ARIZONA APPELLATE DECISIONS 1974-75

For the eighth year, the *Arizona Law Review* presents the "Arizona Note," a critical review of recent Arizona appellate decisions. Consisting of student casenotes prepared by first year candidates in conjunction with the Editorial Board, the "Arizona Note" is intended to develop student skills in analysis, research, and writing, as well as to provide students and members of the bar with a continuing study of the Arizona courts. To supplement the case studies, included this year is a commentary describing generally the operating procedures of the Supreme Court of Arizona, prepared by Chief Justice James Duke Cameron. This addition is intended to provide a broader perspective on the setting within which Arizona appellate decisions develop.

CONTENTS

I. INTERNAL OPERATING PROCEDURES OF THE ARIZONA SUPREME COURT —*James Duke Cameron* 643

II. ADMINISTRATIVE LAW

A. PUBLIC OFFICIALS' DISCRETION TO DISMISS STATE EMPLOYEES
Dixon v. Osman 652

III. CIVIL PROCEDURE

A. TOLLING THE STATUTE OF LIMITATIONS: A NEW RULE
Selby v. Karman 661

IV. CONSTITUTIONAL LAW

A. THE FIGHTING WORDS EXCEPTION TO FIRST AMENDMENT PROTECTION
State v. Brahy 671

B. THE NEW TIMES CASE: ARIZONA'S APPLICATION OF THE FIRST AMENDMENT ON CAMPUS
New Times, Inc. v. Arizona Board of Regents 684

C. THE VOID FOR VAGUENESS DOCTRINE IN ARIZONA
State ex rel. Williams v. City Court 694

D. WEALTH, TEXTBOOKS, AND EQUAL PROTECTION
Carpio v. Tucson High School District No. 1 704

E. JUDICIAL ENFORCEMENT OF RESTRICTIVE COVENANTS AGAINST CHILDREN: AN EQUAL PROTECTION ANALYSIS
Riley v. Stoves 717

V. CRIMINAL LAW AND PROCEDURE

A. COMPETENCY TO WAIVE CONSTITUTIONAL RIGHTS: A NEW CRITERION
State v. Robinson 729

B. DEFENSE WITNESS IMMUNITY FROM PROSECUTION
State v. Sigman 746

C. DOUBLE JEOPARDY, MULTIPLE PUNISHMENT, AND THE CRIMINALITY OF CRIME WHILE ON BAIL
State v. Cassius 757

D. INVITED ERROR AND PROSECUTORIAL COMMENT ON A DEFENDANT'S FAILURE TO TESTIFY
State v. Arredondo 770

E. INDIGENCY IN THE ARIZONA CRIMINAL PROCESS: THE EFFECT OF OUTSIDE AID FOR AN INDIGENT REPRESENTED BY THE PUBLIC DEFENDER
Knapp v. Hardy 779

F. FELONY-MURDER AND MERGER IN ARIZONA
State v. Miniefield 791

VI. EVIDENCE

A. STANDARDS FOR THE ADMISSION OF EVIDENCE AT SENTENCING
State v. Jones, State v. Benge, State v. Dixon 805

B. THE USE OF PRIOR INCONSISTENT STATEMENTS AS SUBSTANTIVE EVIDENCE
State v. Lewis 821

VII. INDIAN LAW

A. ENFORCEMENT OF STATE FINANCIAL RESPONSIBILITY LAWS WITHIN INDIAN COUNTRY
Wauneka v. Campbell 831

VIII. JUVENILE LAW

A. THE STANDARD OF PROOF AT JUVENILE PROBATION REVOCATION PROCEEDINGS
In re Maricopa Juvenile Action No. J-72918-S 846

IX. PUBLIC LAW

A. ARIZONA'S CONSTITUTIONAL PROHIBITION AGAINST MUNICIPAL SUBSIDIZING OF PRIVATE INTERESTS: THE PUBLIC PURPOSE DOCTRINE REJECTED
City of Tempe v. Pilot Properties, Inc. 860

X. REMEDIES

A. PUNITIVE DAMAGES AWARDED IN EQUITY WITHOUT COMPENSATORY DAMAGES
Starkovich v. Noye 873

XI. TAXATION

A. INCLUSION OF ONE TAX IN THE BASE FOR COMPUTATION OF A SECOND TAX
Watkins Cigarette Service, Inc. v. Arizona State Tax Commission 883

XII. TORTS

A. STRICT LIABILITY AND THE ARIZONA CANAL: THE NATURAL WATERCOURSE EVASION
Ramada Inns, Inc. v. Salt River Valley Water Users' Association 895

B. IMPUTED CONTRIBUTORY NEGLIGENCE AS A BAR TO WRONGFUL DEATH RECOVERY BY ALL BENEFICIARIES
DeLozier v. Smith 908

C. APPLICABILITY OF THE GOING AND COMING RULE TO TRAVELING NATIONAL GUARDSMEN
State v. Superior Court 920

XIII. WORKMEN'S COMPENSATION

A. WORKMEN'S COMPENSATION—A NEW INTERPRETATION OF THE TIME LIMITATION FOR FILING A CLAIM
Van Horn v. Industrial Commission 929

B. APPLICATION OF THE PERSONAL COMFORT DOCTRINE TO TRAVELING EMPLOYEES
Pottinger v. Industrial Commission 937

I. INTERNAL OPERATING PROCEDURES OF THE ARIZONA SUPREME COURT

James Duke Cameron*

Internal operations of the Arizona supreme court have recently undergone significant change due to an increasing caseload and additional administrative responsibilities. The processes currently followed reflect the court's desire to maintain maximum involvement of the justices in each case, while adapting to the increased workload and statutory changes. This Article will describe the procedures presently followed by the court, with some indication of their historical development and constitutional and statutory bases. Before consideration of the internal operations of the court, however, a brief discussion of its organization is in order.

Organization of the Arizona Supreme Court

The Supreme Court of Arizona consists of the justices and the various administrative departments which assist them in discharging the court's functions.[1] Originally the court consisted of three justices[2] elected to rotating 6-year terms. In 1947 the court's membership was increased to five,[3] and both membership and length of terms have remained the same since that time. There has been a major change, however, in the method for selection of justices. Under a constitutional amendment recently adopted by initiative,[4] Arizona appellate judges are

* Chief Justice, Supreme Court of Arizona.

1. Additionally, each justice has a personal secretary and two law clerks under present budgetary allowances. ARIZ. CONST. art. 6, § 7, directs the supreme court to appoint a clerk of the court "and assistants" who shall serve at the pleasure of the court. There is no express provision for secretarial help or for law clerks and therefore the legislature must provide for them in the annual budget.

2. ARIZ. CONST. art. 6, § 2 (1910).

3. ARIZ. CONST. art. 6, § 2 (1960); ARIZ. REV. STAT. ANN. § 12-101 (1956). *See generally* REPORT OF THE 22ND ARIZONA TOWN HALL, THE ADEQUACY OF ARIZONA'S COURT SYSTEM 17-52 (1973) [hereinafter cited as ARIZONA'S COURT SYSTEM]; B. MASON & H. HINK, CONSTITUTIONAL GOVERNMENT IN ARIZONA 123-49 (4th rev. ed. 1972).

4. ARIZ. CONST. art. 6, §§ 36-40. The state constitution, which had originally provided specifically for the election of supreme court justices, ARIZ. CONST. art. 6, § 3

no longer elected, but are instead selected through a merit system. Potential nominees to fill an appellate vacancy are recommended by the Commission on Appellate Court Appointments to the governor, who then selects a new appellate judge from the committee's list. The appointee, however, is subject to voter approval in each subsequent election on a yes-no basis.[5] Justice Frank X. Gordon, Jr. is the first justice to be appointed to the supreme court under this new system.

The method for selecting a chief justice and the length of his or her term has fluctuated since the adoption of the state constitution in 1910. Under the original system whereby three justices served rotating 6-year terms, the justice next standing for election served as chief justice for the two years immediately prior thereto.[6] When the court's membership was increased to five, this system became unworkable, and the court began rotating the office of chief justice on a yearly basis.[7] The Modern Courts Amendment to the Arizona constitution,[8] passed in 1960, empowered the court to elect a chief justice for a longer period of time,[9] but it was not until 1972 that a chief justice, Jack D.H. Hays, was elected for a 3-year term. Shortly thereafter, the 1974 initiative measure amended the constitution to prescribe a 5-year term for the chief justice position.[10] The measure continued the practice of filling that office, as well as that of vice chief justice, through election by the justices.[11]

The responsibilities of the chief justice include not only presiding over the supreme court, but also supervising the administration of all the state's courts.[12] The vice chief justice acts in the absence of the chief justice,[13] and when both are absent, the senior justice in time of service on the supreme court customarily presides.

Although the chief justice supervises court administration for the state, most administrative functions are performed by the offices of either the court clerk or the court administrator. The clerk's office[14]

(1910), was amended in 1974 to eliminate this requirement. *See* ARIZ. CONST. art. 6, §§ 2-6.

5. ARIZ. CONST. art. 6, § 38.

6. ARIZ. CONST. art. 6, § 3 (1910).

7. Although the constitution still provided that "[t]he judge having the shortest time to serve, and not holding his office by appointment or by election to fill a vacancy, shall be the chief justice," ARIZ. CONST. art. 6, § 3 (1910), this system had become numerically impossible. *See* ARIZ. REV. STAT. ANN. § 12-101 (1956).

8. ARIZ. CONST. art. 6, § 2.

9. *Id.* § 3.

10. *Id.* The amendment provided for a 5-year term for the chief justice, but the vice chief justice is elected for a "term determined by the court." *See generally* Winters, *Non-Partisan Merit Selection and Tenure of Judges*, 5 ARIZ. BAR J., June 1969, at 9.

11. ARIZ. CONST. art. 6, § 3.

12. *Id.*

13. *Id.*

14. Since its establishment in the 13th century, the office of clerk of the court or

serves generally as the court's housekeeper, the staff being charged with various duties which range from processing the paperwork associated with appeals to maintaining the roll of attorneys admitted to the bar.[15] This office also handles the court's records, budget matters, travel and other claims, purchasing, payroll, and inventory of equipment and furniture.

In contrast with the clerk's office, which has a myriad of different responsibilities, the bulk of the court administrator's work involves administration of the Arizona judicial system.[16] In addition, however, he has other duties in connection with the receipt, accounting, and payment of federal funds received by the various Arizona court agencies through the Law Enforcement Administration Act.[17] He also has separate duties and responsibilities to the Commission on Judicial Qualifications,[18] and from time to time arranges for educational seminars to assist the magistrates and justices of the peace in performing their functions.

The court has a central staff consisting of four attorneys. In contrast to the law clerks, who perform tasks for an individual justice, the staff attorneys work for the entire court on projects assigned by the chief justice. The central staff is particularly helpful to the court in special projects such as rule revision. Each staff attorney brings at least 5 years' experience to bear on his work for the court. The Arizona supreme court's central staff is small compared to those of many state courts, which have begun to rely more and more on central support staff for their routine work.[19]

Processing Appeals

The appellate attorney's initial contact with the court is through the clerk's office. All papers must be filed with the clerk as provided by the statutes and the rules of the supreme court.[20] A case is at issue

prothonotary has played many different roles. At one time it was a very powerful as well as financially rewarding position. *See* Bentham & Bennett, *The Office of Prothonotary, Its Historical Development in England and in New South Wales*, 3 SIDNEY L. REV. 47 (1959-61). *See also* ARIZONA'S COURT SYSTEM, *supra* note 3, at 53-63.

15. *See* Vail, *Supreme Court's Clerk Fulfills "Sixth Man" Role*, Ariz. Weekly Gazette, April 29, 1975, at 9, cols. 5-6. The staff consists of a chief clerk, chief deputy clerk, and five deputy clerks.

16. The Modern Courts Amendment provides that "[t]he Supreme Court shall appoint an administrative director and staff to serve at its pleasure to assist the chief justice in discharging his administrative duties. The director and staff shall receive such compensation as may be provided by law." ARIZ. CONST. art. 6, § 7.

17. 42 U.S.C. §§ 3731-3738 (Supp. IV, 1974).

18. JUD. QUALIFICATIONS COMM'N R.P. 2(B), 9.

19. *See* Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 U.C.L.A.L. REV. 465 (1976); Lesinki & Stockmeyer, *Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity*, 26 VAND. L. REV. 1211 (1973).

20. *See* ARIZ. SUP. CT. R. 1(d), 2, 4, 5(a), (f), 19; Bernstein, *The Disposition of Civil Appeals in the Supreme Court*, 5 ARIZ. L. REV. 175 (1964).

once the various briefs and any requests for oral argument have been filed. A member of the central staff then reviews the file to determine whether it is properly before the court, and writes a short memorandum which, for reasons lost in the court's history, is called an oral summary. In addition to containing a brief statement of the facts of the case and the issues presented, the summary indicates whether the matter should be in division or en banc,[21] identifies the county and the trial judge, and suggests a time limit for oral argument. No substantive recommendations are made. The oral summary, along with the hearing date, is distributed by the clerk's office to each justice, who reviews it and notes any personal disqualification.[22] The matter is then set for oral argument by the chief justice, who also determines time limits for oral argument.[23] In those cases which are not considered complex, each party is permitted 10 minutes for argument. The more complex the case the more time allowed, although the court seldom allows more than 30 minutes per party at oral argument,[24] even in complex cases. Amici curiae may be permitted to file a brief but are usually not heard at oral argument.[25]

Prior to oral argument, the justices who will hear the case read the briefs. Questions are directed to counsel during oral argument, but the time taken in asking and answering questions is not deducted from the time allowed for argument. Immediately after oral argument a conference is held and the cases heard are discussed. A tentative vote is then taken, with the newest member of the court traditionally voting first. This vote is not binding and it is not unusual for a justice to later change his vote. A decision is usually reached at this time whether to publish a full opinion or memorandum decision.[26] Although the chief justice has

21. ARIZ. CONST. art. 6, § 2, permits the court to sit in division of not less than three justices, but does not allow a law to be declared unconstitutional unless the court sits en banc. All oral arguments are recorded. If the three judges who heard the matter in panel cannot agree, the matter is orderd en banc by the chief justice and the absent justices can hear the tape of the oral argument before voting. This procedure prevents a 2-1 decision in panel which would be a decision by a minority of the full court.

22. ARIZ. CONST. art. 6, § 3, allows the court to bring court of appeals or superior court judges to sit when a member of the court disqualifies himself.

23. A notice of oral argument shall be mailed by the clerk at least 20 days prior thereto. ARIZ. SUP. CT. R. 25.

In the past all oral arguments for a particular day were set for 10:00 a.m. Because some attorneys had to wait all day to be heard, this was changed so that oral arguments were set for 10:00 a.m. or 2:00 p.m. Since June of 1975, oral arguments in each appeal are set for a time certain, thus obviating any waiting time. Formerly, the court took a week or two and heard oral arguments every day during that period. Oral arguments on appeal are now heard every other Thursday, except during the August recess.

24. Attorneys will occasionally move for more time for oral argument pursuant to rule 6 of the Rules of the Supreme Court of Arizona, but the motion is seldom granted. One of the longer arguments granted was 3 hours in a recent case in which counsel had requested a full day. Most of the justices feel that there is little connection between length and quality in oral argumentations. Unfortunately, some attorneys will attempt to fill any amount of time that is allowed.

25. ARIZ. SUP. CT. R. 6.

26. Two types of opinions are issued by the court. First, memorandum decisions

the responsibility of assigning the drafting of an opinion to one of the justices, in practice a justice will normally volunteer to write a particular opinion.

One disadvantage of this relaxed system of assignment, in comparison with a strict rotation policy, is the tendency to allow certain justices who profess an expertise in certain areas of the law to assert more influence in that type of case. For example, two members of the present court were juvenile court judges prior to their election to the supreme court and another has had extensive experience with juvenile cases as a judge in a one-judge county. These justices, therefore, tend to write most of the opinions concerning juvenile appeals. There is no denying that their influence in this particular field is greater than the two justices who have had little or no juvenile court experience. The same is true of other areas of the law where a particular justice has what he considers a certain expertise. There is enough give-and-take in formulating decisions, however, to prevent the development of one-person opinions.

After an opinion is written, a tentative draft is circulated to the other members of the court, including the law clerks and the staff attorneys.[27] If the staff attorneys have any questions concerning a proposed opinion, they will usually make this fact known to its author. Law clerks make their opinions known to their particular judge or to one of the author's law clerks. The proposed opinion contains a "buck slip" which each judge returns to the author with minor suggestions if he agrees in substance with the opinion. If any justice does not agree, the author and the chief justice are notified and the matter is held for the next Tuesday conference. At the conference the opinion is discussed and an attempt is made to reach agreement by the full court. If all can agree to the opinion, it is approved and published; if there is disagreement, a dissent may be in order. On a particularly complex case, positions may change several times and a considerable amount of give-

state briefly the question presented and dispose of it with a short citation of authority. *See* ARIZ. SUP. CT. R. 48. Memorandum decisions are the law of the case only and are not published; they cannot be cited as authority. *Id.* 48(a)(2), (c). About one-third of the opinions are now memorandum decisions. As the workload of the court grows, it is expected that the percentage will increase. Second, full opinions contain a complete exposition of the case and are published in *Arizona Reports* and *Pacific Reporter*. *Id.* 48(a)(1), (4). These opinions establish precedent and may be cited as authority. *See id.* 48(c).

27. Where oral argument is not requested, the cases are assigned to various justices by the chief justice. These go on the submitted list automatically and the justice writes an opinion which is circulated in the same manner as an opinion after oral argument. Because cases submitted without oral argument do not have to wait for the oral argument calendar, they tend to be disposed of more rapidly than those in which oral argument is requested.

The method of preparing an opinion varies among justices, depending on the nature of the case. Some allow their law clerks to prepare drafts of opinions. Others assign their clerks to research a particular question and to write memoranda.

and-take may be required before the final opinion and any dissents thereto are filed. All citations of authority and quotations must be checked for accuracy by the law clerks, after which the opinion is typed on a "master," reread by the authoring justice, proofread by the law clerk and secretary, and reproduced. The original is signed by all the judges participating in the decision. If, following notice to the parties, no motion for rehearing is filed within 15 days after the filing of the opinion with the clerk's office, the mandate of the court is issued by the court clerk.[28] If a motion for rehearing is filed, one of the staff attorneys prepares a memorandum and the motion is considered at the regular Tuesday conference.[29]

Special Actions

In 1970 the former extraordinary writ system was replaced by special actions.[30] Because the courts of appeal are burdened with many criminal appeals, their acceptance of jurisdiction over special actions is both discretionary and limited, and many such actions are heard by the supreme court.[31] Until recently applications for writs were entertained by the chief justice, while all five justices heard applications for stays of lower court proceedings.[32] Today there is a rotating system whereby the justices take turns, on a monthly basis, hearing special action applications. The particular justice involved will also hear the application for a stay. In some instances, where the question of a stay is complicated, the justice will call in the other members of the court to hear the application.

If the petitioner and the respondent are agreeable, the matter can be dispatched without oral argument, in which case the special action is

28. ARIZ. SUP. CT. R. 14(a). The issuance of the mandate usually terminates the supreme court's involvement in the case. *See* State v. Federico, 104 Ariz. 49, 448 P.2d 399 (1968).

Copies of the opinion are distributed to the parties, news media, and West Publishing Company for publication in the Arizona and Pacific reporters.

29. Differences in the procedure for deciding appeals occur within the Court of Appeals of Arizona. One panel reads the briefs, hears the argument, and then holds the conference. Another panel of the court has its conference, hears oral argument, and then assigns the case. The third panel assigns and prepares a proposed draft of the opinion before oral argument is heard. Some panels of the court of appeals allow the law clerks and staff attorneys to sit in on the conference. The supreme court, which has 10 law clerks, would find this arrangement too congested.

30. *See generally* RULES OF PROCEDURE FOR SPECIAL ACTIONS (codified in volume 17A of ARIZONA REVISED STATUTES ANNOTATED).

31. A change in jurisdiction and venue rules under ARIZ. REV. STAT. ANN. § 12-120.21(A)(1) (Supp. 1975-76), enacted in 1964, allocated most criminal appeals to the court of appeals. As a result, the supreme court informed division one of the court of appeals that it could refuse to entertain further applications for special actions, and that such applications would be considered by the supreme court. Thus, in the geographic area encompassed by division one, the supreme court takes all applications for special actions. Division two in Tucson continues to entertain special action applications.

32. *See generally* RULES OF PROCEDURE FOR SPECIAL ACTIONS (codified in volume 17A of ARIZONA REVISED STATUTES ANNOTATED) (including extraordinary writs, certiorari, mandamus, prohibition).

discussed during the first conference after the response has been filed. Such petitions will generally be decided sooner than those in which oral argument is requested. Each party is limited to 10 minutes during oral argument. Toward the end of argument, the justices will vote at the bench whether to accept, deny, or send to conference, passing their votes to the chief justice. If all are agreed that the petition should be declined, the chief justice will announce at the close of the hearing or, as is often the case, at the end of petitioner's argument that the court declines to accept jurisdiction. If any one member votes to accept, or if any one member asks for a conference, the matter is taken under advisement and considered at conference. After the conference the clerk is notified of the decision and usually is able to inform the parties of the court's decision on the same afternoon. If jurisdiction of the special action is taken, the matter is assigned to a justice for a written opinion.

Special actions are discretionary, and because of the increased caseload of the court, they are seldom taken. In the first three months of 1975, the court accepted a larger number of petitions than usual—approximately one-third of those filed—because of the need to interpret the 1973 Arizona Rules of Criminal Procedure.[33] The number has now diminished,[34] and in 1975 only 20.7 percent of the petitions were accepted.

Petitions for Review

The court generally considers about 15 petitions for review each week, although the number has been as high as 30. These also are taken up at the weekly conference on Tuesday mornings. When the petitions are filed, a member of the central staff prepares a memorandum on the case. Each justice receives the memorandum together with the petition for review, the motion for rehearing and response thereto, and the opinion of the court of appeals. This is generally the scope of the record considered by the court in deciding the petition, although the staff attorney who prepared the memorandum may have read the briefs and the entire record from the trial court. The actual content of the petition for review is limited by rule and indeed may not contain a statement of the reason why review should be granted.[35] Thus, an

33. For a thorough discussion of the new rules of criminal procedure, see Note, *Arizona's New Rules of Criminal Procedure: A Proving Ground for the Speedy Administration of Justice*, 16 ARIZ. L. REV. 167 (1974).

34. In 1967 the then chief justice of the Arizona supreme court, Charles C. Bernstein, said optimistically: "As time goes on and the backlog becomes less pressing, I would expect the Court to be more and more generous in the granting of discretionary writs." ARIZONA LAW INSTITUTE, EXTRAORDINARY WRITS IN ARIZONA 5 (1967).

35. ARIZ. SUP. CT. R. 47(b).

attorney seeking review in the supreme court should make a persuasive motion for rehearing in the court of appeals so that the reasons for further consideration will be in the record.[36]

Miscellaneous Matters

At the Tuesday conference there are numerous miscellaneous matters to which the court's attention is directed. These include petitions for attorneys' fees in criminal cases, which must be set by the supreme court although they are paid by the county;[37] petitions for transfer from the court of appeals;[38] and petitions for special action where oral argument is not requested. Additionally, numerous petitions are received in pro per from inmates at the Arizona State Prison, county jails throughout the state, and the Arizona State Hospital concerning everything from habeas corpus and special actions to general complaints. Such petitions are referred to a staff attorney, who searches the records of the court to determine whether the petitioner has had a previous matter before the court and the nature of any such action. On the basis of this investigation, the staff attorney prepares a memorandum for the court. If the facts are insufficient to decide the matter, the attorney general or others are asked to respond.

Unless oral argument is requested, state bar matters involving discipline of attorneys are also considered at the Tuesday meeting. If oral argument is requested, however, a state bar case is handled like any other appeal. Because of the sensitive nature of these matters, they are not referred to the staff attorneys or other staff members prior to consideration.[39]

After completion of the Tuesday agenda, the chief justice prepares and signs an order disposing of all items considered. This is transmitted to the clerk's office and is a matter of public record. Confidential administrative matters such as opinions approved and assignments of cases are covered in a separate order.

Conclusion

The internal operating procedures of the Supreme Court of Arizona tend to change with the times and personnel.[40] Most changes in court operations, however, have been made in response to the increased

36. In 1975 11.9 percent of the civil petitions for review and 11.1 percent of the criminal petitions were granted.

37. ARIZ. REV. STAT. ANN. § 13-1721 (Supp. Pamphlet 1973).

38. ARIZ. R. CT. APP. 47(e). Since 1971, when this rule was promulgated, the court has received 31 petitions for transfer. Of these, 16 have been granted.

39. ARIZ. SUP. CT. R. 37.

40. While the number of employees is determined by the budget, their duties are assigned by decision of the court. When asking for an increased budget for personnel, the court must inform the legislature of its plans for increased personnel. In this regard the legislature shares in shaping the court's personnel policies.

caseload. In 1960 the supreme court handled 238 matters.[41] In 1975 1,256 matters[42] were handled, in addition to increased administrative decisions and the exercise of the rulemaking power. The task of keeping current is becoming more and more a losing battle. Thus, the court must often resort to timesaving devices such as memorandum decisions and additional central staff and law clerks. Because the court is forced to utilize timesaving expediencies, the amount of individual attention given by each justice to each case is decreasing. Although the staff does not make decisions for the court, more and more reliance is placed on staff and law clerks for research of both the law and the record. Extensive screening of criminal cases is not practiced to the same extent as in some of the larger state and federal courts[43] because the Arizona supreme court is reluctant to delegate too much of the court's work to nonjudicial personnel.[44] The court believes that the litigant on appeal is entitled to have the decision in his case made by a judge and not by an anonymous member of the staff or an unknown law clerk. Part of the job is to assign what can be properly and competently done by staff while at the same time reserving to the judges those decisions which relate to the merits of the litigant's appeal. How long this practice can continue in light of the ever-increasing caseload is a question.[45] The Arizona supreme court, however, will continue in its attempt to dispense personalized justice.

41. *See* REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE SUPREME COURT 12 (1962).

42. The caseload in the court of appeals in 1975 was: division one, 2,000 and division two, 715. The total for both the court of appeals (divisions one and two) and the supreme court was 3,972 compared to 238 for 1960. There was no court of appeals in 1960, however; it was created in 1965.

Most of the increase in caseload is the result of criminal appeals. In 1960 there were 20 criminal appeals in Arizona. In 1974 there were 704 and in 1975, 1,023.

43. *See* Bell, *Toward a More Efficient Federal Appeals System*, 54 JUDICATURE 237 (1971); Christian, *Using Prehearing Procedures to Increase Productivity*, 52 F.R.D. 55 (1971); Note, *Screening of Criminal Cases in the Federal Courts of Appeals: Practices and Proposals*, 73 COLUM. L. REV. 77 (1973).

44. For a similar reluctance to delegate the work of courts, see Carrington, *The Danger of Judicial Delegation: Concluding Remarks*, 52 F.R.D. 76, 77-78 (1971).

45. In the gigantic industrial societies of the twentieth century, the courts are one of the last institutions where individuals receive individualized treatment. No matter how hopeless an appeal may be, it is not frivolous to the appellant, because it represents his hopes for individualized justice against the alleged prejudicial decision of an institution in an impersonal society. The price of individualized consideration, essential in a democratic society founded upon the individual's importance, is necessarily high. The courts must consider many worthless appeals for fear of missing the one with merit.

In its effort to assure prompt consideration of all claims, the court system must not become just another bureaucracy, cramming litigation papers into suitable slots or at least the closest-fitting cubbyhole. While we may adopt more efficient procedures to find and decide quickly the easily-decided case, these appeals must receive the same deliberative consideration in their disposition as do the more difficult matters. Yet, in order to decide all cases more quickly and efficiently in this volume era, our appellate courts must consider substantial changes in structure and procedure in order to improve the fair, prompt and considered determination of our caseloads.

Tate, *Containing the Law Explosion*, 56 JUDICATURE 228, 234 (1973).

II. ADMINISTRATIVE LAW

A. PUBLIC OFFICIALS' DISCRETION TO DISMISS STATE EMPLOYEES

An employer's absolute discretion in hiring and firing employees is a powerful influence over the lives of workers. When there are no guidelines defining the employer's authority to fire, the employee does not know under what circumstances he may be dismissed; rather, the employer is at liberty to exercise his own discretion, which may include particular biases or whims, in dismissing employees. When such discretion is statutorily granted to state employers,[1] the possibility of arbitrariness in firing becomes subject to constitutional restrictions. In *Dixon v. Osman*,[2] however, the Arizona court of appeals turned aside constitutional challenges to arbitrary firing by the state, holding that a parolee, summarily dismissed from her secretarial job under the statutory discretion of her state employer, was not entitled to a hearing prior to dismissal. The court stated that Dixon had no interest in her job which would fall under the due process guarantee of the 14th amendment and that the reason for her dismissal was not constitutionally impermissible.[3]

Appellant Connie Dixon was employed as a statistical typist for the auditor general. At the time she applied for and received her job, she

---

1. For example, the auditor general's office is granted such discretion by ARIZ. REV. STAT. ANN. § 41-1279.02 (1974). For a discussion of the pro's and con's of such discretion, see text accompanying notes 33-49 *infra*.

2. 22 Ariz. App. 430, 528 P.2d 181 (1974).

3. *Id.* at 431-32, 528 P.2d at 182-83. While holding that Dixon's job was not protected by the 14th amendment, the court did note that even without a protected property interest in the job, Dixon could not be dismissed for a constitutionally impermissible reason. *Id.* at 432, 528 P.2d at 183. The court's opinion provided a number of examples of impermissible grounds for dismissal, all of which involved retaliation for the exercise of particular constitutional rights. Specifically mentioned as impermissible grounds were the exercise of free speech or the privilege against self-incrimination, and racial discrimination. *Id.* Cases finding that such impermissible grounds were the basis for dismissal include: Pickering v. Board of Educ., 391 U.S. 563 (1968); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Board of Trustees v. Davis, 396 F.2d 730 (8th Cir.), *cert. denied*, 393 U.S. 962 (1968). Dixon did not merit due process protection under this analysis, however, because the basis for her dismissal was not constitutionally impermissible. The court reasoned that "[t]he Constitution does not afford an individual the 'right' to be a convicted felon." 22 Ariz. App. at 432, 528 P.2d at 183.

was on parole following a conviction for fraud and writing checks on insufficient funds. Dixon was not questioned about her criminal record prior to her employment.[4] After 4 months, however, she was summarily dismissed for the sole reason that she was an ex-felon,[5] although her performance had been exemplary, resulting in a salary increase.[6] She was never provided with an opportunity to be heard on the matter.[7]

Dixon's dismissal was pursuant to a state statute providing that employees of the auditor general serve at his pleasure.[8] Appellant agreed that the statute allowed for her dismissal with or without cause and conceded that she had no constitutionally protected right to government employment.[9] She argued, however, that the dismissal was nonetheless a denial of due process and equal protection because it was arbitrary, capricious, and discriminatory.[10] The court of appeals rejected this argument on two grounds.

Considering first the due process claim, the court determined that Dixon's job constituted neither life, liberty, nor property.[11] Thus, she was not entitled to the due process guarantees of the 14th amendment.[12] The court relied primarily on the United States Supreme Court's decision in *Board of Regents v. Roth*,[13] which emphasized that one must

---

4. 22 Ariz. App. at 431, 528 P.2d at 182.

5. While the reason for dismissal was alleged in Dixon's complaint, the issue had not been decided, since the complaint was dismissed for failure to state a claim. *See* ARIZ. R. CIV. P. 12(b). The court of appeals noted, however, that the facts stated in the complaint were presumed to be true for purposes of its decision. 22 Ariz. App. at 431, 528 P.2d at 182.

6. *Id.*

7. *Id.*

8. ARIZ. REV. STAT. ANN. § 41-1279.02 (1974) provides that:

> The auditor general may, with the approval of the joint legislative budget committee, appoint and prescribe the duties of such additional professional, technical, clerical and other employees, or contract for such services, necessary to administer the provisions of this article. Such employees shall . . . serve at the pleasure of the auditor general, retaining their positions for no reason other than meritorious performance.

The auditor general and his employees, as appointed or employed by the legislature, are exempt from the provisions of the State Personnel Code. ARIZ. REV. STAT. ANN. §§ 41-762 to -785 (1974). These statutes were formerly embodied in sections 38-901 to -935 (repealed ch. 141, § 71, [1972] Ariz. Sess. Laws 899); the court's opinion refers to the title 38 sections, but this casenote will use the current title 41 sections.

9. 22 Ariz. App. at 431-32, 528 P.2d at 182-83.

10. *Id.* at 431, 528 P.2d at 182. Dixon also argued that the statute granting the auditor general unlimited discretion, ARIZ. REV. STAT. ANN. § 41-1279.02 (1974), was a standardless delegation of power, and therefore must fail as being unconstitutionally void for vagueness. Brief for Appellant at 28-30, Dixon v. Osman, 22 Ariz. App. 430, 528 P.2d 181 (1974). The court of appeals rejected this argument on the basis that the rule against unlawful delegations applies to legislative powers only. 22 Ariz. App. at 432, 528 P.2d at 184. *See* State v. Arizona Mines Supply Co., 107 Ariz. 199, 484 P.2d 619 (1971).

11. *Id.* at 431-32, 528 P.2d at 182-83.

12. The 14th amendment requires that due process be provided to protect interests in "life, liberty, and property." U.S. CONST. amend. XIV, § 1. *See also* Rottenburg v. Cartwright School Dist. No. 83, 22 Ariz. App. 473, 528 P.2d 859 (1974).

13. 408 U.S. 564 (1972).

have more than an abstract need or desire for a specific job to claim a protected property interest. Rather, there must be an entitlement to the position based on contract, statute, or regulation.[14] The court emphasized that Dixon was not prevented from seeking employment with other state offices which might not be so sensitive to her criminal conviction.[15]

Dixon also contended that she deserved an opportunity to rebut what she claimed was a presumption that an ex-felon is unfit to retain employment. The court pointed out, however, that the United States Supreme Court has forbidden only such irrebuttable presumptions as are created by statute.[16] Dixon had not been subjected to any such blanket statutory exclusion; rather, she was dismissed pursuant to a statute vesting absolute discretion in the auditor general.[17]

This casenote will discuss the constitutional standards that must be applied in determining whether a particular type of employment constitutes property for purposes of 14th amendment due process. The correctness of the court of appeals' determination that Dixon had no constitutionally protected interest in her employment will be considered in light of this analysis. Finally, the problem of vesting absolute discretion in state officials will be addressed, with attention to the ramifications of this broad doctrine in the area of public employment. Possible limitations on the doctrine, including elimination of such discretion, will be suggested.

Employment as Property

The Supreme Court's concept of what constitutes property deserving the protection of procedural due process has recently undergone substantial modification. For example, the right-privilege distinction for determining property rights is no longer followed when procedural due process is at issue.[18] This practice marks a sharp break from traditional case law characterizing employment as a privilege rather than a right, and thus not within the protection of due process guarantees.[19]

14. *See id.* at 578.
15. 22 Ariz. App. at 432, 528 P.2d at 183.
16. *Id.* at 432, 528 P.2d at 183; *see, e.g.*, Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971). *See generally* Bezanson, *Some Thoughts on the Emerging Irrebutable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Sewell, *Conclusive Presumptions and/or Substantive Due Process of Law*, 27 OKLA. L. REV. 151 (1974); Note, *The Irrebutable Presumption Doctrine in the Supreme Court*, 85 HARV. L. REV. 1534 (1974); Note, *Irrebutable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).
17. 22 Ariz. App. at 432, 528 P.2d at 183; *cf.* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961).
18. *See* Board of Regents v. Roth, 408 U.S. 564, 571 n. 9 (1972). *But see* Arnett v. Kennedy, 416 U.S. 134, 151-52 (1974).
19. *See* Adler v. Board of Educ., 342 U.S. 485, 492 (1952); Bailey v. Richardson,

The privilege was considered a gratuity, the recipient of which had no right to complain when it was withdrawn, conditioned, or modified.[20] This reasoning was specifically rejected in *Board of Regents v. Roth*,[21] the Supreme Court holding that the test of a protected interest is more flexible than the rigid right-privilege distinction.[22]

In examining the characteristics of a property interest, the Court noted:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[23]

Applying this standard, the *Roth* Court held that a probationary teacher whose employment was not guaranteed by contract, statute, or regulation did not have an entitlement to the job,[24] and, hence, no procedural due process attached prior to dismissal.[25]

The Court elaborated further on the entitlement doctrine in *Roth*'s companion case, *Perry v. Sinderman*.[26] Although careful to point out that a mere subjective expectancy is not a sufficient property interest to

---

86 U.S. App. D.C. 248, 260-61, 182 F.2d 46, 59-60 (1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.12 (3d ed. 1972); Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U.L. REV. 176 (1953). The court in *Bailey* held that a government employee could be dismissed for disloyalty without due process of law. In contrast to the *Dixon* situation, Bailey had not been summarily dismissed. 182 F.2d at 58, 86 U.S. App. D.C. at 260.

20. *See* cases cited note 19 *supra*.

21. 408 U.S. 564 (1972). For cases rejecting the right-privilege distinction in contexts other than employment, see Bell v. Burson, 402 U.S. 535, 539 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (welfare benefits); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (unemployment benefits). *See generally* K. DAVIS, *supra* note 19, §§ 7.12-.13; Note, *Title VII: A Remedy for Discrimination Against Women Prisoners*, 16 ARIZ. L. REV. 974, 981-82 & nn. 41-42 (1974).

22. 408 U.S. at 571.

23. *Id.* at 577.

24. Where the statute or contract states that dismissal will occur only under certain circumstances, the employee has an entitlement to continued employment absent fulfillment of such conditions. *See* Arnett v. Kennedy, 416 U.S. 134, 151-52 (1974); *id.* at 166-67 (Powell & Blackmun, JJ., concurring in part); Perry v. Sinderman, 408 U.S. 593, 599-603 (1972).

25. 408 U.S. at 577-78. Roth was initially hired for a 1-year term, and at the end of that period university officials exercised their discretion not to rehire him. He was given neither notice of the reasons for his nonretention nor an opportunity for a hearing.

26. 408 U.S. 593 (1972).

warrant due process protection, the Court held that a protected interest could be based upon the "policies and practices of the [employing] institution."[27] The entitlement doctrine expressed in *Roth* and *Sinderman* has been applied frequently in cases finding various interests to be protected property[28] and appears to be the current standard for determining whether or not a given interest merits due process property guarantees under the fifth or 14th amendments.[29]

Any analysis of an entitlement question must begin with a consideration of whether the employee has any legally binding claim upon the state through contract, statute, regulation, or usage.[30] Thus, state law must provide the basis for analysis. Dixon apparently had no contractual right to continued employment, and while it is possible that some usage existed whereby employees of the auditor general were fired only for cause, no such theory was plead nor, therefore, considered by the court. Therefore, Dixon's right to a hearing based on property deprivation depends on entitlement via statute or regulation.

The statute regulating Dixon's employment provides that employees "serve at the pleasure of the auditor general, retaining their positions for no reason other than meritorious performance."[31] This clause is ambiguous, and no cases appear to have construed similar provisions elsewhere. It could be argued that meritorious performance ensures

27. *Id.* at 603. The Court stated, "Explicit contractual provisions may be supplemented by other arguments implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' . . . And '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.'" *Id.* at 602, *quoting* 3 A. CORBIN, CORBIN ON CONTRACTS § 562, at 287, 288 (1960). Professors and tenured teachers have been found to have entitlement in their jobs either by contract, by statute, or by a practice in the school which amounts to de facto tenure. *See, e.g.*, Connell v. Higginbotham, 403 U.S. 207 (1971) (substitute teacher had right to notice and hearing before dismissal for failure to sign a loyalty oath); Peacock v. Board of Regents, 510 F.2d 1324 (9th Cir. 1975) (department chairmanship is not a protected interest, although professorship is); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972) (statutory provision providing for a continuing contract after a probationary period could constitute the equivalent of tenure); Papadopoulos v. Oregon State Bd. of Higher Educ., 13 Ore. App. 632, 511 P.2d 854 (1973), *cert. denied*, 417 U.S. 919 (1974) (probationary teachers have no property interest in their jobs, although tenured employees do).

28. In addition to certain kinds of employment, other government benefits have been analyzed in terms of property interests. *See, e.g.*, Goss v. Lopez, 419 U.S. 656 (1975) (interest in not being suspended from school); Vlandis v. Kline, 412 U.S. 441 (1973) (tuition subsidies); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Geneva Towers Tenants Organization v. Federated Mortgage Investors, Inc., 504 F.2d 483 (9th Cir. 1974) (FHA approved rent increase). *But see* People's Rights Organization v. Bethlehem Associates, 487 F.2d 1395 (3d Cir. 1973) (no right to hearing before HUD rent increase approval).

29. It has been suggested, however, that the test of present enjoyment might be an alternative to the entitlement test, with due process required for either entitlement to or the present enjoyment of the benefit. Present enjoyment denotes the present possession of the interest (the job in which one is currently employed) as distinguished from the future enjoyment of the benefit (the expectation of employment in another job). *See* Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89 (1974); Comment, *Procedural Protection at Parole Release Hearings: The Need for Reform*, 1974 DUKE L.J. 1119, 1135 (1974).

30. See text accompanying note 23 *supra*.

31. ARIZ. REV. STAT. ANN. § 41-1279.02 (1974).

retention of employment, in which case the language might be construed to confer entitlement. Dixon's meritorious performance, then, would have constituted the requisite property interest to mandate procedural due process. To construe the language as providing entitlement conditioned on meritorious performance, however, would contradict the express language whereby employees "serve at the pleasure of the auditor general," suggesting that there was no statutory entitlement to the job. Accordingly, the court apparently assumed that the retention clause indicated that meritorious performance is a necessary, but not sufficient, condition of the employment.[32] Under this interpretation, the standard operates to ensure dismissal of incompetent employees but does not mandate that those who perform well must be retained.

Limiting the Discretion of Public Employers

The statute under which Dixon was dismissed, as interpreted by the Arizona court, gives the auditor general complete discretion to dismiss summarily employees of the department.[33] While absolute discretion may not be unconstitutional, the enforcement of such a policy does have serious consequences, and there is a strong argument that the state should modify its statute governing employment with the auditor general to grant an entitlement to employees who are performing satisfactorily, thus giving them the right to procedural due process upon termination. Employment is an important factor in a person's life, and without employment, many of the traditionally protected property and liberty interests may be seriously infringed, even where the impact on such interests is insufficient to invoke due process protection under current Supreme Court standards.[34] Not only may finding a replacement job be difficult, but termination of employment may carry substantial penalties in terms of lost pensions and fringe benefits. Lapses of coverage in medical insurance, for example, could pose a serious threat to the health and financial stability of a terminated employee. The ramifications of losing one's job clearly extend to all who depend on the worker for support.[35] Such far-reaching consequences should not be subject to the employer's whim. Even if other jobs for which the worker qualifies are available, an employment record which indicates that the employee has been fired from his previous job, even though not "for cause," may be a serious handicap.[36]

32. *See* 22 Ariz. App. at 432-33, 528 P.2d at 183-84.
33. ARIZ. REV. STAT. ANN. § 41-1279.02 (1974).
34. *See* Board of Regents v. Roth, 408 U.S. 564, 588-89 (1972) (Marshall, J., dissenting).
35. *Cf.* Arnett v. Kennedy, 416 U.S. 134, 219-21 (1974) (Marshall, Douglas, & Brennan, JJ., dissenting).
36. Courts have recognized that termination for cause creates a stigma which may

The problem of absolute discretion can become acute in a case such as Dixon's, where the discharged employee is an ex-felon.[37] Although Dixon had completed parole and her civil rights had been restored at the time of discharge,[38] the success of her assimilation into noncriminal society may have depended heavily on her ability to secure continuous employment.[39] Thus, policies inherent in the state's efforts to rehabilitate convicted criminals militate strongly against arbitrarily denying them state employment solely because of their status.[40]

The primary governmental interests which might be regarded as requiring a grant of absolute discretion to the auditor general in terminating employees are those of convenience and efficiency. In denying entitlement by granting the employer absolute discretion, the state frees itself from the inconvenience of conducting hearings for cause.[41] It is

adversely affect the employee's ability to find another job; thus termination for cause is regarded as a sufficient infringement of liberty to merit substantive due process protection. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 898 (1961); Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 140-41 (1951); United States v. Lovett, 328 U.S. 303, 313-14 (1946). Accordingly, many cases have held that due process must be afforded an employee whose termination results in a "badge of infamy," such as dismissal for disloyalty. *See* Arnett v. Kennedy, 416 U.S. 134 (1974) (unsupported charge injurious to employee's reputation warrants opportunity to refute the charges); Whitney v. Board of Regents, 355 F. Supp. 321 (E.D. Wis. 1973) (charges of inadequacy and immaturity sufficiently likely to injure teacher's reputation as to require a hearing). *But see* Jablon v. Trustees of the Cal. State Colleges, 482 F.2d 997 (9th Cir. 1973) (college's decision that employee was not a good enough teacher or scholar to merit retention was not sufficient stigma to require hearing); Perry v. Apache Junction Elementary School Dist. #43, 20 Ariz. App. 561, 514 P.2d 514 (1973) (no slander which would require a hearing in the dismissal of a school principal).

There has been no judicial recognition, however, that firings without stated reasons also can result in a stigma. *See* Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 U.C.L.A.L. REV. 1052, 1056 (1972).

37. *See generally* S. RUBIN, THE LAW OF CRIMINAL CORRECTIONS 621-23 (1963); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT 206-12 (Avon 1968); Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306 (1970).

38. Brief for Appellant at 2, Dixon v. Osman, 22 Ariz. App. 430, 528 P.2d 181 (1974). *See generally* Note, *Rehabilitating the Ex-Felon: The Impact of Arizona's Pardons and Civil Rights Restoration Statutes*, 1971 L. & SOC. ORDER 793.

39. *See generally* Rosow, *The Role of Jobs in a New National Strategy Against Crime*, 35 FED. PROB., June 1971, at 14; Note, *supra* note 21, at 975-78; Note, *supra* note 37; *cf.* Beazer v. New York City Transit Authority, 399 F. Supp. 1032 (1975) (holding a city transit authority's ban on employment of former heroin addicts who were or had been participating in methadone maintenance programs violative of due process and equal protection under the 14th amendment). The *Beazer* court reasoned that the transit authority could easily make a determination of fitness for the particular job; so there was no rational reason for maintaining the absolute ban. *Id.* at 1051. The court indicated, however, that it might be acceptable to limit employment to nonsensitive positions. *Id.* at 1052.

40. *See generally* authorities cited notes 37-39 *supra*.

41. It has been argued that summary dismissal should be allowed when the government is acting in its proprietary capacity, since the private employer in comparable circumstances retains such discretion. *See* Cafeteria Workers Local 473 v. McElroy, 397 U.S. 886, 896 (1961); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 582-84, 456 P.2d 645, 656-57, 79 Cal. Rptr. 77, 88-89 (1969). The courts also argue that they are not qualified to make internal decisions or to formulate standards concerning employment status. *See* Bailey v. Richardson, 86 U.S. App. D.C. 248, 258-59, 182 F.2d 46, 57-58

argued that hearings and guidelines will reduce agency efficiency by consuming scarce administrative resources, undermining supervisory authority, and causing the employee's superiors to settle for incompetent employees rather than face a review proceeding.[42] This argument is not convincing, however. If there be a legitimate reason for terminating the employee, that reason should stand up to fair procedures.[43] If no justification exists, it is reasonable to believe that the state's interests will not be served by dismissing competent employees.

The due process procedures which would be required if an entitlement were granted need not put the state to great inconvenience. A judicial, pretermination hearing is not required in every instance where procedural due process must be observed.[44] The Supreme Court has noted that a weighing process can be used to determine the form of the hearing which would be required by procedural due process in any situation.[45] In this way, both the interests of the employee in having a fair hearing and the interests of the state in minimizing cost, delay, and disruption are balanced. Such a weighing could produce a procedure that is speedy and limited in scope, but still provides sufficient notice and hearing to protect the employee's interests.[46] The additional state concern that guidelines and procedures will erode supervisory authority and destroy discipline is without merit. State supervisors possess an arsenal of controls short of dismissal with which to maintain discipline and spur job proficiency.[47]

(1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951); Norlander v. Schleck, 345 F. Supp. 595, 600 (1972). The problem of absolute discretion, however, involves procedural, not substantive, questions; issues of fact and substance need not be considered by the courts. The procedural requirements of notice and hearing under which the employer must show cause have been administered without great problem in those circumstances which do not allow summary dismissal. Provisions for such procedures already exist in Arizona. ARIZ. REV. STAT. ANN. §§ 41-768, -785 (1974). The functioning of the auditor general's office is not so radically different from other state agencies that its exception from these procedures is necessary in order to avoid judicial incapability.

42. Were the law otherwise, the employment status of any governmental employee could not be terminated without subjecting the employer to a protracted judicial hearing. This would result in a substantial reduction in government work production standards. Administrators would generally accept an inferior service, rather than be subjected to the rigors of a judicial hearing where evidential proof would be required to justify their administrative personnel decisions.

Sessions v. Connecticut, 293 F. Supp. 834, 837-38 (D. Conn. 1968).

43. Pickering v. Board of Educ., 391 U.S. 563 (1968), recognizes that the nature of the job is an important factor in the reasonableness of discretion in employee hiring. Therefore, incompatibility may be sufficient reason to dismiss a confidential secretary but not one who fulfills a merely mechanical position. *See id.* at 568-70.

44. Arnett v. Kennedy, 416 U.S. 134, 153-56 (1974). See ARIZ. REV. STAT. ANN. §§ 41-768, -785 (1974) for the scope of proceedings already offered to most state employees.

45. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

46. *See* Arnett v. Kennedy, 416 U.S. 134, 167-71 (1974) (Powell & Blackmun, JJ., concurring); *id.* at 186-96 (White, J., concurring in part); *id.* at 212-16 (Marshall, Douglas, & Brennan, JJ., dissenting).

47. For example, suspension and demotion are possible disciplinary procedures. *See*

Finally, both the public and the state government are injured whenever a spirit of fair play and honesty fails to pervade all public institutions or wherever any public official is allowed free reign for the play of his personal prejudices or biases.[48] A mandatory hearing procedure would put some limitations on this power:

> It might . . . be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. . . . When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful and correct.[49]

Since the termination hearing need not be unduly elaborate, the requirement that decisions affecting an interest as important as one's employment be rendered in a reasonable, nonarbitrary fashion does not seem to be too onerous a burden for Arizona's government to bear.

Conclusion

It is unfortunate that the *Dixon* court did not address itself to the policy considerations involved in dismissing a state employee solely because she was an ex-felon, but the court felt compelled by existing case law and statutory construction to hold that Dixon had no constitutionally protected interest in her employment. The judiciary is not designed to substitute its own policy judgments for those of the legislature.[50] Therefore, it remains for new legislation to provide protection from arbitrary dismissals for those state employees not already protected. Until such legislation is forthcoming, statutorily granted absolute discretion will remain a part of Arizona state employment.

ARIZ. REV. STAT. ANN. § 41-785 (1974).

48. *See* Comment, *supra* note 36, at 1077.

49. Roth v. United States, 408 U.S. 564, 591-92 (1972) (Marshall, J., dissenting).

50. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical, 348 U.S. 483 (1955).

III. CIVIL PROCEDURE

A. TOLLING THE STATUTE OF LIMITATIONS: A NEW RULE

Statutes of limitations have stood for hundreds of years as barriers to the bringing of stale claims. In the past the time that a defendant spent out of the state generally did not count as part of the prescribed time within which an action could be brought. This policy was expressed through the passage of tolling statutes, such as section 12-501 of the Arizona Revised Statutes.[1] As jurisdiction of state courts was expanded through the enactment of long arm provisions,[2] out-of-state defendants often could be served with process, thus making institution of an action possible despite the defendant's absence. The question thus arose whether in such cases a defendant's absence from the state should toll the statute of limitations. The Arizona supreme court answered this question in the negative in *Selby v. Karman*,[3] implicity overruling the prior case of *Connor v. Timothy*.[4]

On September 21, 1971, Selby filed a tort action arising out of an occurrence that had taken place on September 3, 1969. Upon motion by the defendant, the trial court granted summary judgment on the ground that the action was barred by a 2-year statute of limitations.[5]

---

1. When a person against whom there is a cause of action is without the state at the time the cause of action accrues or at any time during which the action might have been maintained, such action may be brought against the person after his return to the state. The time of such person's absence shall not be counted or taken as a part of the time limited by the provisions of this chapter.

ARIZ. REV. STAT. ANN. § 12-501 (1956).

2. *See, e.g.*, CAL. CIV. PRO. CODE § 410.10 (West 1970); N.Y. CIV. PRAC. LAW § 302 (McKinney 1974); ARIZ. R. CIV. P. 4(d), 4(e). *See generally* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); Comment, *The Development of In Personam Jurisdiction over Individuals and Corporations in California: 1849-1970*, 21 HASTINGS L.J. 1105 (1970); "Garnishment and the Validity of Quasi in Rem Jurisdiction," 14 ARIZ. L. REV. 409 (1972).

3. 110 Ariz. 522, 521 P.2d 609 (1974), *vacating* 20 Ariz. App. 206, 511 P.2d 650 (1973).

4. 43 Ariz. 517, 33 P.2d 293 (1934).

5. ARIZ. REV. STAT. ANN. § 12-542 (1956).

Selby appealed, claiming that the statute of limitations was tolled for 52 days by reason of several absences of the defendant during the limitation period. The court of appeals and supreme court affirmed, holding that a defendant's absence does not toll the running of the statute of limitations unless service of process cannot be made in any manner to secure personal jurisdiction over him during the absence.[6]

This note will first examine the history of statutes of limitations and tolling statutes to determine the purpose behind such provisions. Focusing on the various views taken by American courts, a discussion of the effect of expanded means of acquiring jurisdiction, such as substituted service and long arm statutes, on the application of tolling statutes will then be presented. Finally, after reviewing prior Arizona law, the effect of the *Selby* decision will be examined.

Statutes of Limitations and Tolling Statutes

In England by the year 1236, statutes barred any action to recover real property if the claim was founded on a transfer taking place before a particular event, such as the coronation of a king.[7] Personal actions, on the other hand, were theoretically perpetual, although rules, such as the failure of a tort action to survive the death of either party, often acted to eventually bar claims.[8] The need for a definite limitation period for both real and personal actions became obvious, and a statute for this purpose was enacted in 1540.[9] A more comprehensive statute was enacted in 1623, providing for shorter limitation periods in specific actions, and for delaying the running of the statute if the plaintiff for specified reasons was unable to bring the action.[10] The provisions of this act were adopted by the colonies and formed the basis for American limitation law.[11]

The primary purpose of the 1623 act was to insure that inconsequential claims did not crowd the King's courts, and to decrease the hardship to poor defendants caused by defending suits in the King's courts.[12] In a modern context, statutes of limitations avoid the disrup-

6. 110 Ariz. at 524, 521 P.2d at 611. Although the supreme court reached the same result as the court of appeals, the lower court opinion, 20 Ariz. App. 206, 511 P.2d 650 (1973), was vacated, presumably for purposes of future precedent.

7. 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 81 (2d ed. 1898).

8. 1 H. WOOD, LIMITATIONS § 2, at 4-5 (4th ed. 1916); *Developments in the Law —Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950) [hereinafter cited as *Developments—Statutes of Limitations*].

9. The Act of Limitation with a Provifo, 32 Hen. 8, c. 2 (1540). This statute reduced the limit of time in each case to a fixed interval, either 30, 50, or 60 years.

10. An Act for Limitation of Actions and for Avoiding of Suits in Law, 21 Jac. 1, c.16, § 7 (1623).

11. 1 H. WOOD, *supra* note 8, at 6.

12. *Developments—Statutes of Limitations, supra* note 8, at 1178.

tive effect that unsettled claims have on commercial affairs. The general goal of the statutes is to provide for the speedy adjudication of claims,[13] and to preclude reliance on outdated evidence.[14]

The 1623 act provided for the tolling of the statute of limitations only when the plaintiff was suffering under the disabilities of minority, imprisonment, *feme covert, non compos mentis,* or was "beyond the seas."[15] This restriction insured that each plaintiff would have an equal opportunity to bring his action, despite his own temporary disability to file suit. The absence of a prospective defendant from the court's jurisdiction, however, was not encompassed by the 1623 act and therefore did not toll the limitation period.[16] To preserve the plaintiff's cause of action and to correct the inequity caused by barring a plaintiff who could not obtain a judgment without pursuing the defendant, the English statute was amended to provide that the time a defendant spent "beyond the seas" also would not count toward the statutory limitation period.[17] As with the prior statutes of limitations, this new tolling statute was adopted by the colonies.[18] In this country, "beyond the seas" was expanded to mean outside the boundaries of the state.[19] The purpose and intent of this law was to postpone suit while the defendant could not be found for purposes of service,[20] thereby preventing defend-

13. Byrne v. Ogle, 488 P.2d 716, 718 (Alas. 1971).

14. In Fisher v. Phelps, Dodge & Co., 21 Tex. 551, 561 (1858), the court said, "While man is suspending his laws into the distant future . . . nature is silently, but surely, destroying the evidences by which we can ascertain what is just between the parties. Papers are exposed to loss—the memories of the witnesses fail, or they die or are dispersed."

15. An Act for Limitation of Actions and for Avoiding of Suits in Law, 21 Jac. 1, c.16, § 7 (1623). Arizona now allows tolling of the statutes of limitations when the plaintiff is a minor, insane, or imprisoned. ARIZ. REV. STAT. ANN. § 12-502 (1956).

16. Dupleix v. De Roven, 23 Eng. Rep. 950 (Ch. 1705).

17. An Act for the Amendment of the Law, and the better Advancement of Justice, 4 Anne, c.16, § 19 (1705).

18. *See, e.g.,* ch. 23, § 4, [1715] Md. Laws; ch. 17, § 3, [1748-49] Mass. Bay Acts & Resolves; ch. 122, [1728] N.J. Laws. *See generally* 46 HARV. L. REV. 706 (1933). The specific terminology used in the early tolling statutes differed. Some used a lack of residence as the basis for tolling, while others used the term "absence." Where operation of the tolling statute depended on residence, temporary absences of residents did not toll the statute of limitations. Barney v. Oelrichs, 138 U.S. 529 (1890); Connolly v. Serunian, 138 Me. 80, 21 A.2d 830 (1941). Where absence was used, a conflict in the law developed. Most courts initially held that under such a statute, any temporary absence would toll the statute. Connor v. Timothy, 43 Ariz. 517, 33 P.2d 293 (1934); Lane v. National Bank, 6 Kan. 49 (1870); Fisher v. Phelps, Dodge & Co., 21 Tex. 551 (1858). *But see* Clegg v. Bishop, 105 Conn. 564, 136 A. 102 (1927); Blodgett v. Ultey, 4 Neb. 25 (1875).

19. Murray's Lessee v. Baker, 16 U.S. (3 Wheat.) 541 (1818). In *Baker,* the defendant, a Virginia resident, pleaded the Georgia statute of limitations in an action for ejectment. The only issue was whether the defendant's absence from Georgia was within the "beyond the seas" exception for purposes of tolling the limitations statute. The Supreme Court held that the exception must be adapted to the different geography and circumstances of the United States, and must relate to the boundaries of the states. This approach was followed in Bank of Alexandria v. Dyer, 39 U.S. (14 Pet.) 141 (1840). For a discussion of the expansion of the "beyond the seas" doctrine, see J. ANGELL, LIMITATIONS OF ACTIONS AT LAW §§ 9-16, at 209-17 (2d ed. 1846).

20. 46 HARV. L. REV. 706 (1933).

ants from escaping liability by leaving the state's jurisdiction for the required time and then raising the statute of limitations as a bar.[21]

The Impact of Alternative Means for Acquiring Jurisdiction

Originally, the only way for a plaintiff to obtain in personam jurisdiction over a defendant was to procure personal service of process while the defendant was physically present within the state or, in England, not "beyond the seas."[22] The possibility of a defendant evading personal service by staying out of the state or by hiding within the state was problematical. As to residents, the states reasoned that by a legal fiction they could be deemed present at all times.[23] This led to the adoption of statutes[24] providing for substituted service by delivery at the residence for residents not within the state. Similarly, as United States Supreme Court decisions began to broaden the constitutional scope of the states' personal jurisdiction over absent nonresidents,[25] states passed long arm statutes authorizing their courts to exercise jurisdiction over nonresidents on these expanded grounds.[26] While not all such statutes extend as far as what now seems constitutionally permissible, many states have exercised to some degree the broad new constitutional power for acquiring jurisdiction over nonresidents as well as absent residents sanctioned by the United States Supreme Court.[27]

Although these expanded means of acquiring personal jurisdiction represented a positive step in the law, they posed a potential problem with respect to many of the states' tolling statutes. As noted, the original purpose of the tolling statutes was to abate suit while the

21. Byrne v. Ogle, 488 P.2d 716, 717-18 (Alas. 1971); Benally v. Pigman, 78 N.M. 189, 192, 429 P.2d 648, 651 (1967); Summerrise v. Stephens, 75 Wash. 2d 808, 811, 454 P.2d 224, 226 (1969).

22. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

23. Milliken v. Meyer, 311 U.S. 457 (1940).

24. *See, e.g.*, MICH. STAT. ANN. § 27A.1913 (1962); Ariz. Rev. Code § 3755 (1928); Civil Practice Act, art. III, § 13, [1933] Laws of Ill. 788 (codified at ILL. ANN. STAT. ch. 110, § 13.2 (Smith-Hurd 1968)). *See generally* R. BOWERS, PROCESS & SERVICE §§ 259-64 (1927).

25. McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Milliken v. Meyer, 311 U.S. 457 (1940); Hess v. Palowski, 274 U.S. 352 (1927). Due process requires "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'." International Shoe Co. v. Washington, *supra* at 316.

26. *See, e.g.*, ARK. STAT. ANN. § 27-340 (1947); CAL. CIV. PRO. CODE § 410.10 (West 1970); N.Y. CIV. PRAC. LAW § 302 (McKinney 1974).

27. *See generally* Kurland, *supra* note 2; Comment, *supra* note 2. An example of an expansive state long arm statute is CAL. CIV. PRO. CODE § 410.10 (West 1970): "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Similarly, in Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966), the Arizona supreme court found that ARIZ. R. CIV. P. 4(e) "is intended to give Arizona residents the maximum privileges permitted by the Constitution of the United States." *Id.* at 254, 413 P.2d at 733.

defendant was unavailable.[28] Since the methods of substituted service for residents and long arm statutes for nonresidents often rendered the defendant available for suit in spite of his absence from the state, the applicability of the tolling statutes was open to question.[29]

A majority of American jurisdictions ruling on this issue have held that where a defendant is subject to in personam jurisdiction through use of substituted service or the long arm statute, his absence from the state will not toll the statute of limitations.[30] In arriving at this conclusion, some of these courts have used what can be considered a policy approach. The goal of the statutes of limitations and tolling statutes is to provide for the speedy and efficient adjudication of claims, while insuring that each plaintiff will have an equal time period in which to institute his claim if the defendant is absent from the state.[31] The long arm statutes increase the number of persons subject to a state's jurisdiction, although technically "absent" from the state. To apply the tolling statute to such persons would mean that actions against absent defendants might remain valid in perpetuity.[32] The nonresident defendant would be held in limbo indefinitely until the plaintiff decided to institute his action, even though the action could have been commenced within the prescribed period through use of the long arm statute. Recognizing the hardship imposed on a defendant in this situation and the inequity in granting such plaintiffs a longer limitation period than that applicable to plaintiffs whose defendants are within the state,[33] these courts have held the tolling statute inoperative where the plaintiff's ability to bring his action is unaffected by the defendant's absence.[34]

28. See text accompanying notes 20-21 *supra*.

29. 46 HARV. L. REV. 706, 709 (1933).

30. *E.g.*, Nelson v. Richardson, 295 Ill. App. 504, 15 N.E.2d 17 (1938); Long v. Moore, 295 Minn. 266, 204 N.W.2d 641 (1973); Goodemote v. McClain, 40 App. Div. 2d 22, 337 N.Y.S.2d 79 (1972); McCullough v. Boyd, 475 P.2d 610 (Okla. 1970); Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915 (1964). Cases are collected in Annot., 55 A.L.R.3d 1158 (1974).

31. Byrne v. Ogle, 488 P.2d 716 (Alas. 1971); Bolduc v. Richards, 101 N.H. 303, 142 A.2d 156 (1958); Summerrise v. Stephens, 75 Wash. 2d 808, 454 P.2d 224 (1969).

32. Byrne v. Ogle, 488 P.2d 716, 718 (Alas. 1971); Law's Administrator v. Culver, 121 Vt. 285, 289, 155 A.2d 855, 858 (1959); Bergman v. Turpin, 206 Va. 539, 544, 145 S.E.2d 135, 138 (1965).

A collateral point beyond the scope of this note is the application of "borrowing" statutes in these situations. *See* ARIZ. REV. STAT. ANN. § 12-506 (1956). Many states have statutes barring a cause of action not as yet barred by the forum's statute if it would be barred where the cause of action arose or where the defendant has resided since the cause of action arose. Such laws have the effect of applying the shortest statute of limitations to the plaintiff's claim. *Developments—Statutes of Limitations, supra* note 8, at 1262-63.

33. Dedmon v. Falls Prods., Inc., 299 F.2d 173 (5th Cir. 1962); Coombs v. Darling, 116 Conn. 643, 166 A. 70 (1933).

34. Byrne v. Ogle, 488 P.2d 716 (Alas. 1971); Friday v. Newman, 183 So. 2d 25 (Fla. 1966); State *ex rel.* McGhee v. District Court, 162 Mont. 31, 508 P.2d 130 (1973); Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967).

Many of these cases have arisen from motor vehicle accidents. Application of the tolling statute to causes of action against absent nonresident motorists, when substituted service on the secretary of state or the commissioner of motor vehicles is available by

Other majority courts have used a pro tanto amendment or nullification approach in reaching the same result.[35] In the course of enacting legislation in accord with the changing demands of society, legislatures sometimes may intend to repeal or amend an inconsistent preexisting law without mentioning or referring to it.[36] In such cases, the repeal or amendment of a prior law may arise by necessary implication from the enactment of a subsequent law.[37] Adherence to the letter of an old statute must therefore be abandoned if the purpose of the new law would be defeated by a literal interpretation of the old.[38] Although courts have developed a presumption against such an implied repeal,[39] the majority courts using this approach have viewed the passage of long arm statutes as indicative of legislative intent to provide an exception to the tolling provision, since the long arm statute effectively removes a plaintiff's disability to pursue his claim. Therefore, the pro tanto repeal of the tolling statute is consistent with the purpose of long arm service.[40]

---

statute, would give plaintiffs in such cases an advantage over plaintiffs injured in accidents with resident motorists. To eliminate this possibility, some states have enacted nonresident motorist statutes which appoint an agent in the state to receive service of process for nonresident accident defendants. This sets up the legal fiction that the motorist has not left the state. Bank of Nevada v. Friedman, 82 Nev. 417, 420 P.2d 1 (1966).

35. Bolduc v. Richards, 101 N.H. 303, 142 A.2d 156 (1958); Jarchow v. Eder, 433 P.2d 942 (Okla. 1967); Busby v. Shafer, 75 S.D. 428, 66 N.W.2d 910 (1954).

36. 1A C. SANDS, STATUTES & STATUTORY CONSTRUCTION § 23.09, at 223 (4th ed. 1972).

37. Bynum v. State, 490 P.2d 531, 533 (Okla. 1971).

38. Murphy v. State, 65 Ariz. 338, 363, 181 P.2d 336, 352 (1947). Note that this line of reasoning parallels that used by courts taking a policy approach, the policy behind the statutes being used to determine whether an amendment was intended.

39. Industrial Comm'n v. Hartford Accident & Indem. Co., 61 Ariz. 86, 91, 144 P. 2d 548, 550 (1943); Warne v. Harkness, 60 Cal. 2d 579, 587-88, 387 P.2d 377, 382, 35 Cal. Rptr. 601, 606 (1963); People v. Palmer, 109 N.Y. 110, 117-18, 16 N.E. 529, 532 (1888).

40. Bolduc v. Richards, 101 N.H. 303, 142 A.2d 156 (1958); Jarchow v. Eder, 433 P.2d 942 (Okla. 1967); Busby v. Shafer, 75 S.D. 428, 66 N.W.2d 910 (1954).

Application of the amendment theory in a state where long arm jurisdiction was created by court rule rather than by statute, as in Arizona, may be problematical, since the statutory grant of the court's rulemaking power is often limited to purely procedural matters. ARIZ. REV. STAT. ANN. § 12-109(A) (1956) is typical: "[t]he rules shall not abridge, enlarge or modify substantive rights of a litigant." Insofar as a statute of limitations is considered a grant of substantive rights, therefore, *see* Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), it would not be susceptible to pro tanto amendment by a court-made rule.

The only state court which has discussed this question is the Supreme Court of Nevada. Nevada also has long arm jurisdiction by court rule, NEV. R. CIV. P. 4(e), and a statute prohibiting the modification of substantive rights, NEV. REV. STAT. § 2.120 (1971). The court in Bank of Nevada v. Friedman, 82 Nev. 417, 420 P.2d 1 (1966), held that a tolling statute does not grant a substantive right. This decision, made rather perfunctorily by the Nevada court, was premised on the belief that a statute of limitations affected only the remedy and not the substantive cause of action.

Although state statutes of limitation and tolling statutes may be deemed to grant substantive rights for purposes of federal courts' determining whether the state law must be applied in federal court, as was the case in Ragan v. Merchants Transfer & Warehouse Co., *supra*, different considerations appear to govern when the only issue is whether a state may modify or abandon its own laws. The federal court's decision in *Ragan* was based largely on the policy of discouraging forum shopping by refusing to

On the other hand, a minority of jurisdictions have held that any absence of a defendant from a state is enough to invoke the tolling statute, despite the possibility of substituted service or long arm service.[41] These courts have rejected the policy argument by maintaining that it is up to the legislature to make any change in policy; therefore, they will wait for the legislature to take action, lest they be involved in a form of judicial legislation.[42] With regard to the repeal argument, the minority courts have noted that since the long arm statutes contain no specific reference to the tolling provision, no implied repeal or amendment was intended by the legislature.[43] The presumption against implied repeal is based on the belief that the legislature views the whole body of law when legislating, and if they intend to repeal a prior statute, they will expressly designate the offending provisions.[44] Unless there is an irreconcilable conflict between the two statutes, these courts will attempt to interpret them in harmony, without abandoning either.[45] According to these courts, there is no irreconcilable conflict between the tolling statutes and the long arm statutes, since the latter can be interpreted as merely giving plaintiffs an option to proceed at once or to defer the action until the defendant returns to the state.[46] In this way, both statutes are preserved.

---

give the action a longer life in federal court than it would have in state court. *See generally* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 722-23, 729-32 (1974).

41. *E.g.*, Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021 (1957); Roth v. Holman, 105 Kan. 175, 182 P. 416 (1919); Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139 (1950); Vaughn v. Deitz, 430 S.W.2d 487 (Tex. 1968); Bode v. Flynn, 213 Wis. 509, 252 N.W. 284 (1934).

42. Couts v. Rose, 152 Ohio St. 458, 463, 90 N.E.2d 139, 141 (1950); Vaughn v. Deitz, 430 S.W.2d 487, 490 (Tex. 1968); Bode v. Flynn, 213 Wis. 509, 513, 252 N.W. 284, 286 (1934).

43. Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139 (1950); Vaughn v. Deitz, 430 S.W.2d 487 (Tex. 1968). *But see* Bolduc v. Richards, 101 N.H. 303, 142 A.2d 156 (1958). In that case the court, adopting the majority view, stated:

> Had the legislature desired to change existing law so as to afford the plaintiff the latitude of permitting him to allow his case to drag on indefinitely at his option, even though he could get valid service upon the defendant, so long as the latter remained out of the state, it presumably would have said so.

Id. at 306, 142 A.2d at 158.

44. *See* State Land Dep't v. Tucson Rock & Sand Co., 107 Ariz. 74, 77, 481 P.2d 867, 870 (1971).

45. *See id.* at 77, 481 P.2d at 870 (1971); City of Mesa v. Salt River Project Agriculture Improvement & Power Dist., 92 Ariz. 91, 98, 373 P.2d 722, 727 (1962); 1A C. SANDS, *supra* note 36, § 23.10.

46. Couts v. Rose, 152 Ohio St. 458, 462, 90 N.E.2d 139, 141 (1950); Vaughn v. Deitz, 430 S.W.2d 487, 490 (Tex. 1968). Another reason, according to some minority courts, for construing the tolling statutes literally is that defendants, by absenting themselves from the state, should not be entitled to the benefit of the statute of limitations since they often are evading settlement of their disputes. Couts v. Rose, 152 Ohio St. 458, 462, 90 N.E.2d 139, 141 (1950); Bode v. Flynn, 213 Wis. 509, 514, 252 N.W. 284, 286 (1934). One court has emphasized the greater expense and difficulty in obtaining constructive service as compared to personal service. Vaughn v. Deitz, 430 S.W.2d 487, 490 (Tex. 1968). For a critique and discussion of the *Vaughn* decision, see 1 ST. MARY'S L.J. 118 (1969); 23 SW. L.J. 410 (1969); 15 WAYNE L. REV. 912 (1969).

The Arizona Law

The first indication in the Arizona courts of the effect of expanded jurisdiction on the state's tolling statute came in *Connor v. Timothy*.[47] Although a form of substituted service for residents was available at that time,[48] the Arizona supreme court held that the tolling statute[49] nevertheless applied to exclude from the limitation period a resident defendant's temporary absence from the state.[50] In reaching this conclusion, the court did not analyze the purpose of the tolling statute. Rather, it merely examined the term "absence" in the statute and construed it literally.[51]

The claim that the possibility of substituted service should render the tolling statute inoperative was raised again in *Western Coal & Mining Co. v. Hilvert*.[52] The Arizona supreme court's rejection of the claim reflected the court's continued inclination to give the tolling statute effect according to its form rather than its purpose.[53] Although the court purported to follow the majority rule, it had already been suggested that the majority view favored less strict application of the tolling statute.[54]

In 1961, the Arizona supreme court adopted long arm jurisdiction by court rule,[55] rendering absent nonresidents, in addition to absent

47. 43 Ariz. 517, 33 P.2d 293 (1934).
48. Ariz. Rev. Code § 3755 (1928).
49. *Id.* § 2066.
50. 43 Ariz. at 521, 33 P.2d at 294.
51. The court decided that this was the better rule when dealing with a tolling statute, such as Arizona's, based on "absence" rather than "residence" or "resides out of." See discussion note 18 *supra*.
52. 63 Ariz. 171, 160 P.2d 331 (1945).
53. The court in *Western Coal* also held that successive absences might be aggregated to toll the statute of limitations for the total time of all such absences. *Id.* at 184, 160 P.2d at 337. In making this decision, the court looked to the Texas courts' construction of the Texas tolling statute, from which Arizona's was drawn. The Texas statute allowed aggregation of successive absences for tolling purposes. Vaughn v. Deitz, 430 S.W.2d 487 (Tex. 1968); Fisher v. Phelps, Dodge & Co., 21 Tex. 551 (1858).
54. 46 HARV. L. REV. 706, 709 (1933). Despite the court's refusal in *Connor* and *Western Coal* to recognize exceptions to the tolling statute where in personam jurisdiction could be obtained by substituted service, the state legislature, as part of a general revision of the Arizona statutes in 1956, reenacted the tolling statute without inserting any such exception. ARIZ. REV. STAT. ANN. § 12-501 (1956). It is recognized in Arizona that when a statute which has been interpreted by a court of last resort is reenacted without change, the legislature presumably approves of the prior statutory interpretation and adopts that construction as a part of the reenacted statute. State v. Superior Court, 104 Ariz. 440, 442, 454 P.2d 982, 984 (1969); Madrigal v. Industrial Comm'n, 69 Ariz. 138, 142, 210 P.2d 967, 971 (1949). If the 1956 reenactment is viewed in this manner, the legislature apparently was satisfied in allowing the tolling statute to operate, despite a plaintiff's ability to institute his action against an absent resident by some form of substituted service. It is questionable, however, whether the 1956 revision was a complete reenactment or instead was merely a reshuffling of code provisions for the purpose of convenience and publication. To view this type revision as a legislative ratification of prior judicial constructions of the tolling statute might be an unwarranted extension of the rule of legislative adoption of judicial interpretation by reenactment. *Cf.* Mahler v. Trico Prods. Corp., 271 App. Div. 179, 182-83, 63 N.Y.S. 2d 168, 171-72 (1946), *aff'd*, 296 N.Y. 902, 72 N.E.2d 622 (1947).
55. ARIZ. R. CIV. P. 4(e)(2). The court was authorized to promulgate rules of

residents, subject to Arizona jurisdiction. This rule brought increased numbers of persons within the jurisdictional reach of Arizona courts, without expressly imposing any time limit on the exercise of that jurisdiction. Because of the significant effect of Arizona's expanded jurisdictional power and its implications with respect to the state tolling statute, reexamination of *Connor* and *Western Coal* seemed inevitable.

The first inroad came in *Phillips v. Anchor Hocking Glass Corp.*,[56] where Arizona's expanded jurisdiction rule was put to its first major test. In this landmark product liability case, the plaintiff sued Anchor Hocking Glass, an Ohio corporation, for selling defective glassware. Anchor Hocking argued that its contacts with Arizona were so minimal that subjecting it to suit in the state would violate due process.[57] The firm also argued that if it were subject to jurisdiction in Arizona, it could never seek the repose of a statute of limitations, since, as a foreign corporation, it was absent from the state by definition under the tolling statute.[58] While not expressly recognizing the doctrine, the supreme court followed a long line of authority exempting foreign corporations from the application of tolling statutes[59] and noted that a foreign corporation is absent within the meaning of the tolling statute only if it could not be served with process for personal jurisdiction.[60]

Drawing upon *Anchor Hocking*, the supreme court in *Selby v. Karman*[61] reexamined the *Connor* and *Western Coal* cases. Analyzing the basic purpose underlying the statutes, the *Selby* court felt that the literal interpretation given the tolling statute by *Connor* defeated the purposes of the tolling statute, the statute of limitations, and the long arm rule.[62] Since the plaintiff in *Selby* failed to show any reason why defendants could not have been served with process by any of the applicable methods under Arizona's long arm rule, the action was dismissed because it was barred by a 2-year statute of limitations.[63] Although the court did not so state explicitly, *Connor* and *Western Coal* have obviously been overruled. Henceforth, the term "absence" in section 12-501 of the Arizona Revised Statutes will not be given its

procedure by ARIZ. CONST. art. 6, § 5(5) and ARIZ. REV. STAT. ANN. § 12-109(A) (1956). See discussion note 40 *supra*.

56. 100 Ariz. 251, 413 P.2d 732 (1966), *noted in* 8 ARIZ. L. REV. 356 (1967). This decision was followed in Hawkinson Tire Co. v. Paul E. Hawkinson Co., 13 Ariz. App. 343, 476 P.2d 864 (1970), *aff'd*, 107 Ariz. 255, 485 P.2d 825 (1971), and Engle Bros., Inc. v. Superior Court, 23 Ariz. App. 406, 533 P.2d 714 (1975).

57. The court rejected this claim and found sufficient minimum contacts to allow the exercise of jurisdiction. 100 Ariz. at 260, 413 P.2d at 738.

58. *Id.* at 261, 413 P.2d at 738.

59. 46 HARV. L. REV. 706, 710 (1933).

60. 100 Ariz. at 261, 413 P.2d at 738-39.

61. 110 Ariz. 522, 521 P.2d 609 (1974).

62. By focusing on the underlying purposes of the statutes and rules, the court apparently based its decision on a policy theory. See text accompanying notes 30-34 *supra*.

63. ARIZ. REV. STAT. ANN. § 12-542 (1956).

literal interpretation, but instead will refer only to situations where personal jurisdiction cannot be obtained in any manner over the absent defendant.

Selby's construction of the tolling statute accords with Arizona's modern jurisdictional scheme. The *Connor* and *Western Coal* courts had broadened the coverage of the tolling statute by granting some plaintiffs an extended limitation period in cases where personal jurisdiction over the defendant clearly was obtainable. In rectifying this anomalous situation, the *Selby* court instilled some consistency into Arizona limitation law by redefining the tolling statute to insure its original purpose.

Conclusion

In *Selby*, the Arizona supreme court aligned with the majority of jurisdictions in giving effect to the underlying purposes of the tolling statute, the statutes of limitations, and the long arm rule. By overturning the strict, literal approach of *Connor*, the court took a step forward in this area of the law. It is now clear that a plaintiff will not be entitled to the benefits of the tolling statute if he can institute his claim against an absent defendant through use of substituted service or the long arm rule.

IV. CONSTITUTIONAL LAW

A. THE FIGHTING WORDS EXCEPTION TO FIRST AMENDMENT PROTECTION

Fighting words have long been recognized as an exception to the broad protection afforded to expression by the first[1] and 14th amendments[2] to the United States Constitution. States may enact statutes which expressly forbid the utterance of fighting words.[3] Such statutes, however, must be carefully drawn or narrowly construed to avoid being susceptible of application to speech protected by the first and 14th amendments, for any statute which may be applied to prohibit protected speech is overbroad and thus invalid.[4]

In *State v. Brahy*[5] the defendant challenged section 13-371(A)(4) of the Arizona Revised Statutes[6] as being void for overbreadth. The statute under attack declares an individual guilty of disturbing the peace if he willfully and maliciously applies any violent, abusive, or obscene epithet to another.[7] In holding the statute constitutionally valid, the Arizona court of appeals relied principally on the Arizona supreme court's prior interpretation of the statute in *State v. Starsky*,[8] where section 13-371(A)(4) was held not to impinge on protected speech.[9]

---

1. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
2. Gitlow v. New York, 268 U.S. 652 (1925).
3. Gooding v. Wilson, 405 U.S. 518, 523 (1972); Cohen v. California, 403 U.S. 15, 20 (1971).
4. Gooding v. Wilson, 405 U.S. 518, 520 (1972).
5. 22 Ariz. App. 524, 529 P.2d 236 (1974), *review denied*, No. 3110-PR (Ariz. Sup. Ct., Feb. 11, 1975).
6. ARIZ. REV. STAT. ANN. § 13-371 (1956) provides in part:
   A. A person is guilty of a misdemeanor who maliciously and wilfully disturbs the peace and quiet of a neighborhood, family or person by:
      1. Loud or unusual noice.
      2. Tumultuous or offensive conduct.
      3. Threatening, traducing, quarreling, challenging to fight or fighting.
      4. Applying any violent, abusive or obscene epithets to another.
7. *Id.* § 13-371(A)(4).
8. 106 Ariz. 329, 475 P.2d 943 (1970).
9. *Id.* at 332, 475 P.2d at 946.

The facts giving rise to the issue, as outlined in the *Brahy* opinion,[10] occurred when the defendant, Christine Brahy, was informed that her purse must be searched by airport employees before she could enter the boarding area of the Phoenix airport. Angered, defendant slammed her purse down on the table in front of the women assigned to check it and walked toward the boarding gate. Returning toward the table several minutes later, defendant saw her purse being searched. From a distance of about 25 feet she began screaming at the employees, "What are you fucking sons of bitches a-doing in my purse?," repeating this six to eight times. A nearby police officer tried to calm her, but the irate defendant exclaimed, "You fucking son of a bitch, I will spit in your face," and spat on the officer. At this point Brahy was placed under arrest.

The criminal complaint charged Brahy with violating section 13-371(A)(4) in that she maliciously and willfully disturbed the peace and quiet of the "people at the airport by violent, abusive, obscene epithets to another."[11] In a trial to the court, the defendant was convicted. Faced with a first amendment challenge to the statute, the Arizona court of appeals affirmed the judgment on the ground that *Starsky* had construed section 13-371(A)(4) in conformity with guidelines set by the United States Supreme Court in the cases of *Chaplinsky v. New Hampshire*,[12] *Cohen v. California*,[13] and *Gooding v. Wilson*.[14] Under these cases, a fighting words statute may only proscribe the use of words which by their very utterance tend to incite an immediate breach of the peace.[15] Any statute that potentially prohibits speech which does not tend to provoke an immediate breach of the peace, such as speech which is merely offensive to public sensibilities, is overbroad[16] and hence unconstitutional.

The court of appeals found that the Arizona supreme court in *Starsky* had "narrowed the definition of 'disturbing the peace' through 'offensive' conduct to mean wilfully and maliciously inciting others to

10. 22 Ariz. App. at 525, 529 P.2d at 237.
11. *Id.*
12. 315 U.S. 568 (1942).
13. 403 U.S. 15 (1971).
14. 405 U.S. 518 (1972).
15. Gooding v. Wilson, 405 U.S. 518, 525-26 (1972); Cohen v. California, 403 U.S. 15, 20 (1971); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
16. *See* Gooding v. Wilson, 405 U.S. 518, 527 (1972). A defendant has standing to challenge an overbroad statute in the area of fighting words even if his words might be punishable as fighting words under a properly drawn statute. As the Court stated in Dombrowski v. Pfister, 380 U.S. 479, 486 (1965): "We have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Accord*, Plummer v. City of Columbus, 414 U.S. 2, 3 (1973).

violence or engaging in conduct likely to incite others to violence."[17] Thus, section 13-371(A)(4), according to the *Brahy* court, was not overbroad, since the *Starsky* court's construction of the statute limited its application only to fighting words. The court of appeals further held that Brahy's conduct was punishable under the statute because it "was likely to incite others to violence."[18]

Judge Donofrio dissented on two grounds. First, he maintained that "[t]he *Starsky* opinion fails in any way to give guidance as to how our statute must be interpreted to be constitutionally permissible."[19] In addition, Judge Donofrio discussed Brahy's conduct in terms of the likelihood of violent reaction and concluded that, on these facts, there was little likelihood of a physical altercation between Brahy and either the policeman or the airport employees.[20] The dissent opined that because there was no likelihood of a violent response to her words, Brahy's speech could not be considered fighting words and her conviction should be reversed.[21]

Brahy involved two issues with which courts interpreting fighting words statutes are typically faced. The first was whether the statute itself is constitutional. Once the statute was found to be constitutional on its face, the second issue then became whether the defendant's words were, in fact, fighting words and therefore punishable under the statute. This casenote will address both of these issues and the *Brahy* court's treatment of them. First, the court's conclusion that *Starsky* cured the vulnerability of section 13-371(A)(4) to a charge of overbreadth will be examined in light of recent United States Supreme Court decisions. Next, this casenote will analyze the *Brahy* court's test for fighting words. Finally, a more realistic approach, compatible with both first amendment rights and the government's interest in maintaining an ordered society, will be suggested.

Overbreadth

In rejecting defendant's charge that section 13-371(A)(4) was overbroad, the *Brahy* court relied on the Arizona supreme court's "narrowed interpretation" of the statute in *State v. Starsky*.[22] The *Starsky* court defined an obscene epithet for the purposes of section 13-371(A)(4) as "an obscene adjective, a vulgarity, a profanity or, in

17. 22 Ariz. App. at 525, 529 P.2d at 237.
18. *Id.*
19. *Id.* at 527, 529 P.2d at 239 (dissenting opinion).
20. *Id.* at 528, 529 P.2d at 240.
21. *Id.* at 529, 529 P.2d at 241.
22. 106 Ariz. 329, 475 P.2d 943 (1970).

plain terms—'cuss words'."[23] Such speech, the court stated, has no social value and is not protected by the Constitution.[24] Relying on an often quoted passage from *Chaplinsky v. New Hampshire*,[25] which indicated that lewd and obscene, profane, and libelous words, as well as fighting words, are outside the protection of the first amendment,[26] the *Starsky* court asserted that "[i]t is inconceivable that the First Amendment grants to anyone an 'inalienable right' to wilfully and maliciously traverse the peace and quiet of his fellow citizens . . . by use of words which are 'violent, abusive or obscene epithets.' "[27]

Arguably, the *Starsky* court properly narrowed the application of section 13-371(A)(4). The court relied on the California case of *In re Bushman*,[28] where the California supreme court defined disturbing the peace as the "disruption of public order by acts that are themselves violent or that tend to incite others to violence."[29] Using this definition, in order for a defendant to disturb the peace by applying violent, abusive or obscene epithets to another, the epithets must tend to incite others to violence.[30] The statute would thus apply only to fighting words, as defined in *Chaplinsky*, and would not be overbroad.

However, after *Starsky* the United States Supreme Court decided several cases which cast doubt upon the constitutional sufficiency of the *Starsky* court's interpretation of section 13-371(A)(4). In *Cohen v. California*[31] the Supreme Court dealt with the issue of whether offensive

23. 106 Ariz. at 332, 475 P.2d at 946. *See generally* "The Criminality of Cussing," 13 ARIZ. L. REV. 313, 412 (1971).

24. 106 Ariz. at 332, 475 P.2d at 946.

25. 315 U.S. 568 (1942). In *Chaplinsky*, the United States Supreme Court affirmed the defendant's conviction under a New Hampshire statute which forbade addressing a person by "any offensive or derisive name" or by "any offensive, derisive or annoying word." *Id.* at 569. The complaint charged that Chaplinsky "did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists,' the same being offensive, derisive and annoying words and names." *Id.* The Supreme Court held that the statute was not an unconstitutional limitation on freedom of speech because the New Hampshire supreme court had construed the statute to apply only to "the use in a public place of words likely to cause a breach of the peace." *Id.* at 573. By this holding, the United States Supreme Court established that fighting words, those words which "tend to incite an immediate breach of the peace," were not protected by the first amendment. *Id.* at 572.

26. In the words of the *Chaplinsky* court:

> There are certain well-defined and narrowly limited classes of speech, the prevention of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

315 U.S. at 571-72.

27. 106 Ariz. at 332, 475 P.2d at 946.

28. 1 Cal. 3d 767, 463 P.2d 727, 83 Cal. Rptr. 375 (1970).

29. *Id.* at 770, 463 P.2d at 730, 83 Cal. Rptr. at 378, *quoted in* State v. Starsky, 106 Ariz. 329, 331, 475 P.2d 943, 945 (1970).

30. Arizona courts, however, have not strictly applied the *Bushman* definition of "disturbing the peace." See text accompanying notes 61-66 *infra*.

31. 403 U.S. 15 (1971).

language directed at a general audience was punishable under a statute prohibiting "offensive conduct."[32] The Court held that no offensive words inherently provoke a violent response unless addressed to a single individual.[33] In order to be fighting words, then, the words apparently must be addressed to a particular individual in a face-to-face confrontation.[34]

The limits to what form of offensive language is constitutionally punishable were further defined in *Gooding v. Wilson*.[35] In that case the defendant had been convicted under a Georgia statute which made it a misdemeanor to use "opprobrious words or abusive language, tending to cause a breach of the peace."[36] The United States Supreme Court found that, despite its restrictive wording, previous interpretations of the statute by the Georgia supreme court had failed to limit it solely to fighting words. In looking at the Georgia supreme court's previous definitions of "opprobrious words or abusive language" and "breach of the peace," the Supreme Court found that words had been included which, although offensive and insulting, did not tend to incite an immediate breach of the peace.[37] Furthermore, the Georgia courts had not narrowed the definition of breach of the peace to acts which were themselves violent or which tended to provoke a violent response in others, but included within the scope of the term acts which merely disturbed the public peace or tranquility enjoyed by the citizens of a community,[38] thus rendering the statute susceptible of application to speech which was merely offensive.[39] For this reason, the Supreme Court held that the Georgia statute was overbroad, and overturned the defendant's conviction accordingly.[40] The conclusion to be drawn from *Cohen* and *Gooding* is that language which is not likely to provoke violence is protected by the Constitution, even though it may offend the listener.[41] Harm to the sensibilities and protection of the public morality

32. CAL. PENAL CODE § 415 (West 1970). The defendant was convicted of offensive conduct for appearing in the Los Angeles County Courthouse wearing a jacket bearing the words "Fuck the Draft." 403 U.S. at 16.

33. *See* 403 U.S. at 20.

34. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 21 (1974).

35. 405 U.S. 518 (1972).

36. *Id.* at 518-19. During an antiwar demonstration, the defendant engaged in a scuffle with police officers, during which he said, "White son of a bitch, I'll kill you;" "You son of a bitch, I'll choke you to death"; and later, "You son of a bitch, if you ever put your hands on me again, I'll cut you to pieces." *Id.* at 519-20 n.1.

37. *Id.* at 525.

38. *Id.* at 525-26.

39. *Id.* at 527.

40. *Id.* at 520.

41. Rutzick, *supra* note 34, at 20-22. Obscene words are not protected. To be obscene, however, a word must be, in some significant way, erotic. Cohen v. California, 403 U.S. 15, 20 (1971).

from vulgar and profane speech have been specifically rejected as justifications for state proscription of offensive speech.[42]

This conclusion was underscored by the memorandum opinions in *Rosenfeld v. New Jersey*,[43] *Brown v. Oklahoma*,[44] and *Lewis v. City of New Orleans*.[45] In all three cases the defendant's conviction for the use of offensive language was vacated and the case remanded. Rosenfeld and Brown had used offensive language while addressing large assemblies of people; their words were not directed to a single individual, and thus their language could not be considered fighting words. Because the statutes under which they were convicted were susceptible of application to protected speech such as the defendants', the provisions were declared overbroad and invalid and the convictions were set aside.[46] Lewis, in contrast, directed her offensive words at one particular individual. Even though her words thus might have been classified as fighting words, the statute under which she was convicted was not limited to such words;[47] consequently it was overbroad and invalid.[48]

Subsequent to *Rosenfeld, Brown,* and *Lewis,* the Supreme Court has dealt in rather summary fashion with a number of cases involving overbroad statutes.[49] Many of these statutes proscribing offensive lan-

42. Gooding v. Wilson, 405 U.S. 518, 520 (1972). Rutzick, *supra* note 34, at 21-22, 27. *See also* Note, *The "Fighting Words Doctrine" Is Applied to Abusive Language Toward Policemen*, 22 DE PAUL L. REV. 725 (1973); Note, *Purging Unseemly Expletives From the Public Scene: A Constitutional Dilemma*, 47 IND. L.J. 142 (1971) [hereinafter cited as *Constitutional Dilemma*]; Note, *New Jersey's Offensive Language Statute Limited by "Fighting Words" Construction*, 5 SETON HALL L. REV. 108 (1973) [hereinafter cited as *New Jersey's Offensive Language Statute*]. *But see* Von Sleichter v. United States, 472 F.2d 1244 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972); Williams v. District of Columbia, 419 F.2d 638 (D.C. Cir. 1968). In both *Williams* and *Von Sleichter* the circuit court held that indecent or obscene words could be disorderly conduct either as fighting words—words which tend to provoke an immediate breach of the peace—or as language that under contemporary community standards is so grossly offensive to members of the public who actually overhear it as to amount to a nuisance. 472 F.2d at 1247; 419 F.2d at 646.

This holding appears similar to the language in *Chaplinsky*, that fighting words are words which tend to incite an immediate breach of the peace or words "which by their very utterance inflict injury." 315 U.S. at 572, *quoted in* Gooding v. Wilson, 405 U.S. 518, 522 (1972), *and* Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974). The "inflict injury" language, however, was dicta in *Chaplinsky*. The New Hampshire state court holding upon which the Supreme Court relied mentioned only the "inciting a breach of the peace" notion of fighting words. Although *Gooding* quoted both formulations of the concept, the opinion limited the scope of fighting words to those inciting a breach of the peace. *See* 405 U.S. at 524.

43. 408 U.S. 901 (1972).

44. 408 U.S. 914 (1972).

45. 408 U.S. 913, *on remand*, 263 La. 809, 269 So. 2d 450 (1972), *rev'd*, 415 U.S. 130 (1972).

46. *New Jersey's Offensive Language Statute, supra* note 42, at 115.

47. *See* City of New Orleans v. Lewis, 263 La. 809, 818-19, 269 So. 2d 450, 453-54 (1972), *rev'd*, 415 U.S. 130 (1974).

48. *See* Lewis v. City of New Orleans, 408 U.S. 914 (1972).

49. *See* Karlan v. City of Cincinnati, 416 U.S. 924 (1974); Lucas v. Arkansas, 416 U.S. 919 (1974); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Hess v. Indiana, 414 U.S. 105 (1973); Plummer v. City of Columbus, 414 U.S. 2 (1973); Cason v. City of Columbus, 409 U.S. 1053 (1972).

guage were not written in terms of fighting words[50] as the Supreme Court has defined them, and as a result were found constitutionally infirm on their faces. Convictions under such statutes typically were vacated and the case remanded to the state court, affording the local court an opportunity to narrow its own statute to constitutional dimensions.[51]

In *Lewis v. City of New Orleans*[52] the case was thus remanded to the Louisiana supreme court, which upheld the statute, finding it "self evident that what is prohibited are 'fighting words' which cannot enjoy the protection of the First and Fourteenth Amendments to the United States Constitution."[53] Upon return to the United States Supreme Court, the decision was reversed on grounds of overbreadth.[54] The Court reasoned that the Louisiana supreme court had not refined or narrowed the words of the ordinance, but rather had merely affirmed that the ordinance as written applied only to fighting words.[55] The Supreme Court found that instead of defining the ordinance in terms of fighting words, the Louisiana supreme court had used the statutory language as a definition of fighting words.[56] Since the wording of the ordinance was in terms susceptible of overbroad interpretation, the definition of fighting words obtained by using the statutory language was overbroad. *Lewis* thus suggests that in order to render a facially overbroad statute constitutional, an authoritative judicial construction of the statute must specifically limit its operation to fighting words, and the limitation must be in words which are not themselves overbroad.[57]

50. *See, e.g.*, IND. ANN. STAT. § 35-27-2-1 (Burns 1975); Act of Feb. 19, 1909, No. 30, § 1 [1909] Acts of Arkansas 73 (repealed 1975) (superseded by ARK. STAT. ANN. §§ 41-2908, -2909 (1975)); Law of 1885, No. 76, § 1 [1885] Laws of N.H. (repealed 1973) (superseded by N.H. REV. STAT. ANN. §§ 644:3-:4 (1974)).

51. This procedure is consistent with the Court's normal resolution of overbreadth issues, since the Court traditionally has looked not only at the literal wording of an allegedly overbroad statute but also at the state court's interpretation of the statute. That is, even if the statute on its face is overbroad, it may be rendered constitutional by the state court's limiting construction. The crucial determination to be made in this regard is whether judicial construction of a statute has in fact cured any problems of overbreadth. *See, e.g.*, Karlan v. City of Cincinnati, 416 U.S. 924, 929 (1974); Lucas v. Arkansas, 416 U.S. 919 (1974); Lewis v. City of New Orleans, 415 U.S. 130, 131-32 (1974); Plummer v. City of Columbus, 414 U.S. 2, 2-3 (1972); Gooding v. Wilson, 405 U.S. 518, 525-27 (1972).

52. 408 U.S. 913 (1972).

53. City of New Orleans v. Lewis, 263 La. 809, 826, 269 So. 2d 450, 456 (1972).

54. 415 U.S. 130 (1974).

55. *Id.* at 132.

56. Justice Powell, in concurrence, described the inadequacy in this manner:

> In conclusory language, that court construed the ordinance to create a per se rule: Whenever "obscene or opprobrious language" is used "toward or with reference to any member of the city police while in the actual performance of his duty," such language constitutes "fighting words" and hence a violation without regard to the facts and circumstances of a particular case. As so construed, the ordinance is facially overbroad.

Id. at 134-35 (concurring opinion).

57. The Ohio supreme court subsequently summarized the *Lewis* holding:

> A majority of the U.S. Supreme Court has said that no matter how rude,

The majority in *Brahy* held that the *Starsky* interpretation of section 13-371(A)(4) was constitutionally valid, even in light of subsequent cases such as *Cohen, Gooding*, and *Lewis*.[58] The court's reason was that "[i]n *Starsky* the Court narrowed the definition of 'disturbing the peace' through 'offensive' conduct to mean wilfully and maliciously inciting others to violence or engaging in conduct likely to incite others to violence."[59] Since the *Starsky* court had narrowed the statute to constitutional dimensions, the court concluded, it could be applied to Brahy.[60]

On reflection, it is plain that *Starsky* did little to explicate, refine, or narrow the words of section 13-371 except to include "cuss words"[61] among the speech proscribed by the term "obscene epithets."[62] Although the court quoted a definition of disturbing the peace which could conceivably render the statute properly narrow,[63] the court never explicitly adopted that definition. In addition, a subsequent case suggests that the Arizona court of appeals has not interpreted *Starsky* as limiting a disturbance of the peace to acts which are violent or which tend to provoke violence. In *State ex rel. Williams v. Superior Court*,[64] a disturbance of the peace was defined as "a disturbance of public tranquillity or order and may be created by any act which molests inhabitants in the enjoyment of peace and quiet or excites disquietude or fear. . . .

---

abusive, offensive, derisive, vulgar, insulting, crude, profane or opprobrious spoken words may seem to be, their utterance may not be made a crime unless they are fighting words, as defined by that tribunal. Furthermore, the court has stated that [the definitional words above] in and of themselves are constitutionally overbroad and must be rendered unsusceptible of application to protected speech by appropriate judicial decision.

City of Cincinnati v. Karlan, 39 Ohio St. 2d 107, 109, 314 N.E.2d 162, 164 (1974).

The requirement that the words used by lower courts in construing a statute not be susceptible of overbroad definition themselves has been criticized: "Apparently, not only must every statute regulating speech in the 50 States parrot the wording the Court desires, but a state court must play the role of a ventriloquist's dummy mouthing ceremonial phrases in order to obtain the seal of this Court's approval." Lucas v. Arkansas, 416 U.S. 919, 921 (1974) (Blackmun, Burger & Rehnquist, JJ., dissenting).

In some cases, the statute may be so overbroad as written that the state court will refuse to construe it narrowly. In Conchito v. City of Tulsa, 521 P.2d 1384 (Okla. 1974), the Oklahoma supreme court refused to narrow the application of an overly broad statute to fighting words, stating that it was "impossible to narrow its overly broad scope to the prohibition of 'fighting words' without exceeding the limits of the judicial reshaping of legislative enactments by substantially rewriting the ordinance. We do not confuse the power to construe with the power to legislate." *Id.* at 1388.

58. Language in *Brahy* suggests, perhaps inadvertently, that *Starsky* actually anticipated the holdings in *Cohen* and *Gooding*. *See* 22 Ariz. App. at 525, 529 P.2d at 237.

59. *Id.* at 525, 529 P.2d at 237.

60. *Id.*

61. 106 Ariz. at 332, 475 P.2d at 946.

62. ARIZ. REV. STAT. ANN. § 13-371(A)(4) (1956). Judge Donofrio took this position in his dissent since he found no guidance in *Starsky* as to how section 13-371 must be interpreted to be constitutionally permissible. He argued that *Starsky* did not narrow the definition of subsection (A)(4) whatsoever. 22 Ariz. App. at 527, 529 P.2d at 239.

63. See text accompanying notes 28-29 *supra*.

64. 20 Ariz. App. 282, 512 P.2d 45 (1973).

The offense embraces a great variety of conduct destroying or menacing public order and tranquility and includes not only violent acts but acts and words likely to produce violence in others."[65] While violent acts and acts which tend to provoke violence are included within the scope of the statute, it seems plain that the statute is not necessarily limited to those acts. Thus, at the time of Christine Brahy's arrest, section 13-371(A)(4) seemingly was overbroad and unconstitutional.[66] Even accepting the *Brahy* court's conclusion that *Starsky* had cured any overbreadth problems of section 13-371, however, the issue of whether the defendant's speech was punishable as fighting words under the statute still remained.

Determination of Fighting Words

While the question of whether a statute is overbroad is essentially one of law, the determination of whether the words of a defendant in a particular case are fighting words and therefore punishable under the statute has commonly been held to be a question of fact for the jury.[67] The test to be used in making this determination was first stated in *Chaplinsky v. New Hampshire*,[68] where the United States Supreme Court adopted the standard used by the New Hampshire supreme court: "[t]he test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."[69] Similarly, in *Cohen v. California*,[70] the Supreme Court stated that fighting words were "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[71] The Court's references to "average addressee" and "ordinary citizen" indicate that an objective standard is appropriate for determining whether speech is properly punishable as fighting words.

---

65. *Id.* at 283, 512 P.2d at 46.

66. The *Brahy* court itself may have narrowed the statute to constitutional dimensions since it held that "[t]he statute must be drawn or interpreted to include, as a violation, only those epithets amounting to 'fighting words.'" 22 Ariz. App. at 525, 529 P.2d at 237. It also noted that fighting words are those words "which by their very utterance tend to incite an immediate breach of the peace . . . ." *Id.* Thus, whereas the Louisiana supreme court on remand in *Lewis* merely declared that the statute applied only to fighting words, 263 La. at 826, 269 So. 2d at 456; *see* text & notes 52-53 *supra*, the *Brahy* court specifically defined fighting words and limited the statute's operation to that definition.

67. *See, e.g.*, Meyers v. State, 253 Ark. 38, 42, 484 S.W.2d 334, 337 (1972); Wilson v. State, 223 Ga. 531, 534, 156 S.E.2d 446, 449 (1967); Mercer v. Winston, 214 Va. 281, 284, 199 S.E.2d 724, 727 (1973).

68. 315 U.S. 568 (1942).

69. *Id.* at 573, *quoting* State v. Chaplinsky, 41 N.H. 310, 318, 18 A.2d 754, 762 (1941).

70. 403 U.S. 15 (1971).

71. *Id.* at 20.

Chaplinsky and *Cohen* appear to approve a presumption that in a face-to-face confrontation, certain abusive epithets are inherently likely to provoke an uncontrollable impulse to violence on the part of the average addressee.[72] This assumption of an uncontrollable impulse to violence lies at the heart of the fighting words rationale.[73] Normally, in order for the state to punish the use of speech in any form, the speech must create an imminent danger of bringing about a substantial evil which the government has the power to prevent.[74] In the area of fighting words, the substantial evil the government is seeking to prevent is public violence.[75] As noted,[76] however, the Supreme Court appears to have assumed that courts can validly categorize some words as "inherently likely to provoke violent reactions,"[77] thereby effectively eliminating the requirement of an actual imminent danger.[78] These fighting words automatically fall outside the aegis of the first amendment when spoken about the person addressed, and states are free to punish their use "without a demonstration of additional justifying circumstances."[79] This approach, based on the objective standard an-

72. Rutzick, *supra* note 34, at 21; *Constitutional Dilemma, supra* note 42, at 155. This "behavioral assumption" approach focuses on the words used by the speaker. That is, "in the context of a direct confrontation, the connection between words and violent reactive conduct is so tight that the very utterance of some words may trigger uncontrollable violent impulses on the part of the addressee of the words," and "proscription of the triggering words themselves" is necessary to control such impulses. Rutzick, *supra* at 8.

73. Rutzick, *supra* note 34, at 8 n.36.

74. Gitlow v. New York, 268 U.S. 652, 671 (1925); Schenck v. United States, 249 U.S. 47, 51 (1919).

The original test of the requisite degree of proximity between the speech and the substantial evil was the "clear and present danger" standard. Bridges v. California, 314 U.S. 252, 263 (1941); Schenck v. United States, *supra* at 52. Under that test, the speech must be very likely to produce an imminent, substantial evil before the utterances can legitimately be punished. Bridges v. California, *supra* at 263. Some legal scholars have maintained that the Supreme Court has discarded this standard. Linde, *"Clear and Present Danger" Re-examined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970); Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg and Beyond*, 1969 SUP. CT. REV. 41 (1969). Recent cases such as Brandenburg v. Ohio, 395 U.S. 444 (1969), and Grayned v. City of Rockford, 408 U.S. 104 (1972), may "suggest that the Court has abandoned the clear and present danger formulation in favor of a standard that requires the substantial evil to be imminent before First Amendment rights of speech are lost." Note, *In Pursuit of Ordered Liberty: Breach of Peace in California*, 26 HAST. L.J. 290, 304 (1974); *see* Hess v. Indiana, 414 U.S. 105, 108-09 (1973). The clear and present danger and the imminency tests, however, may merely be different expressions of what is essentially the same standard, since courts which have utilized the former test have used the term "imminent" almost synonymously with "clear and present danger." *See* Bridges v. California, *supra* at 263.

75. Gooding v. Wilson, 405 U.S. 518, 523 (1972); Cohen v. California, 403 U.S. 15, 20 (1971); Rutzick, *supra* note 34, at 27.

76. See text accompanying notes 68-71 *supra*.

77. Cohen v. California, 403 U.S. 15, 20 (1971).

78. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 218 (1964); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 11 (1960); Krislov, *From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation*, 1968 SUP. CT. REV. 153, 177 (1968); Stewart, *Public Speech and Public Order in Britain and the United States*, 13 VAND. L. REV. 625, 634-35 (1960).

79. Cohen v. California, 403 U.S. 15, 20 (1971).

nounced in *Chaplinsky* and followed in *Cohen*, disregards the actual or probable reaction of the particular addressee to whom the words are in fact directed.

The major weakness in applying an objective test for determining whether speech is punishable as fighting words is that the sociological and cultural variations among citizens are not taken into account. A word that drives one addressee to fury may leave another unperturbed.[80] Many situations may arise in which words are uttered which would be fighting words under the *Chaplinsky* definition, but the actual possibility of violence is remote. For example, a great difference in physical size might render an altercation unlikely. Likewise, a policeman might be expected to exercise a high degree of restraint in his associations with citizens and not resort to violence upon being the target of an abusive personal epithet.

Cases of abusive language directed toward policemen exemplify this problem. Courts adopting the strict *Chaplinsky* definition of fighting words have held that a policeman should be required to act with no higher degree of restraint than the ordinary citizen.[81] Several courts, on the other hand, have reasoned that since policemen are employed to keep the peace rather than breach it, they should be assumed to have been trained to remain calm in the face of citizen anger, and thus are held to a higher standard of self-control than the ordinary citizen.[82] Courts following this latter approach have implicitly rejected the *Chaplinsky* and *Cohen* unprotected per se treatment of fighting words in favor of a more realistic contextual standard which takes into account the actual imminence of violence in the particular situation.[83] Under this approach, the fighting words concept is applied only where there is provocative language personally aimed at another which results in a

80. As one commentator has stated: "Given the diversity of sensibility and linguistic expression among ethnic, cultural, religious, racial, class and age groups in our heterogeneous society, the difficulty of applying a standard involving 'common knowledge' of the reactions of 'ordinary citizens' seems insurmountable." *Constitutional Dilemma, supra* note 42, at 155.

81. *See, e.g.*, Hammond v. State, 255 Ark. 56, 498 S.W.2d 652 (1973); Whited v. State, 256 Ind. 386, 269 N.E.2d 149 (1971); People v. Cuomo, 70 Misc. 2d 757, 335 N.Y.S.2d 219 (1972); Lane v. Collins, 29 Wis. 2d 66, 138 N.W.2d 264 (1965).

82. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring); Chicago v. Blakemore, 15 Ill. App. 3d 994, 305 N.E.2d 687 (1973); People v. Smolen, 69 Misc. 2d 920, 331 N.Y.S.2d 98 (N.Y.C. Crim. Ct. 1972); People v. Benders, 63 Misc. 2d 572, 312 N.Y.S.2d 603 (Buffalo City Ct. 1970).

83. Judge Donofrio pointed out the unrealistic nature of the traditional fighting words doctrine in his *Brahy* dissent:

> No longer are the words of the rough, coarse and uncivilized confined to their likes. They are part of the working vocabulary of many in our society. To be a member of our society is to be familiar with them, to overhear them used and endure whatever offensiveness it might cause so long as the situation is not one in which the words become a call to combat.

22 Ariz. App. at 529, 529 P.2d at 241 (dissenting opinion).

clear and present or imminent danger of physical violence under the circumstances.[84]

The facts in *Brahy* illustrate the importance of examining the circumstances of the case in order to assess realistically the likelihood of violence. The *Brahy* majority merely concluded, "In our opinion the conduct of the defendant in this case was likely to incite others to violence."[85] The court supported its conclusion with the rationale originally employed in *Chaplinsky* for excluding fighting words from constitutional protection: "The utterances by the defendant in this case are not an essential part of the exposition of ideas and are of such slight social value that any benefit derived from them is clearly outweighed by the social interest in peaceful and nonoffensive conduct."[86] Since Brahy's words, which might have evoked a violent reaction from the average addressee, could reasonably be categorized as fighting words under the *Chaplinsky* definition, there was no need to analyze the actual likelihood of physical violence in the situation. The majority's affirmation of the trial court's determination was thus theoretically consistent with the current United States Supreme Court doctrine of fighting words.

In contrast, however, the dissent undertook a more realistic analysis. While the majority simply concluded that Brahy's words were fighting words, Judge Donofrio carefully surveyed the specific facts of the case and examined the actual likelihood of physical violence. First considering the individuals to whom Brahy's remarks were addressed, he

84. *New Jersey's Offensive Language Statute, supra* note 42, at 119. At least one court has held that vulgar language could not constitute a breach of the peace absent evidence that it resulted in a disturbance or disorder. In People v. Douglas, 29 Ill. App. 3d 738, 331 N.E.2d 359 (1975), the court stated: "The state's concern in prohibiting vulgar language becomes dominant only when a breach of the peace is provoked by the language." *Id.* at 743, 331 N.E.2d at 363. Since, in that case, there was no evidence introduced as to the actual effect of the defendant's language, his conviction for disorderly conduct could not stand.

A similar, less restrictive contextual approach to fighting words under section 13-371(A)(4) would follow the same analysis. The standard by which a defendant's words would be judged would comport with the standard used to judge whether speech-related conduct is punishable as "tumultuous and offensive conduct" under section 13-371(A)(2). In order to be punished under this provision, the conduct must be shown either to be violent in itself or tend to incite others to violence. *See* State v. Starsky, 106 Ariz. 329, 331, 475 P.2d 943, 945 (1970). Section 13-371(A)(4) could be similarly construed to control only speech which clearly exceeds the bounds of first amendment protection, that is, speech which produces a clear and present danger of a violent reaction.

85. 22 Ariz. App. at 525, 529 P.2d at 537.

86. *Id.* at 526, 529 P.2d at 238. The "exposition of ideas" theory is no longer the sole, nor even the most important, rationale for first amendment protection. In Winters v. New York, 333 U.S. 507 (1945), the United States Supreme Court held that expression meant to be entertaining was protected. "The line between the informing and the entertaining is too elusive for the protection of that basic right." *Id.* at 510. Similarly, the Supreme Court has recognized that emotive communication is deserving of protection, even though "ideas capable of relatively precise, detached explication" may not be conveyed in such speech. *See* California v. Cohen, 403 U.S. 15, 26 (1971); Rutzick, *supra* note 34, at 18-20. In his *Brahy* dissent, Judge Donofrio noted this change in the Supreme Court's philosophical approach to first amendment protection. 22 Ariz. App. at 527, 529 P.2d at 239 (dissenting opinion).

stated that although the words spoken to the policeman were disrespectful and reprehensible, "an officer is trained to react professionally to the comments made."[87] The airport employees similarly could be expected to react with professional restraint, since they were "in a position trained to deal with the public, responsible for the safety of aircraft passengers and accustomed to searching the privacies of boarding passengers."[88] The dissent concluded that because the policeman and the airport employees could be expected not to react violently to Brahy's language, her utterances could not be considered fighting words, and thus her conviction could not be based on section 13-371(A)(4).[89] Had the *Brahy* majority undertaken such an analysis by applying a subjective, contextual standard to Brahy's words, her conviction very likely would have been overturned. This result would have provided adequate protection of the state's interest in preventing public violence while allowing the broadest possible scope for an individual's freedom of speech.

Conclusion

Christine Brahy's conviction arguably should have been reversed by the Arizona court of appeals, since it was based on what apparently was an overbroad statute. Moreover, the *Brahy* court adopted the traditional *Chaplinsky* test for determining what speech is punishable as fighting words. This test, although carrying the sanction of the United States Supreme Court, is more restrictive than necessary to protect the legitimate government interest in preventing public violence. While the defendant's behavior at the Phoenix airport was clearly offensive and thoughtless, those factors alone should not automatically render it subject to criminal prosecution. The *Brahy* court's loose interpretation of the language of *Starsky* potentially allows control of speech in situations where the possibility of violence is remote or nonexistent. To this extent, the fighting words doctrine as currently interpreted unduly limits the scope of first amendment protection in Arizona.

87. 22 Ariz. App. at 528, 529 P.2d at 240.
88. *Id.* at 528-29, 529 P.2d at 240-41.
89. *Id.* at 529, 529 P.2d at 241.

B. THE NEW TIMES CASE: ARIZONA'S APPLICATION OF THE FIRST AMENDMENT ON CAMPUS

Prior to the 1960's the exercise of first amendment rights in the academic community often was based upon the long-held belief that education necessitates rigid order and discipline.[1] It was during the social turmoil of the 1960's that the Supreme Court of the United States first questioned this traditional position and recognized that continuation of the academic community as a vehicle for the wide-ranging and robust exchange of ideas requires protection of constitutional freedoms.[2] This modern view, however, does not completely negate the traditional value structure, as survival of an academic environment also requires certain regulated patterns and norms of conduct in the exchange of viewpoints.[3]

In *New Times, Inc. v. Arizona Board of Regents*[4] the Supreme Court of Arizona was required to balance certain first amendment freedoms against the authority of university officials to regulate the conduct of activities on campus. This action was filed by the publisher of an off-campus newspaper, distributed on the campus of the University of Arizona, contending that certain regulations promulgated by the Arizona Board of Regents infringed upon its right to freedom of the press.[5] These regulations limited distribution boxes to six places on campus chosen by university officials. Additionally, registration with campus authorities and a fee of $2 per distribution point per issue were required.[6]

The trial court upheld the constitutionality of the university rules. Reversing the lower court, the Arizona court of appeals held that the regulations constituted an impermissible infringement on the right to freedom of the press.[7] The Arizona supreme court affirmed,[8] holding

1. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Board of Educ. v. Gobitis, 310 U.S. 586 (1939); Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934).

2. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

3. Grayned v. City of Rockford, 408 U.S. 104 (1971); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

4. 110 Ariz. 367, 519 P.2d 169 (1974).

5. In the lower court the appellants sought to have the regulations enjoined and damages awarded under 42 U.S.C. § 1983 (1970). While granting the injunction, the Arizona supreme court also held that Arizona state courts have jurisdiction to entertain section 1983 actions and grant appropriate relief. 110 Ariz. at 375, 519 P.2d at 176.

6. 110 Ariz. at 369-70, 519 P.2d at 171-72.

7. 20 Ariz. App. 422, 513 P.2d 960 (1973), *aff'd*, 110 Ariz. 367, 519 P.2d 169 (1974).

8. New Times, Inc. v. Arizona Bd. of Regents, 110 Ariz. 367, 519 P.2d 169 (1974). The court decided the case on first amendment grounds even though an equal protection issue also was presented. Both the university newspaper and newspapers dis-

that first amendment freedoms may not be restricted merely because they are exercised in an academic environment. This casenote will examine the supreme court's *New Times* decision, considering first the applicable principles relating generally to the exercise of first amendment rights. An historical and analytical development of the status of first amendment rights in schools and colleges will follow. Finally, the *New Times* opinion will be analyzed in the light of these principles.

Principles Governing Protection of First Amendment Freedoms

Freedom of the press is a personal right fundamental to the American concept of ordered liberty and to the existence of a free society.[9] Its protections foster what Justice Holmes called the "free trade in ideas,"[10] thus maintaining the most valuable safeguard against oppressive government, an informed public.[11]

Of course, first amendment rights are not absolute.[12] Such rights must be exercised responsibly and in a manner which does not unduly interfere with the rights of others.[13] Furthermore, it has been recognized consistently that the first amendment and the 14th, which makes provisions of the first amendment applicable to the states,[14] were not intended to prohibit the states from promoting the health, safety, morals, and general welfare of their citizens.[15] Accordingly, states have been able constitutionally to regulate a variety of speech-related social evils, including the volume of loudspeakers,[16] demonstrations blocking pathways,[17] and distribution through the mail of obscene, lewd, and lascivious publications.[18] Nevertheless, identifying the situations where the state can validly regulate first amendment-related activities is often a complex and confusing task. Mere advocacy of dangerous or disruptive activities, or the possibility that danger and disruption may occur is not enough to justify restrictions.[19]

---

tributed from coin vending machines were exempt from the regulations. Consequently, the New Times was the only newspaper distributed on campus that was subjected to the regulations. At least arguably this constituted a violation of the equal protection clause.

9. *See* Near v. Minnesota, 283 U.S. 697 (1931).

10. Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).

11. Keyishian v. Board of Regents, 385 U.S. 589 (1967).

12. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1964).

13. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Baines v. Danville, 337 F.2d 579 (4th Cir. 1964); *cf.* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

14. Gitlow v. New York, 268 U.S. 652, 666 (1925).

15. *See, e.g.*, Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968); Cox v. New Hampshire, 312 U.S. 569 (1941); Near v. Minnesota, 283 U.S. 697 (1931).

16. Kovacs v. Cooper, 335 U.S. 77 (1949).

17. Burney v. Smiley, 281 F. Supp. 280 (D. Colo. 1968).

18. Winters v. New York, 333 U.S. 507 (1949).

19. Yates v. United States, 354 U.S. 298 (1957); DeJonge v. Oregon, 299 U.S. 353 (1936); Stacey v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969).

In attempting to resolve these conflicting interests, the United States Supreme Court has adopted two formulations for determining the constitutionality of state regulations which to some degree abridge first amendment rights. One standard requires that the impediments to individual freedom of action caused by particular governmental regulations be weighed against the value to the public of accomplishing the statutory objectives.[20] Under the other standard, regulatory statutes not intended to directly control expression but incidentally limiting it are upheld if justified by a compelling state interest.[21] It is not enough by either measure that the regulation is rationally related to some permissible state goal.[22]

Regardless of which test is applied, however, some form of balancing between the state justification for the regulation and the severity of the infringement is required. First amendment freedoms may be abridged only when the balance struck indicates that the danger to society is clear, the state interest is compelling, and the infringement is the least restrictive which could protect the asserted state interest.[23] This balancing approach generally has been adopted in resolving issues concerning the exercise of first amendment rights in schools and on college campuses.[24] Nevertheless, the development of first amendment rights in the academic community has involved special problems worthy of discussion.

The Development of First Amendment Freedoms in the Academic Environment

During the period of student unrest in the 1960's important questions arose concerning the extent to which school and college authorities

20. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 91 (1961); *see* American Communications Ass'n, CIO v. Douds, 399 U.S. 383 (1950).

21. *See* NAACP v. Button, 371 U.S. 415, 438 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957); Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 482, 488-90 (1973). The Court has employed a variety of descriptive terms to characterize the type of state interest necessary to justify such regulation: compelling, substantial, subordinating, paramount, overriding, cogent, strong. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968); Sherbert v. Verner, 374 U.S. 398, 403 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 464 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945).

22. Sherbert v. Verner, 374 U.S. 398, 406 (1963); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

23. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Kingsley Books v. Brown, 354 U.S. 435 (1957). In order to preclude what may be construed as censorship, limitations on individual freedoms must be closely scrutinized. *See* Schneider v. Irvington, 308 U.S. 147 (1939); Grossjean v. American Free Press, 297 U.S. 233 (1936). Using a strict scrutiny approach, the Supreme Court has invalidated many regulations on the ground that the extent of the infringement of first amendment freedoms was greater than necessary to protect the state's asserted interest. See Zwickler v. Koota, 389 U.S. 241, 249-50 (1967); NAACP v. Alabama, 377 U.S. 288, 307 (1963). *See generally* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

24. Keyishian v. Board of Regents, 385 U.S. 589 (1967).

could regulate the exercise of first amendment rights on school property. Judicial willingness to permit such interference has varied with the passage of time. Prior to 1943 courts were reluctant to interfere with the judgment of school officials,[25] fearing that such intervention would, in effect, make courts "the school board for the country."[26] Consequently, officials were allowed a free hand in regulating school activities. *West Virginia State Board of Education v. Barnette*[27] marked a major turning point in the Supreme Court's position toward constitutional rights in the academic community. In *Barnette* the Supreme Court expressly overruled the decisions holding judicial interference in regulating school activities inappropriate.[28] Although recognizing that boards of education have important and discretionary functions, the Court concluded that these must be performed within the limitations of the first amendment.[29] The Court reasoned that the 14th amendment, in applying the first amendment to the states, "protected the citizen against the state itself and all of its creatures—Boards of Education not excepted."[30] While *Barnette* invalidated a state statute and not a local school regulation, the decision signaled the erosion of the authority of local school officials to infringe first amendment rights. Unfortunately, the Court did not establish guidelines for determining when first amendment activities could be regulated by state and local officials.

During the period following *Barnette*, lower courts were left to grapple essentially unguided with the competing interests of educational discipline and the preferred position of first amendment freedoms. The courts were not squarely faced with the problem again, however, until the student activism of the 1960's and consequent expression on campus of unpopular ideas rekindled the controversy.[31] Although the lower courts would not rule on whether particular regulations were wise or expedient from an educational standpoint, they did determine their

25. *See, e.g.*, Board of Educ. v. Gobitis, 310 U.S. 586 (1939); Gwynne v. Board of Educ., 259 N.Y. 191, 181 N.E. 353 (1932); Beard v. Board of Educ., 18 Utah 51, 16 P.2d 900 (1932).

26. Board of Educ. v. Gobitis, 310 U.S. 586, 598 (1939).

27. 319 U.S. 624 (1943).

28. In *Barnette* members of Jehovah's Witnesses sought to enjoin enforcement of a West Virginia statute compelling students to salute the United States flag in school. *Id.* at 629-30. In affirming the grant of the injunction the Court found that the statute denied the students freedom of speech and worship. *Id.* at 642.

29. *Id.* at 637. While the Court recognized the governmental interest in encouraging patriotism and a sense of unity and purpose through the mandatory flag salute, the Court stated that none of these interests was sufficiently compelling to overcome first amendment considerations. First amendment rights were recognized as being in a preferred class, to be overcome only in the most grave and cogent circumstances. *Id.* at 639.

30. *Id.* at 637.

31. *See generally* Abbott, *The Student Press: Some First Impressions*, 16 WAYNE L. REV. 1 (1969).

reasonableness in protecting valid state interests.[32] Regulations regarding the freedom of expression on campus were held to be reasonable if they were essential in maintaining order and discipline.[33] The lower courts differed in the extent to which this interest was considered valid,[34] but they did at least develop a general standard for applying the first amendment to campus regulations.[35]

The remaining confusion concerning the standards by which such regulations were to be judged was resolved in *Tinker v. Des Moines Independent Community School District*,[36] in which the Supreme Court took a strong position in favor of first amendment rights. In *Tinker* the Supreme Court had to determine whether the suspension of students who wore black armbands to school in protest of the Vietnam War was an impermissible abridgment of freedom of expression. The Court held that since the protest activity was not accompanied by physical violence or any other disruption of school activities, suspension based on participation therein was violative of the students' rights.[37] *Tinker's* acceptance of the relatively stringent standard that regulations may be imposed only if the expression reasonably threatens material and substantial interference with educational activities[38] marked the final demise of the view that school authorities had wide discretion to regulate the exercise of first amendment rights. A mere desire on the part of educators to avoid the uncomfortable and unpleasant atmosphere that usually attends an unpopular viewpoint was held an insufficient justification for regulation.[39]

---

32. Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966); *see* Note, *Freedom of the Press on the College Campus*, 9 NEW ENGLAND L. REV. 153 (1973).

33. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Brooks v. Auburn Univ., 296 F. Supp. 188 (M.D. Ala. 1969); Snyder v. Board of Trustees, 286 F. Supp. 927 (N.D. Ill. 1968).

34. It remained unclear whether this disciplinary interest was applicable to the educational process only or to school property in general. *Compare* Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967), *with* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966). The lower courts also differed in the extent to which private school regulations were limited by first amendment freedoms. *Compare* Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962), *with* Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

35. *See* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) (high school rule forbidding students from wearing "freedom buttons" held violative of students' right of free expression); Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613, 618 (M.D. Ala. 1967) (overturning expulsion of college newspaper editor for printing "censored" across space where editorial criticizing state officials was to have gone); Hammond v. South Carolina State College, 272 F. Supp. 947, 950 (D.S.C. 1967) (rule proscribing "parades, celebrations, and demonstrations" without prior approval of college authorities was prior restraint of students' rights of freedom of speech and assembly). *But see* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) (disciplining students wearing "freedom buttons" not violative of first amendment where students created disturbance and harassed those not wearing similar buttons).

36. 393 U.S. 503 (1969).

37. *Id.* at 514.

38. *Id.* at 513.

39. *Id.* at 509. The *Tinker* court further observed that:

> In our system, students may not be regarded as closed-circuit recipients

The *Tinker* standard was further delineated in *Grayned v. City of Rockford*,[40] the most recent United States Supreme Court case dealing with the regulation of expression in the academic environment. In *Grayned* the appellant was one of 200 persons marching in a demonstration 100 feet from a school. Forty of the demonstrators, including the appellant, were arrested for being in violation of antipicketing and antinoise ordinances. The antinoise ordinance was particularly aimed at preventing disruptive activities near enough to a school to affect the activities within.[41] The Court held that the antinoise ordinance was a reasonable regulation of the time, place, and manner for exercise of first amendment activities[42] necessary to further significant governmental interests,[43] and was thus constitutionally permitted. When read togeth-

---

> of only that which the state chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

393 U.S. at 511. Unfortunately, *Tinker* did not define what constitutes a substantial disruption nor indicate what educational activities may not be disturbed. Since *Tinker*, the lower courts have done little more than echo the holding that regulations of free expression must be reasonably related to the maintenance of order and discipline necessary to the educational process, and various regulations have been overturned on this basis. *See* Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970); Channing Club v. Board of Regents, 317 F. Supp. 1329 (N.D. Tex. 1970); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970).

The single extension of the *Tinker* doctrine may have occurred in recent decisions indicating that the state's authority to prescribe classroom curricula cannot be extended to areas not designed to be part of the curriculum. Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass. 1970). Accordingly, regulation of activities not intended to be part of the curriculum is invalid unless reasonably intended to protect those activities which are part of the curriculum or some other valid state interest. *See* Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971); Channing Club v. Board of Regents, 317 F. Supp. 688 (N.D. Tex. 1970); *In re* Panarella, 32 N.Y.2d 108, 296 N.E.2d 238, 343 N.Y.S.2d 333 (1973).

40. 408 U.S. 104 (1972).

41. *Id.* at 106.

42. *Id.* at 115; *see* Adderly v. Florida, 385 U.S. 39 (1966); Cox v. New Hampshire, 312 U.S. 569 (1941). Prior to *Tinker* and *Grayned* many school regulations restricting the exercise of first amendment rights were struck down on the grounds that they were overbroad. 408 U.S. at 114; *see* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967). The concept of overbreadth grew out of Supreme Court declarations that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Zwickler v. Koota, 389 U.S. 241, 249-50 (1964). In determining the reasonableness of antinoise regulations under this standard the Court has regarded the crucial question as whether the manner of expression is basically incompatible with the normal activity carried on in a particular place at a particular time. 408 U.S. at 116, 119. The ordinances in *Grayned*, although similar to those held overbroad in prior school decisions, thus were found not overbroad since they were directed toward the permissible interest of protecting the school environment from disruptive influence. 393 U.S. at 509. While *Grayned* does not expand the circumstances under which first amendment freedoms can be regulated, it does allow greater flexibility in regulation when the appropriate circumstances occur. 408 U.S. at 116; *see* Note, *Grayned v. City of Rockford—A Limitation on the Application of the Overbreadth Doctrine to Anti-Disturbance Regulations in the Schools*, 24 HAST. L.J. 1263 (1973).

43. 408 U.S. at 115. The significant government interests which the court found to be advanced by the two ordinances were the orderly regulation of competing legitimate uses of the same place, *id.*, and the maintenance of public order so that the normal activities of the school environment would not be disrupted. *Id.* at 116. *See* Cox v.

er, *Tinker* and *Grayned* indicate that expressive activity may be restricted only where the conduct is likely materially to disrupt academic activities or to interfere with other legitimate uses of the campus. In determining whether such a threat is present and whether the protective regulation is of appropriately limited scope, the court will examine two factors. First, is there a significant state interest involved, in that the expression threatens to disrupt the academic environment? Second, is the regulation reasonable so that the time, place, and manner of the exercise of first amendment activities is restricted only to the extent absolutely necessary. Whenever possible a balance will be struck between the various uses and interests involved.[44] In *New Times, Inc. v. Arizona Board of Regents*, the Arizona supreme court utilized a similar analysis in determining the validity of the regulations promulgated by the Arizona Board of Regents.[45] Although the *New Times* court used the same standard in invalidating both the fee and nonfee regulations imposed by the university, the two types of regulation were analyzed differently in the opinion and will be discussed separately here.[46]

The Constitutionality of the Nonfee Regulations

Consistent with *Grayned* and related cases,[47] the *New Times* court began its opinion by recognizing that the state had an interest in regulating the exercise of first amendment rights in order to prevent disruption of normal educational activity on campus.[48] The court went on to observe that such regulation also may be necessary to ensure that

Louisiana, 379 U.S. 536, 554 (1965); Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

The dual holding of *Grayned*, that regulations that are reasonable in time, place, and manner can restrict the exercise of first amendment rights, and that the measurement of reasonableness is whether the activity is compatible with the norms of the particular place and time, has been a standard used by the United States Supreme Court in areas other than regulation of first amendment rights on campus. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (holding unconstitutional a statute calling for the discretionary licensing of parades); Niemotko v. Maryland, 340 U.S. 268 (1951) (holding unconstitutional an ordinance requiring a permit for an individual or organization desiring to use a public park); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding regulation calling for the licensing of parades).

44. *See* Grayned v. City of Rockford, 408 U.S. 105, 118-21 (1972).

45. 110 Ariz. at 371, 519 P.2d at 173.

46. *New Times* is distinguishable from other school cases in that it involved the exercise of rights by a nonstudent commercial enterprise. Nevertheless, this fact has little practical effect since, as the *New Times* court noted, once lands are opened to the public, freedom of expression will be protected on those lands. *Id.* at 371-72, 519 P.2d at 173-74; *see* Brown v. Louisiana, 383 U.S. 131 (1966); Lovell v. City of Griffin, 303 U.S. 444 (1938). Further support for the Arizona court's position can be found in both *Tinker* and *Grayned*, as the court in each case based its decision on the nature of the activities being regulated and not on whether they were being carried out by students or nonstudents.

47. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968); Cox v. Louisiana, 379 U.S. 536 (1965).

48. 110 Ariz. at 371, 519 P.2d at 173.

first amendment rights are not exercised in a manner which interferes with the rights of others seeking to occupy the same public grounds for other legitimate purposes.[49] Nevertheless, the court found that the distribution regulations imposed by the university did not serve either of these two interests.

While the court offered no explanation for this view, it is supportable. Unlike a demonstration or a speech,[50] newspaper distribution from a fixed point carries little potential for disrupting normal educational activities. Furthermore, since the *New Times* distribution points were stationary and relatively small, there would be little chance that they could interfere with a competing legitimate use of university property. Consequently, the *New Times* court was justified in holding that the advance approval required and the limitation of distribution to six designated points did not serve to protect the state's interest in maintaining order or regulating competing uses. Rather, they served as an unconstitutional prior restraint upon freedom of the press.[51]

The Board of Regents, however, contended that the regulations were supported by another state interest—that of litter control. Relying upon two United States Supreme Court decisions,[52] the *New Times*

49. *Id.* These two interests are closely related. For example, any significant disturbance would be an interference with someone's enjoyment of his rights. On the other hand, whether a place or thing is disturbed is of no legal import unless there is a significant effect on some other person.

While enunciated in different terms, the Arizona standard embodies the elements of the standards announced in *Tinker* and *Grayned*. The first prong includes the substantial interference test of *Tinker* and *Grayned* while the second test encompasses an examination of the reasonableness of the regulation. *Id.* at 371, 519 P.2d at 173.

50. *See* Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970); Power v. Miles, 407 F.2d 72 (2d Cir. 1968); Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967); *cf.* Cox v. New Hampshire, 312 U.S. 569 (1941).

51. 110 Ariz. at 373, 519 P.2d at 175. The *New Times* opinion also stated that requiring the paper to take such cumbersome steps as registering for the right to distribute, paying the fee, and restricting distribution to six designated points effectively precluded distribution without the permission of the university. In reality the distribution regulations resulted in a prior restraint of distribution of the paper. *See id.* at 372-73, 519 P.2d at 174-75. It is generally considered that the chief purpose of the guarantee of freedom of the press is to prevent prior restraints on publication. Near v. Minnesota, 283 U.S. 697 (1931). A regulation which gives an administrative official discretionary power to control in advance the right to publish, distribute, or speak constitutes an unconstitutional prior restraint. Kunz v. New York, 340 U.S. 290 (1951).

In Jones v. Arizona Bd. of Regents, 436 F.2d 618 (9th Cir. 1970), another regulation promulgated by the Arizona Board of Regents was found to be unconstitutional because it created a prior restraint on the distribution of all handbills not officially related to an authorized campus event. Prior to his arrest Jones had been distributing antiwar handbills on campus. The federal court held that not only was the regulation unconstitutional, but the campus police had a duty to protect Jones from those who might physically attack him for expressing his political views. *Id.* at 621.

52. 110 Ariz. at 372, 519 P.2d at 174; *see* Martin v. City of Struthers, 319 U.S. 141 (1943) (indicating, in dictum, that the right to distribute literature may not be withdrawn even if it creates a minor nuisance for the community which has the burden of cleaning up the litter from the streets); Schneider v. Irvington, 308 U.S. 147 (1939) (holding that an ordinance prohibiting a person rightfully on a public street from handing literature to one willing to receive it violates the first amendment and that a community's interest in preventing street litter is insufficient to overcome first amendment rights).

court rejected this argument, holding that litter control was not a sufficiently compelling interest to validate intrusion upon freedom of expression. The court appears correct in its determination that interests such as litter control must give way to the exercise of first amendment rights. It is generally agreed that a state may not curtail freedom of expression by relying on minor matters of public inconvenience or annoyance as substantive evils necessitating the restriction.[53] The United States Supreme Court has clearly stated that the need to control litter is such a minor matter, and the annoyance caused by the refuse is not a sufficiently compelling interest to warrant the state's proscribing an activity protected by the first amendment.[54]

The court's holding that the litter control interest did not outweigh the resulting infringement of first amendment rights is consistent with the general *Tinker-Grayned* approach, allowing regulation only where there is a threat of substantial interference with normal campus activities or competing uses. Since newspaper distribution from stalls does not appear likely to cause disruption, regulation by the university should probably be severely limited. Nevertheless, regulations which specify that distribution boxes cannot be placed so as to block pathways, doorways, or other locations which would obstruct traffic patterns may be valid.[55] In this instance, the university would merely be asserting the authority recognized by *Tinker* and *Grayned* to coordinate competing uses, and would be interfering only minimally with the right to distribute.

Constitutionality of the Fee Requirement

The $2 fee imposed per distribution point for each issue was held by the *New Times* court to constitute an impermissible licensing of the right to distribute newspapers.[56] The regents relied upon the Supreme Court's decision in *Cox v. New Hampshire*[57] to justify imposition of the fee. In that case the Supreme Court, upholding a sliding fee scale for parades, observed that where an activity constitutes a disruption of the

53. Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Schneider v. Irvington, 308 U.S. 147, 162 (1939).

54. Schneider v. Irvington, 308 U.S. 147, 163 (1939). In reaching this conclusion the *New Times* court appeared implicitly to adopt a least restrictive means approach as part of its analysis. The court noted that its rejection of the litter control justification would not leave that interest unprotected, since the university would be free to impose sanctions against those doing the littering. In this manner the state interest in litter control could be protected without a corresponding infringement on the right to distribute. 110 Ariz. at 372, 519 P.2d at 174.

55. *Cf.* 110 Ariz. at 374, 519 P.2d at 176. Here, the court specifically leaves open the question of whether a rental could be exacted for providing space for newspaper stands.

56. *Id.* at 373, 519 P.2d at 175.

57. 312 U.S. 569 (1940).

normal public order, the economic cost should be borne by those engaging in the activity.[58] Unlike a parade, however, the distribution of a newspaper is not an abnormal occurrence which draws crowds of people, requires police supervision, and places a substantial strain on social resources.[59] Consequently, the *New Times* court held that the fee fell outside the boundaries established in *Cox*.

The *New Times* court rejected the contention that the cost of litter cleanup justified imposition of the fee, limiting the potential applicability of this argument to a situation where the "litter . . . [arises] from a special event which places an extraordinary burden on the community for a short period of time and is traceable to a single individual or group."[60] The court also held that *Cox* was not applicable since, unlike in *Cox*, the fee bore no rational relation to the activity involved.[61] This holding was based on the fact that the university had not apportioned the expense of its overall litter control activities according to the source of the litter and based the amount of the fee on such apportionment.[62] Indeed, it appeared to be pragmatically impossible to determine the percentage of litter attributable to the New Times or the additional cleanup costs arising from such litter.[63]

The *New Times* court's invalidation of the fee is in accord with the decisions of both the United States Supreme Court and other courts holding that the assessment of fees or taxes on the exercise of first amendment rights is unconstitutional.[64] The United States Supreme Court has recognized a distinction between the licensing or taxation of commercial activity incident to expression and fees imposed on the expression itself:[65] a publisher must pay equitable taxes on his commer-

58. *Id.* at 577.
59. 110 Ariz. at 373, 519 P.2d at 175.
60. *Id.* at 373-74, 519 P.2d at 175-76. The fact that the court would allow a fee under certain circumstances implies that those intending to stage disruptive activities may have to bear the cost.
61. *Id.* at 374, 519 P.2d at 176. In *Cox* the cost of a parade permit bore a reasonable relation to the expense of policing the parade. The actual cost paid for the parade permit varied with the size of the spectacle and the number of people expected. It was thus considered an expense incident to the administration of the city and the maintenance of public order. Cox v. New Hampshire, 312 U.S. 569, 577 (1940).
62. 110 Ariz. at 374, 519 P.2d at 176.
63. Finally, the regents argued that the commercial nature of the newspaper somehow narrowed the freedom of the press, thus allowing the state to make fee restrictions which would be impermissible in the case of speech or publications of a noncommercial nature. The Arizona supreme court summarily rejected this contention, holding that the commercial nature of the activity is no justification for narrowing the protection of expression secured by the first amendment. *Id.* at 174, 519 P.2d at 176, *citing* Ginzburg v. United States, 383 U.S. 463 (1966).
64. Follet v. Town of McCormick, 321 U.S. 573 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Watchtower Bible and Tract Soc'y v. Los Angeles County, 181 F.2d 739 (9th Cir. 1950); *cf.* Chester Branch, NAACP v. City of Chester, 253 F. Supp. 707 (E.D. Pa. 1966).
65. There is a recognized difference between taxation of the right to free expression and taxation or regulation of the commercial aspects of the business of publishing. The

cial activities,[66] but may not be taxed on his right to freely distribute the news. The fee in *New Times* constituted an impermissible tax since it was not levied on the commercial activity of publishing, but against the right to distribute the newspaper on the university campus.[67]

Conclusion

In *New Times, Inc. v. Arizona Board of Regents* the Arizona supreme court circumscribed the authority of college officials to regulate the exercise of first amendment freedoms on campus. In holding that the interests of litter control and litter cleanup do not justify infringement of the right to distribute and circulate newspapers, the court indicated that it will strictly adhere to the standards established by the United States Supreme Court in *Tinker v. Des Moines Independent Community School District* and *Grayned v. City of Rockford.* In the future the extent to which Arizona school and college authorities can impose restrictions on the time, place, and manner of exercising first amendment rights will depend upon the degree to which such exercise interferes with normal educational activities.

C. THE VOID FOR VAGUENESS DOCTRINE IN ARIZONA

The validity of loitering and vagrancy statutes has been a subject of constitutional dispute for many years. Their opponents have argued that the vague and often generalized language of such statutes serves as a cloak for selective enforcement against those whom the police regard as undesirable.[1] In *Papachristou v. Jacksonville,*[2] the United States

difference lies in the purpose of the tax—whether it is imposed to raise revenue in order to defray the costs of government or to license the exercise of constitutional rights. Watchtower Bible and Tract Soc'y v. Los Angeles County, 30 Cal. 2d 426, 429, 182 P.2d 178, 180, *cert. denied,* 332 U.S. 811 (1947). The press and religious groups are not exempt from the financial burdens of government. "It is one thing to exact a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." Watchtower Bible and Tract Soc'y v. Los Angeles County, 181 F.2d 739, 740 (9th Cir. 1950); *see* Follet v. Town of McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. Opelika, 319 U.S. 103 (1943); Grossjean v. American Free Press, 297 U.S. 233 (1936).

66. Associated Press v. NLRB, 301 U.S. 103 (1937).

67. 110 Ariz. at 373, 519 P.2d at 175.

1. *See* Winters v. New York, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting); Lanzetta v. New Jersey, 306 U.S. 451, 457-58 (1939); Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1, 2 (1960); Foote, *Vagrancy-Type Law and Its Administration,* 104 U. PA. L. REV. 603, 631 (1956); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality,* 37 N.Y.U.L. REV. 102, 108-16 (1962).

2. 405 U.S. 156 (1972), *noted in* 9 GONZAGA L. REV. 217 (1974); 19 N.Y.L.F. 191 (1973); 43 MISS. L. REV. 403 (1972); 12 WASHBURN L.J. 82 (1972).

Supreme Court curtailed such practices by declaring unconstitutional a vagrancy ordinance which failed to give fair notice of what was forbidden, thus leaving excessive discretion to the enforcing authorities.[3]

In the recent Arizona case of *State ex rel. Williams v. City Court*,[4] the constitutionality of a Tucson ordinance[5] making it a crime to loiter in a public place for the purpose of begging was challenged on *Papachristou* grounds.[6] The city magistrate, hearing charges against Jesse Bernard Cohen under this ordinance,[7] found it unconstitutionally vague and overbroad.[8] This ruling was sustained by the superior court. The Arizona court of appeals reversed, however, finding the ordinance sufficiently specific to give a reasonable person notice of what it forbade, and thus not conducive to arbitrary arrests.[9]

This casenote will analyze the *Williams* court's treatment of the void-for-vagueness doctrine in light of the requirements of *Papachristou*.[10] First, the vagueness standards delineated in *Papachristou* and prior decisions will be examined, giving consideration to the dual concern for providing notice to the citizen and developing adequate guidelines for police enforcement. In exploring the difficulties surrounding these two issues, this casenote will compare the statutory vagueness standards enunciated in *Williams* with those from jurisdictions outside of Arizona. Finally, the adequacy of the *Williams* standards will be discussed, followed by a reexamination of the court's ruling on the constitutionalty of the Tucson ordinance.

---

3. 405 U.S. at 162. The Court also implied that the statute may have been overbroad because it proscribed innocent activities which are historically part of the amenities of life even though not mentioned in the Constitution or Bill of Rights. *Id.* at 162-64. Although vagueness and overbreadth are sometimes common to the same statute, an overbroad statute proscribes constitutionally protected activity, Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Stock v. State, 526 P.2d 3, 7-8 (Alas. 1974), while a vague statute fails to give adequate notice of what is prohibited. United States v. Harriss, 347 U.S. 612, 617-18 (1954); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Stock v. State, *supra*; State *ex rel.* Purcell v. Superior Court, 111 Ariz. 582, 584, 535 P.2d 1299, 1301 (1975).

4. 21 Ariz. App. 489, 520 P.2d 1166 (1974).

5. TUCSON, ARIZ., CODE § 11-33(1) (1971).

6. Although involving a vagrancy statute, *Papachristou* often has been invoked to invalidate antiloitering ordinances. *See, e.g.*, United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974), *aff'd sub nom.* Lefkowitz v. Newsome, 420 U.S. 283 (1975); People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied*, 414 U.S. 1093 (1973); People v. Valazquez, 77 Misc. 2d 749, 354 N.Y.S.2d 975 (New York City Ct. 1974).

7. The real party in interest, Jesse Bernard Cohen, was the individual charged with loitering under the Tucson ordinance. When the city court of Tucson struck down the statute, Williams, the city attorney, filed a special action challenging the ruling in superior court pursuant to ARIZ. REV. STAT. ANN. § 12-2001 (1956) and ARIZ. R.P. SPEC. ACTION 4.

8. 21 Ariz. App. at 490, 520 P.2d at 1167.

9. *Id.* at 493-94, 520 P.2d at 1170-71.

10. As aforementioned, see note 6 *supra*, *Papachristou* is often the basis for challenge in cases dealing with the constitutionality of loitering statutes. For a discussion of the *Papachristou* requirements, see text & notes 11-12 *infra*.

The Vagueness Problem

The United States Supreme Court, in dealing with the problem of unconstitutionally vague statutes, has required that any criminal law meet two tests: it must be specific enough to give a person of ordinary intelligence notice as to what is forbidden,[11] and it must provide sufficient enforcement guidelines to prevent arbitrary arrests and convictions.[12] While *Papachristou* reaffirmed and refined this test, such standards did not originate in *Papachristou* and had been applied in numerous earlier Supreme Court cases.[13] The earlier cases concerning loitering established the principle that a statute not otherwise in compliance with the notice requirement can be held valid nonetheless if sufficient guidelines are provided for the police, and arrests are limited to persons who have refused a police request to move on.[14] The latter requirement presumably serves as a substitute for statutory notice.

The Court of Appeals of Arizona found the *Papachristou* requirements met by the Tucson ordinance forbidding "loitering . . . for the purpose of begging."[15] In rejecting the constitutional challenge, the Arizona court held that a reasonable person would have no difficulty understanding the type of behavior forbidden.[16] Additionally, the court found that the ordinance did not lend itself to arbitrary enforcement, because a policeman must have probable cause to believe that a suspect is loitering and has the intent to beg before an arrest can be made.[17] An examination of the manner in which the court reached each of these

11. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). One federal court observed:

> The constitutional vice of a vague or indefinite statute is that "it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

Goldman v. Knecht, 295 F. Supp. 897, 903-04 (D. Colo. 1969), *quoting* United States v. Harriss, 347 U.S. 612, 617 (1954). The Arizona supreme court's latest formulation of the vagueness doctrine is set forth in State v. Starsky, 106 Ariz. 329, 475 P.2d 943 (1970): "[F]or a criminal statute to be unconstitutional for vagueness it must be so vague as to fail to give a citizen notice of what conduct on his part will lead to its violation." *Id.* at 331, 475 P.2d at 945.

12. Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); Goldman v. Knecht, 295 F. Supp. 897, 904 (D. Colo. 1969) ("[A vague] statute fails to establish reasonable standards for determining guilt or innocence, thus licensing the police, jury and judge to create their own standards."). This two-pronged test will hereafter be referred to as the *Papachristou* standard.

13. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971); Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Lanzetta v. New Jersey, 306 U.S. 451 (1939). *See generally* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1957).

14. *See* Colten v. Commonwealth of Kentucky, 407 U.S. 104, 109 (1972); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 88 (1965).

15. State *ex rel.* Williams v. City Court, 21 Ariz. App. 489, 493, 520 P.2d 1167, 1170 (1974); *see* TUCSON, ARIZ., CODE § 11-33(1) (1971).

16. 21 Ariz. App. at 493, 520 P.2d at 1170.

17. *Id.* at 493-94, 520 P.2d at 1170-71.

conclusions reveals some weaknesses both in the court's reasoning and in the Tucson ordinance.

The Notice Requirement

The *Williams* court began its analysis by defining "loiter" as "[t]o be slow in moving; delay; linger; saunter; lag behind."[18] While acknowledging that a statute prohibiting such conduct alone would be unconstitutionally vague, the court held that loitering combined with a second, clearly delineated element is sufficiently specific conduct that its prohibition could pass constitutional muster.[19] Pointing to a number of cases in other jurisdictions where courts had upheld statutes proscribing loitering in connection with another element,[20] the *Williams* court went on to find that the specific additional element in the Tucson ordinance, intent to beg, gave sufficient specificity to the ordinance to put a person on notice as to exactly what was forbidden.[21]

There are, however, certain difficulties with the court's position. It has been held that the second element of a loitering ordinance cannot save the statute if it is as vague as the loitering provision, and fails to sufficiently narrow the statute.[22] Thus the mere existence of a second element, standing alone, does not necessarily render the statute specific and, hence, constitutional. The Arizona court cited a number of cases upholding statutes requiring one or more elements in addition to loitering before criminality would attach. No analysis of the comparative specificity of these elements nor of the intent to beg element in *Williams* was attempted, however. As a result, the precedential basis for the *Williams* decision is weak. The statutes upheld by much of the cited authority prohibited loitering only within certain clearly delineated public places, such as a tavern or public school, and often contained one or more additional elements as well.[23] Such a geographic limitation cer-

18. *Id.* at 491, 520 P.2d at 1168.

19. *Id.* The word "loitering" has been found in other jurisdictions to be unduly vague when used by itself. *See* Baker v. Bindner, 274 F. Supp. 658, 662 (W.D. Ky. 1967); State *ex rel.* Purcell v. Superior Court, 111 Ariz. 582, 583, 535 P.2d 1299, 1300 (1975); City of Seattle v. Drew, 70 Wash. 2d 405, 408-10, 423 P.2d 522, 524-25 (1967).

20. 21 Ariz. App. at 491, 520 P.2d at 1168. See text & notes 26-37 *infra.*

21. 21 Ariz. App. at 493, 520 P.2d at 1170. The court emphasized the ordinance's inclusion of the two essential elements of any crime: act (loitering) and intent (to beg).

22. *See* Scott v. District Attorney, 309 F. Supp. 833 (E.D. La. 1970), *aff'd per curiam*, 437 F.2d 500 (5th Cir. 1971). This case voided a statute making it unlawful to loiter without being able to give a good account of oneself. The "good account" element was found to be as vague as "loitering" and therefore of no help in narrowing the statute.

23. *See* State *ex rel.* De Concini v. Gatewood, 10 Ariz. App. 274, 458 P.2d 368 (1969); Wright v. Munro, 144 Cal. App. 2d 843, 301 P.2d 997 (Dist. Ct. App. 1956). Both cases upheld statutes which prohibited loitering in a bar or tavern. The ordinance in *De Concini* also stated specific times that loitering was prohibited, 10 Ariz. App. at

tainly narrows the scope of the prohibition substantially, particularly when combined with a time or intent factor, and arguably provides a greater degree of specificity than the *Williams* ordinance's broad prohibition of loitering in any public place,[24] limited only by a rather uncertain intent requirement.[25]

The remaining decisions relied on in *Williams* upheld statutes forbidding loitering with the intent to commit acts which were clearly unlawful independent of the loitering statute, such as the use of illegal drugs,[26] prostitution,[27] or acts which would indicate to a reasonable person that the public safety was threatened.[28] The independent crimi-

---

275, 458 P.2d at 369, and the statute in *Wright* limited the scope of the prohibition to begging for alcoholic beverages. 144 Cal. App. at 847, 301 P.2d at 998.

Another case relied upon, State v. Starr, 57 Ariz. 270, 113 P.2d 356 (1941), also appears to involve a statute substantially more specific than the *Williams* ordinance, being limited by time, place, and intent factors. This case upheld a state law intended to prevent molestation of school children, which made criminal the act of loitering without legitimate reason on or within 300 feet of public school grounds while children were in attendance. This statute, like those relating to conduct within a tavern, clearly is more specific as to what is prohibited than a general loitering ordinance to which only a nebulous intent provision is attached.

The *Williams* court stressed that the ordinance in *Wright* contained the phrase "for the purpose of begging," 21 Ariz. App. at 492, 520 P.2d at 1169, which is the sole additional element in the Tucson ordinance. This emphasis implies that the phrase was significant to the California court in deciding the case. The *Wright* court did not discuss this phrase, however, although it did adopt a definition of "solicit" which required both a mental state on the part of the defendant and an overt act calculated to bring about the result solicited. 144 Cal. App. 2d at 848, 201 P.2d at 1000, *quoting* People v. Levy, 8 Cal. App. 2d 763, 769, 50 P.2d 509, 512 (App. Dep't 1935). So defined, the term was held sufficiently specific. If the *Williams* court's definition of intent to beg can be interpreted to require an overt act, then arguably the decision is supported by *Wright* even though the ordinance contains no geographical restriction. See text & notes 32-36 *infra*.

24. The Arizona court of appeals has stated that the meaning of "public place" will depend upon the facts of each particular case. Valley Nat'l Bank of Arizona v. Brooks, 3 Ariz. App. 340, 343, 414 P.2d 189, 192 (1966). Thus, one cannot be sure in advance whether the land, building, or facility which he occupies is in fact a public place in which he may not, while loitering, manifest the intent to beg. Such a consideration may have motivated the federal court in Anderson v. Nemitz, 474 F.2d 814, 817 (9th Cir. 1973), in holding unconstitutional Ariz. Rev. Stat. Ann. § 13-991(3) (1956) (now ARIZ. REV. STAT. ANN. § 13-991(2) (Supp. Pamphlet 1973)) which defined as a vagrant "[a] person who roams about from place to place without any lawful business." The *Nemitz* court without further analysis stated that the statute did not meet *Papachristou* requirements. 474 F.2d at 817.

Additionally, delineation of a place element, such as a tavern or schoolground, contributes towards a clearer manifestation of the type of antisocial conduct which the legislature had in mind in enacting the statute, thus reducing the breadth of enforcement discretion. See text & notes 43-53 *infra*.

25. See text & notes 32-36 *infra*.

26. Burmeister v. New York Police Dep't, 275 F. Supp. 690, 694 (S.D.N.Y. 1967); People v. Pagnotta, 25 N.Y.2d 333, 337-38, 253 N.E.2d 202, 205-06, 305 N.Y.S.2d 484, 488-89 (1969); People v. L., 66 Misc. 2d 191, 320 N.Y.S.2d 456 (Nassau County Dist. Ct. 1971).

27. People v. Willmott, 67 Misc. 2d 709, 711, 324 N.Y.S.2d 616, 618-19 (J. Ct. 1971).

28. *See* People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (Dist. Ct. App. 1973), *cert. denied*, 415 U.S. 951 (1974); People v. Weger, 251 Cal. App. 2d 584, 59 Cal. Rptr. 661 (Dist. Ct. App. 1967), *cert. denied*, 389 U.S. 1047 (1968). *Contra*, United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1171-74 (2d Cir. 1974), *aff'd sub nom.* Lefkowitz v. Newsome, 420 U.S. 283 (1975) (holding unconstitutionally vague a loitering statute almost identical to that in *Solomon*, and containing the same require-

nality of an element does not in itself affect the vagueness of the statute, since proscribing an act does not aid in defining it. It can be argued, however, that where the independent criminal act is one which is well-established and has been judicially limited and defined over the years, as would seemingly be the case with prostitution or illegal drug use, the specificity of such terms can be presumed.[29] Courts considering such matters have not been so specific in their discussions of criminality as an element of loitering statutes, and it has been argued more generally that a proscription against loitering should not be unconstitutionally vague when coupled with preparation to commit a criminal offense.[30] There thus seems to be a feeling that an act made criminal elsewhere in the law is more specific as an element of a loitering statute than is an otherwise noncriminal act. Except for a few limited exceptions, begging is not a proscribed activity in Arizona,[31] and thus validation of the Tucson

ments). The *Solomon* case involved a California disorderly conduct statute, CAL. PENAL CODE § 647(e) (1970), providing for the arrest of a person found wandering from place to place and unable to identify himself or explain his activity, if the surrounding circumstances indicate that the public safety requires such identification. Thus, the statute requires suspicious circumstances plus the citizen's failure to account for his actions and to identify himself.

The "suspicious circumstances" requirement in *Solomon* is similar to the test for a frisk established in Terry v. Ohio, 392 U.S. 1 (1968). That test is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27. The reasonableness of the officer's actions is further measured by whether he acted on "specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* These standards have recently been incorporated into a loitering statute upheld by the Florida supreme court in State v. Ecker, 311 So. 2d 104, 109 (Fla. 1975).

29. Similarly, when prohibited conduct is defined in terms of a standard of reasonableness, see text & note 28 *supra*, a standard to which all persons are expected to adhere aside from the criminal law, the expectation that they may be able to judge the reasonableness of conduct in relation to the public safety is not unjustified.

30. Goldman v. Knecht, 295 F. Supp. 897, 905 (D. Colo. 1969). This language suggests, however, that an overt act in furtherance of the criminal intent was contemplated. See text & notes 32-36 *infra*. For the view that if a loitering statute is aimed at suspected or potential conduct rather than observable conduct it may conflict with the fourth amendment requirement that arrests be based on probable cause, see United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1172 (2d Cir. 1974), *aff'd sub nom.* Lefkowitz v. Newsome, 420 U.S. 283 (1975). Although the Arizona court in *Williams* states that arrests must be based on probable cause, 21 Ariz. App. at 493, 520 P.2d at 1170, the lack of guidelines in the ordinance belie the ability of a police officer to determine probable cause to arrest under the ordinance. *See also* Ricks v. District of Columbia, 414 F.2d 1097, 1101-03 (D.C. Cir. 1968); Territory of Hawaii v. Anduha, 48 F.2d 171 (9th Cir. 1931).

31. ARIZ. REV. STAT. ANN. § 13-991(1) (Supp. Pamphlet 1973) allows state authorities to imprison for ninety days "[a] healthy beggar who solicits alms as a business." While there may be some city ordinances limiting begging, *see* TUCSON, ARIZ., CODE § 11-33(1) (1971), the state statute is a restricted one, and does not criminalize begging in general. ARIZ. REV. STAT. ANN. § 9-240(24) (1956) does permit local municipalities to punish for loitering. It grants the city power:

> To authorize the arrest and punishment of vagrants, stragglers and idle and disorderly persons found loitering or strolling about in public places, leading an immoral or profligate life, and to authorize the confinement of any such person, and persons who fail to pay any fine, in the workhouse or house of correction for a period not exceeding three months.

Papachristou probably renders this enabling statute invalid. See text & notes 11-12 *supra*. It can be argued that if the grant of power enabling a city to make laws is unconstitutionally vague, then the laws enacted thereunder are invalid. *See* City of Rockford v. Hey, 366 Ill. 526, 9 N.E.2d 317 (1937); City of Chicago v. Drake Hotel Co., 274

ordinance cannot rest on the authority of the cases involving loitering with criminal intent.

The lack of precedential basis does not in itself lead to the conclusion that the *Williams* decision is erroneous. Rather, analysis of the degree of notice given by the Tucson ordinance itself is necessary to determine its constitutionality. A problem which arises in regard to a crime defined by intent, despite the foregoing authorities, is the absence of any requirement for an overt act.[32] While an individual reading the statute might be warned that he should not, while strolling through a public place, have an intent to beg, he would have little way of knowing what actions would manifest such an intent, in order that he might avoid them. One court has stated that the notice requirements of due process demand that a loitering statute must proscribe overt conduct in addition to mere loitering if the statute is to give sufficient notice to the citizen,[33] and that the phrase "for the purpose of" was insufficient to meet the requirement of overt conduct.[34] The rationale behind this holding was that the intent clause only reflected a state of mind, and, as such, it was as vague and amorphous a concept as loitering itself.[35] Under this reasoning the *Williams* ordinance would be considered vague because its second element is based solely on intent and thus is no more definite than the loitering element.[36] Additionally, it was earlier suggested that the public place element also is lacking in specificity.[37]

The remaining aspect of the statute which is of questionable clarity is the meaning of "beg" itself. Although the term "begging" carries with it a derogatory implication suggesting bums or panhandling, the inherent vagueness of the term allows it to apply to a larger spectrum of soliciting.[38] Indeed, the *Williams* court defined the term broadly to

---

Ill. 408, 412, 113 N.E. 718, 720 (1916); Brown v. City of Cle Elum, 145 Wash. 588, 261 P. 112 (1927). It can also be argued, however, that an enabling statute does not declare conduct criminal but only constitutes a broad grant of authority to municipalities; thus only the laws passed under the statute, and not the statute itself, can be judged by the *Papachristou* standards.

32. *See* 21 Ariz. App. at 493, 520 P.2d at 1170.

33. People v. Gibson, 184 Colo. 444, 446, 521 P.2d 774, 775 (1974).

34. *Id.* The *Gibson* court did note that the Colorado statute was open to two interpretations, one of which would have eliminated the vagueness problem. *Gibson* stated that the statute could be interpreted as prohibiting loitering only when coupled with an overt act of solicitation. *Id.* The court argued, however, that such an interpretation would force the court to usurp the legislative function of amending the statute and would produce inconsistencies in the Colorado criminal code. *Id.* at 446-47, 521 P.2d at 775. The aim of the legislature had apparently been to forbid intent.

35. *Id.* at 446, 521 P.2d at 775.

36. There is no evidence that the Tucson City Council intended to prohibit loitering only when combined with an overt act of begging. Rather, the text of the ordinance suggests that the legislative intent was to forbid loitering with the proscribed state of mind.

37. See discussion note 24 *supra.*

38. *But see* Goldman v. Knecht, 295 F. Supp. 897, 905 (1969) (stating that the term "beg" is sufficiently clear).

mean "solicitation of money or other valuable consideration without giving consideration in return."[39] This definition could include such variable acts as asking for money, a cigarette, or a light, and indeed could include a request made of a friend or relative as well as a stranger. The dissent points out that street corner solicitors of Christmas contributions for the Salvation Army, blind men playing the guitar with a tin cup nearby, and panhandling hippies can all be swept into the statute.[40] The court apparently argues that a reasonable person will know what types of begging and loitering the statute is designed to prevent, thus providing fair warning of the illegality of the conduct.[41] It is difficult, however, to see how the average person is to make such a determination, and in any event the clarity must appear on the face of the statute, not in some possibly nonexistent community understanding. A citizen cannot be required to guess at the meaning of a statute.[42]

The notice prong of *Papachristou* test for vagueness, then, apparently is not satisfied by the Tucson ordinance. The term "public place" is not defined and is not clear on its face. Further, the begging proscription is vague because of the various types of activity that could be included by the term. Finally, definition of proscribed activity in terms of intent, without reference to overt acts, fails to notify the individual of what conduct will subject him to criminal penalty.

The Arbitrary Enforcement Problem

The second prong of the *Papachristou* vagueness standard requires a determination of whether the law provides adequate guidelines for its enforcement.[43] If the law does not provide sufficient guidelines, citizens may be subject to arbitrary and discriminatory law enforcement.[44]

---

39. 21 Ariz. App. at 493, 520 P.2d at 1170.

40. *See id.* at 495, 520 P.2d at 1172 (Krucker, J., dissenting); see note 48 *infra.*

41. "We hold that the proscription of the act of loitering, when combined with the purpose of begging as contained in the subject ordinance, puts a reasonable person on notice as to exactly what conduct is forbidden." 21 Ariz. App. at 493, 520 P.2d at 1170.

42. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

43. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); *see* text & note 12 *supra.*

44. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 574-75 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1173-74 (1974), *aff'd sub nom.* Lefkowitz v. Newsome, 420 U.S. 283 (1975); Tyson v. New York City Housing Authority, 369 F. Supp. 513 (S.D.N.Y. 1974); Undergraduate Student Ass'n v. Peltason, 367 F. Supp. 1055, 1056 (N.D. Ill. 1973).

The Supreme Court has expressed the view that the guideline requirement is the most important aspect of the vagueness doctrine. Smith v. Goguen, 415 U.S. 566, 574 (1974). *See also* Bence v. Breier, 501 F.2d 1185, 1190 (7th Cir.), *cert. denied*, 419 U.S. 1121 (1974); United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1173 (2d Cir. 1974), *aff'd sub nom.* Lefkowitz v. Newsome, 420 U.S. 283 (1975); Squire v. Pace, 380 F. Supp. 269, 275 (W.D. Va.), *aff'd per curiam*, 516 F.2d 240 (4th Cir. 1974), *cert. denied*, 423 U.S. 840 (1975). In speaking of arbitrary enforcement the *Goguen* Court stated that "[s]tatutory language . . . cannot allow the policeman, prosecutors and juries to pursue their personal predilections," 415 U.S. at 575, and that lawmaking cannot be left "to the moment-to-moment judgment of the policeman on his beat." *Id.*

The threat posed by such statutes was recognized by the United States Supreme Court as early as 1876: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[45] To escape the second prong of the *Papachristou* test, therefore, the language of the statute must define the crime precisely so as to limit enforcement to the antisocial conduct sought to be prevented.[46]

Clearly the Tucson ordinance considered in *Williams* does not meet this test. As pointed out in Judge Krucker's dissent, the majority's definition of "begging"[47] includes varying activities as to which public attitudes differ.[48] As a result, uneven enforcement according to the personal predilections of the police officer is almost inevitable.[49] Indeed, the ordinance, which was passed less than a week after rioting in front of the main gate at the Unversity of Arizona, appears to have been aimed at the hippie panhandlers who gathered at the University's gates.[50] Possibly because of the obvious unconstitutionality of passing an ordinance proscribing an unconventional lifestyle,[51] however, the law

45. United States v. Reese, 92 U.S. 214, 221 (1876).

46. It would hardly be a satisfactory answer to say that the sound judgment and decisions of the police and prosecuting officers must be trusted to invoke the law only in proper cases. The law itself should be so drawn as not to make it applicable to cases which obviously should not be comprised within its terms.

Papachristou v. City of Jacksonville, 405 U.S. 156, 166 n.10 (1972), *quoting* H.R. Doc. No. 392, 77th Cong., 1st Sess. 2 (1941) (President Franklin Roosevelt's veto of a vagrancy law for the District of Columbia).

47. For the court's definition of begging, see text accompanying note 39 *supra.*

48. The standard of "for the purpose of begging" is not certain, for what might appear to one policeman to manifest such purpose might not to another. . . .

For example, imagine the following situation at the corner of Congress and Stone in downtown Tucson: (1) a group of Salvation Army workers soliciting contributions; (2) a blind man playing his accordion with a tin cup available for contributions; and (3) a group of "hippie-type" individuals engaged in like conduct. No one would dispute that they are all doing exactly the same thing, namely remaining in a public place for the manifest purpose of begging. I cannot envision a police officer, under these circumstances, arresting the Salvation Army people or the blind man. The fate of the less conventional individuals, however, is more likely to be otherwise.

21 Ariz. App. at 495, 520 P.2d at 1172 (Krucker, J., dissenting). See text & notes 38-42 *supra.*

49. *See* Goldman v. Knecht, 295 F. Supp. 897, 906 (D. Colo. 1969); Smith v. Hill, 285 F. Supp. 556, 562 (E.D.N.C. 1968). It is frequently argued that the discretionary power given to the police by such statutes is no threat to the public because public officials would exercise this authority with due care. The "good faith" notion has generally been rejected by the courts: "As the Supreme Court stated some time ago, 'well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law.'" People v. Berck, 32 N.Y.2d 567, 577 n.3, 300 N.E.2d 411, 414 n.3, 347 N.Y.S.2d 33, 38 n.3, *cert. denied*, 414 U.S. 1093 (1973). *See also* discussion note 46 *supra.*

50. Appellee's Answering Brief at 9, app. B-1, State *ex rel.* Williams v. City Court, 21 Ariz. App. 489, 520 P.2d 1166 (1974).

51. Speaking of the Jacksonville vagrancy law, the *Papachristou* Court noted that such enactments furnish "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" 405 U.S. at 170. The Court went on to find the statute "plainly unconstitutional," stressing that "[t]he rule of law, evenly applied to minorities as well as majori-

was framed in much broader terms so that it encompasses essentially innocent conduct as well as conduct considered antisocial. This is precisely the type of invitation to arbitrary enforcement which renders a statute unconstitutionally vague.

An additional problem presented by the *Williams* ordinance is its definition of the crime in terms of intent. It is likely that on any given day a police officer will observe countless persons wandering, walking slowly, or lingering in public places; his determination as to whether any of these individuals should be arrested for violating the Tucson loitering ordinance is dependent on whether he discerns an intent to beg on the part of any of these persons. Absent an overt act of begging, either observed by or reported to the officer, he has little to guide him other than his own personal surmise or suspicion. The *Williams* court seemed to be aware of this problem, but failed to treat it other than to state that an arresting officer must have probable cause to believe that the suspect has an intent to beg, adding parenthetically that in most cases evidence of such intent would consist of observing the act of begging.[52] It is difficult, however, to imagine the probable cause requirement being met without occurrence of the act of begging, and the court's implicit recognition of other forms of probable cause is either unrealistic or an unwarranted relaxation of fourth amendment requirements.[53]

Conclusion

In *State ex rel. Williams v. City Court*, the Arizona court of appeals strove to meet the constitutional due process requirements of *Papachristou* by holding that the requirement of specific intent in the Tucson loitering ordinance sufficiently narrowed the ordinance so as to give adequate notice to the citizen and provide adequate standards to prevent arbitrary and discriminatory enforcement. The court's determination is questionable. The term "public place" is not limited and a citizen may not understand where loitering for the purpose of begging is proscribed. Further, the term begging is losely defined and the type of begging to be proscribed may not be understood by either the citizen or

ties, to the poor as well as the rich, is the great mucilage that holds society together." *Id.* at 171.

52. 21 Ariz. App. at 494, 520 P.2d at 1171. The court does say that hard evidence of intent to beg will be needed to establish probable cause under the statute. *Id.* Such an interpretation might give a sufficiently narrow scope to the statute, but the court gives no reason as to why the act of begging would not be required in all, rather than most, cases and is not a mandatory requirement.

53. *See* City of Portland v. James, 251 Ore. 8, 14, 444 P.2d 554, 557 (1968); Comment, *The Unconstitutionality of Oregon's Loitering Statute*, 51 ORE. L. REV. 624, 630 (1971) (arguing that loitering statutes allow arrest on suspicion only, rather than probable cause as required by the fourth amendment, and are therefore unconstitutional). See discussion note 30 *supra*.

the officer. Nor does the statute require commission of an overt act other than loitering itself, thus inviting arbitrary enforcement. The court of appeals should have held the ordinance unconstitutional under *Papachristou*, thus forcing the Tucson City Council to rewrite the statute with greater clarity and precision. If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards to those who apply them and those who must obey them.

D. WEALTH, TEXTBOOKS, AND EQUAL PROTECTION

Much of the debate over equal protection stems from disagreement about the policymaking role which courts should assume.[1] Because the Supreme Court has, to some degree, developed the concept of equal protection to serve as its vehicle for enunciating and protecting basic rights,[2] new developments in this area of the law are viewed with particular condemnation or approbation, depending upon the ideological perspective of the viewer. A recurring question in equal protection has been whether classifications based upon wealth should be strictly scrutinized where they operate to disadvantage a discrete class of persons.[3] The answer to this question, raised again in *Carpio v. Tucson High School District No. I*[4] within the unique context of public educa-

1. *See generally* Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School Dist. No. 15*, 15 ARIZ. L. REV. 457 (1973). Of course, this debate is not limited to the equal protection cases; it is merely more highly visible in these cases because they so directly highlight the Court's exercise of its power over the legislative branch. The propriety of vesting this power in the Court has been the subject of continual dispute since Marshall's delineation of the Supreme Court's power of judicial review in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See* Cooper v. Aaron, 358 U.S. 1, 18-19 (1958); Eakin v. Raub, 12 S. & R. 330, 344-58 (Pa. 1825) (Gibson, J., dissenting); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); L. HAND, THE BILL OF RIGHTS (1958); Murray, *Chief Justice Gibson of the Pennsylvania Supreme Court and Judicial Review*, 32 U. PITT. L. REV. 127 (1971); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

2. *See* Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973); Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355, 1363 (1971).

3. Essentially the claim involved is that classifications drawn on the basis of wealth are sufficient in themselves to require strict judicial review. *See* Note, *Constitutional Law: Equal Quality in Educational Opportunities—"The Necessary Revolution,"* 40 U.M.K.C.L. REV. 185, 191 (1971). Until now, the Court has struck down classifications based on wealth only where the discrimination occurred in conjunction with rights viewed as fundamental, such as voting or criminal appeals. *See, e.g.*, McDonald v. Board of Elections Comm'rs, 394 U.S. 802 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956). *See generally* Reynolds v. Sims, 377 U.S. 533 (1964); Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142 (1907); Yick Wo v. Hopkins, 118 U.S. 356, 370-71 (1886).

4. 111 Ariz. 127, 524 P.2d 948, *vacating* 21 Ariz. App. 241, 517 P.2d 1288 (1974).

tion, depends on whether a fundamental right or suspect classification is found to be involved.[5] In *San Antonio Independent School District v. Rodriguez*,[6] the Supreme Court declined to afford education the status of a fundamental right. Although the plaintiffs in *Rodriguez* raised the issue of wealth as a suspect category, the Court did not reach that issue because it found no discrete class of poor persons affected by the statute.[7] In *Carpio*, the Supreme Court of Arizona interpreted the *Rodriguez* decision to mean that the strict scrutiny test need not be employed where petitioners' equal protection claims are based upon either education as the infringed right or wealth as the classification.[8]

In *Carpio* a class action was brought by Dora Carpio on behalf of her minor children and all others unable to purchase high school textbooks. She sought a declaratory judgment that failure to provide free textbooks to indigent students violated federal and state equal protection, as well as specified provisions of the Arizona constitution.[9] The trial court awarded a summary judgment for the defendants, holding that even if plaintiffs proved that denial of free textbooks results in educational disadvantage, as a matter of law such facts do not constitute a violation of equal protection.[10] The Arizona court of appeals reversed and remanded the case for a determination of whether there was a failure to provide sufficient texts to indigents resulting in a denial of equal educational opportunity to indigent students.[11]

Both the Court of Appeals[12] and the Supreme Court of Arizona[13] rejected the contention that because education is a fundamental right under the Arizona constitution,[14] the compelling state interest standard must be applied. Instead, both courts applied a rational basis test. The courts differed in their conclusions, however, the court of appeals finding that the discriminatory effect of the textbook policy was determina-

5. Federal equal protection analysis is conducted under two separate standards: a rational basis test applied to most legislation, and a strict scrutiny standard applied to state acts affecting fundamental rights or making suspect classifications. *See* text & notes 19-22 *infra*.

6. 411 U.S. 1 (1973).

7. *Id.* at 18-28.

8. 111 Ariz. at 129; 524 P.2d at 950.

9. Appellant's Opening Brief at 1-2, Carpio v. Tucson High School Dist. No. 1, 111 Ariz. 127, 524 P.2d 948 (1974). Although in Arizona textbooks are provided free of charge to all grade school students, ARIZ. REV. STAT. ANN. § 15-1101 (1975), they are not made available to high school students in the same manner. Carpio v. Tucson High School Dist. No. I, 21 Ariz. App. 241, 243, 517 P.2d 1288, 1290, *vacated*, 111 Ariz. 127, 524 P.2d 948 (1974). Informal procedures, however, are available by which some students are able to obtain a scholarship or a loan in order to purchase books. *Id.* Should a student fail to repay a textbook loan, his transcript may be withheld from colleges, other high school districts, and employers. *Id.*

10. 21 Ariz. App. at 246-47, 517 P.2d at 1293-94.

11. *Id.* at 241, 517 P.2d at 1288.

12. *Id.* at 246, 517 P.2d at 1293.

13. 111 Ariz. at 129, 524 P.2d at 950.

14. Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973).

tive,[15] while the supreme court held that neither federal nor state equal protection was violated by the failure to provide indigent students with texts.[16]

This analysis of the supreme court's decision in *Carpio v. Tucson High School District No. I* will consider the federal equal protection issue, with particular attention to the standard of review selected and the court's failure to treat wealth as a suspect classification. Additionally, the application of the selected standard to the challenged classification will be examined, including an evaluation of the court's conclusion that there was a rational basis for the legislative classification.

Federal Equal Protection

The equal protection clause traditionally has been interpreted to require that persons affected by a governmental action be treated equally in the absence of some countervailing justification.[17] Under this theory, the state of Arizona having established through its laws and constitution a system of free public education, this public benefit must be provided in a nondiscriminatory fashion. The plaintiffs in Carpio claimed that establishment of an educational system which revolves around the use of certain required textbooks, when such textbooks are unavailable to some students because of their poverty, is discriminatory.[18]

Where a state law distinguishes classes of citizens, the Constitution requires that the distinction be justified; the differences between the two classes must bear a reasonable and natural relation to the purpose of the law.[19] To decide whether a particular law violates the equal protection

15. 21 Ariz. App. at 248, 517 P.2d at 1295.

16. 111 Ariz. at 130, 524 P.2d at 951. The supreme court also held that Article XI, sections 1 and 6, of the Arizona constitution do not require that such texts be provided. *Id.* at 130, 524 P.2d at 951. Additionally, the court stated that there is no due process right exempting indigents from the payment of state-imposed nonlitigation fees. *Id.* at 130, 524 P.2d at 951. Appellant's due process argument was based almost exclusively on a reading of Boddie v. Connecticut, 401 U.S. 371 (1971), as meaning that due process would prohibit burdening the access of an indigent to a state-provided, essential service by requiring the payment of a fee. The Arizona supreme court, however, found that *Boddie* and similar cases were limited in application to instances where the service involved access to the courts. 111 Ariz. at 130, 524 P.2d at 951. This interpretation seems reasonable, since the *Boddie* holding was strictly limited to access to the courts under the due process requirement that persons be afforded a meaningful opportunity to be heard. 401 U.S. at 377.

17. *See* Hargrave v. Kirk, 313 F. Supp. 944, 948 (M.D. Fla. 1970), *rev'd on other grounds sub nom.* Askew v. Hargrave, 401 U.S. 476 (1971). *See also* Reynolds v. Sims, 377 U.S. 533 (1964).

18. This argument could, of course, be carried even further. Because children are legally compelled to attend school until they are 16 years of age, ARIZ. REV. STAT. ANN. § 15-321 (1975), requiring the use of certain texts imposes even further limitations upon their freedom of action, in the form of a required tax which many can ill afford.

19. *E.g.*, Rinaldi v. Yeager, 384 U.S. 305, 308-11 (1966); McLaughlin v. Florida, 379 U.S. 184, 191-94 (1964); Schrey v. Allison Steel Mfg. Co., 75 Ariz. 282, 286, 255 P.2d 604, 606-07 (1953). In its discussion of equal protection in Chicago M. & St. P.

clause, therefore, the court looks to the character of the classification, the individual interest affected, and the governmental interests allegedly supporting the classification.[20] These three considerations form the basis for two distinct constitutional standards applied by the Supreme Court in determining whether there has been a denial of equal protection. Usually the Court applies the rational basis test, wherein a classification is found constitutionally permissible if it is rationally related to a legitimate state purpose.[21] Where the Court finds the presence of a fundamental right or a suspect classification, however, it will invoke strict judicial scrutiny, requiring that the classification be justified by a compelling state interest.[22]

While the Court in *Rodriguez* established a criterion for determining what constitutes a fundamental right,[23] it has yet to delineate clear guidelines for recognition of suspect categories.[24] Categories have usually been considered suspect where the membership therein is beyond the control of the individual and is generally irrelevant to legislative purposes.[25]

Ry. v. Westby, 178 F. 619 (8th Cir. 1910), the court presented what may be an adequate definition of a "natural" relation of a classification to the purpose of the legislation:

> There must be such a difference between the situation and circumstances of all the members of the class and the situation and circumstances of other members of the state in relation to the subjects of the discriminatory legislation as presents a just and natural reason of necessity or propriety for the difference made by the law in their liabilities and rights. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based on some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis.

Id. at 624-25.

20. Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

21. *See, e.g.*, McDonald v. Board of Elections, 394 U.S. 802 (1969); McGowan v. Maryland, 366 U.S. 420 (1961); United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

22. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Loving v. Virginia, 388 U.S. 1 (1967).

23. 411 U.S. 1, 33-35 (1973). There the Court stated:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing *whether there is a right to education explicitly or implicitly guaranteed by the Constitution.*

Id. at 33 (emphasis added).

24. The Court has generally identified suspect classifications as they arose in controversy by listing some of the characteristics of suspect classifications. See note 25 *infra.*

25. *See* Note, *The Public School Financing Cases: Interdistrict Inequalities and Wealth Discrimination*, 14 ARIZ. L. REV. 88, 112 (1972). Examples of suspect classifications are race, McLaughlin v. Florida, 379 U.S. 184 (1964), national origin, Oyama v. California, 332 U.S. 633 (1948), and, possibly, sex. Frontiero v. Richardson, 411 U.S. 677 (1973). Other suggested criteria are that the class possess an "immutable characteristic determined solely by the accident of birth," *id.* at 686, that the class be "saddled with such disabilities, or subjected to such a history of purposeful unequal treat-

Traditionally the selection of the strict scrutiny or rational basis standard of review was likely to determine the outcome of the case.[26] The almost inevitable consequence of the selection of the strict scrutiny standard was invalidation of the challenged classification,[27] whereas selection of the rational basis test generally resulted in the statute being upheld.[28] Recently, however, the Supreme Court has moved in the direction of creating a middle ground, whereupon a statute affecting a fundamental right or a suspect class of persons may be found to have no rational basis justifying its classification, or a law with no effect on such a right or class may be measured by an unarticulated standard stricter than the rational basis requirement and be upheld.[29] The emergence of this new test and the resultant uncertainty as to its boundaries and application makes unwavering adherence by lower courts to the strict dichotomy of the old two-tiered approach unjustified, particularly since the result of such rigidity may be that serious equal protection claims will receive insufficient attention.[30]

---

ment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), or that the class have "highly visible characteristics on which legislators have found it easy to draw gross, stereotypical distinctions." Comment, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507 (1971). *See generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1965).

26. *See* Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 HARV. CIVIL RIGHTS L. REV. 105, 113 (1972).

27. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967). *See also* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting); Lee, *supra* note 1, at 471; Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489, 1496 (1972).

28. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); Ferguson v. Skrupa, 372 U.S. 726 (1963); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949). *But see* Morey v. Doud, 354 U.S. 457 (1957). *See also* Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause*, 2 HASTINGS CONST. L.Q. 153, 164-65 (1975); Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 372 (1949); Note, *The Right to Equal Educational Opportunity: Serrano and Its Progeny*, 2 N.Y.U. REV. L. & SOC. CHANGE 44, 59 (1972).

29. For example, in Sosna v. Iowa, 419 U.S. 393 (1975), the Court upheld a state statute requiring that the petitioner in a divorce action reside in the state for one year prior to filing the petition, because the fundamental right to travel had not been "irretrievably foreclosed," *id.* at 406, and because the state interest in preventing collateral attack and meddlesome interference with the affairs of another state justified the law. *Id.* at 407. *See also* Rosario v. Rockefeller, 410 U.S. 752 (1973); Jenness v. Fortson, 403 U.S. 431 (1971). In contrast, the Court has recently invalidated legislation under the rational basis test. *See, e.g.*, James v. Strange, 407 U.S. 128 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). *See also* Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973), *rev'd sub nom.* Geduldig v. Aiello, 417 U.S. 484 (1974); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972); Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145, 169-71 (1975); Comment, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123, 124 (1972); "Judicial Enforcement of Restrictive Covenants Against Children: An Equal Protection Analysis," 17 ARIZ. L. REV. 639, 717, 720-21 (1975).

30. Arguably, this reliance on the two-tiered approach would account for the result in *Carpio*. The minimal analysis devoted by the court to the actual basis for the legislative classification is not in accord with this new trend in equal protection. *Compare*

Application of Federal Equal Protection Standards in Rodriguez and Carpio

The Arizona court in *Carpio* based its result solely on a consideration of the traditional test, determining whether the statute involved a fundamental right or a suspect classification. The court relied exclusively on the *Rodriguez* decision in rejecting the application of the strict scrutiny standard.[31] In *Rodriguez* the Supreme Court explicitly refused to hold that education is a fundamental right,[32] and postponed a firm decision about declaring wealth a suspect category.[33] The Court hinted, however, that categorizations on the basis of wealth might, at least in the field of education, invoke strict judicial scrutiny.[34]

The *Rodriguez* Court never reached the problem of wealth as a suspect category because two threshold issues prevented a full consideration of the question. First, the Court found no suspect classification to be involved in the litigation because no disadvantaged class of poor persons could be identified.[35] In prior cases dealing with wealth discrimination, the class discriminated against shared two characteristics: because of their impecunity they were completely unable to pay for some desired benefit; and, as a consequence, they sustained an absolute deprivation of any meaningful opportunity to enjoy that benefit.[36] No class of poor people meeting these criteria could be identified in *Rodriguez*.[37]

Carpio v. Tucson High School Dist. No. I, 111 Ariz. 127, 129-30, 524 P.2d 948, 950 (1974), *with* Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring), *and* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting). *See also* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

31. 111 Ariz. 127, 129, 524 P.2d 948, 950 (1974).

32. 411 U.S. 1, 35 (1973). The Court's choice of language in stating that "education will not alone cause this Court to depart from the usual standard" of review, *id.* at 35, may imply that, when education is coupled with some other important factor, a compelling state interest may be required to support the legislative classification.

33. *Id.* at 18-25.

34. *Id.* at 25 n.60.

35. *Id.* at 19-23.

36. *Id.* at 20.

37. Adopting these criteria, the *Rodriguez* Court considered and rejected three possible descriptions of the disfavored class: (1) poor persons falling below some identifiable poverty level, (2) those relatively poorer than others, or (3) those residing in relatively poorer school districts. The Court found that only the first description—a class of persons definably poor—could possibly meet the two criteria, and appellees made no effort to describe such a class. *Id.* at 22-25. In fact, the available evidence tended to show that poor persons do not necessarily reside in the poorer districts adversely affected by the financing system. *Id.* at 27. The Court rejected the second description—comparative discrimination based on family income—because the correlation between assessable property per pupil and per pupil expenditures was not supported by the evidence. *Id.* at 28. (The Court's discussion of this point centered on the fact that a study presented by appellee revealed that "districts that spend next to the most money on education are populated by families having next to the lowest median family incomes, while the districts spending the least have the highest median family incomes. *Id.* at 27.) Finally, the Court rejected the third description—district wealth discrimination—because

The second threshold consideration preventing a decision on the suspectness of wealth classifications was the fact that in *Rodriguez* only a relative deprivation of educational opportunity was occasioned by the lack of wealth. Essentially the Court found, with little discussion, that "at least where wealth is involved" the equal protection clause does not require precisely equal advantages.[38] The Court concluded that since the Texas system provided an adequate education for all, the relative inequality did not result in an absolute deprivation of the right to an education, and hence did not violate equal protection.[39] The Court did, however, indicate in dicta that where there is an absolute deprivation coupled with a clearly defined classification based on wealth, there might be sufficient interests involved to require strict judicial scrutiny.[40]

In contrast to *Rodriguez*, the factual situation giving rise to *Carpio* squarely presented the issue of whether wealth is per se a suspect classification.[41] *Carpio* involved a distinct class of disadvantaged persons—those who cannot afford the cost of high school texts. Assuming

it lacked the traditional indicia of suspectness. "The class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28.

38. *Id.* at 24 n.57. The Court cited several cases supporting this view: Bullock v. Carter, 405 U.S. 137, 149 (candidate filing fee system); Mayer v. City of Chicago, 404 U.S. 189, 194 (record on appeal); Draper v. Washington, 372 U.S. 487, 495-96 (transcript not provided where appeal deemed frivolous); Douglas v. California, 372 U.S. 353, 357 (appointment of counsel for only appeal of right). The tenor of the language in the cases cited by the Court indicates that where sufficient alternatives exist, the state need not afford the indigent the best alternative. It must, however, provide for one which is sufficient to avoid gross inequity. This is consistent with the court of appeals' disposition of *Carpio*.

The rejection of precise equality was bolstered by the claim that there is no certain correlation between educational expenditures within a district and the educational value received. Although the Court found that no such correlation exists, educators nationwide dispute this claim. "If money is inadequate to improve education, the residents of poor districts should at least have equal opportunity to be disappointed by its failure." J. COONS, W. CLUNE, & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 30 (1970). *See also* Van Dusartz v. Hatfield, 334 F. Supp. 870, 874 (D. Minn. 1971); Bowles & Levin, *The Determinants of Scholastic Achievement—An Appraisal of Some Recent Evidence*, 3 J. HUMAN RESOURCES 3 (1968); Moynihan, *Sources of Resistance to the Coleman Report*, 38 HARV. EDUC. REV. 23 (1968).

39. The Court reached this conclusion because all Texas students were afforded the opportunity to attend school without charge for 12 years, and all schools were provided with books, teachers, transportation and operating funds. Since appellees did not deny that this was "adequate" the state's obligation was considered fulfilled. 411 U.S. at 24.

The requirement that there be an absolute deprivation of a benefit is prominent in recent equal protection decisions, and indicates that it may be considered an essential consideration should the Court declare wealth to be a suspect classification. *See* Sosna v. Iowa, 419 U.S. 393, 406 (1975); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 258-61 (1974).

40. 411 U.S. at 25 n.60.

41. Whereas *Rodriguez* involved relative inequalities in interdistrict financing, the correction of which would have entailed substantial change in the Texas financing system (and by implication in the systems of most other states), *Carpio* concerned the denial of one specific, important educational commodity of limited cost—textbooks. The predominant reason for the *Rodriguez* Court's failure to reach the question of whether in the context of educational opportunity wealth is a suspect classification might have been the potential impact of such a decision, particularly in terms of the effect on other state educational systems. *See* 411 U.S. at 44.

that plaintiffs could demonstrate significant deprivation of educational benefits,[42] the facts in *Carpio* closely approximate the hypothetical situation envisioned by the *Rodriguez* Court as arguably appropriate for strict scrutiny: a definable class of poor students being absolutely deprived of the benefit of education.[43] The factors which relieved the *Rodriguez* Court of the necessity of considering wealth as a suspect classification were thus not present in the *Carpio* case, and this issue should have been more fully examined.

The United States Supreme Court has never invalidated a statute involving a wealth-based classification on that basis alone.[44] Instead, deprivation resulting from lack of wealth has been considered as one factor in assessing the denial of important rights.[45] Strong dicta in certain cases, however, may presage a determination at some future date that wealth is a suspect category.[46]

Regardless of whether wealth is a suspect class in itself, however, there are reasons for holding wealth to be a suspect classification within the unique and limited context of the educational system. Distinctions based on wealth within the context of education share many of the characteristics traditionally involved in suspect classifications. First, since failure to provide free texts effectively penalizes those children whose parents cannot buy them books, and because children have no control over their parents' wealth, it may be said that a student's presence in the deprived group is due to an accident of birth.[47] Additionally, in the context of denying textbooks to indigent students, the classification based upon wealth is particularly destructive since it imposes a badge of inferiority.[48] As Justice Marshall observed, when indigent children are unable to purchase texts the practical consequence

42. See text accompanying notes 50-51 *infra*.

43. 411 U.S. at 25 n.60. The Court here posed the example of a student deprived of an education as a result of being unable to afford the tuition fee. Because *Carpio* involved a deprivation on the basis of a fee charged for texts, and this deprivation thereby arguably deprived students absolutely of the value of an education, it might be the type of education/wealth case which would invoke strict scrutiny. *Cf.* Paulson v. Minidoka County School Dist., 93 Idaho 469, 472, 463 P.2d 935, 938 (1970).

44. Note, *supra* note 3, at 191.

45. *See, e.g.*, Roberts v. LaVallee, 389 U.S. 40 (1967); Anders v. California, 386 U.S. 738 (1967); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

46. Note, *supra* note 3, at 191. *See, e.g.*, McDonald v. Board of Elections Comm'rs, 394 U.S. 802, 807 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966). *See also* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 273-74 (1974) (Douglas, J., concurring). A particularly strong case was made for this proposition in Serrano v. Priest, 5 Cal. 3d 584, 597-604, 487 P.2d 1241, 1250-55, 96 Cal. Rptr. 601, 610-15 (1971). *Cf.* Meadows v. Grabiec, 20 Ill. App. 3d 407, 413, 314 N.E.2d 283, 288 (1974).

47. *See generally* Note, *The Public School Financing Cases: Interdistrict Inequalities and Wealth Discrimination, supra* note 25, at 111-12.

48. *See* Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 21 (1969); Comment, *supra* note 26, at 134.

is that they are forced to sit "bookless, side by side in the same classroom with other more wealthy children learning with purchase[d] textbooks [thus engendering] a widespread feeling of inferiority and unfitness in poor children [which] is psychologically, emotionally and educationally disastrous to their well being."[49] Finally, students unable to purchase textbooks find it virtually impossible to learn the subjects required by the average high school curriculum[50] and thus suffer an absolute deprivation of a public benefit—education.[51]

The requirement that high school students must pay their own textbook fees, regardless of their ability to do so, creates a class of poor deprived of at least a portion of a state-provided benefit on the basis of their wealth. Because this characterization describes a textbook case of wealth classification, a complete analysis of the plaintiffs' claim that wealth should, at least in this context, be declared a suspect classification seems warranted. In light of these arguments supporting the plaintiffs' contention, the Supreme Court of Arizona should arguably have employed some standard of review stricter than the rational basis test when evaluating the classification created by the state.

Treatment of Educational Classifications Under State Equal Protection

There appears to be no requirement that a state court, when considering state equal protection issues, must apply a standard of review identical to that employed by federal courts to federal equal

49. Johnson v. New York State Educ. Dep't, 409 U.S. 75, 76-77 (1971) (concurring opinion), *quoting* Johnson v. New York State Educ. Dep't, 449 F.2d 871, 873 (2d Cir. 1971).

50. The scanty sociological data available indicates that due to textbook costs many poor students actually drop out of school completely. *See* CHILDREN'S DEFENSE FUND, WASHINGTON RESEARCH PROJECT, INC., CHILDREN OUT OF SCHOOL IN AMERICA 4, 79-84 (1974).

51. Crowley v. Bressler, 181 Misc. 59, 63-64, 41 N.Y.S.2d 441, 445-46 (Sup. Ct. 1943). *See also* Paulson v. Minidoka County School Dist., 93 Idaho 469, 472-73, 463 P.2d 935, 938 (1970); Bond v. Public Schools of Ann Arbor School Dist., 383 Mich. 693, 701-02, 178 N.W.2d 484, 488 (1970). Some authorities have held that refusal to provide texts without charge is a denial of equal protection. *See* Vandevender v. Cassell, — W. Va. —, —, 208 S.E.2d 436, 438 (1974); Schoettle, *supra* note 2, at 1413; Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 430 (1973).

Of course, such a conclusion rests on a factual determination that the scholarship/loan program provided by the Arizona school system was in fact inadequate. As the court of appeals pointed out in remanding the case for such a determination, if students did have access to sufficient texts, there would be no denial of equal protection. Carpio v. Tucson High School Dist. No. I, 21 Ariz. App. 241, 249, 517 P.2d 1288, 1296 (1974).

The contrary argument could be made that failure to provide textbooks is not a denial of equal protection since the students are still provided with classroom instruction and thus do not literally suffer a total deprivation of the benefits of education. The question of whether there was a total deprivation of educational benefits ultimately would be one of fact for the trial court to determine. This is consistent with the remand by the court of appeals.

protection questions.[52] In *Valley National Bank v. Glover*,[53] however, the Supreme Court of Arizona held that the equal protection clause of the Arizona constitution and the equal protection clause of the 14th amendment to the United States Constitution have "for all practical purposes the same effect."[54] It would thus seem logical to conclude that, in Arizona at least, the same standards of review should be applied in cases involving state equal protection issues as are used in cases involving federal equal protection issues.[55] The *Shofstall v. Hollins*[56] holding that education is a fundamental right under the state constitution would, under these standards, have required strict scrutiny of the educational classification challenged in *Carpio*.[57] However, the *Glover* case was decided before the emergence of the "new" equal protection, and thus these concepts cannot automatically be incorporated into the statement in *Glover*.[58] The Arizona court implicitly rejected such an incorporation by holding in *Shofstall* that notwithstanding the fundamental nature of education under the Arizona constitution, the state legislation infringing this right merely needed to be rational and not arbitrary in order to pass muster under the state equal protection clause.[59] In *Carpio* the court summarily reaffirmed this standard, implicitly rejecting the strict scrutiny standard.[60]

Existence of a Rational Basis for the Classification

Even assuming that the Arizona supreme court was correct in refusing to grant wealth the status of a suspect classification, there was no analysis of any rational basis for the statute sufficient to satisfy the criteria of the federal equal protection requirements. The equal protection test enunciated by the United States Supreme Court requires that the legislation must be rationally related to some legitimate state

52. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1975); Cooper v. California, 386 U.S. 58, 62 (1967); Breese v. Smith, 501 P.2d 159, 169 (Alas. 1972); State v. Kaluna, 55 Hawaii 361, 369, 520 P.2d 51, 58 (1974). *See also*, "The State Equal Protection Clause: A New Development," 16 ARIZ. L. REV. 489, 566, 571 (1974) [hereinafter cited as "State Equal Protection"].

53. 62 Ariz. 538, 159 P.2d 292 (1945).

54. *Id.* at 554-55, 159 P.2d at 299.

55. This proposition, however logical, has been implicitly rejected by the Supreme Court of Arizona. *See* "State Equal Protection," *supra* note 52, at 569. *See also* Swindler, *State Constitutional Law: Some Representative Decisions*, 9 WM. & MARY L. REV. 166, 174 (1967).

56. 110 Ariz. 88, 515 P.2d 590 (1973).

57. This presumes that a state fundamental right must have the same effect as a federal fundamental right, which is not necessarily true.

58. *Glover* was decided in 1945, whereas the "new" equal protection did not begin to take shape until later in the 20th century with the case of Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

59. 110 Ariz. 88, 90, 515 P.2d 948, 951 (1973).

60. 111 Ariz. 127, 139, 524 P.2d 948, 951 (1974). Application of the strict scrutiny standard by the Arizona courts should arguably result in a finding that the state must provide high school texts to indigent students. See text accompanying notes 41-51 *supra*.

purpose.[61] There is, however, a presumption in favor of challenged legislation, such that if any state of facts can reasonably be conceived that would sustain the classification, their existence will be presumed.[62]

The Arizona supreme court in *Carpio* failed to consider whether the state's failure to provide required textbooks for indigent high school students had some rational basis. The court upheld the statute based upon the legislature's discretion to limit state-provided free education beyond that explicitly provided in the Arizona constitution.[63] The problem with this conclusion is its failure to require the state, even in the most limited sense, to demonstrate a rational relationship to a legitimate state purpose.[64] The court has created a conclusive presumption that whatever the legislature does within its discretionary power has a rational basis. In the circumstances which obtain in *Carpio*, the presumption is that the legislature had a rational basis for acting so as to construct an educational system which, due to gaps and omissions, benefits students unequally. This presumption of validity replaces any analysis of the state interest in the statutory scheme. Even if the Arizona court has reduced the state rational basis test to a presumption of validity, the federal standard cannot be so limited.

A consideration of the classification's validity should involve a three-step analysis: a determination of the purpose, a determination of whether the classification is related to the achievement of the purpose, and finally, a determination of whether the purpose is constitutionally

61. A legislative classification may not be invidious, that is, it may not be arbitrary, capricious, or discriminatory. *See* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959); Sims v. Eyman, 405 F.2d 439, 444, *vacated in part*, 408 U.S. 934 (1971). *See also* Farmer v. Killingsworth, 102 Ariz. 44, 424 P.2d 172 (1967); AFL v. American Sash & Door Co., 67 Ariz. 20, 189 P.2d 912 (1948), *aff'd*, 335 U.S. 538 (1949); Valley Nat'l Bank v. Glover, 62 Ariz. 538, 159 P.2d 292 (1945). An invidious classification is one which is not well suited to the advancement of a proper governmental objective, is adaptive to the oppression of minority groups, and may be used to injure those classified by implying an official belief in their inherent inferiority. Michelman, *supra* note 48, at 20. Doubts as to the constitutionality of the law will be resolved so as to uphold the legislative judgment, and the party challenging the law has the burden of proof. *See* Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934); Schrey v. Allison Steel Mfg. Co., 75 Ariz. 282, 255 P.2d 604 (1953).

62. *See* McDonald v. Board of Elections Comm'rs, 394 U.S. 802 (1969); Allied Stores, Inc. v. Bowers, 358 U.S. 522 (1959); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

63. 111 Ariz. 127, 130, 524 P.2d 948, 951 (1974). In contrast to the Arizona supreme court, the court of appeals held that the rational basis test requires an analysis of the operative effect of a challenged policy, and remanded the case for a determination of whether students were actually denied access to sufficient texts and harmed as a result. 21 Ariz. App. 241, 248-49, 517 P.2d 1288, 1295-96 (1974). The lower court opinion performed the necessary analysis of the statute's purpose and concluded that a facially neutral policy may be grossly discriminatory in operation. In light of the importance of the educational interest affected, the plaintiffs were given an opportunity to prove such a discriminatory effect. *Id.*

64. The problem with the court's citing *Shofstall* as authority for the proposition that the educational system in Arizona meets the requirements of equal protection is primarily that *Shofstall* was an educational financing case, similar to *Rodriguez*. Merely finding that Arizona has a satisfactory educational financing plan does not mean that textbooks need not be provided free. *See* "State Equal Protection," *supra* note 52, at 572-73.

permissible.[65] The justifications for the wealth classification in *Carpio*[66] can be reduced to two interests: an interest in the promotion of education in the state and a desire to conserve the public fisc. The second step of the purpose analysis is determining the relation of the state interest to the classification. The state's refusal to provide poor students with texts clearly is inconsistent with achievement of the educational purpose. Nor does this policy accomplish an absolute gain for the public fisc, for its effect will probably be an increase in the number of persons unemployed and unemployable, thus eventually magnifying the cost to the state.[67] As the Supreme Court observed in *Brown v. Board of Education*, "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[68]

The final step in the rational basis analysis is to determine whether the purpose is permissible. While there is nothing inherently wrong with saving money, in some circumstances this justification is regarded as impermissible to support a discriminatory state action. The Supreme Court in *Shapiro v. Thompson*[69] indicated that while the state has a valid interest in reducing costs, it "may not accomplish such a purpose by invidious discrimination between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools."[70] This position was reaffirmed by the Court's holding in *Memorial Hospital v. Maricopa County*,[71] requiring that invidious distinctions be justified by more than a mere showing that the distinctions will save the state money.[72] These decisions indicate that a state may not accomplish a budgetary savings by drawing invidious or irrational distinctions between classes of citizens, particularly in the provision of educational opportunities. While saving money is

65. *See* State v. J.B. & R. Walker, Inc., 100 Utah 523, —, 116 P.2d 766, 769 (1941); Note, *Developments in the Law—Equal Protection, supra* note 25, at 1081.

66. The purposes offered by the state were: "(1) to raise the level of education of all citizens to a minimum level by providing free textbooks at the common school level; (2) to provide instruction for students in grades nine through twelve; and (3) to accomplish these goals within a finite budget." 21 Ariz. App. at 247, 517 P.2d at 1294. While the supreme court did not discuss these purposes, the court of appeals accepted the justifications offered by the state as the actual purposes of the statutory scheme.

67. *See* Serrano v. Priest, 5 Cal. 3d 584, 605, 487 P.2d 1241, 1245-46, 96 Cal. Rptr. 601, 615-16 (1971); San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 950, 479 P.2d 669, 676, 92 Cal. Rptr. 309, 316 (1971).

68. 347 U.S. 483, 493 (1954).

69. 394 U.S. 618 (1969).

70. *Id.* at 663. *Shapiro*, of course, involved the fundamental right to travel. However, this dicta indicates that even under the rational basis test, statutes that create invidious discriminations in the educational system are not permissible. *See also* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974); Graham v. Richardson, 403 U.S. 365 (1971); Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), *rev'd on other grounds sub nom.* Askew v. Hargrave, 401 U.S. 476 (1971).

71. 415 U.S. 250 (1974).

72. *Id.* at 263.

always a rational purpose, the distinction by which this savings is accomplished must be based on a difference having a fair and substantial relation to that legislative purpose.[73]

In light of the fact that the state action in *Carpio* failed to conform with the three-step purpose analysis, it seems not unreasonable to conclude that the statutory classification is constitutionally infirm, even under the rational basis standard. The Supreme Court of Arizona may, of course, employ whatever standard it chooses in its analysis of state equal protection issues. The commingling of state and federal equal protection in *Carpio*, however, seems to require that the federal test be employed as well, and this did not occur.

Conclusion

Although *Rodriguez* effectively ended discussion of education as a fundamental right, it did not foreclose development of the concept of wealth as a suspect classification sufficient in itself to require that legislation be subjected to strict judicial scrutiny. The Arizona supreme court in *Carpio* rejected the strict scrutiny standard without considering the issue of wealth other than to cite *Rodriguez*. In light of the fact that *Rodriguez* predicted a situation wherein wealth might be considered a suspect classification, this reliance on *Rodriguez* was unjustified. In fact, certain categories based upon wealth probably are suspect, including those related to provision of benefits under a state educational system. The court appears to have reduced the rational basis standard to a conclusive presumption in favor of legislative classifications; as a result, the equal protection analysis in *Carpio* was unsound under the federal standard, which requires at least an analysis of the asserted purpose of the legislation. Finally, such an analysis of the asserted legislative purposes reveals what is arguably an inadequate justification for the invidious classifications.

73. *See* Aiello v. Hansen, 359 F. Supp. 792, 798 (N.D. Cal. 1973), *rev'd on other grounds sub nom.* Geduldig v. Aiello, 417 U.S. 484 (1974); Schoettle, *supra* note 2, at 1415.

E. Judicial Enforcement of Restrictive Covenants Against Children: An Equal Protection Analysis

In *Riley v. Stoves*[1] the Arizona court of appeals was confronted with the question of whether court enforcement of a restrictive covenant against occupancy by families with children violated equal protection. After finding the requisite state action through judicial enforcement of the restrictive covenant, the court went on to analyze the equal protection claim in the unusual situation where the state had no hand in drawing up the challenged classification.

The defendants in *Riley* purchased a mobile park subdivision lot, knowing of the existence of a restrictive covenant limiting occupancy of the subdivision to persons over 21 years of age.[2] Four other lot owners sought an injunction against violation of the age restriction. Arguing that they had purchased their lots in reliance on the covenant, plaintiffs expressed the belief that the age restriction would eliminate the noise and distractions caused by children. Defendants contended that the restriction violated equal protection since it created two groups of people—families with children and those without—and unlawfully discriminated against the former.[3] Rejecting the defendants' claims, the trial court upheld the restriction's constitutionality and issued a permanent injunction prohibiting further violation of the covenant.

The court of appeals, in affirming the trial court's decision, began its equal protection analysis by stating that court enforcement of a restrictive covenant constituted state action under the doctrine of *Shelley v. Kraemer*[4] and *Barrows v. Jackson*.[5] Chief Judge Hathaway, writing

---

1. 22 Ariz. App. 223, 526 P.2d 747 (1974).
2. *See id.* at 225, 526 P.2d at 749.
3. *Id.* at 227, 526 P.2d at 751. Defendants also contended that the trial court erred in allowing plaintiffs to obtain an equitable remedy with unclean hands, *id.* at 229, 526 P.2d at 753; that other conditions in the subdivision were such that the court would be unable to secure the benefits sought to be achieved by the covenant, *id.*; and that ARIZ. REV. STAT. ANN. § 33-303 (1974), *as amended*, ARIZ. REV. STAT. ANN. § 33-303 (A) (Supp. 1975-76), which prohibited discrimination against children in rental situations, provided evidence of a broad public policy against similar discrimination in housing. *Id.* at 227, 526 P.2d at 751. The court held that section 33-303 was aimed at preventing landlords, during periods of housing scarcity, from excluding families with children. It was not designed to be an absolute prohibition against all age-restrictive private covenants. *Id.* Indeed, a recent revision to this statute makes rental in violation of such covenants a criminal offense. ARIZ. REV. STAT. ANN. § 33-303(B) (Supp. 1975-76).
4. 334 U.S. 1 (1948). In *Shelley v. Kraemer*, third parties brought suit to enjoin a sale between black buyers and white sellers of residential property subject to a racially restrictive covenant. The Supreme Court held that while the covenants standing alone

for the court, noted that a state-created classification does not violate the equal protection clause if it bears some rational relationship to a permissible state objective, unless the classification is inherently suspect or infringes upon a fundamental right, in which case a stricter standard of review must be applied.[6] Since the state had no hand in drawing up the covenant at issue, however, the court concluded that it must create a distinct test, asking whether the restriction in question was a reasonable means of accomplishing a legitimate private, rather than public, objective. The covenant in question was found to be a reasonable means of accomplishing the private objective of a quiet, peaceful neighborhood.[7]

This casenote will examine the equal protection problem presented by *Riley*. First, the current analytical scheme used by the Supreme Court for equal protection problems will be explored. Factors unique to an equal protection analysis of judicial, rather than legislative, action will then be developed, followed by an application of the developed standard to *Riley*.

Equal Protection Analysis

The supremacy clause[8] makes the Constitution as interpreted by the Supreme Court binding upon the states and superior to other law.[9] Thus, when a state court deals with 14th amendment questions, such as equal protection, the test applied must meet standards set out by the Supreme Court.[10] Defendants in *Riley* did not purport to base their equal protection claim on the state constitution, and thus the Arizona court was bound to look only to federal constitutional principles in making its decision.[11]

---

violated no rights protected by the 14th amendment, the Court's enforcement of the covenants was a sufficient involvement of the state in the discriminatory result to subject the judicial action to 14th amendment scrutiny.

5. 346 U.S. 249 (1953). In *Barrows v. Jackson*, the Court reaffirmed *Shelley's* judicial "state action" analysis by holding unconstitutional enforcement of a racially restrictive covenant through a damages action by one covenantor against another for selling restricted property to a Black. For further discussion of the *Shelley-Barrows* doctrine, see text & notes 40-56 *infra*.

6. 22 Ariz. App. at 228 & n.2, 526 P.2d at 752 & n.2. He also noted that no assertion of a suspect category or a fundamental right had been made in this case. *Id.* at 228 n.2, 526 P.2d at 752 n.2.

7. 22 Ariz. App. at 228-29, 526 P.2d at 752-53. In support of its decision the court cited Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), holding preservation of a quiet, low-density village to be a permissible state objective.

8. U.S. CONST. art. VI, § 2.

9. Cooper v. Aaron, 358 U.S. 1, 18 (1958); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

10. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

11. *See generally* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959). In both cases reliance on state constitutional grounds avoided potential contrary federal rulings.

Basically, the Supreme Court standard for state actions alleged to violate equal protection has been one of reasonableness. A statutory classification is unconstitutional only if it unreasonably discriminates among persons in similar situations.[12] The equal protection decisions of the Warren Court tested the reasonableness of classifications through a rigid two-tier analysis. Classifications involving suspect categories such as race[13] or affecting fundamental rights such as voting[14] evoked a strict scrutiny standard, under which the infringement was permissible only where necessary to advance a compelling state interest.[15] As a general rule, this stringent reasonableness standard was fatal to the classification in question.[16] In all other situations a minimal scrutiny-rational basis standard was applied,[17] which gave legislatures wide latitude in their enactments by allowing classifications to stand "if any state of facts reasonably may be conceived to justify [them]."[18] In practical effect, application of this very permissive reasonableness standard shifted equal protection review to the legislature.[19]

Although its elements are yet unclear, a new approach to personal right infringement analysis has emerged from the Burger Court. The dichotomous approach of the Warren Court appears to be gradually dissolving into a more flexible balancing test,[20] under which the result is

12. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

13. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Other suspect categories are religion or national origin, Oyama v. California, 332 U.S. 633 (1948), and alienage, Graham v. Richardson, 403 U.S. 365 (1971). Potential suspect categories are sex, *see* Frontiero v. Richardson, 411 U.S. 677 (1973) (four justices holding it a suspect category), legitimacy, Gomez v. Perez, 409 U.S. 535 (1973), and poverty with respect to public rights or benefits. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

14. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). Other rights recognized as fundamental include access to the criminal appellate process, Griffin v. Illinois, 351 U.S. 12 (1956), and interstate travel. Shapiro v. Thompson, 394 U.S. 618 (1969).

15. Eisenstadt v. Baird, 405 U.S. 438 (1972). One state court has defined a compelling state interest as one which the state is forced or obliged to protect. Coleman v. Coleman, 32 Ohio St. 2d 155, 159, 291 N.E.2d 530, 534 (1972).

16. *See* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). For a comprehensive examination of the Warren Court distinction between the two types of equal protection analysis, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*].

17. *See Developments, supra* note 16, at 1076-87. *See generally* "The State Equal Protection Clause: A New Development," 16 ARIZ. L. REV. 489, 566 (1974).

18. McGowan v. Maryland, 366 U.S. 420, 426 (1961); *accord*, Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Goesaert v. Cleary, 335 U.S. 464, 467 (1948); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 420 (1920) (Brandeis, J., dissenting) ("But if I did not think the matter clear, I should . . . feel constrained to resolve the doubt in favor of the constitutionality of the act."). *See also* Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973). *But see* Note, *Legislation Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972), for a view that the court can manipulate the various elements of the rational basis standard to achieve any desired result.

19. *See Developments, supra* note 16, at 1087.

20. This new standard began to emerge in 1971. In seven of 15 equal protection cases decided that term the Court upheld an equal protection claim or remanded for consideration, while voicing the older noninterventionist, deferential standard. Traditional

not always dictated by the existence or nonexistence of a suspect class or fundamental right.[21]

One element of the Court's new approach is its willingness to scrutinize more closely the actual and purported state interests supporting a classification in cases where it would have essentially deferred to the legislature under the two-tier analysis. In *United States Department of Agriculture v. Moreno*,[22] for instance, the Court struck down a regulation precluding households with unrelated members from receiving food stamps. The purpose advanced by the government, prevention of program abuse, would have undoubtedly been sufficient to uphold the regulation under traditional rational basis standards.[23] In applying a more careful scrutiny to the legislative purpose, however, the *Moreno* Court first found the classification ineffective as a means of preventing fraud,[24] and went on to declare the actual purpose of the statute—discouraging hippie communes—to be constitutionally impermissible.[25] Thus, the Court concluded that the statute was "wholly without any rational basis,"[26] one governmental interest having been declared illegitimate and the other not rationally related to the statutory classification.

The Court made its intention to look closely at legislative purposes even clearer in *Weinberger v. Wiesenfeld*,[27] a decision invalidating a gender-based restriction on Social Security survivor's benefits. In rejecting the statutory purpose advanced by the government,[28] the *Wein-*

rational basis review would not have produced this result. *See* James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). For a contemporary discussion of these cases and the standard which was seen to be emerging, see *Developments, supra* note 16.

21. This new standard of scrutiny has been referred to as "variable standard of review," San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting), "balancing form of review," Goodpaster, *supra* note 21, at 499, "means oriented scrutiny," Gunther, *supra* note 17, at 23, 26, and "strict rationality" standard. Tribe, *The Supreme Court, 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 123 (1973).

22. 413 U.S. 528, 534 (1973). Since *Moreno* was a challenge to a federal regulation, no 14th amendment equal protection claim was at issue, nor was a state interest analyzed. The Court has clearly stated, however, that "[its] approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). *See, e.g.*, Schlesinger v. Ballard, 421 U.S. 906 (1975); Jiminez v. Weinberger, 417 U.S. 628, 637 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973).

23. *Cf.* cases cited note 18 *supra*.

24. 413 U.S. at 537-38.

25. "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 534 (emphasis in original).

26. *Id.* at 538. In concurring, Justice Douglas concluded that the legislation unconstitutionally infringed the right of association. *Id.* at 542-44.

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

28. The government, apparently hoping to take advantage of the Court's ruling in Kahn v. Shevin, 416 U.S. 351 (1974) (upholding another gender-based distinction in Social Security benefits on the basis that it was necessary to compensate adequately that

berger Court specifically stated: "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation."[29] The statute was then invalidated when the court found the gender-based distinction of the statute entirely irrational in relation to achievement of the actual legislative aim, providing children deprived of one parent with the opportunity for the personal attention of the other.[30] In these two cases, therefore, the Court made it apparent that rational basis review is no longer a carte blanche to legislative judgment. Instead, current standards call for a careful review of the actual as well as asserted purposes of the legislation to determine whether it is in fact reasonably related to the accomplishment of a legitimate state purpose.[31]

The increasing stringency of the rational basis test does not mean that strict scrutiny review has been abandoned by the Court,[32] for a sufficient infringement[33] of a fundamental right will still invoke this standard. One basis for determining whether the infringement is such as to warrant strict scrutiny is the penalty analysis developed in the durational residence requirement cases.[34] In each of these cases a privilege offered by the state government to residents was denied to those who had not lived in the state for a specified period. The Court held that such restrictions penalized[35] those who had recently exercised their

sex for whom spousal loss caused a disproportionately heavy financial burden), argued that the statutory purpose was to "compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families." 420 U.S. at 648.

29. *Id.* at 648 n.16. In emphasizing this point, the Court also stated that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Id.* at 648.

30. *Id.* at 648-51.

31. Another factor which may enter into the analysis is the importance of the personal right involved and the extent to which the legislation in question infringes upon this right. In his *San Antonio Independent School District v. Rodriguez* dissent, Justice Marshall proposed a sliding scale of equal protection review, whereby the degree of scrutiny would vary according to the constitutional importance of the interests at stake and the invidiousness of the classification. 411 U.S. 1, 124-25 (1973). *See generally* Goodpaster, *supra* note 18, at 501-02. *But see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 31 (1973).

32. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Sugarman v. Dougall, 413 U.S. 634 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972).

33. *Compare* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974), *with* Sosna v. Iowa, 419 U.S. 393 (1975). *Compare* Dunn v. Blumstein, 405 U.S. 330 (1972), *with* Rosario v. Rockefeller, 410 U.S. 752 (1973).

34. Sosna v. Iowa, 419 U.S. 393 (1975); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). *See also* Spevack v. Klein, 385 U.S. 511 (1967); Griffin v. California, 380 U.S. 609 (1965). *See generally* Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145, 160-63 (1975).

35. The Court had defined penalty as "the imposition of any sanction which makes assertion of [a constitutional right] 'costly.'" Spevack v. Klein, 385 U.S. 511, 515 (1967). Thus a penalty exists on a right if a sanction is occasioned by the exercise of that right. Note, *supra* note 34, at 161. In apparently applying this type of standard to the restrictive zoning ordinance in Village of Belle Terre v. Boraas, 416 U.S.

constitutional right to travel. Not in every case, however, was this found to call for strict scrutiny. In the most recent such case, *Sosna v. Iowa*,[36] the Court upheld a durational residence requirement for divorce, finding no penalty because Sosna was not "irretrievably foreclosed from obtaining some part of what she sought."[37] The Court reasoned that a 1-year delay in getting a divorce was not a severe deprivation, particularly since it could be secured in the meantime in the state of plaintiff's former residence.[38] The overall import of these cases is that an irretrievable foreclosure from obtaining some important benefit, imposed because of exercise of a fundamental right, is a constitutionally suspect penalty calling for strict scrutiny review.

Equal Protection Standards Where Judicial Rather Than Legislative Action Is at Issue

The standards outlined above have been developed in the context of challenged statutory classifications. In *Riley*, however, the state action upon which the equal protection challenge rested was potential judicial enforcement of a private agreement.[39] Private action itself, no matter how discriminatory, is not prohibited by the equal protection clause,[40] the applicability of which is dependent on state involvement.[41] Judicial enforcement of a racially restrictive covenant was found by the Supreme Court in *Shelley v. Kraemer*[42] and *Barrows v. Jackson*[43] to constitute sufficient state involvement to invoke the clause. Nevertheless, whether court enforcement of other types of private agreement should be treated as state action has been a subject of controversy.[44]

1 (1974), the Court rejected a right-to-travel challenge on the basis that the restriction was not "aimed at transients." *Id.* at 7.

36. 419 U.S. 393 (1975).

37. *Id.* at 406.

38. *Id.* at 407.

39. Since the decision in *Riley*, the Arizona legislature has enacted a statute making the renting of property covered by an age-restrictive covenant to a family with children a criminal offense. ARIZ. REV. STAT. ANN. § 33-303(B) (Supp. 1975-76). Enforcement of this statute would, of course, clearly constitute state action.

40. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715, 721 (1961); Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

41. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Civil Rights Cases, 109 U.S. 3 (1883).

42. 334 U.S. 1 (1948). See discussion note 4 *supra*.

43. 346 U.S. 249 (1953). See discussion note 5 *supra*.

44. One of the most serious difficulties with the doctrine is its obliteration of the line between private and state action. If followed and extended, the *Shelley* doctrine could preclude offensive assertions of trespass laws to keep intruders out of a private home for purely racial reasons, *cf.* Griffin v. Maryland, 378 U.S. 130 (1964), or preclude enforcement of provisions in a will that discriminate on racial or religious grounds. *Cf.* Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957). If the courts fail to enforce private agreements, it is argued, private parties may be encouraged thereby to resort to violence for enforcement of those agreements. For more comprehensive discussion of the problems and complexities of *Shelley*, see Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Propo-*

Though the *Shelley-Barrows* doctrine has never been extended by the Supreme Court to judicial enforcement of nonracial discriminatory agreements,[45] the general concept of state action has been dramatically expanded in the years since *Shelley* and *Barrows*.[46] It is therefore reasonable to conclude, as the *Riley* court did, that the *Shelley-Barrows* doctrine remains viable and can be applied where the relevant facts are similar to those in *Shelley* and *Barrows*.

In *Riley*, as in those two cases, the agreement sought to be enforced was a restrictive covenant barring the occupancy of certain lots by an unwanted class of persons. The only distinction in *Riley* is the definition of the unwanted group by age rather than race. Justice Black, in discussing the limitations of the *Shelley-Barrows* doctrine, placed emphasis on the nature of the restriction imposed by the agreement: a restraint on the right of a citizen to "own, use, enjoy, occupy, and

---

sition 14, 81 HARV. L. REV. 69 (1967); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

45. *See* CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION, S. DOC. NO. 92-82, 92d Cong., 2d Sess. 1464-65 (1972); Comment, *An Evaluation of the Applicability of Zoning Principles to the Law of Private Land Use Restrictions*, 21 U.C.L.A.L. REV. 1655, 1673 (1974). These authorities assert that the *Shelley* rationale is dead because the Court has had several opportunities to extend its reasoning and has not done so. Cases cited to support this hypothesis are Avent v. North Carolina, 373 U.S. 375 (1963) (per curiam); Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963); and Garner v. Louisiana, 368 U.S. 157 (1961). These cases involved criminal trespass prosecutions against civil rights demonstrators; in each, counsel urged application of *Shelley* to bar state enforcement of the law. *See* Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966). *See also* Bell v. Maryland, 378 U.S. 226, 328-32 (1964) (Black, Harlan, & White, JJ., dissenting). The Supreme Court has reaffirmed the *Shelley* doctrine in recent cases, however. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172, 179 (1972); Evans v. Abney, 396 U.S. 435, 445 (1970). *But see* Bell v. Maryland, *supra* at 328-31 (Black, Harlan, & White, JJ., dissenting) (in which a very narrow interpretation of *Shelley* is urged). Further, the Court has in general exhibited an expansive view of the state action doctrine. *See* cases cited note 46 *infra*.

The most recent case analogous to *Shelley* is Evans v. Abney, *supra*, in which the Court refused to apply the *Shelley* rationale. Property left to a city as a park had been expressly limited to the use of whites only. In an earlier decision, the Court had held that the park could not be maintained on a segregated basis. Evans v. Newton, 382 U.S. 296 (1966). In holding judicial enforcement of the reversion permissible, the *Abney* Court distinguished *Shelley* on the basis that Blacks were not discriminated against by the reversion since no one would have use of the park. *Id.* at 445; *cf.* Palmer v. Thompson, 403 U.S. 217 (1971) (indicating that the same action could have been taken with impunity by legislative enactment). In *Shelley* the judicial action would have aided in carrying out a plan of discrimination, a result not attendant in *Evans v. Abney*.

46. *See* Reitman v. Mulkey, 387 U.S. 369 (1967) (state action exists where the state authorizes discrimination or constitutionalizes the private right to discriminate); Evans v. Newton, 382 U.S. 296 (1966) (state action exists where discrimination is practiced by a facility of such nature as would normally serve the entire community, such as a park); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (state action exists where "[t]he State has so far insinuated itself into a position of interdependence with [the private discriminator] that it must be recognized as a joint participant in the challenged activity . . . ."); Nixon v. Condon, 286 U.S. 73 (1932) (state action exists where the state devolves power upon a private organization which subsequently uses that power in a discriminatory fashion).

dispose of property."[47] He compared the effect of such a restriction to that of a discriminatory state or municipal zoning ordinance.[48] Black's rationale may parallel that of the Court in *Evans v. Newton*,[49] where the traditionally public nature of a park was an important factor in the finding of state action; the similarity of covenants restricting land use to the municipal zoning function may render this type of agreement particularly suspect. In any event, it appears that the nature of the restriction was at least as important as the nature of the excluded class in leading the *Shelley* Court to apply the equal protection clause to judicial enforcement thereof. Thus the *Shelley* rationale would be equally applicable to *Riley*.

A finding of state action, however, does not resolve the problem of determining the analytical scheme with which the equal protection clause can be applied to a state's judicial action. In analyzing state legislation, a crucial factor is the state interest sought to be advanced thereby.[50] Where the action is judicial, however, it is unclear what means and objectives are to be considered in determining the reasonableness of the classification.[51] The *Riley* court resolved this question by adopting as its standard whether "the restriction is a reasonable means to accomplish the private objective when considered in light of its effect upon defendants."[52] Thus, public interest, such as that supporting the enforcement of contracts, was not considered the proper guide; rather, the court looked to the private interest sought to be achieved by the parties to the agreement. This approach is similar to the one apparently used in *Shelley*. There the Court found that since the full coercive power of the state goes into enforcing restrictive agreements, the state action transforms the private purpose in the agreement into a public purpose.[53] Since a state law with the purpose of excluding a person from housing due to his race would be violative of the 14th amendment,[54] the action of the state courts in doing so likewise could not stand.[55] The standard adopted by the *Riley* court, then, which is

47. Bell v. Maryland, 378 U.S. 226, 329 (1964) (dissenting opinion).
48. *Id.; see* Reitman v. Mulkey, 387 U.S. 369, 384-85 (1967) (Douglas, J., concurring).
49. 382 U.S. 296, 301-02 (1966).
50. See text & notes 15-31 *supra*.
51. *See* Riley v. Stoves, 22 Ariz. App. 223, 228, 526 P.2d 747, 752 (1974).
52. *Id.*
53. 334 U.S. 1, 18 (1948). Thus, a discriminatory covenant can be treated as if it were a zoning ordinance with the same objective and effect. *See* Reitman v. Mulkey, 387 U.S. 369, 384-85 (1967) (Douglas, J., concurring); Bell v. Maryland, 378 U.S. 226, 329 (1964) (Black, Harlan, & White, JJ., dissenting).
54. Oyama v. California, 332 U.S. 633 (1948).
55. Shelley v. Kraemer, 334 U.S. 1, 20 (1948). For purposes of application, *Shelley* can be more clearly understood by fitting it into the framework of later equal protection cases dealt with by the Court when its analytical approach was more developed. Once the state action barrier had been passed and the private purpose trans-

precisely the same as the rational basis test[56] except that a private rather than public purpose was considered, appears to be an appropriate one under the limited Supreme Court law on the subject. Since no fundamental right or suspect category was asserted,[57] the court was not obliged to use the more stringent compelling interest test.[58]

Equal Protection Analysis of Riley

In applying the rational basis test to *Riley*, three things must be determined initially: the means, the objectives, and the personal rights which have been burdened. The objective of the covenant was to provide a peaceful neighborhood for adults desiring freedom from the noise and distractions of children.[59] Its accomplishment required judicial enforcement of the exclusion of minors from the mobile home subdivision, thus infringing the right to bear and raise children[60] and the rights of property ownership and alienation.[61]

---

formed into a public one, *Shelley* could be seen as fitting into the framework of a later case which invalidated a "classification based on . . . race [as] inherently suspect and subject to close judicial scrutiny." Graham v. Richardson, 403 U.S. 365, 373 n.6 (1971). Since a suspect category was involved, the infringement would be invalidated unless shown necessary to advance a compelling state interest, see text accompanying notes 13-16 *supra*, which the *Shelley* Court did not find. 334 U.S. at 21. Of course, the *Shelley* opinion was not clear in delineating its rationale and the purposes considered. As pointed out by the *Riley* court, "[b]ecause the restrictions were based upon race, it was more or less assumed that enforcement was invalid if found to be state action." 22 Ariz. App. at 228 n.3, 526 P.2d at 752 n.3.

56. See text & notes 17-31 *supra*.

57. 22 Ariz. App. at 228, n.2, 526 P.2d at 752, n.2.

58. Whether the *Riley* classification based on age is a suspect classification is doubtful. Some lower court decisions have held age to be a suspect category. *See* Manson v. Edwards, 482 F.2d 1076 (6th Cir. 1973); United States v. Duncan, 456 F.2d 1401 (9th Cir. 1972); Republican College Council v. Winner, 357 F. Supp. 739 (E.D. Pa. 1973). The Supreme Court, however, does not seem inclined to broaden the group of suspect categories, *see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 18-39 (1973); Frontiero v. Richardson, 411 U.S. 677 (1973), even though those under 21 could be considered the type of minority cut off from political remedy about which the Court has been concerned in establishing suspect categories. *See* Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

A fundamental right conceivably violated in *Riley* is the right to bear and raise children. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Molino v. Mayor & Council, 116 N.J. Super. 195, 281 A.2d 401 (L. Div. 1971). The restrictive covenant could be said to penalize those who exercise this fundamental right by imposing on them the sanction of expulsion. See text & note 35 *supra*. A counterargument could be made that there is no irretrievable loss, see text & notes 36-37 *supra*, since adequate housing was readily available elsewhere, 22 Ariz. App. at 228, 526 P.2d at 752, and thus the penalty did not reach a level of hardship such as would call for strict scrutiny.

Even if neither the age categorization nor the burden on childbearing would alone invoke strict scrutiny, it is possible that the two together could be viewed as requiring a compelling interest analysis. *Cf.* "Wealth, Textbooks, and Education," 17 ARIZ. L. REV. 639, 704, 709-11 (1975).

59. 22 Ariz. App. at 228, 526 P.2d at 752.

60. See discussion note 58 *supra*.

61. It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential

In analyzing the legitimacy of the purpose of the covenant, several factors must be considered. First, senior citizen communities provided for under zoning ordinances within a larger town have been held valid[62] as long as their effect was not to prevent other needy people from obtaining scarce low income housing.[63] In fact, action of a town board taken to prevent private developers from creating housing restricted to senior citizens has been held invalid.[64] A city ordinance designed to keep children out of the whole city because of the cost of providing schools for them, however, has been held invalid.[65] Additionally, the United States Congress has legitimized the creation of age-restricted housing for the elderly.[66] It appears, therefore, that the state itself could provide for age-restricted housing for senior citizens through zoning ordinances, so long as the restriction bore a reasonable relationship to the state's objective and there was adequate housing for families elsewhere.[67] Arguably, even greater legitimacy would attach where achievement of this objective is through judicial enforcement of a private covenant, because of the state's strong interest in enforcement of contracts.[68] There are, however, no cases specifically so holding.

---

precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.

Lynch v. Household Finance Corp., 405 U.S. 538, 544 (1972), *quoting* Shelley v. Kraemer, 334 U.S. 1, 10 (1948); *accord*, Bell v. Maryland, 378 U.S. 226, 328-32 (1964) (Black, Harlan, & White, JJ., dissenting); Buchanan v. Warley, 245 U.S. 60, 74-79 (1917).

62. Shepard v. Woodland Township Comm. & Planning Bd., 128 N.J. Super. 379, 320 A.2d 191 (Ch. 1974); Maldini v. Ambro, 36 N.Y.2d 481, 369 N.Y.S.2d 385, *cert. denied*, 96 S. Ct. 419 (1975). *Contra*, Hinman v. Planning & Zoning Comm'n, 26 Conn. Supp. 125, 214 A.2d 131 (C.P. 1965).

63. Taxpayers Ass'n v. Weymouth Township, Inc., 125 N.J. Super. 376, 311 A.2d 187 (App. Div. 1973).

64. Central Mgt. Co. v. Town Bd., 47 Misc. 2d 385, 262 N.Y.S.2d 728 (Sup. Ct.), *aff'd*, 24 App. Div. 2d 881, 264 N.Y.S.2d 1011 (1965).

65. Molino v. Mayor & Council, 116 N.J. Super. 195, 281 A.2d 401 (L. Div. 1971). The court in *Molino* specifically found as a fact that there was not sufficient housing for families with children in the town as a whole.

66. *See* 12 U.S.C. § 1701q (1970), *as amended*, (Supp. IV, 1974); 12 U.S.C. § 1701z-6 (Supp. IV, 1974); 42 U.S.C. § 1485 (1970), *as amended*, (Supp. IV, 1974); *cf.* 42 U.S.C. § 3028 (1970).

67. *See* Shepard v. Woodland Township Comm. & Planning Bd., 128 N.J. Super. 379, 320 A.2d 191 (Ch. 1974) (finding authorization of a senior citizen community as a land use regulation permissible but holding age limitation of 52 unreasonable as including some it should not and excluding some that should be included).

68. The state might be viewed as having additional interests in upholding the classification that would not be present were the classification state-created. Since the covenant was created through an agreement of a group of people designating the type of person around whom they wanted to live, their fundamental rights of association come into play. *See* NAACP v. Alabama, 357 U.S. 449 (1958); *cf.* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (Douglas, J., concurring). The state has an interest in protecting the fundamental rights of its citizens, and also a significant interest in promoting the security of contracts—ensuring that the reasonable expectations of private parties relying on promises will be fulfilled. *See* A. CORBIN, CORBIN ON CONTRACTS § 1, at 1-2 (1952). Plaintiffs in *Riley* testified that one of the main inducements to their purchase of a mobile home lot in this subdivision was the covenant against children. 22 Ariz. App. at 226, 526 P.2d at 750.

Insofar as the legitimacy of the purpose is concerned, there would seem to be no constitutional difference where the age-restricted housing is for adults over 21 rather than senior citizens. The Supreme Court seemed to approve the legitimacy of such an objective in *Village of Belle Terre v. Boraas.*[69] Finding provision of a quiet, pleasant neighborhood to be a legitimate police power objective, the *Belle Terre* Court upheld a zoning ordinance excluding households of three or more unrelated persons from the entire village. The *Belle Terre* objective was essentially the same as the objective of the *Riley* covenant, and thus its finding of legitimacy is persuasive.

The second prong of rational basis equal protection analysis involves determining whether the restriction is a reasonable means for achieving its objective. The exclusion of persons under age 21 is certainly one means of ensuring peace and quiet; however, it is not a precisely drawn classification. It cannot be doubted that many children are not unduly noisy, and that persons over 21 can be extremely loud, particularly in the evenings. Nevertheless, "[t]raditional equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety.' "[70] Before the restriction will be overturned, it must be found to be not only imprecise, but without any rational basis in relation to the objective.[71] This could not be said to be the case in *Riley*.

Nor is invalidation of the statute required by the degree of infringement of defendants' rights. Suitable housing for families was available elsewhere, even in another section of the same mobile home subdivision.[72] The right to own, enjoy, and freely alienate property, although burdened, may be counterbalanced by the rights of other property owners in the subdivision to freely associate and to rely on their contracts.[73] Indeed, defendants' purchase of the property was made with knowledge of the restriction.[74] The decision of the Arizona court of appeals thus seems to be in line with the current equal protection standards of the Supreme Court.

Conclusion

On balance, the covenant upheld in *Riley* appears to be a legitimate exercise of private contracting power, enforceable by the courts of the

69. 416 U.S. 1 (1974).
70. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 538 (1973), *quoting* Dandridge v. Williams, 397 U.S. 471, 485 (1970).
71. *Id.*
72. *See* 22 Ariz. App. at 228, 229, 526 P.2d at 752, 753.
73. See discussion note 68 *supra.*
74. *See* 22 Ariz. App. at 225, 526 P.2d at 749.

state. The *Riley* court properly found the restriction supported by a legitimate interest in providing a quiet adult neighborhood for residents of the mobile home subdivision, an interest reasonably furthered by the exclusion of persons under age 21. Had defendants alleged age as a suspect category or either childbearing or property interests as a fundamental right and secured strict scrutiny thereby, the decision might have been different. Especially would this have been true if plaintiffs had shown that low-income housing was scarce in the locale, or that age-restrictive covenants were pervasive in a large area, thus making the impact of the covenant so severe as to constitute the irretrievable foreclosure from securing housing which gives rise to invalidation under the penalty analysis. In the existing state of the facts and pleadings, however, the court's ruling was the appropriate one.

V. CRIMINAL LAW AND PROCEDURE

A. COMPETENCY TO WAIVE CONSTITUTIONAL RIGHTS: A NEW CRITERION

Waivers of constitutional rights have never been considered by the courts with indifference. Indulging every reasonable presumption against a waiver, courts have required that a waiver be the product of a knowing and intelligent choice, made with eyes open to the consequences.[1] Implicit in the criteria for judging a valid waiver is a requirement that the defendant possess sufficient mental faculty to make an intelligent decision. The majority of jurisdictions have presupposed that if a defendant is competent to stand trial—defined as being able to understand the proceedings and to assist counsel—then he also has the requisite mental capacity to waive a constitutional right.[2] This widely held belief was disregarded by the Supreme Court of the United States in *Westbrook v. Arizona*,[3] and was abandoned altogether by a three-judge panel of the United States Court of Appeals for the Ninth Circuit in *Sieling v. Eyman*.[4] The Supreme Court of Arizona adopted the Ninth Circuit view in *State v. Robinson*.[5] As a result, proof of a higher degree of mental capacity will henceforth be demanded to waive a constitutional right under certain circumstances than to proceed to trial with all rights intact.[6]

Robinson was arrested in November of 1971 and charged with armed robbery.[7] After a psychiatric examination, the court found him

1. Johnson v. Zerbst, 304 U.S. 458 (1938); *see* Schneckloth v. Bustamonte, 412 U.S. 218 (1973). *See generally* Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970); Note, *Guilty Pleas and the Concept of Waiver*, 5 WILLAMETTE L.J. 575 (1969).

2. *See* United States v. Harlan, 480 F.2d 515 (6th Cir. 1973), *cert. denied*, 414 U.S. 1026 (1974); Wolf v. United States, 430 F.2d 443 (10th Cir. 1970); State v. Hostler, 109 Ariz. 212, 507 P.2d 974 (1973); *cf.* Commonwealth v. Harris, 431 Pa. 114, 243 A.2d 408 (1968); Comment, *Competence to Plead Guilty: A New Standard*, 1974 DUKE L.J. 149, 156-59.

3. 384 U.S. 150 (1966) (per curiam). See text accompanying notes 39-40 *infra*.

4. 478 F.2d 211 (9th Cir. 1973). See text accompanying notes 56-58 *infra*.

5. 111 Ariz. 153, 526 P.2d 396 (1974).

6. A *Robinson* hearing must be held at least when psychiatrists disagree on the defendant's competence to stand trial, or the defendant displays his incapacity before the court. *See* text accompanying notes 89-97 *infra*.

7. 111 Ariz. at 154, 526 P.2d at 397.

incompetent to stand trial and committed him to the Arizona State Hospital.[8] In 1972 the superintendent of the hospital reported to the court that Robinson's competency was restored, and Robinson was bound over to the superior court after a finding by the court that he was competent. Within a month he agreed to plead guilty to the lesser charge of assault with intent to commit robbery.[9] At the change-of-plea hearing, the trial court questioned him pursuant to *Boykin v. Alabama*,[10] which requires that the court address the defendant and determine that the plea is made voluntarily and intelligently.[11] Since Robinson was confused and unable to recall the events of the robbery, his guilty plea was not accepted. At a second hearing, however, the trial court was able to establish a factual basis for the plea and accepted Robinson's plea of guilty.[12] On appeal the Arizona supreme court ruled that a trial court must make a determination of whether a defendant is competent to enter a plea of guilty, in addition to finding him competent to stand trial, whenever defendant's sanity is in issue and there is a substantial question as to his mental capacity.[13]

This casenote will first review the rationale and scope of the common law test for competency to stand trial. The requirements for a waiver of constitutional rights will then be traced, emphasizing the distinction between the common law test for competency to stand trial and the "reasoned choice" test of *Robinson*. Moreover, the Arizona response to these developments will be examined and the practical effects of the new standards on criminal procedure will be considered. Finally, the *Robinson* holding will be compared with the evolving standards promulgated in response to the new Arizona Rules of Criminal Procedure.

The Common Law Test for Competency to Stand Trial

English common law has long held that a defendant cannot plead to a charge or be brought to trial if he is incompetent.[14] As an insane

8. *Id.* Robinson moved for a mental examination as provided for in ARIZ. REV. STAT. ANN. § 13-1621(B) (Supp. Pamphlet 1973) (*superseded by* ARIZ. R. CRIM. P. 11).

9. 111 Ariz. at 155, 526 P.2d at 398.

10. 395 U.S. 238 (1969).

11. *Id.* at 242. The defendant must understand the nature of the charge and the consequences of the plea. Further, there must be a factual basis for the plea of guilt. *See* State v. Sutherland, 14 Ariz. App. 344, 483 P.2d 576 (1971); "Acceptance of Guilty Pleas," 14 ARIZ. L. REV. 409, 543, 547-49 (1972).

12. 111 Ariz. at 155-56, 526 P.2d at 398-99.

13. *Id.* at 157-58, 526 P.2d at 400-01.

14. As early as 1769, Blackstone noted that:

> . . . if a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And

person cannot bring forth facts which may call for acquittal, a trial of an incompetent would distort the accuracy of the factfinding process and deny fundamental fairness to the accused.[15] If the defendant can appreciate his jeopardy and disclose to counsel what he knows, thereby contributing to a rational defense to the charges, a fair trial can be provided and the accused will be bound over for trial. Hence, the test of competency to stand trial is concerned solely with a defendant's present mental state,[16] and is based on the defendant's ability to understand the nature of the proceedings and to assist counsel in making a rational defense.[17]

Most states have adopted this common law standard of competency to stand trial.[18] Uniform assimilation of the English practice, however,

---

if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence?

4 W. BLACKSTONE, COMMENTARIES *24. This is also a rule under the due process clause of the United States Constitution. Pate v. Robinson, 383 U.S. 375, 378 (1966).

15. *See* Drope v. Missouri, 420 U.S. 162, 171-72 (1975); Pate v. Robinson, 383 U.S. 375, 385 (1966); United States v. Chisolm, 149 F. 284, 287-88 (S.D. Ala. 1906); *In re* Buchanan, 129 Cal. 330, 61 P. 1120, 1121 (1900); Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 457 (1967).

16. Competency-to-stand-trial proceedings must be distinguished from proceedings for civil commitment and from the doctrine of criminal responsibility or the insanity defense. The criminal responsibility doctrine focuses on the defendant's mental condition at the time of the criminal act, to determine whether a defect in reasoning rendered the defendant incapable of knowing the nature and quality of the act or whether it was right or wrong. *See* State v. Schantz, 98 Ariz. 200, 206-07, 403 P.2d 521, 525-26 (1965), *cert. denied*, 382 U.S. 1015 (1966). *See generally* R. ARENS, INSANITY DEFENSE (1974); H. GOULETT, THE INSANITY DEFENSE IN CRIMINAL TRIALS (1965); H. WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933). Civil commitment proceedings, on the other hand, probe the person's present mental state to determine whether he is dangerous to himself or to others, and is in need of treatment and restraint. State *ex rel.* Ronan v. Stevens, 92 Ariz. 227, 375 P.2d 717 (1962); ARIZ. REV. STAT. ANN. §§ 36-501 to -528 (1974). *See generally* R. ROCK, M. JACOBSON, & R. JANOPAUL, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL (1968); Wexler & Scoville, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1 (1971).

17. *See* ARIZ. R. CRIM. P. 11.1. *See generally* S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 408 (rev. ed. 1971); H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 430-31 (1954); Wexler & Scoville, *supra* note 16, at 162-65; Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454 (1967). Because of the limited scope of this competency standard, it is possible that a defendant may be competent to stand trial although he may be insane in the sense of legal responsibility, Thursby v. State, 223 A.2d 61 (Me. 1966), or subject to commitment for treatment under the civil incompetency statutes. McWilliams v. Justice Court, 5 Ariz. App. 200, 424 P.2d 848 (1967).

18. *See, e.g.*, COLO. REV. STAT. ANN. § 16-8-110 (1973) (as interpreted in Hampton v. Tinsely, 240 F. Supp. 213 (D. Colo. 1965), *rev'd on other grounds*, 355 F.2d 470 (10th Cir. 1966)); MICH. STAT. ANN. § 28.966(11) (1972); MO. ANN. STAT. § 552.020 (Vernon Supp. 1975); S. BRAKEL & R. ROCK, *supra* note 17, at 410; H. WEIHOFEN, *supra* note 16, at 435. The Supreme Court of the United States has also made the common law test for competency to stand trial the federal guideline:

> . . . it is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of the events," but . . . the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."

Dusky v. United States, 362 U.S. 402 (1960) (per curiam). The federal standard of incompetency is a constitutional minimum that must be applied whenever the issue of

does not imply uniform application of the standard. The common law test is a variable one, meant to depend upon the facts and peculiarities of each case. Also, jurisdictions have different notions of what constitutes the necessary degree of mental capacity to consult with counsel and to comprehend the proceedings.[19]

When Arizona codified the common law test, the legislature merely set forth the common law formulation and refrained from delineating specific procedures for determining competence.[20] Although the Arizo-

---

the mental competency of a defendant in a state criminal case is brought before a federal habeas corpus court. Noble v. Sigler, 351 F.2d 673 (8th Cir. 1965). In practical effect, as soon as a defendant's competency is in doubt a trial court must suspend all further proceedings until the defendant is ascertained competent to proceed. Drope v. Missouri, 420 U.S. 162, 172-73 (1975); Pate v. Robinson, 383 U.S. 375, 385 (1966). A court adjudication of competency may not be waived, Pate v. Robinson, *supra* at 384-85, and the issue may not be resolved solely on the basis of the judge's observations. Rand v. Swenson, 365 F. Supp. 1294 (E.D. Mo. 1973); Bumgarner v. Lockhart, 361 F. Supp. 829 (E.D. Ark. 1973). If the question of defendant's competency to stand trial, once placed in doubt, was not resolved by a judicial hearing at the trial stage, an appellate court will order a new trial unless defendant's competency can be determined retroactively. State v. Blazak, 110 Ariz. 202, 516 P.2d 575 (1973). The Supreme Court has indicated that under federal law, a retroactive determination would be permissible only under exceptional circumstances. Pate v. Robinson, *supra* at 387; Dusky v. United States, 362 U.S. 402 (1960).

19. For example, the United States District Court for the Western District of Missouri has established eight criteria to be considered when reviewing a habeas corpus proceeding arising out of the federal mental incompetency statutes, 18 U.S.C. §§ 4244-4246 (1970), to determine whether mental competency to stand trial has been established:

> (1) that he has mental capacity to appreciate his presence in relation to time, place and things; (2) that his elementary mental processes are such that he apprehends (i.e. seizes and grasps with what mind he has) that he is in a Court of Justice, charged with a criminal offense; (3) that there is a Judge on the Bench; (4) a Prosecutor present who will try to convict him of a criminal charge; (5) that he has a lawyer (self-employed or Court-appointed) who will undertake to defend him against that charge; (6) that he will be expected to tell his lawyer the circumstances, to the best of his mental ability, (whether colored or not by mental aberration) the facts surrounding him at the time and place where the law violation is alleged to have been committed; (7) that there is, or will be, a jury present to pass upon evidence adduced as to his guilt or innocence of such charge; and (8) he has memory sufficient to relate those things in his own personal manner . . . .

Weiter v. Settle, 193 F. Supp. 318, 321-22 (W.D. Mo. 1961).

The New York Nassau County Court measures competency by taking into account whether the defendant (1) is oriented as to time and place; (2) is able to perceive, recall, and relate; (3) has a rudimentary understanding of the process of trial and the roles of the judge, jury, prosecutor, and defense attorney; (4) can establish a working relationship with his lawyer; (5) possesses sufficient intelligence and judgment to listen to the advice of counsel and appreciate that one course of conduct may be more beneficial than another (without necessarily choosing to adopt it); and (6) can withstand the rigors of trial. People v. Valentino, 78 Misc. 2d 678, 684-85, 356 N.Y.S.2d 962, 969 (Nassau County Ct. 1974). *See generally* United States *ex rel.* Konigsberg v. Vincent, 388 F. Supp. 221, 225 (S.D.N.Y. 1975) (comparing Arizona incompetency standards with New York criteria).

Some psychiatrists have established checklists to provide uniform psychiatric criteria for the common law test. Bukataman, Foy, & Degrazia, *What Is Incompetency to Stand Trial?*, 127 AM. J. PSYCHIATRY 1225 (1971); Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 AM. J. PSYCHIATRY 616 (1965); Smith, *Psychiatric Examinations in Federal Mental Competency Proceedings*, 37 F.R.D. 171 (1965).

20. The first Legislative Assembly of the Territory of Arizona adopted the common law test with the terse words that "[A]n idiot shall not be found guilty or punished for any crime with which he or she may be charged." Howell [Ariz.] Code ch. 10, § 5 (1864).

na standard has since undergone numerous changes,[21] the present test—Arizona Rule of Criminal Procedure 11—still does not enumerate criteria for determining competency to proceed to trial.[22] Rather, the rule simply adopts the general federal definition of competency. Any party to a proceeding—the trial court, the state, or the defendant—may move for an examination by a mental health expert to determine defendant's competency if reasonable grounds exist.[23] If the expert examines the defendant and finds him competent to stand trial, he need go no further in his report;[24] he is not required to make a detailed statement of his findings or pursue a more extensive examination.[25] If the defendant is found incompetent, the expert must report on the nature of the defect or disease from which defendant suffers, the probability that he will become competent, and recommendations for treatment.[26]

The Supreme Court and Competency to Waive Constitutional Rights

English common law did not distinguish competency to stand trial from competency to enter a plea. As pleading was an integral part of

21. Later legislation refrained from further elaboration of the common law test. Ariz. Rev. Stat. ¶ 2108 (1887); Ariz. Rev. Stat., Penal §§ 1147-1148 (1901); Ariz. Rev. Stat., Penal §§ 1264-1265 (1913). In 1939 the Legislature stated that a defendant could not stand trial if he was so mentally defective that he could not understand the proceedings against him or assist in his defense. Ariz. Code § 44-1701 (1939). This statute was subsequently incorporated by the Supreme Court of Arizona into rule 250 of the Arizona Rules of Criminal Procedure. Ariz. R. Crim. P. 250 (1956) (superseded by ARIZ. R. CRIM. P. 11, 25) (the text of rule 250 is set out in note 90 *infra*).

Ariz. Rev. Stat. Ann. § 13-1621 (1956) (amended, ch. 105, § 1, [1968] Ariz. Sess. Laws 2d Reg. Sess. 344, and superseded by ARIZ. R. CRIM. P. 11, 25) briefly recounted that "a person shall not be tried, convicted or punished for a public offense while he is insane." In 1972, the legislature promulgated new trial and pretrial procedures for psychiatric examinations, establishing seven criteria to be considered by the examiner which incorporated tests related to civil commitment, legal responsibility, and competency to proceed to trial. Ariz. Rev. Stat. Ann. § 13-1621(f) (Supp. Pamphlet 1973) (superseded by ARIZ. R. CRIM. P. 11, 25) (the text of the statute is set out in note 91 *infra*). The legislation was short-lived. In 1973 the Supreme Court of Arizona returned to the pre-1972 standard in rule 11 of the new Arizona Rules of Criminal Procedure, which expressly replaced section 13-1621. (The Supreme Court of Arizona has the power to establish all procedural rules pertaining to the Arizona courts. This power was granted by a 1960 amendment to the Arizona Constitution. ARIZ. CONST. art. VI, § 5(5) (Supp. 1975). Statutes set forth by the legislature to regulate procedure remain in effect as court rules until nullified by rules promulgated by the supreme court. State *ex rel.* Purcell v. Superior Court, 107 Ariz. 224, 485 P.2d 549 (1971); State v. Blazak, 105 Ariz. 216, 462 P.2d 84, *appeal after remand*, 110 Ariz. 202, 516 P.2d 575 (1969).)

22. ARIZ. R. CRIM. P. 11.1 and 11.3(e) merely require a mental health expert to give his opinion on whether the defendant can understand the proceedings and assist counsel. (The text of rule 11.1 is set out in note 101 *infra*.) The simplistic legal formula of the common law test, however, without added specificity, often confounds psychiatrists. *See* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, MISUSE OF PSYCHIATRY IN THE CRIMINAL CASES: COMPETENCY TO STAND TRIAL 891 (1974); Hess & Thomas, *Incompetency to Stand Trial: Procedures, Results, and Problems*, 119 AM. J. PSYCHIATRY 713, 719 (1963). See discussion note 19 *supra*.

23. ARIZ. R. CRIM. P. 11.2, 11.3.

24. *Id.* 11.3(e), Comment.

25. *Id.* He may, however, be requested by a party or the court to report findings relating to the defendant's mental condition at the time of the offense.

26. *Id.* 11.3(e)(2). If found incompetent, the defendant may be committed or released, and criminal proceedings are suspended until his competency is restored. *Id.* 11.5(b).

the trial ritual, and psychiatry had not yet disclosed a hierarchy of functional ability, there was only one test of competency for all purposes.[27] When the American jurisdictions adopted the common law, they also adopted the unitary standard.[28] Where the defendant has been fit to proceed to trial, he has generally been considered fit to waive a constitutional right or to enter a plea of guilty.[29]

On close examination, and with the benefit of advanced psychiatry, however, it is not certain that competency to stand trial should be equivalent to competency to waive constitutional rights. Once the defendant is bound over for trial, he confronts matters on which he alone must decide.[30] For example, he chooses whether to proceed to trial or to plead guilty,[31] whether to waive a jury trial,[32] or to testify in his own behalf.[33] Such decisions are of particular significance since, should the accused choose to go to trial, these rights safeguard the fairness of the proceedings and put the government to the test of proof.[34] If defendant's decision is to waive a constitutional right, that choice will be given effect only if it is the product of a knowing and intelligent decision by the accused.[35] Implicit in a valid waiver is the assumption that the defendant is capable of making a rational choice.[36] Also, it is arguable that the capacity to understand the proceedings and make a rational choice requires a higher degree of awareness than that required to understand the proceedings and consult with counsel.[37]

---

27. *See* 4 W. BLACKSTONE, *supra* note 14; H. WEIHOFEN, *supra* note 17, at 452.

28. *See, e.g.*, United States v. Chisolm, 149 F. 284 (S.D. Ala. 1906); State v. Thomas, 78 Ariz. 52, 275 P.2d 408 (1955), *cert. denied*, 350 U.S. 950 (1956); Fralick v. State, 25 Ariz. 4, 212 P. 377 (1923).

29. *See, e.g.*, United States v. Harlan, 480 F.2d 515, 517 (6th Cir. 1973), *cert. denied*, 414 U.S. 1006 (1974); United States *ex rel.* Roberts v. Yeager, 402 F.2d 918 (3d Cir. 1968); Grayson v. State, 438 S.W.2d 553 (Tex. Crim. App. 1969).

30. *See* Henry v. Mississippi, 379 U.S. 443 (1965).

31. *See* Machibroda v. United States, 368 U.S. 487, 493 (1962); Kercheval v. United States, 274 U.S. 220 (1927).

32. *See* Patton v. United States, 281 U.S. 276, 298 (1930); Hensley v. United States, 281 F.2d 605, 608 (D.C. Cir. 1960).

33. A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 5.2, Comment (Approved Draft 1971).

34. Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973).

35. Carnley v. Cochran, 369 U.S. 506 (1962); Von Moltke v. Gillies, 332 U.S. 708 (1947); Johnson v. Zerbst, 304 U.S. 458 (1938).

36. *See* cases cited note 38 *infra*.

37. The distinction has been expressed by one court as follows:

> [The psychiatrists] found [the defendant] able to concretize but deficient in conceptualizing and in syllogistic reasoning. This testimony, though not conclusive, was affirmative evidence of capacity to stand trial, since orientation, memory and ability to concretize are principal elements in a client's ability to convey full and correct information to his attorney. On the other hand, the defendant exhibited inability to conceptualize, to reason logically, and to generalize from particular examples, . . . deficiencies which related directly to the issue of legal responsibility, but may well have been less significant than ade-

Although the Supreme Court of the United States has declared that the defendant must be competent to waive a federal right, it has not gone further to define what competency means in this context.[38]

In *Westbrook v. Arizona*,[39] even though Westbrook had received a hearing on the issue of his competency to stand trial, the Supreme Court vacated his murder conviction and remanded the case for an inquiry and hearing into Westbrook's competency to waive his right to counsel and proceed with his own defense. The Arizona test for competency to stand trial was found not to encompass an inquiry into the issue of competency to waive counsel and proceed pro se. In remanding *Westbrook*, however, the Supreme Court failed to delineate what the test for competency to waive counsel should incorporate.[40]

It has been suggested that *Westbrook* does not require a new and higher standard of competency to waive all constitutional rights, but rather applies only to the unique situation where defendant waives counsel and subsequently proceeds to trial pro se.[41] This analysis,

---

quate memory and satisfactory orientation as determinants of ability to inform and assist counsel.

United States *ex rel.* Roberts v. Yeager, 402 F.2d 918, 919 (3d Cir. 1968). The ability to make a reasoned choice requires a more abstract mental function, and thus a higher degree of awareness, than the common law test of competency. Interview with Dr. David Gurland, Psychiatric Services Center P.C., in Tucson, Ariz., Feb. 18, 1975. (Dr. Gurland has often been called upon to conduct competency examinations under former section 13-1621 and new rule 11).

38. For example, the Supreme Court has referred to a competent waiver as one embodying a competent judgment, or the ability to make an intelligent choice, or control of mental faculties. Brady v. United States, 397 U.S. 742, 756 (1970); Carter v. Illinois, 329 U.S. 173, 179 (1946); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 278 (1942).

39. 384 U.S. 150 (1966) (per curiam), *noted in* 8 ARIZ. L. REV. 347 (1967).

40. The per curiam opinion stated:

> The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." . . .
>
> From an independent examination of the record, we conclude that the question whether this "protecting duty" was fulfilled should be re-examined . . . . Accordingly, the judgment of the Supreme Court of Arizona is vacated and the case is remanded to that court for proceedings not inconsistent herewith.

384 U.S. at 150-51.

41. Comment, *supra* note 2, at 161-62, 166. The writer also suggested that the Supreme Court would have been content if the trial court had made another investigation into defendant's competency to stand trial at the time he waived counsel to be sure that the defendant was still competent. *Id.* at 165-66. However, once defendant is declared competent to stand trial, a presumption of continued competency arises until the trial court is put on notice that a bona fide doubt exists as to defendant's capacity. State v. Bradley, 102 Ariz. 482, 487, 433 P.2d 273, 278 (1967), *rev'd on other grounds*, 106 Ariz. 386, 476 P.2d 841 (1970). Arguably then, the only ground for another hearing when defendant waives counsel is that the waiver per se raises a renewed doubt as to his present sanity. *See* State v. DeCello, 111 Ariz. 46, 48, 523 P.2d 74, 76 (1974).

however, produces the anomalous result that a defendant who waives counsel and proceeds to trial is held to a higher standard of mental capacity than one who waives counsel and pleads guilty. A defendant who proceeds to trial pro se—albeit in probable ignorance of the legal and procedural complexities of a trial situation—nevertheless retains some procedural safeguards to prompt a just determination of guilt or innocence.[42] A defendant who pleads guilty, however, waives all procedural safeguards,[43] save the *Boykin* inquiry of the trial court.[44] If the standard of an accused's capacity is to depend on the rationality of his decisions concerning his defense,[45] the rash consequences of a plea of guilt should prompt a trial court to demand as high a level of competence from the defendant who pleads guilty without counsel as from the defendant who goes to the trial pro se.[46] Additionally, the Supreme Court has not drawn such fine competency distinctions in the past; a trial court has the same high protective duty whenever counsel is waived, despite the defendant's subsequent intentions.[47]

A fair interpretation of *Westbrook* can best be drawn by considering this opinion in conjunction with later decisions of the Supreme Court. Four weeks after *Westbrook* was decided, the Supreme Court addressed the issue of competency to abandon a petition for certiorari to the Supreme Court in *Rees v. Peyton.*[48] Remanding to the district court, the Supreme Court ordered a determination of whether the petitioner was suffering from a mental defect which might substantially affect his capacity to appreciate his position and make a rational choice

---

If this be true, any defendant who waives counsel, not just those whose competency has been put in issue by a prior examination, should be considered of doubtful competency. This doctrine should also apply to a defendant who confesses or pleads guilty. *See* Harris v. State, 76 Tex. Crim. 126, 172 S.W. 975 (1915); Sanders v. State, 18 Tex. App. 372 (1885). It is unlikely that the Supreme Court in *Westbrook* intended such a result. If this is a proper interpretation of *Westbrook*, however, it will be incumbent upon every trial court when accepting a waiver of constitutional rights to inquire and set forth in the record whether there are any facts which raise a reasonable doubt as to defendant's competency.

42. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 235-39 (1973); *cf.* Faretta v. California, 422 U.S. 806 (1975).

43. *See* Bishop, *Waivers in Pleas of Guilty*, 60 F.R.D. 513 (1974).

44. See text & notes 10-11 *supra.*

45. See discussion note 41 *supra.*

46. This anomaly may vanish, however, if *Westbrook* is focused solely on the ability and competency of a defendant to represent himself at trial. It can be argued that the capacity to proceed pro se requires a higher degree of competence than capacity to waive counsel. *See* People v. Jones, 74 Misc. 2d 767, 773-74, 346 N.Y.S.2d 92, 96-98 (Crim. Ct. City of N.Y. 1973). Because a defendant has a constitutional right to defend himself regardless of his legal acumen, however, few courts have separated the issue of competency to proceed pro se from competency to waive counsel. *See* Faretta v. California, 422 U.S. 806 (1975). *Compare* State v. Westbrook, 99 Ariz. 30, 34-35, 406 P.2d 388, 391 (1965), *rev'd per curiam*, 384 U.S. 150 (1966), *with* State v. Westbrook, 101 Ariz. 206, 417 P.2d 530 (1966).

47. Von Moltke v. Gillies, 332 U.S. 708, 721 (1948) (dictum).

48. Rees v. Peyton, 384 U.S. 312 (1966) (per curiam). The petition had sought review of the district and appeals courts' rejection of a habeas corpus claim.

with respect to abandoning further litigation.[49] As the right to pursue a petition of certiorari to the Supreme Court has not been held of constitutional stature,[50] it would be ironic were the test for competency to waive a constitutional right less demanding than the test for competency to abandon a petition for certiorari, that is, the ability to make a rational choice.

Recently, in *Drope v. Missouri*,[51] the Supreme Court considered in dictum the question of competency to waive the right to be present at trial.[52] Assuming without deciding that such a right could be waived, the Court concluded that the record did not afford a basis for determining whether the waiver was competent. For this proposition that a specific inquiry was necessary into the competency of the waiver, Chief Justice Burger cited *Westbrook* and a lower federal court decision, *United States v. Silva*,[53] as authority.[54] The court in *Silva* had applied *Westbrook* to the question of competency to waive the privilege against self-incrimination, holding that an accused was deemed incompetent to waive his rights if he was so mentally ill that he was unable to relinquish a known right with intelligence, knowledge, and understanding in a meaningful act of volition.[55]

Reading *Westbrook*, *Rees*, *Drope*, and *Silva* together, it is apparent that competency to stand trial is not always equivalent to competency to waive a federal constitutional right, or even a lesser privilege such as pursuance of a petition for certiorari. In determining competency for a waiver, the Supreme Court will seek to determine whether the defendant has the mental faculty to make a rational choice. If the record shows only that a defendant can appreciate his jeopardy and consult with counsel, a further inquiry into defendant's capacity will be ordered.

The United States Court of Appeals for the Ninth Circuit was the first to apply this broad mandate of *Westbrook* to the issue of competency to plead guilty. Reversing the Arizona district court in *Sieling v. Eyman*,[56] the court reasoned that normally a waiver of constitutional rights is assessed with the presumption that the defendant is capable of making weighty decisions. Where there is a substantial question of

49. *Id.* at 314.
50. *Cf. Ex parte* McCardle, 73 U.S. (6 Wall.) 318 (1868).
51. 420 U.S. 162 (1975).
52. *Id.* at 182-83. The main issue addressed by the court was whether the Missouri court's conclusion that Drope was competent to stand trial was correct in light of the undisputed evidence of psychiatric testimony to the contrary. The Supreme Court concluded that a reasonable doubt as to Drope's competency existed at the time of trial. *Id.*
53. 418 F.2d 328 (2d Cir. 1969).
54. 420 U.S. at 182.
55. 418 F.2d at 330; *accord*, People v. Dumas, 51 Misc. 2d 929, 274 N.Y.S.2d 764 (Sup. Ct. 1966).
56. 478 F.2d 211 (9th Cir. 1973).

defendant's mental capability, however, the normal inquiry does not resolve the question whether the defendant has a rational and factual understanding that he is relinquishing a constitutional right. The court should determine whether the defendant can make decisions of serious import: "A defendant is not competent to plead guilty if mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented and to understand the nature of the consequences of his plea."[57] As the hearing on competency to stand trial under former Arizona Rule of Criminal Procedure 250 did not inquire into this issue, the case was remanded to determine if Sieling was competent to plead guilty.[58]

Competency to Waive Constitutional Rights in Arizona

After *Westbrook*, the Supreme Court of Arizona has applied a broad inquiry for the test of competency to waive counsel. The trial court has been charged with determining whether a defendant is capable of making an intelligent choice to waive counsel, taking into consideration all the particular facts and circumstances of the case, including the background, experience, and conduct of the accused.[59] As a person is presumed sane until facts cast doubt on the presumption,[60] *Westbrook*

57. *Id.* at 215. The *Sieling* standard is adopted from Judge Hufstedler's dissent in Schoeller v. Dunbar, 423 F.2d 1183 (9th Cir.), *cert. denied*, 400 U.S. 834 (1970). Schoeller, a high school principal with an exceptionally high intelligence quotient, was accused of killing his girlfriend in a jealous rage at the height of an involved love affair. Psychiatric examinations disclosed that Schoeller had suicidal tendencies and exhibited signs of depression. Before entering a plea of guilty to second-degree murder, Schoeller stated that his reasons for entering the plea were of a personal, philosophic nature, and that life to him was no longer desirable or necessary. *Id.* at 1188. On appeal a three-judge panel ruled that Schoeller was competent to stand trial at the time he entered his guilty plea on the basis of his superior intelligence as demonstrated by tests and his remarkable dissertations to the trial court. *Id.* at 1185. The majority did not reach the issue of competence to plead guilty.

In a lengthy dissent, Judge Hufstedler concluded that Schoeller was incompetent to stand trial. *Id.* at 1186-92. Additionally, she argued that *Westbrook* indicated that the standard of competency to plead guilty was higher than that of competency to stand trial. Applying her "reasoned choice" test, Judge Hufstedler then determined that Schoeller was incompetent to plead guilty and that the lower court's acceptance of the plea was a separate violation of due process. *Id.* at 1194.

58. 478 F.2d 211, 215 (9th Cir. 1973); *accord, In re* Williams, 165 F. Supp. 879 (D.D.C. 1958) (The trial court refused to accept Williams' plea of guilty to a charge of drunkenness and bound him over for trial. Williams was found not guilty by reason of insanity and was committed to a mental hospital. On a writ of habeas corpus, seeking to overturn the judgment because the trial court should have accepted his guilty plea, the federal court held that a higher degree of awareness is needed to plead guilty than to stand trial. *Id.* at 881.); Wexler & Scoville, *supra* note 16, at 164 n.90. *Contra*, Wolf v. United States, 430 F.2d 443 (10th Cir. 1970); United States v. Harlan, 480 F.2d 515 (6th Cir. 1973), *cert. denied*, 414 U.S. 1026 (1974); People v. Haral, — Ill. 2d —, 342 N.E.2d 34 (1976).

59. State v. Nicastro, 103 Ariz. 244, 439 P.2d 815 (1968); *accord*, State v. Martin, 102 Ariz. 142, 426 P.2d 639 (1967); State v. Westbrook, 101 Ariz. 206, 417 P.2d 530 (1966).

60. State v. Bradley, 102 Ariz. 482, 487, 433 P.2d 273, 278 (1967).

could have been limited to defendants whose competency is in issue.[61] Nonetheless, the Arizona court has taken that decision one step further and, apparently in the belief that any defendant who waives counsel calls into issue his sanity,[62] applied *Westbrook* whenever counsel was waived.[63] The common law test of competency to stand trial, however, continued to be applied as the test of capacity whenever other constitutional rights were waived, such as the rights implicitly waived in a guilty plea.[64]

The Supreme Court of Arizona has considered *Westbrook* inapplicable where a defendant is represented by counsel, found competent to proceed to trial, and then chooses to waive his right to a jury trial or his right to confront witnesses.[65] As these waivers are inextricably linked to trial strategy and based on the subjective evaluations of counsel, they do not call into question the defendant's competency; indeed, they may well be in his best interests.[66] By similar reasoning, a guilty plea may be a sound decision depending on the strength of evidence indicating guilt.[67] The Arizona court of appeals has thus stated that competence to assist counsel is sufficient to plead guilty.[68] Arguing that a defendant must make a rational choice to meaningfully assist counsel at trial, the court regarded this criterion as implicit in the test for competency to stand trial and saw no need to apply a separate test whenever a constitutional right is waived.

It is commendable that Arizona has adopted such high standards to govern the acceptability of a waiver of counsel, but it is difficult to accept the conclusion that waiver of other constitutional rights should be controlled by lower standards. The duty of a trial court to determine that an accused has the capacity to make a reasoned choice is not lessened because the waiver of a jury trial may be wise strategy. Rather,

---

61. Other considerations may suggest limiting *Westbrook* to the waiver of counsel. In Arizona, a defendant is competent to proceed to trial only if he is capable of understanding the proceedings and assisting counsel in his defense. Implicit in the criteria is a presumption that the defendant is represented by counsel. Moreover, it is counsel who is expected to raise the issue of competency in the first place. *See* Comment, *supra* note 41, at 167 n.85. Hence, counsel is expected to assist the defendant in formulating and interpreting data, and to advise him of his options. Once counsel is waived, the entire burden of defense falls on the accused. A closer look by the trial court at defendant's competency should follow, therefore, because of the additional tasks required of him. Of course, the courts must be able to distinguish mental capacity to defend oneself from legal skill. See discussion note 46 *supra*.

62. State v. DeCello, 111 Ariz. 46, 48, 523 P.2d 74, 76 (1974). *See* discussion note 41 *supra*.

63. *See* cases cited note 59 *supra*.

64. *See* State v. Lopez, 110 Ariz. 198, 516 P.2d 571 (1973); State v. Hostler, 109 Ariz. 212, 507 P.2d 974 (1973); State v. Rojas, 103 Ariz. 431, 443 P.2d 427 (1968).

65. State v. DeCello, 111 Ariz. 46, 48-49, 523 P.2d 74, 76-77 (1974).

66. State v. Ellison, 111 Ariz. 167, 168, 526 P.2d 706, 707 (1974).

67. State v. Byrd, 22 Ariz. App. 375, 527 P.2d 777 (1974).

68. *Id.* at 378, 527 P.2d at 780.

the relevant focus of inquiry should be on factors which will apprise the court that the defendant lacks such capacity. Regardless of the help and advice of counsel, the final choice rests with the accused.[69] The conclusion of the court of appeals that a defendant must be capable of making a rational choice to meaningfully assist counsel may well be true, but ignores the character of the present criteria for competency. Present legal standards for fitness to proceed to trial in Arizona exclude an examination into the capacity to decide,[70] unless the defendant waives counsel. The court of appeals' espousal of a single standard for competency does, however, underscore a major fault in formulating variable standards for competency dependent upon the constitutional right waived. A trial court may face the predicament of forcing an accused through trial and denying him the power to waive a jury trial or testify in his own behalf. Certainly fairness is better achieved by not forcing a defendant who at best has a superficial contact with reality, to sit powerless through a trial by his peers.

In *State v. Robinson*,[71] Arizona's reluctance to apply a broad inquiry into all waivers of constitutional rights was, to a certain extent, overcome. Having previously recognized the *Sieling* standard as binding upon it,[72] the court in *Robinson* applied that test for the first time. The Arizona supreme court, however, has been strict in deciding when the *Sieling* "reasoned choice" test must be applied.

When a Trial Court Should Conduct a Robinson Hearing

In *Robinson*, the Arizona supreme court carefully emphasized the factual basis on which *Sieling* rested.[73] Vice Chief Justice Cameron, writing for the court, noted that psychiatrists had disagreed on whether Sieling was competent to proceed to trial, thereby placing his ability to understand the proceedings and to assist counsel at issue.[74] Also, the uncertainty of the psychiatrists left a further question unresolved: whether the mental capacity of the defendant to waive a constitutional right was presumptively impaired. In such a situation, the trial court must decide both the defendant's competency to stand trial and his

69. *See* text accompanying notes 30-36 *supra*.
70. *See* text accompanying notes 14-26 *supra*, 89-97 *infra*.
71. 111 Ariz. 153, 526 P.2d 396 (1974).
72. *See* State v. DeCello, 111 Ariz. 46, 523 P.2d 74 (1974). Of course, the question of what constitutes a waiver of constitutional rights is a federal one, controlled by federal law. Brookhart v. Janis, 384 U.S. 1 (1966). As the writ of habeas corpus will issue in federal courts where constitutional rights are at issue, the Supreme Court of Arizona was obviously induced to give deference to the *Sieling* opinion. *Cf.* Weiter v. Settle, 193 F. Supp. 318, 321-22 (W.D. Mo. 1961).
73. 111 Ariz. at 157, 526 P.2d at 400.
74. *Id.*

competency to waive a constitutional right. The factor of disagreement was isolated by the Arizona court to indicate that merely because a reasonable doubt had once existed as to the defendant's competency to stand trial, this factor alone is insufficient to require a hearing prior to waiver. To be sure, a hearing on competency to proceed to trial will be granted on a slight showing that the defendant has received psychiatric care in the past.[75] Nonetheless, if the issue can be promptly resolved by a broad inquiry conducted without dispute in favor of competency to stand trial, the record will generally support the inference that the defendant is also competent to waive a constitutional right.[76] Before a *Robinson* inquiry will be held, there must be some element in the situation that raises a substantial question as to the defendant's competency to waive a federal right.[77]

Robinson should not, however, be interpreted to mean that a trial court must hold a *Robinson* inquiry only when the psychiatric testimony as to competency to stand trial is in conflict. After all, in *Robinson* a hearing was ordered although the psychiatrists were in complete agreement as to defendant's competency to proceed to trial.[78] Rather, the conflicting testimony of the experts is only one element that will raise a substantial question of doubt as to the defendant's mental capacity to waive federal rights. When the psychiatrists disagree on an accused's competence, it merely emphasizes that the issue of competency to stand trial is a close question. Further, all the psychiatrists may agree that the defendant is competent to stand trial, but only marginally so,[79] in which case a cloud remains over the defendant's capacity to make a serious and reasoned choice to waive a constitutional right. The court cannot resolve this question until a specific and extensive examination of the defendant's ability to make a rational choice is conducted. After *Westbrook* and *Robinson*, the Arizona rule is that the test of competency to stand trial resolves the issue of competency to waive a constitutional

75. Of course, the party who moves for an examination must show some cause. Sherrick v. Eyman, 389 F.2d 648 (9th Cir. 1968), *cert. denied*, 393 U.S. 874 (1968); Splitt v. United States, 364 F.2d 594, 596, 598 (6th Cir. 1966), *cert. denied*, 385 U.S. 1019 (1967). Once a showing creates a reasonable doubt in the judge's mind as to the defendant's competency, however, an inquiry is necessary. H. WEIHOFEN, *supra* note 16, at 443-44.

76. *See* State v. Decello, 111 Ariz. 46, 523 P.2d 74 (1974).

77. State v. Robinson, 111 Ariz. 153, 157-58, 526 P.2d 396, 400-01 (1974); *see* Rhay v. White, 385 F.2d 883, 886 (9th Cir. 1967). *But see* 1975 ARIZ. ST. L.J. 227, 233-235 (presenting argument that "substantial question" test may not comply with *Westbrook*, as a substantial question did not exist concerning Westbrook's competency).

78. In *Robinson*, the substantial question arose because the defendant was originally found to be incompetent to stand trial, and even after the defendant was determined to have the capacity to proceed to trial, the trial court's *Boykin* examination revealed that he did not fully comprehend the import of his guilty plea. 111 Ariz. at 154-55, 526 P.2d at 397-98.

79. *See* United States *ex rel.* Roberts v. Yeager, 402 F.2d 918 (3d Cir. 1968).

right unless the federal right involved is the right to counsel or there is some element that raises a further doubt as to the defendant's mental capacity.

It is impossible to list all the manifestations of personality that will raise a substantial question as to an accused's ability to waive constitutional rights. This is not to say, however, that the trial courts will often encounter such situations. It is unlikely that a substantial number of defendants will be found fit to stand trial but incompetent to waive federal rights.[80] Nevertheless, certain personality types should receive a *Robinson* inquiry as a matter of course. For example, if a defendant is found to have a borderline intelligence quotient it cannot be inferred that he possesses sufficient intelligence and understanding to waive a constitutional right.[81] The appropriateness of such a mandatory *Robinson* hearing is illustrated unfortunately by courts which have not made a distinction between degrees of competency. In one instance, a Texas court upheld the waiver of the right to counsel and the right against self-incrimination by a defendant with an I.Q. of 51, despite testimony from a psychiatrist that the defendant could not understand, much less waive, a constitutional right.[82] A *Robinson* hearing would appear appropriate also whenever a defendant is diagnosed as a functional schizophrenic with dissociative reactions[83] or highly delusional paranoia,[84] or as suicidal and self-destructive.[85]

Arizona cases following *Robinson*, however, have not drawn these conclusions. Going without mention in four subsequent cases concern-

80. Interview with Dr. David Gurland, *supra* note 37.

81. *See* United States v. Reed, 285 F. Supp. 738 (D.D.C. 1968); People v. Randolph, 58 Misc. 2d 187, 294 N.Y.S.2d 933 (1968). *But see* State v. Ellison, 111 Ariz. 167, 526 P.2d 706 (1974).

82. Grayson v. State, 438 S.W.2d 553, 554-55 (Tex. Crim. App. 1969). In Massachusetts, a defendant who was lobotomized by a self-inflicted gunshot wound was found competent to stand trial and to waive his right against self-incrimination. Commonwealth v. Harrison, 342 Mass. 279, 283-84, 173 N.E.2d 87, 91 (1961).

83. Schizophrenia is defined as "any of a group of severe emotional disturbances characterized by misinterpretation and retreat from reality, delusions, hallucinations, ambivalence, inappropriate affect and withdrawal, bizarre or repressive behavior." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1386 (25th ed. 1974). Such a defendant can apprehend what is happening, and thus be competent to stand trial, but may have difficulty relating these events to himself. For example, a defendant may be imperturbable, and at times oblivious to his surroundings. *See* People v. Swallow, 60 Misc. 2d 171, 301 N.Y.S.2d 798 (Sup. Ct. 1969). A defendant may also be in superficial contact with reality, but unable to respond to normal emotional expressions and behavior. *See* People v. Golwitzer, 52 Misc. 2d 925, 277 N.Y.S.2d 209 (Sup. Ct. 1969).

84. Paranoid schizophrenia is defined as "a psychotic state characterized by delusions of grandeur or persecution often accompanied by hallucinations." DURLAND'S ILLUSTRATED MEDICAL DICTIONARY 1386 (25th ed. 1974). An extreme example of when a *Robinson* hearing should be held is where the defendant believes he is an undercover narcotics agent for the Central Intelligence Agency who fakes his way into prisons to get inside jobs. *See* State v. Castone, 10 Ariz. App. 411, 459 P.2d 328 (1969).

85. See Tanner v. United States, 434 F.2d 260 (10th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971); United States v. Webb, 433 F.2d 400 (1st Cir. 1970), *cert. denied*, 401 U.S. 958 (1971); Schoeller v. Dunbar, 423 F.2d 1183 (9th Cir.), *cert. denied*, 400 U.S. 834 (1970).

ing competency and constitutional rights,[86] *Robinson* appears to have been dropped from supreme court analysis. In particular, *State v. Ellison*[87] and *State v. Bates*[88] have tempered the impact of *Robinson* on criminal procedure in Arizona by an expansive reading of both section 13-1621 of the Arizona Revised Statutes and rule 11 of the Arizona Rules of Criminal Procedure which seemingly preempts the problems addressed by *Sieling* and *Robinson.*

Robinson and the Arizona Rules of Criminal Procedure

Appellate courts are often called upon to make a retroactive determination of competency. All proceedings undertaken while there exists a reasonable doubt as to defendant's competency are voidable.[89] Without data to rebut an attack on a judgment based on the issue of competency, appellate courts may be faced with the unpalatable necessity of vacating a conviction and remanding the case for a new trial.

Both *Westbrook* and *Sieling* dealt with a psychiatric inquiry and hearing pursuant to rule 250 of the previous Arizona Rules of Criminal Procedure,[90] which required only a limited inquiry into a defendant's competency to stand trial. Under this procedure the court searched no further than the threshold issue of competency to stand trial; thus, the record on appeal was inadequate to support a finding that a defendant was competent to waive constitutional rights. *Robinson,* however, concerned competency examinations and hearings as prescribed in section 13-1621 of the Arizona Revised Statutes,[91] which included a far

86. State v. Vassar, 111 Ariz. 487, 533 P.2d 544 (1975); State v. Crowley, 111 Ariz. 308, 528 P.2d 834 (1974); State v. Bates, 111 Ariz. 202, 526 P.2d 1054 (1974); State v. Ellison, 111 Ariz. 167, 526 P.2d 706 (1974). The *Robinson* decision has also undergone a peculiar metamorphosis in the Arizona appellate courts. *See* State v. Byrd, 22 Ariz. App. 375, 527 P.2d 777 (1974).

87. 111 Ariz. 167, 526 P.2d 706 (1974).

88. 111 Ariz. 202, 526 P.2d 1054 (1974).

89. Pate v. Robinson, 383 U.S. 375, 385-86 (1966); State v. Blazak, 110 Ariz. 202, 516 P.2d 575 (1973).

90. The pertinent portions of the rule were as follows:

> (A) If before or during the trial the court has reasonable ground to believe that the defendant . . . is insane or mentally defective, to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately set a time for a hearing to determine the defendant's mental condition . . . .
>
> (B) If the court, after the hearing, decides that the defendant is able to understand the proceedings and to assist in his defense it shall proceed with the trial.

Ariz. R. Crim. P. 250 (1956) (superseded by ARIZ. R. CRIM. P. 11, 25). *See* discussion note 21 *supra.*

91. The portion of the statute which referred to the scope of the inquiry follows:

> (1) Whether the defendant presently suffers from a mental illness or defect.
>
> (2) The defendant's present ability to understand the nature of the proceedings against him.
>
> (3) The defendant's present ability to assist in his own defense.
>
> (4) Whether the defendant suffers from a condition which is diagnosed solely as a sociopathic or psychopathic personality disorder.

more searching inquiry into sanity with respect to civil commitment, legal responsibility, and competency to stand trial. In *Ellison* and *Bates*, decided within two weeks after *Robinson*, the Supreme Court of Arizona reaffirmed that *Sieling* was limited to cases where the factual support of competency to stand trial was conflicting or inadequate.[92] Further, the court stated that the psychiatric report required by section 13-1621 provided sufficient material for a court to decide not only whether a defendant is competent to stand trial, but also whether he has the capacity to waive constitutional rights.[93] Such a complete record may discharge the duty of the trial court to order a specific inquiry bearing on competency to waive federal rights. Moreover, if a finding of competency has not been made at the trial level, a full record allows an appellate court to retroactively determine competency. Hence, section 13-1621 obviates the necessity to remand to the trial court for a hearing. The effect of *Ellison* and *Bates*, therefore, may be to limit a trial court *Robinson* hearing to instances where the psychiatric report is called into question: where psychiatric disagreement occurs,[94] or where the defendant makes a visible display of incapacity.[95] The supreme court has yet to set forth other indicia which would call into question a defendant's capacity. Indeed, in the wake of *Ellison* it is unclear what other factors will mandate a *Robinson* hearing. Ellison was tested as having an I.Q. of 68,[96] characterized as borderline mental retardation. Arguably, this fact alone should have raised a question as to Ellison's capacity to waive a constitutional right.[97] Nevertheless, this element was not regarded as sufficient to require that the supreme court remand and order a *Robinson* inquiry.

The supreme court's espousal of section 13-1621 is misdirected; the section 13-1621 standard is not analogous to the reasoned choice test of *Sieling* and *Robinson*. Although section 13-1621(F)(5) ad-

---

(5) Whether the defendant's ability to reason or to control his conduct is substantially impaired.
(6) The defendant's potential for violent or dangerous behavior.
(7) Whether the defendant's present mental illness or defect justifies his commitment to a mental institution.

Ariz. Rev. Stat. Ann. § 13-1621(F) (Supp. Pamphlet 1973) (superseded by ARIZ. R. CRIM. P. 11, 25). See discussion note 21 *supra*.

92. State v. Bates, 111 Ariz. 202, 204, 526 P.2d 1054, 1056 (1974); State v. Ellison, 111 Ariz. 167, 168, 526 P.2d 706, 707 (1974).

93. State v. Bates, 111 Ariz. 202, 204, 526 P.2d 1054, 1056 (1974); State v. Ellison, 111 Ariz. 167, 168, 526 P.2d 706, 707 (1974).

94. *See* State v. Byrd, 22 Ariz. App. 375, 378, 527 P.2d 777, 780 (1974).

95. See text accompanying notes 10-13 *supra*. It could still be argued, however, that there is a need for the trial court specifically to examine and make findings on the defendant's competency to waive a constitutional right, whatever may be the contents of the psychiatric report.

96. State v. Ellison, 111 Ariz. 167, 168, 526 P.2d 706, 707 (1974).

97. See text & notes 79, 81-82 *supra*.

dresses the defendant's ability to reason or to control his conduct,[98] the statute does not distinguish the ability to make a reasoned choice concerning constitutional rights from the legal test for insanity or for civil commitment.[99] Moreover, the statute neither provides guidelines for psychiatric examination, nor requires a specific judicial determination on capacity to waive a federal right. Hence, section 13-1621 is at best a diluted surrogate for the inquiry outlined in *Robinson.*

Even assuming as did the *Ellison* court that section 13-1621 did entail a broad psychiatric inquiry, trial courts now follow the more cryptic standards of Arizona Rule of Criminal Procedure 11, which rejects as a model the broad format of section 13-1621.[100] Although rule 11 examinations are to be focused solely on the relevant issues of competency to stand trial as defined by the common law,[101] the format of section 13-1621 or some undefined equivalent may be employed sub silentio in order to construct a full psychiatric record.[102] In the absence of a statutory mandate, however, the psychiatric examination conducted to determine competency for trial cannot be relied on to provide the information necessary to determine also competency to waive a constitutional right.[103]

Conclusion

In *State v. Robinson* a clear distinction is established between competency to stand trial and competency to waive a constitutional right. Arizona now follows a dual standard. Before a defendant can proceed to trial, he must be capable of understanding the proceedings and able to consult with counsel. Where a waiver of constitutional rights is involved, however, the defendant must be capable of comprehending the proceedings and exercising a reasoned choice among the alternatives presented to him. Although the courts will rarely face a defendant competent to stand trial yet incompetent to waive his rights, *Robinson,* properly applied, lessens the probability that a court will accept a waiver that is only the product of ignorance.[104] Proper appli-

98. Text of statute is set forth at note 91 *supra.*

99. *See* discussion notes 16, 21 *supra.*

100. ARIZ. R. CRIM. P. 11.3(e), Comment. Under section 13-1621, the psychiatrist was asked to prepare a report not only on the defendant's competency to stand trial but also on psychiatric factors which were not relevant to the competency determination. This mixture confused and prejudiced the ruling on competency by introducing extraneous elements into that determination. *Cf.* Wexler & Scoville, *supra* note 16, at 164.

101. The pertinent portion of rule 11 states: "A person shall not be tried, convicted, sentenced or punished for a public offense while, as a result of a mental illness or defect, he is unable to understand the proceedings against him or to assist in his own defense." ARIZ. R. CRIM. P. 11.1.

102. *See* State v. Vassar, 111 Ariz. 487, 533 P.2d 544 (1975).

103. *See* discussion notes 19, 22 *supra.*

104. The writer proposes the following amendment to rule 11 to enhance the breadth

cation of the *Robinson* test, however, requires a specific psychiatric examination coupled with a contemporaneous judicial determination of competency—a standard which Arizona has not espoused. It is recommended that the Arizona courts avoid the predicament of forcing an accused through trial and denying him the power to waive a jury trial or testify in his behalf by returning to a unitary standard of competency, embracing both the common law and the *Robinson* rationales.[105]

B. DEFENSE WITNESS IMMUNITY FROM PROSECUTION

Ordinarily statutes granting immunity from prosecution are applicable only to witnesses called by the prosecution.[1] By granting immunity from prosecution, the government may compel testimony which would implicate the witness in criminal activity[2] and thus would be protected by the privilege against self-incrimination.[3] Until very recent-

of a psychiatric examination to comply with *Robinson* [the amendment proposal is italicized]:

Rule 11.1 Definition and Effect of Incompetency

a. A person shall not be tried, convicted, sentenced or punished for a public offense while, as a result of a mental illness or defect, he is unable to understand the proceedings against him or to assist in his own defense.

b. *A person shall not be allowed to waive a constitutional right while, as a result of a mental illness or defect, he is unable to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of a waiver.*

Rule 11.3 Appointment of Experts

e. **Experts' Reports**

(1) Any expert appointed by the court shall submit to the clerk of the court his opinion of the defendant's competency to stand trial as defined in Rule 11.1 (a), *and his opinion of the defendant's competency to waive a constitutional right as defined in Rule 11.1(b).*

105. The writer proposes the following amendment to rule 11 to incorporate the common law test of competency and *Robinson* into a unitary standard for fitness to proceed [the amendment proposal is italicized]:

Rule 11.1 Definition and Effect of Incompetency

A person shall not be tried, convicted, sentenced or punished for a public offense while, as a result of a mental illness or defect, he is unable to understand the proceedings against him or to assist in his own defense *or to make a reasoned choice among the alternatives presented to him.*

1. *See, e.g.*, Brady v. United States, 39 F.2d 312 (8th Cir. 1930); *Ex parte* Petraeus, 12 Cal. 2d 579, 86 P.2d 343 (1939); State v. Hennessy, 195 Ore. 355, 245 P.2d 875 (1952). *See generally* 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2282, at 519 (rev. ed. McNaughton 1961).

2. Statutory language varies among jurisdictions. In some states immunity may be granted only in instances where the witness' testimony would implicate him in the same crime for which the defendant is being tried. In others it may be applied where the testimony would be incriminating as to other matters. *See* 8 J. WIGMORE, *supra* note 1, § 2282, at 509 & n.2.

3. In Hale v. Henkel, 201 U.S. 43, 67 (1906), the Court explained the constitutional basis for immunity: "The interdiction of the Fifth Amendment operates only

ly[4] no witness had received immunity for testimony given on behalf of a criminal defendant.

Confronted in *State v. Sigman*[5] with the question of whether Arizona's immunity statute[6] could be applied to compel testimony from a defense witness, Pima County Superior Court Judge Robert Buchanan granted such immunity, despite the traditional limitation in favor of prosecution witnesses. Defendant Elaine Sigman had been charged with two counts of unlawfully selling marijuana. During her trial before Judge Buchanan, Sigman moved to have immunity granted to a defense witness whose testimony allegedly would exculpate her but implicate the witness in criminal activity. After hearing argument on the motion, the judge ruled that immunity would be granted to the defense witness.[7] Judge Buchanan also granted a continuance, allowing a special action[8] to be brought in the Arizona supreme court for determination of the scope of the immunity statute.[9]

In *State v. Buchanan*[10] the supreme court followed the generally accepted prosecution-only approach and set aside Judge Buchanan's order. The court held that it was beyond the jurisdiction of the trial court to grant immunity to defense witnesses.[11] Finding the statute ambiguous in its failure to state on whose application or request immunity could be granted, the court reasoned that legislative intent, public policy, and case law supported its holding,[12] and that the limited grant of immunity posed no constitutional problems.[13]

The court may have qualified its limitation of immunity to prosecution witnesses in stating: "Absent a clear showing to the contrary, the

---

where a witness is asked to incriminate himself—in other words, to give testimony which may expose him to a criminal charge. But if the criminality has been taken away, the Amendment ceases to apply." *Accord*, 8 J. WIGMORE, *supra* note 1, § 2279, at 481.

4. *See* State v. Broady, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974).

5. No. A23780 (Super. Ct., Pima County, Ariz., Apr. 3, 1974).

6. The statute in effect in 1974 provided:

> If a witness in any judicial or grand jury proceeding claims the privilege against self-incrimination but is required by the court to give testimony or produce evidence, the witness shall not be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he testifies or produces evidence. The witness may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order.

Ch. 126, § 1, [1971] Ariz. Sess. Laws 355-56 (repealed 1975). This statute was repealed and replaced by ARIZ. REV. STAT. ANN. § 13-1804 (Supp. 1975-76), which specifically limits grants of immunity to situations where the prosecutor so requests. For the text of the revised statute, see note 15 *infra*.

7. State v. Sigman, No. A23780 (Super. Ct., Pima County, Ariz., Apr. 3, 1974).

8. The special action in Arizona is a uniform procedure for writs of certiorari, mandamus, and prohibition. ARIZ. R.P. SPECIAL ACTIONS.

9. State v. Buchanan, 110 Ariz. 285, 286, 518 P.2d 108, 109 (1974).

10. 110 Ariz. 285, 518 P.2d 108 (1974).

11. *Id.* at 289, 518 P.2d at 112.

12. *Id.* at 287-88, 518 P.2d at 110-11.

13. *Id.* at 289, 518 P.2d at 112.

statutory grant of immunity is limited to the state for the purposes of carrying out the legitimate demands of government."[14] This qualification lost its significance, however, when the Arizona legislature repealed the immunity statute interpreted by the *Buchanan* court and enacted a revised version in its place.[15] The new statute differs from its predecessor in its specific applicability to criminal proceedings and its prescription of the method by which the court may be requested to compel incriminating testimony under a grant of immunity. Under the express provisions of the new statute, immunity can be granted to a witness only upon request of the prosecution.[16]

The question of immunity involves three concepts with deep roots in American and English jurisprudence: the power of government to compel testimony,[17] the privilege against self-incrimination,[18] and the concept of immunity itself.[19] Immunity statutes enable the government

14. *Id.* In State v. Pettit, No. A27255 (Super. Ct., Pima County, Ariz., Mar. 25, 1975), the defense relied upon *Buchanan's* "clear showing" language when Pima County Superior Court Judge Lee Garrett granted immunity to a look-alike defense witness who testified that he was guilty of the charges against the defendant.

15. ARIZ. REV. STAT. ANN. § 13-1804 (Supp. 1975-76):

> In any criminal proceeding before a court or grand jury, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby and if the prosecuting attorney, in writing, requests the court to order that person to answer the question or produce the evidence, the court may so order and that person shall comply with the order. When the court denies such a request, the court shall state its reasons for denial in writing. After complying, such testimony or evidence, or any information directly or indirectly derived from such testimony or evidence, shall not be used against the person in any proceeding or prosecution for a crime or offense concerning which he gave answer or produced evidence under court order. However, he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. If a person refuses to testify after being granted immunity and after being ordered to testify as aforesaid, he may be adjudged in contempt and committed to the county jail. If the grand jury before which he was ordered to testify has been dissolved, he may then purge himself by testifying before the court.

16. *Id.*

17. *See* Kastigar v. United States, 406 U.S. 441, 443-44, (1972). *See generally* Comment, *Immunity from Prosecution: Transactional versus Testimonial or Use*, 17 S.D.L. Rev. 166 (1972); Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963). In 1562 the English government had the statutory power to compel testimony at trial, *see* Kastigar v. United States, *supra* at 443, and this power had become an established principle of the common law by 1742. *Id.; see* 8 J. WIGMORE, *supra* note 1, § 2192, at 70-72.

18. *See* Kastigar v. United States, 406 U.S. 441, 444-45 (1972); Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964). *See generally* Note, *Michigan v. Tucker: A Warning About Miranda*, 17 ARIZ. L. REV. 188 (1975). This privilege is guaranteed by the fifth amendment to the United States Constitution.

19. *See* Kastigar v. United States, 406 U.S. 441, 445 & n.13 (1972). *See also* Counselman v. Hitchcock, 142 U.S. 547 (1892); Note, *supra* note 17. The English Parliament first debated the question of granting immunity in 1742. *See generally* 12 COBBITT, THE PARLIAMENTARY HISTORY OF ENGLAND 625-733 (1812). Although immunity was rejected at that time, *id.*, immunity statutes have since become accepted tools of law enforcement and now are considered "part of the constitutional fabric" of American law. Ullman v. United States, 350 U.S. 422, 438 (1956). The first federal immunity statute was enacted in 1857, Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155-

to compel otherwise privileged testimony by granting the witness immunity from prosecution based on that testimony. Despite the widespread acceptance of the practice of imunizing witnesses, concern that full protection of the privilege against self-incrimination not be eroded has led the Supreme Court to define the extent of the immunity which must be granted in order to avoid violating the constitutional privilege.[20] Although it was originally held that transactional immunity must be granted, barring altogether prosecution of the witness for the offense to which his testimony related,[21] the Court later modified its position to require only use or derivative use immunity.[22] Under this more limited approach the witness may be prosecuted for the offense as to which he testified, but the testimony and evidence derived therefrom cannot be used against him in such prosecution.[23] The cases considered by the Supreme Court uniformly involved testimony by prosecution witnesses,[24] a pattern which helped to generate the general rule that only prosecution witnesses could be granted immunity.[25] The Court, however, has not explicitly considered the question of whether immunity for defense witnesses is permissible or, indeed, constitutionally mandated.

56, and immunity laws are now on the statute books of every state. *See* 8 J. WIGMORE, *supra* note 1, § 2281, at 495-507 & n.11.

20. *See, e.g.*, Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Counselman v. Hitchcock, 142 U.S. 547 (1892).

21. Counselman v. Hitchcock, 142 U.S. 547, 586 (1892). This assertion may have been only dictum, however. *See* Kastigar v. United States, 406 U.S. 441, 454-55 (1972).

22. Kastigar v. United States, 406 U.S. 441, 442 (1972). Although technically use immunity prohibits the use of the compelled testimony itself at a subsequent criminal proceeding against the witness and derivative use immunity prevents use of evidence derived from the compelled testimony, the term "use immunity" generally is used to include both "use" and "derivative use" immunity. As formulated by the Court in Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964), use immunity means that "a . . . witness may not be compelled to give testimony which may be incriminating . . . unless the compelled testimony and its fruits cannot be used in any manner . . . in connection with a criminal prosecution against him."

23. Kastigar v. United States, 406 U.S. 441, 453 (1972); *see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

24. The history of the United States Supreme Court's discussions addressing the issue of witness immunity have involved prosecution witnesses claiming either that compelled testimony, even with immunity, was unconstitutional per se, or that the scope of immunity granted was insufficient to ensure protection from future prosecutions. *See* Kastigar v. United States, 406 U.S. 441 (1972) (statutory grant of use and derivative use immunity is constitutionally valid); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (state grant of immunity also grants use and derivative use immunity from federal prosecution); Ullman v. United States, 350 U.S. 422 (1955) (grant of federal immunity also protects witness from state prosecution); Brown v. Walker, 161 U.S. 591 (1896) (witness testifying under compulsion of federal act is granted immunity from state as well as federal prosecution); Counselman v. Hitchcock, 142 U.S. 547 (1892) (Constitution requires transactional immunity). *See also* Note, *Kastigar v. United States: The Required Scope of Immunity*, 58 VA. L. REV. 1099 (1972).

25. First considered and used in situations where prosecution witnesses were granted immunity so that the prosecution could receive necessary testimony, immunity's restriction to prosecutorial use may have developed into a generally accepted practice by reason of its origins. At its inception, the public interest in effective law enforcement was given as the justification for immunization. *See* 8 J. WIGMORE, *supra* note 1, § 2282, at 519.

This casenote will examine a criminal defendant's sixth amendment right to compulsory process for obtaining witnesses in his favor, addressing the validity of an absolute rule against immunizing defense witnesses in light of that constitutional provision. Policy considerations which enter into formulation of an alternative rule will then be considered. Finally, two alternative procedures for providing defense witness immunity will be examined: the present Arizona statute which funnels such requests through the prosecutor, and a method allowing discretionary judicial grants of immunity.

The Right to Compulsory Process

The *Buchanan* court, after construing the Arizona immunity statute to apply only to prosecution witnesses,[26] held that neither the sixth nor 14th amendment[27] requires a reciprocal right to immunity for defense witnesses.[28] It has been forcefully suggested, however, that without the right to immunity for his witnesses, a defendant lacks "compulsory process for obtaining witnesses in his favor" as guaranteed by the sixth amendment.[29] This provision was included in the Bill of

26. The necessity for construction arose from the statute's ambiguity in failing to state on whose application or request the court had authority to grant immunity. The court examined the legislative history of the Senate bill from which the immunity statute was derived, concluding that it indicated an intent to aid only the prosecution. 110 Ariz. at 287, 518 P.2d at 110. In its interpretation the court rejected the reasoning of Smith v. Superior Court, 17 Ariz. App. 79, 495 P.2d 519 (1972), where the appeals court held that the legislature's revised wording of the immunity statute, deleting references to the prosecutor's active role in the immunization process, indicated that the legislature intended to extend the grant of immunity to defense witnesses. The *Buchanan* court's limited interpretation of the immunity statute also seems to have been founded to some extent on the possibility of collusion and contrivance between the witness and defendant. *But see* text accompanying notes 36-37 *infra*; discussion note 37 *infra*.

The Arizona legislature apparently agreed with the court's finding of ambiguity in the statute's failure to prescribe a method for authorizing the court to grant immunity. ARIZ. REV. STAT. ANN. § 13-1804 (Supp. 1975-76), enacted after the *Buchanan* decision, clarifies the ambiguity by providing that immunity may be granted only after a written request by the prosecuting attorney to compel assertedly privileged testimony. See text of statute note 15 *supra*.

27. Respondent Sigman argued that limiting availability of immunity to prosecution witnesses violated due process, relying on Wardius v. Oregon, 412 U.S. 470 (1973), where the Supreme Court held that due process forbids the enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants. 110 Ariz. at 289, 518 P.2d at 112. The *Buchanan* court rejected the reciprocity argument, stating that the fourteenth amendment does not provide defendants with the power to compel testimony over a claim of privilege, and that the limited grant of immunity is constitutional. *Id.* A similar approach was taken in Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), where the federal court of appeals rejected an argument that fifth amendment due process requires the extension of statutory immunity to defense witnesses. The *Earl* court reasoned that although a judicial procedure for granting such immunity might be meritorious, Congress had not established such a procedure, and, in the absence of legislation, the court lacked authority to establish a system for granting defense witness immunity. *Id.* at 534. See also discussion note 41 *infra*.

28. 110 Ariz. at 289, 518 P.2d at 112.

29. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 143, at 308 & n.20 (2d ed. E. Cleary 1972), *citing* State v. Shaw, 6 Ariz. App. 33, 429 P.2d 667 (1967) ("finding no error in the refusal of the prosecution to grant immunity to a defense witness. The record established, however, that the anticipated testimony would not have estab-

Rights[30] in order to ensure, by providing criminal defendants with the means of obtaining witnesses, that the defendant's own evidence, as well as the prosecution's, might be presented to the jury.[31] The scope of the defendant's right to compulsory process to obtain witnesses has thus been described as being commensurate with that possessed by the prosecution to establish his guilt.[32]

In *Washington v. Texas*[33] the United States Supreme Court held that a Texas statute prohibiting principals, accomplices, and accessories from testifying on behalf of one another, while permitting such persons to testify for the prosecution, violated the defendant's right to compulsory process.[34] Reversing defendant Washington's conviction, the Court reasoned that since an accomplice would be permitted to testify on behalf of the prosecution, the prohibition against his giving testimony for the defendant was arbitrarily imposed.[35] The Court also disapproved of the statute's presupposition that an accomplice testifying on behalf of a defendant would be likely to perjure himself.[36] Emphasizing that the sixth amendment was designed to make testimony of defense witnesses admissible in court, it held that a state could not enact statutes preventing witnesses from testifying "on the basis of a priori categories that presume them unworthy of belief."[37]

Derivable from *Washington* is the principle that denying a defendant, by broad statutory prohibition, the opportunity to receive exculpatory evidence from a witness whose testimony would be admissible if given on behalf of the prosecution is a denial of the defendant's constitutional

lished a defense."); Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953, 956 n.19 (1967).

30. In contrast to the government's power to compel testimony and grant immunity, see discussion notes 17, 19 *supra*, the defendant's right to present witnesses on his own behalf was late in blooming. At common law, the accused in treason and felony cases had no right to present any witnesses. 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1786-88 (1st ed. 1833).

31. The Supreme Court stated in Washington v. Texas, 388 U.S. 14, 20-21 (1967), that the right to compulsory process is "in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Despite this restriction on federal criminal procedure, and the interests in an adequate defense which it embodied, some states continued to enforce statutes prohibiting defendants and codefendants from testifying on their own behalf or on behalf of one another. *See id.*

32. *See In re* Dillon, 7 F. Cas. 710 (No. 3914) (N.D. Cal. 1854) (court rejected defendant's attempt to compel a foreign consul to produce privileged records, holding that the consul was beyond the reach of the court and could be compelled to testify by neither the prosecution nor the defense). *See* Kelly v. United States, 73 A.2d 232 (D.C. Mun. App. 1950), *rev'd on other grounds*, 194 F.2d 150 (D.C. Cir. 1952).

33. 388 U.S. 14 (1968). This case also held the compulsory process clause applicable to the states through the due process clause of the 14th amendment. *Id.* at 19.

34. *Id.* at 23.

35. *Id.*

36. *Id.*

37. *Id.* at 22. On this basis, the *Buchanan* court's implicit fear of collusion may be subject to challenge. See discussion note 26 *supra*. Insofar as the premise underlying the refusal to grant immunity presupposes collusion and defense witness perjury, such refusal would come within the scope of *Washington's* mandate.

right to compulsory process. The question in *Buchanan* could be framed similarly: is the defendant's right to compulsory process violated by denying defendant the opportunity to compel exculpatory evidence from a witness who claims the privilege against self-incrimination where testimony from such a witness could be compelled on behalf of the prosecution through a grant of immunity?[38] Arguably, principles on which the *Washington* decision was based indicate that indeed this practice is violative of the defendant's sixth amendment right.[39] The *Washington* Court defined the right to compulsory process as the right to present the defendant's version of the facts as well as the prosecution's.[40] As long as the state has exclusive benefit of immunity statutes, the defendant will be unable to present his version of the facts as thoroughly as the prosecution,[41] and his right to compulsory process will

38. While *Washington* outlawed statutory prohibitions against testimony by codefendants, a grant of immunity to a defense witness would require affirmative state action to compel the witness' testimony in the face of his claim of privilege. Thus, to grant immunity to defense witnesses on the basis of the *Washington* rationale would require an extension of *Washington*. It has been suggested, however, that the absolute prohibition-affirmative action distinction is not totally valid since the failure to act affirmatively may produce a result identical to an absolute prohibition. *See* Comment, *supra* note 29, at 958. Where, after weighing the interests of prosecution and defense, the facts reveal that the state may act without jeopardizing prosecution interests, the state's failure to do so results in an unnecessary restriction of the defendant's access to relevant information and, as such, is indistinguishable from an unjustifiable absolute prohibition which would completely bar defendant's access to the information. *See id.* at 958; *cf.* Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964) (suppression of evidence grounds for setting aside conviction even though prosecution did not actively or knowingly conceal exculpatory evidence).

39. The Supreme Court's note in *Washington*, that "[n]othing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination . . . ," 388 U.S. at 23 n.21, can be used to justify a refusal to extend the *Washington* principles to the question of defense witness immunity. An inference can be drawn from the footnote that the *Washington* rationale was meant to have no application to cases where the witness claimed the privilege against self-incrimination. *See generally* 8 J. WIGMORE, *supra* note 1, § 2191, at 69. Unlike *Washington*, where only the defendant's constitutional rights were threatened, *Buchanan* presented a situation where the defendant's sixth amendment interests and the witness' privilege against self-incrimination were both affected. A number of state and federal courts have relied on the *Washington* footnote in refusing to require the attendance of witnesses who indicated that they would claim the privilege and refuse to testify if called. *See, e.g.*, United States v. Beye, 445 F.2d 1037 (9th Cir. 1971); Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970); Myers v. Frye, 401 F.2d 18 (7th Cir. 1968); Holloway v. Wolff, 351 F. Supp. 1033 (D. Neb. 1972); State v. Ortiz, 24 Ariz. App. 192, 537 P.2d 29 (1975); Commonwealth v. Greene, 445 Pa. 228, 285 A.2d 865 (1971). The defendant did not seek to have the witness immunized in any of these cases, however; therefore, the issue of whether the *Washington* footnote prohibits compelling testimony if immunity is sought to protect the witness has not been considered.

Further, the Court has also stated: "the design of the constitutional privilege is . . . to protect [the witness] against being compelled to furnish evidence to convict him of a criminal charge." Brown v. Walker, 161 U.S. 591, 605-06 (1896). Therefore, the *Washington* footnote seems less compelling in the context of defense witness immunity, since the grant of immunity would remove the possibility of criminal sanctions from which the privilege protects the witness. *Cf.* Ullman v. United States, 350 U.S. 422, 430-31 (1955).

40. 388 U.S. at 19.

41. It has been suggested that if the government implements immunity in a particular case, while the mechanism remains unavailable to the accused, then the immunity statute as applied would deny the defendant due process. *See* Earl v. United States, 361

fail to accord him the equal footing at trial which was the intent of the constitutional privilege.

Policy Considerations Affecting Defense Witness Immunity

In relying on public policy as a justification for its absolute rule, the *Buchanan* court implies that any rule which would allow the immunization of defense witnesses would jeopardize law enforcement interests.[42] Though an unlimited rule in favor of immunizing defense witnesses would clearly thwart attempts to control criminal activity, the equally compelling public interest in a defendant's presentation of a complete version of the facts suggests that the stringent *Buchanan* rule does not entirely comport with public policy. Even if the *Buchanan* court was technically correct in its conclusion that the criminal defendant loses no right guaranteed by the sixth or 14th amendments when immunization of a defense witness is refused, the court's opinion expresses no basis for that conclusion apart from its assertion that the witness' claim of privilege overrides the defendant's request.[43] It does not address the problem of discrimination created by providing to the prosecution alone a means for overcoming such a claim of privilege. Nor does the court consider that the sixth amendment guarantees reflect public policies which might lead to a contrary conclusion. The public interest in a defendant's ability to present a complete defense militates against the inflexible rule enunciated in *Buchanan* and may warrant legislative reconsideration of the new immunity statute which, while improving on the *Buchanan* rule, fails adequately to protect all of the conflicting interests.

Public defender programs, judicial declarations concerning the right to appointed counsel,[44] and the constitutional violation which inheres in the prosecution's suppression of requested evidence favorable to an accused[45] evidence the broad legislative and judicial concern for the competent representation of a criminal defendant and the thorough

F.2d 531, 534 n.1 (D.C. Cir. 1966). For further discussion of the due process argument, see note 27 *supra*.

42. *See* 110 Ariz. at 289, 518 P.2d at 112.

43. *Id.*

44. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

45. *See* Brady v. Maryland, 373 U.S. 83 (1963). Under Arizona's recently revised immunity statute, which authorizes immunity only on written request from the prosecuting attorney, *Brady* arguably may be violated if the prosecutor always refuses to request immunization of defense witnesses. In cases where essential defense testimony could be made available only through a grant of immunity to a defense witness who would testify willingly if immunized, it is arguable that the prosecutor's refusal to implement the only machinery through which the testimony can be presented constitutes the suppression of material evidence favorable to an accused. This argument for immunization under *Brady* has been rejected, however, in a factual situation different from *Buchanan*, where the defendant and the witness whose immunization he sought had been jointly indicted. Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966).

presentation of his defense. The same considerations may require that a policy of immunization for defense witnesses be implemented, even at some detriment to the public interest in law enforcement. The concurrent public interest in protecting the witness from self-incrimination, however, complicates the present context and raises other policy considerations. A defendant may seek evidence from a witness whose complicity in crime is totally unsuspected, and who is therefore reluctant to testify even under a grant of immunity. Such a case would require greater protection for the witness than situations where the witness' criminal involvement is suspected or under investigation by the prosecution.[46] Care would have to be exercised in each case to fully protect the witness' privilege since, unlike government witness immunity, defense witness immunity may involve witness' admissions of facts not already known to the prosecution.

A final area of concern in determining the appropriate treatment of defense witness immunity involves the interest of the state in prosecuting those who have committed crimes.[47] The prosecutor, as the public official charged with carrying out this function, is in a position to weigh the state's interest in prosecuting the witness against its interest in using the witness' testimony to prosecute the present defendant. The question of defense witness immunity, on the other hand, is problematical because it either takes away from the prosecutor the ability to protect the state's prosecutorial interest in the witness, or requires the prosecutor to weigh against this prosecutorial interest the defendant's interest in securing the witness' testimony, an interest with which the prosecutor is not charged and to which he is acting as an adversary in the proceeding in question.[48] The practical problem therefore exists of placing the re-

46. It is possible that derivative use immunity can provide adequate protection for such a witness, as it prevents the use at a subsequent trial of any evidence to which the state was led by the immunized testimony. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79-80 (1964). Where the witness was not suspected of crime at the time of his testimony, the prosecutor at a subsequent trial of the witness could have a heavy burden to demonstrate that his evidence did not result from the protected testimony. *Id.* at 79 n.18.

47. This concern seems to have been the primary factor motivating the *Buchanan* court to deny defense witness immunity. The court stated:

> The compelling state interest in the effective enforcement of the criminal law is sufficient justification for the legislature to limit the grant of immunity to the State. . . . Immunity is an exercise of choice, i.e., to forego prosecution of one in order to carry out an important public interest in enforcement of the criminal law. It is a proper function reserved to government to carry out a vital public interest.

State v. Buchanan, 110 Ariz. 285, 289, 518 P.2d 108, 112 (1974). An issue overlooked by the *Buchanan* court, however, is that prosecutorial duties involve broader public interests than just the obtaining of convictions, and may dictate the granting of defense witness immunity where the interests of justice require. *See* State v. Broady, 41 Ohio App. 2d 17, 24, 321 N.E.2d 890, 896 (1974), to the effect that the prosecutor's "duty is to seek justice, not merely to convict."

48. *See generally* State v. Broady, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974). Despite the obvious problems in this approach, it seems to be the one adopted by the

sponsibility for this weighing process with an individual who can adequately protect the competing interests where the witness sought to be immunized will testify for the defendant.

The issue of immunization presents, therefore, a competition between the interests of defendant, witness, and state. Each of their interests may be termed "public" with equal propriety. Although the result most in accordance with the overall public interest seemingly could be best achieved by balancing all of their concerns, the *Buchanan* court established an absolute rule based primarily on the state's interest in effective law enforcement. An absolute rule favoring defense witness immunity would jeopardize the countervailing public interest in effective law enforcement, and possibly fail adequately to protect the witness' privilege against self-incrimination.

An Alternative Proposal

An absolute rule in favor of immunizing defense witnesses is thus as objectionable to the public interest in effective law enforcement as the *Buchanan* rule is offensive to the public's interest in a full and fair presentation of facts for the defense. A moderate approach has been adopted by the Arizona legislature in amending the immunity statute to require a request for compelled testimony to come from the prosecutor.[49] Although this procedure seems to allow for defense witness immunity, it would not appear to protect adequately the interests of the defense witness or the defendant. Informing the prosecutor of the reasons why testimony should be compelled could itself provide the prosecutor with substantial evidence about the witness' complicity, which the state would be free to use as the basis for an investigation or the bringing of charges should immunity not be granted. Even if immunity should be granted, the prosecutor may have acquired more information than is protected by the grant of immunity. Thus, leaving the request for immunization in the hands of the prosecutor might fail to protect the witness from criminal liability for which immunization is sought, and making the request of the prosecutor would itself be a form of self-incrimination. Nor can the prosecutor necessarily be relied upon to fully weigh in all cases the defendant's interest in the testimony. He is, after all, involved in an adversary proceeding against the defendant and is subject to many pressures which may dim his view of broader prosecutorial functions.[50]

Arizona legislature in amending the immunity statute to provide for immunity where requested by the prosecutor, but with no limitation to prosecution witnesses. ARIZ. REV. STAT. ANN. § 13-1804 (Supp. 1975-76). For text of statute, see note 15 *supra*. See also discussion in text accompanying notes 50-51 *infra*.

49. See text of statute note 15 *supra*.

50. *See* Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U.

A far better approach would be one which places decisionmaking regarding defense witness immunity with the trial judge, who, with knowledge of the facts and circumstances of the case, could most knowledgeably and impartially balance the interests of prosecution, defendant, and witness.[51] Operatively, such a procedure might be initiated by the defense attorney's contacting the trial judge, generally explaining the situation, the witness' attitude, and the expected testimony. Should the judge determine that immunity may be appropriate, he would order an in camera meeting with counsel for the witness and the defendant, at which the anticipated testimony and its implications of criminality could be more thoroughly reviewed. Following this meeting, the judge would meet with the prosecuting attorney to discover additional information about the crime in which the witness is involved, including whether the state is aware of the witness' complicity. Being apprised of all sides of the question and in view of the likely consequences of his choice, the judge would determine whether immunity was appropriate and, if so, the breadth of immunity which would best protect all competing interests. Before being called at trial, the witness would remain anonymous to all but the defense attorney and the judge.

In considering the propriety of granting immunity in a particular case, the court under this system would gather as much information as possible bearing on the tripartite interests involved and weigh all such information to reach its decision. Through the various devices and techniques outlined, the interests of defendant, prosecution, and society will receive maximum protection. The defendant can present a complete defense through crucial, immunized testimony. The state can retain control over prosecutorial machinery in a manner which will not jeopardize its law enforcement functions. The public will benefit because judicial immunization will allow all material evidence in a case to

---

CHI. L. REV. 112, 134-35 (1972); *cf.* Louisell, *Criminal Discovery: Dilemma Real or Apparent*, 49 CALIF. L. REV. 56 (1961); Editorial Note, *Discovery and Disclosure: Dual Aspects of the Prosecutor's Role in Criminal Procedure*, 34 GEO. WASH. L. REV. 92 (1965).

51. *See* Comment, *supra* note 29, at 960. The court may find in some cases that an unsuspected witness can be fully protected from self-incrimination only by a grant of transactional immunity. But see discussion note 46 *supra*. Although the present Arizona statute provides only for use immunity, ARIZ. REV. STAT. ANN. § 13-1804 (Supp. 1975-76), the Arizona supreme court, exercising its supervisory powers over lower state courts, may be able to authorize transactional immunity for defense witnesses through its supervisory and procedural rule-making powers over lower state courts. State v. Blazak, 105 Ariz. 216, 462 P.2d 84 (1968); Gillespie Land & Irrigation Co. v. Hamilton, 41 Ariz. 432, 18 P.2d 1111 (1933) (rules made by supreme court for superior courts have statutory force); State v. Meek, 8 Ariz. App. 261, 445 P.2d 463 (1968). *See generally* Comment, *supra* note 29, at 971-76.

Until legislative revision of the statute, a system for defense witness transactional immunization would have had statutory authority. *See* ARIZ. CONST. art. 6, § 5; ARIZ. REV. STAT. ANN. § 12-109 (1956).

be heard, while also ensuring that criminals are properly brought to justice.[52]

Conclusion

In *Buchanan*, the Arizona supreme court effectively prohibited the immunization of criminal defense witnesses. Although the public interest in effective law enforcement is served by this inflexible approach, the equally compelling public interest in a defendant's ability to present a complete defense is thereby thwarted. The revised Arizona immunity statute is somewhat more flexible than the *Buchanan* rule, but still fails adequately to protect all the competing interests. A rule leaving the defense witness immunity determination to the discretion of the lower courts would be more appropriate, allowing the facts and circumstances of each individual case to be weighed; the nature, effect, and materiality of the witness' testimony to be evaluated; and the competing interests of prosecution, defendant, and witness in effective law enforcement, presentation of facts, and protection from criminal sanction, respectively, to be balanced.

C. DOUBLE JEOPARDY, MULTIPLE PUNISHMENT, AND THE CRIMINALITY OF CRIME WHILE ON BAIL

Arizona double jeopardy and multiple punishment law has been entrenched in a state of confusion for the past two decades. During that time, several tests have been developed to determine when multiple punishment or double jeopardy concepts bar a conviction or subsequent trial. Unfortunately, these tests have proven to be contradictory, difficult to apply, and difficult to comprehend.[1] The resulting confusion in

52. Generally, a grant of immunity is properly a legislative or executive function, procedurally subject to statutory provisions. *See* 8 J. WIGMORE, *supra* note 1, § 2280b, at 485. A system whereby defense witness immunity is judicially granted could be established by statute, however, or possibly by judicial rulemaking. See discussion note 51 *supra*. Indeed, it has been stated that "[t]he right of immunity, where public interest demands disclosure of incriminating facts be compelled, need not depend necessarily on promises of the prosecution or upon statutory authority, but the grant of immunity may be implied from the circumstances and recognized by the court as an incident of compulsory disclosure of information that is self-incriminating." 4 JONES ON EVIDENCE § 22.7 at 26 (6th ed. S. Gard 1972), *citing* State v. Evans, 104 Ariz. 434, 454 P.2d 976 (1969).

1. State v. Tinghitella, 108 Ariz. 1, 3, 491 P.2d 834, 836 (1971), *noted in* "Multiple Punishment and Double Jeopardy," 14 ARIZ. L. REV. 409, 513 (1972).

this area of the law recently surfaced in *State v. Cassius*,[2] where first the Arizona court of appeals and then the Arizona supreme court faced the problem of construing section 13-1580 of the Arizona Revised Statutes,[3] a relatively new statute making it a crime to commit a felony while released on bail.

Cassius, while free on his own recognizance pending trial on a burglary charge, was apprehended for committing a second burglary. Although Cassius had committed only two burglaries, he was charged with three offenses—the two burglaries and the crime of committing a felony while on bail under section 13-1580. After the state dismissed the first burglary charge, the defendant was convicted of both the second burglary and the crime under section 13-1580. On appeal, although the Arizona court of appeals refused to examine Cassius' claim that these multiple convictions constituted double jeopardy,[4] the court did find that section 13-1580 was inconsistent with Arizona's multiple punishment statute.[5] Instead of invalidating section 13-1580, however, the court of appeals ruled that the legislature had intended a pro tanto repeal of the multiple punishment statute by the subsequent enactment of section 13-1580.[6] Nevertheless, the court went on to hold on its own motion that section 13-1580 violated the fourteenth amendment's equal protection clause and therefore was void.[7]

On review, the Arizona supreme court followed the court of appeals in recognizing section 13-1580 as an implicit exception to the multiple punishment statute.[8] Unlike the court of appeals, the supreme court next examined the double jeopardy issue and, applying a different test from that used for the statutory multiple punishment issue, found that the conviction under section 13-1580 did not violate double jeopardy.[9] Additionally, the supreme court rejected the court of appeals' equal protection analysis.[10]

---

2. 21 Ariz. App. 78, 515 P.2d 903 (1973), *vacated*, 110 Ariz. 485, 520 P.2d 1109 (1974), *petition for cert. dismissed*, 419 U.S. 1045 (1975).

3. A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on bail or his own recognizance and upon conviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance.

ARIZ. REV. STAT. ANN. § 13-1580 (Supp. Pamphlet 1973).

4. The lower court found that the claim had not been properly raised at trial. 21 Ariz. App. at 80, 515 P.2d at 905, *vacated*, 110 Ariz. 485, 520 P.2d 1109 (1974), *petition for cert. dismissed*, 419 U.S. 1045 (1975).

5. ARIZ. REV. STAT. ANN. § 13-1641 (1956).

6. 21 Ariz. App. at 82, 515 P.2d at 907.

7. *Id.*

8. 110 Ariz. at 487, 520 P.2d at 1111.

9. *Id.* at 486-87, 520 P.2d at 1110-11.

10. *Id.* at 488, 520 P.2d at 1112. A writ of certiorari was granted by the United

Cassius is the first Arizona case to differentiate between statutory multiple punishment under section 13-1641 of the Arizona Revised Statutes and double jeopardy. As such, *Cassius* provides a vehicle for analyzing the various tests that now should be used in multiple punishment and double jeopardy cases in Arizona. This casenote first will examine the provisions forming the basis for these two concepts and will explain the differences between them. Prior Arizona cases will be used to illustrate the confusion abounding in this area of the law. Using *Cassius* as a basis for comparison, it will be suggested that much of the confusion in this area can be traced to the erroneous application of a double jeopardy test in multiple punishment cases. Again looking to *Cassius*, the appropriate test to be used in resolving section 13-1641 and double jeopardy issues will be propounded, and a paradigm for deciding these complex cases will be presented.[11]

Multiple Punishment, Double Jeopardy, and Section 13-1641

At the convening of the First Continental Congress, New Hampshire was the only state having a double jeopardy provision in its constitution.[12] After debate, a double jeopardy clause was included in the fifth amendment to the United States Constitution.[13] Its direction that "[no person shall] be subject for the same offense to be twice put in jeopardy of life or limb,"[14] has long been considered to bar

States Supreme Court. Cassius v. Arizona, 419 U.S. 824 (1974). After full briefing and oral argument, however, the writ was cryptically dismissed as improvidently granted. *Id.* at 1045 (1975).

11. The equal protection issue will not be treated in this casenote. Although Cassius did not attack the constitutionality of section 13-1580 at trial, the Arizona court of appeals, fulfilling its obligation to search for fundamental error in criminal appeals, State v. Powell, 5 Ariz. App. 51, 423 P.2d 127 (1967), found section 13-1580 violative of equal protection since it infringes upon the constitutional right to bail by classifying and treating those released on bail or their own recognizance differently from those who remain in custody pending trial. 21 Ariz. App. at 84, 515 P.2d at 909, *vacated*, 110 Ariz. 485, 520 P.2d 1109 (1974), *petition for cert. dismissed*, 419 U.S. 1045 (1975).

In contrast, the Arizona supreme court, admitting that a constitutional right to bail existed, applied a rational basis test to legitimize reasonable limitations on that right. According to the court, requiring a defendant to abide by the law while on bail is not an unreasonable restriction, and such a constraint actually exists independently of section 13-1580. Expressly disagreeing with the court of appeals, the supreme court found section 13-1580 consistent with the equal protection clause. 110 Ariz. at 488, 520 P.2d at 1112.

12. United States v. Wilson, 420 U.S. 332, 339-42 (1975).

13. New York and Maryland, in ratifying the federal Constitution, recommended the inclusion of a double jeopardy clause in the early amendments. James Madison included such a clause in his proposed bill of rights presented in 1789 to the House of Representatives: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 ANNALS OF CONGRESS 434 (1789). Madison's version of the double jeopardy clause was passed by the House. The Senate, however, preferred more traditional language and redrafted the amendment in its present form. United States v. Wilson, 420 U.S. 332, 339-42 (1975).

14. U.S. CONST. amend. V. For a history of the double jeopardy concept, see M. FRIEDLAND, DOUBLE JEOPARDY 5-14 (1969), and J. SIGLER, DOUBLE JEOPARDY 1-37 (1969).

multiple prosecutions and multiple punishments for the same offense.[15] Federal courts have focused on the question of what are "same offenses" when faced with issues of constitutional double jeopardy.[16]

Although the fifth amendment protection against double jeopardy was not extended to the states until 1969,[17] Arizona has had double jeopardy protection since 1864 when the Howell Code was adopted.[18] This protective provision was placed in the constitution when Arizona became a state.[19] Like the federal clause, the Arizona constitutional provision has been applied by the courts with a focus on whether or not the defendant has been twice charged with the same offense.[20] Unlike the federal standard, however, it appears that the Arizona double jeopardy provision does not cover situations of multiple punishment.[21] In-

15. United States v. Wilson, 420 U.S. 332, 339-42 (1975) ("Although the form and breadth of the prohibition varied widely, the underlying premise was generally that a defendant should not be twice tried or punished for the same offense."); North Carolina v. Pearce, 395 U.S. 711, 717 (1969) ("[The double jeopardy clause] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense.").

16. *See* Gore v. United States, 357 U.S. 386, 390-91 (1958); Blockburger v. United States, 284 U.S. 299, 304 (1932).

17. The fifth amendment's double jeopardy clause was held applicable to the states through the 14th amendment in Benton v. Maryland, 395 U.S. 784 (1969).

18. Justice William T. Howell, one of the three original jurists on the Arizona territorial supreme court, wrote the territory's first code of laws—the Howell Code—enacted by the first Arizona territorial legislature in 1864. This stood as the law of the territory until statehood and heavily influenced the new state's early legislation. *See generally* Goff, *William T. Howell and the Howell Code of Arizona*, 11 AM. J. LEGAL HIST. 221 (1967). The applicable portion of the Code provided: "[n]o person shall be subject to a second prosecution for a public offence, for which he has once been prosecuted and duly convicted or acquitted." Howell [Ariz.] Code ch. 11, § 12 (1864).

19. "No person shall . . . be twice put in jeopardy for the same offense." ARIZ. CONST. art. 2, § 10. The protection is also statutory:

> When the defendant is convicted or acquitted, or has once been placed in jeopardy upon an indictment or information, the conviction, acquittal or jeopardy is a bar to another indictment or information for the offense charged in either, or for an attempt to commit the offense, or for any offense necessarily included therein, of which he might have been convicted under the indictment or information.

ARIZ. REV. STAT. ANN. § 13-145 (1956).

20. *See* State v. Harvey, 98 Ariz. 70, 402 P.2d 17 (1965); State v. Carpenter, 1 Ariz. App. 522, 405 P.2d 460 (1965). *In re* Williams, 85 Ariz. 109, 333 P.2d 280 (1958), was the first major case in which the state constitutional provision was applied.

21. This distinction is significant in that any double jeopardy protection afforded by the state above that afforded by the federal protection, *see* text & notes 7-20 *supra*, is available only in regards to multiple prosecution, not punishment. This is due to the fact that Arizona has a statute which governs multiple punishment. *See* text & note 22 *infra*. As a result, the Arizona courts have tended to look to the statute rather than the constitutional provision when multiple punishment issues have arisen. *See, e.g.*, State v. Benge, 110 Ariz. 473, 520 P.2d 843 (1974); State v. Moore, 110 Ariz. 404, 519 P.2d 1145 (1974); State v. Scarborough, 110 Ariz. 1, 514 P.2d 997 (1973); State v. Clayton, 109 Ariz. 587, 514 P.2d 720 (1973); State v. Westbrook, 79 Ariz. 116, 285 P.2d 161 (1955); Murphy v. State, 50 Ariz. 481, 73 P.2d 110 (1937); State v. Swafford, 21 Ariz. App. 474, 520 P.2d 1151 (1974). *See generally* "Multiple Punishment and Double Jeopardy," *supra* note 1. The distinction is significant because the application of state double jeopardy in *Cassius* appears to give more protection to the defendant than that afforded by federal double jeopardy. See text & notes 60-64 *infra*. Any additional degree of protection under the state constitution, however, may be available only where multiple prosecution is involved.

stead, multiple punishment protection in Arizona seems to be strictly statutory, arising solely from section 13-1641 of the Arizona Revised Statutes, which provides:

> An act or omission which is made punishable in different ways by different sections of the law may be punished under either, but in no event under more than one. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.[22]

An initial comparison of section 13-1641 with the double jeopardy provisions reveals an apparent distinction between the two concepts. While section 13-1641 is expressly directed toward multiple punishment or prosecution for the same act, double jeopardy precludes multiple prosecution and, at least under the federal Constitution, multiple punishment for the same offense. If the same act of the defendant is used to establish several offenses under different sections of the law, section 13-1641, read literally, permits prosecution and punishment for only one such offense. A "same act" test would therefore seem appropriate in resolving questions of multiple prosecution or punishment under section 13-1641, with examination focusing on the particular acts of the defendant.

Double jeopardy, on the other hand, concerns the notion of same offense. Although it must be determined preliminarily that only a single act of the defendant is at issue,[23] the thrust of double jeopardy analysis should be a "same offense" test. Essential to the inquiry of whether the offenses are the same for double jeopardy purposes is a comparison of the composite elements of the offenses.[24] Depending on the degree of element commonality between the offenses, double jeopardy may or may not be violated.[25] Thus, a double jeopardy challenge seemingly should activate an offense test, with primary focus on the elements of the various offenses, while section 13-1641 should precipi-

22. ARIZ. REV. STAT. ANN. § 13-1641 (1956). Arizona has had a multiple punishment provision nearly identical to section 13-1641 since 1887. Ariz. Rev. Stat. ¶ 1032 (1887).

23. A defendant must always be charged twice for the same act before a double jeopardy issue arises. That is, double jeopardy, like section 13-1641, does not protect a defendant from being charged twice when the offenses arise out of two or more separate and distinct acts. Morgan v. Devine, 237 U.S. 632 (1915); Gavieres v. United States, 220 U.S. 338 (1911); Moeller v. United States, 378 F.2d 14 (5th Cir. 1967); United States v. Noble, 155 F.2d 315 (3d Cir. 1946). For example, a defendant who burglarizes a gas station on two consecutive nights may be charged and convicted for both burglaries even though the offenses are identical. The fact that each offense arose out of a different act bars the defendant from raising either a double jeopardy or section 13-1641 claim.

24. *See, e.g.*, Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299 (1932); *In re* Williams, 85 Ariz. 109, 114, 333 P.2d 280, 285 (1958); State v. Carpenter, 1 Ariz. App. 522, 526-27, 405 P.2d 460, 464-65 (1965).

25. *See* cases cited note 24 *supra*.

tate an act test focusing on the defendant's actual physical acts rather than the elements of the offenses arising therefrom.

The act test for section 13-1641 and the offense test for double jeopardy should operate together to provide defendants protection against multiple punishment and prosecutions. Double jeopardy will protect a defendant from being twice charged for the same offense arising out of the same section of the law if the offenses are based on the same act, whereas section 13-1641 will not.[26] For example, under section 13-1641 alone, it would be theoretically permissible to charge and convict a defendant twice for the single act of murdering another because each murder charge would be based upon the same section of the law. In such a case the defendant must seek the double jeopardy protection which prohibits multiple prosecutions for the same offense regardless of whether or not the offenses are based upon the same section of the law.

In contrast, section 13-1641 could be violated when double jeopardy is not—if the offenses are not the same, are based upon different sections of the law, and arise from a single act, section 13-1641 prohibits prosecution for more than one of the offenses, while double jeopardy apparently does not. Thus, section 13-1641 would cover the unusual case in which one act gives rise to two separate and distinct offenses. For example, if a defendant sells a machine gun to a juvenile delinquent, he has committed the offenses of selling an illegal firearm and of contributing to the delinquency of a minor. Since these offenses are completely distinct, double jeopardy is not applicable. However, since they are based upon different sections of the law and arise from the same act, section 13-1641 is applicable.

Despite these apparent differences and the distinction between the proper analyses which seemingly should be made under section 13-1641 and the double jeopardy provisions, past Arizona cases have reflected a confusion prevalent in this area of the law. This confusion has resulted largely from improper and inconsistent intermingling of the same act and same offense tests by the Arizona courts in their analyses of section 13-1641 claims. For example, in *State v. Westbrook*[27] the Arizona supreme court, ignoring whether in fact there was only one act, merely compared the elements of the offenses of conspiracy to commit burglary

26. This distinction would disappear if Arizona were to adopt the approach taken in California, since that state's multiple punishment statute, CAL. PENAL CODE § 654 (West 1970), which is nearly identical to Arizona's, has been extended to preclude double punishment in situations where one act gives rise to more than one violation of the same section of the law. *See* Neal v. State, 55 Cal. 2d 11, 15 n.1, 357 P.2d 839, 843 n.1, 9 Cal. Rptr. 607, 611 n.1 (1960), *citing* People v. Brown, 49 Cal. 2d 577, 320 P.2d 5 (1958).

27. 79 Ariz. 116, 285 P.2d 161 (1954).

and attempted burglary in the abstract and held that since the acts supporting each offense could be different, a prosecution for both conspiracy and attempt could never violate section 13-1641.[28] In another case, the supreme court, again using an offense analysis, upheld convictions for burglary and grand theft even though both offenses clearly arose from the same act.[29] Similarly, the supreme court has used an offense examination in finding no section 13-1641 violation when a defendant is charged with burglary and rape where the burglary is committed incident to the rape.[30]

On the other hand, the Arizona courts on occasion have appropriately used an act analysis in determining whether section 13-1641 has been violated. For example, the Arizona supreme court has held that assault with a deadly weapon and attempted kidnapping cannot both be charged when they arise from the same act.[31] Conversely, the court has held that a defendant can be charged with both resisting arrest and assault with intent to commit murder if the crimes arise out of different acts.[32]

The Cassius Analysis

In *Cassius* the Arizona court of appeals, acknowledging the prior inconsistent applications of the same offense and same act concepts,[33] recognized the true purpose of section 13-1641—"to protect an offender against double punishment for a *single act* which violates more than one statute."[34] The court then noted that Cassius' "only *act* was the burglary . . . committed while he was released on his own recognizance on a separate felony charge."[35] Asserting that for a "*single act*, he has been convicted and sentenced for two felony offenses," the court found "no support for a charge under [section] 13-1580,"[36] proscribing the commission of a felony while released on bail. The court of appeals presumed, however, that the state legislature was aware of section 13-1641 when it subsequently enacted section 13-1580. Since the court refused to impute a futile act to the legislature, section 13-1580 was deemed to have carved an exception into section 13-1641.[37]

28. *See id.*
29. State v. Hutton, 87 Ariz. 176, 177-78, 349 P.2d 187, 188-89 (1960).
30. State v. Green, 98 Ariz. 254, 257, 403 P.2d 809, 811 (1965), *noted in* 7 ARIZ. L. REV. 322 (1966).
31. State v. Mitchell, 106 Ariz. 492, 494-96, 478 P.2d 517, 519-21 (1970); *see* State v. Mays, 108 Ariz. 172, 494 P.2d 368 (1972).
32. State v. Tinghitella, 108 Ariz. 1, 4, 491 P.2d 834, 837 (1971).
33. 21 Ariz. App. at 81, 515 P.2d at 906.
34. *Id.*
35. *Id.* at 82, 515 P.2d at 907.
36. *Id.*
37. *Id.; see* Campbell v. Superior Court, 105 Ariz. 252, 462 P.2d 801 (1969); State

The Arizona supreme court aligned with the court of appeals in its reconciliation of section 13-1580 with section 13-1641.[38] The supreme court noted that since a person who commits a felony while free on his own recognizance would be guilty of two felonies for one act, section 13-1580 and section 13-1641 were contradictory.[39] Like the court of appeals, however, the supreme court found in the state legislature's subsequent enactment of section 13-1580 an implicit intent to amend section 13-1641 to that extent, thereby allowing prosecution under section 13-1580 despite the facially contradictory mandate of section 13-1641.[40]

Both the Arizona court of appeals and the supreme court basically applied an act test in analyzing defendant's challenge under section 13-1641. Since the same act—the burglary—was used to support two offenses under different sections of the law, section 13-1641 on its face would have permitted prosecution or punishment for only one such offense. The courts' finding of pro tanto repeal by the legislature, however, avoided this outcome. This possibility of implicit legislative amendment dilutes the protection afforded by section 13-1641 and consequently increases the importance of the double jeopardy defense.[41]

Although the Arizona court of appeals in *Cassius* did not reach the double jeopardy issue, the Arizona supreme court found it to be reviewable. In rejecting Cassius' double jeopardy claim, the supreme court stated:

> The fallacy of defendant's argument on the issue of double jeopardy is that we are not, in the instant case, dealing with *the same offense.* The first count charged him with burglary. The second count charged him with being convicted of a felony while free on his own recognizance. These offenses are entirely different.[42]

Thus, the supreme court's double jeopardy examination consisted essentially of an offense test. Rather than analyzing the physical acts of the defendant, the court compared the offenses arising from his act and, finding them not the same, discerned no double jeopardy problem.

Despite the ultimate results reached by the Arizona courts, *Cassius* recognized a viable distinction between section 13-1641 and double

v. Edwards, 103 Ariz. 487, 446 P.2d 1 (1968); Arizona State Bd. of Directors v. Phoenix Union High School Dist., 102 Ariz. 69, 424 P.2d 819 (1967); City of Mesa v. Killingsworth, 96 Ariz. 290, 394 P.2d 410 (1964).

38. 110 Ariz. at 487, 520 P.2d at 1111.

39. *Id.*

40. *Id.*

41. Unlike section 13-1641, Arizona's constitutional double jeopardy provision may not be repealed pro tanto by the state legislature. ARIZ. CONST. art. 21.

42. 110 Ariz. at 486-87, 520 P.2d at 1110-11.

jeopardy tests. While the former should consider only the defendant's acts,[43] the latter should in addition consider the elements of the offenses charged.[44] To require the offenses to be "the same" under section 13-1641 would be to require too much.

Considering the importance of determining what are same acts for section 13-1641 and double jeopardy purposes, and what are same offenses for double jeopardy purposes, the next step must be an examination of the tests used to define these act and offense concepts.

Same Act and Same Offense Tests

The Arizona courts, for purposes of section 13-1641 and implicitly for double jeopardy, have developed two types of act tests for determining whether there is one act or a multiplicity of acts in any given case.[45] In some cases, primarily concerning drug violations, the courts have used what is termed the "same transaction" test.[46] Usually referred to as the California rule, this test states that a series of physical acts are the same for multiple punishment or double jeopardy purposes if they are committed incident to the same objective.[47] Although this test may be useful in cases involving multiple transactions, it is too lenient in some instances. For example, burglary and rape may become one act under a same transaction anaylsis when committed in the same time sequence incident to the one objective of rape.

This leniency and a resultant confusion from inconsistent cases in both California and Arizona[48] led the Arizona supreme court to enunci-

43. The elements of the offenses are used only to compare the defendant's acts with each offense charged to see if there are enough distinct acts to support both offenses. *See* text & notes 65-67 *infra.*

44. In finding that Cassius had been twice charged for the same act under section 13-1641, the Arizona supreme court implicitly found the same act for double jeopardy purposes as well, thus satisfying the first prong of the double jeopardy test. 110 Ariz. at 487, 520 P.2d at 1111. See discussion note 23 *supra.*

45. "Multiple Punishment and Double Jeopardy," *supra* note 1, at 514-15.

46. *See, e.g.*, State v. Price, 106 Ariz. 433, 477 P.2d 523 (1970); State v. Duplain, 102 Ariz. 100, 425 P.2d 570 (1967); State v. Vallejos, 89 Ariz. 76, 358 P.2d 178 (1960); *cf.* Ashe v. Swenson, 397 U.S. 436, 453-56 (1970) (Brennan, J., concurring).

47. Neal v. State, 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960) (interpreting a multiple punishment statute almost identical to section 13-1641). *See also* 7 ARIZ. L. REV. 322 (1966). The Arizona supreme court first adopted this approach in State v. Vallejos, 89 Ariz. 76, 358 P.2d 178 (1960). Although it was later rejected in State v. Green, 98 Ariz. 254, 403 P.2d 809 (1965), *noted in* 7 ARIZ. L. REV. 322 (1966), the same-transaction test nevertheless has been applied in subsequent cases. *See, e.g.*, State v. Arce, 107 Ariz. 156, 483 P.2d 1395 (1971); State v. Price, 106 Ariz. 433, 477 P.2d 523 (1970); State v. Duplain, 102 Ariz. 100, 425 P.2d 570 (1967); *cf.* State v. Counterman, 8 Ariz. App. 526, 448 P.2d 96 (1968). *Contra*, State v. Boag, 104 Ariz. 362, 453 P.2d 508 (1969); State v. Phillips, 102 Ariz. 377, 430 P.2d 139 (1967).

48. *Compare* State v. Arce, 107 Ariz. 156, 483 P.2d 1395 (1971); State v. Price, 106 Ariz. 433, 477 P.2d 523 (1970); *and* State v. Vallejos, 89 Ariz. 76, 358 P.2d 178 (1960), *with* State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1960), *and* State v. Westbrook, 79 Ariz. 116, 285 P.2d 161 (1954). *See also* State v. Mendoza, 107 Ariz. 51, 481 P.2d 844 (1971); State v. Mays, 105 Ariz. 47, 459 P.2d 307 (1969); State v. Hill,

ate a "practical test" in an attempt to clarify interpretation of section 13-1641.[49] The test, as stated in *State v. Tinghitella*,[50] is to "eliminate the elements in one charge and determine whether the facts left would support the other charge."[51] Although the language of the test mentions elements, the proper focus is primarily on the defendant's acts. Under this standard, robbery and murder may both be charged even if they occur within the same basic transactional sequence, since if the facts supporting the elements of robbery are eliminated, there still remains the fact evidencing commission of murder—the defendant's having killed the victim.[52] In contrast, if a defendant's act of instilling fear in a victim is used to establish that element of robbery, it may not also be used to establish that same element for an assault charge.[53] To convey its meaning more clearly, the practical test probably should read: "eliminate the *facts supporting* one charge and determine whether the facts left would support the other charge." If there are enough separate actions by the defendant to support all of the elements of both charges, the practical test is met. This practical test was expressly applied by the court of appeals in *Cassius*,[54] and the supreme court at least suggested that this was the appropriate standard under section 13-1641.[55]

As noted, if the legality of multiple punishment or prosecution under section 13-1641 is in issue, only an act test need be used.[56] In determining the number of acts involved, the practical test announced in *Tinghitella* should be applied uniformly to all cases.[57] This same determination must also be made when a double jeopardy claim is raised;[58] however, unlike challenges under section 13-1641, this does

11 Ariz. App. 230, 463 P.2d 125 (1969). With regard to California, *compare* People v. McFarland, 58 Cal. 2d 748, 376 P.2d 449, 26 Cal. Rptr. 473 (1962), *and* Neal v. State, 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960), *with In re* Chapman, 43 Cal. 2d 385, 273 P.2d 817 (1954), *and* People v. Knowles, 35 Cal. 2d 175, 217 P.2d 1, *cert. denied*, 340 U.S. 879 (1950).

49. State v. Tinghitella, 108 Ariz. 1, 3, 491 P.2d 834, 836 (1971); State v. Mitchell, 106 Ariz. 492, 495, 478 P.2d 517, 520 (1970).

50. 108 Ariz. 1, 491 P.2d 834 (1971).

51. *Id.* at 3, 491 P.2d at 836.

52. State v. Howes, 109 Ariz. 255, 508 P.2d 331 (1973).

53. State v. George, 108 Ariz. 5, 491 P.2d 838 (1971).

54. 21 Ariz. App. at 81-82, 515 P.2d at 906-07. The court of appeals found only one act under section 13-1641, since removal of all the facts establishing the elements of the burglary left none of defendant's acts to establish the elements of section 13-1580. That is, for purposes of the "practical test" under section 13-1641, the court of appeals in effect defined "facts supporting the charge" as defendant's acts only. As a result, the court rejected the state's contention that the judicial act of conviction would suffice to establish the section 13-1580 element.

55. 110 Ariz. at 487, 520 P.2d at 1111. The consequence of application of the practical test, however, was avoided by the *Cassius* court's reliance on the theory of legislative pro tanto repeal. *See* text accompanying notes 36-40 *supra*.

56. *See* text pp. 761-62, *supra*.

57. Uniform application of the practical test would render the transaction analysis obsolete. *See* text & notes 46-47 *supra*.

58. *See* discussion note 23 *supra*. The Arizona courts have never expressly adopted any particular act test for double jeopardy analysis; the fact that only one act is involved

not end the double jeopardy inquiry. After determining that only one act is involved, it must also be determined whether there is one offense.[59]

The first offense test used by the Arizona courts, termed an "identical elements" test, found no double jeopardy violation if each offense were capable of commission without necessarily committing the other offense.[60] The federal courts use a similar test.[61] Under the federal formulation there is no double jeopardy violation if each offense contains at least one element not included in the other offenses.[62] For example, under this standard, if a defendant is charged with two offenses, one containing elements A and B and the other containing elements A and C, he can be tried for both without violating double jeopardy.

The Arizona supreme court in *Cassius* applied the federal test, but only peripherally to a distinct state test, which it defined as follows:

> The question of whether two offenses are the same, and the criteria for resolving that question, are set out in State v. Tinghitella . . . . There, we held that in order to constitute different offenses, no element of either offense may be an element of the other; *i.e.*, the two offenses must not contain a common element.[63]

Two features of this statement are troubling. First, *Tinghitella* was strictly a multiple punishment case under section 13-1641, and therefore was not proper authority for what the double jeopardy test should be.

---

is assumed or, as is usually the case, the double jeopardy question is decided in conjunction with a section 13-1641 question, and the section 13-1641 determination is determinative for the double jeopardy analysis. *See, e.g.*, State v. Harvey, 98 Ariz. 70, 402 P.2d 17 (1965); State v. Carpenter, 1 Ariz. App. 522, 405 P.2d 460 (1965). In several federal cases a same transaction test has been used in the act analysis of federal double jeopardy claims. *See* Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J., concurring); Moeller v. United States, 378 F.2d 14 (5th Cir. 1967); United States v. Noble, 155 F.2d 315 (3rd Cir. 1946).

59. *See* text pp. 761-62 *supra*.

60. The identical elements test was first used in State v. Westbrook, 79 Ariz. 116, 285 P.2d 161 (1954), where conspiracy to commit burglary and attempt to commit burglary were found not to contain identical elements. The test was used to interpret section 13-1641. As the test is an offense test and not an act test, its use in applying section 13-1641 was inappropriate. However, it is not surprising that it was so used in light of the prevalent confusion between the same act and same offense concepts. See text & notes 28-33 *supra*. In State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1960), the court applied the same test in determining whether burglary and grand theft charges for the wrongful entry of a building and the wrongful taking of a saddle violated section 13-1641. *Hutton* represented a move by the Arizona court toward interpreting section 13-1641 much the same way the California courts had interpreted their multiple punishment statute. CAL. PENAL CODE § 654 (West 1970) (nearly identical to section 13-1641). The California courts had used a type of identical elements test, looking to see if one offense could be committed without committing the other. *See, e.g.*, People v. Brown, 49 Cal. 2d 577, 320 P.2d 5 (1958); People v. Goodman, 159 Cal. App. 2d 54, 323 P.2d 536 (1958); People v. Guarino, 132 Cal. App. 2d 554, 282 P.2d 538 (1955).

61. *See* Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299 (1932); Gavieres v. United States, 220 U.S. 338 (1911); M. FRIEDLAND, *supra* note 14, at 109; Note, *Double Jeopardy—Defining the Same Offense*, 32 LA. L. REV. 87, 88 (1971).

62. *See* cases & authorities cited note 61 *supra*; 110 Ariz. at 487, 520 P.2d at 1111.

63. 110 Ariz. at 487, 520 P.2d at 1111.

Second, even in that different context, nowhere did the *Tinghitella* court say that the two offenses must not contain a common element. Indeed, nowhere in any prior Arizona case has the supreme court made such an assertion. Although the source of this standard is unclear, *Cassius* seemingly has set forth a new offense test for Arizona whereby any element of commonality between two offenses renders them "same offenses" for double jeopardy purposes.[64]

This new double jeopardy test presumably offers greater protection to a defendant than the old Arizona rule or the current federal test. As applied in *Cassius*, the comparison of the elements is made in the abstract from the statutory description of the offenses. Thus, in the example given above, double jeopardy would be present since the two offenses contain a common element—A. The federal test, however, would not find a single offense because each charge also contains elements in addition to A.

Unfortunately, Cassius did not benefit from the expanded protection of the new Arizona offense test. Purportedly using the new test, the supreme court was faced with the question of whether the offense under section 13-1580 had an element in common with its underlying felony. Without elaboration, the supreme court stated, "It is quite obvious that the two offenses with which defendant was charged have no common element."[65] The court therefore found no double jeopardy violation. If the court had properly applied its newly announced test, it arguably should have found that prosecution for both the section 13-1580 offense and the burglary charge did violate the double jeopardy provision, since section 13-1580 must subsume the elements of any underlying felony. Absent the elements of the underlying felony there would be nothing on which to base the section 13-1580 charge. Moreover, although the new double jeopardy test requires only one common element, section 13-1580 seemingly encompasses not only one but all the elements of the underlying felony, and thus prosecution for both offenses would be barred by the traditional double jeopardy offense test.[66] The supreme court's reluctance to delve into the substance of the elements and its reliance upon the mere form of the statutes suggests that henceforth the legislature will be able, through meticulous drafting, to have a single act violate innumerable statutes without violating either double jeopardy or section 13-1641 multiple punishment.

64. *Id.* The court's announcement of this novel double jeopardy test seemingly resulted in part from its misreading of "Multiple Punishment and Double Jeopardy," *supra* note 1, at 516, which the court cited in its opinion. 110 Ariz. at 487, 520 P.2d at 1111.

65. 110 Ariz. at 487, 520 P.2d at 1111.

66. *See* text accompanying notes 60-62 *supra*.

The implications of the decision in *Cassius* are twofold. When faced with a section 13-1641 issue, a court should apply only the practical test to determine whether the same act is involved. When deciding a double jeopardy issue, a court should first use the practical test to determine whether there is more than one act.[67] If there is only one act by the defendant within the meaning of the practical test, a court should then inquire whether there is one offense using the common element test of *Cassius*. This test should be applied on a pro forma basis without regard to the facts in *Cassius*.[68]

Conclusion

Cassius was the first Arizona case to draw a workable distinction between multiple punishment and state and federal double jeopardy. Despite the ultimate results reached by the *Cassius* court, important guidelines for application of these different concepts were implicitly suggested. The court's analyses therefore may be instructive for future cases.

Section 13-1641 and the Arizona double jeopardy clause together offer protection for defendants against multiple punishment, multiple charges, and multiple trials for the same offense as well as the same act. The one-prong same act test under section 13-1641 on its face offers a more liberal defense than the two-prong double jeopardy standard. Since a court may imply a repeal of section 13-1641 when a subsequently enacted statute conflicts with it, however, double jeopardy serves an important function as the more durable shield.

67. Alternatively, a same transaction test may be the appropriate standard for determining whether the same act is involved for double jeopardy purposes. *See* discussion note 58 *supra*.

68. Despite this framework for analysis implicitly suggested by *Cassius*, the Arizona court seemingly has chosen to perpetuate the state of confusion which traditionally has characterized this area of the law. In the post-*Cassius* case of State v. Miniefield, 110 Ariz. 599, 522 P.2d 25 (1974), the Arizona supreme court resorted to an offense test in determining that section 13-1641 had not been violated. This approach was facially inconsistent with that suggested in *Cassius*. For discussion of the *Miniefield* decision, see "Felony-Murder and Merger in Arizona," 17 ARIZ. L. REV. 639, 791 (1976). *See also* Arizona v. Helmick, 112 Ariz. 166, 540 P.2d 638 (1975).

D. INVITED ERROR AND PROSECUTORIAL COMMENT ON A DEFENDANT'S FAILURE TO TESTIFY

The invited error doctrine is one of several devices used by courts to justify alleged errors occurring at trial.[1] Its traditional application involves a rather cursory comparison of statements made by opposing counsel at trial to determine whether an otherwise objectionable statement by one counsel may be upheld as a proper, "invited" response to a prior statement by the opposing counsel. Various tests have been devised by courts to determine the propriety of trial court rulings on objections made to allegedly invited statements and the applicability of the invited error doctrine to support admission of such statements.[2] In *State v. Arredondo*[3] the Arizona supreme court propounded its test in applying the invited error doctrine to cure a prosecutorial trial error normally requiring reversal on appeal.

In *Arredondo* defendant was accused of murdering another man while alone with him in the desert. He pleaded self-defense, but during the trial never took the stand to testify as to the circumstances. He was brought before the jury by his counsel on one occasion for the purpose of comparing relative sizes of the defendant and the victim; however, he said nothing at that time. Despite the lack of testimony by the defendant giving his own version of the shooting, defense counsel attacked in closing argument the State's detailing of the events on the basis that no one had witnessed the alleged murder.[4] During the trial defense counsel made two minor references to his client's failure to take the stand, once in informing the court that his client would not testify,[5] and again in closing argument, when he stated to the jury that they

1. Other devices include estoppel, *see* Larabee Flour Mills v. West Plains Comm'n Co., 216 Mo. App. 257, 264, 262 S.W. 389, 391 (1924), waiver, *see* State v. Mercer, 13 Ariz. App. 1, 3, 473 P.2d 803, 805 (1970), and harmless error. *See* State v. Carpenter, 215 Kan. 573, 576, 527 P.2d 1333, 1336 (1974).

2. *See, e.g.*, State v. Gortarez, 98 Ariz. 160, 168, 402 P.2d 992, 997-98 (1965); People v. Carruthers, 18 Ill. App. 3d 255, 266-67, 309 N.E.2d 659, 667-68 (1974); Combs v. State, 75 Ind. 215, 221 (1881); Daniels v. Dillinger, 445 S.W.2d 410, 414-19 (Mo. Ct. App. 1969); State v. Harper, 128 N.J. Super. 270, 277-79, 319 A.2d 771, 774-75 (App. Div. 1974); State v. Parks, 25 N.M. 395, 403, 183 P. 433, 435 (1919); Radney v. State, 36 Okla. Crim. 240, —, 253 P. 913, 917 (1927).

3. 111 Ariz. 141, 526 P.2d 163 (1974).

4. Defense counsel argued to the jury: "[T]here were no eyewitnesses to the shooting." *Id.* at 144, 526 P.2d at 166.

5. Defense counsel stated: "Your Honor, at this time I advise the Court that I advised my client not to take the stand and that at this time we would rest." *Id.*

would be instructed not to consider that fact in their deliberations.[6] In rebuttal to defense counsel's closing argument, the prosecuting attorney stated that there was indeed an eyewitness to the murder—the defendant himself. He added, in emphasis of the defendant's silence, that the best the defendant could do was to stand in front of the jury and stare at the ground.[7] Defendant was convicted of second-degree murder and sentenced to a 10 to 30-year prison term.[8]

On appeal the Arizona supreme court found that the prosecutor's argument constituted comment on the defendant's failure to take the stand and therefore violated his right to remain silent, guaranteed by both the federal[9] and state[10] constitutions.[11] Nevertheless, the court adopted the state's contention that the prosecutor's remark, if viewed as error, was invited and harmless, and thus the prosecutor's comment did not constitute reversible error.[12] According to the court, the prosecutor's comment was invited since it was made in response to specific references by defense counsel to the fact that the defendant failed to take the stand.[13] The court reiterated this finding in more general terms by declaring that the prosecutor's remarks concerning the eyewitness to the shooting were in response to defense counsel's "statements".[14] Unfortunately, the court did not expressly articulate to which "statements" of defense counsel it was referring, and consequently the basis for the holding was obscured somewhat. Concluding that the prosecutor's

---

6. "With regard to the privilege against self-incrimination, Mr. Arredondo did not get on the stand and you will be instructed by His Honor at the close of the case that you cannot take that into consideration against him in your jury deliberations." *Id.*

7. In rebuttal, the prosecuting attorney argued:

> Defense counsel said there was no eyewitnesses [*sic*] to the shooting. That is not true. There was one witness, right there (indicating). And you know what, the best he could do—Mr. Cronin called him up here, had him stand in front of you, and you know something? That man didn't even have the guts to look you people square in the eye. He looked down the whole time and kept his eyes down. Isn't that right?

Id. at 143, 526 P.2d at 165.

8. *Id.* at 142, 526 P.2d at 164.

9. U.S. CONST. amend. V provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." In Griffin v. California, 380 U.S. 609 (1965), the Supreme Court held that this provision prohibits comment by the prosecution on a defendant's failure to testify at trial. *See generally* Noonan, *Inferences from the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311 (1955); Ratner, *Consequences of Exercising the Privilege Against Self-incrimination*, 24 U. CHI. L. REV. 472 (1957); Reeder, *Comment Upon Failure of Accused to Testify*, 31 MICH. L. REV. 40 (1932).

10. ARIZ. CONST. art. 2, § 10 provides in part that "[n]o person shall be compelled in any criminal case to give evidence against himself . . . ." Arizona statutes contain a similar self-incrimination clause, ARIZ. REV. STAT. ANN. § 13-163(A) (1956), as well as expressly prohibiting any type of use against a defendant of his refusal to testify at trial. *Id.* § 13-163(B).

11. 111 Ariz. at 142, 526 P.2d at 164.

12. *Id.* at 144, 526 P.2d at 166.

13. For the text of defense counsel's statements to which the *Arrendondo* court referred, see notes 5-6 *supra*.

14. 111 Ariz. at 144, 526 P.2d at 166.

remarks were not prejudicial since they were reasonable and pertinent to the issues raised by defense counsel, the *Arredondo* court sanctioned their use under the invited error doctrine despite concededly viewing them as comment on defendant's failure to take the stand.[15]

This casenote will analyze the *Arredondo* court's use of the invited error doctrine to legitimize prosecutorial comment on a defendant's failure to testify. Traditional invited error concepts will first be examined, with particular reference to Arizona's approach. Next, the application of a pure invited error standard to cure the particular error involved in *Arredondo* will be scrutinized. Finally, alternative theories more compatible with constitutional precepts than the invited error doctrine will be suggested as means of justifying seemingly fundamental errors at trial.

Traditional Invited Error Doctrine

The need for immediate, nonreflective rulings by trial courts on objections to allegedly invited statements, and the inherent subjectivity of such rulings, has resulted in confusion and inconsistency.[16] This confusion is illustrated to some extent by the various titles which have been attached to the invited error doctrine, such as "curative admissibility,"[17] "fighting fire with fire,"[18] and "opening the door".[19] Whatever the title, the doctrine in the criminal context generally takes the form outlined by the Arizona supreme court in the following conceptualization: "The doctrine provides that where remarks of the prosecuting attorney, even though improper, are invited or occasioned by accused's counsel, or are in reply to or in retaliation for his acts or statements they are generally not grounds for reversal."[20]

Initial resolution of invited error issues by trial courts necessarily must be based on an abstract recollection of the prior statements made by objecting counsel. Once an objection is made, or in some cases where the error is so grave that objection need not be made, the trial judge must rely solely upon his memory of what was said to make his on-the-spot ruling. Appellate courts, not plagued by trial courts' need to make contemporaneous rulings on objections to allegedly invited statements, can review retrospectively the entirety of the proceedings to

15. In dissent, Justice Cameron noted the constitutional gravity of the error involved and the impropriety of the prosecutor's response to the alleged invitation. *Id.* at 145-46, 526 P.2d at 167-68 (dissenting opinion).

16. *See* Daniels v. Dillenger, 445 S.W.2d 410, 415 (Mo. Ct. App. 1969) (frankly admitting that the Missouri courts have yet to clarify the problem).

17. *See* Rogers v. Toro Mfg. Co., 522 S.W.2d 632, 637 (Mo. Ct. App. 1975).

18. *See* State v. Woodward, 21 Ariz. App. 133, 134, 516 P.2d 589, 590 (1973).

19. *See* Kurtz v. People, 177 Colo. 306, 322, 494 P.2d 97, 106 (1972).

20. State v. Smith, 101 Ariz. 407, 409, 420 P.2d 278, 280 (1966).

determine whether the allegedly invited comments are semantically or logically related to the invitation. This process generally entails a phrase-by-phrase comparison of allegedly invited responses with their invitations.[21] Many courts have described their inquiries in more general terms, stating that if the subject matter of the reply was the same as or similar to the subject raised by defense counsel during trial, the reply was invited or provoked,[22] and therefore admissible for rebuttal purposes. Nevertheless, if an arguably relevant, invited reply is deemed unreasonably inflammatory or prejudicial, it may yet constitute grounds for reversal.[23]

The theoretical basis of the invited error doctrine is not clear. Most courts have treated invited error as a subcategory of harmless error, predicating the determination of harmfulness on whether the error is deemed inflammatory[24] or prejudicial.[25] The Court of Appeals for the Fifth Circuit recently suggested another and more restrictive rationale, treating the invitation to error as a waiver of rights.[26] Although prior Arizona case law in this area reflects the elements traditionally associated with invited error, a theoretical basis for the doctrine has never been clearly articulated.

The first Arizona criminal case utilizing the invited error doctrine was one in which no trial record was preserved.[27] The Arizona supreme court, simply inferring that the prosecutor's comment on defendant's failure to testify was invited and therefore not reversible error, failed to delineate any useful test for determining invited error.[28] Such

21. *See, e.g.*, State v. Neil, 102 Ariz. 299, 428 P.2d 676 (1967); State v. Pierson, 102 Ariz. 90, 425 P.2d 115 (1967); State v. Gortarez, 98 Ariz. 160, 402 P.2d 992 (1965).

22. People v. Weisberg, 396 Ill. 412, 71 N.E.2d 671 (1947); Broussard v. State, 505 S.W.2d 282 (Tex. Crim. App. 1974). Some courts have classified a permissible reply as being retaliatory, *see, e.g.*, People v. Elliston, 181 Colo. 118, 125-26, 508 P.2d 379, 382 (1973); Garrett v. State, — Ind. App. —, —, 300 N.E.2d 696, 702 (1973); State v. Camlen, 515 S.W.2d 574, 576 (Mo. 1974), or within the limits of fair reply or rejoinder. *See, e.g.*, United States v. Milne, 498 F.2d 329, 330 (5th Cir. 1974); United States v. Lipton, 467 F.2d 1161, 1168-69 (2d Cir. 1972); State v. Mathis, 278 So. 2d 280, 281 (Fla. 1973).

23. *See, e.g.*, United States v. Braver, 482 F.2d 117 (2d Cir. 1973); People v. McCartney, 46 Mich. App. 691, 208 N.W.2d 547 (1973); State v. La Porte, 58 Wash. 2d 816, 365 P.2d 24 (1961).

24. *See, e.g.*, Johnson v. United States, 484 F.2d 309 (8th Cir. 1973); Pitts v. State, 307 So. 2d 473 (Fla. Ct. App. 1975); People v. McCartney, 46 Mich. App. 691, 208 N.W.2d 547 (1973).

25. *See, e.g.*, United States v. Greenbank, 491 F.2d 184 (9th Cir. 1974); People v. Stock, 56 Ill. 2d 461, 309 N.E.2d 19 (1974); State v. La Porte, 58 Wash. 2d 816, 365 P.2d 24 (1961).

26. United States v. Taylor, 508 F.2d 761, 764 (5th Cir. 1975). *See also* State v. Smith, 101 Ariz. 407, 409, 420 P.2d 278, 280 (1966) (stating that the notions of waiver and invited error are closely akin). See text accompanying note 56 *infra*. This rationale leaves far less discretion in the trial judge, since waivers at the trial level must be explicit. It would be possible to base the doctrine also on concepts of estoppel, precluding the defendant from inducing error and then reaping its profits through unjust advantage if the prosecutor does not rely, or a reversal if he does.

27. Post v. State, 41 Ariz. 23, 15 P.2d 246 (1932).

28. *Id.* at 28, 15 P.2d at 248. It should be noted, however, that comment on

a test was finally adopted in *State v. Gortarez*,[29] where the court held that the prosecutor's comments are "not grounds for reversal, unless they go beyond a pertinent reply or are necessarily prejudicial."[30] Thus, *Gortarez* propounded a two-part inquiry, resting a determination of invited error on findings of pertinence and nonprejudice.

Certain limits to this two-prong test were recognized by the Arizona supreme court the following year in *State v. Smith*.[31] In that case defense counsel had tried to explain reasons other than guilt why a defendant may choose not to take the stand. The prosecuting attorney responded in closing argument by noting that the defendant, had he taken the stand, could have been cross-examined and forced to reveal prior offenses. The court held that such remarks went beyond the comments of defense counsel and were sufficiently prejudicial to warrant reversal.[32] In so holding, the court stressed the importance of the constitutional prohibition against prosecutorial comment on a defendant's failure to take the stand, announced by the United States Supreme Court in *Griffin v. California*.[33] The *Smith* court refused to limit *Griffin's* scope through expansion of the invited error doctrine and declared that extreme caution should be exercised in considering any circumvention of such a fundamental constitutional right.[34] Additionally, the *Smith* court suggested that when a prosecutor's remarks jeopardize a specific constitutional guaranty such as that enunciated in *Griffin*, prejudicial effect will be presumed and need not be shown in order to establish reversible error.[35]

In the period following *State v. Smith* the Arizona court's reliance on the invited error doctrine declined. This probably can be attributed in part to the United States Supreme Court's decision in *Chapman v. California*,[36] where it was held that *Griffin*-violative comment could be harmless, nonreversible error if found "harmless beyond a reasonable

defendant's failure to testify was not held unconstitutional until Griffin v. California, 380 U.S. 609 (1965), long after the *Post* decision.

29. 98 Ariz. 160, 402 P.2d 992 (1965).

30. *Id.* at 168, 402 P.2d at 997-98, *quoting* 23A C.J.S. *Criminal Law* § 1108, at 210 (1961). In *Gortarez*, the defense counsel repeatedly questioned the character of the state's witnesses. The county attorney responded to these attacks by pointing out that while the character of the state's witnesses was exposed, he was precluded from revealing defendant's true character because "the law don't [*sic*] let us prove it." The court, looking to the record as a whole, found the remark to have been "provoked" by defense counsel. This case, of course, did not involve comment on the defendant's constitutionally protected right to remain silent. See text & notes 33-35 *infra*.

31. 101 Ariz. 407, 420 P.2d 278 (1966).

32. *Id.* at 409, 420 P.2d at 280.

33. 380 U.S. 609 (1965). See discussion note 9 *supra*.

34. 101 Ariz. at 409-10, 420 P.2d at 280-81.

35. *Id.* Although *Smith* definitely appeared to qualify the *Gortarez* test in the *Griffin* context, the *Arredondo* court seemed to bypass *Smith* and revert to a *Gortarez* type approach.

36. 386 U.S. 18 (1967).

doubt."[37] Although nothing in *Chapman* precluded states from imposing, as a matter of state law, a higher "reversible per se" standard for prosecutorial comment on a defendant's failure to testify,[38] the *Chapman* test was established to serve as a constitutional minimum for sustaining a conviction over objection to such comment. After *Chapman*, the Arizona supreme court frequently relied on the harmless error doctrine to sustain convictions in the face of possible fifth amendment violations,[39] thus making resort to invited error concepts unnecessary. The doctrine has been invoked, however, only where evidence of guilt is overwhelming and the prosecutor's comment did not contribute to the verdict.[40]

The harmless error standard on its face differs from the two-prong test established in *Gortarez* for invited error.[41] Unless the second prong of the *Gortarez* test requiring lack of prejudice can at least be equated with the "harmless beyond a reasonable doubt" standard of *Chapman*, application of invited error principles to *Griffin* violations seemingly would create the irreconcilable constitutional conflict feared by the *Smith* court.[42] This potential conflict is exemplified by *State v. Arredondo*, where the Arizona supreme court apparently utilized pure invited error standards in evaluating the permissibility of conceded prosecutorial comment on defendant's failure to testify.

In *Arredondo*, the prosecutor's replies were correctly deemed "pertinent" to defense counsel's prior statements,[43] in accordance with the first prong of the *Gortarez* standard. With regard to the second prong of the test, the court seemingly deviated from the *Gortarez* formulation

37. *Id.* at 24.

38. *See* State v. Cryer, 262 La. 575, 592-93, 263 So. 2d 895, 901 (1972).

39. *See* State v. Pierson, 102 Ariz. 90, 425 P.2d 115 (1967); *cf.* State v. Anderson, 110 Ariz. 238, 517 P.2d 508 (1973); State v. Scarborough, 110 Ariz. 1, 514 P.2d 997 (1973); State v. Shing, 109 Ariz. 361, 509 P.2d 698 (1973); State v. Burrell, 102 Ariz. 136, 426 P.2d 633 (1967).

40. State v. Rhodes, 110 Ariz. 237, 238, 517 P.2d 507, 508 (1973); State v. Scarborough, 110 Ariz. 1, 5, 514 P.2d 997, 1001 (1973).

41. See text accompanying notes 29-30 *supra.*

42. See text accompanying notes 33-35 *supra.*

43. Pertinent, in this context, is not well defined. In practice, it is no more than a subjective determination by the appellate court, based on its reading of the record, that the response is within the general subject area of the invitation. The prosecutor's reply was correctly considered pertinent to defense counsel's invitation since the former's statement that defendant was an eyewitness clearly was related to the latter's prior statement that there were no eyewitnesses to the crime. The crux of the issue, however, was not this surface pertinence of one statement to the other, but rather the dangerous inference that could have been drawn by the jury. That is, the jury could have construed the prosecutor's remarks, despite their pertinence, as comment on defendant's failure to take the stand, and then equated that failure with an inability to substantiate his self-defense claim, thus leading to a conclusion of guilt. The second prong of the *Gortarez* test theoretically addresses this potential danger by focusing on prejudice.

Apparently, only three Arizona invited error cases have been reversed for lack of pertinence. *See* State v. Neil, 102 Ariz. 299, 428 P.2d 676 (1967); State v. Smith, 101 Ariz. 407, 420 P.2d 278 (1966); State v. Cortez, 101 Ariz. 214, 418 P.2d 370 (1966).

by stating that "[the prosecutor's remarks] are not prejudicial if they are reasonable and pertinent to the issues raised by the defense in argument."[44] Read literally, this language injected a new element of reasonableness into the invited error inquiry, and apparently divested the second prong of the *Gortarez* test of any independent significance by assuming nonprejudice if the prosecutor's statements were found both reasonable and pertinent. Since the court devotes little discussion to the determination of nonprejudice,[45] it is impossible to discern the analytical process by which this conclusion was reached.[46] The court's language, however, indicates an absence of the type of scrutiny which would seem to be mandated by *Griffin* and *Chapman*, as well as *Gortarez*.

Arredondo and Standards for Curing Constitutional Error

Even were *Arredondo* supportable under the invited error doctrine enunciated in *Gortarez*, it would not necessarily comport with current constitutional principles. The *Arredondo* court's use of the traditional invited error test to cure prosecutorial comment normally deemed constitutionally impermissible seemingly was inconsistent with higher standards by which constitutional errors usually are measured.[47] Two possible standards which might have better served to protect the defendant's fifth amendment rights from unwarranted prosecutorial comment are those of waiver and harmless error.

The harmless error doctrine enunciated in *Chapman*[48] would have been a more appropriate standard by which to judge the legitimacy of the prosecutor's comments in *Arredondo*. In the context of clear constitutional infractions such as *Griffin*-violative comment, invited error may be viewed as a subcategory of harmless error, thereby invoking the somewhat stricter standards of the latter doctrine.[49] Although the harmless error doctrine may apply to negate the appropriateness of

44. 111 Ariz. at 144, 526 P.2d at 166.
45. *Id.*
46. Viewed on its face, the prosecutor's comment may not seem unduly prejudicial; there was little doubt that defendant was indeed an eyewitness, for his admissions to that effect were in the record and he asserted self-defense, not alibi, in defense. A more dangerous inference, however, could have been drawn from the prosecutor's comment regarding defendant's lack of response when standing before the jury, *see* discussion note 43 *supra*, and the *Griffin* rule was meant to combat that very possibility.
47. As the Supreme Court indicated in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), in cases where "the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right," a strict standard of review applies for evaluating the legitimacy of the prosecutor's comments. *Id.* at 643, *citing* Griffin v. California, 380 U.S. 609 (1965).
48. 386 U.S. 18, 24 (1967). The doctrine of harmless error permits courts to affirm a conviction or decision even in the face of an error normally requiring reversal if that court feels the defendant's right to a fair trial has not been jeopardized by the error, nor would the verdict have been different but for the error. *See generally* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 183, at 429 (2d ed. E. Cleary 1972).
49. *See* United States v. Taylor, 508 F.2d 761, 765 (5th Cir. 1975).

reversal in fifth amendment cases where evidence of guilt is overwhelming and the prosecutor's comment clearly did not contribute to the verdict,[50] the comment must be found "harmless beyond a reasonable doubt."[51] The *Arredondo* court alluded to the state's contention that the alleged error was "harmless,"[52] but the court did not expressly apply the *Chapman* test in determining that the prosecutor's comment was permissible. Moreover, although no prejudice purportedly was found in *Arredondo*, the court appeared to have merely drawn such an inference from its finding of reasonableness and pertinence.[53]

Application of the harmless error standard might have altered the outcome in *Arredondo*. The prosecutor's comment may have given rise to an inference in the minds of the jury that if defendant in fact had a valid defense, he would have taken the stand to make that assertion. Since the defendant was convicted because the jury apparently did not accept his claim of self-defense, it would have been difficult for the *Arredondo* court to hold the prosecution's error "harmless beyond a reasonable doubt."

Another standard which might have been more appropriate than the invited error test in *Arredondo* is the doctrine of waiver. It is now well established that "an intentional relinquishment or abandonment of a known right or privilege" is necessary for a valid waiver of a constitutional right guaranteeing a fair trial.[54] The Supreme Court in *Griffin* expressly held that a criminal defendant has a constitutional right not to have prosecutorial comment directed at his refusal to take the stand.[55] Therefore, for the invited error doctrine to legitimately justify such comment, the standards under that doctrine arguably should not fall below those for waiver of a fundamental constitutional right. This view has been adopted by the Court of Appeals for the Fifth Circuit,[56] and the Arizona supreme court in *Smith*[57] indicated that it regarded notions of waiver and invited error as closely akin.[58] Since application of the invited error doctrine in *Arredondo* essentially amounted to a relin-

50. State v. Rhodes, 110 Ariz. 237, 238, 517 P.2d 507, 508 (1973).
51. *See, e.g.*, Frankoviglia v. Camp, 394 F. Supp. 1293 (E.D. Mo. 1975); State v. Rhodes, 110 Ariz. 237, 517 P.2d 507 (1973); People v. Devaney, 33 Cal. App. 3d 630, 109 Cal. Rptr. 276 (Dist. Ct. App. 1973); Bernard v. State, 538 P.2d 1109 (Okla. Crim. App. 1975); text accompanying notes 36-40 *supra*.
52. 111 Ariz. at 143, 526 P.2d at 165.
53. *See* text accompanying notes 44-46 *supra*.
54. Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969); Miranda v. Arizona, 384 U.S. 436, 475 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *cf.* Henry v. Mississippi, 379 U.S. 443, 450-51 (1965).
55. Griffin v. California, 380 U.S. 609, 612-15 (1965). This right is an extension of the privilege against self-incrimination contained in the fifth amendment.
56. United States v. Taylor, 508 F.2d 761 (5th Cir. 1975).
57. State v. Smith, 101 Ariz. 407, 420 P.2d 278 (1966).
58. *Id.* at 409, 420 P.2d at 280.

quishment of defendant's constitutional rights under *Griffin*, the court should not have disregarded the strictures of the waiver doctrine.

Had *Arrendondo* been analyzed within the framework of established waiver theory, a different result might have obtained. Defense counsel's statements about defendant's intention not to testify and the legal effect thereof hardly established the traditional elements necessary for valid waiver of a constitutional right.[59] Defense counsel in *Arredondo* clearly could not have foreseen that the possible effect of his seemingly innocuous statements would be to open the door to otherwise illegal prosecutorial comment on defendant's failure to take the stand. Had he been aware of this potentiality, he presumably would not have jeopardized the rights of his client in this manner. Additionally, a finding of waiver in this situation results in the defendant's being deprived of a valuable right solely on the basis of his attorney's negligence. Although a client is nearly always bound by the actions of his attorney, a court may refuse to recognize a waiver based on actions of counsel where such actions are not calculated trial strategy, accomplished with knowledge of the consequences.[60] This principle strengthens the argument that *Arredondo* defense counsel's allegedly inviting statements did not amount to a knowing, intelligent waiver of defendant's constitutional rights under *Griffin*.

The Arizona supreme court, however, declined to adopt either the harmless error or waiver standard, utilizing instead the less protective traditional test for invited error. Since the court expressly found the prosecutor's comments ostensibly violative of *Griffin*, the standards used for determining their legitimacy should have reflected constitutional principles.[61] By failing to incorporate such principles in its invited error analysis, the *Arredondo* court seemingly weakened the barrier constructed by *Griffin*.

Conclusion

Arredondo may represent a dilution of the invited error test devised by the Arizona supreme court in *Gortarez*. Moreover, its application in

59. See text accompanying note 54 *supra*.

60. *See* Henry v. Mississippi, 379 U.S. 443 (1965); Fay v. Noia, 372 U.S. 391 (1963); Whitus v. Balkom, 333 F.2d 496 (5th Cir. 1964); Henderson v. State, 94 Fla. 318, 113 So. 689 (1927).

61. As the Supreme Court stated in Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974): "When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." The Court mentioned the privilege against compulsory self-incrimination as an example of such "specific guarantees" and cited *Griffin* for authority. The "special care" referred to by the Court seemingly would require standards at least as high as either the harmless error or waiver doctrines for determining the permissibility of *Griffin*-violative comment.

the context of *Griffin*-violative comments on a defendant's failure to take the stand marks a retreat from prior federal and state court decisions which voiced concern for utmost protection of the privilege against compulsory self-incrimination.

The future impact of *Arredondo* is debatable. If the decision is viewed as formulating a general revision of the invited error doctrine, there can be scarcely a case where the defendant does not invite comment in one manner or another, if only by noting that he has a right to remain silent or that few witnesses supported the state's version of the case. Of particular concern is the court's indifference to the seriousness of the constitutional prohibition against prosecutorial comment on defendant's failure to testify. Under the *Arredondo* court's expanded approach to invited error, such constitutional rights traditionally accorded defendants at trial may be in jeopardy.

E. Indigency in the Arizona Criminal Process: The Effect of Outside Aid for an Indigent Represented by the Public Defender

The sixth amendment to the United States Constitution guarantees indigents the right to court appointed counsel when charged with criminal offenses[1] carrying the possibility of imprisonment.[2] In carrying out

1. Gideon v. Wainwright, 372 U.S. 335 (1963). Powell v. Alabama, 287 U.S. 45 (1932), was the first case to articulate the obligation of a state to supply counsel to an indigent. The United States Supreme Court held:

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.

Id. at 71.

Whether counsel had to be appointed in all criminal prosecutions was first answered in Betts v. Brady, 316 U.S. 455 (1942), where the Court held that determinations should be made on a case-by-case basis under a totality of the circumstances analysis. *Id.* at 462. The totality of facts test proved to be inadequate, however, in that many cases wherein a trial judge had found the facts not to warrant appointment of counsel were overturned by the Supreme Court on appeal. Chewning v. Cunningham, 368 U.S. 443 (1961); Hudson v. North Carolina, 363 U.S. 697 (1959); Williams v. Kaiser, 323 U.S. 471 (1943). Accordingly, the Court held that the sixth amendment right to counsel was obligatory upon the states and entitled an indigent defendant to appointed counsel, at least in felony cases, both at trial, Gideon v. Wainwright, *supra*, and on the first appeal of right. Douglas v. California, 372 U.S. 353 (1963).

In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court made clear that the right to counsel extended to indigents charged with any criminal offenses carrying the possibility of imprisonment, not just felonies. In its latest pronouncement on this area,

this constitutional mandate, it has been necessary for the states to establish the factors that properly should bear on a determination of indigency. Additionally, the permissibility of an indigent defendant's receiving assistance of private counsel or other aid provided by friends or relatives, in addition to public appointed counsel, may come into question.

In *Knapp v. Hardy*,[3] a case of first impression in Arizona and possibly in the United States, the Arizona supreme court addressed these issues. Knapp was arrested and charged with the arson-murder of his two daughters who died when their house was destroyed by fire.[4] At his arraignment, he was declared indigent and the public defender's office was appointed to represent him. Knapp's mother later retained a private attorney to assist the public defender. The county attorney thereafter moved for a determination of counsel, arguing that Knapp was not entitled to representation by both the public defender and the private attorney. The private attorney, however, testified in a hearing on the motion that his retainer would cover only assisting the public defender, not his taking the whole case.[5] The trial court ruled that Knapp was still an indigent, but that should the private attorney become counsel of record, representation by the public defender would cease.[6]

After granting a petition for special action, the Arizona supreme court held that the county attorney could move for a reconsideration of Knapp's indigency status,[7] that the trial court had not abused its discretion in finding Knapp still indigent,[8] but that it had erred in denying the right of the privately retained counsel to associate with the public defender.[9] In making these findings, the court emphasized that the determination of indigency must be based on the defendant's financial condition and not that of relatives or friends.[10]

---

however, the Supreme Court refused to extend the right to counsel beyond the first appeal of right, for example to discretionary appeals or to petitions for review by the United States Supreme Court. Ross v. Moffitt, 417 U.S. 600 (1974).

2. Argersinger v. Hamlin, 407 U.S. 25 (1972).

3. 111 Ariz. 107, 523 P.2d 1308 (1974).

4. Knapp's first trial ended with a hung jury. His second trial resulted in a conviction and a death sentence.

5. 111 Ariz. at 109, 523 P.2d at 1310.

6. *Id.*

7. *Id.* at 110, 523 P.2d at 1311. The court based this part of its holding on ARIZ. R. CRIM. P. 6.4(c), which reads:

> If a determination of indigency or non-indigency has been made by a person other than a Superior Court judge, in a case triable in Superior Court, or, if such determination was made by a Superior Court judge, but there has been a material change in circumstances, either the person requesting appointment of counsel, the attorney appointed, or the prosecutor may move for reconsideration of the determination by the Superior Court.

8. 111 Ariz. at 110, 523 P.2d at 1311.

9. *Id.* at 111, 523 P.2d at 1312.

10. The court also held that the State was not obligated to underwrite the expenses of an expert witness for the defense. *Id.* at 113, 523 P.2d at 1314.

This casenote will analyze two issues raised by *Knapp*. The first is whether the availability of outside aid should ever affect a determination of indigency. The "friends or relatives" test will first be discussed briefly, and possible constitutional bases for its repudiation in Arizona will be explored. The second issue involves the association with the public defender of a private attorney funded from sources other than the defendant. The existence of a constitutional mandate that such association be allowed will be examined, focusing on the right to most effective assistance of counsel.

Determination of Indigency: The Friends and Relatives Test

Although an indigent's right to court appointed counsel at trial[11] and a free trial transcript for appeal[12] are now well established, the question of who qualifies as an indigent is not as clear. The definition of indigency has been vague and there are few appellate court decisions or state statutes outlining the factors to be considered.[13] Complicating the problem is the fact that indigency is generally determined at the local level for purposes of both appointing counsel[14] and granting a free trial transcript.[15] As a result, practices for determining indigency can vary widely. Some of the factors commonly considered include real and personal property owned by the accused, employment, pensions, social security and unemployment compensation, number of dependents, outstanding debts, seriousness of the charge, ability to make bail, and the financial resources of relatives.[16]

The propriety of the latter factor, the friends or relatives test, was at issue in *Knapp*. Basically this test requires that a defendant claiming indigency[17] conclusively show he has no friends or relatives who can

11. Gideon v. Wainwright, 372 U.S. 335 (1963).
12. Griffin v. Illinois, 351 U.S. 12 (1956).
13. *See generally* Stifler, *Determining the Financial Status of an Accused*, 54 ILL. B.J. 868 (1966).
14. ARIZ. R. CRIM. P. 6.2 reads: "The presiding judge of each county shall establish a procedure for appointment of counsel by the Superior Court, or by the non-record courts, for each indigent person entitled thereto."
15. ARIZ. R. CRIM. P. 26.11 reads:

> After pronouncing judgment and sentence, the court shall:
>
> . . . .
>
> b. If he is entitled thereto, advise the defendant that:
>
> . . . .
>
> (2) If he is unable to pay for a certified copy of the record on appeal and the reporter's transcript, they will be provided by the county.

Rule 6.4(a) merely defines an indigent as "a person who is not financially able to employ counsel." The comment to this rule lists factors which should be considered in determining indigency, but does not purport to set statewide standards. See text of comment, note 33 *infra*.
16. Stifler, *supra* note 13, at 871. The financial resources of relatives are usually considered when the indigency of a minor is at issue, because such persons, for example parents or guardians, are legally responsible for him. *Id.* at 875.
17. The reported cases discussing the friends or relatives test generally have resulted

help pay the partial[18] or complete[19] cost of, for example, a trial transcript. If the defendant fails to make such a showing, the trial court can properly refuse to grant a transcript.[20]

While it appears that only two states continue to recognize the friends or relatives test at the appellate level,[21] inquiries about the resources of friends and relatives apparently are made at the lower levels of the criminal justice system.[22] The purpose of such inquiries is to put pressure on the defendant claiming indigency to get money from others to finance his defense rather than having the state pay for it.[23] In

---

from a trial court's refusal to grant a free appeal transcript after an indigent defendant has been convicted. Riley v. State, 49 Ariz. 123, 65 P.2d 32 (1937), *overruled in part*, State v. Vallejos, 87 Ariz. 119, 123, 348 P.2d 554, 557 (1960); Braden v. Commonwealth, 277 S.W.2d 7 (Ky. Ct. App. 1955); Brogden v. State, 38 Okla. Crim. 269, 260 P. 784 (1927); State v. Jefferies, 9 Okla. Crim. 573, 132 P. 823 (1913).

18. State v. Vallejos, 87 Ariz. 119, 348 P.2d 554 (1960) (trial judge offered to have county pay $200 of the transcript cost if the defendant would shoulder the rest).

19. Riley v. State, 49 Ariz. 123, 65 P.2d 32 (1937), *overruled in part*, State v. Vallejos, 87 Ariz. 119, 123, 348 P.2d 554, 557 (1960).

20. Brogden v. State, 38 Okla. Crim. 269, 260 P. 784 (1927). One possible rationale for attributing others' resources to the defendant in the determination of his indigency, as suggested by an Oregon district attorney, is that if family and friends are called upon to finance a defense a few times they will help "straighten up" the defendant. L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS—A FIELD STUDY AND REPORT 109 (1965).

21. *See* Braden v. Commonwealth, 277 S.W.2d 7 (Ky. Ct. App. 1955); Brogden v. State, 38 Okla. Crim. 269, 260 P. 784 (1927); Annot., 55 A.L.R.2d 1072, 1100, 1106 (1957). Although the Kentucky court of appeals, the state's highest court, recognized the validity of the test in *Braden*, the relevant language could be viewed as dicta. The defendant, convicted of sedition, had requested a free trial transcript. Because there were charges that Braden was a Communist, the court refused to apply the friends or relatives test in determining defendant's indigency status, even though the test was generally approved. The court apparently reasoned that even if defendant had friends who could help, they would be deterred from doing so by the nature of the charge and the possible ramifications of their providing aid. In Duke v. Wingo, 415 F.2d 243 (6th Cir. 1969), the Court of Appeals for the Sixth Circuit, although citing *Braden*, interpreted Kentucky law by stating: "[T]he applicant for trial transcript must show that he is without funds to vindicate his rights. Once that showing is made the trial court must allow him to proceed at state expense." The court made no mention of any requirement that an indigent show that his friends and relatives were impecunious. Moreover, in two studies of the Kentucky system for dealing with indigent defendants, no mention was made of using the friends or relatives test at the local level. Bird, *The Representation of Indigent Criminal Defendants in Kentucky*, 53 KY. L.J. 478 (1964); Grove, *Gideon's Trumpet: Taps for an Antiquated System? A Proposal for Kentucky*, 54 KY. L.J. 527 (1966). Thus, it is doubtful whether Kentucky can now be classified as a state actively using the friends or relatives test as a device to preclude defendants claiming indigency from receiving free trial transcripts.

Oklahoma, on the other hand, appears to have used the test for many years. Battles v. State, 406 P.2d 516 (Okla. Crim. App. 1965); *In re* Alexander 392 P.2d 756 (Okla. Crim. App. 1964); Stokes v. State, 355 P.2d 1005 (Okla. Crim. App. 1960); Brogden v. State, 38 Okla. Crim. 269, 260 P. 784 (1927). The *Battles* case, however, seems to have been the last appellate case in Oklahoma to mention the test. Thus, it may now be obsolete in Oklahoma as well as Kentucky.

22. Interview with John M. Neis, Pima County, Arizona, Public Defender, in Tucson, Arizona, Feb. 13, 1975; telephone interview with Bradford Douglass, Jr., Chief Deputy Public Defender, Maricopa County, Arizona, Feb. 13, 1975; Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 2, 20 (1963); Note, *Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems*, 13 STAN. L. REV. 522 (1961).

23. Kamisar & Choper, *supra* note 22.

Minnesota, according to a statewide study, most judges inquire about the financial resources of parents and relatives.[24] Similarly, defender organizations in two California counties specifically ask in indigency affidavits whether friends or relatives are willing to assist the defendant.[25] In Arizona, the Pima[26] and Maricopa[27] county public defenders encourage indigents to hire private counsel if possible, especially where there are known friends or relatives who are willing to help.[28]

Although the friends or relatives test was once followed in Arizona,[29] the Arizona supreme court abandoned the test in *State v. Vallejos*[30] because of asserted constitutional problems. The defendant in *Vallejos* requested a free trial transcript for appeal from his conviction for possession and sale of narcotics. The state, relying on *Riley v. State*,[31] contended that since the defendant did not prove the absence of friends or relatives able to pay for the transcript, he was not entitled to a free one.[32] Overruling *Riley*, the *Vallejos* court held that the defendant did not have to make such a showing, since considering the resources of friends or relatives in determining the indigency of a defendant ran afoul of newly announced constitutional principles.[33]

In reaching this result, the Arizona court relied upon the United States Supreme Court cases of *Griffin v. Illinois*[34] and *Burns v. Ohio*.[35]

24. *Id.*
25. Note, *supra* note 22, at 546 n.161.
26. Interview with John M. Neis, *supra* note 22.
27. Telephone interview with Bradford Douglass, Jr., *supra* note 22.
28. A counterargument to the supposed benefits of pressuring others to aid the defendant is that "there is a certain unfairness in placing pressures on parents and relatives to retain counsel. The result might well be that the defendant whose relatives were 'callous' would be represented by a better lawyer than the defendant whose relatives were sympathetic and conscientious. And the better lawyer will be provided at state expense." Kamisar & Choper, *supra* note 22.
29. Riley v. State, 49 Ariz. 123, 65 P.2d 32 (1937), *overruled in part*, State v. Vallejos, 87 Ariz. 119, 123, 348 P.2d 554, 557 (1960).
30. 87 Ariz. 119, 348 P.2d 554 (1960).
31. 49 Ariz. 123, 65 P.2d 32 (1937).
32. 87 Ariz. at 120, 348 P.2d at 554-55.
33. State v. Vallejos, 87 Ariz. 119, 123, 348 P.2d 554, 557 (1960). This prohibition against considering the financial ability of friends or relatives in determining indigency was incorporated into ARIZ. R. CRIM. P. 6.4 which reads, "The term 'indigent' as used in these rules means a person who is unable to obtain services of counsel without incurring substantial hardship to himself or his family." The comment to rule 6.4(a) states that:

> In making a determination whether or not a defendant is indigent, the court should consider such factors as income, source of income, property owned, outstanding obligations, number and ages of any dependents, and other sources of family income; but *it should not consider* the fact that a person has been released on bail or *the ability of friends or relatives, not legally responsible for him, to obtain services of counsel.*

(emphasis added).
34. 315 U.S. 12 (1956). *Griffin* concerned denial of appeal to a convicted indigent unable to pay for a trial transcript, which was a necessary prerequisite to appeal under state law. *Id.* at 13-14. The Court found that this system discriminated between indigents unable to pay for the transcript and nonindigents who could afford that cost, and that appeal resultantly was denied the former simply on an economic basis. The Court found no rational reason for such discrimination and held it violative of equal protection and due process of the law under the 14th amendment.
35. 360 U.S. 252 (1959). In *Burns*, appeal to the Ohio supreme court was denied to

These cases made clear that in criminal proceedings the availability of the appellate procedure to the defendant may not be denied on the basis of discriminatory economic distinctions.[36] The *Vallejos* court echoed the Supreme Court's mandate by stating that the concepts of equal protection and due process "require that a defendant in a criminal case be allowed access to the appellate courts in spite of his inability to meet the costs which ordinarily attend such an appeal."[37]

The constitutional basis for the *Griffin* decision, on which *Vallejos* relied so heavily is uncertain. The *Griffin* Court purported to rest its decision on both equal protection and due process grounds, declaring that both concepts were meant to eliminate invidious discrimination in criminal trial procedures.[38] By apparently synthesizing the two concepts for purposes of analysis, the Court deviated somewhat from the separate, independent approaches which had typically differentiated these constitutional standards. The distinctiveness of these two concepts in the criminal context was clarified, however, in *Ross v. Moffitt*,[39] where the Supreme Court noted that *Griffin's* analytical merger of the due process and equal protection clauses was not entirely accurate since "each depends on a different inquiry which emphasizes different factors."[40] The *Ross* Court observed that 14th amendment due process involves an examination of the fairness of a particular state procedure or treatment with reference to a specific individual, regardless of the procedure or treatment accorded similarly situated individuals.[41] Equal protection, in contrast, involves analysis of an alleged disparity in treatment by a state between classes of individuals whose situations are virtually identical.[42]

In essence, due process in the context of criminal trials[43] imposes a standard of fundamental fairness, a flexible term meant to comport with

anyone not paying a $20 filing fee. The Court declared that this discriminated between those able to pay the fee and those unable, denying appeal to the latter simply on an economic basis. Citing *Griffin*, the Court found no rational reason for such discrimination against indigents and struck down the requirement as being violative of the equal protection clause of the 14th amendment.

36. As one commentator stated: "If a state provides for appellate review it cannot lay down a procedure that requires the payment of money which indigent persons may be unable to pay, unless it provides an alternative that affords an adequate and effective review to such persons." Qua, *Comments: Griffin v. Illinois*, 25 U. CHI. L. REV. 143, 146 (1957).

37. State v. Vallejos, 87 Ariz. 119, 123, 348 P.2d 554, 556-57 (1960).

38. Griffin v. Illinois, 351 U.S. 12, 17 (1956).

39. 417 U.S. 600 (1974).

40. *Id.* at 609.

41. *Id.*

42. *Id.*

43. The dimensions of due process analysis are basically twofold. Substantive due process limits the extent to which a state may deprive a person of life, liberty, or property, *see* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 1 (1973), while procedural due process governs the manner in which such a

both traditional and changing notions of justice.[44] Although the *Griffin* Court failed to isolate its due process inquiry, the Court seemingly deemed the Illinois procedure fundamentally unfair and thus not compatible with procedural due process standards.[45]

As noted by the Supreme Court in *Ross*, equal protection analysis differs from that of due process.[46] Established equal protection analysis basically has followed a two-tier approach.[47] Under this approach, if a particular state law or procedure creates classifications which result in invidiously discriminatory treatment of a suspect category of persons,[48] or which unduly affect the exercise of a fundamental right,[49] then the law or procedure is subject to strict scrutiny and will withstand attack only if it promotes a compelling governmental interest.[50] If no suspect category or fundamental right is involved, the law or procedure will be upheld unless no legitimate state objective exists or the classification rests on grounds wholly irrelevant to its achievement.[51]

Had the *Griffin* Court undertaken its analysis in traditional equal protection terms, it probably would have invoked the strict scrutiny standard, since denial of access to the appellate court system in a criminal case seemingly was deemed by the Court to be an abridgement

---

deprivation may legitimately occur. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932); Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 7 (1948).

44. *See* Duncan v. Louisiana, 391 U.S. 145 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Palko v. Connecticut, 302 U.S. 319 (1937). Fundamental fairness may require different procedures for different situations, depending on the importance of the liberty or property interest at stake and the nature of the proceeding. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Hannah v. Larch, 363 U.S. 420 (1960). In *Griffin* Illinois' denial of access to the appellate system simply because of financial inability to pay for a transcript was subject to stringent due process analysis, since the indigent's most fundamental liberty interest was at stake—freedom from criminal confinement.

45. Wilcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 10 (1957); Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. Rev. 1054, 1067, 1070 (1963). *See also* articles cited in Wilcox & Bloustein, *supra*, at 10 n.39.

46. 417 U.S. at 609.

47. Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

48. *See* Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin).

49. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Carrington v. Rash, 380 U.S. 89 (1965) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

50. *See* cases cited notes 48-49 *supra*.

51. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Recently the Supreme Court seems to have devised a middle ground analysis for those cases which do not fit squarely within either the strict scrutiny or rational basis molds. In such cases, the Court applies a test stressing the rationality of the means a legislature uses to reach an end. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393 (1975); Rosario v. Rockefeller, 410 U.S. 752 (1973); James v. Strange, 407 U.S. 128 (1972). *See generally* Gunther, *supra* note 47, at 21; Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145, 169-71 (1975).

of a fundamental right, and the class of persons discriminated against—indigents—arguably was viewed as a suspect category in this context.[52] The state's only identifiable interest—saving money by refusing to finance free transcripts for indigents—seemingly was not considered sufficiently compelling by the *Griffin* Court to render the Illinois procedure valid. Although the analysis was not stated in these terms, the result indicated that these ideas were implicit in the Court's reasoning.

In *Vallejos* the Arizona supreme court adopted *Griffin's* general constitutional pronouncements to prohibit consideration of friends' or relatives' financial resources in determining indigency for purposes of obtaining a free trial transcript for appeal. Like the *Griffin* Court, however, the *Vallejos* court failed to thoroughly analyze the constitutional concepts leading to its decision. Had the *Vallejos* court undertaken separate analyses, it undoubtedly would have found the friends or relatives test violative of both equal protection and due process.[53]

Knapp involved the application of the friends or relatives test for purposes of determining the availability of public counsel at the trial court level, rather than the availability of a free transcript for gaining access to the appellate system. Nevertheless, the underlying constitutional principles in *Griffin*, utilized in *Vallejos* to abrogate the friends or relatives test in the transcript context, also counselled its rejection in determining whether counsel should be provided. In *Knapp*, the state argued that since the defendant's mother had the resources to provide counsel, Knapp was no longer indigent and thus no longer entitled to be represented by the public defender.[54] In effect, the state was making the same argument rejected in *Vallejos*. The *Knapp* court discarded this argument by citing its holding in *Vallejos*, and did not specifically discuss the constitutionality of using the friends or relatives test to deny public counsel. The unconstitutionality of the friends or relatives test is apparent, however, when its application is viewed in terms of its potentially unconscionable results. That is, if the test were carried to its logical extreme, an indigent with financially able friends or relatives could be denied counsel altogether if such persons failed actually to provide aid.

52. *Cf.* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (indicating that indigency as a grounds for denying an important civil liberty may be a suspect category, although indigency alone is not suspect).

53. With regard to equal protection, an arguably fundamental interest—criminal appeal—was in danger of being denied to a category approaching suspect status—indigents having financially able friends or relatives; a strict scrutiny test thus was apparently called for. As in *Griffin*, the state's interest in saving money would not have been compelling enough to justify denial of a free transcript to such indigents. Similarly, the *Vallejos* court seemingly would have regarded the state's attribution to the defendant of funds over which he had no control as fundamentally unfair under due process.

54. 111 Ariz. at 109, 523 P.2d at 1310.

Use of the test in this context would be violative of due process for the same reason as in *Vallejos*: it would be fundamentally unfair to attribute another's resources to the defendant. Equal protection also would be violated since a fundamental right—counsel in a criminal trial—conceivably would be denied to an indigent with friends and relatives able to help but unwilling to do so. As in *Vallejos*, the state's moneysaving rationale would not be sufficiently compelling under the strict scrutiny test to justify such discriminatory treatment.

Although this extreme hypothetical clearly reveals the unconstitutionality of the friends or relatives test, the question in *Knapp* went beyond this relatively simple model. In *Knapp*, the defendant not only had at least one financially able relative, but also had the benefit of legal assistance funded by that outside source. The actual provision of outside aid rendered the public defender's status questionable.

The Knapp Right to Dual Counsel and Its Constitutional Basis

After rejecting the friends or relatives test, the *Knapp* court focused on the primary issues in the case—whether positive aid from friends or relatives altered defendant's indigency status and whether the services of the public defender could be made contingent on the lack of any outside aid. The court held that although indigency is not a static condition and is subject to change on reconsideration, the trial court in *Knapp* had not erred in finding defendant still indigent despite provision of legal aid by his mother.[55] The court also held that association of private counsel with the public defender was permissible.[56] Besides being both logical and practical, this latter ruling also may have had constitutional roots.

The broad issue raised by the *Knapp* court's approval of association of private and public counsel was whether the state could effectively deny the provision of additional aid from friends or relatives by giving the defendant a choice between the public defender or additional aid.[57] The essence of the problem is that an indigent defendant put to a choice between either the public defender or whatever aid outsiders could provide short of full representation would, as a practical matter, probably accept the public defender. Thus, although the public defender's

55. *Id.* at 110, 523 P.2d at 1311.
56. *Id.* at 111, 523 P.2d at 1312.
57. The state's duty to provide most effective assistance of counsel, that is, counsel plus other trial preparation expenses, is not at issue here. *See generally* Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632 (1970). In fact, the *Knapp* court held that due process was not violated by denying the defendant state funds to hire an arson expert to testify for the defense. 111 Ariz. at 113, 523 P.2d at 1314. Rather, the isssue is whether most effective assistance of counsel through supplementation of the public defender's services with private resources can be denied by the state.

services would not be denied, additional outside aid over and above the public defender's services would be forbidden. Since the State of Arizona will not provide trial preparation services other than counsel,[58] the result would be that any indigent defendant choosing representation by the public defender would be denied such services altogether. This phenomenon may be referred to as a denial of most effective assistance of counsel, or that aid over and above the provision of one public attorney.[59]

The United States Supreme Court has held that a state is not constitutionally bound to provide assistance in addition to a single attorney to an indigent defendant,[60] though there is a split among state courts on the point.[61] The mere fact that most effective assistance of counsel is not a recognized constitutional right which a state must extend to indigents, however, does not mean that the state can affirmatively deny to indigents the right to secure additional assistance from private sources. Just as criminal appeal is available to all defendants by statute,[62] the right to as much legal assistance as one can afford is a right recognized with as much force as if it too were statutorily granted.[63] Arguably, then, the state should be required to demonstrate a strong and convincing reason for denying such aid from others to an indigent defendant represented by the public defender, especially since what is being denied, his right to present the best possible defense, is at least as important as his right of appeal and is not entirely available from the state.[64]

While the private employment of a defense attorney to handle the entire case would justify withdrawing the public defender under certain circumstances,[65] such withdrawal was not warranted by the quite differ-

58. *See* 111 Ariz. at 113, 523 P.2d at 1314.

59. *See* Note, *supra* note 57, at 640-41.

60. United States *ex rel.* Smith v. Baldi, 344 U.S. 561 (1953).

61. *Compare* People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966) (indigent defendant has a state and federal constitutional right to reasonable fee for expert witness), *with* State v. Superior Court, 2 Ariz. App. 458, 409 P.2d 742 (1966) (contrary). Most states which provide aid in addition to one attorney do so on a statutory basis. Note, *supra* note 57, at 636 n.26.

62. In Arizona the right to criminal appeal is provided by ARIZ. REV. STAT. ANN. § 13-1711 (Supp. 1975-76).

63. *See* State v. Waterhouse, 3 Conn. Cir. 102, 104, 208 A.2d 354, 356 (App. Div. 1964); Jackson v. State, 55 Tex. Crim. 79, 82, 115 S.W. 262, 264 (1908).

64. *See* discussion note 67 *infra*.

65. Had Knapp's mother hired a private attorney to take on full representation rather than simply to assist the public defender at the trial, a strong argument could be made to support the public defender's withdrawal despite Knapp's technical indigency status. Under these circumstances, Knapp would have had the full assistance of an attorney without the public defender. Once the point is reached at which it can objectively be determined that the indigent defendant is in fact receiving full, fair, and adequate legal representation from outside sources, the state's interest in saving money seemingly would outweigh the defendant's interest in having the public defender to supplement that outside aid. Conceding the difficulty in locating that point, once it is determined, that state's retraction of the public defender's services would be justified.

ent circumstances in *Knapp*. The private attorney hired by defendant's mother was employed on a partial retainer only, and thus his services alone arguably would not have afforded the indigent defendant the minimal standard of legal assistance guaranteed by the sixth amendment.[66] Where the provision of outside aid by others falls short of full representation—being limited to the hiring of an expert witness, an investigator, or, as in *Knapp*, another attorney on a limited retainer to assist the public defender—the denial of such aid by the state without a good reason seemingly would violate equal protection and due process.

Equal protection would be violated as a result of the state's discriminating between indigents represented by the public defender and nonindigents. Limiting indigents to only those services provided by the public defender, while allowing nonindigents to hire as much help as their resources permit, effectively would deny indigents the ability fully to defend themselves. The right to present as full and complete a defense as possible seemingly is as fundamental an interest as appeal[67] and would call for strict scrutiny of the state's interest in its denial to indigents.[68] As in *Knapp*, if that interest is no more than pecuniary savings,[69] then such denial arguably would run afoul of equal protection under *Griffin*.[70] Due process also apparently would be denied, since it would seem fundamentally unfair to deprive an indigent defendant of the best defense he can muster where friends or relatives, rather than the state, are underwriting the additional assistance.

Similarly, if an indigent defendant could not receive outside aid of any sort once public defense is provided him, he in effect would be penalized for exercising his sixth amendment right to public counsel. That is, the indigent's right to public defense would be conditioned with a prohibition on receiving aid from outside sources. Such a condition seemingly would be unconstitutional under the rationale of *Griffin v. California*[71] where the Supreme Court held prosecutorial comment on a

---

Such factors as the stage of the proceedings at which the private attorney enters the case and the certainty that he will remain in the case would, of course, be significant. *See* State v. Allen, 105 Ariz. 267, 268, 463 P.2d 65, 66 (1969).

66. The minimal standard required under the sixth amendment is one attorney. *See* United States *ex rel.* Smith v. Baldi, 344 U.S. 561 (1953).

67. The right of access to the courts was early enunicated in Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907). Although that right has been limited in certain civil contexts, *compare* Boddie v. Connecticut, 401 U.S. 371 (1971), *with* United States v. Kras, 409 U.S. 434 (1973), *and* Ortwein v. Schwab, 410 U.S. 656 (1973), cases dealing with criminal trials have emphasized the importance of affording the defendant full access to the means of vindicating himself. *See, e.g.*, Wardius v. Oregon, 412 U.S. 470 (1973); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

68. See text & notes 48-50 *supra*.

69. 111 Ariz. at 111, 523 P.2d at 1312.

70. See text accompanying note 52 *supra*.

71. 380 U.S. 609 (1965). *See also* Spevack v. Klein, 385 U.S. 511 (1967).

defendant's failure to testify at trial to be an unconstitutional penalty on defendant's exercise of his fifth amendment privilege against compulsory self-incrimination.[72] If the state were allowed to deny appointed counsel to an indigent defendant whose friends and relatives provided supplemental aid, such an indigent would be forced to choose between his sixth amendment right to counsel and the availability of certain additional defense tools. Thus, the indigent defendant would be made to pay a price for assertion of his right to appointed counsel. *Griffin* disallows such a result.

In addition to constitutional problems in denying most effective assistance of counsel to an indigent represented by the public defender, there are practical reasons for allowing such aid. The associating attorney might be more skilled in a particular area than the public defender.[73] Additionally, aid other than association could provide things the public defender might normally do without, such as psychiatric examinations or expert witnesses,[74] which could have a definite impact on the defense. Additionally, accepting aid from relatives or friends will give them a stake in the outcome of the proceedings and a greater involvement in the rehabilitation of the defendant should he be convicted.[75] Finally, the defendant's feeling of being victimized by the system seemingly will be substantially lessened. Allowing him the maximum opportunity to defend himself seems the mark of a fair criminal justice system, a factor making a conviction more legitimate in the eyes of the defendant and the community. In allowing private supplemental assistance to an indigent represented by the public defender, therefore, the Arizona court complied with principles of both equity and the constitution.

Conclusion

The ruling in *Knapp* eliminated a vestige of the unfair friends or relatives test and extended to indigents the opportunity to present the best possible defense. It represented a step toward insuring that an indigent's conviction is based upon a thorough airing of the facts rather than an omission of evidence which could not be secured due to a lack of funds or other resources on the part of the public defender.

72. The Court stated in *Griffin*, "[Comment on the refusal to testify] is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614; *cf.* Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Note, *supra* note 51, at 160-63.

73. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974).

74. In *Knapp* an arson expert was hired by the public defender to analyze the physical evidence and to testify for the defense, but due to lack of money he could not be kept on the job. 111 Ariz. at 112, 523 P.2d at 1313.

75. See discussion note 20, *supra*.

F. FELONY-MURDER AND MERGER IN ARIZONA

Appellate courts frequently face claims that state murder convictions involve fundamental error because the appellant was tried on a charge of first-degree felony murder rather than first-degree premeditated murder.[1] The felony-murder rule, under which the former charge is brought, enables the prosecution to charge a defendant with first-degree murder for any killing occurring during the commission of certain felonies, without having to establish the elements normally required for first-degree premeditated murder.[2] Additionally, invocation of the rule substantially reduces the effectiveness of possible defenses such as the defendant's intoxication or provocation, which would be fully available against a charge of first-degree premeditated murder.[3] Because of these harsh effects, it has often been contended that the rule's application should be limited in order to properly maintain the distinctions between the various gradations of killings and their punitive consequences.[4]

In response to these considerations, some courts have limited use of the felony-murder rule through the application of various merger doctrines,[5] which cause the felony committed by a defendant to be absorbed within the homicide committed by him. The effect of merger is to preclude use of the rule by the prosecution, since the act of the defendant is deemed to constitute one offense—some form of homicide—and not two offenses, a homicide and distinct supporting felony.[6] Whether the underlying felony in a particular case should be deemed to have merged with the accompanying homicide, thereby foreclosing operation of the felony-murder rule, poses an issue which courts have not resolved in a uniform fashion.

---

1. *See, e.g.*, State v. Miniefield, 110 Ariz. 599, 522 P.2d 25 (1974); State v. Clayton, 109 Ariz. 587, 514 P.2d 720 (1973); People v. Burton, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971); People v. Mattison, 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971).

2. See text accompanying notes 19-40 *infra*.

3. See text accompanying notes 32-36 *infra*.

4. Note, *The Doctrine of Merger in Felony-Murder and Misdemeanor-Manslaughter*, 35 ST. JOHN'S L. REV. 109, 117 (1960); Comment, *Merger and the California Felony-Murder Rule*, 20 U.C.L.A.L. REV. 250, 264 (1972).

5. *See, e.g.*, State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965); People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); State v. Fisher, 120 Kan. 226, 243 P. 291 (1926); *see* Comment, *supra* note 4. *See also* Note, *supra* note 4.

6. *See, e.g.*, State v. Miniefield, 110 Ariz. 599, 601, 522 P.2d 25, 27 (1974); State v. Essman, 98 Ariz. 228, 235, 403 P.2d 540, 545 (1965); State v. Fisher, 120 Kan. 226, 230-31, 243 P. 291, 293 (1926). *See also* State v. Mendoza, 107 Ariz. 51, 55-56, 481 P.2d 844, 848-49 (1971).

In *State v. Miniefield*,[7] the Arizona supreme court faced a challenge to the application of Arizona's felony-murder statute.[8] Defendant Miniefield, after drinking about one quart of liquor and smoking three or four marijuana cigarettes,[9] engaged in a fracas with one Chester Carr. The scuffle eventually moved to Carr's house, where the defendant shot from outside at Carr, who was inside. The defendant also started a fire on Carr's porch. Although the fire was extinguished, the defendant returned sometime later and again set fire to the house. Carr's 9-month-old daughter died as a result of the second blaze.

At trial, Miniefield relied heavily on the defenses of insanity and inability to premeditate the killing as a result of his liquor and marijuana consumption.[10] These assertions were to no avail, however, as the jury convicted Miniefield of felony-murder by arson, first-degree arson, assault with a deadly weapon and aggravated battery on Carr's wife. On appeal the Arizona supreme court affirmed the felony-murder conviction. Although it recognized that merger concepts may sometimes prevent application of the felony-murder rule,[11] the court determined that the offenses committed by Miniefield did not merge into the homicide.[12] According to the court, there was no error in basing invocation of the felony-murder rule on the arson felony since arson and felony-murder constitute two separate offenses with completely different elements.[13] Additionally, the court noted that Arizona's felony-murder statute[14] draws no distinction between cases where the underlying felony is committed with an intent to kill the victim and cases where a person is accidentally killed during the course of one of the statutorily-enumerated felonies.[15] Finally, the court found Miniefield's conviction consistent with the purposes underlying the felony-murder rule.[16]

This casenote will examine the felony-murder rule and concepts of merger used to limit its effect. After the substantive distinctions between the various forms of homicide are set forth, the merger doctrines applied in various jurisdictions to maintain those distinctions will be analyzed. Next, the casenote will specifically focus on *State v. Miniefield*, scrutinizing the merger test used in that case by the Arizona supreme court. Finally, the appropriateness of the *Miniefield* merger

7. 110 Ariz. 599, 522 P.2d 25 (1974).
8. ARIZ. REV. STAT. ANN. § 13-452 (Supp. Pamphlet 1973).
9. Brief for Appellant at 4, State v. Miniefield, 110 Ariz. 599, 522 P.2d 25 (1974).
10. *Id.* at 10-11.
11. *See* 110 Ariz. at 601, 522 P.2d at 27.
12. *Id.* at 602, 522 P.2d at 28.
13. *Id.* at 601, 522 P.2d at 27.
14. ARIZ. REV. STAT. ANN. § 13-452 (Supp. Pamphlet 1973).
15. 110 Ariz. at 602, 522 P.2d at 28.
16. *Id.*

test and its implications for future Arizona felony-murder prosecutions will be discussed.

The Law of Homicide: Classifications, Intent, and Defenses

Homicide is the killing of one human being by another.[17] A homicide is classified as "innocent homicide" if it does not, as a matter of law, involve criminal guilt.[18] When criminal guilt is present, a homicide may be either murder or manslaughter, the distinction being that murder is homicide committed with malice aforethought.[19] Malice aforethought was long presumed under Arizona law where the other elements of a homicide had been proved,[20] leaving it to the defendant to present evidence of intoxication or other factors negating the existence of such intent.[21] If the defendant were successful, he would be found guilty of the lesser crime of manslaughter, requiring no element of malice aforethought.[22] Recent statutory changes[23] and United States

17. R. PERKINS, CRIMINAL LAW 28 (2d ed. 1969).

18. *Id.* at 33. Innocent homicide is either justifiable or excusable. Justifiable homicide is that which is commanded or authorized by law, such as the killing of an enemy on the battlefield in war, the execution of a criminal who has been properly sentenced to death by a court, or lawful self-defense. Excusable homicides, those committed under circumstances not involving criminal guilt, include killings resulting from unfortunate accidents in which there is neither criminal negligence nor participation in any unlawful act at the time of death, homicides by a small child or an insane person, and mistaken acts of self-defense. *Id.*; S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 496-671 (3d ed. 1973).

19. ARIZ. REV. STAT. ANN. § 13-451 (1956); R. PERKINS, *supra* note 17, at 34. At present the term "malice aforethought" in the legal sense bears no relation to the literal meaning of the two words. Proof of malice is sufficient for a conviction of murder without any need for further proof that the killing was thought out in advance of the fatal act. In addition, the legal concept of malice in this context does not require any element of hatred, grudge, ill will, or spite. *Id.* at 34-35. Malice exists if the prosecution shows that a defendant intended to kill or to inflict serious bodily harm on someone. Moreover, it may exist if the defendant's conduct was extremely negligent, even though no intent to kill or to inflict serious bodily injury is found. *But see* 8 ARIZ. L. REV. 370 (1967). Finally, malice is deemed to exist under circumstances that constitute felony-murder. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, § 67, at 528; *id.* § 69, at 540-41; *id.* § 71, at 545 & n.2 (1972). The Arizona statute defines the concept as follows: "Malice aforethought may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart." ARIZ. REV. STAT. ANN. § 13-451(B) (1956).

20. Miranda v. State, 42 Ariz. 358, 364, 26 P.2d 241, 243 (1933).

21. Once the prosecution proved that the defendant intentionally killed the victim, the burden shifted to the defendant to prove facts in mitigation, justification, or excuse of the killing. If the defendant did not offer such proof, the jury could find him guilty of murder even though the prosecution did not introduce evidence to negative the existence of mitigation, justification, or excuse. W. LAFAVE & A. SCOTT, *supra* note 19, § 68, at 539.

22. Miranda v. State, 42 Ariz. 358, 364, 26 P.2d 241, 243 (1933); R. PERKINS, *supra* note 17, at 86.

23. In 1973, ARIZ. REV. STAT. ANN. § 13-454 (1956), specifically providing that "the commission of the homicide by defendant being proved, the burden of proving circumstances of mitigation, or circumstances that justify or excuse it, devolves upon defendant . . . ," was repealed. Ch. 138, § 4, [1973] Ariz. Sess. Laws 967. *See also* ARIZ. REV. STAT. ANN. § 13-454 (Supp. Pamphlet 1973) (now dealing with sentencing proceedings in cases of first-degree murder).

Supreme Court decisions,[24] however, have nullified the presumption, placing on the prosecutor the burden of proving malice aforethought, even where this involves proving a negative, such as lack of suddenly provoked passion.[25]

Arizona's murder statute[26] delineates several types of first-degree murder[27] and categorizes all other homicides committed with malice aforethought as second-degree murder.[28] One type of first-degree murder is premeditated murder,[29] in which the state has the burden of proving the premeditated nature of the killing[30] as well as malice aforethought.[31] Several of the same facts which might negate the existence of malice aforethought can also be used to disprove deliberation or premeditation. Proof that the killing occurred in the heat of passion after substantial provocation[32] or that the defendant was intoxicated at the time of the crime can be considered by the jury in determining the defendant's ability to entertain malice aforethought[33] or to deliberate and premeditate.[34] If the jury finds no ability to form malice aforethought, it can convict of no crime greater than manslaughter.[35] If

24. *In re* Winship, 397 U.S. 358, 364 (1970), held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." This holding was recently applied specifically to a Maine statute placing on the defendant the burden of disproving malice aforethought. Mullaney v. Wilbur, 421 U.S. 684 (1975). Noting that the issue of the existence of malice aforethought involved a differential in sentencing ranging from a nominal fine to a mandatory life sentence, *id.* at 700, the Court ruled that this element must be proved by the prosecution.

25. 421 U.S. at 701-02. The Court observed that Maine itself requires the prosecution to prove beyond a reasonable doubt the absence of self-defense. *Id.*

26. ARIZ. REV. STAT. ANN. § 13-452 (Supp. Pamphlet 1973).

27. Types of first-degree murder in Arizona are those perpetrated by poison or lying in wait; by torture or any other kind of willful, deliberate or premeditated killing; in the avoidance or prevention of lawful arrest or in escape from legal custody; and in the commission or attempted commission of specified felonies. *Id.* For a discussion of problems in identifying types of first-degree murder, see R. PERKINS, *supra* note 17, at 90.

28. ARIZ. REV. STAT. ANN. § 13-452 (Supp. Pamphlet 1973).

29. *Id.* In Arizona, willful or deliberate killings are also classified as first-degree murder. *Id.* Therefore, textual references to premeditated murder will encompass these two types as well.

30. State v. Moore, 109 Ariz. 111, 115, 506 P.2d 242, 246, *vacated on other grounds*, 414 U.S. 25 (1973). It has been said that one can premeditate and deliberate in a matter of seconds. W. LAFAVE & A. SCOTT, *supra* note 19, § 73 at 563. This view, however, tends to destroy the statutory distinction between first-degree and second-degree murder. The better view is that deliberation requires that one have a cool mind capable of reflection; and that premeditation requires that the one with the cool mind in fact reflect, at least for a short time, before his act of killing. *Id.*

31. W. LAFAVE & A. SCOTT, *supra* note 19, § 68, at 539-40.

32. State v. Moore, 65 Ariz. 70, 75, 174 P.2d 282, 285 (1946); *see* State v. Duke, 110 Ariz. 320, 326, 518 P.2d 570, 576 (1974).

33. State v. Duke, 110 Ariz. 320, 326, 518 P.2d 570, 576 (1974); State v. Contreras, 107 Ariz. 68, 69, 481 P.2d 861, 862 (1971); ARIZ. REV. STAT. ANN. § 13-132 (1956).

34. People v. Baker, 42 Cal. 2d 550, 573, 268 P.2d 705, 719 (1954). There apparently are no Arizona cases specifically holding that voluntary intoxication can negate the ability to premeditate or deliberate.

35. State v. Contreras, 107 Ariz. 68, 69-70, 481 P.2d 861, 862-63 (1946); Miranda v. State, 42 Ariz. 358, 364, 26 P.2d 241, 243 (1933).

it finds the ability to form malice aforethought but not the ability to premeditate or deliberate, it can convict of no crime greater than second-degree murder.[36]

A second type of first-degree murder is felony-murder, a murder committed during the perpetration or attempted perpetration of certain designated crimes.[37] Neither deliberation nor premeditation is an essential element of felony-murder.[38] Proof of commission of the underlying felony is the legal equivalent of proof of premeditation,[39] and malice aforethought is imputed to the homicide merely from proof of intent to commit the felony.[40] Since the existence of malice aforethought, premeditation, or deliberation need not be proven when felony-murder is charged, the defense of diminished capacity due to voluntary intoxication is of little value to a defendant in such a case.[41] Application of the felony-murder rule requires only that the defendant have the capacity to form the intent to commit the underlying felony.[42] The

36. People v. Baker, 42 Cal. 2d 550, 573, 268 P.2d 705, 719 (1954).

37. In Arizona the statutorily-enumerated felonies are arson, first-degree rape, robbery, burglary, kidnapping, mayhem, or the sexual molestation of a child under the age of 13. ARIZ. REV. STAT. ANN. § 13-452 (Supp. Pamphlet 1973). California and many other states recognize a second-degree felony-murder rule that applies to killings committed during the course of felonies not itemized in the state's felony-murder statute. *See* "The Status of Second-Degree Felony-Murder in Arizona," 16 ARIZ. L. REV. 489, 591, 594 n.28 (1974). The Arizona supreme court, however, has ruled that ARIZ. REV. STAT. ANN. § 13-452 (Supp. Pamphlet 1973) does not encompass a second-degree felony-murder rule. State v. Dixon, 109 Ariz. 441, 443, 511 P.2d 623, 625 (1973), *noted in* "The Status of Second-Degree Felony-Murder in Arizona," *supra* at 591.

38. State v. Akins, 94 Ariz. 263, 266, 383 P.2d 180, 182 (1963).

39. State v. Serna, 69 Ariz. 181, 187-88, 211 P.2d 455, 459 (1949); State v. Thorne, 39 Utah 208, 217, 117 P. 58, 61 (1911).

40. People v. Ketchel, 71 Cal. 2d 635, 641, 456 P.2d 660, 663, 79 Cal. Rptr. 92, 95 (1969); People v. Chapman, 261 Cal. App. 2d 149, 165, 67 Cal. Rptr. 601, 610-11 (Dist. Ct. App. 1968). In cases of felony-murder based on arson, such as *Miniefield*, "the jury need find only that the defendant intended to set the fire" to create the presumption of malice aforethought. People v. Nichols, 3 Cal. 3d 150, 165, 474 P.2d 673, 683, 89 Cal. Rptr. 721, 731 (1970).

41. Note, *The Diminished Capacity Defense to Felony-Murder*, 23 STAN. L. REV. 799, 804-05 (1971). The ineffectiveness of drunkenness as a defense to felony-murder charges is illustrated by People v. Fortman, 257 Cal. App. 2d 45, 64 Cal. Rptr. 669 (Dist. Ct. App. 1967). Although the court recognized that had the appellants been charged with premeditated murder, their level of intoxication "might have impelled the jury to conclude that appellants did not have 'the specific mental state essential' to commit murder," *id.* at 55, 64 Cal. Rptr. at 675, the first-degree felony-murder conviction based on robbery was affirmed on the ground that the appellants' intoxication did not negative their ability to form the intent necessary to rob the victim. *Id.* at 49, 64 Cal. Rptr. at 673.

42. *See* Comment, *supra* note 4, at 256. All crimes require a general criminal intent or mens rea, an intent to perform the physical movements constituting the act required for commission of the crime. Some crimes may also require a specific intent, a special mental element above and beyond the mental state necessary to merely carry out the act constituting the crime. W. LAFAVE & A. SCOTT, *supra* note 19, § 28, at 201-02. Intoxication can be a defense to a crime if it prevents a defendant from forming the intent necessary to commit the crime, whether that be general or specific intent. Intoxication can negative both the ability to premeditate and deliberate, *id.* at 345, and the ability to form malice aforethought. *Id.* at 330; *see* text accompanying notes 32-34 *supra*. Intoxication which negates the intent necessary for commission of the underlying felony is a defense to a charge of felony-murder. W. LAFAVE & A. SCOTT, *supra* § 45, at 343.

formation of such an intent is a "rather rudimentary mental operation"[43] which can be inferred from the circumstances surrounding the felony.[44] Thus, application of the felony-murder rule not only aids the prosecution by rendering proof of the traditional elements of first-degree murder unnecessary, but also virtually obliterates the effectiveness of potential defenses. Recognizing these severe consequences, courts have restricted the scope of the felony-murder rule in some instances.

Limitation of Felony-Murder: Merger Doctrines

Most courts have recognized that the felony-murder rule should not operate automatically against all homicides committed during the perpetration or attempted perpetration of a felony. If the rule were broadly applied in this manner, it would be futile to recognize that absence of malice aforethought could reduce murder to manslaughter[45] since the method of committing manslaughter is itself usually a felony, and hence a homicide resulting from such acts would always be murder.[46] Arizona has reduced this possibility by restricting application of the felony-murder rule to felonies specifically enumerated in the state's murder statute.[47] Nevertheless, automatic invocation of the rule even in that limited class of cases severely reduces the prosecution's burden of proof and thus increases the chances of conviction.

In response to these considerations, courts have established additional limitations on the application of the felony-murder rule. The concept of merger has been employed in many jurisdictions to preclude use of the rule when the homicide and the felony are so closely related that to apply the rule would jeopardize the distinction between murder and manslaughter[48] and between the various degrees of murder. Under

43. Busch & Fulgoni, *Diminished Capacity Applied to the Felony-Murder Rule*, 47 L.A.B. BULL. 291, 294 (1972).

44. Note, *supra* note 41, at 805; *see* SPECIAL COMM. ON UNIFORM INSTRUCTIONS, MARICOPA COUNTY, [ARIZ.,] SUPER. CT. JUDGES, MARICOPA RECOMMENDED JURY INSTRUCTIONS FOR CRIMINAL CASES No. 203 (1971). An intent to commit burglary may be inferred from the fact that the defendant, equipped with burglar's tools and a flashlight, went to another person's apartment and tried to push the door open at night while having no lawful purpose there. R. PERKINS, *supra* note 17, at 575.

45. See text & note 35 *supra*.

46. R. PERKINS, *supra* note 17, at 43.

47. ARIZ. REV. STAT. ANN. § 13-452 (Supp. Pamphlet 1973); see discussion note 37 *supra*.

48. *See* People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969). In reversing a second-degree felony-murder conviction based on the felony of assault with a deadly weapon, the *Ireland* court stated:

> To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law.

Id. at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198. Similarly, it has been stated: "The distinction between murder and manslaughter, felonies both, makes it necessary to qual-

merger concepts, felonies committed by the defendant that are not distinct from the felonious homicide itself are deemed absorbed by the homicide. Consequently, the defendant can be prosecuted for premeditated first-degree murder or any lesser charge justified by the homicide itself, but the prosecution cannot use the felony-murder rule to circumvent the requirements of malice aforethought and premeditation. At least two major tests—the "ingredient" test[49] and the "independent felonious purpose" test[50]—have been applied to measure the degree of proximity between a felony and the resulting homicide in order to determine whether they should be deemed to have merged.

Under the ingredient test, application of the felony-murder rule has been rejected where the underlying felony is so indistinct from the resulting homicide that it is considered an ingredient of the homicide. Although some form of ingredient limitation on the felony-murder rule is recognized by most states,[51] there is neither a clear-cut nor a universally accepted test for determining whether a particular felony is ingredient to any homicide that occurs during the commission of the felony.[52] Courts in many states have held that the felony of assault with a deadly weapon is ingredient to any resulting homicide and therefore cannot be used by itself to support a felony-murder charge.[53] The Kansas supreme court, for example, in reversing a first-degree felony-murder conviction based on the felonious act of firing a rifle at several people and thereby killing one of them, stated in *State v. Fisher*:

> Here the act of the defendant in doing the shooting is either murder in the first degree or some other offense. That same act cannot be made the basis, first, of some other felony, as manslaughter, then that felony used as an element of murder in the first degree.[54]

---

ify any rule as to homicide resulting from felony by limiting it to felonies other than felonious homicide itself,—or else to felonies other than manslaughter." R. PERKINS, *supra* note 17, at 43. *See also* State v. Fisher, 120 Kan. 226, 243 P. 291 (1926); Comment, *supra* note 4, at 264; Note, *supra* note 4, at 117.

49. *See, e.g.*, State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965); People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); State v. Fisher, 120 Kan. 226, 243 P. 291 (1926).

50. *See* People v. Burton, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971); People v. Mattison, 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971).

51. *See* R. PERKINS, *supra* note 17, at 43.

52. Consequently, the question of whether a given felony should merge into the resulting homicide as an ingredient felony has been the source of many appellate decisions and much commentary. *See* State v. Miniefield, 110 Ariz. 599, 522 P.2d 25 (1974); State v. Clayton, 109 Ariz. 587, 514 P.2d 720 (1973); People v. Burton, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971); People v. Mattison, 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971). *See generally* Comment, *supra* note 4; Note, *supra* note 4; Note, *The California Supreme Court Assaults the Felony-Murder Rule*, 22 STAN. L. REV. 1059 (1970).

53. *See, e.g.*, State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965); People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); People v. Hüter, 184 N.Y. 237, 77 N.E. 6 (1906).

54. State v. Fisher, 120 Kan. 226, 231, 243 P. 291, 293 (1926). The *Fisher* court's

If assault were allowed to support a felony-murder charge, the court observed, "there could, under this interpretation of the statute, be no such thing as any lower degree of homicide than murder in the first degree."[55] The California supreme court has used similar reasoning to hold that felony-murder charges cannot be based on felonies that are "an integral part of the homicide and . . . included *in fact* within the offense charged."[56]

In *People v. Burton*,[57] the California supreme court abandoned its included-in-fact merger test. Finding that test too broad, since it required merger in any case where use of a deadly weapon was an element of the act constituting the felony,[58] the court substituted a test which merged a felony into a resulting homicide if the felony was

---

language indicates that it was focusing on defendant's acts in determining whether the underlying offense should be deemed to have merged into the resultant homicide.

55. *Id.* at 230, 243 P. at 293. This conclusion followed from a strict reading of the Kansas murder statute, which made any homicide committed during the perpetration of any felony first-degree murder. *Id.*

56. People v. Ireland, 70 Cal. 2d 522, 539, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 198 (1969) (emphasis in original). The reversal of Ireland's felony-murder conviction based on the felony of assault was necessary, as in State v. Fisher, 120 Kan. 226, 243 P. 291 (1926), to preserve the distinction between murder and manslaughter. See discussion note 48 *supra*; text accompanying notes 54-55 *supra*. The *Ireland* court declined to articulate any test by which courts could determine whether a given felony is included in fact within the homicide although it did state that one offense would be "necessarily included" within another offense if the lesser offense were embraced within the statutory definition of the greater offense or if it were embraced within the specific pleadings of the indictment of the greater offense. The court also noted that "an offense may be included *in fact* within the offense charged even though it is not embraced within the statutory definition of the greater offense." 70 Cal. 2d at 539 n.14, 450 P.2d at 590 n.14, 75 Cal. Rptr. at 198 n.14 (emphasis in original).

Another application of this standard occurred in People v. Wilson, 1 Cal. 3d 431, 462 P.2d 22, 82 Cal. Rptr. 494 (1969), in which the defendant had been convicted of first-degree felony-murder based on the felony of burglary. Wilson, who entered his wife's separate apartment intending to commit assault, instead killed her. Under California law, "[e]very person who enters any house, room, apartment . . . with intent to commit . . . any felony is guilty of burglary." CAL. PENAL CODE § 459 (West 1970). Therefore, the burglary used to support Wilson's felony-murder conviction occurred at the time he entered the apartment with the intent to commit the felonious assault. The California supreme court reversed the conviction, stating that burglary cannot be used to support a felony-murder charge when "the entry would be nonfelonious but for the intent to commit the assault, and the assault is an integral part of the homicide and is included in fact within the offense charged . . . ." 1 Cal. 3d at 440, 462 P.2d at 28, 82 Cal. Rptr. at 499-500. Although neither *Wilson* nor *Ireland* referred expressly to an ingredient test, *Ireland* did cite cases and articles approving the ingredient restriction of State v. Fisher, 120 Kan. 226, 243 P. 291 (1926). In addition, the court's examination of the acts performed by the defendants in both *Ireland* and *Wilson* suggest that the included-in-fact restriction of the felony-murder rule is very similar, if not identical, to the ingredient restriction announced in *Fisher*. See text & note 54 *supra*. Other felonies which ordinarily would support a first-degree felony-murder prosecution but which have been viewed as merging into the homicide under the included-in-fact test include mayhem, *cf.* People v. Sears, 62 Cal. 2d 737, 401 P.2d 938, 44 Cal. Rptr. 330 (1965), and poisoning. People v. Mattison, 9 Cal. App. 3d 732, 88 Cal. Rptr. 265 (Dist. Ct. App. 1970).

57. 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971).

58. According to the *Burton* court, the net effect of such a merger doctrine

> would be to eliminate the application of the felony-murder rule to all unlawful killings which were committed by means of a deadly weapon, since in each case the homicide would include *in fact* assault with a deadly weapon, even if the homicide resulted from the commission of one of the six felonies (arson,

committed without any independent felonious purpose.[59] Merger under the independent felonious purpose test maintains the distinction between murder and manslaughter, as did the included-in-fact merger test.[60] In addition, according to the *Burton* court, the new test vindicates California's justification for the existence of the felony-murder rule: it deters felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.[61] All felonies committed *solely* to advance the object of bringing about death would merge under the independent felonious purpose test. Arguably, the felonies of burglary,[62] mayhem,[63] kidnapping, and arson[64] might be performed without any independent felonious purpose. The felonies of rape, robbery, and sexual molestation of a child, on the other hand, are probably always

---

rape, mayhem, robbery, burglary or lewd and lascivious acts upon the body of a child) . . . .

Id. at 386-87, 491 P.2d at 801, 99 Cal. Rptr. at 9.

59. As the *Burton* court stated: "Our inquiry cannot stop with the fact that death resulted from the use of a deadly weapon and, therefore, technically included an assault with a deadly weapon, but must extend to an investigation of the purpose of the conduct." *Id.* at 387, 491 P.2d at 801, 99 Cal. Rptr. at 9.

60. The assault in People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969), and the burglary in People v. Wilson, 1 Cal. 3d 431, 462 P.2d 22, 82 Cal. Rptr. 494 (1969), were both performed without any independent felonious purpose. People v. Burton, 6 Cal. 3d 375, 388, 491 P.2d 793, 802, 99 Cal. Rptr. 1, 10 (1971). *But see* Note, *supra* note 52, at 1064.

Although both merger tests often produce the same result by exempting certain homicides from the operation of the felony-murder rule, the differences between results reached under the tests can be significant. In one case, for example, an inmate of a California penal institution was fatally poisoned by methyl alcohol sold him by a fellow inmate. The seller was convicted of felony-murder based on the underlying felony of mixing poison with a drink with the intent to injure. The court of appeals found merger of the felony with the homicide under the included-in-fact test and accordingly reduced the conviction to involuntary manslaughter. People v. Mattison, 9 Cal. App. 3d 732, 88 Cal. Rptr. 265 (Dist. Ct. App. 1970). The felony-murder conviction was reinstated by the California supreme court, however, using an independent felonious purpose test to find that the underlying felony did not merge into the homicide. Although the supreme court did not disagree that application of the included-in-fact test resulted in merger, the supreme court went beyond a mere examination of the defendant's act or the elements of his crimes and analyzed the defendant's purpose and intent. The court concluded that the defendant's felony-murder conviction "serves rather than subverts the purpose of the rule" because the poisoning was performed "with a 'collateral and independent felonious design.' . . . In other words the felony was not done with the intent to commit injury which would cause death." People v. Mattison, 4 Cal. 3d 177, 185, 481 P.2d 193, 198, 93 Cal. Rptr. 185, 190 (1971).

61. People v. Burton, 6 Cal. 3d 375, 388, 491 P.2d 793, 801-02, 99 Cal. Rptr. 1, 9-10 (1971). Although the deterrence purpose as originally announced referred only to negligent or accidental killings, People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965), the California court subsequently stated that such purpose "is clearly served by punishing [felons] for any killings which they themselves commit, whether the killings were committed *intentionally, negligently, or accidentally.*" People v. Talbot, 64 Cal. 2d 691, 704, 414 P.2d 633, 642, 51 Cal. Rptr. 417, 426 (1966) (emphasis added). A secondary effect of the rule may be to deter some persons from becoming felons. Comment, *supra* note 4, at 258 n.41. *But see* W. LAFAVE & A. SCOTT, *supra* note 19, § 72, at 560-61, *quoting* HOLMES, THE COMMON LAW 58 (1881): "If the object of the [felony-murder] rule is . . . to prevent stealing [or any other felony that might support a felony-murder charge], it would do better to hang one thief in every thousand by lot."

62. *See* People v. Wilson, 1 Cal. 3d 431, 462 P.2d 22, 82 Cal. Rptr. 494 (1969).

63. *Cf.* People v. Sears, 62 Cal. 2d 737, 401 P.2d 938, 44 Cal. Rptr. 330 (1965).

64. *Cf.* State v. Miniefield, 110 Ariz. 599, 522 P.2d 25 (1974).

performed with an independent felonious purpose. Despite this line of authority supporting both the independent felonious purpose and ingredient merger tests,[65] the Arizona supreme court invoked the felony-murder rule in *Miniefield*[66] without thoroughly analyzing the potential applicability of such concepts to the facts before it.

Merger Considerations in State v. Miniefield

In *Miniefield* the Arizona supreme court found that the arson committed by Miniefield did not merge into the resulting homicide.[67] In reaching this conclusion, although the court discussed and impliedly approved of the *State v. Fisher*[68] merger doctrine exempting ingredient felonies from the operation of the felony-murder rule,[69] it did not turn to *Fisher* for its test of merger.[70] Instead, the court used the "practical test" of merger first enunciated in *State v. Mitchell*[71] and later followed in *State v. Mendoza*.[72] According to *Mitchell*, the practical test involves eliminating the elements in one charge and determining whether the facts left would support the other charge.[73] Applying this test in *Mendoza*, the court held that for punishment purposes the crime of assault with a deadly weapon merged into the crime of first-degree rape.[74] By eliminating the elements of the assault with a deadly wea-

65. In addition to limiting the felony-murder rule through these more traditional merger concepts, California courts have held that the rule cannot be invoked unless the felony underlying the homicide is inherently dangerous to human life. People v. Williams, 63 Cal. 2d 452, 457-58 & n.4, 406 P.2d 647, 649-50 & n.4, 47 Cal. Rptr. 7, 9-10 & n.4 (1965) (second-degree felony-murder conviction reversed since the underlying felony of conspiracy to possess methedrine was not "inherently dangerous" and since the felon would "not anticipate that any injury or death might arise solely from the fact that he will commit the felony"); *accord*, People v. Phillips, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966). This exemption from the felony-murder rule for felonies that are not inherently dangerous applies only to second-degree felony-murder. *See* People v. Nichols, 3 Cal. 3d 150, 162-63, 474 P.2d 673, 681, 89 Cal. Rptr. 721, 729 (1970). It is of little significance in Arizona since second-degree felony-murder is not recognized, and the felonies to which the rule applies are specifically enumerated. *See* discussion note 37 *supra*.

66. State v. Miniefield, 110 Ariz. 599, 522 P.2d 25 (1974).

67. *Id.* at 602, 522 P.2d at 28.

68. 120 Kan. 226, 243 P. 291 (1926).

69. The court stated, "The Kansas decision [*Fisher*] is in harmony with our holding in State v. Mendoza . . . ." 110 Ariz. at 601, 522 P.2d at 27.

70. Despite the amorphous nature of *Fisher*'s ingredient test of merger, see text accompanying notes 52-54 *supra*, the arson committed by Miniefield might well have merged into the homicide under that test. In *Fisher* it was the single act of assault that both caused the homicide and invoked the felony-murder rule. Similarly, in *Miniefield* it was the single act of arson that both caused the homicide and invoked the felony-murder rule. In People v. Burton, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971), the California supreme court recognized that an unrestricted included-in-fact test, which appears to be no broader than the *Fisher* test, *see* People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); text accompanying notes 56-58 *supra*, could lead to merger even if a homicide resulted from one of the felonies itemized in a state's felony-murder statute. See text accompanying note 58 *supra*.

71. 106 Ariz. 492, 478 P.2d 517 (1970).

72. 107 Ariz. 51, 481 P.2d 844 (1971).

73. 106 Ariz. at 495, 478 P.2d at 520.

74. 107 Ariz. at 56, 481 P.2d at 849.

pon, defendant's use of a weapon would no longer be available to establish the element of force necessary for a first-degree rape charge; the remaining facts would support only a charge of second-degree rape. Consequently, the defendant could not be punished for both assault with a deadly weapon and first-degree rape since his use of a weapon, a single act, could not be used to establish a necessary element of both offenses.

Until the *Miniefield* decision, the practical test had been applied only to determine whether a defendant could properly be prosecuted or punished for multiple crimes stemming from the same act.[75] If the crimes merged under the practical test, the defendant could be prosecuted and punished for only one of the crimes. Similarly, the Arizona merger cases cited in *Miniefield* were multiple punishment merger cases, not felony-murder merger cases.[76] While this fact in and of itself would not prohibit the practical test from being extended to the context of felony-murder, the test, if properly interpreted by the *Miniefield* court, appears inappropriate in that context since it fails to maintain the distinction between manslaughter and murder.

Purporting to apply the practical test, the *Miniefield* court rested its refusal to find merger on the fact that it was "dealing with separate offenses whose elements are different . . . ."[77] Thus, the court focused on the elements of the two offenses and suggested that if the elements are not identical, application of the felony-murder rule is permissible. If this was a proper interpretation of the practical test, the test seemingly will never preclude use of the felony-murder rule through merger when one of the statutorily-enumerated felonies is involved.[78] That is, when the common elements of any felony and the resulting homicide are eliminated, there will always remain a dead victim. This by itself apparently was sufficient in the *Miniefield* court's mind to support application of the felony-murder rule. This construction of the

75. *See generally* "Double Jeopardy, Multiple Punishment, and the Criminality of Crime While on Bail," 17 ARIZ. L. REV. 639, 757 (1975); "Multiple Punishment and Double Jeopardy," 14 ARIZ. L. REV. 409, 513 (1972).

76. In State v. Mays, 108 Ariz. 172, 494 P.2d 368 (1972), the Arizona supreme court set aside the defendant's conviction and sentence for assault, holding that the crime merged into the robbery for which the defendant had been convicted and sentenced. In State v. Clayton, 109 Ariz. 587, 514 P.2d 720 (1973), although the court held under the practical test that a defendant could be punished both for first-degree felony-murder by burglary and for the underlying burglary offense, the test was not used to determine whether the felony merged into the resulting homicide for the purpose of prosecution under the felony-murder rule. For a discussion of the other case cited by the *Miniefield* court, State v. Mendoza, 107 Ariz. 51, 481 P.2d 844 (1971), see text accompanying note 74 *supra*.

77. 110 Ariz. at 602, 522 P.2d at 28.

78. Additionally, if the *Miniefield* court's interpretation of the practical test was correct, the result reached in State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965), would be facially inconsistent. See discussion note 86 *infra*.

practical test renders the ingredient exception to the felony-murder rule's applicability illusory, despite the court's formal recognition of that exception.[79] In effect, the court may have been indicating that the Arizona statute has limited felony-murder to those felonies for which merger is inappropriate.

Regardless of whether the practical test is suitable for determining felony-murder merger issues, the court's analysis under that test is open to question. Instead of comparing the elements of what are admittedly different offenses, as the *Miniefield* court did, the practical test seemingly should focus on whether the same act is needed to establish an element of both offenses, rather than whether the elements of the various offenses are identical.[80] If this same-act analysis is a valid interpretation of the practical test, the arson felony should have merged into the homicide in *Miniefield.* Under this approach, the fact remaining after eliminating the elements of arson—a dead body—would not support a felony-murder charge since there would be no facts left to establish that the death occurred in the perpetration of a felony. That is, after eliminating the elements of the underlying felony, there would be no facts left to establish the elements of that same felony for purposes of proving the felony-murder. This application would strongly resemble the ingredient test used in other states.[81]

This interpretation of the practical test, despite its literal appeal, probably is not warranted in the felony-murder context. Although it cures the defect of the *Miniefield* court's element analysis by recognizing an ingredient exception to the felony-murder rule and thereby maintaining the distinctions between murder and manslaughter, it suffers from the problem of being overly broad.[82] Under this interpretation, the effectiveness of the rule would be eviscerated since the same act will always be needed both to establish the elements of the underlying felony itself and to trigger the felony-murder rule.[83] Additionally, acceptance

79. See text accompanying notes 68-69 *supra.*

80. *See* "Double Jeopardy, Multiple Punishment, and the Criminality of Crime While on Bail," *supra* note 75, at 765-67.

81. See text & notes 51-56 *supra.* The operation of the ingredient test in California has been described as follows: "[t]he court looked at the particular facts of the homicide, and not merely at the label, in deciding whether the felony was included in fact within the murder charge." Comment, *supra* note 4, at 268.

82. In this respect, this interpretation of the practical test is plagued by the same deficiency as California's included-in-fact merger test. See text & note 58 *supra.*

83. It is possible, however, to interpret this form of the practical test somewhat differently in order to preserve the efficacy of the felony-murder rule. Such an interpretation would allow merger only when it is impossible to separately prove the elements of murder and the elements of the underlying felony. Thus, if an armed gunman, in the course of robbing a convenience store, fatally shoots the attendant or a customer, it would be technically possible to prove the shooting without having to prove the elements of the robbery. On the other hand, in a case such as *Miniefield,* it would not be possible to prove that defendant killed the victim without in the process proving that he set fire to the house, the latter act being an essential element of the murder.

of this interpretation of the practical test would be inconsistent with the *Miniefield* court's view of the rule's utility and purpose.[84] In order to retain the viability of the rule while still avoiding automatic disregard of the distinctions between murder and manslaughter in all first-degree felony-murder cases, the practical test should either be reinterpreted or a new merger test adopted.

Adoption of the independent felonious purpose test is one possible alternative. The *Miniefield* court rejected this test on the ground that the felony-murder statute[85] contains no such qualification.[86] If that test had been used, the arson committed by Miniefield may well have merged into the homicide,[87] thereby foreclosing operation of

84. As the *Miniefield* court stated:

> The legislature has deemed such crimes as murder by poison, murder by torture, murder by lying in wait and murder committed in the perpetration of certain other felonies so heinous and committed with such a wanton disregard for human life that there is no need to prove the elements usually necessary for a conviction of first-degree murder. This is the purpose and the theory behind the felony-murder rule.

110 Ariz. at 602, 522 P.2d at 28. Although this language actually describes the effect rather than the purpose of the rule, such words as "heinous" and "wanton disregard for human life" may suggest that punishment is the primary goal behind the felony-murder rule in Arizona. There is some support for the court's suggestion that the legislature intended to look to the manner of killing in determining the appropriate punishment for a homicide. In Eytinge v. Territory, 12 Ariz. 131, 100 P. 443 (1909), the court expressed a belief that the legislature intended to differentiate between poison "*as an instrument* of murder and other instruments" of murder. *Id.* at 141, 100 P. at 446 (emphasis added). The case has never been criticized by the court. If punishment is the primary function of the felony-murder rule in Arizona, that function arguably would be promoted if the rule were applied to *any* felony-related homicide deemed particularly heinous or performed with a wanton disregard for human life, even if that felony would merge into the homicide under one of the merger tests already discussed. In contrast, California's justification for the felony-murder rule is based on the goal of deterrence of a specific type of crime. *See* text & note 61 *supra*.

85. ARIZ. REV. STAT. ANN. § 13-452 (Supp. Pamphlet 1973).

86. 110 Ariz. at 602, 522 P.2d at 28. Although the *Miniefield* court summarily discarded the possibility of adopting an independent felonious purpose test, recognition of that exception to the felony-murder rule's application may not have been a drastic change in Arizona law. In State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965), the court held that the underlying offense of assault with a deadly weapon merged with the resultant homicide, thereby foreclosing operation of the felony-murder rule. Although the court did not clearly state the proper test to be used for determining whether a particular underlying felony should be merged with the homicide, it did cite with favor New York's felony-murder merger doctrine and a New York case where assault was merged with the resulting homicide. People v. Hüter, 184 N.Y. 237, 77 N.E. 6 (1906). *Hüter* established an independent felonious design test whereby the felony-murder rule applied only if the act causing death was committed while the defendant had a felonious purpose other than causing the death of the victim. *Id.* at 244, 77 N.E. at 9. This merger doctrine is substantially the same as that of California announced in People v. Burton, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971). See Comment, *supra* note 4, at 271. Despite this available authority for the independent felonious purpose test, the *Miniefield* court failed to mention or cite *Essman* or any cases recognizing that test.

87. *See* People v. Mattison, 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971) (act of poisoning would have merged into the resulting homicide had the act been performed solely to cause the victim's death).

The Arizona supreme court summarized Miniefield's defense in this manner: "the arson was coincidentally committed as one of several attempts to murder Mr. Carr . . . . [T]he arson was merely the use of fire to attempt to kill the victim . . . ." 110 Ariz. at 601, 522 P.2d at 27. Despite recognizing this assertion of no independent felonious

the felony-murder rule.[88] At least arguably, the sole purpose of Miniefield's acts was to kill Carr.[89] In light of the court's refusal to adopt the independent felonious purpose test, if the court continues to interpret the practical test in the same manner as in *Miniefield*, the doctrine of merger has been all but expressly obliterated in cases of first-degree felony-murder in Arizona. As a result, the distinctions between murder and manslaughter will be of no avail to a defendant in such cases.

Conclusion

In *State v. Miniefield* the Arizona supreme court upheld a felony-murder conviction based on the underlying felony of arson. In so doing, the court applied a merger test which had never before been used in the felony-murder context. If this new test—the practical test—survives in the form molded by the *Miniefield* court, possibilities of merger will be virtually eliminated in first-degree felony-murder cases in Arizona. In order to avoid automatic disregard of the distinctions between murder and manslaughter and between first and second-degree murder in such cases, the *Miniefield* approach to felony-murder merger should be reconsidered and modified.

---

purpose, the court focused instead on the ingredient test of State v. Fisher, 120 Kan. 226, 243 P. 291 (1926), and the practical test of State v. Mendoza, 107 Ariz. 51, 481 P.2d 844 (1971), in resolving the merger issue.

88. This probable result under the independent felonious purpose test may appear anomalous since the felony-murder rule would apply if Miniefield had killed accidentally while attempting to burn Carr's house, but would not apply if he had killed intentionally without desiring to burn the house itself. On the other hand, this result may be reconciled with the announced goal behind the felony-murder rule which led to California's adoption of the independent felonious purpose test—to deter felons from killing negligently or accidentally. *See* text & note 61 *supra*. Arguably, the felony-murder rule would have little deterrent effect on a defendant who intends to kill his victim, since there would be no incentive to perform the underlying felony "more carefully." *See* Comment, *supra* note 4, at 258 n.41. In contrast, the rule may have a deterrent effect on one who intends to commit a felony other than causing the victim's death. People v. Mattison, 4 Cal. 3d 177, 185, 481 P.2d 193, 198-99, 93 Cal. Rptr. 185, 190-91 (1971).

89. It probably would have made no difference under the independent felonious purpose test that the homicide victim in *Miniefield* was Carr's daughter rather than Carr himself. *See* People v. Sears, 2 Cal. 3d 180, 465 P.2d 847, 84 Cal. Rptr. 711 (1970); Comment, *supra* note 4 at 267. In *Sears*, the defendant entered his wife's apartment to assault her and killed his stepdaughter when the stepdaughter tried to intervene in the assault upon the wife. The state argued that the nonfatal assault on the wife was a felony that would support a felony-murder charge in the prosecution for the killing of the stepdaughter. *Id.* at 188, 465 P.2d at 852, 84 Cal. Rptr. at 716. The California supreme court applied the principle of transferred intent and reversed the conviction on the ground that the first assault was not independent of the homicide. The court said, "It would be anomalous to place the person who intends to attack one person and kills another inadvertently in a worse position than the person who from the outset intended to attack both persons and killed one or both." *Id.* at 189, 465 P.2d at 852, 84 Cal. Rptr. at 716.

VI. EVIDENCE

A. STANDARDS FOR THE ADMISSION OF EVIDENCE AT SENTENCING

Sentencing is a critical stage in the criminal process for both the defendant and the state.[1] By ensuring that an appropriate sentence is imposed, the state protects the interests of justice and potential rehabilitation.[2] However, a trial judge's observations and conclusions frequently do not provide sufficient knowledge of the defendant to permit informed imposition of sentence.[3] Conviction alone cannot indicate the most appropriate sentence since it does not advise the court of collateral matters relevant to sentencing policies.[4] To discover additional facts, the court orders a presentence report.[5] Contents of the report generally include the circumstances of the crime, the defendant's criminal record, and an evaluation of character and family background.[6] Because of its

1. Mempa v. Rhay, 389 U.S. 128 (1967), established that a combined sentencing and probation revocation hearing is a critical stage of the criminal process for the purposes of the right to counsel. Gagnon v. Scarpelli, 411 U.S. 778 (1973), subsequently held that there was no right to counsel at a probation revocation hearing alone. Although the Supreme Court has not held sentencing to be a critical stage of the criminal process, these decisions permit that inference. See discussion note 71 *infra*.

2. Sentencing has several possible objectives: the specific deterrence of the individual criminal, the more general deterrence of other potential criminals through the impact of example, retribution, and rehabilitation of the individual. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT § 1 (2d ed. 1972) [hereinafter cited as MODEL SENTENCING ACT]; Cooper, *The Prosecutor's Role in California Sentencing: Advocate or Informant?*, 20 U.C.L.A.L. REV. 1379, 1381-84 (1973).

3. Pleas of guilty, the most frequent basis for conviction, afford the court no real information to assist in this determination. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 1-2 (Approved Draft, 1968); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

4. MODEL SENTENCING ACT, *supra* note 2, § 2; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 144 (1967); *cf.* State v. Smith, 66 Ariz. 376, 381, 189 P.2d 205, 208-09 (1948).

5. State v. Scanlon, 104 Ariz. 187, 192, 450 P.2d 377, 382 (1969); ARIZ. R. CRIM. P. 26.4; ARIZONA STATE BAR COMM. ON CRIMINAL LAW, ARIZONA PROPOSED RULES OF CRIMINAL PROCEDURE, rule 29.4(a) (1972) [hereinafter cited as PROPOSED RULES].

6. *See* Williams v. New York, 337 U.S. 241 n.15 (1969); FED. R. CRIM. P. 32(c)(2); PROPOSED RULES, *supra* note 5, rule 29.4(b). The defendant is often allowed to verify this information by examining portions of the report. *See* State v. Pierce, 108 Ariz. 174, 494 P.2d 696 (1972); ARIZ. R. CRIM. P. 26.6. Even where disclosure of the presentence report is permitted, however, most authorities would allow the accused or his attorney only to inspect the factual contents which are adverse to his interests. *See* United States v. Perri, 513 F.2d 572 (9th Cir. 1975); ABA PROJECT ON MINIMUM

fundamental importance in determining the nature and length of the defendant's sentence and its potential use by other agencies,[7] the information in the report should be limited to that which is indicative of the relevant characteristics of the defendant and is as accurate as possible.

In seeking and accepting information to assist in the sentencing process, the court has wide discretion. In order to implement the concept of individualized sentencing,[8] the judge is afforded a broad range of possible terms.[9] The court strives to match the sentence to the particular criminal as well as the particular crime by examining evidence of matters in addition to the crime charged. Thus, the court's discretion in fixing sentence is served by its discretion in admitting evidence. Three recent Arizona decisions have amplified this latter discretion by upholding the admission at sentencing of several kinds of questionable evidence.

In *State v. Jones*,[10] the appellant was convicted of burglary and first-degree rape. The sentencing judge examined a presentence report which included two items to which the appellant objected: a confession obtained by a probation officer in the course of preparation of the report, and the results of a polygraph examination concerning an unrelated rape. Jones was sentenced to 9 to 15 years' imprisonment for burglary and 99 to 100 years for rape. On appeal the convictions and sentences were upheld. Relying on the axiom that the rules of evidence are not applicable at sentencing,[11] the Supreme Court of Arizona held that there was no prejudicial error in the use of the confession and polygraph evidence.[12] The court rejected the appellant's contention that the admission of his confession at the sentencing hearing was a violation of his right to remain silent.[13]

STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 4.4 (Approved Draft, 1968) [hereinafter cited as SENTENCING ALTERNATIVES]; ALI MODEL PENAL CODE § 7.07(5) (Proposed Final Draft No. 1, 1961). The value of even limited disclosure is a matter of controversy. For a discussion of the merits of disclosure, see United States v. Dockery, 447 F.2d 1178, 1186 (D.C. Cir. 1971) (Wright, J., dissenting); PROPOSED RULES, *supra* note 5, rule 29.6; "Disclosure of the Presentence Report," 11 ARIZ. L. REV. 551, 588 (1969).

7. The presentence report may be used by any of the corrections authorities. MODEL SENTENCING ACT, *supra* note 2, § 3; SENTENCING ALTERNATIVES, *supra* note 6, § 4.3(b); ALI MODEL PENAL CODE, *supra* note 6, § 7.07(7).

8. *See* Williams v. New York, 337 U.S. 241, 247 (1949); "Appellate Review of Sentences," 14 ARIZ. L. REV. 409, 477, 485-87 (1972). *See generally* Comment, *The Emergence of Individualized Sentencing*, 45 TEMPLE L.Q. 351 (1972).

9. For example, burglary in the nighttime may be punished by 1 to 15 years' imprisonment. *See* ARIZ. REV. STAT. ANN. § 13-302 (Supp. 1975). Rape may be punished by a life sentence or any term not less than 5 years. *See* ARIZ. REV. STAT. ANN. § 13-614 (Supp. Pamphlet 1973). *See generally* Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 4, 6 (1972).

10. 110 Ariz. 546, 521 P.2d 978 (1974).

11. *See* Williams v. New York, 337 U.S. 241 (1949); State v. Levice, 59 Ariz. 472, 130 P.2d 53 (1942).

12. 110 Ariz. at 551, 521 P.2d at 983.

13. The defendant asserted that the use of his confession in the absence of proper

Shortly before the *Jones* decision the Arizona court of appeals held that a sentencing judge could properly consider allegations of criminal acts which resulted in neither prosecution nor conviction. In *State v. Dixon*,[14] the appellant entered a guilty plea to a charge of exhibiting a deadly weapon other than in self-defense. The sentencing judge had before him a list of the appellant's prior police contacts.[15] At the objection of the defense, the judge said he would not consider that portion of the report in his decision. Dixon withdrew his plea, but later reentered a guilty plea. A second judge, contemplating the same presentence report without disclaiming reliance on the challenged parts, sentenced Dixon to not less than 4 nor more than 5 years' imprisonment. The judgment was affirmed, the court of appeals holding that consideration of prior police contacts where no criminal conduct was formally charged or proven did not require reversal of sentence.

Both *Jones* and *Dixon* rested in part on the authority of *State v. Benge*.[16] In that case, the appellants were convicted of possession of marijuana for sale, and transportation of marijuana. At sentencing the court admitted evidence which had been suppressed at trial because it was taken in an illegal search of a "stash house." On appeal the Arizona supreme court determined that there was no error in the admission of the illegally seized evidence at the sentencing hearing,[17] holding that reliable evidence, regardless of how obtained, may be considered.[18]

Jones, Dixon, and *Benge* allow Arizona courts to consider three forms of questionable evidence during sentencing proceedings. First, evidence obtained in violation of constitutional rights has been admitted. Additionally, results of scientific tests of disputed reliability have been accepted. Finally, proof of criminal activity involving neither arrest nor conviction has been considered. These kinds of evidence are not ordinarily admissible at trial except for restricted purposes and under limited circumstances.[19] This analysis will consider the constitutional

warnings violated both his right to remain silent and his right to counsel. Brief for Appellant at 55-61, State v. Jones, 110 Ariz. 546, 521 P.2d 978 (1974).

14. 21 Ariz. App. 517, 521 P.2d 148 (1974).

15. The list included "six traffic violations, two instances of giving false information to police officers, a commitment to Fort Grant as a juvenile, and a description of some 13 incidents in which either no charges were filed or the complaints had been withdrawn." 21 Ariz. App. at 518, 521 P.2d at 149.

16. 110 Ariz. 473, 520 P.2d 843 (1974).

17. The court affirmed the convictions for transportation, but vacated on other grounds the convictions for possession. 110 Ariz. at 479, 520 P.2d at 849.

18. The decision left some uncertainty about the application of the exclusionary rule at sentencing. It is possible that if an improper motive to influence the sentencing judge can be shown to have prompted the illegal search, the evidence will not be admitted. See text accompanying notes 44-62 *infra*.

19. For example, Weeks v. United States, 232 U.S. 383 (1914), held that in federal courts evidence obtained in violation of the fourth amendment is not admissible at trial.

and judicial standards for the admission of evidence at sentencing. The three types of evidence will then be examined in light of those guidelines and the policies they enforce.

Policies Requiring Exclusion of Evidence

Evidence is excluded from trial for essentially three reasons. If the information does not tend to prove a material fact in issue, it is irrelevant.[20] If it does not have sufficient probative value to warrant consideration, although relevant to a material fact in issue, it is unreliable.[21] If the information or the manner in which it was obtained violates a right or principle, its admission contravenes a policy.[22]

These judicial standards of proof are not always observed in the admission of evidence at sentencing. The relevancy criterion is not of great significance since virtually all evidence is relevant to the sentencing decision. Once guilt has been established, all available information is sought to aid the court in determining the most appropriate sentence.[23] Almost every aspect of the defendant's past and present circumstances will have a bearing on the court's evaluation of his character and thereby on the sentence he should receive. The reliability and policy standards raise more difficult questions concerning their application at sentencing. The objectionable impact of unreliable evidence is lessened by the transition from trial to sentencing because the sentencing judge is less likely to be distracted or prejudiced by unreliable evidence than the trial jury would be.[24] Nevertheless, the evidence lacks the desired degree of certainty, and the mere presence of such evidence is likely to have some impact on the judge's consideration. The constitutional safeguards on

Walder v. United States, 347 U.S. 62 (1954), created an exception to the rule. Where the defendant testified on direct examination that he had never possessed any narcotics, the Court permitted the state to impeach his testimony with illegally seized evidence suppressed in a prior trial of the defendant. The Court considered the defendant's sweeping denial an affirmative assertion about matters collateral to the issue of guilt, which would allow the prosecution to introduce the evidence. *See The Supreme Court, 1953 Term*, 68 HARV. L. REV. 96, 113-16 (1954).

20. ARIZONA STATE BAR COMM. ON CIVIL PRACTICE AND PROCEDURE, ARIZONA PROPOSED RULES OF EVIDENCE, rules 401, 403 (1975); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 184-85 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; M. UDALL, ARIZONA LAW OF EVIDENCE § 111 (1960); 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 9 (1940).

21. State v. McGee, 91 Ariz. 101, 370 P.2d 261, *cert. denied*, 371 U.S. 844 (1962) (lie detectors not established as scientifically accurate); State v. Thomas, 79 Ariz. 158, 285 P.2d 612, *cert. denied*, 350 U.S. 950 (1956) (truth serum not established as scientifically accurate). *See* M. UDALL, *supra* note 20, § 135.

22. *See* MCCORMICK, *supra* note 20, § 72.

23. *See* cases and materials cited note 8 *supra*. The New York statute involved in Williams v. New York, 337 U.S. 241 (1949), encouraged the sentencing judge to "consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities." *Id.* at 245.

24. At trial, however, the admissibility of evidence is not changed by the presence of a judge as opposed to a jury; unreliable evidence is no more acceptable in a trial before a judge than in a trial before a jury.

which exclusion of illegally obtained evidence from trial is based may militate toward excluding the evidence from sentencing as well, depending upon whether suppression at sentencing would serve the policies which mandate exclusion from trial.

Due Process Considerations Affecting the Admission of Evidence at Sentencing

Since 1948, Supreme Court opinions have indicated that a person has the right to be sentenced on the basis of accurate information. In *Townsend v. Burke*[25] the absence of counsel coupled with the sentencing judge's reliance on an incorrect statement of the defendant's criminal record was found to constitute a deprivation of due process. The sentencing judge based his decision on previous felony convictions attributed to the defendant who in fact had been acquitted in two cases.[26] The *Townsend* holding was based on two elements: the lack of counsel[27] and the judge's express reliance on materially false information. The Court stated that while factual error alone would not have required reversal of sentence, this combination of factors did.[28] The

25. 334 U.S. 736 (1948).
26. *Id.* at 739-40.
27. "In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner." *Id.* at 741.
28. *Id.* However, express consideration of constitutionally invalid convictions has been held grounds for reversal of sentence. In United States v. Tucker, 404 U.S. 443 (1972), the petitioner had been convicted of armed bank robbery. At his sentencing the district judge gave explicit attention to three prior felony convictions which the petitioner had acknowledged at trial. Because of this record, Tucker was sentenced to the statutory maximum term of imprisonment. Several years later two of the convictions were demonstrated to be constitutionally invalid because Tucker had been denied his right to the assistance of counsel. The United States Supreme Court affirmed the decision of the Ninth Circuit to reverse and remand for resentencing, holding that convictions declared invalid because of denial of the right to counsel cannot be used to support guilt or enhance punishment. The accuracy of the original conviction was not material; rather, fundamental constitutional considerations barred its use against a defendant at sentencing or subsequent trial.

Where the court has indicated confusion concerning the defendant's criminal record, despite attempts by the defendant to correct it, the sentence may be reversed. United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970). If the court accepts the defendant's corrections or recognizes errors in the record, however, the sentence will be upheld. *See* United States v. Summerville, 477 F.2d 393 (5th Cir. 1973); United States v. Jones, 473 F.2d 293 (5th Cir.), *cert. denied*, 411 U.S. 984 (1973); United States v. Battle, 467 F.2d 569 (5th Cir. 1972). Where the court considers a conviction which was reversed on appeal, there is no error if the sentencing judge acknowledges his awareness of the reversal. An invalid conviction, reversed on other than constitutional grounds, does not immunize the facts underlying it from the court's consideration. *See* United States v. Atkins, 480 F.2d 1223 (9th Cir. 1973). Further, an appellate court in reviewing the sentence will not consider the influence of the defendant's criminal record where the sentencing court has expressed its awareness of that record but disclaimed reliance on it. *See, e.g.*, Dukes v. United States, 492 F.2d 1187 (9th Cir. 1974); United States v. Eidum, 474 F.2d 581 (9th Cir. 1973); State v. Scanlon, 104 Ariz. 187, 450 P.2d 377 (1969).

decision suggested that the objective was a complete and fair hearing and that the presence of counsel would contribute to that end.[29]

The limits of due process considerations at sentencing were further defined in *Williams v. New York*.[30] Petitioner Williams had objected to the judge's consideration of his previous criminal activities, as reported by a probation officer in a presentence report, in determining that the death penalty should be imposed. He did not challenge the accuracy of the information,[31] but alleged that he was denied his due process right to confront and cross-examine witnesses.[32] The Court affirmed the sentence and stated that the information necessary to the intelligent imposition of sentence could not be confined to that given in open court; rules of evidence were not applicable to sentencing.[33] The Court noted that Williams had made no attempt to refute the report's contents and had not suggested that they were false.[34] Thus, the issue of reliability of the evidence was not before the Court and the decision only addressed the extent to which the right to confrontation and cross-examination barred the use of irrelevant or hearsay evidence at sentencing. The Court stressed the importance of prescribing a punishment which fits the offender and not merely the crime, noting that the sentencing judge, unlike the jury, is not confined to the narrow issue of guilt of the crime charged.[35]

Ten years later *Williams v. Oklahoma*[36] redefined the scope of sentencing due process in broader terms. The petitioner, who had previously been convicted of murder and sentenced to life imprisonment, was convicted of a kidnap charge arising from the same incident.[37] At the sentencing hearing, the state's attorney made an unsworn statement containing gruesome details of the murder and of the petitioner's past criminal record.[38] As a result, Williams received the death penalty. The Supreme Court reaffirmed the position taken in *Williams v. New York* that a sentencing judge may consider reliable

29. The right to counsel at the sentencing stage, first intimated in *Townsend*, was firmly established by Mempa v. Rhay, 389 U.S. 128 (1967). The defendant appeared at a combined sentencing and probation revocation hearing without counsel. His probation was revoked and sentence imposed on the basis of the uncorroborated charges of his probation officer. The Court reiterated the significance of counsel at such proceedings and noted that an attorney could contribute to the accuracy of the process by challenging such charges. *Id.* at 137.

30. 337 U.S. 241 (1949).

31. *Id.* at 251.

32. *Id.* at 243.

33. *Id.* at 250; *see* Note, *Procedural Due Process at Judicial Sentencing for Felony Convictions*, 81 HARV. L. REV. 821, 826-27 (1968).

34. 337 U.S. at 247.

35. *Id.* at 241, 247.

36. 358 U.S. 576 (1959).

37. *Id.* at 578.

38. *Id.* at 579-80.

unsworn or out-of-court information relative to the convicted person's life and characteristics and the circumstances of the crime.[39] The Court described the memorandum as responsible and in so doing discussed its reliability as a factor distinct from its accuracy.[40] The prosecutor's memorandum was accepted as a reliable source of information. It is likely that the prosecutor's familiarity with the investigation and trial of a case was felt to render him uniquely able to inform the court of the details of a crime.

These Supreme Court decisions suggest that although the constitutional right to counsel is recognized at sentencing, the admission of evidence of prior criminal activities which would be unacceptable at trial does not violate due process. A court's broad discretion in fixing sentence necessitates an equally expansive discretion to accept and consider evidence.

Evidence Obtained by Constitutionally Impermissible Methods

In *State v. Benge* evidence seized in an illegal search of a "stash house" was admitted at the defendant's sentencing hearing.[41] Similarly, in *State v. Jones,* the defendant's statements made to a probation officer in an interview after his conviction were admitted at his sentencing hearing.[42] Jones had not been advised of possible fifth and sixth amendment rights.[43] In these decisions the Arizona supreme court considered the extent to which the exclusionary rules of the fourth and fifth amendments operate at sentencing.

Unconstitutionally Seized Evidence. The function of the fourth amendment exclusionary rule at sentencing is not clear.[44] The Ninth Circuit in *Verdugo v. United States*[45] used the rule to bar admission at sentencing of evidence illegally seized in a search of the defendant's home immediately after his arrest. The *Verdugo* majority recognized that one purpose of the rule was deterrence of fourth amendment violations by the police.[46] The exclusionary rule is thought to eliminate the motive for this kind of activity by effectively precluding convictions based on evidence obtained in an illegal search. Extending this policy,

39. *Id.* at 584.
40. The opinion did not question the substance of the report. In using the word "responsible," the Court instead considered the source of the information. *Id.*
41. 110 Ariz. 473, 479, 520 P.2d 843, 849 (1974).
42. 110 Ariz. 546, 551, 521 P.2d 978, 983 (1974).
43. Brief for Appellant at 53-54, State v. Jones, 110 Ariz. 546, 521 P.2d 978 (1974).
44. Verdugo v. United States, 402 F.2d 599, 611 (9th Cir. 1968); *see* Note, *Application of the Exclusionary Rule at Sentencing,* 57 VA. L. REV. 1255 (1971).
45. 402 F.2d 599 (9th Cir. 1968).
46. *Id.* at 611-12. *See also* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 413 (1966); Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CALIF. L. REV. 929, 951 (1965); McKay, *Mapp v. Ohio: The Exclusionary Rule and the Right of Privacy,* 15 ARIZ. L. REV. 327 (1973).

the *Verdugo* court discerned the possibility that an improper police search might be motivated solely by an intent to influence sentencing, particularly in specialized areas of police work such as narcotics.[47] The court, however, did not base its decision entirely on this rationale. The majority was satisfied that exclusion was "required in this case upon any of the possible grounds for the rule."[48] Despite a vigorous dissent, the *Verdugo* court held that in order to effect the underlying purposes of the exclusionary rule, illegally seized evidence must be excluded at sentencing as well as at trial.[49]

The Second Circuit limited *Verdugo* to cases in which the improper search is motivated by a desire to influence sentencing in *United States v. Schipani.*[50] In *Schipani* the accused had been sentenced on the basis of wiretap evidence suppressed at his trial for income tax evasion. The court, reasoning that *Verdugo* was a limited exception founded on the specific sentence enhancement motive present in that case, held that sufficient deterrence normally would flow from exclusion at trial.[51] The intent to aggravate punishment must therefore be specifically demonstrated, a violation of fourth amendment rights alone not being sufficient to command the exclusion of evidence from sentencing.

Presented with this issue in *State v. Benge,*[52] the Arizona supreme court held that consideration by the sentencing judge of illegally seized evidence excluded from trial was not error. Finding that the dissent in *Verdugo,* rather than the majority opinion, comported with the United States Supreme Court decisions in *Williams v. New York* and *Williams v. Oklahoma,* the Arizona court elected to follow the dissent.[53] However, the court also quoted that portion of *Schipani* which recognized the validity of the *Verdugo* majority opinion as to its particular facts.[54] The

47. 402 F.2d at 612.

48. *Id.* at 611. The court stated that the reasons for the exclusionary rule were not clear, and in considering the evidence used against Verdugo discussed only the deterrence rationale.

49. *Id.* In a separate opinion, Judge Browning addressed additional issues. He argued that due process required disclosure of the presentence report to the defendant. Judge Browning also contended that the exclusionary rule was a protection of the privilege against compelled self-incrimination as well as judicial integrity; exclusion of the illegally seized evidence was required without reference to any deterrence rationale. *Id.* at 613. Judge Byrne, dissenting, rejected the rationale of both the majority and separate opinions. *See* discussion note 53 *infra.*

50. 435 F.2d 26 (2d Cir. 1971).

51. *Id.* at 28.

52. 110 Ariz. 473, 520 P.2d 843 (1974).

53. In dissenting to *Verdugo,* Judge Byrne contended that the exclusionary rule had no application at sentencing. He felt that illegally seized evidence was more reliable than that accepted in *Williams v. New York,* and would therefore meet Supreme Court standards. The dissent distinguished the goals and procedures of the sentencing process from those of trial and argued that the type of fourth amendment right involved had no relation to the underlying principle of informed imposition of sentence. 402 F.2d at 617.

54. 110 Ariz. at 480, 520 P.2d at 850. See text accompanying notes 50-51 *supra.*

dissent in *Verdugo* had contended that there was no reason to limit a sentencing judge's inquiry with the search and seizure protections,[55] whereas *Schipani* permitted at least a narrow application of the rule. There is thus apparent conflict between the scope of the exception in the two authorities cited. Although the Arizona court did not indicate which direction it would pursue, it did clearly repudiate the broader interpretation of *Verdugo* as establishing a blanket exclusionary rule.

There are similar exceptions to the fourth amendment exclusionary rule in other criminal proceedings. In *Walder v. United States*,[56] where the defendant testified on direct examination at trial that he had never possessed any narcotics, the United States Supreme Court held that the state could impeach that testimony with illegally seized evidence suppressed in a prior prosecution. The Court reasoned that the defendant's sweeping denial exceeded his right to refute the charges made against him,[57] and therefore allowed the state to challenge his credibility with the illegally obtained evidence to ensure the accuracy of the proceeding. *Costello v. United States*[58] allowed a grand jury indictment to stand, although the jury had considered evidence gathered in violation of the fourth amendment, in order to preserve the nature of such proceedings. In these two circumstances, the illegal procurement of the evidence did not bar its use.

The Arizona supreme court adopted a narrow view of the functions which the fourth amendment exclusionary rule serves and retained the sentencing judge's broad inquiry when it rejected the majority position of *Verdugo*.[59] Evidence is to be refused at most only where it can be shown that the police misconduct was intended to have a direct effect on sentencing. Deterrence of law enforcement officers, however, is not the only objective of the exclusionary rule.[60] By excluding the evidence,

55. See discussion note 53 *supra*. Judge Byrne suggested that even if the fourth amendment exclusionary rule were found to apply to sentencing, its operation could be effectively subverted by a probation officer's use of the information in a presentence report without identifying the source of the information. 402 F.2d at 617 (dissenting opinion). However, the Ninth Circuit in United States v. Weston, 448 F.2d 626 (9th Cir. 1971), established a standard for the admission of evidence at sentencing which would not permit the use of the kind of evidence Judge Byrne identified. See discussion note 93 *infra*. The *Weston* court required that allegations be substantiated by "information such as to be persuasive of the validity of the charge there made." 448 F.2d at 634. This requirement would mandate that the probation officer either identify the source of the evidence or find other support for the allegation.

56. 347 U.S. 62 (1954).

57. *Id.* at 65.

58. 350 U.S. 359 (1956).

59. In *Benge*, the court determined that sentencing was distinct from trial and that the reasons for exclusion were outweighed by the court's need for information. 110 Ariz. at 479-80, 520 P.2d at 849-50, *citing* Williams v. New York, 337 U.S. 241, 249-50 (1949).

60. *See* United States v. Peltier, 422 U.S. 531, 545, 556-58 (1975) (Brennan, J., dissenting); Amsterdam, *Perspectives on the Fourth Amendment*, 59 MINN. L. REV. 336, 431-32 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667-72 (1970).

the judiciary avoids becoming a party to the illegal acts of the police. In this manner, the exclusionary rule helps to preserve the integrity of the judicial process.[61] Further, any use of illegally seized evidence may constitute a second violation of constitutional rights.[62] These purposes would be thwarted by the use of the evidence at sentencing.

Unconstitutionally Obtained Confession. In *State v. Jones* the defendant claimed that a probation officer illegally obtained his confession in the course of preparing a presentence report. Jones confessed not only to the crime for which he had been convicted, but also to several other serious offenses. His assertion of illegality, based on the absence of *Miranda* warnings[63] at the presentence interview, was rejected by the Arizona supreme court.

Under ordinary circumstances, a probation officer is not required to give *Miranda* warnings.[64] The officer assists the court in assessing the defendant's rehabilitative potential by gathering information in a relaxed and informal interview,[65] and it is felt that the intrusion of *Miranda* warnings would strain the necessary atmosphere.[66] In *State v. Jones*, however, circumstances indicate that the probation officer's interview involved more than the usual presentence discussion. Jones was in jail; he was questioned at length about crimes other than the one for which he was convicted; and he may have been misled by the probation officer's suggestion of the benefits of a complete confession.[67]

61. The integrity of the judiciary is preserved by refusing evidence obtained in violation of the Constitution. *See* Harrison v. United States, 392 U.S. 219, 224 n.10 (1968); Mapp v. Ohio, 367 U.S. 643, 659-60 (1961); Elkins v. United States, 364 U.S. 206, 222-23 (1960); Olmstead v. United States, 227 U.S. 438, 469 (1928) (Holmes, J., dissenting); *id.* at 471 (Brandeis, J., dissenting).

62. If the judiciary distinguishes between the illegal search and seizure and the introduction of the evidence instead of viewing them as part of a single continuing event, there are two distinct violations of the defendant's privacy, one at the time of the search or seizure, and another when the evidence is used against him at trial. Dodge v. United States, 272 U.S. 530, 532 (1926); Verdugo v. United States, 402 F.2d 599, 613 (9th Cir. 1968) (Browning, J., separate opinion).

63. Miranda v. Arizona, 384 U.S. 436 (1966), held that when a person is taken into custody or otherwise deprived of his liberty in a significant manner by law enforcement authorities, before any questioning may take place, he must be given certain warnings. He must be advised that he has the right to remain silent, that anything he says can be used against him, that he has the right to the presence of counsel, and that an attorney will be appointed for him if he cannot afford one. Evidence obtained as a result of interrogation cannot be used at trial unless it is shown that these warnings were given and that the individual knowingly and intelligently waived his rights. *See* Note, *Michigan v. Tucker: A Warning About Miranda*, 17 ARIZ. L. REV. 188, 190-91 (1975).

64. *See* State v. Fimbres, 108 Ariz. 430, 501 P.2d 14 (1972); Nettles v. State, 248 So. 2d 259, 260 (Fla. 1971); Cunningham v. State, 488 S.W.2d 117 (Tex. Crim. App. 1972). *Contra*, People v. W., 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S.2d 260 (1969); State v. Johnson, 87 S.D. 43, 202 N.W.2d 132 (1972).

65. "Admissibility at Probation Revocation Hearings of Incriminating Statements Made to Probation Officer," 15 ARIZ. L. REV. 593, 731, 738 (1973) [hereinafter cited as "Admissibility"].

66. *Id.*

67. "[The probation officer] told Jones, among other things, that his telling everything would help his case, might help him get medical attention, and maybe even

The Supreme Court has stated that the warnings are to be given prior to any interrogation occurring after an investigation has focused on the accused and he has been taken into custody or otherwise deprived of his freedom.[68] The intense psychological pressure to which Jones, an already incarcerated prisoner, was exposed resembles the inherently coercive atmosphere condemned in *Miranda v. Arizona.*[69] It has been held that the testimony of parole officers about the parolee's statements concerning new crimes cannot be admitted at a subsequent trial if the warnings were not given at the time the statements were made,[70] a situation comparable to that involved in *Jones.*

If the questioning by the probation officer constituted custodial interrogation, the additional question whether statements so obtained should be excluded from the sentencing proceeding remains. *Miranda* provided that statements resulting from custodial interrogation may not be used against the defendant in a criminal proceeding[71] unless it is

---

probation, just as Jones' prior probation officer had done following Jones' 1967 conviction for burglary." Brief for Appellant at 53, State v. Jones, 110 Ariz. 546, 521 P.2d 978 (1974).

68. Miranda v. Arizona, 384 U.S. 436, 444 n.4 (1966). Jones was not the object of an investigation of a specific crime. Nevertheless, he was questioned about unsolved crimes in which he had been implicated. Mathis v. United States, 391 U.S. 1 (1968), suggested that any investigation likely to lead to criminal prosecution required *Miranda* warnings. Jones' confession was not used in a formal prosecution, but was used to punish him directly by increasing his sentence.

69. *See* 384 U.S. at 447-58. The Arizona supreme court has acknowledged that statements made while a person is in jail or in custody are made in coercive circumstances. State v. Smith, 112 Ariz. 416, 542 P.2d 1115 (1975). Coerced confessions carry a great risk of unreliability and have been excluded for that reason. 3 J. WIGMORE, *supra* note 20, § 822, at 330 (rev. ed. Chadbourn 1970).

70. People v. Gastelum, 237 Cal. App. 2d 205, 46 Cal. Rptr. 743 (1965); State v. Lekas, 201 Kan. 579, 442 P.2d 11 (1968); State v. Williams, 486 S.W.2d 468 (Mo. 1972); State v. Gallagher, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974), *cert. granted,* 420 U.S. 1003 (1975).

71. While the Arizona supreme court has held that the *Miranda* warnings are a prerequisite to the admission at a probation revocation hearing of a police officer's testimony concerning a probationer's statements, State v. Smith, 112 Ariz. 416, 542 P.2d 1115 (1975), the court would probably not exclude the testimony of a parole officer concerning a convicted defendant's statements. The *Smith* court distinguished its decision in State v. Fimbres, 108 Ariz. 430, 501 P.2d 14 (1972), on the grounds that the *Fimbres* case had involved the testimony of a probation officer. See text accompanying notes 64-66 *supra.* The affirmation of this position would not support the extension of *Miranda* to the testimony of a parole officer at sentencing. However, the circumstances which the *Smith* court identified as its basis for invoking *Miranda* seem to parallel those in *Jones*:

> [T]he police can subvert the holding and requirements of *Miranda* by having the defendant imprisoned by means of the revocation process rather than by a criminal trial with evidence of admissions which would not support a conviction at such a trial. In the present case they were obtained while the appellant was in custody and in jail surroundings, in themselves coercive circumstances.

State v. Smith, 112 Ariz. 416, 420, 542 P.2d 1115, 1119 (1975). Jones' confession was made while he was incarcerated, and the court made affirmative use of his admissions to increase his sentence. Nevertheless, because Jones spoke to a parole officer and not a police officer, the court has reasoned that he is not entitled to the *Miranda* warnings.

If Mempa v. Rhay, 389 U.S. 128 (1967), is read in conjunction with Gagnon v. Scarpelli, 411 U.S. 778 (1973), to establish sentencing as a critical stage of the criminal process, see discussion note 1 *supra,* it is at least arguable that *Miranda* should be applied to the sentencing hearing and the procedures which surround it, such as the presentence

shown that the defendant was informed of his constitutional rights and knowingly waived those rights.[72] This exclusionary rule was formulated to effectuate the constitutional guarantee that no person "shall be compelled in any criminal case to be a witness against himself."[73] This constitutional privilege is available in all trial-like proceedings in which a person's testimony may be legally compelled,[74] and so ordinarily would not be available at sentencing. Where, as in *Jones*, the admissions to the probation officer substantially affected the sentence received by the defendant so that he was in effect punished for coerced statements, the policy behind the *Miranda* exclusionary rule would seem to dictate that *Miranda*-violative statements cannot be used in a presentence report.[75]

Evidence Obtained by Questionable Scientific Tests

In *State v. Jones* the appellant had also submitted voluntarily to a polygraph examination concerning an unrelated rape. The results were not favorable to him and were considered at his sentencing on convictions for burglary and rape. The reliability of polygraph evidence has never been conclusively established, there being three major points of contention: the principles upon which the machine operates, the manner in which the test is administered, and the consequences of its introduction as proof.[76] The lie detector measures physiological responses to a series of questions; certain patterns among these reactions can indicate a deceptive response to a trained observer.[77] There is, however, no

report. However, the Supreme Court has never stated that sentencing alone constitutes a critical part of the criminal process. At least one jurisdiction has held *Miranda* inapplicable to parole revocation hearings on the grounds that the hearing is not a formal trial. United States v. Johnson, 455 F.2d 932 (5th Cir.), *cert. denied*, 409 U.S. 856 (1972). This rationale would distinguish sentencing from a formal trial and would not hold *Miranda* applicable.

72. 384 U.S. at 479; *see* Note, *supra* note 63.

73. U.S. CONST. amend. V.

74. 8 J. WIGMORE, *supra* note 20, § 2252, at 327-28 (rev. ed. McNaughton 1961); M. UDALL, *supra* note 20, § 98, at 156.

75. The argument for the extension of *Miranda* to sentencing is not supported by recent incursions on the doctrine. *See* Michigan v. Tucker, 417 U.S. 433 (1974); Harris v. New York, 401 U.S. 222 (1971); Note, *supra* note 63, at 211-13. In addition, the *Miranda* Court addressed itself to the criminal trial; the opinion does not expressly require application of the exclusionary rule formulated therein to proceedings other than the criminal trial. *See* "Admissibility," *supra* note 65, at 740. Because the statements were used only at sentencing and Jones was never tried for the additional crimes, the admission of the statements might be upheld.

76. *See* United States v. Salazar-Gaeta, 447 F.2d 468 (9th Cir. 1971); United States v. Sadrzadeh, 440 F.2d 389 (9th Cir. 1971); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); J. REID & F. INBAU, TRUTH AND DECEPTION 237-52 (1966); 3A J. WIGMORE, *supra* note 20, § 999 (rev. ed. Chadbourn 1970); Greenlee, *Massachusetts Admits Polygraph Evidence*, 1 J. CONTEMP. L. 93, 104-05 (1974); Comment, *Admissibility of the Results of a Lie Detector Test*, 5 ARIZ. L. REV. 76 (1963); Comment, *Justice Opposes Evidentiary Use of Polygraph Results*, 16 CRIM. L. RPTR. 2306 (1975) [hereinafter cited as *Polygraph Results*].

77. J. REID & F. INBAU, *supra* note 76, at 3-5.

specific physiological reaction which conclusively indicates deception. This distinguishes polygraphs from other forensic tests such as fingerprinting which allow a single, precise reading. Nor are there presently certification procedures for persons who give the tests.[78] Since disagreement persists over the probative force of lie detector evidence, its introduction at trial would lead to confusion of issues if not undue reliance on the appearance of mechanistic accuracy.[79] For these reasons, polygraph evidence has generally been excluded from trial unless the parties have stipulated to its accuracy in the particular case.[80]

In *Jones* the court did not address the question of the reliability of the lie detector test. The opinion distinguished admission at sentencing from admission at trial in order to avoid Arizona precedent limiting the use of polygraph results to situations in which all parties had stipulated to their reliability.[81] While other jurisdictions have begun to accept polygraph test results at trial,[82] the standard in Arizona remains unaltered. Nevertheless, *Jones* establishes that this evidence is admissible at sentencing without qualifying limitations.

The reasons which dictate exclusion of polygraph evidence are not wholly dissipated by the procedural distinctions between a trial and a sentencing hearing. Presumably, a sentencing judge would not be misled by the appearance of accuracy in the way a jury would, and could be expected to weigh such evidence according to its limited

78. *Polygraph Results*, *supra* note 76, at 2307.

79. Greenlee, *supra* note 76, at 104-05; *Polygraph Results*, *supra* note 76, at 2306.

80. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), discussed a standard for admissibility without stipulation:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
>
> We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.

Id. at 1014. *But see* United States v. De Betham, 348 F. Supp. 1377 (S.D. Cal. 1972), *aff'd*, 470 F.2d 1367 (9th Cir. 1972). The *De Betham* court found this standard of admissibility more stringent than that required for other scientific tests. The standard preferred by this court was that "a polygraph examiner, having satisfied a particular court that he is qualified as an expert in his field, should be permitted to present foundational evidence to that court demonstrative of the polygraph's substantial reliability and acceptance, in an effort to establish its probative value." 348 F. Supp. at 1384. The court nevertheless excluded the evidence of the particular test results offered because of binding circuit court precedent excluding polygraph results from trial. *Id.* *See* United States v. Salazar-Gaeta, 447 F.2d 468 (9th Cir. 1971); United States v. Sadrzadeh, 440 F.2d 389 (9th Cir. 1971).

81. 110 Ariz. at 551, 521 P.2d at 983; *see* State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962).

82. Commonwealth v. A Juvenile (No. 1), — Mass. —, 313 N.E.2d 120 (1974); State v. Dorsey, 87 N.M. 323, 532 P.2d 912 (1975).

reliability. Other objections continue, however, including the lack of effective controls on the administration of the tests.[83] Additionally, the judge will be using evidence which is not allowed at trial because of its questionable reliability; this lack of probative force is not changed by the setting in which the evidence is received. Since other jurisdictions, however, have become sufficiently convinced of the reliability of polygraph examinations to allow their introduction at trial without stipulation[84] such acceptance may indicate increased reliability and a reduced need for stipulation to establish probative force.

Evidence of Prior Police Contacts

In *State v. Dixon* the Arizona court of appeals held that a presentence report which contained a list of prior police contacts was admissible at a sentencing hearing.[85] The *Dixon* court's decision raises several issues. Proof of prior convictions is generally admissible at trial for the limited purpose of impeachment.[86] The charges against Dixon, however, lacked the scrutiny of trial,[87] being only the recorded impressions and perhaps unfounded suspicions of police officers. The allegations had not been reviewed in any manner and therefore carried an increased risk of groundlessness.

That police reports were the source of the list of prior police contacts raises reliability problems relating to the source and the substance of the information.[88] Even when there has been an arrest, such reports resemble an unsubstantiated allegation by the police officer that

83. *See Polygraph Results*, *supra* note 76, at 2307. A defense-administered polygraph examination was rejected for this reason in United States v. Francis, 487 F.2d 968 (5th Cir. 1973).

84. *See* cases cited note 82 *supra*.

85. 21 Ariz. App. 519, 521 P.2d 150 (1974).

86. *See* MCCORMICK, *supra* note 20, § 43; 1 J. WIGMORE, *supra* note 20, § 196.

87. It has been suggested that convictions cannot be used as proof unless they can be established by reference to an official record. Baker v. United States, 388 F.2d 931 (4th Cir. 1968); ABA ADVISORY COMM. ON SENTENCING AND REVIEW, STANDARDS RELATING TO PROBATION § 2.3 (Approved Draft, 1970). Earlier Arizona cases have allowed consideration at sentencing of charges less certain than conviction. State v. Masters, 108 Ariz. 189, 494 P.2d 1319 (1972) (previous arrest for larceny); State v. Adams, 1 Ariz. App. 354, 403 P.2d 7 (1965) (fact of prior convictions may be considered in determining sentence even though prior conviction is not charged in the information or established as required by law). By statute, when a court is determining the sentence for a conviction of first degree murder, circumstances which aggravate the sentence are convictions of violent felonies or convictions of offenses which carry a life sentence. ARIZ. REV. STAT. ANN. § 13-454(E) (Supp. Pamphlet 1973).

88. Reliability encompasses two factors. First, the source of the evidence must be considered: does it come from a responsible person or agency, one most likely to have that knowledge and able to report it impartially? For example, government agencies would be preferable to unidentified informants for a report of criminal activities. Further, the information itself must be examined: does the evidence reflect some established or generally accepted fact? Generally, events referable to some official record will be given more weight than unsubstantiated reports. *Cf.* Spinelli v. United States, 394 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 177-79 (1972).

criminal activity has occurred and that the defendant participated. The Ninth Circuit, in *United States v. Weston*,[89] rejected the unsubstantiated allegations of an unidentified informant as a basis for sentencing. The decision was consistent with *Williams v. Oklahoma* which accepted only responsible, out of court, unsworn information.[90] *Dixon* comports with both cases since the police would be a more responsible source of information than an informant. Nevertheless, the substance of the report is distinguishable from the prosecutor's memorandum in *Williams*[91] in that police reports have not been reinforced by a prosecution effort or any official record.[92] *Weston* required that before a sentence could be founded on allegations of an informant, the allegations must be supported by "information such as to be persuasive of the validity of the charge there made."[93] Other courts also have recognized that sentence cannot be based on unsupported charges.[94] There was no attempt made in *Dixon* to verify the substance of the police report. The constitutional requirement of due process would seem to demand that the accuracy of the reports be established before they become the basis of sentence.[95]

For the sentencing court to use such charges, a procedure to substantiate the allegations would be necessary. If the court were to hold an evidentiary hearing to ascertain the validity of the enumerated charges, it might produce the equivalent of a trial on each alleged

---

89. 448 F.2d 626 (9th Cir. 1971).

90. *See* text accompanying notes 36-40 *supra.*

91. *Compare* State v. Dixon, 21 Ariz. App. 517, 521 P.2d 148 (1974), *with* Williams v. Oklahoma, 358 U.S. 576 (1959). A memorandum of a state's attorney used to supply sentencing information may not always be characterized as a neutral report. Sixteen closely typed pages submitted by the state's attorney were characterized as an adversary memo in United States v. Rosner, 485 F.2d 1213, 1230-31 (2d Cir. 1973).

92. In *Williams v. New York* the probation officer had reported prior crimes of which the defendant had been convicted. 337 U.S. at 244. While the Court did not limit the sentencing judge's considerations with the rules of evidence, it accepted information more reliable than police reports.

93. 488 F.2d at 634. Unsubstantiated allegations of an unidentified informant were included in Janice Weston's presentence report to identify her as a major supplier of heroin. Expressly relying on the charges of her substantial involvement in drug trafficking, the district court imposed the statutory maximum sentence. On appeal, the Ninth Circuit reversed the lower court and held that the sentence could not be based on information of such dubious accuracy. The *Weston* court read Townsend v. Burke, 334 U.S. 736 (1948), see text accompanying notes 25-29 *supra*, to mean that sentence could not be based on false information. The court then expanded that principle by requiring that the information be sufficiently substantial to be persuasively valid. 488 F.2d at 634.

94. *See* United States v. Perri, 513 F.2d 572 (9th Cir. 1975) (nature and basis of confidential information adverse to the accused must be disclosed or the information disregarded); Shelton v. United States, 497 F.2d 156 (5th Cir. 1974) (determination that evidence met *Weston* test of reliability placed burden of proof of misinformation on defendant); Haller v. Robbins, 409 F.2d 857 (1st Cir. 1969) (state bears burden of proof of lack of prejudice where constitutionally invalid charges are used at sentencing).

95. *See* United States v. Weston, 448 F.2d 626, 632-34 (9th Cir. 1971); *cf.* Townsend v. Burke, 334 U.S. 736, 739-40 (1948). See text accompanying notes 25-40 *supra.*

offense.[96] The sentencing process could become clogged by a series of such "trials." Further, in Dixon's case, the charges originally were not brought because of insufficient evidence or a constitutional bar. The likely consequence of a validation procedure would be to try Dixon for crimes that the state was unwilling or unable to prosecute, and without the safeguards of a full trial.

Appellate review of a sentence based on such charges would be similarly impractical. A procedure like that for the review of contested prior convictions[97] would effectively have the same result as the validation procedure of the sentencing court. The appellate court would have to examine the record to determine whether the sentence would remain appropriate if the charges were treated as void. If the sentence was deemed inappropriate, the court would have to hold an evidentiary hearing to determine the validity of the charges. As before, there would be a great risk of a series of trials on insubstantial allegations.

If sentencing becomes obstructed with multiple trials, there would be great potential for damage to the criminal justice system. In addition to increasing the possibility of inaccuracy, the use of prior police contacts without any review may effectively destroy the presumption of innocence with respect to the unconvicted charges.

Conclusion

The Arizona courts have indicated that evidence unacceptable at trial will be admitted at sentencing proceedings on the rationale that the information will provide valuable assistance to the court in determining an appropriate sentence. The decisions comport with the reasoning of the United States Supreme Court in *Williams v. New York* where the Court distinguished between the objectives of trial and sentencing.[98] Because sentencing is not limited to the determination of the narrow issue of guilt, the proceeding would be helped, not hindered, by the presentation of all pertinent information. Although the Court determined that the rules of evidence are not applicable to sentencing, it did not hold that all evidence is admissible. Considerations such as constitutional due process still apply to restrict the admission of evidence. The application of the fourth amendment exclusionary rule is not clear, so that illegally seized evidence may be used at sentencing. Polygraph test results, although achieving acceptance in other jurisdictions, have not

96. *Cf.* Commonwealth v. Kates, 452 Pa. 102, 126, 305 A.2d 701, 713 (1973) (Manderino, J., dissenting).

97. *See* Lipscomb v. Clark, 468 F.2d 1321 (5th Cir. 1972); Farrow v. United States, 373 F. Supp. 113 (S.D. Cal. 1974).

98. 337 U.S. 241, 247 (1949).

been recognized as reliable in Arizona without stipulation; yet their reliability is not questioned at sentencing. Allegations of police contacts are similarly admissible despite the risk of inaccuracy.

The sentencing court would be best served by accurate information presented in a full and fair hearing. The three types of evidence allowed in *Jones*, *Dixon* and *Benge* denigrate the reliability of the sentencing process and the prisoner's rights after conviction. The Arizona courts should reconsider whether limiting or excluding such evidence might better serve the ultimate goals of sentencing and the criminal justice process.

B. THE USE OF PRIOR INCONSISTENT STATEMENTS AS SUBSTANTIVE EVIDENCE

Considerable controversy has attended the question of whether a witness's prior inconsistent statement may be offered at trial as proof of the facts stated; as a result, there are currently two conflicting positions concerning the use of such statements.[1] The orthodox, majority view allows their admission only for impeachment purposes.[2] A minority rule, however, admits these statements as substantive evidence as well as for impeachment.[3] Until quite recently, Arizona followed the orthodox view. [4] In the 1973 case of *State v. Skinner*,[5] the Supreme Court of Arizona reversed its position to adopt the minority view,[6] holding that

1. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 251, at 603-04 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

2. *See* MCCORMICK, *supra* note 1, § 39.

3. The United States Supreme Court stated in California v. Green, 399 U.S. 149, 154 & n.6 (1970), that the minority rule is supported by most legal commentators, and pointed out its acceptance in codifications as well. *See* FED. R. EVID. 801(d)(1); MODEL CODE OF EVIDENCE rule 503(b) (1942); UNIFORM RULE OF EVIDENCE 63(1) (1953).

4. *See* State v. Valenzuela, 101 Ariz. 230, 418 P.2d 386 (1966); Otero v. Soto, 34 Ariz. 87, 267 P. 947 (1928).

5. 110 Ariz. 135, 515 P.2d 880 (1973). The decision overruled State v. Valenzuela, 101 Ariz. 230, 418 P.2d 386 (1966), and Otero v. Soto, 34 Ariz. 87, 267 P. 947 (1928). 110 Ariz. at 142, 515 P.2d at 887. Both opinions had stated that prior inconsistent statements may be used for the sole purpose of impeachment. In reaching its decision to alter the Arizona approach, the Supreme Court of Arizona also rejected the voucher rule, a common law procedure whereby a party calling a witness vouched for his credibility and was bound by whatever the witness said. 110 Ariz. at 143, 515 P.2d at 888.

6. Most rules of evidence have their origin in the common law, Doe v. Winn, 30 U.S. (5 Pet.) 233 (1831), although legislatures in many jurisdictions have made changes in these common law rules. *See generally* California State Life Ins. Co. v. Fuqua, 40 Ariz. 148, 10 P.2d 958 (1932); FED. R. EVID.; M. UDALL, ARIZONA LAW OF EVIDENCE

prior inconsistent extrajudicial statements may be admitted substantively when properly introduced for impeachment purposes. In attempting to ensure that all relevant evidence would be admitted at trial, however, the *Skinner* court neglected to create safeguards to guarantee the credibility and trustworthiness of the statement.[7]

Recently, in *State v. Lewis*,[8] the Supreme Court of Arizona was afforded an opportunity to insist upon additional safeguards, but failed to create further requirements. In this case Adolphus Lewis was accused of committing robbery and murder.[9] The State based its case upon the expected testimony of Katie Brown, who had been with the defendant on the night of the robbery and shooting. In her deposition Brown told the county attorney that Lewis had stated to her that he shot the man; however, at trial she testified that she did not hear anyone say who killed the victim. Confronted with her prior statement,[10] Brown admitted having said that Lewis told her he shot the man. The prosecutor attempted to clarify the conflict through further questioning, over a defense objection that the prosecutor was cross-examining his own witness, with the result that Brown again acknowledged Lewis' having made the inculpatory statement.

Upholding the trial court's overruling of the defense objections to the above line of questioning and the introduction of the prior statement, the Supreme Court of Arizona stated that the prosecutor had the right to rely on the previously sworn testimony since the witness' testimony at trial was obviously a surprise and potentially damaging to the prosecution.[11] Under these circumstances, the court held, the prosecutor had a right not only to cross-examine his own witness and impeach her by the use of her prior inconsistent statement, but also to use the prior statement as substantive evidence.[12] The court thus reaffirmed its decision in *Skinner*, but failed to limit its effect to the protected situation present in *Lewis*,[13] leaving the rule free of safeguards to assure some

§ 1, at 3 (1960). At present, Arizona has no statutory rules of evidence, and thus evidentiary policy is determined judicially. State v. Skinner, 110 Ariz. 135, 515 P.2d 880 (1973).

7. See text accompanying notes 40-41 *infra*.

8. 111 Ariz. 115, 523 P.2d 1316 (1974).

9. Although Lewis was charged with murder as well as robbery, the jury was unable to reach a verdict on that charge. The supreme court upheld his conviction for robbery. 111 Ariz. 115, 118, 523 P.2d 1316, 1319 (1974).

10. Defense counsel objected to the prosecutor's impeachment of his own witness, but was overruled on the basis that the prosecutor was unfairly surprised and prejudiced by the witness' change of her story. This finding of the trial court was upheld on appeal. 111 Ariz. at 118, 523 P.2d at 1319. See text accompanying notes 11-12 *infra*.

11. 111 Ariz. at 118, 523 P.2d at 1319.

12. *Id.*

13. At the time Brown's statement was made, she was under oath and represented by counsel; her statement was recorded by a court reporter, thus assuring its accuracy as a representation of what was said. 111 Ariz. at 119, 523 P.2d at 1319. Additionally,

element of veracity in the prior statement as a prerequisite to its substantive use at trial.

This casenote will examine the problems posed by the broad acceptance of prior inconsistent statements in *Skinner* and *Lewis*. First, the history and rationale of the hearsay rule will be briefly examined. The majority and minority rules governing the admissibility of prior inconsistent statements will then be explored with emphasis on their strengths and weaknesses. Finally, safeguards created by other jurisdictions will be considered for their usefulness in ensuring the veracity of the statement, and similar modification of the Arizona rule will be suggested.

The Orthodox and Minority Rules Compared

Prior statements of a witness, when sought to be introduced at trial to prove the truth of the matter stated, have traditionally been considered hearsay and thus inadmissible as evidence.[14] The hearsay rule developed at common law to prevent the trying of a defendant on evidence which consisted solely of ex parte depositions or affidavits secured by the examining magistrates, thereby denying the accused the opportunity to challenge his accuser in a face-to-face encounter before the trier of fact.[15] Although the rule is most often applied to a witness' report of another person's statement,[16] prior statements of the witness himself have also been held inadmissible because the declarant was present and could tell all he knew while under oath and on the witness stand.[17] Thus, while courts generally interpret the hearsay rule as allowing prior inconsistent statements to be admitted for impeachment purposes,[18] the majority of jurisdictions consistently reject such state-

since the statement was made at a deposition, there was an opportunity for cross-examination. *See* ARIZ. R. CRIM. P. 15.3(c); ARIZ. R. CIV. P. 30(c).

14. MCCORMICK, *supra* note 1, § 251, at 601.

15. California v. Green, 399 U.S. 149, 156 (1970). Other factors discouraging the use of hearsay are the risks of faulty perception, distorted memory, inexact communication, and lack of sincerity. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 744 (1961). These risks are minimized at trial through the use of the oath, confrontation, and cross-examination. Such safeguards do not generally exist, however, to ensure the veracity of out-of-court statements. *See* MCCORMICK, *supra* note 1, § 245, at 581-85.

16. Keefe v. State, 50 Ariz. 293, 296, 72 P.2d 425, 426 (1937); MCCORMICK, *supra* note 1, § 246, at 585.

17. "The logic of the orthodox view is that the previous statement of the witness is hearsay since its value rests on the credit of the declarant, who was not (1) under oath, (2) subject to cross-examination, or (3) in the presence of the trier, when the statement was made." MCCORMICK, *supra* note 1, § 251, at 601. For further discussion of this rationale, see text & notes 20-25 *infra*.

18. *Id.* at 586-90. In such circumstances, the statement is offered to prove the witness' self-contradiction through the inconsistency between the prior statement and the statement made in court. The prior statement is thus used to reflect on the veracity of the witness rather than to prove the truth of the statement itself. United States v. Tavares, 512 F.2d 872 (9th Cir. 1975); MCCORMICK, *supra* note 1, § 34, at 67. When

ments when offered as substantive evidence.[19]

Stressing that the rules of evidence were created for the purpose of facilitating the truth,[20] proponents of the orthodox rule contend that the admission of earlier extrajudicial statements would endanger the truth-finding process in several important respects.[21] First, although a witness is under oath at trial, the oath does not affect the veracity of any prior statement made without the sanctions of an oath and under no threat of penalty for perjury. Nor is the jury afforded an opportunity to view the witness' demeanor at the time the prior statement is made.[22] Additionally, the original statement is not usually made in the solemnity of a judicial proceeding; thus, it is not subject to cross-examination, and the application of the truth-testing process is delayed.[23] Perhaps the primary objection to the unrestricted substantive use of prior inconsistent statements is the resulting increase in the opportunity and temptation to manufacture evidence.[24] For these reasons,[25] the supporters of the majority rule insist that substantive use of prior inconsistent statements

a prior, out-of-court statement of the witness is used in this manner, the opposing party is entitled to a jury instruction limiting consideration of the statement to its effect on the witness' credibility. McCORMICK, *supra* note 1, § 251, at 601; *see* California v. Green, 399 U.S. 149, 154 (1970); *cf.* State v. Skinner, 110 Ariz. 135, 142, 515 P.2d 880, 887 (1973).

19. *See, e.g.*, People v. Jones, 48 Mich. App. 102, 210 N.W.2d 145 (1973); State v. Nimrod, 484 S.W.2d 475 (Mo. App. 1972); State v. Mack, 282 N.C. 334, 193 S.E.2d 71 (1972).

20. In his dissent in *State v. Skinner*, Justice Holohan advocated adherence to the orthodox view. State v. Skinner, 110 Ariz. 135, 149-50, 515 P.2d 880, 894-95 (1973). Arguing that substantive use of the statements would provide tools for the unscrupulous, dishonest and crafty to obscure the truth, he concluded that the temptation to secure a favorable statement from the witness at any price would be tremendous. *Id.* at 150, 515 P.2d at 895.

21. *See* State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939).

22. California v. Green, 399 U.S. 149, 154 (1970).

23. It is sometimes argued that the lack of immediate cross-examination allows false testimony to harden "as the witness has opportunity for reconsideration and influence by the suggestions of others . . . ." State v. Saporen, 205 Minn. 358, 363, 285 N.W. 898, 901 (1939), *quoted in* McCORMICK, *supra* note 1, § 251, at 602. Although this rationale might be significant in relation to some prior statements of the witness, it would seem to have little applicability to a prior inconsistent statement, which obviously has not hardened. California v. Green, 399 U.S. 149, 159 (1970); McCORMICK, *supra* note 1, § 251, at 602; 15 WAYNE L. REV. 874, 879 (1969).

24. *See Hearing on Proposed Rules of Evidence Before the Special Subcomm. on the Reform of Federal Criminal Laws of the House Committee of the Judiciary*, 93d Cong., 1st Sess. 155 (1973); McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573, 586 (1947). It does not necessarily follow that the orthodox rule will prevent the manufacture of evidence. This temptation exists almost equally under the orthodox rule, since the statements may come in to impeach and will be considered by the jury as evidence, regardless of contrary instructions, if there is an issue of fact to submit. McCormick, *supra* at 586; *see* State v. Skinner, 110 Ariz. 135, 142, 515 P.2d 880, 887 (1973).

25. Other justifications are advanced for the orthodox position. One such is the tendency of the jury to attach unwarranted weight to the prior statement, especially where the witness has recanted and has assumed a wavering position. United States v. DeSisto, 329 F.2d 929, 933 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964). *See also* Note, *Prior Inconsistent Statements as Substantive Evidence—A New Approach for Oregon*, 7 WILLAMETTE L.J. 268, 277 (1971). Leaving to the jury the decision as to which story is true and whether the witness is credible is the natural functioning of the jury trial system, however.

is incompatible with the common law evidence system. The orthodox rationale, however, is not without serious flaws.

The basis of the orthodox rule is that the previous statement of a witness is hearsay since its value rests on the reliability of a declarant who was not under oath, subject to cross-examination, or in the presence of the trier of fact when the statement was made. In contrast, proponents of the minority position contend that the oath is not the primary safeguard of trustworthiness. They argue that since only one of the exceptions to the hearsay rule[26] actually requires that the out-of-court statement be under oath,[27] this undermines the validity of the oath requirement. Rather, the primary safeguard for reliability is seen as being the trial confrontation which allows cross-examination and a viewing of the witness' demeanor.[28] Under this theory the purpose of the hearsay rule is satisfied where the declarant testifies at the trial and is subject to cross-examination, since there is ample opportunity to test him as to the basis of his former statement and to observe his demeanor as he testifies concerning the inconsistency.[29]

This rationale is compelling. The argument for demanding confrontation is that the opposing party can uncover facts which may either diminish the personal trustworthiness of the witness or force him to reveal circumstances that would qualify his statement.[30] An in-court examination helps to impress upon the witness the seriousness of the matter and attempts to keep duplicity to a minimum through the imposition of a penalty for perjury.[31] Such cross-examination is as possible concerning a witness's prior, out-of-court statement as for his testimony on the stand. Additionally, since the witness is present in court, the jury is able to observe both the witness as he makes his statement and his reaction when confronted with the inconsistency. It can be effectively argued that as a result of this viewing the jury is in as good a position to determine the truth or falsity of the prior statement as it is to

26. The hearsay rule has been eroded with numerous exceptions for particular types of hearsay which are considered trustworthy. *See generally* FED. R. EVID. 803-04; MCCORMICK, *supra* note 1, §§ 254-324, at 614-750.

27. MCCORMICK, *supra* note 1, § 251, at 601.

28. *Id.* at 602.

29. California v. Green, 399 U.S. 149, 155 (1970).

30. *See id.* at 158. Once conflicting testimony has been brought to the jury's attention, an instruction could help them in determining the witness's credibility:

> You are the sole judges of the credibility of witnesses. In determining the weight to be given to the testimony of any witness, you must take into account his ability and opportunity to observe, his memory, his manner while testifying, any motive or prejudice he may have, any inconsistent statements he may have made, and the credibility of his testimony considered in light of all the evidence in the case.

SPECIAL COMM. ON UNIFORM INSTRUCTIONS, MARICOPA COUNTY, [ARIZ.,] SUPER. CT. JUDGES, MARICOPA RECOMMENDED JURY INSTRUCTIONS FOR CIVIL CASES No. 5 (1970). The instruction for a criminal case would, of course, be somewhat different.

31. *See* McCormick, *supra* note 24, at 576-77.

determine the truth or falsity of the inconsistent testimony given in court.[32]

There are certain practical considerations favoring the use of prior inconsistent statements as substantive evidence. Common sense dictates that the witness' memory is more accurate when fresh.[33] Although it will not be true in every case that the original statement is more accurate than the one made later in court, allowing receipt of both gives the jury an opportunity to weigh the two statements and the possible causes for the discrepancy, and to arrive at a well-considered conclusion as to which should be believed. Such determinations are the traditional province of the jury.[34] The proper functioning of the jury would be preserved also through open approval of a process that occurs presently without official sanction—the consideration of a prior inconsistent statement as substantive evidence. Although juries in orthodox-rule states are instructed to consider the prior statement only in weighing the credibility of the witness,[35] this restriction is very hard to enforce and is thought to be frequently ignored, either consciously or unconsciously.[36] This factor was influential in the *Skinner* court's adoption of the minority rule: "In doing this we are persuaded by the futility of requiring that the trier of fact, be it judge or jury, consider such statements for the purpose of impeachment only and not for the truth of the facts stated."[37]

Need for Safeguards in Minority Jurisdictions

For these reasons, it appears that the minority position adopted by Arizona in the *Skinner* decision is the better evidentiary rule in regard to prior inconsistent statements. Nevertheless, the minority rule is not without certain hazards. Without safeguards to ensure some degree of

32. *See* DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925); 15 WAYNE L. REV. 874, 878 (1969).

33. MCCORMICK, *supra* note 1, § 251, at 602. Additionally, the longer the lapse of time, the greater the chance of exposure to corruption, false suggestion, intimidation or appeal to sympathy. *Id.* § 38, at 75-76.

34. The jury's function is to decide questions of fact. It weighs contradictory evidence and inferences, judges witnesses' credibility, and draws the ultimate conclusions as to disputed facts. M. UDALL, *supra* note 6, § 3, at 5.

35. See discussion note 18 *supra*.

36. *See* DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925); Beavers v. State, 492 P.2d 88, 94 (Alas. 1971). One court stated, "[T]o tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable." United States v. DeSisto, 329 F.2d 929, 933 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964).

37. State v. Skinner, 110 Ariz. 135, 142, 515 P.2d 880, 887 (1973). The court quoted Judge Learned Hand's statement that "[w]e should indeed welcome any efforts that help disentangle us from the archaisms that still impede our pursuit of truth." *Id.*, *quoting* United States v. Allied Stevedoring Corp., 241 F.2d 925, 934 (2d Cir. 1957).

trustworthiness in the prior statement, the standard runs the risk of opening up to substantive jury inspection too wide a range of prior inconsistent statements.[38] If no consideration is given to the circumstances under which the prior statement was made, the fears regarding manufactured evidence of those who oppose the minority rule may well be realized. False statements can be made intentionally out of court under no threat of perjury, and be subsequently introduced as substantive evidence of the attorney for the favored party simply upon the witness' testifying contrarily on the stand.

Like other jurisdictions adopting the minority rule,[39] the Arizona court thus far has failed to establish sufficient safeguards to ensure reliability. Its only protective requirement is that required by the confrontation clause: the witness must be present at the trial and open to cross-examination.[40] No requirements were adopted regarding the surroundings at the time the prior statement was made, the recordation of the statement, or the possibility that the statement was not actually made by the declarant.[41]

In *California v. Green*[42] the United States Supreme Court declined to surround the substantive introduction of prior inconsistent statements

38. For example, the use of prior inconsistent statements poses the possibility of violating the *Miranda* requirements. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court required the employment of procedural safeguards to protect the accused's fifth amendment right against self-incrimination. The Court implied that *Miranda*-violative statements were not to be used for any purpose at trial. *Id.* at 476-77. In Harris v. New York, 401 U.S. 222 (1971), however, the Supreme Court held that such statements were admissible for impeachment purposes, maintaining that the *Miranda* shield should not be perverted into a license for perjury. Under this interpretation of the fifth amendment the defendant is not entirely free from the risk of confrontation with his prior inconsistent utterances. *Id.* at 226. In State v. Jorgenson, 108 Ariz. 476, 502 P.2d 158 (1972), the Arizona supreme court followed *Harris* in holding that an accused's prior inconsistent statements, though not admissible under *Miranda*, may be used to impeach the defendant's credibility if he elects to testify. This decision, however, preceded *Skinner*'s broad acceptance of prior inconsistent statements for substantive as well as impeachment value. Thus it is possible to read *Skinner* as allowing substantive use of prior *Miranda*-violative statements if the declarant admits making them and is available for cross-examination in court. Such an interpretation would be in conflict with current constitutional doctrine, however, since the United State Supreme Court has not indicated that statements violative of *Miranda* can be entered as substantive evidence.

39. For an example of a jurisdiction that has adopted a wide-open rule without any significant safeguards, see Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969).

40. State v. Lewis, 111 Ariz. 115, 119, 523 P.2d 1316, 1319 (1975); State v. Skinner, 110 Ariz. 135, 142, 515 P.2d 880, 887 (1973); *see* California v. Green, 399 U.S. 149 (1970). The impeachment also must conform to certain procedural formalities, such as the need for a proper foundation. *See* State v. Lane, 69 Ariz. 236, 241, 211 P.2d 821, 825 (1949). In *Skinner* the court indicated that, at least in a criminal trial, before a witness can be impeached he must have said something damaging and prejudicial to the party calling him, but that the party is not required to be surprised by the change in testimony unless he wishes to cross-examine his own witness. 110 Ariz. at 143, 515 P.2d at 888.

41. There is a particularly strong need for safeguards in criminal trials, where the very nature of the trial requires that utmost reliability inhere in the evidence. Weinstein, *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375, 383 (1968).

42. 399 U.S. 149 (1970), *noted in* 84 HARV. L. REV. 108 (1970) *and* 23 VAND. L. REV. 1365 (1970).

with procedural safeguards other than the right to cross-examination. In defining the extent of sixth amendment confrontation clause requirements in this area, the Court emphasized that the hearsay rule and the confrontation clause, although designed to protect similar values, are not identical in their coverage.[43] The Court thus did not adopt as constitutionally mandated either the minority or majority rule concerning prior inconsistent statements.[44] Rather, it merely required as a constitutional minimum that the declarant be present at the trial[45] and available for cross-examination.[46] The issue of further safeguards,[47] like the question of which evidentiary rule to adopt, was left to the states.

Some jurisdictions have gone farther than the Supreme Court in protecting the substantive use of prior inconsistent statements from abuse. The Wisconsin supreme court in *Gelhaar v. State*,[48] while requiring confrontation as per *Green*, expressly limited its rule to prior inconsistent statements of an opposing party's witness who had observed the facts stated.[49] The limitation to opposing witnesses helps to negate the possibility of fabricated testimony obtained by bribing or pressuring a witness,[50] while the requirement that the statement concern only facts

43. 399 U.S. at 155.

44. *Id.*; *cf. id.* at 171-72 (Burger, C.J., concurring) (emphasizing the importance of state experimentation and innovation in the area of criminal justice).

45. In *Green*, the prior statement had been made at a preliminary hearing. Thus the declarant was under oath; defendant's counsel was present and had an opportunity for cross-examination; and the proceedings were recorded. The Court held that under these circumstances, the statement would have been constitutionally admissible at trial even in the declarant's absence. *Id.* at 165.

46. *See id.* at 158-61. Justice Brennan, in dissenting, argued that the witness's presence in court and availability for cross-examination did not provide sufficient opportunity for confrontation when, as in *Green*, the witness claimed lack of memory. In such a situation, cross-examination concerning the events to which his previous statement related becomes fruitless, rendering the witness a mere "conduit for the admission of stale evidence, whose reliability can never be tested before the trial factfinder by cross-examination of the declarant about the operative events, and by observation of his demeanor as he testifies about them." *Id.* at 194 (Brennan, J., dissenting).

47. The absence of safeguards in the Court's decision is highlighted by its statements summarizing the holding:

> In the typical case to which the California court addressed itself, the witness at trial gives a version of the ultimate events different from that given on a prior occasion. In such a case, as our holding in Part II makes clear, we find little reason to distinguish among prior inconsistent statements on the basis of the circumstances under which the prior statements were given. The subsequent opportunity for cross-examination at trial with respect to both present and past versions of the event, is adequate to make equally admissible, so far as the Confrontation Clause is concerned, both the casual, off-hand remark to a stranger, and the carefully recorded testimony at a prior hearing.

Id. at 168.

48. 41 Wis. 2d 230, 163 N.W.2d 609 (1969), *cert. denied*, 399 U.S. 728 (1970).

49. The limitation to an opposing witness was adopted in response to Wisconsin's statute regulating impeachment of a party's own witness in a criminal action. *See* WIS. STAT. ANN. § 885.35 (1966).

50. The theoretical basis for this limitation is the belief that a party will be less willing to put a pressured witness on the stand, knowing that his prior statements can be introduced by the other party, but not by the party calling the witness should he fail to relate the intended information. *See generally* Weinstein, *supra* note 41, at 378.

observed negates the problem of double hearsay[51] and assures a more nearly accurate perception of the events described.

A liberal safeguard for reliability is that of Alaska, which allows judicial discretion in admitting the statements and commenting on the weight of the evidence admitted.[52] Judicial comment on the weight of the evidence allows the judge closer supervision of the jury, enhancing the jury's understanding of the weight and credibility to be afforded the testimony.[53] Since the judge is experienced in dealing with prior inconsistent statements, he is apt to be more critical of hearsay than the untrained jury, and is able to suggest an appropriate balancing to separate truth from fiction, based on all the relevant factors.[54]

The federal courts also allow such comment by the judge[55] and, in addition, are considerably more restrictive than most state jurisdictions in determining what type of prior inconsistent statements may be used substantively. The new Federal Rules of Evidence classify such statements as nonhearsay only if the witness is available at trial for cross-examination, and the statement was given under oath subject to penalty for perjury at a trial, hearing, or other proceeding, or in a deposition.[56] The rule thus adopts the constitutionally mandated safeguard of cross-examination, as well as the requirement that the statement be under oath. Additionally, the limitation to statements made at a "trial, hearing, or other proceeding, or in a deposition" ensures that the statement will be recorded and identifiable as that of the witness[57] and, generally, that there will have been an opportunity for cross-examination.[58] As a

51. Brown's testimony in *State v. Lewis* was double hearsay, and thus the prior inconsistent statement would not have been allowed as substantive evidence under this rule. *See* 111 Ariz. at 116-17, 523 P.2d at 1317-18. Double hearsay occurs when the out-of-court statement sought to be introduced at trial is itself hearsay.

52. *See* State v. Hobbs, 359 P.2d 956, 967 (Alas. 1961); *cf.* Comment, *Judge's Inability to Comment on the Evidence in Arizona*, 1973 L. & Soc. Order 119, 120.

53. "Whether the jury should be instructed that such evidence should be entirely disregarded, viewed with caution, or limited to consideration for impeachment purposes only, lies within the discretion of the trial judge." State v. Hobbs, 359 P.2d 956, 968 (Alas. 1961); *see* Comment, *supra* note 52, at 135-38.

54. Weinstein, *supra* note 41, at 377-78.

55. *See* Fed. R. Evid. 104(b).

56. *Id.* 801(d)(1):

> A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition
> . . . .

This rule is far narrower than its precursor, upon which the Arizona court relied in its *Skinner* holding. The proposed rule provided that: "A statement is not hearsay if (1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony . . . ." 56 F.R.D. 183, 293 (1971). Such a drastic reduction in the scope of the rule emphasizes the congressional view that more safeguards are needed than just confrontation and cross-examination.

57. *See* Fed. R. Civ. P. 30(c).

58. *See id.*

result, the veracity of the prior statement is assured, and the additional provision for judicial comment ensures that the jury will make an educated determination as to the relative weight these statements should be afforded.

The Federal Rules and the limited admissibility systems now operative in some states indicate the feasibility of placing restrictions on the substantive use of prior inconsistent statements. Additionally, they provide models to guide the Arizona courts or legislature in modifying the rule of *Skinner* and *Lewis* to render it less subject to abuse. Adoption of such protective devices is an important second step to the liberalizing of the hearsay rule regarding prior inconsistent statements.

Conclusion

Skinner and *Lewis* represent a sudden shift for Arizona from the majority rule forbidding the substantive use of prior inconsistent statements at trial. The Arizona supreme court correctly adopted the more progressive position but failed to create adequate safeguards to protect the veracity of the truth-finding process. Modification of the rule to require that safeguards accompany the prior utterance is necessary to ensure the reliability and trustworthiness of the prior inconsistent statement admitted as substantive evidence.

VII. INDIAN LAW

A. ENFORCEMENT OF STATE FINANCIAL RESPONSIBILITY LAWS WITHIN INDIAN COUNTRY

Historically, Indian tribes have had the power to govern their internal affairs without state interference. For example, a tribe may punish Indians[1] for many crimes committed against Indians within Indian country,[2] entertain suits by non-Indians against Indians for controversies arising in Indian country,[3] and settle disputes between Indians.[4] Conversely, the state's authority to regulate acivity of Indians off the reservation and of non-Indians on the reservation has often been upheld. Thus, state courts can try Indians for acts committed off the

1. The question of who qualifies as an Indian for purposes of jurisdiction is not specifically answered by the federal statutes or case law. However, for purposes of determining eligibility for allotment of land, Indians are defined by federal statute as:

> all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members, who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . all other persons of one-half or more Indian blood.

25 U.S.C. § 479 (1970).

State courts have held that an Indian must have a "substantial percentage of Indian blood," and be recognized as an Indian by a tribe under federal jurisdiction. *See* Griswold v. Gomes, 111 Ariz. 59, 61, 523 P.2d 490, 492 (1974); State v. Atteberry, 110 Ariz. 354, 355, 519 P.2d 53, 54 (1974); Makah Indian Tribe v. Clallum County, 73 Wash. 2d 677, 680, 440 P.2d 442, 444 (1968). The Navajo Tribe, for example, accepts members with one-fourth Navajo blood. NAVAJO TRIBAL CODE tit. 1, § 101(b) (Equity 1970).

2. United States v. Quiver, 241 U.S. 602 (1916); *Ex parte* Crow Dog, 109 U.S. 556 (1883).

"Indian country" is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151 (1970). This definition includes Indian land allotments, United States v. Pelican, 232 U.S. 442 (1913), state highway easements through the reservation, Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958), and towns incorporated by the state but located within the boundaries of a reservation, Seymour v. Superintendent, 368 U.S. 351 (1961).

Exclusive tribal jurisdiction has been held to apply even when an Indian defendant is not a member of the tribe on whose reservation she resides. Fox v. Bureau of Revenue, 87 N.M. 261, 531 P.2d 1234 (N.M. App.), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975) (holding that a Comanche Indian living and working on Navajo Reservation is exempt from state tax).

3. 25 C.F.R. § 11.22 (1975).

4. *Id.* § 11.22C. For an extensive discussion of the right of tribal self-government, see Parker, *State and Tribal Courts in Montana: The Jurisdictional Relationship*, 33 MONT. L. REV. 277 (1972); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

reservation,[5] prosecute fully emancipated Indians[6] for acts on the reservation,[7] and entertain suits by Indians.[8] A state may also assert jurisdiction over crimes committed on a reservation by a non-Indian against a non-Indian,[9] and over civil controversies arising on a reservation between non-Indians.[10] Beyond these recognized areas of valid state control, the division of jurisdictional authority is less clear; the state's assertion of jurisdiction often overlaps or conflicts with traditional tribal rights. This clash is especially acute when Indian affairs on a reservation will be directly affected by the outcome of the struggle for jurisdictional prevalence.

Standing as a dominant force between the tribe and the state in this jurisdictional puzzle is the federal government. Although Indian tribes

5. *See* DeCoteau v. District Court, 420 U.S. 425 (1975); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1967); Buckman v. State, 139 Mont. 630, 366 P.2d 346 (1961). *See generally* Davis, *Criminal Jurisdiction Over Indian Country in Arizona*, 1 ARIZ. L. REV. 62, 68 (1959); Comment, *Indictment Under the "Major Crimes Act"—An Exercise in Unfairness and Unconstitutionality*, 10 ARIZ. L. REV. 691, 696 (1968).

6. An emancipated Indian is one who no longer maintains tribal relations or is not recognized as a tribal member. *See* State v. Atteberry, 110 Ariz. 354, 355, 519 P.2d 53, 54 (1974); People v. Carmen, 43 Cal. 2d 342, 349-50, 273 P.2d 521, 525 (1954).

7. State v. Atteberry, 110 Ariz. 354, 356, 519 P.2d 53, 55 (1974); People v. Carmen, 43 Cal. 2d 342, 349-50, 273 P.2d 521, 525 (1954); State v. Big Sheep, 75 Mont. 219, 233-34, 243 P. 1067, 1071 (1926); State v. Howard, 33 Wash. 250, 259, 74 P. 382, 385 (1903).

8. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973), *citing* Felix v. Patrick, 145 U.S. 317, 332 (1892); United States v. Candelaria, 271 U.S. 432, 444 (1926); Harrison v. Laveen, 67 Ariz. 337, 347, 196 P.2d 456, 462 (1948); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).

9. *See* New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1882); State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963).

Historically, non-Indians committing crimes against Indians on reservations are subject to federal law and generally are tried in federal court. Williams v. Lee, 358 U.S. 217, 220 n.5 (1959); Williams v. United States, 327 U.S. 711 (1946). The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1970), may support the extension of criminal jurisdiction over non-Indian defendants to tribal courts as well, at least where the crime is against an Indian or Indian property. Prior to the Act, tribal courts were not obliged to provide the procedural safeguards required by the Constitution for defendants in federal and state courts. Since the Act provides substantially the same protections for defendants in tribal courts, *id.* §§ 1302-1303, one federal district court has upheld tribal jurisdiction over a non-Indian for the criminal assault of a tribal police officer. Oliphant v. Schlie, Civil No. 511-73C2 (W.D. Wash., April 5, 1974), *appeal docketed*, No. 74-2154, 9th Cir., April 30, 1974. The same result was reached in Belgarde v. Morton, No. C74-6835 (W.D. Wash., Aug. 18, 1975). On the question of tribal jurisdiction over non-Indian defendants, *see generally* deRaismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D.L. REV. 59, 102 (1975); Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D.L. REV. 1, 56-57 (1975); Criminal Jurisdiction of Tribes Over Non-Indians, Am. Indian Press Ass'n Release (Dec. 27, 1974), 8 AM. INDIAN L. NEWSLETTER 31 (1975); 18 ST. LOUIS U.L.J. 461 (1974) (Navajo tribal jurisdiction over non-Indian defendants).

10. Langford v. Monteith, 102 U.S. 145, 147 (1880). *See also* Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962). Tribal law can affect the non-Indian civil plaintiff when his cause of action accrues against an Indian on the reservation. Since the Indian defendant generally is not amenable to suit within the state, Williams v. Lee, 358 U.S. 217 (1959), the non-Indian must bring his action in the tribal courts. Federal regulation provides that "[t]he Courts of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction . . . ." 25 C.F.R. § 11.22CA (1975). *See also* NAVAJO TRIBAL CODE tit. 7, § 133(b) (Equity 1970).

historically have been characterized as quasi-sovereign entities,[11] their activities on reservations are subject to the plenary power of Congress.[12] Congress may reserve exclusive federal control over any such activity,[13] or it can delegate its authority to the states[14] or the Indian tribes.[15] Under traditional principles, where Congress fails to exercise its power of control over Indian affairs on reservations and does not specifically grant that power to the states, the tribe retains its right of self-regulation.[16] Although this rule seems to have been modified in some instances where state control allegedly does not infringe upon tribal autonomy,[17] a state is generally powerless to assert jurisdiction over Indian activity on reservations unless expressly authorized by Congress.[18] Congressional policy toward the Indian population has vacillated between that of self-determination and assimilation.[19] As the federal government now seems committed to a policy of Indian autonomy,[20] the

11. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973); United States v. Kagama, 118 U.S. 375, 381-82 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

12. The Constitution specifically gives Congress the power "to regulate commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Congress also has the power to abrogate the provisions of an Indian treaty. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

The President, with the advice and consent of the Senate, has the constitutional power to make treaties with foreign nations. U.S. CONST. art. II, § 2, cl. 2. This power was exercised in the making of numerous treaties with Indian tribes until 1871, when Congress declared that tribes should no longer be recognized as independent nations with whom treaties could be made. 25 U.S.C. § 71 (1970). At the same time the President was given the power to abrogate existing treaties with tribes in actual hostility to the United States. *Id.* § 72.

13. For example, certain serious crimes committed by an Indian in Indian country are subject to exclusive federal jurisdiction. 18 U.S.C. § 1153 (1970).

Congress has delegated a great deal of its power over reservation activities to the Bureau of Indian Affairs, which operates under the Department of the Interior. 25 U.S.C. § 1 (1970).

14. Congress has specifically authorized certain states to exercise jurisdiction over Indians in varying degrees. *See, e.g.*, 18 U.S.C. § 1162 (1970) (granting full jurisdiction over certain Indian reservations, excluding state taxation and fish and game laws, to Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin); 25 U.S.C. § 231 (1970) (allowing any state, with tribal approval, to enforce its laws affecting health and education on Indian reservations); *id.* §§ 232-233 (granting New York criminal and civil jurisdiction over reservations, exclusive of property taxation and fish and game regulation).

15. *See* 25 U.S.C. §§ 636-637 (1970) (authorizing the Navajo Tribe to adopt a tribal constitution and to use tribal funds as it sees fit, with the approval of the Secretary of the Interior).

16. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973); Williams v. Lee, 358 U.S. 217, 220 (1959).

17. *See* Williams v. Lee, 358 U.S. 217, 220 (1959); State *ex rel.* Iron Bear v. District Court, 162 Mont. 335, 342, 512 P.2d 1292, 1297 (1973).

18. Williams v. Lee, 358 U.S. 217 (1959); Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958).

19. For a detailed analysis of the historical relationship between Indians and the United States government, see F. COHEN, FEDERAL INDIAN LAW (1942); Kelly, *Indian Adjustment and the History of Indian Affairs*, 10 ARIZ. L. REV. 559 (1968).

20. Telephone interview with Bradley H. Patterson, White House Liaison for Indian Affairs 1969-75, July 28, 1975. Under the slogan of "self-determination without termination," the federal government is encouraging Indian tribes to gradually assume control of their own governmental functions. *Id.* The policy was stated by former President Richard M. Nixon as follows:

It is my firm belief that Indians must be given more of an opportunity

right of tribal self-government takes on renewed significance, thereby rendering state attempts to exercise jurisdiction over Indian activity on reservations more vulnerable to legal challenge.

In *Wauneka v. Campbell*,[21] the Arizona court of appeals was called upon to define the jurisdictional boundary between the Navajo Tribe and the state[22] in response to a state attempt to enforce the Uniform Motor Vehicle Safety Responsibility Act [Safety Responsibility Act][23] against Indians involved in an on-reservation accident. Pauline Wauneka, a Navajo tribal member residing on the Navajo Reservation in Arizona, was involved in an automobile accident with another Indian on a state highway running through reservation land. In accordance with Navajo tribal law,[24] she was in possession of a valid Arizona driver's license at the time of the accident. After the accident, the Arizona Motor Vehicle Division notified Wauneka that her license would be suspended unless she posted security in compliance with the state's Safety Responsibility Act.[25] Wauneka instituted a class action seeking a declaration that the Act has no application to Indians involved in accidents occurring on the Navajo Reservation. The trial court granted the state's motion for summary judgment on the ground that the Navajo Tribe had consented to enforcement of state licensing and revocation laws by requiring tribal members to obtain Arizona licenses.[26] The court of appeals, however, reversed the trial court's decision and held that Arizona was powerless to enforce its financial responsibility laws for accidents occurring on the Navajo Reservation between members of the tribe.

This commentary will discuss the jurisdictional limitations on state power set forth in *Wauneka*. First, the Indian sovereignty doctrine will

---

to control their own lives and their own destiny as a people. There still exists a need for Federal assistance, both financial and advisory, but there also exists a need for greater control of Indian affairs by Indians.

Nixon, *Special Introduction by President Richard Nixon*, 48 N.D.L. REV. 529, 531 (1972). *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A.L. REV. 535, 536 & n.8 (1975); Kelly, *supra* note 19, at 573-77.

21. 22 Ariz. App. 287, 526 P.2d 1085 (1974).

22. Arizona's relationship to the Navajo Tribe can be traced to the Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667, whereby the Navajo Reservation was established, encompassing land in what are now the states of Arizona, Utah, and New Mexico. The treaty has been interpreted as vesting exclusive federal control over the land within the boundaries of the reservation. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 175 (1973); Williams v. Lee, 358 U.S. 217, 221-22 (1959); Wauneka v. Campbell, 22 Ariz. App. 287, 289, 526 P.2d 1085, 1087 (1974).

23. ARIZ. REV. STAT. ANN. §§ 28-1101 to -1225 (1956), *as amended*, (Supp. Pamphlet 1973).

24. NAVAJO TRIBAL CODE tit. 14, § 602 (Equity 1970) ("Every Indian operating a motor vehicle on the Navajo Reservation shall be the holder of a valid driver's license issued by the state in which such individual resides.").

25. ARIZ. REV. STAT. ANN. § 28-1142(A) (Supp. Pamphlet 1973).

26. 22 Ariz. App. at 288, 526 P.2d at 1086.

be explained as a foundation for understanding the constraints upon a state's jurisdiction over Indians and Indian country. The federal statutes regulating state assumption of jurisdiction over Indians will be examined, and the viability of the infringement test explored. Finally, consideration will be given to the implications of and alternatives to the unenforceability of state law, particularly financial responsibility statutes, within Indian country.

The Indian Sovereignty Doctrine

The Indian sovereignty doctrine represents the judiciary's attempt to describe the unique relationship between the Indian tribes and the government.[27] Indian tribes historically have been possessed of the power of self-government, being semi-autonomous in the administration of their internal affairs. Although their relationship with the federal government is said to resemble that of "a ward to a guardian,"[28] Indians are at the same time citizens of the United States[29] and of the states in which they reside.[30] The term "sovereignty" as applied to Indians, however, is a bit misleading since tribes clearly are not sovereignties in the fullest sense of the term. While sovereignty usually connotes a government with absolute, independent power, free from external control, the power of Indian tribal governments is conditional, subject to the will of Congress.[31] The federal government's plenary authority over the Indians, however, has not divested the sovereignty doctrine of all meaning or significance. Recognition of the semisovereign status of Indians often has formed the groundwork for strict scrutiny of any state attempts to invade the sphere of Indian autonomy in the absence of express federal authorization.[32]

27. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 167-73 (1973); Organized Village of Kake v. Egan, 369 U.S. 60, 71-74 (1962). Perhaps the most comprehensive statement of the Indian sovereignty doctrine was made in United States v. Kagama, 118 U.S. 375 (1886):

> They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed with the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

Id. at 381-82. For a more detailed discussion of the complex relationship between tribal Indians and the United States, see Note, *Sovereignty, Citizenship and the Indian*, 15 ARIZ. L. REV. 973 (1973).

28. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831). Indian tribes have also been described as "domestic dependent nations." *Id.*

29. 8 U.S.C. § 1401(a)(2) (1970).

30. Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948); Martinez v. Southern Ute Tribe, 150 Colo. 504, 509, 374 P.2d 691, 694 (1962).

31. Federal statute provides: "Except as otherwise expressly provided by law, the general laws of the United States . . . shall extend to the Indian country." 18 U.S.C. § 1152 (1970). *See* Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962); United States v. Kagama, 118 U.S. 375, 381-82 (1886). *See generally* Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617 (1968).

32. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172-73 (1973); Or-

The *Wauneka* court appropriately began its analysis by discussing the semiautonomous status of Indian tribes.[33] The court indicated that although the Indian sovereignty doctrine itself presents no real answers to specific jurisdictional questions, it is a useful tool for analyzing the legislation and court decisions that have often tended to complicate Indian law.[34] Accordingly, the *Wauneka* court examined the relevant treaty[35] and statutes with the "tradition of sovereignty in mind."[36]

Statutory Requirements

In recent years, Congress has provided means by which states may assume jurisdiction over Indian tribes within their borders. In 1953, while the official policy of the government favored assimilation, Public Law 280[37] was passed, giving consent of the United States to any state to assume full or partial jurisdiction over Indian reservations by affirmative state legislative action.[38] By 1968, the official policy had returned to one of self-determination.[39] In that year, Congress amended Public

ganized Village of Kake v. Egan, 369 U.S. 60, 71-74 (1962); Williams v. Lee, 358 U.S. 217, 218-20 (1959); United States v. Kagama, 118 U.S. 375, 381-82 (1886).

33. 22 Ariz. App. at 288-89, 526 P.2d at 1086-87, *quoting* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172-73 (1973).

34. 22 Ariz. App. at 289, 526 P.2d at 1087.

35. Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667. The *Wauneka* court acknowledged that the Treaty of 1868 precluded the state from extending its law into Indian country without congressional authorization. 22 Ariz. App. at 289, 526 P.2d at 1087. See discussion note 22 *supra.*

36. 22 Ariz. App. at 289, 526 P.2d at 1087.

37. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (now codified as amended in scattered sections of 18, 28 U.S.C.).

38. Id. §§ 6-7, 67 Stat. 588, 590. Public Law 280 also provided that:

> Notwithstanding the provisions of any Enabling Act . . . the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this Act . . . .

Id. § 6, 67 Stat. 590. A virtually identical provision has been retained under current federal law. 25 U.S.C. § 1324 (1970).

Several states, including Arizona, have broad disclaimer provisions in their enabling acts and constitutions which leave exclusive jurisdiction and control over Indian land to the federal government. Arizona's enabling act, Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569-70, and constitution, ARIZ. CONST. art. 20, paras. 4-5, contain such disclaimers. The federal statutory provision above seemingly requires appropriate amendment or repeal of the disclaimer clause in the state constitution before state jurisdiction can be extended legitimately to Indian reservations. Nevertheless, in 1967 Arizona assumed jurisdiction over air and water pollution control on Indian lands without amending its constitution. ARIZ. REV. STAT. ANN. §§ 36-1801, -1865 (1974). Although this clearly seems to circumvent federal law, other state courts have held that amendment of similar prohibitive constitutional provisions is not a necessary prerequisite to state assumption of jurisdiction over Indian land, despite the directive of 25 U.S.C. § 1324. *See* State *ex rel.* McDonald v. District Court, 159 Mont. 156, 162-63, 496 P.2d 78, 81-82 (1972); Tonasket v. State, 84 Wash. 2d 164, 525 P.2d 744 (1974); State v. Paul, 53 Wash. 2d 789, 794, 337 P.2d 33, 37, *appeal dismissed,* 361 U.S. 898 (1959). The *Wauneka* court, on the other hand, indicated that appropriate amendment of inconsistent state constitutional or statutory provisions is necessary for valid state jurisdiction over Indian lands. 22 Ariz. App. at 289, 526 P.2d at 1087. For a persuasive argument that mere legislative enactment by states having such disclaimer provisions is insufficient to comply with federal statutory requirements, see Goldberg, *supra* note 20, at 567-75.

39. *See* Kelly, *supra* note 19, at 573-77; note 20 *supra.*

Law 280 to require that a state, in addition to taking affirmative legislative action, must obtain the consent of any Indian tribe over which it seeks to exercise jurisdiction.[40] Thus, federal law now clearly requires both appropriate state legislative action and concurrent tribal action before state jurisdiction may be properly asserted. Despite this unambiguous mandate, courts frequently have had to evaluate questionable attempts to apply state law on Indian reservations.

The Arizona court of appeals focused on these federal statutory requirements in *Wauneka.* Turning first to the issue of tribal consent, the court relied on the reasoning of the United States Supreme Court in *Kennerly v. District Court.*[41] In *Kennerly,* the Supreme Court held that the Blackfeet Tribe had not consented to state jurisdiction in accordance with federal law,[42] although the tribal council had passed a resolution purporting to do so.[43] Construing the consent and voting requirements literally, the Court refused to equate the unilateral act of the tribal council with the consent by tribal vote required by the statute.[44]

Adopting the approach of the *Kennerly* Court, the Arizona court in *Wauneka* easily concluded that the tribal consent required by federal law was lacking.[45] The Navajo Tribal Council in *Wauneka,* far from giving its consent to jurisdiction as had the Blackfeet Council in *Kennerly,* merely had required reservation Indians to obtain and possess driver's licenses for the state in which they lived.[46] It would have been extremely difficult in this situation to find consent to anything but the issuance of state licenses, especially since the Navajo ordinance explicitly states that failure to possess a valid state driver's license is punishable in tribal, not state, courts.[47] Clearly the tribal council had not expressly consented to enforcement by the state of its financial responsibility laws. Accordingly, the court of appeals correctly concluded that the Navajo

40. 25 U.S.C. §§ 1321(a), 1322(a) (1970). Such consent was to be manifested by a majority vote of the adult Indians. *Id.* § 1326 (providing in part: "State jurisdiction . . . shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose.").

41. 400 U.S. 423 (1971).

42. *Id.* at 428-29.

43. *Id.* at 425.

44. Although the purported tribal consent in *Kennerly* occurred in 1967, prior to the 1968 amendment specifically requiring such consent, the Court's holding was not affected by that fact. The state's assertion of jurisdiction was invalid under Public Law 280 as well, since no affirmative state legislative action had been taken with respect to the Blackfeet Reservation. *Id.* See text accompanying notes 37-40 *supra.*

45. 22 Ariz. App. at 290-91, 526 P.2d at 1088-89.

46. NAVAJO TRIBAL CODE tit. 14, § 602 (Equity 1970).

47. *Id.* § 604 provides:

> Any Indian violating the provisions of sections 602 [license of state required] and 603 [possession and display of license] of this title shall be subject to prosecution in the Courts of the Navajo Tribe and upon conviction shall be fined a sum of not less than $1 or more than $25, or by a sentence to hard labor for a period of [*sic*] not to exceed 15 days, or both.

Tribe had not "voluntarily relinquished . . . the time-consuming task of controlling and regulating the issuance and withdrawal of licenses of Navajo drivers."[48]

Although the *Wauneka* court rested its decision primarily on the lack of sufficient tribal consent, the court noted that even if the Navajo code provision requiring state licenses were deemed adequate tribal consent under the federal statute, the state still would be powerless to enforce the Safety Responsibility Act against Indians involved in accidents on the Navajo Reservation.[49] The court based this assertion on the fact that Arizona had not satisfied the second requirement of Public Law 280[50] and the 1968 amendments[51] by appropriately amending its constitution or statutes.[52]

Despite the state's failure to comply with these basic federal statutory requirements, had the consent in *Wauneka* actually been deemed sufficient, the invalidity of Arizona's assertion of jurisdiction might not have been as obvious as the court seemed to suggest. Enactment of the Navajo Code provision requiring state driver's licenses predated both Public Law 280 and the 1968 amendments.[53] Although no federal statutory machinery existed prior to 1953 whereby a state could unilaterally assume jurisdiction over Indian affairs on reservations, a tribe itself presumably was free to relinquish part or all of its authority to the state.[54] A finding of valid pre-1953 tribal consent in *Wauneka*, there-

48. 22 Ariz. App. at 290, 526 P.2d at 1088. The court held that the state licensing statute and the Uniform Motor Vehicle Safety Responsibility Act "are separate and distinct pieces of legislation designed to accomplish different objectives." *Id.*

49. *Id.* at 289, 526 P.2d at 1087. The court's holding must be limited for present purposes to situations where only Indians are involved. In other situations, such as where non-Indians are concerned, the additional problem of infringement is presented. See text & notes 57-80 *infra.*

50. Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588, 590 (repealed 1970).

51. *See* 25 U.S.C. §§ 1321(a), 1322(a) (1970) (implicitly retaining the requirement of affirmative state legislative action to assume jurisdiction over Indian country, despite the repeal of § 7 of Public Law 280 by 25 U.S.C. § 1323(b) (1970)).

52. 22 Ariz. App. at 289, 526 P.2d at 1087. See text & notes 37-40 *supra.* The court may have been referring broadly to the lack of any affirmative state legislative action, but the absence of any explanatory analysis renders the court's assertion ambiguous. If the court were referring merely to Arizona's failure to amend or repeal the prohibitive disclaimer provision in the state constitution, it is noteworthy that courts have not always required strict compliance with this requirement and have upheld state jurisdiction where no appropriate amendment has been made. See discussion note 38 *supra.* In this case, however, there was also an absence of state legislation specifically extending the reach of the financial responsibility statutes to licensed Indian drivers.

Following Williams v. Lee, 358 U.S. 217 (1959), a resolution was introduced into the Arizona Senate calling for amendment of the Arizona constitution to extend the state's civil and criminal jurisdiction to Indian reservations. The resolution never got out of committee, however. S.C.R. 9, 24th Legislature, 1st Reg. Sess. (introduced January 27, 1959), *discussed in* Davis, *supra* note 5, at 100. The same resolution had been proposed the previous year, with the same result. S.C.R. 9, 23d Legislature, 2d Reg. Sess. (introduced February 27, 1958).

53. The provisions of tribal law construed in *Wauneka* were passed on October 19, 1951, NAVAJO TRIBAL CODE tit. 14, §§ 601-604 (Equity 1970), two years before Public Law 280 was passed.

54. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832); State *ex rel.* Iron Bear

fore, might have obviated the necessity of state compliance with the requirements later established in the 1953 and 1968 federal laws.

The *Wauneka* court perhaps could have rebutted this reasoning by noting that Arizona had not expressly or impliedly responded to any such offer by the Indians to relinquish jurisdiction to the state.[55] That is, the state had never actively sought to apply the Safety Responsibility Act to Indians involved in reservation accidents prior to *Wauneka.* An additional rebutting argument could have been based on Arizona's enabling act and constitution, both of which were in effect in 1953, reserving to Congress absolute jurisdiction and control over Indian reservations.[56] Despite these potential arguments, however, the court's conclusion that the Navajo Tribe had in no way consented to state enforcement of the Act in this situation formed a more solid basis for its decision.

The Infringement Test

The *Wauneka* court, once having found that Arizona had not complied with the federal statutory prerequisites to assertion of jurisdiction, could have stopped there. Indeed, the court acknowledged that the state's failure to comply with federal law was the determinative factor in its decision.[57] Nevertheless, the court went on to discuss the infringement test, another standard of measuring the limits of state jurisdiction. Devised by the United States Supreme Court in *Williams v. Lee,*[58] the question under this test is "[e]ssentially, absent governing Acts of Congress . . . whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."[59] This test was essentially dictum in the *Williams* opinion,[60] but it has been used unsparingly, often erroneously, by state courts unwilling to

v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973); Comment, *The Power of a State to Impose an Income Tax on Reservation Indians,* 6 WILLIAMETTE L.J. 515, 519 (1970). Such a tribal relinquishment is merely an exercise of its sovereignty, and if the state agrees to accept the jurisdictional responsibility by affirmative action, there is no conflict with federal law. For example, in *Iron Bear,* the Montana supreme court held that a 1938 enactment of the Assinboine-Sioux Tribe recognizing only marriages and divorces granted under Montana laws, coupled with consistent state action, was sufficient to vest the state with exclusive jurisdiction to perform marriages and grant divorces, unaffected by the subsequent passage of Public Law 280 and its 1968 amendments. 162 Mont. at 342, 512 P.2d at 1297. See discussion notes 55, 70 *infra.*

55. In contrast, in State *ex rel.* Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), the state had issued marriage licenses and divorce decrees exclusively long before Public Law 280 was passed; thus the entire process of assuming jurisdiction by mutual action was completed before initial passage of that law. The tribe had delegated its power to the state, and the state had accepted the responsibility.

56. See discussion note 38 *supra.*

57. 22 Ariz. App. at 291, 526 P.2d at 1089.

58. 358 U.S. 217 (1959).

59. *Id.* at 220.

60. *See* Goldberg, *supra* note 20, at n.6.

conclude that the state was powerless to enforce its laws on Indian reservations.[61]

Misinterpretation of the infringement test may be attributed in part to the Supreme Court's failure to delineate the situations where it should be invoked. In *Williams*, the test was formulated in response to Arizona's attempt to assert jurisdiction over an Indian defendant in a suit by a non-Indian for a cause of action arising on the Navajo Reservation.[62] The Supreme Court held that state jurisdiction in such a case would infringe on the right of tribal self-government.[63] Applying the test about three years later, however, the Court found that state regulation of Indian fishing off the reservation would not infringe on the tribal right of self-government.[64] The scope and application of the infringement test were clarified somewhat in *McClanahan v. Arizona State Tax Commission*.[65] In *McClanahan*, the Court rejected the state's contention that a state tax on Indians' income earned on the reservation would not interfere with the right of Indian self-government.[66] Moreover, the Court concluded that the infringement test was meant to apply only when non-Indians or off-reservation affairs were involved.[67] In distinguishing *Williams*,[68] the *McClanahan* Court indicated that there is no room for state action, without the express consent of Congress, in situations involving only Indians and Indian country.[69]

The *Wauneka* court, relying on *McClanahan*, suggested that the infringement standard was not applicable where, as in the case before it,

61. *See* McClanahan v. Arizona State Tax Comm'n, 14 Ariz. App. 452, 484 P.2d 221 (1971), *rev'd*, 411 U.S. 164 (1973) (holding that a personal income tax could be imposed on Indians working on the reservation without infringing on tribal sovereignty, a view that was summarily rejected by the United States Supreme Court); Kennerly v. District Court, 154 Mont. 488, 466 P.2d 85 (1970), *rev'd*, 400 U.S. 423 (1971) (holding that civil jurisdiction over an Indian defendant in a suit on an alleged debt did not interfere with tribal autonomy, since "a debt for groceries is a personal thing and not connected to Indian tribal rights." 154 Mont. at 497, 466 P.2d at 89).

62. Williams v. Lee, 358 U.S. 217 (1959).

63. *Id.* at 223. The authority of tribal courts over reservation affairs was considered an important aspect of tribal self-government. *Id.*

64. Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

65. 411 U.S. 164 (1973).

66. *Id.* at 179.

67. *Id.* at 179-80. Although the Court's prior application of the infringement test to Indian fishing activity in Organized Village of Kake v. Egan, 369 U.S. 60 (1962), ostensibly conflicted with the *McClanahan* qualification of that test, the two cases are reconcilable. Since a reservation had never been established for the Indians involved in *Kake*, their activity was treated as taking place outside of Indian country. Consequently, the state's interest in asserting its jurisdiction was upheld. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 179 (1973).

68. In reference to *Williams*, the *McClanahan* Court stated:

> The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves.

411 U.S. at 179-80.

69. *Id.* at 168, 175; *see* Williams v. Lee, 358 U.S. 217, 220 (1959); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

only Indians and reservation activities were involved.[70] However, sensing the Supreme Court's hesitancy to clearly define the limits of the infringement test, the court of appeals found that even if the test applied, state jurisdiction indeed would infringe on Indian sovereignty.[71] In supporting this conclusion, the court noted that laws such as the Safety Responsibility Act[72] are manifestations of the state's police power, and therefore its invocation against Indians would conflict with the police powers of the tribe.[73] Additionally, the Act contains provisions[74] that could not be enforced against Indians, since Arizona has no civil[75] or criminal[76] jurisdiction over Indians for occurrences on reservations.

The *Wauneka* court might have declared simply that it is infringement per se for a state to regulate Indian activities when only Indians are involved and the action arises on the reservation. Under this approach, which is tantamount to holding the infringement test totally inapplicable in such situations, any state regulation of Indian affairs on a reservation, in the absence of express federal authorization, constitutes impermissible infringement on the right of tribal self-government.[77] On the other

70. 22 Ariz. App. at 290, 526 P.2d at 1088. *But cf.* State *ex rel.* Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973). The *Iron Bear* court, applying the infringement test to Indian activity on a reservation, upheld state jurisdiction to issue divorce decrees against reservation Indians. The court concluded that: "The state . . . has residual jurisdiction in areas where the federal law has not preempted state activity and the tribes have determined not to exercise jurisdiction." *Id.* at 345, 512 P.2d at 1298. As one member of the court noted, however, this broad interpretation of *Williams* was clearly unnecessary to the court's decision: "The *Williams* test simply has no application to this situation and its continued indiscriminate application to all Indian jurisdictional questions in this Court is a mistake." *Id.* at 347, 512 P.2d at 1299 (Haswell, J., specially concurring). *See* discussion notes 54-55 *supra.*

71. 22 Ariz. App. at 290, 526 P.2d at 1088.

72. ARIZ. REV. STAT. ANN. §§ 28-1101 to -1225 (1956), *as amended,* (Supp. Pamphlet 1973).

73. 22 Ariz. App. at 290, 526 P.2d at 1088.

74. ARIZ. REV. STAT. ANN. § 28-1142(A) (Supp. Pamphlet 1973) (within 60 days of report of a motor vehicle accident, the state superintendent shall suspend the operator's license of the driver unless the driver posts "sufficient" security to satisfy any judgment for damages that may result from the accident); ARIZ. REV. STAT. ANN. § 28-1148 (1956) (prescribing exclusionary rules of evidence in civil suits arising from automobile accidents); *id.* § 28-1203 (providing criminal sanctions for noncompliance with other provisions of the Act).

75. Williams v. Lee, 358 U.S. 217 (1959). *But cf.* Indian Oasis School Dist. v. Zambrano, 22 Ariz. App. 201, 526 P.2d 408 (1974). Decided only one week before *Wauneka, Zambrano* held that members of the Sells Indian Reservation district school board could be sued in state court by teachers claiming damages for the board's failure to renew contracts. The thrust of the court's decision was that the board members, some of whom were Indian, were being sued in their capacity as board members, and since their authority was governed by state law, there would be no infringement on the tribal right of self-government. *Id.* at 202, 526 P.2d at 409.

76. Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958) (state jurisdiction over a traffic offense by an Indian denied).

77. The language of *Williams* tends to support this view:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of tribal courts over *Reservation affairs* and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and

hand, when the persons involved are all non-Indians[78] or the action accrues off the reservation,[79] the state can exercise jurisdiction without inquiring into the effect on Indian autonomy. The infringement test remains viable, however, when Indians *and* non-Indians are involved in activities on the reservation.[80] In those instances, it is necessary to consider whether Congress has specifically preempted state action, or whether state jurisdiction would otherwise infringe on the right of tribal self-government. Where, as in *Wauneka*, only Indians are involved in a reservation accident, the state cannot enforce its financial responsibility laws without infringing upon tribal sovereignty.

Implications of Wauneka v. Campbell

The inability of a state to enforce its financial responsibility statutes within a reservation presents serious problems both to the Indian tribes and the state. The primary purpose of such laws "is to prevent financial distress to persons involved in accidents on the highways with uninsured motorists."[81] Absent legislation, enforceable on the reservation, requiring proof of financial responsibility,[82] there is clearly a greater likelihood that uninsured Indian drivers will be using the state highways. This, coupled with the fact that many Indians are virtually judgment-proof due to their low income level,[83] indicates that a substantial num-

---

> the transaction took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

Williams v. Lee, 358 U.S. 217, 223 (1959) (emphasis added).

78. New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); United States v. McBratney, 104 U.S. 621 (1881).

79. *See* Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962) ("It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country.").

80. An interesting question left open in *Wauneka* is whether Arizona could enforce its safety responsibility laws against a non-Indian involved in a reservation accident. The state probably would have jurisdiction over him if the accident involved only non-Indians and non-Indian property. *See* text & note 9 *supra*. A more difficult problem arises if an accident occurs between an Indian and a non-Indian on the reservation. In that situation, the courts should properly consider whether application of the state law would infringe upon the right of tribal self-government. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 179 (1973); Williams v. Lee, 358 U.S. 217 (1959). A court very likely would find that enforcement against the non-Indian would not interfere with tribal sovereignty, while enforcement against the Indian would.

81. Farmer v. Killingsworth, 102 Ariz. 44, 47, 424 P.2d 172, 175 (1967).

82. Although the Navajo Tribal Code contains numerous provisions similar to Arizona's motor vehicle laws, NAVAJO TRIBAL CODE tit. 14, §§ 201-328 (Equity 1970), the Code does not include financial responsibility laws.

83. In 1971, nearly 40 percent of all male reservation Indians were unemployed, compared to a 10 percent figure for nonwhite males and a national unemployment rate of 5.3 percent. The median family income for 74 percent of all reservation Indians was less than $3000, ranging from $900 (Papago in Arizona) to $3600 (Northern Cheyenne in Montana). Comment, *Economic Development of Indian Reservations: Increasing Tribal Participation, Limiting Federal Control*, 48 TUL. L. REV. 649 (1974). See A. SORKIN, AMERICAN INDIANS AND FEDERAL AID 4 (1971).

ber of drivers will not be compensated for damages sustained in reservation accidents. Since every state now has either compulsory automobile liability insurance or financial responsibility laws,[84] driving on the reservation presents dangers largely eliminated elsewhere.

Although a practical system for compensating accident victims on the reservation is sorely needed, this need may not outweigh the financial burden such a system would place on Indian drivers in terms of insurance premiums. The cost of insurance to individual Indian drivers cannot be overlooked and may be an overwhelming burden.[85] Individual tribes must view the problem realistically to determine whether members could sustain such a burden.

Although *Wauneka* dealt specifically with financial responsibility in the motor vehicle context, the general lack of enforceability of state law on Indian reservations indicates that other serious problems are without regulation and may call for similar tribal consideration. If the tribe determines that there is a sufficient need for action in a particular area and that the detrimental effects of the legal changes would be minimal, there are three clear alternative courses the tribe may take. First, the Indians can request the United States to promulgate and enforce regulations on the reservation.[86] Second, the Indians can ask the state to take partial or total jurisdiction over the reservation, and, with the state's consent, allow it to enforce its laws on the reservation.[87] In certain instances, the state will undoubtedly find that the burden of

---

84. *See* Comment, *A Survey of Financial Responsibility Laws and Compensation of Traffic Victims: A Proposal for Reform*, 21 VAND. L. REV. 1050, 1081-82 (1968).

85. Many tribal governments, however, are not as financially troubled as their individual members are. In some instances, tribal council treasuries may be able to offset a portion of the insurance cost to the individual Indians. Wealthy tribes, such as the Navajo Tribe, which derives a great deal of revenue from mineral interests on the reservation, may be equipped to subsidize these programs or to finance low-cost group insurance plans.

86. The Bureau of Indian Affairs, operating under the auspices of the Department of the Interior, has long been a dominant force on the Indian reservations, and has been charged with handling many of the problems on the reservations. For example, the Bureau has long had the responsibility of regulating Indian education. *See* 25 C.F.R. §§ 31-34 (1975).

The United States could, of course, impose such regulations without a tribal request. Such a move is unlikely, however, in view of current federal efforts to promote Indian self-government. See text & note 20 *supra*.

87. Only seven states have assumed any large measure of jurisdiction over Indian reservations in response to Public Law 280 and its 1968 amendments. FLA. STAT. § 285.16 (1973) (enacted in 1961, assuming full jurisdiction); IDAHO CODE § 67-5101 (1973) (assumption of civil and criminal jurisdiction over eight subject areas); IOWA CODE ANN. § 1.12 (Spec. Pamphlet 1974) (1967 enactment assuming civil jurisdiction); NEV. REV. STAT. § 41.430 (1957), *as amended*, (1973) (originally enacted in 1955, now requiring consent of the individual tribes for continuation of full state jurisdiction); N.D. CENT. CODE §§ 27-19-01 to -13 (1974) (assumption of civil jurisdiction with the consent of the Indian tribes); UTAH CODE ANN. §§ 63-36-9 to -21 (Supp. 1973) (enacted in 1971, requiring special election of tribe); WASH. REV. CODE ANN. § 37.12.010 (1964) (civil and criminal jurisdiction over Indians apart from Indian land and over selected subject areas within Indian land). *See also* Goldberg, *supra* note 20.

jurisdiction[88] will be justified by the benefits its citizens will receive.[89] Third, the tribe itself can take affirmative action to regulate Indians on the reservation, possibly by adopting desirable provisions of state law as part of the tribal code. Regardless of which course of legal change, if any, is selected, the initiative clearly lies with the Indians themselves.

If Indians' motor vehicles are insured, the traveling public, both Indian and non-Indian, will benefit from the inevitable decrease in uncompensated reservation accidents, and driving on the reservation will present fewer dangers than it does today. Until some action is taken to ensure financial responsibility of Indian drivers, however, a state like Arizona is in an unusual predicament. It has issued a license which it has no power to revoke, even though an event has occurred within its borders that would otherwise justify revocation or suspension. Such a result may very well encourage the state to seek alternative methods of restricting the use of state driver's licenses by uninsured Indians. For example, Arizona may attempt to revoke the off-reservation driving privileges of a driver such as Wauneka, thus limiting her license to a reservation permit. However, this might be beyond the power of the state under the *Wauneka* holding that states have no jurisdiction over reservation accidents. The state may then, in an effort to either force the Indian tribes to effectuate financial responsibility laws or to relieve itself of the burden of issuing licenses it cannot revoke, refuse to issue licenses to reservation Indians. Whereas the state seemingly can issue or refuse to issue licenses to non-residents,[90] such a choice may make the situation on the reservation far worse than it is now. Unless tribes took up the slack and issued their own licenses, there would be virtually no control over who was permitted to drive within Indian country, and reservations would present even greater dangers to those driving or walking within their boundaries. Such a thought is a sobering one, and although the states are unlikely to create such a situation, the possibility

88. The burden would be primarily financial, in that the cost of establishing enforcement mechanisms on the reservations, such as administrative offices and staff, would be substantial. The state would also probably need to provide administrative hearing procedures on the reservations, which would be an additional burden. Another problem, perhaps a minor one, that may develop, is overcoming the language barrier that exists between many reservations and the states. Interpreters would be necessary on such reservations, and bilingual administrative forms may also be necessary.

89. Obvious examples of situations in which the mutual benefits may justify tribal cession and state acceptance of power are those involving air and water pollution. Arizona has taken jurisdiction over these matters in response to the original Public Law 280. ARIZ. REV. STAT. ANN. § 36-1801 (Supp. Pamphlet 1973) (air pollution); *id.* § 36-1865 (water pollution). See discussion note 38 *supra.*

90. Arguably, such issuance is within the police power of the state. *Cf.* Campbell v. Superior Court, 106 Ariz. 542, 546, 479 P.2d 685, 689 (1971). This solution, however, is also problematical, since it is well established that Indians are citizens of the state in which they reside, despite the fact that they reside on a reservation within that state. *See* Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948); Martinez v. Southern Ute Tribe, 150 Colo. 504, 509, 374 P.2d 691, 694 (1962).

may encourage tribal governments to act to ensure financial responsibility among their drivers.

Conclusion

It is axiomatic that there is a pressing need for more comprehensive regulation of Indians driving in Indian country, including financial responsibility laws. The void that currently exists presents serious dangers to Indians and non-Indians traveling through Indian country. Despite these countervailing considerations, the Arizona court of appeals in *Wauneka* reached the inescapable conclusion that the state could not enforce its financial responsibility laws against Indians for accidents on the Navajo Reservation.

Some states will certainly be reluctant to accept such a ruling, and may try to circumvent it, or try to force tribal consent to enforcement of state law. These measures can only serve to strain already tenuous relations between tribal governments and the states. The real problem is the fact that there are no financial responsibility laws enforceable on most Indian reservations. This void will exist until the Indians themselves decide that it needs to be filled, or the federal government makes the decision for them.

The jurisdictional void left in the wake of *Wauneka* can be filled by the Indians themselves. By enacting their own financial security laws, or adopting state laws and providing a means of tribal enforcement consistent with tribal customs and values, Indian tribes would be asserting their right of self-government. If the tribe decides that its members require and can afford such a system, it can, if necessary, ask the state to administer the program. The state, in turn, should carefully consider the benefits its residents would receive and respond to the tribal request.

VIII. JUVENILE LAW

A. THE STANDARD OF PROOF AT JUVENILE PROBATION REVOCATION PROCEEDINGS

As a result of recent rulings of the United States Supreme Court, juvenile defendants at delinquency adjudication hearings are now entitled to many of the due process safeguards accorded adults in criminal proceedings.[1] Of particular significance is the decision in *In re Winship*, where the Supreme Court held that proof of guilt beyond a reasonable doubt was required at a juvenile delinquency hearing.[2] Still undecided by the Supreme Court, however, is whether proof beyond a reasonable doubt is required at juvenile probation revocation hearings,[3] where a juvenile who has been adjudicated a delinquent and placed on probation in the community faces the possibility of incarceration in a state institution.

The Arizona supreme court answered this question in the negative in the case of *In re Maricopa County Juvenile Action No. J-72918-S.*[4] The court held that the commission of acts for which juvenile probation is revoked need only be proven by a preponderance of the evidence.[5]

Juvenile J-72918-S was first adjudicated a delinquent in March 1972 after admitting to five counts of delinquent acts.[6] He was placed on probation in the custody of his parents but under the supervision of the Maricopa County Probation Department.[7] After several intervening referrals to juvenile court, still another petition was filed against the juvenile in October 1973, this time alleging that he had violated the terms and conditions of his probation by possessing the motor vehicle of another while knowing or having reason to know that the vehicle had

1. *See In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).
2. *In re* Winship, 397 U.S. 358, 368 (1970).
3. *Id.* at 359 n.1.
4. 111 Ariz. 135, 524 P.2d 1310, *vacating* 22 Ariz. App. 33, 523 P.2d 84 (1974).
5. 111 Ariz. at 138, 524 P.2d at 1313.
6. 22 Ariz. App. at 33, 523 P.2d at 84.
7. 111 Ariz. at 136, 524 P.2d at 1311. The terms and conditions of probation were set forth in writing for the juvenile, one of the terms being that he "not violate any criminal laws or laws governing the conduct of children under the age of 18." *Id.*

been stolen.[8] The juvenile was found in violation of the terms and conditions of his probation and committed to the custody of the Department of Corrections.[9]

The major contention of the juvenile on appeal of his commitment was that the violation of probation had not been proven beyond a reasonable doubt.[10] A majority of the Arizona court of appeals agreed that proof beyond a reasonable doubt is required at a juvenile probation revocation hearing at which the juvenile is charged with a criminal act,[11] but found that this burden of proof had been met.[12]

On appeal the Arizona supreme court vacated the opinion of the court of appeals in *Juvenile J-72918-S* and affirmed the judgment of the juvenile court.[13] In rejecting the standard of proof established by the court of appeals, the Arizona supreme court found that a violation of probation does not constitute a "delinquency matter" within the meaning of rule 17(a)(1) of the Arizona Rules of Procedure for the Juvenile Court.[14] Since rule 17 requires a reasonable doubt standard only for delinquency matters and a preponderance of the evidence for all

8. *Id.*
9. *Id.*
10. *Id.*
11. 22 Ariz. App. at 35, 523 P.2d at 86. This distinction between criminal and noncriminal probation violations originates from the language of *Winship*: "This case presents the single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." 397 U.S. at 359. The criminal-noncriminal distinction is also reflected in ARIZ. R.P. JUV. CT. 17. *See* text accompanying note 22 *infra.*

In *Juvenile J-72918-S* the court of appeals stated in dictum that if the probation revocation involved a noncriminal violation, the reasonable doubt standard of *Winship* and rule 17(a)(1) would not be required. 22 Ariz. App. at 36, 523 P.2d at 87. However, if *Winship* means that a reasonable doubt standard must be applied only where the delinquency adjudication or probation revocation involves an alleged criminal act, an anomaly would result whereby a juvenile charged with only a status offense (an act which would not constitute a crime if committed by an adult) could be incarcerated for as long as, but on a lesser standard of proof than, if he had committed a more serious criminal act. Another anomaly in this distinction as applied to probation revocation lies in the fact that adult probation revocation hearings do not require a reasonable doubt standard even though a criminal act is involved. *See* State v. Pietsch, 109 Ariz. 261, 508 P.2d 337 (1973); ARIZ. R. CRIM. P. 27(c)(3). *But see* discussion in text accompanying notes 61-62 *infra.*

12. 22 Ariz. App. at 37, 523 P.2d at 88. Adoption of the reasonable doubt standard left division one, department A, in conflict with a prior decision of division two of the court of appeals, which had held that in a juvenile probation revocation matter "all that is necessary is that the evidence and facts be such as to reasonably satisfy the court that the probationer is violating the terms of his probation or engaging in criminal practices . . . ." *In re* Anonymous, 16 Ariz. App. 597, 598, 494 P.2d 1342, 1343 (1972). Prior to *Juvenile J-72918-S*, division one, department A, also had adopted the preponderance of the evidence standard in *In re* Maricopa County Juvenile Action No. J-72752, 21 Ariz. App. 414, 520 P.2d 327 (1974).

The Arizona supreme court accepted review in *Juvenile J-72918-S* because of the "conflict within the divisions and departments of the Court of Appeals on the question of the burden of proof to be applied in juvenile court on a revocation of probation matter." 111 Ariz. at 136, 524 P.2d at 1311.

13. 111 Ariz. 135, 524 P.2d 1310 (1974).
14. *Id.* at 138, 524 P.2d at 1313; *see* text accompanying note 22 *infra.*

other matters,[15] the court held that the latter standard was the appropriate one at juvenile probation revocation hearings.[16] Additionally, the court construed the United States Supreme Court's *In re Winship*[17] decision to require that a reasonable doubt standard be used only in a hearing where a juvenile is initially adjudicated a delinquent.[18] Finally, the court ruled out any due process problems, noting that due process does not demand a higher evidentiary standard for juvenile probation revocation than for similar adult proceedings,[19] for which only a preponderance of the evidence standard is required.[20]

This casenote will examine and compare the decisions of the Arizona supreme court and the court of appeals in *Juvenile J-72918-S.* Rule 17 of the Arizona Rules of Procedure for the Juvenile Court, relating to the burden of proof in juvenile court proceedings, will be examined with regard to its effect on juvenile probation revocation hearings. Additionally, the nature of probation revocation hearings will be discussed, and a balancing test will be applied to determine whether the benefits of a reasonable doubt standard at both adult and juvenile probation revocation hearings would outweigh its detrimental effects. Finally, a comparison of adult and juvenile probation revocation will be made, contrasting the stake of juveniles and adults in having culpability proved beyond a reasonable doubt at a probation revocation hearing.

The Standard of Proof Under Rule 17

The principal point of contention between the court of appeals and the supreme court concerned the proper interpretation of the juvenile court rules, which incorporate the *Winship* standard.[21] Rule 17 provides that: "(a) The burdens of proof in juvenile proceedings, other than transfer hearings, shall be: (1) Beyond a reasonable doubt, as to a delinquency matter involving criminal offenses and incorrigibility; and (2) By preponderance of the evidence, as to all other types of ac-

15. ARIZ. R.P. JUV. CT. 17(a)(2); *see* text accompanying note 22 *infra.*
16. 111 Ariz. at 138, 524 P.2d at 1313.
17. 397 U.S. 358 (1970).
18. *See* 111 Ariz. at 136, 524 P.2d at 1311. The supreme court stated that the court of appeals' determination that *Winship* requires a reasonable doubt standard at any juvenile court hearing where a criminal act is alleged constituted an unwarranted extension of *Winship. Id.* at 136, 524 P.2d at 1311.
19. *Id.* The court of appeals had expressed disapproval of comparisons between adult and juvenile probation, on the basis that the legislative adoption of a separate juvenile code and juvenile court rules indicates that Arizona policy is to treat juvenile matters differently from adult criminal matters. 22 Ariz. at 36, 523 P.2d at 87. *See* 1973 L. & SOC. ORDER 551, 553.
20. State v. Pietsch, 109 Ariz. 261, 508 P.2d 337 (1973); ARIZ. R. CRIM. P. 27(c)(3). But see discussion in text accompanying notes 61-62 *infra.*
21. *See Special Project—Juvenile Justice in Arizona: Adjudication,* 16 ARIZ. L. REV. 325, 353 (1974) [hereinafter cited as *Adjudication*].

tions."[22] What constitutes a "delinquency matter" requiring a reasonable doubt standard under rule 17(a)(1) was the crux of the differing statutory interpretations.

The court of appeals stated that any adjudication of a petition alleging a delinquent act is a delinquency matter within the meaning of rule 17(a)(1), whether it be the basis of an initial delinquency determination or a revocation of probation.[23] The Arizona supreme court rejected this contention, holding that a violation of the terms of probation is a probationary or dispositional matter, not a delinquency matter as contemplated by rule 17.[24] Dispositional matters, according to the supreme court, are covered by rule 17(a)(2),[25] which requires only a preponderance of the evidence.[26]

Although the court of appeals did not provide statutory support for its view that a probation revocation petition alleging a delinquent act is a delinquency matter, such support can be found in the definitions of a delinquent act and a delinquency hearing within the juvenile code. As defined in the code, a delinquent act includes a criminal act, a status offense, or failure to obey an order of the juvenile court.[27] Further, delinquency hearing is defined as "a proceeding in the juvenile court to determine whether a child has committed a specific delinquent act as set forth in a petition."[28] The probation of a juvenile may be revoked because he allegedly committed a criminal act, a status offense, or a violation of the court-ordered terms of probation, all of which fall within the statutory definition of a delinquent act. Thus, a probation revocation hearing, held to determine whether the alleged delinquent act has been committed, is a delinquency hearing, and thus presumably a delinquency matter requiring proof beyond a reasonable doubt.[29]

---

22. ARIZ. R.P. JUV. CT. 17.

23. 22 Ariz. App. at 35, 523 P.2d at 86.

24. In the case of a juvenile the adjudication of the juvenile as a delinquent gives the court the power to impose the conditions of probation, and a violation of those terms is not a hearing as to a 'delinquency matter,' but it is a different type of action involving the determination whether the court should change the disposition by reason of the juvenile's failure to abide by the conditions of his probation status . . . .

111 Ariz. at 138, 524 P.2d at 1313.

25. *Id.*

26. ARIZ. R.P. JUV. CT. 17.

27. ARIZ. REV. STAT. ANN. § 8-201(8) (1974) defines a delinquent act as any of the following:

an act by a child, which if committed by an adult would be a public offense or any act that would constitute a public offense which could only be committed by a child or by a minor, including violation of any law of this state, or of another state if the act occurred in that state, or of the United States, or any ordinance of a city, county, or political subdivision of this state defining crime, or the failure to obey any lawful order of the juvenile court . . . .

28. ARIZ. REV. STAT. ANN. § 8-201(7) (1974).

29. Apparently, this is the position of the court of appeals. The probation violation of Juvenile J-72918-S was knowing possession of a stolen vehicle, in contravention of

The Arizona supreme court did not discuss these definitions; rather, the court rebutted the court of appeals' argument by characterizing a criminal act committed by a juvenile on probation as a violation of probation rather than a delinquency matter,[30] thus presumably taking the matter out of rule 17(a)(1).[31] It is unclear, however, why a violation of probation cannot also be a delinquency matter within rule 17(a)(1).[32] If the act constituting the alleged probation violation falls within the statutory definition of a delinquent act,[33] the revocation hearing would at least arguably be a delinquency matter within rule 17(a)(1).

The question of the proper standard of proof at juvenile probation revocation hearings, however, should be determined on the basis of legislative policy and the substantive interests involved, as well as by reference to terminology. As the supreme court noted, once a child has been adjudicated a delinquent, the juvenile court is given broad

---

ARIZ. REV. STAT. ANN. § 28-1423 (1956). This offense, constituting an act "which if committed by an adult would be a public offense," falls within the definition of a delinquent act. ARIZ. REV. STAT. ANN. § 8-201(8) (1974). The court stated:

> The petition alleged a violation of probation by the commission of a delinquent act which was regularly set for an adjudicatory hearing. Rule 17(a)(1) of the rules provides that the quantum of proof in delinquency matters is beyond a reasonable doubt. By the nature of the petition this is a delinquency matter.

22 Ariz. App. at 35, 523 P.2d at 86.

30. 111 Ariz. at 138, 524 P.2d at 1313.

31. *Id.*

32. Regardless of the nature of a probation violation, the supreme court's statement that probation revocation is a dispositional matter does not account for the separate rules providing for dispositional hearings and probation revocation hearings in the juvenile court. *See* ARIZ. R.P. JUV. CT. 8, 10. Rule 10 provides for juvenile probation revocation hearings: "Proceedings for revocation of probation shall be initiated and processed under the general rules as hereinabove provided for in delinquency actions."

The wording of the rule itself might be taken as implying that a proceeding for revocation of probation is a delinquency action, with the rule simply directing attention to the location of procedural rules governing such actions. The court of appeals interpreted rule 10 as referring to all the general rules pertaining to delinquency actions, including the reasonable doubt standard of proof in delinquency matters under rule 17(a)(1). 22 Ariz. at 34-35, 523 P.2d at 85-86. The Arizona supreme court rejected this argument, however, stating that rule 10 applies only to the form and contents of the petition, its service, and the procedure at the hearing. The court stated that rule 10 has no relevance to the issue of the standard of proof. 111 Ariz. at 137, 524 P.2d at 1312.

Support for the supreme court's view may be found in the wording of rule 10; it only incorporates the "rules as *hereinabove* provided for in delinquency actions" (emphasis supplied). ARIZ. R.P. JUV. CT. 10. Since rule 17 follows rule 10, it appears that rule 10 was not intended to incorporate the standard of proof set out in rule 17(a)(1) relating to delinquency matters. *But see* 1973 L. & SOC. ORDER 551. The author of that note argues that rule 10 incorporates rule 7, which provides that a hearing in juvenile court may contain both an adjudicatory and a dispositional phase. *Id.* at 553. *In re Winship* would then require the application of a reasonable doubt standard of proof during the adjudicatory phase of the probation revocation hearing, even if rule 17(a)(1) did not apply.

33. *See* ARIZ. REV. STAT. ANN. § 8-201(8) (1974), set out in note 27 *supra*. This is not the position of the court of appeals, however. The court of appeals did not go so far as to consider all probation violations delinquent acts. The court indicated that any noncriminal violation of the terms of probation would not require a reasonable doubt standard. 22 Ariz. at 36, 523 P.2d at 87.

discretionary power to make a proper disposition of the juvenile's case.[34] It is intended that the court's discretion will be used in the best interests of the juvenile and thus should not be hampered by unnecessary procedural restrictions. Although the parens patriae concept has been challenged,[35] setting the standard of proof for juvenile probation revocation at a preponderance of the evidence would prevent courts from exercising unbridled discretion, yet leave them some room to use their best judgment in determining the proper disposition of the juvenile's case. Whether or not constitutional doctrines would indicate a need for a higher standard is next to be considered.

Constitutional Analysis

In *Winship*,[36] as in *In re Gault*,[37] the United States Supreme Court required certain due process safeguards at juvenile delinquency adjudication hearings, perceiving no substantive difference between the felony prosecution of an adult and a hearing that might result in a juvenile's loss of liberty.[38] The Court expressed concern for two substantive interests of the juvenile at stake in a delinquency hearing—the stigma of a delinquency label and the possibility of institutional confinement.[39]

In *Winship*, however, the Court distinguished between the adjudicatory process and the dispositional process in terms of the substantive interests involved.[40] The Court recognized a need to leave unimpaired the "opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment. . . ."[41]

Since *Winship* established proof beyond a reasonable doubt as an essential element of the adjudicatory process but did not set any particular standard of proof for the postadjudicatory or dispositional phase,[42] a critical issue is whether a juvenile probation revocation hearing is an adjudicatory proceeding or is simply part of the dispositional process.[43]

34. 111 Ariz. at 137, 524 P.2d at 1312.
35. *See In re* Gault, 387 U.S. 1, 17-18 (1967).
36. *In re* Winship, 397 U.S. 358 (1970). The Supreme Court there found the reasonable doubt standard a necessary element of due process at juvenile delinquency adjudication hearings.
37. 387 U.S. 1 (1967) (granting juveniles the right to counsel in juvenile delinquency adjudication hearings).
38. *In re* Winship, 397 U.S. 358, 366 (1970); *In re* Gault, 387 U.S. 1, 36 (1967). For articles interpreting *Winship*, *see* Popkin, Lippert & Keiter, *Another Look at the Role of Due Process in Juvenile Court*, 6 FAM. L.Q. 233 (1972); Weiss, *The Poor Kid*, 9 DUQUESNE L. REV. 590 (1971); 16 VILL. L. REV. 352 (1970).
39. *In re* Winship, 397 U.S. 358, 367 (1970).
40. *Id.* at 359 n.1. The Court in *Gault* characterized the dispositional phase as "unique to the juvenile process." 387 U.S. 1, 31 n.48 (1967).
41. *In re* Winship, 397 U.S. 358, 366 (1970).
42. *Id.* at 359 n.1.
43. The Arizona supreme court and court of appeals attempted to categorize juvenile

At a dispositional hearing, the delinquent act for which punishment is to be imposed has been proven beyond a reasonable doubt at a prior adjudicatory proceeding.[44] Thus, the court is concerned only with the characteristics of the juvenile and his offense; it attempts to make a proper determination as to the disposition of the case in the best interests of the juvenile.[45]

The atmosphere at a subsequent probation revocation hearing may be somewhat different from that at the original dispositional hearing. At the probation revocation hearing, a new offense is charged. Although the court has the same options in determining disposition as it had at the initial dispositional hearing, the court's determination at the revocation hearing includes an additional factor—the alleged new act of delinquency.[46] If the act is proven, the juvenile faces a somewhat greater threat of incarceration than he did at his original dispositional hearing. Although the court can commit the juvenile to a state institution at the first dispositional hearing,[47] it generally will not do so upon the juvenile's first offense.[48] In fact, the court in most cases will not commit the juvenile to the Department of Corrections even at a probation revocation hearing,[49] but the juvenile nonetheless probably faces a greater threat of loss of liberty at the probation revocation hearing than at the initial dispositional hearing. A juvenile charged with the commission of a criminal offense while on probation thus essentially faces a new adjudication and a new threat of incarceration.

Following this line of reasoning, the Arizona court of appeals required a reasonable doubt standard of proof at the juvenile probation

---

probation revocation hearings by reference to ARIZ. R.P. JUV. CT. 17. *See* text accompanying notes 21-33 *supra*. However, for constitutional purposes it is more appropriate to analyze the interests involved at probation revocation hearings in terms of the substantive distinction between adjudicatory and dispositional hearings. If probation revocation hearings are deemed adjudicatory, the *Winship* standard of proof beyond a reasonable doubt must be applied.

44. ARIZ. R.P. JUV. CT. 8. The rule indicates that a dispositional hearing is held after a finding of delinquency. There are no new findings of delinquency at the dispositional hearing. Interview with Clinton R. Stinson, Deputy County Attorney for Pima County, in Tucson, Arizona, Apr. 14, 1975.

45. This decision is made upon recommendation of the juvenile's probation officer, with the juvenile's attorney present to question or rebut information contained in the probation officer's report. *Special Project—Juvenile Justice in Arizona: Probation*, 16 ARIZ. L. REV. 369, 378 (1974) [hereinafter cited as *Probation*]. The options of the juvenile court for disposition of a delinquent child are provided in ARIZ. REV. STAT. ANN. § 8-241(A)(2) (1974).

46. The probation revocation petition usually alleges some delinquent act, whether it be a criminal offense or disobedience of an order of the court embodied in a condition of probation. *See* ARIZ. REV. STAT. ANN. § 8-201(8) (1974).

47. *Id.* § 8-241(A)(2)(e); *Special Project—Juvenile Justice in Arizona: Corrections*, 16 ARIZ. L. REV. 393, 394-95 (1974) [hereinafter cited as *Corrections*].

48. *See Corrections, supra* note 47, at 395.

49. *Id.* Incarceration is only one possibility. In practice, the juvenile court judge will more often continue the juvenile on probation or make some change in the disposition short of commitment to the Department of Corrections. *Probation, supra* note 45, at 385.

revocation hearing.[50] It apparently considered the juvenile interests at stake substantially the same as those which *Winship* protects at the initial delinquency adjudication. Rather than emphasizing the threat to the juvenile involved at a probation revocation hearing, as the court of appeals had done, the Arizona supreme court stressed the discretionary nature of the dispositional process. The court noted that after adjudicating the child a delinquent, the juvenile court has broad power to make a proper disposition of the case,[51] including the power to change its dispositional order if it proves necessary.[52] Although a determination to change the dispositional order to incarceration affects the liberty of the juvenile, this can only occur after an original finding of delinquency.[53] According to the supreme court, the issue at a probation revocation hearing is not the adjudication of another delinquent act but simply whether there should be a change in the form or course of rehabilitation previously ordered by the court.[54]

Viewed in this light, the interests of the juvenile in avoiding stigmatization and loss of liberty may not be as great at the probation revocation hearing as at the initial delinquency adjudication. The juvenile has already been labeled by the prior delinquency decision. Further, the liberty of the juvenile is not as significant a factor at a probation revocation hearing, since the juvenile court had the power to commit the youth to a state institution immediately after the initial adjudication of delinquency.[55] Since the interests of the juvenile at a probation revocation hearing are therefore less weighty than at a delinquency adjudication, fewer procedural safeguards are required;[56] proof of a probation violation by a preponderance of the evidence is sufficient.

However, the Arizona supreme court in *Juvenile J-72918-S* did not totally resolve the standard of proof question through its characterization of juvenile probation revocation as nonadjudicatory. By labeling the hearing a probationary, rather than a delinquency matter, the court may have escaped the mandate of *Winship*, but should have gone on to

50. 22 Ariz. App. at 35-36, 523 P.2d at 86-87.
51. 111 Ariz. at 137, 524 P.2d at 1312.
52. The statutory provisions for a change in a juvenile's dispositional order are unclear. Disposition may sometimes be changed (as from one home or agency to another) without a formal petition and hearing, but if commission of a criminal act and the possibility of incarceration are involved, a revocation petition will be filed and a hearing held. Interview with Clinton R. Stinson, *supra* note 44.
53. 111 Ariz. at 137, 524 P.2d at 1312.
54. *Id.*
55. ARIZ. REV. STAT. ANN. § 8-241(A)(2)(e) (1974); *see Corrections, supra* note 47, at 395.
56. *But see* TEX. FAM. CODE § 54.05(f) (1975):

> A disposition based on a finding that the child engaged in delinquent conduct may be modified so as to commit the child to the Texas Youth Council if the court after a hearing to modify disposition finds beyond a reasonable doubt that the child violated a reasonable and lawful order of the court.

apply the balancing process of *Gagnon v. Scarpelli*,[57] a case involving due process rights at adult probation revocation. *Gagnon* indicates that a court must weigh the interests involved in the probation revocation hearing to determine whether a particular due process right, such as the reasonable doubt standard, is required.

The Arizona supreme court stated in *Juvenile J-72918-S* that because a probation revocation hearing is not considered part of the criminal process for adults,[58] Arizona requires only a preponderance of the evidence standard at adult probation revocation hearings.[59] The court supported its position on the proper standard of proof in juvenile revocation proceedings by analogy to adult probation revocation, arguing that neither due process nor the juvenile code required a higher standard of proof at juvenile probation revocation hearings.[60]

The United States Supreme Court's reasoning in *Gagnon v. Scarpelli*,[61] however, may require reexamination of the Arizona standard of proof for both adult and juvenile probationers. In *Gagnon*, the Supreme Court recognized that some due process rights must be granted adult probationers at revocation hearings where a loss of liberty may result.[62] The Court, however, stopped short of applying the full panoply of criminal due process rights at adult probation revocation hearings. Rather, only those due process rights which guarantee the fundamental fairness of the proceeding were required.[63] In determining whether a particular right is required in probation revocation proceedings, the Court indicated that the need for the constitutional protection must be weighed against its possibly detrimental effects.[64] In examining the right to counsel asserted in the case, the Court used the balancing test to

57. 411 U.S. 778 (1973).

58. The court cited Gagnon v. Scarpelli, 411 U.S. 778 (1973), as standing for the proposition that "[e]ven though probation revocation results in a loss of liberty it is not considered a stage of the criminal prosecution." 111 Ariz. at 137, 524 P.2d at 1312. In doing so, the Arizona court changed the emphasis of the Supreme Court's reasoning. The Court in *Gagnon* actually stated that "[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution but does result in a loss of liberty. Accordingly, we hold that a probationer . . . is entitled to [certain due process guarantees]." 411 U.S. at 782.

59. 111 Ariz. at 136, 524 P.2d at 1311, *citing* State v. Pietsch, 109 Ariz. 261, 508 P.2d 337 (1973).

60. 111 Ariz. at 136-37, 524 P.2d at 1311-12.

61. 411 U.S. 778 (1973).

62. *Id.* at 782.

63. *Id.* at 790. *Gagnon* guarantees probationers the rights of notice, opportunity to be heard and present evidence, confrontation and cross-examination, a neutral and detached hearing body, and a written statement of the evidence relied on and the reasons for revocation, as well as the limited right to counsel. *Id.* at 786.

64. *Id.* at 787-88. Another case using such a balancing test is Morrissey v. Brewer, 408 U.S. 471 (1971), in which the balancing process resulted in a holding guaranteeing notice and a hearing at adult parole revocations. *See generally* Popkin, Lippert & Keiter, *supra* note 38; Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745 (1973); 70 MICH. L. REV. 171 (1971).

conclude that only a limited, case-by-case right to counsel exists at adult probation revocation hearings.[65]

The Court's wording in *Winship*[66] makes clear that the reasonable doubt standard is considered a fundamental due process right, at least in the context of a criminal trial or a juvenile delinquency adjudication. The question is whether in the circumstances of a probation revocation hearing the probationer's interests are sufficiently weighty to invoke this particular due process guarantee.

In applying the balancing test in *Gagnon*, the Supreme Court's basic premise was that there are critical differences between criminal trials and probation revocation hearings which both society and the probationer have a stake in preserving.[67] Particularly in the juvenile process, it has generally been felt that the individual and the state benefit from the elements of flexibility, informality, confidentiality, and the discretionary nature of the system which characterize the probation revocation hearing.[68] Though the United States Supreme Court has not addressed the question of due process rights at juvenile probation revocation, the nature of the rights which might be required can perhaps be ascertained by analogy to the Supreme Court's treatment of due process claims at adult probation revocation hearings and juvenile delinquency adjudication hearings. Despite the interests in flexibility and informality, additional procedural formalities have been required by the Court in the adult probation or parole revocation process. In *Morrissey v. Brewer*,[69] for instance, the Court considerably increased the formality of adult parole revocation procedures by requiring notice and a hearing. In *Gagnon* the Court added a limited right to counsel at such hearings.[70] In the juvenile process the Supreme Court similarly has required notice, a hearing, and a right to counsel at juvenile delinquency adjudications despite the argument that these would hinder the beneficial use of the court's discretion.[71] The Supreme Court stated in *Winship* that its application of a reasonable doubt standard at delinquency adjudications would not have a detrimental effect on the flexibility and informality of the juvenile system.[72] Indeed, the application of a stricter standard of proof at probation revocation hearings is not likely to produce

65. 411 U.S. at 790.
66. " 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the fact finder of his guilt.' To this end, the reasonable-doubt standard is indispensable . . . ." 397 U.S. 358, 364 (1970). *See also* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971).
67. 411 U.S. at 788-89.
68. *In re* Winship, 397 U.S. 358, 366 (1970).
69. 408 U.S. 471 (1972).
70. 411 U.S. 778, 790 (1973).
71. *In re* Gault, 387 U.S. 1 (1967).
72. 397 U.S. 358, 366 (1970).

an increase in procedural formality, delay, and expense comparable to that engendered by the notice, hearing, and counsel requirements.[73]

It has been observed that applying the reasonable doubt standard would not involve the machinery of the court system; it merely requires a juvenile court judge to be more confident in reaching his decision.[74] It is apparent, however, that requiring a judge to be more confident in reaching his decisions would probably have some effect on the rules of evidence utilized at the juvenile probation revocation hearing. For example, the judge might be more reluctant to rely on hearsay evidence, which has been admissible in juvenile proceedings.[75] Although not deciding that the hearsay rule and other evidentiary rules must be used in juvenile delinquency proceedings, the Court in *Gault* quoted approvingly from *Harvard Law Review* as follows:

> It is said that "close adherence to the strict rules of evidence might prevent the court from obtaining important facts as to the child's character and condition which could only be to the child's detriment." The assumption is that the judge will give normally inadmissible evidence only its proper weight. It is also declared in support of these evidentiary practices that the juvenile court is not a criminal court, that the importance of the hearsay rule has been over estimated, and that allowing an attorney to make "technical objections" would disrupt the desired informality of the proceedings. But to the extent that the rules of evidence are not merely technical or historical, but like the hearsay rule have a sound basis in human experience, they should not be rejected in any judicial inquiry.[76]

Though the Court thus seemed to indicate that it would not be averse to the introduction of evidentiary objections at juvenile delinquency hearings, even that amount of disruption would not necessarily result from raising the standard of proof. Since juvenile proceedings are before a judge without a jury, even if the reasonable doubt standard seemed to require an increase in the quality of evidence, in practice the technical rules of evidence would probably be relaxed.[77] The court might hear all the evidence nonetheless, simply taking into account its nature and reliability when making its final determination. Of course,

73. A recent study indicates that an increase in the formality of juvenile proceedings would be apt to engender positive rather than detrimental effects on a juvenile by impressing on him the firm yet fair manner in which his situation is handled. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 85 (1967).

74. 9 DUQUESNE L. REV. 673, 678 (1971).

75. *See In re* Gault, 99 Ariz. 181, 192, 407 P.2d 760, 768 (1965), *rev'd on other grounds*, 387 U.S. 1 (1967).

76. *In re* Gault, 387 U.S. 1, 11 (1967), *quoting* Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 794-95 (1966).

77. *See Adjudication, supra* note 21, at 357.

to the extent that probation officers or policemen are now allowed to testify to other than their own firsthand information,[78] there would be additional expense and delay if the increased standard of proof at probation revocation hearings required the proper witnesses to be called instead. An increase in the required quality of evidence might also involve the production of original documents where the best evidence rule is found applicable.[79] Such changes, however, would probably not affect the majority of cases. Moreover, if the evidence involved is from an unreliable source, it is questionable whether it should be presented whether the standard is reasonable doubt or preponderance of the evidence.

In addition to the interest in informaility, both the state and the probationer have a stake in the accuracy of the findings.[80] The state is interested in continuing successful efforts at rehabilitation in the community,[81] which are less costly to the state than incarceration.[82] Accurate findings thus benefit the state by assuring that probationers are not erroneously incarcerated. The individual probationer has an equally strong interest in not having his liberty unjustifiably taken away or his progress toward rehabilitation in the community cut short.[83] A reasonable doubt standard would contribute toward these goals by promoting more accurate findings.

On the other hand, the state has an interest in removing a probationer from the community if it is probable that he will continue to cause trouble or commit crimes, as evidenced by his violation of the conditions of his probation subsequent to conviction.[84] This consideration would weigh in favor of a lower standard of proof, as would the argument that a higher standard of proof on revocation might discourage probationary dispositions due to increased difficulty in obtaining revocations.[85]

The state further has an interest in administering probation revocation hearings in an economical and expeditious manner. Two major

78. In Pima County, juvenile probation revocation hearings are presently conducted, as are delinquency adjudication hearings, with firsthand witnesses called and hearsay excluded. Telephone interview with Clinton R. Stinson, Deputy County Attorney for Pima County, Dec. 1, 1975.

79. *See* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 229-43 (2d ed. E. Cleary 1972).

80. Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973).

81. *Id.*

82. Note, *1973 Illinois Due Process in Proceedings to Revoke Probation: The Need for Expansion of Rights*, 4 LOYOLA U.L.J. 403, 405 (1973).

83. Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973).

84. *Id.* at 785; Morrissey v. Brewer, 408 U.S. 471, 483 (1972).

85. Note, *supra* note 82, at 415. The Supreme Court in *Morrissey v. Brewer*, however, discounted this argument. "A simple factual hearing will not interfere with the exercise of discretion. Serious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole." 408 U.S. 471, 483 (1972). The question may be somewhat more difficult in regard to raising the standard of proof, which involves more than simple fairness.

factors in the Supreme Court's denial of an absolute right to counsel to probationers in *Gagnon* and of a jury trial to juveniles in *McKeiver v. Pennsylvania*[86] were the financial interests involved[87] and the problem of delay.[88] Requiring a higher standard of proof, however, would make procedures more time-consuming or costly to the state only to the extent necessary to properly investigate and present the facts proving the charge. On balance it appears that the reasonable doubt standard would offer additional fact-finding accuracy without substantially disrupting the beneficial aspects of the juvenile or probation systems.

Standard of Proof: Adult Versus Juvenile Probation Revocation Proceedings

In *In re Maricopa County Juvenile Action No. J-72918-S*, the Arizona supreme court stated that due process did not require a higher standard of proof in probation revocation proceedings for juveniles than for adults.[89] While the reasonable doubt standard has not been applied to adult probation revocation proceedings,[90] this does not necessarily preclude the use of the higher standard of proof at juvenile probation hearings. There are policy reasons that may call for a higher standard of proof for juvenile probation revocation. Part of the rationale for the separate treatment of juvenile offenders has been to replace punishment with rehabilitation[91] and prevent juveniles from suffering the civil disabilities of convicted criminals.[92] While it may be true that serious juvenile crime is on the upswing,[93] as long as it is the policy of the juvenile law to emphasize rehabilitation rather than punishment, there seems little justification for limiting the due process rights of juveniles at court procedures subsequent to a delinquency adjudication.

Further, a higher standard of proof should be accorded to juveniles than adults because it is a policy of the law to be more tolerant of their mistakes and indiscretions.[94] The juvenile court should be cautious about changes in disposition, as such changes may be counterproductive in disrupting whatever beneficial relationships the juvenile has with family, friends, and peers. Additionally, fair treatment is more conducive to rehabilitation than is treatment which seems unfair to the proba-

86. 403 U.S. 528 (1971).
87. Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973).
88. McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).
89. 111 Ariz. at 136, 524 P.2d at 1311.
90. State v. Pietsch, 109 Ariz. 261, 508 P.2d 337 (1973), only recently raised the standard to a preponderance of the evidence from a prior requirement that the court merely be "reasonably satisfied" that the probation violation had occurred.
91. *In re* Gault, 387 U.S. 1, 15-16 (1967).
92. *Id.* at 24.
93. *Id.* at 20 n.26.
94. 9 DUQUESNE L. REV. 673, 678 (1971).

tioner.[95] A juvenile whose probation is revoked for an offense he did not commit may become angry and disillusioned with the court system, even though the judge may be earnestly trying to ascertain the dispositional treatment most beneficial to the juvenile. If the primary goal of the juvenile system is rehabilitation, minimizing the chances of an erroneous finding of probation violation may be more meaningful than emphasizing the benefits of the juvenile court's use of discretion.[96]

Conclusion

While a preponderance of the evidence standard of proof at juvenile probation revocation hearings may be sufficient to prevent erroneous findings of probation violations without imposing substantial restrictions on the flexibility and informality of the disposition process, there are also considerations weighing in favor of the reasonable doubt standard of proof at such hearings. While the discretionary nature of the juvenile probation process should be preserved, the factual question of whether a violation has occurred should be determined separately from the discretionary, dispositional question of whether the proven offense should occasion some change in the probationer's treatment. Discretion and flexibility should enter only after the fact of violation has been proven. The reasonable doubt standard would better protect the right of the juvenile to fundamental due process guarantees at a proceeding in which he may lose his liberty, and would better promote the interests of the state in the accuracy of the findings. The reasonable doubt standard would not cause such additional procedural formality as to outweigh its benefits to the juvenile probationer.

95. *See* Morrissey v. Brewer, 408 U.S. 471, 484 (1972); *In re* Gault, 387 U.S. 1, 26 (1967).

96. It is uncertain what emphasis is now to be put on the benefits of judicial discretion. The Supreme Court in McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971), once again stressed the uniqueness and paternal concern of the juvenile court system. Some commentators feel that the *McKeiver* decision represents a shift in the Court's attitude toward a reacceptance of the parens patriae doctrine. *See* Note, *supra* note 64, at 757-58.

IX. PUBLIC LAW

A. ARIZONA'S CONSTITUTIONAL PROHIBITION AGAINST MUNICIPAL SUBSIDIZING OF PRIVATE INTERESTS: THE PUBLIC PURPOSE DOCTRINE REJECTED

In an attempt to capitalize on the rapid industrial development of the late 1800's, many states and municipalities aided railroad development through loans, grants, or subsidies.[1] Subsequently a number of railroads were abandoned and the credit of many municipalities was greatly impaired as a result.[2] In response to this excessive dissipation of public funds and to insure the security of the public treasury, state constitutional provisions were enacted limiting the discretionary spending powers of the state and its political subdivisions.[3] Most states presently retain some type of constitutional limitation on municipal power to lend credit and otherwise expend public funds for the benefit of private interests,[4] despite the fact that such provisions were intended

---

1. *See* Thaanum v. Bynum Irrigation Dist., 72 Mont. 221, 227, 232 P. 528, 530 (1925); Carruthers v. Port of Astoria, 249 Ore. 329, 334-35, 438 P.2d 725, 727 (1968); Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 277-84 (1963).

2. *See* Carruthers v. Port of Astoria, 249 Ore. 329, 334, 438 P.2d 725, 727 (1968).

3. *See* ARIZ. CONST. art. 9, § 7; CAL. CONST. art. 12, § 13; MICH. CONST. art. VII, § 26.

> [The constitutional provision] represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to *quasi* public purposes, but actually engaged in private business.

State v. Northwestern Mut. Ins. Co., 86 Ariz. 50, 53, 340 P.2d 200, 201 (1959), *quoting* Thaanum v. Bynum Irrigation Dist., 72 Mont. 221, 225, 232 P.2d 528, 530 (1925). *See also* Carruthers v. Port of Astoria, 249 Ore. 329, 334-35, 438 P.2d 725, 727 (1968).

4. This note will refer to such constitutional prohibitions as public aid limitations. Most of these provisions prohibit only the lending of public credit to individuals or corporations, that is, allowing private interests to contract loans on the strength of municipal credit. *See, e.g.*, CAL. CONST. art. 12, § 13; COLO. CONST. art. XI, § 1; MICH. CONST. art. VII, § 26. Others prohibit also the making of donations and gifts of public funds to private interests. *See, e.g.*, ARIZ. CONST. art. 9, § 7; N.M. CONST. art. IX, § 14; N.Y. CONST. art. 8, § 1. More recently, the trend has been to permit all public expenditures which benefit private interests so long as such expenditures serve a valid public purpose. *See, e.g.*, ALAS. CONST. art. IX, § 6; HAWAII CONST. art. VI, § 6; ILL. CONST. art. 8, § 1.

For further discussion of the historical roots of these constitutional provisions, see Pinsky, *supra* note 1.

to curtail a specific public danger which has limited current applicability.[5]

In *City of Tempe v. Pilot Properties, Inc.*[6] a municipal lease was challenged as violating Arizona's public aid limitation.[7] The issue was raised in a cross-claim[8] filed by the city of Tempe, seeking to quiet title to property it had leased to a major league baseball team for $1 per year. As part of the agreement, the baseball club had agreed to erect a stadium on the property.[9] Tempe contended that the leasing of the property for nominal consideration was the equivalent of public financing of private interests in violation of Arizona's public aid limitation. Summary judgment against Tempe was granted in the superior court. On appeal the lower court was reversed, the court of appeals remanding for a determination of the lease's validity in regard to certain material issues of fact.[10] The appellate court, however, carefully delineated the standards necessary for determining if a particular lease of public lands violates the Arizona constitution.

This casenote will examine the standards set by the court with particular reference to their consistency with the purpose of Arizona's public aid limitation. Discussion will focus on the court's analysis of whether the lease agreement constituted a subsidy in violation of article 9, section 7 of the Arizona constitution. Additionally, the public purpose exception to public aid limitations will be examined, and the *Pilot Properties* court's assessment of the applicability of this exception to article 9, section 7 will be analyzed in light of prior Arizona law and the law of other jurisdictions.

The Subsidy Test

In seeking to void the lease in *Pilot Properties*, Tempe contended that limiting the annual consideration under the lease to $1 constituted a prohibited subsidy within the meaning of article 9, section 7.[11] In

5. *See* text & notes 25, 68 *infra*.
6. 22 Ariz. App. 356, 527 P.2d 515 (1974).
7. ARIZ. CONST. art. 9, § 7.
8. The original action was instituted by the Milwaukee Brewers, seeking to void a lease agreement between Tempe and Baseball Facilities, Inc. [B.F.I.]. B.F.I. had assigned all of its interest in the lease to Pilot Properties, Inc., which later filed for bankruptcy and subleased the Tempe facility to the Brewers. The First National Bank of Arizona sought to uphold the lease, having financed construction of a stadium on the property, secured by a mortgage on the leasehold interest of B.F.I. and Pilot Properties. 22 Ariz. App. at 359, 527 P.2d at 518.
9. Under the terms of the lease, B.F.I. was also required to construct a spring training complex which would revert to Tempe free of encumbrances at the expiration of 30 years. *Id.*
10. Such issues included the fair market value of the property, the benefit to the city in obtaining title to the stadium, and other factors dealing with the adequacy of consideration. 22 Ariz. App. at 363, 527 P.2d at 522.
11. Article 9, section 7 of the Arizona constitution provides:
Neither the State, nor any county, city, town, municipality, nor any subdivision

addressing this issue, the *Pilot Properties* court referred to the Arizona supreme court's earlier definition of "subsidy" as ". . . a grant of funds or property from a government, to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public."[12] Singling out "assist" as the crucial word in the definition, the court held that a subsidy would exist if the city were receiving less than the fair market rental value for the property, since such a lease would provide assistance or support to a private interest.[13] Conversely, if the fair market rental value of the property were received by the city, a gift or donation in the form of a subsidy could not exist because there would be no assistance or support given to private interests.[14] Thus, the court could have determined that the $1 consideration paid under the lease was less than the fair market rental value of the property, and that consequently the lease constituted a subsidy in violation of article 9, section 7.

Instead of invalidating the lease on this basis, however, the *Pilot Properties* court established a general standard for determining if a particular transaction constitutes a subsidy. According to the court, a subsidy has been granted by a municipality to a private corporation if the consideration received by the city is "so inequitable and unreasonable that it amounts to an abuse of discretion."[15] The utilization of this standard reveals a major inconsistency in the decision. While the court indicated that a subsidy exists if the consideration received on the lease is less than the fair market rental value of the property, the standard subsequently adopted precludes a weighing of the consideration exchanged, relying instead on a strict arbitrariness test. This inconsistency can best be explained through an examination of the nature of the adopted standard.

As the *Pilot Properties* court noted, the abuse of discretion standard is the same criterion used at common law to determine the validity of municipal contracts generally.[16] It is well established that, even

---

of the State, shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the State by operation or provision of law.

The Arizona provision is adopted from the 1889 Montana constitution. *See* MONT. CONST. art. 13, § 1; State v. Northwestern Mut. Ins. Co., 86 Ariz. 50, 53, 340 P.2d 200, 201 (1969).

12. 22 Ariz. App. at 362, 527 P.2d at 521, *quoting* State Tax Comm'n v. Miami Copper Co., 74 Ariz. 234, 241, 246 P.2d 871, 876 (1952).

13. 22 Ariz. App. at 362, 527 P.2d at 521.

14. *Id.* Despite the constitutional prohibition against subsidies, however, municipalities are authorized to lease their property for value. ARIZ. REV. STAT. ANN. § 9-241 (A) (1956).

15. 22 Ariz. App. at 363, 527 P.2d at 522.

16. *Id.*

absent a constitutional public aid limitation, municipalities do not have complete freedom to contract or lease their property upon any desired terms.[17] Nevertheless, in order to insure that municipalities are not unduly restricted in their ability to engage in commercial transactions, courts have held that a municipal contract or lease will be invalidated only where fraudulent[18] or where the consideration received is so inequitable as to constitute an abuse of discretion.[19] Adoption of an abuse of discretion standard reflects the belief that municipal legislative bodies are in the best position to consider a city's economic, financial, and public interests, and courts should therefore defer to their judgment in determining whether adequate consideration has been received.[20] Additionally, such a standard frees the courts from the burdensome task of evaluating and weighing the consideration exchanged between the parties.[21]

In light of the difficulties inherent in the valuation of consideration amounts in the subsidy context as well as the general contract context, the *Pilot Properties* court probably adopted the abuse of discretion test to avoid such determinations. While judicial reluctance to interfere with legislative judgment is understandable, the *Pilot Properties* court's decision presents certain problems. First, the abuse of discretion test is not a measure of whether a commercial arrangement between a municipality and a private corporation constitutes a subsidy within the court's

17. *See, e.g.*, Ravettino v. City of San Diego, 70 Cal. App. 2d 37, 160 P.2d 52 (Dist. Ct. App. 1945); Boston v. Elevated Ry., 215 Mass. 41, 102 N.E. 79 (1913); Miller v. City of Pasco, 50 Wash. 2d 229, 310 P.2d 863 (1957); 10 E. McQUILLIN, MUNICIPAL CORPORATIONS § 28.42 (3d ed. 1966).

18. *See* Seafeldt v. Astoria, 141 Ore. 418, 424, 16 P.2d 943, 945 (1932); Haesloop v. City Council, 123 S.C. 272, 283, 115 S.E. 596, 600 (1923).

19. *See* Schatz v. City Council, 61 N.W.2d 423, 428 (N.D. 1953); Herman v. City of Lake Mills, 275 Wis. 537, 541, 82 N.W.2d 167, 170 (1957); Quackenbush v. City of Cheyenne, 52 Wyo. 146, 150, 70 P.2d 577, 579 (1937). This test has most frequently been applied in taxpayer suits attacking a sale of municipal property. *See* 18 E. McQUILLIN, *supra* note 17, § 52.38 (3d ed. 1963).

20. *See, e.g.*, People v. City of Long Beach, 51 Cal. 2d 875, 338 P.2d 177 (1959); Schatz v. City Council, 61 N.W.2d 423 (N.D. 1953); Ott v. West New York, 92 N.J. Super. 184, 222 A.2d 541 (1966). *See also* Quackenbush v. City of Cheyenne, 52 Wyo. 146, 150, 70 P.2d 577, 579 (1957).

21. It is difficult for courts to determine the value of consideration to the parties involved in a contract, and they therefore generally avoid the necessity for making such determinations. *See* J. MURRAY, MURRAY ON CONTRACTS § 77 (1974). Some courts have held that consideration in the strict contract sense is not required at all for municipal contracts and leases. "The fulfillment of a public purpose is adequate consideration to sustain a state donation or appropriation, and it is not essential that the consideration meet the test of adequate consideration in the strict contract sense." Hill v. City of Summit, 64 N.J. Super. 522, 530-31, 166 A.2d 610, 615 (Super. Ct. 1960); *see* People v. City of Long Beach, 51 Cal. 2d 875, 338 P.2d 177 (1959); Schatz v. City Council, 61 N.W.2d 423 (N.D. 1953). The *Pilot Properties* court gave no indication that the public purpose fulfilled by the stadium could supply sufficient consideration to avoid a finding that the lease constituted a subsidy. The court did state, however, that the fair market value of the property, the benefits bestowed on the city from obtaining title to the stadium in thirty years, and other factors relevant to consideration should be considered on remand in determining if the consideration received was inequitable or unreasonable. 22 Ariz. App. at 363, 527 P.2d at 522.

definition, as taken from an earlier opinion of the Arizona supreme court. Since the court defined subsidy in terms of assistance,[22] all that should be required for a subsidy to exist is a finding of unequal consideration.[23] The abuse of discretion test, however, essentially precludes an assessment of the adequacy of the consideration received by the city. Consideration for the contract is important under this test only insofar as it reflects on the discretionary judgment of the municipal officers. Consequently, a municipality might receive a reduced consideration, thus giving assistance to a private interest, and still not be deemed to have acted so inequitably or unreasonably as to have abused its discretion.

A second problem with the adopted standard is that its very nature makes the test unnecessary. As a matter of traditional municipal contract law, the abuse of discretion standard is always available to challenge the validity of municipal contracts.[24] Thus, if a particular transaction constitutes an abuse of discretion, it is invalid regardless of the prohibition in Arizona's public aid limitation. It is superfluous to apply the same test in determining whether a subsidy exists in violation of article 9, section 7. The effect of the *Pilot Properties* court's adoption of the abuse of discretion test is to greatly increase municipalities' ability to engage in commercial transactions. Courts may avoid holding that particular transactions constitute subsidies in all but the most extreme situations.

The *Pilot Properties* court's narrow interpretation of the scope of Arizona's public aid limitation is not surprising, however. Recent decisions in many jurisdictions have attempted to interpret public aid limitations in a manner which does not unduly restrict the power of political subdivisions to engage in commercial transactions or encourage industrial development.[25] The *Pilot Properties* court's method for read-

22. *See* 22 Ariz. App. at 362, 527 P.2d at 521; text accompanying notes 12-13 *supra.*

23. *See* 22 Ariz. App. at 362, 527 P.2d at 521. See text & notes 13-14 *supra.*

24. *See* Schatz v. City Council, 61 N.W.2d 423, 428 (N.D. 1953); Herman v. City of Lake Mills, 275 Wis. 537, 541, 82 N.W.2d 167, 170 (1957); Quackenbush v. City of Cheyenne, 52 Wyo. 146, 150, 70 P.2d 577, 579 (1970). Arizona has adopted the abuse of discretion test for determining the validity of municipal contracts generally. City of Phoenix v. Landrum & Mills Realty Co., 71 Ariz. 382, 388, 227 P.2d 1011, 1014 (1951).

25. *See* Uhls v. State, 429 P.2d 74, 85 (Wyo. 1967). This trend has been particularly noticeable in relation to the use of revenue bonds by political subdivisions to finance the attraction of industry. Revenue bond financing first appeared in the late 1920's and became common by the 1930's. Municipalities authorized revenue or special fund financing for such projects as housing authorities, educational institution dormitories, municipally owned public utilities, toll bridges, and public market buildings. Carruthers v. Port of Astoria, 249 Ore. 329, 335, 438 P.2d 725, 728 (1968). The bonds were usually upheld as not violating the public aid limitations. *See, e.g.*, Green v. City of Mt. Pleasant, 256 Iowa 1184, 131 N.W.2d 5 (1964); City of Gaylord v. Beckett, 378 Mich. 273, 144 N.W.2d 460 (1966). The rationale behind the refusal to subject this form of public financing to the restrictions of the constitutional prohibitions is that the

ing flexibility into the provision, however, was confusing and resulted in effectively reading the provision out of the constitution. Most courts have achieved the desired flexibility by creating an exception to their respective public aid limitations when the expenditure of public funds is for a public purpose.[26]

The Public Purpose Doctrine

The requirement that public funds derived from tax revenues be expended for a public purpose has traditionally been a part of the common law,[27] with the purpose of insuring that a taxpayer's money is used only to promote his interests in the community at large.[28] Public monies consequently must be expended only for nonprivate purposes.[29] Despite the widespread acceptance of this principle, courts have encountered great difficulty in establishing what constitutes a public purpose.[30] Beyond the generally accepted rule that a public purpose may exist even if private interests derive an incidental benefit from an expenditure,[31] determinations of whether an expenditure is for a public purpose

---

bonds are repaid from a special fund derived from the income produced by the particular project. The municipality assumes neither primary nor secondary liability for repayment of the bonds. Green v. City of Mt. Pleasant, 256 Iowa 1184, 1204, 131 N.W.2d 5, 14-15 (1964). Recently, the general trend has been to encourage this form of financing by municipalities. The Florida constitution has even been amended to create an exception for revenue bond financing in its public aid limitation provision. FLA. CONST. art. 7, § 10.

26. *See, e.g.*, City of Oakland v. Williams, 206 Cal. 315, 274 P. 328 (1929); Fickes v. Missoula County, 155 Mont. 258, 470 P.2d 287 (1970); Club Jolliet, Inc. v. Manchester, 110 N.H. 172, 262 A.2d 844 (1970).

27. *See, e.g.*, Citizen's Sav. & Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874); Proctor v. Hunt, 43 Ariz. 198, 29 P.2d 1058 (1934); People v. Township Bd. of Salem, 20 Mich. 452 (1870); Comment, *State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise—A Suggested Analysis*, 41 COLO. L. REV. 135, 138 (1969).

The public purpose doctrine was first clearly articulated in Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853), where the court declared that the state constitution implicitly directed that taxes be levied only for a public purpose.

28. *See* Citizen's Sav. & Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874); People v. Township Bd. of Salem, 20 Mich. 452 (1870); Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853).

29. The United States Supreme Court has adopted this requirement as a matter of 14th amendment due process: "The due process of law clause contains no specific limitations upon the right of taxation in the States, but it has come to be settled that the authority of the States to tax does not include the right to impose taxes for merely private purposes." Green v. Frazier, 253 U.S. 233, 238 (1920).

30. *See* Visina v. Freeman, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (1958). In Green v. Frazier, 44 N.D. 395, 176 N.W. 11, *aff'd*, 253 U.S. 233 (1920), the North Dakota Supreme Court stated that:

> A public purpose . . . has for its objective the promotion of the general welfare of all of the inhabitants or residents within a given political division as, for example, a state, the sovereignty and sovereign powers of which are exercised to promote the public health, safety, morals, general welfare, security, prosperity, contentment and equality before the law of all the citizens of the state.

Id. at 412, 176 N.W. at 17.

31. The mere fact that some private interests may derive an incidental benefit from the activity does not deprive the activity of its public nature if its primary purpose is public. On the other hand, if the primary object is to pro-

turn on the facts of each case.[32] Changes in prevailing economic and social conditions have resulted in new ideas as to what constitutes a public purpose,[33] and the general trend is toward allowing greater municipal freedom in determining how public funds should be used.[34] As a general rule, courts defer judgments on what constitutes a public purpose to state and municipal legislatures unless there has been an obvious abuse of discretion.[35] The public purpose doctrine nevertheless remains the predominant judicial standard for evaluating the propriety of public fundings.

When the first public aid limitations were enacted, many courts used the preexisting public purpose doctrine to create an exception to the provisions.[36] The constitutional prohibitions were designed to insure that public funds were not put at the disposal of private decision-making or expended to further primarily private interests.[37] Thus, many courts assumed that expenditures which were for a public purpose

---

mote some private end, the expenditure is illegal, although it may incidentally serve some public purpose.

Port Anthony v. Fisher, 269 Minn. 276, 288, 132 N.W.2d 183, 192 (1964); *see, e.g.*, Visina v. Freeman, 252 Minn. 177, 184-85, 89 N.W.2d 635, 643 (1958); Fickes v. Missoula County, 155 Mont. 258, 269, 470 P.2d 287, 292 (1970); Club Jolliet, Inc. v. Manchester, 110 N.H. 172, 176, 262 A.2d 844, 847 (1970).

32. *See, e.g.*, City of Tombstone v. Macia, 30 Ariz. 218, 222, 245 P.2d 677, 679 (1926); Wilmington Parking Auth. v. Ranken, 34 Del. Ch. 439, 448, 105 A.2d 614, 620 (Sup. Ct. 1954); Visina v. Freeman, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (1958).

Several factors have been suggested as being used by courts to determine if a particular expenditure serves a public rather than a private purpose, including (1) whether the expenditure previously has been characterized as being for a public purpose, (2) whether the expenditure has received legislative or voter approval, (3) the general economic benefit accruing to the community from the expenditure, (4) whether the expenditure puts the municipality in competition with a private enterprise, (5) whether the number of beneficiaries of a particular expenditure is large, and (6) the necessity for achieving the purpose of the expenditure. West, *Determining Permissible Municipal Expenditures: The Public Purpose Doctrine Revived*, 7 U. MICH. J.L. REF. 225, 227 (1973).

33. Expenditures which have been held to be for a public purpose vary widely. *See, e.g.*, Daggett v. Colgan, 92 Cal. 53, 28 P. 51 (1891) (state exhibit at World's Fair); Club Jolliet, Inc. v. Manchester, 110 N.H. 172, 262 A.2d 844 (1970) (public parking garage); Brody v. City of Millville, 120 N.J. Super. 1, 293 A.2d 211 (Super. Ct. 1972) (lease of empty warehouse to private corporation); Greensboro-High Point Airport Auth. v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946) (establishment and maintenance of airport); Martin v. City of Philadelphia, 420 Pa. 14, 215 A.2d 894 (1966) (sports stadium).

34. This trend is reflected in the judicial attitude toward the issuance of revenue bonds by municipalities and counties to assist private businesses in establishing factories, plants, and other forms of community enterprise. Courts have found a general public purpose served by the increased job opportunities and greater capital brought to an area. See discussion note 25 *supra*. *See also* Note, *Municipal Inducements to Private Industry*, 40 MINN. L. REV. 681 (1956); Note, *"Public Purpose" in Municipal Financing Plans*, 42 WASH. L. REV. 294 (1966).

35. *See, e.g.*, City of Glendale v. White, 67 Ariz. 231, 194 P.2d 435 (1948); City of West Palm Beach v. Williams, 291 So. 2d 572 (Fla. 1974); Ott v. West New York, 92 N.J. Super. 184, 222 A.2d 541 (Super. Ct. 1966); Note, *The "Public Purpose" of Municipal Financing for Industrial Development*, 70 YALE L.J. 789, 796-97 (1961).

36. *See, e.g.*, Daggett v. Colgan, 92 Cal. 53, 56, 28 P. 51, 52 (1891); Fickes v. Missoula County, 155 Mont. 258, 267, 470 P.2d 287, 291 (1970); Riddlestorffer v. City of Rahway, 82 N.J. Super. 36, 46, 196 A.2d 550, 555-56 (Super. Ct. 1963).

37. *See* text & notes 1-3 *supra*.

avoided both of these consequences, and accordingly were not unconstitutional.[38] The effect of applying the public purpose exception in this context, like the *Pilot Properties* court's "subsidy" formulation,[39] has been to render public aid limitations nugatory.[40] Since judgments as to what constitutes a public purpose are usually left to the discretion of legislative bodies unless there is a clear abuse of discretion, only in extreme cases will an expenditure be held not to accomplish a public purpose. Consequently, the restriction intended by the constitutional provisions has little actual inhibitory effect upon municipal legislatures, and even the minor prohibition which remains adds nothing to previously recognized limitations.

Prior to the *Pilot Properties* decision, Arizona courts applied the public purpose doctrine to except a variety of public fundings in private areas from the operation of article 9, section 7. In *Industrial Development Authority v. Nelson*,[41] the Supreme Court of Arizona noted that "the test to determine whether a loan or donation is prohibited by the constitution is whether the loan or donation is for a public purpose. If there is a public purpose, the loan or donation is not prohibited even though some organization derives special benefit from the project."[42] Citing this case, the appellee bank in *Pilot Properties* contended that the lease agreement served a public purpose and thus was not in violation of article 9, section 7. Indeed, the lease agreement could have been construed as serving a public purpose. The *Pilot Properties* court specifically recognized that municipal benefit had been the object of the transaction, stating, "It is undisputed that the city council was motivated in this desire by an opinion that a major league baseball club training in Tempe would be beneficial to the city from an economic, recreation and

38. *See, e.g.*, City of Oakland v. Williams, 206 Cal. 315, 274 P. 328 (1929); Club Jolliet, Inc. v. Manchester, 110 N.H. 172, 262 A.2d 844 (1970); Uhls v. State, 429 P.2d 74 (Wyo. 1967).

39. See text accompanying notes 15-24 *supra*.

40. Presumably, a stricter public purpose doctrine could be used in determining compliance with public aid limitations, whereby the legislature's judgment would be examined more closely than has been done under traditional municipal contracting principles. In this way, the constitutional provision could maintain a degree of independent vitality.

41. 109 Ariz. 368, 509 P.2d 705 (1973).

42. *Id.* at 373, 509 P.2d at 710. There are numerous examples of expenditures that Arizona courts have deemed to be for a public purpose and consequently not unconstitutional under article 9, section 7. *See, e.g.*, Town of Gila Bend v. Walled Lake Door Co., 107 Ariz. 545, 490 P.2d 551 (1971) (payments to private industry for construction of waterline); City of Glendale v. White, 67 Ariz. 231, 194 P.2d 435 (1948) (membership dues in a municipal league); Humphrey v. City of Phoenix, 55 Ariz. 374, 102 P.2d 82 (1940) (payments to a private contractor for the construction of low-income housing).

The *Pilot Properties* controversy involved the rental of municipal land rather than the expenditure of municipal revenues. There is no analytic difference between the two situations, however, because the land was acquired with municipal monies and, in addition, the lease for nominal consideration constituted a release from a monetary obligation to the city which would otherwise have existed.

prestige standpoint."[43] Utilizing the public purpose doctrine, then, the situation in *Pilot Properties* could appropriately have been held to be excepted from the effect of article 9, section 7.

The *Pilot Properties* court, however, held that any public purpose served by the stadium was not sufficient to except the lease from the prohibition of article 9, section 7. According to the court, "[T]he constitution makes no distinction as between 'donations,' whether they be for a good cause or a questionable one. It prohibits them all."[44] The court noted that the public purpose doctrine is applicable only in determining whether a municipal expenditure satisfies traditional municipal contract law principles.[45] Once this determination is made, the public purpose test has no further applicability, although the expenditure may still be challenged as a subsidy in violation of the Arizona constitution.[46]

In holding that a public purpose would not except an expenditure from article 9, section 7, it was necessary for the *Pilot Properties* court to distinguish prior Arizona law indicating that an expenditure made for a public purpose would be constitutional.[47] *Industrial Development Authority v. Nelson*[48] was distinguished on the grounds that a revenue bond issue created no debt or liability on behalf of the political subdivision.[49] Thus, according to the *Pilot Properties* court, *Industrial Development* involved a financing plan to which article 9, section 7 was inapplicable, rather than a plan which was excepted from the provision

43. 22 Ariz. App. at 358, 527 P.2d at 517. Facilities of this nature have been held by courts in other jurisdictions to serve a public purpose. *See, e.g.*, Los Angeles County v. Dodge, 51 Cal. App. 492, 197 P. 403 (1921); Ginzberg v. City & County of Denver, 164 Colo. 572, 436 P.2d 685 (1968); Martin v. City of Philadelphia, 420 Pa. 14, 215 A.2d 894 (1966).

44. 22 Ariz. App. at 362, 527 P.2d at 521, *quoting* State v. Trujillo, 46 N.M. 361, 369, 129 P.2d 329, 333 (1942).

45. *See* 22 Ariz. App. at 361, 527 P.2d at 520.

> Were we to hold otherwise and say that a "public purpose" was the only "criterion by which the validity of an appropriation of public funds is to be measured, there would be hardly any limit upon the right of the state, county, city, or school districts to appropriate monies to a private corporation."

Id. at 362, 527 P.2d at 521, *quoting* Harrington v. Atteberry, 21 N.M. 50, 54, 153 P. 1041, 1042 (1916).

46. According to the court, "A donation of public property to a private corporation for a purpose that is deemed by the city fathers to be for the public good, in our opinion falls squarely within the prohibition of our constitution . . . ." 22 Ariz. App. at 362, 527 P.2d at 521.

47. See text & notes 41-42 *supra.*

48. 109 Ariz. 368, 509 P.2d 705 (1973). In *Industrial Development*, Pinal County had issued revenue bonds to finance the construction of pollution control facilities for private industry. Repayment of the principal and interest due on the bonds was secured through the leasing of the facilities to a private industry, and the county incurred no general liability. The bond issue was challenged as violating article 9, section 7. The court, however, upheld the constitutionality of the issue and noted that since pollution control facilities served a public purpose, the expenditure was excepted from article 9, section 7. For a further discussion of *Industrial Development*, see "Industrial Development Authorities in Arizona," 16 ARIZ. L. REV. 489, 616 (1974).

49. 22 Ariz. App. at 361, 527 P.2d at 520. See discussion note 25 *supra.*

because it was for a public purpose.[50] The *Pilot Properties* court also reviewed the decision in *Heiner v. City of Mesa*,[51] disagreeing with the decision insofar as it indicated that a public purpose would except municipal transactions from article 9, section 7.[52]

The *Pilot Properties* decision reflects the belief that the public purpose doctrine and constitutional public aid limitations were not designed to accomplish the same ends. Whereas the public purpose doctrine is a broad-based criterion for judging the validity of any public expenditure, public aid limitations were enacted to alleviate a much more specific problem—the dissipation of public monies due to misjudgments by persons in the private sector. While an expenditure may serve a public purpose, this does not necessarily ensure that public funds will not be lost through irresponsible decisions at the private level.[53]

The Public Control Factor

Although the *Pilot Properties* court rejected the public purpose doctrine as an exception to Arizona's public aid limitation,[54] it did not completely preclude public funding of private sector activities.[55] Indeed, the court appeared to be searching for an additional element that, when combined with a public purpose, would be sufficient to create an exception. Although not explicitly stated, this extra factor may be gleaned from *Town of Gila Bend v. Walled Lake Door Co.*,[56] the only Arizona case involving an exception to article 9, section 7 which the *Pilot Properties* court appeared to favor. In the challenged transaction

50. 22 Ariz. App. at 361, 527 P.2d at 520. To the *Pilot Properties* court, the pollution control facility's ability to serve a public purpose was significant only to the extent that it secured compliance with due process and municipal financing principles.

51. 21 Ariz. App. 58, 515 P.2d 355 (1974). In *Heiner*, Mesa donated 10 acres to Good Samaritan Hospital, a private corporation, for the construction of a much needed hospital. The donation was challenged as contravening the mandate of article 9, section 7. The *Heiner* court, however, held that "[t]he public benefit removes the contemplated deed from the restriction of § 7 of Article 9 of the Constitution and constitutes a valid and valuable consideration under the circumstances presented to us in this case." *Id.* at 64, 515 P.2d at 361.

52. 22 Ariz. App. at 362, 527 P.2d at 521.

The ruling by the *Pilot* court creates an interesting split of opinion in the Arizona court of appeals, since *Heiner* was decided by department A of division one of the court of appeals, while *Pilot Properties* was decided by department B of division one. This split in departments can be resolved only by the Arizona supreme court.

53. *See* Lord v. City & County of Denver, 58 Colo. 1, 143 P. 284 (1914); O'Neill v. Burns, 198 So. 2d 1 (Fla. 1967); Comment, *supra* note 27, at 139.

54. 22 Ariz. App. at 362, 527 P.2d at 521. While other courts have been quick to adopt the public purpose doctrine as a broad exception to public aid limitations, the decision in *Pilot Properties* appears reasonable considering the circumstances which prompted passage of public aid provisions. See text and notes 1-3 *supra*. The acceptance of the public purpose exception by other courts probably has been motivated by a desire to avoid impeding industrial growth and development. *See* Carruthers v. Port of Astoria, 249 Ore. 329, 438 P.2d 725 (1968); Uhls v. State, 429 P.2d 74 (Wyo. 1967); text & note 25 *supra*.

55. 22 Ariz. App. at 362-63, 527 P.2d at 521-22.

56. 107 Ariz. 545, 490 P.2d 551 (1971).

Gila Bend had promised to build a waterline to provide fire protection to the Walled Lake Door Co. in consideration of the company rebuilding a partially destroyed plant within the town; Gila Bend was to retain title to the waterline. The court held the expenditure constitutional under article 9, section 7 on the basis that the construction of the pipeline served the valid public purpose of preventing fires. In approving the *Walled Lake* holding, the *Pilot Properties* court interpreted the decision as requiring not only that the subject matter of the expenditure constitute a public purpose, but also that ownership and control of the subject matter remain in the city, before an exemption from article 9, section 7 would be recognized.[57] By distinguishing the holding of *Walled Lake* in this manner, the *Pilot Properties* court indicated that public control, along with a public purpose, may be sufficient to exempt an expenditure from the prohibition of article 9, section 7. Whereas ownership of the land remained in Tempe in *Pilot Properties*, there was no retention of control and thus no exemption from article 9, section 7 under the *Walled Lake* rule.

Many jurisdictions have found an exception to state public aid limitations where public control was retained over the object of the expenditure.[58] The presence or absence of public control has often been a critical factor in decisions involving long term leases of property to private parties.[59] Control over use of the land assures that such use will comport with a recognized public interest; thus, courts have been reluctant to allow any public expenditures for lands or facilities which will be completely controlled by a private party.[60] Public control also ensures that there is public input throughout the decisionmaking and management process.[61]

The *Pilot Properties* decision is unclear as to the rationale for requiring public control over the object of a municipal expenditure,[62] but the court may require public control simply to maintain an appear-

57. 22 Ariz. App. at 361, 527 P.2d at 520.

58. *See, e.g.*, City of Oakland v. Williams, 206 Cal. 315, 274 P. 328 (1929); City of West Palm Beach v. State, 113 So. 2d 374 (Fla. 1959); Sun Printing & Publishing Ass'n v. Mayor of New York, 152 N.Y. 257, 46 N.E. 499 (1897).

While the early cases generally required both a public purpose and public control, the majority of courts subsequently dropped the control factor so that only a public purpose was required for an exception to the public aid limitation.

59. This factor often has been decisive in cases where the public purpose involved was recreational. *See* Los Angeles County v. Dodge, 51 Cal. App. 492, 197 P. 403 (1921); City of West Palm Beach v. State, 113 So. 2d 374 (Fla. 1959).

60. *See, e.g.*, City of West Palm Beach v. State, 113 So. 2d 374 (Fla. 1959); Sun Printing & Publishing Ass'n v. Mayor of New York, 152 N.Y. 257, 46 N.E. 499 (1897); Zachry v. City of San Antonio, 296 S.W.2d 299 (Tex. Civ. App. 1956).

61. *See* Pinsky, *supra* note 1, at 281.

62. In general, the original contract should be able to adequately insure continued use of the land for the public benefit.

ance of investment security.[63] In other words, *Pilot Properties* suggests that municipalities must have dominion over any municipal asset to be in compliance with article 9, section 7, whether in fact such control makes any pragmatic difference. Tempe thus might have been able to ensure the validity of the lease by retaining the power to make certain management decisions respecting the construction, use, and maintenance of the stadium.[64]

The public control exception permits more state and municipal freedom than if the *Pilot Properties* court had not allowed any type of exception. The court's emphasis upon the control factor, however, results in a more literal construction of this aspect of article 9, section 7 than had previously been adopted by Arizona courts.[65] Its narrow interpretation of the public purpose exception, however, is counterbalanced by its extremely restrictive view of when there is a subsidy at all.[66]

Conclusion

Numerous changes in municipal problems and responsibilities have occurred since enactment of the constitutional provisions limiting public aid to private entities. The relative instability of investments in railroads which prompted the passage of the prohibitions[67] is no longer a valid rationale.[68] Many communities now seek to encourage industrial

63. Arguably, two problems might arise from the lack of public control in a situation such as that in *Pilot Properties*. First, the baseball team could be mismanaged and the stadium would fall into disuse. Since the stadium was to accommodate major league baseball games, its use for other purposes would be inherently limited, and the loss of the lease-holding team could lead to a lengthy vacancy period. Thus, the public benefit from the lease, see text & note 43 *supra*, would be substantially lost. Second, by the terms of the lease Tempe had a reversionary interest in the stadium after 30 years, an interest dependent upon purely private interests. Conceivably the management of the baseball club might allow the stadium to deteriorate to such an extent that the stadium would be virtually worthless at the end of the 30-year period. Tempe would not be unprotected in such an event, however, as the owner-lessor's right to prevent waste is legally protected. *See* Jowdy v. Guerin, 10 Ariz. App. 205, 208, 457 P.2d 745, 748 (1969).

64. It is difficult to determine what degree of control might be necessary to validate an expenditure under the public control doctrine. *Compare* Sun Printing & Publishing Ass'n v. Mayor of New York, 152 N.Y. 257, 46 N.E. 499 (1897), *with* Lord v. City & County of Denver, 58 Colo. 1, 143 P. 284 (1914).

65. *Compare* City of Tempe v. Pilot Properties, Inc., 22 Ariz. App. 356, 527 P.2d 515 (1974), *with* Heiner v. City of Mesa, 21 Ariz. App. 58, 515 P.2d 355 (1974), *and* City of Glendale v. White, 67 Ariz. 231, 194 P.2d 435 (1948).

66. *See* text & notes 12-15 *supra*.

67. *See* text & notes 1-3 *supra*.

68. It is arguable that current schemes for promotion of private industrial development are similar to the evils that the early railroad development schemes perpetrated. However, municipalities now have a much greater capability to absorb financial losses (due to the broader tax base), and the technical expertise to evaluate the economic feasibility of financial projects. Additionally, statutory safeguards now exist to prevent the type of corporate excess which occurred in the late 19th century and led to enactment of public aid limitations. *See generally* 15 U.S.C. §§ 77a-77aa (1970); 15 U.S.C. §§ 78a to 78hh-1 (1970), *as amended*, (Supp. IV, 1974). In light of municipal legislatures' ability to evaluate the practicality of particular expenditures, and the lack of danger that a municipality will go bankrupt, the prohibitions appear to serve an outdated purpose. *See* Note, *State Constitutional Limitations on a Municipality's Power to*

growth and development in their area by ensuring adequate capitalization to new businesses through municipal loans and bonds, thus bringing jobs and capital to the area.[69] The opinion of the *Pilot Properties* court is paradoxical in interpreting Arizona's public aid limitations to fit these changed conditions. On one hand, the "abuse of discretion" test adopted for determining the existence of a subsidy takes a very liberal view of municipal powers and severely limits the effect of article 9, section 7. On the other hand, by rejecting the full force of the public purpose exception, the *Pilot Properties* court expressed concern for fulfilling the purpose of article 9, section 7 and not rendering it nugatory. Only final resolution by the Arizona supreme court or a constitutional mandate[70] will eliminate the confusion created by the *Pilot Properties* decision, and settle whether local government is to continue under the yoke of an outdated prohibition.

Appropriate Funds or Extend Credit to Individuals and Associations, 108 U. PA. L. REV. 95, 112-15 (1959).

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

70. If a constitutional mandate is proposed to revise art. 9, § 7, an appropriate model might be ALAS. CONST. art. IX, § 6: "No tax shall be levied, or appropriation of public money made or public property transferred, nor shall the public credit be used, except for a public purpose." Such a provision would ensure the municipality freedom in evaluating its own capabilities to loan money to private concerns, yet would codify the common law and delimit the permissible grounds for such expenditures.

X. REMEDIES

A. PUNITIVE DAMAGES AWARDED IN EQUITY WITHOUT COMPENSATORY DAMAGES

Parties seeking punitive damages usually do so in actions at law in which compensatory damages are the primary form of relief sought. As a result, relatively few jurisdictions have had occasion to deal with the questions of whether a court sitting in equity may award punitive damages, and whether compensatory damages are a prerequisite to an award of punitive damages. The jurisdictions which have considered these issues are widely divergent in their outcomes. The Supreme Court of Arizona was presented with its first opportunity to rule on these matters in the case of *Starkovich v. Noye*.[1]

In July 1966 Harry and Evelyn Noye entered into a formal joint venture agreement for the development of a professional building with Robert Starkovich and John Chopas, doing business as Guardian Development and Sales Company. After completion of the building in 1967, a dispute arose as to the ownership interests of the parties. As specified in the signed agreement, Starkovich and Chopas claimed a 90 percent interest, with the remaining 10 percent going to the Noyes. The Noyes, on the other hand, claimed that before formally executing the contract, the parties had orally agreed to 50 percent interests. Alleging that they were fraudulently induced to sign the document, the Noyes brought an action for a declaratory judgment to establish the ownership interests.[2] Pursuant to a jury verdict,[3] the Noyes were awarded the additional 40 percent interest and $135,000 punitive damages.

---

1. 111 Ariz. 347, 529 P.2d 698 (1974). Although punitive damages were awarded as early as 1908 in Arizona, Iaegar v. Metcalf, 11 Ariz. 283, 94 P. 1094 (1908), the Arizona supreme court had never dealt squarely with the issues presented in *Starkovich*.

2. The action was brought under the Uniform Declaratory Judgments Act, ARIZ. REV. STAT. ANN. §§ 12-1831 to -1846 (1956). Since *Starkovich* involved reformation of a contract, a traditional equitable remedy, the declaratory judgment action was equitable in nature. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.1, at 26 (1973). In cases where monetary damages are sought as part of a declaratory judgment, however, the proceeding may be categorized as an action at law. *See id.* § 2.6, at 74-80.

3. One question which *Starkovich* left open is whether a court sitting without a jury may assess punitive damages. At least one court has held that the imposition of punitive damages is the exclusive province of a jury due to a constitutional guaranty of trial by

Following the adverse ruling by the trial court, Starkovich appealed. The court of appeals vacated the judgment without conclusively resolving the issues of whether a court sitting in equity may award punitive damages and whether compensatory damages are a prerequisite to punitive damages.[4] On further appeal, however, the Arizona supreme court did rule on these questions. In vacating the judgment of the court of appeals and affirming the trial court's verdict, the supreme court held that a court sitting in equity may award punitive damages and that an award of actual monetary damages is not required for an award of punitive damages. By taking a position on these issues, the *Starkovich* court clarified for Arizona an area of law characterized by its lack of uniformity throughout the United States.

This casenote will contrast the *Starkovich* decision with the views of other jurisdictions on the availability of punitive damages in equitable actions. After briefly noting the traditional functions punitive damages serve in the legal system, the appropriateness of awarding such damages in suits arising in equity will be discussed. Next, the issue of whether compensatory damages are an indispensable prerequisite to recovery of punitive damages will be considered. Finally, this casenote will analyze the implications of the *Starkovich* court's resolution of these issues.

---

jury before punishment. Orkin Extermination Co. v. Truly Nolen, Inc., 117 So. 2d 419 (Fla. Dist. Ct. App.), *cert. denied*, 120 So. 2d 619 (Fla. 1960), *overruled in part on other grounds*, Glusman v. Lieberman, 285 So. 2d 29 (Fla. Dist. Ct. App. 1973). An indication of what Arizona may hold is afforded by I.H.P. Corp. v. 210 Central Park South Corp., 12 N.Y.2d 329, 239 N.Y.S.2d 547 (1963), a case relied on by the *Starkovich* court. There it was held that a court sitting in equity without a jury could award punitive damages, because the parties were deemed to have voluntarily waived their rights to trial by jury. *Id.* at 333, 239 N.Y.S.2d at 549. In Arizona the parties have a right to demand a trial by jury in all cases, including declaratory judgment actions. ARIZ. R. CIV. P. 38(a), 57. Although the decisions of the jury are only advisory in equitable actions, Kostolansky v. Lesher, 95 Ariz. 103, 387 P.2d 804 (1964); Zimmer v. Salcido, 9 Ariz. App. 416, 453 P.2d 245 (1969), the court, with the consent of both parties, may order trial by a jury whose decision is binding. ARIZ. R. CIV. P. 39(k). If there is no demand for an issue to be submitted to a jury in equity, however, the parties are deemed to have waived their right to a jury resolution of the issue. Hammontree v. Kenworthy, 1 Ariz. App. 472, 404 P.2d 816 (1965); ARIZ. R. CIV. P. 49(g). Arizona could, therefore, follow the *I.H.P.* precedent in allowing assessment of punitive damages by the court. Such a result would be problematical, however, in that the party to be punished can unilaterally demand only an advisory jury. Consent of both parties, and presumably of the court as well, is necessary in order for the jury's decision to be binding.

4. The court of appeals vacated the judgment because the defendants had not been allowed, during arguments to the jury, to refer to inconsistencies in the plaintiffs' complaint, pretrial depositions, and in-court testimony. Starkovich v. Noye, 21 Ariz. App. 324, 327, 519 P.2d 77, 80 (1974). The supreme court reversed this ruling, finding no proof that the plaintiffs were aware of the statements in the complaint at the time of filing. 111 Ariz. at 350, 529 P.2d at 701.

The court of appeals did indicate in dictum that in Arizona punitive damages cannot be awarded without a finding of actual damage. 21 Ariz. App. at 328, 519 P.2d at 81, *citing* La Frentz v. Gallagher, 195 Ariz. 255, 462 P.2d 84 (1969), *and* Smith v. Don Sanderson Ford, Inc., 7 Ariz. App. 390, 439 P.2d 837 (1968). Finding no authority to support the plaintiffs' contention that the award of the additional 40 percent interest constituted compensatory damages, the court of appeals concluded that punitive damages would be inappropriate. 21 Ariz. App. at 328, 519 P.2d at 81.

Functions of Punitive Damages

An understanding of the nature and purpose of punitive damages is essential for an analysis of the *Starkovich* decision. First awarded approximately 200 years ago in *Huckle v. Money*,[5] punitive damages are also referred to as exemplary, vindictive, or presumptive damages,[6] and are sometimes called smart money.[7] In *Huckle v. Money*, the court reasoned that although the plaintiff's injury was minor, the defendant's entry into plaintiff's house under a nameless warrant to gain evidence was such a blatant infringement upon his privacy that exemplary damages were justified.[8] Subsequently, English courts often allowed awards in excess of actual damage as compensation for nonpecuniary loss caused by a defendant's willful, wanton, or reckless conduct.[9]

Current American use of punitive damages focuses on punishing the willful wrongdoer and deterring similar conduct in the future,[10] although some courts still view the remedy as compensating the plaintiff for wounded feelings.[11] Since punitive damages theoretically serve to protect the entire community by discouraging future misconduct, they are allowed as a matter of public policy.[12] They are deemed appropriate, however, only in cases involving aggravated, wanton, reckless, or

---

5. 95 Eng. Rep. 768 (K.B. 1763).

6. Gila Water Co. v. Gila Land & Cattle Co., 30 Ariz. 569, 577, 249 P. 751, 753 (1926); H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 29, at 27 (rev. ed. 1961).

7. *See* Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214 (1936). H. OLECK, *supra* note 6, § 29, at 27. *See also* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957).

8. 95 Eng. Rep. 768 (K.B. 1763).

9. For example, in Benson v. Frederick, 97 Eng. Rep. 1130 (K.B. 1766), the court allowed excessive damages as compensation for the plaintiff's injured dignity when he was scandalized and disgraced by being wrongfully flogged. In Tullidge v. Wade, 95 Eng. Rep. 909 (K.B. 1769), the plaintiff's daughter was seduced in his own house, and exemplary damages were allowed for this insult.

Within the English system, the allowance of punitive damages expanded to cover three situations: (1) where injury results from oppressive acts by the government; (2) where the injury is deliberately inflicted with a motive to profit; (3) where such damages are authorized by statute. Rookes v. Barnard, 1 All E.R. 367, 407-12 (H.L. 1964); Hodgin & Veitch, *Punitive Damages—Reassessed*, 21 INT'L & COMP. L.Q. 119 (1972).

10. Brown v. Coates, 253 F.2d 36 (D.C. Cir. 1958); Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 487, 502 P.2d 522, 524 (1972); Acheson v. Shafter, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971); Ross v. Clark, 35 Ariz. 60, 68, 274 P. 639, 642 (1929); D. DOBBS, *supra* note 2, § 3.9, at 205; Annot., 67 A.L.R.2d 943 (1959).

Currently 46 of the 50 states allow some form of punitive damages. Massachusetts, Nebraska, and Washington do not allow punitive damages. City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 269, 47 N.E.2d 265, 272 (1943); Abel v. Conover, 170 Neb. 926, 929, 104 N.W.2d 684, 688 (1960); Steele v. Jackson, 458 P.2d 889, 890 (Wash. 1969); D. DOBBS, *supra* at 204 n.3. Although Louisiana may be included in this category, the near equivalent of punitive damages has been granted in that state. Loeblich v. Barnier, 113 So. 2d 95 (La. App. 1959); D. DOBBS, *supra* at 204 n.3. Connecticut considers them as extra compensation to aid in covering attorney fees and other court costs. Tedesco v. Maryland Cas. Co., 127 Conn. 533, 538, 18 A.2d 357, 359 (1941).

11. D. DOBBS, *supra* note 2, § 3.9, at 205.

12. Acheson v. Shafter, 107 Ariz. 576, 490 P.2d 832 (1971); Downs v. Sulphur Springs Valley Elec. Coop., Inc., 80 Ariz. 286, 297 P.2d 339 (1956).

malicious wrongdoing.[13] Generally, such cases must include an element of fraud, malice, or gross negligence.[14] When these elements establish the requisite public interest, punitive damages enable the judicial system to regulate the undesirable conduct without resorting to criminal sanctions. This gives the legal system the necessary flexibility to deal with a wide range of wrongful acts. Although the overwhelming majority of jurisdictions allow punitive damages where the necessary degree of misconduct is present, they are split on the issue of whether a court sitting in equity may award punitive damages.[15]

Punitive Damages Arising in Equity

It is well established that an equity court, once it has acquired jurisdiction over the subject matter of a controversy, has discretionary power to award complete relief including compensatory damages.[16] However, a majority of jurisdictions have traditionally denied the awarding of punitive damages by courts sitting in equity.[17] These courts advance several justifications for so holding. Some assert that a court of equity does not have the power to award punitive damages in the absence of a statute expressly granting such power.[18] Other courts contend that punitive damages are inconsistent with the common law principle that equity will award only what is due *ex aequo et bono*—in justice and fairness—without regard to the reprehensibility of the defendant's conduct.[19] Several courts rely on the theory that in seeking equitable relief, the parties waive any claim to punitive damages.[20]

13. Lufty v. Roper, 57 Ariz. 495, 115 P.2d 161 (1941); Iaegar v. Metcalf, 11 Ariz. 283, 94 P. 1094 (1908); C. McCORMICK, HANDBOOK on the LAW OF DAMAGES § 79, at 280 (1935). Since punitive damages are based upon a culpable state of mind, or a reckless disregard of the circumstances, ordinary negligence will not support them. D. DOBBS, *supra* note 2, § 3.9, at 206.

14. McNelis v. Bruce, 90 Ariz. 261, 367 P.2d 625 (1961).

15. D. DOBBS, *supra* note 2, § 3.9, at 211.

16. Gentry v. Andrews, 79 Ariz. 270, 275, 288 P.2d 487, 490 (1955); Sinclair Oil & Gas Co. v. Bishop, 441 P.2d 436, 447 (Okla. 1967); D. DOBBS, *supra* note 2, § 2.7, at 83-84.

17. D. DOBBS, *supra* note 2, § 3.9, at 211.

18. Brody v. Trans World Airlines, Inc., 196 F. Supp. 504, 505 (D. Del. 1961); Orkin Extermination Co. v. Truly Nolen, Inc., 117 So. 2d 419, 422 (Fla. Dist. Ct. App.), *cert. denied*, 120 So. 2d 619 (Fla. 1960), *overruled in part on other grounds*, Glusman v. Lieberman, 285 So. 2d 29 (Fla. Dist. Ct. App. 1973); Kemp v. Lake Serene Property Owners Ass'n, Inc., 256 So. 2d 924, 926 (Miss. 1971). This position is in accordance with the rule that courts will follow the common law in the absence of a statute which modifies or negates the common law principles involved.

19. Superior Constr. Co. v. Elmo, 204 Md. 1, 20, 104 A.2d 581, 583 (1954); Equity Serv. Co. v. Hamilton, 257 So. 2d 201, 207 (Miss. 1972); Sinclair Oil & Gas Co. v. Bishop, 441 P.2d 436, 448 (Okla. 1967); Pedah Co. v. Hunt, 265 Ore. 433, 435, 509 P.2d 1197, 1198 (1973). Note, *Punitive Damages in Equity*, 16 MD. L. REV. 68 (1956). In 1853, the United States Supreme Court expressed the view that courts of law were available to plaintiffs who wished to strike with an element of vengeance. If they chose the courts of equity, however, "they [would] be allowed to claim that which, *ex aequo et bono*, is theirs, and nothing beyond this." Livingston v. Woodworth, 56 U.S. (15 How.) 546, 560 (1853).

20. Superior Constr. Co. v. Elmo, 204 Md. 1, 19, 104 A.2d 581, 584 (1954); Karns

Finally, a few states hold that punitive damages may be awarded only by a jury, and any usurpation of that power would violate the defendant's right to trial by jury before punishment.[21]

In contrast to this line of authority, a minority of jurisdictions allow punitive damages in actions arising in equity. These courts stress that under a merged system of law and equity,[22] only one form of pleading is used, and all remedies are available to the court in order to avoid a multiplicity of suits.[23] Similarly, some jurisdictions assert that once a court has jurisdiction over a controversy, it may administer complete relief.[24] Since courts of equity in all states may award compensatory damages,[25] it is argued, there is no sound reason why punitive damages may not also be awarded.[26]

The Arizona supreme court, approving the award of punitive damages in *Starkovich*, adopted the approach taken in the leading cases of *I.H.P. Corp. v. 210 Central Park South Corp.*[27] and *Union Oil Co. v. Reconstruction Oil Co.*[28] The Arizona court emphasized that the distinction between actions at law and equity has been abolished in Ari-

---

v. Allen, 135 Wis. 48, 58, 115 N.W. 357, 361 (1908). *Contra*, I.H.P. Corp. v. 210 Central Park South Corp., 12 N.Y.2d 329, 189 N.E.2d 812, 239 N.Y.S.2d 547 (1963). This view was first espoused in Bird v. Wilmington & M.R.R., 29 S.C. Eq. (8 Rich). 46, 64 Am. Dec. 739 (1855). Although equitable relief was sought, the court reasoned that it could award damages for injuries already sustained since such damages would be ancillary to the main relief and would prevent a multiplicity of suits. However, the court held that by choosing to sue in equity and thereby bringing himself in the rules of equity, the plaintiff waived all claims for punitive damages.

21. Orkin Extermination Co. v. Truly Nolen, Inc., 117 So. 2d 419, 422 (Fla. Dist. Ct. App.), *cert. denied*, 120 So. 2d 619 (Fla. 1960), *overruled in part on other grounds*, Glusman v. Lieberman, 285 So. 2d 29 (Fla. Dist. Ct. App. 1973); *cf.* Kelite Prods., Inc. v. Binzel, 224 F.2d 131 (5th Cir. 1955). See discussion note 3 *supra*.

22. Thirty-seven states have a merged system, whereby both legal and equitable remedies may be dispensed by a single, unified court. D. DOBBS, *supra* note 2, § 2.7, at 82.

23. *See, e.g.*, Union Oil Co. v. Reconstruction Oil Co., 20 Cal. App. 2d 170, 183, 66 P.2d 1215, 1221 (Dist. Ct. App. 1937); I.H.P. Corp. v. 210 Central Park South Corp., 12 N.Y.2d 329, 332, 239 N.Y.S.2d 547, 548 (1963); Susquehanna S.S. Co. v. Anderson & Co., 239 N.Y. 285, 294, 146 N.E. 381, 384 (1925).

24. Morgan v. Board of Supervisors, 67 Ariz. 133, 139, 192 P.2d 236, 240 (1948) (stating that "where equity has acquired jurisdiction for one purpose, it will retain jurisdiction to final adjustment of all differences between parties arising from cause of action presented."); Union Oil Co. v. Reconstruction Oil Co., 20 Cal. App. 2d 170, 183, 66 P.2d 1215, 1221, (Dist. Ct. App. 1937); Sinclair Oil & Gas Co. v. Bishop, 441 P.2d 436, 447 (Okla. 1967); D. DOBBS, *supra* note 2, § 2.7, at 84.

25. *See* text & note 16 *supra*.

26. *See* 63 COLUM. L. REV. 175, 178-79 (1963). Additionally, Justice Traynor noted that in certain circumstances granting an equitable remedy would result in the defendant losing only that which he had wrongfully obtained. Without punitive damages, the same person or others would not be deterred from perpetrating similar frauds. Ward v. Taggart, 51 Cal. 2d 736, 743, 336 P.2d 534, 538 (1959).

27. 12 N.Y.2d 329, 239 N.Y.S.2d 547 (1963), *noted in* 63 COLUM. L. REV. 175 (1963). In this action for injunctive relief, the court reasoned that since New York had merged the systems of law and equity, there was no valid reason for denying complete relief in a single action. *Id.* at 333, 239 N.Y.S.2d at 549.

28. 20 Cal. App. 2d 170, 66 P.2d 1215 (Dist. Ct. App. 1937). The court, noting that only one form of state action existed under state law, reasoned that since the award of damages was incidental to the primary injunctive relief sought, it was within the court's power to grant complete relief. 20 Cal. App. 2d at 183, 66 P.2d at 1221.

zona resulting in a single form of civil action.[29] This merger, according to the court, resulted in two distinct advantages. First, a court could grant complete relief in a single case, regardless of the equitable or legal nature of the relief.[30] Second, merger helped avoid a multiplicity of suits,[31] an increasingly important consideration in view of growing judicial caseloads. Under this modern system, recovery of punitive damages should not depend on the particular type of relief sought or on the old common law mold into which a claim technically fits. Recognizing the obsolescence of the traditional view, the court ruled that punitive damages may be awarded by a court sitting in equity.[32]

Compensatory Damages as a Prerequisite to Punitive Damages

Collateral to the issue of an equity court's ability to award punitive damages is the question of whether such relief may be granted only in conjunction with compensatory damages. It is well established that punitive damages are recoverable only upon a showing of actual harm or injury to the plaintiff.[33] Thus, a person cannot, acting as a "private attorney general," maintain a civil action based solely on punitive damages in order to punish another.[34] The requirement of actual injury was clearly met in *Starkovich*. The plaintiffs' legally protected interest in being free from dishonest contractual dealings was invaded. The complaint sounded in fraud, a legally recognized cause of action, and the favorable jury verdict validated the plaintiffs' claim for relief.

Most courts, however, go beyond the basic requirement of legal injury to the plaintiff, restricting also the types of relief which can be accompanied by an award of punitive damages. Despite the presence of actual injury, therefore, the particular remedy granted by the *Starkovich* court to vindicate the plaintiffs' interest—reformation of the contract—posed a distinct problem.

Although it is generally agreed that punitive damages may be awarded only when a legally protected interest has been invaded, it is

29. 111 Ariz. at 351, 529 P.2d at 702, *citing* McRae v. Lois Grunow Memorial Clinic, 40 Ariz. 496, 14 P.2d 478 (1932).

30. As the court noted, the power to grant complete relief is supported by ARIZ. R. CIV. P. 54(d) and by the Uniform Declaratory Judgment Act. ARIZ. REV. STAT. ANN. § 12-1838 (1956). 111 Ariz. at 351, 529 P.2d at 702.

31. 111 Ariz. at 351, 529 P.2d at 702.

32. Further support of the court's position is found in J. POMEROY, CODE REMEDIES § 9, at 13 (5th ed. 1929): "Strictly speaking, the remedy given is no part of the action, but is the result thereof; it is the object for which the action . . . is directed."

33. *See* D. DOBBS, *supra* note 2, § 3.9, at 208-10. This is not only a necessary prerequisite to an award of punitive damages, but also may be an essential ingredient of standing, the absence of which will prevent maintenance of the suit in federal court. *See* Sierra Club v. Morton, 405 U.S. 727 (1972); Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

34. Schippel v. Norton, 38 Kan. 567, 16 P. 804 (1888). *See* D. DOBBS, *supra* note 2, § 3.9, at 208.

less clear what forms of remedy are a sufficient prerequisite to such an award. Assuming the requisite reprehensibility of the defendant's conduct, monetary compensatory damages obviously will suffice. Indeed, in the vast majority of jurisdictions, some form of compensatory damages is an absolute prerequisite to awarding punitive damages.[35] Additionally, most jurisdictions have held that nominal damages are a sufficient basis for awarding punitive damages.[36] California,[37] Idaho,[38] and now Arizona have gone beyond traditional theories to allow a purely equitable, nonmonetary form of relief, such as an injunction or reformation of a contract, to serve as a proper basis for an award of punitive damages.

California has deemed punitive damages appropriate in an action for declaration of the respective interests of stockholders.[39] The court took a broad view of the term "damages" in holding that a requirement of actual damages as a prerequisite to punitive damages was satisfied by the necessity of cancellation of old shares of stock and issuance of new shares in proportion to the contributions of the stockholders.[40]

Similarly, in an action to quiet title to water rights and to enjoin further interference with those rights, the Idaho supreme court ruled that punitive damages should not be restricted to cases involving some form of compensatory relief.[41] The court reasoned that such a limitation, while insuring that some legally protected interest had been invad-

35. Worden v. Tri-State Ins. Co., 347 F.2d 336, 343-44 (10th Cir. 1965); Evans v. Newport News Shipbuilding & Dry Dock Co., 243 F. Supp. 1017, 1019-20 (E.D. Va. 1965); Chavez v. Times-Mirror Co., 72 Cal. App. 694, 697, 237 P. 1085, 1086-87 (Dist. Ct. App. 1925); Note, *Damages—Actual or Nominal—Exemplary Damages not Recoverable Unless Actual Damages Proved*, 18 U. CIN. L. REV. 545 (1949).

36. Marins-Crawford Motor Co. v. Smith, 285 Ala. 477, 486, 233 So. 2d 484, 492 (1970); Finney v. Lockhart, 35 Cal. 2d 161, 164, 217 P.2d 19, 21 (1950); Crystal Dome Oil & Gas Co. v. Savic, 51 Idaho 409, 6 P.2d 155, 156 (1931); Comment, *Nominal Damages as a Basis for Awarding Punitive Damages in California*, 3 STAN. L. REV. 341 (1951); *cf.* Craviolini v. Scholer & Fuller Associated Architects, 101 Ariz. 33, 415 P.2d 456 (1956). In these states there is a wide variation as to whether the punitive damages should bear any relation to the amount of the "compensatory" damages. Results such as an award of $1.00 compensatory damages and $175,000.00 punitive damages have been permitted. Reynolds v. Pegler, 223 F.2d 429 (2d Cir.), *cert. denied*, 350 U.S. 846 (1955). Most jurisdictions look to three factors in determining the amount of punitive damages: (1) the consequences to society of the defendant's act; (2) the wantonness with which the act was committed; and (3) the defendant's ability to pay. Morris, *Punitive Damages in Torts Cases*, 44 HARV. L. REV. 1173 (1931); Comment, *The Relation of Exemplary Damages to Compensatory Damages*, 22 TEXAS L. REV. 235 (1944). In a few jurisdictions nominal damages will not satisfy the requirement of actual damages. Thompson v. Mutual Ben. Health & Accident Ass'n, 83 F. Supp. 656 (N.D. Iowa 1949); *see* Comment, *Punitive Damages in Tennessee*, 27 TENN. L. REV. 381 (1960).

37. Topanga Corp. v. Gentile, 249 Cal. App. 2d 681, 58 Cal. Rptr. 713 (Ct. App. 1967).

38. Village of Peck v. Denison, 92 Idaho 747, 450 P.2d 310 (1969).

39. Topanga Corp. v. Gentile, 249 Cal. App. 2d 681, 58 Cal. Rptr. 713 (Ct. App. 1967).

40. *Id.* at 691, 58 Cal. Rptr. at 719.

41. Village of Peck v. Denison, 92 Idaho 747, 450 P.2d 310 (1969).

ed, unnecessarily precluded the award of punitive damages in cases where a party has invaded a protected interest but may not be liable for compensatory damages. The court asserted that there was no reason why equitable relief may not fulfill the same function as compensatory damages, since both remedies are predicated upon an invasion of a legally protected right.[42]

The Arizona supreme court followed the approach of the California and Idaho courts in *Starkovich*. Viewing the term "damages" in its broadest sense,[43] the court found "no logical reason why a judgment awarding an additional 40 percent on a $400,000 building should not be considered as relief sufficient to support punitive damages."[44] Implicit in the court's finding was its recognition of the function of punitive damages, that is, to punish the wrongdoer and protect the public from similar actions by others.[45] They are not aimed primarily at compensating the injured party.[46] The purposes underlying punitive damages were served in *Starkovich*. Fraudulent misconduct was involved, and actual damage was evidenced by the need to reform the contract.[47] An equitable remedy alone would have had no deterrent effect since the wrongdoer would have stood to lose only that which he illegally gained. Thus, punitive damages were appropriate.

Implications of Starkovich

The *Starkovich* decision may open the door to the use of punitive damages in other types of action in Arizona. Although *Starkovich* could be viewed narrowly as allowing punitive damages only where the primary relief is translatable into monetary terms,[48] the court appeared to take a more expansive view, quoting from the Idaho supreme court: "We prefer to adhere to the rule which gives the term [damages] its

42. *Id.* at 752, 450 P.2d at 315.

43. 111 Ariz. at 351, 529 P.2d at 702, *citing* Nab v. Hills, 92 Idaho 877, 883, 452 P.2d 981, 987 (1969).

44. 111 Ariz. at 352, 529 P.2d at 703. In support of its finding, the court quoted Dobbs' comment on the rule that punitive damages require an award of compensatory damages: "If the rule means only that the plaintiff must have a cause of action before he can recover punitive damages, it states sound law in an obscure way; if it means more, it introduces complications that serve no purpose." D. DOBBS, *supra* note 2, § 3.9, at 210.

45. Acheson v. Shafter, 107 Ariz. 576, 490 P.2d 832 (1971). See text accompanying notes 5-15 *supra*.

46. Nielson v. Flashberg, 101 Ariz. 335, 419 P.2d 514 (1966); Braun v. Moreno, 11 Ariz. App. 509, 466 P.2d 60 (1970). In fact, punitive damages often result in a windfall to the plaintiff. This may be one reason why punitive damages are not favored in some jurisdictions, and why they are justified only in the most extreme cases of aggravated misconduct.

47. *See* 111 Ariz. at 352, 529 P.2d at 703.

48. The reformation granted by the court had the effect of awarding the plaintiffs an additional 40 percent on a $400,000 building, the equivalent of $160,000. 111 Ariz. at 352, 529 P.2d at 703.

broader significance, as including either pecuniary loss *or the alteration of one's position to his prejudice.*"[49]

That there might be some limitation on the types of remedy to which punitive damages may be attached was indicated by the Arizona supreme court's post-*Starkovich* decision denying punitive damages in an action for rescission of contract.[50] That result was probably dictated, however, by the unique nature of the action for rescission. Since the remedy of rescission is available as well to a plaintiff claiming mistake as to one alleging fraud (mistake induced by the other party), the element of scienter or fault has diminished significance.[51] The action hinges instead on the inequity of allowing one party to keep a benefit received because of his own misstatements, whether intentional or mistaken.[52] Thus, in electing to seek rescission rather than to affirm the contract and sue for breach, the plaintiff waives any assertions of defendant's fault, accepting instead a return to the status quo ante. The rescission situation should be regarded, therefore, as an isolated exception to the general rule that punitive damages may be granted wherever a legal injury to plaintiff is coupled with defendant's wanton misconduct.

A few cases from other states suggest actions in which punitive damages may be held appropriate under the *Starkovich* rule. In a significant departure from the general rule that punitive damages will not be awarded for breach of contract,[53] the Indiana court of appeals recently upheld an award of punitive damages in a contract action involving the failure of several insurance companies to settle claims within a reasonable time.[54] Punitive damages were deemed appropriate because the "insurer's conduct amounted to heedless disregard of the consequences."[55] As already noted, Idaho has allowed punitive damages in an action to quiet title to water rights and to enjoin future interference with those rights.[56] Punitive damages have also been granted in a Tennessee suit to prevent encroachment on real estate[57]

49. *Id.* at 351, 529 P.2d at 702, *quoting* Nab. v. Hills, 92 Idaho 877, 883, 452 P.2d 981, 987 (1969).
50. Hubbard v. Superior Court, 111 Ariz. 585, 535 P.2d 1302 (1975).
51. D. DOBBS, *supra* note 2, § 9.4, at 619.
52. *Id.*
53. *See* D. DOBBS, *supra* note 2, § 12.4, at 818. Continental Nat'l Bank v. Evans, 107 Ariz. 378, 489 P.2d 15 (1971), held that punitive damages could not be awarded for breach of contract. This general rule was implicitly undermined in *Starkovich*. Given the requisite degree of misconduct, punitive damages seemingly may be awarded in contract breach cases after *Starkovich*.
54. Vernon Fire & Cas. Ins. Co. v. Sharp, — Ind. App. —, 316 N.E.2d 381 (1974).
55. *Id.* at —, 316 N.E.2d at 384.
56. Village of Peck v. Denison, 92 Idaho 747, 450 P.2d 310 (1969).
57. Jones v. Morrison, 62 Tenn. App. 50, 458 S.W.2d 434 (1970). This case also involved compensatory damages for the land already taken.

and, as aforementioned, in a California action for declaration of the respective interests of stockholders.[58]

Although these cases demonstrate the usefulness of punitive damages in private litigation, public interest litigation would perhaps be an even more appropriate area in which punitive damages might be utilized to enforce public policy. Environmental actions, for example, in which injunctions are the predominant remedy, would benefit from an expanded use of punitive damages as a further deterrent to future misconduct. Moreover, public interest suits, such as consumer fraud actions, which cannot economically be brought today because of the plaintiff's small stake in the outcome and the disproportionate expense of litigation, might be made feasible. The difficulties inherent in class action suits would be thereby obviated, and the cause typified by most public interest litigation furthered. It can be seen that *Starkovich* presents a host of new opportunities. Exactly how far the policy of awarding punitive damages will extend, given the requisite outrageous conduct of the defendant and the invasion of some legally protected interest of the particular complainant, may only be limited by the imagination of future litigants and judicial caution in expanding the use of such remedies.

Conclusion

The *Starkovich* court, by focusing on the defendant's conduct rather than the procedural or remedial form of the action, brought the Arizona law on punitive damages into line with the realities of the modern legal system. As a result, the use of punitive damages may be broadened in the future. This expansion, while potentially stimulating the maintenance of a host of future suits, will at the same time preserve the intended functions and policies underlying punitive damages.

58. Topanga Corp. v. Gentile, 249 Cal. App. 2d 681, 58 Cal. Rptr. 713 (Ct. App. 1967).

XI. TAXATION

A. INCLUSION OF ONE TAX IN THE BASE FOR COMPUTATION OF A SECOND TAX

The realm of statutory construction is perhaps one of the most confusing and contradictory areas of modern law. One commentator has labeled the rules of interpretation mere "explanations and apologies," rationalizations necessary for the orderly establishment and operation of social standards.[1] Much of the confusion is caused because the courts are not applying rules of law, but rather canons of construction,[2] which are primarily judge-made, and often inconsistent and contradictory.[3] The complexities of statutory construction were recently exemplified in the case of *Watkins Cigarette Service, Inc. v. Arizona State Tax Commission*,[4] where two appellate courts, applying familiar canons of construction, reached precisely opposite conclusions as to the ambiguity and scope of a tax statute.[5]

The *Watkins* plaintiffs, Watkins Cigarette Service and Valley Vendors, were Arizona corporations engaged in the business of selling cigarettes through vending machines. As such, plaintiffs were required by statute to pay certain taxes to the state, including a luxury privilege tax and a transaction privilege, or sales, tax. The luxury privilege tax[6] required all vendors of cigarettes to purchase luxury tax stamps and to affix those stamps to each package of cigarettes before the sale of the commodity.[7] The stamps' face value was 10 cents, but could be pre-

1. Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335, 349 (1949):

> [E]veryone is fully aware that the rules of interpretation are not rules of law, or of grammar, or of semantics, or even of policy. They are explanations and apologies, which, historically, we have accepted as the proper verbalizings to accompany a result where, though the judge speaks last, court, administrator, legislature must cooperate if intelligent social standards are to be maintained.

2. *See generally* Ward, *Trends in the Interpretation of Statutes*, 2 V.U.W.L. REV. 155 (1957).

3. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

4. 111 Ariz. 169, 526 P.2d 708, *rev'g* 21 Ariz. App. 196, 517 P.2d 1089 (1974).

5. ARIZ. REV. STAT. ANN. § 42-1204 (Supp. 1975-76).

6. *Id.* §§ 42-1201 to -1231. This tax consisted of a privilege tax, *id.* § 42-1204 (A)(6), and a school equalization tax. Ch. 2, § 3, [1965] Ariz. Sess. Laws 413. Both taxes together will be referred to as the luxury tax.

7. ARIZ. REV. STAT. ANN. § 42-1207(A) (Supp. 1975-76).

paid at the rate of 98.5 percent of their face value.[8] According to the plaintiff-vendors, the full amount of the luxury tax was passed on to the consumer as part of the purchase price.[9] The vendors were also required to pay a transaction privilege tax,[10] which was a sales tax assessed at the rate of 3 percent[11] of the vendor's gross proceeds of sales or gross income.[12] Both taxes were enacted by the same session of the 1935 legislature.[13] It was not until 1969, however, that any attempt was made to collect a sales tax on that part of the sale price attributable to the luxury tax.[14] In that year, after paying taxes computed in a manner similar to that of the proceeding 34 years, plaintiffs were assessed an additional state sales tax equal to 3 percent of the amount collected for the luxury tax. After exhausting their administrative remedies, plaintiffs paid the additional tax under protest and commenced a civil action to recover the sum paid.[15]

The trial court entered summary judgment in favor of the tax commission, but on appeal plaintiffs successfully obtained a reversal in a 2-1 decision by the Arizona court of appeals.[16] The court found that the terms "gross income" and "gross proceeds of sales" used to define the sales tax base[17] did not encompass that portion of the sale price attributable to the luxury tax received by the seller. In reaching this conclusion, the court placed great emphasis upon legislative amend-

8. Ch. 2, § 1, [1965] Ariz. Sess. Laws 412 (now, as amended, ARIZ. REV. STAT. ANN. § 42-1207(D) (Supp. 1975-76)).

9. 21 Ariz. App. at 199, 517 P.2d at 1093. Plaintiffs had labeled each vending machine with a price breakdown showing the portion of the price accounted for by the luxury tax, the state sales tax, and any applicable city tax. Watkins displayed the price breakdown as follows:

45¢ Deposit		50¢ Deposit	
Sales	3365	Sales	3846
State Excise	1000	State Excise	1000
3% State Sales Tax	0101	3% State Sales Tax	0116
1% City Sales Tax	0034	1% City Sales Tax	0038
Total Cost	4500	Total Cost	5000

10. ARIZ. REV. STAT. ANN. §§ 42-1301 to -1372 (Supp. 1975-76).

11. *Id.* §§ 42-1309, -1312, -1361. This tax consisted of a sales tax and an education excise tax. Both taxes will be referred to as the sales tax.

12. ARIZ. REV. STAT. ANN. § 42-1309 (Supp. 1975-76). Gross income was defined as "the gross receipts of a taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property, or service, or both, and without any deduction on account of losses." *Id.* § 42-1301(5). Gross proceeds of sales were defined as "the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of the property sold, expense of any kind, or losses, but cash discounts allowed and taken on sales shall not be included as gross income." *Id.* § 42-1301(6).

13. Ariz. Code §§ 73-1301 to -1334, 73-1401 to -1414 (1939).

14. *See* text & notes 50-51 *infra.*

15. Watkins and Valley were assessed an additional amount of approximately $50,000 in total. 111 Ariz. at 171, 526 P.2d at 710.

16. Watkins Cigarette Serv., Inc. v. Arizona State Tax Comm'n, 21 Ariz. App. 196, 517 P.2d 1089, *rev'd*, 111 Ariz. 169, 526 P.2d 708 (1974).

17. ARIZ. REV. STAT. ANN. §§ 43-1301(5)-(6) (Supp. 1975-76). See definitions note 12 *supra.*

ments to both the luxury tax and sales tax statutes, and upon the commission's apparent longstanding acquiescence in exclusion of the luxury tax from the sales tax base.

On full appeal, the Arizona supreme court, dividing 3-2, vacated the court of appeals' decision.[18] Finding the statutes to be clear and unambiguous, the supreme court purported to give literal effect to the statutory language by including the full amount of the purchase price, including the luxury tax, in the sales tax base of gross income or gross proceeds of sales.[19] Thus, imposition of the sales tax on that part of the price collected to cover the luxury tax was held proper.

This casenote will contrast and compare these diametrically opposed appellate decisions. The two courts' views on the incidence of the luxury tax and the significance attached to that finding will first be examined. Next, other courts' decisions on the issue of whether one tax is properly includable in computing the base for a second tax will be discussed briefly. The basic rules of statutory construction employed by the two Arizona courts in reaching their contrary results will then be analyzed, with particular emphasis on the courts' views of the effect of a long term administrative interpretation, the effect of legislative nullification of a judicial interpretation of a similar statute, and the scope of judicial power to reconcile conflict in statutes *in pari materia.* Finally, the practical impact of the supreme court's binding decision in *Watkins* will be considered.

Incidence and Nature of the Luxury Tax

A preliminary distinction between the two *Watkins* opinions was the courts' different views of the seller's role and obligation in the luxury tax scheme, and the different degrees of importance attached to the legal and practical incidence of the luxury tax. The court of appeals found that the vendor was, in practical effect, a collector of the luxury tax for the state, and that the legislature had not intended to tax the vendor for performing this service.[20] To support this finding, the court of appeals cited language from *Stults Eagle Drug Co. v. Luke,*[21] where the Arizona supreme court upheld the constitutionality of the luxury tax statute, characterizing the merchant dealing in luxuries as, in practical effect, a tax collector for the state.[22] Focusing on the practical effect of the

18. Watkins Cigarette Serv., Inc. v. Arizona State Tax Comm'n, 111 Ariz. 169, 526 P.2d 708 (1974).
19. *Id.* at 172, 526 P.2d at 711.
20. 21 Ariz. App. at 201, 517 P.2d at 1094.
21. 48 Ariz. 467, 62 P.2d 1126 (1936).
22. *Id.* at 473, 62 P.2d at 1129. The *Stults Eagle* court made this characterization

statutes, whereby the luxury tax is ultimately paid by the consumer,[23] the court of appeals held such taxes excludable from the vendor's gross income or gross proceeds of sales for sales tax purposes.[24] Notably, however, the court did not affirmatively state that the purchaser, rather than the vendor, was legally responsible for payment of the luxury tax. Rather, the court of appeals looked no further than the practical effect to determine the legal incidence of the tax and its significance.[25]

The Arizona supreme court, rejecting the court of appeals' reasoning, turned to another statement in *Stults Eagle*, that "[e]very person selling the luxuries defined is required to pay the tax."[26] Noting that the legal obligation to pay the luxury tax is on the vendor, the supreme court asserted that this obligation is unaltered even if, as alleged by the *Watkins* plaintiffs, the economic burden of the tax is shifted to the consumer. According to the supreme court, "[t]he state is concerned with the ultimate fact—that the tax be paid by the vendor."[27] Thus, the seller was viewed not merely as a tax collector for the state, but rather as bearer of the legal burden to pay the tax.[28]

Unlike the court of appeals, which cited no cases from other jurisdictions, the supreme court supported its position by pointing to several states that had allowed the method of assessment advocated by the state tax commission in *Watkins*.[29] The central rationale underlying

despite its recognition that the luxury tax is required to be paid by the seller rather than by the purchaser of the goods. *Id.* at 476, 62 P.2d at 1129.

23. Plaintiffs added the entire amount of the tax onto the price of a package of cigarettes, and this fact was indicated by a price breakdown attached to each vending machine. 111 Ariz. at 170, 526 P.2d at 709. See discussion note 9 *supra*.

24. 21 Ariz. App. at 201-02, 517 P.2d at 1094-95.

25. *Id.* Under the court of appeals' analysis, which adopted the *Stults Eagle* court's "tax collector for the state" language, the practical incidence of the tax implicitly was placed solely upon the consumer. This determination of the obligation for the tax, however, is not completely consistent with economic theory. The reason for this is based upon two considerations, namely the merchant's expected profits, and supply and demand. If the total tax were passed on to the consumer by adding that amount to the base price, the merchant's sales possibly would drop due to the increased price. On the other hand, if the total tax were paid by the merchant rather than passed on to the consumer, the former's profits would decline since his intake would be limited to the base price, which would then be reduced by the amount of the tax liability. The result is that in practice, the merchant usually absorbs some of the tax and passes the rest on to the consumer, the ultimate goal being maximization of profits and minimization of losses. The amount passed on and the amount absorbed will vary with the state of the market. *See* R. LIPSEY & P. STEINER, ECONOMICS 119-25 (2d ed. 1969). In *Watkins*, the merchant purported to pass the entire tax on to the consumer by labeling each vending machine with a price breakdown. See discussion note 9 *supra*. The determination of whether actual liability for the tax has shifted from one party in the transaction to the other thus involves more complex considerations than the mere posting of a sign. *See* R. LIPSEY & P. STEINER, *supra*.

26. Stults Eagle Drug Co. v. Luke, 48 Ariz. 467, 476, 62 P.2d 1126, 1130 (1936).

27. 111 Ariz. at 172, 526 P.2d at 711.

28. *Accord*, Pure Oil Co. v. State, 244 Ala. 258, 12 So. 2d 861 (1943) (such taxes are the obligation of the seller, even if passed on to the consumer by way of higher prices).

29. 111 Ariz. at 172, 526 P.2d at 711, *citing* Martin Oil Serv., Inc. v. Department of Revenue, 49 Ill. 2d 260, 273 N.E.2d 823 (1971), *cert. denied*, 405 U.S. 923 (1972); Fischman & Sons, Inc. v. Department of Revenue, 12 Ill. 2d 253, 146 N.E.2d 54 (1957);

the cases cited, according to the supreme court, was their treatment of the tax as a part of the cost of the goods, and as such, part of the vendor's tax base.[30] The supreme court adopted this approach in *Watkins*, asserting that "when the tax is passed on as an increase in the purchase price of the item, the increase in price reflects a mere 'expense' of the cost of doing business which is not deductible from gross income."[31] Although the supreme court did not mention several earlier cases refusing to include one tax in computing the base for a second tax,[32] such minority cases have been substantially undermined by more recent decisions.[33]

The supreme court's holding in *Watkins* thus was supportable by authority from other jurisdictions. This authority, however, would have been meaningless if it did not comport with Arizona's statutory framework. Consequently, both *Watkins* opinions concentrated primarily on interpreting the language and determining the effect of the particular

Gurley v. Rhoden, 288 So. 2d 868 (Miss. 1974), *aff'd*, 421 U.S. 200 (1975); Ferrara v. Director, Div. of Taxation, 127 N.J. Super. 240, 317 A.2d 80 (App. Div. 1974). In its affirmance of Gurley v. Rhoden, *supra*, the United States Supreme Court held that a state may include both the state and federal excise taxes on gasoline in the producer's gross income for purposes of assessing the state sales tax. 421 U.S. at 211. *Gurley* thus effectively affirms the constitutionality of the *Watkins* approach.

30. 111 Ariz. at 172, 526 P.2d at 711. In Fischman & Sons, Inc. v. Department of Revenue, 12 Ill. 2d 253, 146 N.E.2d 54 (1957), a case cited by the supreme court in *Watkins*, the seller argued that the state had forced him into the business of selling the luxury stamps, and it was thus unfair to tax him for engaging in this pursuit. The court replied that the retailer was not in the business of selling luxury stamps, which were mere indicia of the tax's payment, *id.* at 255, 146 N.E.2d at 56, concluding that it is not unfair to tax a retailer who voluntarily engages in an occupation knowing that it entails the payment of such taxes. Application of this approach in Arizona, according to the court of appeals, would be weakened by the *Stults* court's characterization of the retailer as a tax collector for the state. See text accompanying notes 20-22 *supra*.

31. 111 Ariz. at 172, 526 P.2d at 711.

32. These cases held that dividends from mutual life insurance policies used to purchase additional paid-up insurance under the terms of the policy are not subject to the gross premiums tax, Williams v. Massachusetts Mut. Life Ins. Co., 221 Tenn. 508, 427 S.W.2d 845 (1968), that state sales tax may not be used in computing city sales tax, Gulf Oil Corp. v. McGoldrick, 256 App. Div. 207, 9 N.Y.S.2d 544 (1939); Kesbec, Inc. v. Taylor, 253 App. Div. 353, 2 N.Y.S.2d 241 (1938), Socony-Vacuum Oil Co., Inc. v. City of New York, 247 App. Div. 163, 287 N.Y.S. 288 (1936), and that federal excise tax on gasoline may not be used in computing state sales tax. Standard Oil Co. v. State, 283 Mich. 85, 276 N.W. 908 (1937); Standard Oil Co. v. State Tax Comm'n, 71 N.D. 146, 299 N.W. 447 (1941); Tax Review Bd. v. Esso Standard Div. of Humble Oil & Refining Co., 424 Pa. 355, 227 A.2d 657 (1967).

Typical of these decisions was Standard Oil Co. v. State, *supra*, in which the court held that since the federal excise tax and state sales tax both attached in law and in fact at the time of the sale, the federal tax was not to be considered part of the purchase price upon which the state sales tax was computed. *But see* Gurley v. Rhoden, 421 U.S. 200, 211 (1975) (stating that "even if the liability for the state and federal excise taxes did arise simultaneously with the sales tax . . . ," this would not prevent the former from being included in the latter's tax base).

33. *See* Pure Oil Co. v. State, 244 Ala. 258, 12 So. 2d 861 (1943) (inspection fee properly includable in license tax); State v. Thoni Oil Magic Benzol Gas Stations, Inc., 121 Ga. App. 454, 174 S.E.2d 224 (1970) (federal excise tax on gasoline properly includable for state sales and use taxes, but state motor fuel tax properly excludable); Sun Oil Co. v. Gross Income Tax Div., 238 Ind. 111, 149 N.E.2d 115 (1958) (federal excise tax on gasoline properly includable for computing state sales tax); Leader v. Glander, 149 Ohio St. 1, 77 N.E.2d 69 (1948) (city gross receipts tax properly includable for computing state gross receipts tax); cases cited note 29 *supra*.

Arizona statutes at issue.[34] A thorough analysis of the processes of statutory construction undertaken by the two *Watkins* courts is necessary to explain the divergent results reached by them.

Watkins and the Process of Statutory Construction

A cardinal rule of statutory construction regards the legislative will as all-important;[35] all rules of construction are thus aimed toward ascertaining and declaring the intent of the legislative body.[36] It follows that a statute which is clear and unambiguous on its face requires no extrinsic construction,[37] whereas a statute that is deemed ambiguous requires a thorough analysis of its legislative purpose, legislative background, and the practical effects of possible interpretation.[38] The initial determination of whether a statute is ambiguous can be problematical, however, when its interrelationship with statutes *in pari materia* and its application to a given set of circumstances are at issue.

A statute will require construction where the legislature has enacted other apparently inconsistent statutes,[39] where the language employed is unclear,[40] or where a literal interpretation of the statutory language leads to such an absurd result that the outcome could not have been intended by the legislature.[41] In such situations the court must construe the statute so that it is reasonable, workable, and consistent with related statutes,[42] and may even be justified in disregarding the precise wording of the statute.[43]

34. ARIZ. REV. STAT. ANN. §§ 42-1204, -1309 (Supp. 1975-76).

35. *See, e.g.*, Isley v. School Dist. No. 12, 81 Ariz. 280, 286, 305 P.2d 432, 436 (1956); Ernst v. Collins, 81 Ariz. 178, 181, 302 P.2d 941, 943 (1956); Powers v. Isley, 66 Ariz. 94, 100, 183 P.2d 880, 884 (1947). The basis for this canon is the principle of separation of legislative and judicial functions. *See generally* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 45.01-.15 (4th ed. 1973).

36. City of Mesa v. Killingsworth, 96 Ariz. 290, 295, 394 P.2d 410, 413 (1964); *In re* Stark's Estate, 52 Ariz. 416, 422, 82 P.2d 894, 896 (1938); Weigel v. Hohn, 45 Ariz. 81, 82, 39 P.2d 933, 934 (1935).

37. *See* City of Mesa v. Killingsworth, 96 Ariz. 290, 394 P.2d 410 (1964); Gustafson v. Rajkovich, 76 Ariz. 280, 263 P.2d 540 (1953); *In re* Adoption of Wilcox, 68 Ariz. 209, 204 P.2d 168 (1949).

38. *See generally* G. ENDLICH, COMMENTARIES ON THE INTERPRETATION OF STATUTES § 18 (1st ed. 1888); G. FOLSOM, LEGISLATIVE HISTORY RESEARCH FOR THE INTERPRETATION OF LAWS (1972).

39. Mayor & Common Council v. Randall, 67 Ariz. 369, 196 P.2d 477 (1948); Western Coal & Mining Co. v. Hilvert, 63 Ariz. 171, 160 P.2d 331 (1945); Street v. Commercial Credit Co., 35 Ariz. 479, 281 P.2d 46 (1929).

40. An ambiguity requiring construction has been defined as "doubtfulness or uncertainty; language which is open to various interpretations of having a double meaning; language which is obscure or equivocal." Caldwell v. State, 115 Ohio St. 458, 460, 154 N.E. 792, 792 (1926). *See also* Crane v. Frohmiller, 45 Ariz. 490, 500, 45 P.2d 955, 957 (1935); E. BARRET, P. BRUTON & J. HONNOLD, CONSTITUTIONAL LAW CASES AND MATERIALS 126-27 (3d ed. 1968), *citing* WRITINGS OF THOMAS JEFFERSON 1788-1792, at 285-89 (1895).

41. City of Mesa v. Killingsworth, 96 Ariz. 290, 294, 394 P.2d 410, 413 (1964); Garrison v. Luke, 52 Ariz. 50, 56, 78 P.2d 1120, 1122 (1938); Automatic Registering Machine Co. v. Pima County, 36 Ariz. 367, 371, 285 P. 1034, 1035 (1930).

42. Garrison v. Luke, 52 Ariz. 50, 56, 78 P.2d 1120, 1122 (1938).

43. *See* Adams v. Bolin, 74 Ariz. 269, 276, 247 P.2d 617, 622 (1952); Hicks v.

The divergence of the two courts' decisions in *Watkins* resulted initially from differing opinions on what constitutes statutory ambiguity. The statutory language levying the luxury tax "[i]n addition to all other taxes"[44] and defining the sales tax base in terms of "gross income" or "gross proceeds of sales"[45] was held by the supreme court to be unambiguous.[46] Having made that initial determination, the supreme court needed do no more than give effect to what it deemed to be the plain meaning of the statutory language.[47] The court of appeals, on the other hand, found the scheme ambiguous since the luxury privilege tax act "contain[ed] no specific provision relating to the inclusion or exclusion of that tax in computing the transaction privilege tax . . . ."[48] In resolving this issue, the court of appeals therefore undertook an analysis of legislative intent and statutory history, emphasizing several factors arguably supporting its position. Although the supreme court's failure to find the statute ambiguous seemingly obviated any need to examine these issues, the higher court nevertheless proceeded to rebut the court of appeals' assertions and methodically reject those factors as determinants of statutory meaning.

One such factor was the stance that had been assumed by the Arizona State Tax Commission through the years. The state tax commission for 30 years had interpreted the taxing statutes as allowing the luxury tax exemption from the sales tax base.[49] Although the commission reversed its interpretation in 1965 by promulgating a regulation prohibiting the exclusion of luxury tax from gross income or gross proceeds of sales,[50] it did not enforce that new interpretation until 1969, 4 years later.[51] While both courts took notice of the commission's 30-year interpretation of the tax statutes, only the court of appeals attached significance to that factor;[52] the supreme court treated the commission's past stance as largely irrelevant.[53]

Courts have traditionally given weight to an administrative interpretation for several reasons. Among these is the presumption that the

Krigbaum, 13 Ariz. 237, 241, 108 P. 482, 485 (1910); Leives v. Steffy, 4 Ariz. 11, 14, 32 P. 261, 262 (1893).

44. ARIZ. REV. STAT. ANN. § 42-1204(A) (Supp. 1975-76).

45. *Id.* § 42-1309(A).

46. 111 Ariz. at 172, 526 P.2d at 711.

47. See text accompanying note 37 *supra.*

48. 21 Ariz. App. at 198, 517 P.2d at 1091.

49. Both courts point out that between 1935 and September 1969, the commission took no steps to include luxury tax receipts within the tax on such amounts. 111 Ariz. at 172, 526 P.2d at 711; 21 Ariz. App. at 201-02, 517 P.2d at 1093-94.

50. Retail Sales Reg., 15 [ARIZ.] ADMIN. R. & REG. § R15-5-218(B)(15) (1975).

51. 21 Ariz. App. at 200-01, 517 P.2d at 1093-94.

52. *Id.* at 201, 517 P.2d at 1094.

53. 111 Ariz. at 172, 526 P.2d at 711. The supreme court's position, however, was based on its previous finding there was no ambiguity in the statute. The court acknowledged that great weight should be given to long term administrative interpretation if the statute were ambiguous. *Id.*

legislature knew of the interpretation and did not change it by amendment, with the corresponding implication that the legislature was satisfied with that interpretation.[54] This is an especially strong consideration where the administrative position has stood for a number of years,[55] or the statutes have been reenacted by the legislature with presumed knowledge of the interpretation.[56] The tax statutes in question in *Watkins* were passed by the 1935 legislature,[57] and subsequently reenacted without substantial change by the legislature in 1956.[58] That fact probably influenced the court of appeals in its search for a proper statutory construction, leading it to declare that the administrative body's long term construction was entitled to great weight.[59] The supreme court, in contrast, relied on the well-recognized qualification that administrative interpretation of a statute is only entitled to weight, and is not controlling on a court.[60] This weight is lessened if the interpretation is clearly erroneous,[61] and the supreme court in *Watkins* apparently took this view, finding that "the commission acted properly in reassessing its former position."[62]

Another factor considered crucial by the court of appeals, but not by the supreme court, was postpassage treatment of the taxing scheme by the state judiciary and legislature. While the statutory history of the luxury tax was quite sparse, this deficiency did not exist in regard to the sales tax. In *State Tax Commission v. Quebedeaux Chevrolet*,[63] the Arizona supreme court had held that the sales tax collected by the merchant was itself properly included in the merchant's gross income or gross proceeds of sales for computation of the merchant's ultimate transaction privilege tax liability,[64] finding this result in accordance with

54. United States v. Arizona, 295 U.S. 174, 191 (1935); Desert Waters, Inc. v. Superior Court, 91 Ariz. 163, 171, 370 P.2d 652, 657 (1962); Frazier v. Terrill, 65 Ariz. 131, 135, 175 P.2d 438, 441 (1947). *See generally* F. McCAFFREY, STATUTORY CONSTRUCTION 41, 79 (1953).

55. Chee Lee v. Superior Court, 81 Ariz. 142, 302 P.2d 529 (1956) (15-year interpretation upheld); Copper Queen Consol. Mining Co. v. Territorial Bd. of Equalization, 9 Ariz. 383, 84 P. 511 (1906) (18-year interpretation upheld); Chesapeake & Ohio Ry. v. Michigan Pub. Serv. Comm'n, 347 Mich. 234, 79 N.W.2d 586 (1956) (50-year interpretation upheld).

56. Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5, 14 (1939); Madrigal v. Industrial Comm'n, 69 Ariz. 138, 144, 210 P.2d 967, 971 (1949); Moore v. Chilson, 26 Ariz. 244, 254, 224 P. 818, 821 (1924).

57. Ariz. Code §§ 73-1301 to -1334, -1401 to -1414 (1939).

58. Ch. 1, [1956] Ariz. Sess. Laws 3d Spec. Sess. 501, *enacting* Ariz. Rev. Stat. Ann. §§ 42-1201 to -1217, 42-1301 to -1347 (1956).

59. 21 Ariz. App. at 201, 517 P.2d at 1094.

60. *See* Federal Land Bank v. Warner, 292 U.S. 53, 55 (1934); Long v. Dick, 87 Ariz. 25, 29, 347 P.2d 581, 584 (1959).

61. Long v. Dick, 87 Ariz. 25, 29, 347 P.2d 581, 584 (1959); Bohannan v. Corporation Comm'n, 82 Ariz. 299, 303, 313 P.2d 379, 382 (1957); Austin v. Barrett, 41 Ariz. 138, 144, 16 P.2d 12, 14 (1932).

62. 111 Ariz. at 172, 526 P.2d at 711.

63. 71 Ariz. 280, 226 P.2d 549 (1951).

64. *Id.* at 289, 226 P.2d at 555.

the legislative intent.[65] Immediately after the *Quebedeaux* decision, however, the legislature amended the statute to specifically exclude the amount received by the merchant for payment of the sales tax from his gross income or gross proceeds of sales.[66] This statutory change effectively nullified the specific holding of *Quebedeaux*.[67]

The legislative intent in exempting sales taxes from the transaction privilege tax base was apparently transferred by the *Watkins* court of appeals to demonstrate an intent to exempt also the concurrently enacted luxury tax.[68] The supreme court rejected the analogy since the legislature's change in the transaction privilege tax article, which exempted only sales taxes from the tax base, was not accompanied by a similar change in the luxury tax article specifically applying the same principle to the luxury tax.[69] In view of this legislative silence, the court denied having power to write such an exclusionary provision into the statute.[70]

The *Watkins* courts' conflicting views on the relevance of the 1952 amendment to the sales tax statute were based on contrary principles of statutory interpretation.[71] The failure of the 1952 legislature to make its will explicit with regard to the luxury tax statute was utilized by both courts in support of their contradictory positions; the court of appeals apparently drew a broad inference from the legislative response to *Quebedeaux* and contended that the legislature's failure to address the luxury tax issue merely indicated its acceptance of a longstanding administrative position,[72] while the supreme court asserted that the legisla-

---

65. *Id.* at 286, 226 P.2d at 553.

66. Ariz. Code § 73-1302(a) (Supp. 1952) (now ARIZ. REV. STAT. ANN. § 42-1302 (Supp. 1975-76)).

67. 21 Ariz. App. at 200, 517 P.2d at 1093.

68. *Id.*

69. 111 Ariz. at 171, 526 P.2d at 710.

70. *Id.* The court stated:

> When the legislature acted in 1952 on the transaction privilege tax article, they did not add a similar section to the preceding article dealing with the luxury privilege tax. The legislators could have also provided a statute excluding the luxury tax from computations of transaction privilege tax, but they did not. Whether this was a conscious omission or an unconscious oversight is not for us to decide. We have no power to write such an exclusionary provision into the statute.

Id. at 171, 526 P.2d at 710.

The supreme court's refusal to imply a legislative intent to amend the luxury tax statute merely from the legislature's amendment of the sales tax statute seemingly was in accord with the court's prior opinion in Arizona State Tax Comm'n v. Staggs Realty Corp., 85 Ariz. 294, 337 P.2d 281 (1959), where the supreme court refused to imply a legislative intent to change universally the meaning of a statutory term merely from the legislature's redefinition of that term for purposes of an exemption under one statute.

71. *Compare* Lambert v. Conrad, 185 Cal. App. 2d 85, 8 Cal. Rptr. 56 (Dist. Ct. App. 1960), *and* People *ex rel.* Paganini v. Town of Corte Madera, 97 Cal. App. 2d 726, 218 P.2d 810 (Dist. Ct. App. 1950), *with* Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955).

72. See text & note 54 *supra*. The court of appeals apparently felt that the legislature had found it necessary to act on the sales tax question because of the

ture bypassed the opportunity to expressly exclude luxury tax from the sales tax base, as it had seen fit to do with the sales tax itself.[73]

While the 1952 legislature had the opportunity to amend the luxury tax statute, as the supreme court noted, the legislature really had no reason to regard such a change as necessary. The commission interpreted the statute for 17 years so as to exclude the luxury tax from the sales tax base.[74] The inaction of the lawmakers in 1952 could thus as easily be viewed as acceptance of the prevailing interpretation and effect of the statute.[75] The court of appeals' assumption that the sales tax amendment indicated a legislative restatement of its original intent to the same effect cannot be unquestionally accepted, however. From a practical standpoint, the legislature that amended the sales tax statute in 1952 was a different legislature than the one that originally enacted the statute 17 years earlier. This latter fact also would counsel against equating the 1952 sales tax amendment with an implicit legislative intent to restate the intent and effect of the luxury tax statute.[76]

A final factor considered by the court of appeals, and again refuted by the supreme court, was the statutory discount given the merchant in his purchase of luxury tax stamps from the state. At the time of *Stults Eagle Drug Co. v. Luke*,[77] where the supreme court stated that the merchant dealing in luxuries "in effect, constituted a tax collector for the state,"[78] merchants were required to purchase the luxury stamps at their face value.[79] Subsequent legislation amended the statute to enable the merchant to purchase the luxury tax stamps at a discount.[80] The court of appeals viewed these discounting measures as indicative of the luxury merchants' status as compensated tax collectors for the state.[81] If the merchant were required to pay sales tax on the portion of the sales price collected for the luxury tax, the court of appeals reasoned, the procedure in practical effect would compel the merchant to pay in taxes on luxury tax collections twice as much as he received in compensation for collect-

Quebedeaux decision, while continuing to accept the judicially undisturbed administrative interpretation regarding the luxury tax.

73. 111 Ariz. at 171, 526 P.2d at 710.

74. See text & notes 49-51 *supra.*

75. *See* Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955).

76. In their attempts to discern the legislative intent behind the tax scheme in *Watkins,* however, both of the two appellate courts were necessarily hampered by the lack of detailed legislative history in Arizona. Because of the resulting inability to review the hearings and debates surrounding passage of a statute, any attempt at declaring legislative intent must involve some degree of speculation.

77. 48 Ariz. 467, 62 P.2d 1126 (1936).

78. *Id.* at 473, 62 P.2d at 1129.

79. Ariz. Code § 73-1403 (1939).

80. The discount provided for the prepurchase of the stamps at 95 percent of their face value. Ch. 51, § 1, [1945] Ariz. Sess. Laws 132. This was later raised to 98.5 percent of the face value. Ch. 2, § 1, [1965] Ariz. Sess. Laws 412 (now, as amended, ARIZ. REV. STAT. ANN. § 42-1207(D) (Supp. 1975-76)).

81. 21 Ariz. App. at 201, 517 P.2d at 1093.

ing the tax.[82] The court of appeals concluded that, contrary to a literal reading of the statutory language, the legislature could have not intended such an incongruous result.[83]

In contrast, the supreme court did not consider the *Stults Eagle* decision and subsequent discount provisions relevant.[84] Unable to conclude that the post-*Stults Eagle* discounting amendment evidenced a clear legislative intention to exclude the luxury tax from the sales tax base, the supreme court instead found another possible reason for the statutory discount. The merchant must prepurchase the stamps, and this prepayment, according to the court, could account for the discount.[85]

Both courts' views of the relevance of the discount provisions appear vulnerable. The court of appeals was primarily concerned with the perceived legislative intent to compensate the merchant in some way for his tax collecting services. Even under the supreme court's holding, however, the merchant still is compensated. Although the merchant must pay a higher sales tax when the luxury tax is included in the sales tax base, he still will pay less tax than if he were required to purchase the stamps at face value.[86] The supreme court, in contrast, viewed the prepurchase procedure as a possible explanation for the discount, yet it gave no reason why the prepurchasing is important or relevant to the discount. It apparently regarded prepayment of a tax related to subsequent sales as a burden on the taxpayer which would warrant the discount. The original statute, however, provided no compensation for the merchant despite his being required to prepurchase the stamps.[87]

---

82. The court of appeals used the following example:

> Assume that a retailer collects $1,000 in luxury taxes during a given year. Under [section] 42-1207, the stamps necessary to raise this amount of revenue cost the retailer only $985. Thus he is being compensated in the sum of $15.00 for his tax collection efforts done on behalf of the state. If the $1,000 luxury tax collected by the retailer is included in his tax base for purposes of figuring his [sales] tax liability, the retailer is paying $30 in additional taxes on this amount. ($1,000 × .03 = $30.00). He therefore is paying in taxes on the amount collected, twice as much as he received in compensation for collecting the tax.

Id. at 201, 517 P.2d at 1094. The figures used in this example would now be somewhat different due to an amendment increasing the discount. *See* ARIZ. REV. STAT. ANN. § 42-1207(D) (Supp. 1975-76).

83. Although the court of appeals did not specifically make this argument, it may have considered the fact that, rather than simply lowering the tax itself, the legislature provided for purchase of the tax stamps at a discount. This could be seen as evidencing the legislative intent that the merchant, while paying a discounted price, would add the entire face value onto the price of the goods; such a view would support an overall legislative intent that the merchant be a tax collector for the state.

84. 111 Ariz. at 171, 526 P.2d at 710.

85. *Id.* at 173, 526 P.2d at 712.

86. Thus, *Watkins* results in an increased sales tax to the merchant of something less than the full 3 percent of the amount collected for the luxury tax. This slight break to the merchant is attributable to the present prepurchase discount provision. ARIZ. REV. STAT. ANN. § 42-1207(D) (Supp. 1975-76).

87. *See* Ariz. Code § 73-1403 (1939).

Conclusion

It can be seen that the various factors relied on by the court of appeals and rebutted by the supreme court in *Watkins* did not provide a conclusive resolution to the tax question at issue.[88] Reasonable men can and did take differing views as to the importance and effect of each of these factors.[89] The major gap between the courts' decisions can be traced to their contrary views as to the ambiguity of the statutory tax scheme. Once having found the statutory scheme ambiguous, the court of appeals was able to turn to the longstanding administrative interpretation, the legislative history of the tax statutes, and the compensation provided the vendor in the form of a discount on the prepurchase price of the luxury tax stamps to support its conclusion. Conversely, the supreme court, finding the statute unambiguous, simply gave effect to what it considered the plain meaning of the statutory language, rebutting the factors cited by the court of appeals only as a means of weighting its holding.

Watkins was a very close case which could have been decided either way. Both decisions were supportable; both followed well-known and accepted principles of statutory construction; and both were well-reasoned within the confines of the canons which were applied. *Watkins* thus illustrates how two courts, applying recognized rules of construction to the same set of facts, may reach opposite conclusions when faced with an arguably ambiguous statute and uncertain legislative history.

88. The ultimate decision by the supreme court in *Watkins* will have a profound practical effect on Arizona merchants dealing in luxuries. *Watkins* resulted in a higher sales tax, since the 3 percent sales rate must now be applied to a larger amount, that is, the base price plus the amount collected for the luxury tax. Presumably the seller will want to pass on to the consumer the entire sales tax, thereby causing the overall price of the goods to increase, assuming the base price remains constant. *See* ARIZ. REV. STAT. ANN. § 42-1302 (Supp. 1975-76). This latter assumption, however, may not be perfectly compatible with economic theory. See discussion note 25 *supra*. This price increase might adversely affect the merchant's business, ultimately forcing him to reduce the base price or to partially bear the brunt of the sales tax.

The major cause for plaintiffs' concern in *Watkins*, however, probably was not the future adjustments that would have to be made to counter this sales tax increase, but rather the funds at issue in the case—the amount of taxes paid under protest. See discussion note 15 *supra*. Plaintiffs had not included the sales tax increase, that is, 3 percent of luxury tax collected, in determining the final sales price for those luxuries already sold. If the deficiency from such past transactions is to be recouped, either partially or totally, a future price increase even greater than 3 percent of the luxury tax collected will be necessary.

89. The closeness of the issue was illustrated by the split in the total of eight appellate justices deciding the question. Four justices took the side of the plaintiff, and an equal number agreed with the defendant.

XII. TORTS

A. STRICT LIABILITY AND THE ARIZONA CANAL: THE NATURAL WATERCOURSE EVASION

Traditionally, Arizona's courts have granted a broadly based tort immunity to irrigation organizations.[1] Such immunity perhaps has been desirable in light of Arizona's economic dependence on agricultural and mining interests which depend on the availability of large quantities of artificially collected water. State public policy traditionally has fostered a favorable environment for these interests.[2] As a result Arizona's courts have limited tort liability of irrigation districts to instances in which a canal company has been manifestly negligent in the construction, maintenance or operation of its canals.[3] They have refused to impose liability, for example, when a child drowns in an irrigation canal.[4] This immunity, however, has come under increasing fire in recent years.[5] With Arizona's broadening economic foundation and rapid urbanization, the state's dependence on the agricultural and mining industries has subsided. These factors, when combined with the growing potential for canal-related damage caused by factors other than negligence in rapidly developing urban areas, raise the question of whether such broad immunity is still necessary.[6]

---

1. *See, e.g.*, Lee v. Salt River Valley Water Users' Ass'n, 73 Ariz. 122, 238 P.2d 945 (1951); City of Glendale v. Sutter, 54 Ariz. 326, 95 P.2d 569 (1939); Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 100 P. 441 (1909).

2. *See* City of Glendale v. Sutter, 54 Ariz. 326, 330, 95 P.2d 569, 570 (1939).

3. *See, e.g.*, Salt River Valley Water Users' Ass'n v. Blake, 53 Ariz. 498, 90 P.2d 1004 (1939); Salt River Valley Water Users' Ass'n v. Arthur, 51 Ariz. 101, 74 P.2d 582 (1937); Green Reservoir Flood Control Dist. v. Willmoth, 15 Ariz. App. 406, 489 P.2d 69 (1971). *See also* Comment, *Tort Immunity of Irrigation Districts: An Unattractive Nuisance*, 15 ARIZ. L. REV. 172, 177 (1973).

4. *See* Lee v. Salt River Valley Water Users' Ass'n, 73 Ariz. 122, 238 P.2d 945 (1951); Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 100 P. 441 (1909).

5. *See* Dombrowski v. Maricopa County Municipal Water Conservation Dist. No. 1, 108 Ariz. 275, 496 P.2d 136 (1972); Hersey v. Salt River Valley Water Users' Ass'n, 10 Ariz. App. 321, 458 P.2d 525 (1969); Comment, *supra* note 3, at 178.

6. The supreme court has recently expressed some desire to reduce the scope of the tort immunity granted to irrigation districts. *See* Dombrowski v. Maricopa County Municipal Water Conservation Dist. No. 1, 108 Ariz. 275, 496 P.2d 136 (1972). This immunity, which consists primarily of the court's reluctance to apply the attractive nuisance doctrine to irrigation canals, was first recognized in Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 100 P. 441 (1909). *See* Comment, *supra* note 3. *See generally* 9 ARIZ. L. REV. 339 (1967). In that decision the territorial supreme court

In *Ramada Inns, Inc. v. Salt River Valley Water Users' Association*,[7] the Arizona supreme court was confronted with an attempt to recover for water damage from flood waters caused by the presence of the Arizona Canal. In September 1970 and June 1972, the Safari Hotel in Scottsdale was damaged by flood waters that either overflowed the banks of the Arizona Canal or were diverted from their

---

refused to apply the attractive nuisance doctrine to irrigation canals for two reasons: (1) it was inapplicable to patent and alluring dangers, and (2) public policy considerations dictated that mining and irrigation interests be afforded a most favorable environment because of their beneficial impact on the state. *Id.* at 129, 100 P. at 442. The court later overruled the first part of this holding, leaving the public policy consideration as the only basis for the continuing immunity of the irrigation districts. *See* Lee v. Salt River Valley Water Users' Ass'n, 73 Ariz. 122, 126, 238 P.2d 945, 948 (1951); Buckeye Irrigation Co. v. Askren, 45 Ariz. 566, 575, 46 P.2d 1068, 1071 (1935). Beginning with Hersey v. Salt River Valley Water Users' Ass'n, 10 Ariz. App. 321, 458 P.2d 525 (1969), Arizona courts have expressed dissatisfaction with the broad exemption given irrigation canals, and in Dombrowski v. Maricopa County Municipal Water Conservation Dist. No. 1, 108 Ariz. 275, 277, 496 P.2d 136, 138 (1972), the supreme court expressed a willingness to limit immunity in certain situations.

The supreme court's most recent irrigation canal case, Ramada Inns, Inc. v. Salt River Valley Water Users' Ass'n, 111 Ariz. 65, 523 P.2d 496 (1974), does not involve the attractive nuisance doctrine. Its relation to the foregoing line of cases lies in the fact that after the court had disposed of the appellant's claim by ruling that the Arizona Canal was a natural watercourse, it went on to reaffirm *Salladay*, citing the continued utility and necessity of the canal and noting that it was as indispensible as ever for the maintenance of prosperity. 111 Ariz. at 68, 523 P.2d at 499. It may reasonably be inferred, therefore, that the public policy which motivated the original grant of immunity is still a valid consideration which the court will not lightly cast aside.

Ramada Inns, however, should not be read as a reaffirmation of unlimited liability immunity for irrigation districts. From the beginning the grant of immunity has been motivated by a recognition of the economic infeasibility of childproofing hundreds of miles of rural or semirural canals. *See* Lee v. Salt River Valley Water Users' Ass'n, 73 Ariz. 122, 126, 238 P.2d 945, 948 (1951). The same sort of economic impossibility precluded the imposition of liability in *Ramada Inns*. Overflow of a canal in an urban area is capable of doing millions of dollars worth of damage. To the extent that irrigation canals remain an important contributor to the economic well-being of the state, it would be foreign to the public interest to impose so debilitating a burden on the districts. The *Ramada Inns* decision reaffirms the unwillingness of the court to completely abandon its grant of immunity to the districts, when the economic consequences of either preventing the injury or satisfying the judgment could be disastrous. The language of the *Ramada Inns* decision is compatible nonetheless with the court's stated desire to limit immunity in cases where the economic burden would not be too great. *Ramada Inns* was simply not a case in which a relaxation of immunity could feasibly be invoked. The supreme court has recently attempted to resolve the apparent conflict between the desire to maintain the economic viability of urban canal systems and the desire to limit immunity. In Salt River Valley Water Users' Ass'n v. Giglio, No. 12207 (Ariz. Sup. Ct., Apr. 16, 1976), a case involving flood damage sustained by a group of private homeowners during the 1970 flood, the supreme court affirmed a finding of negligence on the part of the Water Users' Association and awarded compensatory damages. The court noted that the *Ramada Inns* decision did not completely exculpate the Water Users' Association from liability for flood damage, but simply limited its duty to the use of reasonable care. Where the Water Users' Association fails to use due care in the operation of the canal, it may be held liable. *Id.* The *Giglio* decision reflects a recognition by the court that while strict liability is too stringent a standard in light of the economic consequences to the Association, the imposition of liability where canals have been operated negligently is entirely proper. *Giglio* is not itself an expansion of the scope of canal operators' liability. It does, however, demonstrate that *Ramada Inns* is not to be viewed as a complete elimination of the operators' responsibility to use due care. The decision indicates that the extent of the duty is that imposed by pre-*Ramada Inns* cases. See Salt River Valley Water Users' Ass'n v. Blake, 53 Ariz. 498, 90 P.2d 1004 (1939).

7. 111 Ariz. 65, 523 P.2d 496 (1974).

natural runoff by the canal's elevated embankments. Ramada Inns, Inc., owner of the Safari, filed suit against the Salt River Valley Water Users' Association[8] and others,[9] alleging liability on theories of strict liability, negligence, trespass, and inverse eminent domain. The superior court granted a motion to dismiss the counts based on strict liability and inverse eminent domain.[10]

On appeal Ramada Inns, Inc. asserted that, by virtue of the increased population and development of the Phoenix area, the Arizona Canal had become an inherently dangerous instrumentality the owners of which should be subject to strict liability. Appellants further argued that the losses sustained because of the continued operation of the canal should be shouldered by the Water Users' Association, since it was in a better position to spread the loss among consumers ultimately using the irrigation water. The Arizona supreme court, noting the continued utility and necessity of the canal, ruled that the Arizona Canal had developed the characteristics of a natural watercourse and that any losses occasioned by locating near this natural feature of the land should not be passed on to others, but would have to be borne by the landowner.[11]

This casenote will focus on the merit of the court's decision by examining the authority cited by the court in support of its holding. The analytical soundness of the court's decision will then be considered. Finally, the writer will examine the propriety of applying the doctrine of strict liability to canal systems in urban areas of Arizona.

The Arizona Canal as a Natural Watercourse

In *Ramada Inns* the court noted that there is considerable authority for the proposition that an artificial watercourse can, by reason of its history and permanence, assume the characteristics and burdens of a natural watercourse.[12] The opinion cited authority[13] which presented

8. The Salt River Valley Water Users' Association was incorporated in 1903 and entered into an agreement with the United States for the construction of the Salt River Project in 1904. In 1937 the Association transferred and assigned all its property and its power and water rights to the Salt River Project Agricultural Improvement and Power District, which the Association formed, but continued to operate the irrigation and power facilities. In 1949 the District assumed control of the electrical power system, but the Association has continued to operate and maintain the canal system. *See* Uhlmann v. Wren, 97 Ariz. 366, 401 P.2d 113 (1965); City of Mesa v. Salt River Project Agricultural Improvement & Power Dist., 92 Ariz. 91, 373 P.2d 722 (1962).

9. The other defendants, Maricopa County and the City of Scottsdale, were charged with negligence in another count of the complaint, but were not parties to the appeal.

10. A judgment of dismissal was rendered as to those counts, and was entered to be effective without awaiting trial and disposition of the remaining counts. 111 Ariz. at 66, 523 P.2d at 497.

11. 111 Ariz. at 68, 523 P.2d at 499.

12. *Id.* at 67, 523 P.2d at 498, *citing* Chowchilla Farms, Inc. v. Martin, 219 Cal. 1, 25 P.2d 435 (1939); Saelens v. Pollentier, 7 Ill. 2d 556, 131 N.E.2d 479 (1956).

13. Saelens v. Pollentier, 7 Ill. 2d 556, 131 N.E.2d 479 (1956).

various criteria to be considered in determining whether an artificial watercourse can become "natural" by operation of law. Among the factors noted were whether the stream was temporary or permanent, whether it was intended as a permanent waterway, and whether the people of the surrounding community had come to rely on its continued existence.[14] The *Ramada Inns* court concluded that after ninety years of existence, and general acceptance by the community, the Arizona Canal could be regarded as natural.[15]

While it is conceded that the "natural watercourse" principle will admit of the construction given it by the court, such an interpretation represents a fundamental departure from the context in which the rule previously has been applied. Formerly, this doctrine has been adopted in cases where a party had artificially changed the course of a stream and lower riparian owners had come to rely on that manmade condition. The courts have held in such situations that the original diverting party may not subsequently change the course of the stream to the detriment of lower riparian owners.[16] The doctrine emerging from the earliest cases is one of equitable estoppel, in which the owner who changed the course of a stream and allowed other owners to rely on the new course was estopped to assert the right to return the stream to its original channel.[17] Thus, the new channel came to be regarded as natural and

---

14. 111 Ariz. at 67, 523 P.2d at 498. *See also* 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES § 60 (3d ed. 1911).

> Where the creator of the artificial condition intended it to be *permanent*, and a community of landowners . . . has been allowed to adjust itself to the presence and existence of the . . . artificial condition, acting upon the supposition of its continuance, and this has proceeded for a long time beyond the prescriptive period, the new condition will be regarded as though it were a natural one, its artificial origin being then disregarded by the law as it has been by the community.

Id. at 59 (emphasis in original).

15. 111 Ariz. at 67, 523 P.2d at 498.

16. *See, e.g.*, Chowchilla Farms, Inc. v. Martin, 219 Cal. 1, 25 P.2d 435 (1933); Stimson v. Inhabitants of Brookline, 197 Mass. 568, 83 N.E. 893 (1908); Gardner v. Dollina, 206 Ore. 1, 288 P.2d 796 (1955). *See also* 1 S. WIEL, *supra* note 14, § 60, at 59. *Stimson* concerned a ditch, dug in 1652, which opened on the Charles River and reentered the Charles at another point downstream. The owner of the land across which the ditch ran was not allowed to refill it where such damming raised the water level in the main channel and inundated plaintiff's land. *Gardner* involved the diversion of the headwaters of a creek at a time when there were no lower riparian owners. The court held that a purchaser of land along the creek bed could not, after ninety years had passed, compel the return of the water to the original creek bed.

17. *See* Shepardson v. Perkins, 58 N.H. 354, 356 (1878); Hollett v. Davis, 54 Wash. 326, 103 P. 423 (1909). A modern treatise has limited the principle expressly to such a situation:

> [A] watercourse, although originally constructed artificially, may from the circumstances under which it originated and by long-continued use and acquiescence by persons interested therein become and be held to be a natural watercourse, *and that riparian owners thereon and those affected thereby may have all the rights to the waters therein as they would have in a natural stream or watercourse.*

the law simply acknowledged riparian rights where they had not existed previously.[18] The use of such case law to support the *Ramada Inns* holding is certainly questionable. The authority upon which the court relies is concerned almost exclusively with the law of water rights and has no logical application in a tort action.[19] Further, the factual posture of these cases differs from the situation in *Ramada Inns*. In the water rights cases a number of individuals exercised riparian rights in the "natural" channel, while in *Ramada Inns* the Arizona Canal was not subject to multiple individual interests. Rather, it was within the exclusive control of the Water Users' Association.

In holding that the Arizona Canal is a natural watercourse, the Arizona supreme court simply ignored the implications of the relevant law.[20] In cases where a canal has been declared a natural watercourse, it has lost most of its artificial character. That is, the canal must have the attributes of a natural watercourse and function in such a way as to

---

1 T. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 96 (1971) (emphasis added).

18. See cases cited notes 16-17 *supra*. The theory underlying riparian rights is that the water in a watercourse or lake may be used for the enjoyment and development of riparian land. Land is riparian if it touches a body of water. The riparian landowner does not own the water, but has a right to its reasonable use in a manner compatible with the rights of other riparian owners. Riparian law differs from the prior appropriation theory of water rights in that riparian rights arise under the common law, while the measure of an appropriation is defined by statute. The prior appropriation doctrine followed in Arizona and other western states begins with the premise that the water in natural watercourses belongs to the public. Use of the water is not limited to riparian owners. Rather, a right to the use of water is acquired by the one who first appropriates it for a beneficial use. See W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 19, at 56 (3d ed. 1965); C. SMITH AND R. BOYER, SURVEY OF THE LAW OF PROPERTY 186-87 (2d ed. 1971); F. TRELEASE, CASES AND MATERIALS ON WATER LAW 10-11 (2d ed. 1974). The *Ramada Inns* court's use of a doctrine originating in riparian states to justify its decision brings it into conflict with the general water rights law of Arizona which is based on the doctrine of prior appropriation. *See* discussion note 20 *infra*.

19. Even the cases which the *Ramada Inns* court cited to justify its disposition of the appeal concern the traditional application of the doctrine to the rights of riparian owners in waters artificially diverted. Chowchilla Farms, Inc. v. Martin, 219 Cal. 1, 25 P.2d 435 (1939), barred the closing off of an artificial canal between two rivers after riparian owners had come to rely on it as a source of water. Saelens v. Pollentier, 7 Ill. 2d 556, 131 N.E.2d 479 (1956), forbade the damming of a ditch that had existed for 50 years, where such action would be to the detriment of another riparian owner. The only case cited by the court which involved a suit for damages occasioned by flooding was Weck v. Los Angeles County Flood Control Dist., 194 Cal. App. 2d 599, 232 P.2d 293 (Ct. App. 1951), where the principle was cited in dicta, but was not controlling authority for the court's holding.

20. By declaring the Arizona Canal to be a natural watercourse, the court placed itself in a rather inconsistent position. The water law of most western states dictates that water in a natural watercourse is public property, subject to the acquisition of original private rights by appropriation. See 1 S. WIEL, *supra* note 14, § 52, at 46. Arizona has recognized this right by statute. ARIZ. REV. STAT. ANN. § 45-101 (1956). Yet no one would deny that the water in the Arizona Canal belongs to the Water Users' Association, and indeed the *Ramada Inns* court acknowledges such exclusive control in its opinion. 111 Ariz. at 67, 523 P.2d at 498. The law of appropriation, enacted into law in Arizona, provides a mechanism for the acquisition of water rights in natural watercourses. When an artificial watercourse is adjudged natural in a prior appropriation jurisdiction, the waters should be open to appropriation through the normal procedures. *See* Hough v. Porter, 51 Ore. 318, 95 P. 532, *modified on rehearing*, 98 P. 1083 (1909).

make the manner of its creation irrelevant.[21] Generally, the canal has become the principal channel of a natural watercourse when it is so classified.[22] Indeed, several jurisdictions require that the canal supplant the natural channel before it can become a natural watercourse.[23] The canal must also have a permanent, although not necessarily constant, source of water which is not dependent upon human regulation.[24] Additionally, the water must flow naturally through the manmade channel without requiring continual maintenance.[25] The Arizona Canal fails to satisfy any of these requirements. While it takes its water from the Salt River, it has by no means supplanted the natural bed of the Salt as the principal channel. Nor is its source of water independent of human regulation. The presence of water in the Arizona Canal is made possible only by the activities of the Water Users' Association at the headgate of the canal.[26] These activities must be conducted on a regular basis to maintain a constant desired flow of water, and the flow may be altered at any time by the Water Users' Association.[27] Further, the Arizona Canal requires continual maintenance and the Water Users' Association has found it necessary to employ a permanent maintenance staff for the purpose.[28] Since the Arizona Canal is not the primary channel of the Salt River, and requires human action for its maintenance, it does not possess the attributes of a natural watercourse. Moreover, the very factors that preclude a finding that the Arizona Canal is natural bring it squarely within the definition of an artificial watercourse.[29]

21. San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920). *See also* 1 T. Hutchins, *supra* note 17, at 96.

22. *See* Chowchilla Farms, Inc. v. Martin, 219 Cal. 1, 25 P.2d 435 (1939), where the Fresno slough, an artificially constructed canal, had become the principal channel of the Kings River and a principal tributary of the San Joaquin River. *See also* Hollett v. Davis, 54 Wash. 326, 103 P. 423 (1909).

23. *See, e.g.*, Sheffet v. County of Los Angeles, 3 Cal. 3d 720, 84 Cal. Rptr. 11 (1970); Logsdon v. Anderson, 239 Iowa 585, 30 N.W.2d 787 (1948); Darr v. Carolina Aluminum Co., 215 N.C. 768, 3 S.E.2d 434 (1939); *cf.* Auchmuty v. Chicago, Burlington & Quincy R. Co., 349 P.2d 193 (Wyo. 1960).

24. *See* Wattson v. Eldridge, 207 Cal. 314, 278 P.2d 236 (1929), where a watercourse which had to be supplied with water by acts of man was ruled to be artificial even though it was intended to be permanent, had been relied upon, and had existed for a considerable period. *See also* W. BURBY, *supra* note 18, § 19, at 49.

25. Branch v. City of Altus, 195 Okla. 625, 159 P.2d 1021 (1945).

26. Reply Brief for Appellants at 16-17, Ramada Inns, Inc. v. Salt River Valley Water Users' Ass'n, 111 Ariz. 65, 523 P.2d 496 (1974).

27. *Id.* at 16. The Water Users' Association is under a statutory obligation to control the flow of water in the canal. *See* ARIZ. REV. STAT. ANN. § 45-204 (1956).

28. Reply Brief for Appellants at 16-17. Indeed, the *Ramada Inns* court recognized that the Water Users' Association has a statutory duty to maintain the Arizona Canal. 111 Ariz. at 67, 523 P.2d at 498. *See* ARIZ. REV. STAT. ANN. § 45-205 (Supp. 1974).

29. *See* 1 S. WIEL, *supra* note 14, § 52, at 46:

> An artificial flow, depending for its continuance upon the act of man, differs in its essentials from a flow created by nature; the one is voluntary, and the other is an element of the geological structure, a natural part of the earth; the one requires duties to be placed upon the upper owner if he must continue it, the other requires no act of man to continue it.

Recognizing that community reliance on the canal was necessary to a finding that the Arizona Canal is a natural watercourse, the *Ramada Inns* court gave considerable attention to the fact that the canal protected landowners to the south from floodwaters.[30] It should be noted that the landowners' reliance was based on the fact that the elevated banks of the canal formed a buffer against surface waters rather than on the flow of water in the canal. Generally when courts consider the reliance factor, it is in the context of the lower riparian owners' reliance on the canal as a continuing source of water, or on the continuance of water in an altered channel.[31] However, there is some authority for the proposition that if a community has come to rely on a canal as a flood control device and the canal satisfies the criteria set forth above,[32] it can become a natural watercourse.[33] The determinative factor appears to be the purpose for which the watercourse was intended. Where reliance on the artificial channel as a flood control device was found sufficient for declaring it a natural watercourse, it was the result of that channel's being intended primarily for that purpose at the time of its creation.[34] The *Ramada Inns* court ignored this factor in its reliance analysis. Indeed, it stated that the Arizona Canal is not and was not intended to be a flood control device.[35]

The decision in *Ramada Inns* does not appear to be in harmony with the law that preceded it. The conclusion that the Arizona Canal is a natural watercourse rests on very tenuous footing. Further, the decision has limited precedential value. The court relied heavily on characteristics unique to the Arizona Canal. It had existed for ninety years and the surrounding landowners had grown accustomed to it.[36] It is not difficult to envision a situation in which a relatively new canal

---

To the extent that the Arizona Canal is deemed to be a natural watercourse, no liability can be imposed on the Water Users' Association for damage from floodwater. See text accompanying notes 52-53 *infra*. Complete immunity for the Association, however, was not the objective of the court. The treatment of the canal as a natural watercourse has presented a problem for the court in a subsequent decision. In order to impose liability on the Association in a case where it had been negligent, the court was placed in the bizarre position of holding that the Arizona Canal was a natural watercourse for some purposes, but not others. *See* Salt River Valley Water Users' Ass'n v. Giglio, No. 12207 (Ariz. Sup. Ct., Apr. 16, 1976).

30. 111 Ariz. at 68, 523 P.2d at 499.
31. *See* text accompanying notes 16-17 *supra*.
32. *See* text accompanying notes 21-25 *supra*.
33. *Cf.* Clement v. State Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950).
34. *Id.* at 638, 220 P.2d at 903.
35. 111 Ariz. at 68, 523 P.2d at 499.
36. The court may also have considered the fact that the plaintiff and indeed the entire city of Scottsdale had located in this area long after the Arizona Canal had been constructed. Such consideration of temporal priority is generally associated with the law of nuisance. In Arizona the fact that the plaintiff came to the nuisance does not constitute an absolute defense to a nuisance action. *See* Spur Industries, Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972). *See generally* Comment, *Indemnification of a Nuisance Defendant for Costs Incurred by Complying with an Injunction*, 15 ARIZ. L. REV. 1004 (1973). For a related discussion, see note 66 *infra*.

might overflow, injuring neighboring land. Since such a canal would lack the characteristics that exempted the Arizona Canal from liability, the *Ramada Inns* analysis would not be applicable, and the court would find it necessary to confront the strict liability issue squarely. The decision's somewhat contrived mechanism for avoiding the imposition of strict liability is an enigma, especially since a better rationale exists for refusing to hold the Water Users' Association strictly liable. Even that rationale, however, is open to question.

Strict Liability and Irrigation Canals in Arizona

Rylands v. Fletcher[37] first enunciated the doctrine of strict liability in cases of abnormally dangerous conditions and activities. This principle is generally limited to situations where the defendant has used his property in a manner that is abnormal or inappropriate in light of the locale.[38] Thus, the focus of strict liability has come to apply to inherently dangerous instrumentalities that are not natural to the surroundings.[39] For example, strict liability is imposed on instrumentalities which, apart from the useful function which they serve in the community, would be deemed nuisances.[40] The fact that the use to which the instrumentality is put is to be encouraged may exonerate it from any moral stigma; nevertheless, liability is imposed to effect a just distribution of the loss among those who benefit from the dangerous activity.[41]

37. L.R. 3 H.L. 330 (1868).

38. In *Rylands*, a suit involving the escape of water from an artificial reservoir which flooded adjoining coal mines, Justice Blackburne, in the Exchequer Chamber, announced that a person who brought onto his land anything that was likely to do mischief if it escaped, kept it at his peril and was absolutely liable for any damage that was the natural consequence of the escape. Fletcher v. Rylands, L.R. 1 Ex. 265, 279-80 (1866). On Appeal to the House of Lords, strict liability was affirmed in substance, but with the significant limitation that the principle had application only when the use to which the defendant's land was put was abnormal or inappropriate in light of the locale. Rylands v. Fletcher, L.R. 3 H.L. 330, 338 (1868).

39. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 78, at 505-06 (4th ed. 1971). The draft Restatement (Second) of Torts has accepted this concept of strict liability, applying it to abnormally dangerous activity which is inappropriate to the place where it is carried on:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
> a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others.
> b) Whether the gravity of the harm which may result from it is likely to be great.
> c) Whether the risk cannot be eliminated by the exercise of reasonable care.
> d) Whether the activity is not a matter of common usage.
> e) Whether the activity is inappropriate to the place where it is carried on.
> f) The value of the activity to the community.

RESTATEMENT (SECOND) OF TORTS § 520 (Tent. Draft No. 10, 1964).

40. There is, in jurisdictions purporting to reject strict liability, a body of case law based on a theory of nuisance that parallels the principal applications of strict liability. Courts of these jurisdictions have characterized as absolute nuisances the very things that have, in other jurisdictions, been found to be abnormally dangerous. *See* W. PROSSER, *supra* note 39, § 78, at 512-13.

41. Note, *Loss-Shifting and Quasi-Negligence: A New Interpretation of the Pals-*

American courts have recognized the propriety of holding property owners liable for water collected in quantity in dangerous places.[42] Strict liability has also been applied to canals,[43] as well as to water stored in quantity, if within close proximity to a municipality.[44] Arizona also has recognized strict liability in cases involving dangerous manipulation of water.[45] Application of strict liability to irrigation canals constitutes a somewhat special problem, however, in view of their necessity in the arid Southwest.

Courts have noted that irrigation canals are almost impossible to render harmless.[46] That fact, however, only satisfies the first requirement for a strict liability determination. To justify the imposition of strict liability the canals must be an inappropriate use of the land.[47] Unlike the pluvial areas of the North and East, the economy of the West depends to a great extent on irrigation. It is not unreasonable to classify irrigation of land in an arid state as a natural activity.[48] Arizona and other western states have recognized the ongoing desirability of transporting irrigation water in open canals.[49] Additionally, several

---

graf Case, 8 U. CHI. L. REV. 729, 743 (1941). *See also* W. PROSSER, *supra* note 39, § 75, at 495.

42. *See* Smith v. Board of County Rd. Comm'rs, 5 Mich. App. 370, 146 N.W.2d 702 (1966); Bridgeman-Russell Co. v. City of Duluth, 158 Minn. 509, 197 N.W. 971 (1924). *See also* W. PROSSER, *supra* note 39, § 78, at 509.

43. *See* Ure v. United States, 93 F. Supp. 779, 786-87 (D. Ore. 1950), *rev'd on other grounds*, 225 F.2d 709 (9th Cir. 1955). There the court stated:

> When one voluntarily and deliberately does an act upon his land which results in a physical trespass upon lands in other ownership, the liability is absolute. In the stored water cases, a condition has been created, the consequences (sic) of which may be injury to other land. But in the active release and management of a column of water flowing at a fast rate and in great volume, as in setting off a blast, the person who initiates and carries on the activity is a participant in whatever results. If the result is a trespass on lands of another, the liability is absolute.

Id. at 787.

44. *See* Bridgeman-Russell Co. v. City of Duluth, 158 Minn. 509, 197 N.W. 971 (1924). In that case the court stated:

> If a break occurs in a reservoir itself, . . . the flood may utterly ruin an individual financially. In such a case, even though negligence be absent, natural justice would seem to demand that the enterprise or what really is the same thing, the whole community benefited by the enterprise, should stand the loss rather than the individual. It is too heavy a burden upon one.

Id. at 511, 197 N.W. at 972.

45. *See* Green Reservoir Flood Control Dist. v. Willmoth, 15 Ariz. App. 406, 489 P.2d 69 (1971).

46. City of Glendale v. Sutter, 54 Ariz. 326, 330, 95 P.2d 569, 570 (1939); Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 129, 100 P. 441, 442 (1909).

47. See text accompanying notes 39-41 *supra*.

48. *See* Reter v. Talent Irrigation Dist., 258 Ore. 140, 482 P.2d 170 (1971). The Oregon court held in that case that a small irrigation canal used to irrigate an orchard in a naturally arid area was not exceptional or unusual in light of the locality. *See also* 46 ORE. L. REV. 239, 242 (1966).

49. *See* Salt River Valley Water Users' Ass'n v. Blake, 53 Ariz. 498, 502, 90 P.2d 1004, 1006 (1939); Reter v. Talent Irrigation Dist., 258 Ore. 140, 145, 482 P.2d 170, 173 (1971); *cf.* Clark v. DiPrima, 241 Cal. App. 2d 823, 51 Cal. Rptr. 49 (Ct. App. 1966). In Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 100 P. 441 (1909), the court observed that "irrigation canals . . . are indispensible for the mainte-

western jurisdictions considering the need for canals and other water saving mechanisms, have refused to impose strict liability based upon ultrahazardous and abnormal use of land. These courts argue that canals are a matter of common usage, natural in arid climates.[50] Exempting the Arizona Canal from strict liability under this rationale might therefore be warranted.

Appellant Ramada Inns, Inc., however, sought to draw a distinction between the circumstances under which the foregoing law developed and the Arizona Canal's situation. Generally, the question of irrigation as an appropriate use of the land arose in a rural situation rather than an urban context.[51] Ramada Inns, Inc. argued that holding irrigation to be a natural activity in the southwest does not necessarily mean that it is appropriate in a densely populated section of a metropolitan area.[52] The question then becomes whether to judge the propriety of a given activity in light of its immediate locality or its regional surroundings. Having disposed of the case by finding the Arizona Canal to be a natural watercourse, the court never reached this issue. Of course, if the canal is to be regarded as being in the same class as a river, the court need not consider the appropriateness of its location with respect to its surroundings. However, to the extent that this aspect of the court's ruling is open to question, the issue of appropriateness is not only significant, but probably would control the application of strict liability to an urban canal.[53]

---

nance of life and prosperity." The court went on to note that such canals are common in the southwest. *Id.* at 129, 100 P. at 442.

50. Clark v. DiPrima, 241 Cal. App. 2d 823, 51 Cal. Rptr. 49 (Ct. App. 1966); Reter v. Talent Irrigation Dist., 258 Ore. 140, 482 P.2d 170 (1971); Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936). "A large portion of Texas is an arid or semi-arid region. . . . With us the storage of water is a natural or necessary and common use of the land. . . . [A]nd obviously the rule announced in Rylands v. Fletcher, predicated upon different conditions, can have no application here." *Id.* at 165, 96 S.W.2d at 226.

51. *See* cases cited note 49-50 *supra.*

52. Brief for Appellant at 32-35, Ramada Inns, Inc. v. Salt River Valley Water Users' Ass'n, 111 Ariz. 65, 523 P.2d 496 (1974).

53. There is substantial authority for the proposition that the appropriateness of the activity rests, at least in part, on the proximity of that activity to areas of dense population. *See, e.g.*, Nola v. Orlando, 119 Cal. App. 518, 6 P.2d 984 (Ct. App. 1933); Bridgeman-Russell Co. v. City of Duluth, 158 Minn. 509, 197 N.W. 971 (1924); Suko v. Northwestern Ice & Cold Storage Co., 166 Ore. 557, 113 P.2d 209 (1941). Courts in California, for example, have refused to apply strict liability to irrigation canals in rural areas because they are a natural use of the land. Nonetheless, they do impose such liability on the artificial collection of large quantities of water in urban areas. *Compare* Clark v. DiPrima, 241 Cal. App. 2d 823, 51 Cal. Rptr. 49 (Ct. App. 1966), *with* Nola v. Orlando, 119 Cal. App. 518, 6 P.2d 984 (Ct. App. 1933). The Restatement (Second) of Torts calls for balancing the value of an activity to the community with the appropriateness of the activity to the place where it is carried on. See the Restatement factors listed in note 39 *supra.* In order to give effect to both the "inappropriate to the place" test and the "value to the community" test, the appropriateness of the activity must be evaluated in terms of its impact on its immediate surroundings. If an activity were to be judged in terms of its appropriateness to the entire community in which it was pursued, there would be little distinction between the two factors to be bal-

Whether strict liability should attach to an irrigation canal in an urban area is an unresolved issue. The courts have consistently held that the collector of large quantities of water in an urban setting is strictly liable for any injury occasioned by the escape of the water.[54] These decisions, however, did not involve canals and the applicability of this reasoning to the problem of an urban canal is as yet undetermined. For example, a California court has drawn a distinction between rural irrigation canals and other types of irrigation storage facilities,[55] holding strict liability inapplicable to a canal, but excluding other types of stored water from the effect of the ruling.[56] While the California court distinguished canals from collected water, it does not appear that the distinction was based on any intrinsic difference between the two modes of water collection. The court simply ruled that a rural irrigation canal

---

anced. If, for example, the appropriateness of an irrigation canal were to be measured in terms of its regional location, appropriateness would be measured in terms of the need for irrigation in order to support the agricultural activity of an arid area. The value to the community would likewise be a function of the benefit derived from agriculture. Thus, although the Restatement conceives of a trade-off between these two considerations, the appropriateness test would be virtually identical with the value to the community test. *Cf.* Yommer v. McKenzie, 255 Md. 220, 257 A.2d 138 (1969). Giving effect to the Restatement test in the context of the *Ramada Inns* case, the court should balance the appropriateness of an irrigation canal in a heavily developed area in light of the potential for damage against the value of the canal to the entire community in terms of the value of the agricultural industry to Maricopa County and the State of Arizona.

54. It appears that the prevailing view is to impose strict liability on proprietors who collect water artificially and in large quantity in urban areas or in places dangerously close to valuable property. *See, e.g.*, Ure v. United States, 93 F. Supp. 779 (D. Ore. 1950), *rev'd on other grounds*, 225 F.2d 709 (9th Cir. 1955); Lubin v. Iowa City, 257 Iowa 383, 131 N.W.2d 765 (1965); Bridgeman-Russell Co. v. City of Duluth, 158 Minn. 509, 197 N.W. 971 (1924).

The draft Restatement (Second) of Torts takes the position that where water is stored in large quantity in a dangerous urban location, there is strict liability: "The thing which stands out from the cases is that the important thing about the activity is not that it is extremely dangerous in itself, but that it is abnormally so in relation to its surroundings." RESTATEMENT (SECOND) OF TORTS § 520, Note to Institute, at 57 (Tent. Draft No. 10, 1964).

> Where water is stored in large quantity in a dangerous location in a city, there has been strict liability. . . .
>
> But where the water is collected in a rural area, with no particularly valuable property near, there has been no strict liability.

Id. at 58. See note 39 *supra*. While section 520 of the Restatement (Second) of Torts has not been officially adopted as yet, it appears to be a much better statement of the law than the original, in that it provides a specific test for the application of strict liability and reflects more accurately the standards that the courts have applied. *See* RESTATEMENT (SECOND) OF TORTS § 520, Note to Institute, at 56-57 (Tent. Draft No. 10, 1964).

The fact that the draft Restatement takes this position is of particular significance in Arizona since the Arizona supreme court has announced an intention to follow the Restatement where there is no binding previous decision or contrary legislative enactment. Smith v. Normart, 51 Ariz. 134, 143, 75 P.2d 38, 42 (1938). Despite the unofficial nature of section 520, there is no bar to its use by Arizona courts. *See* Serrano v. Kenneth A. Eldridge Contracting Co., 2 Ariz. App. 473, 409 P.2d 757 (1966). In that case the Restatement (Second) of Torts was cited and followed although it was in tentative draft form. *Id.* at 474-76, 409 P.2d at 758-60. *See also* Comment, *Reevaluation of the Restatement as a Source of Law in Arizona*, 15 ARIZ. L. REV. 1021 (1973).

55. Clark v. DiPrima, 241 Cal. App. 2d 823, 51 Cal. Rptr. 49 (Ct. App. 1966).

56. *See id.* at 827, 51 Cal. Rptr. at 53.

was relatively harmless and was such a common operation in farming areas that the operator of a canal should not be strictly liable.[57] Of greater significance is the fact that many decisions finding strict liability for water collected artificially focus on the relative propensity for damage and the nature of the surrounding area, rather than the type of facility involved.[58] Thus, if a canal were located in close proximity to other valuable property, which would be the case in an urban setting, and such proximity made it abnormally dangerous, the fact that it was a canal and not some other type of water facility should not save it from strict liability.[59]

Decisions attaching strict liability to artificially collected water in urban areas seem equally applicable to an urban canal. Thus, apart from its classification as a natural watercourse, there appears to be no compelling rationale for exempting the Arizona Canal from strict liability. Following this line of reasoning, Ramada Inns, Inc. also argued that the Water Users' Association should be held strictly liable since it was best able to absorb the damage costs.[60] The Association, appellant argued, was in a better position to spread the loss by passing the cost on to consumers who ultimately profit most from the continued operation of the canal. The position of Ramada Inns, Inc. is not without support. Many academic authorities are beginning to look to the exigencies of social justice and, when neither side is at fault, are inclined to ask which of the parties can best bear the loss.[61] Under such a loss-shifting analysis, liability may be imposed regardless of the nature of the activity involved.[62] This argument has received considerable support in the fields of products liability and employers liability.[63] Its proponents emphasize that some individuals have better access to insurance, or are in a position to invoke market mechanisms to distribute the loss over a large class of individuals. It is argued that distributing a loss to those who can bear it with the least disutility, creates utility.[64]

---

57. *Id.*

58. *See* Union Pac. R.R. v. Vale, Ore. Irrigation Dist., 253 F. Supp. 251 (D. Ore. 1966); Lubin v. Iowa City, 257 Iowa 383, 131 N.W.2d 765 (1965); Bridgeman-Russell Co. v. City of Duluth, 158 Minn. 509, 197 N.W. 971 (1924).

59. *See* Bridgeman-Russell Co. v. City of Duluth, 158 Minn. 509, 197 N.W. 971 (1924). Strict liability has been applied to irrigation canals located adjacent to valuable property. Union Pac. R.R. v. Vale, Ore. Irrigation Dist., 253 F. Supp. 251 (D. Ore. 1966).

60. 111 Ariz. at 67, 523 P.2d at 498.

61. *See* W. PROSSER, *supra* note 39, § 75, at 494; Ehrenzweig, *Negligence Without Fault*, 54 CALIF. L. REV. 1422 (1966); Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805, 811 (1930).

62. See authorities cited note 61 *supra.*

63. *See* Note, *supra* note 41, at 733-36; Feezer, *supra* note 61, at 814.

64. *See* Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547 n.49 (1972). This doctrine has been criticized as being contrary to the notion of corrective justice. Under such a system of distributive justice, liability turns on a defendant's wealth rather than his conduct. *Id.*

In *Ramada Inns*, the Arizona supreme court rejected the argument tersely: "Merely showing a loss does not justify transferring the loss, and the reasons justifying the transferring of a loss must of necessity return to the nature and utility of the activity conducted by the Water Users."[65] This issue deserved closer attention by the court. The utility of the Water Users' activity is necessarily judged by either the number of people upon whom it confers a benefit or by the size of the benefit conferred. It is precisely because the advantages of the canal are realized by so many consumers that there may be a capacity to spread the loss without causing anyone significant economic dislocation. Thus, even assuming that the Arizona Canal cannot be considered an abnormally dangerous activity, this does not necessarily preclude the imposition of strict liability on the Water Users' Association. Indeed, the presence of a large class of people who can bear the economic loss occasioned by the canal presents a strong argument for the application of strict liability.[66] In sum, it appears that apart from the dubious classification of the Arizona Canal as a natural watercourse, there is substantial justification for imposing strict liability on the Association to the extent of damage occasioned by the overflow of the canal in an urban area.[67]

65. 111 Ariz. at 67-68, 523 P.2d at 498-99.

66. Given the continuing potential for damage to the surrounding property and the considerable value of that property, the ultimate loss due to flooding may be beyond the financial capacity of the Water Users' Association and the private landowners. In that event it would not seem unreasonable to invoke the doctrine of Spur Industries, Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972). In *Spur Industries*, the defendant had commenced cattle feeding operations in an agricultural area well outside the boundaries of any city. Several years later a real estate developer purchased land nearby and constructed an extensive retirement community development. In an action seeking injunctive relief, the supreme court held that the feeding operation could be enjoined as a public nuisance, but that the developer seeking the injunction was required to indemnify the feeder for the reasonable cost of relocating his operation or shutting down.

The intermittent flooding caused by the Arizona Canal could be characterized as a substantial interference with the local residents' use and enjoyment of their property. Such reasoning indicates that the canal falls within the definition of a public nuisance. *See* ARIZ. REV. STAT. ANN. § 13-601 (1956). *See generally* City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938). The court could therefore enjoin the continued operation of the canal in the Scottsdale area. However, at the time that the Arizona Canal was originally constructed the development of Scottsdale was probably unforeseeable, and the residents of Scottsdale came to the canal fully aware of its presence. Under these circumstances the Water Users' Association might be properly indemnified for the cost of relocating the canal. *See* Spur Industries, Inc. v. Del E. Webb Dev. Co., *supra*, at 185-86, 494 P.2d at 707-08.

67. Even if strict liability does apply in urban canal cases, there still remains the problem of the extent of such liability. In activities which are held strictly liable, liability does not extend to all injuries occasioned by the activity, but rather, only to those consequences which lie within the extraordinary risk which calls for such special responsibility. *See* W. PROSSER, *supra* note 39, § 79, at 518. In a canal situation, that risk and responsibility might be limited to leakage and the resulting damage. For example, one decision applying strict liability to a rural canal indicated that the extraordinary risk could be limited to cases of violent breach of the canal wall, as opposed to slight overflow or percolation which caused flooding. Ure v. United States, 93 F. Supp. 779, 786-87 (D. Ore. 1950), *rev'd on other grounds*, 225 F.2d 709 (9th Cir. 1955). In an urban setting, however, the risk of damage is quite as great in cases of overflow as of violent breach. In both instances the type of risk involved is the same: escaping water flowing into commercial and residential property. While a violent breach of the canal wall does

Conclusion

The issues placed before the court in *Ramada Inns* were symptomatic of the problems that Arizona is encountering during its transition from a rural agrarian state to an urbanized industrial one. The issue of liability for canal-related damage to urban property will undoubtedly assume a position of even greater significance in the future. In *Ramada Inns*, the court disposed of the question by the dubious mechanism of characterizing the Arizona Canal as a natural watercourse. This decision, inextricably bound to facts unique to the Arizona Canal, leaves unanswered the general question of an irrigation district's liability for damage to urban property.

B. IMPUTED CONTRIBUTORY NEGLIGENCE AS A BAR TO WRONGFUL DEATH RECOVERY BY ALL BENEFICIARIES

The first wrongful death statute[1] was enacted in England during the mid-19th century to alter the anomalous situation that made it less costly for a tortfeasor to kill his victim than to maim him.[2] That anomaly has been obviated in the United States as well, with all states now providing a statutory cause of action for the wrongful death of another.[3] Arizona's first wrongful death statute,[4] passed in 1887 and

a greater amount of harm than does a gentle overflow, this only affects the extent of damage; some degree of damage occurs in either situation.

1. Lord Campbell's Act, 9 & 10 Vict. 2, c. 93, § 1 (1846). Section 1 of this act provided:

> that whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to a Felony.

2. Since no right of action for the tortious killing of a human being existed at common law, an anomalous situation arose whereby a tortfeasor was not liable if his victim died from injuries suffered, but was liable if the victim survived. *See, e.g.*, Wabash R.R. v. Hassett, 170 Ind. 370, 83 N.E. 705 (1908); Wescott v. Young, 275 Mass. 82, 175 N.E. 153 (1931); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808).

3. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-611 to -613 (1956), *as amended*, (Supp. 1975-76); MO. ANN. STAT. §§ 537.070-.100 (Vernon 1955); OKLA. STAT. ANN. tit. 12, §§ 1053-1055 (Supp. 1975-76); VT. STAT. ANN. tit. 14, §§ 1491-1492 (1974). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127 (4th ed. 1971); 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1.9 (2d ed. 1975).

4. Ariz. Rev. Stat. ¶¶ 2145-2155 (1887).

modeled after the English Act,[5] placed the right of action in certain designated beneficiaries, the measure of damages being their loss.[6] When the statute was revised in 1901,[7] the right was shifted from the beneficiaries to the estate, with the measure of damages being the loss to the estate and the recovery proceeds being distributed according to the intestate succession laws.[8] The 1887 and 1901 acts essentially were fused in Arizona's 1956 wrongful death statute,[9] which draws a distinction between the right to be a party plaintiff[10] and the right to share in the distribution of the amount recovered.[11] An action for wrongful death under the 1956 statute must be brought by the surviving spouse or personal representative of the decedent for and on behalf of the surviving spouse, children, parents or, if none of them survive, the estate of the decedent.[12] The 1956 statute also provided for distribution of the damages recovered in a wrongful death action according to the laws of intestate succession.[13] Although this mode of distribution was altered by a 1974 amendment allowing direct recovery by the specified individuals in proportion to the amount of their damages,[14] the Arizona court of appeals was required in *DeLozier v. Smith*[15] to resolve an apparent conflict between the right to maintain a wrongful death action and the right to recover under the intestate succession provision of the statute as it appeared prior to 1974.

In that case a surviving husband brought an action on behalf of himself and his five minor children to recover damages for the alleged wrongful death of his wife occasioned by the combined negligence of defendants Dr. Joseph B. DeLozier and Nicholls Pharmacy, Inc.[16] De-

5. *See* partial text of English Act, note 1 *supra*.

6. Ariz. Rev. Stat. ¶¶ 2149-2155 (1887), *discussed in* Southern Pacific Co. v. Wilson, 10 Ariz. 162, 165, 85 P. 401, 402 (1906).

7. Ariz. Rev. Stat., Civil ¶¶ 2764-2767 (1901). For discussion of Arizona's wrongful death statutes from 1887 through 1956, see Solomon v. Harmon, 107 Ariz. 426, 429, 489 P.2d 236, 239 (1971); Lueck v. Superior Court, 105 Ariz. 583, 586-87, 469 P.2d 68, 71-72 (1969) (McFarland, J., dissenting); *In re* Estate of Milliman, 101 Ariz. 54, 60-61, 415 P.2d 877, 884 (1966).

8. Ariz. Rev. Stat., Civil ¶ 2765 (1901). *See generally* Arizona Binghampton Co. v. Dickson, 22 Ariz. 163, 177-78, 195 P. 538, 543 (1921).

9. ARIZ. REV. STAT. ANN. §§ 12-611 to -613 (1956), *as amended*, (Supp. 1975-76); *see* Solomon v. Harmon, 107 Ariz. 426, 489 P.2d 236 (1971); *In re* Estate of Milliman, 101 Ariz. 54, 415 P.2d 877 (1966).

10. ARIZ. REV. STAT. ANN. §§ 12-612(A)-(B) (1956), *as amended*, (Supp. 1975-76).

11. *Id.* §§ 12-612(A), (C).

12. ARIZ. REV. STAT. ANN. § 12-612(A) (1956) (also found unchanged at ARIZ. REV. STAT. ANN. § 12-612(A) (Supp. 1975-76)). Section B of this statute adds the right of a parent to sue for the death of his child and the guardian, for his ward. ARIZ. REV. STAT. ANN. § 12-612(B) (Supp. 1975-76).

13. ARIZ. REV. STAT. ANN. § 12-612(C) (1956), *as amended*, (Supp. 1975-76); *see* Ariz. Rev. Stat. Ann. § 14-201 (1956) (repealed 1975).

14. ARIZ. REV. STAT. ANN. § 12-612(C) (Supp. 1975-76).

15. 22 Ariz. App. 136, 524 P.2d 970, *rev'g* 21 Ariz. App. 599, 522 P.2d 555 (1974).

16. The pharmacy was not a party to the appeal since it previously had been exonerated from liability. 22 Ariz. App. at 137, 524 P.2d at 971.

fendants denied negligence on their part and affirmatively asserted that the decedent's death was due to the negligence of the plaintiff spouse or the negligence or intentional act of the decedent. The trial court entered judgment on the jury's verdict in favor of the children against the physician and in favor of the physician against the husband.[17] Although the Arizona court of appeals at first affirmed the judgment,[18] it thereafter granted the motion for rehearing and reversed its initial decision.[19] In a new opinion, the court stressed that the language of the wrongful death statute[20] permitted a wrongful death action only if the deceased could have maintained an action for damages against the defendant had death not ensued.[21] Noting that under the instructions given,[22] the jury had to have found the surviving spouse contributorily negligent,[23] and that community property concepts in Arizona required interspousal imputation of contributory negligence,[24] the court of appeals reasoned that the wife could not have maintained an action had she survived.[25] Consequently, the court held that all of the potential beneficiaries under the wrongful death statute, including the children, were barred from recovery, and judgment was entered accordingly for the defendant.[26] As a result of this decision, recovery under Arizona's wrongful death statute is foreclosed to all statutory beneficiaries if the decedent or the decedent's surviving spouse is found contributorily negligent.[27]

17. *See* 22 Ariz. App. at 138, 524 P.2d at 972.

18. DeLozier v. Smith, 21 Ariz. App. 599, 522 P.2d 555, *rev'd*, 22 Ariz. App. 136, 524 P.2d 970 (1974). The court initially held that in a wrongful death action the negligence of a surviving parent does not bar recovery by innocent surviving children beneficiaries. In this first opinion the court relied primarily on the distinction between maintaining a wrongful death action and recovering in such an action. *See* text & notes 42-43 *infra*.

19. DeLozier v. Smith, 22 Ariz. App. 136, 524 P.2d 970 (1974).

20. ARIZ. REV. STAT. ANN. §§ 12-611 to -613 (1956), *as amended*, (Supp. 1975-76).

21. *See id.* § 12-611.

22. The jury was instructed in part: "If you find that [defendant's negligence was a proximate cause of decedent's death, that decedent did not commit suicide and was not contributorily negligent and that] plaintiff was [contributorily] negligent and that his negligence was a proximate cause of decedent's death, then your verdict should be for the defendant with respect to recovery by plaintiff on his own behalf." 22 Ariz. App. at 137, 524 P.2d at 971 (1974).

23. The jury rendered its verdict: "For Decedent's Children and against Defendant DeLozier in the sum of $20,000.00, and for Defendant DeLozier and against Plaintiff James Smith, and in favor of Defendant Nicholls and against Plaintiff James Smith and Decedent's Children." Under the instructions given to the jury, *see* discussion note 22 *supra*, this form of verdict was to be given only if the plaintiff was found negligent and his negligence was a proximate cause of the decedent's death. 22 Ariz. App. at 138, 524 P.2d at 972.

24. *See* Heimke v. Munoz, 106 Ariz. 26, 27, 470 P.2d 107, 180 (1970); Tinker v. Hobbs, 80 Ariz. 166, 167, 294 P.2d 659, 660 (1956); Pacific Constr. Co. v. Cochran, 29 Ariz. 554, 555, 243 P. 405, 406 (1926).

25. 22 Ariz. App. at 139, 524 P.2d at 973.

26. *Id.*

27. This decision followed the reasoning of other community property states. *See* Sprouse v. Magee, 46 Idaho 622, 269 P. 993 (1928); Ostheller v. Spokane I.E.R. Co., 107 Wash. 678, 182 P. 630 (1919). *But see* Johnson v. Ottomeir, 45 Wash. 2d 419,

This casenote will examine the propriety of the court of appeals' interpretation of Arizona's wrongful death statute. The defense of contributory negligence will first be discussed in relation to wrongful death actions, with focus on Arizona's doctrine of interspousal imputation of contributory negligence. The *DeLozier* opinion will then be analyzed in light of Arizona's peculiar constitutional provision leaving the question of contributory negligence and its effect solely to the jury.[28] Finally, it will be suggested that the recent amendment to Arizona's wrongful death statute,[29] which changes the method of distribution of damages, provides a basis for abandoning the imputation doctrine in future wrongful death actions. In the alternative, it will be suggested that a prerequisite to future application of the doctrine in this context be an appropriate jury instruction on the law of imputed contributory negligence and its attendant consequence of barring all recovery by potential beneficiaries.

Interspousal Imputation of Contributory Negligence

The simplest form of wrongful death action predicated upon negligence presents a situation where the only negligence contributing to the death was that of the defendant. Since nothing would have barred an action for damages against the negligent defendant by the decedent had he lived, certain members of the decedent's family can subsequently maintain the wrongful death action against the negligent defendant.[30] The issues become more complex, however, when the decedent is found contributorily negligent.

Arizona's wrongful death statute limits liability for wrongful death to instances where "the [wrongful] act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof."[31] Thus, if a valid affirmative defense would have defeated an action by the decedent had he or she lived, that same defense can be asserted after the death as a complete barrier to recovery by potential beneficiaries under the wrongful death statute.[32] One such defense, contributory negligence,

275 P.2d 723 (1954) (children's recovery allowed in wrongful death action against estate of father who committed suicide after killing their mother).

28. ARIZ. CONST. art. 18, § 5.

29. ARIZ. REV. STAT. ANN. § 12-612(C) (Supp. 1975-76).

30. *See, e.g.*, Cullen v. Atchison, 211 Kan. 368, 507 P.2d 353 (1973); Suarez v. Berg, 117 N.J. Super. 456, 285 A.2d 68 (App. Div. 1971); Mills v. Inter Island Tel. Co., 68 Wash. 2d 820, 416 P.2d 115 (1966).

31. ARIZ. REV. STAT. ANN. § 12-611 (1956).

32. *See, e.g.*, Huebner v. Duechle, 109 Ariz. 549, 514 P.2d 470 (1973) (interspousal tort immunity); Herberg v. White, 49 Ariz. 313, 66 P.2d 253 (1937) (contributory negligence); Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (1974) (deceased was unborn fetus); Gomez v. Leverton, 19 Ariz. App. 604, 509 P.2d 735 (1973) (statute of

is based not upon the idea that the defendant is any less to blame for the injury, but rather on the notion that the injured party's own negligent conduct prohibits him or her from maintaining the action.[33] As a general rule, the decedent's contributory negligence precludes any right of action for wrongful death since his own culpability, had he lived, would have precluded him from maintaining a suit for damages.[34]

While the decedent's own contributory negligence may preclude any subsequent wrongful death action, in *DeLozier* the surviving spouse rather than the decedent was found contributorily negligent. The question addressed by the court was whether the contributory negligence of a surviving spouse can be asserted as a defense not only against him as a statutory beneficiary, but also to preclude totally maintenance of the wrongful death action in the same manner as would the contributory negligence of the decedent, thereby denying recovery to all statutory beneficiaries.

In noncommunity property states, damages awarded in a tort action are separate property of the individual party who recovers, even in the context of a marital relationship.[35] Consequently, the contributory negligence of one spouse in such jurisdictions need not be imputed to the other, nonnegligent spouse, since the former theoretically will not be unjustly enriched by the latter's recovery. In the wrongful death context, therefore, the decedent's own contributory negligence will totally bar the action under most state statutes, since he could not have maintained an action had he survived;[36] however, the contributory

limitations); Livingston v. Citizen's Util., Inc., 13 Ariz. App. 94, 474 P.2d 453 (1969), *vacated on other grounds*, 107 Ariz. 62, 481 P.2d 855 (1970) (assumption of risk); Reed v. Frey, 10 Ariz. App. 292, 458 P.2d 386 (1969) (res judicata).

33. *See* Crum v. Holloway Gravel Co., 273 So. 2d 566 (La. Ct. App. 1973); Ries v. Daffin Corp., 81 S.D. 134, 131 N.W.2d 577 (1964); Missouri Pacific Ry. v. Rose, 385 S.W.2d 492 (Tex. Civ. App. 1964). Prosser points out, however, the growing dissatisfaction with the absolutist doctrine suggested by these theoretical underpinnings:

> Criticism of the denial of all recovery was not slow in coming, and it has been with us for more than a century. The history of the doctrine has been that of a chronic invalid who will not die. With the gradual change in social viewpoint, stressing the humanitarian desire to see injuries compensated, the defense of contributory negligence has gradually come to be looked upon with increasing disfavor by the courts, and its rigors have been quite extensively modified
>
> . . . .

W. PROSSER, *supra* note 3, § 65, at 418. It was just such dissatisfaction which led to the enactment of ARIZ. CONST. art. 18, § 5, leaving all questions of contributory negligence to the jury. *See* Note, *Arizona Constitutional Law Derailed in Federal Diversity Court: A Reevaluation of Herron v. Southern Pacific Co.*, 16 ARIZ. L. REV. 208, 210-11 (1974).

34. *See, e.g.*, Womach v. Preach, 64 Ariz. 61, 165 P.2d 657 (1946); Laidlaw v. Barker, 78 Idaho 67, 297 P.2d 287 (1956); Storm v. Brown, 15 Ill. App. 3d 29, 303 N.E.2d 42 (1973); Allison v. Snelling & Snelling, Inc., 425 Pa. 519, 229 A.2d 861 (1967). But see discussion note 33 *supra*.

35. *See, e.g.*, Kinsch v. DeVito Constr. Co., 54 Ill. App. 2d 149, 203 N.E.2d 621 (1964); Kuehn v. Jenkins, 251 Iowa 718, 100 N.W.2d 610 (1960); Maryz v. Revier, 284 Minn. 166, 170 N.W.2d 83 (1969).

36. Storm v. Brown, 15 Ill. App. 3d 29, 303 N.E.2d 42 (1973); Allison v. Snelling & Snelling, Inc., 425 Pa. 519, 229 A.2d 861 (1967).

negligence of a statutory beneficiary in these states will preclude only his own recovery.[37] This result follows even where the contributorily negligent beneficiary is the surviving spouse,[38] since his negligence is not imputed to the deceased spouse so as to bar the cause of action altogether.

In community property states such as Arizona, on the other hand, damages recovered in a tort action by one or both spouses are community property, entitling each spouse to a vested one-half interest in any proceeds recovered by suit or settlement.[39] Where both spouses are living, a contributorily negligent spouse would be unjustly enriched by gaining a one-half interest in any damages recovered by the nonnegligent spouse. To combat this possibility of a contributorily negligent spouse's profiting from his own wrong, the doctrine of interspousal imputation of contributory negligence was judicially created,[40] providing the defendant with an affirmative defense against either spouse.[41] The question raised in *DeLozier* was whether the contributory negligence of a surviving spouse could properly be imputed to a deceased spouse, thereby preventing maintenance of a wrongful death action by either the negligent survivor or any of the other named beneficiaries.

The *DeLozier* court initially held that imputation of the surviving spouse's contributory negligence to his deceased wife would not have precluded her from maintaining an action had death not ensued, even though it might have barred any recovery.[42] As a consequence, the

37. *See, e.g.*, Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Curse v. Dole, 155 Kan. 292, 124 P.2d 470 (1942); Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965). Several community property states follow the same rule. Flores v. Brown, 39 Cal. 2d 622, 248 P.2d 922 (1952); Cook v. Faria, 74 Nev. 262, 328 P.2d 568 (1958); Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963); Schwing v. Bluebonnet Express, Inc., 489 S.W.2d 270 (Tex. 1973), *noted in* 5 TEX. TECH. L. REV. 230 (1973).

38. Lynn v. Wagstaff Motor Co., 126 Ga. App. 516, 191 S.E.2d 324 (1972); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956).

39. Heimke v. Munoz, 106 Ariz. 26, 470 P.2d 107 (1970); Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956); Pacific Constr. Co. v. Cochran, 29 Ariz. 554, 243 P. 405 (1926); Kenyon v. Kenyon, 5 Ariz. App. 267, 425 P.2d 578 (1967); ARIZ. REV. STAT. ANN. § 25-211 (Supp. Pamphlet 1973).

40. *See* Martinez v. Rodriguez, 410 F.2d 729 (5th Cir. 1969) (applying Florida law); Clark v. Foster, 87 Idaho 134, 391 P.2d 853 (1964); Wheat v. Gray, 309 Ky. 593, 218 S.W.2d 400 (1949); Heath v. Wylie, 109 Wash. 86, 186 P. 313 (1919); cases cited note 39 *supra*. Some community property states, however, do not follow the imputation doctrine. *See* cases cited end of note 37 *supra*. Additionally, in special cases where the need for imputing contributory negligence is found lacking, the imputation rule has been held inapplicable. Michie v. Calhoun, 85 Ariz. 270, 336 P.2d 370 (1959); Clark v. Foster, 87 Idaho 134, 391 P.2d 853 (1964); Johnson v. Ottomeir, 45 Wash. 2d 419, 275 P.2d 723 (1954).

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

42. 21 Ariz. App. 599, 602, 522 P.2d 555, 558, *rev'd*, 22 Ariz. App. 136, 524 P.2d 970 (1974). The court reasoned that the apparent finding of the surviving spouse's contributory negligence was an after-the-fact determination by the jury which only affected the right to recover in a wrongful death action and not the right to maintain such an action. 21 Ariz. App. at 602, 522 P.2d at 558.

court held that the husband's contributory negligence barred him from sharing in any proceeds recovered, but did not prevent maintenance of the wrongful death action in the first instance and did not foreclose recovery by the children.[43] On rehearing, the *DeLozier* court reversed its decision, holding that the surviving spouse's contributory negligence is imputed to the decedent to bar any wrongful death recovery.[44] In a new opinion, the court reinterpreted the statutory condition permitting a wrongful death action only if the decedent could have maintained a personal injury action had death not ensued, apparently finding a bar to recovery the equivalent of inability to maintain the action.[45]

Application of the traditional interspousal imputation doctrine appears somewhat incongruous in the wrongful death context, however, since the possibility of the contributorily negligent spouse's unjust enrichment from his gaining a community property interest in any recovery by the nonnegligent spouse obviously disappears with the latter's death. Thus, the possibility of the survivor's unjust enrichment seemingly depends solely on the method of distribution of any wrong-

43. 21 Ariz. App. at 604, 522 P.2d at 560. As a correlate to this holding, the court declared that the intestate distribution statute, Ariz. Rev. Stat. Ann. § 14-201 (1956) (repealed 1975) which was incorporated by reference in the 1956 wrongful death statute to control distribution of wrongful death proceeds, was inapplicable since the action was not brought on behalf of the decedent's estate. 21 Ariz. App. at 603, 522 P.2d at 559. The court relied on prior cases which had held the intestacy distribution provision inapplicable except in cases where the wrongful death action was for the benefit of the decedent's estate. *See* Lombardo v. Pollock, 21 Ariz. App. 537, 521 P.2d 636 (1974); Lueck v. Superior Court, 10 Ariz. App. 161, 457 P.2d 348, *vacated on other grounds*, 105 Ariz. 583, 469 P.2d 68 (1969), *noted in* 1970 L. & Soc. Order 437 (1970); Salinas v. Kahn, 2 Ariz. App. 181, 407 P.2d 120 (1965), *modified*, 2 Ariz. App. 348, 409 P.2d 64 (1966). Had the intestate distribution scheme applied, the contributorily negligent surviving spouse in *DeLozier* would have received a one-half interest in any wrongful death recovery, thereby resulting in his unjust enrichment. Ariz. Rev. Stat. Ann. § 14-201 (1956) (repealed 1975) (this section was superseded effective January 1, 1974 to provide that the surviving spouse will receive all the separate and community property where there are surviving children of both spouses. Ariz. Rev. Stat. Ann. § 14-2102 (1975)).

44. 22 Ariz. App. 136, 524 P.2d 970 (1974).

45. *Id.* at 138-39, 524 P.2d at 972-73; *see* Ariz. Rev. Stat. Ann. § 12-611 (1956). The court stated that "[s]ince [the husband's] contributory negligence, as found by the jury, would have barred a suit for personal injuries by the decedent had she survived, this wrongful death action was likewise barred." 22 Ariz. App. at 140, 524 P.2d at 974. Thus, in contrast to its first opinion, *see* text & notes 42-43 *supra*, the *DeLozier* court regarded the jury's finding of contributory negligence as a bar not only to recovery in a wrongful death action, but also to maintenance of such an action. Although the court did not expressly reject its earlier assertion that the intestate distribution scheme was inoperative, the court may have abandoned that position implicitly. Recognition of the intestate distribution statute's applicability under the 1956 wrongful death statute would have comported with basic rules of statutory interpretation. An accepted canon of statutory construction is that where the language of a statute is plain and unambiguous and conveys a clear meaning, there is no need to resort to extraneous sources for statutory interpretation. *See* City of Mesa v. Killingsworth, 96 Ariz. 290, 394 P.2d 410 (1964); Ernst v. Collins, 81 Ariz. 178, 302 P.2d 941 (1956); Kelly v. Bastedo, 70 Ariz. 371, 220 P.2d 1069 (1950). The explicit and unambiguous language of the wrongful death statute required that, by providing that all proceeds were to be distributed according to the intestacy laws, the contributorily negligent surviving spouse would have shared in the recovery. *Cf.* Lueck v. Superior Court, 105 Ariz. 583, 469 P.2d 68 (1970).

ful death proceeds. Under the 1956 wrongful death statute, these proceeds were to be distributed in accordance with the intestacy statute, thus resulting in the negligent spouse's receiving a share of the proceeds.[46] By finding the intestacy scheme inapplicable in its first opinion,[47] the *DeLozier* court effectively eliminated the possibility of the contributorily negligent spouse's unjust enrichment.

In 1974, the legislature repealed the intestacy scheme of distribution from Arizona's wrongful death statute.[48] The new distribution provision allows direct recovery by specified beneficiaries in proportion to the amount of their damages.[49] The end result in the *DeLozier* situation, which barred recovery by all the statutory beneficiaries in order to prevent the contributorily negligent surviving spouse from being unjustly enriched, technically need no longer obtain because the jury is empowered by this new provision to deny him recovery while awarding the wrongful death recovery to innocent beneficiaries.[50] The new distribution provision provides a means by which the possibility of the contributorily negligent spouse's unjust enrichment can be effectively eliminated. Accordingly, it is suggested that the doctrine of imputation of contributory negligence be abolished in the wrongful death context as no longer necessary.[51] The current wrongful death statute is sufficient to prevent unjust enrichment, and abolition of the imputation doctrine will avoid the harsh result to innocent beneficiaries attested to by *DeLozier*.

Contributory Negligence as a Jury Question in Arizona

There remains a further ground for objecting to continued application of the *DeLozier* rule. The court's holding rested fundamentally on the jury's finding of contributory negligence on the part of the sur-

46. *See* ARIZ. REV. STAT. ANN. § 12-612(C) (1956), *as amended*, (Supp. 1975-76). See discussion note 43 *supra*.

47. See discussion note 43 *supra*.

48. ARIZ. REV. STAT. ANN. § 12-612(C) (Supp. 1975-76). The 1956 version of this subsection, however, was applicable in *DeLozier*. 21 Ariz. App. at 600 n.1, 522 P.2d at 556 n.1.

49. "The amount recovered in an action for wrongful death shall be distributed to the parties . . . in proportion to their damages . . . ." ARIZ. REV. STAT. ANN. § 12-612(C) (Supp. 1975-76).

50. A strict reading of the statute, however, would appear to allow this result only through the jury's finding the spouse not damaged while finding damage to other beneficiaries, a result which could appear arbitrary to an appellate court. A preferable method for achieving this result seemingly would be an interpretation of the statute which would allow the jury to distribute the award in proportion to damage only to those statutory beneficiaries found eligible to recover. In this way a jury award excluding the spouse could be openly based on a defense such as contributory negligence, rather than on the fiction of no damage.

51. The Arizona supreme court has previously disregarded the imputation doctrine where it is unnecessary to prevent unjust enrichment. Michie v. Calhoun, 85 Ariz. 270, 336 P.2d 370 (1959).

viving spouse.[52] That basis for the court's decision arguably is weakened by an Arizona constitutional provision making the jury the sole determinant of the issue of contributory negligence.[53] The *DeLozier* court, however, failed to address this issue.

Arizona's constitution provides that the questions of both the factual existence and legal effect of contributory negligence shall be left solely to the jury in all cases.[54] Under this provision, the jury is vested with the discretionary power to decide not only whether a party was contributorily negligent, but also whether such negligence, even if admittedly present, should act as a bar to recovery.[55] Both the factual and legal issues must therefore be submitted to the jury, and the court may not direct a verdict for defendant on the issue or instruct the jury that it must find in favor of defendant if contributory negligence is found.[56]

Although the jury in *DeLozier* presumably found the surviving spouse contributorily negligent,[57] automatic imputation of that contributory negligence to the nonnegligent deceased spouse arguably infringed upon the jury's broad constitutional right to determine the issue itself. This infringement is accented by the fact that the jury's finding of contributory negligence was based on an instruction of law that was at least misleading, if not fatally erroneous.[58] That is, the court's

52. The jury returned a verdict in favor of the children against the defendant and in favor of the defendant against the plaintiff upon instructions as to the law of contributory negligence. See discussion notes 22-23 *supra*. The court reasoned, based upon this verdict, that the jury found negligence on the part of the plaintiff and defendant, but not on the part of the decedent or children. 22 Ariz. App. at 138, 524 P.2d at 972. However, there was no explicit jury finding to this effect. Given the strict interpretation which has been accorded to article 18, section 5 of the Arizona constitution, reserving all contributory negligence questions for the jury, see text & notes 54-56 *infra*, it may have been error for the court to make this presumption.

53. ARIZ. CONST. art. 18, § 5 provides: "The defense of contributory negligence . . . shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

54. *Id. See generally* Note, *supra* note 33, at 210-16.

55. It is well settled that:

> when there is evidence from which a jury could find . . . that the defendant was guilty of negligence, and one of the defenses is that the plaintiff also was guilty of negligence, the constitution takes away from either the trial or appellate court the right to determine whether, as a matter of either law or fact, the evidence shows such contributory negligence to exist, and leaves the question both of law and fact on that particular issue to the decision of the jury.

Campbell v. English, 56 Ariz. 549, 554-55, 110 P.2d 219, 221 (1941); *accord*, Rogers v. Mountain States Tel. & Tel. Co., 100 Ariz. 154, 166, 412 P.2d 272, 280 (1966); City of Phoenix v. Mullen, 65 Ariz. 83, 89, 174 P.2d 422, 426 (1946); Winchester v. Palko, 18 Ariz. App. 534, 537, 504 P.2d 65, 68 (1972).

56. *See* Heimke v. Munoz, 106 Ariz. 26, 470 P.2d 197 (1970); Layton v. Rocha, 90 Ariz. 369, 368 P.2d 444 (1962); Rhind v. Kearny, 21 Ariz. App. 570, 521 P.2d 1148 (1974); Cohen v. Sahuaro Petroleum & Asphalt Co., 17 Ariz. App. 215, 496 P.2d 641 (1972).

57. See text & notes 22-23 *supra*. This attribution to the jury is itself questionable, however. *See* discussion note 52 *supra*.

58. For the thrust of the court's instruction of law given to the jury, see note 22 *supra*.

instruction, ostensibly permitting recovery by the children despite the surviving spouse's contributory negligence, may have colored the jury's decision to find him contributorily negligent and to invoke that as a bar to his recovery. Had the jury instead been given a proper instruction incorporating the ultimate holding in *DeLozier*, to the effect that the surviving spouse's contributory negligence would defeat a wrongful death action in toto, it might well have resolved the issue of contributory negligence and its effect differently, as it had a constitutional right to do. In other words, had the court's instruction contained a correct statement of the law, the jury might have allowed recovery by the children simply by refusing to take account of the father's contributory negligence as a matter of law, despite finding it as a matter of fact. Although this seemingly would have resulted in the contributorily negligent spouse's unjust enrichment due to the intestate distribution provisions,[59] the likelihood of the jury's nevertheless following this course is manifest in its obvious desire to allow recovery by the children.[60]

By imputing the surviving spouse's contributory negligence to the deceased spouse, thereby denying wrongful death recovery to all potential beneficiaries, the court negated the jury's discretionary decision to award damages to the nonnegligent children.[61] In so doing, the court in essence divested the jury of its constitutional right to determine the existence and effect of contributory negligence. This arguably was enough to warrant reversal. Additionally, the deficiency of the court's

59. *See* discussion note 43 *supra*.

60. In Heimke v. Munoz, 106 Ariz. 26, 470 P.2d 107 (1970), the Arizona supreme court adopted an instruction to the jury that recovery "may" be denied if plaintiff is found contributorily negligent, *id.* at 29, 470 P.2d at 110, thus apparently approving a jury's finding for the plaintiff despite undisputed evidence of contributory negligence. *See* Note, *supra* note 33, at 212-16.

61. In its second opinion, the court of appeals relied upon an earlier supreme court case, Quintero v. Continental Rent-A-Car System, Inc., 105 Ariz. 135, 460 P.2d 189 (1969), for the proposition that once the decedent is found contributorily negligent, any wrongful death action is cut off entirely. DeLozier v. Smith, 22 Ariz. App. 136, 139, 524 P.2d 970, 973 (1974). The court's reliance on that case for denying all recovery in *DeLozier* despite the jury's verdict may have been misplaced, since the summary judgment in *Quintero* apparently was granted on the issue of proximate cause rather than the decedent's contributory negligence. This was the interpretation accepted in the *DeLozier* court's first decision. 21 Ariz. App. at 602, 522 P.2d at 558. *But see* Huebner v. Deuchle, 18 Ariz. App. 241, 243 n.2, 501 P.2d 417, 419 n.2 (1972) (dictum), *vacated*, 109 Ariz. 549, 514 P.2d 470 (1973); Heimke v. Munoz, 11 Ariz. App. 126, 128, 462 P.2d 819, 821 (1969) (dictum), *vacated*, 106 Ariz. 26, 470 P.2d 197 (1970). In Cohen v. Sahuaro Petroleum & Asphalt Co., 17 Ariz. App. 215, 496 P.2d 641 (1972), the court of appeals concluded that summary judgment could not be granted on the issue of the plaintiff's contributory negligence, even if it was undisputed. The conclusion was based upon the doctrine of Heimke v. Munoz, 106 Ariz. 26, 470 P.2d 197 (1970), and Layton v. Rocha, 90 Ariz. 369, 368 P.2d 444 (1962), that the constitution prohibits a court's directing a verdict on the issue of contributory negligence. Proximate cause, on the other hand, is an essential element of the claim and may be found by the court as a matter of law. *See* McDowell v. Davis, 104 Ariz. 69, 448 P.2d 869 (1969); Sanders v. Beckwith, 79 Ariz. 67, 283 P.2d 235 (1955); Buckeye Irrigation Co. v. Asknen, 45 Ariz. 566, 46 P.2d 1068 (1935).

instruction, upon which the jury's finding of contributory negligence was based,[62] seemingly constituted grounds for remanding either for a new trial or for a redetermination of the contributory negligence issue by the jury, with the benefit of a properly informative instruction on the doctrine of imputing contributory negligence.[63] Disposition on the case in this manner arguably was necessary in order to give full force and effect to the jury's constitutional role in resolving issues of contributory negligence.

Future Application of DeLozier

Potential distribution of wrongful death proceeds according to the intestate distribution provision, whereby the contributorily negligent father would have received one-half of any wrongful death recovery, arguably constituted a sufficient basis for invoking the imputation doctrine in *DeLozier*. That basis seemingly has been eradicated, however, under Arizona's current wrongful death statute,[64] and therefore the interspousal imputation doctrine should be abandoned in the wrongful death context. The current statute eliminates reference to the intestacy distribution law for purposes of disbursing wrongful death proceeds, and instead directs that such proceeds be distributed to individuals in proportion to damages suffered.[65] The mere fact that one is found contributorily negligent, of course, does not mean that he has not suffered damages, and this fact might undermine the suggestion that the imputation doctrine be discarded solely on the basis of this statutory revision.[66] Presumably, however, a jury would be reluctant to award damages to a party found contributorily negligent by it as a matter of fact, even if the contributorily negligent party did suffer damages; therefore, the danger of his unjust enrichment would be diminished to the extent the jury follows such a course.

62. *See* text accompanying notes 58-59 *supra.*

63. The *DeLozier* court summarily dismissed a cross-appeal concerning the trial court's instruction with regard to the extent of leeway allowed the jury in its determination of whether contributory negligence, once found, should bar the plaintiff's action. The court approved of the doctrine of Layton v. Rocha, 90 Ariz. 369, 368 P.2d 444 (1962), allowing the court to instruct the jury that it "should" find for defendant if contributory negligence be found. 22 Ariz. App. at 140, 524 P.2d at 974. The court's approval of the *Layton* instruction, however, did not constitute approval of the instruction discussed here—the affirmatively misleading instruction on the effect of the jury's finding contributory negligence on the part of the surviving spouse. For a discussion of jury instructions on contributory negligence, see Flood, *Community Liability for the Tortious Acts of One of the Spouses*, 6 ARIZ. L. REV. 268 (1965); Molloy, *Jury Instructions in Negligence Cases*, 6 ARIZ. L. REV. 27 (1964); Ridge, *Contributory Negligence Instructions in Arizona*, 4 ARIZ. L. REV. 256 (1963); Note, *supra* note 33; Note, *Contributory Negligence—Confusion Out of Compromise*, 13 ARIZ. L. REV. 556 (1971). On the question of the trial court's duty to deliver contributory negligence instructions, see Jones Constr. Co. v. Noland, 105 Ariz. 446, 446 P.2d 740 (1970); Mitchell v. Colquette, 93 Ariz. 211, 379 P.2d 757 (1963); McIver v. Allen, 33 Ariz. 28, 262 P. 5 (1927).

64. *See* ARIZ. REV. STAT. ANN. § 12-612(C) (Supp. 1975-76).

65. *Id.*; see text accompanying notes 48-50 *supra.*

66. But see discussion note 50 *supra.*

In any event, the new statute eliminates the danger of the contributorily negligent surviving spouse benefiting unjustly, in contravention of the jury's wishes, from awards made to other nonnegligent beneficiaries. The new statute, unlike the 1956 statute which controlled the *DeLozier* decision, allows the jury to specifically deny recovery to a contributorily negligent surviving spouse, without adversely affecting the right of other, faultless beneficiaries to recover.[67] Thus, the interspousal imputation doctrine is no longer necessary to prevent unjust enrichment in this context and should be discarded.

Arizona's new wrongful death distribution provision, however, does not by itself necessarily alter or require rejection of the *DeLozier* holding. Affirmative action by the courts seemingly is necessary for this result to obtain. Although the provision does provide a strong policy argument for abandoning the concept of imputed contributory negligence in cases involving the wrongful death of a nonnegligent spouse, it is now up to the judiciary, which created the imputation doctrine originally, to recognize that the new statute renders the original policy for imputation less than compelling in the wrongful death context.

If the courts fail to discard the imputation theory in wrongful death cases, however, then *DeLozier's* rather harsh result will remain intact in the future. In that event, a jury should at least be afforded a proper instruction on the law of interspousal imputation of contributory negligence, arguably revealing its effect on other nonnegligent beneficiaries.[68] That is, the jury should be instructed that all recovery will be denied for the death of a nonnegligent spouse if the surviving spouse is found contributorily negligent, regardless of attempted awards to other specific nonnegligent beneficiaries.[69] If such an instruction is delivered, then *DeLozier* will deny wrongful death recovery to all potential beneficiaries if the jury still finds the surviving spouse contributorily negligent.

Conclusion

The harsh result worked on the nonnegligent wrongful death

67. This result would bring Arizona in line with the majority view, which precludes recovery only by the contributorily negligent beneficiary without affecting the right of the other nonnegligent beneficiaries to recover. *See* text accompanying note 37 *supra.*

68. *See* text accompanying notes 58-59 *supra.*

69. Under Arizona's current wrongful death distribution statute, ARIZ. REV. STAT. ANN. § 12-612(C) (Supp. 1975-76), a surviving spouse's contributory negligence cannot automatically be inferred from the jury's failure to award recovery to him. In accordance with the new provision, the jury may simply have found that the surviving spouse, though not contributorily negligent, suffered no loss from the death. Although this circumstance is admittedly unlikely in most cases, the jury should be specifically questioned on the issue of contributory negligence, with *DeLozier* controlling only when it is expressly found and applied by the jury.

beneficiaries by the *DeLozier* court was based on the need to impute the surviving spouse's contributory negligence to the nonnegligent deceased spouse. Arizona's new provision controlling distribution of wrongful death proceeds provides a strong policy argument for eliminating the imputation doctrine in this context. If the imputation doctrine is not abandoned, however, the jury should be properly instructed on the law of imputed contributory negligence and the consequences that *DeLozier* unveiled.

C. APPLICABILITY OF THE GOING AND COMING RULE TO TRAVELING NATIONAL GUARDSMEN

The doctrine of respondeat superior, which recognizes the vicarious liability of an employer for the tortious acts of his employees, grew out of the general policy consideration that every person is expected by society to conduct his affairs, either personally or through an agent, in a manner not injurious to others.[1] The doctrine is based on the theory that since an employer reaps a profit from the activities in which his employees engage, he should bear, as a cost of doing business, any losses caused by their torts.[2] In accordance with this principle, an employer is held vicariously liable for the torts of an employee only when the latter was acting for the employer's benefit at the time of the wrongful conduct.[3]

Three interrelated legal prerequisites to respondeat superior liability reflect these policy considerations. First, it must be shown that the employer-employee relationship existed at the time of the tortious

1. *See* Farwell v. Boston & Worcester R.R., 45 Mass. (4 Met.) 49, 55, 38 Am. Dec. 339, 340 (1842), *discussed in* Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 120 n.93 (1916). The Laski article traces the historical development of respondeat superior.

2. *See* Anderson v. Gobea, 18 Ariz. App. 277, 280, 501 P.2d 453, 456 (1972); Hinman v. Westinghouse Elec. Co., 2 Cal. 3d 956, 960, 471 P.2d 988, 990, 88 Cal. Rptr. 188, 190 (1970); Huntsinger v. Fell, 22 Cal. App. 3d 803, 808, 99 Cal. Rptr. 666, 668 (Dist. Ct. App. 1972). This theory was articulated by the *Hinman* court thusly:

> [Such losses] are placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

2 Cal. 3d at 960, 471 P.2d at 990, 88 Cal. Rptr. at 190, *quoting* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69, at 471 (3d ed. 1964).

3. *See* Anderson v. Gobea, 18 Ariz. App. 277, 280, 501 P.2d 453, 456 (1972); Laski, *supra* note 1, at 115.

act.[4] Additionally, the activity for which the employer is to be charged must have been performed within the scope of the servant's employment.[5] Since an employee's performance of duties for the employer generally is limited both in time and in the nature of the acts to be performed, the employer is held liable only for torts committed within such time and in relation to such acts;[6] to do otherwise would transform the employer into a general insurer of his employees' personal liability. The final requisite to respondeat superior liability is that the employer must have controlled or had the right to control the employee's activity from which the tort arose.[7] While actual supervision of the particular act is not required, the employer must have been empowered to dictate the mode and manner by which the work was to be performed had he chosen to do so.[8]

In applying these criteria to the cases, courts have specifically delineated certain exceptions to the doctrine of respondeat superior.

---

4. Scottsdale Jaycees v. Superior Court, 17 Ariz. App. 571, 574, 499 P.2d 185, 188 (1972); Elder v. Cisco Constr. Co., 52 Wash. 2d 241, 244, 324 P.2d 1082, 1084 (1958). The parameters of the employer-employee relationship are set forth in the definition of a servant by the RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957):

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
> a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> b) whether or not the employed is engaged in a distinct occupation or business;
> c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> d) the skill required in the particular occupation;
> e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> f) the length of time for which the person is employed;
> g) the method of payment, whether by time or by the job;
> h) whether or not the work is a part of the regular business of the employer;
> i) whether or not the parties believe they are creating the relation of master and servant; and
> j) whether the principal is or is not in business.

5. Olson v. Staggs-Bilt Homes, Inc., 23 Ariz. App. 574, 576, 534 P.2d 1073, 1075 (1975); Anderson v. Gobea, 18 Ariz. App. 277, 280, 501 P.2d 453, 456 (1972); Scottsdale Jaycees v. Superior Court, 17 Ariz. App. 571, 574, 499 P.2d 185, 188 (1972); Calhoun v. Middletown Coca-Cola Bottling Co., 43 Ohio App. 2d 10, 332 N.E.2d 73, 72 Ohio Op. 2d 158 (1974); RESTATEMENT (SECOND) OF AGENCY § 219 (1957).

6. *See* W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 84 (1964); W. PROSSER, *supra* note 2, § 70, at 461-62. Analogously, to be compensable under Arizona workmen's compensation laws, an injury must arise in the course of the individual's employment. ARIZ. REV. STAT. ANN. § 23-1021 (1971). Injuries arising from specific duties that an individual is engaged to perform are compensable, but those involving lesser activities which are solely for the individual's benefit, such as seeking personal comfort, eating, or going to and from work, are not compensable. *See* Royall v. Industrial Comm'n, 106 Ariz. 346, 476 P.2d 156 (1970); Gaumer v. Industrial Comm'n, 94 Ariz. 195, 382 P.2d 673 (1963); Goodyear Aircraft Corp. v. Industrial Comm'n, 62 Ariz. 398, 158 P.2d 511 (1945); "Application of the Personal Comfort Doctrine to Traveling Employees," 17 Ariz. L. Rev. 639, 937 (1975).

7. *See* Throop v. F.E. Young & Co., 94 Ariz. 146, 150, 382 P.2d 560, 562-63 (1963); RESTATEMENT (SECOND) OF AGENCY § 219 (1957).

8. Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 136, 65 P.2d 35, 37-38 (1937); Glasgow v. Floors, Inc., 356 S.W.2d 699, 705 (Tex. Civ. App. 1962).

Generally, these exceptions single out certain common employee activities not of substantial benefit to the employer which are recognized as falling outside the realm of respondeat superior liability.[9] For example, the employer is not held liable for torts committed by employees who have abandoned their employment to go on personal frolics.[10] Similarly, an employee is held not within the scope of his employment when going to and from work;[11] consequently, tortious acts committed by the employee during that commuting time are not imputable to the employer.[12] The applicability of the "going and coming" exception was recently at issue in *State v. Superior Court*,[13] where the Arizona supreme court invoked the rule despite respondents' contention that the tortfeasor's military status and the reimbursement of travel expenses negated the rule's applicability and mandated vicarious liability.

Virgil Derrick, an Arizona National Guardsman traveling from his home in San Manuel to Phoenix for a weekend training session, was involved in an automobile accident. Derrick and the occupants of the other car, Durwood Rousseau and Robert Schraft, were killed. In a negligence suit filed by the families of Rousseau and Schraft against Derrick's estate and the State of Arizona, the trial court held that the state was vicariously liable to the plaintiffs should they prove negligence by Derrick.[14] On appeal the supreme court reversed, finding that neither the state's payment to Derrick of travel expenses nor his National Guard status demonstrated sufficient employer control to render the state liable under the doctrine of respondeat superior.[15]

This casenote will discuss judicial application of the going and coming rule to National Guardsmen. Initially, the general reasons behind the going and coming exception to respondeat superior will be reviewed, with focus on the extent of an employer's control over employee activities in preparation for reporting to work. Next, the effect of compensation for travel expenses and of military status will be analyzed, with the conclusion that these factors do not indicate sufficient control to establish vicarious liability.

---

9. For a discussion of the types of employee activities for which the employer is not liable, see Glos, *Master's Liability for the Torts of His Servants*, 10 S. TEX. L.J. 21 (1968).

10. A common example of an excepted frolic occurs when an employee on an errand for the employer detours to perform some personal task. *See* Peters v. Pima Mercantile Co., Inc., 42 Ariz. 454, 460, 27 P.2d 143, 145 (1933); RESTATEMENT (SECOND) OF AGENCY § 235 (1957); *cf.* cases cited note 6 *supra*.

11. Butler v. Industrial Comm'n, 50 Ariz. 516, 521-22, 73 P.2d 703, 705-06 (1937); Anderson v. Gobea, 18 Ariz. App. 277, 280, 501 P.2d 453, 456 (1972); Scottsdale Jaycees v. Superior Court, 17 Ariz. App. 571, 575, 499 P.2d 185, 189 (1972).

12. *See* cases cited note 11 *supra*.

13. 111 Ariz. 130, 524 P.2d 951 (1974).

14. *Id.* at 132, 524 P.2d at 953.

15. *Id.* at 133, 524 P.2d at 954.

The Going and Coming Rule

The rule that an employer is not liable for an employee's torts committed while going to or coming from work[16] seems to be an outgrowth of the "preparatory acts"[17] doctrine.[18] Under this doctrine, an employment relationship is deemed to exist only when the employee is performing the work for which he was hired and not while he is merely preparing to begin that work.[19] Thus, the employer normally is not liable for activities that all employees universally must undertake before their actual services begin.[20] This doctrine appears to reflect the absence of the time, space, and control elements necessary for employer liability.[21] Commuting takes place off the employer's premises and, normally, outside of the time for which the employee is paid;[22] commuting activity merely anticipates the beginning or follows the ending of the work day.[23] Additionally, the employer has no control over the means by which the employee travels to the workplace nor the manner in which he conducts himself while doing so.[24] Under these

16. Anderson v. Gobea, 18 Ariz. App. 277, 280, 501 P.2d 453, 456 (1972); Scottsdale Jaycees v. Superior Court, 17 Ariz. App. 571, 575, 499 P.2d 185, 189 (1972); Sendejaz v. Industrial Comm'n, 4 Ariz. App. 309, 312, 420 P.2d 32, 35 (1966); Hinman v. Westinghouse Elec. Co., 2 Cal. 3d 956, 961, 471 P.2d 988, 990, 88 Cal. Rptr. 188, 190 (1970); Sherar v. B & E Convalescent Center, 49 Cal. App. 3d 227, 229, 122 Cal. Rptr. 505, 506 (Dist. Ct. App. 1975).

17. Anderson v. Gobea, 18 Ariz. App. 277, 280, 501 P.2d 453, 456 (1972); Scottsdale Jaycees v. Superior Court, 17 Ariz. App. 571, 574-75, 499 P.2d 185, 188-89 (1972); RESTATEMENT (SECOND) OF AGENCY § 233 (1957). The Restatement discusses the doctrine as follows:

> The employment exists only during the time when the servant is performing or should be performing the work which he is employed to do. It does not begin at the time when it is necessary for him to act in order to perform the required service. It begins only when the master has a right to direct the method by which the servant is to perform the work, and terminates when the master has no longer a right to control it.

Id. § 233, comment *a* at 516.

18. *See* authorities cited note 17 *supra.*

19. *See* authorities cited note 17 *supra.*

20. Hinman v. Westinghouse Elec. Co., 2 Cal. 3d 956, 960-62, 471 P.2d 988, 990-91, 88 Cal. Rptr. 188, 190-91 (1970); Huntsinger v. Fell, 22 Cal. App. 3d 803, 808, 99 Cal. Rptr. 666, 668 (Dist. Ct. App. 1972). The *Hinman* court noted, however, that the "cases indicate that exceptions will be made to the 'going and coming' rule where the trip involves an incidental benefit to the employer, not common to commute [*sic*] trips by ordinary members of the work force." 2 Cal. 3d at 963, 471 P.2d at 991, 88 Cal. Rptr. at 191.

21. *See* Anderson v. Gobea, 18 Ariz. App. 277, 280, 501 P.2d 453, 456 (1972). The time, space, and control factors are elements of scope of employment. *Id.*

22. For a discussion of the applicability of this rule where the employee is compensated for his travel time or expenses, see text & notes 37-46 *infra.*

23. "The rule is sometimes ascribed to the theory that the employment relationship is 'suspended' from the time [the employee] leaves his job to go home until he returns to it." Harris v. Oro Dam Constructors, 269 Cal. App. 2d 911, 912, 75 Cal. Rptr. 544, 545 (1969); *accord,* Pauley v. Industrial Comm'n, 109 Ariz. 298, 301, 508 P.2d 1160, 1163 (1973).

24. A different result probably would obtain where the preparatory act at issue involved putting on company-provided equipment or uniforms, preparing tools for use, or other acts performed after arrival at the workplace which are more directly connected with the employment duties and more subject to control by the employer than commuting. *Cf.* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 21.60 (1972).

conditions, the travel itself is not viewed as conferring a benefit on the employer because the only benefit he receives is the "mere making of the services available at the place where they are needed."[25] The going and coming rule is also a recognition that in his daily transit to and from work the employee encounters hazards experienced by all commuters.[26] Such hazards do not represent a potential harm to the public created by the employer's enterprise[27] and thus cannot be imputed to the employer without some additional manifestation by the employer of consent to responsibility.[28]

The Arizona supreme court in *State v. Superior Court* followed these principles by recognizing that something more than mere travel to work was necessary to hold an employer responsible for tortious acts committed by the employee while commuting.[29] The only measurable benefit conferred on the National Guard by Derrick was his reporting for lineup and participating in training activities. His method or manner of transport was immaterial to the Guard. Thus, Derrick seemingly was not rendering a material service to the Guard at the time of the accident.

The Control Factor

Despite this lack of any appreciable benefit realized by the Guard from Derrick's travel, it was necessary for the court to decide whether Derrick was merely performing a preparatory act at the beginning of his working day, or was instead actually engaged in employment at the time of his travel.[30] Of the three interrelated elements governing respondeat superior liability,[31] perhaps the most crucial in determining the existence of an employment relation in any given situation is the ability of the master to direct and control the acts of the servant.[32] When the ability to direct the employee's mode and manner of acting exists, the employee in effect is acting as an extension of, and is legally

25. Sharp v. W. & W. Trucking Co., 421 S.W.2d 213, 219 (Mo. 1967), *noted in* 34 ALBANY L. REV. 764 (1970).

The "special errand rule" is an exception to this general principle. When the employee is not simply going to or coming from work but is on a special mission for his employer, the employee is considered in the scope of employment from the time that he starts on the errand until he returns or until he deviates from his duties. *See* Boynton v. McKales, 139 Cal. App. 2d 777, 789, 294 P.2d 733, 740 (Dist. Ct. App. 1956), *noted in* 4 ST. MARY'S L.J. 137 (1972); *cf.* Peters v. Pima Mercantile Co., Inc., 42 Ariz. 454, 461, 27 P.2d 143, 145 (1933).

26. Sendejaz v. Industrial Comm'n, 4 Ariz. App. 309, 311, 420 P.2d 32, 34 (1966).

27. See text & note 2 *supra.*

28. Sendejaz v. Industrial Comm'n, 4 Ariz. App. 309, 311, 420 P.2d 32, 34 (1966).

29. 111 Ariz. at 133, 524 P.2d at 954.

30. *See* Hansen v. Oakley, 76 Ariz. 307, 312, 263 P.2d 807, 810 (1953).

31. See text accompanying notes 4-8 *supra.*

32. *See* Throop v. F.E. Young & Co., 94 Ariz. 146, 150, 382 P.2d 560, 562-63 (1963), *noted in* 6 ARIZ. L. REV. 150 (1964); Lee Moor Contracting Co. v. Blanton,

able to create liability in, the employer,[33] even if he is merely traveling to or from work. While courts may look to various circumstances in determining control,[34] the Arizona supreme court in *State v. Superior Court* followed the view that no employer control over traveling employees exists where the use of a car is not part of the contract of service, that is, where the employer cannot direct the driver when, where, or how to drive the car.[35] In finding control lacking, the court said, "[t]he Guard had no right to dictate the manner of travel, the route to be taken, his speed, or that he use his car to go and come from school as compared to other modes of travel."[36]

Effect of Reimbursement of Travel Expenses. Respondents alleged further, however, that the Guard's payment to Derrick of a travel allowance exhibited a sufficient exercise of control to render the state liable for Derrick's tort.[37] American courts generally require that the employee either be reimbursed both for travel time and travel expenses or be subject to an employer's orders in regard to the travel before the employer can be found in control of the employee.[38] The presence of these conditions gives rise to an inference that the employer is receiving some benefit beyond the normal commuter traveling which merely brings the employee to the worksite.[39] That is, an employer who pays for his employees' travel time and mileage or who sends an employee on an assignment is deemed to have impliedly agreed that the employee's work encompasses the travel time, whereas no such implication arises in the absence of these factors.[40]

Although Derrick received a fixed mileage reimbursement paid to all guardsmen and other state employees on state-authorized travel,[41] respondents failed to show that control by the National Guard accompanied such payment. The court noted that Derrick was free to take

49 Ariz. 130, 136, 65 P.2d 35, 37-38 (1937); Scottsdale Jaycees v. Superior Court, 17 Ariz. App. 571, 575, 499 P.2d 185, 189 (1972); RESTATEMENT (SECOND) OF AGENCY § 220(1) (1957).

33. For a detailed discussion of the policy reasons behind vicarious liability, see T. BATY, VICARIOUS LIABILITY 146-54 (1916); Note, *Respondeat Superior as an Affirmative Defense*, 36 So. CALIF. L. REV. 445 (1963).

34. For an enumeration of several such factors, see RESTATEMENT (SECOND) OF AGENCY § 220 (1957), set forth in part in note 4 *supra*.

35. 111 Ariz. at 133, 524 P.2d at 954; *see* Harris v. Oro Dam Constructors, 269 Cal. App. 2d 911, 917-18, 75 Cal. Rptr. 544, 549 (Ct. App. 1969); Wesolowski v. John Hancock Mut. Life Ins. Co., 308 Pa. 117, 121, 162 A. 166, 167 (1932).

36. 111 Ariz. at 133, 524 P.2d at 954.

37. *Id.*

38. *See, e.g.*, Hinson v. United States, 257 F.2d 178, 183 (5th Cir. 1958) (applying Georgia law); Hinman v. Westinghouse Elec. Co., 2 Cal. 3d 956, 963, 471 P.2d 988, 992, 88 Cal. Rptr. 188, 192 (1970); Beard v. Seamon, 175 So. 2d 671, 675 (La. Ct. App. 1965); Elder v. Cisco Constr. Co., 52 Wash. 2d 241, 245-46, 324 P.2d 1082, 1085 (1958).

39. O'Brien v. Traders & Gen. Ins. Co., 136 So. 2d 852, 864 (La. Ct. App. 1961).

40. *Id.*

41. *See* ARIZ. REV. STAT. ANN. § 26-158 (1956).

any route to Phoenix he chose and was free to travel at any time, "a week or a day in advance on business or pleasure."[42] Under these circumstances, the court concluded that travel was not intrinsically involved in Derrick's employment.[43]

The view taken by the Arizona court is not unanimously held. One jurisdiction has found that an employer reaps a substantial benefit in reaching out to a wider labor market or in enlarging the available labor market by paying travel expenses and compensation for travel time.[44] The employer is held to have assumed the risks flowing from this benefit, and is therefore held liable for the torts of his traveling employees.[45] Nevertheless, the Arizona court's rejection of employer liability when only travel expenses are paid by the employer appears more equitable, since provision of such allowance, whether to promote recruitment or as a result of collective bargaining, does not alter the fact that the employee's trip does not directly benefit the employer.[46] This is particularly true where, as was found by the Arizona court, the employer exercises no control over the travel.

An additional policy reason exists for disfavoring liability based merely on the reimbursement of travel expenses. Such a policy would inevitably discourage employers from offering reimbursements, thus depriving employees of a valuable benefit. The rule adopted by the Arizona supreme court, requiring something more than reimbursement for travel expenses to establish employer control and the resulting respondeat superior liability, thus appears preferable from the standpoint of both legal precedent and policy.

Effect of Tortfeasor's Military Status. In advocating the state's vicarious liability, respondents also argued that Derrick was on "full time training duty," and therefore under the control of the state and within the scope of a broadly defined employment at the time of the accident.[47] In support of this contention, an analogy was drawn

42. 111 Ariz. at 133, 524 P.2d at 954.
43. *Id.*
44. Hinman v. Westinghouse Elec. Co., 2 Cal. 3d 956, 962, 461 P.2d 988, 992, 88 Cal. Rptr. 188, 192 (1970).
45. *Id.*
46. Harris v. Oro Dam Constructors, 269 Cal. App. 2d 911, 917, 75 Cal. Rptr. 544, 548 (Ct. App. 1969).
47. 111 Ariz. at 133, 524 P.2d at 954. Although Derrick's active participation in Guard activities was limited to one weekend per month and he otherwise worked six days a week at Magma Copper Co., *id.* at 132-33, 524 P.2d at 953-54, respondents based their contentions that Derrick was on full-time training status for the full 6-month period upon two factors. First, 32 U.S.C. § 504 (1970) provides that National Guard members may attend schools conducted by the Air Force or Army under regulations prescribed by the respective secretary. Second, Special Order Number 45, under which Derrick reported, stated that "By authority of the Secretary of the Army and the Chief National Guard Bureau the following individuals are ordered to FULL TIME TRAINING DUTY in a Federal non-pay status with his consent for the period indicated." Re-

between this case and cases under the Federal Tort Claims Act[48] involving military personnel.[49] The Act itself was of little help to the respondents since it encompasses only the federal government and limits its liability to situations which under state law would have resulted in liability between private parties.[50]

In *State v. Superior Court*, the Arizona supreme court reviewed the Federal Tort Claims Act cases cited by respondents[51] to determine whether they offered a broader standard for judging whether Derrick, in driving to work, was within the scope of his Guard employment. The cases did not lead to this conclusion since, like the state standard, the touchstone of these federal cases rested on the right of the military to control the employee's travel activity. These cases, unlike the instant case, dealt with situations where servicemen on active duty were being paid for their time in addition to their travel expenses.[52] Additionally, their travel orders and manner of travel could have been changed at the whim of their commanding officers.[53] Under these circumstances the courts had little difficulty in finding that an employment relationship existed because of the military's control or right to control the servicemen's activities.[54]

In still other cases brought under the Act, liability was denied where, although the government was reimbursing the servicemen for

---

spondent's Memorandum of Points and Authorities in Support of Response to Petition for Special Action, State v. Superior Court, No. 11561 (Super. Ct., Maricopa County, Ariz., May 7, 1974) (emphasis in original).

48. 28 U.S.C. § 1346(b) (1970). One commentator has suggested that the federal rather than the state government should be responsible for the torts of National Guardsmen. *See* Note, *National Guardsmen and Tort Liability*, 42 N.D.L. REV. 365 (1966).

49. Cooner v. United States, 276 F.2d 220 (4th Cir. 1960); Hinson v. United States, 257 F.2d 178 (5th Cir. 1958); Myers v. United States, 219 F. Supp. 71 (D. Mo. 1963).

50. 28 U.S.C. § 1346(b) (1970); *see* Bach v. United States, 92 F. Supp. 715, 717 (S.D.N.Y. 1950). Thus, under this Act the court would have looked to Arizona law, which was the basis of its earlier conclusion that the going and coming rule prevented liability from attaching.

51. *See* cases cited note 49 *supra.*

52. *See* Cooner v. United States, 276 F.2d 220, 223 (4th Cir. 1960); Hinson v. United States, 257 F.2d 178, 180 (5th Cir. 1958); Myers v. United States, 219 F. Supp. 71, 74-75 (D. Mo. 1963).

53. *See* cases cited note 52 *supra.*

54. In Hinson v. United States, 257 F.2d 178 (5th Cir. 1958), the court looked to the special factors characteristic of military activity and discipline in determining whether the tortfeasor was under the control of the military. In this case the tortfeasor was on active duty and accountable to the Army for all of his actions, including the driving of his car. The court held that he was not merely on his way to work, but was actually on duty performing the task assigned to him, that of travel.

Similarly, in Myers v. United States, 219 F. Supp. 71 (D. Mo. 1963), the tortfeasor was traveling from one duty base to another transporting United States property. The court judged the employment relationship in existence at the time of the accident, stating that a man who is being paid for his time and travel and whose orders can be changed en route, obviously is under his employer's control and authority, and therefore acting within that relationship.

The third case cited by respondents, Cooner v. United States, 276 F.2d 220 (4th Cir. 1960), also involved an accident occurring during a change of duty stations by a full-time military man, leading to the same result of government liability.

their mileage at a fixed rate, the control of the trip was subject to the individual's own choice.[55] The only interest of the military in such travel was that the individual arrive at the specified base on the day designated in his orders. In these cases, since there was no control there was no liability.[56] Since *State v. Superior Court* fit into this same mold, the Arizona supreme court rejected employer liability.

Conclusion

The established doctrine of respondeat superior seeks to spread the risk by removing the burden of injury from the party harmed by an employee's negligence and placing it on the tortfeasor's employer, who receives a benefit from the injury-causing activity. In *State v. Superior Court*, however, the employee did not fit within the group of tortfeasors for whose misdeeds employers normally are to be held liable. When an individual is merely engaged in going to or from work, holding the employer liable without a greater showing of reason for responsibility would work an injustice on the employer by holding him liable for activities over which he has no control or interest and from which he gains no benefit. Taking these considerations into account, the Arizona court correctly decided that a National Guardsman's status as a mere traveler outweighed his technical active duty status as a guardsman. While the court did not state what factors would be sufficient to indicate employer control, payment of travel expenses apparently is not by itself enough.

55. In United States v. Eleazar, 177 F.2d 914 (4th Cir. 1949), a serviceman had received orders to change duty stations, with a 2-week delay which was to count as leave. He was involved in an accident during that period, and although he was receiving reimbursement for mileage at a fixed rate, the government was not held liable because "he was driving for his own use and benefit subject to the control of no one but himself." *Id.* at 916.

Similarly, in Rutherford v. United States, 73 F. Supp. 867 (6th Cir. 1947), a naval officer, after participating in a radio show to aid recruiting, was involved in an auto accident. The court found that his job was over when he left the broadcast and used his own private auto for private purposes. Therefore, the government was not liable because there was no control over the officer.

56. *See* cases cited note 55 *supra*. *See also* Bach v. United States, 92 F. Supp. 715 (S.D.N.Y. 1950).

XIII. WORKMEN'S COMPENSATION

A. WORKMEN'S COMPENSATION—A NEW INTERPRETATION OF THE TIME LIMITATION FOR FILING A CLAIM

The Arizona Workmen's Compensation Act contains a provision barring claims filed more than 1 year after the injury was sustained.[1] Although it is manifest that in certain instances enforcement of such a limit would result in injustice,[2] it has in the past been strictly applied to applications for compensation.[3] In *Van Horn v. Industrial Commission*[4] the Supreme Court of Arizona attempted to reconcile strict application of the 1-year limit with the Arizona constitutional provision mandating enactment of a "just and humane [workmen's] compensation law."[5] Originally determining that the Industrial Commission possessed "inherent power" to hear claims filed after expiration of the statutory period where necessary to achieve a just result,[6] the court subsequently modified its position to interpret the limitation as an affirmative defense which is waived if not asserted by the employer at the first hearing before the commission.[7]

Petitioner Van Horn sustained injuries in an automobile accident occurring in the course of his employment on April 25, 1970, becoming aware of most of his injuries on that day.[8] On the following day Van Horn was visited by his employer, who indicated that he had given a check to petitioner's father and that he would take care of the financial obligations arising out of the accident.[9] Relying upon his employer's

1. ARIZ. REV. STAT. ANN. § 23-1061(A) (Supp. 1975-76).
2. *See* Bluma v. Industrial Comm'n, 7 Ariz. App. 358, 360, 439 P.2d 521, 523 (1968); *cf.* State Compensation Fund v. Foulds, 167 Colo. 123, 445 P.2d 716 (1968); United Brick & Tile Co. v. Roy, 356 P.2d 107 (Okla. 1960); Blackburn v. Pennsylvania Turnpike Comm'n, 206 Pa. Super. 192, 213 A.2d 159 (1965).
3. The leading case under the former statute, Collins v. Industrial Comm'n, 102 Ariz. 509, 433 P.2d 801 (1967), interpreted the limitation statute as setting a jurisdictional prerequisite to action by the Industrial Commission. *Id.* at 511, 433 P.2d 803. Only two exceptions were recognized: infancy, and apparent triviality of injury at the time of its occurrence. *Id.* The rule of this case continued to be followed after the statute was amended in 1969. *See* Freig v. Industrial Comm'n, 15 Ariz. App. 187, 487 P.2d 408 (1971). *But see* Priedigkeit v. Industrial Comm'n, 20 Ariz. App. 594, 514 P.2d 1045 (1973).
4. 111 Ariz. 86, 523 P.2d 783, *modified*, 111 Ariz. 237, 527 P.2d 282 (1974).
5. ARIZ. CONST. art. 18, § 8.
6. 111 Ariz. 86, 89, 523 P.2d 783, 786, *modified*, 111 Ariz. 237, 527 P.2d 282 (1974).
7. 111 Ariz. 237, 239, 527 P.2d 282, 284 (1974).
8. 111 Ariz. at 87, 523 P.2d at 784.
9. *Id.*

repeated assertions that he would "take care of things,"[10] petitioner did not file a claim within 1 year of the accident, as required by the Arizona statute. His claim was subsequently held invalid by the Industrial Commission, since timely filing was regarded as a jurisdictional prerequisite.[11] Further, previous interpretation of the statute as jurisdictional prevented estoppel from being invoked against the employer.[12]

On appeal the Supreme Court of Arizona reversed the commission's decision, holding that the commission had inherent power to hear the petitioner's claim where necessary to promote justice.[13] In so ruling the court prevented a harsh decision, but at the cost of establishing a vague and unwieldy precedent. It is not surprising, therefore, that in a later opinion accompanying denial of a motion for rehearing, the court modified its position. The result of allowing Van Horn's claim was achieved by interpreting the 1-year limitation as an affirmative defense rather than a jurisdictional prerequisite, thus allowing for the assertion of estoppel by conduct against the employer who had enticed delay with assurances of assistance.[14]

This casenote will assess the significance of the *Van Horn* decisions, examining the extent of their departure from previous caselaw regarding the 1-year filing requirement. First, possible constitutional limitations on the inherent powers doctrine will be examined and problems associated with its practical application will be discussed. Next, the shift in the court's position from granting the commission inherent power to hear an untimely claim, to that of designating the 1-year limitation an affirmative defense will be examined. Finally, the precedential value and possible repercussions of the two *Van Horn* decisions will be explored.

The Inherent Powers Doctrine

The concept of inherent powers generally is used to connote those powers necessary to the ordinary and efficient exercise of jurisdiction.[15]

10. *Id.* at 88, 523 P.2d at 783; Brief for Appellant at 17, Van Horn v. Industrial Comm'n, 111 Ariz. 86, 523 P.2d 783, *modified*, 111 Ariz. 237, 527 P.2d 282 (1974).

11. *See* Collins v. Industrial Comm'n, 102 Ariz. 509, 433 P.2d 801 (1967); McCormick v. Industrial Comm'n, 96 Ariz. 88, 392 P.2d 299 (1964); Inspiration Consol. Copper Co. v. Smith, 78 Ariz. 355, 358, 28 P.2d 273, 275 (1955); Hartford Accident & Indem. Co. v. Industrial Comm'n, 43 Ariz. 50, 29 P.2d 142 (1934).

12. Holland v. Industrial Comm'n, 78 Ariz. 16, 274 P.2d 836 (1954). *See* 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 78.70 (1973).

13. 111 Ariz. 86, 89, 523 P.2d 783, 786, *modified*, 111 Ariz. 237, 527 P.2d 282 (1974).

14. 111 Ariz. at 239, 527 P.2d at 284.

15. State v. Superior Court, 39 Ariz. 242, 247, 5 P.2d 192, 194 (1931) (superior court did not have inherent power to require police, who had taken possession of criminal defendant's home, to allow defendant to inspect premises); Clark v. Austin, 340 Mo. 467, 483, 101 S.W.2d 977, 988 (1937) (courts have inherent power to punish persons for contempt for violating statute regulating the practice of law); Hale v. State, 55 Ohio St. 210, 45 N.E. 199 (1896) (court has inherent power to punish for contempt).

Although such powers are not dependent upon a constitutional grant or legislative enactment,[16] they must be exercised within the jurisdiction prescribed by statute and the constitution.[17] The Industrial Commission may act judicially in that it is a factfinding body and its awards are subject to judicial review;[18] nevertheless, its power is derived from the legislature and must conform to the legislative grant.[19]

Under its police power the legislature can legislate on any subject not expressly forbidden by the state or federal constitution.[20] Unlike the United States Congress, whose only powers are those granted by the federal Constitution,[21] the legislatures of the states have all legislative power except that withheld from them by state constitutions or surrendered to the federal government.[22] Thus, the Arizona constitutional provision concerning workmen's compensation gives no power that the legislature does not already possess, because a workmen's compensation law may be enacted in the exercise of the state's police power.[23] The provision is a restriction on the legislature's power only in the sense that it requires the legislature to implement a particular statutory program.[24] The legislature is therefore free to restrict or expand the workmen's compensation law as it desires, so long as it maintains the program in

16. State *ex rel* Andrews v. Superior Court, 39 Ariz. 242, 248, 5 P.2d 192, 195 (1931).

17. *Id.* at 247, 5 P.2d at 195; Fraser v. Payne, 34 P.2d 821, 825 (Cal. 1934), *modified*, 3 Cal. 2d 630, 45 P.2d 345 (1935).

18. Zager v. Industrial Comm'n, 40 Ariz. 479, 485, 12 P.2d 472, 474 (1932); Doby v. Miami Trust Co., 39 Ariz. 228, 5 P.2d 187 (1931).

19. Red Rover v. Industrial Comm'n, 58 Ariz. 203, 211, 118 P.2d 1102, 1106 (1941).

The court in the first *Van Horn* decision cited no authority for its position that the Industrial Commission had inherent power to bypass a statutorily established limitation period. 111 Ariz. at 89, 527 P.2d at 786. Although Jones v. Industrial Comm'n, 96 Ariz. 293, 394 P.2d 213 (1964), and Parsons v. Industrial Comm'n, 98 Ariz. 74, 76, 402 P.2d 20, 22 (1965), were cited for the proposition that the Industrial Commission had limited discretionary powers, *see* 111 Ariz. at 89-90, 527 P.2d at 786-87, these cases did not hold that the commission had inherent powers. The *Jones* court held that the finding of the commission was proper where the commission disbelieved claimant's uncorroborated testimony that he filed within the statutory time limitation. In *Parsons*, the court stated that the commission has the power to require a claimant to reopen his application for an award rather than filing a petition for a rehearing to consider the effect of conditions developing after the award.

20. Home Accident Ins. Co. v. Industrial Comm'n, 34 Ariz. 201, 208, 269 P. 501, 503 (1928).

21. The federal constitution is regarded as a delegation of powers by the people of the federal government, and thus Congress is not empowered to exercise authority not granted by express provisions or by implication in the Constitution. Katzenbach v. Morgan, 384 U.S. 641 (1966); Graham v. John Deere Co., 383 U.S. 1 (1965); United States v. Butler, 297 U.S. 1 (1935); Chicago, Burlington & Quincy R.R. v. Otoe County, 83 U.S. (16 Wall.) 667 (1872).

22. Home Accident Ins. Co. v. Industrial Comm'n, 34 Ariz. 201, 208, 269 P. 501, 503 (1928).

23. Atkinson Kier Bros. Spicer Co. v. Industrial Comm'n, 35 Ariz. 48, 52-53, 274 P. 634, 635 (1929); *see* Brief for State Compensation Fund as Amicus Curiae at 6, Van Horn v. Industrial Comm'n, 111 Ariz. 237, 527 P.2d 282 (1974).

24. Atkinson Kier Bros. Spicer Co. v. Industrial Comm'n, 35 Ariz. 48, 52-53, 274 P. 634, 635 (1928).

some form and enacts any specific type of provision mandated by the constitution.[25]

One method of analyzing the Arizona court's inherent power theory in light of these principles focuses on the source of the Industrial Commission's power. There is no such administrative body mentioned in the constitution,[26] and thus the extent of its powers cannot be said to be controlled by the constitutional mandate.[27] Rather, the commission was established by the legislature[28] in an exercise of its police power, only the outlines of which were dictated by the constitution. Similarly, the 1-year limitation[29] was enacted via the police power and neither mandated nor prohibited constitutionally. This limit was a valid restriction on the jurisdiction of a statutorily created entity.[30] In enlarging the powers of the commission, therefore, the supreme court arguably was invading the legislative sphere in violation of the doctrine of separation of powers.[31]

It is likely, however, though certainly not clear from the opinion, that the court viewed its action not as an invasion of the legislative sphere, but as a legitimate effort to conform a statutory enactment with a governing constitutional provision.[32] Preceding its declaration of the commission's inherent power to waive the deadline where the ends of justice so require, the court quotes that part of the constitutional mandate which states:

> . . . The Legislature shall enact a Workmen's Compensation Law . . . in order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protec-

25. For instance, the constitution mandates that the workmen's compensation law extend to workmen engaged in manual or mechanical labor in public employment, that it cover both personal injury and death, and that the employee be given an opportunity to elect a common law suit rather than compensation under the Act. ARIZ. CONST. art. 18, § 8. See note 35 *infra*. Thus, the legislature may not enact a workmen's compensation program excluding these elements.

26. *See* ARIZ. CONST. art. 18, § 8.

27. *See* 111 Ariz. at 90, 523 P.2d at 787 (Holohan, J., dissenting).

28. See Pressley v. Industrial Comm'n, 73 Ariz. 22, 31, 236 P.2d 1011, 1017 (1951); Sims v. Moeur, 41 Ariz. 486, 19 P.2d 679 (1933); ARIZ. REV. STAT. ANN. § 23-921 (1971).

29. ARIZ. REV. STAT. ANN. § 23-1061(A) (Supp. 1975-76).

30. *See* Collins v. Industrial Comm'n, 102 Ariz. 509, 433 P.2d 801 (1967).

31. *See generally* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 30-31 (1973); Powell v. McCormack, 395 U.S. 486 (1969).

There are additional problems with the court's theory. The Arizona supreme court has repeatedly held that the Industrial Commission has only those powers granted it by the legislature. *See, e.g.*, Pressley v. Industrial Comm'n, 73 Ariz. 22, 31, 236 P.2d 1011, 1017 (1951); Paramount Pictures, Inc. v. Industrial Comm'n, 56 Ariz. 217, 220, 106 P.2d 1024, 1025 (1940); Danner v. Industrial Comm'n, 54 Ariz. 275, 283, 95 P.2d 53, 56 (1939). Indeed, the court had declared that article 8, section 8, merely directs the legislature to exercise its inherent power to create a workmen's compensation law. Goodyear Aircraft Corp. v. Industrial Comm'n, 62 Ariz. 398, 408, 158 P.2d 511, 515 (1945).

32. *See* 111 Ariz. at 89, 523 P.2d at 786. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

> tion 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 . . . .[33]

Apparently interpreting the "just and humane" language as imposing a constitutional restriction on the entire workmen's compensation program, the court held that the legislature has no power to impose an absolute time limitation which may result in injustice in certain cases.[34] Thus, the commission, in administering the program, is not bound by the statutory time limit when such a result would ensue. It would appear, however, that the court's interpretation in this regard lacks textual support in the Arizona constitution. When viewed in the context of the entire constitutional provision, the "just and humane" language appears simply to proclaim the constitutional policy underlying the requirement that an employee be able to elect coverage merely by failing to reject workmen's compensation protection prior to injury.[35] Thus, the court may have erred by limiting in this way the legislative power to define the workmen's compensation program.[36]

The constitutional difficulty with the inherent powers doctrine is compounded by potential administrative problems. Prior to *Van Horn* the Arizona courts had reviewed awards of the commission on the basis of its clearly defined statutory authority.[37] For example, if the commission relieved a claimant from the effect of late filing, the reviewing court needed only to determine if the situation fell within two specific judicially established exceptions.[38] Under a grant of inherent powers, however, the courts would be forced to devise new standards against which to review awards of the Industrial Commission. Although the majority opinion declared that the commission's inherent powers may be asserted

---

33. 111 Ariz. at 89, 523 P.2d at 786, *quoting* ARIZ. CONST. art. 18, § 8.

34. 111 Ariz. at 89, 523 P.2d at 786.

35. The Legislature shall enact a Workmen's Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment . . . ; and, provided further, in order to ensure 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 injury.

ARIZ. CONST. art. 18, § 8.

36. The court's commitment to its interpretation, however, can be seen in the second *Van Horn* decision, where the Arizona supreme court modified its original holding only after finding that an amendment to the statute setting the 1-year limitation brought it into compliance "with the constitutional mandate to the legislature to provide a 'just and humane compensation law.'" 111 Ariz. at 239, 527 P.2d at 284.

37. ARIZ. REV. STAT. ANN. § 23-1061 (Supp. 1975-76); *see* Collins v. Industrial Comm'n, 102 Ariz. 509, 510-11, 433 P.2d 801, 803-04 (1967); Freig v. Industrial Comm'n, 15 Ariz. App. 187, 189, 487 P.2d 408, 410 (1971).

38. See discussion note 3 *supra*.

when the "ends of justice dictate,"[39] the formulation of any concrete standards to ensure consistent application of such a doctrine is virtually impossible.[40] According to the dissent in *Van Horn*, it is possible that in the process of creating new standards against which the courts could review inherent powers, the courts and the commission might establish precedent that would substantially erode the limitations originally imposed by statute.[41]

An earlier judicial grant of broad discretion to the Industrial Commission,[42] allowing it to relax the time limitation for requesting a hearing after an employee has received a notice of claim status,[43] has caused the courts considerable difficulty in determining the limits of such discretion.[44] Only after 3 years of confusion and conflicting interpretations among the various departments in the court of appeals did the Arizona supreme court resolve the differing interpretations given the

39. 111 Ariz. at 90, 523 P.2d at 787.

40. Justice Holohan, in his dissenting opinion, mentioned some of the possible difficulties which might arise from the use of a concept of inherent powers to satisfy the ends of justice:

> [T]he Court's extension of the statute leaves the Commission with no real standard. The Court holds that the Commission may relieve a workman of a failure to file a timely application for compensation when the ends of justice dictate. In the spirit of the federal supreme court we will decide on a case-by-case basis what is meant by the "ends-of-justice." Do we mean that excusable neglect is part of the ends of justice? Is the concept to be limited to conduct by the employer or insurer which would constitute fraud, coercion or estoppel?

Id. at 92, 523 P.2d at 789 (Holohan, J., dissenting).

41. *Id.* at 91, 523 P.2d at 788 (Holohan, J., dissenting).

42. *See* Parsons v. Bekins Freight, 108 Ariz. 130, 493 P.2d 913 (1972).

43. A notice of claim status is issued when the insurance carrier, after receiving the workman's claim, notifies the workman of the denial of his claim. The carrier is also required to file a notice of claim status with the Industrial Commission. ARIZ. REV. STAT. ANN. § 23-1061(F) (Supp. 1975-76).

44. In Parsons v. Bekins Freight, 108 Ariz. 130, 493 P.2d 913 (1972), the Arizona supreme court held that when a claimant was unaware that his present symptoms were a continuation of an industry-related injury, relief from failure to make a timely filing should be allowed. The court in *Parsons* set down three limiting guidelines for allowing recovery: (1) do the facts warrant relief in the interest of justice? (2) was the delay excessive? (3) are the consequences of granting relief unfair to the insurance carrier? *Id.* at 132, 493 P.2d at 915. The Arizona court of appeals, however, split in interpreting the extent of discretion granted to the Industrial Commission. In Taylor v. Industrial Comm'n, 20 Ariz. App. 46, 509 P.2d 1083 (1973), department B of division one of the court of appeals held the exception was limited to situations where, at the time of the issuance of an award or a notice of claim status, the claimant could not have obtained knowledge of facts concerning the extent of his injury through reasonable diligence. The commission could then waive the 60-day filing requirement, provided that the delay was neither excessive nor prejudicial to the interests of the carrier. *Id.* at 50, 509 P.2d at 1087. *See also* Garcia v. Industrial Comm'n, 20 Ariz. App. 145, 146, 510 P.2d 1050, 1051 (1973). In contrast, the appellate court in department A of division one in Trull v. Industrial Comm'n, 21 Ariz. App. 511, 520 P.2d 1188 (1974), applied the *Parsons* guidelines in less restrictive terms. The *Trull* court found that a delay in filing, caused by petitioner's living a considerable distance from her attorneys and her involvement in legal proceedings concerning her standing to file an Arizona claim as a widow, warranted the commission's acceptance of jurisdiction. Further, the *Trull* court held that where a delay is not excessive and imposes no unfair consequences on the insurance carrier, the commission may excuse the delay. Thus, under *Taylor*, failure to file a request for a hearing for reasons other than a claimant's reasonable lack of knowledge will not entitle a claimant to relief, while according to *Trull*, relief might be granted under other circumstances.

exception to the time limitation.[45] The granting of discretion as to the notice of claim status hearing was accompanied by some sort of standards to guide future judicial decisionmaking. Even greater confusion could be expected to result from the standardless grant in *Van Horn*.[46]

The Filing Requirement as an Affirmative Defense

In view of the legal and practical difficulties of the inherent powers doctrine, it is understandable that the court decided to review and alter its decision. In the second *Van Horn* opinion,[47] accompanying the denial of a rehearing, the court modified its position and relied upon *Priedigkeit v. Industrial Commission*[48] to hold that the 1-year limitation is an affirmative defense rather than a jurisdictional prerequisite.[49] As such it is susceptible to a plaintiff's claim of equitable estoppel against the employer,[50] and thus would not bar Van Horn's claim.[51] This finding rendered the broad language of the original *Van Horn* decision unnecessary to decide the case,[52] and that decision was accordingly modified.

The *Priedigkeit* decision construed an amendment to the limitation statute[53] enacted in response to the court's interpretation of the 1-year requirement as jurisdictional.[54] As amended, the statute states that

45. *See* Chavez v. Industrial Comm'n, 111 Ariz. 364, 529 P.2d 1181 (1974). The transferability of these broad standards can be seen in Janis v. Industrial Comm'n, 111 Ariz. 362, 529 P.2d 1179 (1974), where the court used the *Parsons* rationale to extend the time limitation for reviewing an award. *See* ARIZ. REV. STAT. ANN. § 23-942(D) (Supp. 1975-76).

46. *Compare* Parsons v. Bekins Freight, 108 Ariz. 130, 493 P.2d 913 (1972), *with* Van Horn v. Industrial Comm'n, 111 Ariz. 86, 523 P.2d 282, *modified*, 111 Ariz. 237, 527 P.2d 282 (1974).

47. 111 Ariz. 237, 527 P.2d 282 (1974).

48. 20 Ariz. App. 594, 514 P.2d 1045 (1973). This case and the statute it interpreted apparently were called to the court's attention by the amicus curiae brief of the State Compensation Fund, filed in conjunction with the motion for rehearing. *See* 111 Ariz. at 239, 527 P.2d at 284.

49. 111 Ariz. at 239, 527 P.2d at 284.

50. *Id.*

51. See text & notes 9-12, 14 *supra.*

52. 111 Ariz. at 239, 527 P.2d at 284. The court stated: "We believe that the statute as amended complies with the constitutional mandate to the legislature to provide a 'just and humane compensation law,' . . . ." *Id.*

In fact, basing the original decision on the inherent powers doctrine was unnecessary as well, since the court, relying on *Parsons*, had held that the employer and the commission were both estopped from enforcing the limitation. 111 Ariz. at 90, 523 P.2d at 787. In the second decision, the court retracted its holding that the commission itself could be estopped. 111 Ariz. at 239, 527 P.2d at 284.

53. 20 Ariz. App. at 597, 514 P.2d 1048. ARIZ. REV. STAT. ANN. § 23-1061(D) (Supp. 1975-76) provides: "The issue of failure to give notice must be raised at the first hearing on a claim for compensation in respect to the injury or death." Compare subsection D prior to the amendment, which read: "No application [for compensation] shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the right thereto accrued." Ch. 83, § 80(d), [1925] Ariz. Sess. Laws 411.

54. *See* Collins v. Industrial Comm'n, 102 Ariz. 509, 433 P.2d 801 (1967).

objection to untimely filing must be raised at the first hearing.[55] These amendments, according to *Priedigkeit*, make it "apparent that the one year filing requirement can no longer be considered as jurisdictional in nature. Rather, it must now be considered as being in the nature of an affirmative defense, which must be asserted by the party relying thereon, and which may be waived unless *timely* asserted."[56] *Van Horn* follows the *Priedigkeit* rationale, reasoning further that as an affirmative defense, the 1-year limitation is susceptible also to an assertion of equitable estoppel.[57] As neither *Van Horn* decision made a determination that the employer failed to assert the limitations defense at the first hearing, the decision apparently turned on the principle of estoppel. Since estoppel prevents assertion of a right that is inconsistent with a party's prior conduct,[58] the court found that in *Van Horn* the employer, having lulled the claimant into a false sense of security, was estopped from asserting the affirmative defense of failure to file.[59]

While the court in the second *Van Horn* opinion indicated an intent to retreat from its earlier position, it did not indicate complete abandonment of the inherent powers doctrine.[60] The commission re-

55. See discussion note 53 *supra*.

56. 20 Ariz. App. at 597, 514 P.2d at 1048 (emphasis in original). Although the opinion used the term "affirmative defense," the court noted that the analogy between the statute and an affirmative defense was not completely appropriate. Once the issue of a failure to comply is raised, the claimant, in accordance with his burden of establishing all elements of his claim, would have the burden of establishing that he in fact filed his claim within the 1-year period. *Id.* at 597 n.6, 514 P.2d at 1048 n.6. Other jurisdictions also have held that failure to raise the defense of untimely filing of an original claim amounts to a waiver of the defense. *See* Gunn Distrib. Co. v. Talbert, 230 Ark. 442, 323 S.W.2d 434 (1959); Peerless Coal Co. v. Gordon, 237 Ark. 152, 372 S.W.2d 240 (1963); Iacovelli v. Modern Bakery Co., 4 App. Div. 2d 723, 163 N.Y.S.2d 522 (1957).

57. Waiver involves the voluntary relinquishment of a known right. Arizona Title Guar. Trust Co. v. Modern Homes, Inc., 84 Ariz. 399, 330 P.2d 113 (1958); *In re* Brandt's Estate, 67 Ariz. 42, 190 P.2d 497 (1948). On the other hand, the concept of estoppel, often confused with waiver, *see* Webb v. Crane Co., 52 Ariz. 299, 80 P.2d 698 (1938), precludes a party from asserting a right after having taken a position inconsistent with such assertion. Holmes v. Graves, 83 Ariz. 174, 318 P.2d 354 (1957). The two doctrines are generally both assertible in the same procedural context. *See generally* "Satisfaction of Judgment as a Bar to Appeal Rights," 16 ARIZ. L. REV. 489, 509, 511-12 (1974).

One court, in purporting to apply waiver principles in a workmen's compensation case, in fact used a rationale closer to that of estoppel. In this case the employer was said to have waived his limitation defense by making voluntary payments before the expiration of the limitation for filing a claim, the court's reasoning being that voluntary payment leads the claimant to postpone filing a claim, thus making delay reasonable. Lindskog v. Rosebud Mines, Inc., 84 Idaho 160, 369 P.2d 580 (1962); *see* A. LARSON, *supra* note 12.

58. *See* Holmes v. Graves, 83 Ariz. 174, 318 P.2d 354 (1957); "Satisfaction of Judgment as a Bar to Appeal Rights," *supra* note 57, at 511 & n.19. For examples of estoppel in a workmen's compensation context similar to the situation in *Van Horn*, see Cowden Mfg. Co. v. Fulty, 472 S.W.2d 679 (Ky. 1971); Thorn v. Strawbridge & Clothier, 191 Pa. Super. 59, 155 A.2d 414 (1959); Gibbs v. Texas Employer's Ins. Ass'n, 378 S.W.2d 349 (Tex. Civ. App. 1964); *see* 3 A. LARSON, *supra* note 12, § 78.45. See discussion note 57 *supra*.

59. 111 Ariz. at 239, 527 P.2d at 284.

60. The court did not specifically overrule its prior decision establishing the inherent powers doctrine, but merely "modified" it. *See* 111 Ariz. at 240, 527 P.2d at 285.

tains considerable discretion in hearing equitable defenses.[61] Thus, there appears to be a variety of circumstances which would justify the commission in rejecting the affirmative defense of failure to file. Such situations might involve the mental incompetence of the claimant,[62] negligence on the part of the claimant's attorney,[63] or the claimant's failure through no fault of his own to obtain claim forms.[64] It appears, therefore, that the court's modification of its decision does not substantially narrow the area of exceptions to the 1-year limitation. Nonetheless, the affirmative defense interpretation serves to bring the exceptions within the general scope of the legislative intent, and ties in with accepted and manageable judicial concepts. It is thus an administrative and constitutional improvement over the original holding, while still preserving the flexibility necessary to accomplish a just result.

Conclusion

In the original *Van Horn* decision, the Arizona supreme court gave sweeping powers to the Industrial Commission in an effort to achieve justice. Apparently recognizing that its granting of inherent powers to the commission might create both constitutional and administrative problems, the court modified its position, holding that the 1-year requirement was an affirmative defense which must be raised at the first hearing or waived. The court's modification, however, was not a total retreat, but left the commission with a residuum of equitable powers which will allow it to achieve a more just result in appropriate cases.

B. Application of the Personal Comfort Doctrine To Traveling Employees

Workmen's compensation legislation exemplifies a state's concern for injured employees, reflecting a general policy that employers who receive the benefit of their employees' labors should also provide compensation for on-the-job injuries.[1] It was not the intent of the legisla-

61. *See* Red Rover Copper Co. v. Industrial Comm'n, 58 Ariz. 203, 214, 118 P.2d 1102, 1107 (1941) ("the Commission in making an award necessarily has the right to consider and make the proper application of the rules of equity as well as those of common law, to the facts as found by it.").

62. *See* United Brick & Tile Co. v. Roy, 356 P.2d 107 (Okla. 1960).

63. *See* State Compensation Fund v. Foulds, 167 Colo. 123, 445 P.2d 716 (1968).

64. Blackburn v. Pennsylvania Turnpike Comm'n, 206 Pa. Super. 192, 213 A.2d 159 (1965).

1. *See* Engle v. Industrial Comm'n, 77 Ariz. 202, 207, 269 P.2d 604, 606 (1954); English v. Industrial Comm'n, 73 Ariz. 86, 89, 237 P.2d 815, 817 (1951); Kay v. Hillside Mines, 54 Ariz. 36, 42, 91 P.2d 867, 869 (1939).

ture, however, to make the employer a general insurer of his employees' safety.[2] Thus, compensation will be granted under the Arizona Workmen's Compensation Act[3] only after the injured worker has shown that the injury occurred in the course of employment and that it arose out of the employment.[4] These are two separate requirements, both of which must be demonstrated to justify recovery.[5]

Certain limitations have been judicially developed in response to the statutory requirement that the injury arise out of and in the course of employment, including the rules that the injury must occur on the employer's premises,[6] and that injuries sustained while coming to or going from work are not covered.[7] These seemingly narrow strictures are often liberally interpreted, however, to permit compensation in a wide range of work-related accidents. For example, an exception to the premises restriction and the going and coming doctrine has been recognized where the injury occurred during travel necessitated by the employment.[8]

Another example of the courts' liberalization of the restrictions on workmen's compensation recovery is the line of cases permitting recovery to an employee injured while taking a pause from his duties to minister to his personal comfort and needs.[9] This exception, known as the personal comfort doctrine, has been applied to compensate injuries sustained while the worker was drinking,[10] eating lunch,[11] smoking,[12]

2. *See* Buick v. Industrial Comm'n, 82 Ariz. 129, 133, 309 P.2d 257, 259 (1957); Application of Barrett, 78 Ariz. 219, 223, 278 P.2d 409, 411 (1955); Strauss v. Industrial Comm'n, 73 Ariz. 285, 290, 240 P.2d 550, 554 (1952).

3. ARIZ. REV. STAT. ANN. §§ 23-901 to -1091 (1956), *as amended*, (Supp. 1975-76); *see* ARIZ. CONST. art. 18, § 18.

4. ARIZ. REV. STAT. ANN. § 23-1021(A) (1956).

5. Edwards v. Industrial Comm'n, 94 Ariz. 342, 343, 385 P.2d 219, 220 (1963); Peter Kiewit Sons' Co. v. Industrial Comm'n, 88 Ariz. 164, 168, 354 P.2d 28, 30 (1960); Loveless v. Industrial Comm'n, 6 Ariz. App. 345, 346-47, 432 P.2d 600, 601-02 (1967); *see* 7 ARIZ. L. REV. 350 (1965).

6. Pauley v. Industrial Comm'n, 109 Ariz. 298, 302, 501 P.2d 1160, 1164 (1973); Gaughan v. Industrial Comm'n, 21 Ariz. App. 137, 138, 516 P.2d 1232, 1233 (1974).

7. Harris v. Industrial Comm'n, 72 Ariz. 197, 198, 232 P.2d 846, 847 (1951).

8. Delk v. Industrial Comm'n, 74 Ariz. 378, 249 P.2d 943 (1952); Strauss v. Industrial Comm'n, 73 Ariz. 285, 240 P.2d 550 (1952); Harris v. Industrial Comm'n, 72 Ariz. 197, 232 P.2d 846 (1951). Under this exception compensation for injuries has been awarded where the employee's transportation was provided by the employer, Strauss v. Industrial Comm'n, *supra* at 289, 240 P.2d at 553, or the employee was injured while performing a special task or mission for the employer away from the employment premises. *See* Cavness v. Industrial Comm'n, 74 Ariz. 326, 256 P.2d 709 (1953). Courts have extended this exception further by compensating employees whose travel time was paid by the employer, *see* Serrano v. Industrial Comm'n, 75 Ariz. 326, 256 P.2d 709 (1953), and where the employee was subject to 24-hour call. *See* State Compensation Fund v. Kempainen, 12 Ariz. App. 483, 472 P.2d 94 (1970).

9. *See generally* Comment, *Workmen's Compensation: The Personal Comfort Doctrine*, 1960 WIS. L. REV. 91.

10. *See* Alabama Concrete Pipe Co. v. Berry, 226 Ala. 204, 206, 146 So. 271, 272 (1933).

11. *See, e.g.*, Nicholson v. Industrial Comm'n, 76 Ariz. 105, 110, 259 P.2d 547, 550 (1953); Racine Rubber Co. v. Industrial Comm'n, 165 Wis. 600, 162 N.W. 664 (1917).

12. *See, e.g.*, Wiseman v. Industrial Accident Comm'n, 46 Cal. 2d 570, 297 P.2d 640

and sleeping.[13] In considering whether an injury is compensable under either the personal comfort doctrine or the traveling employee rule, of course, courts still must find that the injury meets the statutory requirements of occurring in the course of employment and arising out of employment.

In *Pottinger v. Industrial Commission*,[14] a case involving injury sustained by a traveling employee while attending to his personal comfort, the Arizona court of appeals was confronted with a combination of these doctrines. The petitioner, George Pottinger, traveled to Chandler, Arizona, to attend an insurance convention where he hosted a hospitality room sponsored by his employer. Alcoholic beverages were served in the hospitality room and, while serving as host, he became intoxicated. Upon returning to his hotel room, Pottinger sustained serious burns when he dropped a match onto his shirt while attempting to light a cigarette. When Pottinger sought compensation for his injuries, the Industrial Commission found that his burns were not the result of an accident arising out of his employment.[15]

The Arizona court of appeals affirmed the commission's denial of compensation,[16] finding that although Pottinger was acting in the course of his employment on the night of the injury, the accident did not arise out of the employment. The court stated that the personal comfort doctrine did not apply to traveling employees such as Pottinger.[17] Further, even if the doctrine did apply, Pottinger's accident was not compensable because it arose out of a purely personal act of the petitioner.[18]

This casenote will discuss and analyze the application of the personal comfort doctrine to traveling employees.[19] First, the personal comfort doctrine will be examined in light of the requirement that the accident occur in the course of and the injury arise out of the employment. Attention will also be focused on the applicability of the personal comfort doctrine to injuries occurring off the employer's premises. Fi-

(1956); Petrie v. Crucible Steel Co., 4 App. Div. 2d 905, 166 N.Y.S.2d 780 (1957); Boullier v. Samsan Co., 100 R.I. 676, 219 A.2d 133 (1966).

13. *See* Peterson v. Industrial Comm'n, 16 Ariz. App. 41, 490 P.2d 870 (1971) (sleeping at a hotel while on employment-related travel).

14. 22 Ariz. App. 389, 527 P.2d 1232 (1974).

15. *Id.* at 390, 527 P.2d at 1233.

16. *Id.*

17. *See id.* at 392, 527 P.2d at 1235. But see discussion note 43 *supra.*

18. *Id.* at 393, 527 P.2d at 1236. In dissenting, Judge Nelson argued that the primary source of the petitioner's injuries was the state of intoxication caused by his employment duties. Pottinger's inability to light a cigarette resulted from this state of intoxication. *Id.* at 394, 527 P.2d at 1237.

19. For purposes of this casenote, the term "traveling employee" is intended to represent all employees who, as part of their employment duties, are required to depart from their employers' premises.

nally, the principles developed from this analysis will be applied in discussing the correctness of the *Pottinger* decision.

Personal Comfort Doctrine

The personal comfort doctrine is a judicial recognition that employees who engage in reasonable activities for their needs and relaxation while within the time and space limits of their employment do not leave the course of employment for purposes of compensation under workmen's compensation laws.[20] For example, the Arizona supreme court has held that preparing lunch is an activity which is reasonably incidental to the employment and is therefore within the course of employment.[21]

For such an injury to be compensable, however, the employee engaging in a personal comfort activity must also be acting within the scope of his employment. The limits of this doctrine have been carefully circumscribed by the courts. It has been held that the employee may not engage in activities which are expressly prohibited by the employer,[22] nor may the activity depart from the employment to such an extent as to constitute abandonment of the employment.[23] Although the

20. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 21.00, at 5-3 to -4 (1972). The analytical problem with a personal comfort activity is that the activity appears to be beneficial to the employee only and to bear no relation to the employment or the employee's duties. Two rationales have been offered for holding such incidental activities within the course of employment. Many courts recognize that the employer derives an indirect benefit from a comfortable employee because he resumes his work refreshed and relaxed, and thus is more productive and effective in the performance of his duties. Comment, *Workmen's Compensation and the Coffee Break: An Adjustment in the Law*, 4 ARIZ. L. REV. 93, 96 (1962). Additionally, the particular activity may be deemed part of the employment either because of its nature or because of the employment's customs and practices, such as agricultural workers cooling off in flooded irrigation canals. 1 A. LARSON, *supra* § 20.20, at 5-2 to -3. In Arizona, the supreme court has recognized the latter rationale by holding that an injury occurs within the course of employment if the employee was performing some act reasonably incidental to his duties. Royall v. Industrial Comm'n, 106 Ariz. 346, 350, 476 P.2d 156, 160 (1970); Goodyear Aircraft Corp. v. Industrial Comm'n, 62 Ariz. 398, 411, 158 P.2d 511, 515 (1945).

21. Goodyear Aircraft Corp. v. Industrial Comm'n, 62 Ariz. 398, 158 P.2d 511 (1945). In other jurisdictions compensation has been awarded for various types of injuries resulting from the pursuit of personal comfort activities. Whiting-Mead Commercial Co. v. Industrial Accident Comm'n, 178 Cal. 505, 173 P. 1105 (1918) (lighting a cigarette with hand covered by turpentine-soaked bandage); Divelbiss v. Industrial Comm'n, 140 Colo. 452, 344 P.2d 1084 (1959) (showering after completion of a work shift in a mine); Harlan Collieries Co. v. Johnson, 308 Ky. 89, 212 S.W.2d 540 (1948) (drinking acid under the mistaken belief that it was water).

22. Goodyear Aircraft Corp. v. Gilbert, 65 Ariz. 379, 383-84, 181 P.2d 624, 627 (1947). The court stated however, that where the prohibition pertained only to the manner in which the work was accomplished, rather than the scope of the work, compensation is generally not barred by a violation. *Id.*

23. *Cf.* Sherril & LaFolette v. Herring, 78 Ariz. 332, 336-37, 279 P.2d 907, 910 (1955); King v. Alabam's Freight Co., 38 Ariz. 205, 220, 298 P. 634, 639 (1931); Embree v. Industrial Comm'n, 21 Ariz. App. 411, 413, 520 P.2d 324, 326 (1974). Additionally, when the method chosen to attain comfort is highly unusual, unreasonable, or dangerous, it may not be considered incidental to the employment. Pacific Fruit Express Co. v. Industrial Comm'n, 32 Ariz. 299, 306-07, 258 P. 253, 255-56 (1927);

doctrine is primarily a course-of-employment rationale, the facts surrounding an injury sustained in the pursuit of personal comfort will often by dispositive of the arising standard as well. Additionally, examination of the personal activity engaged in at the time of the injury will involve analysis of the degree and type of risk, which are arising-out-of-the-employment criteria. Thus, to determine whether a personal comfort activity which results in injury is compensable, the same two-part analysis must be satisfied as for any injury under the Workmen's Compensation Act.[24]

In the Course of Employment

The Arizona supreme court has stated that "in the course of employment" refers to the time, place, and circumstances surrounding the injury in relation to the employment.[25] The accident must take place within the time period of the employment, at a place where the employee might reasonably have been expected to be.[26] Additionally, the circumstances of the injury must indicate that the worker was involved in some activity relating to his duties.[27] Normally these determinations require an analysis of the events and activities engaged in by the employee at the moment of the accident. In *Pottinger v. Industrial Commission*, the court of appeals found that the petitioner was within the course of his employment on the night of the injury.[28] The court stated the employee's attendance at the convention was of the kind of duties he was employed to perform for the benefit of his employer, and was within the time and space limits of his employment.[29] In reaching its conclusion that Pottinger was within the course of his employment at the time of his injury, the court recognized and partially applied the widely accepted traveling employee rule.[30]

Generally, an employee is not compensated for injuries which occur off the employer's premises, though the activity engaged in by the

accord, Young v. Department of Labor & Indus., 200 Wash. 138, 146, 93 P.2d 337, 340-41 (1939).

24. *See* Comment, *Workmen's Compensation: Personal Comfort in Practical Perspective*, 1971 L. & SOC. ORDER 823, 824-25.

25. Royall v. Industrial Comm'n, 106 Ariz. 346, 349, 476 P.2d 156, 159 (1970); Nicholson v. Industrial Comm'n, 76 Ariz. 105, 107-08, 259 P.2d 547, 549 (1953).

26. Royall v. Industrial Comm'n, 106 Ariz. 346, 350-51, 476 P.2d 156, 160-61 (1970).

27. *Id.* at 349, 476 P.2d at 159.

28. 22 Ariz. App. at 391, 537 P.2d at 1234.

29. "The conduct of a servant or agent is within the scope of his employment if '(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is actuated, at least in part, by a purpose to serve the master.' "

Id. at 390, 527 P.2d at 1233, *quoting* Transamerica Ins. Co. v. Valley Nat'l Bank, 11 Ariz. App. 121, 125, 462 P.2d 814, 818 (1969).

30. 1 A. LARSON, *supra* note 20, § 25.00, at 5-172. *See* text & notes 8 *supra*, 34-35 *infra*.

employee at the time of the injury may be associated with the employment.[31] The employee is deemed not to be in an appropriate place to justify compensation under the workmen's compensation statutes. For instance, under the going and coming rule, an employee involved in an automobile accident on the way to work would not be compensated for any injury sustained in that accident, the rationale being that the injury, although resulting from an activity incidental to the employment,[32] is too remotely related to the employment.[33]

Courts have generally mitigated the harshness of the going and coming rule in relation to traveling workers because of the special nature of their employment. Traveling employees are deemed to be within the course of their employment throughout the journey away from the work premises.[34] The application of this rule is not unlimited, however. If an employee deviates from his work trip to engage in a personal activity which is not related in time and space to the employment, compensation will be denied.[35]

Applying these principles, the *Pottinger* court appears to be correct in holding that Pottinger was within the course of his employment at the time of the accident.[36] Traditionally, in analyzing the in-the-course-of-employment requirement, it is necessary to look at the nature of the work and the expectations of the employer.[37] As an insurance agency office manager, Pottinger was often required to engage in professional and social functions. Additionally, the purpose of the hospitality room hosted by Pottinger at the insurance convention was to generate new accounts. Although he was not required to stay overnight at the convention site by his employer, both prudence and law would mandate that Pottinger obtain a reasonable period of rest following an evening of

31. Harris v. Industrial Comm'n, 72 Ariz. 197, 198, 232 P.2d 846, 847 (1951); 1 A. LARSON, *supra* note 20, § 15.11, at 4-2 to -3.

32. In contrast, it is recognized that an injury which occurs on the employer's premises while the worker is either going to or coming from work is compensable. See 1 A. LARSON, *supra* note 20, § 15.11, at 4-3. Arizona has only recently recognized the premises exception to the going and coming rule. *See* Pauley v. Industrial Comm'n, 109 Ariz. 298, 302, 508 P.2d 1160, 1164 (1973).

33. 1 A. LARSON, *supra* note 20, § 15.11 at 4-3. Travel to or from work is viewed as failing to satisfy the time as well as space requirement. *See generally* "Applicability of the Going and Coming Rule to Traveling National Guardsmen," 17 ARIZ. L. REV. 639, 920, 923-24 (1975).

34. 1 A. LARSON, *supra* note 20, § 25.00, at 5-172.

35. *Id.* § 19.00, at 4-216.

36. 22 Ariz. App. at 391, 527 P.2d at 1234. In finding that the petitioner was within the course of his employment on the night of the injury, the court relied on Peterson v. Industrial Comm'n, 16 Ariz. App. 41, 490 P.2d 870 (1972). In *Peterson* the court of appeals stated that an accident occurs within the course of employment if, during the time for which he is employed, the employee is injured while doing what a person so employed might reasonably do and is at a place where he might reasonably be expected to be. *Id.* at 44, 49 P.2d at 873. The *Peterson* court went on to hold that sleeping was reasonably incidental to the work of a traveling employee. *Id.*

37. 1 A. LARSON, *supra* note 20, § 20.00, at 5-1.

drinking,[38] rather than driving home immediately. Thus, Pottinger was within the course of his employment because he was a traveling employee within reasonable time and space limitations. Holding that Pottinger was within the course of employment during his overnight stay in Chandler, however, does not end the analysis. Arguably, Pottinger's lighting of a cigarette was a personal act outside the course of employment unless the personal comfort doctrine is applicable.[39]

In *Royall v. Industrial Commission*[40] the Arizona supreme court indicated that the personal comfort activity must be reasonably incidental to the employment if any resulting injury is to be covered by workmen's compensation. As with any course-of-employment question, the time, place, and circumstances of the accident are to be considered in making this determination.[41] In *Royall* the court found that an injury, sustained when petitioner tripped over another employee's feet while walking to a telephone in the employee lounge to make a personal call, occurred within the course of employment. Petitioner was within reasonable time and space limits at the time of the injury, being on a paid coffee break in an area provided by the employer for employee relaxation.

The personal comfort doctrine is equally applicable to traveling employees. A traveling employee may engage in activities, such as eating and sleeping,[42] which although primarily directed to the attainment of employee comfort, also may be reasonably incidental to the employment of a traveling worker.[43] In determining whether Pottinger's

38. The Arizona courts have consistently held that because an employee was intoxicated at the time he was injured, he is not thereby barred from coverage under the Workmen's Compensation Act. *See, e.g.*, Ortega v. Ed Horrell & Son, 89 Ariz. 370, 362 P.2d 744 (1961); King v. Alabam's Freight Co., 38 Ariz. 205, 298 P. 634 (1931); Peterson v. Industrial Comm'n, 16 Ariz. App. 41, 49 P.2d 870 (1971). For such a result to be warranted, the state of intoxication must have reached such an extreme as to be tantamount to abandonment of employment. Simpkins v. State Banking Dep't, 45 Ariz. 186, 42 P.2d 47 (1935); Embree v. Industrial Comm'n, 21 Ariz. App. 411, 520 P.2d 324 (1974); Peterson v. Industrial Comm'n, *supra*. In *Pottinger* a bar based on intoxication would appear particularly unjust since, as pointed out by Judge Nelson, the intoxication was itself a direct result of the employment. 22 Ariz. App. at 394, 527 P.2d at 1237 (dissenting opinion).

39. See text & notes 20-24 *supra*.

40. 106 Ariz. 346, 476 P.2d 156 (1970).

41. *Id.* at 350-51, 476 P.2d at 160-61. See text accompanying notes 25-27 *supra*. In Goodyear v. Industrial Comm'n, 62 Ariz. 398, 158 P.2d 511 (1945), the Arizona supreme court first enunciated the proper approach to analyzing the activity engaged in by the employee at the time of the injury. The *Goodyear* court found that the conditions of the claimant's employment made it necessary for him to bring soda pop to work. *Id.* at 414-15, 158 P.2d at 518. The court also noted that since chilling the pop was necessary to making it palatable, placing the pop in the cooler was reasonably incidental to his employment. Thus, the bursting of the bottle and the employee's resulting injury were within the course of employment. *Id.* at 415, 158 P.2d at 518.

42. *See, e.g.*, Wiseman v. Industrial Accident Comm'n, 46 Cal. 2d 570, 297 P.2d 649 (1956); Patton v. Patton, 308 S.W.2d 739 (Mo. 1958); Burton v. Broadcast Music Inc., 31 App. Div. 2d 557, 294 N.Y.S.2d 406 (1968).

43. Arizona courts have already recognized the application of the personal comfort

attempt to light a cigarette in his hotel room met the requirements of the personal comfort doctrine, however, the court of appeals relied heavily on the supreme court's decision in *Pauley v. Industrial Commission*,[44] which the *Pottinger* court interpreted as holding that the personal comfort doctrine was restricted to accidents occurring on the premises of the employer.[45] This interpretation eliminated traveling employees from the rule's coverage, and thus resulted in a denial of compensation to Pottinger. Concededly, *Pauley* held that where an employee is injured going to or coming from work, while off the premises, there can be no compensation.[46] Thus, the decision could be read as holding that the personal comfort doctrine is strictly limited to employees who are on the employer's premises. However, *Pauley* involved an employee who spent her regular working hours on the employer's grounds. She was injured while on a refreshment break on the boundary of the work area.[47] The *Pauley* rule purports only to limit the personal comfort doctrine for those employees whose regular employment duties require performance on the premises; at least arguably, it has no application to traveling employees.[48]

Assuming *Pauley* to be distinguishable, the applicability of the personal comfort doctrine in *Pottinger* should be determined on the basis of the traditional criteria of time, place, and circumstances. Pottinger was within reasonable time and space confines at the time of the injury in his capacity as a traveling employee. He was in his hotel room shortly after the closing of the hospitality room. Finally, petitioner's undeniable fatigue at the end of a long day's work, the employment-induced intoxication and the fact that smokers often unwind with a cigarette at the end of the day indicate that Pottinger's smoking was within the reasonable limits of the personal comfort doctrine. Conced-

doctrine to traveling employees in certain situations. For example, in Strauss v. Industrial Comm'n, 73 Ariz. 285, 240 P.2d 550 (1952), the Supreme Court of Arizona found that a car salesman who was required to do extensive intracity traveling was within the course of employment when he stopped to purchase groceries. Noting that the personal comfort doctrine was not limited to acts performed on the employer's premises, the court held that considering the number of hours worked by the employee and the time available for the accomplishment of such acts, stopping for groceries was reasonably contemplated by the employer. *Id.* at 290-91, 240 P.2d at 544. The holding of *Strauss* indicates that in situations where the employee is required to be away from the employer's premises as part of the fulfillment of his employment duties, the personal comfort doctrine may still be applicable. More recently, the court of appeals in Peterson v. Industrial Comm'n, 16 Ariz. App. 41, 490 P.2d 870 (1971), found that a reasonable period of sleep is incidental to the duties of an employee engaged in out-of-town travel. Although the court did not rely on the personal comfort doctrine in awarding compensation, it is evident that sleeping is not a duty of the employment: it is for the benefit of the employee. *Id.* at 44, 490 P.2d at 873.

44. 109 Ariz. 298, 508 P.2d 1160 (1973).
45. 22 Ariz. App. at 392, 537 P.2d at 1235.
46. 109 Ariz. at 302, 508 P.2d at 1164.
47. *Id.* at 301, 508 P.2d at 1163.
48. *See id.*

edly, the personal activity must still be related to the employment and not strictly recreational. Unreasonable forms of relaxation will surely take a traveling employee out of the course of his employment as they would a "premises" employee.[49] Nonetheless, smoking a cigarette after a long day's work before retiring for the night is reasonably incidental to the employment of a traveling employee,[50] as is cooling a bottle of soda pop for a worker at a torrid construction site.[51]

Arising out of the Employment

Although an employee may be found to be within the course of employment at the time an injury occurs, compensation will be denied if the injury did not also arise out of the employment.[52] This requirement has reference to the cause or origin of the injury[53] rather than the time, place, and circumstances of the injury. For an injury to be compensable, there must be some causal connection between it and the employment,[54] and the risk must arise in some way from the employment. A court's examination of the arising-out-of-the-employment requirement involves a two-fold analysis. In determining whether the arising requirement has been met, the court must first analyze the hazard which caused the injury to determine whether there is any work connection, and if so, to what degree. As a practical matter, this analysis involves consideration of the character and source of the risk in question.

---

49. *Cf.* Edwards v. Industrial Comm'n, 94 Ariz. 342, 385 P.2d 870 (1971). In that case, a traveling employee drowned while swimming in the pool at the motel where he was staying. The court held that a traveling employee could be compensated for injuries while away from his employer's premises so long as he was in the course of employment at the time the injury or death occurred. The court found that the recreational activity in which the decedent was indulging was in no way associated with or incident to his employment. *Id.* at 343-44, 385 P.2d at 220. *See also* 1 A. LARSON, *supra* note 20, § 22.00, at 5-62. Smoking a cigarette generally is not considered strictly recreational in the same way that swimming is. *See* cases cited note 50 *infra.*

50. *See, e.g.*, Wiseman v. Industrial Accident Comm'n, 46 Cal. 2d 570, 297 P.2d 649 (1956); Puffin v. General Elec. Co., 132 Conn. 279, 43 A.2d 746 (1945); Mack v. Post Exch., 207 S.C. 258, 35 S.E.2d 838 (1945). *See generally* 1 A. LARSON, *supra* note 20, § 21.40, at 5-22. Other jurisdictions have held that smoking is an activity which is reasonably incidental to the employment and therefore within its course. These decisions hold that smoking is such a common activity that the employer must reasonably anticipate that his employees will engage in it while pausing from their duties. *See* Whiting-Mead Commercial Co. v. Industrial Accident Comm'n, 178 Cal. 505, 507, 173 P. 1105, 1106 (1918); Spencer v. Chesapeake Paperboard Co., 186 Md. 522, 538, 47 A.2d 385, 388 (1946). Further the smoking of tobacco is seen as being as much of a necessity to the smoking employee as are other personal comfort activities, such that he cannot perform his employment duties if he is deprived of the opportunity to partake of his habit. Whiting-Mead Commercial Co. v. Industrial Accident Comm'n, *supra* at 507, 173 P. at 1106.

51. See discussion note 41 *supra.*

52. *See* Royall v. Industrial Comm'n, 106 Ariz. 346, 349, 476 P.2d 156, 159 (1970); Peter Kiewit Sons' Co. v. Industrial Comm'n, 88 Ariz. 164, 168, 354 P.2d 28, 30 (1960).

53. Royall v. Industrial Comm'n, 106 Ariz. 346, 349, 476 P.2d 156, 159 (1970).

54. *Id.* at 349, 476 P.2d at 159; Edwards v. Industrial Comm'n, 94 Ariz. 342, 343-44, 385 P.2d 219, 220 (1963).

The arising-out-of-the-employment clause has been subject to two major lines of causal interpretation in American case law.[55] The peculiar risk doctrine requires that the injured worker show the origin of the harm to be peculiar to the employment.[56] The second approach, currently followed by a substantial number of courts,[57] is the actual risk standard. This test does not require that the risk be peculiar to the employment, but only that the employment subject the employee to a greater quantity of such risk than would otherwise exist.[58]

Having determined the line of interpretation to be followed, the court still has the difficult task of determining the source of the risk. The cause or origin of an injury may be categorized into three areas of risk.[59] First, there are risks which are distinctly associated with the employment,[60] such as machinery breaking, plant walls collapsing, tractors overturning. Such risks would be compensable under any line of interpretation of the term "arising out of the employment," as this is precisely the type of accident which the workmen's compensation statutes are intended to cover. The second category of risks causing injuries are those which are distinctly personal to the employee and have no work connection.[61] This category would include preexisting medical conditions such as advanced heart disease, or hazards which the injured employee has himself brought to his employment, such as a weapon for personal security. Little problem is posed for the courts by accidents resulting from such conditions, since hazards which have no work-connection clearly are not intended to be within the coverage of the workmen's compensation laws.[62] The third category of cases is, under-

55. The earliest approach used by the courts to interpret the arising requirement was a traditional tort law theory. Generally it was required that the employee show that the injury was proximately caused by the employment. 1 A. LARSON, *supra* note 20, § 6.50, 3-4 to -8. This strict interpretation of the arising-out-of-the-employment requirement has now generally been rejected by most courts as out of keeping with the spirit and purpose of the workmen's compensation laws. *Id.* § 6.50, at 3-4. On the other end of the spectrum is the emerging positional risk test, a far more liberal standard accepted by only a small minority of jurisdictions, which requires only that the injury would not have resulted but for the fact that the conditions of the employment placed the employee in such a position that he was injured. Larson, *The Positional-Risk Doctrine in Workmen's Compensation*, 1973 DUKE L.J. 761.

56. Larson, *supra* note 55, at 763.

57. 1 A. LARSON, *supra* note 20, § 6.30, at 3-3.

58. Larson, *supra* note 55, at 762.

59. 1 A. LARSON, *supra* note 20, § 7.00, at 3-4. A fourth category of risks, not relevant to this casenote, are neutral risks. These are risks which have no association with either the employment or the worker. Illustrative of this category are situations where an employee is hit by a stray bullet while working on the employment premises or lightning strikes an employee on the work premises. *Id.* § 7.30, at 3-10.

60. *Id.* § 7.10, at 3-9; Larson, *supra* note 55, at 764.

61. 1 A. LARSON, *supra* note 20, § 7.20, at 3-10; Larson, *supra* note 55, at 764.

62. *See* Sacks v. Industrial Comm'n, 13 Ariz. App. 83, 474 P.2d 442 (1970) (denying compensation for an injury caused solely by a preexisting medical condition); Loveless v. Industrial Comm'n, 6 Ariz. App. 345, 432 P.2d 600 (1967) (denying compensation for an injury caused by an imported risk). *See generally* Comment, *supra* note 24, at 831-32.

standably, the source of most litigation. This category involves those risks which are mixed, that is, neither distinctly personal to the employee nor distinctly associated with the employment.[63] Most personal comfort injuries result from a risk within this latter category.[64]

In *Pottinger* the court of appeals did not find the requisite casual connection between the injury and the employment. The court held that the petitioner's injuries were not caused by a risk related to the employment, but rather were the result of a purely personal act.[65] The court's analysis, however, presents some difficulties. First, the court's interpretation of the arising-out-of-employment standard is questionable. Additionally, the court may have incorrectly categorized the risk to which the petitioner was exposed.

In *Pottinger*, the court of appeals required that the injury arise out of a risk peculiar to or increased by the employment in order for the causal connection to be sufficient,[66] a condition not found satisfied in that case. Although the Arizona cases are not clear in this area, the pre-*Pottinger* trend appears to support the use of the actual risk approach while using peculiar risk language.[67] The Arizona supreme court's rejection of the notion that a risk must be peculiar to the employment originally was manifested in *Goodyear v. Industrial Commission*,[68] a case holding that an employee injured by a pop bottle exploding when set on ice was an injury which arose out of the employment. The *Goodyear* court stated that an accident need not result from any risk which is necessary or inherent in the employment,[69] but that the accident need only arise out of the nature, conditions, and obligations of the employment.[70] Thus, an accident which arose in the pursuit of an activity incidental to the employment was viewed as arising out of the conditions of the employment.[71] Certainly, the *Goodyear* danger of a pop bottle exploding when set on ice is not peculiar to any type of employment, but such a risk may be greatly increased due to various circumstances surrounding the employment, such as exposing the bottle to the desert sun prior to setting it on ice.

63. 1 A. LARSON, *supra* note 20, § 7.40, at 3-11. For example, an employee who injured his head while bending over a drinking fountain would have engaged in a personal risk, but the risk could also be categorized as an employment risk if the employee was authorized or not prohibited from using the fountain at the time of the injury.

64. 1 A. LARSON, *supra* note 20, § 12.33, at 3-273 to -274.

65. 22 Ariz. App. at 393, 527 P.2d at 1236.

66. *Id.*

67. *See, e.g.*, Warner v. Industrial Comm'n, 78 Ariz. 317, 279 P.2d 726 (1955); O'Connor v. Industrial Comm'n, 19 Ariz. App. 43, 504 P.2d 966 (1972); Charles v. Industrial Comm'n, 2 Ariz. App. 202, 407 P.2d 391 (1965).

68. 62 Ariz. 398, 158 P.2d 511 (1945).

69. *Id.* at 409, 158 P.2d at 516.

70. *Id.* at 415, 158 P.2d at 518.

71. *Id.*

More recently, the supreme court used a similar analysis in *Pauley v. Industrial Commission*[72] to hold that an employee injured while on a brief off-premises refreshment break was not injured as a result of conditions arising out of the employment, the risk being outside the employer's premises and not within its control. In that case, the court expressly overruled earlier decisions[73] which had interpreted the arising-out-of-the-employment requirement as necessitating a special risk or danger to which the employee was exposed.[74] Reaffirming its earlier interpretation of the arising requirement,[75] the court noted that the cause of an injury must be sufficiently associated with the employment to constitute a risk to which the claimant would not otherwise have been exposed.[76]

It would appear that under prior Arizona case law, Pottinger's injury would have been considered one arising out of his employment. His employment responsibilities had required that he remain in the hospitality room until four o'clock in the morning, indulging in alcoholic beverages provided by his employer. No doubt the long hours and the state of intoxication precipitated by the employment increased the risk of Pottinger's receiving an injury, even from such a common activity as smoking.[77] Pottinger's injury, as the court of appeals conceded, was at least in part attributable to his state of intoxication and fatigue,[78] conditions which closely associate the cause of the injury to the employment. The employment-induced intoxication and fatigue increased the degree of claimant's exposure to the danger of injury so as to create a situation in which he was subjected to an actual risk of the employment. The *Pottinger* court's requirement that an accident arising out of the pursuit of personal comfort evolve from a risk peculiar to the employment[79] placed a greater burden upon the claimant. As the *Pauley* court indicated, compensation is not dependent upon special or peculiar risks of the employment.[80]

The *Pottinger* court also rejected the petitioner's claim on the basis that the risk of the petitioner was a purely personal one, that is a risk which has no work connection.[81] In reaching this conclusion, the court

72. 109 Ariz. 298, 508 P.2d 1160 (1973).
73. City of Phoenix v. Industrial Comm'n, 104 Ariz. 120, 449 P.2d 291 (1969); McCampbell v. Benevolent & Protective Order of Elks, 71 Ariz. 244, 226 P.2d 147 (1950); Inman v. Industrial Comm'n, 9 Ariz. App. 156, 450 P.2d 122 (1969).
74. 109 Ariz. at 301-02, 508 P.2d at 1163-64.
75. Royall v. Industrial Comm'n, 106 Ariz. 346, 351, 476 P.2d 156, 161 (1970).
76. 109 Ariz. at 302, 508 P.2d at 1164.
77. *See* 22 Ariz. App. at 393-94, 527 P.2d at 1236-37 (Nelson, J., dissenting).
78. *Id.* at 391, 527 P.2d at 1234.
79. *Id.* at 393, 527 P.2d at 1236.
80. 109 Ariz. at 301, 508 P.2d at 1163.
81. 22 Ariz. App. at 393, 527 P.2d at 1236.

relied heavily upon the case of *Sacks v. Industrial Commission*,[82] in which compensation was denied to an employee who suffered a disc herniation while arising from a toilet on the employer's premises. The injury was conceded to be the result of a preexisting degenerative condition comparable to progressive arteriosclerosis.[83] The *Pottinger* court compared the *Sacks* decision with two cases involving injuries which, though occurring during personal activities of the employee, resulted from conditions existing on the employer's premises.[84] The court concluded from these three cases that injuries resulting from personal activities are compensable only when the risk involved has some direct connection with the employment. Pottinger's decision to smoke, lacking any direct work connection, thus involved him in a purely personal, and hence noncompensable, risk.

The court's conclusion on this point is at least questionable. The accident in *Pottinger* appears to have resulted from a mixed risk, rather than a purely personal one. Although smoking generally involves a personal risk, the surrounding circumstances indicate that in this instance it was work connected. Due to the claimant's employment-caused state of intoxication, the risk that an injury would occur was increased and thus a direct work connection was involved. It was not a risk that was distinctly personal to the employee, as was the preexisting, self-contained illness in *Sacks*. Had the court found the risk to Pottinger mixed, a finding that the injury arose out of the employment would not have been inevitable. But the close causal connection between the employment and the necessity of the smoking as a personal comfort activity could well have justified the court in holding that the source of the injury arose out of the employment.

Conclusion

While the court of appeals' determination in *Pottinger v. Industrial Commission* that a traveling employee is within the course of employmen when he stays overnight at a hotel is within the mainstream of modern workmen's compensation decisions, its holding as to the application of the personal comfort doctrine is more questionable. *Pottin-*

82. 13 Ariz. App. 83, 474 P.2d 442 (1970).
83. *Id.* at 84, 474 P.2d at 443.
84. The *Pottinger* court cited Nicholson v. Industrial Comm'n, 76 Ariz. 105, 259 P.2d 547 (1953), in which the Arizona supreme court held that claimant's beneficiaries were entitled to compensation for the death of a construction worker killed when the platform under which he was eating lunch collapsed, since the death arose out of the employment. *Id.* at 110, 259 P.2d at 550-51. In Royall v. Industrial Comm'n, 106 Ariz. 346, 476 P.2d 156 (1970), also relied upon by the *Pottinger* court, the Arizona supreme court held that an employee on a coffee break who tripped over the legs of a fellow worker on the way to make a personal telephone call in the employee lounge was injured by a risk arising out of the employment. *Id.* at 351, 476 P.2d at 161.

ger's discussion of the application of the personal comfort doctrine has left serious doubt concerning its application to traveling employees. The decision will undoubtedly result in renewed litigation to clarify this aspect of the law. There appears to be little reason to distinguish between personal comfort acts on and off the employer's premises so long as the employee is acting within the course of employment and the injury arose out of the employment.