ARIZONA APPELLATE DECISIONS 1975-76

The "Arizona Note" issue is an annual project of the *Arizona Law Review* which can truly be characterized as a group effort. Although each casenote represents the substantial contribution of one first-year candidate, the program is designed to be a learning tool for the writer, requiring much guidance and leadership from the editorial board. We have a rather unique casenote program at the University of Arizona, in that we extend invitations to students immediately after their first semester in law school. This gives them an opportunity to develop their skills in research, analysis, and writing at an early stage in their legal education. It also requires, however, that the editors work very closely with the candidates, often contributing significantly to the final published note.

The editorial board works very hard to select cases for comment and to produce a commentary which, in addition to training candidates in legal writing, will provide other students and members of the bar with a continuing study of the work of the Arizona courts. In the 9 years since the Arizona Note program formally began, the casenote has progressed from what was essentially a restatement of the case itself to an in-depth analysis of the case and the court's reasoning. We have generally received favorable feedback from students, lawyers, and judges as to the utility of the current casenote program. We encourage comment from our readers regarding the casenotes published herein, so that we may continue to improve our program.

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I. ADMINISTRATIVE LAW

A. ADMINISTRATIVE DISCRETION IN PUBLIC UTILITY REGULATION

Since their advent, federal and state administrative agencies have grown to a position of prominence in terms of jurisdiction and power of independent action.[1] The increased power of agencies has fostered much criticism particularly in regard to the discretionary power often granted by applicable enabling legislation.[2] One of the most intensely criticized powers of agencies is the discretion to act either by creating industrywide rules or by mandating a special order applicable only to the particular case being adjudicated.[3] In this regard, the United States Supreme Court has generally favored the promulgation of rules, while recognizing the need for federal agency discretion to act by order in appropriate cases.[4] The Arizona court of appeals was recently required to consider this issue in *Arizona Corporation Commission v. Palm Springs Utility Co.*[5] Reversing the lower court's finding, the court of appeals held that the Corporation Commission could legally issue an order requiring a utility company to meet certain water quality standards without having previously promulgated a regulation imposing the same standards upon the industry generally.[6]

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1. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.04 (1958 & Supp. 1970). Although normally referred to as a new field in the study of law, the development of administrative law in the United States began not long after the nation's birth. *Id. See generally* Davis, *An Administrative Procedure Act for Arizona*, 2 ARIZ. L. REV. 17, 19-22 (1960).

2. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 36-37 (1950); Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1397-1418 (1975); Hector, *The New Critique of the Regulatory Agency*, 12 AD. L. BULL. 12, 21 (1959); Reich, *The New Property*, 73 YALE L.J. 733, 749-50, 760-64 (1964); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 536-39 (1970).

3. *See* B. SCHWARTZ, ADMINISTRATIVE LAW § 66 (1976); Baker, *Policy by Rule or Ad Hoc Approach—Which Should it be?*, 22 LAW & CONTEMP. PROB. 658, 658-65 (1957); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 921-22 (1965).

4. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 290, 293-94 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 772 (1969); SEC v. Chenery Corp., 332 U.S. 194, 202 (1947). *See generally* K. DAVIS, *supra* note 1; B. SCHWARTZ, *supra* note 3, at 186.

5. 24 Ariz. App. 124, 536 P.2d 245 (1975).

6. *Id.* at 129-30, 536 P.2d at 250-51.

After receiving complaints about the quality of drinking water which Palm Springs supplied to its customers, the Commission held a hearing at which it determined that the water quality was not acceptable.[7] Despite the absence of a previously announced water quality standard, and absent any evidence showing that the problem was peculiar to water supplied by Palm Springs, the Commission ordered the company to meet a specific and detailed water quality standard.[8] On review, the superior court set aside the order, ruling that in the absence of a statewide regulation which established water quality standards, the Arizona Corporation Commission could not impose such a standard by an order directed solely at Palm Springs.[9] The court of appeals reversed and upheld the Commission's order, finding it fully supported in the record of the hearing and authorized by Arizona law.[10] Rejecting the utility company's assertion that a general regulation was required prior to issuing an order, the court concluded that although an Arizona statute mandates the adoption of regulations for provision of customers with services,[11] it does not expressly or impliedly prohibit the Commission from acting by order in specialized situations.[12] The Commission could act by order so long as there was statutory authority for its action and the action was not so discriminatory as to be a denial of equal protection.[13]

This casenote will examine the rules for determining when an agency should properly exercise its power by adjudication rather than by formal rulemaking. It will first consider the limitations on Arizona commissions imposed by *Palm Springs*, and the statutory and constitutional bases for these restrictions. The test formulated by the United States Supreme Court to guide agencies in their decision to act by rule or order will then be examined, and *Palm Springs* will be analyzed in an attempt to formulate a desirable standard for Arizona administrative law.

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7. *Id.* at 125-26, 536 P.2d at 246-47.
8. *Id.* at 126, 536 P.2d at 247.
9. *Id.*
10. *Id.* at 130, 536 P.2d at 251.
11. ARIZ. REV. STAT. ANN. § 40-321(B) (1974) states: "The commission shall prescribe regulations for the performance of any service or the furnishing of any commodity and upon proper demand and proper tender of rates, the public service corporation shall furnish the commodity or render the service within the time and upon the conditions prescribed."
12. 24 Ariz. App. at 129, 536 P.2d at 250.
13. *Id.* It is unclear from the text of *Palm Springs* whether the court is referring to the Arizona equal protection clause, ARIZ. CONST. art. 2, § 13, or to the equal protection clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 1. *See* 24 Ariz. App. at 129, 536 P.2d at 250. The court of appeals also specifically rejected the lower court's use of ARIZ. REV. STAT. ANN. § 40-322(A)(1)-(2) (1974) as a basis for requiring a prior regulation, since it arguably applies only to measurement of services and does not require, but only allows, adoption of general regulations. 24 Ariz. App. at 130 n.3, 536 P.2d at 251 n.3.

Arizona Guidelines for Administrative Discretion

Following the proliferation of administrative agencies occurring during the New Deal era, Arizona experienced a period of intense discussion involving possible statutory provisions which could adequately guide and limit agency action.[14] From these discussions, Arizona administrative statutes were formulated.[15] The rulemaking provisions adopted in Arizona[16] require each state agency to give notice of its intention to formulate a rule, in order to allow public input;[17] the agency must also file all proposed and adopted rules with the Secretary of State.[18] However, there is no express requirement that the agency promulgate rules pursuant to this authorization; the agency has the option of proceeding instead by means of adjudication.

Assuming the desirability of agency rulemaking,[19] and recognizing that a requirement that agencies act solely by rule would be unworkable,[20] one possible legislative remedy would be to include in the state's administrative provisions a statute requiring an agency to act by rule, unless in its reasoned discretion, a rule would not be appropriate.[21] If an agency then decided to act by order, that decision should be subject to judicial review for abuse of discretion.[22] Unfortunately, the apparent failure to differentiate between rulemaking and adjudicating powers currently persists throughout Arizona statutory law. As the court in *Palm Springs* correctly determined, there is no specific requirement in Arizona statutes that an agency promulgate general

14. *See* Davis, *supra* note 1. *See also* 1 K. DAVIS, *supra* note 1.

15. *See* Davis, *supra* note 1, at 20-22. Arizona rulemaking procedures are found at ARIZ. REV. STAT. ANN. §§ 41-1001 to -1013 (1974); adjudicative procedures are at ARIZ. ADMIN. R. & REG. tit. 14, §§ R14-3-101 to -3-111 (1975). Arizona also has separate provisions for judicial review of agency action. ARIZ. REV. STAT. ANN. §§ 12-901 to -914 (1956 & Supp. 1976-77). The provisions of the Arizona statutes are similar to those found in the MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1946), *reprinted in* 7 RUTGERS L. REV. 431, 459-63 (1953). For a history of this Act, see HANDBOOK OF THE NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 197-99, 202-17 (1946). In addition, Congress has enacted the Administrative Procedure Act, 5 U.S.C. §§ 1001-1011 (1970), which applies only to federal agencies.

16. ARIZ. REV. STAT. ANN. §§ 41-1001 to -1013 (1974).

17. *Id.* § 41-1002.

18. *Id.* § 41-1004.

19. See text & notes 36-49 *infra*.

20. Few authorities would seriously consider requiring an agency to act exclusively by rule. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 290, 293-94 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 772 (1969); SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947). In that *Chenery* was the first in this line of decisions, its principles have become etched with the case's name. For a discussion of the *Chenery* guidelines for making an evaluation of an agency decision to act by order instead of regulation, See text & notes 23-27 *infra*.

21. *See* 1 K. DAVIS, *supra* note 1, § 6.13, at 278-79 (Supp. 1970).

22. Guidelines for judicial review of such discretion could be taken from SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947). For a discussion of this possibility, see text & notes 51-71 *infra*. Making action by regulation the rule in Arizona, and the discretionary choice of action by order the exception to that rule would be a significant change over the current Arizona statutes in which no legislative preference can be found. See text & notes 23-27 *infra*.

rules prior to taking regulatory action.[23] On the contrary, the court recognized that the Arizona constitution expressly gives the Commission full power to "make reasonable rules, regulations, and orders, by which such [public service] corporations shall be governed . . . and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations."[24]

Emphasizing similar phrases, the court also relied on several other statutory provisions[25] which authorize the Commission to determine and enforce just and reasonable classifications for the adequacy of a corporation's service.[26] The court recognized the statutory authority of the Commission to supervise and regulate the public utilities in Arizona by whatever means necessary.[27] It emphasized the power of the Commission to impose reasonable standards of service on the utility companies.[28] The *Palm Springs* court found further that the power of the Commission clearly included the discretion to regulate by order in certain circumstances.[29] The clear intent of Arizona law was to allow the Commission discretion to accomplish some of its goals by general regulations and others through case-by-case adjudication resulting in an individual order.[30] The real issue, however, was how and when this discretion could be exercised.

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23. 24 Ariz. App. at 129, 536 P.2d at 250.

24. ARIZ. CONST. art. 15, § 3, *quoted in* 24 Ariz. App. at 127, 536 P.2d at 248. Similar language, requiring corporate compliance with any Commission regulation or individual order, was quoted from ARIZ. REV. STAT. ANN. § 40-202(B) (1974), which states: "A public service corporation shall comply with every order, decision, rule or regulation made by the commission in any matter relating to or affecting its business as a public service corporation . . . ." *See* 24 Ariz. App. at 128, 536 P.2d at 249.

25. ARIZ. REV. STAT. ANN. §§ 40-321(A), -361(B) (1974).

26. 24 Ariz. App. at 127-28, 536 P.2d at 248-49.

27. *Id.* In reaching this conclusion, the court relied upon ARIZ. REV. STAT. ANN. § 40-202(A) (1974), which reads: "The commission may supervise and regulate every public service corporation in the state and do all things, whether specifically designated in this title or in addition thereto, necessary and convenient in the exercise of such power and jurisdiction."

28. *See* 24 Ariz. App. at 127-28, 536 P.2d at 248-49. This assertion was bolstered by the language of ARIZ. REV. STAT. ANN. § 40-321 (1974), which provides in part:

> A. When the commission finds that the equipment, appliances, facilities or service of any public service corporation, or the methods of manufacture, distribution, transmission, storage or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation.

The *Palm Springs* court relied, as well, on *id.* § 40-361(B), which sets forth the obligations of corporations subject to Corporation Commission action: "Every public service corporation shall furnish and maintain such service, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and the public, and as will be in all respects adequate, efficient and reasonable."

29. 24 Ariz. App. at 129-30, 536 P.2d at 250-51.

30. 24 Ariz. App. at 128, 536 P.2d at 249. The appellee, Palm Springs Utility Company, argued that ARIZ. REV. STAT. ANN. § 40-321(B) (1974) requires the promulgation of regulations governing the adequacy of service—in this case the quality of water. *See* 24 Ariz. App. at 127, 536 P.2d at 248; for the text of this statute, see note

The *Palm Springs* court derived some specific guidelines for commission regulations from statutes and constitutional provisions.[31] The court specifically recognized the Commission's discretion in choosing to act by order instead of regulation "so long as there exists a rational statutory or constitutional basis for the action, and the action is not so discriminatory as to constitute a denial of . . . equal protection."[32] This standard appears to be a reflection of the court's desire to give the Commission as much discretion in its decisionmaking as the constitution will allow. The Commission is clearly authorized to act by rule, regulation, or order. The only limitation which the court imposes on agency action appears to be a requirement that the action be "just and reasonable." The refusal to further limit administrative prerogatives is apparently meant to reflect the intent of the lawmakers who formulated the applicable constitutional and statutory provisions.[33]

Application of the facts in *Palm Springs* to the test offered by the court should demonstrate the breadth of discretionary power now permitted the Arizona Corporation Commission. First, a rational statutory basis will seemingly always exist for issuing an order instead of a regulation, since the Commission's enabling provisions speak of it acting by rules, regulations, or orders.[34] Second, since the court found no excessive discrimination in imposing a water quality standard on only one utility company, with little if any evidence to show that the water quality problem was peculiar to that company,[35] it seems

11 *supra*. The court did not agree with this argument, since such an interpretation would "require that we ignore the previously discussed constitutional and statutory provisions" which allow action by rule or order. 24 Ariz. App. at 129-30, 536 P.2d at 250-51; see text & notes 23-29 *supra*.

31. See 24 Ariz. App. at 127-29, 536 P.2d at 248-50.

32. *Id.* at 129, 536 P.2d at 250; *accord*, Trico Elec. Cooperative, Inc. v. Ralston, 67 Ariz. 358, 363-65, 196 P.2d 470, 473 (1948); Commercial Life Ins. Co. v. Wright, 64 Ariz. 129, 139-40, 166 P.2d 943, 949 (1946). The equal protection test suggested by the court may be found, to some degree, in a large number of federal cases. *See, e.g.*, Retail Union v. NLRB, 466 F.2d 380, 389-91 (D.C. Cir. 1972); Alabama-Tennessee Natural Gas Co. v. FPC, 359 F.2d 318, 343 (5th Cir. 1966); Mastrapasqua v. Shaugnessy, 180 F.2d 999, 1002 (2d Cir. 1950). *See also* Benjamin, *A Lawyer's View of Administrative Procedure—The American Bar Association Program*, 26 LAW & CONTEMP. PROB. 203, 204 (1961); Massel, *The Regulatory Process*, 26 LAW & CONTEMP. PROB. 181, 199 (1961); Wright, *Federal Rule Making*, 59 CORNELL L. REV. 375, 379 (1974); Note, *Role of Remedial Discretion in the Exercise of Ad Hoc Rule Making*, 36 IND. L.J. 484, 487 (1961). Courts have often upheld the issuance of adjudicatory orders by public service commissions against public utilities. *See, e.g.*, Chicago, M., St. P. & Pac. R.R. v. Public Serv. Comm'n, 221 Ind. 1, 6, 46 N.E.2d 230, 231 (1943); Northwestern Tel. Serv. Co. v. Public Util. Comm'n, 175 Ohio St. 300, 301, 194 N.E.2d 434, 434 (1963); Southern Ry. v. Commonwealth, 193 Va. 291, 299, 68 S.E.2d 552, 558 (1952).

33. *See* 24 Ariz. App. at 127-28, 536 P.2d at 248-49.

34. ARIZ. CONST. art. 15, § 3; ARIZ. REV. STAT. ANN. §§ 40-202(B), -321(A) (1974).

35. It is not clear whether the Commission had specific factual data as to the average dissolved solids and chloride levels of water in other areas of the state. *See* 24 Ariz. App. at 131, 536 P.2d at 252. The Commission did receive testimony from the State Health Department indicating that test results of Palm Springs water showed 2,049 parts per million [ppm] of dissolved solids (as compared to the federally recommended

probable that the court would uphold most decisions to exercise the order-making power.

Choice Between Regulations and Orders

The correct choice in a given situation between the two methods of administrative operation allowed to the Commission in *Palm Springs* has long been an area of considerable debate,[36] and is of great importance today. Although indicating that rules of general applicability are not always desirable,[37] the Arizona court of appeals recognized that as a general principle, the generation of policy by promulgation of industrywide regulation is favored over case-by-case adjudication.[38] Preference is given to the promulgation of rules for a variety of reasons. First, it permits private entities who will be affected by agency action to plan effectively, relying on established rules. Although agencies can give guidance through decisions reached on a case-by-case basis, an established rule provides clearly articulated standards for the corporation to consider before it acts.[39]

Acting by regulation is also more likely to result in uniform application of the agency's decisions, a crucial factor when many corporations are involved, which avoids putting the burden of an agency policy on one corporation unfortunate enough to become the medium for case-by-case rulemaking.[40] Another advantage of acting by regulation is that agencies can utilize their research and administrative staffs more effectively when a regulation is being fashioned for future application.[41] Adjudicatory rulemaking likewise fails to give adequate

maximum of 500 ppm) and 840 ppm of chlorides (as compared to the federal standard of 250 ppm). *Id.* at 126, 536 P.2d at 247. Although the methodology used by the Commission to arrive at the standard it imposed on Palm Springs (not more than 1,000 ppm of dissolved solids and 250 ppm of chlorides) is unclear, the standard it set appears to be easily attainable, at least in portions of the state. For a report on the water quality in McMullen Valley (covering parts of Maricopa, Yavapai, and Yuma counties), see W. Kam, GEOLOGY & GROUND-WATER RESOURCES OF THE MCMULLEN VALLEY, MARICOPA, YAVAPAI, AND YUMA COUNTIES, ARIZONA (Ariz. State Land Dep't Water Resources Rep. No. 8, 1961). In this study, of the 48 locations tested, the average level of dissolved solids was less than 500 ppm, with only two locations exceeding 1,000 ppm. Further, the average chloride content was less than 100 ppm, with only 2 samples exceeding 200 ppm. *Id.* at 61-66. These figures are not necessarily representative of statewide water quality, however, as McMullen Valley covers only 720 of Arizona's 114,000 square miles. *See id.* at 7.

36. See authorities cited note 3 *supra.*

37. 24 Ariz. App. at 129, 536 P.2d at 250, *quoting* SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

38. 24 Ariz. App. at 128, 536 P.2d at 249.

39. Baker, *supra* note 3, at 662-64; Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards,* 75 HARV. L. REV. 863, 878-79 (1962); Shapiro, *supra* note 3, at 926, 932-35.

40. *Cf.* Friendly, *supra* note 39, at 878. For a discussion of the possibility of proceeding against all similarly situated companies to allow consistency, see Shapiro, *supra* note 3, at 935-36.

41. Baker, *supra* note 3, at 664-65; Shapiro, *supra* note 3, at 930-32. *Cf.* Friendly, *supra* note 39, at 882. Some agencies may be able to reap the same benefit by delaying prosecution until adequate research has been completed. Shapiro, *supra* note 3, at 932.

notice to members of the affected class, and, although agencies may periodically receive amicus curiae briefs as they hear a case, there is generally very little public participation.[42] On the other hand, the last step of the rulemaking process is normally a public hearing,[43] with notice to those affected, at which criticism of the proposed rule can be received.[44] Regulation by adjudication is also disfavored as not being as conducive to judicial review as regulation by previously established rules.[45]

Case-by-case adjudication, however, remains essential for effective regulation when the agency's familiarity or experience with a problem area is too limited to allow intelligent promulgation of general rules or where the problem is unique and unlikely to recur.[46] Even in such a situation, the agency should normally attempt to formulate a general rule as soon as possible.[47] Compromise rulemaking by ad hoc decisions, until sufficient experience is gained, followed by promulgation of industrywide regulations, is probably the most efficient and effective procedural pattern for most agencies to follow.[48] It allows the agency to study the issue as long as necessary, adjudicating as many specific cases as required to gain sufficient experience or knowledge in the area, and to then formulate the general rule.[49] Absent a legislatively defined rule to determine when an agency may proceed by adjudication, the *Palm Springs* court grappled with the standard formulated in *SEC v. Chenery Corp.*[50] in order to evaluate the action of the Arizona Corporation Commission.

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42. Shapiro, *supra* note 3, at 930.
43. *See* Baker, *supra* note 3, at 664; Shapiro, *supra* note 3, at 930.
44. *See* text & note 17 *supra*. *See also* Davis, *supra* note 1, at 24.
45. Baker, *supra* note 3, at 664-65; Shapiro, *supra* note 3, at 941-42.

> There are many instances when the threat of administrative sanctions, such as nonrenewal of a license, may deter interested persons from testing the validity of an agency's position even though they believe that position to be invalid. In such instances, a formal announcement of the agency's position in a regulation may permit an individual to obtain judicial review even before any action has been taken in a particular case, if he can show that his ordering of his affairs is plainly affected by the very existence of the regulation. At the same time, however, the threat of review may operate to discourage an agency from taking any steps that would expose a questionable stand to judicial scrutiny.

Id.

46. Baker, *supra* note 3, at 661. Some authorities are not satisfied with requiring either rulemaking or case-by-case adjudication, and look only to the substantive effect of the action, not the particular procedure employed. *See* Benjamin, *supra* note 32; Bernstein, *The Regulatory Process: A Framework for Analysis*, 26 LAW & CONTEMP. PROB. 329, 331-32 (1961); Massel, *supra* note 32; Robinson, *supra* note 2, at 535-39.
47. *See* Baker, *supra* note 3, at 660-63; Jaffe, *The Report of the Attorney General's Committee on Administrative Procedure*, 8 U. CHI. L. REV. 401, 411 (1941). *See also* K. DAVIS, *supra* note 1.
48. Jaffe, *supra* note 47.
49. *See* Griswold, *A Summary of the Regulation Problem*, 54 HARV. L. REV. 398, 413-14 (1941).
50. 332 U.S. 194 (1947) (*Chenery* II). For a discussion of *Chenery* I and *Chenery* II and their relationship to one another, see note 52 *infra*.

The Chenery Test

The *Palm Springs* court cited *SEC v. Chenery Corp.*[51] for the proposition that an administrative agency could constitutionally issue an order without a prior regulation.[52] In *Chenery*, the Supreme Court was presented with the question of whether the Securities and Exchange Commission had the power to issue an order requiring certain corporate executives to turn in purchased stock, possession of which was not outlawed by statute or regulation, but was against Commission policy.[53] The Court concluded that in effectively administering its statutory responsibilities, the Commission was not required to embody all its decrees in the form of rules.[54] In order to perform its statutory functions effectively, the Commission needed the latitude to act either by regulation or adjudication.[55]

Although recognizing the importance of rulemaking as the preferred method of regulation, the Court acknowledged the necessity of retaining the discretionary power, under certain conditions, to solve problems on an ad hoc basis.[56] The Court then outlined those circumstances in which an agency should be allowed to act by order instead of regulation.[57] The problem should be: one which is not reasonably foreseeable; one with which the agency has had insufficient experience to intelligently form an acceptable rule; or one which is so specialized or unique that it cannot be adequately dealt with by a general rule.[58] The administrative agency in *Palm Springs*, as in

51. 332 U.S. 194 (1947) (*Chenery* II).

52. 24 Ariz. App. at 129, 536 P.2d at 250. *Chenery* involved a corporation which filed a voluntary plan for reorganization with the Securities and Exchange Commission. Before the reorganization proceedings were final, several officers of the corporation purchased about 7½ percent of the corporation's preferred stock on the open market. SEC v. Chenery Corp., 318 U.S. 80, 84-85 (1943) (*Chenery* I). The action was not fraudulent and no federal regulation was violated. *Id.* at 85. However, by order, the Commission directed these officers to surrender the shares at cost plus 4 percent interest, indicating only that the officers were in a fiduciary relationship with the corporation and should not be allowed to trade-in the corporation's stock during this period. *Id.* The Supreme Court found this order predicated upon an inadequate basis, and remanded it for further consideration by the Commission. *Id.* at 95. After additional review, the Commission reissued the order, this time basing it on the appropriate sections of the Public Utility Holding Company Act, ch. 687, 49 Stat. 803. The Supreme Court once again heard an appeal from the order. This time the decision was upheld as sufficiently justified by the reliance on the Holding Company Act. SEC v. Chenery Corp., 332 U.S. 194, 199, 209 (1947) (*Chenery* II). *See also* American Power & Light Co. v. SEC, 329 U.S. 90, 106 (1946). In *Chenery* II, then, the real question was whether the SEC could validly proceed by adjudication without previously adopting a rule.

53. 332 U.S. at 199-200.

54. *Id.* at 202.

55. *Id.* at 202-03. *See also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 774-75 (1969) (Black, J., concurring); American Power & Light Co. v. SEC, 329 U.S. 90, 106, 112 (1946); National Petroleum Refiner's Ass'n v. FTC, 482 F.2d 672, 678 (D.C. Cir. 1973).

56. 332 U.S. at 202-03.

57. *Id.*

58. *Id.*; *see* Baker, *supra* note 3, at 661-62; Griswold, *supra* note 49, at 413-41; Shapiro, *supra* note 3, at 927-28; Note, *supra* note 32, at 486-87. It should be noted

Chenery, was not statutorily required to promulgate any general rule before it acted by order.[59] Unlike the order in *Chenery*, however, the Commission's action appears to be one which should have been taken by rule. An application of the *Chenery* guidelines to the action taken in *Palm Springs* lends support to this conclusion.

The first question to consider in applying *Chenery* to *Palm Springs* is whether the problem of poor water quality was reasonably unforeseeable. Since the water quality problem involved dissolved solids and chlorides, a problem not uncommon to the Southwest,[60] it seems likely that the ultimate need to establish a water quality standard was reasonably foreseeable.[61] Second, it is extremely doubtful that the Corporation Commission's experience with the problem was so limited that formulation of a general rule was not possible.[62] Within the *Palm Springs* case itself there was evidence of experience in this area; expert testimony was available on water quality readings and problems,[63] and some knowledge of water quality in surrounding wells was possessed by the Commission.[64] Testimony given before the Commission indicated

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that *Chenery* II held that a decision to act by rule or order is within the informed discretion of the administrative agency, and that the specifying of situations in which it felt an agency would be justified in acting by order instead of rule was dictum. Justice Jackson in his dissent in *Chenery* II points out that the Court apparently had ignored this dictum itself since it seemed to assume that the agency did in fact arrive at its decision through the experience it possessed. 332 U.S. at 213 (Jackson, J., dissenting). Generally, the Supreme Court has cited *Chenery* for the proposition that the decision to act by order is within the informed discretion of the agency. *See* NLRB v. Bell Aerospace Co., 416 U.S. 290, 294 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 772 (1969). However, the courts have indicated that there may be situations in which an agency will have abused its discretion by failing to promulgate a rule. *See* NLRB v. Bell Aerospace Co., *supra*; Arkansas-Best Freight v. Occupational Safety & Health Review Comm'n, 529 F.2d 649, 656 (8th Cir. 1976). *See also* Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1139 (D.N.H. 1976). Here the court found that case-by-case adjudication, in the absence of general standards to guide such adjudication, could not be used to deny welfare benefits. With the qualified exception of *Baker-Chaput*, no court has found an agency's decision to act by order an abuse of discretion, based solely on the *Chenery* guidelines. Perhaps this is why the *Palm Springs* majority was not willing to go that far.

59. *See* text & notes 23-30 *supra*.

60. The problem is common enough that it was specifically dealt with by statute in California. CAL. HEALTH & SAFETY CODE §§ 4027-4028 (West 1970 & Supp. 1976). The California statutes establish the limits for dissolved solids and for chlorides identical to the federal standards. For the federal standards, see PUBLIC HEALTH SERVICE DRINKING WATER STANDARDS (Public Health Service Pub. No. 956, 1962). *See also* discussion note 35 *supra*. Dissenting in *Palm Springs*, Judge Jacobson would have taken judicial notice of the water quality problems of the Southwest, and argued that since these problems were prevalent, the necessity of establishing a water quality standard was foreseeable. 24 Ariz. App. at 130-31, 536 P.2d at 251-52 (Jacobson, J., dissenting).

61. 24 Ariz. App. at 131, 536 P.2d at 252 (Jacobson, J., dissenting).

62. In his dissent, Judge Jacobson argued that the burden of showing lack of experience should be on the Commission, and that the agency had failed to meet that burden. *Id.* Although this assertion is probably not supportable, and would seem to be contrary to *Chenery*, 332 U.S. at 202, at least one court has indicated that where the agency has sufficient experience, a regulation must be promulgated. Arkansas-Best Freight v. Occupational Safety & Health Review Comm'n, 529 F.2d 649, 656 (8th Cir. 1976). *See also* Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1139 (D.N.H. 1976).

63. *See* 24 Ariz. App. at 126, 536 P.2d at 247.

64. *Id.*

that water in the nearby City of Mesa, Arizona, was far below the standards which the Commission eventually established for Palm Springs.[65] The Commission also had access to federally recommended maximum levels for chlorides and dissolved solids[66] and imposed the federally recommended level for chlorides, but adopted a level twice as permissive as the level recommended for dissolved solids,[67] presumably for good reason.[68] Taken together, these specific examples of access to or possession of expertise seem to indicate that the Commission had sufficient experience with the problem to have established a prior regulation.

Finally, the question arises whether the problem in *Palm Springs* was so unique that its regulation by general rule was not possible. There was no indication in the Commission's order that the problem with Palm Springs' water was any different from problems encountered in other areas of the state.[69] Neither was there any indication of any factor that made Palm Springs' water problem so unique as to require its own set of standards which should not be imposed on other water companies in the state.[70] The facts in *Palm Springs* thus indicate that, under the *Chenery* test, there was an arguable basis for the claim by the company that the order was discriminatory and should have been preceded by an industrywide regulation.

Had the *Palm Springs* court adhered to the *Chenery* test, not only would the result have been different, but the lack of concise guidelines in Arizona administrative law would have been remedied; the Corporation Commission would have been provided clear limitations on its discretion to act by adjudication instead of regulation. Apparently, the Arizona court of appeals, perhaps conscious of the difficulty the Supreme Court has experienced in limiting administrative discretion, desired to leave the Commission with broader discretionary powers than arguably permitted by *Chenery*—powers as broad as the equal protection clause would allow.[71]

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65. Brief for Appellee at 3 & n., Arizona Corp. Comm'n v. Palm Springs Util. Co., 24 Ariz. App. 124, 536 P.2d 245 (1975).

66. 24 Ariz. at 125-26, 536 P.2d at 246-47. See discussion note 60 *supra*.

67. *Id.* at 126, 536 P.2d at 247.

68. Perhaps the adoption by the Commission of a lower standard for dissolved solids was a realization on its part that the federal standards were too strict for the Southwest, but since the Commission was not required to state the basis for its decision, the actual basis is unknown. *See id.* at 130, 536 P.2d at 251.

69. *See id.* at 131, 536 P.2d at 252 (Jacobson, J., dissenting). See discussion note 35 *supra*.

70. *See* 24 Ariz. App. at 130-31, 536 P.2d at 251-52. In NLRB v. Bell Aerospace Co., 416 U.S. 290 (1974), the Court justified the NLRB's decision to act by adjudication on the ground that a general rule could not adequately deal with the unique, although related, situations in question. *Id.* at 294. The Court also indicated that there may be situations in which such action by order would be an abuse of discretion. *Id.*

71. *See* 24 Ariz. App. at 129, 536 P.2d at 250. See Baker-Chaput v. Cammett, 406

Conclusion

Arizona administrative statutes, having failed to provide a framework for the administrative decision to use adjudicative orders in lieu of general rules, left the court without specific guidelines when the *Palm Springs* case arose. This gap in Arizona administrative law has apparently been filled by the decision, at least as applied to the Arizona Corporation Commission. Granted broad discretionary powers, the Commission is now required to establish a regulation covering a given problem only if there is no rational statutory or constitutional authority for an order or if the issuance of an order would be excessively discriminatory.

F. Supp. 1134, 1139 (D.N.H. 1976), for an application of *Chenery* in the equal protection context.

II. ANTITRUST LAW

A. APPLICATION OF THE RULE OF REASON TO EXCLUSIVE PHYSICIAN CONTRACTS FOR NUCLEAR MEDICINE

The reasonableness of restraints imposed upon the practice of medicine, through the device of exclusive contracts for medical services, was recently considered by the Arizona court of appeals in a suit by a physician excluded from the field of nuclear medicine by virtue of such an agreement. In *Dattilo v. Tucson General Hospital*,[1] the court found this restraint upon the practice of nuclear medicine to be justified by the "rule of reason."[2] For the most part, the facts in the case were undisputed.[3] Dr. Dattilo, an internist at Tucson General Hospital, was studying the specialty of nuclear medicine.[4] Dr. Dattilo is a doctor of osteopathy[5] and cannot practice at any other Tucson medical hospital.[6] In 1968, Tucson General began deliberations resulting in the

1. 23 Ariz. App. 392, 533 P.2d 700 (1975).
2. *Id.* at 395, 533 P.2d at 703.
3. *Id.* at 394, 533 P.2d at 702.
4. *Id.*
5. The evidence was in dispute as to whether the plaintiff had actually begun the practice of his specialty at the hospital. *See* Brief for Appellant at 4, Dattilo v. Tucson Gen. Hosp., 23 Ariz. App. 392, 533 P.2d 700 (1975). Dr. Dattilo did hold a license issued by the Arizona Atomic Energy Commission, authorizing him to handle radioactive isotopes. 23 Ariz. App. at 394, 533 P.2d at 702.

Osteopathy is a philosophy of medical treatment first proclaimed by Dr. A.T. Still in 1874. *See* 16 ENCYCLOPAEDIA BRITANNICA 1145 (1969). The modern 20th century concept of Dr. Still's teaching is that the human body is a unit that possesses an inherent ability to overcome disease. *Id.* at 1146. It recognizes that a variety of physical, chemical, and nutritional factors influence an individual's state of health and that drugs and surgery are necessary in the treatment of many illnesses. Osteopathy recognizes a disease process characterized by "osteopathic lesions" which develop in bones, joints, or muscles, and manifest themselves as areas of pain, tenderness, and muscle spasm. *Id.* Lesions are considered capable of causing disturbances in various organs by affecting the flow of blood. When no recognized disease is diagnosed in a patient, an osteopath may employ manipulation of the affected area to treat the lesions. *Id.* Osteopathy emphasizes physical treatment; including rest, exercise, diathermy, manipulation, and mechanical traction, although a modern physician will use such remedies only as an adjunct to accepted medical means of treatment. *Id.* By 1966, Doctors of Osteopathy [D.O.], enjoyed the right to practice medicine in 40 states. In 21 of these states, the licensing examinations given a D.O. and a Doctor of Medicine [M.D.] are identical. *Id.*

6. Brief for Appellant at 4; *see* 23 Ariz. App. at 396, 533 P.2d at 704; discussion note 75 *infra*. The practice of osteopathy has been subject to a number of restraints imposed by the American Medical Association. Until 1960, when the Association gave permission to medical societies to admit osteopathic physicians who are as qualified as medi-

organization of a nuclear medicine department.[7] Prior to the hospital's execution of an exclusive agreement to administer this department, Dr. Dattilo petitioned the Board of Trustees for consideration as a contractee.[8] This request was not acted upon,[9] and an exclusive contract was granted to two out-of-state physicians.[10] The hospital subsequently refused to allow Dattilo to practice nuclear medicine upon his own patients, invoking the exclusive provision of the contract.[11] Dr. Dattilo sought redress for an alleged violation of the Arizona constitution,[12] and the state antitrust statute,[13] and common law prohibitions against

cal doctors, a medical hospital would not grant staff privileges to osteopathic physicians. Greisman v. Newcomb Hosp., 40 N.J. 389, 393, 192 A.2d 817, 819 (1963). In *Greisman*, the court compelled a medical hospital to consider an osteopathic doctor's petition for staff privileges. *Id.* at 403-04, 192 A.2d at 824-25. Although a practitioner of osteopathy trains at a different professional school than a medical practitioner, there is no difference in accepted procedure or technique in the practice of nuclear medicine by a qualified doctor in either field. Interview with Dr. Dennis Patton, Director of the Division of Nuclear Medicine, University of Arizona Medical Center, in Tucson, Arizona, Sept. 1, 1976.

7. 23 Ariz. App. at 394, 533 P.2d at 702.

8. *Id.*

9. Brief for Appellant at 7. *Cf.* Peterson v. Tucson Gen. Hosp., Inc., — Ariz. App. —, 559 P.2d 186 (1976). The *Peterson* case arose when the appellant, Dr. Peterson, reapplied for membership on the staff of Tucson General Hospital after having had his staff privileges revoked for failure to comply with hospital rules and regulations. The hospital's Credentials Committee and Department of General Practice recommended the acceptance of the application, but the hospital Executive Committee denied it. *Id.* at —, 559 P.2d at 188. The appellant, Peterson, asked for judicial review of the hospital's action. The court of appeals ruled:

> We conclude that judicial review is proper. Our review, however, is not broad but is limited. If the hospital has refused staff privileges on the basis of factual findings supported by substantial evidence and reached its decision by the application of a reasonable standard, i.e. one that comports with the legitimate goals of the hospital and the rights of the individual and the public, then judicial inquiry should end.

Id. Arguably, the arbitrary refusal to consider Dr. Dattilo's application for specialty staff privileges would have been a violation of the *Peterson* rule, if that case had been existing precedent.

10. 23 Ariz. App. at 394, 533 P.2d at 702.

11. *Id.* The contractual clause provided: "The Board of Trustees agrees that, upon your arrival in Tucson, you will be in complete charge of the Nuclear Medicine area, and any other Physician working in that area will do so by your permission, and is to be responsible to you." *Id.*

12. ARIZ. CONST. art. 14, § 15 provides:

> Monopolies and trusts shall never be allowed in this State and no incorporated company, co-partnership or association of persons in this State shall directly or indirectly combine or make any contract, with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders or with any co-partnership or association of persons, or, in any manner whatever, to fix the prices, limit the production, or regulate the transportation of any product or commodity. The Legislature shall enact laws for the enforcement of this Section by adequate penalties, and in the case of incorporated companies, if necessary for that purpose, may, as a penalty declare a forfeiture of their franchises.

13. Ariz. Rev. Stat. Ann. § 44-1401 (1967) (repealed 1974) provided:

> A. A trust is a combination of capital, skill, or acts, by two or more persons for any of the following purposes:
>
> 1. To create or carry out restrictions in trade or commerce . . . in the full and free pursuit of any business authorized or permitted by law. . . .
>
> B. Any such combination is against public policy, unlawful and void . . . .
>
> C. The creation or maintenance of a monopoly within the state, or the attempt to create or maintain a monopoly within the state, is unlawful and

restraint of trade.[14] At trial, monetary damages were claimed for the loss of patient referrals from other doctors because of Dattilo's inability to provide specialty services.[15] The jury returned a verdict of $40,000 against one defendant, Tucson General Hospital.[16] Upon a motion by the defense, the trial judge set aside the verdict and entered judgment for all the defendants.[17]

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prohibited.

Arizona has now adopted the Uniform State Antitrust Act, Ch. 26, § 1, [1974] Ariz. Sess. Laws 59 (codified at ARIZ. REV. STAT. ANN. §§ 44-1401 to -1413 (Supp. 1976-77)).

14. *See* RESTATEMENT OF CONTRACTS §§ 513-16 (1932). Section 514 provides: "[A] bargain in restraint of trade is illegal if the restraint is unreasonable." Section 515 states:

> A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification if it (a) is greater than is required for the protection of the person for whose benefit the restraint is imposed, or . . . (c) tends to create, or has for its purpose to create, a monopoly . . . .

The RESTATEMENT OF TORTS §§ 765-67 (1939) also addresses restraints on trade.

> Persons who cause harm to another by a concerted refusal in their business to enter into or continue business relations with him are liable to him for that harm, even though they would not be liable for similar conduct without concert, if their concerted refusal is not justified under the circumstances.

Id. § 765(1). Among the factors to be considered in a finding of justification is "the appropriateness of the actors' conduct as a means of advancing their interests and the availability of less harmful means to that end." *Id.* § 765(c); *see* Blank v. Palo Alto-Stanford Hosp. Center, 234 Cal. App. 2d 377, 385, 44 Cal. Rptr. 572, 577 (Ct. App. 1965). The nature of these factors is imprecise. Their application to particular situations balances the relative importance to society and the parties of protecting the activities interfered with, against the damage caused by permitting the interference to continue. Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal. 2d 806, 810, 376 P.2d 568, 570, 26 Cal. Rptr. 640, 642 (1962).

The action for conspiracy to restrain trade developed from the English common law, which recognized a tort for interference with a lawful trade or calling. The elements necessary to establish a prima facie case are the existence of a valid business or relational expectancy, the knowledge of the expectancy on the part of the interfering party, an intentional interference inducing or causing a breach or termination of the expectancy without privilege or justification, and damage to the party whose expectancy has been disrupted. *See* Harber v. Ohio Nat'l Life Ins. Co., 390 F. Supp. 678, 683 (E.D. Mo. 1974), *aff'd*, 512 F.2d 170 (8th Cir. 1975); Downey v. United Weatherproofing, Inc., 363 Mo. 852, 858-59, 253 S.W.2d 976, 980 (1953); Calbom v. Knudtzon, 65 Wash. 2d 157, 162-63, 396 P.2d 148, 151 (1964).

Several cases have protected a medical professional's practice from unreasonable infringement. *See* Willis v. Santa Ana Community Hosp. Ass'n, *supra*; Wyatt v. Lake Tahoe Forest Hosp. Dist., 174 Cal. App. 2d 709, 715, 345 P.2d 93, 97 (Ct. App. 1959); Tatkin v. Superior Court, 160 Cal. App. 2d 745, 757-65, 326 P.2d 201, 208-13 (Ct. App. 1958); Owen v. Williams, 322 Mass. 356, 360, 77 N.E.2d 318, 321 (1948); Peek v. Northern Pac. Ry., 51 Mont. 295, 303-04, 152 P. 421, 423-24 (1915). *See also* Dent v. West Va., 129 U.S. 114, 121-23 (1889); Pratt v. British Medical Ass'n, [1919] 1 K.B. 244, 278-79; Basak, *Principles of Liability for Interference with Trade, Profession or Calling*, 27 LAW Q. REV., pt. I, 290; Pt. II, 399 (1911); *id.* at 28 LAW Q. REV., pt. III, 52 (1912); Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465 (1957); Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503 (1952).

15. 23 Ariz. App. at 396, 533 P.2d at 704.

16. *Id.* at 393, 533 P.2d at 701.

17. *Id.* The trial judge recognized that a conspiracy to restrain trade requires the agreement of two or more individuals and therefore directed a verdict for all defendants. Brief for Appellant at 3. *See, e.g.*, United States v. Wise, 370 U.S. 405, 407-10 (1962); Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 469 (1962); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 n.59 (1940). An agreement between a corporation and its shareholders, officials, or employees does not satisfy the plurality of actors requirement. *See, e.g.*, Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911, 914-15 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); Goldlawr, Inc. v. Shubert, 169 F. Supp. 677, 690 (E.D. Pa. 1958), *aff'd*, 276 F.2d 614 (2d Cir. 1960); Beacon

On appeal, the Arizona court of appeals affirmed. Reserving the question whether such a contract was governed by Arizona antitrust statutes or common law,[18] the court decided that under either cause of action the rule of reason was the appropriate legal standard and that "[r]easonable minds could not differ as to the reasonableness of and justification for the exclusive contract."[19]

This casenote will scrutinize the rationale of the *Dattilo* opinion in the light of Arizona law and precedent from other state and federal jurisdictions. As the rule of reason weighs several factors, an analysis must include an exposition of the relevant technical aspects of nuclear medicine and the beneficial and detrimental facets of use of the exclusive contract in the medical industry. Although there is evidence supporting the *Dattilo* court's finding of reasonableness, the court made no attempt to define the market for nuclear medicine services or the effect of the exclusive contract upon competition. Both elements are requisites in a rule of reason analysis, and will be discussed.

The Nuclear Medicine Specialty

Nuclear medicine[20] is a specialized medical tool available to physicians for the diagnosis of suspected disease through the measuring of absorption and retention of radioactive isotopes injected into the body.[21] The specialty is used in the detection of kidney, brain, and bone disease, tumors or cancers, and certain metabolic disorders.[22]

Fruit & Produce Co. v. H. Harris & Co., 152 F. Supp. 702, 704 (D. Mass. 1957). *See generally* 16 J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION § 6.01[1-2] (1975).

18. 23 Ariz. App. at 395, 533 P.2d at 703. The *Dattilo* court also did not rule on whether the medical profession is exempt from the Arizona antitrust laws. *See generally* 16F J. VON KALINOWSKI, *supra* note 17, at § 49.01(1) (1976); Bauer, *Professional Activities and Antitrust Laws*, 50 NOTRE DAME LAW. 570 (1975). The existence of an antitrust exemption in the federal courts for certain professional activities was placed in doubt by the recent Supreme Court decision of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), which held that bar association minimum fee schedules are a violation of parts of the Sherman Antitrust Act. 15 U.S.C. §§ 1-3 (Supp. V, 1975). The *Goldfarb* Court left open the possibility that the nature of the profession, its public service aspect, or the morale of the practitioners may be bona fide considerations that would justify a court in granting a special exemption. 421 U.S. at 787 n.17. Certain activities of the American Medical Association have been found subject to section 3 of the Sherman Act. *See* United States v. AMA, 110 F.2d 703 (D.C. Cir.), *cert. denied*, 310 U.S. 644 (1940) (restraint by medical association on legitimate operations of group health plan); Note, *Trade Regulations: Restraint on Practice of Medicine as an Illegal Restraint of Trade*, 6 U.C.L.A.L. REV. 348 (1959).

19. 23 Ariz. App. at 397-98, 533 P.2d at 705-06.

20. *See* H. WAGNER, PRINCIPLES OF NUCLEAR MEDICINE 1 (1968). "Nuclear medicine is the application of radioactive materials to the diagnosis and treatment of patients and the study of human disease." *Id. See generally* S. BAUM & R. BRAMLET, BASIC NUCLEAR MEDICINE (1975); W. BLAHD, NUCLEAR MEDICINE (2d ed. 1971); R. OLIVER, PRINCIPLES OF THE USE OF RADIO-ISOTOPE TRACERS IN CLINICAL AND RESEARCH INVESTIGATIONS (1971).

21. Dattilo v. Tucson Gen. Hosp., 23 Ariz. App. at 395, 533 P.2d at 703. *See generally* authorities cited note 20 *supra*.

22. S. BAUM & R. BRAMLET, *supra* note 20, at 175, 227, 236, 382.

The practice of nuclear medicine involves the selection of an appropriate isotope, the preparation of radioactive isotope solutions, their proper administration into the human body in accordance with the peculiar medical problem to be solved, the utilization of complex and costly apparatus to measure the decay of the isotopes induced, and the diagnosis of illness by interpreting the results displayed upon photographic scans.[23] A prerequisite to the practice of nuclear medicine is access to the technical equipment.[24] The Tucson metropolitan area currently has six nuclear medicine facilities;[25] each installation is owned by an area hospital. The institutions utilize a variety of machines which measure the presence of isotopes within the human organism. Such equipment costs from $50,000 to $150,000.[26] Because of this, private ownership of a complete nuclear diagnostic facility is economically unfeasible.[27]

A specialist in nuclear medicine must successfully complete four years of advanced research subsequent to graduation from medical school.[28] Two years of this scholastic preparation are devoted to studies in radiology, and an additional two years are spent on the practical and technical aspects of nuclear medicine.[29] The principal role of the nuclear specialist is to analyze scans in order to diagnose illness and disease. The physician must also be present to control the positioning of the patients and the procedures used when the scans are prepared. The doctor is also commonly charged with the supervision of technical personnel in those portions of the specialty that do not require the physician's personal attention.[30] The mixture of administrative and medical functions in this specialty is an important consideration favoring exclusive control of the department's operation. The performance of any individual physician depends upon the smooth interaction of the

23. W. BLAHD, *supra* note 20, at 1-128, 145-55.
24. *See* S. BAUM & R. BRAMLET, *supra* note 20, at 218-31; W. BLAHD, *supra* note 20, at 25-54.
25. Interview with Dr. Dennis Patton, *supra* note 6.
26. Interview with Michael J. Harris, Administrator of Tucson General Hospital, in Tucson, Arizona, on Sept. 9, 1976; Interview with Dr. Dennis Patton, *supra* note 6.
27. Interview with Dr. Dennis Patton, *supra* note 6.
28. *Id.*
29. *Id.*
30. *Id.* Radioactive isotopes are manufactured commercially and are prepared in solution by a trained radio-pharmacist. Interview with Dr. Dennis Patton, *supra* note 6. The introduction of these isotopes can usually be accomplished by oral administration or a simple injection by trained personnel. H. WAGNER, *supra* note 20, at 833-34, 840-58. After administration, the radioactive isotopes are measured by hospital technicians using sophisticated equipment. W. BLAHD, *supra* note 20, at 1-128, 145-55. The photographic scans can be permanently recorded for use at a later time. *Id.* It is important to note that the physician is ultimately responsible for the supervision of personnel in all the above tasks. Interview with Dr. Dennis Patton, *supra* note 6. *See generally* W. BLAHD, *supra* note 20, at 1-128, 145-55.

functioning elements and personnel.[31] A doctor's personal preferences as to the procedures to be used may conflict irreconcilably with the standards used by other doctors and the techniques of medical personnel.[32] Any efficiencies obtained in the management of the department should afford substantial benefits to patient care.

Application of the Rule of Reason

The *Dattilo* court found the alleged restraints of trade arising from the hospital's exclusive contract with physicians to be justified by the rule of reason.[33] The rule of reason originated in federal jurisprudence as a method of assessing the propriety of certain commercial practices with anticompetitive side effects.[34] The Sherman Antitrust Act[35] forbids all contracts, combinations, and conspiracies in restraint of trade.[36] However, the Act was interpreted in *Standard Oil Co. v. United States*,[37] to prohibit only unreasonable competitive restraints.

31. Interview with Dr. Dennis Patton, *supra* note 6.

32. *Id.*

33. 23 Ariz. App. at 395, 533 P.2d at 703. For Arizona case law upon this subject, see Bonney v. Northern Ariz. Amusement Corp., 78 Ariz. 155, 277 P.2d 248 (1954); Tucson Fed. Sav. & Loan Ass'n v. Aetna Inv. Corp., 74 Ariz. 163, 245 P.2d 423 (1952).

34. *See* Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911).

35. 15 U.S.C. §§ 1-7 (Supp. V, 1975). *See generally* 16A J. VON KALINOWSKI, *supra* note 17, at §§ 9.01[1]-9.02[5] (1976); Note, *"Combinations" in Restraint of Trade: A New Approach to Section One of the Sherman Act*, 1966 UTAH L. REV. 75.

36. 15 U.S.C. § 1 (Supp. V, 1975) states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ." The next section of the Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . ." *Id.* §2.

Proof of an interstate commerce connection is a necessary element to a cause of action under the Sherman Act. *Id.* § 1. No federal law violation was alleged in *Dattilo*, although there is no reason why such a count could not have been included. The crucial element of proof in determining federal jurisdiction is an effect, actual or threatened, upon interstate commerce. *See, e.g.*, Burke v. Ford, 389 U.S. 320, 321 (1967); Radovich v. National Football League, 352 U.S. 445, 451-52 (1957); United States v. Yellow Cab Co., 332 U.S. 218, 225-26 (1947). Tucson General Hospital has substantial contacts with interstate commerce. In fact, the dispute in *Dattilo* was focused on the fact that the hospital employed two out-of-state doctors to enter the exclusive contract. In addition, the hospital regularly purchases quantities of medicines from out-of-state suppliers. Interview with Michael J. Harris, *supra* note 26. A recent Supreme Court decision, Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976), held that a possible effect on future out-of-state medicine purchases, revenues from out-of-state insurance companies, and the commercial effects of proposed new construction, would be sufficient to establish the hospital's nexus with interstate commerce for Sherman Act purposes. *Id.* at 741. *See also* Apex Hosiery v. Leader, 310 U.S. 464, 484-85 (1940); Teamsters Local 167 v. United States, 291 U.S. 293 (1934); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

37. 221 U.S. 1 (1911). *See also* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). The Supreme Court has distinguished per se restraints from a class of competitive practices which, upon the application of the rule of reason, may be found unreasonable. White Motor Co. v. United States, 372 U.S. 253, 261-64 (1963); *see* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); People v. Santa Clara Valley Bowling Proprietors Ass'n, 238 Cal. App. 2d 225, 234, 47 Cal. Rptr. 570, 576 (Ct. App. 1965). Per se restraints are practices that exist only for anticompetitive purposes; they are always condemned. The textbook statement of per se illegality was made in Northern Pac. Ry. v. United States, *supra*: "[T]here are certain agreements or practices which

The test of reasonableness is essentially an examination of competitive sensibility.

Under the rule of reason, the purpose of a restraint and its impact upon the relevant market is examined.[38] The factors to be weighed under the federal antitrust rule include: the peculiar nature of the business, conditions before and after the imposition of the restraint, and the nature of the restraint itself.[39] The rule of reason excuses an act

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because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 356 U.S. at 5. *See also* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 373 (1967) (territorial restrictions on resale of products by distributors are illegal per se); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211-12 (1959) (group boycotts are illegal per se); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (price-fixing is illegal per se).

When the restraint is not per se illegal, the Court conducts a case by case determination of its reasonableness in the affected area of competition. *See, e.g.*, United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 387 (1956) (the reasonableness of restraint on market tested by measuring the effect on relevant market); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 622-24 (1953) (newspaper advertising rates held reasonable because of legitimate competitive purpose in reducing newspaper's costs); Von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A.L. REV. 569, 590 (1964). *See also* 16 J. VON KALINOWSKI, *supra* note 17, at §§ 6.02[1]-6.02[4]; Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965); Note, *The Bank Holding Company and the Sherman Act: The Validity of Cooperation Among Commonly Held Banks*, 18 ARIZ. L. REV. 147, 162-64 (1976).

38. The general competitive environment is normally identified by an inquiry into the product and geographic markets. The relevant product market is the range of goods or services with which a product or service competes. A court examines all items that are reasonably interchangeable with the product or service in question; all close substitutes are part of the relevant product market. International Boxing Club v. United States, 358 U.S. 242, 249-50 (1959) (action under sections 1 and 2 of the Sherman Act); United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 395 (1956) (action under section 2 of the Sherman Act); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 615-25 (1953) (action under sections 1 and 2 of the Sherman Act). The relevant geographic market is the area in which the defendant does business or in which he can compete effectively. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 331-32 (1961) (held no violation of section 3 of the Clayton Act or sections 1 and 2 of the Sherman Act); United States v. E.I. DuPont de Nemours & Co., *supra* (action under section 2 of the Sherman Act). The factors that determine the relative geographic constraints include transportation costs, Erie Sand & Gravel Co. v. FTC, 291 F.2d 279, 281 (3d Cir. 1961), the area of effective competition of the questioned product, United States v. Columbia Pictures Corp., 189 F. Supp. 153, 192 (S.D.N.Y. 1960), or the availability of other sources of supply. Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 454-57 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967).

The relevant product and geographic markets of the nuclear medicine industry were not defined by the *Dattilo* court. It is proposed that the relevant market for nuclear medicine services should have been defined by the *Dattilo* court to include only the Tucson metropolitan area, for several reasons. Nuclear medicine is primarily used in the treatment of critically-ill patients. Interview with Dr. Dennis Patton, *supra* note 6. Such individuals cannot be expected to utilize other services at a distance greater than a short ambulance trip. Thus the actual competitive market for nuclear medicine services is very limited.

39. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). The inquiry is conducted on a case by case basis. The court will first determine the business area or relevant market affected by the restraint. *See* text & note 38 *supra*. Once this determination has been made, the courts examine the condition of the market before and after the restraint was imposed in order to test its reasonableness. Two common tests are used by federal courts to determine the anticompetitive effect of a restraint contested under the Sherman Act. 15 U.S.C. §§ 1-7 (Supp. V, 1975). The first applies a direct

that "merely regulates and perhaps thereby promotes competition"[40] but condemns it when its effect is to suppress or destroy competition.[41] If the questionable activity serves a legitimate purpose and produces a beneficial result which outweighs the detrimental effects of the reduction of competition, it will be found reasonable.[42] In *Dattilo*, the court had to apply these principles to nuclear medicine.

Traditionally, courts are extremely hesitant to interfere with the administration of hospitals.[43] An exception is occasionally made when a physician is summarily denied access to hospital facilities.[44] In the

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measurement that seeks to ascertain whether the relevant market has been substantially changed on a percentage share basis. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (action under sections 1 and 2 of the Sherman Act—87 percent of accredited service stations constituted a monopoly); United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 399 (1956) (action under section 2 of the Sherman Act—18 percent of market does not constitute a monopoly); American Tobacco Co. v. United States, 328 U.S. 781, 794-98 (1946) (action under section 2 of the Sherman Act—80 plus percent of tobacco market was a monopoly). *See also* United States v. Columbia Steel Co., 334 U.S. 495, 527-28 (1948) (action under sections 1 and 2 of the Sherman Act).

A second test involves an analysis of market structure and is used in cases where a defendant's market share is not so clearly determinative. Offenses against Sherman Act section 1 are examined under a variety of factors in order to gauge the reasonableness of restraints by firms possessing between 50 and 80 percent of the relevant market. *See* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 329 (1961); United States v. E.I. DuPont de Nemours & Co., *supra* at 387-89; United States v. Columbia Steel Co., *supra*.

40. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

41. *Id.*

42. *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967) (vertically imposed distribution restraint, absent price-fixing intent, instituted in reasonably competitive market, not a per se violation and not unreasonable under section 1 of the Sherman Act); United States v. Columbia Steel Co., 334 U.S. 495, 526-28 (1948) (acquisition of corporation by defendant was not a Sherman Act violation absent intent to restrain trade and absent a substantial effect upon the market for steel goods); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238-41 (1918) (restriction upon the time period for price making on exchange was reasonable as a regulation with no appreciable effect on market prices).

43. Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 64 (D.D.C. 1963). In *Shulman*, the district court refused to grant a physician's petition for reinstatement to a hospital courtesy staff. Although the hospital was operated for the benefit of the public and not for profit, and had accepted donations from the government, *Id.* at 61, it was found not to be public in nature. The court refused to place a duty upon the hospital to not arbitrarily exclude practicing members of the medical profession. *Id.* at 63-64. *See generally* authorities cited note 68 *infra*.

44. *See, e.g.*, Rosner v. Eden Township Hosp. Dist., 58 Cal. 2d 592, 598, 375 P.2d 431, 434, 25 Cal. Rptr. 551, 554 (1962); Greisman v. Newcomb Hosp., 40 N.J. 389, 403-04, 192 A.2d 817, 825 (1963); Woodard v. Porter Hosp. Inc., 125 Vt. 419, 423, 217 A.2d 37, 40 (1966). The California supreme court in *Rosner* ordered the readmittance of a physician to a municipal hospital staff because it found that the evidence failed to sustain a professional ethics charge based upon the doctor's inability "to get along with some of the doctors or hospital personnel." 58 Cal. 2d at 598, 375 P.2d at 434-35, 25 Cal. Rptr. at 554-55. In essence, the court held that this was not a sufficient ground to exclude a physician from a hospital. *Id.*

The court in *Woodard* found that a doctor's complaint that a hospital had first arbitrarily reduced his surgical privileges and then declared his expulsion from the general hospital staff without a hearing, stated a cause of action. 125 Vt. at 424, 217 A.2d at 40. The Vermont supreme court held that even though Porter Hospital was a private institution, it must exercise its discretionary powers of staff selection as a fiduciary for the public good. *Id.* at 423, 217 A.2d at 40. *See* Peterson v. Tucson Gen. Hosp., Inc., — Ariz. App. —, 559 P.2d 186, 191 (1976) (holding that the decisions of a hospital having a geographic monopoly in the field of osteopathy are subject to limited judicial review, as it is a "quasi-public" institution).

vast majority of cases, the decision of a hospital board of trustees will be upheld if it is based upon any substantial justification.[45] The *Dattilo* court relied heavily upon four cases which have found the use of an exclusive contract system for the administration of medical specialties to be justified.[46]

The California court in *Blank v. Palo Alto-Stanford Hospital Center*[47] decided that a count alleging that such a contract constituted unjustified interference with the plaintiff's profession was unmerited:[48] "[T]he exclusive contract method of operating the Palo Alto Diagnostic X-Ray Department was, and is, a reasonable method of operating the department."[49] The *Blank* court based its conclusion upon evidence of the benefits to patient care, hospital administration, and the availability of physicians in emergency situations.[50] The court passed over the alleged antitrust violations because of an earlier California case that found the "learned professions" to be exempt from certain California antitrust statutes.[51] The *Blank* decision itself is persuasive authority for the *Dattilo* holding. Although *Blank* did not consider exclusive contracts in the context of their reasonableness under

45. See discussion & cases cited note 68 *infra*.

46. 23 Ariz. App. at 395-96, 533 P.2d at 703-04; *see* Letsch v. Northern Hosp. Dist., 246 Cal. App. 2d 673, 55 Cal. Rptr. 118 (Ct. App. 1966); Blank v. Palo Alto-Stanford Hosp. Center, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (Ct. App. 1965); Benell v. City of Virginia, 258 Minn. 559, 104 N.W.2d 633 (1960); Adler v. Montefiore Hosp. Ass'n, 453 Pa. 60, 311 A.2d 634 (1973), *cert. denied*, 414 U.S. 1131 (1974). It should be noted that evidence of similar prevailing business customs is not a conclusive justification for restraints of trade or commerce. Several courts hold that such testimony is irrelevant, since the guilt or innocence of others cannot justify an antitrust violation. United States v. New York Great Atl. & Pac. Tea Co., 173 F.2d 79, 89 (7th Cir. 1949); Hills Bros. Inc. v. FTC, 9 F.2d 481, 484-85 (9th Cir.), *cert. denied*, 270 U.S. 662 (1926).

47. 234 Cal. App. 2d 377, 394, 44 Cal. Rptr. 572, 583 (Ct. App. 1965). In *Blank*, the plaintiff was a doctor specializing in radiology and a member of the hospital's general staff. The Palo Alto-Stanford Hospital is a cooperative facility, owned in part by the City of Palo Alto and in part by the trustees of the Leland Stanford Junior University. There are two separate radiology facilities within the hospital. The defendants were granted an exclusive contract in radiology at the city operated facility within the hospital. The contract allowed the defendants to engage other assistants at their own expense. *Id.* at 383, 44 Cal. Rptr. at 575. The hospital, prior to the time the contract was granted, maintained a staff of 17 doctors who enjoyed radiology privileges. Subsequent to the execution of the exclusive contract, 14 lost all access privileges. *Id.* at 381, 44 Cal. Rptr. at 574-75. For purposes of the case, the court did not determine the public or private status of the hospital, but assumed that its governing board did not have the unrestricted right to enter into an exclusive contract, and could do so only if its action was not unreasonable or arbitrary. *Id.* at 383, 44 Cal. Rptr. at 576.

48. *Id.* at 385, 44 Cal. Rptr. at 577. *See generally* discussion & authorities cited note 14 *supra*.

49. 234 Cal. App. 2d at 386, 44 Cal. Rptr. at 578.

50. *Id.* at 388-89, 44 Cal. Rptr. at 579.

51. *See id.* at 379, 44 Cal. Rptr. at 573-74. The California supreme court in Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal. 2d 806, 809, 376 P. 2d 568, 570, 26 Cal. Rptr. 640, 642 (1962), implied an exemption in the statutory prohibition contained in CAL. BUS. & PROF. CODE §§ 16700-16758 (West 1964) regulating trusts which carry out "restrictions in trade or commerce." *Id.* § 16720. Trade or commerce was found not to include professions because other antitrust legislation includes them specifically within its terms. *See id.* § 1600: "[E]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

the antitrust law, it weighed the justifications for the exclusive contract and found the alleged offense to be a reasonable practice by the Palo Alto-Stanford Hospital in establishing a radiology facility as required by California law.[52] The *Dattilo* court utilized similar analysis. The two cases can nonetheless be distinguished upon the ground that a California administrative code provision required the Palo Alto-Stanford Hospital to maintain radiology facilities[53] and Arizona law does not have such a requirement. The *Blank* court held the exclusion of the plaintiff from a facility required by California administrative regulations to be neither arbitrary nor unreasonable as a matter of law.[54] The standard applied by *Blank* is more closely akin to that used for judicial review of administrative action than the standard of reasonableness used by *Dattilo*.[55] The *Blank* court states that only an abuse of discretion by the hospital would have demanded a different result,[56] clearly a less demanding test than the balancing test used by *Dattilo* under the rule of reason.[57]

Following *Blank*, another California court, in *Letsch v. Northern San Diego County Hospital District*[58] held that the closed staff operation of a public hospital's radiology services did not unlawfully interfere with the practice of medicine by the doctors using the hospital. In addition, the *Dattilo* court relied upon two state supreme courts which have also adjudicated issues relating to the maintenance of exclusive medical specialty departments at hospitals. The Minnesota supreme court, in *Benell v. City of Virginia*,[59] held that the institution of a closed staff system in radiology in a municipal hospital was reasonable. Although cited in *Dattilo* for the proposition that the closed staff radiology department was "in furtherance of the hospital's obligation to operate and ad-

52. 234 Cal. App. 2d at 394, 44 Cal. Rptr. at 582-83.
53. *See id.* at 387, 44 Cal. Rptr. at 578.
54. *Id.* at 394, 44 Cal. Rptr. at 582-83.
55. *Compare id.* at 394, 44 Cal. Rptr. at 583, *with* Dattilo v. Tucson Gen. Hosp., 23 Ariz. App. at 395-96, 533 P.2d at 704-05.
56. *See* 234 Cal. App. 2d at 381, 44 Cal. Rptr. at 574.
57. *See* text & notes 33-42 *supra.*
58. 246 Cal. App. 2d 673, 55 Cal. Rptr. 118 (Ct. App. 1966). Here the controversy originated when an exclusive contract was given by the defendant public hospital for the performance of all hospital radiology services. The plaintiff attacked the grant as an unlawful interference with his right to pursue the practice of medicine. *Id.* at 674, 55 Cal. Rptr. at 119. No antitrust issue was raised. The *Letsch* court relied on Blank v. Palo Alto-Stanford Hosp. Center, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (Ct. App. 1965), and held that the exclusive contract system was reasonable. 246 Cal. App. 2d at 677, 55 Cal. Rptr. at 121.
59. 258 Minn. 559, 104 N.W. 2d 633 (1960). The plaintiff in *Benell* was a specialist in radiology practicing at the Virginia Municipal Hospital, an institution governed by an appointed public board. *Id.* at 561, 104 N.W.2d at 635. Pursuant to an order of this body, the plaintiff was notified of the termination of his services at the hospital because of his refusal to disassociate himself from a private clinic in the area. *Id.* Dr. Benell sought judicial review of the hospital board resolution on the grounds that it was arbitrary and capricious. *Id.* The *Benell* court was persuaded by evidence of the reasonableness of the hospital's desire to employ a full time, independent cardiologist.

minister the hospital efficiently and economically,"[60] the *Benell* court actually limited its function to a determination of whether the commission's act was supported by substantial evidence.[61] The court cited the views of the American College of Radiology, approving the practice of exclusive hospital control of X-ray facilities,[62] and ruled the Board's action to be neither arbitrary nor capricious, and therefore nonreviewable.[63] Presumably, the standard of judicial review of administrative action used in *Benell* is not equivalent to the standard of reasonableness applied by *Dattilo*. It can be argued that *Benell* is weak support for the *Dattilo* holding.[64]

The Pennsylvania supreme court, in *Adler v. Montefiore Hospital Association*,[65] held that to allow open admissions to the surgery staff while requiring a closed cardiology department did not violate fourteenth amendment equal protection or due process rights.[66] The *Adler* court ruled the actions of a teaching hospital to be state action,[67]

Id. at 562-63, 104 N.W.2d at 635. The dissent in this case suggested that the practice of granting exclusive contracts imposed an unreasonable burden upon the right of a patient to choose an attending physician, as well as upon the practice of medicine by a competent physician already permitted to practice cardiology at the hospital. *Id.* at 570-71, 104 N.W.2d at 639-40 (Gallagher, J., dissenting).

60. 23 Ariz. App. at 396, 533 P. 2d at 704.

61. 258 Minn. at 563-64, 104 N.W.2d at 636.

62. *Id.* at 564 n.2, 104 N.W.2d at 636 n.2.

63. *Id.* at 563, 104 N.W.2d at 636.

64. See generally text & note 55 *supra*.

65. 453 Pa. 60, 311 A.2d 634 (1973), *cert. denied*, 414 U.S. 1131 (1974). Dr. Adler sought to render comprehensive medical care, including cardiology, to his own patients at a public teaching hospital. *Id.* at 62, 311 A.2d at 635. He contended that the hospital's practice of exclusivity was unlawful and violative of equal protection and due process rights. *Id.* at 76-82, 311 A.2d at 642-45. The Pennsylvania supreme court found the requisite state action to bring constitutional scrutiny to bear. *Id.* at 69, 311 A.2d at 639. The court ruled that the alleged discrimination, perpetrated by allowing open access in the surgery department but refusing free entrance to the cardiology department, did not constitute an unreasonable distinction between classes of individuals. *Id.* at 78-80, 311 A.2d at 643-44. The *Adler* court also found that Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), did not grant Dr. Adler a right to a hearing before dismissal. 453 Pa. at 81, 311 A.2d at 645.

66. 453 Pa. at 78-80, 311 A.2d at 643-44. *See* discussion note 65 *supra*.

67. 453 Pa. at 70-71, 311 A.2d at 639-40. The fourteenth amendment applies only to action by the state and not to private conduct. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961); Shelley v. Kraemer, 334 U.S. 1, 13-15 (1948). In *Burton*, the Court ruled that essentially private conduct cannot violate the fourteenth amendment unless the state is involved to a significant extent. 365 U.S. at 722. A distinction has been recognized between public and private hospitals for such constitutional purposes. A public hospital is an instrumentality of the state, owned and operated by the public. A private hospital is founded and maintained by private persons or a corporation over which the state can exercise no managerial control. Edson v. Griffin Hosp., 21 Conn. Supp. 55, 58-59, 144 A.2d 341, 343 (Super. Ct. 1958); Levin v. Sinai Hosp., 186 Md. 174, 178, 46 A.2d 298, 300-01 (1946); Woodard v. Porter Hosp. Inc., 125 Vt. 419, 422, 217 A.2d 37, 39-40 (1966). Courts have characterized some hospitals as quasi-public or community institutions, particularly where the hospital has received funds from public sources and through public subscription, and where it enjoys tax benefits because of its nonprofit status. *See* Silver v. Castle Memorial Hosp., 53 Hawaii 475, 481-82, 497 P.2d 564, 569-70, *cert. denied*, 409 U.S. 1048 (1972); Greisman v. Newcomb Hosp., 40 N.J. 389, 396, 192 A.2d 817, 820-21 (1963); Sussman v. Overlook Hosp. Ass'n, 95 N.J. Super. 418, 421-22, 231 A.2d 389, 391 (App. Div. 1967). Another instance where a hospital has been found to be a semi-public institution is where it

so that the hospital could be constitutionally prohibited from acting arbitrarily in derogation of Dr. Adler's rights. However, the right of a physician to hospital privileges is not uniformly recognized.[68] Moreover, the equal protection standard applied in *Adler* is not equivalent to the rule of reason in the antitrust laws.

Reasonableness of Granting Exclusive Contracts

Although the *Dattilo* court failed to consider the anticompetitive effects of an exclusive contract upon the market for nuclear medicine services, it did consider whether there was substantial evidence of the reasonableness of the contract, and its impact upon medical care. The court noted that Tucson General Hospital, in establishing an exclusive contract system for its nuclear medicine department, had a legitimate purpose. By entering the contractual arrangement, the hospital added two specialists and instituted a full-time nuclear medicine department.[69] The *Dattilo* court found no evidence of an anticompetitive purpose or intent to monopolize the nuclear medicine specialty.[70] Nevertheless, the legitimate nature of the overall purpose does not prevent an inquiry into the reasonableness of a competitive practice as a method of conducting business.[71] In the *Dattilo* context, evidence exists to support

receives construction funds and other benefits allowed under federal statutes. 42 U.S.C. §§ 291-300 (1974); *see* Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826, 828 (4th Cir. 1969); Eaton v. Grubbs, 329 F.2d 710, 715 (4th Cir. 1964). *See also* Peterson v. Tucson Gen. Hosp., Inc., — Ariz. App. —, 559 P.2d 186, 191 (1976) (quasi-public institution found where private hospital holds a de facto monopoly over the practice of osteopathic medicine in a particular geographic area).

68. A substantial number of cases hold that the decision to include or exclude physicians from admission to a medical staff, or to decline to review an appointment that has expired, rests within the sound discretion of hospital administrators. *See, e.g.*, Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 63 (D.D.C. 1963); Levin v. Sinai Hosp., 186 Md. 174, 179-80, 46 A.2d 298, 301 (1946); Leider v. Beth Israel Hosp. Ass'n, 11 N.Y.2d 205, 209, 182 N.E.2d 393, 394, 227 N.Y.S.2d 900, 901 (1962). A generally recognized limitation on this discretion is that a hospital board may not be arbitrary or capricious in its selection of staff. *See, e.g.*, Rosner v. Eden Township Hosp. Dist., 58 Cal. 2d 592, 598, 375 P.2d 431, 434, 25 Cal. Rptr. 551, 554 (1962); Greisman v. Newcomb Hosp., 40 N.J. 389, 403-04, 192 A.2d 817, 825 (1963); Woodward v. Porter Hosp., Inc., 125 Vt. 419, 423, 217 A.2d 37, 40 (1966). The almost universal rule is that a hospital may set up reasonable staff requirements and may enact reasonable rules to promote administration and patient care. *See, e.g.*, Hayman v. City of Galveston, 273 U.S. 414, 417-18 (1927); Green v. City of St. Petersburg, 154 Fla. 339, 342, 17 So.2d 517, 518 (1944); Seldon v. City of Sterling, 316 Ill. App. 455, 462, 45 N.E.2d 329, 332 (1942). *See generally* 1 HOSPITAL LAW MANUAL, *Medical Staff* §§ 1-1 to 2-8 (1973).

69. 23 Ariz. App. at 394, 533 P.2d at 702.

70. *Id.* The *Dattilo* court felt sufficiently convinced of the reasonableness of the exclusive contract to affirm a directed verdict. The court's inquiry into the anticompetitive side effects of the exclusive contract turned up only scant evidence supporting Dr. Dattilo's claim. *Id.* at 396, 398, 533 P.2d at 704, 706. In Peterson v. Tucson Gen. Hosp. Inc., — Ariz. App. —, 559 P.2d 186 (1976), the court of appeals states, "Tucson General Hospital is the only osteopathic hospital in Tucson and thus constitutes a virtual monopoly since it is the hospital in which an osteopathic physician may have staff privileges." *Id.* at —, 559 P.2d at 191.

71. Northern Pac. Ry. v. United States, 356 U.S. 1, 5(1958); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

a contrary view, that an exclusive contract for medical services is not justified in all instances.[72]

Several anticompetitive effects of the hospital's action can be identified. Perhaps most importantly, Dr. Dattilo lost the possibility of future employment as a nuclear specialist at Tucson General.[73] Additionally, because Tucson General Hospital is the only osteopathic hospital in Tucson,[74] Dr. Dattilo was effectively precluded from the practice of nuclear medicine in that city; an osteopath could not practice at a Tucson medical hospital.[75] An injury to the public also occurred with the exclusion of Dr. Dattilo from competition, in that the public's right of choice was limited.[76]

The *Dattilo* court recanted several reasons why it held the exclusive contract was reasonable.[77] The court cites at length the testimony of several administrators of Tucson area hospitals, establishing the patient care benefits brought about by an exclusive contract.[78] Testimony was given to the effect that these contracts are needed for control, standardization of procedure, and effective, efficient operation of the nuclear medicine department.[79] These are clearly important considerations in the successful management of a nuclear medicine specialty.[80] Undoubtedly, the exclusive contract allowed Tucson General to obtain many operational advantages. It is not clear, however, whether such an exclusive agreement is necessary to obtain adequate managerial control.

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72. *See* text & notes 81-89 *infra.*

73. 23 Ariz. App. at 396, 533 P.2d at 704.

74. *Id.* at 394, 533 P.2d at 702. *See generally* discussion at notes 5-6 *supra.*

75. There is no statute or regulation in Arizona that prevents an osteopathic physician from practicing at a medical hospital. Telephone interview with Dr. Richard McGill, D.O., Secretary of the Arizona Board of Osteopathic Examiners, in Phoenix, Arizona, Jan. 31, 1977. Such restrictions are the result of individually enacted by-laws of medical hospitals which limit staff privileges to medical doctors. *Id.* At the time of the *Dattilo* litigation, no Tucson medical hospital allowed staff privileges to Doctors of Osteopathy. Telephone interview with Dr. Gerald Wetstein, D.O., Medical Director, Tucson General Hospital, Tucson, Arizona, Feb. 1, 1977. There has been a recent change in this practice however; since *Dattilo* and *Peterson* were decided, several Phoenix hospitals and St. Mary's Hospital in Tucson, now allow staff privileges to qualified osteopathic physicians. Telephone interview with Dr. Richard McGill, D.O., *supra*; Telephone interview with Dr. Gerald Wetstein, D.O., *supra. See also* discussion note 70 *supra.*

76. The Supreme Court, in Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949), stated that foreclosure of competition in a substantial line of commerce by an exclusive dealing arrangement is a violation of section 3 of the Clayton Act. 15 U.S.C. § 14 (1970). The Standard Oil Court stated that in view of the widespread adoption of exclusive contracts for the supply of petroleum products to service stations, a substantial share of the market was foreclosed to the competition of independent suppliers. 337 U.S. at 314; *see* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328-30 (1961). The foreclosure problem is analogous to *Dattilo.* The practice of granting exclusive contracts to physicians damages competition by substantially lessening the possibility of competition by private nuclear medicine specialists.

77. 23 Ariz. App. at 396-97, 533 P.2d at 704-05.

78. *Id.*

79. *Id.* at 396, 533 P.2d at 704.

80. Interview with Dr. Dennis Patton, *supra* note 6.

The *Dattilo* court did not adequately analyze the testimony given by the many expert witnesses. Substantial evidence confirms their conclusions, but nothing in the evidence suggests that an alternative method of hospital control would not provide many of the benefits found to accrue from an exclusive contract. It is submitted that a less restrictive alternative than that approved in *Dattilo* exists. The utilization of contracted or salaried physicians for the performance of hospital services is widespread. In 1959, approximately 98 percent of all hospitals used one or more of such individuals to handle various specialties.[81] An extensive study of this practice showed a positive statistical correlation between excellence in hospital care and the rigidity of administrative controls on access to medical facilities.[82] The study attributed this to the supervision and control that strict administrative procedure allows over mediocre or below-par practitioners.[83] An improvement in care was noted in hospitals with strictly supervised staffs, including those open to all qualified individuals who met admissions requirements, or those utilizing physicians employed by the hospital, so long as certain management controls were maintained.[84] This suggests an alternative to the practice of exclusivity upheld in *Dattilo,* and one that is presently utilized successfully in many hospitals for the control of surgery and other specialty departments. These institutions allow access to their facilities after a private physician's credentials are approved by a review board.[85] For example, at the time of the *Dattilo* action, Tucson Medical Center, a medical hospital, allowed free access to three specialty departments: cardiology, radiology, and pathology.[86] The exclusive contract is not the only form of management that allows the implementation of hospital controls.[87] The management practices used by many hospitals show the compatability of open systems with the implementation of rigorous standards for professional competence and hospital procedure.[88] While the exclusive contract may make such

81. M. ROEMER & J. FRIEDMAN, DOCTORS IN HOSPITALS, MEDICAL STAFF ORGANIZATION AND HOSPITAL PERFORMANCE 63, at table 1 (1971).

82. *Id.* at 69-71, 75-76, 80-82. "All the evidence suggests that such physician-hospital contracts are positively associated—regardless of which is cause and which is effect— with a higher record of those hospital performance traits that are generally regarded as desirable, traits reflecting better patient care, education, and community health service." *Id.* at 82.

83. *Id.* at 284-85.

84. *See* discussion note 82 *supra.*

85. M. ROEMER & J. FRIEDMAN, *supra* note 81, at 206-11.

86. Brief for Appellant at 24. The administrator of Tucson Medical Center testified that several private physicians worked in the Cardiopulmonary Department, and that the departments of radiology and pathology are open to all qualified physicians. *Id.*

87. M. ROEMER & J. FRIEDMAN, *supra* note 81, at 285-86.

88. *See* authority cited notes 81-83 *supra.* The *Dattilo* court also found that improved patient care and scheduling could be obtained by using an exclusive contract. 23 Ariz. App. at 396, 533 P.2d at 704. This finding involves many of the problems of management control dealt with above. The advantages found by the court may be the

supervision possible, it is not the only method of doing so, and therefore seems unnecessarily burdensome to qualified private physicians.[89]

A second benefit allowed by the use of exclusive contracts appears to be a substantial one. Agreements of this nature give a hospital governing board the ability to more easily monitor individual doctors and maintain established standards and procedures.[90] Simple reasons of practicality and the span of supervisorial control make this an advantageous administrative device. The admission of additional physicians causes substantial hardship and scheduling difficulties, especially because much of the nuclear medicine practice involves work by a fixed number of technicians within a predetermined amount of available time.[91] This particular problem appears to be a weighty one since the care of critically-ill patients often hangs in the balance. Where this factor is particularly acute, and the addition of physicians is impossible due to existing facilities, a substantial justification exists for an exclusive contract.

The *Dattilo* court noted that cost was an additional factor justifying use of exclusive contracts. Although the court of appeals wisely noted that economical operation of a nuclear medicine facility is an important goal,[92] the necessity of an exclusive contract as opposed to other management schemes, was not considered. Economies of equipment operation and salary costs, as well as the distribution of the hospital's overhead expenses, can be maximized by proper equipment scheduling and by standardized procedures and controls, whether the specialist is an exclusively contracted or private staff physician. A primary occupation of a doctor of nuclear medicine is to read and diagnose scans, a task that is begun after the use of hospital technicians and equipment ends.[93] Assuming that the physicians granted access to facilities are highly competent and do not perform unneeded services, the substitution of physicians should have a de minimus effect on a specialty department. Matters of scheduling and equipment operation are management problems that seem to arise whether physicians are independent, salaried, or contracted.

Two additional reasons recognized by the court of appeals as justification for the exclusive contract also appear to be of minimal impor-

result of a system, irrespective of an exclusive agreement, that imposes very strict operating controls and rigorous professional admission standards on hospital staff. *See* text & notes 81-84 *supra*. While the exclusive contract undoubtedly makes this possible, another system of hospital admissions, allowing an open staff and using rigorous quality standards arguably may achieve similar results.

89. M. ROEMER & J. FRIEDMAN, *supra* note 81, at 285-86.
90. 23 Ariz. App. at 396, 533 P.2d at 704.
91. Interview with Dr. Dennis Patton, *supra* note 6.
92. 23 Ariz. App. at 396, 533 P.2d at 704.
93. Interview with Dr. Dennis Patton, *supra* note 6.

tance. The need for consistency in the training of technicians[94] and the ability of physicians employed in the exclusive contract system "to keep up with the current cases in the field"[95] are worthy goals, but any competent salaried physician can train a technician, and all qualified and competent specialists, no matter how they are compensated, should be expected to keep current with recent medical developments. Finally, important to the purpose of establishing a proficient nuclear medicine department "is the creation of a substantial pool of medical knowledge available to the staff of the hospital."[96] One of the primary purposes in employing full-time specialists is to make their skills constantly available to fulfill the consultation needs of more generalized staff practitioners.[97] This can nevertheless be fulfilled in many hospitals by the employment of salaried specialists. An exclusive contract may be appropriate in small hospitals, however, in order to guarantee a level of business sufficient to pay salary costs. Administrative efficiency in the control of attending staff physicians, and the creation and maintenance of a pool of technical knowledge will be substantial justifications for closed staff systems at these institutions.

The findings of the *Dattilo* court are supported by weighty considerations and a large quantum of evidence. It is plain that in some situations, exclusive contracts offer substantial benefits. However, it is also clear that other managerial systems can provide advantages of a similar nature. It is not apparent that the benefit of exclusive systems over other systems outweighs the harshness of exclusivity on individual practitioners. The *Dattilo* opinion therefore should be considered persuasive only under its precise facts, and future exclusive contracts carefully reviewed on a case by case basis.

Conclusion

In *Dattilo*, the Arizona court of appeals held a contract for the exclusive in-hospital performance of nuclear medicine services to be justified by the rule of reason. Although a defense of an exclusive contract system can be readily made, it is not immediately clear in every case that such an agreement is the most beneficial to all the parties concerned. The preclusive effects of such grants can be a severe hardship to the individual practitioner. The rule of reason is more than an abstract consideration of the general benefits contrasted with the detri-

94. 23 Ariz. App. at 396, 533 P.2d at 704.
95. *Id.*
96. *Id.*
97. *See* Blank v. Palo Alto-Stanford Hosp. Center, 234 Cal. App. 2d 377, 389, 44 Cal. Rptr. 572, 579 (Ct. App. 1965).

ments of a particular practice. Established precedent requires a determination of a market for the product or service of interest and a determination of the competitive effect of the questioned business activity upon the competition in that market. The effect of granting an exclusive privilege to a single physician or group is to bar potential competing physicians. It is suggested that the *Dattilo* opinion would have been more firmly grounded, in a legal sense, if it had followed the analysis outlined above.

III. CIVIL PROCEDURE

A. PRIVILEGE FOR INTERNAL SAFETY REPORTS

The Arizona civil pretrial discovery process[1] is designed to allow parties to litigation an opportunity to narrow and clarify the issues, thereby encouraging the just, speedy, and efficient settlement of every action.[2] Although it is recognized that these ends are best achieved by allowing for a broad scope of discoverable matter,[3] discovery is not unlimited. First, discovery is restricted to relevant, nonprivileged matter.[4] Second, protective orders allow the court to limit discovery to prevent "annoyance, embarrassment, oppression, or undue burden or expense."[5] In *Jolly v. Superior Court*,[6] these parameters were applied to determine the discoverability of reports which were based on information gathered by a corporate employer during an internal safety investigation.

In *Jolly*, two Salt River Project employees, injured in a collision between a Southern Pacific train and their employer's trucks brought suit against the Southern Pacific Railroad.[7] The Salt River Project, although it was not named a party to the suit,[8] compiled a report of the

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1. *See generally* ARIZ. R. CIV. P. 26-37.
2. Comet Stores v. Superior Court, 108 Ariz. 84, 86, 492 P.2d 1191, 1193 (1972); State Farm Ins. Co. v. Roberts, 97 Ariz. 169, 175, 398 P.2d 671, 675 (1965); Watts v. Superior Court, 87 Ariz. 1, 4-5, 347 P.2d 565, 566-67 (1959); *see* 2 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2001 (1970). Arizona has adopted the Federal Rules of Procedure with only minor changes. *Compare* FED. R. CIV. P. 26-37, *with* ARIZ. R. CIV. P. 26-37.
3. The broad scope of discovery under the federal system was recognized in Hickman v. Taylor, 329 U.S. 495 (1947):

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.

Id. at 507. For a discussion of *Hickman*, see 2 C. WRIGHT & A. MILLER, *supra* note 2, § 2022. *See also* Comment, *Pre-Trial Discovery of Expert Opinion*, 4 ARIZ. L. REV. 267 (1963).
4. ARIZ. R. CIV. P. 26(b)(1).
5. *Id.* 26(c).
6. 112 Ariz. 186, 540 P.2d 658 (1975).
7. *Id.* at 187-88, 540 P.2d at 659-60.
8. *Id.* at 188, 540 P.2d at 660.

accident pursuant to an unrelated collective bargaining agreement which required investigation of all work-related accidents resulting in the treatment of an employee by a physician.[9] The investigation sought to determine whether company safety regulations were violated and whether disciplinary action was appropriate.[10] Southern Pacific caused a subpoena duces tecum[11] to be issued, commanding the Salt River Project to produce the internal safety report.[12] Earl Jolly, the Supervisor of the Insurance and Claims Division of the Salt River Project, moved unsuccessfully to quash the subpoena.[13] The Salt River

9. *Id.* at 191, 540 P.2d at 663.

> The purpose of the investigation is threefold: 1) to determine if any safety rule, instruction or procedure has been violated; 2) to discipline the violators; and 3) to maintain records on each employee to provide an accurate basis for internal disciplinary action. If it is determined that an established safety standard has been violated or that the action could have been prevented by application of due caution on the part of the employee, investigative data and reports are submitted to a committee whose function is to determine the correct disciplinary action. Safety rules and regulations are codified separately under the title of "Accident Prevention Rules" and must be approved by the Joint Union-Management Negotiating Committee. Petitioner also asserts that this accident reporting and investigative system is necessary to apprise management of areas and personnel requiring increased safety supervision.

Id. at 191 n.1, 540 P.2d at 663 n.1.

10. *Id.* Recommendations for additional safety regulations, or changes in existing ones, could be included in the report. *Id.* Although subsequent remedial measures are not generally admissible as substantive evidence, *see* Slow Dev. Co. v. Coulter, 88 Ariz. 122, 127, 353 P.2d 890, 893 (1960); FED. R. EVID. 407, such reports may still be discoverable; any matter reasonably calculated to lead to admissible evidence is subject to discovery. ARIZ. R. CIV. P. 26(b)(1). *See generally* 2 J. WEINSTEIN, EVIDENCE 407-1 to -25 (1975).

11. *See* ARIZ. R. CIV. P. 45(e). This rule specifically provides that the subpoena may command the person to whom it is directed to produce any materials which are discoverable under Rule 26(b), subject to the limitations contained in Rule 26(c). ARIZ. R. CIV. P. 45(e)(1).

12. *See* 112 Ariz. at 188, 540 P.2d at 660.

13. *Id.* The issue of timeliness was almost dispositive of the case:

> The initial appearance for the deposition was scheduled for December 5, 1974, and continued by stipulation to January 7, 1975. On the 7th, respondent railroad was notified that a motion to quash the subpoena or, in the alternative, for a protective order, was outstanding; petitioner had mailed the motion to the Pinal County Superior Court the day before, January 6, 1975. The motion was denied . . . . Respondent railroad again had served upon the petitioner a subpoena duces tecum for a deposition scheduled April 8, 1975. On this date, however, petitioner's counsel appeared in lieu of petitioner and instructed counsel for respondent railroad that a motion for protective order had been filed in the Superior Court of Pinal County that very morning . . . .

Id. The *Jolly* court held that the mere filing of a motion does not dispense with the duty to appear for a deposition. *Id.* at 189, 540 P.2d at 661. Rather, the burden is on the deponent to get a court order halting discovery. *Id.* *See* Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965). As the *Jolly* court stated:

> *Dolman* poignantly displays the deleterious effect upon the discovery process which may result from a party's unilateral filing of a protective order, or the giving of notice of the filing thereof, on the very day the deposition and production of documents is to take place. In order for one to be relieved of the responsibility of complying with a properly issued subpoena duces tecum, it is necessary that court approval be obtained.

112 Ariz. at 189, 540 P.2d at 661. Because the trial court based its denial of a protective order on grounds other than timeliness, the Arizona supreme court felt compelled to review the merits of the case. If the lower court had denied the motion solely on the ground of timeliness, however, the supreme court would not have disturbed the trial court's exercise of discretion. *Id.*

Project thereupon filed a special action[14] in the Arizona supreme court, arguing that communications between employer and employees must be confidential to prevent adverse labor consequences, so that production of the report would be oppressive and adversely affect the public interest.[15]

The supreme court rejected these contentions and denied relief, upholding the trial court.[16] The court held that portions of the report were relevant,[17] unprivileged, and therefore discoverable.[18] It refused to create a special privilege for internal safety reports.[19] In reaching this decision, however, the court distinguished between purely factual and self-evaluative sections of the report.[20] Self-evaluative sections—for example, comments concerning future safety improvements or disciplinary action taken because of violations of the company's internal safety rules—were labeled irrelevant to the tort action, and therefore nondiscoverable.[21] Factual matters, such as employee statements con-

14. *See* ARIZ. R.P. SPEC. ACTIONS (codified in volume 17A of the Arizona Revised Statutes). For a discussion of special actions, see Lesher, *Extraordinary Writs in the Appellate Courts of Arizona*, 7 ARIZ. L. REV. 34 (1965); Nelson, *The Rules of Procedure for Special Actions: Long Awaited Reform of Extraordinary Writ Practice in Arizona*, 11 ARIZ. L. REV. 413 (1969).

15. 112 Ariz. at 187, 189, 540 P.2d at 659, 661.

16. *Id.* at 193, 540 P.2d at 665.

17. *Id.* at 192, 540 P.2d at 664. The standard of relevance utilized for purposes of discovery is not as strict as that which governs the admissibility of evidence at trial. Any information or material "reasonably calculated to lead to the discovery of admissible evidence" is relevant for discovery purposes. ARIZ. R. CIV. P. 26(b)(1); *see* Dean v. Superior Court, 84 Ariz. 104, 114, 324 P.2d 764, 771 (1958), *noted in* Comment, *Discovery of Attorney's Work Product*, 1 ARIZ. L. REV. 112 (1959). In *Jolly*, the petitioner contended that a stricter standard of relevancy should be applied to discovery from nonparties than parties. 112 Ariz. at 191, 540 P.2d at 663. The petitioner relied on Collins & Aikman Corp. v. J. P. Stevens & Co., 51 F.R.D. 219 (D.S.C. 1971), to establish this distinction. In *Collins*, the court found that compelling a third party to reveal confidential documents would result in inconvenience and harassment. *Id.* at 221. Although the *Collins* court noted that the Rules of Civil Procedure may not establish a separate standard of relevance with respect to nonparties, *id.*, that decision arguably is based solely on the need to protect innocent parties from the burden of discovery under rule 26(c). *See id.* The Arizona supreme court refused to follow *Collins*, noting that other courts had not done so. 112 Ariz. at 191, 540 P.2d at 663.

There are, however, more compelling reasons for the holding in *Jolly*. The standard applied to determine relevancy under rule 26(b) is whether the requested material is reasonably calculated to lead to admissible evidence. ARIZ. R. CIV. P. 26(b)(1); *see* Dean v. Superior Court, *supra*. If a stricter standard were applied to nonparties, a party might be denied access to information which would lead to admissible evidence. A party's case might fail solely because important information is in the hands of one not a party. This result would be antithetical to the interest of promoting the fair and speedy settlement of claims, expressed in ARIZ. R. CIV. P. 1. *See generally* Kerr-McGee Oil Indus., Inc. v. McCray, 89 Ariz. 307, 310, 361 P.2d 734, 735 (1961) (rules of procedure are construed liberally).

18. 112 Ariz. at 191, 540 P.2d at 663. Reports prepared in the normal course of business for nonlitigative purposes are not exempt from discovery under the "work-product" doctrine enunciated in Hickman v. Taylor, 329 U.S. 495 (1947). Goosman v. A. Duie Pyle, Inc., 320 F.2d 45, 52 (4th Cir. 1963). *See also* Robertson v. Commonwealth, 181 Va. 520, 541, 25 S.E.2d 352, 360 (1943) (accident statement given by an employee to an employer not privileged); discussion note 3 *supra*.

19. 112 Ariz. at 190, 540 P.2d at 662.

20. *Id.* at 191, 540 P.2d at 663.

21. *Id.*

cerning what actually happened, on the other hand, were held relevant and discoverable.[22] The court further indicated that the person from whom discovery is sought could still seek to excise any irrelevant sections of the report via in camera inspection by the trial court.[23]

This casenote will analyze the issue of privilege for internal safety reports raised in *Jolly*. First, the scope of privilege under the rules of civil procedure will be discussed. Next, the criteria used by the Arizona and federal courts to create a qualified privilege for similar reports will be evaluated. Finally, the application of these factors in *Jolly* will be examined.

Privilege for Self-Evaluative Reports

Privilege as used in the parlance of civil procedure is equivalent to privilege under the rules of evidence.[24] Thus, invocation of any of the statutory privileges, such as those concerning communications between spouses,[25] attorney and client,[26] physician and patient,[27] or clergyman and penitent,[28] will bar discovery unless waived by the privilege holder.[29] Immunity from discovery is not as clear, however, when a person or entity of whom the request is made seeks to establish a common law privilege.[30]

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22. *Id.*

23. *Id.* at 192, 540 P.2d at 664. In camera inspection is a common method for determining claims of this kind. *See* Dean v. Superior Court, 84 Ariz. 104, 114, 324 P.2d 764, 771 (1958).

24. United States v. Reynolds, 345 U.S. 1, 6 (1953); Wild v. Payson, 7 F.R.D. 495, 499 (S.D.N.Y. 1946); Gardner, *Privilege and Discovery: Background and Development in English and American Law*, 53 GEO. L.J. 585 (1965).

25. ARIZ. REV. STAT. ANN. § 12-2231 (Supp. 1976-77); *id.* § 13-802(1) (Supp. Pamphlet 1973). *See generally* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 78-86 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

26. ARIZ. REV. STAT. ANN. § 12-2234 (1956); *id.* § 13-1802(2) (Supp. Pamphlet 1973). *See generally* MCCORMICK, *supra* note 25, at §§ 87-95.

27. ARIZ. REV. STAT. ANN. § 12-2235 (Supp. 1976-77); *id.* § 13-1802(4) (Supp. Pamphlet 1973). *See generally* MCCORMICK, *supra* note 25, at §§ 98-105.

28. ARIZ. REV. STAT. ANN. § 12-2233 (1956); *id.* § 13-1802(3) (Supp. Pamphlet 1973).

29. Cimijotti v. Paulsen, 219 F. Supp. 621 (N.D. Iowa 1963) (discovery denied on grounds that priest and penitent privilege not waived); Salamon v. Indemnity Ins. Co. of N. Am., 10 F.R.D. 232 (S.D.N.Y. 1950) (marital privilege not waived by plaintiff and discussions with deceased husband held protected). *See generally* MCCORMICK, *supra* note 25, §§ 72-77.

30. Dean Wigmore lists four criteria which are recognized as necessary to establish a common law evidentiary privilege:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (J. McNaughton rev. 1961) (emphasis in original). *See generally* F. JAMES, CIVIL PROCEDURE § 6.1 (1965). The

Discovery originated as an equitable device.[31] The concept itself seems to have sprung from the Roman custom of compelling defendants to make a statement or confession or produce a specific document or thing.[32] In the English legal system, the recognition of the power of courts to compel full disclosure seems to be contemporaneous with the founding of the Court of the Chancery.[33] Discovery, even in its earliest stages of development, was governed by considerations of public policy.[34] As stated by Professor Pomeroy, "[d]iscovery . . . must . . . aid . . . some object which a court of equity can regard with approval, or at least without disapproval, some object which is not opposed to good morals or to the principles of public policy embodied in the law."[35] Thus, a matter of public interest may be raised as an argument for creation of a privilege or as a reason for invoking the protections of the rules of civil procedure;[36] it is doubtful, however, that arguments based solely on public interest will find widespread judicial approval.[37]

Although precedent suggests the judiciary is willing to bestow a qualified privilege on governmental files pertaining to an investigator's opinions and recommendations,[38] case law on the self-evaluative reports

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Federal Rules of Evidence recognize the principles of common law privilege subject to interpretation by the federal courts. FED. R. EVID. 501.

31. *See* F. JAMES, *supra* note 30.

32. 3 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 1933-1934 (1918).

33. 1 J. POMEROY, EQUITY JURISPRUDENCE § 192 (1886).

34. *Id.* at § 202.

35. *Id.*

36. *See* United States v. Matles, 19 F.R.D. 319 (E.D.N.Y. 1956) (admittedly valid discovery denied on ground that defendant might prevent government witnesses from testifying); Penn v. Automobile Ins. Co., 27 F. Supp. 336 (D. Ore. 1939) (discovery of list of witnesses denied on public policy grounds that disclosure might adversely affect subsequent criminal prosecution of plaintiff). A qualified privilege has also been accorded grand jury transcripts. Courts tend to balance the governmental and public interest in the secrecy of grand jury proceedings against unfairness to the private party requesting discovery. *See* United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958) (no compelling necessity for wholesale discovery of grand jury transcripts); City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 486, 491 (E.D. Pa. 1962) (need for disclosure not outweighed by need for secrecy in civil antitrust action). Grand jury transcripts are discoverable in two situations: when the proceedings are long terminated and the length of time has minimized the need for secrecy, and when the grand jury process has been misused by the government to gain evidence for civil actions. 4 J. MOORE, FEDERAL PRACTICE ¶ 26.61[6.—3] (2d ed. 1976).

37. Courts traditionally balance the public interest in disclosure against the private harm that would be created by discovery. In McMann v. SEC, 87 F.2d 377 (2d Cir. 1937), Judge Learned Hand stated: "The suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme." *Id.* at 378. *See also* Hanson v. Rowe, 18 Ariz. App. 131, 500 P.2d 916 (1972); Degnan, *The Evidence Law of Discovery: Exclusion of Evidence Because of Fear of Perjury*, 43 TEXAS L. REV. 435, 454 (1965).

38. In Reliable Transfer Co. v. United States, 53 F.R.D. 24 (E.D.N.Y. 1971), the district court denied discovery of the opinions and recommendations of a Coast Guard officer investigating the grounding of a motor vessel which was allegedly caused by a faulty warning light on a buoy.

> The facts found by an investigating officer should be made available to the adversary under general principles of discovery, and are being made avail-

of private business is sparse.[39] The bulk of cases creating a qualified privilege for the reports of private businesses have dealt with medical reports.[40] The first case to create a qualified privilege from discovery for a company's self-evaluative reports was *Bredice v. Doctor's Hospital, Inc.*,[41] in which an administratrix brought a malpractice action and sought to discover the records of a hospital board of inquiry investigating the decedent's death.[42] The board of inquiry was required to make recommendations for improving clinical practice at the hospital so that future incidents could be prevented.[43] The district court found that the public interest in encouraging procedures designed to improve health care would be impeded if the report was released,[44] and therefore

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able in this case. Free discovery of opinions based on those facts might cause undue reticence by the investigating officer, and prevent fulfillment of the purposes of investigation.

. . . .

. . . A Coast Guard investigator might feel less free to suggest "appropriate measures for promoting safety of life and property at sea" . . . if he thought that any suggestion of additional precautions might result in imposing pecuniary liability on the government.

Id. at 25; *accord*, Farrell v. Piedmont Aviation, Inc., 50 F.R.D. 385 (W.D.N.C. 1969) (discovery of reports which contained opinions, conclusions, and recommendations made by branch of FAA denied); Craig v. Eastern Airlines, Inc., 40 F.R.D. 508 (E.D.N.Y. 1966) (report containing conclusions, opinions, and recommendations of FAA employee-expert held not discoverable).

Whether internal reports compiled by a police department are discoverable has also been frequently litigated. *See, e.g.*, United States *ex rel.* Jackson v. Petrilli, 63 F.R.D. 152, 153 (N.D. Ill. 1974) (statements taken by police from prison inmates not discoverable in civil rights action); Holmes v. Gardler, 62 F.R.D. 70 (E.D. Pa. 1974) (evaluative summaries, opinions, and recommendations in police report held not discoverable); Gaison v. Scott, 59 F.R.D. 347, 353 (D. Hawaii 1973) (evaluative summaries in police report held not discoverable); Frankenhauser v. Rizzo, 59 F.R.D. 339, 345 (E.D. Pa. 1973) (opinion and evaluative summaries in police report held not discoverable in civil rights action); Wood v. Breier, 54 F.R.D. 7, 10 (E.D. Wis. 1972) (police report held discoverable in civil rights action because completely factual); City of Phoenix v. Peterson, 11 Ariz. App. 136, 462 P.2d 829 (1969) (record of officer discipline discoverable when separated from administrative portions of file). The cases generally distinguish between factual and evaluative portions of the police report.

[P]laintiffs are entitled to discovery of the signed statements of witnesses and those portions of the police reports containing factual data. No harm to the public interest can flow from such discovery. The same reasoning applies to the analysis of physical evidence made by the police department. . . . Notwithstanding the foregoing, we shall not require disclosure of the evaluative summary portion of the police investigative reports and will order those portions excised before delivery to the plaintiffs.

Frankenhauser v. Rizzo, *supra*.

39. *See generally* 57 MINN. L. REV. 807 (1973).

40. *See, e.g.*, Gillman v. United States, 53 F.R.D. 316 (S.D.N.Y. 1971); Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973); Tucson Medical Center, Inc. v. Misevch, 113 Ariz. 34, 545 P.2d 958 (1976).

41. 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973); *accord*, Oviatt v. Archbishop Bergan Mercy Hosp., 191 Neb. 224, 226-27, 214 N.W.2d 490, 492 (1974).

42. 50 F.R.D. at 249. The plaintiff was the administratrix of the decedent's estate. *Id.*

43. *Id.* at 250. These reviews were required for hospital accreditation. *Id.*

44. *Id.* The court stated:

The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. . . . The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be de-

held that such reports were subject to a qualified privilege.[45] This qualified privilege could be overcome by a showing of extraordinary circumstances.[46]

Two subsequent cases, *Gillman v. United States*[47] and *Banks v. Lockheed-Georgia Co.*,[48] used the *Bredice* rationale to limit discovery of self-evaluative reports. In *Gillman*, an investigative board was formed by the director of a mental hospital to inquire into the events surrounding a suicide.[49] The deceased's widow in a subsequent malpractice suit, sought discovery of the report produced by this investigative board.[50] The report was held nondiscoverable, except to the extent of any factual portions of the record—statements by hospital personnel to the board.[51] The court found that the public policy in encouraging improved medical care would be impaired if the report were discoverable.[52] As to the purely factual matters, the court reasoned that the plaintiff had a crucial need for these sections, because the deceased had died very suddenly, and the information reflecting the circumstances of his death was almost wholly in the hands of the hospital.[53]

In *Banks*, the *Gillman* privilege was extended to a self-critical analysis of company personnel practices.[54] A company report made

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stroyed if the meetings and the names of those participating were to be opened to the discovery process.

Id.

45. *Bredice* also discussed the question of whether the plaintiff had shown sufficient good cause to force release of the documents. *Id.* at 251. The court held that plaintiff had not made such a showing. In reaching this conclusion, the court seemed to utilize the pre-1970 requirement of good cause for discovery of documents, despite amendment of this rule in 1970. *Id. Compare* FED. R. CIV. P. 34 (1939), *with* FED. R. CIV. P. 26 (1970). *See* 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2205.

46. 50 F.R.D. at 251. *See* discussion note 45 *supra.*

47. 53 F.R.D. 316 (S.D.N.Y. 1971). *See also* Nazareth Literary Benevolent Institution v. Stephenson, 503 S.W.2d 177, 179 (Ky. App. 1973) (indicating that *Gillman* limited *Bredice* to its facts).

48. 53 F.R.D. 283, 285 (N.D. Ga. 1971). *But see* Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co., 61 F.R.D. 115, 118 (N.D. Ga. 1972) (refusing to apply *Banks* to documents prepared by an insurer in the normal course of its business of investigating claims of policyholders).

49. 53 F.R.D. at 317.

50. *Id.*

51. *Id.* at 319. The *Gillman* court recognized that disciplinary proceedings already chilled testimony, nullifying the benefits of the privilege:

> It is true that criticism will probably flow more easily if comment is known to be privileged. But the threat of disciplinary action alone, quite aside from suits for damages, has a chilling effect on testimony. Such distortion of an incident as there may be in order to blind the Board of Inquiry is as likely to occur for the purpose of averting disciplinary action as it is to avoid damages in litigation. Aside from the normal tendency for self-exculpation, we do not believe that a narration of the facts will be more inhibited at the Board level than it would be in a courtroom, even if its pre-trial discovery is predictable.

Id. For similar reasons, the *Jolly* court discounted the necessity for confidentiality of employee communications. 112 Ariz. at 190, 540 P.2d at 622; see text & notes 74-77 *infra.*

52. 53 F.R.D. at 319.

53. *Id.* at 318-19.

54. 53 F.R.D. at 285.

to evaluate compliance with Title VII of the Civil Rights Act of 1964,[55] but went beyond the requirements of the Act, and made specific recommendations about particular company weaknesses.[56] Responding to a demand for production of this report in an employment discrimination suit, the court held the self-evaluative sections of the report were protected from discovery.[57] The court found that discovery, if allowed, would discourage preparation of such self-critical reports, contrary to the public interest in encouraging compliance with civil rights legislation.[58] In *Jolly*, the Arizona supreme court considered whether considerations of public interest mandated creation of a privilege for material gathered in the course of a company internal safety investigation.

Privilege and Public Interest in Arizona

The *Jolly* court refused to create a privilege as to internal company safety reports "[a]bsent an overriding matter affecting public interest."[59] Apparently, the court reasoned that the interest in worker safety does not equal the public interest served by hospital staff review.[60] In light of statutory and judicial precedent in Arizona, this result is baffling. Arizona statutory provisions establishing a state agency to ensure occupational health and safety,[61] an employer's liability law,[62] and a workmen's compensation law[63] seem to clearly evince an overriding public concern for labor safety.[64] As does the Title VII report in *Banks*,[65] the internal safety report of *Jolly* represents a serious attempt to carry out public policy embodied in statute.

55. 42 U.S.C. §§ 2000e to 2000e-15 (1970). *See* discussion note 65 *infra*.
56. 53 F.R.D. at 284.
57. *Id.* at 285.
58. *Id.* As in *Gillman*, the *Banks* court distinguished between factual and self-evaluative portions of the report.

> [T]his Court feels that to allow the plaintiffs access to the written opinions and conclusions of the members of Lockheed's own research team would discourage companies such as Lockheed from making investigations in civil rights cases. . . . The defendant Lockheed, however, is hereby ordered to provide the plaintiffs with any factual or statistical information that was available to the members of Lockheed's research "team . . . ."

Id.
59. 112 Ariz. at 190, 540 P.2d at 662.
60. *See* id. The Arizona Legislature has seemingly recognized an evidentiary privilege for a hospital committee investigating malpractice claims. ARIZ. REV. STAT. ANN. § 36-445.01 (Supp. 1976-77); *see* Tucson Medical Center, Inc. v. Misevch, 113 Ariz. 34, 545 P.2d 958 (1976). The *Jolly* court did not state whether the creation of additional privileges would be considered a matter solely for legislative determination, but *Misevch* may indicate that this is the case. See *id.*
61. ARIZ. REV. STAT. ANN. §§ 23-401 to -433 (Supp. 1976-77).
62. *Id.* §§ 23-801 to -808 (1970).
63. *Id.* §§ 23-901 to -1081 (1970 & Supp. 1976-77). *See also* "Compromise of Workmen's Compensation Claims," 18 ARIZ. L. REV. 585, 849 (1976).
64. *See generally* Note, *Arizona Pit Mine Safety Inspections: An Analysis of Legal Incentives*, 17 ARIZ. L. REV. 1024 (1975).
65. Banks v. Lockheed-Ga. Co., 53 F.R.D. 283 (N.D. Ga. 1971); see text & notes 54-58 *supra*. The administrative regulations promulgated for enforcing the Civil Rights Act require that any employer having over $50,000 worth of governmental contracts develop a written affirmative action program. 41 C.F.R. § 60.14 (1976).

Subsequent to *Jolly*, in *Tucson Medical Center, Inc. v. Misevch*,[66] the Arizona supreme court recognized that a statute can impliedly give rise to an evidentiary privilege, specifically finding a privilege for the reports and minutes of medical review committees.[67] The plaintiff brought suit for the wrongful death of his wife, a surgical patient at the hospital.[68] The action was based on the alleged negligence of the hospital in retaining an anesthesiologist on the staff.[69] In reaching its decision, the court recognized a basic distinction between factual material and deliberative or policymaking portions of the report, relying on *Jolly*.[70] However, in contrast to *Jolly*, the court found such deliberative information privileged rather than irrelevant.[71] The major distinction between the cases is that *Misevch* rests upon an Arizona statute according a privilege to medical committees.[72] In *Jolly*, no such direct statutory authority was found.[73] Although no statute expressly authorized the privilege in *Jolly*, it seems that the same need for confidentiality exists in labor safety matters.

Even had an otherwise sufficient public interest been found, the *Jolly* court pointed to an underlying reason why protection would not be granted.[74] Ordinarily, the basis for a public interest privilege for internal investigative reports is the need for encouraging voluntary and open employee disclosure of relevant facts.[75] The preparation of the internal safety report in *Jolly*, however, was faced with severe obstacles to voluntary employee participation, even without the threat of potential use in litigation. The participants in the investigation were under intense pressure not to disclose information harmful to them, as the report could be used for disciplinary purposes.[76] Protection from

66. 113 Ariz. 34, 545 P.2d 958 (1976).
67. *Id.* at 37, 545 P.2d at 961.
68. *Id.* at 35, 545 P.2d at 959.
69. *Id.*
70. *Id.* at 37, 545 P.2d 961. The court stated: "We make the distinction that was made in another context in *Jolly v. Superior Court* . . . that the proper demarcation is between purely factual, investigative matters and matters and materials which are the product of reflective deliberation or policymaking processes." *Id.*
71. *Compare id., with* Jolly v. Superior Court, 112 Ariz. at 191, 540 P.2d at 663.
72. 113 Ariz. at 37, 545 P.2d at 961; *see* ARIZ. REV. STAT. ANN. § 36-445.01 (1974), *as amended*, ch. 1, § 16, [1976] Ariz. Laws 32; note 60 *supra.*
73. Although there is a weighty public interest in the *Jolly* context, the internal safety report originated from a collective bargaining agreement, *see* text & note 9 *supra*, thus investing the safety program with a private interest as well. An element of private interest, however, does not defeat a claim of privilege. This is demonstrated by the *Bredice* and *Gillman* cases, in which the private hospitals maintained staff review boards in order to meet nongovernmental accreditation requirements. *See* Gillman v. United States, 53 F.R.D. 316, 317 (S.D.N.Y. 1971); Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).
74. 112 Ariz. at 190, 540 P.2d at 662.
75. *See* Tucson Medical Center, Inc. v. Misevch, 113 Ariz. 34, 37, 545 P.2d 958, 961 (1976).
76. 112 Ariz. at 190, 540 P.2d at 662.

discovery thus would not have significantly increased the ease with which employer and employee communications would occur.[77] Arguably, however, the supreme court in *Jolly* gave too much weight to this factor. In *Gillman*, the court held, despite this coercive aspect, there was a sufficient public interest in encouraging the employer to conduct self-evaluation to require a qualified discovery privilege as to self-evaluative summaries.[78]

The *Jolly* court did, however, grant a measure of protection to self-evaluative safety reports, although it rejected the theory of qualified privilege. Rather than extending a privilege to the report's recommendations and opinions, *Jolly* simply held that the evaluative portions of the report were irrelevant, and therefore nondiscoverable.[79] Presumably, in an action between different parties, where the report's conclusions are relevant, they would also be discoverable.[80] In some instances, then, investigators may be hampered in their evaluations for fear that suggestions or opinions they render may impose pecuniary liability on their employer,[81] a result seemingly inconsistent with the spirit of Arizona labor law.[82]

Conclusion

The Arizona supreme court refused to create a qualified privilege for nonmedical internal safety reports in *Jolly*. It did recognize a distinction between clearly relevant factual sections of the report, and self-evaluative portions. This distinction allows for the protection of such self-evaluative sections on the grounds of irrelevancy in some actions. This holding, however, does not adequately consider the public interest favoring continued implementation of corporate self-evaluation without stimulating fear of adverse consequences.

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77. *See* 57 MINN. L. REV. 807, 818 (1973).

78. Gillman v. United States, 53 F.R.D. 316, 319 (S.D.N.Y. 1971); *see* discussion note 51 *supra*.

79. 112 Ariz. at 191, 540 P.2d at 663. *See also* Richards v. Maine Cent. R.R., 21 F.R.D. 590, 591 (S.D. Me. 1957).

80. *Cf.* Tucson Medical Center, Inc. v. Misevch, 113 Ariz. 34, 37, 545 P.2d 958, 961 (1976) (although relevant, conclusions and opinions of hospital investigative committee were nondiscoverable due to statutory privilege). For example, in *Jolly*, if Southern Pacific had sought indemnity from Salt River Project, the conclusions reached in the report may have represented admissions. For a discussion of Arizona law on indemnity, see Sherk, *Common Law Indemnity Among Joint Tortfeasors*, 7 ARIZ. L. REV. 59 (1965).

81. *Cf.* Reliable Transfer Co. v. United States, 53 F.R.D. 24 (E.D.N.Y. 1971); *see* discussion note 38 *supra*.

82. *See* text & notes 61-64 *supra*.

IV. CONSTITUTIONAL LAW

A. A NEW LOOK AT FORFEITURE IN ARIZONA

Forfeiture of vehicles used in the commission of certain crimes[1] has been a common, and for the most part, accepted practice in Anglo-American jurisprudence.[2] Recently, however, some state courts have begun to view the forfeiture process more critically.[3] Forfeiture statutes have had extremely harsh effects on those convicted of misdemeanors and, in many cases, completely innocent owners.[4] Arizona, however, began to relax its enforcement of forfeiture statutes in 1970 when the supreme court held that the state could not compel the forfeiture of the property of owners who had no knowledge of and had not participated in the criminal enterprise.[5] In *In re 1972 Dodge Van*,[6] the Arizona court of appeals upheld a lower court which declined

1. The crimes usually associated with forfeiture are related to drug, contraband, liquor, and smuggling offenses. *See, e.g.*, 18 U.S.C. § 3615 (1970); ARIZ. REV. STAT. ANN. § 36-1041 (1974); UTAH CODE ANN. § 58-37-13 (1953).

2. *See* 1 W. BLACKSTONE, COMMENTARIES *300-02; Note, *Forfeiture of Property Used in Illegal Acts*, 38 NOTRE DAME LAW. 727 (1963).

3. *See, e.g., In re* One 1965 Ford Mustang, 105 Ariz. 293, 463 P.2d 827 (1970); Commonwealth v. One 1959 Chevrolet Impala Coupe, 201 Pa. Super. 145, 191 A.2d 717 (1963); State v. One (1) Porsche 2-Door, 526 P.2d 917 (Utah 1974); Comment, *Vehicle Forfeiture in Arizona: Burrage and the Extension of the Quasi-Criminal Doctrine*, 1972 LAW & SOC. ORD. 476 (now ARIZ. ST. L.J.); Note, *Due Process in Automobile Forfeiture Proceedings*, 3 U. BALT. L. REV. 270 (1974); Comment, *State v. One (1) Porsche 2-Door; A Judicial Standard for Forfeiture of Conveyances for Simple Possession of Marijuana*, 1974 UTAH L. REV. 871. In contrast, while the constitutionality of forfeiture statutes is often challenged, the federal courts generally give full effect to them. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235-37 (1972); United States v. One 1961 Cadillac Hardtop Auto., 207 F. Supp. 693, 698-99 (E.D. Tenn. 1962).

4. Generally speaking, for purposes of forfeiture, no evidence need be introduced to show that the owners were in any way involved in the crimes for which the property was forfeited. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (yacht forfeited because lessees took marijuana on board); Van Oster v. Kansas, 272 U.S. 465 (1926) (car forfeited because bailee used it to transport liquor illegally); Dobbin's Distillery v. United States, 96 U.S. 395 (1888) (distillery forfeited because lessees failed to pay liquor taxes). *Contra, In re* One 1965 Ford Mustang, 105 Ariz. 293, 463 P.2d 827 (1970) (forfeiture denied because owner was in no way involved in the illegal activity).

5. *In re* One 1965 Ford Mustang, 105 Ariz. 293, 300-01, 463 P.2d 827, 834-35 (1970).

6. 24 Ariz. App. 337, 538 P.2d 766 (1975).

to order the forfeiture of a van seized during an arrest for possession of marijuana because forfeiture of the vehicle had been precluded by a prior plea bargain.

In *Dodge Van*, the appellee, Kevin Swanson, was charged with possession of marijuana found in his vehicle, as well as the commission of two traffic offenses.[7] Appellee's attorney reached a plea agreement with the Deputy County Attorney, whereby in exchange for Swanson's plea of guilty to possession of marijuana, the remaining charges would be dropped, and the sentence would be limited to a monetary fine.[8] No mention of forfeiture was made by either attorney, and a fine was assessed which appellee paid.[9] Subsequently, the Yuma County Attorney instituted a civil action for forfeiture of appellee's van.[10] The trial court found that the forfeiture would be inconsistent with the plea bargain and denied it.[11]

Appellant, the State of Arizona, contended that since the disposition of the vehicle had never been discussed during the plea bargaining process, the state was free to seek forfeiture.[12] Implicit in this argument is the notion that forfeiture is a civil penalty unrelated to the criminal prosecution.[13] The state's argument is consonant with the majority rule which views forfeiture as a civil proceeding in which the action is taken, not against the owner, but against the offensive instrument itself.[14] The appellee argued that since the Arizona supreme court previously had characterized forfeiture as a criminal penalty,[15] to order forfeiture of the van would be to impose a more severe penalty than that agreed upon by the parties.[16] Appellee further argued[17] that to

7. *Id.* at 338, 538 P.2d at 767.
8. *Id.*
9. *Id.*
10. *Id.* at 338-39, 538 P.2d at 767-68. The action was filed pursuant to ARIZ. REV. STAT. ANN. § 36-1041 (1974), which provides: "The interest of the legal owner or owners of record of any vehicle used to transport unlawfully a narcotic drug, or in which a narcotic drug is unlawfully kept, deposited or concealed, or in which a narcotic is unlawfully possessed by an occupant, shall be forfeited to the state."
11. *See* 24 Ariz. App. at 339, 538 P.2d at 768.
12. Brief for Appellant at 10, *In re* 1972 Dodge Van, 24 Ariz. App. 337, 538 P.2d 766 (1975).
13. *See* 24 Ariz. App. at 338-39, 538 P.2d at 767-68.
14. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-88 (1974); Various Items of Personal Property v. United States, 282 U.S. 577, 580-81 (1931); People v. One 1964 Chevrolet Corvette Convertible, 274 Cal. App. 2d 720, 79 Cal. Rptr. 447 (Ct. App. 1969); State v. One 1960 Mercury Station Wagon, 5 Conn. Cir. 1, 2-6, 240 A.2d 99, 101-03 (1968); Sochemaro v. Rossetti, 6 Misc. 2d 23, 24-25, 161 N.Y.S.2d 454, 456-57 (N.Y. Mun. Ct. 1957). *See also* 1 W. BLACKSTONE, *supra* note 2; Note, *supra* note 2, at 727. *But cf.* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). This case held forfeiture to be quasi-criminal insofar as it was necessary to invoke the owner's fourth amendment rights. *Id.* at 696-98.
15. *See In re* One 1965 Ford Mustang, 105 Ariz. 293, 299, 463 P.2d 827, 833 (1970).
16. *See* Brief for Appellee at 10, *In re* 1972 Dodge Van, 24 Ariz. App. 337, 538 P.2d 766 (1975).
17. *Id.* at 11-12.

allow the prosecutor to break his promise would violate the rule set down by the United States Supreme Court in *Santobello v. New York*,[18] where the Court held that states were obligated to perform promises made to defendants as the result of a plea bargain.[19] The Arizona court of appeals agreed with appellee, holding that the forfeiture was a criminal penalty and that the prosecutor could not be allowed to break his promise.[20] This decision is unique in Arizona in that it is the first time the forfeiture statute has been construed as a criminal penalty where the owner of the property in question had been convicted on the underlying criminal charges.[21]

In holding that forfeiture is punishment for a criminal offense,[22] the Arizona court has departed from the majority rule that forfeiture is a civil penalty.[23] Further, the court has called attention to a new consideration: whether forfeitures must be specifically included in, or excluded from, plea bargains related to the underlying offense. This casenote will examine historical and legal treatment given the forfeiture proceeding. First, the Arizona court's characterization of forfeiture as a criminal proceeding will be discussed. Second, the effect of the decision on future plea bargains made when the possibility of forfeiture exists will be explored.

Criminal or Civil Penalty

The history of forfeiture can be traced back at least to the time of Moses.[24] Modern forfeiture statutes arose from the English law of deodand,[25] under which personal property causing death was held

18. 404 U.S. 257 (1971). See text & notes 113-18 *infra*.

19. 404 U.S. at 262. The Court noted that the proper remedy, depending on the circumstances, would be to allow withdrawal of the guilty plea or require the prosecutor's specific performance of the plea bargain. *Id.* at 263.

20. 24 Ariz. App. at 339-40, 538 P.2d at 768-69.

21. In two previous cases, the supreme court had held that forfeiture was a criminal penalty. In those cases, the court held that the owner of the property must be in some way connected with the criminal use of his vehicle. Since the owner was totally innocent in both cases, the forfeitures were not allowed. One 1962 Volkswagen Sedan, Motor No. 4230506, 105 Ariz. 315, 317, 464 P.2d 338, 340 (1970); *In re* One 1965 Ford Mustang, 105 Ariz. 293, 300-01, 463 P.2d 827, 834-35 (1970).

22. 24 Ariz. App. at 339, 538 P.2d at 768. *See also In re* One 1965 Ford Mustang, 105 Ariz. 293, 463 P.2d 827 (1970).

23. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-88 (1974); Van Oster v. Kansas, 272 U.S. 465, 465-69 (1926); Metallic Flowers v. City of New York, 4 App. Div. 2d 292, 298-99, 164 N.Y.S.2d 227, 234 (1957). *See generally* Note, *supra* note 2, at 727.

24. "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten . . . ." *Exodus* 21:28. This Mosaic law has occasionally been utilized by the courts to support forfeiture of personal property. *See* J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921); United States v. One 1963 Cadillac Coupe de Ville Two-Door, 250 F. Supp. 183, 185 (W.D. Mo. 1966). *See also* Note, *supra* note 2, at 727; 60 CORNELL L. REV. 467, 468 (1975). Additionally, the use of forfeiture has been documented in ancient Greek and Roman law. O. HOLMES, THE COMMON LAW 10-11 (1881).

25. *See* O. HOLMES, *supra* note 24, at 23-27.

directly responsible and forfeited to the king for pious purposes.[26] While common law deodand itself has not survived,[27] its presence is still felt in American jurisprudence.[28] Today, forfeiture statutes abound in both federal[29] and state law.[30] The courts recognize two different types of forfeiture, depending on the nature of the item forfeited. Forfeiture of per se contraband is predicated upon the illegality of possession of the property itself.[31] Forfeiture of derivative contraband relates to otherwise inoffensive property which is used in conjunction with per se contraband or in some type of illegal operation.[32] Forfeiture of per se contraband is seldom questioned.[33]

26. *See* 1 W. BLACKSTONE, *supra* note 2, at *300-01. "It matters not whether the owner were concerned in the killing or not; for, if a man kills another with my sword, the sword is forfeited as an accursed thing." *Id.* at *301. Weapons used to commit felonies are usually confiscated and forfeited as per se contraband. *See* ARIZ. REV. STAT. ANN. § 13-914 (Supp. 1976-77). *See also* statutes cited notes 29-30 *infra.*

27. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681-82 n.19 (1974). Deodand can be distinguished from statutory forfeiture in at least two ways. First, deodand only applied where the personal property was directly responsible for the death of a person. Second, the death need not have been the result of a criminal act; the object would be forfeited as a deodand even if the death were entirely accidental. *See* 1 W. BLACKSTONE, *supra* note 2, at *300-01. Death, of course, is not the sole trigger of modern forfeiture statutes. The statutes do, however, generally require that a crime be committed before a forfeiture can be effected. *See* statutes cited notes 29-30 *infra.*

28. The United States Supreme Court has referred to deodand as the historical basis for forfeiture statutes and as support for forfeiture decisions. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-82 (1974); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510-11 (1921). The Court has also used part of the rationale which perpetuated deodand in its later years; that is, the owner is held responsible for the damage done by his chattel since, presumptively, without his negligence the damage would not have occurred. *See* Calero-Toledo v. Pearson Yacht Leasing Co., *supra* at 687-90; Van Oster v. Kansas, 272 U.S. 465, 467 (1926).

One of the earliest applications of forfeiture in the United States was in an admiralty case in which the brig Palmyra was forfeited for acts of piracy. The Palmyra, 25 U.S. (12 Wheat.) 1 (1827). One of the respondents' arguments in that case was that an in personam conviction for piracy was a prerequisite to the in rem proceeding against the ship. *Id.* at 7. Justice Story, writing for the Court, responded that personal conviction of the offender was not necessary to enforce a forfeiture in rem where it is provided for by statute. *Id.* at 15. The Supreme Court recently indicated that Justice Story's characterization of forfeiture actions is still valid. *See* Calero-Toledo v. Pearson Yacht Leasing Co., *supra* at 683-84.

29. *See, e.g.*, 18 U.S.C. § 3615 (1970) (illegal liquor and vehicles used to transport such contraband); 19 U.S.C. §§ 1592, 1594-1595a, 1602, 1607, 1609, 1612 (1970) (customs violations); 49 U.S.C. § 782 (1970) (carriers transporting contraband articles).

30. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-1041 (1974); UTAH CODE ANN. § 58-37-13 (1953); WIS. STAT. ANN. § 161.55 (West 1974).

31. Illegal liquor and stills are examples of per se contraband. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 698-99 (1965).

32. Automobiles used for illegal purposes are characterized as derivative contraband. *Id.* at 699-700. The *Plymouth Sedan* Court drew a distinction between the nature of the property forfeited in that case and the nature of the contraband forfeited in United States v. Jeffers, 342 U.S. 48 (1951) and Trupiano v. United States, 334 U.S. 699 (1948). *Jeffers* and *Trupiano* were search and seizure cases in which the court suppressed the evidence but refused to return it. *Id.* at 54; 334 U.S. at 710. *Jeffers* involved forfeiture of illegally seized narcotics and *Trupiano* involved forfeiture of an unconstitutionally seized still. Although neither case was a forfeiture proceeding, the Court noted in both cases that since the illegally seized property was contraband, the owners were not entitled to have it returned. 342 U.S. at 54; 334 U.S. at 710. The Court in *Plymouth Sedan* noted that mere possession of the contraband items in *Jeffers* and *Trupiano* was a crime, whereas possession of an automobile was not, despite its use to transport bootleg liquor; hence the distinction between per se and derivative contraband. 380 U.S. at 698-99.

33. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 698-99 (1965).

Dodge Van, however, involved the forfeiture of derivative contraband. In affirming the trial court's refusal to allow forfeiture, the Arizona court of appeals determined that forfeiture was a criminal penalty.[34] This is the minority rule, albeit one which reflects a trend toward moderating the harsh effects of forfeiture.[35] The court reasoned that the intent of the legislature was the controlling factor in characterizing forfeiture as either a civil or criminal penalty.[36] The court found the legislature intended to deter narcotics traffic by penalizing offenders through forfeiture.[37] It then concluded that since the penalty could be triggered only by commission of a criminal act, it must be a criminal penalty.[38] This determination led the court to conclude that to allow the forfeiture in the instant case would be a violation of due process.[39]

Contrary to the Arizona court's decision, forfeiture is generally held to be a civil action, entirely distinct from the underlying criminal offense. As such, the United States Supreme Court has held that civil forfeiture does not constitute a denial of due process under either the fifth[40] or fourteenth amendments.[41] This position has two justifications. First, a forfeiture proceeding is held to be an action against the property itself and not against the owner or offender.[42] The guilt or innocence of the owner is generally not called into question.[43] Hence,

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34. 24 Ariz. App. at 339, 538 P.2d at 768.
35. *See* cases cited note 3 *supra*.
36. 24 Ariz. App. at 339, 538 P.2d at 768.
37. *Id.*
38. *Id.* The court relied heavily on *In re* One 1965 Ford Mustang, 105 Ariz. 293, 463 P.2d 827 (1970), where the Arizona supreme court said:

> Under the present state of constitutional development, there can be no question but that forfeiture of an automobile is punishment for a criminal offense. It is the only way a car could be forfeited; otherwise, it would be taking property without due process of law. In the instant case, under the statute, the forfeiture was likewise a penalty because the automobile was used in a criminal offense.

Id. at 299, 463 P.2d at 833. *See also* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 (1965).
39. *See* 24 Ariz. App. at 339, 538 P.2d at 768. See discussion of plea bargains, text & notes 110-27 *infra*.
40. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-85 (1974); Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 508-13 (1921).
41. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974); Van Oster v. Kansas, 272 U.S. 465, 468 (1926). *But see* National Bond & Inv. Co. v. Gibson, 6 F.2d 288 (D. Kan. 1925). In *Calero-Toledo*, the Court noted that it might reach a different conclusion if the property were either stolen from its rightful owner, or if the owner had done all he reasonably could to insure that his property would not be put to any illegal use. 416 U.S. at 688-89.
42. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-90 (1974); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972); Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931); Dobbin's Distillery v. United States, 96 U.S. 395, 401 (1878); United States v. One 1961 Cadillac Hardtop Auto., 207 F. Supp. 693, 698 (E.D. Tenn. 1962).
43. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-86 (1974); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510-13 (1921); Dobbin's Dis-

the owner's personal rights are not jeopardized, and the constitutional guarantees usually associated with criminal proceedings do not apply. The Court has also held that civil constitutional guarantees, such as the taking of property without just compensation, are not violated by forfeiture actions.[44] While many courts have indicated dissatisfaction with this characterization,[45] the Supreme Court continues to place emphasis on the in rem nature of the proceeding.[46]

Second, the Supreme Court has indicated that forfeiture is so well established[47] that only a most compelling constitutional attack would be successful.[48] Justice Holmes noted over 50 years ago that it would take a strong argument to find a fourteenth amendment violation in a practice that has been widely accepted for over 200 years.[49] Although the case in which Justice Holmes made this observation was not one involving forfeiture,[50] the principle is perhaps even more applicable to forfeiture cases, in light of the longevity of the practice.[51] Justice Holmes' view appears to hold true even today in regard to forfeiture.[52]

The *Dodge Van* court relied primarily on *In re One 1965 Ford Mustang*[53] for the conclusion that forfeiture in Arizona is a criminal penalty.[54] In *Ford Mustang*, the Arizona supreme court held that for-

tillery v. United States, 96 U.S. 395, 403-04 (1878). *But see* United States v. United States Coin & Currency, 401 U.S. 715 (1971).

44. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 685 (1974); Van Oster v. Kansas, 272 U.S. 465, 468 (1926); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510-11 (1921).

45. *See, e.g.*, United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971); McKeehan v. United States, 438 F.2d 739, 745 (6th Cir. 1971); United States v. One (1) 1969 Buick Riviera Auto., 358 F. Supp. 358, 359 (S.D. Fla. 1973).

46. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-88 (1974).

47. *See, e.g.*, J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921) (forfeiture statute "too firmly fixed . . . to be now displaced"); United States v. One 1961 Cadillac Hardtop Auto., 207 F. Supp. 693, 698-700 (E.D. Tenn. 1962) (court indicated its dissatisfaction with forfeiture and the rationale behind it, but nevertheless upheld it); United States v. One 1940 Packard Coupe, 36 F. Supp. 788, 790 (D. Mass. 1941) ("it is now too late to attempt a construction of the [forfeiture] statutes here involved as exempting from forfeiture . . ." the property interests of innocent persons).

48. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 688-90 (1974); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 509-12 (1921).

49. Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

50. *Jackman* decided the constitutionality of a Pennsylvania statute which provided, in essence, that an implied easement existed on both sides of a property line for whatever distance was necessary to build a party wall. *Id.* at 29-32. The Pennsylvania supreme court construed the statute to mean that walls built on the property line that were not suitable for party walls could be torn down by adjacent property owners to enable them to build a proper party wall on the property line. *Id.* at 31-32. In addition, the court held that the owner whose wall was destroyed in such a situation was not entitled to compensation for resulting lost profits. *Id.* at 29-30. The statute and practice in question was found to have been in existence, in one form or another, since 1721. *Id.* at 30-31.

51. See text & notes 24-28 *supra*.

52. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974), *citing* J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510-11 (1921).

53. 105 Ariz. 293, 463 P.2d 827 (1970).

54. 24 Ariz. App. at 339, 538 P.2d at 768.

feiture under the Arizona statute is punishment for a criminal offense and that the legislature intended that it be a criminal penalty.[55] Since the supreme court's opinions are binding on all other courts in the state,[56] the court of appeals was actually compelled to find that forfeiture is a criminal penalty.

In addition, the United States Supreme Court has noted that forfeiture is not always exclusively a civil penalty, and that in some cases its criminal aspects are paramount. In *Boyd v. United States*[57] and *One 1958 Plymouth Sedan v. Pennsylvania*,[58] the Court found that civil forfeiture is essentially penal in character and therefore is a quasi-criminal penalty.[59] This finding compelled exclusion of evidence seized in violation of fourth amendment requirements;[60] fourth amendment protections do not apply in a strictly civil proceeding. While these cases lend support to the court's opinion in *Dodge Van*, they are not necessary to the holding. The Arizona courts are the governing authority on statutory construction and determination of legislative intent with respect to Arizona statutes.[61] As long as the court does not infringe on federal constitutional rights, its decisions on these matters will be upheld.[62] Since the Arizona courts' interpretation of Arizona Revised Statutes section 36-1041 does not offend the federal Constitution,[63] it is the law in Arizona.

Judge Eubank, dissenting in *Dodge Van*, disagreed with the majority's characterization of forfeiture as a criminal penalty,[64] largely ignoring *In re One 1965 Ford Mustang*[65] and *In re One 1962 Volkswagen Sedan*.[66] Instead, the dissent construed *Ford Mustang* and *Volkswagen Sedan* as requiring only that the owner of the vehicle have

55. 105 Ariz. at 299, 463 P.2d at 833; *see* text & notes 36-38 *supra*.
56. Lopez v. Arizona Water Co., 23 Ariz. App. 99, 101, 530 P.2d 1132, 1134 (1975); *see* ARIZ. CONST. art. 6, § 1.
57. 116 U.S. 616 (1886).
58. 380 U.S. 693 (1965).
59. *See id.* at 697-98 (1965); 116 U.S. at 633-34.
60. 380 U.S. at 696-98; 116 U.S. at 633-34.
61. *See, e.g.*, Gurley v. Rhoden, 421 U.S. 200, 208 (1975); Eisenstadt v. Baird, 405 U.S. 438, 441-42 (1972); Groppi v. Wisconsin, 400 U.S. 505, 507 (1971); ARIZ. CONST. art. 6, § 1.
62. The United States Supreme Court is a superior authority on federal constitutional questions. U.S. CONST. art. III, §§ 1-2.
63. *See generally* United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971) (Court noted certain federal forfeiture statutes "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise"); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965) (Court noted that forfeiture proceedings were quasi-criminal in nature, to penalize for an offense against the law); Boyd v. United States, 116 U.S. 616, 633-34 (1886) (Court noted that forfeiture proceedings stemming from criminal offenses are quasi-criminal in nature for purposes of the fourth amendment). The cases cited above suggest that there is no federal constitutional provision which requires that forfeiture be a civil penalty.
64. 24 Ariz. App. at 340-41, 538 P.2d at 769-70 (Eubank, J., dissenting).
65. 105 Ariz. 293, 463 P.2d 827 (1970).
66. 105 Ariz. 315, 464 P.2d 338 (1970).

scienter in order to forfeit the vehicle.[67] This interpretation of the two cases is inaccurate. *Volkswagen Sedan* was the companion case to *Ford Mustang* and the supreme court's interpretation of the forfeiture statute[68] was the essential element in both decisions. While it is true that *Ford Mustang* held that owners were required to have scienter before their property could be forfeited,[69] that was only a part of the holding. The essence of the court's opinion was that forfeiture under the Arizona statute is a criminal penalty,[70] which led to the conclusion that if the owner does not have scienter his property cannot be forfeited. The dissent simply took a narrow view of the supreme court's decision, while the majority opinion states the correct interpretation of the prior case law.

The dissent also cited *Van Oster v. Kansas*[71] and *One Lot Emerald Cut Stones v. United States*[72] as authority for its position that forfeiture is not a criminal penalty.[73] Reliance on these cases is misplaced. *Van Oster* involved a Kansas forfeiture law, which the Supreme Court held did not run afoul of federal constitutional limitations.[74] The Kansas statute provided that automobiles used to unlawfully transport liquor were subject to forfeiture.[75] The Kansas supreme court had construed the statute[76] as permitting the forfeiture of the interest of even an innocent owner.[77] On appeal, the United States Supreme Court upheld the Kansas supreme court.[78] The Arizona supreme court, however, has not construed the Arizona statute to apply to innocent owners,[79] even though the United States Supreme Court condones such construction and application. The Arizona statute has been construed to impose a criminal penalty,[80] and *Van Oster* does not preclude the court from so interpreting the statute.

One Lot Emerald Cut Stones v. United States[81] also is not on

67. 24 Ariz. App. at 340, 538 P.2d at 769.
68. ARIZ. REV. STAT. ANN. § 36-1041 (1974).
69. 105 Ariz. at 300, 463 P.2d at 834.
70. *Id.* at 298-300, 463 P.2d at 832-34.
71. 272 U.S. 465 (1926).
72. 409 U.S. 232 (1972).
73. 24 Ariz. App. at 340-41, 538 P.2d at 769-70.
74. 272 U.S. at 466, 468.
75. *Id.* at 466.
76. The Kansas statutes involved in *Van Oster* were similar to the Arizona statute construed in *Dodge Van* in that they provided for the forfeiture of any vehicle used to carry intoxicating liquors into or within the state, regardless of the owner's innocence. Law of Mar. 20, 1919, ch. 217, §§ 1, 4 [1919] Kan. Sess. Laws 294-96 (repealed 1949). The primary difference between the Kansas statutes and the Arizona statute is that the Arizona statute relates to drug, rather than liquor offenses. ARIZ. REV. STAT. ANN. § 36-1041 (1974).
77. 272 U.S. at 466.
78. *Id.* at 469.
79. *See* text & notes 69-70 *supra.*
80. *In re* One 1965 Ford Mustang, 105 Ariz. 293, 463 P.2d 827 (1970).
81. 409 U.S. 232 (1972).

point. That case involved the forfeiture of per se contraband.[82] *Dodge Van*, on the other hand, involves the forfeiture of derivative contraband.[83] As previously noted, derivative contraband is forfeitable only when it is connected with criminal activity; it is not illegal in its own right.[84] Thus it is clear that *One Lot Emerald Cut Stones* has no bearing on *Dodge Van* since the court of appeals, in the latter case, was dealing with derivative contraband which cannot be forfeited absent a judicial determination that a crime has been committed.[85] For these reasons, it is apparent that the majority opinion correctly characterized forfeiture under Arizona law. The court's determination that forfeiture is a criminal penalty was not dispositive of the case, however. It was still necessary to determine the effect of the plea agreement on the forfeiture proceedings.

Plea Bargains and Forfeiture

Plea bargains have long been a part of the criminal justice system, although they have only recently become openly accepted.[86] *Dodge Van* presents the rather unique question of the effect of a plea bargain on a subsequent attempt to forfeit a motor vehicle used in the offense giving rise to the plea. In this case, the subject of forfeiture was not raised by either party during the plea discussions.[87] Since the court characterized the forfeiture as a criminal penalty,[88] it required the forfeiture to be specifically covered by the plea bargain.[89] For this reason, the terms and enforceability of the agreement become important. Analysis of the validity of a plea bargain must be performed in two distinct steps. The first step is to determine if the guilty plea itself meets the requirements set forth by the courts.[90] The second step is

82. *One Lot Emerald Cut Stones* was a forfeiture proceeding involving emeralds brought into the United States illegally. *Id.* The possession of the stones was illegal; they were per se contraband. *Id.* at 237; *see* text & note 31 *supra.*

83. *See* 24 Ariz. App. at 337-39, 538 P.2d at 766-68; text & note 32 *supra.*

84. See text & note 32 *supra.*

85. See text & notes 29-33 *supra.*

86. In the past, courts have gone to some lengths to have the record show that no plea bargain was made, even when all parties concerned knew one had occurred. Roughly 90 percent of all defendants plead guilty—many as a result of plea bargains. S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 758 (3d ed. 1975); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967). A recent survey indicated that in New York approximately 80 percent of all homicide cases are resolved through plea bargaining. N.Y. Times, Jan. 27, 1975, at 1, col. 4. The trend today is toward more openness in judicial recognition of plea bargains, a position best exemplified by the American Bar Association's recommendation that plea bargaining be formally recognized by the courts. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 3.1 (a) (1968).

87. 24 Ariz. App. at 338, 538 P.2d at 767.

88. *Id.* at 339, 538 P.2d at 768.

89. *Id.* at 340, 538 P.2d at 769.

90. See text & notes 92-109 *infra.*

to determine if the prosecutor has kept his part of the agreement.[91]

The United States Supreme Court developed certain minimum standards for acceptability of guilty pleas in *Boykin v. Alabama*.[92] The *Boykin* Court found that since so many constitutional rights are effectively waived by a defendant who pleads guilty, the courts should carefully scrutinize all guilty pleas.[93] The rights waived by pleading guilty include the fifth amendment privilege against compulsory self-incrimination, the sixth amendment right to trial by jury, and the sixth amendment right to confront one's accusers.[94] Because of the potentially harmful effects of these waivers, *Boykin* requires that the guilty plea be made understandingly and voluntarily,[95] whether or not it is the result of a bargain.[96]

While the Arizona courts have generally adhered to the *Boykin* mandate,[97] their interpretation of the term "understandingly" is still somewhat in doubt.[98] The *Boykin* Court indicated that "understandingly" means that the defendant should have a "full understanding [of the] consequence" of his plea.[99] Arizona courts, in turn, have interpreted this to mean that the defendant must be aware of the "full range of punishment" available for the crime to which he pleads guilty in order for the plea to be considered voluntary.[100] The Arizona courts have also held, however, that "full range of punishment" does not require defendants to be advised of every possible collateral effect of their guilty pleas.[101] Thus, a defendant need not be informed that his guilty plea could lead to deportation,[102] nor need he be apprised of the

91. See text & notes 110-12 *infra*.

92. 395 U.S. 238 (1969). These standards have been codified in FED. R. CRIM. P. 11.

93. 395 U.S. at 243-44.

94. *Id.* at 243. *See also* Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Pointer v. Texas, 380 U.S. 400, 403 (1965); Malloy v. Hogan, 378 U.S. 1, 3 (1964). The defendant also waives other rights when he pleads guilty. These include the right to challenge prior proceedings, illegal searches or seizures, admissibility of evidence, and the insufficiency of an indictment. *See* "Acceptance of Guilty Pleas," 14 ARIZ. L. REV. 409, 543, 544 (1972).

95. 395 U.S. at 242-44.

96. *See* Santobello v. New York, 404 U.S. 257, 261-62 (1971) (the *Santobello* Court verbalized what the *Boykin* Court, 395 U.S. at 242-44, had implied but not delineated).

97. *See, e.g.*, State v. Nunez, 109 Ariz. 408, 411, 510 P.2d 380, 383 (1973); State v. Darling, 109 Ariz. 148, 151, 506 P.2d 1042, 1045 (1973); State v. Church, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973).

98. See text & notes 99-105 *infra*.

99. 395 U.S. at 244.

100. *See, e.g.*, State v. Church, 109 Ariz. 39, 44, 504 P.2d 940, 945 (1973); State v. Carr, 108 Ariz. 203, 207, 495 P.2d 134, 138 (1972); State v. Hooper, 107 Ariz. 327, 329-30, 487 P.2d 394, 396-97 (1971).

101. See text & notes 102-05 *infra*.

102. *See* State v. Rodriguez, 17 Ariz. App. 553, 554-55, 499 P.2d 167, 168-69 (1972). The court of appeals found that failure to advise the defendant that a plea of guilty would subject him to deportation did not invalidate the plea. *Id.* The court also cited several federal decisions recognizing other collateral effects of guilty pleas of which the defendant need not be advised in federal court. *Id.* at 554, 499 P.2d at 168. *See*

availability of parole.[103] The rationale for distinguishing between direct and collateral effects of guilty pleas is that collateral consequences are not within the realm of the court's jurisdiction.[104] Thus, it appears that in Arizona, only those penalties over which the court has direct control[105] must be made known to the defendant.

Courts do not have direct control over all types of forfeiture. By statute in Arizona, per se contraband is automatically forfeited to the state.[106] The defendant's guilt or innocence has no bearing on the forfeiture of such contraband.[107] Possession of derivative contraband, however, is not in itself illegal, and its forfeiture must be effectuated in a court proceeding,[108] upon a showing that its owner either used it or allowed it to be used for an illegal purpose.[109] Thus it appears that where forfeiture through judicial action is foreseen, as in the case of derivative contraband, the defendant should be so advised prior to pleading guilty or entering into a plea bargain.

Second, the validity of a plea bargain depends upon the prosecutor's adherence to the agreement. The Supreme Court has explicitly recognized a special remedy for a defendant whose guilty plea was induced by a subsequently breached plea agreement.[110] When the defendant's involuntary plea has not been bargained, the only remedy is withdrawal of the guilty plea and reversal of the conviction.[111] On the

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Meaton v. United States, 328 F.2d 379, 380-81 (5th Cir. 1964), *cert. denied*, 380 U.S. 916 (1965) (possible loss of civil rights, such as right to vote, travel, and obtain a passport); United States v. Cariola, 323 F.2d 180, 186-87 (3d Cir. 1963) (deprivation of voting rights); Redwine v. Zuckert, 317 F.2d 336, 337-38 (D.C. Cir. 1963) (undesirable discharge from the armed forces).

103. State v. Ross, 108 Ariz. 245, 247-48, 495 P.2d 841, 843-44 (1972); State v. McCallister, 107 Ariz. 143, 144-45, 483 P.2d 558, 559-60 (1971); State v. Smith, 13 Ariz. App. 507, 509, 478 P.2d 122, 124 (1970). Federal courts, however, have held that failure to advise a defendant of the availability of parole is sufficient to invalidate a guilty plea. *See, e.g.*, Harris v. United States, 426 F.2d 99, 101 (6th Cir. 1970); Jenkins v. United States, 420 F.2d 433, 437 (10th Cir. 1970); Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964).

104. *See* State v. Ross, 108 Ariz. 245, 247, 495 P.2d 841, 843 (1972).

105. Only those punishments which are not meted out by courts are considered collateral. For instance, deportation determinations and granting of parole are functions normally administered by government agencies rather than the courts. *See* 8 U.S.C. 1252(b) (1970) (deportation determination made by special inquiry officer appointed by the United States Attorney General); ARIZ. REV. STAT. ANN. §§ 31-401 to -402 (1976) (parole must be recommended by the Board of Pardons and Paroles). There is no mechanical definition of "collateral effect," however, and to date, the courts have only ruled on a few of the many possible collateral effects.

106. *See* ARIZ. REV. STAT. ANN. § 13-426(c) (1956) (forgery and counterfeiting equipment); *id.* § 13-914 (Supp. 1976-77) (certain weapons); *id.* § 36-1014 (1974) (narcotic drugs).

107. The Arizona statute providing for forfeiture of illegal drugs, for example, does not require a court proceeding to determine the guilt or innocence of the owner of the contraband, only a determination that it is contraband. *Id.*

108. *Id.* §§ 36-1041 to -1045.

109. *See In re* One 1965 Ford Mustang, 105 Ariz. 293, 300, 463 P.2d 827, 834 (1970); ARIZ. REV. STAT. ANN. §§ 36-1041 to -1046 (1974).

110. Santobello v. New York, 404 U.S. 257 (1971).

111. *See* Boykin v. Alabama, 395 U.S. 238, 244 (1969).

other hand, when a plea bargain is involved, the additional remedy of specific performance also becomes available. Specific performance is an equitable remedy applied to plea bargains because of their contractual nature.[112] In essence, it gives the defendant the benefit of his bargain.

In upholding the grant of specific performance in *Dodge Van*, the court of appeals relied on *Santobello v. New York*.[113] In *Santobello*, the defendant agreed to plead guilty in exchange for the state's promise to refrain from making any sentence recommendation to the judge.[114] At sentencing, another prosecutor had replaced the original prosecuting attorney.[115] The new prosecutor recommended, despite the plea agreement, that the maximum sentence be given.[116] The Supreme Court held that the state must fulfill all promises made in reaching a plea bargain,[117] and remanded the case for a determination of whether the circumstances required specific performance of the original promise, or a withdrawal of the guilty plea and a trial on the merits of all the original charges.[118] Similarly, in *Dodge Van*, the court of appeals held that the County Attorney's prosecution of the forfeiture

112. Specific performance has been urged or granted under three theories. First, plea bargains are thought to be enforceable as ordinary contracts. *See* Scribner v. State, 9 Okla. Crim. 465, 506-08, 132 P. 933, 948-49 (1913). Second, many courts have viewed specific performance as compelled either by fairness or due process considerations. *See, e.g.*, United States v. Ewing, 480 F.2d 1141, 1143 (5th Cir. 1973) (fairness); People v. Antonelli, 6 Misc. 2d 78, 80, 156 N.Y.S.2d 710, 712 (Kings County Ct. 1956) (due process); Courtney v. State, 341 P.2d 610, 611-12 (Okla. Crim. App. 1959) (due process). The reasoning behind this theory is that since the defendant waives several constitutional rights by pleading guilty, see text & note 94 *supra*, failure to enforce the agreement would allow the state "to play fast and loose with an accused's constitutional rights to its advantage and [the defendant's] detriment." Courtney v. State, *supra* at 612. Third, specific performance has been held mandated as a pledge of public faith. *See, e.g.*, State v. Hingle, 242 La. 844, 866, 139 So. 2d 205, 212 (1962); Commonwealth v. St. John, 173 Mass. 566, 569, 54 N.E. 254, 254-55 (1899); State v. Ward, 112 W. Va. 552, 554, 165 S.E. 803, 805 (1932). The reasoning behind this theory is apparently the encouragement of the defendant's reliance on the promises made by the public prosecutor. *See* State v. Wolske, 280 Minn. 465, 472-73, 160 N.W.2d 146, 151-52 (1968).

113. 404 U.S. 257 (1971).

114. *Id.* at 258-59.

115. *Id.* at 259.

116. *Id.*

117. *Id.* at 262. The Court views the prosecutors here as a single entity. "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done." *Id.*

118. *Id.* at 263. While the Arizona court of appeals did not specifically address the issue of reliance in *Dodge Van*, it is a factor to be considered when determining whether the plea bargain should be enforced. *See* People v. Butterfield, 37 Cal. App. 2d 140, 99 P.2d 310 (Ct. App. 1940). *See also* Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771, 784-85 (1973). The reliance factor should be considered whether withdrawal or specific performance is contemplated. The test of reliance is probably best expressed in *Santobello*: "[A] constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, *such promise must be fulfilled*." 404 U.S. at 262 (emphasis added). Since the *Dodge Van* court relied on this portion of *Santobello*, *see* 24 Ariz. App. at 339, 538 P.2d at 768, it is reasonably inferable that the court also considered and accepted appellee's reliance on the prosecutor's promise.

action constituted a violation of the earlier plea bargain because forfeiture is the type of punishment of which the defendant must be informed.[119] As to the remedy to be applied, rather than order withdrawal of the guilty plea and grant a new trial, the Arizona court simply refused to permit the vehicle to be forfeited;[120] in effect, it granted specific performance. This remedy appears to be more reasonable than ordering withdrawal of the plea. Had the court opted for withdrawal of the guilty plea, the state could have tried the defendant on the criminal charges, reserving the right to eventually initiate forfeiture proceedings.[121]

The court based the grant of specific performance on both due process and contractual grounds.[122] The court held that appellee had "kept his part of the bargain"[123] in return for one of the state's considerations—a punishment certain.[124] Citing *Santobello*, the court also noted that the safeguards relating to plea bargains[125] must be observed, thus implying a concern for the satisfaction of due process requirements.[126] Determining that the state's attempt to forfeit the appellee's vehicle would violate contractual and constitutional limitations, the *Dodge Van* court affirmed the refusal of the trial court to permit forfeiture.[127]

The dissent argued,[128] however, that if the prosecutor's failure to mention forfeiture in the plea bargain negotiations constituted manifest injustice, the trial court should have applied rule 17.5 of the Arizona Rules of Criminal Procedure.[129] Compliance with this rule would have entailed setting aside the agreement, the plea, and the sentence, and trying the case on its merits.[130] This argument has considerable merit, since withdrawal is the remedy most often granted to defendants when

119. 24 Ariz. App. at 339-40, 538 P.2d at 768-69.
120. *Id.*
121. *See id.* at 340, 538 P.2d at 769 (Eubank, J., dissenting). Since *Dodge Van* was decided in 1975, prosecutors have occasionally avoided the necessity of providing for forfeiture in plea agreements by forfeiting the offending vehicle before trial of the criminal charges. Generally, however, prosecutors specifically reserve the right to forfeit in their plea agreements whenever possible. Telephone interview with Rhonda Idle, Deputy County Attorney for Pima County, in Tucson, Arizona, Dec. 22, 1976.
122. 24 Ariz. App. at 339-40, 538 P.2d 768-69.
123. *Id.* at 339, 538 P.2d at 768.
124. *Id.* at 339-40, 538 P.2d at 768-69.
125. *Santobello* did not delineate the safeguards which courts must observe when guilty pleas stem from plea bargains. However, the opinion implies that the Court is referring to the constitutional safeguards discussed in Boykin v. Alabama, 404 U.S. 238, 261-62 (1969). *See* text & notes 92-99 *supra.*
126. 24 Ariz. App. at 339, 538 P.2d at 768 (court appeared to be most concerned with the possibility of prosecutors inducing involuntary guilty pleas); see text & notes 97-110 *supra.*
127. *Id.* at 339-40, 538 P.2d at 768-69.
128. *Id.* at 340, 538 P.2d at 769 (Eubank, J., dissenting).
129. The court may "allow withdrawal of a plea of guilty . . . when necessary to correct a manifest injustice." ARIZ. R. CRIM. P. 17.5.
130. 24 Ariz. App. at 340, 538 P.2d at 769.

prosecutors do not comply with plea agreements.[131] This argument, however, ignores one essential point. While the rule does permit the court to allow withdrawal of a plea of guilty even after sentencing,[132] it does not require that the plea be withdrawn. The rule is discretionary, and specifies when the court may permit withdrawal, as well as the procedure to be followed if allowing withdrawal of the plea is the remedy granted. In addition, the rule does not prohibit the court from granting specific performance.[133] Furthermore, it is arguable that *Santobello* requires courts to consider the remedy of specific performance when faced with breaches of plea bargains by prosecutors.[134] Thus, based on *Santobello* and the need to protect an individual's rights in the plea bargaining process, it is clear that the Arizona court of appeals in *Dodge Van* correctly precluded forfeiture by allowing specific performance.

Conclusion

Civil forfeiture of derivative contraband has long been an accepted part of American jurisprudence. While the *Dodge Van* court's characterization of forfeiture as a criminal penalty is only one of many such decisions, it is unique as applied to plea bargains. By construing forfeiture to be within the range of punishment of which the defendant must be advised prior to the acceptance of a plea, the court has dictated that forfeiture information be included in all plea bargains where the in rem action is a possible direct effect. This decision may ultimately result in either a reduction in the number of forfeitures for misdemeanors and minor felonies such as possession of marijuana or a reduction in the number of plea bargains for such offenses.

131. *See* Santobello v. New York, 404 U.S. 257, 266 (1971) (Douglas, J., concurring); Commonwealth v. Alvarado, 442 Pa. 516, 522, 276 A.2d 526, 529 (1971).
132. *See* ARIZ. R. CRIM. P. 17.5, Comment.
133. *See id.* 17.5.
134. In *Santobello*, the Supreme Court held that the trial court determines whether the petitioner should be allowed to withdraw his plea of guilty or be granted specific performance on the plea bargain. 404 U.S. at 263. On the other hand, Justice Douglas stated that the Court should give the defendant's preference of remedy "considerable, if not controlling," weight. *Id.* at 267 (Douglas, J., concurring).

V. COPYRIGHT

A. PUBLICATION AND COMMON LAW COPYRIGHT

Common law copyright can be described simply as "the right of an author to the first publication of his work."[1] This right of first publication is to be differentiated from its statutory cousin, the federal copyright law,[2] which is authorized by the Constitution.[3] Common law copyright is a right which is "protected by the laws of the individual states."[4] The key distinction between statutory and common law copyright is the concept of publication; when publication occurs,[5] the author is divested of his common law copyright and must fulfill certain statutory requirements to obtain federal copyright protection.[6]

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1. E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 321 (1975).

2. 17 U.S.C. §§ 1-216 (1970). Statutory protection for an author includes the exclusive right to publish, sell or otherwise disseminate his creations for a limited period of time. *Id.* §§ 1, 24. This federal system of copyright basically protects the economic interest a creator has in his product, in exchange for the indispensible cultural contributions which an author can make to society. Bell v. Pro Arts, Inc., 366 F. Supp. 474, 482 (N.D. Ohio 1973); *see* Patterson, *Copyright and the Public Interest*, in COPYRIGHT: VIEWPOINTS ON HISTORY, LAWS, LEGISLATION 43 (A. Kent & H. Lancour eds. 1972) [hereinafter cited as COPYRIGHT: CURRENT VIEWPOINTS].

The federal statute explicitly recognizes the validity of common law rights. "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor." 17 U.S.C. § 2 (1970). It must be noted that title 17, the Copyright Code, has been completely revised, effective January 1, 1978, except as otherwise provided. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541. Among the major revisions is 17 U.S.C.A. § 104 (Supp. Pamphlet 1976), which brings unpublished works under statutory protection. Nevertheless, common law protection still extends to works not within the subject matter provisions of the statute. *Id.* § 301(b).

3. The Constitution grants to Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

4. E. KINTNER & J. LAHR, *supra* note 1. *See, e.g.*, Edgar H. Wood Associates, Inc. v. Skene, 347 Mass. 351, 197 N.E.2d 886 (1964); Krahmer v. Luing, 127 N.J. Super. 270, 317 A.2d 96 (Ch. Div. 1974); Tabor v. Hoffman, 118 N.Y. 30, 23 N.E. 12 (1889).

5. Although there is no definition of publication in the federal statute, *see* A. LATMAN, HOWELL'S COPYRIGHT LAW 62-63 (rev. ed. 1962); M. NIMMER, COPYRIGHT § 49, at 193 (1976), the Copyright Act defines the date of publication as the date "when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority." 17 U.S.C. § 26 (Supp. IV, 1974), *amending* 17 U.S.C. § 26 (1970). Prior to publication, the owner has a property right to withhold his work, or to disseminate it with whatever restrictions he may see fit to impose. Werckmeister v. American Lithographic Co., 134 F. 321, 324 (2d Cir. 1904).

6. E. KINTNER & J. LAHR, *supra* note 1, at 320; *see* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 347 (1908); Werckmeister v. American Lithographic Co., 134 F. 321, 324 (2d Cir. 1904).

A variety of artistic and literary productions are eligible for the common law right of first publication.[7] In fact, common law copyright inheres in all of an author's unpublished forms of expression,[8] with "author" including such diverse persons as artists, playwrites, sculptors, and composers.[9] Common law copyright can protect either an author's monetary interest in first publication, or his creative interest, should he choose not to sell or otherwise publish his work, but rather decide to enjoy his work privately.[10] Common law copyright, then, is an important and valuable tool for protecting the economic and privacy rights of authors.[11]

In *Gustave v. Zuppiger*,[12] the doctrine of common law copyright was applied by an Arizona appellate court for the first time.[13] Gustave, a creative designer, was commissioned to design the interior of a new branch bank, including a two-level check stand, modular teller lines, desks, and a coffee table.[14] When the bank later built three additional branches, Zuppiger, a cabinetmaker who had previously done work for Gustave, was hired by the bank to copy Gustave's original designs for the new branches.[15] Gustave brought an action to

7. E. KINTNER & J. LAHR, *supra* note 1, at 320-25. For a representative, although not exhaustive sampling of productions eligible for common law copyright, see 17 U.S.C. § 5 (1970), *as amended* 17 U.S.C. § 5 (Supp. IV, 1974).

8. E. KINTNER & J. LAHR, *supra* note 1.

9. *Id. See, e.g.*, International Tape Mfr. Ass'n. v. Gerstein, 344 F. Supp. 38 (S.D. Fla. 1972), *vacated on other grounds*, 494 F.2d 25 (5th Cir. 1974) (author as composer); King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D.N.Y. 1963) (author as speaker); Fader v. Twentieth Century-Fox Film Corp., 169 F. Supp. 880 (S.D.N.Y. 1959) (author as writer); Grandma Moses Properties, Inc. v. This Week Magazine, 117 F. Supp. 348 (S.D.N.Y. 1953) (author as artist).

10. L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 18 (1968); *see* discussion note 5 *supra*.

11. *See* American Visuals Corp. v. Holland, 239 F.2d 740, 743-44 (2d Cir. 1956); Note, *"Copyright" Protection For Uncopyrightables: The Common-Law Doctrines*, 108 U. PA. L. REV. 699, 702 (1960).

12. 24 Ariz. App. 557, 540 P.2d 176 (1975).

13. *But cf.* San Manuel Copper Corp. v. Redmond, 8 Ariz. App. 214, 445 P.2d 162 (1968). In that case, Redmond had perfected a system for more efficient processing of copper. *Id.* at 216, 445 P.2d at 164. Soon after he presented his technique to the smelting company management for approval, Redmond's process was adopted without his receiving any compensation. The court of appeals held that Redmond was entitled to judgment on a theory of quasi-contract, since the company had been unjustly enriched at Redmond's expense. *Id.* at 217-18, 445 P.2d at 165-66. Although *Redmond* was actually the first Arizona case to recognize that common law rights of an inventor are enforceable in state court, the type of relief granted and the theory proceeded upon would be inappropriate to *Gustave*; Gustave had been commissioned and paid for his work. 24 Ariz. App. at 558, 540 P.2d at 177.

14. 24 Ariz. App. at 558, 540 P.2d at 177.

15. *Id.* A common law copyright is not divested by a limited publication. *See* text & notes 76-90 *infra*. The question whether a publication was sufficiently limited most often arises where an abbreviation or other variation of the actual work is published. Thus, when a finished product is developed from drawings or models, a general publication of the product does not imply the publication of the drawings or models from which it evolved. Tabor v. Hoffman, 118 N.Y. 30, 23 N.E. 12 (1889). Consequently, after such a publication, the product may be freely copied, but may not be reproduced from the "drawings." *Id. But see* Letter Edged In Black Press, Inc. v. Public Bldg. Comm'n, 320 F. Supp. 1303 (N.D. Ill. 1970), illustrative of the reverse situation, mandating an opposite result. In that case, a maquette of a Picasso statue was shown without restric-

collect royalties from Zuppiger, claiming an infringement of his common law copyright[16] in the furnishings.[17] At trial, the court found

tion, thereby placing it in the public domain. *Id.* at 1309. The court held that no copyright could be obtained for the completed statue, since it was merely a copy of a work already dedicated to the public. *Id.* at 1310. *Gustave* is analogous to the *Tabor* situation. Assuming Gustave had given the bank the diagrams or designs along with the furniture, the bank would be powerless to prevent the public from copying the actual pieces. But should a competitor obtain a copy of the designs without authorization, he would be infringing the copyright should he then commence to manufacture identical furnishings from the designs. This distinction between plans and finished product most commonly occurs in the field of architecture. It is well established that while the display of a finished building constitutes a publication, a common law copyright is nevertheless reserved in the plans for that building. *See, e.g.*, Nucor Corp. v. Tennessee Forging Steel Serv., Inc., 476 F.2d 386 (8th Cir. 1973); DeSilva Constr. Corp. v. Herrald, 213 F. Supp. 184 (M.D. Fla. 1962); Smith v. Paul, 174 Cal. App. 2d 744, 345 P.2d 546 (Ct. App. 1959); Edgar H. Wood Associates, Inc. v. Skene, 347 Mass. 351, 197 N.E.2d 886 (1964); Krahmer v. Luing, 127 N.J. Super. 270, 317 A.2d 96 (Ch. Div. 1974). A more subtle issue is whether the depositing of architectural plans in a public office, if required by law, is a general publication of the plans. The better view considers it a limited publication, because the architect is not voluntarily depositing the plans. *See, e.g.*, Smith v. Paul, *supra*; Edgar H. Wood Associates, Inc. v. Skene, *supra*; Shaw v. Williamsville Manor, Inc., 38 App. Div. 2d 442, 330 N.Y.S.2d 623 (1972). *Contra*, Kurfiss v. Cowherd, 233 Mo. App. 397, 121 S.W.2d 282 (1938). A similar problem arises when an architect gives the plans to a developer; courts are in disagreement as to the effect of such disclosure. *Compare* Nucor Corp. v. Tennessee Forging Steel Serv., Inc., *supra* (not a general publication), *with* Ballard H.T. Kirk & Associates, Inc. v. Poston, 33 Ohio App. 2d 117, 293 N.E.2d 102 (1972) (general publication). Similarly, because the filing of a manuscript for statutory copyright is not in itself a dedication of the work to the public, it is not a publication and does not terminate the common law copyright in the event the statutory right is not secured. *See* Hearst Corp. v. Shopping Center Network, Inc., 307 F. Supp. 551, 557 (S.D.N.Y. 1969); Fader v. Twentieth Century-Fox Film Corp., 169 F. Supp. 880, 881 (S.D.N.Y. 1959). *But see* Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N.Y. 241, 49 N.E. 872 (1898).

16. Infringement of the common law copyright entitles the holder to any remedy available in the forum state. E. KINTNER & J. LAHR, *supra* note 1, at 412-413. Commonly, "a plaintiff may claim all the profits the defendant has made by reason of his infringement." *Id. See, e.g.*, Nucor Corp. v. Tennessee Forging Steel Serv., Inc., 476 F.2d 386 (8th Cir. 1973); Baut v. Pethick Constr. Co., 262 F. Supp. 350 (M.D. Pa. 1966); Shaw v. Williamsville Manor, Inc., 38 App. Div. 2d 442, 330 N.Y.S.2d 623 (1972).

Punitive damages and injunctive relief may be awarded in the court's discretion. E. KINTNER & J. LAHR, *supra*, at 413; M. NIMMER, *supra* note 5, § 150, at 666-67, § 157, at 698.1; *see, e.g.*, Ted Arnold Ltd. v. Silvercraft Co., 259 F. Supp. 733 (S.D. N.Y. 1966); King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D.N.Y. 1963); Tabor v. Hoffman, 118 N.Y. 30, 23 N.E. 12 (1889). Where there has been no contractual relationship between the parties, an action may be brought in quasi-contract, under the theory of unjust enrichment. M. NIMMER, *supra* note 5, § 170, at 734.4-.5. "The doctrine [of unjust enrichment] is applicable to a situation where . . . the product of an inventor's brain is knowingly received and used by another to his own great benefit without compensating the inventor." Matarese v. Moore-McCormack Lines, Inc., 158 F.2d 631, 634 (2d Cir. 1946); *accord*, San Manuel Copper Corp. v. Redmond, 8 Ariz. App. 214, 445 P.2d 162 (1968) (holding that fraud is not necessary for recovery). Alongside common law copyright has developed the "misappropriation" doctrine, an analogous but separate form of protection based upon property rights. E. KINTNER & J. LAHR, *supra* note 1, at 462-63. *See generally* Note, *Beyond the Realm of Copyright: Is There Legal Sanctuary for the Merchant of Ideas?*, 41 BROOKLYN L. REV. 284 (1975); Note, *supra* note 11. This doctrine was first enunciated in International News Serv. v. Associated Press, 248 U.S. 215 (1918), where it was held to be unfair competition for a news gathering organization to appropriate news coverage from another news gathering company. *Id.* at 239-40. The criteria for protection against misappropriation are investment of time, effort, and money to create a "property right," an appropriation at little or no cost, and a diversion of profits away from the creator. Comment, *The Misappropriation Doctrine After Sears-Compco*, 2 U. SAN FRANCISCO L. REV. 292, 295 (1968); *see* Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631 (1937).

17. 24 Ariz. App. at 558, 540 P.2d at 177.

that Gustave did not possess a common law copyright in the furnishings and rendered a verdict for Zuppiger.[18]

Affirming the trial court, the court of appeals held that although Gustave's designs were entitled to common law copyright protection,[19] the right had passed from Gustave to the bank.[20] As copyright is intangible, separate from any ownership in the expression of the copyrighted work,[21] an artist may transfer his work to his employer while retaining his common law copyright for that work.[22] The law presumes, however, the transfer of a copyright from an employee or independent contractor to his employer, absent any express reservation or agreement to the contrary.[23] This "works for hire" doctrine was the ratio decidendi of *Gustave*; because the plaintiff failed to rebut the presumptive transfer of the copyright in the furnishings he designed, the court concluded that any copyright belonged exclusively to the bank, which commissioned the work.[24] The court nevertheless went on to state that the common law copyright in the furniture had terminated, regardless of who was entitled to its protection, since the work had been published when it was displayed to the public in the branch bank.[25]

This commentary will trace the historical development of the American doctrine of common law copyright and will examine the nature of the right, the persons to whom it is available, and the creations to which it may apply. The *Gustave* criteria will also be contrasted with those of other jurisdictions. Finally, it will discuss the con-

18. Brief for Appellant at 5, Gustave v. Zuppiger, 24 Ariz. App. 557, 540 P.2d 176 (1975).

19. See text accompanying note 49 *infra.*

20. 24 Ariz. App. at 559-60, 540 P.2d at 178-79.

21. American Tobacco Co. v. Werckmeister, 207 U.S. 284, 298-99 (1907); Pushman v. New York Graphic Soc'y, 287 N.Y. 302, 307, 39 N.E.2d 249, 250 (1942); E. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 99 (1879). *See also* 17 U.S.C. § 27 (1970).

22. *See, e.g.*, Werckmeister v. Springer Lithographing Co., 63 F. 808, 811 (S.D.N.Y. 1894); Chamberlain v. Feldman, 300 N.Y. 135, 139, 89 N.E.2d 863, 865 (1949); Ashworth v. Glover, 20 Utah 2d 85, 433 P.2d 315 (1967). *But see* Ripley v. Findlay Galleries, Inc., 155 F.2d 955 (7th Cir.), *cert. denied*, 329 U.S. 775 (1946) (in an action for alleged infringement, sale of picture through agent included common law copyright where the artist consented to reproduction by gallery). *See also* discussion note 15 *supra.*

23. *See, e.g.*, Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565, 568 (2d Cir. 1966); Lumiere v. Robertson Cole Distrib. Corp., 280 F. 550 (2d Cir.), *cert. denied*, 259 U.S. 583 (1922); CAMBRIDGE RESEARCH INSTITUTE, OMNIBUS COPYRIGHT REVISION—COMPARATIVE ANALYSIS OF THE ISSUES 101 (1973). Although artists seek to exempt themselves from this, the "works for hire" doctrine, by claiming the status of independent contractors, the courts have not recognized any distinction between the two for common law copyright purposes. Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 300 (9th Cir. 1965); *see* Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940); 1 COPYRIGHT SOCIETY OF THE U.S.A., STUDIES ON COPYRIGHT 720 (1963).

24. 24 Ariz. App. at 559-60, 540 P.2d at 178-79.

25. *Id.* at 560, 540 P.2d at 179; *see* text & notes 76-90 *infra.*

cept of publication and how it operates in Arizona to divest the common law copyright.

Common Law Origins of Copyright

The system of statutory and common law copyright, now employed to promote the literary arts,[26] is based on a doctrine which originated for a completely different reason. The early development of copyright law represented an attempt by the English crown to retard the dissemination of certain published works, in order to impede the Protestant Reformation.[27] As published dissent can be eliminated by controlling the publishers and booksellers, the London Stationers' Company, composed of the leading English printers and publishers, was granted a monopoly over all printing by royal decree in 1557.[28] To exercise their monopoly in orderly fashion and to prevent disputes and piracy, the Stationers developed among themselves the idea of copyright, a trade regulation device, assuring the members of the Company that there would be no unauthorized printing of their work.[29] Specifically, the Stationers' copyright gave the holder the perpetual right to publish, sell, or assign the protected work.[30] Because authors were not members of the Stationers' Company, they did not own copyrights.[31]

After a slow decline, the Stationers' legal monopoly met its demise in 1694.[32] Parliament's adverse reaction to the Stationers' power led to the passage of the Statute of Anne in 1709,[33] intended to prevent future monopolies in the book trade.[34] The statute provided, in part, that a copyright in published works would be available to authors as well as Stationers for a period of 14 years and that only authors could obtain a similar renewal term.[35] The statute was interpreted as recognizing the author's right in his work, both before and after publication.[36] Acting largely from selfish motives, the Stationers convinced the common law courts that the right of perpetual ownership was thereby vested in the author.[37] The booksellers believed that an

26. U.S. CONST. art. I, § 8, cl. 8.
27. *See* CAMBRIDGE RESEARCH INSTITUTE, *supra* note 23, at 5-6; E. DRONE, *supra* note 21, at 43; Harrison, *History*, in COPYRIGHT: CURRENT VIEWPOINTS, *supra* note 2, at 1-3; B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 26-27 (1967); L. PATTERSON, *supra* note 10, at 3.
28. *See* L. PATTERSON, *supra* note 10, at 28-30.
29. *See* E. DRONE, *supra* note 21, at 54-61; B. KAPLAN, *supra* note 27, at 1-6; L. PATTERSON, *supra* note 10, at 6-12, 43-44.
30. L. PATTERSON, *supra* note 10, at 45-46.
31. *Id.* at 64-65.
32. *Id.* at 139.
33. 8 Anne, c. 19 (1709).
34. L. PATTERSON, *supra* note 10, at 144.
35. 8 Anne, c. 19, §§ 1, 11 (1709).
36. *See* L. PATTERSON, *supra* note 10, at 144-47.
37. *Id.* at 169.

author invested with a perpetual copyright would naturally assign it to them in return for the publication of his book. The Stationers thus hoped to ride the coattails of the authors, under the Statute of Anne, to a legally recognized and perpetual property right.[38] The battle in the courts centered around this notion of authors' rights for more than half a century.[39]

The rights of the author were not definitively delineated until the case of *Donaldson v. Beckett*[40] in 1774. *Donaldson* fashioned a scheme whereby the author would hold a common law copyright until publication of his work, but after publication his protection would be limited to that provided by the Statute of Anne.[41] This dual scheme of statutory and common law copyright was subsequently adopted in the United States.[42] *Wheaton v. Peters*,[43] the first Supreme Court case to deal with common law copyright, recognized that publication divests common law rights.[44] These holdings, coupled with a statutory system requiring publication to obtain permanent protection,[45] established publication as the dividing line between statutory and common law copyright.[46] The historical rules so promulgated served, in large measure, as the basis for the doctrines applied by the *Gustave* court.

Requirements of Copyrightability

Although the basic requisite for common law copyright is that the work in question remain unpublished, other criteria must be met for an author to claim the right of first publication. The first requirement is that the subject matter be of a copyrightable variety.[47]

While the intellectual property to which early copyright law

38. *Id.* at 153, 169-72. The Stationers achieved a victory in Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769), when the court stated that an author retains his common law copyright after publication, and that the right was not abrogated by the Statute of Anne. *Id.* at 206, 217, 250. The victory was, however, short lived, as the House of Lords overturned *Millar* in Donaldson v. Beckett, 1 Eng. Rep. 837 (H.L. 1774); *see* text & notes 40-41 *infra*.

39. *See* L. PATTERSON, *supra* note 10, at 158-72.

40. 1 Eng. Rep. 837 (H.L. 1774).

41. *Id.* at 846.

42. *See* L. PATTERSON, *supra* note 10, at 17, 172-79.

43. 33 U.S. (8 Pet.) 591 (1834). Wheaton, a reporter for the United States Supreme Court, sought to prevent the copying of his reports, by claiming a copyright under both the copyright statute, Act of April 29, 1802, ch. 36, 2 Stat. 171, and the common law. The Court held its opinions could not be copyrighted, and that an author holds no common law copyright in his work after publication. 33 U.S. (8 Pet.) at 668.

44. 33 U.S. (8 Pet.) at 656-57; *see* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 347 (1908); E. KINTNER & J. LAHR, *supra* note 1, at 320-21; A. LATMAN, *supra* note 5, at 61-62.

45. *See* 17 U.S.C. § 10 (1970). The first federal copyright statute was passed by the First Congress at its second session. Act of May 31, 1790, ch. 15, 1 Stat. 124.

46. *See* E. KINTNER & J. LAHR, *supra* note 1, at 320, 325; A. LATMAN, *supra* note 5, at 61-62.

47. *See* M. NIMMER, *supra* note 5, § 42.1, at 42.1-.2.

applied was literary in character,[48] the subject matter of modern copyright law has been expanded considerably.[49] The *Gustave* court stated that a common law copyright may vest in any artistic or literary expression which is "original with its author," "developed beyond the point of merely an abstract idea," and "unpublished."[50] Under both statutory and common law copyright, protection is provided for literary expressions and works of art.[51] The word "art," however, is difficult to define. The *Gustave* court rejected a test which has developed under the federal copyright statutes.[52] The statutory test attempts to define "art" on the basis of its aesthetic rather than utilitarian value.[53] To be sure, even the federal courts have held that a work of art may have commercial value while retaining its association with the fine arts for purposes of copyright law.[54] It has been more broadly stated that "a thing is a work of art if it appears to be within the historical and ordinary conception of the term art."[55] The court in *Gustave* refined this latter theory so that a work would be termed art if it would be considered such by any "meaningful segment" of the population.[56]

The second requirement for common law copyright, originality,[57]

48. E. DRONE, *supra* note 21, at 54-61. *See also* B. KAPLAN, *supra* note 27, at 1-6; L. PATTERSON, *supra* note 10, at 6-12.

49. For example, statutory copyright embraces such copyrightable items as books, periodicals, lectures, dramatic and musical compositions, maps, works of art, models and reproductions of such works, technical drawings, photographs, motion pictures, and sound recordings. 17 U.S.C. § 5 (1970), *as amended*, 17 U.S.C. § 5 (Supp. IV, 1974).

50. 24 Ariz. App. at 558, 540 P.2d at 177, *quoting* M. NIMMER, *supra* note 5, § 11.2, at 42.1-.2. *See generally* American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907); Werckmeister v. Springer Lithographing Co., 63 F. 808 (S.D.N.Y. 1894).

51. See text & notes 49-50 *supra*. The subject matter of statutory copyright, however, is restricted to those areas enumerated in 17 U.S.C. § 5 (1970), *as amended*, 17 U.S.C. § 5 (Supp. IV, 1974).

52. 24 Ariz. App. at 558-59, 540 P.2d at 177-78.

53. *See* Ted Arnold Ltd. v. Silvercraft Co., 259 F. Supp. 733, 734 (S.D.N.Y. 1966); 37 C.F.R. § 202.10(c) (1976).

54. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (circus poster held copyrightable). Furthermore, even if an article's intended use is purely functional, it will not be denied registration on that basis alone. Mazer v. Stein, 347 U.S. 201, 218 (1954); *see, e.g.*, Rosenthal v. Stein, 205 F.2d 633, 636 (9th Cir. 1953) (statuettes used as lamp bases); Baut v. Pethick Constr. Co., 262 F. Supp. 350 (M.D. Pa. 1966) (stained glass window); Ted Arnold Ltd. v. Silvercraft Co., 259 F. Supp. 733 (S.D.N.Y. 1966) (antique telephone pencil sharpener). *See also* Lahore, *Art and Function in the Law of Copyright and Designs*, 4 ADELAIDE L. REV. 182 (1971); Latman, *Fifteen Years After Mazer v. Stein: A Brief Perspective*, 16 BULL. COPYRIGHT SOC'Y 278 (1969); Waldheim, *Don't Maim Our Copyrights!*, 7 BULL. COPYRIGHT SOC'Y 160, 161 (1960).

55. Rosenthal v. Stein, 205 F.2d 633, 635 (9th Cir. 1953). *See also* Mott, *An Analysis of the "Unity of Art" Concept in European Legal Systems*, 11 BULL. COPYRIGHT SOC'Y 242 (1964).

56. 24 Ariz. App. at 559, 540 P.2d at 178. This theory was espoused in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903): "Yet if [works] command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt." *Id.* at 252; *see* M. NIMMER, *supra* note 5, § 19.1, at 85.2. The problem that remains after *Gustave* is identifying and classifying meaningful segments of the population.

57. *See* M. NIMMER, *supra* note 5, § 11.2, at 42.1-.2. Originality is also required for statutory copyright. *Id.*

demands that the work have been produced through the author's own skill, labor, and judgment.[58] Originality is to be distinguished from novelty,[59] in that an original work may be identical to a work produced previously, provided it was not actually copied; novelty is not a prerequisite to common law copyright.[60] In a given case, it will be a question of fact whether a work is an independent creation, or merely a copy of a prior work.[61]

As is true of originality, the requirement of development beyond merely an abstract idea is a requisite of statutory and common law copyright alike.[62] "[I]t is the form of expression of an idea, rather than the idea itself, that is copyrightable."[63] Although an idea must be embodied in some form of expression to be copyrightable, common law protection arguably includes forms which are intangible, such as dance or speech.[64] The scope of common law copyright protection might arguably depend on whether an intellectual production has progressed to the point that it can be identified as having been produced by its author.[65] Once the idea has advanced to that stage of development, there is every reason to accord the creator a property right in his work, concomitant with its existence as an original creation.[66] The furnishings in *Gustave* were found to be artistic, original, and sufficiently developed, and thus were proper subjects for common law copyright.[67] Any common law copyright, however, may be lost by publication.

58. *See* Doran v. Sunset House Distrib. Corp., 197 F. Supp. 940, 944 (S.D. Cal. 1961); Alva Studios, Inc. v. Winninger, 177 F. Supp. 265, 267 (S.D.N.Y. 1959); M. NIMMER, *supra* note 5, § 10, at 32; Note, *supra* note 16, at 295. In the copyright context, originality "means little more than a prohibition of actual copying." Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951); *accord*, Gelles-Widmer Co. v. Milton Bradley Co., 313 F.2d 143, 146 (7th Cir.), *cert. denied*, 373 U.S. 913 (1963).

59. *See* M. NIMMER, *supra* note 5, § 10.1, at 33-34.3.

60. While novelty is not required of copyrighted works, it is a prerequisite for patent protection. 35 U.S.C. § 102 (1970), *as amended*, 35 U.S.C. § 102 (Supp. IV, 1974); *see* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951); *accord*, Gelles-Widmer Co. v. Milton Bradley Co., 313 F.2d 143, 146 (7th Cir.), *cert. denied*, 373 U.S. 913 (1963); Wihtol v. Wells, 231 F.2d 550, 553 (7th Cir. 1956); Doran v. Sunset House Distrib. Corp., 197 F. Supp. 940, 944 (S.D. Cal. 1961).

61. *See* authorities cited note 60 *supra*; M. NIMMER, *supra* note 5, § 10.2, at 34.2.

62. M. NIMMER, *supra* note 5, § 11.2, at 42.2; *see* Columbia Broadcasting System v. DeCosta, 377 F.2d 315, 320 (1st Cir.), *cert. denied*, 389 U.S. 1007 (1967); Goodson-Todman Enterprises Ltd. v. Kellogg Co., 358 F. Supp. 1245, 1246-47 (C.D. Cal. 1973), *rev'd on other grounds*, 513 F.2d 913 (9th Cir. 1975).

63. E. KINTNER & J. LAHR, *supra* note 1, at 339.

64. *See* M. NIMMER, *supra* note 5, § 11, at 38. Statutory copyright, however, is restricted to those works which meet the "writings" requirement of the Constitution. *Id.*; *see* U.S. CONST. art. I, § 8, cl. 8 (the text of this provision is set forth at note 3 *supra*). As common law copyright does not arise out of the Constitution, it is exempt from the "writings" limitation. M. NIMMER, *supra* note 5; *see* authorities cited note 66 *infra*.

65. E. DRONE, *supra* note 21, at 6-8, 98. *See also* M. NIMMER, *supra* note 5, § 11.1, at 38-42.1.

66. *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102-03 (2d Cir. 1951); Peter Pan Fabrics, Inc. v. Acadia Co., 173 F. Supp. 292, 299-300 (S.D.N.Y. 1959); Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Co., 171 F. Supp. 603, 606 (S.D.N.Y. 1959). *See also* Note, *supra* note 16, at 287-97.

67. 24 Ariz. App. at 559, 540 P.2d at 178.

Divestiture of Copyright and Mitigation of the Publication Doctrine

As noted previously, publication marks the dividing line between the investing of statutory protection and the divesting of common law rights.[68] In determining whether the publication doctrine will terminate a common law copyright, the courts do not give conclusive weight to the subjective intent of the author.[69] Where the author's actions are voluntary, a determination of publication is based primarily upon the objective evidence which manifests the author's intent.[70] An author controls whether or not he publishes his work, and he is required to act in a manner which clearly demonstrates his purpose.[71] The burden of ascertaining his intent is not imposed upon those who wish to make use of the work.[72]

Recognizing the hardship imposed upon an author by the forfeiture of his common law rights through publication,[73] courts have developed several doctrines to mitigate the potentially harsh result.[74] One such practice is to define publication on a case-by-case basis, the result depending upon the action taken by the author toward public distribution.[75] Two distinct species of publication result: A "general"

68. See text accompanying notes 44-46 *supra.*

69. *See* Smith v. Paul, 174 Cal. App. 2d 744, 345 P.2d 546 (Ct. App. 1959); Edgar H. Wood Associates v. Skene, 347 Mass. 351, 197 N.E.2d 886 (1964).

70. *See* cases cited note 69 *supra*; *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 21 (1973).

71. A. LATMAN, *supra* note 5, at 5.

72. *Id.*

73. *See generally* Note, *Goldstein v. California: Validity of State Copyright Under the Copyright and Supremacy Clauses*, 25 HASTINGS L.J. 1196, 1213-14 (1974); Comment, *Copyrights: States Allowed to Protect Works Not Copyrightable Under Federal Law*, 58 MINN. L. REV. 316, 323 (1973).

74. See text & notes 76-95 *infra.* Where an object is uncopyrightable under the federal statutory rules, a greater degree of dissemination is generally required before finding a publication than has been required where statutory copyright is available. *See* Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469, 486-87 (1955). In this situation, it is preferable not to cause the hardship normally accompanying the divestiture of common law rights. For example, the performance of an intellectual creation, largely because it changes every time it is given, is not copyrightable under the federal statute. 17 U.S.C. §§ 4-5 (1970); *see* A. LATMAN, *supra* note 5, at 66-67; M. NIMMER, *supra* note 5, § 53.2, at 211. *See also* CAMBRIDGE RESEARCH INSTITUTE, *supra* note 23, at 47. Judicial action thus becomes necessary in order to reduce the harsh effect of the publication doctrine. The Supreme Court has held that such a performance does not constitute a general publication. Ferris v. Frohman, 223 U.S. 424, 435 (1912) (performance of a stageplay). Similarly, unauthorized recordings made of Dr. Martin Luther King's "I Have A Dream" speech were considered to be an infringement of Dr. King's common law copyright, in King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D.N.Y. 1963), where the court held that a speech is a performance and not a publication. *Id.* at 107; *accord*, Nutt v. National Institute, Inc. for Improvement of Memory, 31 F.2d 236, 238 (2d Cir. 1929) (public lecture on memory system held not a publication). This same rationale should be applied in the case of an artistic performance on live television. M. NIMMER, *supra.* Just as dramatic productions are slightly different from night to night, making it nearly impossible to deposit the exact work in the federal copyright office prior to publication, the immense volume of televised materials presents the same type of problem. *Id.*

75. M. NIMMER, *supra* note 5, § 58, at 224.

publication will terminate common law copyright, while a "limited" publication can be accomplished without the forfeiture of common law protection.[76]

A general publication manifests a dedication to the public of the author's work,[77] resulting from "a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public."[78] For example, the unrestricted offer of merely one copy of a book to the public implies that the author has surrendered his common law rights.[79] The *Gustave* court, quoting the leading commentator on copyright law, Professor Nimmer,[80] applied the following general test: "Publication occurs when by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public."[81] In *Gustave*, placing the furniture in the bank for customer use was deemed to constitute availability to the general public.[82] The bank's display of the furniture might also be construed as a loan to the public, since presumably all bank customers were free to use the pieces. Nimmer, however, caveats that the general test may not be sufficient in the case of works which are not "exploited through the distribution of printed copies."[83] Furniture, for instance, would not fall within the ambit of "printed copies." For exceptions to the general rule, Nimmer suggests that a general publication involves no less than "acquisition by members of the public of a possessory interest in tangible copies of the work in question."[84] A strict application of this test to the facts in *Gus-*

76. *See, e.g.*, American Tobacco Co. v. Werckmeister, 207 U.S. 284, 299-300 (1907); Werckmeister v. American Lithographic Co., 134 F. 321, 324-25 (2d Cir. 1904); Werckmeister v. Springer Lithographing Co., 63 F. 808, 812 (S.D.N.Y. 1894); Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N.Y. 241, 247-48, 49 N.E. 872, 874 (1898). *See generally* Dirrim, *The Common Law Copyright and its Limitations*, 30 DICTA 108 (1953); Yankwich, *Some Observations on Publication in the Law of Copyright*, 5 BULL. COPYRIGHT SOC'Y 329 (1958).

77. *See* authorities cited note 76 *supra*.

78. Werckmeister v. American Lithographic Co., 134 F. 321, 326 (2d Cir. 1904).

79. *Id.* at 325; *see* Grandma Moses Properties, Inc. v. This Week Magazine, 117 F. Supp. 348, 350 (S.D.N.Y. 1953) (unrestricted sale of a single copy of a painting).

80. 24 Ariz. App. at 560, 540 P.2d at 179.

81. M. NIMMER, *supra* note 5, § 49, at 194-95.

82. 24 Ariz. App. at 560, 540 P.2d at 179.

83. M. NIMMER, *supra* note 5, § 49, at 196.

84. *Id.*, § 52, at 207. This proposition is useful, but must be applied cautiously, especially to exhibited works. In that works on exhibition are usually originals rather than copies, making Nimmer's test inapplicable, the courts have consistently held that an exhibition is not a general publication, provided the owner expressly imposes restrictions on their being copied. *See* American Tobacco Co. v. Werckmeister, 207 U.S. 284, 300 (1907); Werckmeister v. American Lithographic Co., 134 F. 321, 330 (2d Cir. 1904); A. LATMAN, *supra* note 5, at 65-66; Note, *Do Art Exhibitions Destroy Common Law Copyright in Works of Art?*, 19 AM. SOC'Y COMPOSERS & PUBLISHERS 81 (1971).

tave seems to indicate the court erred when it stated, in dicta, that the bank's use of the furnishings constituted a general publication.[85] If Nimmer would require that the public be instilled with a property interest before a general publication has occurred, then it may be argued that there was no publication of the furnishings; certainly, the public was not free to walk off with the desks and coffee table.

In contrast to the concept of general publication, a limited publication will not operate to divest the common law copyright, as the restrictions imposed by the author are objective evidence of his desire not to dedicate the work to the public.[86] A limited publication must be restricted to a select class of persons and for a limited purpose, which excludes the right to copy and disseminate the work.[87] Unless both restrictions are placed on publication, the common law copyright is lost.[88] The *Gustave* court, again in dicta, rejected the claim that publication of the furnishings was "limited so as to preserve the copyright."[89] As no evidence contradicted the presumed dedication to the public, and any person entering the bank had unrestricted use of the furnishings, the court took the view that the limitations as to persons was absent.[90]

Another method by which the courts have attempted to mitigate divestiture of common law copyright involves the two-sided nature of the publication doctrine. The act of publication has the dual effect of divesting common law rights and initiating statutory copyright protection.[91] Courts are inclined to require a greater degree of publication to invalidate common law copyright than to afford statutory protection.[92] As no definition of publication can be found in the federal statutes,[93] a court can consider the circumstances of each case when it attempts to define publication.[94] Where a court finds that a divestiture

85. 24 Ariz. App. at 560, 540 P.2d at 179.

86. *See* American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907); Werckmeister v. American Lithographic Co., 134 F. 321 (2d Cir. 1904); text & notes 70-72 *supra.*

87. White v. Kimmell, 193 F.2d 744, 746 (9th Cir.), *cert. denied,* 343 U.S. 957 (1952); *see* Werckmeister v. American Lithographic Co., 134 F. 321, 326 (2d Cir. 1904).

88. American Visuals Corp. v. Holland, 239 F.2d 740, 744 (2d Cir. 1956) (not restricted as to persons); Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N.Y. 241, 251-52, 49 N.E. 872, 876 (1898) (not restricted as to persons).

89. 24 Ariz. App. at 560, 540 P.2d at 179.

90. *Id.*

91. *See* text & notes 5-6 *supra.*

92. *Compare* Hirshon v. United Artists Corp., 243 F.2d 640, 645 (D.C. Cir. 1957), *with* American Visuals Corp. v. Holland, 239 F.2d 740, 744 (2d Cir. 1956); *see* B. RINGER & P. GITLIN, COPYRIGHTS 7 (1965); Henn, *The Quest for International Copyright Protection,* 39 CORNELL L.Q. 43, 51 n.39 (1953); Kaplan, *supra* note 74, at 484-88; Yankwich, *supra* note 76, at 339. In light of the different treatment courts are willing to give publication, depending on its legal effect, cases decided under statutory requirements have been held to be poor precedent for determining whether there has been a common law forfeiture. Continental Cas. Co. v. Beardsley, 253 F.2d 702, 707 (2d Cir.), *cert. denied,* 358 U.S. 816 (1958).

93. See text & note 5 *supra.*

94. Kaplan, *supra* note 74, at 484-85. *Compare* Patterson v. Century Prods. Inc.,

of a common law copyright is harsh, a more limited definition of publication can be utilized. Conversely, a court may relax the publication standards where a work has been commercially exploited.[95] In *Gustave*, if the court felt the bank was unjustly enriched at Gustave's expense, and if the copyright had not been transferred to the bank, it could have chosen to apply a lenient standard for publication, thus allowing Gustave to recover. Where, however, the court was faced with such an obvious transfer of the designer's rights to the bank, it could do nothing to mitigate the harsh effect of common law copyright principles.

Conclusion

Arizona now recognizes that common law copyright is a viable form of protection for literary or artistic works. The common law copyright is available for any creative work meeting certain criteria, the most important of which is that it remains unpublished. While the court of appeals in *Gustave* was not called upon to analyze the operation of the critical concept of publication, a liberal approach was taken as to the scope of protection offered by common law copyright, and the door has been opened for future cases to further develop Arizona's case law for protection of literary and artistic achievement.

93 F.2d 489 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938); *and* Universal Film Mfg. Co. v. Copperman, 218 F. 577 (2d Cir. 1914), *with* Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N.Y. 241, 49 N.E. 872 (1898).

95. Kaplan, *supra* note 74, at 486.

VI. CREDITORS' REMEDIES

A. COMMON LAW REPLEVIN AND SELF-HELP REPOSSESSION

In the last few years the United States Supreme Court has decided several cases dealing with the constitutionality of state statutes governing creditors' remedies.[1] Based upon these decisions, the Arizona supreme

1. *See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). The fourteenth amendment guarantee of due process curbs the arbitrary exercise of governmental power to deprive a person of his property. Dent v. West Va., 129 U.S. 114, 124 (1889). At a minimum, due process requires notice and a hearing at a meaningful time before a final adjudication of rights. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); *see* Comment, *Creditors' Prehearing Remedies and Due Process*, 14 ARIZ. L. REV. 834 (1972); Comment, *Prejudgment Replevin and Self-Help Repossession—Creditor Remedies of the Past: A Constitutional Plan of Assault*, 17 ST. LOUIS L.J. 127, 130-31 (1972). In Sniadach v. Family Fin. Corp., *supra*, the Supreme Court struck down a Wisconsin wage garnishment statute that allowed a creditor to secure court attachment of a debtor's wages prior to a hearing on the underlying claim. The Court stated that such summary procedures did not satisfy the requirements of due process. 395 U.S. at 342; *see* Del Duca, *Pre-Notice, Pre-Hearing, Prejudgment Seizure of Assets—Self-Help Repossessions Under UCC § 9-503, Its Antecedents and Future*, 79 DICK. L. REV. 211, 212 (1975).

Three years later the Court decided Fuentes v. Shevin, *supra*. In *Fuentes* the Court considered the constitutionality of the Florida and Pennsylvania replevin statutes. For a definition of present-day replevin, see discussion note 6 *infra*. The Florida law enabled a creditor to seek a writ of replevin without any showing that his goods were being wrongfully detained by the defaulting debtor. 407 U.S. at 73. After the creditor filed a complaint initiating a formal suit for repossession, and posted a security bond for double the value of the collateral, a writ was issued directing an officer to recover the goods and serve the debtor with the complaint. *Id.* at 74. Following this ex parte repossession procedure, the collateral would be impounded for 3 days, during which time the debtor could post his own double bond and reclaim possession. *Id.* at 75. If, however, the debtor refused or was unable to post the required security, the property was transferred to the creditor, pending final disposition of the underlying suit for repossession. *Id.* The Pennsylvania statute was similar to the Florida law, except the creditor was not required to initiate a formal court action to establish his right to possession. *Id.* at 75-78. The Court held the statutes were unconstitutional, since chattels were permitted to be taken from their possessor without prior notice and an opportunity to be heard. *Id.* at 96-97; *see* Del Duca, *supra* at 215.

Fuentes was distinguished in Mitchell v. W.T. Grant Co., *supra*, where the Court upheld a Louisiana statute which did not provide for notice and hearing prior to seizure of property pursuant to a sequestration writ—a mandate of the court ordering the sheriff to take possession of specific property in the possession of another person until after a judicial decision as to who is entitled to the property. BLACK'S LAW DICTIONARY 1531 (4th ed. 1951). The Louisiana statute required that prior to seizure the creditor file with the court a sworn affidavit sufficient to enable the judge to make an initial finding establishing the existence of the debt, the lien, and the buyer's default. 416 U.S. at 605-06. In addition, the statute provided that the debtor could immediately seek dissolution

court, in *Thornton v. Carson*,[2] held that the Arizona replevin statutes[3] did not meet the due process requirements of the fourteenth amendment.[4] The court's decision in *Thornton* has had significant and interesting ramifications in cases of repossession of goods by secured creditors. One such case is *First National Bank v. Superior Court*.[5] In *First National Bank*, the court was faced with the issue whether there exists a common law right to prejudgment replevin in Arizona.[6] The petitioner, First National Bank of Arizona, had originally sought a court order allowing repossession of a mobile home.[7] The bank held a perfected security interest in the mobile home,[8] and at the time the action was initiated, the respondents Joe and Nancy Sumrall were 5 months in arrears.[9] The trial court denied the bank's request for prejudgment possession of the mobile home, basing its decision on *Thornton*.[10] In

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of the writ, which would be ordered unless the creditor proved the grounds for its issuance. *Id.* The Court held that these provisions comported with due process. *Id.* at 609; *see* Del Duca, *supra* at 224-30.

One year later, in North Ga. Finishing, Inc. v. Di-Chem, Inc., *supra*, the Court held unconstitutional a Georgia statute which permitted a writ of garnishment to be issued in pending suits on an affidavit of the plaintiff or his attorney containing only conclusory allegations. 419 U.S. at 607-08. The statute further prescribed filing of a bond as the only method of dissolving the garnishment. *Id.* at 607. The defendant was deprived of use of his property pending the litigation and was not afforded an opportunity for an early hearing. *Id.* at 606-07. *Mitchell* was distinguished on the ground that the Louisiana statute provided for judicial participation in the issuance of the writ and, an early hearing without the filing of a bond. *Id.* at 607; *see* Del Duca, *supra* at 230-33.

2. 111 Ariz. 490, 533 P.2d 657 (1975).

3. ARIZ. REV. STAT. ANN. §§ 12-1301 to -1314 (1956), *as amended*, ARIZ. REV. STAT. ANN. §§ 12-1301 to -1304, -1308 to -1309 (Supp. 1976-77).

4. 111 Ariz. at 492, 533 P.2d at 659. The two basic reasons for holding the Arizona statute unconstitutional were: there was no independent judicial determination interposed between the creditor's application and the issuance of an order for the taking of the property; and, there was no provision for an immediate hearing to determine rightful possession of the property. *Id.* These defects seem to be remedied in the new Arizona statutes on attachment, garnishment, and replevin. *See* Ch. 170, §§ 1-26, [1976] Ariz. Sess. Laws 786 (codified in scattered sections of titles 4, 7, 11 ARIZ. REV. STAT. ANN.).

5. 112 Ariz. 292, 541 P.2d 392 (1975).

6. *Id.* at 293, 541 P.2d at 393. Arizona adopted by statute the common law as the rule of decision in its courts, subject to certain qualifications. ARIZ. REV. STAT. ANN. § 1-201 (1956). The common law of Arizona includes the English common law, as amended by statute, which was in force at the time of the American Revolution. Patterson v. Connolly, 51 Ariz. 443, 445, 77 P.2d 813, 814 (1938); John W. Masury & Son v. Bisbee Lumber Co., 49 Ariz. 443, 461-63, 68 P.2d 679, 687-88 (1937).

Present-day replevin is an action at law by which the owner or one who has a general or special property interest in a chattel wrongfully taken and detained, or lawfully taken but wrongfully detained, seeks to recover possession of the chattel. *See* ARIZ. REV. STAT. ANN. §§ 12-1301 to -1314 (1956 & Supp. 1976-77). Common law replevin required the goods to be wrongfully taken. *See* discussion text & notes 74-88 *infra*. In either case, replevin enables the plaintiff to obtain possession of the goods at the outset of the action. *See* J. KOFFLER & A. REPPY, COMMON LAW PLEADING 253 (1969). *See generally* H. WELLS, LAW OF REPLEVIN (1880). For a discussion of the constitutionality of common law replevin, see note 94 *infra*.

7. 112 Ariz. at 293, 541 P.2d at 393.

8. *Id. See generally* ARIZ. REV. STAT. ANN. §§ 44-3101 to -3153 (Supp. 1976-77); UNIFORM COMMERCIAL CODE §§ 9-101 to -507 (1972) [hereinafter cited as UCC]; 1 & 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (1965).

9. 112 Ariz. at 293, 541 P.2d at 393.

10. *Id.*

taking jurisdiction of the bank's petition for special action, the Arizona supreme court stated that due to the unenforceability of the Arizona replevin statute,[11] the bank's only recourse was the common law action of replevin.[12] The court went on to say that common law replevin was only available where there had been a tortious taking of property:[13] tortious taking refers to an unlawful taking as distinguished from an unlawful holding.[14] Since the Sumralls had lawfully come into possession of the mobile home, the common law remedy of replevin was unavailable.[15]

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11. *Id.* at 294, 541 P.2d at 394. Petitioner argued, however, that the deficiencies in the statute identified in *Thornton* were not present in the instant case. Memorandum of Points and Authorities in Support of Petition for Special Action at 30-31, First Nat'l Bank v. Superior Court, 112 Ariz. 292, 541 P.2d 392 (1975) [hereinafter cited as Memorandum for Petitioner]. The court rejected this argument, stating that it would not engage in a legislative function and rewrite the statute in a constitutional manner. 112 Ariz. at 295, 541 P.2d at 395.

12. 112 Ariz. at 295, 541 P.2d at 395. In its supporting memorandum before the court, petitioner argued that it was entitled to the relief requested both as a matter of law and equity. Memorandum for Petitioner at 11. In support of its legal claim to prejudgment repossession, the petitioner pointed to the terms of the loan and security documents, and to the statutory provision for self-help in the Arizona version of the UCC. *Id.*; *see* ARIZ. REV. STAT. ANN. § 44-3149 (Supp. 1976-77). The default provision of the loan and security documents held by the petitioner recited that, upon default, the petitioner had the right to take immediate possession of, and to sell or otherwise dispose of, the collateral. *See* Memorandum for Petitioner at 3-4. The statutory provision of self-help was incorporated by reference into the default clauses of the loan and security documents. *Id.* at 4. This statute provides in part: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of peace or may proceed by action." ARIZ. REV. STAT. ANN. § 44-3149 (Supp. 1976-77); UCC § 9-503. The meaning of the phrase "breach of the peace" has been considered in many cases. *See, e.g.*, Evers-Jordon Furniture Co. v. Hartzog, 237 Ala. 407, 187 So. 491 (1939); Dominick v. Rea, 226 Mich. 594, 198 N.W. 184 (1924); Sims v. Horton, 43 Wash. 2d 907, 264 P.2d 879 (1953). The following general rules apply: If a debtor consents to a repossession, it cannot be a breach of the peace. *See, e.g.*, Klett v. Security Acceptance Co., 38 Cal. 2d 770, 242 P.2d 873 (1952); White v. Southern Mercantile Co., 162 So. 229 (La. Ct. App. 1935); Sims v. Horton, *supra*. If the creditor repossesses in disregard of the debtor's protest, most courts find the creditor guilty of a breach of the peace. *See, e.g.*, Crews & Green v. Parker, 192 Ala. 383, 68 So. 287 (1916); Cecil Baber Elec. Co. v. Greer, 183 Okla. 541, 83 P.2d 598 (1938); Westerman v. Oregon Auto. Credit Corp., 168 Ore. 216, 122 P.2d 435 (1942). Entry into a debtor's residence in his absence is also regarded as a breach of the peace. *See, e.g.*, Evers-Jordon Furniture Co. v. Hartzog, *supra*; Girard v. Anderson, 219 Iowa 142, 257 N.W. 400 (1934); Lark v. Cooper Furniture Co., 114 S.C. 37, 102 S.E. 786 (1920). Similarly, many courts have held that entry into a place of business or a garage is a breach of the peace. *See, e.g.*, Dominick v. Rea, *supra*; Wilson Motor Co. v. Dunn, 129 Okla. 211, 264 P. 194 (1928); Voltz v. General Motors Acceptance Corp., 332 Pa. 141, 2 A.2d 697 (1938).

The petitioner in *First National* further argued that, pursuant to Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), it had a constitutional due process right to prejudgment recovery. Memorandum for Petitioner at 21-24. With the Arizona replevin statute unavailable, the petitioner argued it was entitled to equitable prejudgment relief in the form of an order to show cause procedure. It was contended that this procedure complied with all of the due process requirements prescribed by the Arizona supreme court and the United States Supreme Court. *Id.* at 27-29. The court, however, limited the issue to whether there existed a common law right to prejudgment replevin absent a tortious taking. 112 Ariz. at 293, 541 P.2d at 393.

13. For a discussion of the requirements of common law replevin, see text & notes 64-89 *infra*.

14. *See* J. KOFFLER & A. REPPY, *supra* note 6, at 256.

15. 112 Ariz. at 295, 541 P.2d at 395.

Prior to the recent enactment of a new replevin statute,[16] the only remedy arguably remaining for prejudgment seizure of property in Arizona was the self-help provision of the Uniform Commercial Code.[17] This remedy has yet to face constitutional scrutiny in Arizona. Since the common law action of replevin originated as a response to abuses of self-help,[18] this casenote will first examine the historical framework in which the two remedies developed.[19] Second, attention will be focused upon the considerations which led to the original acceptance and application of the self-help remedy, with an eye toward determining whether those considerations remain valid today. Last, the constitutionality of the private remedy of self-help will be briefly discussed.

Historical Antecedents of Self-Help and Replevin

The general nature of self-help involves a man taking steps to correct a wrong done to him or his property. Because self-help frequently would result in an assertion of one's rights by force, and was therefore in contravention of basic legal process,[20] the law at an early stage of history imposed prohibitions upon its practice.[21] Such prohibitions had become so severe in England at the outset of the 13th century that it was difficult to apply self-help even in cases of self-defense.[22] The reason for these restrictions was that the rules governing self-help

16. Ch. 170, §§ 1-26, [1976] Ariz. Sess. Laws 786, *amending* ARIZ. REV. STAT. ANN. §§ 12-1301 to -1314 (1956).

17. UCC § 9-503.

18. 3 W. HOLDSWORTH, HISTORY OF THE ENGLISH LAW 278-83 (3d ed., rewritten 1923); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 574-78 (2d ed. 1923).

19. In considering the value of history, Justice Black, in his dissenting opinion in Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), *rev'g*, 37 Wis. 2d 163, 154 N.W.2d 259 (1967), borrowed key language from the Wisconsin supreme court's decision:

> The Supreme Court of Wisconsin properly pointed out:
>
> "The ability to place a lien upon a man's property, such as to temporarily deprive him of its beneficial use, without any judicial determination of probable cause dates back not only to medieval England but also to Roman times." [37 Wis. 2d at 171, 154 N.W.2d at 264.]
>
> The State Supreme Court then went on to point out a statement made by Mr. Justice Holmes in Jackman v. Rosenbaum Co., 260 U.S. 22, 31 [1922]:
>
> "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ."

395 U.S. at 349.

20. *See* 2 F. POLLOCK & F. MAITLAND, *supra* note 18, at 574.

21. *See* Gibbs v. Titelman, 369 F. Supp. 38, 46 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974) (court stated that self-help distraint, see text & notes 24-30 *infra*, had ceased to be a valid extrajudicial remedy before the Norman Conquest in 1066). *See generally* 3 W. HOLDSWORTH, *supra* note 18, at 278; 2 F. POLLOCK & F. MAITLAND, *supra* note 18, at 574.

22. 2 F. POLLOCK & F. MAITLAND, *supra* note 18, at 574. In fact, it was widely accepted that the man who had slain another in self-defense required a royal pardon. *Id.*

were new, and strict obedience to them was required if they were to survive.[23]

Once the general supremacy of the law and legal process had been established, attempts were made to define the conditions under which a man was allowed to help himself. From this evolved the oldest form of self-help, the process of distraint.[24] Distraint, as defined by Blackstone, involved an aggrieved party taking possession of a personal chattel from a wrongdoer in order to satisfy the wrong, which usually was nonpayment of rent, or injury done by cattle.[25] Self-help distraint was revived during the 13th century, when the existence of a tenant's estate depended upon the performance of certain feudal duties.[26] When the duties were not performed, forfeiture of the land could result.[27] Self-help distraint of a tenant's chattels was substituted for this harsh remedy.[28] Although the power of distraint was extrajudicial, it was not a right of self-satisfaction. Thus, the chattels taken by the landlord could neither be sold nor used by him, but had to be given up if the tenant tendered the arrears or offered security to appear and contest the landlord's claim.[29] Because the things distrained were considered to be in custody of the law, the writs ordinarily applicable to the recovery of chattels would not lie against the landlord who refused to give them up.[30]

Abuses of distraint became more prevalent as lords exercised power to gain jurisdiction and political power over surrounding land.[31] In order to mitigate a wrongful distraint, the law developed the special remedy of replevin before the end of the 13th century.[32] Replevin was

23. 3 W. HOLDSWORTH, *supra* note 18, at 278. It was feared that if too many exceptions were allowed, the rules would weaken, and assertion of rights by force would again emerge. *Id.*

24. *Id.* at 281.

25. 3 W. BLACKSTONE, COMMENTARIES *6-7. For a discussion of the types of distraint, see note 28 *infra.*

26. *See* Gibbs v. Titelman, 369 F. Supp. 38, 46 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974).

27. *Id.*

28. *Id. See also* 3 T. STREET, THE FOUNDATION OF LEGAL LIABILITY 287 (1906). Two types of distraint were recognized during this period: distress damage feasant, which allowed the distrainor to impound trespassing animals until their owner had paid for damages; and distress for rent, which allowed a landlord to go upon demised premises and seize anything as security for rent in arrears. 3 W. HOLDSWORTH, *supra* note 18, at 281-82.

29. 2 F. POLLOCK & F. MAITLAND, *supra* note 18, at 576.

30. 3 W. HOLDSWORTH, *supra* note 18, at 282-83. The writs applicable to the recovery of chattels were trespass and novel disseisin. *Id.* Novel disseisin was a writ of assise which lay for the recovery of lands or tenements, where the claimant had been recently dispossessed. BLACK'S, *supra* note 1, at 155. Assise refers to a species of court, consisting of a certain number of men, usually 12, who were summoned together to try a disputed cause. *Id.* at 154; *see* 1 W. HOLDSWORTH, *supra* note 18, at 275.

31. 3 W. HOLDSWORTH, *supra* note 18, at 282-83. Distraint was readily available to the lord, and its use would serve to impress upon the tenants the broad extent of the lord's power. *Id.*

32. *Id.*; 2 F. POLLOCK & F. MAITLAND, *supra* note 18, at 577-78.

an action at law, regularly used by the tenant to contest his landlord's extrajudicial seizure of his goods upon a distress for rent.[33] It resulted in the tenant gaining immediate repossession of the thing taken in distress. In return, the tenant gave security or bond pending a trial of the right of distress.[34] If the original seizure should be judged valid, the tenant was required to return the chattel to the distrainor.[35] Thus, replevin provided an important means of controlling abuses of self-help, prolonging its use, and preventing attempts to terminate it.[36] Having been saved from extinction, the right of self-help significantly expanded during the 14th, 15th, and 16th centuries to allow the recapture of chattels wrongfully taken.[37] The reason for this expansion was that redress in the courts was not easily available, and the judicial procedure was lengthy and cumbersome.[38] By the end of the 16th century, it was generally recognized that a man could exercise self-help in the retaking of chattels, provided the recapture was peaceable;[39] the legal machinery of the courts would be relied upon to guard against abuses and maintain the public peace.[40]

Replevin during the 14th to 17th centuries overlapped with the actions of trespass and trover. Although the spheres of trespass and replevin were distinct at the end of the 13th century, before the end of the 15th century the action of trespass was allowed as an alternative to replevin.[41] Generally, an action of trespass would apply where a person took a chattel belonging to another.[42] If one sued in replevin, he reacquired the chattel and received damages for the wrongful detention; if he sued in trespass, he could recover the full value of the chattel.[43] Generally, the action of trespass was preferred to that of replevin.[44] There are two possible explanations for this. First, replevin was subject

33. 3 W. HOLDSWORTH, *supra* note 18, at 284.
34. *Id.*
35. *Id.* at 284-85.
36. *Id.* at 283.
37. *See* Branston, *The Forcible Recaption of Chattels*, 28 LAW Q. REV. 262, 266 (1912). Other categories of self-help were also legalized during this period. These included self-defense, reentry onto real property by one disseised of his land, abatement or removal of nuisances, and seizure of heriots. *See* 3 W. BLACKSTONE, *supra* note 25, at *3-6, 15; 3 W. HOLDSWORTH, *supra* note 18, at 278-80. "Heriots" refers to a customary tribute of goods, payable to the feudal lord of the fee to the land on the death of the owner. BLACK'S, *supra* note 1, at 859.
38. Branston, *supra* note 37, at 265; *see* 3 W. BLACKSTONE, *supra* note 25, at *3. Courts tended to be too preoccupied with controversies over real property to concern themselves with legal actions brought by those who had been dispossessed of goods. Branston, *supra* note 37, at 265.
39. 3 W. HOLDSWORTH, *supra* note 18, at 279. *See also* Goodhart v. Lowe, 37 Eng. Rep. 661, 662 (Ch. 1820).
40. Branston, *supra* note 37, at 275.
41. 3 W. HOLDSWORTH, *supra* note 18, at 285.
42. J. KOFFLER & A. REPPY, *supra* note 6, at 153-54.
43. *Id.* at 258.
44. 3 W. HOLDSWORTH, *supra* note 18, at 285.

to "wager of law,"[45] and second, the defendant landlord might avoid the action by arguing that he, and not the tenant, was the owner of the chattel.[46]

There was also an overlap between replevin and trover, the latter action being available against a defendant who converted chattels to his own use.[47] The action of trover extended to the case of a wrongful distress.[48] The recognized distinction between the two actions was that by replevin, the plaintiff could reacquire the chattel taken; in an action of trover, however, he could only recover damages.[49] Yet trover in general was preferred to replevin, since the former remedy had a wider application. Unlike replevin, trover could be brought not only against the actual taker of the goods, but also against a bailee or other person to whom they may have been conveyed.[50] Because of the available alternatives, replevin fell into some disuse until the first half of the 19th century.[51]

19th Century Expansion: Merger of Self-Help and Replevin

Modern application of self-help repossession under the Uniform Commercial Code[52] involves the right of a party with a security interest in property to retake it upon default, without judicial aid.[53] The concept of a single device known as a security interest was not introduced until the Uniform Commercial Code came into existence.[54] Pre-Code law recognized a variety of security devices, including that of the conditional sale.[55] The historical antecedents of the security device and the right of self-help are extensive and can be found in the Greek, Roman, and

45. "Wager of law" is the giving of gage or sureties by a defendant as security in an action for a debt that on a certain day he would take an oath in open court that he did not owe the debt, and at the same time bring with him 11 neighbors who would avow that they believed the defendant to be telling the truth. BLACK'S, *supra* note 1, at 1750.

46. J. KOFFLER & A. REPPY, *supra* note 6, at 258. In replevin, the plaintiff was assumed to be the owner of the seized chattel; in trespass it was assumed the property had vested in the tortfeasor. *Id.* Therefore, if the defendant under a replevin action contested ownership of the chattel, the assumption as to the plaintiff's ownership would no longer be valid, and the action would fail. *See id.* A further effect of these principles was that a plaintiff suing in replevin would obtain repossession of the specific chattel; in trespass he could, if desired, recover damages for the full value of the chattel instead. *Id.*

47. 3 W. HOLDSWORTH, *supra* note 18, at 284-85.

48. *Id.* at 286.

49. *Id.*

50. *Id.* at 286-87.

51. *Id.* at 285.

52. UCC § 9-503.

53. *Id.*

54. *Id.* § 9-101, Comment.

55. *Id.* A conditional sale is a contract for the sale of goods under which possession is delivered to the buyer and title is to vest in the buyer upon payment of part or all of the purchase price. *In re* Spanish Language Television, Inc., 456 F.2d 159, 161 (9th Cir. 1972); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 22-1, at 755 (1972).

English law.[56] In America, the conditional sale contract was utilized as early as 1808.[57] A basic characteristic of the conditional sale during the 19th century was that upon default of the buyer, the seller, as holder of the title, had the right to repossession.[58] This right could be exercised either by an action of replevin or through self-help.[59] The right of a seller to repossess the property by self-help was clearly established by the courts not only when the contract provided for self-help,[60] but even in the absence of such provisions.[61] If a breach of peace was threatened, however, the creditor had to resort to the courts, and was therefore limited to an action for replevin.[62] The theory behind the allowance of peaceable repossession was that the creditor was entitled, by his own act,

56. McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58, 63-75 (1973). Self-help was looked upon with favor during the Greek classical period. Under at least two of the security devices available at that time, creditors held nonpossessory security interests in debt collateral. Upon default, creditors were permitted to repossess the collateral by self-help. *Id.* at 63-64. Security devices under classical Roman law also applied to chattel security for the payment of a money debt or other obligation. In general, these devices involved a transfer of title to the creditor without a transfer of possession. Upon default, the creditor was permitted to repossess the collateral by self-help. *Id.* at 64-66.

In England, the bill of sale and conditional sale contract were firmly established during the 19th century. *Id.* at 68-71. A bill of sale was used as security for a debt or other obligation. Title to the collateral was transferred to the creditor from the debtor. A clause was generally included which provided for repossession by the creditor upon default, including permission to enter the premises of the debtor. Such a clause was not considered essential, however, to establish these rights. *Id.* In the case of a conditional sale contract, the right of the seller to retake possession upon breach of the condition was also recognized. *Id.* at 71-72.

57. In Harkness v. Russell, 118 U.S. 663 (1886), the Court recognized the validity of the conditional sale contract and traced its use in the United States back to 1808. *Id.* at 671.

58. *See, e.g.*, Tyler v. Freeman, 57 Mass. (3 Cush.) 261 (1849); Wiggins v. Snow, 89 Mich. 476, 479, 50 N.W. 991, 992 (1891); Campbell Printing Press & Mfg. Co. v. Walker, 1 N.Y. St. Rptr. 200 (Sup. Ct. 1886).

59. In Quimby v. Lowell, 89 Me. 547 (1897), self-help repossession of a bicycle was permitted after default by the buyer. In Williams v. Williams, 23 So. 291 (Miss. 1898), replevin was held to lie where there had been a breach by the buyer of a conditional sale of personal property. These two cases were cited by the plaintiff in Robinson v. Berry, 93 Me. 320, 45 A. 34 (1899) in support of the proposition that upon "breach of the conditions the seller may retake the property or replevin." *Id.* at 321 (parties' arguments not reported in *Atlantic Reporter*). In that case, the court upheld the replevin action for the recovery of furniture. *Id.* at 323-24, 45 A. at 35. *See generally* cases cited note 58 *supra*. For a discussion of the utilization of replevin in cases of wrongful detention, see text & notes 74-89 *infra*.

60. *See, e.g.*, Gregory v. Morris, 96 U.S. 619, 623 (1877); Kenny v. Planer, 3 Daly 131, 134-35 (C.P.N.Y. County 1869); F.A. North & Co. v. Williams, 120 Pa. 109, 13 A. 723 (1888). In the case of chattel mortgages, the right of self-help repossession was also valid when provided for in the mortgage or contract of sale. *See* Burns v. Campbell, 71 Ala. 271, 287 (1882); White Sewing Mach. Co. v. Conner, 111 Ky. 827, 64 S.W. 841 (1901).

61. *See, e.g.*, Shireman v. Jackson, 14 Ind. 459 (1860); Proctor v. Tilton, 65 N.H. 3, 17 A. 638 (1888); Levan v. Wilten, 135 Pa. 61, 19 A. 945 (1890). *See generally* Segrist v. Crabtree, 131 U.S. 287 (1888). In the case of chattel mortgages, the right of peaceable self-help repossession was also recognized even absent a clause expressly granting such a right. *See, e.g.*, Whisler v. Roberts, 19 Ill. 274, 282 (1857); Jamieson v. Bruce, 6 G. & J. 72, 74-75 (Md. Ct. App. 1834); McNeal v. Emerson, 81 Mass. (15 Gray) 384 (1860).

62. *See, e.g.*, Shireman v. Jackson, 14 Ind. 459 (1860); Lambert v. Robinson, 162 Mass. 34, 37-38, 37 N.E. 753, 753-54 (1894); Kenny v Planer, 3 Daly 131, 134-35 (C.P.N.Y. County 1869).

to obtain the same redress which a court of law would afford him.[63]

When replevin was revived in the 19th century,[64] two issues were raised regarding its application. The first was whether replevin would apply only to wrongful distress[65] or could be used for all unlawful takings.[66] Blackstone maintained that replevin was available only in the instance of a wrongful distress.[67] This view held some credibility, since for several hundred years replevin was actually applied only in cases of wrongful distress.[68] The view was modified in the 19th century and replevin was held to lie for all unlawful takings.[69] The reason for this modified view was that in many situations involving a wrongful taking, possession of the thing was of far greater value than the thing itself.[70] If replevin were not permitted in such cases, the law would be deficient in not providing adequate redress.[71] Possession by the wrongdoer and an actual wrongful taking were the only requirements to support the action;[72] there was nothing in the common law writ which would limit it to the case of a wrongful distress.[73] Thus, the more modern view extended replevin beyond a remedy limited to wrongful distraint to a remedy which merged with self-help to be applied against any unlawful taking.

The second issue facing the 19th century courts was whether replevin would lie where the taking was lawful, but the detention unlawful. This was the crucial issue decided by the court in *First National Bank.*[74] One view was that replevin was originally an action to recover chattels wrongfully taken as well as wrongfully detained.[75]

63. *See* Shireman v. Jackson, 14 Ind. 459, 460 (1860). In Blackford v. Neaves, 23 Ariz. 501, 205 P. 587 (1922), the Supreme Court of Arizona held that under a conditional sale, with the title retained by the vendor, the vendor could, upon default, retake possession of the property sold, even in the absence of an express agreement to that effect. *Id.* at 505, 205 P. at 588. Furthermore, the vendor need not resort to the courts if he could obtain the property without a breach of the peace. *Id.* The court did not base its holding on the existing Arizona statute concerning self-help repossession. *See* ch. 40, § 16, [1919] Ariz. Sess. Laws 43. Rather, it relied upon common law. 23 Ariz. at 505-06, 205 P. at 591-92, *citing* Shireman v. Jackson, *supra*; Proctor v. Tilton, 65 N.H. 3, 17 A. 638 (1888).

64. See text accompanying notes 41-51 *supra.*

65. The recognized forms of distraint were distress damage feasant and distress for rent. See discussion note 28 *supra.*

66. *See* H. WELLS, *supra* note 6, at 29.

67. 3 W. BLACKSTONE, *supra* note 25, at *145-46.

68. *See* H. WELLS, *supra* note 6, at 29-30.

69. *See, e.g.*, Harwood v. Smethurst, 29 N.J.L. 195, 197 (Sup. Ct. 1861); Pangburn v. Patridge, 7 Johns. 140, 142 (N.Y. Sup. Ct. 1810); Reist v. Heilbrenner, 11 Pa. 131, 132 (1824).

70. Pangburn v. Patridge, 7 Johns. 140, 142 (N.Y. Sup. Ct. 1810).

71. *Id.*

72. *See id.* at 143. In support of its position, the *Pangburn* court noted that trespass and replevin became alternative remedies before the end of the 15th century. Thus, replevin would lie "for goods taken tortiously, or by a trespasser." *Id.*

73. H. WELLS, *supra* note 6, at 29.

74. 112 Ariz. at 294-95, 541 P.2d at 394-95.

75. H. WELLS, *supra* note 6, at 3.

This argument can be traced to comments made by Blackstone on the subject of distress damage feasant.[76] Blackstone noted that if *A* distrained *B*'s cattle damage feasant, and *B* tendered sufficient amends, then even though *A*'s original taking was lawful, the subsequent detainment after tender of amends was wrongful, and this entitled *B* to an action of replevin against *A* to recover the cattle.[77] A few jurisdictions followed the reasoning of Blackstone and recognized that replevin would lie for either a wrongful taking or a wrongful detention.[78] In *Baker v. Fales*,[79] the court relied on Blackstone's comments and held that the writ of replevin would lie where the defendant had lawfully come into possession of certain furniture which he was unlawfully detaining.[80]

This was a minority rule, however, the majority of courts holding that replevin would not lie at common law except in cases where there had been a wrongful taking.[81] Perhaps the principal case which refuted the argument in *Baker v. Fales*,[82] holding that replevin would be barred absent a tortious taking, was *Harwood v. Smethurst*.[83] The New Jersey court in *Harwood* noted that the *Baker* court had cited no cases outside of Massachusetts in support of its position, thereby suggesting that the Massachusetts view was that of a small minority.[84] The *Harwood* court went on to reconcile its position with Blackstone's comments,[85] by saying that since replevin was originally a counter-remedy to distraint, it was intended to be coextensive with distraint.[86] Thus, replevin would apply not only in cases of a wrongful distraint but also in cases where the original distraint was lawful but subsequently became unlawful.[87] In cases not directly involving distraint, the law in England and America required a wrongful taking in order for replevin to apply.[88]

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76. *See* text & notes 77-78 *infra*.
77. 3 W. BLACKSTONE, *supra* note 25, at *151.
78. *See, e.g.*, Paul v. Luttrell, 1 Colo. 317 (1817); Marstin v. Baldwin, 17 Mass. 606 (1822); Baker v. Fales, 16 Mass. 147 (1819).
79. 16 Mass. 147 (1819).
80. *Id.* at 152. Further, in Marstin v. Baldwin, 17 Mass. 606 (1822), the court said: [R]eplevin lies for goods unlawfully detained, although there may have been no tortious taking. Such is clearly the law of Massachusetts, whatever may be the law of England." *Id.* at 609. Similarly, in Paul v. Luttrell, 1 Colo. 317 (1817), the court stated: "In this territory replevin lies whenever any goods or chattels have been wrongfully distrained or wrongfully taken, or shall be wrongfully detained." *Id.* at 320.
81. *See, e.g.*, Harwood v. Smethurst, 29 N.J.L. 195, 205-06 (Sup. Ct. 1861); Troy Laundry Mach. Co. v. Carbon City Laundry Co., 27 N.M. 117, 196 P. 745 (1921); Pangburn v. Patridge, 7 Johns. 140 (N.Y. Sup. Ct. 1810). *See also* H. WELLS, *supra* note 6, at 33.
82. 16 Mass. 147 (1819).
83. 29 N.J.L. 195 (Sup. Ct. 1861).
84. *Id.* at 199.
85. *See* text accompanying note 77 *supra*.
86. 29 N.J.L. at 199-200. For a discussion of distraint, see text & notes 24-30 *supra*.
87. 29 N.J.L. at 199-200.
88. *Id.* In the case of a lawful taking and an unlawful detention, the plaintiff had to proceed under the common law action of detinue. *See* J. KOFFLER & A. REPPY, *supra*

Subsequent to the establishment of the majority rule, many states, including Arizona, expanded the remedy of replevin by statute to include cases in which property had been lawfully obtained, but unlawfully detained.[89] With the expansion of replevin in this manner, the action departed from its feudal antecedents and became coextensive with self-help. Each remedy had as its objective the immediate recovery of property by one who had a right to its possession. In the area of conditional sales, replevin and self-help became alternative remedies in the event of default by the debtor.[90] It was natural, therefore, that when state replevin statutes underwent judicial scrutiny, attention was also focused on self-help repossession.

Prejudgment Remedies in Arizona

The Arizona replevin statutes[91] were held unconstitutional in *Thornton v. Carson.*[92] Although in *First National Bank* the court limited the application of common law replevin,[93] in cases where common law replevin does apply it may itself be subject to the same constitutional infirmities as statutory replevin.[94] If this were the case, then prior to the recent enactment of a new replevin statute,[95] the only prejudgment remedy left in Arizona would have been the self-help remedy authorized by the Uniform Commercial Code.[96] Whether stat-

note 6, at 256. In addition to replevin, detinue was the only remedy at common law for the recovery of a specific chattel. *Id.* at 244. In detinue, however, the plaintiff was not allowed to recover his property until the matter of right between the parties had been determined. *Id.* at 258.

89. J. KOFFLER & A. REPPY, *supra* note 6, at 266; *see* Ariz. Rev. Stat., Civil ¶ 3812 (1901).

90. *See* Fuentes v. Shevin, 407 U.S. 67, 102-03 (1972) (White, J., dissenting).

91. ARIZ. REV. STAT. ANN. §§ 12-1301 to -1314 (1956) (now ARIZ. REV. STAT. ANN. §§ 12-1301 to -1304, -1308 to -1309 (Supp. 1976-77)).

92. 111 Ariz. 490, 533 P.2d 657 (1975).

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

94. One issue not addressed by the court in *First National Bank* was whether the common law action of replevin is itself violative of the fourteenth amendment, assuming the action is otherwise appropriate. Where courts participate in denying constitutionally protected rights, sufficient state action is present to bring it within the purview of the fourteenth amendment. For example, in Shelley v. Kraemer, 334 U.S. 1 (1948), the Court held that enforcement in state courts of restrictive covenants prohibiting the sale or lease of property to Negroes constituted state action, subject to the fourteenth amendment. *Id.* at 20; *see* Mitchum v. Foster, 407 U.S. 225, 240 (1972). For a discussion of the state action requirement, see text & notes 104-21 *infra.* In the case of common law replevin, where the plaintiff applies for the writ, it is issued by the court, and the sheriff obtains and delivers the property to the plaintiff, state action is clearly present. *See* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 338 (9th Cir. 1973), *cert. denied,* 419 U.S. 1006 (1974). The next question would be whether the requirements identified in Thornton v. Carson, 111 Ariz. 490, 492, 533 P.2d 657, 659 (1975) of judicial interposition and immediate hearing are satisified. The first is, but the second is not. The conclusion to be drawn is that common law replevin would itself be unconstitutional.

95. Ch. 170, §§ 1-26, [1976] Ariz. Sess. Laws 786.

96. UCC § 9-503.

utory self-help repossession is also constitutionally defective is an issue not yet addressed by the Arizona courts.[97]

The extrajudicial remedy of self-help was incorporated into the Uniform Conditional Sales Act in 1918,[98] which was adopted by Arizona in 1919.[99] This provided that a conditional seller could repossess without legal process if such could be accomplished without a breach of the peace.[100] This apparently was intended to be simply a restatement of the common law right of self-help.[101] Self-help repossession was subsequently incorporated into the Uniform Commercial Code,[102] in section 9-503 which became effective in Arizona in 1968.[103]

Initial attacks were made on section 9-503,[104] resting on the fourteenth amendment, following the Supreme Court's decisions in *Sniadach v. Family Finance Corp.*[105] and *Fuentes v. Shevin.*[106] This amendment applies only to state action, however, not private conduct.[107] The Supreme Court has held that state action includes not only action taken directly by the state, but also action taken indirectly by the state through private bodies.[108] In *Burton v. Wilmington Parking Authority*,[109] the Court found state action where a private party, who was the lessee of a restaurant located on public premises, discriminated on the basis of race.[110] The Court held that since the state had the right to control conduct on the public premises, it could not abdicate its responsibilities under the equal protection clause.[111] On the other hand, in *Moose*

97. As discussed in the text accompanying notes 104-21 *infra*, the principal hurdle in establishing the unconstitutionality of self-help repossession under UCC § 9-503, is to establish the presence of state action. If state action can be shown, then self-help repossession would be unconstitutional under the *Thornton* criteria. See text & note 4 *supra*. Other infirmities of self-help are the threats it poses of breaches of the peace and retaliatory tort actions for conversion. *See* discussion & cases cited note 12 *supra*. It has been argued, however, that the potential harm to the debtor in terms of increased litigation and cost, as well as the risk of breach of the peace, might in fact be greater if self-help is abandoned. *See* J. WHITE & R. SUMMERS, *supra* note 55, § 26-6, at 974.

98. Uniform Conditional Sales Act § 16 (1918).

99. Ch. 40, § 16, [1919] Ariz. Sess. Laws 43 (replaced in Arizona when UCC was adopted at ch. 3, § 5, [1967] Ariz. Sess. Laws 224).

100. Uniform Conditional Sales Act § 16 (1918).

101. *See* 2A UNIFORM LAWS ANNOTATED, COMMENTARIES ON CONDITIONAL SALES § 109, at 150 (1924).

102. UCC § 9-503.

103. *See* ch. 3, § 5, [1967] Ariz. Sess. Laws 224 (codified at ARIZ. REV. STAT. ANN. § 44-3149 (Supp. 1976-77)).

104. *See, e.g.*, Gibbs v. Titelman, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

105. 395 U.S. 337 (1969). See discussion note 1 *supra*.

106. 407 U.S. 67 (1972). See discussion note 1 *supra*.

107. Shelley v. Kraemer, 334 U.S. 1 (1948). "[The Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Id.* at 13.

108. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

109. 365 U.S. 715 (1961).

110. *Id.* at 725.

111. *Id.* at 726.

Lodge v. Irvis,[112] the Court held that granting a liquor license to a private club which imposed racial restrictions on its members and guests was not sufficient to constitute state action.[113] Attempting to formulate a test for state action, the Court held that "where the impetus for the discrimination is private, the State must have 'significantly involved itself . . .' to fall within the ambit of the constitutional prohibition."[114] It is the consideration of the "significant state involvement" standard which has dominated the attention of the courts in actions challenging the constitutionality of section 9-503.[115]

The strongest argument advanced against finding state action in the enactment of section 9-503 is that the statute represents a mere codification of the common law right of self-help.[116] Self-help is by its nature a private remedy; if mere codification of common law self-help was sufficient to constitute significant state involvement, the result arguably would be an excessively broad application of the fourteenth amendment.[117] All statutes adopting the common law would be subject to due process analysis, and all private activity regulated by such statutes would be included.[118] One federal court has correctly noted that there is no precedent to support such a broad application.[119] In addition, even if section 9-503 were to be repealed, parties would still be free to contractually provide for self-help.[120] Thus, codification is insufficient state action to bring self-help within the ambit of the fourteenth amendment because it creates no right not otherwise available.[121]

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112. 407 U.S. 163 (1972).
113. *Id.* at 176-77.
114. *Id.* at 173.
115. *See* Shirley v. State Nat'l Bank, 493 F.2d 739, 744 (2d Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). Although there is inconsistency at the district court level, all cases appealed to the court of appeals have resulted in a holding that there is no state action. *See* Del Duca, *supra* note 1, at 216-17.
116. *See, e.g.*, Gibbs v. Titelman, 502 F.2d 1107, 1114 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Shirley v. State Nat'l Bank, 493 F.2d 739, 743 (2d Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 332 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). In *Adams*, the court stated, citing Moose Lodge v. Irvis, 407 U.S. 163, 173 (1972), that the test is not state action but rather "significant" state action. 492 F.2d at 330.
117. *See* Shirley v. State Nat'l Bank, 493 F.2d 739, 744 (2d Cir. 1974).
118. *See id.*; Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). The court in *Adams* noted that statutes regulate many forms of purely private conduct, such as contractual relations and gifts. If all behavior that conformed with these laws was subject to the fourteenth amendment, the state action concept would be emasculated. *Id.* at 330-31. Since the statutes challenged in *Adams* dealt with private activity, there was an absence of significant state involvement. *Id.* at 333. On this basis, Fuentes v. Shevin, 407 U.S. 67 (1972), could be easily distinguished. In *Fuentes*, the Court was dealing with a state replevin statute under which an action was filed in court, a writ was formally issued and served by a state agent. These facts left no doubt as to state action. 492 F.2d at 338.
119. Shirley v. State Nat'l Bank, 493 F.2d 739, 744 (2d Cir. 1974). *But see* discussion note 121 *infra*.
120. This alternative was available prior to the enactment of the Uniform Conditional Sales Act and UCC; *see* text & notes 56-63 *supra*.
121. Shirley v. State Nat'l Bank, 493 F.2d 739, 742 (2d Cir. 1974). Counterar-

Conclusion

First National Bank is illustrative of the continuing problems raised by prejudgment repossession of chattels. *First National Bank* concerned the common law action of replevin, which developed during the 13th century as a check on abuses of self-help. By the 19th century,

guments to the majority holding of no state action have, however, been made by lower courts. The district court in Gibbs v. Titelman, 269 F. Supp. 38 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974), concluded that although it was well established that self-help repossession had its ancestry in the common law, it was not settled whether it was a sound historic principle with any precedential value. *Id.* at 45. Having reviewed the 13th century prohibitions against self-help and its revival during feudalism, the court concluded that the judicial system of today is sophisticated enough to redress the injuries which once gave rise to the remedy of self-help. *Id.* at 46-47. Thus the court found that codification of a remedy lacking value in modern society did constitute state action. *Id.* This argument failed before the court of appeals, however. 502 F.2d at 1114.

In Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom.* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974), the district court relied on the proposition enunciated in Reitman v. Mulkey, 387 U.S. 369, 375-80 (1967), that the enactment of a statute is state action if it encourages, authorizes, or permits an individual to perform an act that would be constitutionally invalid if performed by the state. 338 F. Supp. at 617. In *Reitman*, the Court affirmed a decision by the California supreme court holding that an amendment to the California constitution, which granted private citizens full discretion in choosing to whom they wished to sell, lease, or rent residential property was invalid under the fourteenth amendment. The Court stated that the amendment made the right to discriminate a basic state policy. 387 U.S. at 377-79. Applying the reasoning from *Reitman* to UCC § 9-503, the *Adams* court reasoned that creditors are "persuaded or induced to include" provisions for self-help repossession in contractual agreements because they are permitted to do so by statute. 338 F. Supp. at 617. *See also* Comment, *Creditors' Prehearing Remedies and Due Process, supra* note 1, at 840-43. Prior to adoption of the Uniform Conditional Sales Act and the UCC, creditors had to rely on either contractual rights to self-help repossession or case law supporting such a right. Subsequent to adoption of the statutory provisions, creditors were provided with another means of enforcing their right to self-help, one which emanated from the state. Making enforcement easier for the creditor may in some instances encourage private conduct which, if carried on by the state, would be a denial of due process. Such encouragement may make the right to deny due process a basic state policy. If so, state action is present. *See* Comment, *State Action in Self-Help Automobile Repossession*, 14 SANTA CLARA LAW. 659, 668-69 (1974). In Adams v. Southern Cal. First Nat'l Bank, *supra* at 333, however, the court takes the contrary position; UCC § 9-503 merely codified an existing policy of state neutrality. The court of appeals in *Adams* quoted language from Reitman v. Mulkey, *supra* at 376, where the Supreme Court found that the California supreme court had not held a state may never codify an existing policy of neutrality with respect to private discrimination. 492 F.2d at 333.

A further argument against the majority view has been advanced, which analogizes self-help repossession to other common law self-help practices which were codified and subsequently came under judicial review. For example, state action has been found in several cases challenging distraint-for-rent statutes, which grant an apartment operator the right to enforce a lien on a tenant's personal goods for rents due and unpaid by peremptory seizure and retention of the tenant's property. *See, e.g.*, Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Barber v. Rader, 350 F. Supp. 183 (E.D. Fla. 1972); Dielen v. Levine, 344 F. Supp. 823 (D. Neb. 1972). State action has also been found in cases involving innkeeper's lien laws, under which an innkeeper can enforce a lien upon property brought into the proprietor's hotel by a guest who has not paid his charges. *See* Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970). Distraint-for-rent, innkeeper's lien laws, and self-help repossession all existed at common law. Each procedure authorized the taking of property in the possession of another without prior notice or hearing and each allowed the taker to determine whether a seizure should take place. *See* text & notes 20-40 *supra*. The argument concludes that since the three procedures are of the same nature, state action should be present in all three. *See* Spak & Spak, *Constitutional Attacks on Creditors' Self-Help Repossession Rights Under U.C.C. Section 9-503—Developments in Illinois Secured Transactions*, 24 DEPAUL L. REV. 378, 398-99 (1975).

replevin and self-help had become alternative remedies available to the creditor if the debtor defaulted. According to recent Supreme Court cases, prejudgment seizure of property under a statutory provision is constitutional only when the statute adequately guarantees due process. Under the Uniform Commercial Code, a secured creditor may summarily repossess without judicial review. This provision does not violate the due process requirements of the fourteenth amendment, since the state is not significantly involved in the repossession. Unless and until state action is found to exist, self-help repossession will not be subject to constitutional due process limitations.

VII. CRIMINAL PROCEDURE

A. COLLATERAL ESTOPPEL, CRIMINAL PROCEEDINGS, AND THE PREVENTION OF CONTRADICTORY RESULTS

The doctrine of collateral estoppel operates in civil litigation to preclude relitigation of issues necessarily determined by a valid and final judgment in a prior action.[1] The traditional rule has been that collateral estoppel may be asserted only if the parties to the later litigation had been parties to the prior action.[2] In applying the doctrine currently, however, courts have tended to relax the strict identity requirement.[3] Collateral estoppel has also been applied in criminal prosecutions to preclude relitigation of issues already litigated by the state in prior criminal proceedings.[4] A significant question is whether the traditional "identity-of-parties" requirement should be applied to limit the use of collateral estoppel in criminal proceedings. In *State v. Stauffer*,[5] the Arizona supreme court held that collateral estoppel does not preclude the state's relitigation of an issue unless the criminal defendant asserting the plea was a party to the prior proceeding.[6]

On June 28, 1973, officers of the Maricopa County Sheriff's Department followed a car known to contain approximately 200 pounds of marijuana to a residence in Tempe, Arizona.[7] After the contraband had been delivered, and because it was felt the marijuana was being sold and distributed rapidly,[8] the officers immediately entered the

1. Di Orio v. City of Scottsdale, 2 Ariz. App. 329, 331, 408 P.2d 849, 851 (1965).
2. *See* Goetz v. Board of Trustees, 203 Kan. 340, 349, 454 P.2d 481, 489 (1969).
3. *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 350 (1971); Realty Exch. Corp. v. Phoenix Title & Trust Co., 15 Ariz. App. 199, 202-03, 487 P.2d 420, 423-24 (1971); Pomeroy v. Waitkus, 183 Colo. 344, 350-51, 517 P.2d 396, 399 (1973).
4. *See, e.g.*, Hoag v. New Jersey, 356 U.S. 464, 470 (1958); State v. Little, 87 Ariz. 295, 304, 350 P.2d 756, 762 (1962); People v. Williams, 59 Ill. 2d 557, 560, 322 N.E.2d 461, 462 (1975).
5. 112 Ariz. 26, 536 P.2d 1044 (1975).
6. *Id.* at 29, 536 P.2d at 1047.
7. *See id.* at 27-28, 536 P.2d at 1045-46. The driver of the vehicle was arrested in Yuma, Arizona, agreed to turn informant, and continued to transport the shipment to Tempe. *Id.*
8. *Id.* at 28, 536 P.2d at 1046. One officer testified that the plan was to first

house and arrested the occupants, a Ms. Godfrey[9] and Gary Stauffer.[10] A cursory search of the house for other occupants resulted in the discovery of the marijuana.[11] The marijuana was subsequently seized pursuant to a search warrant.[12]

On October 9, 1973, Stauffer filed a motion to suppress the marijuana evidence, which was denied on November 23, 1973.[13] Three months later, Godfrey filed a similar motion, which was granted.[14] Stauffer then filed a motion to reconsider, asserting collateral estoppel based upon Godfrey's successful motion to suppress the evidence.[15] The motion to reconsider was heard on April 2, 1974, and denied the following day.[16] Two days later all charges against Godfrey were dismissed.[17]

Stauffer was convicted of possession of marijuana for sale.[18] On appeal to the Supreme Court of Arizona, he argued that collateral estoppel and res judicata required that the marijuana evidence against him be excluded due to his codefendant's success in suppressing the same evidence.[19] The court rejected this argument, however, stating that the principles of res judicata and collateral estoppel apply only to

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ascertain the destination of the marijuana and then to obtain a search warrant. *Id.* The delivery car was driven into a garage, the door was closed, and when the car was later driven away, it was stopped and searched. *Id.* at 27-28, 536 P.2d at 1045-46. The marijuana was no longer in the trunk. *Id.* A second and third car arrived at the residence and left. *Id.* at 28, 536 P.2d at 1046. Since it was felt that the marijuana was being removed, the arrests were made before a search warrant could be obtained. *Id.*

9. Reply Brief for Appellant at 8, State v. Stauffer, 112 Ariz. 26, 536 P.2d 1044 (1975).

10. 112 Ariz. at 28, 536 P.2d at 1046.

11. *Id.*

12. *Id.*

13. Opening Brief for Appellant at 8-9, State v. Stauffer, 112 Ariz. 26, 536 P.2d 1044 (1975).

14. *Id.* at 9-10.

15. *Id.* at 10.

16. *Id.*

17. *Id.* at 30. The actual reason for the dismissal is unclear. Appellee stated in his Answering Brief that Godfrey had produced alibi testimony that she was not present at the residence. Answering Brief for Appellee at 12, State v. Stauffer, 112 Ariz. 26, 536 P.2d 1044 (1975). The extent to which this testimony contributed to the dismissal of the charges against her is not certain. For purposes of this casenote, it will be assumed that appellant's contention that Stauffer and Godfrey were in the same relative position in the house when the officers entered is correct. See Reply Brief for Appellant at 8. Based upon this premise it seems most likely that the reason for dismissing the charges against Godfrey was the lack of admissible evidence rather than an alibi.

18. 112 Ariz. at 28, 536 P.2d at 1046.

19. *See id.* at 28-29, 536 P.2d at 1046-47; Opening Brief for Appellant at 29. There was no intermediate court of appeals decision in this case. See ARIZ. R. SUP. CT. 47(e)(5) (the supreme court *sua sponte* may order the transfer of any case pending before the court of appeals to the supreme court). Stauffer made two other arguments on appeal. First, he claimed his arrest was unlawful and that the subsequent seizure of the contraband was thereby also illegal. 112 Ariz. at 28, 536 P.2d at 1046. Second, Stauffer argued that he was denied his right to a speedy trial. *Id.* The court resolved both of these issues against Stauffer and ultimately affirmed his conviction. *Id.* at 28-29, 536 P.2d at 1046-47.

relitigation of identical issues between the same parties.[20] The court held that Stauffer could not assert collateral estoppel against the state because he was not a party to the proceeding in which the evidence was suppressed.[21]

As authority for its application of the identity-of-parties rule, the court quoted the United States Supreme Court in *Ashe v. Swenson*:[22] "[Collateral estoppel] means simply 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."[23]

This casenote will discuss the traditional requirements for using collateral estoppel in civil litigation, and will analyze the doctrine's present status in Arizona and other jurisdictions. The application of collateral estoppel in criminal proceedings will then be examined and compared to its use in civil trials. Finally, the argument will be made that in certain situations it is desirable to abandon the identity-of-parties requirement in criminal proceedings.

Collateral Estoppel and Identity-of-Parties

The legal doctrines of res judicata and collateral estoppel are used to bar subsequent relitigation of issues that have been previously decided.[24] Res judicata applies only when a final judgment has been rendered on the merits of an action.[25] The principle provides that the judgment binds the parties to the action as to every point decided and also as to every question raised by the record which could have been decided.[26] Collateral estoppel traditionally stands for the proposition that a necessary finding of fact on a previously litigated issue will preclude relitigation of that issue between the same parties or their privies.[27]

20. 112 Ariz. at 29, 536 P.2d at 1047.
21. *Id.*
22. 397 U.S. 436 (1970).
23. *Id.* at 443, *quoted in* 112 Ariz. at 29, 536 P.2d at 1047.
24. See text & notes 25-29 *infra.*
25. *See, e.g.*, Hoff v. City of Mesa, 86 Ariz. 259, 261, 344 P.2d 1013, 1014 (1959); Ruth v. United States Fidelity & Guar. Co., 83 So. 2d 769, 772 (Fla. 1955); Bulgo v. Bulgo, 41 Hawaii 578, 589 (1957); Peek v. Berry, 143 Tex. 294, 299-300, 184 S.W.2d 272, 274 (1945).
26. *See, e.g.*, Day v. Wiswall's Estate, 93 Ariz. 400, 402, 381 P.2d 217, 219 (1963); Di Orio v. City of Scottsdale, 2 Ariz. App. 329, 330, 408 P.2d 849, 850 (1969); Pomeroy v. Waitkus, 183 Colo. 344, 349-50, 517 P.2d 396, 399 (1973); State Sav. & Loan Ass'n v. Corey, 53 Hawaii 132, 137, 488 P.2d 703, 707 (1971), *cert. denied*, 406 U.S. 920 (1972); Keith v. Schiefen-Stockham Ins. Agency, Inc., 209 Kan. 537, 545, 498 P.2d 265, 273 (1972).
In addition, persons who are not parties to an action may, under certain circumstances, be bound by its result. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 83-87 (Tent. Draft No. 2, 1975). For example, a judgment by or against the trustee of an estate will bind the beneficiary of the estate. *Id.* § 85(1)(a), comment *b.*
27. *See, e.g.*, State v. Little, 87 Ariz. 295, 304, 350 P.2d 756, 762 (1960); Di Orio v. City of Scottsdale, 2 Ariz. App. 329, 331, 408 P.2d 849, 851 (1965); State Sav.

There are several justifications for the use of res judicata and collateral estoppel. First, public policy requires that disputes not continue indefinitely.[28] In addition, the preclusion of unnecessary relitigation fosters certainty of individual rights,[29] thereby allowing individuals to rely on previous judicial determinations in shaping their conduct.[30] Moreover, the prevention of relitigation conserves judicial resources[31] and avoids the subjection of defendants to duplicative, vexatious litigation.[32] In the criminal context, the use of res judicata and collateral estoppel tends to encourage the prosecution to exercise care in the preparation and presentation of its case.[33] Perhaps the most important policy objective served by the doctrine of collateral estoppel is the prevention of inconsistent results,[34] thereby enhancing the dignity of, and encouraging respect for judicial proceedings.[35]

The traditional rule has been that an estoppel must be mutual.[36] That is, in order to assert collateral estoppel in a subsequent action, both parties to the later action must be bound by the prior adjudica-

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& Loan Ass'n v. Corey, 53 Hawaii 132, 139, 488 P.2d 703, 708 (1971), *cert. denied*, 406 U.S. 920 (1972); Goetz v. Board of Trustees, 203 Kan. 340, 349, 454 P.2d 481, 489 (1969); Laws v. Fisher, 513 P.2d 876, 877 (Okla. 1973).

28. *See* Lee v. Johnson, 70 Ariz. 122, 127, 216 P.2d 722, 725 (1960); Lauderdale v. Industrial Comm'n, 60 Ariz. 443, 447, 139 P.2d 449, 451 (1943).

29. *See* Lee v. Johnson, 70 Ariz. 122, 127, 216 P.2d 722, 725 (1960).

30. *See* id.; Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 219-20 (1954); Note, *Collateral Estoppel in Criminal Prosecutions: Time to Abandon the Identity of Parties Rule*, 46 S. CAL. L. REV. 922, 931 (1973).

31. *See* Lee v. Johnson, 70 Ariz. 122, 127, 216 P.2d 722, 725 (1960); People v. Taylor, 12 Cal. 3d 686, 695-97, 527 P.2d 622, 628, 117 Cal. Rptr. 70, 76-77 (1974); People v. Superior Court, 44 Cal. App. 3d 494, 503-04, 118 Cal. Rptr. 702, 707 (1975); Friedland, *Issue Estoppel in Criminal Cases*, 9 CRIM. L.Q. 163, 164 (1966); Note, *supra* note 30, at 940.

32. *See* Di Giangemo v. Regan, 528 F.2d 1262, 1269 (2d Cir. 1975); People v. Taylor, 12 Cal. 3d 686, 695-97, 527 P.2d 622, 628, 117 Cal. Rptr. 70, 76-77 (1974); People v. Superior Court, 44 Cal. App. 3d 494, 503-04, 118 Cal. Rptr. 702, 707 (1975); Note, *supra* note 30, at 946. The cost involved in duplicative litigation is not as great when the individual asserting collateral estoppel was not prosecuted in the first action, since the state is prosecuting him for the first time. Vexation, however, does result when the outcome against the later defendant contradicts the previous finding. Litigation is likewise vexatious if the defendant is forced to undergo all the hardships of prosecution of an issue which the state has previously litigated unsuccessfully. *See id.* at 946-47. For these reasons, the use of res judicata and collateral estoppel may serve to quell fears that the state will continually relitigate issues against a single individual until it wins. *See* Di Giangemo v. Regan, *supra* at 1269. This fear is not warranted, however, in cases like *State v. Stauffer*, where a determination as to whether the government illegally seized evidence is not determinative of the defendant's guilt or innocence; nor does exclusion of the evidence necessarily guarantee an end to the litigation.

33. Friedland, *supra* note 31, at 164, 201.

34. People v. Taylor, 12 Cal. 3d 686, 695, 527 P.2d 622, 628, 117 Cal. Rptr. 70, 76 (1974), *citing* Note, *supra* note 30, at 950.

35. *See* People v. Taylor, 12 Cal. 3d 686, 695-96, 527 P.2d 622, 628-29, 117 Cal. Rptr. 70, 76-77 (1974); Note, *supra* note 30, at 950.

36. For example, in Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 127 (1912), the Court stated that it was an elementary principle of law that the estoppel of a judgment must be mutual; *accord*, Luke v. Hill, 137 Ga. 159, 161, 73 S.E. 345, 346 (1911); Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 390, 105 S.E.2d 869, 873 (1958); Gentry v. Farruggia, 132 W. Va. 809, 812, 53 S.E.2d 741, 743 (1949); RESTATEMENT OF JUDGMENTS § 93 (1942); Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 304 (1961).

tion.[37] A corollary to the mutuality requirement has been that there must be identity-of-parties in the later litigation; collateral estoppel may be utilized in subsequent proceedings only when the same parties are involved.[38]

In recent years, both state and federal courts have gradually abandoned the strict mutuality of estoppel and identity-of-parties requirements in civil litigation.[39] This trend was acknowledged and followed by the United States Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation.*[40] The Court held in this patent infringement case that a patentee could be estopped to assert the validity of a patent previously declared invalid in a suit between the patentee and a different defendant.[41] The Court thereby rejected the identity-of-parties requirement for an assertion of collateral estoppel in federal civil proceedings.[42] The patentee, however, could overcome

37. Board of Comm'rs v. Heaston, 144 Ind. 583, 593, 41 N.E. 457, 460 (1895); Adamson v. Hill, 202 Kan. 482, 484, 449 P.2d 536, 538-39 (1969); Agnew v. Union Constr. Co., 291 S.W.2d 106, 109 (Mo. 1956); Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 390, 105 S.E.2d 869, 873 (1958); Gentry v. Farruggia, 132 W. Va. 809, 812, 53 S.E.2d 741, 743 (1949).

38. *See, e.g.*, Hoag v. New Jersey, 356 U.S. 464, 470 (1958); Pena-Cabanillas v. United States, 394 F.2d 785, 786 (9th Cir. 1968); Laughlin v. United States, 344 F.2d 187, 189-90 (D.C. Cir. 1965); Ferina v. United States, 340 F.2d 837, 839 (8th Cir. 1965); United States v. Carlisi, 32 F. Supp. 479, 483 (E.D.N.Y. 1940); State v. Little, 87 Ariz. 295, 304, 350 P.2d 756, 762 (1960); Lauderdale v. Industrial Comm'n, 60 Ariz. 443, 446-47, 139 P.2d 449, 450-51 (1943); Di Orio v. City of Scottsdale, 2 Ariz. App. 329, 331, 408 P.2d 849, 851 (1965).

39. *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 350 (1971); Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir. 1964); Adriaanse v. United States, 184 F.2d 968, 970 (2d Cir.), *cert. denied*, 340 U.S. 932 (1950); Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950); United States v. United Air Lines, 216 F. Supp. 709, 725-30 (E.D. Wash., D. Nev. 1962); Pennington v. Snow, 471 P.2d 370, 376-77 (Alas. 1970); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942); Pomeroy v. Waitkus, 183 Colo. 344, 350-51, 517 P.2d 396, 399 (1973); Ellis v. Crocket, 51 Hawaii 45, 56, 451 P.2d 814, 822 (1969); Lynch v. Chicago Transit Authority, 62 Ill. App. 2d 220, 224, 210 N.E.2d 792, 794 (1965); Pat Perusse Realty Co. v. Lingo, 249 Md. 33, 45, 238 A.2d 100, 108 (1968); Home Owners' Fed. Sav. & Loan Ass'n v. Northwestern Fire & Marine Ins. Co., 354 Mass. 448, 451-55, 238 N.E.2d 55, 57-59 (1968); Howell v. Vito's Trucking & Excavating Co., 20 Mich. App. 140, 146, 173 N.W.2d 777, 780 (1969); Lustik v. Rankila, 269 Minn. 515, 523, 131 N.W.2d 741, 746 (1964); Sanderson v. Balfour, 109 N.H. 213, 216, 247 A.2d 185, 187 (1968); Desmond v. Kramer, 96 N.J. Super. 96, 108, 232 A.2d 470, 477 (1967); DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147, 225 N.E.2d 195, 198-99, 278 N.Y.S.2d 596, 601 (1967).

40. 402 U.S. 313 (1971).

41. *Id.* at 350.

42. Although it might be argued that the application of *Blonder-Tongue* should be limited to patent infringement cases, later decisions indicate that the courts are not so limiting it. *See, e.g.*, Federal Sav. & Loan Ins. Corp. v. Hogan, 476 F.2d 1182, 1187 (7th Cir. 1973) (action for damages caused by alleged conspiracy to defraud savings & loan association); PI Enterprises, Inc. v. Cataldo, 457 F.2d 1012, 1015 (1st Cir. 1972) (action challenging constitutionality of town ordinance limiting height of buildings); Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1182 (3d Cir. 1972) (action for damages by buyer against seller for selling allegedly defective goods). In *PI Enterprises*, the court, relying on *Blonder-Tongue*, stated: "The application of collateral estoppel in federal courts is no longer grounded upon the mechanical requirements of mutuality." 457 F.2d at 1015. *See also* Humphreys v. Tann, 487 F.2d 666, 671 (6th Cir. 1973), wherein the court recognized the applicability of the reasoning

the estoppel if he could show that he did not have a full and fair opportunity—procedurally, substantively, and evidentially—to litigate the issue in the prior suit.[43]

Arizona follows the modern trend and no longer requires identity-of-parties to assert collateral estoppel in civil cases. In *Moore Drug Co. v. Schaneman*[44] the court of appeals stated that collateral estoppel bars relitigation of an issue by the party against whom the estoppel is asserted if that party had a full opportunity to litigate, and actually did litigate that issue in the prior action.[45] This is true even though the party raising the bar was not a party to the prior suit.[46]

The doctrine of collateral estoppel also has been applied to criminal proceedings.[47] However, the tendency in civil litigation to abrogate the rigid mutuality requirement is not as evident in criminal decisions.[48] In *State v. Little*,[49] the Supreme Court of Arizona upheld a defendant's assertion of collateral estoppel to bar the state from relitigating an issue decided in the defendant's favor in a prior criminal proceeding.[50] Since the parties to the prior action in *Little* were identical to those in the later one, however, the traditional requirement for asserting collateral estoppel had been satisfied.[51] In *State v. Stauffer*,[52] on the other hand, the court refused to abandon the identity-of-parties

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of *Blonder-Tongue* to a wrongful death action. In view of these cases, there is no apparent reason for considering *Blonder-Tongue* limited to its facts. Indeed, the Court stated in *Blonder-Tongue* that "it is apparent that the uncritical acceptance of the principle of mutuality of estoppel . . . is today out of place." 402 U.S. at 350. The necessary effect of abandonment of mutuality seems to be the abrogation of the identity-of-parties rule.

43. 402 U.S. at 333.

44. 10 Ariz. App. 587, 461 P.2d 95 (1969).

45. *Id.* at 589, 461 P.2d at 97; *accord*, Krumtum v. Burton, 111 Ariz. 448, 451, 532 P.2d 510, 513 (1975); Mecham v. City of Glendale, 15 Ariz. App. 402, 404, 489 P.2d 65, 67 (1971); Realty Exch. Corp. v. Phoenix Title & Trust Co., 15 Ariz. App. 199, 202-03, 487 P.2d 420, 423-24 (1971); Di Orio v. City of Scottsdale, 2 Ariz. App. 329, 331, 408 P.2d 849, 851 (1965).

46. *See* Mecham v. City of Glendale, 15 Ariz. App. 402, 404, 489 P.2d 65, 67 (1971); Moore Drug Co. v. Schaneman, 10 Ariz. App. 587, 588, 461 P.2d 95, 96 (1969).

47. *See, e.g.*, Hoag v. New Jersey, 356 U.S. 464, 470 (1958); Sealfon v. United States, 332 U.S. 575, 578 (1948); United States v. Oppenheimer, 242 U.S. 85, 87 (1916); Laughlin v. United States, 344 F.2d 187, 190 (D.C. Cir. 1965); United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961); State v. Little, 87 Ariz. 295, 304, 350 P.2d 756, 762 (1962); Teitelbaum Furs, Inc. v. Old Dominion Ins. Co., 58 Cal. 2d 601, 605, 375 P.2d 439, 441, 25 Cal. Rptr. 559, 561 (1962); People v. Williams, 59 Ill. 2d 557, 560, 322 N.E.2d 461, 462 (1975); Barnett v. Commonwealth, 348 S.W.2d 834, 835 (Ky. 1961); State v. Leibowitz, 22 N.J. 102, 109, 123 A.2d 526, 530 (1956); People v. De Sisto, 27 Misc. 2d 217, 236, 214 N.Y.S.2d 858, 881 (Kings County Ct. 1961).

48. *See, e.g.*, United States v. Friedman, 506 F.2d 511, 517 (8th Cir. 1974); United States v. Barnes, 386 F. Supp. 162, 163 (E.D. Tenn. 1973), *aff'd*, 506 F.2d 1400 (6th Cir. 1974); People v. Seltzer, 25 Cal. App. 3d Supp. 52, 57, 101 Cal. Rptr. 260, 263 (Super. Ct. App. Dep't 1972).

49. 87 Ariz. 295, 350 P.2d 756 (1962).

50. *Id.* at 304, 350 P.2d at 762.

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

52. 112 Ariz. 26, 536 P.2d 1044 (1975).

requirement in criminal proceedings involving different defendants.[53] It is clear, however, that *Ashe v. Swenson*,[54] relied upon in *Stauffer*,[55] does not demand that an issue always be relitigated when the parties to the subsequent action are not the same as in the prior proceeding;[56] it does not support a strict adherence to the identity-of-parties rule in all criminal cases. Despite this fact, the rule announced in *Stauffer* indicates that identity-of-parties persists in Arizona as a prerequisite to the use of collateral estoppel in criminal proceedings.[57] While the facts may justify the holding in *Stauffer*,[58] the court's failure to articulate its reasons for retaining the identity-of-parties requirement lays the foundation for an unnecessarily broad application of the *Stauffer* rule in future cases, creating the risk of logically inconsistent and manifestly unjust results. In view of some of the policy reasons previously discussed,[59] a few courts in other jurisdictions have relaxed the mutuality rule in criminal proceedings.[60] These relaxations, and in some instances abandonment of the rule, will now be discussed.

Toward Abandonment of Mutuality in Criminal Cases

Several courts have held that when the criminal liability of a defendant is dependent upon the conviction of another, he may assert as a bar against the state a favorable verdict or judgment obtained by the other individual.[61] In *People v.*

53. *Id.* at 29, 536 P.2d at 1047.
54. 397 U.S. 436 (1970).
55. 112 Ariz. at 29, 536 P.2d at 1047; *see* text & notes 22-23 *supra.*
56. Indeed, immediately following the definition of collateral estoppel in *Ashe*, the Court stated, "it is much too late to suggest that [collateral estoppel] is not fully applicable to a former judgment in a criminal case . . . because of lack of 'mutuality' . . . ." 397 U.S. at 443, *quoting* United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961). The *Ashe* Court held that collateral estoppel in criminal cases involving the same defendant is embodied in the fifth amendment's protection against double jeopardy which is binding on the states through the fourteenth amendment. *See* Ashe v. Swenson, 397 U.S. at 445; Benton v. Maryland, 395 U.S. 784 (1969). Double jeopardy considerations, however, are beyond the scope of this casenote. For a discussion of *Ashe* and double jeopardy, see Comment, *Ashe v. Swenson: Collateral Estoppel, Double Jeopardy and Inconsistent Verdicts*, 71 COLUM. L. REV. 321 (1971); Comment, *Twice in Jeopardy*, 75 YALE L.J. 262 (1970). For a discussion of Arizona's treatment of double jeopardy, see generally "Double Jeopardy, Multiple Punishment, and the Criminality of Crime While on Bail," 17 ARIZ. L. REV. 639, 757 (1975).
57. *See* text & notes 20-21 *supra.*
58. *See* text accompanying notes 115-20 *infra.*
59. See text & notes 28-35 *supra.*
60. See text & notes 61-82 *infra.*
61. In Shuttlesworth v. Birmingham, 373 U.S. 262 (1963), the appellant's conviction for aiding and abetting in the violations of a city trespass ordinance was reversed after the ordinance was declared to be unconstitutional as applied to the principals. *Id.* at 265. The Supreme Court held that there can be no conviction for aiding and abetting an innocent act. *Id.* at 266; *accord*, United States v. Prince, 430 F.2d 1324 (4th Cir. 1970) (*per curiam*) (defendant's aiding and abetting conviction set aside after subsequent acquittal of principal). *Contra*, United States v. Musgrave, 483 F.2d 327, 331-32 (5th Cir.), *cert. denied*, 414 U.S. 1023 (1973). The *Musgrave* court distinguished *Shuttlesworth* on the ground that the actions of the trespassers were declared innocent by

Taylor,[62] the defendant was tried for the death of a cofelon which occurred during the course of an armed robbery.[63] The defendant was the driver of the getaway car. He waited outside in the car while two confederates entered the liquor store which the trio had conspired to rob.[64] A gun battle ensued in the store, as a result of which one of Taylor's cofelons was mortally wounded by the victim of the crime.[65] Under California law Taylor could only be convicted of murder if malice aforethought were proven against one of the actual perpetrators of the robbery.[66] The court held that, because the state had previously attempted and failed to prove the mens rea element against the other surviving confederate, it was barred from relitigating the issue in the defendant's trial.[67] In the court's view, three policy reasons support the abandonment of the identity-of-parties requirement. First, the doctrine of collateral estoppel promotes judicial economy by minimizing repetitive litigation.[68] Further, it protects defendants against the harassment of repetitious litigation.[69] Finally, the doctrine helps preserve the integrity of the judicial system by preventing inconsistent verdicts.[70]

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the Supreme Court, whereas in *Musgrave* the principal's acquittal did not connote an innocent act, but rather the failure of the government to prove guilt beyond a reasonable doubt. *Id.* *See* United States v. Bruno, 333 F. Supp. 570, 576 (E.D. Pa. 1971) (finding of authenticity of document in previous trial of defendant's alleged coconspirators barred relitigation of same issue in conspiracy trial of defendant); People v. Taylor, 12 Cal. 3d 686, 692, 527 P.2d 622, 625, 117 Cal. Rptr. 70, 73 (1974) (due to the prior acquittal of codefendants, defendant could not be held vicariously liable under felony-murder rule); People v. Superior Court, 44 Cal. App. 3d 494, 502-03, 118 Cal. Rptr. 702, 707 (1975) (prosecution barred from trying defendant for conspiracy subsequent to acquittal of his alleged coconspirators); People v. Walker, 361 Ill. 482, 487-88, 198 N.E. 353, 356 (1935) (accessory before the fact of larceny, although indicted as principal, cannot be convicted where actual perpetrators of alleged theft are acquitted); Schmidt v. State, 261 Ind. 81, 83, 300 N.E.2d 86, 88 (1973) (conviction of defendant as accessory to first degree murder reversed in light of subsequent conviction of only principal for accessory after the fact to manslaughter); State v. St. Philip, 169 La. 468, 474, 125 So. 451, 453 (1929) (defendant's conviction for aiding and abetting in arson annulled due to prior acquittal of codefendants on charge of committing arson); State v. Spencer, 18 N.C. App. 499, 499-500, 197 S.E.2d 232, 232 (1973) (defendant, convicted of aiding and abetting codefendant in commission of second-degree murder, granted new trial after new trial ordered for codefendant).

62. 12 Cal. 3d 686, 527 P.2d 622, 117 Cal. Rptr. 70 (1974).

63. *Id.* at 688, 527 P.2d at 623, 117 Cal. Rptr. at 71.

64. *Id.* at 689, 527 P.2d at 624, 117 Cal. Rptr. at 72.

65. *Id.* at 690, 527 P.2d at 624-25, 117 Cal. Rptr. at 72-73.

66. *See id.* at 691, 527 P.2d at 625, 117 Cal. Rptr. at 73. The California supreme court had previously held that the felony-murder doctrine was inapplicable to Taylor's case because the killing was committed by the victim of the crime. Taylor v. Superior Court, 3 Cal. 3d 578, 582, 477 P.2d 131, 133, 91 Cal. Rptr. 275, 277 (1970). However, Taylor could be held vicariously liable for murder if it were proven that his cofelon's death was the proximate result of the intentional acts of either of his confederates. *See* People v. Taylor, 12 Cal. 3d 686, 691, 527 P.2d 622, 625, 117 Cal. Rptr. 70, 73 (1974); Taylor v. Superior Court, 3 Cal. 3d 578, 583, 477 P.2d 131, 133-34, 91 Cal. Rptr. 275, 277-78 (1970).

67. 12 Cal. 3d at 691, 527 P.2d at 625, 117 Cal. Rptr. at 73.

68. *Id.* at 695, 527 P.2d at 628, 117 Cal. Rptr. at 76, *citing* Note, *supra* note 30, at 940-50.

69. *Id.*

70. *Id.*

The identity-of-parties requirement was further limited in a recent California court of appeals decision, based largely upon the policy reasons enumerated in *Taylor*.[71] In *People v. Superior Court*,[72] the defendant was charged with conspiracy to commit robbery.[73] His trial was severed from that of his two coconspirators and he was subsequently convicted of conspiracy.[74] The two codefendants, however, were acquitted.[75] On appeal, the defendant's conviction was reversed.[76] When the state, on remand, sought to retry him, the trial court dismissed the conspiracy charge.[77] In upholding this dismissal, the court of appeals stated that collateral estoppel barred relitigation of the conspiracy count because of the acquittal of both of the alleged coconspirators.[78] The court also enumerated the prerequisites to assertion of collateral estoppel. First, there must be an issue necessarily determined in the prior action which is identical to the issue sought to be relitigated.[79] Second, there must have been a final judgment on the merits.[80] Finally, the party against whom the plea is asserted must have been a party to the prior proceeding.[81] The court expressly states that mutuality is not essential.[82]

Superior Court was a case involving interdependent criminal liability—a conviction of the defendant on a charge of conspiracy, in light of the acquittal of his alleged coconspirators, would have meant that he had accomplished the legal impossibility of conspiring with himself. Similarly, the holding in *People v. Taylor* was expressly limited to situations in which the liability of the defendant asserting the estoppel depends vicariously upon the liability of another.[83] On the other hand,

71. See text & notes 68-70 *supra*.
72. 44 Cal. App. 3d 494, 118 Cal. Rptr. 702 (1975).
73. *Id.* at 497, 118 Cal. Rptr. at 703. The defendants were also charged with robbery and murder. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 498, 118 Cal. Rptr. at 704. The reversal by an unpublished majority opinion was not based upon collateral estoppel considerations. *Id.*
77. *Id.*
78. *Id.* at 503, 118 Cal. Rptr. at 707. The result in *Superior Court* ordinarily would not seem surprising. Since an element of the crime of conspiracy is the concurrence of two or more minds, the outcome is arguably compelled. *See* CAL. PENAL CODE § 182 (West 1970). But the court noted that the "consistency" rule applies in California only when the coconspirators are tried together. 44 Cal. App. 3d at 500, 118 Cal. Rptr. at 705. When the trials of coconspirators are severed, one may be convicted while the other, tried separately, goes free. *Id.* Therefore, the plea of collateral estoppel was upheld not because of the nature of the substantive crime but rather because of the standards announced by *Taylor*, and a desire for consistent results and conservation of judicial resources. *Id.* at 503, 118 Cal. Rptr. at 707.
79. 44 Cal. App. 3d at 501, 118 Cal. Rptr. at 706.
80. *Id.*
81. *Id.*
82. *Id.*
83. The court emphasized that it was not reaching the question of whether the identity-of-parties requirement should also be discarded in cases where the defendant's criminal liability turns on a determination of a previously decided, identical factual issue

where, as in *Stauffer*, the defendant is asserting the estoppel as to a prior determination of a suppression motion, the criminal liability of the parties is not interdependent; nor does the liability of the later defendant depend vicariously upon that of another. The criminal liability of the later defendant turns, instead, upon the determination of a previously decided, identical factual issue, unrelated to the ultimate verdict of guilt or innocence of the prior defendant. While it might be argued that the abandonment of the identity-of-parties requirement should not be extended to the situation involved in *Stauffer*,[84] the principal reason relied upon by the California supreme court in support of its decision in *Taylor* also supports abrogation of the rule in cases like *Stauffer*. In *Taylor*, the court stated that the principal rationale for applying collateral estoppel in criminal cases involving vicarious liability is the prevention of inconsistent results.[85] However, even in situations involving defendants who may be found independently guilty, it is clear that a fundamental injustice has occurred when the ultimate outcome of two criminal adjudications allows one individual to go free while another defendant, charged with the same crime, based upon the same factual situation, is convicted. Moreover, in criminal as opposed to civil cases, the greater potential costs to society of countenancing contradictory results encourage the application of collateral estoppel to prevent inconsistency.[86] The loss to a criminal defendant may be imprisonment or possibly death, whereas in civil cases a litigant risks only pecuniary loss.[87] Furthermore, due to the greater publicity and visibility of criminal proceedings, inconsistent or contradictory results therein are more apt to cause damage to the public's confidence in the judicial system than in the case of civil trials.[88] This injury to the integrity of the judi-

but is not dependent upon the ultimate verdict of guilt or innocence of the defendant in the prior action. People v. Taylor, 12 Cal. 3d 686, 698 n.15, 527 P.2d 622, 630 n.15, 117 Cal. Rptr. 70, 78 n.15 (1974).

84. For example, it has been argued that the public interest in the enforcement of criminal laws outweighs the need to apply collateral estoppel to prevent inconsistent outcomes. *See* People v. Seltzer, 25 Cal. App. 3d Supp. 52, 57, 101 Cal. Rptr. 260, 263 (Super. Ct. App. Dep't 1972).

85. People v. Taylor, 12 Cal. 3d 686, 695, 527 P.2d 622, 628, 117 Cal. Rptr. 70, 76 (1974). The court noted that the need for judicial economy also supports the application of the doctrine in vicarious liability situations. *Id.* However, the need for conservation of judicial resources is no less acute simply because the later defendant seeking to preclude relitigation of an issue is independently guilty of the crime involved. If the state had a full opportunity to contest an issue in a previous proceeding, there is a clear misallocation of time and energy when the state is allowed to relitigate that issue. In addition, the *Taylor* court pointed out that the third major policy furthered by the doctrine of collateral estoppel—the prevention of vexatious relitigation of issues—is not violated when different defendants are tried in separate trials. *Id.* at 696, 527 P.2d at 629, 117 Cal. Rptr. at 77. *But see* discussion in note 32 *supra*.

86. Note, *supra* note 30, at 950.

87. *Id.*

88. *Id.*

cial system can be averted by applying collateral estoppel to prevent codefendants from being subjected to incongruous outcomes.[89]

Nevertheless, there are situations where courts find it desirable to permit inconsistent results to stand. A prime example of where contrary results have been tolerated is the verdict rendered by a jury in criminal trials.[90] The belief is that inconsistent jury verdicts may be the result either of compromise, where unanimity is not present as to all issues,[91] or of an exercise of leniency.[92] The arguments supporting tolerance of inconsistent jury verdicts, however, do not readily apply where the prior factual determination giving rise to the collateral estoppel claim did not depend upon the conduct of the particular defendant and his ability to evoke sympathy from a jury.[93] For example, the prior decision which was asserted against the state in *Stauffer* determined that a search and seizure was illegal. The facts necessary to a determination of that issue related to the state's conduct of the search and seizure, and not to the ability of Godfrey to evoke sympathy. Moreover, the justifications for allowing inconsistencies in jury verdicts do not support such a result where the inconsistent judgments are rendered by a judge.[94] There is no need for a judge to strike a compro-

89. See text & notes 34-35 *supra.*

90. A frequently cited case in the area of inconsistent jury verdicts is Dunn v. United States, 284 U.S. 390 (1932). In that case the defendant was indicted on three separate counts—maintaining a nuisance by keeping liquor for sale, unlawful possession of intoxicating liquor, and unlawful sale of liquor. *Id.* at 391. The jury returned acquittals on the latter two counts, but found him guilty of the first—a logically inconsistent result. *See id.* at 392. Nevertheless, the Supreme Court affirmed the conviction, holding that a jury's verdict in a multiple count indictment need not show rational consistency. *Id.* at 393. The Arizona supreme court is in agreement with *Dunn* on the issue of inconsistent jury verdicts in multiple count indictments, *see* State v. Zakhar, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969), and has extended the rule to allow inconsistent verdicts rendered by a single jury against two or more codefendants. *See* State v. Jordan, 105 Ariz. 250, 251, 462 P.2d 799, 800 (1969).

91. In Dunn v. United States, 284 U.S. 390, 393-94 (1932), the Court quoted with approval the following language from Steckler v. United States, 7 F.2d 59 (2d Cir. 1925):

> The most that can be said in such cases is that . . . the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. . . .
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> . . . .
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> That the verdict may have been the result of compromise, or of mistake . . . is possible. But verdicts cannot be upset by speculation into such matters.

Id. at 60.

92. Dunn v. United States, 284 U.S. 390, 394 (1932); Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649, 654-55 (1950); Friedland, *supra* note 31, at 201.

93. For example, if a defendant is tried for showing an allegedly obscene film, and there is no question that the film was shown by the defendant, the only issue to be decided by the jury is whether the film is obscene. In this situation, the defendant should be allowed to assert against the state a prior determination of nonobscenity obtained by another defendant as to the same film. The defendant's reliance on the previous adjudication should be permitted, since without it the public is confronted with the anomaly that one individual is free to show the film while others do so at the risk of criminal prosecution. Note, *supra* note 30, at 946; see discussion note 110 *infra. Contra*, People v. Seltzer, 25 Cal. App. 3d Supp. 52, 57, 101 Cal. Rptr. 260, 263 (Super. Ct. App. Dep't 1972).

94. *See* United States v. Maybury, 274 F.2d 899 (2d Cir. 1960), in which the de-

mise with himself.[95] Similarly, any exercise of leniency by a judge properly comes at sentencing.[96] Finally, perhaps the most important reason for not allowing judges to indulge in the vagaries which juries are allowed is that inconsistency promotes disrespect for the law.[97]

In addition to the inconsistency argument, other reasons have been relied upon to justify retaining the identity-of-parties rule.[98] It has been argued, for example, that because the state cannot assert a favorable result against subsequent defendants, and must, therefore, always risk contradictory results, the identity rule should be retained.[99] However, the fact that the state cannot assert a favorable result against persons not parties to the prior prosecution is inadequate to support retention of the identity-of-parties requirement; the argument begs the question. Simply because the state is barred by due process requirements from ever asserting a favorable outcome against new defendants,[100] it does not follow that a nonparty should be precluded from asserting unfavorable judgments against the state. Instead, the question should be whether the state had a full and fair opportunity to pre-

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fendant was convicted by a judge of uttering a check knowing it to be forged, and was acquitted in the same trial of forgery. *Id.* at 901. The court reversed the conviction on the ground of inconsistency. *Id.* at 905, *noted in* Comment, *Inconsistent Verdicts in a Federal Criminal Trial*, 60 COLUM. L. REV. 999 (1960).

95. United States v. Maybury, 274 F.2d 899, 905 (2d Cir. 1960).

96. *Id.*

97. *Id.*

98. See text & notes 99-103 *infra*.

99. *See* People v. Seltzer, 25 Cal. App. 3d Supp. 52, 57, 101 Cal. Rptr. 260, 263 (Super. Ct. App. Dep't 1972). The defendant sought to prevent the state from litigating the issue of a film's alleged obscenity arguing that it had been conclusively determined adversely to the state in a prior criminal prosecution. The court denied the defendant's claim on mutuality grounds. *Id.*

100. Assertion by the state of a favorable judgment against a nonparty to the prior trial would constitute a violation of the defendant's right to present evidence and make arguments. Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 329 (1971); *see* National Pub. Serv. Ins. Co. v. Welch, 81 Ariz. 156, 160, 302 P.2d 926, 929 (1956). *See also* McKinney v. Alabama, 424 U.S. 669 (1976). In *McKinney*, the state had instituted an in rem proceeding against certain magazines, and obtained a judicial declaration that the items were obscene. In a subsequent criminal prosecution of the defendant for selling the magazines, the defendant was precluded from litigating the obscenity issue even though he was neither a party to nor notified of the in rem proceeding. The Court held that this preclusion violated the first and fourteenth amendments. *Id.* at 673. The Court reasoned in part that the state may not constitutionally presume that the parties to the in rem proceeding will adequately protect the interests of later criminal defendants. *Id.* at 676.

One commentator has suggested that the principle justification for retention of the mutuality and identity-of-parties rules is the possibility of inconsistent results in multiple litigation. Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 IND. L.J. 1, 14 (1969). It is argued that, due to the inability to determine with confidence that the first outcome was correct, the abandonment of mutuality sacrifices justice "to a compulsion for tidiness." *Id.* However, tidiness is not the value to be protected by loosening the mutuality requirement. The question is not whether judges or even juries are infallible, but whether it is desirable as a matter of public policy to impose a consistency requirement in order to prevent the occurrence of contradictory and unfair results. *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 74, 246 N.E.2d 725, 730-31, 298 N.Y.S.2d 955, 961-63 (1969). For example, suppose that defendants X and Y are arrested for possession of marijuana, and that the facts surrounding their arrests and the subsequent seizure of the contraband are identical. If X successfully moves for

sent its case in the earlier trial.[101] That the state may not use a favorable judgment should carry no weight in the determination of whether it is entitled to relitigate unfavorable results.

It has also been contended that the public interest in enforcement of the criminal laws sustains adherence to the identity-of-parties rule.[102] This argument amounts to the assertion that the benefits derived from enforcement of the criminal laws outweigh the importance of forestalling contradictory factual determinations. This, however, is an unconvincing rationale for the retention of the rule. The argument makes the implicit assumption that the enforcement of the criminal laws and the promotion of judicial integrity are mutually exclusive ends; they are not. Consistency, predictability, certainty of individual rights, and fairness, are all desirable goals of the judicial system.[103] Therefore, if a legal or factual issue has been fully litigated once, enforcement of the criminal laws does not suffer by precluding relitigation. On the contrary, preclusion enhances the integrity of the fact-finding process by advancing these goals.

Criteria for the Abandonment of Mutuality

The California court in *People v. Superior Court*,[104] in the interests of preventing inconsistencies and preserving judicial resources, took a desirable step toward the abandonment of mutuality. It is submitted, however, that the rule announced there may go too far.[105] Suppose that 10 defendants are arrested in a house for possession of stolen property, and that the evidence and facts surrounding the arrests of all individuals are identical. Five defendants file motions to suppress the evidence, each before a different judge. Four of the motions are denied but a fifth is granted. A sixth defendant then moves to suppress the evidence against him, seeking to assert the previous favorable determination against the state. Due to the already contradictory results, the state should not necessarily be estopped from relitigating the issue in the suppression hearing against the sixth defendant.[106] Instead, a

suppression of the evidence and the charges against him are dismissed and *Y* thereafter moves to suppress the evidence, *Y* should be allowed to assert the favorable outcome of *X*'s hearing. Allowing *Y* to interpose the suppression would foreclose the possibility that the second judge will admit the evidence, permitting *Y* to be tried while, in all likelihood, the charges against *X* will be dropped. *But see* text & notes 31-35 *supra*.

101. See text & notes 107-14 *infra*.

102. People v. Seltzer, 25 Cal. App. 3d Supp. 52, 57, 101 Cal. Rptr. 260, 263 (Super. Ct. App. Dep't 1972).

103. See text & notes 31-35 *supra*.

104. 44 Cal. App. 3d 494, 118 Cal. Rptr. 702 (1975).

105. For a statement of the rule, see text accompanying notes 79-82 *supra*.

106. This is the criminal procedure equivalent of the civil mass-accident situation, to which, it has been argued, mutuality should apply. *See* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 308 (1956).

court ruling upon such a plea of collateral estoppel should determine whether the party against whom the estoppel is asserted had a full and fair opportunity to litigate, and actually did litigate the identical issue in the prior proceeding.[107] If this test is satisfied, identity-of-parties should not be required. This test formed the basis for the Supreme Court's holding in *Blonder-Tongue*.[108] Although this was a civil case, the arguments supporting abrogation of the identity-of-parties rule in civil cases apply with equal force to criminal cases.[109]

Several factors should be considered in determining whether assertion of collateral estoppel by a nonparty to the prior prosecution should be permitted in criminal proceedings. First, the court should ascertain whether the prior judgment was based on a factual determination independent of the guilt or innocence of the particular defendant involved.[110] Second, it is important to consider whether the

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Professor Currie argued that the aversion to allowing the ruling on the fifth defendant's motion to stand as a conclusive determination as to the sixth defendant results from the feeling that the outcome of the fifth trial was an aberration. *Id.* at 289. Since there is a possibility that the aberration will occur in the first adjudication, the argument continues, mutuality should be retained where the party against whom the plea is asserted faces two or more successive actions. *Id.* at 289, 308. This contention was based on the belief that the outcome in the mass-accident situation could be the result either of factors evoking sympathy for the plaintiff or of a compromise jury verdict. *Id.* at 288. *But see* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 32 (1965), where Professor Currie, based upon empirical evidence that his objection was an over-generalization, reversed his former position that mutuality should always be required in the multiple plaintiff context. In any event, the factors which might evoke sympathy or give rise to a compromise verdict are not present where an issue, adjudicated by a judge, relates to the state's conduct of a search and seizure—the situation in *Stauffer*. Hence, where the result of the first defendant's motion to suppress is adverse to the state, the above justifications for enforcing the mutuality rule lose all force. But where two or more contradictory results have already been reached, substantial doubt exists as to which is the correct decision. In the former case, the identity-of-parties requirement should be discarded, assuming that the state had an otherwise full and fair opportunity to litigate the matter in the prior hearing. See text & notes 104-10 *infra*. In the latter situation, the mutuality rule should be retained, and later defendants should be forced to litigate the issue, unless one of the prior outcomes is clearly erroneous.

107. This test was applied in a federal criminal action in United States v. Bruno, 333 F. Supp. 570 (E.D. Pa. 1971). The *Bruno* court observed that "courts have begun to recognize that . . . mutuality is essentially a due process concept which should be retained only where the party sought to be estopped did not have a full and fair opportunity to litigate the issue effectively." *Id.* at 576. The court went on to hold that where the government had a full and fair opportunity to attack the authenticity of a document in a prior trial of two coconspirators, collateral estoppel barred the government's relitigation of the same issue against a third defendant. *Id.* As a result, the conspiracy charge against the defendant had to be dismissed. *Id.*

108. Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971). See text & notes 40-43 *supra*.

109. See text & notes 28-35 *supra*.

110. If the prior determination did not depend upon the guilt or innocence of the previous defendant, it was probably not a result of the influence of factors evoking sympathy for him. Therefore, the issue should be taken as having been conclusively decided in the prior proceeding. However, if the previous finding depended upon the defendant's alleged criminal conduct, the court should carefully examine the record of the prior proceeding in order to ensure that the outcome was neither a compromise nor the result of an exercise of leniency. *See* Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir. 1964); text & notes 90-93 *supra*.

issue was previously decided by a judge or by a jury.[111] Another important factor is whether there have been contradictory determinations as to other individuals similarly situated.[112] If so, it may be impossible to determine which decision was correct. Therefore, unless one result is obviously correct, a subsequent defendant should be required to litigate the issue and should not be permitted to choose the result most favorable to his case.[113] Finally, the court should determine whether the party against whom the estoppel is asserted had an incentive to litigate the issue fully in the prior action.[114]

If the above criteria had been applied in *Stauffer*, the outcome would have been the same. It is true that the prior judgment was based on a factual issue not directly related to the guilt or innocence of Godfrey,[115] that the decision was made by a judge,[116] and that the state, since it was aware of another possible claimant, Stauffer,[117] had an incentive to litigate fully the issue of the admissibility of the marijuana. Although these are all considerations weighing in favor of allowing Stauffer's plea, an additional factor weighing against him is that when Stauffer made his motion to reconsider there had already been

111. *See* Note, *Collateral Estoppel in Criminal Cases*, 21 RUTGERS L. REV. 274 (1967); text & notes 90-92, 94-97 *supra*. If the jury could not rationally have reached its verdict on any other basis, the jury's decision should be taken as conclusive of the issue. *See* Note, *supra* at 287. A criminal defendant should be able to collaterally estop the state as to an issue, only if that was the single issue rationally dispositive of the prior defendant's guilt. Note, *supra* note 30, at 945.

112. Collateral estoppel is designed partly to prevent contradictory results. *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 74, 246 N.E.2d 725, 730-31, 298 N.Y.S.2d 955, 961-63 (1969). If one or more inconsistencies have already occurred, mutuality should not be abandoned unless one result is clearly erroneous. *See* discussion note 106 *supra*.

113. It has been suggested that a possible result of discarding mutuality is "lying in wait"; that is, failing to join as a party to the prior proceeding in order to take advantage of a favorable outcome without risking anything. This has been characterized as a "distasteful manipulation of the judicial process." Note, *Collateral Estoppel in Oregon: Problems After the Fall of Mutuality*, 7 WILLAMETTE L.J. 151, 157 (1971). Whether or not this is an objectionable practice is irrelevant; it may be inevitable. In criminal proceedings, the practice may take the form of careful timing of motions and use of severance procedures in order to get before an accomodating judge. The problem, however, might be mitigated at the pretrial stage by requiring the state to join multiple defendants for the hearing on a joint motion to suppress. *See* Hazard, *Res Nova in Res Judicata*, 44 S. CAL. L. REV. 1036, 1044-45 (1971).

114. Arguably, whenever the state is involved in the prosecution of multiple defendants, it is aware that pleas of collateral estoppel may be asserted against it by some of the individuals. It therefore has an incentive to litigate fully the issues involved. However, suppose an individual pleads guilty to driving in excess of the speed limit and pays a fine. If the state thereafter seeks to preclude litigation of that issue in a trial of the individual for vehicular manslaughter, a strong argument can be made that the estoppel should not be permitted since the defendant may not have had an incentive to litigate the question fully; he may have preferred simply to pay the fine. *See* Vestal & Coughenour, *Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 VAND. L. REV. 683, 688 (1966). On the other hand, if evidence is available to the state which was not reasonably available previously, then relitigation of the suppression motion should be allowed even though the state had an incentive to litigate the matter fully in the prior proceeding. *See* Hazard, *supra* note 113, at 1044.

115. *See* Opening Brief for Appellant at 9-10. See text & note 110 *supra*.

116. 112 Ariz. at 29, 536 P.2d at 1047.

117. *See id.* at 28, 536 P.2d at 1046.

contradictory determinations as to the admissibility of the evidence.[118] Allowing the plea would only perpetuate the contradiction. Stauffer's plea therefore was properly denied. In any event, the identity-of-parties analysis used by the court in *Stauffer* was unnecessary to the result as Stauffer had been a party to previous litigation of this issue and had lost.[119] He had already had his "day in court" before Godfrey successfully moved to suppress the evidence.[120]

Conclusion

The failure to articulate the precise reasons for denying Stauffer's plea effectively precludes the future use of collateral estoppel in Arizona criminal cases when the party asserting the plea was not a party to the first proceeding. Such a restrictive holding was not mandated by the facts in *Stauffer*. When the criminal liability of multiple defendants depends on the resolution of an identical factual or legal issue which has once been fully and fairly litigated by the state, other defendants who were not parties to that action should be permitted to rely on that determination as conclusive. When the prior decision was made by a judge, and involved an issue unrelated to the criminal conduct of the defendant in the prior proceeding, the need becomes particularly acute to allow such reliance in order to preserve the integrity of the judicial system by preventing inconsistency and injustice.

B. Spousal Consent to Search

The fourth amendment to the United States Constitution[1] protects the "sanctity of a man's home and the privacies of life"[2] by requiring that government officials obtain a search warrant before conducting a

118. *See* Opening Brief for Appellant at 8-10.
119. *Id.* at 8-9.
120. If, however, Godfrey had successfully moved to suppress the marijuana prior to a motion by Stauffer, and Stauffer thereafter had filed a motion to suppress, asserting against the state the determination of Godfrey's motion, the collateral estoppel plea should have been permitted. See discussion note 106 *supra*.

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

U.S. Const. amend. IV.
2. Boyd v. United States, 116 U.S. 616, 630 (1886).

search of private property.[3] An exception to this general rule[4] is recognized when the police obtain permission to search.[5] Using the voluntariness standard employed in confession cases[6] prior to *Miranda v. Arizona*,[7] the United States Supreme Court has held that the police may search a person's property with his consent and without a search warrant,[8] provided the consent was not coerced "by implied threat or covert force."[9] The Court has also condoned warrantless searches conducted by police pursuant to the consent of someone other than the person the police were investigating.[10] In *Yuma County Attorney v. McGuire*,[11] the Arizona supreme court has extended this latter rule, upholding a search founded upon the consent of the spouse of the individual against whom the search was directed.

The defendant in *McGuire*, Thomas Franklin Lutz, was a suspect in a recent burglary.[12] Two police officers went to the defendant's home, informed his wife that the defendant, who was not at home, had been implicated in the burglary, and requested permission to search the premises.[13] Although the police had not obtained a search warrant, the defendant's wife allowed them to enter the marital home. Mrs. Lutz led the officers to a back bedroom where they found evidence

3. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 478-82 (1971); Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); Katz v. United States, 389 U.S. 347, 356-57 (1967).

4. The courts allow warrantless searches and seizures in a number of situations. The police can search a suspect without a warrant incident to an arrest. *See, e.g.*, Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969); Note, *Searches of the Person Incident to Lawful Arrest*, 69 COLUM. L. REV. 866 (1969). Warrants are not required when government officials search persons or property crossing United States borders. *See, e.g.*, United States v. Ortiz, 422 U.S. 891 (1975); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973). *See also* Note, *Almeida-Sanchez and Its Progeny: The Developing Border Zone Search Law*, 17 ARIZ. L. REV. 214 (1975). A search warrant is usually not required when the object of the search is a movable motor vehicle. *See, e.g.*, Cady v. Dombrowski, 413 U.S. 433 (1973); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925); United States v. Morrow, 541 F.2d 1229 (7th Cir. 1976). *See also* Comment, *Warrantless Searches and Seizures of Automobiles and the Supreme Court From Carroll to Cardwell: Inconsistently Through the Seamless Web*, 53 N.C.L. REV. 722 (1975). Warrantless entries into residences are allowed where "exigent circumstances" exist. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 478-82 (1971); Vale v. Louisiana, 399 U.S. 30, 35 (1970); Warden v. Hayden, 387 U.S. 294, 307 (1967).

5. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Zap v. United States, 328 U.S. 624, 630 (1946); Davis v. United States, 328 U.S. 582, 593-94 (1946).

6. *See, e.g.*, Watts v. Indiana, 338 U.S. 49 (1949); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Brown v. Mississippi, 297 U.S. 278 (1936). See discussion note 23 *infra*.

7. 384 U.S. 436 (1966).

8. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Zap v. United States, 328 U.S. 624, 630 (1946); Davis v. United States, 328 U.S. 582, 593-94 (1946).

9. Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

10. *See, e.g.*, United States v. Matlock, 415 U.S. 164 (1974); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Frazier v. Cupp, 394 U.S. 731 (1969).

11. 111 Ariz. 437, 532 P.2d 157 (1975).

12. *Id.* at 437, 532 P.2d at 157. McGuire was the trial judge at Lutz's suppression hearing, against whom the county attorney brought the special action. *Id.*

13. *Id.*

in a closet which incriminated the defendant.[14] The trial court suppressed this evidence, holding the consent search invalid.[15] The prosecution filed a petition for special action with the Arizona supreme court to contest the legality of the trial judge's ruling.[16] The court accepted jurisdiction and vacated the trial court's suppression order.[17] In so doing, the court overruled a prior decision[18] and held that the spouse of a person suspected of a crime, having equal rights to use and occupy the premises in question, can give valid consent to a search of the marital home for evidence incriminating the nonconsenting spouse.[19] In recognizing the modern trend towards equalizing the rights and obligations of men and women, the court felt that a wife should be accorded authority to allow searches of premises that she and her husband jointly occupy.[20] Although acknowledging the argument that judicial sanction of spousal consent to a search directed at the nonconsenting spouse might tend to be destructive of the marital relationship, the court considered this danger insufficient to necessitate a distinction between spousal consent and other third-party consent situations.[21] The court intimated one limitation on its holding, however; spousal consent is invalid where by agreement or understanding the consenting spouse does not have access to the particular area or item which was searched.[22]

This casenote will first examine the joint use and control test and the exclusive control exception utilized in third-party consent situations. The fourth amendment right to privacy will be compared with the corollary "assumption of risk" rule. Next, the protected status of

14. *Id.* Among the evidence seized was pornographic material allegedly stolen in the burglary. It is not clear from the opinion whether one item of evidence, a pair of boots, was found in this same closet or in another undisclosed location. *Id.*

15. The trial court relied upon State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963), *overruled*, Yuma County Attorney v. McGuire, 111 Ariz. 437, 532 P.2d 157 (1975).

16. 111 Ariz. at 437, 532 P.2d at 157.

17. *Id.*

18. *See id., overruling* State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963).

19. 111 Ariz. at 438, 532 P.2d at 158, *quoting* Commonwealth v. Sebastian, 500 S.W.2d 417, 419 (Ky. 1973). Both dissenting justices in *McGuire* argued in their separate opinions that the case should have been remanded for a determination of whether the Yuma Police Department had sufficient time within which to obtain a warrant. 111 Ariz. at 440, 532 P.2d at 160 (Lockwood, J., dissenting); *id.* at 439, 532 P.2d at 159 (Struckmeyer, J., dissenting); *accord*, United States v. Matlock, 415 U.S. 164, 180 (1974) (Douglas, J., dissenting).

20. 111 Ariz. at 438, 532 P.2d at 158. The dissenting justices disagreed with the majority as to the significance of the trend toward equality, arguing that neither spouse should be permitted to consent to a search directed against the other. *Id.* at 440, 532 P.2d at 160 (Lockwood, J., dissenting); *id.* at 438-39, 532 P.2d at 158-59 (Struckmeyer, J., dissenting). See discussion text & notes 72-74 *infra.*

21. 111 Ariz. at 438, 532 P.2d at 158. *But see* Mascolo, *Inter-spousal Consent to Unreasonable Searches and Seizures: A Constitutional Approach*, 40 CONN. B.J. 351, 398-403 (1966); Comment, *The Effect of a Wife's Consent to a Search of the Husband's Property*, 69 DICK. L. REV. 69 (1964).

22. 111 Ariz. at 438, 532 P.2d at 158, *quoting* Commonwealth v. Sebastian, 500 S.W.2d 417, 419 (Ky. 1973). Apparently, no contention was made in *McGuire* that the areas searched were inaccessible to the defendant's wife.

marriage will be scrutinized in view of the reasoning used in *McGuire*. Finally, the rationale for other warrantless searches and seizures will be considered and compared to the rationale for allowing third-party consent searches.

The Rationale of Third-Party Consent

State and federal courts impose a dual requirement on the prosecution when determining the validity of third-party consent searches. First, the government must prove that consent was voluntarily given.[23] Second, the person who consents must have had authority to consent to a search of the property.[24] Although the first requirement is accepted by all courts, courts are split as to the proper focus of the authority test.[25]

When the Arizona supreme court was first confronted with the problem, in *State v. Pina*,[26] it adopted the minority view in refusing to validate spousal consent as a waiver of the other spouse's fourth amendment rights.[27] While recognizing that a criminal defendant is

23. *See* Bumper v. North Carolina, 391 U.S. 543, 548-50 (1968). The United States Supreme Court dealt with the voluntariness issue in Schneckloth v. Bustamonte, 412 U.S. 218, 222-31 (1973). The Court stated that the "Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." *Id.* at 228. The validity of consent depends on the "totality of circumstances" surrounding its procurement by the police. *Id.* at 227; *see e.g.*, United States v. Stone, 471 F.2d 170, 173 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); United States v. Thompson, 421 F.2d 373, 376-77 (5th Cir.), *vacated on other grounds*, 400 U.S. 17 (1970); Roberts v. United States, 332 F.2d 892, 897 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965); People v. Chism, 390 Mich. 104, 134-35, 211 N.W.2d 193, 207-08 (1973); State v. Rye, 2 Wash. App. 920, 922-24, 471 P.2d 96, 98-99 (1970). In Commonwealth v. Smith, — Pa. —, 368 A.2d 272 (1977), the Pennsylvania supreme court recently invalidated a spousal consent search. The court concluded that the totality of circumstances, including the spouse's knowledge of her husband's confession and her own lengthy custodial interrogation, indicated that her consent was not totally voluntary. *Id.* at —, 368 A.2d at 277.

24. *See, e.g.*, United States v. Matlock, 415 U.S. 164, 171 (1974); Frazier v. Cupp, 394 U.S. 731, 740 (1969); United States v. Stone, 471 F.2d 170, 173 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); United States v. Thompson, 421 F.2d 373, 375-76 (5th Cir.), *vacated on other grounds*, 400 U.S. 17 (1970); Roberts v. United States, 332 F.2d 892, 895-97 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965); Commonwealth v. Martin, 358 Mass. 282, 287-90, 264 N.E.2d 366, 368-70 (1970); State v. Rye, 2 Wash. App. 920, 924-25, 471 P.2d 96, 99-100 (1970); Note, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797 (1966); Note, *Family Consent to an Unlawful Search*, 28 WASH. & LEE L. REV. 207 (1971). For example, when an employee consents to a search of his employer's premises, the validity of the search depends upon the position of the employee with the company. *Compare* United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946), *cert. denied*, 329 U.S. 742 (1947) (court upheld a consent search when the office manager of a corporation allowed the FBI to examine corporate records), *with* Hays v. State, 38 Okla. Crim. 331, 261 P. 232 (1927) (store clerk does not possess sufficient authority to consent to a search of his employer's premises). *See* La Fave, *Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth*, 1966 U. ILL. L.F. 255, 320. The United States Supreme Court has held that a hotel clerk does not have authority to consent to the search of a guest's room, Stoner v. California, 376 U.S. 483 (1964); nor may a landlord authorize the search of his tenant's home. Chapman v. California, 365 U.S. 610 (1961).

25. *See* text & notes 24 *supra*, 29-31, 34-36 *infra*.

26. 94 Ariz. 243, 383 P.2d 167 (1963).

27. In *Pina*, the police, after obtaining a search warrant, searched the defendant's

free to relinquish his own constitutional rights, the court held that a person could not waive the fourth amendment protections of another individual.[28] The *Pina* court joined several other state courts[29] in considering the fourth amendment as protecting the rights of the person aggrieved by the search. These courts have held that only the suspect, the individual against whom the search was directed, could waive these rights;[30] therefore, a wife must receive express authority before she can validly waive her husband's right to demand a search warrant.[31] These decisions reject the implied agency theory,[32] which would give one spouse the right to allow the police to search the couple's residence based on authority emanating from the marriage relationship.[33]

A majority of courts treat spousal consent from a different perspective, focusing on the consenting rather than the implicated spouse, inquiring whether the consenting spouse, by reason of her relationship to the property searched, has sufficient authority to permit the search.[34] As in other third-party consent situations, an ownership

home for narcotics without success. *Id.* at 246, 383 P.2d at 168. Later that day, the police returned with the same warrant, searched the dwelling, and found a quantity of heroin. When the warrant was subsequently held to be invalid by the supreme court, on the ground that it authorized only the first intrusion, the state claimed that the defendant's wife had consented to the second search, negating the need for a warrant. *Id.* at 246-47, 383 P.2d at 169. The court held that the defendant's wife did not possess sufficient authority to allow the search, concluding that "[o]bviously a third person cannot waive another's basic constitutional rights against unlawful searches and seizures unless specifically authorized." *Id.* at 247, 383 P.2d at 169.

28. *Id.*

29. *See, e.g.*, State v. Blakely, 230 So. 2d 698 (Fla. Ct. App. 1970); Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952); State v. Hall, 264 N.C. 559, 142 S.E.2d 177 (1965).

30. *See* State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963); cases cited note 29 *supra.*

31. This view would render most spousal consent searches invalid, because express authority requires that the defendant intended for his wife to allow the police to search their home, and, in addition, that he has communicated this intent to his spouse. It will be a rare case indeed in which these two requirements are met, as few individuals think far enough into the future to authorize another to waive their fundamental constitutional liberties.

32. *See* cases cited notes 29-30 *supra.*

33. RESTATEMENT (SECOND) OF AGENCY § 22, comment *b* (1958), concurs with these decisions: "Neither husband nor wife by virtue of the relation has power to act as agent for the other."

34. *See, e.g.*, United States v. Stone, 471 F.2d 170 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); United States v. Thompson, 421 F.2d 373 (5th Cir.), *vacated on other grounds*, 400 U.S. 17 (1970); Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965). At least 25 states have allowed third-party consent searches where the party consenting had ownership rights or use rights in the property. *See* People v. Chism, 390 Mich. 104, 130-33 n.22, 211 N.W.2d 193, 205-07 n.23 [sic] (1973). In United States v. Lawless, 465 F.2d 422 (4th Cir. 1972), the wife, following a violent argument with her husband, returned with the police to the couple's mobile home. After her husband was arrested, the wife led the authorities in a successful search of the premises for a shotgun. The defendant claimed that his wife lacked the authority to consent to the search of the mobile home because she intended to abandon the home, and that she did not even possess a key for it. Nevertheless, the validity of the search was upheld. *Id.* at 423. In Stein v. United States, 166 F.2d 851 (9th Cir. 1948), a common law wife was locked out of the couple's house when her husband went to live with his mother. The house was bought with the defendant's money; nevertheless, the common law wife broke a window to get back into the house, and then

interest in the property is insufficient to establish adequate authority to consent;[35] the prosecution must demonstrate that the consenting party had joint use or control of the property.[36] In *United States v. Matlock*,[37] the United States Supreme Court stated that the joint use or control test asks whether "it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."[38] Although the Court has never dealt specifically with the question of spousal consent,[39] it can be reasonably inferred from *Coolidge v. New Hampshire*[40] and *Matlock*,[41] that the Court would be willing to apply the joint use or control test to spousal consent cases.[42]

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invited the police in to search for drugs which were subsequently used as evidence against the husband. *Id.* at 853. The search was declared reasonable because the wife had joint control of the premises until the defendant locked her out, and the court was unwilling to let the defendant abrogate her rights in such a fashion. *Id.* at 855. It may be inferred from these cases that physical possession of the premises is not always a necessary prerequisite to a valid consent.

35. *See* United States v. Matlock, 415 U.S. 164, 171 n.7 (1974); Stoner v. California, 376 U.S. 483, 488-90 (1964); Chapman v. California, 365 U.S. 610, 616-17 (1961).

36. *See, e.g.*, United States v. Stone, 471 F.2d 170 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); United States v. Thompson, 421 F.2d 373 (5th Cir.), *vacated on other grounds*, 400 U.S. 17 (1970); Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965).

37. 415 U.S. 164 (1974), *noted in* 41 TENN. L. REV. 923 (1975).

38. 415 U.S. at 171 n.7.

39. In Amos v. United States, 255 U.S. 313 (1921), the question of the validity of spousal consent to a search was brought before the Court; however, the Court did not reach the question because it found the consent was given involuntarily.

40. 403 U.S. 443 (1971). In *Coolidge*, after the defendant was jailed, two police officers went to the defendant's home to question his wife about his whereabouts on the night of the murder of a 14-year-old girl. *Id.* at 485-86. During the questioning, the defendant's wife produced four guns and some clothing for the officers, all of which implicated Coolidge in the murder. *Id.* at 486. The Court refused to consider this a search, in that the wife voluntarily turned over the evidence to the authorities in an effort to clear her husband of suspicion. *Id.* at 489-90. For this reason, and because the officers did not enter the premises to conduct a search, the seizure and admissibility of the evidence were upheld. *Id.* at 488-90. Despite the lack of a search, *Coolidge* was cited in United States v. Matlock, 415 U.S. 164 (1974), for the following proposition:

> [T]hat when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Id. at 171.

41. In *Matlock*, the defendant lived with a Mrs. Graff. 415 U.S. at 166. Although not married, the couple had represented themselves to be husband and wife on a number of occasions. *Id.* at 168. The incriminating evidence was found in a bedroom which the couple shared. Justice White, writing for the Court in *Matlock*, noted:

> This Court left open, in Amos v. United States, . . . the question whether a wife's permission to search the residence in which she lived with her husband could "waive his constitutional rights," but more recent authority here clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.

Id. at 170.

42. Even if the Supreme Court were to so hold, it would not mandate the same result in Arizona. The Arizona supreme court could construe ARIZ. CONST. art. 2, § 18

Assuming that a spouse has voluntarily given the police permission to search the marital premises, a futher problem arises in determining the boundaries within which the police can search. In response to this problem, the courts have developed a corollary to the joint use or control theory—the exclusive control doctrine—which provides that an area or an object which is restricted to the exclusive use of one individual cannot be searched pursuant to a third party's consent.[43] The courts employing the exclusive control rule stress that while the consenting party might have access to part of the property, or the entire property for some purposes, such access does not necessarily imply the power to authorize the police to search the entire property.[44] Therefore, exclusive control does not always involve strictly prohibiting others from using certain property; the control is merely restrictive enough to forbid others from consenting to a search of the property.[45]

Property and Privacy in Third-Party Consent Situations

In *Yuma County Attorney v. McGuire*, the court adopted both the joint use or control doctrine[46] and the exclusive control exception[47] in overruling *Pina*.[48] In so doing, the court seems to place more weight

("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.") as prohibiting spousal consent searches. Such a decision would adhere to the legislative policy favoring confidentiality in the marital relationship, as reflected by statute. See text & notes 67-71 *infra*.

43. *See* Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965), *cert. denied*, 383 U.S. 968 (1966); Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951). *See also* 39 U. CIN. L. REV. 807, 809-10 (1970).

44. *See* United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951), in which the defendant's fourth amendment rights were held to have been violated when the District of Columbia police, with the prior consent of defendant's supervisor, searched her desk at her place of work. *Id.* at 1021. Although her supervisor could properly inventory her desk to obtain "official property needed for official use," the court held that neither the supervisor nor the police could reasonably search her personal possessions which she was entitled to keep in her desk. *Id.* Under the exclusive control exception, fourth amendment protections have been extended to a case in which a landlady consented to a search of her tenant's bedroom, Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965), *cert. denied*, 383 U.S. 968 (1966), to a case where the defendant's mother consented to a search of the defendant's bureau, Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965), and to a case where a daughter and son-in-law of the defendant allowed the police to search a locked cabinet that the defendant was storing at their house, Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955). In State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962), the court did not specifically invoke the exclusive control doctrine, but held a spousal consent search unreasonable because the search extended to the defendant's jewelry case. *Id.* at 633, 372 P.2d at 372. After examining several cases validating spousal consent, the court noted: "None of them goes so far as to hold that a wife in joint occupancy of the home can permit a search of her husband's personal effects . . . in a bedroom bureau drawer. The wife has no such right." *Id.* at 631, 372 P.2d at 372.

45. *See* Cunningham v. Heinze, 352 F.2d 1, 4-5 (9th Cir. 1965), *cert. denied*, 383 U.S. 968 (1966); Holzhey v. United States, 223 F.2d 823, 826-27 (5th Cir. 1955); United States v. Blok, 188 F.2d 1019, 1021 (D.C. Cir. 1951); 39 U. CIN. L. REV. 807 (1970).

46. 111 Ariz. at 437-38, 532 P.2d at 157-58.

47. *Id.* at 438, 532 P.2d at 158.

48. State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963); see text & notes 18-20 *supra*.

on the property rights of the consenting spouse than on the fourth amendment privacy rights of the implicated spouse. Prior to the landmark decision in *Katz v. United States*,[49] the fourth amendment was characterized as extending to "constitutionally protected areas;"[50] a search was declared unreasonable only if government agents physically trespassed into such an area in conducting the search.[51] With the advent of sophisticated electronic eavesdropping equipment,[52] however, the protected area doctrine no longer provided an adequate safeguard against governmental intrusions into the lives of private citizens.[53] To mitigate this development, the *Katz* court redefined the fourth amendment as protecting "people, not places"[54]: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[55] In a concurring opinion, Justice Harlan interpreted this language to require a two-part analysis. First, a person must exhibit a subjective expectation of privacy.[56] Second, that expec-

49. 389 U.S. 347 (1967). For further analysis of the *Katz* decision, see Comment, *Eavesdropping, Wiretapping, and the Law of Search and Seizure—Some Implications of the Katz Decision*, 9 ARIZ. L. REV. 428 (1968); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 969 (1968).

50. *See, e.g.*, Lanza v. New York, 370 U.S. 139, 142 (1962); Jones v. United States, 362 U.S. 257, 261 (1960); Weeks v. United States, 232 U.S. 383, 389-91 (1914).

51. *See* Berger v. United States, 388 U.S. 41, 57, 59 (1966); Lopez v. United States, 373 U.S. 427, 438-39 (1963); Silverman v. United States, 365 U.S. 505, 508 (1961).

52. In Berger v. New York, 388 U.S. 41, 45-49 (1966), the Court recognized the dangers presented by electronic eavesdropping equipment, declaring New York's permissive eavesdropping statute unconstitutional. For a comprehensive review of eavesdropping methods, see S. DASH, R. SCHWARTZ & R. KNOWLTON, THE EAVESDROPPERS 341-52 (1959).

53. Katz v. United States, 389 U.S. 347, 352-53 (1967).

54. *Id.* at 351.

55. *Id.* at 351-52. The Court made it clear that the fourth amendment does not establish a "general constitutional 'right to privacy,'" but rather regulates governmental intrusions into the lives of citizens. *Id.* at 350. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Supreme Court recognized the plain view doctrine, which allows police to seize contraband, stolen items, dangerous instrumentalities, or mere evidence, inadvertently discovered while engaged in authorized investigatory activities. *Id.* at 465-72. *See* Harris v. United States, 390 U.S. 234, 235-36 (1968); Ker v. California, 374 U.S. 23, 43 (1963); United States v. Lee, 274 U.S. 559, 563 (1927); United States v. Candella, 469 F.2d 173 (2d Cir. 1972); United States v. Ware, 457 F.2d 828 (7th Cir. 1972); United States v. Vilhotti, 323 F. Supp. 425 (S.D.N.Y. 1971). *See also The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 244-46 (1971). Under the plain view exception, if the officer lawfully enters the premises, he may seize any obviously incriminating evidence, even if the absent, nonconsenting party exercises exclusive control over the property. *See* Davis v. United States, 327 F.2d 301, 305 (9th Cir. 1964).

56. 389 U.S. at 361. (Harlan, J., concurring). The requirement that the suspect must have exhibited an actual subjective expectation of privacy has been criticized on the ground that it provides little protection against unreasonable searches and seizures.

> An actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that

tation must be one which society is prepared to recognize as reasonable.[57] Subsequent decisions of the Supreme Court have adopted Justice Harlan's interpretation in determining the validity of a particular search.[58]

It is clear that both prongs of this test must be met; even if the suspect has exhibited a subjective expectation of privacy, the reasonableness of such an expectation must be established.[59] The United States Supreme Court has evaluated the reasonableness of a third-party consent search by asking whether the suspect assumed the risk that this coinhabitant would allow the police to enter and search the premises.[60] This is a logical step, for if privacy can be equated with control over property,[61] and the property is controlled by both tenants, the finding of joint control would eliminate all reasonable expectations of privacy.[62]

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we were all forthwith being placed under comprehensive electronic surveillance. . . . Fortunately, neither *Katz* nor the fourth amendment asks what we expect of government. They tell us what we should demand of government.

Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

The courts that have applied the subjective expectation test, however, have invalidated a number of searches. *See, e.g.*, United States v. Guadalupe-Garza, 421 F.2d 876, 878 (9th Cir. 1970) (strip-search at an international border invalid although claimed to be a routine inspection); Smyth v. Lubbers, 398 F. Supp. 777 (E.D. Mich. 1975) (search declared invalid when the police searched college dormitory rooms without a warrant); United States v. Durkin, 335 F. Supp. 922, 924 (W.D. Mo. 1971) ("There can be no doubt that the renter of a locker at public terminals or similar public places justifiably expects that it is for his private use, to place therein what he will, free from prying eyes, and that it and its contents are inviolate . . . ."); People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973) (protection extended to stalls in a public restroom).

57. 389 U.S. at 361 (Harlan, J., concurring). In United States v. White, 401 U.S. 745 (1971), Justice Harlan expanded this view of the fourth amendment requirements, again in the electronic surveillance context:

> The critical question . . . is whether . . . we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.
>
> This question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement. For those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties, I am of the view that more than self-restraint by law enforcement officials is required and at the least warrants should be necessary.

Id. at 786 (Harlan, J., dissenting).

58. *See, e.g.*, United States v. Dionisio, 410 U.S. 1, 8, 14-15 (1973); United States v. White, 401 U.S. 745, 751-52 (1971); Terry v. Ohio, 392 U.S. 1, 9 (1968); Mancusi v. DeForte, 392 U.S. 364, 368 (1968).

59. *See* Koran v. United States, 408 F.2d 1321 (5th Cir. 1969), *cert. denied*, 402 U.S. 948 (1971).

> It is true that appellant Koran did not wish to expose his words to the public. However, this fact alone does not suffice, for no criminal desires public exposure of his surreptitious activity. The crucial fact here is that the appellant knowingly took the risk that his conversants might expose his statements. Therefore he cannot now complain that his conversants did in fact expose the conversations.

Id. at 1323.

60. Frazier v. Cupp, 394 U.S. 731, 740 (1969).

61. *Cf.* Comment, *Privacy*, 77 YALE L.J. 475, 482 (1968).

62. 41 TENN. L. REV. 923, 928 (1975). *See, e.g.*, United States v. Matlock, 415 U.S. 164 (1974); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Frazier v. Cupp, 394 U.S. 731 (1969).

This reasoning is equally applicable in the spousal consent situation, where, assuming the consenting spouse has joint access and control of the premises for most purposes, the individual against whom the search is directed has assumed the risk that his spouse might authorize a search of the property.[63] Thus, in all third-party consent cases, the reasonable expectation of privacy arises only if an individual has exclusive control over the property subject to the search.[64]

The assumption of risk doctrine applies to situations where a person does not enjoy complete privacy.[65] For example, although in some instances one might expect a great deal of privacy, as when engaging in private conversation with a trusted associate, the United States Supreme Court has held that a person assumes the risk that the associate might reveal the conversation to the authorities.[66] Arizona statutory law, however, arguably provides exceptions to this rule in the case of married couples.[67] These testimonial privilege provisions, as noted by the Arizona supreme court, are considered "necessary to support the peace and tranquility of families and to protect the marital relation."[68]

63. *Cf.* United States v. Matlock, 415 U.S. 164, 171 n.7 (1974); Frazier v. Cupp, 394 U.S. 731, 740 (1969); Villine v. United States, 297 A.2d 785, 787 (D.C. Ct. App. 1972).

64. *See* discussion text & notes 43-45 *supra.*

65. *See, e.g.,* United States v. Matlock, 415 U.S. 164 (1974) (man who shared house with his mistress assumed the risk that she would consent to a search of their bedroom); United States v. White, 401 U.S. 745 (1971) (conversants assume the risk that their conversation will be repeated to the authorities); Frazier v. Cupp, 394 U.S. 731 (1969) (defendant assumed the risk that his cousin would allow the police to search a mutually used duffel bag).

66. *See, e.g.,* United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); On Lee v. United States, 343 U.S. 747 (1952). *See also* Koran v. United States, 408 F.2d 1321 (5th Cir. 1969), *cert. denied,* 402 U.S. 948 (1971).

67. ARIZ. REV. STAT. ANN. § 13-1802 (Supp. Pamphlet 1973) provides in pertinent part:

> A person shall not be examined as a witness in the following cases:
>
> 1. A husband for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without consent of the other, examined as to any communication made by one to the other during the marriage. These exceptions do not apply in a criminal action or proceeding for a crime committed by the husband against the wife, or by the wife against the husband, nor in a criminal action or proceeding against the husband for abandonment, failure to support or provide for or failure or neglect to furnish the necessities of life to the wife or the minor children. Either spouse may, at his or her request, but not otherwise, be examined as a witness for or against the other in a prosecution for bigamy or adultery, committed by either spouse, or for rape, seduction, the crime against nature or any similar offense, committed by the husband.

Id. §§ 12-2231 to -2232 (1956), provide similar testimonial privileges for civil proceedings. *See also* State v. Whitaker, 112 Ariz. 537, 539-42, 544 P.2d 219, 221-24 (1975); State v. Drury, 110 Ariz. 447, 450-54, 520 P.2d 495, 498-502 (1974); State v. Narten, 99 Ariz. 116, 124, 407 P.2d 81, 87 (1965), *cert. denied,* 384 U.S. 1008 (1966); Arizona Title Guar. & Trust Co. v. Wagner, 75 Ariz. 82, 85, 251 P.2d 897, 899 (1953); State v. Hunt, 8 Ariz. App. 514, 522, 447 P.2d 896, 904 (1968).

68. State v. Whitaker, 112 Ariz. 537, 540, 544 P.2d 219, 222 (1975). The courts in Arizona are also firmly committed to the common law rule forbidding interspousal tort actions. *See, e.g.,* Huebner v. Deuchle, 109 Ariz. 549, 514 P.2d 470 (1973); Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968). Such a rule is partially based on a social policy intended to protect marriage. *See* Windauer v. O'Connor, *supra* at 267, 485 P.2d at 1157.

An additional rationale for the promulgation of these statutes is "that there is a natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner."[69] These statutes evidence a legislative policy designed to protect and foster unity and confidentiality in the marital relationship.[70] Essentially, these statutes accord a greater degree of privacy to a husband and wife than to other social relationships, limiting the public's access to information jointly controlled by marriage partners. Arguably, this greater degree of privacy granted married couples under the privileged communications statutes should be extended to spousal consent situations, for in both circumstances the policy favoring privacy in marriage is involved. The *McGuire* court, however, refused to distinguish spousal consent from other third-party consent searches.[71]

The court's rejection of a special rule forbidding one spouse from waiving the other's fourth amendment rights was further weakened by the rationale presented in support of the result. While employing the joint use or control test, the *McGuire* court did not validate the spousal consent search on the basis of the assumption of risk theory, but instead relied on the "equalization of the rights and obligations of men and women"[72] for overruling *Pina*.[73] The *Pina* court, on the other hand, did not distinguish between the sexes when it declared a third-party consent search unreasonable. Under *Pina*, the rights of men and women were presumably equal: Neither spouse could validly consent to a search directed at the absent partner.[74] The *McGuire* court thus not only avoided the assumption of risk analysis accepted by many

69. State v. Whitaker, 112 Ariz. 537, 540, 544 P.2d 219, 222 (1975), *quoting* 8 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2228, at 217 (McNaughton rev. 1961).

70. *See* text & notes 67-69 *supra*.

71. 111 Ariz. at 438, 532 P.2d at 158. Dissenting in *McGuire*, Justice Struckmeyer noted: "The decision in *Pina* was bottomed on sound social policy. Marriage and the home are everywhere recognized as institutions to be encouraged and protected. They are the foundation upon which a stable society is built. . . . The rule in *Pina* prevents unnecessary and unjustified invasions of privacy before they occur." *Id.* at 439, 532 P.2d at 159.

72. *Id.* at 438, 532 P.2d at 158, *quoting* Commonwealth v. Sebastian, 500 S.W.2d 417 (Ky. 1973).

73. State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963), *overruled*, Yuma County Attorney v. McGuire, 111 Ariz. 437, 532 P.2d 157 (1975).

74. 94 Ariz. at 247, 383 P.2d at 169. In Commonwealth v. Sebastian, 500 S.W.2d 417 (Ky. 1973), relied upon by the Arizona supreme court in *McGuire*, the Kentucky court overruled Veal v. Commonwealth, 199 Ky. 634, 251 S.W. 648 (1923), which stood for the proposition that a wife did not possess the authority "to grant permission to police officers to search her husband's house in his absence." *Id.* at 635, 251 S.W. at 649. There was no mention in *Veal* that a husband could consent to a search of the premises directed at his wife, but the wording of *Sebastian*, equalizing the rights of the spouses, indicates that only the husband could validly consent under *Veal*. *See* 500 S.W.2d at 419. In that *Pina* carried no such implication, the Arizona supreme court's reliance on Kentucky precedent in *McGuire* seems to have been unnecessary.

courts in other third-party consent situations, but also overruled reasoned precedent that was more consistent with the social policy, reflected in the Arizona statutes, to encourage unity and tranquility in the marriage relationship.[75] If, however, the *McGuire* court had rejected the validity of spousal waiver of fourth amendment rights, it would have then been faced with the problems of examining the remaining exceptions to the warrant requirement.

Traditional Exceptions to the Warrant Requirement

Where the United States Supreme Court has recognized exceptions to the warrant requirement,[76] the justification is usually that such warrantless searches are necessary to protect the police from physical danger,[77] or that, under the circumstances, obtaining a search warrant would be impractical or impossible.[78] No such justifications exist in cases involving third-party consent searches. Police will normally seek consent to search from a third person because the suspect is absent,[79] perhaps in custody,[80] when the police approach the premises. The suspect, who is unaware of the consent search, is effectively prohibited from exercising his fourth amendment right to refuse to allow the search. The right of a cotenant to consent, apparently absolute when the suspect is absent from the premises, does not super-

75. *See* text & notes 67-69 *supra.*

76. The necessity for requiring a warrant, whenever possible, upon the proper showing of probable cause, has been succinctly stated by Mr. Justice Douglas:

> The judicial scrutiny provided by the second clause of the Amendment is essential to effectuating the Amendment, and if, under that clause a warrant could have been obtained but was not, the ensuing search is "unreasonable" under the Amendment. The intervention of a judicial officer gives the Amendment vitality by restraining unnecessary and unjustified searches and invasions of privacy before they occur. At the same time, a written warrant helps ensure that a search will be limited in scope to the areas and objects necessary to the search because both the "place to be searched" and the "things to be seized" must be described with particularity. We have therefore held that only the gravest of circumstances could excuse the failure to secure a properly issued search warrant.

United States v. Matlock, 415 U.S. 164, 180-83 (1974) (Douglas, J., dissenting) (footnote omitted).

77. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969) (police officer may search suspect and area immediately within suspect's reach for possible hidden weapons); Terry v. Ohio, 392 U.S. 1, 22-24, 29 (1968) (without probable cause, police officer can "pat down" suspect for weapons); Warden v. Hayden, 387 U.S. 294, 298-300 (1967) (police may search premises and search for weapons if their lives or the lives of others are endangered).

78. *See* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (police in "hot pursuit" of suspect not required to obtain warrant); Carroll v. United States, 267 U.S. 132, 153 (1925) (not necessary to obtain search warrant for movable vehicle).

79. In *McGuire,* the defendant Lutz was not at home when the police received his wife's permission to search his home. 111 Ariz. at 437, 532 P.2d at 157.

80. The defendant in *Matlock* was arrested on the front lawn of his residence and taken a short distance away. The arresting officers returned to the house and obtained the permission of the defendant's paramour to search the premises. 415 U.S. at 166-67.

sede the defendant's fourth amendment protections when he is on the premises and actively objects to the search, or has previously informed the police that he does not want the premises to be searched.[81] The fourth amendment protections afforded the defendant when he is present, however, are withdrawn under *McGuire* when he is absent. Consequently, where the police lack probable cause for a search warrant, or merely fail to obtain one, they are allowed to conduct a more intrusive search of the suspect's property than if they were required to first request a search warrant from a judicial officer; they are not bound by a search warrant's admonition to search only specific places for specific items.[82] In order to stem possible abuses, the validity of a search, even that made pursuant to third-party consent, should be determined according to whether or not the police officers had sufficient time in which to obtain a search warrant.[83] Such a ruling would encourage the police to obtain search warrants, and the judicial scrutiny of police action would augment the protections of the fourth amendment.

Conclusion

In *McGuire*, the Arizona supreme court overruled well-reasoned precedent and upheld the validity of a search based on spousal consent. In so doing, the court has subrogated the defendant's privacy rights to the property rights of the consenting spouse and the interests of the

81. In Lawton v. State, 320 So. 2d 463 (Fla. Ct. App. 1975), the estranged wife of the defendant consented to a search of the couple's apartment. The court held this search to be unreasonable, stating:

> Assuming . . . Mrs. Lawton . . . had sufficient control over the premises as to authorize her consent to a search, we believe that the search cannot stand because *appellant was physically present on the premises* and *affirmatively objected to the search*. . . .
>
> . . . [S]uch a rule is more likely to promote peace and tranquility. When one of two joint occupants consents to a search while the other is actively objecting, the possibility of an untoward confrontation cannot be overlooked. Under these circumstances . . . the consent of a single joint occupant is not enough.

Id. at 464-65 (emphasis in original). *See* Lucero v. Donovan, 354 F.2d 16, 21 (9th Cir. 1965) (brother could not consent to search of sister's apartment over her express protests and demand for search warrant); Tompkins v. Superior Court, 59 Cal. 2d 65, 69, 378 P.2d 113, 116, 27 Cal. Rptr. 889, 892 (1963) (one joint occupant absent from premises may not consent to search of premises over objection of another joint tenant who is present at time of search); People v. Mortimer, 46 App. Div. 2d 275, 277, 361 N.Y.S.2d 955, 956 (1974) (search declared unreasonable where defendant refused consent, but search was conducted pursuant to permission of defendant's parents). *Contra*, Vandenberg v. Superior Court, 8 Cal. App. 3d 1048, 87 Cal. Rptr. 876 (1970) (court found defendant's father still exercised control over him and could permit search despite son's objection).

82. *See* United States v. Matlock, 415 U.S. 164, 187-88 (1974) (Douglas, J., dissenting); Trupiano v. United States, 334 U.S. 699, 706-07 (1948); Johnson v. United States, 333 U.S. 10, 13-15 (1948).

83. Yuma County Attorney v. McGuire, 111 Ariz. at 440, 532 P.2d at 160 (Lockwood, J., dissenting); *id.* at 439, 532 P.2d at 159 (Struckmeyer, J., dissenting).

state. The court should reconsider its position and reconcile consent searches with the rationale behind the traditional exceptions to the warrant requirement. Furthermore, the court should give effect to the social policy established in Arizona of protecting and maintaining the marital relationship, distinguishing between spousal and other third-party consents.

C. REASONABLE SUSPICION, INVESTIGATORY STOPS, AND THE USE OF PROFILES

The fourth amendment to the United States Constitution requires probable cause to effectuate a lawful search or seizure.[1] The United States Supreme Court has recognized, however, that certain investigatory stops by police do not necessarily rise to the level of searches and seizures demanding probable cause.[2] Rather than avoid the fourth amendment issue or weaken the standards for probable cause in these situations, the Court has created a lesser standard of reasonableness for these investigatory stops—that of reasonable suspicion.[3] In *State v. Ochoa*,[4] the Arizona supreme court was faced with two difficult fourth amendment issues relating to the reasonable suspicion standard. The first question to be answered was whether the protection against unreasonable searches and seizures, provided by the Arizona[5] and United States constitutions,[6] applies to purely regulatory police stops made for

1. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 269-70 (1973), *discussed in* Note, *Almeida-Sanchez and Its Progeny: The Developing Border Zone Search Law*, 17 ARIZ. L. REV. 214 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 463-64, 479 (1971); Chambers v. Maroney, 399 U.S. 42, 47-51 (1970); McDonald v. United States, 335 U.S. 451, 453-56 (1948); Carroll v. United States, 267 U.S. 132, 155-56, 161-62 (1925).

2. *See, e.g.*, United States v. Martinez-Fuerte, 96 S. Ct. 3078, 3084 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975); Adams v. Williams, 407 U.S. 143, 145-56 (1972); Terry v. Ohio, 392 U.S. 1, 20-21 (1968).

3. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 881-84 (1975); Terry v. Ohio, 392 U.S. 1, 27 (1968). *But see* United States v. Martinez-Fuerte, 96 S. Ct. 3074, 3084 (1976). While most courts rely on the familiar reasonable suspicion designation, the Ninth Circuit often uses the term "founded suspicion" when referring to its investigatory stop standard. *See* United States v. Ojeda-Rodriquez, 502 F.2d 560, 561 (9th Cir. 1974); United States v. Bugarin-Casas, 484 F.2d 853, 854-55 (9th Cir. 1973); Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966). The two labels, however, appear to have no meaningful distinction, and reasonable suspicion will be used in this casenote. *See generally* Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U. SAN FRANCISCO L. REV. 219 (1974-75).

4. 112 Ariz. 582, 544 P.2d 1097 (1976).

5. ARIZ. CONST. art. 2, § 8.

6. U.S. CONST. amend. IV.

the purpose of checking drivers' licenses and motor vehicle registrations.[7] Once this was determined in the affirmative, the court had to decide whether a police prepared profile, consisting of stolen vehicle and driver characteristics, may be used to provide police with the requisite reasonable suspicion to justify vehicle stops.[8]

Early on the morning of July 27, 1974, while heading south from Tucson towards Nogales, Arizona, Raymond Ochoa was stopped in a 1973 Ford pickup truck by an Arizona highway patrolman.[9] Ochoa was stopped because he and the vehicle he was driving fit a stolen motor vehicle profile[10] developed in 1974 by Arizona law enforcement agencies in an attempt to stem the large flow of stolen vehicles into Mexico.[11] The profile vehicles were 1972 through 1974 Ford, Chevrolet, GMC, and Dodge pickup trucks, and 1972 through 1974 Ford and Chevrolet sedans.[12] The profile driver, usually alone, would be between 17 and 27 years of age.[13] If there were passengers in the vehicle, according to the profile, they would not be children.[14] In addition, the vehicle would have no visible luggage, and would have either Maricopa or Pima county license plates.[15]

After approaching the vehicle driven by Ochoa, a sheriff's detective noticed that the suspect turned off the truck's engine by manipulat-

7. 112 Ariz. at 584, 544 P.2d at 1099.

8. *Id.* at 585, 544 P.2d at 1100. The court did not discuss the usual probable cause requirement of the fourth amendment, but simply stated that both the federal and Arizona constitutions require reasonable suspicion of criminal activity in this type of case. *Id.* at 584, 544 P.2d at 1099. In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the United States Supreme Court held that reasonable suspicion was the proper standard for stopping a car where a roving patrol was checking for illegal aliens. *Id.* at 881-84. Justice Douglas, in a concurring opinion, felt that the rationale of Terry v. Ohio, 392 U.S. 1 (1968), was being expanded to an unallowable degree, and that probable cause was the proper standard. 422 U.S. at 888-90.

9. 112 Ariz. at 583, 544 P.2d at 1098.

10. *Id.* A stolen motor vehicle task force, consisting of members of the Tucson and Phoenix police departments, the Federal Bureau of Investigation, the Arizona Department of Public Safety, and the Pima County Sheriff's office, was put into operation on June 15, 1974. *Id.* at 585-86, 544 P.2d at 1100-01. A spotter selects the cars to be stopped in accordance with the profile characteristics and contacts officers operating a marked unit, instructing them to stop the vehicles selected. *Id.* at 586, 544 P.2d at 1101. The officer making the stop then asks the driver to produce a license and proof of registration. *Id.* If the identification on both items do not match, a radio check is made to determine if the car is stolen. If the registration and license papers are satisfactory, or if it is believed that the car is borrowed, the driver is allowed to proceed. *See* Transcript of Suppression Hearing, Nov. 18, 1974, at 71, State v. Ochoa, 112 Ariz. 582, 544 P.2d 1097 (1976).

11. 112 Ariz. at 585, 544 P.2d at 1100. The profile was developed at a meeting in Phoenix on May 15, 1974. Approximately 40 persons attended, representing the United States attorney's office, the county attorneys' offices of Maricopa, Pima, and Santa Cruz counties, the Federal Bureau of Investigation, and the Phoenix, Tucson, and Yuma police departments. *Id.* Indicative of the severity of the automobile theft problem this project was intended to combat is that during one 6 month period, automobiles worth $500,000 were stolen in Tucson, 95 percent of which were believed to be transported to Mexico. *See* Transcript of Suppression Hearing, Nov. 18, 1974, at 62.

12. *See* 112 Ariz. at 585-86, 544 P.2d at 1100-01.

13. *Id.* at 586, 544 P.2d at 1101.

14. *Id.*

15. *Id.*

ing a second ignition switch under the dashboard.[16] The detective asked Ochoa where he had gotten the truck.[17] After Ochoa replied that he had stolen the truck in Tucson, he was arrested and subsequently indicted for theft of a motor vehicle.[18]

At trial, the defendant made a motion to suppress evidence based on the initial impropriety of the stop.[19] The motion was granted on the ground that there had been a fourth amendment violation,[20] as no reasonable suspicion existed to justify the stop.[21] The Arizona court of appeals affirmed the trial court, agreeing that the profile did not provide the necessary reasonable suspicion to overcome fourth amendment objections.[22] The court felt the profile was deficient in four areas. The first three shortcomings announced by the court were based on the overbroad nature of the profile,[23] its lack of statistical support,[24] and the excessive discretion afforded police to make investigatory stops.[25] The court also objected to the profile's description of cars to be stopped: The automobiles listed were not necessarily among those most likely to be stolen, but rather represented those that, once stolen, would most probably be transported to Mexico.[26]

The court of appeals' decision in *Ochoa* was reversed by the Arizona supreme court.[27] In resolving the fourth amendment—regulatory stop issue, the supreme court followed *Terry v. Ohio*,[28] in upholding the court of appeals' determination that routine, regulatory license and registration checks fall within the fourth amendment's protection.[29] The court recognized that travelers on the highways must be protected from unnecessary intrusions by governmental agents.[30] The supreme

16. The second ignition switch was in the officer's plain view when he approached defendant's automobile. *Id.* at 583, 544 P.2d at 1098. If the stop was justified, the second ignition in plain view would supply probable cause for the officer to arrest the suspect or conduct a search of his car. *See* Harris v. United States, 390 U.S. 234, 236 (1968).

17. 112 Ariz. at 583, 544 P.2d at 1098.

18. *Id.*; *see* ARIZ. REV. STAT. ANN. § 13-672 (Supp. 1976-77).

19. The motion was made to suppress use of his confession and the evidence of the stolen automobile, upon the theory that a lack of probable cause at the time of the initial stop contaminated everything that followed. *See* 112 Ariz. at 583, 544 P.2d at 1098. *See also* Wong Sun v. United States, 371 U.S. 471, 484-87 (1963).

20. *See* 23 Ariz. App. at 511, 534 P.2d at 442.

21. *Id.*

22. *Id.* at 514, 534 P.2d at 445.

23. *Id.* at 515, 534 P.2d at 446.

24. *Id.* at 514-15, 534 P.2d at 445-46.

25. *Id.* at 515, 534 P.2d at 446.

26. *Id.* at 514, 534 P.2d at 445.

27. 112 Ariz. 582, 583, 544 P.2d 1097, 1098 (1976).

28. 392 U.S. 1 (1968); *see* text & notes 36-40 *infra*.

29. *See* 112 Ariz. at 584, 544 P.2d at 1099. The Arizona supreme court, quoting *Terry*, held that "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry v. Ohio, 392 U.S. 1, 16 (1968), *quoted in* State v. Ochoa, 112 Ariz. 582, 584, 544 P.2d 1097, 1099 (1976). See text & notes 36-40 *infra*.

30. See 112 Ariz. at 584, 544 P.2d at 1099. The court held that in addition to vio-

court, however, reversed the court of appeals on the profile issue,[31] holding that the stolen vehicle profile did provide a basis for reasonable suspicion justifying the stop.[32]

This casenote will discuss the state of the law relating to the fourth amendment and investigatory stops, especially random regulatory automobile license and registration checks. In addition, the use of profiles by police to establish reasonable suspicion will be examined. The profile used in *Ochoa* will then be analyzed in terms of fourth amendment protections. For this purpose, the *Ochoa* profile will be compared with the profile used and approved for airport searches.[33] Finally, suggestions will be made as to how such profiles can be compiled consistently with fourth amendment guarantees against unreasonable searches and seizures.

Investigatory Stops and the Fourth Amendment

The fourth amendment of the United States Constitution protects people from unreasonable searches and seizures by the government.[34] Nevertheless, because of their limited nature, some intrusions have been upheld upon less than probable cause.[35] In *Terry v. Ohio*,[36] for example, the United States Supreme Court approved a limited warrantless search—a pat-down or frisk for weapons—in order to protect officers from persons they reasonably believe to be armed and dangerous.[37] In order for such investigatory stops and frisks to be valid, however, the police officer must be able to point to specific and articulable

lating the fourth amendment's reasonableness standard, stops based on less than reasonable suspicion are prohibited by the Arizona constitution. 112 Ariz. at 584, 544 P.2d at 1099; *see* ARIZ. CONST. art. 2, § 8. Protection is thus assured under both constitutions. Hence, if the United States Supreme Court finds regulatory automobile stops unprotected by the fourth amendment, motorists in Arizona will still enjoy the protection afforded by the Arizona constitution.

31. *See* 112 Ariz. at 586, 544 P.2d at 1101.

32. *Id.* The Arizona supreme court felt that State v. Becerra, 111 Ariz. 538, 541, 534 P.2d 743, 746 (1975), supported the finding that compliance with a profile does constitute reasonable suspicion, or perhaps even probable cause, for a police stop and search. *See* 112 Ariz. at 585, 544 P.2d at 1100. In *Becerra*, however, the court was merely characterizing the officer's personal observations as being equivalent to a profile; the officer was not actually using a profile. *See* State v. Becerra, *supra* at 540-41, 534 P.2d at 745-46. In addition, the court felt the *Ochoa* profile stop satisfied the reasonable suspicion test laid down in Terry v. Ohio, 392 U.S. 1 (1968). *See* 112 Ariz. at 586, 544 P.2d at 1101. In *Terry*, the Supreme Court demanded that a stop, to be valid, be supported by specific and articulable facts which enable the police officer to form a reasonable belief as to the existence of criminal activity. 392 U.S. at 21.

33. *See* United States v. Lopez, 328 F. Supp. 1077, 1086-87, 1097 (E.D.N.Y. 1971). *See generally* Andrews, *Screening Travelers at the Airport to Prevent Hijacking: A New Challenge for the Unconstitutional Conditions Doctrine*, 16 ARIZ. L. REV. 657 (1974).

34. U.S. CONST. amend. IV. *See* cases cited note 1 *supra*.

35. *See, e.g.*, United States v. Martinez-Fuerte, 96 S. Ct. 3074, 3084 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975); Adams v. Williams, 407 U.S. 143, 146 (1972); Terry v. Ohio, 392 U.S. 1, 30-31 (1968).

36. 392 U.S. 1 (1968).

37. *Id.* at 30-31.

facts reasonably warranting a belief that his safety or that of others was in jeopardy.[38] The Court held in *Terry* that any determination of the legality of a search or seizure must necessarily take into account its unique circumstances, since the fourth amendment forbids only those which are unreasonable.[39] On the other hand, the Court expressly rejected any notion that such stops were outside the fourth amendment's protections.[40] Instead, in an attempt to focus upon the state's interest in crime prevention,[41] a lesser standard than probable cause was made applicable to investigatory stops.[42] In *Adams v. Williams*,[43] the Supreme Court elaborated on the lower standard recognized in *Terry*, holding that a brief investigatory stop and protective search of an individual is not prohibited by the fourth amendment where the officer has reasonable cause to believe the suspect is armed and dangerous.[44] Finally, in *United States v. Brignoni-Ponce*,[45] the Court formally adopted the reasonable suspicion standard.[46]

The reasonable suspicion standard[47] governing investigatory stops, developed in *Terry*, *Adams*, and *Brignoni-Ponce*, has been widely employed by state and federal courts, particularly in the area of automobile stops.[48] There are still some courts, however, that allow police officers unlimited discretion to stop cars to check drivers' licenses and automobile registrations despite a lack of reasonable suspicion.[49] Some

38. *Id.* at 21-22. In demanding specific and articulable facts to legalize police intrusions, the Supreme Court stated that "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 21 n.18.

39. *Id.* at 9. The Court in *Terry* found that to determine the reasonableness of the stop, it is necessary to balance the governmental interest which arguably justifies the intrusion against the constitutionally protected interests of the private citizen. *Id.* at 20-21. See text & notes 64-68 *infra*.

40. 392 U.S. at 16.

41. *Id.* at 22-24.

42. *Id.* at 27.

43. 407 U.S. 143 (1972).

44. *See id.* at 146-47. The Court held that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 146. In addition, it was noted that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Id.* at 145.

45. 422 U.S. 873 (1975).

46. *Id.* at 881-84. *See* discussion notes 69-70 *infra*.

47. For a discussion of the development of the reasonable suspicion standard, see Note, *supra* note 1, at 224-31.

48. *See, e.g.*, United States v. Fallon, 457 F.2d 15, 18 (10th Cir. 1972); United States v. Turner, 442 F.2d 1146, 1148 (8th Cir. 1971); Young v. United States, 435 F.2d 405, 408 (D.C. Cir. 1970); Martinez v. People, 169 Colo. 366, 368-69, 456 P.2d 275, 277 (1969); Anderson v. State, 123 Ga. App. 57, 60-61, 179 S.E.2d 286, 288-89 (1970); People v. Tassone, 41 Ill. 2d 7, 10-11, 241 N.E.2d 419, 421 (1968), *cert. denied*, 394 U.S. 965 (1969). *See also* Note, *Automobile Spot Checks and the Fourth Amendment*, 6 RUTGERS CAMDEN L.J. 85 (1974).

49. *See, e.g.*, United States v. Turner, 442 F.2d 1146, 1147-48 (8th Cir. 1971); United States v. Berry, 369 F.2d 386, 387 (3d Cir. 1966); City of Miami v. Aronovitz,

of these courts uphold such regulatory stops as authorized by motor vehicle statutes,[50] while others do so on the theory that driving is a privilege which can be regulated by states, even through indiscriminate stops by authorized officials.[51]

In Arizona, both divisions of the court of appeals, prior to the supreme court's decision in *Ochoa*, had considered the effect of the fourth amendment in automobile stop situations, arriving at contrary conclusions. In 1973, division one held that license-check stops are permitted under Arizona motor vehicle statutes,[52] and are therefore reasonable.[53] Division two, however, expressly rejected this rationale in *State v. Ochoa*,[54] instead demanding that there be reasonable suspicion of criminal activity before such stops are made. In *Ochoa*, the Arizona supreme court resolved this split, holding that the fourth amendment is applicable to regulatory stops,[55] and that reasonable suspicion is the requisite standard.[56] The supreme court stated that Arizona motor vehicle statutes do not authorize the stopping of travelers upon public highways to ascertain whether they have committed a crime.[57] The

114 So. 2d 784, 787 (Fla. 1959); Commonwealth v. Mitchell, 355 S.W.2d 686, 688 (Ky. Ct. App. 1962).

50. *See, e.g.*, United States v. Turner, 442 F.2d 1146, 1147-48 (8th Cir. 1971); United States v. Berry, 369 F.2d 386, 387 (3d Cir. 1966); Rogers v. United States, 362 F.2d 358, 361 (8th Cir.), *cert. denied*, 385 U.S. 993 (1966).

51. *See, e.g.*, City of Miami v. Aronovitz, 114 So. 2d 784, 787 (Fla. 1959); Commonwealth v. Mitchell, 355 S.W.2d 686, 688 (Ky. Ct. App. 1962); Morgan v. Town of Heidelberg, 246 Miss. 481, 487, 150 So. 2d 512, 514 (1963). Some jurisdictions draw a distinction, for purposes of determining the legality of the stop, between a stop made pursuant to a criminal investigation and one made merely to enforce licensing statutes. *See, e.g.*, People v. Andrews, 173 Colo. 510, 513-14, 484 P.2d 1207, 1209 (1971); State v. Smolen, 4 Conn. Cir. Ct. 385, 392, 232 A.2d 339, 344 (1967); Palmore v. United States, 290 A.2d 573, 582-83 (D.C. Ct. App. 1972), *aff'd on other grounds*, 411 U.S. 389 (1973). *See generally* Note, *Automobile License Checks and the Fourth Amendment*, 60 VA. L. REV. 666 (1974).

52. State v. Ream, 19 Ariz. App. 131, 133-34, 505 P.2d 569, 571-72 (1973). In Arizona, an automobile registration card must at all times be carried in plain sight within the driver's compartment, subject to inspection by the state motor vehicle superintendent, his authorized agent, any peace officer, or member of the highway patrol. ARIZ. REV. STAT. ANN. § 28-305(D) (Supp. Pamphlet 1973). Anyone operating an automobile must have his driver's license in his immediate possession, and must produce it upon request by a police officer. *See id.* § 28-423 (1956).

53. *See* State v. Ream, 19 Ariz. App. 131, 133-34, 505 P.2d 569, 571-72 (1973). The court stated that operating a car on a highway is sufficient reason for police to stop the car to see if it is lawfully registered and the driver licensed. The court quoted with approval the state's contention that: "The test is one of balancing the interests and needs of the state in its monumental task of regulating the highway and motor vehicles against the fleeting and minimal inconvenience suffered by motorists during the strictly limited stops." *Id.* at 133, 505 P.2d at 571. The court held that even though the facts did not show any reasonable suspicion of criminal activity under *Terry*, the stop was nonetheless valid because it was not unreasonable. *Id.* at 133-34, 505 P.2d at 571-72.

54. *See* 23 Ariz. App. 510, 513-14, 534 P.2d 441, 444-45 (1975), *rev'd*, 112 Ariz. 584, 544 P.2d 1097 (1976).

55. *See* 112 Ariz. at 584, 544 P.2d at 1099.

56. *Id. But cf.* State v. Gutierrez, 27 Ariz. App. 226, 553 P.2d 1211 (1976).

57. 112 Ariz. at 584, 544 P.2d at 1099. The court distinguished between stops made to investigate crimes known to have been committed, and stops made for the purpose of discovering crime in the first instance. *Id.* In so doing, the court seeks to ensure that police will not effectuate stops for the purpose of demanding proof that no crime is being committed. *See also* State v. Gutierrez, 27 Ariz. App. 226, 227, 553 P.2d 1211, 1212 (1976).

court thus had no need to reach the issue, which was settled years before,[58] of whether driving on a state roadway is a right or a privilege.[59] In *Schecter v. Killingsworth*,[60] the court expressly rejected the argument that driving in Arizona is a privilege, finding that the use of public highways is a right, subject only to reasonable state regulation.[61] In *Ochoa*, the court recognized that driving upon a public highway is a private matter, constitutionally protected from government harassment.[62] The supreme court has made it clear in *Ochoa* that Arizona law requires at least reasonable suspicion of criminal activity before governmental agents may stop travelers on the highways for investigatory or regulatory purposes.[63]

Reasonable Suspicion and the Use of Profiles

In *Terry v. Ohio*,[64] the Supreme Court held that in order for an

58. *See* Schecter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136 (1963).

59. For examples of courts which have followed the privilege argument, see City of Miami v. Aronovitz, 114 So. 2d 784, 787 (Fla. 1959); Commonwealth v. Mitchell, 35 S.W.2d 686, 688 (Ky. Ct. App. 1962); Morgan v. Town of Heidelberg, 246 Miss. 481, 487, 150 So. 2d 512, 514 (1963). The Supreme Court has rejected the theory that actions classified as privileges may be regulated to a greater extent than those classified as rights. *See, e.g.*, Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Sherbert v. Verner, 374 U.S. 398, 404-05 (1963).

60. 93 Ariz. 273, 380 P.2d 136 (1963). The court in *Schecter* dealt with the driver's license suspension provision of the Arizona Financial Responsibility Act. ARIZ. REV. STAT. ANN. § 28-1142 (1956), *as amended*, ARIZ. REV. STAT. ANN. § 28-1142 (Supp. 1976-77). The statute was upheld over equal protection and due process objections. 93 Ariz. at 283-86, 380 P.2d at 143-45.

61. 93 Ariz. at 279-80, 380 P.2d at 140. The privilege argument was thus effectively foreclosed prior to *Ochoa*. In addition, the language in *Ochoa* seems to implicitly reaffirm *Schecter*. *See* 112 Ariz. at 584, 544 P.2d at 1099.

62. *See* 112 Ariz. at 584, 544 P.2d at 1099.

63. In *Ochoa*, the Arizona supreme court held that the motor vehicle statutes do not permit police officers to randomly stop automobiles to conduct routine license checks. *Id.* at 585, 544 P.2d at 1100. *But cf.* State v. Gutierrez, 27 Ariz. App. 226, 553 P.2d 1211 (1976). In contrast, the Ninth Circuit requires reasonable suspicion in a criminal context identical to *Ochoa*, United States v. Carrizoza-Gaxiola, 523 F.2d 239 (9th Cir. 1975), but sets no such requirement for purely regulatory license checks. *See* United States v. Bowen, 500 F.2d 960, 964-65 (9th Cir. 1974), *aff'd on other grounds*, 422 U.S. 916 (1975). It is therefore noteworthy that *Ochoa* was based on both the United States and Arizona constitutions. 112 Ariz. at 584, 544 P.2d at 1099; see discussion note 30 *supra*. In Arizona, it appears that all police stops will require at least reasonable suspicion to satisfy the state constitution, regardless of the requirements of the fourth amendment. Justice Hays, specially concurring in *Ochoa*, felt that the court's holding, applying a reasonable suspicion requirement to all stops, was too broad and should have been limited to criminal investigations. 112 Ariz. at 586-87, 544 P.2d at 1101-02. In State v. Gutierrez, 27 Ariz. App. 226, 553 P.2d 1211 (1976), a police officer stopped the defendant's car to make a license check. The stop was made because the officer had stopped the defendant a few weeks earlier after observing suspicious behavior, at which time the defendant did not have a driver's license in his possession. *Id.* at 226, 553 P.2d at 1211. The court of appeals upheld the stop, stating that the supreme court in *Ochoa* did not intend to limit or inhibit the legitimate enforcement of license and registration statutes. The court reasoned that *Ochoa* was aimed at preventing pretext stops to effectuate arrests for more serious acts. *Id.* at 227, 553 P.2d at 1212. The opinion thus suggests, as did Justice Hays in his concurrence in *Ochoa*, that a different standard may evolve for stops solely to enforce licensing and registration statutes.

64. 392 U.S. 1 (1968).

investigatory stop and frisk to be valid, the detaining officer must be able to point to specific and articulable facts which, in light of his training and experience, indicate that criminal activity may be afoot.[65] Once these objective facts have been established, the probability that they indicate criminal activity is determined.[66] The court must then decide whether this probability justifies the intrusion, considering the competing interests of the individual and the government.[67] The test for determining reasonableness involves balancing the need to stop against the intrusion which the stop entails.[68]

Until recently, no guidelines were available as to what objective facts would be sufficient to support a reasonable suspicion automobile stop.[69] In *United States v. Brignoni-Ponce*,[70] however, the Supreme Court articulated several factors to be considered.[71] These factors include: Characteristics of the search area, the driver's behavior, characteristics of the vehicle, and the mode and dress of the passengers.[72] In addition, the officer's own experience and training is deemed valuable and relevant in determining whether reasonable suspicion existed to make the stop.[73] To determine if the *Ochoa* profile is constitutionally permissible, it is necessary to assimilate the objective facts available

65. *Id.* at 21.

66. *See* United States v. Lopez, 328 F. Supp. 1077, 1097 (E.D.N.Y. 1971); *cf.* Terry v. Ohio, 392 U.S. at 21-22.

67. *See* Terry v. Ohio, 392 U.S. at 20-21; United States v. Lopez, 328 F. Supp. 1077, 1097 (E.D.N.Y. 1971). In *Lopez*, the court reasoned that implied in the term reasonable suspicion is a "continuum of probability" of criminal activity. *Id.* at 1094. The various degrees of probability and the type of criminal activity suspected would justify different types of intrusions. As an example, the court theorized that a customs search for contraband might require a 33 percent probability, although the same type of search, to locate a bomb being taken aboard an aircraft, would be justified with a mere 5 percent probability. *Id.* at 1095.

68. *See* Terry v. Ohio, 392 U.S. at 20-21; Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967). This final step would require the court to balance the interest of the government in making the intrusion against the resentment encountered by the individuals affected. United States v. Lopez, 328 F. Supp. 1077, 1097 (E.D.N.Y. 1971).

69. Although the Supreme Court had not specifically approved application of the reasonable suspicion standard to automobile stops prior to 1975, this procedural test was commonly used by lower federal courts. *See, e.g.*, United States v. Laird, 511 F.2d 1039, 1039 (9th Cir. 1975); United States v. McDevitt, 508 F.2d 8, 11 (10th Cir. 1974); United States v. Wright, 476 F.2d 1027, 1030 (5th Cir. 1973); United States v. Fallon, 457 F.2d 15, 18 (10th Cir. 1972). *See also* text & note 48 *supra.*

70. 422 U.S. 873 (1975). In *Brignoni-Ponce*, the Court expanded the *Terry* reasonable suspicion standard to cover investigatory stops involving nonborder checks for illegal aliens. *Id.* at 884. This holding indicates that the reasonable suspicion standard is no longer applicable solely to situations where danger to a police officer is present. *Compare id., with* Terry v. Ohio, 392 U.S. 1, 24 (1968).

71. The factors listed in *Brignoni-Ponce* are especially relevant to the *Ochoa* situation for several reasons. First, the cases involved similar investigatory stops. Second, in both cases the initial intrusion was modest, usually taking no more than a minute; all that was required was an answer to a few questions and, at most, presentation of specified documents. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975); Transcript of Suppression Hearing, Nov. 18, 1974, at 70-71.

72. *See* 422 U.S. at 884-85.

73. *Id.* at 885. See discussion note 32 *supra.*

to the officer applying the profile, and to determine the probability that these facts indicate criminal activity.[74] In the usual stop situation, the objective facts are based on the personal observations of the stopping officer. In *Ochoa*, on the other hand, the objective facts are derived from a list of profile characteristics[75] offered as blanket proof of reasonable suspicion.[76]

The question whether the *Ochoa* profile is designed to supply the requisite reasonable suspicion was raised by a recent federal case—*United States v. Carrizoza-Gaxiola.*[77] In *Carrizoza-Gaxiola*, the Ninth Circuit dealt with facts identical to *Ochoa*. Stopped while driving a stolen late-model Ford LTD,[78] the defendant was charged with transporting a stolen vehicle in foreign commerce.[79] The stop occurred on the same highway, during the same time period, and was carried out by the same multiagency task force, using the same profile, as that in *Ochoa*.[80] The federal court, however, held that the profile did not supply the arresting officer with reasonable suspicion.[81] Driving a certain model of car toward the Mexican border was found to be neither incriminating nor unusual.[82] In essence, the Ninth Circuit could find no means by which specific facts indicating criminal activity would be made available to the stopping officer through the use of a profile.[83]

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74. *See* text & notes 64-66 *supra.*

75. The profile used in *Ochoa* consisted of two categories of characteristics. *See* text & notes 10-15 *supra.* The first set of criteria was based on the likelihood that a particular car, if stolen, was being transported to Mexico. *See* State v. Ochoa, 23 Ariz. App. 510, 514, 534 P.2d 441, 445 (1975), *rev'd*, 112 Ariz. 584, 544 P.2d 1097 (1976). The criteria used for this purpose were the year and type of vehicle, and the age of the driver. *See* 112 Ariz. at 585-86, 544 P.2d at 1100-01; 23 Ariz. App. at 514, 534 P.2d at 445. A second group of factors were used with the intent of avoiding harassment of obvious tourists. *See* 23 Ariz. App. at 514, 534 P.2d at 445. These criteria included the requirement that only vehicles with Pima or Maricopa County license plates were to be stopped, and that any cars with visible luggage or children were not to be stopped. *See* 112 Ariz. at 585-86, 544 P.2d at 1100-01; 23 Ariz. App. at 514, 534 P.2d at 445.

76. *See* 112 Ariz. at 585, 544 P.2d at 1100. It is not clear in either *Terry* or *Brignoni-Ponce* whether reasonable suspicion must be tied to the suspicious behavior of a particular individual, or may be determined from a list of general profile characteristics.

77. 523 F.2d 239 (9th Cir. 1975).

78. *Id.* at 240.

79. *Id.; see* 18 U.S.C. § 2312 (1970).

80. *Compare* United States v. Carrizoza-Gaxiola, 523 F.2d 239, 240-41 (9th Cir. 1975), *with* State v. Ochoa, 112 Ariz. at 585-86, 544 P.2d at 1100-01.

81. *See* 523 F.2d at 241. The court stated that reasonable suspicion requires particularized suspicion of criminal activity to single out the person stopped. *Id.*

82. *Id.*

83. In *Carrizoza-Gaxiola*, the police officials appeared to use more independent discretion than in *Ochoa*, see text & notes 111-13 *infra*, which seems to be the lone fact distinguishing the two cases. This is not to say that police exercised no discretion in *Ochoa*. See text & notes 108-13 *infra*. The federal court's decision, however, was not based on the police discretion, but rather on the inadequacy of the profile itself. Carrizoza-Gaxiola, 523 F.2d 239, 240-41 (9th Cir. 1975). *Compare id., with* United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971). In *Lopez*, although an airport hijacking profile was upheld, *id.* at 1086-87, 1097, use of independent police discretion resulted in the defendant's conviction being reversed. *Id.* at 1101-02.

Validity of the Ochoa Profile

To assess the persuasiveness of the *Carrizoza-Gaxiola* precedent, and to determine if the *Ochoa* profile provides the stopping officer with sufficient objective facts to constitute reasonable suspicion,[84] several factors must be considered. First, the success rate of the stops must be compared to the number of intrusions.[85] In addition, the profile itself must be examined to ensure that it is relatively narrow, as broad profiles tend to furnish poor statistical probability of criminal activity.[86] To assist in this determination, the *Ochoa* profile may be compared with the profile used in airport searches.[87] The airport profile, in use since the early seventies,[88] is aimed at preventing skyjacking attempts.[89] If a prospective airline passenger fits the profile characteristics, he is asked for identification.[90] If satisfactory identification is not provided, the suspect is then asked to consent to a search.[91] If he refuses, he will not be permitted to board the aircraft.[92] If he consents, unless contraband or a weapon is found as a result of the search, he is allowed to board the airplane.[93] The airport profile was carefully drawn to minimize intrusiveness, and to eliminate possible abuses of discretion in its application.[94] The characteristics composing the profile were narrowly fashioned to ensure that the number of stops would be minimal—of 500,000 people sampled, only 0.28 percent fit the profile.[95] No statistics are available, however, as to the potential intrusiveness of the *Ochoa* profile. No statistics were compiled, for example, showing how many cars in Arizona would fit the profile.[96] No information was

84. *See* text & notes 38, 64-66 *supra.*

85. A favorable success rate would increase the probability that the criteria observed indicates criminal activity. With a high probability of criminal activity, the likelihood that the profile will withstand constitutional objection increases. *See* text & notes 64-68 *supra.*

86. A low probability of criminal activity would decrease the likelihood that the government's interest in making the stops would outweigh the interest of an individual to avoid such intrusions. *See* text & notes 64-68 *supra. See also* discussion note 85 *supra.*

87. *See, e.g.*, United States v. Doran, 482 F.2d 929 (9th Cir. 1973); United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); Andrews, *supra* note 33 at 712-17.

88. *See* United States v. Lopez, 328 F. Supp. 1077, 1082-85 (E.D.N.Y. 1971). The airport screening system was developed by a 1968 task force including officials of the Federal Aviation Administration, the Department of Justice, and the Department of Commerce. Experts in law, engineering, and psychology were involved in drawing up the airport profile. *Id.* at 1082.

89. *Id.*

90. *Id.* at 1083.

91. *Id.*

92. *Id.*

93. *Id.; see* text & note 120 *infra.*

94. *See* United States v. Lopez, 328 F. Supp. 1077, 1082, 1086 (E.D.N.Y. 1971).

95. *Id.* at 1084. Partially as a result of these favorable statistics, the *Lopez* court upheld the use of the airport profile. *See id.* at 1086-87, 1097. *See also* Andrews, *supra* note 33, at 712-17.

96. *See* 112 Ariz. at 586, 544 P.2d at 1101. The only figure available was the num-

available indicating the number of 17 to 27 year old drivers of profile vehicles traveling to Nogales or in Arizona. In fact, there was no available data as to the number of 17 to 27 year olds registered to drive in the state.[97] In essence, no statistics were available concerning the absolute or relative number of street encounters possible using the *Ochoa* criteria.[98] In addition, no statistics were available concerning the number of stops made or the criminal apprehension rate achieved by the *Ochoa* stops.[99] In view of these gaps, it appears that the *Ochoa* profile lacks a statistical basis upon which to judge the objective facts

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ber of stolen profile vehicles in Phoenix for an 18 month period. Although this figure exhibits the likelihood that a car thief may be driving a profile vehicle, no comparative data was available to display the number of profile vehicles driven by law-abiding persons. *See* Transcript of Suppression Hearing, Nov. 18, 1974, at 31. In addition, it was shown that of the 10,000 automobiles stolen in Phoenix in 1973 and the first 6 months of 1974, only 373, or 3.7 percent, matched the profile. *See* State v. Ochoa, 23 Ariz. App. at 515, 534 P.2d at 446. Thus it may be argued that the profile is weakened in that it is not geared toward stopping vehicles likely to be stolen. Some doubt also exists as to exactly what vehicles are included in the profile. The 1972 to 1974 year span is generally stated to be the correct criteria, but testimony of police officers at Ochoa's suppression hearing revealed that they believed 1970 to 1974 models were to be stopped. *Compare* State v. Ochoa, 112 Ariz. 582, 585-86, 544 P.2d 1097, 1100-01 (1976), *with* State v. Ochoa, *supra* at 515, 534 P.2d at 446. In United States v. Carrizoza-Gaxiola, 523 F.2d 239 (9th Cir. 1975), a case involving the same profile as *Ochoa*, the model-year description used for stopping the vehicles was 1970 to 1974. *See id.* at 240.

97. Although no objective statistic was available, a witness for the state testified that, in his experience, the number of 17 to 27 year old drivers driving to Nogales was very small. *See* Transcript of Suppression Hearing, Nov. 18, 1974, at 47.

98. To obtain either statistic, it would be necessary to know the number of profile cars in Arizona or on the highways where the profile is used. Such statistics, however, were not available. *See* text & notes 96-97 *supra*. The court of appeals in *Ochoa* noted that it is doubtful that the *Ochoa* profile could approach the less than 1 percent selectivity rate of the airport profile. *See* 23 Ariz. App. at 515, 534 P.2d at 446.

The Arizona supreme court upheld the use of the *Ochoa* profile on the basis of several statistics relating only to the Phoenix area. First, 75 percent of the 10,000 automobiles stolen in Phoenix during 1973 and the first 6 months of 1974 were Fords and Chevrolets, 90 percent of which were never recovered. *See* 112 Ariz. at 585, 544 P.2d at 1100. However, since the model-year classification used by the task force narrowed the field so that only 3.7 percent of the 10,000 stolen vehicles fit the profile, *see* discussion note 96 *supra*, it appears that the profile is designed to apply only to a very small percentage of potentially stolen vehicles. Another statistic that the supreme court found persuasive was one reflecting the increase in recovery of stolen profile vehicles after the profile was put into operation. In the first 14 days of June, 1974, before the task force was put into operation, 15.4 percent of stolen profile vehicles were recovered. In the second half of June, when the profile was in use, this figure rose 17.9 percent to 33.3 percent recovery. *See* 112 Ariz. at 586, 544 P.2d at 1101. It should be noted, however, that during this time span the total numerical recovery of stolen vehicles actually dropped, from four to three. *Id.* This discrepancy was due to the fact that 17 less profile vehicles were stolen during the later period. *Id.*

The supreme court noted also that in 3 days in July, 1974, the task force recovered $25,000 worth of stolen vehicles. *Id.* Although this figure would seem to support the state interest in perpetuating the use of the profile, no information has been offered as to how many stops were necessary to achieve this recovery. Any monetary success achieved through the use of the profile should be weighed against the degree of intrusiveness necessary to achieve it. *See* text & notes 39, 67-68 *supra*. In the airport profile, for example, 1 in 15 stops has been successful in preventing individuals from taking firearms aboard an aircraft. *See* United States v. Lopez, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971).

99. *See* Transcript of Suppression Hearing, Nov. 18, 1974, at 72. *See also* text & note 125 *infra*.

available to the officer. Without this basis, it is difficult to disagree with the Ninth Circuit's finding in *Carrizoza-Gaxiola*[100] that fitting the profile does not sufficiently indicate criminal activity.

Another problem raised by use of broad profiles lacking statistical support such as that approved in *Ochoa*, is that they tend to encourage abuse of discretion by governmental officials. In *United States v. Lopez*,[101] the court indicated that the exercise of broad individual judgment by police officers or governmental agents in the use of an airport hijacking profile would raise constitutional problems.[102] In *Lopez*, although the skyjacking profile was upheld,[103] the defendant's conviction was reversed due to the degree of discretion allowed airline officials using the profile.[104] Similarly, in *United States v. Brignoni-Ponce*,[105] the Supreme Court disapproved of nonfixed checkpoint stops by police officers checking for illegal aliens,[106] partly due to the excessive discretion allowed the stopping officers.[107]

In *Ochoa* and *Carrizoza-Gaxiola*, both based on the stolen automobile profile, police appear to have used a great deal of discretion in determining which cars to stop. The task force did not stop "obvious" tourists, even if the car fit the profile characteristics,[108] and conversely, some stops were made for nonprofile reasons.[109] In *Ochoa*, in fact, it appears that the spotter relayed a signal to the marked unit to stop the defendant because "the driver did not appear to fit the vehicle."[110] In *Carrizoza-Gaxiola*, the government conceded that part of the reason

100. 523 F.2d 239, 241 (9th Cir. 1975).
101. 328 F. Supp. 1077 (E.D.N.Y. 1971).
102. *See id.* at 1101.
103. *Id.* at 1086-87, 1097.
104. *Id.* at 1101-02. In the *Ochoa* context, however, both the degree of discretion allowed stopping officers, see text & notes 108-13 *infra*, and the statistical weaknesses of the profile, see text & notes 96-99 *supra*, require a reevaluation of the complete profile.
105. 422 U.S. 873 (1975).
106. *Id.* at 883-84. *But see* United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976), where the Supreme Court approved the use of routine, fixed checkpoint stops to monitor the entrance of illegal aliens into the country without requiring individual reasonable suspicion. *Id.* at 3084. The Court noted, however, that such operations involve less discretionary enforcement activity than roving patrol stops, *id.* at 3083, and that unreasonable exercises of discretion in the location or operation of the checkpoints would be subject to poststop judicial review. *Id.* It is interesting to consider whether, based on *Ochoa*, the Arizona constitution would allow fixed checkpoint stops inside the state upon less than reasonable suspicion. See text & note 30 *supra*.
107. 422 U.S. at 882. The Court stated that to approve roving patrol stops of all vehicles in a border area without any particularized suspicion that a certain vehicle is carrying illegal immigrants would subject the residents of these and other areas to potentially unlimited interference with their use of the highways. *Id.* Finding that the fourth amendment demands more restraints than the broad discretion requested by the government would provide, the Court rejected the contention that Mexican ancestry alone could supply reasonable suspicion. *Id.* at 882-87.
108. *See* Transcript of Suppression Hearing, Nov. 18, 1974, at 45.
109. *See* text & notes 110-13 *infra*.
110. Transcript of Suppression Hearing, Nov. 18, 1974, at 102.

for stopping the particular suspect was that he appeared to be Mexican[111] and the vehicle had Mexican license plates,[112] criteria rejected in the *Ochoa* profile.[113] These cases supply strong evidence that the stolen motor vehicle profile has already been misused by police officers. If the profile is to be used in the future, such abuse of discretion must be curtailed in order to ensure the preexistence of facts constituting reasonable suspicion.

Assuming a vehicle-driver profile could establish specific facts indicating the likelihood of criminal activity, the court must next balance the competing interests involved to properly evaluate the profile.[114] First, the governmental interest in controlling this type of crime is investigated. As noted by the Arizona supreme court, a strong state interest exists in lowering the automobile theft rate.[115] To determine the extent to which this state interest permits stopping profile vehicles, it again would be helpful to compare the motor vehicle stop with the airport stop. The purpose of the airport profile is to prevent possible hijackers from getting aboard airplanes, not necessarily to arrest those suspected of being hijackers.[116] The automobile profile used in *Ochoa*, however, is clearly aimed at apprehending car thieves.[117] The hijacker profile, developed to save lives, commands a higher governmental interest than a stolen motor vehicle profile geared only to stop the flow of contraband out of the country.[118] Since the governmental interest is lower in the *Ochoa* situation, the personal intrusion involved should be correspondingly lower, in order to achieve the overall balance obtained in the airport situation. If this balance is obtained, the automobile profile could properly withstand constitutional attack.[119]

When the intrusion levels of the automobile and airport situations are compared, a reason for treating the two profiles differently emerges

111. 523 F.2d 239, 240 (9th Cir. 1975). All races, except Native Americans, are included on the profile. No specific racial or ethnic basis is to be used to make profile stops. *See* Transcript of Suppression Hearing, Nov. 18, 1974, at 40, 65-66.

112. *See* 523 F.2d at 240.

113. Only cars with Pima or Maricopa County license plates were to be stopped as profile vehicles. 112 Ariz. at 586, 544 P.2d at 1101. The testimony in *Ochoa* indicated that no particular racial or ethnic basis was to be used to make stops. *See* Transcript of Suppression Hearing, Nov. 18, 1974, at 40, 65-66. *See* discussion note 111 *supra*.

114. *See* text & notes 39, 64-68 *supra*.

115. *See* 112 Ariz. at 586, 544 P.2d at 1101. *See also* discussion note 98 *supra*.

116. *See* United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973); United States v. Epperson, 454 F.2d 769, 771 (4th Cir. 1972). *See also* text & note 120 *infra*.

117. *See* 112 Ariz. at 586, 544 P.2d at 1101.

118. In United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971), the court noted that the "overwhelming societal interest" in protecting airline passengers' lives would allow a search upon less probability of criminal activity than a search "merely to stop the flow of contraband out of the country." *Id.* at 1095.

119. Since the *Lopez* profile may not mark the outer limits of the fourth amendment, the *Ochoa* profile may not need to match the *Lopez* standards to be constitutional. In order to ensure constitutional validity, however, the *Lopez* case should be used as a guide to future use of profiles.

as a result of a variation in their application. Whereas an individual stopped on the basis of the hijacker profile has the choice of consenting to the search or turning around and walking away,[120] the driver in the stolen vehicle situation, once stopped, is afforded no choice to turn around and drive away from the border.[121] When this coercive feature is combined with the community resentment that often exists in police-stop situations,[122] it is evident that the automobile profile is arguably more intrusive than the airport profile, and cannot be as broadly justified.

Future Use of the Motor Vehicle Profile

In order to ensure that the use of a stolen motor vehicle profile comports with fourth amendment standards, the balancing test[123] demands a narrowly-drawn profile, minimizing the intrusion on the public. The government should be required to show statistically the narrowness of the intrusion resulting from use of the profile, as well as the reasons for including a particular characteristic in the profile. The data necessary to support or invalidate the *Ochoa* profile characteristics is currently available, but simply has not yet been compiled.[124] More data on which to base future stops would become available if police were required to keep records of their stops and success rates.[125] Also, by adding more criteria to the stolen motor vehicle profile, and hence narrowing its scope, the discretionary element could be drastically reduced: The more detailed the profile, the less opportunity enforcement officials will have to supply their own criteria. Such additional profile criteria, however, is not likely to be added to the profile unless demanded by the courts.

Conclusion

In Arizona, investigatory and regulatory license stops are now protected by the fourth amendment to the United States Constitution and

120. Airline passengers arousing suspicion, whether screened by the profile method, or by handbag and magnetometer checks, are asked to consent to a search. A denial of consent by the passenger only authorizes the officers to refuse entrance to the aircraft. *See, e.g.*, United States v. Moore, 483 F.2d 1361, 1362-64 (9th Cir. 1973); United States v. Davis, 482 F.2d 893, 910-11 (9th Cir. 1973); United States v. Meulener, 351 F. Supp. 1284, 1287 (C.D. Cal. 1972). *Contra*, United States v. Skipwith, 482 F.2d 1272, 1276-77 (5th Cir. 1973). *But cf.* United States v. Homburg, 546 F.2d 1350 (9th Cir. 1976).

121. In *Ochoa*, the supreme court noted that the defendant was not free to turn from the border and leave. *See* 112 Ariz. at 584, 544 P.2d at 1099.

122. *See* Schwartz, *Stop and Frisk (A Case Study on Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433, 452-53 (1967).

123. *See* text & notes 39, 67-68 *supra.*

124. See text & notes 96-99 *supra.*

125. No report was made on the stop in *Ochoa.* The detaining officer testified that the task force was not required to make reports of the profile stops. *See* Transcript of Suppression Hearing, Nov. 18, 1974, at 72, 81.

article 2, section 8 of the Arizona constitution. If a stop is to satisfy these provisions, it must be supported by reasonable suspicion. In *Ochoa*, the Arizona supreme court went one step further, holding that a police prepared profile may be used to supply reasonable suspicion. When properly supervised, profiles may be a useful means of establishing reasonable suspicion to conduct investigatory stops. Safeguards must be provided, however, to prevent abuse of such profiles. The Arizona supreme court, however, gave blanket approval to the *Ochoa* profile, balancing the interests involved without determining whether specific and articulable facts indicating criminal activity were available to the officer—a necessary predicate to the balancing analysis.

If the characteristics listed in a profile are not carefully drawn and statistically supported, police officers will be allowed unrestrained discretion to make investigatory stops. Such discretion often evades judicial review and effectively abrogates the reasonable suspicion standard mandated by the Arizona supreme court. Profiles must therefore be carefully scrutinized to ensure that the characteristics included are properly supported by objective data, and offer enough detail to prevent abuses. Only following this determination should the court balance the competing interests to determine the validity of the particular intrusion.

VIII. EVIDENCE

A. ADMISSIBILITY OF PRIOR UNCHASTITY EVIDENCE IN A RAPE PROSECUTION

Courts historically have applied special rules of evidence to the cross-examination of a complaining witness in a rape prosecution where consent is in issue.[1] Perhaps the most striking example of this tendency is that evidence of prior unchastity has been held admissible both to attack a woman's capacity for truth and veracity,[2] and to prove her willingness to consent to an act of intercourse.[3] The Arizona supreme court once expressed the belief that "common experience teaches us that the woman who has once departed from the paths of virtue is far more apt to consent to another lapse than is the one who has never stepped aside from that path."[4] Recently, however, courts and commentators have questioned these special evidentiary rules, in light of empirical

1. *See generally* Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1973) [hereinafter cited as Comment, *Rape and Rape Laws*]; Note, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L.J. 1551 (1975) [hereinafter cited as Note, *California Rape Evidence Reform*]; Comment, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflections of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403 (1975) [hereinafter cited as Comment, *Limitations on the Right*]; Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1373 (1972); 27 BAYLOR L. REV. 362 (1965); 8 GA. L. REV. 973 (1974).

For example, a jury instruction has sometimes been given to the effect that rape is an easy charge to make, and a difficult one to defend. *See* Slocum v. People, 120 Colo. 86, 92-93, 207 P.2d 970, 973-74 (1949); State v. Elsen, 69 Idaho 50, 57-58, 187 P.2d 976, 979-80 (1947); 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1847). For an argument that this instruction remains valuable, see Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309 (1973). Holding that this instruction constitutes an impermissible comment on the evidence by the judge, contrary to ARIZ. CONST. art. 6, § 27, Arizona recently barred use of this instruction. State v. Settle, 111 Ariz. 394, 396, 531 P.2d 151, 153 (1975).

2. *See* People v. Pantages, 212 Cal. 237, 263, 297 P. 890, 901 (1931); Calhoun v. State, 85 Tex. Crim. 496, 504-05, 214 S.W. 335, 339 (1919).

3. *See, e.g.*, State v. Finley, 85 Ariz. 327, 336, 338 P.2d 790, 796 (1959); People v. Whitfield, 58 Mich. App. 585, 591-92, 228 N.W.2d 475, 478 (1975); State v. Grundler, 251 N.C. 177, 191-92, 111 S.E.2d 1, 11 (1959).

4. State v. Wood, 59 Ariz. 48, 52, 122 P.2d 416, 418 (1942); *see* State v. Kelley, 110 Ariz. 196, 197, 516 P.2d 569, 570 (1973); State v. Martinez, 67 Ariz. 389, 393, 198 P.2d 115, 117 (1948).

data suggesting the unavoidably prejudicial nature of unchastity evidence.[5] In fact, some commentators have concluded that such evidence is irrelevant, the use of which they see as indicative of a societal stereotype of the "loose" woman, perpetuated by a male-dominated system of lawyers, judges, and legislators.[6]

The Arizona supreme court was called upon to reevaluate its former holdings on this issue in *State ex rel. Pope v. Superior Court.*[7] In that case, Joseph Grier, the real-party-in-interest, was charged with one count of kidnapping, three counts of first-degree rape, two counts of sodomy, and two counts of lewd and lascivious conduct.[8] As a defense to the rape charge, Grier claimed the prosecutrix had consented to the sexual intercourse.[9] The county attorney unsuccessfully brought a motion in limine seeking to exclude evidence pertaining to the complaining witness' prior sexual conduct.[10] In a special action brought by the county attorney,[11] the Arizona supreme court overruled precedent[12] and held that evidence of unchastity is inadmissible to impeach the credibility of the prosecutrix in a rape case.[13] Moreover, evidence of prior sexual conduct is now also inadmissible to demonstrate a woman's propensity to consent to intercourse,[14] subject to narrowly defined exceptions.[15]

This casenote will first discuss the general rules on admissibility and use of character evidence. These rules will then be compared to the judicial treatment of character evidence in rape prosecutions where consent is raised as a defense. The changes effected in Arizona law by

5. For example, in State v. Geer, 13 Wash. App. 71, 74-75, 533 P.2d 389, 391 (1975), the court held that prior sexual acts are inadmissible unless they are of extraordinary relevance and materiality. *See* People v. Rincon-Peneda, 14 Cal. 3d 864, 879-82, 538 P.2d 247, 257-59, 123 Cal. Rptr. 119, 129-31 (1975); Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 345 (1973); 8 GA. L. REV. 973, 975 (1974); text & notes 47-52 *infra*.

6. *See generally* Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303 (1975); Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391 (1975); Note, *supra* note 5. The societal stereotype is manifested by the presumption that a woman hitchhiking alone is in search of sex. *See* Comment, *Rape and Rape Laws*, *supra* note 1, at 929.

7. 113 Ariz. 22, 545 P.2d 946 (1976) *noted in* 1976 ARIZ. ST. L.J. 213, *overruling* State v. Wood, 59 Ariz. 48, 122 P.2d 416 (1942). *See generally* Gerber & Foreman, *Arizona's Criminal Law: The Critical Need for Comprehensive Revision*, 18 ARIZ. L. REV. 63, 84 n.138 (1976).

8. 113 Ariz. at 24, 545 P.2d at 948.

9. *See id.* at 27, 545 P.2d at 951.

10. *Id.* at 24, 545 P.2d at 948.

11. ARIZ. R. SPECIAL ACTIONS 4(a) (codified in volume 17A of the Arizona Revised Statutes). *See generally* Lesher, *Extraordinary Writs in the Appellate Courts of Arizona*, 7 ARIZ. L. REV. 34 (1965).

12. *See* State v. Kelley, 110 Ariz. 196, 197, 516 P.2d 569, 570 (1973); State v. Martinez, 67 Ariz. 389, 393, 198 P.2d 115, 117 (1948); State v. Wood, 59 Ariz. 48, 52, 122 P.2d 416, 418 (1942), *overruled*, State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976).

13. 113 Ariz. at 29, 545 P.2d at 953.

14. *Id.*

15. *Id.*; see text & notes 59-65 *infra*.

Pope will be discussed. Finally, an analysis of the narrowly defined *Pope* exceptions will be made, considering their continued viability under the proposed Arizona evidentiary rules and criminal code.

Use of Character as Evidence

Character consists of the moral and ethical qualities which distinguish an individual from others.[16] It constitutes "a generalized description of one's disposition in respect to a general trait such as honesty, temperance, or carefulness."[17] Character may be established by three types of evidence: Reputation, opinion, or specific prior acts.[18] Reputation is the community estimate of an individual, essentially "what people think an individual is and what they say about him."[19] Where character evidence is admissible, it is generally held that one's character can be established by testimony as to one's reputation;[20] it generally cannot be shown by a witness' individual opinion,[21] or by prior specific acts.[22]

Whether evidence of a trait of character will be admissible at trial is dependent, of course, on its relevance.[23] The concept of relevance is given an exceedingly broad meaning by most jurisdictions.[24] Succinctly stated, relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[25] Under this wide rubric, a person's character may be relevant at trial in two respects. First, a witness' character for truth and veracity will shed light upon the credibility of his trial testimony.[26] Second, a witness' character will support an inference, albeit circum-

16. State v. Parker, 96 Mo. 382, 391, 9 S.W. 728, 732 (1888); BLACK'S LAW DICTIONARY 294 (4th ed. 1951).

17. Frase v. Henry, 444 F.2d 1228, 1232 (10th Cir. 1971).

18. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 186, at 443 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

19. McNaulty v. State, 138 Tex. Crim. 317, 321, 135 S.W.2d 987, 989 (1939). *See also* State v. Hall, 18 Ariz. App. 593, 597, 504 P.2d 534, 538 (1972) (noting testimony as to defendant's reputation for truth and veracity was based on conversations with police officers and civilians in neighborhood).

20. M. UDALL, ARIZONA LAW OF EVIDENCE § 114, at 225 (1960).

21. *See id.* § 66; *cf.* Sheek v. State, 19 Ariz. 509, 511-12, 172 P. 662, 663-64 (1918); State v. Hall, 18 Ariz. App. 593, 597, 504 P.2d 534, 538 (1972).

22. *See* Stone v. State, 243 Ala. 605, 607, 11 So. 2d 386, 388 (1943); State v. Wood, 59 Ariz. 48, 50, 122 P.2d 416, 417 (1942); MCCORMICK, *supra* note 18.

23. *See* FED. R. EVID. 402.

24. Relevance generally means evidence having any tendency in reason to prove or disprove a fact. *See, e.g.*, Brooks v. Bale Chevrolet Co., 198 Ark. 17, 20, 127 S.W.2d 135, 137 (1939); People v. Hill, 19 Cal. App. 3d 306, 319, 96 Cal. Rptr. 813, 821 (1971); Schiltz v. Cullen-Schiltz & Associates, Inc., 228 N.W.2d 10, 16 (Iowa 1975).

25. *See* Ariz. Proposed R. Evid. 401 (Proposed and submitted to the Supreme Court of Arizona by the Arizona State Bar Committee on Civil Practice and Procedure on March 10, 1976).

26. *See* State v. Harris, 73 Ariz. 138, 142, 238 P.2d 957, 959 (1951); M. UDALL, *supra* note 20, at § 66.

stantial,[27] that on a particular occasion the person acted consistently with the demonstrated character.[28] Even though relevant in these two respects, however, character evidence may still be inadmissible. If the potential prejudicial effects of the evidence outweigh its probative value, proof of character will be inadmissible.[29]

Arizona courts follow the majority rule permitting the showing of a witness' poor reputation for truth and veracity for purposes of impeachment.[30] Arizona also allows the use of prior bad acts to impeach if the acts resulted in a felony conviction.[31] The prior act, however, even if a felony conviction, must not be so remote as to be incapable of reasonably casting a reflection on the witness' credibility.[32] On the sub-

27. Circumstantial evidence is such that it relates to a series of facts not in issue, yet having from experience shown such a high correlation with the fact in issue as to warrant an inference of that fact. State v. Simpier, 1 Ariz. App. 98, 100, 399 P.2d 719, 721 (1965).

28. Zimmerman v. Superior Court, 98 Ariz. 85, 90, 402 P.2d 212, 215 (1965); M. UDALL, *supra* note 20, at 218.

29. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. *See generally* United States v. Gorman, 393 F.2d 209, 212 (7th Cir.), *cert. denied*, 393 U.S. 832 (1968); Belmont Indus., Inc. v. Bethlehem Steel Corp., 62 F.R.D. 697, 707 (E.D. Pa. 1974).

30. Baumgartner v. State, 20 Ariz. 157, 163, 178 P. 30, 33 (1919); M. UDALL, *supra* note 20, § 66, at 99; *see* State v. Branch, 108 Ariz. 351, 353, 498 P.2d 218, 220 (1972); *cf.* State v. Sorensen, 104 Ariz. 503, 506, 455 P.2d 981, 984 (1969). The evidence must, however, bear directly on credibility. *See, e.g.*, Foster v. United States, 282 F.2d 222, 223 (10th Cir. 1960) (general bad moral character of a witness excluded on issue of veracity); Salgado v. United States, 278 F.2d 830, 831 (1st Cir. 1960) (reputation evidence of homosexuality not admissible on question of veracity); People v. Peters, 23 Cal. App. 3d 522, 533, 101 Cal. Rptr. 403, 410 (1972) (homosexuality does not bear on veracity trait). *Contra*, Grammer v. State, 239 Ala. 633, 638, 196 So. 268, 272 (1940) (general character, not just character for truth and veracity, may be used to impeach witness' credibility).

31. State v. Harris, 73 Ariz. 138, 142, 238 P.2d 957, 959 (1951). The reasons for this limitation to felony convictions are to avoid confusion of the jury, to save court time, to avoid witness harrassment, and to encourage voluntary testimony on the part of the witness. *Id. See also* Midkiff v. State, 29 Ariz. 523, 537, 243 P. 601, 606 (1926); Hadley v. State, 25 Ariz. 23, 35, 212 P. 458, 462 (1923). Should Arizona adopt its proposed rules of evidence, this limitation would endure in slightly different form.

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Ariz. Proposed R. Evid. 609(a). This limitation on the admissibility of evidence of felony convictions is still the minority position. 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 983, at 841 (J. Chadbourn rev. 1970). For cases taking the majority position, see Tucker v. Lower, 200 Kan. 1, 5, 434 P.2d 320, 324 (1967); Robinson v. State, 507 P.2d 1296, 1301 (Okla. Crim. App. 1973). For the minority position, see People v. Hamilton, 60 Cal. 2d 105, 116-17, 383 P.2d 412, 418, 32 Cal. Rptr. 4, 10 (1963); People v. Robles, 183 Colo. 4, 6-7, 514 P.2d 630, 631 (1973).

32. *See* State v. King, 110 Ariz. 36, 39, 514 P.2d 1032, 1035 (1973); Sibley v. Jeffries, 76 Ariz. 340, 345, 264 P.2d 831, 833-34 (1953); People v. Wilson, 50 Cal. App. 3d 811, 818, 123 Cal. Rptr. 663, 667 (1975). Arizona's common law rule would not be significantly altered by the proposed rules of evidence. *See* Ariz. Proposed R. Evid. 609(b).

stantive side, Arizona generally prohibits the introduction of character testimony of any type for use as circumstantial evidence to help establish the probable conduct of an individual on a given occasion.[33] The primary reason for disallowing substantive use of character evidence is that it is likely to engender prejudice and hostility in a jury.[34]

These stringent guidelines for the admissibility of character evidence are relaxed somewhat in a criminal prosecution where rape is alleged.[35] While considerable disagreement has consistently existed among the jurisdictions concerning both the methods by which character may be proven, and the use to which character evidence may be put,[36] all courts concur in the belief that, to some extent, the character trait of unchastity is a proper and necessary evidentiary item to effectuate justice in a rape trial where consent is an issue.[37] The Arizona supreme court once expressed the value of such testimony: "The character of a prosecutrix in a rape case takes on a peculiar importance when a defense of consent is asserted, for then the character of the victim for chastity becomes a matter of probative value."[38] The majority of jurisdictions only allow evidence of general reputation for unchastity, and of specific prior acts of intercourse with the defendant;[39] evidence of sexual acts

33. M. UDALL, *supra* note 20, § 115, at 227; *see* State v. Fierro, 108 Ariz. 268, 269, 496 P.2d 129, 130 (1972); MCCORMICK, *supra* note 18, § 188, at 445. *See also* Rich v. Cooper, 234 Ore. 300, 305, 380 P.2d 613, 615 (1963).

34. A criminal defendant generally cannot be subjected to evidence of his commission of a prior unrelated crime, because it is not trustworthy evidence that he committed the act for which he is presently being tried. *See* Guey v. State, 20 Ariz. 363, 368, 181 P. 175, 177 (1919). Such evidence "sheds no light upon the transaction . . . and [is] calculated to excite the prejudices of the jury." *Id.* The high probability of prejudice, distraction from the real issues, time consumption, and the possibility of surprise to a witness, outweigh any probative value. *See id.* at 368-69, 181 P. at 177; People v. Sam, 71 Cal. 2d 194, 206, 454 P.2d 700, 706-07, 77 Cal. Rptr. 804, 810-11 (1969); MCCORMICK, *supra* note 18, § 188, at 445; 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 57, at 454-56 (3d ed. 1940).

35. See text & notes 1-4 *supra*, 37-45 *infra*. In the past, the prosecutrix has been seen as likely to fabricate charges of rape, either from motives of revenge, or as the result of a psychological abnormality. *See* 3A J. WIGMORE, *supra* note 31, § 924(a), at 737.

36. *Compare* State v. Geer, 13 Wash. App. 71, 74-75, 533 P.2d 389, 391 (1975) (specific acts of misconduct are not relevant to credibility), *with* Smiloff v. State, 439 P.2d 772, 777 (Alas. 1968) (evidence of specific prior sexual acts by the prosecutrix with the defendant is admissible to demonstrate consent). *See generally* text & notes 39-45 *infra*.

37. *See, e.g.*, State v. Wood, 59 Ariz. 48, 52, 122 P.2d 416, 418 (1942), *overruled*, State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976); State v. Holcomb, 73 Wash. 652, 657, 132 P. 416, 418 (1913); People v. Whitfield, 58 Mich. App. 585, 591-92, 228 N.W.2d 475, 478 (1975).

38. State v. Finley, 85 Ariz. 327, 336, 338 P.2d 790, 796 (1959); *see* M. UDALL, *supra* note 20; 3 H. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 766, at 1761-62 (5th ed. P. Herrick rev. ed. 1957); 1 J. WIGMORE, *supra* note 34, § 200, at 682.

39. 1 J. WIGMORE, *supra* note 34, § 200, at 682-84; *see, e.g.*, Williams v. State, 291 Ala. App. 1, 7, 282 So. 2d 349, 354 (1973); People v. Wilcox, 33 Ill. App. 3d 432, 436, 337 N.E.2d 211, 216 (1975); State v. Grundler, 251 N.C. 177, 191-92, 111 S.E.2d 1, 11 (1959).

with a third person is inadmissible.[40] Prior to *Pope*, Arizona had aligned itself with a less popular position, admitting testimony as to general reputation for unchastity, as well as evidence of prior sexual acts with either the defendant or another person,[41] as long as those acts were not too remote.[42]

In addition to the question of the type of character evidence that is admissible, courts have taken varying positions on the use to which this evidence can be put. Some jurisdictions allow evidence of unchastity to go only to the issue of propensity to consent,[43] while others recognize its additional function as impeachment evidence, and allow the evidence to go to credibility.[44] Prior to *Pope*, Arizona had no clear precedent as to whether evidence of unchastity could be used for both impeachment and substantive purposes.[45]

Given the broad definition of relevance,[46] it is difficult to negative the probative nature of unchastity evidence when consent is at issue in a trial where rape is alleged. The problem, however, lies in the prejudicial nature of the testimony;[47] juries are prone to give too much weight to evidence of the prosecutrix' prior unchastity. A recent study of rape trials where consent was at issue[48] shows that juries, exposed to evidence of unchastity, tend to acquit even in the face of clear evidence

40. H. UNDERHILL, *supra* note 38, at 1766; *see, e.g.*, Lynn v. State, 231 Ga. 559, 559, 203 S.E.2d 221, 222 (1974), *noted in* 8 GA. L. REV. 973, 975 (1974); People v. Hankins, 90 Ill. App. 2d 51, 59-60, 234 N.E.2d 104, 109 (1967); Wynn v. Commonwealth, 216 Va. 355, 356-57, 218 S.E.2d 445, 446 (1975).

41. State v. Martinez, 67 Ariz. 389, 393, 198 P.2d 115, 117 (1948); State v. Wood, 59 Ariz. 48, 52-53, 122 P.2d 416, 418 (1942), *overruled*, State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976); State v. Guerrero, 58 Ariz. 421, 429, 120 P.2d 798, 801 (1942).

42. State v. Guerrero, 58 Ariz. 421, 429, 120 P.2d 798, 801 (1942).

43. *See* Shay v. State, 229 Miss. 186, 192, 90 So. 2d 209, 211 (1956); State v. Sims, 30 Utah 2d 357, 360, 517 P.2d 1315, 1317 (1974), *cert. denied*, 417 U.S. 970 (1975). It has been pointed out that to allow the use of such evidence for impeachment logically leads to repugnant results, as the same rationale could be used to attack the credibility of a female witness in any case. *See* People v. Johnson, 106 Cal. 289, 294, 39 P. 622, 623 (1894). Despite this argument, Dean Wigmore has consistently maintained that chastity has a direct connection with veracity. *See* 3A J. WIGMORE, *supra* note 31, § 924(a), at 736.

44. CAL. EVID. CODE § 782 (West Supp. 1976); *see* People v. Pantages, 212 Cal. 237, 263, 297 P. 890, 901 (1931); Calhoun v. State, 85 Tex. Crim. 496, 504-05, 214 S.W. 335, 339 (1919).

45. *Compare* State v. Wood, 59 Ariz. 48, 51, 122 P.2d 416, 417-18 (1942), *quoting* People v. Pantages, 212 Cal. 237, 262, 297 P. 890, 901 (1931) (court in dictum indicated that a general reputation for unchastity might be used to attack the prosecutrix' credibility), *with* Fuller v. State, 23 Ariz. 489, 496, 205 P. 324, 326 (1922) (in a statutory rape case, reputation for truth and veracity can neither be proven by evidence of the prosecutrix' general reputation for unchastity, nor by prior sexual acts); *and* Sage v. State, 22 Ariz. 151, 159, 195 P. 533, 536 (1921) (prior unchastity not admissible to impeach credibility in statutory rape case).

46. *See* text & notes 24-25 *supra*.

47. *See* State v. Geer, 13 Wash. App. 71, 73-74, 533 P.2d 389, 391 (1975).

48. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 254 (1966). This study has been cited by several courts. See State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 27-28, 545 P.2d 946, 951-52 (1976); People v. Rincon-Peneda, 14 Cal. 3d 864, 879-82, 538 P.2d 247, 257-59, 123 Cal. Rptr. 119, 129-31 (1975).

to the contrary.[49] Apparently the jury considers that by her prior conduct, a woman voluntarily assumes the risk of rape.[50] Thus, even where a lesser charge is available, juries will often acquit rather than convict.[51] In fact, Federal Bureau of Investigation statistics show that of the four violent crime offenses, forcible rape has the highest rate of acquittal or dismissal.[52] Given the extreme degree of prejudice against the prosecuting witness in a rape case, the *Pope* court wisely reexamined the admissibility of unchastity evidence.

Use of Character as Evidence After Pope

The *Pope* court ruled that character evidence of unchastity cannot be used to impeach the testimony of the complaining witness in a rape prosecution.[53] The court noted that it is "unreasonable to allege a link between the prior improper sexual activity of a prosecutrix in a rape prosecution and the truthfulness of her sworn testimony."[54] The *Pope* court, however, did not concomitantly set out such a blanket exclusionary rule for the use of character testimony as circumstantial evidence of consent. Rather, implicitly recognizing the relevance of such evidence, the *Pope* court attempted to balance its probative value against its prejudicial effect.[55] The court noted several possible adverse consequences flowing from the use of prior specific acts of unchastity for substantive proof. The court recognized that references to prior sexual acts injects collateral issues which divert the jury's attention from the defendant's guilt or innocence.[56] Moreover, the court emphasized that consent to

49. H. KALVEN & H. ZEISEL, *supra* note 48. *See also* Note, *supra* note 5, at 343-44.
50. H. KALVEN & H. ZEISEL, *supra* note 48, at 249-54.
51. *Id.*
52. *See* FBI, UNIFORM CRIME REPORTS 1973, table 18, at 116 (1974). According to this report, only 36 percent of forceable rape prosecutions are successful. *Id.* at 35. This high potential for prejudice, resulting partly from the use of prior unchastity evidence for both impeachment and substantive purposes, mitigates against the argument that the defendant's constitutional right to confront and cross-examine adverse witnesses would be abridged by the exclusion of such evidence. *See generally* Pointer v. Texas, 380 U.S. 400, 403-06 (1965). Although fundamental, the right to confrontation is not absolute, and may yield to other competing interests. *See* Chambers v. Mississippi, 410 U.S. 284, 295 (1973). Even highly relevant evidence may not be admitted if it creates sufficiently high possibilities of confusion, prejudice, and inconvenience to the court. *See* United States v. Wright, 489 F.2d 1181, 1186 (D.C. Cir. 1973). *See generally* Comment, *Limitations on the Right, supra* note 1, at 419-25; 8 GA. L. REV. 973, 974-75 (1974).
53. 113 Ariz. at 29, 545 P.2d at 953. The court noted, however, that if veracity were actually affected by prior unchastity, extrinsic evidence impeaching veracity would be admissible, but would be limited to testimony of the witness' poor reputation for truth and veracity; it would not permit introduction of testimony as to specific acts of unchastity. *Id.* at 26-27, 545 P.2d at 950-51.
54. *Id.* at 26, 545 P.2d at 950.
55. "A more difficult question is posed when one balances the probative value of evidence concerning the proxecutrix' unchastity against its prejudicial effect when the defense of consent is raised." *Id.* at 27, 545 P.2d at 951.
56. *Id.* at 28, 545 P.2d at 952.

sexual intercourse on one occasion is not always reliable evidence of consent on another.[57] Finally, the supreme court held that the possible relevance of such evidence is often outweighed by its inflammatory effect on the jury, and is therefore generally inadmissible.[58]

The *Pope* court recognized, however, that in certain situations, "evidence of prior unchaste acts has sufficient probative value to outweigh its inflammatory effect and require admission."[59] Thus, testimony as to specific acts of intercourse with the defendant is admissible, since such evidence is viewed as highly probative of the victim's consent in the case.[60] Such evidence may also be used to refute physical or scientific evidence as to the origin of semen, disease, pregnancy, or loss of virginity.[61] Further, testimony as to the victim's poor general reputation for chastity is admissible to rebut evidence of chastity submitted by the prosecution, or to negate the mens rea requirement of intent in an attempted rape prosecution.[62] In addition, both reputation as a prostitute and specific prior acts of prostitution are admissible to support a defense of consensual prostitution.[63] A final exception drawn by the court to the general exclusionary rule is that evidence of unchastity is admissible in connection with an effort to demonstrate prior unsubstantiated charges of rape by the prosecutrix.[64]

The *Pope* court acknowledged that there may be other instances where evidence of prior unchastity may be admissible. Such instances exist simply where the "evidence concerning unchastity is alleged to be sufficiently probative to compel its admission despite its inflammatory effect."[65] Although the court left unarticulated the circumstances under which this additional exception might be utilized, these will undoubtedly be instances where the trial court, after carefully weighing the prejudicial impact of the proferred testimony against its probative value, will decide in favor of admissibility.[66]

In order to secure compliance with its holding, the *Pope* court outlined the necessary procedures for determining when the admissibility

57. *Id.*
58. *Id.* at 29, 545 P.2d at 953.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id. See generally* "Reasonable Mistake of Age Establishes Lack of Mens Rea as a Defense," 7 ARIZ. L. REV. 324 (1966).
63. 113 Ariz. at 29, 545 P.2d at 953.
64. *Id.*; see text & notes 93-97 *infra.*
65. 113 Ariz. at 29, 545 P.2d at 953.
66. Arizona has previously recognized the duty of the trial judge to balance the prejudicial effects against the probative value of the evidence offered for admissibility. *See* State v. Beers, 8 Ariz. App. 534, 539, 448 P.2d 104, 109 (1968). The present Federal Rules of Evidence, together with Arizona's proposed rules of evidence, specifically provide for such a balancing test. FED. R. EVID. 403; Ariz. Proposed R. Evid. 403.

of unchastity evidence is warranted by its probative value. A written offer of proof must be submitted to the trial court, which will conduct an in camera hearing.[67] The offer of proof must refer to the specific records, documents, and testimony which will be relied upon to show consent.[68] If the trial court determines the evidence to be credible, sufficiently probative of consent to outweigh its inflammatory effect, and not too remote, it will be admitted.[69] The procedure required by *Pope*, as well as the underlying rules of evidence adopted by the decision, indicate a clear shift from prior Arizona case law, accomplishing what otherwise would have been a task for the legislature.

Statutory Reform

Several jurisdictions have recently enacted statutes relating to the admissibility of unchastity evidence in rape prosecutions.[70] Although Arizona currently has no such statute, the legislature is considering a

67. 113 Ariz. at 29, 545 P.2d at 953.

68. *Id.*

69. *Id.* An interesting due process question is raised by *Pope*. U.S. CONST. art. I, § 10, prohibits the passing of ex post facto legislation by the states. Beazell v. Ohio, 269 U.S. 167, 169-70 (1925). In *Beazell*, the court held that it is unconstitutional for the legislature to deprive a criminal defendant of a defense available at the time of the commission of the crime. *Id.* Moreover, to judicially alter the rules of evidence after a crime has been committed, and before the trial therefor, to require less or a different measure of evidence to convict, is also unconstitutional. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). This latter rule has similarly been held binding on state courts, under the due process clause. *See* Bouie v. Columbia, 378 U.S. 347, 353-54 (1964); U.S. CONST. amend. XIV, § 1. Before a retroactive change will be held unconstitutional, however, it must affect substantial personal rights. Beazell v. Ohio, *supra* at 171. At the very least, the change must alter the situation to the material disadvantage of the defendant. Rooney v. North Dakota, 196 U.S. 319, 326-27 (1905). Based on these criteria, neither the ex post facto clause, nor its counterpart in the due process clause, was violated by *Pope*. The evidentiary alteration in *Pope*, a nonmaterial procedural one, left untouched the amount of proof necessary to convict. *See* Mallett v. North Carolina, 181 U.S. 589, 595-96 (1901). In *Pope*, the Arizona supreme court merely recognized the lack of sufficient probative value of prior unchastity in many instances. 113 Ariz. at 29, 545 P.2d at 953.

70. *See* CAL. EVID. CODE § 1103 (West Supp. 1976); MICH. STAT. ANN. § 28.788 (10)(1-2) (Supp. 1976). The Michigan statute allows evidence of specific prior acts, reputation, and opinion evidence which goes to the prosecutrix' character for unchastity. *Id.* However, such evidence is admissible only when the judge, in camera, determines that the probative value of the evidence outweighs its inflammatory, prejudicial nature, and the evidence relates to the prosecutrix' past sexual conduct with the defendant, or instances of sexual activity which establish the source or origin of semen, pregnancy, or disease. *Id.* For a general discussion of the Michigan statute, see Robinson, *Civil and Criminal Evidence*, 21 WAYNE L. REV. 437, 483-86 (1975). In California, reputation and opinion for unchastity, and evidence of specific sexual acts, are only admissible as circumstantial evidence of conduct when the prior conduct was with the defendant, or the prosecution has offered evidence of chastity. CAL. EVID. CODE § 1103 (West Supp. 1976). Evidence of prior unchastity offered to impeach credibility is admissible, however, if, in an in camera hearing, the judge determines the evidence is relevant to credibility. *Id.* § 782. To guide this latter determination, the California statute instructs the judge to consider, *inter alia*, whether the evidence offered tends to demonstrate a bias, interest, or motive to fabricate. *Id.* § 780 (West 1974); *cf.* People v. Rowland, 262 Cal. App. 2d 790, 796, 69 Cal. Rptr. 269, 273 (Ct. App. 1968) (homosexuality is relevant to prove bias, interest, or motive). As a practical matter, however, this distinction between use for impeachment and substantive purposes is rather difficult for the jury to grasp, as the two purposes usually are intertwined. *See* Giles v. Maryland, 386 U.S. 66, 76 (1967). For a general discussion of the California statute, see Note, *California Rape Evidence Reform, supra* note 1.

new criminal code,[71] and the Arizona supreme court is presently considering the adoption of a modified version of the Federal Rules of Evidence.[72] Whereas the proposed new rules of evidence have no provisions specifically related to the problem faced in *Pope*, adoption of the proposed criminal code will alter the effect of *Pope*; the proposed criminal code thus provides a ready vehicle to analyze the *Pope* holding.

Arizona's proposed criminal code completely prohibits both opinion and reputation evidence as to the prosecutrix' prior sexual conduct,[73] whereas the *Pope* court allows limited use of such testimony.[74] The code permits testimony as to specific instances of sexual conduct only if offered to prove prior consensual acts with the defendant, or to refute physical or scientific evidence,[75] both exceptions recognized in *Pope*.[76] Unlike *Pope*, however, the statute apparently would prohibit evidence of chastity submitted by the prosecution.[77] The proposed code would also eliminate the use of unchastity evidence to bolster defenses of prostitution or prior unsubstantiated charges of rape.[78] Further, the exclusionary rules of the proposed law would be inapplicable to an attempted rape prosecution.[79]

While the Federal Rules of Evidence do not deal specifically with the problem of unchastity evidence in rape cases, the comment of the advisory committee, prepared before the rules were adopted to aid interpretation of the rules, indicates that the use of circumstantial character evidence by the defendant to introduce pertinent evidence of the prosecutrix' character in support of a claim of consent in a rape case is permissible. *See* FED. R. EVID. 404(a) notes.

71. *See* ARIZ. CRIM. CODE COMM'N, ARIZ. REV. CRIM. CODE § 1409 (1975) (proposed). The pertinent portion of the proposed Code provides:

> (a) Opinion and reputation evidence of the victim's sexual conduct shall not be admitted in a prosecution under this article. Evidence of specific instances of the victim's sexual conduct shall be admissible in prosecutions under this article only to the extent that the following proposed evidence is material to a fact at issue:
>
> (1) testimony establishing the victim's past sexual conduct with the defendant; or
>
> (2) testimony which directly refutes physical or scientific evidence.
>
> (b) Prior to introduction of evidence under subsection (a), a written motion and offer of proof shall be filed with the court and the judge shall order an in camera hearing to determine admissibility of evidence under subsection (a).

Id. § 1409. *See also* Gerber & Foreman, *supra* note 7, at 83-86.

72. *See* Ariz. Proposed R. Evid. (proposed and submitted to the Supreme Court of Arizona by the Arizona State Bar Committee on Civil Practice and Procedure on Mar. 10, 1976). See text & notes 98-99 *infra*.

73. *See* ARIZ. CRIM. CODE COMM'N, ARIZ. REV. CRIM. CODE § 1409(a) (1975) (proposed).

74. 113 Ariz. at 29, 545 P.2d at 953; *see* text & notes 59-65 *supra*.

75. ARIZ. CRIM. CODE COMM'N, ARIZ. REV. CRIM. CODE § 1409(a)(1), (2) (1975) (proposed).

76. *See* text & notes 60-61 *supra*.

77. The statutory language stating that such evidence "shall not be admitted in a prosecution" presumably applies to both the prosecution and defendant. *See* ARIZ. CRIM. CODE COMM'N, ARIZ. REV. CRIM. CODE § 1409(a) (1975) (proposed).

78. The code states that such evidence is admissible only if it fits within one of two exceptions, neither of which apply to the present situation. *See id.* § 1409(a)(1), (2); *see* text & note 75 *supra*.

79. Arizona has a general attempt statute, ARIZ. REV. STAT. ANN. § 13-108 (1956),

The three exceptions recognized by both the proposed criminal code and the Arizona supreme court in *Pope* are salutory. Prior sexual conduct with the defendant in a rape case is highly probative of consent;[80] much more so than the evidence of sexual acts with others which may be considered too tenuous to demonstrate a likelihood of consent on a particular occasion.[81] The attempted rape prosecution exception is justified as recognizing that the subjective intent of the defendant is a necessary element of the substantive crime of attempt.[82] In order to establish the offense of attempted rape, the prosecution must show a certain level of mens rea; a purpose to accomplish the intercourse notwithstanding resistance on the part of the victim.[83] This exception is justified in that knowledge of prior unchaste reputation may negate a specific intent to rape.[84] The *Pope* exception for refutation of physical and scientific evidence is equally warranted. Relevancy certainly outweighs the prejudice such evidence might generate.[85]

The proposed Arizona criminal code, however, would eliminate three of the exceptions reserved in *Pope*. By eliminating the prosecutorial use of chastity evidence, the code eliminates the need for defense rebuttal.[86] It must be noted, however, that one type of chastity evidence is not excluded by the code or the court; the use by the prosecution of physical or scientific evidence relating to chastity.[87] Arguably, in applying this rule, admissibility should be subject to the same balancing test of relevancy against prejudicial effect as a defendant's offer of such proof. For example, loss of virginity should not be admissible as probative of the unlikelihood of consent.[88] Although the *Pope* exception for rebuttal is mandated by the confrontation clause once evidence of

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rather than a specific one for the crime of attempted rape. While the proposed legislation has a broad prohibition, it does limit itself to "prosecutions under this article," *see* ARIZ. CRIM. CODE COMM'N, ARIZ. REV. CRIM. CODE § 1409(a) (1975) (proposed). The attempt statute is not specifically included under that article. In contrast, although Michigan has a general attempt statute, MICH. STAT. ANN. § 28.788(7) (Supp. 1976), the Michigan legislation on unchastity evidence is applicable to prosecutions for attempted rape. *Id.* § 28.788(10)(1).

80. Rice v. State, 35 Fla. 236, 238-39, 17 So. 286, 287 (1895).

81. *See id.*; 27 BAYLOR L. REV. 362, 368 (1975).

82. State v. Geer, 13 Wash. App. 71, 73-74 n.1, 533 P.2d 389, 391 n.1 (1975); ARIZ. REV. STAT. ANN. § 13-108 (1956). A specific intent to commit rape is an essential element of attempted rape. *See* State v. Moore, 194 Ore. 232, 241-42, 241 P.2d 455, 460 (1952). In this regard, prior unchastity is relevant to a charge of attempted rape, and clearly its relevance outweighs possible prejudice. *See* Smiloff v. State, 439 P.2d 772, 777 (Alas. 1968).

83. *See* State v. Gammons, 260 N.C. 753, 755, 133 S.E.2d 649, 651 (1963); *cf.* Ramirez v. State, 55 Ariz. 441, 448, 103 P.2d 459, 462 (1940).

84. *See* State *ex rel.* Pope v. Superior Court, 113 Ariz. at 29, 545 P.2d at 953.

85. *See* Commonwealth v. McKay, 363 Mass. 221, 227, 294 N.E.2d 213, 218 (1973).

86. ARIZ. CRIM. CODE COMM'N, ARIZ. REV. CRIM. CODE § 1409(a) (1975) (proposed). See text & note 62 *supra.*

87. ARIZ. CRIM. CODE COMM'N, ARIZ. REV. CRIM. CODE § 1409(a)(2) (1975) (proposed).

88. *But see* State v. Bradley, 72 Ariz. 16, 21, 230 P.2d 216, 219 (1951).

virginity comes in,[89] the *Pope* court failed to consider the prejudicial impact of the initial introduction of such prosecutorial evidence under the balancing test.

The code also eliminates the exception related to a defense of prostitution.[90] Although it has been said a man will not commit a felony to obtain that which, based on past experience, he might obtain with money,[91] the empirical value of this folklore is dubious. Furthermore, a history of prostitution is in reality merely a history of prior unchastity. The fact that an economic motive is present arguably adds no weight to the probative value of the testimony on the issue of consent. In fact, a prostitute logically would hesitate to jeopardize future earnings by risking a reputation for instituting criminal rape proceedings against her clientele. Assuming that prostitution is indistinguishable from general unchastity so far as its probative value is concerned, and considering its equally prejudicial value, the prostitution exception cannot be justified.

The final *Pope* exception eliminated in the proposed criminal code concerns use of unchastity evidence in conjunction with demonstrating the prosecutrix' previous unsubstantiated charges of rape.[92] Ordinarily, prior false rape charges are admissible in trial as both impeachment evidence, and as substantive proof that the crime was not committed.[93] It is used to describe a particular state of mind of the prosecutrix, a state of mind rendering the existence of a criminal act less probable.[94] The Arizona supreme court indicates that evidence of unchastity becomes admissible under this exception.[95] However, other courts have held that evidence of sexual conduct is not necessary to establish a prior unsubstantiated rape charge. The Oregon supreme court has specifically stated: "The rule is limited to the reception of evidence that the prosecutrix had admitted the falsity of the charges or they had been disproved."[96] The *Pope* court's allowing evidence of specific instances of prior unchastity as proof of the falsity of prior rape charges represents an unduly broad exception, and one that is unsupported by competent

89. *See* Smith v. Illinois, 390 U.S. 129 (1968); Brookhart v. Janis, 384 U.S. 1 (1966); Deinhardt v. State, 29 Md. App. 391, 348 A.2d 286 (1975).

90. *See* ARIZ. CRIM. CODE COMM'N, ARIZ. REV. CRIM. CODE § 1409 (1975) (proposed).

91. *See* Bedgood v. State, 115 Ind. 275, 279, 17 N.E. 621, 623 (1888).

92. *See* 113 Ariz. at 29, 545 P.2d at 953.

93. State v. Nab, 245 Ore. 454, 458-59, 421 P.2d 388, 390-91 (1966). *See also* People v. Hurlburt, 166 Cal. App. 2d 334, 342-43, 333 P.2d 82, 87-88 (Ct. App. 1958); People v. Simbolo, 188 Colo. 49, 52, 532 P.2d 962, 963 (Colo. 1975) (as impeachment evidence). As substantive proof of the nonexistence of rape, the evidence is said to "have a tendency to show a morbid condition of mind or body, and go a long way in explaining the charge." State v. Nab, *supra* at 459, 421 P.2d at 391, *quoting* People v. Evans, 72 Mich. 367, 380, 40 N.W. 473, 478 (1888).

94. State v. Nab, 245 Ore. 454, 458-59, 421 P.2d 388, 390-91 (1966).

95. 113 Ariz. at 29, 545 P.2d at 953.

96. State v. Nab, 245 Ore. 454, 459, 421 P.2d 388, 391 (1966).

authority. Moreover, to the extent the exception utilizes unchastity, rather than merely proof of prior false charges, as a vehicle of impeachment, it contradicts the rationale of the *Pope* court.[97]

While the proposed criminal code would reject three of the exceptions approved in *Pope*, the proposed rules of evidence would seem to have no effect on *Pope*. Rule 608, although not dealing specifically with the rape case, would restrict the introduction of opinion and reputation evidence of unchastity, for impeachment purposes, to cases in which unchastity actually relates to veracity.[98] Specific acts may be inquired into on cross-examination, but they also must reflect the character of the witness for truthfulness.[99] Presumably, the finding in *Pope* that there is no necessary relationship between chastity and truthfulness[100] will preclude the admissibility of chastity evidence for impeachment purposes.

Adoption of the proposed rules of evidence would also seem to leave the *Pope* holding intact as to its treatment of the substantive use of unchastity evidence. This is true despite rule 404, which provides that character evidence is admissible to prove conduct if it is "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused."[101] Proof of character under this rule may be made by opinion

97. The *Pope* court held that credibility may not be impeached by evidence of unchastity. *See* 113 Ariz. at 29, 545 P.2d at 953. The court specifically stated: "If the witness' reputation for chastity is so bad that it has in some way affected her credibility, then extrinsic evidence would be admissible to prove that she had a bad reputation for truth and veracity. This showing may not include reference to prior illicit sexual activity." *Id.* at 26-27, 545 P.2d at 950-51.

98. *See* Ariz. Proposed R. Evid. 608(a), which provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

99. *See id.* 608(b), which provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

See also id. 405(b), which provides: "In cases in which character or trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."

100. 113 Ariz. at 26, 545 P.2d at 950.

101. *See* Ariz. Proposed R. Evid. 404(a)(2).

The proposed rules also would allow the introduction of character evidence "to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice." *Id.* 406. In Spoonhunter v. United States, 476 F.2d 1050 (10th Cir. 1973), the court held that prior acts of unchastity are admissible to show the existence of a habit. *Id.* at 1057. Habit describes an individual's unvaried response to a repeated specific situation, while character is a description of one's disposition generally or in respect to a single trait. *See* MCCORMICK, *supra* note 18, § 195, at 462-63. Proof of habit is especially significant in that it is thought to be

or reputation evidence.[102] Although the notes of the Advisory Committee to the federal rules seem to contemplate admissibility of a pertinent trait of character to support a claim of consent in a rape case,[103] rule 404 should not disturb *Pope*. The proposed rules exclude even relevant evidence if its probative value is substantially outweighed by the danger of prejudice, confusion, the possibility of "undue delay, waste of time, or needless presentation of cumulative evidence."[104] The *Pope* court's characterization of the prejudicial quality of unchastity evidence[105] should remain intact, requiring exclusion unless the evidence meets one of the exceptions adopted by the supreme court.

Conclusion

In the rules governing the admissibility of character evidence, the treatment traditionally accorded the rape case is aberrational. Based on the fiction that a woman's prior consensual conduct is always indicative of both her propensity for truth and veracity and her consent on the occasion in question, the courts in Arizona have long erred. They have failed to sufficiently balance the prejudicial nature of unchastity evidence against its probative value.

Recognizing the invalidity of many of the traditional assumptions utilized in rape cases, *Pope* has established comprehensive guidelines regarding the admissibility of character evidence in rape prosecutions. Unfortunately, the supreme court sanctioned a few dubious exceptions to this general rule. Promulgation of the proposed Arizona criminal code would seem to remedy these defects.

highly persuasive proof of conduct on a particular occasion. *See* FED. R. EVID. 406 notes. Under the proposed Arizona rules, however, evidence as to habit would be excluded if it was too prejudicial, time consuming, or confusing. *See* Ariz. Proposed R. Evid. 403; text & note 23-29 *supra*.

102. Ariz. Proposed R. Evid. 405(b).

103. *See* FED. R. EVID. 405(b) notes.

104. Ariz. Proposed R. Evid. 403.

105. 113 Ariz. at 28-29, 545 P.2d at 952-53.

IX. FAMILY LAW

A. WHOSE INTEREST IS CONTROLLING IN THE NAME CHANGE OF MINORS—THE FATHER'S, THE MOTHER'S, OR THE CHILD'S?

Names play a greater role in our society than simply that of identification.[1] Cases are frequently being brought challenging infringements upon the right to maintain one's name or to change it at will.[2] In these name-change cases, the courts have balanced the state's interest in administrative and economic convenience, as well as society's interest in maintaining social customs, against the individual's interest in bearing whatever name he or she may choose.[3] Additional interests enter the picture, however, where the name-change involves a child. When an attempt is made to change the name of a minor, some jurisdictions will permit the change if both natural parents consent.[4] When a custodial parent attempts to change the name of a minor over the

1. Names have become a matter of pride and an indication of status. One's name is increasingly recognized as a part of one's self-concept and a representation of that self-concept to the world. Courts have begun to recognize that because of the societal implications of a name, a name-change may affect at least two types of personal relationships: That of a child with a noncustodial parent, and that of marriage partners. *See* Stuart v. Board of Supervisors of Elections, 266 Md. 440, 442-43, 295 A.2d 223, 224 (1972); Robinson v. Hansel, 302 Minn. 34, 35-36, 223 N.W.2d 138, 140 (1974).

2. *See, e.g.*, Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972); State *ex rel.* Rago v. Lipsky, 327 Ill. App. 63, 63 N.E.2d 642 (1945); *In re* Reben, 342 A.2d 688 (Me. 1975); Stuart v. Board of Supervisors of Elections, 266 Md. 440, 295 A.2d 223 (1972); *In re* Lawrence, 133 N.J. Super. 408, 337 A.2d 49 (App. Div. 1975); State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 177 N.E.2d 616 (1961); *In re* Strikwerda, 216 Va. 470, 220 S.E.2d 245 (1975).

3. *See, e.g.*, Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972); Custer v. Bonadies, 30 Conn. Supp. 385, 318 A.2d 639 (Super. Ct. 1974); Stuart v. Board of Supervisors of Elections, 266 Md. 440, 295 A.2d 223 (1972).

4. *See, e.g., In re* Trower, 260 Cal. App. 2d 75, 77, 66 Cal. Rptr. 873, 874 (Ct. App. 1968); Worms v. Worms, 252 Cal. App. 2d 130, 134, 60 Cal. Rptr. 88, 90 (Ct. App. 1967); *In re* Ebenstein, 85 N.Y.S.2d 261, 262 (Sup. Ct. 1948). The common law process of name-change involves no statutory formalities. The change is effected by simply adopting a new name and using it consistently. *See, e.g.*, Stuart v. Board of Supervisors of Elections, 266 Md. 440, 446, 295 A.2d 223, 226 (1972); Smith v. United States Cas. Co., 197 N.Y. 420, 422, 429, 90 N.E. 947, 947-48, 950 (1910); Laflin & Rand Co. v. Steytler, 146 Pa. 434, 442, 23 A. 215, 217 (1892). Absent fraudulent intent, the change legally takes effect unless either the child or one of the natural

objection of the noncustodial parent, a court in making its decision must balance three interests—the father's interest in having the child continue to bear the patronymic surname, the mother's interest in determining the child's surname, and the child's welfare and best interest.[5]

In *Laks v. Laks*,[6] the Arizona court of appeals considered whether a divorced woman with custody of minor children may append her own surname to the children's patronymic surname over the objection of the children's father.[7] Subsequent to a divorce decree, appellant Eliot[8] had begun a common law process to change her children's surname to Eliot-Laks without the consent of the children's natural father.[9] Henry Laks, the children's father, petitioned the court to issue a permanent injunction to prohibit Ms. Eliot from changing the names of the three minor children and to order her to reinstate the surname Laks to comply with their birth certificates, as well as governmental, medical, and prior school records.[10] The injunction was granted and the mother appealed.[11]

On appeal Ms. Eliot argued that, as the children's mother, she had an absolute right equal with the father to give the children her name and the trial court's failure to so hold was violative of the equal protection clause of the fourteenth amendment.[12] Appellant also argued that the burden of proof should have been upon the father to show that the change of name was not in the best interest of the children.[13] Citing cases from other jurisdictions, the court of appeals, however, affirmed the trial court, holding that the father had standing to ask for injunctive relief because, according to custom, a father has a protectible interest in having his children bear his surname.[14] The father had made a

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parents brings a suit to enjoin the use of the new name. *See In re* Ebenstein, *supra* at 262. Where such an action is filed, its merit depends on the following:

> Where the father, as here, objects to a change in name and is guilty of no inattention to the child or other misconduct so serious as to make it for the best interest of such child that his name be allowed to be altered, then the court should refuse to permit such change . . . .

Oullette v. Oullette, 245 Ore. 138, 142, 420 P.2d 631, 633 (1966).

5. *See, e.g.*, Worms v. Worms, 252 Cal. App. 2d 130, 134-36, 60 Cal. Rptr. 88, 90-91 (Ct. App. 1967); Mark v. Kahn, 333 Mass. 517, 521-22, 131 N.E.2d 758, 761-62 (1956); Robinson v. Hansel, 302 Minn. 34, 35-38, 223 N.W.2d 138, 140-41 (1974).

6. 25 Ariz. App. 58, 540 P.2d 1277 (1975).

7. *Id.* at 59, 540 P.2d at 1278.

8. The superior court had restored appellant's maiden name, Katherine Eliot, in the divorce decree, pursuant to ARIZ. REV. STAT. ANN. § 25-325(D) (Supp. Pamphlet 1973). Abstract of Record at 17, Laks v. Laks, 25 Ariz. App. 58, 540 P.2d 1277 (1975).

9. 25 Ariz. App. at 59, 540 P.2d at 1278.

10. *Id.* Laks also alleged that Ms. Eliot failed to comply with their property settlement agreement. Eliot, however, did not contest the superior court's order on this issue. *Id.*

11. *Id.*

12. *Id.* at 59-60, 540 P.2d at 1278-79; *see* U.S. CONST. amend. XIV, § 1.

13. 25 Ariz. App. at 60, 540 P.2d at 1279.

14. "Whatever the nature of the father's interest, courts have generally recognized

prima facie case for injunctive relief by showing that Eliot-Laks was not the name on the children's birth certificates;[15] appellant then had the burden to go forward with evidence to show that the name-change was in the children's best interest.[16] The court presumed there was adequate evidence in the trial record to support the finding that the name-change was not in the children's best interest.[17]

It is the purpose of this casenote to analyze the three competing interests involved in name-changes of minors—those of the father, the mother, and the children. First, the history of surnames and name-changes will be discussed in the context of the father's interest in having a child bear his surname. Next, the mother's interest in having the child also bear her name will be analyzed under the equal protection clause. Finally, the child's interest will be discussed and analyzed. In the absence of case law in Arizona defining the best interest of the child in name-change cases, an analogy will be drawn from the standards applied in child custody cases.

The Father's Interest

In *Laks*, the Arizona court of appeals followed precedent from other jurisdictions to hold that a father has a protectible interest in having his children bear his name, according to custom, although that custom has never amounted to a common law legal right.[18] Other courts have described this interest as one of "inherent concern,"[19] a "natural right,"[20] "fundamental right,"[21] "primary right,"[22] "time honored right,"[23] or a "natural and commendable desire of the father to have his children bear his name."[24] In view of the importance now placed on surnames, and the numerous cases instituted to assert legal rights in them,[25] it is interesting to note that surnames were not always used

that the father has a protectible interest in having his child bear the parental surname in accordance with the usual custom, even though the mother may have been awarded custody of the child." *Id.* (citations omitted).

15. *Id.* at 61, 540 P.2d at 1280.

16. *Id.*

17. The court of appeals presumed there was sufficient evidence in the record to support the judgment since no transcript of the trial testimony was presented. *Id.*

18. *Id.* at 60, 540 P.2d at 1279.

19. Robinson v. Hansel, 302 Minn. 34, 35, 223 N.W.2d 138, 140 (1974).

20. West v. Wright, 263 Md. 297, 300, 283 A.2d 401, 402 (1971); De Vorkin v. Foster, 66 N.Y.S.2d 54, 55 (Sup. Ct. 1946); *see* Note, *Domestic Relations: Change of Minor's Surname: Parental Rights in Minor's Surname*, 44 CORNELL L.Q. 144, 146 (1958).

21. Young v. Board of Educ., 114 N.Y.S.2d 693, 694 (Sup. Ct. 1952).

22. *In re* Trower, 260 Cal. App. 2d 75, 77, 66 Cal. Rptr. 873, 874 (Ct. App. 1968); *In re* Larson, 81 Cal. App. 2d 258, 262, 183 P.2d 688, 690 (Ct. App. 1947).

23. 25 Ariz. App. at 60, 540 P.2d at 1279; *In re* Shipley, 26 Misc. 2d 204, 211, 205 N.Y.S.2d 581, 589 (Sup. Ct. 1960).

24. 25 Ariz. App. at 61, 540 P.2d at 1280; Clinton v. Morrow, 220 Ark. 377, 383, 247 S.W.2d 1015, 1018 (1952).

25. *See* text & note 2 *supra.*

by early societies.[26] They came into use only when populations had increased to such an extent that more than one name was needed for adequate identification.[27] This need developed around the time of the Norman Conquest of England in 1066.[28] Surnames came into more widespread use during the 14th century, but even then were not the major means of identification;[29] greater importance was still attached to a person's first or christian name because it was the designation conferred by baptism.[30] The choice of a surname, on the other hand, was individual, generally reflecting something characteristic of the individual, such as appearance, character, occupation, or history.[31]

An early English statute required, in addition to an individual's name, that his calling, his estate or degree, and the town, hamlet, or place to which he belonged, be inserted on every writ or indictment.[32] In the early 16th century, a regulation was established in England by the Secretary to King Henry VIII, requiring every parish to record births, marriages, and deaths.[33] As a result of these two acts, surnames became a more permanent fixture, eventually leading to the use of one surname to designate all members of the same family.[34] Children were generally given their father's surname because names often originated from a male's occupation,[35] and inheritance generally passed through

26. Smith v. United States Cas. Co., 197 N.Y. 420, 423, 90 N.E. 947, 948 (1910); *Ex parte* Snook, 2 Hilt. 566, 569-70 (N.Y. Ct. C.P. 1859); Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 WASH. U.L.Q. 779, 780; Note, *supra* note 20, at 145.

27. Lamber, *supra* note 26; Comment, *Married Woman's Right to Her Maiden Name: The Possibilities for Change*, 23 BUFFALO L. REV. 243, 244 (1973); Note, *supra* note 20, at 145.

28. *In re* Shipley, 26 Misc. 2d 204, 208, 205 N.Y.S.2d 581, 586 (Sup. Ct. 1960); L. PINE, THE STORY OF SURNAMES 10 (1965); Comment, *supra* note 27, at 244.

29. *See Ex parte* Snook, 2 Hilt. 566, 568 (N.Y. Ct. C.P. 1859).

30. [T]hroughout the early reports the christian name is uniformly referred to as the most certain mark of the identity of the individual in all deeds or instruments. Greater importance being attached to the christian name arose from the fact that it was the designation conferred by the religious rite of baptism, while the surname was frequently a chance appellation, assumed by the individual himself, or given to him by others, for some marked characteristic, such as his mental, moral or bodily qualities, some peculiarity or defect, or for some act he had done which attached to his descendants, while sometimes it did not.

Id. at 568-69.

31. *Id.* at 569-70.

32. 1 Hen. V., c.5 (1413).

33. *See Ex parte* Snook, 2 Hilt. 566, 571 (N.Y. Ct. C.P. 1859).

34. [The two acts] operated to check the caprice of individuals in the matter of their names, and to fix them as durable appellations, for every man's name thereafter became a matter of record at his birth, his marriage, and at his death; and this recording of such events in every family, led to the use of one name to designate the members of one family, which the record served to perpetuate; transmitting it from father to son, until the practice became general for all descendants to bear, and become known by, the name of a common ancestor. But this was the work of several centuries . . . .

Id.

35. *See* E. SMITH, TREASURY OF NAME LORE 76 (1967); Lamber, *supra* note 26, at 781.

male heirs.[36] The custom of giving children their father's surname developed during a time when society viewed the wife and child virtually as property of the husband-father.[37] If the child's mother was prominent, or an inheritance was due to pass through the mother, however, the children might be given her surname instead.[38]

The two earliest American courts to consider the name-change issue adopted the view that although the custom of changing one's name had become a common law right,[39] the custom of giving a child its father's surname had not.[40] The *Laks* court followed this early American interpretation of the common law,[41] holding that although a father's surname is customarily given to a child, this custom has never risen to the stature of a common law right.[42] The court could point to no statutory provision or common law rule creating a legal right in the father to have his children bear his surname.[43] It instead looked to other jurisdictions which had previously analyzed the father's legal interest

36. *See* Lamber, *supra* note 26, at 781.

37. *See id.* at 781-82.

38. L. PINE, *supra* note 28, at 23-24; Lamber, *supra* note 26, at 781; MacDougall, *Married Women's Common Law Right to Their Own Surnames*, 1 WOMEN'S RIGHTS L. REP., Fall-Winter 1972-73, at 2, 4 n.18.

39. *Ex parte* Snook, 2 Hilt. 566, 573 (N.Y. Ct. C.P. 1859); Laflin & Rand Co. v. Steytler, 146 Pa. 434, 442, 23 A. 215, 217 (1892). In *Snook*, the New York court, in a decision authored by Judge Charles Daly, refused to allow the petitioner to change his name under a statute that required as a prerequisite to granting the name-change that the applicant derive a financial benefit from the new name. Law of Dec. 14, 1847, no. 2, ch. 464, [1847] Laws of N.Y. 632 (now N.Y. Civ. Rights Law §§ 60 to 63 (McKinney Supp. 1975-76)). Although the petitioner failed to meet the statutory requirements, the court recognized that, according to the facts stated in the petition, he had already properly adopted the new name by the common law method. 2 Hilt. at 576.

40. A man's name is the designation by which he is distinctively known in the community. Custom gives him the family name of his father, and such *praenomina* as his parents choose to put before it . . . . But all this is only a general rule, from which the individual may depart if he chooses.

Laflin & Rand Co. v. Steytler, 146 Pa. 434, 442, 23 A. 215, 217 (1892) (emphasis in original). *See* Smith v. United States Cas. Co., 197 N.Y. 420, 428, 90 N.E. 947, 950 (1910); *Ex parte* Snook, 2 Hilt. 566, 571-72 (N.Y. Ct. C.P. 1859).

A relatively recent Ohio case lends support to giving the father's customary right more weight. The Ohio court of appeals held that when a child is born in wedlock, its legal name becomes a first name plus the last name of his or her natural father. Kay v. Bell, 95 Ohio App. 520, 524-25, 121 N.E.2d 206, 208-09 (1953). "It has been the custom in our country since the time 'when the memory of man runneth not to the contrary' to give to a child the surname of its father." *Id.* at 524, 121 N.E.2d at 208 (citations omitted).

41. 25 Ariz. App. at 60, 540 P.2d at 1279. Judge Daly's history of surnames, compiled in *Ex parte* Snook, 2 Hilt. 566 (N.Y. Ct. C.P. 1859), appears to be the earliest judicial discussion concerning name-changes in American law. *See id.* at 575. Although Judge Daly cited only English cases and treatises, his reasoning and language have been relied upon by American courts and commentators. *See, e.g.*, Smith v. United States Cas. Co., 197 N.Y. 420, 423, 90 N.E. 947, 948 (1910); *In re* Evett, 392 S.W.2d 781, 783 (Tex. Civ. App. 1965); Lamber, *supra* note 26; Comment, *supra* note 27.

42. 25 Ariz. App. at 60, 540 P.2d at 1279. Arizona does, however, recognize the common law right of a person to change his name without legal formality. State v. Carroll, 21 Ariz. App. 99, 100, 515 P.2d 1197, 1198 (1973).

43. 25 Ariz. App. at 60, 540 P.2d at 1279. There appear to be no statutes in Arizona or in other American jurisdictions requiring parents to give their child a patro-

in having his offspring use his surname.[44] Texas has held that the natural father has an "interest"[45] in a proceeding, such as a name-change case, which affects the relationship of parent and child.[46] Although the Texas court did not explicate the father's substantive right, it did find that under the due process clauses of both the Texas constitution and the fourteenth amendment of the United States Constitution, the father must be given notice of such a proceeding.[47] Georgia, on the other hand, has held that a father's "protectible interest"[48] in having his children bear his surname is not a property right protected by the due process clauses of the state or federal constitutions.[49]

The *Laks* court adopted the Georgia position,[50] holding that the father's interest is not a legal right, but rather a "protectible interest."[51] Even so, the father's interest was not dispositive of the case. In the *Laks* situation, because the interest of the child is controlling,[52] the interest of the father is largely irrelevant where the interest of the

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nymic surname. Lamber, *supra* note 26, at 804-05. In contrast, in the 19th and 20th centuries, statutory provisions have been enacted to effectuate name-changes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-601 (1956); CAL. CIV. PROC. CODE § 1276 (West Supp. 1975); TEX. FAM. CODE ANN. §§ 32.01-.05, 32.21-.24 (Vernon 1975). However, in most jurisdictions these statutes did not abolish the common law method of name-change. *See, e.g.*, Laks v. Laks, 25 Ariz. App. at 60, 540 P.2d at 1279; *In re* Taminosian, 97 Neb. 514, 514, 150 N.W. 824, 824 (1915); Smith v. United States Cas. Co., 197 N.Y. 420, 429, 90 N.E. 947, 950 (1910); L. GREENE, HOW TO CHANGE YOUR NAME AND THE LAW OF NAMES 7, 9 (1954); Note, *supra* note 20, at 145.

Arizona statutes relevant to a change of name are: ARIZ. REV. STAT. ANN. § 12-601 (1956) (statutory procedure for change of name); *id.* § 16-112 (1975) (statute authorizing re-registration for voting after change of name due to court order or marriage); *id.* § 25-325 (Supp. Pamphlet 1973) (statute allowing restoration of maiden name or a former name after divorce); *id.* § 28-427 (1956) (statute requiring notification to motor vehicle department after change of name by marriage or otherwise). There is no Arizona statute requiring a change of name upon marriage. Prior to 1974, Arizona law required a woman to designate the prefix "Miss" or "Mrs." when registering to vote. Ch. 62, § 5, [1933] Ariz. Sess. Laws 222, *as amended*, ARIZ. REV. STAT. ANN. § 16-143 (1975).

44. 25 Ariz. App. at 60, 540 P.2d at 1279.

45. Eschrich v. Williamson, 475 S.W.2d 380, 383 (Tex. Civ. App. 1972).

46. *See id.* at 381, 383.

47. *Id.* at 383.

48. Fulghum v. Paul, 229 Ga. 463, 464, 192 S.E.2d 376, 378 (1972).

49. *Id.* The court added that the father's interest was a factor to be considered in determining a child's best interest with regard to a name-change. The court further suggested that it would be appropriate, although not constitutionally mandated, for the legislature to require personal notice to the natural father in such cases. *Id.*

The United States Supreme Court has recognized that the parent-child relationship itself constitutes a constitutionally protected liberty interest, rather than a property right, therefore having a higher degree of constitutional protection. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972); Ginsberg v. New York, 390 U.S. 629, 638-39 (1968); Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); Armstrong v. Manzo, 380 U.S. 545, 550 (1965); May v. Anderson, 345 U.S. 528, 532-33 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The Supreme Court has never considered whether a name-change is within this constitutionally protected area, thus allowing for the differing results in Texas and Georgia.

50. 25 Ariz. App. at 60, 540 P.2d at 1279.

51. *Id.* After indicating that this interest was not a legal right, the court failed to explain how or why it was, nonetheless, legally protectible.

52. *Id.* at 61, 540 P.2d at 1280. See text & note 54 *infra*.

child does not weigh equally in favor of either parent.[53] Nevertheless, it is noteworthy that the court found it desirable to establish a protectible interest in the father, while finding no such interest in the mother.

The Mother's Interest

The court of appeals properly held that the interests of the children in the *Laks* case were the dominant factor to be considered.[54] As the case dealt with older children,[55] capable of making their own decision, the court did not deem it necessary to address the equal protection issue.[56] However, the question remains as to what other courts are to do where the children's interests are not determinative. The court of appeals indicated that, had the case dealt with the initial naming of a child, it would have found merit in appellant's equal protection argument.[57] As the interests of a child at birth arguably do not weigh more strongly in favor of one surname over another,[58] the interests of both the father and mother would seem to be relevant.[59] According to *Laks*, because the father has a protectible customary interest in having the child bear his surname, while the mother does not, the scale would most probably balance in favor of the father.[60]

Although the mother may not point to any customary interest in having the child bear her surname, once the courts begin to look beyond the child's best interest, tipping the scale in favor of one parent over the other, arguably, a legal right of the mother is being af-

53. Because the interest of the child is controlling, it was unnecessary for the court to devote a major portion of the opinion to a discussion of the interests of the parents. The court's finding nevertheless indicates that because the father has a protectible interest in having the child bear his surname while the mother can establish no such customary interest, if the interest of the child weighs equally in favor of either parent, the father's interest would prevail. 25 Ariz. App. at 60-61, 540 P.2d at 1279-80.

54. *Id.* at 61, 540 P.2d at 1280. For cases from other jurisdictions, prior to *Laks*, which held that the interest of the child was controlling, *see, e.g., In re* Trower, 260 Cal. App. 2d 75, 77, 66 Cal. Rptr. 873, 874 (Ct. App. 1968); West v. Wright, 263 Md. 297, 299, 283 A.2d 401, 402 (1971); Mark v. Kahn, 333 Mass. 517, 522, 131 N.E.2d 758, 762 (1956); Robinson v. Hansel, 302 Minn. 34, 35-36, 223 N.W.2d 138, 140 (1974).

55. The court observed that at least two of the children might have been old enough at the time of the original hearing to make an intelligent and decisive choice as to whether to change their name. The appellant, however, did not call the children as witnesses. 25 Ariz. App. at 61, 540 P.2d at 1280.

56. *Id.*

57. *Id.*

58. Although there may be instances in which the name given a child at birth would ultimately cause such embarrassment that it would prove not to have been in the child's best interest, such a result is largely fortuitous, and there is little doubt that the parents have the right to so name the child. The United States Supreme Court has recognized a constitutionally protected interest of parents to "direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1924). *See also In re* Lawrence, 133 N.J. Super. 408, 414, 337 A.2d 49, 52 (App. Div. 1975). Many courts allow name-changes of minors to be given effect when both parents consent. *See* authorities cited note 4 *supra.*

59. *See* 25 Ariz. App. at 61, 540 P.2d at 1280.

60. See text & notes 50-53 *supra.*

fected—the right to be treated equally before the law.[61] Once equal protection is at issue, the court may not rely on habit or custom to defeat the constitutional right of one spouse in favor of the other. Where the mother asserts her constitutional rights, it would seem that the only means of adequately protecting the interests of both parents would be to give the child a dual surname, combining the names of each parent. This alternative seems necessary in light of judicial precedent in the area of equal protection.

Any state legislation that discriminates against a suspect category,[62] or impinges upon a fundamental right,[63] will not withstand constitutional attack unless it can be justified by a compelling state interest.[64] Although coming close at one point, the United States Supreme Court has not yet declared sex a suspect category. In *Frontiero v.*

61. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. An analogous situation is the custom of marriage and the traditional family unit. When the rights of children are being affected, nontraditional family units must be afforded equal protection of the law. "[Illegitimate] children cannot be denied the right of other children because familial bonds in such cases [are] often as warm, enduring, and important as those arising within a more formally organized family unit." Stanley v. Illinois, 405 U.S. 645, 652 (1972) (citation omitted).

62. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (race); Oyama v. California, 332 U.S. 633, 646 (1948) (national origin).

63. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (right to travel); Carrington v. Rash, 380 U.S. 89, 94, 96 (1965) (right to vote); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate).

64. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Carrington v. Rash, 380 U.S. 89, 96 (1965); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

The equal protection clause guarantees equal treatment before the law rather than absolute equality. *See* Norvell v. Illinois, 373 U.S. 420, 423 (1963); Tigner v. Texas, 310 U.S. 141, 147 (1940). In early equal protection cases, the Supreme Court developed the rational basis test for determining whether a state classification violated an individual's right to equal protection under the law. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911); Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96, 103-06 (1899); Gulf C. & S.F. Ry. v. Ellis, 165 U.S. 150, 155 (1897). This test required that a statutory classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Id.* *See, e.g.*, Morey v. Doud, 354 U.S. 457, 463-64 (1957); International Harvester Co. v. Missouri, 234 U.S. 199, 204-05 (1914); Lindsley v. Natural Carbonic Gas Co., *supra* at 78-79. The Court, in applying the rational basis approach, acts under a strong presumption that a state legislature has acted within its constitutional power, unless no rational basis whatsoever can be found. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); International Harvester Co. v. Missouri, *supra* at 215; Lindsley v. Natural Carbonic Gas Co., *supra* at 83. Under this test, the Supreme Court has rarely failed to recognize some rational basis to support the state's classification. *See, e.g.*, McDonald v. Board of Elections, 394 U.S. 802, 810-11 (1969); Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955); Goesaert v. Cleary, 335 U.S. 464, 467 (1948); Buck v. Bell, 274 U.S. 200, 207-08 (1927); Lindsley v. Natural Carbonic Gas Co., *supra* at 83.

A more recent development has been that when the individual right intruded upon is deemed fundamental, or when the classification is inherently suspect, the Court will apply a much stricter, "compelling state interest" test. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971); Shapiro v. Thompson, *supra* at 638; Carrington v. Rash, *supra* at 94, 96; McLaughlin v. Florida, *supra* at 192; United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The Supreme Court has yet to uphold a state law under this strict scrutiny test.

Richardson,[65] Justice Brennan's lead opinion stated that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[66] The concurring justices, however, while agreeing that the challenged statutes were unconstitutionally discriminatory, did not join in holding that classifications based upon sex are inherently suspect.[67] *Frontiero* and an earlier case, *Reed v. Reed*,[68] indicate that the Supreme Court, rather than making sex a suspect category, will instead apply the rational basis test more strictly where state legislation appears to discriminate on the basis of sex, by abandoning the presumption that any state purpose, no matter how tenuous, is rational.[69] The court may further require positive evidence of a valid

65. 411 U.S. 677 (1973).

66. *Id.* at 688. In *Frontiero*, a married female Air Force officer successfully challenged a statute which contained a presumption that spouses of male servicemen were dependents for purposes of obtaining increased housing and medical allowances, whereas spouses of female members had to prove their dependent status. *Id.* at 678-79. Prior to *Frontiero*, the California supreme court actually held that sex classifications are inherently suspect. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

67. Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Stewart, J., concurring); *id.* (Powell, Blackmun, JJ., Burger, C.J., concurring). The effort to persuade the Supreme Court to apply the compelling state interest test to cases involving sex discrimination may have been prompted by the recognition that in cases where that test had been applied, the state was unable to prove a compelling state interest to justify the challenged regulation. *See* discussion note 64 *supra*. On the other hand, Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972), is illustrative of what may happen when the rational basis test is applied to sex discrimination statutes. In *Forbush*, the federal district court held that an Alabama law requiring a woman to assume her husband's surname upon marriage had a legitimate state purpose. *Id.* at 222-23. The court found that longstanding custom and administrative convenience provided a rational basis for Alabama's law. *Id.* at 222. In balancing the plaintiff's injury against the high cost to the state of change, the court pointed out that the plaintiff's injury was minor, because Alabama provides a simple, inexpensive means by which any person, including a married woman, may legally change his or her name. *Id.*

68. 404 U.S. 71 (1971). The Court in *Reed* held that a mandatory provision of the Idaho probate code giving preference to men over women in the appointment of an administrator was an unconstitutional denial of equal protection. *Id.* at 76-77. The state's only justification for the discrimination was administrative convenience, which a unanimous Court found unpersuasive. "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ." *Id.* at 76.

69. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684 (1973); Reed v. Reed, 404 U.S. 71, 75-77 (1971); Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights*, 17 ARIZ. L. REV. 145, 169-71 (1975); Comment, *Constitutional Attacks on Mandatory Retirement: A Reconsideration*, 23 U.C.L.A.L. REV. 549, 561-64 (1976). The "new" equal protection test applied in *Reed* has been called the "rational scrutiny" test. *Id.* at 561. This test places the burden of proving the rational relationship upon the state and is more rigorously applied than the older rational basis test. *Id.* at 561-62.

In both *Reed* and *Frontiero*, the Court found that although administrative convenience may be a legitimate state purpose, it does not justify "providing dissimilar treatment for men and women who are thus similarly situated." Reed v. Reed, *supra* at 77; *see* Frontiero v. Richardson, *supra* at 683-84. *Compare id.* at 684; *and* Reed v. Reed, *supra* at 75-77, *with* Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972). The rationale of these cases indicates that where the state's only interest is administrative or economic convenience, the state must prove the economic burden is strong enough to overcome the injury suffered as a result of the de-

state purpose.[70]

A woman's right to maintain her maiden name is one area where courts are beginning to reevaluate contemporary customs in light of their constitutional validity.[71] Although none of the case law in this area deals directly with the *Laks* name-change situation, an argument can be made that modern day customs should not be upheld over equal protection rights. In the past, married women have faced difficulties asserting equal protection arguments to support a right to use their maiden names in procuring driver's licenses,[72] registering motor vehicles,[73] and registering to vote.[74] Some courts, however, have upheld a woman's right to retain her name after marriage, balancing the woman's interest against both the custom and the state's interest in administrative and economic convenience.[75] These courts have found that although there is a strong customary interest in having women adopt their husband's surname after marriage, the custom has never risen to the level of a legal mandate.[76]

An examination of the historical and legal developments of the tradition involved here raises questions as to the soundness of a court's reliance upon custom in assessing legal rights. For example, a woman's right to maintain her maiden name after marriage has been upheld, even though the practice of using the husband's surname is so widespread that it is easy to assume such a custom has always existed and has been sanctioned by law.[77] The custom of a woman assuming

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nial of equal treatment. *See* Frontiero v. Richardson, *supra* at 690-91; Reed v. Reed, *supra* at 75-77.

70. *See* Frontiero v. Richardson, 411 U.S. at 683, 689.

71. *See, e.g.*, Custer v. Bonadies, 30 Conn. Supp. 385, —, 318 A.2d 639, 641-45 (Super. Ct. 1974); Stuart v. Board of Supervisors of Elections, 266 Md. 440, 447-49, 295 A.2d 223, 227-28 (1972); State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 501-02, 177 N.E.2d 616, 619 (1961).

72. *See* Forbush v. Wallace, 341 F. Supp. 217, 223 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972).

73. *See* Bacon v. Boston Elevated Ry., 256 Mass. 30, 31, 152 N.E. 35, 36 (1926).

74. *See, e.g.*, Custer v. Bonadies, 30 Conn. Supp. 385, —, 318 A.2d 639, 639 (Super. Ct. 1974); People *ex rel.* Rago v. Lipsky, 327 Ill. App. 63, 64, 63 N.E.2d 642, 643 (1945); Stuart v. Board of Supervisors of Elections, 266 Md. 440, 442, 295 A.2d 223, 224 (1972).

75. *See, e.g.*, Custer v. Bonadies, 30 Conn. Supp. 385, —, 318 A.2d 639, 640-45 (Super. Ct. 1974); Stuart v. Board of Supervisors of Elections, 266 Md. 440, 443-49, 295 A.2d 223, 224-28 (1972); State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 501-03, 177 N.E.2d 616, 619-20 (1961); Dunn v. Palermo, 522 S.W.2d 679, 683-88 (Tenn. 1975).

76. *See, e.g.*, Custer v. Bonadies, 30 Conn. Supp. 385, —, 318 A.2d 639, 642 (Super. Ct. 1974); Stuart v. Board of Supervisors of Elections, 266 Md. 440, 447, 295 A.2d 223, 227 (1972); State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 501, 177 N.E.2d 616, 619 (1961); Dunn v. Palermo, 522 S.W.2d 679, 687-89 (Tenn. 1975); Kruzell v. Podell, 67 Wis. 2d 138, 143-54, 226 N.W.2d 458, 461-66 (1975). It is interesting to compare the refusal of these courts to afford such a firmly entrenched custom the status of a rule of law, with the *Laks* finding that "the father has a protectible interest in having his child bear the parental surname in accordance with the usual custom." 25 Ariz. App. at 60, 540 P.2d at 1279.

77. *See, e.g.*, Custer v. Bonadies, 30 Conn. Supp. 385, —, 318 A.2d 639, 640-41

her spouse's surname is simply not rooted in law. As late as the 13th and 14th centuries, it was not unusual for women of prominent families to retain their father's name after marriage.[78] In such instances, it was common for the husband to adopt the woman's maiden name upon marriage.[79] Under English common law, a married woman was not compelled to change her name.[80] She was, however, entitled to assume her husband's surname, if she desired, pursuant to the common law right to adopt the surname of one's choice.[81] If a woman did choose to assume her husband's name, it was treated merely as a voluntary name-change, not a legal consequence of marriage.[82] The English common law to this day permits women the choice of whether or not to take their husband's name upon marriage.[83] In the American jurisdictions that follow the English common law, a woman's surname is not automatically changed by reason of her marriage.[84] It is against this historical and legal background that the equal protection challenge

(Super. Ct. 1974); Stuart v. Board of Supervisors of Elections, 266 Md. 440, 448-49, 295 A.2d 223, 227-28 (1972); State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 502, 177 N.E.2d 616, 619-20 (1961); Dunn v. Palermo, 522 S.W.2d 679, 681-89 (Tenn. 1975); Kruzel v. Podell, 67 Wis. 2d 138, 143-54, 226 N.W.2d 458, 461-66 (1975).

78. *See* C. EWEN, A HISTORY OF SURNAMES OF THE BRITISH ISLES 389 (1931); L. PINE, *supra* note 28, at 23-24; Daum, *The Right of Married Women to Assert Their Own Surnames*, 8 U. MICH. J.L. REF. 63, 67 (1974).

79. L. PINE, *supra* note 28, at 23-24.

80. Stuart v. Board of Supervisors of Elections, 266 Md. 440, 447-48, 295 A.2d 223, 227 (1972); L. PINE, *supra* note 28, at 23; MacDougall, *supra* note 38, at 4 & n.21.

81. *See* Custer v. Bonadies, 30 Conn. Supp. 385, —, 318 A.2d 639, 640 (Super. Ct. 1974); MacDougall, *supra* note 38, at 4 & n.20.

82. *See* Custer v. Bonadies, 30 Conn. Supp. 385, —, 318 A.2d 639, 640 (Super. Ct. 1974); 19 HALSBURY'S LAWS OF ENGLAND 829 (3d ed. 1957); MacDougall, *supra* note 38, at 4 & n.22.

83. Dunn v. Palermo, 522 S.W.2d 679, 683 (Tenn. 1975); *In re* Fry, [1945] Ch. 348 at 351; Daum, *supra* note 78, at 67, 75; MacDougall, *supra* note 38, at 5.

84. *See* Custer v. Bonadies, 30 Conn. Supp. 385, —, 318 A.2d 639, 640-41 (Super. Ct. 1974); Stuart v. Board of Supervisors of Elections, 266 Md. 440, 448-49, 295 A.2d 223, 227 (1972); *In re* Lawrence, 133 N.J. Super. 408, 412-14, 337 A.2d 49, 51-52 (App. Div. 1975); Dunn v. Palermo, 522 S.W.2d 679, 682-89 (Tenn. 1975); Kruzell v. Podell, 67 Wis. 2d 138, 140, 143-52, 226 N.W.2d 458, 459, 460-65 (1975).

There appears to be a fairly even split among American jurisdictions that have considered the question of the legal effect of marriage upon a woman's surname. *Stuart*, a leading case which follows the English common law, holds that women who retain their maiden names after marriage are deemed to have chosen not to take advantage of the common law right to change their names. Stuart v. Board of Supervisors of Elections, *supra* at 447, 295 A.2d at 227. The Maryland court of appeals in *Stuart* held that only those women who had in fact undergone a "change of name by marriage" need to register to vote under their husband's surnames. *Id.* at 449, 295 A.2d at 228. The court was willing to accept this interpretation even though it went against a longstanding and uniform administrative practice in Maryland voter registration. *Id.* at 443, 295 A.2d at 224. The court cited numerous English cases and writers, as well as American cases, in support of its interpretation of the applicable common law. *Id.* at 445-48, 295 A.2d at 225-27. Some of the courts upholding a woman's right to retain her birth name after marriage suggest, however, that the husband's consent is a relevant, if not necessary, factor. *See In re* Lawrence, *supra* at 413, 337 A.2d at 52; State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 502, 177 N.E.2d 616, 619 (1961).

According to the contrary theory, followed in other jurisdictions, the husband's sur-

must be evaluated. In that a woman, as much as a man, has a common law right to retain or change her name at will,[85] it is clear that she has a definite interest in the use of her name, which neither custom nor the state's interest in administrative convenience may diminish without equal protection of law.[86]

Due to the increasing support for providing equal rights for women, irrespective of modern-day customs to the contrary, courts deciding children's name-change cases should reassess their reliance on contemporary custom in giving priority to the father's interest over that of the mother.[87] The *Laks* court indicated that the mother would have a viable equal protection argument at the time of the children's initial naming, despite custom.[88] Yet, if the court recognizes the father's customary interests beyond the point of birth, it should logically recognize similar interests of the mother at those later stages if it is to afford her equal protection. In cases like *Laks*, however, the court properly considered the equal protection argument unnecessary, as the respective interests of the parents in the children's name were secondary to the interests of the children themselves.

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name automatically becomes the wife's legal name upon marriage. *See In re* Kayaloff, 9 F. Supp. 176 (S.D.N.Y. 1934); State *ex rel.* Rago v. Lipsky, 327 Ill. App. 63, 67, 63 N.E.2d 642, 644 (1945).

These cases are based on English principles of coverture:

> By marriage, the husband and wife are one person in law . . . that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-French a *feme covert*, . . . or under the protection and influence of her husband, her *baron* or *lord*; and her condition during her marriage is called her *coverture*.

1 W. BLACKSTONE, COMMENTARIES *442 (emphasis in original; footnote omitted); *accord*, Lamber, *supra* note 26, at 781 & n.7.

85. Custer v. Bonadies, 30 Conn. Supp. 385, —, 318 A.2d 639, 643-44 (Super. Ct. 1974); Stuart v. Board of Supervisors of Elections, 266 Md. 440, 446-47, 295 A.2d 223, 226-27 (1972); *In re* Strikwerda, 216 Va. 470, 472-73, 220 S.E.2d 245, 246 (1975).

86. *See* Stuart v. Board of Supervisors of Elections, 266 Md. 440, 449-50, 295 A.2d 223, 228 (1972). The administrative convenience justification for a legislative classification based on sex was expressly rejected by the Supreme Court in Stanley v. Illinois, 405 U.S. 645, 656 (1972):

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize . . . government officials . . . .

(footnote omitted.)

87. *But see In re* Lone, 134 N.J. Super. 213, 338 A.2d 883 (L. Div. 1975), in which the court, in denying a name-change, viewed the father's interest as an "interest in maintaining his relationship with his child for their mutual benefit," rather than as a customary interest in perpetuating his name. *Id.* at 219-21, 338 A.2d at 887. Viewed in this light, a court denying a name-change may be advancing this interest in the father, an interest which has already been secured for the custodial mother through the award of custody.

88. 25 Ariz. App. at 61, 540 P.2d at 1280.

The Child's Interest

In dealing with the change of a child's name, courts generally have made little differentiation between common law and statutory methods.[89] Most of the decided cases involve attempts by a custodial mother to change the child's name from the patronymic surname to that of a stepfather[90] or to her own surname,[91] or to add a name to the father's surname.[92] The factor most often cited as decisive in denying or granting these name-changes is the nature of the child's relationship with the noncustodial parent, generally the father.[93] In one leading case, the court indicated that a noncustodial father may forfeit his right to challenge the child's name-change if his behavior in the past has shown lack of concern for the child's welfare, or if he has embarrassed the child by serious misconduct.[94] If no misconduct has occurred, the change-of-name petition will be denied, for the reason that allowing it might well contribute to the further estrangement of the child from a father who exhibits a desire to preserve the parental relationship.[95] Rather than forcing a new name upon a child which the child may later reject, the court will consider whether the child is old enough to make his or her own decision.[96] The desirability of a child knowing his par-

89. *See* Hall v. Hall, 30 Md. App. 214, 223-24, 351 A.2d 917, 923-24 (1976). *Compare* Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (1956); *and* Sobel v. Sobel, 46 N.J. Super. 284, 134 A.2d 598 (Ch. Div. 1951), *with* Robinson v. Hansel, 302 Minn. 34, 223 N.W.2d 138 (1974); *and In re* Shipley, 26 Misc. 2d 204, 205 N.Y.S.2d 581 (Sup. Ct. 1960). *See* Brief for Appellant at 4-5, Laks v. Laks, 25 Ariz. App. 58, 540 P.2d 1277 (1975).

90. *See, e.g.*, Worms v. Worms, 252 Cal. App. 2d 130, 131, 60 Cal. Rptr. 88, 88 (Ct. App. 1967); Mark v. Kahn, 333 Mass. 517, 517-18, 131 N.E.2d 758, 760 (1956); Robinson v. Hansel, 302 Minn. 34, 35, 223 N.W.2d 138, 140 (1974).

91. *See, e.g., In re* Ebenstein, 85 N.Y.S.2d 261, 262 (Sup. Ct. 1948); *In re* Harris, 43 N.Y.S.2d 521, 521 (Sup. Ct. 1943); *In re* Proman, 63 N.Y.S.2d 83, 84 (N.Y. City Ct. 1946).

92. *See In re* Trower, 260 Cal. App. 2d 75, 77, 66 Cal. Rptr. 873, 874 (Ct. App. 1968); *In re* Widrick, 25 Misc. 2d 1078, 1084, 212 N.Y.S.2d 350, 355-56 (Sur. Ct. 1960).

93. *See* Mark v. Kahn, 333 Mass. 517, 521, 131 N.E.2d 758, 762 (1956). The Massachusetts court observed that the bond between a noncustodial father and his child is tenuous, especially if there is a stepfather in the child's life. *Id.* The court concluded from this observation that if the child's name is changed, the bond will be further weakened, if not destroyed. *Id.* There was no attempt to substantiate such a conclusion. *See also* text & notes 95, 105 *infra.* The court looked to the father's behavior toward the child to determine if he had exhibited any "desire to preserve the parental relationship." 333 Mass. at 522, 131 N.E.2d at 762. When such a desire is found, the name-change will not be granted, on the basis that it would not be in the child's best interest. *Id.*; *accord*, West v. Wright, 263 Md. 297, 301-02, 283 A.2d 401, 403-04 (1971); Robinson v. Hansel, 302 Minn. 34, 35-36, 223 N.W.2d 138, 140 (1974); *In re* Shipley, 26 Misc. 2d 204, 207, 205 N.Y.S.2d 581, 585-86 (Sup. Ct. 1960).

94. "A father who completely abandons a child, or is indifferent to a child's welfare or has by his serious misconduct caused the child embarrassment, can by his actions lose the right to successfully protest the child's change of name." Mark v. Kahn, 333 Mass. 517, 522, 131 N.E.2d 758, 762 (1956) (citations omitted).

95. *See, e.g.*, Degerberg v. McCormick, 41 Del. Ch. 46, 187 A.2d 436 (1963); Mark v. Kahn, 333 Mass. 517, 521-22, 131 N.E.2d 758, 762 (1956); Robinson v. Hansel, 302 Minn. 34, 35-36, 223 N.W.2d 138, 140 (1974); *In re* Lone, 134 N.J. Super. 213, 220-21, 338 A.2d 883, 887-88 (L. Div. 1975).

96. *See* Mark v. Kahn, 333 Mass. 517, 521, 131 N.E.2d 758, 762 (1956); Robinson

entage is an additional factor the courts may consider.[97] On the other hand, the fact that a child has suffered embarrassment or has been harassed by his peers because he bears a different surname than his custodial parent, although seemingly important, has been held insufficient to show that a name-change is in the child's best interest.[98]

In *Laks*, the Arizona court of appeals did not indicate the guidelines to be applied in determining whether a change of name will be in the child's best interest.[99] The Arizona statutory provision for changing the name of minors similarly does not indicate what interests are to be considered by a court in its determination of whether or not to grant such a petition.[100] It is useful to note, however, that Arizona also employs the best interest of the child test in the analogous area of custody cases.[101] Due to the subjective nature of the test, Arizona courts recognize that the trial court is in the best position to evaluate these interests according to the particular circumstances of each case; the trial court is therefore given broad discretion in making its determinations.[102] It seems reasonable that this same rule should also be applied in name-change cases. In both custody and name-change cases, the trial court must evaluate the same interests to render a judgment suited to the needs of the individual child involved. Although the factors used in determining whether a particular custody award will be in the child's best interest cannot be transferred in toto to name-change cases, such factors do give the court some direction.[103]

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v. Hansel, 302 Minn. 34, 37-38, 223 N.W.2d 138, 141 (1974).

97. *See In re* Lone, 134 N.J. Super. 213, 221, 338 A.2d 883, 888 (L. Div. 1975); *In re* Epstein, 121 Misc. 151, 152, 200 N.Y.S. 897, 898 (N.Y. City Ct. 1923).

98. *See* West v. Wright, 263 Md. 297, 299, 283 A.2d 401, 402 (1971); *In re* Epstein, 121 Misc. 151, 151-52, 200 N.Y.S. 897, 897 (N.Y. City Ct. 1923).

99. *See* 25 Ariz. App. at 61, 540 P.2d at 1280.

100. *See* ARIZ. REV. STAT. ANN. § 12-601(B) (1956) provides: "The guardian or next friend of a minor may file an application for change of the name of the minor in the county of the minor's residence, or if the minor is sixteen years of age or over, he may file his own application."

101. *See, e.g.*, Andro v. Andro, 97 Ariz. 302, 305, 400 P.2d 105, 107-08 (1965); Smith v. Smith, 90 Ariz. 190, 191, 367 P.2d 230, 231-32 (1961); Earley v. Earley, 10 Ariz. App. 308, 309, 458 P.2d 512, 513 (1969). The best interest of the child test requires a case-by-case determination of what would best advance the welfare of the child. See text & note 102 *infra*.

102. Henning v. Henning, 89 Ariz. 330, 335, 362 P.2d 124, 127 (1961); Galbraith v. Galbraith, 88 Ariz. 358, 362, 356 P.2d 1023, 1026 (1960).

103. *See, e.g.*, Johnson v. Johnson, 105 Ariz. 233, 238, 462 P.2d 782, 787 (1969); Andro v. Andro, 97 Ariz. 302, 305, 400 P.2d 105, 107-08 (1965); Smith v. Smith, 90 Ariz. 190, 191, 367 P.2d 230, 231 (1961); Galbraith v. Galbraith, 88 Ariz. 358, 363, 356 P.2d 1023, 1026 (1960); Orezza v. Ramirez, 19 Ariz. App. 405, 409, 507 P.2d 1017, 1021 (1973); "Best Interests of Child May Require Reversal of Trial Court Custody Award Favoring Fit Parent Over Maternal Grandparents," 8 ARIZ. L. REV. 149, 163, 165 (1966). An early Arizona holding in a custody case, which is equally applicable to name-change cases, stated that "the primary consideration of the court in such cases is the best interest and welfare of the child or children, as the case may be, rather than the technical legal right of the parent." Clifford v. Woodford, 83 Ariz. 257, 262, 320 P.2d 452, 455 (1957) (citations omitted).

An attempt to more specifically define what is in a child's best interest is difficult in a vacuum, as the many elements of each child's life must be weighed differently according to each factual situation: What is in the best interest of one child may not be in the best interest of another, or of the same child under different circumstances. In one custody case, for example, the Arizona court of appeals stated that the association of a boy with his natural father is desirable and in the child's best interest.[104] It seems, however, that a shared identical surname is not always necessary to maintain such a relationship. If a parent and child have developed a close relationship, it will likely endure despite a change of the child's surname. If the parent and child have been unable to establish such a relationship, however, it seems equally unlikely that a shared surname alone will form an adequate substitute.[105]

There is no indication in the record that the children in *Laks* ever requested the change of name.[106] It appears that the mother wanted to add her name to the patronymic surname in the belief that it was in the children's best interest, to enable them to be socially identified with her by name, and spared inevitable confusion.[107] The mother offered no evidence that the use of a hyphenated surname would be in the best interest of the children, thus failing to carry her burden of proof.[108] In fact, there was little evidence at all as to how the proposed change would affect the children one way or another.[109] The court of appeals, therefore, had no choice but to rely on the trial court's judgment that the name-change would not be in the best interest of the children.[110]

Conclusion

Although the custom of giving a child the father's surname is of relatively recent origin in Western culture, it is one which has undeniably been followed in American society. It is true that a child's mother cannot claim a traditional or customary interest in having her child bear

104. *See* Earley v. Earley, 10 Ariz. App. 308, 310, 458 P.2d 512, 514 (1969).
105. Certainly there are cases between these two extremes, in which the relationship is tenuous, where a name-change might well have a negative effect, especially if the custodial parent seeks to further alienate the child from the noncustodial parent. Unfortunately, courts adopting this view have often failed to give it careful analysis. *See* Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (1956); Robinson v. Hansel, 302 Minn. 34, 223 N.W.2d 138 (1974). A few courts have, however, been more thorough in justifying their adoption of this view. *See* Degerberg v. McCormick, 41 Del. Ch. 46, 187 A.2d 436 (1963); *In re* Lone, 134 N.J. Super. 213, 338 A.2d 883 (L. Div. 1975).
106. *See* 25 Ariz. App. at 61, 540 P.2d at 1280.
107. *See* Abstract of Record at 17.
108. *Id.*
109. *Id.*
110. *See* 25 Ariz. App. at 61, 540 P.2d at 1280.

her surname, whereas the father can. However, the recent court trend recognizing women's equal protection rights in other areas demonstrates the inequities that have resulted from relying on custom to define constitutional rights. In light of recent case law, specifically in the equal protection area, it is doubtful that a court may constitutionally give priority to a father's interest over that of the mother simply on the basis of custom.

In future cases, courts should not follow the policy of jurisdictions that measure the benefit to the child in terms of possible harm to the father's interest. Instead, determinations of the child's best interest should follow those guidelines now being used in custody cases. The child's preference, if the child is old enough, should have a strong influence. The child's own personality and environment, and the reaction of his peers to the fact that he has a different name than his custodial parent, should also be considered. Only in cases where the child's interest weighs equally in favor of either name should the parents' interests be considered, and these, arguably, must be given equal weight, avoiding tendencies, under the rubric of custom, to tip the scale in favor of the father.

X. INDIAN LAW

A. SERVICE OF PROCESS ON INDIAN RESERVATIONS: A RETURN TO PENNOYER V. NEFF

After the Revolution, the United States initially perpetuated the English concept of treating Indian tribes as separate sovereign nations.[1] As Americans spread westward, and encroachment on Indian lands increased, however, the concept grew of a guardian-ward relationship between the United States and the Indians.[2] This policy was expressed in two opinions authored by Chief Justice Marshall: *Cherokee Nation v. Georgia*[3] and *Worcester v. Georgia*.[4] As a result of these cases, the principle was established early that Indian tribes possess internal sovereignty under general federal supervision.[5] Consequently, state juris-

1. *See* Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 953-58 (1975).

2. The guardian-ward theory is based on the relative weakness of the Indian tribes compared to the United States, and the consequent dependency of the Indians on the federal government. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832). Thus, Indian tribes are viewed as "domestic dependent nations" with limited political sovereignty, subject to the plenary power of Congress. *Id.* at 559-61; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831). For a general discussion of the guardianship theory, see Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445 (1970). *See also* Note, *Sovereignty, Citizenship and the Indian*, 15 ARIZ. L. REV. 973 (1973). The modern theory is one of self-determination, which seeks to end federal control over Indian tribes with their consent, while maintaining government funding. Address by President Nixon, U.S. Congress, July 8, 1970, *reprinted in* 28 CONG. Q. 1821 (1970).

3. 30 U.S. (5 Pet.) 1 (1831). This case involved the question whether the Cherokee Nation could sue the State of Georgia in federal court to enjoin a state law which would have extended state control over Cherokee lands. The Supreme Court held that it lacked original jurisdiction because tribes are "domestic dependent nations," not foreign nations within the meaning of U.S. CONST. art. III, § 2, cl. 1. 30 U.S. (5 Pet.) at 16-19.

4. 31 U.S. (6 Pet.) 515 (1832). Worcester, a white missionary, was convicted of violating a Georgia statute which required any white residing in the Cherokee territory to obtain a state license and take a loyalty oath. Worcester argued that Georgia had no jurisdiction within the Cherokee Nation. The Court, speaking through Chief Justice Marshall, agreed, declaring that the Indian nations were independent political communities in which the laws of Georgia had no force. *Id.* at 561. Marshall also emphasized that control over Indian affairs rested exclusively with the federal government. *Id.* at 559-61.

5. *Id.* at 561-62; 30 U.S. at 15-16. Judicial decisions on the nature of Indian tribal powers have been marked by three main principles: first, an Indian tribe possesses all the powers of a sovereign state; second, conquest subordinates the tribe to the United

diction extends to Indians in Indian country[6] only when authorized by Congress.[7]

As the nation grew, the feeling manifested that Indians should abandon tribal relations and be incorporated into the Anglo-American culture. This new attitude was expressed in the General Allotment Act of 1887[8] and court decisions recognizing limited state authority over non-Indians within a reservation.[9] Within 15 years of the Allotment Act's conception, ambitious whites had acquired almost one-half of the Indian land holdings, and two-thirds of the Indians were forced into poverty and economic dependence on the federal government.[10] At the same time, individual states gained jurisdiction over thousands of Indian allotees who had obtained patents-in-fee to their lands.[11] The failure of the allotment program led to the Indian Reorganization Act of 1934,[12] which halted all allotment, restored to many tribes reservations which had been lost, and provided machinery for tribes to assert authority over their internal affairs.[13]

The tribal governments established under the Reorganization Act do not have absolute control over their own affairs, however. Federal,

States and ends the external powers of sovereignty, but does not affect internal tribal sovereignty; last, unless expressly qualified by Congress, the control of intratribal affairs is vested in the tribal government. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942). *See also* United States v. Quiver, 241 U.S. 602, 603-04 (1916); *Ex parte* Crow Dog, 109 U.S. 556, 568-72 (1883).

6. "Indian country" is defined as including reservations, dependent Indian communities, and Indian allotments to which title has not been extinguished. 18 U.S.C. § 1151 (1970); *see* "Enforcement of State Financial Responsibility Laws Within Indian Country," 17 ARIZ. L. REV. 639, 831, n.2 (1975). *See also Ex parte* Crow Dog, 109 U.S. 556, 561-62 (1883).

7. Congressional power to deal with Indians is based on the commerce clause of the Constitution. U.S. CONST. art. I, § 8, cl. 3; *see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558-59 (1832).

8. Ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-358 (1970)). *See* Clinton, *supra* note 1, at 966. This Act was intended to break down tribal unity, end federal support to Indians, and civilize the Indians so they could be assimilated into the dominant white culture. *See id.* This was to be achieved by allocating parcels of land to individual Indians to be held in trust by the government for 25 years. Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 389-90. Allotees receiving a patent-in-fee or other Indians who abandoned their tribes were granted United States citizenship. *Id.* § 6, 24 Stat. 390 (codified at 25 U.S.C. § 349 (1970)). *See also* 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976) (expanding federal jurisdiction to certain intra-Indian crimes committed in Indian country); 25 U.S.C. § 71 (1970) (prohibiting the making of further treaties with Indian tribes).

9. *See* Draper v. United States, 164 U.S. 240 (1896); United States v. Kagama, 118 U.S. 375 (1886); Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885); United States v. McBratney, 104 U.S. 621 (1882).

10. E. SPICER, A SHORT HISTORY OF THE INDIANS OF THE UNITED STATES 112-16 (1969). *See also* F. COHEN, *supra* note 5, at 210-16.

11. The General Allotment Act provided that all Indians to whom allotments had been made should be subject to the laws of the state in which they resided upon the end of the federal trust period. Ch. 119, § 6, 24 Stat. 390 (codified at 25 U.S.C. § 349 (1970)); *see* State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926). This result was altered in 1934, when Congress indefinitely extended the trust period as to all land still unpatented. Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984 (codified at 25 U.S.C. § 462 (1970)).

12. Ch. 576, 48 Stat. 984 (codified in scattered sections of 25 U.S.C.).

13. E. SPICER, *supra* note 10, at 125.

state, and even county governments sometimes assert jurisdiction over Indian matters.[14] The position of the Indians within these various governmental systems is still being defined by Congress and the courts.[15] Although recent United States Supreme Court decisions have upheld federal supremacy and barred state jurisdiction within a reservation,[16] these decisions leave unanswered the question whether a state can exercise in personam jurisdiction over reservation Indians.[17]

Conflicting state court decisions tend to confuse rather than clarify the exact limits of state jurisdiction over reservation Indians. Many state courts consider only the question of subject matter jurisdiction, holding that personal jurisdiction is acquired through service of process within a reservation if the court has subject matter jurisdiction.[18] Other courts hold that the state has no authority within a reservation, and state service of process there is consequently invalid, regardless of the nature

14. Indian tribes usually have jurisdiction over matters involving Indians within the reservation, unless the subject matter is of federal concern. F. COHEN, *supra* note 5, at 119-21. States generally have jurisdiction over Indians who commit acts off the reservation, "Enforcement of State Financial Responsibility Laws Within Indian Country," *supra* note 6 at 831-32, and over non-Indians who act within the reservation, as long as the exercise of jurisdiction doesn't interfere with tribal self-government. *See* Indian Civil Rights Task Force, *Development of Tripartite Jurisdiction in Indian Country*, 22 KAN. L. REV. 351, 382-83 (1974). County laws may also apply within reservations if the state has jurisdiction over Indians there. *See* Note, *The Extension of County Jurisdiction over Indian Reservations in California: Public Law 280 and the Ninth Circuit*, 25 HASTINGS L.J. 1451, 1476 (1974).

15. For an excellent discussion of the evolution of federal and state policies and Indian rights, see Indian Civil Rights Task Force, *Development of Tripartite Jurisdiction in Indian Country*, 22 KAN. L. REV. 351 (1974).

16. Fisher v. District Court, 424 U.S. 382 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Kennerly v. District Court, 400 U.S. 423 (1971). *But cf.* DeCoteau v. District County Court, 420 U.S. 425 (1975) (limiting state jurisdiction to terminated nonallotted lands within former reservation).

17. All of the cases cited in note 16, *supra*, and indeed, most cases in Indian law, were decided on the question of the state court's jurisdiction over the subject matter in each particular case, so the issue of personal jurisdiction was not reached by these courts.

18. *See* Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893 (1974); State Sec., Inc. v. Anderson, 84 N.M. 629, 506 P.2d 786 (1973). *See also* Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (1958), *rev'd*, 358 U.S. 217 (1959) (reversed on grounds the state was without subject matter jurisdiction); Kane, *Jurisdiction Over Indians and Indian Reservations*, 6 ARIZ. L. REV. 237, 251 (1965).

Bad Horse concerned a divorce proceeding between two Indians who had obtained a state marriage license and were married outside the boundaries of the reservation. 163 Mont. at 446, 517 P.2d at 894. The defendant, who was served with process on the reservation by a state process server, moved to dismiss on the grounds that the state court lacked both subject matter and personal jurisdiction. *Id.* at 447, 517 P.2d at 894. The Montana supreme court held that the state had subject matter jurisdiction and stressed that Indians must be allowed to sue in state courts, or equal protection would be denied. *Id.* at 452, 517 P.2d at 896. Pointing out that the state had not been federally preempted and that tribal self-government was not infringed, the court concluded that state service extended to the reservation. *Id.*, 517 P.2d at 897.

State Securities and *Williams* both dealt with attempts by non-Indians to recover debts owed to them by Indians residing within the Navajo Reservation. In *Williams*, the debt was contracted on the reservation, 83 Ariz. at 242-43, 319 P.2d at 999-1000, while in *State Securities* the Indian had entered into a contract off the reservation. 84 N.M. at 629, 506 P.2d at 786. In both cases, the defendant was served within the reservation. 83 Ariz. at 243, 319 P.2d at 1000; 84 N.M. at 629, 506 P.2d at 786. In determining whether the state court had obtained personal jurisdiction, the New Mexico supreme court in *State Securities* looked at the issues of congressional preemption, state

and location of the cause of action.[19] A recent Arizona case, *Francisco v. State*,[20] exemplifies the second type of reasoning.

In *Francisco*, a paternity suit was brought by a Papago Indian against another Papago residing within the reservation. The mother and child lived off the reservation, in Tucson, Arizona,[21] and it was stipulated on appeal that the child was conceived off the reservation. The defendant also conceded that the trial court had subject matter jurisdiction.[22] Thus, the sole issue on appeal was the validity of the superior court's assertion of personal jurisdiction over an Indian residing within a reservation.[23] Reversing a court of appeals decision that personal jurisdiction follows once subject matter jurisdiction is found,[24] the Arizona supreme court held that the trial court lacked

disclaimer, and infringement on tribal self-government. 84 N.M. at 629-30, 506 P.2d at 786-87. The court found there was no preemption, after examining the power of the tribal courts and determining they had original but not exclusive jurisdiction. *Id.* at 630, 506 P.2d at 787. The court then cited Organized Village of Kake v. Egan, 369 U.S. 60 (1962), to support its conclusion that no disclaimer of jurisdiction had been made. 84 N.M. at 630, 506 P.2d at 787. Finally, the *State Securities* court looked at the possibility of infringement and found that the state and tribe have concurrent jurisdiction. *Id.* To hold otherwise would shield Indians from obligations arising away from the reservation, according to the court. *Id.* at 632, 506 P.2d at 789.

The Arizona court in *Williams* also held that Indians could be sued in state court in matters over which the federal government had not expressly retained jurisdiction. 83 Ariz. at 244, 319 P.2d at 1000. The court held that in this case the state had subject matter jurisdiction and stated:

> Our view is that if the subject matter of the litigation is one that the state court has jurisdiction to try and determine and the federal government has not reserved sole and exclusive jurisdiction over the territory involved, the state officers may enter such territory under the state's sovereign authority and serve the necessary process to enable it to exercise its legitimate jurisdiction.

Id.

19. Martin v. Denver Juvenile Court, 177 Colo. 261, 493 P.2d 1093 (1972); County of Beltrami v. County of Hennepin, 264 Minn. 406, 119 N.W.2d 25 (1963).

In *Martin* the defendant, a reservation Indian, moved to quash service in a paternity suit on the grounds that the sheriff had no authority within Indian lands. 177 Colo. at 262, 493 P.2d at 1093. The court agreed, reasoning that under the applicable South Dakota law, the state was considered to have ceded jurisdiction over Indian lands in its Enabling Act, and had never amended its constitution to assume jurisdiction. *Id.* at 263, 493 P.2d at 1094. Since service of process was not made by an officer "having powers and duties within the Indian territory," the court held the state lacked personal jurisdiction over the defendant. *Id.* at 264, 493 P.2d at 1094.

Beltrami concerned the legal residence of certain Indian children for receipt of county welfare aid. 264 Minn. at 407, 119 N.W.2d at 26-27. To determine whether the state welfare law extended to tribal members living within the reservation, the court asked whether "the exercise of such jurisdiction by the state would impair a right granted or reserved by Federal law or interfere with tribal self-government." *Id.* at 415, 119 N.W.2d at 31. The court found that federal welfare laws existed, and more importantly, the extension of state law would conflict with existing federal and tribal jurisdiction. *Id.* at 415-16, 119 N.W.2d at 31-32. The court added that this conflict would also preclude state process from extending to Indians on the reservation. *Id.* at 416, 119 N.W.2d at 32.

20. 113 Ariz. 427, 556 P.2d 1 (1976).

21. *Id.* at 428, 556 P.2d at 2.

22. *Id.* The trial court has subject matter jurisdiction over paternity proceedings pursuant to ARIZ. REV. STAT. ANN. § 12-841 (Supp. 1976-77).

23. 113 Ariz. at 428, 556 P.2d at 2 (1976).

24. 25 Ariz. App. 164, 541 P.2d 955 (1975), *vacated*, 113 Ariz. 427, 556 P.2d 1 (1976). The court of appeals held that Arizona could exercise jurisdiction because the cause of action had arisen off the reservation, and service of process would be valid over a non-Indian under the same circumstances. *Id.* at 169, 541 P.2d at 960.

personal jurisdiction because the deputy sheriff who served process within the reservation was without proper authority to do so.[25] The court based this holding on its conclusion that state authority within the reservation had been federally preempted[26] by an Executive order and congressional enactment.[27]

The scope of the *Francisco* opinion is perplexing. The acquisition of personal jurisdiction over a defendant appears to be a civil procedure problem, yet the court focused solely on federal preemption, an issue which is usually raised to determine the limits of subject matter jurisdiction.[28] Possibly realizing that a total prohibition on service of process within a reservation would result in an unwelcome return to the sovereign power concept of *Pennoyer v. Neff*,[29] the court noted that service within the reservation would be valid if made by tribal authorities.[30] This dicta may indicate that service is to be made pursuant to

25. 113 Ariz. at 431, 556 P.2d at 5.

26. As a general rule, state laws are not applicable to reservation Indians unless Congress has so provided. F. COHEN, *supra* note 5, at 254. Where the relevant federal enactments fail to authorize the extension of state law, either through express denial or by reserving jurisdiction to the federal or tribal government, state authority is said to be federally preempted. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973). *See also* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), in which the Court said that state laws would apply within reservations unless that application "would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Id.* at 148. The *Mescalero* language might indicate that there is state power unless Congress acts to preempt it. However, the *McClanahan* decision pointed out that federal treaties and statutes virtually always define the limits of state and federal jurisdiction, so the question is moot whether state laws should apply absent overriding federal legislation to the contrary. 411 U.S. at 172 n.8.

27. 25 U.S.C. §§ 1321-1326 (1970); Exec. Order No. 2524 of Feb. 1, 1917, *reprinted in* 4 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 1005 (1929).

28. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). *McClanahan* held that the state had exceeded lawful authority by imposing an income tax on Indians whose incomes were derived from reservation sources, a question of the state's subject matter jurisdiction. In a decision issued the same day as *McClanahan*, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the Court held that a state tax on tribal land outside the reservation was valid, and stated that Indians going beyond reservation boundaries are generally subject to state laws. *Id.* at 148-49. These cases indicate that state laws may be applied to reservation Indians if the state has subject matter jurisdiction, as when the activity in question occurs outside the reservation. *Id.* However, a decision on whether the state has such jurisdiction depends on the respective authority of the state, the tribe, and the federal government, as determined by the federal treaties and statutes. 411 U.S. at 168-72; 411 U.S. at 148-49.

29. 95 U.S. 714 (1877). *Pennoyer v. Neff* involved the validity of a judgment in which jurisdiction over the defendant had been obtained through service by publication, utilized because the defendant resided out-of-state. In reaching its conclusion that the proceeding was void for lack of personal jurisdiction, *id.* at 733, the Court distinguished between in personam and in rem jurisdiction, and set forth principles of state jurisdiction. According to these principles, every state has exclusive jurisdiction over persons within its territory and "the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and . . . no tribunal established by it can extend its process beyond that territory . . . ." *Id.* at 722. For a history of personal jurisdiction law from *Pennoyer* to the present, see 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1064-1068 (1969).

30. In holding that there was no personal jurisdiction over the petitioner due to an invalid service of process, we think it appropriate to point out that the trial court did indeed have subject matter jurisdiction. This has been conceded by the petitioner and is not here an issue. We further note that service of process could have validly been effected through the Papago Indian authorities

the Arizona long-arm rule,[31] although the opinion is unclear on this point.

This casenote will examine the limits of the state's personal jurisdiction within an Indian reservation in order to evaluate the best means to effectuate state service of process there. The territorial limits on personal service of process and the need for long-arm service on out-of-state defendants will be discussed. The note will then examine the extent of state authority within the reservation, in order to determine whether a reservation Indian should be considered in-state or out-of-state for service of process purposes. Finally, the implications of the *Francisco* court's jurisdictional approach, and the desirability of viewing the issue from a civil procedure standpoint will be considered.

Personal Jurisdiction and Service of Process

Once subject matter jurisdiction is acquired, courts must obtain in personam jurisdiction through personal service of process or the voluntary appearance of the defendant before the court.[32] The purpose of the service is to give the defendant formal notice of the proceeding and an opportunity to defend himself, in accordance with the requirements of due process.[33] The degree of limitation on a court's ability to acquire jurisdiction over nonresident defendants under the due process clause of the fourteenth amendment, has varied over the years.[34] After *Pennoyer v. Neff*,[35] a defendant could only be served within the territorial limits of the state, because every state was thought to possess exclusive jurisdiction over persons within its territory.[36] These territorial limitations on state jurisdiction were also applied to Indian country, at least where tribal lands were excluded from territorial or state jurisdiction by treaty.[37]

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who are vested with the power to serve process pursuant to tribal law. 113 Ariz. at 428 n.1, 556 P.2d at 2 n.1.

31. ARIZ. R. CIV. P. 4(e)(2). The Arizona long-arm rule provides for personal service by registered mail, or by a person authorized to serve process where the service is made. See text & notes 46-50 *infra*. *See generally* "Tolling the Statute of Limitations: A New Rule," 17 ARIZ. L. REV. 639, 651 (1975).

32. Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925); Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 316-17 (1870); Howard v. United States *ex rel.* Alexander, 126 F.2d 667, 668 (10th Cir. 1942).

33. 4 C. WRIGHT & A. MILLER, *supra* note 29, § 1063, at 204.

34. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957) (noting gradual expansion of state jurisdiction over nonresidents).

35. 95 U.S. 714 (1877).

36. *Id.* at 722.

37. *See* Langford v. Monteith, 102 U.S. 145 (1880); Harkness v. Hyde, 98 U.S. 476 (1879). *Langford* involved a forcible detainer action to recover possession of buildings on Indian lands. 102 U.S. at 145. The defendant contended the court had no jurisdiction over the matter because the Indian land formed no part of the Idaho territory. *Id.* at 145-48. Although reasserting the general principle of *Harkness* that "when by the act of Congress organizing a territorial government, lands are excepted out of the jurisdiction of the government . . . they constitute no part of such Territory," 102

With the advent of modern transportation and communication, the burden of being sued in a foreign state lessened, and the due process limitations on nonresident service of process became increasingly more flexible.[38] In *International Shoe Co. v. Washington*,[39] the United States Supreme Court held that a state could subject a nonresident defendant to judgment in personam if the defendant had sufficient minimum contacts with the forum state.[40] As the Supreme Court extended the constitutional limits of a state's personal jurisdiction over out-of-state defendants, states began enacting long-arm statutes authorizing their courts to exercise jurisdiction over nonresidents, within constitutionally permissible limits.[41] Arizona's long-arm rule[42] is designed to give Arizona residents the maximum jurisdiction over nonresident defendants permitted by the United States Constitution.[43]

Arizona courts can acquire personal jurisdiction over defendants within the territorial limits of the state[44] through personal service of process by a sheriff, his deputy, or any person over 21 years-old who is specially appointed by the court.[45] When the defendant is out-of-state, the court can acquire personal jurisdiction over him through long-arm service if the defendant is a resident of the state, a corporation doing business within the state, or a person who has caused an event to occur in Arizona out of which the cause of action arose.[46] Service

U.S. at 146 (rephrasing language in *Harkness*, 98 U.S. at 478), the Court in *Langford* found that the applicable treaty did not expressly exclude lands held by Indians from territorial jurisdiction. *Id.* at 147. Thus, if the lower court had subject matter jurisdiction, which it did not in *Langford*, "process may run there, however, the Indians themselves may be exempt from that jurisdiction." *Id.* In *Harkness*, the Court held that Congress had excluded the Indian lands from territorial jurisdiction by treaty. 98 U.S. at 478. Territory so reserved was set apart as though it were another country, the Court explained, and service on the non-Indian defendant there was an unlawful act of the territorial sheriff. *Id.*

38. 4 C. WRIGHT & A. MILLER, *supra* note 29, § 1065, at 211.

39. 326 U.S. 310 (1945).

40. *Id.* at 316. *International Shoe* is well known for the following language: "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, . . . he have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* This language has been cited often by Arizona courts. *See, e.g.*, Houghton v. Piper Aircraft Corp., 112 Ariz. 365, 367, 542 P.2d 24, 26 (1975); Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 254, 413 P.2d 732, 734 (1966); Nickerson v. Nickerson, 25 Ariz. App. 251, 252, 542 P.2d 1131, 1132 (1975).

41. *See, e.g.*, ARK. STAT. ANN. § 27-340 (1962); CAL. CIV. PROC. CODE § 410.10 (West 1973); N.Y. CIV. PRAC. LAW § 302 (McKinney Supp. 1975-76). Arizona has acquired long-arm jurisdiction through a court rule, rather than a statute. ARIZ. R. CIV. P. 4(e)(2). *See also* "Tolling the Statute of Limitations: A New Rule," *supra* note 31, at 664.

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

43. Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 254, 413 P.2d 732, 733 (1966).

44. The process of the Superior Court of Arizona extends to all parts of the state. ARIZ. CONST. art. 6, § 13; ARIZ. R. CIV. P. 4(f).

45. ARIZ. R. CIV. P. 4(c). The sheriff's authority to serve process is set out in statutes delineating the powers and duties of sheriffs. *See* ARIZ. REV. STAT. ANN. §§ 11-441, -447 (1956).

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

can be effectuated under the long-arm rule either by registered mail[47] or through direct service by a person authorized to serve process under the law of the state where service is made.[48]

Since the adoption of long-arm jurisdiction in 1961, Arizona courts have upheld service of process on nonresident defendants in paternity suits, provided the relevant events leading up to the birth occurred within the state.[49] This proviso insures that the constitutional due process requirement of "minimum contacts," and the state requirement that the defendant "cause an event to occur in this state," are met.[50] In *Francisco*, both of these requirements were satisfied, as the conception and birth took place in Tucson, where the suit was brought.[51] Thus, the assumption of jurisdiction over the defendant by a state court would be constitutionally permissible once effectuated through proper service of process.[52] Had the defendant stayed in Tucson, the trial court could have acquired personal jurisdiction through personal service by a county deputy sheriff.[53] If the defendant had moved to another state, the court could have obtained personal jurisdiction through long-arm service.[54] Since Francisco complicated matters by moving to an Indian reservation within the state, however, the question in a civil procedure context becomes whether the reservation is "in" or "out"-of-state for purposes of the Arizona service of process rules.[55]

Rather than casting the issue in a civil procedure context, however, the *Francisco* court questioned whether the state laws authorizing the sheriff to serve process within the state applied within Indian country.[56] Generally, Indian tribes are permitted to regulate their own domestic affairs without state interference, unless limited by congressional enactments.[57] However, the exact limits of state law in matters involving Indians and Indian land can only be determined after following the analysis set out by the United States Supreme Court in

47. *Id.* 4(e)(2)(a).
48. *Id.* 4(e)(2)(b).
49. *See* Bebeau v. Berger, 22 Ariz. App. 522, 529 P.2d 234 (1975); Backora v. Balkin, 14 Ariz. App. 569, 485 P.2d 292 (1971).
50. Bebeau v. Berger, 22 Ariz. App. 522, 523, 529 P.2d 234, 235 (1975).
51. 113 Ariz. at 428, 556 P.2d at 2.
52. The defendant in *Francisco* had caused an event to occur within the state, and had sufficient minimum contacts with the forum. *See* text & note 51 *supra*. However, due process also requires that the defendant have legal notice of the action through service of process. D.W. Onan & Sons v. Superior Court, 65 Ariz. 255, 264-65, 179 P.2d 243, 249 (1947); Stinson v. Johnson, 3 Ariz. App. 320, 322, 414 P.2d 169, 171 (1966).
53. ARIZ. R. CIV. P. 4(c).
54. *Id.* 4(e)(2).
55. See text & notes 44-48 *supra*.
56. 113 Ariz. at 428, 556 P.2d at 2.
57. *See* Williams v. Lee, 358 U.S. 217, 220 (1959). This includes, among other things, the power to choose a form of government, define tribal membership, levy taxes, regulate Indian property, and administer justice. *See* F. COHEN, *supra* note 5, at 122.

McClanahan v. Arizona State Tax Commission.[58] The *McClanahan* procedure uses the Indian sovereignty principles introduced in *Worcester v. Georgia*[59] as a backdrop against which the applicable treaties and federal statutes which define the limits of state power are examined.[60] The result of such an examination is a fair determination of whether the exertion of state jurisdiction is federally preempted.[61]

The *McClanahan* analysis is also the proper paradigm to apply if the issue is framed within the civil procedure context. If the state is preempted, the Indians residing within the reservation are, for all practical purposes, out-of-state, within the meaning of the long-arm rule; but if state laws apply within reservation boundaries for lack of preemption, the defendant should be considered in-state for service of process purposes.[62]

The Extent of State Authority

The Arizona supreme court in *Francisco* followed the *McClanahan* test for determining whether the defendant was subject to state law, examining the Executive order creating the Papago Reservation, the Arizona Enabling Act, and the 1968 Indian Civil Rights Act.[63] These and other relevant statutes will now be discussed to determine whether the application of state law was federally preempted, and consequently, whether Indian country is out-of-state for service of process purposes.

The Executive Order. The analysis in *McClanahan* began with an examination of the language and historical circumstances of the 1868 treaty between the Navajo Nation and the United States.[64]

58. 411 U.S. 164 (1973). See discussion note 28 *supra.* It is possible that state laws may be applicable where essential tribal relations or Indian rights are not concerned, as in cases involving non-Indians. In Williams v. Lee, 358 U.S. 217 (1959), the Supreme Court made the general observation that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. However, in *McClanahan,* the Court seemed to limit the *Williams* infringement test to situations involving non-Indians, where the tribe and state both have an interest in asserting jurisdiction. *Id.* at 179. *See* "Enforcement of State Financial Responsibility Laws Within Indian Country," *supra* note 6, at 839-42.

59. 31 U.S. (6 Pet.) 515 (1832); see discussion note 5 *supra.*

60. 411 U.S. at 172.

61. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); see discussion note 26 *supra.*

62. If the Indian tribes are sovereign in relation to the state government, they take on the attributes of states, and are out-of-state in a jurisdictional, if not a territorial sense. *See generally* United States v. Kagama, 118 U.S. 375, 384 (1886); *In re* Lynch's Estate, 92 Ariz. 354, 357, 377 P.2d 199, 201 (1962); text & note 109 *infra.*

63. 113 Ariz. at 429, 556 P.2d at 3.

64. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173-74 (1973). The Supreme Court traditionally has placed great emphasis on treaty provisions. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-57 (1832), where the Court held that the treaty with the Cherokees implied that the internal affairs of the Indians remained exclusively within tribal control. *See also* Williams v. Lee, 358 U.S. 217 (1959); Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885).

The Papagos, however, made no treaties with the federal government.[65] Rather, their reservation was created by Executive order in 1917.[66] The order, like the Navajo treaty, contained no express provisions exempting the tribe from state control.[67] Nevertheless, the *Francisco* court found that the Executive order precludes the extension of state law to the reservation.[68] Relying on the reasoning in *McClanahan* that the Navajo treaty implicitly granted the Navajos exclusive sovereignty over their reserved lands,[69] the court in *Francisco* concluded that the order reserving land for exclusive Papago use also granted the Papagos sovereignty over their lands,[70] to the implied exclusion of state authority.[71] Thus, if no other federal enactment contradicts the exclusive sovereignty implicit in the Executive order, state authority within the reservation is preempted, and the reservation may be out-of-state for service of process purposes. However, if the extension of state law to reservation Indians is authorized by other federal acts, state authority may extend within the reservation despite the Executive order.[72]

The Arizona Enabling Act. A disclaimer of state interest in Indian land was a condition of statehood for most of the Western States.[73] The Arizona Enabling Act, for example, disclaims all state right and title to lands lying within the boundaries of any Indian reser-

65. The Papagos never signed a peace treaty with the United States government because they fought on the side of the Anglo-Americans against the raiding Apache Indians. E. SPICER, CYCLES OF CONQUEST 135-36 (1962). By the time the Apache raids had ceased and the cooperation between whites and Papagos had evolved into open hostility over land rights, Congress had forbidden the making of any more treaties with Indians. Act of Mar. 3, 1871, ch. CXX, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1970)).

66. Exec. Order No. 2524 of Feb. 1, 1917, *reprinted in* 4 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 1005 (1929). This order revoked previous land grants to the Papago Indians and withdrew and set apart approximately two million acres of land as a reservation for the Papago Tribe.

67. *Compare id., with* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).

68. 113 Ariz. at 430, 556 P.2d at 4.

69. 411 U.S. at 174-75.

70. 113 Ariz. at 430, 556 P.2d at 4.

71. *See* Note, *Tribal Property Interests in Executive Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627 (1960). The legal nature of the Indian property interests in Executive order reservations derives from the right of conquest or discovery. The absolute title to the lands is vested in the United States as a conquering nation, but the tribe retains the right to use and occupy the land to the exclusion of all but the federal government. *Id.* at 629-30.

72. Thus, Arizona has acquired jurisdiction to enforce air and water pollution standards on Indian reservations, including the Papago reservation, by passing affirmative state legislation pursuant to Public Law 280. Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 590 (codified at 25 U.S.C. § 1322(a) (1970)), which authorized the application of state laws within Indian reservations if the state passed affirmative legislation to that effect. *See also* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 177 n.16 (1973) for examples of federal statutes authorizing certain narrow extensions of state laws into Indian reservations; discussion note 103 *infra*.

73. *See* Comment, *State Civil Power Over Reservation Indians*, 33 MONT. L. REV. 291, 292 (1972).

vation.[74] In 1926, the Arizona supreme court interpreted the Enabling Act as a disclaimer of only the state's property or proprietary interest in Indian lands, rather than of all governmental control.[75] In *Francisco*, the court reaffirmed this view.[76] Arizona and other states which limit their disclaimer provisions to property interests,[77] find support for their positions in *Organized Village of Kake v. Egan*,[78] where the United States Supreme Court held that a disclaimer provision did not completely oust the state of Alaska from regulating Indian affairs.[79] However, in *McClanahan*, the Court pointed out that *Kake* dealt with nonreservation Alaskan natives, and was not determinative of issues involving reservations set aside for the exclusive use of other American Indians.[80] Instead, *McClanahan* suggests that Arizona's entry into the Union was conditioned on an express disclaimer of all jurisdiction over Indians living on reservations within the state.[81]

The Arizona supreme court in *Francisco* failed to mention this aspect of *McClanahan*, even though the court of appeals viewed *McClanahan* as restricting the state's traditional interpretation of its Enabling Act.[82] The supreme court instead relied on *Kake* and Arizona case law for the assertion that the disclaimer applied only to the state's proprietary interests.[83] Interestingly, the court noted that while the Act did not generally preclude the assertion of state jurisdiction over In-

74. Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569 (1910); ARIZ. CONST. art. 20, para. 4 states:

> The people inhabiting this State do agree and declare that they forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

75. Porter v. Hall, 34 Ariz. 308, 321, 271 P. 411, 415 (1928). The holding in *Porter* that Indians could not vote in state elections was expressly overruled in Harrison v. Laveen, 67 Ariz. 337, 349, 196 P.2d 456, 463 (1948), but the *Porter* interpretation of the state Enabling Act remains viable.

76. 113 Ariz. at 430, 556 P.2d at 4.

77. *See, e.g.*, State *ex rel.* Iron Bear v. District Court, 162 Mont. 335, 341, 512 P.2d 1292, 1296 (1973); State Sec., Inc. v. Anderson, 84 N.M. 629, 630, 506 P.2d 786, 787 (1973); Tonasket v. State, 84 Wash. 2d 164, 177, 525 P.2d 744, 752 (1974). *See also* Comment, *supra* note 73.

78. 369 U.S. 60 (1962).

79. *Id.* at 71.

80. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 176 n.15 (1973). The holding in *Kake* that federal legislation did not preclude the assertion of residual state authority was made in the context of a decision on the fishing rights of nonreservation natives where federal treaties and statutes do not define the limits of state jurisdiction. *Id.* In *Francisco* and *McClanahan*, the tribes live on reservations set aside for them by federal acts which limit state jurisdiction. *See id.* at 172 & n.8.

81. *Id.* at 175.

82. 25 Ariz. App. at 167-68, 541 P.2d at 958-59. The court of appeals saw *McClanahan* as restricting the *Porter* interpretation of the Enabling Act, at least where taxation is involved. 25 Ariz. App. at 168, 541 P.2d at 959. However, the court read *McClanahan* as intending the Enabling Act to preempt state jurisdiction only when the state's interest in a particular cause of action conflicts with a federal or tribal interest in the same matter. *Id.*

83. 113 Ariz. at 430, 556 P.2d at 4.

dians, neither did it sanction jurisdiction in this case.[84] The court failed to explain when, if ever, the Enabling Act would sanction the extension of state jurisdiction into an Indian reservation.

The conclusion of the supreme court in *Francisco* that the Enabling Act neither sanctions nor denies the exercise of state jurisdiction over reservation Indians[85] does not affect the exclusive tribal sovereignty implicit in the Executive order creating the Papago Reservation.[86] The Act merely defines the limits of the state's property interests, not the limits of state jurisdictional power. Thus, even under the court's narrow interpretation of the Act, state authority remains preempted. The result would have been the same if the court had taken the broader view that the Act disclaimed both property and governmental interests, as suggested by the Supreme Court in *McClanahan*,[87] and applied the rule that doubtful statutory expressions are to be resolved in favor of Indians.[88] Under the broader interpretation, the Act would preclude the extension of state laws to the reservation, and would serve as another indicator of federal preemption.

Congressional Enactments. The *Francisco* court next considered the effect of the 1968 Indian Civil Rights Act on state jurisdiction.[89] This Act is one of a series of federal Indian statutes affecting Indian sovereignty. In order to fully understand the 1968 Act and the extent of congressional preemption, it is necessary to examine other congressional legislation as well.

In very recent legislation, Congress has declared its commitment to Indian self-government by proposing the transfer of control of Indian affairs from the federal government to the Indians themselves.[90] The plan, favoring tribal autonomy with minimum state and federal intrusion, modifies a previous long term policy of detribalization and assimilation.[91] One of the statutes which had attempted to assimilate the Indian was the Indian Reorganization Act of 1934,[92] which provided

84. *Id.*
85. *See id.*
86. *See* text & notes 64-72 *supra.*
87. 411 U.S. at 176 n.15; see text & notes 80-81 *supra.*
88. *See, e.g.*, Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Choate v. Trapp, 224 U.S. 665, 675 (1912); Jones v. Meehan, 175 U.S. 1, 11 (1899).
89. Pub. L. No. 90-284, 82 Stat. 80 (codified at 25 U.S.C. §§ 1321-1326 (1970)).
90. *See* 25 U.S.C. § 450a(b) (Supp. V, 1975).
91. For a general discussion of the trend toward terminating federal control over Indians and assimilating them into the Anglo-American way of life, see F. COHEN, *supra* note 5, at 84-87. *See also* Clinton, *supra* note 1, at 962-71; Kelly, *Indian Adjustment and the History of Indian Affairs*, 10 ARIZ. L. REV. 559 (1968).
92. Ch. 576, 48 Stat. 984 (codified in scattered sections of 25 U.S.C.). The Act was enacted to stop the alienation of lands belonging to ward Indians, to provide for the purchase of land for landless Indians, to stabilize tribal government by vesting tribal organizations with limited authority, to permit Indian tribes to incorporate, to improve education for Indians, and to prohibit further allotment of Indian lands. *See Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 28 (1934).

in part for the gradual political integration of Indian communities by allowing tribes to set up representative governments based on approved constitutions.[93] Tribal councils and courts established under the Reorganization Act were granted jurisdiction over Indians within their reservations, except where preempted by federal law.[94] The Papago tribal court is specifically granted jurisdiction by the Papago Law and Order Code over all paternity suits involving Papagos.[95] The jurisdictional powers of the Papago tribal court thus may indicate a federal preemption of state power.

Despite the formation of tribal governments, the goal of Indian integration within the Anglo-American society was not achieved by the Reorganization Act.[96] Indians had grown dependent on the technical assistance and aid the federal government provided in hopes of achieving Indian self-sufficiency.[97] Concerned about the extent of governmental assistance, Congress changed direction and began a policy of withdrawing the federal government from Indian affairs.[98] Apparently in the belief that the states would be more adept at assimilating Indians, Congress passed Public Law 280, which provided a way for states to acquire civil and criminal jurisdiction over Indian reservations.[99] The state was required only to take affirmative legislative action.[100] Public Law 280 proved unsatisfactory to all concerned, however. Most states could not afford the increased costs of extending their governmental control to reservations, and the Indians objected to the unilateral imposition of state control over their lands.[101]

The dissatisfaction with Public Law 280 led to an amendment included in the Indian Civil Rights Act of 1968 requiring the consent of the Indians before a state could assume jurisdiction over an Indian tribe.[102] Arizona has not amended its constitution to assume full juris-

93. *See* E. SPICER, *supra* note 65, at 351.

94. *See Hearings on 7902 Before the House Comm. on Indian Affairs, supra* note 92, at 28-29.

95. *See* LAW AND ORDER CODE OF THE PAPAGO TRIBE § 3 (1937). *See also* 25 C.F.R. § 11.30 (1976). The Papago tribal court maintains exclusive jurisdiction over reservation domestic affairs, including paternity suits, and has tried a number of cases involving off-reservation Papagos. Telephone interview with Sandra Pharo, Attorney with Papago Legal Services, Sells, Arizona, Feb. 12, 1976.

96. *See* E. SPICER, *supra* note 10, at 139.

97. *See id.*

98. *See* E. SPICER, *supra* note 65, at 351-52.

99. Ch. 505, 67 Stat. 588 (codified, as amended in scattered sections of 18, 25 U.S.C.). For a complete analysis of Public Law 280, see Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A.L. REV. 535 (1975).

100. Ch. 505, § 7, 67 Stat. 588, 590 (codified, as amended, at 25 U.S.C. § 1322(a) (1970)).

101. Goldberg, *supra* note 99, at 545-57.

102. Pub. L. No. 90-284, § 46, 82 Stat. 80 (codified at 25 U.S.C. § 1326 (1970)). For a discussion of the amendment, see Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617 (1968).

diction over Indians within the state,[103] nor have the Papagos consented to such an extension of state power.[104] The state's failure to comply with Public Law 280 thus precludes the extension of state jurisdiction to the reservation, since the state failed to overcome the federal preemption evidenced by the Executive order, and possibly the Enabling Act.[105]

Implications of Francisco

Based on the Executive order establishing the Papago Reservation, the Arizona Enabling Act, and the federal statutes restricting state jurisdiction over reservation Indians, it appears that the Arizona supreme court properly decided that state authority was federally preempted. Once it found that state jurisdiction was preempted, the court concluded that a deputy sheriff had no authority to serve process on reservation Indians because the laws vesting the deputy with authority did not extend within the reservation.[106] Carried to the extreme, the court's logic could be viewed as setting up a sort of force field around the reservation which no state service of process can penetrate, regardless of the cause of action or fairness of the forum. Indeed, substitute service of process by registered mail or direct service by a tribal officer authorized to serve process by tribal law is effective in an Arizona state court only as sanctioned by state law. Conceivably, then, use of substitute service is an application of Arizona law in Indian country which would be invalid for lack of jurisdiction under *Francisco*. This reasoning could turn reservations into havens for Indian exiles from Arizona law, and return the state to the days of *Pennoyer v. Neff*,[107] where direct service could only be made when the defendant was encountered within the state's boundaries. The *Francisco* court

103. Although Arizona has not taken affirmative legislative action to amend its statutes so as to acquire full jurisdiction over Indian reservations, it did provide in ARIZ. REV. STAT. ANN. §§ 36-1801, -1865 (1974) that state air and water pollution abatement laws would apply to all Indian lands, and the state could enforce those laws within the reservations. Both of these statutes were enacted prior to the 1968 amendments to Public Law 280 requiring tribal consent.

104. Francisco v. State, 113 Ariz. at 431, 556 P.2d at 5.

105. Public Law 280 was intended to help states overcome the disclaimer provisions in their enabling acts. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 177-78 (1973). This is an additional indication that the Arizona Enabling Act disclaimed state governmental as well as property interests. See text & notes 85-88 *supra*.

106. 113 Ariz. at 431, 556 P.2d at 5. The conclusion that a state agent lacks authority to serve process within a reservation is supported by another federal statute which permits certain state agents to enter tribal lands with tribal consent, to inspect health and educational conditions. 25 U.S.C. § 231 (1970). This statute arguably demonstrates the intent of Congress to prohibit state agents from otherwise entering Indian lands to enforce state laws without tribal consent or federal statutory authorization. *See* Kane, *supra* note 18, at 254. *See also* Martin v. Denver Juvenile Court, 177 Colo. 261, 493 P.2d 1093 (1972); discussion note 19 *supra*.

107. 95 U.S. 714 (1877). See text & notes 29, 35-36 *supra*.

did not carry its reasoning to these lengths, however. Rather, the court explicitly approved service of process by a tribal court officer without explanation.[108] This would seem to be inconsistent with the jurisdictional approach taken by the court. In contrast, *Francisco* can be interpreted as a civil procedure problem, in which case an alternate mode of service could be justified.

Since state authority does not extend to the Papago Reservation, it is reasonable to infer that the reservation is out-of-state in a jurisdictional, if not a territorial sense. This inference is supported by the holding of the Arizona supreme court in *In re Lynch*,[109] that the probate of a will by a Navajo tribal court came within the meaning of an Arizona statute allowing wills already admitted to probate in another state or foreign country to be admitted in Arizona.[110] If a reservation is considered to be out-of-state for purposes of the service of process rules as well, the court can only acquire in personam jurisdiction through long-arm service.[111] Thus, in a case like *Francisco*, service on the defendant could presumably be made not only by tribal authorities, as the court suggested, but also by registered mail.[112] The civil procedure analysis thus conceptually solves the problem of acquiring jurisdiction over reservation Indians, while ensuring the continuance of tribal sovereignty. Future cases involving similar issues should be decided in this framework, rather than entirely through an analysis of federal preemption.

Conclusion

In *Francisco*, the Arizona supreme court complicated a basic civil prccedure problem by overlooking the procedural aspects altogether, and concentrating on the question of state authority within an Indian reservation. In finding that the state's authority was federally preempted, the court opened the way for a discussion of how service could

108. 113 Ariz. at 428 n.1, 556 P.2d at 2 n.1. See the quoted portion of the case at note 30 *supra*.

109. 92 Ariz. 354, 377 P.2d 199 (1962).

110. *Id.* at 357, 377 P.2d at 201.

111. *See* ARIZ. R. CIV. P. 4(e)(2). Even if the state acquires jurisdiction under the long-arm provision, however, it will not be able to enforce the judgment against the defendant on the reservation except through the tribal courts. Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971). This helps ensure that tribal sovereignty will not be infringed upon. *See* Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 208-10.

112. The trial court in *Francisco* upheld service on the basis of minimum contacts and Ariz. R. Civ. P. 4(f), which provides for personal service within the state's territorial limits, but also noted that service could be held valid under the long-arm rule. Appellee's Response to Special Action Petition at 15, Francisco v. State, 25 Ariz. App. 164, 541 P.2d 955 (1975).

be validly effectuated within a reservation. The court's failure to deal with the procedural issue, other than in a brief footnote authorizing service by tribal authorities, leaves unanswered the question of a state's power to acquire in personam jurisdiction over reservation Indians. The question should be resolved in future cases by treating the reservations as being outside the state's jurisdiction, so that substitute service of process can be used.

XI. LEGAL PROFESSION

A. DUTIES OF THE INSURANCE COMPANY-RETAINED COUNSEL: TO THE INSURER AND THE INSURED

An attorney retained by an insurance company to defend its insured in litigation initiated by a third person, can face a conflict of interest if, in the course of such representation, he discovers information which would permit the company to deny coverage to the insured.[1] Normally, the interests of the company and the insured are unified in the goal of avoiding or reducing the liability of the insured. If, however, a question of coverage arises, the company's best interest lies in avoiding liability to the insured, which is obviously inconsistent with the interest of the insured in being protected by insurance coverage. In dealing with this conflict, the attorney must take care to avoid unethical behavior which could have serious consequences for the insurance company.[2]

In *Parsons v. Continental National American Group*,[3] the Arizona supreme court dealt with the question of a conflict of interest arising in the course of representation of an insured, and held that the attorney owes the insured his "undeviating and single allegiance"[4] and cannot divulge to the insurer any confidences or secrets obtained in the course of such representation which would be contrary to the best interests of the insured.[5] In the event revelation of such information is made to the insurer, the insurer is estopped to deny coverage, and is deemed to have waived any policy defense suggested thereby.[6]

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1. Such information is usually a policy defense, which is a claim by the company that the act bringing about the suit against the insured is not covered by the policy, either due to a specific exclusion or because the insured failed to comply with the procedural requirements of the policy. *See* Pacific Indem. Co. v. Acel Delivery Serv., Inc., 485 F.2d 1169, 1173 (5th Cir. 1973), *cert. denied*, 415 U.S. 921 (1974) (interpreting Texas law).

2. The actions of the attorney may estop the company, or the company, through its own actions which mislead or prejudice the insured, may waive its right to assert a policy defense. *See* text & notes 21-23 *infra*.

3. 113 Ariz. 223, 550 P.2d 94 (1976).

4. *Id.* at 227, 550 P.2d at 98.

5. *Id.*

6. *Id.* at 228, 550 P.2d at 99. It should be noted that the supreme court used the phrase "constitutes a waiver of *any* policy defense." *Id.* (emphasis added). If this is

The *Parsons* controversy arose out of an earlier case. Plaintiff Parsons brought an action against the insured, Michael Smithey, for an assault upon her and her minor children.[7] Smithey was covered by a homeowner's personal liability insurance policy issued by Continental National American Group [CNA], which excluded coverage of personal injury caused by intentional acts of the insured.[8] An employee of CNA determined that the act did not fall within the scope of the intentional acts exclusion, and recommended settlement.[9] CNA made two unsuccessful attempts to settle for medical expenses before it retained counsel to defend the suit.[10] In the course of preparing for trial, the attorney discovered confidential information which led him to conclude that the assault was intentional and therefore there was no coverage.[11] The attorney then interviewed the insured and wrote the company of his discoveries.[12] No defense of the insured was presented and a judgment well in excess of the policy limits was entered.[13]

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read literally, the result would be that improper use of the attorney-client relationship by either the attorney or the insurer will result in waiver of not only the particular defense to which the unethical conduct relates, but any other defense, even those which arise at some later point in the litigation. It is doubtful that the supreme court intended to place the insurer under so great a sanction for its behavior as to lose all of its defenses of whatever nature. Such a sanction would, however, undoubtedly be a most effective method of assuring scrupulous conduct on the part of the insurer.

7. *See* Parsons v. Smithey, 109 Ariz. 49, 504 P.2d 1272 (1973).

8. Parsons v. Continental Nat'l Am. Group, 23 Ariz. App. 597, 597, 535 P.2d 17, 17 (1975), *vacated*, 113 Ariz. 223, 550 P.2d 94 (1976).

9. 113 Ariz. at 225, 550 P.2d at 96.

10. *Id.*

11. *Id.*

12. *Id.* The attorney also advised the company to obtain a non-waiver agreement from the insured. 23 Ariz. App. at 599, 535 P.2d at 19. A non-waiver agreement is normally a form agreement sent to the insured for his signature, which provides that neither party intends by his actions to give up any rights. 22 DRAKE L. REV. 824, 827-28 (1973). The agreement will normally protect the company from claims of waiver, but has little effect on the rights of the insured, since normally nothing that he has done would result in such a waiver. *Id.* A reservation of rights, on the other hand, is a one-sided document with the same purpose, but which does not require the insured's signature. The only difference seems to be that a non-waiver carries more weight since it is signed by the insured, although it seems clear that this is often done in complete ignorance of its meaning. *Id.* Despite this difference, the court of appeals, quoting the letter to the insured, called it a non-waiver letter, 23 Ariz. App. at 599, 535 P.2d at 19, whereas the supreme court characterized it as a reservation of rights. 113 Ariz. at 225, 550 P.2d at 96.

It has recently been held that such agreements are insufficient to constitute adequate disclosure required of the insurer where possible policy questions exist. *See* Employers Cas. Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973). The *Tilley* court held that "The obligation of [the insurer] and the attorney to notify [the insured] of the specific conflict, and the consequences of their failure to do so are not relieved by the standard non-waiver agreement." *Id.* at 560. CNA sent two such forms to the insured, neither of which contained information specifically mentioning the question of coverage which had arisen. The *Parsons* court held that these agreements were insufficient to prevent a waiver of the policy defense because of the conflict of interest between the two clients of the attorney, and the prejudice caused thereby to the insured. 113 Ariz. at 228, 550 P.2d at 99. In addition, the court held that the company violated the requirement of good faith by rejecting a settlement offer for less than the policy limits after having been informed by their attorney that, given coverage, the injury would be worth the full amount of the policy. *Id.* at 229, 550 P.2d at 100.

13. 113 Ariz. at 227-28, 550 P.2d at 96-97.

Plaintiffs filed a garnishment action against CNA, in which the insurer was represented by the counsel it had retained to defend the insured.[14] CNA denied liability, invoking the intentional acts exclusion, and also denied that it was estopped to assert, or had waived, its rights.[15] All issues were decided in favor of the insurer at trial. The court of appeals reversed,[16] holding that the insurer was estopped to assert the policy defense since it was based upon information obtained from the attorney, in derogation of the attorney's duty to keep confidential the information received in the course of the attorney-client relationship with the insured.[17] The Arizona supreme court affirmed the judgment but vacated the opinion of the appeals court, replacing it with an opinion which more clearly delineates the duty of the attorney to the insured.[18] The court stated:

> When an attorney who is an insurance company's agent uses the confidential relationship between an attorney and a client to gather information so as to deny the insured coverage under the policy in the garnishment proceeding we hold such conduct constitutes a waiver of any policy defense, and is so contrary to public policy

14. *Id.* at 228, 550 P.2d at 97.

15. *Id.*

16. 23 Ariz. App. 597, 604, 535 P.2d 17, 24 (1975), *vacated*, 113 Ariz. 223, 550 P.2d 94 (1976).

17. Because the company took advantage of the fiduciary relation of its agent, the retained attorneys, to have access to the confidential file . . . and the fruits of the attorney-client interviews, as well as the inherent prejudice of having a defense asserted in the tort case by an attorney whose loyalty was clearly shown . . . to be with the company, and whose attention was frequently directed to the policy exclusion, the trial court should have held as a matter of law that CNA was estopped to deny coverage and had waived the intentional act exclusion.

Id. at 603, 535 P.2d at 23.

18. For example, the appellate court opinion cites an Arizona ethics opinion which advocates that the attorney who discovers a possible policy defense should advise the insurer to defend under a reservation of rights or bring a declaratory judgment action. ARIZ. ETHICS OP. 282 (1969), *cited in* 23 Ariz. App. at 603, 535 P.2d at 23. This seems inconsistent with the statement later quoted in the case which says that the highest duty of the lawyer is owed to the insured, and he cannot supply information to the insurer which is detrimental to the insured. 23 Ariz. App. at 603, 535 P.2d at 23. To advise the company to bring a declaratory judgment action is diametrically opposed to the protection of the insured's interests. The supreme court opinion eliminates some of these inconsistencies, stating that the attorney owes the insured his highest duty and undeviating loyalty, 113 Ariz. at 227, 550 P.2d at 98, yet states that "The attorney . . . should have notified CNA that he could no longer represent them when he obtained any information (as a result of his attorney-client relationship with [the insured]) that could possibly be detrimental to [the insured's] interests under the coverage of the policy." *Id.* While it is clear that, given the existence of such dual representation, withdrawal from the representation of one client is required, *see* text & notes 40-42 *infra*, the effect of this notification to the insurer will be little different from revealing the existence of the policy defense. This presents the most serious drawback to multiple representation in this situation: once the conflict arises, there is no way for the attorney to continue representing both the insurer and insured, and any sort of withdrawal will serve to place the insurer on notice that such a conflict exists. Other definitions of the relationship between the attorney and insurer do not create this dilemma. *See generally* discussion text & notes 55-76 *infra*.

> that the insurance company is estopped as a matter of law from disclaiming liability under an exclusionary clause in the policy.[19]

The *Parsons* decision clarifies, to some degree, the duty owed the insured by the insurance company-retained attorney. There is still confusion, however, regarding the relationship between the insurer and the attorney retained to defend the insured. This casenote will analyze this relationship, and the effect that a possible conflict of interests can have on the ability of the attorney to fully represent the insurance company as a client in the traditional sense. Alternative definitions for the duty owed to the insurer which avoid the conflict inherent in such dual representation will be suggested. Both the traditional attorney-client relationship, and the alternative relationships will then be analyzed, and solutions for dealing with such conflicts in either case will be suggested.

Duty to the Insured

In holding the insurer liable under the policy due to the abuse of the attorney-client relationship, Arizona joins a growing number of jurisdictions which forbid the attorney to engage in conduct favorable to the insurer which will prejudice the insured.[20] In these jurisdictions, conduct prejudicing the insured will result in the insurer losing its rights to assert a policy defense, through the operation of either waiver or estoppel.[21] Such a result can occur because of conduct on the part of

19. 113 Ariz. at 228, 550 P.2d at 99.

20. *See, e.g.*, Crum v. Anchor Cas. Co., 264 Minn. 378, 119 N.W.2d 703 (1963); Perkoski v. Wilson, 371 Pa. 553, 92 A.2d 189 (1952); Employers Cas. Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973); Van Dyke v. White, 55 Wash. 2d 601, 349 P.2d 430 (1960). Several other courts have held that the attorney must withdraw from representation of the insured when a conflict arises but do not prohibit continued representation of the insurer. *See* Allstate Ins. Co. v. Keller, 117 Ill. App. 2d 44, 149 N.E.2d 482 (1958); Hamilton v. State Farm Mut. Auto. Ins. Co., 9 Wash. App. 180, 511 P.2d 1020 (1973). This result seems to stem from the attitude that the attorney's first responsibility is to the client that initially retained him and who will be at least partially liable for the judgment—the insurer. It further reflects a view that the attorney is the representative of the insured only for court appearances and in all other situations is the attorney of the insurer. *See* Keeton, *Liability Insurance and the Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1170 (1954). It appears, therefore, that the attorney under this view can represent both the insured and insurer only where their interests coincide; where these interests differ, he represents only the insurer. *See Symposium—Conflict of Interest Problems in Insurance Practice*, 37 INS. COUNSEL J. 497, 513 (1970). This view is not without practical justification, since the insurer may deal on a regular basis with the attorney, while the insured is only involved during his particular litigation. In addition, the representation of the insured is based solely upon liability under the policy. If the insurer is led to believe that no coverage exists, it may reasonably consider its duty to defend at an end. If such is the case, there is no reason to continue to provide an attorney at its expense for the insured. The *Guiding Principles of the National Conference of Lawyers and Liability Insurers* make clear that the insurer is considered the primary client. ABA Nat'l Conference of Lawyers & Liability Insurers, *Guiding Principles*, 20 FED'N INS. COUNSEL Q. 95, I-VI, IX, at 95-99 (Summer 1970) [hereinafter cited as *Guiding Principles*]. Indeed, the attorney is only prohibited by these rules from divulging to the company those confidences which come directly from the insured, and not those from other sources in the course of representation. *Id.*, VI, at 97-98. This, however, is clearly in conflict with the ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4, DR 4-101(B)(1) (1975).

21. Crum v. Anchor Cas. Co., 264 Minn. 378, 119 N.W.2d 703 (1963); Perkoski

the insurer itself,[22] or conduct of the attorney retained by the insurer.[23] These concepts are frequently relied upon by courts to prevent forfeiture of insurance coverage under circumstances which would produce results inequitable to the insured.[24] Whenever an insurance com-

v. Wilson, 371 Pa. 553, 92 A.2d 189 (1952); Employers Cas. Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973); Van Dyke v. White, 55 Wash. 2d 601, 349 P.2d 430 (1960). Although the terms waiver and estoppel are often used interchangeably, they are distinct concepts. *See* Hollman, *Insurance and the Doctrines of Estoppel, Waiver and Election,* 9 AM. BUS. L.J. 39, 45-47 (1971); 23 MD. L. REV. 252, 257 (1963). Waiver is the voluntary relinquishment of a known right. Buchanan v. Switzerland Gen. Ins. Co., 76 Wash. 2d 100, 108, 455 P.2d 344, 349 (1969); Hollman, *supra,* at 47; 23 MD. L. REV. 252, 257 (1963). Estoppel is the unintentional result of voluntary conduct on the part of the insurer which induces the insured to change his position in reliance upon such conduct. *See* 3 POMEROY'S EQUITY JURISPRUDENCE § 804, at 188 (5th ed. 1941); Hollman, *supra,* at 41. Once such reliance has occurred, the insurer is estopped from changing its position in a manner which would result in unfair advantage to the company. *See* 23 MD. L. REV. 252, 257 (1963). In the case of either waiver or estoppel, there must be a showing of prejudice to the insured. *See, e.g.,* American Cas. Co. v. Shely, 314 Ky. 80, 234 S.W.2d 303 (1950); Ashland Window & Housecleaning Co. v. Metropolitan Cas. Ins. Co., 269 App. Div. 31, 53 N.Y.S.2d 677 (1945). Courts, however, have often presumed prejudice to arise in such situations without proof by the insured. *See, e.g.,* Northwestern Nat'l Ins. Co. v. Corley, 503 F.2d 224, 229 (7th Cir. 1974) (interpreting Illinois law); Pendleton v. Pan Am. Fire & Cas. Co., 317 F.2d 96, 99 (10th Cir. 1963) (interpreting New Mexico law); Schmidt v. National Auto. & Cas. Ins. Co., 207 F.2d 301, 304-05 (8th Cir. 1953) (interpreting Missouri law).

Prejudice will be found where an attorney retained by the insurance company continues to defend without notifying the insured of a conflict of interest. Pacific Indem. Co. v. Acel Delivery Serv., Inc., 485 F.2d 1169 (5th Cir. 1973), *cert. denied,* 415 U.S. 921 (1974) (interpreting Texas law). In addition, prejudice is usually presumed to result from loss of control over the suit by the insured. *See, e.g.,* Schmidt v. National Auto. & Cas. Co., 207 F.2d 301 (8th Cir. 1953) (interpreting Missouri law); Malley v. American Indem. Corp., 297 Pa. 216, 146 A. 571 (1929); Humes Constr. Co. v. Philadelphia Cas. Co., 32 R.I. 246, 79 A. 1 (1911). Thus, prejudice is not necessarily prevented even where the insured is represented by his own counsel, so long as control of the suit is in the hands of the insurer. Ballard v. Citizens Cas. Co., 196 F.2d 96 (7th Cir. 1952) (interpreting Illinois law); Royle Mining Co. v. Fidelity & Cas. Co., 161 Mo. App. 185, 142 S.W. 438 (1912); *see* Brief for Appellee at 1, 4, Parsons v. Continental Nat'l Am. Group, 23 Ariz. App. 597, 535 P.2d 17 (1975).

22. *See, e.g.,* Carpenter v. Superior Court, 101 Ariz. 565, 422 P.2d 129 (1967); Farmers Ins. Exch. v. Henderson, 82 Ariz. 335, 313 P.2d 404 (1957); State Farm Auto. Ins. Co. v. Civil Serv. Employees Ins. Co., 19 Ariz. App. 594, 509 P.2d 725 (1973).

23. Crum v. Anchor Cas. Co., 264 Minn. 378, 119 N.W.2d 703 (1963); Perkoski v. Wilson, 371 Pa. 553, 92 A.2d 189 (1952); Employers Cas. Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973); Van Dyke v. White, 55 Wash. 2d 601, 349 P.2d 430 (1960). An attorney does not always have the power to bind his client by his actions, merely by virtue of his employment. *See* United Liquor Co. v. Stephenson, 84 Ariz. 1, 3, 322 P.2d 886, 887 (1958); Smith v. Washburn & Condon, 38 Ariz. 149, 152, 297 P. 879, 880 (1911). Where the power is expressly given, however, or where third parties would be justified in believing that the attorney is acting with the authority of his client, the client will be bound by the actions of his attorney. *See* Arizona Title Ins. & Trust Co. v. Pace, 8 Ariz. App. 269, 271-72, 445 P.2d 471, 473-74 (1968). One case has held that an insurance company is bound by the acts of the attorney retained to defend its insured: "Those whom the Insurer selects to execute its promises, whether attorneys, physicians, no less than company-employed adjusters, are its agents for whom it has the customary legal liability." Smoot v. State Farm Mut. Auto. Ins. Co., 299 F.2d 525, 530 (5th Cir. 1962) (interpreting Georgia law).

24. *See, e.g.,* Pacific Indem. Co. v. Acel Delivery Serv., Inc., 485 F.2d 1169 (5th Cir. 1973), *cert. denied,* 415 U.S. 921 (1974) (interpreting Texas law); Arizona Title Ins. & Trust Co. v. Pace, 8 Ariz. App. 269, 445 P.2d 471 (1968); McCary v. John Hancock Mut. Life Ins. Co., 236 Cal. App. 2d 501, 46 Cal. Rptr. 121 (Ct. App. 1965); Allstate Ins. Co. v. Keller, 117 Ill. App. 2d 44, 149 N.E.2d 482 (1958); Schwartz v. Sar Corp., 19 Misc. 2d 660, 195 N.Y.S.2d 496 (Sup. Ct. 1959); Perkoski v. Wilson, 371 Pa. 553, 92 A.2d 189 (1952); Employers Cas. Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973); Van Dyke v. White, 55 Wash. 2d 601, 349 P.2d 430 (1960).

pany undertakes or continues the defense of its insured with knowledge of a policy defense, failing both to give notice of the existence of the defense to the insured, and to sufficiently consider the insured's interests, it waives that defense.[25] In addition, conduct of the attorney which is inconsistent with the duty to represent the best interests of the insured will result in prejudice to the insured sufficient to bring about waiver or estoppel against the insurer.[26] Thus, upon discovery of a conflict of interest, the attorney may not promote the interests of the insurer at the expense of the insured without risking a charge of waiver or estoppel against the insurer.[27]

Prior to *Parsons*, confusion existed in Arizona over the complex relationships between the attorney, insurer, and insured. *Parsons* clarifies the duties of the attorney to the insured, but leaves clouded the question of the attorney's representation of his other client, the insurer. A close analysis of the insurer-attorney relationship is required, to determine what duty is owed the insurer, and how the attorney can best meet this obligation without affecting his duty to the insured.

Attorney-Client Relationship Between the Attorney and the Insurer

In *Parsons*, the attorney is variously referred to by the court as "the carrier's attorney,"[28] and "its agent,"[29] while the court also states that "the lawyer represents both the insurer and insured."[30] Although it appears that the attorney acts as legal counsel to both the insurer and insured, such a relationship is questionable in view of the primacy given to protection of the insured.[31] If both the insurer and insured

25. *See, e.g.*, Pacific Indem. Co. v. Acel Delivery Serv., Inc., 485 F.2d 1169 (5th Cir. 1973), *cert. denied*, 415 U.S. 921 (1974) (interpreting Texas law); Arizona Title Ins. & Trust Co. v. Pace, 8 Ariz. App. 269, 445 P.2d 471 (1968); J. Frank & Co. v. New Amsterdam Cas. Co., 175 Cal. 293, 165 P. 927 (1917); United States Fidelity & Guar. Co. v. Yost, 183 Miss. 65, 183 So. 260 (1938); O'Dowd v. United States Fidelity Guar., 117 N.J.L. 444, 189 A. 97 (Ct. Err. & App. 1937); Schwartz v. Sar Corp., 19 Misc. 2d 660, 195 N.Y.S.2d 496 (Sup. Ct. 1959). *But see* Fidelity Cas. Co. v. McConnaughy, 228 Md. 1, 179 A.2d 117 (1962).

26. Tiedke v. Fidelity & Cas. Co., 222 So. 2d 206 (Fla. 1969); Crum v. Anchor Cas. Co., 264 Minn. 378, 119 N.W.2d 703 (1963); Perkoski v. Wilson, 371 Pa. 553, 92 A.2d 189 (1952); Van Dyke v. White, 55 Wash. 2d 601, 349 P.2d 430 (1960).

27. Employers Cas. Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973); Automobile Underwriters' Ins. Co. v. Long, 63 S.W.2d 356 (Tex. 1933).

28. 113 Ariz. at 224, 550 P.2d at 95.

29. *Id.* at 226, 550 P.2d at 97.

30. *Id.* at 227, 550 P.2d at 98.

31. *See id.*; text & note 19 *supra*. The relationship between the insurance company, the insured, and the attorney is one posing many difficulties. The insured is normally the named defendant, who may be held liable for judgments in excess of the policy limits, or for the entire judgment if no coverage exists. On the other hand, the insurance company accepts the risk of liability conditioned upon its right to control the litigation. *See* Malley v. American Indem. Corp., 297 Pa. 216, 146 A. 571 (1929); *Guiding Principles, supra* note 20. In addition, the company's obligation to pay judgments rendered against the insured is limited to coverage and conditions stated in the insurance contract. The company is not normally required to pay judgments which result from activities not

are considered clients of the attorney, a serious conflict of interest problem arises where a question as to coverage exists. The Code of Professional Responsibility[32] requires that where the attorney represents conflicting clients, full disclosure of potential conflicts must be made to the parties and their consent to the dual representation must be obtained.[33]

The mere possibility that his clients' interests may conflict in the future may not be sufficient to preclude multiple representation,[34] but only in unusual situations may the attorney place himself in such a position.[35] In those situations, the attorney is ethically required to disclose possible conflicts and their implications, and obtain consent to the dual representation before it is undertaken.[36] Even then he may only undertake dual representation when it is clear that he can adequately represent the interests of each client.[37] It is imperative that in every such situation the insured be completely informed of any possible conflict from the outset, so that, before any prejudice results, he may choose whether to allow the company full control of the suit or to retain counsel at his own expense.[38] Disclosure of possible conflicts will better enable the insured to protect his interests should a conflict develop after consent is given and representation has begun.[39]

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within the policy coverage, or which result from the insured's violation of the policy terms. See generally text & note 79 *infra*.

32. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1975).

33. *Id.* EC 5-16, DR 5-105(C); *see, e.g.*, American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561 (1974); Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (Ct. App. 1968); Fidelity Cas. Co. v. McConnaughy, 228 Md. 1, 179 A.2d 117 (1962); Kelly v. Greason, 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968); *In re* Boivin, 271 Ore. 419, 533 P.2d 171 (1975); Hamilton v. State Farm Mut. Auto. Ins. Co., 9 Wash. App. 180, 511 P.2d 1020 (1973); RESTATEMENT (SECOND) OF AGENCY § 394, comment *d* (1958).

34. State v. Garaygordobil, 89 Ariz. 161, 164, 359 P.2d 753, 755 (1961); ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15 (1975).

35. The ABA Code provides that if a lawyer is confronted with the representation of clients with potentially differing interests, he may only undertake such employment if "it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his professional judgment on behalf of each." ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1975).

36. Kelly v. Greason, 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968); ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1975).

37. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1975).

38. *Id.*; see text & note 79 *infra*.

39. Once the attorney undertakes to explain the possible or actual conflicts to his multiple clients, he is faced with differing definitions of sufficient disclosure. It has been suggested that the insured, by agreeing in the policy to give the insurer control of the suit, consents to representation which contains the potential for conflicts. H. DRINKER, LEGAL ETHICS 114 (1953). This theory is unpersuasive because accession to such a clause cannot be considered informed consent; it does not relieve the attorney of his ethical responsibility to disclose. *See* Corboy, *Defending the Insurance Company and the Insured—Can Two Masters Be Served?*, 55 CHI. B. REC. 102 (1973). The information required to be given has variously been described as "full and complete," Brodsky, *Duty of the Attorney Appointed by the Liability Insurance Company*, 14 CLEV.-MAR. L. REV. 375, 383 (1965), "sufficient to inform an inexperienced insured," Keeton, *supra* note 20, at 1169, and "all facts necessary to permit a client to make an

Once a conflict arises, the attorney has two options. He can either withdraw from the multiple representation[40] or may continue dual representation after full disclosure of the conflict to both parties, but only where both consent and it is clear that he can continue to represent the interests of both adequately.[41] In the insurance situation, either alternative presents problems. Continued representation of both the insurer and the insured where there is a policy defense seems impossible without violation of the Code requirement that professional judgment not be adversely affected by multiple representation.[42] The conflict is between directly opposing, not merely differing, interests. When a policy defense arises, the insurer desires to avoid coverage, obviously the opposite of the result desired by the insured. Not even the most responsible attorney can forcefully represent the best interests of both clients in such a situation.[43] Even where there has been full disclosure of the conflict and the consent of both parties has been obtained, courts have indicated that withdrawal from representation of both clients may be required.[44] The rationale of these cases is that a client, although fully apprised of potential conflict, will, because of his lack of expertise, be forced to rely upon the attorney to protect his interests and confidences.[45] If the attorney withdraws from representation of both clients, there is no danger that prejudice will result from the continued representation of either. In this situation, different problems arise.

Although withdrawal is an ethically acceptable option,[46] it gives full protection to neither the insurer nor the insured. The dangers of undertaking representation which may later result in withdrawal are warned against in the Code.[47] The most significant danger is that both clients may be left without counsel at some crucial point in the litigation. At that point, both will likely become aware that their interests differ in some unknown respect. The act of withdrawal under such

informed decision." American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 590, 113 Cal. Rptr. 561, 570 (1974). In *In re* Boivin, 271 Ore. 419, 533 P.2d 171 (1975), the court detailed the required disclosures:

> [I]t is not sufficient that both parties be informed of the fact that the lawyer is undertaking to represent both of them, but he must explain to them the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel . . . .

Id. at 424, 533 P.2d at 174.

40. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15, DR 5-105(B) (1975).
41. *Id.* DR 5-105(C).
42. *Id.* DR 5-105(B).
43. *Id.*; *see* Corboy, *supra* note 39, at 103.
44. *See* Kelly v. Greason, 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968); *In re* Boivin, 271 Ore. 419, 533 P.2d 171 (1975). *See also* H. DRINKER, *supra* note 39, at 120.
45. Kelly v. Greason, 23 N.Y.2d 368, 378, 244 N.E.2d 456, 462, 296 N.Y.S.2d 937, 946 (1968).
46. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A), (B) (1975).
47. *Id.* EC 5-15.

circumstances, while inconvenient to the insurer, is not fatal to its ability to protect its interests. The insurer can turn to its battery of attorneys and investigators who may be able to continue to protect adequately its rights. Withdrawal works a substantial hardship on the insured, however, who is left without counsel and without insight into the conflict which his counsel should provide. In addition, if the insurer refuses to defend, the insured may have little time to prepare a defense independent of the control of the insurer. So, although withdrawal may prevent injustice arising from the conflict of interest, the insured is left in an inferior position, faced with two adversaries instead of one.

The Arizona supreme court, recognizing the unsatisfactory result in requiring complete withdrawal, suggests a solution gaining widespread acceptance:[48] continued representation of the insured.[49] This view holds the attorney to the same standard of representation which would be expected had the insured retained and paid the attorney himself.[50] Although this view offers considerable protection for the insured, it severely limits the ability of the attorney to represent the insurer, and conduct which would normally be considered mandatory under the duty to the insurer can now be seen as a breach of the attorney's duty to the insured.[51]

Even if the attorney withdraws from representation of the insurer, this does not relieve him of his duty to protect the confidences and secrets obtained from the insurer in the course of representation.[52] If such representation is initiated with an understanding that withdrawal from representation of the insurer may be required at some future time, the attorney must make sure that he does not receive from the insurer any information which will later interfere with his ability to fully defend the insured once withdrawal from representation of the insurer has occurred.[53] A limitation of the attorney-client relationship to such a de-

48. *See, e.g.*, Smoot v. State Farm Mut. Auto. Ins. Co., 299 F.2d 525, 532 (5th Cir. 1962) (interpreting Georgia law); American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 590, 113 Cal. Rptr. 561, 572 (1974); Crum v. Anchor Cas. Co., 264 Minn. 378, 392, 119 N.W.2d 703, 711-12 (1963); Newcomb v. Meiss, 263 Minn. 315, 322, 116 N.W.2d 593, 598 (1962); Jackson v. Trapier, 42 Misc. 2d 139, 140, 247 N.Y.S. 2d 315, 316 (Sup. Ct. 1964).

49. 113 Ariz. at 227, 550 P.2d at 98.

50. *See, e.g.*, American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 590, 113 Cal. Rptr. 561, 572 (1974); Lysick v. Walcom, 258 Cal. App. 2d 136, 146, 65 Cal. Rptr. 406, 413 (Ct. App. 1968); Crum v. Anchor Cas. Co., 264 Minn. 378, 392, 119 N.W.2d 703, 711-12 (1963); Newcomb v. Meiss, 263 Minn. 315, 322, 116 N.W.2d 593, 598 (1962).

51. *See* text & notes 52-54 *infra.*

52. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A), (B), EC 4-4 (1975).

53. An example of such a confidence which the attorney could receive from the insurer would be evidence of bad faith in refusing to settle a claim within the policy limits. An attorney in possession of such information could not ethically reveal this knowledge to the insured, yet it is obviously in the best interests of the insured to know this, since

gree is clearly inconsistent with the element of trust inherent in that relationship.[54] The insurer, forewarned of the possible withdrawal of its attorney and unable to communicate with him fully on matters which may conflict with his duty to the insured, seems to lose the benefit of representation, except where its interests are in complete accord with those of the insured. By defining the relationship of the attorney and insurer in terms other than attorney-client, it is possible to both clarify and limit the duties owed by the attorney to the insurer. Such a redefinition will serve both to avoid conflicts present in the definition discussed above, and will make clear to both the insurer and the insured exactly what each can expect from the attorney.

Principal-Agent Relationship Between the Insurer and Attorney

It may be possible to define the attorney's relationship with the insurer as something other than the traditional one of attorney and client. One possible description of this relationship is that of principal and agent.[55] The *Restatement of Agency* clearly recognizes that an attorney is the agent of his client.[56] The agency relationship, however, need not necessarily entail all of the responsibilities of an attorney-client relationship.[57]

An agent has a duty to protect his principal,[58] to give his principal all necessary information in his possession,[59] and to avoid conflicts of interest between principals.[60] The law of agency, however, recognizes two types of relationships which do not present the same conflict problems as does the attorney-client relationship. The first of these is the concept of superior duty owed to one of two principals.[61] This disparity in the scope of duty may limit the extent to which confidential information received from one principal may be communicated to another.[62] As long as both principals are aware of one another and un-

bad faith has been held to require the insurer to pay judgments in excess of the policy limits. In fact, this was the ultimate outcome of *Parsons*, 113 Ariz. at 229, 550 P.2d at 100. *See* Farmers Ins. Exch. v. Henderson, 82 Ariz. 335, 341, 313 P.2d 404, 408 (1957).

54. "A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client." ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1975).

55. In *Parsons*, the attorney is referred to as the agent of his client. 113 Ariz. at 228, 550 P.2d at 99. See discussion text & note 23 *supra*.

56. RESTATEMENT (SECOND) OF AGENCY § 1, comment *e* (1958); *see* American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561 (1974).

57. *See, e.g.*, Curtis v. Richards, 4 Idaho 434, 40 P. 57 (1895); Herfuth v. Horine, 266 Ky. 19, 98 S.W.2d 21 (1936); Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947).

58. RESTATEMENT (SECOND) OF AGENCY § 13 (1958).

59. *Id.* § 381.

60. *Id.* §§ 391-93.

61. *Id.* § 381, comment *e*.

62. *See id.*

derstand that this may prevent some communication between the agent and the secondary principal, it is proper for the agent to withhold from the secondary principal information received in the representation of the primary principal, even though the agent would otherwise be obligated to divulge that information.[63]

Defining the attorney's relationship with the insurer in this manner allows the defense of the insurer to continue although some conflicts may arise, while the attorney is still fully able to defend the insured. His duty to the insurer is to protect its interests wherever they coincide with the interests of the insured, with no prejudice resulting to either due to the revelation of confidences. There does not seem to be any reason why the insurer cannot agree from the outset to occupy the position of inferior principal.[64] After *Parsons*, this would seem to be the most attractive alternative for the insurer to choose.

Another agency concept which may be useful in this situation is the theory of limited agency.[65] Although the agent still has a duty to act with utmost good faith and loyalty to his principal's interests in this relationship, the agent's duty is limited to a specific area.[66] If the agency of the attorney for the insurer is defined in such limited terms, dual representation is permissible despite the potential of conflict. For example, the attorney may be considered the agent of the company for the purpose of limiting, through his representation of the insured, both the insurer's and the insured's liability. The agency would not, however, include a duty to limit the liability of the insurer to the insured.[67] The attorney therefore would not be obligated to provide information as to possible policy defenses available to the insurer, and his duties to the insurer and the insured could thereby be rendered consistent.

The court in *Parsons* recognizes that the attorney is the agent of the company,[68] but holds that his overriding duty of loyalty is to the insured.[69] This can be viewed as an implicit application of the theory

63. *See id.*

64. It may have been intended by the *Restatement* that only the principal first retaining the attorney would be the superior principal, but there does not seem to be any reason why the insurer cannot agree to occupy the secondary role, although it is normally the first to contact the attorney. It would be preferable for the insurer to agree to this role, rather than forcing the insured to occupy the inferior position, which would be inconsistent with *Parsons*. *See* 113 Ariz. at 228, 550 P.2d at 98.

65. RESTATEMENT (SECOND) OF AGENCY § 161(a) (1958).

66. *See* First Nat'l Bank v. Sant, 161 Mont. 376, 506 P.2d 835 (1973).

67. The rule stated in the section applies most frequently where an attorney at law receives information from a client under such circumstances that he has a duty not to reveal it without the client's permission. In such cases, the attorney, in acting for other clients, is privileged to act without revealing the information and, in many cases, without reference to it.
RESTATEMENT (SECOND) OF AGENCY § 281, comment *a* (1958).

68. 113 Ariz. at 228, 550 P.2d at 99.

69. "Both the A.B.A. Committee on Ethics and Professional Responsibility and the

that the insurer is a secondary principal, or that the attorney is merely the limited agent of the insurer. The agency theories also explain how the attorney's conduct can give rise to a waiver or estoppel that is binding on the company.[70]

Employer-Employee Relationship Between the Attorney and Insurer

A third description of the attorney's duty to the insurer is that it is one owed by an employee to his employer. This relationship contains many of the elements of the agency concept.[71] The attorney in such a situation is required by his employment only to defend the insured to the best of his ability, in order to avoid liability of both the insurer, and his client, the insured.[72] He is not required to protect the company in any manner which may prove prejudicial to his client, the insured.[73]

The Code of Professional Responsibility prohibits an attorney from allowing third persons who pay for the representation of his client to interfere with the professional judgment of the attorney.[74] This Code provision clearly applies to an insurance carrier,[75] so that an attorney who is considered employed by the insurer could not let this relationship in any way hinder his representation of the insured. The insurer can sufficiently protect its interests where they might differ from those of the insured, by employing adjusters, investigators, and separate legal counsel. It is also clear that the attorney, just as any other employee, could bind the company through his activities if they are within the scope of his employment.

Any of the limited relationships discussed in this casenote would serve to avoid the conflicts inherent in the multiple representation situation which arises under the liability insurance contract, as well as to clarify for both the attorney and the insurer exactly the conduct that will be considered proper on the part of the attorney in his relationship

State Bar of Arizona, Committee on Rules of Professional Conduct have held that an attorney that represented the insured at the request of the insurer owes undivided fidelity to the insured . . . ." *Id.* at 226, 550 P.2d at 97. *But cf.* discussion note 18 *supra.*

70. *See* RESTATEMENT (SECOND) OF AGENCY § 12 (1958) (an agent has the power to alter legal relations between principal and third parties).

71. *Id.* §§ 2, 220.

72. *See, e.g.*, Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 52, 149 N.E.2d 482, 486 (1958); Jackson v. Trapier, 42 Misc. 2d 139, 140, 247 N.Y.S.2d 315, 316 (Sup. Ct. 1964); Hamilton v. State Farm Mut. Auto. Ins. Co., 9 Wash. App. 180, 185, 511 P.2d 1020, 1024 (1973). *See also* Ford, *The Insurance Contract: The Conflicts of Interest it Breeds*, 36 INS. COUNSEL J. 610, 611 (1969).

73. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-23 (1975).

74. *Id.* DR 5-107(B). *See also id.* EC 5-22 to -23.

75. *See* Jacobs, *Ethical Conflicts in Relations Between an Insured, his Primary Carrier, his Excess Carrier and his Attorney*, 24 FED'N INS. COUNSEL Q. 50, 53 (Summer 1974).

with the insurer. The courts, however, have not as yet analyzed the problems inherent in such a definition, and, as the *Parsons* decision illustrates, they continue to refer to the attorney as having an attorney-client relationship with the insurer.[76] If this approach is adhered to, the duty of the insurance company-retained counsel to the insurer must be clarified by understandable rules which will allow the attorney to provide the level of responsibility to the insured demanded by *Parsons*.

Application of the Attorney-Client Relationship

If the relationship between the attorney and the insurer is defined as attorney-client, several measures must be taken by the attorney to prevent conflicts of interest in such dual representation. If the attorney owes the insurer a duty to promote its interests, he may not undertake defense of the insured without full disclosure of the potential conflicts to both insurer and insured.[77]

Given the conclusion of the court in *Parsons* that the primary duty is owed to the insured,[78] it is clear that some solution is demanded for the problems of representing the interests of the insurer. It may be that the only solution for conflicts is the provision of separate counsel for the insurer and insured in all matters.[79] Although the retained counsel may attempt to represent both, he cannot assert the interests of the insurer in the manner traditionally demanded by the attorney-client relationship if those interests conflict, as they often will, with the best interests of the insured. Therefore, when a conflict arises, the insurer is entitled to have its interests represented by its own counsel. If such separate counsel is required, the question of who will pay the attorney for the insured arises.

Separate attorneys, both paid for by the insurer, have been demanded in other conflict situations, and may be appropriate here.[80] If,

76. 113 Ariz. at 227, 550 P.2d at 98; *see* cases cited note 50 *supra*.

77. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-16, DR 5-105(C) (1975). *See also* text & notes 37-39 *supra*.

78. 113 Ariz. at 227, 550 P.2d at 98.

79. Keeton, *supra* note 20; *Symposium, supra* note 20, at 500. If control of the litigation is no longer in the direct control of the insurer, because the retained attorney is not fully responsible to the insurer, noncooperation, as a policy defense, will necessarily have to be redefined to exclude any action on the part of the insured or his attorney which is reasonably intended to assert the insured's best interests. For a discussion of the problems of policy avoidance on the grounds of noncooperation by the insured, see R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 252-54 (4th ed. 1966).

80. *See* O'Morrow v. Borad, 27 Cal. 2d 794, 167 P.2d 483 (1946); Keeton, *supra* note 20. The *O'Morrow* case involved a very common situation, where the same insurer represents both the plaintiff and defendant; here the conflict of interest becomes very clear. Only by completely withdrawing from control of the suit can the insurer prevent prejudice to the defendant-insured. For this reason, separate counsel is chosen by the

however, the insurer is seeking to avoid liability under the policy, its duty to defend the insured should not include providing counsel in a declaratory judgment action by the insurer on the question of coverage. If a declaratory judgment is brought on the issue of coverage, by the insurer against the insured,[81] that judgment will be binding on the company, both as to the question of coverage, and as to the insurer's duty to defend and provide counsel for the insured. Such an action when brought at the behest of the insurer, cannot be suggested or instigated by the attorney for the insured since such an action would be inconsistent with his duty to represent the best interests of the insured.[82]

A serious question also arises as to the proper timing of a declaratory judgment action. If the company decides that there is coverage and begins to defend, the application of the principle of waiver may prevent future conflicts from arising. At present, an insurer may begin the defense of an insured where there is a question of coverage, and provided there is full disclosure of the possible conflict, the insurer is not estopped from later claiming a policy defense.[83] Such a situation encourages the company to delay settlement, hoping that a defense will

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insured, and the insurance company pays for this representation under its duty to defend. O'Morrow v. Borad, *supra* at 801, 167 P.2d at 487.

81. Courts in most instances have permitted the insurance carrier to institute a declaratory judgment action against the insured to determine coverage. *See, e.g.*, Spadaro v. Palmisano, 109 So. 2d 418 (Fla. 1959); Hanover Ins. Group v. Cameron, 122 N.J. Super. 51, 298 A.2d 715 (Ch. Div. 1973); American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup. Ct. 1954). *But see* Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842 (1975). In such an action, the plaintiff in the underlying tort action is not a party.

The remedy of submitting special verdicts to the jury hearing the issue of the defendant-insured's liability to decide questions on the issue of coverage, without disclosure of the existence of insurance, is not a satisfactory solution for two reasons. *See* Glen Falls Group Ins. Co. v. Hoium, 294 Minn. 247, 252, 200 N.W.2d 189, 192 (1972). First, the presentation of the case in the best interests of the insured will be severely impaired by presentation of evidence on the question of coverage. Second, it will be impossible to present such evidence without at least implying to the jury the existence of insurance, thereby causing severe prejudice to the cause of the insured. *See* 22 DRAKE L. REV. 824, 829 (1973), *noting* Glen Falls Group Ins. Co. v. Hoium, *supra*.

82. The court of appeals in *Parsons* quoted ARIZ. ETHICS OP. 261 (1968), which modifies ARIZ. ETHICS OP. 146 (1964) to read: "If the attorney for the defendant believes that . . . the insurance carrier has a policy defense which he wishes to raise, he should . . . advise the insurance company to bring a declaratory judgment action on the issue . . . ." ARIZ. ETHICS OP. 261 at 4 (1968). This action seems inconsistent with the decision of the supreme court that the attorney owes the insured his complete loyalty. 113 Ariz. at 227, 550 P.2d at 98. Clearly, an attorney retained by the insured would have no duty to warn the insurer of a policy defense, even by recommending a declaratory judgment action without disclosure of the actual defense, as this would be an ethical violation. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1975). *But cf.* discussion note 18 *supra*.

83. 113 Ariz. at 228, 550 P.2d at 99. The supreme court in *Parsons* held that the reservation of rights offered in this case was ineffective because of the conflict of interest in having one attorney first represent the insured and then represent the insurer in the garnishment action, and because of the prejudice resulting from the attorney degrading his fiduciary relationship with the insured by revealing secret information to the insurer. *Id.*

arise,[84] and places pressure on the attorney retained by the insurer to act as its investigator.[85] An early insurance case discusses the inequity of this result:

> When an insurance company or its representative is notified of the loss . . . it becomes its duty immediately to investigate all facts in connection with the supposed loss as well as any possible defense on the policy. It cannot play fast and loose, taking a chance in hope of winning, and, if the results are adverse, take advantage of a defect in the policy. The insured loses substantial rights when he surrenders, as he must, to the insurance carrier the conduct of the case. . . . With a little diligence and within a brief time, the carrier could have procured the exact knowledge on which it now relies, and in most cases may similarly prepare a defense.[86]

Applying this logic to the problem at hand, the best solution may be to require the insurer to make a decision concerning coverage based upon information gathered by its adjusters and agents after an adequate period of investigation. If it denies coverage, a declaratory judgment is appropriate. If it determines that coverage exists, and a defense of the insured is begun, this act should constitute a waiver of all policy defenses in existence at that time.[87] This would eliminate many conflict of interest problems[88] and allow a single attorney to represent both parties. However, it seems that a greater number of conflicts will be avoided by utilizing a characterization of the insurer's relationship with the attorney as something other than attorney-client.

Defining the relationship between the attorney and the insurer in terms of any of the limited modes of representation discussed above[89] calls into question the scope of the attorney's duty to the insurer. In

84. *See* Hanover Ins. Group v. Cameron, 122 N.J. Super. 51, 67, 298 A.2d 715, 725 (Ch. Div. 1973).

85. *Symposium, supra* note 20, at 502.

86. Malley v. American Indem. Corp., 297 Pa. 216, 224, 146 A. 571, 573 (1929).

87. It is debatable whether this decision to defend should waive only those policy defenses in existence at the time of the decision and which could have been made known to the insurer through diligent investigation, or whether a decision to defend should result in a waiver of all policy defenses, regardless of the time they arise. This question has only arisen where bad faith and prejudice have been shown; it has not been raised where the estoppel or waiver would arise merely from the insurer's making a decision to defend.

88. A conflict of interest may still arise if the amount of possible liability exceeds coverage under the policy. This problem has been dealt with successfully, however, through the doctrine of equality of consideration, which requires the insurer to consider the best interests of the insured and its own best interests equally when considering settlement. Where bad faith in negotiating a settlement on the part of the insurer is shown, the company becomes liable for the entire amount of the judgment, including amounts in excess of the policy limits. *See, e.g.*, Farmers Ins. Exch. v. Henderson, 82 Ariz. 335, 341, 313 P.2d 404, 408 (1957); Lange v. Fidelity & Cas. Co., 290 Minn. 61, 66, 185 N.W.2d 881, 885 (1971); Hernandez v. Great Am. Ins. Co., 464 S.W.2d 91, 95 (Tex. 1971). This was the ultimate effect of the attorney's action in *Parsons* as well. *See* 113 Ariz. at 228-29, 550 P.2d at 99-100.

89. See text & notes 55-76 *supra*.

each case, the attorney's duty to represent the interests of the insurer is limited to those areas where the best interests of the insurer and insured coincide. It must be made clear to the insurer that the attorney's duty is so limited, and that there will be no disclosures by the attorney which might prove detrimental to the interests of the insured. If the insurer has decided to undertake defense of the insured, there is no direct conflict, and the insurer's interests can be fully represented by that attorney. If, however, there is a question as to coverage, it is the responsibility of the insurer to provide for its own counsel, or some other device to protect its interests, and not rely upon the attorney retained to represent the insured, since his duty to the company will clearly not include such actions.

Conclusion

Regardless of the method used to analyze the relationship between the insurer and counsel retained by it to defend the insured, it is incumbent upon that attorney to act in a manner which scrupulously and thoroughly protects the interests of the insured. Any attempt by the company to influence the attorney to the detriment of the insured must be rebuffed, and the attorney must at all times remain free from any economic pressures exerted by the company. After the *Parsons* decision, a careful redefinition of the duties owed to the insurer by the retained counsel is essential. Such a redefinition will enable both the attorney and the insurance company to know the legal and ethical limitations on their roles, permitting the attorney to act consistently with the duty of loyalty he owes to the insured under *Parsons*.

B. THE ATTORNEY-COUNCILMAN AND THE APPEARANCE OF IMPROPRIETY

Although lawyers often function as public officials or politicians, such dual roles present inherent possibilities of conflicts of interest.[1]

1. Special fiduciary obligations are also incumbent on the lawyer who becomes a representative in the Legislative Branch of government, especially where he continues his private practice after assuming public office. Such a lawyer must be able to envisage the moral disaster that may result from a confusion of his role as legislator and his role as the representative of private clients. The fact that one in this position is sometimes faced with delicate issues difficult of resolution should not cause the lawyer to forget that a failure to face honestly and courageously the moral issues presented by his position may for-

As government employees, these lawyers owe a duty to the public in general, while as individual lawyers or members of a firm, they have a duty to their clients as well. Under the Code of Professional Responsibility,[2] a lawyer is urged to enter public office,[3] provided he does not engage in activity which is likely to create a conflict of interest.[4] The Code clearly intends to prevent conflict in the situation where a lawyer holds a public office and still maintains ties with a law firm.[5] As a supplementary means of avoiding conflict, the "infectious disqualification" rule[6] provides that any prohibition against the activities of one lawyer necessarily extends to the other members of his firm, by virtue of the close relationship between the members of a law firm.[7]

In *In re Ethics Opinion No. 74-28*,[8] the Arizona supreme court addressed the conflict of interest problem of an individual who is employed both as a private attorney and as a government officer. In that case, the court was presented with the following hypothetical fact situation:

> Attorney P was elected to City B's city council, which is a part-time position. The City B council has the power to hire and fire the city court magistrates and the city attorney. The city attorney serves as the chief legal advisor to the council, the city manager, and all city departments, offices, agencies and represents the city in all legal procedings.[9]

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feit his integrity both as lawyer and as legislator and pervert the very meaning of representative government.

ABA Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958).

2. The American Bar Association promulgated the new Code of Professional Responsibility in 1970. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1970). The Code was adopted by the Arizona supreme court on January 29, 1971, and became effective Apr. 1, 1971. ARIZ. SUP. CT. R. 27-44. The Code consists of three separate but related parts: Canons of Ethics, Ethical Considerations, and Disciplinary Rules. The Canons express axiomatic norms governing the professional conduct of lawyers. ABA CODE OF PROFESSIONAL RESPONSIBILITY, *Preliminary Statement* (1975). From these general statements, the Ethical Considerations and Disciplinary Rules were formulated. *Id.* The Ethical Considerations are intended to be aspirational, describing conduct a member of the legal profession should observe. *Id.* The Disciplinary Rules represent mandatory standards of behavior; their breach is a cause for disciplinary action. *Id.* The Disciplinary Rules delimit the minimum required of the attorney in the performance of his duties. *Id.*

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 8-8 (1975).

4. *Id.* EC 8-8 provides:

> Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

5. *Id.* DR 8-101.

6. *See* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 33 (1931).

7. "The relations of partners in a law firm are so close that the firm, and all members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking." *Id.* at 2.

8. 111 Ariz. 519, 533 P.2d 1154 (1975).

9. ARIZ. ETHICS OP. 74-28, at 1 (1974), *quoted in* 111 Ariz. at 520, 533 P.2d at 1155.

Although the council position was only part-time, the members of the city councilman's law firm perceived that their appearances before the city council, city boards and commissions, and their practice in the city courts, created a potential conflict of interest for the partner serving as city councilman, and possibly for the entire firm. The firm contacted the State Bar Committee on Rules of Professional Conduct [State Bar Committee],[10] presenting five specific questions for consideration:

> 1. Is the attorney-city councilman prohibited from practicing law in the city's courts?
> 2. Are the remaining partners of the firm prohibited from practicing law in city courts?
> 3. Is the firm prohibited from representing plaintiffs where the city would be a named defendant?
> 4. Are the members of the firm prohibited from appearing before the city council on civil matters?
> 5. Are members of the firm prohibited from appearing before city administrative boards, such as planning and zoning and the board of adjustments?[11]

Relying primarily on the Code of Professional Responsibility,[12] the State Bar Committee answered each question affirmatively, finding that all the situations presented clear conflict of interest problems for the city councilman and his firm "so intractable as to be beyond any curing."[13]

The League of Arizona Cities and Towns, which had not participated in the proceedings before the State Bar Committee, filed a petition for review directly with the Arizona supreme court.[14] Accepting

10. According to Rule 1 of the State Bar Committee Rules of Procedure, a request for an opinion is made to the Chairman of the Committee on Rules of Professional Conduct. Committee Rules of Procedure, 9 ARIZ. B.J., Winter, 1973-74, at 6. The Committee was created by the Board of Governors of the State Bar of Arizona, to offer advisory opinions regarding specific factual situations to members of the bar and the judiciary. Statement of Jurisdictional Policies, *id.* at 5. The nature of the Committee is to offer guidance only. *Id.* Under Rules 1 and 2 of the State Bar Committee Rules of Procedure, all inquiries are initiated by contacting the Committee Chairman, who determines if the question lies within the jurisdiction of the Committee. Committee Rules of Procedure, *id.* at 6-7. Any bar member may request an opinion concerning a specific issue, in accordance with policy 5 of the State Bar Statement of Jurisdictional Policies, providing it is not the subject of any pending proceeding, and will not be disposed of by the final determination of any pending litigation. Statement of Jurisdictional Policies, *id.* at 6.

11. 111 Ariz. at 520-21, 533 P.2d at 1155-56; ARIZ. ETHICS OP. 74-28, at 1 (1974).

12. For a discussion of when the Code was adopted and how it is structured, see note 2 *supra.*

13. ARIZ. ETHICS OP. 74-28, at 2 (1974).

14. The League argued that it was in the public interest that the Committee's opinion be clarified so that lawyers would not be unnecessarily discouraged from serving the general public through elective office. Brief for Petitioner at 2, *In re* Ethics Opinion No. 74-28, 111 Ariz. 519, 533 P.2d 1154 (1975). In addition to the petition for review filed by the League, a petition for leave to intervene was filed by the law firm of an

jurisdiction,[15] the court took a position contrary to that of the State Bar Committee on questions four and five,[16] permitting appearances by members of the firm before the city council and city boards, with specific limitations thereon.[17] In order for the firm's members to appear before the council, the attorney-public official must openly disqualify

incumbent Phoenix city councilman, and several other law firms petitioned to appear amici curiae. 111 Ariz. at 520, 533 P.2d at 1155. The law firms asserted that the State Bar Committee opinion imposed restrictions in excess of American Bar Association and Arizona statutory standards. Brief for Robert S. Lynch of Rawlins, Ellis, Burrus & Kiewit as Amicus Curiae at 3, *In re* Ethics Opinion No. 74-28, 111 Ariz. 519, 533 P.2d 1154 (1975). See discussion text & note 36 *infra*.

15. All parties recognized that the Arizona supreme court had the power to render opinions binding on members of the legal community under its inherent power to set higher standards for members of the Bar than those set for public employees in general. Brief for Petitioner at 1, Brief for Respondent at 6, Brief for Robert S. Lynch of Rawlins, Ellis, Burrus & Kiewit as Amicus Curiae at 5, *In re* Ethics Opinion No. 74-28, 111 Ariz. 519, 533 P.2d 1154 (1975). That the court is vested with this plenary power would seem to indicate that it must certainly have the discretionary power to entertain any suit which concerns the regulation of attorney conduct. Nevertheless, the State Bar challenged the exercise of jurisdiction on the grounds that the Arizona League of Cities and Towns did not constitute a proper party to challenge the decision of the State Bar Committee under either the constitutionally outlined appellate jurisdiction of the Arizona supreme court or by means of any special rule giving it standing. The State Bar argued that the League did not satisfy the requirement of being an aggrieved party, since it had not been a party to the State Bar Committee's decision, and did not purport to speak directly for any attorney who could be governed by the opinion. Brief for Respondent at 2-3. *See* ARIZ. CONST. art. 6, § 5; Compass Realty & Inv. Corp. v. AA Refrigeration & Heating, Inc., 21 Ariz. App. 214, 517 P.2d 1107 (1974) (definition of "aggrieved party"). Rule 73(a) of the Arizona Rules of Civil Procedure provides: "A judgment or order in a civil action or proceeding may be reviewed by appeal as prescribed in these Rules, and not otherwise. The appeal may be taken by any party aggrieved by such judgment or order."

The fact that the Arizona supreme court holds the inherent power to govern the conduct of members of the State Bar, however, indicates that traditional rules of standing are somewhat inapplicable. *See generally* Estates Theaters, Inc. v. Columbia Pictures Indus., 345 F. Supp. 93, 95 (S.D.N.Y. 1972); Richardson v. Hamilton Int'l Corp., 333 F. Supp. 1049, 1052 (E.D. Pa. 1971); State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961); *In re* Wren, 79 Ariz. 187, 191, 285 P.2d 761, 763 (1955). The court resolved this preliminary issue by acknowledging that although there was no rule of the court or provision of the Arizona Constitution which explicitly authorized the acceptance of the League's petition, 111 Ariz. at 520, 533 P.2d at 1155, it would nevertheless exercise jurisdiction under its inherent powers. *Id.*; ARIZ. SUP. CT. R. 27 to 44. The court expressly limited the scope of the decision, however, stating that review was necessary in light of an "overriding statewide interest and the extraordinary circumstances," 111 Ariz. at 520, 533 P.2d at 1155, which called for a "common-sense solution to this problem which protects the public and yet makes available to public bodies the active participation of attorney members." *Id.* at 521, 533 P.2d at 1156.

16. 111 Ariz. at 521, 533 P.2d at 1156. None of the parties seeking review challenged the decision of the State Bar Committee regarding questions one and two, which prohibited participation of the lawyer-councilman and his firm in matters before the city's courts. The court reviewed only those questions pertaining to the appearance of members of the firm before the city council itself, city boards, and commissions. *Id.* Some confusion does exist as to question three. Although the petition for review urged consideration of questions three, four, and five, Brief for Petitioner at 10, the amicus brief asked for review of only questions four and five. Brief for Robert S. Lynch of Rawlins, Ellis, Burrus & Kiewitt as Amicus Curiae at 6. In the supreme court's opinion, it is asserted that both petitioners and amici curiae conceded the correctness of the determinations on questions one, two, and three. 111 Ariz. at 521, 533 P.2d at 1156. Unless some concession was made by the League of Cities and Towns during oral argument, the court's dropping of the challenge to question three is unexplained.

17. 111 Ariz. at 521, 533 P.2d at 1156.

himself from the matter, which must appear in the records of the proceeding.[18] In addition, he may not discuss the matter with any city councilman or employee.[19] Finally, there must be a separation of accounts so that the city councilman receives no fee or any other remuneration from the law firm on the matter.[20] In order for members of the firm to appear before boards and commissions of the city, the attorney-public official must again refrain from any discussion of the matter with members of the city council, boards, or commissions, or any city employee.[21] Fees again must be separated.[22] The final limitation on these appearances is that the attorney-public official must avoid "participation in the selection of members of boards or commissions before which his firm *regularly* appears."[23]

This discussion will explore the Arizona supreme court's decision in *In re Ethics Opinion No. 74-28*, in light of precedent addressing the conflicts of interest dilemma faced by attorneys in government service. State and national bar committee views, as well as the Arizona statutory attempt to resolve the problem of public official conflicts of interest, will be examined. The resolution of *In re Ethics Opinion No. 74-28* will further be discussed in relation to the new Code of Professional Responsibility, adopted in 1970,[24] with special emphasis given to Canon 9. Finally, the questions raised but unanswered by the Arizona supreme court will be analyzed.

Previous Attempts to Resolve the Conflict of Interest

The problem presented by lawyers holding public office was first addressed by the American Bar Association Committee on Rules of Professional Ethics [National Bar Committee] in a 1959 opinion, Opinion 296.[25] The National Bar Committee prohibited a member of a law firm from appearing before a legislative committee while any other member of the firm was serving in the legislature, even though the legislator-lawyer made a full disclosure and would receive no fee.[26] The Committee found that representation of the public by the legislator, while the legislator's law partner represented the private interests of

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* (emphasis in original). It should be noted that the court has not set forth a clear definition of what constitutes "regular" appearances by the members of a firm. The lack of clear standards for determining when members of a firm appear regularly may present serious problems in the application of the decision to everyday practice.
24. *See* authorities cited note 2 *supra.*
25. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 296 (1959).
26. *Id.* at 2.

a client, constituted "inherently antagonistic" positions.[27] Opinion 296 impliedly rested on Canon 6 of Professional Ethics,[28] the predecessor to the Code of Professional Responsibility, and on the rule of "infectious disqualification."[29]

Canon 6 held it unethical to represent conflicting interests, except where consent by all parties was given pursuant to a full disclosure of the facts.[30] The conflict of interest rule established in Opinion 296 does not directly concern the interest of the public at large, however, an interest which must be considered in the case of an elected official. As the public cannot consent, in the usual sense, to the representation of conflicting interests by a public officer, the application of old Canon 6 to this situation effectively bars lawyers from legislative service. Indeed, the practical effect of opinion 296 was to deter many lawyers from running for legislative office.[31]

To remedy this unfortunate result, the National Bar Committee, in Opinion 306,[32] negated the prohibition where a constitutional or statutory provision, or legislative rule, impliedly consents to such an appearance.[33] Opinion 306 was an attempt to resolve the problem of consent raised by Canon 6 by inferring the consent of the public where the legislature, or other representative body, has adopted a requirement that the attorney disclose in the record his conflicting interest and dis-

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27. *Id.* at 1.

28. See *id.*; ABA CANONS OF PROFESSIONAL ETHICS, No. 6. At the time of Opinion 296, the old Canons of Professional Ethics were in effect. These Canons were originally adopted in 1908, and were amended from time to time. ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 1 (1967). In 1970, the Code of Professional Responsibility was adopted, replacing the Canons of Professional Ethics. ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS v-vii (1970). The conflict of interest problem, formerly covered in Canon 6, is contained in the new Canon 5. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON NO. 5 (1975); Weddington, *A Fresh Approach to Preserving Independent Judgment—Canon 6* of the Proposed Code of Professional Responsibility*, 11 ARIZ. L. REV. 31 (1969). Old Canon 6 dealt directly with the issue of conflicts of interest.

> It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.
>
> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

ABA CANONS OF PROFESSIONAL ETHICS, No. 6 (1963).

29. See text & notes 6-7 *supra.*

30. See discussion note 28 *supra. See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON NO. 5, DR 5-101 (1975).

31. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 306, at 1 (1962).

32. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 306 (1962).

33. *Id.*

qualify himself from voting.[34] In the absence of such a resolution, the "infectious disqualification" rule will preclude participation by the attorney in situations involving conflicting interests.[35] In Arizona, the conflict of interest problem for public employees is covered by statute.[36] As the Arizona statute complies fully with the requirements set forth by the National Bar Committee in Opinion 306, it would appear to be dispositive of the facts presented in *In re Ethics Opinion No. 74-28*.[37]

This position is supported partially by a 1970 State Bar Committee opinion.[38] The conflict presented in Opinion 70-5 concerned a lawyer-councilman whose firm represented a city employees' union.[39] Since the attorney was serving the city in a non-legal capacity, and his position was part-time, the State Bar Committee analogized the problem to that presented in the legislator-lawyer situations discussed in National Bar Committee Opinions 296 and 306,[40] and decided that the Arizona statute furnished sufficient standards of ethical conduct to allow the firm to continue representing the union under certain conditions; the public officer must announce the interest, insert the announcement in the official records, and abstain from participating in making the decision on the matter creating the conflict.[41] In addition to the disclosure and abstention requirements set forth by the National Bar Committee, however, the State Bar Committee included additional guidelines for the behavior of the attorney-councilman if the firm was to continue representing the union. The State Bar Committee held

34. *Id.* at 2.

35. *Id.*; ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 296 (1959). In Opinion 306, satisfactory consent was found in section 22 of article III of the Texas Constitution which reads: "A member who has a personal or private interest in any measure or bill, proposed, or pending before the Legislature, shall disclose the fact to the House of which he is a member, and shall not vote thereon."

36. ARIZ. REV. STAT. ANN. §§ 38-501 to -506 (1974). *Id.* § 38-503(B) provides:

> Any public officer or employee who has, or whose relative has a substantial interest in any decision of a board, administrative official, commission, or legislative or administrative body of which he is a member or to which he makes recommendations, shall make known such interest in the official records of such board, commission, or legislative or administrative body and shall refrain from participating in any manner as an officer or employee in such decision.

37. 111 Ariz. 519, 533 P.2d 1154 (1975). The petitioners had argued that standards for conduct of lawyers who were also public officials were adequately outlined in the statute. Brief for Petitioner at 5. Since there was no special professional relationship between the council (or the city) and the lawyer, such as an attorney-client relationship, it was contended that the same standards should be imposed upon the attorney-councilman as would be imposed on city council members in general. *Id.* To impose higher standards upon the attorney, it was argued, would thwart the will of the electorate by discouraging the attorney from seeking and accepting public office. *Id.*

38. ARIZ. ETHICS OP. 70-5 (1970).

39. The lawyer-councilman had been questioned by the political party committee nominating him for office, as to the possibility of a conflict of interest if he was elected. He expressed the opinion that any problem could be remedied by his abstaining from participation in any matters regarding the employees' union. *Id.* at 1.

40. *Id.* at 5. See discussion text & notes 25-36 *supra*.

41. ARIZ. ETHICS OP. 70-5, at 8 (1970). *See* ARIZ. REV. STAT. ANN. § 38-503(B)

that the councilman cannot personally represent the union,[42] or share in any fees collected by his firm for the handling of matters between the union and the council or other city official.[43]

In Opinion 74-28, however, the State Bar Committee found it necessary to overrule Opinion 70-5,[44] in part because of the adoption of the new Code of Professional Responsibility.[45] Canon 9 of the Code[46] was interpreted to impose higher standards than those imposed by the Arizona statute and Opinion 70-5.[47] The State Bar Committee interpreted Canon 9 to be a broad prohibition against any appearance which might reasonably be viewed by the public as improper,[48] mandating a complete disqualification of the councilman's law firm from representing any client in dealings with the city.

The State Bar Committee relied primarily on Ethical Consideration [EC] 9-3 and EC 9-6 of Canon 9 for its decision.[49] EC 9-6 includes an exhortation against conduct which gives rise to even "the appearance of impropriety."[50] The State Bar Committee ruled that the possibility was substantial that the appearance of the councilman's partners before the city boards, commissions, or council, and the practice by the councilman or his partners in the city courts, would distort public confidence to a great extent,[51] contrary to the language of EC 9-6, which obligates an attorney to encourage and inspire respect for the legal profession among his clients and the public.[52] The Committee stated without discussion that the public would likely lose confidence

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(1974). The text of this statute is set forth in note 36 *supra*. Thus, the lawyer may not vote or otherwise participate, directly or indirectly, in the consideration of matters involving the city and the employees' union.

42. ARIZ. ETHICS OP. 70-5, at 8 (1970). This conclusion may logically follow and be implied from the National Bar Committee opinions. See text & note 35 *supra*.

43. ARIZ. ETHICS OP. 70-5, at 8 (1970).

44. ARIZ. ETHICS OP. 74-28, at 2 (1974).

45. *Id.* See discussion note 2 *supra*.

46. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON NO. 9 (1975).

47. ARIZ. ETHICS OP. 74-28, at 2 (1974).

48. *Id.* at 3.

49. *Id.* at 1; *see* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 9-3, 9-6 (1975).

50. Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 9-6 (1975).

51. ARIZ. ETHICS OP. 74-28, at 3 (1974).

52. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 9-6 (1975). The text of this rule is set forth in note 50 *supra*.

in the legal profession upon learning of the relationship between the councilman and a private law firm.[53]

EC 9-3, the second rule relied upon in Opinion 74-28,[54] provides that a lawyer who served in public employment may not accept employment after he has left public office, regarding a matter in which he had substantial responsibility while in office.[55] The State Bar Committee implied from EC 9-3 that the attorney-councilman is also prohibited from accepting employment related to public duties during his term of office,[56] since this would also give the appearance of impropriety. Thus, the Committee reiterated the employment stricture of Opinion 70-5, with one important difference: although consent can vitiate the conflict of interest outlined in old Canon 6,[57] it cannot eliminate the "appearance of impropriety" proscribed by Canon 9.[58] Under Opinion 74-28, despite Arizona's statutory provision,[59] the rule of "infectious disqualification" will prohibit not only the councilman, but also his firm, from practice involving the city or city agencies. In addition, to be logically consistent, the ban presumably applies to the whole firm even after the councilman-lawyer has left office. The full effect of the State Bar Committee opinion is thus to truncate a portion of the firm practice forever.

The Arizona Supreme Court and Canon 9

In direct contrast to the resolution of the State Bar Committee in Opinion 74-28,[60] the Supreme Court of Arizona considered Canon 9, the appearance of impropriety provision, as not requiring application of the "infectious disqualification" rule.[61] Rather, the court stated that the duties imposed by the conflict of interest statute, coupled with additional safeguards, maintain a sufficient appearance of propriety to satisfy the Code of Professional Responsibility.[62] Responding to question four, concerning appearance by the councilman's firm before the city council, the court imposes two restrictions on the activity of the public

53. ARIZ. ETHICS OP. 74-28, at 3 (1974).
54. *Id.* at 1.
55. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 9-3 (1975) provides:
> After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

56. ARIZ. ETHICS OP. 74-28, at 3 (1974).
57. *See* discussion note 28 *supra.*
58. ARIZ. ETHICS OP. 74-28, at 2-3 (1974).
59. ARIZ. REV. STAT. ANN. § 38-503(B) (1974); the text of this statute is set forth in note 36 *supra.*
60. See text & notes 44-59 *supra.*
61. 111 Ariz. at 521, 533 P.2d at 1156; see text & note 7 *supra.*
62. 111 Ariz. at 521, 533 P.2d at 1156.

official in addition to the requirements of the Arizona conflict of interest statute.[63] The first prohibits discussion of the matter with any person even slightly involved in the matter before the city council.[64] Second, the court requires a separation of accounts, to ensure that no financial benefit accrues to the attorney-public official by virtue of the appearance of a member of his firm.[65] In effect, the court has reinstated the decision of the State Bar Committee in Opinion 70-5;[66] the appearance of impropriety standard, applied to practice before the city council, seems to require no more than the conflict of interest rules under Canon 6 of the Canons of Professional Ethics.[67]

The court's solution to question five, involving firm appearances before city boards and commissions, was more strict. The court stated that avoidance of the appearance of impropriety is more difficult in this situation as "the lines of authority and influence are even less apparent,"[68] as the supervisory role of the attorney-councilman over board and commission members is less direct. Again, the attorney-councilman must refrain from discussion of the problem with board or commission members, city employees, or city council members, and there must be a separation of accounts.[69] In addition, the attorney-councilman must not participate in the selection of members of those city boards before which lawyers in his firm regularly appear.[70] Recognizing that nonparticipation presents a difficult problem for the attorney-public official, as anticipation of all future appearances before boards and commissions is probably impossible,[71] the court requires only a "good faith" attempt to keep "potential conflicts at a minimum," with abstention being favored in doubtful situations.[72] The court's inclusion of the term

63. ARIZ. REV. STAT. ANN. § 38-503(B) (1974). The text of this statute is set forth in note 36 *supra*.

64. 111 Ariz. at 521, 533 P.2d at 1156. This restriction may be derived from the general language of the statute, forbidding the councilman "participating in any manner" in the decision. ARIZ. REV. STAT. ANN. § 38-503(B) (1974). The text of the statute is set forth in note 36 *supra*.

65. 111 Ariz. at 521, 533 P.2d at 1156. The requirement of separate accounts may present a problem in the application of the court's decision. In order to truly ensure the absence of any share of the fee or remuneration gained by the firm for the matter going to the attorney-public official, some policing of the firm's accounts would seem necessary.

66. *Compare In re* Ethics Opinion No. 74-28, 111 Ariz. 519, 533 P.2d 1154 (1975), *with* ARIZ. ETHICS OP. 74-28 (1974), *and* ARIZ. ETHICS OP. 70-5 (1970).

67. ABA CANONS OF PROFESSIONAL ETHICS, No. 6 (1963). See discussion note 28 *supra*.

68. 111 Ariz. at 521, 533 P.2d at 1156.

69. *Id.*

70. *Id.*

71. *Id.* at 521-22, 533 P.2d at 1156-57.

72. *Id.* The concurring justices felt that lawyers should be encouraged to serve the public, and that the majority applied too strict an interpretation of Canon 9, discouraging lawyers from entering public service. *Id.* at 522, 533 P.2d at 1157 (Cameron, C.J., Lockwood, J., concurring). The concurring opinion further urges that the goal to be served by Canon 9 is the prevention of "actual unethical conduct," as opposed

good faith seems to imply that if an attorney fails to demonstrate an honest effort to comply with the Code and the court's interpretations of it, he will be acting unethically. This requirement that the attorney-public official take positive action to avoid unethical activity implies that Canon 9 seems to add significantly to the requirements of old Canon 6. For example, a good faith effort might well require the attorney-councilman to keep a detailed list of his firm's clients who appear before the boards and commissions of the city. If such a list is not continually updated, the attorney might negligently fail to meet the requirements established by the supreme court, without actually making an unethical selection which might create a conflict of interest. Upon disclosure of his action to the public, however, the events perhaps would give rise to the "appearance of impropriety." Although the court's solution closely resembles the decision of the State Bar Committee in Opinion 70-5, the role of new Canon 9 is apparent. Under the Code of Professional Responsibility, the attorney has an ethical duty not only to avoid actual conflicts of interest, but also to take affirmative measures to avoid the appearance, in the eyes of the public, of a conflict. The supreme court, however, realized the practical difficulties involved for the lawyer-councilman, and imposed only the requirement of a good faith effort.[73]

The Unanswered Questions

The petition for review submitted by the Arizona League of Cities and Towns requested review only of questions four and five; and, therefore, the Arizona supreme court addressed only these questions.[74] However, the remaining questions still seem to be open to varying interpretations. The State Bar Committee applied an extremely strict standard of disqualification throughout its analysis of the questions presented;[75] however, since the court did not accept that standard,[76] it

to what the public might perceive to be misconduct. *Id.* The concurring justices noted the possible effect of the broader prohibition:

> To be overly strict in interpreting Canon 9 would prevent an attorney from discharging his responsibility as a citizen to participate in public affairs and hold public office. To deny an attorney this opportunity for public service would not only unnecessarily restrict his rights as a citizen, but would imply that attorneys are exempt from the reasonable demands and responsibilities of citizenship, a result which, we believe, would reflect unfavorably upon the legal profession and be a loss to society.

Id. For a recent decision adopting a similar interpretation of Canon 9, see Shell Oil Co. v. Gas-A-Tron, 534 F.2d 1322 (9th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3147 (U.S. Aug. 24, 1976) (No. 76-139).

73. *See* 111 Ariz. at 521, 533 P.2d at 1156.
74. *Id.* at 520, 533 P.2d at 1155. *But see* discussion note 16 *supra.*
75. *See* text & notes 44-59 *supra.*
76. *See* text & notes 16-23, 61-72 *supra.*

might be useful to explore questions one, two, and three in light of the court's treatment of questions four and five.

Under the reasoning of *In re Ethics Opinion No. 74-28*, the court probably would concur with the judgment of the State Bar Committee with regard to question one, practice by the attorney-councilman in the city courts.[77] In such a case, the close and substantial relationship between the councilman and the city or any city functions creates a clearly conflicting interest, inevitably giving the appearance of impropriety, that could not, as a practical matter, be purged by the attorney-councilman's refraining from choosing the magistrates or city attorney. Although the court recognized that abstention would suffice in the case of the firm's practice before city boards and commissions,[78] application of this restriction to question one would clearly deprive the councilman of an important part of his duties, without significantly reducing the appearance of impropriety unavoidably resulting where a city councilman practices in city court.

Question two, however, regarding the practice of the attorney-councilman's partners in the city courts, presents a closer case. Following the court's reasoning in *In re Ethics Opinion No. 74-28*, it may not be necessary to apply the "infectious disqualification" rule, provided the appearance of impropriety could be adequately diminished by other means. The reasoning applied by the court to question five[79] would seem to control in this situation.

The lawyer-councilman would clearly be required to refrain from discussing any matters handled by the firm with city magistrates or the city attorney, and to maintain separate fee accounts.[80] The final condition imposed by the court, however, that the councilman refrain from selecting members of boards before which his firm regularly appears,[81] is not easily applied to this situation. A delicate balance is necessary, so as to prevent the appearance of impropriety, while encouraging lawyers to enter public service.[82] In this situation, the councilman must be required to abstain from selection of city magistrates and the city attorney in order to be consistent with the supreme court's standards.

The difference between this situation and that of the individual

77. *See* text & note 13 *supra*.
78. 111 Ariz. at 521, 533 P.2d at 1156.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*; ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 8-8 (1975). Unlike the situation where members of the attorney-councilman's firm regularly appear before a specific board or commission, here the attorney-councilman must abstain from appointing all magistrates because there is no way of predicting which magistrates the firm will be appearing before on a regular basis.

councilman's practice before the city courts is that here, despite the restriction on the councilman's functions, there is a corresponding reduction in the appearance of impropriety, not possible in the first situation. The appearance of a conflict of interests is not as great where firm members, rather than the councilman himself, practice in the city courts, so that abstention will sufficiently diminish the taint. This is certainly more attractive than barring a firm from a major portion of its practice.

In the case of conflict presented in question three, regarding representation of a client by the councilman's firm where the city is a named defendant, the Arizona supreme court's analysis requires an examination of the duties performed by the attorney as city councilman, to determine the lines of authority which might link him to the city's role in the particular lawsuit.[83] To flatly hold that a firm was completely prohibited from undertaking litigation against the municipality simply because one of its members was on the city council, would seem to place an unduly severe limitation on the firm's practice in the community, not at all consistent with the supreme court's holding. If the lawyer's duties as councilman include direct authority over the agency or body which caused the city to be a party to the litigation, or he directly participated in a decision having a substantial relation to the litigation, the appearance of impropriety is clearly sufficient to require a safeguarding of the public interest; the firm should not be permitted to represent the client in that situation. If the appearance of impropriety is not so obvious, however, the city councilman may bear the burden of deciding whether as a matter of good faith his firm should defer the representation. Since the court has required that the ethical considerations should be favored in all cases,[84] in this instance, the attorney-councilman would be required to make a diligent effort to ensure that his firm was not undertaking representation of clients in litigation against the city involving matters in which he participated as a councilman.

Conclusion

By exercising jurisdiction in this case, the Arizona supreme court undertakes a more active role in the guidance of members of the bar. Perhaps such a role is desirable, in light of the political climate of the seventies, in which the ethics of government officials are being challenged strongly by the public.[85] In its decision, the court has set useful stand-

83. 111 Ariz. at 521, 533 P.2d at 1156.
84. *Id.*
85. *See generally* Hertzberg, *Watergate: Has the Image of the Lawyer Been*

ards for attorneys in public service, by clarifying the role of Canon 9. The court has interpreted Canon 9 as a safeguard for the public interest by including in its definition of impropriety any activity which the public may perceive to be improper, whether or not actual impropriety exists. Thus, it has become the affirmative duty of the lawyer-councilman to monitor his activities and those of his firm while serving the public interest through elective office. The Arizona supreme court's solution to the problem presented is a logical, practical one, recognizing that if lawyers are to be encouraged to enter public office and to serve conscientiously, a balancing of interests is necessary. By striking a balance between the pre-Canon 9 resolution in Opinion 70-5 and the strict approach of Opinion 74-28, the court has reached a solution which will help to remove the reluctance on the part of attorneys to seek and accept public office, and will thereby facilitate the political process.

Diminished?, 79 COM. L.J. 73 (1974); Richardson, *The Watergate Morality*, 24 BUFFALO L. REV. 267 (1974); Smith, *Bar and Watergate: Conversation with Chesterfield Smith*, 1 HASTINGS CONST. L.Q. 31 (1974); Thomason, *What the Public Thinks of Lawyers*, 1974 N.Y.S.B.J. 151.

XII. REAL PROPERTY LAW

A. REZONING SUBJECT TO CONDITIONS

Since the landmark case of *Village of Euclid v. Ambler Realty Co.*,[1] cities and towns have increasingly exercised their power to regulate land uses[2] by dividing such uses into rigid, clearly defined categories.[3] *Euclid* lent its name to the term "Euclidean zoning," which can be defined as the "separation of the municipality into districts, and the regulation of buildings and structures in the districts so created, in accordance with their construction and the nature and extent of their use."[4] In *Transamerica Title Insurance Co. v. City of Tucson*,[5] the Arizona court of appeals was confronted with the problem of "conditional zoning,"[6] a variation of Euclidean zoning,[7] where the City of Tucson required a landowner, as a condition of rezoning, to dedicate part of his land for right-of-way purposes.[8] When conditional zoning is utilized, the zoning change does not become effective unless the landowner covenants to use his land either in a certain way, or subject to certain conditions.[9]

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1. 272 U.S. 365 (1926). In *Euclid*, the Supreme Court concluded that if zoning were an otherwise valid exercise of the police power, its limitations on industrial development would have no effect on its validity. *Id.* at 388-90. The Court approved a locality's exclusion of business and industry from all residential districts, and the exclusion of multiple dwellings from one and two family districts. *Id.* at 390, 395. *See* 4 N. WILLIAMS, AMERICAN PLANNING LAW 7 (1975). Although some of the prohibited uses were neither dangerous nor offensive, Justice Sutherland observed: "The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity." 272 U.S. at 388-89. *See generally* Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145 (1975).

2. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING 20 (1968).

3. *See* 272 U.S. at 390.

4. Mansfield & Swett, Inc. v. Town of West Orange, 120 N.J.L. 145, 149, 198 A. 225, 228 (Sup. Ct. 1938); *see* 1 R. ANDERSON, *supra* note 2, at 22.

5. 23 Ariz. App. 385, 533 P.2d 693 (1975).

6. The term "conditional zoning" has been used to describe a "zoning change which permits use of a particular property subject to conditions not generally applicable to land similarly zoned." 1 R. ANDERSON, *supra* note 2, at 610.

7. *See generally* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 1-15 (4th ed. 1975).

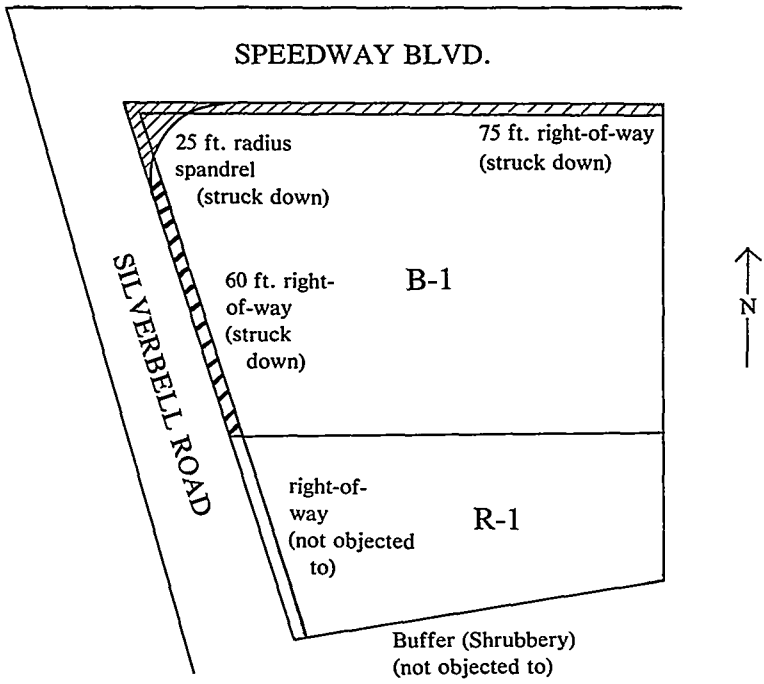
8. 23 Ariz. App. at 386, 533 P.2d at 694.

9. *See, e.g.*, Sylvania Elec. Prods., Inc. v. Newton, 344 Mass. 428, 183 N.E.2d 118 (1962); Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963); Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

In *Transamerica Title*, the landowner-appellant desired to zone an entire parcel of land for commercial use, land which had previously been zoned one-fourth residential.[10] The rezoning was requested in order to render the land more suitable for the construction of a proposed shopping center.[11] Although the appellant was legally entitled to build a shopping center on the land as originally zoned,[12] the City conditioned its rezoning grant upon several requirements: Appellant would have to dedicate to the City rights-of-way for the street bordering the northern edge of the property, for the road on the west side of the property, a radius spandrel[13] at the northwest corner, and comply with certain buffer conditions.[14]

Transamerica Title filed an action for a declaratory judgment in

10. 23 Ariz. App. at 386, 533 P.2d at 694. See illustration note 14 *infra*.
11. 23 Ariz. App. at 386-87, 533 P.2d at 694-95.
12. *Id.* at 389, 533 P.2d at 697. Transamerica Title had prepared two alternative plans, designated Plan S and Plan S-1. *Id.* at 386-87, 533 P.2d at 694-95. Plan S provided for development of the property under the existing zoning, utilizing the area sought to be rezoned for parking, a permissible use under the existing R-1 zone. *Id.* at 387, 533 P.2d at 695. Under Plan S-1, however, the improvements would be located to the rear of the property, with the parking predominantly in front of the buildings, which could not be done unless the property was rezoned. *Id.*
13. See illustration note 14 *infra*.
14. 23 Ariz. App. at 391, 533 P.2d at 699. The following illustration, although simplified and not drawn to scale, should aid in understanding the *Transamerica Title* facts.



superior court to challenge the imposition of these conditions.[15] The trial court's judgment upholding these conditions was reversed by the Arizona court of appeals.[16] In discussing the legal status of conditional rezoning, the court was careful to differentiate between a valid application of the noncompensatory governmental police power, and those actions constituting an exercise of eminent domain, requiring payment of just compensation.[17] The court of appeals held that the city's action constituted eminent domain, and therefore, just compensation was required.[18] As the City failed to demonstrate that an appreciable increase in traffic would necessarily ensue on adjacent streets if the appellant was permitted to exploit the land in a way which violated the existing zoning, the dedication conditions were held to amount to a deprivation of constitutional protections; the appellant was held entitled to have the property rezoned, free of the invalid conditions.[19]

This casenote will explicate the rationale behind the *Transamerica Title* court's approach to conditional zoning. The distinctions between the police power and eminent domain will be examined, as they relate to the power to zone. Next, the note will focus upon the relation between conditional zoning and the police power; special emphasis will be placed upon the tests for legality of such zoning within the context of *Transamerica Title.*

The Police Power to Zone and Eminent Domain

A clear understanding of the police power and eminent domain is essential to evaluate the decision in *Transamerica Title.* With

15. 23 Ariz. App. at 387, 533 P.2d at 695.

16. *Id.* at 391, 533 P.2d at 699. The court of appeals quoted the following findings of fact and conclusions of law made by the trial court in entering judgment in favor of the City of Tucson:

> 13. The right-of-way dedications required in this case are reasonably related to the proposed use under the rezoning.
>
> 14. The proposed use under the rezoning will increase traffic on the streets bordering the plaintiff's property.
>
> 15. The proposed use of the property under the rezoning will increase traffic turbulence on the streets.

Id. at 387, 533 P.2d at 695. These findings of fact were rejected by the court of appeals as being clearly erroneous. *Id.* at 391, 533 P.2d at 699. As to what satisfies this standard, Judge Learned Hand once observed:

> It is idle to try to define the meaning of the phrase 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

United States v. Aluminum Co. of Am., 148 F.2d 416, 433 (2d Cir. 1945).

17. 23 Ariz. App. at 387-88, 533 P.2d at 695-96.

18. *Id.* at 390, 533 P.2d at 698. ARIZ. CONST. art. 2, § 17, provides in part: "No private property shall be taken . . . for public or private use without just compensation having first been made, or paid into court for the owner . . . ."

19. *Id.* at 391, 533 P.2d at 699. Judge Hathaway, dissenting, did not consider the conditions imposed to be unreasonable or unsupported by the evidence. *Id.* at 391-92, 533 P.2d at 699-700 (Hathaway, J., dissenting).

respect to the basic legal philosophy underlying each power, the Arizona supreme court has observed:

> In the exercise of eminent domain property or an easement therein is taken from the owner and applied to public use because the use or enjoyment of such property or easement therein is beneficial to the public. In the exercise of the police power the owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him because his use or enjoyment of such property is injurious to the public welfare. Under the police power the property is not, as a general rule, appropriated to another use, but is destroyed or its value impaired, while under the power of eminent domain it is transferred to the state to be enjoyed and used by it as its own.[20]

As the *Transamerica Title* court noted, the Arizona constitution mandates payment of just compensation where private property is taken for a public use,[21] while there is no such limitation on the police power.[22] The purpose of requiring just compensation in conjunction with the exercise of eminent domain is to protect a landowner's proprietary and economic interests.[23] A taking by government of private property for public use may not be effected in such a manner so as to force a small segment of society to bear economic burdens for the benefit of the general public; such burdens properly should be borne by the state.[24]

The power to zone is a function of the police power,[25] so that the parameters of the police power determine the validity of an exercise of the zoning power.[26] In establishing these parameters, the Arizona

20. Moton v. City of Phoenix, 100 Ariz. 23, 26, 410 P.2d 93, 94-95 (1966), *quoting* 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN 95 (3d ed. 1950).

21. ARIZ. CONST. art. 2, § 17; *see* text & notes 18, 20 *supra*.

22. 23 Ariz. App. at 387-88, 533 P.2d at 695-96. For a discussion of the requirement of just compensation, see Moton v. City of Phoenix, 100 Ariz. 23, 26, 410 P.2d 93, 94 (1966); Uvodich v. Arizona Bd. of Regents, 9 Ariz. App. 400, 406, 453 P.2d 229, 235 (1969); State *ex rel.* Herman v. Southern Pac. Co., 8 Ariz. App. 238, 240, 445 P.2d 186, 188 (1968); "Compensation for Taking Property Adjacent to Access Highways," 11 ARIZ. L. REV. 61, 147 (1969).

23. State *ex rel.* Herman v. Southern Pac. Co., 8 Ariz. App. 238, 240, 445 P.2d 186, 188 (1968).

24. Armstrong v. United States, 364 U.S. 40, 49 (1960).

25. City of Scottsdale v. Municipal Court, 90 Ariz. 393, 396, 368 P.2d 637, 638 (1962); Rubi v. 49'er Country Club Estates, Inc., 7 Ariz. App. 408, 411, 440 P.2d 44, 47 (1968). *See generally* 1 E. YOKELY, ZONING LAW AND PRACTICE 24 (3d ed. 1965).

26. *See, e.g.*, City of Phoenix v. Fehlner, 90 Ariz. 13, 18, 363 P.2d 607, 610 (1961); City of Phoenix v. Collins, 22 Ariz. App. 145, 147, 524 P.2d 1318, 1320 (1974); City of Phoenix v. Beall, 22 Ariz. App. 141, 144, 524 P.2d 1314, 1317 (1974). Prior to the formalization of zoning as a function of the police power, the police power itself was relied on to justify techniques of land and building control. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (approving Los Angeles city ordinance prohibiting operation of kiln in certain parts of the city); Barbier v. Connolly, 113 U.S. 27, 32 (1885) (upholding restrictions upon types of buildings which could be used for laundries in San Francisco, aimed at fire prevention); People *ex rel.* Namm v. Carlin, 182

courts have upheld zoning where a substantial relation to public health, safety, morals, or general welfare is demonstrated, and the zoning ordinance is neither arbitrary nor unreasonable.[27] In *Transamerica Title*, the court emphasized that the police power is a circumscribed power designed for specific exigencies, stating: "The police power cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights as to the inviolateness of private property."[28]

Eminent domain, however, represents power of broader scope. As a right of the sovereign to appropriate private property to use for public benefit, eminent domain represents an essential attribute of sovereignty.[29] The power of eminent domain is not derived from state constitutions; such constitutional provisions only impose limitations on its exercise.[30] Whereas the police power is subject to the constitutional rights directly afforded interests in private property, "the power of eminent domain is superior to property rights"[31] and may be exercised subject only to the payment of just compensation.[32] Cognizant of the well-established rule "that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change,"[33] the *Transamerica Title* court confronted the issue whether the conditional rezoning ordinance in question fell within the orbit of the police power.[34]

App. Div. 626, 169 N.Y.S. 295 (1918) (upholding adoption of building code). Where an exercise of the police power violated constitutional guarantees, however, the Supreme Court has invalidated it. Thus, in Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Court found that the arbitrary and unequal administration of laundry construction requirements was designed to disadvantage the Chinese segment of the San Francisco populace, a clear violation of the equal protection clause. *Id.* at 374.

Along with the sporadic application of the police power, eminent domain, the common law of nuisance, and restrictive covenants were the primary methods used to insulate incompatible land uses from each other. For an excellent discussion of prezoning techniques of land use regulation, see 1 R. ANDERSON, *supra* note 2, at 34-39; 1 A. RATHKOPF, *supra* note 7, at 1-4.

27. *E.g.*, City of Phoenix v. Fehlner, 90 Ariz. 13, 18, 363 P.2d 607, 610 (1961); City of Tucson v. Arizona Mortuary, 34 Ariz. 495, 506-07, 272 P. 923, 927 (1928); City of Phoenix v. Collins, 22 Ariz. App. 145, 147, 524 P.2d 1318, 1320 (1974); City of Phoenix v. Beall, 22 Ariz. App. 141, 144, 524 P.2d 1314, 1317 (1974). *See also* "Judicial Review in Eminent Domain Proceedings," 15 ARIZ. L. REV. 593, 796 (1973); "No Affirmative Showing Required to Change Zoning Classification Under Void Ordinance," 4 ARIZ. L. REV. 116 (1962).

28. 23 Ariz. App. at 388, 533 P.2d at 696.

29. *See* 1 P. NICHOLS, *supra* note 20, at 1-19.

30. City of Scottsdale v. Municipal Court, 90 Ariz. 393, 396, 368 P.2d 637, 638 (1962). *See generally* 1 P. NICHOLS, *supra* note 20, at 1-19.

31. City of Scottsdale v. Municipal Court, 90 Ariz. 393, 397, 368 P.2d 637, 639 (1962), *quoting* State *ex rel.* Askew v. Kopp, 330 S.W.2d 882, 888 (Mo. 1960).

32. *In re* Forsstrom, 44 Ariz. 472, 479, 38 P.2d 878, 882 (1934). *See generally* 1 P. NICHOLS, *supra* note 20, at 1-9.

33. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

34. 23 Ariz. App. at 388, 533 P.2d at 696. The zoning power is circumscribed by the general limitations imposed upon applications of the police power. *See* text & notes 25-26 *supra*. Consequently, "[l]ocal zoning ordinances are not applicable to pub-

Conditional Zoning

Conditional zoning[35] represents one of several devices designed to make traditional Euclidean zoning more adaptable to the needs of urban planning.[36] These devices, which include special permits,[37] exceptions,[38] and variances,[39] were a response to the inadequacy of applying the simple Euclidean technique to patterns of urbanization not contemplated when zoning by use districts was first proposed.[40] Since zoning ordinances cannot practically be designed to impose restrictions on particular parcels of land, conditional zoning can achieve a measure

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lic uses of property for which an agency of the government has the power to acquire lands by the exercise of the power of eminent domain." City of Scottsdale v. Municipal Court, 90 Ariz. 393, 397, 368 P.2d 637, 639 (1962), *quoting* State *ex rel.* Askew v. Kopp, 330 S.W.2d 882, 888 (Mo. 1960).

35. See text & notes 6-9 *supra.*

36. 1 A. RATHKOPF, *supra* note 7.

37. A special permit is issued by a board of zoning appeals or by legislative authority, allowing a use different from the uses allowed under existing zoning, if permission for the use is granted. *See* 1 A. RATHKOPF, *supra* note 7, at 12-39. Standards are adopted in advance which allow the use only where minimal injury to surrounding property will ensue if the permit is granted. *See* 1 R. ANDERSON, *supra* note 2, at 609. Special permits are often utilized where the proposed use might be unsuitable in some locations within a zoning district, such as public utility installations. If such installations were permitted in all locations without restraint, it might harm other users; however, an outright exclusion within a district would hinder an essential service. Allowing public utility installations in all districts subject to a special permit requirement is one method of controlling the establishment of troublesome uses on a lot-by-lot basis. *Id.* at 608-609.

38. An exception refers to a specific provision in a zoning ordinance whereby a use is expressly permitted if conditions detailed therein are found to exist. *In re* Devereux Foundation, 351 Pa. 478, 483, 41 A.2d 744, 746 (1945). The exception is effectuated where those facts and circumstances prescribed by ordinance are ascertained by the zoning board of appeals. Heath v. Mayor & City Council, 187 Md. 296, 303, 49 A.2d 799, 803 (1946). The exception device is less versatile than the special permit, since here the zoning board determines solely whether the property owner has established the facts entitling him to the exception; it does not require a determination of the desirability of the proposed use. 1 R. ANDERSON, *supra* note 2, at 605.

39. Arizona recognizes two types of variances:

> A "use" variance is one which permits a use of land other than that allowed by the zoning ordinance. Thus a variance which permits a commercial use in a residential district is a "use" variance . . . . "Area" variances involve such matters as setback line, frontage requirements, height limitations, lot size restrictions, density regulations and yard requirements.

Ivancovich v. City of Tucson Bd. of Adjustment, 22 Ariz. App. 530, 536, 529 P.2d 242, 248 (1974). Undue hardship must be demonstrated to receive a variance and a loss of value is insufficient to preclude application of a zoning ordinance. City of Phoenix v. Fehlner, 90 Ariz. 13, 19, 363 P.2d 607, 611 (1961).

> A use variance cannot be granted unless the situation arises where reasonable use cannot be made of the property in a manner consistent with the zoning regulations. . . . It must be shown that the zoning ordinances preclude the use of the property in question for any purpose to which it is reasonably adapted; in other words, can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof?

Ivancovich v. City of Tucson Bd. of Adjustment, *supra* at 538, 529 P.2d at 250.

The primary difference between a variance and an exception is that "a variance is authority extended to the owner to use his property in a manner forbidden by the zoning enactment, while an exception allows him to put his property to a use which the enactment expressly permits." Service Realty Corp. v. Planning & Zoning Bd. of Appeals, 141 Conn. 632, 636, 109 A.2d 256, 259 (1954). *See also* Reps, *Legal and Administrative Aspects of Conditional Zoning and Exceptions*, 2 SYRACUSE L. REV. 54, 55 (1950).

40. 1 A. RATHKOPF, *supra* note 7.

of flexibility in the regulation of the use of such property, while simultaneously alleviating the shock which might accompany sudden transitions in land use.[41]

The *Transamerica Title* court acknowledged the power of a municipality to impose conditions on zoning or rezoning,[42] but because such conditions cannot exceed the scope of the police power,[43] the

41. *See* Stefaniak, *The Status of Conditional Zoning in Illinois—An Argument to Sustain a Flexible Zoning Tool*, 63 ILL. B.J. 132, 139 (1974).

42. 23 Ariz. App. at 388, 533 P.2d at 696. Arizona and New York statutorily sanction forms of conditional zoning. *See* ARIZ. REV. STAT. ANN. § 9-462.01(A)(7), (D) (Supp. Pamphlet 1975); N.Y. VILLAGE LAW § 7-738 (McKinney 1973). ARIZ. REV. STAT. ANN. § 9-462.01 (Supp. Pamphlet 1975) provides in relevant part:

> A. Pursuant to the provisions of this article, the legislative body of any municipality by ordinance may:
>
> . . . .
>
> 7. Require as a condition of re-zoning public dedication of rights-of-way, as streets, alleys, public ways, drainage and public utilities as are reasonably required by or related to the effect of the re-zoning.
>
> . . . .
>
> D. The legislative body may approve a change of zone conditioned upon a schedule for development of the specific use or uses for which rezoning is requested. If at the expiration of this period the property has not been improved for the use for which it was conditionally approved, it shall revert to its former zoning classification without legislative action.

The Arizona statute, however, does not expressly sanction the general use of conditions. This may be a serious flaw, in that rezoning may produce public burdens which the Arizona statute does not specifically mitigate. A provision empowering municipalities to impose additional conditions reasonably designed to prevent harm to the general welfare would add needed flexibility to the Arizona law. The New York statute also provides for the imposition of conditions when zoning is modified. Unlike the Arizona law, in addition to specifically enumerating a list of permissible conditions, the New York law also allows a zoning board to add other conditions which the board, in its discretion, considers reasonable. *See* N.Y. VILLAGE LAW § 7-738 (McKinney 1973), which provides in relevant part:

> The board of trustees is hereby empowered by resolution to authorize the planning board, simultaneously with the approval of a plat or plats pursuant to this article, to modify applicable provisions of the local laws subject to the conditions hereinafter set forth and such other reasonable conditions as the board of trustees may in its discretion add thereto.

The statute proceeds to outline a procedure which the applicant must follow, *id.* § 7-738(a), and provides, *inter alia*, for methods of construction (detached, attached, or multistory units), *id.* § 7-738(c), and requirements concerning the ownership, use, and maintenance of open spaces within the plat. The New York statute, however, applies only to lands zoned for residential purposes, *id.* § 7-738(b), thus limiting its flexibility. As a result, the impact of the New York law upon commercial development will be minimal, especially in areas of transition from residential to commercial use. Unfortunately, this is precisely the area where conditional zoning can be most efficacious. *See* Comment, *Toward a Strategy for Utilization of Contract and Conditional Zoning*, 51 J. URB. L. 94, 111 (1973).

Hawaii has also legislatively approved a form of conditional zoning, by requiring that a subdivider provide sites for parks and playgrounds, or pay an amount in lieu thereof to the county, as a condition precedent to final approval of subdivision plans. HAWAII REV. STAT. § 46-6 (1968).

43. 23 Ariz. App. at 388, 533 P.2d at 696. See text & notes 25-26 *supra*. Since zoning is a legislative power, its exercise cannot be delegated in a manner injurious to the general welfare. *See generally* 1 R. ANDERSON, *supra* note 2, at 616-20. Where conditions precedent to a zoning change are incorporated into a formal agreement between the landowner and the municipality, some courts have viewed the device, popularly known as "contract zoning," as an illegal contract. "Contracts . . . have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations." Houston Petroleum Co. v. Automotive Prods. Credit Ass'n, 9 N.J. 122, 129, 87 A.2d 319, 322 (1952); *see* Ford Leasing Dev. Co. v. Board of County Comm'rs, 186 Colo. 418, 425, 528 P.2d

court then inquired into whether the conditions imposed in the case at bar were reasonably conceived with respect to this requirement. The primary function of the police power is to safeguard the public interest from private endeavors posing potential threats to the general welfare.[44] The imposition of conditions precedent to rezoning therefore should attempt to insulate the public from the deleterious effects of land use which would otherwise stem from a zoning change. As the zoning power may not be substituted for eminent domain where the taking of property for public use is involved,[45] conditions attached to the zoning power are similarly restricted.[46] The *Transamerica Title* court expressed its disapproval of municipal attempts to usurp the police power in order to avoid just compensation, in cogent language: "An arbitrary, conceived exaction will be nullified as a disguised attempt to take private property for public use without resort to eminent domain."[47] Although legitimate exercises of the police power by definition frequently impair private rights in property because such rights are detrimental to the public interest,[48] such impairment will not amount to an eminent domain type of confiscation.[49] In *Transamerica Title*, the court faced the issue of how far conditional zoning, as an

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237, 241 (1974); Baylis v. City of Baltimore, 219 Md. 164, 170, 148 A.2d 429, 433 (1959); V.F. Zahodiakin Eng'r Corp. v. Zoning Bd. of Adjustment, 8 N.J. 386, 395, 86 A.2d 127, 132 (1952).

It has been suggested that distinctions between contract zoning and conditional zoning are tenuous and of no real import because the two achieve essentially the same result. Stefaniak, *supra* note 41, at 134. Indicating that the result was not the critical factor invalidating the exaction of conditions precedent to rezoning, the Supreme Court of Wisconsin suggested that the method of obtaining such concessions from the landowner could determine the legality of the ordinance:

> When a zoning authority does not make an agreement to zone but is motivated to zone by agreements as to the use of the land made by others or by voluntary restrictions running with the land although suggested by the authority, the zoning ordinance in some jurisdictions is valid and not considered to be contract or conditional zoning.

State *ex rel.* Zupanic v. Schimenz, 46 Wis. 2d 22, 29, 174 N.W.2d 533, 537 (1970). Most courts acknowledge that contract zoning is illegal in the sense that a legislature cannot contract away its powers. *See, e.g.*, Hedrich v. Village of Niles, 112 Ill. App. 2d 68, 78, 250 N.E.2d 791, 795 (1969); Gregory Manor v. City of Clifton, 53 N.J. Super. 482, 492, 147 A.2d 595, 601 (App. Div. 1959); Church v. Town of Islip, 8 N.Y.2d 254, 259, 168 N.E.2d 680, 683, 203 N.Y.S.2d 866, 869 (1960). However, even where the attachment of conditions could technically be defined as contract zoning, at least one court has stated that such a contract contains, as an implied term, reservation of the right to exercise the police power in the future. Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 419, 79 Cal. Rptr. 872, 878 (Ct. App. 1969).

44. 23 Ariz. App. at 387, 533 P.2d at 695. *See generally* Strine, *The Use of Conditions in Land Use Control*, 67 DICK. L. REV. 109, 110 (1963).

45. See text & notes 30-34 *supra*.

46. *See* Strine, *supra* note 44, at 111.

47. 23 Ariz. App. at 388, 533 P.2d at 696.

48. "The general rule . . . is that considerations of financial loss or of so-called 'vested rights' in private property are insufficient to outweigh the necessity for legitimate exercise of the police power of a municipality." City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 457, 274 P.2d 34, 42 (Ct. App. 1954), *quoting* Standard Oil Co. v. City of Tallahassee, 183 F.2d 410, 413 (5th Cir. 1950).

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

exercise of the police power, could be utilized before it constituted an outright confiscation.[50]

In *Church v. Town of Islip*,[51] an early case sanctioning conditional zoning, a New York court concluded that restrictive covenants conditioning a zoning change were reasonably designed to benefit the neighborhood, and as such represented a valid use of the police power.[52] The *Church* court, however, did not articulate any general test of reasonableness to evaluate the propriety of conditional zoning. Such a test was detailed in *Scrutton v. County of Sacramento*,[53] where a California court held that a condition is reasonable if its purpose is to mitigate the public burden which will ensue following a rezoning grant.[54] The *Transamerica Title* court approved the *Scrutton* formulation, stating that "[t]he fulfillment of public needs emanating from the proposed land use is the sine qua non of the exaction's reasonableness."[55]

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50. 23 Ariz. App. at 388, 533 P.2d at 696. In Rand v. City of New York, 3 Misc. 2d 769, 771, 155 N.Y.S.2d 753, 755 (Sup. Ct. 1956), the court held that conditions attached to the grant of a variance, which severely limited use of the subject property, constituted an unconstitutional taking. *Id.* This principle is equally applicable to conditional zoning in that both conditional zoning and variances are derived from the zoning power itself. *See* 1 A. RATHKOPF, *supra* note 7; 2 E. YOKELY, *supra* note 25, at 144-45. Therefore, conditions which are overly restrictive or confiscatory can represent a taking in violation of constitutional protections. *See generally* 3 R. ANDERSON, *supra* note 2, at 51.

51. 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

52. *Id.* at 259, 168 N.E.2d at 683, 203 N.Y.S.2d at 869.

53. 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (Ct. App. 1969).

54. *Id.* at 422, 79 Cal. Rptr. at 880.

55. 23 Ariz. App. at 388, 533 P.2d at 696.

A small number of cases have indicated that it is possible for a zoning commission to impose conditions involving needs which the commission is not directly responsible for and which will require the cooperation of another governmental agency. Thus, in Lurie v. Planning & Zoning Comm'n, 160 Conn. 295, 278 A.2d 799 (1971), the court upheld the issuance of a special permit conditioned on a number of offsite highway and traffic changes requiring approval of a separate agency. *Id.* at 306-07, 278 A.2d at 805. The court observed that where another agency is reluctant to commit itself to a course of action before knowing that if such a commitment is made it will satisfy conditions deemed necessary by the zoning authority, it is logical that the zoning authority approve the requested change in land use subject to favorable action by another agency not controlled by the zoning authority. *Id.* In Farina v. Zoning Bd. of Appeals, 157 Conn. 420, 254 A.2d 492 (1969), the court also acknowledged the power of the zoning authority to impose conditions requiring favorable action by another agency. *Id.* at 424, 254 A.2d at 492. The court stated that such conditions precedent to granting a special exception were valid so long as it was the zoning authority, rather than another agency, which determined what improvements were necessary. *Id.*

The same logic would seem to apply to conditional zoning, although in Levine v. Town of Oyster Bay, 46 Misc. 2d 106, 259 N.Y.S.2d 247 (Sup. Ct. 1964), the court voided a condition precedent to rezoning which required the property owner to lower the grade of the entire parcel, because compliance with that condition did not depend solely on the willingness of the owner to perform: "The fact that permission to do the necessary excavation and removal of material must come from the same official body, to wit, the Town Board, that purported to grant the change of zone is no assurance or guarantee that it will be forthcoming." *Id.* at 110, 259 N.Y.S.2d at 252. The court distinguished the *Church* case, see text & notes 51-52 *supra*, on the rather tenuous ground that in the instant case the owner instead of the town proposed the conditions. *Id.* at 110, 259 N.Y.S.2d at 251.

The adverse impact of the zoning change therefore must be directly attributable to the proposed modification in land use to justify the imposition of ameliorating conditions.[56] The court of appeals in *Transamerica Title* observed that the necessary correlation between rezoning and public needs was present in *Ayres v. City Council*,[57] a leading case on conditional rezoning. In *Ayres*, the California supreme court upheld a dedication requirement because the city had sufficiently documented the increase in traffic noise and fumes which the proposed subdivision would create, necessitating street widening, restrictions of ingress and egress, and the screening of lot owners from noise and hazards of local traffic.[58] The *Ayres* court reasoned that if the rezoning would create a substantial change in traffic patterns, jeopardizing public safety, then requiring compliance with conditions designed to protect the safety and general welfare of the lot owners and the public was a reasonable exaction.[59]

The *Ayres* court emphasized that the dedication requirements imposed were not a compulsory taking for public use, because they were conditions related to increased traffic and other needs of the proposed subdivision; this type of condition was characterized as voluntary in nature and entirely constitutional.[60] A condition is voluntary in the

56. See text & notes 51-54 *supra*. In addition to the relation between the conditions imposed and the public burdens arising from the rezoning, the procedural aspects of such conditions are an important factor in evaluating the legality of the conditions. It is possible for a rezoning to become effective only if conditions are met within a certain period of time, or to provide alternatively that rezoning becomes effective immediately, with automatic repeal if the conditions are not met within the specified period of time. *See* State *ex rel.* Zupanic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970). Whether such time limits are reasonable usually depends on a case-by-case analysis, but a factor such as technological constraints should be taken into consideration when evaluating the reasonableness of a particular promise.

In addition to the technical feasibility of a condition, a strong argument also can be presented for releasing a landowner from the condition where adjacent land is similarly rezoned without the imposition of similar conditions. *See* Comment, *supra* note 42. To facilitate the use of conditional zoning and lessen the potential for friction, conditions could be imposed with a provision that the municipality is estopped for a specific time period from rescinding the rezoning decision. Such a restriction would afford a measure of security for applicants wary of complying with costly conditions. If an applicant does agree to conditions, and subsequently breaches them, the municipality can then elect among several remedies, such as specific performance or injunctive relief. The appropriate remedy would depend, in part, on the stage of completion of the improvements, since halting construction would amount to economic waste in situations where projects are nearly finished. *Id.*

A condition should not only be drafted to permit reasonable compliance within technological and time limitations, but should also be specific enough to prevent any subsequent disagreements as to what it entailed. Therefore, conditions which are overly vague and uncertain will be held constitutionally invalid under the due process clause of the fourteenth amendment. *See* City of Miami Beach v. Eason, 194 So. 2d 652, 654-55 (Fla. App. 1967). *See generally* Strine, *supra* note 44, at 130. If a condition provides for subsequent modifications or additions, the opportunity for unreasonable surprise can justify excision of that condition on due process grounds. *Id.*

57. 34 Cal. 2d 31, 207 P.2d 1 (1949); *see* 23 Ariz. App. at 388, 533 P.2d at 696.

58. 34 Cal. 2d at 41-43, 207 P.2d at 7-8.

59. *Id.*

60. *Id.* at 42, 207 P.2d at 8.

sense that a property owner is given the option to exploit his land through new uses allowed by a rezoning, provided that he complies with such restrictions as are deemed necessary to minimize any public cost which may be associated with the new use.[61] The critical factor in the *Ayres* decision was the certainty of the public burden which would be created by the rezoning.[62] In *Scrutton v. County of Sacramento*,[63] a similar yardstick was employed and the county's evidence justifying the imposition of conditions was found wanting. The *Scrutton* court observed that the county's affidavits failed to demonstrate how the contemplated construction of apartments would produce traffic or other undesirable effects necessitating street modifications at the sole expense of the property owner.[64] Since the primary justification for the imposition of conditions is either to neutralize the deleterious consequences resulting from the rezoning, or to meet public service demands created by the proposal,[65] a lack of relationship between the exaction and the proposed use is fatal to the conditions imposed.[66] Relying on the example set by *Scrutton*, the *Transamerica Title* court scrutinized the evidence offered by the City of Tucson to discern whether or not the conditions at issue did indeed attempt to fulfill public needs emanating from the proposed rezoning.[67]

Although the *Transamerica Title* court recognized that the trial court must make a factual determination as to the relationship between the conditions exacted and the proposed use,[68] it recognized as well that such findings may be rejected if demonstrated to be clearly erroneous.[69] In *Transamerica Title*, the trial court had failed to consider the fact that if a deplorable situation either exists or is likely to occur under the original zoning, conditioning the rezoning on exactions designed to remove or prevent the undesirable situation is unreasonable; the rezoning is not responsible for the creation of the obnoxious use.[70] The court of appeals was fully cognizant of the fact that the

61. *See id.* at 42, 207 P.2d at 7. When the expenditure of public monies is necessary to provide service for a select group, that group is directly benefitting from such a provision and should be assessed accordingly. Where services are expended at a price to the public, "[t]he subdivider who creates the demand ought to pay the price and pass it along to the owners of the subdivided and improved land." 1 R. ANDERSON, *supra* note 2, at 442.

62. 34 Cal. 2d at 42-43, 207 P.2d at 8.

63. 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (Ct. App. 1969); *see* text & notes 53-55 *supra*.

64. 275 Cal. App. 2d at 422, 79 Cal. Rptr. at 880.

65. *Id.* at 421, 79 Cal. Rptr. at 879. *See generally* Note, *Zoning Amendments and Variances Subject to Conditions*, 12 SYRACUSE L. REV. 230, 233 (1960).

66. 275 Cal. App. 2d at 422, 79 Cal. Rptr. at 879.

67. 23 Ariz. App. at 388-90, 533 P.2d at 696-98.

68. *Id.* at 390, 533 P.2d at 698.

69. *Id.* at 387, 533 P.2d at 695; Olson v. State, 12 Ariz. App. 105, 108, 467 P.2d 945, 948 (1970); Park Cent. Dev. Co. v. Roberts Dry Goods, Inc., 11 Ariz. App. 58, 60, 461 P.2d 702, 704 (1969).

70. 23 Ariz. App. at 390, 533 P.2d at 698; *see* Besselman v. Moses Lake, 46 Wash.

appellant could have built the same shopping center with the *existing* zoning.[71] If the zoning change was a proper exercise of the police power,[72] then any conditions attached to that change should be for the purpose of lessening the public burden associated with the rezoning.[73] However, where the conditions are unrelated to the effects of the rezoning, then the validity of such exactions becomes suspect.[74]

The *Transamerica Title* court's review of the proceedings at trial prompted the conclusion that "[t]here is no evidence that the rezoning of the land in question will cause any appreciable burden on the streets over and above that which would emanate from the land *prior to rezoning*."[75] Factors unconnected with the rezoning request had already necessitated widening of the streets in question;[76] it was not shown that the proposed rezoning itself would contribute significantly to traffic and safety problems in the area.[77] In rejecting the trial court's finding that the proposed use under Plan S-1 would adversely affect traffic patterns appreciably more than the improvement plan necessitated by the existing zoning, the court of appeals concluded that the City had failed to show the reasonableness of the conditions

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2d 279, 280 P.2d 689 (1955) (court struck down city's attempt to condition rezoning upon the landowner taking steps to solve drainage problem unrelated to requested zoning change). *See generally* Miller, *The Current Status of Conditional Zoning*, in PROCEEDING OF THE INSTITUTE ON PLANNING, ZONING & EMINENT DOMAIN 121, 124, 129 (Sw. Legal Foundation 1974).

71. 23 Ariz. App. at 390, 533 P.2d at 698.

72. A proposed zoning change must stand on its own merits and should not be justified by the exaction of conditions; the rezoning must be based on reasonable grounds which precipitate the need for a change in land use. Thus, in Sylvania Elec. Prods., Inc. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1961), the court observed that the validity of a zoning amendment was not contingent upon the validity of certain conditions imposed by the city. *Id.* at 435, 183 N.E.2d at 123. *See also* Reps, *supra* note 39, at 70.

73. See text & notes 55, 61 *supra*.

74. In one case, the New Jersey supreme court struck down a condition which required the landowner to refrain from erecting any factory buildings on a plot of ground; the court deemed this an obliquitous way of creating a park at the sole expense of the individual landowner. Soho Park & Land Co. v. Board of Adjustment, 6 N.J. Misc. 686, 687, 142 A. 548, 549 (Sup. Ct. 1928). In Gerczak v. Todd, 233 Md. 25, 194 A.2d 799 (1963), the court also took a dim view of such extraneous conditions: "[Z]oning authorities may not require a developer to defray the cost of public improvements beyond the boundaries of his own property." *Id.* at 27, 194 A.2d at 801.

75. 23 Ariz. App. at 390, 533 P.2d at 698 (emphasis in original).

76. A nearby hospital and a community college were already generating a great deal of traffic, suggesting the need for the road widening. In addition, the mere construction of a shopping center, even under existing zoning, made wider roads a necessity. *Id.*

77. *Id.* The City of Tucson's contention that any rezoning from residential to commercial use would by its very nature generate increased traffic was rejected by the court of appeals as an abstract argument which disregarded the factual setting. *Id.* at 390-91, 533 P.2d at 698-99. The entire parcel as it would be utilized under Plan S-1 had to be considered, not merely the rezoned portion. *Id.* at 391, 533 P.2d at 699. Moreover, the court upheld appellant's contention that evidence concerning dedications exacted by the City on other parcels of land should not have been admitted by the trial court; whether the City reasonably exercised its police power in other cases was irrelevant to the instant case. *Id.*

precedent to rezoning.[78] Since the dedication requirements were not within the scope of the police power, the City could not secure the land in question without providing just compensation.[79] The *Transamerica Title* court relied upon the *Scrutton* court's warning that "[t]he grant of a public privilege may not be conditioned upon the deprivation of constitutional protections."[80]

Conclusion

The court of appeals in *Transamerica Title* was confronted with the legitimacy of a specific application of conditional zoning, a device designed to impart flexibility to an otherwise rigid system of Euclidean zoning. Since conditional zoning imposes restrictions upon a parcel in addition to those placed upon other land within the same zoning classi-

78. *Id.* As to what constitutes a reasonable condition, no hard and fast rule can be drawn. However, where an analogy between a condition and a well recognized type of land control can be made, the condition is usually upheld. Strine, *supra* note 44, at 131. Conditions reflecting traditional police power goals have been upheld in a variety of cases. *See, e.g.*, Vlahos Realty Co. v. Little Boar's Head Dist., 101 N.H. 460, 146 A.2d 257 (1958) (requiring maintenance of toilet facilities at eating establishment); Everson v. Zoning Bd. of Adjustment, 395 Pa. 168, 149 A.2d 63 (1959) (requiring landscaping, and paved off-street parking); Fiske v. Zoning Bd. of Review, 70 R.I. 426, 40 A.2d 435 (1944) (restriction of access to property to improve flow of traffic). Conditions regulating the operation of businesses have frequently been upheld where they reduce the potential nuisance effects associated with various enterprises. *See, e.g.*, North Borough of N. Plainfield v. Perone, 54 N.J. Super. 1, 148 A.2d 50 (App. Div. 1958) (requirement that garage and service station operators make repairs and store automobiles inside buildings and not on public streets); Everson v. Zoning Bd. of Adjustment, *supra* (prohibition of parking in certain area); *In re* Consolidated Cleaning Shops, Inc., 103 Pa. Super. 66, 157 A. 811 (1931) (requirement that applicant use gas burner in dry-cleaning business although competitors were allowed to use coal burners). Somewhat more aesthetic goals have also been upheld where a relationship to some aspect of the police power is demonstrated. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (upholding an ordinance restricting residence to "families," because the ordinance promoted family values, youth values, and clean air); Berman v. Parker, 348 U.S. 26, 35 (1954) (upholding an act because its goals of elimination and prevention of substandard housing conditions would promote the health and safety of residents); Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949) (requirement that landowner devote a strip of land to the planting of trees found to be reasonably related to the public health, safety, and general welfare); City of Miami Beach v. Eason, 194 So. 2d 652 (Fla. App. 1967) (requirement that cars belonging to car rental business situated in hotel not be serviced in hotel area had reasonable relation to public health, safety, and welfare); Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960) (condition that landowner plant hedges benefitted public safety).

There is a question as to whether conditions are unreasonable when they represent a substantial restraint on alienation. In Village of Belle Terre v. Borass, *supra*, the Supreme Court upheld an ordinance limiting occupancy of homes to "families," as defined in the ordinance. 416 U.S. at 8-9. This ordinance clearly limited the marketplace for the landowner's property; *Belle Terre* could represent a modern trend sanctioning such restrictions. *See also* Taxpayers Ass'n, Inc. v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976) (upholding an ordinance for age-restricted mobile home parks). *But see* Soho Park & Land Co. v. Board of Adjustment, 6 N.J. Misc. 686, 142 A. 548 (Sup. Ct. 1928) (condition restricting land to one specific business use declared illegal restraint on alienation); Olveson v. Board of Review, 71 R.I. 303, 308, 44 A.2d 720, 722 (1945) (invalidating condition allowing property to be used as rooming house only by applicant.)

79. 23 Ariz. App. at 391, 533 P.2d at 699.

80. *Id.*; *see* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 421, 79 Cal. Rptr. 872, 879 (Ct. App. 1969).

fication, such conditions are subject to the limitations of the police power; neither zoning nor any conditions attached thereto may exceed the scope of the police power. If conditions attached to a rezoning grant do not exhibit a sufficient nexus to the rezoning, then the utilization of conditional zoning becomes suspect. In *Transamerica Title,* the court determined that the conditions at issue were not conceived to ameliorate adverse effects directly attributable to the rezoning. Although conditional zoning can be a feasible method of permitting new uses upon a parcel without causing any unnecessary public burdens, it cannot, as the *Transamerica Title* decision demonstrates, be relied upon as a substitute for eminent domain.

B. Installment Contracts for the Sale of Land: Waiver of Time of the Essence Clause

The installment contract is a commonly used device in the sale of real property which provides a large measure of security for the vendor.[1] This device allows the vendor to retain title to the property, while the buyer takes possession and is entitled to all the incidents of ownership.[2] In the event of a breach by the buyer, summary proceedings may restore possession of the land to the vendor, and depending on the terms of the contract, the vendor may keep all installments paid and sue for any installments due.[3] The ease with which the land can be reclaimed by the buyer under such a contractual arrangement in the event of a default gives the vendor a significant advantage.[4]

The features that favor the vendor are correspondingly disadvantageous to the vendee. Installment contracts frequently provide that "time is of the essence," so that failure to make a payment on time is a breach for which the seller is entitled to consider the contract at

1. Comment, *Comparison of California Mortgages, Trust Deeds and Land Sale Contracts,* 7 U.C.L.A.L. Rev. 83, 95-102 (1960). The vendor is often in a position to dictate the terms of the sales contract. *Id.* at 102.

2. *Id.* at 95-97. The vendee is free to use the property as he sees fit; his interest is generally alienable and subject to taxation. *Id.* at 96-97.

3. G. Osborne, Mortgages § 20, at 29 (2d ed. 1970). *See also* Trevillian v. Lee, 111 Ariz. 229, 231, 527 P.2d 100, 102 (1974); Sturm v. Heim, 95 Ariz. 300, 303, 389 P.2d 702, 704 (1964).

4. Comment, *supra* note 1, at 97.

an end.[5] If the vendee defaults, he may forfeit his interest and his right to possession within a relatively short time,[6] and may not be able to regain the amount he has already paid on the contract.[7]

While contracts which clearly provide for a forfeiture will be so interpreted and enforced,[8] this result is disfavored by the courts, and where possible, contracts will be construed against forfeiture.[9] Because of the disparity between the magnitude of the breach and the loss resulting from forfeiture, courts of equity are often willing to interpret the seller's conduct as a waiver of the time of the essence clause in order to circumvent a forfeiture and ameliorate its harsh effects on the purchaser.[10] In Arizona, the granting of relief from forfeiture is at the discretion of the court.[11]

Eyman v. Sowa[12] presented the Arizona court of appeals with the question of whether a seller of land under an installment contract is bound by the prior conduct of a third person, such as a mortgagee, which, if imputable to the seller, would constitute a waiver of the seller's right to insist upon forfeiture.[13] The court did not determine whether a third party could actually waive a seller's right to initiate a forfeiture; it held that the seller himself waived this right.[14] The court held that there had been a waiver because the seller, by inserting certain terms in the contract, had created a situation in which the purchaser could be "lull[ed] into a false sense of security" by the behavior of the third party.[15]

Under the terms of the *Eyman* contract, the purchaser was required to make payments directly to the seller's mortgagee each

5. *See* Armstrong v. Irwin, 26 Ariz. 1, 10, 221 P. 222, 225 (1923); Comment, *supra* note 1, at 95-97.

6. Trevillian v. Lee, 111 Ariz. 229, 231, 527 P.2d 100, 102 (1974); Sturm v. Heim, 95 Ariz. 300, 303, 389 P.2d 702, 704 (1964).

7. Tennent v. Leary, 82 Ariz. 67, 73, 308 P.2d 693, 697 (1957). *See generally* First Nat'l Bank v. Osborne, 39 Ariz. 107, 110, 4 P.2d 384, 385 (1931).

8. Branker v. Bowman, 62 Ariz. 214, 220, 156 P.2d 898, 901 (1945); Eisele v. Kowal, 11 Ariz. App. 468, 471, 465 P.2d 605, 608 (1970).

9. Harford v. National Life & Cas. Co., 81 Ariz. 43, 46, 299 P.2d 635, 637 (1956); Phoenix Title & Trust Co. v. Horwath, 41 Ariz. 417, 428, 19 P.2d 82, 86 (1933). *See also* Tolmachoff v. Eshbaugh, 41 Ariz. 318, 324-26, 18 P.2d 256, 259 (1933), *quoting* Stark v. Norton, 24 Ariz. 454, 459-61, 211 P. 66, 67-68 (1922). In *Stark*, some 21 installment payments were made on the amount due under a contract for the sale of land. *Id.* at 460, 211 P. at 68. Only five of these payments were made on the date due. *Id.* Since all were accepted by the seller, the court refused to enforce the forfeiture, on grounds that the time of the essence clause had been waived. *Id.* The court in *Tolmachoff*, in a fact situation which closely paralleled that of *Stark*, followed the earlier case, finding that the clause had been waived. 41 Ariz. at 326, 18 P.2d at 259.

10. *See, e.g.*, Arizona Coffee Shops v. Phoenix Downtown Parking Ass'n, 95 Ariz. 98, 387 P.2d 801 (1963); Cordell v. Enis, 162 Ark. 41, 257 S.W. 375 (1924); Tough v. Netsch, 83 N.H. 374, 142 A. 702 (1928); 18 ARK. L. REV. 175, 176 (1964).

11. Sturm v. Heim, 95 Ariz. 300, 304, 389 P.2d 702, 705 (1964).

12. 23 Ariz. App. 588, 534 P.2d 1087 (1975).

13. *Id.* at 590, 534 P.2d at 1089.

14. *Id.*

15. *Id.* at 590-91, 534 P.2d at 1089-90.

month, and to make an additional monthly payment to an escrow company for the benefit of the seller.[16] The purchasers became more than 30 days delinquent in their payments to the mortgagee.[17] The mortgagee nevertheless accepted a late payment. Although the seller would have been able to enforce a forfeiture under the contract and the terms of the applicable statute, the mortgagee did not notify the seller of the default.[18] The following month the purchaser was again delinquent on the payment to the mortgagee, whereupon the mortgagee notified the seller of the later default.[19] The seller then executed a Notice of Election and Declaration of Forfeiture,[20] demanding payment of the delinquent amount within 10 days.[21] The seller had no knowledge of the earlier default by the purchaser, nor the mortgagee's acceptance of the late payment.[22]

After the expiration of the 10 day period during which the default could be cured, the escrow agent, at the request of the seller, recorded a quitclaim deed from the purchaser to the seller.[23] The purchaser then instituted an action to set aside the forfeiture. The trial court held for the plaintiff-purchaser, finding that the acceptance by the mortgagee of the late payment constituted a waiver of the time of the essence clause of the contract, and that the seller was bound by the waiver.[24] The court found that the seller was required to reinstate the time of the essence clause by notifying the buyer of his intent to insist on strict compliance with that clause.[25] Since the seller had failed to

16. *Id.* at 589, 534 P.2d at 1088. The parties to the present case were each the successors in interest of the original parties. *Id.*

17. *Id.* By statute in Arizona, the defaulting party is permitted a period of 30 days from the date of default to make payments before forfeiture of his interest may be enforced when less than 20 percent of the purchase price has been paid under a contract to convey real property. ARIZ. REV. STAT. ANN. § 33-741(A)(1) (1974). If the time of the essence clause has been waived, however, the seller is required to reinstate it by clear and definite notice to the buyer; the buyer then has a reasonable time within which to bring the payments up to date. Kammert Bros. Enterprises, Inc. v. Tanque Verde Plaza Co., 102 Ariz. 301, 305, 428 P.2d 678, 682 (1967); Arizona Title Guar. & Trust Co. v. Modern Homes, Inc., 84 Ariz. 399, 403, 330 P.2d 113, 115 (1958); Onekama Realty Co. v. Carothers, 59 Ariz. 416, 423, 129 P.2d 918, 921 (1942). If the buyer fails to cure the default within the reasonable time stated in the notice, the statutory period of 30 days begins to run. Arizona Title Guar. & Trust Co. v. Modern Homes, Inc., *supra* at 403-04, 330 P.2d at 115.

18. 23 Ariz. App. at 589, 534 P.2d at 1088; *see* ARIZ. REV. STAT. ANN. § 33-741 (A)(1) (1974).

19. 23 Ariz. App. at 589-90, 534 P.2d at 1088-89.

20. *Id.*

21. Brief for Appellant at 9, Eyman v. Sowa, 23 Ariz. App. 588, 534 P.2d 1087 (1975).

22. 23 Ariz. App. at 590, 534 P.2d at 1089.

23. *Id.* The seller had only to request the escrow company file the deed which had been left with it for this very purpose under the terms of the contract, and the property passed directly to the seller. *Id.*

24. *See id.*

25. *Id.; see, e.g.*, Kammert Bros. Enterprises, Inc. v. Tanque Verde Plaza Co., 102 Ariz. 301, 305, 428 P.2d 678, 682 (1967); Arizona Title Guar. & Trust Co. v. Modern Homes, Inc., 84 Ariz. 399, 403, 330 P.2d 113, 115 (1958); Onekama Realty Co. v.

notify the purchaser of this intent, the trial court ruled that the forfeiture could not be accomplished. The court of appeals affirmed, but relied instead on the seller's actions at the time of the formation of the contract.[26] The court recognized that the seller had no knowledge of the buyer's prior delinquency, and that even if he had had such knowledge, he would have had no right under Arizona law to insist that the mortgagee not accept the late payment.[27] The court based its decision not on an agency concept, but on the ground that the seller's conduct resulted in the buyer's reliance on the acceptance of the late payment; the seller had allowed this condition to arise by the terms of the contract.[28]

This casenote will examine the propriety of the *Eyman* court's use of waiver as a mechanism for avoiding forfeiture when the acts giving rise to the supposed waiver were performed by a third party. It will suggest that while the court's conclusion cannot be justified on a waiver theory under Arizona law, it can be reconciled with the principles of estoppel. The elements of waiver and estoppel will provide the framework for this analysis.

Elements of Waiver

It has long been established in Arizona that, in a default situation, the repeated acceptance of late payments by the vendor results in a waiver of the vendor's right to insist on the strict performance of a time of the essence clause.[29] If the clause has been waived in this manner, the vendor must reinstate it by notification to the buyer of this reinstatement and give a reasonable opportunity to remedy the default.[30]

Assuming in the *Eyman* situation that the mortgagee's conduct is imputable to the seller, it is nevertheless clear that the acceptance of one late payment does not constitute a waiver. There must be

Carothers, 59 Ariz. 416, 423, 129 P.2d 918, 921 (1942); Bennie v. Becker-Franz Co., 14 Ariz. 580, 586-87, 134 P. 280, 283-84 (1913).

26. 23 Ariz. App. at 590-91, 534 P.2d at 1089-90.

27. *Id.* at 590, 534 P.2d at 1089; *see* Hale v. Flores, 19 Ariz. App. 236, 238, 506 P.2d 276, 278 (1973).

28. 23 Ariz. App. at 590-91, 534 P.2d at 1089-90. According to the court, the seller failed to protect himself from the problems created by the mortgagee's conduct in that he did not provide that payments should be made either directly to the seller or to his agent. *Id.*

29. *See, e.g.*, Onekama Realty Co. v. Carothers, 59 Ariz. 416, 423, 129 P.2d 918, 921 (1942); Tolmachoff v. Eshbaugh, 41 Ariz. 318, 325, 18 P.2d 256, 259 (1933); Stark v. Norton, 24 Ariz. 454, 460, 211 P. 66, 68 (1922). The vendor's power to make such a waiver is grounded on the reasoning that "the essence clause is inserted for his benefit and its observance is in no sense essential to a continuation of the other provisions of the contract." *Id.* at 459, 211 P. at 67.

30. Kammert Bros. Enterprises, Inc. v. Tanque Verde Plaza Co., 102 Ariz. 301, 305, 428 P.2d 678, 682 (1967); Arizona Title Guar. & Trust Co. v. Modern Homes, Inc., 84 Ariz. 399, 403, 330 P.2d 113, 115 (1958); Bennie v. Becker-Franz Co., 14 Ariz. 580, 586, 134 P. 280, 283-84 (1913).

frequent acceptance of late payments for the time of the essence clause to be waived.[31] Further, intent to waive a right is essential to the validity of the waiver,[32] although conduct itself may give rise to the inference of intent to waive.[33] It is the conduct of the person possessing the right which waives the right.[34] In order to waive a right, the party who possesses it must have an opportunity to choose between its relinquishment and its enforcement.[35] If the circumstances under which the putative waiver took place indicate that it was involuntary or unintentional, waiver will not be recognized, especially where valuable personal rights are involved.[36]

Analyzed on the basis of these criteria, the facts in *Eyman* as to acceptance of the late payment do not support a finding of waiver. In *Eyman*, the acceptance of a late payment occurred on only one occasion.[37] Moreover, the seller's conduct did not warrant an inference of an intent to waive. The conduct of the mortgagee, of which the seller had no knowledge and over which the seller had no control,[38] was held to have waived the time of the essence clause.[39] The seller's lack of knowledge of the mortgagee's conduct is significant. The vendor lacked an opportunity to choose between the enforcement and relinquishment of his right to insist on the strict performance of the time of the essence clause, as he did not know of the vendee's first default.[40]

The court's finding of waiver also conflicts with prior Arizona cases indicating that no right can be waived until it actually exists.[41]

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31. Tolmachoff v. Eshbaugh, 41 Ariz. 318, 325, 18 P.2d 256, 259 (1933); Stark v. Norton, 24 Ariz. 454, 460, 211 P. 66, 68 (1922). *See also* Arizona Title Guar. & Trust Co. v. Modern Homes, Inc., 84 Ariz. 399, 401-02, 330 P.2d 113, 115 (1958).

32. Arizona Title Guar. & Trust Co. v. Modern Homes, Inc., 84 Ariz. 399, 402, 330 P.2d 113, 114 (1958); *In re* Brandt's Estate, 67 Ariz. 42, 48, 190 P.2d 497, 501 (1948); Lindus v. Northern Ins. Co., 6 Ariz. App. 74, 79, 429 P.2d 708, 713 (1967).

33. *See, e.g.*, City of Tucson v. Koerber, 82 Ariz. 347, 356, 313 P.2d 411, 418 (1957); Meason v. Ralston Purina Co., 56 Ariz. 291, 302, 107 P.2d 224, 229 (1940); Southwest Cotton Co. v. Valley Bank, 26 Ariz. 559, 563, 227 P. 986, 988 (1924).

34. *See, e.g.*, Arizona Title Guar. & Trust Co. v. Modern Homes, Inc., 84 Ariz. 399, 402, 330 P.2d 113, 114 (1958); Southwest Cotton Co. v. Valley Bank, 26 Ariz. 559, 563, 227 P. 986, 988 (1924); Springfield Gas & Elec. Co. v. Southern Sur. Co., 250 S.W. 78, 81 (Mo. App. 1923).

35. *See* Arizona Title Guar. & Trust Co. v. Modern Homes, Inc., 84 Ariz. 399, 402, 330 P.2d 113, 114 (1958).

36. *See In re* Brandt's Estate, 67 Ariz. 42, 48, 190 P.2d 497, 501 (1948); Guarantee Title & Trust Co. v. Babbitt Bros. Trading Co., 47 Ariz. 47, 53, 53 P.2d 734, 736 (1936).

37. 23 Ariz. App. at 590, 534 P.2d at 1089.

38. *See* Hale v. Flores, 19 Ariz. App. 236, 238, 506 P.2d 276, 278 (1973).

39. 23 Ariz. App. at 590-91, 534 P.2d at 1089-90.

40. *Id.* If the seller had known, the criteria for the existence of a valid waiver might have been met; the Arizona supreme court has held a waiver voluntary if the party who is entitled to the right of strict performance is completely aware that the agreement is not being complied with. *See* Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 120, 250 P.2d 554, 557 (1953).

41. *See* Arizona Title Guar. & Trust Co. v. Modern Homes, Inc., 84 Ariz. 399, 402,

The *Eyman* court implies that the waiver occurred at the time of formation of the contract, when the seller's conduct

> allowed the creation of a situation where the mortgagee's conduct in accepting late payments could lull the purchasers into a false sense of security, thus constituting a waiver of the time of the essence clause of the contract of sale insofar as concerns any alleged default relating to the mortgage payments.[42]

The practical effect of the finding of the waiver of the time of the essence clause is to find a waiver of any right of forfeiture the seller might have in the event of the buyer's default. This right of forfeiture does not arise until the buyer is in default, so that the finding of the waiver of the time of the essence clause in the formation of the contract is by extension also a finding of a waiver of the right of forfeiture at the formation of the contract. At the formation of the contract, however, the buyer was not in default, and the seller's right to declare forfeiture was not in existence at that time. The tracing of the waiver to the formation of the contract, before any default existed, places the result in *Eyman* in conflict with earlier holdings that no right can be waived until it exists.[43]

Elements of Estoppel

Although the facts of *Eyman* cannot be reconciled with the concept of waiver, the court could have based its holding upon the doctrine of estoppel.[44] Indeed, the Arizona court's analytical approach was similar to that used in estoppel cases, in which three basic elements must be present: The performance of acts which are inconsistent with the later assertion of rights; some action by the adverse party in reliance on such conduct; and injury to the adverse party from the other party's repudiation of the conduct.[45] While intent is an essential

330 P.2d 113, 114 (1958); Hale v. Flores, 19 Ariz. App. 236, 238, 506 P.2d 276, 278 (1973).

42. 23 Ariz. App. at 590-91, 534 P.2d at 1089-90.

43. *See, e.g.*, Arizona Title Guar. & Trust Co. v. Modern Homes, Inc., 84 Ariz. 399, 402, 330 P.2d 113, 114 (1958); Hale v. Flores, 19 Ariz. App. 236, 238, 506 P.2d 276, 278 (1973); Hosch v. Howe, 92 Mont. 405, 410, 16 P.2d 699, 700 (1932).

44. Earlier Arizona cases indicate that the distinction between waiver and estoppel is often confused. City of Glendale v. Coquat, 46 Ariz. 478, 482, 52 P.2d 1178, 1180 (1935); Insurance Co. of N. Am. v. Williams, 42 Ariz. 331, 335, 26 P.2d 117, 118-19 (1933); Equitable Life Assurance Soc'y v. Pettid, 40 Ariz. 239, 252, 11 P.2d 833, 838 (1932).

45. *See, e.g.*, Holmes v. Graves, 83 Ariz. 174, 177, 318 P.2d 354, 356 (1957); Irwin v. Pacific Am. Life Ins. Co., 10 Ariz. App. 196, 199, 457 P.2d 736, 739 (1969); Engler v. Sainer, 4 Ariz. App. 86, 88, 417 P.2d 720, 722 (1966). *See also* Lillywhite v. Coleman, 46 Ariz. 523, 528, 52 P.2d 1157, 1160 (1935). In City of Glendale v. Coquat, 46 Ariz. 478, 52 P.2d 1178 (1935), the Arizona supreme court cogently contrasted waiver and estoppel:

> There are several essential differences between the two doctrines. According

element of waiver,[46] estoppel does not require intent to abandon or surrender a right.[47]

The *Eyman* case appears to satisfy each of the elements of estoppel. The acceptance of the late payment by the mortgagee was an act inconsistent with the later assertion of the seller's right to insist on strict performance of the time of the essence clause. In addition, the opinion states that the buyer was "lull[ed] into a false sense of security."[48] This language clearly indicates that the court recognized that the seller's conduct in the formation of the contract induced the buyer to rely on the mortgagee's conduct in accepting the late payment. It can be argued that the second late payment was made on the faith of the mortgagee's acceptance of the first late payment, satisfying the element of reliance, the second of the three essential elements of estoppel.[49] Finally, the injury to the buyer by the seller's election of forfeiture[50] provides the third of the three requisites for a finding of

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> to all the accepted definitions of the term waiver, it is essential that there should be an intentional relinquishment of a known right, and it, therefore, assumes the existence of a choice between the relinquishment and the enforcement of the right, while in an estoppel the intention to waive a right does not need to be present. Also, waiver depends upon what one himself intends to do, regardless of the attitude assumed by the other party, whereas estoppel depends rather upon what the other party has done. Waiver does not necessarily imply that the other party has been misled to his prejudice, but an estoppel always involves this element. Estoppel results from an act which operates to the injury of the other party, while waiver may even affect him beneficially. Estoppel frequently carries the implication of fraud, but waiver never does.

Id. at 482, 52 P.2d at 1180.

46. *See, e.g.*, City of Glendale v. Coquat, 46 Ariz. 478, 482, 52 P.2d 1178, 1180 (1935); Southwest Cotton Co. v. Valley Bank, 26 Ariz. 559, 565, 227 P. 986, 988 (1924); Hays v. Manning, 263 Mo. 1, 46, 172 S.W. 897, 907 (1914).

47. Equitable Life Assurance Soc'y v. Pettid, 40 Ariz. 239, 252, 11 P.2d 833, 838 (1932); Piz v. Housing Authority, 132 Colo. 457, 471, 289 P.2d 905, 912 (1955); Gorge Lumber Co. v. Brazier Lumber Co., 6 Wash. App. 327, 336, 493 P.2d 782, 788 (1972).

48. 23 Ariz. App. at 590-91, 534 P.2d at 1089-90; *see* Onekama Realty Co. v. Carothers, 59 Ariz. 416, 425, 129 P.2d 918, 922 (1942) (court applied reasoning of estoppel, although it did not refer to it by name, where "one has lulled another into security").

49. *See, e.g.*, Holmes v. Graves, 83 Ariz. 174, 177, 318 P.2d 354, 356 (1957) (action on an open account by grocery store for groceries charged by defendants, defendants were held estopped to demand an itemized account of groceries charged; since they had neither protested nor desired that the particular items purchased and their prices be noted in detail over a 4 year period); Munger v. Boardman, 53 Ariz. 271, 278-79, 88 P.2d 536, 539 (1939) (mortgagee and her successors did not bring suit against assignees of note and mortgage earlier because they relied on assignee's promise to pay note and conduct of assignees pursuant to mortgage agreement; assignees were estopped from pleading the statute of limitations); Herman Chanen Constr. Co. v. Northwest Title & Trust Co., 6 Ariz. App. 490, 492, 433 P.2d 807, 809 (1967) (subcontractor made bid on work that he was not licensed to perform; general contractor's insistence that subcontractor further subcontract that work estopped general contractor from asserting subcontractor's lack of license in the subcontractor's action to recover for work he had performed).

50. 23 Ariz. App. at 589-90, 534 P.2d at 1088-89. While the doctrine of equitable estoppel is seldom invoked to avoid forfeiture of a buyer's interest under an installment contract for the sale of land, the possibility of avoiding forfeiture because of the seller's unconscionable or misleading conduct has been recognized and the concept applied in at least one case. *See* Housing Authority v. Warrick, 100 N.J. Super. 256, 263, 241 A.2d 655, 658-59 (App. Div. 1968).

estoppel.[51]

Eyman illustrates the difficulty courts have with the terms estoppel and waiver. The two concepts differ, however, and should be dealt with distinctly. The facts of the *Eyman* dispute indicate that the seller had neither intention nor knowledge of the circumstances in which the buyer had made the first late payment, so that a basic element of waiver is unfulfilled, while all the elements of estoppel are present. Moreover, the use of the estoppel theory instead of waiver in the *Eyman* case would have avoided the implication that the mortgagee had the power under the contract to waive the rights of the seller. Although the court did attempt to negate this inference,[52] the application of estoppel would have obviated the possibility of any such implication, with the emphasis properly on the detriment to the buyer instead of the intention and knowledge of the seller. While the *Eyman* court's finding of waiver is not justified by the facts of the case, the ultimate result is in accord with the public policy disfavoring forfeitures in installment contracts for the sale of land.[53] The use of the language of estoppel would have merely provided a more sound analytical framework on which to base future holdings.

Conclusion

The Arizona court of appeals based its decision in *Eyman* on a confused notion of waiver. The decision would have been more appropriately decided if it had been based on the equitable doctrine of estoppel, a similar but distinct theory. The *Eyman* court's decision is in line with the established judicial policy against forfeitures, but follows that policy for reasons not justified by the facts of the case. In future cases, Arizona courts should take care to recognize and distinguish waiver from estoppel.

51. *See* Holmes v. Graves, 83 Ariz. 174, 177, 318 P.2d 354, 356 (1957); Munger v. Boardman, 53 Ariz. 271, 278-79, 88 P.2d 536, 539 (1939); Herman Chanen Constr. Co. v. Northwest Title & Trust Co., 6 Ariz. App. 490, 492, 433 P.2d 807, 809 (1967). *See also* discussion note 49 *supra*.

52. "By reaching this conclusion we do not hold that acts by a mortgagee in accepting late payments will in all circumstances constitute a waiver on the sellers' part." 23 Ariz. App. at 591, 534 P.2d at 1090.

53. *See, e.g.*, Mason v. Hasso, 90 Ariz. 126, 130, 367 P.2d 1, 3 (1961); Glad Tidings Church of Am. v. Hinkley, 71 Ariz. 306, 311, 226 P.2d 1016, 1020 (1951); Hale v. Flores, 19 Ariz. App. 236, 237, 506 P.2d 276, 277 (1973).

XIII. TORTS AND INSURANCE LAW

A. UNINSURED MOTORIST INSURANCE AND THE PHYSICAL CONTACT RULE

Legislation enacted in all 50 states since the twenties demonstrates that public policy encourages operators of motor vehicles to be financially responsible for the purpose of preventing economic loss to individuals involved in automobile accidents.[1] Motorists generally demonstrate the requisite level of financial responsibility by shifting the burden to an insurance company through a liability insurance policy.[2] Financial responsibility statutes, however, do not provide a satisfactory solution to the problems which arise when one party to an automobile accident does not comply with the law, either by failing to furnish sufficient evidence of financial responsibility, or by fleeing the scene of the accident.[3] In an attempt to remedy this problem, most states now require by statute that uninsured motorist coverage be included in all automobile liability insurance contracts.[4] Under such provisions, the insured pays a premium for coverage which substitutes for the legal liability of the financially irresponsible motorist.[5] Uninsured motorist provisions included in automobile insurance policies typically contain a clause stating that a "hit-and-run" automobile will qualify the insured for coverage, unless there is no physical contact between the vehicles.[6]

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1. *See* Murphy & Netherton, *Public Responsibility and the Uninsured Motorist*, 47 GEO. L.J. 700, 700-10 (1959). *See also* COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 97-131 (1932) [hereinafter cited as COLUMBIA UNIVERSITY STUDY].

2. *See* U.S. DEP'T OF TRANSPORTATION, DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY, table 3, at 212 (1970). Table 3 shows that approximately 79 percent of the total number of private passenger vehicles in the United States during 1967 were covered by liability insurance. In Arizona during that period, approximately 73 percent of all passenger vehicles were insured. *Id. See also* C. KULP & J. HALL, CASUALTY INSURANCE 484-85 (4th ed. 1968).

3. Frequent mention will be made in this casenote regarding hit-and-run vehicles. Unless otherwise stated hit-and-run vehicles will refer to both contact and noncontact situations.

4. *See, e.g.*, ARIZ. REV. STAT. ANN. § 20-259.01 (1975); CAL. INS. CODE § 11580.2 (West 1972); DEL. CODE ANN. tit. 18, § 3902 (1974); FLA. STAT. ANN. § 627.727 (West 1972); TEX. INS. CODE art. 5.06-1 (1960).

5. Cheek, *Recovery Procedure Under the Uninsured Motorist Coverage of the Family Liability Policy*, 1960 INS. L.J. 723, 725.

6. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, app. A, 1, at 291, 294 (1969). *See* the model provision quoted in note 17 *infra*.

As a result, injured insured motorists often remain uncompensated in situations where there has been no contact between their vehicle and the hit-and-run vehicle.[7]

The Arizona supreme court recently considered the propriety of placing such a physical contact requirement in automobile liability policies under the Arizona uninsured motorist statute.[8] In *Balestrieri v. Hartford Accident & Indemnity Insurance Co.*,[9] the insured claimed that he had been forced off the road by an unknown motorist heading in the opposite direction.[10] When his insurance company refused to compensate him for his injuries, Balestrieri brought an action seeking a declaration that he was covered by the uninsured motorist endorsement in his policy.[11] The trial court ruled that the policy conditions for recovery had not been fulfilled and that the policy provisions were not in conflict with the Arizona uninsured motorist statute.[12] The Arizona court of appeals reversed, finding the endorsement in derogation of the Arizona uninsured motorist statute and therefore void as against public policy.[13] However, the Arizona supreme court vacated the court of appeals decision, and held that the physical contact requirement in the policy was consistent with the Arizona statute and public policy.[14] The court noted that the language of the statute indicated a legislative intent to require protection for the insured from those motorists who were "actually" uninsured, but not from all unknown motorists.[15]

This casenote will initially examine the various judicial interpretations given state uninsured motorist legislation, and then will evaluate

7. *See, e.g.*, Prosk v. Allstate Ins. Co., 82 Ill. App. 2d 457, 226 N.E.2d 498 (1967); Buckeye Union Ins. Co. v. Cooperman, 33 Ohio App. 2d 152, 293 N.E.2d 293 (1972); Amidzich v. Charter Oak Fire Ins. Co., 44 Wis. 2d 45, 170 N.W.2d 813 (1969). See text & notes 11-15 *infra*.

8. ARIZ. REV. STAT. ANN. § 20-259.01 (1975).

9. 112 Ariz. 160, 540 P.2d 126 (1975).

10. 112 Ariz. at 160, 540 P.2d at 126.

11. *Id.* The policy provided coverage for bodily injury sustained by the insured in an accident caused by an uninsured motor vehicle. *Id.* The policy defined an uninsured automobile to include a "hit-and-run" automobile, which was further defined as "an automobile which causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident." *Quoted at* 112 Ariz. at 161 n.1, 540 P.2d at 127 n.1.

12. 112 Ariz. at 160, 540 P.2d at 126; *see* ARIZ. REV. STAT. ANN. § 20-259.01 (1975).

13. 22 Ariz. App. 255, 260, 526 P.2d 779, 784 (1974), *vacated*, 112 Ariz. 160, 540 P.2d 126 (1975).

14. 112 Ariz. at 161, 163, 540 P.2d at 127, 129.

15. *Id.* at 163, 540 P.2d at 129. See text accompanying notes 43-49 *infra*. As a result of this statutory construction, the contractual uninsured motorist provision, providing compensation in hit-and-run situations, provided greater coverage than required by statute. Thus, the insurer's limitation of coverage to those hit-and-run accidents in which there was physical contact was considered a valid contractual restriction, and one which the court would not alter. 112 Ariz. at 163, 540 P.2d at 129.

the *Balestrieri* decision with a two-part analysis. It will first examine whether the Arizona supreme court was correct in strictly construing the Arizona uninsured motorist statute to exclude hit-and-run motor vehicles. Assuming that the statute is applicable to hit-and-run vehicles, the second part of the analysis will examine the requirement of a "hit" for purposes of the statute. Finally, recommendations will be offered for future judicial and legislative action in the uninsured motorist area.

Judicial Interpretation of Uninsured Motorist Laws

The present forms of uninsured motorist laws evolved during almost 50 years of financial responsibility legislation and increased state regulation of the insurance industry.[16] By 1975, all 50 states had

16. A. WIDISS, *supra* note 6, at §§ 1.1-.12.

The increasing popularity of automobiles in the early 1900's was accompanied by a corresponding rise in the number of deaths and injuries caused by vehicular accidents. *See* COLUMBIA UNIVERSITY STUDY, *supra* note 1, at 17. Many accident victims or their families were left uncompensated when insolvent motorists were at fault. *Id.* at 17-23. This problem motivated state legislatures to attempt remedial action, illustrated by the early enactment of the Massachusetts compulsory insurance law. Ch. 346, § 1-13, [1925] Mass. Acts & Resolves 426 (now MASS. GEN. LAWS ANN. ch. 90, § 34A (1975)). This statute provided that no vehicle could be registered in the state unless accompanied by a certificate of insurance, obtained by showing that a liability insurance policy, with specified minimum coverage, had been procured. *See* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 76-83 (1965); C. KULP & J. HALL, *supra* note 2, at 482; A. WIDISS, *supra* at § 1.2; Murphy & Netherton, *supra* note 1, at 702-03.

Another type of early financial responsibility legislation was the "future-proof" law, which provided for the suspension of a driver's license and revocation of one's vehicle registration, for conviction of a serious traffic offense, or for failure to satisfy a judgment for damages arising from an automobile accident. *See* ch. 183, [1925] Conn. Pub. Acts 3956 (repealed 1927); ch. 210, [1927] Me. Acts & Resolves 197 (repealed 1941); R. KEETON & J. O'CONNELL, *supra* at 103-05. This suspension was to stay in effect for a specified minimum period, and then until the individual provided the state with proof of financial responsibility in the event of future accidents. A. WIDISS, *supra* at § 1.3. Future-proof laws, however, failed to identify the uninsured or irresponsible driver until an uncollectible judgment had been entered against him. Since accident victims are likely to examine the negligent party's financial status before beginning proceedings, judgments against the uninsured and irresponsible motorist were rare, and consequently, the number of such persons removed from the road for a reason other than serious violation of the law was minimal. *See id.*; Murphy & Netherton, *supra* at 704-05.

Another statutory financial responsibility measure was the "security" type law, first enacted in 1937. N.H. REV. STAT. ANN. § 268:1 (1955) (derived from ch. 161, §§ 1-29, [1937] N.H. Laws 293). *See* ARIZ. REV. STAT. ANN. § 28-1142(A) (Supp. 1976-77); Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300, 307-08 n.24 (1950). Security type legislation has proven more effective than future-proof laws in increasing the proportion of insured drivers on the road. *See* A. WIDISS, *supra* at § 1.6. However, the absolute number of uninsured motorists and the losses attributable to these drivers continue to increase. *See id.* The financial responsibility statute currently in effect in Arizona is of the security type. *See* ARIZ. REV. STAT. ANN. § 28-1142(A) (Supp. 1976-77), which requires suspension of the Arizona driving privileges of an uninsured owner of a motor vehicle involved in an accident in the state resulting in death, bodily injury, or property damage in excess of $300, unless a security deposit is made in an amount sufficient to cover any judgment resulting from the accident, or other proof of financial responsibility is provided. *See generally* R. KEETON & J. O'CONNELL, *supra* at 105-09; Murphy & Netherton, *supra* at 705-07.

adopted some form of legislation making uninsured motorist coverage a mandatory part of all automobile insurance policies issued in the state.[17] These statutory provisions may be grouped into three major categories. The first type of statute is similar to the standard policy endorsement: Uninsured motorist is defined so as to include hit-and-run drivers, and there must be physical contact between vehicles to constitute a hit-and-run.[18] The second type of uninsured motorist legislation provides that coverage must be included for injury received from "hit-and-run" as well as for "uninsured" motor vehicles, but does not explicitly require physical contact.[19] The most common statutory provision simply

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The ultimate effect of this statute is to give all financially irresponsible drivers one "free" accident.

As the number of financially irresponsible motorists and the losses attributed to their first "free" accidents continued to increase in spite of the early legislation, pressure developed in support of some type of direct compensation for the injured motorist. A. WIDISS, *supra* at § 1.6. Unsatisfied judgment funds have been tried in some states as an attempt to remedy the "one-bite" situation. *See* Act of April 17, 1957 ch. 836, § 1, [1957] Laws of Md. 1560 (repealed 1972); N.D. CENT. CODE § 39-17-01 (1972); A. WIDISS, *supra* at § 1.5. This legislation requires automobile owners to contribute to a designated fund used to compensate injured claimants who are unable to satisfy judgments against insolvent motorists. *See* G. HALLMAN, UNSATISFIED JUDGMENT FUNDS 1-5 (1968).

17. See text & notes 18-20 *infra*. In 1956, the insurance industry created the "standard uninsured motorist endorsement" for automobile policies, which provides that the insurance company is: "To pay all sums which the insured . . . shall be legally entitled to recover as damages . . . because of bodily injury . . . sustained by the insured, caused by accident . . . [with] such uninsured automobile . . . ." A. WIDISS, *supra* note 6, app. A, 2, at 299. The endorsement defined "uninsured automobile" as: "[A]n automobile . . . [for] which there is no . . . insurance . . . or a hit-and-run automobile . . . ." *Id.* at 300. A "hit-and-run" automobile was defined as: "[A]n automobile which causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident . . . ." *Id.* at 301.

18. CAL. INS. CODE § 11580.2 (West Supp. 1976); GA. CODE ANN. § 56-407.1 (Supp. 1976); IOWA CODE ANN. § 516.A1 (1975); N.Y. INS. LAW § 617 (McKinney 1966); S.C. CODE ANN. § 46-75.33 (Supp. 1974); W. VA. CODE ANN. § 33-6-31 (1975). The physical contact requirement of the insurance policy has been enforced in states with these physical contact statutes. *See, e.g.*, Orpustan v. State Farm Mut. Auto. Ins. Co., 7 Cal. 3d 988, 500 P.2d 1119, 103 Cal. Rptr. 919 (1972); Basilla v. Aetna Ins. Corp., 38 Mich. App. 260, 195 N.W.2d 893 (1972); Coker v. Nationwide Ins. Co., 251 S.C. 175, 161 S.E.2d 175 (1968). Problems generally have arisen in defining what "physical contact" actually encompasses. *See, e.g.*, Krych v. Mercury Cas. Co., 16 Cal. App. 3d 875, 94 Cal. Rptr. 592 (1971); Motor Vehicle Accident Indem. Corp. v. Eisenberg, 18 N.Y.2d 1, 218 N.E.2d 524, 271 N.Y.S.2d 641 (1966); Coker v. Nationwide Ins. Co., *supra*. *See generally* Note, *The Requirement of a "Hit" for Coverage Against Hit-and-Run Drivers Under Uninsured Motorists Statutes and Policy Endorsements*, 20 S.C.L. REV. 790, 795-800 (1968).

19. DEL. CODE ANN. tit. 18, § 3902 (1974); ILL. ANN. STAT. ch. 73, § 755a (Smith-Hurd Supp. 1976-77); ME. REV. STAT. ANN. tit. 24a, § 2902 (Supp. 1976-77); MINN. STAT. ANN. § 65B.49 (Supp. 1976); NEB. REV. STAT. § 60-509.01 (1968); NEV. REV. STAT. § 690B.020 (1975); N.H. REV. STAT. ANN. § 268:15-a (Supp. 1975); N.J. STAT. ANN. § 17:28-1.1 (Cum. Supp. 1976-77); N.D. CENT. CODE § 26-02-42 (Interim Supp. 1975); OKLA. STAT. ANN. tit. 36, § 3636 (Supp. 1975-76); R.I. GEN. LAWS ANN. § 27-7-2.1 (Supp. 1975); S.D. COMPILED LAWS ANN. § 58-11-9 (Supp. 1976); UTAH CODE ANN. § 41-12-21.1 (1953); VT. STAT. ANN. tit. 23, § 941 (Supp. 1976); WASH. REV. CODE ANN. § 48.22.030 (Supp. 1975). Under this type of statute, the physical contact provisions in the insurance policy have been upheld by some courts as a valid contractual restriction. *See, e.g.*, Finch v. Central Nat'l Ins. Group, 17 Ill. App. 3d 822, 308 N.E. 2d 634, *aff'd*, 59 Ill. 2d 118, 319 N.E.2d 469 (1974); Prosk v. Allstate Ins. Co., 82 Ill. App. 2d 457, 226 N.E.2d 498 (1967); Hendricks v. United States Fidelity & Guar. Co.,

requires that coverage be provided for injuries caused by operators of "uninsured motor vehicles."[20]

This last group of statutes has been subject to diverse judicial interpretations, regarding their applicability to hit-and-run vehicles, and the ability of the insurer to restrict coverage to cases of physical contact. Some courts have held that such a physical contact requirement in the insurance policy is contrary to the intent of the statute and public policy, and therefore void.[21] A majority of courts, however, including the Arizona supreme court,[22] have held that neither the statutory language nor public policy conflicts with the typical insurance policy terms requiring an actual physical contact for recovery.[23]

In determining whether an insurance company can limit its hit-and-run coverage to physical contact situations and still be consistent

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5 N.C. App. 181, 167 S.E.2d 876 (1969). *Contra*, Hartford Accident & Indem. Co. v. Novak, 83 Wash. 2d 576, 520 P.2d 1368 (1974), *noted in* 23 KAN. L. REV. 335 (1975).

20. *See, e.g.* ALA. CODE tit. 36 § 74(62a) (Supp. 1973); ALASKA STAT. § 28.20.440 (b)(3) (Cum. Supp. 1975); ARIZ. REV. STAT. ANN. § 20-259.01(A) (1975); ARK. STAT. ANN. § 66-4003 (1966); COLO. REV. STAT. ANN. § 10-4-319 (1973); CONN. GEN. STAT. ANN. § 38-175(c) (1969); FLA. STAT. ANN. § 627.727 (West Supp. 1976-77); HAWAII REV. STAT. § 431-448 (1968); IDAHO CODE § 41-2502 (Supp. 1975); IND. CODE § 27-7-5-1 (Burns 1975); KAN. STAT. ANN. § 40-284 (1973); KY. REV. STAT. ANN. § 304.20-020 (1972); LA. REV. STAT. ANN. § 22:1406D (West Supp. 1976); MD. ANN. CODE art. 48a, § 541(c) (1975); MASS. GEN. LAWS ANN. ch. 175, § 113L (Supp. 1975); MICH. COMP. LAWS ANN. § 24.13010 (1972); MISS. CODE ANN. § 83-11-101 (Supp. 1975); MO. ANN. STAT. § 379.203 (Vernon Supp. 1976); MONT. REV. CODES ANN. § 40-4403 (Interim Supp. 1975); N.M. STAT. ANN. § 64-24-105 (1972); N.C. GEN. STAT. § 20-279.21(3) (Supp. 1975); OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1975); PA. STAT. ANN. tit. 40, § 2000 (1971); TENN. CODE ANN. § 56-1148 (Supp. 1975); TEX. INS. CODE art. 5.06-1 (Supp. 1975-76); WIS. STAT. ANN. § 204.30(5) (Supp. 1975-76); WYO. STAT. ANN. § 31-315.1 (Interim Supp. 1975).

ARIZ. REV. STAT. ANN. § 20-259.01(A) (1975) provides:

> On and after January 1, 1966, no automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle, shall be delivered or issued for delivery in this state, with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in § 28-1142, under provisions filed with and approved by the insurance director, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. For the purposes of the coverage provided for pursuant to this section, "uninsured motor vehicles", [sic] subject to the terms and conditions of such coverage, includes any insured motor vehicle where the liability insurer thereof is unable to make payment on the liability of its insured, within the limits of the coverage, because of insolvency.

21. *See, e.g.*, State Farm Fire & Cas. Co. v. Lambert, 291 Ala. 645, 285 So. 2d 917 (1973); Farmers Ins. Exch. v. McDermott, 34 Colo. App. 305, 527 P.2d 918 (1974); Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429 (Fla. 1971); DeMello v. First Ins. Co., 55 Hawaii 519, 523 P.2d 304 (1974).

22. Balestrieri v. Hartford Accident & Indem. Ins. Co., 112 Ariz. 160, 540 P.2d 126 (1975).

23. *See, e.g.*, Ely v. State Farm Mut. Auto. Ins. Co., 148 Ind. App. 586, 268 N.E.2d 316 (1971); Collins v. New Orleans Pub. Serv., Inc., 234 So. 2d 270 (La. Ct. App. 1970); Buckeye Union Ins. Co. v. Cooperman, 33 Ohio App. 2d 152, 293 N.E.2d 293 (1972); Amidzich v. Charter Oak Fire Ins. Co., 44 Wis. 2d 45, 170 N.W.2d 813 (1969).

with the Arizona uninsured motorist statute, two stages of analysis must be employed. First, the statute must be examined to ascertain whether coverage is required for hit-and-run vehicles under the "uninsured motor vehicle" clause.[24] If the statute does not encompass hit-and-run drivers, then any limitation on the scope of hit-and-run coverage will be considered contractual, and thus neither prohibited nor required by statute.[25] If, however, the statute is interpreted to require that insurers provide coverage against hit-and-run vehicles, a second inquiry must be made: Whether the insurance company can limit such coverage to situations in which there is a physical contact between the insured's vehicle and the hit-and-run automobile.[26]

Meaning of "Uninsured Motorist"

For a claimant to recover under the Arizona uninsured motorist statute, he must show either that the unknown hit-and-run driver is actually uninsured or that hit-and-run vehicles are "uninsured motorists" for purposes of the statute.[27] Since the insurance status of a hit-and-run driver is virtually beyond proof,[28] the insured must necessarily bring his accident within the purview of statutory provisions by invoking a broad construction of "uninsured motorist" before he can receive compensation. Many courts, including the Arizona supreme court in *Balestrieri*, have stated that the language of this type of statute requires the policy to protect the insured only from the actually uninsured motorits.[29] However, previous Arizona case law reveals an inconsistency between the Arizona supreme court's restrictive interpretation of the statute and its apparently remedial nature.[30] The broad public policy purposes served by the statute should have influenced the court to examine the legislation more closely. In interpreting legislation, courts generally look to the intent of the legislature, consider the context of the statute, the language used, the subject matter, its effects and consequences, and the spirit and purpose of the law.[31]

24. *See* Balestrieri v. Hartford Accident & Indem. Ins. Co., 22 Ariz. App. 255, 257-58, 526 P.2d 779, 781-82 (1974), *vacated*, 112 Ariz. 160, 540 P.2d 126 (1975).
25. *See* 112 Ariz. at 163, 540 P.2d at 129.
26. See text & notes 52-71 *infra*.
27. *See* Balestrieri v. Hartford Accident & Indem. Ins. Co., 22 Ariz. App. at 257-58, 526 P.2d at 781-82.
28. *See* Aksen, *Arbitration of Uninsured Motorist Endorsement Claims*, 24 OHIO ST. L.J. 589, 601 (1963).
29. 112 Ariz. at 163, 540 P.2d at 129; *see, e.g.*, Collins v. New Orleans Pub. Serv., Inc., 234 So. 2d 270 (La. Ct. App. 1970); Buckeye Union Ins. Co. v. Cooperman, 33 Ohio App. 2d 152, 29 N.E.2d 293 (1972); Amidzich v. Charter Oak Fire Ins. Co., 44 Wis. 2d 45, 170 N.W.2d 813 (1969).
30. *See* text & notes 47-51 *infra*.
31. Sellinger v. Freeway Mobile Home Sales, Inc., 110 Ariz. 573, 575, 521 P.2d

In a number of recent decisions, courts have examined the parameters of statutory coverage in light of the legislative intent in enacting uninsured motorist statutes, and have concluded that the term "uninsured motor vehicles" includes hit-and-run and unknown motor vehicles.[32] In *State Farm Fire & Casualty Co. v. Lambert*,[33] the uninsured motorist statute was viewed as an attempt to narrow the gaps in coverage provided by most uninsured motorist policy provisions.[34] The Alabama statute[35] in *Lambert* made uninsured motorist coverage mandatory,[36] from which the court concluded the purely contractual nature of that coverage had been legislatively proscribed.[37] The statute, in the court's view, eliminated the restrictions imposed by physical contact provisions in automobile insurance policies, and required coverage against the unknown hit-and-run driver, as well as the driver known to be financially irresponsibile.[38] Under this construction of the statute, the injured insured has only to prove that the accident was actually caused by the negligence of the hit-and-run driver; he need not prove that the hit-and-run driver was uninsured.[39]

The Arizona court of appeals adopted this reasoning in *Balestrieri*, stating that there is no difference between a hit-and-run driver whose insurance status is unknown and a driver who is known but has no insurance.[40] In either situation, the insured has no recourse against the person who negligently caused the damages.[41] Therefore, the statutory mandate should operate to require recovery under the policy in both instances.[42] The Arizona supreme court, however, decided

1119, 1121 (1974); State v. Stockton, 85 Ariz. 153, 155, 333 P.2d 735, 736 (1958). A cardinal rule of statutory construction is that the court will attempt to ascertain the meaning of the legislation, and, if it is constitutional, give it effect. Long v. Dick, 87 Ariz. 25, 28, 347 P.2d 581, 583 (1959). Courts are not controlled by the literal meaning of statutory language where its purpose and intent would be thwarted by a literal interpretation. Phoenix v. Superior Court, 101 Ariz. 265, 267, 419 P.2d 49, 51 (1966); Feffer v. Bowman, 90 Ariz. 48, 54, 365 P.2d 472, 476 (1961).

32. *See, e.g.*, Montoya v. Dairyland Ins. Co., 394 F. Supp. 1337 (D.N.M. 1975); State Farm Fire & Cas. Co. v. Lambert, 291 Ala. 645, 285 So. 2d 917 (1973); Balestrieri v. Hartford Accident & Indem. Ins. Co., 22 Ariz. App. 255, 526 P.2d 779 (1974), *vacated*, 112 Ariz. 160, 540 P.2d 126 (1975); Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429 (Fla. 1971); DeMello v. First Ins. Co., 55 Hawaii 519, 523 P.2d 304 (1974). *See also* "Uninsured Motorist Coverage," 14 ARIZ. L. REV. 409, 600, 603-05 (1972).

33. 291 Ala. 645, 285 So. 2d 917 (1973).

34. *Id.* at 649, 285 So. 2d at 919.

35. ALA. CODE tit. 36, § 74 (62a) (Supp. 1973).

36. *See id.* This statute is identical to ARIZ. REV. STAT. ANN. § 20-259.01(A) (1975). The full text of this statute is set forth at note 20 *supra*.

37. 291 Ala. at 649, 285 So. 2d at 919.

38. *Id.* at 649-50, 285 So. 2d at 919-20.

39. *See, e.g.*, Montoya v. Dairyland Ins. Co., 394 F. Supp. 1337 (D.N.M. 1975) (applying New Mexico law); State Farm Fire & Cas. Co. v. Lambert, 291 Ala. 645, 285 So. 2d 917 (1973); Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429 (Fla. 1971); Webb v. United Serv. Auto. Ass'n, 227 Pa. Super. 508, 323 A.2d 737 (1974).

40. 22 Ariz. App. at 257-58, 526 P.2d at 781-82.

41. *Id.*

42. *Id.*

that an extension of coverage to hit-and-run situations would be beyond the power of the court; it would "be tantamount to rewriting and varying the plain language of the statute."[43]

The supreme court relied in part on the elimination of the phrase "unknown motorist" from the title of the statute prior to its adoption.[44] It likewise relied upon the absence of a subsequent attempt to amend the statute.[45] These facts indicated to the court that the legislature had intended only to protect the motorist from other drivers who were actually uninsured.[46] It is far from clear, however, that the court's conclusion was consonant with the intent of the legislature. Prior to this decision, the lower Arizona appellate courts had attempted to give effect to the apparent legislative intent in enacting the uninsured motorist statute, viewing the statute as remedial in nature, and thus giving its terms a liberal construction.[47] The deletion of "unknown motorists" from the title of the final legislative product is not necessarily indicative of the legislative intent. The state senator who led the bill through the senate stated that the bill was intended to provide protection for accidents with hit-and-run vehicles as well as for accidents with known uninsured motorists.[48] It has been argued that this might in fact be evidence of a mistake in drafting the uninsured motorist statute.[49]

The supreme court did not give sufficient weight to the remedial nature of the statute,[50] and the possibility of a drafting mistake in holding that "uninsured motorist" means actually uninsured.[51] Even if hit-and-run vehicles are included in the statutory class of "uninsured motor vehicles," the insured would still have to face the issue whether coverage may be contractually limited to accidents involving an actual physical contact between vehicles.

43. 112 Ariz. at 163, 540 P.2d at 129.
44. *Id.*
45. *Id.*
46. *Id.*
47. *See, e.g.*, Williams v. Williams, 23 Ariz. App. 191, 194, 531 P.2d 924, 927 (1975); Reserve Ins. Co. v. Staats, 9 Ariz. App. 410, 413, 453 P.2d 239, 242 (1969); Geyer v. Reserve Ins. Co., 8 Ariz. App. 464, 467, 447 P.2d 556, 559 (1968).
48. *See* "Uninsured Motorist Coverage," *supra* note 32, at 604 n.27.
49. *Id.* at 604. *See also* Slutes, *Recent Developments in Arizona's Uninsured Motorist Coverage*, 12 ARIZ. L. REV. 749, 751-52 (1970).
50. See text & note 47 *supra*.
51. 112 Ariz. at 163, 540 P.2d at 129; *cf.* Mazon v. Farmers Ins. Exch., 13 Ariz. App. 298, 475 P.2d 957 (1970), *vacated*, 107 Ariz. 601, 491 P.2d 455 (1971). In *Mazon*, the insured was struck in the eye with a rock thrown by a person occupying another vehicle; he sought coverage under his insurance policy's uninsured motorists provision. *Id.* at 299, 475 P.2d at 958. The policy provision included hit-and-run vehicles if there was physical contact between the insured's vehicle and the other vehicle. *Id.* The court of appeals broadly construed the policy provision to require only proximate causation, which it found to be present. *Id.* at 301, 475 P.2d at 960. The supreme court, however, held that the accident did not arise "out of the ownership, maintenance or use of such uninsured motor vehicle," as required by the insurance policy, and vacated the lower court's decision, without reaching the issue of physical contact. 107 Ariz. at 602-03, 491 P.2d at 456-57.

Meaning of "Hit-and-Run"

The Arizona supreme court, in *Balestrieri*, did not address the question whether a policy provision limiting hit-and-run coverage to cases of physical contact constituted an impermissible restriction under the Arizona statute. Such a discussion was made unnecessary by the holding that a hit-and-run vehicle was not an uninsured motor vehicle.[52] However, to the extent that the court's ruling on this point is open to question, the scope of coverage becomes the central issue. In analyzing this question, the reasoning of the court of appeals in *Balestrieri* will provide a useful place to begin.

The court of appeals, after concluding that the uninsured motorist statute encompassed the hit-and-run situation, dealt directly with the validity of the physical contact requirement, relying on a recent Washington supreme court decision[53] for its conclusion that the statute is inconsistent with a physical contact requirement.[54] The court of appeals disagreed with courts that have held that the word "hit" requires actual physical contact between vehicles.[55] By examining the public policy behind the uninsured motorist statute[56] to afford protection of those injured by highway users who are unable or unwilling to make just compensation,[57] the court of appeals found that an actual "hit" was not required.[58] The court's reasoning was sound, as in determining whether the uninsured motorist provision is applicable, the only relevant factor should be whether the accident was caused by one who is financially irresponsible or unknown.[59]

52. 112 Ariz. at 163, 540 P.2d at 129. See text & notes 8-15 *supra*.

53. Hartford Accident & Indem. Co. v. Novak, 83 Wash. 2d 576, 520 P.2d 1368 (1974).

54. 22 Ariz. App. at 260, 526 P.2d at 784.

55. *Id.* at 259, 526 P.2d at 783. For examples of cases holding the word hit requires actual physical contact, see Prosk v. Allstate Ins. Co., 82 Ill. App. 2d 457, 226 N.E.2d 498 (1967); Ely v. State Farm Mut. Auto. Ins. Co., 148 Ind. App. 586, 268 N.E.2d 316 (1971); Hendricks v. United States Fidelity & Guar. Co., 5 N.C. App. 181, 167 S.E.2d 876 (1969).

56. 22 Ariz. App. at 257, 526 P.2d at 781.

57. *Id.*

58. *Id.* at 258-60, 526 P.2d at 782-84.

59. The court of appeals thus avoided the need to resort to a strained interpretation of the word "hit," employed by several courts to find policy coverage. For example, when a hit-and-run vehicle sets in motion a sequence of events which proximately causes physical contact between the insured's vehicle and any object, it can be argued that the requirement of physical contact is satisfied. *See* Mazon v. Farmers Ins. Exch., 13 Ariz. App. 298, 475 P.2d 957 (1970), *vacated on other grounds*, 107 Ariz. 601, 491 P.2d 455 (1971); discussion note 51 *supra*. This argument, however, has been dismissed in some jurisdictions. *See, e.g.*, Page v. Insurance Co. of N. Am., 256 Cal. App. 2d 274, 64 Cal. Rptr. 89 (Ct. App. 1967); Inter-Insurance Exch. v. Lopez, 238 Cal. App. 2d 441, 47 Cal. Rptr. 834 (Ct. App. 1965); Coker v. Nationwide Ins. Co., 251 S.C. 175, 161 S.E.2d 175 (1968). On the other hand, this analysis has been accepted in other jurisdictions. *See, e.g.*, State Farm Fire & Cas. Co. v. Lambert, 291 Ala. 645, 285 So. 2d 917 (1973); Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429 (Fla. 1971); Webb v. United Serv. Auto. Ass'n, 227 Pa. Super. 508, 323 A.2d 737 (1974); Hartford Accident & Indem. Co. v. Novak, 83 Wash. 2d 576, 520 P.2d 1368 (1974). In the latter

A literal reading of the phrase "hit-and-run," where an uninsured motorist statute is held to apply to such drivers, would be inconsistent with the purpose of protecting the public from an inability to obtain compensation for injuries caused by the financially irresponsible.[60] It has been held that the requirement of physical contact in the policy is not to provide meaning to the term "hit-and-run," but rather is for the purpose of preventing fraudulent claims and should be read with this purpose in mind.[61]

The necessity of preventing fraudulent claims presents one of the most forceful arguments in support of physical contact limitations in uninsured motorist endorsements.[62] The fear of fraudulent claims apparently motivated the insurance industry to create physical contact provisions,[63] which have frequently been upheld as a valid attempt by the insurer to prevent the insured from blaming collisions on "phantom vehicles," when the actual cause of the accident was the insured's own negligence.[64] The use of a physical contact requirement, however, is overbroad if its sole utility is the prevention of fraud, since it operates to deny relief for valid as well as fraudulent claims.[65] Indeed, in many

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cases, the courts found that the legislature intended to protect the insured motorist against injuries or damages proximately caused by a hit-and-run vehicle—even absent physical contact. One commentator has stated: "Certainly where a legitimate claim is made out and factual causation is proved, the policy exclusion of physical contact should fail. Arbitrators, when allowed to rule on this question, have applied the doctrine of proximate cause and granted the appropriate recovery to the insured for his injuries." Aksen, *supra* note 28, at 602. Even states where the proximate cause argument is rejected recognize that strict construction of the physical contact requirement often produces unfair results. To ameliorate the unfairness, they have created the concept of the "indirect contact." Such contact occurs where the unknown hit-and-run vehicle comes into contact with a second vehicle which in turn strikes the insured's vehicle. Even though there is no actual physical contact between the hit-and-run vehicle and the insured's vehicle, coverage has been found under the policy in many cases. *See, e.g.*, Inter-Insurance Exch. v. Lopez, *supra* at 446, 47 Cal. Rptr. at 836-37; Motor Vehicle Accident Indem. Corp. v. Eisenberg, 18 N.Y.2d 1, 218 N.E.2d 524, 271 N.Y.S.2d 641 (1966); Johnson v. State Farm Mut. Auto. Ins. Co., 70 Wash. 2d 587, 424 P.2d 648 (1967). *See generally* Nickum, *Uninsured Motorist Protection: Proving the Uninsured Status of the Tort-Feasor-Motorist as a Condition Precedent to Recovery*, 1 TEX. TECH L. REV. 163, 176 (1969).

60. *See* Hartford Accident & Indem. Co. v. Novak, 83 Wash. 2d 576, 585, 520 P.2d 1368, 1373 (1974) (adopting a proximate cause approach).

61. *See, e.g.*, State Farm Fire & Cas. Co. v. Lambert, 291 Ala. 645, 285 So. 2d 917 (1973); Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429 (Fla. 1971); Hartford Accident & Indem. Co. v. Novak, 83 Wash. 2d 576, 585, 520 P.2d 1368, 1374 (1974).

62. *See, e.g.*, Ely v. State Farm Mut. Auto. Ins. Co., 148 Ind. App. 586, 590, 268 N.E.2d 316, 319 (1971); Buckeye Union Ins. Co. v. Cooperman, 33 Ohio App. 2d 152, 159-61, 293 N.E.2d 293, 297-98 (1972); Smith v. Allstate Ins. Co., 224 Tenn. 423, 428-29, 456 S.W.2d 654, 656 (1970).

63. A. WIDISS, *supra* note 6, at § 2.41.

64. *See, e.g.*, Collins v. New Orleans Pub. Serv., Inc., 234 So. 2d 270, 273 (La. Ct. App. 1970); Smith v. Allstate Ins. Co., 224 Tenn. 423, 428-29, 456 S.W.2d 654, 656 (1970); Amidzich v. Charter Oak Fire Ins. Co., 44 Wis. 2d 45, 54, 170 N.W.2d 813, 818 (1969).

65. *See, e.g.*, Balestrieri v. Hartford Accident & Indem. Ins. Co., 22 Ariz. App. at 257-59, 526 P.2d at 781-83; Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429, 430 (Fla. 1971); DeMello v. First Ins. Co., 55 Hawaii 519, 526-28, 523 P.2d 304, 308-09 (1974). *See also* A. WIDISS, *supra* note 6, at § 2.41 (Supp. 1976).

cases where the accident in fact was caused by a driver who fled the scene, and the parties have stipulated that no fraud was present, some courts have nevertheless upheld the strict policy language requiring a physical contact, and have denied recovery for lack of contact.[66] Because of such unfair application of this rule, many courts have criticized the prevention of fraud as a justification for the physical contact rule.[67]

In *Brown v. Progressive Mutual Insurance Co.*,[68] for example, the Florida court stated the only reason to impose a physical contact requirement on the insured is to provide reliable proof that an accident actually occurred in the manner the insured claims.[69] Since proof of the events culminating in the accident involves questions of fact, these matters are determined more properly by a jury than by a rigid legal rule of preclusion.[70] Whether there is physical contact or not, a serious loss may be suffered as a result of an accident with a motorist who leaves the scene, and the injured insured should be protected against such a loss if possible.[71] A less restrictive rule of law should be devised, one which would allow the insured to offer proof as to the manner in which the accident occurred. The State of Oregon could well provide an example for others to follow in creating a test that minimizes the possibility of fraud and does away with the mechanical test of physical contact.

A Proposal for Legislative Change

The Oregon uninsured motorist statute[72] represents a laudable attempt to provide a more workable standard of proof in hit-and-

66. *See, e.g.*, Collins v. New Orleans Pub. Serv., Inc., 234 So. 2d 270, 273 (La. Ct. App. 1970); Smith v. Allstate Ins. Co., 224 Tenn. 423, 428-29, 456 S.W.2d 654, 656-57 (1970); Amidzich v. Charter Oak Fire Ins. Co., 44 Wis. 2d 45, 49-55, 170 N.W.2d 813, 816-18 (1969).

67. *See, e.g.*, State Farm Fire & Cas. Co. v. Lambert, 291 Ala. 645, 649-50, 285 So. 2d 917, 920 (1973); Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429, 430 (Fla. 1971); DeMello v. First Ins. Co., 55 Hawaii 519, 526, 523 P.2d 304, 308 (1974); Hartford Accident & Indem. Co. v. Novak, 83 Wash. 2d 576, 583, 520 P.2d 1368, 1372 (1974).

68. 249 So. 2d 429 (Fla. 1971).

69. *Id.* at 430.

70. *Id.* Since the jury is charged with the responsibility of determining the facts of the case from the evidence presented, the involvement of another car in the accident should be decided by the jury and not precluded by a contractual provision attempting to create a limitation on the applicability of the statute. *Id.* Even if prevention of fraud was a valid objective of the physical contact requirement, it is conceivable that the opposite effect might be produced; a claimant might attempt to ensure recovery merely by damaging his own car to create the appearance of contact with another vehicle. *See* DeMello v. First Ins. Co., 55 Hawaii 519, 529, 523 P.2d 304, 310 (1974). Arguably, then, the physical contact provision may invite fraud instead of discouraging it.

71. *See* State Farm Fire & Cas. Co. v. Lambert, 291 Ala. 645, 285 So. 2d 917 (1973); Hartford Accident & Indem. Co. v. Novak, 83 Wash. 2d 576, 520 P.2d 1368 (1974).

72. ORE. REV. STAT. § 743.792 (1973).

run cases. The statute requires insurers to include coverage in all policies for phantom vehicles, in addition to uninsured and hit-and-run vehicles.[73] The statute facilitates the Oregon legislature's intent to require coverage and assure recovery for non-contact accidents when proof is available to corroborate the manner of occurrence of the accident.[74] Under the phantom vehicle section of the statute, the insured must satisfy three requirements. First, the identity of the operator, or owner of the phantom vehicle, must be unknown and unascertainable.[75] Second, the facts of the accident must be corroborated by competent evidence.[76] This evidence, however, cannot be testimony of the insured, or any other individual with an uninsured motorist claim arising from the same accident.[77] This provision requires only that the claimant provide enough facts to permit an inference that the accident

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73. *Id.* The statute provides:

> 1(a) The insurer will pay all sums which the insured . . . shall be legally entitled to recover as general and special damages from the owner or operator of an uninsured vehicle because of bodily injury sustained by the insured caused by accident and arising out of the ownership, maintenance or use of such uninsured vehicle. . . .
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> . . . .
>
> 2(d) "Uninsured vehicle," except as provided in paragraph (e) of this provision, means:
>
> . . . .
>
> (B) A hit-and-run vehicle . . . .
>
> (C) A phantom vehicle as defined in paragraph (g) of this provision.
>
> . . . .
>
> (g) "Phantom vehicle" means a vehicle which causes bodily injury to an insured arising out of a motor vehicle accident which is caused by an automobile which has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident, provided:
>
> (A) There cannot be ascertained the identity of either the operator or the owner of such phantom vehicle;
>
> (B) The facts of such accident can be corroborated by competent evidence other than the testimony of the insured or any person having an uninsured motorist claim resulting from the accident; and
>
> (C) The insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer . . . and shall have filed with the insurer within 30 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof.

Id.

74. *Id.*; *see* Hartford Accident & Indem. Co. v. Novak, 83 Wash. 2d 576, 580, 520 P.2d 1368, 1370-71 (1974).

75. ORE. REV. STAT. § 743.792(2)(g)(A) (1975).

76. *Id.* § 743.792(2)(g)(B). An example of evidence which has been held sufficient is provided in Farmers Ins. Exch. v. Colton, 264 Ore. 210, 504 P.2d 1041 (1972). A witness testified that a vehicle precisely fitting the insured's description of the phantom vehicle was in motion in the vicinity. *Id.* at 216-18, 504 P.2d at 1044-45. It was stated that:

> The "facts of an accident" do not mean the total vision of all of the facts of impact or of a motor vehicle accident. We conclude that the statute requires the observation, with corroborated testimony thereof, of facts from which inferences may be drawn that the accident was caused by a phantom vehicle. The requirement of corroboration was intended to discourage and prevent fraudulent claims and this restriction should not be extended to prevent recovery where fraud does not exist.

Id. at 216-17, 504 P.2d at 1044.

77. ORE. REV. STAT. § 743.792(2)(g)(B) (1973).

was actually caused by a phantom vehicle.[78] Third, the insured must report the accident within 24 hours, and file with his insurer, within 30 days, a statement setting forth the facts constituting a cause of action against an unascertainable person.[79] The approach suggested by this statute provides a significant deterrent to fraud, while allowing recovery in noncontact situations which would otherwise make the insured ineligible for compensation, due to the physical contact rule.[80] The statute represents a legislative declaration that traditional mechanisms of the judicial system can protect against the fraudulent claims feared by the insurance industry.[81]

The *Balestrieri* decision defeats the apparent intention of the Arizona legislature in enacting the uninsured motorist statute: To protect the insured motorist from the financially irresponsible. A change in the Arizona statutes is necessary to protect the insured motorist from the hit-and-run driver. The Arizona legislature must take affirmative action to clarify the scope of the Arizona uninsured motorist statute. If the statute is to include hit-and-run drivers, then the legislature has several options. It can amend the statute to expressly mandate coverage for hit-and-run motor vehicles, thereby nullifying the holding of the supreme court in *Balestrieri*. Such an amendment would be somewhat illusory, in that it would still force a judicial determination of the validity of physical contact restrictions on policy coverage.[82] A more substantial reform of the Arizona statute would be the inclusion of specific provisions for recovery in phantom or unknown vehicle situations, including special evidentiary rules to ensure corroboration, in a manner similar to the Oregon statute.[83] In any event, after *Balestrieri*, the bur-

78. See discussion note 76 *supra*.

79. ORE. REV. STAT. § 743.792(2)(g)(C) (1973).

80. Farmers Ins. Exch. v. Colton, 264 Ore. 210, 216-17, 504 P.2d 1041, 1044 (1972). The court stated: "The purpose of the amendment to the Oregon uninsured motorist statute was to broaden the right of recovery by the injured insured or passenger to include recovery where there is no contact between the negligent unidentified driver's vehicle and the vehicle in which the insured or passenger was riding." *Id.*

81. *See* Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965), in which the court stated: "As to the danger of illusory and fictional claims, this is not a new problem; our courts deal constantly with claims for pain and suffering based upon subjective symptoms only; and the courts and the medical profession have been found equal to the danger." *Id.* at 463, 210 A.2d at 714. Similarly, in Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965), the court expressed confidence in the judicial system:

> As to the possibility of actions based on fictitious injuries, a court should not deny recovery for a type of wrong which may result in serious harm because some people may institute fraudulent actions. Our trial courts retain sufficient control, through the rules of evidence and the requirements as to the sufficiency of evidence, to safeguard against the danger that juries will find facts without legally adequate proof.

Id. at 566-67, 214 A.2d at 16. *See also* Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

82. See text & notes 52-71 *supra*.

83. See text & notes 72-79 *supra*.

den is on the legislature to take affirmative action to clarify the intent of the Arizona uninsured motorist statute, and to provide guidance for the courts in future controversies concerning physical contact requirements in automobile insurance policies.

Conclusion

In *Balestrieri,* the Arizona supreme court declined to give the Arizona uninsured motorist statute the liberal construction it has received in earlier Arizona decisions. By failing to apply rules of construction normally applicable to remedial statutes, the court has disregarded the obvious legislative intent behind the passage of the uninsured motorist statute, and has created a major gap in the comprehensive coverage which the statute was designed to promote. The literal construction given the statute by the court now seems to be reversible only by legislative action clearly indicating the intent and scope of uninsured motorist provisions in Arizona.

B. ARIZONA HOSPITALS HELD TO HAVE A STATUTORY DUTY TO RENDER EMERGENCY CARE

Negligence implies the breach of a duty of care owed by an individual to the injured party.[1] Traditionally, private individuals have been considered free of any duty to render aid to strangers in peril.[2] As a corollary of this rule, the common law imposes no duty on a private hospital's emergency ward to render aid to every person who might appear at the door.[3] The changing role of the modern hospital

1. "A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." LeLievre v. Gould, [1893] 1 Q.B. 491, 497. *See, e.g.,* Massengill v. Yuma County, 104 Ariz. 518, 521, 456 P.2d 376, 379 (1969); Morris v. Ortiz, 103 Ariz. 119, 121, 437 P.2d 652, 654 (1968); West v. Soto, 85 Ariz. 255, 261, 336 P.2d 153, 156 (1959); Barnum v. Rural Fire Protection Co., 24 Ariz. App. 233, 235, 537 P.2d 618, 620 (1975).

2. *See, e.g.,* Owl Drug Co. v. Crandall, 52 Ariz. 322, 325, 80 P.2d 952, 953 (1938); Handibloe v. McCarthy, 114 Ga. App. 541, 543, 151 S.E.2d 905, 907 (1966); Osterland v. Hill, 263 Mass. 73, 76, 160 N.E. 301, 302 (1928); Yania v. Bigan, 397 Pa. 316, 322, 155 A.2d 343, 346 (1959); Ames, *Law and Morals,* 22 HARV. L. REV. 97, 112 (1908); Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability,* 56 U. PA. L. REV. 217, 219 (1908); Seavey, *I Am Not My Guest's Keeper,* 13 VAND. L. REV. 699, 700 (1960).

3. "A private hospital is not under a common law duty to serve every one who applies for treatment . . . ." Levin v. Sinai Hosp., 186 Md. 174, 180, 46 A.2d 298, 301 (1946). *See, e.g.,* Lucy Webb Hayes Nat'l Training School v. Geoghegan, 281

emergency ward[4] and mounting public sentiment, however, have apparently inspired some courts and legislatures to modify this traditional common law rule.[5]

In *Guerrero v. Copper Queen Hospital*,[6] the Supreme Court of Arizona held that a privately owned hospital is under an affirmative duty to provide emergency care to all persons presenting themselves for such aid unless there is "cause" for denying such care.[7] The appellants, Saul and Maria de Lourdes Guerrero, through their guardian ad litem, filed a complaint against the Copper Queen Hospital of Bisbee, Arizona, requesting damages for the hospital's failure to provide emergency services.[8] The children were taken to the hospital for treatment of burns suffered in a kitchen accident.[9] The complaint stated that the staff of the Copper Queen Hospital refused to render emergency aid to the children, residents of Mexico, forcing the family to go elsewhere, and resulting in a delay in treatment which allegedly aggravated their injuries.[10]

The trial court dismissed the complaint for failure to state a claim upon which relief could be granted,[11] finding that the hospital had no duty to give aid to the plaintiffs.[12] The Arizona court of appeals reversed, holding that there was a duty to provide emergency treatment because of the plaintiff's reliance on the hospital's well-established custom of providing emergency care to all.[13] The Arizona supreme court vacated the opinion of the court of appeals, but affirmed its ultimate decision on other grounds.[14] The supreme court held that the complaint stated a sufficient claim for relief because the hospital had a statutory

F. Supp. 116, 117 (D.D.C. 1967); Birmingham Baptist Hosp. v. Crews, 229 Ala. 398, 399, 157 So. 224, 225 (1934); Natale v. Sisters of Mercy, 243 Iowa 582, 597, 52 N.W.2d 701, 710 (1952).

4. *See* text & notes 74-75 *infra*.

5. *See, e.g.*, New Biloxi Hosp., Inc. v. Frazier, 245 Miss. 185, 193-94, 146 So. 2d 882, 885-86 (1962); O'Neill v. Montefiore Hosp., 11 App. Div. 2d 132, 135, 202 N.Y.S.2d 436, 440 (1960); Methodist Hosp. v. Ball, 50 Tenn. App. 460, 488, 362 S.W.2d 475, 479 (1961); CAL. HEALTH & SAFETY CODE § 1317 (West Supp. 1976); FLA. STAT. ANN. § 401.45(1) (West Supp. 1976); ILL. ANN. STAT. ch. 111½, § 86 (Smith-Hurd Supp. 1976); N.Y. PUB. HEALTH LAW § 2805-b(1) (McKinney Supp. 1975); TENN. CODE ANN. § 53-5201 (Supp. 1975); Comment, *Liability of Private Hospital Emergency Rooms for Refusal to Provide Emergency Care*, 45 MISS. L.J. 1003, 1005 (1974).

6. 112 Ariz. 104, 537 P.2d 1329 (1975), *noted in* 1975 ARIZ. ST. L.J. 607.

7. 112 Ariz. at 106, 537 P.2d at 1331.

8. *Id.* at 105, 537 P.2d at 1330.

9. *Id.*

10. *Id.*

11. *See* ARIZ. R. CIV. P. 12(b)(6).

12. 112 Ariz. at 105, 537 P.2d at 1330.

13. Guerrero v. Copper Queen Hosp., 22 Ariz. App. 611, 612, 529 P.2d 1205, 1206 (1974), *vacated*, 112 Ariz. 104, 537 P.2d 1329 (1975). The court relied on the minority rule represented by Wilmington Gen. Hosp. v. Manlove, 54 Del. 105, 174 A.2d 135 (1961). 22 Ariz. App. at 612, 529 P.2d at 1206. See text & notes 35-40 *infra*.

14. *See* 112 Ariz. at 106, 537 P.2d at 1331.

duty to provide emergency treatment to anyone who comes to the hospital in need of such assistance.[15]

This casenote will initially discuss the common law in relation to a hospital's duty to provide emergency care to all who enter. The scope of the statutory duty imposed in *Guerrero* and its effect on the common law duty, will then be examined. Finally, that statutory duty will be analyzed as to its validity, conclusiveness, and practicality.

Common Law and the Duty to Render Aid

Liability for failure to render assistance depends on the existence of an affirmative duty to aid.[16] Basic to the determination of whether an individual is under a common law duty to aid someone in peril is the distinction between misfeasance and nonfeasance.[17] There can be no liability in tort for nonfeasance or failure to take action where there existed no duty to aid.[18] However, once the individual does undertake to render aid,[19] he assumes a duty of care and can be held liable for misfeasance in the performance of that duty.[20] Similarly, since other potential rescuers will be less likely to render assistance when it is already beng provided, the aider creates a new risk of harm if he abandons the victim after aid has begun. Abandonment of aid once the duty is assumed is misfeasance.[21] On the other hand, where there is no duty,

15. *Id.*

16. *See* text & note 1 *supra.*

17. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 314 (1965); Bohlen, *supra* note 2; Powers, *Hospital Emergency Service and the Open Door*, 66 MICH. L. REV. 1455, 1460-61 (1968).

18. *See, e.g.*, Barnum v. Rural Fire Protection Co., 24 Ariz. App. 233, 235, 537 P.2d 618, 620 (1975); Stiewel v. Borman, 63 Ark. 30, 36, 37 S.W. 404, 405 (1896); Desmarais v. Wachusett Regional School Dist., 360 Mass. 591, 593, 276 N.E.2d 691, 693 (1971), *cert. denied*, 414 U.S. 859 (1973); Trum v. Town of Paxton, 329 Mass. 434, 438, 109 N.E.2d 116, 119 (1952).

19. The question is whether the individual's conduct is sufficient to be considered an undertaking to give aid, thus creating the possibility of tort liability. See text & note 32 *infra.*

20. *See* RESTATEMENT (SECOND) OF TORTS § 323, at 135 (1965), which states in relevant part:

> One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care . . . if
>
> . . . .
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

See, e.g., Erie R.R. v. Stewart, 40 F.2d 855, 857 (6th Cir.), *cert. denied*, 282 U.S. 843 (1930); Langston v. Chicago & N.W. Ry., 398 Ill. 248, 254, 75 N.E.2d 363, 366 (1947); Ray v. Hines, 118 Wash. 530, 534, 203 P. 929, 930 (1922); Seavy, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 919 (1951). However, a majority of jurisdictions have also held that a mere gratuitous promise to render service or assistance, with nothing more, is no substitute for an actual undertaking and imposes no tort liability on the promisor. *See* Randolph's Adm'r v. Snyder, 139 Ky. 159, 163, 129 S.W. 562, 563 (1910); Long v. Patterson, 198 Miss. 554, 562, 22 So. 2d 490, 492 (1945).

21. *See* Lacey v. United States, 98 F. Supp. 219, 220 (D. Mass. 1951); Owl Drug

and therefore the victim has no justifiable expectation of aid, nonfeasance or mere failure to initiate aid does not aggravate the victim's situation.[22] Thus, the majority of courts have held that neither physicians[23] nor hospitals[24] have a duty to provide treatment to every person who seeks assistance; they will not be liable for nonfeasance.

Under certain circumstances, however, courts have recognized exceptions to the general rule that there is no duty to render aid and have found liability for nonfeasance.[25] For example, where the perilous situation is the result of an act or omission by the person neglecting to render aid, the courts have imposed liability.[26] Similarly, the law imposes tort liability where the duty to act is based upon some special relationship,[27] such as the hospital-patient relationship.[28] In this situa-

Co. v. Crandall, 52 Ariz. 322, 325, 80 P.2d 952, 953 (1938); cases cited note 20 *supra*. *See also* RESTATEMENT (SECOND) OF TORTS §§ 323-324 (1965).

22. *See* W. PROSSER, *supra* note 17, § 56, at 339; Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631, 632 (1952) [hereinafter cited as Note, *Failure to Rescue*]. Among the reasons for not imposing tort liability for failure to render aid absent a clear duty are the difficulty of singling out which person should be liable when many people could have assisted, and the impossibility of isolating those situations which should give rise to liability. Additionally, it is thought that the law must not be used to enforce moral values such as unselfishness and courtesy. *See, e.g.*, W. PROSSER, *supra* at 340-41; Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196, 215 (1946); Powers, *supra* note 17, at 1479; Note, *Moral Challenge to the Legal Doctrine of Rescue*, 14 CLEV.-MAR. L. REV. 334, 350 (1965) [hereinafter cited as Note, *Moral Challenge*]; Note, *Failure to Rescue*, *supra* at 642-43; Note, *Must a Private Hospital Be a Good Samaritan?*, 18 U. FLA. L. REV. 475, 486-87 (1965).

23. *See, e.g.*, Butterworth v. Swint, 53 Ga. App. 602, 604, 186 S.E. 770, 772 (1936); Hurley v. Eddingfield, 156 Ind. 416, 417, 59 N.E. 1058, 1058 (1901); Childers v. Frye, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931). *See also* McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 553 (1959).

24. *See, e.g.*, Lucy Webb Hayes Nat'l Training School v. Geoghegan, 281 F. Supp. 116, 117 (D.D.C. 1967); Birmingham Baptist Hosp. v. Crews, 229 Ala. 398, 399, 157 So. 224, 225 (1934); Natale v. Sisters of Mercy, 243 Iowa 582, 597, 52 N.W.2d 701, 710 (1952); Hill v. Ohio County, 468 S.W.2d 306, 309 (Ky. Ct. App. 1970), *cert. denied*, 404 U.S. 1041 (1972).

25. *See* Powers, *supra* note 17, at 1461-62; text & notes 26-27 *infra*.

26. *See, e.g.*, Hollinbeck v. Downey, 261 Minn. 481, 486, 113 N.W.2d 9, 12 (1962) (duty to cry warning on golf course); Chandler v. Forsyth Royal Crown Bottling Co., 257 N.C. 245, 249, 125 S.E.2d 584, 586 (1962) (duty of driver to warn of broken glass bottles from truck on the road); Montgomery v. National Convoy & Trucking Co., 186 S.C. 167, 175, 195 S.E. 247, 251 (1938) (duty of driver to warn of his stalled truck on highway); RESTATEMENT (SECOND) OF TORTS § 321, Comment *a*, at 116 (1965).

27. These special relationships include employer-employee, *see, e.g.*, Anderson v. Atchison, T. & S.F. Ry., 333 U.S. 821, 823 (1948); Chicago Union Traction Co. v. Sawusch, 218 Ill. 130, 134, 75 N.E. 797, 798 (1905); Carey v. Davis, 190 Iowa 720, 724-25, 180 N.W. 889, 891 (1921); RESTATEMENT (SECOND) OF TORTS § 314B (1965), common carrier-passenger, *see, e.g.*, Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326, 331 (5th Cir. 1959); Endelman v. Palmer, 65 F. Supp. 436, 438 (S.D.N.Y. 1946); Yu v. New York, N.H. & H.R.R., 145 Conn. 451, 454, 144 A.2d 56, 58 (1958); RESTATEMENT (SECOND) OF TORTS § 314A(1) (1965), innkeeper-guest, *see, e.g.*, McKee v. Sheraton-Russell, Inc., 268 F.2d 669, 671 (2d Cir. 1959); Knott Corp. v. Furman, 163 F.2d 199, 207 (4th Cir.), *cert. denied*, 332 U.S. 826 (1947); Dove v. Lowden, 47 F. Supp. 546, 548 (W.D. Mo. 1942); RESTATEMENT (SECOND) OF TORTS § 314A(2) (1965), invitor-invitee, *see, e.g.*, L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 93-95, 40 N.E.2d 334, 337 (1942); Blizzard v. Fitzsimmons, 193 Miss. 484, 491, 10 So. 2d 343, 344 (1942); Peck v. Gerber, 154 Ore. 126, 133, 59 P.2d 675, 679 (1936); RESTATEMENT (SECOND) OF TORTS § 314A(3) (1965).

28. *See, e.g.*, Mounds Park Hosp. v. Von Eye, 245 F.2d 756, 759 (8th Cir. 1957);

tion, a duty of care arises from an existing contractual relationship.[29] Absent an actual hospital-patient relationship, however, a duty may also arise from a statute or regulation establishing the duty.[30] Where no duty on behalf of a hospital to accept all persons seeking admission has been created by statute, regulation, or contract, no liability can be imposed unless the hospital has voluntarily undertaken to render care.[31]

Recent decisions have evinced a desire by the courts to find a voluntary assumption of duty in relatively minimal or even fictional undertakings by a hospital staff.[32] This tendency to find a voluntary assumption whenever possible seems to indicate that a duty to render assistance attaches unless the staff refuses aid immediately upon the patient's arrival at the hospital.[33] Courts in a few jurisdictions have gone even further, making the existence of a duty a function not of the hospital's action with respect to the particular patient, but rather of the hospital's custom and policy with respect to a particular class of

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Slater v. Missionary Sisters of the Sacred Heart, 20 Ill. App. 3d 464, 469, 314 N.E.2d 715, 719 (1974); Sylvester v. Northwestern Hosp., 236 Minn. 384, 386, 53 N.W.2d 17, 19 (1952).

29. *See* cases cited note 27 *supra*. A major reason for holding the defendant liable is that he is in a position to obtain an economic benefit from the relationship. *See* W. PROSSER, *supra* note 17, § 56, at 339; McNiece & Thornton, *Affirmative Duties in Torts*, 58 YALE L.J. 1272, 1282-87 (1949).

30. *See* Guerrero v. Copper Queen Hosp., 112 Ariz. 104, 537 P.2d 1329 (1975); Greyhound Terminal v. Thomas, 307 Ky. 44, 45-46, 209 S.W.2d 478, 479 (1947); Osborne v. McMasters, 40 Minn. 103, 105, 41 N.W. 543, 544 (1889); text & notes 44-46 *infra*.

31. *See, e.g.*, Reeves v. North Broward Hosp. Dist., 191 So. 2d 307, 309 (Fla. Dist. Ct. App. 1966); Levin v. Sinai Hosp., 186 Md. 174, 180, 46 A.2d 298, 301 (1946); New Biloxi Hosp., Inc. v. Frazier, 245 Miss. 185, 197, 146 So. 2d 882, 887 (1962); Barcia v. Society of New York Hosp., 39 Misc. 2d 526, 527-28, 241 N.Y.S.2d 373, 375-76 (Sup. Ct. 1963); Methodist Hosp. v. Ball, 50 Tenn. App. 460, 469, 362 S.W.2d 475, 479 (1961); Comment, *Hospital's Duty of Emergency Care: A Functional Approach*, 6 COLUM. J.L. & SOC. PROB. 454, 461 (1970).

32. In O'Neill v. Montefiore Hosp., 11 App. Div. 2d 132, 202 N.Y.S.2d 436 (1960), the court held that a nurse's act of merely making a phone call for the plaintiff to another doctor, without rendering medical aid of any kind, was a sufficient undertaking to create a duty to give further aid. *Id.* at 135, 202 N.Y.S.2d at 440. In New Biloxi Hosp., Inc. v. Frazier, 245 Miss. 185, 146 So. 2d 882 (1962), the victim of a shotgun wound was left unassisted and unattended in an emergency ward before being transferred to another hospital. *Id.* at 193-94, 146 So. 2d at 885-86. Although he had never actually been given aid, the court found that he had been admitted as a patient. *Id.* at 198, 146 So. 2d at 887. In Methodist Hosp. v. Ball, 50 Tenn. App. 460, 362 S.W.2d 475 (1961), the court found that where the plaintiff was in the emergency room for 45 minutes, the circumstances were such that he could be considered a patient during that time, although it was not proven that he received any actual medical aid. *Id.* at 488, 362 S.W.2d at 479. Since liability is predicated on an undertaking to give aid, it has been held that where the hospital has initiated treatment for an indigent patient, it cannot later negligently withdraw its treatment based on the patient's inability to pay. *See* Le Juene Road Hosp., Inc. v. Watson, 171 So. 2d 202, 204 (Fla. Dist. Ct. App. 1965).

33. Once an individual goes to an emergency ward and is allowed to wait for more than a few minutes, is asked background information, or is told to fill out a form, he is deemed to have been admitted as a patient, and the hospital has undertaken to render aid. *See* cases cited note 32 *supra*; Welch, *Mishandling Medical Emergencies*, in AMERICAN TRIAL LAWYERS ASS'N, 1970 CONVENTION PROCEEDING 239, 243 (D. Runyan ed. 1971); Note, *Torts—Duty of a Private Hospital to Render Emergency Treatment*, 1974 WIS. L. REV. 279, 283-84 n.20.

patients.[34] These courts would find a basis for liability wherever a hospital which customarily renders necessary aid to all who enter denies medical attention to a single individual.

In the leading case of *Wilmington General Hospital v. Manlove*,[35] the court found a duty to render care based on the hospital's actions in maintaining an emergency ward and its practice of treating all persons requiring emergency treatment.[36] In that case, the court held that a hospital will be held liable for refusal of emergency aid whenever there is an unmistakable emergency and the plaintiff has relied upon the hospital's past policy of rendering aid to all persons requesting it.[37] Under the *Manlove* rule, therefore, a hospital may avoid liability if the plaintiff is unable to establish that open admittance was the custom or policy of the hospital and that an unmistakable emergency actually existed.[38]

Statutory Duty to Aid

The Arizona court of appeals in *Guerrero* adopted the *Manlove* rule.[39] The court found that the appellants' reliance on the defendant-hospital's custom of admitting all emergency patients was sufficient to create a duty of care.[40] In contrast, several states, electing not to rely upon common law principles of tort liability, have enacted statutes expressly requiring hospitals to admit all persons in need of emergency care.[41] These jurisdictions have created a statutory duty of care

34. *See* Wilmington Gen. Hosp. v. Manlove, 54 Del. 15, 23, 174 A.2d 135, 139 (1961); Stanturf v. Sipes, 447 S.W.2d 558, 562 (Mo. 1969).

35. 54 Del. 15, 174 A.2d 135 (1961).

36. *Id.* at 23, 174 A.2d at 139. The holding was based partially upon the rule that a negligent termination of gratuitous services creates tort liability. *Id.*; *see* RESTATEMENT (SECOND) OF TORTS § 323 (1965).

37. *See* Wilmington Gen. Hosp. v. Manlove, 54 Del. 15, 23, 174 A.2d 135, 139 (1961); *accord*, Stanturf v. Sipes, 447 S.W.2d 558 (Mo. 1969). The plaintiff in *Stanturf* suffered from frostbite and had been denied admission to the emergency ward. *Id.* at 559. As a result of the delay in receiving medical attention, his feet had to be amputated. *Id.* at 560. Following *Manlove*, the Missouri court found that an unmistakable emergency and a well-established custom existed, imposing a duty of care on the hospital. *Id.* at 562.

38. The *Manlove* rule may encourage hospitals to adopt a policy not to admit all emergency patients, and instead to give superficial examinations to victims in an attempt to discover unmistakable emergencies. This in turn may cause serious delays in treatment and permit serious latent injuries to go undetected. *See* Comment, *supra* note 31, at 466. *But see* text & notes 76-77 *infra*. In an apparent attempt to avoid these possible results under the *Manlove* rule, the Arizona supreme court in *Guerrero* affirmed the court of appeals' decision imposing a duty of care on the defendant hospital, but based its decision on statute rather than common law. *See* 112 Ariz. at 106, 537 P.2d at 1331.

39. 22 Ariz. App. at 612, 529 P.2d at 1206.

40. [W]e find that the allegations are sufficient to state a claim for, if proven, liability on the part of a private hospital may be predicated on the refusal of service to a patient in case of an unmistakable emergency, if the patient has relied upon a well-established custom of the hospital to render aid in such a case.

Id.

41. "Emergency services and care shall be provided to any person requesting such

requiring that hospitals not only provide emergency facilities but also render emergency aid to all persons who need it.[42] The Arizona supreme court in *Guerrero* found statutory liability preferable to liability grounded upon the *Manlove* rule.[43] Although the court may not have rejected the *Manlove* rule in principle, it felt that reliance on the minority rule was misplaced where the hospital's liability already existed by statute.[44]

Statutorily created duty is the most far reaching of the exceptions to the common law rule.[45] Such statutes may serve as a basis for imposing civil liability even though they do not expressly create a civil remedy.[46] Civil liability can be imposed for violation of a statutory duty of care if the injured party is a member of the class of persons intended to be protected by the statute[47] and the harm created is of the type intended to be prevented.[48] Some courts also require that the

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services or care . . . for any condition in which the person is in danger of loss of life, or serious injury or illness, at any health facility . . . ." CAL. HEALTH & SAFETY CODE § 1317 (West Supp. 1976); *accord*, ILL. ANN. STAT. ch. 111½, § 86 (Smith-Hurd Supp. 1976); N.Y. PUB. HEALTH LAW § 2805-b(1) (McKinney Supp. 1975); TENN. CODE ANN. § 53-5201 (Supp. 1975). *But cf.* FLA. STAT. ANN. § 401.45 (West Supp. 1976), which makes the duty to render care contingent on the hospital actually operating an emergency ward and does not expressly require hospitals to operate emergency wards.

42. *See* Comment, *supra* note 31, at 471; Comment, *supra* note 5, at 1017. *But see* FLA. STAT. ANN. § 401.45 (West Supp. 1976) which states in relevant part: "No person shall be denied treatment for any emergency medical condition which will deteriorate from a failure to provide such treatment at any hospital . . . that operates an emergency department providing emergency treatment to the public." The statute does not expressly require all hospitals to provide emergency facilities.

43. 112 Ariz. at 106, 537 P.2d at 1331.

44. "The reliance by the parties on either [the *Manlove* rule or the majority rule] is misplaced. A private hospital has no duty to accept a patient or serve everyone unless a different public policy has been declared by statute or otherwise . . . .

The character of private hospitals in Arizona has been changed by statute and regulations.

Id. It is not clear from this holding whether the court would have rejected the *Manlove* rule had it not found that a statutory duty existed. However, the court's use of the words "unless a different public policy has been declared by statute or otherwise" may indicate a willingness to accept the "well-established custom" standard of *Manlove*. *See id.*

45. W. PROSSER, *supra* note 17, § 36, at 190.

46. *See, e.g.*, Brooks v. E.J. Willig Truck Transp. Co., 40 Cal. 2d 669, 679, 255 P.2d 802, 808-09 (1953); Hallman v. Bushman, 196 S.C. 402, 408, 13 S.E.2d 498, 501 (1941); Brumfield v. Wofford, 143 W. Va. 332, 335-36, 102 S.E.2d 103, 105 (1958). *See also* Linden, *Tort Liability for Criminal Nonfeasance*, 44 CANADIAN B. REV. 25 (1966). Unless a statute specifically creates a civil remedy for the actions which it prohibits, however, a court is not bound to hold the violator civilly liable, although a court may voluntarily choose to adopt the statutory standard out of deference to the legislature. *See* W. PROSSER, *supra* note 17, § 36, at 191-92.

47. *See, e.g.*, Wright v. Carter Prods., Inc., 244 F.2d 53, 61 (2d Cir. 1957); Hidalgo v. Cochise County, 13 Ariz. App. 27, 28, 474 P.2d 34, 35 (1970); Akers v. Chicago, St. P., M. & O. Ry., 58 Minn. 540, 544, 60 N.W. 669, 670 (1894). In *Guerrero*, the supreme court held that aliens are not excluded from the protection of the statute. 112 Ariz. at 107, 537 P.2d at 1332; *see* 1975 ARIZ. ST. L.J. 607, 618-21.

48. *See* Wright v. Carter Prods., Inc., 244 F.2d 53, 61 (2d Cir. 1957); Gaynor v. Atlantic Greyhound Corp., 183 F.2d 482, 484 (3d Cir. 1950); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 473 (1933).

statute or regulation be designed specifically to promote public safety.[49] When the above criteria are met, a majority of courts, including Arizona, hold that any violation of the statute constitutes negligence per se.[50]

As authority for its holding that a statutory duty of care exists for hospital emergency services in Arizona, the *Guerrero* court first looked to the state licensing statutes, which empower the state health department to adopt rules and regulations governing the licensing of hospitals in Arizona.[51] The court then looked at the relevant regulations which require general hospitals to provide facilities for emergency care.[52] The court reasoned that the public policy in support of the regulation logically would also forbid a hospital from denying emergency care to any patient without cause.[53] The court then determined that the duty to render emergency care would give rise to civil liability for a private hospital's denial of care to any emergency victim.[54] This reliance on licensing rules and regulations for the recognition of a

49. *See* Marusa v. District of Columbia, 484 F.2d 828, 834 (D.C. Cir. 1973); Logullo v. Joannides, 301 F. Supp. 722, 724 (D. Del. 1969); Home Ins. Co. v. Hamilton, 253 F. Supp. 752, 755 (E.D. Ky. 1966), *rev'd on other grounds*, 395 F.2d 108 (6th Cir. 1968). *See also* Freeman v. United States, 509 F.2d 626, 630 (6th Cir. 1975).

50. *See, e.g.*, Freeman v. United States, 509 F.2d 626, 630 (6th Cir. 1975); United States v. Burlington N., Inc., 500 F.2d 637, 640 (9th Cir. 1974); Muhammad v. United States, 366 F.2d 298, 302 (9th Cir.), *cert. denied*, 386 U.S. 959 (1966); Konow v. Southern Pac. Co., 105 Ariz. 386, 389, 465 P.2d 366, 369 (1970). Once the defendant has been found to have violated the statute, he is not permitted to prove that his conduct would constitute due care by some other standard.

> When the breach of a statutory duty is held to be negligence *per se*, or negligence as a matter of law, the court holds that the legislature has created an absolute duty, which cannot be escaped by attempting to prove that the breach was in fact done in the exercise of due care.

Northern Indiana Transit, Inc. v. Burk, 228 Ind. 162, 171, 89 N.E.2d 905, 909 (1950); *accord*, Konow v. Southern Pac. Co., *supra*. However, unlike strict liability, negligence per se is excusable if the circumstances under which it arose were beyond the control of the defendant. *See* United States v. Burlington N., Inc., *supra*; W. PROSSER, *supra* note 17, § 36, at 198-99. Of course, even where negligence per se is shown, the plaintiff is still required to establish the causal connection between the injuries sustained and the defendant's illegal conduct. *See, e.g.*, Young Candy & Tobacco Co. v. Montoya, 91 Ariz. 363, 368, 372 P.2d 703, 706 (1962); Collier v. Stamatis, 63 Ariz. 285, 288, 162 P.2d 125, 126 (1945); Hall v. Mertz, 14 Ariz. App. 24, 26, 480 P.2d 361, 363 (1971); W. PROSSER, *supra* at 200-01.

51. 112 Ariz. at 106, 537 P.2d at 1331. "A person shall not establish, conduct or maintain in this state a health care institution . . . unless that person holds a current and valid license . . . ." ARIZ. REV. STAT. ANN. § 36-407 (1974).

> The director shall adopt . . . reasonable rules and regulations which shall establish minimum standards and requirements for . . . licensure of health care institutions necessary to assure the public health, safety and welfare. . . . The director shall use the current standards adopted by the joint commission on accreditation of hospitals . . . as guidelines in prescribing minimum standards and requirements under this section.

Id. § 36-405(A).

52. 112 Ariz. at 106, 537 P.2d at 1331. "General hospitals shall provide facilities for emergency care. Such facilities shall set aside an area on grade, accessible to an entrance to the hospital." ARIZ. ADMIN. R. & REG. tit. 9, § R9-10-248 (1975). *See also id.* § R4-2.610. The court also noted that the purpose of the regulations is to "provide minimum requirements of such institutions . . . for types and extent of services to be provided." 112 Ariz. at 106, 537 P.2d at 1331.

53. 112 Ariz. at 106, 537 P.2d at 1331.

54. *Id.*

statutory duty requiring a hospital to render care to an applicant emergency victim poses questions concerning the adequacy of those rules and regulations as a source of civil liability.

Validity of the Statutory Duty Found in Guerrero

The statutes and regulations construed in *Guerrero* do not provide extremely persuasive authority for the court's holding. They do not expressly require that a hospital emergency ward give aid to all patients who request it, as do statutes in other jurisdictions.[55] At most, they provide for revocation of the hospital's license for failure to maintain emergency facilities.[56] Therefore, any interpretation creating a duty in *Guerrero* cannot be said to arise from the express language of the health regulations; instead, the court is relegated to the implied intent of the legislature. Courts need not always confine themselves to the express wording of a statute. In addition, they can look to both the purpose and public policy behind such legislation.[57] In *Guerrero*, the Arizona supreme court held that the purpose behind the hospital licens-

55. *Compare* ARIZ. ADMIN. R. & REG. tit. 9, §§ R9-10-248, R4-2.610 (1975), *with* CAL. HEALTH & SAFETY CODE § 1317 (West Supp. 1976); FLA. STAT. ANN. § 401.45(1) (West Supp. 1976); ILL. ANN. STAT. ch. 111½, § 86 (Smith-Hurd Supp. 1976); N.Y. PUB. HEALTH LAW § 2805b-1(1) (McKinney Supp. 1975); *and* TENN. CODE ANN. § 53-5201 (Supp. 1975).

56. The director may suspend or revoke the license of any health care institution if its owners, officers, agents or employees:

. . . .

(3) Have been, are or may continue to be in substantial violation of the requirements for licensure of the institution, as a result of which the health or safety of one or more patients or the general public is in immediate danger . . . .

ARIZ. REV. STAT. ANN. § 36-427 (1974).

57. *See* Phoenix Ref. Co. v. Powell, 251 S.W.2d 892 (Tex. Civ. App. 1952); Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 362-63 (1932); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 320 (1913). Purpose and public policy are the apparent touchstones for the creation of civil liability in cases where a statute's language does not in its express terms cover the act in question. *See* Kern v. Autman, 54 Del. 402, 406, 177 A.2d 525, 527 (1961) (statutes governing operation of vehicles on the highway apply to operation of vehicles in parking lots as well); Black v. Stith, 164 Ore. 117, 121, 100 P.2d 485, 486 (1940) (statute prohibiting reckless left turns at intersections is equally applicable to reckless left turns on the highway between intersections). Of course, a duty to exercise ordinary care in the operation of a motor vehicle already exists at common law. Kern v. Autman, *supra* at 408, 177 A.2d at 528; Black v. Stith, *supra* at 121, 100 P.2d at 487. This differs from the situation in *Guerrero*, where there is no common law duty of care under the majority rule. *See* text & notes 3, 24 *supra*.

One learned commentator has attempted to explain how and why courts imply civil liability in statutes not expressly creating it:

> Many courts have, however, purported to "find" in the statute a supposed "implied," "constructive," or "presumed" intent to provide for tort liability. In the ordinary case this is pure fiction, concocted for the purpose. The obvious conclusion can only be that when the legislators said nothing about it, they either did not have the civil suit in mind at all, or deliberately omitted to provide for it. . . . Perhaps the most satisfactory explanation is that the courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind.

W. PROSSER, *supra* note 17, § 36, at 191.

ing statutes[58] created, by implication, an affirmative duty on the part of hospitals to render emergency services to all.[59] The court, in effect, loosely construed the Arizona statutes to create a duty of care which did not otherwise exist.[60]

Not only did the Arizona supreme court find a statutory duty to aid, in derogation of the common law; it also recognized a limitation on that duty. The court held that the statute limits liability to refusals to render emergency treatment "without cause."[61] The *Guerrero* court's approach to the interplay between the common law and Arizona statutes and regulations cannot be reconciled with accepted canons of statutory construction. The limits for such interplay are clearly defined in Arizona and prescribe that in the absence of a contrary statute or constitutional provision, the common law is the rule of decision.[62] A general maxim, nonetheless basic to statutory construction, is that statutes in derogation of the common law are to be strictly construed.[63] Therefore, to supplant the common law by statute, the legislature must clearly manifest an intention to modify the common law,[64] because an intent to depart from such deep-rooted principles will not be lightly inferred.[65] However, where the intent is clear, the common law is abrogated, but only to the extent that the language or intent of the statute is clearly inconsistent with it,[66] and wherever possible, statutes will be given an interpretation consistent with the common law.[67]

The *Guerrero* court abandoned these rules, by creating a statutory

58. 112 Ariz. at 106, 537 P.2d at 1331; see text & note 52 *supra.*

59. 112 Ariz. at 106, 537 P.2d at 1331; see text & note 44 *supra.*

60. *See* text & note 3 *supra.* Public policy seems to clearly support creating a duty for emergency wards to treat emergency victims. *See* Powers, *supra* note 17, at 1455-58. *See also* discussion note 74 *infra.* However, there is also a strong public policy against courts creating tort liability where notification of the duty is given neither by common law nor by statute. *See* text & notes 69-70 *infra.*

61. *See* 112 Ariz. at 106, 537 P.2d at 1331.

62. ARIZ. REV. STAT. ANN. § 1-201 (1974).

63. *See* Jamison v. Encarnacion, 281 U.S. 635, 640 (1930); *In re* Estate of Thelen, 9 Ariz. App. 157, 161, 450 P.2d 123, 126-27 (1969); Tucson Gas & Elec. Co. v. Shantz, 5 Ariz. App. 511, 515, 428 P.2d 686, 690 (1967).

64. Kilmer v. Hicks, 22 Ariz. App. 552, 553, 529 P.2d 706, 707 (1974); Tucson Gas & Elec. Co. v. Shantz, 5 Ariz. App. 511, 515, 428 P.2d 686, 690 (1967). *But see* Jamison v. Encarnacion, 281 U.S. 635, 640 (1930), where the Court held "[t]he rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure." *Id.; accord,* Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); Yetman v. Naumann, 16 Ariz. App. 314, 317, 492 P.2d 1252, 1255 (1972). Note that the words "obvious" and "plainly intended" are used by the Court, indicating that although statutory language need not be restricted to narrow technical meanings, a sound basis for the inference of a duty of care must still exist in the language of the statute. *See* Jamison v. Encarnacion, *supra.*

65. *In re* Estate of Thelen, 9 Ariz. App. 157, 161, 450 P.2d 123, 127 (1969).

66. *See* Kilmer v. Hicks, 22 Ariz. App. 552, 553, 529 P.2d 706, 707 (1974).

67. *See, e.g.,* Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); Farnsworth v. Hubbard, 78 Ariz. 160, 166, 277 P.2d 252, 258 (1954); Macon v. Hillsdale Highway Dist., 65 Idaho 833, 841, 154 P.2d 490, 495 (1945).

duty ostensibly from a licensure regulation.[68] Legislative intent to mandate emergency care for all does not clearly exist in the language of the statute, and the implication of such a duty is not the result of a strict construction of the statute in light of contrary common law, making efforts, where possible, to preserve consistency between the two rules.

In addition to the obvious problems of construction, the *Guerrero* holding raises several constitutional obstacles. In order to insure due process of law, a statute must adequately inform the citizen of his duties thereunder.[69] The rules and regulations in *Guerrero* make no mention of admittance policies requiring public access to the facilities;[70] nor do they create the "without cause" limitation.[71] Another constitutional limitation on the court's role in enforcing statutes is the separation of powers doctrine, which mandates that the creation of a statutory duty, as well as any exceptions to that duty, is the function of the

68. *See* 112 Ariz. at 106, 537 P.2d at 1331.

69. *See* Miller v. California, 413 U.S. 15, 36-37 (1973); Palmer v. City of Euclid, 402 U.S. 544, 545 (1971). This type of due process limitation has been applied most often to penal statutes; such a statute is void for vagueness if the language does not sufficiently convey a definite warning of the proscribed conduct as measured by common understanding and practices. *Id.* The *Guerrero* court characterized the relevant statutes and regulations as "remedial." 112 Ariz. at 107, 537 P.2d at 1332. Civil or remedial statutes have traditionally been given a more liberal application than criminal statutes. Isbrandtsen Co. v. Johnson, 343 U.S. 779, 782 (1952); Bullard v. Garvin, 1 Ariz. App. 249, 251, 401 P.2d 417, 419 (1965). However, while the statutes and regulations in *Guerrero* are remedial and thereby subject to liberal application, they are also in derogation of common law and therefore subject to strict construction. *See* text & notes 63-67 *supra*. Although these two general rules appear to conflict, they are not mutually exclusive, as demonstrated in Jamison v. Encarnacion, 281 U.S. 635 (1930); *see* discussion note 64 *supra*.

In *Jamison*, the Court held that the Federal Employers' Liability Act, which created a duty of employers to protect employees from negligent acts of fellow employees, although contrary to common law and therefore subject to the rule of strict construction, would be liberally applied to fulfill its obvious legislative purposes. 281 U.S. at 640; *accord*, Isbrandtsen Co. v. Johnson, *supra* at 782-83. The *Jamison* Court held that "negligent" acts should be broadly defined for the purposes of the Act to include "any breach of duty owed [an employee] by another [employee] chargeable with knowledge of the probable result of his conduct," which would include the intentional use of excessive force by a foreman to induce an employee to work harder. 281 U.S. at 641. The Court reasoned that to hold an employer liable for carelessness or negligence on the part of the foreman but to ignore assault, a much more serious breach of duty to the employee, would be contrary to the primary purpose of the Act. *Id.* Note that a statutory duty of care creating civil liability for negligence already existed in *Jamison*. The question before the Court was not as to the existence of the duty but rather to the scope of the preexisting duty. *Compare* Jamison v. Encarnacion, *supra, with* Guerrero v. Copper Queen Hosp., 112 Ariz. 104, 537 P.2d 1329 (1975), *vacating* 22 Ariz. App. 611, 529 P.2d 1205 (1974). There was no preexisting statutory duty to render aid of any kind expressed in the health regulations cited by the court in *Guerrero*. The primary legislative purpose behind the rules and regulations cited in *Guerrero* was merely to "provide minimum requirements" for service in health care institutions. 112 Ariz. at 106, 537 P.2d at 1331, *citing* ARIZ. REV. STAT. ANN. § 36-405(A) (1974). A purpose expressed in such general terms does not mandate the creation of a duty to admit all persons to an emergency ward; nor would such an intent be defeated by the preclusion of that duty. *See* cases cited note 72 *infra*.

70. *See* ARIZ. REV. STAT. ANN. § 36-405(A) (1974); 9 ARIZ. ADMIN. R. & REG. tit. 9, § R9-10-249 (1975).

71. *See* authorities cited note 70 *supra*.

legislature and not the courts.[72] The *Guerrero* approach gives a strained interpretation to a statute, despite constitutional obstacles. In addition, the Arizona supreme court has imposed practical burdens on health care providers in the state, which will now be discussed.

Modern Emergency Wards and the Practical Application of the Guerrero Rule

Any duty of care imposed upon an individual or institution ideally should reflect that individual's or institution's role in society.[73] Therefore, a duty to render emergency care should be designed to best meet the role of the modern emergency ward within the community. In establishing a statutory duty of care, the Arizona supreme court seems to have overlooked the practical realities.

The role of the hospital emergency room has changed greatly over the past several years.[74] Nonemergency use of such facilities, especially among low-income minority groups, has greatly increased.[75] In light of this increase in nonemergency use of hospital emergency facilities, the duty of the modern emergency ward should be limited to the detection of genuine emergencies, in order that prompt care may be provided.[76] Once the existence of a genuine emergency has been ruled out, a hospital's duty must be minimized, so that valuable emer-

72. *See* United States v. Muniz, 374 U.S. 150, 166 (1963); Rayonier Inc. v. United States, 352 U.S. 315, 320 (1957); Pillsbury v. United Eng'r Co., 342 U.S. 197, 199-200 (1952). *See also* Lueck v. Superior Court, 105 Ariz. 583, 585-86, 469 P.2d 68, 70-71 (1970), where the Arizona supreme court, in refusing to find an ambiguity in a wrongful death statute which gave no tort action to the parents of a deceased person where that person had a surviving spouse and children, stated, "[w]hen we find that the common law is unjust or out of step with the times, we have no reluctance to change it . . . . Here we are dealing with a legislative enactment, and it is proper that only the Legislature correct any deficiencies therein." *Id.*; *see* City of Phoenix v. Lane, 76 Ariz. 240, 243, 263 P.2d 302, 303-05 (1953), where the court said that it was not its prerogative, but that of the legislature to rewrite the Motor Vehicle Safety Responsibility Act in furtherance of a public policy to accomplish full and complete insurance coverage for victims in all situations where injury or damage results from an automobile accident, *id.*; *see* Rowe v. Goldberg Film Delivery Lines, Inc., 50 Ariz. 349, 355, 72 P.2d 432, 435 (1937), where the court held that workmen's compensation statutes which allowed compensation to employees for injury by accident in the course of employment should not be construed to create a duty for employers to insure the health and safety of their employees and found that creation of such a duty was the function of the legislature and not the courts. *Id.*

73. *See* W. PROSSER, *supra* note 17, § 3, at 14-16.

74. The emergency room is increasingly a major source of general medical care for large portions of the population. 3 The Health Law Project, Univ. of Pa. Law School, Materials on Health Law 1 (rev. ed. 1972) (unpublished).

75. The emergency ward is being used as a family drop-in clinic for many nonemergency problems, and as a result is suffering from problems of overcrowding and insufficient facilities. *See* AMERICAN MEDICAL ASS'N, DEP'T OF HOSPITALS & MEDICAL FACILITIES, EMERGENCY DEPARTMENT—A HANDBOOK FOR THE MEDICAL STAFF 5 (1966); James, *The Emergency Room: Entry to the Health-Care System*, 47 HOSPITAL TOPICS, Oct. 1969, at 69. For a discussion of the factors causing such a drastic increase in the demand for emergency facilities, see Gibson, *EMS: A Facet of Ambulatory Care*, 47 HOSPITALS, May 16, 1973, 59, 61.

76. *See* Comment, *supra* note 31, at 468.

gency facilities can be devoted to the purpose for which they are designed.[77] Absent such a practical limitation, it is conceivable that the emergency wards could become filled with nonemergency patients, leaving no room for people with actual emergencies.[78]

Statutes expressly creating a duty for hospitals to render emergency care have attempted to solve this problem by requiring only that all persons applying for aid be adequately examined, their condition appraised, and care given to those with actual emergencies.[79] Arizona does not have the benefit of such an explicit statute, nor does the *Guerrero* decision fill the void. The Arizona supreme court makes no clear distinction between emergency and nonemergency patients,[80] nor does the decision provide a standard for determining the extent of required emergency care.[81] Moreover, circumstances which constitute cause for refusal of treatment, a privilege which the court reserves for the hospital,[82] remain undefined.[83]

Arizona courts attempting to apply the *Guerrero* holding, however, will not be totally devoid of statutory guidance. The Arizona statute that enables the health department to promulgate rules and regulations for the licensing of hospitals[84] may provide the standard for distinguishing between those people who must be treated and those to whom treatment may be denied. The Arizona statute expressly

77. *Id.*

78. *See* Walker, *Criteria Devised to Evaluate Patients' Needs to Utilize Emergency-Room Services*, 51 HOSPITAL TOPICS, May, 1973, at 28-29.

79. *See* CAL. HEALTH & SAFETY CODE § 1317 (West Supp. 1976); FLA. STAT. ANN. § 401.45(1) (West Supp. 1976); ILL. ANN. STAT. ch. 111½, § 86 (Smith-Hurd Supp. 1976); N.Y. PUB. HEALTH LAW § 2805-b(1) (McKinney Supp. 1975); TENN. CODE ANN. § 53-5201 (Supp. 1973). These statutes generally have defined an emergency victim as one whose condition poses a danger of loss of life, or serious injury or illness.

80. The court merely stated that "a hospital may not deny emergency care to any patient without cause." 112 Ariz. at 106, 537 P.2d at 1331. The court might have intended that the "without cause" proviso create a distinction between emergency and nonemergency situations, much as the Delaware court did in Wilmington Gen. Hosp. v. Manlove, 54 Del. 15, 174 A.2d 135 (1961). *See* text & notes 35-36, 40 *supra*. However, if the court is in fact making a distinction between emergencies and nonemergencies, the question remains whether other circumstances, such as lack of space or personnel, will be sufficient cause to deny care to an actual emergency victim. *See* text & note 83 *infra*.

81. Emergency care covers a broad spectrum of services, ranging from appraisal of the situation and administration of first aid, to a full regimen of treatment, involving a prolonged stay in the emergency ward. Noer, *Critical Surgery Belongs in O.R., Not E.R.*, 106 MOD. HOSPITAL, Jan. 1966, at 92.

82. 112 Ariz. at 106, 537 P.2d at 1331.

83. Although at common law, a hospital need not establish cause for failing to render emergency care, hospitals have, possibly in an attempt to add moral justification to their actions, given various reasons for refusing to admit emergency victims. They include the lack of a physician's referral, membership in a disfavored medical insurance group, preemergency care by another doctor, contagious disease, emergency room personnel being unable to locate a physician, overcrowded condition of the facilities, and the victim's injuries not requiring immediate treatment. *See* Birmingham Baptist Hosp. v. Crews, 229 Ala. 398, 400, 157 So. 224, 225 (1934); O'Neill v. Montefiore Hosp., 11 App. Div. 2d 132, 134, 202 N.Y.S.2d 436, 438 (1960). The court in *Guerrero* does not indicate which of these excuses will now provide legal cause to refuse aid.

84. ARIZ. REV. STAT. ANN. § 36-405(A) (1974).

provides that the Director of Health Services shall have the power to adopt rules for licensing all Arizona hospitals, using as a guideline the rules promulgated by the Joint Commission on Accreditation of Hospitals.[85] This portion of the statute, in effect, designates the Commission's rules as the primary source to be used in formulating rules pertaining to the construction, maintenance, and use of hospital facilities in the state. These same rules might similarly have been used by the *Guerrero* court to interpret the relevant department of health regulations.[86] According to Commission standards and accompanying interpretations, an accredited hospital must provide adequate treatment or referral for treatment as warranted by the needs of the community and the capabilities of the hospital.[87] The standards of the Commission prescribe an admittance policy which assures adequate care for emergency victims yet allows the hospital sufficient latitude so that it can avoid needless waste of its resources.[88] The requirement of adequate appraisal and advice or initial treatment for any and all ailments, assures each ill or injured patient the degree of care warranted by the circumstances.[89]

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85. *Id.*

86. Where a statute refers to some outside source for construction, such as a neighboring state's statute, that source is usually considered persuasive. *See* Mileham v. Arizona Bd. of Pardons & Paroles, 110 Ariz. 470, 473, 520 P.2d 840, 843 (1974); City of Phoenix v. Superior Court, 109 Ariz. 533, 537, 514 P.2d 454, 458 (1973). Findings by various private commissions in the construction and revision of uniform state laws and model acts are also persuasive. *See, e.g.*, Arizona State Bd. of Medical Examiners v. Clark, 97 Ariz. 205, 209, 398 P.2d 908, 912 (1965); Valley Nat'l Bank v. Avco Dev. Co., 14 Ariz. App. 56, 60, 480 P.2d 671, 675 (1971); Neil B. McGinnis Equip. Co. v. Henson, 2 Ariz. App. 59, 61, 406 P.2d 409, 411 (1965). Findings by the Joint Commission on Accreditation of Hospitals could readily be accorded such status. For example, the Commission's findings have been held proper for submission to a jury to aid it in determining the requisite standard of care in a malpractice action against a hospital. Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 332, 211 N.E.2d 253, 257 (1965).

87. Emergency Services Standard I reads: "A well-defined plan for emergency care, based on community need and on the capability of the hospital, shall exist within every hospital." JOINT COMM'N ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS, EMERGENCY SERVICES 1 (1973). *See* Comment, *supra* note 31, at 459.

88. The Commission's standards allow the hospital staff, after making an initial appraisal of the victim, to choose between referring or transferring the patient, or giving him treatment according to the accompanying Interpretation of Emergency Service Standard I which states in part:

> The hospital must have some procedure whereby the ill or injured person can be assessed, and either treated or referred to an appropriate facility, as indicated. Most hospitals that offer a broad range of services can provide effective care for any type of patient requiring emergency service. Hospitals that offer a partial range of services may be capable of operating a limited emergency service only, and, therefore, must arrange for the transfer or referral of certain patients to other institutions. Some hospitals may elect to refer all emergency patients. In either case, the referring hospital must institute essential life-saving measures and provide emergency procedures that will minimize aggravation of the condition during transportation. Inherent in this action is the understanding that no patient should arbitrarily be transferred if the hospital where he was initially seen has means for adequate care of his problem . . . .

JOINT COMM'N ON ACCREDITATION OF HOSPITALS, *supra* note 87.

89. *See* Comment, *supra* note 31, at 460.

Conclusion

At common law a hospital has no duty to render emergency care to all persons requesting it. Several courts, however, have found a duty on the part of hospitals to admit patients with unmistakable emergencies who rely on the hospitals' well-established custom of admitting all such patients. In creating a duty of care where one was needed, the Arizona supreme court declined to adopt the minority *Manlove* rule and instead found that a statutory duty of care exists. The relevant Arizona statute, however, does not expressly create such a duty. The *Guerrero* decision obviously provides for a greater degree of emergency health care than the *Manlove* rule, but it also aggravates the problem of overcrowding due to an influx of nonemergency patients. The court has left open questions as to what constitutes "cause" to refuse treatment, and once the patient has been admitted, what the requisite standard of care should be. In the absence of answers provided by the relevant statutes and regulations, the Arizona courts should use those standards adopted by reference in the statutes and promulgated by the Joint Commission on Accreditation of Hospitals.

C. THE DUTY OF A POLICE OFFICER TO A PURSUED MOTORIST

The police officer has a professional duty to protect the public from the acts of criminals,[1] yet he also has certain legal duties toward those whom he pursues as lawbreakers.[2] For breach of these duties, he may be liable in tort.[3] In recent years, state and municipal immunity

1. State v. Nolan, 354 Mo. 980, 988-89, 192 S.W.2d 1016, 1020-21 (1946); Wrubel v. State, 11 Misc. 2d 878, 174 N.Y.S.2d 687 (Ct. Cl. 1958); Somerset Bank v. Edmund, 76 Ohio St. 396, 404, 81 N.E. 641, 643 (1907). *But cf.* Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) (police have no duty to protect people even if notified by victim in advance).

2. *See, e.g.*, Chaudoin v. Fuller, 67 Ariz. 144, 192 P.2d 243 (1948); Harding v. State, 26 Ariz. 334, 225 P. 482 (1924); Wimberly v. Paterson, 75 N.J. Super. 584, 183 A.2d 691 (Ct. App. 1962).

3. *See* Chaudoin v. Fuller, 67 Ariz. 144, 192 P.2d 243 (1948). *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (damages may be awarded for a federal agent's violation of a citizen's constitutional rights); Monroe v. Pape, 365 U.S. 167 (1961). The Supreme Court in *Bivens* distinguished actions against a police officer for violation of a citizen's constitutional rights from conventional tort actions, 403 U.S. at 390, yet there are a number of similarities. *See* Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 323-24 (1965); Comment,

from suit has been increasingly abrogated,[4] and suits for torts committed by police officers have thus become more likely to succeed in terms of actual recovery. A number of police officers have thus been held liable in tort for accidents involving their police vehicles.[5] In *Herderick v. State*,[6] the Arizona court of appeals considered the question of police tort liability to a passenger in a vehicle being pursued by an officer.

Sovereign Immunity—An Anathema to the Constitutional Tort, 12 SANTA CLARA LAW. 543, 547-48 (1972).

Often both the police officer and his governmental employer are sued. *See, e.g.*, Herderick v. State, 23 Ariz. App. 111, 530 P.2d 1144 (1975); Gardner v. McDowell, 202 Kan. 705, 451 P.2d 501 (1969); Larson v. Lester, 259 Wis. 440, 49 N.W.2d 414 (1951). Even when sovereign immunity exists, the policeman is generally held personally liable for negligent or wrongful acts causing personal injury. *See* Ruth v. Rhodes, 66 Ariz. 129, 133-34, 185 P.2d 304, 307 (1947); Mathes & Jones, *Toward a "Scope of Official Duty": Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 894-907 (1965). When the policeman and state or city are sued jointly, the state or city is obligated to pay the entire judgment unless the officer was acting grossly out of the line of duty. The primary reason for this is the doctrine of respondeat superior, which imposes vicarious liability on an employer for tortious conduct of an employee within the scope of employment. Conchin v. El Paso & S.W. R.R., 13 Ariz. 259, 262, 108 P. 260, 261 (1910); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 70 (4th ed. 1971). A number of states have passed statutes providing that a police officer either is immune from liability or will be indemnified for acts done within the scope of his employment. *See, e.g.*, ILL. ANN. STAT. ch. 24, § 1-4-5 (Smith-Hurd 1962); MASS. ANN. LAWS. ch. 41, § 100 (Michie/Law. Co-op 1958); N.Y. GEN. MUN. LAW. § 50(c) (Consol. 1975). *See also* Morrison, *Negligent Operation of a Police Vehicle*, 16 CLEV. ST. L. REV. 442, 445 (1967). Arizona has enacted no such statute.

There are a variety of offenses for which a police officer may be held liable in tort. An officer can be held liable for false imprisonment, *see* State v. Gilbert, 105 Ariz. 475, 477, 467 P.2d 63, 65 (1970); Platt v. Greenwood, 50 Ariz. 158, 69 P.2d 1032 (1937); Manos, *Police Liability for False Arrest or Imprisonment*, 16 CLEV. ST. L. REV. 415 (1967), for misuse of weapons, *see* Chaudoin v. Fuller, *supra*; Havier v. Partin, 16 Ariz. App. 265, 492 P.2d 761 (1972); Greenstone, *Liability of Police Officers for Misuse of Their Weapons*, 16 CLEV. ST. L. REV. 397 (1967), invasion of privacy, *see* Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952); Schad, *Police Liability for Invasion of Privacy*, 6 CLEV. ST. L. REV. 425 (1967), and defamation. *See* Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962); Krebs v. McNeal, 222 Miss. 560, 76 So. 2d 693 (1955); Maxey, *Police Tort Liability for Defamation*, 16 CLEV. ST. L. REV. 435 (1967). *But cf.* Paul v. Davis, 424 U.S. 693 (1976).

4. State and municipal sovereignty were abrogated in Arizona in Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963). *See* Comment, *Governmental Immunity in Arizona—the Stone Case*, 6 ARIZ. L. REV. 102 (1964). *See also* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 213, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 90 (1961); Hargrove v. Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957); Molitor v. Kaneland Community Dist. No. 302, 18 Ill. 2d 11, 29, 163 N.E.2d 89, 98 (1959), *cert. denied*, 362 U.S. 968 (1960); Hicks v. State, 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975); Dakin, *Municipal Immunity in Police Torts*, 16 CLEV. ST. L. REV. 448 (1967).

5. Liability may attach when the negligence of a police officer causes a collision between the police vehicle and another vehicle. *See, e.g.*, City of Scottsdale v. Kokaska, 17 Ariz. App. 120, 495 P.2d 1327 (1972); Herron v. Silbaugh, 436 Pa. 339, 260 A.2d 755 (1970); Martin v. Ehlers, 13 Utah 2d 236, 371 P.2d 851 (1962). More unusual is the action alleging liability for injury when a pedestrian or another vehicle is struck by the pursued vehicle. *See* Myers v. Town of Harrison, 438 F.2d 293 (2d Cir.), *cert. denied*, 404 U.S. 829 (1971); Wilson v. City of Tucson, 8 Ariz. App. 398, 446 P.2d 504 (1968); Downs v. Camp, 113 Ill. App. 2d 221, 252 N.E.2d 46 (1969). While liability is quite frequently assigned in the former type of action, it is almost uniformly denied in the latter. The most unusual situation is that discussed here, where negligence of the operator of the pursued vehicle causes injury to an occupant of that vehicle. *See* Poole v. City of Louisville, 107 Ga. App. 303, 130 S.E.2d 157 (1963); Strobel v. State, 36 App. Div. 2d 485, 321 N.Y.S.2d 11 (1971), *aff'd*, 30 N.Y.2d 629, 282 N.E.2d 331, 331 N.Y.S.2d 442 (1972).

6. 23 Ariz. App. 111, 530 P.2d 1144 (1975).

Herderick was a wrongful death action involving the death of a passenger in a speeding vehicle during a chase in which the policeman did not engage his siren or flashing lights. One rainy night, Patrolman McHenry of the Arizona Highway Patrol, parked in his patrol car near a bar, observed two men leave the bar and begin arguing with a third man.[7] The two men then entered a car, prevented the third man from entering, and sped out of the parking lot.[8] McHenry pursued the car at speeds of up to 110 miles per hour but soon lost sight of it.[9] Thinking the car might have turned onto a side road, McHenry retraced his path and found that the car had missed a turn and crashed.[10] One of the men in the vehicle was dead and the other was dying.[11] There were no other vehicles or pedestrians on the road during McHenry's pursuit of the fleeing car,[12] and at no time did he engage his siren or flashing lights.[13]

Herderick's family brought suit against the officer and the state, charging that the policeman had a duty to warn and identify himself, which was breached when he failed to use his flashing lights and siren.[14] The plaintiffs argued that the fleeing driver, not knowing his pursuer was a police officer, had sped recklessly in an attempt to escape, and had crashed as the proximate result of the officer's failure to warn or identify himself.[15] The trial court granted a motion for summary judgment, holding that the officer had violated no duty of due care by failing to take the precaution of turning on his flashing lights or activating his siren.[16] The court of appeals upheld this judgment.[17]

This casenote will first consider whether a policeman in Arizona owes a specific statutory duty to warn or identify himself to a motorist he is pursuing. It will then discuss the common law duty of due care which may be owed by a policeman to a pursued motorist. Finally, the foreseeability test currently used in Arizona to determine whether a duty exists will be analyzed and a refinement of that test will be suggested.

7. *Id.* at 112-13, 530 P.2d at 1145-46.
8. *Id.* at 113, 530 P.2d at 1146.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* The plaintiff's argument as to the use of flashing lights failed since, according to ARIZ. REV. STAT. ANN. § 28-624(C) (1956), police vehicles may, but are not required to be equipped with or display red flashing lights visible from the front. Thus, no breach of statutory duty could be predicated upon the defendant's failure to display red lights, even if the vehicle was so equipped. *See* 23 Ariz. App. at 113, 530 P.2d at 1146.
15. 23 Ariz. App. at 113, 530 P.2d at 1146.
16. *See id.* at 112, 530 P.2d at 1145.
17. *Id.* at 115, 530 P.2d at 1148.

Specific Statutory Duty

In determining the liability of the police officer in *Herderick*, the court of appeals first sought to determine whether a duty, one of the prerequisites to recovery,[18] was owed to the plaintiff.[19] A legal duty may be derived either from statute[20] or common law,[21] and the court looked first to the Arizona statutes that specifically govern the use and operation of emergency vehicles.[22] Arizona Revised Statutes section 28-954(D)[23] provides that the driver of a fully equipped police vehicle responding to an emergency call has a duty to "sound the siren when reasonably necessary to warn pedestrians and other drivers" of its approach.[24] The Arizona court of appeals rejected the argument that the purpose of this statute is to have the officer identify himself, concluding rather that it is limited only to warning pedestrians and other drivers of the approaching vehicle.[25]

Section 28-954(D), however, merely applies a general duty to warn while responding to emergency calls; it does not grant the prerogative to exceed the speed limit. Arizona Revised Statutes section 28-624[26] exempts emergency vehicles from the posted speed limit, but

18. *See, e.g.*, Massengill v. Yuma County, 104 Ariz. 518, 521, 456 P.2d 376, 379 (1969); Morris v. Ortiz, 103 Ariz. 119, 121, 437 P.2d 652, 654 (1968); West v. Soto, 85 Ariz. 255, 261, 336 P.2d 153, 156 (1959); Barnum v. Rural Fire Protection Co., 24 Ariz. App. 233, 235, 537 P.2d 618, 620 (1975).

19. 23 Ariz. App. at 113, 530 P.2d at 1146. In order for actionable negligence to exist in Arizona, three requirements must be satisfied. There must exist a duty on the part of the defendant to protect the plaintiff from the injury of which he complains. *See* cases cited note 18 *supra*. The defendant must fail to perform that duty, and finally, an injury to the plaintiff must proximately result from such failure. Massengill v. Yuma County, 104 Ariz. 518, 521, 456 P.2d 376, 379 (1969); Vivian Arnold Realty Co. v. McCormick, 19 Ariz. App. 289, 294, 506 P.2d 1074, 1079 (1973); City of Scottsdale v. Kokaska, 17 Ariz. App. 120, 124, 495 P.2d 1327, 1331 (1972).

20. In Arizona, violation of a statute created to protect a certain group is negligence per se, prohibiting proof of due care by other standards, but plaintiffs must prove that they are members of the class of persons whom the statute was designed to protect. *See* Orlando v. Northcutt, 103 Ariz. 298, 300, 441 P.2d 58, 60 (1968); Hidalgo v. Cochise County, 13 Ariz. App. 27, 28, 474 P.2d 34, 35 (1970).

21. *See, e.g.*, Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013 (9th Cir.), *cert. denied*, 400 U.S. 902 (1970); Morris v. Ortiz, 103 Ariz. 119, 437 P.2d 652 (1968); Kreisman v. Thomas, 12 Ariz. App. 215, 469 P.2d 107 (1970).

22. See ARIZ. REV. STAT. ANN. § 28-101(1) (Supp. 1976-77) (defining "authorized emergency vehicles" to include police vehicles).

23. *Id.* § 28-954(D) (1956) provides:

> Any authorized emergency vehicle may be equipped with a siren, whistle or bell, capable of emitting sound audible under normal conditions from a distance of not less than five hundred feet and of a type approved by the department, but the siren shall not be used except when the vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law, in which latter events the driver of the vehicle shall sound the siren when reasonably necessary to warn pedestrians and other drivers of the approach thereof.

24. *Id.*

25. 23 Ariz. App. at 114, 530 P.2d at 1147.

26. ARIZ. REV. STAT. ANN. § 28-624(B)(3) (1956) provides: "The driver of an authorized emergency vehicle may . . . [e]xceed the prima facie speed limit so long as he does not endanger life or property."

conditions this privilege on the use of a siren when "reasonably necessary."[27] Section 28-624(C) does not mention pedestrians and other drivers, as does section 28-954(D). The *Herderick* court, however, read this language into section 28-624(C), in concluding that "when exceeding the speed limits the patrolman must give warning by siren of his approach to other drivers and pedestrians on the highway."[28] The court has now made clear that any specific statutory duty under sections 28-954(D) and 28-624(C) to sound a siren is merely a duty to warn pedestrians and "other drivers"; it is not a duty owed to the driver of the vehicle being pursued,[29] or to identify the pursuer as a police officer.[30]

The plaintiff argued that an officer's obligation to use a siren is not limited to those situations in which it is necessary to warn of the approach of the emergency vehicle.[31] Plaintiff relied in part on another statute, which requires drivers to pull over to the curb whenever emergency vehicles approach, and to wait there until the vehicles pass, unless otherwise directed by a police officer.[32] Because the statute places this obligation upon motorists, the plaintiff reasoned that the siren is an identifying mechanism as well as a warning mechanism, thereby compelling a statutory duty to identify.[33] The court, however, rejected this argument. Recognizing that the duty to warn other motorists of the approach of the emergency vehicle would of necessity allow the warned motorist to identify that warning as emanating from an emergency vehicle, the court nevertheless held that the officer's statutory duty was

27. The exemptions granted by this section to an authorized emergency vehicle shall apply only when the driver of the vehicle while in motion sounds audible signal by bell, siren or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp displaying a red light visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle.

Id. § 28-624(C).

28. 23 Ariz. App. at 114, 530 P.2d at 1147.

29. *Id.* The court noted that although only the driver of the fleeing vehicle could be technically classified as a lawbreaker, it did not see how distinguishing between passenger and driver helped in defining a duty imposed on the patrolman. *Id.* at 113 n.1, 530 P.2d at 1146 n.1; *accord*, Strobel v. State, 36 App. Div. 2d 485, 321 N.Y.S.2d 11 (1971), *aff'd*, 30 N.Y.2d 629, 282 N.E.2d 331, 331 N.Y.S.2d 442 (1972). The plaintiff's argument to the contrary was based on the failure to identify the pursuer so that the driver would slow down or stop, thus avoiding death or injury to the passenger. 23 Ariz. App. at 113, 530 P.2d at 1146.

30. 23 Ariz. App. at 114, 530 P.2d at 1147.

31. *Id.*

32. ARIZ. REV. STAT. ANN. § 28-775(A)(1) (1956) states:

The driver of every vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in that position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

33. 23 Ariz. App. at 114, 530 P.2d at 1147.

solely one of warning, which was owed only to pedestrians and "other drivers," and not to the driver of the pursued automobile.[34]

The court's distinction between a duty to warn and a duty to identify seems rather strained, since a duty to warn of one's approach logically presupposes identifying oneself.[35] The court seems correct, though, in its argument that the interrelation of the Arizona statutes determines that the duty of a police officer, whether to warn or to identify, runs only to pedestrians and to "other drivers." Since both sections 28-624(C)[36] and 28-954(D)[37] deal with situations in which an emergency vehicle must use a siren, it seems logical to impute that the language of one statute applies to the other.[38] However, even if under section 28-624(C), an emergency vehicle may disregard speed regulations if precautions are taken which are reasonably necessary to warn pedestrians and other drivers of its approach, there is still the question of why the "other drivers" category is not broad enough to include drivers of the vehicle being pursued.

Although the court treated the statute as clear on its face, it appears to be ambiguous, since "other drivers" can be construed to mean either drivers other than the violator or other than the policeman himself. In the former instance, "other drivers" would not include a violator of the law, but in the latter instance it would. Although the court did not explore this ambiguity, its interpretation that "other drivers" does not include suspected law violators is probably correct, as there are no other Arizona statutes requiring a policeman to warn law violators of his approach. Another Arizona statute states that, although policemen generally must, when making an arrest, inform a person of their authority and the reason for the arrest, they need not do so if the person to be arrested is then engaged in the commission of a crime.[39]

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34. *Id.*

35. To warn means to put on guard and to give information of approaching danger. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2577 (unabr. 1961). The reason flashing lights and sirens do communicate to people that danger is near is because people identify them from experience as emanating from emergency vehicles which travel fast and disregard highway regulations. If people did not first identify sirens as coming from emergency vehicles, they might not be warned that a potentially dangerous situation was developing. Still, the critical distinction in determining liability is not whether a policeman's duty is one of warning or identifying, but rather to whom this duty is owed. See generally text & notes 61-103 *infra.*

36. See text of statute set forth at note 27 *supra.*

37. See text of statute set forth at note 23 *supra.*

38. *But see* Poole v. City of Louisville, 107 Ga. App. 305, 130 S.E.2d 157 (1963), in which the court construed statutes virtually identical to Arizona's, upholding damages to a driver injured as a result of being pursued by a policeman who failed to identify himself.

39. ARIZ. REV. STAT. ANN. § 13-1408 (1956) provides:

> When making an arrest without a warrant, the officer shall inform the person to be arrested of his authority and the cause of his arrest, unless the person to be arrested is then engaged in the commission of an offense, or is

The officer in *Herderick* was not making an arrest as he chased the speeding car,[40] but rather endeavoring to get close enough to do so, thus, this statute suggests that he had no specific statutory duty to give warning or identify himself as he approached.[41]

General Statutory Duty of Due Regard

In deciding whether a duty was owed by the officer to Herderick, the court next looked to Arizona Revised Statutes section 28-624(D), which states that the specific exceptions provided elsewhere in that section do not relieve drivers of emergency vehicles from "the duty to drive with due regard for the safety of all persons."[42] The court indicated that this statutory provision created the same duty imposed on every other user of the highways,[43] or, in other words, the common law duty of due care. This ruling clarifies the scope of the Arizona case, *Massengill v. Yuma County*,[44] which held that breach of a duty owed to the general public will not render a police officer liable to any private individual who may have been harmed as a result.[45]

In *Massengill*, a deputy sheriff on duty in the parking lot of a tavern reputedly serving alcoholic drinks to minors, followed but failed to stop or arrest the drivers of two cars who left the bar and drove recklessly down a dangerous strip of highway.[46] Plaintiff's decedent was subsequently struck and killed by one of the two cars when it veered onto the wrong side of the highway.[47] The Arizona supreme court

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pursued immediately after its commission or after an escape, or flees or forcibly resists before the officer has opportunity so to inform him, or when the giving of such information will imperil the arrest.

40. In Arizona, an arrest occurs when one's freedom of movement is restricted by the police. State v. Stauffer, 112 Ariz. 26, 28, 536 P.2d 1044, 1046 (1975), *noted in* "Collateral Estoppel, Criminal Proceedings, and the Prevention of Contradictory Results," 18 ARIZ. L. REV. 585, 668 (1976). A person may be under arrest when police pull his car to the side of the road if he is not then free to leave the presence of officers, State v. Vaughn, 12 Ariz. App. 442, 444, 471 P.2d 744, 747 (1970), but not every time an officer uses his emergency equipment to flag down a vehicle has an arrest been made. State v. Taras, 19 Ariz. App. 7, 9, 504 P.2d 548, 550 (1973).

41. Nevertheless, the court's treatment of "other drivers" in ARIZ. REV. STAT. ANN. § 28-624(C) (1956) reflects a narrow construction of a policeman's statutory duty to warn. *Accord*, Pagels v. City & County of San Francisco, 135 Cal. App. 2d 152, 154, 286 P.2d 877, 879 (Ct. App. 1955).

42. ARIZ. REV. STAT. ANN. § 28-624(D) (1956). "Due regard" is a general term which the court in *Herderick* defined as "the same duty imposed on every other user of the highways, that is, the duty to use due care." 23 Ariz. App. at 115, 530 P.2d at 1148; *see* Krauth v. Billar, 71 Ariz. 298, 226 P.2d 1012 (1951).

43. *See* discussion note 42 *supra*.

44. 104 Ariz. 518, 456 P.2d 376 (1969), *noted in* "Duty of Public Officials," 12 ARIZ. L. REV. 89, 229 (1970).

45. 104 Ariz. at 523, 456 P.2d at 382. *Massengill's* theory of public duty has been criticized as an attempt to unreasonably limit the scope of state tort liability following the abrogation of sovereign immunity. *See* "Duty of Public Officials," *supra* note 44.

46. 104 Ariz. at 519-20, 456 P.2d at 377-78.

47. *Id.* at 520, 456 P.2d at 378.

upheld the trial court's dismissal of the wrongful death action on the ground that the duty to arrest was not owed to the particular plaintiff, but only to the general public.[48]

The Arizona courts, as well as courts in other jurisdictions, have found it difficult to distinguish between public duties and duties owed to individuals,[49] but they have generally agreed that failure of police and fire protection are breaches of public duty and thus do not form the basis for individual recovery.[50] The *Massengill* court discussed a limitation on the public duty rule, however, noting that if an injured party can show that a public duty involved a duty owed specifically to him, then liability would be imposed.[51] A public duty involves a duty owed specifically to an individual when that individual suffers a "specific and peculiar injury by reason of its nonperformance."[52]

In *Duran v. City of Tucson*,[53] the Arizona court of appeals recognized several ways in which "specific injury" might result from breach of a public duty.[54] The basis for liability might be the provision of facilities or services for the direct use by members of the public rather than to protect the public generally from external hazards.[55] Liability

48. *Id.* at 523, 456 P.2d at 381.

49. *See* Duran v. City of Tucson, 20 Ariz. App. 22, 25, 509 P.2d 1059, 1062 (1973) (rejecting the widely-used definition of when public duty constitutes individual wrong as "not especially helpful" and substituting various definitions of its own); Tampa v. Davis, 226 So. 2d 450, 452-54 (Fla. App. 1969) (describing confusion created in Florida law by requirement that public officials owe a "special duty" to individuals in order to be held liable); Motyka v. City of Amsterdam, 15 N.Y.2d 134, 140, 204 N.E.2d 635, 637, 256 N.Y.S.2d 595, 598 (1965) (Desmond, C.J., dissenting) (pointing out inconsistencies within New York case law defining public duty).

50. *See, e.g.*, Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969); Commercial Union Ins. Co. v. City of Wichita, 217 Kan. 44, 536 P.2d 54 (1975); H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928). *But see* Veach v. City of Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967).

51. 104 Ariz. at 523, 456 P.2d at 381.

52. *Id.* at 521, 456 P.2d at 379.

53. 20 Ariz. App. 22, 509 P.2d 1059 (1973).

54. See text & notes 55-58 *infra.* Some states impose liability if the tort is committed against someone with whom the government employee is in privity, or is otherwise in contact with, through a direct transaction. *See* Gerneth v. City of Detroit, 465 F.2d 784, 786 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); Florida First Nat'l Bank v. City of Jacksonville, 310 So. 2d 19, 26 (Fla. App. 1975); Tampa v. Davis, 226 So. 2d 450, 454 (Fla. App. 1969). *Herderick* could arguably be distinguished from *Massengill* under this formulation. When the officer pursued the car in which Herderick was riding, he could be considered to be in contact through a direct transaction with Herderick, as distinguished from the officer in Massengill, who had no direct contact with the car in which Massengill rode, but only with the drunken drivers who ran Massengill down. However, the court in *Duran* rejects the use of this test in Arizona, asserting that its adoption would be inconsistent with Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963), where liability was imposed for failure to properly maintain the highway and remove old directional signs where a new highway and an old highway intersected, even though there had been no direct contact between state employees and the plaintiff. 20 Ariz. App. at 25, 509 P.2d at 1062.

55. 20 Ariz. App. at 25, 509 P.2d at 1062. *See also* Ivicevic v. City of Glendale, 26 Ariz. App. 460, 549 P.2d 240 (1976); Delarosa v. State, 21 Ariz. App. 263, 518 P.2d 582 (1974); Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); Campbell v. City of Bellevue, 85 Wash. 2d 1, 530 P.2d 234 (1975).

might also attach for the negligent performance of an act by government employees which is clearly similar to acts which would give rise to liability if performed by ordinary citizens.[56] This latter exception distinguishes such acts from those involving a public duty in that an ordinary citizen would not be called upon to perform a public duty. An additional basis for liability might be where an act actively works an injury as opposed to an act which merely withholds a benefit.[57] Finally, liability might be imposed when government has, by its own conduct, narrowed a public duty into a specific one.[58]

It can be argued that whereas no specific duty existed under the facts of *Massengill*, there was such a duty in *Herderick*. When the officer, without identifying himself, gave high-speed chase to the car in which Herderick was riding, he was performing an act for which an ordinary person might also have been held negligent.[59] If an ordinary individual had chased another under circumstances in which it was foreseeable that his identity might be mistaken and this mistake cause harm, the individual might well be held liable. When the officer in *Massengill* failed to arrest a drunken driver, however, this action was one which an ordinary person would not be called upon to perform.[60] In *Massengill*, the officer's breach of a public duty to arrest lawbreakers could be said to merely withhold the benefit of police protection from the plaintiff, without which protection he was vulnerable to harm by a third party. In *Herderick*, however, it was action by the policeman—initiating a high-speed chase without identifying himself—which allegedly caused the injury. The type of duty involved in *Herderick* is, thus, validly distinguishable from that in *Massengill*; *Massengill*'s exemption for breach of public duty may not be controlling. This issue was not addressed in *Herderick*, however, as the court held that the only statutory duty was a codification of the common law duty of due care.

56. 20 Ariz. App. at 25, 509 P.2d at 1062. *Duran* gives as an example of this, the operation of a motor vehicle. *Id.*

57. *See* Massengill v. Yuma County, 104 Ariz. 518, 522, 456 P.2d 376, 380 (1969).

58. *Id.* at 523, 456 P.2d at 381. *Massengill* cites Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958), in which a municipality was held liable for failing to provide police protection to a person who responded to the city's plea for information leading to apprehension of a nationally sought criminal. The individual's volunteering of special help to the city created a specific duty of due care by the city towards him. *Id.* at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269. *See also* Florida First Nat'l Bank v. City of Jacksonville, 310 So. 2d 19 (Fla. App. 1975); Gardner v. Village of Chicago Ridge, 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966).

59. *Cf.* Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930) (employer had duty to protect employees against injuries caused by fright, although no duty to anticipate fright).

60. *Accord*, Barnum v. Rural Fire Protection Co., 24 Ariz. App. 233, 236, 537 P.2d 618, 621 (1975) (private firefighting corporation had "duties and liabilities of individual or private corporation" rather than those of governmental entity, and so it was not liable for failure of fire protection.).

Foreseeability and Due Care

The *Herderick* court's decision that section 28-624(D) codifies the common law duty, left open the question whether this duty ran from the officer to Herderick. Duty is classically defined, in negligence cases, as an obligation enforced by law, to conform to a particular standard of conduct toward another.[61] The standard of conduct usually required has been that of a reasonable person under like circumstances.[62] The size of the class of persons to whom this duty of due care is owed has long been a subject of disagreement in tort law. The two views now current in America were contrasted very sharply in *Palsgraf v. Long Island Railroad Co.*,[63] in which Judge Cardozo, speaking for the majority, held that "the risk reasonably to be perceived defines the duty to be obeyed."[64] Under the Cardozo formulation, one only owes a duty to prevent harm to those whom he should reasonably foresee might be harmed by his acts.[65] Judge Andrews argued for the minority, however, that a duty is owed not only to people whom an actor perceives might be harmed by his acts, but to the world at large.[66] An individual need not prove he was a foreseeable plaintiff in order to recover,[67] but only that the defendant took an unreasonable risk and that the plaintiff's injury was proximately caused by the taking of this risk.[68] Arizona has adopted the majority view of *Palsgraf* and uses a foreseeability test to determine whether a duty is owed to the particular plaintiff.[69]

The court in *Herderick*, after deciding that section 28-624(D) codified the common law duty of users of a highway toward each other, held that the officer had violated no duty of due care to Herderick.[70] It reasoned that a violation of due care by failing to identify would only arise where a reasonable man could have foreseen that harm would befall the pursued driver because of failure to

61. W. PROSSER, *supra* note 3, § 53, at 324.
62. *Id.* § 32, at 150.
63. 248 N.Y. 339, 162 N.E. 99 (1928).
64. *Id.* at 344, 162 N.E. at 100.
65. *Id.*
66. *Id.* at 350, 162 N.E. at 103.
67. *Id.*
68. *Id.* at 350-51, 162 N.E. at 103.
69. *See, e.g.*, Tucker v. Collar, 79 Ariz. 141, 285 P.2d 178 (1955); Crouse v. Wilbur-Ellis Co., 77 Ariz. 359, 272 P.2d 352 (1954); West v. Cruz, 75 Ariz. 13, 251 P.2d 311 (1952). A number of other jurisdictions also define duty by foreseeability. *See* Holman v. State, 53 Cal. App. 3d 317, 124 Cal. Rptr. 773 (1975); Stribling v. Chicago Housing Authority, 34 Ill. App. 3d 551, 340 N.E.2d 47 (1976); Geyer v. City of Logansport, — Ind. App. —, 346 N.E.2d 634 (1976); Dachelle v. New York World Telegram Corp., 20 App. Div. 2d 892, 248 N.Y.S.2d 1021 (1964), *aff'd*, 15 N.Y.2d 923, 206 N.E.2d 869, 258 N.Y.S.2d 845 (1965); Rose v. Nevitt, 56 Wash. 2d 882, 355 P.2d 776 (1960).
70. 23 Ariz. App. at 115, 530 P.2d at 1148.

identify, and that there was no evidence presented showing that the officer should have foreseen that the driver of the pursued vehicle thought he was being chased by anyone.[71] It is generally recognized in negligence cases that the judge determines whether a legal duty from the defendant to the plaintiff exists[72] and whether sufficient evidence has been produced to warrant the finding of any given fact,[73] so the court was within its prerogative in making both these determinations. The court did not, however, decide the issue of duty by applying a foreseeability test. It stated that foreseeability is usually a question for the jury,[74] but that it was not submitting the question of foreseeability to the jury because there was insufficient evidence for the jury to find that "a reasonable man [should have anticipated] that the driver of the pursued vehicle thought he was being chased by anyone."[75] The court thus indicated that the foreseeability test goes to the issue of breach of duty rather than the existence of a duty. This treatment stemmed, in large part, from the court's conclusion that a duty was created by statute.

If the *Herderick* court had not implied a duty from statute but had applied the common law *Palsgraf* test,[76] it probably would have likewise denied Herderick recovery. However, the court would have reached this result through a different formulation. Since, under *Palsgraf*, duty is determined by foreseeability,[77] the court would have asked whether, in this instance, a reasonable man should have foreseen that harm would befall the driver of the pursued vehicle due to the policeman's failure to identify himself. If it was found that the harm was not foreseeable, the court would hold, as a matter of law, that there was no duty. In *Herderick*, the same result would probably have been reached whether the court held that no duty existed or that a duty did exist but that there was not sufficient evidence of foreseeability on the issue of breach to submit the case to a jury. In either event, the lack of evidence of foreseeability would inevitably lead the court to conclude, as a matter of law, that no duty was breached. However, the possibility in *Herderick*

71. *Id.*
72. *See* City of Scottsdale v. Kokaska, 17 Ariz. App. 120, 126, 495 P.2d 1327, 1333 (1972); Elbert v. Saginaw, 363 Mich. 463, 476, 109 N.W.2d 879, 885 (1961); Baca v. Britt, 73 N.M. 1, 4, 385 P.2d 61, 63 (1963); W. PROSSER, *supra* note 3, § 37, at 206.
73. *See* MacDonald v. Eichenauer, 77 Ariz. 252, 254, 269 P.2d 1057, 1058 (1954); Yuma Furniture Co. v. Rehwinkel, 8 Ariz. App. 576, 578, 448 P.2d 420, 422 (1968); Peters v. Billick, 147 Conn. 699, 702, 166 A.2d 146, 147 (1960); Morgan v. Citizen's Bank, 190 N.C. 209, 215, 129 S.E. 585, 588 (1925); W. PROSSER, *supra* note 3, § 37, at 205. Prosser, in discussing functions of court and jury, says that the court must decide on the sufficiency of the evidence to permit a finding of the facts, the existence of a duty, and the general standard of conduct. The jury generally decides the weight of the evidence as establishing the facts and the particular standard of conduct. *Id.*
74. 23 Ariz. App. at 115, 530 P.2d at 1148.
75. *Id.*
76. *See* text & note 64 *supra.*
77. *See* text & note 65 *supra.*

of using either of two formulations to reach the same result illustrates a basic confusion in Arizona tort law. Arizona courts are divided on what issue of negligence foreseeability goes to and whether foreseeability of harm should be decided by the judge or jury.[78]

In *City of Scottsdale v. Kokaska*,[79] the court of appeals surveyed the use of the foreseeability test in Arizona, noting that foreseeability has been used to determine not only duty,[80] but also breach[81] and proximate cause.[82] The *Kokaska* court stated, however, that the conflict concerning foreseeability was more apparent than real, since the elements of duty, breach, and proximate causation blend into each other making it difficult to consider one element apart from the others.[83] Furthermore, the court acknowledged that foreseeability plays a role in determining the presence or absence of each element.[84]

Arizona courts are not alone in their inconsistent application of the foreseeability standard. Foreseeability is an amorphous concept upon whose application neither courts[85] nor scholars[86] can agree. Despite *Kokaska*'s contrary assertion, the problems of inconsistent application of the foreseeability test are real as well as apparent. One result of Arizona courts not applying foreseeability consistently is that it is often difficult to follow the court's reasoning in negligence cases. In *Herderick*, for instance, even upon reading the opinion very closely it cannot easily be determined whether the court held that the policeman had a duty to warn the pursued speeder but did not breach this duty, or that no duty existed in the first instance. Arizona's adherence to the *Pals-*

78. This confusion was discussed at length in City of Scottsdale v. Kokaska, 17 Ariz. App. 120, 124-26, 495 P.2d 1327, 1331-33 (1972). *See* text & notes 79-84 *infra*.

79. 17 Ariz. App. 120, 124-27, 495 P.2d 1327, 1331-34 (1972).

80. *See, e.g.*, Morris v. Ortiz, 103 Ariz. 119, 121, 437 P.2d 652, 654 (1968); Rosendahl v. Tucson Medical Center, 93 Ariz. 368, 370, 380 P.2d 1020, 1022 (1963); Mountain States Tel. Co. v. Kelton, 79 Ariz. 126, 133, 285 P.2d 168, 172 (1955).

81. *See* Gilbert v. Quinet, 91 Ariz. 29, 32-33, 369 P.2d 267, 269 (1962); Tucker v. Collar, 79 Ariz. 141, 147, 285 P.2d 178, 182 (1955).

82. *See* O'Rielly Motor Co. v. Rich, 3 Ariz. App. 21, 25-26, 411 P.2d 194, 198-99 (1966).

83. 17 Ariz. App. at 126, 495 P.2d at 1333. *See* Green, *Identification of Issues in Negligence Cases*, 26 Sw. L.J. 811 (1972), where the author states: "The basic affirmative issues in a negligence case are few, but lie so close together that they are easily confused." *Id.* at 811. Despite this, Green contends that careful identification and separation of issues in negligence cases is essential to correct analysis. *Id.*

84. 17 Ariz. App. at 126, 495 P.2d at 1333.

85. *Compare* Richards v. Stanley, 43 Cal. 2d 60, 64-67, 271 P.2d 23, 27-29 (1954) ("[T]here are many situations involving foreseeable risks where there is no duty."), *and* Dahlstrom v. Shrum, 368 Pa. 423, 425, 84 A.2d 289, 292 (1951) ("[F]oreseeability has no place when we are considering proximate or legal cause."), *with* Kettman v. Levine, 115 Cal. App. 2d 84, 850, 253 P.2d 102, 106 (Ct. App. 1953) ("[T]he question of proximate cause is a question of foreseeability."), *and* Burr v. Clark, 30 Wash. 2d 149, 153, 190 P.2d 769, 773 (1948) ("The duty to use care is based on the knowledge of danger.").

86. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.8, at 1058-60 (1956); Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 16-19 (1953).

graf test[87] indicates that the existence of a duty is determined by a foreseeability test, yet the *Herderick* court did not use such a test. The result is that what one would expect to be dealt with as a question of duty was actually dealt with as a question of breach.

Inconsistent use of the foreseeability test may also give trial courts undue discretion in allocating functions between judge and jury, since the court can decide, in a given instance, whether a foreseeability test should be made by the court, on the issue of duty, or by the jury, on the issue of breach.[88] According to Arizona case law, the existence of duty is determined by a foreseeability test[89] and is to be decided by the court.[90] The difficulty with this scheme is that, whereas generally the court decides matters of law and the jury matters of fact,[91] determination of foreseeability in a particular case is not a question of law alone, but a question of mixed law and fact.[92] In determining whether a certain harm was foreseeable, the court is determining whether a reasonable person in a particular situation would have foreseen such a harm.[93] By deciding such a question, the court could be said to be invading the province of the jury, since it is usually the function of the jury to apply "reasonable person" standards to particular facts.[94] The fact that determination of foreseeability is so similar to the types of questions juries usually consider[95] may be one reason Arizona courts are unsure of their own role in this determination. On the other hand,

87. *See* text & note 69 *supra.*

88. The majority and dissenting opinions in Morris v. Ortiz, 103 Ariz. 119, 437 P.2d 652 (1968), illustrate how a case can be sent to or kept from the jury depending on the court's determination of which body should determine foreseeability. In *Ortiz*, the Arizona supreme court upheld the trial court's direction of a verdict for Ortiz, holding that he, as a high school auto mechanics teacher, was not liable for injuries sustained by a student when he and other students were trying to bend a severed automobile roof and another student jumped onto the roof. *Id.* at 123, 437 P.2d at 656. The court used a foreseeability test in determining that Ortiz had no duty to anticipate unexpected acts which occur daily on school premises. *Id.* at 121, 437 P.2d at 654. Justice Lockwood, dissenting, suggested that the question of foreseeability of harm was one which should have been decided by the jury. *Id.* at 123, 437 P.2d at 656.

89. *See, e.g.*, Tucker v. Collar, 79 Ariz. 141, 285 P.2d 178 (1955); Crouse v. Wilbur-Ellis Co., 77 Ariz. 359, 272 P.2d 352 (1954); West v. Cruz, 75 Ariz. 13, 251 P.2d 311 (1952).

90. City of Scottsdale v. Kokaska, 17 Ariz. App. 120, 126, 495 P.2d 1327, 1333 (1972).

91. ARIZ. CONST. art. 6, § 12; M. UDALL, ARIZONA LAW OF EVIDENCE § 3, at 5 (1960).

92. This argument is based on the premise that determination of foreseeability of harm in a particular case does not establish a principle that will have broad application to similar disputes. *See* Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1869 (1966). It should be noted that not all legal questions can be categorized as pure questions of law or fact. *Id.* at 1872.

93. *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). *See also* text & notes 63-69 *supra.*

94. *See* Weiner, *supra* note 92, at 1876-80.

95. *See* 2 F. HARPER & F. JAMES, *supra* note 86, § 18.8, at 1059. "The duty issue frequently poses questions of the kind usually given to the jury . . . . Reasonable foreseeability of harm is the very prototype of the question a jury must pass upon in particularizing the standard of conduct in the case before it." *Id.*

turning the question of foreseeability of harm over to the jury on the issue of breach of duty is also confusing, since it is the determination of foreseeability of harm which establishes a duty in the first place;[96] a duty cannot be breached unless it is first proven to exist.

Perhaps some of the confusion as to which issue is being decided when foreseeability is considered and who should decide the foreseeability question would be cleared up if duty were recognized as not solely a question for the court.[97] The court's role should be to determine duty in cases in which that duty is established by statute,[98] by longsettled precedent, strong policy considerations,[99] or by clear foreseeability or non-foreseeability of harm. If harm is clearly unforeseeable, the court should dispose of the matter by dismissal, summary judgment, or directed verdict.[100] In instances in which there was a debatable question whether the injury was within the foreseeable scope of the risk, the case should be submitted to the jury on the issue of duty,[101] as well as, as the *Herderick* court did, on the issue of breach of that duty.[102] The jury would then determine whether the injury was foreseeable, giving rise to a duty, and whether the duty, thus established as a matter of law, was breached, due to the failure of the defendant to exercise reasonable care.

The result in *Herderick* would not be changed by this formulation, but its analysis would be. Rather than holding that the patrolman had a duty of due care towards the speeding motorist but that there was not enough evidence to send the case to the jury on the question of breach, the court would apply a foreseeability test to the issue of duty and determine that, as a matter of law, no duty existed. If the question of foreseeability had been a debatable one, however,[103] it should have been submitted to the jury on the question of duty.

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96. *See* text & note 69 *supra.*

97. The duty issue, like any other, can be broken down into a) rules and b) the application of those rules to the concrete facts of a given case. Here as elsewhere the court lays down the rules. But the application of those rules to particular facts should be, and in fact usually is, committed to the jury on the duty issue as upon any other.

2 F. HARPER & F. JAMES, *supra* note 86, § 18.8, at 1059. *But see* City of Scottsdale v. Kokaska, 17 Ariz. App. 120, 495 P.2d 1327 (1972); W. PROSSER, *supra* note 3, § 37, at 206.

98. *See* text & note 20 *supra.*

99. *See, e.g.*, Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Cavanaugh v. First Nat'l Stores, 329 Mass. 179, 107 N.E.2d 307 (1952); Murphy v. City of Tacoma, 60 Wash. 2d 603, 374 P.2d 976 (1962); W. PROSSER, *supra* note 3, § 37, at 206.

100. City of Scottsdale v. Kokaska, 17 Ariz. App. 120, 126, 495 P.2d 1327, 1333 (1972).

101. *See* 2 F. HARPER & F. JAMES, *supra* note 86, § 18.8.

102. *See* 23 Ariz. App. at 115, 530 P.2d at 1148.

103. One could argue that there was a debatable question in *Herderick*, fit for jury consideration, as to whether it should have been foreseeable to the patrolman that the occupants in the pursued vehicle might think he was someone other than a police officer and that they would be harmed by his failure to identify himself. Testimony showed that the patrolman watched as Herderick and the driver of the pursued car left a tavern,

Conclusion

In Arizona, a policeman has no specific statutory duty to warn or identify himself to an offending motorist he is pursuing. However, a policeman does have a general statutory duty of due regard to users of the highways, which is equivalent to the common law duty of due care. The *Herderick* court's analysis of the duty of due care owed by a patrolman to a pursued speeder illustrates a basic confusion in Arizona tort law over which elements of negligence should be determined by a test of foreseeability and the proper functions of judge and jury. Some of this confusion could be alleviated by recognizing that duty is not always a question for the court alone. It is the function of the court to determine whether foreseeability of harm creates a duty owed by the defendant to the plaintiff, but if there is a debatable question as to whether that harm is foreseeable, the question should be submitted to the jury on the issue of duty.

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argued heatedly with a third man, and then careened out of the parking lot, after repelling the third man's attempt to enter their car. Brief for Appellant at 2, Herderick v. State, 23 Ariz. App. 111, 530 P.2d 1144 (1975).

Some of the accidents which result in suits, such as the one in *Herderick*, might be avoided altogether by changes in police codes. Police codes vary from city to city on the question of when a police officer must employ his vehicle's siren and flashing lights. *See, e.g.*, City of Chicago Police Dep't, General Order 75-20 (III)(C) (Oct. 16, 1975) (on file in the *Arizona Law Review* office) (giving the officer discretion, weighing the risk of harm against the nature of the emergency); Phoenix Police Dep't, Operation & Maintenance of Dep't Vehicles, Order No. A-11(2)(C), (3)(A) (June 1, 1975) (on file in the *Arizona Law Review* office) (requiring use of siren and lights when responding to certain emergencies); Rules and Procedure Manual, § 6.05 (1975) (on file in the *Arizona Law Review* office) (requiring use of siren or lights whenever a police vehicle is engaging in an authorized emergency call).

XIV. WORKMEN'S COMPENSATION

A. WORKMEN'S COMPENSATION: COMPROMISE OF CLAIMS

The hazards encountered in modern industrial employment result in a staggering number of injuries and deaths.[1] Without some form of compensation, injured workers and their families face severe financial hardship. Early attempts to compensate employees for work-related injuries, utilizing general principles of tort law, were frustrated by traditional tort defenses.[2] Since the aggregate cost of ensuring that industrial injuries are compensated is extremely high,[3] the public must either provide support for the injured and their dependents through the public welfare system,[4] or require industry to pay the cost of the injuries. Thus, by the early 20th century, most states, opting for the latter, had enacted workmen's compensation laws[5] under which compensation is awarded to injured employees regardless of fault and without regard to common law defenses.[6]

As in other states, the Arizona procedure for receiving workmen's compensation benefits is extensively regulated by statute.[7] If compensation is elected,[8] it is the employee's exclusive remedy for an injury

1. *See* W. MALONE, M. PLANT & J. LITTLE, THE EMPLOYMENT RELATION 46 (1974). American industry takes over 16,000 lives every year. *Id. See also* Workmen's Compensation Bd. v. Abbott, 212 Ky. 123, 130, 278 S.W. 533, 537 (1925); S. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 2 (1944).

2. *See* S. HOROVITZ, *supra* note 1 (referring to contributory negligence, assumption of risk, and the fellow servant doctrine). *See also* 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 2.30 (1972); Note, *Arizona Pit Mine Safety Inspections: An Analysis of Legal Incentives*, 17 ARIZ. L. REV. 1024, 1028-29 (1975).

3. In 1963 an estimated 1.33 billion dollars was paid to workmen's compensation claimants in the United States. N. CARTER, WORKMEN'S COMPENSATION CLAIMS xi (1965).

4. *See* 1 A. LARSON, *supra* note 2, § 2.50.

5. By 1920, all but eight states had adopted a workmen's compensation act. *See id.* § 5.30, at 39.

6. "The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result." 1 A. LARSON, *supra* note 2, § 2.10, at 5. *See also* Red Rover v. Industrial Comm'n, 58 Ariz. 203, 210, 118 P.2d 1102, 1105 (1941).

7. *See* ARIZ. REV. STAT. ANN. §§ 23-901 to -1091 (1970 & Supp. 1976-77).

8. The protection of workmen's compensation is optional. *See* ARIZ. CONST. art. 18, § 8. An employee may preserve his right to bring a tort action against the employer if he expressly rejects workmen's compensation coverage in writing before any injury occurs; if he does nothing, he has elected compensation. *See* ARIZ. REV. STAT. ANN. § 23-906(B), (C) (Supp. 1976-77).

sustained in the course of employment.[9] The effect of such a statutory scheme is that the employee surrenders his right to sue for damages, in exchange for guaranteed benefits;[10] the amount of an award for a particular injury is fixed by statute.[11] The process of obtaining workmen's compensation is fairly simple. An injured employee first processes his claim through the employer's insurance carrier.[12] If the claim is rejected by the carrier, the employee may then contest the claim at a hearing before the Industrial Commission.[13] Where the employee's injury is compensable,[14] the Commission will instruct the carrier to pay the claim.[15] An employee who remains dissatisfied with the findings of the Commission may then appeal to the courts.[16]

Since the reorganization of the Industrial Commission in 1969, private insurers have been permitted to participate more extensively in the administration of the compensation system by collecting premiums and paying compensation, without substantial regulation by the Industrial Commission.[17] The insurers have used the opportunity to

9. *See* ARIZ. REV. STAT. ANN. § 23-1022 (Supp. 1976-77).

10. 1 A. LARSON, *supra* note 2, § 1.10, at 2.

11. *See* ARIZ. REV. STAT. ANN. §§ 23-1041 to -1047, -1062 (1970 & Supp. 1976-77).

12. *Id.* § 23-1061(G) (Supp. 1976-77). The carrier may pay compensation without the necessity of an award by the Industrial Commission. *Id.* As a safeguard, the Commission does make an independent determination of the employee's average monthly wage. *Id.* § 23-1061(F).

13. *Id.* § 23-941. The Industrial Commission's authorization to formulate rules of procedure is granted by *id.* § 23-107(A)(1). These rules supplement the procedure which is set forth in the Workmen's Compensation Act. Pursuant to these rules any interested party or authorized representative may request a hearing before the Industrial Commission. ARIZ. ADMIN. R. & REG. tit. 4, § R4-13-135 (1975). The chief hearing officer assigns the request to a presiding hearing officer who sets the matter for hearing. *Id.* § R4-13-138. The hearing is an informal proceeding before a hearing officer and is not governed by technical rules of procedure and evidence. *See* ARIZ. REV. STAT. ANN. § 23-941(F) (Supp. 1976-77). Additionally, the hearing officer can request an informal conference to resolve amicably the issues in controversy. ARIZ. ADMIN. R. & REG. tit. 4, § R4-13-120 (1975).

14. An employee must be injured by an accident arising out of and in the course of his employment for it to be compensable under the Act. ARIZ. REV. STAT. ANN. § 23-1021 (1970).

15. *See id.* § 23-943(f), 944 (1970 & Supp. 1976-77).

16. *Id.* § 23-951 (Supp. 1976-77). An appeal cannot be taken from an award of a hearing officer of the Industrial Commission; review must be had at the Commission level first. Ross v. Industrial Comm'n, 20 Ariz. App. 353, 354, 513 P.2d 143, 144 (1973). An appeal from the final agency action bypasses the superior court and goes directly to the court of appeals upon a writ of certiorari. *See* ARIZ. REV. STAT. ANN. § 23-951 (Supp. 1976-77). Awards are reviewed in the same manner as judgments of the superior courts and are not modified; they are only affirmed or set aside. Red Rover Copper Co. v. Industrial Comm'n, 58 Ariz. 203, 212, 118 P.2d 1102, 1106 (1941); ARIZ. REV. STAT. ANN. § 23-951(D) (Supp. 1976-77).

17. *See* King, *Reorganization of the Industrial Commission*, 10 ARIZ. L. REV. 371, 372-73 (1968). Prior to reorganization of the Industrial Commission in 1969, the Commission "operated a state insurance company, made initial compensation awards, adjudicated contested claims, and regulated private insurance carriers writing workmen's compensation insurance." *Id.* at 372. *See* ch. 83, §§ 30-39, 55, [1925] Ariz. Sess. Laws 345. Since the Commission could not award compensation at less than the fixed statutory amount, settlement of compensation claims between the insurer and the insured worker by compromise was forbidden. Doby v. Miami Trust Co., 39 Ariz. 228, 236, 5 P.2d 187, 190 (1931). For a discussion of the 1969 amendments to the Workmen's

initiate a system of compromise to settle particularly troublesome claims.[18] Although many of these compromises were not reported,[19] their existence was evident when the request for hearing or the claim itself was withdrawn by one of the parties prior to a determination of compensability by the Commission.[20] This process created a conflict, since there is no express statutory provision allowing the Commission to approve compromise agreements between an employee and the carrier.[21] Furthermore, due to the remedial nature of the workmen's compensation system, it has been held that a compromise agreement entered into after a claim has been found to be compensable is unenforceable.[22] The jurisdiction of the Commission over compromises made prior to a determination of compensability, however, remained uncertain until *Gray v. Industrial Commission.*[23]

In *Gray*, the claimant allegedly suffered a heart attack at work.[24] He filed a claim for benefits with his employer's insurance carrier, which denied the claim.[25] Later, however, Gray, his employer, and the carrier reached a compromise agreement which they submitted to the Industrial Commission for approval.[26] The Commission refused to approve or disapprove the compromise settlement, asserting that it lacked jurisdiction except to determine compensability.[27] Gray ap-

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Compensation Act, see Marks, *The 1969 Amendments to the Arizona Workmen's Compensation Act from the Compensation Insurer's Point of View*, 5 ARIZ. B.J., Sept., 1969, at 5.

18. In 1974, one of the Industrial Commission's hearing officers formally noted that compromises, which had been going on for the previous four years, were increasing in number, despite their questionable validity. *See* Vigil v. Industrial Comm'n, 24 Ariz. App. 496, 498, 539 P.2d 970, 972 (1975).

19. For example, one large insurance company was taken to task by the Arizona court of appeals for attempting to usurp the exclusive statutory power and duty of the Commission by endeavoring to make an untimely settlement outside the provisions of the law and without the knowledge or approval of the Commission. Travelers Ins. Co. v. Industrial Comm'n, 21 Ariz. App. 298, 300, 518 P.2d 1015, 1017 (1974). *See* Vigil v. Industrial Comm'n, 24 Ariz. App. 496, 498, 539 P.2d 970, 972 (1975).

20. Vigil v. Industrial Comm'n, 24 Ariz. App. 496, 498, 539 P.2d 970, 972 (1975). In contrast to this tacit acknowledgement of compromises, the *Gray* and *Vigil* cases forced the Industrial Commission to formally approve or disapprove the agreements since they were submitted to the Commission for approval. *See* Vigil v. Industrial Comm'n, *supra* at 497, 539 P.2d at 971; text & notes 24-32 *infra.*

21. *But see* discussion text & notes 34-40 *infra.* Workmen's compensation is a statutory remedy which cannot be extended beyond the terms of the statute creating it. Danner v. Industrial Comm'n, 54 Ariz. 275, 283, 95 P.2d 53, 56 (1939); Kay v. Hillside Mines, Inc., 54 Ariz., 36, 40, 91 P.2d 867, 869 (1939); Sorenson v. Six Cos., Inc., 53 Ariz. 83, 89-90, 85 P.2d 980, 982-83 (1939).

22. Travelers Ins. Co. v. Industrial Comm'n, 21 Ariz. App. 298, 299, 518 P.2d 1015, 1016 (1971). An additional restriction, imposed by the Industrial Commission itself, is that no settlement will be recognized as valid unless approved by the Commission. ARIZ. ADMIN. R. & REG. tit. 4, § R4-13-120 (1975).

23. 24 Ariz. App. 499, 539 P.2d 973 (1975), *aff'd per curiam*, 113 Ariz. 296, 552 P.2d 766 (1976).

24. *Id.* at 500, 539 P.2d at 974.

25. *Id.*

26. *Id.* Thus, the Industrial Commission was forced to take a stand on the issue of compromise.

27. *Id.* The Industrial Commission, subsequent to the compromise, denied com-

pealed on the issue of the Commission's jurisdiction to approve or disapprove a compromise settlement of a workmen's compensation claim.[28] The court of appeals, in an opinion affirmed and adopted by the Arizona supreme court,[29] set aside the award of no compensation, and ruled that the Commission had jurisdiction to approve the settlement since the compensability of the claim was a matter of genuine dispute.[30] The court found statutory authorization for compromise in a general labor statute,[31] and adopted a procompromise philosophy.[32]

This casenote will discuss the validity of workmen's compensation compromise agreements under Arizona constitutional, statutory, and decisional law. First, the constitutional and statutory bases of the *Gray* court's conclusion that compensation claims may be compromised in some situations will be analyzed. Second, the conflicting public policies favoring and prohibiting compromise will be discussed to determine which position best serves the purposes of the workmen's compensation scheme.

Statutory and Constitutional Bases for Compromise

Express authorization for compromise of claims is extremely important in the workmen's compensation context, since the right to compensation is completely statutory in nature.[33] In *Gray*, however, the Arizona supreme court gave little attention to this principle. Holding that the Industrial Commission had jurisdiction to approve compromise agreements, the *Gray* court relied on Arizona Revised Statutes section 23-107(A)(3),[34] contained in the introductory chapter to Arizona's labor statutes,[35] which provides: "The commission has full power, jurisdiction and authority to . . . [p]romote the voluntary arbitration, mediation and conciliation of disputes between employers

pensability of Gray's claim, on the ground that he had not sustained his burden of showing that the heart attack was work-related. *Id.*

28. *See* Brief for Petitioner at 8, Gray v. Industrial Comm'n, 24 Ariz. App. 499, 539 P.2d 973 (1975), *aff'd per curiam*, 113 Ariz. 296, 552 P.2d 766 (1976).

29. 113 Ariz. 296, 552 P.2d 766 (1976) (per curiam).

30. 24 Ariz. App. at 503, 539 P.2d at 977.

31. *See* ARIZ. REV. STAT. ANN. § 23-107(A)(3) (Supp. 1976-77).

32. *See* 24 Ariz. App. at 502-03, 539 P.2d at 976-77. The court adopted verbatim the procompromise discussion of Brigham Young Univ. v. Industrial Comm'n, 74 Utah 349, 360-61, 279 P. 889, 893 (1929). 24 Ariz. App. at 502-03, 539 P.2d at 976-77.

33. *See, e.g.*, Pressley v. Industrial Comm'n, 73 Ariz. 22, 31, 236 P.2d 1011, 1017 (1951); Sorenson v. Six Cos., Inc., 53 Ariz. 83, 89-90, 85 P.2d 980, 982-83 (1939); Industrial Comm'n v. Arizona Power Co., 37 Ariz. 425, 439, 295 P. 305, 310 (1931).

34. ARIZ. REV. STAT. ANN. § 23-107(A)(3) (Supp. 1976-77); *see* 24 Ariz. App. at 501, 539 P.2d at 975.

35. This statute is found in chapter 1 of title 23, which spells out the general powers, duties, and jurisdiction of the Industrial Commission. ARIZ. REV. STAT. ANN. §§ 23-101 to -109 (1970 & Supp. 1976-77). The Workmen's Compensation Act, although administered under the auspices of the Industrial Commission, is found in Chapter 6 of Title 23. *Id.* §§ 23-901 to -1091 (1970 & Supp. 1976-77).

and employees."[36] The court found three arguments persuasive in holding the statute applicable to compromise settlements where the claim has not been accepted under the Arizona Workmen's Compensation Act. Initially, it relied on dicta in *Goodrich v. Industrial Commission*,[37] to the effect that case law permits such compromise settlements.[38] Additionally, the court adopted the reasoning and language of the Utah supreme court which long ago reached the same conclusion.[39] Finally, the *Gray* court analogized to the general legal policy promoting amicable settlements.[40]

There are more compelling arguments, however, indicating that reliance on section 23-107(A)(3) is misplaced. First, the statute does not appear particularly applicable to the workmen's compensation area. The language of the provision is more suited to the area of collective bargaining.[41] Second, the statute is part of a grant of general powers to the Industrial Commission, authorizing the Commission to administer a broad range of employer-employee relations.[42] The Commission is charged with the enforcement of virtually all of the state's labor laws;[43] its purpose is not limited to the administration of workmen's compensation. Thus, when viewed in its proper context, it can be inferred that the statute is designed primarily for use by the Industrial Commission in settling conventional labor disputes, rather than a jurisdictional grant over compromised compensation claims.[44] A majority of other jurisdictions that permit compromise do so by express statutory authorization and do not rely on a vague, general provision such as

36. *Id.* § 23-107(A)(3) (Supp. 1976-77).
37. 13 Ariz. App. 402, 477 P.2d 276 (1970).
38. "We feel that the Commission then may approve a compromise or lump-sum settlement prior to the time that the Commission has taken any action accepting the claim." *Id.* at 404, 477 P.2d at 278, *quoted in* 24 Ariz. App. at 501, 539 P.2d at 975.
39. *See* Brigham Young Univ. v. Industrial Comm'n, 74 Utah 349, 360-61, 279 P. 889, 893 (1929), *quoted in* 24 Ariz. App. at 502-03, 539 P.2d at 976-77.
40. 24 Ariz. App. at 503, 539 P.2d at 977.
41. The function of the Industrial Commission for purposes of workmen's compensation does not fit within the ambit of any of the functions the Commission is generally authorized to perform under ARIZ. REV. STAT. ANN. § 23-107(A)(3) (Supp. 1976-77). Arbitration, mediation, and conciliation are all adversary procedures whereby parties to a controversy select or accept the active interference of an impartial third party to settle the dispute. *See* Gates v. Arizona Brewing Co., 54 Ariz. 266, 269, 95 P.2d 49, 50 (1939); BLACK'S LAW DICTIONARY 134, 361, 1133 (4th ed. 1951). The function of an arbitrator, mediator, or conciliator is to settle a dispute as amicably as possible, most often by encouraging each of the parties to compromise his position. Although such a role may be appropriate for the Industrial Commission in other contexts, it is certainly inappropriate to workmen's compensation, primarily because the right to, and the amount of compensation are explicitly set out in the statute. *See* ARIZ. REV. STAT. ANN. § 23-1021 (1970).
42. These include employee health, safety, and welfare, regulation of private employment offices, and publication of employment opportunities. ARIZ. REV. STAT. ANN. § 23-107(A)(2), (4), (5) (Supp. 1976-77).
43. *See id.* § 23-107(A)(2).
44. *See* Brief for Respondent at 12, Gray v. Industrial Comm'n, 24 Ariz. App. 499, 539 P.2d 973 (1975), *aff'd per curiam*, 113 Ariz. 296, 552 P.2d 766 (1976).

that found conclusive in *Gray*.[45] The inherent ambiguity of section 23-107(A)(3) when applied to workmen's compensation renders it enervative justification for validating compromise agreements and should not have been held to control over a more explicit provision supporting a contrary conclusion.[46]

The Workmen's Compensation Act itself contains a provision which arguably precludes a holding that compromise of a compensation claim is permitted in Arizona. Although its meaning is somewhat obscure, Arizona Revised Statutes section 23-1025 expressly prohibits waiver of compensation.[47] There are three possible interpretations as to the time in the compensation process when this statute applies. The first interpretation is an extremely narrow view, applying the no waiver provision only to the preinjury situation.[48] This view is arrived at by reading the statute as a whole, for in addition to the provision forbidding waiver of compensation there is a provision in the statute forbidding any payment of the employer's compensation premiums by the employee.[49] Under the narrow view, the statute is intended only to prevent an employer from attempting to evade his duty to provide coverage; the employer may neither require an employee to waive compensation as a condition of employment nor may he shift the responsibility for premium payments.[50] Under this interpretation the no waiver provision applies only to the preinjury situation and thus has no application to postinjury compromise.

45. *See, e.g.*, CAL. LAB. CODE §§ 5000-5001 (West 1971); TEX. REV. CIV. STAT. art. 8307 § 12 (1967); WIS. STAT. ANN. § 102.16 (1973). These statutes generally state that where the liability is uncertain, the board may approve any compromise or settlement made between the parties. The Wisconsin statute provides the additional protection of a later review of the compromise at the option of the employer, employee, or Commission, within 1 year of the original settlement. *See also* SCHNEIDER'S WORKMEN'S COMPENSATION § 1867, at 520 (1951). A minority of jurisdictions will allow compromise without specific statutory authorization. *See* Ruehmann v. Consumers' Ice & Fuel Co., 192 Minn. 596, 257 N.W. 501 (1934); Brigham Young Univ. v. Industrial Comm'n, 74 Utah 349, 279 P. 889 (1929).

46. An Arizona court has held that the general power of the Industrial Commission to promote voluntary arbitration, mediation, and conciliation of disputes between employers and employees, under ARIZ. REV. STAT. ANN. § 23-107(A)(3) (Supp. 1976-77), does not override the specific provisions of *id.* § 23-1067, limiting the amount of lump-sum payments for workmen's compensation. Goodrich v. Industrial Comm'n, 13 Ariz. App. 402, 405, 477 P.2d 276, 279 (1970). *See also* Doby v. Miami Trust Co., 39 Ariz. 228, 5 P.2d 187 (1931).

47. ARIZ. REV. STAT. ANN. § 23-1025 (Supp. 1976-77).

48. *See* 3 A. LARSON, *supra* note 2, § 82.32, at 15-559.

49. ARIZ. REV. STAT. ANN. § 23-1025 (Supp. 1976-77). Because of the possibility that employers would require employees to pay the premiums, and thus defeat the intent of the compensation system, a misdemeanor is imposed for deducting premiums from employee wages. *See id.* § 23-967 (1970).

50. *Cf.* Industrial Comm'n v. Meddock, 65 Ariz. 324, 180 P.2d 580 (1947) (the employer used an escape device in a cleverly drawn contract in an endeavor to circumvent the legal responsibility to provide coverage for his employees); Red Rover Copper Co. v. Industrial Comm'n, 58 Ariz. 203, 206, 118 P.2d 1102, 1103 (1941) (employer fraudulently persuaded employee to opt out of workmen's compensation coverage by misrepresenting his insurance coverage).

A second possible interpretation of the statute is that an employee with a compensable injury, can never accept less than full statutory compensation.[51] In a majority of jurisdictions, provisions prohibiting waiver are given this broad reading.[52] They have been interpreted to forbid an employee's agreement to take less than the statutory benefits both before and after the claim has arisen.[53] The reason supporting the majority position is that since the compensation system is completely statutory, and the statutes impart no flexibility, the state compensation agency has no power to approve any agreement which does not conform to statute.[54] Prior to *Gray*, there existed a strong argument that this interpretation would be applied in Arizona. In *Travelers Insurance Co. v. Industrial Commission*[55] the statute was construed to prohibit compromise after a finding of compensability. Thus the statutory prohibition of waiver was extended beyond the preinjury situation to preclude a postaward settlement.[56]

The *Gray* court took a third, selective application approach. Although acknowledging that compromise is prohibited after compensability has been determined, it found no prohibition of settlement when compensability is in dispute.[57] The *Gray* opinion reflects a view, taken in a minority of jurisdictions, which considers the statutory term "waiver" inapplicable to the settlement process.[58] This view recognizes

51. *See* Travelers Ins. Co. v. Industrial Comm'n, 21 Ariz. App. 298, 518 P.2d 1015 (1974).

52. *See, e.g.*, International Coal & Mining Co. v. Industrial Comm'n, 293 Ill. 524, 127 N.E. 703 (1920); Workmen's Compensation Bd. v. Abbott, 212 Ky. 123, 133, 278 S.W. 533, 538 (1925); Nagy v. Ford Motor Co., 6 N.J. 341, 348-49, 78 A.2d 709, 712-13 (1951). Although the exact wordings of the no waiver statutes vary from state to state, they generally provide that: "No agreement by an employee to waive his rights to compensation under this title shall be valid." 3 A. LARSON, *supra* note 2, § 82.32, at 15-559. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1025 (Supp. 1976-77); R.I. GEN. LAWS ANN. § 28-33-26 (1968); UTAH CODE ANN. § 35-1-90 (1974).

53. *See, e.g.*, Workmen's Compensation Bd. v. Abbott, 212 Ky. 123, 135-36, 278 S.W. 533, 539 (1925) (compromise after claim arose forbidden because it might result in early recourse to welfare which systematic compensation seeks to avoid); Ruehmann v. Consumers' Ice & Fuel Co., 192 Minn. 596, 599, 257 N.W. 501, 502 (1934) (agreement after claim arose for the employee to take less compensation than is provided by law is invalid); Walker v. Comerford, 29 App. Div. 2d 245, 247, 287 N.Y.S.2d 185, 187 (1968) (compromise after claim arose legally void and does not bar subsequent compensation recovery); Jenkins v. T. Hogan & Sons, 177 App. Div. 36, 40, 163 N.Y.S. 707, 709-10 (1917) (purpose of the no waiver provision is for the protection of the employee and a compromise settlement after claim arose is invalid). *See also* Nagy v. Ford Motor Co., 6 N.J. 341, 348, 78 A.2d 709, 712 (1951).

54. *See, e.g.*, International Coal & Mining Co. v. Industrial Comm'n, 293 Ill. 524, 528, 127 N.E. 703, 705 (1920); Workmen's Compensation Bd. v. Abbott, 212 Ky. 123, 133, 278 S.W. 533, 538 (1925); Nagy v. Ford Motor Co., 6 N.J. 341, 348-49, 78 A.2d 709, 712-13 (1951).

55. 21 Ariz. App. 298, 518 P.2d 1015 (1974).

56. *Id.* at 299, 518 P.2d at 1016.

57. 24 Ariz. App. at 503, 539 P.2d at 977.

58. *See* Hartford Accident & Indem. Co. v. Industrial Comm'n, 320 Ill. 544, 545-46, 151 N.E. 495-96 (1926); Brigham Young Univ. v. Industrial Comm'n, 74 Utah 349, 360-61, 279 P. 889, 892-93 (1929). Some jurisdictions following the minority rule, however, have both no waiver statutes and statutes which authorize compromise, so that the no waiver statutes must be construed in a more limited fashion to avoid any conflict. *See*

that workmen's compensation is the insured employee's exclusive remedy for work-related injuries, and that benefits can only be obtained through the applicable compensation laws.[59] The minority rule holds, however, that in compromising a claim to compensation, the employee's rights are asserted, not waived.[60] The jurisdictions that take this approach interpret the no waiver provision to mean only that an employee cannot contract away his compensation rights before injury as a condition of employment,[61] or after a determination that the claim is compensable.[62] This view is more easily justified in jurisdictions where, in addition to the no waiver provision, there is an express statutory authorization for compromise.[63] In such a jurisdiction, to hold that the no waiver statute prohibits compromise would result in the nullification of the statute permitting compromise.[64] Although Arizona does not have a statute authorizing compromise, the *Gray* court chose the minority position,[65] relying solely on *Brigham Young University v. Industrial Commission*.[66]

In addition to the no waiver statute, the Arizona constitution discourages compromise in its general policy as well as in its specific language.[67] The objective of the workmen's compensation system, as stated in the constitution, is to insure a just and humane method

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Workmen's Compensation Bd. v. Abbott, 212 Ky. 123, 133, 278 S.W. 533, 538 (1925); Sarrasin v. Crescent Co., 104 R.I. 69, 74-75, 241 A.2d 818, 820-21 (1968). *See also* Jenkins v. Texas Employers' Ins. Ass'n, 211 S.W. 349, 350 (Tex. Civ. App. 1919). There are jurisdictions, utilizing the *Gray* reasoning, which limit the applicability of the no waiver statute even without statutory authorization for compromise. *See* Ruehmann v. Consumers' Ice & Fuel Co., 192 Minn. 596, 257 N.W. 501 (1934); Brigham Young Univ. v. Industrial Comm'n, *supra*.

59. 24 Ariz. App. at 502, 539 P.2d at 976; Brigham Young Univ. v. Industrial Comm'n, 74 Utah 349, 360-61, 279 P. 889, 892-93 (1929).

60. 24 Ariz. App. at 502, 539 P.2d at 976; *see* 3 A. LARSON, *supra* note 2, § 82.32, at 15-559.

61. *See* Black v. Panhandler & Santa Fe Ry., 222 F. Supp. 308, 312 (E.D. Okla. 1963), *aff'd sub nom.* Black v. Texas Employers Ins. Ass'n, 326 F.2d 603 (10th Cir. 1964); Workmen's Compensation Bd. v. Abbott, 212 Ky. 123, 278 S.W. 533 (1925).

62. 24 Ariz. at 502-03, 539 P.2d at 976-77; *see* Travelers Ins. Co. v. Industrial Comm'n, 21 Ariz. App. 298, 299, 518 P.2d 1015, 1016 (1974); Goodrich v. Industrial Comm'n, 13 Ariz. App. 402, 404, 477 P.2d 276, 278 (1970); Brigham Young Univ. v. Industrial Comm'n, 74 Utah 349, 360-61, 279 P. 889, 892-93 (1929).

63. *See* Workmen's Compensation Bd. v. Abbott, 212 Ky. 123, 278 S.W. 533 (1925); Sarrasin v. Crescent Co., 104 R.I. 69, 241 A.2d 818 (1968); Jenkins v. Texas Employers' Ins. Ass'n, 211 S.W. 349 (Tex. Civ. App. 1919).

64. *See* cases cited note 63 *supra*.

65. 24 Ariz. App. at 503, 539 P.2d at 977.

66. 74 Utah 349, 279 P. 889 (1929); *see* 24 Ariz. App. at 503, 539 P.2d at 977.

67. ARIZ. CONST. art. 18, § 8 provides:

> [I]n order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, and producing uncertain and unequal compensation therefor, such employee, engaged in such private employment, may exercise the option to settle for compensation by failing to reject the provisions of such Workmen's Compensation Law prior to the injury.

of compensating the worker for job-related injuries.[68] The system is designed to be protective of the injured employee and deliberately favors him in the compensation process.[69] If compromise settlements are allowed to take place, there will be situations where the insurance company will accomplish settlement solely because the employee doubts the compensability of his claim. In these situations, the employee's insecurity is taken advantage of, and the constitutional duty of protection owed by the state to the employee will be breached. The result will be "uncertain and unequal compensation,"[70] frustrating the clear constitutional policy.[71] Conversely, the Arizona constitution evinces an intention to benefit only those injuries which arise from the employment relation.[72] Reading such a requirement literally, a determination of compensability seems to be a prerequisite to an award of benefits. Once that determination is made in the affirmative, an award of statutory benefits is mandatory.[73] The opposite is also true; once an injury is determined not to be compensable, statutory benefits are prohibited.[74] Approval of benefits which are less than the statutory amount, without a determination that the accident arose out of or in the course of employment, directly contradicts the language and intent of the Arizona constitution.[75]

It is clear from a literal reading of the Arizona constitutional provision and statutes governing workmen's compensation that compromise lacks explicit approval, and violates the intent and purposes of the compensation system. In addition to the question of statutory interpretation, the decision to allow compromise involves serious public policy considerations, which will now be discussed.

Public Policy Considerations

The basic purpose of the workmen's compensation statutes is to implement a recognized public policy,[76] the theory being that each

68. *Id.*; *see* Red Rover Copper Co. v. Industrial Comm'n, 58 Ariz. 203, 118 P.2d 1102 (1941).

69. Pressley v. Industrial Comm'n, 73 Ariz. 22, 236 P.2d 1101 (1951).

70. ARIZ. CONST. art. 18, § 8.

71. *Id.* For the full text of the section, see note 67 *supra*. *See* 3 A. LARSON, *supra* note 2, § 82.41.

72. ARIZ. CONST. art. 18, § 8. *See* Red Rover Copper Co. v. Industrial Comm'n, 58 Ariz. 203, 118 P.2d 1102 (1941); ARIZ. REV. STAT. ANN. § 23-1021 (1970).

73. *See* ARIZ. REV. STAT. ANN. § 23-1021(A) (1970).

74. Doby v. Miami Trust Co., 39 Ariz. 228, 236, 5 P.2d 187, 190 (1931). "If a petitioner has not established under the rules of law applicable to such cases that he is entitled to compensation, the commission has no jurisdiction to award him one penny." *Id. See generally* ARIZ. REV. STAT. ANN. §§ 23-942 to -943 (Supp. 1976-77).

75. ARIZ. CONST. art. 18, § 8. For the full text of the section, see note 67 *supra*. *See* Doby v. Miami Trust Co., 39 Ariz. 228, 5 P.2d 187 (1931).

76. Chief Justice Alfred Lockwood of the Arizona supreme court, writing some of the early Arizona compensation opinions, reviewed the history and purposes of workmen's compensation, ensuring that his opinions implemented the spirit as well as the

time an employee is killed or injured there is an economic loss which must be compensated.[77] Since most industrial accidents are attributable to the inherent risk of employment, the loss should be borne by industry.[78] Thus, a sum fixed by law is set aside to compensate the employee for losing the right to earn a livelihood, which, but for the accident, he would have earned.[79] An understanding of this principle is especially important in determining whether to permit compromise prior to a determination of compensability, since it affects the interests of the employee, the employer, the insurance carrier, and society as a whole. As the *Gray* court recognized, the dispute is essentially one of public policy.[80]

There are two basic lines of reasoning which are given as justification for the employee's right to compromise his claim prior to a determination of compensability. The first is that an individual has an inherent right to settle his own dispute.[81] This argument is based on the freedom of contract principle justifying the compromise of a tort claim,[82] and holds the state's interest in regulating compromise in workmen's compensation cases insufficient to overcome this right.[83] State encroachment on the freedom to contract is considered paternalistic because it treats the injured employee as a ward.[84] Since compensation statutes do not specifically invalidate compromise agreements, the argument continues that a settlement should only be invalidated upon a finding of fraud, mistake, or deceit.[85]

The history of workmen's compensation, however, indicates that

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letter of the law. *See* Red Rover Copper Co. v. Industrial Comm'n, 58 Ariz. 203, 118 P.2d 1102 (1941); Ossic v. Verde Cent. Mines, 46 Ariz. 176, 49 P.2d 396 (1935). In *Ossic*, he discussed specifically the court's role in this regard:

> While we may not violate the clear language of the act, merely because in our opinion we think some other provisions would have been wiser, yet where there is any reasonable doubt as to the construction to be given it, either in part or in whole, that construction should be adopted which will best effect the purpose of seeing that the injured workman is reasonably compensated for the loss of his earning power caused by the injuries which he has sustained through a compensable accident.

Id. at 186-87, 49 P.2d at 401.

77. Ossic v. Verde Cent. Mines, 46 Ariz. 176, 185-86, 49 P.2d 396, 400 (1935), *quoting* State *ex rel.* Munding v. Industrial Comm'n, 92 Ohio St. 434, 450, 111 N.E. 299, 303 (1917).

78. Ossic v. Verde Cent. Mines, 46 Ariz. 176, 186, 49 P.2d 396, 400 (1935).

79. *Id.* at 186, 49 P.2d at 401.

80. *See* 24 Ariz. App. at 502, 539 P.2d at 976.

81. *See* Jenkins v. Texas Employers' Ins. Ass'n, 211 S.W. 349, 350 (Tex. Civ. App. 1919).

82. *See* Hartford Accident & Indem. Co. v. Industrial Comm'n, 320 Ill. 544, 545-46, 151 N.E. 495, 496 (1926).

83. Brigham Young Univ. v. Industrial Comm'n, 74 Utah 349, 354, 279 P. 889, 893 (1929).

84. Dotson v. Proctor & Gamble Mfg. Co., 102 Kan. 248, 250, 169 P. 1136, 1137 (1918).

85. Brigham Young Univ. v. Industrial Comm'n, 74 Utah 349, 354, 279 P. 889, 893 (1929).

it is an alternative to, and not a companion of tort liability.[86] Failure to draw this distinction may result in a reversion to the uncertainties of the tort law,[87] and a weakening of the remedial effects of the workmen's compensation system. Unlike the tort system, the scheme of workmen's compensation is one in which the injured employee is deliberately favored.[88] The awarding of workmen's compensation is not meant to turn on determinations of fault as in the tort system.[89] Since allowing an injured employee to settle his own disputes by compromise is a reflection of the influence of tort law,[90] it appears to be an inappropriate remedy in the workmen's compensation context.

A second policy argument opposing employee settlements centers around the public's interest in the funding mechanism of the compensation scheme. The public indirectly funds the workmen's compensation system, as the employer passes on the cost of the insurance coverage to the consumer, through an increased cost of the product or service.[91] The public expects that in return for the payment of higher

86. *See* Ossic v. Verde Cent. Mines, 46 Ariz. 176, 49 P.2d 396 (1935) where the court explained:

> Workmen's Compensation Acts are an outgrowth of theories of economics developed during the last fifty years. During the Eighteenth and most of the Nineteenth Centuries, legislators and courts alike believed that the doctrine of laissez faire was the fundamental principle of all economic relations, including that of employer and employee, and that the only protection permitted to or required by an employee in case of death or accident as a result of his employment was the common-law right pertaining to all persons injured through the negligence of another. But little protection as such right commonly gave, it was even more limited by the enunciation of the doctrines commonly called "assumption of risk" and "fellow servant rule." The practical effect of these principles was that in all except the rarest cases the employee alone bore the burden of loss occasioned by his injuries. These rules, although harsh, were perhaps fairly workable in primitive times before the industrial revolution came into full effect, but as time went on and the units of production became larger and larger, their practical working results were so inherently and obviously unjust as to awaken a revolt in the minds of all who were not blinded by their immediate selfish interests, and this revolt culminated in the employers' liability and workmen's compensation laws now practically universal in Western Europe and found in almost every state in the Union.

Id. at 184-85, 49 P.2d at 400. *See also* discussion text & notes 2, 6 *supra.*

87. *See* Bendler v. Bendler, 3 N.J. 161, 167-68, 69 A.2d 302, 305 (1949); 1 A. LARSON, *supra* note 2, § 1.20, at 2-3; *cf.* Red Rover Copper Co. v. Industrial Comm'n, 58 Ariz. 203, 118 P.2d 1102 (1941).

88. *See* State v. Pressley, 74 Ariz. 412, 418, 250 P.2d 992, 996 (1952); Ossic v. Verde Cent. Mines, 46 Ariz. 176, 185-86, 49 P.2d 396, 400-01 (1935); Stell v. Industrial Comm'n, 23 Ariz. App. 167, 168, 531 P.2d 543, 544 (1975). Although these cases recognize that workmen's compensation law should be construed in the employee's favor, the difficulty with this approach in the instant case is determining which view really favors the employee. The freedom of contract approach may give the employee greater choice, but may also subject him to greater manipulation. *See* discussion text & notes 105-12 *infra*; see discussion in text at notes 69-71 *supra.* The no compromise view, on the other hand, affords the employee greater protection by requiring full statutory compensation for all compensable injuries, but only at the risk of being denied compensation entirely.

89. *See* discussion text & note 6 *supra.*

90. *See* Nagy v. Ford Motor Co., 6 N.J. 341, 350, 78 A.2d 709, 713 (1951); Bendler v. Bendler, 3 N.J. 161, 167-69, 69 A.2d 302, 305 (1949).

91. *See* 3 A. LARSON, *supra* note 2, § 82.40, at 15-561; W. MALONE, M. PLANT & J. LITTLE, *supra* note 1, at 47.

prices, neither employees injured in the scope of employment nor their families will be forced to become public wards.[92] The public has a right to expect also that only those employees that are statutorily eligible for compensation actually receive it; it is for those individuals that the public is willing to bear the ultimate economic burden. Allowing employees to recover under workmen's compensation for injuries that did not occur in the course and scope of employment would greatly undermine the public policy of the compensation system. Hence it is the public policy of the state to see that full benefits are fairly awarded,[93] but only to those who meet the statutory qualifications.[94] Compromise settlement, giving a person with a compensable claim less than the statutory amount, or granting even minimal benefits to an individual with a noncompensable claim, frustrates this policy, and gives the public something less than it bargained for.[95]

The second argument recognized by the *Gray* court in support of employee compromises is that the public interest is served by allowing claim settlement, thus reducing litigation and its attendant costs.[96] In general litigation, public policy usually does encourage the amicable settlement of disputes whenever possible.[97] The supreme court in *Gray* applied this reasoning to workmen's compensation disputes by permitting insurance carriers and injured employees to settle disputed claims without litigation.[98] This approach, however, does not accord sufficient weight to the fact that the compensation boards were created in order to resolve those very disputes which usually form the basis of compromise.[99] Essentially, workmen's compensation is a statutory remedy, the cornerstone of which is compensability. Unless the claimant can demonstrate that his claim is compensable, the Commission should have no jurisdiction to award him compensation benefits.[100]

92. Industrial Comm'n v. Oden, 68 Ariz. 234, 239, 204 P.2d 849, 852 (1949). However, unlike tort recovery, workmen's compensation does not restore to the employee that which he lost. Full statutory compensation is generally barely sufficient to keep the worker from destitution. 3 A. LARSON, *supra* note 2, § 2.50, at 11. *See* Home Accident Ins. Co. v. Industrial Comm'n, 34 Ariz. 201, 211-12, 269 P. 501, 504 (1928).

93. *See* Whipple v. Industrial Comm'n, 59 Ariz. 1, 7, 121 P.2d 876, 878 (1942); Atkinson Kier Bros. v. Industrial Comm'n, 35 Ariz. 48, 54, 274 P. 634, 636 (1929); 3 A. LARSON, *supra* note 2, § 82.40, at 15-561.

94. *See* Doby v. Miami Trust Co., 39 Ariz. 228, 238, 5 P.2d 187, 191 (1931).

95. *See* 3 A. LARSON, *supra* note 2, § 82.41, at 15-562.

96. 24 Ariz. App. at 503, 539 P.2d at 977; *see* Brigham Young Univ. v. Industrial Comm'n, 74 Utah 349, 361, 279 P. 889, 893 (1929).

97. 24 Ariz. App. at 503, 539 P.2d at 977; *see* Dansky v. Buck, 92 Ariz. 1, 11, 373 P.2d 1, 8 (1962); Little v. Brown, 40 Ariz. 206, 208-09, 11 P.2d 610, 611 (1932).

98. 24 Ariz. App. at 503, 539 P.2d at 977.

99. *See* 3 A. LARSON, *supra* note 2, § 82.42, at 15-562.

100. [N]o matter how doubtful the evidence or how difficult the conclusion is, the issue must be met and the decision made. If a petitioner has not established under the rules of law applicable to such cases that he is entitled to compensation, the commission has no jurisdiction to award him one penny.

Doby v. Miami Trust Co., 39 Ariz. 228, 236, 5 P.2d 187, 190 (1931).

Moreover, while reduction of litigation is generally a legitimate state objective, it is inappropriate in regard to workmen's compensation where even today the number of contested cases handled by the courts is relatively small when compared to the total number of claims handled by state compensation agencies.[101] Out of those cases which are contested, the agency procedure disposes of most of the purely factual disputes;[102] only a few of the total compensation claims ever reach the courts.[103] Since the potential reduction in litigation of compensation controversies is highly speculative, this consideration must be weighed against the potential adverse consequences of permitting an injured employee to accept payment in an amount other than that required by statute.

The statutory benefits are designed to guarantee the employee a certain minimum level of compensation; a compromise of the amount of those benefits jeopardizes the purpose of compensation in that it threatens to force the injured employee to rely on public assistance.[104] Compromise is a bargaining process whereby differences are settled by mutual consent; the hope of gaining is weighed against the danger of losing.[105] Pressures are brought to bear on both the insurance company and the employee. The insurance companies are under normal business pressures from their stockholders to maintain profits by minimizing their awards.[106] To that end, they use professionals in the bargaining process to effect the lowest possible settlements.[107] The interests of the claimant, on the other hand, compel him to attempt to obtain the highest possible compensation. The compulsion resulting

101. Only about one-tenth to one-fifteenth of all claims are even contested at the agency or judicial level. *See* 3 A. LARSON, *supra* note 2, § 82.10, at 15-555.

102. In 1975 there were approximately 126,600 total claims filed with the Industrial Commission. Of those claims, 25,400 were serious, time lost claims. Of the total claims, 3,213 were contested before hearing officers 2,527 of which were resolved. Only 165 claims were appealed to the courts. Interview with Robert D. Steckner, Chief Hearing Officer of the Arizona Industrial Commission, in Tucson, Arizona, Nov. 19, 1976.

103. *See* 3 A. LARSON, *supra* note 2, § 82.10, at 15-555. The intent of the Arizona Workmen's Compensation Act to keep the courts away from decisions regarding administration of compensation seems to be manifested by the restriction of the court's judgment to affirming or setting aside an award. *See* ARIZ. REV. STAT. ANN. § 23-951 (D) (Supp. 1976-77). *See also* Malinski v. Industrial Comm'n, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968); Cole v. Town of Miami, 52 Ariz. 488, 497, 83 P.2d 977, 1001 (1938).

104. *See* text & note 92 *supra*.

105. *See* Brecht v. Hammons, 35 Ariz. 383, 389, 278 P. 381, 383 (1929).

106. *See* Doby v. Miami Trust Co., 39 Ariz. 228, 237, 5 P.2d 187, 191 (1931).

107. *See* N. CARTER, *supra* note 3, at 101 which discusses the role of the insurer's representative in this situation:

> The steps toward effecting a settlement require a claims man to be both a strategist and a tactician. If a case is one for disposition by agreement the claims man wants to settle at the fairest, yet lowest, figure. However, he must appear to be adamant on the question of settlement. He must create the impression that his position is right, that the witnesses are invincible; and, that if he would pay anything, it would only be for nuisance value.

Id.

from general self-interest may be exacerbated by problems created by the injury itself. The claimant may be faced with funeral expenses or pressing medical bills aggravated by unemployment. Faced with long delays, and the possibility of receiving no compensation at all, the financially pressed employee may determine that his immediate need for cash is paramount.[108] The desperate financial condition of the claimant could coerce a settlement at far less than the amount to which he is statutorily entitled, seemingly contrary to the policy of the workmen's compensation system. For example, in California, where compromise is encouraged, settlements occur most frequently among disadvantaged or poorly organized workers.[109] Thus it could be said of the employee that "it is his poverty and not his will which consented."[110] Gambling away one's compensation rights because of extrinsic economic conditions is repugnant to the dignity and purpose of the compensation system.[111] It is clearly inconsistent with the "just and humane compensation law" which the Arizona constitution mandates.[112] The need for reducing workmen's compensation litigation, when balanced against the detriment of allowing an employee to receive compensation benefits differing from the statutory entitlement, does not justify a policy of compromise.

Conclusion

Workmen's compensation is a creature of statute, governed exclusively by the terms of the statute. The *Gray* court had to give a strained interpretation to Arizona's Workmen's Compensation Act to find that the Industrial Commission has jurisdiction to approve compromise settlements. In so doing, the court placed Arizona in a distinct minority of states which permit compromise without any explicit legislative authorization. A policy approach which attempts to justify compromise because of an absolute right to settle any controversy contradicts the history and purpose of the Workmen's Compensation Act and mistakenly adopts a rationale more appropriate to tort litigation. Further, the goal of reducing litigation through compromise is of minimal significance, and is far outweighed by the adverse effects compromise may have on claimants and the public.

108. Beers, *Compromise Agreements in Workmen's Compensation; Their Limitations*, 16 CONN. B.J. 161, 162 (1942).

109. *See* J. NONET, ADMINISTRATIVE JUSTICE 173 (1969). Illustrative of this fact is that 26 percent more claims were compromised in rural Bakersfield than in urban San Diego. *Id.*

110. Thrussell v. Handyside, [1888] 20 Q.B.D. 359, 364.

111. The purpose of the no waiver statute arguably is to protect the employee from economic coercion, and from his own ignorance or greed. *See* Jenkins v. T. Hogan & Sons, 177 App. Div. 36, 40, 163 N.Y.S. 707, 709 (1917).

112. ARIZ. CONST. art. 18, § 8. See text & notes 67-75 *supra.*