT DRUG OFFENDERS 2 (1968).

67. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259, 267 (9th Cir. 1975). Although the *Page* court refused to rule that probable cause and a search warrant are constitutional prerequisites for every probationer search, it concluded that searches and seizures which are not regulatory must be predicated upon some factual basis that a breach of probation is occurring or is about to occur prior to the search. 115 Ariz. at 134, 564 P.2d at 85. However, the supreme court in *Montgomery* apparently chose not to adopt this balancing of interests approach and substituted merely the vague warning that warrantless search and seizure probation conditions should be sparingly imposed. 115 Ariz. at 585, 566 P.2d at 1331.

68. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259, 266 (9th Cir. 1975).

69. *See* People v. Mason, 5 Cal. 3d 759, 768-69, 488 P.2d 630, 636, 97 Cal. Rptr. 302, 308 (1971), *cert. denied*, 405 U.S. 1016 (1972).

70. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975) (analogizing to the special interest parole officers have in invading the privacy of parolees), *citing* Latta v. Fitzharris, 521 F.2d 246, 249 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975). In order to fulfill his responsibility for helping the parolee-probationer to reintegrate into society by evaluating the parolee-probationer's progress, and by preventing possible further criminal activity, it is essential that the parolee-probation officer have a thorough understanding of his charge's environment, personal habits, relationships with others, and activities at and away from home. Additionally, this information must be kept current. *See* United States v. Consuelo-Gonzalez, 521 F.2d at 262; Latta v. Fitzharris, 521 F.2d at 249. Furthermore, *Page* acknowledges this "special relationship" between probationers and their probation officers by holding that warrantless searches by probation officers based on a factual basis that a breach of probation is occurring or is imminent is not an invasion of a probationer's reasonable expectation of privacy. *See* 115 Ariz. at 134, 564 P.2d at 85. *But see* United States v. Bradley, 571 F.2d 787 (4th Cir. 1978), which declined to extend to a parole officer the authority to conduct a warrantless search of a parolee's residence, even in the situation in which the trial judge has imposed a parole condition requiring the parolee to consent to "periodic and unannounced visits by the parole officer." *Id.* at 789. The court explained:

> While we recognize the important governmental interests at stake, we conclude that they have the effect of diminishing the rigorousness of the standard of cause which the parole officer must satisfy to obtain a warrant, not of removing the judicial protection which the warrant requirement interposes between the parole officer and the search.

Id. at 790. In this manner, the court rejected the analysis of the Ninth Circuit in Latta v. Fitzharris and ruled that not even the special relationship between the parole officer and the parolee is a sufficient basis upon which to justify a warrantless search of the parolee's home. *Id.*

according to other conditions of his probation.[71] Under this analysis, warrantless searches are reasonably related to the purposes of probation when the probation officer determines that there is a factual basis indicating that a breach of probation has occurred or is about to occur.[72] The probation officer may then conduct the search or delegate his authority to police officers to conduct the search.[73]

On the other hand, although warrantless searches conducted by police officers without the authorization of a probation officer may be useful in preventing criminal acts, they significantly hinder the rehabilitative process. Law enforcement officers generally do not have rehabilitative goals in mind as they conduct warrantless searches,[74] and given their lack of involvement in the rehabilitative process, there is generally no necessity for police officers to have a privilege to conduct such searches.[75] Therefore, where police officers seek to conduct a search of a probationer without the probation officer's authorization, they would be left to justify such a search on some ground other than that the person searched is a probationer.[76] Justice Peters, dissenting in *Mason*, contended that the all-encompassing waiver of constitutional rights associated with a probation condition granting police officers the unlimited authority to conduct warrantless searches and seizures is not conducive to effective rehabilitation.[77] If the probationer is treated like a prisoner, he will have no incentive to act responsibly in society. While such treatment may be an administrative necessity within prison, it fails to further probation's rehabilitative function of supplying the probationer with a sense of self-worth, independent judgment, and selective responsibility. By denying a probationer his reasonable expectation of privacy, the state encourages him to view himself as untrustworthy rather than as an individual capable of behaving responsibly.[78] The detrimental effects of limitless searches have been characterized in this manner: "Each search . . . chips away at the [individual's] belief that he has an opportunity to grow as an individual with his own set of behavior controls. The rehabilitation process is, therefore, retarded by each such search . . . ."[79]

71. *See* People v. Mason, 5 Cal. 3d 759, 769, 488 P.2d 630, 636, 97 Cal. Rptr. 302, 308 (1971), *cert. denied*, 405 U.S. 1016 (1972) (Peters, J., dissenting).

72. *See* State v. Page, 115 Ariz. at 134, 564 P.2d at 85. The court of appeals in State v. Jeffers, 116 Ariz. 192, 568 P.2d 1092 (Ct. App. 1977), decided in the interim between *Page* and *Montgomery*, ruled that a finding of probable cause by a probation officer is not a constitutional prerequisite to conducting a warrantless search and seizure of a probationer's person or property since the purpose of such search and seizure is to determine whether the probationer is complying with the terms of his probation. *Id.* at 195, 568 P.2d at 1093. But the court limited its ruling to searches and seizures conducted by probation officers. *See* discussion note 19 *supra*.

73. *See* State v. Page, 115 Ariz. at 134, 564 P.2d at 85.

74. People v. Mason, 5 Cal. 3d at 769, 488 P.2d at 636, 97 Cal. Rptr. at 308 (Peters, J., dissenting).

75. *Id.*

76. *See* State v. Page, 115 Ariz. at 134, 564 P.2d at 85.

77. 5 Cal. 3d at 769, 488 P.2d at 636, 97 Cal. Rptr. at 308.

78. *Id.* at 770, 488 P.2d at 636, 97 Cal. Rptr. at 308. *See also* Note, *supra* note 62.

79. 5 Cal. 3d at 770, 488 P.2d at 636, 97 Cal. Rptr. at 308, *quoting* Note, *supra* note 62, at 135. In United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975), the Ninth Circuit

The *Page* decision represented an attempt by the Arizona Court of Appeals to balance these competing interests by interpreting the extent to which society is prepared to view a probationer's expectation of privacy as "reasonable." The majority in *Page* seemed to assert that society has a fundamental interest in furthering probation's goal of rehabilitation,[80] and to conclude that permitting unrestricted searches by any law enforcement officer for the purpose of protecting society from future crime, places an unreasonable burden on the rehabilitative process.[81] The final product in this balancing procedure was characterized by the revised probation condition suggested in *Page*.[82] The procedural safeguards enunciated by the court of appeals in *Page* aid in rehabilitating a probationer by guaranteeing him a significant degree of privacy and by helping to reinforce a positive self-image as one who is worthy of responsibility, albeit closely supervised, over his own actions.

In stark contrast to the careful balancing of interests test applied by the court of appeals in *Page* looms the elliptical and inconsistent approach applied by the supreme court in *Montgomery*.[83] The court in *Montgomery* concluded that the sentencing judge has been given great latitude in determining whether to impose such conditions on the offender.[84] Further, absent a showing that the terms of probation violate "basic fundamental rights or bear no relationship whatever to the purpose of probation over incarcera-

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noted that the probation condition imposed there permitted searches which could not possibly have served the ends of probation. *Id.* at 265. For example, an intimidating and harassing search to serve law enforcement ends totally unrelated to defendant's prior conviction or her rehabilitation was authorized by the terms of the condition. Although this unrestricted condition, like that in *Mason*, *Page*, and *Montgomery*, helps to deter future crime by allowing constant scrutiny of a probationer's activities, it hinders the rehabilitative process by denying the probationer his right to enjoy a significant degree of privacy. *Id; see* Tamez v. State, 534 S.W.2d 686 (Tex. Crim. App. 1976), where the Texas Supreme Court rejected a probation condition similar to that in *Page*:

> Likewise, we conclude that the probationary condition in the instant case is too broad, too sweeping and infringes upon the probationer's rights under the Fourth and Fourteenth Amendments. . . . The condition imposed would literally permit searches, without probable cause or even suspicion, of the probationer's person, vehicle or home at any time, day or night, by any peace officer, which could not possibly serve the ends of probation.
>
> . . . .
>
> A probationer may be entitled to a diminished expectation of privacy because of the necessities of the correctional system, but his expectations may be diminished only to the extent necessary for his reformation and rehabilitation.

Id. at 692.

80. *See* 115 Ariz. at 133, 564 P.2d at 85. *See also* text & notes 51-53, 61-67 *supra*.

81. *See* 115 Ariz. at 133, 564 P.2d at 85.

82. The Arizona Court of Appeals in *Page* suggested that the following condition would more properly express the views in its holding:

> That the defendant submit to a search of her person or property conducted in a reasonable manner at a reasonable time by a probation officer or peace officer at his direction where the probation officer has reasonable grounds to believe that a violation of probation has occurred or is about to occur.

115 Ariz. at 134, 564 P.2d at 85.

83. 115 Ariz. 583, 566 P.2d 1329 (1977).

84. *See id.* at 584, 566 P.2d at 1330.

tion," the sentencing judge's discretion will not be disturbed.[85] This conclusion is clearly not supported by the court's own analysis of a probationer's expectations of privacy. The court admits that "in a great majority of cases" the trial court should not adopt warrantless search and seizure probation conditions because warrantless police searches may be counter-productive in rehabilitating the probationer and may interfere with the probation officer's supervision of the defendant.[86] Moreover, it warns that warrantless search conditions should be sparingly imposed.[87] But the *Montgomery* court failed either to articulate any standards by which the trial court could determine when it could validly authorize warrantless police searches, or to define the characteristics of the "great majority of cases" in which such searches should not be authorized, or to give any indication of what "basic fundamental rights" might be violated by an unrestricted search condition.[88] In other words, even though the supreme court disfavors the use of the subject probation condition, it will not invalidate such conditions unless they appear to violate the court's nebulous criteria.

For these reasons, the decision in *Montgomery* succeeds only in frustrating the twin goals of probation. *Montgomery* permits the trial court to grant police officers the carte blanche authority to conduct warrantless searches and seizures of a probationer's person and property. The court apparently views such authority as a reasonable alternative to incarceration as punishment.[89] However, as *Page* and *Consuelo-Gonzalez* demonstrate, the important distinction between incarceration and probation is that probation has the rehabilitative goal of reintegrating the probationer into society.[90] Although unrestricted searches and seizures by police officers are necessary for the orderly administration of the penal system, they are clearly unnecessary and counter-productive to the goal of rehabilitating the probationer.[91]

85. *Id.*
86. *Id.* at 585, 566 P.2d at 1331.
87. *Id.*
88. It is unclear whether the "basic fundamental rights" to which the Supreme Court in *Montgomery* refers would prohibit, for example, a condition authorizing a stomach-pumping search, *see* Rochin v. California, 342 U.S. 165 (1952), or conditions authorizing warrantless searches and seizures to obtain urinalysis testing, fingernail and hair samples, and wiretapping without limitations on who may conduct such searches and seizures and under what circumstances they may be justified, *see* discussion notes 35, 56, 79 *supra*.
89. See 115 Ariz. at 584-85, 566 P.2d at 1330-31.
90. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259, 263 (9th Cir. 1975); State v. Page, 115 Ariz. 131, 133-34, 564 P.2d 82, 84-85 (Ct. App. 1977).
91. In a strong dissenting opinion in *Montgomery*, Justice Holohan argued that a search of a probationer by a police officer at any time and upon any whim without a warrant is a patently unconsitutional violation of a probationer's conditional constitutional rights because of the omission of any requirement for reasonableness. 115 Ariz. at 585-86, 566 P.2d at 1332.

It is noteworthy that Judge Froeb dissented in *Page* on the grounds that *Consuelo-Gonzalez* involved federal probationary procedures which the states need not follow. 115 Ariz. at 135, 564 P.2d at 86. The court in *Consuelo-Gonzalez* based its opinion on the Federal Probation Act § 1, 18 U.S.C.A. § 3651 (Supp. 1977), and commented that its decision may not be applicable to a particular state statute or interest. 521 F.2d at 265. It is also significant to note that the *Consuelo-Gonzalez* court was so divided over the issue of granting probationers fourth amendment rights that there was no majority opinion. Six in the majority would permit warrantless searches of the probationer by the probation officer. *Id.* at 262. Those same judges would allow

Conclusion

State v. Page is the first case in Arizona to deal with the constitutionality of probation conditions permitting warrantless searches and seizures, and the short-lived decision significantly amended the Arizona view of probationary status. The court of appeals' decision in *Page* represented a salutary attempt to balance the competing interests of fostering rehabilitation and preventing recidivism. By refusing to grant police officers carte blanche authority to search and seize a probationer's person or property without a warrant, the court of appeals guaranteed to the probationer a significant degree of privacy and probation from harassment, while reasonably accommodating the competing interests of crime prevention and rehabilitation.

State v. Montgomery, on the other hand, represents a futile attempt by the supreme court to articulate a workable characterization of the probationary status. The supreme court fails to provide any guidelines by which a sentencing judge can determine when the circumstances surrounding a particular probationer permit the imposition of warrantless search and seizure conditions. *Montgomery's* greatest flaw lies, perhaps, in its concession

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warrantless searches by police officers at the probation officer's direction and would reduce the probable cause requirement to that of a reasonable belief. *Id.* at 262, 265-66. The other three judges concurring with the decision would extend to the probationer the total protection of the fourth amendment. *Id.* at 268. But a more recent case in the Ninth Circuit, United States v. Gordon, 540 F.2d 452 (9th Cir. 1976), has reaffirmed *Consuelo-Gonzalez*, although it did not extend the reasoning of *Consuelo-Gonzalez* beyond its nonconstitutional grounds. *See id.* at 453.

While the majority in *Page* considered rehabilitation as the controlling interest of probation, the dissent considered administrative necessities and the prevention of recidivism as the controlling interests. *See* 115 Ariz. at 135, 564 P.2d at 86 (Froeb, J., dissenting). In the dissent's view, therefore, the probation condition imposed on Page was simply a reasonable means of utilizing scarce law enforcement resources. *See id.* Judge Froeb noted that the tremendous workload placed on probation officers sometimes renders them physically incapable of conducting the supervision themselves, and stated that such probation conditions should only be imposed when necessary. *Id.* Furthermore, he suggested that rehabilitation is a factor to be considered when they are imposed and that each search must in any case be scrutinized for abuses. *Id.* However, Judge Froeb's arguments are not compelling. To justify imposition of unlimited search and seizure conditions on the ground of administrative necessity constitutes an arbitrary denial of a probationer's right to a reasonable expectation of privacy. To impose such a probation condition merely because there is an insufficient number of probation officers to facilitate the county's probation workload would surely hinder the rehabilitative process. It is certainly more equitable to hire more probation officers, thus encouraging the implementation of rehabilitative goals, than to deny fourth amendment guarantees of privacy to probationers.

In any event, a scarcity of probation officers is but one factor to consider in evaluating society's interest in prohibiting other law enforcement officers from conducting warrantless searches of probationers. This factor need not be weighed heavily, however, because under *Page* the workload of probation officers would not necessarily increase enough to require the hiring of additional officers; probation officers can still delegate their authority to police officers to conduct warrantless searches under the proviso that the authority be expressly given to the police and be founded on a factual basis indicating the necessity for the search. *Id.* at 134, 564 P.2d at 85. Even if added personnel were required, the higher administrative costs would be in furtherance of the state's interest in rehabilitation. Society as a whole benefits from the rehabilitation of criminal offenders. *See* text & notes 61-63 *supra*. In addition, the cost of hiring more probation officers is counter-balanced to some degree by a more efficient, more successful rehabilitation program which reduces recidivism and the number of criminal offenders kept in prison at the public expense. *Id.* The widespread use of police officers to conduct warrantless searches and seizures at their own will may alleviate the need to hire more probation officers, but it also may seriously hinder the rehabilitative process by allowing arbitrary and unreasonable intrusions into the probationer's privacy. *See* text & notes 74-82 *supra*.

that unrestricted police intrusions into the privacy of a probationer may be counter-productive impediments to the rehabilitative and supervisory purposes of probation. The supreme court's only response to this analytical flaw is merely a retreat from the carefully balanced conclusions in *Page* and *Consuelo-Gonzalez* and the announcement that the probation conditions authorizing those searches "should be sparingly given."

The parameters of valid probation conditions are yet to be clearly defined. It is hoped that in future consideration of cases similar to *Page* and *Montgomery*, the Arizona courts will reaffirm the analytical soundness of the balance struck in *Page* in order to sustain *Montgomery's* admonition that warrantless search conditions should seldom be utilized.

IV. EVIDENCE

A. THE NEW NEUTRALITY EXCEPTION TO THE DEAD MAN STATUTE

The need to clarify the standards for applying the Arizona dead man statute[1] was recently illustrated in *Cachenos v. Baumann*.[2] In February 1968, plaintiff Faith Cachenos loaned defendant Ben Chittenden $6,500 for a land survey.[3] The loan was secured by a note and a mortgage.[4] In July 1968, Chittenden received approximately $19,000 from Mrs. Cachenos for

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1. The Arizona dead man statute, ARIZ. REV. STAT. ANN. § 12-2251 (1956), provides:

> In an action by or against executors, administrators, or guardians in which judgment may be given for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. The provisions of this section shall extend to and include all actions by or against the heirs, devisees, legatees or legal representatives of a decedent arising out of any transaction with the decedent.

The statute is designed to prevent a living person from defrauding a decedent who cannot refute the witness' testimony. *See* Carrillo v. Taylor, 81 Ariz. 14, 25, 299 P.2d 188, 195 (1956); Goldman v. Sotelo, 7 Ariz. 23, 23, 60 P. 696, 696 (1900). The statute prevents parties from testifying about transactions and communications with the deceased, since a party to an action by or against the decedent could benefit by distorting facts. *See* Carrillo v. Taylor, 81 Ariz. 14, 25, 299 P.2d 188, 195 (1956); M. UDALL, ARIZONA LAW OF EVIDENCE § 103 (1960). The dead man statute is in derrogation of the general rule favoring the competency of all witnesses. Carrillo v. Taylor, 81 Ariz. 14, 25, 299 P.2d 188, 195 (1956); M. UDALL, *supra*, § 85, at 125. It should, therefore, be strictly construed. *See e.g.*, Corbett v. Kingan, 19 Ariz. 134, 138, 166 P. 290, 291 (1917); Goldman v. Sotelo, 7 Ariz. 23, 24, 60 P. 696, 697 (1900); Cachenos v. Baumann, 25 Ariz. App. 502, 544 P.2d 1103 (1976); *In re* Estate of MacDonald, 4 Ariz. App. 94, 98, 417 P.2d 728, 732 (1966). It applies in suits by or against specified persons who had a relationship with a decedent, and only excludes testimony of technical or named parties to the suit, who are interested in the specific issue on which they seek to testify. *See* Cachenos v. Baumann, 25 Ariz. App. 502, 506, 544 P.2d 1103, 1107 (1976). Although § 12-2251 also applies to proceedings in which the guardian of a ward is a party in his capacity as such, the analysis of this casenote is limited to the statute's effect on transactions with a decedent. The statute's protection can be invoked by an heir, devisee, legatee, executor, or legal representative, when sued or suing in their legal capacity. ARIZ. REV. STAT. ANN. § 12-2251 (1956); *see* Barnes v. Shattuck, 13 Ariz. 338, 345, 114 P. 952, 954, *aff'd on other grounds*, 232 U.S. 117 (1911).

There are two exceptions within the statute which allow the admission of otherwise incompetent testimony. The testimony will be admitted when a technical party is called to testify about a transaction or communication with the deceased by the opposite party. ARIZ. REV. STAT. ANN. § 12-2251 (1956). The bar is also lifted if an otherwise incompetent witness is required by the court to testify. *Id; see, e.g.*, Garza v. Fernandez, 74 Ariz. 312, 318, 248 P.2d 869, 873 (1952); Wolff v. First Nat'l Bank, 47 Ariz. 97, 107, 53 P.2d 1077, 1081 (1936); Goldman v. Sotelo, 7 Ariz. 23, 25, 60 P. 696, 697 (1900). The power to require testimony is within the sound discretion of the court. *E.g.*, Wolff v. First Nat'l Bank, 47 Ariz. 97, 107, 53 P.2d 1077, 1081 (1936); Johnson v. Moilanen, 23 Ariz. 86, 89, 201 P. 634, 635 (1921); Costello v. Gleesen, 15 Ariz. 280, 289, 138 P. 544, 548 (1914); Goldman v. Sotelo, 7 Ariz. 23, 25, 60 P. 696, 697 (1900).

2. 25 Ariz. App. 502, 544 P.2d 1103 (1976).

3. *Id.* at 503, 544 P.2d at 1104.

4. *Id.* The loan was made to United Brokerage Inc., which had been incorporated by Chittenden and codefendant Lavin. *Id.*

the purchase of ten parcels of land with existing contracts of sale, which Chittenden and his partner, Kenneth Lavin, had fraudulently obtained.[5] Defendants Lavin and George Lucero then formed a partnership called Lake Havasu Estates.[6] Chittenden convinced Mrs. Cachenos to exchange the securities thus far acquired and an additional $12,000 for a $38,000 debt interest in Lake Havasu Estates.[7] When the loan became due, Mrs. Cachenos found that the only evidence of the transaction showed her purchasing thirty-two lots for which she had paid $38,000, but which had a value of only $8,000.[8] Prior to Mrs. Cachenos filing suit for fraud, Chittenden committed suicide.[9] In support of her action, Mrs. Cachenos attempted to offer her deposition and Lucero's affidavit, both of which dealt with transactions with the decedent.[10] The trial court found that the dead man statute barred the deposition and affidavit from evidence.[11] It further determined that Mrs. Cachenos' allegations of fraud could not be supported, and entered summary judgment for the defendants.[12] The court of appeals reversed and remanded.[13]

The court of appeals reasoned that the dead man statute should be strictly construed,[14] and only applied to the testimony of technical, that is, named parties interested in the specific issue to which their testimony relates.[15] A technical party with no interest in the issue to which his

5. *Id.* at 503-04, 544 P.2d at 1104-05. In June 1968, Arizona Land Co., for which both Chittenden and Lavin had worked, went bankrupt and Lavin went to work for Arizona Acceptance Corp. *Id.* Arizona Acceptance Corp. sold paper and contracts generated by the land sales of other corporations. Before its assets were taken over by the trustee, Lavin and Karla Hensley, his secretary, secretly removed contracts from the Arizona Land Co. These were the contracts purchased by Mrs. Cachenos. *Id.* at 504, 544 P.2d at 1105.

6. *Id.* at 504, 544 P.2d at 1105. The partnership had an option to buy land in a subdivision known as Lake Havasu Estates. The basis of this option was a $15,000 monthly payment. The partners then sold the lots on which they had exercised their option. *Id.*

7. *Id.* The loan was to be secured by a mortgage of 40 noncontiguous acres of lots throughout the subdivision. Lavin told Lucero to acquire a 40 acre plot in Mohave County so that Chittenden could close a transaction with Mrs. Cachenos. Lucero found a plot for which he paid $8000. Title for the land went from Lake Havasu Estates, a partnership, to Lake Havasu Estates, a corporation, to Chittenden, and finally to Mrs. Cachenos. Chittenden told her that these were the lots in Lake Havasu Estates which were to secure her loan. *Id.*

8. *Id.*

9. *Id.* at 505, 544 P.2d at 1106.

10. *See id.* at 504-05, 544 P.2d at 1105-06.

11. *See id.* at 503, 544 P.2d at 1104.

12. *Id.*

13. *Id.* at 507, 544 P.2d at 1108.

14. *Id.* at 506, 544 P.2d at 1107.

15. *Id.* (quoting Keough v. St. Paul Milk Co., 205 Minn. 96, 128, 285 N.W. 809, 826 (1939)). In *Keough*, James D. Keough, who was a named party to the suit, was allowed to testify as to conversations with the deceased ex-president of the milk company. *Id.* at 127, 285 N.W. at 826. The court held that the testimony was not barred by the Minnesota dead man statute, Minn. Stat. vol. 3, § 9817 (Mason 1927) (current version at MINN. STAT. ANN. § 595.04 (West 1945)), which disqualified a party or other person interested in the event concerning which he sought to testify. *See* 205 Minn. at 127, 285 N.W. at 826. James Keough's testimony related to transactions involving stock in which he had no financial interest. The court noted: "No good reason can be suggested for excluding the testimony of one who, although a party to the action for some other purpose, is not a party to, or interested in, the issue to which his testimony relates." *Id.*, *quoting* Bowers v. Schuler, 54 Minn. 99, 103, 55 N.W. 817, 818 (1893).

testimony relates is a competent witness.[16] The court therefore concluded that Lucero's affidavit should have been considered in determining whether sufficient independent evidence existed to corroborate the testimony of Mrs. Cachenos.[17]

This casenote will discuss the "neutral issue" exception to the dead man statute, and will evaluate the effectiveness of this new exception in satisfying the statute's purpose. Attention will then be turned to one of the traditional exceptions—corroborative evidence—and its interaction with the "neutral issue" exception to produce the result in *Cachenos*.

The Neutral Interest Exception

Traditionally, the Arizona dead man statute excluded the testimony of formal technical parties to the suit.[18] Under the new rule, the statute only precludes the testimony of a formal technical party when he is interested in the specific issue on which he seeks to testify.[19] While a specific definition of interest has never been formulated in Arizona case law, other jurisdictions considering the problem have determined that the interest must be direct and vested to disqualify a potential witness.[20] The test of interest is whether the party will necessarily gain or lose pecuniarily by the direct legal operation of the judgment, or whether the judgment would be legal evidence for or against him in another trial.[21] If either of the above conditions is met, the testimony is excluded.

Application of the neutrality exception to the *Cachenos* facts is best understood by analyzing Lucero's interest in the issue of Chittenden's liability. At the time Mrs. Cachenos loaned Lake Havasu Estates $38,000,

16. 25 Ariz. App. at 506, 544 P.2d at 1107. This ruling was made in regard to the admissibility of Lucero's affidavit. The court said Lucero had no interest in the issue of Chittenden's liability to Mrs. Cachenos, and that he could, therefore, testify as to that specific issue. *Id.*

17. *Id.* There are two situations where there may be an abuse of discretion in cases applying the dead man statute. These situations are where a ruling results in injustice, or where a ruling excluding testimony is made despite the presence of independent corroborative evidence. *Id.* at 505, 544 P.2d at 1106. Both situations are really functions of the statutory power conferred on the court to require a party to testify. *See* ARIZ. REV. STAT. ANN. § 12-2251 (1956).

18. Corbett v. Kingan, 19 Ariz. 134, 146, 166 P. 290, 294 (1917).

19. Cachenos v. Baumann, 25 Ariz. App. 502, 505, 544 P.2d 1103, 1106 (1976). The *Cachenos* court was the first in Arizona to create this exception.

20. *See, e.g.*, Novak v. Novak, 141 Mont. 312, 315, 377 P.2d 367, 368 (1963) (wife of plaintiff allowed to testify as to transactions with the deceased because, upon recovery by the plaintiff, no direct right to the proceeds would grow out of her relationship with the plaintiff); Billow v. Billow, 360 Pa. 343, 347, 61 A.2d 817, 819 (1948) (where the interest involved is a possible right of indemnity or contribution depending on the outcome of the trial, the interest is not direct and will not disqualify the witness); Sine v. Harper, 118 Utah 415, 428, 222 P.2d 571, 578 (1950) (witness allowed to testify because even if the contract in question was reformed, the reformation would not necessarily affect him in a pecuniary way).

21. *See, e.g.*, Denver Nat'l Bank v. McLagan, 133 Colo. 487, 490, 298 P.2d 386, 389 (1956); *In re* Dillon's Estate, 269 Pa. 234, 240, 111 A. 919, 921 (1920); Sine v. Harper, 118 Utah 415, —, 222 P.2d 571, 577 (1950); Merchants' Supply Co. v. Hughes' Ex'rs, 139 Va. 212, 216, 123 S.E. 355, 356 (1924); Adams Marine Serv., Inc. v. Fischel, 42 Wash. 2d 555, 560, 257 P.2d 203, 208 (1963). The fact that a witness *might* profit if one party wins is an interest affecting his credibility, not his competency. *See* Commonwealth Trust Co. v. Szabo, 391 Pa. 272, 282, 138

the partnership was composed of Lucero and Lavin.[22] The loan was set up by Chittenden, but was never repaid by the partnership.[23] Under partnership law, each partner acts for and binds the partnership within the scope of the partnership business.[24] Thus, given the fact that Lavin and Chittenden worked in concert on the Lake Havasu Estates loan,[25] if Chittenden breached his fiduciary relationship with Mrs. Cachenos to procure it, the partnership would be liable due to Lavin's participation. But Lucero was not directly interested in the issue of Chittenden's liability to Mrs. Cachenos.[26] His interest was contingent upon a finding that the partnership was liable for Chittenden's act. Because Lucero would not necessarily gain or lose financially through operation of the judgment, the neutrality exception was applicable.[27]

Liability might also attach to the Lake Havasu Estates partnership based on its agency[28] relationship with Chittenden. The partnership did business by exercising an option to buy land in the Lake Havasu Estates subdivision.[29] The basis of the option was a $15,000 monthly payment to the subdivision.[30] The partnership had great difficulty in raising funds to make the payments.[31] Thus, Lavin may have suggested the Cachenos loan to Chittenden. It is equally possible, however, that the idea was Chittenden's since both he and Lavin had been personally making payments to Mrs. Cachenos on the contracts comprising the $19,000 transaction.[32] The loan agreement also enabled Chittenden to relieve Mrs. Cachenos of all the evidence from the first two transactions.[33] Both men therefore had incen-

A.2d 85, 88 (1958); Gildner v. First Nat'l Bank & Trust Co., 342 Pa. 145, 159, 19 A.2d 910, 916 (1941).

22. 25 Ariz. App. at 506, 544 P.2d at 1106.

23. *Id.* at 504, 544 P.2d at 1104.

24. *See* A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 48, at 272 (1968). A partnership exists whenever two or more people agree to be co-owners of a business for profit. RESTATEMENT (SECOND) OF AGENCY § 14A (1957). Every partner is an agent of the partnership and his acts to carry on the business of the partnership bind the partnership, unless the acting partner had no authority to do so, and the person he is dealing with is aware of this. A. BROMBERG, *supra*, § 49, at 275. The partnership is liable for the misrepresentations of a partner. *See* Strang v. Bradner, 114 U.S. 555, 561, (1885); Monmouth College v. Gochery, 241 Mo. 522, 526, 145 S.W. 785, 788 (1912); Gannon, Goulding & Thies v. Hausaman, 42 Okla. 41, 47, 140 P. 407, 410 (1914). It is also liable for participating in a third person's breach of trust. *See* A. BROMBERG, *supra*, § 54, at 311.

25. Abstract of Record on Appeal at 136-37, Cachenos v. Baumann, 25 Ariz. App. 502, 544 P.2d 1103 (1976) (affidavit of George Lucero). Lucero frequently heard conversations between Lavin and Chittenden relating to Mrs. Cachenos and the prospect of having her give up the contracts sold to her by the Arizona Acceptance Corp. After one of these discussions, Lucero was told by Lavin that a transaction could be completed with Chittenden and Mrs. Cachenos if 40 acres of land could be acquired as security for Mrs. Cachenos. *Id.*

26. 25 Ariz. App. at 506, 544 P.2d at 1107.

27. See text accompanying note 21 *supra*.

28. Agency is the legal relationship which arises when two parties agree that one will represent and act for the other. W. SELL, AGENCY § 1 (1975).

29. 25 Ariz. App. at 504, 544 P.2d at 1105.

30. *Id.*

31. Abstract of Record on Appeal at 136, Cachenos v. Baumann, 25 Ariz. App. 502, 544 P.2d 1103 (1976) (affidavit of George Lucero).

32. *See* 25 Ariz. App. at 504, 544 P.2d at 1105.

33. *See* Appellant's Opening Brief at 38, Cachenos v. Baumann, 25 Ariz. App. 502, 544 P.2d 1103 (1976).

tives to solicit the Cachenos loan to Lake Havasu Estates and either one could have been acting as the other's agent. While the facts are unclear as to who was the principal, Lavin or Chittenden, it is clear that the men acted in concert to obtain the loan.[34] An agency may arise by implication where one person acts for the benefit of another.[35] Lavin and Chittenden had such an agency relationship, and because Lucero was Lavin's partner, he could be found jointly and severally liable for any misrepresentation made by Lavin and Chittenden.[36] Lucero, however, would not necessarily gain or lose financially through operation of a judgment against Chittenden, and therefore was not directly interested in the issue of Chittenden's liability to Mrs. Cachenos.[37] Accordingly, the court of appeals properly concluded that his affidavit should have been admitted.[38]

Having defined and explained the neutral interest exception created by the *Cachenos* court, it is appropriate to analyze the rule's efficacy in furthering the stated purposes of the dead man statute.

Neutrality and Statutory Purpose

The purpose of the dead man statute is to prevent the living from defrauding the dead, without excluding legitimate claims against estates.[39] Judicial construction of the statute reflects a balancing of these competing considerations. Strict construction and application of the dead man statute places more responsibility on the fact finding process for ensuring the veracity of testimony since more testimony is admitted. The new exception to the dead man statute has the same effect since it will allow still more testimony to come in at trial. For the reasons discussed below, this is an undesirable result.

The neutrality exception could be abused to defraud the deceased. Two technical parties, seemingly without similar interests in a particular issue, could collude to defraud the estate. For example, in *Sunfire Coal Co. v.*

34. Lucero overheard Lavin and Chittenden planning ways to get out of the $19,000 transaction with Mrs. Cachenos, and was told by Lavin to find some land so Chittenden could close a deal with Mrs. Cachenos. Abstract of Record on Appeal at 137, Cachenos v. Baumann, 25 Ariz. App. 502, 544 P.2d 1103 (1976) (affidavit of George Lucero). The partnership received only $4000 from Mrs. Cachenos' $12,000 check, while Chittenden took the remaining $8,000. *See id.* at 136, 138.

35. Arizona Storage & Distrib. Co. v. Rynning, 37 Ariz. 232, 237, 293 P. 16, 17 (1930); *see* Griffin v. Russell, 144 Ga. 275, 278, 87 S.E. 10, 11 (1915). Where one derives a legal benefit from the acts of another, ratification of those acts is assumed, and an agency relation is established. *See* Herrin v. Lamar, 106 Ga. App. 91, 95, 126 S.E.2d 454, 457 (1962).

36. A. BROMBERG, *supra* note 24, § 54, at 316. Where the wrongdoing of one is imputed to the other, both are jointly and severally liable for the entire result. *Id.* Joint and several liability means that the plaintiff can proceed against one or both, and execute to collect the entire judgment from one or both. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 48, at 299 (4th ed. 1971).

37. *See* text & notes 20-21 *supra*.

38. The court stated that even if Lucero had an interest, it was certainly adverse. 25 Ariz. App. at 506, 544 P.2d at 1107. It would appear, therefore, that his testimony would be admissible under the traditional adverse party exception. *See* text & note 52 *infra*.

39. *See* Carrillo v. Taylor, 81 Ariz. 14, 25, 299 P.2d 188, 195 (1956).

Day,[40] two sisters of the decedent who were trying to establish dependency for workman's compensation claims were permitted to testify for each other.[41] Although, under the workman's compensation laws of that state, the recovery of one sister diminished the recovery of the other,[42] and their interests were therefore adverse,[43] they could have agreed to testify for each other, believing that a smaller recovery was better than none at all.[44] An even greater potential for abuse existed in *Cachenos*. While Lucero's affidavit tended to establish that Chittenden and Lavin defrauded Mrs. Cachenos,[45] it also asserted Lucero's ignorance until after the fact.[46] Although Lucero could be found jointly and severally liable for the acts of the partnership[47] and its agents,[48] in return for his testimony Mrs. Cachenos could have agreed to execute against Lavin or Chittenden for the full amount of any judgment in her favor.[49] Thus, while absence of interest might limit untrue testimony somewhat, the neutrality exception also allows for collusion and fraud against an estate.

Opportunities for cross-examination and impeachment of witnesses are the major checks against the potential for abuse. Cross-examination enables one to show that a witness is lying or mistaken.[50] It enables an attorney to question the honesty, integrity, or recall ability of the witness being questioned.[51] Thus, collusion between witnesses could be brought out at trial. Despite these procedural safeguards supporting the competence of technical parties with no interest in the issue on which they seek to testify, the traditional adverseness exception,[52] applied to parties to both the action and

40. 267 Ky. 716, 103 S.W.2d 82 (1937).
41. *Id.* at 718, 103 S.W.2d at 83-84.
42. *Id.* at 719, 103 S.W.2d at 84. Apparently, under Kentucky law, the amount awarded would have been the same regardless of the number of dependents since this is the only way the recovery by one of the sisters would necessarily have diminished the recovery of the other. *See id.*
43. *Id.* at 719, 103 S.W.2d at 84.
44. They could have reached these conclusions independently as well as by collusion, but the same fraud would have resulted.
45. Abstract of Record on Appeal at 132-33, 135-37, Cachenos v. Baumann, 25 Ariz. App. 502, 544 P.2d 1103 (1976).
46. *Id.* at 139. *But see* discussion notes 25, 34 *supra*.
47. A. BROMBERG, *supra* note 24, § 58. *See also* text & note 36 *supra*.
48. A. BROMBERG, *supra* note 24, § 58; *see* text & note 36 *supra*.
49. For a discussion of the problems created by agreements in which a plaintiff and a defendant manipulate the ultimate liability in a law suit, see Comment, Gallagher Covenants, Mary Carter Agreements, and Loan Receipt Agreements: Unsettling Contributions to Confict Resolution, 1977 ARIZ. ST. L.J. 117 (1977).
50. M. UDALL, *supra* note 1, § 45, at 65.
51. *Id.* § 45, at 68. Counsel has great latitude in impeaching witnesses, and has the right to show any fact which tends, even slightly, to affect the credibility of the witness. To this end he may inquire into any motive for the testimony and examine as to any act or statement tending to show motive. *Id.* § 45, at 69. Counsel may also point out any bias or pecuniary interest of the party seeking to testify. *Id.* § 61, at 81. Additionally, the fact finding judge or jury is not bound to accept testimony where there is reason to believe it is false or mistaken. Knapp v. Arizona Highway Dept., 56 Ariz. 54, 57, 104 P.2d 180, 181 (1940).
52. The statute provides that a party to the action will be allowed to testify if called by an adverse party. ARIZ. REV. STAT. ANN. § 12-2251 (1956).

the issue, offers a better balance between the competing interests[53] sought to be protected by the dead man statute.

The adversity requirement precludes the type of fraud which the neutrality exception allows. Whereas parties neutral to the issue might have some incentive to collude and defraud an estate, such incentive is much less likely where there is adverseness between the witness and the technical party as to the issue on which the testimony is sought. Adverseness requires that gain by one party necessarily results in an equal loss by the other party. Thus, the incentive to collude is significantly diminished.[54] For this reason, the traditional adverseness rule should be retained, to the exclusion of the neutrality exception. Despite this argument weighing against use of the neutrality exception, the *Cachenos* court applied the exception in admitting Lucero's affidavit. The next issue is whether this affidavit serves as sufficient corroborative evidence to render Mrs. Cachenos' own testimony admissible.

Corroborative Evidence

The dead man statute provides that a court may allow the testimony of an otherwise incompetent party.[55] This exercise of judicial discretion is required either where injustice will result if the testimony is rejected, or where the party's testimony is corroborated by independent evidence.[56] The *Cachenos* court stated that Mrs. Cachenos' testimony as to transactions with Chittenden was admissible if corroborated by independent evidence.[57] Corroborative evidence tends to confirm the jury's belief that the testimony of the witness sought to be corroborated is true.[58] The amount and quality of corroboration required varies with the facts in a particular case.[59] The corroborative evidence must tend to support some allegations essential to the claim of the technical party opposing the estate.[60] In one case,[61] for exam-

53. See text accompanying note 39 *supra*.

54. Admittedly, there may still be collusion in some cases such as those involving multiple parties, but the possibility is reduced in comparison to when a party has no interest in the particular issue.

55. ARIZ. REV. STAT. ANN. § 12-2251 (1956).

56. Cachenos v. Baumann, 25 Ariz. App. at 505, 544 P.22 at 1106.

57. *See id.* at 506, 544 P.2d at 1107. The court's omission of any discussion of the interests of justice exception is curious because the facts of the case, particularly as revealed by Lucero's testimony, *see* Abstract of Record on Appeal at 132-33, 135-37, Cachenos v. Baumann, 25 Ariz. App. 502, 544 P.2d 1103 (1976), show that it may have been in the interests of justice to allow Mrs. Cachenos to testify.

58. *E.g.*, Hanson v. Kierman, 159 Mont. 448, 456, 499 P.2d 787, 790 (1972); Peck v. Wright, 70 N.M. 259, 260, 372 P.2d 831, 832 (1962); Lusk v. Daugherty, 61 N.M. 196, 200, 297 P.2d 333, 337 (1956); Varner v. White, 149 Va. 177, 185, 140 S.E. 128, 130 (1927).

59. *See* Seaboard Citizen's Nat'l Bank v. Revere, 209 Va. 684, 690, 166 S.E.2d 258, 263 (1969); Brooks v. Worthington, 206 Va. 352, 357, 143 S.E.2d 841, 845 (1965).

60. *See, e.g.*, Johnson v. Mommoth Lode & Uranium Exploration Corp., 136 Mont. 420, 423, 348 P.2d 267, 269 (1960); Peck v. Wright, 70 N.M. 259, 260, 372 P.2d 831, 832 (1962); Porter v. Porter, 65 N.M. 14, 17, 331 P.2d 360, 362 (1958). Thus, one claiming an employer owes him money on an oral employment contract must corroborate the existence of the contract, not merely that he was at work. Johnson v. Mommoth Lode & Uranium Exploration Corp., 136

ple, cattle being cared for by decedent's son while she was alive all perished.[62] To ensure his mother an income, the son branded some of his own cattle with his mother's brand, although he claimed that by doing so he did not intend to transfer title to her.[63] While the evidence corroborated his claim that some of the cattle had his mother's brand, there was no corroboration of his claim that all her cattle had died.[64] Therefore, his testimony to that effect was excluded.[65]

Several types of evidence are admitted by the courts as corroborative evidence.[66] Corroboration can come from a written contract[67] or other document[68] signed by the deceased. Sufficient corroboration also exists where the deceased's testimony from another trial supports the allegations of the party opposing the estate.[69] The circumstances surrounding the transaction or communication with the deceased can also corroborate the testimony of the party opposing the estate.[70] Where the testimony sought to be corroborated is an unlikely narrative, a greater degree of corroboration is required than where the narrative is in line with the common experience of a reasonable man.[71] More evidence is also required where one seeks to

Mont. 420, 423, 348 P.2d 267, 269 (1960). In *Johnson*, the evidence supported the allegations of the decedent's legal representative. *Id.* at 424, 348 P.2d at 269.

61. *See* Gillespie v. O'Neil, 38 N.M. 141, 144, 28 P.2d 1040, 1042 (1934).

62. *Id.* at 142, 28 P.2d at 1040.

63. *Id.* at 144, 28 P.2d at 1041-42.

64. *Id.*

65. *Id.*

66. In Steinfield v. Martinez, 40 Ariz. 116, 10 P.2d 367 (1932), the court concluded that an entry on the books of a loan company would corroborate the existence of a debt. *Id.* at 121, 10 P.2d at 369. The direct testimony of a disinterested witness to a transaction or communication with the deceased justifies the court's exercise of discretion in admitting the testimony of the party opposing the estate corroborated thereby. *See, e.g.*, Condos v. Felder, 92 Ariz. 366, 369, 377 P.2d 305, 309 (1962); Goldman v. Sotelo, 7 Ariz. 23, 25, 60 P. 696, 697 (1900); Sharp v. Sharp, 115 Mont. 35, 41, 139 P.2d 235, 237 (1943); Peck v. Wright, 70 N.M. 259, 260, 372 P.2d 831, 832 (1962); *In re* Baldwin's Will, 58 N.M. 370, 371, 271 P.2d 404, 405 (1954); Leckie v. Lynchburg Trust & Sav. Bank, 191 Va. 360, 370, 371, 60 S.E.2d 923, 926-27 (1950).

67. In Davey v. Janson, 62 Ariz. 39, 153 P.2d 158 (1944), the court allowed the party opposing the estate to testify that the deceased owed him money because the contract corroborated the allegations of his testimony. *Id.* at 42, 153 P.2d at 159.

68. In Goodwin v. Travis, 58 N.M. 465, 272 P.2d 672 (1954), the decedent's estate brought an action to collect on a note held by the deceased. *Id.* at 467, 272 P.2d at 673. Prior to his death, the deceased prepared an affidavit stating that he intended the money to be a gift. *Id.* at 469, 272 P.2d at 674. This was adequate corroboration to admit the defendant's own testimony, which was to the same effect. *Id.* at 470, 272 P.2d at 675.

69. Costello v. Gleeson, 15 Ariz. 280, 289, 138 P. 544, 548 (1914).

70. In Hansen v. Kierman, 159 Mont. 448, 449 P.2d 787 (1972), the plaintiff and decedent made an oral agreement to execute mutual wills, but the will of the deceased was never found. *Id.* at 451, 499 P.2d at 788. The court found sufficient corroboration in the circumstances surrounding the transaction to admit the plaintiff's testimony. First, the plaintiff had executed a will leaving everything to the deceased. *Id.* at 455, 499 P.2d at 791. Also, they were good friends and held both a savings account and a residence in joint tenancy with a right of survivorship. *Id.* at 456, 499 P.2d at 791. In Brooks v. Wortington, 206 Va. 352, 143 S.E.2d 841 (1965), the defendant was allowed to testify that the money he allegedly owed the estate was a gift from the deceased. *Id.* at 358, 143 S.E.2d at 846. The court reasoned that since they were close friends who lived together, and since the decedent furnished the money for the house they lived in, the circumstances corroborated the defendant's testimony. *Id.* Because the deceased was a careful business woman, who normally required a note for a debt, the court found additional corroboration in the absence of a note. *Id.*

71. *See* Trevillian v. Bullock, 185 Va. 958, 963, 40 S.E.2d 920, 922 (1947). In *Trevillian*, the action was brought to compell payment on a note due to the estate. *Id.* at 960, 40 S.E.2d at 920.

corroborate testimony as to the motives of the deceased by referring to occurrences many years before the cause of action arose,[72] or where a confidential relationship existed between the parties at the time of the transaction.[73] Thus, the amount and quality of corroboration required depends on the facts in each case. In all cases, however, the evidence must tend to prove some allegation essential to the claim of the party opposing the estate.

In *Cachenos*, the court found sufficient corroboration for the plaintiff's claims in the affidavit of Lucero,[74] and in the circumstances surrounding Chittenden's dealings with Mrs. Cachenos,[75] to allow her to testify. This was the first time an Arizona court allowed the testimony of a party to be corroborated by testimony admitted under an exception to the dead man statute.[76] Since there is some reason to doubt the reliability of Lucero's affidavit,[77] it is open to question whether the purposes of the dead man statute were furthered when the court held that the affidavit corroborated Mrs. Cachenos' testimony.

Conclusion

The new neutrality exception can be abused. The potential for abuse can only be minimized through strict application of the exception. The adverseness exception gives greater assurance that the estate of a decedent will not be defrauded. While careful scrutiny of the interests of technical parties seeking to testify, combined with trial procedures designed to ensure the integrity of a witness and the truth of his testimony, will minimize potential fraud under the neutrality exception, the adverseness exception is better suited to further the purposes of the dead man statute.

The defendant alleged there was no consideration for the note, and that the renewal of the note without surrender of the original corroborated his testimony. *Id.* at 962, 40 S.E.2d at 922. The court held there was insufficient corroboration to allow the defendant's testimony. *Id.* at 963, 40 S.E.2d at 922.

72. *See* Ingles v. Greer, 181 Va. 838, 841, 27 S.E.2d 222, 223 (1943) (testimony of four witnesses, based on events occurring several years before the action, held to be insufficient corroboration to justify admitting the plaintiff's testimony).

73. *See* Seaboard Citizens Nat'l Bank v. Revere, 209 Va. 684, 690, 166 S.E.2d 258, 263 (1969) (partnership relationship).

74. *See* 25 Ariz. App. at 506, 544 P.2d at 1107. Lucero testified to conversations he had heard between Lavin and Chittenden regarding Chittenden's dealings with Mrs. Cachenos. Abstract of Record On Appeal at 133, 136-37, Cachenos v. Baumann, 25 Ariz. App. 502, 544 P.2d 1103 (1976).

75. *See* 25 Ariz. App. at 506-07, 544 P.2d at 1107-08. See text & notes 4-13 *supra* for a discussion of the circumstances surrounding the transaction.

76. Lucero's affidavit was ruled admissible under the neutrality exception. *See* text & notes 18-38 *supra*.

77. *See* text & notes 39-54 *supra*.

V. INDIAN LAW

A. DOUBLE JEOPARDY AND SUCCESSIVE PROSECUTIONS BY TRIBAL AND FEDERAL COURTS

The inherent sovereignty of Indian tribes as to powers of self-government[1] and the recognized authority of the federal government over Indian affairs[2] create a situation in which an Indian who commits a crime within a reservation may be subject to the jurisdiction of both Indian and federal prosecuting authorities.[3] In such a situation, the Indian offender may be prosecuted twice for the same offense under two distinct sets of laws. The double jeopardy clause[4] may not be applicable in this context due to the "dual sovereignty" exception. This exception allows a second prosecution for the same criminal act where the two prosecuting authorities derive their power from separate sovereigns.[5] Although the application of this exception has been limited to the state-federal context,[6] its rationale, which involves

1. The Indians possess recognized authority to regulate their internal relations. *See* text & notes 100-04 *infra*.

2. Federal authority over the Indians has been termed "plenary." Winton v. Amos, 255 U.S. 373, 391-92 (1921).

3. For example, a criminal act which violates a provision of an Indian tribal code may also violate one of the crimes listed in the Indian Crimes Act of 1976, § 2, 90 Stat. 585 (codified at 18 U.S.C. § 1153 (1976)):

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.
>
> In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

See also NAVAJO TRIBAL CODE tit. 17, §§ 271-272 (1970) (assaults); *id.* § 321 (contributing to the delinquency of a minor); *id.* § 351 (disorderly conduct); *id.* §§ 391-392 (embezzlement and theft).

4. U.S. CONST. amend. V.

5. *See* text & notes 38-41 *infra*.

6. *See* United States v. Wheeler, 545 F.2d 1255, 1257 (9th Cir. 1977), *rev'd*, 46 U.S.L.W. 4243 (1978).

consideration of the source of authority of the prosecutorial entities involved, seems equally relevant to the Indian-federal situation.[7] If Indians are deemed to have sovereign powers of self-government separate from the federal government, should successive prosecutions be permitted under the "dual sovereignty" rationale?

This issue had either been pretermitted by the courts,[8] or left uncontested by the prosecuting authority,[9] until the Ninth Circuit decided *United States v. Wheeler*.[10] In 1974, Anthony Wheeler, a Navajo Indian, pleaded guilty in Navajo tribal court to charges of contributing to the delinquency of a minor and disorderly conduct.[11] More than a year later, he was indicted in federal district court for carnal knowledge of a female Indian under the age of sixteen years.[12] There was no dispute that the federal and tribal charges grew out of the same incident and actions of the defendant.[13] The district court judge dismissed the indictment on the ground that allowing the federal prosecution would be allowing a second prosecution for the same offense, thereby violating the double jeopardy guarantee.[14] In upholding the district court's dismissal of the charges, the Ninth Circuit chose not to recognize the Navajo Tribe as a separate sovereign.[15] If it had, federal prosecution would

7. See text & notes 42-54, 100-04 *infra*.

8. United States v. Kills Plenty, 466 F.2d 240, 243 n.3 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973). In *Kills Plenty*, the court found that the defendant's acquittal in a tribal court on a charge of driving while intoxicated did not bar the defendant's subsequent prosecution in federal district court for involuntary manslaughter under the rule of collateral estoppel, since the two cases did not share an "ultimate fact issue." *Id.* at 243; *see* discussion note 23 *infra*. In addition to the ultimate fact element, collateral estoppel requires a showing that both adjudicatory entities involved are arms of the same sovereign. 466 F.2d at 243. Although the *Kills Plenty* court did not fully analyze this latter issue, it did state that "the Tribal Courts are not arms of the same sovereign as the United States District Court." *Id.* at 243 n.3, *quoting* Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); *accord*, Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971) (the Indian tribes are not federal instrumentalities).

9. United States v. La Plant, 156 F. Supp. 660, 661-62 (D. Mont. 1957).

10. 545 F.2d 1255 (9th Cir. 1976), *rev'd*, 46 U.S.L.W. 4243 (1978). The Eighth Circuit held, in a decision subsequent to *Wheeler*, that the double jeopardy proscription does not prohibit a federal prosecution of a criminal act following prosecution of the same act in a tribal court. United States v. Walking Crow, 560 F.2d 386, 389 (8th Cir. 1977); *see* United States v. Elk, 561 F.2d 133, 134-35 (8th Cir. 1977). For a discussion of *Walking Crow*, see text & notes 83-88 *infra*.

11. 545 F.2d at 1256.

12. *Id.*

13. *Id.* The court rejected the government's contention that Wheeler was not being tried in federal court for the same offense as that for which he was tried in tribal court. The court noted that the double jeopardy guarantee is also violated where one of the charges in a prosecution is a "lesser included offense" of a charge in a separate prosecution, in that every violation of one charge necessarily constitutes a violation of the other. Thus the tribal "contributing to the delinquency of a minor" charge was a lesser included offense to the "carnal knowledge" charge made in federal district court. Since the two charges grew out of the same actions of the defendant and the evidence necessary to convict the defendant of the federal charge would have been sufficient to convict him of the lesser tribal charge, the court concluded that it could not be said that Wheeler would have been tried for a separate offense if the federal prosecution had been allowed. *Id.* at 1258. This holding was not challenged before the Supreme Court.

The lesser included offense instruction is available, in an appropriate case, to an Indian charged with a felony under the Federal Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (1976)), despite the fact that the lesser included offense might originally have been within the exclusive jurisdiction of a tribal court. Keeble v. United States, 412 U.S. 205, 209-12 (1973).

14. *See* 545 F.2d at 1258.

15. *See id.*

have been permitted under the "dual sovereignty" rationale.[16] But instead, the court analogized the Navajo tribal courts to territorial courts which derive their authority from the United States government and are thus subject to double jeopardy scrutiny.[17] The court supported its conclusion by comparison to an earlier decision, *Colliflower v. Garland*,[18] which held that for purposes of habeas corpus review, Indian courts might be considered arms of the federal government.[19]

The United States Supreme Court granted certiorari and unanimously reversed the Ninth Circuit in *Wheeler*.[20] The Court concluded that the dual sovereignty exception would permit successive prosecutions by tribal and federal governments of an Indian offender for crimes committed on the Indian reservation.[21]

This casenote will first discuss the meaning of the double jeopardy guarantee to the individual defendant as well as to the prosecuting sovereign. The "dual sovereignty" exception to this guarantee and its underlying rationale will then be described and applied to the history of the Navajo tribal courts. The Supreme Court's analysis of the ways such sovereignty has been limited will then be examined. This casenote will conclude with a summary of the factors which justify the Supreme Court's holding.[22]

Double Jeopardy and the Dual Sovereignty Exception

The fifth amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[23] It is a basic premise of our legal system that the government, with its extensive legal

16. *Id.*
17. *Id.* at 1257-58.
18. 342 F.2d 369 (9th Cir. 1965).
19. *Id.* at 378-79.
20. United States v. Wheeler, 46 U.S.L.W. 4243 (1978). This casenote was originally written on the Ninth Circuit's decision in *Wheeler*. The Supreme Court's decision was released on March 22, 1978, which was after this casenote had gone to press.
21. *Id.* at 4247-48.
22. In light of the similarity between the Supreme Court's decision and the original focus of this caseote, see discussion note 20 *supra*, the latter will largely remain a critique of the Ninth Circuit's opinion. The Supreme Court's opinion will be incorporated in order to explicate the Court's current posture with regard to questions of Indian sovereignty.
23. U.S. CONST. amend. V. The phrase "for the same offense" in the double jeopardy clause raises the question whether a single criminal act may be prosecuted in a single action involving multiple charges. Where a person is subjected at trial to multiple charges for a single criminal act, the test to be applied in determining whether or not to invoke the double jeopardy proscription is whether each statute upon which the various charges are based "requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). Thus, if one charge uses the same evidence as another, the proscription will be invoked. This "same evidence" test, although used by the Supreme Court in the above situation, has never been sanctioned by the Court as a test for determining whether successive prosecutions violate the double jeopardy clause. Abbate v. United States, 359 U.S. 187, 197-98 (1959) (separate opinion); *see* CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1104 (1973).

However, the Court has applied the doctrine of collateral estoppel in barring subsequent prosecutions for crimes arising out of the same criminal act. Ashe v. Swenson, 397 U.S. 441,

arsenal, should bear a much heavier burden than the defendants in criminal prosecutions.[24] Thus, upon the government's failure in its first attempt to obtain a conviction, subsequent prosecutions are barred by the double jeopardy clause in order to protect the individual from the burdens of extended litigation.[25]

Whereas the double jeopardy guarantee is a cherished guardian of individual liberty, the dual sovereignty exception protects the interests of the prosecuting sovereigns. *Moore v. Illinois*,[26] decided in 1852, suggested the separate nature of such interests:

> Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.[27]

The interests which one sovereign seeks to serve in the definition of its crimes and the enforcement of its laws may be wholly different from those of another.[28] To ensure that the interests of one sovereign are not promoted at the expense of those of another, the Supreme Court has developed the double jeopardy exception.[29] Thus, prosecution by two separate sovereigns for the same act does not place the offender in double jeopardy because a single act may infringe the interests of both sovereigns.

Adhering to the rationale of *Moore*, the Supreme Court, in *United*

437-45 (1970); *accord*, State v. Stauffer, 112 Ariz. 26, 29, 536 P.2d 1044, 1047 (1975). In *Ashe*, the Court held that the collateral estoppel rule is one of constitutional dimensions embodied in the fifth amendment double jeopardy guarantee. 397 U.S. at 446. The doctrine of "collateral estoppel" simply means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit [or criminal prosecution]." *Id.* at 443. The Court in *Ashe* was divided on the collateral estoppel issue, and it is uncertain whether this doctrine will be used as a test for deciding double jeopardy questions in future cases. CONGRESSIONAL RESEARCH SERVICE, *supra* at 1105.

24. For instance, in a criminal prosecution the government must not only produce evidence of the guilt of the accused, but must also persuade the judge or jury of his guilt beyond a reasonable doubt. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 342, at 806 (2d ed. E. Cleary 1972).

25. The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to 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.

Green v. United States, 355 U.S. 184, 187-88 (1957).

26. 55 U.S. (14 How.) 13 (1852).

27. *Id.* at 20.

28. CONGRESSIONAL RESEARCH SERVICE, *supra* note 20, at 1100; *see* discussion notes 31, 38 *infra*.

29. *See* text & notes 32-37 *infra*.

States v. Lanza,[30] upheld the validity of federal prosecution of a defendant who had been convicted in a state court for crimes arising from the same acts. Chief Justice Taft reasoned that two sovereigns, each deriving their prosecutorial powers from separate sources, were capable of asserting concurrent jurisdiction over the same criminal act if the act could be considered a punishable crime against both sovereigns.[31]

In the companion cases of *Bartkus v. Illinois*[32] and *Abbate v. United States*,[33] the Supreme Court held that the fifth amendment does not bar successive prosecutions of a single defendant for the same criminal acts where one prosecution is in a state court and the other in federal court, regardless of the order in which they take place.[34] As had its predecessors, the *Abbate* Court gave consideration to the divergent interests of the state and federal sovereigns:

> [I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered. . . . But no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law.[35]

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30. 260 U.S. 377 (1922).
31. *Id.* at 382.
32. 359 U.S. 121 (1959).
33. 359 U.S. 187 (1959).
34. In *Bartkus*, the petitioner, acquitted following a federal prosecution for bank robbery, was convicted in an Illinois state court of violating the Illinois robbery statute. 359 U.S. at 122. Petitioners in *Abbate* were convicted in an Illinois court of conspiring to injure or destroy the property of another. Based upon the same facts as those involved in the state prosecution, the petitioners were subsequently convicted in a federal district court for conspiring to destroy parts of a federally operated and controlled communications system. 359 U.S. at 188-89.
35. 359 U.S. at 195. The Supreme Court in *Wheeler* emphasized the "undesirable consequences" which would flow from allowing a tribal prosecution to bar a federal prosecution and vice versa. 46 U.S.L.W. at 4247-48. In much the same fashion as the problems anticipated by *Abbate*, enforcement of the Federal Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (1976)), will be effectively negated if an Indian offender who commits a crime violative of federal law, but is first prosecuted in tribal court for a "lesser included offense" of that crime, is allowed the constitutional "immunity" from federal prosecution which the Ninth Circuit provided by invocation of the double jeopardy proscription. 46 U.S.L.W. at 4248. Although the Court recognized that the federal government's interests in the enforcement of its laws could be solidified through Congressional enactment depriving the tribes of all criminal jurisdiction, it questioned the desirability of such action in light of a tribe's "significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions." *Id.* Invocation of the dual sovereignty exception ensures that both federal and tribal interests can be effectuated. *See id.* The use of interest analysis, although strongly advocated, has not been accepted by the Court as an aid in determining the propriety of successive prosecutions by separate sovereigns. See discussion note 41 *infra*. Unless the Court is indicating through its substantial discussion of the interests involved a break with its traditional position, *see* text & notes 38-40 *infra*, such analysis does not go far in support of the *Wheeler* result. The dual sovereignty doctrine is a response to the divergent interests possessed by separate sovereigns. It is an assumption of this doctrine that interests in law enforcement are unique as to each sovereign. If the separateness of one prosecuting sovereign from the other is established by examination of the source of the prosecutorial powers of each, the exception attaches and a successive prosecution will be permitted. The Court need not reexamine the interests involved because the dual sovereignty rationale necessarily implies separate interests. *See* text & notes 28-37 *supra*.

Thus, to safeguard the interests of the states, which "under our federal system have the principal responsibility for defining and prosecuting crimes,"[36] and to ensure the efficiency of federal law enforcement, the Court found that because of the separate nature of the two sovereigns, the double jeopardy clause would not bar the subsequent prosecution.[37]

Application of the double jeopardy proscription depends on whether the prosecuting sovereigns are the same. Thus, consecutive prosecutions by state and municipal courts are not excepted from the purview of the double jeopardy guarantee because the source of the judicial powers of the municipal court spring from the same organic law which created the state courts of general jurisdiction.[38] State political subdivisions are considered subordinate instrumentalities designed to assist in furthering state governmental interests.[39] As the Supreme Court observed in *Wheeler*, the distinction between the relationship there from that of a state and federal government is "not the extent of control exercised by one prosecuting authority over the other, but rather the ultimate source of the power under which the respective prosecutions were undertaken."[40]

In order to determine whether or not the double jeopardy proscription should be invoked, the court must examine the relationship between the sovereigns with a view to the source from which their prosecutorial powers are derived.[41] Accordingly, the development of the Navajo tribal courts, and the source of the authority which they exercise, shall be traced.

The Navajo Court System

In *Wheeler*, the Ninth Circuit concluded that the Navajo tribal courts are arms of the federal sovereign.[42] In doing so, it compared Navajo courts

36. 359 U.S. at 195.
37. *Id.* at 196.
38. *See* Waller v. Florida, 397 U.S. 387, 394-95 (1970). *See generally* "Successive Municipal-State Prosecution," 10 ARIZ. L. REV. 235, 275 (1968).
39. *See* Reynolds v. Sims, 377 U.S. 533, 575 (1964).
40. 46 U.S.L.W. at 4245.
41. It has been suggested that, in addition to a two sovereigns rationale, the courts should invoke a "separate interest test" in determining the propriety of successive prosecutions by state and federal governments. Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1561 (1967). Thus, successive trials would be allowed if the "federal interest to be vindicated by prosecution were substantially different from the state interest involved in the initial trial." *Id.* However, "if both the federal and state statutes [involved] represented similar policies, . . . a second prosecution would be prohibited." *Id.*; *see, e.g.*, United States v. Sutton, 245 F. Supp. 357, 362 (D. Md. 1965) (court found interests protected by state and federal sovereigns to be different); United States v. Patterson, 155 F. Supp. 669, 675 (N.D. Ill. 1957) (dictum recognizing separate interests of the sovereigns involved); Commonwealth v. Mills, 447 Pa. 163, 171-72, 286 A.2d 638, 642 (1971) (state conviction disallowed because there was no evidence that the interests of the state were not fully protected by an initial prosecution in federal court), discussed in 18 VILL. L. REV. 491 (1973). *But see* Abbate v. United States, 359 U.S. 187, 197-98 (1959) (separate opinion) (the Supreme Court has not sanctioned a "separate interests" test in the fifth amendment successive prosecution context).
42. The *Wheeler* holding was expressed in the negative. The court stated that the tribal courts "are *not* arms of separate sovereigns." 545 F.2d at 1256 (emphasis added).

to the Indian courts considered in *Colliflower v. Garland*[43] and to territorial courts discussed in *Grafton v. United States*.[44] In both *Colliflower* and *Grafton*, the courts applied an historical analysis to determine the source of the authority exercised by the prosecuting sovereigns. However, *Wheeler* failed to examine either the history of the Navajo courts or the origin of the power by which they function beyond summarily equating them to the courts considered in *Colliflower*.

In *Colliflower*, the Ninth Circuit reviewed the history of the tribal courts of the Fort Belknap Indian Reservation. Based upon the finding that the Fort Belknap courts functioned as agents of both the tribe and the federal government,[45] the court concluded that a federal court was of competent jurisdiction, in a habeas corpus proceeding, to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court.[46] The court expressly limited its holding to the courts of the Fort Belknap reservation;[47] in pointing out that "[t]he history of other Indian courts may call for a different ruling,"[48] the court demonstrated its awareness of a basic characteristic of American Indian tribes—the history of one may not be the same as that of another. Generally, each tribe is unique in terms of its culture, development, and relationship with the federal government.[49]

The courts with which *Colliflower* was concerned were the Courts of Indian Offenses.[50] These courts were established during the late 19th and early 20th century by the Secretary of the Interior to force Indian tribes to abandon traditional "heathenish practices."[51] Although viewed by certain

43. 342 F.2d 369, 370 (9th Cir. 1965); *see* 545 F.2d at 1258.
44. 206 U.S. 333, 340-41 (1907); *see* 545 F.2d at 1258.
45. 342 F.2d at 379.
46. *Id.* The finding in *Colliflower* that tribal courts are at least in part arms of the same sovereign was made to give the court jurisdiction under 28 U.S.C. § 2241(c)(1), (3) (1970). The writ of habeas corpus is available to anyone who is "in custody under or by color of the authority of the United States," *id.* § 2241(c)(1), or "in violation of the Constitution . . . of the United States," *id.* § 2241(c)(3). Continued need for the *Colliflower* approach to gain habeas corpus jurisdiction appears doubtful in light of the Indian Civil Rights Act of 1968, § 203, 25 U.S.C. § 1303 (1970) which provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."
47. 342 F.2d at 379. In Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir. 1969), the Ninth Circuit, for purposes of acquiring habeas corpus jurisdiction, examined the historical origin of the Yakima tribal court and the scope of its authority. 419 F.2d at 489. Noting that the early Indian courts were organized pursuant to executive order and intended as "mere educational and disciplinary instrumentalities," and that the Yakima Law and Order Code was based upon the Bureau of Indian Affairs Law and Order Regulations, the court in *Settler* could not distinguish *Colliflower* so as not to accept jurisdiction. *Id.* However, both the Yakima and Fort Belknap court systems are historically distinguishable from the Navajo court system, an argument not fully examined by the court of appeals in *Wheeler*. *See* text & notes 50-67 *infra*.
48. 342 F.2d at 379.
49. In terms of the development of tribal judicial systems, for example, the Cherokee have had a fairly advanced system for nearly one-hundred years while the Pueblo Indians in New Mexico rely solely on custom law for the administration of justice. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 553-54 (1976). *But cf.* United States v. Walking Crow, 560 F.2d 386, 389 (8th Cir. 1977) (tribal courts, in general, are not inferior instrumentalities of the federal judicial system).
50. 342 F.2d at 374.
51. Clinton, *supra* note 49, at 553.

courts and commentators as having an uncertain legal foundation,[52] the Courts of Indian Offenses are now provided for in the Bureau of Indian Affairs Law and Order Regulations.[53] They are characterized as "stop-gap measures"[54] to be employed where "traditional agencies for the enforcement of tribal law and custom have broken down [and] for which no adequate substitute has been provided under Federal or State law."[55]

The Courts of Indian Offenses were established by the Commissioner of Indian Affairs on the Navajo reservation in 1903.[56] The early Navajo courts,[57] like the Fort Belknap courts,[58] were funded mainly by the federal government. Throughout the history of these courts, the qualification, appointment, and removal of judges has been regulated by the federal government.[59] The laws enforced by these courts were set out in the Bureau's Law and Order Regulations.[60] In light of the federal government's involvement in the creation and maintainence of the Courts of Indian Offenses, it was reasonable for the court in *Colliflower* to conclude that the Fort Belknap courts were, for habeas corpus purposes, "in part, at least,

52. Early in the history of the tribal courts it was held that they were not courts authorized under article III, § 1, of the United States Constitution. United States v. Clapox, 35 F. 575, 577 (D. Ore. 1888). The court in *Colliflower* pointed out that, in addition to lacking constitutional authority, there is apparently no congressional legislation providing for the establishment of these Indian courts. 342 F.2d at 373. It has been claimed that "[e]ven the federal regulations governing the Courts of Indian Offenses were, as their authors seemingly recognized, promulgated without statutory authority." Clinton, *supra* note 49, at 555 (footnotes omitted). But in Iron Crow v. Oglala Sioux Tribe, 129 F. Supp. 15, 18 (D.S.D. 1955), *aff'd*, 231 F.2d 89 (8th Cir. 1956), it was suggested that 25 U.S.C. § 2 (1970), which sets out a general grant of power for the management of all Indian affairs and all matters arising out of Indian relations, authorized the regulations now found in Law and Order on Indian Reservations, 25 C.F.R. §§ 11.1-.306 (1977). On appeal in *Iron Crow*, the court held that a congressional act is not needed to establish the legality of the tribal courts. 231 F.2d at 94. The court pointed out that a tribe's inherent sovereignty as to matters of self-government obviates any need for constitutional or statutory authorization of such courts. *Id.* at 94-96.

53. 25 C.F.R. § 11.1(b) (1977).

54. Clinton, *supra* note 49, at 554.

55. 25 C.F.R. § 11.1(b) (1977). Only a few Courts of Indian Offenses established pursuant to federal regulation remain operational, since the regulations are meant to encourage tribes to organize their own courts. *See* Clinton, *supra* note 49, at 554.

56. R. UNDERHILL, THE NAVAJOS 220 (1954). Traditionally, peace and order were maintained without the formality of an established court and police system; a system of taboos and informal laws governed behavior. U.S. BUREAU OF INDIAN AFFAIRS, THE NAVAJO YEARBOOK 273 (1961) [hereinafter cited as NAVAJO YEARBOOK].

Following the Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667, interaction of Navajos with non-Indians increased and troubles ensued. Factors which contributed to this situation included the competition between Navajos and non-Indians for off-reservation water and rangeland, the construction of the Atlantic and Pacific Railroad through the reservation, liquor usage among the tribe, and a general opposition by certain tribal leaders to the changes being brought on by the federal government. NAVAJO YEARBOOK, *supra* at 274. As these problems grew more complex, the traditional tribal mechanisms were less able to cope with them, often requiring the local Indian agent to assume a role as both judge and law enforcer. W. HAGAN, INDIAN POLICE AND JUDGES 104 (1966).

57. R. UNDERHILL, *supra* note 56.

58. Colliflower v. Garland, 342 F.2d 369, 372 (9th Cir. 1965), *citing* Appropriations Act of 1888, ch. 503, 25 Stat. 233, as the first mention of funding for these courts.

59. *Id.*; *see* 25 C.F.R. §§ 11.3-.4 (1977).

60. First promulgated in substantially their present form, *see* Colliflower v. Garland, 342 F.2d 369, 374 (9th Cir. 1968), the regulations provide that a tribe may, with the approval of the Commissioner of Indian Affairs, adopt these regulations as the body of its tribal law. 25 C.F.R.

arms of the federal government."[61] However, the question remains whether the present-day Navajo tribal courts are so similar to the Fort Belknap courts as to justify the Ninth Circuit's conclusion in *Wheeler.*

The parallel histories of the Fort Belknap and Navajo court systems diverged in 1959. In that year the Navajo Tribal Council, pursuant to its own resolution[62] approved by the Commissioner of Indian Affairs,[63] abolished the Courts of Indian Offenses and created the Navajo Tribal Courts and Courts of Appeals. The courts thus established were expressly intended as "courts of the Navajo Tribe and not of the Department of the Interior."[64] The qualification, appointment, and removal of the judges which serve these courts were placed in the hands of the Navajo Tribal Council.[65] Although the laws enforced in these courts are to a large extent based upon federal regulations,[66] it has been held that they should be considered the law of the Navajo Tribe and not that of the Department of the Interior.[67]

Examination of the Navajo tribal courts as they function today thus reveals that they differ greatly from those of the Fort Belknap Tribe. Yet to be considered is the inherent right of the authority by which these courts operate.

Source of Authority Approach Applied to the Navajo Courts

Looking to the source of tribal judicial power in general, the Ninth Circuit analogized the relationship which tribal courts have with federal courts to that between the United States military courts and territorial courts.[68] In *Grafton*,[69] an American soldier who had been acquitted in a military court-martial was convicted for an offense arising out of the same criminal act by the Supreme Court of the Philippine Islands, a territorial

§ 11.1(d)-(e) (1977). Both the Navajo and Fort Belknap Indian communities have taken such action. The Navajos adopted these regulations through Tribal Council Res. CJA-1-59, passed January 6, 1959, approved by the Secretary of Interior on February 11, 1959. NAVAJO TRIBAL CODE tit. 7, § 1 (1970); *see* Colliflower v. Garland, 342 F.2d at 374.

61. 342 F.2d at 378-79.

62. NAVAJO TRIBAL CODE tit. 7, § 101, historical notes (1970) (quoting Tribal Council Res., CO-69-58 § 1 (1958)).

63. Davis, *Court Reform in the Navajo Nation*, 43 J. AM. JUD. SOC'Y 52, 54 (1959).

64. NAVAJO TRIBAL CODE tit. 7, § 101, historical notes (1970), *quoting* Tribal Council Res., CO-69-58, Preamble (1958).

65. NAVAJO TRIBAL CODE tit. 7, § 131 (1970).

66. *See* discussion note 60 *supra*.

67. Oliver v. Udall, 306 F.2d 819, 822 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 908 (1963). As the assistant general counsel of the Navajo Tribe, Lawrence Davis, wrote at the time of creation of the Navajo tribal courts:

> [T]he old dispute about whether the Courts of Indian Offenses were educational instrumentalities of the Department of the Interior . . . or instrumentalities of the Navajo Tribe . . . [has become] moot. The new courts are clearly and exclusively the judicial branch of the Navajo nation and are free from control of the Department of the Interior or any other agency of the federal government.

Davis, *supra* note 63, at 54.

68. 545 F.2d at 1257-58.

69. Grafton v. United States, 206 U.S. 333 (1907).

court.[70] Presaging *Lanza*[71] by one year, the Supreme Court of the United States directed its inquiry to the origins of the authority by which the two prosecutorial entities were acting and reversed the conviction. The Court concluded that "[i]f . . . a person be tried for an offense in a tribunal deriving its jurisdiction authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States."[72]

In *Wheeler*, the Supreme Court emphasized the Ninth Cirtcuit's misconception of the factor which set *Grafton* apart from *Bartkus* and *Abbate*.[73] The court of appeals premised its analogy upon decisions which have found that the Indian tribes could be considered neither states nor nations possessed of the full attributes of sovereignty.[74] The court noted that "[t]he federal government has complete, plenary control over the criminal jurisdiction of tribal courts."[75] But the above factors illustrate only that certain powers are denied the tribes as a result of federal intervention and that the exertion of those powers which the tribes do possess may be regulated by the federal government.[76] All this, however, does not identify the source of the authority by which the Navajo people have created their court system and empowered it to enforce tribal law.[77] And it is the source of the authority which determines the applicability of the dual sovereignty exception to the double jeopardy clause.[78]

In *Wheeler*, the Supreme Court felt no hesitation in asserting: "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members."[79] And such power is founded upon the aboriginal sovereign power of internal control possessed by the Indian long before contact with the Europeans.[80] In *Ortiz-Barraza v. United States*,[81] where it was held that Indian tribes possess the power to exclude non-Indian trespas-

70. *Id.* at 340-41.
71. United States v. Lanza, 260 U.S. 377 (1922); *see* text accompanying notes 30-31 *supra*.
72. 206 U.S. at 352.
73. 46 U.S.L.W. at 4245.
74. 545 F.2d at 1257, *citing* United States v. Kagama, 118 U.S. 375, 381-82 (1886), *quoted in* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973).
75. 545 F.2d at 1257.
76. *See* 46 U.S.L.W. at 4246. In United States v. Walking Crow, 560 F.2d 386 (8th Cir. 1977), the court stated: "While [the Indian Crimes Act] took away from the Indian tribes and their tribal courts jurisdiction over enumerated offenses, the jurisdiction that was left to them was in our view an inherent and original jurisdiction of quasi-sovereign powers." *Id.* at 389.
77. *See* United States v. Walking Crow, 560 F.2d 386, 389 (8th Cir. 1977). The position taken by the court of appeals would work against the settled application of the dual sovereignty exception to successive state and federal prosecutions. The Constitution of the United States and the supremacy clause do limit the exercise of state authority. 46 U.S.L.W. at 4245. But the Ninth Circuit's approach would mean that these two sovereigns could not be considered separate for the exception's purposes. In reality "this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power." *Id.*
78. *See* text & notes 23-41 *supra*.
79. 46 U.S.L.W. at 4245.
80. *Id.*
81. 512 F.2d 1176 (9th Cir. 1975).

sers from the reservation, the Ninth Circuit observed that the "Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or act of Congress. . . . Intrinsic in this sovereignty is the power of a tribe to create and administer a criminal justice system."[82] In a recent decision, *United States v. Walking Crow*,[83] the Eighth Circuit was presented with the same "troublesome" question with which the Ninth Circuit attempted to deal.[84] The defendant, who had been convicted of simple theft in a Rosebud Sioux tribal court, was indicted for robbery by a federal grand jury, both charges being based upon the same act.[85] His double jeopardy claim was denied at the trial in federal district court which resulted in a conviction and sentence of three years imprisonment.[86] On appeal, the Eighth Circuit affirmed the conviction, finding the dual sovereignty exception applicable.[87] The court indicated that the jurisdiction possessed by the tribal courts is inherent in the Indian tribes' quasi-sovereign powers.[88] Although Congress may have limited this jurisdiction by statute, the court concluded "that a tribal court in administering its residual jurisdiction is not acting as an adjudicatory arm of the federal government, and . . . is not simply an inferior court in the federal judicial system."[89] These cases evidence the recognition of substantial sovereign powers in the Indians. Such powers were not fully explored by the court of appeals in *Wheeler*.

Early treaties which the United States made with Indians also acknowledge significant powers of self-government.[90] In construing treaties made with the Cherokee Nation, the Supreme Court remarked in *Talton v. Mayes*:[91]

> [T]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment. . . .[92]

The Supreme Court in *Wheeler* found conclusive support in *Talton* for the assertion that when a tribe punishes a member for infraction of its law, it is

82. *Id.* at 1179.
83. 560 F.2d 386 (8th Cir. 1977).
84. *Id.* at 387.
85. *Id.*
86. *Id.*
87. *Id.* at 389.
88. *Id.*
89. *Id.*
90. *See* Clinton, *The Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 961-62 (1975). Jurisdiction over serious crimes was reserved to the tribe if the perpetrator and victim were Indian. *Id.*
91. 163 U.S. 376 (1896).
92. *Id.* at 384.

exercising its sovereign power.[93] In considering the 1868 treaty with the Navajos,[94] the Supreme Court, in *Williams v. Lee*,[95] found implicit in the treaty "that the internal affairs over the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[96] Characterization of powers of self-government as remaining with the tribe indicates recognition of inherent, albeit limited, tribal sovereignty.[97]

The power to regulate internal matters is inherent in the Navajo Tribe.[98] The origins of the power supporting the Navajo courts is not to be found in the organic law of the United States.[99] Rather, such authority is derived from the inherent sovereign powers of self-government which rest with the Navajo Tribe. This would indicate the applicability of the dual sovereignty exception. The question remains whether these powers remain intact in light of the federal government's supreme authority over Indian matters.

Limitations Upon Tribal Sovereignty

Indian tribes do not have the sovereign status of a state or a nation.[100] Because of conquest and cession, Indian tribes have no claim to sovereignty cognizable under international law.[101] Indian affairs are regulated under the constitutionally conferred "plenary" authority of the federal government.[102] The tribal sovereignty which has been abrogated by the actions of the United States is, however, external in nature.[103] Such external sovereignty, regarding relations with other sovereigns, must be distinguished from inherent internal sovereignty concerning matters of self-government, which has been retained by the tribes.[104] Although the Indian tribes have not been found to possess that degree of sovereignty ascribed to nationhood, they have

93. 46 U.S.L.W. at 4247.
94. Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667.
95. 358 U.S. 217 (1959).
96. *Id.* at 221.
97. In contrast to the Navajo treaty, the court in Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965), interpreted the treaties with the Fort Belknap Reservation as making no provision for self-government by the Indians or for tribal courts. *Id.* at 371.
98. *See* text & notes 94-97 *supra*.
99. *See id.*
100. 545 F.2d at 1257; *see* United States v. Kagama, 118 U.S. 375, 381-82 (1886).
101. Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600, 602 (1976).
102. Winton v. Amos, 255 U.S. 373, 391-92 (1921). For a discussion of the source of this plenary authority, see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 89 (1942).
103. *See* F. COHEN, *supra* note 102, at 122, *quoted in* Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 133 (10th Cir. 1959).
104. *Id.* The early case of Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), recognized the exclusiveness of tribal powers over internal matters, except where federal law was made applicable by congressional enactment. *Id.* at 560-62. Later cases have acknowledged this power:

> They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.

nonetheless retained a limited form of sovereignty. The Supreme Court was unequivocal in its assertion in *Wheeler*: "The powers of Indian tribes are, in general, '*inherent powers of limited sovereignty which has [sic] never been extinguished.*' "[105] Despite the source of tribal sovereignty, however, "[i]t exists only at the sufferance of Congress and is subject to complete defeasance."[106]

Recognizing that Indian sovereignty is of a limited character,[107] the Supreme Court in *Wheeler* examined federal action affecting tribal jurisdiction to assure itself that such action had in no way defeased the tribes of their power to regulate criminal activity among their members.[108] The Court examined how the Navajo Tribe's sovereign power may have been limited by treaty, statute, or necessary implication from the federal government's plenary authority over Indian affairs.[109]

As noted above, the 1868 treaty with the Navajos left the Tribe's internal sovereignty intact.[110] Thus, while that treaty and an earlier one[111] gave the United States jurisdiction to punish Navajo tribal members for crimes committed against non-Indians, neither restricted the Tribe's ability to sanction member offenders.[112]

Where Congress has seen fit to establish federal criminal jurisdiction over crimes involving Indians, it has consistently reaffirmed a tribe's power to police its members.[113] Thus, acts which have authorized the federal government to punish crimes committed against Indians and applied federal enclave criminal law to "Indian country" have excepted crimes committed by one Indian against another.[114] The Supreme Court concluded that "far from depriving Indian tribes of their sovereign power to punish offenses

Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 133 (10th Cir. 1959). Treaties with the Indians, which were important elements of the Indian-federal government relationship during the 19th century, are generally viewed as reserving some power of self-government to the Indians. Clinton, *supra* note 90, at 962. Most treaties promulgated during the period 1776 to 1871 were couched in the language of international diplomacy. *Id.* at 953. With the Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, future treaty-making with Indians was abolished.

105. 46 U.S.L.W. at 4246, *quoting* F. COHEN, *supra* note 102, at 122 (emphasis in original).
106. *Id.*
107. *Id.* See text & notes 100-06 *supra*.
108. 46 U.S.L.W. at 4646-47.
109. *Id.*
110. *See* text & notes 94-97 *supra.*
111. Treaty with the Navajos, Sept. 9, 1849, 9 Stat. 974.
112. 46 U.S.L.W. at 4246.
113. *Id.*
114. The Indian Trade and Intercourse Act of July 22, 1790, ch. 33, § 5, 1 Stat. 138, although permitting the federal government to punish offenses committed against Indians by "any citizen or inhabitant of the United States," did not refer to crimes committed by Indians. 46 U.S.L.W. at 4246. The Supreme Court in *Wheeler* took this to mean that the act recognized an intra-Indian offense exception to the grant of jurisdiction. The Act of March 3, 1817, ch. 92, 3 Stat. 383, extended federal jurisdiction to crimes committed within the Indian country by "any Indian, or other person or persons," but expressly excluded intra-Indian offenses. *Id.* Furthermore, the General Crimes Act of June 25, 1948, ch. 645, § 1152, 62 Stat. 757, 18 U.S.C. § 1152 (1976), a direct descendent of the Indian Trade and Intercourse Act of 1834, ch. 161, § 25, 4 Stat. 733, which applies federal enclave criminal law generally to crimes in "Indian country," excepted crimes against one Indian committed by another. *Id.* As the Supreme Court noted in

against tribal law by members of a tribe, Congress has repeatedly recognized that power and declined to disturb it."[115]

Portions of the Indian's sovereign powers have been impliedly lost due to their dependent status.[116] However, the areas in which removal of sovereignty has been implied are those involving Indian and non-Indian relations.[117] Thus, the Court has recently held that Indian tribes cannot try non-members in tribal courts.[118] Such limitation goes to the tribes' external powers. The exercise of such powers would be inconsistent with the Indian's dependent status.[119] The powers dealt with in both *Wheeler* decisions, however, concern the maintenance of the tribe's internal order.[120] The dependent status of the Indians is not incompatible with the tribes' power to prescribe and enforce internal criminal laws: the right to self-government does not hamper the ability of the general government to order relations in a federal system.[121]

Thus, while Congress has in certain ways limited tribal sovereignty,[122] it has not excised the power to sanction members' criminal activity. Furthermore, the fact that Congress has set up such limitations does not mean that Congress should be considered the source of tribal sovereignty.[123]

Wheeler, such exception was out of deference to the tribes' recognized jurisdiction over such offenses. *Id.* An amendment to the Indian Trade and Intercourse Act of 1834 highlighted the jurisdiction of tribal courts by providing that federal courts could not try an Indian "who has been punished by the local law of the Tribe." Act of March 27, 1854, ch. 24, § 3, 10 Stat. 270, 18 U.S.C. § 1152 (1976). This Act is not applicable here. Wheeler was punished under the Major Crimes Act. *See* discussion note 3 *supra*.

115. 46 U.S.L.W. at 4246.

116. *Id.* at 4246.

117. *Id.*

118. Oliphant v. Suquamish Indian Tribe, 46 U.S.L.W. 4210, 4216 (1978).

119. 46 U.S.L.W. at 4247; *see* text & notes 100-05 *supra*.

120. *See* text & notes 100-05 *supra*.

121. *See* 46 U.S.L.W. at 4247.

122. Where Congress and the Bureau of Indian Affairs have exercised their authority in relation to the Navajo, the purpose of such action has been to strengthen the tribal government and its courts. *See* Williams v. Lee, 358 U.S. 217, 222 (1959); *accord*, Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 96 (8th Cir. 1956); *cf.* United States v. Nice, 241 U.S. 591, 599 (1916) (legislation affecting the Indians is to be construed in their best interests). Both Congress and the Supreme Court have sought to preserve Indian powers of internal sovereignty. *See* Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975), stating: "The status of Indian tribes as dependent sovereigns with inherent but limited powers (which include the power to draft a constitution and to enact law) has been recognized by Congress. 25 U.S.C. § 476 (1970) [Indian Reorganization Act of 1934]." In Williams v. Lee, 358 U.S. 217 (1959), Arizona attempted to assert its jurisdiction over an Indian where the cause of action arose on the Navajo Reservation. In rejecting the validity of the state's assertion of jurisdiction, the Court developed the so-called "infringement test." *Id.* at 220. Absent governing acts of Congress, the question is whether the state action infringes on the right of the reservation Indians to make their own laws and be ruled by them. *Id.* For a discussion of the infringement test, see Note, *Enforcement of State Financial Responsibility Laws Within Indian Country*, 17 ARIZ. L. REV. 831, 839-42 (1975). *But see* Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, §§ 6-7, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (1970)) (providing for assumption by the state of jurisdiction over Indians without tribal consent). Arizona has not acquired criminal and civil jurisdiction over Indian lands by the provisions of these Acts. Williams v. Lee, 358 U.S. 217, 222-23 (1959). The impact of Public Law 280 has been buffered by the Indian Civil Rights Act of 1968, §§ 401-402, 25 U.S.C. §§ 1321-1322 (1970), which requires consent by the tribe to the state's assumption of jurisdiction. *See also* Clinton, *supra* note 90, at 962 (asserting that the Federal Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C.A. § 1153 (Supp. 1977)), was the first attack by Congress on tribal self-government over intra-Indian crimes).

123. *See* O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1144 (8th Cir. 1973). The

Conclusion

Invocation of the dual sovereignty exception to the double jeopardy clause depends upon the organic law by which the sovereign is empowered to exert its authority rather than the outer limits to which that power may be exercised. The Ninth Circuit did not examine the history of the Navajo tribal courts or the source of the authority by which they operate. Such examination indicates that Navajo tribal courts are the result of the exercise of tribal powers of self-government—not appendages of the federal court system. And these sovereign internal powers have not been limited by treaty, statute, or implication so as to render inapplicable the dual sovereignty exception. Thus, under that exception, a prior conviction or acquittal in tribal court of a member for a crime against another member should not bar a subsequent prosecution in a federal court.

purpose of the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201-701, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-1341 (1970) and 25 U.S.C.A. § 1341(c) (Supp. 1977)), was to protect and preserve individual rights of Indian peoples, with the realization that this goal was best achieved by maintaining the unique Indian culture and necessarily strengthening tribal governments and courts. 482 F.2d at 1144.

VI. LEGAL PROFESSION

A. ATTORNEY LIABILITY TO THIRD PARTIES

Undeviating fidelity to the client is a fundamental principle of the legal profession.[1] A lawyer's judgment should be exercised "solely for the benefit of his client and free of compromising influences and loyalties."[2] The substantial increase in legal malpractice litigation indicates that attorneys must not take this duty lightly.[3] However, this duty to serve the client is tempered by an attorney's concurrent obligation to consider the interests of those outside the attorney-client relationship.[4] Uncertainty as to the nature and scope of the attorney's duty to these outside parties makes it difficult for a lawyer to resolve his conflicting responsibilities. This uncertainty was increased by two recent decisions of the Arizona Court of Appeals concerning the liability of attorneys to third parties not in privity of contract.[5]

In *Chalpin v. Brennan*,[6] the plaintiff entered into an agreement with a corporation whereby he became general manager of the corporation and purchased an option to buy shares of its stock.[7] The contract was completed after the defendant, who was the corporation's attorney and one of its directors, prepared and submitted to Chalpin documents containing allegedly false statements that the issue of common stock by the corporation had been authorized by the Securities and Exchange Division of the Arizona

1. Parsons v. Continental Nat'l Am. Group, 113 Ariz. 223, 227, 550 P.2d 94, 98 (1976); *In re* Baker, 102 Ariz. 346, 347, 429 P.2d 665, 666 (1967).

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1976).

3. One commentator reports that legal malpractice suits have risen between 40-50% during the years 1974-75. 223 NATION 553 (1976).

4. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 (1976) provides: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent oblibation to treat with consideration all persons involved in the legal process and avoid the infliction of needless harm."

5. There is some disagreement on the actual definition of "privity of contract." Courts seem to have a preference for a simple definition, referring to "privity" as the relation that exists between contracting parties. Howarth v. Pfeifer, 443 P.2d 39, 42 (Alas. 1968); City of LaCrosse v. Schubert, Schroeder & Assocs., Inc., 72 Wis. 2d 38, 41, 240 N.W.2d 124, 126 (1976). Corbin, on the other hand, states that the term "privity" is surrounded by mystery, and is apparently best defined by a hypothetical example: "[W]here B has promised A to render a performance beneficial to C, we may say that A is in privity with B . . . ." 4 A. CORBIN, CORBIN ON CONTRACTS § 778, at 28-29 (1951).

6. 114 Ariz. 124, 559 P.2d 680 (Ct. App. 1976).

7. Chalpin v. Mobile Gardens, No. 1 CA-CIV 2051, at 7-8 (Ariz. Ct. App. May 9, 1974).

Corporation Commission.[8] Chalpin paid $15,000 on the option agreement and assumed general management of the corporation. Several weeks later he discovered that sale of lots in the development project had not been approved by the state and that the corporation had not been authorized to issue and sell stock.[9] Chalpin resigned and filed suit against the corporation and its attorney, Brennan. One count of the complaint[10] alleged damages resulting from negligent malpractice in the drafting of the employment management agreement by Brennan.[11] The trial court granted summary judgment in favor of Brennan. Division 1 of the Court of Appeals of Arizona, in affirming the decision of the trial court, held that an individual not in privity with an attorney has no cause of action against that attorney for negligent malpractice.[12]

Fickett v. Superior Court[13] was a conservator's suit against the former guardian of an incompetent's estate and against the former guardian's attorney, Fickett. The former guardian had been found liable for misappropriation and conversion to his own use of the estate's funds in a previous action.[14] The suit against Fickett alleged that he was negligent in failing to discover that the former guardian's activities were improperly divesting the estate of its resources.[15] Fickett filed a motion for summary judgment arguing that since there was no fraud or collusion between the guardian and himself, he was not liable for the guardian's misappropriation of the assets of the estate.[16] The trial court denied the motion for summary judgment, and Division 2 of the Arizona Court of Appeals affirmed.[17] The appellate court held that the lack of privity of contract did not prevent the conservator from filing suit,[18] and that when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward.[19]

8. Brief for Appellant at 12-13, Chalpin v. Brennan, 114 Ariz. 124, 559 P.2d 680 (Ct. App. 1976). [hereinafter cited as Chalpin Brief].
9. *Id.* at 13.
10. The complaint was in six counts. Count I sought recovery of $15,000 based on a promissory note executed by Mobile Gardens to Chalpin. Count II, based on a statutory right, ARIZ. REV. STAT. ANN. § 44-2001 (1956), sought rescission of the contract. Count III was for wages under the employment-management agreement. Counts IV and VI were for fraud. The trial court granted summary judgment in favor of the defendants on all counts except Count I, which was settled in favor of Chalpin, and Count V, which was the subject of the appeal. Chalpin Brief, *supra* note 8, at 4-6.
11. 114 Ariz. at 125, 559 P.2d at 681.
12. *Id.* at 126, 559 P.2d at 682. The court further stated in dictum that Brennan's role as an officer of the corporation did not increase his liability for the improper sale of the stock. *Id.* However, Brennan could conceivably have been found liable under federal securities and exchange regulations. *See id.* For a discussion of this type of liability, see Note, *The Duties and Obligations of the Securities Lawyer: The Beginning of a New Standard for the Legal Profession?*, 1975 DUKE L.J. 121, 127.
13. 27 Ariz. App. 793, 558 P.2d 988 (1976).
14. *In re* Guardianship of Styer, 24 Ariz. App. 148, 536 P.2d 717 (1975).
15. 27 Ariz. App. at 794, 558 P.2d at 989.
16. *Id.*
17. *Id.* at 796, 558 P.2d at 991.
18. *Id.* at 794-95, 558 P.2d at 989-90.
19. *Id.* at 795, 558 P.2d at 990.

This casenote will first discuss the reasons behind the requirement of privity in actions for negligent malpractice and attempt to demonstrate that the sounder policy would be to abolish the privity rule. The *Fickett* court's application of the balancing test to determine liability will be compared with that test's application by other courts which have abandoned the privity requirement; the balancing test will then be applied to the facts of *Chalpin* to demonstrate the utility of the alternative to privity of contract. Finally, this casenote will briefly explore the possible effects on the legal profession in Arizona of the demise of the privity rule.

Fickett and *Chalpin* reach different conclusions as to when liability to third parties should be imposed on attorneys.[20] Since an action for negligent malpractice is based on a hybrid of contract and tort theories,[21] an evaluation of these conflicting decisions will require an examination of both theories of liability.

The Basis of Liability

Tort actions based on negligence generally rest on the breach of a duty owed by the defendant to the plaintiff.[22] This duty is predicated upon the "foreseeability" or reasonable anticipation that harm or injury is likely to result from acts or omissions.[23] This limitation on liability to foreseeable injury protects a potential defendant from infinite responsibility for his actions.[24] The concept limits the liability to which an individual will be exposed.

The law of contracts has a similar device to limit an individual's liability—"privity of contract."[25] This concept is based on the need to draw a line between those individuals whose rights should be protected under the contract, and those who have no just claim for relief.[26] A party not in privity is not entitled to recover for a breach of contractual obligations.[27] This

20. It is noted that a factual distinction between *Fickett* and *Chalpin* could account for the different rationales used by the courts in determining whether the attorney should be liable. That distinction is the presence of a fiduciary relationship between the attorney and the ward in *Fickett*, and the absence of a fiduciary relationship in *Chalpin*. However, this distinction seems to have little significance in light of the broad language in *Fickett* that the balancing test, see text & notes 66-117 *infra*, is the "better view" in the determination of an attorney's liability to third persons than is the privity requirement. 27 Ariz. App. at 795, 558 P.2d at 990.

21. Averill, *Attorney's Liability to Third Parties for Negligent Malpractice*, 2 LAND & WATER L. REV. 379, 380 (1967).

22. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 325 (4th ed. 1971).

23. Tucson Rapid Transit Co. v. Tocci, 3 Ariz. App. 330, 334, 414 P.2d 179, 183 (1966); Palsgraf v. Long Island Ry., 248 N.Y. 339, 342, 162 N.E. 99, 101 (1928).

24. W. PROSSER, *supra* note 22, § 43, at 263.

25. Privity of contract has been defined as a direct transaction between the parties. *See* W. PROSSER, *supra* note 22, § 93, at 622. See discussion note 5 *supra*.

26. G. GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS § 238, at 388 (rev. ed. 1965). *See also* W. PROSSER, *supra* note 22, § 93, at 623.

27. *See, e.g.*, National Cash Register Co. v. Unarco Indus., Inc., 490 F.2d 285, 286 (7th Cir. 1974); Twine v. Liberty Nat'l Life Ins. Co., 294 Ala. 43, 50, 311 So. 2d 299, 305 (1975); Treadway v. Western Cotton Oil & Ginning Co., 40 Ariz. 125, 138, 10 P.2d 371, 375 (1932).

branch of contract doctrine was grafted onto tort law in the famous case of *Winterbottom v. Wright*,[28] where the English Court of Exchequer held that the defendant's breach of a contract to keep a mail coach in repair would not support a cause of action by an injured passenger. While the action had been brought in contract,[29] later courts read the case to stand for the principle that there could be no liability, in either contract or tort, of a contracting party to one with whom he was not in privity.[30] This rule is not logical; when a defendant acts in a manner likely to affect the interests of another person, the incidental existence of a contract with a third person should not negative the defendant's responsibility for his behavior.[31] In recognition of the illogic of the privity requirement, the courts have rejected it in actions against negligent auto mechanics,[32] the modern analogy to *Winterbottom v. Wright*, and in other areas of the law, such as products liability[33] and medical malpractice.[34] The basis of the current theory of liability in these areas is the recognition of a duty based on the foreseeability of harm.[35]

The first American case to explicitly recognize foreseeability as a basis for liability in a malpractice suit by a third party was *Glanzer v. Shepard*.[36] In that case, the plaintiff had purchased a quantity of beans, the total purchase price to be determined by weight.[37] The defendant, a public weigher, had contracted with the seller to certify the correct weight of the beans, and knew that the certified weight would be used as the basis for determining the amount of payment.[38] The defendant overstated the weight and the plaintiff overpaid.[39] The court noted that liability could have been based on a third party beneficiary theory,[40] but instead rested liability on the foreseeability of harm to the buyer.[41] The court stated that "the bounds of

28. 152 Eng. Rep. 402 (Ex. 1842).

29. No other basis for imposing liability had yet been developed. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.5, at 1040 (1956).

30. W. PROSSER, *supra* note 22, § 93, at 622.

31. *Id.*

32. General Motors Corp. v. Jenkins, 114 Ga. App. 873, 879, 152 S.E.2d 796, 800 (1966); Zierer v. Daniels, 40 N.J. Super. 130, 133, 122 A.2d 377, 378-79 (1956); Barnhart v. Freeman Equip. Co., 441 P.2d 993, 997-98 (Okla. 1968).

33. *See* 2 F. HARPER & F. JAMES, *supra* note 29, § 28.1, at 1535.

34. Norton v. Hamilton, 92 Ga. App. 727, 730, 89 S.E.2d 809, 812 (1955); Kaiser v. Suburban Transp. Sys., 65 Wash. 2d 461, 465, 398 P.2d 14, 16 (1965); *cf.* Malone v. University of Kan. Medical Center, 220 Kan. 371,—, 552 P.2d 885, 888 (1976) (holding that action for medical malpractice is in tort, not contract).

35. The underlying theory was succinctly expressed by Justice Cardozo in the landmark case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), as follows: "Because the danger is to be foreseen, there is a duty to avoid the injury." *Id.* at 385, 111 N.E. at 1051. While the test adopted by the *Fickett* court involves several factors, of which foreseeability is only one, application of the test could be expected to compensate an actually foreseen plaintiff's injury in most cases. T. Fiflis, *Current Problems of Accountants' Responsibilities to Third Parties*, 28 VAND. L. REV. 31, 112 (1975).

36. 233 N.Y. 236, 135 N.E. 275 (1922).

37. *Id.* at 237-38, 135 N.E. at 275.

38. *Id.* at 239, 135 N.E. at 275-76.

39. *Id.* at 238, 135 N.E. at 275.

40. *Id.* at 240, 135 N.E. at 277.

41. *Id.* at 240, 135 N.E. at 276. "The controlling circumstance is not the character of the consequence, but its proximity or remoteness in the thought and purpose of the actor." *Id.*

duty are enlarged by knowledge of a prospective use."[42]

Other courts have followed this foreseeability approach in extending the liability of professionals for negligent malpractice. The approach has been used in third party suits against engineers,[43] architects,[44] surveyors,[45] and accountants.[46] The foreseeability theory of liability was crystallized into a formal test by the California Supreme Court in *Biakanja v. Irving*,[47] where the court held that determination of liability is a matter of policy, involving the balancing of various factors.[48] This case and its progeny continue to be a major force in the erosion of the privity requirement.[49]

Attorney's Liability to Third Parties

Where an attorney's performance is the subject of litigation, courts have generally followed the rule that in the absence of fraud or collusion, no action for negligence will lie unless there is privity between the parties.[50] Two reasons are said to support the requirement of privity. First, it is feared that allowing third parties to sue would result in endless litigation, as there would be "no bounds to actions."[51] Second, it is urged that allowing a third party to acquire an actionable interest in the performance of a contract would seriously restrict the right of contract by imposing an involuntary assump-

42. *Id.*

43. M. Miller Co. v. Dames & Moore, 198 Cal. App. 2d 305, 308, 18 Cal. Rptr. 13, 15 (1961).

44. Mallow v. Tucker, Sadler & Bennett, Architects & Eng'rs, Inc., 245 Cal. App. 2d 700, 703, 54 Cal. Rptr. 174, 176 (1966); Conklin v. Cohen, 287 So. 2d 56, 61 (Fla. 1973); Miller v. DeWitt, 37 Ill. 2d 273, 283, 226 N.E.2d 630, 637 (1967); Inman v. Binghamton Hous. Auth., 3 N.Y.2d 137, 144, 143 N.E.2d 895, 899, 164 N.Y.S.2d 699, 703-04 (1957). *See generally* Crisham, *Liability of Architects and Engineers to Third Parties*, 26 F.I.C.Q. 177, 179 (1976).

45. *E.g.*, Kent v. Bartlett, 49 Cal. App. 3d 724, 731, 122 Cal. Rptr. 615, 618-19 (1975); Rozny v. Marnul, 43 Ill. 2d 54, 66, 250 N.E.2d 656, 663 (1969); Craig v. Everett M. Brooks Co., 351 Mass. 497, 501, 222 N.E.2d 752, 755 (1967).

46. *E.g.*, Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs, 455 F.2d 847, 851 (4th Cir. 1972); Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472, 475 (8th Cir. 1968); Rusch Factors, Inc., v. Levin, 284 F. Supp. 85, 92-93 (D.R.I. 1968); Ryan v. Kanne, 170 N.W. 2d 395, 401 (Iowa, 1969); Aluma Kraft Mfg. Co. v. Elmer Fox & Co., 493 S.W.2d 378, 383 (Mo. Ct. App. 1973); Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 880 (Tex. Civ. App. 1971); *cf.* Milliner v. Elmer Fox & Co., 529 P.2d 806, 808 (Utah 1974) (abandoned the requirement of privity although accountant held not liable to third party).

47. 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958).

48. Those factors are: the extent to which the transaction was intended to affect the plaintiff; the foreseeability of harm to her; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; and the social policy of preventing future harm. *Id.* at 650, 320 P.2d at 19. For a discussion of these factors, see text & notes 66-117 *infra*.

49. Wade, *The Attorney's Liability for Negligence*, in PROFESSIONAL NEGLIGENCE 217, 221 (T. Roady & W. Anderson, eds. 1960).

50. This principle was first articulated by the United States Supreme Court in Savings Bank v. Ward, 100 U.S. 195, 205-06 (1879), and was reiterated by the California Supreme Court 16 years later in Buckley v. Gray, 110 Cal. 339, 342, 42 P. 900, 900 (1895). *See also* Delta Equip. & Constr. Co. v. Royal Indem. Co., 186 So. 2d 454, 458 (La. Ct. App. 1966); Hakala v. Van Schaick, 171 Misc. 418, 424-25, 12 N.Y.S.2d 928, 934 (N.Y. City Ct. 1939); Bryan & Amidei v. Law, 435 S.W.2d 587, 593 (Tex. Civ. App. 1968).

51. Savings Bank v. Ward, 100 U.S. 195, 202 (1879). *See generally* cases cited note 50 *supra*.

tion of duties on the contracting parties.[52]

Despite these apprehensions, some courts allow negligence suits by third parties not in privity with the defendant.[53] At least two theories have been advanced to justify such litigation. The first predicates the attorney's duty on a contractual third party beneficiary relationship.[54] Under this approach, the court looks to the intent of the party contracting with the attorney and finds a breach of duty when that intent is to benefit a third party and is frustrated by the negligence of the attorney.[55] The more common[56] second approach involves the application of the balancing test developed in *Biakanja*.[57] This test was first applied to negligence actions against attorneys by the California Supreme Court in *Lucas v. Hamm*,[58] where the beneficiary of a will suffered financial loss when the will drafted by the defendant was ruled invalid.[59] Following this decision, the balancing test has been used in California,[60] Connecticut,[61] and New Jersey[62] to determine the liability of attorneys. As predicted by one commentator,[63] the *Lucas* decision has not been limited to beneficiaries of wills, but has been applied to other situations as well.[64] The decision in *Fickett* is a prime example.[65]

Fickett—The Balancing Test

The *Fickett* court adopted the balancing test first utilized in *Biakanja*,[66] and determined that an attorney representing the guardian of an incompetent

52. Buckley v. Gray, 110 Cal. 339, 345, 42 P. 900, 901 (1895); Roddy v. Railway Co., 104 Mo. 234, 245, 15 S.W. 1112, 1114 (1891). *See also* cases cited note 50 *supra*.

53. *See, e.g.*, Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Woodfork v. Sanders, 248 So. 2d 419 (La. Ct. App. 1971); Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (1976).

54. Woodfork v. Sanders, 248 So. 2d 419, 425 (La. Ct. App. 1971).

55. *Id.*

56. *Cf.* Averill, *supra* note 21, at 400 (suggesting that the third party beneficiary theory would be limited to specific fact situations similar to the one in *Lucas*).

57. 49 Cal. 2d 647, 650, 320 P.2d 16, 19. For a discussion of how the balancing test has been applied, see note 163 *infra*.

58. 56 Cal. 2d 583, 588, 364 P.2d 685, 687, 15 Cal. Rptr. 821, 823 (1961), *cert. denied*, 368 U.S. 987 (1962). The *Lucas* court would also have allowed the plaintiff to sue under a third party beneficiary theory. *Id.* at 589-91, 364 P.2d at 689, 15 Cal. Rptr. at 825.

59. *Id.* at 587, 364 P.2d at 687, 15 Cal. Rptr. at 823. Although it allowed the third party to sue, the court concluded that in view of the confused state of the law relating to perpetuities, it would be improper to hold that the attorney had not used reasonable skill. *Id.* at 592, 364 P.2d at 690, 15 Cal. Rptr. at 826.

60. *E.g.*, Heyer v. Flaig, 70 Cal. 2d 223, 228-29, 449 P.2d 161, 164-65, 74 Cal. Rptr. 225, 228-29 (1969); Bucquet v. Livingston, 57 Cal. App. 3d 914, 921, 129 Cal. Rptr. 514, 518 (1976); Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 111, 128 Cal. Rptr. 901, 905-06 (1976); Donald v. Garry, 19 Cal. App. 3d 769, 771-72, 97 Cal. Rptr. 191, 192 (1971).

61. Licata v. Spector, 26 Conn. Supp. 378, 383, 225 A.2d 28, 29-30 (1966).

62. Stewart v. Sbarro, 142 N.J. Super. 581, 593, 362 A.2d 581, 588 (1976).

63. Miller, *Public Accountants and Attorneys: Negligence and the Third Party*, 47 NOTRE DAME LAW. 588, 602 (1972).

64. *See* Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971) (involving an attorney's duty to a creditor); Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (1976) (involving an attorney's liability to buyers of stocks).

65. The court in *Fickett* found a duty to the ward of an attorney's client. 27 Ariz. App. at 793, 558 P.2d at 988. See text & notes 13-19 *supra*.

66. 49 Cal. 2d at 650, 320 P.2d at 19; *see* 27 Ariz. App. at 795, 558 P.2d at 990.

also owes a duty to the ward.[67] A comparison of the *Fickett* court's application of the factors included in the balancing test with their application by other courts is helpful in illustrating the court's rationale and the utility of the balancing test itself.

1. *The extent to which the transaction was intended to affect the plaintiff*

In *Fickett*, the transaction was the agreement between the defendant attorney and the guardian of an incompetent's estate whereby the defendant served as the guardian's attorney. The court concluded that in such a relationship, the attorney necessarily assumes a duty to the ward since the sole purpose of the guardianship is to protect the ward's interests.[68] In *Lucas*, where suit by a third party against an attorney was first allowed, the court found that one of the main purposes of the transaction between the attorney and the testator was to provide for the transfer of property to the plaintiff.[69] Thus, both *Fickett* and *Lucas* involve fact situations similar to those in traditional third party beneficiary cases. The same intent which identifies a third party beneficiary defines the necessary intent for this aspect of the balancing test.[70] This conclusion is supported by the decision in the post-*Biakanja* case of *Haldane v. Freedman*.[71] In *Haldane*, the attorney was retained to represent the wife in a divorce action. The client's children sued their mother and her attorney for devaluation of their mother's estate.[72] Applying the balancing test, the court held that since the transaction between the mother and her attorney was not intended to affect the children, the attorney was not liable for the plaintiff's loss.[73] The distinction between these cases lies in the reason for a client's transaction with the attorney. In *Fickett* and *Lucas*, the client's purpose was to produce a benefit for a third party, while in *Haldane*, the client retained the attorney to obtain a benefit for herself.

2. *The foreseeability of harm to the plaintiff*

Courts utilizing the balancing test have not given a clear and precise

67. 27 Ariz. App. at 795, 558 P.2d at 990. In its discussion of the general requirement of privity, the court identified the two arguments traditionally relied upon to justify witholding liability, *see* text & notes 50-52 *supra*, but did not discuss their effect, if any, on the court's decision. *Id.* at 794, 558 P.2d at 989.

68. 27 Ariz. App. at 795, 558 P.2d at 990. The court cited a Washington case, *In re* Fraser, 83 Wash. 2d 884, 523 P.2d 921 (1974), which noted that the basic purpose of a guardianship is to preserve the ward's property, and that the logical reason for a guardian to employ an attorney would be to benefit the ward. *Id.* at 897, 523 P.2d at 928; *see* 27 Ariz. App. at 795, 558 P.2d at 990.

69. 56 Cal. 2d at 589, 364 P.2d at 688, 15 Cal. Rptr. at 824.

70. To be classified as a third party beneficiary, "the third person must be one who the contracting parties intended should receive a direct benefit from the promise." G. GRISMORE, *supra* note 26, § 238, at 388.

71. 204 Cal. App. 2d 475, 22 Cal. Rptr. 445 (1962).

72. *Id.* at 477, 22 Cal. Rptr. at 446.

73. *Id.* at 478-79, 22 Cal. Rptr. at 447.

definition of this factor.[74] However, a few examples of how this factor has been applied are helpful in outlining the concept involved.

The *Fickett* court concluded that if the attorney knew or should have known that the guardian was acting adversely to the ward's interests, harm to the ward was foreseeable.[75] In *Heyer v. Flaig*,[76] a daughter of the decedent sued an attorney for negligently failing to fulfill the decedent's testamentary directions when drafting the will.[77] The court found that "the attorney's actions and omissions will affect the success of the client's testamentary scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable."[78] *Metzker v. Slocum*[79] concerned an action against an attorney previously retained by the parents of a minor for failure to perfect an adoption.[80] When the parents divorced ten years after the invalid adoption, the father claimed that the minor was not his legally adopted child and refused to pay child support.[81] Although the attorney's negligence was the initial cause of the minor's loss of child support, the court ruled that the attorney could not reasonably foresee such a result.[82] The difference in these decisions seems to be some sort of "unforeseen consequence" factor.[83] Where a reasonable man in the attorney's place could have anticipated injury to the plaintiff, the courts imposed liability; where such anticipation of harm was not reasonable, the defendant was not held liabile.

3. *The degree of certainty that the plaintiff suffered injury*

There is no doubt that the ward in *Fickett* suffered harm. That issue was litigated at the trial of the former guardian.[84] The court there found that the guardianship had been "dismal,"[85] and that the once substantial estate had been significantly reduced by the time the new guardian took over.[86] In *Lucas*, the court found that the injury to the plaintiff was certain because the

74. Foreseeability may be a short way of saying that an individual is required to be aware of the hazardous consequences of his actions. *See generally* RESTATEMENT (SECOND) OF TORTS § 289 (1965). An individual with superior knowledge or intelligence in a particular area, such as an attorney, is required to be more aware of the hazards in his field of expertise than will be the ordinary person. *Id.* § 289, Comment m. As Justice Fleming opined in Coberly v. Superior Court, 231 Cal. App. 2d 685, 42 Cal. Rptr. 64 (1965): "[A] lawyer, may not gain business as a specialist and defend mistakes as a laymen." *Id.* at 689, 42 Cal. Rptr. at 67.

75. 27 Ariz. App. at 795, 558 P.2d at 990.

76. 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

77. *Id.* at 225-26, 449 P.2d at 163, 74 Cal. Rptr. at 227.

78. *Id.* at 228, 449 P.2d at 164, 74 Cal. Rptr. at 228.

79. 272 Or. 313, 537 P.2d 74 (1975).

80. *Id.* at 317, 537 P.2d at 76.

81. *Id.*

82. *Id.*

83. *See generally* W. PROSSER, *supra* note 22, § 43, at 250, stating the general rule that if the defendant could not reasonably foresee any injury as the result of his act, there is no negligence and no liability.

84. *In re* Guardianship of Styer, 24 Ariz. App. 148, 150-51, 536 P.2d 717, 719-20 (1975).

85. *Id.* at 150, 536 P.2d at 719.

86. *Id.* at 150-51, 536 P.2d at 719-20.

estate would have passed to the plaintiff had the will been properly drafted.[87] In *Haldane*, the plaintiffs merely had an expectation that they would inherit their mother's estate.[88] The harm of the alleged devaluation of the mother's estate was not certain since their mother was still alive and legally could have disinherited them at any time.[89] Thus it appears that this factor requires a present damage to the plaintiff, as opposed to a future possibility of damage.

4. *The closeness of the connection between the defendant's conduct and the injuries suffered*

The defendant's failure to act in *Fickett*, while not an initial cause of the injury to the plaintiff, was a factor that contributed to its occurence. Had the attorney dissuaded the guardian from acting against the interests of the estate, or reported the guardian's activities to the proper authorities,[90] it seems likely that injury to the ward could have been prevented or reduced. In *Lucas* and the other cases[91] involving suits by injured beneficiaries against attorneys who drafted faulty wills, the estates would have transferred as intended had the attorneys not been negligent. Such a connection was not present in *Ventura County Humane Society v. Holloway*,[92] where an attorney drafted a will containing a bequest to "Society for the Prevention of Cruelty to Animals (Local or National)," a nonexistent organization.[93] A county humane society filed suit against the attorney for allegedly drafting the will in ambiguous terms. The court held that the attorney was not guilty of malpractice because there was no evidence that the ambiguous language was due to negligence of the drafter.[94] The language could have been the deliberate choice of the testator.[95] There was no evidence that the defendant's conduct caused the injury to the plaintiff.[96] The search for a connection between the defendant's act and the plaintiff's injury is just another way of

87. 56 Cal. 2d at 589, 364 P.2d at 688, 15 Cal. Rptr. at 824.
88. 204 Cal. App. 2d at 479, 22 Cal. Rptr. at 447.
89. *Id.*
90. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1976) states:
(B) A lawyer who receives information clearly establishing that:
(1) His client has, in the course of the representation, perpetuated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunbal, except when the information is protected as a privileged communication.
91. *See* Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Bucquet v. Livingston, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1967); Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (1966). *See also* Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (notary public).
92. 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 (1974).
93. *Id.* at 902, 115 Cal. Rptr. at 467. At the probate of the will, the major issue concerned which of numerous humane societies would reap the benefit of the testator's affection for animals. For a discussion of the court's handling of this case, see Comment, *Attorney Malpractice in California: The Liability of a Lawyer Who Drafts an Imprecise Contract or Will*, 24 U.C.L.A. L. REV. 422, 439-41 (1976).
94. 40 Cal. App. 3d at 905, 115 Cal. Rptr. at 469.
95. *Id.*
96. *Id.* at 906-07, 115 Cal. Rptr. at 470.

determining the issue of proximate cause,[97] a necessary determination in any negligence case.[98]

In applying the balancing test, the *Fickett* court imposed a higher standard of care on the defendant than have the California courts. The *Fickett* court held the attorney liable for failure to act, or nonfeasance, while *Lucas* and the other cases[99] concerned active misconduct, or misfeasance. Traditionally, liability for nonfeasance has been limited to situations where the relation between the plaintiff and the defendant is of some economic benefit to the defendant, while liability for misfeasance has been extended to any person to whom harm may reasonably be anticipated.[100] Since *Fickett* imposed liability for failure to act, it could be argued that the case extends attorneys' liability beyond the traditional rule.[101] However, even if the scope of liability has been broadened, the impact of the extension should be limited by the requirement of the additional factors of intent to affect the plaintiff and foreseeability of harm to him.

5. *The moral blame attached to the defendant's conduct*

While the *Fickett* court was silent on this factor, *Biakanja*, on which *Fickett* relied,[102] demonstrates how a defendant's blameworthiness might affect a court's decision to impose liability. The defendant, a public notary, was sued for negligently failing to obtain the proper attestation to a will. In holding him liable, the court felt that the defendant was morally blameworthy because he was engaged in the unlawful practice of law.[103] It is unclear how the *Biakanja* court's definition of "immorality" squares with traditional tort notions of that term, which define moral fault as either an intentional

97. The concept of proximate cause defies definition. Although the term is common in negligence cases, disagreement as to its meaning is equally widespread. Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 472 (1950). Commentators insist that no specific definition is possible, and that proximate cause is no more than a device utlized by the courts to limit an individual's responsibility for his conduct. 2 F. HARPER & F. JAMES, *supra* note 29, § 20.1, at 1108; W. PROSSER, *supra* note 22, § 41, at 236. Courts often prefer to assign a more specific meaning to the term, although the end result is a patchwork of definitions. *Compare* Arizona State Highway Dep't v. Bechtold, 105 Ariz. 125, 129, 460 P.2d 179, 183 (1969) (which defines proximate cause as "that cause without which the accident would not have happened"), *with* Thur v. Dunkley, 474 P.2d 403, 405 (Okla. 1970) (proximate cause is the cause which sets in motion the chain of circumstances leading to the injury).

98. *See, e.g.*, Stearman v. Miranda, 97 Ariz. 55, 59, 362 P.2d 622, 624 (1964); Champion v. Bennetts, 37 Cal. 2d 815, 821, 236 P.2d 155, 158 (1951); Roberts v. Fisher, 169 Colo. 288, 292, 455 P.2d 871, 873 (1969).

99. *See* cases cited notes 60-62 *supra*.

100. For example, while there is traditionally no "duty to rescue" on the part of a bystander, a public carrier will be required to take reasonable steps to protect or aid a passenger who becomes helpless while in its charge. 2 F. HARPER & F. JAMES, *supra* note 29, § 18.6, at 1046-48.

101. The relation between the attorney of an incompetent's guardian and the incompetent is certainly of economic benefit to the attorney; in essence the attorney is the agent of the incompetent, not the guardian. *See In re* Fraser, 83 Wash. 2d 884, 897, 523 P.2d 921, 928 (1974). Regarded in this way, *Fickett* does not appear to go beyond the traditional scope of liability for nonfeasance.

102. 27 Ariz. App. at 795, 558 P.2d at 990.

103. 49 Cal. 2d at 651, 320 P.2d at 19.

tort or negligence.[104] An application of these concepts to a defendant's behavior under a separate factor labeled "moral blame" seems to be redundant in that it is deciding whether a negligent act is "negligent." If the *Biakanja* court had in mind a definition of moral blameworthiness based on the defendant being an evil person, the utility of such a factor in determining liability is slight. There are many situations where the "fault" upon which liability rests does not necessarily coincide with personal immorality.[105] For reasons of public policy, the law often imposes liability in the absence of immorality,[106] and often refuses to impose liability despite its presence.[107] Cases holding attorneys liable to third parties demonstrate that the absence of immorality has not prevented courts from imposing liability.[108] Moreover, the cases where the balancing test was used and liability was not imposed[109] did not turn on the morality of the attorney's conduct.[110] This factor has not played a role in post-*Biakanja* California cases involving attorney liability,[111] and its utility in the determination of whether to hold the attorney liable to third parties remains to be demonstrated.

6. *The policy of preventing future harm*

This factor involves a consideration of whether any social policy would be served by holding the defendant liable. In the will beneficiary cases, the plaintiffs were the only parties who could bring an action against the attorneys.[112] If they had not been allowed to sue, the defendants would have

104. In the tort sense, "immorality" means either conduct intended to invade the legally protected interests of another, or conduct which creates a foreseeable and unreasonable risk to such interests of others. 2 F. HARPER & F. JAMES, *supra* note 29, § 14.1, at 786. Thus the term "immorality" seems to be shorthand for intentional tortious acts or negligence.

105. W. PROSSER, *supra* note 22, § 4, at 18.

106. *See* Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 393, 381 P.2d 107, 113 (1963) (employers or principals are liable for the tortious acts committed by agents or employees); Culp v. Signal Van & Storage, 142 Cal. App. 2d Supp. 859, 861, 298 P.2d 162, 164 (1956) (one who purchases personal property from another having no title thereto or right to sell such property is guilty of conversion, although the buyer is acting honestly and in good faith); Gordon Creek Tree Farms, Inc. v. Layne, 230 Or. 204, 221, 368 P.2d 737, 741 (1962) (defendant liable for trespass despite a mistake of fact or lack of knowledge of boundary lines, even though the owner of the property failed to erect boundary markers).

107. *See* Yania v. Bigan, 397 Pa. 316, 321-22, 155 A.2d 343, 346 (1959) (defendant who induced a business visitor to jump into a water-filled trench and failed to rescue him held not liable for the subsequent drowning); Handiboe v. McCarthy, 114 Ga. App. 541, 543, 151 S.E.2d 905, 907 (1966) (defendant who refused to rescue a child drowning in a swimming pool held not liable); Sidwell v. McVay, 282 P.2d 756, 759 (Okla. 1955) (defendant who failed to prevent a neighbor's child from hammering on an explosive held not liable for the subsequent explosion).

108. *See, e.g.*, Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Bucquet v. Livingston, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976); Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971).

109. *See, e.g.*, Ventura County Humane Soc'y v. Holloway, 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 (1974); Hiemstra v. Huston, 12 Cal. App. 3d 1043, 91 Cal. Rptr. 269 (1972); Haldane v. Freedman, 204 Cal. App. 2d 475, 22 Cal. Rptr. 445 (1962).

110. The *Lucas* court found the attorney's morality to be a "minor factor" in determining liability. 56 Cal. 2d at 589, 364 P.2d at 688, 15 Cal. Rptr. at 824.

111. The California Supreme Court ommitted "moral blame" from the factors to be considered when it applied the *Biakanja* test to attorneys in *Lucas*. *Id.* at 588, 364 P.2d at 687, 15 Cal. Rptr. at 823.

112. Only the beneficiaries suffered harm from the negligent attorney's conduct. The executor lacked standing since the estate of the testator normally would not be injured by the

been insulated from the consequences of their negligence, thus defeating the policy of deterring future misconduct.[113] Interest in advancing a social policy was also illustrated in *Donald v. Garry*,[114] where a creditor sued an attorney to recover a loss sustained when a collection agency's action to collect a debt owed the plaintiff was dismissed for lack of diligent prosecution by the defendant. The court identified the social policy that lawsuits should be diligently prosecuted,[115] and that this policy would be frustrated by permitting a dilatory lawyer to escape the consequences of his negligent act.[116]

Through use of the balancing test, the *Fickett* court came close to applying a general negligence theory to suits by third parties against attorneys. Such considerations as intent to benefit the plaintiff, foreseeability of harm, connection between act and injury, and the certainty of harm bear a close resemblence to the elements traditionally required for a cause of action founded on negligence.[117] This decision is in sharp contrast to *Chalpin*, decided just one month prior to *Fickett*.

Chalpin—Requirement of Privity

The *Chalpin* facts might have supported a claim based on a third party beneficiary contract theory.[118] However, the plaintiff relied on the theory that an attorney should be held liable to third parties not in privity where intent to affect and foreseeability are present.[119] This issue was one of first impression in Arizona.[120] Although not discussing the balancing test per se, the language of the *Chalpin* decision indicates that the court felt compelled

negligence. Heyer v. Flaig, 70 Cal. 2d 223, 228, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969); Bucquet v. Livingston, 57 Cal. App. 3d 914, 925, 129 Cal. Rptr. 514, 521 (1976).

113. *See* text accompanying note 158 *infra*.

114. 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971).

115. *Id.* at 772, 97 Cal. Rptr. at 192. This social policy is reflected in the doctrine of laches, which requires the plaintiff to exercise diligence and avoid unreasonable delay in prosecuting an action. Barr v. Petzhold, 77 Ariz. 399, 406, 273 P.2d 161, 165 (1954). Lack of diligence either evidences an abandonment by the plaintiff of his claim or prejudices the defense against such a claim, *id.*, and may result in a dismissal of the action. Price v. Sunfield, 57 Ariz. 142, 147-48, 112 P.2d 210, 212 (1941).

116. 19 Cal. App. 3d at 772, 97 Cal. Rptr. at 192.

117. W. PROSSER, *supra* note 22, § 30, at 143.

118. The court in Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962), reasoned that a contract between an attorney and client for drafting a will was obviously to benefit the will beneficiaries, and consequently held that the beneficiaries could bring an action based on a third party beneficiary theory. *Id.* at 589-90, 364 P.2d at 688, 15 Cal. Rptr. at 824. A contract between an attorney and client for drafting an employment agreement between the client and a third party is analagous to the situation in *Lucas*, and thus arguably should support a third party beneficiary theory of recovery. *See* RESTATEMENT (SECOND) OF CONTRACTS § 133(1)(b) (Tent. Draft 1-7, 1973), which allows an examination of the circumstances to support the finding of an intended beneficiary. However, it is unlikely that such a liberal view would be followed in Arizona. *See* Basurto v. Utah Constr. & Mining Co., 15 Ariz. App. 35, 39, 485 P.2d 859, 863 (1971) (where a contract does not, on its face, indicate an intent to benefit a third party, that person cannot sue for breach of the contract as a third party beneficiary).

119. Chaplin Brief, *supra* note 8, at 21-24.

120. 114 Ariz. at 125, 559 P.2d at 681.

to discuss the concepts of foreseeability and intent that have played such a major role in the California decisions. The court stated that the California cases where privity was not required were "distinguishable from the *Chalpin* case in the degree of foreseeability and the extent to which the original attorney-client relationship between Brennan and Mobile Gardens was intended to affect Chalpin."[121] The court did not expand upon this analysis, however, but simply applied the rule requiring privity of contract.[122] The court reasoned that to allow third parties not in privity to sue "could conceivably encourage a party to contractual negotiations to forego personal legal representation and then sue counsel representing the other contracting party for legal malpractice if the resulting contract later proves disfavorable in some respect."[123] It is probable, however, that the balancing test would prevent the imposition of liability in that type of case.[124]

Even if the court's fears were justified, several considerations override the anticipated negative consequences of abandoning privity.[125] First, *Chalpin* in effect grants attorneys immunity to suits by third parties. As noted by the Arizona Supreme Court: "[T]here is perhaps no doctrine more firmly established than the principle that liability follows tortious wrongdoing; that where negligence is the proximate cause of the injury, the rule is liability and immunity is the exception."[126] Absent a compelling public policy, the law should not immunize any tortfeasor from the consequences of tortious conduct.[127] In addition, the legal profession's privilege of self-regulation carries with it a duty to protect the public from those attorneys who engage in tortious conduct.[128] To allow lawyers to avoid responsibility for their negligence by using a defense often unavailable to other professions[129] seems to be a dereliction of that duty, as well as an unjustified double standard.[130] The balancing test method of determining an attorney's liability

121. *Id.* at 126, 559 P.2d at 682.

122. *Id.* The court never discussed the threshhold question of whether Chalpin was in privity of contract. Given the definition of privity set out by Corbin, 4 A. CORBIN, *supra* note 25, an argument could have been made that Chalpin was in privity. However, Chalpin's brief for the court of appeals did not raise this issue. *See* Chalpin Brief, *supra* note 8.

The *Chalpin* court did not specifically reject the balancing test as unsound in all situations, but instead attempted to distinguish away the cases where it had been used. 114 Ariz. at 126, 559 P.2d at 682. However, the court did seem to totally reject as "unreasonable and unwise" the use of the balancing test where a contractual situation was the basis of the action. *Id.*

123. 114 Ariz. at 126, 559 P.2d at 682.

124. *See* text accompanying notes 168-69 *infra*.

125. *See* discussion notes 162-72 *infra*.

126. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 392, 381 P.2d 107, 112 (1963).

127. Freehe v. Freehe, 81 Wash. 2d 183, 192, 500 P.2d 771, 777 (1972).

128. Wallach & Kelly, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA LAW. 257, 272 (1970).

129. *See* text & notes 43-46 *supra*.

130. There is no sound reason why an exception should be made for lawyers since in all relevant respects they share the same characteristics of the other professions for which liability has been found. *See* Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 & n.1 (1975). This is especially true when other professionals, such as accountants, face significantly more extensive liability to third parties than do attorneys. Miller, *supra* note 63, at 602.

to third parties offers a more satisfactory policy than the requirement of privity imposed by the *Chalpin* court.[131]

Chaplin—The Balancing Test

During the same week that the Arizona Court of Appeals decided *Chalpin*, the California Supreme Court, in *Goodman v. Kennedy*,[132] handed down a ruling in a case with remarkable similarities to the facts in *Chalpin*. In *Goodman*, the plaintiffs were owners of stocks issued by a corporation represented by the defendant attorney. On the basis of the attorney's negligent advice, the corporation had issued the stock without an escrow arrangement, which led to a violation of a Securities and Exchange Commission regulation.[133] Several months later, the plaintiffs purchased a large number of the shares after their attorney discussed the contemplated purchase in a telephone conversation with the defendant. The violation was discovered after the plaintiffs had made their purchase. As a result of the violation, the corporation became insolvent, and the plaintiffs lost a large sum of money. The plaintiffs then brought suit against the corporation's attorney, claiming that the attorney was liable to them, as potential purchasers of stock, for negligently advising his client on the matter of the stock issue.[134] In addition, the plaintiffs claimed that the defendant was liable for failing to inform them of facts that resulted in the securities violation.[135] Applying a balancing test similar to the one used in *Fickett*,[136] the court determined that the defendant attorney owed neither duty to the plaintiffs, and held that he was not liable for their loss.[137] A comparison of the application of the balancing test in *Goodman* and the facts in *Chalpin* illustrates how the test might have been used by the Arizona Court of Appeals in *Chalpin*, and demonstrates that the negative effects predicted by that court need not result from the abolition of the privity requirement.

1. *The extent to which the transaction was intended to affect the plaintiff*

The agreement which formed the basis of the allegation of negligence

131. Admittedly, balancing various factors is an abstract exercise which poses difficulty in its application to specific fact situations. However, the balancing test at least allows a court to focus on the competing interests involved in the determination of liability. *See* O'Connell, *Word Games Judges Play*, 1974 TRIAL LAW. GUIDE 330, 343.

132. 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976).

133. *Id.* at 340, 556 P.2d at 741, 134 Cal. Rptr. at 379.

134. *Id.* at 342, 556 P.2d at 741-42, 134 Cal. Rptr. at 379-80.

135. *Id.* at 339, 556 P.2d at 740, 134 Cal. Rptr. at 378.

136. The *Goodman* court also listed as a reason for denying liability for mere negligence the burden on the legal profession, *id.* at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381, which was not discussed by the *Fickett* court. *See* text accompanying note 161 *infra*.

137. 18 Cal. 3d at 339, 556 P.2d at 740, 134 Cal. Rptr. at 378. The dissent would have held the attorney liable on the ground that harm to the plaintiffs was foreseeable because the attorney knew that, if his advice were followed, those who purchased the stock would be affected. *Id.* at 352, 556 P.2d at 748, 134 Cal. Rptr. at 386 (Mosk, J., dissenting).

in *Chalpin* was drafted by the defendant expressly for the signature of the plaintiff.[138] The transaction between the defendant and his client, the corporation, at least for the purposes of this particular contract, seems to have been directly intended to affect the plaintiff.[139] In *Goodman*, the transaction between the defendant and his client took place months before the plaintiffs became involved in the purchase of stocks.[140] There is reason to believe that the defendant was not sure that the corporation would issue the additional shares at the time he gave his advice.[141] Thus, the transaction between the attorney and his client was not intended to affect the plaintiffs. Benefit to the plaintiffs was, at most, a "collateral consideration of the transaction."[142]

2. *The forseeability of harm to the plaintiff*

In *Chalpin*, the plaintiff paid $15,000 for shares of stock which the corporation had not been authorized to issue. His decision to purchase was made only after certain representations were made directly to him by the defendant.[143] In contrast is *Goodman*, where at the time the defendant's negligent acts occured, the plainiff was not a part of the transaction.[144] While it might be foreseeable that a potential, but as yet unidentified, purchaser of stock might be injured by an attorney's negligent advice to his client, the California court refused to hold an attorney to such a demanding standard.[145] Finding liability in *Goodman* would have extended the bounds of tort liability to claims from an indeterminate class of plaintiffs.[146] Thus the foreseeability factor in *Goodman* could only be met by an extension of the limits of foreseeability, while the *Chalpin* facts would not have required a departure from the traditional notions of foreseeability to justify liability.[147]

3. *The degree of certainty that the plaintiff would suffer harm*

In both cases it seems likely that purchasers would suffer harm from buying stock issued in violation of a securities regulation since the value of

138. 114 Ariz. at 125, 559 P.2d at 681.
139. It is only logical for a lawyer to assume that his client intends to "affect" a third party by obtaining the party's signature on an employment contract.
140. 18 Cal. 3d at 340-41, 556 P.2d at 740-41, 134 Cal. Rptr. at 378.
141. *Id.* at 352, 556 P.2d at 748, 134 Cal. Rptr. at 386 (Mosk, J., dissenting).
142. *Id.* at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381.
143. *See* Record at 26-27, 35-36, *cited in* Chalpin Brief, *supra* note 8, at 12.
144. 18 Cal. 3d at 340-41, 556 P.2d at 740-41, 134 Cal. Rptr. at 378.
145. *Id.* at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381.
146. Such an extension of liability squarely conflicts with the principle that there should be a limit to the consequences of a negligent act. *See* Ultramares Corp. v. Touche, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931). The scope of liability for negligence is generally limited to foreseeable consequences. *See* text & note 23 *supra*.
147. *See* Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co., 14 Ariz. App. 486, 484 P.2d 639 (1971), where the Arizona Court of Appeals imposed liability on a title insurer to parties not in privity of contract where there was "an *identified* representee to whom the defendant [made] a *direct* representation." *Id.* at 493, 484 P.2d at 646 (emphasis in original).

stock declines once a violation is discovered and the appropriate regulatory agency takes action.[148] This certainty of harm, present in both cases, was not discussed by the *Goodman* majority,[149] presumably because it was outweighed by the countervailing considerations of the burden on the profession and a decline in the quality of legal services resulting from the imposition of liability.[150] These considerations are not present in *Chalpin*, where imposing liability would not have stretched the traditional boundary of tort liability.[151] Consequently, the "degree of certainty" of harm in *Chalpin* supports the imposition of liability.

4. *The closeness of the connection between the defendant's conduct and the injury suffered*

In *Goodman*, there was no allegation that the defendant's faulty advice was ever communicated to the plaintiffs or that they acted in reliance upon it. Nor was there an allegation that the attorney made any affirmative representations to the plaintiffs.[152] If there was a connection between the defendant's conduct and the injury suffered, it was at most an indirect one. In *Chalpin*, on the other hand, the documents prepared by Brennan for Chalpin's signature contained express representations that the issue of common stock had been authorized by the Securities Division of the Arizona Corporation Commission.[153] These misrepresentations establish a direct link between the defendant's conduct and the plaintiff's injury, and thus constitute "causation in fact," one of the necessary elements of any negligence action.[154]

5. *The moral blame attached to the defendant's conduct*

This factor is best judged by a review of the attorney's behavior in each case. In *Goodman*, the attorney negligently gave his client faulty advice, while in *Chalpin*, the attorney knowingly made false written representations

148. *See* Sargent, *The SEC and the Individual Investor: Restoring His Confidence in the Market*, 60 VA. L. REV. 553, 563 (1974).

149. The dissent in *Goodman* argued that there was certainty of harm to the plaintiffs despite the fact that their identity could not be known at the time the negligent act was committed. 18 Cal. 3d at 352, 556 P.2d at 748, 134 Cal. Rptr. at 386 (Mosk, J., dissenting).

150. *Id.* at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381. These two factors were not among those listed by the California court in its first decision applying the balancing test to suits against lawyers by third parties. *See* Lucas v. Hamm, 56 Cal. 2d 583, 588, 364 P.2d 685, 687, 15 Cal. Rptr. 821, 823 (1961), *cert. denied*, 368 U.S. 987 (1962). The court in *Goodman* did not specify whether it was intentionally adding these considerations to the factors to be weighed in determining liability in all cases. For a further discussion of the possible burden on the legal profession of the application of the balancing test, see text & notes 162-70 *infra*.

151. *See* text & notes 145-47 *supra*.

152. 18 Cal. 3d at 345, 556 P.2d at 744, 134 Cal. Rptr. at 382. Indeed, one of the plaintiffs' allegations, that the defendant failed to inform them of the material events surrounding the decision to issue stock, negates any claim of deliberate misrepresentation. *Id.* at 341, 556 P.2d at 741, 134 Cal. Rptr. at 379.

153. Chalpin Brief, *supra* note 8, at 12-13.

154. W. PROSSER, *supra* note 22, § 41, at 236.

to a party he knew to be engaged in contract negotiations with his client.[155] The difference between these two acts might be equated to the difference between "common" negligence and "willful, wanton and reckless" negligence, the latter justifying extended liability.[156] The defendant in *Chalpin* clearly violated ethical standards by which lawyers judge themselves.[157]

6. *The policy of preventing future harm*

One of the functions of tort law is to set standards of care to deter future misconduct by imposing liability for violations of those standards.[158] Immunizing a wrongdoer from the consequences of his acts makes deterrance unlikely, thus frustrating the policy of preventing future harm. When a third party not in privity of contract is the only practical plaintiff, the policy of preventing future harm can only be served by disregarding the privity requirement.[159] However, depending upon the nature of the third party plaintiff, there may exist contravening considerations. The *Goodman* court feared that holding an attorney liabile for faulty advice to future unidentified parties would "inject undesirable self-protective reservations into the attorney's counseling role" with his client and would place an undue burden on the legal profession.[160] Apparently, the court felt that the social costs of imposing liability outweighed the social benefits.[161] In *Chalpin*, however, the imposition of liability would only make attorneys reluctant to make misrepresentations to parties with whom their clients were dealing—a socially desirable goal. Thus, under the *Chalpin* facts, the policy of prevent-

155. Brennan Deposition, vol. 2, at 46, *cited in* Chalpin Brief, *supra* note 8, at 15-16.

156. As distinguished from ordinary negligence, which may amount to a mere mistake or momentary lapse of attention, the concept of "willful, wanton and reckless" negligence refers to a situation where the actor intentionally acts in disregard of a known risk with conscious indifference to the consequences. W. PROSSER, *supra* note 22, § 34, at 185. Such aggravated action justifies liability despite the presence of contributory negligence by the other party. Alabam Freight Lines v. Phoenix Bakery, Inc., 64 Ariz. 101, 107, 166 P.2d 816, 819 (1946). Such behavior also justifies the imposition of punitive damages. Salt River Valley Water Users' Ass'n v. Giglio, 113 Ariz. 190, 202, 549 P.2d 162, 174 (1976).

157. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5), (7) (1976), which state that a lawyer shall not "(5) [k]nowingly make a false statement of law or fact [or] (7) [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

The defendant in *Chalpin* was subsequently disbarred for his role in the transaction. 114 Ariz. at 126 n.1, 559 P.2d at 682 n.1.

158. Riss v. City of New York, 22 N.Y.2d 579, 590, 240 N.E.2d 860, 856-66, 293 N.Y.S.2d 897, 905 (1968) (Keating, J., dissenting).

159. In *Goodman*, the corporate client could have instituted an action against the defendant for malpractice, although the dissent pointed out that such an action would be of little value to the plaintiffs. 18 Cal. 3d at 352, 556 P.2d at 749, 134 Cal. Rptr. at 387 (Mosk, J., dissenting). In addition, if the attorneys acted fraudulently in *Goodman* and *Chalpin*, it is possible that the Securities and Exchange Commission could have taken action against them. Note, *The Duties and Obligations of the Securities Lawyer: The Beginning of a New Standard for the Legal Profession?*, 1975 DUKE L.J. 121, 127. However, it is not certain whether the Commission could hold the attorneys liable for failure to keep their clients from breaking the laws where the lawyers themselves did not engage in fraudulent behavior. *Id.*

160. 18 Cal. 3d at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381.

161. Presumably, if attorneys would be subject to an unknown, but potentially huge, liability for incorrect advice, they would be overcautious in dealing with their clients, and clients would rarely be able to obtain specific advice from a lawyer. *See* Note, *supra* note 159, at 143.

ing future harm is not outweighed by other policy considerations and justifies the imposition of liability.

It seems reasonable to conclude that had the *Chaplin* court applied the balancing test to determine whether the attorney should have been held liable to a third party not in privity, a different decision would have been reached.

Attorney Liability to Third Parties: A Burden on the Profession?

The traditional justification for the requirement of privity in negligence suits has been the difficulty in deciding where to draw the line between those parties whose interests should be protected and those who have no just claim.[162] By weighing the various factors included in the *Fickett* approach,[163] courts would be able to draw this line and allow injured parties a remedy without subjecting attorneys to an unreasonable standard of conduct. Experience in California, where the balancing test has been widely used since *Lucas*, has demonstrated that courts are capable of using the test to dismiss unreasonable third party claims against attorneys.[164] In view of the experiences of professions which have been subjected to liability without the requirement of privity,[165] the imposition of third party liability would probably not result in any serious harm to the legal profession.[166] To the contrary, attorney liability to third parties might result in the legal profession's use of more care in the preparation of its work product, thus improv-

162. G. GRISMORE, *supra* note 26, § 238, at 388.

163. Any test involving a "balancing" of factor requires the apportioning of weight among the factors. Writers who have criticized the use of a balancing test in other contexts contend that such a device offers little guidance and thrusts a court into a "vast space," enabling it to reach a decision on either side of the issue. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 913 (1963). Indeed, the use of the same balancing test has resulted in contradictory results under analogous fact situations. *Compare* NAACP v. Alabama *ex rel.* Patterson, 347 U.S. 449, 460-66 (1958) (compulsory disclosure of membership lists violates constitutional rights of members of the NAACP), *with* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 88-105 (1961) (compulsory disclosure of membership lists does not violate constitutional rights).

This criticism is really no more than a recognition that the balancing test eschews the application of a rigid formula and permits the court to consider any pertinent facts, including considerations of public policy. Fiflis, *Current Problems of Accountants' Responsibilities to Third Parties*, 28 VAND. L. REV. 31, 110 (1975). Any attempt to emphasize a particular factor should be avoided as it would necessarily introduce the sort of rigidity that the test was designed to circumvent.

164. *See, e.g.*, National Auto & Cas. Ins. Co. v. Atkins 45 Cal. App. 3d 562, 119 Cal. Rptr. 618 (1975); Ventura County Humane Soc'y v. Holloway, 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 (1974); Hiemstra v. Huston, 12 Cal. App. 3d 1043, 91 Cal. Rptr. 269 (1970); Haldane v. Freedman, 204 Cal. App. 2d 475, 22 Cal. Rptr. 445 (1962). The Oregon Supreme Court, while not expressly substituting the balancing test for the requirement of privity, has used the test in denying liability to a third party. Metzker v. Slocum, 272 Or. 313, 537 P.2d 74 (1975).

165. *See* text & notes 43-46 *supra*.

166. Accountants have increasingly been held liable to third parties. *See* text & note 46 *supra*. Yet the profession seems to be thriving. *See* Besser, *Privity—An Obsolete Approach to the Liability of Accountants to Third Parties*, 7 SETON HALL L. REV. 507, 537 (1976). The accounting profession is similar to the legal profession in that both make professional judgments based upon the selection and application of principles to a formulation of evidence, Gormley, *Accountants' Professional Liability—A Ten Year Review*, 29 BUS. LAW. 1205, 1206 (1974), so that a comparison of the two would not appear to be unfair.

ing the quality of legal services offered to the public.[167] In short, the potentially slight burden on the legal profession does not justify the retention of a legal anachronism—the doctrine of privity.

The *Chalpin* court expressed an apprehension that abolishing the privity requirement might encourage a party to forego personal legal representation, rely upon the attorney for the other party to protect his interest, and bring suit if those interests were not satisfied.[168] However, careful application of the factors in the balancing test would discourage this sort of behavior in most situations by not imposing liability upon the attorney in the absence of foreseeability of harm. *Goodman* is a good example of how a court would apply the balancing test to the facts of a given case to dismiss the type of lawsuit the *Chalpin* court was concerned about. Moreover, even if a third party were to bring a suit similar to the one hypothesized by the *Chalpin* court, the attorney could utilize several available defenses.[169] In short, it appears that the reasons traditionally offered for the requirement of privity are no longer compelling. As the Arizona Supreme Court has indicated, where the reasons supporting a judicial rule are no longer viable, the rule should be changed.[170]

Conclusion

Far from being a burden on the legal profession, the substitution of the balancing test for the requirement of privity might be beneficial. First, the test provides a flexible approach for determining liability because it permits a court to respond to evolving social mores and business practices. In addition, allowing third parties to sue attorneys in appropriate situations eliminates the incompetent and unethical attorney's luxury of insulation from the consequences of his negligent acts, and thus would improve the character and image of the profession as a whole.

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167. Besser, *supra* note 166, at 533.

168. 114 Ariz. at 126, 559 P.2d at 682.

169. The Arizona Court of Appeals has established that an attorney is not liable simply because his client becomes unhappy with the result of the transaction. Talbot v. Schroeder, 13 Ariz. App. 230, 231, 475 P.2d 520, 521 (1971). It follows that this defense would also be available in suits by nonclients. In addition, the Arizona Supreme Court has ruled that an attorney will not be held liable, while acting in good faith and in the belief that his conduct is for the benefit of his client, for a mere error of judgment or mistake on an unsettled point of law. Martin v. Burns, 102 Ariz. 341, 343, 429 P.2d 660, 662 (1967).

170. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963).

B. ADMISSION TO THE BAR: MENTAL FITNESS REQUIREMENTS IN ARIZONA

The incidence of mental health problems among members of the legal profession presents special hazards, both for society and the profession.[1] Since the profession has traditionally been self-regulating,[2] it must decide what mental health standards are needed and what to do when these standards are not maintained.[3] In making such determinations, the legal profession must balance the rights of the public and the rights of practicing attorneys and applicants to the profession to assure that fair and adequate standards are maintained.[4]

The recent Arizona case of *In re Ronwin*[5] exemplifies the difficulties of this balancing determination as applied to bar applicants.[6] The Arizona Supreme Court denied Edward Ronwin's motion seeking admission to the bar or, in the alternative, permission to retake the bar examination,[7] on the

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1. *See* Place & Bloom, *Mental Fitness Requirements for the Practice of Law*, 23 BUFF. L. REV. 579, 579 (1974). Because attorneys are committed to protect the property, liberty, and often the lives of their clients, great care must be taken to protect the client, as well as the general public, who might be injured by the rendition of services by a mentally incompetent attorney. R. ALLEN, E. FENSTER, & H. WEIHOFEN, MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 354 (1968).

2. *See* R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 253-349 (1953).

3. *See* Place & Bloom, *supra* note 1.

4. *See* R. ALLEN, E. FENSTER, & H. WEIHOFEN, *supra* note 1, at 254. One court, however, has placed primary emphasis on the rights of the applicant by stating: "The power of the court to reject the application on the grounds of moral delinquency is one of great delicacy, and should be exercised with extreme caution, and with a scrupulous regard for the character and rights of the applicant." *In re* Monaghan, 126 Vt. 53, 64, 222 A.2d 665, 674 (1966).

5. 113 Ariz. 357, 555 P.2d 315 (1976), *cert. denied*, 419 U.S. 967 (1974).

6. The mental fitness requirements applicable to bar applicants as stated in *Ronwin* may also be applied to practicing attorneys who are facing disciplinary proceedings. *See* ARIZ. SUP. CT. R. 29(b)(8) which provides: "Grounds for disbarment, suspension or censure of members shall be as follows: . . . Failure to maintain such special mental and moral fitness as would have entitled the member to admission in the first instance." See text & notes 8, 63-68 *infra*.

7. *Id.* at 360, 555 P.2d at 318. Admission to the bar is a judicial function. ARIZ. SUP. CT. R. 28(a); *see In re* Miller, 29 Ariz. 582, 596-97, 244 P. 376, 380 (1926); ARIZ. REV. STAT. ANN. § 32-275 (1976). The Arizona Constitution, in the distribution of powers, precludes either the legislature or the state bar from admitting anyone to practice. ARIZ. CONST. art. 3; *see* State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 88, 366 P.2d 1, 9 (1961), *modified*, 91 Ariz. 293, 371 P.2d 1020 (1962).

The State Bar of Arizona Committee on Examinations and Admissions must make the initial determination as to whether an applicant is qualified to take the Arizona bar examination or be admitted to the bar. ARIZ. SUP. CT. R. 28(a). If the committee concludes that an applicant is unqualified, or if the committee is unable to make a determination as to an applicant's qualifications, permission to take the examination or admission to the bar will be denied with the applicant being advised of the reasons for such denial. *Id.* 28(c) (XII)(A). *See also In re* Klahr, 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967); *In re* Levine, 97 Ariz. 88, 91, 397 P.2d 205, 207 (1964); *In re* Burke, 87 Ariz. 336, 338-39, 351 P.2d 169, 171 (1960); *In re* Courtney, 83 Ariz. 231, 233, 319 P.2d 991, 993 (1957).

In *Ronwin*, the applicant, Edward Ronwin, graduated from the Arizona State University College of Law in January of 1974 and was permitted to take the February 1974 bar examination. 113 Ariz. at 357, 555 P.2d at 315. After being informed of his failure to pass that examination, he reapplied to take the July 1974 test. Eight days before the test, he was informed that he was not qualified to retake the bar examination. *Id.* A Special Committee appointed by

ground that he was not "mentally . . . able to engage in active and continuous practice of law"[8] as required by court rules.

This casenote will examine the construction given to the Arizona Supreme Court rule requiring that an applicant be "mentally . . . able to engage in active and continuous practice of law."[9] First, the rule will be examined in light of constitutional demands that any bar admission requirement be rationally related to an applicant's ability to practice law. Potential due process vagueness problems in the interpretation of Arizona's mental fitness rule will then be examined. The development of moral character requirements from arbitrary rules to requirements with fixed standards will be applied to this examination by analogy. The method of evaluation used to determine Ronwin's mental fitness will then be analyzed. Of particular concern will be the court's stressing of past, rather than present mental fitness.

Constitutional Limitations on Bar Admission Requirements

For many years, courts held that admission to the practice of law was in no sense a right,[10] either constitutional,[11] natural,[12] or prescriptive.[13] Because the practice of law was considered to be a privilege,[14] the individual states were permitted to set their own standards for admission with unfet-

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the court, after conducting formal hearings, *see* ARIZ. SUP. CT. R. 28(c)(XII)(D), affirmed the findings of the Committee on Examinations and Admissions. 113 Ariz. at 358, 555 P.2d at 316. The Special Committee concluded that Ronwin was suffering from an established personality disorder such that, were he admitted to practice law, he would be unreasonably suspicious of the people with whom he would come into contact, make irresponsible and highly derogatory untrue statements against persons in responsible positions, and bring and pursue groundless claims. *Id.*

8. ARIZ. SUP. CT. R. 28(c)(IV)(3); *see* 113 Ariz. at 359, 555 P.2d at 317. The burden of establishing an applicant's mental fitness rests with the applicant. *In re* Walker, 112 Ariz. 134, 137, 539 P.2d 891, 894 (1975), *cert. denied*, 424 U.S. 956 (1976); *In re* Klahr, 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967); *In re* Levine, 97 Ariz. 88, 91, 397 P.2d 205, 207 (1964); *In re* Burke, 87 Ariz. 336, 339, 351 P.2d 169, 172 (1960); *In re* Courtney, 83 Ariz. 231, 233, 319 P.2d 991, 993 (1957). An applicant initially establishes his mental fitness by submitting with his application a certificate from a licensed physician stating that the applicant is "mentally . . . able to engage in the active and continuous practice of law." ARIZ. SUP. CT. R. 28 (c)(III)(7).

9. ARIZ. SUP. CT. R. 28(c)(IV)(3).

10. *See, e.g., Ex parte* Garland, 71 U.S. 333, 384 (1866); *In re* Egan, 52 S.D. 394, 398, 218 N.W. 1, 2-3 (1928); *In re* Stone, 74 Wyo. 389, 288 P.2d 767, 768 (1958). See text & notes 11-14 *infra*.

11. *See In re* Gibbs, 35 Ariz. 346, 353, 278 P. 371, 374 (1929).

12. *See In re* Bailey, 30 Ariz. 407, 411, 248 P. 29, 30 (1926). *See also In re* Greer, 52 Ariz. 385, 389, 81 P.2d 96, 98 (1938), where the court held that unlike the ordinary avocations of life, such as farming, the industrial trades, or the merchantile business, a person has no natural right to practice law.

13. In State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), the court stated:

> We have enunciated the general principles of the nature of the practice of law in Arizona, and that it must be and is confined to those who have been duly licensed as lawyers, and that neither a corporation nor a layman, under the guise of long-established custom or as to matters which they may claim incidental to their lawful business, may engage in the practice of law.

Id. at 95, 366 P.2d at 14.

14. *See In re* Miller, 29 Ariz. 582, 597, 244 P. 376, 380 (1926).

tered discretion.[15] The United States Supreme Court in *Schware v. Board of Bar Examiners*[16] overturned this privilege doctrine, holding that state supreme court bar admission rules are subject to the constitutional standards of the due process and equal protection clauses of the fourteenth amendment.[17] The Arizona Supreme Court, following *Schware*, has held that admission to the practice of law "cannot be treated as a matter of grace or favor,"[18] but "[f]or those who have the necessary qualifications, it is a right."[19] Although the right to practice law has been recognized, it remains settled that the practice of law may be regulated in the public interest through the imposition of reasonable qualification requirements.[20] These qualifications are, nevertheless, subject to the procedural[21] and substantive[22] limitations of due process and equal protection.

In *Willner v. Committee on Character and Fitness*,[23] the United States Supreme Court held that procedural due process requires that an applicant who has been denied the right to practice law be provided notice and a hearing on the grounds for rejection and a reasonable and definite statement of the charge or charges.[24] The hearing should provide an opportunity to confront and cross-examine adverse witnesses.[25] These procedural safeguards have been expanded by the Arizona Supreme Court to include the right to produce witnesses.[26] While the *Ronwin* court strictly adhered to these minimum procedural safeguards,[27] the standard used to measure mental fitness for the practice of law raises several due process issues.

A requirement for admission to practice law may fail on due process grounds if the requirement bears no rational connection with an applicant's capacity to practice law.[28] Thus, a strong correlation must exist between the

15. For a discussion of legislatively imposed standards, see *In re* Admission to the Bar, 61 Neb. 58, 60, 84 N.W. 611, 612 (1900). The Arizona Supreme Court had stated that the practice of law is "bestowed upon certain persons primarily for the benefit of society, and upon such terms and conditions as the state may fix." *In re* Greer, 52 Ariz. 385, 389, 81 P.2d 96, 98 (1938).

The first set of requirements for practicing law in the territory of Arizona was stated in the Howell Code of 1864. Under the Code, any white male, twenty-one years or older, who presented testimonials of good moral character and passed an oral examination conducted by a judge of the supreme court of the Arizona territory would be permitted to practice law. Howell [Ariz.] Code ch. XXVIII, § 1,264 (1864).

16. 353 U.S. 232 (1957).

17. *Id.* at 238-39.

18. *In re* Levine, 97 Ariz. 88, 91, 397 P.2d 205, 207 (1964).

19. *Id.* at 90, 397 P.2d at 207.

20. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). Membership in the State Bar of Arizona is governed by ARIZ. REV. STAT. ANN. §§ 32-211 to -275 (1976).

21. *See* Willner v. Committee on Character & Fitness, 373 U.S. 96, 102 (1963).

22. *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

23. 373 U.S. 96 (1963).

24. *Id.* at 105.

25. *Id.* at 103-05.

26. *In re* Levine, 97 Ariz. 88, 91, 397 P.2d 205, 207 (1964). Discretion is vested in the states to exceed minimal due process standards. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972) (although certain minimal requirements of due process must be adhered to in parole revocations, each state is permitted to adopt its own procedure).

27. *See* 113 Ariz. at 358, 555 P.2d at 316.

28. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

requirement and the state's interest in ensuring that its citizens are protected against the admission of unqualified persons to law practice. To satisfy this interest, it has been held that, in order to ensure that attorneys possess the intellectual capabilities needed to practice law, applicants may be required to hold law degrees from accredited law schools,[29] and to have passed the state bar examination.[30] Similarly, six-month residency requirements have been found to be rationally related to legitimate state interests in investigating the qualifications of applicants,[31] but one-year residency requirements,[32] and requirements that applicants be United States citizens,[33] have been held to be excessive and thus violative of equal protection.[34] The exercise of first amendment freedoms of religion,[35] association,[36] and speech[37] has been

29. *See* Hackin v. Lockwood, 361 F.2d 499, 504 (9th Cir. 1966); *In re* Schatz, 80 Wash. 2d 604, 608-09, 497 P.2d 153, 156 (1972). Applicants for admission to the Arizona bar must be graduated from an accredited law school. ARIZ. SUP. CT. R. 28(c)(IV)(4). That requirement does not apply to applicants who have graduated from nonaccredited law schools, provided that such applicants have been actively engaged in the practice of law for at least five of the seven years immediately prior to the application for admission to practice in Arizona. *Id.*

30. *See* Chaney v. State Bar, 386 F.2d 962, 964 (9th Cir. 1967); *In re* Russell, 236 So. 2d 767, 768-69 (Fla. 1970). Some states automatically admit graduates of their law schools to law practice, while requiring graduates of out-of-state law schools to take and successfully complete an examination. *See, e.g.*, MISS. CODE ANN. §§ 73-3-9, 73-3-33 (1973); MONT. REV. CODES ANN. § 93-2002 (1947); WIS. STAT. ANN. § 256.28 (West 1977). These rules have been upheld as rationally related to an applicant's ability to practice law, as the out-of-state applicants are presumed to be less familiar with the law of the particular jurisdiction than graduates of the law school within that jurisdiction. *See* Schenfield v. Prather, 387 F. Supp. 676, 686-88 (N.D. Miss. 1974); Goetz v. Harrison, 154 Mont. 274, 281-85, 462 P.2d 891, 895-97 (1969).

31. *See* Tang v. Appellate Div., 373 F. Supp. 800, 801-02 (S.D.N.Y. 1972), *aff'd*, 487 F.2d 138 (2d Cir. 1973); Suffling v. Bondurant, 339 F. Supp. 257, 260 (D.N.M. 1972), *aff'd*, 409 U.S. 1020 (1972). *But see* Potts v. Honorable Justices, 332 F. Supp. 1392 (D. Hawaii 1971). In *Potts*, the court held that a six-month residency requirement, which could be satisfied by residency for any six-month period after the age of fifteen, was violative of the equal protection clause of the fourteenth amendment. *Id.* at 1397-98. The court found that the dual justifications for the requirement served no legitimate state interest. First, it was noted that residency for six months would do little to assure that a person would be better able to understand Hawaiian customs and government. *Id.* Second, since residency was not required during the sixty-day investigation period prior to the bar examination, the requirement could not be justified as an aid to checking and verifying the qualifications of bar applicants. *Id.* at 1398.

32. *See* Webster v. Wofford, 321 F. Supp. 1259, 1261-62 (N.D. Ga. 1970). *See also* Lipman v. Van Zant, 329 F. Supp. 391, 399-404 (N.D. Miss. 1971); Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1358-60 (E.D.N.C. 1970).

33. *See In re* Griffiths, 413 U.S. 717, 724-26 (1973); Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 294, 496 P.2d 1264, 1270, 101 Cal. Rptr. 896, 902 (1972).

34. The residency requirement cases, see text & notes 32-33 *supra*, were found to violate the equal protection clause of the fourteenth amendment because those requirements created two classes of applicants—those who had maintained the requisite residency period and those who had not—which had no rational connection to the applicant's fitness to practice law. *See, e.g.*, Potts v. Honorable Justices, 332 F. Supp. 1392, 1396-98 (D. Hawaii 1971); Lipman v. Van Zant, 329 F. Supp. 391, 399-404 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259, 1261-62 (N.D. Ga. 1970); Kennan v. Board of Law Examiners, 317 F. Supp. 1350, 1358-60 (E.D.N.C. 1970). In defining a class subject to regulation, the distinctions that are drawn must have some relevance to the purpose for which the classification is made. *See* Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966).

Classifications based on citizenship are inherently suspect and subject to close judicial scrutiny. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971). Such classifications bear a heavy burden of justification. McLaughlin v. Florida, 379 U.S. 184, 196 (1964). Rejection of qualified applicants based on citizenship is violative of equal protection as no relation exists between an applicant's capacity to practice law and the applicant's citizenship. *See In re* Griffiths, 413 U.S. 717, 724-27 (1973); Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 294, 496 P.2d 1264, 1270, 101 Cal. Rptr. 896, 902 (1972).

35. "[U]nder our constitutional system, men could not be excluded from the practice of

held to be an improper subject of inquiry when evaluating applicants; however, specific and limited inquiries into an applicant's political beliefs have been upheld,[38] apparently on the theory that a state has an interest in admitting applicants who are dedicated to the "peaceful and reasoned settlement of disputes between men, and between a man and his government."[39] One court has even stated that specific age requirements may be constitutionally valid if the age which must be reached to practice law bears a rational connection to general levels of maturity and judgment attained by persons otherwise deemed qualified.[40] Thus, while the states retain authority to set their own standards for admission to the practice of law,[41] these standards must have a rational connection with an applicant's ability to practice.[42]

In addition to specific bar admission requirements related to educational achievement,[43] residency,[44] and age,[45] and restricted inquiry into first amendment areas,[46] all fifty states have adopted general character fitness requirements[47] to evaluate bar applicants. Such broad or sweeping require-

law, or indeed from following any other calling, simply because they belong to any of our religious groups . . . ." *In re* Summers, 325 U.S. 561, 571 (1945).

36. *See In re* Stolar, 401 U.S. 23, 27-31 (1971) (a state may not require that a bar applicant list all the organizations to which he has belonged, nor may an applicant be required to state whether he has ever been a member of any organization which advocates the overthrow of the United States government by force); Baird v. State Bar, 401 U.S. 1, 5-8 (1971) (an applicant cannot be compelled to state whether she has ever been a member of the Communist Party or any organization that advocates overthrow of the United States government by force or violence).

37. *See In re* Levine, 97 Ariz. 88, 96-97, 397 P.2d 205, 211 (1964) (criticism of a public official by an applicant which may later prove to be false may not be used to exclude a person from the legal profession); 7 ARIZ. L. REV. 118, 124 (1965).

38. *See* Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 161, 166 (1971) (New York requirements that a bar applicant take an oath affirming to "support the Constitution of the United States" and to state whether the applicant has ever *knowingly* organized or *knowingly* been a member of any group advocating the violent overthrow of the United States or any state or political subdivision were constitutionally valid); 23 VAND. L. REV. 131, 131 (1969). *In re Stolar,* 401 U.S. 23 (1971), and *In re Baird,* 401 U.S. 1 (1971), held unconstitutional first amendment association inquiries which sought to punish an applicant solely because of membership in a particular organization. 401 U.S. at 28; 401 U.S. at 6. In contrast to the broad inquiries in *Stolar* and *Baird, Wadmond* upheld limited inquiry into association on the theory that *knowing* membership in a group advocating violent overthrow may be made criminally punishable and, thus, not protected. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. at 165.

39. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 166 (1971).

40. Hackin v. Lockwood, 361 F.2d 499, 502 (9th Cir. 1966). Applicants for admission to the Arizona bar must be at least twenty-one years of age at the date of the bar examination. ARIZ. SUP. CT. R. 28(c)(IV)(1).

41. *See* text & notes 29-40 *supra.*

42. *See* text & note 28 *supra.*

43. See text & notes 29-30 *supra.*

44. See text & notes 31-34 *supra.*

45. See text & note 40 *supra.*

46. See text & notes 35-39 *supra.*

47. Law Students Civil Rights Research Council, Inc., v. Wadmond, 401 U.S. 154, 160 n.13 (1970), *citing* MARTINDALE-HUBBELL LAW DIRECTORY, *passim* (103 ed. 1970). These qualifications are usually phrased in terms of "general fitness and moral character" or in terms of "good moral character." *See, e.g.,* CAL. BUS. & PROF. CODE § 6060 (West 1974) ("good moral character"); N.H. REV. STAT. ANN. § 311:2 (Supp. 1975) ("of good moral character and suitable qualifications"); VT. STAT. ANN. tit. 12, § 1 (Supp. 1977) ("good moral character").

ments may present due process vagueness problems if sufficient guidelines are not included to inform applicants and admissions committees as to what standards are included within the requirements.[48] Although moral character requirements are inherently vague,[49] such requirements have been upheld because they are rationally related to a person's ability to practice law,[50] and they have acquired well defined meanings through long usage and judicial interpretation.[51] Certain fixed standards such as honesty and candor,[52] "an

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Arizona requires bar applicants to submit evidence of "good moral character." ARIZ. SUP. CT. R. 28(c)(IV)(2). Moral character requirements have been upheld as the standard can rationally be expected to ensure the integrity of the bar and an applicant's ability to practice. *See, e.g.*, Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957); Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 459-60, 421 P.2d 76, 86, 55 Cal. Rptr. 228, 238 (1966); *In re* Appell, 116 N.H. 400, —, 359 A.2d 634, 636 (1976); *In re* Monaghan, 126 Vt. 53, 65, 222 A.2d 665, 675 (1966).

48. Constitutional analysis of bar admission requirements has traditionally been confined to due process and equal protection principles. The concept of void for vagueness grows out of the due process right of notice. United States v. Harriss, 347 U.S. 612, 617 (1954); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). Notice, in this context, is the requirement that a statute or ordinance must be sufficiently specific as to make clear to a person of common intelligence what conduct is required or forbidden. *Id. See generally* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1961).

The void for vagueness analysis, however, has generally applied only to criminal statutes and to statutes regulating first amendment freedoms. The United States Supreme Court, in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), set forth a two-pronged test for analyzing criminal statutes or ordinances. A statute will be held unconstitutional under void for vagueness principles if it fails to give a person of ordinary intelligence notice as to what is forbidden, *id.* at 162; *see, e.g.*, United States v. Harriss, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926), or fails to include sufficient guidelines for its enforcement, Papachristou v. City of Jacksonville, 405 U.S. at 162, 170; *see* Thornhill v. Alabama, 310 U.S. 88, 96-98 (1940). Under the *Papachristou* test, a criminal statute or ordinance will be held unconstitutional if either prong is not satisfied. 405 U.S. at 161-71. The Arizona courts have utilized the first prong of the *Papachristou* standard in considering cases where vagueness is an issue. *See In re* Bates, 113 Ariz. 394, 399-400, 555 P.2d 640, 645-46 (1976), *aff'd in part and rev'd in part*, Bates v. State Bar of Arizona, — U.S. —, 97 S. Ct. 2691 (1977); State v. Osborn, 16 Ariz. App. 573, 575, 494 P.2d 773, 775 (1972). *See generally* "The Void for Vagueness Doctrine in Arizona," 17 ARIZ. L. REV. 639, 694 (1975).

Noncriminal statutes regulating protected freedoms encompassed within the first amendment are also subject to void for vagueness scrutiny. Parade licensing ordinances may thus be declared unconstitutional if the ordinance is unclear as to what type of activity must be licensed, *see* Walker v. City of Birmingham, 388 U.S. 307, 316-17 (1967) (petitioners were found to have fully understood the terms of the ordinance, even though the ordinance might have been unconstitutionally vague), or if no specific guidelines are included for the administration of the licenses, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149-53, 158-59 (1969) (parade license ordinance which directed the city commission to issue a permit unless the public welfare, peace, safety, health, decency, good order, morals or convenience required that it be refused declared unconstitutional).

49. The United States Supreme Court, in attempting to define the term "good moral character," has stated:

> [T]he term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

Konigsberg v. State Bar, 353 U.S. 252, 263 (1957).

50. *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

51. Konigsberg v. State Bar, 353 U.S. 252, 263 (1957). "[T]he term 'good moral character, although broad, has been so extensively used as a standard that its long usage and case law surrounding that usage have given the term well-defined contours which make it a constitutionally appropriate standard." *In re* Willis, 288 N.C. 1, 11, 215 S.E.2d 771, 777 (1975).

52. *See, e.g.*, Spears v. State Bar, 211 Cal. 183, 187, 294 P. 697, 698 (1930); *In re* Capace, 110 R.I. 254, 259-60, 291 A.2d 632, 634-35 (1972); *In re* Board of Law Examiners, 191 Wis. 359, 362-63, 210 N.W. 710, 710-12 (1926). Generally, failure to make a full disclosure of information

absence of proven conduct or acts which have been historically considered as manifestations of 'moral turpitude,' "[53] and an absence of a criminal history[54] or evidence of unethical business practices[55] have developed as the basic criteria used in evaluating an applicant's good moral character. The Vermont Supreme Court has further defined the concept of good moral character by disapproving "behavior [that] truly portrays an inherent and fixed quality of character of an unsavory, dishonest, debased and corrupt nature."[56] Although the Vermont test has been cited with approval by the Arizona Supreme Court,[57] the test has been extended in Arizona to state that moral character means not only an absence of negative characteristics, but also a demonstration of exemplary characteristics.[58] Thus, despite the abstractness of the term "good moral character," the requirement bears a rational relationship to a person's ability to practice law, and, because certain fixed standards have been applied to the term, fourteenth amendment due process requirements are met.

As true of the term "good moral character," Arizona's requirement that bar applicants be "mentally . . . able to engage in active and continuous practice of law"[59] is inherently vague. General mental fitness has an

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on an application will be found to indicate a lack of honesty and candor. However, mere oversight or nondisclosure of insignificant matters has been held to be nondeterminative. *Compare In re* Walker, 112 Ariz. 134, 138-40, 539 P.2d 891, 895-97 (1975), *cert. denied*, 424 U.S. 956 (1976) (nondisclosure of failure to register for the draft and nondisclosure of traffic arrest warrants established lack of good moral character); *and* Greene v. Committee of Bar Examiners, 4 Cal. 3d 189, 193-201, 480 P.2d 976, 978-84, 93 Cal. Rptr. 24, 26-32 (1971) (omissions and misstatements regarding residency, attendance at other law schools, applications for admission to other bar associations, nature of prior civil litigation, and arrest record established lack of good moral character), *with In re* Gimbel, 271 Or. 671, 674, 533 P.2d 810, 811-12 (1975) (nondisclosure of one arrest not determinative as the applicant listed numerous other arrests); *and* Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 473, 421 P.2d 76, 95, 55 Cal. Rptr. 228, 247 (1966) (nondisclosure of one arrest and nominal role in civil litigation did not establish lack of good moral character as the applicant made full disclosure in all other areas as required by the application).

Repeated failure by an applicant to answer material questions during admissions committee hearings may establish lack of moral character. *See In re* Anastaplo, 366 U.S. 82, 86-87, 92-95 (1961).

53. Konigsberg v. State Bar, 353 U.S. 252, 263 (1957).

54. *See, e.g., In re* Garland, 219 Cal. 661, 662, 28 P.2d 354, 354 (1934); *In re* Cassidy, 268 App. Div. 282, 287, 51 N.Y.S.2d 202, 207 (1944), *aff'd*, 296 N.Y. 926, 927, 73 N.E.2d, 41, 42 (1947); *In re* Willis, 288 N.C. 1, 16-17, 215 S.E.2d 771, 780-81 (1975). *But see In re* Florida Bd. of Bar Examiners, 183 So. 2d 688, 690 (Fla. 1966); *In re* Schaeffer, 273 Or. 490, 494-95, 541 P.2d 1400, 1403-04 (1975) (both courts held that convictions for misdemeanors or petty offenses do not establish a lack of good moral character).

55. *See In re* Wells, 174 Cal. 467, 475-76, 163 P. 657, 660-61 (1917); *In re* Appell, 116 N.H. 400, —, 359 A.2d 634, 636 (1976).

56. *In re* Monaghan, 126 Vt. 53, 60, 222 A.2d 665, 671 (1966).

57. *See In re* Klahr, 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967). *See also* 10 ARIZ. L. REV. 153, 165 (1968).

58. "Upright character" . . . is something more than an absence of bad character. . . . It means that he [an applicant for admission] must have conducted himself as a man of upright character ordinarily would, should, or does. Such character expresses itself not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing if it is right, and the resolve not to do the pleasant thing if it is wrong.

In re Walker, 112 Ariz. 134, 138, 539 P.2d 891, 895 (1975), *cert. denied*, 424 U.S. 956 (1976), *quoting In re* Farmer, 191 N.C. 235, 238, 131 S.E. 661, 663 (1926).

59. ARIZ. SUP. CT. R. 28(c)(III)(7).

obvious rational connection to an applicant's ability to conceptualize legal concepts and problems.[60] But because no common usage or judicial interpretation has given the term a well-defined meaning,[61] the requirement may be unconstitutionally vague and violative of due process.[62] The *Ronwin* court construed the phrase to exclude "persons whose long-standing personality traits indicate an obvious inability to get along with authority figures under situations of minor stress and conflict, whether or not these personality deficiencies rise to the level of medically recognized and categorized mental disorders."[63] In finding that applicant Ronwin did not meet this requirement, the court determined that he had a "paranoid personality"[64] characterized by "hypersensitivity, rigidity, unwarranted suspicion, excessive self-importance, and a tendency to blame others and ascribe evil motives towards them."[65] Behavior characteristics exhibited by Ronwin[66] were such, the court concluded, that he would be "unable to reasonably deal with the type of social interaction involved in dealing with clients, other members of the Bar and the public."[67] In adopting and so defining the bar admission requirement that applicants be "mentally . . . able to engage in active and continuous practice of law," the *Schware* rational connection test[68] appears to be satisfied. Still to be established, however, are more exacting guidelines delineating personality traits which would make an applicant mentally unfit to practice law. Until such guidelines are established by the Arizona Supreme Court or the state bar, there will remain the possibility of a due process vagueness challenge to the admission requirement.

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60. *See* Place & Bloom, *supra* note 1, at 582, 584-89. *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 1-6 (1976) ("An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability.").

61. *Ronwin* was apparently a case of first impression by the Arizona Supreme Court as no cases were cited in which Rule 28(c)(IV)(3) had been interpreted.

62. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 170 (1972).

63. 113 Ariz. at 359, 555 P.2d at 317.

64. *Id.*

65. The court was apparently taking this definition from the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-11) 42 (2d ed. 1968). Generally, characteristics of paranoia are life-long patterns often recognizable by the time of adolescence or earlier. *Id.* at 41. *See generally* D. SHAPIRO, NEUROTIC STYLES 54-107 (1965). The determinative factors in *Ronwin* consisted of expert testimony and evidence of certain actions which occurred during Ronwin's two and one-half years of law school. *See* 113 Ariz. at 359, 555 P.2d at 317. Transcripts from the Special Committee hearings, *see id.* at 358, 555 P.2d at 316, indicate that three experts—two psychiatrists and one psychologist—testified before the committee. Reporter's Transcript of Proceedings, vol. 1, at 139, vol. 2, at 222, 263, 299, *In re* Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976). One psychiatrist was of the opinion that Ronwin was mentally able to practice law, *id.* vol. 2, at 270, while the other psychiatrist testified that he was of the opinion that Ronwin should not be excluded from the practice of law, *id.* at 226. The psychologist, however, testified that he believed Ronwin not to be mentally able to practice law. *Id.* vol. 1, at 174-75, vol. 2, at 299-308.

66. The actions involved concerned Ronwin's alleged threats of violence which occurred during academic discussions, and a letter written by Ronwin to the president of Arizona State University in which Ronwin demanded that the acting dean of the law school and a law professor be dismissed from the faculty. 113 Ariz. at 359 n.1, 555 P.2d at 317 n.1.

67. *Id.* at 359, 555 P.2d at 317.

68. See text & note 28 *supra*.

Constitutional Limitations on the Application of Bar Admission Requirements

In addition to establishing bar admission requirements, fourteenth amendment due process standards are likewise applicable to the analytical methods used to evaluate persons seeking admission to law practice.[69] Thus, although the individual states may impose reasonable requirements as preconditions to law practice,[70] these requirements may not be arbitrarily manipulated to deny a qualified person the right to practice law.[71] An examination of the *Ronwin* court's evaluation of the applicant's qualifications to practice law reveals certain difficulties with the constitutional application of the phrase "mentally . . . able to engage in active and continuous practice of law" to Ronwin. Unlike the method of analysis traditionally used in Arizona[72] and other jurisdictions[73] to evaluate an applicant's qualifications to practice law, past, not present, fitness appeared to be determinative in *Ronwin*.[74]

The distinction between past and present qualifications has been emphasized by the courts in determining an applicant's moral character. Although certain fixed standards have been developed in evaluating an applicant's moral character,[75] the Arizona Supreme Court has stated that because each case ultimately is decided on its particular facts, an ad hoc determination must be made in each instance as to an applicant's moral fitness.[76] In making such an ad hoc determination, the Arizona Supreme Court had held that the issue is the applicant's present moral character, with evidence of past conduct being relevant only as that behavior reflects upon the applicant's current moral character.[77] Past conduct is relevant to an applicant's

69. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957).

70. *Id.*; *see* text & notes 29-40 *supra*.

71. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). The California Supreme Court has stated that reasonable doubts encountered in evaluating an application to practice law should be resolved in favor of the applicant. Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 451, 421 P.2d 76, 80, 55 Cal. Rptr, 228, 230,(1976). Arizona courts have stated that only "competent" evidence may be considered in evaluating an applicant, *see In re* Burke, 87 Ariz. 336, 339, 351 P.2d 169, 172 (1960), and where such evidence is inconclusive, doubts will be resolved in the applicant's favor, *see In re* Courtney, 83 Ariz. 231, 236, 319 P.2d 991, 995 (1957).

72. See text & notes 75-77, 83 *infra*. *See also* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), where the Court stated: "We conclude that his past membership in the Communist Party does not justify an inference that he presently has bad moral character." *Id.* at 246. In *In re* Monaghan, 126 Vt. 53, 222 A.2d 665 (1966) the court stated: "The sole question in issue is the petitioner's *present* good moral character and general fitness." *Id.* at 57, 222 A.2d at 670 (emphasis in original).

73. See text & notes 82, 85-86 *infra*.

74. See text & notes 94-97 *infra*.

75. See text & notes 52-58 *supra*.

76. *See In re* Klahr, 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967).

77. *See In re* Walker, 112 Ariz. 134, 539 P.2d 891 (1975), *cert. denied*, 424 U.S. 956 (1976), where the court held that a violation of the Selective Service Act over a five-year period, and the subsequent nondisclosure of that violation, was behavior of "such long duration [that] cannot be considered as a temporary aberration to be cancelled by the lapse of a few months time." *Id.* at 138, 539 P.2d at 895. In Willard v. Goodenough, 30 Vt. 391 (1858), the court stated

present moral character where the degree, duration, or the nature of such conduct bear on the applicant's ability to practice law. Thus, a prior history of unwarranted character assassinations[78] and a failure to register for military service[79] have been stated to be conduct of such severity as to reflect on current moral character. Likewise, questionable conduct occurring over a period of years may be deemed more important[80] than an isolated instance occurring many years prior to an individual's application to the bar.[81]

Because the present state of the applicant's moral character is at issue, some courts have held that an applicant who has been suspended or disbarred from the practice of law in another jurisdiction will not automatically be disqualified for admission, but the evidence of discipline in another jurisdiction will be one factor in the evaluation of the applicant's current moral fitness.[82] This procedure has been followed in Arizona in evaluating the reinstatement petitions of disciplined attorneys. In such cases, the courts have looked to the original conduct for which the attorney was disciplined and to whether, from the time of suspension or disbarrment to the time the reinstatement petition was filed, rehabilitation has been shown.[83] Similarly, the Arizona Supreme Court has held that bar applicants who have been denied admission for lack of good moral character may be granted admission upon a present showing of good character.[84]

When an applicant's mental fitness is at issue, present, rather than past, evidence has also been the customary method of evaluation. These evaluations, however, have been determined under moral character requirements as most states have not adopted specific mental health requirements for bar applicants. In the Nevada case of *In re Schaengold*,[85] the state supreme court adhered to this standard in admitting to law practice an applicant with continuous and sustained mental problems. The court, in overruling a

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the following: "What the character had formerly been is relevant only as it blends with the continuous web of life and tinges its present texture." *Id.* at 396. *See also* Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 246 (1953).

78. *In re* Feingold, 296 A.2d 492, 499-500 (Me. 1972). The court characterized this behavior as "turbulent, intemperate or irresponsible." *Id.* at 500.

79. *In re* Walker, 112 Ariz. 134, 137-38, 529 P.2d 891, 894-95 (1975), *cert. denied*, 424 U.S. 956 (1976).

80. *See id.*; *In re* Feingold, 296 A.2d 492, 499 (Me. 1972).

81. *See In re* Schaeffer, 273 Or. 490, 496, 541 P.2d 1400, 1403 (1975).

82. *See In re* Question of Law, 265 So. 2d 1, 1-2 (Fla. 1972); *In re* Kimball, 40 App. Div. 2d 252, 253, 339 N.Y.S.2d 302, 304, *modified*, 41 App. Div. 2d 780, 342 N.Y.S.2d 373, *rev'd on other grounds*, 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973); Note, *The Concept of Attorney Fitness in New York: New Perspectives*, 24 BUFF. L. REV. 553, 558, 566 (1975).

83. *In re* Lanahan, 102 Ariz. 191, 191-92, 427 P.2d 142, 142-43 (1967); *see In re* Spriggs, 90 Ariz. 387, 368 P.2d 456 (1962), where the court stated: "[T]he law does not intend that disbarred members remain out of their profession indefinitely if the disbarred member has rehabilitated himself in society and has shown himself to be a person of good moral character." *Id.* at 388, 368 P.2d at 457.

84. *In re* Guberman, 90 Ariz. 27, 30, 363 P.2d 617, 619 (1961). *See also In re* Alpert, 269 Or. 508, 519, 525 P.2d 1042, 1047 (1974) (an applicant who was denied admission to the Oregon bar for lack of moral character was given a three-year leave to reapply).

85. 83 Nev. 65, 422 P.2d 686 (1967).

recommendation that Schaengold not be permitted to practice law, placed particular emphasis on Schaengold's prior twenty-three year membership in good standing in the Ohio bar.[86] Despite a current psychiatric diagnosis that Schaengold was suffering from a permanent mental disorder characterized by a loosening of the thinking processes under situations of pressure,[87] no determination was made as to the applicant's present or future ability to function as a lawyer.[88] Since Schaengold had never been judicially declared incompetent or involuntarily hospitalized, the court was unwilling to risk injustice by denying Schaengold's application based on uncertain and inexact psychiatric findings.[89]

The *Schaengold* type analysis has been applied in other jurisdictions to persons whose mental competency to practice law is at issue. The Oregon Supreme Court in *In re Gimbel*[90] granted the petitioner's application despite numerous arrests which occurred within a four-year period during which the applicant was an admitted alcoholic. Evidence of rehabilitation from this problem and the testimony of character witnesses as to the present mental fitness of the applicant were determinative in the court's decision.[91]

The nature of the evidence used to determine Ronwin's mental fitness raises the due process issue of whether that evidence supports the conclusion that Ronwin was not mentally fit to practice law.[92] Based upon psychiatric and psychological testimony, it was concluded that Ronwin had a paranoid personality[93] such that he did not meet the court rule for mental fitness to practice law. The validity of that conclusion, however, is subject to question. Ronwin's past behavior of rage during academic discussions, threats of physical violence, and an inability to maintain normal interpersonal relationships, which was used by the court to determine his present mental fitness, occurred during a short period of time[94] under seemingly provocative circumstances[95] which were unlikely to be repeated in the future. No other evidence of similar behavior, occurring either before or after Ronwin's enrollment in law school, was cited in the court's decision. The court, in fact, commended Ronwin for resorting to the legal system in his attempt to resolve the problems he was encountering in law school.[96] While the court

86. *Id.* at 66, 422 P.2d at 686.
87. *Id.* at 67, 422 P.2d at 687.
88. *Id.*
89. *Id.* at 66-68, 422 P.2d at 686-88.
90. 271 Or. 671, 533 P.2d 810 (1975).
91. *Id.* at 674-75, 533 P.2d at 812.
92. See text & note 71 *supra*.
93. 113 Ariz. at 359, 555 P.2d at 317; *see* text & note 65 *supra*.
94. *See* discussion note 65 *supra*.
95. During Ronwin's enrollment at the Arizona State University College of Law he was the target of various religious and ethnic slurs, and, on one occasion, had his locker burglarized. 113 Ariz. at 359 & n.1, 555 P.2d at 317 & n.1.
96. *Id.* at 360, 555 P.2d at 318. A lawsuit was filed against seven fellow law students whom Ronwin alleged were responsible for the harassment he was receiving. *Id.* at 360 n.2, 555 P.2d at 318 n.2.

concluded that Ronwin had a continuing inability to maintain normal interpersonal relationships, which would adversely affect his ability to practice law,[97] that conclusion must also be questioned as Ronwin's behavior occurred under highly unusual conditions. No clear showing was made that, absent those conditions, the behavior would continue.

Conclusion

The disposition of the Ronwin application raises serious questions as to the method of future analysis in determining the fitness of bar applicants. Unlike the court's prior decisions, past, not present, fitness appeared to be determinative in *Ronwin*. The Arizona requirement that bar applicants be "mentally . . . able to engage in active and continuous practice of law" satisfies the *Schware* test as the rule is rationally related to a person's ability to practice law. Until the rule is more specifically defined, however, the possibility remains of a due process vagueness challenge to the requirement.

97. *Id.* at 359, 555 P.2d at 317.

VII. TORTS

A. THE UNREASONABLY DANGEROUS REQUIREMENT IN ARIZONA PRODUCTS LIABILITY LAW

Strict products liability in tort is a means of imposing responsibility for injury on sellers whose defective products cause injuries.[1] Use of the doctrine has developed rapidly,[2] and it is now the law in over two-thirds of the states.[3] One problem currently facing some courts is whether a plaintiff must prove that a defect rendered a product unreasonably dangerous in order to recover in a products liability case. Although a majority of jurisdictions apply the unreasonably dangerous standard as a necessary element in proving strict products liability,[4] a minority of courts have rejected the requirement.[5] The Arizona Supreme Court considered the unreasonably dangerous

1. *See, e.g.*, O.S. Stapley Co. v. Miller, 103 Ariz. 556, 559, 447 P.2d 248, 251 (1968); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion); RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

2. *See, e.g.*, Putnam v. Erie City Mfg. Co., 338 F.2d 911, 918 (5th Cir. 1964); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 62-63, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1962); Garthwait v. Burgio, 153 Conn. 284, 287, 216 A.2d 189, 191 (1965).

3. W. PROSSER, LAW OF TORTS § 98, 657-58 (4th ed. 1971). The adoption of strict liability in tort by the RESTATEMENT (SECOND) OF TORTS § 402A (1965) hastened its acceptance as a theory for products liability actions. *See* Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 714 (1970).

4. The majority adheres to the RESTATEMENT (SECOND) OF TORTS § 402A (1965), which states:

> (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.

See, e.g., O.S. Stapley Co. v. Miller, 103 Ariz. 556, 559, 447 P.2d 248, 251 (1968); Garthwait v. Burgio, 153 Conn. 284, 289, 216 A.2d 189, 192 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 623, 210 N.E.2d 182, 188 (1965); Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197, 200 (Ky. 1976); Cornelius v. Bay Motors, Inc., 258 Or. 564, 571, 484 P.2d 299, 302-03 (1971).

5. *E.g.*, Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976, 978 (D. Alas. 1973); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 132-33, 501 P.2d 1153, 1161, 104 Cal. Rptr. 433, 441 (1972); Glass v. Ford Motor Co., 123 N.J. Super. 599, 601-02, 304 A.2d 562, 564 (Law Div. 1973); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 96-97, 337 A.2d 893, 900 (1975). In Beron v. Kramer Trenton, Co., 402 F. Supp. 1268 (E.D. Pa. 1975), *aff'd*, 538 F.2d 318 (3d Cir. 1976), the court refused to grant *Berkebile* precedential value because only two justices signed the court's opinion, while the five concurring justices expressed no agreement with the opinion. *Id.* at

standard in the recent case of *Byrns v. Riddell, Inc.*,[6] and in a somewhat confused opinion, held in favor of its continued use.[7]

Plaintiff, Kevin Byrns, brought a products liability action for brain injuries received in a football game.[8] The injuries were allegedly caused by the shell of the plaintiff's helmet "bottoming out" and hitting his head when he collided head-to-head with an opponent.[9] The result of the injuries was substantial paralysis for life and the destruction of important parts of plaintiff's brain.[10] Plaintiff alleged that the "bottoming out" effect transmitted too much of the energy of a blow to the helmet onto the head of the wearer, thus making the product defective by manufacture and design, and, therefore, inherently dangerous to the user.[11] He further alleged that Riddell, Inc. knew of this defect and had a duty to warn buyers of it and to advise them that it had two safer helmet designs.[12] On appeal, the Supreme Court of Arizona reversed the trial court's directed verdict and remanded the case, finding that reasonable minds could differ as to whether the helmet was defective when it left the seller's hands.[13] The principal significance of

1276. Other courts have eliminated the "defective condition" requirement. *See* Ross v. Up-Right, Inc., 402 F.2d 943, 946-47 (5th Cir. 1968) (where improper design allegedly caused injury, question is whether product was unreasonably dangerous, and plaintiff need not prove specific defect once unreasonable danger is shown); Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 154, 542 P.2d 774, 779 (1975) (if a product is unreasonably dangerous, it is necessarily defective).

6. 113 Ariz. 264, 550 P.2d 1065 (1976).

7. *Id.* at 266, 550 P.2d at 1067.

8. *Id.* at 265, 550 P.2d at 1066.

9. *Id.*

10. Abstract of Record at 6-7, Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976).

11. 113 Ariz. at 265, 550 P.2d at 1066.

12. *Id.*; *see* Appellants' Opening Brief at 7-8, Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976). Byrns' helmet was a TK-2; the safer designs were known as the RAC-H8 and the micro-fit. *See generally* Philo & Stine, *The Liability Path to Safer Helmets*, 13 TRIAL 38 (January 1977). This duty to warn argument apparently was based upon RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965), which provides that a seller who "has reason to anticipate that danger may result from a particular use . . . may be required to give adequate warning of the danger . . . , and a product sold without such warning is in a defective condition." *See* Appellants' Reply Brief at 7, Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976); Appellants' Opening Brief at 22-23, Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976). Arguably, § 402B of the Restatement is also related in that Riddell represented that the TK-2 was the "finest in the field," when in fact it manufactured two safer helmet designs. *See* Abstract of Record at 22, Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976). The RESTATEMENT (SECOND) OF TORTS § 402B (1965) states that:

> One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though
>
> (a) it is not made fraudulently or negligently, and
>
> (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

13. 113 Ariz. at 268, 550 P.2d at 1069. The trial court granted Riddell's motion for a directed verdict on the ground that the evidence indicated that the blow was to the untested and strongest portion of the helmet, *i.e.*, the top. *Id.* at 266, 550 P.2d at 1067. Because there was no evidence presented relating to the top of the helmet, the trial judge ruled that a decision by the jury as to whether the helmet was defective would be purely speculative. The supreme court disagreed, holding that reasonable persons could differ as to the point of impact, and therefore, the jury should have been allowed to decide the question of causation and whether or not the helmet was defective. *Id.* at 268, 550 P.2d at 1069.

Bryns lies in its clear adoption of the requirement that a plaintiff in a products liability action show, as a necessary element of his case, that the defective product which caused his injuries was unreasonably dangerous.[14]

This casenote will discuss the nature of strict liability in tort including the underlying policy considerations. Particular attention will be devoted to a discussion of whether Arizona's retention of the unreasonably dangerous requirement is a desirable or effective limitation on the use of products liability. This discussion will focus on the effect of the requirement in two areas: where the plaintiff attempts to show a design defect; and where the issue involves proximate cause and misuse.

The Nature of Strict Liability in Tort

Strict tort liability is a special rule making the seller of a product liable to the consumer or user injured by its product. The rule imposes liability regardless of whether the seller has exercised all possible care in the preparation and sale of his product.[15] Moreover, the injured party is not required to be a buyer or to have any contractual relationship with the seller as a condition to recovery, since the purpose of strict liability is to protect the user or consumer.[16] However, the rule is not intended to make the seller or manufacturer an insurer responsible for all injuries involving its products.[17]

Strict liability in tort serves several functions. It recognizes that a seller, in marketing his product, undertakes a responsibility toward members of the consuming public who may be harmed by it.[18] Requiring the seller to stand behind his product is felt to be the most likely means of

14. 113 Ariz. at 266, 550 P.2d at 1067. Although the strict liability rule of § 402A of the Restatement of Torts was adopted by Arizona in O.S. Stapley Co. v. Miller, 103 Ariz. 556, 559, 447 P.2d 248, 251 (1968), it was not clear whether, or how, the "unreasonably dangerous" rule applied as a limitation on the doctrine's use. *Cf.* Colvin v. Superior Equip. Co., 96 Ariz. 113, 118-19, 392 P.2d 778, 781-82 (1964) (a warranty case appearing to adopt the rationale of Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962), that a manufacturer is liable where the plaintiff is injured while using a defective product in its intended manner). For the view that *Colvin* adopted the strict liability doctrine, see Nalbandian v. Byron Jackson Pumps, 97 Ariz. 280, 287-89, 399 P.2d 681, 686-87 (1965) (concurring opinion). *See also* Epstein, *Personal Injuries from Defective Products—Some "Dots and Dashes,"* 9 ARIZ. L. REV. 163, 174 (1967); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 794 (1966); Comment, *Arizona: A Move Toward Strict Products Liability*, 7 ARIZ. L. REV. 263 (1963).

15. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) & Comment a (1965).

16. *See* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63-64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); RESTATEMENT (SECOND) OF TORTS § 402A, Comment *l* (1965).

17. *See* Maas v. Dreher, 10 Ariz. App. 520, 521, 460 P.2d 191, 192 (1969); Barker v. Lull Eng'r Co., Inc., — Cal. 3d —, —, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); Epstein, *supra* note 14; text & note 23 *infra*. *See also* Horn v. General Motors Corp., 17 Cal. 3d 359, 374, 551 P.2d 398, 406, 131 Cal. Rptr. 78, 86 (1976) (Clark, J., dissenting).

18. *See* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63-64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

reducing the number of dangerous products.[19] The manufacturer can thereby absorb the cost of injuries as a cost of doing business and spread this expense among the consumers of its products.[20] Another function of the doctrine is to alleviate the difficult burden on the injured plaintiff to prove negligence on the part of the manufacturer.[21] These functions indicate that the doctrine is primarily plaintiff-oriented.

The primary justification for the unreasonably dangerous standard, on the other hand, may be somewhat inconsistent with the purposes of strict liability.[22] The reason for requiring proof of unreasonable danger is the perceived need to prevent a manufacturer from becoming an insurer against injuries caused by products which are unavoidably dangerous or have dangers normally associated with their use.[23] The standard may work to protect the defendant by adding an element of proof to the plaintiff's case.[24] Thus the policy behind strict liability may run counter to the use of the unreasonably dangerous standard[25] in that strict liability was intended to

19. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 129, 501 P.2d 1153, 1159, 104 Cal. Rptr. 433, 439 (1972); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (Traynor, J., concurring); RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

20. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

21. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring); Glass v. Ford Motor Co., 123 N.J. Super. 599, 603, 304 A.2d 562, 564 (Law Div. 1973). Strict liability is also intended to rescue the plaintiff from the pitfalls of pursuing a warranty theory, Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

22. *See* Barker v. Lull Eng'r Co., Inc., — Cal. 3d —, —, 573 P.2d 443, 451, 143 Cal. Rptr. 225, 233 (1978); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 97, 337 A.2d 893, 900 (1975); Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286, 322-23 (1966).

23. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966). An example of such a product is any alcoholic beverage—good rye is not unreasonably dangerous just because it may harm the liver and kidneys or cause a person to spend the night face down on the tavern floor with the injuries incidental to such a place of repose. But a cheap well whiskey with a surfeit of formaldehyde would be unreasonably dangerous.

Although preventing manufacturers from becoming insurers of unavoidably or normally dangerous products is a worthwhile objective, it is difficult to see what the unreasonably dangerous concept contributes toward this end. See text & notes 28-75 *infra*. The same objective is accomplished by requiring that there be an actual defect which was the proximate cause of the injury. *See, e.g.*, Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976, 978 (D. Alas. 1973); Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244, 247-48 (Alas. 1969); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); Glass v. Ford Motor Co., 123 N.J. Super. 599, 602, 304 A.2d 562, 564 (Law Div. 1973); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 96, 337 A.2d 893, 900 (1975). *See generally* Friedman v. General Motors Corp., 43 Ohio St. 2d 209, 216, 331 N.E.2d 702, 706 (1975) (requiring proof that a defect existed when the product left the factory which was the proximate cause of an injury).

24. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972). Thus in Arizona and jurisdictions that follow the Restatement, it is necessary for the plaintiff to prove that when the product left the hands of the seller, it possessed a defect which rendered the product unreasonably dangerous, and which was the proximate cause of plaintiff's injuries. *See* O.S. Stapley Co. v. Miller, 103 Ariz. 556, 559, 447 P.2d 248, 251 (1968); Epstein, *supra* note 14, at 174-75.

25. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 95, 337 A.2d 893, 899 (1975); Note, *supra* note 22.

ease the burden on the injured plaintiff who would otherwise be put to the difficult task of proving that the manufacturer was negligent.[26] In view of the apparent conflict between the general purposes of products liability and the requirement of proof of unreasonable danger, it is necessary to determine whether and how courts should apply the element to limit a manufacturer's liability for injury-causing defects. Although the court plainly adopts the standard in *Byrns*, its attempt at enunciating guides for the standard's application is confusing and warrants clarification.[27]

The Unreasonably Dangerous Requirement as a Limiting Device in Strict Liability

Even though there is no all-encompassing rule for applying strict liability in tort, and each case must be decided in light of its particular facts,[28] certain generalizations are possible with respect to the unreasonably dangerous requirement. The Arizona Supreme Court's rationale for retaining the unreasonably dangerous concept was that it is an effective means of limiting strict tort liability in two areas: where the plaintiff attempts to show a design defect; or where the issue is whether the injury follows as a matter of course from the defect, and there is a question of misuse or harmful conduct by the plaintiff.[29] Each of these situations will now be examined.

Design

The first element of the *Byrns* court's rationale is that the unreasonably dangerous standard provides a means of limiting a manufacturer's liability in the area of design defects.[30] Design defects differ from manufacturing defects in several important respects.[31] A manufacturing defect is provable

26. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442, (1972); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

27. *See* 113 Ariz. at 267, 550 P.2d at 1068.

28. *Id.*

29. *Id.* The court cited no cases as authority for this assertion, but relied solely on a quote from Annot., 54 A.L.R.3d 352, 358 (1973). *See* 113 Ariz. at 267, 550 P.2d at 1068. The annotation itself simply states this conclusion with no case authority on point for support. The Restatement does not express any intention that the unreasonably dangerous language be a limitation in these areas; it only deals with products that are unavoidably unsafe, such as the vaccine for rabies, whiskey, tobacco, and butter. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comments i, k (1965); Prosser, *supra* note 23.

30. 113 Ariz. at 267, 550 P.2d at 1068.

31. By applying the unreasonably dangerous concept in an attempt to limit the liability of manufacturers for design defects, the Arizona Supreme Court implicitly recognized the differences. *See id.* This distinction between manufacturing and design defects is apparent in the authority cited by the court, Annot., 54 A.L.R.3d 352, 358 (1973), *see* 113 Ariz. at 267, 550 P.2d at 1068, which says that the concept of unreasonably dangerous will not usually affect cases involving manufacturing defects, but will serve to limit liability in cases involving design defects. The California Supreme Court, in Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 134, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 443 (1972), argued that such a distinction is untenable because a defect may emerge from the mind of the creator as well as from the hands of the workman. The court reasoned that there is an inherent difficulty in deciding the category to which a particular defect belongs. The court wished to avoid giving plaintiff's counsel the advantage if he succeeded in classifying a defect as one of manufacture, or conversely, giving a clever defense counsel the advantage if he could characterize the defect as one of design. *Id.*

by comparison of the nonconforming, injury-causing product with the non-defective products in the same product line.[32] Thus, an appropriate factor to consider[33] in determining the existence of a manufacturing defect would be the "common knowledge and normal public expectation of the danger."[34]

Proving a design defect, however, is necessarily a more complex task, partly because of the importance of policy issues.[35] Several factors should be considered in determining the existence of a design defect for which a manufacturer will be held liable in the absence of valid defenses. These include the utility of and need for the product, the existence of safer designs, and the practical ability of the manufacturer to implement safer designs.[36] In balancing these factors, the fact and severity of injury should be considered in order to avoid condemning a manufacturer's entire product line in situations where, for example, a product of enormous utility cannot be redesign-

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While the court recognized the potential economic loss to a manufacturer who has his entire product line condemned, it did not feel that this justified a different standard of proof to be met by an injured consumer. *Id.* However, California recently adopted a two-part test to be used in determining whether a design defect exists. A product may be defective in design if it fails to meet the expectations of an ordinary consumer as to safety or if the risk of danger inherent in the design outweighs the benefits of the design. Barker v. Lull Eng'r Co., Inc., — Cal. 3d —, —, 573 P.2d 443, 446, 143 Cal. Rptr. 225, 228 (1978).

32. *See* Baker v. Lull Eng'r Co., Inc., — Cal. 3d —, —, 573 P.2d 443, 446, 143 Cal. Rptr. 225, 228 (1978). Phillips v. Kimwood Mach. Co., 269 Or. 485, 491, 525 P.2d 1033, 1035-36 (1974); Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 456 (1969); Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?*, 8 SW. U.L. REV. 109, 118 (1976).

33. The Arizona Supreme Court in *Byrns* set forth a seller-oriented hindsight test of an unreasonably dangerous defect. The test considers whether a reasonable manufacturer, with the constructive knowledge of the dangerous potential of his product revealed in the trial, would market the product. 113 Ariz. at 267, 550 P.2d at 1068 (quoting Dorsey v. Yoder Co., 331 F. Supp. 753, 759-60 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973)).

The court also offered a second test based on the expectations of the consumer. If a product is more dangerous than the ordinary consumer in the community would expect, then it is unreasonably dangerous. One of the factors involved in this test is the obviousness of the defect. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965)).

These tests are to be used in determining whether either a design or manufacturing defect is unreasonably dangerous. *Id.* However, the unreasonably dangerous concept will seldom be of controlling significance in cases involving manufacturing defects. *See* discussion notes 23, 31 *supra* & note 34 *infra*. The second, buyer-oriented test makes more sense because the buyer is the one whose reasonable expectations (and physical well-being) are to be protected by the doctrine of products liability.

34. 113 Ariz. at 267, 550 P.2d at 1068, *quoting* Dorsey v. Yoder Co., 331 F. Supp. 753, 760 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973), *quoting* Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965). This phrase was suggested as a factor in determining whether a defect renders a product unreasonably dangerous. However, similar language is used in California to define a design defect. Barker v. Lull Eng'r Co., Inc., — Cal. 3d —, —, 573 P.2d 443, 446, 143 Cal. Rptr. 225, 228 (1978). In regard to manufacturing defects, the unreasonably dangerous standard seems superfluous because the plaintiff must already prove that there was a defect which was the proximate cause of the injury. If a product is defectively different from others in the same product line and this difference was the proximate cause of an injury to the plaintiff, then the defect would seem to make the product unreasonably dangerous to the injured plaintiff. Nothing is gained by the added phrase "unreasonably dangerous." *See* discussion note 23 *supra*. Nor does the unreasonably dangerous standard provide the seller with any additional defenses. See text & notes 55-81 *infra*.

35. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 838 (1973).

36. *See* Wade, *supra* note 34. The ability of a manufacturer to use safer designs depends in part upon the effect such changes may have on the price and utility of the product. *Id.* Although these three factors appear to be the most relevant in cases of design defects, Professor Wade's entire list should be considered in determining whether a product is reasonably safe. See Byrns v. Riddell, Inc., 113 Ariz. 264, 267, 550 P.2d 1065, 1068 (1976), where the court sets out Wade's test.

ed without either destroying its utility or making it prohibitively expensive.[37] Due to the inherently complex nature of design defects, and the policy considerations involved in such cases, the unreasonably dangerous standard is an appropriate limitation in this area. Simply stated, therefore, the requirement can be used to limit liability in the area of design defects by preventing a manufacturer from becoming an insurer against the possibility of the existence of a safer design.[38]

The argument has been raised, however, that the unreasonably dangerous standard imposes an undue burden on the plaintiff in a design case.[39] Admittedly, the requirement does add an additional element to the plaintiff's case,[40] which the California Supreme Court believes "rings of negligence."[41] On the other hand, the Oregon Supreme Court has noted that strict liability, even with the unreasonably dangerous element, is considerably different from negligence.[42] In any event, even the California court has admitted that the purpose of strict liability is not to make the manufacturer an insurer of his product.[43] Once this latter fact is conceded, the important question is whether the unreasonably dangerous element will

37. Although the California Supreme Court recognizes "that it is more damaging to a manufacturer to have an entire line condemned, so to speak, for a defect in design, than a single product for a defect in manufacture," Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 134, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 443 (1972), it did not believe that this fact warrants a different standard of proof for the plaintiff in design cases than is imposed in manufacturing defect cases. *Id.* This argument ignores reality because the different standard of proof does not arise solely from this policy consideration but primarily from the inherent difference between a manufacturing defect and a design defect. As has been noted, "[A] design feature is often hard to characterize as legally defective, whereas a deviant item is labeled by its very abnormality." Dickerson, *supra* note 32. The *Cronin* court rejects the distinction between manufacturing and design defects, which suggests that all one would have to prove to recover damages for a design related injury is that there are safe designs. If proof of a design defect can be made merely by showing the existence of a safer design, the manufacturer is in effect, required to insure against the existence of designs safer than his own. Such a result would run counter to the purpose of strict liability. *See* text & note 17 *supra*. It also runs counter to common sense which says that "nothing is so safe that it cannot be made safer." Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 574 (1969). Therefore, some limitation on strict liability for a design defect is necessary. *Cf.* Hoenig, *supra* note 32, at 119-25 (author suggests replacing strict liability with negligence in cases involving design defects).

38. "Defectiveness as a touchstone of liability can become a meaningless fiction if it is interpreted simply as an injury-causing characteristic of a product. The 'unreasonably dangerous' requirement is a useful safeguard against that possibility, and should not be lightly discarded." 7 AKRON L. REV. 361, 368 (1974).

39. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).

40. *See id. See also* Epstein, *supra* note 14, at 174-75.

41. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); *accord*, Glass v. Ford Motor Co., 123 N.J. Super. 599, 602, 304 A.2d 562, 564 (Law Div. 1973); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 96, 337 A.2d 893, 899 (1975); 23 DRAKE L. REV. 197, 203 (1973); 6 RUTGERS-CAMDEN L.J. 189, 195-96, 199 (1973).

42. *See* Roach v. Kononen, 269 Or. 457, 465, 525 P.2d 125, 129 (1974). In Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974), the Oregon Supreme Court distinguished negligence from strict liability on the ground that strict liability charges the seller with knowledge of a defect which he could not reasonably be expected to have, and asks whether, with such knowledge, the seller would have sent the product into the stream of commerce, whereas negligence rules only charge with knowledge a seller who should have known of the defect. *Id.* at 494-95, 525 P.2d at 1037-38.

43. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).

operate to prevent the imposition of absolute liability; so viewed, the element is not an undue burden on the plaintiff, and the debate over whether requiring proof of unreasonable danger amounts to demanding proof of negligence is irrelevant.[44]

Whether application of the unreasonably dangerous standard will limit liability in design defect cases ultimately depends upon the facts of the particular case.[45] The requirement represents a means of incorporating the elements which must be considered in answering the essentially factual question of whether a design defect existed.[46]

For example, in *Turner v. General Motors Corp.*,[47] a 1969 Impala was held to be unreasonably dangerous due to defective design because it lacked a roll bar,[48] even though no domestic car came equipped with roll bars.[49] This case provides a very good example of the way the unreasonably dangerous standard can provide the balancing between the likelihood and gravity of harm and the burden of implementing a safer design.[50] Similarly, in *Phillips v. Kimwood Machine Co.*,[51] in which a machine for sanding fiberboard ejected a sheet of fiberboard, injuring the plaintiff,[52] the Oregon Supreme Court apparently weighed the utility of the machine against the risk of loss arising from its use in deciding that the sander could be found dangerously defective.[53] These cases are offered only as illustrations. They demonstrate how the unreasonably dangerous standard may be used to

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44. *See* Phillips v. Kimwood Mach. Co., 269 Or. 485, 498, 525 P.2d 1033, 1039 (1974).

> It is necessary to remember that whether the doctrine of negligence, ultrahazardousness, or strict liability is being used to impose liability, the same process is going on in each instance, *i.e.*, weighing the utility of the article against the risk of its use. Therefore, the same language and concepts of reasonableness are used by courts for the determination of unreasonable danger in products liability cases.

Id. Even California now balances the utility of a design against its inherent risk in determining if the design is defective. Barker v. Lull Eng'r Co., Inc., — Cal. 3d —, —, 573 P.2d 443, 446, 143 Cal. Rptr. 225, 228 (1978). *But see* cases cited note 5 *supra*.

45. Byrns v. Riddell, Inc., 113 Ariz. 264, 267, 550 P.2d 1065, 1068 (1976).

46. The likelihood of harm to the consumer using a product for an intended purpose must be balanced against the availability of safer designs and against the utility and cost of the redesigned product. Wade, *supra* note 34; *see* Phillips v. Kimwood Mach. Co., 269 Or. 485, 495-96, 525 P.2d 1033, 1038 (1974). This balancing is essential if strict liability is not to become absolute liability. *See* discussion note 38 *supra*.

47. 514 S.W.2d 497 (Tex. Civ. App. 1974).

48. *Id.* at 507.

49. *Id.* at 506.

50. *Id.* at 504. The court applied an "ordinary consumer's expectation" test, see text & notes 33-34 *supra*, and concluded that the ordinary consumer "may well expect the roof of that car to maintain its structural integrity in a roll-over accident." *See* 514 S.W.2d at 505. The reasonable expectation test was augmented in *Turner* through the use of certain countervailing factors to determine whether a particular design is unsafe:

> For instance, if a change in design would add little to safety, render the vehicle ugly or inappropriate for its particular purpose, and add a small fortune to the purchase price, then a court should rule as a matter of law that the manufacturer had not created an unreasonable risk of harm.

Id. at 504.

51. 269 Or. 485, 525 P.2d 1033 (1974).

52. *Id.* at 488, 525 P.2d at 1034.

53. *See id.* at 499 & n.13, 525 P.2d at 1038-39 & 1039 n.13. The Oregon court applied a "dangerously defective" standard, which it believed includes the same considerations as the "unreasonably dangerous" concept. *See id.* at 491 & n.3, 525 P.2d at 1036 & n.3.

prevent a manufacturer from becoming an insurer of his product by requiring a balancing of the economic pros and cons of imposing strict liability in the area of design defects.[54] Insofar as *Byrns* requires use of the unreasonably dangerous standard in design cases, the decision can be applied in the same manner, that is, to ensure that the condemnation of a manufacturer's product line is economically sound. Other aspects of the *Byrns* opinion are troublesome, however, and they now will be considered.

Proximate Cause: The Effect of Misuse and Other Intervening Events on a Seller's Liability

The *Byrns* court believed that the unreasonably dangerous requirement would be an effective means of limiting strict tort liability "in situations in which injury does not follow as a matter of course from the defect, and in which there are serious questions as to the effect to be given harm-producing conduct or misuse on the part of the injured person."[55] The court's apparent concern is to assure the manufacturer of adequate defenses where causation is an issue and where the plaintiff may have used the product in an unforeseeable manner.[56] But, as this analysis will demonstrate, the doctrine of strict liability furnishes the manufacturer with adequate defenses in these situations. And since these defenses are not necessarily related to the unreasonably dangerous requirement, what the *Byrns* court says regarding cause and misuse should not be read literally.

Several defenses to strict products liability in tort are recognized by courts and the Restatement of Torts.[57] These defenses include assumption of risk,[58] intervening causes,[59] and misuse.[60] The unreasonably dangerous requirement adds nothing to these defenses, and may, therefore, only serve

54. *See id.* at 495-96, 499 n.13, 525 P.2d at 1038, 1039 n.13. *See also* Wade, *supra* note 34.

55. 113 Ariz. at 267, 550 P.2d at 1068, *quoting* Annot., 54 A.L.R.3d 352, 358 (1973).

56. The court was concerned with limiting the liability of manufacturers. *Id.* The goal implies concern for adequate defenses since manufacturers typically are defendants in products liability cases. *Cf.* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 134, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 443 (1972) (expressing the view that the unreasonably dangerous requirement was a burden on the plaintiff).

57. One defense that is not allowed in strict liability cases is contributory negligence. "Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence." RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

58. *See* O.S. Stapley Co. v. Miller, 103 Ariz. 556, 561, 447 P.2d 248, 253 (1968); RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). In Arizona, contributory negligence and assumption of risk are questions for jury determination. ARIZ. CONST. art. 18, § 5. But since the jury can still award relief to a plaintiff who assumes a risk, *see* Chavez v. Pima County, 107 Ariz. 358, 361, 488 P.2d 978, 981 (1971), assumption of risk need not bar plaintiff's recovery. Instead, Arizona may have what amounts to a de facto comparative negligence rule permitting a jury, in its discretion, to weigh the relative fault of plaintiff and defendant and to impose liability where it sees fit. *See generally* Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974).

59. *See* Rogers v. Unimac Co., 115 Ariz. 304, 565 P.2d 181 (1977). *See also* Stroud v. Dorr-Oliver, Inc., 112 Ariz. 403, 411, 545 P.2d 1102, 1110 (1975).

60. *See* Stroud v. Dorr-Oliver, Inc., 112 Ariz. 403, 412, 545 P.2d 1102, 1111 (1975); RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965).

either to burden the plaintiff's case with an extra layer of proof,[61] or to confuse a jury.[62]

The Restatement recognizes assumption of risk as a defense to strict liability and defines it as the voluntary and unreasonable use of a product by the consumer having knowledge of the defect.[63] Assumption of risk is a well-established tort defense[64] and needs little elaboration. It is allowed as a defense to strict liability in Arizona,[65] and is one way of dealing with harm-producing conduct by the plaintiff.[66]

Intervening causes may also cut off liability, so this is a defense to strict liability.[67] For example, where an employer fails to perform normal maintenance on a product, the omission may cut off the liability of the manufacturer for injuries sustained by an employee.[68] Moreover, the Arizona Supreme Court has held that if it is apparent that a product failed to reach the user without a substantial change in its condition from when the product left the defendant's hands, and that such change may have been the proximate cause of the injury, it is error not to submit the issue of intervening cause to the jury.[69] While a product which undergoes substantial change

61. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).

62. A jury can only be confused if, for example, it is instructed both that misuse by a plaintiff is a defense, see text & notes 73-76 *infra*, and that the unreasonably dangerous requirement also limits liability in misuse cases. Nevertheless, the supreme court in *Byrns* seemed to believe that the additional requirement of showing unreasonable danger was an element to submit to the jury in misuse situations. *See* 113 Ariz. at 267, 550 P.2d at 1068. For a criticism of this aspect of the *Byrns* opinion, see text & notes 72-76 *infra*.

63. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

64. *See* W. PROSSER, *supra* note 3, § 68, at 439; RESTATEMENT (SECOND) OF TORTS § 496A (1965).

65. *See* Mather v. Caterpillar Tractor Corp., 23 Ariz. App. 409, 412, 533 P.2d 717, 720 (1975). *See also* discussion note 58 *supra*. California also recognizes assumption of risk as a defense to strict liability and rejects contributory negligence. Luque v. McLean, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169-70, 104 Cal. Rptr. 443, 449-50 (1972).

The *Byrns* court eliminated one source of confusion when it rejected the "patent-latent" distinction as a qualification of the obviousness test. 113 Ariz. at 267, 550 P.2d at 1068. The court noted that New York had also rejected the distinction in Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). 113 Ariz. at 267, 550 P.2d at 1068. The *Micallef* court pointed out that the patent-latent distinction amounted to an assumption of risk defense as a matter of law and relieved the defendant of having to prove that the plaintiff subjectively appreciated the risk. 39 N.Y.2d at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120. The "patent-latent" distinction had its roots in a case tried under a negligence theory, where the New York Court of Appeals maintained that a manufacturer is under no duty to guard against injuries from patent perils or from manifestly dangerous sources. Campo v. Scofield, 301 N.Y. 468, 472, 95 N.E.2d 802, 804, (1950), *overruled by* Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). In *Campo*, the court felt that rules requiring manufacturers to guard against patent hazards should be promulgated by the legislature, not the judiciary. *Id.* at 475, 95 N.E.2d at 805. The Arizona Court of Appeals adopted the patent-latent language in Maas v. Dreher, 10 Ariz. App. 520, 460 P.2d 191 (1969), where the plaintiff, who was injured by hitting the corner of a wastebasket lid to make it fit, could not recover for the resultant injury to her hand. *Id.* at 522, 460 P.2d at 193. In *Byrns*, the supreme court rejected the patent defect rule as a ground for denial of a plaintiff's recovery because "[i]ts only function is to encourage patent design defects." 113 Ariz. at 267, 550 P.2d at 1068. Nevertheless, the court retained the obviousness of a defect as one element to consider in determining whether a defect is unreasonably dangerous. *Id.*

66. Stroud v. Dorr-Oliver, Inc., 112 Ariz. 403, 412, 542 P.2d 1102, 1111 (1975).

67. *See* W. PROSSER, *supra* note 3, § 102, at 668-69.

68. *See* Bond v. Transairco Co., 514 F.2d 642, 645 (5th Cir. 1975); Rogers v. Unimac Co., 115 Ariz. 304, 307, 565 P.2d 181, 184 (1977).

69. *See* O.S. Stapley Co. v. Miller, 103 Ariz. 556, 560, 447 P.2d 248, 252 (1968).

after leaving the seller's hands may not have been unreasonably dangerous when sold,[70] injecting the unreasonably dangerous inquiry clouds the clear issue of intervening cause. Intervening cause is by itself a sufficient defense; "unreasonably dangerous" only serves to confuse the issue.[71]

The *Byrns* court further confounded products liability law by stating that the concept of an unreasonably dangerous defect might limit liability in cases involving the issue of misuse by the injured plaintiff.[72] However, misuse was already a defense to strict products liability,[73] and it is difficult to see what the unreasonably dangerous requirement adds. Simply stated, the doctrine of misuse provides that a seller escapes liability if it is proved that the product was being used in an unforeseeable manner or for an abnormal purpose.[74] Conversely, if a defect causes an injury when the product is used for its intended or a reasonably foreseeable use, there is no misuse.[75] The misuse rule of liability is necessary to prevent the manufacturer from becoming an insurer of the complete safety of his product.[76] However, since misuse, and the other defenses previously discussed, already serve as limitations on the use of strict liability,[77] it is illogical[78] and

70. *See* Rogers v. Unimac Co., 115 Ariz. 304, 306-07, 565 P.2d 181, 184 (1977).

71. For example, in Rogers v. Unimac Co., 115 Ariz. 304, 306-07, 565 P.2d 181, 183-84 (1977), the Arizona Supreme Court stressed the unreasonably dangerous requirement when the case could have easily been disposed of on the basis of intervening cause. The injuries sued upon in *Unimac* were caused, not by any unsafe condition in the machine which existed when the machine was originally sold; rather, the machine was in a condition conducive to injuring its user only by the intervening failure of the machine's owner to perform normal repairs. *See id.* at 310, 565 P.2d at 187. *See generally*, Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972) (discussing the unreasonably dangerous requirement as an extra layer of proof for the plaintiff).

72. 113 Ariz. at 267, 550 P.2d at 1068 (quoting Annot., 54 A.L.R.3d 352, 358 (1973)).

73. *See* W. PROSSER, *supra* note 3, § 102, at 668-69; RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965). *See generally* Dale & Hilton, *Use of the Product—When is it Abnormal?*, 4 WILLAMETTE L. REV. 350 (1967). Misuse originated as a defense to negligence, but also applies to strict liability. *See* W. PROSSER, *supra* note 3, § 102, at 668-69.

74. *See* Eshbach v. W.T. Grant & Co., 481 F.2d 940, 943 (3d Cir. 1973); Colosimo v. May Dep't Store Co., 466 F.2d 1234, 1235 (3d Cir. 1972); Hensley v. Muskin Corp., 65 Mich. App. 662, 663, 238 N.W.2d 362, 362 (1976); W. PROSSER, *supra* note 3, § 102, at 668-69.

75. *See* Moran v. Faberge, Inc., 273 Md. 538, 552, 332 A.2d 11, 21 (1975) (one of the most extreme cases in this respect: pouring cologne on a burning candle was foreseeable and manufacturer was held liable); Ford Motor Co. v. Matthews, 291 So. 2d 169, 174-75 (Miss. 1974) (foreseeable that someone might start tractor in gear while standing next to it). Apparently, only an unforeseeable misuse is a defense. *See id.*

A manufacturer may escape liability for foreseeable misuse of the product by providing an appropriate warning or directions. *See* McDevitt v. Standard Oil Co. of Tex., 391 F.2d 364, 370 (5th Cir. 1968); Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir.), *cert. denied*, 391 U.S. 913 (1967); W. PROSSER, *supra* note 3, § 102, at 669; RESTATEMENT (SECOND) OF TORTS § 402A, Comment j (1965).

76. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).

77. These defenses are closely related in that they all relate to the issue of proximate cause. It is often difficult to classify a particular course of conduct exclusively as assumption of risk, intervening cause, or misuse because often more than one category covers a given set of facts. *See, e.g.*, Colosimo v. May Dep't Store Co., 466 F.2d 1234, 1236 (3d Cir. 1972) (concurring opinion); McDevitt v. Standard Oil Co. of Tex., 391 F.2d 364, 369 & n.7 (5th Cir. 1968); Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 858, 861 (5th Cir.), *cert. denied*, 391 U.S. 913 (1967).

78. The Arizona Supreme Court's conclusion that the unreasonably dangerous requirement will limit the manufacturer's liability in cases where there is an issue of misuse or proximate cause is illogical because the limitation of liability is achieved by the already mentioned defenses. The requirement of unreasonable danger, on the other hand, is an element of the

unnecessary[79] to expect the unreasonably dangerous requirement to limit the seller's liability. The requirement adds no new legal limitation and can only serve to confuse a jury[80] and to impose an unwarranted burden on the plaintiff's case.[81]

Conclusion

The Arizona Supreme Court in *Byrns v. Riddell, Inc.* declined to follow California's lead in rejecting the unreasonably dangerous standard. Therefore, a plaintiff in Arizona must show not only that his injuries were proximately caused by a defect, but also that the defect made the product unreasonably dangerous. Although this additional requirement is of little value in cases involving manufacturing defects, it can be a useful means of ensuring the balancing of factors necessary to prevent the manufacturer from becoming an insurer against the possible existence of safer designs. Thus the standard should serve as a useful limitation on strict products liability in cases involving design defects. On the other hand, the unreasonably dangerous requirement is not apt to be a useful limiting device in cases raising proximate cause and misuse questions. In these latter situations, since adequate defenses already exist to prevent the manufacturer from becoming an insurer of his product, the unreasonably dangerous standard adds nothing but confusion. In short, the significance of the *Byrns* case is the clear holding that the unreasonably dangerous requirement remains an essential element in a plaintiff's strict products liability case in Arizona. However, the brief discussion of the manner in which the standard is to be applied was inadequate. It is hoped that the analysis provided herein will aid in the future clarification of this aspect of strict liability law.

plaintiff's case. *See* Epstein, *supra* note 14. Thus if the element of unreasonable danger is to provide a limitation in this area, a literal reading of the court's language seems to imply that the plaintiff is given the burden of showing the nonexistence of defenses as part of his case. Some cases indicate that courts have a tendency to find, first, that assumption of risk, intervening cause, or misuse has severed the causal relationship, and then to announce that for these reasons the product was not unreasonably dangerous. *See* Colosimo v. May Dep't Store Co., 466 F.2d 1234, 1235 (3d Cir. 1972); Rogers v. Unimac Co., 115 Ariz. 304, 307, 565 P.2d 181, 184 (1977). While it may be true that the product in question was not unreasonably dangerous, the invocation of the phrase obscures the true basis for the decisions.

79. *See* text & notes 23, 57-76 *supra*.

80. Where clear-cut issues relating to cause exist, the interjection of the vague phrase "unreasonably dangerous" is apt to confuse the jury since it actually relates to a different issue, that of the existence of a defect for which a manufacturer will be held liable. The addition of an unnecessary element into the factors for determining a manufacturing defect is not apt to be conducive to clarity. *See generally* discussion notes 23, 62 *supra*.

81. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d, 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972). *See generally* discussion note 21 *supra*.

B. CRIMINAL DEMANDS: AN EXCEPTION TO THE DUTY OF A BUSINESS PROPRIETOR TO ACT REASONABLY TO PROTECT HIS PATRONS

Robert and Pat Bennett, John Grimm, and others were present as customers at the Brown Fox Tavern on December 14, 1973.[1] Elden P. Baker, the owner, was tending bar.[2] At about 10:45 p.m., Mitchell Blazak entered the tavern and demanded money from Baker, threatening to shoot him if he refused to comply.[3] Baker retorted, "Piss on you, go ahead and shoot me, you are not getting my money."[4] Blazak then shot Baker four times, killing him, and shot Robert Bennett and John Grimm once each, seriously injuring Bennett and killing Grimm.[5]

Plaintiffs, Robert and Pat Bennett, and John and Edna Grimm, surviving parents of John Grimm, brought a negligence action against the estate of Elden P. Baker and Baker's widow.[6] Plaintiffs claimed damages for the injury to the plaintiff Bennett and for the wrongful death of John Grimm.[7] The trial court granted summary judgment and plaintiffs appealed.[8] In *Bennett v. Estate of Baker*,[9] the court of appeals affirmed the trial court's judgment, holding as a matter of law that Baker's duty to keep his premises reasonably safe for his patrons did not encompass the duty to avoid increasing the risk of criminal activity by antagonizing a robber.[10]

This casenote will examine the general concept of duty in negligence cases, and will then apply that examination to the analysis of duty by the court of appeals in *Bennett*. The argument will be made that although there is no duty to accede to criminal demands, there is a duty to exercise reasonable care for the safety of a business' patrons. The subsequent issues to be addressed are whether there was a breach of that duty by Baker, and if so, whether some policy reason exists for relieving him from liability. This casenote will conclude that it cannot be determined as a matter of law that Baker acted reasonably to protect his patrons' safety and, therefore, the issue of his negligence should have been submitted to the jury to determine whether his actions were reasonable under the circumstances.

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1. Bennett v. Estate of Baker, 27 Ariz. App. 596, 597, 557 P.2d 195, 196 (1976).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. 27 Ariz. App. 596, 557 P.2d 195 (1976).
10. *Id.* at 599, 557 P.2d at 198. For a plaintiff to prevail in a negligence case, he must establish that his injuries were caused by the defendant's conduct, that as a matter of policy he should be afforded protection from the injury he suffered, and that the defendant breached his duty to the plaintiff. Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1401 (1961).

Duty

Duty is a legal obligation to conform to a certain standard of conduct for the benefit of another.[11] The standard of conduct varies with the relationship of the plaintiff to the defendant. The essential question is whether the defendant should be legally responsible for what he has caused.[12] The issue is whether, as a matter of social policy, the invaded interest of the plaintiff[13] is entitled to legal protection from the defendant's act or failure to act.[14]

The relationship between Baker and the plaintiffs most properly fits within the common law classification of landowner-invitee.[15] The owner is

11. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 324 (4th ed. 1971). The legal standard in negligence cases requires the defendant to act reasonably in light of the apparent risk. *Id.*

12. *Id.* at 245.

13. In Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), Justice Cardozo, in the majority opinion, stated that a defendant owes a duty of care to those persons whom the average reasonable person would have foreseen a risk of harm under the circumstances. *Id.* at 344, 162 N.E. at 100. This is known as the foreseeable plaintiff test of duty. W. PROSSER, *supra* note 11, at 254-55. The rationale of the foreseeable plaintiff test is that the defendant's liability should not be unlimited. Therefore, his liability is restricted to those to whom the defendant could reasonably foresee danger of harm. Tucker v. Collar, 79 Ariz. 141, 146, 285 P.2d 178, 181 (1955). The Arizona courts adhere to this test. *See, e.g.*, Rager v. Superior Coach Sales, 111 Ariz. 204, 210, 526 P.2d 1056, 1062 (1974); Gilbert v. Quinet, 91 Ariz. 29, 33, 369 P.2d 267, 269 (1962); Tucker v. Collar, 79 Ariz. 141, 146, 285 P.2d 178, 181 (1955). Before liability will be imposed upon a defendant for his act or failure to act, the prevision of a reasonable person must recognize the danger of injury to the plaintiff, or one in the plaintiff's position. *See, e.g.*, Parsons v. Smithey, 109 Ariz. 49, 54, 504 P.2d 1272, 1277 (1973); Morris v. Ortiz, 103 Ariz. 119, 121, 437 P.2d 652, 654 (1968); West v. Cruz, 75 Ariz. 13, 19-20, 251 P.2d 311, 315 (1952). *See also* Genovay v. Fox, 50 N.J. Super. 538, 550, 143 A.2d 229, 235 (1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959).

14. W. PROSSER, *supra* note 11, § 53, at 245. This issue requires a policy determination as to whether the community will impose the obligation on the defendant given the circumstances of the particular case. City of Scottsdale v. Kokaska, 17 Ariz. App. 120, 124, 495 P.2d 1327, 1331 (1972). *See also* Green, *supra* note 10.

15. *See* Daugherty v. Montgomery Ward, 102 Ariz. 267, 269, 428 P.2d 419, 421 (1967). An invitee is one who enters premises upon business which concerns the proprietor. W. PROSSER, *supra* note 11, § 61. The relationship of landowner-invitee imposes a duty on the landowner to act so as to protect his invitees against known dangers and those which might be discovered through the exercise of reasonable care. Berne v. Greyhound Parks of Ariz., Inc., 104 Ariz. 38, 41, 448 P.2d 388, 391 (1968).

The nature and extent of the landowner's duty varies with the status of the plaintiff in relation to the landowner. Thus, a landowner has a duty to exercise a higher degree of care for an invitee than for a licensee (one who has permission to enter upon land but comes upon the land for his own benefit and not for the benefit of the landowner, *see* W. PROSSER, *supra* note 11, § 60, at 376) and has a greater obligation of care for a licensee than for a trespasser. *See* Shannon v. Butler Homes, Inc., 102 Ariz. 312, 316, 428 P.2d 990, 994 (1967); Robles v. Severyn, 19 Ariz. App. 61, 63, 504 P.2d 1284, 1286 (1967). These obligations derive from the landowner's possession of and control over the property. *See* 7 URB. L. ANN. 347, 349 (1974). Two theories may justify the imposition of a higher standard of conduct upon the possessor of land where an invitee comes onto his property than in the cases where a licensee or trespasser is involved. The first rationale is that the owner derives an economic benefit from allowing potential customers onto his property. W. PROSSER, *supra* note 11, § 61. An alternative theory is that the owner, by opening his property to the public, impliedly warrants that his premises have been made reasonably safe for public use. J. PAGE, THE LAW OF PREMISES LIABILITY 64-65 (1976). Arizona has recognized the existence of a landowner-invitee relationship and the higher standard of care required by such a relationship in a variety of situations. *See, e.g.*, Daugherty v. Montgomery Ward, 102 Ariz. 267, 269, 428 P.2d 419, 421 (1967) (store owner-customer); Pierce v. Lopez, 16 Ariz. App. 54, 57-58, 490 P.2d 1182, 1185-86 (1971) (bar owner-patron); Burke v. Arizona Biltmore Hotel, Inc., 12 Ariz. App. 69, 71, 467 P.2d 781, 783 (1970) (hotel proprietor-guest); Gee v. Salcido, 2 Ariz. App. 280, 281-82, 408 P.2d 42, 43-44 (1965) (store proprietor-shopper). In *Pierce*, the court stated that the duty owed by a bar owner to a patron was to exercise

under an affirmative duty to make his premises reasonably safe for use by his invitees, but he is not an insurer of their safety and is not required to keep the premises absolutely safe.[16] The owner's duty extends to reasonable protection of his invitees against the negligence or even intentional attacks of third parties.[17] The *Bennett* court cited *Burke v. Arizona Biltmore Hotel, Inc.*,[18] for the proposition that an owner of premises is under an affirmative duty to make those premises safe, and then cited *Pierce v. Lopez*[19] as authority for establishing one limitation on the duty of a bar owner resulting from the status relationship.[20] The *Pierce* court, however, first found that the relationship of bar owner-patron established a duty, and then went on to a determination of whether the bar owner was negligent.[21] In contrast, the *Bennett* court simply concluded that the duty of the owner to make the premises reasonably safe did not include the duty to accede to criminal demands.[22] The court emphasized the deterrent effect of Baker's resistance to criminal demands without analyzing the nature of the risk to the patrons.[23]

No court has held that a proprietor's duty of reasonable care includes an obligation to accede to criminal demands; however, they have held the proprietor to an obligation of reasonable conduct when faced with criminal activity.[24] The *Bennett* court was correct in not imposing a duty to accede to criminal demands because imposing such a duty would be equivalent to a decision that, as a matter of law, it is never reasonable to resist criminal demands—that is to say, the risk of harm to the patrons always outweighs the utility of resisting—when in fact, in some situations there might be a high probability of success in resisting criminal activity and in such cases the utility of resistance would outweigh the risk, thus making resistance

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reasonable care and vigilance to protect his patrons from reasonably foreseeable injury or annoyance at the hands of other patrons. 16 Ariz. App. at 57, 490 P.2d at 1185. Furthermore, a bar owner must act reasonably to prevent harm from the negligent or intentional acts of persons who have entered the premises. *Id.* at 57-58, 490 P.2d at 1185-86. The court in *Bennett* recognized the duty imposed by the status relationship, 27 Ariz. App. at 598, 557 P.2d at 197, but failed to utilize it. *See* text & notes 18-22 *infra*.

16. *See* Berne v. Greyhound Parks of Ariz., Inc., 104 Ariz. 38, 41, 448 P.2d 388, 391 (1968); Burke v. Arizona Biltmore Hotel, Inc., 12 Ariz. App. 69, 71, 467 P.2d 781, 783 (1970). The *Bennett* court expressly recognized the duty imposed by this status relationship. 27 Ariz. App. at 598, 557 P.2d at 197.

17. *See, e.g.*, Pierce v. Lopez, 16 Ariz. App. 54, 58, 490 P.2d 1182, 1186 (1971); Genovay v. Fox, 50 N.J. Super. 538, 549, 143 A.2d 229, 234 (1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959); Sinn v. Farmer's Deposit Sav. Bank, 300 Pa. 85, 89, 150 A. 163, 164 (1930).

18. 12 Ariz. App. 69, 467 P.2d 781 (1970).

19. 16 Ariz. App. 54, 490 P.2d 1182 (1971). In *Pierce*, the court addressed the issue of whether a bar owner was liable for injuries sustained by one of his patrons from the assault of another patron. *Id.* at 57, 490 P.2d at 1185. The court examined the common law and determined that the relationship of bar owner-patron established the bar owner's duty. *Id.* at 58, 490 P.2d at 1186. The court then went on to find that the defendant's motion for directed verdict was improperly denied as there was insufficient evidence from which a jury could find negligence. *Id.* at 58-59, 490 P.2d at 1186-87.

20. *See* 27 Ariz. App. at 598, 557 P.2d at 197.

21. 16 Ariz. App. at 58-59, 490 P.2d at 1186-87.

22. 27 Ariz. App. at 598-99, 557 P.2d at 197-98.

23. *Id.* See text & notes 25-34 *infra*.

24. *See, e.g.*, Kelly v. Kroger Co., 484 F.2d 1362, 1363 (10th Cir. 1973); Genovay v. Fox, 50 N.J. Super. 538, 549, 143 A.2d 229, 234 (1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959); Noll v. Marian, 347 Pa. 213, 215, 32 A.2d 18, 19 (1943).

reasonable. The *Bennett* court stopped short in its analysis, however. By affirming summary judgment on the ground that there was no duty to accede, with little consideration of whether Baker acted reasonably,[25] the court in effect determined that it is always reasonable to resist criminal demands irrespective of the utility of the resistance or the magnitude of the risk of harm to patrons.[26] In practical terms, landowners are granted the power to disregard patron safety whenever they decide to refuse criminal demands since no injured patron will be able to take his negligence action to the jury. A better approach would be to hold that although there is no duty to accede to criminal demands, there is a duty to act reasonably to protect patrons from injury, and that in some situations it would be reasonable to resist criminal demands and in others it would be reasonable to accede to those demands.[27] In those situations where it cannot be determined that the defendant's resistance was reasonable as a matter of law, the question should go to the jury to determine whether his actions were reasonable under the circumstances of that case.

Although it properly denied the existence of a duty to accede to criminals, the *Bennett* court failed to consider all the competing considerations necessary to establish the extent of the duty owed by Baker.[28] The process involves balancing the probability and gravity of harm to the plaintiff and defendant against the utility of the defendant's conduct, the extent to which the plaintiff's protected interest will be advanced by the defendant's particular course of conduct, and the social value of the interest protected by the plaintiff.[29] In analyzing these factors in situations like that in *Bennett*, the probability of harm to the patrons is obvious in the event the robber is provoked to start shooting.[30] The chance that he will discriminate with respect to his victims is slight.[31] In *Bennett*, Baker realized, or should have realized, the grave risk of harm, at least to himself, in refusing the

25. The only portion of the court's opinion which bears on a consideration of reasonableness consists of the court's comment that "[h]is statement certainly did not involve the same degree of danger as the physical actions in *Helms* and *Schubowsky*." 27 Ariz. App. at 599, 557 P.2d at 198.

26. *See id.*

27. *See* Genovay v. Fox, 50 N.J. Super. 538, 143 A.2d 229 (1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959).

28. *See* W. PROSSER, *supra* note 11, § 31; RESTATEMENT (SECOND) OF TORTS §§ 291-293 (1965).

29. In Mills v. Charles Roberts Air Conditioning Appliances, 93 Ariz. 176, 379 P.2d 455 (1963), the court, in reviewing whether the jury was properly instructed, stated that *all* the elements contained in § 291 of the Restatement must be submitted to the jury for their determination on the question of negligence. 93 Ariz. at 179, 379 P.2d at 457.

30. In Palsgraf v. Long Island R. Co., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1929), the court recognized shooting as an activity so dangerous as to require a person to have a degree of foresight not far from that of an insurer.

Attempts to prevent a robbery, failure to take the robber seriously, and use of physical force against a robber have been cited as causes of victim precipitated homicide. M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 252 (1958). *See also* H. VON HENTIG, THE CRIMINAL AND HIS VICTIM 438 (1948).

31. In *Bennett*, the robber did not merely shoot the owner who had provoked him but also two customers. *See* text & note 5 *supra*.

gunman's demand and inviting him to shoot. Against this interest in protecting patrons from harm, the utility of Baker's conduct in preventing robberies must be weighed. The *Bennett* court determined, without any consideration of the effectiveness of Baker's actions, that the utility of his conduct outweighed any lessening of the risk to patrons which might have occurred had he acceded to the robber's demands.[32] A balancing of policy considerations was performed by the court in *Boyd v. Racine Currency Exchange*[33] to determine whether a duty should be imposed on a bank teller to accede to a bank robber's demands. The *Boyd* court concluded that the likelihood of the injury, the magnitude of the burden of guarding against it, and the consequences of placing the burden on the defendant would lead to increased criminality and therefore found no duty.[34] In *Boyd*, the teller was protecting herself from injury by refusing the gunman's alternative demand to open her bullet proof teller's cage.[35] In *Bennett*, however, the action of the bar owner in no way protected either himself or his patrons from harm, and the protection provided for the money was only marginal.[36]

On the other hand, it could be argued, as the *Bennett* court asserted, that accession to criminal demands will simply lead to more robberies as robbers realize that their demands will be met.[37] The increase in robberies would lead to increased danger to invitees due to an increased exposure to criminality.[38] Given the gravity of the potential harm as against the speculative nature of the utility of Baker's conduct, the court should have sent the case to the jury to determine whether Baker acted reasonably under the circumstances of the case.[39]

As compared with *Bennett*, *Genovay v. Fox*[40] provides a more rea-

32. *See* 27 Ariz. App. at 599, 557 P.2d at 198.

33. 56 Ill. 2d 95, 306 N.E.2d 39 (1974).

34. *Id.* at 100, 306 N.E.2d at 42. The court emphasized the utility of the defendant's conduct, and reasoned that, for the protection of future business invitees, no duty should be imposed upon the defendant bank. *Id.* This case has been criticized on the ground that sanctioning resistance to robbers might effectively create a greater risk of harm to the invitee rather than reducing the risk. *See* 6 ST. MARY'S L.J. 517, 524-25 (1974). "Administrators of institutions such as banks could react to *Boyd* by instructing their personnel to safeguard funds regardless of any threats made to invitees by prospective robbers. Such a reaction could only cause an increase in deaths and injuries to invitees." *Id.* at 524-25. *Boyd* has also been criticized for the emphasis it placed on the protection of property as opposed to the protection of life. *See* 7 CREIGHTON L. REV. 138, 144-45 (1973). This criticism is supported by the fact that the bank's funds were insured, there was a low incidence of successful bank robberies, and there was a high rate of recovery of stolen funds. *Id.* at 145.

35. *See* 56 Ill. 2d at 100, 306 N.E.2d at 42.

36. Although Baker's response can be regarded as an obstacle to the gunman's robbery, its effectiveness is questionable; the robber could have shot Baker and then taken the money.

37. *See* 27 Ariz. App. at 599, 557 P.2d at 198. Baker was gambling that the robber would rather abort his attempt than commit a murder. *See generally* Note, *Kelly v. Kroger Company and The Duty Owed to Business Invitees: An Alarming Definition of Negligence*, 59 IOWA L. REV. 1351 (1974).

38. *See* 6 ST. MARY'S L.J. 517, 524 (1974).

39. J. PAGE, *supra* note 15, at 90. *See also* M.G.A. Theaters, Inc. v. Montgomery, 83 Ariz. 339, 343, 321 P.2d 1009, 1011 (1958).

40. 50 N.J. Super. 538, 143 A.2d 229 (1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959).

sonable application of the policy considerations in determining whether a special duty should be imposed upon an owner of premises when confronted by an armed robber. The *Genovay* court reasoned that the risk of serious harm to invitees weighed heavily enough as a social policy consideration that immunity should not be extended to the defendant as a matter of law.[41] The court held that the utility of the defendant's conduct was for the consideration of the jury in determining whether the defendant had acted reasonably in light of all the circumstances.[42]

By precluding a jury determination of unreasonable conduct in all cases presenting these circumstances, the court effectively recognizes a higher standard of care as being owed to trespassers than to business invitees. In most states, a landowner discovering the presence of a trespasser must use ordinary care to avoid injury to him, and the landowner will be subject to liability for any excesses of force.[43] Under *Bennett*, the patrons of an innkeeper who resist a robbery attempt will have no opportunity to assert that the defendant breached his obligation of reasonable protection.

Had the *Bennett* court found, as it should have, that Baker was under a duty to act as a reasonable person to avoid an unreasonable risk of harm to

41. *Id.* at 558, 143 A.2d at 239.

42. *Id. Genovay* involved the liability of an owner of a bowling alley for the injuries sustained by two patrons who were injured in resisting an armed robbery. *Id.* at 543, 143 A.2d at 231. The *Genovay* court left to the jury whether the actions of the bar owner were those of a reasonable man acting in an emergency or whether his actions were a deliberate attempt to provoke his patrons to attempt to apprehend the bandit. *Id.* at 557, 143 A.2d at 239. The court stated that the owner's actions in delaying the progress of the robbery may have induced the patrons to attempt to apprehend the bandit. *Id.* at 561, 143 A.2d at 241. The court also left to the jury whether the utility of the owner's actions in stalling the robber outweighed the risk to patrons in those circumstances, *i.e.*, whether the owner's conduct was reasonable. *Id.* at 558, 143 A.2d at 239. The facts of *Bennett* are well-suited to the analysis in *Genovay*. Both cases involved a status relationship, a confrontation with an armed robber, and an incitement of criminal activity by the owner.

In its discussion of duty, the *Bennett* court also cited Noll v. Marian, 347 Pa. 213, 32 A.2d 18 (1943); *see* 27 Ariz. App. at 598, 557 P.2d at 197, wherein a bank customer was shot during a robbery. The decision there, however, did not turn on the question of duty. The court recognized that a duty was established by the status relationship, 347 Pa. at 215, 32 A.2d at 19, and held the defendant to the standard of conduct of a reasonable person under the circumstances. The duty was to use reasonable care for the business invitee's protection. The court then determined that the defendant had acted reasonably in light of the emergency situation, and that the plaintiff's injuries were the result of an unforeseeable independent act of a third party. *Id.* See text & notes 85-93 *infra*. In *Noll*, seconds after the robbers announced a holdup and warned everyone to remain still, the teller serving the plaintiff dropped out of sight behind the counter. 347 Pa. at 215, 32 A.2d at 19. The *Genovay* court, on the other hand, determined that the defendant's actions could not be classified as an emergency response, and instead submitted the reasonableness issue to the jury. 50 N.J. Super. at 557-58, 143 A.2d at 239.

Another case cited by the *Bennett* court, Helms v. Harris, 281 S.W.2d 770 (Tex. Civ. App. 1955); *see* 27 Ariz. App. at 598, 557 P.2d at 197, although recognizing that actions in self-defense or in defense of property are privileged in most cases, added the caveat that if such actions involved an unreasonable risk of harm to third persons, the actor would be subject to liability. 281 S.W.2d at 771-72.

43. *See* W. PROSSER, *supra* note 11, § 58. The traditional standard of conduct required of a landowner was to refrain from wilful and wanton conduct toward a trespasser. *Id.* Currently, this standard has been extended to impose a duty to use ordinary care to avoid injuring a discovered trespasser. *See id.* at 362. Baker's conduct could be characterized as wilful or wanton. *See* text & notes 51-62 *infra*. This presents the anomolous situation of excusing a business proprietor for wilful and wanton misconduct toward invitees, who traditionally are afforded a high standard of care, while holding a landowner liable for like conduct toward a discovered trespasser.

his patrons,[44] a determination of whether Baker breached that duty would then have been necessary.[45] This issue will now be addressed.

Breach of Duty

On the facts of the *Bennett* case, it would be very difficult for a jury to find that Baker acted reasonably under the circumstances.[46] The *Boyd* case[47] has been criticized for absolving the defendant of liability.[48] Yet that case on its facts still presented a greater justification for relieving the defendant from liability than did *Bennett*. In *Boyd*, the court emphasized the utility of the bank teller's action in protecting both her life and her employer's funds by refusing the robber's demands.[49] However, in that case the teller was in a bullet proof cage and one of the robber's demands was that she open the cage, thereby exposing herself to danger.[50] In *Bennett*, Baker's action in no way protected either himself or his patrons, and the protection provided for the money was minimal.[51] Baker must have realized there was an unreasonable risk of bodily harm, at least to himself; but instead of avoiding it, he chose to invite it.[52]

In *Schubowsky v. Hearn Food Store, Inc.*,[53] the court affirmed a directed verdict holding that the defendant was justified in taking action to defend himself and his employer's property against an armed robber.[54] In *Bennett*, however, the owner's action might have carelessly jeopardized his own life as well as those of his patrons, and cannot be justified on the basis

44. *See* W. PROSSER, *supra* note 11, § 31, at 146.

45. Finding a breach of duty involves an application of the standard of conduct, established with the duty, to the particular facts of the case in issue. The determination of whether a defendant was negligent is a question of fact for the jury unless the evidence is insufficient to make a jury issue. Genovay v. Fox, 29 N.J. 436, 438, 149 A.2d 212, 212 (1959). Where reasonable men could not differ as to whether a defendant's conduct was negligent or not, the question is for the court. W. PROSSER, *supra* note 11, § 37, at 208.

46. An issue raised in the briefs, but not addressed by the court, was that Baker's action was in violation of his own rules. Brief for Appellant at 3-4, Bennett v. Estate of Baker, 27 Ariz. App. 596, 557 P.2d 195 (1976). Baker's wife testified that he had instructed all his employees not to resist any armed robbery, but to give the robber the money without resistance. *Id.* The rules of an employer have probative value in determining whether the defendant-employer realized or should have realized that his actions involved an unreasonable risk of harm. *See* R.L. Bryan v. Southern Pacific Co., 79 Ariz. 253, 260, 286 P.2d 761, 765 (1955). This factor should at least have been a consideration in the court's determination as to the reasonableness of Baker's action. In addition, Baker had been drinking for approximately five hours at the time the bandit entered the bar. Brief for Appellant, *supra* at 2-3. This was in violation of ARIZ. REV. STAT. ANN. § 4-244(12) (Supp. 1977), and hence negligence per se. *See* W. PROSSER, *supra* note 11, § 36, at 200-02. The court failed to consider this issue which would bear on a determination of whether Baker's actions were reasonable.

47. Boyd v. Racine Currency Exchange, 56 Ill. 2d 95, 306 N.E.2d 39 (1974). See text & notes 33-35 *supra*.

48. *See* discussion note 34 *supra*.

49. 56 Ill.2d at 100, 306 N.E.2d at 42. The danger to the actor himself and the value of the interest protected are among the factors to be considered in judging the reasonableness of the defendant's actions. *See* W. PROSSER, *supra* note 11, § 11; RESTATEMENT (SECOND) OF TORTS §§ 291-293 (1965).

50. 56 Ill. 2d at 99-100, 306 N.E.2d at 42.

51. See text & note 36 *supra*.

52. *See* 27 Ariz. App. at 597, 557 P.2d at 196.

53. 247 So. 2d 484 (Fla. Ct. App. 1971).

54. *Id.*; *see* Bennett v. Estate of Baker, 27 Ariz. App. at 598, 557 P.2d at 197. The *Schubowsky* opinion contains a bare statement of a conclusion, unsupported by any reasoning.

of self-defense. Further, although the *Schubowsky* decision bases the defendant's immunity on the justification of defense of life and property, none of the cases cited by that court[55] upholds an unqualified privilege to resist criminal activity.[56] Given the nature of Baker's actions, it is fair to say that a jury could easily find the conduct to be unreasonable.[57] There is, however, the possibility that Baker's action could be considered the act of a reasonable person faced with an emergency situation. The emergency doctrine applies to sudden, unexpected situations that call for immediate action, and to situations where the actor does not have reasonable time for deliberation.[58] The defendant in *Noll v. Marian*[59] was relieved from liability on the basis of this doctrine.[60] However, the doctrine should not apply to the facts in *Bennett*, where Baker had previously considered the possibility of robbery and had instructed his employees as to what he considered the most prudent action to take in such a situation.[61] Baker's reaction of coolly taunting the gunman to shoot would also not seem to be the normal reaction of a person faced with an emergency. A more plausible emergency reaction would probably have been an attempt to flee or to attack the robber. In any event, this would have been a question for the jury.

Under the undisputed factual circumstances of the robbery, Baker's actions could be interpreted as being not merely negligent but in fact wilful and wanton. The characterization of conduct as wilful or wanton applies to an intentionally done act of an unreasonable character, the risk being known to the actor, or so obvious he is presumed to be aware of it, and the risk being so great there is a high probability that harm will follow.[62] Wilful and wanton conduct takes on the "aspect of highly unreasonable conduct, or an extreme departure from ordinary care."[63] A defendant who is guilty of

55. *See* Miracle v. Kriens, 160 Fla. 48, 33 So. 2d 644 (1948); Yingst v. Pratt, 139 Ind. App. 695, 220 N.E.2d 276 (1966); Noll v. Marion, 347 Pa. 213, 32 A.2d 18 (1943); Helms v. Harris, 281 S.W.2d 770 (Tex. Civ. App. 1955); 247 So. 2d at 484-85.

56. In Miracle v. Kriens, 160 Fla. 48, 33 So. 2d 644 (1948), a bar patron was shot in the course of a struggle between a bar employee and an intruder. The court held that there was no foreseeable danger to the injured plaintiff and that the defendant's employee acted reasonably under the circumstances. *Id.* at 53, 33 So. 2d at 647. In Yingst v. Pratt, 139 Ind. App. 695, 220 N.E.2d 276 (1966), the court recognized that the resistance offered must be commensurate with the risk involved. *Id.* at 700, 220 N.E.2d at 279. Helms v. Harris, 281 S.W.2d 770 (Tex. Civ. App. 1955), held defendants to a standard of conduct not to expose an invitee to an unreasonable risk of harm through actions taken in self-defense or defense of property. *Id.* at 772. In Noll v. Marian, 347 Pa. 213, 32 A.2d 18 (1943), the defendant was held to a standard of conduct requiring him to act as a reasonable man in the circumstances. *Id.* at 214, 32 A.2d at 19.

57. There was sufficient evidence to make an issue of fact for the jury as to whether Baker acted reasonably. *See* discussion note 42 *supra*. The court in Genovay v. Fox, 29 N.J. 436, 149 A.2d 212 (1959), reversed the court of appeals on the ground that there was insufficient evidence adduced from which a jury could conclude the defendant was negligent. *Id.* at 438, 149 A.2d at 214.

58. *See* W. PROSSER, *supra* note 11, § 33, at 169-70.

59. 347 Pa. 213, 32 A.2d 18 (1943).

60. *Id.* at 215, 32 A.2d at 19. *See also* "The Duty of a Police Officer to a Pursued Motorist," 18 ARIZ. L. REV. 585, 834, 844 (1976).

61. See discussion note 45 *supra*.

62. W. PROSSER, *supra* note 11, § 34, at 185; RESTATEMENT (SECOND) OF TORTS § 500 (1965).

63. W. PROSSER, *supra* note 11, § 34, at 185; *see, e.g.*, Nichols v. Baker, 101 Ariz. 151, 153, 416 P.2d 584, 586 (1966); R.L. Bryan v. Southern Pacific Co., 79 Ariz. 253, 256, 286 P.2d 761, 762 (1955); Barry v. Southern Pacific Co., 64 Ariz. 116, 121, 166 P.2d 825, 828 (1946).

wanton negligence is treated as if he were guilty of an intentional wrong;[64] he is denied the defense of contributory negligence[65] and is liable for punitive damages.[66] One consequence of Baker's conduct being characterized as reckless or wilful is that he would not be relieved of liability on the ground that he was confronted with an emergency situation.[67] The risk and gravity of harm in the *Bennett* case were obvious. Baker's action gave no evidence of any consideration of the magnitude of harm and the substantial likelihood that it would follow.[68] Baker was acting in reckless disregard not only of his patron's safety but also of his own.[69] After it is established that the defendant owed a duty, and that he breached that duty, it still must be shown that the breach was a cause of the plaintiff's injury.[70] Whether Baker's conduct was the cause of Bennett's injury will now be considered.

Cause in Fact

The issue in *Bennett* in relation to causation was whether Baker's words[71] were a cause of the plaintiff's injuries.[72] The defendant's act is a cause in fact of the plaintiff's injury if, in a "natural and continuous sequence,"[73] it produced the injury and if it is an act "without which the injury would not have occurred."[74] In applying this test, the court asks whether under the circumstances the particular result might reasonably be expected to follow from the defendant's particular act or omission.[75] The only requirement is that the plaintiff present probable facts from which a causal relation may reasonably be inferred.[76] Whether Baker's action more

64. Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, 111, 166 P.2d 816, 821 (1946).
65. Evans v. Pickett, 102 Ariz. 393, 395, 430 P.2d 413, 415 (1967).
66. W. PROSSER, *supra* note 11, § 2, at 9.
67. See text & notes 58-61 *supra*.
68. See text & notes 1-5, 51-52 *supra*.
69. Self-defense and defense of property are factors weighing in favor of relieving a defendant of liability because they weigh on the side of the social utility of his action and balance against the risk to patrons. See discussion note 32 *supra*. However, where the defendant acts in disregard of his own safety, the possible result detracts from the utility of his conduct.
70. *See* W. PROSSER, *supra* note 11, § 41.
71. See text accompanying notes 1-5 *supra*.
72. A similar issue was presented in Boyd v. Racine Currency Exchange, 56 Ill. 2d 95, 306 N.E.2d 39 (1974), where a robber threatened to shoot a patron, the bank teller refused the robber's demands, and the robber then shot and killed the patron. *Id.* at 96, 306 N.E.2d at 40. The court recognized that complete acquiescence might have prevented the decedent's death. *Id.* at 99-100, 306 N.E.2d at 42. This recognition raises the question of whether the teller's action was a cause of the decedent's death. The dissent in *Boyd* argued that this issue of fact was for the jury, and that the issue could not be determined as a matter of law. *Id.* at 101, 306 N.E.2d at 42. The *Boyd* court has also been criticized for placing more emphasis on its own "speculative hypothesis" than on the "declared intent of the robber," and in so doing, placing an unreasonable burden of proof on the plaintiff. *See* 7 CREIGHTON L. REV. 138, 145-46 (1973).
73. Pacht v. Morris, 107 Ariz. 392, 394, 489 P.2d 29, 31 (1971); McDowell v. Davis, 104 Ariz. 69, 71, 448 P.2d 869, 871 (1969); *see* 11 ARIZ. L. REV. 61, 182, 185 (1969).
74. 11 ARIZ. L. REV. 61, 182, 185 (1969). This is called the "but for" or "sine qua non" rule. *See* W. PROSSER, *supra* note 11, § 41, at 238-39.
75. *See* W. PROSSER, *supra* note 11, § 41, at 242. Cause in fact is a fact question for the jury. *Id.*
76. E.L. Jones Constr. Co. v. Noland, 105 Ariz. 446, 453, 466 P.2d 740, 747 (1971).

probably than not[77] caused the plaintiff's injury is a question which should have gone to the jury. However, even if the defendant's conduct in fact caused the plaintiff's injury, the court must determine whether, for policy reasons, the defendant is to be relieved of liability on the basis of proximate cause.

Proximate Cause

Proximate cause is, like duty, a policy determination made by the court.[78] It is to be distinguished from causation in fact,[79] which is a jury question.[80] Proximate cause asks whether, given a duty and breach by a defendant, there is any policy consideration which would justify relieving the defendant of liability in the particular case.[81] In the *Bennett* case, assuming Baker caused the robber to shoot,[82] the issue with reference to proximate cause is whether the robber's action stepped between Baker's negligence and the plaintiffs' injuries to cut off Baker's liability.[83] Phrased in traditional terms the question is whether the robber's action "superseded" Baker's negligence.[84] A superseding cause is one which overrides the defendant's negligence and becomes the responsible cause itself.[85] Superseding cause is not a question of the fact of causation at all,[86] but is rather a question of whether, for policy reasons, the defendant is to be held liable for an injury brought about by a later independent cause.[87] A defend-

77. The standard of proof used in civil cases is the preponderance of the evidence. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 339 (2d ed. E. Cleary 1972). "[P]roof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence." *Id.* at 794.

78. To distinguish proximate cause from duty, it may prove helpful to utilize a temporal analysis. The duty issue arises in the first instance as a question of whether the defendant stands in any relation to the plaintiff so as to impose the obligation to act for his protection. *See* W. PROSSER, *supra* note 11. Proximate cause deals with the connection, if any, between defendant's duty and the plaintiff's injury, *i.e.*, is there any reason for relieving the defendant of liability. *See* W. PROSSER, *supra* note 11, § 42, at 245.

79. W. PROSSER, *supra* note 11, § 42, at 244.

80. *Id.* § 41, at 237.

81. *See id.* § 42, at 244-45.

82. See text & notes 71-77 *supra*.

83. In Arizona, the "proximate cause of an injury is any cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury, and without which, the injury would not have occurred." Pacht v. Morris, 107 Ariz. 392, 394, 489 P.2d 29, 31 (1971).

84. Courts in Arizona variously refer to a superseding cause as an "efficient intervening cause," *see id.*; McDowell v. Davis, 104 Ariz. 69, 71, 448 P.2d 869, 871 (1969), or as a "superseding cause," *see* Collins v. Maricopa County, 15 Ariz. App. 354, 358, 488 P.2d 991, 995 (1971); Santello v. Cooper, 12 Ariz. App. 123, 129, 468 P.2d 390, 396 (1970), *vacated*, 106 Ariz. 262, 475 P.2d 246, or simply as an "intervening cause," E.L. Jones Constr. Co. v. Noland, 105 Ariz. 446, 453, 466 P.2d 740, 747 (1970).

85. E.L. Jones Constr. Co. v. Noland, 105 Ariz. 446, 453, 466 P.2d 740, 747 (1970). Once a defendant's negligence is an established fact, there can be innumerable intervening causes. The courts have, in order to keep the defendant's liability within reasonable limits, adopted the doctrine of superseding cause. A superseding cause is one which the defendant could not reasonably have foreseen as adding to or acting upon his negligence, and which relieves the defendant of liability. *See generally* W. PROSSER, *supra* note 11, § 44, at 270-73; *see also* 7 URB. L. ANN. 347, 351 (1974).

86. *See* 11 ARIZ. L. REV. 61, 182, 183 (1969).

87. An independent action which could not reasonably have been foreseen is characterized as a superseding cause and acts to relieve the defendant of responsibility for the plaintiff's

ant's liability in these cases is predicated on a finding that the intervention of the subsequent independent act is within the scope of the risk created by the defendant's negligent act.[88] The courts, in making this finding, use a test of foreseeability.[89] In Arizona, the test for determining whether liability should be imposed where an act distinct from that of the defendant has intervened is whether that intervening act should reasonably have been anticipated by the defendant.[90]

A superseding cause must be one which steps between the defendant's negligent act and the plaintiff's injury, and changes the normal sequence of events, thereby producing a result different from that which could ordinarily have been expected or anticipated by the defendant.[91] The fact that a superseding cause takes the form of a criminal act does not necessarily relieve the negligent actor from liability for his negligence.[92] An intentionally tortious or criminal act will not be a superseding cause if the defendant at the time of his negligent act realized or should have realized the likelihood of the criminal act.[93] An analysis of *Bennett* demonstrates that the action of the robber was not a superseding cause, but rather the expectable reaction of a gunman to Baker's retort.[94]

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injury. *See* Tucson Rapid Transit v. Tocci, 3 Ariz. App. 330, 334, 414 P.2d 179, 183 (1966). *See also* RESTATEMENT (SECOND) OF TORTS §§ 441-449 (1965).

88. W. PROSSER, *supra* note 11, § 44, at 273.

89. *See, e.g.*, Stroud v. Dorr Oliver, 112 Ariz. 403, 411, 542 P.2d 1102, 1110 (1975); Herzberg v. White, 49 Ariz. 313, 321-22, 66 P.2d 253, 257 (1937); Mesa City v. Lesueur, 21 Ariz. 532, 539, 190 P. 573, 576 (1920).

90. *See* E.L. Jones Constr. Co. v. Noland, 105 Ariz. 446, 453, 466 P.2d 740, 747 (1970); O'Reilly Motor Co. v. Rich, 3 Ariz. App. 21, 25, 411 P.2d 194, 198 (1966).

91. E.L. Jones Constr. Co. v. Noland, 105 Ariz. 446, 453, 466 P.2d 740, 747 (1970).

92. *See, e.g.*, Jensen v. United States, 88 F. Supp. 542, 544, (E.D. Pa.), *aff'd*, 184 F.2d 72 (3d Cir. 1949); Nichols v. City of Phoenix, 68 Ariz. 124, 138, 202 P.2d 201, 210 (1949); Pierce v. Lopez, 16 Ariz. App. 54, 61, 490 P.2d 1182, 1189 (1971) (Howard, J., concurring). *See also* RESTATEMENT (SECOND) OF TORTS § 449 (1965).

93. RESTATEMENT (SECOND) OF TORTS § 448 (1965). No Arizona case law exists on this point, but, in the absence of prior decisions to the contrary, the Arizona Supreme Court will follow the Restatement in cases where it is applicable. MacNeil v. Perkins, 84 Ariz. 74, 81, 324 P.2d 211, 215 (1958). The issue of foreseeability of intervening criminal activity arises in either of two contexts: first, whether the proprietor should have foreseen that the criminal activity was a likely occurrence and taken steps to prevent it; or second, whether injury to a patron is a reasonably foreseeable occurrence once the initial criminal instrusion is an established fact. *See* Genovay v. Fox, 50 N.J. Super. 538, 143 A.2d 229 (1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959) (discussion of foreseeability in both contexts). *See also* 6 ST. MARY'S L.J. 517, 519 (1974).

Courts have applied the foreseeability test in various contexts. In Yingst v. Pratt, 139 Ind. App. 695, 220 N.E.2d 276 (1966), the dissenting justices stated that the foreseeability test would be applied after an armed robbery became an established fact in determining whether the defendant's action in resisting the crime was reasonable under the circumstances. *See id.* at 701-10, 220 N.E.2d at 280-85. The court in *Yingst* excused the tavern owner from liability on the ground that he was justified in defending his property. In contrast to this rationale, the *Bennett* court did not require that Baker follow any standard of reasonableness; instead, the court determined that he was wholly justified in taking whatever course of action he desired. *See* 27 Ariz. App. at 599, 557 P.2d at 198. The court in Noll v. Marian, 347 Pa. 213, 32 A.2d 18 (1943), applied the foreseeability test to the question of whether a bank robbery was foreseeable. The court held that it was not, and therefore the defendant was not negligent in failing to take precautions to prevent a robbery. *Id.* at 214, 32 A.2d at 19.

94. The only other conclusion to be drawn would be that Baker thought that the robber was bluffing and would back down if resisted. This is a questionable interpretation and even if accepted, the issue of whether this was Baker's intention is properly a question of fact for the jury. *See* W. PROSSER, *supra* note 11, § 37, at 206. Where reasonable men can differ as to an inference to be drawn from the evidence, the question is for the jury. *Id.*

The *Genovay*[95] case and *Helms v. Harris*[96] are illustrative of how the issue of intervening cause has been applied.[97] In *Genovay*, following a robber's entrance into a bowling alley, the proprietor took actions which impeded the progress of the robbery and further aggravated the robber's aggressiveness.[98] The court stated those actions could reasonably have been interpreted as inciting the proprietor's patrons to try to apprehend the robber.[99] The court in *Genovay*, therefore, did not characterize the robber's action as a superseding cause.[100] In *Bennett*, the robber's action was, if anything, more easily foreseeable than in *Genovay*, and, therefore, less reasonably characterized as superseding. The bar owner in *Bennett* absolutely refused the robber's demands and in fact invited the robber to shoot.[101] By contrast, the action of the proprietor in *Genovay* was only arguably calculated to induce resistance on the part of the patrons, and the owner did comply with the robber's demands.[102]

The court in *Helms* found that the injury inflicted by the robber upon the plaintiff customer who tried to run out of the store being robbed resulted from causes independent of the shopkeeper's resistance.[103] The robber feared that if the plaintiff's flight were not stopped, it would result in the robber's apprehension.[104] The court opined that the defendant's conduct would have been a cause of the plaintiff's injury had it occurred during the course of the shopkeeper's struggle with the bandit, but the injury was not

95. 50 N.J. Super. 538, 143 A.2d 229 (1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959).

96. 281 S.W.2d 770 (Tex. Civ. App. 1955).

97. Although *Genovay*, *see* 50 N.J. Super. at 563, 143 A.2d at 242, and *Helms*, 281 S.W.22 at 771, use a "natural and probable consequences" test of proximate cause, while Arizona uses "foreseeability," *see* cases cited note 89 *supra*, in application the tests are the same. *See* W. PROSSER, *supra* note 11, § 43, at 252. "The phrase [natural and probable] therefore appears to come out as the equivalent of the test of foreseeability, of consequences within the scope of the original risk, so that the likelihood of their occurrence was a factor in making the defendant negligent in the first instance." *Id.*

98. 50 N.J. Super. at 560, 143 A.2d at 240-41.

99. *Id.* at 561, 143 A.2d at 241. When two patrons did jump the robber, they were shot and injured. *Id.* at 547-48, 143 A.2d at 234. The court in *Genovay* characterized the actions of the patrons in attacking the robber as independent intervening causes, yet the court stated that the actions of the patrons would not necessarily relieve the proprietor of liability. *Id.* at 561-62, 143 A.2d at 241.

100. In *Genovay*, the court held that once the holdup became an established fact, the question of whether the defendant's conduct was foreseeably calculated to induce the action which caused the plaintiff's injuries was a question for the jury. *Id.* at 560-61, 143 A.2d at 240.

101. 27 Ariz. App. at 597, 557 P.2d at 196.

102. *See* 50 N.J. Super. at 560-61, 143 A.2d at 240-41.

103. 281 S.W.2d at 771.

104. *Id.* The court in dicta recognized a duty not to subject invitees to an unreasonable risk of harm. *Id.* at 772. The decision, however, was based on the fact that the plaintiff had failed to establish a causal relation between the defendant's conduct and her injury. *Id.* at 771. In *Helms*, an armed robber had entered a grocery store and had demanded money at gun point. *Id.* at 770. The clerk at the counter grabbed for the robber's gun, a struggle ensued, and the clerk finally dived behind the counter. The robber fired one shot at the clerk behind the counter and then started to flee. As the robber reached the door, he saw the plaintiff running toward the back of the store; the gunman then shot at and struck the plaintiff. *Id.* at 770-71. The court reasoned that the plaintiff had failed to prove that the clerk's resistance had caused the gunman to shoot at her, and that it was equally probable that he had shot the plaintiff to stop her from escaping to give warning to the police, thus preventing his escape. *Id.*

foreseeable once the shopkeeper's resistance ceased.[105] In *Helms*, the plaintiff's action in fleeing could be said to be an "efficient intervening" cause or one which by its nature became the proximate cause of the plaintiff's injury.[106]

On the facts of *Bennett*, the action of the robber should not be classified as a superseding cause because his action was well within the scope of the risk created by Baker's response. That the robber's reaction was also foreseeable is evidenced by Baker's words affirming his thought that being shot was a foreseeable result. Since the robber's action was not a superseding cause, and there would appear to be no other reason for absolving Baker of liability, it should be concluded that his conduct proximately caused the plaintiffs' injuries.

Conclusion

The court in *Bennett* should not have made a determination that there was no duty under the circumstances of the case. By holding that there was no duty, the court grants defendants in similar circumstances an immunity for their actions regardless of how unreasonable those actions might be. The *Bennett* court abbreviated the balancing of the relevant policy factors and placed primary importance on the utility of the defendant's conduct. The better approach would have been to follow a policy weighing approach and to submit to the jury the question of whether the utility of the defendant's conduct outweighed the gravity and risk of harm to the plaintiffs. There should be no determination as a matter of law that the defense of property is such a substantial factor as to outweigh the value of the protection of the patrons against serious bodily injury. Rather, it should be recognized that in all cases involving similar fact situations, there is a duty to protect patrons from injury at the hands of third parties. It is for a jury to determine the reasonableness of the landowner's conduct in each case.

105. *Id.* at 771.
106. *See* Nichols v. City of Phoenix, 68 Ariz. 124, 136-37, 202 P.2d 201, 209-10 (1949). See text & notes 85-90 *supra*.

VIII. WORKMEN'S COMPENSATION

A. MENTAL INJURY AND THE WORKMEN'S COMPENSATION ACT

The purpose of Arizona's Workmen's Compensation Act[1] is to provide employees with compensation for earnings lost because of work-related injuries.[2] Wages lost as a result of physical injuries have always been deemed compensable by the courts.[3] Similarly, when an injury results in a disabling mental condition, an employee is entitled to compensation to the same extent as if the disability were physical.[4] In cases where no single, unexpected event causes a mental injury, however, Arizona courts have been unwilling to extend the protection of workmen's compensation to the resultant disability.[5] In the recent case of *Muse v. Industrial Commission*,[6] the Arizona Court of Appeals denied compensation for a disabling mental condition.

In *Muse*, Harry Muse, the petitioner, had been a bus driver for Greyhound Lines West for thirty-one years.[7] On a run from Phoenix to Los Angeles, he had a brief blackout during a stop.[8] When Muse returned to Phoenix, he consulted the company physician and was ordered not to return to bus driving because he was psychologically unable to continue.[9] Petitioner's subsequent claim for workmen's compensation benefits was denied by the insurance carrier, and a hearing was held by the Industrial Commission to determine whether benefits were due.[10] The hearing officer, taking into consideration the testimony of two psychiatrists, concluded that while

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1. ARIZ. REV. STAT. ANN. §§ 23-901 to -1091 (1971 & Supp. Pamphlet 1957-77).
2. *See* ARIZ. CONST. art. 18, § 8; 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 1 (1972).
3. *See* Paulley v. Industrial Comm'n, 91 Ariz. 266, 272, 371 P.2d 888, 893 (1962). Compensation is based upon an employee's average monthly wage at the time of injury. ARIZ. REV. STAT. ANN. § 23-1041(A) (Supp. Pamphlet 1957-77).
4. Sanchez v. Industrial Comm'n, 96 Ariz. 19, 24-25, 391 P.2d 579, 583 (1964); Castellanos v. Industrial Comm'n, 15 Ariz. App. 319, 323, 488 P.2d 675, 679 (1971). Emotional distress and mental injuries will be used interchangeably from here forward.
5. *See, e.g.*, Verdugo v. Industrial Comm'n, 114 Ariz. 477, 479, 561 P.2d 1249, 1251 (Ct. App. 1977); Ayer v. Industrial Comm'n, 23 Ariz. App. 163, 165-66, 531 P.2d 208, 210-11 (1975); Shope v. Industrial Comm'n, 17 Ariz. App. 23, 25, 495 P.2d 148, 150 (1972).
6. 27 Ariz. App. 312, 554 P.2d 908 (1976).
7. *Id.* at 313, 554 P.2d at 909.
8. *Id.*
9. *Id.*
10. *Id.*

Muse's employment was a factor in bringing about his disability, recovery should nevertheless be denied.[11] In affirming the decision of the Industrial Commission, the *Muse* court upheld the position that in order for mental distress unaccompanied by physical force or exertion to be compensable, there must be some unexpected, work-connected, injury-causing event, stating: "A disabling mental condition brought about by the gradual buildup of emotional stress over a period of time and not by an injury-causing event is not compensable."[12]

This casenote will present an analysis of *Muse v. Industrial Commission* in the context of Arizona law and policy regarding the compensability of three categories of injury: physical injury; mental injury coincidental with or as a result of physical injury or accident; and mental injury brought about by the gradual buildup of emotional distress. These categories will be analyzed first by showing the inconsistencies between those cases in which compensation has been granted without regard to a precipitating event and those cases in which compensation has been denied because of the absence of a precipitating event. This will be followed by a discussion of the policy arguments for and against compensation for the gradual buildup of emotional distress.

Requirements of Arizona's Workmen's Compensation Act

Workmen's compensation is a system designed to afford compensation to workers suffering industrial injuries.[13] The purpose of the system is to shift the cost of industrial accidents from the injured employee to industry[14] by relieving the injured employee of the necessity of proving the employer's negligence and by eliminating certain defenses, such as the fellow servant rule.[15] Industry, in turn, passes the cost of its insurance coverage for employee accidents to the consumer through the increased cost of products and services.[16]

The Arizona Workmen's Compensation Act limits compensability by requiring that an injury be the result of an "accident arising out of and in the course of . . . employment."[17] Arizona courts have determined that the

11. *Id.* at 313-14, 554 P.2d at 909-10.

12. *Id.* at 313, 554 P.2d at 910. The *Muse* decision is the third in a line of cases holding that gradually acquired mental disability is not compensable. *See* Ayer v. Industrial Comm'n, 23 Ariz. App. 163, 166, 553 P.2d 208, 211 (1975); Shope v. Industrial Comm'n, 17 Ariz. App. 23, 25, 495 P.2d 148, 150 (1972). *Muse* was followed, early in 1977, in Verdugo v. Industrial Comm'n, 114 Ariz. 477, 479, 561 P.2d 1249, 1251 (Ct. App. 1977).

13. Red Rover Copper Co. v. Industrial Comm'n, 58 Ariz. 203, 211, 118 P.2d 1102, 1105 (1941).

14. Ossic v. Verde Cent. Mines, 46 Ariz. 176, 186, 49 P.2d 396, 400 (1935).

15. Red Rover Copper Co. v. Industrial Comm'n, 58 Ariz. 203, 210, 118 P.2d 1102, 1105 (1941); Robles v. Preciado, 52 Ariz. 113, 119-20, 79 P.2d 504, 507 (1938).

16. See 3 A. LARSON *supra* note 2, § 82.41 (1976).

17. ARIZ. REV. STAT. ANN. § 23-1021(A) (1971); *see* Truck Ins. Exch. v. Industrial Comm'n, 22 Ariz. App. 158, 160, 524 P.2d 1331, 1333 (1974); Aquino v. Industrial Comm'n, 8 Ariz. App. 444, 446, 447 P.2d 259, 261 (1968), *cert. denied*, 397 U.S. 1044 (1970).

term "arising out of" refers to the causal relationship between employment and the injury,[18] and that "in the course of" refers to the time, place, and circumstances of an employee's accident.[19] The term "accident" is also important in determining whether a disability caused by a mental or physical condition is compensable. This was especially true in *Muse*, where the court's interpretation served as a bar to Muse's recovery.

Interpretation of "Accident" in Compensating Physical Injuries

The term "accident" has been given a very broad interpretation by the courts where a physical injury is involved. Traditionally, an accident was defined to permit compensation only for an injury which was traceable in time and place from a sudden, unexpected event that was the cause of that injury.[20] The courts have since expanded the concept of injury by accident to include unexpected, work-related injuries that developed gradually.[21] Thus, a disability is caused by accident and is compensable when either the causative agent or its injurious effect is "unexpected or accidental."[22] For example, a stock girl in a supermarket, who developed a disabling trauma in her shoulder as a result of reaching up to stock cans on a shelf, was held to have a compensable disability, even though there was no identifiable, precipitating event which caused the injury; the injury was sufficiently causally connected to the claimant's working conditions, and thus was an accidental, work-related injury.[23] The reason for compensating gradually

18. *E.g.*, Royall v. Industrial Comm'n, 106 Ariz. 346, 349, 476 P.2d 156, 159 (1970); Gaumer v. Industrial Comm'n, 94 Ariz. 195, 198, 382 P.2d 672, 674 (1963); Zambonini v. Industrial Comm'n, 25 Ariz. App. 493, 496, 544 P.2d 710, 713 (1976). The type of accident which best satisfies the "arising out of" requirement is where the source of the injury is uniquely associated with employment, such as the failure of machinery. Royall v. Industrial Comm'n, 106 Ariz. at 350, 476 P.2d at 160. The type of accident which least satisfies the requirement is where the source of the injury "relates to risks personal to the claimant which are in no way work-connected, such as a heart attack entirely attributable to a preexisting heart condition." *Id.* For a discussion of the "arising out of and in the course of his employment" requirement, see 7 ARIZ. L. REV. 350, 353 (1966). *See also* 1 A. LARSON, *supra* note 2, § 6.00 (1972).

19. Royall v. Industrial Comm'n, 106 Ariz. 346, 349, 476 P.2d 156, 159 (1970). The activity which best satisfies the requirement that the injury be sustained "in the course of his employment" is the employee's performance of the specific duties which he was hired to perform. *Id.* at 350, 476 P.2d at 160. Conversely, the type of activity which may fail to meet the "in course of" test is one that is merely "incidental to the performance of the employee's duties, such as . . . going to and coming from work." *Id.*; *see* Aquino v. Industrial Comm'n, 8 Ariz. App. 444, 446-47, 447 P.2d 259, 261-62 (1968), *cert. denied*, 397 U.S. 1044 (1970) (employer held not liable for employee's back injury sustained while carrying ice given to him by the employer for the employee's personal use).

20. *See* Jones v. Industrial Comm'n, 70 Ariz. 145, 147-48, 217 P.2d 589, 591 (1950); Emery v. Industrial Comm'n, 69 Ariz. 87, 92-93, 210 P.2d 217, 220-21 (1949); Pierce v. Phelps Dodge Corp., 42 Ariz. 436, 445, 26 P.2d 1017, 1020-21 (1933). *But see In re* Mitchell, 61 Ariz. 436, 150 P.2d 355 (1944). In *Mitchell*, the court limited *Pierce* by stating that the accident need not be an instantaneous happening, *id.* at 451, 150 P.2d at 361, and that an injury which is gradual and progressive qualifies for compensation, *id.* at 452, 150 P.2d at 361.

21. *See, e.g.*, Caganich v. Industrial Comm'n, 108 Ariz. 580, 581, 503 P.2d 801, 802 (1972); Paulley v. Industrial Comm'n, 91 Ariz. 266, 271, 371 P.2d 888, 893 (1962); Employers Mut. Liab. Co. v. Industrial Comm'n, 24 Ariz. App. 427, 429, 539 P.2d 541, 543 (1975).

22. Paulley v. Industrial Comm'n, 91 Ariz. 266, 272, 371 P.2d 888, 893 (1962).

23. *See* Employers' Mut. Liab. Co. v. Industrial Comm'n, 24 Ariz. App. 427, 429-30, 539 P.2d 541, 543-44 (1975). *See also* Reilley v. Industrial Comm'n, 1 Ariz. App. 12, 14-15, 398 P.2d 920, 922-23 (1965) (employee contracted byssinosis as a result of repeated exposure to and inhalation of cotton dust and lint and was awarded compensation).

developed physical disabilities is simply to further the workmen's compensation law's purpose of ensuring that all workers "injured while engaged in industrial work" be compensated for their inability to work.[24] In order to expand the definition of accident to include such disabilities, while still limiting compensation to work-related injuries, the courts have apparently applied the "arising out of" element of the Act[25] to require a clear showing of the causal connection between employment and injury.[26] In cases involving mental injuries, however, the courts' definition of "accident" has not acquired the same expansive quality as it possesses with respect to physical disability.

Interpretation of "Accident" in Compensating Emotional Distress

In determining the compensability of an emotionally caused disability, the same basic rule applies as in the case of physical disability: in order for a mental injury to be compensable, it must be caused by an accident arising out of and in the course of employment.[27] While this is the same language applied to physical injuries, the courts have interpreted "accident" differently when considering mental injuries. Unlike the rule applied to gradually acquired physical disability,[28] Arizona courts will not provide compensation for mental injuries unless there is some unexpected, precipitating event.[29]

In some cases, there is an apparent requirement that the mental disability be causally connected to an accidental physical injury in order for the emotional element to be compensable.[30] However, in *Brock v. Industrial Commission*,[31] the Arizona Court of Appeals did not require that there be a physical injury resulting from the accident. In *Brock*, the claimant ran over and killed a pedestrian while operating a truck in the course of his employment.[32] The claimant suffered no physical injury, but he did have a pre-

24. *See* Paulley v. Industrial Comm'n, 91 Ariz. 266, 272, 371 P.2d 888, 893 (1962).

25. *See* Dunlap v. Industrial Comm'n, 90 Ariz. 3, 5, 363 P.2d 600, 602-03 (1961); *noted in* 3 ARIZ. L. REV. 316 (1961); Mead v. American Smelting & Refining Co., 1 Ariz. App. 73, 76, 399 P.2d 694, 697 (1965).

26. In Inglis v. Industrial Comm'n, 11 Ariz. App. 368, 464 P.2d 814 (1970), the petitioner claimed compensation for a permanent disability allegedly resulting from "a series of minimal traumas" sustained during the course of his 17-year employment as a route salesman. *Id.* at 369, 464 P.2d at 815. Although the court acknowledged that physical disabilities developed gradually are compensable if unexpected and definitely work-connected, it nevertheless held that, due to the conflicting testimony on the question, the petitioner failed to carry his burden of proving a causal connection between his disability and his employment. *Id.* at 369, 464 P.2d at 815.

27. *See* Cammeron v. Industrial Comm'n, 98 Ariz. 366, 370, 405 P.2d 802, 804 (1965) (neurosis, causally connected to physical injury arising out of and in course of employment, is compensable); Sproul v. Industrial Comm'n, 91 Ariz. 128, 132, 370 P.2d 279, 282 (1962) (to same effect).

28. See text & notes 21-26 *supra*.

29. *See* Verdugo v. Industrial Comm'n, 114 Ariz. 477, 479, 561 P.2d 1249, 1251 (Ct. App. 1977); Ayer v. Industrial Comm'n, 23 Ariz. App. 163, 166, 531 P.2d 208, 211 (1975).

30. *See, e.g.*, Cammeron v. Industrial Comm'n, 98 Ariz. 366, 370, 405 P.2d 802, 804 (1965); Sanchez v. Industrial Comm'n, 96 Ariz. 19, 24, 391 P.2d 579, 582-83 (1964); Tatman v. Provincial Homes, 94 Ariz. 165, 167-68, 382 P.2d 573, 574-75 (1963); Homack v. Industrial Comm'n, 18 Ariz. App. 598, 600, 504 P.2d 539, 541 (1972).

31. 15 Ariz. App. 95, 486 P.2d 207 (1971).

32. *Id.* at 95, 486 P.2d at 207.

existing depressive anxiety condition that was aggravated by the accident and his subsequent attempts to prove his innocence.[33] The court in *Brock* was convinced that the fact of physical force or exertion does no more than provide a means of determining whether the injury is one "arising out of and in the course of" employment; it is not an element necessary to determine if the claimant has been "injured by accident."[34] Instead, the court interpreted accident to include "any unexpected injury-causing event, so long as it is work-connected."[35] Since the employee's accident was an unexpected event, and was found by the commission to be causally related to Brock's mental injury, the court held the commission in error in denying Brock's mental disability claim.[36] The court reached this result because it could find no reason to distinguish between mental and physical injuries caused by some unexpected event, and because it was reluctant to make a "mental injury" exception to the all-inclusive language of the statute.[37] Moreover, the court felt that such a construction would be overly restrictive and contrary to the intent of the Workmen's Compensation Act.[38] In the cases subsequent to *Brock*, claims for compensation for gradually developed mental disabilities have been denied in the absence of an unexpected precipitating event.[39] The court of appeals' rationale for this outcome is that granting compensation for mental disabilities resulting from the day-to-day stresses and strains of employment would entitle to compensation "any disgruntled employee . . . who leaves his job in a huff because of an emotional disturbance."[40]

Muse and other cases raise several inconsistencies in Arizona's treatment of mental and physical disabilities. In cases where there is no unexpected precipitating event, and where the cause of a physical injury is not readily apparent, the Arizona Supreme Court holds that causation is peculiarly within the knowledge of medical experts, upon whose opinions courts must necessarily rely.[41] Similarly, when a physical injury or other unexpect-

33. *Id.* at 95-96, 486 P.2d at 207-08.

34. *Id.* at 96, 486 P.2d at 208.

35. *Id.* In State Comp. Fund v. Industrial Comm'n, 24 Ariz. App. 31, 535 P.2d 623 (1975), the court held compensable not only the mental distress that arises because of a nonphysical injury-causing accident, but extended coverage to a heart attack that was the result of that mental distress. *Id.* at 34-35, 535 P.2d at 626-27.

36. 15 Ariz. App. at 96-97, 486 P.2d at 208-09.

37. *See id.* The statute referred to was ARIZ. REV. STAT. ANN. § 23-1041(A) (Supp. Pamphlet 1957-77).

38. 15 Ariz. App. at 97, 486 P.2d at 209. The Arizona Court of Appeals found itself in accord with other jurisdictions which had found that work-connected emotional stress resulting in disability is a sufficient basis for an award of benefits. *Id.* at 97, 486 P.2d at 209. *But see* text accompanying note 53 *infra*.

39. *See, e.g.*, Verdugo v. Industrial Comm'n, 114 Ariz. 477, 479, 561 P.2d 1249, 1251 (Ct. App. 1977); Muse v. Industrial Comm'n, 27 Ariz. App. 312, 313-14, 554 P.2d 908, 909-10 (Ct. App. 1976); Ayer v. Industrial Comm'n, 23 Ariz. App. 163, 165-66, 531 P.2d 208, 210-11 (1975); Shope v. Industrial Comm'n, 17 Ariz. App. 23, 25, 495 P.2d 148, 150 (1972).

40. Shope v. Industrial Comm'n, 17 Ariz. App. 23, 25, 495 P.2d 148, 150 (1972).

41. *See* McNeely v. Industrial Comm'n, 108 Ariz. 453, 455, 501 P.2d 555, 557 (1972) (expert testimony sought as to the causal connection between employment and a heart attack).

ed event is claimed to have resulted in a disabling psychological condition, Arizona's courts display no reluctance to rely upon expert medical testimony to establish the causal connection between the physical injury or other event and the disability.[42] Yet, in cases involving mental distress, absent an accident, the Arizona Court of Appeals apparently refuses to rely on medical testimony to establish causation.[43] Drawing this distinction makes little sense. When scientific knowledge about the effects of mental stress on behavior was undeveloped, some justification may have existed for denying workmen's compensation benefits for stress-created disabilities since the ability to show a causal connection between work and its psychological effects was minimal.[44] However, this justification may no longer exist since experts are available to testify on the relation between job stress and the psyche of an employee.[45]

A majority of jurisdictions, according to the leading workmen's compensation commentator, perceive no difficulty in compensating both suddenly acquired and gradually caused psychological disabilities.[46] The state of Michigan, for example, in *Carter v. General Motors Corp.*,[47] opened its courts to the litigation of workmen's compensation claims based on the gradual buildup of emotional distress, and it has apparently not been troubled by the pestilence of "Pandora's box" anticipated by the Arizona Court of Appeals.[48] The worker in *Carter* suffered from psychosis resulting from emotional stress gradually built up due to causes and conditions peculiar to a factory assembly line.[49] The claimant also had suffered from earlier instability that was aggravated by the work situation.[50] The court held that where the causal connection between the employment and the injury is clearly established, and where the employee is unable to work as a result of that injury, compensation must be granted even in the absence of a physical injury or single, injury-causing event.[51]

In subsequent cases, Michigan courts demonstrated that a court can use the requirement that a claimant prove an actual, work-connected disability to protect the judicial and the workmen's compensation systems from

42. *See, e.g.*, Cammeron v. Industrial Comm'n, 98 Ariz. 366, 370, 405 P.2d 802, 804 (1965) (expert testimony sought as to the connection between back injury and neurosis); Brock v. Industrial Comm'n, 15 Ariz. App. 95, 96, 486 P.2d 207, 208 (1971); Selvidge v. American Airlines, Inc., 4 Ariz. App. 104, 107, 417 P.2d 738, 741 (1966). *See also* 1A A. LARSON, *supra* note 2, § 42.23, at 7-378 to -379 (1973).

43. *See, e.g.*, Muse v. Industrial Comm'n, 27 Ariz. App. 312, 313-14, 554 P.2d 908, 909-10 (1976); Ayer v. Industrial Comm'n, 23 Ariz. App. 163, 165-66, 531 P.2d 208, 211-12 (1975); Shope v. Industrial Comm'n, 17 Ariz. App. 23, 24-25, 495 P.2d 148, 150-51 (1972).

44. *See* 1A A. LARSON, *supra* note 2, § 42.23 (1973).

45. *Id.*

46. *Id.* at 7-373 & n.81.

47. 361 Mich. 577, 106 N.W.2d 105 (1960).

48. *See* Shope v. Industrial Comm'n, 17 Ariz. App. 23, 25, 495 P.2d 148, 150 (1972).

49. 361 Mich. at 580-81, 106 N.W.2d at 107.

50. *Id.* at 583-85, 106 N.W.2d at 108-09.

51. *Id.* at 585-93, 106 N.W.2d at 109-13.

fraudulent claims.[52] There is no reason to expect that experience in Arizona would have been significantly different from Michigan's, had the court decided *Muse* differently.

In addition to holding that mental injuries must arise from an identifiable, unexpected event, the *Muse* court stated that mental injury resulting from no more than the usual, ordinary, and expected incidents of the job is noncompensable.[53] However, this conflicts with the Arizona policy that, while the Workmen's Compensation Act does not provide general accident coverage, compensation should be granted where there is a causal connection between the employment and the accident.[54] In cases involving physical injuries or disabilities resulting gradually from usual exertion, Arizona courts hold that compensation should be granted, provided that the commission is convinced that the exertion caused or contributed to the disability or injury.[55] The court in *Muse, Ayer v. Industrial Commission*,[56] and *Shope v. Industrial Commission*,[57] on the other hand, denied compensation for mental injuries sustained under similar circumstances, apparently because of a fear that a contrary rule would entitle malingerers to compensation.[58] The *Brock* court, however, refused to recognize any difference between emotional disability and physical injury that would make one compensable and the other not,[59] and there appears to be no justification for the court's implicit conclusion in *Muse* and like cases that medical experts are competent to testify as to the existence and work-connection of the former type of physical disability, but not as to the latter type of mental disability.[60] If, as

52. In Deziel v. Difco Laboratories, Inc., 394 Mich. 466, 232 N.W.2d 146 (1975), the court reiterated the requirement that in order to be compensable, the injury must have arisen "out of and in the course of" employment. *Id.* at 475, 232 N.W.2d at 150. Claimant Deziel's request for compensation was denied because she could not sufficiently show that the injury was work-connected. In the companion case of Bahu v. Chrysler Corp., 394 Mich. 466, 232 N.W.2d 146 (1975), the court stressed the fact that the claimant had to be, in fact, disabled. *See id.* at 477-78, 232 N.W.2d at 151. The *Deziel* court also remanded the claim in another companion case, MacKenzie v. General Motors Corp., 394 Mich. 466, 232 N.W.2d 146 (1975), for clarification of whether the injury was causally related to the employment. *Id.* at 479, 232 N.W.2d at 152. Similarly, the court in Milton v. Oakland County Bd. of Auditors, 54 Mich. App. 429, 221 N.W.2d 197 (1974), found that the claimant suffered noncompensable disability because the emotional distress was not causally connected to employment but was solely the result of the claimant's emotional problems. *Id.* at 431-32, 221 N.W.2d at 199. Finally, in Labuda v. Chrysler Corp., 61 Mich. App. 250, 232 N.W.2d 686 (1975), the Michigan Court of Appeals refused to grant compensation to a claimant because the Workmen's Compensation Appeal Board had found that the claimant was not disabled. *Id.* at 253, 232 N.W.2d at 687-88. *See also* Leskinen v. Michigan Employment Security Comm'n, 398 Mich. 501, 247 N.W.2d 808 (1976).

53. Muse v. Industrial Comm'n, 27 Ariz. App. 312, 314, 554 P.2d 908, 910 (1976).

54. Muchmore v. Industrial Comm'n. 81 Ariz. 345, 352, 306 P.2d 272, 276 (1957).

55. *See, e.g.*, Jones v. Industrial Comm'n, 81 Ariz. 352, 355-58, 306 P.2d 277, 279-81 (1957); Phelps Dodge Corp. v. Cabarga, 79 Ariz. 148, 153, 285 P.2d 605, 608 (1955); Employers' Mut. Liab. Co. v. Industrial Comm'n, 24 Ariz. App. 427, 429-30, 539 P.2d 541, 543-45 (1975). Arizona is apparently in accord with a majority of jurisdictions on this point. *See* 1A A. LARSON, *supra* note 2, § 38.00 (1973). This result is reached by interpreting the "caused by accident" language of ARIZ. REV. STAT. ANN. § 23-1021(A) (1971) as meaning that either the causative agent or its resultant effect must be accidental. *See* Paulley v. Industrial Comm'n, 91 Ariz. 266, 272, 371 P.2d 888, 893 (1962).

56. 23 Ariz. App. 163, 531 P.2d 208 (1975).

57. 17 Ariz. App. 23, 495 P.2d 148 (1972).

58. *See* text & notes 39-40 *supra*.

59. *See* text & notes 30-38 *supra*.

60. *See* text & notes 41-46 *supra*.

the courts have stated, the purposes of workmen's compensation are to compensate for lost earning capacity and to prevent an employee and his family from becoming public charges during the period of disability,[61] there should be no distinction made between mental and physical disabilities. An employee suffering a proven mental disability, demonstrably caused by work, and who is unable to work as a result, suffers no less of a wage loss than does an employee who is either physically disabled from working, or psychologically disabled from working, or psychologically disabled due to some unexpected occurrence; each is equally capable of becoming a burden on society and each should, therefore, be equally compensated.

It might be argued that compensation should be denied in cases of mental disability resulting from the gradual buildup of emotional stress in order to prevent employers from becoming insurers of the mental health of their employees.[62] An employer arguably may not be as capable of knowing an employee's mental condition as he is of knowing an employee's physical condition. While an employer can require an employee to undergo a physical examination to determine if he will be able to stand the physical strain of his job, there may be no way of testing how an employee will react to the emotional strain of the job. Thus, it may be unfair to require an employer to insure against mental disability when mental injuries are involved. However, a refusal to grant an award to an employee because the injury was unforeseeable by the employer does not simply protect the employer from being a mental health insurer; rather, it places the employer's interests above those of the employee. Such a result is incompatible with the previous court decisions which require an employer to take his employee as he finds him,[63] with whatever mental or physical weaknesses he may have.[64] Moreover, the outcome of *Muse* is inconsistent with other cases which state that the Workmen's Compensation Act should be liberally construed in favor of the employee,[65] thus effectuating its purpose of placing the burden of work-related injuries on industry and the community as a whole.[66] It flies in the face of this fundamental principle to require, as the court in *Muse* does, that the loss from an unexpected psychological disability fall on the

61. Prigosin v. Industrial Comm'n, 113 Ariz. 87, 89, 546 P.2d 823, 825 (1976); Raban v. Industrial Comm'n, 25 Ariz. App. 159, 161, 541 P.2d 950, 952 (1975); Altamirano v. Industrial Comm'n, 22 Ariz. App. 379, 380, 527 P.2d 1096, 1097 (1974).

62. Although the Workmen's Compensation Act is to be given a liberal construction, it is not intended to provide general health insurance for employees. *See* Matlock v. Industrial Comm'n, 70 Ariz. 25, 30, 215 P.2d 612, 615 (1950); Bergstressor v. Industrial Comm'n, 13 Ariz. App. 91, 93, 474 P.2d 450, 452 (1970).

63. *See* State Comp. Fund v. Joe, 25 Ariz. App. 361, 366, 543 P.2d 790, 795 (1975); Nelson v. Industrial Comm'n, 24 Ariz. App. 94, 96, 536 P.2d 215, 217 (1975); Hardware Mut. & Cas. Co. v. Industrial Comm'n, 23 Ariz. App. 535, 539, 534 P.2d 749, 753 (1975).

64. Ramonett v. Industrial Comm'n, 27 Ariz. App. 728, 729, 558 P.2d 923, 924 (1976); *see* Capitol Foundry v. Industrial Comm'n, 27 Ariz. App. 79, 83, 551 P.2d 69, 73 (1976).

65. *See* Beasley v. Industrial Comm'n, 108 Ariz. 391, 393, 499 P.2d 106, 108 (1972); Goodyear Aircraft Corp. v. Gilbert, 65 Ariz. 379, 384-85, 181 P.2d 624, 627 (1947).

66. *See* Pottinger v. Industrial Comm'n, 22 Ariz. App. 389, 393, 527 P.2d 1232, 1236 (1974); Hannon v. Industrial Comm'n, 9 Ariz. App. 231, 232, 451 P.2d 44, 45 (1969).

shoulders of the disabled employee.[67] Most important, it must be recognized that compensating mental injuries caused by job stress would leave neither the employer's interests nor the workmen's compensation fund unguarded, since the employee would still have the burden of proving a debilitating psychological condition and the causal connection between it and his employment situation.[68]

Conclusion

The Arizona Court of Appeals has stated that where the only rational conclusion is that a causal connection exists between employment and the injury, the Industrial Commission cannot arbitrarily withhold compensation. However, the court in *Muse* chose to ignore uncontroverted testimony that employment did contribute to Muse's mental disability, and, instead, imposed a requirement that there be some unexpected event precipitating the mental injury. Unfortunately, the court did not support this requirement with judicial reasoning that will withstand scrutiny. The "unexpected event" requirement appears contrary to the purpose and intent of the Workmen's Compensation Act and demonstrates an implicit lack of faith in the validity of expert opinion as well as an inconsistency with the judicial treatment given similar issues. While not every case in which there is a gradually occurring emotional disability may be compensable, the court should at least consider these cases on their merits and compensate where expert testimony indicates it is appropriate, as mandated by the Workmen's Compensation Act.

67. At least one court has also stated that the negligence concept of "foreseeability" cannot be injected into workmen's compensation cases, since it conflicts with the system's basic policy of compensating for injuries which arise out of and in the course of employment. Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 511, 330 N.E.2d 603, 607, 369 N.Y.S.2d 637, 642 (1975) (ruling that psychological or nervous injury is compensable to the same extent as physical injury).

68. *See, e.g.*, Russell v. Industrial Comm'n, 104 Ariz. 548, 554, 456 P.2d 918, 924 (1969); *In re* Estate of Bedwell, 104 Ariz. 443, 444, 454 P.2d 985, 986 (1969); Blasdell v. Industrial Comm'n, 65 Ariz. 373, 379, 181 P.2d 620, 624 (1947); Hannon v. Industrial Comm'n, 9 Ariz. App. 231, 232, 451 P.2d 44, 45 (1969).

Editor's Note: Shortly after this casenote went to press, the Supreme Court of Arizona decided Firemen's Fund Ins. Co. v. Industrial Comm'n, No. 13319-PR (Ariz., filed Apr. 25, 1978), and held that a disabling mental condition brought about by the "gradual buildup of stress and tension is compensable as an injury by accident" under the Arizona Workmen's Compensation Act. *Id.*, slip op. at 4, 7-8. In *Firemen's Fund*, the respondent-employee suffered from a condition—diagnosed as a neurotic depression or mental breakdown—which resulted from "the delegation to her of excessive responsibilities." *Id.*, slip op. at 3, 5. In a 3-2 decision, the court held, first, that an injury is the result of an "accident" within the meaning of the Act if it is unexpected; if the injury is unexpected, no unexpected injury-causing event need occur. *Id.*, slip op. at 5. Second, the majority concluded that physical impact or exertion by the employee is not a necessary condition to finding that a disabling injury has occurred. *Id.*, slip op. at 7.

It appears that a majority of the supreme court has chosen simply to rely on the competency of mental health experts and the Industrial Commission to ferret out fraudulent disability claims by malingering employees. As argued in this casenote, the court's choice is the only one logically consistent with prior case law. *See* text & notes 41-61 *supra*. The only difficulty presented by *Firemen's Fund* is the determination of the scope of the decision. An

expansive reading of the opinion indicates that *any* mental disability brought about by the gradual buildup of emotional stress would, if work-related, be compensable. As the court phrased the issue, it had to decide "whether a disabling [mental] injury which results from the gradual buildup of stress and tension is compensable as an injury by accident." Firemen's Fund, Inc. v. Industrial Comm'n, No. 13319-PR, slip op. at 4 (Ariz., filed Apr. 25, 1978). Since no limitation was placed on this formulation of the problem, *Firemen's Fund* may mean that *any* work-related, stress-caused emotional disability is compensable.

On the other hand, certain aspects of the majority opinion raise the possibility that the court was subtly attempting only to authorize compensation of mental disabilities caused by the imposition of excessive responsibilities on the injured employee. For example, at one point the court noted that, although the respondent's job was routine, "the delegation to her of *excessive responsibilities* resulted in . . . her mental breakdown." *Id.*, slip op. at 5 (emphasis added). Later in the opinion, the court emphasized that respondent's injury did not result from her inability to keep pace with other workers; rather, it was caused by the repeated imposition of larger amounts of responsibility on her, until she could no longer tolerate her work situation. *Id.*, slip op. at 7. These two parts of the majority's opinion appear to leave room for the argument that mental injury caused by nothing more than ordinary, nonexcessive job stress is not compensable. In this respect, *Muse* is consistent with *Firemen's Fund*. *See* Muse v. Industrial Comm'n, 27 Ariz. App. 312, 314, 554 P.2d 908, 910 (1976). *See also* text & notes 53-61 *supra*.

The apparent ambiguities in *Firemen's Fund* will have to await further judicial treatment.