CONTENTS

ARIZONA APPELLATE DECISIONS 1973-74

For the seventh year, the "Arizona Note" consists of contributions from the *Arizona Law Review's* first-year candidacy program. As in past years, significant Arizona appellate decisions are selected for critical analysis and comment. Through the candidacy program, first-year students and members of the Editorial Board work to develop analytical, research, and writing skills, as well as to produce commentaries which offer students and members of the bar a continuing study of the Arizona courts and developments in the law. Again, decisions of the Court of Appeals of Arizona have been included in this year's "Arizona Note." The continued inclusion of these decisions is intended to provide a broader perspective on the important developments in Arizona law.

I. ADMINISTRATIVE LAW

A. PRIVILEGE BEFORE ADMINISTRATIVE BOARDS

Society has long recognized that an individual's good name and reputation should be protected from defamatory attacks.[1] There are, however, certain exceptional situations in which the individual's interest in his good reputation must be subordinated to some other interest. For example, the public has an interest in full and fair disclosure of facts which form a basis for decisions affecting public life.[2] Therefore, an absolute privilege is extended to statements made in judicial, legislative, and executive proceedings.[3] In *Melton v. Slonsky*,[4] the Arizona court of appeals was presented with the question of whether this privilege should be extended to statements made during administrative hearings.

The *Melton* suit arose out of statements made by the defendant before the Arizona State Liquor Board. The plaintiff, Mr. Slonsky, had applied to the board for a transfer of his liquor license. During a hearing on the application, the defendant, Mrs. Melton, made statements to the effect that the plaintiff had had difficulty in the operation of his bar business and that he had obtained his liquor license by bribing public officials.[5] The trial court ruled that the defendant's statements were slanderous per se and were not protected by any privilege.[6] As a result, at the close of the testimony the court directed a verdict for the plaintiff on the issue of liability and submitted to the jury only the question of damages.[7]

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1. W. PROSSER, THE LAW OF TORTS § 111 (4th ed. 1971).
2. Bolton v. Walker, 197 Mich. 699, 707, 164 N.W. 420, 423 (1917); Montgomery v. City of Philadelphia, 392 Pa. 178, 183, 140 A.2d 100, 102-03 (1958); W. PROSSER, *supra* note 1, § 114; Veeder, *Absolute Privilege in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 469 (1909).
3. Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941); Mellon v. Brewer, 18 F.2d 168 (D.C. Cir. 1927); Mills v. Denny, 245 Iowa 584, 588, 63 N.W.2d 222, 225 (1954); Tanner v. Stevenson, 138 Ky. 578, 128 S.W. 878 (1910); Massey v. Jones, 182 Va. 200, 28 S.E.2d 623 (1944); W. PROSSER, *supra* note 1, § 114.
4. 19 Ariz. App. 65, 504 P.2d 1288 (1973).
5. Mr. Slonsky was applying for the transfer of his Series No. 7 beer and wine license. At that time, he also owned a Series No. 6 license. Defendant's statements related only to plaintiff's operation of his bar and the obtaining of his No. 6 license through allegedly illegal means. *Id.* at 66-67, 504 P.2d at 1289-90.
6. *Id.* at 66, 504 P.2d at 1289.
7. *Id.*

On appeal, the defendant contended that there was an absolute privilege for remarks made before administrative boards such as the Arizona State Liquor Board because they exercise quasi-judicial power.[8] The plaintiff argued that the liquor board was not quasi-judicial, and thus no privilege attached to testimony given before such a board.[9] Reversing the judgment of the trial court, the court of appeals held that Mrs. Melton's statements were subject to only a qualified privilege.[10] In reaching its decision, the court recognized that the question was that of the proper balance between two conflicting public policies: the policy that an individual should be able to speak freely in administrative proceedings without the fear of being held liable for his statements in a defamation action and the policy of preventing a volunteer from venting "his malice under the guise of protecting the public."[11] Acknowledging a split of authority on whether such statements are absolutely privileged, the court asserted that the conflicting policies could best be served by "extending a qualified or defeasible privilege to statements made before such boards."[12] Additionally, the court held that whether the defendant had exceeded the bounds of the qualified privilege was a matter for jury determination, and it remanded the case for a new trial.[13]

This casenote first will discuss whether there is a need for making communications before administrative boards privileged. An examination then will be made of the different views on the problem of administrative privilege, with particular emphasis on the extension of an absolute privilege through the use of the quasi-judicial test. This approach will be analyzed and contrasted with the rule adopted by the Arizona court in *Melton*; the granting of only a qualified privilege for communications made in administrative proceedings. Finally, the discussion will focus on some inherent difficulties with the new Arizona privilege rule.

The Need for the Privilege

The need to grant a privilege to witnesses appearing before administrative boards is apparent from an examination of the basic purpose of such boards. Administrative boards and agencies are created to protect the public interest and ensure that various laws are en-

8. *Id.* at 67, 504 P.2d at 1290.
9. *Id.*
10. *Id.* at 68, 504 P.2d at 1291.
11. *Id.* at 67-68, 504 P.2d at 1290-91.
12. *Id.* at 68, 504 P.2d at 1291.
13. *Id.*

forced.[14] To accomplish this purpose, however, a board must have access to all relevant information. An individual possessing such information should not be deterred from testifying simply because he fears a defamation action if he testifies before the board. Therefore, some form of privilege is necessary to ensure full disclosure and protection of the public's interests.[15] As the Supreme Court of New Jersey stated in *Ranier's Dairies v. Raritan Valley Farms*:[16]

> Although there is some diversity in opinion, most courts recognize that the persuasive social considerations underlying the grant of an absolute privilege or immunity to participants in judicial proceedings are equally applicable to *quasi*-judicial proceedings . . . indeed there is much to be said for the view that their force is even greater where . . . the proceeding was not merely designed to determine private issues between private parties but was primarily designed to ascertain whether important departmental regulations which were promulgated in the public interest were being violated.[17]

Thus, the administrative witness should be allowed to speak his mind fully and fearlessly, without the worry of intimidating or vexatious litigation.[18]

Most jurisdictions recognize the need for granting a privilege to witnesses who appear before administrative boards. The scope and applicability of the privilege, however, vary greatly from jurisdiction to jurisdiction. The various approaches range from the recognition of an absolute privilege for statements made before quasi-judicial boards to the view that only a qualified privilege exists before all administrative agencies.

Absolute Privilege

A majority of jurisdictions employ the quasi-judicial approach to determine the existence of a privilege before administrative bodies.[19] Under this rule, an absolute privilege is extended to witnesses' state-

14. K. DAVIS, ADMINISTRATIVE LAW §§ 1.02, 1.05 (1972).
15. Sale v. Railroad Comm'n, 15 Cal. 612, 620, 104 P.2d 38, 41 (1940); Driscoll v. Burlington-Bristol Bridge Co., 10 N.J. Super. 545, 567, 77 A.2d 255, 265 (Super. Ct., Ch. 1950); K. DAVIS, *supra* note 14, § 1.02.
16. 19 N.J. 552, 117 A.2d 889 (1955).
17. *Id.* at 559-60, 117 A.2d at 892-93.
18. Buschbaum v. Heroit, 5 Ga. App. 521, 527, 63 S.E. 645, 647 (1908); Middlesex Concrete Prod. & Excavatory Corp. v. Carteret Indus. Ass'n, 68 N.J. Super. 85, 91, 172 A.2d 22, 25 (App. Div. 1961).
19. *See, e.g.*, Jenson v. Olson, 273 Minn. 390, 141 N.W.2d 488 (1966); White v. United Mills Co., 240 Mo. App. 443, 208 S.W.2d 803 (1948); Shumway v. Warrick, 108 Neb. 652, 189 N.W. 301 (1922); Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 117 A.2d 889 (1955); Independent Life Ins. Co. v. Rodgers, 165 Tenn. 447, 55 S.W.2d 767 (1933); Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 166 S.W.2d 909 (1942); W. PROSSER, *supra* note 1, § 114.

ments only where the administrative hearing is quasi-judicial in nature.[20] The determination of whether a hearing is quasi-judicial is reached by a number of methods.

A few states have adopted statutes that provide for an absolute privilege in all lawful proceedings,[21] including administrative board hearings. In Oklahoma, the applicable statute states that a privileged communication or publication is one made in "any legislative, or judicial proceedings or any other proceeding authorized by law."[22] Although a similar California statute creates a privilege for communications before all proceedings authorized by law,[23] it has been interpreted as being limited to quasi-judicial and quasi-legislative proceedings.[24] Guidelines for determining the quasi-judicial nature of a proceeding were set forth in *Ascherman v. Natanson*,[25] where the California court of appeals held that statements made at a hospital board of directors hearing were privileged. A proceeding is quasi-judicial in nature, the court indicated, when: 1) the board considers and investigates evidentiary facts; 2) the board or agency decides issues by application of rules of law; and, 3) the decision of the agency affects the personal or property rights of private persons.[26]

In other states, the existence of a quasi-judicial privilege turns on the individual jurisdiction's technical definition of quasi-judicial power and whether a given board exercises such power.[27] Factors viewed as indicative of this power include the power to issue subpoenas, administer oaths and to provide for notice and a hearing for the accused.[28] Texas courts, for example, have stated that where a commission can investigate complaints, compel the attendance of witnesses, subpoena testimony, and render enforceable judgments, it exercises quasi-judicial powers and, therefore, all communications made to it are absolutely privileged.[29] Other courts have held that the quasi-judicial nature of

20. Mock v. Chicago, R.I. & Pac. R.R., 454 F.2d 131, 133-34 (8th Cir. 1972); Jenson v. Olson, 273 Minn. 390, 393, 141 N.W.2d 488, 490 (1966); Aransas Harbor Terminal Ry. v. Taber, 235 S.W. 841, 842 (Tex. Civ. App. 1921).

21. *See, e.g.*, HAWAII REV. STAT. § 751-12 (1968); LA. REV. STAT. ANN. § 14:50 (1950); MONT. REV. CODES ANN. § 64-208 (1970); N.D. CENT. CODE § 14-02-05 (1971); S.D. CODE § 47.0503 (1939).

22. OKLA. STAT. ANN. tit. 12, § 1443 (1961); *see* Pacific Employers Ins. Co. v. Adams, 196 Okla. App. 597, 168 P.2d 105 (1946).

23. CAL. CIV. CODE § 47(2) (West 1945).

24. Ascherman v. Natanson, 23 Cal. App. 3d 861, 866, 100 Cal. Rptr. 656, 659 (Ct. App. 1972).

25. *Id.* at 861, 100 Cal. Rptr. at 656.

26. *Id.* at 866, 100 Cal. Rptr. at 659.

27. Jenson v. Olson, 273 Minn. 390, 141 N.W.2d 488 (1966); Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 166 S.W.2d 909 (1942).

28. Jenson v. Olson, 273 Minn. 390, 393, 141 N.W.2d 488, 490 (1966); *cf.* Englewood v. Dailey, 158 Colo. 356, 358, 407 P.2d 325, 327 (1965).

29. Aransas Harbor Terminal Ry. v. Taber, 235 S.W. 841 (Tex. Civ. App. 1921). Texas courts have held communications which involve the revocation of professional licenses to be absolutely privileged. Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 166

an administrative board is dependent on the discretionary power possessed by the board.[30] The ability of the board to exercise such discretion indicates that the board is not limited to mechanical determinations of questions of fact, but rather is charged with exercising its judgment in making decisions of a very subtle and perhaps important nature.

Many jurisdictions consider factors other than the power of the administrative body in determining whether a hearing is quasi-judicial in nature. Quite often the controlling factor is the public interest at stake in the proceedings.[31] As with many other descriptive phrases, the definition of public interest has varied from one jurisdiction to another. It may range from the interest the citizenry has in licensing only scrupulous insurance agents[32] to the interest of a city in protecting the health of its citizens.[33] Illustrative of this public interest concept are the federal agencies which generally have been found to exercise quasi-judicial power.[34] The fact that many federal administrative hearings provide for notice and the opportunity to be heard has been a relevant consideration in determining that these boards are quasi-judicial in nature.[35] The judicial nature of the hearing, however, has not been the controlling factor; rather, the impact of the board's decisions on areas of public concern has been cited as the major reason for finding that they exercise quasi-judicial power.[36]

Other jurisdictions, such as New York, have examined both the public importance of the hearing and the powers of the board in determining whether an absolute privilege is applied to communications before administrative agencies. This approach has led to some divergent

S.W.2d 909 (1942) (state insurance commission); Bloom v. A.H. Robins Co., 479 S.W.2d 780 (Tex. Civ. App. 1972) (state board of pharmacy); McCafee v. Feller, 452 S.W.2d 56 (Tex. Civ. App. 1970) (state bar); Thornton v. Rio Grande Life Ins. Co., 367 S.W.2d 950 (Tex. Civ. App. 1963) (state insurance commission). *See also* Robertson v. Industrial Life Ins. Co., 75 So. 2d 798 (Fla. 1954); Jenson v. Olson, 273 Minn. 390, 141 N.W.2d 488 (1966).

30. Shumway v. Warrick, 108 Neb. 652, 655-56, 189 N.W. 301, 302-03 (1922). *See also* Independent Life Ins. Co. v. Rodgers, 165 Tenn. 447, 458-59, 55 S.W.2d 767, 770 (1933).

31. Johnson v. Independent Life & Accident Ins. Co., 94 F. Supp. 959, 963 (D.S.C. 1951); Independent Life Ins. Co. v. Rodgers, 165 Tenn. 447, 458, 55 S.W.2d 767, 770 (1933).

32. Independent Life Ins. v. Rodgers, 165 Tenn. 447, 458, 55 S.W.2d 767, 770 (1933).

33. Powers v. Vaughan, 312 Mich. 297, 20 N.W.2d 196 (1925).

34. *See, e.g.*, Mock v. Chicago, R.I. & Pac. R.R., 454 F.2d 131 (8th Cir. 1972) (National Railroad Adjustment Board); Smith v. O'Brien, 88 F.2d 769 (D.C. Cir. 1936) (Civil Service Commission); Loudin v. Mohawk Airlines Inc., 44 Misc. 2d 926, 255 N.Y.S.2d 302 (Sup. Ct. 1964) (Civil Aeronautics Board); Alagna v. N.Y. & Cuba Mail S.S. Co., 155 Misc. 796, 279 N.Y.S. 319 (Sup. Ct. 1935) (Federal Radio Commission).

35. Mock v. Chicago, R.I. & Pac. R.R., 454 F.2d 131, 134 (8th Cir. 1972); Alagna v. N.Y. & Cuba Mail S.S. Co., 155 Misc. 796, 797, 279 N.Y.S. 319, 320 (Sup. Ct. 1935).

36. Mock v. Chicago, R.I. & Pac. R.R., 454 F.2d 131, 134-35 (8th Cir. 1972); Loudin v. Mohawk Airlines Inc., 44 Misc. 2d 926, 937-38, 255 N.Y.S.2d 302, 304 (Sup. Ct. 1964).

results depending not only on the agency, but also on the nature of the hearing. Testimony before the New York Industrial Board[37] and the City of New York Bar[38] has been found absolutely privileged since these agencies are deemed to exercise quasi-judicial power. Both the judicial nature of the board's power[39] and the type of proceedings[40] —revocation of a professional license—were emphasized as reasons for the extension of the absolute privilege. In *Ellish v. Goldman*,[41] on the other hand, the New York supreme court stated that proceedings before a zoning board of appeals were not necessarily quasi-judicial simply because the board had the judicial power to summon witnesses and administer oaths.[42] The court indicated that in some instances hearings before an administrative agency of that type could be quasi-judicial, and an absolute privilege would therefore apply.[43] A housing contractor's building application, however, was not considered such a proceeding.[44] Thus, since the proceeding was not quasi-judicial, but purely administrative in its scope, only a qualified privilege existed.[45]

Whether a witness will be granted an absolute or qualified privilege in an administrative proceedings is determined, in the majority of jurisdictions, on the basis of whether the hearing is recognized as being quasi-judicial in nature. Such a determination is based, in part, on the extent to which the board functions as a court. The similarity of the board's procedures to those of a court, its discretionary powers, and its public significance are important factors in determining whether a board exercises quasi-judicial power. If the board acquires quasi-judicial status, then witnesses in its proceedings are granted an absolute privilege. However, where the administrative agency fails to meet the quasi-judicial standards, only a qualified privilege applies.[46]

Qualified Privilege and the Arizona Rule

A minority of jurisdictions have rejected any rule granting an ab-

37. Bleeker v. Drury, 149 F.2d 770 (1st Cir. 1945).
38. Wiener v. Weintraub, 22 N.Y.2d 330, 239 N.E.2d 540, 292 N.Y.S.2d 667 (1968).
39. Bleeker v. Drury, 149 F.2d 770, 771 (1st Cir. 1945).
40. Wiener v. Weintraub, 22 N.Y.2d 330, 332, 239 N.E.2d 540, 541, 292 N.Y.S.2d 667, 669 (1968).
41. 117 N.Y.S.2d 867 (Sup. Ct. 1952).
42. *Id.* at 867. The New York courts have followed such reasoning in at least two other cases where they did not recognize a privilege in administrative proceedings. Longo v. Tauriello, 201 Misc. 35, 107 N.Y.S.2d 361 (Sup. Ct. 1951) (housing and rent commission hearing); Leganowicz v. Rone, 240 App. Div. 731, 265 N.Y.S. 703 (Sup. Ct. 1933) (division of licenses hearing).
43. 117 N.Y.S.2d at 869.
44. *Id.* at 869-70.
45. *Id.* Generally, a qualified privilege is allowed if the remarks have been made in good faith. Jenson v. Olson, 273 Minn. 390, 141 N.W.2d 488 (1966); Supry v. Bolduc, 112 N.H. 274, 293 A.2d 767 (1972).
46. *See* text & note 45 *supra.*

solute privilege before administrative boards.[47] These courts have argued that the public interest which is being vindicated is only of an intermediate degree of importance; therefore, publication of possibly defamatory material must be made in a reasonable manner and only for a proper purpose.[48] Strict limitations are applied in determining whether a qualified privilege exists. Generally, the privilege is conditioned on the testimony being relevant to the issue under consideration.[49] This relevancy limitation is intended to ensure that some degree of protection can be furnished the party who is under official scrutiny.[50] The testimony can be communicated only to those persons reasonably believed to represent the public interest,[51] and the privilege is lost if the statement is made with malice or for any purpose other than furthering the public interest. This requirement is intended to prevent administrative proceedings from becoming forums for unfettered character assassination[52] and to deny the privilege where the statements are motivated by malice or bad faith or where they do not further the public purpose.[53] In *Melton*, the Arizona court of appeals adopted this limited defamation privilege and stated that it would be applicable to testimony before any administrative board.[54]

The major distinction between the quasi-judicial approach and the qualified privilege is in the determination of the existence of the privilege. Courts following the quasi-judicial test examine the proceeding in an abstract manner. They do not concern themselves with the actual testimony or the attitudes of the particular witness; rather, they focus on the board itself, considering its judicial and discretionary powers and the public importance of the function it performs.[55] If the administrative proceeding is quasi-judicial, then the examination goes no further: an absolute privilege is extended.[56] If the proceedings fail the quasi-judicial test, the witness is granted only a qualified privilege. In contrast, jurisdictions following the qualified privilege approach must examine each proceeding in detail, considering the motives of the witness, and whether he gave testimony to those who represent the public interest.[57] There must be an evaluation of whether there was ex-

47. Mills v. Denny, 245 Iowa 584, 585, 63 N.W.2d 222, 225 (1954); Meyer v. Parr, 69 Ohio App. 344, 351, 37 N.E.2d 637, 641 (1941); W. PROSSER, *supra* note 1, § 115.
48. Meyer v. Parr, 69 Ohio App. 344, 351, 37 N.E.2d 637, 641 (1941); W. PROSSER, *supra* note 1, § 115.
49. W. PROSSER, *supra* note 1, § 115.
50. *Id.*
51. Melton v. Slonsky, 19 Ariz. App. 65, 68, 504 P.2d 1288, 1291 (1973); Meyer v. Parr, 69 Ohio App. 344, 350, 37 N.E.2d 637, 641 (1941).
52. Meyer v. Parr, 69 Ohio App. 344, 350, 37 N.E.2d 637, 641 (1941).
53. *Id.*
54. 19 Ariz. App. 65, 68, 504 P.2d 1288, 1291 (1973).
55. *See* text accompanying notes 19-44 *supra.*
56. *See* text accompanying notes 19-49 *supra.*
57. *See* text accompanying notes 47-53 *supra.*

cessive publication, whether the witness actually believed what he said and why he said it.

The major difficulty with the qualified privilege approach is whether it is sufficiently flexible to meet the various demands imposed by the wide variety of administrative board hearings. Although virtually all jurisdictions provide that a privilege will attach only to statements relevant to the issues being considered,[58] other limitations imposed on the qualified privilege present difficulties in their application.[59]

For example, in most states, it is simply assumed that a witness testifies in furtherance of the public interest, and his motives are not questioned. Unlike the absolute privilege jurisdictions, in Arizona a witness will lose his privilege if his statements are made with malice.[60] This appears destructive of one of the basic purposes for granting a privilege — to encourage the free flow of information.[61] The likelihood that a witness will come forward and freely testify are lessened if he fears that the motivation behind his testimony may be subjected to future scrutiny.[62] Additionally, the uncertainty in a future determination of whether the testimony served an ascertainable public interest may inhibit a prospective witness. For these reasons, the discernible trend in most jurisdictions has been away from such qualifications and toward an absolute privilege which does not subject the witness' motives to scrutiny.[63]

Additionally, the qualified privilege creates uncertainty as to the existence of a privilege. Since this privilege is determined on the facts of each case, prior precedent is of little value in ascertaining the possible existence of a privilege. Had the Arizona State Liquor Board been recognized as an important public agency, exercising quasi-judicial powers and requiring the extension of an absolute privilege, the *Melton* decision would have been of greater value in ascertaining the existence of privileges in other administrative proceedings. In contrast,

58. *See* Bleeker v. Drury, 149 F.2d 770, 771 (1st Cir. 1945); Robertson v. Industrial Life Ins. Co., 75 So. 2d 798, 799 (Fla. 1954); Shumway v. Warrick, 108 Neb. 652, 656, 189 N.W. 301, 303 (1922); Wiener v. Weintraub, 22 N.Y.2d 330, 331, 239 N.E.2d 540, 292 N.Y.S.2d 667, 668-69 (1968); Pacific Employers Ins. v. Adams, 196 Okla. App. 597, 598, 168 P.2d 105, 106 (1946).

59. *Compare* Melton v. Slonsky, 19 Ariz. App. 65, 504 P.2d 1288 (1973), *with* Pacific Employers Ins. Co. v. Adams, 196 Okla. App. 597, 168 P.2d 105 (1946), [*and*] Independent Life Ins. Co. v. Rodgers, 165 Tenn. 447, 55 S.W.2d 767 (1933). *See also* Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 166 S.W.2d 909 (1942); Engelmohr v. Bache, 66 Wash. 2d 103, 401 P.2d 346 (1965).

60. Melton v. Slonsky, 19 Ariz. App. 65, 68, 504 P.2d 1288, 1291 (1973).

61. W. PROSSER, *supra* note 1, § 115.

62. Independent Life Ins. Co. v. Rodgers, 165 Tenn. 447, 459, 55 S.W.2d 767, 770 (1933).

63. *Id.*; Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 110-11, 166 S.W.2d 909, 912 (1942); Engelmohr v. Bache, 66 Wash. 2d 103, 104, 401 P.2d 346, 347 (1965).

it will be necessary for prospective witnesses and their attorneys to carefully evaluate all factors in an attempt to determine if their testimony will be privileged.

The qualified privilege approach adopted in *Melton* is intended to provide protection for the citizen subject to administrative scrutiny. The quasi-judicial privilege, however, is sufficiently flexible to protect this interest, while providing an alternative which encourages complete disclosure in administrative hearings. The latter approach provides for a relative weighing of the interests involved in the hearing.[64] The importance, power, and public function of the administrative agency are balanced against the right of the citizen to be secure in his reputation. The application of established criteria,[65] combined with consideration of whether the board decides issues of significant public concern, provides a workable formula for determining the proper privilege to be granted in administrative board proceedings. The decisions rendered in administrative proceedings often have a more profound affect on the average citizen than many judicial decisions.[66] Considering the importance of such proceedings, it would seem that the witness' privilege in administrative hearings should be no less than what is available in a court of law.[67]

Conclusion

The major reason for the existence of administrative boards is to protect the public through the enforcement of laws.[68] The Arizona conditional privilege, however, may make it more difficult for Arizona administrative agencies to perform their public function. Because of the restricted nature of this privilege, the informed witness may be reluctant to speak at proceedings even though the public interest, as represented by the administrative agency, may indeed be vital. In contrast, the quasi-judicial test allows a court to give proper consideration to an individual's right to protect his reputation while also ensuring that a sufficient privilege can be extended to guarantee that witnesses will come forward unhesitatingly and fully disclose the facts.

64. See text accompanying notes 25-42 *supra.*
65. See text accompanying notes 25-28 *supra.*
66. Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 559-60, 562-63, 117 A.2d 889, 892-93, 894 (1955).
67. *Id.*; Independent Life Ins. Co. v. Rodgers, 165 Tenn. 447, 458-60, 55 S.W.2d 767, 770 (1933).
68. Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 562-63, 117 A.2d 889, 894 (1955).

II. CIVIL PROCEDURE

A. JUDICIAL REVIEW OF ARBITRATION AWARDS

Arbitration affords a speedy, private, inexpensive, and informal method for settling disputes. Instead of using the usual judicial tribunals, parties to a controversy contractually agree to submit their disputes to personally selected arbitrators for final disposition.[1] The agreement to arbitrate includes an agreement to accept the decision of the arbitrators as conclusive and binding upon the parties.[2] Whether this finality precludes judicial review is a continuing controversy. In *Verdex Steel & Construction Co. v. Board of Supervisors*,[3] the Court of Appeals of Arizona addressed the question of the scope of judicial review of an arbitration award.

The *Verdex* dispute arose from a contractual relationship between the appellant, Verdex Construction Company, and the Chandler High School District and its architect, McCollum, both appellees. The contract was for the erection of a high school gymnasium. After three steel arches collapsed during construction, problems arose between the parties regarding their respective liabilities. Verdex called for arbitration as provided in the contract between itself and the school district. Although McCollum contended that he was not obligated to arbitrate with Verdex because he was not a signatory to that contract, he did participate extensively in the arbitration proceedings. In so doing, McCollum did not disavow his intention to be bound by the arbitral decision; however, there was no writing as required by law, stating his agreement to arbitrate.[4]

The arbitrators gave a unanimous award in Verdex's favor

1. *See* Gates v. Arizona Brewing Co., 54 Ariz. 266, 269, 95 P.2d 49, 50 (1939).
2. *See* Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROB. 698, 699 (1952).
3. 19 Ariz. App. 547, 509 P.2d 240 (1973).
4. ARIZ. REV. STAT. ANN. § 12-1501 (Supp. 1974-75). While the language of the statute may be viewed as not requiring a written agreement, it was the intent of the drafters of the *Uniform Arbitration Act* that the act apply only to voluntary written agreements. *Commissioners' Prefatory Note*, in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 162 (1955). *Cf.* Pirsig, *The Minnesota Uniform Arbitration Act and the Lincoln Mills Case*, 42 MINN. L. REV. 333, 336 (1958); Pirsig, *The New Uniform Arbitration Act*, 11 BUS. LAW. 44, 45 (April, 1956) [hereinafter cited as Pirsig, *New Uniform Act*].

against the school district and McCollum, and Verdex applied for judicial confirmation of this award.[5] McCollum answered by disclaiming any consent to the arbitration, and the trial court denied confirmation of the award on this ground. The court of appeals reversed, directing confirmation of the award against the school district and McCollum.[6] In reaching its decision, the court applied section 12-1512 of the *Arizona Revised Statutes Annotated*, which specifies statutory grounds for declining confirmation of an arbitration award. The Arizona statute is substantially identical to section 12 of the *Uniform Arbitration Act*[7] and enumerates only limited grounds for judicial review.

Much discussion preceded the drafting of the *Uniform Arbitration Act*.[8] Even now, the issue of the scope of judicial review of arbitration awards raises two significant policy arguments. First, arbitration proponents note that extensive judicial review will result in arbitration becoming but one more step in a prolonged litigation process. Without limited review, the basic purpose of arbitration, an efficient private settlement of differences would never be realized.[9] On the other hand, those advocating broader review of arbitration proceedings indicate that without judicial supervision a body of law disconnected from that administered in the courts will govern commercial activities.[10] Expanded judicial review also may be necessary to prevent those businesses and trade associations which regularly implement arbitration from being outside the system of law to which nonarbitrating persons

5. A second award was made against Verdex in favor of a subcontractor. When the subcontractor sued to confirm this award, Verdex made a third party claim to confirm its award against McCollum and the school district. Since Verdex's surety paid this second award promptly, it was not part of the case on appeal. 19 Ariz. App. at 550, 509 P.2d at 243.

6. The court of appeals affirmed the trial court's judgment that the Board of Supervisors of Maricopa County, also named in Verdex's claim, was not liable since the board had made it clear that it was not participating in the arbitration, and the arbitrators had not made the board a party to the award. *Id.*

7. UNIFORM ARBITRATION ACT § 12. ARIZ. REV. STAT. ANN. § 12-1512 (Supp. 1974-75) uses the language "declining to confirm an award" where section 12 uses "vacating an award." The Arizona version of section 12 also omits subsection (b), which specifies a time limit for moving to vacate an award, and subsection (d), which calls for confirmation if vacation is denied and no other motion is pending.

8. Illustrating the two poles of discussion at that time are Comment, *Judicial Innovations in the New York Arbitration Law*, 21 U. CHI. L. REV. 148 (1953), and Herzog, *Judicial Review of Arbitration Proceedings—A Present Need*, 5 DE PAUL L. REV. 14 (1955).

9. The United States Supreme Court expressed its full approval of arbitration when it stated: "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration . . . . The federal policy of settling . . . disputes by arbitration would be undermined if courts had the final say on the merits of the award." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). *See also* Comment, *Judicial Review of Arbitration: The Role of Public Policy*, 58 NW. U.L. REV. 545, 546 (1963).

10. As used herein, the phrase "commercial arbitration" is intended to be inclusive of all forms of contractual arbitration agreements except for collective bargaining contracts.

and institutions are accountable.[11] An examination of these two points of view leads to the conclusion that court adherence to either extreme would detract from the basic aims of arbitration. Nevertheless, the *Uniform Arbitration Act* seems to embody statutory support for the limited review position.[12] The *Verdex* ruling is an example of judicial adherence to that policy.

This casenote will suggest, however, that the broader review approach is still elected by courts where the ramifications of the arbitral decision transcend the mere settlement of the private dispute.[13] The *Verdex* court's election of the limited review position, therefore, will be analyzed with respect to its apparent total rejection of the broader review approach and the ramifications of such a policy.[14]

Evolution of Arbitration Statutes

Civilized societies have been disposed to use arbitration for many centuries.[15] Despite a generally favorable attitude toward this method of settling private disputes, the common law imposed three restrictions on arbitration. An agreement to arbitrate could be revoked by either party at any time prior to the rendering of the award.[16] The common law doctrine of ouster rendered agreements to arbitrate future disputes unenforceable.[17] Additionally, enforcement of an arbitral award could be accomplished only through a judicial action or by asserting the award as a defense to an action.[18]

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11. Since the main purpose of arbitration is to provide an expedient and equitable solution to the dispute at hand, an arbitral decision tends to be self-centered and often is divorced from consideration of public policy and precedent. *See* Note, *Commercial Arbitration: Expanding the Judicial Role*, 52 MINN. L. REV. 1218, 1228-30 (1968).

12. *See* text & notes 25-30 *infra*.

13. Recognition of such ramifications is demonstrated by American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968), holding that antitrust claims were inappropriate for arbitration: "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest." *Id.* at 826.

14. It must be noted that this discussion centers on judicial review of commercial arbitration awards. ARIZ. REV. STAT. ANN. § 12-1517 (Supp. 1974-75), specifically disallows application of the act to labor arbitration situations. For a discussion of the affect of waivers on the enforceability of arbitration agreements, see "Enforceability of Arbitration Agreements," 13 ARIZ. L. REV. 313, 479 (1971).

15. "Equity is justice that goes beyond the written law. And it is equitable . . . to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the diecast looks only to the law, and the reason why arbitrators were appointed was that equity might prevail." Aristotle, quoted in Mayer, *Arbitration and the Judicial Sword of Damocles*, 4 LAB. L.J. 723 (1953).

16. *See* Pirsig, *New Uniform Act, supra* note 4, at 44.

17. The doctrine of ouster pertains to early judicial hostility to future arbitration agreements, which were perceived as an attempt to bypass or oust the courts of their jurisdiction. Arizona held this view as late as 1956. *See* Fineg v. Pickrell, 81 Ariz. 313, 318, 305 P.2d 455, 458 (1956). For a full discussion of the doctrine of ouster, see M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 3.01 (1968).

18. *See* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 203 (1954) [hereinafter cited as HANDBOOK ON UNIFORM STATE LAWS]; Pirsig, *New Uniform Act, supra* note 4, at 44.

State statutes have sought to eliminate these limitations. Arizona has a long history of arbitration statutes, the first having been enacted in 1877.[19] These early arbitration laws, however, did not provide an award enforcement procedure to reinforce the advantages of arbitration.[20] To the contrary, these statutes provided a right of appeal to a trial de novo if it was expressly reserved in the arbitration agreement.[21] Nor was there any delineation or limitation of grounds for appeal from arbitral decisions.[22] Thus, appeal to the courts was readily available to a party dissatisfied with the arbitral decision.[23]

With the substantial adoption of the *Uniform Arbitration Act* in 1962,[24] the effectiveness of arbitration in Arizona became ensured. The basic purpose of the act is to foster and protect the parties' voluntary agreement to settle their disputes in an extrajudicial setting.[25] The act presumes that arbitration is a method not to compromise disputes but to settle them, that parties voluntarily agree to arbitration, and that the agreement includes a willingness to regard the arbitral de-

19. Howell [Ariz.] Code ch. 48, §§ 382-391 (1864). Interestingly, section 388 of that enactment was quite similar to section 12 of the *Uniform Arbitration Act* in detailing the allowed scope of judicial review. These criteria were eliminated when a new arbitration act was substituted in the *Revised Statutes of Arizona* (1887) and was continually excluded until the substantial adoption of the *Uniform Arbitration Act* in 1962. *See* text & note 24 *infra*.

20. The exception was chapter 48, section 388 of Arizona's *Howell Code* (1864). See discussion note 19 *supra*.

21. Ariz. Rev. Stat. ¶¶ 16-17 (1887); Ariz. Rev. Stat., Civil ¶¶ 304-305 (1901); Ch. 35, [1913] Ariz. Laws 2d Spec. Sess. (available only as codified in Ariz. Rev. Stat., Civil ¶¶ 1489-1490 (1913)); Ariz. Rev. Code § 4299 (1928); Ariz. Code § 27-306 (1939); Ariz. Rev. Stat. Ann. §§ 12-1506(B)-(C) (1956). The *Uniform Arbitration Act*, as adopted by Arizona, does not provide a right of appeal reservation.

22. While the early Arizona statutes provided that the decisions of the arbitrators were final judgments to be entered and recorded as rulings of the court, final judgments were always appealable from a justice of the peace court and often appealable from superior court. Statutes providing that arbitral awards were final judgments were: Ariz. Rev. Stat. ¶ 14 (1887); Ariz. Rev. Stat., Civil ¶ 302 (1901); Ch. 35, [1913] Ariz. Laws 2d Spec. Sess. (available only as codified in Ariz. Rev. Stat., Civil ¶ 1487 (1913)); Ariz. Rev. Code § 4297 (1928); Ariz. Code § 27-304 (1939); Ariz. Rev. Stat. Ann. § 12-1504(B) (1956). Statutes governing appeals from justice of the peace courts were: Ariz. Rev. Stat. ¶ 1452 (1887); Ariz. Rev. Stat., Civil ¶ 2107 (1901); Ch. 46, [1913] Ariz. Laws 2d Spec. Sess. (available only as codified in Ariz. Rev. Stat., Civil ¶ 1341 (1913)); Ariz. Rev. Code § 4203 (1928); Ariz. Code § 20-701 (1939); Ariz. Rev. Stat. Ann. § 22-261(A) (1956). The following governed appeals from superior courts: Ariz. Rev. Stat. § 846 (1887); Ariz. Rev. Stat., Civil ¶ 1493 (1901); Ch. 46, [1913] Ariz. Laws 2d Spec. Sess. (available only as codified in Ariz. Rev. Stat., Civil ¶ 1227 (1913)); Ariz. Rev. Code § 3659 (1928); Ariz. Code § 21-1702 (1939); Ariz. Rev. Stat. Ann. § 12-2101 (1956).

23. Illustrative of review practices in Arizona prior to 1962 was Albert v. Goor, 70 Ariz. 214, 218 P.2d 736 (1950). At issue on appeal in *Albert* was the scope of the arbitration submission agreement and whether the arbitrators had acted within that scope. In ruling the arbitral award null and void as not meeting the requirements of finality and completeness, the court criticized the arbitrators for basing the award on a verbal realty listing agreement which was violative of the statute of frauds. The court ruled that the arbitrators were bound to follow the law in considering the validity of the realty agreement. Thus, in this early Arizona decision, the court assumed a power of review over deviations from legal principles. *Id.* at 218, 218 P.2d at 739.

24. ARIZ. REV. STAT. ANN. §§ 12-1501 to -1518, -2101.01 (Supp. 1974-75).

25. *See Commissioners' Prefatory Note, supra* note 4, at 162.

cision as final and binding.[26] The act also recognizes that normally neither party contemplates challenging the award in court.[27]

Given these premises, the act is designed to discourage delaying tactics and attempts to relitigate decided issues and to preserve valid arbitration awards, even where courts might not agree with the merits of the decision.[28] The act, however, does not intend to remove arbitration entirely from judicial scrutiny. Rather, the party objecting to the award bears the burden of proving why he should not be bound.[29] Without the protection afforded by the imposition of such a burden, the advantages of arbitration would be lost, the arbitration procedure's flexibility decreased and its usefulness dissipated.[30]

The Dilemma

Despite the need for limited judicial review in order to effectuate successful arbitration and notwithstanding the language of the *Uniform Arbitration Act* specifically curtailing judicial intervention, there are two important considerations which suggest that broader judicial review of arbitration proceedings are appropriate. First, the element of voluntariness in an arbitration agreement may be nonexistent if the arbitration procedure has become institutionalized[31] or if the dispute being settled by arbitration is one that was wholly unforeseen by one or both parties.[32] If the unforeseen dispute is also ill-suited to the arbitration process,[33] the parties may be locked into arbitration against their wills and without the safeguard of a meaningful judicial review of the arbitral decision. Secondly, one of the practical purposes of the common law doctrine of ouster, the desirability of having all final decisionmaking forums similarly interpret the law,[34] would be thwarted

26. *See* Mentschikoff, *supra* note 2, at 699.
27. *See* Pirsig, *New Uniform Act, supra* note 4, at 51.
28. *Id.*
29. *See* Comment, *Judicial Control of the Arbitrator's Jurisdiction: A Changing Attitude*, 58 NW. U.L. REV. 521, 544 (1963).
30. *Cf.* Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFFALO L. REV. 1, 21-22 (1952).
31. This is common among various trade groups. In these trades, consent to arbitration is hardly voluntary since the buyer-seller contracts use a standard clause requiring arbitration should a dispute arise. For a comparative discussion of trade group arbitration, see Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961).
32. As one writer has pointed out, the very simplicity of most arbitration clauses is their greatest weakness. He suggests that at a minimum the parties should decide in advance what specific types of disputes they will agree to arbitrate and to what extent the arbitrator will be bound to follow recognized law or will have greater flexibility. *See* Carlston, *Theory of the Arbitration Process*, 17 LAW & CONTEMP. PROB. 631, 651 (1952).
33. Disputes which involve difficult questions of law or fact and those where a jury trial is desired or where a decision based on legal principles is preferred are considered to be better suited for litigation. *See* C. WEHRINGER, ARBITRATION PRECEPTS AND PRINCIPLES 7-11 (1969).
34. Schmitthoff, *Arbitration: The Supervisory Jurisdiction of the Courts*, 1967 J. BUS. L. 318, 325 (1967).

if appellate courts were precluded from reviewing questions of law.[35] Further, if courts are not allowed to review questions of law, even where an arbitrator has disregarded significant public policies, noncompliance with important legislative and judicial rules would be tacitly authorized.[36]

In dealing with the inevitable appeals of those aggrieved by the arbitral process, courts give little recognition to the question of voluntariness.[37] They are faced with a much knottier problem, however, in dealing with the other consideration. Where the public policy of effectuating arbitration clashes with other important policies, the court confronted with such a conflict must designate priorities.[38] Such a dilemma will arise most often when the arbitrator's disregard of well-settled and important public policies may have consequences extending beyond the parties and their private contract to arbitrate. Courts faced with a conflict between the public policy favoring private arbitration and other public policy considerations affecting larger interests usually will choose the latter.[39] Notwithstanding a court's predisposition to

35. The scope of judicial review is already curtailed by the limited record of arbitral proceedings made available to reviewing courts. ARIZ. REV. STAT. ANN. § 12-1508(A) (Supp. 1974-75), provides: "The award shall be in writing and signed by arbitrators joining the award . . . ." Traditionally, this writing requires no more than the amount of the award. The arbitrators do not have to give the reasons behind their decisions, and frequently no record is kept of the proceedings. It is even suggested that arbitrators are often under pressure not to write an opinion. *See* Mentschikoff, *supra* note 31, at 865 & n.32. Moreover, most courts will not set aside arbitration awards, even when errors of law are involved, unless there is clear arbitrariness. When this judicial penchant for award confirmation is combined with the usual insufficiency of the writing, the reality is that awards, though technically appealable on limited grounds, become virtually conclusive when entered by the arbitrator. This result is summarized in Canadian Indem. Co. v. Ohm, 271 Cal. App. 2d 703, 709-10, 76 Cal. Rptr. 902, 906 (Ct. App. 1969):

> "The parties to an arbitration provision agree that they will be bound by the decision of the arbitrators on the matters submitted for arbitration whether that decision determines disputed questions of law or fact, and whether it is right or wrong."
>
> . . . "Parties who agree to arbitration may expect not only to reap the advantages that flow from the use of that nontechnical, summary procedure, but also to find themselves bound by an award reached by paths neither marked nor traceable and not subject to judicial review."

For a further statement of the difference between the procedures of an arbitration panel and a court of law, see Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203 (1955).

36. *See* Comment, *supra* note 9, at 547.

37. The right of parties to contract for full arbitration of their disputes is now consistently upheld. *See* New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Ass'n, 12 Ariz. App. 13, 16, 467 P.2d 88, 91 (1970). *Cf.* Jeanes v. Arrow Ins. Co., 16 Ariz. App. 589, 591, 494 P.2d 1334, 1336 (1972).

38. New York's attitude toward such conflicts was recently summarized in Board of Educ. v. Byram Hills Teachers Ass'n, 74 Misc. 2d 621, 622, 345 N.Y.S.2d 302, 304 (Sup. Ct. 1973): "[A]n award may not be confirmed if it directs an act which will violate the criminal and civil law . . . contravene major public policy . . . or violate constitutional provisions . . . ." *Accord*, Loving & Evans v. Blick, 33 Cal. 2d 603, 611-12, 204 P.2d 23, 28 (1949); St. Paul Ins. Co. v. Lusis, 6 Wash. App. 205, 208 & n.1, 492 P.2d 575, 577 & n.1 (1971).

39. Arbitration awards which have required commission of an unfair labor practice have been refused enforcement. Glendale Mfg. Co. v. Local 520, Int'l Ladies' Garment

limit judicial review to the statutory grounds, the court occasionally may find itself having to balance the importance of arbitration against other contravened public policies and having to apply broader review powers.

The Verdex Decision

The *Verdex* court found no statutory basis for declining confirmation of the arbitration award.[40] It ruled that arbitrators are empowered to decide questions of fact and law[41] and that the statute limiting judicial review[42] did not give the court power to scrutinize arbitrators' rulings on questions of fact[43] or law.[44] The court clearly indicated that the delineated statutory grounds for review were the sole basis for judicial review of arbitration awards in Arizona.[45]

In so ruling, the court chose a narrow construction of the statutory grounds preferred by the drafters of the *Uniform Arbitration Act*.[46] Yet the desirability of such a restrictive construction is ques-

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Workers', 283 F.2d 936 (4th Cir. 1960), *cert. denied*, 366 U.S. 950 (1961); Meyers v. Kinney Motors, Inc., 32 App. Div. 2d 266, 301 N.Y.S.2d 171 (Sup. Ct. 1969).

Agreements violative of antitrust laws also have been viewed as inappropriate for arbitration despite the presence of either general arbitration clauses or clauses calling for arbitration of specific practices. Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); Helfenbein v. International Indus. Inc., 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971); Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968); Aimcee Wholesale Corp. v. Tomer Prods., Inc., 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968). *See also* Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U.L. REV. 1085 (1969); Pitofsky, *Arbitration and Anti-trust Enforcement*, 44 N.Y.U.L. REV. 1072 (1969). *Contra*, Asken, *Arbitration and Anti-trust—Are They Compatible?*, 44 N.Y.U.L. REV. 1097 (1969).

40. 19 Ariz. App. 547, 552, 509 P.2d 240, 245 (1973).
41. *Id.* at 551, 509 P.2d at 244.
42. ARIZ. REV. STAT. ANN. § 12-1512 (Supp. 1974-75).
43. 19 Ariz. App. at 551, 509 P.2d at 244.
44. *Id.* at 552, 509 P.2d at 245.
45. *Id.* at 551, 509 P.2d at 244.
46. *See* HANDBOOK ON UNIFORM STATE LAWS, *supra* note 18, at 203-04. The *Uniform Arbitration Act*, adopted by the Conference of Commissioners on Uniform Laws in 1955, was amended in 1956. *Commissioners' Prefatory Note, supra* note 4, at 162; HANDBOOK ON UNIFORM STATE LAWS, *supra* note 18, at 292. The 1956 amendment is evidence of the continued struggle to ensure the inviolability of arbitration. The only amendments made were in the section relating to the grounds for vacating an award. Subsection (3) of section 12 originally read: "The arbitrators exceeded their powers *or rendered an award contrary to public policy.*" (Emphasis added.) The amendment deleted the italicized portion.

Shortly before the amendments were made, Maynard E. Pirsig, chairman of the Special Committee on the *Uniform Arbitration Act*, expressed the committee's concern that these subsections would not be misused by reviewing courts. *See* Pirsig, *New Uniform Act, supra* note 4, at 48-49. In his discussion of the language, "or rendered an award contrary to public policy," Pirsig stated: "The words . . . represent well-recognized principles asserted by judicial decision. For example, an award, the execution of which would compel the commission of a crime, should not be enforced." *Id.* at 48. The drafters' deletion of this portion of subsection (3) did not change the fact that courts still recognize contravened public policy as grounds for the vacation of arbitral awards. *See* text & notes 38-39 *supra*. Its elimination as a specified ground, therefore, seems to have been predicated on a fear of abuse rather than on an express intent to abolish it as a ground for review.

tionable. First, the issues before the court were easily resolvable within the statutorily enumerated grounds for review,[47] and the court's more expansive holding was not required. Second, the statute in question did not expressly limit judicial review to its enumerated grounds,[48] and the court's reasoning failed to recognize that unforeseen special considerations might at some future time require more extensive review. Considering these factors, the court's view was unnecessarily rigid. Additionally, the court did not rely on strong precedent to support its conclusions.

Rather than grounding its limitation of judicial review of arbitration awards on a precedential foundation, the court merely emphasized that its conclusion was not in conflict with previous Arizona decisions. Appellees contended[49] that *Park Imperial, Inc. v. E.L. Farmer Construction Co.*[50] empowered the court to review and impeach arbitration awards with obvious mistakes.[51] The court noted, however, that it did not construe *Park Imperial* as allowing either review of questions of fact or giving expanded statutory review powers.[52] Similarly, the court was careful to observe that *Bacchus v. Farmers Insurance Group Exchange*[53] did not address the reviewability of arbitrator's error of law[54] and thus posed no barrier to its holding.[55]

The court cited no authority in support of its position. Its ruling that arbitrators' decisions were nonreviewable except for explicit

47. McCollum denied that he had agreed to arbitrate. The school district charged that the award was gross error. Thus, reversal could have been based simply on the facts of the case. For McCollum, a reversal was automatic, given the record of his participation, his failure to make an explicit objection to being bound by the award, and his confession of error by not filing an answering brief. 19 Ariz. App. at 550-51, 509 P.2d at 243-44. Rejection of the school district's contention could have been based merely on the failure to sustain the burden of showing gross mistake. *Id.* at 552, 509 P.2d at 245. *See* Park Imperial, Inc. v. E.L. Farmer Constr. Co., 9 Ariz. App. 511, 513-14, 454 P.2d 181, 183-84 (1969).

48. In addition to the public policy ground for vacation, discussed in note 46 *supra*, a few courts in other jurisdictions which have adopted the *Uniform Arbitration Act* also have expressed the view that arbitral awards can be vacated where a gross error has occurred. Nizinski v. Golden Valley Elec. Ass'n, 509 P.2d 280, 283 (Alas. 1973); Albert v. Albert, 391 S.W.2d 186, 188 (Tex. Civ. App. 1965). *Contra*, Trustees of Boston & Maine Corp. v. Massachusetts Bay Transp. Authority, — Mass. —, —, 294 N.E.2d 340, 343 (1973). See text & notes 50-51 *infra*, for Arizona's apparent approval of this additional ground for vacation.

49. Brief for Appellee at 2, Verdex Steel & Constr. Co. v. Board of Supervisors, 19 Ariz. App. 547, 509 P.2d 240 (1973).

50. 9 Ariz. App. 511, 454 P.2d 181 (1969).

51. The *Park Imperial* court did imply that an award error might be cause for vacation. *Id.* at 513-14, 454 P.2d at 183-84. The court concluded, however, that the *Park Imperial* complainant had not sustained the burden of showing a gross mistake, and the award was upheld.

52. 19 Ariz. App. at 551, 509 P.2d at 244.

53. 12 Ariz. App. 1, 467 P.2d 76, *vacated*, 106 Ariz. 280, 475 P.2d 264 (1970).

54. 19 Ariz. App. at 551, 509 P.2d at 244. Certainly, the *Bacchus* court was quite explicit in stating that it was not dealing with the arbitration decision itself. 106 Ariz. at 284, 475 P.2d at 268.

55. 19 Ariz. App. at 551, 509 P.2d at 244.

statutory grounds was not compelled by either the cited authorities or the exigencies of the *Verdex* fact situation.[56] Relying entirely on previous opinions which had not reached the instant issues and offering little reasoning of its own, the *Verdex* court established a novel proposition of Arizona law.

Conclusion

By severely limiting judicial review, the narrow result reached in *Verdex* furthers the interest in an effective arbitration process. It entirely ignores, however, the interest in a standard of review flexible enough to allow consideration of those public policies so compelling as to require recognition regardless of the forum in which a dispute is resolved. It is submitted that the permissible scope of judicial review in any given arbitral case must be flexible in order to balance these conflicting interests.[57] Assuredly, Arizona does have a longstanding position favoring arbitration and, consequently, a presumption limiting judicial review.[58] Given this disposition, only clear violations of significant public policies should warrant denial of an arbitration award confirmation.[59]

There being no threat to public policy considerations in *Verdex*, affirmance of the arbitral award was required. The contentions of the third party defendants, being based on distortions of the statutory grounds, were frivolous refusals to comply with an award consonant

56. See discussion note 47 *supra*.

57. Although tests have been devised to resolve [the issues of how much and under what circumstances there should be judicial review], the nature of the problem is not susceptible of determination by hard and fast rules. Each case presents unique circumstances which require a careful weighing of particular matters of public policy. Given the diverse settings in which such policy may require departure from the arbitration ideal, it is submitted that the only workable approach is a balancing of policies on an ad hoc basis.

Comment, *supra* note 9, at 548.

58. *See* text & notes 19-24 *supra*. *See also* Jeanes v. Arrow Ins. Co., 16 Ariz. App. 598, 591, 494 P.2d 1334, 1336 (1972).

59. In Bacchus v. Farmers Ins. Group Exch., 106 Ariz. 280, 475 P.2d 264 (1970), the Supreme Court of Arizona dealt with the issue of the allowance of setoffs to reduce the amount of uninsured motorist coverage provided by ARIZ. REV. STAT. ANN. § 20-259.01 (Supp. 1974-75). The court considered the coverage of uninsured motorists a sufficiently significant public policy to sidestep the issue of judicial reviewability of arbitration awards in order to disallow setoffs from substitute liability coverage. 106 Ariz. at 284, 475 P.2d at 268. Moreover, the court went so far as to decide two companion cases on similar principles. Transportation Ins. Co. v. Wade, 106 Ariz. 269, 475 P.2d 253 (1970); Porter v. Empire Fire & Marine Ins. Co., 106 Ariz. 274, 475 P.2d 258 (1970). Had the arbitrator in *Bacchus* decided that a setoff was allowable, the court would have been forced to balance the need for effective arbitration against the need for broader review. In that event, arguably, the supreme court would have intervened and denied confirmation of the arbitration award on the basis of the strong public policy regarding uninsured motorist coverage. Indeed, this result was tacitly sanctioned by the court of appeals in Jeanes v. Arrow Ins. Co., 16 Ariz. App. 589, 591, 494 P.2d 1334, 1336 (1972), where it was stated incorrectly that the supreme court had invalidated the *Bacchus* award because the arbitrator allowed a setoff.

with public policy. Indeed, the contentions could have been disposed of without reaching the issue of judicial review. Because of its unnecessary restrictiveness, the *Verdex* position on the scope of judicial review of arbitration awards may well prove to be a ruling a future Arizona court will need to retract.

B. SATISFACTION OF JUDGMENT AS A BAR TO APPEAL RIGHTS

The question of whether compliance with the judgment of a trial court terminates the right to appeal that judgment has been considered periodically in the courts of Arizona. The case of *Del Rio Land, Inc. v. Haumont*[1] is the most recent Arizona ruling on this question. In an action for specific performance of a contract for the sale of land, Del Rio was ordered to convey the land to Haumont, and it did so by executing a written agreement of sale prior to filing its appeal. Del Rio was forced to execute the sales agreement because it was faced with financial difficulties which made it impossible to post a supersedeas bond[2] and because a judgment of foreclosure had been entered against the property in a separate action.[3] The Arizona supreme court rejected appellee's contention that Del Rio had lost its right to appeal by complying with the judgment. The court held that satisfaction of a judgment barred an appeal only when compliance was voluntary. In *Del Rio*, the court found that "[t]he actions taken by the officers of the corporation were compelled by the necessities of the situation and must be regarded as compulsory rather than voluntary."[4]

This case gave greater consideration to the involuntariness of the satisfaction than had been given in prior Arizona cases which had presumed involuntariness from the coercive effect of the mere existence of the judgment. The rationale behind the voluntariness criterion and its application can best be understood by examining the three grounds on which courts have held an appeal to be barred because of satisfac-

1. 110 Ariz. 7, 514 P.2d 1003 (1973), *vacating* 18 Ariz. App. 348, 501 P.2d 1189 (1972).
2. A supersedeas bond is posted by an appellant to guarantee that the judgment will be satisfied if the appeal is unsuccessful. When the bond has been posted, the judgment is stayed pending appeal. *See* ARIZ. R. CIV. P. 73(k).
3. The judgment of foreclosure had been acquired by Haumont, thus giving him the power to force an execution sale under the foreclosure judgment and to require compliance with the judgment for specific performance. *See* Del Rio Land, Inc. v. Haumont, 18 Ariz. App. 348, 350, 501 P.2d 1189, 1191 (1972).
4. 110 Ariz. at 10, 514 P.2d at 1006.

tion of the judgment: (1) mootness, (2) waiver or estoppel, and (3) compromise and settlement or accord and satisfaction.

Bases for Denying Appeal Rights

The mootness doctrine is based on the absence of an actual controversy.[5] Since an adversary situation is necessary to ensure a full hearing on the issues, the courts refuse to render opinions when the plaintiff's interest in maintaining the suit has ceased.[6] Although the Arizona courts abide by a policy of declining to decide moot questions,[7] they do have discretion to hear such cases;[8] it generally is exercised when the question is found to be of a continuing nature[9] or of public importance.[10]

In cases involving satisfaction of judgment and the right to appeal, the mootness doctrine has been applied in two different situations: when restitution is impossible and when there has been voluntary compliance. When satisfaction has made it impossible to return the parties to the prejudgment status quo,[11] the issue is regarded as being moot because the decision of the appellate court would have no effect.[12] This situation generally occurs in judgments ordering specific

5. Mesa Mail Publishing Co. v. Board of Supervisors, 26 Ariz. 521, 227 P. 572 (1924); Belknap v. Hunt, 20 Ariz. 148, 177 P. 932 (1919); J.R. Francis Constr. Co. v. Pima County, 1 Ariz. App. 429, 403 P.2d 934 (1965).

6. Article III, section 2 of the United States Constitution authorizes judicial action only when a "case or controversy" is before the court. Thus, the federal courts refuse to hear questions in which the dispute has ceased. *See, e.g.*, Mills v. Green, 159 U.S. 651 (1895); Logan v. West Orange-Cove Independent School Dist., 440 F.2d 1076 (5th Cir. 1971). Although the limitation on judicial authority in the Arizona constitution is not worded as strictly as that in the United States Constitution, *see* ARIZ. CONST. art. 6, § 5, the Arizona courts also follow the policy of dismissing a case which has become moot.

7. Harrison v. Hunt, 28 Ariz. 75, 235 P. 158 (1925); Mesa Mail Publishing Co. v. Board of Supervisors, 26 Ariz. 521, 227 P. 572 (1924); J.R. Francis Constr. Co. v. Pima County, 1 Ariz. App. 429, 403 P.2d 934 (1965). *See* "The Mootness Doctrine in a State Court," 13 ARIZ. L. REV. 313, 464 (1971).

8. Arizona Osteopathic Medical Ass'n v. Fridena, 105 Ariz. 291, 463 P.2d 825 (1970); Board of Examiners of Plumbers v. Marchese, 49 Ariz. 350, 66 P.2d 1035 (1937).

9. State v. Superior Court, 86 Ariz. 231, 344 P.2d 736 (1959); Board of Examiners of Plumbers v. Marchese, 49 Ariz. 350, 66 P.2d 1035 (1937).

10. Camarena v. Department of Pub. Welfare, 106 Ariz. 30, 470 P.2d 111 (1970); State v. Superior Court, 104 Ariz. 440, 454 P.2d 982 (1969); Corbin v. Rodgers, 53 Ariz. 35, 85 P.2d 59 (1938).

11. The statutory basis for restoring the status quo is found in ARIZ. REV. STAT. ANN. § 12-2103(B) (1956): "When the judgment or order is reversed or modified the court may make complete restitution of all property and rights lost by the erroneous judgment or order."

12. Chicago Great W. Ry. v. Bucher, 150 F.2d 394 (8th Cir. 1945). Arizona courts occasionally have looked to the possibility of restitution in determining whether an appeal would lie. In Burnkrant v. Saggau, 12 Ariz. App. 310, 470 P.2d 115 (1970), the court of appeals found that a controversy remained despite appellant school superintendant's compliance with a writ of mandamus ordering that a suspended child be readmitted to school. The court's holding was based entirely on the ability to restore the status quo by the school's withholding from the child credits earned during the period when he would have been suspended had the writ not been issued. *See also* Freeman v. Winthroath Pumps, 13 Ariz. App. 182, 183, 475 P.2d 274, 275 (1970).

or injunctive relief where the appealing party has complied with an order to perform some irreversible act. Adopting a liberal position on mootness, federal courts hold that appeal is not barred by compliance with the judgment so long as restitution can be enforced.[13] The majority of states, however, have adopted the second, and broader, view of the mootness doctrine.[14] Under this view a case is moot if a party has acquiesced in the judgment by voluntary compliance regardless of the availability of restitution.[15] Nevertheless, involuntary compliance given in response to compelling circumstances does not destroy the controversy.

The second bar to the right to appeal after satisfaction of the judgment is based on the doctrines of waiver and estoppel. Although these two terms are used interchangeably in some cases,[16] two different principles actually are involved. The theory of waiver requires the voluntary relinquishment of a known right or conduct warranting an inference of such relinquishment.[17] In order for a waiver to be inferred, the circumstances must indicate clearly that the conduct was intended as a waiver and was voluntary.[18] Thus, a satisfaction of judgment which is made involuntarily or which is made with no intent to give up the right to appeal cannot operate as a waiver.

Under the doctrine of estoppel, a party is precluded from asserting a right when he previously has taken a position inconsistent with the assertion of that right.[19] Although the doctrine of estoppel is not effective unless the other party has relied to his detriment on his adversary's earlier inconsistent position,[20] this element does not seem to be

13. Leader Clothing Co. v. Fidelity & Cas. Co., 227 F.2d 574, 575 (10th Cir. 1955); Chicago Great W. Ry. v. Bucher, 150 F.2d 394, 398 (8th Cir. 1945); 13 CYCLOPEDIA OF FEDERAL PROCEDURE § 58.36 (3d ed. 1966). *See generally* Bakery Sales Drivers Local 33 v. Wagshal, 333 U.S. 437, 442 (1947); Erwin v. Lowry, 48 U.S. (7 How.) 172 (1849).

14. *See, e.g.*, Anderson v. Carder, 159 Kan. 1, 150 P.2d 754 (1944); Baker v. Nelson, 265 So. 2d 825 (La. 1972); Hayes v. Nourse, 107 N.Y. 577, 14 N.E. 508 (1877).

15. *E.g., In re* Brown, 39 Ariz. 545, 8 P.2d 453 (1932); Everts v. Matteson, 45 Cal. App. 2d 14, 115 P.2d 207 (Ct. App. 1941); Anderson v. Carder, 159 Kan. 1, 150 P.2d 754 (1944). In Thompson v. Harris, 9 Ariz. App. 341, 452 P.2d 122 (1969), the court looked to voluntariness in refusing to dismiss an appeal as moot. The court relied solely on the tenant appellant's statement in his brief that he terminated his occupancy of the premises solely because of the ejectment order secured by the landlord and that he wished to be restored to possession. *Id.* at 344, 452 P.2d at 125. The determinative factor in finding that a controversy still existed was the appellant's intent in complying with the judgment; his intent was determined solely from his own statements in the brief. A liberal interpretation of mootness was applied, the question being whether the parties regarded a controversy as still existing between them.

16. *See* Webb v. Crane Co., 52 Ariz. 299, 80 P.2d 698 (1938); Hogue v. McAllister, 122 Wash. 347, 210 P. 671 (1922).

17. Arizona Title Guar. Trust Co. v. Modern Homes, 84 Ariz. 399, 330 P.2d 113 (1958); *In re* Brandt's Estate, 67 Ariz. 42, 190 P.2d 497 (1948).

18. *In re* Brandt's Estate, 67 Ariz. 42, 190 P.2d 497 (1948).

19. Holmes v. Graves, 83 Ariz. 174, 318 P.2d 354 (1957); Lewis v. Shook, 182 Ore. 483, 188 P.2d 148 (1947).

20. Holmes v. Graves, 83 Ariz. 174, 318 P.2d 354 (1957); Waugh v. Lennard, 69 Ariz. 214, 211 P.2d 806 (1949).

required when satisfaction of judgment is at issue.[21] Rather, the inconsistency alone, that of acquiescing in a judgment and subsequently prosecuting an appeal from that judgment, may be sufficient to constitute estoppel.[22] An exception to the doctrine of estoppel is recognized, however, when it can be shown that the inconsistent conduct of satisfying the judgment resulted from duress[23] or was otherwise involuntary.[24] Thus, once again voluntariness is significant to the determination of whether the appeal will lie.

The third basis for denying the right to appeal following satisfaction of a judgment arises when there has been a compromise and settlement[25] or an accord and satisfaction.[26] Both of these theories involve the parties' voluntarily agreeing to settle their dispute. Compromise and settlement is an agreement with mutual concessions by the parties,[27] while accord and satisfaction involves a unilateral concession on the part of the creditor by accepting something different from that to which he feels entitled.[28] The distinction is important since a compromise is binding when the agreement is finalized. An accord, on the other hand, is not binding until it has been fully executed.[29] Thus, while an executory accord does not bar a party from prosecuting

21. Preluzsky v. Pacific Co-op Cafeteria Co., 195 Cal. 290, 232 P. 970 (1925) (dicta); Greenspot Desert Inns v. Roy, 63 Cal. App. 2d 54, 146 P.2d 39 (Ct. App. 1944) (dicta); Whitehead v. Whitehead, 13 N.C. App. 393, 185 S.E.2d 706 (1972).

22. Webb v. Crane Co., 52 Ariz. 299, 80 P.2d 698 (1938); *see* West v. Baker, 18 Ariz. App. 151, 500 P.2d 1139 (1972), *vacated on other grounds*, 109 Ariz. 415, 510 P.2d 731 (1973). It is possible that the absence of a requirement for detrimental reliance in this situation is due to the courts' failure to carefully distinguish between estoppel and waiver. Estoppel is found more often when a party has accepted the benefits of a trial court decree and subsequently prosecutes an appeal therefrom. *See* Busseuil v. Arizona Veteran's Serv. Comm'n, 17 Ariz. App. 379, 498 P.2d 191 (1972); Klebora v. Klebora, 118 Cal. App. 379, 5 P.2d 965 (Ct. App. 1931); McDaniel Gift Shop, Inc. v. Balfe, 179 So. 2d 588 (Fla. 1965). In Arizona, appeal is barred from any portion of a judgment which may put in issue the party's right to the benefit which he has accepted. Finck v. Finck, 9 Ariz. App. 382, 452 P.2d 709 (1969).

23. *In re* Estate of Cohen, 105 Ariz. 337, 464 P.2d 620 (1970); Berry v. Solomon, 60 Ariz. 333, 137 P.2d 386 (1943).

24. Preluzsky v. Pacific Co-op Cafeteria Co., 195 Cal. 290, 232 P. 970 (1925) (dicta); Greenspot Desert Inns v. Roy, 63 Cal. App. 54, 146 P.2d 39 (Ct. App. 1944); St. Vincent's Nursing Home v. Department of Labor, 168 N.W.2d 265 (N.D. 1969).

25. Dakota County v. Glidden, 113 U.S. 222 (1885); Little v. Brown, 40 Ariz. 206, 11 P.2d 610 (1932); Belknap v. Hunt, 20 Ariz. 148, 177 P. 932 (1919); Royster v. English, 138 Colo. 428, 334 P.2d 733 (1959); United Serv. Auto. Ass'n v. Lederle, 400 S.W. 2d 749 (Tex. 1966). In *Del Rio*, the court rejected appellee's contention that the agreement of sale constituted an accord and satisfaction or compromise and settlement, because it contained additional provisions to those outlined in the court order. The court held that the additional terms of the agreement were supplemental and necessary to carry out the judgment. 110 Ariz. at 10-11, 514 P.2d at 1006-07.

26. Bank of Martinez v. Zeising, 104 Cal. 238, 38 P. 41 (1894); *In re* Connell's Estate, 121 Cal. App. 703, 9 P.2d 849 (Ct. App. 1932).

27. Isaacson v. City of Oakland, 263 Cal. App. 2d 414, 69 Cal. Rptr. 379 (Ct. App. 1968); Kelly v. Steinberg, 148 Cal. App. 2d 211, 306 P.2d 955 (Ct. App. 1957).

28. Green v. Huber, 66 Ariz. 116, 184 P.2d 662 (1947); Dykes v. Clem Lumber Co., 62 Ariz. 181, 156 P.2d 406 (1945); Cano v. Arizona Frozen Prods. Co., 38 Ariz. 404, 300 P. 953 (1931).

29. Cano v. Arizona Frozen Prods. Co., 38 Ariz. 404, 300 P. 953 (1931).

an appeal,[30] a party to a compromise may seek relief only through an action for breach of the agreement.[31] Cases decided on the basis of either accord and satisfaction or compromise and settlement are an offshoot of the mootness doctrine since the determinative factor is the absence of a controversy. It is sometimes simply stated that compromise and settlement moots the question.[32]

Arizona Case Law

Prior to *Del Rio*, a number of Arizona cases have considered whether satisfaction of judgment should preclude appeal. The decisions have not been entirely consistent in their approach. The voluntariness test, which underlies most of the Arizona case law on the subject, was first introduced in *In re Brown*.[33] Voluntariness was defined more sharply in another early Arizona case, *Webb v. Crane Co.*,[34] which treated the subject through the theory of waiver and estoppel. Noting the compelling effect of the judgment and the possibility of seizure and sale of the appellant's equipment if it failed to pay, the *Webb* court determined that payment of the judgment had been involuntary and, therefore, did not constitute waiver or estoppel.[35] Since, absent a stay or supersedeas bond,[36] the property of one delinquent in satisfying a judgment is always subject to seizure and sale,[37] the proper interpretation of the *Webb* decision is that the mere existence of the judgment is sufficiently coercive to render compliance involuntary.[38] This is in fact the interpretation made by the court in *Freeman v. Winthroath Pumps*,[39] which cited *Webb* and stated that "even though execution was not issued, the payment of a judgment must be

30. Memphis v. Brown, 87 U.S. (20 Wall.) 289 (1873); Moreno v. Russell, 47 Ariz. 38, 53 P.2d 411 (1936); Lyle v. Federal Union Ins. Co., 206 Ark. 956, 178 S.W.2d 651 (1944); Hinkle v. Basic Chem. Corp., 163 Colo. 408, 431 P.2d 14 (1967).

31. Cano v. Arizona Frozen Prods. Co., 38 Ariz. 404, 300 P. 953 (1931). The original claim is not extinguished, however, if, under standard contract principles, the compromise has not been completed or grounds for rescission exist. *Id.*; Barbara Dev. Corp. v. Jordan, 37 Ariz. 497, 295 P. 782 (1931); Benson v. Larsen, 95 Minn. 438, 104 N.W. 307 (1905).

32. Little v. Brown, 40 Ariz. 206, 209, 11 P.2d 610, 611 (1932); Del Rio Land, Inc. v. Haumont, 18 Ariz. App. 348, 352, 501 P.2d 1189, 1193 (1972).

33. 39 Ariz. 545, 8 P.2d 453 (1932). Although *Brown* now is cited as authority for the proposition that only voluntary satisfaction of judgment moots the appeal, the *Brown* court's definition of the word "voluntary" appears sufficiently broad to encompass any situation in which a judgment might be satisfied. In *Brown*, voluntariness was found when the petitioner paid the judgment as the condition of his release from jail on a contempt citation.

34. 52 Ariz. 299, 80 P.2d 698 (1938).

35. *Id.* at 320, 80 P.2d at 708.

36. *See* ARIZ. R. CIV. P. 62(d), 73(k).

37. *See* ARIZ. REV. STAT. ANN. §§ 12-1551 to -1558 (1958); ARIZ. R. CIV. P. 69, 70.

38. This interpretation is in line with dicta in Dakota County v. Glidden, 113 U.S. 222, 224 (1883), which is cited in *Webb*. 52 Ariz. at 320, 80 P.2d at 708.

39. 13 Ariz. App. 182, 475 P.2d 274 (1970).

regarded as compulsory. Therefore, this payment does not release errors, nor deprive the payor of his right to appeal."[40] This interpretation of *Webb* seems to have been followed implicitly in other pre-*Del Rio* decisions, although the criterion of voluntariness was not mentioned in these cases.[41]

A corollary proposition to denial of appeal rights after compliance with a judgment, and one which impliedly supports the *Freeman* interpretation of *Webb*, was set forth in *Stewart v. Stewart*.[42] There it was held that an appellate court has discretion to dismiss an appeal when the appellant has been adjudged in contempt of the trial court for failing to comply with the judgment.[43] The court went on to state that the rule may be applicable even if the contumacious appellant has not been adjudged in contempt of court.[44] The only stated exceptions were where the appellant could not comply in good faith with the order and where compliance with the order would substantially prejudice the appellant's rights.[45] The holding that appeal rights can be lost by failure to comply with the judgment clearly strengthens the position that the judgment itself is compulsory. Thus, any interpretation of "voluntary satisfaction" which requires more than judgment per se before satisfaction can be made without barring the right to appeal could leave a potential appellant in an untenable position. He would face either dismissal on *Stewart* grounds if he failed to comply with the judgment or dismissal on mootness grounds if he had complied but could show no hardship factors sufficient to render the compliance involuntary.[46]

40. *Id.* at 183, 475 P.2d at 275.

41. Burnkrant v. Saggau, 12 Ariz. App. 310, 470 P.2d 115 (1970); Thompson v. Harris, 9 Ariz. App. 341, 452 P.2d 122 (1969). In *Burnkrant*, the court stated that the appellants could "hardly be faulted for their prompt compliance with the writ, which was their only lawful course of conduct. . . ." 12 Ariz. App. at 312, 470 P.2d at 117.

42. 91 Ariz. 556, 372 P.2d 697 (1962).

43. The decision was grounded on the necessity of sustaining the dignity and effectiveness of the state's judicial system. *Id.* at 358, 372 P.2d at 699. *See also* National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37, 45 (1954). In *Stewart*, the appellant's conduct was determined to be in flagrant disregard of several court orders and a contempt citation. He had remained outside the state throughout the proceedings in order to avoid the court's jurisdiction.

44. 91 Ariz. at 360, 372 P.2d at 700.

45. *Id.*

46. Two other propositions, well established in Arizona case law, also favor a rule which limits the circumstances in which an appeal will be dismissed as moot because of compliance with the judgment below. A line of Arizona cases holds that a right of appeal granted by constitution or statute should be upheld where possible. Davis v. Campbell, 24 Ariz. 77, 206 P. 1078 (1922); Del Rio Land, Inc. v. Haumont, 18 Ariz. App. 348, 354, 501 P.2d 1189, 1195 (1972) (Eubanks, J., dissenting). Another related line of cases has consistently held that failure to post supersedeas bond has no effect on appeal rights or the right to restitution upon reversal. Markel v. Transamerica Title Ins. Co., 103 Ariz. 353, 362-63, 442 P.2d 97, 106-07 (1968). Such bond is considered to be merely a protective device to guard against dissipation of funds or disposal of property by the appellee. Hackin v. Superior Court, 102 Ariz. 93, 94, 425 P.2d 420, 421 (1967); Allison v. Chatwin, 99 Ariz. 99, 103, 407 P.2d 69, 71 (1965); Freeman v. Winthroath Pumps, 13 Ariz. App. 182, 185, 475 P.2d 274, 275 (1970).

Impact of Del Rio on Existing Law

It is possible to infer a departure from the prior trend of Arizona law in the language of the *Del Rio* decision. The court considered a number of factors in finding Del Rio's compliance to be involuntary, including the company's financial difficulties and the judgment of foreclosure which had been entered against the property in another action.[47] In its decision, the court stated: "It is not necessary that a party risk a contempt citation before his compliance may be termed involuntary; on the contrary, the existence of the judgment is a sufficient condition and threat which, together with other factors, may be sufficient to show that the compliance was involuntary."[48] The *Del Rio* decision and in particular the statement that existence of a judgment, "together with other factors," renders compliance involuntary may be interpreted as modifying the Arizona rule for determining voluntariness. Since its finding of involuntariness seems to be based on the additional hardship factors facing the appellant, *Del Rio* could be read as requiring more than the mere threat of seizure and sale implicit in the possibility of execution. It may be argued that absent these extenuating circumstances compliance would be considered voluntary. Under this interpretation, *Del Rio* would include the absence of unusual hardship factors as an additional basis for denying the right to appeal after satisfaction of the judgement.[49]

If the foregoing interpretation of *Del Rio* is correct, then the decision is a departure from the previous line of cases dealing with appeal rights after satisfaction of judgment. Moreover, in light of the *Stewart* case, it would present serious problems for the appellant who could not show hardship factors, since his appeal would be vulnerable to dismissal whether he complied with the judgment or not. In such a case, the net effect of *Del Rio* is to make the securing of a costly supersedeas bond compulsory.[50] The results reached by the foregoing analysis are compelling reasons for resisting any change in Arizona

47. 110 Ariz. at 10, 514 P.2d at 1006.
48. *Id.*
49. Although previous cases seem to raise a presumption of involuntariness from the existence of a judgment, *Del Rio* appears to reverse the presumption and require a showing of factors indicating involuntariness as a defense to appellee's claim of voluntariness. This conclusion may be drawn from the wording of the decision, whereby that which is required to be "shown" is the involuntariness and not the voluntariness, implying that it is the appellant who must prove this element of the case. The court states, " . . . we do not believe that it is necessary to show the issuance of a contempt citation before compliance with a judgment can be termed involuntary . . . [and] the existence of the judgment . . . together with other factors, may be sufficient to show that the compliance was involuntary." *Id.*
50. ARIZ. R. CIV. P. 73(k) sets the amount of a supersedeas bond at the sum necessary to cover the whole amount of the judgment (or the value of property involved), plus costs of appeal, interest, and damages for delay. It allows the judge to vary this formula at his discretion.

law suggested by *Del Rio*. It is probable that if the court had intended to make such a major break with the past, the decision would have so stated. Instead, the language indicating the revision perhaps should be regarded as superfluous, the result of careless judicial craftsmanship. Rather than intending that additional hardship factors were necessary, it is likely that the court's use of the words "together with" was intended to mean merely "as well as." Such an interpretation would indicate that, as in the past, the mere existence of the judgment would be sufficient to prevent a finding of involuntariness. The discussion of the other factors compelling this appellant's satisfaction of the judgment was probably only makeweight, in order to give emphasis to the involuntariness of the compliance in this case. The court's citation to and quotation from *Webb* is additional evidence that no change in the law was intended.

Conclusion

The ambiguity of the language in *Del Rio Land, Inc. v. Haumont* renders it susceptible to widely varying interpretations. It can be argued that the decision intended to break with the past by requiring other involuntariness factors in addition to the threat of execution. On the other hand, the discussion of hardship factors in addition to judgment may be regarded as mere dicta, giving emphasis to the involuntariness of Del Rio's compliance.

In a long line of cases prior to *Del Rio*, the Arizona courts developed a method for dealing with pre-appeal satisfaction of judgment which gave maximum protection to the aggrieved party's right of appeal while at the same time protecting the rights of the party prevailing in the court below. It was recognized that a law-abiding person would regard a trial court judgment as binding until and unless reversed on appeal and would feel compelled to comply therewith unless the procedures for staying the judgment had been followed. The rule developed by the court precluded appeal only when compliance with the judgment had been made in such a manner as to actually destroy the controversy between the parties. To interpret *Del Rio* as requiring hardship factors before compliance is considered involuntary would extend the bar of appeal to controversies which have not necessarily become abstract. An undue burden would be placed on the appellant, who would have to either post the costly supersedeas bond, defy the trial court's decree, or prove in the appellate courts that compliance was involuntary. *Del Rio* should be interpreted as being consistent with the prior Arizona rule that existence of a judgment is per se a sufficiently compelling circumstance to render compliance involuntary and, thus, to leave appeal rights intact.

C. NUNC PRO TUNC ENTRY OF DIVORCE DECREES

In Arizona, as in many other jurisdictions, it was once common for attorneys to withhold the filing of otherwise final divorce decrees until their clients had paid their bills.[1] *Hash v. Henderson*[2] was the consequence of such a practice. Some 200 unfiled decrees, dated from 1927 to 1955, were found among the effects of a deceased Arizona attorney. The probate court ordered the executors to attempt to notify the parties to the decrees and provided that the decrees should be filed nunc pro tunc if the original parties raised no objections.[3] The effect of this or-

1. The technique ultimately was declared unethical on grounds that the failure to enter a written judgment could seriously affect property and personal rights and because the attorney, as an officer of the court, has an obligation to aid in dispensing justice efficiently. ARIZ. B.A. COMM. ON RULES OF PROFESSIONAL CONDUCT, OPINION NO. 47 (1959).

2. 109 Ariz. 174, 507 P.2d 99 (1973).

3. The fact that the order was issued by the probate court raises several jurisdictional issues. First, it was not clear that a superior court sitting in probate had jurisdiction to enter orders affecting rights in divorce actions. The majority opinion acknowledged that petitioners had challenged the lower court's jurisdiction but did not discuss the merits of the issue. Rather, the court simply issued its own modification of the probate court's order and claimed to have thus disposed of the question. *Id.* at 177, 507 P.2d at 101.

Justice Struckmeyer, in a dissenting opinion, argued that the superior court sitting in probate was without jurisdiction to issue orders affecting rights in divorce proceedings. He noted that the superior court is a court of general jurisdiction, *see* Tube City Mining & Milling Co. v. Otterson, 16 Ariz. 305, 311, 146 P. 203, 206 (1914), but that a court sitting in probate is limited to those powers specifically granted by statute. Vargas v. Greer, 60 Ariz. 110, 131 P.2d 818 (1943). Justice Struckmeyer concluded that the superior court sitting in probate had no jurisdiction to order the filing of the divorce decrees and was powerless to confer jurisdiction upon itself by means of prescribing notice procedures. 109 Ariz. at 180, 507 P.2d at 105. The majority, by adopting the order of the probate court as its own, seemed to indicate that the lower court was without jurisdiction. The new Arizona probate code, effective January 1, 1974, renders the question moot. The code expands the jurisdiction of the superior court sitting in probate to all matters relating to the estates of decedents. ARIZ. REV. STAT. ANN. § 14-1302 (Spec. Pamphlet 1973). *See* R. EFFLAND, ARIZONA PROBATE CODE PRACTICE MANUAL § 5.2 (1973).

Assuming that the court sitting in probate did not have jurisdiction, the majority's disposition raised the question of whether the supreme court exceeded its authority by promulgating the order as its own in a special action. When the *Arizona Rules of Procedure for Special Actions* became effective in 1970, the three extraordinary writs of certiorari, mandamus, and prohibition were replaced by the special action in order to facilitate procedures for obtaining relief, while preserving the substantive character of the writs. ARIZ. R.P. SPECIAL ACTIONS 1. *See generally* Nelson, *The Rules of Procedure for Special Actions: Long Awaited Reform of Extraordinary Writ Practice in Arizona*, 11 ARIZ. L. REV. 413 (1969). Relief is available under a special action only if it could have been obtained under one of the common law writs. Tucson Pub. Schools, Dist. No. 1 v. Green, 17 Ariz. App. 91, 92, 495 P.2d 861, 862 (1972). The special action in *Hash* was in the nature of either prohibition or certiorari. Prior Arizona cases had emphasized that these two writs were intended only to prevent or correct excesses of jurisdiction. *See* State *ex rel.* Andrews v. Superior Court, 39 Ariz. 242, 5 P.2d 192 (1931). In recent years, however, the supreme court has extended the scope of these writs to include review of abuses of power when necessary to accomplish "essential justice." *See* Genda v. Superior Court, 103 Ariz. 240, 439 P.2d 811 (1968); Caruso v. Superior Court, 100 Ariz. 167, 412 P.2d 463 (1966). The *Hash* court may have been

der would have been to give the decrees full retroactive effect as of the date when they originally should have been filed.[4]

In a special action, the Supreme Court of Arizona adopted and promulgated as its own the order of the probate court.[5] The majority opinion[6] was devoted primarily to considering the bizarre nature of the case and the consequences of remedial alternatives. The court reasoned that an entry nunc pro tunc would cause the fewest serious problems for the original parties, since a refusal to file the decrees could have resulted in bigamy charges against any of the parties who had remarried—as happened in at least one instance.[7] As to those parties who subsequently may have reconciled, the court reasoned that most would never know of the filing of the decrees. Additionally, the court noted that any problems encountered by these parties could be remedied through a court's equitable powers.[8] Concerned primarily with the effect of its decision on the 200 divorced couples, the court placed minimal emphasis on the substantive principles governing the use of an entry nunc pro tunc. Nevertheless, to the extent it conflicted with *Hash*, the court explicitly overruled *Black v. Industrial Commission*,[9] the leading Arizona case on nunc pro tunc entry.

This discussion will examine the traditional requirements for the use of nunc pro tunc, as well as certain statutory modifications in the traditional rules. Then, after a review of prior Arizona law, *Hash* will

applying such an "essential justice" rationale. However, rather than merely testing or reviewing the lower court's exercise of jurisdiction, the supreme court utilized the special action to overcome the lower court's apparent lack of jurisdiction. Thus, *Hash* could be read as indicating an expansion of the scope of extraordinary relief available in special actions.

4. *See generally* 1 A. FREEMAN, JUDGMENTS §§ 121-39 (5th ed. 1925).

5. 109 Ariz. 174, 507 P.2d 99 (1973). The probate court ordered the executors to send notice by certified mail to the last known address of the parties and to advertise for 4 successive weeks in two Phoenix and two Tucson newspapers. The notices and advertisements required all parties to appear and show cause why all the decrees should not be filed nunc pro tunc. The supreme court modified the probate court's order by omitting the certified letters, requiring that the published notice contain the last known addresses of the parties and the dates of the decrees and requiring a copy of its opinion to be attached to each decree filed.

6. Justice Struckmeyer dissented, arguing that the majority misapplied its power to enter judgment nunc pro tunc. He noted that the objective of an order nunc pro tunc was to place the record in proper form where the recording of a judgment was omitted through mistake or inadvertence. *Id.* at 182, 507 P.2d at 106. Emphasis was placed upon the common law principle which mandated that parties seeking such a remedy make an affirmative showing that the delay in entry was due to mistake or inadvertence, rather than their own blameworthy actions. *Id.* at 182, 507 P.2d at 107. In this regard, Justice Struckmeyer noted the significance of the decedent's customary explanation to each client that they were not divorced until the decree was filed. His solution was to deposit the decrees with the clerk of the superior court to await instructions from the parties and to then determine nunc pro tunc entry on a case-by-case basis. *Id.* at 182-83, 507 P.2d at 107-08.

7. *Id.* at 175, 507 P.2d at 100.

8. A superior court has equitable power to set aside a nunc pro tunc divorce decree upon a proper showing by the parties. *Id.* at 176, 507 P.2d at 101.

9. 83 Ariz. 121, 317 P.2d 553 (1957).

be analyzed, and its potential impact on the future use of entry nunc pro tunc will be examined.

General Principles of Entry Nunc Pro Tunc

It is generally agreed that four principles govern the entry nunc pro tunc and its effect: (1) the necessity for proving the existence of a validly rendered judgment; (2) the necessity for showing that the failure to enter the judgment was due to mistake or inadvertence, or that it was incorrectly entered; (3) the requirement that only interested parties may bring an action to enter a judgment nunc pro tunc; and, (4) the limitation that the entry may not relate back to affect the property rights of those who acquired their interest without notice of the previously rendered judgment.

An order or decree may be entered nunc pro tunc only when the judgment actually has been rendered but has not been entered in the record.[10] It cannot be entered to supply a judgment which should have or was intended to have been issued but was not.[11] Nor may it be utilized to alter a previously entered judgment which is determined to be undesirable.[12] The threshold question, then, is whether or not the court has been asked to effectuate a judgment[13] actually and validly rendered. Generally, entry has been viewed as merely a ministerial act separate from rendition;[14] however, in Arizona the *validity* of an unentered judgment has varied from period to period. Thus, in order to determine the validity of the *Hash* decrees, it is necessary to identify the Arizona law in effect during the various periods when these decrees were rendered.

As noted, the unentered judgments in *Hash* covered a period from 1927 to 1955. Prior to 1932, Arizona followed the common law rule: an effective judgment existed upon rendition, and no formal requirements governed the manner of rendition.[15] The mere announcement of the judgment by the court was sufficient to establish the legal status of the parties independently of any requirement for filing and entry.[16]

10. Stephens v. White, 46 Ariz. 426, 51 P.2d 921 (1935).
11. *Id.*
12. 1 A. FREEMAN, *supra* note 4, § 131.
13. A judgment is a final determination of the rights of the parties. *See* Paul v. Paul, 28 Ariz. 598, 238 P. 399 (1925).
14. Black v. Industrial Comm'n, 83 Ariz. 121, 128-29, 317 P.2d 553, 560-61 (1957). *See* Moulton v. Smith, 23 Ariz. 319, 203 P. 562 (1922); Kinsley v. New Vulture Mining Co., 11 Ariz. 66, 90 P. 438 (1907); Meade v. Scribner, 10 Ariz. 33, 85 P. 729 (1906).
15. *See* Black v. Industrial Comm'n, 83 Ariz. 121, 317 P.2d 553 (1957); Moulton v. Smith, 23 Ariz. 319, 203 P. 562 (1922); Kinsley v. New Vulture Mining Co., 11 Ariz. 66, 90 P. 438 (1907); Meade v. Scribner, 10 Ariz. 33, 85 P. 729 (1906).
16. *See* Black v. Industrial Comm'n, 83 Ariz. 121, 317 P.2d 553 (1957); Moulton v. Smith, 23 Ariz. 319, 203 P. 562 (1922); Kinsley v. New Vulture Mining Co., 11 Ariz. 66, 90 P. 438 (1907); Meade v. Scribner, 10 Ariz. 33, 85 P. 729 (1906).

From 1932 to 1939, the *Uniform Rules for the Superior Courts* controlled.[17] Rule VII provided that no judgment could be validly rendered without the simultaneous filing and entry of a formal written judgment.[18] Failure to comply with the rule voided the judgment.[19] Since 1940, a valid judgment may be rendered under the *Arizona Rules of Civil Procedure* without entry and filing.[20] The judgment, however, is not effective until entered and filed.[21] Although it is obviously necessary that the prior judgment be validly rendered, adequate proof of the actual existence of the prior judgment also must be presented.

Entry nunc pro tunc requires that the previous rendition be proven by clear and convincing evidence.[22] The traditional rule is that the evidence must be of record in the original case; a notation made by authority of the court must be found somewhere among the court's written records and memoranda.[23] Thus, under the strict application of this rule, the mere existence of a signed decree would be insufficient to support a nunc pro tunc entry in the absence of proper evidence showing that a judgment was actually rendered.[24] A few states have

17. These had the binding effect of statute. *See* Day v. Board of Regents, 44 Ariz. 277, 36 P.2d 262 (1934).

18. Rule VII of the *Uniform Rules for the Superior Courts* (1932), read in part:

> No judgment shall be rendered by any Superior Court unless simultaneously with such rendition there shall be filed with the clerk a formal written judgment, signed by the trial judge. When the court has arrived at a decision in any case, it shall notify the parties, and the one in whose favor the decision is to be shall prepare and present to the judge a proposed form of judgment within five days thereafter, and serve a copy thereof on the opposite party.

19. *See* Harrington v. White, 48 Ariz. 291, 61 P.2d 392 (1936); Ferguson v. Goff, 46 Ariz. 260, 50 P.2d 20 (1935); Chiricahua Ranches Co. v. State, 44 Ariz. 559, 39 P.2d 640 (1934); *cf.* Black v. Industrial Comm'n, 83 Ariz. 121, 317 P.2d 553 (1957) (Struckmeyer, J., dissenting). *But see* Collins v. Superior Court, 48 Ariz. 381, 62 P.2d 131 (1936). *Collins* provided that the mere failure to comply with rule VII by not rendering a judgment in open court left a judgment voidable rather than void.

In American Sur. Co. v. Mosher, 48 Ariz. 552, 64 P.2d 1025 (1936), the court reaffirmed the view that failure to enter judgment in compliance with the rule left rendition void. In Cahn v. Schmitz, 56 Ariz. 469, 108 P.2d 1006 (1941), the supreme court held that failure to comply with the rule VII provision for actual entry required the judgment to be reversed and remanded, although the judgment was not considered void. While it is questionable whether a judgment could have been collaterally attacked for failure to comply with *any* provision of rule VII, it remained that failure to comply with the requirement of simultaneous entry left rendition ineffective, and the judgment was void.

20. *See* Harbel Oil Co. v. Steele, 81 Ariz. 104, 301 P.2d 757 (1956); Southwestern Freight Lines v. Shafer, 57 Ariz. 111, 111 P.2d 625 (1941).

21. *See* Jackson v. Sears, Roebuck & Co., 83 Ariz. 20, 315 P.2d 871 (1957).

22. Black v. Industrial Comm'n, 83 Ariz. 121, 127, 317 P.2d 553, 557 (1957).

23. *See* Hudson v. Hudson, 20 Ala. 364 (1852); Tedder v. Morrow, 100 Fla. 1486, 131 So. 387 (1930); Robertson v. Pharr, 56 Ga. 245 (1876); Dauderman v. Dauderman, 130 Ill. App. 2d 807, 263 N.E.2d 708 (1970); Arnd v. Poston, 199 Iowa 931, 203 N.W. 260 (1925); Gorman v. Lusk, 280 Ky. 692, 134 S.W.2d 598 (1939); Rhodes v. Sherrod, 16 Miss. (8 S. & M.) 97 (1847); Levy v. Winans, 464 S.W.2d 763 (Mo. App. 1970); McGavock v. Puryear, 46 Tenn. 34 (1868); Cameron v. Thurmond, 56 Tex. 22 (1881); Bloyd v. Scroggins, 123 W. Va. 241, 15 S.E.2d 600 (1941). The written records and memoranda required by the majority rule are those that are required by law to be kept in the court which allegedly rendered the original judgment. *See* 1 A. FREEMAN, *supra* note 4, § 127.

24. Generally, decrees are not documents required by law to be kept among the records of the court. *See* Hudson v. Hudson, 20 Ala. 364 (1852).

adopted a more liberal view allowing evidence other than that which is of record to support an entry nunc pro tunc. Several states have allowed the use of any relevant written evidence, whether or not of record.[25] In some instances, the testimony of the judge presiding at the original proceeding is satisfactory,[26] and some courts have allowed the use of any significant evidence, written or oral.[27]

The second principle of nunc pro tunc entry concerns what grounds are proper justification for such action. The cases can be divided into two general categories: those where final judgment was appropriate but was never rendered and those where a judgment was formally rendered, but through mistake or inadvertence by the court, was never entered. [28] It is with this latter category that this casenote is primarily concerned. While the mistake or inadvertence justifying entry nunc pro tunc was originally limited to errors committed by the court or its clerks,[29] the grounds have been broadened to include oversight or lack of attentiveness by the parties.[30] In most instances where a judgment has not been entered, some negligence in the form of lack of attentiveness is attributable to the parties.[31] Generally, this results from their failure to ensure to themselves that their judgment was duly entered. Thus, where both parties have failed to ensure that a judgment was properly entered, entry nunc pro tunc has been found to be proper.[32]

The third principle pertains to which parties are entitled to move for entry of a judgment nunc pro tunc. Where a purely clerical error is present, the court may properly correct its records upon its own mo-

25. *See* Boyd v. Schott, 152 Ind. 161, 52 N.E. 752 (1899); Newton v. Newton, 166 Mich. 421, 132 N.W. 91 (1911).

26. *See* Elliot v. Elliot, 154 Kan. 145, 114 P.2d 823 (1941).

27. *See* Eiland v. Parkers Chapel Methodist Church, 222 Ark. 552, 261 S.W.2d 795 (1953); *In re* Cook's Estate, 77 Cal. 220, 19 P. 431 (1888); Lockard v. Lockard, 169 Neb. 226, 99 N.W.2d 1 (1959); State v. Coleman, 110 Ohio App. 475, 169 N.E.2d 703 (1959); *In re* Moody's Estate, 115 Vt. 1, 49 A.2d 562 (1946), *cert. denied*, 331 U.S. 814 (1948).

28. *See* 1 A. FREEMAN, *supra* note 4, § 122, at 222-23; 6A J. MOORE, FEDERAL PRACTICE ¶ 58.08 (2d ed. 1953). It will be noted that in the first category no judgment has been rendered at all. In this respect, the first category differs entirely from the second. The majority of situations in the former class involve circumstances where the case has been put in order for final judgment, but before the judgment is rendered one of the parties dies. *See* Mitchell v. Overman, 103 U.S. 62 (1880). While the failure to render judgment is not due to any blameworthy delay by the court, nevertheless, it is a result of the court's inability to render judgment instantaneously upon the case being presented. The situation in *Hash*, however, does not fall within this category, because there was no delay in the rendition of judgment occasioned solely by the conduct of the court.

29. *See* Cuebas Y Arrendondo v. Cuebas Y Arrendondo, 223 U.S. 376, 390 (1911); Mitchell v. Overman, 103 U.S. 62, 64-65 (1880).

30. 1 A. FREEMAN, *supra* note 4, § 126, at 230-31.

31. While the fault may be that of the attorney, the negligence of the attorney is attributable to his client. *See* Balmer v. Gagnon, 19 Ariz. App. 55, 504 P.2d 1278 (1973).

32. 1 A. FREEMAN, *supra* note 4, § 126, at 230-31.

tion.[33] In other situations, the rule is by no means so clear. The majority view is that any persons having rights dependent upon or affected by the outcome of the original action are proper parties.[34] This, of course, is a rule capable of liberal interpretation. When third parties move for entry of divorce decrees nunc pro tunc, a number of states require that there be some form of privity between the moving party and an original party to the divorce.[35] Other jurisdictions demand that the moving party have had an interest in the outcome of the original litigation, often to the extent of requiring some property interest.[36]

Once a judgment has been entered nunc pro tunc, it is universally accepted and enforced as though it had been properly entered.[37] The intervening rights of third parties, however, have been excepted from this rule where those parties had no notice of the unentered judgment.[38] Thus, a nunc pro tunc entry can never affect the status of third parties who acted with faith on the record.[39] Where the third party can be charged with notice or knowledge, however, the nunc pro tunc entry is fully effective.[40]

While the prior discussion has concentrated upon the common law principles, these principles have been altered by statute in California.[41]

33. *See* Black v. Industrial Comm'n, 83 Ariz. 121, 317 P.2d 553 (1957); Wood's Pharmacy, Inc. v. Kenton, 50 Ariz. 53, 68 P.2d 705 (1937); 1 A. FREEMAN, *supra* note 4, § 126.

34. 1 A. FREEMAN, *supra* note 4, § 136, at 256.

35. The nature of this privity is not entirely clear. It may require being in a proper representative capacity for an original party to the action, Heil v. Rogers, 329 S.W.2d 960 (Mo. App. 1959), or as little as being affected to the same extent as would a party to the original action, for example, the second spouse of a supposedly divorced party. Moore v. Shook, 276 Ill. 47, 114 N.E. 592 (1916).

36. *See* Gaderson v. Gaderson, 257 S.W.2d 569 (Tex. Civ. App. 1923).

37. 1 A. FREEMAN, *supra* note 4, § 139, at 263.

38. *Id.*

39. *See In re* Ackermann, 82 F.2d 971 (6th Cir. 1936); Corbett v. Corbett, 113 Cal. App. 595, 298 P. 819 (Ct. App. 1931); Hobson v. Dempsey Constr. Co., 232 Iowa 1226, 7 N.W.2d 896 (1943); Stoddard v. Atchinson, 54 N.D. 519, 210 N.W. 3 (1926); Parter v. Lerch, 129 Ohio St. 47, 193 N.E. 766 (1935); Crum v. Fillers, 6 Tenn. App. 547 (1926).

40. *See* Plant v. Gunn, 94 U.S. 664 (1877); Pollard v. King, 62 Ga. 103 (1878); Coleman v. Watson, 54 Ind. 65 (1876); 1 A. FREEMAN, *supra* note 4, § 139, at 262.

41. The California statute, CAL. CIV. CODE § 4515 (West 1970), provides that the court may enter divorce decrees upon its own motion,

> [w]henever either of the parties in a proceeding for dissolution of the marriage is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed and entered, if no appeal has been taken from the interlocutory judgment or motion made for a new trial to annul or set aside the judgment . . . the court, on the motion of either party thereto or upon its own motion, may cause a final judgment to be signed, dated, filed and entered . . . as of the date when the same could have been given or made by the court if applied for.

The courts have concluded that this grant of power permits application for entry by a person not a party to the original divorce action even though the parties to that action are still alive. *See* Hurst v. Hurst, 227 Cal. App. 2d 859, 39 Cal. Rptr. 162 (Ct. App. 1964). *See also* Kern v. Kern, 261 Cal. App. 2d 325, 67 Cal. Rptr. 802 (Ct. App. 1968); Hamrick v. Hamrick, 119 Cal. App. 2d 839, 260 P.2d 188 (Ct. App. 1953); *cf.* Hull v. Hull, 102 Cal. App. 2d 382, 227 P.2d 546 (Ct. App. 1951). Additionally, it has been held that where the evidence, in an action for annulment, revealed that a prior

In addition to utilizing entry nunc pro tunc to correct court records, the California courts also may exercise this power in divorce cases to remedy unjust situations.[42] The original intent of the California legislation was to validate otherwise void marriages, thereby relieving the parties of the consequences of bigamous relationships.[43] Going beyond the statutory intent, however, the California courts have held that the statute may be construed as broadly as necessary to avoid injustice.[44] Thus, it is not surprising that the grounds for entry have been expanded to include mistake, inadvertence, or negligence by one of the parties.[45] Under these extended grounds, the party seeking the order must show that failure to enter the judgment was the result of mistake, inadvertence, or excusable negligence.[46] The terms of the statute, however, are not infinitely expandable. Mistake is limited to a mistake of fact occurring when a person understands the realities to be other than what they are; inadvertence means a lack of attentiveness or negligence; and negligence refers to the failure to use ordinary care.[47] The burden of showing mistake, inadvertence, or negligence, however, is not particularly great,[48] and entry nunc pro tunc is liberally granted. Nevertheless, even under California's liberal policy, the mere failure to apply for a decree generally does not justify entry nunc pro tunc.[49]

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divorce decree had not been entered, it was proper for the judge to enter it on his own motion. Armstrong v. Armstrong, 85 Cal. App. 2d 482, 193 P.2d 495 (Ct. App. 1948). The conclusion to be drawn from these cases is that there are but minimal limits concerning who may bring an action to have a divorce decree entered nunc pro tunc in California. As with the traditional rules of nunc pro tunc, however, the exercise of this power may not destroy vested rights acquired in good faith. *See In re* Adoption of Graham, 58 Cal. 2d 899, 377 P.2d 275, 27 Cal. Rptr. 163 (1962); *In re* Casimir's Estate, 19 Cal. App. 3d 773, 97 Cal. Rptr. 623 (Ct. App. 1971); Ringel v. Superior Court, 54 Cal. App. 2d 34, 128 P.2d 558 (Ct. App. 1942).

42. *See* Comment, *Nunc Pro Tunc: A Cure for Bastardy and Bigamy in California,* 6 U.C.L.A.L. REV. 298 (1959).

43. *See In re* Hughes' Estate, 80 Cal. App. 2d 550, 182 P.2d 253 (Ct. App. 1947); Macedo v. Macedo, 29 Cal. App. 2d 387, 84 P.2d 552 (Ct. App. 1939); *cf.* Price v. Price, 242 Cal. App. 2d 705, 51 Cal. Rptr. 699 (Ct. App. 1966); 27 CALIF. L. REV. 463 (1939).

44. *See In re* Hughes' Estate, 80 Cal. App. 2d 550, 182 P.2d 253 (Ct. App. 1947); *cf.* Price v. Price, 242 Cal. App. 2d 705, 51 Cal. Rptr. 699 (Ct. App. 1966); Hurst v. Hurst, 227 Cal. App. 2d 859, 39 Cal. Rptr. 162 (Ct. App. 1964); 27 CALIF. L. REV. 463 (1939).

45. Berry v. Berry, 140 Cal. App. 2d 50, 59-60, 294 P.2d 757, 764 (Ct. App. 1956); *cf.* Kern v. Kern, 261 Cal. App. 2d 325, 67 Cal. Rptr. 802 (Ct. App. 1968). This represents a substantial change from previous California practice. *See* Corbett v. Corbett, 113 Cal. App. 595, 298 P. 819 (Ct. App. 1931).

46. Berry v. Berry, 140 Cal. App. 2d 50, 294 P.2d 757 (Ct. App. 1956).

47. *Id.*

48. The California courts have held that delay in entry of final judgment of divorce beyond the time when such judgment might have been obtained is sufficient grounds for finding that there was inadvertence or negligence. *See* Hurst v. Hurst, 227 Cal. App. 2d 859, 39 Cal. Rptr. 162 (Ct. App. 1964). This, however, is difficult to reconcile with the position of Berry v. Berry, 140 Cal. App. 2d 50, 294 P.2d 757 (Ct. App. 1956), that the mere failure to apply for the final decree is insufficient to constitute mistake, negligence, or inadvertence. *See* Waller v. Waller, 3 Cal. App. 3d 456, 83 Cal. Rptr. 533 (Ct. App. 1970).

49. Berry v. Berry, 140 Cal. App. 2d 50, 294 P.2d 757 (Ct. App. 1956). *See also* Nemer v. Nemer, 117 Cal. App. 2d 35, 254 P.2d 661 (Ct. App. 1953) (where on evi-

Arizona Developments

Authority to enter judgments nunc pro tunc has long been recognized in Arizona as a power inherent in the court.[50] This authority had not been subject to complete judicial scrutiny, however, until 1957. In *Black v. Industrial Commission*,[51] the Arizona supreme court affirmed the traditional principles of nunc pro tunc. The court noted that entry nunc pro tunc is appropriate only when there has been a validly rendered judgment and there is evidence proving that the failure to record was the result of oversight, inadvertence, or some other adequate reason.[52] *Black* did not address the question of who is entitled to apply for entry nunc pro tunc. It did create, however, considerable uncertainty as to the nature of the evidence necessary to prove the valid rendition of a prior judgment.

Earlier Arizona case law had indicated that the only proper means of establishing the valid rendition of a prior judgment was through the minutes of the trial court.[53] In *Black*, however, the court ruled that a minute entry was insufficient to show that a judgment had been validly rendered.[54] The *Black* decision not only resulted in confusion as to the required proof, but also gave rise to speculation that the court was completely prohibiting entry nunc pro tunc.[55] A 1970 amendment to rule 58(a) of the *Arizona Rules of Civil Procedure* affirmed the continued vitality of entry nunc pro tunc.[56] The amendment, however, did not specify the conditions or circumstances necessary for entering a judgment nunc pro tunc or the effects of such judicial action.[57] Rather,

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dence that the husband relied on his wife's attorney to obtain final judgment, a delay of more than 2 years after the interlocutory decree justified the conclusion that the decree had not been entered due to inadvertence or negligence within meaning of the statute).

50. *See, e.g.*, Wood's Pharmacy, Inc. v. Kenton, 50 Ariz. 53, 68 P.2d 705 (1937); Rae v. Brunswick Tire Corp., 45 Ariz. 135, 40 P.2d 976 (1935); Southern Pac. R.R. v. Pender, 14 Ariz. 573, 134 P. 289 (1913).

51. 83 Ariz. 121, 317 P.2d 553 (1957).

52. *Id.* at 126, 317 P.2d at 558.

53. American Sur. Co. v. Mosher, 48 Ariz. 552, 64 P.2d 1025 (1936). The court intimated, however, that under certain circumstances the recollection of the presiding trial judge might provide a basis for entry. *Id.* at 564, 64 P.2d at 1030.

54. The action in *Black* tested the validity of a divorce decree which had been approved and signed by a judge and noted in the court minutes in 1943, but which was not entered until 1955.

55. *See* ARIZ. R. CIV. P. 58(a), State Bar Comm. Notes.

56. ARIZ. R. CIV. P. 58(a), provides:

> All judgments shall be in writing and signed by a judge or a court commissioner duly authorized to do so. The filing with the clerk of the judgment constitutes entry of such judgment, and the judgment is not effective before such entry, except that in such circumstances and on such notice as justice may require, the court may direct the entry of a judgment nunc pro tunc, and the reasons for such direction shall be entered of record. The entry of the judgment shall not be delayed for taxing cost.

See also ARIZ. R. CIV. P. 58(a), State Bar Comm. Notes.

57. *See* ARIZ. R. CIV. P. 58(a), State Bar Comm. Notes.

it was suggested that appropriate substantive rules be developed from the existing law.[58]

Analysis of *Hash* discloses that the court's utilization of the nunc pro tunc entry may represent a significant departure from traditional principles. In fact, the *Hash* decision manifests an exercise of judicial discretion beyond the California practice under which courts are afforded broad power by statute. First, a number of the *Hash* divorces did not meet the requirement that there be a validly rendered prior judgment. The pre-1932[59] and the post-1939[60] divorces were validly rendered prior judgments pursuant to the then existing Arizona law. However, those decrees dated between 1932 and 1939 were void for failure to comply with superior court rule VII, which provided that no judgment was validly rendered without filing and entry.[61] The decrees which were not void might have been entered nunc pro tunc upon a proper showing of the prior rendition, but since the only evidence presented was the decrees themselves,[62] the showing was insufficient from the standpoint of the traditional approach.[63] Therefore, *Hash* may be read as adopting a lesser evidentiary standard than prevailed under *Black*[64] and as signifying a departure from the traditional proof requirements.

The *Hash* court did not address the requirement that there must be a showing of mistake or inadvertence to justify nunc pro tunc entry. Certainly no mistake or inadvertence was apparent on the part of the court or its officials.[65] It is also problematic whether mistake or inadvertence attributable to the parties could have been shown. While they were notified by their attorney that their decrees would not become final until filed, it is not clear that the clients understood or remembered the significance of failure to file.[66] Irrespective of the actual existence of mistake or inadvertence, it is significant that the court made no reference to the necessity of proving this element. In light of the explicit overruling of *Black*, it may be surmised that *Hash* signifies an expansion of the grounds for entry nunc pro tunc. At a minimum, the court's decision raises serious doubt as to the continued necessity for proving inadvertence or mistake as a basis for entry nunc pro tunc.

58. *Id.*
59. *See* text accompanying notes 15-16 *supra.*
60. *See* text accompanying note 20 *supra.*
61. See text accompanying notes 17-19 *supra.*
62. The *Hash* opinion does not indicate that any additional evidence existed.
63. *See* text accompanying notes 23-24 *supra.*
64. This is more in keeping with the earlier case of American Sur. Co. v. Mosher, 48 Ariz. 552, 64 P.2d 1025 (1936). See text & note 53 *supra.*
65. See discussion note 6 *supra.*
66. Hash v. Henderson, 109 Ariz. 174, 507 P.2d 99, 100 (1973).

While the decision in *Hash* does not square well with traditional principles of retrospective entry, it bears considerable resemblance to the practice of the California courts. In California, however, courts have been afforded statutory power beyond that contemplated by the framers of the amended Arizona rule.[67] *Hash* clearly represents alterations in traditional nunc pro tunc principles which go beyond the inherent power of the court. Every court possesses the power to maintain and correct its own records and to protect the parties before it. Nunc pro tunc, however, is intended only as a procedural remedy to be used to preserve substantive rights.[68] Its intended use is not the use made of it by the *Hash* court, which was to effect substantive results through the use of a procedural mechanism. The purpose and reasoning of *Hash* was consistent with the motivating factor of California procedure — obtaining a beneficent result.[69] It is by no means clear, however, that even California courts would enter judgment nunc pro tunc under the circumstances in *Hash*.[70] Even the liberal California procedure requires proof that the parties were previously entitled to the entry of a final judgment and a showing of why such judgment was not obtained and filed.[71] While the results reached by the court may not be faulted in light of the unique fact situation which required resolution, the means used by the court may prove troublesome.

Conclusion

As a result of *Hash*, the status of nunc pro tunc entry in Arizona is in a state of turmoil. Undoubtedly, confronted with this unprecedented factual situation, the court could have limited its holding to the peculiar facts before it. Rather, the court chose to overrule any conflicting principles set forth in *Black*,[72] thereby rendering the future requirements for entry nunc pro tunc unclear. Whether *Hash* foreshadows the abolition of such traditional nunc pro tunc requirements as the

67. *See* ARIZ. R. CIV. P. 58(a), State Bar Comm. Notes.
68. *See generally* 1 A. FREEMAN, note 4 *supra*, §§ 121-39.
69. *See* text & note 44 *supra*.
70. In Hurst v. Hurst, 227 Cal. App. 2d 859, 39 Cal. Rptr. 162 (Ct. App. 1964), the defendant in an action for entry of judgment nunc pro tunc contended that the failure to enter judgment was the result of the plaintiff's failure to pay his attorney. The court concluded, on the facts, that this was not the reason the decree had not been entered. The court allowed entry nunc pro tunc on the basis of the moving party's erroneous belief that the unentered decree automatically became final after 1 year. This misconception of the law was similar to that suffered by some of the divorced individuals in *Hash*. The *Hash* court observed that it was by no means clear that all of the individuals understood or remembered the attorney's advice or were aware of the requirement that the decree be filed before the divorce became effective. 109 Ariz. at 175, 507 P.2d at 100. In contrast to *Hash*, however, the California court in *Hurst* made a specific finding of fact as to why the decrees were not entered.
71. *See* text accompanying note 45 *supra*.
72. 109 Ariz. at 177, 507 P.2d at 102 (1973).

necessity for a valid prior judgment and a showing of mistake or inadvertence is mere speculation. It seems likely, upon reconsideration, that the court may wish to limit *Hash* to its facts. Whatever the ultimate outcome, it is unfortunate that the court did not specify clearly the precedential weight which should be given to the *Hash* decision.

III. COMMERCIAL LAW

A. Recovery on an Open Account

The debtor-creditor relationship recently has come under the increasing scrutiny of the courts. Because of the commonplace use of consumer credit, the legitimacy of recovery procedures used by creditors has been carefully scrutinized. While the trend in this process has been one of increased protection of the debtor,[1] the Supreme Court of Arizona has not always followed that trend.[2] An example is *Holt v. Western Farm Services, Inc.*,[3] in which the court was presented with the question of the quantum of evidence necessary to recover on an open account.

Plaintiff, Western Farm Services, brought suit on an open account for farm supplies purchased on credit over a 14-year period. At the trial, plaintiff introduced a summary of the account from January 1970 to July 1971, as well as invoices for 1970.[4] The summary included a monthly breakdown of the charges (debits) and payments (credits) during this 18-month period. It began, however, with a debit balance which purportedly represented the defendants' net liability on the account for the 12 previous years. Although invoices supported the 1970-71 entries,[5] no documentary evidence was presented to corroborate the initial debit balance.

Holding that only those items which were evidenced by invoices remained due, the trial court nonetheless ordered recovery on the total

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1. Symbolic of this change are Fuentes v. Shevin, 407 U.S. 67 (1972), and Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). *But see* Mitchell v. W.T. Grant Co., 415 U.S. 944 (1974). For legislative efforts to protect the debtor, see Boyd, *Representing Consumers—The Uniform Commercial Code and Beyond*, 9 Ariz. L. Rev. 373 (1968). For an overview, see Countryman, *The Bill of Rights and the Bill Collector*, 15 Ariz. L. Rev. 521 (1973).

2. Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 502 P.2d 1327 (1972), *noted in* "The Precedential Authority of United States Supreme Court Minority Decisions," 15 Ariz. L. Rev. 593, 621 (1973).

3. 110 Ariz. 276, 517 P.2d 1272 (1974), *vacating* 19 Ariz. App. 335, 507 P.2d 674 (1973).

4. The 1971 charges represented interest accruing on the unpaid balance of the account and were not in issue on appeal. 19 Ariz. App. at 337, 507 P.2d at 676.

5. *Id.* at 337-38, 507 P.2d at 676-77. Plaintiff's general manager testified that, although he did not have personal knowledge of the account throughout its existence, it was prepared in the ordinary course of business and always had been kept in substantially the same manner.

amount claimed.[6] The court reached this result by subtracting defendants' 1970 payments from the oldest items of the account,[7] even though the beginning balance was unsupported by documentary evidence. Thus, the initial debit balance was extinguished by defendants' 1970 payments and only the 1970 debts remained outstanding. Since these items were supported by invoices, the court found that plaintiff had proved its claim.

The court of appeals affirmed the trial court's result but expressed different reasoning in so doing. Because the defendants had promised that they eventually would pay the total account rendered,[8] the court of appeals reasoned that defendants impliedly had approved the initial debit balance, thereby transforming it into an account stated.[9] To recover on an account stated, a creditor need only prove an agreement on the amount stated.[10] Since, in the court's opinion, the beginning debit balance was an account stated and the remainder of the account was supported by invoices, all items of the account had been proved. Consequently, recovery was ordered on the total amount claimed.

On review, the Arizona supreme court rejected the court of appeals' reasoning.[11] Utilizing rationale similar to that of the trial court, the supreme court held that the plaintiff could credit payments made during 1970 to the initial debit balance rather than against the 1970 charges. The court held that no invoices documenting the beginning balance were necessary, because that debit had been totally offset by defendants' 1970 payments.[12] Recovery then was ordered on the unextinguished 1970 charges.

This discussion will address the evidentiary problems a creditor must overcome in order to recover on an account stated and an open account. Consideration will be given to the approaches taken by the court of appeals and the supreme court in *Holt*, and the consequences of that decision will be evaluated.

Recovery on an Account Stated

An account stated exists when a creditor and debtor, after a mu-

6. *Id.*
7. *Id.* at 337, 507 P.2d at 676.
8. 110 Ariz. at 277, 517 P.2d at 1273. Defendants, after receiving current bills which included the debit balance, had, on several occasions, promised to pay. When confronted by the manager, one defendant had stated that the bill might be paid either "this year or next year."
9. 19 Ariz. App. 335, 338-39, 507 P.2d 674, 677-78 (1973).
10. Chittenden & Eastman Co. v. Leader Furniture Co., 23 Ariz. 93, 201 P. 843 (1921).
11. 110 Ariz. 276, 517 P.2d 1272 (1974).
12. *Id.* at 278, 517 P.2d at 1274.

tual investigation of the account, agree that a certain balance is due.[13] Once such an agreement is proved, the creditor is not required to establish the component items of the stated balance.[14] There are several policy considerations which favor a recovery on an account stated without documentation of individual items. The creditor may have relied on the debtor's acquiescence to the agreed balance. Further, he may have destroyed his old books believing that there was no longer a need for them, or documentary evidence of the account between the parties never may have existed. An action on an account stated has many characteristics of the doctrine of promissory estoppel.[15] A creditor has relied, presumably to his detriment, on his agreement with the debtor. Since the debtor previously acknowledged that a particular debt existed, it seems unfair to disallow recovery simply because the creditor no longer can prove the component parts of the balance.

An account stated is most easily established when the parties reach an express understanding as to the status of their account. However, in most jurisdictions, including Arizona, such an agreement also may be implied.[16] For example, when the creditor renders a statement of the account to the debtor and the debtor retains the statement for an unreasonable time without objection, an account stated may be presumed.[17] Additionally, if the debtor promises to pay the balance of an account after it is rendered, the account may become stated.[18] On these grounds, the court of appeals in *Holt* considered the initial debit balance to be an account stated. In over 12 years, the defendants had not objected to the accuracy of the accounts rendered. They had made partial payments on the account and promised to pay the remainder. Therefore, it was concluded that defendants' actions impliedly had stated the beginning debit balance of the account.[19]

It is settled law in Arizona that an open account may begin with an account stated as the first item.[20] Assuming that there was suffi-

13. Kunselman v. Southern Pac. R.R., 33 Ariz. 250, 263 P. 939 (1928).
14. Ingalls v. Ingalls Iron Works Co., 258 F.2d 750 (5th Cir. 1958); West Hill Memorial Park v. Doneca, 131 F.2d 374 (9th Cir. 1942); Ralston v. Morgan, 50 Ariz. 504, 73 P.2d 94 (1937).
15. 15 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1863, at 573-74 (3d ed. 1972).
16. *See, e.g.*, Chittenden & Eastman Co. v. Leader Furniture Co., 23 Ariz. 93, 201 P. 843 (1921); Trafton v. Youngblood, 69 Cal. 2d 17, 442 P.2d 648, 69 Cal. Rptr. 568 (1968); Fleischman Distilling Corp. v. Frontier Liquor Corp., 18 Misc. 2d 903, 191 N.Y.S.2d 674 (Sup. Ct. 1959).
17. *E.g.*, Toland v. Sprague, 37 U.S. (12 Pet.) 300 (1838); O'Hanlon v. Jess, 58 Mont. 415, 193 P. 65 (1920); Lamont Mercantile Co. v. Piburn, 51 Okla. 618, 152 P. 112 (1915).
18. Toland v. Sprague, 37 U.S. (12 Pet.) 300 (1838); *see, e.g.*, United States *ex rel.* Pool Constr. Co. v. Smith Rd. Constr. Co., 227 F. Supp. 315 (N.D. Okla. 1964); Gardner v. Watson, 170 Cal. 570, 150 P. 994 (1915); Lorton v. Henderson, 159 Kan. 679, 158 P.2d 373 (1945).
19. 19 Ariz. App. 335, 338-39, 507 P.2d 674, 677-78 (1973).
20. Piper v. Salem, 48 Ariz. 314, 61 P.2d 399 (1936).

cient evidence to find the stating of an account, the court's decision was consistent with prior law and allowed recovery by a creditor who generously extended long term credit to farmers. The supreme court, however, rejected the account stated analysis, finding that defendants never impliedly or expressly agreed that the debit balance contained in the monthly statements was an accurate representation of the account. The court held that merely rendering a purported statement of account does not constitute an account stated.[21] As a result, the account in issue was considered to be a simple, open account.[22]

Recovery on an Open Account

An open account is one in which there are continuing and concurrent dealings between parties and which has not been closed or stated.[23] In an open account, one indivisible liability arises from the reciprocative series of debits and credits.[24] Therefore, the burden is on the party seeking recovery to prove the accuracy of every item of the account.[25] Earlier Arizona case law had applied these principles in holding that recovery could not be had on an open account which began with an unproven debit balance.[26] These cases were distinguished, however, in *Holt*.

The *Holt* court clearly acknowledged that a creditor has the burden of proving every item of its claim on an open account.[27] Nonetheless, the court chose not to address the fact that plaintiff made no attempt to prove the accuracy of the pre-1970 debts which constituted the beginning balance of the account. Noting that a creditor has the right to apply the debtor's payments to the oldest items of an account, the court reasoned that plaintiff could apply defendants' 1970 payments to the oldest items of the account, thereby extinguishing the beginning balance.[28] By virtue of this logical tour de force, the court concluded that the unproven debit balance no longer existed. Since the 1970 charges were properly supported by invoices, the court held that there was sufficient evidence to support plaintiff's recovery on the remaining debts.

21. 110 Ariz. 276, 278, 517 P.2d 1272, 1274 (1974).
22. *Id.*
23. Connor Livestock Co. v. Fisher, 32 Ariz. 80, 225 P. 996 (1927). *See also* Smith v. Davis, 323 U.S. 111 (1944); Continental Cas. Co. v. Grabe Brick Co., 1 Ariz. App. 214, 401 P.2d 168 (1965); Heron v. Gaylor, 46 N.M. 230, 126 P.2d 295 (1942).
24. Panhandle Irrigation Co. v. Bates, 78 N.M. 706, 437 P.2d 707 (1968).
25. *E.g.*, Piper v. Salem, 48 Ariz. 314, 61 P.2d 399 (1936); Kunselman v. Southern Pac. R.R., 33 Ariz. 250, 263 P. 939 (1928); Silva v. Linneman, 73 Cal. App. 2d 971, 167 P.2d 794 (Ct. App. 1946); Parker v. Center Grocery Co., 387 S.W.2d 903 (Tex. Civ. App. 1965).
26. *See* Merrick v. United States Rubber Co., 7 Ariz. App. 443, 440 P.2d 314 (1968).
27. 110 Ariz. 276, 278, 517 P.2d 1272, 1274 (1974).
28. *Id.* at 278, 517 P.2d at 1274-75.

That the plaintiff has the burden of proving every item of an open account had been well settled in Arizona.[29] Through the offsetting technique employed in *Holt*, however, the supreme court released the plaintiff from the burden of proving the beginning debit balance.[30] In effect, the court partially overruled the existing law since, if a debtor's current payments offset the initial debit balance of his account, his creditor will not have to prove the earlier charges.[31] The court reached this conclusion by relying on case law which set forth the general rule that a creditor may apply current payments by a debtor to whatever portion of the entire debt the creditor desires to extinguish.[32] The creditor is, therefore, free to extinguish the earliest debts if he prefers. Every case cited by the court for this proposition, however, dealt with accounts in which *all* items had been properly proven.[33] In *Holt*, on the other hand, the court applied this principle in a case where the beginning balance had not been proven. The creditor thus is allowed to apply payments to unproven debts and then sue on the outstanding debts which he can prove.

The supreme court reasoned that a creditor could apply the debtor's payments to whatever debts he wished. From this proposition, the court proceeded to apply the payments to the items it wished—items which were never proven. This circuitous reasoning entirely begs the question concerning the requirements for proof of an open account. The application of this rule allows creditors to recover for alleged debts without having to produce evidence of their existence. As long as the payments made in the current year were greater than the beginning balance, the claim could not be questioned. The methodology of the *Holt* court disregards a long-accepted evidentiary rule for open accounts and demonstrably increases the possibility of unjust recoveries.

The once well-settled requirement that a creditor prove every item of an open account is particularly justifiable in a case like *Holt*, where the party seeking recovery is a merchant. Through its bookeeping and billing, a merchant can produce the documents and records which reveal the status of outstanding accounts. Therefore, it is generally in a

29. *E.g.*, Piper v. Salem, 48 Ariz. 314, 61 P.2d 399 (1936); Kunselman v. Southern Pac. R.R., 33 Ariz. 250, 263 P.2d 939 (1928); Chittenden & Eastman Co. v. Leader Furniture Co., 23 Ariz. 93, 201 P. 843 (1921).

30. *See* 110 Ariz. at 278, 517 P.2d at 1274-75.

31. Presumably, if a debtor's payments do not offset the beginning balance, a creditor then would have to produce some evidence of the component items in the balance. As a result, the less a debtor pays, the better his position is with respect to potential litigation.

32. 110 Ariz. at 278, 517 P.2d at 1274.

33. *See* Security Trust & Sav. Bank v. June, 38 Ariz. 513, 1 P.2d 970 (1931); Hollywood Wholesale Elec. Co. v. Baskin, 146 Cal. App. 2d 399, 303 P.2d 1049 (Ct. App. 1956). In both of these cases, the evidence clearly supported the fact that provable debts were outstanding.

better position to prove the correctness of a claim.[34] This is especially true in modern commerce, where many merchants have large bookkeeping departments, computers, standardized business forms, and, often, extraordinary bargaining power over the individual consumer.[35] These factors indicate that any duty to obtain and preserve evidence of outstanding debts should fall on the merchant-creditor, who is in the best position to do so.

In addition, a court cannot be certain that a claim based on an open account is valid without proof of the individual items of the account. For this reason, it has been a general rule that a creditor has not carried his burden of proof when some items remain unproven.[36] Numerous courts when faced with insufficient evidence of debt have deducted the unproven items from the plaintiff's claim.[37] When faced with an unproven beginning debit balance in an action on an open account, it is only logical to disallow the unproven amount by subtracting it from the creditor's claim.[38] The obvious danger of allowing recovery on unproven items is that the claims may be erroneous or fraudulent. An unscrupulous creditor may have inflated accounts receivable to cover up business losses. An embezzling bookkeeper may have hidden deficits with debit entries in a customer's account. The computer which handles an account may have made a mistake. These possibilities are not remote; they happen every day.[39] Although it is not the duty of the courts to uncover such errors, they should not legitimatize potentially incorrect claims by granting recovery.

These problems could have been avoided if the supreme court had adopted the stated account rationale of the court of appeals. Basing its decision on the asserted fact that an open account was involved, the supreme court ignored circumstances which indicated that the accounts rendered were, in fact, transformed into accounts stated. Promises to pay,[40] retention of bills without objection,[41] and partial payments

34. *See* F. JAMES, JR., CIVIL PROCEDURE § 7.8, at 257 (1965).
35. *Id.*
36. The court of appeals expressly rejected the approach later adopted by the supreme court, stating that it was not supported by authority. 19 Ariz. App. 335, 337 n.2, 507 P.2d 674, 676 n.2 (1973).
37. *E.g.*, Porter v. Lawrence, 19 La. App. 9, 139 So. 506 (1932); Devlin v. Heid Bros., 21 S.W.2d 746 (Tex. Civ. App. 1929); Mankin v. Aldridge, 127 Va. 761, 105 S.E. 459 (1920).
38. A creditor must produce proof of the debits and credits or fail in his suit. Mortgage Serv., Inc. v. Booty, 140 So. 2d 461 (La. App. 1962); *see* Merrick v. United States Rubber Co., 7 Ariz. App. 433, 440 P.2d 314 (1969); Parker v. Center Grocery Co., 387 S.W.2d 903 (Tex. Civ. App. 1965).
39. N. LENHART & P. DEFIESE, MONTGOMERY'S AUDITING 56 (8th ed. 1957).
40. Toland v. Sprague, 37 U.S. (12 Pet.) 300 (1838); *see, e.g.*, United States *ex rel.* Pool Constr. Co. v. Smith Rd. Constr. Co., 227 F. Supp. 315 (N.D. Okla. 1964); Gardner v. Watson, 170 Cal. 570, 150 P. 994 (1915); Lorton v. Henderson, 159 Kan 697, 158 P.2d 373 (1945).
41. *E.g.*, Toland v. Sprague, 37 U.S. (12 Pet.) 300 (1838); O'Hanlon v. Jess, 58

on a rendered account[42] are all factors which go to the intent of the parties and are matters to be considered when determining whether an account is considered to be stated.[43] These factors, all of which were present in *Holt*, should have been considered in determining the nature of the account. The supreme court, however, ignored these factors and rejected the stated account approach. In doing so, it not only weakened the evidentiary standards required in order to recover on an open account, but also raised questions as to the amount of evidence necessary to imply an account stated. After *Holt*, it is no longer certain whether an account stated may be inferred from such factors as retention of bills without objection or whether there must be express agreement between the parties.

Conclusion

The trend in contemporary law is toward recognition and protection of the debtor. Yet, in *Holt v. Western Farm Services, Inc.*, the Supreme Court of Arizona retrogressed in a decision which ignored basic principles of fairness and logic. Not only was the holding inconsistent with settled law regarding recovery on an account, but the technique employed allows possible unjust and fraudulent recoveries. The court should have affirmed the court of appeals decision or reversed the trial court and deducted the unproven debit balance from plaintiff's recovery.

B. THE DUTIES OF A GARNISHEE BANK

A garnishee bank may often find itself in an untenable position; when served with a writ of garnishment it must decide whether to impound the designated account[1] or to refuse to impound it, on the ground that it is not obligated to the judgment debtor.[2] If the bank impounds an account and it is later determined that it was not the defendant's account, the bank may be liable to the true owner.[3] Con-

Mont. 415, 193 P. 65 (1920); Lamont Mercantile Co. v. Piburn, 51 Okla. 618, 152 P. 112 (1915).

42. Richey v. Pedersen, 100 Cal. App. 2d 394, 224 P.2d 100 (Ct. App. 1950).

43. 15 S. WILLISTON, *supra* note 15, § 1863, at 573-74.

1. ARIZ. REV. STAT. ANN. §§ 12-1574, -1576, -1578 (1956).

2. *Id.* § 12-1581.

3. Valley Nat'l Bank v. Brown, 110 Ariz. 260, 517 P.2d 1256 (1974), *vacating* 19 Ariz. App. 493, 508 P.2d 752 (1973).

versely, if the bank improperly refuses to impound an account,[4] denying that it holds property of the defendant, it may be liable to the garnishing creditor.[5]

The bank, as an impartial stakeholder,[6] rightly expects to be protected when it has impounded, in good faith, funds pursuant to a writ of garnishment. This interest, however, must be balanced with the interests of the depositor who has a right to be protected from the wrongful impoundment of his property. Ideally, these competing interests are provided adequate protection through statutory procedures. However, as in the case of *Valley National Bank v. Brown*,[7] the existing statutory provisions do not always clearly delineate the duties involved. In the first *Brown* decision, the Arizona court of appeals attempted to strike a proper balance between these competing interests by setting forth four duties incumbent upon a garnishee bank. Those duties, if followed, would protect the bank and also ensure a depositor that his funds will not be impounded without due process of law.[8]

In *Brown*, a deficiency judgment had been obtained naming Claude V. and Lillian R. Brown, judgment debtors.[9] A writ of garnishment was issued against Valley Bank ordering the bank to impound the account of "Claude V. Brown and Lillian R. Brown, his wife."[10] Although the bank had no account in that precise name, it did have

4. If this occurs, the creditor may controvert the garnishee's denial of liability, in which case the issue of the true ownership of the account proceeds to trial. Weir v. Galbraith, 92 Ariz. 279, 287, 376 P.2d 396, 401 (1962); ARIZ. REV. STAT. ANN. §§ 12-1589 to -1590 (1956). At the trial the creditor carries the burden of proof in establishing that the garnishee held garnishable funds of the defendant at the time the writ was served. Mid-State Elec. Supply Co. v. Arizona Title Ins. & Trust Co., 105 Ariz. 321, 324, 464 P.2d 604, 607 (1970); A.N.S. Properties, Inc. v. Gough Indus., Inc., 102 Ariz. 180, 183, 427 P.2d 131, 134 (1967).

5. Valley Bank & Trust Co. v. Parthum, 47 Ariz. 496, 56 P.2d 1342 (1936).

6. Valley Nat'l Bank v. Brown, 19 Ariz. App. 493, 497, 508 P.2d 752, 756 (1973), *vacated*, 110 Ariz. 260, 517 P.2d 1256 (1974).

7. 19 Ariz. App. 493, 508 P.2d 752 (1973), *vacated*, 110 Ariz. 260, 517 P.2d 1256 (1974).

8. *Brown* involves postjudgment garnishment. This is not to be confused with the constitutional due process attack on prejudgment garnishment and attachment. *See generally* Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. U.S. 337 (1968); Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521 (1973).

9. The original debt was owed to Home Savings and Loan Association. A deficiency judgment was obtained and assigned for collection to Union Guaranty Company which issued the writ of garnishment against Valley Bank. 110 Ariz. at 262, 517 P.2d at 1258.

10. ARIZ. REV. STAT. ANN. § 12-1577 (Supp. 1974-75), provides for writs to be served on the branch of a financial institution which is indebted to the judgment debtor. In *Brown*, the writ was issued against the 7th Avenue and Thomas Road Branch of the Valley National Bank in Phoenix. A writ of execution also was secured and served at the address of Edward and Lillian R. Brown, which was the address given in the investigatory report. The sheriff attempted to seize the Brown's automobile pursuant to the writ of execution and was informed by the Browns that they were not the judgment debtors. He contacted the creditor's attorney who told him not to execute the writ, and he apologized to the Browns. The bank was not informed of these events. 110 Ariz. at 262, 517 P.2d at 1258.

two joint savings accounts bearing the name Lillian R. Brown,[11] one of which was Edward and Lillian R. Brown. In an attempt to determine the identity of the defendant, the bank contacted the creditor's attorney. The bank learned that the address and place of employment the creditor had listed for the judgment debtor, Lillian R. Brown, corresponded to the information on the bank records for the joint savings account of Edward and Lillian R. Brown.[12] Despite this verification of addresses, the bank questioned the creditor's attorney as to whether its depositor was in fact the judgment debtor.[13] The creditor, however, refused to quash the writ and the bank impounded the account. It was later proven that the Lillian R. Brown whose account was impounded was not the Lillian R. Brown identified in the writ.[14]

The depositors, Edward and Lillian R. Brown, subsequently brought a negligence action to recover damages.[15] The plaintiffs alleged that the bank was negligent in "[f]ailing to make an adequate investigation of the facts to determine the true status of the conflicting claims of ownership to these funds."[16] The trial court submitted the issue of negligence to the jury which found for the Browns. Appealing this judgment, the bank argued that it could not be held liable since it had properly impounded the account pursuant to section 12-1595 of the *Arizona Revised Statutes Annotated.* Additionally, the bank alleged that it had no duty to resolve conflicting claims between creditors and depositors.[17] The court of appeals agreed and reversed the judgment of the trial court.

The court of appeals decision was vacated by the Supreme Court of Arizona. The supreme court acknowledged that section 12-1595 was intended to protect garnishee banks when they are required to impound funds held in joint accounts. The court noted, however, that the statute provided protection only when the bank had impounded the

11. The other was in the name Lillian R. Brown or Yetta Perlman. 19 Ariz. App. at 495, 508 P.2d at 754.

12. The information corresponded because the creditor's investigator originally had supplied Union Guaranty with information concerning the wrong Lillian R. Brown. *Id.*

13. 110 Ariz. at 262, 517 P.2d at 1258.

14. *Id.* at 260, 517 P.2d at 1256.

15. The original action was filed against Valley National Bank, Union Guaranty Company, the law firm representing Union Guaranty, and the individual attorney in charge of the garnishment. On stipulation, Union Guaranty was released before the case was submitted to the jury. The jury returned a verdict against the bank and the individual attorney. Only the Valley Bank appealed.

16. 19 Ariz. App. at 497, 508 P.2d at 755.

17. ARIZ. REV. STAT. ANN. § 12-1595 (1956), specifies the procedure to be followed when a writ is served on a bank in an attempt to reach an account in the name of two or more persons. Subsection B directs the bank to impound all funds and to promptly notify each person listed on the business records as having an interest in the account concerning the pendency of the proceedings. The entire account is to be impounded even though only one joint tenant may be the judgment debtor. Ultimately though, only the interest of the judgment debtor is subject to garnishment. Musker v. Gil Haskins Auto Leasing, Inc., 18 Ariz. App. 104, 500 P.2d 635 (1972).

funds of the *defendant* named in the garnishment writ. Since the Valley Bank had garnished the funds of a party not named in the writ, the statute provided no defense.[18] The supreme court found that the issue of negligence had been properly submitted to the jury and upheld the judgment for the Browns.

This commentary will discuss the principle duties of a garnishee bank, as set forth in the court of appeals opinion. Particular emphasis will be placed on the fourth duty, to follow the mandate of the writ. The effect of *Brown* on this duty, and any impact *Brown* will have on the future development of a garnishee's duties, will be explored.

Duties of a Garnishee Bank

The court of appeals set forth four principle duties which are encumbent upon a garnishee bank. First, the garnishee must make "full and complete disclosure of all the facts regarding its financial relationship with the alleged judgment debtor."[19] The garnishment statute requires that the garnishee's answer specify any indebtedness to the defendant and identify any of the defendant's property in his possession.[20] Although the statutory language is framed in absolute terms, it has been interpreted as requiring only that the garnishee make a full and complete disclosure of the facts as they existed at the time the writ was served.[21] Thus, it is not necessary for the garnishee to answer concerning indebtedness incurred or property obtained subsequent to the time of service but prior to the answering of the writ.

The second duty delineates the effect of service of the writ upon the activity of the garnishee bank. From the time of service, the garnishee "shall not pay to the defendant any debt or deliver to him any property. . . ."[22] If the garnishee disposes of any debt or property, he does so at the risk of being held personally liable.[23] This restriction, however, only applies to property or indebtedness which the garnishee is required to admit in its answer. Since a garnishee need not acknowledge any property or indebtedness incurred subsequent to the

18. 110 Ariz. at 263, 517 P.2d at 1259.
19. 19 Ariz. App. 493, 497, 508 P.2d 752, 756 (1973).
20. ARIZ. REV. STAT. ANN. § 12-1574 (1956).
21. Reeb v. Interchange Resources, Inc., 106 Ariz. 458, 460, 478 P.2d 82, 84
22. 19 Ariz. App. at 497, 508 P.2d at 756, *quoting* ARIZ. REV. STAT. ANN. § 12-1578 (1956). The garnishing creditor does not acquire a full lien upon the debt or property. Rather, the writ acts as notice that a right to perfect a lien exists. Kuffel v. United States, 103 Ariz. 321, 325, 441 P.2d 771, 775 (1968). The garnishment writ merely prevents the garnishee from paying the debt or the property over to the judgment debtor, or otherwise disposing of it. *See* Weir v. Galbraith, 92 Ariz. 279, 376 P.2d 396 (1962).
23. Mid-State Elec. Supply Co. v. Arizona Title Ins. & Trust Co., 105 Ariz. 321, 324, 464 P.2d 604, 607 (1970); Weir v. Galbraith, 92 Ariz. 279, 376 P.2d 396 (1962); Haigler v. Burson, 38 Ariz. 192, 298 P. 404 (1931).

service of the writ, it may be assumed that such property or debt is not part of the property in *custodia legis*, and it may be handled and disposed of normally.[24]

The third duty requires the garnishee to "advise all adverse claimants to the property or debt garnished of the pendency of the garnishment proceedings."[25] Of the duties enumerated by the court of appeals in *Brown*, only this duty has no direct statutory basis. Rather, the court relied on a Washington case, *Portland Association of Credit Men, Inc. v. Earley*,[26] in which the Washington court stated: "The garnishee, in some respects, occupies the position of a trustee, and is bound to protect, by legal and proper means, the rights of all parties to the chattels or credits attached in his hands . . . ."[27] The duty to notify all adverse claimants of the pendency of the garnishment proceedings ensures protection for the rights of all parties. Upon receipt of adequate notice, all parties may join in the proceedings and their respective rights settled in one judicial determination.[28] The duty of notification is particularly important since a garnishing creditor stands in the shoes of the judgment debtor[29] and has only those rights which the judgment debtor would have in a suit to recover his property from the garnishee.[30] For example, if there is a valid assignment of property prior to service of the writ, both the judgment debtor and the garnishing creditor would be barred from recovering the property from the garnishee. Although the *Earley* case involved such a prior assignment, the garnishee nevertheless paid the money into court.[31] As a result, the garnishee was held liable to the assignee whose interest was unaffected by the garnishment proceedings because he had not received adequate notice.[32] In contrast, the notification requirement set forth in the court of appeals decision in *Brown* provides protection for

24. Mid-State Elec. Supply Co. v. Arizona Title Ins. & Trust Co., 105 Ariz. 321, 464 P.2d 604 (1970); *accord*, Boswell v. Citizens' Sav. Bank, 123 Ky. 485, 96 S.W. 797 (1906). *But cf.* Snyder Nat'l Bank v. Pinkston, 219 S.W.2d 606 (Tex. Civ. App. 1949).

25. 19 Ariz. App. at 497, 508 P.2d at 756.

26. 42 Wash. 2d 273, 254 P.2d 758 (1953).

27. *Id.* at 282, 254 P.2d at 763, *citing* Bellingham Bay Boom Co. v. Brisbois, 14 Wash. 173, 44 P. 153 (1896) (emphasis deleted).

28. Portland Ass'n of Credit Men, Inc. v. Earley, 24 Wash. 2d 273, 282, 254 P.2d 758, 763 (1953).

29. This is because garnishment is a proceeding which vests a creditor with the right to appropriate property or a debt of the debtor which is in the hands of a third party. Ellery v. Cumming, 40 Ariz. 512, 518, 14 P.2d 709, 712 (1932). *See generally* C. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES 390-91 (7th ed. 1891); 2 R. SHINN, A TREATISE ON THE AMERICAN LAW OF ATTACHMENT AND GARNISHMENT 832 (1900); R. WAPLES, TREATISE ON ATTACHMENT AND GARNISHMENT 5 (1805).

30. Mid-State Elec. Supply Co. v. Arizona Title Ins. & Trust Co., 105 Ariz. 321, 323-24, 464 P.2d 604, 606-07 (1970); Elery v. Cumming, 40 Ariz. 512, 513-14, 14 P.2d 709, 710-12 (1932).

31. 42 Wash. 273, 280, 254 P.2d 758, 762 (1953).

32. *Id.* at 281-82, 254 P.2d at 763.

the garnishee by affording the third party adequate notice and an opportunity to appear and protect his interests.[33]

The fourth duty, to "follow the mandate of the writ,"[34] was determinative of the outcome in *Brown*. The Arizona supreme court, relying on the obvious difference between the writ and the bank's records, found that the defendant had failed to perform this obligation. It is in conjunction with this duty that the bank often finds itself in a difficult position. No real issue is presented when the information in the writ corresponds exactly to the bank records; the bank must impound the funds. The problem arises when there is a discrepancy between the writ and the records. If the bank refuses to impound the account, it is potentially liable to the creditor.[35] On the other hand, it may be liable to the depositor if it wrongfully impounds.[36]

Potential liability to the creditor arises when the bank refuses to impound because of a discrepancy, and it later results that it had held the property of the judgment debtor. In *Brown*, the Arizona supreme court indicated that if this situation arises the bank will be protected if it refuses to impound.[37] The court stated that when there is a discrepancy between the writ and the records, the bank is "on notice by its own records" that their depositor may not be the judgment debtor, and the bank should refuse to impound, answering that it is not indebted to the person identified in the writ.[38]

Limited to its facts, the supreme court's decision specifically addresses only a discrepancy in names. The reasoning of the *Brown* court, however, seems equally applicable when there is a discrepancy in other information, such as an address or place of employment; the bank should not be required to impound. The court stated that the bank should not be placed in a position where it must act, at its own peril, as an adjudicator of conflicting claims.[39] To do so would

33. Judicial proceedings are provided for in ARIZ. REV. STAT. ANN. § 12-1590 (1956).

34. 19 Ariz. App. 493, 497, 508 P.2d 752, 756 (1973).

35. Valley Bank & Trust Co. v. Parthum, 47 Ariz. 496, 56 P.2d 1342, *rehearing denied*, 48 Ariz. 87, 59 P.2d 335 (1936).

36. Valley Nat'l Bank v. Brown, 110 Ariz. 260, 517 P.2d 1256 (1974).

37. In Valley Bank & Trust Co. v. Parthum, 47 Ariz. 496, 56 P.2d 1342, *rehearing denied*, 48 Ariz. 87, 59 P.2d 335 (1936), which is cited for the fourth duty, the writ did not match the bank records. The bank refused to impound and was held liable to the creditor. *Parthum*, however, did not address the question of whether the bank should impound when the writ does not match the records. Rather, *Parthum* involved a fraudulent conveyance in which the judgment debtor deposited money in the name of his daughter to conceal its true ownership. Additionally, there was no discrepancy between the writ and the bank records. The bank was not able to substantiate additional information supplied in the writ which stated that the account, properly identified in the writ and held by the bank, was in fact owned by the judgment debtor. *Id.* at 497, 56 P.2d at 1343.

38. 110 Ariz. at 263, 517 P.2d at 1259.

39. *Id.*

destroy the bank's status as an impartial stakeholder and impose upon it a judicial obligation to determine the true ownership of the property in its possession.[40] A logical extension of *Brown* is that the bank should not be required to investigate *any* discrepancy and that no liability should attach if it refuses to impound in such a situation.[41] The reasoning of a Colorado court in 1895 is equally applicable today:

> In the intricate and complicated business of banking . . . . [w]hen banks are necessarily held to such strict accountability, it is not asking too much that in proceeding against them the individual sought to be reached should be so designated as to leave no doubt in regard to identity.[42]

A general rule absolving the bank from liability when there is any discrepancy between the writ and the records would seem consistent with the policies set forth in *Brown*. This would relieve the bank of the responsibility of investigating discrepancies and place the burden of proper identification on the garnishing creditor.

Potential liability to the depositor arises in situations such as in *Brown*, where, despite a discrepancy, the bank proceeds to impound and it later results that the account was not that of the defendant. If a bank elects to impound despite a discrepancy, it is not afforded statutory protection.[43] The bank, however, will not necessarily be held strictly liable to the depositor. *Brown* announced that the bank would be liable only if it acted unreasonably in impounding the account. The test is whether "[w]ith the information possessed by the Bank in its own records plus . . . subsequent information . . . would an ordinary prudent person have acted in the same fashion?"[44] Application of this negligence standard necessarily must turn on the facts of each case. In *Brown*, it appears that despite the additional information received from

40. *Id.*

41. Such a position also would be consistent with previous Arizona cases which have held that garnishment, being a purely statutory remedy without common law origin, rests wholly on the judicial process, and its prosecution depends on adherence and conformity to the laws which created it. State v. Allred, 102 Ariz. 102, 103, 425 P.2d 572, 573 (1967); Weir v. Galbraith, 92 Ariz. 279, 286, 376 P.2d 396, 400 (1962); Regan v. First Nat'l Bank, 55 Ariz. 320, 326, 101 P.2d 214, 217 (1940); Davis v. Chilson, 48 Ariz. 366, 369, 62 P.2d 127, 129 (1937). *See also* C. DRAKE, *supra* note 29, at 386; 1 W. WADE, TREATISE ON THE LAW OF ATTACHMENT AND GARNISHMENT 22 (1886).

42. German Nat'l Bank v. National State Bank, 5 Colo. App. 427, 428-29, 39 P. 71, 72 (1895).

43. In *Brown*, the supreme court summarily dismissed the bank's claim that section 12-1595 of the *Arizona Revised Statutes Annotated* provided a defense, saying:

> The statute was designed for the protection of banks faced with garnishments affecting interests in joint accounts. The important point of distinction in this case is that the Bank did not follow the requirements of the statute. The Bank did not hold the funds of the *defendant* identified in the writ, namely Lillian R. Brown, wife of Claude V. Brown.

110 Ariz. at 263, 517 P.2d at 1259.

44. 110 Ariz. at 263, 517 P.2d at 1259.

the creditor's attorney, the discrepancy in names was a major factor in finding the bank negligent. It is evident that a name discrepancy will be given great weight, and a bank is advised not to impound when there is a discrepancy in the names.[45] While the bank may prevail on the negligence issue, the greatest protection is obtained simply by refusing to impound and then answering the writ by denying liability to the person identified therein.

Conclusion

The four duties of a garnishee bank set forth by the court of appeals delineate the basic obligations of a garnishee bank. Most significantly, *Brown* provides guidelines to be followed when there is conflicting information in the writ and the bank records. The bank is best advised to look strictly to the writ and its own records and to deny liability if there is a conflict. If the principles of *Brown* are consistently applied in future cases, then the burden of accurate identification will properly shift to the garnishing creditor and the garnishee bank's position will be less perilous.

45. In Staley v. Brown, 244 Miss. 825, 146 So. 2d 739 (1962), a writ was issued for Henry N. Brown. The bank held an account in the name of Mrs. H.N. Brown with an authorized signature of H.N. Brown. The bank refused to impound and was not held liable. The creditor alleged that the bank had actual knowledge of the true identity of the judgment debtor and, therefore, should be held liable for not impounding the funds. The court disagreed, stating that "the bank was controlled primarily by the writ of garnishment and the description of the person sought to be held as a debtor which was given in the writ." *Id.* at 830, 146 So. 2d at 741. In Campbell v. Yazoo, 199 Miss. 309, 24 So. 2d 531 (1946), the writ was issued against J. Edgar Watson instead of G. Edgar Watson. A default judgment against the garnishee was set aside on the strength of this discrepancy. In R.M. Tire Service Co., Inc. v. Deposit Guar. Bank & Trust Co., 173 Miss. 316, 160 So. 274 (1935), a writ was served with the first two initials of the judgment debtor's name transposed. The address included in the writ corresponded to the address on the bank's records. The bank, however, did not impound the funds and was not held liable. The officer serving the writ had orally identified the defendant to the cashier at the time he served the writ. The court rejected the argument that because the bank had actual knowledge it should be liable for not impounding. The court said: "The bank was primarily controlled by the writ and by the description of the person sought to be held . . . . To hold otherwise would require a bank to perform duties which should be performed by the attaching creditors." *Id.* at 318, 160 So. at 276. *But see* Central of Ga. R.R. v. Napier, 19 Ga. App. 483, 91 S.E. 1004 (1917) (a writ was issued for E.B. Johnson, and the bank was held liable for not impounding an account in the name of Ed. Johnson). *See also* German Nat'l Bank v. National State Bank, 5 Colo. App. 427, 39 P. 71 (1895) (bank was not held liable for refusing to impound when the first two initials had been transposed); 5A A. MICHIE, BANKS AND BANKING 112 (1952). A question arises as to a bank's duty in light of varying degrees of discrepancies. How similar may the names be in order for the bank to be protected if it refuses to impound? If there is actual doubt on the part of the bank as to whom is intended by the writ, then the bank should not impound, but if the difference is such that there is no doubt, at least two courts have held the bank liable for not impounding. In Nebut v. Fourth Nat'l Bank, 22 Ala. App. 447, 116 So. 708 (1928), the writ was issued for Hall-Beale Co. The bank account was in the name Hall-Beale Co., Inc. In Citizens' Sav. Bank v. Boswell, 127 Ky. 21, 104 S.W. 1014 (1907), the writ was issued for O'Dell Commission Company. The bank held the account in the name O'Dell Company.

IV. CONSTITUTIONAL LAW

A. COMMERCIAL EXPLOITATION OF TOPLESS DANCING: SIDESTEPPING THE FIRST AMENDMENT

In recent years, the increase in topless and bottomless entertainment has provoked extensive attempts at regulation. Local governments have employed general lewd and lascivious acts or indecent exposure statutes,[1] special topless dancing ordinances,[2] and liquor licensing requirements[3] to aid in their prosecutions of nude dancers. The defendants invariably counter the prosecutors' attacks with first amendment challenges involving speech-conduct distinctions, obscenity and substantial state interest tests, as well as statutory vagueness and overbreadth objections. Few courts, however, have accepted these claims for first amendment protection.[4]

In *Yauch v. State*,[5] the Arizona supreme court considered for the first time the regulation of nude dancing. Yauch, the owner of a Tucson nightclub, and Porter, one of the topless dancers employed by him, were charged with violation of four city ordinances which prohibited entertainers in any "restaurant, nightclub, bar, tavern, tap room, theater, or in a private, fraternal, social, golf or country club, . . . or

1. *See, e.g., In re* Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655, *cert. denied*, 395 U.S. 910 (1968), *partially overruled*, Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied*, 415 U.S. 931 (1974); People v. Conrad, 70 Misc. 2d 408, 334 N.Y.S.2d 180 (Buffalo City Ct. 1972); Haines v. State, 512 P.2d 820 (Okla. Crim. App. 1973). *See generally* Annot., 49 A.L.R.3d 1084 (1973).

2. *See, e.g.*, Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied*, 415 U.S. 931 (1974); Brandon Shores, Inc. v. Greenwood Lake, 68 Misc. 2d 343, 325 N.Y.S.2d 957 (Sup. Ct. 1971); City of Portland v. Derrington, 253 Ore. 289, 451 P.2d 111, *cert. denied*, 396 U.S. 901 (1969).

3. *See, e.g.*, Paladino v. City of Omaha, 335 F. Supp. 897 (D. Neb.), *aff'd*, 471 F.2d 812 (8th Cir. 1972); City of Salem v. Liquor Control Comm'n, 34 Ohio St. 2d 244, 298 N.E.2d 138 (1973).

4. The small minority holding that nude dancing constitutes protected expression include Reichenberger v. Warren, 319 F. Supp. 1237 (W.D. Wis. 1970); *In re* Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655, *cert. denied*, 395 U.S. 910 (1968), *partially overruled*, Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied*, 415 U.S. 931 (1974) (after a recomposition of the California Supreme Court); Haines v. State, 512 P.2d 820 (Okla. Crim. App. 1973). Except for California v. LaRue, 409 U.S. 109 (1973), which was decided on the ground of the twenty-first amendment rather than the first, the United States Supreme Court has consistently refused to review topless dancing cases. *See* Crownover v. Musick, *supra*.

5. 109 Ariz. 576, 514 P.2d 709, *vacating* 19 Ariz. App. 175, 505 P.2d 1066 (1973).

in any public place" from exposing either "the nipple and aureola" of the breast or the lower part of the torso "consisting of the private parts or anal cleft or cleavage of the buttocks."[6] The defendants pleaded guilty to the charges in city court and appealed to the Pima County superior court. When their motion to dismiss for unconstitutionality was denied, the defendants filed a petition for special action[7] with the Arizona court of appeals. The court of appeals held that dance, unless it is obscene, is a medium of expression entitled to first amendment protection, and declared the ordinances unconstitutional as to dancers.[8] On review, however, the Arizona supreme court vacated the appeals court decision and declared the ordinances constitutional in their entirety.[9]

Although *Yauch* raised many constitutional issues,[10] it is beyond the scope of this casenote to address all of them. Although it is not clear in the opinion whether the court was holding nude dancing to be pure conduct or conduct combined with expression, it is abundantly clear that the court relied heavily on the commercial setting to determine that topless dancing could be regulated. For this reason, this discussion will examine the role of commercial exploitation in *Yauch* and its impact on first amendment protection generally.

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6. TUCSON, ARIZ. CODE §§ 11-25.1 to -25.4 (1965). Section 11-25.1 of the code states:

> Any female entertaining or performing any dance or in any play, exhibition, show or other entertainment, or any female serving food or spiritous [sic] liquors . . . in a restaurant, nightclub, bar, cabaret, tavern, tap room, theater, or in a private, fraternal, social, golf or country club, . . . or in any public place, who appears . . . in such a manner that the nipple and the aureola (the more darkly pigmented portion of the breast encircling the nipple) are not firmly covered by a fully opaque material, is guilty of a misdemeanor.

Section 11-25.3 provides:

> Any person entertaining or performing any dance or in any play, exhibition, show or other entertainment, or any person serving food or spirituous liquors . . . in a restaurant, nightclub, bar, cabaret, tavern, tap room, theater, or in a private, fraternal, social, golf or country club, . . . or in any public place, who appears . . . in such a manner that the lower part of his or her torso, consisting of the private parts or anal cleft or cleavage of the buttocks, is not covered by a fully opaque material or is so thinly covered as to appear uncovered, is guilty of a misdemeanor.

Ordinances 11-25.2 and 11-25.4 prohibit any person who conducts or operates any of the establishments enumerated in ordinances 11-25.1 and 11-25.3 from employing a female unclothed as prohibited by 11-25.1, or any male or female unclothed as prohibited by 11-25.3.

7. In Arizona, the special action has replaced the common law writs of certiorari, mandamus, and prohibition. ARIZ. R.P. SPECIAL ACTIONS 1.

8. 19 Ariz. App. 175, 182, 505 P.2d 1066, 1073 (1973). The court distinguished the statutory provisions concerning nude waiters and waitresses from those concerning nude dancers. Unlike dancing, the serving of food and drink involves no element of communication or expression and can be tied more closely to legitimate state regulation of health standards. *Accord*, Crownover v. Musick, 9 Cal. 3d 405, 431, 509 P.2d 497, 515, 107 Cal. Rptr. 681, 699 (1973) (Tobriner, J., dissenting), *cert. denied*, 415 U.S. 901 (1974).

9. 109 Ariz. 576, 577, 514 P.2d 709, 710 (1973).

10. Besides the complex first amendment problems of speech-conduct, obscenity and substantial state interest which were avoided by the court, this ordinance also raised overbreadth questions regarding the use of the words "theatre" and "any public place."

The concept of commercial exploitation apparently operated in two ways in *Yauch*. At first glance, it appears that the court used commercial exploitation to determine that nude dancing was conduct, not expression.[11] It is also possible, however, that the court may have recognized the presence of some expression.[12] If so, the court must have found that, despite the presence of elements of expression, the regulation of the conduct was justified by a substantial state interest—the heightened danger to the moral health and welfare of the community posed by the commercial exploitation of topless dancing. This commentary will first examine the possible conduct holding using commercial exploitation as a factor to distinguish conduct from speech, and then explore a possible conduct-plus-expression holding using commercial exploitation as a factor to establish a substantial state interest.

Nude Performances Are Conduct

The Arizona supreme court apparently held that nude dancing in bars and restaurants is conduct and does not contain sufficient elements of expression to invoke first amendment protection.[13] Although it is not stated clearly, this determination seemingly rested on two separate grounds: 1) nude dancing in bars and restaurants is a form of indecent exposure,[14] and 2) nudity in bars and restaurants is for the purpose of commercial exploitation and not the communication of ideas.[15]

The court's attempt to ground its holding on indecent exposure was unpersuasive. It cited as authority two indecent exposure cases[16] but ignored the distinction between the common law offense involving an unwilling, unsuspecting victim and nude dancing before consenting adults.[17] Nor did the supreme court acknowledge, as did the court of

11. 109 Ariz. at 578, 514 P.2d at 711. See text & notes 15, 19 *infra*.

12. See text & notes, 56-57, 67 *infra*. It is at least arguable that the court was holding the expression obscene under the Supreme Court's new obscenity standards. *See* Miller v. California, 413 U.S. 15, 34 (1973); text accompanying note 52 *infra*. However, this interpretation of the *Yauch* holding is dubious in light of the court's statement that "[p]rohibitions against indecent exposure are not necessarily founded on matters obscene or pornographic." 109 Ariz. at 578, 514 P.2d at 711. It is much more likely that the court was attempting to avoid the obscenity issue entirely.

13. 109 Ariz. at 578, 514 P.2d at 711.

14. *Id.* at 577, 514 P.2d at 710.

15. *Id.* at 578, 514 P.2d at 711.

16. Truet v. State, 3 Ala. App. 114, 57 So. 512 (1912) (a woman exposing herself on a public road); State v. Galbreath, 69 Wash. 2d 664, 419 P.2d 800 (1966) (a man exposing himself in front of a young girl).

17. The common law offense requires an intentional exposure of the private parts of the body in a public place in the presence of others. Although nude enterainment falls within this definition, statutes on indecent exposure were intended to proscribe acts toward viewers likely to be offended by the act, not to prohibit private performances before receptive adults. People v. Conrad, 70 Misc. 2d 408, 410, 334 N.Y.S.2d 180, 183 (Buffalo City Ct. 1972). *Accord*, Reichenberger v. Warren, 319 F. Supp. 1237, 1239 (W.D. Wis. 1970) (statutes intended to protect children and unwilling adults). *See* TUCSON, ARIZ. CODE § 11-29 (1965) (prohibiting indecent conduct "in any place where

appeals, that certain acts unlawful on a public street may be depicted on a stage and come within first amendment protection.[18]

The second basis for the court's determination that nude performances constitute conduct focused on the location of the performances —bars, restaurants, and nightclubs. *Yauch* emphasized that the owners of these establishments were commercially exploiting nudity to attract customers and, therefore, concluded that nude dancing in bars, restaurants, and nightclubs was not expression. This conclusion apparently rested on the assumptions that a commercial purpose diminishes first amendment protection and that a commercial environment automatically precludes expression of ideas. The court emphasized the impact of the commercial setting by differentiating between "legitimate theater" and entertainment in bars and restaurants: "The ordinances . . . do not bring within the scope of their prohibition performances of dances, plays, exhibitions, shows or other entertainment where the dissemination of ideas is the objective."[19] Seemingly, then, first amendment rights are diluted in bars, restaurants, and nightclubs. Entertainment on a theater stage is expression, but entertainment where food and liquor are served is conduct.

By concluding that nude dancing is conduct, the court sidestepped some of the more difficult issues presented by the case. The first amendment affords a less rigid standard of constitutional protection to pure conduct, than to mixed conduct and speech or to pure speech.[20] Had the court determined that dancing was pure expression, nude per-

there are other persons present to be annoyed or offended thereby"). *But see* Paris Adult Theater I v. Slaton, 413 U.S. 49, 57, 68 (1973) (rejecting the proposition that conduct involving consenting adults is beyond state regulation). *See generally* Annot., 93 A.L.R. 996 (1934); Annot., 94 A.L.R.2d 1353 (1964) (noting a division of authority regarding the effect of consent).

18. 19 Ariz. App. at 181, 505 P.2d at 1072. Artistic license demands that the stage and artistic pursuits generally should not be judged by ordinary standards. *See* Barrows v. Municipal Court, 1 Cal. 3d 821, 830, 464 P.2d 483, 489, 83 Cal. Rptr. 819, 825 (1970); *In re* Giannini, 69 Cal. 2d 563, 572, 446 P.2d 535, 541, 72 Cal. Rptr. 655, 661, *cert. denied*, 395 U.S. 910 (1968), *partially overruled*, Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied*, 415 U.S. 931 (1974). Additionally, the medium of entertainment effectively alters the state interest involved in regulating "indecent exposure." The need to exercise the police power for public safety is less compelling on a stage than in a public street. Comment, *The First Amendment Onstage*, 53 B.U.L. REV. 1121, 1133 (1973). See, however, Paris Adult Theater I v. Slaton, 413 U.S. 49, 67 (1973), stating that: "Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theater stage . . . ."

19. 109 Ariz. at 579, 514 P.2d at 712. The potential for abuse in this reasoning is discussed at text & note 46 *infra*.

20. Speech-conduct distinctions appeared in: Street v. New York, 394 U.S. 576 (1969) (flag burning); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (armband protest); United States v. O'Brien, 391 U.S. 367 (1968) (draft card burning); Cox v. Louisiana, 379 U.S. 559 (1965) (picketing). For discussions of speech-conduct and symbolic expression, see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Nimmer, *The Meaning of Symbolic Speech Under the*

formances could be regulated only upon proof of obscenity[21] or a substantial overriding government interest.[22] Where speech and conduct are mixed, the court must first determine if the communicative elements are sufficient to bring the first amendment into play. If there are sufficient communicative elements, a substantial state interest in the regulation of the conduct which is unrelated to the suppression of expression must be demonstrated to justify the incidental infringement of first amendment rights.[23] Pure conduct, on the other hand, whether obscene or not, may be regulated with only a minimal showing of state interest.[24] Thus, by ignoring the aesthetic-expression elements inherent in the dance form[25] and by focusing on nudity as conduct, the court avoided the complexities of the obscenity and substantial state interest tests. The court's reliance on commercial exploitation as a means of circumventing the first amendment warrants further definition and appraisal.

Commercial Exploitation as a Factor in Distinguishing Conduct and Speech

The determination of whether any given activity is expression or conduct or a combination of both involves complex questions and

First Amendment, 21 U.C.L.A. REV. 29 (1973); Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration*, 12 ARIZ. L. REV. 71 (1970); Comment, *supra* note 18 (discussing nude entertainment specifically); Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968).

21. *In re* Giannini, 69 Cal. 2d 563, 567-72, 446 P.2d 535, 538-41, 72 Cal. Rptr. 655, 658-61, *cert. denied*, 395 U.S. 910 (1968), *partially overruled*, Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied*, 415 U.S. 931 (1974). In concluding that dancing is conduct, many courts noted the difficulty in applying obscenity standards if dancing were deemed expression. Major Liquors, Inc. v. City of Omaha, 188 Neb. 628, 634-35, 198 N.W.2d 483, 487 (1972); City of Portland v. Derrington, 253 Ore. 289, 292, 451 P.2d 111, 113, *cert. denied*, 396 U.S. 901 (1969). For a comprehensive analysis of obscenity prosecutions, see Comment, *New Prosecutorial Techniques and Continued Judicial Vagueness: An Argument for Abandoning Obscenity as a Legal Concept*, 21 U.C.L.A.L. REV. 181 (1973). *See generally* Annot., 49 A.L.R.3d 1084 (1973).

22. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972) (state interest in preventing and controlling crime outweighed the infringement on freedom of the press resulting from compelling newsmen to reveal confidential sources before a grand jury); Baird v. State Bar of Ariz., 401 U.S. 1 (1971) (legitimate interest in determining the competence and character of person seeking to practice law was not so substantial as to justify requiring answers to questions concerning membership in communist or subversive groups); NAACP v. Button, 371 U.S. 415 (1963) (state's interest in regulating solicitation of legal cases by attorneys was not sufficient to justify infringement of first amendment freedom of association).

23. United States v. O'Brien, 391 U.S. 367 (1968). See text & notes 60-62 *infra*. *See also* cases & authorities cited note 20 *supra*.

24. Pure conduct and nude entertainment are discussed in Comment, *supra* note 18, at 1130. *See generally* authorities cited note 20 *supra*.

25. For discussions of dancing as an artistic form, see Yauch v. City of Tucson, 19 Ariz. App. 175, 180, 505 P.2d 1066, 1071; *In re* Giannini, 69 Cal. 3d 563, 567-72, 446 P.2d 535, 538-41, 72 Cal. Rptr. 655, 658-61, *cert. denied*, 395 U.S. 910 (1968), *partially overruled*, Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied*, 415 U.S. 931 (1974); C. SACHS, WORLD HISTORY OF THE DANCE (1963).

highly subjective judgments. The communicative arts, including drama and dance, traditionally have been considered presumptively expression.[26] Nude dancing, however, apparently has been treated by the courts as a marginal area where other factors are weighed to determine whether expression exists. In making the speech-conduct determination, the court may consider the actor's intention to communicate or the viewer's perceptions of communication or simply the court's own analysis of the possibilities for communication under all the circumstances.[27] The determination also may turn on the context in which the activity is performed. Although theoretically it should make no difference if a play or a dance is performed in a theater, at a fair, or in a bar, some courts apparently have felt that a commercial context is a major factor in distinguishing conduct from speech.

Yauch relied on *City of Portland v. Derrington*[28] as authority for its conclusion that commercial exploitation establishes conduct: "When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employes is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours."[29] Although *Portland* offered no authority to support this reasoning, numerous courts have followed the decision,[30] and other courts have played variations on the same theme.[31]

The Arizona court of appeals read *Portland* as holding that a profit motive precluded first amendment protection.[32] In rejecting *Portland*, the court of appeals relied on the reasoning of the United States Supreme Court[33] and concluded that a profit motive did not in it-

26. See authorities cited note 25 *supra*, note 64 *infra*.

27. *See generally* Hodges v. Fitle, 332 F. Supp. 504, 507-08 (1971); Crownover v. Musick, 9 Cal. 3d 405, 425-26, 509 P.2d 497, 510-11, 107 Cal. Rptr. 681, 694-95 (1973), *cert. denied*, 415 U.S. 931 (1974); Major Liquors, Inc. v. City of Omaha, 188 Neb. 628, 634-37, 198 N.W.2d 483, 487-88 (1972); Hoffman v. Carson, 250 So. 2d 891, 894 (Fla.), *appeal dismissed*, 404 U.S. 981 (1971).

28. 253 Ore. 289, 451 P.2d 111, *cert. denied*, 396 U.S. 901 (1969).

29. 109 Ariz. 576, 578-79, 514 P.2d 709, 711-12, *quoting* City of Portland v. Derrington, 253 Ore. 289, 292, 451 P.2d 111, 113, *cert. denied*, 396 U.S. 901 (1969).

30. Starshock, Inc. v. Shusted, 370 F. Supp. 506 (D.N.J. 1974); Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied*, 415 U.S. 931 (1974); Hoffman v. Carson, 250 So. 2d 891 (Fla.), *appeal dismissed*, 404 U.S. 981 (1971); Major Liquors, Inc. v. City of Omaha, 188 Neb. 628, 198 N.W.2d 483 (1972).

31. Hodges v. Fitle, 332 F. Supp. 504 (D. Neb. 1971); City of Salem v. Liquor Control Comm'n, 34 Ohio St. 2d 244, 298 N.E.2d 138 (1973).

32. Yauch v. State, 19 Ariz. App. 175, 182, 505 P.2d 1066, 1073, *vacated*, 109 Ariz. 576, 514 P.2d 709 (1973). The Florida Supreme Court adopted a similar reading and followed *Portland*. As evidence of a profit motive, the court noted that the dancer received extra tips for removing her bra and pants, and quoted an observation of the trial judge: "Apparently the spontaneity of [the dancer's] 'self-expression' was in direct proportion to the monetary consideration she received from the barflies rather than from her absorption in the artistry of her dance." Hoffman v. Carson, 250 So. 2d 891, 894 (Fla.), *appeal dismissed*, 404 U.S. 981 (1971).

33. Smith v. California, 361 U.S. 147, 150 (1959) (dissemination of books under

self prevent first amendment protection of expression.[34] This analysis recognizes the pervasiveness of commercialism in modern society. When books are written for profit, plays are produced for profit, and political speeches are often given with fund raising in mind, clearly a profit motive alone, whether on the part of either a performer or a sponsor, should not be sufficient to preclude first amendment protection.

The Supreme Court of Arizona emphasized the "sales promotion" language of *Portland* instead of the profit motive interpretation suggested by the court of appeals. Therefore, the fact that nude entertainment was employed to attract customers and promote liquor sales indicated to the supreme court that nude dancing was merely a commercial activity and, as such, subject to government regulation, free of first amendment restraints.[35] For the Supreme court, the controlling distinction was not that money was made directly from nude entertainment, but that money was made from the sale of liquor which the nude entertainment promoted. The same logic appeared in *Crownover v. Musick.*[36] *Crownover* relied heavily on *Portland* and reinforced the *Portland* thesis that nude entertainment is conduct and not expression entitled to first amendment protection by stating, "it is common knowledge that [nude entertainment] is nothing more than a sales gimmick."[37] Similarly, *Major Liquors, Inc. v. City of Omaha*[38] quoted the *Portland* sales promotion language and made special note of a bar owner's objections that banning nude entertainment reduced his patronage and income.[39] The Arizona supreme court concluded that nude entertainment in bars is sales promotion, and sales promotion is merely conduct subject to state regulation without regard to first amendment safeguards.

The Nebraska case of *Hodges v. Fitle*[40] illuminates best the theory and authority underlying the sales promotion rationale. *Hodges* carried the *Portland* language a step further by labeling nude dancing "purely commercial advertisement." The opinion based its conclusions on the United States Supreme Court's opinion in *Valentine v. Chresten-*

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commercial auspices does not alter essential constitutional protection); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (motion pictures are protected by the first amendment even though they are commercial profit-making enterprises). A profit motive should be distinguished, however, from pure commercial advertising which is not entitled to first amendment protection. *See* text & note 41 *infra.*

34. 19 Ariz. App. at 182, 505 P.2d at 1073.

35. Yauch v. State, 109 Ariz. 576, 578, 514 P2.d 709, 711 (1973).

36. 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied,* 415 U.S. 931 (1974).

37. *Id.* at 426, 509 P.2d at 511, 107 Cal. Rptr. at 695.

38. 188 Neb. 628, 198 N.W.2d 483 (1972).

39. *Id.* at 633-34, 198 N.W.2d at 487.

40. 332 F. Supp. 504 (D. Neb. 1971).

sen,[41] which held that handbills were purely commercial advertising and that a city could regulate their distribution in the streets. Like *Portland*, *Hodges* emphasized sales promotion as an important factor in justifying the regulation of nude dancing:

> As the handbill in *Chrestensen* was used to promote a product, so is the dancing here used to promote a product—the sale of alcoholic beverages. It is not aimed in any sense at the dissemination of opinion or communication of information. It is not within the purview of the traditional First Amendment cases.[42]

Hodges is a far-reaching extension of *Chrestensen*.[43] More importantly, however, labeling nude entertainment as commercial advertising does not clarify the first amendment issues. The commercial advertising approach involves the same basic problem as speech-conduct: where both expression and advertising are present, the court must determine if the communicative elements are sufficient to bring the first amendment into play. In *New York Times Co. v. Sullivan*,[44] for example, a political message in the form of a paid advertisement was given constitutional guarantees, and in *United States v. Polak*,[45] an advertisement which included excerpts from books was held entitled to first amendment protection. Thus, pure commercial advertising is as difficult to determine as pure conduct.

The sales promotion-commercial advertising approach opens a path for abusive circumvention of the first amendment. To what limits may its logic be pushed? If a nightclub stages a controversial play in order to promote business, is the play a sales gimmick or is it entitled to first amendment protection?[46] On the basis of this approach, anything used to attract customers into a drinking or eating establishment might be called sales promotion or commercial advertising and with-

41. 316 U.S. 52 (1942). Commercial advertising is discussed generally in Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965). The application of commercial advertising to nude entertainment is discussed in Note, *California v. LaRue: The Supreme Court View of Wine, Women, and the First Amendment*, 68 NW. U.L. REV. 130, 142-47 (1973) [hereinafter cited as Note, *The Supreme Court View*].

42. 332 F. Supp. at 509.

43. *Hodges* is the only application of the commercial advertising theory to communicative arts or entertainment, and arguably it stretches the limited *Chrestensen* holding too far. Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973), is a more typical application of the commercial advertising principles. There, help wanted ads were held commercial speech and not within the first amendment. It should be noted that four justices objected to even this limited extension of *Chrestensen*. Mr. Chief Justice Burger found a "disturbing enlargement" of the commercial speech doctrine and a "serious encroachment" on the first amendment. *Id.* at 393 (Burger, C.J., dissenting). Mr. Justice Douglas stated that commercial speech should be protected by the first amendment. *Id.* at 398 (Douglas, J., dissenting).

44. 376 U.S. 254 (1964).

45. 312 F. Supp. 112 (E.D. Pa. 1970).

46. "Certainly a play which passes muster under the First Amendment is not made illegal because it is performed in a beer garden." California v. LaRue, 409 U.S. 109, 121 (1972) (Douglas, J., dissenting).

drawn from the scope of first amendment protection.[47]

Yauch also can be read to suggest that commercial exploitation, in addition to being used as a test for advertising or sales promotion, also may be used to directly negate any elements of expression or any intent to communicate: "[W]e believe nudity in the setting of restaurants and cabarets is for the obvious purpose of commercial exploitation, used to attract customers, and '[i]ts elimination will not hinder the operation of the market place of ideas.' "[48] The effect of this language is to make commercial exploitation a test for distinguishing conduct from expression.

This kind of reasoning appears to have its foundation in the obscenity cases where commercial exploitation is a factor in distinguishing protected speech from obscene speech. In *A Book v. Attorney General of Massachusetts*,[49] the Supreme Court of the United States stated: "Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance."[50] Commercial exploitation also appears to be a consideration in determining a lack of "serious merit" under the Supreme Court's new obscenity guidelines announced in *Miller v. California:* "[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom."[51]

The use of commercial exploitation as a factor in distinguishing conduct from expression as opposed to protected speech from obscene speech is not justified. By transferring the language and reasoning of the obscenity cases to the context of a conduct determination, the court in *Yauch*, perhaps inadvertently, broadened the scope of activities which the state may regulate. In effect, the court made commercial exploitation a threshold test of the first amendment in which commercial exploitation negates the existence of expression; where there is commercial exploitation, there is no first amendment protection.

47. As the dissent in *Major Liquors* pointed out: "Any form of entertainment could be banned, paintings and decor could be banned or strictly regulated, and even the playing of music might be prohibited." 188 Neb. 628, 638, 198 N.W.2d 483, 489 (1972) (McCown, J., dissenting).

48. 109 Ariz. at 578, 514 P.2d at 711, *quoting* Crownover v. Musick, 18 Cal. App. 3d 181, 188, 95 Cal. Rptr. 691, 695 (1971), *rev'd*, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied*, 415 U.S. 931 (1974). The use of the *Crownover* court of appeals decision in this context is misleading. The quotation referred to the nudity of waiters and waitresses which the court of appeals distinguished from dancers and performers.

49. 383 U.S. 413 (1966).

50. *Id.* at 420.

51. 413 U.S. 15, 34 (1973).

Clearly, commercial exploitation alone does not preclude expression of ideas. The fact that a book or film commercially exploits sex, violence, nostalgia, or the occult does not mean that communication is not present. In the same way, the fact that a dance commercially exploits nudity should not determine that the performance does not qualify as expression. *Yauch*, however, failed to distinguish the obscenity requirement from a first amendment threshold test when it used the language of an obscenity case to support its conclusion that nude dancing is not expression: "We cannot say that these ordinances are aimed at serious works which 'lift the spirit, improve the mind, enrich the human personality and develop character . . . .' "[52] Following this reasoning, wearing a jacket bearing the words "Fuck the Draft" would be held to be conduct because the communication did not "lift the spirit [and] improve the mind."[53]

The doctrine of commercial exploitation, then, does not mandate the exclusion of nude entertainment from first amendment protection. A finding of pure conduct by the court completely ignores the expression elements of the dance as an art form, which the Supreme Court acknowledged in *California v. LaRue*: "[W]e agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression . . . ."[54] Indeed, the court in *Yauch* back-handedly recognized that some expression elements are present in nude performances by its citation to *United States v. O'Brien*.[55] This recognition, then, demands that there be proof of a substantial state interest in order to justify the abridgement of expression through state regulation.

Commercial Exploitation as a Factor in Establishing a Substantial State Interest

Yauch quoted *O'Brien* as a justification for the regulation of conduct;[56] however, *O'Brien* involved a situation where "speech" and

52. 109 Ariz. 576, 579, 514 P.2d 709, 712 (1973), *quoting* Paris Adult Theater I v. Slaton, 413 U.S. 49, 63 (1973).

53. See Cohen v. California, 403 U.S. 15 (1971), where the Supreme Court reversed Cohen's conviction for " 'maliciously and wilfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct' " on the grounds that the state was regulating speech, not conduct. *Id.* at 16, 18.

54. 409 U.S. 109, 118 (1972). *LaRue* did not expressly decide the scope of first amendment protection which should be afforded to nude entertainment. The Court upheld regulations of the California Department of Alcoholic Beverage Control which prohibited nudity and certain specific sexual acts on the basis that the twenty-first amendment conferred "something more than the normal state authority over public health, welfare, and morals." *Id.* at 114. *LaRue* is discussed in Comment, *supra* note 18; Note, *The Supreme Court View*, *supra* note 41; 6 AKRON L. REV. 247 (1973); 87 HARV. L. REV. 133 (1973).

55. 391 U.S. 367 (1968).

56. 109 Ariz. at 578, 514 P.2d at 711.

"nonspeech" elements were combined in the same course of conduct.[57] The use of *O'Brien* thus suggests that the court recognized the presence of at least some speech elements in nude dancing.

When a regulated activity includes both speech and non-speech elements, the balancing of individual rights and state interests is especially difficult.[58] The degree of first amendment protection, as well as the degree of state interest needed to justify intrusion on first amendment rights, appears to vary according to the degree of communication found in the act.[59] *United States v. OBrien*[60] announced the test for assessing the permissibility of regulating conduct intertwined with speech. There, the Court set forth a four-prong test:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.[61]

The test apparently operates in two steps: When the communicative element is not affected, regulation can be justified by any reasonable purpose pursuant to the state's police power.[62] However, when the regulation of conduct also restricts the communicative element, the government must establish a substantial state interest which is not related to the suppression of expression.[63]

Yauch quoted *O'Brien* as justification for the regulation of conduct without applying the four-prong test[64] or expressly discussing any

57. 391 U.S. at 376.

58. "The Court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression." Cowgill v. California, 396 U.S. 371, 372 (1970) (Harlan, J., concurring).

59. *See generally* cases & authorities cited note 20 *supra.*

60. 391 U.S. 367 (1968). O'Brien alleged the burning of his draft card was "symbolic expression" entitled to first amendment protection, but the Supreme Court held that the government interest in the efficiency of the Selective Service system was sufficient to justify incidental limitations on O'Brien's symbolic expression. *Id.* at 382.

61. *Id.* at 377. The Arizona court of appeals concluded that the Tucson topless ordinances would fail under this test. 19 Ariz. 176, 182, 505 P.2d 1066, 1073 (1973). For conflicting applications of the test to nude performances, see the majority opinion and dissent in Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied,* 415 U.S. 931 (1974).

62. Crownover v. Musick, 9 Cal. 3d 405, 440, 509 P.2d 497, 521 (107 Cal. Rptr. 681, 705 (1973), *cert. denied,* 415 U.S. 931 (1974).

63. *Id.*

64. It is at least arguable that the situation which prompted the permissibility of the regulation in *O'Brien* is distinguishable from that involved in nude dancing. *O'Brien* involved a law which prohibited the destruction of draft cards and which on its face did not attempt to regulate speech; it also involved symbolic speech which does not carry full first amendment protection. However, as Mr. Justice Tobriner pointed out emphatically in his *Crownover* dissent, nude dancing is not symbolic speech but is rather,

> communicative entertainment, an activity which heretofore has been entitled

state interest with reference to that test. *Yauch* did, however, advert to certain state interests. The police power to regulate conduct for the general welfare and public morality was invoked by the court's statement: "The evil sought to be suppressed is not only the infliction of nudity upon a beholder's moral sensibilities, but also the public degradation of the individual exposed."[65] This elastic police power serves as a legitimate state interest supporting the regulation of nude performances as conduct.[66] Assuming, however, that the *Yauch* court recognized that communicative elements were affected by the ordinance, it is doubtful that the state's interest in protecting the public's moral sensibilities was so substantial as to satisfy the *O'Brien* test.[67]

The court's citation to *Paris Adult Theater I v. Slaton*[68] might be seen as support for a substantial state interest in the regulation of nude dancing. In *Paris,* the Supreme Court recognized that community standards could be debased by "crass commercial exploitation of sex" and that the state has a right to act on this basis.[69] The *Paris* language apparently suggested to the Arizona supreme court that commercial exploitation is a factor that activates a state interest in the regulation of nude conduct since it heightens the danger to peace, morals, and good order engendered by that conduct. It can be argued, however, that the use of the *Paris* language is not justified in a non-obscenity case since the state interest in regulating "the crass commercial exploitation of sex" derives from the assumed adverse effect of obscenity, not from the commercial exploitation itself.[70] In any event, the *Yauch* opinion certainly did not demonstrate that this heightened state interest was substantial enough to meet the *O'Brien* test and justify abridging first amendment rights. In this regard, Mr. Justice Brennan's evaluation in *Paris* of the state interest in public morality is applicable to the *Yauch* treatment of that interest:

> . . . to *full protection* under the First Amendment. The majority opinion stands *O'Brien* on its head, transforming that case, which involved the extension of the First Amendment into the peripheral region of symbolic speech, into a weapon which renders the protected region of communicative entertainment vulnerable to the inroads of censorship.

9 Cal. 3d 405, 439, 509 P.2d 497, 520, 107 Cal. Rptr. 681, 704 (1973), *cert. denied,* 415 U.S. 931 (1974).

65. 109 Ariz. at 578, 514 P.2d at 711.

66. *See, e.g.,* Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied,* 415 U.S. 931 (1974); People v. Lindenbaum, 11 Cal. App. 3d Supp. 1, 90 Cal. Rptr. 340 (Super. Ct. App. Dep't 1970); Brandon Shores, Inc. v. Greenwood Lake, 68 Misc. 2d 343, 325 N.Y.S.2d 957 (Sup. Ct. 1971); City of Portland v. Derrington, 253 Ore. 289, 451 P.2d 111 (1969), *cert. denied,* 396 U.S. 901 (1969).

67. *See* California v. LaRue, 409 U.S. 109 (1972) (suggesting that the police power alone might not be sufficient to justify the regulation of nude dancing).

68. 413 U.S. 49 (1973), *cited in* Yauch v. State, 109 Ariz. 576, 578, 514 P.2d 709, 711 (1973).

69. 413 U.S. at 63.

70. Ginzburg v. United States, 383 U.S. 463, 500 (1966) (Stewart, J., dissenting).

> Even a legitimate, sharply focused state concern for the morality of the community cannot . . . justify an assault on the protections of the First Amendment . . . . Where the state interest in regulation of morality is vague and ill defined, interference with the guarantees of the First Amendment is even more difficult to justify.[71]

Conclusion

In an attempt to justify the regulation of activities in nightclubs, bars, and restaurants, the Arizona court has produced an opinion that leaves first amendment rights vulnerable. By indiscriminately employing the commercial context criterion to determine that nude entertainment is conduct, the court has "torn down the constitutional protections of the communicative arts, exposing the drama, the motion picture, the dance, the opera, the visual arts, sculpture, and communicative entertainment in general, to unbridled censorship."[72]

Because it may undercut areas of expression traditionally protected, the use of commercial exploitation to distinguish speech and conduct is untenable. Nor does commercial exploitation of sex risk a danger sufficient to establish a substantial state interest permitting regulation of nude conduct at the expense of the communicative elements present in that conduct. In attempting to sidestep first amendment problems by the use of commercial exploitation, *Yauch* created a greater problem—the undermining of first amendment protection in a commercialized world.

B. RELIGIOUS FREEDOM AND THE NATIVE AMERICAN CHURCH

In *State v. Whittingham*,[1] the Arizona court of appeals was confronted with the delicate question of whether a criminal prosecution for the unlawful possession of peyote in a religious ceremony violated the first amendment freedom of members of the Native American Church. Because this issue was a matter of first impression in Ari-

71. 413 U.S. at 112 (Brennan, J., dissenting).
72. Crownover v. Musick, 9 Cal. 3d 405, 437, 509 P.2d 497, 519, 107 Cal. Rptr. 681, 703 (1973) (Tobriner, J., dissenting), *cert. denied*, 415 U.S. 931 (1974).

1. 19 Ariz. App. 27, 504 P.2d 950 (1973), *review denied*, 110 Ariz. 279, 517 P.2d 1275, *cert. denied*, 94 S. Ct. 3071 (1974).

zona at the appellate level,[2] the court of appeals had an opportunity to set precedent in this rather sensitive area of the law.

In October 1969, a group of over 40 persons congregated in a Native American Church near Parks, Arizona to take part in a Peyotist[3] ceremony for the purpose of blessing the marriage of the defendants, Mr. and Mrs. Whittingham. While not all of the participants in the ceremony at Parks were Indians and neither spouse appeared to be of Indian descent, Mrs. Whittingham testified that her grandfather was a fullblooded Blackfoot Indian. The ceremony was not performed within the boundaries of an Indian reservation,[4] but Navajo Indians presided over and conducted the ritual.[5]

Although the use or possession of peyote is prohibited by Arizona law,[6] it is nevertheless an essential feature of this and other Native American Church ceremonies.[7] The Whittinghams, as sincere participants in this apparently bona fide Peyotist ceremony, possessed and ingested peyote throughout the ritual. During the course of the proceedings, agents of the Arizona Department of Public Safety raided the premises and arrested Mr. and Mrs. Whittingham. At the Whittinghams' trial, the court rejected their contention that the use of peyote as part of a bona fide religious ceremony was protected under the first amendment to the United States Constitution.[8] As a result,

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2. A similar case had been decided previously by the superior court of the county in which *Whittingham* originated. State v. Attakai, No. 4098 (Coconino County Super. Ct., July 26, 1960). In that case, the trial court upheld the religious freedom defense of a member of the Native American Church in a prosecution for possession of peyote. An appeal by the state was dismissed by the Arizona supreme court.

3. Since peyote is the very foundation of the religion, the terms Peyotism and Native American Church often are used interchangeably.

4. The court noted that the federal government had made an exception for the use of peyote in Peyotist ceremonies on reservations. 19 Ariz. App. at 29, 504 P.2d at 952. See discussion note 21 *infra*. Although the Bureau of Indian Affairs, acting under the authority of 25 U.S.C. § 2 (1970), has made possession or use of peyote on Navajo reservations a crime punishable by fine, imprisonment, or both, the religious use of the drug in Native American Church ceremonies has been specifically exempted. 25 C.F.R. § 11.87 NH (1974).

5. 19 Ariz. App. at 28, 504 P.2d at 951.

6. In Arizona, possession of peyote is a misdemeanor punishable by 6 months imprisonment, a fine not exceeding $300, or both. ARIZ. REV. STAT. ANN. §§ 36-1061, 13-1645 (1956).

7. The Native American Church, which originated in Oklahoma around 1918, is primarily of Indian membership. W. LABARRE, THE PEYOTE CULT 167-74 (1964); A. MARRIOTT & C. RACHLIN, PEYOTE 86-98 (1971). Its creed revolves around the sacramental use of peyote, a nonnarcotic, nonhabit forming hallucinogen which can produce bizarre distortions of sensory perception. State v. Whittingham, 19 Ariz. App. 27, 30, 504 P.2d 950, 953 (1973). The principal active ingredient in peyote is mescaline, a substance which produces hallucinatory symptoms such as the observance of multicolored designs and patterns. Peyote may induce vomiting because of its bitter taste and cause convulsions and, ultimately, death. No evidence was introduced at the Whittinghams' trial, however, to document any incidents of human death caused by peyote. *Id.*

8. The U.S. CONST. amend. I, provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

the Whittinghams were convicted of violating Arizona law,[9] and an appeal followed.

The sole question presented on appeal was whether the use of peyote in the aforementioned manner fell within the scope of first amendment protection. Two main issues must be dealt with whenever the free exercise of religion defense is raised to justify otherwise unlawful activity. Initially, a court must consider whether the regulation in issue actually interferes with the free exercise of the claimant's religion. If the court finds that a defendant's religious freedom has in fact been contravened, it then must determine whether there is a compelling state interest which justifies this infringement.

Focusing on these issues, the court of appeals held that the state drug law, as applied to the sincere practice of Peyotism, violated the first amendment.[10] The court observed that peyote was used in the bona fide practice of a religious belief, that the drug was an integral part of the religion, and that the Whittinghams were sincere participants in the Peyotist ceremony.[11] It also noted that the manner in which the drug was used in the ceremonies was not dangerous to the public health, safety, or morals.[12] Therefore, finding no compelling state interest which justified interference with this religious activity, the court reversed the Whittinghams' conviction.

This discussion will focus first on the factors involved in determining whether a drug regulation contravenes the free exercise clause of the first amendment. Next, various considerations which underlie a finding of compelling state interest will be analyzed. Finally, it will be suggested that care must be taken in evaluating religious freedom defenses to drug-related prosecutions if applicable laws are to retain their vitality.

Contravention of the Free Exercise of Religion

While the free exercise of religion is constitutionally protected, the various elements which comprise a religion are not delineated specifically in the Constitution, nor have they been established conclusively by the courts. Inherent difficulties arise in attempting to identify particular beliefs or activities as being religious in nature. Because of these difficulties and the questionable propriety of categorizing faiths, most courts have abstained from such inquiries.[13] This

9. See discussion note 6 *supra.*
10. 19 Ariz. App. at 29, 504 P.2d at 952.
11. *Id.* at 31, 504 P.2d at 954.
12. *Id.*
13. *But see* Davis v. Beason, 133 U.S. 333 (1890) (bigamy and polygamy cannot be called tenets of religion); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968)

hesitancy also may be attributed, in part, to a judicial recognition and appreciation of the variety of differing religious values in modern society. As the *Whittingham* court noted:

> In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty.[14]

Because of the difficulty of objectively evaluating alleged religious beliefs and activities, it has not been unusual for courts to accept an individual's subjective definition of religion.[15] This approach obviates the necessity of "picking and choosing among religious beliefs"[16] and instead defers to sincere beliefs which are "in [one's] own scheme of things, religious."[17] Despite acceptance of this approach in nondrug contexts, courts have been reluctant to extend the subjective standard into the area of drug-related prosecutions.[18] Because of the controversial and disfavored nature of the crime involved, courts might seem tempted to simply declare such activities nonreligious per se and, thus, not within the sweep of first amendment protection. While most courts purportedly refrain from applying their own moral and ethical standards in ruling on such matters,[19] they simply have not been overly receptive to arguments based upon the religious need for drugs.

In *Whittingham*, no question was raised as to the validity of the religious doctrines of the Native American Church. Peyotism was found to be an historically established creed with a rather large following.[20] The court noted that federal drug regulations recognized an exception for the use of peyote in ceremonies of the Native American Church.[21] In addition, several states have enacted statutes permitting

(the Neo-American Church, under whose doctrine the defendant attempted to justify her use of psychedelic drugs, is not a religion within the meaning of the first amendment).

14. 19 Ariz. App. 27, 33, 504 P.2d 950, 955 (1973), *quoting* People v. Woody, 61 Cal. 2d 716, 724, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964).

15. *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965); United States v. Ballard, 322 U.S. 78 (1944); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969). *But see* United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968) (where the court stated that the assertion of a religious freedom defense to a drug charge must be based on more than just a personal code of conduct that lacks spiritual import).

16. United States v. Seeger, 380 U.S. 163, 175 (1965).

17. *Id.* at 185.

18. *See, e.g.*, Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966).

19. United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968); *cf.* Leary v. United States, 383 F.2d 851, 859-60 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

20. 19 Ariz. App. at 29, 504 P.2d at 952. The state's contention that Peyotism was strictly an Indian religion was refuted by the court of appeals, which accepted the trial court's finding that membership in the Native American Church was not limited solely to persons who were Indians or who had Indian heritage. *Id.* at 28, 504 P.2d at 951.

21. Act of Oct. 24, 1968, Pub. L. No. 90-639, § 2(a), 82 Stat. 1361, and Act of

the use of peyote for sacramental purposes.[22] According to the court, these factors illustrated that the religion was an established and continuing vibrant force and not just a fad. The recognition of the use of peyote as an essential part of a firmly rooted theological system of discipline and ritual is crucial. It is this factor that distinguishes *Whittingham* from those cases where religious justification for the use of drugs has been based solely on an individual's philosophy or beliefs.[23]

Beyond the question of whether beliefs or actions are classified as religious in nature, courts often will consider the role that a regulated activity plays in one's religious life. This is a relevant factor in determining whether first amendment rights have been violated.[24] When a religious freedom defense is raised in a drug-related criminal prosecution, the court may inquire into the essentiality of the drug in relation to the defendant's professed creed.[25] Religious freedom defenses are summarily discarded when no connection is shown between the use of drugs and any meaningful religious principles or beliefs.[26] If it is not shown that use of the drug is a formal requisite for the practice of religion or that it is predominantly used by a particular sect, the claim will be rejected.[27]

The defendant might carry this burden by demonstrating that his beliefs require him to ingest psychedelic drugs,[28] or that the exercise of his beliefs would be greatly inhibited without the use of drugs.[29] On

July 15, 1965, Pub. L. No. 89-74, § 3(b), 79 Stat. 227, *amending* Act of June 25, 1938, ch. 675, §§ 501-505, 52 Stat. 1049-53, provided that certain drugs could, by regulation, be exempted from federal control. Under this authority, the Director of the Bureau of Narcotics and Dangerous Drugs exempted the use of peyote in bona fide ceremonies of the Native American Church. 21 C.F.R. § 1307.31 (1974). The 1938 statute was repealed by Act of Oct. 27, 1970, Pub. L. No. 91-513, Title II, § 701(a), 84 Stat. 1281. However, in repealing the 1938 law, Congress provided that any regulations which had been passed under the statute would remain effective until modified, superceded, or repealed. *Id.* § 705. Currently, the bona fide use of peyote by the Native American Church is exempted by regulation. 21 C.F.R. § 1307.31 (1974).

22. *See, e.g.*, IOWA CODE ANN. § 204.204(5) (Cum. Pamphlet 1974); N.M. STAT. ANN. § 54-11-6(D) (Supp. 1973); S.D. COMPILED LAWS ANN. § 39-17-57(9)(a) (Supp. 1974).

23. *See* Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

24. State v. Whittingham, 19 Ariz. App. 27, 29, 504 P.2d 950, 952 (1973), *review denied*, 110 Ariz. 279, 517 P.2d 1275, *cert. denied*, 94 S. Ct. 3071 (1974).

25. Leary v. United States, 383 F.2d 851, 857 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). *But see* State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926) (where a Crow Indian charged with possession of peyote on an Indian reservation was not permitted to show the essential role played by that drug in the Native American Church nor his status as a member of the faith in good standing).

26. United States v. Kuch, 288 F. Supp. 439, 444 (D.D.C. 1968).

27. Leary v. United States, 383 F.2d 851, 860 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969). For an in depth discussion of *Leary* and the religious use of psychedelic drugs, see Finer, *Psychedelics and Religious Freedom*, 19 HASTINGS L.J. 667 (1968).

28. United States v. Kuch, 288 F. Supp. 439, 452 (D.D.C. 1968).

29. People v. Crawford, 69 Misc. 2d 500, 508, 328 N.Y.S.2d 747, 755 (Dist. Ct. 1972), *aff'd*, 72 Misc. 2d 1021, 340 N.Y.S.2d 848 (App. T. 1973).

the other hand, a defendant's testimony could invalidate any claim of essentiality if he admitted, for example, that the religious experience would be possible without the use of drugs.[30] Similarly, a defendant's statement that prohibiting the use of a drug would not affect his religious beliefs but simply would be considered a violation of those beliefs and practices might indicate that the drug is not indispensable for religious purposes.[31] Claims of first amendment protection for the use of drugs clearly must be based on something more than one's personal philosophy that such use is beneficial.[32] An allegation that drugs serve as a means of broadening and sharpening one's mind in order to more clearly comprehend life, truth, and God will not suffice.[33]

Recognizing the use of peyote as a traditional feature of the Peyotist religion, the *Whittingham* court had little difficulty hurdling the potential obstacle of essentiality. Peyote itself is more than just a sacrament; members of the Native American Church worship the drug and pray to and through it.[34] It represents a sacred symbol around which the entire service is organized, and its ingestion by the congregation signifies a meaningful highlight of the ceremony. Without the use of peyote, the very foundation of the creed would be obliterated.[35]

In placing emphasis on these factors, the Arizona court of appeals adopted much of the reasoning expressed 9 years earlier by the Supreme Court of California in a closely analogous case, *People v. Woody*.[36] The defendants in *Woody* were Navajo Indians convicted for the use of peyote in a ceremony of the Native American Church. In reversing the convictions, the California court stressed the indispensable role that peyote played in the ceremonies and emphasized the historical background of the creed.[37] It was acknowledged that the use of peyote represented the essence of the religious expression of the Peyotist cult. The court concluded, therefore, that application of the statutory prohibition would preclude the defendants' practice of their faith.[38] In light of the unique characteristics of the Native American Church, the factors stressed by the *Woody* and *Whittingham* courts

30. *Id.*
31. Leary v. United States, 383 F.2d 851, 857 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).
32. People v. Mitchell, 244 Cal. App. 2d 176, 182, 52 Cal. Rptr. 884, 888 (Ct. App. 1966).
33. People v. Collins, 273 Cal. App. 2d 486, 487, 78 Cal. Rptr. 151, 152 (Ct. App. 1969).
34. State v. Whittingham, 19 Ariz. App. 27, 28, 504 P.2d 950, 951 (1973), *review denied*, 110 Ariz. 279, 517 P.2d 1275, *cert. denied*, 94 S. Ct. 3071 (1974).
35. *Id.* at 29, 504 P.2d at 952; People v. Woody, 61 Cal. 2d 716, 722, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74 (1964).
36. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), *noted in* 6 ARIZ. L. REV. 305 (1965).
37. 61 Cal. 2d at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73.
38. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

clearly established that the use of peyote was an essential aspect of a sincere religious practice.

Another consideration in determining whether the free exercise of religion has in fact been obstructed is the defendant's loyalty or adherence to his professed religious beliefs. This issue would become especially crucial if the modern trend of accepting subjective definitions or assertions of religion is extended to drug-related areas.[39] Under present authority, any doubt as to a defendant's exclusive use of drugs for strictly religious activities will undermine his claim of sincerity or good faith.[40] The religious freedom defense also will be weakened if evidence reveals that the defendant used drugs extensively before becoming involved with the particular faith under whose doctrine he now asserts the defense.[41] The issue of a defendant's sincerity and good faith adherence to his beliefs should be left to the jury. With its normal cynicism and preconceived biases, a jury would closely scrutinize a defendant's allegations and, thereby, prevent unwarranted applications of the religious freedom defense in drug cases.[42]

The California court, in *Woody*, maintained that the trier of fact could deal with any questions concerning the bona fides of a defendant's religious principles and his sincere adherence to professed religious beliefs.[43] The *Whittingham* court adopted this reasoning by ruling that the bona fides of religious faith could properly be litigated.[44] The good faith of the defendants' belief, however, was not at issue on appeal since the trial court had found the parties to be sincere participants in what they believed to be a bona fide Peyotist ceremony for the blessing of their marriage.

With the sincerity of the defendants' belief in mind, the *Whittingham* court inquired whether the free exercise of the defendants' religion was infringed upon by the state statute which outlawed possession or use of peyote.[45] Recognizing that the use of peyote in the Na-

39. See text accompanying notes 15-18 *supra*.
40. State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966).
41. People v. Crawford, 69 Misc. 2d 500, 507, 328 N.Y.S.2d 747, 755 (Dist. Ct. 1972), *aff'd*, 72 Misc. 2d 1021, 340 N.Y.S.2d 848 (App. T. 1973).
42. *See* Finer, *supra* note 27, at 698-99.
43. People v. Woody, 61 Cal. 2d 716, 726, 394 P.2d 813, 820-21, 40 Cal. Rptr. 69, 76-77 (1964). Continuing this policy, the California court remanded a companion case for the purpose of determining whether the petitioner's belief was honest or whether he sought "to wear the mantle of religious immunity merely as a cloak for illegal activities." *In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964), *quoting* People v. Woody, 61 Cal. 2d at 726, 394 P.2d at 821, 40 Cal. Rptr. at 76. The implications of *Woody* seemed to be broadened in *Grady*, where the petitioner was not an Indian, but an unaffiliated, self-styled peyote preacher who acted as a group spiritual leader. Nevertheless, a unanimous court held that if his belief in Peyotism was honest and in good faith, his use of peyote for religious purposes was protected by the first amendment. *In re* Grady, 61 Cal. 2d at 888, 394 P.2d at 729, 39 Cal. Rptr. at 913.
44. 19 Ariz. App. at 31, 504 P.2d at 954.
45. ARIZ. REV. STAT. ANN. § 36-1061 (1956).

tive American Church is the central force and theological basis of the religion and an essential part of the ceremony, the court concluded that adherents to that creed could not freely exercise their religious beliefs without the drug.[46] Therefore, enforcement of the state regulation against the Whittinghams undeniably violated their free exercise of religion. The court's inquiry, however, did not end here. Although an obstruction of defendants' religious freedom had been found, the court had yet to inquire whether that inhibitive barrier was justified by a compelling state interest.

Compelling State Interest

First amendment freedoms, including the right to the free exercise of religion, traditionally have been accorded a preferred or privileged status, since they are essential elements of the American democratic system.[47] As a result, courts generally have demanded greater justification for infringement of first amendment rights than for infringement of other liberties.[48] First amendment liberties, however, are not totally unlimited. The government is vested with power to enact laws to preserve and protect the public health, safety, and general well-being.[49] Such statutes may conflict at times with first amendment rights, and it has been the duty of the judiciary to strike a balance between unfettered individual freedom and the public welfare. To aid in this process, courts have established standards to test whether state restriction of religious freedom is justified.[50] Just as notions of religion and the mores of society have changed, however, so too have these standards.[51]

In much of the early litigation involving the free exercise clause, a distinction was often drawn between religious beliefs and opinions on the one hand and acts or practices on the other.[52] The former were

46. 19 Ariz. App. at 29, 504 P.2d at 952.

47. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Board of Educ. v. Barnette, 319 U.S. 624 (1943).

48. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 438 (1963); Marsh v. Alabama, 326 U.S. 501, 509 (1946); Thomas v. Collins, 323 U.S. 516, 530 (1945); Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115 (1973).

49. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

50. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Board of Educ. v. Barnette, 319 U.S. 624 (1943).

51. Early cases indicated that criminal laws, by themselves, were predominant, overriding forces which could validly control acts "inimical to the peace, good order, and morals of society," even if such actions were demanded by one's religion. Davis v. Beason, 133 U.S. 333, 342 (1890); Reynolds v. United States, 98 U.S. 145, 166 (1878). This narrow view gradually lost much of its vitality, however, and today the mere fact that the legislature has seen fit to impose criminal sanctions is not sufficient to justify infringement of religious freedoms. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963); Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

52. Reynolds v. United States, 98 U.S. 145, 164 (1878) (legislature cannot regulate

given absolute constitutional protection, while the latter often were not.[53] Although this dichotomy has served as a convenient tool for some courts to rationalize their dismissal of religious freedom defenses to drug charges,[54] less emphasis has been placed on the belief-action distinction in recent opinions. Instead, the thrust of the inquiry, in theory at least, seems to have shifted to an analysis of the government regulation itself and a balancing of the interests involved.[55]

The basic rule applied today was formulated by the United States Supreme Court over a decade ago, when it held that any burden on the free exercise of religion may be justified only by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . ."[56] A mere showing of a rational relationship to some colorable state interest is insufficient.[57] Any interference with first amendment rights by the state must be for the purpose of preventing only the gravest abuses which endanger paramount public interests.[58]

Because of the controversial nature of drug-related crimes, however, courts generally have not had difficulty rejecting religious freedom claims by finding a sufficient compelling interest.[59] The mere fact that a law prohibits the activity in question, indicating legislative concern, has itself been considered sufficient evidence of a compelling state interest.[60] Similarly, some courts have espoused an attitude of judicial restraint, maintaining that the wisdom of particular

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mere opinion but can govern actions which violate social duties or subvert good order).

53. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 86 (1944); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Reynolds v. United States, 98 U.S. 145, 166 (1878). "The first amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." Cantwell v. Connecticut, *supra* at 303-04. The reasonableness of religious *beliefs*, however, may not be questioned or tested. United States v. Ballard, *supra* at 86; Founding Church of Scientology v. United States, 409 F.2d 1146, 1155-56 (D.C. Cir. 1969).

54. *See, e.g.*, Leary v. United States, 383 F.2d 851, 859 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); United States v. Kuch, 288 F. Supp. 439, 445 (D.D.C. 1968); State v. Bullard, 267 N.C. 599, 603, 148 S.E.2d 565, 569 (1966); Lewellyn v. State, 489 P.2d 511, 515 (Okla. 1971).

55. A recent Supreme Court decision indicated that religious freedom claims cannot be casually disregarded or abandoned without first conducting an adequate balancing test. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). Although the first amendment claim in *Yoder* arose in a nondrug context, the thrust of the opinion suggests that any less restrictive alternative which might reasonably achieve the goals of the legislation should be utilized. *Id.* at 225.

56. Sherbert v. Verner, 374 U.S. 398, 403 (1963), *quoting* NAACP v. Button, 371 U.S. 415, 438 (1963).

57. Sherbert v. Verner, 374 U.S. 398, 406 (1963); Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

58. Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

59. *See, e.g.*, Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966).

60. Leary v. United States, 383 F.2d 851, 859 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969). *But see* discussion note 51 *supra*.

laws should not be questioned, or that the judiciary should not substitute its judgment for that of the legislature.[61] In other cases, a compelling state interest has been found, in part, because of the court's fear that religious exemptions would render drug laws meaningless and unenforceable[62] and result in a general breakdown in society.[63] Some decisions are based on the potentially dangerous effects of drugs or the likelihood of abuse if religious exceptions were allowed.[64] Finally, a few courts flatly declare that the use of drugs imposes a substantial risk to health and life, and that no possible justification exists for such use in the name of religious freedom.[65]

It can be seen, then, that although deference purportedly is given to the compelling state interest test, many courts readily dismiss such assertions of religious freedom. This may be indicative of judicial application of the doctrine to buttress or justify the preformed opinion that the religious exception has no place in the area of drugs. In contrast, the California supreme court, in *Woody*, conducted a thorough and convincing constitutional analysis by first scrutinizing defendants' activities to ensure that they in fact constituted a sincere, good faith exercise of religion.[66] The court then turned to the compelling interest test to determine whether defendants' conduct could nevertheless be

61. United States v. Kuch, 288 F. Supp. 439, 448 (D.D.C. 1968). Such reasoning signifies abandonment of the compelling interest test and adoption of the rational basis test, even in the face of a first amendment claim. *See* Leary v. United States, 383 F.2d 851, 860-61 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); State v. Big Sheep, 75 Mont. 219, 239, 243 P. 1067, 1073 (1926).

62. Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); State v. Big Sheep, 75 Mont. 219, 239, 243 P. 1067, 1073 (1926).

63. United States v. Kuch, 288 F. Supp. 439, 445 (D.D.C. 1968).

64. Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); United States v. Kuch, 288 F. Supp. 439, 446 (D.D.C. 1968); State v. Bullard, 267 N.C. 599, 604, 148 S.E.2d 565, 569 (1966). The *Leary* court expressed its concern in the following manner:

> The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, "turn on," is the "in" thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana.

Leary v. United States, *supra* at 861. Similarly, the North Carolina court in *Bullard* made the following contention:

> The defendant may believe what he will as to peyote and marijuana and he may conceive that one is necessary and the other is advisable in connection with his religion. But it is not a violation of his constitutional rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia, and his position cannot be sustained here—*in law nor in morals.*

State v. Bullard, *supra* at 604, 148 S.E.2d at 569 (emphasis added).

65. State v. Bullard, 267 N.C. 599, 604, 148 S.E.2d 565, 569 (1966); Lewellyn v. State, 489 P.2d 511, 516 (Okla. 1971).

66. People v. Woody, 61 Cal. 2d 716, 720, 394 P.2d 813, 816, 40 Cal. Rptr. 69, 72 (1964).

validly circumscribed.[67] The *Woody* court concluded that no sufficient compelling interest was shown to justify the infringement on petitioners' religious use of peyote.[68]

The reasons underlying the decision were substantial and convincing. The court pointed out that there was no evidence that Indians who used peyote were more likely to become addicted to other narcotics than non-peyote-using Indians.[69] Additionally, there was evidence that peyote caused no permanent injury to the Indians, and that its use for nonreligious purposes was considered sacrilegious.[70] The court also noted that Indian children never, and Indian teenagers rarely, used peyote.[71] Finally, the state's contention that peyote obstructs enlightenment and shackles the Indian to primitive conditions was flatly rejected.[72] The *Woody* case provided an example of how the compelling interest test could be applied to drug-related religious defenses in a valid, credible manner, thereby restoring some integrity and viability to the doctrine.

Because the facts in *Woody* and *Whittingham* were almost identical, it is not surprising that the Arizona court adopted the *Woody* reasoning and held that no compelling state interest justified restriction of the good faith exercise of Peyotism. A great deal of emphasis was placed on the fact that peyote is neither a narcotic nor a habit-forming substance.[73] Its use, therefore, posed no threat of addiction, a factor which would have represented a grave danger that the state validly could have controlled.[74] In addition, the state's expert witness presented no conclusive evidence of the drug's deleterious effect on humans.[75] The court conceded that an excessive use of the substance might be harmful, but noted that this could be said of many items of everyday use.[76] Since the state failed to show that the use of peyote in the ceremonies of the Native American Church was sufficiently dangerous to warrant state intrusion,[77] the court held that the police power could not justifiably be exercised to limit the good faith practice of Peyotism.

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67. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.
68. *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.
69. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.
70. *Id.* at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73.
71. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.
72. *Id.*
73. 19 Ariz. App. 27, 30, 504 P.2d 950, 953 (1973).
74. *Id.*
75. The testimony of an expert witness, who emphasized the dangers of peyote, was based exclusively on unpublished tests conducted solely on dogs and monkeys and undertaken approximately 16 years before trial. *Id.*
76. The court pointed out aspirin and alcohol as common examples. *Id.*
77. *Id.*

The Limited Scope of the Peyote Exception

The well-reasoned holdings announced in *Woody* and *Whittingham* are not indicative of a general trend toward a dilution of current drug laws. The exception delineated by the California court, and now recognized by statute in several states,[78] has been narrowly and strictly construed.[79] Most courts confronted with religious freedom defenses to drug charges have easily distinguished *Woody*, limiting its application to bona fide ceremonies of the Native American Church.[80] Arguments that equal protection requires extension of the Peyotist exception to other religious oriented drug use have been unequivocally rejected.[81] Similarly, attempts to amend federal law to include other sects within the peyote exception have failed.[82]

The peyote exception created in *Woody* and followed in *Whittingham* must be recognized, therefore, to be of limited scope. Although the potential for abuse and the possibility of fraudulent claims still exist, relaxation of the criminal code in this narrow context is reasonable in light of the fact that first amendment rights are involved. While application of this rationale to other drug-related areas has been advocated by some,[83] it continually has been rejected by the courts[84]

78. *See, e.g.*, IOWA CODE ANN. § 204.204(5) (Cum. Pamphlet 1974); N.M. STAT. ANN. § 54-11-6(D) (Supp. 1973); S.D. COMPILED LAWS ANN. § 39-17-57(9)(a) (Supp. 1974).

79. Perhaps the best evidence of the limited scope of the exception has been illustrated in California, where the exception was first given judicial recognition. In several subsequent California cases, claimants were held to be outside the narrow sweep of the bona fide and essential religious practice justification recognized in *Woody* because of the factual circumstances in each case. People v. Werber, 19 Cal. App. 3d 598, 97 Cal. Rptr. 150 (Ct. App. 1971) (defendant failed to show that marihuana was an object of worship essential to an exclusively religious ritual); People v. Collins, 273 Cal. App. 2d 486, 78 Cal. Rptr. 151 (Ct. App. 1969) (defendant did not worship or sanctify marihuana, but merely employed it to reach desired capacities for communication and apperception); People v. Mitchell, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (Ct. App. 1966) (defendant failed to demonstrate the presence of safeguards against possible antisocial consequences or misuse of marihuana and the authentic religious nature of his use of that drug). These cases illustrate that proper application of the *Woody-Whittingham* rationale does not make a shambles of state drug laws.

80. Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); People v. Crawford, 69 Misc. 2d 500, 508, 328 N.Y.S.2d 747, 755 (Dist. Ct. 1972), *aff'd*, 72 Misc. 2d 1021, 340 N.Y.S.2d 848 (App. T. 1973). Other courts have taken a position of neutrality or expressed disapproval of the *Woody* decision. United States v. Kuch, 288 F. Supp. 439, 449 (D.D.C. 1968); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966).

81. Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); United States v. Kuch, 288 F. Supp. 439, 450-51 (D.D.C. 1968).

82. Kennedy v. Bureau of Narcotics & Dangerous Drugs, 459 F.2d 415, 417 (9th Cir. 1972). The *Kennedy* court recognized the validity of petitioners' claim that the existing statutory peyote exception was violative of the equal protection clause. Nevertheless, the court denied reclassification to include the Church of the Awakening on the ground that such action would be plagued by the same constitutional infirmity that petitioners asserted.

83. *See* Finer, *supra* note 27.

84. Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968).

on the grounds that extension of the limited peyote exception might spawn the very problems that the state was concerned with in *Woody* and *Whittingham*. Whether such concerns are justified is beyond the scope of this article. It seems clear, however, that courts must carefully evaluate religious freedom defenses to drug charges. A careful balance is necessary if applicable criminal laws are to remain a viable force in contemporary society without first amendment freedoms being lightly brushed aside.

Conclusion

The Arizona court of appeals was faced with a unique and controversial problem in *Whittingham*. In light of the historical basis and singular nature of the religious practices of the Native American Church, the court legitimately distinguished those cases which have rejected religious freedom defenses in drug prosecutions. By recognizing a limited exception to the criminal drug laws, the Arizona court reaffirmed the lofty position that first amendment freedoms traditionally have held in the American system of justice.

C. THE STATE EQUAL PROTECTION CLAUSE: A NEW DEVELOPMENT

The judicial history of the equal protection clause emerges as a series of struggles in which the proponents of opposing interpretations vie for supremacy. A product of the Civil War, the equal protection clause was originally intended only as a method of vindicating the civil rights of recently freed slaves.[1] Thus, early equal protection challenges involving issues other than racial discrimination met with little success.[2] The reluctance to expand the scope of equal protection persisted for some time. Perhaps as a sustained reaction to the judicial abuses which characterized the substantive due process era,[3] the Supreme Court consistently sought in equal protection cases to avoid sitting as a superlegislature or needlessly hampering the operation of

1. Plessy v. Ferguson, 163 U.S. 537 (1896); Strauder v. West Virginia, 100 U.S. 303 (1880); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

2. *See, e.g.*, Goesart v. Cleary, 335 U.S. 464 (1948) (sex); Nashville C. & L. Ry. v. Browning, 310 U.S. 362 (1940) (railroads); Engel v. O'Malley, 219 U.S. 128 (1911) (banking); Davidson v. New Orleans, 96 U.S. 97 (1887) (taxation).

3. *See generally* Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973).

state governments.[4] In order to prevent such criticism, the Court traditionally has limited itself to a standard of review whereby questioned legislation was granted a presumption of constitutionality and was upheld so long as any conceivable set of facts formed a reasonable basis for its existence.[5] Only in a relatively few instances did the Court depart from this rational basis test and employ a stricter standard of review.[6]

The 1960's, however, witnessed the rapid expansion of the strict scrutiny standard of review. Under this standard of review, if legislation infringes upon the exercise of a fundamental right or utilizes a suspect category, the state's interests are strictly scrutinized, and the legislation will be invalidated unless those interests are demonstrated to be compelling.[7] Although earlier cases had recognized the necessity for protecting certain rights and minority groups,[8] the increased use of strict standards of review led to the development of the so-called "new equal protection."[9] While the new equal protection was criticized,[10] the list of possible fundamental rights and suspect categories grew.[11] The utility of the strict scrutiny test as a tool for challenging legislation previously considered beyond the pale of constitutional attack was not overlooked. An example of this effort is found in the many recent school tax cases,[12] including the Arizona case of *Shofstall v. Hollins.*[13]

In *Shofstall,* students and taxpayers filed suit against the state

4. Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting). In Day-Bright Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), Justice Douglas stated, "[o]ur recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Id.* at 423. *See also* Burns Baking Co. v. Bryan, 264 U.S. 504, 517 (1924) (Brandeis, J., dissenting).

5. McGowan v. Maryland, 366 U.S. 420 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). *See generally* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

6. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); United States v. Carolene Prods. Co., 304 U.S. 144 (1937). *See generally* Goodpaster, *The Constitution and Fundamental Rights,* 15 ARIZ. L. REV. 479, 484-88 (1973).

7. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

8. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); United States v. Carolene Prods. Co., 304 U.S. 144 (1937).

9. *See* Comment, *Legislative Purpose, Rationality and Equal Protection,* 82 YALE L.J. 123 (1972).

10. *Compare* Note, *Eisenstadt v. Baird: A Return to the "Lochner" Era of Judicial Intervention?,* 33 U. PITT. L. REV. 853 (1972), [*and*] Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach,* 58 VA. L. REG., (n.s.) 1489 (1972), *with* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

11. *See generally* Houle, *Compelling State Interest vs. Mere Rational Classification: The Practitioner's Equal Protection Dilemma,* 3 URBAN LAW. 375 (1971); Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1120-31 (1969).

12. *E.g.,* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Ingram v. Payton, 222 Ga. 503, 150 S.E.2d 825 (1966); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), *rev'd on rehearing,* 389 Mich. 390, 212 N.W.2d 711 (1973); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973).

13. 110 Ariz. 88, 515 P.2d 590 (1973).

superintendent of education, alleging that the use of local property taxation as the principal tool in school funding was a violation of the equal protection clauses of both the United States and Arizona constitutions.[14] Noting the state constitution's emphasis upon education and its importance to society, the plaintiffs contended that education was a fundamental right.[15] They also asserted that wealth was a suspect category and that the existing system of educational funding classified students in accordance with the wealth of individual families and school districts.[16] Thus, the plaintiffs urged the court to adopt a standard of strict scrutiny and invalidate the funding system, alleging that their fundamental right of education was violated by a classification based on wealth.[17]

The defendant agreed that the strict scrutiny test should be applied when legislation infringes upon the exercise of a fundamental right or utilizes a suspect category.[18] He contended, however, that these special elements were not present and that the correct standard of review was the rational basis test.[19] The defendant also asserted that the use of local property taxation to finance public education was justified by the state's desire to give the community a voice in decisions affecting the school system, and that the court should not discard a system which had been maintained sucessfully for 50 years when no practical alternative was presently available.[20]

In the interim between the filing of briefs by the parties and the supreme court's decision in *Shofstall*, the United States Supreme Court decided *San Antonio Independent School District v. Rodriguez*,[21] a Texas case involving issues substantially identical to those in *Shofstall*. Upholding the Texas financing system, Justice Powell concluded that education is not implicitly or explicitly guaranteed by the United States

14. Brief for Appellee at 6-8, Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973). The seminal articulation of this position is found in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). The California court found that even though the state contribution of additional educational funds was designed to supplement local expenditures, the largest portion of school revenues was raised on the local level. Distribution of the grant on a uniform basis to all school districts served to widen the gap between various districts. As a result, per pupil expenditures were a function of the district's realty valuation and the willingness to tax itself. For a discussion of how the use of property taxation might condition, on the basis of wealth, the right to an education, see J. COONS, W. CLUNE, & S. SUGERMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970), and Note, *The Public School Financing Cases: Interdistrict Inequalities and Wealth Discrimination*, 14 ARIZ. L. REV. 88 (1972).

15. Brief for Appellee at 10-20, Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973).

16. *Id.* at 21-28.

17. *Id.* at 28, 33.

18. Brief for Appellant at 24, Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973).

19. *Id.* at 37.

20. *Id.* at 43-47.

21. 411 U.S. 1 (1973).

Constitution and, therefore, could not be considered a fundamental right for purposes of the equal protection-strict scrutiny test.[22] The Court also held, on the facts of *Rodriguez,* that no suspect classification was involved; there was little evidence that poor students were concentrated in districts with a low property tax base and no reason to believe that the members of the class involved needed any special protection against the workings of the political process.[23]

While *Rodriguez* settled the question of the alleged violations of the federal equal protection clause, the state equal protection issues raised in *Shofstall* remained unaffected.[24] Recognizing the extensive treatment of education in the state constitution, Chief Justice Hays reasoned that a basic education is a right guaranteed by the state and, therefore, a fundamental right for state purposes.[25] Nevertheless, the court upheld the state system of educational funding, concluding that the system need only meet the mandates of the state constitution and be rational and not arbitrary in order to withstand a state equal protection challenge.[26] Thus, the court avoided the issues of strict scrutiny and compelling interest, despite its finding that education was a state fundamental right.

The court's disposition of *Shofstall* indicates that a rational basis is all that is required for challenged legislation to pass state constitutional muster when the federal equal protection clause is not in issue. This presents numerous questions concerning the relationship between state and federal equal protection. This casenote, however, will limit discussion to three areas: first, the different considerations inherent in state and federal equal protection; second, the impact of state fundamental rights on the standard of review in state equal protection cases; and third, the role of suspect categories in state equal protection litigation.

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22. *Id.* at 33-34.
23. *Id.* at 23-29.
24. 110 Ariz. 88, 89, 515 P.2d 590, 591 (1973).
25. ARIZ. CONST. art. 11, §§ 1, 6. The court also noted the treatment of education in title 15 of the *Arizona Revised Statutes Annotated.* Although the court did not directly address the issue of wealth as a suspect category, it apparently rejected the allegation, albeit sub silencio. In citing *Rodriguez* to the effect that disparity in per pupil expenditures does not require the court to find an infringement upon a fundamental right, the court must necessarily have viewed the differences in interdistrict tax resources as constituting no suspect category. 110 Ariz. 88, 91, 515 P.2d 590, 593 (1973). *But cf.* Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure,* 6 HARV. CIV. RIGHTS L. REV. 481 (1971).
26. The court was not compelled to directly address the reasonableness of the state's funding system. That question was mooted by new legislation, effective July 1, 1974, which attempts to equalize local tax rates by increasing the flat grant from the state and providing added funds to those districts incapable of raising extra resources. *See* ARIZ. REV. STAT. ANN. §§ 15-1211 to -1249 (Supp. 1973).

Federalism and Equal Protection

The constitutional division of duties and responsibilities between the three separate branches of federal government was designed to prevent one branch from interfering with or usurping the powers of the others.[27] Additionally, because of the federal nature of our government, the division of power between the national and state governments must be maintained.[28] Of course, absolute separation and division of power is neither possible nor desirable, and early Supreme Court decisions established the right of judicial review over both federal[29] and state[30] legislative enactments. Although judicial review has never been seriously challenged,[31] it should be tempered by the spirit of federalism and separation of powers if the essential constitutional balance is to be retained.

Whether review is sought in federal or state court, considerations of the separation of powers and federalism remain the same. In passing on the validity of legislation, the court's posture should be one of deference to the legislative branch because courts are not considered the proper forum for the creation of policy.[32] They neither possess the requisite tools needed to accomplish such a task, nor are they directly answerable to the electorate.[33] In *Rodriguez*, Justice Powell observed that the requirements of federalism are considered in every application of the strict scrutiny test.[34] The Court's decision was due, in part, to its aversion to striking down a system of educational funding utilized in almost all of the states.[35] Thus, to some degree, *Rodriguez*

27. In Myers v. United States, 272 U.S. 52 (1926), Justice Brandeis stated in dissent:

> The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

Id. at 293. *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Frankfurter, J., concurring).

28. The supremacy clause and the 10th amendment ensure that neither the states nor the federal government will interfere with the duties or the internal workings of the other. History is replete with examples of the clash of interests within the federal system. *See, e.g.*, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1940) (abstention in the federal courts); Collector v. Day, 78 U.S. (11 Wall.) 113 (1871) (taxing power); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (commerce clause). See 1A J. MOORE, FEDERAL PRACTICE ¶ 0.205, at 2231 (2d ed. 1974), for a discussion of the three-judge court requirement as minimizing federal judicial interference with state action.

29. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

30. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

31. *See generally* E. CORWIN, COURT OVER CONSTITUTION (1957). *But see* R. VON MOSCHZISKER, JUDICIAL REVIEW OF LEGISLATION 88-97 (1971).

32. Hetherington, *State Economic Regulations and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1958).

33. Hetherington, *supra* note 32, at 25-32. *But see* Wright, *The Role of the Supreme Court in a Democratic Society*, 54 CORNELL L. REV. 1, 11 (1968).

34. 411 U.S. 1, 44 (1973).

35. *Id.*

evidences judicial restraint occasioned by considerations of federalism.

At least one state court has interpreted *Rodriguez* as implying that a stricter standard of review might be utilized in a more appropriate fashion at the state level.[36] The considerations which bear upon equal protection litigation in the state courts are quite different, in many respects, from those at the federal level. When a state court is presented with an equal protection challenge to state legislative enactments, considerations of federalism, which restrained the *Rodriguez* court, are not present. Rather, the state court, within the limitations of the state government's separation of powers, may utilize any standard of review it chooses. Since all 50 state constitutions contain an equal protection clause,[37] the possible use of differing standards of review at the state and federal levels may be of profound importance in equal protection litigation.

The *Rodriguez* and *Shofstall* decisions illustrate the difference between application of state and federal equal protection clauses. As noted, the *Rodriguez* Court found that the use of property taxation in educational funding was not violative of federal equal protection. A major factor in the Supreme Court's deferring of the equal protection question to the states was the essentially local nature of the problem.[38] In *Shofstall*, the Arizona court recognized that the claims based on state grounds were left undisturbed by *Rodriguez* and decided the case on the basis of state equal protection. The compatability of these two decisions lies in the *Rodriguez* rejection of education as a federal fundamental right because it is not implicitly or explicitly guaranteed by the United States Constitution. Hence, the state equal protection clause can be relied upon when challenged legislation infringes on rights of a local nature.

State Fundamental Rights

The concept that certain rights are fundamental and, therefore, deserve increased protection from governmental infringement is one of long standing.[39] The proper application of the principle, however, is

36. Robinson v. Cahill, 62 N.J. 473, 490, 303 A.2d 273, 290 (1973).

37. There are two basic types of equal protection clauses to be found in the constitutions of the 50 states. The first type, exemplified by the Arizona constitution, prohibits the enactment of laws granting to any citizen or group of citizens "privileges or immunities which, upon the same terms, shall not equally belong to all citizens . . . ." ARIZ. CONST. art. 2, § 13. The New Jersey equal protection clause typifies the second category, which guarantees certain rights "among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. 1, ¶ 1.

38. 411 U.S. 1, 58 (1973).

39. *See generally* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

the subject of intense debate. Freedom of speech was the first right to be accorded a preferential position.[40] Certain rights, deemed basic to the concept of democratic government, were identified in the due process incorporation cases.[41] In the area of equal protection, the concept of fundamental rights developed on a case-by-case basis.[42] Although there are examples to the contrary,[43] it appears that there is a single unifying characteristic which ties together the categories of fundamental rights—they all refer to the involvement of the individual in the process and structure of governmental operations.[44]

The *Rodriguez* rejection of education as a fundamental right may seem inconsistent with this approach. The Court previously had described education as a right preservative of all rights,[45] and many consider it a necessary condition to the intelligent exercise of free speech and the right to vote.[46] Although *Rodriguez* held that education was not implicitly or explicitly guaranteed by the constitution, the Court specifically acknowledged the significance of education to society.[47] While the Court recognized the national importance of education, it also recognized the strong local interests involved. In this respect, education is unique for, unlike many other important rights, it must by necessity be adapted to local interests, needs, and capabilities. This is federalism in its most logical form.[48] Thus, the use of the rational basis test by the *Rodriguez* Court acknowledged that certain issues are more properly and effectively resolved at the state level.

Education is an example of the type of right that may be granted fundamental status for state constitutional purposes. The factors which inhere in the decision undoubtedly will be similar to those used in in-

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

41. Duncan v. Louisiana, 391 U.S. 145 (1968); Klopfer v. North Carolina, 386 U.S. 213 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); *see* Adamson v. California, 332 U.S. 46 (1947) (Black, J., dissenting).

42. *See* Harper v. Board of Elections, 383 U.S. 633 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (criminal appeals); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation). *But see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare benefits). *See generally* Goodpaster, *supra* note 6.

43. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942) (establishing procreation as a fundamental right).

44. *See* Goodpaster, *supra* note 6, at 482. Goodpaster recognized only four categories of fundamental rights: first amendment rights, political participation rights, rights to due process, and equal protection.

45. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

46. Brief for Appellee at 16-19, Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); *see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35-36 (1973).

47. 411 U.S. at 29-30.

48. *Id.* at 58. Justice Powell concluded that, "[t]he consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand."

terpreting the United States Constitution combined with other considerations which are of local importance. For example, the *Shofstall* court emphasized the extensive treatment of education in the state constitution and legislation.[49] Recognition of additional state fundamental rights, however, awaits future judicial determination. It must be noted that utilization of the state fundamental rights approach is of no particular significance if a state court, as in *Shofstall*, does not apply a stricter standard of review. In the event that state courts do employ a more demanding judicial analysis, although in a discrete and judicious manner, the concept of state fundamental rights could serve a significant role in state constitutional litigation.

State Suspect Categories

In addition to the fundamental rights doctrine, the concept of suspect categories is also of importance in the development of a state court's approach to judicial review in equal protection cases. Equal protection does not prohibit enactment of legislation which classifies citizens or groups of citizens[50] so long as the classification is neither arbitrary nor irrational.[51] It has been recognized, however, that legislative classifications based upon certain characteristics ought to be subjected to strict judicial scrutiny.

This development can be traced to the landmark case of *United States v. Carolene Products Co.*,[52] which suggested that classifications which discriminate against insular or discrete minority groups should be invalidated if there is no compelling state interest in favor of the classification.[53] Basic to the suspect category doctrine is the fact that there are certain groups that are unable to effectuate a competent voice in governmental affairs and that certain characteristics of the classification are inherently unrelated to the exercise of a state's police powers.[54] The number of suspect categories recognized by the Supreme Court

49. 110 Ariz. at 89, 515 P.2d at 591.

50. Barbier v. Connolly, 113 U.S. 27 (1884). The Court noted that in providing for the welfare of citizens the state's police power

> may press with more or less weight upon one than upon another, but [regulations] are designed, not to impose unequal or unnecessary restrictions upon any one but to promote . . . the general good . . . . Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

Id. at 32.

51. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

52. 304 U.S. 144 (1937). *See also* Korematsu v. United States, 323 U.S. 214, 216 (1944).

53. 304 U.S. at 152 n.4.

54. *See* Tanner v. Little, 240 U.S. 369, 382 (1916).

is small, despite urging by commentators for recognition of additional ones.[55] To date, the Court has recognized that statutory schemes utilizing classifications based on race,[56] national origin,[57] and alienage[58] are suspect and require application of the strict scrutiny test.[59] Several state courts, however, have gone further and declared classifications based upon sex,[60] illegitimacy,[61] and wealth[62] to be suspect, triggering application of the strict scrutiny test. Thus, independent application of the doctrine of suspect categories by state courts may evolve as a significant factor in state equal protection litigation.

In Arizona, the concept of suspect categories has not been well received by the courts. Classifications relating to wealth,[63] residency,[64] age,[65] prior accident record,[66] occupational status,[67] and prior conviction[68] have all been rejected as non-suspect. In each case, the court found that such characteristics bore a rational relationship to the objectives of the state. This position is not, however, entirely inconsistent with the concept of suspect categories, which is based on the need to protect those groups who are powerless to protect themselves. In each Arizona case, either the state was privileged in its position as parens patriae[69] or the classified group was one which was in the mainstream of political effectiveness.[70] Although the Arizona courts have yet to

55. *See* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); Comment, *California's Low Income Housing Referendum: Equal Protection and the Problem of Economic Discrimination*, 8 COLUM. J.L. & SOC. PROB. 135 (1972); Comment, *Are Sex Based Classifications Constitutionally Suspect?*, 66 NW. U.L. REV. 481 (1971). *See generally* Houle, *supra* note 11.

56. Loving v. Virginia, 388 U.S. 1 (1967); Strauder v. West Virginia, 100 U.S. 303 (1879).

57. Oyama v. California, 332 U.S. 633 (1948).

58. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

59. For other categories considered suspect by individual members of the Supreme Court, see Frontiero v. Richardson, 411 U.S. 677 (1973) (Brennan, J.); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J., dissenting); James v. Valtierra, 402 U.S. 137 (1971) (Marshall, J., dissenting); Labine v. Vincent, 401 U.S. 532 (1971) (Brennan, J., dissenting).

60. *See, e.g.*, Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); State v. Chambers, 63 N.J. 287, 307 A.2d 78 (1973); Hanson v. Hunt, 83 Wash. 2d 195, 517 P.2d 599 (1974).

61. Munn v. Munn, 168 Colo. 76, 450 P.2d 68 (1969); Storm v. None, 57 Misc. 2d 342, 291 N.Y.S.2d 515 (N.Y. County Family Ct. 1968); Armijo v. Wesselius, 73 Wash. 2d 716, 440 P.2d 471 (1968).

62. *See* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

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

64. City of Phoenix v. Superior Court, 109 Ariz. 533, 514 P.2d 454 (1973); Board of Regents v. Harper, 108 Ariz. 223, 495 P.2d 453 (1972), *noted in* "Durational Residence Requirements: Nonresident Tuition Rates and Equal Protection," 15 ARIZ. L. REV. 593, 636 (1973).

65. *In re* Maricopa County, Juvenile Action No. J-73355, 110 Ariz. 207, 516 P.2d 580 (1973).

66. Shector v. Killingsworth, 93 Ariz. 273, 380 P.2d 136 (1963).

67. Edwards v. Alhambra Elementary School Dist., 15 Ariz. App. 293, 488 P.2d 498 (1971).

68. State v. Sanchez, 110 Ariz. 214, 516 P.2d 1226 (1973).

69. *In re* Maricopa County, Juvenile Action No. J-73355, 110 Ariz. 207, 516 P.2d 580 (1973).

70. State v. Sanchez, 110 Ariz. 214, 516 P.2d 1226 (1973); Shofstall v. Hollins, 110

acknowledge a constitutionally suspect category, it can be anticipated that as this concept gains additional recognition in other jurisdictions it may become a significant factor in state equal protection litigation.

Conclusion

The Arizona court's disposition of *Shofstall v. Hollins* is notable in several respects. Recognition of education as a state fundamental right was founded on the emphasis which the state constitution places on education. However, the *Shofstall* court's failure to utilize a more demanding style of judicial scrutiny was unfortunate. Without development of this concept, effective use of the state equal protection clause will be diminished. Nevertheless, development of the state suspect categories doctrine may provide an additional means of pursuing equal protection litigation.

Ariz. 88, 515 P.2d 590 (1973); City of Phoenix v. Superior Court, 109 Ariz. 533, 514 P.2d 454 (1973); Board of Regents v. Harper, 108 Ariz. 223, 495 P.2d 453 (1972); Shector v. Killingsworth, 93 Ariz. 273, 380 P.2d 136 (1963); Edwards v. Alhambra Elementary School Dist., 15 Ariz. App. 293, 488 P.2d 498 (1971).

V. CRIMINAL LAW AND PROCEDURE

A. THE COURT'S DISCRETION TO DECLARE A MISTRIAL FOR A JURY'S FAILURE TO AGREE

When the jury in a criminal case appears unable to reach a verdict, the trial judge is presented with a dilemma. He has the discretionary power to discharge the jury and declare a mistrial, but he must be cautious in exercising this power. If he delays too long in discharging an undecided jury, he risks reversal for a coerced verdict.[1] On the other hand, if he prematurely and improperly dismisses the jury, retrial of the defendant will be barred by the constitutional guarantee against double jeopardy.[2]

In *State v. Fenton*,[3] the Arizona court of appeals was faced with the question of whether a trial judge had abused his discretion by unnecessarily discharging the jury.[4] The defendants in *Fenton* had been indicted for assault, aggravated assault, robbery, and grant theft. On the fifth day of trial, at 3:35 in the afternoon, the jury retired for deliberation with 16 possible verdicts.[5] Less than 8 hours later, they

1. *Compare* Pfeiffer v. State, 35 Ariz. 321, 332-33, 278 P. 63, 67-68 (1929), *with* Douglas v. State, 44 Ariz. 84, 96-97, 33 P.2d 985, 989-90 (1934). In *Pfeiffer*, the judge's statement that he could stay the rest of the week if necessary was held improper. There were 3 days remaining in the week, and the prospect of having to consider the case for such time might have caused some jurors to abandon their positions on guilt or innocence. In *Douglas*, however, the judge's statement to the jury that he would not be present until late the following day to receive their verdict was not held coercive, because he also stated that he did not wish to infer they had to reach a decision by then. *See also* Hennessey, *The Allen Charge: Dead Law a Long Time Dying*, 6 U. SAN FRANCISCO L. REV. 326 (1972).

2. "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. The double jeopardy clause of the fifth amendment was made applicable to the states in Benton v. Maryland, 395 U.S. 784 (1969). Most state constitutions contain similar double jeopardy prohibitions. *See, e.g.*, ARIZ. CONST. art. 2, § 10; CAL. CONST. art. 1, § 13; ILL. CONST. art. 1, § 10; N.Y. CONST. art. 1, § 6; TEX. CONST. art. 1, § 14.

3. 19 Ariz. App. 274, 506 P.2d 665 (1973).

4. Ariz. R. Crim. P. 302(A) (1956) (abrogated 1973), was in effect at the time of trial in *Fenton*. This was virtually identical to the present ARIZ. R. CRIM. P. 22.4, which provides:

> The court shall discharge the jurors when:
>
> a. Their verdict has been recorded as set forth in Rule 23;
>
> b. Upon expiration of such time as the court deems proper, it appears that there is no reasonable probability that the jurors can agree upon a verdict; or
>
> c. A necessity exists for their discharge.

5. Memorandum for Real Parties in Interest at 2, Petition for Special Action, State v. Fenton, 19 Ariz. App. 274, 506 P.2d 665 (1973).

were summoned back into the courtroom. In response to questions from the judge, the foreman indicated that the jury had reached a decision on some of the verdicts but needed more time to reach decisions on the others. The judge then asked if any of the jurors felt that they were hopelessly deadlocked. No one replied. After an in camera discussion between counsel and the court to determine the proper course of action,[6] the judge again asked the foreman if the remaining verdicts could be reached. The foreman responded that it would be impossible to proceed further that evening.[7] The judge then declared a mistrial and dismissed the jurors. The court directed verdicts of acquittal as to the charges of aggravated assault and robbery and ordered a new trial date on the offense of simple assault and the alternative count of grand theft.[8]

The case was presented to the court of appeals in a petition by the state for a special action.[9] The prosecutor alleged that the trial judge had abused his discretion in directing verdicts of acquittal on some of the charges after discharging the jury.[10] The defendants, on the other hand, challenged the new trial of the remaining charges on grounds of double jeopardy. Viewing the double jeopardy issue dispositive of the case, the court held that the trial judge had abused his discretion by discharging the jury and thus ordered a dismissal of all charges against the defendants.[11] The court of appeal's opinion, however, did little to assist trial judges in determining when a jury may be discharged for failure to reach a verdict.

This casenote will analyze *Fenton* by first tracing the historical development of the court's discretionary power to discharge a deadlocked jury. Then, after an examination of relevant Arizona case law, consideration will be given to the standards used to guide the trial

6. The judge proposed that those verdicts already reached be submitted to the court in a sealed envelope to be held by the clerk, and that the jury be directed to return the following day to resume deliberations. The defense counsel so stipulated, but the prosecuting attorney would not agree to the arrangement. 19 Ariz. App. at 275, 506 P.2d at 666.

7. *Id.*

8. *Id.*

9. The traditional writs of certiorari, mandamus, and prohibition have been replaced by the special action under ARIZ. R.P. SPECIAL ACTIONS 1-8. For a discussion of the special action, see Nelson, *The Rules of Procedure for Special Actions: Long Awaited Reform of Extraordinary Writ Practice in Arizona*, 11 ARIZ. L. REV. 413 (1969).

10. Ariz. R. Crim. P. 270 (1956). This rule, which was in effect at the time of trial in *Fenton*, provided that the court could direct the jury to acquit the defendant if, in the court's opinion, the evidence was insufficient to warrant a conviction. In *Fenton*, because the jury already had been dismissed when the court directed the verdicts, the state argued that the verdicts were void and arbitrary and requested that all counts be restored for the new trial. *See* Memorandum in Support of State's Petition for Special Action at 2-3, State v. Fenton, 19 Ariz. App. 274, 506 P.2d 665 (1973).

11. 19 Ariz. App. at 276-77, 506 P.2d at 667-68.

judge's exercise of discretion. In light of criteria employed in other jurisdictions, guidelines will be offered to assist Arizona trial judges in this determination.

Historical Development of Judicial Discretion to Discharge a Jury

The United States Constitution guarantees that no one shall be placed in jeopardy twice for the same offense.[12] This constitutional rule of finality is designed to protect individuals from the harassment and expense of multiple prosecutions. Once jeopardy has attached,[13] for however short a time, the trial must proceed to a legal conclusion, or the accused must be discharged and cannot be retried for the same offense.[14] This does not mean, however, that the defendant may never be subjected to a retrial.[15] "[A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials . . . ."[16]

In *United States v. Perez*,[17] the United States Supreme Court ruled that a trial judge, in certain situations, may discharge a jury and order a new trial without having the second trial barred by double jeopardy. "[T]he law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated."[18] When the judge properly exercises his discretion in discharging the jury, the defendant is not considered to have been placed in jeopardy. In the past, the Supreme Court has applied the *Perez* "manifest necessity" test whenever it was faced with a double jeopardy question. In these cases, a second trial has been permitted whenever circumstances arose, through no fault of the defense or prosecution, to abort the first trial before a final verdict was reached.[19] This

12. U.S. CONST. amend. V.

13. In the context of a jury trial, jeopardy attaches when the jury has been impanelled and sworn. Illinois v. Somerville, 410 U.S. 458, 467-68 (1973); Downum v. United States, 372 U.S. 734, 735 (1963). However, see State v. Padilla, 107 Ariz. 134, 138-39, 483 P.2d 549, 553-54 (1972), where the Arizona supreme court ruled that jeopardy had not attached, even though the jury had been impanelled and sworn, when the trial was delayed for a month due to the illness of the prosecuting attorney.

14. 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 136 (1957).

15. "Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." Wade v. Hunter, 336 U.S. 684, 688-89 (1949).

16. *Id.* at 689.

17. 22 U.S. (9 Wheat.) 579 (1824).

18. *Id.* at 580 (emphasis added). For a more detailed analysis of *Perez* and its effect on double jeopardy, see Note, *Double Jeopardy, The Reprosecution Problem*, 77 HARV. L. REV. 1272 (1964); Comment, *Conditions Barring Plea of Double Jeopardy After Mistrial*, 36 N.Y.U.L. REV. 730 (1961).

19. Illinois v. Somerville, 410 U.S. 458 (1973) (improperly drawn indictment con-

exception to the attachment of double jeopardy protects the public's interest in ascertaining the defendant's guilt or innocence. It is difficult, however, to determine when this power may be properly exercised.[20]

Discharging Arizona Juries for Failure to Agree

Rule 22.4 of the *Arizona Rules of Criminal Procedure* requires the judge to discharge the jury when "it appears that there is no reasonable probability that the jurors can agree upon a verdict."[21] It is left to the court's discretion to determine when this point has been reached, and neither the statute nor the case law delineates standards for its application.

In *State v. Woodring*,[22] the Arizona supreme court held that a jury was discharged properly for failure to agree, and therefore, the retrial of a burglary defendant was not barred by double jeopardy. In the lower court, the jury had deliberated both before and after lunch. At 4:55 in the afternoon, the foreman indicated to the court that the jury was unable to reach a verdict. When asked if they thought they ultimately could agree, the jurors indicated they could not. The judge then discharged the jury and declared a mistrial. The Arizona supreme court upheld the judge's decision, stating that where the jury is unable to agree upon a verdict and is properly discharged by the court, the status of the case is the same as though there had been no trial at all.[23]

More recently, in *State v. Moore*,[24] the Arizona supreme court again found no abuse of discretion on the part of the trial judge in discharging the jury. In this case, 24 hours after deliberations had begun, the jury was divided nine to three.[25] When questioned by the court, only one juror on the panel expressed a belief that further deliberations would result in a verdict. The judge discharged the jury and declared a mistrial. On review, the court held that the trial judge prop-

stituted manifest necessity); United States v. Jorn, 400 U.S. 470 (1971) (prosecution's failure to warn witnesses of their constitutional rights did not constitute manifest necessity); Downum v. United States, 372 U.S. 734 (1963) (absence of a key witness did not constitute manifest necessity); Keerl v. Montana, 213 U.S. 135 (1908); Dreyer v. Illinois, 187 U.S. 71 (1902); Logan v. United States, 144 U.S. 263 (1892); Simmons v. United States, 142 U.S. 148 (1891) (bias of one juror did not constitute manifest necessity).

20. In *Perez*, the Supreme Court warned that the manifest necessity rule should be used with great caution, under urgent circumstances, and only in obvious cases. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

21. ARIZ. R. CRIM. P. 22.4. Ariz. R. Crim. P. 302 (1956) (abrogated 1973), which was in effect at the time of the *Fenton* trial, contained virtually identical language. *See* discussion note 4 *supra*.

22. 95 Ariz. 84, 386 P.2d 851 (1963).

23. *Id.* at 86, 386 P.2d at 852.

24. 108 Ariz. 532, 502 P.2d 1351 (1972).

25. There was some doubt whether the division was nine to three or eight to four, because there was no reporter present. *Id.* at 536, 502 P.2d at 1355.

erly had determined that the jury was deadlocked and had exercised sound discretion in declaring a mistrial.

In *State v. Fenton*,[26] for the first time in Arizona, a judge was found to have abused his discretion by improperly discharging a jury. According to the opinion, legal necessity for discharging a jury exists after such time as the judge feels proper, if it satisfactorily appears there is no reasonable probability that the jury can agree.[27] In this case, however, there was no indication in the trial record that the jury was deadlocked. In fact, the inference was just the opposite—the jurors indicated that they could have reached a decision on the remaining charges if they had been allowed to resume deliberations the following morning. The jury's discharge was thus unnecessary and an abuse of discretion.

An examination of these cases indicates that Arizona appellate courts focus on certain factors in determining whether a trial judge properly has exercised his discretion in discharging a jury. For example, they have considered jurors' statements concerning their ability to agree. In *Fenton*, no one replied when the judge asked the jury if anyone felt they were hopelessly deadlocked. In contrast, 11 jurors in *Moore* felt further deliberation would be fruitless. Another factor that has been noted by the courts is the length of time the jury has spent in deliberation. In both *Fenton* and *Moore*, the jury already had spent between 8 and 9 hours in actual deliberation. While this was adequate in *Moore*, *Fenton* indicates that the period of time is not significant when the jury believes it can reach a verdict. Finally, *Moore* indicates another important factor—the split in the vote may be indicative of the jury's progress.[28] This, along with other information, can be important in determining whether further deliberation might be fruitful.

While some standards may be inferred from the consideration of these factors, the cases offer no general guidelines. It is clear, however, that the trial judge must proceed cautiously before declaring a mistrial and discharging the jury. He should make a thorough inquiry into all the facts of the situation and painstakingly consider all possible alternatives short of trial abortion.[29] This task would be easier if guidelines were provided, and it is only through appellate opinions that a trial judge can discover the limitations to be imposed on his dis-

26. 19 Ariz. App. 274, 506 P.2d 665 (1973).
27. *Id.* at 276, 506 P.2d at 667.
28. State v. Moore, 108 Ariz. 532, 536, 502 P.2d 1351, 1355 (1972). *See* text & notes 36-38 *infra*.
29. United States v. Walden, 448 F.2d 925, 930 (4th Cir. 1971).

cretionary power.[30] Therefore, if an appellate court decides a judge has abused his discretion, as in *Fenton*, it has the responsibility to specify what criteria the judge should have considered in making his decision.[31] While *Moore*, *Woodring*, and *Fenton* provide some assistance, statutes and case law in other jurisdictions offer additional guidelines which may assist Arizona's trial judges.

Guidelines Applied in Other Jurisdictions

One of the most important factors a trial judge should consider in determining whether to discharge an undecided jury is how the jurors feel about their ability to agree upon a verdict. A New York statute provided that a jury could not be discharged until after such time as they themselves declared their inability to agree.[32] Strictly construed by the courts, this statute was interpreted to prohibit the judge from dismissing the jury as long as any juror felt further deliberation could lead to an agreement.[33] It does not appear desirable to require that the jury be unanimous in its declaration that they cannot agree upon a verdict.[34] Continually returning the jury for further deliberations merely because one or two jurors felt agreement was possible may result in a coerced verdict. Additionally, the jurors are not in the best position ultimately to decide whether they are deadlocked or merely in need of additional information.[35] Nevertheless, it is important, in the proper exercise of the court's discretionary power, that the jurors be allowed to express the possibility of their inability to reach a verdict. In California, the courts question the jury to determine each juror's feeling

30. *See* Rosenberg, *Judicial Discretion of the Trial Court Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

31. In a recent Supreme Court case on double jeopardy, Justice Marshall stated his view that "one of the strengths of the articulation of legal rules in a series of cases is that successive cases present in a clearer focus considerations only vaguely seen earlier. Cases help delineate the factors to be considered and suggest how they ought to affect and result in particular situations." Illinois v. Somerville, 410 U.S. 458, 477 (1973) (Marshall, J., dissenting).

32. N.Y. Code of Crim. Pro. §§ 428, 430 (1881), *as amended*, N.Y. CODE CRIM. PRO. § 310.60 (1971).

33. People *ex rel.* Stabile v. Warden, 202 N.Y. 138, 149-50, 95 N.E. 729, 731-32 (1911); Adamo v. Several Justices of the Supreme Court, 28 App. Div. 2d 653, 653, 280 N.Y.S.2d 742, 743 (Sup. Ct. 1967); People v. Ketchum, 45 Misc. 802, 804, 257 N.Y.S.2d 681, 684 (Sup. Ct. 1965).

34. In 1971, New York amended its statute, because the courts were construing it too strictly, requiring juries to be sent back for further deliberations any time they did not agree unanimously that they were unable to reach a verdict. Now a jury may be discharged, without agreeing upon any of the charges, when the court is satisfied such agreement is unlikely to occur within a reasonable time. *See* N.Y. CODE CRIM. PRO. § 310.60, Practice Commentary (1971).

35. It may be that all the jury really needs is additional instructions to clear up confusing points of law or fact. As long as the judge does not imply that the jury must come to a decision, the additional instructions do not constitute an abuse of discretion. *See* United States v. Allis, 155 U.S. 117, 123 (1894); De Vault v. United States, 338 F.2d 179, 183 (10th Cir. 1964).

about further deliberations. This is intended to ensure that the foreman has truly communicated all the jurors' feelings on the subject and has not intimidated them into accepting his view.

It also may be helpful for the judge to inquire as to the numerical split in the vote on the latest ballot.[36] It is important, however, that the jury not reveal how it stands as to guilt or innocence. If, for example, the jurors were sent back for further deliberation after revealing they stood deadlocked at nine to three for conviction, they might infer that the court agreed with the majority and desired a verdict for conviction. Any such action by the court is grounds for reversal.[37] Consequently, all that should be indicated is the numerical division. Learning the present numerical split of the jury provides some indication of how close they are to agreeing. But it is even more useful to discover the number of ballots taken and whether there have been any significant changes in the division in the most recent ballots.[38] A jury divided 10 to two may appear closer to reaching a decision than one standing at four to eight. But if it is known that the 10 to two split has remained unchanged through five ballots, it would appear more likely that the jury is truly deadlocked. The jury split four to eight, on the other hand, may have stood eight to four on the last ballot or 10 to two on the first ballot, indicating a trend toward possible agreement. This information indicates to the judge whether the jury could agree if sent back for further deliberation.

Another important factor to be considered is the length of time the jurors have spent in deliberation. As with all of these factors, this must be considered in light of the circumstances of each case. Obviously, in evaluating the period of deliberation, such factors as the nature of the charge, the number of counts, the amount and complexity of the evidence, and the presence of conflicting testimony must be considered.[39]

36. People v. Lammers, 108 Cal. App. 2d 279, 280, 238 P.2d 667 (Ct. App. 1951). Such an inquiry "is proper as a means of assisting the court in its determination as to whether there is a reasonable probability of the jury agreeing upon a verdict and the advisability of sending them out for further deliberation." People v. Von Badenthal, 8 Cal. App. 2d 404, 410, 48 P.2d 82, 85 (Ct. App. 1935).

Regarding the court's inquiry as to the jury's numerical split in vote, California represents the minority view. In federal courts, such an inquiry may be reversible error due to its coercive nature. Brasfield v. United States, 272 U.S. 448 (1926). California has distinguished the federal cases, however, as applying only when it is the purpose of the court to ascertain how the jury is divided as to guilt or innocence. People v. Curtis, 36 Cal. App. 2d 306, 325-26, 98 P.2d 228, 237 (Ct. App. 1939). In a recent double jeopardy case the United States Supreme Court said, "Federal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state policy." Illinois v. Somerville, 410 U.S. 458, 468 (1973).

37. United States v. Mack, 249 F.2d 321, 324 (7th Cir. 1957); People v. Carter, 68 Cal. 2d 810, 816, 442 P.2d 353, 357-58, 69 Cal. Rptr. 297, 301 (1968).

38. Clemensen v. Municipal Court, 18 Cal. App. 3d 492, 502, 96 Cal. Rptr. 126, 132 (Ct. App. 1971); State v. Baker, 293 S.W.2d 900, 904 (Mo. 1956).

39. *See* People v. Ritchie, 17 Cal. App. 3d 1098, 1105, 95 Cal. Rptr. 462, 466 (Ct.

For example, it may be unreasonable to require a jury to continue deliberations after they have indicated their inability to agree where the charge is minor and the case is not complex.[40] A longer time should be allowed, however, where a case involves complex questions of fact or law.[41] In considering whether a jury should be discharged, the determination should depend upon the nature of the case and not upon any fixed rule as to hours or days spent in deliberation.[42]

If after considering the above factors the trial judge determines that the jury cannot agree, he should make a record of the facts upon which he relied in reaching his decision. In Arizona, the supreme court has indicated it is sufficient if the record merely states that the jury was discharged for failure to agree upon a verdict.[43] No further explanation of the facts upon which the judge based his decision need be set forth in the record. It seems, however, that in a matter so seriously affecting a defendant's life and liberty, the court's discretion should be exercised only for reasons clearly enumerated in the record.[44] Therefore, Arizona should consider adopting California's statutory approach[45] which requires that the reasons for a mistrial be set forth in the minutes. The statute is intended to restrain judicial discretion based on arbitrary and undisclosed motives.[46] Being forced to articulate his reasons for discharging the jury, the trial judge must carefully evaluate the situation and his motives before making his decision. Additionally, a permanent record is available for the appellate courts if they are called upon to review the trial court's action.

Conclusion

In *State v. Fenton*, the Arizona court of appeals ruled that the trial judge had abused his discretionary powers by discharging the jury when there was no clear indication of their inability to agree.[47] "We believe the record here does not reflect such reasonable probability [that the

App. 1971); *Ex parte* McLaughlin, 41 Cal. 211, 218 (1874); Whitten v. State, 61 Miss. 717, 724-25 (1884); Lindsey v. Texas, 393 S.W.2d 906, 908 (Tex. Crim. App. 1965).

40. State v. Leach, 120 Ind. 124, 126, 22 N.E. 111, 112 (1889).

41. For example, in capital cases it has been said that courts "should be extremely careful how they interfere with any of the chances of life in favor of the prisoner." United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

42. United States v. Perez, 27 F. Cas. 504 (No. 16,033) (C.C.S.D.N.Y. 1823), *aff'd*, United States v Perez, 22 U.S. (9 Wheat.) 579 (1824).

43. State v. Moore, 108 Ariz. 532, 535, 502 P.2d 1351, 1354 (1972).

44. *See* People v. Borousk, 24 Cal. App. 3d 147, 100 Cal. Rptr. 867, 874-75 (Ct. App. 1972); State v. Smith, 44 Kan. 75, 80, 24 P. 84, 85 (1890); *Ex parte* Maxwell, 11 Neb. 428, 436-37 (1876); State v. Whitman, 93 Utah 557, —, 74 P.2d 696, 698 (1937). *See also* ALI CODE OF CRIMINAL PROCEDURE § 358 (Official Draft 1930).

45. CAL. PENAL CODE § 1385 (West 1970).

46. People v. Borousk, 24 Cal. App. 3d 147, 100 Cal. Rptr. 867, 874-75 (Ct. App. 1972).

47. 19 Ariz. App. at 276, 506 P.2d at 667.

jury would be unable to agree] but merely a weary group of jurors."[48] In so holding, however, the court of appeals failed to specify what factors the trial judge should have considered in making his decision. Appellate courts should delineate more explicitly the procedure a trial judge should follow in determining whether a jury is deadlocked. Any guidelines they can offer, such as the advisability of determining the number of ballots taken, the numercial division, and any significant shifts in this division, will greatly assist trial judges who must decide whether to dismiss an apparently deadlocked jury.

B. CONSTITUTIONAL REQUIREMENTS FOR AN UNDERSTANDINGLY-MADE GUILTY PLEA

The most significant element in the expedition of the criminal justice system is the guilty plea, which is responsible for 90 percent or more of all convictions.[1] The importance of the guilty plea as a waiver of constitutional rights has been recognized by the United States Supreme Court. The Court has endeavored to protect the rights of the accused at this critical stage in the criminal process by imposing procedural requirements upon the acceptance of a guilty plea in state courts. In *Boykin v. Alabama*,[2] the defendant had pleaded guilty to five counts of armed robbery, an offense then punishable by death in Alabama.[3] The Supreme Court reversed the conviction and held that because a guilty plea constitutes a waiver of certain fundamental constitutional rights[4] it is necessary that the trial court, at the time of the plea, inform the accused of those rights in order to ensure that he makes a constitutionally valid waiver.[5] The Court reasoned that "a plea of guilty is more than a confession which admits the defendant did various acts; it is itself a conviction; nothing remains but to give judgment and determine the punishment."[6] Thus, before a guilty plea

48. *Id.* at 277, 506 P.2d at 668.

1. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

2. 395 U.S. 238 (1969).

3. Boykin was not addressed by the court at his arraignment, nor did he address the court in regard to his guilty plea. In accordance with Alabama law, a jury reviewed the case and sentenced Boykin to death on each of the five counts.

4. The Court noted that in pleading guilty an accused simultaneously waived his right to a jury trial, his privilege against self-incrimination, and his right to confront his accusers. 395 U.S. at 243.

5. *See id.*

6. *Id.* at 242.

can constitutionally be accepted by the trial court, it must be determined that the plea is knowing and voluntary.

The *Boykin* Court emphasized that more than a simple recitation of the defendant's rights is necessary in order to satisfy the constitutional requirement of a voluntary and understandingly-made plea. Quoting from its decision in *McCarthy v. United States*,[7] decided 2 months earlier, the *Boykin* Court stated that "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."[8] The Court then stated that what is at stake for the accused "demands the utmost solicitude" from the courts, including canvassing the matter with the accused to establish that he understands "what the plea connotes and its consequences."[9] Hence, the *Boykin* ruling requires that a guilty plea be based on a complete understanding of the specific law the accused is charged with violating and its relation to the acts he has admitted committing.

An extremely important question raised by the general language of the *Boykin* decision is whether the defendant must be apprised of the elements of the crime with which he is charged. The Supreme Court of Arizona has answered this question in the negative.[10] The Arizona rule, that the elements of the charge need not be enumerated, was recently challenged in *State v. Duran*.[11] Ralph Soto Duran entered pleas of guilty to an amended information charging assault with intent to commit rape and lewd and lascivious acts. Duran, who possessed a limited education, was sentenced to concurrent prison terms of 13 to 14 years and 4 to 5 years respectively for the charges. His appeal to the Supreme Court of Arizona raised three questions, all of which related directly to his ability to understand the relationship between the two charges.[12] From the record of the arraignment at which Duran pleaded, it appears that he was unable to grasp the relationship between his conduct and the lesser included offense of committing lewd and lascivious acts because he could not comprehend the criminal duality of his actions.[13] Nevertheless, he received an additional sen-

7. 394 U.S. 459 (1969).
8. 395 U.S. at 243 n.5.
9. *Id.* at 243-44.
10. State v. Ferrell, 108 Ariz. 394, 499 P.2d 109 (1972); State v. Phillips, 108 Ariz. 332, 498 P.2d 199 (1972).
11. 109 Ariz. 566, 514 P.2d 487 (1973).
12. The three questions were: (1) Had there been a showing that the defendant understood the nature of the charge of lewd and lascivious acts? (2) Did the act constituting lewd and lascivious conduct merge into the charge of assault with intent to commit rape? (3) Had the defendant been properly advised of the elements of assault with intent to commit rape? *Id.* at 567, 514 P.2d at 488.
13. The transcript of the arraignment reveals the following discussion between the court and Duran:

tence as a result of his guilty plea to the offense of committing lewd and lascivious acts. The *Duran* court stated that "we have consistently held that the accused need not be advised of the specific elements of the offense charged."[14] To the contrary, the court noted that the recital of the specific elements of the offense charged might be more confusing than helpful to the defendant.[15] The court also emphasized that Duran had been advised by his attorney that his acts constituted lewd and lascivious conduct.

This analysis of *Duran* will first examine the purpose of the *Boykin* edict. Next, the intended import of the *Duran* holding, that a defendant need not be apprised of the elements of the crime charged, will be considered. Finally, the validity of the Arizona supreme court's holding will be assessed under the *Boykin* requirements.

The Historical Context

The requirement of an understandingly-made guilty plea first arose in *McCarthy v. United States*,[16] which involved a tax evasion prosecution in the Illinois federal district court. The defendant, a 65-year-old man suffering from an illness and a drinking problem, pleaded guilty to the "willful and knowing" attempt to evade his tax payment. The record of his testimony at the sentencing hearing, however, revealed that both he and his attorney insisted that his failure to file his tax reports was due to inadvertence and neglect and was "committed without any disposition to deprive the United States of its due."[17] The trial judge accepted the plea of guilty but did not comply with rule 11 of the *Federal Rules of Criminal Procedure*, which requires a thorough inquiry into the voluntariness and understanding with which a defendant makes his plea.[18] On review, the Supreme Court held that the failure to strictly comply with the requirements of rule 11 required automatic reversal.

Interpreting rule 11, the *McCarthy* Court defined what is meant by the phrase "understanding the nature of the charge and the conse-

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Duran: [after being asked to relate those acts giving rise to the lewd and lascivious conduct charge] That's included in what I said awhile ago. That's included in—force her to have sexual acts.
Court: What?
Duran: Like I said awhile ago, I force (sic) her to have sexual acts. That's included in all you know.

Id.

14. *Id.* at 568, 514 P.2d at 489.
15. *Id.*
16. 394 U.S. 459 (1969).
17. *Id.* at 470.
18. Rule 11 provides that a court shall not accept a guilty plea "without first addressing the defendant personally and determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea." FED. R. CRIM. P. 11.

quences of the plea." The opinion intimated that in some cases it is necessary that the defendant understand the elements of the crime of which he is accused before he makes his plea.[19] The Court stated that:

> [S]ince the elements of the offense were not explained to petitioner, and since the specific acts of tax evasion do not appear of record, it is also possible that if petitioner had been adequately informed he would have concluded that he was actually guilty of one or two closely related lesser included offenses, which are mere misdemeanors.[20]

The *McCarthy* Court, therefore, indicated that the defendant's understanding of the law as it bears on his acts is essential to a valid plea and that this may in some, but not all, cases require an understanding of the essential elements of the crime charged.[21]

The necessity of the defendant's understanding of the relationship between the law and his actions is particularly acute when the indictment alleges lesser included offenses. In this situation, the accused who pleads without the necessary understanding risks pleading erroneously to a more serious offense when he may only be guilty of some lesser crime. As the *McCarthy* Court indicated, where the charge encompasses lesser included offenses, ascertaining the defendant's understanding of the specific charge to which he pleads guilty "would seem a necessary prerequisite to a determination that he understands the meaning of the charge."[22] Thus, the establishment of an understanding of the elements of the crime charged would avoid a situation such as in *McCarthy*, and perhaps *Duran*, where the defendant might plead "voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."[23]

Although the *McCarthy* Court grounded its holding on its supervisory powers over the federal courts, the reasoning requiring strict compliance with rule 11 apparently was motivated by constitutional requirements for the protection of the accused—constitutional requirements which are equally applicable to the states under the due process clause of the fourteenth amendment.[24] The *McCarthy* Court first noted the important constitutional rights which are waived by pleading

19. 394 U.S. at 467 n.20, 471.
20. *Id.* at 471.
21. *Id.* at 467 n.20.
22. *Id.*
23. *Id.* at 467.
24. Heberling, *Judicial Review of the Guilty Plea*, 7 LINCOLN L. REV. 137, 179-80 (1972).

guilty[25] and then stated that strict compliance with rule 11 is necessary to protect these rights.[26] Thus, without so holding, the Court apparently viewed the procedural requirements of rule 11 as being constitutionally mandated. Two months after the *McCarthy* decision, it was announced in *Boykin* that the same procedural requirements that *McCarthy* imposed upon the federal courts under the Supreme Court's supervisory powers were applicable to the states under the due process clause of the fourteenth amendment.[27]

The *Boykin* Court drew directly from the reasoning in *McCarthy*. The court required that the defendant in a state proceeding understand "what the plea connotes and its consequences."[28] This language is similar to the rule 11 requirement that had been construed in *McCarthy*.[29] Since the Court used the terms "connotes" and "consequences" in conjunction, it is presumed that the two terms were meant to carry distinct meanings.[30] It seems clear that the term "consequences" requires that a court impart to the defendant a knowledge of the rights the defendant is waiving and the possible prison term he faces. The meaning of "connotes" is not so obvious. It implies, as rule 11 was interpreted in *McCarthy*, that an understanding of the very nature of the offense is required.[31]

What is problematic with the *Boykin* decision is that it is not clear what must be done by the trial judge to ensure an understandingly-made plea. Perhaps the Court purposely left open the specific requirements, believing that the circumstances of each case will determine to what lengths the trial court must go in establishing a sufficient understanding of the "nature" of the offense. Nevertheless, it seems clear that in cases such as *McCarthy* or *Duran*, where the defendant faces multiple charges and clearly lacks the ability to fully comprehend the relationship between those charges, that *Boykin* would seem to require that all reasonable means, including enumerating the elements, be taken to ensure that the defendant has been adequately apprised of the "nature" of the offense.[32]

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25. 394 U.S. at 466. The Court stated: "These two purposes for the procedural requirements of rule 11 have their genesis in the nature of a guilty plea. A defendant who enters such a plea simultaneously waives several constitutional rights . . . ." *Id.*

26. *Id.*

27. *See* Heberling, *supra* note 24, at 181; Comment, *Criminal Procedure Requirements for Acceptance of Guilty Pleas*, 48 N.C.L. REV. 352, 357-58 (1972); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 181, 183-84 (1969).

28. 395 U.S. 238, 243-44 (1969).

29. *See* text accompanying notes 18-22 *supra.*

30. *The Supreme Court, 1968 Term, supra* note 27, at 184.

31. *Id.*

32. This seems particularly true considering the facts of *McCarthy*. *See* text accompanying note 21 *supra.*

Arizona and the Boykin Ruling

The Supreme Court of Arizona had previously recognized that the *Boykin* ruling, in effect, "extended the procedural requirements of rule 11 . . . to the state courts."[33] This position was soon reevaluated, and in *State v. Williker*,[34] the court announced that compliance with the "spirit" of rule 11 was all that was required by *Boykin*. Upon analysis, however, it is evident that *Williker* was quite rigorous in characterizing the sort of inquiry which constitutes such compliance.[35] In contrast, *Duran* made no mention of the "spirit" requirement of *Williker*. Although it is to be assumed that *Duran* was decided with a view towards compliance with rule 11 and *Boykin*, there is serious doubt as to whether *Duran*, at least on the facts of the case, met that objective.

Before assessing *Duran* with respect to rule 11 and *Boykin*, it is necessary to analyze the intent of the Arizona supreme court when it held that an accused need not be advised of the specific elements of the offense charged.[36] *Duran* may be read as satisfying the mandate of *Boykin* and rule 11. Apparently quoting the Supreme Court in the *McCarthy* opinion, the *Duran* court stated:

> The most appropriate procedure to be followed by the judge will vary from case to case depending upon many circumstances. In some instances merely a reading of the information or indictment will be sufficient to inform the defendant of the meaning of the charge. . . . In other instances, the charge may have to be explained by the judge to the defendant in simple language.[37]

Despite this language, the failure of the *Duran* court to require that the defendant be apprised of the specific elements of the offense charged, particularly when a lesser included offense is involved, is troublesome. Perhaps the court was merely indicating that a reading of the elements in specific or technical language was unnecessary.

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

34. 107 Ariz. 611, 491 P.2d 465 (1971). *See also* "Acceptance of Guilty Pleas," 14 ARIZ. L. REV. 409, 543, 547-48 (1972).

35. *Williker* involved an appeal from a ruling denying a motion to withdraw the defendant's plea. The appeal was based on the fact that the court did not fully inquire of the defendant to determine the understanding of his plea. Rather, the inquiry was partially made by the defendant's attorney. The interrogation of the defendant by his own attorney and the court was extensive. The Supreme Court of Arizona affirmed the conviction, holding that the *Boykin* case did not require the states to strictly comply with the procedure outlined in federal rule 11; rather, adherence to the "spirit" of the rule was sufficient. 107 Ariz. at 614, 491 P.2d at 468. The court said that rule 11 could not be construed to require "the judge to personally conduct the entire examination of the defendant without the aid of counsel." *Id.* Certainly the type of interrogation which took place in *Williker* complied with the "spirit" of rule 11. But it did much more, it virtually complied with the letter of rule 11. *See* FED. R. CRIM. P. 11. The record clearly showed compliance with *Boykin* and rule 11, a "canvassing" of the matter with the defendant to determine the voluntariness and intelligence of his plea.

36. 109 Ariz. 566, 568, 514 P.2d 487, 489 (1973).

37. *Id.*

This interpretation is supported by the court's argument that "a mere recital of the elements . . . may be more confusing than helpful to the defendant."[38] If this interpretation is correct and if the opinion is to be internally consistent, then the implication is that a more simplified explanation of the elements may still be necessary in certain cases.

The result under the facts presented in *Duran* suggests that a departure from the requirements of *Boykin* and rule 11 was intended, although ambiguously announced. As in *McCarthy*, which suggested that an explanation of the elements of the crime was necessary, Duran was charged with a lesser included offense. Additionally, it may be argued that Duran, like McCarthy, did not appreciate nor even understand the criminal duality of his acts. His plea of guilty to the charge of lewd and lascivious conduct may not have been understandingly made if he was unable to comprehend the basic proposition that his acts constituted more than his ultimate goal, to "force her to have sexual acts."[39] Yet, despite the apparent absence of Duran's understanding, the Supreme Court of Arizona chose to let his plea-based conviction stand as a knowing and understanding waiver of his constitutional rights.

Arizona's New Rules of Criminal Procedure

The new *Arizona Rules of Criminal Procedure* contain a provision specifically dealing with the acceptance of guilty pleas.[40] Rule 17.2 provides that before a guilty plea can be accepted the court must address the defendant personally and inform him of the rights he is waiving and of the "nature of the charge to which the plea is offered."[41] The comment to rule 17.2(a) provides some interesting insight into whether a defendant should be apprised of the elements of the offense charged. The comment states that rule 17.2 uses the language of rule 11 of the *Federal Rules of Criminal Procedure.* It then states: "In some cases, merely reading the technical language of the indictment or information will be sufficient to insure the accused understands the elements of the charge against him. In others, the explanation should be couched in 'simple everyday language.' "[42] Thus, regardless of the

38. *Id.*

39. *See* text & note 13 *supra.* The advice of counsel as to whether the acts to which admission is made fall within the definition of the crime charged is no substitute for the defendant's own understanding of his guilt. *See* McCarthy v. United States, 394 U.S. 459, 470-71 (1969).

40. ARIZ. R. CRIM. P. 17 (effective September 1, 1973).

41. ARIZ. R. CRIM. P. Form XIX, suggests that the defendant must be warned that he is waiving the right to confront his accusers, his privilege against self-incrimination, the right to assistance from counsel, and the right to present evidence on his own behalf.

42. ARIZ. R. CRIM. P. 17.2(a), Comment.

precise holding in *Duran*, the new Arizona rules make it clear that in similar cases, where the defendant displays a clear lack of understanding in regard to the crime he is charged with committing, an explanation of the elements of that charge is mandatory.[43]

Conclusion

Protection of the rights of the accused in the criminal plea process was the primary concern of the United States Supreme Court in both the *McCarthy* and *Boykin* decisions. If the constitutional rights waived by a plea of guilty are to be preserved, there must exist procedural safeguards which will ensure a voluntary and intelligent plea.[44] To the extent that *Duran* established the proposition that in Arizona a simplified explanation of the elements would never be required, the holding is questionable in light of *Boykin* and *McCarthy*. At the very least, those two decisions establish that when an accused is facing a multifaceted charge the court must endeavor to impart to the defendant a simple, understandable explanation of how and why his acts constitute guilt of each of the offenses charged. This would seem to require an apprisal of the specific elements of the individual offenses charged, as acknowledged by the new *Arizona Rules of Criminal Procedure*.

C. THE STATUS OF SECOND-DEGREE FELONY-MURDER IN ARIZONA

The felony-murder rule, which may result in the imposition of murder liability for deaths which occur during the commission of a felony,[1] recently has been applied in one jurisdiction to heroin sellers when death results from the use of the purchased drug.[2] This applica-

43. This comment so closely resembles the language used by the Supreme Court in *McCarthy*, 394 U.S. 459, 467 n.20 (1969), that it is likely that the drafters of the Arizona rules were cognizant of the applicability of the *McCarthy* information requirements to the states.

44. *See* 8 GONZAGA L. REV. 332, 334 (1973).

1. *See generally* W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 10.07 (7th ed. 1967); R. MORELAND, LAW OF HOMICIDE 42-54 (1972); R. PERKINS, CRIMINAL LAW 37-45 (2d ed. 1969); 1 F. WHARTON, CRIMINAL LAW AND PROCEDURE, §§ 251-53 (12th ed. 1957); Arent & McDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes*, 20 CORNELL L.Q. 288 (1935).

2. People v. Poindexter, 51 Cal. 2d 142, 330 P.2d 763 (1958); People v. Taylor, 11 Cal. App. 3d 57, 89 Cal. Rptr. 697 (Ct. App. 1970); Ureta v. Superior Court, 199 Cal. App. 2d 672, 18 Cal. Rptr. 873 (Ct. App. 1962).

tion of the felony-murder rule was rejected, however, by the Arizona supreme court in *State v. Dixon.*[3]

The defendant, Benny Dixon, sold a quantity of heroin to James Ross, and Ross subsequently self-administered a fatal dose of the drug. Dixon was charged with second-degree murder under section 13-452 of the *Arizona Revised Statutes Annotated.* This statute designates three classes of homicide as first-degree murder, including deaths which occur during the commission of certain enumerated felonies, but not specifically including drug sales.[4] It further provides that "all other kinds of murder are of the second degree." The prosecution urged the court to interpret the statute as including all killings committed during the commission of nonenumerated felonies[5] within this residual second-degree murder category.

The *Dixon* court held that it was not the intent of the legislature to encompass deaths resulting from nonenumerated felonies, such as the sale of heroin, among second-degree murders since such killings lacked the "malice aforethought" required by the statutory definition of murder.[6] In effect, the court ruled that the statute did not encompass a second-degree felony-murder rule under which the defendant could be prosecuted. The court expressly declined to rule on the question of whether the sale of heroin could constitute the proximate cause of death.[7]

This commentary, after providing a brief statement of the felony-murder rule, will examine the *Dixon* holding in the context of prior Arizona law. Particular attention will be devoted to the apparent legislative intent of the enactment of the Arizona murder statute and the subsequent judicial interpretations of that provision. Finally, some of the considerations involved in the question of a heroin seller's liability for a user's death will be considered.

The Felony-Murder Rule

The felony-murder rule was founded on the concept that special criminal liability may arise as a consequence of the commission of a separate illegal act.[8] Thus, the rule provided that if a homicide

3. 109 Ariz. 441, 511 P.2d 623 (1973).
4. ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1973).
5. ARIZ. REV. STAT. ANN. § 36-1002.02 (Supp. 1974-75), provides that the sale of heroin is a felony.
6. 109 Ariz. at 443, 511 P.2d at 625.
ARIZ. REV. STAT. ANN. § 13-451(A) (1956), provides that: "Murder is the unlawful killing of a human being with malice aforethought."
7. 109 Ariz. at 443, 511 P.2d at 625.
8. This notion appears as early as the 13th century and may actually be a vestige of Roman law. See R. MORELAND, *supra* note 1, at 42; Crum, *Causal Relations and*

occurred during a felony the intent to commit murder was conclusively presumed from the mere commission of the felony.[9] For centuries, courts have attempted to define both the kinds of felonies and the relationship between the felony and the death necessary for the imposition of liability.[10] Generally, the rule provides that a person committing an inherently dangerous felony[11] will be liable for murder for any death, even if unintended,[12] which occurs within the frame of events that defines the felony.[13] The death must also have been proximately caused[14] by an act of the felon or a co-felon,[15] and some jurisdictions require that the lethal act have been "independent" of the felony.[16] The rule has survived in some form in almost every American jurisdiction;[17] however, it lacks authoritative statement or rationale[18] and has been criticized by commentators,[19] and by some courts,[20] as ineffective, unnecessary, and unjustified. In some instances, application of

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the Felony Murder Rule, 1952 WASH. U.L.Q. 191; Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

9. *See* R. PERKINS, *supra* note 1, at 37-39.

10. *Id.* at 38-39.

11. *See id.* at 39-41.

12. *See id.* at 37.

13. The frame of events may be defined narrowly, *see* Arent & McDonald, *supra* note 1, or broadly by use of the concept of res gestae. *See* Crum, *supra* note 8, at 196-99; Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 51, 60 (1956).

14. On the one hand, this is a minimal requirement avoiding conviction for murder upon a mere coincidence of death and felony, for example, a fatal traffic accident involving a stolen car. *See* 1 F. WHARTON, *supra* note 1, § 252. But the doctrine of proximate causation as developed in tort law has been employed by some courts to expand the scope of the felony-murder rule to impose liability for killings which the felon himself, or his co-felon, has not committed. This is based on the theory that the lethal act of another is a foreseeable consequence of the commission of a violent crime. *See* Morris, *supra* note 8.

15. The various rationales for holding a felon liable for killings committed by a co-felon are noted by Arent & McDonald, *supra* note 1, at 305, and Crum, *supra* note 8, at 193.

16. The requirement of independence was developed to avoid the elimination of the crime of manslaughter in those cases in which death resulted from a felonious assault. Where it is recognized, however, it is applied to all felony-murders. *See* Arent & McDonald, *supra* note 1, at 298-302; Corcoran, *Felony-Murder in New York*, 6 FORDHAM L. REV. 43 (1937); Note, *The California Supreme Court Assaults the Felony Murder Rule*, 22 STAN. L. REV. 1059 (1970); Note, *Merger and the California Felony Murder Rule*, 20 U.C.L.A.L. REV. 250 (1972); Annot., 40 A.L.R.3d 1323 (1971). In Arizona, this requirement takes the form of an essential elements test, which requires that the elements forming the underlying felony be separable from the elements which make up the homicide. *See* State v. Miller, 110 Ariz. 498, 520 P.2d 1113 (1974); State v. Howes, 109 Ariz. 255, 508 P.2d 331 (1973); State v. Mendoza, 107 Ariz. 51, 481 P.2d 844 (1971); State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965).

17. Ludwig, *supra* note 13, at 53, collects the different American murder statutes. Most statutes, including Arizona's, closely follow the 1794 Pennsylvania statute which enumerated the kinds of felonies, most commonly, rape, burglary, robbery, and arson, which would support a first-degree murder charge. Keedy, *History of the Pennsylvania Statute Defining Degrees of Murder*, 97 U. PA. L. REV. 759 (1949).

18. *See* R. PERKINS, *supra* note 1, at 38-39.

19. *See* R. MORELAND, *supra* note 1, at 49-53; Crum, *supra* note 8, at 208-10; Ludwig, *supra* note 13, at 54; Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701 (1937).

20. People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965); Jenkins v. State, 230 A.2d 262 (Del. 1967).

the rule has been limited.[21] For example, the *Model Penal Code* would modify the rule by providing that the commission of a felony gives rise to a rebuttable, rather than conclusive, presumption of intent.[22] Other limitations of the rule, as is evidenced by *Dixon*, may be anticipated.[23]

Analysis of the Dixon Holding

The *Dixon* holding rests on the court's perception of legislative intent. Interpreting section 13-452 of the *Arizona Revised Statutes Annotated*, the court found that the legislature's use of "murder" in the last sentence of the section was intended to exclude all accidental deaths, even those committed during felonies. This conclusion, the *Dixon* court said, was mandated by the statutory definition of murder as a homicide committed with malice aforethought.[24] The *Dixon* construction of section 13-452 seems unsupported by either the legislative intent apparent from the initial enactment of the statute or the subsequent judicial interpretations of this provision.

The Arizona penal code was adopted from California in 1901,[25] Its definition of murder as a killing with malice aforethought repeats the centuries-old common law definition which has been accepted in the United States;[26] the categorization of the degrees of murder is typical of American murder statutes.[27] Contrary to the *Dixon* holding, the majority of courts which have interpreted this type of statute have held that it establishes a second-degree felony-murder rule.[28] Moreover, the principle that malice aforethought may be implied by law

21. *See* R. PERKINS, *supra* note 1, at 43-45.

22. MODEL PENAL CODE § 201.2(1)(b), Comment 4 (Tent. Draft No. 9, 1959).

23. Abolition of the rule, however, is unlikely. For example, Illinois and New York have enacted new homicide statutes which have retained the felony-murder rule. ILL. ANN. STAT. ch. 38, § 9 (Smith-Hurd 1972); N.Y. PENAL CODE § 125.25 (McKinney 1967).

24. 109 Ariz. 411, 413, 511 P.2d 623, 625 (1973). The court did not define malice aforethought but presumably identified it with intent. Several Arizona cases have defined malice as an intentional killing without legal justification. *See, e.g.*, State v. Maloney, 101 Ariz. 111, 416 P.2d 544 (1966); State v. Schantz, 98 Ariz. 200, 403 P.2d 521 (1965); Bennett v. State, 15 Ariz. 58, 136 P. 276 (1913). It should be noted that the court's apparent construction of the statute may be inconsistent since murder, as used in the statute, also encompasses felony-related homicides.

25. Collins v. State, 37 Ariz. 353, 294 P. 625 (1930).

26. Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L.J. 537 (1934).

27. R. PERKINS, *supra* note 1, at 89.

28. *See* People v. Satchell, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1973); Jenkins v. State, 230 A.2d 262 (Del. 1967); State v. Anderson, 239 Iowa 1118, 33 N.W.2d 1 (1948); People v. Arnett, 239 Mich. 123, 214 N.W. 231 (1927); State v. Jasper, 486 S.W.2d 268 (Mo. 1972); Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958); State v. Lewis, 133 W. Va. 584, 57 S.E.2d 513 (1949). *Cf.* Commonwealth v. Chase, 350 Mass. 738, 217 N.E.2d 195, *cert. denied*, 385 U.S. 906 (1966); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972). *But cf.* Gray v. State, 463 P.2d 897 (Alas. 1970). Several states have established a second-degree felony-murder rule by statute. *See* FLA. STAT. ANN. § 782.04 (Supp. 1974); N.D. CENT. CODE §§ 12-27-08, 12-27-12 (1960); WASH. REV. CODE ANN. § 9.48.040 (1961).

from the commission of a dangerous felony, even in the absence of statutory command, is generally recognized.[29] In addition to the foregoing, an evaluation of basic principles of statutory interpretation supports the conclusion that the Arizona statute was intended to include second-degree felony-murder.

First, it is clear that at common law the word "murder" was interpreted to encompass felony-murders. Theoretically, murder requires malice aforethought, but this phrase long ago acquired a technical meaning much broader than merely "hate" or "intent." Rather, it came to describe the state of mind that willingly and, in the eyes of the law, unjustifiably endangers human life.[30] Malice aforethought, in this sense, was conclusively proven by the mere commission of a dangerous crime.[31] Second, at the time of its adoption from California, the murder statute had been authoritatively construed as establishing a second-degree felony-murder rule.[32] Finally, the Arizona penal code has been re-enacted subsequent to judicial interpretations which have established that malice may be presumed from the commission of a felony and that the statute encompasses a second-degree felony-murder rule.[33]

Another difficulty caused by the *Dixon* holding is that it creates a statutory inconsistency. Section 13-456 of the *Arizona Revised Statutes Annotated* defines involuntary manslaughter as a killing which occurs during the commission of an "unlawful act not amounting to a felony."[34] Thus, second-degree felony-murder is not encompassed within the manslaughter statute, and, as a result of the *Dixon* holding, it appears to have been eliminated from the criminal code.[35] This result

29. *See, e.g.*, Yarnal v. Brierly, 324 F. Supp. 311 (W.D. Pa. 1971); People v. Mattison, 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971); People v. McBride, 30 Mich. App. 201, 186 N.W.2d 70 (1971).

30. R. PERKINS, *supra* note 1, at 46-48; 1 F. WHARTON, *supra* note 1, § 242; Perkins, *supra* note 26.

31. R. PERKINS, *supra* note 1, at 45. It has been suggested that malice aforethought has no intrinsic meaning but simply describes the circumstances in which the law will impose liability for murder. *See* W. HOLMES, THE COMMON LAW 51-59 (1881). Nevertheless, it has always been recognized that a felony-related homicide satisfies the requirement of legal malice. *See* W. CLARK & W. MARSHALL, *supra* note 1, § 10.07; R. PERKINS, *supra* note 1, at 46; J. STEPHAN, DIGEST OF CRIMINAL LAW art. 223 (1887); 1 F. WHARTON, *supra* note 1, § 251; Morris, *supra* note 8, at 58-59.

32. *See* People v. Olson, 80 Cal. 122, 22 P. 1258 (1889); People v. Foren, 25 Cal. 361 (1864); People v. Sanchez, 24 Cal. 17 (1864); People v. Bealoba, 17 Cal. 389 (1861).

33. *See* text accompanying notes 38-42 *infra*. The criminal code was re-enacted in 1939 and 1956.

34. ARIZ. REV. STAT. ANN. § 13-456(A) (Supp. 1973).

35. *See* Pike, *What is Second Degree Murder in California?*, 9 S. CAL. L. REV. 112 (1936). *Contra*, Comment, *New Limitations on Second-Degree Felony-Murder in California*, 55 CALIF. L. REV. 329 (1967). It should be noted, however, that even if second-degree felony-murder cannot be prosecuted, the practical impact is likely to be insignificant since most dangerous felonies are already enumerated in the statute.

seems logically inconsistent, since section 13-456 has been construed to punish all misdemeanor-homicides, even those resulting from minor offenses.[36] *Dixon* also implicitly conflicts with section 13-460 of the criminal code which implies that unlawful homicides cannot be excused.[37]

The *Dixon* holding not only contravenes apparent legislative intent, it also conflicts directly with prior Arizona case law. The holdings in two cases, *Wylie v. State*[38] and *Kinsey v. State*,[39] and dictum in a third, *State v. Jones*,[40] stand in direct contradiction to *Dixon*. *Wylie*, in upholding the second-degree murder conviction of a policeman for an accidental killing committed during an attempt to make an illegal arrest, interpreted the murder statute to include second-degree felony-murder.[41] *Kinsey* upheld the second-degree murder conviction of an abortionist. The court noted that the murder statute precluded a finding of murder in the first degree, but that murder committed in perpetration of a nonenumerated felony would be considered second-degree murder.[42] Although it was not necessary to the decision, the *Jones*

36. State v. Myers, 59 Ariz. 200, 125 P.2d 441 (1942). *But see* United States v. Pardee, 368 F.2d 368 (4th Cir. 1966); People v. Stuart, 47 Cal. 2d 167, 302 P.2d 5 (1956).

37. ARIZ. REV. STAT. ANN. § 13-460 (1956), provides:

> Homicide is excusable when:
>
> 1. Committed by accident and misfortune, or in doing a lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

See State v. Myers, 59 Ariz. 200, 125 P.2d 441 (1942); Wylie v. State, 19 Ariz. 346, 170 P. 869 (1918); State v. Reynolds, 19 Ariz. App. 159, 505 P.2d 1050 (1973).

Alternative theories of liability may allow courts to avoid the apparent contradiction between *Dixon* and section 13-460. For example, Arizona law provides that killing with a dangerous weapon raises a presumption of malice. *See* State v. Brierly, 109 Ariz. 308, 509 P.2d 201 (1973); State v. Intogna, 101 Ariz. 275, 419 P.2d 59 (1966); State v. Preis, 89 Ariz. 336, 362 P.2d 660 (1961). Although this is only a rebuttable inference of fact, R. MORELAND, *supra* note 1, at 27; 4 ARIZ. L. REV. 109 (1962), the cases are sufficiently ambiguous to allow a liberal use of the presumption. In addition, the language of section 13-451(B), that malice will be implied when "no considerable provocation" has preceded a killing or "when the circumstances attending the killing show an abandoned and malignant heart," is capable of a broad application. *But see* State v. Chalmers, 100 Ariz. 70, 411 P.2d 448 (1966), *noted in* 8 ARIZ. L. REV. 370 (1967).

38. 19 Ariz. 346, 170 P. 869 (1918).

39. 49 Ariz. 201, 65 P.2d 1141 (1939).

40. 95 Ariz. 4, 385 P.2d 1019 (1963).

41. 19 Ariz. at 357, 170 P. at 876.

42. It is obvious that if defendant did commit an unnecessary abortion upon the person of deceased, which resulted in the death of the latter, she was guilty of homicide, which clearly could not have been either justifiable or excusable. . . . Obviously it was not murder of the first degree, so that the only category within which it could fall is murder of the second degree, and that is exactly what courts in states with statutes similar to ours have said, to wit, that a homicide committed in the perpetration of a felony which is not one of the class making the homicide murder of the first degree is murder of the second degree.

49 Ariz. at 227, 65 P.2d at 1152.

In apparent reference to this passage, the *Dixon* court said: "[A]dmittedly, the case contains some language supporting the State's theory in the instant case." 109 Ariz. 441, 443, 511 P.2d 623, 625 (1973). The *Dixon* court attempted to distinguish *Kinsey* and Jones v. State, 95 Ariz. 4, 385 P.2d 1019 (1963), on the ground that in each of the cases the accused had *killed* the victim. This distinction can hardly be con-

court stated that a second-degree murder charge would lie for an accidental death caused during a kidnapping.[43] Two other cases, *State v. Essman*[44] and *Hightower v. State*,[45] impliedly contradict *Dixon* since each involved a prosecution for second-degree felony-murder. Moreover, implied, but persuasive, support for the second-degree felony-murder rule was provided by *Mayweather v. State*,[46] and other cases which held that killings committed in self-defense are unjustifiable when the perpetrator has created the dangerous circumstances in which death occurs.[47]

As shown above, neither statutory interpretation nor prior case law supports the holding of the *Dixon* court. *Dixon* creates considerable uncertainty, and it must be concluded that until a comprehensive review of this area of Arizona law is undertaken, the question of whether there can be second-degree felony-murder prosecutions remains unclear.

The Liability of a Seller of Heroin for the Heroin-Caused Death of a User

The most interesting questions raised by *Dixon* were not addressed by the court: (1) should the seller of heroin be held liable for the heroin-induced death of a user, and (2) assuming liability is imposed, is the felony-murder rule the best legal theory on which to proceed? These questions have not been definitively answered,[48] and

sidered dispositive of *Kinsey* or *Jones* since *Dixon*'s construction of section 13-452 appears to overrule *Kinsey*, and it contradicts *Jones*.

43. 95 Ariz. at 6, 385 P.2d at 1020.

44. 98 Ariz. 228, 403 P.2d 540 (1965) (holding that it was incorrect to instruct the jury that assault with a deadly weapon would support a second-degree felony-murder charge because the felony was not independent of the act causing death).

45. 62 Ariz. 351, 158 P.2d 156 (1945) (defendant tried and acquitted of a second-degree murder charge arising from an abortion-related death).

Despite these cases recognizing second-degree felony-murder, the question always has been a confused one in Arizona. Stokes v. Territory, 14 Ariz. 242, 127 P. 742 (1912), decided by the same court that later decided *Wylie*, reversed a first-degree murder conviction on the ground that a jury instruction stating that malice might be presumed from the commission of a felony was incorrect since murder required actual intent. The same court which in *Jones* assumed that there was second-degree felony murder indicated in State v. Schroeder, 95 Ariz. 255, 260, 389 P.2d 255, 258 (1964), that there was not.

46. 29 Ariz. 460, 242 P. 864 (1926). *Mayweather* recognized the principle of transferred intent by upholding a murder conviction for an accidental killing in a purposeful attempt to shoot a third person.

47. *See, e.g.*, State v. Copley, 101 Ariz. 242, 418 P.2d 579 (1966); State v. Myers, 59 Ariz. 200, 125 P.2d 441 (1942); Carter v. State, 18 Ariz. 369, 161 P. 878 (1916).

48. Only California has applied the felony-murder rule to drug deaths. See cases cited note 2 *supra*. Aside from *Dixon*, only one other case has considered the question. Commonwealth v. Bowden, — Pa. —, 309 A.2d 714 (1973) (concurring opinion). Persons who have provided fatal doses of heroin have been held liable for manslaughter in the following cases: People v. Hopkins, 101 Cal. App. 2d 704, 226 P.2d 74 (Ct. App. 1951); Silver v. State, 13 Ga. App. 722, 79 S.E. 919 (1913); Brown v. Commonwealth, 219 Ky. 406, 293 S.W. 975 (Ct. App. 1927); State v. Thomas, 118 N.J. Super. 377, 288 A.2d 32 (1972); People v. Cruciani, 70 Misc. 2d 528, 334 N.Y.S.2d 515 (Suffolk County Ct. 1972); and second-degree murder in: State v. Johnson, 68 Misc.2d 937, 329

since they are likely to arise again, a brief examination of them may be of interest.

The question of the liability of the heroin seller raises two important policy considerations. First, should the act of the user in injecting the heroin be considered the proximate cause of death, and second, has the user assumed the risk of death? There is a continuing debate among courts and writers concerning the extent of liability for a criminal homicide. One view, adhering to the principles of proximate causation, as developed in tort law, provides that a person is responsible for any foreseeable homicide for which he aided in the commission of.[40] Others advocate that liability should not extend beyond the last responsible actor whose intelligent, voluntary act preceded death.[50] Obviously, the heroin seller will be absolved of homicidal liability if the latter view is accepted.[51] Even under the first view of causation, the seller may not be liable depending primarily upon determination of the question of foreseeability.[52] Another consideration under the proximate cause theory is that the victim may have been a willing participant in the events which led to his death; this may be viewed as an intervening cause. Although the concept of assumption of risk ostensibly has no place in the criminal law, there is nevertheless a reluctance on the part of courts to attach liability for a death which was consciously risked by its victim.[53] This attitude is illustrated in cases involving the

N.Y.S.2d 265 (Schenectedy County Ct. 1972). A person injecting fatal heroin was found guilty of first-degree murder in People v. Brown, 37 Mich. App. 192, 194 N.W.2d 560 (1971). A seller of heroin was absolved from homicidal liability in People v. Pickney, 65 Misc. 2d 265, 317 N.Y.S.2d 416 (Rockland County Ct. 1971). A person who had injected but not sold heroin was absolved of liability in Commonwealth v. Bowden, — Pa. —, 309 A.2d 714 (1973). There appears to be no other cases which have considered the question. Cases deciding analogous questions are noted in 32 A.L.R.3d 589 (1970).

Florida punishes the "distribution" of fatal heroin as murder by statute. *See* FLA. STAT. ANN. § 782.04 (Supp. 1974).

49. *See* Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949); W. CLARK & W. MARSHALL, *supra* note 1, § 4.01; R. PERKINS, *supra* note 1, at 725-32; Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Focht, *Proximate Cause in the Law of Homicide*, 12 S. CAL. L. REV. 19 (1936).

50. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 255 (2d ed. 1960). *See* Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958); Morris, *supra* note 8; Wechsler & Michael, *supra* note 19, at 724; Note, *Heroin Deaths: Homicidal Responsibility of the Seller in New York*, 37 ALBANY L. REV. 497, 511-18 (1973); Note, *The Use of the Tort Liability Concept of Proximate Cause in Cases of Criminal Homicide*, 56 NW. U.L. REV. 791, 804 (1962).

51. However, the heroin user may be an addict whose need for heroin is considered so overpowering as to constitute an irresistible impulse. *See* State v. Thomas, 118 N.J. Super. 377, 288 A.2d 32 (1972). *But see* Wilson, Moore & Wheat, *The Problem of Heroin*, 2 DRUG ABUSE L. REV. 102, 104-07 (1972-73).

52. Two cases have absolved providers of fatal heroin from homicidal liability on the ground that death was not sufficiently foreseeable. People v. Pickney, 65 Misc. 2d 265, 317 N.Y.S.2d 416 (Rockland County Ct. 1971); Commonwealth v. Bowden, — Pa. —, 309 A.2d 714 (1973).

53. *See* People v. Ferlin, 203 Cal. 587, 265 P. 230 (1928); Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1956) (Musmanno, J., dissenting); Morris, *supra* note 8, at 79; Note, *Limitations on the Applicability of the Felony-Murder Rule in Cal-*

prosecution of those aiding a suicide. In such a situation, even though death is virtually certain, courts have split on the question of liability.[54]

Assuming a decision in favor of the imposition of liability, the propriety of applying the felony-murder rule to heroin-induced homicides is questionable. In jurisdictions which do not invoke the rule unless the resulting homicide is independent of the felony, such an application appears illogical since the defendant's lethal act, the transfer of the heroin to the buyer, is the underlying felony.[55] Moreover, it may be argued that the rule's justification as a deterrent against the use of violence by felons[56] is not served by this application. The artificial nature of the rule also militates against its extension.[57]

Conclusion

In *State v. Dixon*, the Arizona supreme court construed Arizona's murder statute to limit application of the felony-murder rule to specifically enumerated felonies. In light of *Dixon's* conflict with existing Arizona case law and its apparent contravention of the intent of the framers of Arizona's criminal code, its future validity is uncertain. It must be concluded that the current status of the second-degree felony-murder rule in Arizona is uncertain, and subsequent litigation can be anticipated. Additionally, the question of whether a seller of heroin can be held liable for the death of a user remains undecided.

D. AIRLINE SEARCHES OF CHECK-ON BAGGAGE

One of the fundamental safeguards of individual liberty is found in the fourth amendment to the United States Constitution, which guarantees the right of the people to be secure from unreasonable searches and seizures.[1] This provision has been strengthened by the exclusionary rule, which prohibits admission at trial of evidence obtained in

ifornia, 22 HASTINGS L.J. 1327 (1971). Similarly, felons are usually not held liable for the deaths of co-felons which occur during commission of felonies. 1 F. WHARTON, *supra* note 1, § 253.

54. *See* May v. Pennell, 101 Me. 516, 64 A. 885 (1906); Grace v. State, 44 Tex. Crim. 193, 69 S.W. 529 (1902). *But see* People v. Roberts, 211 Mich. 187, 178 N.W. 690 (1920); Blackburn v. State, 23 Ohio St. 146 (1872). *See also* MODEL PENAL CODE § 201.5 (Tent. Draft No. 9, 1959).

55. See discussion note 16 *supra*. Without explanation, People v. Taylor, 11 Cal. App. 3d 57, 87 Cal. Rptr. 697 (Ct. App. 1970), rejected this contention.

56. People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1962).

57. People v. Satchell, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971).

1. U.S. CONST. amend. IV.

violation of the search and seizure clause.[2] Although the exclusionary rule is applicable to federal[3] and state governments,[4] it does not apply to searches and seizures in which there is no government involvement.[5] Therefore, some state action must be found to have been involved in an illegal search before the fruits of that search can be excluded at trial. The question of what constitutes sufficient state action to invoke the exclusionary rule has been raised in many different contexts.[6] In *State v. Fellows*,[7] the Supreme Court of Arizona was presented with the particular issue of whether a search of check-on baggage by airline employees constituted state action and thus was subject to the fourth amendment exclusionary rule.

The *Fellows* case began with an anonymous bomb threat telephoned from Phoenix to the Los Angeles office of Trans World Airlines.[8] The TWA office in Phoenix was notified of the call. About 3 hours later, at the Phoenix airport, defendant Fellows purchased a ticket at the TWA counter. He then checked his bag and boarded a plane for Chicago. After the defendant left the counter area two TWA employees, without request or direction from a law enforcement agency, unlocked his suitcase and found kilo-sized bricks wrapped in polyethylene bags and paper.[9] Suspecting that the bags contained marijuana, the employees closed the suitcase and called the police. When three Phoenix police officers arrived, they requested that one of the TWA employees reopen the defendant's suitcase.[10] After determining that the bags contained marijuana, the officers arrested the defendant and charged him with attempting to transport marijuana.

Prior to trial, the defendant filed a motion to suppress, contending that the marijuana was obtained through an illegal search. The trial court granted this motion along with a motion to dismiss the information against the defendant. On appeal by the state,[11] the Supreme

2. Weeks v. United States, 232 U.S. 383 (1914).
3. *Id.*
4. Mapp v. Ohio, 367 U.S. 643 (1961).
5. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Burdeau v. McDowell, 256 U.S. 465 (1921).
6. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Lustig v. United States, 338 U.S. 74 (1949); Gambino v. United States, 275 U.S. 310 (1927).
7. 109 Ariz. 454, 511 P.2d 636 (1973).
8. The caller did not specify a flight or an airline in his threat. Brief for Appellee at 2, State v. Fellows, 109 Ariz. 454, 511 P.2d 636 (1973).
9. Fellows and a companion, who was jointly charged, were the only individuals on the flight in question to have their bags searched. Preliminary Hearing Transcript at 27, 40, State v. Fellows, 109 Ariz. 454, 511 P.2d 636 (1973). Both of the individuals searched had a "hippie appearance." *Id.* at 29.
10. There was a conflict on whether the TWA employee or the police officers opened the bag on this occasion. The employee testified that the police opened the bag. *Id.* at 119. The supreme court, however, indicated that the TWA employees opened the suitcase.
11. The state only appealed the order granting the motion to dismiss, failing to appeal from the order dismissing the information. Because of this, the defendant filed a

Court of Arizona vacated the superior court order and reinstated the information. In reaching its decision, the supreme court held that the original search by the TWA employees was a private act and, therefore, not within the scope of the fourth amendment. The employees, the court stated, were acting "in response to a general duty of care to protect the airplane" and not "under the authority of the state."[12] The court also reasoned that because of the TWA employees' tip the police officers had probable cause to carry out the second search of the defendant's bags.[13] Failure to obtain a search warrant, the court said, was justified by exigent circumstances.[14]

While the *Fellows* decision was based on the proposition that state action was not involved in the initial search of the baggage by the airline employees, the court's brief opinion failed to specify what test or standard was employed in making that determination. The court stated the "[t]here was no general police instigated exploratory search" and there was not "a joint operation with law enforcement authorities."[15] State action is not limited, however, to police actions. The question of whether the initial search conducted by the employees could have constituted state action, even absent police involvement, was not explored by the court. This discussion, therefore, will examine this question, analyze theories that have been employed to determine whether specified conduct constitutes state action, and evaluate the facts of *Fellows* in the context of these tests.

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motion to dismiss the appeal, arguing that the case was moot. The supreme court denied the defendant's motion without argument or opinion and reinstated the information without discussing this issue. 109 Ariz. at 456, 511 P.2d at 638.

12. *Id.*

13. Probable cause must be present for a search to be legal. Chambers v. Maroney, 399 U.S. 42 (1970); Aguilar v. Texas, 378 U.S. 108 (1964). When, as in *Fellows*, probable cause is based on an informant's tip, the evidence showing probable cause must be at least as persuasive as that necessary to obtain a valid warrant. Aguilar v. Texas, *supra* at 112. In *Aguilar*, the Court required that for a warrant to issue the magistrate must be informed of: (1) the underlying circumstances showing that the informant was reliable, and (2) the underlying circumstances on which the informant based his conclusion. *Id.* at 114.

The Arizona supreme court has held that reliability is enhanced when an ordinary citizen volunteers information obtained in the ordinary course of his affairs. State *ex rel.* Flournoy v. Wren, 108 Ariz. 356, 364, 498 P.2d 444, 452 (1972), *noted in* "Informant's Statement as Basis for Stop and Frisk," 15 ARIZ. L. REV. 593, 677, 682 (1973); *cf.* Adams v. Williams, 407 U.S. 143 (1972). In *Fellows*, the court merely stated that the police officers "clearly had probable cause." 109 Ariz. at 456, 511 P.2d at 638.

14. Generally, the fourth amendment has been held to require that a magistrate find that probable cause exists and issue a warrant. When exigent circumstances are present, however, the judgment of the police as to the existence of probable cause will be sufficient to authorize a warrantless search. Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). *Carroll* and *Chambers* both involved automobiles, but in State v. Fassler, 108 Ariz. 586, 503 P.2d 807 (1972), this justification for warrantless searches was extended to include packages in transit. *Accord*, United States v. Ogden, 485 F.2d 536 (9th Cir. 1973); People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972), *cert. denied*, 411 U.S. 931 (1973). *But cf.* Coolidge v. New Hampshire, 403 U.S. 443, 462 n.18 (1973).

15. 109 Ariz. 454, 456, 511 P.2d 636, 638 (1973).

Government Action in Fourth Amendment Cases

Since the decision of the United States Supreme Court in *Burdeau v. McDowell*,[16] it has been accepted that the fourth amendment only applies to government action.[17] The government cannot avoid fourth amendment sanctions, however, by having private citizens carryout searches on its behalf.[18] Thus, if an individual is acting as an agent or instrument of the state when the invasion of privacy occurs, the fourth amendment requires that any evidence so obtained be excluded.[19] The determination of government, as opposed to private, action is not always clear, however.[20] In the context of airport searches and the private actions of the employees of public carriers, the fourth amendment proscriptions are not applicable "so long as the search is conducted by the carrier for its own purposes and without the instigation or participation of government agents."[21] Applying this criteria to *Fellows*, it would appear that the determinative question was whether there had been sufficient government involvement to establish that the airline employees were acting as agents or instruments of the government. In contrast, if they were merely pursuing a private objective, their acts were outside the scope of fourth amendment protection.[22]

The Arizona supreme court did not appear to evaluate the purpose of the search in *Fellows*, but rather concluded that there was no evidence that the employees "acted as police agents."[23] In so doing, the *Fellows* court relied on a California case which provided a narrow criteria for determining the presence of state action in airport searches. In *People v. McKinnon*,[24] the California supreme court stated that gov-

16. 256 U.S. 465 (1921).

17. *See* Comment, *Private Party Searches and Seizures—A Province of the Fifth Amendment*, 3 U. SAN FRANCISCO L. REV. 159 (1968).

18. Byars v. United States, 273 U.S. 28, 33-34 (1927).

19. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

20. *See* Byars v. United States, 273 U.S. 28, 32 (1927); Corngold v. United States, 367 F.2d 1 (9th Cir. 1966); Note, *Private Assumption of the Police Function Under the Fourth Amendment*, 51 B.U.L. REV. 464, 465 (1971); 37 Mo. L. REV. 545 (1972).

21. United States v. Echols, 477 F.2d 37, 39 (8th Cir. 1973). *Compare* Corngold v. United States, 367 F.2d 1 (9th Cir. 1966), *with* Gold v. United States, 378 F.2d 588 (9th Cir. 1967).

In *Corngold*, an employee searched a crate at the request of federal agents. The court held that, since the sole purpose of the search was to aid the agents, the requisite state action was present. In *Gold*, however, agents informed employees of suspicions concerning a freight shipment and subsequently left the premises. Airline employees then searched the freight and found contraband. Since the air carrier's rates were based on the type of goods carried, the court found that the search was made for legitimate corporate purposes. *See also* Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039, 1042-43 (1971).

22. *See* Gold v. United States, 378 F.2d 588 (9th Cir. 1967).

23. 109 Ariz. 454, 456, 511 P.2d 636, 638 (1973).

24. 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972), *cert. denied*, 411 U.S. 931 (1973).

ernment action could be shown only if the airline personnel were acting at the express direction or request of police or if the police had actual knowledge of the search and the ability to prevent it.[25] While the *Fellows* court did not explain its reliance on *McKinnon*, it is clear that traditional concepts of state action are not limited to police activity,[26] and that the determinations of what constitutes state action often involve complex and subtle evaluations.[27] For this reason, it may be useful to explore other applications of the state action concept and analogize their application to *Fellows*.

State Action in Fourteenth Amendment Cases

Other basis for determining what constitutes state action have been developed in cases arising under the fourteenth amendment. Although there has been only limited application of fourteenth amendment state action tests in search and seizure cases,[28] it appears that the same standards of government involvement should apply to fourth amendment situations. Fourth amendment rights "are to be regarded as of the very essence of constitutional liberty" and "the guaranty of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen."[29] Additionally, it is through the fourteenth amendment that the fourth amendment and its remedies are made applicable to the states.[30] Therefore, application of fourteenth amendment state action tests to the initial search in *Fellows* provides a means for evaluating whether the activities of airline employees constitutes state action.

Evans v. Newton[31] set forth the "state function" analysis for evaluating the existence of government involvement. In *Newton*, a testator had devised to the city of Macon, Georgia a tract of land to be held in trust and used as a park for white persons only. For several years, the park was maintained in accordance with this wish. City officials, however, eventually agreed that the fourteenth amendment prohibited

25. *Id.* at 912-13, 500 P.2d at 1106-07, 103 Cal. Rptr. at 906-07. In *McKinnon*, the court pointed out that for the police to have the ability to prevent the search it would be necessary that they be physically present when the search was made. *Id.* at 913, 500 P.2d at 1106, 103 Cal. Rptr. at 906.

26. *See* Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967); Knoll Associates, Inc. v. FTC, 397 F.2d 530 (7th Cir. 1968).

27. *See* NLRB v. South Bay Daily Breeze, 415 F.2d 360 (9th Cir. 1969); Knoll Associates, Inc. v. FTC, 397 F.2d 530 (7th Cir. 1968); Gold v. United States, 378 F.2d 588 (9th Cir. 1967); Corngold v. United States, 367 F.2d 1 (9th Cir. 1966). *See also* Note, *supra* note 21, at 1042-43.

28. *See* United States v. Ogden, 485 F.2d 588 (9th Cir. 1973); United States v. Davis, 482 F.2d 893 (9th Cir. 1973); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).

29. Gouled v. United States, 255 U.S. 298, 304 (1921).

30. Mapp v. Ohio, 367 U.S. 643 (1961).

31. 382 U.S. 296 (1966).

them from continuing segregated operation of the park. When the city began to allow blacks to use the park, a board of managers, which had been created by the testator's will, brought suit asking that the provisions of the will be complied with and that the city be removed as trustee.[32] On certiorari, the United States Supreme Court held that the public nature of the park required it to be treated as a public institution subject to the fourteenth amendment.[33] The test that the Court used to find state action in the operation of the park was whether "private individuals or groups had been endowed by the state with powers governmental in nature."[34]

In applying this test to the facts in *Fellows*, it is necessary to consider, first, whether airlines are endowed with the power to search and, second, whether that power is governmental in nature. In answering the first question, the intensive government regulation of airport and airline security evidences the extent to which the power to search has been endowed upon the airlines by the government.[35] A Civil Aeronautics Board regulation allows airlines to refuse to carry any passenger or parcel unless consent is given to a search of person or property.[36] Without the support of this regulation, the airlines would not have the right to reject a passenger or a parcel unless they had reasonable grounds to suspect that the goods were dangerous or illegal.[37] It is reasonable to conclude, therefore, that by virtue of this regulation the government has endowed the airlines with the power and the duty to search. Consequently, the search in *Fellows* met the first part of the *Evans* test. It is also necessary to determine whether this power to search is governmental in nature.[38] In other words, is it a function that would "in all likelihood be performed by the state?"[39] In *Fellows*, the search was induced by a bomb threat; it was carried out for the

32. *Id.* at 297.
33. *Id.* at 302.
34. *Id.* at 299. *Cf.* Coolidge v. New Hampshire, 403 U.S. 443, 486 (1971). Recent support for this test may be found in Moose Lodge v. Irvis, 407 U.S. 163 (1972), which involved the lodge's refusal to serve Blacks. In holding that state action was not involved in the discrimination, the Court stated that the lodge did not perform "a service that would in all likelihood be performed by the state." *Id.* at 175. This is essentially the "governmental nature" requirement of the *Evans* test. The "endowed by the State" requirement of *Evans* was not at issue in *Moose Lodge*.
35. *See* 49 U.S.C. § 1511 (1970); 14 C.F.R. §§ 107.1 to -.11, 121.538 (1974). For a detailed delineation of government involvement in airline searches, see United States v. Davis, 482 F.2d 893 (9th Cir. 1973).
36. Rule A(3), CAB No. 17 (Trans World Airlines, Inc., 1963), *cited in* Note, *supra* note 20, at 1045 n.34. Since the *Fellows* search, a new regulation has been enacted which establishes even more government involvement in searches of this kind. This Federal Aviation Administration regulation requires that each airline formulate a security plan designed to prevent the loading of any baggage without proper compliance with said plan. 14 C.F.R. § 121.538 (1972).
37. *See* The Nitro-Glycerine Case, 82 U.S. (15 Wall.) 524 (1872); *cf.* Bruskas v. Railway Express Agency, 172 F.2d 915 (9th Cir. 1942).
38. Evans v. Newton, 382 U.S. 296 (1966).
39. Moose Lodge v. Irvis, 407 U.S. 163 (1972). *See* discussion note 34 *supra*.

security of the public, and it served a police function. Arguably, this type of search, if not undertaken by the airlines, would have been performed by the state.[40] Thus, it could be concluded that both requirements of the *Evans* test were met by the search in *Fellows*. It can be seen that the application of this fourteenth amendment state function test could have resulted in the exclusion of the evidence and dismissal of the charges against Fellows.

Another test for state action, the "significant involvement" test, was developed in *Peterson v. City of Greenville*.[41] The *Peterson* Court found state action in a restauranteur's refusal to serve blacks when a city ordinance required racial segregation in eating establishments. Even though it was not shown that the restauranteur's action was in any way influenced by the ordinance, the court held that the state had, to a "significant extent," become involved in the resulting discrimination and had "removed the conduct from the sphere of private choice."[42] This test has been applied in at least two airport search cases. In *United States v. Lopez*,[43] the court held that "the government may not initiate [an antihijacking] system such as this one and then deny responsibility for properly policing it. Continuous supervision and control of personnel who have the power to intrude on constitutional rights is essential."[44] Following the *Lopez* rationale, the Ninth Circuit Court of Appeals held, in *United States v. Davis*,[45] that the government was significantly involved in airport searches. The court detailed the extensive government involvement and concluded that any search conducted pursuant to the "airport search program" was within the reach of the fourth amendment.[46]

As with the state function test, the extensive government role in the *Fellows* search is an example of the government's significant involvement in airport searches. The search was authorized by government regulations.[47] It was carried out by an airline that may operate

40. On this basis, *Fellows* is easily distinguishable from United States v. Ogden, 485 F.2d 536 (9th Cir. 1973), where the court found the search to be a mere fluke caused by an employee's unauthorized curiosity.

41. 373 U.S. 244 (1963).

42. *Id.* at 248; *cf.* Reitman v. Mulkey, 387 U.S. 369 (1967); Robinson v. Florida, 378 U.S. 153 (1964). This test originated in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

43. 328 F. Supp. 1077 (E.D.N.Y. 1971).

44. *Id.* at 1101.

45. 482 F.2d 893 (9th Cir. 1973). The court cited Lustig v. United States, 338 U.S. 74 (1949), to support the proposition that government involvement at any point of the search was sufficient to invalidate the search. 482 F.2d at 896-97.

46. 482 F.2d at 904. In United States v. Ogden, 485 F.2d 588 (9th Cir. 1973), it was acknowledged that the correct test was applied in *Davis*. However, the Ogden court found no state action because the search was executed at the personal whim of an airline employee.

47. Rule A(3), CAB No. 17 (Trans World Airlines, Inc., 1963), *cited in* Note, *supra* note 21, at 1045 n.34.

only in accordance with government licensing regulations, which cover virtually every phase of its operations. Therefore, if the significant involvement test was to be applied to the facts of *Fellows*, it seems clear that state action was present in the search by the airline employees.

Burton v. Wilmington Parking Authority[48] established the "interdependence" test for determining the presence of government action. In *Burton*, a restaurant that leased space in a parking complex was accused of racial discrimination. The parking complex was partially financed by municipal bonds and was owned and operated by the Wilmington Parking Authority, an agency of the state of Delaware.[49] Stressing the financial interdependence of the parking authority and the restaurant, the Court found that:

> The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.[50]

For this reason, the Court held that fourteenth amendment restrictions were binding on the lessee restaurant.[51]

The facts in *Fellows* also lend themselves to an analysis similar to that applied in *Burton*. The initial search was made by TWA employees at Phoenix Sky Harbor Airport, which is owned and operated by the City of Phoenix. Trans World Airlines leases space at the airport from the city, and lease revenues are used to support the airport. Unquestionably, there is a strong economic interdependence between TWA and the City of Phoenix. Thus, application of the fourteenth amendment *Burton* rationale might lead to the conclusion that there was such a high degree of interdependence between the airline and government operations that it would necessitate exclusion of the evidence.

Conclusion

The *Fellows* opinion gave only brief attention to the issue of government involvement in the search conducted by the TWA employees. The court did not give the state action issue a detailed examination, but followed the reasoning of *People v. McKinnon*,[52] which indicated that government involvement in airport searches is present only if the

48. 365 U.S. 715 (1961).
49. *Id.* at 716.
50. *Id.* at 725.
51. *Id.* at 726.
52. 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972), *cert. denied*, 411 U.S. 931 (1973). *See* text accompanying notes 24-25 *supra*.

search was conducted in the presence of the police or at their express direction.[53] This casenote has attempted to show that more expansive state action concepts, as applied in cases involving the equal protection clause, may be applied to searches of this type. Application of these concepts provides an accepted means of measuring state action when the government involvement is indirect and may be used to ensure individual security from unjustified searches and seizures.

53. 7 Cal. 3d at 913, 500 P.2d at 1106, 103 Cal. Rptr. at 906.

VI. EVIDENCE

A. PRIOR TESTIMONY AND THE HEARSAY RULE IN ARIZONA

Wigmore defines hearsay as an oral or written statement made at a time when there was no opportunity to cross-examine the declarant and offered to prove the truth of the words spoken or written.[1] Concurring in this definition,[2] most authorities find the hearsay rule satisfied when prior testimony is offered in evidence at a subsequent proceeding, provided that the testimony initially was given under oath and the witness was subject to confrontation and cross-examination[3]—the tests generally assumed necessary to ensure the trustworthiness or reliability of a witness' testimony.[4]

The Arizona supreme court, while subscribing to the Wigmorean definition of hearsay,[5] nevertheless has held prior testimony inadmissible in a subsequent proceeding unless its admission into evidence was necessary to avoid an unjust result.[6] The element of necessity traditionally has been supplied only when the declarant is unavailable due either to death or physical absence from the jurisdiction.[7] *State v. Thomas*[8] presented the Supreme Court of Arizona with an opportunity to reexamine the requirement that a witness be dead or physically beyond the court's jurisdiction before his prior testimony may be admitted in a subsequent proceeding.

Thomas, the defendant, was tried for the crime of first degree murder, committed during a liquor store robbery in Tucson, Arizona. At the first trial a witness, Lucius Sorrell, testified that Thomas came

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1. 5 J. WIGMORE, EVIDENCE §§ 1361-1362 (3d ed. 1940).
2. *See* M. UDALL, ARIZONA LAW OF EVIDENCE §§ 171, 182 (1960); Brown, *The Hearsay Rule in Arizona*, 1 ARIZ. L. REV. 1 (1959).
3. M. UDALL, *supra* note 2, § 182; 5 J. WIGMORE, *supra* note 1, §§ 1367-1368, 1396; Brown, *supra* note 2, at 3.
4. *See* Martin, *Former Testimony Exception in the Proposed Rules of Evidence*, 57 IA. L. REV. 547, 550 (1972); 30 LA. L. REV. 651 (1970).
5. State v. Coey, 82 Ariz. 133, 141, 309 P.2d 260, 265 (1957) (dictum); U.S. Fidelity & Guar. Co. v. Davis, 3 Ariz. App. 259, 261, 413 P.2d 590, 592 (1966).
6. *Cf.* State v. Dixon, 107 Ariz. 415, 489 P.2d 225 (1971); 5 J. WIGMORE, *supra* note 1, §§ 1402-1410.
7. Adkins v. State, 42 Ariz. 534, 28 P.2d 612 (1934); Tom Reed Gold Mines Co. v. Moore, 40 Ariz. 174, 11 P.2d 347 (1932); M. UDALL, *supra* note 2, § 182, at 407.
8. 110 Ariz. 120, 515 P.2d 865 (1973).

to his apartment the night of the homicide-robbery and asked to borrow a gun to pull a job and that Thomas left the apartment without a gun and returned later claiming he had one. Sorrell further testified that he saw the defendant and three other men running through a park near the liquor store at about the time of the robbery.[9]

The first trial, at which Sorrell's testimony was given, ended in a hung jury, and a second trial was ordered.[10] At the subsequent trial, Sorrell testified that he did not remember the defendant and was unable to recall the events that occurred on the date of the crime.[11] The state then moved for the admission of Sorrell's prior testimony, and the trial court sustained the motion on the basis of the present incompetence of the witness. Following the defendant's first degree murder conviction, the defense appealed on the ground that rule 256 of the *Arizona Rules of Criminal Procedure*[12] allows the admission of prior testimony in a subsequent trial only when the witness is dead or physically beyond the court's jurisdiction.[13]

Upholding the trial court's ruling, the supreme court held that the sixth amendment right of confrontation was satisfied, whether or not the witness was available for cross-examination at the second trial, provided that the prior testimony had initially been given against the same party and upon the same charge and that the witness was subject to cross-examination at the first trial.[14] Rule 256, the court continued, was a permissive rule which allowed introduction of former testimony in situations other than when the witness was dead or physically beyond the jurisdiction of the court.[15] Evidencing a concern for the availability of testimony, the court concluded that prior testimony should be admitted where "the witness through no fault of the party offering the prior testimony refuses or is incapable of testifying even though present in court."[16]

In *Thomas*, the Arizona supreme court departed from its prior position and achieved a result consistent with the Wigmorean approach to this problem. This commentary will review the effect of *Thomas* on Arizona's law of evidence. It will begin with an examination of the

9. *Id.* at 123-24, 515 P.2d at 868-69.
10. *Id.* at 123, 515 P.2d at 868.
11. *Id.* at 125, 515 P.2d at 870.
12. Ariz. R. Crim. P. 256, *superceded by* ARIZ. R. CRIM. P. 19.3(c).
13. 110 Ariz. at 125-26, 515 P.2d at 870-71. The defendant also based his appeal upon the trial court's refusal to admit a document impeaching a state's witness, the admission of gruesome photographs relating to the autopsy of the victim, permitting the state to reopen its case after both parties had rested and the matter had been ready for submission to the jury, and improper conduct on the part of the prosecuting attorney during the course of the trial. *Id.* at 120-21, 515 P.2d at 865-66.
14. *Id.* at 125, 515 P.2d at 870.
15. *Id.* at 126, 515 P.2d at 871.
16. *Id.*

constitutional requirements for admission of former testimony. Then, after a discussion of prior Arizona law, an evaluation of Arizona's current approach to the admission of prior testimony will be presented.

The Confrontation Requirement

In order to admit prior testimony in criminal cases, not only must the hearsay rule be satisfied, but there also must be compliance with the sixth amendment right of confrontation. To effectuate this constitutional safeguard, the United States Supreme Court has recognized the necessity of affording the accused the opportunity for cross-examination: an important means of testing the reliability and trustworthiness of the testimony offered.[17]

The Arizona supreme court in *Thomas* held that the opportunity to confront and cross-examine the witnesss was sufficient to guarantee the trustworthiness and reliability of the testimony and satisfy the right of confrontation when admission of this testimony was sought at a subsequent proceeding.[18] The court concluded that admissibility of prior testimony was dependent primarily upon "the opportunity to cross-examine at the time the prior testimony was taken . . . or if the witness is available on the opportunity to cross-examine the witness at the trial in which the prior testimony . . . is admitted."[19] Such a position complies with the basic constitutional right of confrontation, for the *Thomas* decision recognized the necessity of assuring the cross-examination of the witness. The right of confrontation requires only one opportunity for cross-examination, either when the testimony was initially given or at the subsequent proceeding.[20] Contemporaneous cross-examination is not required if there is an opportunity to cross-examine at the subsequent proceeding in which the testimony is sought to be admitted.[21]

17. Mancusi v. Stubbs, 408 U.S. 204 (1972) (right of confrontation requires adequate opportunity to cross-examine accusor to establish reliability of the testimony and afford the trier of fact a satisfactory basis for evaluating the truth of the testimony when offered subsequently); California v. Green, 399 U.S. 149 (1970) (belated cross-examination sufficient to test reliability and trustworthiness of prior testimony); Barber v. Page, 390 U.S. 179 (1968) (prior testimony which had been subject to cross-examination cannot be admitted in a subsequent proceeding if the party offering the testimony fails to obtain or make a good faith effort to obtain declarant); Pointer v. Texas, 380 U.S. 400 (1965) (witness offering testimony in a judicial proceeding must be subject to confrontation and attendant cross-examination); Douglas v. Alabama, 380 U.S. 415 (1965) (cross-examination is necessary to ensure effectiveness of the right of confrontation, and where accused is prevented from conducting a cross-examination, the testimony will be excluded).

18. 110 Ariz. at 125, 515 P.2d at 870.

19. *Id.*

20. California v. Green, 399 U.S. 149 (1970).

21. State v. Thomas, 110 Ariz. 120, 125, 515 P.2d 865, 870 (1973). In California v. Green, 399 U.S. 149 (1970), the Supreme Court concluded that admitting a declarant's prior testimony did not violate the sixth amendment right of confrontation where

Although there need be only one cross-examination, an attempt to secure the witness for cross-examination at the time the testimony is subsequently offered must be made to satisfy constitutional requirements of the sixth amendment.[22] In discussing the admissibility of prior testimony in regard to constitutional guarantees of confrontation, the Arizona supreme court in *Thomas* concluded that:

> [I]t is immaterial for the purposes of the confrontation clause of the United States Constitution whether the witness could be available for cross-examination at the second trial or not. His testimony at the prior trial of the same defendant upon the same charge was subject to cross-examination by defendant at that time and was, for sixth amendment purposes, admissible.[23]

The court's language should not be interpreted as eliminating the need to secure the attendance of the witness at a subsequent trial simply because an adequate opportunity for cross-examination has once been afforded the accused. Such a position would be untenable in view of the Supreme Court's demand that the party offering the testimony make an affirmative demonstration of a good faith effort to procure the witness' presence at the trial.[24] Although the wording in *Thomas* does not mandate a positive effort to secure the attendance of the witness at the subsequent trial, any abrogation of this requirement would deny the accused his constitutionally guaranteed right of confrontation.[25]

Admissibility of Prior Testimony

Apart from those constitutional rules applicable solely to criminal cases, the Arizona rules of evidence in civil actions are generally applicable to criminal cases.[26] It is not surprising, therefore, that the development of one body of rules has been influenced by the development of the other. Until recently, the Arizona civil[27] and criminal[28] rules governing admissibility of prior testimony were identical in sub-

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the witness is present at the subsequent trial and subject to cross-examination. The Court expressed the view that belated cross-examination can serve as a constitutionally adequate substitute for contemporaneous cross-examination. *Id.* at 157-64.

22. Barber v. Page, 390 U.S. 719 (1968). In *Barber*, the Court found that a witness is not unavailable for purposes of admitting prior testimony unless the prosecutor has made a good faith effort to obtain his presence. The Court noted, however, that where the state has made a good faith effort and that effort has failed, the opportunity to cross-examine one's accusors at least once, whether or not before the ultimate trier of fact, satisfied the constitutional guarantee of confrontation. *Id.* at 724-25. *See* Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971).

23. 110 Ariz. 120, 125, 515 P.2d 865, 870 (1973).

24. Barber v. Page, 390 U.S. 719 (1968).

25. Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968).

26. M. UDALL, *supra* note 2, § 1, at 2. *See* Ariz. R. Crim. P. 272, *superceded by* ARIZ. R. CRIM. P. 11.7, 19.3, 21.1.

27. ARIZ. R. CIV. P. 43(e).

28. Ariz. R. Crim. P. 256, *superceded by* ARIZ. R. CRIM. P. 19.3(c).

stance. Both rules provided for admission of prior testimony whenever, "the witness dies or is beyond the jurisdiction of the court in which the action is pending and his absence is not procured by the party offering the evidence . . . ."[29] Prior to *Thomas*, the judicial interpretation afforded these rules has been quite restrictive in both civil and criminal cases.

Narrow judicial interpretation of the civil rule evolved from the Arizona supreme court's decision in *Tom Reed Gold Mines v. Moore*.[30] In that case, the court addressed the problem of the admissibility of a transcript from a personal injury suit in a subsequent wrongful death action. Examining the requirements of the predecessor to civil rule 43(e),[31] the court concluded that prior testimony of an unavailable witness could be admitted only in a subsequent proceeding involving the same cause of action.[32] In addition to the strict interpretation afforded the cause of action requirement, dicta in *Tom Reed Gold Mines* foreshadowed a restrictive interpretation of the unavailability requirement. The court stated that admitting prior testimony in a subsequent proceeding that did not involve the same cause of action in contravention to the requirements of the rule would also invite an extension of the unavailability requirement to allow admission of prior testimony where the witness could not testify due to insanity or other reasons.[33] The court was of the opinion that this would contravene the express statutory limitation of "death or beyond the jurisdiction of the court."[34] Evidently, the court viewed this language as providing only for the physical absence of the witness and not including mental absence. Thus, mental incapacity, failure of memory, or supervening incompetency would not satisfy the condition of unavailability as defined by the court in *Tom Reed Gold Mines*.[35]

Following the strict interpretation of the civil rule's unavailability requirement in *Tom Reed Gold Mines*, it is not surprising that the Arizona supreme court adopted a strict interpretation of the predecessor to criminal rule 256.[36] In *Adkins v. State*,[37] the accused's wife had testified at his first trial but, due to illness, was unable to testify at the time of his second trial on a charge of abduction.[38] Although

29. *Compare* ARIZ. R. CIV. P. 43(e), *with* Ariz. R. Crim. P. 256, *superceded by* ARIZ. R. CRIM. P. 19.3(c).
30. 40 Ariz. 174, 11 P.2d 347 (1932).
31. Ariz. Rev. Code § 4415 (1928).
32. 40 Ariz. at 179, 11 P.2d at 349.
33. *Id.* at 182, 11 P.2d at 349-50.
34. *Id.*
35. *See* M. UDALL, *supra* note 2, § 182, at 409; Brown, *supra* note 2, at 11.
36. Ariz. Rev. Code § 5058 (1928).
37. 42 Ariz. 534, 28 P.2d 612 (1934).
38. *Id.* at 542, 28 P.2d at 615.

both trials involved the same cause, the supreme court upheld the trial court's refusal to admit the wife's prior testimony because illness did not meet the unavailability requirements of the rule.[39]

Prior to *Thomas*, the combined impact of *Tom Reed Gold Mines* and *Adkins* was to allow the admission of prior testimony in a civil or criminal trial only when the subsequent trial involved the same claim and the witness was either dead or physically absent from the jurisdiction.[40] Ironically, the rules governing the use of depositions in civil[41] and criminal[42] actions and the rule authorizing the use of preliminary hearing testimony at subsequent criminal proceedings[43] did not restrict their use to instances where the declarant was dead or physically absent.

Faced with this anomalous situation, the *Thomas* court concluded that criminal rule 256 was a permissive rule, and that the unavailability requirement was not restricted to instances involving the death or physical absence of the witness.[44] The focus of the requirement, the court reasoned, was not the physical absence of the witness, but rather the unavailability of the testimony.[45] In support of this position, the court quoted with approval from the Colorado supreme court[46] which stated that, "the true test was not so much the 'unavailability' of the witness, but the 'unavailability' of his testimony and that the witness who—though present—refused to testify is just as surely 'unavailable' as the witness who stepped across a state line to avoid service of a subpoena."[47]

In extending the admissibility of prior trial testimony to circumstances in which the "witness . . . refuses or is incapable of testifying even though present in court,"[48] the Arizona supreme court explicitly overruled any contrary implications in *Tom Reed Gold Mines* and *Adkins*.[49] As a result of the *Thomas* decision, prior testimony may

39. *Id.*
40. M. UDALL, *supra* note 2, § 182, at 409; Brown, *supra* note 2, at 11.
41. ARIZ. R. CIV. P. 26(d)(3).
42. ARIZ. REV. STAT. ANN. § 13-1885 (1956).
43. Ariz. R. Crim. P. 30(b), *superceded by* ARIZ. R. CRIM. P. 19.3; *see* State v. Dixon, 107 Ariz. 415, 489 P.2d 225 (1971).
44. 110 Ariz. 120, 126, 515 P.2d 865, 871 (1973).
45. *Id.* The unavailability requirement of rule 256 did not state that the witness must be physically "beyond the jurisdiction of the court." Therefore, the conclusion reached in *Thomas*, that a witness may be absent for both physical and mental reasons and, therefore, "beyond the jurisdiction of the court," seems consistent with a literal interpretation of that rule.
46. Johnson v. People, 152 Colo. 586, 384 P.2d 454, *cert. denied*, 376 U.S. 922 (1963); *see* State v. Stewart, 85 Kan. 404, 116 P. 489 (1911).
47. 110 Ariz. at 126, 515 P.2d at 871, *quoting* Johnson v. People, 152 Colo. 586, 384 P.2d 454, *cert. denied*, 376 U.S. 922 (1963).
48. 110 Ariz. at 126, 515 P.2d at 871.
49. *Id.* at 127, 515 P.2d at 872.

now be admitted into evidence whether the witness is present or not.[50] In criminal cases, however, in order for that testimony to be admitted when the witness is absent, the constitutional requirements of confrontation must be satisfied.[51] Therefore, it is necessary that the witness had been available for cross-examination when the testimony was given or is presently subject to cross-examination.[52] Additionally, in both civil and criminal proceedings, the party seeking to admit prior testimony must have made a good faith effort to secure the presence of the witness at the subsequent proceeding or the testimony will be inadmissible.[53]

The impact of *Thomas* in criminal cases is lessened by rule 19.3 (c) of the new *Arizona Rules of Criminal Procedure.*[54] Superceding rule 256, rule 19.3(c) provides for admission of prior testimony where the adversary "had the right and opportunity to cross-examine the declarant . . . and . . . [t]he declarant is unavailable as a witness, or is present and subject to cross-examination."[55] *Thomas*, however, may be useful in interpreting any ambiguity implicit in the phrase "unavailable as a witness." In *Thomas*, the court determined that unavailability includes not only physical absence but mental absence as well.[56] In instances where the witness is mentally incapacitated, incompetent, or claiming privilege, *Thomas* indicated that the witness is just as unavailable as if he were dead or physically absent from the jurisdiction.[57] It can be anticipated that this interpretation will be applied to the term "unavailable as a witness" in rule 19.3(c).

Not only does the *Thomas* decision aid in understanding rule19.3 (c), but it also may have an important impact upon rules of evidence in civil cases.[58] Although not necessary to the decision, the *Thomas* court expressly overruled *Tom Reed Gold Mines*, thus indicating the adoption of less restrictive standards in civil as well as criminal cases. In view of the *Thomas* decision and the general application of civil rules to criminal proceedings,[59] it can be anticipated that admissibility of prior trial testimony in civil suits will no longer be restricted

50. *See* text accompanying notes 17-25 *supra.*
51. *See* Barber v. Page, 390 U.S. 719 (1968); Douglas v. Alabama, 380 U.S. 415 (1965).
52. *See* California v. Green, 399 U.S. 149 (1968); Pointer v. Texas, 380 U.S. 400 (1965).
53. *See* State v. Head, 91 Ariz. 246, 371 P.2d 599 (1962); State v. Reynolds, 7 Ariz. App. 48, 436 P.2d 142 (1968); text accompanying notes 20-24 *supra.*
54. ARIZ. R. CRIM. P. 19.3(c), promulgated prior to the decision announced in *Thomas*, was not relied upon in arriving at the decision.
55. ARIZ. R. CRIM. P. 19.3(c).
56. *See* text & notes 43-47 *supra.*
57. 110 Ariz. at 126, 515 P.2d at 871.
58. *See* M. UDALL, *supra* note 2, § 1, at 2.
59. *See* text accompanying note 25 *supra.*

solely to instances where the witness is physically unavailable. Considering the court's apparent desire to introduce uniformity to the rules governing admissibility of prior testimony,[60] a change in the civil rules of evidence if not already accomplished sub silentio by *Thomas* is at least foreshadowed by that decision.

Conclusion

With the promulgation of rule 19.3(c) and the subsequent decision in *State v. Thomas,* the Arizona supreme court has effected a major change in the rules governing the admissibility of prior recorded testimony. Testimony given at a previous judicial proceeding where the witness was subject to cross-examination will now be readily admissible in subsequent proceedings. Constitutional limitations on the use of prior testimony provide an adequate opportunity to examine the witness and to determine reliability and trustworthiness. Substantially consistent with the decisions of the United States Supreme Court in this area and achieving the results of the Wigmorean approach endorsed by the Arizona supreme court, the rule emerging from the *Thomas* decision is a proper approach in determining the admissibility of prior testimony.

60. *See* 110 Ariz. at 127, 515 P.2d at 872; M. UDALL, *supra* note 2, § 182, at 409-10.

VII. PUBLIC LAW

A. INDUSTRIAL DEVELOPMENT AUTHORITIES IN ARIZONA

In 1968, Arizona passed legislation[1] authorizing the formation of industrial development authorities.[2] The purpose of an authority is to assist corporations to locate, relocate, or expand physical facilities within the authority's jurisdiction without heavy initial capital expenditure. As a political subdivision of the state[3] and initially incorporated with the approval of local government,[4] the authority's powers and functions are directed toward raising capital through the issuance of limited obligation revenue bonds.[5] The proceeds of the bond sales are used to finance the acquisition, construction, or equipping of industrial facilities for lease and eventual sale to private industry.[6] The authority's capital also may be lent, as secured or unsecured loans, directly to a private corporation for the expansion and construction of facilities.[7]

Industrial Development Authority v. Nelson,[8] was a test case[9] intended to determine the validity of the industrial development authority

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1. ARIZ. REV. STAT. ANN. §§ 9-1151 to -1196 (Supp. 1974-75). In 1972, additional legislation authorized the creation of pollution control corporations with the power to issue revenue bonds, the proceeds of which can be used for the construction of pollution control facilities. These facilities then can be leased to private corporations. The proceeds of the bond sales also can be loaned to private corporations with the limitation that the loan funds be used to construct pollution control facilities. *Id.* §§ 9-1221 to -1281. This legislation also extended the powers of the industrial development authorities to include the powers granted pollution control corporations. *Id.* § 9-1230(B).

2. Although the existence of industrial development authorities is of recent vintage in Arizona, their origin dates back to 1936 when Mississippi became the first state to extend direct municipal financing to aid the development of industry. *See* Ch. 1, § 7, [1936] Miss. Laws, 1st Extra. Sess. 8. It was believed that the authorities would encourage development of an industrial base in the South during the Depression and that the resulting economic growth would be to the public benefit. Note, *Municipal Inducements to Private Industry*, 40 MINN. L. REV. 681, 683 (1956).

3. ARIZ. REV. STAT. ANN. § 9-1152 (Supp. 1974-75).

4. *Id.*

5. General obligation bonds are payable from the taxes and general funds of the government, but limited obligation bonds are payable solely from the rents or debt reduction payments of the specific project financed. Abbey, *Municipal Industrial Development Bonds*, 19 VAND. L. REV. 25, 28 (1965). The bonds are offered at an interest rate lower than commercial bonds due to their tax exempt status. See text note 40 *infra*. They are also exempt from state and federal securities registration requirements, since they are issued by a political subdivision. Abbey, *supra* at 61.

6. ARIZ. REV. STAT. ANN. § 9-1156 (Supp. 1974-75).

7. *Id.* § 9-1156(A)(9).

8. 109 Ariz. 368, 509 P.2d 705 (1973).

9. Motion for Rehearing for Respondent at 5, Industrial Dev. Authority v. Nelson, 109 Ariz. 368, 509 P.2d 705 (1973).

in Arizona. On September 15, 1972, the Industrial Development Authority of Pinal County notified the Arizona attorney general of its intention to float two issues of revenue bonds. The proceeds from the first issue were to be loaned to Magma Copper Company for the purchase and installation of air pollution control facilities at its San Manuel, Arizona smelter.[10] The revenue from the second issue was for the acquisition and construction of pollution control facilities and machinery which would be leased to Magma.[11]

In contravention of his statutory duty,[12] the attorney general declined to render an opinion as to the validity of the proposed bond issue because he questioned the constitutionality of the statutes under which the Pinal County Authority was incorporated.[13] The authority then brought a special action[14] in the Supreme Court of Arizona, requesting that the court determine the constitutionality of the legislation and order the attorney general to render an opinion as to the validity of the issue.[15] The Arizona supreme court, after ruling on the substantive issues, granted the requested relief.[16]

As the sole construction of the enabling legislation, *Industrial Development Authority* is important as a case of first impression in Arizona. This commentary will discuss and analyze the Arizona supreme court's holding with respect to the two principal questions presented. First, the court held that the proposed activities of the authority were in the public benefit and, therefore, not gifts or loans for the benefit of a private corporation. Second, the court held that the authority was properly designated as a political subdivision by the state legislature. Both of these issues raised important state constitutional questions which challenged the concept of industrial development authorities in Arizona.

Public Purpose Doctrine

The first constitutional issue considered by the court concerned

10. 109 Ariz. at 371, 509 P.2d at 708.
11. The real property and improvements were to be subject to a mortgage as security for the bondholders. *Id.*
12. ARIZ. REV. STAT. ANN. § 9-1171(F) (Supp. 1974-75), requires that the attorney general issue an opinion on the validity of a bond issue within 10 days after notification by the industrial development authority.
13. 109 Ariz. 368, 371, 509 P.2d 705, 708 (1973).
14. ARIZ. R.P. SPECIAL ACTIONS 1.
15. The *Industrial Development Authority* court noted that the attorney general's opinion was important to protect the political subdivision from issuing unauthorized or illegal bonds and to give assurance of a bond's legality to prospective bond purchasers. The court found, however, that section 9-1171(F) of the *Arizona Revised Statutes Annotated* did not make the opinion a condition precedent to issuance of the bonds. 109 Ariz. at 376-77, 509 P.2d at 713-14.
16. 109 Ariz. at 377, 509 P.2d at 714.

the possible violation of article 9, section 7, of the Arizona constitution which provides: "Neither the State, nor any county, city, town, municipality, or other subdivision of the State shall ever give or loan its credit in the aid of . . . any individual, association, or corporation . . . ."[17] The attorney general opposed the issuance of the bonds on the grounds that they were in furtherance of a private purpose and violative of the constitutional prohibition. The supreme court, while noting that some incidental benefit flowed to the corporation,[18] held that the revenue bond issues were primarily in furtherance of a public purpose.[19] The holding was consistent with the public purpose doctrine: that if the primary benefit derived from a governmental expenditure is for the public good, any incidental benefits which accrue to private enterprise are secondary and permissible.[20] In support of its position, the court observed that the Arizona supreme court previously had held that the use of government credit to provide for slum clearance was in the interest of the general public and, therefore, not an impermissible gift or loan.[21]

The court also relied on strong precedent from other jurisdictions to support its holding. A majority of states have used some form of government-sanctioned financing to encourage development of local industry.[22] Half of these states have constitutional provisions similar to Arizona's which prohibit the giving or loaning of credit for private purposes. In those states where the use of such financing has been upheld, the expected economic growth of the state was viewed as render-

17. ARIZ. CONST. art. 9, § 7.
18. 109 Ariz. 368, 373-74, 509 P.2d 705, 710-11 (1973).
19. *Id.*
20. Note, *The "Public Purpose" of Municipal Financing for Industrial Development*, 70 YALE L.J. 789 (1961); *see* City of Glendale v. White, 67 Ariz. 231, 194 P.2d 435 (1948) (municipal corporation's expenditures of tax funds must be for a public purpose); Proctor v. Hunt, 43 Ariz. 198, 29 P.2d 1058 (1934) (money raised by public taxation can only be spent for a public purpose and not for the personal benefit of any individual).

The court, in *Industrial Development Authority*, traced the history and rationale of the constitutional prohibition in the constitutions of Arizona and other states. It noted that these prohibitions owe their origin to losses incurred by municipal corporations which gave or loaned money to transportation corporations in the 1800's. Many of those corporations subsequently went bankrupt leaving the municipalities liable on bond and stock debts. The municipalities then were required to pay the obligations from public treasuries. *See generally* Shestack, *The Public Authority*, 105 U. PA. L. REV. 553 (1957).

21. Humphrey v. City of Phoenix, 55 Ariz. 374, 387, 102 P.2d 82, 87 (1940) (upholding the constitutionality of a municipal housing act creating low cost housing and providing for slum clearance through the use of revenue bond financing); *accord*, City of Phoenix v. Superior Court, 65 Ariz. 139, 175 P.2d 811 (1946) (temporary housing for veterans); South Side Dist. Hosp. v. Hartman, 62 Ariz. 67, 153 P.2d 537 (1944) (hospital construction). *See also* Tucson Transit Authority, Inc. v. Nelson, 107 Ariz. 246, 485 P.2d 816 (1971) (public transportation).

22. For an exhaustive list of case law as of 1968, see Mitchell v. North Carolina Indus. Fin. Authority, 273 N.C. 137, 159 S.E.2d 745 (1968); Uhls v. State *ex rel.* City of Cheyenne, 429 P.2d 74 (Wyo. 1967).

ing these projects of significant public benefit.[23] The public purpose rationale is well stated in *Mitchell v. North Carolina Financing Authority*:[24]

> An inadequate number of jobs means an oversupply of labor, which results in low wages. Unemployment and low wages lead to hunger, ill health, and crime. The continued existence of an established industry and the establishment of new industry provide jobs, measurably increase the resources of the community, promote the economy of the state, and thereby contribute to the welfare of its people. The stimulation of the economy is, therefore, an essential public and governmental purpose. The fact that a private interest incidentally benefits from such governmental aid is not fatal if substantial public benefits also result.[25]

Relying on this reasoning, the *Industrial Development Authority* court held that the general purpose of industrial development authorities was public and thus not violative of the Arizona constitution.

The court found the public purpose of industrial development authorities to be even more compelling where, as in this case, the purpose was to finance pollution control facilities. With regard to financing for pollution abatement, the court found the reasoning in *Fickes v. Missoula County*[26] particularly persuasive. The statutory authorization[27] for the pollution control project in that action was similar to the statute challenged in *Industrial Development Authority*. More significantly, the Montana constitutional provision in question[28] was the source of article 9, section 7 of the Arizona constitution.[29] *Fickes* upheld the county's financing of air and water pollution control facilities for a private corporation on the basis that the public purpose of the project offset any incidental benefits to the corporation. The court emphasized that assisting the corporation toward compliance with the legal requirements

23. *But see* State v. Town of N. Miami, 59 So. 2d 779 (Fla. 1952); Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960); Martin v. Maine Sav. Bank, 154 Me. 259, 147 A.2d 131 (1958); State *ex rel.* Meyer v. County of Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962); State *ex rel.* Burton v. Greater Portsmouth Growth Corp., 7 Ohio St. 2d 34, 218 N.E.2d 446 (1966); Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959). Five of the foregoing jurisdictions have amended their constitutions to allow industrial development financing. FLA. CONST. art. 7, § 10 (c)(2); ME. CONST. art. 9, § 8(A); NEB. CONST. art. 15, § 16; OHIO CONST. art. 8, § 13; WASH. CONST. art. 8, § 8.

24. 273 N.C. 137, 159 S.E.2d 745 (1968). The court in *Mitchell* nevertheless found the enabling legislation unconstitutional. The North Carolina supreme court reasoned that a public purpose should be equated with a governmental purpose to promote health, safety, morals, and general welfare and questioned whether it was the proper function of the government to provide a site and to equip a plant for the exclusive use of a private industrial enterprise. *Id.* at 144-45, 159 S.E.2d at 750-51.

25. *Id.* at 138, 159 S.E.2d at 752.

26. 155 Mont. 258, 470 P.2d 287 (1970).

27. MONT. REV. CODES ANN. §§ 11-4101 to -4110 (1947).

28. MONT. CONST. art. 13, § 1.

29. Industrial Dev. Authority v. Nelson, 109 Ariz. 368, 373, 509 P.2d 705, 710 (1973).

for environmental protection was a valid public purpose.[30] Similarly, the *Industrial Development Authority* court recognized that the purpose of the lease and loan to Magma was to enable the company to curtail air pollution by complying with federal and state pollution control legislation.[31] Therefore, "[t]he obvious public purpose sought to be accomplished by [the enabling legislation] is the protection of the health of the citizens of this state by preventing or limiting air, water and other forms of pollution."[32]

Due to the precedent set by the great majority of jurisdictions and because of the general presumption favoring the constitutionality of legislative enactments,[33] the holding in *Industrial Development Authority* was not surprising. The case indicated, however, that there is likely to be minimal judicial scrutiny of questions relating to the activities of the authorities and the purposes for which their bonds are issued. The court specifically stated that it was "not concerned with the wisdom, necessity, propriety or expediency of the legislation . . . ."[34] The absence of judicial review of industrial authority activities, however, is not remedied by existing legislation. To the contrary, the enabling legislation does not provide for any procedures or standards which would ensure that industrial authorities maximize the public benefit and effectively balance public needs.

The factual situation presented in *Industrial Development Authority* exemplifies the types of public conflicts which may arise. Magma was an established firm in the San Manuel area. While the availability of authority funding undoubtedly resulted in some economic stimulation, it may be questioned whether such funding resulted in sufficient public benefit to comply with the public purpose doctrine.[35] The public benefit, an increased economic base, is obviously more attenuated in this situation than when a new industry is being established. Another consideration is that Magma was already under a statutory duty to comply with pollution control requirements.[36] Unquestionably, the control of air pollution is a public purpose. However, alternative pri-

30. 155 Mont. at 268, 470 P.2d at 292.
31. 42 U.S.C. §§ 1857-1858 (1970); ARIZ. REV. STAT. ANN. §§ 36-1700 to -1720 (Supp. 1974-75).
32. Industrial Dev. Authority v. Nelson, 109 Ariz. 368, 374, 509 P.2d 705, 711 (1973). *See* Ch. 69, § 1, [1972] Ariz. Sess. Laws 274.
33. Industrial Dev. Authority v. Nelson, 109 Ariz. 368, 371, 509 P.2d 705, 708 (1973); State v. Krug, 96 Ariz. 225, 393 P.2d 916 (1964) (presumption of constitutional validity of statutes must be overcome by the questioning party).
34. 109 Ariz. at 371, 509 P.2d at 708.
35. *Cf.* Smith v. State, 222 Ga. 552, 150 S.E.2d 868 (1966); Manning v. Fiscal Court of Jefferson County, 405 S.W.2d 755, 756-57 (Ky. 1966). *But cf.* Neussner v. McNair, 250 S.C. 257, 157 S.E.2d 410 (1967); Uhls v. State *ex rel.* City of Cheyenne, 429 P.2d 74 (Wyo. 1967).
36. 42 U.S.C. §§ 1857-1858 (1970); ARIZ. REV. STAT. ANN. §§ 36-1700 to -1720 (Supp. 1974-75).

vate financing was apparently available, and there were no allegations that Magma would suffer adverse financial impact because of the required pollution controls.[37] In such a situation, the public benefit received by the use of authority funds appears questionable. This seems particularly significant considering the limited availability of public funding.[38]

Under the existing enabling legislation, use of the authorities' funds and the effectiveness of their activities are almost completely within the authorities' control. It can be anticipated that judicial review will be virtually nonexistent so long as the authorities operate within the limited constraints of existing legislation. Confronted with this situation and the increasing and often conflicting needs of public funding, the legislature and the sponsoring municipalities should continually evaluate the effectiveness of the authorities to ensure that they do, in fact, further a public purpose.

Industrial Development Authorities as Political Subdivisions

The second major constitutional issue raised in *Industrial Development Authority* was whether the Arizona constitution limits the power of the legislature to designate development authorities as political subdivisions.[39] The determination of this issue was essential since a primary motivation for purchasing authority bonds is the exemption of their interest income from taxation. This tax benefit results from the authority's designation as a political subdivision.[40] The attorney general argued that article 13, section 7, of the Arizona constitution limits the types of political subdivisions which may be created in Arizona.[41] Since industrial development authorities were not included in these categories, the attorney general contended that the legislature lacked authority to designate them as political subdivisions. The court noted, however, that the purpose of the Arizona constitutional provision was to ensure an ad valorem tax exemption for certain improvement districts and not to limit the authority of the legislature to create

37. Response to Petition for Special Action at 20, Industrial Dev. Authority v. Nelson, 109 Ariz. 368, 509 P.2d 705 (1973). Of course, where the burden of discharging the statutory duty is so great as to require a polluting company to shut down there would be a different consideration with regard to protection of the local economy. *See* Kennecott Copper Corp. v. Town of Huxley, 84 N.M. 743, 745, 507 P.2d 1074, 1076 (1973).

38. See text & notes 49-50 *infra*.

39. ARIZ. REV. STAT. ANN. § 9-1152(A) (Supp. 1974-75), provides that development corporations shall be political subdivisions of the state.

40. INT. REV. CODE of 1954, § 103(a).

41. ARIZ. CONST. art. 13, § 7, provides that: "Irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts, now or hereafter organized pursuant to law, shall be political subdivisions of the State . . . ."

political subdivisions.[42] Accordingly, the court held that the legislature had the power to designate industrial development authorities as political subdivisions.

While there appears to be no constitutional impediment to the creation of political subdivisions, there are limits as to what realistically may be considered a government entity, and overuse of the government entity classification may render it ineffective.[43] The classic definition of a political subdivision is: "[A]ny division of the State made by the proper authorities thereof, acting within their constitutional powers, for the purpose of carrying out a portion of those functions of the State which by long usage and the inherent necessities of government have always been regarded as public."[44] Cities, towns, and counties, described as true political subdivisions,[45] are charged with the general management of government at lower levels. Other political subdivisions, which are created for the purpose of performing one or more specific public functions, are usually designated to be quasi-municipal corporations.[46] Utility districts, port authorities, and hospital, housing, and educational districts are examples of quasi-municipal corporations.[47] It would appear that industrial development authorities are properly categorized as quasi-municipal corporations serving a limited function for the public benefit.

Interestingly, this function—the issuance of tax exempt revenue bonds for the benefit of private industry—is regarded by the Internal Revenue Service as having too remote a connection with actual government functions to be granted political subdivision status. Although, at one time, all industrial development authorities were granted tax exemptions, the current code provides only a limited tax exemption for development authority bonds.[48] The recognition of industrial develop-

42. Industrial Dev. Authority v. Nelson, 109 Ariz. 368, 374-75, 509 P.2d 705, 711-12 (1973); *accord*, Roberts v. Spray, 71 Ariz. 60, 67, 223 P.2d 808, 813 (1950).

43. *See* Shestack, *supra* note 20, at 568 n.76.

44. Commissioner v. Shamberg's Estate, 144 F.2d 998, 1004 (2d Cir. 1944), *quoting* 30 OP. ATT'Y GEN. 252 (U.S. 1914).

45. Commissioner v. Shamberg's Estate, 144 F.2d 998, 1004 (2d Cir. 1944).

46. *See* Shumway v. Fleishman, 66 Ariz. 290, 292, 187 P.2d 636, 637 (1947).

47. *Cf.* Hernandez v. Frohmiller, 68 Ariz. 242, 204 P.2d 854 (1949).

48. In the Tax Reform Act of 1969, Act of Dec. 30, 1969, Pub. L. No. 91-172, 83 Stat. 487, Congress recognized the problem involved in designating authorities as political subdivisions and thus sought to control their proliferation. After passage of this act, the bond debts of industrial development authorities were no longer considered obligations of the state or a political subdivision within the meaning of section 103. 1968-2 CUM. BULL. 731. It was recognized that the primary obligor was not the state or political subdivision. Rev. Rul. 68-590, 1968-2 CUM. BULL. 68. In addition, the Internal Revenue Service recognized the benefited industry, not the authority, as the true owner of lease-back facilities. *Id.*

Under pressure from the many states with industrial development financing, several statutory exceptions to the above rulings were made. There is a "small issue exemption" limited to industrial development bond issues having an aggregate face value up to $5 million, INT. REV. CODE OF 1954, § 103(6)(D). It has been suggested that this limita-

ment authorities as political subdivisions also has been criticized, for economic reasons, by municipal bond dealers[49] and by the National Association of Counties.[50] These groups have noted that the rapid increase in the number of authorities has tended to flood the bond market, thereby driving down the prices of municipal bonds and increasing the rates local governments must pay for bond issues used to finance less attenuated public projects such as schools and government buildings.

Other undesirable consequences may follow from the designation of development authorities as political subdivisions. In spite of the statutory provision exempting the municipality or county from liability on the bonds,[51] the concern has been advanced by some courts that even if revenue bonds do not directly obligate a municipality or county, the mortgage may constitute a debt.[52] Additionally, a default on the bonds could damage the credit of the municipality which is associated with the development authority. Viewed from an economic vantage, such a default would result in higher interest rates due to a less stable credit rating and in higher taxes to repay municipal obligations.[53]

Finally, there is no requirement for state approval of bonds in order to ensure their validity prior to issuance.[54] This is true even though industrial development authorities are classified as political subdivisions of the state and thus theoretically responsible to the state government.[55] While the Arizona statute requires the attorney general to give his opinion as to the validity of the bonds, the opinion need not be requested prior to their issuance.[56] Requiring the attorney general's opinion as

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tion may be open to constitutional attack as discriminatory of larger companies in contravention of the fifth and fourteenth amendments. *See* Martori & Bliss, *Taxation of Municipal Bond Interest—"Interesting Speculation" and One Step Forward,* 44 NOTRE DAME LAW. 191, 210 (1968).

49. N.Y. Times, Jan. 21, 1968, § F, at 1, col. 8.

50. Wall Street Journal, March 29, 1968, at 24, col. 1.

51. ARIZ. REV. STAT. ANN. § 9-1182 (Supp. 1974-75), states that the municipality or county shall not be liable for either the principal or interest from any of the bonds or for any pledge, mortgage, obligation, or agreement made by the authority. Nevertheless, the efficacy of the exculpatory clauses in revenue bond acts remains uncertain. Quirk & Wein, *A Short Constitutional History of Entities Commonly Known as Authorities,* 56 CORNELL L. REV. 521 (1971). In the event of default, the municipality might be considered liable under theories of breach of implied warranty, trust, covenant, or even misrepresentation. Note, *Revenue Bond Sanctions,* 42 COLUM. L. REV. 395, 409-19 (1942). The limited use and, therefore, liquidity of pollution control facilities would cause difficulties in the event of default and attempted sale. Quirk & Wein, *supra.*

52. *See* McNichols v. City & County of Denver, 123 Colo. 132, 230 P.2d 591 (1951); State v. Florida State Improvement Comm'n, 60 So. 2d 747 (Fla. 1952); Brash v. State Tuberculosis Bd., 124 Fla. 167, 167 So. 827 (1936).

53. Note, *supra* note 2, at 686; *see* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).

54. *See* text & note 15 *supra.*

55. *See* Glendale Union High School Dist. v. Peoria School Dist. No. 11, 55 Ariz. 151, 99 P.2d 482 (1940) (the state legislature has full control over all funds acquired by any political subdivision of the state, subject only to constitutional restrictions).

56. Industrial Dev. Authority v. Nelson, 109 Ariz. 368, 376, 509 P.2d 705, 713 (1973); see text & note 15 *supra.*

a condition precedent to their issuance would be valuable to protect the authority and the state from the issuance of unauthorized or illegal bonds.

Conclusion

As a direct result of the *Industrial Development Authority* decision, industrial development authorities are now established in Arizona as a method of industrial stimulus and corporate financing. The vital questions concerning their constitutional validity have been answered by this decision. The attorney general now regularly issues opinions approving bond issues,[57] and a number of authorities are currently in operation in Arizona.[58] It has been accepted in Arizona that the authorities benefit the public by stimulating the economy and by encouraging adherance to pollution control statutes. The authorities' status as political subdivisions, although criticized by some, is based on economic realities and current legal policies. The development authorities' activities, however, should be reviewed to ensure that they in fact do effectuate a public purpose.

57. Address by Gary K. Nelson, Attorney General of Arizona, Phi Delta Phi Speakers Series, College of Law, University of Arizona, in Tucson, Ariz., Feb. 25, 1974.

58. Letter from the Arizona Corporation Commission, Oct. 8, 1974, on file in the *Arizona Law Review* office.

VIII. TAXATION

A. CORPORATE MERGER AND THE SURVIVAL OF LOSS CARRYOVERS FOR STATE TAX PURPOSES

Complexity has long characterized the use and misuse of legislatively-created and judicially-defined corporate tax attributes. A determination of when tax attributes should survive modifications in the ownership, operations, or structure of a corporation requires examination of the statutory authorization for special corporate tax benefits, coupled with scrutiny of judicial doctrines developed to curb abuse of the legislative grace that generated these advantages.[1]

In 1973, an Arizona appellate court, for the first time, was faced with the question of whether the survivor-corporation of a statutory merger[2] may carry over and deduct premerger losses sustained by one of the merged corporations. The Arizona court of appeals held, in *State Tax Commission v. Oliver's Laundry & Dry Cleaning Co.*,[3] that where a loss corporation and a gain corporation merge, the "pre-merger losses may be offset against post-merger gains only to the extent that [the] business which was previously operating [at] a loss is now operating at [a] profit."[4] Additionally, the court stated that where it is shown that the losing corporation would have continued operating at a deficit but for the merger, the surviving corporation would not be entitled to deduct any of the premerger losses as a net operating loss carryover.

Robert and Patricia Brooks, owners of 95 percent[5] of the stock in Oliver's Laundry and Dry Cleaning, purchased a second laundry and dry cleaning establishment, incorporating it as New Cascade in July of 1963. They owned 100 percent[6] of the New Cascade stock. New Cascade, a business similar to its older sister company, was maintained as a separate corporation.[7] Separate accounting records were kept,

1. For an excellent discussion of survival and transfer of corporate tax attributes, see B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ch. 16 (3d ed. 1971) [hereinafter cited as BITTKER & EUSTICE].

2. In Arizona, corporations may not merge or consolidate with one another except by express statutory authority. Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 P. 1044, *rehearing denied*, 34 Ariz. 482, 272 P. 918 (1928).

3. 19 Ariz. App. 442, 508 P.2d 107 (1973).

4. *Id.* at 447, 508 P.2d at 112.

5. Abstract of Record at 12, State Tax Comm'n v. Oliver's Laundry & Dry Cleaning Co., 19 Ariz. App. 442, 508 P.2d 107 (1973).

6. *Id.* at 11.

7. 19 Ariz. App. at 443, 508 P.2d at 108.

separate tax returns were filed, and New Cascade was represented to the public as a fully independent entity. On September 28, 1964, after the fledgling corporation had sustained nearly $50,000 in operating losses, the owners donated all their stock in New Cascade to Oliver's and the two corporations merged.[8] Subsequent to the merger, there was a reduction in the staff and sales force of the combined business, thereby reducing overhead expenses in the resulting corporation.[9] New Cascade was not accounted for as a separate division of Oliver's after the merger, and on its state income tax returns for the fiscal years 1966 and 1967, Oliver's deducted New Cascade's net operating loss carryover.[10] The appellate court disallowed the deduction on the ground that New Cascade had no profits against which to offset its losses. Since New Cascade would have continued operating at a deficit but for the merger, the profits the postmerger corporation was attempting to offset were attributable to a different business unit than the one that sustained the losses.

One purpose of a net operating loss carryover in a graduated tax system based on annual income is to place the taxpayer with fluctuating income in about the same position as the taxpayer whose yearly income is more stable.[11] The loss carryover deduction also has been viewed as a stimulant to investment in new business[12] and risk enterprise[13] as well as a boost to small business.[14] The *Internal Revenue Code of 1939* provided for a net operating loss carryover for federal tax purposes: "If for any taxable year . . . *the taxpayer* has a net operating loss, such net operating loss shall be a net operating loss carryover for each of the three succeeding taxable years."[15] In 1954, the federal statutes governing the availability of net operating carryover deductions following reorganizations were changed. The words "the taxpayer" have been eliminated and express guidelines established.[16]

8. Authorization and procedure for executing a statutory merger is found in ARIZ. REV. STAT. ANN. §§ 10-341 to -349 (1956).

9. Abstract of Record at 15, State Tax Comm'n v. Oliver's Laundry & Dry Cleaning Co., 19 Ariz. App. 442, 508 P.2d 107 (1973).

10. New Cascade filed its federal income tax returns as a subchapter S corporation. *See* INT. REV. CODE of 1954, §§ 1371-1378. Each shareholder of a subchapter S corporation carries his share of the corporation's net operating loss over to his individual return where it is treated as a trade or business deduction to offset against other income, thereby precluding the net operating loss carryover problem on the federal level. *Id.* § 1374; BITTKER & EUSTICE, *supra* note 1, ch. 6, at 25.

11. H.R. REP. No. 855, 76th Cong., 1st Sess. 9 (1939).

12. *Id.*

13. TREASURY DEP'T & JOINT COMM. ON INTERNAL REVENUE TAXATION, BUSINESS LOSS OFFSETS, reprinted in *Hearings on Revenue Revisions Before the House Comm. on Ways and Means*, 80th Cong., 1st Sess., pt. 5, at 3784 (1947).

14. *Id.* at 3751-53, 3789.

15. Act of Oct. 20, 1951, ch. 521, § 330, 65 Stat. 505 (Int. Rev. Code of 1939, § 122(b)(2)(C)) (emphasis added).

16. *See* INT. REV. CODE OF 1954, §§ 381-382; Becker, *Loss Carryovers and the Libson Shops Doctrine*, 32 U. CHI. L. REV. 508, 530 (1965).

In creating a net operating loss carryover for state tax purposes, the Arizona legislature adopted substantially the same language[17] that Congress used in the *Internal Revenue Code of 1939*.[18] Both the Arizona provision and the 1939 Code make the carryover deduction available to "the taxpayer" that sustained the loss, and neither statute specifically provides for a carryover upon merger. Not having enacted changes similar to those made at the federal level in 1954, the Arizona provision remains similar to that of the 1939 Code. Acknowledging the comparability of the two statutes, the *Oliver's* court reiterated that "where the Arizona Income Tax Act is similar to the Federal Income Tax Act, the decisions of the federal courts will be very persuasive in determining how the Arizona Income Tax Act should be construed."[19] The *Oliver's* court decided that examination of federal case law was proper since both statutes limited the net operating loss carryover to the taxpayer who suffered the losses.[20] Much controversy has centered around whether the taxpayer seeking the deduction is the same taxpayer who suffered the loss.[21] Throughout the history of the net operating loss carryover deduction, several elements have been deemed important by federal courts in determining the identity of the taxpayer. This note will review those elements as they developed under federal law and analyze their application in Arizona under the *Oliver's* decision.

Continuity of the Legal Entity

Early decisions disallowed carryovers to the surviving corporation of a merger when it was not the same legal entity which incurred the loss.[22] In *New Colonial Ice v. Helvering*,[23] the court defined the taxpayer as being the surviving *legal entity*. Stockholder identity and the

17. Ariz. Rev. Stat. Ann. § 43-123(s)(2)(B) (1956), *renumbered as* ARIZ. REV. STAT. ANN. § 43-123.21 (Supp. 1974-75), provides: "If for any taxable year beginning after December 31, 1953, *the taxpayer* has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the five succeeding taxable years . . . ." (Emphasis added.)

18. *Compare* ARIZ. REV. STAT. ANN. § 43-123.21 (Supp. 1974-75), *with* Act of Oct. 20, 1951, ch. 521, § 330, 65 Stat. 505 (Int. Rev. Code of 1939, § 122(b)(2)(C)).

19. 19 Ariz. App. 442, 444, 508 P.2d 107, 109 (1973). Earlier, in Arizona State Tax Comm'n v. Fagerburg, 59 Ariz. 29, 122 P.2d 212 (1942), the state supreme court explained that where the federal income tax act is comparable to state law, "the similarity of such act with ours is sufficient, we think, to make the decisions of the United States courts very persuasive as to how our act should be construed. Both laws refer to income from trade, business or profession, in settings that require the same interpretation." *Id.* at 34, 122 P.2d at 215. *Accord*, Arizona State Tax Comm'n v. Kieckhefer, 67 Ariz. 102, 191 P.2d 729 (1948).

20. 19 Ariz. App. at 445, 508 P.2d at 110.

21. *See* BITTKER & EUSTICE, *supra* note 1, ch. 16, at 60.

22. *See, e.g.*, New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934); Standard Paving Co. v. Commissioner, 190 F.2d 330 (10th Cir. 1951); Weber Flour Mills Co. v. Commissioner, 82 F.2d 764 (10th Cir. 1936); Shreveport Producing & Ref. Co. v. Commissioner, 71 F.2d 972 (5th Cir. 1934).

23. 292 U.S. 435 (1934).

nature of the business were separate and distinct from the legal corporate form and irrelevant in identifying the taxpayer.[24] Under this approach, where a corporation which had sustained losses changed its legal identity, the new corporation was not considered to be the same taxpayer and was not allowed the tax attributes of the old corporation. This was true even where the stockholders of the loss corporation were the owners of the survivor-corporation and the nature of the business had not been altered.[25]

Strict adherence to the corporate entity criterion resulted in an analysis which emphasized form over substance.[26] Assuming the merger of a loss corporation with a gain corporation, the net operating loss carryover would be extinguished at the merger date if the gain corporation was the surviving entity. On the other hand, if the loss corporation was the survivor, the legal entity was kept intact, and the net operating loss deduction would have been available. Such an approach invited taxpayers during the *New Colonial* era to arrange for the loss corporation to survive the merger so that its losses would be deductible. Often, this manipulation led to cases of "minnows swallowing whales"[27] to ensure preservation of tax attributes.

Another consequence of the legal entity criterion was the underlying inequity to the stockholders. Stockholders of the surviving corporation who also had held ownership interests in the preceding losing corporation lost any indirect benefit of a carryover deduction if the legal entity changed upon merger. In a merger where the loser survived, however, the benefit was available to all stockholders even if they held no interest in the premerger loss corporation. Since such tax relief should only be afforded to the taxpayer who originally suffered the loss,[28] it was recognized that the availability of the net operating loss carryover should not turn on which corporation survived the merger, but rather on the economic realities of each situation.[29] As more courts took the view that the substance of the merger transaction should be taken into account in determining who the taxpayer is, the corporate entity criterion began to crumble.

Deviations from strict adherence to the corporate entity criterion became evident in cases where the reorganization took the form of a

24. *Id.* at 441-42.
25. New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934); Weber Flour Mills Co. v. Commissioner, 82 F.2d 764 (10th Cir. 1936).
26. *See* Comment, *Loss Carryover—The Viability of the Libson Shops Doctrine Under the 1954 Code*, 61 NW. U.L. REV. 555, 558-59 (1966).
27. *See* Alprosa Watch Corp., 11 T.C. 240 (1948); BITTKER & EUSTICE, *supra* note 1, ch. 16, at 7-8.
28. *See* Reed, *Loss Carry-Overs: A Fight to the Finish*, 39 TAXES 839 (1961).
29. S. REP. No. 1622, 83d Cong., 2d Sess. 52 (1954).

statutory merger. In *Stanton Brewery, Inc. v. Commissioner*,[30] for example, the court allowed an excess profits credit carryover[31] following a parent-subsidiary merger, even though there was a change in the formal corporate entity. Contrary to *New Colonial Ice*, use of the merged corporation's tax attributes was not barred by a change in the corporate entity. The court reasoned that the survivor of such a merger was "the union of component corporations into an all-embracing whole which absorbs the rights and privileges, as well as the obligations, of its constituents."[32] Therefore, the surviving corporation was "the 'taxpayer' now obligated to pay their taxes and entitled to their credits."[33] Later, in *Newmarket Manufacturing Co. v. United States*,[34] the First Circuit looked past an alteration in corporate form where the purpose was merely to change the corporate domicile. In allowing the loss carryback privilege,[35] the court saw the individuals behind the legal corporate entity as those who actually bear the tax burdens. These decisions foreshadowed the fall of the continuity of the legal entity criterion as the test for determining who the taxpayer is and introduced the continuity of business enterprise test.

Continuity of Business Enterprise

The death knell for the legal entity test was sounded in *Libson Shops v. Koehler*,[36] which is the leading case involving postmerger carryover of a net operating loss under the 1939 Code. *Libson* involved the merger of 17 corporations, 16 sales corporations, and one management firm, owned in the same proportions by the same individuals. Before the merger, three of the corporations had operated at a loss and,

30. 176 F.2d 573 (2d Cir. 1949).

31. Section 710(c)(3)(B) of the *Int. Rev. Code of 1939* provided that: "If for taxable year beginning after December 31, 1939, *the taxpayer* has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carryover for each of the two succeeding taxable years." (Emphasis added.) Since the credit was available to the taxpayer, the issue of that taxpayer's identity faced the court. A distinction between the two tax attributes is not significant for the purposes of this casenote.

32. 176 F.2d at 575.

33. *Id.* at 576.

34. 233 F.2d 493 (1st Cir. 1956), *cert. denied*, 353 U.S. 983 (1957).

35. Int. Rev. Code of 1939, § 122, provided for the net operating loss deduction. Subsection (b)(1) provided for the deduction to be carried back, and subsection (b)(2) provided for the carryforward. Both carrybacks and carryforwards were subject to use by the taxpayer, and there is no need to distinguish between them for the purposes of this casenote. For an explanation of the calculation of carrybacks and carryforwards, see Hawkins, *Mechanics of Carrying Losses to Other Years*, 14 WESTERN RES. L. REV. 241 (1963).

36. 353 U.S. 382 (1957). Since the extensive revision in the carryover rules made by the *Internal Revenue Code of 1954* via sections 381-382, and the elimination of the language in section 172 referring to "the taxpayer," federal courts have held *Libson* to be inapplicable or of severely limited use under the 1954 Code. Frederick Steel Co. v. Commissioner, 375 F.2d 351 (6th Cir.), *cert. denied*, 389 U.S. 901 (1967); Maxwell Hardware Co. v. Commissioner, 343 F.2d 713, 722-23 (9th Cir. 1965); WOFAC Corp. v. United States, 269 F. Supp. 654 (D.N.J. 1967); *see* Comment, *supra* note 26, at 555.

following the merger, continued to sustain losses as departments of the survivor-corporation. When the amalgamated corporation attempted to apply these premerger losses to offset its postmerger gains, the Supreme Court denied the carryover. The court based its opinion on the fact that the income against which the deduction was claimed was not produced by substantially the same business enterprise which incurred the losses.[37] That is, the loss corporations had produced no postmerger income against which the losses could be offset. This decision established what has come to be called the continuity of business enterprise test,[38] which required that the merged entity apply its carryover loss deduction only against postmerger income attributable to the merged loss corporation.

Federal court decisions reveal that at least two variations of the business enterprise test have developed since *Libson*. First, language in *Libson* has been interpreted so as to deny a net operating loss deduction where it would not have been available *but for* the merger.[39] For example, in *Bookwalter v. Hutchens Metal Products, Inc.*,[40] the deduction was disallowed on the ground that granting a net operating loss carryover when there could not have been a deduction but for the merger resulted in a windfall to the taxpayer. Loss carryovers, the court said, should not be permitted when there was a radical change in the source of income as a result of the merger and the merged corporation brought no "hope of future profit" to the survivor.[41] The *Bookwalter* decision indicated that any income attributable to the merger could not be offset by the loss carryover deduction. Thus, under this approach, where a strategic managerial change, such as the shifting of assets between the two merged units, could not have occurred but for the merger, then the successor corporation would be prohibited from using the premerger net operating losses against income attributable to such a change. The but for test was effective in that it was a deterrent to merger where the sole purpose of the amalgamation was to make use of an otherwise unavailable deduction.[42] It was not sufficiently flexible, however, to allow loss carryovers where reallocation of the loss corporation's assets and resulting changes in the character of the business were responsible for some postmerger profits. If such alterations could not have been

37. 353 U.S. at 390.
38. BITTKER & EUSTICE, *supra* note 1, ch. 16, at 60.
39. Bookwalter v. Hutchens Metal Prods., Inc., 281 F.2d 174 (8th Cir. 1960). In distinguishing *Newmarket*, the *Libson* court had stated that "[*b*]*ut for* the merger, the old corporation [in Newmarket] would have been entitled to a carry-back." 353 U.S. at 388 (emphasis added).
40. 281 F.2d 174 (8th Cir. 1960).
41. *Id.*
42. *See* Becker, *supra* note 16, at 527.

made absent the merger, the carryover would not have been allowed. Thus, the carryover would have been disallowed even though the merger resulted in the assets of the loss corporation contributing to postmerger profits of the successor. The but for test, then, had two requirements: (1) postmerger business must have been conducted as it had been prior to the merger, and (2) the unit that had sustained premerger losses must have generated income following the merger.

A second, more flexible permutation of the continuity of business enterprise test originated in *Foremost Dairies, Inc. v. Tomlinson*,[43] where premerger losses were set off against postmerger gains to the extent that the "bundle of assets" received from the loss corporation contributed to postmerger profits.[44] In *Foremost*, a gain corporation was merged with a loss corporation, the loss corporation being the survivor. Looking past the form of the merger,[45] the court took the view that:

> [T]he continuity of business enterprise theory in Libson Shops means that where a loss corporation and a gain corporation are merged, pre-merger losses may be offset against post-merger gains only to the extent that the business which was previously operating at a loss is now operating at a profit. Furthermore, the business referred to in the sentence above does not mean the formal legal entity but rather the *bundle of assets*, which previously constituted the pre-merger business unit.[46]

In spite of substantial changes in ownership, capital structure, location, management, and the type of goods produced, the court allowed the net operating loss carryover to the extent that the assets of the loss corporation contributed to the net profits of the postmerger corporation. The continuity of business test as applied in *Foremost* has been referred to as a continuity of assets[47] or bundle of assets[48] test. The distinction between this and the but for test is that the bundle of assets approach would not preclude use of the deduction following a shifting of assets as long as the assets and their contribution to postmerger profits could be traced through the merger.

A classic application of the bundle of assets criterion is *Amherst Coal Co. v. United States*,[49] where the assets of the merged-loss corporation were partially distributed to two subsidiaries of the survivor. The court allowed the survivor and its two subsidiaries to deduct the

43. 238 F. Supp. 258 (M.D. Fla. 1963), *aff'd mem.*, 341 F.2d 580 (5th Cir. 1965).
44. *Id.* at 262.
45. "[I]t is not important that, as a matter of form in accomplishing the merger, the same formal legal entity which was in existence before the merger survived the merger and continued as a legal creature thereof. . . ." *Id.* at 261.
46. *Id.* at 262 (emphasis added).
47. *See* Becker, *supra* note 16, at 516.
48. 238 F. Supp. at 262.
49. 295 F. Supp. 421 (S.D.W. Va. 1969).

premerger losses in proportion to the income each derived from the loss corporation's assets. *Amherst* was a case where application of the bundle of assets criterion rewarded a taxpayer who had made profitable use of the newly acquired assets. In this respect, the bundle of assets approach is superior to the legal entity test because it looks to economic results rather than to corporate form. In addition, such a tracing of assets through the merger[50] is less of a deterrent to strategic business changes that avoid economic waste than is the but for test. Alteration of operations or liquidation of some assets will not automatically destroy the carryover deduction under this construction.

Although the bundle of assets approach may be more equitable and policy oriented than either the legal entity or the strict but for tests, its practical application is more difficult. Numerous accounting problems arise in trying to determine how much of the survivor's profits should be attributed to the assets of the acquired loss corporation. It may be difficult to allocate overhead, labor, and revenues in order to determine the contribution of acquired assets to the total postmerger income.[51] Since the burden is on the taxpayer to prove that income was produced by substantially the same business unit that produced the losses,[52] difficulty in assignment of revenues and expenses may preclude the deduction.

Continuity of Ownership

There is some authority to suggest that when the surviving corporation is owned substantially by the same persons as the loss corporation, the net operating loss carryover should be allowed in spite of a change in the business enterprise.[53] In *Norden-Ketay Corp. v. Commissioner*,[54] the court indicated that it might be equitable to allow a carryover in this situation since the purpose of the loss carryover is to grant a legitimate tax advantage to the shareholders of the corpora-

50. The Commissioner of the Internal Revenue seems to have acquiesced in the tracing of assets through the merger: "Following a statutory merger or consolidation, the tax treatment of which is determined under the Internal Revenue Code of 1939, and in the absence of any evasion or avoidance of tax, premerger or preconsolidation net operating losses . . . of an absorbed constituent may be carried over to the resultant corporation to the extent that such losses . . . offset income of the resultant corporation attributable to *assets acquired by it from the absorbed constituent* and used in continuing the prefusion business of such absorbed constituent." Rev. Rul. 59-395, 1959-2 CUM. BULL. 475, 476 (emphasis added).

51. *See* Sinrich, *Libson Shops—An Argument Against Its Application Under the 1954 Code*, 13 TAX L. REV. 167, 174 (1958).

52. Allied Central Stores, Inc. v. Commissioner, 339 F.2d 503 (2d Cir. 1964); Rev. Rul. 59-395, 1959-2 CUM. BULL. 475, 479.

53. Norden-Ketay Corp. v. Commissioner, 319 F.2d 902, 906 (2d Cir.), *cert. denied*, 375 U.S. 953 (1963). *See also* Rev. Rul. 63-40, 1963-1 CUM. BULL. 46. *But see* Julius Garfinckel & Co. v. Commissioner, 335 F.2d 744 (2d Cir. 1964), *cert. denied*, 379 U.S. 962 (1965).

54. 319 F.2d 902 (2d Cir.), *cert. denied*, 375 U.S. 953 (1963).

tion.[55] A test which allows loss carryover solely because there is continuity of ownership may be in accord with the policy of providing carryover relief to the person or persons who suffered the economic loss.[56] It is, however, inconsistent with *Libson*, where the net operating loss was disallowed even though there was complete continuity of ownership.[57]

Continuity of Business Test in Arizona

Before *Oliver's*, there was no Arizona authority concerning which test should be used to determine when a surviving corporation is entitled to carryover premerger losses for state tax purposes. Viewing *Libson* as controlling, the *Oliver's* court rejected the legal entity method of identifying the taxpayer.[58] Moreover, the court did not treat continuity of ownership as an issue. Since the owners of the surviving corporation had owned all of the stock in the loss corporation, the facts lent themselves readily to a continuity of ownership analysis. The conclusion, therefore, is that continuity of ownership will not automatically result in allowance of the carryover deduction for Arizona tax purposes. Under *Oliver's*, it is the continuity of the business enterprise test which must be met before loss carryovers will be allowed.

In applying the continuity of business enterprise test, the court apparently chose the but for approach, stressing the following passage from *Libson*: " '*Had there been no merger*, these businesses would have had no opportunity to carry over their losses.' "[59] The taxpayer in *Oliver's* had stated that New Cascade would have continued to suffer losses had it stayed in business. Accordingly, the court found that "but for the merger, New Cascade would not have been able to benefit from the carryover, since this business unit would not have had gains against which to off-set losses."[60] Under the but for interpretation, the continuity of business enterprise test had not been met and the net operating loss carryover deduction was unavailable.

Oliver's seems to be simply another example of the but for test in determining business continuity. Relying on the statement by one of its owners that New Cascade would have continued to lose money, the Arizona court of appeals surmised that none of the postmerger in-

55. This statement was mere dicta since the court found no substantial continuity of ownership. Only 3 percent of the stockholders of the old corporation owned stock in the new corporation.

56. *See* Reed, *supra* note 28.

57. The stockholders in *Libson* each owned the same proportion in the successor as they had owned in the merged corporations. 353 U.S. 382, 383 (1957).

58. 19 Ariz. App. 442, 446, 508 P.2d 107, 111 (1973).

59. *Id.*

60. *Id.* at 447, 508 P.2d at 112.

come could be attributed to New Cascade. As a result, the continuity of business requirement had not been met and the carryover was not available to Oliver's. There were, however, no revenue or cost figures before the court that would have enabled the petitioners to argue that the assets of New Cascade had contributed to the postmerger profits. Such a presentation might have enabled the court to choose the bundle of assets approach and allow the deduction to the extent the taxpayer could have shown a postmerger contribution to income by the assets acquired from the merged-loss corporation.

The *Oliver's* decision does not necessarily indicate that Arizona has chosen the strict but for criterion over the bundle of assets approach. Some of Oliver's postmerger profits may have been generated by the more efficient management of the assets of both corporations and a resulting reduction in operating costs. Had the amalgamated corporation been able to allocate revenues and expenses between the assets acquired from New Cascade and the assets Oliver's had before the merger, the bundle of assets approach might have been employed and perhaps a different result would have been reached.

Conclusion

Regardless of the fate of *Libson* under the *Internal Revenue Code of 1954*,[61] the continuity of business enterprise test lives on in Arizona. The legal entity concept has been discarded, and the survivor of a statutory merger will not be entitled to the net operating loss deduction merely because there is continuity of ownership between the loss corporation and the corporation seeking the deduction. The particular variation of the continuity of business enterprise test to be applied in Arizona is not clear, but it appears that the carryover deduction will not be allowed where it would not have been available absent the merger. The *Oliver's* court did not, however, foreclose the possibility that the bundle of assets approach might be taken in the future if the court is given sufficient data showing that the loss corporation's assets have contributed to postmerger profits.

B. RETROACTIVE EFFECT OF ARIZONA'S BUSINESS PRIVILEGE TAX ON LONG TERM LEASES

Taxation on the privilege of engaging in business is a common

61. See discussion note 36 *supra*.

source of revenue for state and local governments.[1] The enforcement of the privilege tax, however, gives rise to special problems, particularly the determination of when the taxable privilege is being exercised. Although privilege taxes generally are measured by income received from an activity,[2] the mere receipt of income does not always mean that the privilege is currently being exercised. Present receipts may be simply the result of prior endeavors. If, however, the past business activities giving rise to current income were not taxable when commenced, a subsequent tax may be challenged as being retroactive in nature.[3] On this basis, the Arizona transaction privilege tax was contested in *Tower Plaza Investments Ltd. v. DeWitt*.[4]

In 1967, the Arizona legislature amended the privilege tax statute to add a tax on "[l]easing or renting for a consideration the use or occupancy of real property."[5] Although income from preexisting leases was not immediately taxable, it was to be used in computing the tax beginning in December 1972. The *Tower Plaza* petitioners, a group of shopping center lessors, contended that this amendment resulted in a retroactive tax because it was levied on lease transactions consummated prior to the statute's enactment.[6] Rejecting the petitioners' argument, the Supreme Court of Arizona held that the tax was not retroactive because it affected only the present receipts of income and not proceeds received prior to the enactment of the amendment.[7]

This discussion will first present the basic elements of a retroactive tax. Then, the three points relied upon by the *Tower Plaza* court to support its conclusions will be evaluated: (1) that the execution of the leases before the enactment of the statute was merely an antecedent fact; (2) that the receipt of rental payments was the taxable

1. *E.g.* ALA. CODE tit. 51, § 629(22) (Supp. 1973); ALASKA STAT. § 43.70.020 (1962); CAL. REV. & TAX. CODE § 6051 (West Supp. 1974); D.C. CODE ANN. § 47-2602 (Supp. 1974-75); FLA. STAT. ANN. § 212.031 (Supp. 1974-75); HAWAII REV. STAT. § 237-13 (1968); KAN. STAT. ANN. § 79-3603 (Supp. 1973); MD. ANN. CODE art. 81, § 325 (1957); N.M. STAT. ANN. § 72-16A-7 (Supp. 1973); WASH. REV. CODE ANN. § 82.04.220 (1961); WIS. STAT. ANN. § 77.52 (Supp. 1974-75).

2. Industrial Uranium Co. v. State Tax Comm'n, 95 Ariz. 130, 132, 387 P.2d 1013, 1014 (1963).

3. People *ex rel.* Albright v. Fireman's Pension Fund, 103 Colo. 1, 13, 82 P.2d 765, 771 (1938); Garrett Freight Lines, Inc. v. State Tax Comm'n, 103 Utah 390, 135 P.2d 523 (1943). *See generally* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

4. 109 Ariz. 248, 508 P.2d 324 (1973), *appeal dismissed*, 414 U.S. 1118 (1974).

5. Ch. 3, § 1, [1967] Ariz. Sess. Laws 3d Spec. Sess. 901 (codified at ARIZ. REV. STAT. ANN. § 42-1314 (Supp. 1974-75)).

6. 109 Ariz. at 250, 508 P.2d at 326. The petitioners also challenged the tax as impairing the obligation of contracts. This issue has not been explored in this discussion, because it is not closely related to those factors which relate to the retroactivity of a tax. A tax may be retroactive without impairing the obligation of contracts. *See* Barwise v. Sheppard, 299 U.S. 33, 40-41 (1936); Wiseman v. Gillioz, 192 Ark. 950, 958-59, 96 S.W.2d 459, 463 (1936).

7. 109 Ariz. at 252, 508 P.2d at 328.

event; and, (3) that the tax did not seek to reach transactions completed before its enactment. Attention will then be focused on the issue of retroactivity, evaluating both the petitioners' contention and the law in support of the court's holding.

Retroactive Taxation

The definition of a retroactive tax relied on in *Tower Plaza*, and in most other cases, was first set forth by Justice Story in *Society for the Propagation of the Gospel v. Wheeler*:[8] "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ."[9] It is sometimes thought that the government does not have the power to impose such taxes, and, in fact, the *Tower Plaza* court assumed that a retroactive tax would violate due process of law.[10] The imposition of retroactive taxes, however, is not prohibited per se by the United States Constitution,[11] and the Supreme Court has held that such a tax may stand if it is not oppressive.[12] Similarly, a number of state courts have upheld retroactive taxes in the absence of express state constitutional prohibitions.[13] Whenever possible, however, courts will avoid giving a tax retroactive effect, and an ambiguous statute will be held prospective unless its retroactivity is clearly indicated.[14]

The Tower Plaza Rationale

The *Tower Plaza* court set forth three reasons supporting its hold-

8. 22 F. Cas. 756 (No. 13,156) (C.C.S.D.N.H. 1814).
9. *Id.* at 767.
10. 109 Ariz. 248, 252, 508 P.2d 324, 326 (1973).
11. The constitutional prohibitions against ex post facto laws refer to crimes and criminal penalties. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).
12. *See* Welch v. Henry, 305 U.S. 134, 147 (1938) (where the Court allowed a state income tax enacted in 1935 to be levied on income received in 1933).
A retroactive tax may be unconstitutional in that it constitutes a deprivation of property without due process of law or because of the severity and unexpectedness of the burden which it imposes. While no precise limits on the extent of permissible retroactivity have been established, a few Supreme Court cases provide general guidelines. In Milliken v. United States, 283 U.S. 15 (1931), the Court held that a gift tax, applied retroactively to gifts causa mortis, was not unconstitutional because the tax in question was very similar to a tax that had been in effect at the time the transfers were made. The new tax, therefore, was not unduly burdensome. Welch v. Henry, 305 U.S. 134 (1938), upheld a retroactive tax imposed on income realized 2 years previously. According to the *Welch* opinion, retroactive taxation is not burdensome when it occurs "at the first opportunity after knowledge of the nature and amount of income is available." *Id.* at 150.
13. Roth Drugs v. Johnson, 13 Cal. App. 2d 720, 57 P.2d 1022 (Ct. App. 1936); State v. Bell, 61 N.C. 76, 86 (1867); Garrett Freight Lines, Inc. v. State Tax Comm'n, 103 Utah 390, 135 P.2d 523 (1943).
14. *See* Neild v. District of Columbia, 110 F.2d 246, 254 (D.C. Cir. 1940); Home

ing that the tax was not retroactive. First, the court stated that the signing of the leases was merely an antecedent fact and that the statute was not retroactive "simply because it may relate to antecedent facts."[15] The court was correct in stating that taxation based on proceeds arising from an antecedent event is not necessarily retroactive. Although such a tax creates tax liability for a transaction which is completed, it is not retroactive if the antecedent event is not the taxable event. For example, a tax expressly levied upon those doing business during the current fiscal year may be measured by gross receipts from the year preceding enactment.[16] Such a statute has been held nonretroactive even though the tax was measured by events occurring prior to the effective date of the tax.[17] Thus, while the *Tower Plaza* court's statement of law was correct, its reliance on this principle was misplaced since it is still necessary to identify the taxable event. It is evident that the court relied on cases which arose in entirely different factual contexts and which did not provide a means for resolving this issue.

Cox v. Hart,[18] the first authority cited by the court, was not supportive of the *Tower Plaza* decision. The provision adjudged prospective in *Cox* protected persons whose actions were commenced prior to the statute's enactment by specifically exempting them from its operation.[19] The effect of Arizona's statute was entirely different. Instead of preserving the prestatutory status quo, the Arizona tax imposed a new burden[20]—a burden many of the lessors could not escape because they could neither raise the rents nor revoke leases.[21]

The *Tower Plaza* court also relied on a District of Columbia case to bolster the position that the execution of the leases was merely an antecedent fact. In *John McShain, Inc. v. District of Columbia*,[22] a builder had signed several construction contracts, each for a fixed price;[23] subsequently, a tax was levied on the value of materials purchased. Since the tax had not been anticipated in setting the contract prices, the contractor's profit was reduced by the added expense of the

Indem. Co. v. Missouri, 78 F.2d 391, 394 (8th Cir. 1935). *See generally* Smead, *supra* note 3.

15. 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973).
16. Neild v. District of Columbia, 110 F.2d 246, 253-54 (D.C. Cir. 1940).
17. *Id.* at 252.
18. 260 U.S. 427, 435 (1922).
19. *Cox* was not a tax case; it dealt with conflicting land claims. The statute in question provided: "nothing herein contained shall be so construed as to impair the present bona fide claim of any actual occupant of any of said lands so occupied." Act of July 1, 1902, ch. 1377, 32 Stat. 728. It was contended that any application of the law to the appellee would be retrospective because her occupation of the land commenced prior to the statute's enactment.
20. ARIZ. REV. STAT. ANN. § 42-1314(B) (Supp. 1974-75).
21. Petition for Special Action at 7, Tower Plaza Invs. Ltd. v. DeWitt, 109 Ariz. 248, 508 P.2d 324 (1973).
22. 205 F.2d 882 (D.C. Cir. 1953).
23. *Id.* at 883.

tax. The court, however, held that the tax was not retroactive because the taxable event was the present activity of purchasing materials, rather than the past act of signing the contracts.[24] Although the burdensome effect of the *McShain* tax was similar to that in *Tower Plaza*, the District of Columbia statute clearly differed from the Arizona privilege tax. The District of Columbia tax did not, in any way, purport to reach the construction contracts; rather, the taxable event was the purchase of building materials.[25] In contrast, the Arizona statute specifically applies to the business of leasing. Thus, *McShain* was not helpful in determining whether the signing of the leases was the taxable event.

In the third case used by the *Tower Plaza* court, a privilege tax was imposed on all persons who hired a certain number of employees during the year preceding the enactment of the tax statute.[26] The court found that the antecedent event merely defined the class of persons who were required to pay the privilege tax. The tax was not retroactive, however, because the taxable event was the current exercise of the privilege of hiring employees.[27] Although this case, like the others cited by the court, was superficially similar to *Tower Plaza*, this similarity did not resolve the question before the court—whether the signing of the leases was the taxable event.

The second reason set forth by the *Tower Plaza* court in support of its holding was that the taxable event was the receipt of rentals rather than the signing of the leases. In so doing, the court relied on the proposition that the "taxable event is the realization of income."[28] This statement, however, was made in the context of an income tax case[29] and, when quoted in its entirety, appears to have little relevance to a case involving privilege taxes. The cited opinion states: "From the beginning the revenue laws have been interpreted as defining 'realization of income' as the taxable event, rather than the acquisition of the right to receive it."[30] In *Tower Plaza*, however, the tax was on the privilege of doing business, not the receipt of income; the application of income tax principles merely circumvented the central issue of whether petitioners were currently engaging in the business of leasing. The court made no further attempt to directly support its conclusion that the receipt of rentals was in fact the taxable event.

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24. *Id.*
25. D.C. CODE ANN. § 47-2601(14)(a)(5) (1966).
26. Bates v. McLeod, 11 Wash. 2d 648, 120 P.2d 472 (1941).
27. *Id.* at 649-51, 120 P.2d at 473-74.
28. 109 Ariz. 248, 251, 508 P.2d 324, 327 (1973).
29. Helvering v. Horst, 311 U.S. 112 (1940).
30. *Id.* at 115.

The final point raised by the court was that the statute did not attempt to reach transactions completed before its enactment.[31] This ruling apparently arose in response to petitioners' contention that current receipts should be excluded from taxation because those receipts resulted from transactions completed before the passage of the act. The lessors' position was founded on the reasoning that the execution of the leases completed the transactions; therefore, a tax on the proceeds would be retroactive.[32] While the *Tower Plaza* court offered no authority or reasoning supporting its finding that the tax was not applied to completed transactions, further analysis of petitioners' claim and of other precedent in this area supports the court's result.

Completed Transactions and Retroactive Taxation

The allegation that the tax was being applied to completed transactions arose out of the irrevocable[33] nature of the leases. Petitioners contended that entering into an irrevocable lease permanently terminated the leasing transaction.[34] In contrast, if the leases had been revocable, each receipt of a rental payment would have been considered a new transaction.[35] Thus, the petitioners concluded that the tax was being imposed on obligations determined in the past and that the taxable event was the act which fixed these obligations—the execution of the leases. The leading case in support of this argument, *Hansord Agency, Inc. v. Commissioner*,[36] involved the application of a tax upon: "Any transfer of title or possession, or both, of tangible personal property."[37] The *Hansord* court reasoned that the rights of the parties were irrevocably fixed at the time the lease was entered into, and that the rent payments did not constitute new transactions, but were merely installment payments.[38] Because the tax was imposed upon the initial transfer of possession, the court found that the payment of rent was not the taxable event. Based on the *Hansord* reasoning, a tax imposed on the initial transaction would have been retroactive because the leases

31. 109 Ariz. at 252, 508 P.2d at 328.
32. *Id.* at 250, 508 P.2d at 326.
33. The leases were considered irrevocable because neither the lessor nor lessee could unilaterally terminate the lease without being in breach of contract. Petition for Special Action at 7, Tower Plaza Invs. Ltd. v. DeWitt, 109 Ariz. 248, 508 P.2d 324 (1973). *See also* Hansord Agency, Inc. v. Commissioner, 294 Minn. 198, 199 N.W.2d 823 (1972).
34. *See* Hansord Agency, Inc. v. Commissioner, 294 Minn. 198, 199 N.W.2d 823 (1972).
35. *Id.* at 200, 199 N.W.2d at 824; *see* Gandy v. State, 57 Wash. 2d 690, 695, 359 P.2d 302, 304 (1961).
36. 294 Minn. 198, 199 N.W.2d 823 (1972).
37. *Id.* at 199, 199 N.W.2d at 824.
38. *Id.* at 199-200, 199 N.W.2d at 824.

were executed and the transactions completed before the tax became effective.[39]

The *Hansord* rationale would appear inapplicable to the situation found in *Tower Plaza.* While the statute in *Hansord* taxed the "transfer of title or possession," the Arizona tax is imposed on the privilege of "engaging or continuing" in business.[40] This distinction was noted by the *Tower Plaza* court: "The tax is not upon sales, as such, but upon the privilege or right to engage in business in the state."[41] Thus, resolution of the issue presented in *Tower Plaza* was dependent on whether the petitioners' current and continuing activities could be included within the scope of engaging in business.

The Arizona privilege tax statute defines "business" broadly as "all activities or acts . . . engaged in or caused to be engaged in with the object of gain . . . either directly or indirectly, but not casual activities."[42] Similarly, the privilege tax statutes of other jurisdictions also encompass a wide range of activities.[43] More specifically, such statutes also provide an expansive definition of what constitutes leasing.[44] Although the Arizona statute does not define leasing, the Arizona supreme court considered this question in *State Tax Commission v. Peck.*[45] The *Peck* court, in determining whether the privilege tax applied to the renting of specific personal property, defined leasing as: " '(1) to take and hold under an agreement to pay rent,' or '(2) to obtain the possession and use of a place or article for rent.' "[46] The court concluded that the lessees' "exclusive use of the equipment for a fixed period of time and for payment of a fixed amount of money"[47] was sufficient to constitute leasing within the meaning of the tax stat-

39. A tax on a completed transaction is retroactive. Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (No. 13,156) (C.C.S.D.N.H. 1814).

40. ARIZ. REV. STAT. ANN. § 42-1314(A) (Supp. 1974-75).

41. 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973).

42. ARIZ. REV. STAT. ANN. § 42-1301(1) (Supp. 1974-75).

43. New Mexico and Alaska impose taxes similar to Arizona's. New Mexico's tax defines "engaging in business" as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." N.M. STAT. ANN. § 72-16A-3(E) (Supp. 1973). Alaska's statute defines "business" as "all activities or acts . . . engaged in . . . including rental of personal or real property . . . ." ALASKA STAT. § 43.70.110(1) (1962). The following state privilege tax statutes also contain broad definitions of doing business: ALA. CODE tit. 51, § 629(21)(a) (1958); D.C. CODE ANN. § 47-2601(2) (1973); FLA. STAT. ANN. § 212.02 (1943); HAWAII REV. STAT. § 237-2 (1968); WASH. REV. CODE ANN. § 82.04.140 (1961); WIS. STAT. ANN. § 77.51(8) (Supp. 1974-75).

44. New Mexico levies a privilege tax measured by gross receipts on those engaged in the business of renting real property. The New Mexico statute contains the following definition of leasing: "any arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property." N.M. STAT. ANN. § 72-16A-3(J) (Supp. 1973). *See also* WIS. STAT. ANN. § 77.51(7)(k) (Supp. 1974-75).

45. 106 Ariz. 394, 476 P.2d 849 (1970).

46. *Id.* at 396, 476 P.2d at 851.

47. *Id.*

ute. Similarly, *Kirk v. Western Corporation*,[48] applying a Florida privilege tax applicable to the leasing of personal property, set forth an all inclusive definition of leasing activity:

> The rental business . . . did not consist exclusively in the act of executing the lease documents . . . such business also consisted of maintaining sufficient contacts with the lessee and the equipment to make sure that the leased property is properly maintained and protected against waste; that it is kept in an acceptable state of repair; that it is covered by insurance sufficient to protect the interest of the owner; and most importantly, that the rents . . . are paid by the lessee . . . .[49]

It is evident, in both the context of existing law and the realities of modern business activities,[50] that the petitioners' contention in *Tower Plaza*, that the business of leasing did not continue after the signing of the leases, was tenuous. Leasing encompasses more than the signing of the documents. "Business" and "leasing" are defined broadly enough to embrace continuing landlord-tenant relationships, which are evidenced by rent payments and other profit-motivated transactions between lessor and lessee.

Conclusion

The *Tower Plaza* court held that the receipt of rental was the taxable event and ruled that the tax did not reach completed transactions. Although the court did not substantiate its conclusions, the existing law and the realities of modern-day business transactions supported the court. The Arizona privilege tax statute provides that the taxable event is the privilege of engaging in business. Rarely do all transactions between lessor and lessee cease when the lease is signed, and the receipt of rentals evidences the continuing business relationships. Thus, because the court interpreted the statute as applying to petitioners' current activities, the tax was not retroactive.

48. 216 So. 2d 503 (Fla. 1968).
49. *Id.* at 507. This lessor was held subject to the tax despite the fact that, at the time the leases were signed, they were not taxable.
50. *See* S. MCMICHAEL & P. O'KEEFE, LEASES: PERCENTAGE, SHORT & LONG TERM 309-383 (5th ed. 1969); NEW YORK PRACTISING LAW INSTITUTE, BUSINESS & LEGAL PROBLEMS OF SHOPPING CENTERS 123-345 (1970). *See generally* NEW YORK PRACTISING LAW INSTITUTE, COMMERCIAL REAL ESTATE LEASES (1969).

IX. TORTS

A. RELEASE OF A JOINT TORTFEASOR

Attempts to avoid antiquated common law rules through procedural techniques often result in confusion and create legal traps for the unwary. The use of many of these devices to evade the common law rule governing the release of joint tortfeasors has resulted in such a situation in Arizona. In *Adams v. Dion*,[1] the Supreme Court of Arizona abrogated the common law rule that the release of one joint tortfeasor[2] releases all.[3] The court thereby adopted the position taken by the majority of American jurisdictions[4] and legal commentators.[5]

Plaintiff Adams suffered personal injuries in an accident caused by the alleged dragracing of defendant Dion and one Kris Burwell. Plaintiff previously had released Burwell after obtaining an out-of-court settlement of $50,000. In this action, commenced after Burwell's release, the trial court rendered a summary judgment in favor of Dion on the basis of the common law rule that the release of one joint tortfeasor releases all. In abrogating the common law rule and reversing the trial court, the supreme court adopted the position of the *Restate-*

1. 109 Ariz. 308, 509 P.2d 201, *vacating* 19 Ariz. App. 69, 504 P.2d 1292 (1973).

2. The meaning of the term "joint tortfeasor" has become as confusing as its relation to release. The imposition of joint and several liability for wrongful injury has included tortious incidents involving concerted action or common plan, failure in performance of a common duty, and, in some jurisdictions, independent concurring torts where damage could not be apportioned. *See* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1, at 711-12 & n.108 (1956).

In Arizona, in order for two or more persons to be joint tortfeasors, there must exist a community of interest. DeGraff v. Smith, 62 Ariz. 261, 157 P.2d 342 (1945). At common law, liability as joint tortfeasors existed only in the case of pure torts (concerted action), as distinguished from procedural torts (joinder of independent torts causing single injury). *See* Kennedy, *Settlement Devices with Joint Tortfeasors*, 25 FLA. L. REV. 762 (1973). *See generally* Thompson v. London County Council, [1899] 1 Q.B. 840; Sadler v. Great W. Ry., [1896] A.C. 450.

3. Kiffin v. Willis, 87 Eng. Rep. 455 (K.B. 1695); Cocke v. Jennor, 80 Eng. Rep. 214 (K.B. 1614); Patridge v. Emson, 74 Eng. Rep. 1030 (K.B. 1597) (dictum). American jurisdictions generally rely on the common law rule expressed in two early decisions. Gilpatrick v. Hunter, 24 Me. 18 (1844); Ruble v. Turner, 12 Va. (2 Hen. & M.) 324 (1808).

4. *See, e.g.*, Parry Mfg. Co. v. Crull, 56 Ind. App. 77, 101 N.E. 756 (1913); Fitzgerald v. Union Stockyards Co., 89 Neb. 393, 131 N.W. 612 (1911); Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958).

5. *E.g.*, 4 A. CORBIN, CONTRACTS §§ 931-935, at 732-65 (1951); 1 F. HARPER & F. JAMES, *supra* note 2, at 711-12; Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 424 (1937); Wigmore, *Release to One Joint-Tortfeasor*, 17 ILL. L. REV. 563 (1923).

ment (Second) of Torts.[6] The *Restatement* provides that the release of one tortfeasor does not discharge others jointly liable, unless full compensation is paid or the parties to the release intend the release to be a total discharge of all parties.[7]

This discussion will review the origin of the common law rule and consider the traditional theories supporting its application. Consideration will then be given to the frequent criticism of the rule as well as to the many legal devices employed to avoid its harsh results.

Justifications and Criticism

The common law rule that the release of one tortfeasor releases all originated in England in the 17th century.[8] The original basis for the rule and the justification upon which most courts relied was that the claimant was entitled to only one satisfaction; satisfaction being defined as full compensation for a wrong. By settling a claim with one defendant, thereby releasing him from further liability, a plaintiff was deemed to have satisfied fully his claim for relief.[9] This reasoning was sound if the defendant's payment constituted full compensation for the wrong. At common law, however, the courts gave no consideration to the sufficiency of the compensation, since release under seal was conclusive evidence that the injured party had received full satisfaction.[10] Thus, the seal established a conclusive presumption of full consideration, and this could not be attacked at law.[11] This presumption in favor of the tortfeasor was founded on the belief that the release instrument should be interpreted most strongly against the maker.[12] The plaintiff's sol-

6. 109 Ariz. at 310, 509 P.2d at 203. The RESTATEMENT (SECOND) OF TORTS § 885 (Tent. Draft No. 16, 1970), provides:

(1) A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it shall do so.

(2) A covenant not to sue one tortfeasor, or not to proceed further against him, does not discharge any other tortfeasor liable for the same harm.

(3) Payments made by any person in compensation of a claim for a harm for which others are liable as tortfeasors diminish the claim against them, whether or not the person making the payment is liable to the injured person, and whether or not it is so agreed at the time of payment, or the payment is made before or after judgment. The extent of the diminution is the amount of the payment made, or a greater amount if so agreed.

7. RESTATEMENT (SECOND) OF TORTS § 885 (Tent. Draft No. 16, 1970).

8. Kiffin v. Willis, 87 Eng. Rep. 455 (K.B. 1695); Cocke v. Jennor, 80 Eng. Rep. 214 (K.B. 1614).

9. *See* Kiffin v. Willis, 87 Eng. Rep. 455 (K.B. 1695).

10. *E.g.*, Gunther v. Lee, 45 Md. 60 (1876); Arnett v. Missouri Pac. R.R., 64 Mo. App. 368 (1896); Cocke v. Jennor, 80 Eng. Rep. 214 (K.B. 1614). A release under seal was deemed a satisfaction in law which was considered to be the equivalent of a satisfaction in fact. *See* 5 M. BACON, A NEW ABRIDGEMENT OF THE LAW 703 (1813).

11. *E.g.*, Gunther v. Lee, 45 Md. 60 (1876); McBride v. Scott, 132 Mich. 176, 93 N.W. 243 (1903); Rogers v. Cox, 66 N.J.L. 432, 50 A. 143 (1901).

12. Carey v. Bilby, 129 F. 203, 205 (8th Cir. 1904); Bronson v. Fitzhugh, 1 Hill (N.Y.) 185, 15 N.Y. Common L.R. 95 (1841).

emn acts of signing, sealing, and delivering the instrument were considered adequate safeguards against the possibility of leaving the plaintiff without a remedy against other tortfeasors.[13]

As the importance of the seal diminished in American jurisdictions,[14] courts justified continued application of the release rule by maintaining that consideration for a release would be presumed to represent total compensation.[15] This conclusive presumption rested on the fiction that the released party was considered to have committed the entire tort.[16] Thus, the principal justification for the release rule rested on the unfounded presumption that a single consideration given by one tortfeasor constituted full compensation.

That the rule was rooted in a judicial misunderstanding of the difference between satisfaction and release is curious since these two legal concepts are clearly distinguishable. Release is the surrender of a claim, irrespective of the compensation received, while satisfaction requires acceptance of full compensation.[17] The illogic of the release rule is evident. It presumed that a release always constituted full satisfaction and resulted in the release of the other tortfeasors without full compensation being made.[18]

Various other theories were advanced to justify the common law rule. One theory reasoned that an injured party had an indivisible cause of action.[19] Consequently, by releasing one tortfeasor, a plaintiff was considered to have extinguished effectively the entire claim and any grounds for further recovery.[20] Further justification for the rule was founded on the theory that it prevented an injured party from menacing joint tortfeasors with multiple suits[21] and prevented double recovery.[22] In reality, continued adherence to the rule seems to have

13. Note, *Release of a Joint Tortfeasor*, 28 IA. L. REV. 515 (1943).
14. 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 219a (3rd ed. 1957).
15. *See* Flynn v. Manson, 19 Cal. App. 400, 126 P. 181 (Ct. App. 1912); Ellis v. Bitzer, 2 Ohio 89 (1825); Abb v. Northern Pac. Ry., 28 Wash. 428, 68 P. 954 (1902).
16. *See* cases cited note 15 *supra*.
17. *See generally* 1 F. HARPER & F. JAMES, *supra* note 2, at 711; W. PROSSER, LAW OF TORTS § 49 (4th ed. 1971).
18. Betcher v. Kunz, 112 Wash. 563, 192 P. 955 (1920). This case illustrates the gross unfairness caused by the court's confusion between satisfaction and release. Plaintiff, upon learning he had been defrauded in purchasing $30,000 of corporate stock, procured a return of his note of $10,000 from one of the tortfeasors. Other notes had been transferred by the defendants to holders in due course. The relief sought against these other defendants, for the face value of the transferred notes plus interest, was denied on the principle that the release of the one tortfeasor fully satisfied the claim. Thus, defendants unjustly were enriched by $20,000.
19. Muse v. De Vito, 243 Mass. 384, 137 N.E. 730 (1923); Arnett v. Missouri Pac. R.R., 64 Mo. App. 368 (1896); Stires v. Sherwood, 75 Ore. 108, 145 P. 645 (1915).
20. *See* cases cited note 19 *supra*.
21. Stires v. Sherwood, 75 Ore. 108, 145 P. 645 (1915); J.E. Pinkham Lumber Co. v. Woodland State Bank, 156 Wash. 117, 286 P. 95 (1930).
22. Lamoreux v. San Diego & Ariz. E. Ry., 48 Cal. 2d 617, 311 P.2d 1 (1957);

been founded on a general reluctance on the part of the judiciary to change a settled principle of law.

The various justifications given for the rule have been attacked as being without merit. The possibility of a plaintiff's unjust enrichment through double recovery is eliminated by applying any compensation as a reduction pro tanto of subsequent judgments against remaining wrongdoers.[23] It has been held that a pro tanto reduction must be made even if the parties have agreed that the release would not diminish subsequent judgments.[24] In *Adams*, the Arizona supreme court affirmed that "any amount received for the release of one joint tortfeasor must be credited on any judgment received against the other."[25] Thus, the possibility of plaintiff's unjust enrichment is eliminated.

Another attack on the rule was based on the rule's obvious conflict with the well-settled principle of law that the intention of the parties, determined by their words, the compensation paid, and the totality of circumstances, governs any judicial examination of an agreement.[26] Yet some courts, adhering to the rule, explicitly have held that the intention of the parties was immaterial.[27] In abrogating the rule, the *Adams* court specified the relevance of the parties' intent and the amount of compensation paid. According to the court, these are questions of fact provable by parol evidence despite the existence of a written release agreement.[28] The rule adopted by the *Adams* court precludes the harsh consequences which often resulted from strict application of the release rule and judicial indifference to the intent of the injured party.[29]

Although some courts seemed hesitant to abrogate a rule that had existed for over 300 years, the injustice of the doctrine was attacked strongly by legal commentators. Dean Wigmore considered the doc-

McBride v. Scott, 132 Mich. 176, 93 N.W. 243 (1903); J.E. Pinkham Lumber Co. v. Woodland State Bank, 156 Wash. 117, 286 P. 95 (1930).

23. McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Gilbert v. Finch, 173 N.Y. 455, 66 N.E. 133 (1903); Natrona Power Co. v. Clark, 31 Wyo. 284, 225 P. 586 (1924).

24. Home Tel. Co. v. Fields, 150 Ala. 306, 43 So. 711 (1907); *see* RESTATEMENT (SECOND) OF TORTS § 885(3) (Tent. Draft No. 16, 1970).

25. 109 Ariz. 308, 309, 509 P.2d 201, 202 (1973).

26. *See* Prosser, *supra* note 5, at 425.

27. *See* Flynn v. Manson, 19 Cal. App. 400, 126 P. 181 (Ct. App. 1912); McBride v. Scott, 132 Mich. 176, 93 N.W. 243 (1903). *But see* Carey v. Bilby, 129 F. 203 (8th Cir. 1904); Gilbert v. Finch, 173 N.Y. 455, 66 N.E. 133 (1903); Ellis v. Esson, 50 Wis. 138, 6 N.W. 518 (1880).

28. 109 Ariz. at 309, 509 P.2d at 202. The court cited as precedent for this rule, Collins v. Collins, 46 Ariz. 485, 52 P.2d 1169 (1935), which stated that "as between a third party and one of the parties to the contract it may always be proven by parol evidence that a contract between them is different from what it purports to be on its face." *Id.* at 499, 52 P.2d at 1174.

29. *E.g.*, Gilpatrick v. Hunter, 24 Me. 18 (1844); Larson v. Anderson, 108 Wash. 157, 182 P. 957 (1919); Abb v. Northern Pac. Ry., 28 Wash. 428, 68 P. 954 (1902).

trine to be a surviving relic based on false logic.[30] Similarly, Dean Prosser condemned the rule as an "antiquated survival of an arbitrary common law procedural notion."[31] Recognizing that the rule was undesirably harsh and unjustified, many jurisdictions chose to abrogate it at an early date.[32] They did so despite the argument—advanced and rejected in *Adams* — that the abolition of a long standing legal doctrine was a matter only for legislative consideration.[33] A few courts abrogated the rule on the rationale that it arose out of cases where there actually had been full satisfaction.[34] On this basis, it was reasoned that the rule should not be expanded beyond these facts.[35] Many jurisdictions, however, continued to strictly apply the rule, and knowledgeable lawyers resorted to four basic methods to avoid its disastrous effects.

Methods of Avoiding the Rule

The covenant not to sue was the primary means used in Arizona[36] and other jurisdictions[37] to avoid the harsh common law results of a release. Some jurisdictions found this escape mechanism repugnant to the doctrine of release[38] and thus meaningless, since the nature of the cause of action was legally indivisible.[39] Other courts justified its utilization on the basis that a claim against a tortfeasor intentionally had been reserved.[40] The covenant expressly stated that the agreement was not intended to be a legal release and embodied the implied presumption that compensation paid for the convenant did not constitute full satisfaction.[41] There is a clear distinction between a covenant not to sue and a general release. The release is a general abandonment of the entire cause of action, thus extinguishing any further claims by the injured party.[42] On the other hand, the

30. Wigmore, *supra* note 5, at 563.
31. Prosser, *supra* note 5, at 425.
32. *E.g.*, McEwen v. Kansas City Pub. Serv. Co., 225 Mo. App. 194, 19 S.W.2d 557 (1929); Fitzgerald v. Union Stockyards Co., 89 Neb. 393, 131 N.W. 612 (1911); Ellis v. Esson, 50 Wis. 138, 6 N.W. 518 (1880).
33. *See* 109 Ariz. 308, 310, 509 P.2d 201, 203 (1973); Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958).
34. Louisville & Evansville Mail Co. v. Barnes Adm'r, 117 Ky. 860, 79 S.W. 261 (1903).
35. *Id.*
36. Fagerberg v. Phoenix Flour Mills Co., 50 Ariz. 227, 71 P.2d 1022 (1937).
37. Parry Mfg. Co. v. Crull, 56 Ind. App. 77, 101 N.E. 756 (1913); Snow v. Chandler, 10 N.H. 92 (1839); Natrona Power Co. v. Clark, 31 Wyo. 284, 225 P. 586 (1924).
38. *E.g.*, O'Shea v. New York C. & St. L.R.R., 105 F. 559 (7th Cir. 1901); Gunther v. Lee, 45 Md. 60 (1876); Bland v. Warwickshire Corp., 160 Va. 131, 168 S.E. 443 (1933).
39. Muse v. De Vito, 243 Mass. 384, 137 N.E. 730 (1923); Ellis v. Bitzer, 2 Ohio 89 (1825); Abb v. Northern Pac. Ry., 28 Wash. 428, 68 P. 954 (1902).
40. Duck v. Mayeu, [1892] 2 Q.B. 511 (C.A.).
41. Fagerberg v. Phoenix Flour Mills Co., 50 Ariz. 227, 71 P.2d 1022 (1937); Ellis v. Esson, 50 Wis. 138, 6 N.W. 518 (1880); Duck v. Mayeu, [1892] 2 Q.B. 511 (C.A.).
42. *See* W. PROSSER, *supra* note 17, at 303.

courts have interpreted the covenant not to sue merely as an agreement not to enforce the claim against a particular tortfeasor, and the cause of action was not extinguished.[43] Thus, the covenant has been characterized in Arizona as an "ingenious method of whipping the devil around a stump."[44] Since it commonly has been recognized that the injured party could have but one satisfaction, the consideration for the covenant not to sue has been regarded as a reduction pro tanto of the claims against other tortfeasors.[45]

The second method used to avoid the harsh common law rule was the release with reservation. This method, like the covenant not to sue, was a means of retaining the claim while receiving partial satisfaction from one of the tortfeasors. Unlike the covenant not to sue, which was distinct from a release, the reservation of the right to sue other joint tortfeasors was an express provision in a release instrument.[46] While the release with reservation is an effective way of circumventing the rule, it is nevertheless a potential trap for the unwary. The *Adams* court eliminated this potential problem by expressly rejecting any requirement of reservation.[47]

The covenant not to execute, recognized in Arizona,[48] was a third method of circumventing the common law rule. Under this method, the plaintiff entered an agreement with one of the tortfeasors and promised to execute the prospective judgment only against the other tortfeasors.[49] As with the covenant not to sue, the plaintiff retained his indivisible cause of action and did not have to expressly reserve his claim against the other tortfeasors.[50] The other defendants still were entitled to have the amount of any previous settlement applied to reduce any compensation they might owe to the injured party,[51] regardless of the

43. *Id.*
44. Fagerberg v. Phoenix Flour Mills Co., 50 Ariz. 227, 235, 71 P.2d 1022, 1026 (1937).
45. Pacific States Lumber Co. v. Bargar, 10 F.2d 335 (9th Cir. 1926); Berry v. Pullman Co., 249 F. 816 (5th Cir. 1918); City of Chicago v. Babcock, 143 Ill. 358, 32 N.E. 271 (1892). *But see* Nashville Interurban Ry. v. Gregory, 137 Tenn. 422, 193 S.W. 1053 (1917).
46. Greenhalch v. Shell Oil Co., 78 F.2d 942 (10th Cir. 1935). Some courts, however, including the United States Supreme Court, have held that a release need not expressly reserve rights against the other tortfeasors, and such rights will be reserved if such was the intention of the parties. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1970) (applying Utah law); Colby v. Walker, 86 N.H. 568, 171 A. 774 (1934).
47. 109 Ariz. 308, 309, 509 P.2d 201, 202 (1973).
48. Riexinger v. Ashton Co., 9 Ariz. App. 406, 453 P.2d 235 (1969).
49. *Id.*
50. Whittlesea v. Farmer, 86 Nev. 347, 469 P.2d 57 (1970).
51. Riexinger v. Ashton Co., 9 Ariz. App. 406, 453 P.2d 235 (1969). In *Riexinger*, plaintiff was a passenger in one defendant's automobile. While traveling along a detour being constructed by defendant Ashton, the automobile struck a depression in the road causing injury to plaintiff. Before trial, the defendant driver paid plaintiff $5,000 in consideration for a covenant not to execute. At the close of the trial against both defendants, the jury returned a verdict of $20,000 against the defendant construction com-

ultimate determination of that party's liability.[52]

Finally, the common law rule has been avoided indirectly by allowing the plaintiff to enter a nolle prosequi or a dismissal as to one joint tortfeasor without discharging the others.[53] The rule also has been circumvented indirectly in those instances where there is a voluntary abandonment or dismissal of a claim against an alleged joint tortfeasor who is not in fact at fault. Such a dismissal does not operate to release the actual tortfeasors.[54] This result has been justified on the basis that the common law rule is not actually applicable since the released party was not a joint tortfeasor.[55]

Conclusion

Many courts have abrogated the common law rule that the release of one tortfeasor releases all. Besides inhibiting compromise and settlement, the rule gives refuge to wrongdoers by preventing injured parties from receiving full compensation. Dependent upon ancient formalities which no longer exist and applied in total disregard of the intention of the parties, the justifications for the rule are based on unfounded presumptions and judicial illogic. Even where courts have not abrogated the inveterate rule, various methods of circumventing it have been approved. Relying on the *Restatement (Second) of Torts*, legal commentators, and recent judicial decisions, the Supreme Court of Arizona, in *Adams*, thus followed the preferred position by ruling that the intention of the parties and the extent of compensation paid will govern the effect of a release. As a result, it is no longer necessary to resort to procedural chicanery to avoid the harsh results arising from the release of a joint tortfeasor.

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pany, finding it to be the sole tortfeasor. Plaintiff appealed from the trial court's granting of a motion to have the $5,000 credited to the judgment against the construction company. The Arizona court of appeals affirmed the judgment, stating that the law will try to make the injured party whole again, but any more than that would be beyond the law's purpose.

This result is not contrary to the collateral source rule, since that rule applies only where some gratuitous or preplanned benefit, such as insurance, comes to plaintiff from a source having no connection with the defendant. *Id.* at 408, 453 P.2d at 237.

52. Wardell v. McConnell, 25 Neb. 558, 41 N.W. 548 (1889); Thomas v. Central R.R., 194 Pa. 511, 45 A. 344 (1900). *But see* Tompkins v. Clay St. Hill R.R., 66 Cal. 163, 4 P. 1165 (1884); Brewer v. Casey, 196 Mass. 384, 82 N.E. 45 (1907).

53. Lally v. Cash, 18 Ariz. 574, 164 P. 443 (1917); Callaghan v. Meyers, 89 Ill. 566 (1878); Birkel v. Chandler, 26 Wash. 241, 66 P. 406 (1901).

54. Guarisco v. Pennsylvania Cas. Co., 209 La. 435, 24 So. 2d 678 (1945).

55. *Id.*

B. PARENTAL LIABILITY FOR THE TORTS OF A MINOR CHILD

In *Parsons v. Smithey*,[1] the Supreme Court of Arizona considered for the first time the issue of parental liability for the intentional torts of a minor child. Absent a statute, vicarious liability never has been imposed on the basis of the parental relationship alone.[2] The parents may be held responsible, however, for their own negligence in failing to control their child.[3] This was the principal theory employed in the *Parsons* case.

In the early morning hours of March 26, 1967, Michael Smithey, then 14 years old, left his home and went to the neighboring house of the plaintiffs. Forcing his way through a sliding glass door, he entered Mrs. Parsons' bedroom. Michael began beating Mrs. Parsons over the head with a hammer and demanded that she take off her clothes and lie on the floor. Her screams awakened two daughters who attempted to pull Michael away from their mother. When one of the daughters ran to call the police, Michael followed her out of the bedroom and began beating her with the hammer. He then returned to attack Mrs. Parsons with a knife and a large belt buckle, inflicting numerous injuries and almost completely severing an ear. Finally, the girls offered Michael money and persuaded him to leave. As he left, he threatened to kill them if they called the police.

Mrs. Parsons and her daughters brought suit against Michael and his parents pursuant to Arizona's vicarious liability statute[4] and under

1. 109 Ariz. 49, 504 P.2d 1272 (1973), *vacating* 15 Ariz. App. 412, 489 P.2d 75 (1971).

2. Bieker v. Owens, 234 Ark. 97, 350 S.W.2d 522 (1961); Gissen v. Goodwill, 80 So. 2d 701 (Fla. 1955); Condel v. Savo, 350 Pa. 350, 39 A.2d 51 (1944); W. PROSSER, THE LAW OF TORTS § 123 (4th ed. 1971).

3. W. PROSSER, *supra* note 2, § 123. Other theories have developed which hold a parent responsible for the torts of a child: (a) when the child acts as an agent or servant of the parent; (b) when the parent encourages, directs, or consents to the tortious conduct of his child or ratifies such conduct by accepting its benefits; or, (c) when the parent entrusts the child with a dangerous instrumentality (such as a gun) or with anything the child has shown a propensity to misuse. *Id.* *See generally* Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 893 (1934); Comment, *Liability of Negligent Parents for the Torts of Their Minor Children*, 19 ALA. L. REV. 123 (1966); Comment, *Parental Tort Liability*, 1 LAND & WATER L. REV. 299 (1966).

4. ARIZ. REV. STAT. ANN. § 12-661 (1956), states:

> Any act of malicious or wilful misconduct of a minor which results in any injury to the person or property of another shall be imputed to the parents having custody or control of the minor for all purposes of civil damages, and such parents having custody or control shall be jointly and severally liable with such minor for any actual damages resulting from such malicious or wilful misconduct.
>
> The joint and several liability of one or both parents having custody or

the common law doctrine which holds parents liable for negligently failing to exercise reasonable control over a minor child. Because the statutory remedy provided for maximum damages of only $500 for each tort, plaintiffs relied primarily on their common law claim. The trial court directed a verdict for the plaintiffs on the issue of Michael's liability, but it also directed a verdict for the defendant parents on the issue of their liability for negligently failing to control Michael. The issue of parental liability for negligence turned on the foreseeability of Michael's conduct. The Smitheys had knowledge of prior aggressive and aberrational behavior by Michael. In addition, they had received three professional recommendations that he obtain psychiatric help.[5] Nevertheless, the trial court found as a matter of law that the Smitheys reasonably could not have foreseen that Michael would commit such a violent and vicious act and, therefore, held that they were not liable for the injuries he inflicted. The court of appeals reversed and remanded,[6] but the supreme court affirmed the judgment of the trial court.

This casenote will examine the supreme court's holding for its implications regarding the nature and extent of the prior conduct necessary to establish foreseeability, which in turn activates an affirmative duty of reasonable parental control. The question of what constitutes reasonable care, once a duty of control has been established, also will be considered.

Foreseeability: The General Rule

Parental liability for negligently failing to restrain or discipline a child is predicated upon the parents' special power of control over the conduct of their child. Parents are under a duty to exercise this power reasonably for the protection of others.[7] The parental duty of control

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control of a minor under this section shall not exceed five hundred dollars for each tort of the minor. The liability imposed by this section is an addition to any liability now imposed by law.

5. 109 Ariz. at 52, 504 P.2d at 1275.

6. Parsons v. Smithey, 15 Ariz. App. 412, 489 P.2d 75 (1971). The court of appeals agreed that Michael's conduct was not reasonably foreseeable, but reversed on the ground that denying the plaintiffs access to Michael's juvenile records was error.

7. RESTATEMENT (SECOND) OF TORTS § 316 (1965), provides:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his his child, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.

See also Condel v. Savo, 350 Pa. 350, 39 A.2d 51 (1944); Seaman v. Hockman, 2 Pa. D. & C.2d 663 (C.B. Bucks County 1953); RESTATEMENT (SECOND) OF TORTS § 316, comment *a* at 124 (1965); W. PROSSER, *supra* note 2, § 123.

arises when a child's prior misconduct makes a recurrence of similar behavior reasonably foreseeable to his parents.[8] In addition, the parents' negligence in failing to restrain the child must have been the proximate cause of the child's subsequent tortious conduct.[9] What remains uncertain is the question of what facts are sufficient to establish parental foreseeability.

Until now the courts have generally held that a parental duty of control arises only when a child has previously exhibited to his parents the *specific type* of misbehavior which resulted in the plaintiff's injury.[10] Others have gone further, requiring the *habitual* commission of a particular tort.[11] However the requirement was stated, its practical effect was that parents must have knowledge of at least one prior act of the same specific type before a subsequent act would be deemed foreseeable. This stringent requirement derives from a judicial reluctance to impose liability upon parents for the conduct of their children which they could not reasonably have anticipated and, therefore, prevented.[12] Requiring specific prior acts tends to ensure that parents knew of their child's misbehavior and had an opportunity to prevent its recurrence. While this policy protects the parents of infant tortfeasors, it also discourages litigation, limits liability to relatively extreme cases,[13] and often leaves the victim of the first of the most violent and vicious acts uncompensated.

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8. W. PROSSER, *supra* note 2, § 123.

9. The injury committed by the child must have been the natural and probable consequence of the parents' negligent act, that is, a consequence which, under the surrounding circumstances, might and ought reasonably to have been foreseen as likely to flow from such negligent act.
Condel v. Savo, 350 Pa. 350, 352, 39 A.2d 51, 52 (1944).

10. *E.g.*, Muma v. Brown, 1 Mich. App. 373, 136 N.W.2d 696 (1965), *aff'd*, 378 Mich. 637, 148 N.W.2d 760 (1967); National Dairy Prods. Corp. v. Freschi, 393 S.W.2d 48 (Mo. Ct. App. 1965); Bocock v. Rose, 213 Tenn. 195, 373 S.W.2d 441 (1963).

11. *E.g.*, Ryley v. Lafferty, 45 F.2d 641 (D. Idaho 1930) (complaint was found to state a cause of action against parents whose son injured another child where parents knew that their son habitually beat and abused smaller boys); Martin v. Barrett, 120 Cal. App. 2d 625, 261 P.2d 551 (Ct. App. 1953) (complaint failed to state a cause of action because it did not allege a specific known course of misconduct by the minor involving his habitual, intentional, and specific wrongful acts against other parties); Norton v. Payne, 154 Wash. 241, 281 P. 991 (1929) (parents who knew of their daughter's habit of striking smaller children in the face with sticks held liable for injuries inflicted when she hit another child in the eye with a stick).

12. Capps v. Carpenter, 129 Kan. 462, 289 P. 655 (1930). As Dean Prosser remarked, "[I]t would be extending the hardships of harassed and exasperated parents too far to hold them liable for general incorrigibility, a bad education and upbringing, or the fact that the child turns out to have a nasty disposition." W. PROSSER, *supra* note 2, § 123.

13. For example, in Gissen v. Goodwill, 80 So. 2d 701 (Fla. 1955), the plaintiff's complaint alleged that the parents had prior knowledge of aggressive acts committed by their daughter about the premises of the hotel where they were guests. These acts included striking and damaging hotel furnishings and striking guests and employees of the hotel. In this action by a hotel employee whose finger was severed when the child slammed a door on his hand, the court held that the complaint failed to state a cause of action because it did not allege that the child endangered others by habitually slamming doors.

Deploring the latter result,[14] the *Parsons* court recognized that there are some instances, short of a child's habitual commission of identical injurious acts, where parents would be under a duty to restrain or control their child. While the language of the opinion is somewhat ambiguous, the court apparently intended that foreseeability may now be predicated upon parental knowledge of a child's tendency or predisposition toward the commission of a particular type of act.[15] Moreover, all relevant evidence—not just evidence of prior acts similar or identical to that complained of—will be admissible to demonstrate a child's *propensity* toward a certain type of harmful conduct and, therefore, to establish foreseeability.[16] Thus, the court has enunciated a new, less rigorous standard of foreseeability. The ultimate disposition of the *Parsons* case, however, indicates that the new standard will be applied strictly. Although substantial evidence was offered in an attempt to prove that reasonable parents should have anticipated Michael's conduct, the supreme court, like the trial court, held as a matter of law that the attack was not reasonably foreseeable.

The evidence admitted at the trial to show Michael's propensity for aggressive and violent acts included proof of two prior unprovoked assaults upon females. When Michael was 12 years old, he accosted a stranger on the street and told her to take off her clothes. When she refused, he threw a rock toward her. Later in the same year, Michael followed a classmate after school and forced his way into her home before proceeding to "shove her around." The evidence established that Michael's parents were aware of these incidents. They also knew that his behavior caused problems at school because he aggressively "poked and pummeled" other children and acted as if he "hated the world." Moreover, as noted, the evidence revealed that in the 5-year period preceding the assaults on the Parsons, Michael's parents had received three separate professional recommendations that he receive psychiatric care.[17]

14. 109 Ariz. at 54, 504 P.2d at 1277.

15. *Id.* at 53, 504 P.2d at 1276.

16. *Id.* at 53-54, 504 P.2d at 1276-77. The court cited Reida v. Lund, 18 Cal. App. 3d 698, 96 Cal. Rptr. 102 (Ct. App. 1971), in support of this position. In *Reida,* the plaintiffs had been injured when the defendants' son stationed himself on a hill overlooking a highway and shot at passing automobiles. When the police arrived, the boy shot himself. Plaintiffs offered the testimony of a psychologist as evidence of the parents' knowledge of the boy's violent and irrational disposition. The psychologist contended that the symptoms of the boy's mental disorder must have been apparent to the parents. A dismissal of the case was sustained because the mere statements of a psychologist who had never examined the boy were thought insufficient to prove that the parents were in fact aware of any symptoms. The court of appeals indicated, however, that the psychologist's statement could have been buttressed by statements of teachers, doctors, fellow students, friends, acquaintances, and neighbors of the boy, and this evidence might have been sufficient to create a submissible issue of fact. *Id.* at 703, 96 Cal. Rptr. at 104.

17. Additional evidence of foreseeability was rejected by the trial court. This evi-

In light of both the foregoing evidence and the court's pronouncement that many types of evidence other than similar or identical prior acts should be admissible to demonstrate a child's tendency toward tortious conduct, the court's approval of the directed verdict suggests that the new standard of foreseeability will be strictly applied. Clearly, the evidence did not establish Michael's repeated commission of violent assaults. Yet his prior acts in general, and the rock-throwing incident in particular, differ only in degree, and not in kind, from the assault upon Mrs. Parsons. Perhaps a great difference in degree should be sufficient to preclude foreseeability and thus insulate parents from liability. If, however, such evidence as presented in this case tending to show Michael's propensity for physically assaulting others is insufficient as a matter of law to put parents on notice of the dangerous proclivities of their children and to create an affirmative duty to control them, it is unclear precisely what evidence will be required. While a showing of habitual conduct no longer may be necessary, it is clear that a strong case will be required to establish foreseeability. Thus, while the *Parsons* court has formulated a new, more liberal standard of foreseeability, its strict application of that standard may divest the new rule of much practical significance.

What Constitutes Reasonable Care?

The parents' duty to exercise reasonable care to control their child arises only when the child's prior conduct makes future injury to others foreseeable.[18] Since the plaintiffs in *Parsons* failed to prove the foreseeability needed to establish a duty of control, parental inaction was not an issue considered on appeal.[19] Those few cases discussing the reasonableness of parental attempts to restrain or control a minor child hold that to do nothing is clearly unreasonable.[20] Beyond this unsur-

dence included Michael's school records documenting a meeting in which the Smitheys were encouraged by Michael's school counselor to obtain psychiatric help for Michael. Recorded comments by Michael's teachers concerning his aggressive behavior also were rejected, as were police records revealing, among other things, Michael's two arrests for arson at the age of 8 and 11. 109 Ariz. at 52, 504 P.2d at 1275. The supreme court held that this evidence should properly have been admitted, as should "[a]ll evidence which indicates that it should have been 'readily apparent' to his parents that Michael's disposition was such that he had a propensity to commit violent and vicious acts . . . ." *Id.* at 53-54, 504 P.2d at 1276-77. The court noted, however, that even if this evidence had been admitted, it still would have been insufficient to send the case to the jury on the issue of foreseeability. *Id.* at 54, 504 P.2d at 1277.

18. *See* cases cited note 10 *supra.*

19. Their efforts at controlling Michael might have been at issue if Michael had committed an assault identical to the one in which he accosted a woman on the street and threw rocks at her after she refused to remove her clothes. If Michael had duplicated his earlier act but succeeded in injuring someone with a rock, arguably the court would have reached a different conclusion as to either the existence of a parental duty of control or the reasonableness of the Smitheys' failure to restrain, correct, or seek help for Michael.

20. Bieker v. Owens, 234 Ark. 97, 99, 350 S.W.2d 522, 524 (1961). In *Bieker*, the

prising fact, precisely what will be required of parents in the exercise of reasonable care is uncertain. In a Massachusetts case, the court held the evidence insufficient to prove that the defendants' minor son had a definite propensity to misuse fireworks and, therefore, found no duty of parental control.[21] The court noted, however, that when the boy had previously misused fireworks, his father ordered him to retire to a more suitable place for such activities and cautioned him several times to be careful. Thus, the court intimated that even had there been sufficient foreseeability to engender a duty of control, the father nevertheless had exercised the reasonable care required to fulfill that duty. Considering a similar issue, a New Jersey court implied that a mother's knowledge of her child's previous throwing of stones and other objects at playmates gave rise to a duty to restrain or discipline the child.[22] The court sustained a directed verdict for the parents, however, upon a showing that the mother had reprimanded, warned, and punished the child in response to his earlier misconduct. In short, once a duty of control has arisen, a parent must make reasonable efforts to discharge that duty. While the measures need not be effective, it is nonetheless clear that some demonstrable attempt at control is required.

What constitutes reasonable care naturally will vary with the circumstances of each particular case. While there are no decisions on point, it seems logical that the age and maturity of the child, his intelligence, his psychiatric condition, and the nature and severity of any prior tortious acts would be among the determining factors. In *Parsons*, the plaintiffs urged that reasonable care under the circumstances would have been to make some demonstrable effort to restrain or discipline Michael, or at least to secure psychiatric help. The court implicitly rejected the notion that mere recommendations to seek psychiatric help create a duty to do so.[23] Yet it would seem that in some cases

minor defendants' prior acts were confined to assaulting and injuring, with their fists, younger boys. When they subsequently ran another boy's automobile off the road, dragged him from the car, and then beat and kicked him, the court found that the complaint stated a claim against the parents. The court's holding turned not on the foreseeability of the instant acts, but rather on the parents' failure to exercise any control over their sons after learning of their prior conduct. In Singer v. Marx, 144 Cal. App. 2d 637, 301 P.2d 440 (Ct. App. 1956), the young defendant had engaged for some months in the practice of throwing rocks at others prior to hurling the rock which injured the plaintiff. The court held that a jury question was presented as to the liability of the boy's mother who, knowing of her child's dangerous propensities, failed to administer effective discipline to control his behavior. *See also* Caldwell v. Zaher, 344 Mass. 590, 183 N.E.2d 706 (1962); Condel v. Savo, 350 Pa. 350, 39 A.2d 51 (1944); Norton v. Payne, 154 Wash. 241, 281 P. 991 (1929).

21. DePasquale v. Dello Russo, 349 Mass. 655, 212 N.E.2d 237 (1965).

22. Zuckerbrod v. Burch, 88 N.J. Super. 1, 210 A.2d 425 (1965).

23. Although the three professionals who had recommended psychiatric care for Michael testified at the trial that they could have anticipated his tortious conduct, none of the three communicated their apprehension to the Smitheys. 109 Ariz. at 54, 504

such treatment clearly would be required by the severity of a child's mental or emotional disorder. A jury, if it had been permitted to do so, might have found that a reasonable parent would have secured psychiatric care for Michael. Perhaps it also would have found that merely taking Michael to a psychiatrist would have been insufficient in itself.[24]

Ultimately, the question of reasonableness is one for the trier of fact. Unfortunately, the inquiry will be after the fact—not parents wondering what they should do, but a jury determining what they should have done. The current paucity of cases on this issue offers little guidance for predicting what will constitute reasonable care in any particular case.

Conclusion

The *Parsons* court undoubtedly was influenced by the difficult policy considerations underlying the issue of parental liability for the torts of a minor child. On the one hand, courts are universally reluctant to make parents suffer the consequences of the misconduct of their offspring except in those instances where the child's prior tendencies were pronounced and his subsequent tort was readily foreseeable. At the same time, the courts necessarily are concerned for the innocent victims of such tortious conduct. They recognize that parents are in a unique position to guide, train, and discipline their children. Indeed, if the task of socializing children is not to devolve upon society at large, it must remain the responsibility of individual parents. The problem for the courts is discerning the point at which parents' moral and social responsibilities become legal responsibilities. These conflicting policy considerations are a pervasive, often tacit undercurrent influencing all the decisions regarding parental liability.

The outcome of the *Parsons* case is not remarkable when compared with the numerous cases which have found a parental duty to exist only when a child has repeatedly committed a specific tort. The result is disappointing, however, in light of the court's announce-

P.2d at 1277. In mentioning this point, the court left open the question whether the direct communication of this possibility to the Smitheys would have affected either the foreseeability of Michael's act or the reasonableness of his parents' inaction.

24. The RESTATEMENT (SECOND) OF TORTS § 316 (1965), quoted at note 6 *supra*, provides that a parent must have the "ability to control" his child, as well as knowledge of the need to do so. Arguably, because an emotional or psychiatric disorder such as Michael's would render a parent unable to control his child, parental liability could not arise from the child's misconduct. *See id.*, comment *b* at 124. Neither the case law nor the comments to the *Restatement* have attempted to define specifically what is meant by the phrase "ability to control." It is likely, however, that rather than relieving the parents of liability, a child's psychiatric condition will instead increase what parental efforts will be sufficient to constitute reasonable care.

ment of a more liberal and enlightened standard of foreseeability. Ultimately, the outcome in *Parsons* may be more significant than the new rule enunciated by the court. By approving the trial court's directed verdict, the Arizona supreme court may have been indicating that, despite its formulation of a new standard of foreseeability, it will apply that standard cautiously and require a strict showing of foreseeability before holding parents accountable for the torts of their children.