CONTENTS

ARIZONA APPELLATE DECISIONS 1972-73

For the past 5 years *Arizona Law Review* has presented the "Arizona Note," a review of significant cases decided by the Supreme Court of Arizona during the previous year. Written by first year students as part of the *Review's* candidacy program these case commentaries have provided students and members of the bar alike with critical analyses of developments in Arizona law. The scope of this sixth "Arizona Note" has been expanded to include important decisions of the Arizona Court of Appeals. This expanded format and the continued excellence of the student commentators has resulted in the following case commentaries. We are confident they will serve you well.

JOHN F. MUNGER, *Arizona Note Editor*

I. CIVIL PROCEDURE

A. PERSONAL JURISDICTION AND INTERSTATE CONTRACT TRANSACTIONS

The increasing mobility of American society has been accompanied by an expansion of industrial and commercial operations, necessitating that businesses reach beyond their own territories to sell their products and solicit prospective workers and materials. Furthermore, the telephone, media advertising and the mails have enabled corporate agents to avoid personal travel to business related areas. Unfortunately, the law of personal jurisdiction has not kept pace with the dynamic changes in our society, and the remnants of *Pennoyer v. Neff*[1] and its jurisdictional requirement of physical control over parties has often deprived courts of jurisdiction in legal actions where the defendant did not physically enter the jurisdiction.

The case of *Molybdenum Corp. of America v. Superior Court*,[2] presented the Arizona Court of Appeals with the issue of whether consummation of a single employment contract within the state provided sufficient minimum contacts to permit the exercise of jurisdiction over a nonresident corporation. Specifically, the court was faced with the problem of deciding whether Rule 4(e)(2) of the *Arizona Rules of Civil Procedure*[3] could be applied to vest the trial court with jurisdiction. Rule 4(e)(2), Arizona's "long-arm" statute, provides for service of process by registered mail or direct service out of state: "When the defendant . . . is a person, partnership, corporation or unincorporated association subject to suit in a common name which has caused an event to occur in the state . . . ."[4]

The facts giving rise to the decision are by no means unique. The court of appeals accepted as undisputed that: (a) the defendant was a nonresident corporation; (b) the plaintiff was a resident of Arizona; (c) the defendant had written to plaintiff from New Mexico and offered him employment in New Mexico; (d) the plaintiff had accepted the job offer by letter mailed in Arizona; (e) the defendant corporation had phoned from New Mexico and informed the plaintiff

1. 95 U.S. 714 (1877).
2. 17 Ariz. App. 354, 498 P.2d 166 (1972).
3. ARIZ. R. CIV. P. 4(e)(2).
4. *Id.*

in Arizona that defendant did not intend to perform in accordance with its original offer.[5] Following the defendant's apparent breach of contract, the plaintiff brought suit in Arizona. The defendant moved to dismiss, contending that no personal jurisdiction had been acquired, but the motion was denied. Subsequently, defendant filed a special action in the court of appeals to obtain relief from the order denying defendant's motion to dismiss.[6]

Initially, the court of appeals found that Rule 4(e)(2) was potentially applicable to the facts, holding that the phrase "caused an event to occur" was intended to include contract claims.[7] The trial court, however, was directed to grant defendant's motion to dismiss for lack of personal jurisdiction. In support of the decision, Judge Howard, writing for a unanimous court, stated that an investigation of prior cases had failed to uncover any case where the nonresident's contact with the state was so "miniscule" as in the subject case.[8] The opinion emphasized that the contract involved in the litigation had no substantial connection with the state. The mere acceptance of the defendant's offer within this state failed to establish a sufficient nexus with the state to satisfy the minimum contacts requirement.[9] The court noted several contract cases which had allowed jurisdiction, but distinguished them on the ground that in each there had been some activity within the borders of the forum state, either before or after the execution of the contract.[10]

---

5. 17 Ariz. App. at 355, 498 P.2d at 167.

6. The special action in Arizona is a uniform procedure for writs of certiorari, mandamus and prohibition. ARIZ. R.P. SPECIAL ACTIONS. Granting a petition for special action is a serious act of intervention by an appellate court; accordingly, intervention is a matter of discretion and a writ from the higher court is granted or withheld according to the circumstances of the case by the court to which the application is made. *See* Industrial Comm'n v. Superior Court, 5 Ariz. App. 100, 423 P.2d 375 (1967).

7. 17 Ariz. App. at 355, 498 P.2d at 167.

8. *Id.* at 356, 498 P.2d at 168.

9. *Id.*

10. *Id., citing* Raymond E. Danto, Assocs. v. Arthur D. Little, Inc., 316 F. Supp. 1350 (E.D. Mich. 1970); Maryland Nat'l Bank v. Shaffer Stores Co., 240 F. Supp. 777 (D. Md. 1965); Executive Properties, Inc. v. Sherman, 223 F. Supp. 1011 (D. Md. 1963); Knight v. District Court, 162 Colo. 14, 424 P.2d 110 (1967); Compania de Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955); Western Sav. & Loan Ass'n v. Harris, 283 Minn. 419, 168 N.W.2d 498 (1969); Goldman v. Parkland of Dallas, Inc., 277 N.C. 233, 176 S.E.2d 784 (1970); Simms v. Hobbs, 411 P.2d 503 (Okla. 1966).

The cases above, cited by the court as typical examples of the requirement of either some preliminary or subsequent activity to the execution of the contract to satisfy "minimum contacts", do not fully support the court's contention. The cases cited were either concerned with statutes requiring more activity than Arizona's more liberal "long-arm" requires, or the question of what constituted the necessary minimum contact was avoided by the numerous contacts which the defendant had established with the state. In the case of *Western Savings*, the court did not mention any subsequent activity within the forum state and it would appear that the defendant's physical presence within the state at the time of the execution of the promissory note was determinative of the reasonableness of exercising jurisdiction.

The reference in *Molybdenum* to the lack of substantial connection with the forum state illustrates the tendency of Arizona's courts to base personal jurisdiction on a quantitative measure of activity. This analysis will attempt to demonstrate that a determinant such as substantial connection cannot be applied consistently and that its use as a standard for resolving jurisdictional questions, particularly where a single contract transaction is involved, is entirely inadequate. A four-part investigation will be employed. First, the elements of minimum contacts and fair play and substantial justice, constitutionally required in any exercise of jurisdiction, will be presented to illustrate the multiplicity of factors a court must consider. Second, the peculiar nature of contracts will be examined to support the premise that interstate contract transactions require special consideration in any due process balancing test. Third, various factors other courts have deemed significant when questioning the exercise of jurisdiction will be surveyed. Finally, the standard promulgated in *Molybdenum* will be reexamined.

Minimum Contacts and Due Process

With regard to jurisdiction over nonresident defendants, *International Shoe Co. v. Washington*[11] is the landmark case which defines the standard necessary to satisfy due process. The Court set forth a two-pronged test. The first requirement of due process was that there must be some minimum contact with the forum state which results from an affirmative act of the defendant.[12] Secondly, the maintenance of the suit must not offend traditional notions of fair play and substantial justice.[13]

Unlike the *Molybdenum* court, the *International Shoe* Court defined the nature of minimum contacts qualitatively. Specifically rejecting the defendant's contention that its activities in the forum state were insubstantial, the Supreme Court noted that the question of minimum contacts cannot be answered by any quantitative test. "The test is not merely . . . whether the activity . . . is a little more

11. 326 U.S. 310 (1945), *noted in* McBaine, *Jurisdiction Over Foreign Corporations: Actions Arising Out of Acts Done Within the Forum*, 34 CALIF. L. REV. 331 (1946); N.Y.U.L.Q. REV. 442 (1946). *See generally* Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960) [hereinafter cited as *State Court Jurisdiction*]; Note, *Jurisdiction Over Foreign Corporations—An Analysis of Due Process*, 104 U. PA. L. REV. 381 (1955) [hereinafter cited as *An Analysis of Due Process*].

12. 326 U.S. at 316.

13. *Id.*

or a little less."[14] Rather, it must depend upon the quality and nature of the activity in relation to the fairness the due process clause is designed to insure.[15] Thus, *International Shoe* breached the walls surrounding each state which had been erected by the earlier physical presence doctrine[16] and its progeny.[17] The decision allowed a more realistic investigation of actions occurring within the forum state and afforded state legislatures the opportunity to expand the range of service of process.

Nevertheless, some states in extending the jurisdictional reach of their courts enacted "long-arm" statutes which demand more activity than the minimum contacts test of *International Shoe* seems to require. In addition, the courts have often added their own limitations. "Doing business" statutes, for example, have been interpreted as requiring a continuous association between the nonresident defendant and the state.[18] Similarly, statutes referring to the "transaction of any business" within the state appear to allow jurisdiction for a single transaction. Courts in states with such statutes, however, have often required either preliminary or subsequent activity, or physical presence within the forum state to establish the requisite contact.[19]

On the other hand, some states have enacted statutes or rules to assure that their courts will only be restricted by Federal Constitutional limitations.[20] Rule 4(e)(2) of the *Arizona Rules of Civil Procedure* manifests such an intention, and the Supreme Court of Arizona has indicated that the rule should be given a liberal application.[21]

14. *Id.* at 319. The misdirection of a quantitative test was underscored by dicta to the effect that even some single or occasional acts, because of the nature, quality and circumstances of their commission, may be deemed sufficient to render a corporation liable to suit. *Id.* at 318.

15. *Id.*

16. Pennoyer v. Neff, 95 U.S. 714 (1877).

17. *See* 2 J. MOORE, FEDERAL PRACTICE ¶ 4.25, at 1145 (2d ed. 1953); *State Court Jurisdiction, supra* note 11, at 919-22.

18. *See* Green v. Chicago, Burlington & Quincy Ry. Co., 205 U.S. 530, 534 (1907) (a pre-*International Shoe* decision, which has been cited as authority for the proposition that mere solicitation within the state does not constitute doing business); Rosenburg v. Weir, 154 F. Supp. 6 (D. Md. 1957); Compania de Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955). *See generally* 2 J. MOORE, FEDERAL PRACTICE ¶ 4.25[2.-2], at 1150 (2d ed. 1955).

19. *See* Knight v. District Court, 162 Colo. 14, 424 P.2d 110 (1967) (jurisdiction upheld though contract was executed by defendants outside of the forum state, since defendants had been physically present in the state to negotiate terms of the promissory note in question); Grobark v. Addo Mach. Co., 16 Ill. 2d 426, 158 N.E.2d 73 (1959) (no jurisdiction because the defendant corporation was not "transacting business" within the forum state); Saletko v. Willys Motors, Inc., 36 Ill. App. 2d 7, 183 N.E.2d 569 (1962) (no jurisdiction even though defendant took the initiative; contract was negotiated by telephone and accepted by mail); Kramer v. Vogl, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966) (no jurisdiction when the only solicitation within the forum state was by out-of-state mailing).

20. *See* N.J.C. PRAC. R. 4:4-4(i).

21. Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966), *noted in* 8 ARIZ. L. REV. 356 (1967).

This approach, which rejects a quantitative analysis, arguably produces more equitable results. Moreover, such a test is more consistent with the spirit of the minimum contacts test, since the minimum contacts test was not meant to be a test of set rules, but a process of reasoning seeking a fair result in each case.[22]

The element of fairness is the second step in the due process analysis initiated by *International Shoe.* Once the requisite minimal contact with the forum has been established, a court must then determine the fairness of maintaining the suit. The *International Shoe* court avoided summarizing the criteria necessary for a "fairness" determination. The opinion, however, focused upon the defendant and suggested that an estimate of the inconveniences of defending in a distant forum was relevant to any "fair play" consideration.[23]

Since that decision, courts have stressed the need for balancing the interests of both parties. In *Phillips v. Anchor Hocking Glass Corp.*, the Supreme Court of Arizona expressly endorsed this direction in the law of jurisdiction,[24] citing authorities who have suggested various features essential to a fairness evaluation.[25] Nonetheless, the court emphasized particular factors[26] noting:

> that fair play and substantial justice are satisfied if (1) the cause of action involves local contacts which make it reasonably desirable from plaintiff's point of view that the cause of action be tried at the selected forum, (2) the defendant has sufficient causal responsibility for the presence of the local contacts in the forum state to permit the court to conclude that he has by his own volition subjected himself to answering for them there and (3) relevant public interests are served, or not disserved by allowing the cause to be determined at that forum.[27]

The *Phillips* court also stated that in judging the fairness of exercising jurisdiction over a nonresident manufacturer whose product has injured a resident plaintiff, lower courts should consider the nature

22. Note, *In Personam Jurisdiction Over Foreign Corporations: An Interest Balancing Test*, 20 U. FLA. L. REV. 33, 53 (1967).

23. 326 U.S. at 317.

24. 100 Ariz. at 255, 413 P.2d at 734. "The important trend in our notions of fairness has been a shift from emphasizing what is fair to the defendant to a consideration of what is fair to both parties." *Id.*

25. *Id.* at 255-56, 413 P.2d at 734-35, *citing* Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695 (1959); Leflar, *The Converging Limits of State Jurisdictional Powers*, 9 J. PUB. L. 282 (1960); Kurland, *supra* note 11.

26. 100 Ariz. at 255-56, 413 P.2d at 734-35 (the court adopted these factors from Leflar, *supra* note 25, at 285-86).

27. 100 Ariz. at 255-56, 413 P.2d at 734-35. Some courts have pointed to regulatory statutes as demonstrative of such a state interest. McGee v. Int'l Life Ins., 355 U.S. 220 (1957) (insurance regulation); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950) (life and health insurance regulation); Hess v. Pawloski, 274 U.S. 352 (1927) (nonresident motor vehicle regulation). *Contra*, Cleary, *The Length of the Long Arm*, 9 J. PUB. L. 293, 297 (1960).

and size of the corporation's business, the economic independence of the plaintiff and the nature of the cause of action, including the applicable law and practical matters of the trial.[28] The possibility of serious economic injury from breaches of contract suggests that these additional considerations should not be restricted to actions in tort.[29]

Legal authorities are constantly offering additional criteria of what constitutes fairness to be reviewed,[30] adding to the Herculean task of weighing all factors. Some commentators propose a balancing of the inconveniences to the defendant against various interests of the forum state.[31] The expense of hiring local counsel and the burden of transporting witnesses and evidence into the claimant's jurisdiction must be considered a burden to the nonresident defendant which, if excessive, would justify denial of jurisdiction by the forum court.[32] On the other hand, the plaintiff's forum would appear appropriate in cases where the defendant's activities may subject residents to physical or economic harm.[33] In addition, the expense to the plaintiff in traveling to an alternate forum, when excessive, must be considered as a burden to the plaintiff which should encourage plaintiff's court to accept jurisdiction. Finally, where both parties would be burdened by being forced to litigate in the other's courts, the courts should consider the economic disparity between the parties.[34] This factor would encourage adoption of jurisdiction by the courts of the state in which any private, noninstitutional litigants reside.

Despite the availability of these elements, a survey of relevant factors of a fairness test should not be mistaken for a recommended checklist for judicial examinations of jurisdiction. Instead, the multiplicity of suggested criteria should serve to illustrate the importance of considering all variables, each varying in importance from case to case.[35]

The liberal exercise of jurisdiction since *International Shoe*, while demanding more analysis than previous quantitative standards, realistically recognizes the extent to which duties and obligations to a res-

28. 100 Ariz. at 260, 413 P.2d at 738.
29. *See* Compania de Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955).
30. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, U. ILL. L.F., 533, 577 (1963); *An Analysis of Due Process, supra* note 11, at 383-84.
31. Currie, *supra* note 30, at 577; *An Analysis of Due Process, supra* note 11, at 390.
32. Currie, *supra* note 30, at 577; *An Analysis of Due Process, supra* note 11, at 384.
33. *An Analysis of Due Process, supra* note 11, at 388.
34. *Id.* at 383.
35. *But see* "Garnishment and the Validity of Quasi In Rem Jurisdiction," 14 ARIZ. L. REV. 409, 421-22 (1972).

ident may accrue without a nonresident physically entering the state. The increased opportunity to obtain jurisdiction over nonresident defendants requires the court to use its judgment to insure that the exercise of jurisdiction is not abused. Only by balancing all factors, thereby avoiding the tendency to confine the investigation to select areas, can the court guarantee a fair exercise of jurisdiction to both parties.

Contracts and Due Process

As the previous discussion illustrates, any attempt at formulating a single blueprint for establishing what constitutes minimum contacts is misdirected. It is particularly fruitless in contract suits, for in such suits the establishment of minimum contacts is often obscured by a breach of contract which occurs prior to the beginning of any performance by the parties. A breach of contract, unlike tortious conduct, is often manifested by a failure to act. Thus, it is more difficult to say that a meaningful act occurred or an injury resulted in any particular place.[36] The related physical activity being so negligible, the court's resolution of the question of exercising jurisdiction should focus on the parties involved.

Despite the propriety of the case by case approach, however, some general principles can be discerned. When partial or complete performance has already taken place, the court is provided with tangible evidence to decide the appropriateness of a particular forum. Often, the performance itself can satisfy the minimum contacts requirement by presenting elements which establish the convenience of a specific forum, rendering that state court a fair and reasonable location for the suit. If the suit alleges defective performance, for example, the witnesses and evidence will probably be in the state of performance.[37] Likewise, usages and customs are often important in construing a contract or determining matters related to its performance; thus, a court more familiar with a particular custom or usage may deserve priority. Requiring a court to select the proper forum can, of course, be avoided. In contract actions, the appropriate forum may be dictated by the parties' agreement. Nevertheless, if the agreement is silent as to the forum where the contract can be litigated, the court must decide the appropriateness of a particular forum. A survey of leading cases involving single contract transactions indicates particular facts which courts have judged of primary importance when

36. *State Court Jurisdiction, supra* note 11, at 1003-04.
37. *Id.* at 926.

addressing questions of minimum contacts and fair play and substantial justice.

The prevailing view requires some activity within the forum state other than the consummation of the contract to satisfy the minimum contacts requirement. Prior negotiations within the state often supply the requisite activity to promote jurisdiction.[38] It has been clear since *McGee v. International Life Insurance Co.*,[39] however, that the defendant's physical presence within the state is not necessary: "Today many commercial transactions touch two or more states and may involve parties separated by a full continent. With this increasing nationalization of commerce has come a greater increase in the amount of business conducted by mail across state lines."[40]

Some jurisdictions still maintain that their "long-arm" statutes require the defendant or his agent to have been physically present within the state.[41] This position, however, reflects a lack of attention by the courts to the changing nature of business dealings.[42] Such an insistence on *presence* echoes the power principle of *Pennoyer*. There is no reason to assert that liabilities and the resulting obligation to defend are any more worthy of adjudication in the plaintiff's home state simply because the defendant has physically crossed the boundaries of the state.

The most widely accepted instances in which jurisdiction is granted arise when some part of the contract performance has taken place within the state. The decision in *Molybdenum* mirrors this attitude. The emphasis is on the substantial connection of the contract with the state, not the activity of the defendant.[43] Illustrative of this reasoning is *Goldman v. Parkland of Dallas, Inc.*,[44] in which jurisdiction was upheld in a fact situation essentially similar to that of *Molybdenum*. After mailing the acceptance, however, the plaintiff in *Goldman* entered into performance of the contract of employment within

38. *See* Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951 (2d Cir. 1967) (court upheld jurisdiction when preliminary negotiations were conducted in the forum state by one of the high-level personnel of the defendant corporation over a period of two months); Compania de Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955) (jurisdiction upheld since defendant corporation's representatives had come to forum state to negotiate, deliver check for escrow fund and inspect the subject of the contract).

39. 355 U.S. 220 (1957) (nonresident insurance company subjected to jurisdiction though interstate mail delivery of policy and payment of premiums).

40. *Id.* at 222-23.

41. *See* Grobark v. Addo Mach. Co., 18 Ill. App. 2d 10, 151 N.E.2d 425 (1958), *aff'd*, 16 Ill. 2d 426, 158 N.E.2d 73 (1959); Kropp Forge Co. v. Jawitz, 37 Ill. App. 2d 475, 186 N.E.2d 76 (1962).

42. *See* text accompanying notes 39-40 *supra*.

43. *See* Maryland Nat'l Bank v. Shaffer Stores Co., 240 F. Supp. 777 (D. Md. 1965).

44. 277 N.C. 223, 176 S.E.2d 784 (1970). *Accord*, Simms v. Hobbs, 411 P.2d 503 (Okla. 1966).

the forum state 2 weeks prior to defendant's breach. To allow jurisdiction in those instances wherein performance has already begun before the breach, but to deny jurisdiction when the breach has occurred prior to any performance of the contract within the state, places unwarranted emphasis upon when the breach occurs. Emphasizing subsequent performance, rather than the relation of the contract with the state, is a return to a quantitative standard rejected in *International Shoe*. Economic harm is not necessarily related to the chronological position of the breach. An earlier repudiation of the contract would seem as culpable as a breach after part performance, and deserving of adjudication within plaintiff's selected forum.

Statutes which specifically deal with a single transaction appear to conclude that the minimum contacts requirement is satisfied in such isolated instances even though a contract is not made in the state, if part of the agreement is to be performed there.[45] This is an expansion of *International Shoe*, which had considered only the present and past activity of the foreign corporation. The fairness of maintaining an action when minimum contacts limitations are so interpreted is not wholly unfounded. It seems fair to require a defendant deriving profit from activities connected with the forum state to allocate, as a cost of doing business, the expense of defending in that state.[46] The fact that the defendant breaches a contract before performance is commenced should not alter the fairness of such a policy. A state may legitimately assert an interest in providing relief to a resident in order to discourage the breach of other contracts between residents and nonresidents.[47]

A minority viewpoint recognizes that the requisite minimum contact may result from the single act of the contract being executed in the state.[48] The *Molybdenum* court specifically rejected such a

45. *State Court Jurisdiction, supra* note 11, at 1004. *See* IOWA CODE ANN. § 617.3 (Supp. 1972); MINN. STAT. ANN. § 303.13 (1969); N.C. GEN. STAT. § 55-145(a) (1965); TEX. REV. CIV. STAT. ANN. art. 2031b(4) (1964); VA. CODE ANN. § 8-81.2 (Interim Supp. 1972); WIS. STAT. ANN. § 262.05(5) (Supp. 1973). *See also* Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, 323 P.2d 437 (1958); Tice v. Wilmington Chem. Corp., 259 Iowa 27, 141 N.W.2d 616 (1966); Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

46. *State Court Jurisdiction, supra* note 11, at 928.

47. *Id.* at 927.

48. Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959). "It seems only fair to permit one who has suffered a wrong at the hands of a resident of a foreign state to sue in his own state irrespective of whether he can show multiple transactions." *Id.* at 553, 99 N.W.2d at 677.

Justice Traynor agrees that when the defendant has elected to deal with the plaintiff, even if only by mail, there is adequate basis for jurisdiction. Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, 860, 323 P.2d 437, 440-41 (1958). Even a single telephone conversation has been held sufficient to allow jurisdiction. Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970) (court characterized the defendant's bidding at an auction over the phone as

liberal standard.[49] The statutes of those states, in which such a liberal exercise of jurisdiction is authorized, are construed as allowing the greatest advantage to the resident offered by due process.[50] Such statutes, however, fail to distinguish those instances where the place of signing is a poor indicator that the state is related to the contract and its performance. The elements of fairness must be especially inspected in such situations, for the state may have only an incidental or secondary connection with the transaction.[51]

This necessary focus upon the fairness of the forum has prompted various legal writers to suggest rather regimented tests for allowing or denying jurisdiction. Where the requisite minimum contact is based on the sole act of executing the contract, Professor Cleary has stated that a contract executed in the forum state by a nonresident defendant should be distinguished from one consummated by the plaintiff-resident. Jurisdiction should be denied in the latter instance, absent other activity within the state causally related to the defendant, since the defendant was not in fact doing business there.[52] Thus, Professor Cleary has measured the fairness of the forum by an element of quantitative activity, rather than an investigation into the position of the parties and their inconvenience in bringing suit within the forum.

Professor Ehrenzweig, cautioning that a test such as Professor Cleary's might result in a suit being tried in an unanticipated forum, has focused on the plaintiff's and defendant's domiciles at the time of the contracting as being most acceptable as forum locations.[53] This would be particularly applicable to *Molybdenum*, where the acceptance was made at the plaintiff's domicile after the defendant initiated the action by his offer, actively soliciting the plaintiff's services. The above suggestions, though in apparent opposition to one another, have centered on different aspects of a single contract transaction. It would be possible, then, to satisfy the criteria of each writer from the facts of a single contract suit. Each authority, however, in introducing

---

a projection of himself into the auction room, far exceeding the simple placing of an order by telephone). *See* 39 FORDHAM U.L. REV. 325 (1970/71).

49. 17 Ariz. App. at 356, 498 P.2d at 168. *See* text accompanying note 9 *supra*.

50. *See* Patrick Ellam Inc. v. Nieves, 41 Misc. 186, 245 N.Y.S.2d 545 (1963).

51. Weisman, *The Georgia Long Arm Statute*, 4 GA. ST. B.J. 13 (1967).

52. Cleary, *supra* note 27, at 300. While Professor Cleary expressly stated that his reference to "doing business" did not necessarily relate to those instances involving systematic or continuing activity, the requirement of the defendant's presence within the forum is reminiscent of cases requiring at the least the "transacting of business." It is doubtful that this standard for fairness is applicable to those cases arising under the more liberal due process statutes involving a single event. *Id.* at 301.

53. "Both are fora which the parties could foresee at the time of the transaction and which, in contrast to the often accidental places of contract and performance, typically bear a close relation to the parties and the applicable law." Ehrenzweig, *Ehrenzweig in Reply*, 9 J. PUB. L. 328, 331 (1960).

standards for measuring the fairness of a particular forum, has established inflexible tests which could choose a forum secondary or unrelated to the transaction, a result that could be avoided by addressing the various factors entertained in *International Shoe* and subsequent decisions.[54]

North Carolina has made a legislative attempt to embody these various criteria for allowing jurisdiction in single contract transactions.[55] North Carolina's "long-arm" statute provides that the execution or performance of the contract supplies a sufficient nexus between the state and the cause of action, while the requirement that the plaintiff be a resident provides the element of state interest in furnishing a means of redress to its citizens.[56] Such a statute, nonetheless, distracts from the need for balancing all pertinent factors in all cases.[57] More positively, it would offer the degree of predictability and uniformity courts and businesses desire, especially given the pressures of an increasingly congested judicial system.

Conclusion

The particular nature of contracts and the possibility of multistate connections of a single transaction necessitates the use of a balancing test to determine if sufficient minimum contacts and fairness exist to warrant an exercise of personal jurisdiction. The decision not to allow jurisdiction in *Molybdenum* was not totally without justification. There were a number of significant factors missing, which, if present, could have favored reaching outside the state to bring the defendant before the court. The contract was not to be performed within the state where the action was sought to be brought.[58] Additionally, the defendant had not anticipated realizing any profit within

54. *See* text accompanying notes 23-35 *supra.*

55. N.C. GEN. STAT. § 55-145(a) (1965): "Every foreign corporation shall be subject to suit in this state, by a resident of this state . . . (1) Out of any contract made in this state or to be performed in this state."

56. *Contra,* Fourth Northwestern Nat'l Bank v. Hilson Indus., 264 Minn. 110, 117 N.W.2d 732 (1962), in which the Minnesota Supreme Court, in denying jurisdiction, stated:

> The only connection with Minnesota in this case, however remote, is the fact that the notes are payable here. This situation arises out of an effort by the nonresident defendant to accommodate plaintiff. Fixing the place of payment at plaintiff's business residence is hardly the kind of commercial benefit to defendant that must be balanced by a countervailing capitulation to jurisdiction under [MINN. STAT. ANN.] § 303.13 [1969].

Id. at 117, 17 N.W.2d at 736. *See also* Currie, *supra* note 30, at 577.

57. Note, *supra* note 22, at 52. "The dangers of bogging down in technical language is avoided by adopting a test that avoids the need for extensive statutory language. . . . This sparseness of statutory language reflects the fact that the minimal contacts test is more than a mechanical application of legal rules or statutory language." *Id.*

58. *See* text accompanying notes 45-47 *supra.*

Arizona. Neither was the alternate forum, adjacent to Arizona, particularly inconvenient to the plaintiff.

Other factors, however, favored rendering the foreign corporation liable to suit in Arizona. The defendant was responsible for the initiation of the subject activity, having solicited the plaintiff's services. In addition, the state had an interest in protecting a resident from possible economic injury. In weighing the inconvenience to the opposing parties, it appears that the foreign corporation could have more easily shouldered the finanicial burden of traveling to the plaintiff's forum.[59] The *Molybdenum* court, however, chose not to divert its attention to a consideration of such criteria,[60] avoiding such an examination by finding that the transaction failed to satisfy the minimum contacts requirement, since it lacked the necessary "substantial connection" with the state.

The problem arising from the *Molybdenum* decision results from the court's directive that minimum contacts are not established unless there is a "substantial connection" with the forum state, thus restricting the liberal exercise of jurisdiction afforded by Rule 4(e)(2). The inflexible standard of "substantial connection" will prevent lower courts from considering the "fairness" of exercising jurisdiction, a central feature of the *International Shoe* decision. Such a mechanical measure for allowing jurisdiction ignores the fact that obligations and liabilities owed to a resident-plaintiff are not necessarily related to a specific amount of contact the defendant has with the forum state.

Admittedly, the standard of "substantial connection" would prove more expedient in deciding matters of personal jurisdiction than a careful investigation of all relevant factors. Nonetheless, the court's interest in creating an applicable standard for the lower courts would be better served by the enactment of a statute relating to contracts, similar to that of North Carolina. While reliance on such a statute is not as comprehensive and equitable as an individual balancing test, it would at least assure a guideline for the courts, sensitive to the transitory nature and factors that are exclusive to a contract suit. Such a resolution would be entirely unnecessary, however, if Rule 4(e)(2) were applied to the full extent authorized by due process.

---

59. Note, *supra* note 22, at 38-39.

> The high cost of distant litigation is an unavoidable expense inherent in an economy composed of corporations with multistate markets and activities. If this cost is inevitable, it should be treated as a normal expense of doing business and thus spread among the people who enjoy the products and services of the defendant corporation. *Id.*

60. While the elements of a fairness test were mentioned, 17 Ariz. App. at 355, 498 P.2d at 167, the court did not pursue an active examination of the factors involved in the test.

Arizona's "long-arm" statute encourages jurisdiction as a result of any act which causes an event to occur within the state. It does not mandate that a court determine whether the defendant's activity has reached the quantitative threshold required by a "doing business" or a "transacting of business" statute. Instead, once the statutory requirement of Rule 4(e)(2) has been fulfilled, the exact magnitude of the activity associated with the forum state should be only one of several meaningful areas scrutinized when weighing the reasonableness and fairness to both parties. In spite of the liberal nature of Arizona's "long-arm" statute, the holding of the court of appeals in *Molybdenum* can be compared to those jurisdictions requiring some physical presence or continuous activity within the state by the defendant. This frustrates the intent of Rule 4(e)(2), and is in opposition to a public policy which recognizes the need for fair adjudication of each and every suit.

B. MULTIPLE PARTY LITIGATION: MOTIONS FOR SUMMARY JUDGMENT AND RES JUDICATA

The problematic relationship between motions for summary judgment and multiple party litigation has undoubtedly presented difficulties for lawyers in analyzing the legal position of clients in relation to all the parties to lawsuits.[1] Indeed, competent representation necessitates not only that counsel know the relevant substantive law, but also that he understand both the utilization and the implications of all the procedural devices that may affect his client's substantive position. Demanding meticulous inquiry beyond the superficial labels of plaintiff and defendant, *Rigney v. Superior Court*[2] reiterates the importance of analyzing the implications of motions for summary judgment in multiple party litigation in terms of the actual legal interrelationships of all the parties.

Rigney was a negligence action, arising out of an automobile accident, in which the plaintiff joined five defendants.[3] Prior to trial,

1. For an extensive general discussion of the scope and characteristics of multiple party litigation as it has developed in the federal courts, see *Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874 (1958). For comprehensive analysis of the background, current use and implications of motions for summary judgment, see 6 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 56, (2d ed. 1972).

2. 17 Ariz. App. 546, 499 P.2d 160 (1972).

3. Rigney was a passenger in a car owned by K & D Construction Co. and driven by Kamrath. The car collided with a vehicle driven by Puckett, injuring Rigney. The accident occurred near a highway construction site that was under the con-

two of the codefendants moved for summary judgment, and when neither the plaintiff nor the other defendants contested the motion, it was granted.[4] Subsequently, one of the remaining codefendants moved for leave to amend his answer to raise two affirmative defenses of contributory negligence, alleging that negligence on the part of the previously successful movants for summary judgment should be imputed to the plaintiff.[5] The motion was granted by the trial court; the plaintiff thereupon filed a petition for special action in the court of appeals, objecting to the trial court's decision.

The plaintiff contended in the special action that the amending defendant had occupied an adversary position vis-á-vis the movants on the motion for summary judgment and was therefore barred from raising the issue of negligence decided by the summary judgment. The Court of Appeals of Arizona agreed with plaintiff's position and held that the issue of the codefendants' negligence decided by the summary judgment was res judicata as to the amending defendant as well as to the plaintiff. The amended answer was therefore ordered to be stricken.[6]

This analysis of *Rigney v. Superior Court* first examines Rule 56 of the *Arizona Rules of Civil Procedure* to determine if the rule itself resolves the issue presented by the case. *Rigney* is then compared with prior Arizona rulings in analogous situations to test its consistency, and similar analysis is made of leading precedents from other jurisdictions. Finally, both the practical and theoretical implications of *Rigney* are discussed.

Application of Rule 56 in Multiple Party Litigation

Rule 56 provides that a defending party may, at any time, move for a summary judgment.[7] Further, a court may grant a summary

trol of the M.M. Sundt Construction Co. Rigney's complaint joined as defendants Puckett, Kamrath, K & D Construction Co., M.M. Sundt Construction Co., and the Arizona Highway Department. *Id.* at 546, 499 P.2d at 160.

4. Kamrath, the driver of the vehicle in which Rigney was riding, and K & D Construction Co., its owner, successfully moved for summary judgment. The judgment contained a Rule 54(b) certificate that rendered the judgment final, and there was no appeal. *Id.* at 547, 499 P.2d at 161.

5. Puckett first claimed that Rigney was involved in a joint venture with Kamrath and K & D Construction Co. and because Kamrath was negligent, that negligence should be imputed to the plaintiff, thereby making her contributorily negligent. This consequence would bar her recovery in Arizona. *See* West v. Soto, 85 Ariz. 255, 261-63, 336 P.2d 153, 157-58 (1959). Puckett's second affirmative defense was that since Rigney later married Kamrath, damages to Rigney after the marriage for lost wages and medical expenses would be community property and therefore Kamrath's negligence should be imputed to Rigney. *See* Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956).

6. 17 Ariz. App. at 548, 499 P.2d at 162. The practical consequence of this ruling was that Puckett, the principal remaining defendant, was barred from asserting his two affirmative defenses of contributory negligence. *See* text & note 5 *supra.*

7. ARIZ. R. CIV. P. 56(b).

judgment against those parties having no cause of action or defense, without granting a motion against parties as to whom an issue of fact exists.[8] This latter principle is supported by Rule 54(b), which provides for the entry of a final judgment as to one or more, but fewer than all, of the parties when multiple parties are involved.[9] Thus, the court of appeals was correct in upholding the procedure of granting the summary judgment in favor of two of the five defendants in the *Rigney* case. A summary judgment operates as a judgment on the merits[10] and is res judicata as to all adverse parties.[11] Rule 56 does not, however, define who are adverse parties for purposes of a motion for summary judgment.

The *Rigney* court squarely faced this problem and decided that if a Rule 56 motion is made by one of several codefendants, the other parties are to be regarded as adverse parties for purposes of the motion and must be given notice of the motion. Having had notice, and thus a chance to litigate the issue, the court held that the codefendant was bound by the court's judgment and could not relitigate the issues settled by the court at the summary judgment hearing.[12] The only difficulty with stating the holding of *Rigney* in these terms is that the court spoke in terms of the parties to the suit at hand, instead of clearly articulating a per se rule. However, an analysis of analogous cases and the meaning of the term adverse parties as contemplated by the operation of a Rule 56 motion strongly suggests that the court's holding can be considered a per se rule that a codefendant is always an adverse party who is entitled to notice whenever another codefendant seeks to escape the suit through a motion for summary judgment.

Analogous Arizona Cases

There is substantial Arizona authority to support the proposition that the adverse character of a party with regard to the doctrine of res judicata is to be determined not by his alignment in the pleadings but rather by his relationship with the other parties as indicated by his interests involved in the case.[13] Three Arizona cases will be ex-

8. Home Sav. Bank v. Bentley, 5 Wis. 2d 19, 92 N.W.2d 377 (1958) (summary judgment could be granted for plaintiff against less than all of defendants against whom relief was sought).

9. ARIZ. R. CIV. P. 54(b). The rule states that when a summary judgment for or against fewer than all parties is granted, the judgment is final "only upon an *express* determination that there is no just reason for delay and upon an *express* direction for the entry of judgment." (emphasis added).

10. 6 J. MOORE, *supra* note 1, at ¶ 56.03.

11. *Id.* at ¶ 56.17[52].

12. 17 Ariz. App. at 548, 549, 499 P.2d at 161, 162.

13. See Chicago, R.I. & P. Ry. Co. v. Schendel, 270 U.S. 611 (1926). "It is

amined: the first is a suit between codefendants to a prior action; the second involves the motion for a directed verdict; and the third illustrates the application of section 82 of the *Restatement of Judgments.*[14]

Ocean Accident & Guarantee Corp. v. United States Fidelity & Guarantee Co.[15] was the offspring of a prior action for workmen's compensation resulting from the death of a service station attendant. The widow had applied to the Industrial Commission of Arizona for compensation. The Commissioner entered an award against both the insurance carrier of the station's operator and the insurer of the oil company that owned the station. United States Fidelity, the parent company's insurer, paid the full amount of the award and subsequently sued the operator's insurance carrier on two alternative theories—indemnification to recover the total amount of the award or contribution for half of what had been paid. Ocean Accident claimed as its defense that it was not liable to the plaintiff. The Supreme Court of Arizona held that the liability of the two carriers had been determined in the original action and could not be relitigated. The trial court's disposition of the case, granting contribution but denying indemnification, was thus affirmed.

The supreme court said that it does not matter whether the parties in a subsequent action were not formally labeled as adversaries in the prior controversy. If they were proper parties to the original action and the issues raised later were actually litigated at that time, the first judgment is res judicata and the issues decided in the original action may not be litigated again.[16]

Kennecott Copper Corp v. McDowell[17] is an application of the above principle to a directed verdict situation. In a wrongful death action, the trial court granted a directed verdict in favor of one of the two codefendants and the jury returned a verdict against the other defendant. Neither the plaintiff nor the losing defendant appealed from the directed verdict. Because they did not, the Arizona supreme

elementary, of course, that, in any judicial proceeding, the arrangement of the parties on the record, so long as they are adverse, or the fact that the party against whom the estoppel is pleaded was an objecting party, is of no consequence. A judgment is as binding upon an unwilling defendant as it is upon a willing plaintiff." *Id.* at 615.

14. The common thread running through these situations that makes them analogous to the summary judgment situation is that in each case, a judgment was rendered for one or more of several codefendants. Such a judgment determines the rights and duties between those codefendants and the plaintiff and that determination becomes res judicata as to all parties.

15. 63 Ariz. 352, 162 P.2d 609 (1945).

16. *Id.* at 358-59, 162 P.2d at 612. "[R]es judicata . . . may arise as between codefendants if they represent adverse interests in a former proceeding as to an issue and such issue was in fact litigated." *Id.* at 359, 162 P.2d at 612, *quoting from* Wright v. Schick, 134 Ohio St. 193, 199, 16 N.E.2d 321, 325 (1938).

17. 100 Ariz. 276, 413 P.2d 749 (1966).

court considered the judgment final and the determination of the successful defendant's lack of liability became res judicata.[18]

The preceeding cases are actually positive statements of the negative rule enunciated in the *Restatement of Judgments*: "The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves."[19] This rule is followed in Arizona[20] and its application is illustrated in *Burrell v. Southern Pacific Co.*[21]

Burrell was a wrongful death action arising from a car-train collision. The personal representative of the deceased auto passenger sued the driver and the railroad. The plaintiff ultimately recovered a judgment against the driver, but the railroad was found not liable. In a subsequent action, the motorist sued the railroad alleging that the collision was due either to the negligence of the railroad or to the maintenance of a nuisance by the railroad. The railroad's defense of res judicata was overruled, the court holding that the motorist and the railroad were not adverse parties in the former action as to issues raised in the record.[22]

The court pointed out that when there are multiple defendants in a suit, each trying to escape liability to the plaintiff by showing that the other was blameworthy, they are presenting evidence merely for the purpose of defending against the plaintiff's claim. Since they are not attempting to adjudicate issues between themselves, they are not adverse parties.[23] It follows that if issues are actually joined between each of the codefendants and the plaintiff and are fully litigated, the rights and liabilities as between the plaintiff and each of the defendants in regard to those issues have been finally determined, and the judgment should be res judicata as to all the parties.

This is the rationale of *Rigney*. The *Rigney* court distinguished *Burrell* observing that the rule enunciated in *Burrell* and explicitly stated in section 82 of the *Restatement of Judgments* is only applicable when the present litigation involves issues that were not litigated between two or more previous parties. In such a case there is no bar to the litigation of those issues because there was no prior determina-

18. *Id.* at 279, 413 P.2d at 751; *accord,* Atchison, T. & S.F. Ry. Co. v. Parr, 96 Ariz. 13, 391 P.2d 575 (1964).
19. RESTATEMENT OF JUDGMENTS § 82 (1942).
20. In the absence of prior Arizona decisions and statutes, Arizona courts have declared that they will follow the RESTATEMENT OF THE LAW whenever it is applicable. Ingalls v. Neidlinger, 70 Ariz. 40, 46, 216 P.2d 387, 390 (1950); State *ex rel.* Indus. Comm'n v. Smith, 6 Ariz. App. 261, 263, 431 P.2d 902, 904 (1967).
21. 13 Ariz. App. 107, 474 P.2d 466 (1970).
22. *Id.* at 111, 474 P.2d at 470.
23. *Id.* at 110, 474 P.2d at 469.

tion of them. But when the pending litigation involves issues already decided between parties the relitigation of those issues is barred by the doctrine of res judicata.

Cases from Other Jurisdictions

The holding in *Rigney* is supported by decisions from other jurisdictions. In *Landers v. Mays*,[24] an automobile accident negligence action, two of the three codefendants moved for and were granted summary judgments. The Court of Appeals of Ohio held that when a motion for summary judgment is made by one of several codefendants, the other codefendants who have interests adverse to the granting of the motion are entitled to notice of the motion.[25] This ruling formed the basis of the *Rigney* decision.[26] Although the Ohio court warned against indiscriminate use of summary judgments in favor of fewer than all defendants in a negligence action, it recognized that negligence codefendants are often placed in the position of adverse parties.[27]

An analogous decision involving a directed verdict situation is skillfully discussed in *Newark Electronics Corp. v. City of Chicago*.[28] In this case, Newark Electronics was damaged when a broken water pipe flooded its basement. Newark Electronics commenced a negligence action against the city of Chicago and Speedway Wrecking Co., the city's contractor; Chicago then cross-claimed against Speedway Wrecking.[29] Speedway Wrecking obtained directed verdicts on both the complaint and the cross-claim, while the plaintiff was awarded

24. 118 Ohio App. 1, 193 N.E.2d 182 (1963).

25. *Id.* at 5, 193 N.E.2d at 184. The appellate court reversed the judgment granting summary judgments to two of the three defendants because the remaining defendant was not given notice of or an opportunity to appear at the summary judgment hearing. Although the *Rigney* court cites *Landers* in support of the proposition that codefendants should always be considered adverse parties when a summary judgment is sought by one of several codefendants in a multiple party suit, the Ohio court did not establish this proposition as a per se rule, but rather determined the adverse nature of the codefendants from the facts of the case. It can be argued, however, that since an analysis of the facts of each such case will probably reveal that the codefendants do in fact have adverse interests, the practical effect of both *Landers* and *Rigney* is to establish a per se rule.

26. 17 Ariz. App. at 548, 499 P.2d at 162.

27. 118 Ohio App. at 7, 193 N.E.2d at 185-86. In most negligence cases, there are genuine issues of fact. The parties themselves are often witnesses and their testimony, as well as the testimony of bystanders, is frequently in conflict. It is usual in such cases for affidavits and other evidentiary materials to be submitted in opposition to a motion for summary judgment. Such evidence would usually establish the existence of a genuine issue of fact, and the motion would therefore be denied. However, when none of the parties contest the motion for summary judgment, as in the *Rigney* case, summary judgment is appropriate. *See generally* Wills, *Procedure Under the Ohio Summary Judgment Statute*, 20 OHIO ST. L.J. 613 (1959).

28. 130 Ill. App. 2d 1021, 264 N.E.2d 868 (1970).

29. Chicago maintained that it was only passively negligent and was entitled to indemnification by Speedway Wrecking for any liability.

a judgment against Chicago. Neither Newark Electronics nor Chicago appealed the directed verdict for Speedway Wrecking on the complaint, but Chicago appealed the directed verdict against its cross-claim.

In the cross-claim appeal, the Appellate Court of Illinois faced the threshold question whether Chicago was bound by the directed verdict for Speedway Wrecking on the complaint.[30] Since neither the city nor Newark Electronics had appealed the directed verdict, that judgment was final. The court accordingly held that the issue of Speedway Wrecking's negligence to Newark Electronics had been finally decided, was res judicata and therefore prevented the court from even considering Chicago's appeal from the directed verdict on its cross-claim. Because Speedway Wrecking's freedom from negligence toward Newark Electronics had been established by the directed verdict, appellate review of Chicago's demand for indemnification was estopped.[31]

Not surprisingly, the court admonished the parties that "[w]hen an issue of 'whose fault it is' is present, it behooves all codefendants . . . to keep in mind the doctrine of res judicata and its offshoot, estoppel by verdict."[32] It also observed that any other holding would permit the wasteful relitigation of issues already decided, fostering the unwelcome possibility of inconsistent judgments.[33]

Since the elimination of inconsistent judgments and the promotion of judicial efficiency by preventing the relitigation of issues are the primary functions of the doctrine of res judicata, the *Rigney* rule functionally applies res judicata to summary judgment situations involving multiple defendants.[34] As the cases examined have illustrated, the rationale utilized in *Rigney* has been logically applied in directed verdict situations, in cases involving previous codefendants in a subsequent action, and to summary judgments. The rule enunciated in *Rigney* is thus clearly supported in its logic and rationale by analogous cases in Arizona and other jurisdictions.[35]

30. "[W]hat has happened is that there is now a *final* judgment in favor of Speedway and against the plaintiff on its complaint—a judgment no one appeals—and a quintessential part of this judgment, is a finding that Speedway did not negligently cause plaintiff's damages. Is this finding for Speedway binding on the City?" 130 Ill. App. 2d at 1024, 264 N.E.2d at 870.

31. *Id.* at 1024-25, 264 N.E.2d at 870-71.

32. *Id.* at 1023, 264 N.E.2d at 869.

33. *Id.* at 1025, 264 N.E.2d at 871.

34. *See generally, Developments in the Law—Res Judicata,* 65 HARV. L. REV. 818 (1952); Cleary, *Res Judicata Reexamined,* 57 YALE L.J. 339 (1948).

35. In addition to cases involving summary judgments, directed verdicts, and prior codefendants in a subsequent action as described above, the same reasoning and similar rules apply to other analogous cases as well, including:

a. *contribution cases*—American Motorists Ins. Co. v. Vigen, 213 Minn. 120, 5 N.W.2d 397 (1942) (unsuccessful codefendant may not relitigate the liability issue of a successful codefendant to the injured person in a subsequent action brought by one

Implications of Rigney

The *Rigney* decision will have a significant effect on future cases involving multiple defendants in which one or more of the codefendants seek absolution by moving for summary judgment.[36] If *Rigney* in fact creates a per se rule that codefendants are adverse parties in such a situation and are entitled to be notified of the motion,[37] then they will be bound by the court's judgment. The obvious consequence of such a rule will be a more diligent effort on the part of each defendant's counsel to find issues of fact that will defeat a motion for summary judgment.

The argument was made before the court of appeals that this result would greatly reduce the ease with which summary judgments could be obtained in multiple party litigation.[38] There is nothing undesirable about such an effect, however, because the purpose of the summary judgment device is to eliminate only those issues that are not in actual dispute.[39] Increased diligence on the part of counsel to find genuine issues merely assures that summary judgments will not be improvidently granted.

A procedural due process[40] argument was also raised in *Rigney*, the petitioners contending that a fair and reasonable opportunity to be heard would be denied to remaining codefendants when a motion early in the course of a lawsuit required them to anticipate defenses and raise issues of which they could not yet be aware.[41] A closer look at the *Arizona Rules of Civil Procedure*, however, reveals that these objections can be adequately met.

---

of them against the other).

b. *indemnity actions*—Fidelity & Cas. Co. v. Federal Express, Inc., 136 F.2d 35 (6th Cir. 1943) (insofar as the rights or obligations of coparties *inter se* are dependent on their rights or obligations toward their common adversary, the judgment adjudicating the latter is conclusive upon codefendants in subsequent litigation between them); *accord*, Wright v. Schick, 134 Ohio St. 193, 16 N.E.2d 321 (1938).

c. *modified judgment*—Berylwood Inv. Co. v. Graham, 43 Cal. App. 2d 659, 111 P.2d 467 (1941) (when modified judgment occurs in favor of one codefendant, the interests of all remaining defendants become adverse to that exonerated defendant and such judgment is conclusive as between all codefendants).

d. *partition suits*—Shippert v. Shippert, 371 Ill. 267, 20 N.E.2d 597 (1939) (in partition suit all parties are adverse and each is bound by the decree when entered).

36. The same will be true, for that matter, when a codefendant moves for a directed verdict.

37. *See* note 25 *supra*.

38. Brief for Respondent at 7, 8, Rigney v. Superior Court, 17 Ariz. App. 546, 499 P.2d 160 (1972).

39. 6 J. MOORE, *supra* note 1, at ¶ 56.04[1].

40. The basic requirement of procedural due process is that the person against whom a judgment is sought be given notice and a fair opportunity to be heard before rendition of judgment. Dohany v. Rogers, 281 U.S. 362 (1930); City of Chicago v. Cohn, 326 Ill. 372, 158 N.E. 118 (1927).

41. This point was argued by defendant Puckett before the court of appeals. Brief for Respondent at 6, 7, Rigney v. Superior Court, 17 Ariz. App. 546, 499 P.2d 160 (1972).

Rule 5 provides for notice to all parties of the motion for summary judgment, and each party has a full opportunity to be heard at the summary judgment hearing.[42] If counsel feels that he lacks sufficient information upon which to oppose the motion, Rule 56(f) provides that the court may refuse the application for judgment or order a continuance to permit affidavits to be obtained, depositions to be taken, or other discovery to insure a fair and full determination of the motion.[43]

Conclusion

The import of the *Rigney* decision is that whenever there are multiple defendants in a lawsuit, there is a special burden on counsel to recognize the extent to which his client stands in an adverse position to all the other parties. This entails looking beyond the labels of plaintiff and defendant, and requires practical analysis of the relative positions of the parties. The *Rigney* result obliges counsel to take affirmative action to protect his client's interest whenever those interests are challenged by a codefendant's motion for summary judgment.

C. AGGREGATION IN CLASS ACTIONS IN ARIZONA

Judson School v. Wick[1] raised the question whether claims in class action suits could be aggregated to meet the superior court's minimum jurisdictional amount of $200.[2] *Judson* was a class action alleging maladministration of funds and breach of fiduciary duties. The defendants filed a petition for special action[3] in the court of ap-

42. ARIZ. R. CIV. P. 5(a). *See* note 25 *supra.*
43. ARIZ. R. CIV. P. 56(f).

1. 108 Ariz. 176, 494 P.2d 698 (1972).
2. At the time *Judson* was decided ARIZ. REV. STAT. ANN. § 22-201 (B) provided that:

> Justices of the peace have exclusive original jurisdiction of all civil actions when the amount involved, exclusive of interests and costs, is less than two hundred dollars except when concurrent jurisdiction has been conferred upon the superior court, and have jurisdiction concurrent with the superior court of all civil actions when the amount involved, exclusive of interests and costs, is two hundred dollars or more and less than five hundred dollars.

These jurisdictional amounts were subsequently raised to $500 and $1,000, respectively, pursuant to Ch. 145, § 1, [1972] Ariz. Sess. Laws 999 which became effective with the adoption of a parallel amendment to ARIZ. CONST. art. 6, § 14. *See* 73 Ariz. Legis. Rev. 33 (Nov. 29, 1972). These changes, however, should in no way affect the principles enunciated in *Judson.*

3. In Arizona the procedures for the actions of prohibition, mandamus and certiorari have been consolidated into one action—the special action. ARIZ. R.P. SPECIAL ACTIONS.

peals to prohibit the trial judge from permitting aggregation of the plaintiffs' claims. The defendant founded his argument on the United States Supreme Court decision in *Snyder v. Harris*,[4] reasoning that, since rule 23 of the *Arizona Rules of Civil Procedure* is identical to the federal class action rule,[5] the courts of Arizona should be bound by the *Snyder* decision that aggregation is not permitted in "spurious" class actions.[6] The plaintiffs contended that the suit concerned a common fund, which would have qualified it as a "true" class action under old rule 23.[7] They argued that *Snyder* involved a "spurious" class action, so that its prohibition of aggregation was not inconsistent with permitting aggregation in a "true" class action such as their claim.[8]

Although the state court of appeals refused jurisdiction in the special action, the Supreme Court of Arizona granted review. Its ultimate decision, however, was based on neither the plaintiffs' nor the defendant's contentions. Rather, the court looked to fundamental differences between state and federal courts.[9] For this reason, the court's conclusion that claims in class actions may be aggregated appears to be applicable not only to "true" class actions, such as *Judson*, but also to "spurious" actions. In other words, the amount in controversy required as a jurisdictional minimum for superior court was interpreted to be the sum of the claims of all the class members, and not merely the damages claimed by any single plaintiff.

Although aggregation is a doctrine with a long history in Arizona,[10] *Judson* marked the first attempt to apply it to class actions. With the increasing reliance by consumers and other small claim plain-

4. 394 U.S. 332 (1969).

5. Fed. R. Civ. P. 23(A), 28 U.S.C. Rule 23 (1964) (amended 1966). Professor Moore, the author of original rule 23, labeled these three categories of class action "true," "hybrid," and "spurious," respectively. *See* MOORE, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551 (1937). Since "spurious" and "hybrid" suits both involve "several" claims and consequently present the same aggregation problems, for purposes of convenience in this discussion they will both be referred to as "spurious" actions.

6. 108 Ariz. at 176, 494 P.2d at 698.

7. The fund involved in *Judson School v. Wick* was a profit-sharing pension fund, totalling somewhat more than $1,000,000. By seeking an accounting for the management of this fund, the plaintiffs were attempting to enforce a right which was "joint, common, or secondary." Interview with David L. Cocanower, co-counsel for plaintiffs, in Phoenix, Arizona, Jan. 24, 1973.

8. *Id.*

9. The court stressed the fact that state and federal courts have different jurisdictional considerations. 108 Ariz. at 177, 494 P.2d at 699. *See* text accompanying notes 26-35 *infra*.

10. *See* Mosher v. Bellas, 33 Ariz. 147, 264 P. 468 (1928) (court stated that aggregation of claims had "prevailed in this jurisdiction ever since the adoption of the Constitution," and that it was "the settled law of this jurisdiction.") *Id.* at 155, 264 P. at 470. *See also* Nichols v. McClure, 23 Ariz. 27, 201 P. 95 (1921); Southern Pac. Co. v. Nelson, 20 Ariz. 344, 180 P. 987 (1919); Atchison, T. & S.F. Ry. v. Carrow, 18 Ariz. 83, 156 P. 961 (1916); Miami Copper Co. v. State, 17 Ariz. 179, 149 P. 758 (1915).

tiffs on this form of litigation, however, aggregation has become a significant issue.[11] This analysis will question whether *Judson* represents a liberalization of aggregation doctrine in Arizona by allowing aggregation in all class actions or merely restates the traditional and more restrictive position found in *Snyder* that aggregation is allowed only in "true" class actions.

In the federal court system, aggregation of separate claims to satisfy the minimum jurisdictional amount requirement has met with consistent opposition ever since the 1832 Supreme Court decision in *Oliver v. Alexander*.[12] This disapproval found expression in the old federal class action rule, which distinguished between so-called "true" class suits based on joint and common claims and "spurious" or "hybrid" suits founded on several claims.[13] In the latter categories aggregation was firmly barred.[14] The adoption in 1966 of a revised class action rule eliminating the old class action categories[15] raised hopes for a liberalized judicial attitude toward aggregation.[16] These hopes were dashed 3 years later by the Supreme Court in *Snyder v. Harris*.[17] After discussing the changes in rule 23, the *Snyder* court flatly declared that aggregation would not be permitted in suits in which the claims were "separate," "distinct," and "several" thus maintaining the pre-revision classifications at least in regard to aggregation.

While many states operate under rules identical or similar to the *Federal Rules of Civil Procedure, Snyder* may not be controlling precedent in these states. As the basic units of the American judiciary, state trial courts[18] operate under jurisdictional and policy considerations different from those of the federal court system.[19]

Ambiguities in the *Judson* decision generate serious doubts whether it applies to both "true" and "spurious" forms of class action. Certain aspects of *Judson* suggest that the supreme court, despite its

11. Indeed, one commentator has gone so far as to declare that "reality of judicial relief for the consumer may be entirely dependent upon the availability of class actions." Comment, *The Small Claim Plaintiff and the Doctrine of Finality Under 28 U.S.C. § 1291*, 29 WASH. & LEE L. REV. 465, 466 (1972).

12. 31 U.S. (6 Pet.) 143 (1832).

13. *See* note 5 *supra*.

14. Clark v. Paul Gray, Inc., 306 U.S. 583 (1939).

15. FED. R. CIV. P. 23.

16. *See* Wright, *Class Actions*, 47 F.R.D. 169 (1969), *set out in* C. WRIGHT, LAW OF FEDERAL COURTS 306 (2d ed. 1970); Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601 (1969); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356 (1967); 68 COLUM. L. REV. 1554 (1968).

17. 394 U.S. 332 (1969).

18. Trial courts here refers to courts of general jurisdiction, known as superior courts in Arizona and as circuit, county, district or supreme courts, etc. in other states.

19. *See* text accompanying notes 26-35 *infra*.

statement to the contrary,[20] intended to remain consistent with *Snyder*, permitting aggregation in "true" actions, but barring it in "spurious" ones. Other aspects of the majority opinion, however, indicate that it marks broad procedural reform and that aggregation of claims will be permitted in any class action in Arizona courts.

The primary element in the *Judson* case suggesting that the court may have intended to adhere to the *Snyder* distinction between "spurious" and "true" class actions stems from the fact that Arizona's rules of civil procedure are almost identical to the *Federal Rules of Civil Procedure*.[21] As a result of this similarity, rules decisions by federal courts are highly influential precedent for Arizona courts.[22] Since the *Snyder* decision indicates that on the matter of aggregation new rule 23 should be interpreted in the same fashion as old rule 23, an Arizona court may be inclined to give Arizona's rule 23 an identical reading. This could mean that the *Judson* court intended its decision to allow aggregation only in "true" class actions, as was the case under the old federal and Arizona rules. The failure of the *Judson* court to relate the issue of aggregation to classification may also support this interpretation. If the court failed to establish this link, not because it was ignoring *Snyder*, but rather because *Judson* was so obviously a "true" class action, the court may simply not have felt itself compelled to resolve the issue of aggregation of "spurious" claims.[23]

Despite clues indicating that the supreme court may have intended to permit aggregation only in "true" class actions, other factors demonstrate convincingly that *Judson* is not restricted to such suits. Most significant is the court's complete omission of any discussion of the factual situation involved in the case.[24] By disregarding the facts and by speaking of "resolving one more important jurisdictional is-

20. 108 Ariz. at 177, 494 P.2d at 699. "[S]nyder is not applicable to the jurisdiction of state courts irrespective of how admirably it may fit the federal scheme of things." *Id.*

21. Arizona was the first state to adopt the FEDERAL RULES OF CIVIL PROCEDURE and has had "almost instant parallelism" with them ever since. Frank, *Proceedings of the Sixty-first Annual Meeting of the Mississippi State Bar: Should We Adopt for Our State Courts Rules of Practice and Procedure in Line with the Federal Rules: a Panel*, 37 MISS. L.J. 499, 545 (1966).

22. *See* Edwards v. Young, 107 Ariz. 283, 486 P.2d 181 (1971); Jenney v. Arizona Exp., Inc., 89 Ariz. 343, 362 P.2d 664 (1961); Harbel Oil Co. v. Steele, 80 Ariz. 368, 298 P.2d 789 (1956).

23. More plausible, of course, is the suggestion that the court did not discuss the link between aggregation and classification of class suits because it felt that classification was completely irrelevant to the aggregation issue.

24. For that matter, the majority's statement of the respondents' contention is insufficient to the point of being incorrect. Justice Struckmeyer says the respondents believed their claims could be aggregated to attain the jurisdictional minimum. Nowhere does he mention that the respondents asserted jurisdiction under *Snyder* because of the "joint and common" nature of their claims. Interview with David L. Cocanower, co-counsel for plaintiffs, in Phoenix, Arizona, Jan. 24, 1973.

sue,"[25] the court strongly implies that its intention was to lay down a broad, general rule.

Another factor in *Judson* also evidences an intention to apply aggregation doctrine more liberally than did the United States Supreme Court in *Snyder*. The *Judson* court placed heavy emphasis on the jurisdictional differences between state and federal courts, rather than upon the long-accepted "true"/"spurious" distinction which the court easily could have applied.[26] Unlike federal district courts, Arizona superior courts are courts of general jurisdiction.[27] The role of superior court is to decide all but the least important cases, whereas that of federal district court is to decide only the most important ones. By thus distinguishing *Judson* from *Snyder*, the Supreme Court of Arizona declared an intention to tailor rule 23 to the state's own jurisdictional needs, irrespective of the "true"/"spurious" distinctions in *Snyder*. In avoiding these distinctions the court indicated that in Arizona the distinctions are not germane to the question of aggregation.

The conflicts arising from the distinctions between state and federal courts are not limited to jurisdictional matters, however. Disharmony also exists with regard to tradition and precedent. Here, it is well to note that before adopting the *Federal Rules of Civil Procedure* in 1940,[28] Arizona had a history of liberal attitudes toward claim aggregation.[29] In 1928 the court said that "contrary to the prevailing rule . . . [aggregation is] the settled law of this jurisdiction."[30] The justices may have felt obligated to heed this rule, though they made no mention of it, since state precedent in procedural matters can be more compelling than prior federal decisions. At any rate, Arizona's historical preference for liberalized aggregation encourages the view that interpretation of *Judson* should not be bound by the old "true"/"spurious" distinctions.

Another factor which indicates that the *Judson* court might not have intended to honor the *Snyder* distinction between "spurious" and "true" class actions is a similar trend in other state courts. Ten years ago the Supreme Court of California abolished the joint or common fund requirement for class actions and permitted aggregation in both "spurious" and "true" suits.[31] In a recent consumer case that same

25. 108 Ariz. at 176, 494 P.2d at 698.
26. *Id.* at 177, 494 P.2d at 699.
27. Kemble v. Stanford, 86 Ariz. 392, 347 P.2d 28 (1960).
28. Allen, *The New Rules in Arizona*, 16 F.R.D. 183, 187 (1955).
29. *See* note 10 *supra*.
30. Mosher v. Bellas, 33 Ariz. 147, 155, 264 P. 468, 470 (1928).
31. Chance v. Superior Court, 58 Cal. 2d 275, 373 P.2d 849, 23 Cal. Rptr. 761 (1962). This position was affirmed in Daar v. Yellow Cab Co., 67 Cal. 2d 695, 707, 433 P.2d 732, 741, 63 Cal. Rptr. 724, 733 (1967). *See also* Paley v. Coca Cola Co., 39 Mich. App. 379, 197 N.W.2d 478 (1972).

court reasoned that since *Snyder* limited aggregation in federal class actions, state courts should fill the resulting gap and provide forums for all class actions, especially those which cannot be tried in federal courts.[32] Quoting a similar argument from *Snyder* itself, the *Judson* court employs the same logic as the California court.[33] If so, the Supreme Court of Arizona probably intended to allow aggregation in "spurious" as well as "true" class actions.

Finally, the general tone of the court's decision suggests an intent to permit aggregation in all class actions. Both the majority and dissenting opinions laud class actions as efficient and economical means of litigating cases involving large numbers of persons.[34] Both admit that the complex legal questions involved in class suits are beyond the grasp of justice courts. Consequently, said the majority, all such actions should be tried in superior court,[35] which implies that aggregation must be permitted in both "true" and "spurious" class actions. It seems implausible therefore, that the *Judson* court could have intended to impose state-level restraints on class actions like those *Snyder* created for federal courts.

Conclusion

Like any right decision based on the wrong set of facts, *Judson* poses significant problems of interpretation. Does it proclaim a liberalized aggregation doctrine or is it merely a restatement of the long-standing federal rule that allows aggregation in "true" class actions? For the present, it seems more logical to conclude that *Judson* represents a liberalization. The factors supporting a broad aggregation rule outnumber and outweigh those opposing it. Until the supreme court speaks more clearly, however, the availability of aggregation in "spurious" or "hybrid" class actions in Arizona will remain uncertain.

32. Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971). *See* Rosenberg, *Class Actions for Consumer Protection*, 13 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 601 (1972).

33. 108 Ariz. at 177, 494 P.2d at 699. "Suits involving issues of state law and brought on the basis of diversity of citizenship can often be most appropriately tried in state courts." *Id.*, *quoting* Snyder v. Harris, 394 U.S. 332, 341 (1969).

34. 108 Ariz. at 177, 494 P.2d at 699 (majority); *Id.* at 178, 494 P.2d at 700 (Holohan, J., dissenting).

35. 108 Ariz. at 177, 494 P.2d at 699. The dissent, on the other hand, while conceding that justice courts lack the expertise to try class actions, expressed the view that such suits should be brought as individual actions in justice courts if no claimant's stake is greater than the $200 minimum jurisdictional amount. *Id.* at 178, 494 P.2d at 700 (Holohan, J., dissenting). This is truly a retrogressive position, undercutting the entire rationale of representative litigation. In essence, it would deny plaintiffs, even in "true" class actions, redress of grievances unless each had an individual claim large enough to make litigation economically feasible. This position would make it possible for manufacturers of consumer goods, for example, to defraud their Arizona customers of any sum less than $200 (now $500—see note 2 *supra*) without any danger of effective prosecution. *See* Kirkpatrick, *Consumer Class Litigation*, 50 ORE. L. REV. 21 (1970).

II. CONSTITUTIONAL LAW

A. THE PRECEDENTIAL AUTHORITY OF UNITED STATES SUPREME COURT MINORITY DECISIONS

Although the Supreme Court of the United States occupies the position of final arbiter of questions of constitutional law under our system of government,[1] in *Roofing Wholesale Co. v. Palmer*,[2] the Supreme Court of Arizona refused to follow a constitution concerned decision of the Supreme Court of the United States. Prior to *Roofing Wholesale*, the United States Supreme Court in *Fuentes v. Shevin*[3] invalidated Pennsylvania and Florida replevin procedures[4] as violative of the due process clause of the fourteenth amendment. Provisions in the Arizona attachment statutes are imperiled by the same constitutional defect.[5] Conceding that the majority in the *Fuentes* decision "fully intended to apply the due process clause of the United States Constitution to situations as are presently before the court,"[6] the Supreme Court of Arizona, nevertheless, refused to invalidate the Arizona statutes because *Fuentes*, a decision with two justices not participating,[7] was not a decision by a majority of the full Supreme Court.[8]

---

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
2. 108 Ariz. 508, 502 P.2d 1327 (1972).
3. 407 U.S. 67 (1972).
4. FLA. STAT. ANN. §§ 78.01-78.21 (Supp. 1973); PA. R. CIV. P. 1071-86.
5. ARIZ. REV. STAT. ANN. §§ 12-1526 to -1527 (1956). The Arizona statutes provide for the issuance of a writ of attachment immediately upon the execution and filing of an affidavit and bond by the party seeking to attach the debtor's property. In addition, the governmental officers issuing and executing the writ are required to keep the writ's issuance undisclosed until it is executed. No prior notice or prior hearing is provided for the debtor.
6. 108 Ariz. at 510, 502 P.2d at 1329.
7. Due to the death of Justice Black and the retirement of Justice Harlan, *Fuentes*, along with numerous other cases, was heard and decided by a seven-member court. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972); Cole v. Richardson, 405 U.S. 676 (1972); Fein v. Selective Serv. Sys., 405 U.S. 365 (1972).
8. 28 U.S.C. § 1 (1970) provides that the Supreme Court shall consist of nine justices; five, consequently, constitute a majority of the full Court. The Arizona supreme court's position in *Roofing Wholesale* is reminiscent of that taken by the Virginia Court of Appeals in Hunter v. Martin, 18 Va. (4 Munf.) 1 (1814), wherein the Virginia court, on different grounds, refused to follow an apparent three to one decision by a seven-member Supreme Court in Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813). This decision by a minority of the Supreme Court undoubtedly contributed to the Virginia court's discontent. Unconcerned with the vote distribution in this latter case, the Supreme Court held the decision binding on the Virginia Court of Appeals in the now famous case of Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). For a more complete consideration of this landmark in constitutional history, see 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 442-53 (rev. ed. 1932).

The Supreme Court has on several other occasions rendered decisions involving

This casenote will briefly set forth the judicial climate relative to prejudgment creditors' remedies in which *Roofing Wholesale* was decided.[9] Assessment of the position taken by the Supreme Court of Arizona will center on an examination of the validity and precedential value of minority decisions.[10] Finally, consideration will be given to the desirability of rendering such decisions.

The Decision and its Judicial Setting

The judicial climate relative to prejudgment creditors' rights was initially characterized in the main by *Sniadach v. Family Finance Corp.*,[11] in which the Supreme Court of the United States declared Wisconsin's procedures for garnishment of wages without a prior hearing violative of the due process clause of the fourteenth amendment.[12] Although most lower courts read this decision broadly,[13] applying it to situations involving attachment and property other than wages, a few, including the Supreme Court of Arizona, limited the application of *Sniadach* to the garnishment of wages.[14] The propriety of this broad reading of the case by the majority of lower courts was confirmed by the United States Supreme Court in *Fuentes*, where the notice and hear-

---

the determination of constitutional issues by a majority of a less than full Court. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972); Cole v. Richardson, 405 U.S. 676 (1972); Lego v. Twomey, 404 U.S. 477 (1972); Schilb v. Kuebel, 404 U.S. 357 (1971); Santobello v. New York, 404 U.S. 257 (1971); Kawakita v. United States, 343 U.S. 717 (1952); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Colegrove v. Green, 328 U.S. 549 (1946); United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944); Feldman v. United States, 322 U.S. 487 (1944); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870). Nonconstitutional decisions by less than a majority of the whole Court have also been rendered. *See, e.g.*, Fein v. Selective Serv. Sys., 405 U.S. 365 (1972); Dalehite v. United States, 346 U.S. 15 (1953); United States v. Texas, 339 U.S. 707 (1950).

9. For a fuller discussion of recent developments in the area of prejudgment creditors' remedies, see Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521 (1973); Comment, *Creditor's Prehearing Remedies and Due Process*, 14 ARIZ. L. REV. 834 (1972).

10. The term "minority decision" will be used in this casenote to refer to a decision by a multi-member court in which all the members were not participating, in which the members actually participating were not equally divided in their resolution of the case and in which, therefore, a majority numbering less than a majority of the full court made the decision.

11. 395 U.S. 337 (1969).

12. WIS. STAT. ANN. §§ 267.01-267.24 (Supp. 1973).

13. *See, e.g.*, Aaron v. Clark, 342 F. Supp. 898 (N.D. Ga. 1972); Randone v. Superior Court, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972); Jones Press, Inc. v. Motor Travel Servs., Inc., 286 Minn. 205, 176 N.W.2d 87 (1970); Lucas v. Stapp, 6 Wash. App. 971, 497 P.2d 250 (1972); Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

14. Limitation by the Arizona supreme court occurred in First Nat'l Bank & Trust Co. v. Pomona Mach. Co., 107 Ariz. 286, 486 P.2d 184 (1971), *noted in* 14 ARIZ. L. REV. 409 (1972) and Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969), *noted in* 12 ARIZ. L. REV. 202 (1970). Other decisions so limiting *Sniadach* include: Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970); Michael's Jewelers v. Handy, 6 Conn. Cir. 103, 266 A.2d 904 (1969).

ing requirements were extended to prejudgment attachments.[15] Finally, relying on the broadening of *Sniadach* by *Fuentes*, the Federal District Court for Arizona in *Western Coach Corp. v. Shreve*[16] declared the Arizona garnishment statutes unconstitutional when applied to a businessman's bank account.

It was in this judicial context that the Supreme Court of Arizona in *Roofing Wholesale* declined to likewise invalidate the Arizona attachment statutes.[17] Apparently relying on *Fuentes*, the clerk of the Superior Court of Maricopa County refused to issue writs of attachment and garnishment which were requested by Roofing Wholesale Company when it filed a complaint for money due on an expressed open account contract. As a consequence of this refusal, the creditor petitioned the Supreme Court of Arizona for special action in the nature of mandamus seeking issuance of the writs.

In the Supreme Court of Arizona, Roofing Wholesale contended that since *Fuentes* was not a decision by a majority of the full Supreme Court of the United States, it was advisory only and not binding upon the Arizona supreme court.[18] Although the court never expressly stated this view as its own position, the court at least implicitly adopted this position.[19] As its expressed reason for not following *Fuentes*, the court asserted:

> [W]ere we convinced that the four man majority . . . would become at least a five man majority when the two judges who did not participate . . . are called up to participate in a similar question, we would then be inclined to follow the decision . . . . When however, we have doubts that once the full court hears the case that the opinion will stand, we are reluctant to declare unconstitutional Arizona statutes based upon a decision by less than a clear majority.[20]

The majority in *Roofing Wholesale*[21] offered three federal cases as

15. 407 U.S. at 88-89. For discussion of the general acceptance of *Fuentes* in the lower courts, see Countryman, *supra* note 9, at 521.

16. 344 F. Supp. 1136 (D. Ariz. 1972), *aff'd*, 475 F.2d 754 (9th Cir. 1973).

17. Despite *Roofing Wholesale*, an Arizona superior court has declared the Arizona attachment statutes unconstitutional on the basis of *Fuentes*. Holman v. Wagner, No. C-261513 (Super. Ct. of Maricopa County, Ariz., Jan. 31, 1973). The constitutionality of the Arizona garnishment statutes as applied generally is currently being challenged in a federal class action suit. Manning v. Palmer, Civil No. 73-31 (D. Ariz., filed Jan. 17, 1973).

18. Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 510, 502 P.2d 1327, 1329 (1972).

19. Unless the court is to be charged with outright defiance of an authoritative Supreme Court mandate or deemed to have viewed the *Fuentes* decision a legal nullity—the only alternatives available as explanations for the court's decision—this position must be viewed as the court's implicit holding.

20. 108 Ariz. at 510-11, 502 P.2d at 1329-30. It is not clear from the opinion whether this reasoning was propounded as a basis for holding a minority decision unauthoritative or as a basis for not following an advisory decision.

authority in support of its position. The court first cited *United States v. Pink*,[22] in which the United States Supreme Court reiterated the principle that a decision by an equally divided court does not constitute an authoritative determination for subsequent cases. Next, it was observed that the Court of Customs and Patent Appeals had announced in dictum in *Frischer & Co. v. Bakelite Corp.*[23] that a judgment by a multimember court is invalid unless rendered with the concurrence of a majority of all the legally constituted members of that court. Finally, the majority found support in the Supreme Court's failure to categorically disapprove the validity of the *Frischer* proposition in *FTC v. Flotill Products, Inc.*[24] Upon these grounds, the Supreme Court of Arizona loosed itself from the constraints of the *Fuentes* minority decision.

Supreme Court Decisions as Authoritative Precedent

Most Supreme Court decisions, since rendered by a majority of the full Court, do not present the contended problem of want of authority which has been raised with regard to minority decisions. Full Court decisions on questions of federal law establish authority which is binding on the courts of Arizona and other states by virtue of both federal and state constitutional and statutory provisions.[25] To be sure, due to the difficulties inherent in the imprecision of language, in the purposive vagueness of some decisions,[26] in the ambiguity of decisions

21. Two dissenting opinions were rendered in *Roofing Wholesale*. The dissenting opinion by Justice Lockwood in essence observed that an opinion by a majority of a quorum of the Supreme Court was binding and that it was for Congress or the Court to indicate otherwise. 108 Ariz. at 512-13, 502 P.2d at 1331-32. No authority was cited. Justice Struckmeyer adopted the views of Justice Lockwood and went on to observe that in light of the number of minority decisions which have been rendered by the Court, such decisions must be regarded as authoritative lest important areas of constitutional law be placed in limbo. *Id.* at 513, 502 P.2d at 1332.

22. 315 U.S. 203, 216 (1942).

23. 39 F.2d 247, 255 (C.C.P.A. 1930), *cert. denied*, 278 U.S. 641 (1928), 282 U.S. 852 (1930).

24. 389 U.S. 179 (1967).

25. U.S. CONST. art. VI provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. CONST. art. III, § 2 provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . ." The reach of this clause to cases arising in state courts was confirmed in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), it was held that it is the province of the judicial department to interpret and apply the Constitution and the laws of the United States. U.S. CONST. art. III, § 2 and the provisions of 28 U.S.C. §§ 1251 to -1258 (1970), constitute the Supreme Court the final arbiter of all questions of federal law in the federal and state courts. Additionally, ARIZ. CONST. art. 2, § 3, provides that "[t]he Constitution of the United States is the supreme law of the land."

26. It is a common and salutary jurisprudential practice to render decisions which leave unanswered questions arguably posed in a given controversy, providing answers only to those essential for the resolution of the controversy. This practice has the effect of allowing further experimentation by subordinate courts in areas where the

comprising varying combinations of concurring opinions,[27] and in the methodology of stare decisis,[28] some legitimate disparity in the application of Supreme Court mandates by lower courts is inevitable. Such disparity, with the exception of multiple concurrence decisions, is not the consequence of any deficiency in the authoritativeness of the decision rendered. The treatment accorded *Fuentes* by the Arizona supreme court is the consequence of a contended deficiency in the precedential authority of that decision.

Contrary to the proposition regarding minority decisions articulated in *Frischer* and relied on by the Arizona supreme court in *Roofing Wholesale*,[29] the almost universally accepted common law rule is, unless otherwise provided by statute or constitutional provision, that a quorum consisting of a simple majority of a full court may act for the court and that a simple majority of the quorum may bind the court, at least for purposes of the case before the court.[30] The only major

---

complexity, weight, and uncertainty of interests and issues involved would make an attempt at definitive resolution by a higher court injudicious. *See* W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 186-88, 204-05 (1964).

27. Decisions in which there is a concurrence in the result but not in the rationale, (often termed no-clear-majority decisions) have presented a major problem in the application of legal precedents. In such cases, it is arguable as to which rationale, if any, is controlling. This problem was the concern of the final two authorities cited in support of the majority position in *Roofing Wholesale*. *See* State v. Reese, 222 So. 2d 732 (Fla. 1969), *cited in* Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 512, 502 P.2d 1327, 1331 (1972); Cain v. Commonwealth, 437 S.W.2d 769 (Ky. 1969), *rev'd* 397 U.S. 319 (1970), *cited in* Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 512, 502 P.2d 1327, 1331 (1972). Given that all four of the majority justices concurred in the rationale in *Fuentes*, the cited authorities are inapplicable and this problem does not present itself in this analysis. For an exhaustive study of the application of no-clear-majority decisions in the lower courts, see Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956).

28. The methodology of stare decisis involves the distillation of the law on a given subject from the history of cases on the subject by the analogical comparison of those cases. Thus, the analogical position of a decision in a line of precedents will affect the decision's own precedential effect. If the precedential value of a particular decision is unimpaired by a line of related precedents whose tenor is contrary or oblique to the given decision, the decision's future application will be more straightforward. As the Supreme Court indicated, however, the *Fuentes* decision is imbedded in a virtually undeviating mainstream of precedents. *See* 407 U.S. at 82, 88-89. For a study of the problems presented by the effects of precedential context, see Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3 (1967).

29. See text accompanying note 23 *supra*.

30. *See, e.g.*, Mountain States Tel. & Tel. Co. v. People *ex rel.* Wilson, 68 Colo. 487, 190 P. 513 (1920); Gibbs v. Milk Control Bd., 185 Ga. 844, 196 S.E. 791 (1938), *quoted with approval in* Life Ins. Co. v. Burke, 217 Ga. 742, 743, 125 S.E.2d 48, 49 (1962); Davidson v. State, 248 Ind. 26, 221 N.E.2d 814 (1966), *cert. denied*, 387 U.S. 911 (1967); State v. Lane, 26 N.C. 434 (1844); C. WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 210 (1935).

Congress and many states have established statutory and constitutional provisions deviating from the common law rule. *See, e.g.*, 28 U.S.C. §§ 175(a)-(f) (1970) (Court of Claims: A majority "who actually sit" must concur in any decision.); 28 U.S.C. § 215 (1970) (Court of Customs and Patent Appeals: "Three judges . . . constitute a quorum. The concurrence of three judges is necessary to any decision."); CAL. CONST. art. 6, § 2 ("The Supreme Court consists of the Chief Justice . . . and 6 associate justices . . . . Concurrence of 4 judges present at the argument is necessary for a judgment."); N.Y. CONST. art. 6, § 2 ("Five members of the court shall consti-

decision announcing an inconsistent rule is *Frischer*. Moreover, the Supreme Court expressly judged the *Frischer* rule "doubtful" in *FTC v. Flotill Products, Inc.*[31]

It is to be noted at this point that the common law rule establishes only the validity of a minority decision;[32] it thus becomes important to recognize that a distinction exists between a valid decision and an authoritative decision. The former is a decision which is made with the authority to resolve a controversy between particular litigants, but which is not necessarily an authoritative precedent for future cases. The latter is a decision which, in addition to being valid, constitutes effectual precedent in the court announcing it and is binding upon all other courts subordinate to the announcing court.

While the common law position on the validity of minority decisions is clear, the Supreme Court and Congress have for the most part been silent as to the validity and precedential authority of such decisions. In fact, it is unclear to what extent resolution of questions in this area is charged to the Court or to Congress. For present purposes, however, it is important only to recognize that, at the least, the Court has the power to provide for the incidents of decisionmaking[33] in the absence of congressional expression on the subject.[34] Resolu-

tute a quorum, and the concurrence of four shall be necessary to a decision, but no more than seven judges shall sit in any case."). ARIZ. CONST. art. 6, § 2, which provides that "[t]he Supreme Court shall sit in accordance with rules adopted by it, either in banc or in divisions of not less than three justices, but [that] the court shall not declare any law unconstitutional except when sitting in banc," leaves the questions of quorum and voting requirements open. ARIZ. CONST. art. 6, §§ 3-4, however, provide respectively for temporary assignment of lower court judges in case of disqualification and gubernatorial appointment in case of permanent vacancies.

31. 389 U.S. 179, 184 (1967). The primary purpose of footnote 7 to the *Flotill* opinion appears to be to establish the untenability of the *Frischer* proposition. As the Court demonstrated in that footnote, "[t]he authorities cited in Frischer as supporting the exception [to the general rule] fail with one exception to do so." *Id.* at 184 n.7. The exception, Johnson v. State *ex rel.* Brannon, 1 Ga. 271 (1846), which announced its holding without supporting authority, appears to have been overruled sub silentio in Gibbs v. Milk Control Bd., 185 Ga. 844, 196 S.E. 791 (1938). It thus appears that, contrary to the intimation of the Arizona supreme court in *Roofing Wholesale*, 108 Ariz. at 511, 502 P.2d at 1330, the United States Supreme Court was disapproving the *Frischer* rule in *Flotill*.

32. *See* cases cited note 30 *supra*.

33. In particular, this power is to be taken as consisting of the power to determine according to what principles, with what reliance upon what previous decisions and by what vote cases are to be decided.

34. Generally speaking, the "judicial power [vested in the federal courts, U.S. CONST. art. III, § 1,] . . . is the right to determine actual controversies arising between adverse litigants . . . ." Muskrat v. United States, 219 U.S. 346, 361 (1911). "Certain implied powers must necessarily result to Courts . . . from the nature of their institution." United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). Fundamentally, it has been observed that the judicial power must comprise the power to determine the incidents of decisionmaking itself. *See* R. HARRIS, THE JUDICIAL POWER OF THE UNITED STATES 78 (1940); C. WARREN, *supra* note 30, at 210. Determinations under these implied powers are made with reference to the common law since, as with other language in the Constitution, the terms "court" and "judicial power" "cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was adopted." Ex parte Grossman, 267

tion of any conflict of power in this area, however, is unnecessary since the manifestations by Congress and the Court on the subject are consonant.

Considering first the manifestations by the Court in the exercise of its power, this much is apparent: even assuming arguendo the validity of the *Frischer* proposition, the Court has in practice tacitly repudiated the proposition and adopted what is, in fact, the common law rule. A contrary position would require viewing numerous past minority Court orders to lower courts as purposeless utterances.[35] Thus, when the Court renders a decision by less than a majority of the whole, at least as to the parties before the Court, that decision is valid and binding. It is also true that the Court has in the past cited minority decisions as precedent in subsequent decisions in the same manner as full Court decisions have been cited.[36] It may be said that such an

---

U.S. 87, 108-09 (1925). *See* C. WARREN, *supra* note 30, at 210. For example, the Court has with reference to common law practice, provided that decisions by an equally divided court do not constitute authority for future decisions. *See* cases cited note 47 *infra*.

Despite the Supreme Court's apparent powers in the area of decisionmaking, the regulation of many aspects of the Court are left by the Constitution to Congress. For example, 28 U.S.C. §§ 1251-58 (1970) provide for the regulation of the Court's appellate jurisdiction. Control of this matter is expressly delegated by article III of the Constitution to Congress. Additionally, 28 U.S.C. §§ 1-6 (1970) provide for the organization and terms of the Court. Due to the failure of article III to make any express provisions for these matters, control of them has been considered implicitly delegated to Congress under the necessary and proper clause. U.S. CONST. art. I, § 8. *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA 358, 586 (6th ed., N. Small ed. 1964).

In some areas, the Court's powers and Congress' powers impinge on one another. For example, the contempt power—"a power . . . requisite to the self-preservation of courts and to the vindication of judicial authority," R. HARRIS, *supra* at 159—is subject to congressional regulation, yet it appears that this power may not be wholly abrogated by Congress. *Id.* at 77-78, 151, 171-72. "Regulation is valid, however, so long as Congress does not impede the efficient exercise of the judicial power or impair the essential independence of the courts." *Id.* at 151. This latter proposition, grounded in the doctrine of separation of powers, *id.* at 77, arguably imposes a more stringent limitation on congressional power, if any, to regulate the incidents of decisionmaking. *See id.* at 77-78; C. WARREN, *supra* note 30, at 210-15. *But cf.* FTC v. Flotill Products, Inc., 389 U.S. 179 n.7 (1967) (suggesting that Congress may provide how many members of a quorum of the Supreme Court may bind the quorum and, thereby, act for the Court).

35. In particular, the district courts in *Fuentes* had upheld as constitutional the Pennsylvania and Florida replevin statutes. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970). Bearing this in mind, the *Frischer* proposition cannot be adopted unless one is willing to concede that the parties in *Fuentes* were not bound by that decision and that Florida and Pennsylvania remained free to continue unconstitutionally administering their replevin laws. Other examples of minority decision reversals of lower courts include: Cole v. Richardson, 405 U.S. 676 (1972); United States v. Ohio Power Co., 353 U.S. 98, *motion for consideration by full court denied*, 353 U.S. 977 (1957); United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944).

36. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (cited as authority in Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953)); Feldman v. United States, 322 U.S. 487 (1944) (cited as authority in Adamson v. California, 332 U.S. 46, 51 (1947)); United States v. United States Steel Corp., 251 U.S. 417 (1920) (cited as authority in Apex Hosiery Co. v. Leader, 310 U.S. 469, 501 (1940)).

inveterate practice supplies a gloss of validity to the proposition that minority decisions are authoritative.[37] The argument is inconclusive, however, insofar as subsequent adherence to a minority decision may be viewed merely as tacit ratification of that decision by a full Supreme Court.[38]

Aside from Supreme Court provisions manifested by inference from the Court's practice, Congress has expressly provided that any six justices shall constitute a quorum of the Court;[39] it has not provided how many of the quorum may bind the Court. Given this provision, there should be no doubt as to the validity and authoritativeness of a decision in which there is concurrence by five justices (a majority of the full Court), provided six justices (a quorum) have participated in making the decision. There have been several legislative proposals and enactments during the history of the Court providing for the number of justices constituting the Court and for special votes in certain circumstances.[40] The provision for nine justices, the six justice quorum requirement and provision for disposition of cases in the absence of a quorum,[41] however, are the only current congressional expressions regarding the quantity of judicial participation necessary for action by the Court.

This absence of definitive provision by Congress in the area of decisional validity and authoritativeness is probably explainable as a reflection of congressional deference to the Supreme Court's power and independence.[42] But, on the assumption that Congress has plenary power to legislate exclusively in this area if it chooses, even if Congress is viewed as having somehow pre-empted the area, the outcome as to the validity of minority decisions is unchanged. It is a well-settled principle of statutory construction that when legislating in a particular area, Congress is presumed to know and adopt the pertinent common

37. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). "[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive power' . . . ." *Id.* at 610-11 (Frankfurter, J., concurring).

38. It also may be argued that previous state court adherence to minority decisions is indicative of their authoritativeness. *See* Union Interchange, Inc. v. Mortensen, 90 Ariz. 112, 366 P.2d 333 (1961) (treating as authoritative United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944)). This argument, however, is also inconclusive insofar as the state adherence may be viewed merely as a determination to follow the advice of the Supreme Court.

39. 28 U.S.C. § 1 (1970).

40. *See* W. MURPHY, CONGRESS AND THE COURT 22-23, 57-62 (1962); Culp, *A survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States,* 4 IND. L.J. 386 (1929).

41. 28 U.S.C. § 2109 (1970) (providing, in the absence of a quorum, final and conclusive decision by the courts of appeals in cases involving direct appeals from the district courts and affirmance as if by an equally divided court in all other cases).

42. *See* note 34 *supra.*

law unless a contrary intention is indicated.[43] There is a further presumption that if such an intention is indicated, the common law is modified only to the extent that the intention is clearly expressed or fairly implied.[44] The immediate inference from these principles, Congress' quorum provision and the common law rule is that, so far as Congress is concerned, a majority of a quorum may validly act for the whole Court, a conclusion consistent with the rule manifested by the practice of the Supreme Court.

So far as the Supreme Court, Congress and the common law rule are concerned, it has been established that a decision by a four-member majority of the Supreme Court is valid. Absent relevant countervailing considerations, it is submitted that a valid decision should possess precedential authority, there being prima facie no ground for treating one valid decision differently from another. However, it may be contended that the Court in rendering minority decisions binds only the parties immediately before the Court, and while in so doing the Court perforce decides questions of law, such decisions on the law are conclusive only for purposes of the instant case and do not constitute authoritative precedent. These decisions would accordingly be only advisory as to questions of law decided in the course of rendering them.[45]

Minority Decisions vis-à-vis Other Valid Decisions

There are three possible grounds for distinguishing minority decisions from other decisions and, thereby, for considering their precedential effect as only advisory. First, as the Arizona supreme court cited in support of its position, the United States Supreme Court has expressly provided in *United States v. Pink*[46] and other cases that a judgment by an equally divided Court merely allows the decision of the court below to stand and does not constitute authoritative precedent for subsequent cases.[47] The reason for this disposition is that when a simple majority—of the full Court or otherwise—cannot be obtained, the consequent existence of equally opposing positions precludes the predominance of any one position and, thereby, precludes the affirmative action necessary to reverse a lower court and resolve questions of

43. E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 228, at 423 (1940); 3 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5301, at 4 (3d ed. 1943).
44. E. CRAWFORD, *supra* note 43, at 423.
45. Since such decisions would be rendered in the context of an actual controversy, their rendition would not run afoul the long standing constitutional rule against purely advisory opinions. *See* Flast v. Cohen, 392 U.S. 83 (1968).
46. 315 U.S. 203 (1942).
47. Neil v. Biggers, 409 U.S. 188 (1972); Durant v. Essex Co., 74 U.S. (7 Wall.) 107 (1868).

law.[48] To be sure, as the Supreme Court said in *Pink*, "the lack of an agreement by a majority of the Court on the principles of law involved prevents [the decision] from being an authoritative determination for other cases,"[49] but the "agreement of a majority" spoken of there was not necessarily the agreement of a majority of nine justices. Thus, the rationale warranting treatment of equal-division decisions as not authoritative is inapplicable to an unequal-division decision, such as one by a vote of four to three.

That greater numerical concurrence assures soundness of decision is a second ground upon which the precedential authority of a minority decision might be challenged. This contention, however, is not compelling. Soundness of decision is achieved not by amassing as many justices as possible in the majority, but by adequate consideration of all points of view and interests involved. It is undoubtedly true that a decision by nine justices, at least in terms of the number of justices participating in the decision, has received fuller consideration than a decision by eight or fewer. But that nine justices may, in these terms, provide for fuller consideration than three or seven is not to say that three or seven are necessarily inadequate for the purposes of the endeavor. Adequacy of consideration is, in more significant terms, as much, if not more, a function of the diverse views of interested parties before the Court and the advocative skills and adversity of those parties as it is of the number of justices competent to sit. The very fact that the Supreme Court has adjudicated numerous constitutional and nonconstitutional issues with less than a full Court[50] is indicative of the Court's own belief in its competence to render decisions under such circumstances. Moreover, in providing for a quorum of the Supreme Court, Congress has determined that six justices shall be minimally adequate. So long as six justices participate in the decision, therefore, the Court is de jure competent to decide; its consideration is deemed adequate. And it is finally to be observed that the distribution of a vote is basically irrelevant to the issue of the existence of adequate consideration, for a decision by a vote of four to three has received as much, if not more, consideration as a decision by a vote of five to two or six to zero.[51]

The third ground for regarding minority decisions as merely advisory is that advanced by the Supreme Court of Arizona in treating

48. *See* Durant v. Essex Co., 74 U.S. (7 Wall.) 107 (1868).
49. 315 U.S. at 216.
50. *See, e.g.*, cases cited note 8 *supra*.
51. It is conceivable that when there is a unanimous or nearly unanimous vote, the members of the Court are in substantial agreement. It is arguable that such agreement is not as conducive to vigorous discussion and, thereby, to extensive consideration as where close division of opinion exists.

Fuentes as unauthoritative—that a change in personnel on the Court through the filling of vacancies existent at the time a decision is rendered may result in the toppling of that decision on a subsequent occasion.[52] Irrespective of whether a decision is made by a full majority or less than a full majority, however, there is always the possibility that as new justices are appointed the outcome of any given controversy will vary.[53] This potential for precedential instability has and will continue to contribute to the frustration of decisionmaking in the lower courts. Nevertheless, until such time as a decision is overruled or modified in a subsequent case or line of decisions, it remains binding on the lower courts.[54]

Despite this potential for change, it has been observed that "[t]he court is the same though the judges change"[55] and that "while the personnel . . . [have] changed . . . , the principles of law have not . . . ."[56] Admittedly, to the extent that the law changes in response to the flux of societal norms and values which are represented continuously on the Court through the replacement of justices, the view that the law never changes though the judges do, taken as an empirical observation, involves no little fiction.[57] The law does change as the judges change. Yet, the philosophical underpinning of this view embodies substantial indispensable truth.

Predictability and stability, fostered by the principle of stare decisis, are fundamental values in our legal system.[58] It is, of course, of paramount importance that the system be responsive to the progress and needs of society, but it is also desirable that any change be stable and predictable.[59] Recognizing in *Roofing Wholesale* the concern of

52. Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 510-11, 502 P.2d 1327, 1329-30 (1972).

53. In fact, short-term reversal in the law may occur regardless of change in the composition of a court. A change of position on the part of three justices was responsible for the Supreme Court's overruling, after three years, its previous holding that compulsory flag saluting in public schools was constitutional. *See* West Virginia State Bd. of Educ. v. Barnette. 319 U.S. 624 (1943), *overruling* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

54. *See* Kelman, *supra* note 28, at 3-6; Comment, *Stare Decisis and the Lower Courts: Two Recent Cases,* 59 COLUM. L. REV. 504 (1959).

55. Scown v. Czarnecki, 264 Ill. 305, 330, 106 N.E. 276, 285 (1914).

56. Walling v. Bown, 9 Idaho 740, 743, 76 P. 318, 319 (1904), *aff'd on other grounds,* 204 U.S. 320 (1907). In this respect, the Arizona supreme court's reason for not following *Fuentes* goes beyond mere concern that minority decisions are susceptible to change. The court apprehends change merely on the basis of anticipated behavior of new personnel on the Supreme Court. True, it is sound jurisprudential practice to deviate from precedent when a trend bespeaks change in the air; the issue, however, as subsequently developed in the text accompanying notes 58-62 *infra,* is how that change is legitimately ascertained. *See* Kelman, *supra* note 28. The subsequent textual commentary in this regard is applicable regardless of whether the Arizona supreme court's reason is a justification for holding minority decisions unauthoritative or for not following a particular advisory decision.

57. *See* R. MCCLOSKEY, THE AMERICAN SUPREME COURT 223-31 (1960).

58. *See* B. CARDOZO, THE GROWTH OF THE LAW 2-3, 36-38, 44-46, 143 (1924).

59. *Id.*

both the majority and minority of the court about the possible disruptive effect the immediate applicability of *Fuentes* would have on commercial practices in Arizona,[60] it is undoubtedly true that these juridical values would be conceded by the Arizona supreme court; predictability and stability facilitate the regularity and security of commercial practices. Yet subscription to these values and the majority's avoidance of change in *Roofing Wholesale* by the apparent inquiry into the ideological dispositions of individual justices is paradoxical; if the legal system is to succeed in giving optimum effect to these values, it must proceed upon a rational basis, a basis which is not provided by the above sort of inquiry.

Ideological analysis in the nature of an inquiry into the fugitive ideological propensities peculiar to individual justices is, in the context of judicial decisionmaking by lower courts, a tool of dubious utility and legitimacy. Suppose the Supreme Court renders an ideologically colorable decision by a vote of five to four—an indisputably valid and authoritative decision—and one member of the majority subsequently dies. If that justice is succeeded by one whose prepossessions occupy the opposite end of the political spectrum, ideological analysis would dictate that the opinion is no longer to be followed because there are "doubts that once the full [Supreme Court] hears [a similar] case that the opinion will stand."[61]

Not only are the results of the application of this analysis abhorrent, but the application itself is fraught with insuperable obstacles. It is difficult enough for psychiatrists and sociologists to predict men's behavior individually and collectively, for example, as members of a body such as a court.[62] A fortiori, the lay judiciary in applying higher court decisions should not undertake to do the same. Indeed, by legitimizing such a process of precedential application in the context of judicial decisionmaking, courts would ignore the very juridical principles and considerations which operate to bridle the personal psychologies and ideologies of men and thereby breathe into our system of law some degree of predictability, stability and rationality.

A Preference for Avoiding Minority Decisions

While changing judicial personnel and other considerations previously examined are insufficient bases for denying an otherwise valid decision precedential authority, the potential political impact of such

60. 108 Ariz. at 512, 502 P.2d at 1331.
61. *Id.* at 510, 502 P.2d at 1329.
62. For a discussion of judicial voting studies and the difficulties encountered, see S. KRISLOV, THE SUPREME COURT IN THE POLITICAL PROCESS 63-71 (1965).

decisions, particularly with regard to invalidation of state law, is not without judicial moment. Early in the history of constitutional adjudication, the Court announced a policy of not, without necessity, deciding constitutional issues in the absence of a full bench. Speaking for the Court in explaining postponement of a decision in *Briscoe v. Commonwealth's Bank*,[63] Justice Marshall stated that "[t]he practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four [of the seven] judges concur in the opinion, thus making the decision that of a majority of the whole court."[64] The *Briscoe* opinion comprises only one paragraph, and other than what may be gleaned from the short extract quoted here, its underlying philosophy was not articulated. One view on the basis for the practice, as stated extrajudicially by Justice Burton, is that the practice is promotive of stability so long as the membership of the majority rendering the opinion remains unchanged and that the requirement of greater concurrence increases assurance of soundness.[64] It is more likely, however, that this practice had for its initial motivation considerations of political expediency rather than considerations of salutary decisonmaking. The 25 years immediately preceding *Briscoe* witnessed increasing state and congressional discontent with minority rulings by the Court, culminating in an unsuccessful series of legislative attempts to increase the size of the Court or provide for voting majorities.[66] The *Briscoe* opinion, by announcing a policy of avoiding minority decisions, obviated the need for further attempts.[67]

Only once has *Briscoe* been cited by the Court in overruling a previous minority decision. In *Knox v. Lee*,[68] the Court overruled *Hepburn v. Griswold*,[69] a decision rendered 15 months earlier. These cases were rendered in an acutely controversial political setting.[70] *Hep-*

63. 33 U.S. (8 Pet.) 118 (1834).

64. *Id.* at 122.

65. Burton, *The Legal Tender Cases: A Celebrated Supreme Court Reversal*, 42 A.B.A.J. 231, 233 (1956). While it is true that greater concurrence in the majority may contribute to the stability of a precedent, that such concurrence is greater assurance of a sound decision than when there is less concurrence is a dubious proposition. *See* text & notes 49-51 *supra*.

66. W. MURPHY, *supra* note 40, at 22-23. In fact, *Briscoe* and its companion case, *City of New York v. Miln*, were themselves politically charged cases in which the Court apparently wanted to withhold judgment until a greater concurrence could be achieved. *See* W. MURPHY, *supra* note 40, at 27. Decision of the two cases was delayed again in the next term of the Court. City of New York v. Miln, 34 U.S. (9 Pet.) 85 (1835).

67. *See* W. MURPHY, *supra* note 40, at 23.

68. 79 U.S. (12 Wall.) 457 (1871) (popularly known as one of the Legal Tender Cases).

69. 75 U.S. (8 Wall.) 603 (1870).

70. For a fuller discussion of the incidents surrounding these two cases, see W. MURPHY, *supra* note 40, at 41-42 and Burton, *supra* note 65.

burn, at least implicitly, invalidated as unconstitutional the Legal Tender Act of 1862.[71] The vote in *Hepburn* was four to three with two vacancies on the Court. The anticipated invalidation of the Act by the *Hepburn* decision eventuated in President Grant's filling the two vacancies on the day *Hepburn* was officially announced with two justices likely to uphold the Act on a future occasion. The overruling of *Hepburn* by *Knox* was the upshot. Although the Court stated in *Knox* that *Hepburn* "was decided by a divided court, and by a court having a less number of judges than the law then in existence provided" while *Knox* "has been heard before a full court, and [has] received our most careful consideration,"[72] the background of these cases demonstrates that the overruling of *Hepburn* was the consequence of political manipulation and not precedential weakness.

Even if the overruling of *Hepburn* were the consequence of some sort of precedential weakness, the *Knox* opinion itself suggests that *Hepburn* was, nevertheless, an authoritative precedent. *Knox* explicitly overruled *Hepburn*,[73] an action inconsistent with the proposition that *Hepburn* was not a binding precedent. Additionally, while the *Hepburn* and *Knox* cases demonstrate to some extent the authoritativeness of a minority decision, reference may also be had to the *Briscoe* opinion itself in establishing at least the validity of minority decisions. The Court did not say in the *Briscoe* opinion that it could not render a minority decision; rather, the Court merely observed that its policy was to render such decisions only if pressed by necessitous circumstances, thereby presupposing that valid minority decisions may be rendered.[74]

The *Briscoe* policy appears to have been honored, if at all, with little regularity, particularly in this century.[75] Rather than the consequence of any doubt as to the validity of minority decisions, the *Briscoe* policy of avoiding such decisions was probably the consequence of a politically oriented response to a continuing congressional threat to the Court's independence during a time when the Court was struggling to establish its respectability and institutional strength. It is thus justifiable to impute this subsequent treatment of the *Briscoe*

71. Act of Feb. 25, 1862, ch. 33, § 1, 12 Stat. 345.
72. 79 U.S. (12 Wall.) at 553-54.
73. *Id.* at 553. As was stated more fully in the opinion: "[I]t is no unprecedented thing in courts of last resort . . . to overrule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far-reaching consequences as the present, . . . we regard it as our duty so to decide . . . ." *Id.* at 554.
74. *See* text accompanying notes 63-64 *supra*.
75. Aside from five minority decisions rendered earlier in this century and involving constitutional issues, six such decisions involving constitutional issues were rendered during the term in which *Fuentes* was rendered. *See* cases cited note 8 *supra*.

policy to the Court's cognizance of its increasing prestige and strength as an American institution and the Court's realization that what it may and may not do as a body of political power is as much a function of political reality as it is of the requisites for the de jure validity of a decision.[76] The very fact that a minority decision has been rendered, rather than decision postponed, manifests the absence of any felt necessity for invoking the *Briscoe* policy and demonstrates per se the inapplicability of *Briscoe*. While the number of justices participating in the decision and voting in the majority may be important to the de facto impact of a decision on our system of government[77] and may thereby predicate a policy such as was articulated in *Briscoe*,[78] so far as the de jure impact and authoritativeness of a decision are concerned, the participation of six justices in the decision is all that is required.

Conclusion

The concern of the judiciary at all levels should be not with simply counting the number of justices participating in a decision, but with the desirability of providing a full and fair consideration of all competing interests. Toward the achievement of this end, the Supreme Court has adequate tools at its command for avoiding decision if it has any doubts about the advisability of hearing a case and rendering a decision.[79] Granted, the common law rule, in holding minority decisions valid, is expressive of the policy that there be no need that the judicial power ever abate itself or be abated, in particular, because of the absence of one or more judges.[80] Yet as the *Briscoe* decision man-

76. *See* R. McCLOSKEY, *supra* note 57, at 223-31.

77. *See* S. KRISLOV, *supra* note 62, at 56. *See generally* THE IMPACT OF SUPREME COURT DECISIONS (T. Becker ed. 1969). De facto impact comprises assessment of the extent to which a given decision will induce the alteration of executive policies or evasion of that decision by judicial craftsmanship in the lower courts.

78. It has been observed on the basis of *Briscoe* that "[a] decision disallowing a legislative act, either national or state, must be concurred in by a majority of the entire membership of the Bench. This is a cautionary rule—originally a concession to state pride—for other kinds of decision are binding when concurred in by a majority of a quorum of the Court." Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639, 642 (1926). Since this limitation "has nothing to do with statutory or constitutional construction," THE CONSTITUTION OF THE UNITED STATES OF AMERICA 635 (6th ed., N. Small ed. 1964), as *Fuentes* and *Hepburn* demonstrate, departure therefrom may occur at the Supreme Court's discretion. *See* note 34 *supra*.

79. *See, e.g.*, Flast v. Cohen. 392 U.S. 83 (1968) (standing); Baker v. Carr, 369 U.S. 186 (1962) (justiciable questions); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) (denial of certiorari); Rescue Army v. Municipal Court, 331 U.S. 549 (1947) (in general). *See generally* Harlan, *Manning the Dikes—Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States*, 13 RECORD OF N.Y.C.B.A. 541, 542-46 (1958).

80. One motivation for the common law rule was the desire for the expeditious and unfailing administration of justice by avoiding the suspension of the judicial power. *See* State v. Lane, 26 N.C. 434 (1844); *cf.* 42 N.Y.U.L. REV. 135 (1967). This consideration has led one court to assert that even one judge may validly hold court in the absence of others. State v. Lane, 26 N.C. 434, 459 (1844).

ifested, the nature of the power requires that pivotal Supreme Court mandates issue, whenever possible, only under favorable circumstances, in particular, only when a full Court is participating in decisions.

The noncompliance with *Fuentes* by the Arizona supreme court in *Roofing Wholesale* is an example of the sort of lower court response facilitated when a decision does not issue under the most favorable circumstances. Nevertheless, the common law rule, the practice of the Supreme Court, the manifestations of Congress and the presupposition of the *Briscoe* decision conclusively establish the validity of minority decisions. This validity, in conjunction with the absence of any basis for differentiating between minority and other decisions with respect to precedential authority, establishes in turn the authoritativeness of minority decisions. Compliance with *Fuentes* is immediately inescapable.

B. DURATIONAL RESIDENCE REQUIREMENTS: NONRESIDENT TUITION RATES AND EQUAL PROTECTION

States have long restricted the allocation of certain governmental benefits by classifying individuals as residents and nonresidents. As both personal mobility and the range of state services have increased, nonresident status has meant denial of more benefits to more persons. Nonresident classification may mean either complete ineligibility for some benefits, or that others will be available only at costs higher than those charged residents. Various criteria have been devised for determining resident or nonresident status in the apportionment of public benefits.[1] One such scheme, known as a durational residence requirement,[2] has met frequent constitutional challenge in recent years. The decision of the United States Supreme Court in *Shapiro v. Thompson*[3] is the usual foundation for attack upon durational residence requirements. In *Shapiro*, the Court sustained the invalidation of Connecticut, Washington, D.C., and Pennsylvania durational residence requirements for receipt of welfare benefits on the grounds that the clas-

1. Voter registration, automobile registration and property ownership within the state are among the criteria used to determine residency for various purposes.

2. A durational residence or "waiting period" requirement differs from other residence requirements in that it conditions the receipt of resident status for certain purposes on the length of time a person has been a resident of the state. Thus, while a person may meet all other requirements of residence, he will be denied resident status for certain purposes until he has lived in the state for a specified period of time. *See* Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

3. 394 U.S. 618 (1969).

sification they created infringed on the fundamental right to travel interstate and violated the equal protection clause by their failure to promote a compelling state interest.

In *Board of Regents v. Harper*,[4] seven University of Arizona students, who had been classified nonresidents and thus had to pay higher tuition rates,[5] filed suit against the Arizona Board of Regents contending that the 1-year durational residence requirement imposed by the Board[6] was unconstitutional. The trial court, deeming the *Shapiro* decision to be controlling, declared the 1-year requirement violative of equal protection guarantees. The Supreme Court of Arizona reversed, holding that a durational residence requirement for the determination of tuition rates does not create a classification that infringes on the right to travel, and that it otherwise complies with equal protection mandates.[7] A similar result has been reached by all other appellate courts ruling on the issue.[8]

The challenge in *Harper* made it necessary for the Supreme Court of Arizona to resolve certain issues raised but left unresolved in previous decisions of the United States Supreme Court. Thus, before evaluating the Arizona supreme court's treatment of these issues, it will be necessary to explore briefly the nature and purpose of the equal protection clause and the applicable equal protection tests. Next, the right to travel and its effect on the constitutionality of durational residence requirements will be discussed. This will be followed by an assessment of the analysis employed by the Supreme Court of Arizona

---

4. 108 Ariz. 223, 495 P.2d 453 (1972).

5. Nonresident tuition rate for one semester at the University of Arizona was $445 in 1973 compared to $205.50 for residents. During the spring semester of 1972-73, 7,057 students out of a total student body of 26,786 were classified nonresidents. Interview with David L. Windsor, Dean of Admissions and Records, University of Arizona, in Tucson, Arizona, Sept. 17, 1973. Thus, the additional nonresident tuition charge accounts for approximately $1½ million of the university's operating budget per semester.

6. The rule promulgated by the Board of Regents provides that a student over the age of 21 must meet certain requirements in order to receive resident classification, including the requirement that "legal residence in the state ha[ve] been established (independently of the circumstances of attendance at an Arizona institution of learning) for at least one year next preceeding the last day of registration for credit, and that he [be] eligible to become a registered voter." 108 Ariz. at 225, 495 P.2d at 455.

7. *Id.* While the *Harper* case was decided on the basis of the equal protection clause, argument was also made that the durational residence requirement violated the due process and the privileges and immunities clauses of both the state and federal constitutions and the commerce clause of the federal constitution. *Id.* at 224, 495 P.2d at 454. For a discussion of the role of these constitutional clauses in the area of residence classification, *see* Note, *The Right to Travel-Its Protection and Application Under the Constitution*, 40 U. MO. K.C. L. REV. 66, 68-74 (1971). For a discussion of the role played by the privileges and immunities clause only, *see* Note, *The Constitutionality of Nonresident Tuition*, 55 MINN. L. REV. 1139, 1143-44 (1971).

8. *See, e.g.*, Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); Kirk v. Board of Regents of the Univ. of Calif., 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969); Thompson v. Board of Regents of the Univ. of Neb., 187 Neb. 252, 188 N.W.2d 840 (1971).

in deciding that the state's durational residence requirement for the determination of tuition rates does not violate the equal protection clause.

The Nature of Equal Protection and the Equal Protection Tests

As interpreted by the United States Supreme Court,[9] the equal protection clause of the fourteenth amendment stands as a safeguard against arbitrary or unreasonable classifications[10] which provide different governmental treatment of individuals who are "similarly situated."[11] The Supreme Court has not interpreted the equal protection clause as an absolute prohibition against state establishment of classifications and divergent treatment of individuals based on such classifications.[12] Rather, the Court analyzes three factors in assessing the constitutionality of a state classification: the character of the classification, the individual interests affected, and the governmental objectives asserted in support of the classification.[13]

Two tests have been devised by the Court to determine whether a particular classification contravenes equal protection guarantees. The individual interests affected and the nature of the classification involved in a particular case determine which test is to be employed.[14] The first, known as the "rational relationship" or "traditional" equal protection test, applies in the vast majority of cases. Two rules have been enunciated by the Supreme Court for the application of the test: (1) the constitutionality of the state's classification is to be presumed;[15] and (2) the Constitution requires only that the classification have a reasonable basis (that is, that the distinction between persons is not wholly arbitrary) and that it be rationally related to a valid state purpose.[16] When these standards apply, the Court generally defers to

9. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

10. The effect of a durational residence requirement is to create two classes of residents who differ only in the length of time they have resided in the state. Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

11. *See, e.g.*, National Union of Marine Cooks v. Arnold, 348 U.S. 37, 41 (1954); Louisville Gas Co. v. Coleman, 277 U.S. 32, 37 (1928); Truax v. Corrigan, 257 U.S. 312, 315-16 (1921).

12. In Dandridge v. Williams, 397 U.S. 471 (1970), the Court stated:

> In the area of economics and social welfare a state does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some "reasonable basis" it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequalities."

Id. at 485, *quoting* Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78 (1911).

13. *See* Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Shapiro v. Thompson, 394 U.S. 618, 620 (1969).

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

15. *See* Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935).

16. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911).

the judgment of the state legislatures and most challenged classifications are upheld.[17]

The second equal protection test is known as the "compelling state interest" or "rigid judicial scrutiny" test. Since this standard has been imposed in a very limited number of situations, its scope has not been fully delineated.[18] The Supreme Court has defined two circumstances in which it believes this closer analysis is mandated by the Constitution. The test applies when a classification is based upon a criterion deemed "suspect" by the Court. Such suspect criteria include wealth,[19] political ideology,[20] religion,[21] and race.[22] Application of the test is also required when the challenged classification interferes with the exercise of a "fundamental constitutional right." The test has been invoked to protect the individual's right to vote,[23] travel,[24] and procreate,[25] and the rights of the criminally accused.[26] When the "rigid" test applies, judicial inquiry focuses on the nature of the governmental objective asserted by the state as justification for the classification. It is not enough that the classification is arguably related to a permissible state objective; the objective must be compelling and the classification must be indispensible to the accomplishment of that objective.

Although the decisions in *Shapiro v. Thompson*[27] and *Dunn v Blumstein*[28] represent the most detailed exposition of the compelling state interest test, the Court has not established precise guidelines for determining the types of state objectives which will be deemed "compelling".[29] As a result, this task has fallen upon the lower courts.[30]

17. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

18. *See* Korematsu v. United States, 323 U.S. 214 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942) for the first applications of the compelling state interest test.

19. Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

20. Williams v. Rhodes, 393 U.S. 23 (1968).

21. Sherbert v. Verner, 374 U.S. 398 (1963).

22. Korematsu v. United States, 323 U.S. 214 (1944).

23. Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Board of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

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

25. Skinner v. Oklahoma, 316 U.S. 535 (1942).

26. Douglas v. California, 372 U.S. 353 (1962); Griffin v. Illinois, 351 U.S. 12 (1956).

27. 394 U.S. 618 (1969).

28. 405 U.S. 330 (1972).

29. In *Dunn*, the Court offered some guidance for the application of the compelling state interest test by stating:

> In pursuing that important [state] interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity . . . . [I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it most choose "less drastic means."

Dunn v. Blumstein, 405 U.S. 330, 335 (1972). No formula, however, was offered for determining the type of state interest which would be considered "compelling" or the type of means which would be deemed "less drastic." For a discussion of Dunn v.

It is apparent that the test to be applied will dictate, to a large extent, the success or failure of a constitutional challenge to a state classification. The classification of individuals based on their place of residence has not been viewed by courts as "inherently suspect." Thus, unless application of the compelling state interest test can be triggered by establishing that a durational residence requirement infringes on the exercise of a fundamental constitutional right, constitutionality will be assessed under the traditional equal protection test.

Shapiro v. Thompson and the Right to Travel

For more than a century, the Supreme Court has acknowledged an implicit constitutional right to unimpeded interstate travel.[31] In explanation, the Court has stated:

> The right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel has long been recognized as a basic right under the Constitution.[32]

Blumstein, *see* Note, *New Mexico Bar Residency as an Unconstitutional Penalty on Applicant's Right to Travel: A Projected Reversal of Suffling v. Bondurant 349 F. Supp. 257 (S.N.M. 1972)*, 2 N.M.L. REV. 252 (1972).

30. In Baldwin v. Smith, 316 F. Supp. 670, 676-77 (D. Vt. 1970), *rev'd on other grounds*, 446 F.2d 1043 (2d Cir. 1971), the court established a standard for the implementation of the test by stating:

> (a) . . . The alleged classification must be strictly relevant to whatever pupose is claimed by the state to justify its use and also that it be the fairest and least restrictive alternative evident for the purpose ("necessity") and (b) . . . that the infringement of fundamental interests resulting from the classification be outweighed by the claimed state purpose ("compellingness"). (alteration in original)

quoting Michelman, *The Supreme Court, 1968 Term—Forward: On Protecting the Poor Through the 14th Amendment*, 83 HARV. L. REV. 7, 20 n.34 (1969). For a further explication of the nature of the dual equal protection tests, see Houle, *Compelling State Interest vs. Rational Classification: The Practitioner's Equal Protection Dilemma*, 3 URBAN LAW. 375 (1971); Note, *The Public School Financing Cases, Interdistrict Inequalities and Wealth Discrimination*, 14 ARIZ. L. REV. 88, 105-13 (1972).

31. *See, e.g.*, Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869); Smith v. Turner (Passenger Cases), 48 U.S. (7 How.) 283 (1849).

32. United States v. Guest, 383 U.S. 745, 758 (1966). In early cases, the Court attempted to pinpoint the source of the right to travel. It has been ascribed to the privileges and immunities clause of article IV, section 2, of the Constitution, *see, e.g.*, Edwards v. California, 314 U.S. 160, 181, 183-85 (1941) (Douglas & Jackson, J.J., concurring); Twining v. New Jersey, 211 U.S. 78, 97 (1908); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868); and to the commerce clause, *see, e.g.*, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867); Edwards v. California, 314 U.S. 160 (1941). In *Shapiro*, however, the Court refused to ascribe the right to any particular provision. 394 U.S. at 630.

The source of the right to travel is not without consequence. For example, if the right emanates from the commerce clause, there may not be a corresponding right to travel intrastate. *See* Maricopa County v. Superior Court, 108 Ariz. 373, 498 P.2d 461 (1972) (1-year durational residence requirement for the receipt of nonemergency medical care applied to persons moving to a different county was upheld). If, however, the right is recognized as being a personal one, a corresponding right to travel

In *Shapiro v. Thompson*, the Court invalidated Connecticut, Pennsylvania, and Washington, D.C., durational residence requirements which rendered persons who had resided in those jurisdictions for less than 1 year ineligible for welfare benefits. The Court characterized such a distinction among destitute persons as an invidious discrimination infringing on the fundamental right of individuals to travel interstate and establish new residences.[33] Accordingly, the Court chose not to apply the traditional equal protection standard and scrutinized the state welfare schemes under the more stringent compelling state interest test.[34]

In support of the classification the state asserted that the waiting period provision promoted an objective determination of resident status and protected the fiscal integrity of the welfare programs.[35] Both of these objectives were rejected as being less than "compelling" under the stringent test.[36]

While the Supreme Court afforded constitutional protection to the right to travel before *Shapiro*, the earliest cases involved state actions which directly restrained actual physical movement.[37] Ostensibly, *Shapiro* extended protection of the right to travel to prevent not only direct restraints on physical movement but also indirect restraints imposed by the deprivation of state benefits.[38] However, the Court in

---

intrastate would be guaranteed. *See* Cole v. Housing Auth. of the City of Newport, 435 F.2d 807 (1st Cir. 1970) (county durational residence requirement for public housing held unconstitutional).

See also Zemel v. Rusk, 381 U.S. 1, 14 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 505-6 (1964); and Kent v. Dulles, 357 U.S. 116, 125 (1958), where the right to travel internationally was ascribed to the due process clause of the fifth amendment. For a further background on the history and nature of the right to travel, see Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1965); Note, *supra* note 7.

33. 394 U.S. at 627.

34. *Id.* at 634.

35. It was also asserted that the classification served the objective of deterring the entry of needy persons into the state. The Court rejected this as a constitutionally impermissible objective. *Id.* at 627-28. Additionally, the objectives of encouraging new residents to enter the labor force and protecting against fraudulent welfare claims were offered to justify the requirement. Each of these was rejected as not being a compelling state interest. *Id.* at 634.

36. The Court also determined that, under the traditional equal protection test, the durational residence requirement was not rationally related to the goals of devising an objective test for determining resident status and protecting the fiscal integrity of the welfare programs. *Id.* at 635. The Supreme Court of Arizona apparently believes that a durational residence requirement is rationally related to the same purposes where college tuition rates are concerned. *See* text accompanying notes 70-75 *infra*. *See generally* Note, *Shapiro v. Thompson: A New Approach Under the Equal Protection Clause?*, 6 CALIF. W.L. REV. 179 (1969).

37. *See, e.g.*, Edwards v. California, 314 U.S. 160 (1941) (California statute imposing criminal penalties upon those bringing indigents into the state); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) ($1 tax imposed on persons leaving the state); Smith v. Turner (Passenger Cases), 48 U.S. (7 How.) 283 (1849) (tax imposed on shipowners for each passenger on board).

38. *See* Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U.L. REV. 989, 998 (1970).

Shapiro expressly reserved judgment on the degree to which this increased protection would afford freedom from deprivations of state benefits by stating in footnote 21:

> We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other may not be penalties upon the exercise of the constitutional right of interstate travel.[39]

The judicial reticence expressed in footnote 21 was broken in *Dunn v. Blumstein*[40] in which the Supreme Court invalidated a 1-year durational residence requirement for the determination of voter eligibility. While protection of the right to travel figured prominently in the decision, the Court took more notice of the fact that the requirement infringed on the right to vote.[41] The Court applied the more stringent equal protection test and determined that the objectives advanced as justification for the requirement were not compelling state interests.[42]

It is apparent from the *Shapiro* decision that a classification that infringes on the right to travel by conditioning eligibility for state benefits on the satisfaction of a durational residence requirement is to be judged by the more stringent compelling state interest test.[43] It is not clear, however, what type of deprivation infringes on the right to travel. Thus, the issue before the Supreme Court of Arizona in *Harper* was whether higher nonresident tuition rates impeded this freedom to travel.

The Constitutionality of Durational Residence Requirements for the Determination of University Tuition Rates

Board of Regents v. Harper[44] required the Supreme Court of Arizona to determine the extent to which *Shapiro* protects the right to travel against the allocation of state benefits on the sole basis of length of residence. In confronting the equal protection argument, the court had two alternatives: (1) it could have found that a durational residence requirement for the determination of tuition rates infringes on the right to travel and therefore applied the compelling state interest test in assessing its constitutionality; or (2) it could have found that

39. 394 U.S. at 638 n.21.
40. 405 U.S. 330 (1972). *See also* Shapiro v. Thompson, 394 U.S. 618, 654-55 (1969) (Warren, C.J., dissenting).
41. 405 U.S. at 336-37.
42. *Id.* at 360.
43. 394 U.S. at 620.
44. 108 Ariz. 223, 495 P.2d 453 (1972).

such a requirement does not limit the right to travel and resorted to the traditional equal protection test.[45] The court, relying heavily upon three post-*Shapiro* lower court decisions[46] which upheld durational residence requirements for university tuition rates, chose the latter alternative and sustained the requirement under the traditional equal protection test.[47] In reaching this result, the court concluded that, unlike the denial of welfare benefits involved in *Shapiro*, the deprivation of in-state college tuition rates did not violate the right to travel.[48] This conclusion rested on the absence of both a deterrent effect and a deprivation of an essential governmental benefit.

The court in *Harper* distinguished the *Shapiro* decision by maintaining that a deprivation of in-state tuition rates would not deter persons from changing residences while a deprivation of welfare benefits, as in *Shapiro* would have created such a deterrent effect.[49] In so doing, the court defined an infringement on the right to travel solely in terms of whether the waiting-period requirement deterred the exercise of the right. It is not apparent from the *Shapiro* opinion, however, that protection of the right to travel is limited to those situations where state classifications create a deterrent effect. On the contrary, language in that opinion indicates that a durational residence requirement infringes on the right to travel not only when the ineligibility serves to *deter* travel, but also when it *penalizes* those who have exercised the right by establishing a new residence.[50] This interpretation was expressly affirmed in *Dunn v. Blumstein*:[51]

> *Shapiro* did not rest upon a finding that a denial of welfare actually deterred travel. Nor have other "right to travel" cases . . . always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling state interest test would be triggered by any classification which serves to *penalize* the exercise of that right. . .[52]

45. These two alternatives are indicated of *Shapiro*, 394 U.S. at 638 n.21.
46. Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); Kirk v. Board of Regents of the Univ. of Calif., 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969); Thompson v. Board of Regents of the Univ. of Neb., 187 Neb. 252, 188 N.W.2d 840 (1970).
47. 108 Ariz. at 226-27, 495 P.2d at 456-57.
48. *Id.* at 225, 495 P.2d at 455.
49. *Id.* It is, of course, entirely possible that some people would be deterred from traveling if in-state tuition rates were to be denied for an extended period of time. For example, a family wishing to change residences might be deterred from entering a state if it could not afford out-of-state tuition rates for its college-age members. However, families which would actually be deterred from moving by increased tuition payments are probably few in number, and under the rule adopted in *Harper* the size of the class deterred would have to be substantial in order to create a deterrent effect. *See* Lane v. McGarry, 320 F. Supp. 562, 564 (N.D.N.Y. 1970); Board of Regents v. Harper, 108 Ariz. 223, 225, 495 P.2d 453, 455 (1972).
50. Shapiro v. Thompson, 394 U.S. 618, 631 (1969).
51. 405 U.S. 330 (1972).
52. *Id.* at 339-40.

Nonetheless, several courts entertaining post-*Shapiro* challenges to durational residence requirements have ignored the possible penal effect of withholding a state benefit and have defined an infringement on the right to travel solely in terms of whether the deprivation substantially deterred travel.[53] That is, the deprivation must be such that many individuals desiring to establish residence in a state are deterred from doing so.[54]

The decision between framing the analysis in terms of a deterrent effect before the right is exercised and examining the case for a penal effect after the exercise will have a substantial impact on the resulting determination whether a particular deprivation infringes on the right to travel.[55] Whether the result of the deprivation is discussed in terms of deterrence or of penalty, however, the problem remains one of isolating the type of state deprivation whose loss creates an impermissible effect. For this reason, most challenges to durational residence requirements have centered on the nature and necessity of the state benefit involved.

In *Harper*, the court noted that the durational residence requirement overturned in *Shapiro* had created a class of persons who were deprived of the means necessary to life.[56] In contrast, the court stated, ineligibility for in-state tuition rates does not withhold a benefit vital to personal survival.[57] The distinction, therefore, centers on the importance to the individual of the state benefit involved. A durational residence requirement which denies newcomers bare necessities of life given to residents will be deemed to limit the right to travel and will survive challenge only if it promotes a compelling state interest. On the other hand, if the residence rule merely withholds a "non-necessity" from new residents, it will be sustained as long as it is rationally related to a permissible state purpose.

While the essential/nonessential benefit distinction has become the common standard for measuring whether denial of a benefit will infringe on the right to travel,[58] substantial disagreement exists as to

53. *See, e.g.*, Starns v. Malkerson, 323 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); Lane v. McGarry, 320 F. Supp. 562 (N.D.N.Y. 1970); Kirk v. Board of Regents of the Univ. of Calif., 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969). *But see* Cole v. Housing Auth. of the City of Newport, 435 F.2d 807 (1st Cir. 1970); Carter v. Gallagher, 337 F. Supp. 626 (D. Minn. 1971).

54. See note 49 *supra*.

55. See text accompanying notes 63-66 *infra*.

56. 108 Ariz. at 225, 495 P.2d at 455.

57. *See id.*

58. *See, e.g.*, Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D. N.C. 1970); Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd mem.*, 400 U.S. 884 (1971); Thompson v. Board of Regents of the Univ. of Neb., 187 Neb. 252, 188 N.W.2d 840 (1971). *But see* Carter v. Gallagher, 337 F. Supp. 626 (D. Minn. 1971).

what benefits are "essential."[59] For example, public housing,[60] divorce[61] and nonemergency medical care[62] have been deemed essential benefits in some jurisdictions while in others they have been found to be nonessential. The Supreme Court of Arizona, in adopting the "necessary to life" formula, has indicated that it will take a narrow view of the range of benefits which will be considered essential.[63]

Arizona's use of the essential/nonessential benefit distinction and the "necessary to life" standard of review to determine the nature of the benefit raises two further questions. First, is the essentiality of the benefit a proper basis for analyzing whether a durational residence requirement infringes on the right to travel? The United States Supreme Court, in a different context, has stated that an essential/nonessential distinction is irrelevant in the consideration of constitutional protections.[64] In *Shapiro*, however, the Supreme Court indicated that not all denials of benefits to newcomers infringe on the right to travel.[65] Thus, it appears that the Court has sanctioned some consideration of the nature of the benefit withheld in determining whether a durational residence requirement infringes on the right to travel. Additionally, since the Supreme Court of Arizona indicated in *Harper* that an infringement of the right to travel will be found only if there is a substantial deterrent effect, adoption of the essential/nonessential benefit distinction is necessary. The exact number of persons deterred by any

59. *See generally* Symposium, *Durational Residency Requirements*, 6 SUFFOLK L. REV. 565 (1972).

60. *Compare* Cole v. Housing Auth. of the City of Newport, 435 F.2d 807 (1st Cir. 1970), *with* Lane v. McGarry, 320 F. Supp. 562 (N.D.N.Y. 1970).

61. *Compare* Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971) *with* Coleman v. Coleman, 32 Ohio St. 2d 155, 291 N.E.2d 530 (1972).

62. *Compare* Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971) *with* Maricopa County v. Superior Court, 108 Ariz. 373, 498 P.2d 461 (1972).

63. The decision in Maricopa County v. Superior Court, 108 Ariz. 373, 498 P.2d 461 (1972), indicates that the Supreme Court of Arizona will continue to adhere to the "necessary to life" formulation. That decision upheld a county durational residence requirement for the receipt of nonemergency medical care. Since nonemergency medical aid was deemed not necessary to life, the court refused to judge the constitutionality of the requirement under the compelling state interest test.

64. Fuentes v. Shevin, 407 U.S. 67 (1972) (invalidating Florida and Pennsylvania replevin statutes). Prior to *Fuentes*, the Court had invalidated a state prejudgment garnishment statute, Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), and a statute providing for an *ex parte* deprivation of welfare benefits, Goldberg v. Kelley, 397 U.S. 254 (1970). Due to the essentiality of wages and welfare benefits, many courts limited the application of these two decisions to *ex parte* deprivations involving necessities. *See, e.g.*, Black Watch Farms Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969); 300 W. 154th St. Realty Co. v. Department of Bldgs., 26 N.Y.2d 538, 260 N.E.2d 534, 311 N.Y.S.2d 899 (1970). *See generally* Note, *Creditor's Rights*, 12 ARIZ. L. REV. 198 (1970). In *Fuentes*, the Court rejected this distinction and stated that due process mandates a preliminary hearing prior to any deprivation of property regardless of its essential or nonessential nature. 407 U.S. at 70. For a more extensive discussion of *Fuentes* and collateral due process considerations see Comment, *Prejudgement Creditors Remedies and Due Process*, 14 ARIZ. L. REV. 834 (1972).

65. See text accompanying note 39 *supra*.

given deprivation is, for all practical purposes, indeterminable. Consequently, the question whether a state deprivation substantially deters travel must be answered on a qualitative "reasonable man" basis. By interrelating this approximate answer with an analysis of the nature of the benefit deprived, courts attempt to establish a workable standard.

Conceding that the essential/nonessential distinction is a proper one, the second question is whether "essentiality" is correctly defined in terms of "necessity for sustaining life." The United States Supreme Court has indicated in *Shapiro* and *Dunn* that deprivations which either deter potential travelers or penalize those who have already traveled infringe on the right to travel.[66] This difference is not without consequence. By definition, a deprivation which merely penalizes those who have traveled cannot have deterred travel. Accordingly, the type of benefit that, when withheld, deters travel would have to be more essential than one whose withholding still allows travel but penalizes those who do. The most essential benefits are obviously those necessary to sustain life. Thus, while the Supreme Court of Arizona apparently acknowledged that a penal effect also infringes on the right to travel,[67] the "necessary to life standard" established in *Harper* is more attuned to a formula that equates infringement of the right to travel with a deterrent effect. Deprivation of benefits less than "necessary to life" may not deter travel, but as indicated by the United States Supreme Court, such deprivations may create a penal effect and consequently should be prohibited. Under the standard indicated by the Supreme Court of the United States it would be possible to conclude that education is an essential benefit;[68] a withholding of in-state tuition rates by the imposition of a durational residence requirement then would infringe on the right to travel by penalizing those who have exercised the right. Under the standard enunciated by the Supreme Court of Arizona, however, the same conclusion could not be reached. Since higher education is not vital to individual survival, the prospect of paying nonresident tuition rates would not deter travel in a constitutional sense. It is, however, possible to reach the same result under both the Arizona and the federal standards. If the United States Supreme Court were to determine that education is not an essential benefit[69] the result reached under either standard would be that a denial of

66. Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). See text accompanying note 52 *supra*.

67. Board of Regents v. Harper, 108 Ariz. 223, 225, 495 P.2d 453, 455 (1972).

68. See note 69 *infra*.

69. The argument that education is a fundamental right like the implied constitutional right to travel has not been propounded in any of the cases attacking durational residence requirements for the determination of tuition rates. At one time, the Supreme Court seemed to accord fundamental interest status to education. *See* Abing-

in-state tuition rates to recent arrivals does not infringe on the right to travel. The difference is that the standard enunciated in *Harper* is more constrictive than the standard indicated by the United States Supreme Court in ascertaining which benefits are essential.

Application of the Traditional Equal Protection Test

Having concluded that Arizona's 1-year durational residence requirement for in-state college tuition rates did not infringe on the right to travel, the court in *Harper* assessed the rule's constitutionality under the traditional equal protection test. The court found the requirement to be rationally related to the purpose of devising an objective test for the determination of resident status.[70] Noting that it is often difficult to discern whether a college student intends to remain within the state or is there only for the purpose of attending school, Chief Justice Hays concluded that a durational residence requirement would provide an objective measure of intention.[71] The court also acknowledged that a durational residence requirement protects the fiscal integ-

---

ton School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); Brown v. Board of Educ., 347 U.S. 483, 493 (1954). Recently, however. in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). the Court stated:

> Education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected . . . [T]he undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing State's social and economic legislation.

411 U.S. at 35. While it is now clear that education will not be given independent constitutional protection, the question remains whether the Court would consider education to be an "essential benefit" in the context of a durational residence requirement for the determination of tuition rates. In Vlandis v. Kline, 93 S. Ct. 2230 (1973), the Court indicated that it would probably respond in the negative and that a 1-year durational residence requirement would be constitutional. In *Vlandis*, a Connecticut statute under which college students who were classified as nonresidents at the time of their enrollment were conclusively presumed to be nonresidents for the duration of their college careers was invalidated as denying due process of law. *Id.* *See also* Carrington v. Rash, 380 U.S. 89 (1965) (statute conclusively presuming the nonresidency of military personnel during their tour of duty constituted a denial of equal protection). However, Justice Stewart's majority opinion in *Vlandis* assumed that the imposition of a 1-year durational residence requirement without the offending conclusive presumption would be a reasonable method for determining bona fide residence. 93 S. Ct. at 2236, 2237 n.9. Justice White also expressed the view that a 1-year durational residence requirement would not be unconstitutional. *Id.* at 2238 (White, J., concurring). Justice Marshall (with Justice Brennan concurring), however, stated that in light of Dunn v. Blumstein, 405 U.S. 330 (1972), and Shapiro v. Thompson, 394 U.S. 618 (1969), a 1-year durational residence requirement may deny equal protection. 93 S. Ct. at 2238 (Marshall, J., concurring). The decision in *Vlandis* indicates that a majority of the Court is presently inclined to continue the trend established in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), of again deferring to legislative classifications in social and economic areas, at least where the requirements of due process are met.

70. 108 Ariz. at 228, 495 P.2d at 458.

71. *Id.* "Residence" as used in the context of a durational residence requirement actually refers to domicile. The primary requisites for the acquisition of a domicile are contemporaneous presence within the state and intent to remain there. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 16, 18 (1969). A person who travels to a state with an intent to remain is immediately a domiciliary.

rity of universities by ensuring a steady flow of high out-of-state tuition fees.[72]

In finding the classification created by the durational residence requirement constitutional under the traditional equal protection test, the court apparently ignored the reasoning in *Shapiro* which led the United States Supreme Court to conclude that a durational residence requirement was not rationally related to the purpose of devising an objective test for the determination of resident status.[73] Although the Supreme Court of Arizona offered no explanation for its apparent divergence, a California court in *Kirk v. Board of Regents of the University of California*[74] acknowledged a similar departure from *Shapiro* and explained:

> We cannot accept the portion of the *Shapiro* opinion . . . concerning the irrationality and unconstitutionality of the welfare residence requirements, under the traditional equal protection criteria, as a conclusive indication that the durational residency requirement here in issue is equally irrational and unconstitutional under the traditional test.[75]

One significant distinction between universities and welfare agencies lies in the machinery available for administration. As the Supreme Court noted in *Shapiro*, welfare agencies are generally equipped with investigatory machinery through which an applicant's employment, housing, family relationships and other aspects of personal life are reported.[76] Through this information, a welfare agency has ready access to facts from which a reliable determination of an applicant's resident status can be made.[77] Given this means to determine residence, an additional durational test is completely unnecessary, and therefore unreasonable. Universities, on the other hand, are not equipped with extensive investigatory staffs. While most schools have established residence committees to assess the qualifications of a student, the determination of resident status is generally based upon evidence offered by the individual applicant and not upon the findings of an independent investigation. As an objective benchmark to supplement the student's self-serving evidence, a durational residence requirement would not appear to be completely unreasonable.

A second important consideration is the difficulty in discerning the intent of college students as a class. Usually, university students have not achieved any degree of social permanence and do not have

72. 108 Ariz. at 228, 495 P.2d at 458.
73. See note 36 *supra*.
74. 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969).
75. *Id.* at 437, 78 Cal. Rptr. at 267.
76. 394 U.S. at 636.
77. *Id.*

definite plans concerning future residence. This impermanence would appear to be more true of college students than of welfare applicants because the likelihood of a student's premature withdrawal from school or acceptance of employment in another state are great. Additionally, many students seeking in-state classification maintain substantial ties with their state of origin throughout their college careers.[78] Consequently, student testimony concerning domiciliary intent may be ambiguous and untrustworthy.[79] By requiring the satisfaction of a durational residence requirement, external manifestation of an intent to remain would be provided.[80]

While a durational residence requirement does, in general terms, reasonably relate to a valid state purpose, it may impose undue hardship on those newcomers who genuinely intend to remain domiciled in the state. The value of a durational residence requirement is questionable when it appears that less restrictive alternatives exist.[81] One such alternative would be to completely discard the irrebutable presumption of nonresidency during the 1-year waiting period and determine resident status solely through use of a rebuttable presumption which could be overcome only by meeting a high standard of proof, such as by clear and convincing evidence.[82] In this manner, the difficulties encountered in discerning a student's intent would be minimized without the harshness of a blanket application affecting those who are bona fide residents.

Unlike the compelling state interest test, however, the traditional test requires only that the classification be rational, not that it be the least restrictive or best possible alternative for the accomplishment of a state objective.[83] Accordingly, the Supreme Court of Arizona was correct in concluding that an irrebutable presumption of nonresidency under a durational residence requirement for the determination of tuition rates does not violate the equal protection clause.[84]

78. Six of the seven plaintiffs in *Harper* bore substantial contacts with other states, such as the filing of income tax returns, automobile registration, and out-of-state summer employment. 108 Ariz. at 231-32, 495 P.2d at 461-62.

79. In *Harper* for example, plaintiff Harper testified: "The intent was that I can't say it was 100% . . . if I like[d] Tucson . . . then I would stay." *Id.* at 231, 495 P.2d at 461. When questioned about his intent, plaintiff Lawrence replied: "I had only been here a month or maybe two weeks, by the time . . . registration occurred, so I couldn't be positive about that then." *Id.* at 232, 495 P.2d at 462.

80. Spencer, *The Legal Aspects of the Nonresident Tuition Fee*, 6 ORE. L. REV. 332, 334, 352-53 (1926)..

81. Note, *The Constitutionality of Nonresident Tuition*, 55 MINN. L. REV. 1139, 1158 (1971).

82. *Id.* at 1159.

83. See cases cited note 16 *supra*.

84. A few durational residence requirements have been held irrational under the traditional equal protection test. *See* Stevens v. Campbell, 332 F. Supp. 102 (D. Mass. 1971) (5-year durational residence requirement for receipt of veterans benefits); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971) (1-year durational residence requirement for eligibility to take the bar exam).

Conclusion

The Supreme Court of Arizona in *Board of Regents v. Harper* has manifested its desire to halt the erosion, ostensibly signaled by *Shapiro v. Thompson*, of the right of states to regulate eligibility for governmental services through the use of a durational residence requirement. By ruling that the device is constitutional unless it substantially deters the exercise of the right to travel, and defining deterrence in terms of deprivation of a benefit necessary to life, the court has assured that the number of cases in which a state deprivation will be deemed to infringe on the right to travel will be small. Accordingly, most challenges to durational residence requirements in Arizona will be judged not through application of the compelling state interest test, but by an application of the less stringent traditional equal protection standard.

While a less restrictive alternative to a durational residence requirement exists in the form of a presumption of nonresidency rebuttable by clear and convincing proof, the principle of limited judicial review leaves the choice among rational systems of regulation to the legislature.

C. FEDERAL PREEMPTION OF STATE CONTROL OVER AIRCRAFT FLIGHT

Under the doctrine of preemption, state and local governments may be deprived of power to protect local interests against activities within the cognizance of a federal regulatory agency. In *Williams v. Superior Court*,[1] the Supreme Court of Arizona held that the Federal Aviation Act of 1958[2] does not preempt the field of flight control for the purpose of noise abatement and Arizona courts, with due regard for "federal preeminence in the area of interstate commerce," can entertain a nuisance action to abate noise from Arizona Air National Guard flights.[3]

1. 108 Ariz. 154, 494 P.2d 26 (1972).
2. 49 U.S.C. §§ 1301-1542 (1970).
3. 108 Ariz. at 157, 494 P.2d at 29. *But see* City of Burbank v. Lockheed Air Terminal, Inc., 93 S. Ct. 1854 (1973), discussed in text accompanying notes 14-18 and 79-84, *infra*. The other questions presented in *Williams* were whether administrative officers making administrative decisions are susceptible to the injunctive process despite an anti-injunction statute and whether the Air National Guard is a state or a federal instrumentality. The court gave the anti-injunction statute its time-honored reading, holding that public officials acting beyond the scope of their authority are not protected. ARIZ. REV. STAT. ANN. § 12-1802 (1956). *See* Crane Co. v. Arizona State Tax Comm'n, 63 Ariz. 426, 163 P.2d 293 (1946).

The real party in interest, Sunnyside School District No. 12, operates a school situated beneath the usual flight path of Arizona Air National Guard aircraft using Tucson International Airport. The school is less than 1 mile from the end of the runway ordinarily used by the Guard. At the airport, the Guard also hosts an instructional facility where pilots from several states, including Arizona, are trained to pilot jet fighter aircraft.[4] This training is conducted under the authority of the Secretary of the Air Force.[5] All fights are controlled by Federal Aviation Administration personnel in the airport control tower and conform to all federal laws and regulations. The Arizona Guard normally flies on weekends. It is only during the periods when the multistate training facility is in operation that the school is significantly disrupted.

Originally, Sunnyside School District brought an action in state court against Governor Jack Williams as Commander-in-Chief of the Arizona National Guard, seeking injunctive relief from flights over the school.[6] *Williams v. Superior Court* is a special action[7] brought in response to an order denying defendant's motion to dismiss the complaint for want of jurisdiction.[8] The Arizona court of appeals treated the motion as one for summary judgment,[9] which it ordered the trial court to grant on the ground that the Federal Aviation Act of 1958 divested the state superior court of jurisdiction to hear the action.[10] The Supreme Court of Arizona, however, reversed the court of appeals, holding that such flight control has not been preempted.[11]

In reaching its decision, the *Williams* court viewed the Federal Aviation Act of 1958 as governing only the technical aspects of flight in which the Federal Aviation Administration is expert. Through this expertise analysis, the court distinguished prior rulings by federal courts

---

Relying on the Arizona Constitution, art. 16, § 2, the court held that the Arizona Air National Guard is a state instrumentality. The court did not consider the effect of the federal statute which designates Air National Guard units as reserve components of the Air Force. 10 U.S.C. § 261(a)(5) (1970); *cf.* Shaw, *The Interrelationship of the United States Army and the National Guard*, 31 MIL. L. REV. 39 (1966). The court also failed to consider the grant of authority to Congress to prescribe the discipline for training the militia by the militia clause. U.S. CONST. art. I, § 8, cl. 16. Since either of these authorities control over the Arizona Constitution, U.S. CONST. art. VI, § 2, the court should have recognized them.

4. 108 Ariz. at 155, 494 P.2d at 27.

5. *See generally* 32 U.S.C. § 504(a)(2) (1970).

6. No. 125520 (Pima County Super. Ct., filed March 31, 1971).

7. *See* ARIZ. R.P. SPECIAL ACTIONS. *See also* Nelson, *The Rules of Procedure for Special Actions: Long Awaited Reform of Extraordinary Writ Practice in Arizona*, 11 ARIZ. L. REV. 413 (1969); Lesher, *Extraordinary Writs in the Appellate Courts of Arizona*, 7 ARIZ. L. REV. 34 (1965).

8. *See generally* ARIZ. R. CIV. P. 12(b).

9. *See id.*, 12(b), 56(b).

10. Williams v. Superior Court, 15 Ariz. App. 480, 484, 489 P.2d 854, 858 (1971), *vacated*, Williams v. Superior Court, 108 Ariz. 154, 494 P.2d 26 (1972).

11. 108 Ariz. at 157, 494 P.2d at 29.

that the field has been preempted.[12] The court recognized federal dominance in the aviation field, but concluded that this dominance does not preclude local efforts "at noise regulation which are . . . actually consistent with an important federal objective: minimization of noise from airplane operations."[13]

A recent decision of the United States Supreme Court, *City of Burbank v. Lockheed Air Terminal, Inc.*,[14] conflicts with the *Williams* ruling. Lockheed, the owner of Hollywood-Burbank Airport, obtained an injunction in United States district court restraining Burbank from enforcing an ordinance which prohibited jet aircraft takeoffs from the airport between 11:00 p.m. and 7:00 a.m.[15] The Ninth Circuit affirmed.[16] Affirming the court of appeals, the Supreme Court held that the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972,[17] preempts airspace management and aircraft noise abatement. Therefore, the Burbank curfew violated the supremacy clause because it impinged on airspace management by restricting the FAA's freedom in scheduling flights as well as invading the preempted area of aircraft noise abatement.[18]

On the authority of the ruling of the Ninth Circuit in *Lockheed*, the United States District Court for the District of Arizona enjoined the real party in interest in *Williams* from proceeding further for an injunction in the state court.[19] The court also based the injunction on its ruling, contrary to *Williams*, that the Air National Guard, particularly the multistate training operations, is a federal instrumentality.

This discussion will present the analysis appropriate to preemption decisions and then apply this analysis to the Federal Aviation Act of 1958. Then, the treatment of the preemption issue by the *Williams* court will be evaluated and the current status of *Williams* will

12. See text accompanying note 92, *infra*.

13. 108 Ariz. at 157, 494 P.2d at 29. In his concurring opinion, Justice Struckmeyer argued that the preemption question should not have been reached, since the issue is simply one of state power to deal with a violation of the state public nuisance statute, ARIZ. REV. STAT. ANN. § 13-601 (1956), by state controlled aircraft. 108 Ariz. at 159, 494 P.2d at 31. Justice Holohan dissented, arguing that the field is preempted, that federal remedies are available to vindicate the interests involved, and that in all events, no injunction could issue since the aircraft fly by order of the Secretary of the Air Force and are thus beyond the reach of state power. *Id.* at 160-62. 494 P.2d at 32-34.

14. 93 S. Ct. 1854 (1973).

15. Lockheed Air Terminal, Inc. v. City of Burbank, 318 F. Supp. 914 (C.D. Cal. 1970), *aff'd*, 457 F.2d 667 (1972), *aff'd*, 93 S. Ct. 1854 (1973). See text accompanying note 84, *infra*.

16. Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667 (9th Cir. 1972), *aff'd*, 93 S. Ct. 1854 (1973).

17. 49 U.S.C. § 1431 (Supp. 1973).

18. 93 S. Ct. at 1856-57.

19. United States v. Sunnyside School Dist. No. 12, Civil No. 72-47 (D. Ariz., filed May 23, 1972).

be considered. This evaluation will reveal that the conflict between *Williams* and *Lockheed* stems from a deficient preemption analysis by the *Williams* court. *Williams*, of course, was vitiated by the action of the federal district court and interred when the United States Supreme Court affirmed *Lockheed*.

Preemption

Preemption is the assumption of exclusive jurisdiction by the federal government over subject matter which the states might formerly have regulated.[20] The power to preempt arises out of the supremacy clause of the United States Constitution. The legitimate exercise of federal power[21] being supreme, it is within that power to be exclusive.[22] While some of the earlier cases suggest that state regulation of certain activities is prohibited by the Constitution without more,[23] the modern trend is to find displacement of state power in specific federal legislation.[24] When federal legislation deprives the states of jurisdiction over a field of activity, that field is preempted.

Whether particular federal legislation preempts a field is solely a question of the intent of Congress.[25] The theory of preemption is inherently complex because it must divine the intent of Congress, often where Congress has not expressed itself. Institutional pressures on the courts may compound this complexity by producing a lack of candor in preemption decisions. Preemption is an attractive ground for decision in that it places the onus of invalidating state legislation on

20. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Some authorities use the term "supersession" to mean preemption. *Id.*

21. One commentator has argued that where the federal government is unable to deal adequately with the multiplicity of local variances affecting proper regulation of a field, and the field is closely tied to the health and safety of the state's inhabitants, the due process clause of the fifth amendment and the ninth amendment should limit the power of Congress to preempt. While these considerations do bear on the ease with which courts find preemption, no case has yet gone that far. Comment, *Air Pollution, Pre-emption, Local Problems and the Constitution—Some Pigeonholes and Hatracks*, 10 ARIZ. L. REV. 97 (1968).

22. State regulation may also deprive local governments of jurisdiction by preemption. Alta-Dena Dairy v. San Diego County, 271 Cal. App. 2d 66, 76 Cal. Rptr. 510 (1969).

23. Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851).

24. Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 219 (1959).

25. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 93 S. Ct. 1854, 1859 (1973); Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

Before considering the elements necessary for a finding of preemption, however, an important distinction should be observed: preemption is not inextricably linked to the commerce clause. Although both issues are often litigated in the same case, Colorado Anti-Discrimination Bd. v. Continental Airlines, Inc., 372 U.S. 714 (1963); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945), and although many of the considerations relevant to preemption, such as the need for uniformity and the extent of the federal interest, do bear on the question of commerce clause infringement, *id.*, preemption differs from commerce clause questions. The former re-

Congress rather than the courts.[26] Often, however, the same result would be compelled on another basis as is reached on preemption grounds.[27] Preemption may, therefore, provide the ostensible justification for a result actually reached for other reasons. While the search for the "other rationale" of preemption decisions may often prove fruitful, the analysis which follows takes the decisions at face value.

Where Congress clearly expresses an intent to displace state power, the question of preemption poses little difficulty. Intent, of course, can be either expressed or implied. Often, specific statutory provisions are an expression of intent to preempt,[28] or a federal agency is given exclusive authority over a field. In either case, the field is preempted.[29]

The function of the court when confronted with a claim of implied preemption is to determine whether the exercise of state power will obstruct the accomplishment of the purposes of Congress[30] or impair federal superintendence of the field governed by federal legislation.[31] In making this determination, the courts consistently look to a combination of three factors: the purpose of the statute, the nature of the subject matter covered by the statute, and the scope of the regulatory scheme. Although each factor may not be relevant in every case, they are not independent. Each affects the application of the others. As Mr. Justice Black noted: "There is not—and from the very nature of the problem, there cannot be—any rigid formula or rule"[32] which will work with all statutes in determining a question of preemption. Indeed, the only rule of a general character is the presumption against preemption.[33]

Subjection of a field to comprehensive and pervasive regulation often marks preemptive intent.[34] The scope of the federal legislation

---

quires action by Congress while the judiciary must decide whether the commerce clause has been infringed in the absence of congressional action. *See generally* California v. Zook, 336 U.S. 725, 734 (1949). Preemption, then, involves the effect of congressional power and that power need not be exercised pursuant to the commerce clause. Thus, the two doctrines should not be confused.

26. Note, *supra* note 24, at 224.

27. *Id.* 217-22. *See* text accompanying note 84, *infra*, for a discussion of *Lockheed* as a case with an alternate rationale.

28. *See* 42 U.S.C. § 1857f—4 (1970); 42 U.S.C. § 4905(e) (Supp. 1973).

29. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 233 (1947).

30. Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

31. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

32. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

33. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). It has been argued that the presumption of the validity of state laws in preemption cases is at the mercy of the views of individual members of the Supreme Court concerning federalism. Abraham & Loder, *The Supreme Court and the Preemption Question*, 53 KY. L.J. 289 (1965).

34. Napier v. Atlantic Coast Line Ry. Co., 272 U.S. 605 (1926); *accord*, City of Burbank v. Lockheed Air Terminal, Inc., 93 S. Ct. 1854, 1859-60 (1973); Campbell v.

implies that Congress intended to occupy the field, leaving no room for supplementary state regulation.[35] Absent a contrary indication from other factors, however, a state may regulate persons or aspects of the activity not subject to federal law.[36]

To be found preemptively pervasive, a regulatory scheme generally must be accompanied by adequate means of enforcement and implementation. Enforcement powers consisting of mere licensing authority, therefore, will not support a finding of preemption.[37] On the other hand, provision for enforcement programs, penalties, remedies, and a quasi-judicial system within an agency indicates preemptive intent.[38]

Preemption may be required to accomplish the purposes of federal legislation. For example, when Congress seeks to impose uniform regulations, state measures will fail as disrupting the desired uniformity.[39] Likewise, a purpose which requires uniformity implies preemption. In *Rice v. Santa Fe Elevator Corp.*[40] grain warehousemen were confronted with state and federal regulations in the same area. The purpose of the federal legislation was to facilitate the use of grain elevator receipts as collateral by making it easier for financial institutions to know what regulations might affect the value of the receipts. The field was held to have been preempted since additional state measures would produce multiplicity of regulation, and therefore would cause the very evil sought to be eliminated by the statute.

Similarly, the need for a central authority to effect the purpose of federal legislation indicates preemption. In one case, subversive activities control was held to have been hindered by the number of jurisdictions seeking to enforce their own laws. Communication of vital information among local, state, and federal authorities was minimal and federal investigations could be disrupted by local action. Preemption was held necessary to accomplish the purposes of federal law in this field.[41]

The scope and purpose of federal legislation interact to imply preemption. Where the purpose of federal legislation requires exclu-

Hussey, 368 U.S. 297 (1961); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

35. City of Burbank v. Lockheed Air Terminal, Inc., 93 S. Ct. 1854, 1862 (1973); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Hines v. Davidowitz, 312 U.S. 52, 69 (1941); Napier v. Atlantic Coast Line Ry. Co., 272 U.S. 605, 611-13 (1926).

36. Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1, 10 (1937).

37. Head v. New Mexico Bd. of Exam., 374 U.S. 424, 431 (1963).

38. Abraham & Loder, *supra* note 33, at 292.

39. Campbell v. Hussey, 368 U.S. 297, 300-01 (1961).

40. 331 U.S. 218 (1947).

41. Pennsylvania v. Nelson, 350 U.S. 497 (1956).

sion of the states, gaps in the federal scheme do not prevent a finding of preemption.[42] The theory is that Congress has determined that proper regulation requires the omitted aspects of the activity to go unregulated. Conversely, a congressional purpose to expand local control over an activity helps defeat the inference of preemption arising from pervasive regulation.[43] Preemption itself would obstruct the accomplishment of this purpose.

The nature of the subject of the federal law controls the ease with which preemption is found. Obviously, whether regulation is comprehensive depends on the complexity of the subject matter. In addition, some areas are so dominated by the national interest that any federal regulation preempts the field. For example, regulatory activity which affects relations with other countries, such as alien registration[44] and regulation of property inheritance by aliens,[45] is readily preempted on two theories. First, Congress is deemed to have selected among all regulatory schemes when legislating in these fields.[46] Any state activity alters the scheme and thus upsets the national policy. Second, only one policy can exist in foreign affairs. Effective foreign policy requires that the treatment of aliens be uniform in all states, since unfair treatment of the citizens of other countries is a source of friction in international relations.[47] On the other hand, a strong state interest in regulating certain subject matter can only be overcome by a clear showing that Congress intended to preempt the field.[48]

Not surprisingly, when an area has traditionally been within the police power of the states, a clear indication of preemption is required. Thus, pervasive regulation of the safety aspects of ship boilers did not preempt the field so that a city could not impose additional air polution restrictions on the same boilers.[49] In this case, a narrow purpose coupled with a strong local interest avoided the preemptive implications attributable to comprehensive regulation. State regulations for the health and safety of the people are displaced only with great reluctance.[50] This is sound policy in the light of the total disability imposed on state power by the finding of preemption.

Finally, once preemption is found, the effect on state power is

42. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 235-36 (1947).
43. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 148-51 (1963).
44. Hines v. Davidowitz, 312 U.S. 52 (1941).
45. Zschering v. Miller, 389 U.S. 429 (1968).
46. *See* Hines v. Davidowitz, 312 U.S. 52, 72-73 (1941).
47. *Id.* at 64.
48. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).
49. *Id.*
50. *See* City of Burbank v. Lockheed Air Terminal, Inc., 93 S. Ct. 1854, 1859 (1973); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

devastating. If state regulation is within the area federally preempted, it necessarily fails. "[C]oincidence is as fatal as opposition and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."[51] Therefore, that state regulations seek the same goals as federal regulations will not avoid their invalidation on preemption grounds.

Preemption of Flight Control

The federal regulatory scheme governing aviation is embodied in the Federal Aviation Act of 1958. The Act is an exercise of the commerce power.[52] It gives the United States "complete and exclusive national sovereignty in the airspace of the United States."[53] Some courts have treated this provision as an exclusionary clause, preempting state regulation of aviation in any form.[54] This reading misconstrues the sovereignty section of the Act. That section deals only with foreign civil and military aircraft in American airspace. The specific governing the general, it appears that the declaration is of national sovereignty as against other nations, rather than federal sovereignty as against the states.[55] Thus, the sovereignty section is a weak basis upon which to rest a finding of preemption.

The Act further declares "a public right of freedom of transit through the navigable airspace."[56] Navigable airspace is defined as the "airspace above minimum altitudes of flight" as prescribed by the FAA and includes "airspace needed to insure safety in takeoff and landing."[57] State regulations which deny the right of transit to those unable to comply with them have been invalidated under this section. For example, both noise[58] and scheduling[59] regulations have been invalidated as abridging the right of transit.[60]

51. Charleston & W.C.R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915).
52. Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590, 596 (1954) (referring to the Civil Aeronautics Act of 1937, 52 Stat. 973).
53. 49 U.S.C. § 1508 (1970).
54. City of Burbank v. Lockheed Air Terminal, Inc., 93 S. Ct. 1854, 1856 (1973); United States v. City of New Haven, 447 F.2d 972, 973 (2d Cir. 1971). Although the Supreme Court appears to have adopted this reading of the sovereignty section, upon analysis, the Court's single mention of the section seems inconsistent with the significance of an express statement of preemptive intent in legislation. Therefore, the Court's lone reference to the sovereignty section appears more make-weight than substantive.
55. *See* Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590, 595 (1954).
56. 49 U.S.C. § 1304 (1970).
57. *Id.* § 1301(24).
58. American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); Opinion of the Justices, — Mass. —, 271 N.E.2d 354 (1971).
59. Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667 (9th Cir. 1972), *aff'd*, 93 S. Ct. 1854 (1973). *Contra*, Township of Hanover v. Town of Morristown, 108 N.J. Super. 461, 261 A.2d 692 (Ch. 1969).
60. Of course, the federal government can only guarantee this right within the

A saving clause preserving the "remedies now existing at common law or by statute" appears in the Act.[61] This clause has been held to preserve state tort remedies, but no case has been found which reads the clause as allowing state *regulatory* activity.[62] One traditional tort remedy, however, cannot survive the Act. Injunction or abatement of a nuisance created by aircraft would conflict with the right of air transit section[63] assuming authorization of the particular flights to be within the ambit of federal power.[64] Thus, it appears that the purpose of the saving clause is only to retain the state forum for the monetary compensation of injuries caused by aviation operations.

The sovereignty section, the right of air transit section, and the saving clause exhaust the list of express provisions in the Federal Aviation Act of 1958 which might reveal its intended effect on state law. One other indicator of congressional intent is more helpful. The Senate Commerce Committee, reporting on the effect of the 1968 noise control amendment to the Act on state law, concluded that it would have no effect, since the flight of aircraft had already been preempted by the Federal Aviation Act of 1958.[65] The committee is well supported in its interpretation of the original Act by indicators of implied preemption.

The regulatory scheme established by the Act is pervasive and comprehensive.[66] The Act deals with safety, traffic, the allocation and use of airspace, airport planning, construction, and operation, economic

reach of its power. Those state court rulings which have ordered the closing or restriction of local airports are reconcilable with this section since federal power did not reach the airports involved. *See* Brandes v. Mitterling, 67 Ariz. 349, 196 P.2d 464 (1948); Atkinson v. Bernard, Inc., 223 Ore. 624, 355 P.2d 229 (1960).

61. 49 U.S.C. § 1506 (1970).

62. McCord v. Dixie Aviation Corp., 450 F.2d 1129 (10th Cir. 1971); Rogers v. Ray Gardner Flying Servs., Inc., 435 F.2d 1389 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); McEntire v. Forte's Estate, 463 S.W.2d 491 (Tex. Civ. App. 1971); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964); *cf.* Griggs v. County of Alleghany, 369 U.S. 84 (1962) (claim for damages from aviation activities remanded to state court). *Contra*, Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964) (saving clause concludes preemption question, area not preempted).

63. *Cf.* Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667, 676 n.12 (1972), *aff'd*, 93 S. Ct. 1854 (1973). See text accompanying notes 56-60, *supra*.

64. In his concurring opinion in *Williams*, Justice Struckmeyer took the position that the flights were enjoinable in that they were the "exercise of a public office in an unlawful manner." He reasoned that the flights were a state function which were enjoinable if in violation of state law. 108 Ariz. at 160, 494 P.2d at 32.

65. S. REP. No. 1353, 90th Cong., 2d Sess. 6 (1968). The FAA apparently agreed in 1968, but has subsequently changed its mind. *Compare* letter from the Secretary of Transportation to the Senate Commerce Committee, *id.* at 6-7 and Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667, 670 (9th Cir. 1972), *aff'd*, 93 S. Ct. 1854 (1973) with City of Burbank v. Lockheed Air Terminal, Inc., 93 S. Ct. 1854, 1856 (1973). The FAA appeared as *amicus curie* in favor of preemption in the Ninth Circuit but changed its position in the Supreme Court.

66. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 93 S. Ct. 1854, 1862 (1973); Griggs v. County of Allegheny, 369 U.S. 84, 91 (1962) (Black, J., dissenting); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

aspects of commercial aviation, and sets standards for aviation personnel and equipment, including noise standards for aircraft.[67] Civil [68] and criminal[69] penalties, in addition to licensing authority, are provided to enforce the Act. Thus, the Act constitutes a preemptively pervasive regulatory scheme well supported by adequate means of enforcement.

The Federal Aviation Act of 1958 was further amended after the *Williams* decision by the Noise Control Act of 1972,[70] which made the federal scheme even more pervasive. The Noise Control Act of 1972 changed prior law in two important respects. First, noise standards for new aircraft are now mandatory, while previously the setting of standards was merely authorized.[71] Second, the new law establishes a check of sorts on the FAA. The FAA and the Environmental Protection Agency must now engage in an elaborate, published, colloquy concerning proposed noise regulations.[72] The effect of the amendment on the question of preemption is to clarify what was previously arguable: that the field of aircraft noise abatement is preempted.[73]

The purpose of the Federal Aviation Act of 1958 is also indicative of preemption. The purpose of the Act is to centralize authority over flight control and unify the regulation of flight. By giving "the Administrator authority to regulate the use of all airspace over the United States by both civil and military aircraft and to establish and operate a unified system of air traffic control,"[74] the Act eliminates the evils caused by the division of authority between two civilian agencies and the military under the prior system.[75] The accomplishment of this pur-

67. 49 U.S.C. § 1301 *et seq.* (1970). The statute authorizing FAA regulation of aircraft noise applies only to civil aircraft. *Id.* § 1431 (Supp. 1973).

68. *Id.* §§ 1471, 1474 (1970).

69. *Id.* § 1472.

70. *Id.* § 1431 (Supp. 1973).

71. *Compare id.* § 1431(b)(2) *with* Act of July 21, 1968, Pub. L. No. 90-411, 82 Stat. 395.

72. 49 U.S.C. § 1431(c) (Supp. 1973). The EPA is required to submit proposals for aircraft noise abatement to the FAA, which must publish the proposed regulations and hold a public hearing concerning them. The FAA must then either prescribe the regulations, modify them, or reject them. Should the proposed rules be rejected or modified, the FAA must publish a notice giving the reasons for its action. If the EPA determines that the action of the FAA is not adequately protective of the public health and welfare, it can require the FAA to review its decision. The FAA must then either accept the proposed regulations or publish in detail the factual basis for rejection. While this system has the great merit of exposing the regulatory process to public view through the publication requirements, the FAA retains the final veto over any proposed regulations.

73. Nevertheless, the *Lockheed* decision provoked a vigorous dissent by Mr. Justice Rehnquist joined by Justices Stewart, White, and Marshall. The dissenters noted that the Burbank airport would probably be the only airport in the nation affected by the Court's ruling as it is the only privately-owned major airport in the country. Municipalities which own the airports which serve them are still free, as airport owners, to restrict the use of their facilities to certain times and to aircraft meeting acceptable noise limits. 93 S. Ct. at 1867-69.

74. H. REP. No. 2360, 85th Cong., 2d Sess. 6 (1958).

75. City of Burbank v. Lockheed Air Terminal, Inc., 93 S. Ct. 1854, 1865 (1973) (dissenting opinion).

pose would be hindered if state authorities could impose their own notions of desirable allocation of airspace. In addition, the Act commands the FAA to balance various considerations when regulating aviation. The FAA is to regulate with regard to the requirements of safety, efficiency, the development of aviation, and national defense.[76] Since the FAA presumably adheres to its mandate, FAA regulations, or abstention from regulation, reflect this balance. Any additional regulatory activity by the states, therefore, would upset the balance which Congress intended. Preemption is thus necessary to effectuate the balance.[77]

Finally, the very nature of aviation demands national control. The airplane is most valuable for long-distance rapid transportation. Thus, air transit is not limited to a single jurisdiction, but ignores territorial limitations. For this reason, local regulation would seriously impede the development of an effective national air transportation system.[78] Since there is a strong national interest in such a system, the interest in the regulation of aviation is correspondingly strong. Indeed, the very scope of the Federal Aviation Act of 1958 reflects the strength of this interest.

To support its conclusion that both airspace management and aviation noise abatement are preempted, the Supreme Court of the United States in *Lockheed* relied mainly on the pervasive scope of the federal aircraft noise abatement scheme. The Court found that "the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls."[79] In addition, the Court found that curfews like that imposed by Burbank encroach on the preempted field of airspace management by limiting the FAA's discretion as to how to allocate the available airspace.[80]

Legislative history and a purpose requiring uniformity also figured in the *Lockheed* ruling. Legislative committee reports accompanying the Noise Control Act of 1972 noted that the Act was not "intended to alter in any way" the existing distribution of powers among the federal government and the states.[81] The Court cited committee reports accompanying the 1968 noise abatement amendment expressing the view that the field is preempted[82] to show that its decision did not

76. 49 U.S.C. §§ 1303, 1348(a), (c) (1970).
77. City of Burbank v. Lockheed Air Terminal, Inc., 93 S. Ct. 1854, 1862 (1973).
78. *See* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 107 (1948).
79. 93 S. Ct. at 1862.
80. *Id.*
81. H.R. REP. No. 92-842, 92d Cong., 2d Sess. 10 (1972); S. REP. No. 92-1160, 92d Cong., 2d Sess. 10-11 (1972).
82. See text accompanying note 65 *supra*.

alter the distribution of power. Finding a preemptive purpose, the Court held that "the delicate balance between safety and efficiency and the protection of persons on the ground" and "[t]he interdependence of these factors requires a uniform and exclusive system of federal regulation."[83] Thus, *Lockheed* fits into the classic mold of preemption decisions by relying on legislative history, pervasive regulations, and a purpose requiring uniformity of regulation to support a finding of preemption. *Lockheed* is also classic since an alternate rationale was available to reach the same result. The federal district court in which the *Lockheed* suit was originally brought enjoined enforcement of the ordinance as an undue burden on interstate commerce as well as on preemption grounds.[84]

Federal preemption of flight control and aircraft noise abatement does not eliminate the whole range of local response to aircraft noise. Airport *owners* may restrict the use of their facilities to certain times,[85] and may set limits for acceptable noise output levels.[86] State courts may grant monetary relief to property owners on either the theories of nuisance or inverse condemnation.[87] The United States Supreme Court has twice held that when interference with existing property uses amounts to a "taking," compensation is constitutionally required.[88] Thus, federal preemption of flight control precludes only those local efforts which are regulatory in character.[89]

---

83. 93 S. Ct. at 1862.

84. Lockheed Air Terminal, Inc. v. City of Burbank, 318 F. Supp. 914 (1970), *aff'd*, 457 F.2d 667 (1972), *aff'd*, 93 S. Ct. 1854 (1973).

The imposition of local curfews would disrupt air traffic far beyond the immediate curfew. If, for example, New York were to impose a Burbank-type curfew, no flight could arrive in Los Angeles from New York before approximately 4 o'clock in the afternoon. This calculation assumes a 6 hour flight time and a 3 hour time differential between the two cities. If both cities were to impose a curfew on both takeoff *and landing*, as was done by the court in Township of Hanover v. Town of Morristown, 108 N.J. Super. 461, 261 A.2d 692 (Ch. 1969), all flights from New York to Los Angeles would have to leave New York between 7:00 a.m. and 2:00 p.m. The resulting crowding of flights formerly spread out over 24 hours into 7 hours would aggravate, not alleviate, the noise problem. 93 S. Ct. at 1856.

85. City of Burbank v. Lockheed Air Terminal, Inc., 93 S. Ct. 1854. 1861, n.14 (1973); Stagg v. Municipal Court, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969); *cf.* City of Winner v. Lineback, 86 S.D. —, 192 N.W.2d 705 (1971).

86. Letter from Secretary of Transportation, *supra* note 65; *cf.* 14 C.F.R. §§ 36.5, 36.1581 (1972) (compliance with federal aircraft noise requirements does not assure suitability for use at any particular airport). *See also* note 88, *infra*.

87. *See, e.g.*, Griggs v. County of Allegheny, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Brandes v. Mitterling, 67 Ariz. 349, 196 P.2d 464 (1948).

88. Griggs v. County of Allegheny, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946). In *Griggs*, the airplanes flew within 12 feet of Griggs' chimney. In *Causby*, the noise and lights from the airplanes caused Causby's chickens to become agitated and suicidal. The *Griggs* holding that airport owners are responsible for obtaining "aviation easements" where interference with use and enjoyment of property by aircraft amounts to a taking, 369 U.S. at 89, implies that airport owners should retain control over acceptable noise and hours of use so as to be able to control their liability.

89. An injunction is regulatory in character since, like legislation, it may prohibit

The Williams Decision

Since *Williams* and *Lockheed* consider essentially the same issue and reach opposite conclusions, a comparison of the two cases is inviting. However, the preemption analysis employed by the Supreme Court of Arizona fails to follow the traditional preemption analysis employed in *Lockheed,* or indeed in any prior case, and thus such a comparison would be fruitless. Specifically, the Supreme Court of Arizona failed to consider any of the indicators of preemptive intent. In fact, it made no reference whatsoever to the intent of Congress in the Federal Aviation Act of 1958. The court's entire analysis consisted of concluding that state regulation of the flight of aircraft is permissible if it does not directly conflict with federal regulations. Of course, the court did not have to confront the Noise Control Act of 1972, since that Act was not passed until nearly a year after the *Williams* decision. Nevertheless, since the only issue in preemption decisions is the intent of Congress,[90] a correct decision reached from this analysis would be coincidental.

The *Williams* court distinguished previous cases holding similar attempts at state regulation invalid, reasoning that those cases "dealt with infringements on the areas in which the FAA is expert: safety, flight patterns, altitudes, etc."[91] The attempted distinctions, however, arguably fail. One of the cases distinguished, *American Airlines, Inc. v. Town of Hempstead,*[92] involved an ordinance which addressed only noise, and did not, on its face, invade any area of FAA expertise. Since the relief sought in *Williams* involved an alteration of the Air National Guard flight pattern, and thus invaded a conceded area of FAA expertise, the court also failed, in its distinction, to address one of the major issues in the case: whether injunctive relief having such an effect could be granted. Thus, the court merely acknowledged and then proceeded to ignore seemingly authoritative decisions.

The court recognized "that the allocation and regulation of airspace is one of the prime areas of federal control,"[93] but thought that there could be "local attempts at noise regulation which are not in conflict with the areas of basic federal concern . . . ."[94] This apparently assumes that whether state action intrudes on a preempted area

---

the doing of certain acts, rather than merely compensating those injured by lawful acts. If federal preemption deprives the legislature of a state of the power to proscribe certain acts, clearly the state courts cannot then proscribe the same acts.

90. See text & note 25 *supra.*

91. 108 Ariz. at 157, 494 P.2d at 29.

92. 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd,* 398 F.2d 369 (2d Cir. 1968), *cert. denied,* 393 U.S. 1017 (1969).

93. 108 Ariz. at 157, 494 P.2d at 29.

94. *Id.*

depends on the label attached to it; or, that local regulations distinguishable in purpose from federal regulations avoid the bar of preemption. The nature of the state regulation, rather than its name, determines its intrusion into a preempted field;[95] the actual effect, rather than the purpose, of state legislation is determinative of whether it invades a preempted area or conflicts with federal legislation.[96]

In *Williams*, the court emphasized the consonance of the protection sought "with an important federal objective: the minimization of noise from aircraft operations."[97] This statement suggests that the court followed the lead of *Township of Hanover v. Town of Morristown*,[98] from which the court quoted extensively, into misunderstanding preemption. The United States Supreme Court has declared: "a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."[99] Indeed, a lower Arizona court has recognized that in a preempted field a state court is deprived of jurisdiction "over matters embraced by the congressional act regardless of whether the state law coincides with, is complementary to, or opposes the federal congressional expression."[100]

Finally, the court responded to the court of appeals grant of summary judgment by holding that "[t]he chance that some possible remedies would infringe upon the federal preeminence in an area is not a valid basis upon which to deny a state court the power to hear a case on its merits and reach a constitutionally sound result."[101] This statement is in apparent contradiction of the teaching of the United States Supreme Court in the preemption context that "the power to decide a matter can hardly be made dependant on the way in which it is decided."[102]

Conclusion

Williams is dead. The foregoing autopsy reveals that it died of a lack of analysis, the tissue and organs of a judicial decision. When it enjoined further proceedings in the case,[103] the federal district court

95. Weber v. Annhauser-Busch, Inc., 348 U.S. 468, 480 (1955).
96. *Cf.* Perez v. Campbell, 402 U.S. 637 (1971).
97. 108 Ariz. at 157, 494 P.2d at 29.
98. 108 N.J. Super. 461, 261 A.2d 692 (Ch. 1969).
99. Charleston & W.C.R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915).
100. Grand Canyon Airlines, Inc. v. Arizona Aviation, Inc., 12 Ariz. App. 252, 255, 469 P.2d 486, 489 (1970); *accord*, Campbell v. Hussey, 368 U.S. 297, 302 (1961); Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U.S. 767, 775 (1947); Charleston & W.C.R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915).
101. 108 Ariz. at 157, 494 P.2d at 29.
102. Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U.S. 767, 775 (1947).
103. United States v. Sunnyside School Dist. No. 12, Civil No. 72-47 (D. Ariz., filed May 23, 1972).

merely discovered the death. Any hope of resurrection in the federal appellate courts is laid to rest by *Lockheed.*

The complete dissimilarity between *Williams* and prior authoritative decisions[104] in the area of preemption strongly suggests that the Supreme Court of Arizona did not seek to resolve the issue in a way which would survive further litigation, but rather refused to put its imprimatur on a further erosion of state power. In so doing, the court did a disservice to both the parties to the dispute and the federal system. The litigants were put to needless expense. The federal system suffered needless friction when the district court was forced to enjoin the state proceedings.

In another case in which the Supreme Court of Arizona was called upon to define the extent of state power and erred in favor of the state,[105] Justice Lockwood, in dissent, identified the problem and set forth the proper solution: "In this case, I am convinced the majority of the Court misconceives what the law is in its concern over what the law in strict justice should be. . . . But it is not the function of this Court to change federal . . . policy. We should interpret, not amend the existing federal law . . . ."[106] Similarly, in *Williams,* the court should have followed the established method of preemption decisions to end the dispute rather than merely postponing the inevitable.

D. THE CONSTITUTIONALITY OF HAIR LENGTH REGULATIONS IN PUBLIC SCHOOLS

Within the last decade, many male students have been suspended and expelled from public schools because the length of their hair exceeded what school regulations allowed. Courts which have been called upon to determine the extent to which schools may impose hair length restrictions on their male students have arrived at widely differing conclusions for a broad range of reasons. Some courts presume that the regulations are valid[1]; others presume that they are

104. The court relied on Township of Hanover v. Town of Morristown, 108 N.J. Super. 461, 261 A.2d 692 (Ch. 1969), wherein the court granted relief similar to that sought in *Williams* and employed preemption reasoning similar to that of *Williams. Hanover,* however, is the decision of a state trial court ruling on a federal question and, thus, is hardly persuasive.

105. Warren Trading Post Co. v. Moore, 95 Ariz. 110, 387 P.2d 809 (1963), *rev'd sub nom.,* Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

106. *Id.* at 119-20, 387 P.2d 816 (Lockwood, J., dissenting).

1. *See* King v. Saddleback Junior College, 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 404 U.S. 1042 (1972) (holding absence of disruption in the school did not

invalid.[2] One court views the regulation as a "spectre" of government control over the physical appearance of its citizens,[3] while another discerns no constitutional question in regulating the length of schoolboys' hair.[4] Perhaps the judicial confusion may be traced to the novelty of the legal issue presented and its socially controversial nature, but whatever the case, long haired males can attend public school in some communities and cannot in others.

In *Pendley v. Mingus Union High School District No. 4*,[5] the Supreme Court of Arizona held that a public high school may deny entry to male students whose hair length violates the school's dress code. The decision ended a dispute which arose at the opening of the 1970 school year when the plaintiff, a 16 year old male, was denied admission to classes at Mingus Union High School because his hair was longer than the school's dress code permitted.[6]

After being denied permission to attend classes, Pendley brought a special action against the school board, seeking reinstatement. At the hearing, held in superior court with an advisory jury, testimony was presented by school administrators to the effect that the plaintiff's long hair disrupted the educational climate of the school,[7] the hair length restriction reflected local community values,[8] and expressed a defiant attitude.[9] Pendley contended that his hairstyle was not an expression of particular ideological or religious beliefs but rather a symbol of his individual rights.[10] After the advisory jury found the rule reasonable and the hairstyle disruptive, the trial court dismissed the action.

The Court of Appeals of Arizona reversed the judgment of the lower court, holding that the regulation was an unwarranted exercise of the school board's delegated rule-making authority because the evidence failed to sustain the school board's contention that Pendley's

---

establish that presence of long-haired males cannot be a distracting influence which interferes with the educational process).

2. *See* Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972).

3. Breese v. Smith, 501 P.2d 159 (Alaska 1972).

4. Freeman v. Flake, 448 F.2d 258 (10th Cir.), *cert. denied*, 405 U.S. 1032 (1972).

5. 109 Ariz. 18, 504 P.2d 919 (1972).

6. The rule provided as follows: "Haircut requirements for boys. Sideburns must be neat at all times. Hair should be off the forehead, collar and ears." *Id.* at 19, 504 P.2d at 920.

7. *Id.* at 20, 504 P.2d at 921.

8. As to which values of the community were reflected by the hair rule, the school psychologist stated that he wanted the students "to imitate . . . the judges, the doctors, the lawyers, the best in our society." *Id.* at 26, 504 P.2d at 927 (dissenting opinion).

9. *Id.* at 19, 504 P.2d at 920.

10. *Id.* at 20, 504 P.2d at 921.

hairstyle was a significant threat to discipline and order at the high school.[11]

In reversing the court of appeals ruling, the Supreme Court of Arizona limited itself to three constitutional issues:[12] (1) whether the hair regulation violated the due process guarantee of the fourteenth amendment; (2) whether it violated the equal protection guarantee of the fourteenth amendment; and (3) whether the regulation violated any of Pendley's other constitutionally guaranteed rights.[13]

In support of his position, the respondent claimed that the first, ninth and fourteenth amendments protected his right to style his hair without school board interference. The court answered that since the regulation had a reasonable relationship to the maintenance of discipline and order in the school it had a legitimate state purpose and therefore did not violate the due process guarantee of the fourteenth amendment.[14] The court also held that the regulation had been uniformly applied and thus no equal protection issue was presented.[15] Disposing of Pendley's contention that his choice of hairstyle was otherwise constitutionally protected, the court ruled that choice of hairstyle was not protected by the first amendment because length of hair does not express an opinion[16] and that a citizen's interest in hair length is not sufficiently fundamental to fall within ninth amendment protection.[17]

The following discussion analyzes the constitutional issues discussed by the Supreme Court of Arizona in *Pendley*. First, the discussion focuses upon the competing interests involved in the dispute over public school hair length regulations. Then, student claims to constitutional protection for free choice of hairstyle under the due

11. Pendley v. Mingus Union High School Dist. No. 4, 17 Ariz. App. 512, 498 P.2d 586 (1972).

12. By resting its decision on constitutional grounds, the supreme court failed to consider whether the hair length regulation was a valid exercise of the power of the school board. The court of appeals had struck down the regulation on the ground that it furthered no purpose properly related to education and therefore exceeded the scope of the school board's authority. *Id.* at 516, 498 P.2d at 590. For an analysis of the functions school board rule-making authority is designed to promote, *see* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non Constitutional Analysis*, 117 U. PA. L. REV. 373 (1969). The basis of school board authority in Arizona is found in ARIZ. CONST. art. 110, § 2; ARIZ. REV. STAT. ANN. §§ 15-305; *id.* §§ 15-302, -321 (Supp. 1972-73).

13. 109 Ariz. at 19, 504 P.2d at 920.

14. *Id.* at 23, 504 P.2d at 924.

15. *Id.*

16. *Id.* at 24, 504 P.2d at 925. Although Pendley stated that his long hair was intended as a symbol of his individual rights, the court relied on dictum of the United States Supreme Court differentiating between symbolic speech and the wearing of hair at a desired length. *See* Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503, 507 (1969) (involving a school prohibition on the wearing of anti-war armbands).

17. 109 Ariz. at 24, 504 P.2d at 925 (distinguishing the right to privacy expressed in Griswold v. Connecticut, 381 U.S. 479 (1965)).

process and equal protection guarantees of the fourteenth amendment are analyzed. Finally, the discussion concentrates on the standards of review courts must employ to weigh the competing interests and rule on the constitutionality of such regulations.

Competing Interests Involved in Hair Length Disputes

A court's determination of the constitutionality of public school hair length regulations depends upon how it treats two basic issues: first, whether a student's interest in wearing long hair has any constitutional protection; second, if it is protected, the kind of showing a school board must make to override the student's interest.[18] The answer to the constitutional protection question determines the standard of review a court will apply to the regulation. In turn, the standard of review will determine in great measure whether the regulation will be upheld or invalidated.[19]

Courts are widely split on the constitutionality of hair length regulations and the United States Supreme Court repeatedly has refused to decide the question.[20] At least some of the judicial confusion in this area can be traced to the difficulty of finding a specific clause in the Constitution governing the question of personal appearance. One court, in affirming hair length regulations, concluded that the absence of such a provision indicates that the Constitution offers no protection for student's interest in wearing long hair;[21] another regarded the question unworthy of consideration by courts with already overloaded dockets.[22] Tribunals invalidating hair length regulations have held that such regulations are an unwarranted intrusion on the constitutional rights of long-haired students.[23]

Although judges disagree about the amount of protection the

18. Note, *Schools and Districts*, 84 HARV. L. REV. 1702, 1704 (1971).

19. *See* text accompanying note 71 *infra*.

20. The federal courts of appeals are split 5-4 on the issue; the first, third, fourth, seventh and eighth circuits, on differing rationales, have invalidated such regulations, while the fifth, sixth, ninth and tenth circuits, on equally varying theories, have upheld the regulations.

For cases invalidating hair length regulations, *see* Stull v. School Bd. of W. Beaver Jr. & Sr. High School, 459 F.2d 339 (3d Cir. 1972); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

For cases upholding hair length regulations, *see* Freeman v. Flake, 448 F.2d 958 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972); King v. Saddleback Jr. College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970); Ferell v. Dallas Independent Comm. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 858 (1968).

21. Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970).

22. Freeman v. Flake, 448 F.2d 250 (10th Cir. 1971).

23. *See, e.g.*, Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

Constitution provides for students' rights to a free choice of hair length, they generally agree on the interests at stake in the dispute.[24] Courts have upheld student claims to free choice of hairstyle under two constitutional provisions. Primarily, courts have accepted student contentions that the right to wear long hair is a form of liberty protected by the fourteenth amendment from abridgment without due process of law.[25] Secondarily, judicial approval has been given to student claims that such regulations deny equal protection of the law by allowing only those with short hair to obtain public education.[26] The amount of recognition a court gives to these asserted student rights determines the approach it takes in dealing with the countervailing arguments of the school board advanced in support of the regulation.

Balanced against student interest in choice of hairstyle is the schools' interest in making rules to further the orderly process of education. School officials generally contend that hair length regulations are reasonably related to a legitimate educational function either because they advance the education of the individual student[27] or because they help establish a proper educational atmosphere.[28] Since there is a strong presumption against rules which educate by imposing sanctions on students who disagree,[29] courts sustaining such regulations usually rely on the theory that such rules help maintain order and discipline in the school.[30] Construed in this manner, hair length regulations are viewed as a proper exercise of the schools' authority.[31]

Due Process Analysis

A due process challenge to public school hair length restrictions questions the reasonableness of the school's intrusion on the interests of its students. To respond to this question, a court must first characterize the nature of a student's interest in his choice of hair length

24. *Compare* Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971) *with* Massie v. Henry, 455 F.2d 779 (4th Cir. 1972).

25. Stull v. School Bd. of W. Beaver Jr. & Sr. High School, 459 F.2d 339 (3d Cir. 1972); Yoo v. Moynihan, 28 Conn. Supp. 375, 262 A.2d 814 (1972); Murphy v. Pocatello School Dist. No. 25, 94 Idaho 32, 480 P.2d 878 (1971).

26. Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

27. *See generally* Goldstein, *supra* note 12.

28. *See generally,* Goldstein, *Reflections on Developing Trends in the Law of Student Rights,* 118 U. PA. L. REV. 612 (1970).

29. The reason for this presumption is that this function is usually fulfilled by persuasion and instruction, thereby leaving room for parental disagreement. Goldstein, *supra* note 12, at 391-92. To justify a hair length regulation as enhancing students' education, a state would have to assert that the regulation teaches good grooming and cleanliness (a difficult assertion in view of long hair styles commonly accepted for females).

30. *See* King v. Saddleback Jr. College, 445 F.2d 932 (9th Cir. 1971); Pendley v. Mingus Union School Dist. No. 4, 109 Ariz. 18, 504 P.2d 919 (1972).

31. 109 Ariz. at 73, 504 P.2d at 924.

within our constitutional framework. In *Pendley*, the supreme court held that the right of free choice of grooming was not sufficiently fundamental to be protected by the Bill of Rights.[32] On the other hand, judges upholding student claims have concluded that students' right to free choice of grooming *is* a fundamental right, found implicitly in the liberty provision of the due process clause of the fourteenth amendment or among the rights reserved to the people by the ninth amendment.[33] Actually, the difference between the latter two approaches is largely semantic since both rest on notions of constitutional protection of personal privacy.

Although the Constitution does not explicitly mention any right of privacy, the United States Supreme Court has recognized such a right.[34] To date, the right of personal privacy has afforded protection to individual activities relating to child rearing and education,[35] family relationships,[36] termination of pregnancy,[37] possession of obscene materials,[38] and contraception.[39] In theory, these decisions reaffirm the proposition that personal privacy is fundamental to the American scheme of ordered liberty,[40] and their effect is to define zones of private decision making which the government cannot invade without compelling justification.

Unfortunately, it is not at all clear which aspects of the right of personal privacy come within the purview of fundamental rights. One approach, advanced by Justice Douglas in *Griswold v. Connecticut*,[41] is that fundamental privacy rights are derived from other constitutional rights already well established. Employing this approach, the right to privacy is implied from the first amendment's guarantee of freedom of expression, the third amendment's prohibition against the quartering of troops, the fourth amendment prohibition against unreasonable searches and seizures, and the ninth amendment reservation of "certain rights" to the people. An alternative approach, expounded

32. *Id.* at 74, 504 P.2d at 925. *But see id.* at 76, 504 P.2d at 927 (Holohan, J., dissenting).

33. For a holding based on the liberty protection theory, *see Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971); for a holding based on the ninth amendment, *see* Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

34. Roe v. Wade, 410 U.S. 113 (1973); Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., concurring); Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

35. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

36. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

37. Roe v. Wade, 410 U.S. 113, 153 (1973).

38. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

39. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

40. *See* Palko v. Connecticut, 320 U.S. 319, 325 (1937).

41. 381 U.S. 479 (1965). Justice Douglas further interpreted this right to privacy in Roe v. Wade, 410 U.S. 113, 210-215 (1973).

by Justice Goldberg in *Griswold*, finds protection for the fundamental right to privacy in the ninth amendment.[42]

Under either theory, a strong argument can be made for constitutional protection in the case of personal grooming. Applying the Douglas reasoning, choice of hairstyle should be protected as a form of nonverbal expression or as an aspect of the fundamental right of privacy protected by the penumbral characteristics of the Bill of Rights guarantees.[43]

If intended as a symbol by the wearer and so understood by his audience, the wearing of long hair arguably has a claim to first amendment protection as a communicative nonverbal form of expression. However, judges have been reluctant to accept this argument and instead have either taken the view that the message conveyed by long hair is too unclear to be protected as a form of expression,[44] or that long hair is not a form of symbolic speech.[45]

If clarity of expression were the rationale for extending protection to nonverbal forms of communication, then Pendley had a strong claim to first amendment protection. Certainly the message conveyed by Pendley's long hair seemed clear enough to the Yavapai County School superintendent, who testified that Pendley's appearance was a sign of a defiant attitude.[46] Moreover, Pendley himself testified that his long hair was a symbol expressing his individual rights.[47] Nevertheless, the *Pendley* court, without examining the communicative implications of Pendley's hair style, declared that the wearing of long hair was not symbolic speech.[48]

A more straightforward approach to the question of whether there is a constitutional right to wear long hair is based on an analysis of the noncommunicative interests reflected in allowing individual choice in this area. Under Douglas' penumbral rights theory, the Bill of Rights entails a guarantee of personal privacy because in its absence well-established rights could be impaired. In contrast, the ninth amendment theory views personal privacy as a right implicit

42. 381 U.S. at 486-499 (Goldberg, J., concurring).
43. Ferell v. Dallas Independent Comm. School Dist., 393 U.S. 856 (1968) (Douglas, J., dissenting).
44. Richards v. Thurston, 424 F.2d 1281, 1284 (1st Cir. 1969). For a general discussion of the point at which conduct becomes sufficiently expressive to be protected by the first amendment *see* Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968). *See also* Note *Freedom of Speech and Symbolic Conduct, The Crime of Flag Desecration*, 12 ARIZ. L. REV. 71, 75-86 (1970).
45. Pendley v. Mingus Union High School Dist. No. 4, 109 Ariz. 18, 24, 504 P.2d 919, 925 (1972).
46. *Id.* at 26, 504 P.2d at 927 (dissenting opinion).
47. *Id.* at 20, 504 P.2d at 921.
48. *Id.* at 24, 504 P.2d at 925.

in the American scheme of ordered liberty, rather than as a mere adjunct to the specific rights enumerated in other amendments.[49]

What is common to both approaches is the belief that people should be able to make their own decisions in areas of uniquely personal concern. There are few areas of decision making more personal than grooming, so a stron gcase can be made for constitutional protection in the area of hairstyles. Certainly it is difficult to conceive of a regulation more intrusive into the sphere of private decision making than one restricting physical appearance, and the amount of litigation over public school hair restrictions bears witness to the fact that such regulations are considered a severe deprivation of liberty by many affected students.[50]

Nor should the force of the privacy argument be diminished because the challenged regulation applies only to adolescents attending public schools. As the Court recognized in *Tinker v. Des Moines Independent Community School District*[51] students are "persons" possessed of fundamental rights under our Constitution, and state operated schools cannot be "enclaves of totalitarianism."[52] The Court has also declared that protection of constitutional rights is nowhere more vital than in the community of American schools,[53] because during his stay in school the student is engaged in discovering his identity and finding his place in our society. If students are to be ordered to restrict their hair length when no specific reason for the restriction is apparent, then—contrary to the Supreme Court's holding half a century ago—schools can now be conducted "to foster a homogenous people."[54]

Equal Protection Analysis

While a due process attack on a school hair length regulation questions the reasonableness of the intrusion upon the students' interests, an equal protection challenge questions the legitimacy of denying a male student the right to an education, solely on the basis of the length of his hair. To respond to an equal protection challenge, a court should examine the reason for the different treatment given long and short haired students. If there is no discernible reason for the

49. Griswold v. Connecticut, 381 U.S. 479, 488-494 (1965) (Goldberg, J., with whom Brennan, J. and Warren, C.J. join, concurring). *See also* Palko v. Connecticut, 320 U.S. 319, 325-26 (1937).
50. *See* cases cited note 20 *supra.*
51. Tinker v. Des Moines Independent Comm. School Dist., 393 U.S. 503, 511 (1969).
52. *Id.* at 511.
53. Shelton v. Tucker. 364 U.S. 479, 487 (1960).
54. Meyer v. Nebraska, 262 U.S. 390, 402 (1922).

discriminatory treatment imposed on the disfavored students, the classification should be found "suspect" or "arbitrary"; the school then bears the burden of showing why the discrimination need be made.[55] Likewise, if a court construes a student's interest in obtaining an education as "fundamental,"[56] it also should demand a high level of justification by the school board.

As the dissent recognized in *Pendley*,[57] a governmental regulation which interferes with a constitutional right is permissible if it is within the constitutional power of the state, if it furthers an important or substantial governmental interest, if it is unrelated to the suppression of the particular right, and if the incidental restriction is no greater than is essential to the furtherance of the state's legitimate interest.

The first step in determining whether a regulation is within the constitutional power of the state is to define the purpose of the rule. Courts which find constitutional protection for students' choice of hairstyle ascribe to the regulation of hair length its most probable purpose in the factual setting of the dispute.[58] Accordingly, if the facts do not accord with the reason advanced by the school for the regulation, the court may find that the regulation imposes an arbitrary value system on the students and therefore has an unconstitutional purpose.[59] On the other hand, some courts will uphold a regulation if it can be characterized as advancing *any* constitutional purpose—for example, that it might plausibly aid the maintenance of order and discipline in the schools.[60]

In *Pendley*, the Supreme Court of Arizona demonstrated little understanding of the equal protection issue. The court concluded that no equal protection issue was present because there was no evidence that the rule had been applied selectively.[61] Following this line of reasoning, no equal protection issue would have been presented when black students were denied access to white public schools because no evidence could have been presented that the rule had been applied

55. *See* Brown v. Board of Educ., 347 U.S. 483 (1954); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970).

56. *See* Harper v. Board of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964). Both these cases concern voting rights. *Contra* San Antonio Independent School Bd. v. Rodriguez, 93 S. Ct. 1278 (1973) (education).

57. 109 Ariz. at 26, 504 P.2d at 927 (Holohan, J., dissenting). *See also* United States v. O'Brien, 391 U.S. 367, 377 (1968).

58. *See* Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

59. Breese v. Smith, 501 P.2d 159 (Alaska 1972).

60. King v. Saddleback Jr. College, 445 F.2d 932, 940 (9th Cir. 1971); Pendley v. Mingus Union High School Dist. No. 4, 109 Ariz. 18, 22, 504 P.2d 919, 923 (1972); *cf.* Turner v. Fouche, 396 U.S. 346, 360-61 (1970); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

61. 109 Ariz. at 23, 504 P.2d at 924.

selectively among black or white students.[62] The crucial question in an equal protection challenge, not even mentioned by the *Pendley* court, is whether the categories drawn by the regulation are reasonably related to the legitimate and constitutional object of the regulation —in this case, the maintenance of discipline and order in the school.

A decision as to the reasonable relationship between a regulation and its purpose depends upon the way the court characterizes the classification. If the classification appears to be invidious, then the court will label the classification "suspect." For example, classifications based on race[63] and ancestry,[64] have been declared "suspect." Although from one perspective these "suspect" categories differ from the "long hair" category in that they are based on unalterable traits, it appears that school officials are equating a physical characteristic with some brand of moral inferiority. Thus it is possible to argue that the classifications drawn by the regulation are also suspect.

In the event a long hair classification is deemed suspect it is subject to attack for over- or under-inclusiveness if there is evidence that people other than "long hairs" are also contributing to the problem to which the rule is addressed.[65] The basis for both these objections is that the restriction of constitutional rights must be as narrow as possible, consistent with the purposes of the regulation.[66] It is difficult to perceive how the restriction on the rights of students in *Pendley* was sufficiently narrow to sustain the regulation. There, students and administrators testified that some students were disturbed by the presence of Pendley and that short haired students had threatened to cut his locks forcibly.[67] No testimony was presented to indicate that actual disruption occurred because of Pendley's presence at school, nor was there any evidence that the school took disciplinary steps to deal with potential disrupters. If schools were permitted to exclude those whose personal appearance caused other students to threaten disruption, equal protection of the laws would vanish when a student entered the schoolyard. Obviously this is not the case.[68] As one commentator has noted, it is absurd to punish a person because his neighbors have no self control.[69]

62. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).
63. *Id.*
64. Korematsu v. United States, 323 U.S. 214 (1944).
65. Tinker v. Des Moines Independent Comm. School Dist., 393 U.S. 503, 507 (1969); Shapiro v. Thompson, 394 U.S. 618, 631 (1969).
66. *See* United States v. O'Brien, 391 U.S. 367, 381 (1968).
67. 109 Ariz. at 20, 504 P.2d at 921.
68. *See* Tinker v. Des Moines Independent Comm. School Dist., 393 U.S. 503 (1969).
69. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 151-52 (1941).

Standards of Review

In *Pendley*, the Supreme Court of Arizona, finding no constitutional protection for a student's interest in wearing long hair, held the rule was constitutional because it was reasonably related to the maintenance of order and discipline in the school, a legitimate state interest.[70] The court relied on testimony of potential disruption caused by the presence of the long-haired youth at school.[71]

The *Pendley* approach to the hair length issue comports with the usual standard of review applied when no fundamental right is at stake. This standard is described as the "rational basis" or "reasonable relation" test.[72] Employing this standard of review, a court gives substantial deference to legislative determinations that the challenged rule is desirable. Therefore the student must show that there is no rational relation between the regulation and a legitimate state interest. While the Arizona court sustained school regulation of hair length under this flexible standard, another court applying it concluded that the regulation was invalid. In that case, however, the court found some degree of constitutional protection for students' freedom of hairstyle.[73]

On the other hand, courts holding that students have a fundamental right to choose their own hair length apply a strict standard of review to the regulation. This approach—the "compelling state interest" test—requires that the school demonstrate a compelling interest in the regulation which would justify the abrogation of the students' fundamental rights.[74] Generally, courts using this standard of review have invalidated school hair length regulations,[75] although one federal court of appeals has upheld a hair regulation under the compelling state interest standard.[76]

---

70. 109 Ariz. at 23, 504 P.2d at 924.

71. *Id.* at 21, 504 P.2d at 922.

72. Although the rational basis test has its origin as a standard of judicial review of economic regulations, its modern application applies as well to the field of personal rights. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Note, *The Public School: Interdistrict Inequality and Wealth Discrimination*, 14 ARIZ. L. REV. 88, 108-09 (1972).

73. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); *cf.* Stull v. School Bd. of W. Beaver Jr. & Sr. High School, 459 F.2d 339 (3d Cir. 1972) (dismissal of complaint vacated, case remanded for hearing on merits). *Contra* Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971); King v. Saddleback Jr. College, 445 F.2d 932 (9th Cir. 1971).

74. Although there has been disagreement among courts as to the meaning of "compelling state interest," it is generally agreed that when a regulation abridges a fundamental right, courts are required to examine closely the state interest which compels the otherwise unjustified intrusion upon the fundamental interests of its citizens. Katzenbach v. Morgan, 384 U.S. 641 (1965). *See generally* Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Note, *supra* note 72, at 110-13.

75. *See* Massie v. Henry, 455 F.2d 779 (1972); Bishop v. Colaw, 450 F.2d 1069 (1971); Laine v. Dittman, 125 Ill. App. 2d 136, 259 N.E.2d 824 (1970).

76. Ferrell v. Dallas Independent Comm. School Dist., 392 F.2d 697 (5th Cir.

Similar standards of review are employed by courts to determine whether the hair rule violates the equal protection clause. If a hair length regulation is challenged on equal protection grounds, a court should examine whether a regulation depriving long-haired male students of their educational opportunity is based on a suspect classification or denies fundamental rights. If the classification appears to be invidious, arbitrarily subjecting the disfavored class to inferior treatment, then the classification is "suspect" and a strict standard of review should be applied.[77] Likewise, if the disfavored group is being denied fundamental rights, then a strict standard of review should be applied to the classification.[78] Accordingly, in the case of a regulation which denies fundamental rights by means of a suspect classification, it is quite predictable that the strict standard of review—the compelling state interest test—cannot be met.[79] For example, where a regulation deprived blacks of their right to vote or attend public schools, the state interest could not serve to override the black citizen's interest.[80]

In contrast, when a court holds that neither fundamtntal rights nor suspect categories are involved in an equal protection challenge, the lenient standard of review, the rational basis test, applies.[81] This is the approach taken by the *Pendley* majority. Under this standard, deference is given to the legislative classifications and a court ascribes to the regulation any constitutional purpose it might be construed to reflect.[82] Furthermore, judges employing this standard will not overturn a regulation because of its piecemeal approach to the solution of a problem.[83] Rather, they will presume that the regulation is valid and impose the burden of proving the regulation's invalidity on the challenger.[84] Thus the result under the rational basis test is likely to favor the state.

1968). However, the court's approach in *Ferrell* is distinguishable on its facts insofar as there was some evidence that the hair length dispute was a publicity stunt to publicize the suspended youth's rock band.

77. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1963); Brown v. Board of Educ., 347 U.S. 483 (1954).

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

79. Loving v. Virginia, 388 U.S. 1 (1967) (statute prohibited interracial marriages); United States v. Mississippi, 380 U.S. 128 (1965) (voting rights).

80. Louisiana v. United States, 380 U.S. 145 (1965); Cooper v. Aaron. 358 U.S. 1 (1958).

81. *Compare* Breese v. Smith, 501 P.2d 159 (Alaska 1972) *with* Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971).

82. *See* Turner v. Fouche, 396 U.S. 346, 360-61 (1970); Williams v. Lee Optical, 348 U.S. 483, 489 (1955).

83. Railway Express Agency v. New York, 336 U.S. 106 (1949); Buck v. Bell, 274 U.S. 200, 208 (1927).

84. King v. Saddleback Jr. College, 445 F.2d 932, 939 (9th Cir. 1971); Pendley v. Mingus Union High School Dist No. 4, 109 Ariz. 18, 25, 504 P.2d 919, 926 (1972).

Conclusion

What is remarkable in the *Pendley* decision is the absence of any kind of solid analysis of student claims to constitutional protection for their right to wear long hair. For example, the court holds that the wearing of long hair is not symbolic speech but fails to explain why it is not symbolic speech.[85] Likewise, the court holds that freedom of appearance is not a fundamental right but does not explain why it is not fundamental.[86] Such a brief treatment of student claims to constitutional protection for their long hair left the court free to accept the meager factual evidence as to potential disruptions offered by school administrators in support of the regulation and rule in favor of the regulation's validity. Clearly, the underlying policy determination governing the *Pendley* decision was to let the school board exercise broad authority over the personal appearance of its student charges.

Although the *Pendley* decision is legally justifiable, the policy it advances is of questionable wisdom. Arguably, school hair length restrictions create an evil more invidious than the one they are designed to eliminate. The message they convey to students is clear—you must conform for the sake of conformity. Moreover, such regulations give authority to administrators to make long-haired students yield to the will of the majority even though the subject of the conformity is a uniquely personal concern which does not directly bear on the freedom of other students. The strength of American democracy is derived from the great amount of personal freedom guaranteed the diverse people within the American system. If public schools attempt to exclude those whose personal hairstyle offends school authorities' notions of propriety, courts should require those authorities to present hard facts to justify that exclusion.

85. 109 Ariz. at 24, 504 P.2d at 925.
86. *Id.*

III. CRIMINAL LAW AND PROCEDURE

A. INFORMANT'S STATEMENT AS BASIS FOR STOP AND FRISK

The power of the police to stop and temporarily detain suspicious persons is of ancient origin,[1] but recognition of this authority as being sanctioned and controlled by the fourth amendment is of recent vintage.[2] The stop and frisk power has been denounced as "a long step down the totalitarian path,"[3] and praised as "essential to effective criminal investigation."[4] It has been credited with decreases in the crime rate[5] and with increases in inner-city tensions.[6] Where opinions as to the wisdom of a police practice are so disparate, it is inevitable that conflict will surround the standards governing its use.

In *State ex rel. Flournoy v. Wren*[7] the Supreme Court of Arizona was faced with the question whether the stop of a suspect could be based solely upon information given to a police officer by a third party. The defendants in *Flournoy* occupied a motel room in Flagstaff. A clerk operating the motel switchboard inadvertently overheard a telephone conversation between one of the defendants and an unidentified caller. The parties were apparently using a code, but the essence of the communication was "car trouble, contact would be late, put stuff on road, fly out immediately."[8] The police were informed of

1. The common law permitted watchmen and citizens to detain suspicious persons found on the streets at night until their good reputation could be established. *See* Frang, *Stop and Frisk: The Issue Unresolved*, 49 J. URBAN L. 733, 740-41 (1972).

2. *See* Terry v. Ohio, 392 U.S. 1 (1967). Prior to *Terry*, the Supreme Court avoided recognizing any inherent power of the police to stop and frisk by treating potential stop and frisk situations in terms of the doctrines applicable to warrantless searches incident to arrest. *See, e.g.*, Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959); Brinegar v. United States, 338 U.S. 160 (1949).

3. Terry v. Ohio, 392 U.S. 1, 38 (1967) (Douglas, J., dissenting).

4. People v. Morales, 22 N.Y.2d 55, 63, 238 N.E.2d 307, 313, 290 N.Y.S.2d 898, 906 (1968), *vacated* 396 U.S. 102 (1969).

5. *See* A. BRISTOW, FIELD INTERROGATION 5 (1964).

6. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 158-59 (1968).

7. 108 Ariz. 356, 498 P.2d 444 (1972).

8. 108 Ariz. at 358, 498 P.2d at 446. Police were also informed of a second telephone intercept, intentionally made by the motel manager, which revealed that "the people were coming. They were in town, and they were coming." *Id.* at 359, 498 P.2d at 447. The court admitted the possibility that the second intercept violated federal law, 18 U.S.C. § 2511 (Supp. 1972), but did not consider it as a significant factor contributing to cause for the stop. 108 Ariz. at 360-61, 498 P.2d at 448-49.

the conversation and they requested that the motel manager watch for other activity. Later that evening, two vehicles arrived at the motel. An occupant of one of these vehicles registered at the motel, while the balance of occupants entered the room of the original suspects. The motel owner informed police of these occurrences and gave them a detailed description of the vehicles. When one of the vehicles left the motel the police followed and stopped it within a short distance. While an identification card was being filled out, the odor of marihuana was noticed on a jacket of one of the suspects. They were subsequently arrested and charged with possession and transportation of marihuana. Prior to trial, the defendants successfully moved for suppression of some of the evidence seized by the police on the ground that it was the fruit of an unlawful stop and detention.[9] The state, by special action,[10] petitioned the supreme court for an order quashing the suppression order. The court found the stop to be reasonable and granted the petition, holding, *inter alia*,[11] that stops may be justified by reports from third parties as well as by personal observations of the acting officer. The court concluded that the report of the suspicious telephone conversation gave police sufficient cause for a stop,[12] and stated that to require greater cause would create "an intolerable manacling of law enforcement"[13] by requiring probable cause for any police investigation.

This commentary will consider the conflicting interests in permitting a stop and frisk to be based upon an informant's report to the

9. Following the arrest of the vehicle's occupants, marihuana was found in plain view in the vehicle; a warrantless search incident to the arrest uncovered more drugs under the front seat. Police obtained a warrant to search the motel rooms occupied by the suspects and to search the remaining vehicle. A search of the rooms and the vehicle pursuant to the warrant uncovered additional drugs.

10. The special action is authorized by ARIZ. R.P. SPECIAL ACTIONS and is intended to consolidate the procedure for writs of mandamus, prohibition and other extraordinary writs. *See* Nelson, *The Rules of Procedure for Special Actions: Long Awaited Reform of Extraordinary Writ Procedure in Arizona*, 11 ARIZ. L. REV. 413 (1969). *Compare* Lesher, *Extraordinary Writs in the Appellate Courts of Arizona*, 7 ARIZ. L. REV. 34 (1965).

11. The court found the first telephone intercept to be unintentional and thus not in violation of 18 U.S.C. § 2511 (Supp. 1972). 108 Ariz. at 360, 498 P.2d at 448. It noted that the police had probable cause for arrest on the basis of the odor of marihuana on one of the suspects, the content of the telephone intercept and the demeanor of the suspects during the stop. *Id.* at 361-62, 498 P.2d at 449-50. The court passed over as insignificant certain technical flaws in the warrant, including a mistake in the year of the vehicle to be searched, the use of an incorrect letterhead, and the lack of a seal. *Id.* at 365, 498 P.2d at 453.

12. Two other circumstances were cited by the court as justifying the stop: the officer's knowledge of the "suspicious activity" observed by the motel manager, and his knowledge of the license number of the suspects' vehicle. *Id.* at 361, 498 P.2d at 449. An examination of the opinion, however, discloses no evidence of "suspicious activity" aside from the content of the telephone intercepts, nor any reason why any significance should be attached to police knowledge of the license number, aside from establishing that the vehicle stopped was the vehicle observed at the motel.

13. *Id.* at 361, 498 P.2d at 449.

acting officer.[14] After examining the general standards applicable to informant-based stops and frisks, consideration will be given to the reliability of information provided by private citizens, criminal informants, and anonymous informants. The standards utilized by several jurisdictions to assess the reliability of each type of informant will be discussed, and standards which will best reconcile the competing interests of collective security and individual privacy will be suggested.

The Informant's Tip As A Basis For A Stop Or Frisk

The Supreme Court of the United States set forth the general standards which govern stop and frisk situations in *Terry v. Ohio*.[15] The decision in *Terry* was narrowly drawn, as might be expected in a case of first impression which marked a major departure from past trends.[16] The holding was centered on the frisk rather than the stop and was limited to investigatory intrusions[17] based on the officer's own observations of suspicious conduct.[18] In stressing the fourth amendment's reasonableness requirement, rather than its less flexible probable cause requirement,[19] and in assessing reasonableness by means of a balancing test,[20] *Terry* set forth standards which have been

14. The term "informant" will be used to denote any person furnishing information to the police officer concerning the suspicious or criminal activities of third parties.

15. 392 U.S. 1 (1967), *noted in* 10 ARIZ. L. REV. 419 (1968).

16. Previously the Court had placed emphasis on the warrant requirement of the fourth amendment, rather than the reasonableness requirement. *Terry* was the first case in which the Court permitted the search or seizure of a suspect upon less than traditional probable cause. The Court evidently feared that a wide stop and frisk power might lead to overzealous use by the police of the power the Court was recognizing. *See generally* Adams v. Williams, 407 U.S. 143, 154 (1972) (Marshall, J., dissenting).

17. "Intrusions," for the purposes of this discussion, will be used as a generic term encompassing stops, frisks, and searches of the person.

18. In *Terry*, a police detective with 35 years experience observed two suspects pacing back and forth in front of a shop. The suspects would from time to time peer into the shop and then confer together nearby. After observing this behavior for some time, the officer concluded it was likely that the suspects were casing the shop for a robbery. He confronted the suspects. When they would not identify themselves, he frisked them and found a pistol on Terry. 392 U.S. at 5-7. Terry was charged with carrying a concealed weapon and sought to suppress the pistol as the product of an unlawful search. *Id.* at 7.

19. The Court had begun to emphasize reasonableness as a highly relevant consideration in determining the propriety of police searches in Cooper v. California, 386 U.S. 58 (1967). In *Cooper*, the Court placed heavy reliance on its earlier decision in United States v. Rabinowitz, 399 U.S. 56 (1950), in which it had held that "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." 386 U.S. at 62. *But see* Coolidge v. New Hampshire, 403 U.S. 443 (1970).

20. A balancing test was first applied by the Supreme Court to searches and seizures in Camara v. Municipal Court, 387 U.S. 523 (1967); this test requires the weighing of the individual interest in privacy against the societal interests in permitting an intrusion. If the interest of society is determined to outweigh that of the individual, the conduct may be deemed reasonable and, therefore, permissible under the fourth amendment. The *Terry* Court noted that the officer's intrusions had been

subsequently applied to all types of stop and frisk situations. Until recently, however, the Supreme Court left open the question of whether information given to an officer by third parties could, on its own, provide a sufficient basis to justify a stop and frisk,[21] or whether the officer's own observations could alone justify such actions.

The Court squarely addressed this question in *Adams v. Williams*,[22] where an informant, who was personally known to the acting officer, told him that an armed suspect was seated in a nearby automobile and that he had narcotics in his possession. The officer proceeded to the vehicle, knocked on the closed window and asked the suspect to open the door. When Williams instead rolled down the window, the officer reached inside the vehicle and seized a pistol from the suspect's waistband, where the informant had stated it would be located. Williams was arrested for carrying a concealed weapon, and a search incident to the arrest uncovered narcotics as well as additional weapons. Following conviction on charges of narcotics possession and carrying a concealed weapon, and an unsuccessful appeal to the Supreme Court of Connecticut, Williams petitioned the federal district court for a writ of habeas corpus. The writ was denied, but the Court of Appeals reversed the decision and granted the writ. The Supreme Court affirmed the district court's decision to deny relief. The Court in *Adams* construed its earlier decision in *Terry* to support an officer's making a protective search[23] of a

limited to those steps necessary to protect himself from an armed attack by the suspect, and that the societal interest in preventing such attacks was sufficient to justify the frisk. 392 U.S. at 24.

21. The only discussion of this issue by the Court prior to Adams v. Williams, 407 U.S. 143 (1972), came in a dissenting opinion by Justice Black in Whitely v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 573 (1971) (Black, J., dissenting). In his opinion, Justice Black argued that, under *Terry*, an informant's report could create sufficient cause to detain a suspect.

22. 407 U.S. 143 (1972).

23. In *Adams* the officer seized a pistol, which was not in plain view, from the waistband of the suspect without first patting down the outer surfaces of his clothing to determine if he did possess a weapon. It would appear that in allowing the seizure the *Adams* majority misapplied *Terry*. The majority took the position that "[t]his Court recognized in *Terry* that . . . 'when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' he may conduct a limited protective search for concealed weapons." 407 U.S. at 146. Justice Rehnquist, while accurately quoting a portion of *Terry*, colored the original meaning by substituting his own conclusion. In *Terry*, the sentence is completed with "the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." 392 U.S. at 24. *Terry* expressly limited the permissible intrusion to "a carefully limited search of the outer clothing of such persons in an effort to discover weapons which might be used to assault [the officer]." *Id.* at 30. At the same time, *Terry* condemned New York cases which permitted searches unpreceded by frisks as allowing "unrestricted rummaging about a person and his effects." *Id.* at 17-18, n.15. In Sibron v. New York, 392 U.S. 40 (1967), a companion case to *Terry*, the Court struck down a personal search, noting that:

> Assuming arguendo that there were adequate grounds to search Sibron for weapons, the nature and scope of the search actually conducted were so

suspect based solely on an informant's report of criminal activity. The Court stated that for the purpose of justifying a stop and frisk the informant need not meet the same standards of reliability necessary to establish probable cause for arrest or search. While observing that "one simple rule will not cover every situation,"[24] the Court suggested that victims of crime and "credible informants" should be considered sufficiently reliable to justify police response.[25] The majority concluded that the information provided by the officer in *Adams* bore sufficient indicia of reliability to uphold the officer's actions. The factors considered by the Court included that the informant was personally known to the officer, that he had come forward in person to give information that was immediately verifiable at the scene, and that he would have been subject to criminal penalties if he knowingly gave false information to the officer.[26] The *Adams* dissent argued vigorously that *Terry* constituted a narrow exception to the probable cause requirement of the fourth amendment, and should therefore be limited to intrusions based on the officer's own observations.[27]

In both *Terry* and *Adams* the Supreme Court declined to provide guidelines which would have helped to clarify the amorphous contours of the balancing test to be applied to stop and frisk.[28] This refusal has produced a great deal of conflict in state and federal courts.[29] Most jurisdictions, when faced with a stop and frisk situation, have followed the lead of the Supreme Court and attempted

---

> clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched.

Id. at 65. It should be noted, however, that in *Terry* and *Sibron* the suspects were standing in the open when approached by the officer. The officer in *Adams* was confronted by a suspect seated in an automobile on a dark street. There was, moreover, some direct evidence that the suspect was carrying weapons beneath his clothing. It might, therefore, be argued that the officer in *Adams* faced a situation where a frisk would have been unreasonably dangerous; the suspect might well have drawn and fired when ordered to leave the vehicle. This distinction between the situations in *Adams* and *Terry* was not, however, noted by the *Adams* Court.

24. 407 U.S. at 147.

25. *Id.* The Court did not define "credible" except to note that the informant did not have to possess the same quantum of reliability for a stop as would be required to satisfy the tests for establishing probable cause for an arrest. *Id.* The definition of "credible" thus becomes circular: a credible informant is one whose statement can justify a stop.

26. *Id.* at 146-47.

27. 407 U.S. at 149-62 (dissenting opinions). The dissent also took issue with the extension of *Terry* to possessory offenses, expressing concern that stop and frisk would become a vehicle for fishing expeditions. *Id.* The use of the power to stop in *Flournoy* would seem to bear out this concern.

28. For a general critique of the balancing test applied to searches and seizures see Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433 (1967).

29. For a collection of lower court decisions in which *Terry* may have been misconstrued, see Frang, *supra* note 1, at 759-62.

to limit their holdings to the facts of each case. This case-by-case approach, combined with the fact that stop and frisk situations are "incredibly rich in diversity,"[30] explains why few jurisdictions have been able to develop a body of case law sufficiently comprehensive to provide general standards for all types of informant-based stops and frisks.[31] Formulation of general standards is, however, mandated both by the confusion attendant to the expansion of the doctrine since *Terry* and by the threat to individual freedoms posed by informant-based intrusions.

The Supreme Court has recognized that tips given to police by informants will vary substantially in their value and reliability. The appropriate response of a police officer in any given situation will depend in large part upon the circumstances in which a tip is received.[32] In applying the general standard of reasonableness to informant-based intrusions, courts have distinguished between informants who are private citizens and those who are in some way connected with criminal activity.[33] While the motives of the criminal informant are suspect,[34] the private citizen is generally considered reliable per se,[35] since he is more likely to be acting from altruistic motives, and his fear and respect for the police are considered greater than those of the criminal informant. The *Flournoy* court utilized this approach, noting that the switchboard clerk's status as a private citizen rendered his report of the telephone conversation reliable information.[36]

The Private Citizen Informant

Relatively few problems are created by permitting intrusions based upon information given by a private citizen personally known

30. Terry v. Ohio, 392 U.S. 1, 13 (1967).

31. New York and California would appear to be the only jurisdictions that have ruled on a broad spectrum of stop and frisk situations. Even in these jurisdictions, much of the case law antedates *Terry* and may be in conflict with its holding. *See id.* at 17-18 n.15.

32. Adams v. Williams, 407 U.S. 143, 147 (1972).

33. In general, private citizen informants are either victims of or witnesses to a crime, whose reports are motivated primarily by a desire to expedite the apprehension of the criminal. Criminal informants generally report prospective criminal acts in hopes of gaining police favor or rewards. *See generally In re* Boykin, 39 Ill. 2d 617, 237 N.E.2d 460 (1968).

34. For a thorough discussion of police use of criminal informants, and the dangers inherent in their use, see Comment, *Informers in Federal Narcotics Prosecutions*, 2 COLUM. J.L. & SOC. PROB. 47 (1966).

35. *See* Adams v. Williams, 407 U.S. 143, 147 (1972); United States v. Mahler, 442 F.2d 1172 (9th Cir. 1972); *In re* Boykin, 39 Ill. 2d 617, 237 N.E.2d 460 (1968). *See also* LaFave, *Street Encounters and the Constitution*, 67 MICH. L. REV. 39, 79 (1968).

36. 108 Ariz. at 364, 498 P.2d at 452.

to the officer, and courts have readily validated such intrusions.[37] The courts also have accorded the reliability associated with the status of private citizen to informants not previously known to the officer, if the informant volunteers his name to the police, either in a face-to-face[38] or telephonic[39] report to the officer. It appears that courts are frequently willing to presume an informant to be a private citizen in the absence of proof that he should be otherwise classified.[40]

The degree of credence which should be associated with informants not previously known to the officer should be determined by weighing the considerations which detract from their credibility against factors which favor use of the tips they give as some justification for an officer's intrusion. On the one hand it should be recognized that the rationale which justifies the private citizen's presumption of reliability does not apply as strongly to an informant who merely volunteers a name, but was not previously known to the officer. Information of this type may be hardly more reliable than an anonymous tip, since the name given by the informant may be fictitious.[41] On the other hand, it is patently unrealistic to expect the police, charged with the detection and prevention of crime, to ignore a report of impending criminal activity. Furthermore, citizen reporting systems have proven of great utility in suppressing crime.[42] In view of police manpower shortages,[43] such systems may become increasingly necessary to future crime prevention programs. To impose broad restrictions on citizen reports would not only impair their use by police, but might also discourage citizen participation and concern by suggesting that reports would not inspire police response.

Courts may best be able to balance these considerations by recognizing that a report by an informant who gives his name, but is not personally known to the officer, may create sufficient suspicion to jus-

37. *See* United States v. Harflinger, 436 F.2d 928 (8th Cir. 1970), *cert. denied,* 402 U.S. 973 (1971); Rutherford v. State, 48 Ala. App. 289, 264 So. 2d 210 (1972).

38. *See* People v. Baker, 12 Cal. App. 3d 826, 96 Cal. Rptr. 760 (1970); People v. Jeffries, 39 Mich. App. 506, 197 N.W.2d 903 (1973). *See generally* text accompanying note 58 *infra.*

39. *See* Commonwealth v. Landue, 356 Mass. 337, 251 N.E.2d 894 (1969). *See also* text and note 65 *infra.*

40. *See* State v. Armstrong, 292 Minn. 471, 194 N.W.2d 293 (1972); People v. Arthurs, 24 N.Y.2d 688, 249 N.E.2d 462, 301 N.Y.S.2d 614 (1969). In *Armstrong* and *Arthurs* the informants were unknown to the officers and did not give their names. The courts nonetheless presumed the informants to be private citizens.

41. For example, in United States v. Unverzagt, 424 F.2d 396 (8th Cir. 1970), a stop was upheld in spite of the inability of the officer to subsequently locate anyone who went by the name the telephone informant had used.

42. In Chicago, a program of this type has been credited with leading to 7,800 arrests during its first two years of operation. CHICAGO POLICE DEPARTMENT, 1968 ANNUAL REPORT 6.

43. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 109 (1967).

tify a surveillance of the individual but insufficient cause to stop and detain him. It should be recognized that, contrary to the assumption made by the *Flournoy* court, restricting stops made on unreliable tips does not have the effect of "preventing any police investigation, even routine"[44] under the same circumstances. A tip of marginal reliability may call for surveillance of the suspect without stopping him.[45] The more offensive intrusions of a stop and frisk might be justified by some minimal corroboration of the informant's identity. Such corroboration could be found where the informant's position suggests that he is a private citizen whose identity can later be verified. In *Flournoy*, for example, the informant's position as a motel clerk would tend to affirm his private citizen status. Similarly, reports by occupants of the premises where the crime was committed should be sufficient to justify a stop and frisk.[46] The identify of an informant could also be corroborated by a check of his driver's license or other personal identification. Upon corroboration of identity, the private citizen should be entitled to the presumption of reliability and an intrusion based on his report should be valid.

The Criminal Informant

Information given by criminal informants poses a greater danger to individual liberties than does that given by private citizens. The motives of the criminal informant are not as likely to be altruistic, but rather based on a personal grudge or hope of gain. There is a danger that the informant would be willing to gamble that an uncertain hunch is correct, in the hope that the police will forget his error if he is mistaken and remember his services if he is correct.[47]

While a criminal informant's report must meet strict standards of reliability to justify an arrest or search,[48] *Adams* indicated that these reports are not held to such strict standards when only a stop

44. 108 Ariz. at 361, 498 P.2d 449.

45. *See* Adams v. Williams, 407 U.S. 143, 147 (1972); LaFave, *supra* note 35, at 76-78.

46. *See, e.g.*, United States v. Rosenberg, 458 F.2d 1183 (5th Cir. 1972), *cert. denied*, 409 U.S. 868 (1973) (hotel manager); Application of Kiser, 419 F.2d 1134 (8th Cir. 1969) (employees of nearby business); People v. Baker, 12 Cal. App. 3d 826, 96 Cal. Rptr. 760 (1970) (attendant at bowling alley); People v. Irvin, 264 Cal. App. 2d 747, 70 Cal. Rptr. 892 (1968) (occupant of house reporting prowlers).

47. *See* Comment, *Informers in Federal Narcotics Prosecutions*, 2 COLUM. J.L. & SOC. PROB. 47 (1966).

48. *See* United States v. Harris, 403 U.S. 573 (1971) (tip of first time informant is valid if circumstances suggest he is reliable); Spinelli v. United States, 393 U.S. 410 (1969) (report must either specify that information was obtained firsthand by informant or must relate criminal activity in such detail as to suggest personal observation); Aquilar v. Texas, 378 U.S. 108 (1964) (informant must be shown reliable and report must be based on his own observations).

is sought to be justified.[49] One state court has gone so far as to take the position that no proof of reliability is needed,[50] and another court has upheld a stop based on a criminal informant's tip without any inquiry into the informant's reliability.[51] The dangers created by combining the wide discretion vested in the officer in the *Terry* situation with the proclivity for abuse inherent in the criminal informant require the adoption of stricter standards than the courts have imposed in these cases.

In formulating general standards for stop and frisk situations which are based on information given by criminal informants, courts should recognize that stops, frisks, and searches of the person involve differing degrees of intrusion into privacy. A stop, when compared with a frisk or a search, is a minimal intrusion[52] and less likely to be used as a "fishing expedition" for contraband.[53] Frisks and personal searches are more intrusive and more susceptible to abuse[54] and, therefore, greater suspicion should be required to outweigh the individual interests in avoiding these intrusions. At the same time, while the increased possibility of unfounded reports justifies the imposition of stricter strandards on criminal informants than on private citzens, an officer's personal knowledge of the informant's identity provides at least some assurance of credibility. A suitable balance could be

49. The *Adams* informant had given information once in the past; investigation of the report did not uncover criminal activity. 407 U.S. at 156 (Marshall, J., dissenting). The Court instead found sufficient indications of reliability in the officer's personal knowledge of the informant's identity, together with the potential of prosecution for willfully misleading an officer. The potential of prosecution, however, would seem to afford little protection against false reports. It would be most difficult to prove a willful attempt to mislead the officer, for the informant could claim that something occurred after the tip to cause the suspect to abandon his criminal activity. Furthermore, it is doubtful that the police would prosecute their own informants in view of the possibility that prosecutions would drive away potential sources of information.

50. Lane v. Superior Court, 271 Cal. App. 2d 821, 76 Cal. Rptr. 895 (1969).

51. Stone v. People, 174 Colo. 504, 485 P.2d 495 (1971), *aff'd sub nom.*, Stone v. Patterson, 468 F.2d 558 (10th Cir. 1972).

52. One writer has stated:

> If the stop is made expertly and politely, no one else may notice that anything is amiss; bystanders will see, when they see anything, a policeman talking with a citizen, something that is a common, everyday occurrence. A frisk, however, is difficult to conceal; if he is innocent, the person searched may suffer irreparable damage to his reputation. Moreover, it is a far more humiliating experience; the head-to-toe frisk, no matter how circumspectly carried out, is not easily endured.

Landynski, *The Supreme Court's Reach for Fourth Amendment Standards; the Problem of Stop and Frisk*, 45 CONN. B.J. 146, 148 (1971). *See* United States v. Owens, 472 F.2d 780, 788 (8th Cir. 1973) (Lay, J., dissenting); *cf.* Coolidge v. New Hampshire, 403 U.S. 443 (1970). *But see* Terry v. Ohio, 392 U.S. 1, 33 (1967) (Harlan, J., concurring); *cf.* Chambers v. Maroney, 399 U.S. 42 (1970).

53. *But see* "Proper Grounds for Investigatory Stops: A Test," 15 ARIZ. L. REV. 708 (1973).

54. For a discussion of possible abuses of the frisk power see THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ON THE POLICE 185 (1967).

struck, therefore, by permitting stops based solely upon a report of criminal activity by a known criminal informant, but requiring corroboration in the form of observed suspicious acts[55] to justify frisks and personal searches.[56]

The Anonymous Informant

In contrast with private citizens and criminal informants known to the officer, anonymous informants act in the knowledge that they can never be called to account for their accusations.[57] Since his identity is unknown, an anonymous informant's status as private citizen or criminal informant cannot be ascertained. The degree of reliability to be accorded their tips must be determined from the nature and circumstances of the tip itself rather than the status of the informant. In general, courts have concluded that information given by an anonymous informant, during a face-to-face encounter with an officer, is sufficiently reliable to justify a stop and frisk.[58] In a face-to-face encounter the officer sees the informant and has "the opportunity in some degree at least of forming an impression, from the tell-tales of character, such as voice, facial expression, gestures, intensity of emotional projection and general appearance, of the extent to which his informant could be trusted."[59] The necessity of undergoing this scrutiny may also remove much of the temptation for an informant to give misleading information to the police.

On occasion, circumstances may indicate that it is more likely than not that the informants are private citizens, whose tips are likely to be reliable. In a Minnesota decision,[60] that state's supreme court upheld a stop where several bystanders shouted "[s]top him, that's him" and pointed to the defendant as he was leaving the scene of

55. The observation of innocent conduct should not establish the veracity of the informant, since the informant could observe innocent habits of the suspect and report these together with unfounded claims of criminal activity. In order to sufficiently corroborate a tip, the activity observed should be inconsistent with innocent pursuits. La Fave, *supra* note 35, at 77-78.

56. In addition to upholding stops based on informants' reports, courts have also upheld frisks based on reports of weapons possession. *See* United States v. Rosenberg, 458 F.2d 1183 (5th Cir. 1972), *cert. denied*, 409 U.S. 868 (1973) (officers arresting defendant conducted frisk based on report that a firearm had been discharged in his room); People v. Taggart, 20 N.Y.2d 335, 229 N.E.2d 581, 283 N.Y.S.2d 1 (1967), *appeal dismissed*, 392 U.S. 667 (1968) (suspect stopped and frisked following report that he was carrying a firearm in pocket).

57. "Anonymous" as used in this discussion denotes an informant whose identity is unknown even to the officer, rather than one whose identity is known to the officer but not divulged to the court.

58. *See* State v. Armstrong, 292 Minn. 471, 194 N.W.2d 293 (1972); People v. Arthurs, 24 N.Y.2d 688, 249 N.E.2d 462, 301 N.Y.S.2d 614 (1969).

59. People v. Bronk, 66 Misc. 2d 932, 934, 323 N.Y.S.2d 134, 137 (1971) (Quinn, J., dissenting).

60. State v. Armstrong, 292 Minn. 471, 194 N.W.2d 293 (1972).

the crime. In a New York case,[61] a stop was made after a pedestrian and a group of bar patrons described the suspect in detail and another nearby pedestrian guided the officer to the suspect. The high court of that state upheld the stop, reasoning that the number of informants and the apparent independence of their reports made it unlikely that they were acting out of spite or hope of gain, and justified the conclusion that they were private citizens, entitled to the presumption of reliability.[62]

Despite the possibility of abuses by anonymous informants, several courts have upheld stops based on information given by passers-by who either were not asked by police to identify themselves[63] or refused to give their names to police upon request.[64] The unarticulated but implicit assumption in these cases was that the informant was a private citizen and thus reliable per se. This assumption, however, may be unsupportable. A criminal informant seeking police favor would not conceal his identity, for then it would be impossible to credit him with his tip. But a criminal informant attempting to harrass an adversary by means of false accusations would seek the protection of anonymity. Thus, there is no assurance that an anonymous informant is a private citizen.

While anonymous face-to-face reports may be less reliable than other sources of information, there are several practical considerations which favor giving some degree of credence to information from this source. Police cannot entirely ignore such reports because private citizens, fearful of retribution, may understandably be reluctant to give their names. In addition, when responding to an emergency, police may have insufficient time to verify the identity of the informant. To penalize the police and the public for prompt action under emergency conditions would be unreasonable. Finally, by requiring a face-to-face encounter with the officer, many misleading reports will be eliminated.

The interests of the public and of the individual can best be balanced by presuming that the anonymous face-to-face informant is sufficiently reliable to justify a stop but not a frisk or search. These more extensive intrusions may be warranted if corroborating observations are made, where the need for immediate action is compelling,[65]

61. People v. Arthurs, 24 N.Y.2d 688, 249 N.E.2d 462, 301 N.Y.S.2d 614 (1969).
62. *Id.* at 692, 249 N.E.2d at 465, 301 N.Y.S.2d at 618.
63. People v. Nanes, 174 Colo. 294, 483 P.2d 958 (1971).
64. United States v. Walker, 294 A.2d 376 (D.C. App. 1972).
65. An example of a situation where immediate action is needed would be where a report of a serious crime in progress nearby is made and it is obvious that delay would increase the criminal's chance of escape.

or where the number of informants makes it more likely than not that they are private citizens. These exceptions would provide police protection in situations where the public interest in immediate action is particularly strong, or where the danger of abuse is minimal, and would apply additional safeguards to those which inhere in a face-to-face report.

The form of anonymous report which bears the greatest danger of abuse is the anonymous telephone tip. The caller is completely beyond scrutiny or recognition, and even the minimal safeguards of a face-to-face anonymous report are absent.[66] Although some lower courts have upheld, without comment, stops based on such reports,[67] others have required corroboration of the tip or a showing of highly unusual circumstances before authorizing such procedures. In a New Mexico case,[68] the court upheld a stop based on an anonymous telephone tip, reasoning that the suspect's berserk behavior and attempted flight from officers sufficiently corroborated the report of narcotics use. In another case,[69] the Court of Appeals of New York upheld a search of the person based on an anonymous telephone tip in which the suspect was described as armed. Following up the tip, the acting officer found the suspect standing near a group of children. The court noted that a gunfight could not have been risked in this situation and suggested that the use of anonymous telephone tips should be limited to matters "gravely affecting personal or public safety or irreparable harm to property of extraordinary value."[70]

A proper balancing of individual and public interests requires standards which eliminate frisks and searches of the person based upon anonymous telephone reports. The individual's interest in privacy should be considered sufficient to outweigh any public interest in frisks based upon reports of such questionable veracity. Stops based upon anonymous telephone tips, while permissable in some instances, should be limited to situations involving grave threat to human life—where there is a perceived need for immediate police action.[71] Under any other circumstances an anonymous telephone report should justify only surveillance of the suspect. If suspicious activity were observed by

66. In telephone tips the officer cannot observe the demeanor of the informant in an attempt to assess his reliability. *Compare* text accompanying note 59 *supra*.

67. *See* People v. Koelth, 25 Cal. App. 3d 779, 102 Cal. Rptr. 102 (1972).

68. State v. Garcia, 83 N.M. 490, 493 P.2d 975 (1972).

69. People v. Taggart, 20 N.Y.2d 335, 229 N.E.2d 335, 283 N.Y.S.2d 1 (1967), *appeal dismissed*, 392 U.S. 667 (1968). It would appear that this decision goes much too far by permitting an uncorroborated anonymous tip to support a search of the person. The *Taggart* opinion was strongly criticized by the Supreme Court in *Terry*, 392 U.S. at 17-18 n.15, but is still followed in New York. *See* People v. Bronk, 66 Misc. 2d 932, 323 N.Y.S.2d 134 (1971).

70. 20 N.Y.2d at 343, 229 N.E.2d at 586, 283 N.Y.S.2d at 9.

71. For example, where an anonymous report was received that an individual would be boarding an aircraft with a bomb.

the investigating officers, the anonymous report could be considered as a secondary source of information tending to give greater strength to the suspicion generated by the observations. The tip itself, however, should not be considered sufficient to form the primary justification for the stop.

Conclusion

In *State ex rel. Flournoy v. Wren* the Supreme Court of Arizona for the first time recognized that police may base the stop of a suspect upon information given to them by a third party. The court in *Flournoy* did not, however, establish general standards to control unreasonable intrusions based on insufficient cause. Such standards are in the public interest, because the presently vague frontiers of stop and frisk are in urgent need of clarification. They are essential to the private interest, since the combination of potential abuse by informants and the more relaxed standards of stop and frisk pose a great danger to personal privacy. Such standards should consider the varying degrees of intrusion occasioned by ordinary surveillance, stops, frisks and personal searches, and should require differing levels of reliability to justify each intrusion. They should also recognize the various degrees of reliability to be accorded private citizens, criminal informants and anonymous informants, and limit the circumstances under which the reports of these informants may justify an intrusion. In this manner the courts may best reconcile the public and private interests and clarify the amorphous boundaries of the stop and frisk power.

B. Silence at Interrogation and Impeachment—The Arizona View

The United States Supreme Court has never directly determined whether a party's silence at the time of arrest may be used as a tacit admission to impeach him or to prove his guilt at trial. However, in *Miranda v. Arizona*, the Court indicated in dictum that the silence of the accused cannot be used against him for any purpose at the trial;[1] the weight of lower court authority is in agreement.[2] In Arizona,

1. 384 U.S. 436, 468 n.37 (1966).

2. A majority of courts do not allow use of evidence of silence to prove guilt. *See, e.g.*, United States *ex rel.* Smith v. Brierly, 384 F.2d 992 (3rd Cir. 1967); Helton v. United States, 221 F.2d 338 (5th Cir. 1955); People v. Simmons, 28 Cal. 2d 699, 172 P.2d 18 (1946); State v. Stump, 254 Iowa 1181, 119 N.W.2d 210 (1963); "Privilege Against Self-Incrimination as a 'Tacit Admission'," 14 Ariz. L.

however, it is not clear whether evidence of silence during a custodial interrogation is admissible at trial.[3] Particularly unclear is the use of such silence for the purpose of impeachment. The United States Circuit Court of Appeals for the Ninth Circuit has adopted the majority view that evidence of such silence cannot be used for impeachment.[4] An Arizona court of appeals case, *State v. Zappia*,[5] took the contrary view, a rule followed in a substantial minority of jurisdictions.[6] The recent case of *State v. Greer*,[7] provided the Arizona court of appeals an opportunity to reconsider whether the silence of a defendant at the time of police interrogation can be used for the impeachment of an accused who takes the stand in his own defense.

Greer was arrested on a warrant in connection with a burglary and was given his *Miranda* warnings by the police. He chose to remain silent. At his trial he testified on his own behalf and for the first time presented an alibi. On cross-examination, the prosecutor asked Greer whether he had told the police his alibi at the time of his arrest in order to exonerate himself. The defense made no objection,[8] and Greer replied that he had not told the police of his alibi. Greer was convicted and appealed.

The court of appeals initially affirmed Greer's conviction.[9] On rehearing, however, the court held that questioning about Greer's silence during interrogation was not legitimate cross-examination and that error had been committed in permitting it.[10] In ruling that the

REV. 409, 523 (1972) [Hereinafter, "Privilege Against Self-Incrimination"]. Most jurisdictions also prohibit use of evidence of such silence for impeachment. *See, e.g.*, United States v. Nolan, 416 F.2d 588 (10th Cir. 1969); United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969); Hunt v. Cox, 312 F. Supp. 637 (E.D. Va. 1970); State v. Galasso, 217 So. 2d 326 (Fla. 1968); People v. Gisandi, 9 Mich. App. 289, 156 N.W.2d 601 (1967); Comment, *Constitutional Law—Privilege Against Self-Incrimination, The Use During Trial of a Defendant's Silence at the Time of Arrest*, 10 WASHBURN L.J. 105 (1970).

3. Until recently it seemed that such silence could not be used to prove guilt under any circumstances. State v. Simoneau, 98 Ariz. 2, 401 P.2d 404 (1965); State v. Villalobos, 6 Ariz. App. 144, 430 P.2d 723 (1967). In a recent case, however, the Arizona supreme court established an exception to the ban on the use of tacit admissions to prove guilt. State v. O'Dell, 108 Ariz. 53, 492 P.2d 1160 (1972) (accused voluntarily initiated a conversation with the police and then became silent when confronted with physical evidence of the crime). *See generally* "Privilege Against Self-Incrimination," *supra* note 2.

4. Fowle v. United States, 410 F.2d 48 (9th Cir. 1969).

5. 8 Ariz. App. 549, 448 P.2d 119 (1969).

6. *See, e.g.*, Sharp v. United States, 410 F.2d 969 (5th Cir. 1969); Johnson v. People, 172 Colo. 406, 473 P.2d 974 (1970); State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968); State v. Burt, 107 N.J. Super. 390, 258 A.2d 711 (1969); State v. Robideau, 70 Wash. 2d 994, 425 P.2d 880 (1967).

7. 17 Ariz. App. 162, 496 P.2d 152 (1972).

8. The court of appeals did not specify why it was considering an appeal in absence of a timely objection at the time of trial, but Judge Haire indicated in dissent that the court may have been invoking the "fundamental error" exception. 17 Ariz. App. at 167, 496 P.2d at 157 (Haire, J., dissenting).

9. 16 Ariz. App. 156, 492 P.2d 36 (1971).

10. 17 Ariz. App. at 163, 496 P.2d at 153.

prosecution cannot use the silence of a defendant at the time of arrest to impeach his testimony at a trial, the court rested its decision on two separate theories. The first of these is that the defendant's silence at the time of interrogation was not a prior inconsistent statement and therefore, under the laws of evidence, could not be used to impeach him. Second, the court said that the use of prior silence to impeach an accused would violate the fifth amendment, as applied to the states through the due process clause of the fourteenth amendment.

This analysis of *State v. Greer* will deal with its impact on the use of evidence of silence to impeach a criminal defendant. Initially, the two bases of the court's decision in *Greer* will be examined to determine the ultimate effect which the decision was intended to have. Related decisions will be analyzed to determine their potential interplay with the *Greer* ruling. Both of these aspects must be observed before the ultimate meaning and significance of *State v. Greer* can be assessed.

Prior Inconsistent Statements

The court based its decision in *Greer* on two grounds. First, the court found that the rule that prior inconsistent statements could be used to impeach a party's testimony was inapplicable.[11] Denied use of this evidentiary rule, the prosecution had no basis upon which it could introduce the evidence of the defendant's silence for impeachment purposes.[12] Second, the court went beyond the facts of this particular case and found that the fifth amendment to the United States Constitution prohibited questions concerning the prior silence of the defendant.

The state had introduced evidence of the defendant's silence under the evidentiary rule that a prior statement inconsistent with present testimony may be used to impeach a witness' testimony.[13] The prosecution argued that an innocent person in Greer's situation would have presented his alibi to the police immediately upon arrest in order to exonerate himself. It was the state's theory that a party who does not mention an alibi at the time of arrest or interrogation probably does not have one, and an alibi later presented at trial may give rise to a fair inference of lack of credibility. Based on this interpretation

11. 17 Ariz. App. at 164, 496 P.2d at 154.
12. Silence at interrogation fits into none of the other recognized categories of valid impeachment evidence. *See generally* 3A J. WIGMORE, EVIDENCE § 1017, at 993-95 (Chadbourne Rev. 1970); M. UDALL, ARIZONA LAW OF EVIDENCE §§ 60-68, at 79-111 (1960).
13. 16 Ariz. App. at 158, 492 P.2d at 39.

of the defendant's silence, the prosecutor argued that he should be allowed to show the inconsistency in cross-examination.[14]

The court of appeals rejected this view, citing the important qualification that prior statements may be used to impeach only if they are in fact inconsistent.[15] Silence, the court noted, is not necessarily inconsistent with a later alibi because it does not imply strongly that the party did not have an alibi at the time of arrest. Rather, such silence is highly ambiguous.[16] In certain circumstances an innocent man may choose to remain silent in the face of an accusation. Reasons for doing so may relate to his defense[17] or to surprise and fear.[18] Defendant's silence thus was not a clearly contradictory statement and lacked sufficient evidentiary value for impeachment.

The court's reasoning is consistent with both legal theory and human experience. The police had given Greer his *Miranda* warnings, telling him in effect, that to remain silent was a valid or even recommended course of action. Therefore, whether he was innocent or guilty, he legitimately could have chosen to remain silent. Put in this context, an exercise of the right to silence at the time of arrest was ambiguous. As such, the evidence could have little value for determining the credibility of Greer's testimony, and the laws of evidence would bar its use.[19] The court's decision also finds support in a substantial majority of jurisdictions where the rules of evidence clearly seem to prevent the type of questioning that occurred in this case.[20]

While the court's decision on the point of evidentiary law was sound, the breadth and nature of the rule articulated could be inter-

14. Several courts have adopted this theory as the basis of their decisions allowing the kind of questioning held invalid in *Greer*. *See, e.g.*, Johnson v. People, 172 Colo. 406, 408, 473 P.2d 974, 976 (1970); State v. Jackson, 201 Kan. 795, 798, 443 P.2d 278, 282 (1968); State v. Burt, 107 N.J. Super. 390, 393, 258 A.2d 711, 713 (1969); State v. Robideau, 70 Wash. 2d 994, 996, 425 P.2d 880, 883 (1967).

15. 17 Ariz. App. at 164, 496 P.2d at 154. *See* 3A J. WIGMORE, EVIDENCE, § 1017, at 993-95 (Chadbourne Rev. 1970).

16. 17 Ariz. App. at 164, 496 P.2d at 154.

17. *See* Grunewald v. United States, 353 U.S. 391, 423 (1957) (suggesting particularly that where his lawyer is not present at his interrogation, an innocent party who is nevertheless threatened with prosecution may not wish to divulge any information without first preparing his defense with his attorney).

18. In Commonwealth v. Dravecz, 424 Pa. 582, 227 A.2d 904 (1967), Justice Musmanno observed:

> It may be desirable and dramatic for the wrongly accused person to shout: "I am innocent!" but not everybody responds spontaneously to stimuli. The accusation may be so startling that the accused is benumbed into speechlessness. There are persons so sensitive and hurt so easily that they swallow their tongue in the face of overwhelming injustice.

424 Pa. at 587, 227 A.2d at 907.

19. *See* Fowle v. United States, 410 F.2d 48, 50 (9th Cir. 1969).

20. *See, e.g.*, United States v. Nolan, 416 F.2d 588, 593 (10th Cir. 1969); Fowle v. United States, 410 F.2d 48, 50 (9th Cir. 1969); Fagundes v. United States, 340 F.2d 673, 677 (1st Cir. 1965); State v. Dearman, 198 Kan. 44, 46, 422 P.2d 573, 575 (1967).

preted in various ways. If the court was saying that silence in response to police interrogation is always ambiguous, such silence could never have any probative value; *Greer* would create an absolute rule that evidence of silence at the time of interrogation is never to be used for impeachment.[21] Such an absolute evidentiary rule would have a great effect on future criminal trials in Arizona. It is clear, however, that the *Greer* rule was not intended to be absolute.

As the *Greer* court recognized, silence at interrogation is not always held to be ambiguous in Arizona.[22] In *State v. O'Dell*,[23] the Supreme Court of Arizona stated that while silence is usually ambiguous and of no probative value, there are certain limited cases where it may indicate guilt and thus be admissible.[24] While *O'Dell* dealt with evidence of silence as a proof of guilt rather than for the purpose of impeachment, it clearly shows that evidence of silence can serve a positive purpose at trial. By acknowledging *O'Dell*, the *Greer* court seemed to recognize that silence may not be ambiguous in some limited circumstances,[25] including certain situations where it is sufficiently unambiguous to be used to prove mere lack of truth and veracity in impeachment. Thus, to the extent it rests on evidentiary principle, the rule established in *Greer* probably is not intended as an absolute rule.

Greer and the Fifth Amendment

The *Greer* court could have rested its decision on the evidentiary rule alone. Instead, it went on to justify its conclusion on the independent ground that the use of a defendant's silence at the time of interrogation to impeach him violates his fifth amendment privilege against self-incrimination.[26] In so doing, the court could have been espousing only a qualified rule, such as that found in the majority opinion in *Grunewald v. United States*.[27] The *Greer* court, however, apparently intended to promulgate an absolute constitutional rule such

21. This is not the view adopted by the Ninth Circuit in Fowle v. United States, 410 F.2d 48 (9th Cir. 1969). The court there seemed to view the evidentiary ban against trial use of silence at the time of interrogation as dependent on circumstances. *Id.* at 51. This is the precedent the *Greer* court relies upon in its discussion of the evidentiary ground. 17 Ariz. App. at 164, 496 P.2d at 154.

22. 17 Ariz. App. at 164, 496 P.2d at 154.

23. 108 Ariz. 53, 492 P.2d 1160 (1972).

24. *See* "Privilege Against Self-Incrimination," *supra* note 2, at 529-30.

25. 17 Ariz. App. at 164, 496 P.2d at 154. The Arizona court of appeals noted that the Supreme Court of Arizona in *O'Dell*, strictly limited its holding to the specific facts of the case and hence created a very narrow exception that allows admission of evidence of silence where such silence has clear probative value.

26. 17 Ariz. App. at 165, 496 P.2d at 154.

27. 353 U.S. 391 (1957).

as is found in *Fowle v. United States*,[28] which derives its logic from Justice Black's concurring opinion in *Grunewald*,[29] and thus bypass the qualifications and limitations of the evidentiary rule discussed above.

In *Grunewald* the United States Supreme Court held that evidence of a defendant's silence was not admissible to impeach his testimony, but did so only after considering the special circumstances of the case and the probative value of the defendant's silence under such circumstances.[30] Thus, the rule established in *Grunewald*, forbidding admission of evidence of prior silence, was not an absolute and can be applied only on a case-by-case basis.

Concurring in *Grunewald*, Justice Black argued that a defendant's exercise of the right to silence can never be used to penalize him if he testifies in his own defense. To allow such questioning under any special circumstances would create an impermissible tension between the accused's right to silence and his right to testify on his own behalf.[31] The Ninth Circuit in *Fowle* elaborated on this point of view by noting that forcing a party to sacrifice one right in order to assert another right robs both of the rights of much of their significance.[32] Both Justice Black and the *Fowle* court agreed that such a tension between rights is forbidden by the constitutional amendments involved. When the *Greer* court cited *Fowle* and Mr. Justice Black's argument in support of its decision, therefore, it joined those courts adopting an absolute constitutional rule against the use of evidence of silence to impeach a defendant.

Probable Impact of Greer

Although the *Greer* court purported to establish an absolute bar against the admission of evidence of defendant's prior silence to impeach, the impact of the rule probably will be somewhat more limited. The rule may be subject to limitation through the application of a rationale employed by the United States Supreme Court in *Harris v. New York*.[33] In addition, two Arizona cases provide strong precedent for

28. 410 F.2d 48 (9th Cir. 1969).
29. 353 U.S. 391, 425 (1957) (Black, J., concurring).
30. 353 U.S. 391 (1957). The special circumstances the Court found in this case were the ambiguous nature of the defendant's silence, and the nature of the grand jury hearings which had left his rights unprotected.
31. "I do not, like the Court, rest my conclusion on the special circumstances of the case. I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it." 353 U.S. at 425 (Black, J., concurring).
32. 410 F.2d at 54. "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury." *Id., quoting* Slowchower v. Board of Educ., 350 U.S. 551, 557-58 (1955).
33. 401 U.S. 222 (1971).

limiting the effect of the *Greer* rule, whether based on principles of evidence or constitutional law.

Whether or not *Harris* can be used to limit the rule adopted by the *Greer* court depends on the relationship of the rights dealt with in *Greer* and those dealt with in *Harris*. This relationship is not clear in the abstract. In *Greer*, the defendant made no statement at interrogation, consequently the only right that could be invoked to exclude evidence of Greer's silence is the fifth amendment right to silence. *Harris*, on the other hand, involved a statement obtained in violation of *Miranda*.[34] Since both cases involve the effect of the prosecution cross-examination and the tension that cross-examination creates between constitutional rights, it is the view that the courts take of the rights involved in each case that is crucial to a consideration of *Harris* and its effect on *Greer*. When in *Harris* the United States Supreme Court allowed a prosecutor to use a verbal statement obtained in violation of *Miranda*, to impeach an accused, it may have been dealing with either the defendant's right to silence or some derivative right to the suppression of illegally obtained evidence.[35] An adoption of the latter view would require the exclusionary rule be seen not only as a deterrent to the police excesses, but also as containing some independent right of the accused within it. Thus, *Harris* and *Miranda* would deal with an independent right which a defendant has to have illegally obtained evidence excluded from his trial instead of a use of the exclusionary rule to enforce the right to silence. If *Harris* is seen as dealing with such a right, then the constitutional tension in *Harris* would be different from that in *Greer*. While *Harris* would allow impeachment that created a tension between the right to testify and the right to suppression of illegally obtained evidence, *Greer* involves a tension between the right to testify and the right to silence. This means that an absolute constitutional rule against admission of evidence of silence for

34. *Id.* at 223-24.

35. Most writers have not attempted to classify the nature of the rights in conflict in *Harris* but speak vaguely of its effect on fifth amendment rights. Nor has any writer actually considered the differing effects of the various interpretations of *Harris*, in terms of the applicability of its rationale to similar questions under the broad concepts of impeachment and fifth amendment rights. The commentaries on *Harris*, by and large, have concentrated on the effects of *Harris* on the rules of Walder v. United States, 347 U.S. 62 (1954) and Miranda v. Arizona, 384 U.S. 436 (1966) or on the reasoning of the Court's decision in *Harris*. *See, e.g.*, Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Note, *Admitting the Inadmissible; The Wounding of Miranda*, 23 BAYLOR L. REV. 639 (1971); Comment, *Harris v. New York: The Death Knell of Miranda and Walder?*, 38 BROOKLYN L. REV. 357 (1971); Note, *Harris v. New York—A Retreat From Miranda*, 45 TEMP. L.Q. 118 (1971); Note, *Evidence—Statements Obtained in Violation of Miranda Guidelines May Be Used to Impeach Testifying Defendant's Credibility*, 24 VAND. L. REV. 843 (1971).

impeachment found in *Greer* would not be subject to limitation under the *Harris* rationale. However, if *Harris* directly involves the enforcement of the right to silence, rather than a subsidiary right to the suppression of illegally obtained evidence, then that decision allows just the sort of tension between the right to testify and the right to silence that *Greer* found impermissible. Consequently, *Greer* would be subject to future limitation by Arizona courts as a constitutional rule which is more protective than the United States Supreme Court suggested the constitution requires.

Although it is unclear which view of *Harris* is correct in the abstract, the latter view of the relation between *Harris* and *Greer* probably will be the one adopted in Arizona, which means that the *Greer* rule will not be absolute or unqualified. In *State v. Altman*,[36] the Supreme Court of Arizona indicated, in dictum, that it believed that *Harris* allows questioning of a defendant about his failure to tell the police his alibi at the time of his arrest. This means that the Supreme Court of Arizona thinks that *Harris* permits just the sort of tension between the right to testify and the right to silence that *Greer* declared was constitutionally impermissible.[37] It would appear to be the supreme court's view that the fifth amendment allows questioning about an exercise of the right to silence at police interrogation, therefore, in the eyes of the highest court in Arizona, the constitutional standard set in *Greer* is stricter than that required by the federal constitution. As a result, there is no reason to believe that the Supreme Court of Arizona would enforce an absolute interpretation of *Greer*, nor need other state courts strictly adhere to *Greer* in light of the supreme court's seeming belief in the constitutionality of the use of evidence of prior silence to impeach.

The absolute quality of the *Greer* rule will be subject to qualification other than the use of *Harris* and *Altman*, presented above. Two other cases indicate that the Arizona courts probably will limit both the evidentiary and constitutional aspects of the *Greer* rule in future applications. The first such case that can be used to limit *Greer* is *State v. Zappia*.[38] There, while on the stand, the defendant presented an alibi for the first time. The prosecution questioned Zappia about his failure to tell the police of his alibi at the time of his arrest and the defense objected. The judge agreed with the objection and told the jury, "[t]hat's right, there is no obligation for him to say anything."[39] Nev-

36. 107 Ariz. 93, 96, 482 P.2d 460, 463 (1971).
37. *See* Discussion of the possible impacts of *Harris* on a *Greer*-type rule in text accompanying notes 33-35 *supra*.
38. 8 Ariz. App. 549, 448 P.2d 119 (1969).
39. Id. at 551, 448 P.2d at 121.

ertheless, she allowed the questioning to continue. On appeal, the Arizona court of appeals held that the examination of the defendant was proper, because, by taking the stand, the defendant had opened himself up to all legitimate cross-examination and questioning about his post-arrest silence was therefore legitimate. On rehearing of Greer's appeal the court distinguished Greer's situation from that in *Zappia* because of the jury instructions provided by the judge in *Zappia.* After distinguishing the two cases, the court held that *Zappia* was overruled to the extent it was inconsistent with *Greer.*[40] The court was obviously attempting to establish a new general rule against admission of evidence of silence.[41]

Though the *Greer* court attempted to overrule *Zappia* partially, the fact that the judge's statement was acknowledged as important enough to distinguish the two cases left *Zappia* with substantial vitality. Recognition of the distinction in the two cases probably means that *Greer* will be limited in its application to those cases where limiting jury instructions are absent. This will leave *Greer* with little effect. It is so easy to satisfy the *Zappia* exceptions to the *Greer* rule that *Zappia* should control in most situations.[42]

The other case which may limit the effect of the *Greer* decision is *State v. Peterson.*[43] In *Peterson,* the Supreme Court of Arizona faced the question of whether a violation of *Fowle v. United States,*[44] the Ninth Circuit case which forms the basis for *Greer,* could be harmless error. The Arizona Supreme Court seemed to indicate that it considered a violation of *Fowle* almost as harmless error per se.[45] This rationale was again followed by the court in *State v. Belcher.*[46] Thus,

40. 17 Ariz. App. at 166, 496 P.2d at 155.

41. The *Zappia* exception to *Greer* may in fact be a harmless error determination rather than a real exception to the *Greer* rule. While the court purports to make a distinction between the two cases and does not mention harmless error, it does say, "[w]e believe *Zappia* can be distinguished from the case sub judire by the prompt rulings and appropriate comment of the trial judge which minimized any adverse influence." 17 Ariz. App. at 153.

Thus the court in effect focuses on the limited effect of the error in *Zappia* as opposed to *Greer* rather than any substantive difference between the two cases. Such a view of *Zappia* would be more consistent with the *Greer* court's apparent desire to establish an absolute constitutional bar against use of silence at interrogation for impeachment.

42. At least arguably, the *Zappia*-type instruction is totally inadequate. Merely informing the jury that the accused has a right to silence probably will not overcome the prejudice that is created when a defendant testifies that he failed to tell his story to the police. *Cf.* Fowle v. United States, 410 F.2d 48, 54 (9th Cir. 1969).

43. 107 Ariz. 268, 485 P.2d 1158 (1971).

44. 410 F.2d 48 (9th Cir. 1969).

45. 107 Ariz. at 270, 485 P.2d at 1160-61. Arguably, however, *Peterson* may be limited to its facts. In *Peterson* no mention of the failure to tell the alibi to the police was made in concluding arguments and the questioning about silence was cut off by the objections of the defense counsel which were sustained.

46. 108 Ariz. 290, 496 P.2d 590 (1972).

in situations virtually identical to *Greer* and *Fowle*, the court held that questioning about a defendant's prior silence was harmless error, even in absence of instructions as were provided by the judge in *Zappia*. This application of the harmless error rule, though perhaps erroneous,[47] can be used effectively to limit the impacts of both *Greer* and *Fowle* in future litigation.

These two Arizona cases show that if the *Greer* rule was intended to be absolute, the Arizona courts have sufficient precedent to the contrary to severely limit its impact. First, trial courts could give habitual though rudimentary instructions to the jury each time questions about silence are asked. This would satisfy the requirements of the *Zappia* exception to the *Greer* rule, and admission of such evidence of silence would be proper. Further, by continuing the view of harmless error set forth in *Peterson*, courts might be able to render *Greer* impotent even where it applies by viewing violations as harmless error per se.

Conclusion

The Arizona Court of Appeals in *State v. Greer* attempted to establish a qualified evidentiary rule and an absolute constitutional rule against the admission of evidence of prior silence for impeachment purposes at trial. It seems clear, however, that insofar as the rule was meant to be absolute, that attempt is doomed to failure. On an evidentiary level, as the court itself recognized, Arizona law clearly allows the use of such evidence under certain circumstances. An absolute rule might seem stronger, therefore, if based purely on the right to remain silent guaranteed by the fifth amendment of the United States Constitution. However, due to the uncertain nature of this right as defined in *Harris* and *Miranda*, this concept also is a shaky foundation for a rule absolutely forbidding any use of evidence of silence for impeachment purposes at trial. The potential conflict between the type of absolute rule mandated by *Greer* and the rule laid down by the United

47. *See* "Constitutional Error as Harmless Error," 14 ARIZ. L. REV. 409, 506 (1972). The author suggests that the Supreme Court of Arizona incorrectly applied the standard for harmless error in *Peterson*. The court purported to apply the federal standard which must be applied in all cases where federal constitutional questions are raised. *Chapman v. California*, 368 U.S. 18 (1967). However, the court failed to meet the true standards of the federal rule which requires that the error be proved harmless beyond a reasonable doubt. In order to meet the reasonable doubt standard, the untainted evidence must provide such overwhelming proof of guilt that the jury would have returned the same verdict in absence of the error. The Peterson court failed to meet the requirements of this rule when it did not weigh the rest of the admitted evidence to see if it alone would support a conviction but rather considered only whether that evidence was adequate to take the case to the jury. Therefore, the Supreme Court of Arizona failed to correctly apply the harmless error standard in this case.

States Supreme Court in *Harris* is only hinted at by the Arizona Supreme Court in *Altman*.[48] Ultimately, any reconciliation between *Greer* and *Harris* depends on how one characterizes the rights affected in both cases. In view of the attitude expressed by the Supreme Court of Arizona in *Altman* and *Peterson*, it is probable that *Harris* and its logic will be used to limit any rule similar to the one adopted in *Greer*. Even if the Supreme Court of Arizona should choose not to limit *Greer*, its practical impact may be limited by trial courts, if they choose to do so by *Zappia* instructions.

In the final analysis, if the rule created by *Greer* against the admission of evidence of prior silence is so limited, it will be unfortunate. As the *Greer* majority acknowledges, to allow use of such evidence of prior silence is to ultimately rob the right to silence of much of its efficacy. As the court notes, the effect would be to establish a system where the *Miranda* warnings, to be truthful, would have to say: "If you say anything it can be used against you, but if you don't say anything that fact may also be used against you."

C. Obscene Films, State Action and The Fifth Amendment

Rarely has any area of jurisprudence been so thoroughly confused and consistently misunderstood as has obscenity law. The difficulties in defining substantive standards for determining whether expressive material is obscene have vexed the courts for many years.[1] This confusion has led the Supreme Court to emphasize the importance of procedural safeguards in any governmental attempt to suppress the public distribution of material alleged to be obscene. Specifically, the Court has ruled that some form of judicial inquiry to determine whether material is obscene must precede any governmental action making it unavailable to the public.[2] Unfortunately, the Court has

48. 107 Ariz. at 96, 482 P.2d at 463.

1. A national survey of prosecuting attorneys undertaken by the Commission on Obscenity and Pornography revealed that definitional problems involving obscenity caused the most difficulty in securing successful prosecutions. Report of the Commission on Obscenity and Pornography, 333 (1970). The Commission was created by Congress in 1967 to study the problem of obscenity. Act of Oct. 3, 1967, Pub. L. No. 90-100, § 188, 81 Stat. 253.

2. A prior adversary hearing, rather than an *ex parte* proceeding, is especially appropriate in obscenity cases. L. Myers, The American Legal System, 215 n.56, 238 (rev. ed. 1964). Because an adversary hearing provides an opportunity for the accused to confront the witnesses against him and allows for an interchange of ideas,

not elaborated extensively or clearly upon the requirement of a hearing and its underlying rationale. As a result, controversy continues as to precisely what state actions are prohibited prior to an adversary hearing on obscenity, and in particular whether, and by what procedure, the material in question may be obtained for the hearing.[3]

Anderson v. Coulter[4] brought just such a problem before the Supreme Court of Arizona. Here the city of Phoenix had filed a complaint against theater owner Anderson requesting that a film he was showing be adjudicated obscene, so that it could be seized and Anderson charged with violations of the Arizona criminal obscenity statute.[5] Anderson was served with a subpoena duces tecum requiring him to produce the film for the hearing. He moved to quash the subpoena on the basis of his privilege against self-incrimination. The motion was denied, and Anderson filed a special action[6] in the Arizona court of appeals requesting that the superior court be prohibited from requiring him to produce the film. The court of appeals ruled that Anderson was entitled to invoke the privilege and noted that, if the film was taken from him over his fifth amendment objection, Arizona law would require that he be held immune from any criminal prosecution with regard to past exhibitions of the film.[7] The Supreme Court of Arizona granted the city's petition for review.

---

it reduces the possibility of an improper seizure of nonobscene material. *Cf.* Marcus v. Search Warrant, 367 U.S. 717 (1961) (180 out of 280 books seized under *ex parte* proceeding devoid of judicial scrutiny were subsequently determined not to be obscene at trial).

3. *See* Lee Art Theater v. Virginia, 392 U.S. 636 (1968); Marcus v. Search Warrant, 367 U.S. 717 (1961); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). There is some controversy as to whether there is an absolute right to an adversary hearing. *See* Note, *Prior Adversary Hearings,* 46 N.Y.U.L. REV. 80 (1971). The procedure used in Anderson v. Coulter, 108 Ariz. 388, 499 P.2d 103 (1972), *cert. denied,* 410 U.S. 990 (1973), has evolved due to decisions of the United States Court of Appeals for the Ninth Circuit and the Supreme Court of Arizona requiring a prior adversary proceeding before seizure of any allegedly obscene material. Demich, Inc. v. Ferdon, 426 F.2d 643, 646 (9th Cir. 1970), *vacated on other grounds,* 401 U.S. 990 (1971); N.G.C. Theater Corp. v. Mummert, 107 Ariz. 484, 489 P.2d 823 (1971).

4. 108 Ariz. 388, 499 P.2d 103 (1972), *cert. denied,* 410 U.S. 990 (1973).

5. ARIZ. REV. STAT. ANN. § 13-532 (Supp. 1972-73). *Id.* § 13-535 provides for enjoining the sale or distribution of obscene material.

6. The special action procedure replaces extraordinary writs of certiorari, mandamus and prohibition. ARIZ. R. SPECIAL ACTIONS 1.

7. Anderson v. Coulter, 16 Ariz. App. 27, 30, 490 P.2d 856, 858 (1971), *vacated* 108 Ariz. 388, 499 P.2d 103 (1972). ARIZ. REV. STAT. ANN. § 13-1804 (Supp. 1972-73), provides that:

> If a witness in any judicial or grand jury proceeding claims the privilege against self-incrimination but is required by the court to give testimony or produce evidence, the witness shall not be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he testifies or produces evidence. The witness may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order.

The court of appeals held that the subpoena would be a form of testimonial compulsion which is constitutionally prohibited, and that the protection provided by the

On review, the court was faced with a dilemma. Materials alleged to be obscene may not be seized by the state in enforcing obscenity laws without a prior adversary hearing. At the hearing, however, the state would be without power to produce the "best evidence"[8] as to whether a film was obscene unless the exhibitor could be forced by subpoena to produce the film. Yet, such a subpoena seemingly would violate the exhibitor's fifth amendment right not to be a witness against himself unless the state was willing to grant him immunity and forego any prosecution for past violations.[9] Thus, the state would be forced to choose between obtaining no more than an injunction against future showings or attempting determination of the film's obscenity based upon other evidence.

The court extricated itself from this dilemma by holding that a person who exhibits an allegedly obscene film to the public has, by that exhibition, waived the right to claim a privilege against self-incrimination and can be required to produce the film at a prior adversary hearing.[10] This casenote will analyze that holding and consider whether the Arizona supreme court's adoption of the public exhibition waiver rationale conforms with current judicial mandates involving the waiver of constitutional rights and privileges, or represents an unnecessary erosion of the privilege against self-incrimination which could have been avoided by a granting of immunity. Attention will be given to the evidentiary problems faced by prosecutors attempting to enforce the state obscenity laws prior to *Anderson*, and the possible inhibiting effects on the exercise of first amendment rights resulting from the decision.

Arizona statute must be granted to the petitioner should he produce the film pursuant to an order of the court issued after the assertion of the fifth amendment privilege. 16 Ariz. App. at 30, 490 P.2d at 858.

8. Broadly stated, the "best evidence" rule requires the production of the best proof that is available—"the utmost evidence the nature of the fact is capable of." C. McCORMICK, EVIDENCE § 229, at 559 (2d ed. Cleary 1972). The ruling is usually applied to writings. Therefore, if one wishes to prove the contents of a writing, he must produce the writing itself. Since a film is also a media of communication, the rule has also been referred to in obscenity cases. *Id.* at 559-60.

Under the fourth amendment, however, probable cause to suspect obscenity can be shown *ex parte* and without possession of the film through the use of affidavits, testimony or still photographs. Demich v. Ferdon, 426 F.2d 643, 646 (9th Cir. 1970), *vacated on other grounds*, 401 U.S. 990 (1971). As the *Demich* court pointed out, should the exhibitor choose not to produce the film at an adversary hearing to rebut the showing of probable cause and should an order for seizure follow, he would have waived any right to complain that the magistrate failed to consider the film as a whole. The adversary hearing is for the purpose of protecting the first amendment rights of the exhibitor and the community, not for obtaining evidence or establishing the prosecutor's case. In the past police have even been known to film and tape record allegedly obscene motion pictures as they were being shown. N.Y. Times, July 28, 1971, at 37, col. 8.

9. *See* text accompanying notes 7-8 *supra*.

10. 108 Ariz. at 391, 499 P.2d at 106.

Fifth Amendment Problems

Courts have traditionally experienced difficulty in reconciling the state's right to promote effective law enforcement with the individual's right not to assist in his own crimination. The privilege against self-incrimination can be characterized as a buffer against the state in that it prohibits even those guilty of an offense from being compelled beyond a limited extent to participate in the establishment of their own guilt.[11] This doctrine is based upon the belief that requiring such participation would simply be too great a violation of the dignity of the individual regardless of whether he is guilty of a criminal offense.[12] Conversely, opponents of the privilege contend that the historical prosecutory abuses which required its adoption no longer exist. They argue that the privilege deprives the state of a valuable source of information, the subject of the investigation himself, thereby placing whatever questionable values it serves over the more compelling need to obtain the truth.[13] For this reason the privilege is sometimes characterized as a constitutional nuisance which the courts should abate whenever possible.

Abatement has been achieved by the courts with two judicial techniques; a narrow construction of the scope of the privilege,[14] or a broad construction of the doctrine of waiver. The first approach would have been difficult to apply in *Anderson*, since a response to a subpoena duces tecum, in effect, requires a witness to affirm

11. The amendment does not protect defendants from being compelled to provide nontestimonial evidence such as blood or handwriting samples or to participate in a lineup. Nor does it protect a custodian of a corporation's books from producing them even though such production might incriminate the corporation as well as the custodian. Vilbert v. California, 388 U.S. 263 (1967) (handwriting exemplar); United States v. Wade, 388 U.S. 218 (1967) (lineup); Schmerber v. California, 384 U.S. 757 (1966) (blood sample); Rogers v. United States, 340 U.S. 367 (1951) (custodial records).

12. *See, e.g., In re* Gault, 387 U.S. 1, 47 (1967); Culumbe v. Connecticut, 367 U.S. 568 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Z. CHAFFEE, THE BLESSINGS OF LIBERTY 186-90 (1956); C. MCCORMICK, *supra* note 8, § 118, at 252-53; Griswold, *The Right to Be Let Alone*, 55 NW. U.L. REV. 216, 223 (1960).

13. *See* S. HOOK, COMMON SENSE AND THE FIFTH AMENDMENT (1957); 8 J. WIGMORE, EVIDENCE § 2251, at 295 (McNaughton rev. 1961); Terry, *Constitutional Provisions Against Forcing Self-Incrimination*, 15 YALE L.J. 127 (1905).

14. Arguing before the court of appeals, the prosecution contended that the self-incrimination privilege is based on the precept that only using a person's own involuntary words to convict him is contrary to the values of civilized society. Respondent's Supplemental Memorandum for Special Action at 5, Anderson v. Coulter, 108 Ariz. 388, 499 P.2d 103 (1972). *See* McKay, *Self Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 214. Under this argument, film exhibitors do not come within the protection of the constitutional guarantee against self-incrimination since it arguably only protects a person from any unwilling testimonial disclosures and does not preclude the introduction of physical evidence that a defendant is compelled to provide. The production of the film could be equated to a handwriting or voice exemplar, a blood sample, or a fingerprint. Adoption of this rationale by the *Anderson* court, however, would have been contrary to settled law in this area. *See* text & note 15, *infra*.

that the chattels brought to court are in fact those requested by the subpoena. This implied representation has traditionally been found to be a testimonial activity within the protection of the privilege.[15] Several leading federal cases, however, have ordered an accused to make a copy of allegedly obscene material available to the prosecution upon request.[16] These cases have indirectly, and probably unintentionally, raised serious constitutional questions.[17] Although seemingly condemning any seizure which infringes on the public's right to view material that could be within the protection of the first amendment, the courts appear to have ignored the fact that a subsequent delivery of the film for the purpose of prosecution also may tie up protected material which the public has a right to view.[18] Nor do

15. *E.g.*, Curcio v. United States, 354 U.S. 118, 125 (1957); United States v. Judson, 322 F.2d 460 (9th Cir. 1963); Haywood v. United States, 268 F. 795, 802 (7th Cir. 1920); People v. Defore, 242 N.Y. 13, 27, 150 N.E. 585, 590 (1926). It is clear that the protection of the privilege extends to an accused's communications, whatever form they take. This includes compulsion of responses which are also communications, such as the compliance with a subpoena to produce one's papers. Boyd v. United States, 116 U.S. 616 (1886). Even though the documents or chattels sought are not oral in form and are already in existence, there is still a testimonial disclosure implicit in their production. It is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. *See* 8 J. WIGMORE, *supra* note 13 § 2664, at 379-80. For this very reason, a California appellate court has held the privilege to apply to films in obscenity cases. People v. De Renzy, 275 Cal. App. 2d 380, 384, 79 Cal. Rptr. 777, 779 (1969).

16. Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir.), *cert. denied*, 396 U.S. 985 (1969); Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968). The films were to be used by the prosecutor in the criminal trials, but it is not clear whether this includes the use of the films as evidence in the adversary hearings. *See* note 18 *infra*.

17. Such a procedure was initially mentioned in Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968). The court upheld a district court order that the prosecution return four prints of a film seized without a prior adversary hearing and in violation of the first amendment. Although requiring return of the prints, the court upheld the lower court's order that the accused deliver one print to the prosecuting attorney for use in the criminal cases involving the film. This procedure has also been followed by another federal appellate court.

In Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir.), *cert. denied*, 396 U.S. 985 (1969), the court adopted the requirement, first put forward in Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968), that the exhibitor deliver a copy of the movie for "reasonable" use in the preparation and trial of the charges pending in the state court. 410 F.2d at 641. In a footnote to this statement the court went on to say that they were expressing "no opinion on the film's admissibility in evidence." *Id.* at 641 n.4. The Second Circuit has also suggested that, if need be, a copy of the film could be made available for purposes of prosecution. Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). *See* United States v. Alexander, 428 F.2d 1176 (8th Cir. 1970).

18. Under the fourteenth amendment, a state is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected speech. Marcus v. Search Warrant, 367 U.S. 717, 731 (1961). Those procedures which create a prior restraint of expression come to the courts bearing a heavy presumption against their constitutional validity. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

Both Merritt v. Lewis, 309 F. Supp. 1249, 1252 (E.D. Cal. 1970), and Bazzell v. Gibbons, 306 F. Supp. 1057, 1061 (E.D. La. 1969), recognized that the unconstitutional seizure of a copy of a film without a prior adversary hearing is no less condemnable when there is a requirement for such a hearing, but a court nevertheless orders a copy of the film delivered to the prosecution for use at the hearing. For this

these cases supply a satisfactory answer to the proposition that a defendant may stand on his fifth amendment right against self-incrimination and refuse to deliver the film or a specially made copy.[19] The decisions did not indicate whether fifth amendment objections were interposed, or the possible result if they had been. While no state court has squarely confronted this issue, a California appellate court and one justice of the Supreme Court of Pennsylvania have opined that this process for compelling production of materials would impinge upon the possessor's fifth amendment rights.[20]

The *Anderson* court realized that should the applicability of the fifth amendment privilege be recognized, the state would be without power to produce the film at a hearing. In order to avoid such a result, the court relied upon the doctrine of waiver. Such an application of the doctrine, however, can not be supported in light of past United States Supreme Court decisions.

An Election Dilemma Resulting from Waiver

The United States Supreme Court has always carefully scrutinized any alleged waiver of fundamental constitutional rights, repeatedly emphasizing that courts must indulge every reasonable presumption against waiver and not presume acquiescence in the loss of these rights.[21] The Court has set especially high and rigorous standards of proof to establish a waiver of the fifth amendment privilege.[22]

---

reason, both courts felt they were not constrained to follow the decision in Tyrone v. Wilkinson, 410 F.2d 639 (4th Cir.), *cert. denied*, 396 U.S. 985 (1969). *See* text & note 17 *supra* for discussion of *Tyrone*. It was the opinion of these courts that if the seizure is made for the purpose of destroying the film or preventing further exhibitions, then A Quantity of Books v. Kansas, 378 U.S. 205 (1964) is applicable and an adversary hearing prior to seizure or destruction of the material is required in order not to run afoul of the first amendment guarantee to the right of freedom of expression. On the other hand, where a single copy of a film is seized pursuant to a valid search warrant issued on the basis of probable cause for the sole purpose of preserving it as evidence to be used in a criminal action, such a seizure would not violate the first amendment and no prior hearing need be held. These cases also suggest that the owner could keep and continue to show a copy pending the hearing. They do not consider, however, whether a seizure would be a violation of the public's first amendment rights in the instance where another copy of the film is unavailable and the film seized is ultimately found to be protected.

19. Although it is unclear whether theater operators would have the necessary equipment, they might be required to copy the original film thus getting around the first amendment problems, but this would not avoid the fifth amendment complications. *See* text & notes 21-23 *infra*.

20. People v. De Renzy, 275 Cal. App. 2d 380, 384, 79 Cal. Rptr. 777, 779 (1969); Commonwealth v. Polak, 438 Pa. 67, 263 A.2d 354 (1970) (Roberts, J., concurring). Because the *Anderson* court recognized that any court process designed to compel production of the questioned material would impinge upon the possessor's fifth amendment rights, it adopted the doctrine of waiver. Anderson v. Coulter, 108 Ariz. 388, 391, 499 P.2d 103, 106 (1972).

21. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Ohio Bell Tel. Co. v. Public Utilities Comm., 301 U.S. 292, 307 (1937).

22. Miranda v. Arizona, 384 U.S. 436, 475 (1966).

Miranda v. Arizona[23] defined an aspect of the protection available to prevent compelled pretrial self-incrimination. The Court expressed its skepticism of prosecutorial claims that the privilege had been waived by placing a heavy burden on the state to demonstrate that a defendant knowingly and intelligently waived his privilege to remain silent.[24] Similarly, one federal appellate court has noted that a waiver of constitutional rights is not to be lightly inferred, and should be confined narrowly in its operation, else the constitutional guarantee would be effectively nullified.[25] Under the *Anderson* rule, state action does not arise until after a film has been exhibited. Consequently, the privilege is deemed waived before the exhibitor is aware of the state's intention to prosecute or seek information from him. This is inconsistent with any notion of a knowing and voluntary relinquishment of the privilege as required by *Miranda*.[26]

Anderson ultimately requires the theater owner to elect between two alternatives. He might exhibit all films he acquires, realizing that some may be considered obscene and he could later be compelled to incriminate himself. On the other hand, he could exhibit only those films which are in his opinion not obscene, thus potentially restricting the public's access to acceptable material. If he elects to exhibit a film which could be obscene, he automatically volunteers to assist the state in assembling incriminating evidence if he is later prosecuted. An exhibitor is therefore effectively required to surrender his possible first amendment rights to show a film as a penalty for retaining the right not to incriminate himself. Similar state-imposed waivers of constitutional rights have been condemned by the Supreme Court.[27]

---

23. *Id.*
24. *Id.* at 475.
25. Hashagen v. United States, 283 F.2d 345, 353 (9th Cir. 1960).
26. Miranda v. Arizona, 384 U.S. 436, 475 (1966).
27. *See, e.g.*, Simmons v. United States, 390 U.S. 377, 394 (1968); Carnly v. Cochran, 369 U.S. 506 (1962). *Compare* Glasser v. United States, 315 U.S. 60 (1942), *and* Johnson v. Zerbst, 304 U.S. 458 (1938).

Anderson has the effect of abrogating the fifth amendment privilege against self-incrimination directly, for it holds that a party who elects to commit the crime of exhibiting obscene movies, whether he knows them to be obscene or not, has no fifth amendment protection if requested to provide the film as evidence for the prosecution. The Supreme Court objected to a similar abrogation of the privilege in Marchetti v. United States, 390 U.S. 39 (1968). There, the Court overruled Lewis v. United States, 348 U.S. 419 (1955), which had held that certain registration and occupational tax requirements imposed upon gamblers did not infringe on their fifth amendment privilege. The *Lewis* Court had reasoned that the statutes did not compel self-incrimination but merely imposed upon a gambler the choice of whether he wished, at the cost of losing his privilege against self-incrimination, to commence wagering activities. Finding this reasoning unpersuasive, the *Marchetti* Court argued that the question was not whether the defendant held a "right" to violate state law, but whether, having done so, he could be compelled to produce evidence against himself. The Court overruled *Lewis* stating that the constitutional privilege was intended to

Unfortunately, it is not only the first amendment rights of the exhibitor which are jeopardized in *Anderson*. Aware of the fact that he may later be called upon to provide the prosecution with the evidence which could possibly lead to his conviction, a theater owner may be more conservative with regard to the films he elects to exhibit.[28] Thus the state indirectly may be limiting the public's access to nonobscene films. Just such a state instigated result, under different circumstances, has been condemned by the Supreme Court of the United States in *Smith v. California*.[29] There, the Court held unconstitutional an obscenity ordinance which authorized conviction for the sale of obscene books even though it was never proved that booksellers knew such books to be obscene. The Court reasoned that the statute would cause booksellers to limit the books sold to only those they had inspected, thereby effecting a depletion in the amount of materials offered for sale. This would necessarily result in a limitation of the public's access to nonobscene as well as obscene books.[30] The possible loss of fifth amendment rights occasioned by *Anderson* may well operate to make cautious theater owners reluctant to exhibit anything but the most unquestionable material. This type of coercion of the exhibitor, as well as his resultant timidity in deciding what to exhibit, ultimately and illegitimately restricts the public's access to materials, much as did the condemned bookselling ordinance in *Smith*.[31]

Anderson theoretically transforms traditional methods of prosecution in all instances of criminal obscenity. If a defendant is accused of using vulgar language in public, the *Anderson* doctrine of "public

shield the guilty as well as the innocent and foresighted. Marchetti v. United States, 390 U.S. 39 (1968). It noted that if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from those circumstances in which it had historically been guaranteed, and withheld from those who required it the most. *Id.*

28. The scienter problem has greater ramifications as a result of the recent Supreme Court decision in Miller v. California, 93 S. Ct. 2607 (1973). This decision enables juries to measure prurient appeal and patent offensiveness by the standard that prevails in the forum community, and not by a national standard. Thus, until a community standard can be established, if possible on anything other than a case by case approach, what is legally being shown in other communities may be found obscene in Arizona. The exhibitor, therefore, has no effective guide as to which films are legal to display.

29. Smith v. California, 361 U.S. 147 (1959).

30. *Id.* at 153.

31. *Cf.* Speiser v. Randall, 357 U.S. 513 (1958). There, the court held unconstitutional any rule of law which compels a citizen to "steer far wider of the unlawful zone" in the exercise of first amendment rights. The court stated that where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding will create the danger that the legitimate utterance will be penalized. *Id.* at 526. It was reasoned that the man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear those burdens. *Id.* at 526.

exhibition waiver" can possbly force him to the witness stand for examination about the language he used or the ideas he expressed. The decision, in effect, requires the accused to supply the state's entire proof, much the same as would a subpoena requiring an accused to produce contraband material in a narcotics case. Any number of obscenity crimes have public overtones sufficient to permit zealous prosecutors to argue that the fifth amendment privilege has been waived.[32]

Conclusion

It is important to note that the destruction of constitutional guarantees is not accomplished by a complete denial of any constitutional right but by means of a gradual erosion consisting of silent approaches and slight deviations from legal modes of procedure.[33] In view of the fact that courts must be watchful for the constitutional rights of citizens and prohibit any stealthy encroachment thereon,[34] it seems incredible that the Supreme Court of Arizona could ignore the disfavor with which the United States Supreme Court has looked upon fictional waivers of fifth amendment rights. The self-incrimination problem could have been avoided by upholding the court of appeals decision compelling production of the film but granting immunity as to past exhibitions. If the film was determined to be obscene, future presentations could then be enjoined.

Obviously, this proposed procedure is not entirely satisfactory. If the materials are adjudged obscene, they will have been permitted to be disseminated until the time of the hearing, leaving the distributor unpunished. Yet the position that serious harm may come from such dissemination is sufficiently tenuous to justify taking this risk in order to preserve constitutional rights.[35]

32. The facts in Cohen v. California, 403 U.S. 15 (1971), provide an example of the type of circumstances in which an industrious prosecutor could apply the rule in *Anderson*. In *Cohen* the defendant was convicted of violating a statute prohibiting the malicious and willful disruption of the peace. The defendant's conduct consisted of wearing a jacket bearing the words "Fuck the Draft" in a corridor of a courthouse. Under *Anderson*, Cohen could conceivably have been forced to bring the jacket to court because it had been exhibited in public.

33. Boyd v. United States, 116 U.S. 616, 635 (1886).

34. *Id.*

35. Although admitting that more studies would have to be conducted before a final conclusion could be reached, the majority report in the REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY concluded that:

> [I]f a case is to be made against 'pornography' in 1970, it will have to be made on grounds other than demonstrated effects of a damaging personal or social nature. Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youth or adults.

The principle that the state should shoulder the entire burden of proving an individual's guilt is firmly embedded in constitutional law. *Anderson* is inconsistent with this policy and with requirements that waivers of constitutional rights be made intelligently and with full knowledge. It is also inconsistent in principle with a number of decisions holding that surrender of one constitutional right cannot be exacted as the price for exercising another. But most importantly, the *Anderson* decision represents an unnecessary erosion of a constitutional privilege which could easily have been avoided by a grant of immunity with minimal effect on the enforcement of state obscenity laws.

D. PROPER GROUNDS FOR INVESTIGATORY STOPS: A TEST

As early as the year 1285, the authority of the police to stop and detain persons on less than probable cause was established by statute.[1] Little comment was published on the subject, however, until the 1960's, which brought forth a considerable amount of legal commentary on the areas of "stop and frisk" and field interrogations.[2] Although the United States Supreme Court shed some light on the practice of frisking in *Terry v. Ohio*,[3] it explicitly refused to decide anything concerning the constitutionality of investigatory stops upon less than probable cause.[4] Accordingly, each jurisdiction has been left to decide for itself whether to allow investigatory stops and upon what grounds.[5] *State v. Baltier*[6] is the first attempt by an Arizona court to articulate

REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 333 (1970). Another relevant finding of the Commission was that a sharp reduction in sex offenses in Copenhagen, Denmark, corresponded with the relaxation of prohibitions regarding the dissemination of sexual materials. *Id.* at 242. On the other side of the controversy are the minority opinions of the various commissioners. *Id.* at 373-631. For another view on this matter, *see* Cairns & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962).

1. Statutes of Winchester, 13 Edw. 1, c. 4 (1285) & 5 Edw. 3, c. 14 (1331); *cf.* Lawrence v. Hedger, 3 Taunt 14, 128 Eng. Rep. 6 (C.P. 1810); Samuel v. Payne, 1 Doug 359, 99 Eng. Rep. 230 (1780).

2. *E.g.*, Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L.C. & P.S. 465 (1967); Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433 (1967); LaFave, *"Street Encounters" and The Constitution; Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 n.4 (1968) [hereinafter cited as LaFave].

3. 392 U.S. 1 (1968).

4. *Id.* at 19 n.16. Recent interpretations of *Terry* have, however, suggested that an investigatory stop would be constitutional if reasonable under the circumstances. *See* text accompanying notes 32-34 *infra*.

5. *See* Note, *The Limits of Stop and Frisk—Questions Unanswered by Terry*, 10 ARIZ. L. REV. 419, 436 (1968).

6. 17 Ariz. App. 441, 498 P.2d 515 (1972).

a specific test for determining when grounds exist for such a stop. Although the courts of Arizona had previously recognized the right to make investigatory stops, the grounds required were phrased in vague terms of reasonableness.[7]

The facts of *Baltier* are illustrative of a typical investigatory stop situation. Two police officers driving through a park observed the defendant get out of a car and start walking through the park. Apparently upon sighting the patrol car, the defendant turned, ran back to the car and drove off. Later that same day, the officers observed the defendant sitting on a hill in the same park. As the patrol car approached, he got up and hurried away. Intending to question the defendant about his earlier flight, the officers alighted from their vehicle and commanded him to stop. When they attempted to question him, he became abusive in his language. The officers then asked the defendant to remove a jacket that was slung over his left arm, because they felt it might be concealing a weapon. Baltier refused and, when the officers reached for the jacket, a struggle ensued. He was arrested for assaulting a peace officer, and a subsequent search disclosed LSD and marijuana. The defendant was convicted of possession of marijuana and dangerous drugs, and subsequently sentenced to 1 to 3 years in the Arizona State Prison.

This analysis will examine the test employed by the court in *Baltier* for determining the reasonableness of an investigatory stop. Some attention will be given to the individual factors which must be considered in the development of a workable test for evaluating such stops. The test formulated in *Baltier* will be compared with the minimum standards for constitutionality required by *Terry*, and with tests suggested by other authorities. An examination of the basis for, and possible future application of the *Baltier* test will be made. Some consideration will be given to the role of *Miranda*[8] warnings during investigatory stops; the potential misuse of such questioning as a device to obtain grounds for further intrusion will also be examined.[9]

Proper Grounds for Investigatory Stops

At the outset, two essential distinctions should be made—between "voluntary" and "forcible" stops and between such informal stops and an arrest. A policeman, like any other person, has the right to attempt to talk to anyone he wishes. The person to whom the offi-

7. *See* State *ex rel.* Flournoy v. Wren, 108 Ariz. 356, 361, 498 P.2d 444, 449 (1972); State v. Gunter, 100 Ariz. 356, 360-61, 414 P.2d 734, 737-38 (1966).
8. Miranda v. Arizona, 384 U.S. 436 (1966).
9. *See also* Note, *supra* note 5; Comment, *Detention for Taking Physical Evidence Without Probable Cause*, 14 ARIZ. L. REV. 132 (1972).

cer is speaking has a corresponding right to ignore him and walk away. As long as the person cooperates and talks to the officer the stop can be considered voluntary.[10] This sort of police-citizen confrontation cannot properly be deemed a detention,[11] since there is no "seizure" of the person and the fourth amendment simply is not applicable. But where the officer has seized the person and detained him—a "forcible" stop—the fourth amendment does apply.[12] The next question is the point at which a "seizure" of the person takes place. In *Terry v. Ohio*[13] the United States Supreme Court stated that a person is "seized" when an officer "accosts an individual and restrains his freedom to walk away."[14] As noted in both *Terry* and *Baltier*, such a restraint has taken place when a reasonable man in the position of the defendant would feel he was not "free to go on his way."[15] It is necessary to make this determination in each case, because a "forcible" stop requires some justification by the officer, while a "voluntary" stop requires none. Thus, any evidence seized as a result of a "forcible" stop made on less than justifiable grounds could be suppressed.[16]

It is also necessary to distinguish an investigatory stop from an arrest, as the purposes of the two are radically different.[17] The purpose of a stop is to conduct a "limited inquiry in the course of an investigation,"[18] while the purpose of an arrest is to take "a person into custody in order that he may be forthcoming to answer for the commission of an offense."[19] Although the manner in which the two forms of detentions are made—"by actual restraint of the person"[20]—is superficially the same, there are great differences in the permissible degree of intrusion into personal privacy,[21] suggesting that the grounds

10. Since the person has consented to the stop, presumably he may remove his consent and terminate the stop at will.

11. *See* State v. Rhodes, 19 Ariz. App. 505, 508 P.2d 764 (1973); Batts v. Superior Court, 23 Cal. App. 3d 435, 100 Cal. Rptr. 181 (1972).

12. *See* Terry v. Ohio, 392 U.S. 1, 16 (1968); State v. Baltier, 17 Ariz. App. 441, 444, 498 P.2d 515, 518 (1972).

13. 392 U.S. 1 (1968).

14. *Id.* at 16. *See* State v. Baltier, 17 Ariz. App. 441, 444, 498 P.2d 515, 518 (1972).

15. 392 U.S. at 16; 17 Ariz. App. at 444, 498 P.2d at 518. Another possible test is the officer's intent. The *Baltier* court, however, specifically rejected the officer's intent test. *Id.* at 444, 498 P.2d at 518. Note that this is the same test that is used to determine if *Miranda* warnings are to be given. *See* text accompanying notes 80-88 *infra*. *See also* United States v. Hall, 421 F.2d 540 (2d Cir. 1969).

16. *See* Wong Sun v. United States, 371 U.S. 471 (1963), which bars all fruits of illegal seizures from being used against the defendant. In the remainder of this discussion, the word "stop" will mean a forcible stop, unless otherwise noted. See text accompanying notes 95-99 *infra*, for a discussion of the practice of using a voluntary stop to obtain grounds for a forcible stop.

17. *See* Note, *supra* note 5, at 425.

18. State *ex rel.* Flournoy v. Wren, 108 Ariz. 356, 361, 498 P.2d 444, 449 (1972).

19. ARIZ. R. CRIM. P. 13.

20. ARIZ. REV. STAT. ANN. § 13-1401(A) (1956); ARIZ. R. CRIM. P. 14(A).

21. Comment, *supra* note 9, at 136. An arrest usually entails fingerprinting,

for a stop may be less than for an arrest.[22] Accordingly, these are the outer boundaries on the grounds needed for an investigatory stop: the grounds must be something more than are necessary for a voluntary stop, but may be less than the probable cause needed for arrest. To determine where the line is to be drawn within these parameters, it is necessary to balance the interests of society against those of the individual to reach a reasonable result.[23]

In reaching this result, it must be remembered that both the government and the private citizen have substantial interests in the determination of what are proper grounds for a stop. Investigatory stops are considered by some authorities as essential to effective law enforcement,[24] while the private citizen has a constitutionally protected right to be free from unreasonable seizures. The problem lies in developing a test that specifies the circumstances under which the interests of society in preventing and detecting crime outweigh the rights of the private citizen, to such an extent that an investigatory stop will be allowed.[25]

Numerous factors are involved in formulating such a test. For example, the time and place of the stop must be considered, for action which constitutes suspicious conduct at night in a high crime area might take on an entirely different character under other circumstances.[26] Whether the stop is for the investigation of a crime already known to have been committed, or for discovering crime in the first instance is also a factor to be considered.[27] Factors such as these must be assessed in determining the reasonableness of a stop;[28] any state-

booking, photographing and perhaps a short time in jail awaiting an appearance before a magistrate to set bail. *See generally* W. LAFAVE, ARREST 202-07 (1965).

22. In Arizona, there must be probable cause to believe the person arrested has committed a particular crime before an arrest is proper. ARIZ. REV. STAT. ANN. § 13-1403 (Supp. 1972-73). Such probable cause exists where the " 'facts and circumstances within [the officer's] knowledge . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that, an offense has been or is being committed." Ker v. California, 374 U.S. 23, 35 (1963); State v. Pederson, 102 Ariz. 60, 66, 424 P.2d 810, 816, *cert. denied*, 389 U.S. 867 (1967).

23. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967); State v. Baltier, 17 Ariz. App. 441, 447, 498 P.2d 515, 521 (1972).

24. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 7 (1967) [hereinafter cited as DETECTION OF CRIME].

25. The very nature of a test is superior to a case by case determination of reasonableness as required by State *ex rel.* Flournoy v. Wren, 108 Ariz. 356, 498 P.2d 444 (1972) and State v. Gunter, 100 Ariz. 356, 414 P.2d 734 (1966). A test provides guidelines to compare situations and reach comparable results in like situations, whereas declaring conduct to be reasonable merely states a conclusion, without elaborating on the supporting factors.

26. DETECTION OF CRIME, *supra* note 24, at 19.

27. Presumably more latitude would be allowed for the investigation of crime than for the detection of crime. This distinction is made in the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(1)(a) (Official Draft No. 1, 1972) and noted in LaFave, *supra* note 2, at 62.

28. Not only must the stop be reasonable, but *Terry* suggests that the conduct of the stop itself must be reasonably related in scope to the reason for the stop. Terry v.

ment of a test to be met before suspects may be stopped must necessarily incorporate these factors into more precise language. In deciding what language to use, it is necessary to consider the standards laid down by the United States Supreme Court in analogous situations.

In *Terry v. Ohio*,[29] the Supreme Court set forth standards to be met before a frisk may be conducted,[30] but specifically declined to do so for investigatory stops.[31] Although the Court has said that investigatory stops are outside the holdings in *Terry*[32] and *Sibron v. New York*,[33] it now appears, from recent dicta,[34] that the Court may be willing to read *Terry* as allowing investigatory stops on lesser grounds than the probable cause necessary for a proper arrest. If so, *Terry* provides guidelines for reviewing investigatory stops: "[W]ould the facts available to the officer at the moment of the seizure . . . 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[35] The Court made it clear that "hunches" and the "subjective good faith" of the officer are not enough to meet this test.[36] The problem confronting the courts is clear: they must seek an intelligible standard of suspicion falling somewhere between probable cause and a mere hunch.

The Baltier Test

The court in *Baltier* adopted a threefold test:

> There must be a rational suspicion by the police officer that some activity out of the ordinary is or has taken place, some indication to connect the person under suspicion with the unusual activity, and some suggestion that the activity is related to crime.[37]

This test was developed in the California case of *People v. Henze*.[38] The Supreme Court of California clarified the test in *Irwin v. Su-*

Ohio, 392 U.S. 1, 20 (1968). In general, stops should be of short duration, and limited to questions such as name, address and a brief explanation of the activities that warranted the stop. Note, *supra* note 5, at 427. Force, if required to restrain the suspect, should be minimal or at least reasonable. *See* ARIZ. REV. STAT. ANN. § 13-1401(B) (1956); *cf.* Sibron v. New York, 392 U.S. 40, 60 n.20 (1968).

29. 392 U.S. 1 (1968).

30. See text accompanying notes 89-90 *infra*.

31. 392 U.S. at 19 n.16.

32. Morales v. New York, 396 U.S. 102, 105 (1969) (declining to consider the legality of investigatory stops because of an inadequate record).

33. 392 U.S. 40 (1968).

34. United States v. Dionisio, 410 U.S. 1, 9 (1973); Adams v. Williams, 407 U.S. 143, 145-46 (1972); *see* Terry v. Ohio, 392 U.S. 1, 33-34 (1968) (Harlan, J., concurring). *But see* Williams v. Adams, 436 F.2d 30, 39 (2d Cir. 1970) (Friendly, J., dissenting).

35. 392 U.S. at 21-22.

36. *Id.* at 22.

37. 17 Ariz. App. at 448, 498 P.2d at 522.

38. 253 Cal. App. 2d 986, 61 Cal. Rptr. 545 (1967).

perior Court[39] by stating that "[w]here the events are as consistent with innocent activity as with criminal activity, a detention based on those events is unlawful."[40] Apparently this is the interpretation that the *Baltier* court adopted, since *Irwin* was cited as the basis for the test, and it was stated that the defendant's conduct was "more consistent with criminal than innocent behavior."[41]

In applying the test, the *Baltier* court stated that the police must present "specific and articulable facts"[42] that are to be evaluated "in light of the particular circumstances."[43] In *Baltier*, these particular circumstances were that the defendant was observed by police officers leaving a car in a public park, and then running back to the car, apparently upon sighting the patrol car. Later the same day the officers again saw the defendant seemingly try to evade them when they approached. The court concluded that his "action in going to abnormal extremes to avoid uniformed police officers was not only suspicious conduct but also more consistent with criminal than innocent behavior."[44] The conclusion of the court appears well founded as it has been recognized that "deliberately furtive action and flight at the approach of . . . law officers are strong indicia of *mens rea*."[45] This is not to suggest that mere flight provides grounds for an arrest, but only that flight is sufficient to distinguish a suspect's activity from that of any other person.[46] Distinctive activity of this type indicates that the police did not act on a hunch. The stop in *Baltier*, therefore, met the *Terry* minimum standard.

The California case of *People ex rel. Acosta v. Superior Court*[47] provides an excellent example of the importance of the interpretation

39. 1 Cal. 3d 423, 462 P.2d 12, 82 Cal. Rptr. 484 (1969).

40. *Id.* at 427, 462 P.2d at 14, 82 Cal. Rptr. at 486. It is necessary to explain what is meant by "activity." If a store has been robbed, and the suspect matches the robber's description, then the robbery is the "activity," and the suspect's features are the "indication to connect" him to the robbery. In *Baltier*, the suspect's action in fleeing the police was both the "activity" and the "indication." If a reasonable man could say that this activity was of a sort more likely to be done by a criminal, a stop would be permissible.

41. 17 Ariz. App. at 448, 498 P.2d at 522. *See also* State v. Taras, 19 Ariz. App. 7, 504 P.2d 548 (1973) (court used the *Baltier* test without reference to this interpretation). The importance of this interpretation, and its impact on the validity of the test is discussed in the text accompanying notes 72-78 *infra*.

42. 17 Ariz. App. at 448, 498 P.2d at 522.

43. *Id.* at 447, 498 P.2d at 521.

44. *Id.* at 448, 498 P.2d at 522.

45. Sibron v. New York, 392 U.S. 40, 66 (1968). This general rule must be applied carefully, however, since the officer might be the cause of an innocent person's flight. Compare the present facts with the plainclothes officer banging on Blackie Toy's door in Wong Sun v. United States, 371 U.S. 471, 483 n.10 (1963), or flight at the approach of a gun-carrying stranger in Sibron v. New York, 392 U.S. at 75 (Harlan, J., concurring).

46. This assertion restates the requirement that the activity be more consistent with criminal behavior. Irwin v. Superior Court, 1 Cal. 3d 423, 426, 462 P.2d 12, 14, 82 Cal. Rptr. 484, 486 (1969).

47. 20 Cal. App. 3d 1085, 98 Cal. Rptr. 161 (1971).

that is given to the *Baltier* test. In *Acosta*, the court contended that the gloss placed on the test by the Supreme Court of California in *Irwin*—that the events must be more consistent with criminal than innocent behavior—was wrong.[48] The *Acosta* court stated that *Irwin* should be interpreted as saying that when "one engages in equivocal conduct which is subject to inferences of lawful *or* criminal activity," a detention is permissible.[49] The court chose to dismiss several previous cases which had recognized the validity of the questioned interpretation.[50] In applying the *Irwin* test, the *Acosta* court upheld the stop of a car, solely upon the basis that a police officer had observed a passenger drinking from a can.[51] The court observed that although there was no basis to distinguish this activity from any other person's activity,[52] the officer had a suspicion that the defendant was drinking beer.[53] In the absence of further articulable and specific facts, this suspicion must be recognized as a mere hunch,[54] and therefore violative of the *Terry* minimum standard. It is apparent that the removal of the *Irwin* interpretation, as was done by the court in *Acosta*, reduces the test used in *Baltier* to an unacceptable level.[55]

A standard quite similar to the *Baltier* test was set forth by the United States Court of Appeals for the Ninth Circuit in *Wilson v. Porter*.[56] Police had observed a car driving very slowly up and down a street during the very early hours of the morning. In upholding a forcible stop of the car, the court stated that brief, informal detentions should be allowed: "[W]henever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their action. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing."[57] Under both the *Baltier* test and the *Wilson* test, the police must act reasonably in light of the circumstances, and in both the suspicious conduct must differentiate the sus-

48. *Id.* at 1089, 98 Cal. Rptr. at 163. See discussion at text accompanying notes 72-78 *infra.*

49. 20 Cal. App. 3d at 1091, 98 Cal. Rptr. at 164.

50. *Id.* at 1088 n.3, 98 Cal. Rptr. at 163 n.3. *Contra,* Remers v. Superior Court, 2 Cal. 3d 659, 470 P.2d 11, 87 Cal. Rptr. 202 (1970) (Supreme Court of California explicitly restated this requirement). See text accompanying notes 64-68 *infra.*

51. 20 Cal. App. 3d at 1091, 98 Cal. Rptr. at 165.

52. *Id.* at 1089, 98 Cal. Rptr. at 163.

53. *Id.* at 1091, 98 Cal. Rptr. at 165. In fact, it turned out to be a can of soft drink. *Id.* at 1087, 98 Cal. Rptr. at 162.

54. *See* People v. Robles, 23 Cal. App. 3d 739, 745, 104 Cal. Rptr. 907, 911 (1972) (detention on events as consistent with innocent activity as with criminal activity is a "mere hunch"). *See also* Sibron v. New York, 392 U.S. 40, 61 (1968).

55. This could have important ramifications in the interpretation of *Baltier.* See text accompanying notes 72-78 *infra.*

56. 361 F.2d 412 (9th Cir. 1966).

57. *Id.* at 415.

pect person from any other persons; in other words, the person must not be arbitrarily chosen. Since the theoretical bases of the tests are similar, in practice the same results should be reached with both tests.[58] *Baltier* is superior to *Wilson* in the sense that the *Wilson* test of reasonableness states a conclusion, whereas the *Baltier* test gives some indication of when a stop will be reasonable.

A third test, based on section 2 of the Uniform Arrest Act,[59] has been adopted by statute in a number of states.[60] It allows a stop when there is reasonable grounds to suspect that a person has committed, is committing or is about to commit a crime. Additionally, some states in adopting the Uniform Arrest Act test have chosen to limit it to specific types of crimes, such as felonies or crimes relating to forcible injury or property damage.[61] This statutory test is more stringent than the test developed in *Baltier*. The facts presented by *Baltier* would not pass the statutory test, since as the court noted "[the officers] did not suspect [the defendant] of having committed or of being in the process of committing any crime."[62] The Uniform Arrest Act

58. *See* United States v. Mallides, 339 F. Supp. 1 (S.D. Cal. 1972) (holding that the *Irwin* test and the *Wilson* test do not materially differ). The *Wilson* test was adopted in Division One of the Arizona Court of Appeals, in State v. Ruiz, 19 Ariz. App. 84, 86, 504 P.2d 1307, 1309 (1973). The court upheld the stop of a person of Mexican descent in a predominantly black area by two police officers on foot patrol because evidence showed that it was very unusual to see a person of either Anglo or Mexican descent in that area of Phoenix, and it had been the officer's experience that the few Anglos or Mexicans who were in the area were there for the purpose of purchasing narcotics. Under these circumstances, the court ruled, it was possible to say that the defendant was distinguishable from any other person. In view of its potential use to justify racial harrassment, the *Ruiz* decision should be strictly held to its facts, if it is followed at all.

Note also that *Baltier* has recently been extended to investigatory stops of automobiles, thus furthering the similarity between *Wilson* and *Baltier*. State v. Taras, 19 Ariz. App. 7, 10, 504 P.2d 548, 551 (1972). *But cf.* State *ex rel.* Berger v. Cantor, 13 Ariz. App. 555, 479 P.2d 432 (1971) (stop for a license, registration or safety inspection requires no grounds).

59. UNIFORM ARREST ACT § 2(1): "A peace officer may stop any person abroad whom he has reasonable grounds to suspect is committing, has committed or is about to commit a crime, and demand of him his name, address, business abroad and whither he is going." *See generally* Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

60. These include: ALA. CODE tit. 15, § 118(1) (Cum. Supp. 1971); DEL. CODE ANN. tit. 11, § 1902 (Cum. Supp. 1970); FLA. STAT. ANN. § 901.151(2) (1973); ILL. REV. STAT. ch. 38, § 107-14 (Smith-Hurd 1970); IND. ANN. STAT. § 9-1048 (Supp. 1972); KAN. STAT. ANN. § 22-2402(1) (Cum. Supp. 1972); LA. CODE CRIM. PRO. ANN. art. 215.1(A) (West Supp. 1972); MO. ANN. STAT. § 84.710(2) (1969); NEB. REV. STAT. § 29-829 (Cum. Supp. 1969); NEV. REV. STAT. § 171.123(1) (1971); N.H. REV. STAT. ANN. § 594:2(a) (1955); N.Y. CODE CRIM. PRO. § 180-a (McKinney Supp. 1970); R.I. GEN. LAWS ANN. § 12-7-1 (1956); TEX. CODE CRIM. PRO. ANN. art. 14.03 (Supp. 1972-73); WIS. STAT. ANN. § 968.24 (1971). *See also* HAWAII REV. STAT. § 708-4 (1968); MASS. ANN. LAWS c.41, § 98 (Cum. Supp. 1971); United States v. Fields, 458 F.2d 1194 (3d Cir. 1972) (adopting a test similar to section 2(1)).

61. *See* ARK. STAT. ANN. § 43-429 (Supp. 1971) (felonies); N.D. CENT. CODE § 29-29-21 (Supp. 1971) (includes narcotics); UTAH CODE ANN. § 77-13-33 (Supp. 1971) (felonies); VA. CODE ANN. § 19.1-100.2 (Supp. 1972) (felony or concealed weapon). *See also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(1)(a) (Official Draft No. 1, 1972).

62. 17 Ariz. App. at 446, 498 P.2d at 520.

test approaches the probable cause needed for an arrest,[63] so it seems safe to assume that it would satisfy the standard suggested by *Terry* for investigatory stops.

In attempting to assess the manner in which the *Baltier* test should be applied, it is informative to observe how the rule from which it evolved has been applied by the California courts. Under the *Irwin* test, a California court has concluded that standing by a roadside with a back pack at 7:30 a.m., absent other suspicious conduct, is insufficient to justify an investigatory stop.[64] On the other hand, it has been held that purchasing large quantities of balloons daily over an extended period of time was more consistent with criminal than with innocent activities.[65] A 15 minute visit to premises known to be used for the sale of heroin was likewise considered more consistent with criminal activity.[66] In *Flores v. Superior Court*,[67] on facts similar to *Baltier*, the court of appeals held that when the defendant kept his eyes glued on a car containing three narcotics agents cruising a high crime area, and abruptly changed his direction of walking when their car approached him, his conduct was more consistent with criminal than with innocent behavior.[68] In *People v. Moore*,[69] the California supreme court decided that making a telephone call in a high crime area and appearing nervous was not distinguishable from the conduct of an innocent person, and therefore did not justify an investigatory stop.[70] Thus it is apparent that in the application of the *Irwin* test by the California courts, the major question is whether the suspect's conduct can be distinguished from that of an innocent person. In other words, the conduct must be more consistent with criminal than with innocent behavior. As previously noted, this element of the *Irwin* test was tacitly adopted in *Baltier*.[71]

In analyzing the potential effect of *Baltier*, it is apparent that the efficacy of the test in discouraging unconstitutional intrusions will depend on judicial interpretation of elastic phrases such as "reasonable suspicions." An interpretation that expands the meaning of such phrases to include hunches is just as impermissible as a test which explicitly sanc-

63. *See* De Salvatore v. State, 52 Del. 550, 163 A.2d 244 (1960). *See also* text accompanying notes 17-23 *supra*.
64. Pendergraft v. Superior Court, 15 Cal. App. 3d 237, 241, 93 Cal. Rptr. 155, 157 (1971).
65. People v. McLean, 6 Cal. App. 3d 300, 305, 85 Cal. Rptr. 683, 685 (1970) (balloons are frequently used to store narcotics).
66. People v. Garcia, 7 Cal. App. 3d 314, 319, 86 Cal. Rptr. 628, 630 (1970).
67. 17 Cal. App. 3d 219, 94 Cal. Rptr. 496 (1971).
68. *Id.* at 224, 94 Cal. Rptr. at 499.
69. 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968).
70. *Id.* at 683, 446 P.2d at 806, 72 Cal. Rptr. at 806.
71. *See* text accompanying note 41 *supra*.

tions stops on hunches.[72] This result is demonstrated in the preceding discussion of *Acosta*.[73] The *Acosta* court stated that a stop on a hunch was invalid,[74] but the manner in which it interpreted *Irwin* would allow stops based on equivocal conduct, which necessarily calls for a hunch on the part of the officer.[75] If construed in this manner, the *Acosta* approach is clearly below the *Terry* minimum standard. The important point is that the only difference between *Irwin* and *Acosta* is the requirement by *Irwin* that the suspect's actions be distinguishable from those of an innocent person—that his actions be more consistent with criminal behavior.[76] This takes on great significance in Arizona in view of the casual treatment *Baltier* gave this construction of the *Irwin* test.[77] In applying the *Baltier* test, care must be taken to insure that the *Irwin* construction of the test is used, for although it is possible to achieve a valid result without stating this requirement explicitly,[78] to reject it would be to lower the standards below the minimum indicated in *Terry*.[79]

Need for Miranda Warnings

An additional problem that must be resolved is the applicability of *Miranda*[80] warnings to investigatory stops. Since *Terry* suggests that the stop must be "reasonably related in scope to the circumstances which justified the interference in the first place,"[81] any questioning would probably have to be reasonably related to the activities that gave rise to the officer's suspicions;[82] that is, the police officer could not engage in a general inquiry. Since the activities of the suspect must have been suggestive of criminal activity, there is a substantial possibility of an incriminating response. Whether and at what point the warnings are to be given then becomes very important.

72. *See* Sibron v. New York, 392 U.S. 40, 61 (1968).
73. See text accompanying notes 47-55 *supra*.
74. 20 Cal. App. 3d at 1091, 98 Cal. Rptr. at 164.
75. See text accompanying notes 51-55 *supra*.
76. See text accompanying notes 47-50 *supra*.
77. See text accompanying note 41 *supra*.
78. In State v. Taras, 19 Ariz. App. 7, 10, 504 P.2d 548, 551 (1972), the court used the *Baltier* test without mentioning this interpretation. The court upheld the stop of a car which was parked behind a drive-in theatre screen and which drove off rapidly, without headlights, upon sighting the patrol car. In terms of *Irwin* and *Wilson*, this was, however, conduct more consistent with criminal than innocent behavior and sufficient to make the stop neither arbitrary nor harrassing.
79. *See* Remers v. Superior Court, 2 Cal. 3d 659, 470 P.2d 11, 87 Cal. Rptr. 202 (1970) (Supreme Court of California explicitly restated this requirement).
80. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that a defendant must be advised of his constitutional rights before any information obtained from "custodial interrogation" can be admitted in evidence against him).
81. 392 U.S. at 20. *See generally* LaFave, *supra* note 2, at 93-114; Note, *supra* note 5, at 433.
82. Thus in *Baltier* the officers could ask Baltier why he was evading them, and in *Ruiz*, see note 58 *supra*, the officers could ask why Ruiz was in the area.

The *Miranda* opinion provides very few clues as to when warnings are required in relation to an investigatory stop. Although that opinion states that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by [the] holding,"[83] this statement must be viewed in light of the previous sentence, which states that such questioning includes persons not under restraint.[84] The Court apparently was referring to questioning of witnesses and nonsuspect bystanders. The opinion does state, however, that the holding applies to "custodial interrogation," with custody defined as being deprived of "freedom of action in any significant way."[85] The Supreme Court of Arizona has held that when someone is detained on mere suspicion absent probable cause, such detention is "custodial" when a reasonable man under the circumstances would not believe he is free to go,[86] and "no interrogation whatsoever, even the routine or casual, is permitted unless a valid waiver of defendant's stated rights is demonstrated."[87] It would appear, therefore, that when the police start questioning a suspect about his actions, *Miranda* warnings are required. Warnings would not need to preface a request for name and address because they are not inherently inculpatory.[88]

Obtaining Grounds to Frisk During a Stop

In *Baltier,* the officers did not have grounds to frisk the defendant until after they had stopped him[89]—a factual difference from the frisk that was allowed in *Terry.* The United States Supreme Court stated in *Terry* that a police officer may conduct a "carefully limited search of the outer clothing" of a person to disclose any concealed weapons if the officer has a rational basis to support a suspicion that the suspect is armed and dangerous and nothing dispels this fear in the initial stages of the police-citizen encounter.[90] The holding in *Terry* only covers those situations in which the grounds for the frisk were obtained before the initial encounter.

83. 384 U.S. at 477.
84. *Id. See also* LaFave, *supra* note 2, at 97.
85. 384 U.S. at 444.
86. State v. Mumbaugh, 107 Ariz. 589, 595, 491 P.2d 443, 449 (1971); *accord,* State v. Rhodes, 19 Ariz. App. 505, 508 P.2d 764 (1973). *See* LaFave, *supra* note 2, at 104. *Contra,* People v. Manis, 268 Cal. App. 2d 653, 74 Cal. Rptr. 423 (1969). This criterion is identical to the definition of an investigatory stop. See text accompanying note 15 *supra.*
87. 107 ARIZ. at 594, 491 P.2d at 448.
88. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(5)(a) (Official Draft No. 1, 1972); *cf.* California v. Byers, 402 U.S. 424 (1971); Sciberras v. United States, 380 F.2d 732 (10th Cir. 1967). *See also* LaFave, *supra* note 2, at 106; DETECTION OF CRIME, *supra* note 24, at 59 (noting that most people do not refuse to identify themselves).
89. 17 Ariz. App. at 449, 498 P.2d at 523.
90. 392 U.S. at 30.

It would be unrealistic, however, not to allow a frisk merely because a stop preceded the obtaining of the grounds to frisk.[91] In *Baltier*, once the contact was made, the defendant's actions took on a different character. As the court noted, the "defendant was not merely uncooperative but . . . was abusive in his language to the point of being threatening."[92] When this was viewed in light of the "unique" circumstance present—defendant had a jacket slung over his arm—the court concluded that the facts supported a reasonable belief that the defendant was armed and dangerous.[93] If this does not exactly fit the facts of *Terry*, it certainly fits the spirit—allowing a frisk whenever an officer reasonably fears for his own or other's safety. If this is accepted, the policeman was justified in reaching for the jacket, and the defendant was not justified in forcibly resisting the attempt. Accordingly, the arrest for assault of a peace officer was valid.[94]

It seems clear, therefore, that grounds for a frisk may arise during an investigatory stop.[95] Using the same line of reasoning, it is apparent that the grounds for a forcible stop may be obtained during a voluntary stop and that grounds for an arrest may be obtained during a frisk. These possibilities give rise to a danger that the purpose of the voluntary stop may be merely to obtain grounds for a forcible stop, and thence a frisk and then perhaps with some resistance, grounds for arrest, so that a complete search could be made. Thus, it is possible that the frisk may become the object of the stop, rather than a protective incident thereto.[96] A police officer could stop a person and then rely on this snowball effect to turn the stop into a "fishing expedition."[97] This has prompted some contentions that the police should be barred from employing stops if the crime suspected is a minor one such as possession of marijuana.[98] Indeed, a significant number of the cases concerned with the area of investigatory stops involve arrests for possession of narcotics after a search was conducted incident to the stop.[99] If the courts strictly applied the construction emphasized previously—that the suspicious conduct must be more con-

91. Terry v. Ohio, 392 U.S. at 13 (recognizing that events arising after the stop may change the tone of the encounter).

92. 17 Ariz. App. at 449, 498 P.2d at 523.

93. The court also noted that a narcotics agent had been shot recently in the same area. 17 Ariz. App. at 449, 498 P.2d at 523. In the absence of either grounds to connect the defendant with the shooting, or a pattern of shooting of policeman, however, it may be argued that this fact was irrelevant to the case before the court.

94. *See* ARIZ. REV. STAT. ANN. § 13-541(A) (Supp. 1972-73).

95. *Cf.* State v. Washington, 107 Ariz. 521, 489 P.2d 1201 (1971); State v. Ruiz, 19 Ariz. App. 84, 504 P.2d 1307 (1973).

96. Adams v. Williams, 407 U.S. 143, 151 (1972) (Brennan, J., dissenting), *quoting* Williams v. Adams, 436 F.2d 30, 38 (1970) (Friendly, J., dissenting).

97. See LaFave, *supra* note 2, at 66.

98. See LaFave, *supra* note 2, at 65.

99. *See, e.g.*, cases at text accompanying notes 64-70 *supra*.

sistent with criminal than innocent behavior—the result would be fewer stops on grounds that border on hunches, and correspondingly less chance that the stop was in fact a sham. Consequently, the construction given the *Baltier* test not only affects the validity of the test, but its integrity as well.

Conclusion

The potential for misuse of the investigatory stop on less than probable cause is outweighed by the need of society for an effecitve law enforcement tool.[100] The suggested minimum requirements—that the grounds for a stop be more than a hunch, and reasonable under the circumstances—should give protection to the private citizen while leaving adequate leeway for the police.[101]

Given the proper interpretation, the test expounded in *Baltier* for investigatory stops is a workable alternative to the broad test of reasonableness used previously.[102] This interpretation—that the conduct which aroused the suspicion should be more consistent with criminal than with innocent behavior—not only insures the validity of the test, but if strictly applied will go far toward preventing the harassment that is the principle popular objection to field interrogation. It is perhaps the last barrier against a total invasion of the right of privacy of the citizen on the street.

E. AIRPORT SEARCHES OF CARRY-ON LUGGAGE

In recent years the menace of airplane hijacking has become an increasingly important national concern.[1] In an effort to curb the threat presented by this menace the federal government has instituted an extensive airport surveillance system which includes a pre-boarding search of passengers and their carry-on luggage.[2] Significant constitu-

100. See text accompanying notes 24-25 *supra.* The intensity of public reaction to the current crime problem is borne out by President Nixon's proposed revamping of the federal criminal code. *See* H.R. DOC. NO. 60, 93d Cong., 1st Sess. 1731 (1973).
101. See text accompanying notes 29-36 *supra.*
102. See text & note 7 *supra.*

1. McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach,* 41 FORDHAM L. REV. 293, 294-97 (1972).
2. The security procedures sanctioned for use in all airport terminals are under the supervision and control of the Federal Aviation Administration (FAA). *See* 14 C.F.R. § 107 (1973) (airport security); *id.* § 121.538 (aircraft security). The basic procedure in effect during the time of the search of Damon involved three steps: (1) a personality profile used to identify suspected hijackers; (2) an electric mag-

tional questions have arisen as a result of the procedures used in these searches. In *State v. Damon*,[3] the Court of Appeals of Arizona considered these constitutional issues, and while engaging in a generally laudable effort to promote the public welfare, may have unnecessarily disregarded certain fourth amendment principles.

Damon attempted to board an airplane at Tucson International Airport while carrying a single piece of luggage. At the boarding gate a federal agent operating a hand-held magnetometer detected the presence of a metal object inside Damon's bag and a search was subsequently initiated in an effort to determine whether the object was a weapon. During the course of the search an agent discovered a quantity of cocaine and marijuana. Damon was arrested and was later convicted under Arizona law for the unlawful possession of narcotics.[4]

On review, the court of appeals considered whether carry-on luggage may lawfully be searched when a magnetometer detects the presence of metal inside.[5] The court upheld both the search and seizure.[6] By its resolution of the case the court implicitly recognized an emerging exception to the strict constitutional standard usually required to justify such a search.[7] Though the opinion characterized the procedure as a frisk similar to that sanctioned in *Terry v. Ohio*,[8] the analogy is inappropriate. *Terry* authorized an investigating officer to make a limited search of a suspect's outer clothing,[9] while *Damon* sanc-

---

netometer (metal detector) employed at the boarding gate; and (3) an interrogation and possible search by a law enforcement officer of those persons singled out by steps (1) and (2). United States v. Lopez, 328 F. Supp. 1077, 1082-83 (E.D.N.Y. 1971). The procedure utilized in the search of Damon did not employ a profile. Record, at 12-13, State v. Damon, No. A-19749 (Hearing, Super. Ct., Pima County, Ariz., April 25, 1972).

On August 1, 1972, an FAA directive modified the boarding program. Under the latest procedure no prospective passenger may board unless: (1) his carry-on baggage and other articles on or about his person have been searched; and (2) the passenger, but not his luggage, has cleared through a metal detector; or (3) in the absence of a metal detector, each passenger has submitted to a consent search. *See* United States v. Davis, No. 71-2993 (9th Cir., June 29, 1973). In addition, the procedure is accompanied by signs and public address announcements warning that baggage and passengers are subject to search. United States v. Doran, No. 72-2363 at 3 (9th Cir., July 10, 1973) (explanation of warnings given); United States v. Lopez, 328 F. Supp. 1077, 1083 (E.D.N.Y. 1971) (example of warning signs).

3. 18 Ariz. App. 421, 502 P.2d 1360 (1972).

4. ARIZ. REV. STAT. ANN. § 36-1002 (Supp. 1972).

5. Counsel for the state and the defense dealt at length with the question of whether the defendant consented to the search. Briefs for Appellant & Appellees, State v. Damon, 18 Ariz. App. 421, 502 P.2d 1360 (1972). The court, however, did not consider this question to be the central issue. *Id.* at 422, 502 P.2d at 1361.

6. Holding the search to be lawfully initiated, the court found that the investigating officer could properly seize evidence of crimes other than the one being investigated. *Id.* at 422, 502 P.2d at 1361; *accord*, Hill v. California, 401 U.S. 797 (1971).

7. *See* cases cited note 40 *infra*.

8. 392 U.S. 1 (1968).

9. *Id.* at 30.

tioned an extensive intrusion beyond the suspect's wearing apparel and into his baggage.[10]

The decision in *Damon* represents a significant extension of the *Terry* frisk rationale. It must be noted, however, that because of modifications in the federally required security program[11] the continuing applicability of this rationale to airport baggage searches is questionable. The casenote will therefore attempt to place and analyze the decision in *Damon* within the context of this developing area of the law. It will first discuss the rationale supporting the decision in *Terry* and then will consider the manner in which lower court decisions have extended the *Terry* rationale to justify arguably similar searches at airport boarding areas. The propriety of asserting *Terry* and this later line of cases as precedent for an airport baggage search will then be challenged. Finally, the more recent decisions justifying baggage searches under the revised procedure will be analyzed.

Application of the Terry Rationale to Airport Boarding Searches

The United States Supreme Court has recognized that the fourth amendment governs all intrusions by agents of the state upon an individual's personal security.[12] Whenever reasonably practical, an investigating officer must obtain prior judicial approval for an intended search by procuring a warrant.[13] This procedure, which is specified in the "warrant" clause of the fourth amendment, requires the officer to provide a magistrate with sufficient facts to establish probable cause for the search. The evidence presented must be sufficient to permit a reasonably prudent man to be warranted in the belief that a criminal offense has been or is being committed.[14]

Limited exceptions to the warrant requirement have been carved out, however, where the time required to obtain a search warrant would only serve to frustrate legitimate police activity.[15] One such exception would arguably be the pre-boarding search of carry-on air-

10. 18 Ariz. App. at 424, 502 P.2d at 1363. For a discussion of the increasingly broad interpretations of *Terry* utilized by courts to uphold the anti-hijacking system, *see* McGinley & Downs, *supra* note 1.

11. See note 2 *supra*.

12. Terry v. Ohio, 392 U.S. 1, 17 n.15 (1968). The Court defined personal security as:

> [T]he right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestioning authority of law.

Id. at 9, *quoting* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

13. 392 U.S. at 20.

14. *Compare* Terry v. Ohio, 392 U.S. 1, 27 (1968) *with* Carroll v. United States, 267 U.S. 132, 162 (1924).

15. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest); Harris v. United States, 390 U.S. 234 (1968) (plain view); Schmerber v. California, 384 U.S. 757 (1966) (exigent circumstances).

plane luggage.[16] Classifying a certain type of search as an exception to the warrant requirement, of course, does not necessarily dispense with the need to establish probable cause. The Court has frequently reiterated that government officials acting without a warrant must still establish probable cause prior to their search.[17] Recently, however, the "reasonableness" clause of the fourth amendment has been used as an independent standard for evaluating a specific type of search and seizure.[18]

In *Terry v. Ohio*, the Supreme Court held that an investigating officer who determines that a suspect might be armed and dangerous may pat down the suspect's outer garments in a limited search for weapons.[19] If, during the pat-down, the officer touches an object which feels like a weapon, he may reach into the suspect's garments and remove the object. Authority to conduct a limited search was granted to provide the officer with a means of assuring his personal safety during the course of his investigation. In light of this limited objective, the entire frisk must be restricted to a search for "guns, knives, clubs, or other hidden instrumentalities for the assault of the officer."[20]

In justifying its departure from the traditional probable cause standard, the Court stated that under these circumstances the officer should be tested "by the Fourth Amendment's general proscription against unreasonable searches and seizures."[21] The reasonableness of the search in *Terry* was evaluated by balancing the need to search against the invasion which the search entailed.[22] The test involved a careful examination of the governmental interest in order to insure that the procedure was justified in light of the objective to be achieved. The governmental interest was then balanced against the nature and magnitude of the intrusion upon the suspect. A determination was also made to insure that the suppositions relied upon to initiate the frisk were not the result of the officer's unparticularized "hunches."

16. As the Arizona court of appeals recognized in *Damon*, a baggage search conducted within the context of the airport anti-hijacking program must, as a practical matter, be performed without a search warrant. 18 Ariz. App. at 424, 502 P.2d at 1363; *accord*, United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Kroll, 351 F. Supp. 148 (W.D. Mo. 1972). The system is designed to minimize the disruption of the boarding process. United States v. Lopez, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971). Thus, the exigencies of time and convenience would preclude an investigating officer from obtaining a warrant in this situation.

17. *See, e.g.*, Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Henry v. United States, 361 U.S. 98 (1959); Carroll v. United States, 267 U.S. 132 (1925).

18. Terry v. Ohio, 392 U.S. 1 (1968). *See also* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19-50 (1969).

19. 392 U.S. at 29-30.

20. *Id.*

21. *Id.* at 20 (footnote omitted).

22. *Id.* at 21, *quoting* Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

The inferences had to be based upon specific and articulable facts which led to a reasonable suspicion that the suspect was armed.[23] This demand for specificity was noted to be central to a proper application of fourth amendment principles.[24]

The dissent in *Terry* pointed out that the use of the "reasonableness" test to determine the validity of a search represented a significant departure from the traditional standard for a valid search.[25] The majority, however, made an important distinction between a pat-down and other more traditional searches. The pat-down was described as "a brief, though far from inconsiderable, intrusion upon the sanctity of the person" and could thus be "characterized as something less than a 'full' search."[26] Under these circumstances the officer's actions were held reasonable.

After the decision in *Terry* the frisk rationale was usually utilized in cases involving traditional "street encounters" between the police and a suspect.[27] With the implementation of the "Sky Marshal" airport security program,[28] however, courts began to apply the frisk rationale to this new situation. The first case to deal with the validity of the airport anti-hijacking procedure involved the frisk of a passenger rather than a search of carry-on luggage. In *United States v. Lopez*,[29] a federal district court undertook an examination of the entire airline passenger screening procedure. The court found that if the proper procedures were followed a frisk of a screening program "selectee"[30] would be reasonable.[31]

A subsequent airport frisk decision by the United States Court of Appeals for the Fourth Circuit determined that a pat-down of an airline passenger was permissible even when based solely upon a positive magnetometer reading. In *United States v. Epperson*,[32] the court held that the officer had cause to frisk when the magnetometer indicated the presence of metal under the suspect's garments and the suspect could not justify the device's indication by producing the metal

23. 392 U.S. at 27.
24. *Id.* at 21 n.18.
25. *Id.* at 35-36 (Douglas, J., dissenting).
26. *Id.* at 26. *Compare* Chimel v. California, 395 U.S. 752, 762-63 (1969).
27. *See, e.g.*, United States v. Lee, 271 A.2d 566 (D.C. App. 1970); People v. Lee, 48 Ill. 2d 272, 269 N.E.2d 488 (1971); State v. Brooks, 3 Wash. App. 769, 479 P.2d 544 (1970).
28. See note 2 *supra.*
29. 328 F. Supp. 1077 (E.D.N.Y. 1971).
30. "Selectee" is the designation used for those individuals who fit the hijacker profile and activate the magnetometer. *Id.* at 1083.
31. *Id.* at 1097. In *Lopez* the court granted a motion to suppress because proper screening procedures were not used. The criterion used in the screening procedure had been improperly altered by an airline employee, thus destroying its objectivity. *Id.* at 1101. The court also determined that the use of a magnetometer to facilitate aircraft boarding checks constituted a search, but that the intrusion was justified by an antecedent warning provided by the use of the profile. *Id.* at 1100.
32. 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).

object.[33] In approving the frisk, the court noted that the officer's actions were motivated by a reasonable fear for the safety of other airline passengers.[34]

Damon's Extension of the Terry Rationale

Superficially, there are similarities between the earlier airport frisk cases and the search in *Damon*. The most obvious are that both types of search involve a boarding passenger and the use of federal airport security measures. It is thus perhaps understandable that the Arizona court of appeals sought justification for a baggage search by merely extending the pat-down rationale to include a passenger's luggage.

In *Damon* the application of the *Terry* rationale to carry-on luggage was viewed as an extension of the *Epperson* decision.[35] The Arizona court concluded that if the magnetometer was activated a warrantless search of such baggage was permissible, provided it was limited to a search for weapons.[36] Ostensibly complying with the procedure established in *Terry*, the court stated that an initial pat-down of the luggage should be made. Hard surface carry-on baggage, however, which was incapable of being effectively searched in this manner was allowed to be opened. Authorities could then engage in further examinations of any contents capable of containing a weapon.

The Arizona court of appeals was incorrect in applying the *Terry* frisk rationale to airport baggage searches. From a practical standpoint, the pat-down requirement would often have to be abandoned because hard-cover luggage does not readily lend itself to a meaningful frisk. The abandonment of the frisk without some analogous substitute finds no support in either *Terry* or in the earlier airport frisk cases.[37] Indeed, in a companion case to *Terry*, the Court specifically disapproved of the abandonment of the initial frisk.[38]

33. 454 F.2d at 772. The court, employing the balancing test formulated in *Terry*, see text accompanying notes 22-24 *supra*, determined that an overwhelming governmental interest in locating unusual quantities of metal justified the use of the magnetometer. 454 F.2d at 771. The *Epperson* rationale for the use of the magnetometer was adopted in State v. Damon, 18 Ariz. App. 421, 424, 502 P.2d 1360, 1363 (1972). *Compare* United States v. Lopez, 328 F. Supp. 1077, 1100 (E.D.N.Y. 1971).

34. 454 F.2d at 772.

35. State v. Damon, 18 Ariz. App. 421, 423-24, 502 P.2d 1360, 1362-63 (1972). See text accompanying notes 32-34 *supra*.

36. 18 Ariz. App. at 424, 502 P.2d at 1363.

37. See text accompanying notes 19-20 & 29-34 *supra*. It is important to note in the earlier airport frisk cases that a magnetometer reading did not substitute for the pat-down but served only the function of raising the officer's reasonable suspicion that the suspect was armed. United States v. Epperson, 454 F.2d 769, 772 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); United States v. Lopez, 328 F. Supp. 1077, 1097 (E.D.N.Y. 1971).

38. Sibron v. New York, 392 U.S. 40, 65 (1968).

When compared with *Terry* and the less extensive airport frisk decisions, it becomes clear that *Damon* has not merely extended the pat-down procedure but has instead sanctioned a search of all objects in the immediate control of the suspect which are capable of containing weapons. A clearer perspective and analysis of such a search would have been achieved had the court used the generalized balancing test now associated with the reasonableness clause of the fourth amendment.[39] This test has in fact been used in more recent decisions to justify baggage searches.[40] The courts in these cases found that even a minimal level of articulable suspicion would sanction the intrusion in light of the extreme threat posed by hijacking.[41]

From a theoretical standpoint, it is debatable whether the reasonableness test was intended to have application in such broad criminal investigatory searches. The Court in *Terry* specified that the intrusion on the suspect should be less than a full search.[42] The Court declined to develop at length the limitations to be placed upon the scope of such an intrusion, noting that restrictions could only be developed in the concrete factual circumstances of individual cases.[43] The Court did, however, criticize a line of New York decisions which included *People v. Pugach*,[44] a frisk case approving the search of a suspect's briefcase. The Court's criticism of this decision, which sanctioned a search based upon less than probable cause, was aimed at the state court's failure to consider limitations upon the scope of searches as a potential mode of police regulation.[45]

Given the Supreme Court's reluctance to provide a clear distinction between a frisk and a full search, it is not surprising to find that lower courts differ greatly in their determinations as to the proper scope of a protective search for weapons. At least two state courts, including the Arizona court of appeals, have clearly condoned the

39. See text accompanying notes 22-24 *supra*.

40. United States v. Slocum, 464 F.2d 1180, 1182-83 (3d Cir. 1972) (search of suitcase justified by exceptional circumstances when the screening procedure identified a "selectee" who might be a hijacker). United States v. Kroll, 351 F. Supp. 148, 152 (W.D. Mo. 1972) (court, after considering both the governmental and individual interests involved, concluded that as a general proposition a limited inspection of all carry-on luggage for weapons would be reasonable).

41. The courts, however, are not in complete agreement on this point. In People v. Sortino, 68 Misc. 2d 151, 325 N.Y.S.2d 472 (1971), the court concluded that an investigating officer needed probable cause to search carry-on luggage. The search was conducted by a customs agent under the authority of the "Sky Marshal" program, but the screening procedure was not utilized. *See also* State v. Mahony, 106 Ariz. 297, 475 P.2d 479 (1970) (probable cause required to search a suitcase found in automobile).

42. See text accompanying note 26 *supra*.

43. Terry v. Ohio, 392 U.S. 1, 29 (1968).

44. 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 833 (1964), *cert. denied*, 380 U.S. 936 (1965).

45. 392 U.S. at 17 n.15.

search of items in the general area of the suspect.[46] The argument presented in each opinion concluded that the items searched posed a threat to the investigating officer. In still other frisk situations where the suspect is carrying an object, such as a suitcase[47] or a coin purse,[48] courts have deemed it proper to simply remove the object from the suspect's reach. This procedure has been adopted as the stated policy of law enforcement officials in New York.[49]

It is suggested that the procedure which requires removal of the object from the suspect's reach is more in keeping with the holding and dicta of *Terry*. This suggestion is based on the contention that the reasonableness test as formulated and applied in *Terry* is ill-suited to protect an individual from extensive intrusions upon his personal security. The apparent reluctance of the Supreme Court to apply this test to a full search has already been noted.[50] Certainly, rumaging through the contents of an object, such as a suitcase, is a more extensive search than a pat-down and thus involves a materially greater invasion of the suspect's fourth amendment rights. The magnitude of such an intrusion suggests that a proper balance is struck only under the stricter probable cause standard. This traditional test offers greater protection against encroachment on the rights that the fourth amendment is intended to secure.[51] In balancing the competing interests between the state and the individual, the lesser standard associated with the reasonableness clause should be restricted in application so as to be utilized only in evaluating frisks of the person in fact situations reconcilable with *Terry*.

An Alternative to the Terry Rationale: Consent

As has been suggested above,[52] recent revisions in airport board-

46. State v. Phillips, 16 Ariz. App. 174, 492 P.2d 423 (1972); Nash v. State, 295 A.2d 715 (Del. Sup. Ct. 1972).

47. United States v. Hostetter, 295 F. Supp. 1312 (D. Del. 1969). *See also* United States v. Margeson, 259 F. Supp. 256 (E.D. Pa. 1966); People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963).

48. United States v. Collins, 439 F.2d 610 (D.C. Cir. 1971).

49. NEW YORK COMBINED COUNCIL OF LAW ENFORCEMENT OFFICIALS, MEMORANDUM REGARDING: THE "STOP-AND-FRISK" AND "KNOCK, KNOCK" LAWS (June 1, 1964) *reprinted in* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 38, 40 (1967). The memo states:

> If the suspect is carrying an object such as a handbag, suitcase, sack, etc. which may conceal a weapon, the officer should not open that item, but should see that it is placed out of reach of the suspect so that its presence will not represent any immediate danger to the officer.

50. See text accompanying notes 42-45 *supra*.

51. Go Bart v. United States, 282 U.S. 344, 357 (1931); Gouled v. United States, 255 U.S. 298, 304 (1921); Weeks v. United States, 232 U.S. 383, 391-92 (1914); Boyd v. United States, 116 U.S. 616, 635 (1886). When legislation sanctions a search and seizure, it is likewise to be construed so as to afford maximum protection for the individual. Grau v. United States. 287 U.S. 124 (1932).

52. See text accompanying note 11 *supra*.

ing procedure may not be constitutional even under the reasonable suspicion rationale. Though the magnetometer is still used to check prospective passengers, the device is no longer being used with respect to carry-on luggage. The revised procedure requires instead that all carry-on baggage be routinely searched prior to boarding.[53] This policy permits the officer to initiate a baggage search without the prior necessity of establishing specific facts which would justify the intrusion. Because a search under such circumstances need not be based upon an officer's articulable suspicion, arguably it cannot be justified under either probable cause[54] or reasonable suspicion[55] standards.

A fourth amendment standard for evaluating such a procedure has, however, been recently promulgated. In *United States v. Davis*[56] the Court of Appeals for the Ninth Circuit determined that the boarding procedure is essentially an "administrative" search conducted "in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime," and thus "may be permissable under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched."[57] The fourth amendment requirement of reasonableness is satisfied by a determination that the search is as limited in its intrusiveness as is consistent with the satisfaction of the program's administrative purpose. The court determined that each passenger retained the right to withhold assent to such a search.[58] Thus, in *Davis* the court predicated approval of a baggage search upon a determination of two separate findings of fact. First, it must be proven that the passenger in fact consented to the search. Second, it must be shown that the consent-in-fact was voluntarily given.[59]

In reaching its decision in *Davis* the court of appeals remanded to the district court, finding that the defendant had been improperly assigned the burden of proving his lack of consent to the search.[60] In ordering the remand, however, the court indicated that a finding of consent-in-fact might be implied from a determination that the regulations were properly in effect when the passenger presented him-

53. See note 2 *supra.*
54. See text accompanying note 14 *supra.*
55. See text accompanying notes 22-24 *supra.*
56. No. 71-2993 (9th Cir., June 29, 1973).
57. *Id.* at 21-22.
58. *Accord,* United States v. Meulener, 351 F. Supp. 1284, 1289 (C.D. Cal. 1972).
59. *See* United States v. Ruiz-Estrella, No. 73-1007 (2d Cir., June 11, 1973).
60. When given voluntarily, consent will waive a claim to all fourth amendment rights. Schneckloth v. Bustamonte, 41 U.S.L.W. 4726 (1973); Zap v. United States, 328 U.S. 624 (1946). The burden of proof that consent was freely given rests with the state. Schneckloth v. Bustamonte, 41 U.S.L.W. 4726, 4727 (1973); Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

self for boarding. It was suggested that under these circumstances the alternatives presented to the prospective passenger would be so self-evident that a decision to board would manifest consent. This dicta was quickly adopted in subsequent Ninth Circuit opinions. In *United States v. Doran*[61] the court held that airport signs warning of the impending search, as well as public address warnings, informed the defendant of the existence and nature of the procedure. Thus, having chosen to participate in the regulated activity, the implication of defendant's consent was unavoidable.[62] This position was re-affirmed in *United States v. Miner*,[63] though the court suggested that defendant's implied consent might have been withdrawn when he initially turned down a request to open his suitcase.

The net result of the Ninth Circuit opinions is to create a presumption of consent-in-fact in those situations where the passenger boards while the regulated procedures are in effect.[64] This presumption of consent in such situations would appear to deprive the passenger of effective fourth amendment protection, because to overcome the inference of consent the passenger must apparently demonstrate that he affirmatively withheld his consent.[65] This act of withholding consent must necessarily take place within a public setting in which many individuals might hesitate to express their objections to a search. Further, there is nothing in either the warnings or the search procedure which suggests that passengers retain the right to withdraw from the process without subjecting themselves to further investigation.[66]

Prospective passenger's rights would of course be afforded adequate protection where each is actually informed that the search will not take place without his express approval. Though the courts have been reluctant to require a warning in other situations involving consent to search,[67] there would appear to be sound reasons for compel-

61. No. 72-2362 (9th Cir., July 10, 1973).
62. *Contra*, United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).
63. No. 72-3204 (9th Cir., August 1, 1973).
64. Though such a presumption is in general at variance with the Supreme Court's policy of indulging every reasonable presumption *against* waiver of fundamental constitutional rights, *see, e.g.*, Brookhart v. Janis, 384 U.S. 1, 4 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Hodges v. Easton, 106 U.S. 408, 412 (1882), there appears to be recent Supreme Court support for this position in Schneckloth v. Bustamonte, 41 U.S.L.W. 4726, 4733 (1973).
65. See text accompanying notes 61-63 *supra*.
66. See note 2 *supra*.
67. *See, e.g.*, Schneckloth v. Bustamonte, 41 U.S.L.W. 4726, 4730 (1973); United States v. Sheard, 473 F.2d 441 (D.C. Cir. 1972); United States v. Noa, 443 F.2d 144 (9th Cir. 1971); Gorman v. United States, 380 F.2d 158 (1st Cir. 1967). *Compare* Byrd v. Lane, 398 F.2d 750 (7th Cir. 1968), *cert. denied*, 393 U.S. 1020 (1969) *with* United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966). *But see* United States v. Moderacki, 280 F. Supp. 633 (D. Del. 1968); United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966).

ling such a procedure during airport boarding searches. First, the regulated nature of the procedure provides ample opportunity to supply the warning without disrupting the boarding process. Second, informing the passenger of his option to refuse consent for the search would counteract the coercive factors, such as the presence of uniformed guards, which may exist during the boarding procedure. And finally, because the search fulfills administrative rather than investigative functions, a warning cannot be viewed as having an adverse effect upon law enforcement efforts.

Once the warning has been given the passenger should have the choice either to give consent or to check his bag with the regular luggage. Should he refuse to do either, he should then be denied passage onto the plane. The burden imposed upon those passengers who refuse to comply with this procedure would appear to be justified in order to maintain the safety necessary to operate the airlines.[68]

Conclusion

There is a legitimate need, as recognized in *Damon*, to curtail the threat of air hijacking and to insure the safe passage of the air traveling public. All proper measures should be taken to insure that these objectives are realized. This compelling need, however, should not permit the adoption of procedures which violate constitutional principles relating to the individual's right to remain free from unreasonable searches.

The baggage search sanctioned in *Damon* is clearly not a mere extension of the *Terry* frisk rationale. In *Damon* the investigating officer is given authority to make a search of all objects within the suspect's immediate possession based only on the investigating officer's reasonable suspicion. The application of the reasonable suspicion test to such an extensive search appears to be inconsistent with the decision in *Terry* and thus sets a precedent which is of dubious propriety.

The consent theory generally set forth in *United States v. Davis* provides the proper context within which to analyze airport baggage searches. It is questionable, however, whether the fiction of implied

68. While the right to travel has long been recognized as a fundamental constitutional right, United States v. Guest, 383 U.S. 745 (1966); Passenger Cases, 48 U.S. (7 How.) 283 (1849), and there must be a compelling governmental interest shown in order to penalize the exercise of that right, Shapiro v. Thompson, 394 U.S. 618, 634 (1969), courts have been quite uniform in finding that the government has a substantial interest in curtailing the threat which hijacking poses. *See, e.g.*, United States v. Epperson, 454 F.2d 769, 771 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972) ("overwhelming" governmental interest); United States v. Bell, 464 F.2d 667, 674 (2d Cir. 1972); United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972) ("overwhelming" governmental interest).

consent adequately protects the passenger's fourth amendment rights. Under these circumstances there appear to be good policy reasons for requiring warnings as to the passenger's right to refuse consent. When such warnings have been given and express consent is obtained, both the safety of the flying public and the rights of the individual are protected.

F. Admissibility at Probation Revocation Hearings of Incriminating Statements Made to Probation Officer

Probation is a rehabilitative experiment, an opportunity for the criminal offender to reintegrate into society without undergoing prison confinement. This opportunity for self-rehabilitation has long been considered to be a matter of grace,[1] terminable at the discretion of the courts, so long as termination is not arbitrary or capricious.[2] Accepting this characterization of probation in *State v. Fimbres*,[3] the Supreme Court of Arizona considered whether statements made by a probationer to his supervising officer were admissible at a probation revocation hearing, absent a showing that the probationer had been informed of his rights under *Miranda v. Arizona*.[4] In accord with the majority of courts having decided this issue,[5] the *Fimbres* court ruled that such statements are admissible at probation revocation hearings.

Fimbres was arrested for burglary while on probation following the suspended imposition of sentence[6] for an armed robbery conviction.

1. *See, e.g.*, Escoe v. Zerbst, 295 U.S. 490 (1935); State v. Maxwell, 97 Ariz. 162, 398 P.2d 548 (1965); Varela v. Merrill, 51 Ariz. 64, 74 P.2d 569 (1937).
2. Burns v. United States, 287 U.S. 216 (1932).
3. 108 Ariz. 430, 501 P.2d 14 (1972).
4. In Miranda v. Arizona, 384 U.S. 436 (1967) the United States Supreme Court held that when a person is taken into custody or otherwise deprived of his freedom in any significant way by law enforcement authorities he must be given certain warnings prior to any questioning. He must be advised "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires." *Id.* at 478-79. No evidence obtained as a result of interrogation can be used against an individual at trial unless it is shown that the warnings were given and the individual knowingly and intelligently waived these rights.
5. *See, e.g.*, United States v. Johnson, 455 F.2d 932 (5th Cir.), *cert. denied*, 409 U.S. 856 (1972); Clark v. State, 222 So. 2d 766 (Fla. Ct. App. 1969); People v. Ronald W., 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S.2d 260 (1969); Cunningham v. State, 488 S.W.2d 117 (Tex. Crim. App. 1972).
6. Ariz. Rev. Stat. Ann. § 13-1657(A) (Supp. 1972-73) provides that a court may, in its discretion, place a defendant on probation "[i]f it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be subserved thereby . . . ." The court may provide for probation by suspending the imposition of sentence. *Id.* § 13-1657(A)(1).

He informed his probation officer that he had "gotten into trouble again" and, in response to the officer's inquiry as to the nature of the trouble, admitted that he had participated in a burglary.[7] Subsequently, a petition to revoke Fimbres' probation was filed by the officer. At the hearing on the revocation petition, the probation officer testified concerning Fimbres' incriminating statements. Defense counsel objected to the admission of this testimony unless it were shown that Fimbres had been warned of his *Miranda* rights prior to admitting his participation in the burglary. Overruling this objection, the trial judge admitted the officer's testimony and revoked probation.[8] A sentence of 6 to 7 years was then imposed for Fimbres' prior armed robbery conviction.[9]

On appeal, the Supreme Court of Arizona affirmed, basing its decision on two complementary grounds. First, quoting from a Maryland Supreme Court decision,[10] the court declared that probation is a matter of grace, a personal privilege which may be terminated at the discretion of the court, so long as the probationer is given notice of the charges and an opportunity to answer or explain the facts. Thus, the court concluded, in determining whether to revoke probation, all relevant facts may be considered, "even if obtained more informally than the rules of evidence would permit."[11] Additionally, the court implied that the *Miranda* rule was incompatible with probation procedures which require open communication between the probationer and his supervisor.[12] The court declared that the entire probation program would be destroyed if the probation officer, as an agent of the court, were not allowed to freely discuss with the court any statements made to him by the probationer. The opinion, as a whole, reflects the view that correctional procedures should not be frozen in the mold of trial procedure.[13]

---

7. 108 Ariz. at 431, 501 P.2d at 15.

8. *Id.* ARIZ. REV. STAT. ANN. § 13-1657(B) (Supp. 1972-73) provides that a court may revoke probation

> if the interests of justice so require, and if the court, in its judgment, has reason to believe that the person so placed upon probation is violating the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates, or a vicious life.

Fimbres' probation was conditioned on his good behavior. Additional conditions were that he not break any law and that he make reports to and carry out the orders of his probation officer. 108 Ariz. at 430, 501 P.2d at 14.

9. A convicted offender may be placed on probation where the imposition of sentence is deferred, *see* note 6 *supra*, or where the execution of sentence is deferred. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 279 § 1 (Supp. 1972); NEV. REV. STAT. § 176.185 (1971). Where deferred imposition is involved, revocation of probation is followed by sentencing. In deferred execution cases, revocation is followed by execution of the previously imposed sentence.

10. Scott v. State, 238 Md. 255, 265, 208 A.2d 575, 580 (1965).

11. 108 Ariz. at 432, 501 P.2d at 16.

12. *Id.*

13. *Cf.* Williams v. New York, 337 U.S. 241, 247-50 (1949).

A survey of recent cases and legal commentary, however, reveals a trend toward the expansion of procedural protections afforded the probationer at a revocation hearing.[14] In light of these developments, this note will examine the continued validity of the "grace doctrine" as a basis for the *Fimbres* decision. The reasoning of the *Fimbres* opinion will be compared with that found in the decisions of other courts which have dealt with this issue and alternative bases for the result reached by the Supreme Court of Arizona will be suggested. Consideration will be given to whether probation interviews should be regarded as custodial interrogations within the meaning of *Miranda* and whether the *Miranda* exclusionary rule should be applied to revocation proceedings.

The "Grace Doctrine"

Upholding the revocation of probation in *Fimbres*, the Supreme Court of Arizona relied heavily on the theory that probation is a matter of grace, a personal privilege which may be revoked whenever a court is reasonably persuaded that the interests of justice so require.[15] Adherents of this position draw support from the fact that the state is not constitutionally required to provide for a probation program.[16] Accordingly, the offender, having been tried and convicted, is entitled to nothing more than the punishment provided by law. If the state does provide its courts with statutory authority to place offenders on probation[17] it is felt that the courts should have some latitude in administering the program. Under this view, judicial discretion has been limited only by the guidelines, if any, provided by the probation statute[18] and the restriction that probation may not be terminated ar-

14. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (minimum due process requirements for probation revocation); Mempa v. Rhay, 389 U.S. 128 (1969) (right to counsel at combined sentencing and probation revocation hearing); *cf.* Morrissey v. Brewer, 408 U.S. 471 (1971) (minimum due process requirements for parole revocation). *See generally* Brief for Amicus Curiae, Appendix, Mempa v. Rhay, 389 U.S. 128 (1967); Comment, *Discretionary Power and Procedural Rights in the Granting and Revoking of Probation*, 60 J. CRIM. L.C. & P.S. 479 (1969); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PROBATION (Tent. Draft Feb. 1970).

15. 108 Ariz. at 432, 501 P.2d at 16. This traditional view of the discretionary nature of probation was formulated by the United States Supreme Court in Burns v. United States, 287 U.S. 216 (1932), and perpetuated by dictum in Escoe v. Zerbst, 295 U.S. 490 (1935).

16. *Cf.* Escoe v. Zerbst, 295 U.S. 490, 492 (1935).

17. In the absence of statutory authority, courts are without power to suspend sentences. *Ex parte* United States, 242 U.S. 27, 51 (1916). The first probation statute was enacted in 1878, MASS. ACTS ch. 198 (1878). Subsequently, other state legislatures and Congress have enacted probation statutes for their respective jurisdictions. *See, e.g.*, 18 U.S.C. §§ 3651-3655 (1970).

18. State probation statutes vary greatly in the amount of discretion granted the courts in revoking probation. At one extreme are those which allow probation to be revoked without notice or hearing and which place practically no limits on the

bitrarily.[19]

In basing its opinion upon this proposition that probation is a matter of grace, however, the Supreme Court of Arizona chose an unsound foundation. The "grace doctrine" has not been without its critics,[20] and the extent of discretion exercised in administering the probation program has been increasingly drawn into question.[21] Stemming from a growing concern for the rights of persons subject to administrative processes in the criminal justice system,[22] there has emerged a growing recognition that discretion and a benevolent purpose do not guarantee fairness.[23] As the United States Supreme Court noted when it set forth guidelines for juvenile proceedings in *In re Gault*,[24] "unbridled discretion, however benevolently motivated, is a poor substitute for principle and procedure."[25]

It is especially important that probation, which is now the most frequent penal disposition of convicted offenders,[26] be administered within the same framework of due process as are other aspects of the criminal justice system.[27] Society has a very real interest in insuring realization of the rehabilitative purposes of probation[28] by providing

court's discretion. *See, e.g.*, IOWA CODE ANN. § 247.26 (1969). The Connecticut probation statute, on the other hand, guarantees the probationer a hearing, notice of the charges against him, assistance of counsel, opportunity to cross-examine witnesses and present evidence on his own behalf. It also requires that the violation of probation be established by reliable and probative evidence. CONN. GEN. STAT. ANN. § 53a-32 (Supp. 1972). With regard to the amount of discretion allowed by the Arizona probation statute, see notes 6 and 8 *supra*.

19. Burns v. United States, 287 U.S. 216, 223 (1932).

20. It has been noted by one Arizona judge that the best thing that can be said about the "grace" concept is that it is "easy to remember and easy to apply." State v. Walter, 12 Ariz. App. 282, 284, 469 P.2d 848, 850 (1970) (Howard, J., concurring).

21. *See generally* Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311 (1959); Comment, *supra* note 14.

22. UNITED STATES TASK FORCE ON CORRECTIONS, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 12 (1967).

23. Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEXAS L. REV. 1, 15 (1968).

24. 387 U.S. 1 (1967).

25. *Id.* at 18.

26. F. COHEN, A LEGAL CHALLENGE TO CORRECTIONS: IMPLICATIONS FOR MANPOWER AND TRAINING 32 (1969). *See also* Cohen, *supra* note 23, wherein Prof. Cohen states:

> There is no other area of law, except perhaps the civil commitment of the mentally ill, where the lives of so many people are so drastically affected by officials who exercise virtually absolute, unreviewed discretion.

Id. at 5.

On June 30, 1971 there were 42,549 persons under supervision in the federal probation program. ADMIN. OFFICE OF THE UNITED STATES COURTS, 1971 ANN. REP. 219. In 1969 there were 4,617 persons in the Arizona state probation program. STATE JUSTICE PLANNING AGENCY, REPORT ON A STUDY OF PROBATION IN ARIZONA 113 (1969).

27. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 805 (1961); *cf.* Morrissey v. Brewer, 408 U.S. 471 (1972).

28. Society has an important economic interest in the success of the probation program. In 1966, the cost of supervising a person on probation for 1 day was only

for fair revocation proceedings. A person who feels his probation has been revoked in a summary and unfair fashion is likely to be embittered and a more difficult subject for future reformation.[29]

The notion that a person can be deprived of a benefit without regard for due process of law because that benefit is characterized as a matter of grace or privilege, rather than a "right" is no longer valid.[30] In *Morrissey v. Brewer*,[31] concerning parole revocation, the Supreme Court of the United States rejected the approach which deals with a parolee's liberty in terms of "right" or "privilege." Instead, the Court concluded that the liberty of a parolee "includes many of the core values of unqualified liberty" and deserves protection.[32]

According to the reasoning in *Morrissey*, the characterization of parole as a "right" or a "privilege" is not determinative of what procedural protections should be required at parole revocation. Rather, the questions to be resolved are whether the nature of the interest being protected in revocation proceedings is such that some procedural safeguards should be afforded and, if so, what safeguards are necessary under the circumstances.[33] In *Morrissey*, the Court chose not to prescribe precise procedures which must be complied with in order to revoke parole.[34] It did, however, set forth minimal requirements under the fourteenth amendment which were meant to serve the parolee's interest in his liberty and the state's dual interest in rehabilitation and the safety of the community.[35]

67¢; the cost of imprisonment in the federal system for 1 day was $7.54. This analysis underestimates the full economic advantage of probation because it disregards the added benefits of probationers' income, family support and avoidance of the prison stigma. ADMIN. OFFICE OF THE UNITED STATES COURTS, 1966 ANN. REP. 128.

29. *See* State v. Zolantakis, 70 Utah 28, 30, 259 P. 1044, 1046 (1927). *See generally* Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175, 196 (1964); Warren, *Probation in the Federal System of Criminal Justice*, 19 FED. PROB. 3 (1955); Comment, *Right to Counsel at Probation Revocation: Mempa v. Rhay in the Lower Courts*, 56 IOWA L. REV. 199, 205 (1970).

30. Graham v. Richardson, 403 U.S. 365, 374 (1971). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

In Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969), the court stated:

> We are not impressed by the argument that probation is a "mere" privilege, or a matter of grace, rather than a right and that, therefore, various constitutional mandates . . . should be held to be inapplicable . . . . When a state undertakes to institute proceedings for the disposition of those accused of crime it must do so consistently with constitutional privileges, even though the actual institution of the procedure was not constitutionally required.

Id. at 1322-23.

31. 408 U.S. 471 (1972).

32. *Id.* at 482.

33. *Id.* at 488.

34. *Id.* at 488, 489.

35. Under the minimum due process guidelines set forth in *Morrissey*, parole revocation is a two-step procedure. First, the parolee is entitled to a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole. This initial hearing

The guidelines enunciated in *Morrissey* were expressly applied to probation revocation proceedings in *Gagnon v. Scarpelli*,[36] where the Court made it clear that denials of due process to probationers could no longer be justified by the grace doctrine.[37] In *Gagnon*, the respondent, a probationer, was arrested in the course of a burglary. He admitted involvement in the crime to the police, but later claimed that the admission was made under duress and was false. His probation was revoked without a hearing. On a petition for a writ of habeas corpus, the district court held that revocation without a hearing and the benefit of counsel was a denial of due process,[38] and the court of appeals affirmed.[39]

The Supreme Court granted certiorari and affirmed, holding that a probationer is entitled to a preliminary and a final revocation hearing under the conditions specified in *Morrissey*.[40] In dealing with the question whether an indigent probationer has a right to appointed counsel at revocation hearings, the Court noted that due process is not so rigid that all informality and flexibility must be sacrificed.[41] While it recognized that fundamental fairness would require that the state provide appointed counsel for indigent probationers in certain cases, the Court refused to promulgate a new inflexible constitutional rule with respect to appointment of counsel, preferring the decision to be made on a case-by-case basis.[42]

As is illustrated by this approach to appointed counsel, the Court's opinion leaves ample latitude to state authorities charged with the re-

---

need not be formal, but the parolee must be given notice of the time, place and purpose thereof, and of the alleged parole violation. At the hearing, the parolee may appear and speak in his own behalf and bring and present letters, documents and other persons who can give relevant information to the hearing officer. In addition, persons who have given adverse information on which parole revocation is to be based may be made available for questioning in the parolee's presence unless the hearing officer determines that an informant would be subject to risk of harm if his identity were disclosed. *Id.* at 485-87.

Second, the parolee is entitled to a hearing prior to the final decision on revocation by the parole authority. The minimum requirements of due process at this hearing are:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement of the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489.

36. 411 U.S. 778 (1973).
37. *Id.* at 782 n.4.
38. Gagnon v. Scarpelli, 317 F. Supp. 72 (E.D. Wis. 1970).
39. Gonsolus v. Gagnon, 454 F.2d 416 (7th Cir. 1971).
40. 411 U.S. at 782. *See* note 35 *supra.*
41. 411 U.S. at 788.
42. *Id.*

sponsibility for administering the probation system. However, the *Gagnon* decision finally interred the grace doctrine. "It is clear," the Court declared, ". . . that a probationer can no longer be denied due process in reliance on the dictum in *Escoe v. Zerbst*, that probation is an 'act of grace.' "[43]

Alternative Bases for the Fimbres *Decision*

Although the grace doctrine can no longer be relied upon in decisions concerning probation revocation, the result reached in *Fimbres* is not without alternative bases of support. *Miranda* provides that statements obtained as a result of custodial interrogation may not be used against a defendant at a criminal trial unless he was first fully apprised of his constitutional rights.[44] The *Miranda* rule, however, does not apply to statements which are not obtained as a result of custodial interrogation. Neither does it apply to statements introduced at proceedings which are not part of the criminal case. Therefore, if Fimbres' statements were not obtained as a result of custodial interrogation or if the probation revocation hearing were not a stage of the criminal prosecution, the result in *Fimbres* would be maintainable without reliance upon the grace doctrine.

The *Fimbres* court failed to deal with the question whether the elements of custodial interrogation are present in probation interviews.[45] *Miranda* defined "custodial interrogation" as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way.[46] Unless incriminating statements are obtained as a result of custodial interrogation, the *Miranda* rights do not attach. Thus, some state courts have held *Miranda* to be inapplicable to situations similar to that in *Fimbres* on the grounds that conferences between the probationer and the probation officer do not fall within the definition of custodial interrogation.[47] Under this rationale, incriminating statements made during a probation conference are admissible, even in the absence of *Miranda* warnings.

In support of this position, it is argued that probation officers are

43. *Id.* at 782 n.4.
44. *See* note 4 *supra.*
45. The *Miranda* rule was aimed at the evils of "incommunicado interrogation" in a "police-dominated atmosphere." The Court stated that interrogation in such circumstances carries its own badge of intimidation. 384 U.S. at 457.
46. *Id.* at 444.
47. *See* Clark v. State, 222 So. 2d 766 (Fla. 1969); People v. Ronald W., 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S.2d 260 (1969); Kirven v. State, 492 S.W.2d 468 (Tex. Crim. App. 1973); *cf.* Gilmore v. People, 171 Colo. 358, 467 P.2d 828 (1970); State v. Johnson, — S.D. —, 202 N.W.2d 132 (1972).

not law enforcement officers within the meaning of *Miranda*.[48] While the law enforcement officer's duty is to detect crime and enforce the laws, the probation officer's duty is guidance and rehabilitation.[49] When his purpose is guidance and rehabilitation, the probation officer should not be considered a law enforcement officer for *Miranda* purposes. Were probation officers required to begin every visit or contact with the probationers by reciting the *Miranda* warnings, the relationship would become very strained and the necessary atmosphere of informality and trust would almost certainly be destroyed.[50] In determining whether a probation officer is acting as a law enforcement officer, some courts have looked to the statutory provisions governing the powers and duties of probation officers. Where the statutory authority of the officers is limited, it has been held that they are not law enforcement officers for *Miranda* purposes.[51] On the other hand, where probation officers are given broad powers by statute, they have been held to be law enforcement officers within the meaning of *Miranda*,[52] and have been required to give the *Miranda* warnings to probationers in their custody whom they are interviewing.

Apart from the question whether probation officers are law enforcement officers, some courts have found probation interviews to be noncustodial for the reason that the atmosphere of coercion and intimidation, which was the focus of concern in *Miranda*, is not present in such interviews. Regular probation conferences are usually initiated for the purposes of education and rehabilitation. For this reason, they differ from police investigatory interrogations and have not been considered to be instances of custodial interrogation which must be preceded by recital of the *Miranda* warnings.[53] Thus, when the probationer has asked to see his probation officer and made incriminating admissions to him, it has been held that there was no custodial inter-

48. *See* People v. Ronald W., 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S.2d 260 (1969). *Contra*, State v. Lekas, 201 Kan. 579, 442 P.2d 11 (1968); State v. Williams, 486 S.W.2d 468 (Mo. 1972).

49. State v. Johnson, — S.D. —, 202 N.W.2d 132, 133 (1972).

50. *See* Note, *Revocation of Probation*, 23 BAYLOR L. REV. 431 (1971).

51. In State v. Johnson, — S.D. —, 202 N.W.2d 132, 134 (1972), the court pointed to the limited statutory authority of probation officers provided in S.D. COMPILED LAWS ANN. § 23-57-12 (1967), and determined that probation officers were not law enforcement officers for *Miranda* purposes.

52. In State v. Lekas, 201 Kan. 579, 583, 442 P.2d 11, 16 (1968), the court states that probation officers did fall within the category of law enforcement officers for *Miranda* purposes, citing KAN. STAT. ANN. § 62-2235 (1964), which provided that probation officers "shall have and exercise police powers to the same extent as other peace officers." Similar language can be found in ARIZ. REV. STAT. ANN. § 12-253 (Supp. 1972-73), which provides that a probation officer has "the authority of a peace officer in the performance of his duties."

53. *See* Nettles v. State, 248 So. 2d 259, 260 (Fla. 1971).

rogation.[54] It has similarly been held that there was no custodial interrogation when the probation officer was only taking a monthly report and not conducting an investigation which had begun to focus on the probationer.[55]

This does not mean, however, that *Miranda* could never be applicable to any meeting between a probationer and his probation officer, regardless of the circumstances. Just what is "custodial interrogation" is best determined on a case-by-case basis,[56] and there are some situations in which probation interviews may assume the character of custodial interrogation. For example, when the probation officer is investigating the commission of a new offense, he should be required to warn the probationer of his rights under *Miranda* before questioning him concerning the offense.[57] In such a situation, the probation officer has stepped out of his usual role and assumed a role of investigation normally reserved for other law enforcement personnel.[58]

It might be further argued that the *Miranda* warnings should be given whenever the possibility exists that statements made by a probation officer may lead to the initiation of new criminal proceedings against the probationer. *Mathis v. United States*[59] indicates that questioning an imprisoned suspect constitutes custodial interrogation, even when he is in custody for an unrelated offense, whenever there is a possibility that the matter under investigation will end up in criminal prosecution.[60] While a probationer, unlike a prisoner, is not confined within a cell, he is in custody throughout his term of probation. During this period, the probationer is under heavy psychological pressure to answer any inquiries made by his probation officer, perhaps even greater pressure than when the interrogation is carried on by a police officer.[61] For this reason, the probation officer should give the probationer the *Miranda* warnings before questioning him concerning activities which could lead to new criminal charges.[62]

Whether or not questioning by a probation officer constitutes

54. Gilmore v. People, 171 Colo. 358, 467 P.2d 828 (1970); People v. Ronald W., 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S.2d 260 (1969).
55. Cunningham v. State, 488 S.W.2d 117, 120 (Tex. Crim. App. 1972).
56. United States v. Gibson, 392 F.2d 373, 376 (4th Cir. 1968).
57. State v. Lekas, 201 Kan. 579, 584, 442 P.2d 11, 15 (1968) (parole officer); State v. Williams, 486 S.W.2d 468, 473-74 (Mo. 1972) (parole officer). *Contra*, State v. Johnson, — S.D. —, 202 N.W.2d 132 (1972) (probation officer).
58. In *Gagnon*, the Supreme Court noted that "an exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation." 411 U.S. at 785.
59. 391 U.S. 1 (1968).
60. *Id.* at 4.
61. United States v. Deaton, 468 F.2d 541, 544 (5th Cir. 1972).
62. *Id.*

custodial interrogation, the additional question remains whether statements so obtained should be excluded at the revocation hearing. *Miranda* provides that statements resulting from custodial interrogation may not be used against the defendant in a criminal proceeding unless it is shown that the defendant was informed of his constitutional rights and that he intelligently waived those rights.[63] This exclusionary rule was formulated to effectuate the constitutional guarantee that no person "shall be compelled in any criminal case to be a witness against himself."[64] The Court in *Miranda* addressed itself to the criminal trial and the opinion does not expressly require application of the exclusionary rule formulated therein to proceedings other than the criminal trial.

Accordingly, *Miranda* has been held inapplicable to revocation hearings on the grounds that the hearing is not a formal trial[65] and the normal procedural and evidentiary rules governing criminal trials are not required.[66] Probation revocation is considered to be neither a prosecutorial nor an adversary proceeding, "but is more in the nature of an administrative hearing intimately involved with the probationer's rehabilitation."[67] Support for this position can be found in *Gagnon*, where the Court pointed out the critical differences between criminal trials and probation revocation hearings, including the fact that formal procedures and rules of evidence are not employed at revocation hearings.[68]

It should be noted that, in *Gagnon*, sentence had been imposed prior to probation revocation. Under these circumstances, the Supreme Court said, probation revocation is not part of the criminal proceeding and counsel may not always be required.[69] In *Mempa v. Rhay*, on the other hand, the Court held that a combined sentencing and revocation hearing is a critical stage in the criminal process and counsel must be provided.[70] For purposes of the right to counsel, then,

63. *See* note 4 *supra.*
64. U.S. CONST. amend. V.
65. United States v. Johnson, 455 F.2d 932 (5th Cir.), *cert. denied*, 409 U.S. 856 (1972).
66. Arciniega v. Freeman, 439 F.2d 776 (9th Cir. 1971) (hearsay evidence admissible at parole revocation hearings); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972) (illegally seized evidence admissible at probation revocation hearing).
67. United States v. Johnson, 455 F.2d 932, 933 (5th Cir.), *cert. denied*, 409 U.S. 856 (1972). Support for this position may be found in cases which have refused to expand *Miranda* protections to proceedings which are essentially administrative in nature. *See* McCoy v. United States, 403 F.2d 896, 904 (5th Cir. 1958) (Selective Service proceedings); United States v. Dicks, 392 F.2d 524, 528 (4th Cir. 1968) (Selective Service proceedings); Diric v. Immigration and Naturalization Serv., 400 F.2d 658, 661 (9th Cir. 1968) (deportation hearings); United States v. Webb, 398 F.2d 553, 557 (4th Cir. 1968) (Interstate Commerce Commission hearing).
68. 411 U.S. at 788-89.
69. 411 U.S. at 781-82.
70. 389 U.S. at 137.

the Court has differentiated between the two types of revocation proceedings, and the question arises whether a similar distinction should be made in considering the applicability of the *Miranda* exclusionary rule to revocation hearings. It would seem, however, neither necessary nor wise to make such a distinction.

The right to counsel, upon which *Mempa* turned, is not confined to representation during the trial on the merits.[71] Rather, it extends to every stage of a criminal proceeding wherein the substantial rights of a criminal accused may be affected.[72] Thus, counsel is required at revocation hearings held in conjunction with sentencing because sentencing is a critical stage of the criminal proceeding,[73] but there is no absolute requirement that counsel be afforded at post-sentencing revocation hearings. Application of the *Miranda* exclusionary rule, however, does not turn on whether the proceeding is a critical stage of the criminal prosecution. It was formulated to govern the admissibility of statements at the criminal trial. Probation revocation hearings, whether conducted in connection with or subsequent to sentencing, are not criminal trials and should not be governed by procedural and evidentiary rules applicable to the criminal trial.

As the United States Supreme Court stated in *Gagnon*, both society and the probationer have a stake in preserving the differences between criminal trials and revocation hearings.[74] To require compliance with an exclusionary rule such as set forth in *Miranda* would probably signal the end of probation. The *Fimbres* court touched upon this point when it stated that "requiring the probationer to report to a probation officer is the only practical way that a system of probation can be maintained by the court . . . ."[75] Although the probationer should retain all the rights and protections of an ordinary citizen "except those expressly, or by necessary implication, taken from him by the law,"[76] there must be open and honest communication between the probationer, his supervisor and the courts. Therefore, the probationer should not be able to interpose the *Miranda* rule to evade this most necessary condition of probation. It is unlikely that courts would be willing to employ the alternative of probation if the *Miranda* exclusionary rule was applied at revocation hearings. In the words of the *Fimbres* court, a rule "that the probation officer may not . . . testify

71. Moore v. Michigan, 355 U.S. 155, 160 (1957).
72. Mempa v. Rhay, 389 U.S. 128, 134 (1967).
73. *Id.* at 135.
74. 411 U.S. at 789.
75. 108 Ariz. at 432, 501 P.2d at 16.
76. United States v. Manfredonia, 341 F. Supp. 790, 795 (S.D.N.Y. 1972).

at a revocation of probation hearing as to statements made by the defendant would completely destroy the system of probation . . . ."[77]

Conclusion

Though the *Fimbres* court correctly determined that a probationer's statements to his probation officer should be admissible at the revocation hearing regardless of whether compliance with *Miranda* was shown, it reached the right result for the wrong reasons. By couching its opinion in terms of grace and privilege, the court perpetuated the anachronistic image of probationers as persons without constitutional protections. Further, the grace doctrine, upon which the decision was based, has been discarded by the United States Supreme Court in *Morrissey* and *Gagnon.*

If the result reached in *Fimbres* is to be sustained, it must be on the grounds that probation revocation proceedings are not criminal in nature and were not meant to fall within the ambit of the *Miranda* rule. This does not mean that *Miranda* has no application in the administration of the probation program. Where the probation officer subjects the probationer to questioning as to criminal activity for which the probationer has not been brought to trial, the *Miranda* warnings should be given. If the probationer is not given the requisite warnings, however, his incriminating statements should still be considered by the court in probation revocation hearings, even though those same statements would be inadmissible at a criminal trial.

G. INCREASED SENTENCES IN TRIALS DE NOVO

Many criminal trials in Arizona are exempt from review by the state's appellate courts. These are trials de novo[1] granted on appeal[2]

77. 108 Ariz. at 432, 501 P.2d at 16.

1. E. BERGE, J. GREACEN & B. HERNANDEZ, SURVEY OF ARIZONA SUPERIOR COURT CRIMINAL CASES 67 (1970). In Maricopa County, Arizona trials de novo account for 40 percent of the criminal trials in superior court. This high rate of retrial by trial de novo is not peculiar to Maricopa County. Similar rates were found in the case load of the courts in the greater Boston area. S. BING & S. ROSENFELD, THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON 94 (1970).

2. In most statutes the trial de novo is described as an appeal. *See, e.g.,* ARIZ. REV. STAT. ANN. § 12-124 (1956); ARK. STAT. ANN. § 44-501 (1947); FLA. STAT. ANN. § 924.41 (1972); MINN. STAT. ANN. § 488.20 (1971); MISS. CODE ANN. § 1201 (Supp. 1972).

The Arizona courts have defined the trial de novo as: "[A] case to be tried in

from conviction of minor offenses in the nonrecord justice courts.[3] Under Arizona's statutory scheme a defendant is entitled to a new trial in superior court to redetermine his guilt or innocence if he appeals from a justice court.[4]

A recent Supreme Court of Arizona decision, *Thigpen v. Superior Court*,[5] will have considerable impact upon both the rights of defendants and the quality of nonrecord court justice in Arizona because it upheld an increased sentence imposed after a trial de novo. Thigpen had been convicted in justice court on two counts of receiving stolen property and then exercised his right to appeal the decision to a trial de novo in the superior court. Upon reconviction, his sentence was increased from a fine of $200 to a fine of $400 and 120 days in the county jail.[6] The superior court judge, in imposing the sentence, failed to state in writing the grounds for the increased sentence. The supreme court, citing the recent decision of the United States Supreme Court in *Colten v. Kentucky*,[7] upheld the increased sentence. In so doing, it expressly overruled its decision in *Bronstein v. Superior Court*,[8] which held that a superior court judge who imposed an increased sentence in a trial de novo was required to state in writing some change in circumstances between the initial conviction and reconviction that justified the increased sentence.

This discussion will examine the holding in *Thigpen* in light of the decisions of the United States Supreme Court in *Colten* and *North Carolina v. Pearce*,[9] and will analyze those cases as applied to the Arizona statutory scheme providing for a trial de novo upon appeal from a conviction in justice court. Finally, the effect of *Thigpen* upon the administration of misdemeanor justice in the state will be discussed.

---

all manners as though the superior court were the court of original jurisdiction." Horne v. Superior Court, 89 Ariz. 289, 291, 361 P.2d 547, 548-49 (1961).

3. In a nonrecord court the actual proceedings are not recorded for review. *See* ARIZ. CONST. art. 6, § 30.

4. ARIZ. REV. STAT. ANN. §§ 22-371, 374 (Supp. 1972-73). Judges presiding over the trial of defendants charged with lesser crimes may, depending on the jurisdiction, be called justice of the peace, magistrates, police court judges or county judges. For purposes of this discussion "judges of nonrecord courts" will be used to indicate this classification of judicial officers.

Depending on the state, courts of general criminal jurisdiction may be referred to as circuit court, county criminal court, district court, or supreme court. For the purposes of this discussion, the Arizona term superior court will be used to denote this general class of courts.

5. 108 Ariz. 457, 501 P.2d 559 (1972).

6. Thigpen was found guilty of receiving stolen property as a misdemeanor under ARIZ. REV. STAT. ANN. § 13-621 (Supp. 1972-73). The punishment for violation of this section is maximum of 6 months in the county jail and a fine of $300. *Id.* § 13-1645 (1956).

7. 407 U.S. 104 (1972).

8. 106 Ariz. 251, 475 P.2d 235 (1970).

9. 395 U.S. 711 (1969).

Constitutionality of Increased Sentences After Reconviction

In *Gideon v. Wainwright*,[10] the Supreme Court indicated concern about the effect of the structure of the state court systems on the constitutional rights of a defendant in a criminal prosecution. Justice Black, writing for the majority, stated that "from the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[11] A number of commentators have argued that the principle enunciated by Justice Black should apply to the imposition of a greater sentence upon reconviction after a successful appeal. They reasoned that the possibility of a harsher sentence at the second trial might chill a defendant's exercise of his right of appeal.[12]

In *Patton v. North Carolina*,[13] the leading federal case on the constitutionality of increased sentencing before *Pearce v. North Carolina*,[14] the United States Court of Appeals for the Fourth Circuit applied the reasoning of the Supreme Court in *Gideon* to the question of increased sentence on retrial after a successful appeal. Judge Sobeloff argued that in resentencing, an area particularly susceptible to undetectable prejudice,[15] it would be necessary to deny any increase in sentence.[16] This contention[17] of the existence of a chilling effect on a defendant's appellate rights led the United States Supreme Court to consider the case of *North Carolina v. Pearce*.[18]

In *Pearce* the Supreme Court considered the constitutionality of an increased sentence upon retrial following a successful appeal from a state court criminal conviction. Pearce had been convicted of assault with intent to commit rape and was sentenced to a prison term not to exceed 15 years. The Supreme Court of North Carolina reversed the conviction[19] and remanded the case for retrial. Pearce was reconvicted and sentenced to a period of imprisonment that, when added

10. 372 U.S. 335 (1963).
11. *Id.* at 344.
12. *See* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the Successful Criminal Appellant*, 74 YALE L.J. 606 (1965); Note, *In Van Alstyne's Wake: North Carolina v. Pearce*, 31 U. PITT. L. REV. 101 (1969); Note, *Limitations on Sentencing After Reconviction in North Carolina v. Pearce*, 83 HARV. L. REV. 187 (1969).
13. Patton v. North Carolina, 381 F.2d 636, *cert. denied*, 390 U.S. 905 (1967).
14. 395 U.S. 711 (1969).
15. The Fourth Circuit found that the possibility of an increased sentence had a chilling effect on the exercise of the right of appeal and thus violated the due process clause of the fourteenth amendment. Additionally, it held that by permitting an increased sentence the courts were putting the defendant twice in jeopardy of punishment for the same offense. Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967).
16. *Id.* at 641.
17. *See also* Marano v. United States, 374 F.2d 583, 585 (1st Cir. 1967).
18. 395 U.S. 711 (1969).
19. State v. Pearce, 266 N.C. 234, 145 S.E.2d 918 (1966).

to the time already served, exceeded his original sentence.[20] After an unsuccessful appeal in the state courts[21] on the constitutionality of the increased sentence, Pearce petitioned the federal district court for a writ of habeas corpus to set aside the sentence. The district court found the new sentence unconstitutional and, when the state court failed to resentence the petitioner, issued a release order. The Court of Appeals for the Fourth Circuit affirmed the order[22] and the Supreme Court granted certiorari.[23]

Pearce contended that an increased sentence for the same offense upon retrial was unconstitutional per se as violative of both the double jeopardy protection afforded by the fifth amendment and the equal protection clause of the fourteenth amendment. The Court rejected these contentions,[24] but affirmed, holding that the due process clause of the fourteenth amendment bars an increased sentence in certain situations. The Court reasoned that a state providing a system of appellate courts must keep them open to all persons. To insure the integrity of the appellate process it must be kept free from distinctions which lack a rational basis and act only to impede equal and open access.[25] The Court further reasoned that equal access to the appellate process can only be assured if those who would use it are free from the apprehension that, after reversal and reconviction, a sentencing judge might use an increased sentence to retaliate against a defendant.[26] It concluded that to protect a convicted defendant from such apprehension the due process clause of the fourteenth amendment requires every judge who imposes an increased sentence upon retrial to state, in writing, the actions[27] of the defendant occurring after the

20. North Carolina v. Pearce, 395 U.S. 711, 713 (1969).
21. State v. Pearce, 268 N.C. 707, 151 S.E.2d 571 (1966).
22. 397 F.2d 253 (4th Cir. 1968).
23. North Carolina v. Pearce, 393 U.S. 922 (1968).
24. The Court rejected the claim of double jeopardy, observing that the right to retry a defendant after a successful appeal and to impose a greater sentence at retrial was well established as a constitutionally protected practice. The Court cited for authority United States v. Tatco, 377 U.S. 463, 465 (1963) and Stroud v. United States, 251 U.S. 15, 40 (1919).

Pearce also argued that, since those individuals who did not take an appeal could not be subjected to an increased sentence, to subject those who did appeal to the possibility of an increased sentence was to create an invidious classification. The Court rejected this contention, reasoning that the defendant could also have a less severe sentence imposed at retrial; therefore, the possibility of a greater sentence was not on its face an invidious classification. 395 U.S. at 719-20, 722-23.
25. *Id.* at 724.
26. *Id.* at 726.
27. It would appear that the Court wanted a demonstration of some objective evidence to validate the increase in sentence. The Court did not elaborate on the type of conduct to which it referred, but such evidence might be a revised sentencing report containing new information bearing on the possibility of rehabilitation. For example, evidence of the commission of other crimes might raise doubt as to the defendant's potential for rehabilitation. New evidence of the severity or circumstances of the original crime would not be used to justify an increased sentence. *Id.*

first sentencing which justify the increased punishment.[28] Thus, an appellate court would have a record before it from which it could determine whether the increased sentence was imposed out of vindictiveness, in violation of the fourteenth amendment.[29]

Nothing in the *Pearce* decision indicated whether its holding applied to a trial de novo as well as to retrial after a conventional appeal, and a split of authority on the issue arose between various state and federal courts. Some courts, including the Supreme Court of Arizona,[30] found no distinction between a retrial following the ordinary system of appeals and a trial de novo granted upon appeal.[31] Other courts held that *Pearce* applied to the trial de novo because the same impediments to appeal discussed in *Pearce* existed, and to free review by trial de novo from the possibility of vindictiveness, the *Pearce* requirement of articulated justification for increased sentencing was invoked.[32]

On the other hand, a number of state and federal courts concluded that significant differences in the structure and function of a normal system of appeals and a system of appeals by trial de novo made *Pearce* inappropriate.[33] One argument against the application of *Pearce* was that the trial de novo was not an appeal as that term is commonly understood, but rather a new trial, where the question of guilt was redetermined without reference to the findings of fact and conclusions of law of the court that heard the case in the first instance.[34] In a trial de novo, these courts argued, the defendant is not required to allege error which might be reviewed at the discretion of the appellate court, but rather is provided a new trial as a matter of right. Therefore, the defendant in a trial de novo is given two wholly separate and distinct trials and the second court is unaffected by any actions taken by the first.[35]

A second argument advanced by courts holding *Pearce* inappli-

28. 393 U.S. at 724-25.
29. *Id.* at 726.
30. Bronstein v. Superior Court, 106 Ariz. 251, 475 P.2d 235 (1970).
31. *See, e.g.*, State v. Shak, 51 Hawaii 626, 446 P.2d 558, *cert. denied*, 394 U.S. 1009 (1970); Eldridge v. State, — Ind. —, 267 N.E.2d 48 (1971); Cherry v. State, 9 Md. App. 416, 264 A.2d 887 (1970); State v. Stanosheck, 186 Neb. 17, 180 N.W.2d 226 (1970).
32. *See* Wood v. Ross, 434 F.2d 297 (4th Cir. 1970); Commonwealth v. Harper, 219 Pa. Super. 100, 280 A.2d 637 (1971).
33. *See* Levieux v. Rollins, 414 F.2d 353 (1st Cir. 1969); Manns v. Allman, 324 F. Supp. 1149 (W.D. Va. 1971); Mann v. Commonwealth, — Mass. —, 271 N.E.2d 331 (1971); People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); Evans v. City of Richmond, 210 Va. 403, 171 S.E.2d 247 (1969).
34. *See* Manns v. Allman, 324 F. Supp. 1149 (W.D. Va. 1971); Evans v. City of Richmond, 210 Va. 403, 17 S.E.2d 247 (1969).
35. *See* Mann v. Commonwealth, — Mass. —, 271 N.E.2d 331, 332 (1971).

cable to trials de novo was that nonrecord court judges presiding at an initial trial are frequently unable to impose a knowledgeable sentence upon a defendant[36] because they usually lack a sufficient staff to compile and evaluate presentencing information.[37] Where this condition was found to exist, it was argued that superior courts, having more adequate staffs to develop relevant presentence information, were better equipped to impose sentence and should not be handicapped by the limitations of *Pearce*.

The third argument advanced to allow increased sentences in a trial de novo was that the application of *Pearce* would result in a massive overloading of the judicial system.[38] This fear was based on the assumption that the possibility of a greater sentence at a trial de novo regulates the flow of cases into the superior courts.[39]

The diversity of opinion among courts as to the applicability of *Pearce* to trials de novo was considered by the Supreme Court in *Colten v. Kentucky*.[40] The petitioner had been convicted of disorderly conduct by a county court and fined $10. He took an appeal to a trial de novo, and after reconviction his sentence was increased to a fine of $50. In levying the fine the judge failed to state in writing any change in circumstances that might have justified the increase.[41] The Kentucky Court of Appeals affirmed,[42] and the Supreme Court agreed to review the constitutional question involved.

The majority, in affirming the sentence and holding *Pearce* inapplicable, discussed several of the rationales previously advanced by lower courts,[43] but placed primary emphasis on the mechanical distinctions between the trial de novo system of appeal in Kentucky and the appellate system under consideration in *Pearce*. Justice White, writing for the majority, noted that Colten was afforded the same rights in the trial de novo as any other individual who entered the court of general criminal jurisdiction in the first instance,[44] including

36. *See* People v. Olary, 382 Mich. 559, 567-68, 170 N.W.2d 842, 845 (1969).
37. In most cases in Arizona the only information available to justices of the peace before they impose sentence is the local criminal record of the defendant. Many of the justices rely on the arresting officer or prosecutor for such records. ARIZONA STATE UNIVERSITY RESEARCH COMMITTEE, TOWN HALL RESEARCH REPORT, ARIZONA'S COURT SYSTEM, 212-13 (1972).
38. *See* State v. Sparrow, 276 N.C. 499, 508, 173 S.E.2d 897, 903 (1969).
39. This reasoning is self-defeating. Assuming that large numbers of defendants would seek the trial de novo if the *Pearce* rule were applied, it follows that the fear of an increased sentence at a trial de novo is real and that defendants are significantly deterred from exercising their rights of appeal. This is precisely the evil found unconstitutional in *Pearce*.
40. 407 U.S. 104 (1972).
41. *Id.* at 112.
42. Colten v. Commonwealth, 467 S.W.2d 374 (Ky. 1971).
43. 407 U.S. at 119. *See* notes 38-39 *supra*.
44. 407 U.S. at 117.

the right to conventional appeal of a reconviction.[45] In distinguishing *Colten* from *Pearce*, the Court observed that under the Kentucky statutory scheme the defendant in a trial de novo was given a second, fresh chance to litigate his guilt in the second tier of a two-tier system of justice. The two tiers operated independently, but in a parallel manner. The actions of the inferior courts in the first tier in no way affected the operation of the courts in the second tier—the two existed as independent systems of justice. The defendant therefore left the first and entered the second without suffering the loss of any rights.[46] In *Pearce*, however, the question of guilt was being retried in the same court in which the conviction was previously rendered, and the possibility of vindictiveness was inherent in the process.

Applicability of Colten to Trials De Novo in Arizona

On first impression it would appear that in *Thigpen v. Superior Court*[47] the Supreme Court of Arizona was justified in assuming that *Colten* applies to increased sentences imposed in trials de novo under the statutory scheme in Arizona. The assumption could have been based on the fact that Arizona's earlier rule of *Bronstein v. Superior Court*[48] was decided on the assumption that *Pearce*[49] applied to trials de novo. Additionally, Arizona's trial de novo statute was noted in *Colten*[50] as closely approximating the Kentucky statute under consideration. In *Thigpen*, however, the supreme court failed to scrutinize the Arizona appellate system to determine whether the *Colten* rationale is applicable.

Arizona has a trial de novo system that varies significantly from most of the other two-tier systems cited in *Colten*.[51] Under the Arizona Constitution, the state appellate courts are without jurisdiction

45. *Id.* at 113.
46. *Id.* at 112.
47. 108 Ariz. 457, 501 P.2d 559 (1972).
48. 106 Ariz. 251, 475 P.2d 235 (1970).
49. 395 U.S. 711 (1969).
50. 407 U.S. at 112 n.4.
51. It is important to note that the vast majority of the states cited in *Colten* do grant the right of appeal from a trial de novo. The following statutory citations provide the relevant state statutes pertaining to the trial de novo and appeals therefrom. ARK. STAT. ANN. §§ 43-2730, 44-501 *et seq.* (1947); COLO. R. CRIM. P. 37 (h-k) (1970); IND. CODE §§ 9-721 (Cum. Supp. 1972), 9-2301 (1956); KAN. STAT. ANN. §§ 22-3601, 22-3609 (Cum. Supp. 1972); ME. DIST. CT. CRIM. R. 37 (1972); ME. R. CRIM. P. 37 (1972); MICH. STAT. ANN. §§ 28-1121, 28-1226 (1972); MINN. STAT. ANN. 488.20 (1971), 632.01 *et seq.* (1945), 633.20 *et seq.* (Cum. Supp. 1972); MISS. CODE ANN. §§ 1150 (1942), 1201, 1202 (Supp. 1972); MO. SUP. CT. R. 22.10 *et seq.*, 28 (1953); MONT. REV. CODES ANN. §§ 95-2009, 95-2401 *et seq.* (1947); NEB. REV. STAT. §§ 29-611 *et seq.*, 29-2302 *et seq.* (1964); NEV. REV. STAT. §§ 2.090, 177.015, 189.010 *et seq.* (1971); N.H. REV. STAT. ANN. §§ 490:4, 502:18, 502A:11-12 (1955); N.M. STAT. ANN. §§ 36-15-1 *et seq.*, 41-15-2 (1953); N.C. GEN. STAT. §§ 15-177 *et seq.* (1965), 15-180 (Cum. Supp. 1971); N.D. CENT. CODE §§ 32-33-01, 33-12-40 (1960); PA. STAT. ANN. §§ 17-41, 17-190 (1962); PA. CONST. SCHED. art. 5, § 16 (1962); TEX. CODE CRIM. P. §§ 44.02, 44.13, 44.17, 45.10

to review a trial de novo in superior court except in limited situations.[52] In *State v. Jean*,[53] the Supreme Court of Arizona noted that it is unable to review the conviction of a defendant who has taken an appeal to a trial de novo except when he challenges the constitutionality of the statute under which he was charged. An allegation that the statute was applied unconstitutionally, on the other hand, will not confer jurisdiction on the state's appellate courts.[54]

Likewise, a defendant convicted in a trial de novo cannot obtain review through special action.[55] The courts have refused these writs on the grounds that they lack the appellate jurisdiction to review a trial de novo except where the constitutionality of the statute is at issue,[56] and the power to review by special action does not exist where power to review on direct appeal does not lie. Thus, the doors of all state appellate courts are closed to the defendant in a trial de novo, except when the charging statute is allegedly unconstitutional.

It is clear, therefore, that under the statutory scheme in Arizona, unlike the system operating in *Colten*, the defendant who appeals to a trial de novo is not on an equal footing with other individuals entering the superior court as a court of first instance. In Arizona the two tiers are not parallel. A defendant who is tried in a justice court is denied the right of appeal granted to those who are tried in the superior court.

(1966); VA. CODE ANN. §§ 16.1-132, 16.1-136, 17-96 (1950); WASH. REV. CODE ANN. §§ 350.380 *et seq.*, 2.04.010 (Supp. 1972); W. VA. CODE ANN. §§ 50-18-10, 58-5-1 (1966).

The only state which appears to share a system similar to Arizona's is Florida. *See* FLA. REV. STAT. ANN. §§ 924.08, 924.41, 924.45 (1972). Although Maryland does not permit appeal from a trial de novo, its statutes forbid the imposition of an increased sentence at the trial de novo. MD. ANN. CODE art. 5, § 43, art. 5, § 12 (Cum. Supp. 1972).

52. ARIZ. CONST. art. 6, § 5(3). "The Supreme Court shall have . . . [a]ppellate jurisdiction in all actions and proceedings except civil and criminal actions originating in courts not of record, unless the action involves the validity of a tax, impost, assessment, toll, statute or municipal ordinance."

53. 98 Ariz. 375, 405 P.2d 808 (1965).

54. State v. Anderson, 9 Ariz. App. 42, 449 P.2d 59 (1969). Thigpen, of course, had a constitutional claim under both *Bronstein* and *Pearce*, and was challenging the constitutionality of the law under which he was sentenced. The court granted the appeal because the question of increased sentence under the statute dealt with the constitutionality of the act.

55. In Arizona the special action writ is a device for immediate review by the appellate courts of any action by a public official where a speedy and adequate remedy at law is not available. The special action writ has replaced the equitable writs of certiorari, mandamus, quo warranto, and prohibition. ARIZ. R.P. SPECIAL ACTIONS, 1-8. *See also* Nelson, *The Rules of Procedure for Special Actions: Long-Awaited Reform of Extraordinary Writ Practice in Arizona*, 11 ARIZ. L. REV. 413 (1969).

56. *See* Brooks v. Jennings, 17 Ariz. App. 407, 498 P.2d 481 (1972) (special action writ appropriate to review alleged error in preliminary hearing); Zarate v. Jennings, 17 Ariz. App. 401, 498 P.2d 475 (1972) (special action writs can only be used in cases where a conventional appeal would lie to the appellate court granting the writ; not in most other cases arising in the justice courts); Crouch v. Justice Court, 7 Ariz. App. 460, 440 P.2d 1000 (1968) (misdemeanor conviction in justice court may not be reviewed by special action to appellate courts).

The Implications of Thigpen

The consequences of the Arizona statutory scheme forbidding appellate review of the judgment in a trial de novo are startling. For example, 40 percent of the criminal trials heard in the superior courts of Maricopa County, the state's population center, are nonreviewable.[57] The wisdom of providing for appellate review of the decisions of courts of general jurisdiction in other contexts is acknowledged in every state. The existence of the appellate system itself admits of the fallibility of the best of judges. The crowded dockets of appellate courts also evidence the possibility of error in the lower courts. In Arizona, however, a significant number of the cases heard by superior court judges —the trial de novo—escape the guiding hand of the state's appellate courts.

While the speedy administration of justice in lesser criminal offenses may be a significant justification for the state's nonrecord courts, they nevertheless suffer from a number of serious flaws. Nonrecord courts take an average of about 20 minutes to hear a case and convict a defendant.[58] In terms of time spent, a substantial chance of error exists. Additionally, the ability of a nonrecord judge to rule correctly on legal matters may be hampered by his lack of formal legal training. Only 10.5 percent of the justices of the peace in Arizona have law degrees[59] and over 37 percent[60] of them have not advanced beyond a high school education. Thus, judges presiding in justice courts not only administer justice swiftly, but they often administer it without any formal legal education.

Sentencing abuses in the justice courts also pose a serious problem to the appellate process. One study has suggested, for instance, that nonrecord court judges will frequently use their sentencing powers to discourage appeals.[61] This is accomplished by giving a light sentence to defendants who might have a valid legal objection. Those defendants who attempt to appeal will find themselves facing greater sentences for the same offense than those who choose not to appeal. The defendant thus faces a serious risk of an increased sentence if he attempts to assert his rights. It might be argued that such a practice would justify the procedure of permitting the superior court judge to impose a greater sentence since the nonrecord court judge may be overly lenient in his sentencing of the defendant in order to dis-

57. *See* note 1 *supra.*
58. *See* THE PRESIDENT'S COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 30 (1967).
59. ARIZONA STATE UNIVERSITY RESEARCH COMMITTEE, *supra* note 37, at 168.
60. *Id.* at 167.
61. S. BING, *supra* note 1, at 106-7.

courage appeal. While this argument on its face appears to have some legitimacy, it overlooks a most important consideration. A defendant who truly believes he was wronged might forego his right of appeal since he could have a true fear that if found guilty in the superior court he would have a much more severe sentence imposed upon him. It was this very fear that led the Supreme Court to impose its rule in *North Carolina v. Pearce.* It is hard to justify a system that deals leniently with those who accept its judgments but imposes the threat of a greater sentence on those who attempt to exercise the legal right of appeal granted to them by the law.

Even when a defendant contests a decision of the justice court he finds himself without signicant appellate rights when he reaches the superior court for his trial de novo. Not only is he without a right to have the decision of the superior court reviewed, but the appellate courts are without jurisdiction to review at their discretion. The defendant finds himself in a unique position when appearing before an Arizona superior court judge in a trial de novo. Unlike an appellate court judge, the superior court judge can pass sentence on the defendant which can exceed the penalty imposed by the court below. The superior court judge in Arizona also finds himself trying the case as a court of last resort within our state court system. If his docket has been overloaded by trials de novo, he may impose greater sentences to stop such a flow of cases and there is no state remedy for such an action. No matter how serious the judge's errors in conducting the trial the defendant has no recourse in the state appellate system.[62] Protection against such discretion is compensated for in *Colten* by the guarantee of a general right to appeal under the Kentucky statutes,[63] but such protection is lacking in Arizona.

There are three possible solutions to the problems created by the uniqueness of the trial de novo in Arizona. The first would be for the legislature of Arizona to pass a statute similar to one now in force in Maryland,[64] which forbids any increase in sentence levied on those who elect to take a trial de novo. The major problem of this solution would be that defendants could retain their lenient sentences while at the same time taking an appeal. One might argue that in such a case it would be unfair to tie the hands of the court in reference to the sentence imposed. While this may appear to be a major problem the better solution would be to improve the sentencing procedure in the nonrecord courts.

62. *See* text and notes 52-56 *supra.*
63. KY. REV. STAT. § 23.032 (1971).
64. MD. ANN. CODE art. 5, § 43, art. 5, § 12 (Cum. Supp. 1972).

A second solution would be to reinstate the *Bronstein-Pearce*[65] rule. Such an action is within the power of the state supreme court and would not require legislative approval. Reimposing the rule would reduce the possibility of vindictiveness at resentencing by using a system that apparently created no insurmountable problems in the 2 years it was in effect. The other states that applied *Pearce* to trials de novo before *Colten* also apparently concluded that the requirement would not seriously impede the effective administration of justice.[66]

A third alternative would be to amend the Arizona Constitution to permit appellate review of trials de novo. This solution might be attractive to those who agree with those courts which argued that a *Pearce* rule applied to the trial de novo would increase the case load at the superior court level and would thus disrupt the effective administration of justice. These courts felt that since a trial de novo was an appeal that could be taken as a matter of right that defendants found guilty in the nonrecord courts would automatically appeal whether there was justification for such an appeal or not. These courts reasoned that the possibility of a greater sentence at trial de novo acted as a regulator of the flow of cases into the superior court.[67] The vast majority of the states[68] mentioned in this article seem to be able to administer justice effectively in the trial de novo while guaranteeing access of the appellate system.

Conclusion

In *Thigpen v. Superior Court*, the Supreme Court of Arizona failed to analyze its own appellate system and incorrectly held that *Colten v. Kentucky* eliminated the necessity to articulate reasons for increasing the sentence of a defendant reconvicted on appeal to a trial de novo. The Arizona system of trials de novo fails to meet the basic requirement of *Colten* that the first trial should in no way affect the rights of the defendant at the second trial.

Because of Arizona's unique system, the possibility of vindictiveness that the Supreme Court feared in *Pearce v. North Carolina* exists in Arizona. While at least three courses of action could be taken to protect a defendant from possible vindictiveness, reinstating the *Pearce-Bronstein* rule of written justification for an increased sentence would best reduce the defendant's potential risk without disrupting the Arizona system as presently constituted.

65. North Carolina v. Pearce, 395 U.S. 711 (1969); Bronstein v. Superior Court, 106 Ariz. 251, 475 P.2d 235 (1970).
66. *See* notes 31-32 *supra.*
67. *See* notes 38-39 *supra.*
68. *See* note 51 *supra.*

H. ALTERNATIVE SENTENCING OF INDIGENTS

In *Griffin v. Illinois*,[1] the Supreme Court of the United States recognized the constitutional relationship between indigency and the right to equal treatment in the criminal process. In support of its holding that due process required that an indigent defendant be supplied, without cost, the trial transcripts needed for an appeal, the Court indicated that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[2] This principle requires strict judicial scrutiny of legislative classifications based on wealth where fundamental rights are concerned. Such classifications have been found constitutionally infirm where their existence cannot be justified by a compelling state interest.[3] Applying the *Griffin* rationale to sentencing procedures, the Supreme Court recently condemned statutes that discriminated against indigents by allowing the length of a defendant's incarceration to be determined by his ability to pay a fine.[4]

The Supreme Court of Arizona, in *In re Collins*,[5] addressed the issue of whether the incarceration of an indigent upon the nonpayment of a fine imposed under the Arizona alternative sentencing statute[6] amounted to the same invidious discrimination condemned by the Supreme Court of the United States. After determining that Collins was indigent, the court upheld the practice of sentencing in the alternative[7] but nonetheless held that whenever an indigent is sentenced under the statute, he must first be given an opportunity to pay the fine before the alternative of imprisonment may be invoked. In addition, needed guidelines were adopted to assist lower courts in determining whether a defendant is indigent and entitled to an alternate means of paying a fine instead of being required to pay it immediately.

This commentary will analyze the requirements set forth in *Col-*

1. 351 U.S. 12 (1956).
2. *Id.* at 19.
3. Douglas v. California, 372 U.S. 353 (1963) (right to counsel in direct appeal from a felony conviction); Smith v. Bennett, 365 U.S. 708 (1961) (waiver of filing fee for indigent); Griffin v. Illinois, 351 U.S. 12 (1956) (waiver of fee for trial transcript for indigent); *see* Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in felony trial).
4. Tate v. Short, 401 U.S. 395 (1971) (imprisonment for failure to pay a fine imposed under a "fine only" statute); Williams v. Illinois, 399 U.S. 235 (1970) (imprisonment beyond the statutory maximum to work off concurrent unpaid fine); *see* Morris v. Schoonfield, 399 U.S. 508 (1970).
5. 108 Ariz. 310, 497 P.2d 523 (1972).
6. ARIZ. REV. STAT. ANN. § 13-1645 (1956). See text accompanying note 27 *infra*.
7. An example of sentencing in the alternative is the option of paying a $30 fine or spending 30 days in jail.

lins concerning the sentencing of indigents in Arizona. Since *Collins* was substantially foreshadowed by recent Supreme Court decisions, analysis of the Arizona case first necessitates a review of its constitutional foundation. After analyzing *Collins*, the sentencing guidelines adopted by the Arizona court will be reviewed to determine the extent they will serve to implement the court's holding.

Constitutional Background

Prior to 1970, federal and state courts were without specific standards concerning the rights of indigent defendants incarcerated for the nonpayment of fines. Although substantial constitutional questions had been raised in light of *Griffin*, the lower courts could not agree on an indigent's rights, if any, to equal treatment in this respect.[8] The Supreme Court of the United States initially considered this issue in *Williams v. Illinois*.[9] The Court, extending the reasoning in *Griffin* to sentencing procedures, noted that the incidence in which fines were being converted to jail terms was increasing, thereby resulting in a significant number of defendants being jailed for their inability to pay.[10] The Court explained that a sentencing statute, while not discriminatory on its face, could operate to deny a defendant equal protection by means of its application.

In *Williams*, the petitioner had been convicted of petty theft and given the maximum sentence provided by state law: one year in prison, a $500 fine plus $5 court costs.[11] Unable to pay the fine, Williams was given an additional 101 days in jail to work off the monetary obligation at the rate of $5 per day.[12] The Supreme Court vacated the sentence, holding that imprisonment beyond the maximum term provided by law, solely because of the defendant's inability[13] to pay a fine and court costs, amounted to discrimination

8. *Compare* State v. Brown, 5 Conn. Cir. 228, 249 A.2d 672 (1967) (commitment to jail upon default of payment of fine held not to be deprivation of due process) *with* People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966) (inability to pay fine as factor determining length of jail term is denial of due process). *Compare* People v. Williams, 41 Ill. 2d 511, 244 N.E.2d 197 (1969), *vacated*, Williams v. Illinois, 399 U.S. 235 (1970) (economic status of defendant neither gives nor takes away constitutional right of equal protection of the law once a sentence is lawfully imposed) *with* People v. Collins, 47 Misc. 2d 210, 261 N.Y.S.2d 970 (1965) (imprisonment of indigent defendant beyond maximum statutory term denies right of equal protection provision of fourteenth amendment).

9. 399 U.S. 235 (1970).

10. *Id.* at 240. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 18 (1967).

11. ILL. REV. STAT., ch. 38, § 16-1 (1967).

12. *See id.* § 1-7(k). *But cf.* ARIZ. REV. STAT. ANN. § 13-1648(A) (1956) providing that incarceration for nonpayment of a fine shall not extend beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted.

13. *Williams* did not apply to willful refusal to pay fines or court costs. 399 U.S. at 242 n.19.

violative of the fourteenth amendment guarantee of equal protection and was therefore impermissible.[14]

The *Williams* holding did not render a state powerless to enforce judgments of fines on those unable to pay, but it did require that the statutory ceiling placed on imprisonment for a conviction be the same for all defendants, irrespective of their economic status.[15] The Court mentioned several alternative methods of collecting unpaid fines[16] but left the states free to devise their own systems of avoiding the extension of jail terms solely on the basis of a defendant's involuntary inability to pay.

The issue of confinement for nonpayment of a fine where the term of imprisonment did not exceed the statutory maximum was considered in a companion case, *Morris v. Schoonfield.*[17] In a per curiam opinion, the Supreme Court remanded the case for reconsideration in light of *Williams* and newly enacted state legislation that required a determination of a defendant's ability to pay a fine either in full or on an installment basis.[18] In a concurring opinion, Justice White suggested that the *Williams* reasoning was applicable to any sentencing statute affecting indegents. He stated:

> [T]he same constitutional defect condemned in Williams also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.[19]

One year later in *Tate v. Short,*[20] the Court applied this language in holding a different type of sentencing statute unconstitutional. Here the petitioner had accumulated fines totaling $425 for nine separate traffic offenses; crimes punishable under state statutes by fines only. Unable to pay the fines because of his indigency, Tate was committed to a municipal prison farm to work off the fines at the rate of $5 per day. Relying on *Williams* and *Morris* the Court reversed, holding

14. *Id.* at 244.
15. *Id.*
16. *Id.* n.21. The Court suggested the use of installment plans used in other states as well as a parole system requiring the indigent to do specified work during the day to satisfy the fine.
17. 399 U.S. 508 (1970).
18. ILL. REV. STAT. ch. 7 § 1007-9-1 (Supp. 1972-73).
19. 399 U.S. at 509. *Quoted with approval in* Tate v. Short, 401 U.S. 395, 398 (1971) *and* In re Collins, 108 Ariz. 310, 311, 497 P.2d 523, 524 (1972).
20. 401 U.S 395 (1971).

that imprisonment solely because of indigence where punishment otherwise would result in only a fine, violated petitioner's right to equal protection.[21] While recognizing a substantial and valid state interest in collecting revenue generated by criminal fines, the Court noted that a "work off" system was illusory because, rather than aiding in the collection of revenue, it burdened the state with the cost of feeding and housing the indigent during his imprisonment.[22] It was recommended that an alternative method of collecting fines be developed.[23]

As a result of these decisions, an indigent's sentence can neither exceed the statutory limit nor be converted from a fine into a jail term where incarceration is attributable solely to the inability to pay a fine immediately. Under these circumstances, an opportunity to pay the monetary penalty through some acceptable collection method must be afforded before imprisonment is permissible. Nevertheless, state courts that have considered the constitutionality of alternative sentencing statutes have generally upheld jail terms in the event that fines are not paid.[24]

Before the rationale in *Williams* and *Tate* may be extended to the policy of sentencing in the alternative, a determination whether a defendant is actually indigent and unable to pay his fine forthwith must be made. Courts considering the question have placed great weight on the trial judge's discretionary determination of a defendant's pecuniary status.[25] Thus, the issue is not only what the indigent's rights are, but who qualifies as an indigent defendant. It was because of this emphasis on a defendant's financial status in sentence determination that Collins, a college student, contended that his right to equal protection was violated when he was incarcerated solely because of his inability to pay a fine.

Alternative Sentencing and In re Collins

Collins was arrested for shoplifting a can of meat.[26] He pled guilty and was sentenced to pay a fine of $100 or, alternatively, serve

21. *Id.* at 398.
22. *Id.* at 399.
23. The Court listed various permissible methods of collecting the fine. *Id.* at 400 n.5.
24. People v. Lewis, 19 Cal. App. 3d 1019, 97 Cal. Rptr. 419 (1971); State *ex rel.* Moats v. Janco, 180 S.E.2d 74 (W. Va. 1971) (dictum). *Contra,* Arthur v. Schoonfield, 315 F. Supp. 548 (D. Md. 1970). *See also In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970), *discussed in* 22 SYRACUSE L. REV. 807 (1971) and 16 VILL. L. REV. 754 (1971).
25. *See* People v. Lewis, 19 Cal. App. 3d 1019, 97 Cal. Rptr. 419 (1971); City of Orlando v. Cameron, 264 So. 2d 421 (Fla. 1972).
26. Shoplifting is a misdemeanor under ARIZ. REV. STAT. ANN. § 13-673 (Supp. 1972-73).

40 days in jail.[27] Unable to pay the fine, he was incarcerated. Collins applied for a writ of habeas corpus, claiming that he had been discriminated against by being jailed solely because he was too poor to pay his fine. After an informal hearing on the writ, the supreme court ordered an evidentiary hearing in the superior court to determine if Collins was indigent at the time of his sentencing.

Collins had stated at his trial that he was unable to pay the fine, that he knew of no one who could guarantee payment and that he could not pay in installments. At the hearing he testified that his only income was $60 a month, which he received from his parents, and that he had no other assets. He added, however, had he been permitted to do so, he would have sought employment and tried to pay the fine. After considering these facts, the presiding judge concluded that Collins was not an indigent according to the commonly accepted definition of the term.

The Supreme Court of Arizona reviewed this determination in light of the constitutional standards set forth in *Williams, Morris* and *Tate*. The court noted that the practice of alternative sentencing was not constitutionally infirm since it was specifically excluded from the *Williams* holding.[28] The court also noted that the Arizona law met constitutional standards by prohibiting the incarceration of a defendant beyond the statutory maximum if jailed for the nonpayment of a fine.[29] Citing the language of *Morris*,[30] the court reasoned, however, that since a fine alone cannot be converted to a jail term when not paid immediately, an indigent must be given a reasonable opportunity to pay a fine even under an alternative sentencing statute. Although reaching this conclusion, the court still had to determine whether Collins was indigent.

In rejecting the commonly accepted definition of indigency relied on by the trial court, the supreme court drew a distinction between an indigent and a person unable to pay a $100 fine. Although a layman's conception of indigency may not include a college student living on money received from his parents, various tests for determining legal indigency have been developed for different purposes.[31] For example, an issue of indigency arises in appeals in forma pauperis where the defendant is wholly unable to pay any necessary court costs.[32] Be-

27. ARIZ. REV. STAT. ANN. § 13-1645 (1956) provides for a maximum penalty of $300 or six months in jail or both for misdemeanors.
28. Williams v. Illinois, 399 U.S. 235, 243 (1970).
29. ARIZ. REV. STAT. ANN. § 13-1648 (1956).
30. See text accompanying note 19 *supra*.
31. *See generally* Comment, *Definition of Indigency: a Modern Day Legal Jabberwocky*, 4 ST. MARY'S L.J. 34 (1972).
32. Proceedings in forma pauperis, 28 U.S.C. § 1915(a) (1970); ARIZ. R. CRIM. PROC. 361(B).

cause the emphasis in this instance is to provide the opportunity for equal justice in the criminal process, only a "good faith" showing of inability to pay is required.[33] In determining whether an alternate method of paying a fine should be allowed, however, good faith is not an appropriate standard since the court must be able to differentiate between those totally unable to pay any fine,[34] those unable to pay a fine forthwith but who could do so in installments and those able to pay but who refuse to do so.[35] The only distinction which must be made in a proceeding in forma pauperis is between those able and those unable to pay. This distinction would not provide sufficient information for a judicial determination on the applicability of installment payments of a fine.

By holding that a criminal defendant may be considered indigent if, through the force of circumstances, he is incapable of paying a fine forthwith, the *Collins* court adopted the procedural definition suggested in *Williams* and *Tate*.[36] To clarify and facilitate the application of the "force of circumstances" standard, the court adopted procedural guidelines[37] which provide uniform standards for determining whether to impose a fine in a particular case as well as authorizing an appropriate method of payment.[38]

Applying the Sentencing Standards

The *Collins* court wisely concluded that something more than the unrestricted discretion of trial judges was needed to prevent the discriminatory incarceration of defendants.[39] To insure a fair application of its holding, the court adopted a portion of the standards proposed by the American Bar Association which delineate factors to be considered by trial judges when imposing a fine and directing its method

33. Proceedings in forma pauperis, 28 U.S.C. § 1915(a) (1970), *construed in* Ellis v. United States, 356 U.S. 674 (1958).

34. The Supreme Court did not consider whether an indigent unable to pay any fine may be incarcerated. *See* Tate v. Short, 401 U.S. 395, 400-01 (1971).

35. "[A] criminal cannot avoid completely the deterring, corrective action of the state purely because of his indigency. . . . In *Tate v. Short*, the Court emphasized that its holding did not suggest any constitutional infirmity in imprisonment of a defendant with a means to pay a fine who refuses or neglects to do so." *In re* Collins, 108 Ariz. 310, 311, 497 P.2d 523, 524 (1972).

36. *Id.* at 312, 497 P.2d at 525.

37. The Supreme Court of Arizona has the authority to make procedural rules for the state courts. ARIZ. CONST., art. 6, § 5(5).

38. *See* note 40 *infra*. One commentator has suggested that a state could adopt a method for the systematic collection of the necessary data on all defendants receiving fines as punishment. Note, *Proposed Standards for Defining Indigence in Criminal and Civil Cases in Illinois*, 48 CHI.-KENT L. REV. 59 (1971). Such a policy however, would probably place an unnecessary burden on the state and a drain on its trained personnel. *See* Note, *Fining the Indigent*, 71 COLUM. L. REV. 1281 (1971).

39. ARIZ. REV. STAT. ANN. § 13-1645 (1956) provides for discretionary sentencing in misdemeanor cases.

of payment.[40] Although the court's definition of indigency as the inability to pay a fine under the force of circumstances is unaffected by these standards, trial judges now have a basis for establishing a relationship between a defendant's ability to pay and the amount and method of payment.

The significance of these standards will lie in the ability of courts to utilize them to avoid the type of problem raised in *Collins*. Specifically, the courts must have some guidelines for imposing fines and directing methods of payment so as not to place more severe sanctions on one who is able to pay, but cannot do so forthwith, than on one who can pay immediately. In applying the general "force of circumstances" standard, the guidelines authorize courts to consider a variety of factors affecting the defendant's ability to pay. The financial resources and other obligations[41] of the defendant are to be considered along with his ability to pay on an installment basis.[42] Any reasons that make a fine preferable as a deterrent or corrective measure should also be applied.[43] Thus, Collins, a college student with limited funds but a desire to pay a fine by installments, would fall within these guidelines and not necessarily be incarcerated for shoplifting. The legitimate state interests in providing a proper penal sanction and revenue collection are thus served without the imposition of a jail term.

But the guidelines go further. Inherent in the wording are the suggestions that in some cases neither a fine nor a jail term would be appropriate[44] and that not only should the payment method be flexible

40. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURE § 2.7 (Approved Draft, 1968) [hereinafter cited as ABA STANDARDS], as adopted, provides:

> § 2.7(b) Whether to impose a fine in a particular case, its amount up to the authorized maximum, and the method of payment should remain within the discretion of the sentencing court. The court should be explicitly authorized to permit installment payments of any imposed fine, on conditions tailored to the means of the particular offender.
> (c) In determining whether to impose a fine and its amount, the court should consider:
> (i) the financial resources of the defendant and the burden that payment of a fine will impose, with due regard to his other obligations;
> (ii) the ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court;
> (iii) the extent to which payment of a fine will interfere with the ability of the defendant to make any ordered restitution or reparation to the victim of the crime; and
> (iv) whether there are particular reasons which make a fine appropriate as a deterrent to the offense involved or appropriate as a corrective measure for the defendant.

41. *Id.* §§ 2.7(b), (c)(i).

42. *Id.* §§ 2.7(b), (c)(ii).

43. *Id.* § 2.7(c)(iv). Note that ABA STANDARDS § 2.7(e) provides: "The court should not be authorized to impose alternative sentences, e.g., '$30 or 30 days.' The effect of nonpayment of a fine should be determined after the fine has not been paid and after examination of the reasons for non-payment." This section was not adopted by the *Collins* court.

44. ABA STANDARDS, *supra* note 40 §§ 2.7(c)(iii), (iv). But note that "a crim-

to accommodate impecunious offenders, but the amount of the fine should also reflect the defendant's financial status.[45] All of these considerations will remain within the discretion of the court.[46] The effect and wisdom of the future application of these factors by the trial courts is speculative and not within the scope of this note.[47]

Conclusion

The future importance of *In re Collins* may not be in the actual holding, but, rather, in the impact of the procedural guidelines it has adopted. Fines will probably continue to be set at arbitrary amounts, but with increased use of flexible payment plans. Where alternative sentencing is authorized, jail sentences imposed simply to avoid the constitutional issues involved in fining indigents will be of questionable validity.[48] The rules adopted in *Collins* effectively protect the state's interest in applying criminal sanctions, while ensuring that indigent defendants will not receive harsher sentences simply because of their impecuniary status.

inal cannot avoid completely the deterring, corrective action of the state purely because of his indigency. . . . The most he can expect is a reasonable opportunity to discharge the fine before the alternative of imprisonment is invoked." 108 Ariz. at 311, 497 P.2d at 524.

45. ABA STANDARDS, *supra* note 40, §§ 2.7(b), (c)(i).

46. *Id.* § 2.7(b).

47. *See generally* Dix, *Judicial Review of Sentences: Implications for Individualized Disposition*, 1 LAW & SOC. ORDER 369 (1969); "Appellate Review of Sentences," 14 ARIZ. L. REV. 409, 477 (1972); Note, *Fining the Indigent*, 71 COLUM. L. REV. 1281 (1971); Note, *Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution*, 22 VAND. L. REV. 611 (1969).

48. *Cf.* Tate v. Short, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring).

IV. DECEDENTS' ESTATES

A. WILL CONTESTS: STATE STANDING AND COSTS

In re Estate of Moll[1] presented the Arizona court of appeals with two significant issues involving decedents' estates. The first issue was whether the possibility of escheat of an estate established the standing of the state to contest the validity of a will. The second issue was whether a successful contestant's costs should be assessed against the proponent of the will or charged to the decedent's estate.

The state of Arizona filed opposition to probate the decedent's will on grounds of undue influence, lack of testamentary capacity and lack of execution by the decedent. The proponent's motion to dismiss on grounds that the state lacked standing to contest a will was denied by the probate court. Thereafter, a jury found the will to be invalid and the court assessed costs against the estate. The court of appeals affirmed the lower court's ruling on the proponent's motion to dismiss the state's contest but denied the state's cross-appeal for assessment of costs against the unsuccessful proponent. The state's contingent interest, derived from the possibility of escheat, was held sufficient to make the state a "person interested" in a probate proceeding within the meaning of the pertinent Arizona statute.[2] Additionally, the court held that the allowance of costs in a will contest brought prior to probate was within the discretion of the probate court and if probate was refused costs could be assessed against the estate.

This commentary will first analyze the standing decision an-

---

1. 17 Ariz. App. 84, 495 P.2d 854 (1972).

2. "Any person interested may appear and contest the will . . . ." ARIZ. REV. STAT. ANN. § 14-351 (1956), *repealed* Ch. 75, § 3, [1973] Ariz. Sess. Laws (effective Jan. 1, 1974). ARIZ. REV. STAT. ANN. § 14-3401, *added* Ch. 75, § 4, [1973] Ariz. Sess. Laws (effective Jan. 1, 1974), contains the same "any person interested" language as does section 14-351. Section 14-3401 was added as part of the UNIFORM PROBATE CODE which the Arizona legislature adopted with some modifications in 1973. *See* Ch. 75, §§ 3, 4, 15, 17, 18, 21, 22, 26, 27 [1973] Ariz. Sess. Laws (effective Jan. 1, 1974). See O'Connell & Effland, *Intestate Succession And Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205 (1972); Kruse, *Highlights of Proposed Arizona Probate Code Revision*, ARIZ. B.J., Spring 1972, at 5.

The *Moll* decision follows the general rule that the state's interest in the possible escheat of an estate is sufficient to confer standing. State *ex rel.* Donovan v. District Court, 25 Mont. 355, 365, 65 P. 120, 122 (1901); State v. Nieuwenhuis, 43 S.D. 198, 202, 178 N.W. 976, 977 (1920); State v. Lancaster, 119 Tenn. 638, 655, 105 S.W. 858, 862 (1907); T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 99, at 523 (2d ed. 1953).

nounced in *Moll*. Next, consideration will be given to responsibility for the cost of contest, an issue raised in *Moll* and expanded in a recent Arizona court of appeals decision.[3] An additional issue, whether a successful contestant should be awarded attorney's fees, will be discussed in light of this recent decision.

State Standing in Probate Proceedings

Absent the possibility of being a legatee or devisee under a will, the foundation for state standing in probate proceedings in Arizona evolves from laws relating to escheat. A statutory duty is imposed upon the estate tax commissioner to initiate escheat proceedings when he has reason to believe that property has escheated to the state.[4] An estate may escheat to and vest in the state if a person dies intestate and without heirs.[5]

Any "person interested" may appear and contest a will either before[6] or within 6 months after probate.[7] The Supreme Court of Arizona has defined a "person interested" as one who will be directly affected in a pecuniary sense by a settlement of an estate under a will.[8] This includes any party who is affected detrimentally by being deprived of a right he would have had in the absence of a will.[9] Since the state is the lawful heir when an owner of property dies leaving no one authorized to take either by will or descent,[10] it is clear that the state has an interest in a probate proceeding that could result in escheat by the invalidity of a will.

It is significant that Arizona's will contest statute was patterned after a California statute also granting standing to any "person interested."[11] A California court has held that the state has sufficient interest to qualify as a "person interested" under this statute.[12] There, the California supreme court was faced with the state's contention that it was the only entity entitled to receive the estate because the will was invalid and the decedent had died without heirs at law. The court

3. *In re* Estate of O'Brien, 18 Ariz. App. 375, 502 P.2d 176 (1972).
4. ARIZ. REV. STAT. ANN. § 12-882 (Supp. 1972-73).
5. *Id.*, § 12-881 (1956).
6. *See* note 2 *supra.*
7. ARIZ. REV. STAT. ANN. 14-371 (1956), *repealed* Ch. 75, § 3, 1973 Ariz. Sess. Laws (effective Jan. 1, 1974). ARIZ. REV. STAT. ANN. § 14-3412, *added* Ch. 75, § 4, 1973 Ariz. Sess. Laws (effective Jan. 1, 1974), requires an interested person to petition the court for an order to vacate a formal testacy order not later than 60 days after the entry of the order.
8. *In re* Estate of Biehn, 41 Ariz. 403, 409, 18 P.2d 1112, 1114 (1933).
9. *Id.*
10. State v. Phoenix Sav. Bank & Trust Co., 60 Ariz. 138, 141, 132 P.2d 637, 639 (1942).
11. CAL. PROB. CODE ANN. §§ 370,380 (West 1956).
12. *In re* McCabe's Estate, 219 Cal. 742, 29 P.2d 195 (1934).

held that this allegation was sufficient to disclose the possibility of escheat which gave the state standing to appear and contest the validity of the will.[13]

There is little dispute over the state's right to take property by escheat.[14] To recognize this right and then preclude the state from protecting its interest by will contest, however, could render escheat a nullity under certain circumstances. Escheat would undoubtedly occur when a decedent died intestate without lawful heirs. The outcome would be less clear, however, when a will named a beneficiary but no lawful heirs existed who could take the estate in the event of the invalidity of the will. Such was the situation in *Moll*. If the state had not contested the will, it is possible that an invalid will could have been admitted to probate. The likelihood of such an occurrence is evidenced by the number of cases in which the state has successfully contested the will after it was admitted to probate.[15] In circumstances where escheat might arise, the state may be the only party whose interest is adverse to that of a proponent who is a beneficiary under the will, but not a lawful heir.[16]

Although the state might successfully contest a will, this alone does not create an escheat. The only issue at the contest proceeding is the validity of the will.[17] The question of escheat is determined at a subsequent proceeding, and it is there that the state must prove that escheat has occurred. Consequently, the state is placed in the position of alleging facts at the contest proceeding which would be sufficient, if proven, to sustain a finding of escheat. For this reason, it is clear that the state should be granted standing to contest a will if its allegations constitute a prima facie case for escheat.

---

13. *Id.* at 744, 29 P.2d at 195; *accord, In re* Peterson's Estate, 138 Cal. App. 443, 32 P.2d 423 (1934).

14. *See* State v. Phoenix Sav. Bank & Trust Co., 60 Ariz. 138, 132 P.2d 637 (1942).

15. *See, e.g., In re* Miller's Estate, 274 Mich. 190, 264 N.W. 338 (1936); State v. Nieuwenhuis, 43 S.D. 198, 178 N.W. 976 (1920); State v. Lancaster, 119 Tenn. 638, 105 S.W. 858 (1907).

16. Instances in which there would be no lawful heirs, making escheat necessary, have been strictly limited by a provision in the Arizona intestate succession statute. ARIZ. REV. STAT. ANN. § 14-202.4 (1956). Whereas many states limit the degree of kindred which may take by intestate succession, this statute provided for no such limitation. The statutory language "and so on without end" provided an almost unlimited possibility of potential heirs. This section, however, has been repealed. The new intestate succession statute limits inheritance by collaterals to descendants of grandparents. ARIZ. REV. STAT. ANN. § 14-341, *added* Ch. 75, § 4, [1973] Ariz. Sess. Laws (effective Jan. 1, 1974). The state must also contend with the fact that escheats are looked on with disfavor by the courts. *In re* Estate of Wallin, 16 Ariz. App. 34, 490 P.2d 863 (1971). When an escheat is alleged to have occurred, it is presumed that a decedent left heirs or next of kin capable of inheriting property. *Id.* at 35, 462 P.2d at 864.

17. *In re* Hesse's Estate, 62 Ariz. 273, 277, 157 P.2d 347, 349 (1945).

Liability for Costs and Attorney's Fees

By upholding the lower court's decision to assess costs against the estate rather than against the proponent of the will, the *Moll* court affirmed earlier decisions holding that the awarding of costs was within the discretion of the probate court in all will contests brought prior to probate.[18] Section 14-376 of the *Arizona Revised Statutes Annotated*, providing that it is in the court's discretion to assess costs either against the party who resisted the successful probate revocation or the decedent's estate, was held to apply only to contests brought *after* probate.[19]

Confusion over the application of section 14-376 can be traced to the fact that both the statute, applicable to contests after probate, and the *Moll* rule, applied to contests brought prior to probate, accomplish the same result. Section 14-376 permits the court to exercise its discretion in assessing costs against either the estate of the decedent or the party resisting the contest when probate is revoked. The *Moll* court simply applied the same reasoning to a contest brought prior to probate, a situation not covered by the statute. It is clear that the court reached the correct result. First, the application of section 14-376 solely to contests brought after probate is consistent with prior Arizona case law.[20] Secondly, the decision is consistent with the California supreme court's interpretation of the California statute from which the Arizona statute was adopted.[21]

Uncertainty has also arisen whether a court's discretion to award fees and expenses under section 14-376 includes attorney's fees. This confusion can be traced to an early Arizona supreme court decision where the proponent of a will was awarded reasonable attorney's fees for resisting the contest.[22] A subsequent case, however, overruled this interpretation of section 14-376.[23] The court cited California interpretations[24] of a similar statute and held that the statutory language "fees and expenses" did not include attorney's fees. Since "fees and

18. 17 Ariz. App. at 86, 495 P.2d at 856.

19. *Id.* This interpretation is consistent with other cases involving the interpretation of this statute. *See In re* McConnell's Estate, 101 Ariz. 538, 541, 421 P.2d 895, 898 (1966); *In re* Estate of O'Brien, 18 Ariz. App. 375, 378, 502 P.2d 176, 179 (1972).

20. *See In re* Estate of Pitt, 1 Ariz. App. 533, 405 P.2d 471 (1965).

21. *See In re* Olmstead's Estate, 120 Cal. 447, 52 P. 804 (1898).

22. *In re* Nolan's Estate, 56 Ariz. 353, 108 P.2d 385 (1941). The successful proponent filed a statement of costs which included an item of $850 for attorney's fees for services in resisting the contest. The unsuccessful contestant objected to this amount as unreasonable and excessive. The probate court disallowed the item of attorney's fees and the Arizona supreme court reversed.

23. *In re* Estate of McConnell, 101 Ariz. 538, 421 P.2d 895 (1967).

24. *In re* Olmstead's Estate, 120 Cal. 447, 52 P. 804 (1898); *In re* Estate of McGinn, 2 Coffey Prob. Dec., 313 (1889).

expenses" did not include attorney's fees, it was reasoned that the term "costs" in section 14-376 did not include attorney's fees either.[25]

This issue was recently relitigated in *In re Estate of O'Brien*,[26] a case decided by the court of appeals after *Moll*. There, the attorney for the successful will contestant presented a claim for attorney's fees and costs against the estate prior to distribution; the probate court allowed the claim in full, but the court of appeals reversed that part of the order allowing attorney's fees. It was held that in the absence of statutory authority or a contract between the parties attorney's fees may not be awarded to a successful litigant. The opinion concluded that the probate court is strictly a creature of statute and is therefore limited to statutorily prescribed powers and procedure. Since there was no statutory authority allowing the probate court to award attorney's fees in will contests, the probate court was without jurisdiction to apply equitable principles to award attorney's fees.[27]

The *O'Brien* court indicated the need for legislative action on the issue of attorney's fees. In contemplating the advisability of such legislation, consideration should be given to its effect upon the parties. The contestant who is required to pay his own attorney's fees may be more reluctant to assert a monetarily small, but nevertheless meritorious claim. The inequity of such a case supports the granting of discretionary power to award attorney's fees from the estate. Additionally, if the will is declared invalid because of undue influence or fraud perpetrated by the proponent, the probate court should have discretionary power to assess the contestant's legal fees against him. This result would discourage the proponent from resisting the will contest if he knows the will to be invalid and may also discourage fraud and undue influence in the drafting of a will.

Conclusion

The *Moll* decision, granting the state standing to contest the validity of a will, insures protection of the state's escheat interest at the mo-

25. *In re* Estate of McConnell, 101 Ariz. 538, 543, 421 P.2d 895, 900 (1967).
26. 18 Ariz. App. 375, 502 P.2d 176 (1972).
27. Historically, English courts have awarded attorney's fees as part of costs. Numerous reasons have been advanced for the failure of the United States to generally follow the English rule. One commentator suggests that the English system was originally adopted in this country in New York. A statute was enacted by the New York legislature fixing the amount of legal fees recoverable. Due to inflation the fixed amount became unrealistic and was eventually discarded. Ehrenzweig, *Reimbursement of Counsel Fees And The Great Society*, 54 CALIF. L. REV. 792 (1966). Another commentator notes that each man was expected to represent himself before the court without the luxury of a lawyer and one who utilized a lawyer should not be compensated for his discretion. Kuenzel, *The Attorney's Fees: Why Not A Cost Of Litigation*, 49 IOWA L. REV. 75 (1963).

ment it arises. Legislation in this area is desirable and should specifically provide that the state shall have standing when it can plead facts sufficient to demonstrate a prima facie case of escheat.

The awarding of attorney's fees is generally allowed only upon authority of a statute or contract by the parties.[28] Arizona should follow the example of the states which have enacted legislation awarding attorney's fees to a successful litigant.[29] Upon determining that a will has been executed in favor of a proponent due to his undue influence upon the testator or other improper acts, a probate court should be permitted to exercise its discretion by awarding reasonable attorney's fees to a successful contestant.

28. *In re* Estate of McConnell, 101 Ariz. 538, 542, 421 P.2d 895, 899 (1966). Colvin v. Superior Equipment Co., 96 Ariz. 113, 122, 392 P.2d 778, 784 (1964). For a detailed discussion of liability for attorney's fees see 3 W. BOWE & D. PARKER, PAGE ON WILLS § 26.148 (rev. ed. 1961).

29. *E.g.*, ALASKA STAT. §§ 09.60.010, 09.60.040 (1962); FLORIDA STAT. ANN. § 734.01 (1951); NEV. REV. STAT. § 18.010.3(a), (b) (1963).

V. EVIDENCE

A. ADMISSIBILITY OF ILLEGALLY OBTAINED WIRETAP EVIDENCE BEFORE GRAND JURIES

The grand jury[1] is an institution which favors the state's interest in the swift initiation of criminal prosecutions. This preference results in an unbalanced system which often fails to adequately protect those under investigation.[2] The admissibility before a grand jury of various types of otherwise incompetent evidence is illustrative not only of an historical state interest in allowing great flexibility to the grand jury, but also of the prosecution orientation of that body. In the recent decision of *State ex rel. Berger v. Myers*,[3] the Supreme Court of Arizona was afforded the opportunity to evaluate the legal and policy considerations presented by the admission of allegedly illegally obtained wiretap evidence before a grand jury.

In *Berger*, the court addressed the question of whether illegally obtained wiretap evidence is admissible before a grand jury. Olen Leroy James, as real party in interest, sought to restrain a duly impanelled grand jury from confronting witnesses with what he believed to be evidence secured through the use of an illegal wiretap. James alleged that the introduction of the evidence would cause him irrepar-

1. In Arizona, the grand jury is an instrument of the state from which criminal indictments will issue if the grand jury finds sufficient probable cause to prosecute. *See* ARIZ. R. CRIM. P. 12.1(d)(4).

On July 15, 1972, the Arizona Bar Committee on Criminal Law submitted a proposed revision of the Arizona Rules of Criminal Procedure to the Supreme Court of Arizona. THE SUPREME COURT'S ADVISORY COMM. ON CRIM. RULES, ARIZONA STATE BAR COMMITTEE ON CRIMINAL LAW, ARIZONA PROPOSED RULES OF CRIMINAL PROCEDURE (1972). The supreme court adopted the rules in a modified form April 17, 1973, to become effective on September 1, 1973. Order Promulgating "The 1973 Rules of Criminal Procedure" (1973). All citations of criminal rules in this discussion will be to the new rules, with appropriate parenthetical references to corresponding sections of the old rules.

2. Arizona's rules of criminal procedure, as do those of other states, allow a one-sided presentation to the grand jury by a county attorney. *See* ARIZ. R. CRIM. P. 12.3(b) (formerly ARIZ. R. CRIM. P. 83) (state may challenge a panel or individual juror; accused has no similar privilege); ARIZ. R. CRIM. P. 12.5 (formerly ARIZ. R. CRIM. P. 98) (county attorney may examine witnesses before the grand jury, while the accused is without representation of counsel unless under direct investigation); ARIZ. R. CRIM. P. 12.9 (formerly ARIZ. R. CRIM. P. 103) (indictment may be challenged only on the ground that due process has been violated and may not be challenged on the ground that there was insufficient legal evidence); ARIZ. R. CRIM. P. 12.6 (formerly ARIZ. R. CRIM. P. 104) (grand jurors are under no duty to hear evidence from a person under investigation although he may be compelled or permitted to appear).

3. 108 Ariz. 248, 495 P.2d 844 (1972).

able damage, possibly resulting in indictment for a felony. He petitioned the superior court judge presiding over the grand jury for a temporary restraining order to prohibit the grand jury from continuing its investigation until the legality of the wiretap evidence could be determined. The superior court issued the restraining order and the state contested this action through a special action, seeking a writ of prohibition against the judge who granted the restraining order.

The supreme court issued the writ of prohibition and held that, as a general rule, superior courts of Arizona are without jurisdiction to restrain public officials or a public body, such as the grand jury, from discharging the duties imposed upon them by law.[4] In so holding, the court acknowledged that an exception to the rule exists when public officers act illegally or in excess of their powers. Then, in dicta, the court considered the propriety of allowing preindictment suppression of allegedly illegally obtained wiretap evidence. It refused to extend the exclusionary rule to evidence presented to a grand jury, stating that grand juries are not bound to act by the customary rules of evidence[5] and that no statute or rule of procedure provides for the suppression of illegally obtained wiretap evidence prior to indictment.[6]

In its ruling in *Berger*, the supreme court was required to consider important aspects in two areas of the law which have been legally and politically sensitive in recent years—the institution of the grand jury, and the use of evidence that is the product of electronic surveillance. To evaluate the opinion and determine its potential impact, it will first be necessary to analyze the court's reasoning in holding the superior court without jurisdiction to intercede in grand jury proceedings. The general nature of the grand jury as an integral part of the criminal process and the rules of evidence applicable to grand juries will then be discussed. Finally, the applicability of constitutional and federal statutory protections to the admissibility of wiretap evidence before a grand jury will be considered in light of recent decisions of the Supreme Court of the United States.

The Jurisdictional Issue

The central consideration in *Berger* was whether section 12-1802 (4) of the *Arizona Revised Statutes Annotated*, providing that an injunction cannot be granted "[t]o prevent enforcement of a public

4. *Id.* at 250, 495 P.2d at 846.
5. *Id.* at 250, 495 P.2d at 846.
6. *Id.*

statute by officers of the law for the public benefit,"[7] precluded the superior court from issuing an injunction against a county attorney and the grand jury to prohibit them from using or considering illegal wiretap evidence in discharging their duties. In determining that the statute was controlling in this instance, the court placed principal reliance on its holding in *Hislop v. Rodgers*.[8] There, the court held that under the predecessor of section 12-1802(4)[9] a superior court judge was without jurisdiction to restrain a chief of police from summarily abating a public nuisance by padlocking the doors of the business constituting the alleged nuisance. The *Hislop* court reasoned that the intent of the legislature in enacting the statute was to prevent judicial interference with the enforcement of duly enacted laws by the executive branch.[10]

It would appear that *Berger* is unsupportable by the rationale relied on by the *Hislop* court. The injunctive relief sought in *Berger* was to be imposed against a grand jury over which the convening superior court judge had supervision,[11] and was not sought exclusively to inhibit an executive function. While the issuance of the injunction would affect the executive branch by restraining the county attorney, there is a strong interest on the part of the judiciary in preserving the integrity of a grand jury proceeding.

However, it is academic that *Hislop* is readily distinguishable from *Berger*. The proper determination of the jurisdictional issue in *Berger* hinged upon the court's analysis of the substantive question of whether illegally seized wiretap evidence is admissible before a grand jury. The court noted in its opinion that the relevant statute procluding the issuance of an injunction against a public officer was not always conclusive. It cited several cases for the proposition that a judge may issue an injunction in situations where the public officer pursued his statutory function in an illegal or unconstitutional manner, or where he was acting in excess of his power.[12] Analysis of whether *Berger*

7. ARIZ. REV. STAT. ANN. § 12-1802(4) (Supp. 1972-73).
8. 54 Ariz. 101, 92 P.2d 527 (1939).
9. *Compare* ARIZ. REV. STAT. ANN. § 12-1802(4) (1956) *with* ARIZ. REV. CODE § 4281 (1928).
10. 54 Ariz. at 107-12, 92 P.2d at 531-34; *accord*, Southern Oregon Co. v. Quine, 70 Ore. 63, 139 P. 332 (1914).
11. ARIZ. REV. STAT. ANN. § 21-401 (Supp. 1972-73) provides that grand juries are duly impanelled by the presiding superior court judge of the county in which the grand jury is to sit. Interestingly, a case cited in *Berger* for another proposition contains a discussion of the impanelling court's inherent power to insure that the grand jury proceeds properly in discharging its duties. State v. Bramlett, 166 S.C. 323, 164 S.E. 873 (1932) (reviewing court has inherent power to expunge damaging materials from record when pertaining to person not under consideration for indictment). A recent United States Supreme Court case also indicates that grand juries remain under the supervision of the judiciary when they are pursuing their investigations. Branzburg v. Hayes, 408 U.S. 665, 707 (1972) (dictum).
12. *See* Board of Regents v. Tempe, 88 Ariz. 299, 356 P.2d 399 (1960) (city's

constitutes an exception to the general rule, therefore, requires a discussion of the court's analysis of whether allegedly illegally obtained wiretap evidence is admissible before a grand jury. If the introduction of such evidence is illegal, presumably the court would have the inherent equitable power to prevent it.[18]

Admissibility of Evidence Before a Grand Jury

Historically, the grand jury has been viewed as fundamental to the fair administration of justice in the Anglo-American system of law.[14] Its importance to the framers of the constitution as a salient feature of criminal justice is manifested by the fifth amendment.[15] Today, while the grand jury may still be justified as protecting the citizen from wrongful criminal prosecution,[16] it is also a powerful investigatory tool in the hands of a prosecutor and is used to probe charges of crime and malfeasance in public office.[17] It is the duty of a grand jury to return indictments against all persons charged with the commission of a public offense if its members, after considering all the evidence, find probable cause to believe the accused is guilty.[18]

In investigating public offenses, the grand jury is not subject to the ordinary rules of evidence that are applicable at a trial in which

building codes inapplicable to construction at a state university; appellants entitled to injunctive relief); McClusky v. Sparks, 80 Ariz. 15, 291 P.2d 791 (1955) (taxpayer entitled to injunctive relief against county tax assessor acting in an unconstitutional manner); Hunt v. Superior Court, 64 Ariz. 325, 170 P.2d 293 (1946) (injunctive relief appropriate to restrain election officials from acting contrary to state statute); Crane Co. v. Arizona State Tax Comm'n, 63 Ariz. 426, 163 P.2d 656 (1945) (state officers may be enjoined from doing acts which are beyond their power).

13. Stated in another way, in some situations, *see* note 12 *supra*, the power to issue injunctions against a public officer or body is embodied in the general statute authorizing injunctive relief. ARIZ. REV. STAT. ANN. § 12-1801 (1956).

14. Wood v. Georgia, 370 U.S. 375 (1962); L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 144-46 (1947).

15. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." U.S. CONST. amend. V. The United States Supreme Court in Hurtado v. California, 110 U.S. 516 (1884), held that states could constitutionally substitute prosecution by information as an alternative to prosecution by indictment. Arizona provides for criminal prosecution by either indictment or information. ARIZ. CONST. art. 2, § 30; ARIZ. R. CRIM. P. 2.1 & 2.2 (formerly ARIZ. R. CRIM. P. 78). An information issues from a preliminary hearing, which is an adversary proceeding. ARIZ. R. CRIM. P. 5.3 (formerly ARIZ. R. CRIM. P. 22 & 23). An indictment issues from a grand jury hearing, which is not an adversary proceeding. ARIZ. R. CRIM. P. 12.6 & 12.7. [Provided for in ARIZ. REV. STAT. ANN. §§ 21-412, -414 (Supp. 1972-73)].

16. This was the intent of the grand jury when King Henry II initiated its use at the Assize of Clarendon in 1166. As previous methods of determining guilt such as trial by ordeal and trial by battle fell into disrepute, the grand jury began to function as the petite jury does today, determining guilt or innocence. By 1352, however, public feeling that indictors, those making formal accusations, make inappropriate judges led to the separation of the two functions. The grand jury stood between legitimate prosecution and malicious attack by political and private enemies. Note, *Indictment Sufficiency*, 70 COLUM. L. REV. 876, 881 (1970).

17. ARIZ. REV. STAT. ANN. § 21-407 (Supp. 1972-73).

18. *Id.* § 21-413.

guilt is determined. The United States Supreme Court has held, as a general principle, that the competency and adequacy of evidence before a grand jury cannot be questioned prior to indictment.[19] By not requiring grand juries to adhere to the rules of evidence applicable to trials, it is thought that several unique characteristics of the grand jury are preserved. Grand jury proceedings are secret and those present are sworn to secrecy.[20] It is argued that a preindictment hearing to determine the trial admissibility of evidence placed before the grand jury would destroy the secrecy which not only serves to protect persons being investigated, but which also allows freedom of deliberation by the accusatorial body. It is also believed that by imposing strict rules of evidence, expediency—an admitted asset of the grand jury—would be sacrificed. Additionally, since the grand jury is without power to adjudge a person guilty of a crime and a defendant is able to prevent the admission of incompetent evidence at or before trial,[21] the Supreme Court has stated that the interests of a person against whom such evidence has been used to obtain an indictment are adequately protected.[22]

The fact that the evidence sought to be presented to the grand jury was illegally seized in violation of the fourth amendment has no affect on its admissibility. In *Mapp v. Ohio*,[23] the Supreme Court held that the federal evidentiary rule requiring exclusion of illegally obtained evidence was mandated by the fourth amendment and applied to the states through the fourteenth amendment. The court reasoned that the only way to effectively deter law enforcement agencies from violating the fourth amendment was to take away the incentive for violating the law by prohibiting the use of illegally seized evidence.[24]

19. Costello v. United States, 350 U.S. 359 (1956) (hearsay evidence admissible at a grand jury hearing). *See* Lawn v. United States, 355 U.S. 339 (1958) (defendant has no right to determination of whether evidence, documents or fruits of testimony elicited at a prior grand jury hearing had been obtained in violation of his constitutional rights against self incrimination; the Court reaffirming that the competency and adequacy of evidence before a grand jury will not be tested).

20. ARIZ. R. CRIM. P. 12.1(d)(6) (formerly ARIZ. R. CRIM. P. 107) (no one present at a grand jury shall disclose testimony received by it). *See also* ARIZ. R. CRIM. P. 12.8(c) (transcript made available to the defendant).

21. ARIZ. R. CRIM. P. 16.1 (providing that all motions, including suppression of evidence, be made at a pretrial omnibus hearing).

22. Blue v. United States, 384 U.S. 251 (1966).

23. Mapp v. Ohio, 367 U.S. 643, 655 (1961). Elevated the federal exclusionary rule required by Weeks v. United States, 232 U.S. 383 (1914), to constitutional status. *Mapp* followed Wolf v. Colorado, 338 U.S. 25 (1949), which extended fourth amendment prohibition against unreasonable searches and seizures to the states through the due process clause of the fourteenth amendment.

24. In *Mapp*, the Supreme Court determined that the exclusionary rule was the only viable alternative to deter police from breaking the law. 367 U.S. 643 (1961). Wolf v. Colorado, while holding the fourth amendment applicable to the states, declined to impose the exclusionary rule in favor of allowing states to pursue solutions to the problem of unlawful police conduct. 338 U.S. 25 (1949). Twenty-six states passed statutory rules of exclusion, but civil liabilities and police interdepartmental

The *Mapp* doctrine clearly requires the suppression of illegally obtained evidence when objection to its introduction is made at or prior to trial,[25] but the exclusionary rule has not been extended to allow preindictment suppression of illegally obtained evidence. In *Blue v. United States*,[26] the Court considered the question of whether an indictment could be quashed if it were based in part on illegally seized evidence. The Court held that the use of such tainted evidence did not constitute grounds for quashing the indictment, and indicated that an important consideration in its holding was the fact that the indicted individual would have an opportunity to insure that such evidence would not be used against him in the trial to establish his guilt.[27] *Blue* has been widely cited by both state and federal courts as standing for the proposition that the fourth amendment does not prohibit the presentation of illegaly seized evidence to a grand jury.[28]

While the logical extension of *Mapp* would seem to require the denial of any use of illegally sezied evidence, insofar as the state benefits from it by securing an indictment, it would appear that exclusion of evidence at this level of criminal proceedings would not significantly advance the deterrent purposes of *Mapp*.[29] On balance, the ability of an aggrieved party to suppress the evidence at a later stage, the fact that a grand jury is without power to adjudge guilt, and other public policy considerations inhering to the smooth functioning of the grand jury, outweigh the potential injury to the individual which springs from the criminal indictment.

Wiretapping and other forms of electronic surveillance constitute

---

discipline failed to alleviate or deter police lawlessness in other jurisdictions. The Supreme Court, in *Mapp*, declared the exclusionary rule of constitutional origin and made the rule applicable to the states under the fourteenth amendment. *See* Note, *Unconstitutionally Obtained Evidence before the Grand Jury as a Basis for Dismissing the Indictment*, 27 MD. L. REV. 168, 179 (1967).

25. *See* note 21 *supra*.

26. 384 U.S. 251 (1966).

27. *Id.* at 255. *See also* United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971); Rosado v. Flood, 394 F.2d 139 (2d Cir. 1968); Truchenski v. United States, 393 F.2d 627 (8th Cir. 1968); West v. United States, 359 F.2d 50 (8th Cir. 1966).

28. *See* United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y. 1970); United States v. Nat'l Marketing, Inc., 306 F. Supp. 1238 (D. Minn. 1969); State v. Parks, 437 P.2d 642 (Alasaka 1968); People *ex rel.* Dunbar v. District Court, —Colo. —, 500 P.2d 358 (1972); State v. Price, 108 N.J. Super. 272, 260 A.2d 877 (1970).

29. Illegally seized evidence has also been held to be admissible in some situations where it is not sought to be introduced affirmatively by the prosecution as evidence of guilt. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971) (confession obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), may be used for impeachment purposes to attack a witness's credibility); Walder v. United States, 347 U.S. 62 (1954) (evidence illegally seized pertaining to a prior offense held admissible for the purposes of impeaching defendant's testimony in trial for a subsequent offense); United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (judge may properly consider illegally seized evidence in determining sentence). *But see* Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968), *cert. denied*, 397 U.S. 925 (1970) (judge may not consider illegally obtained evidence in sentencing).

searches and seizures within the meaning of the fourth amendment.[30] Being within the scope of the fourth amendment, searches conducted by electronic devices must adhere to strict constitutional guidelines and the use of such devices must be preceded by the issuance of a warrant.[31] In the absence of a valid warrant, the evidence gained by electronic surveillance may be challenged as illegally obtained and subject to suppression at or prior to trial.

In its constitutional aspects, illegally seized wiretap evidence is indistinguishable from illegally seized physical evidence. It would appear, therefore, that the fourth amendment does not provide the foundation upon which illegally obtained wiretap evidence can be suppressed prior to the time that a grand jury renders an indictment.[32] Insofar as the petitioner in *Berger* relied upon constitutional protections to obtain preindictment suppression of wiretap evidence, therefore, the claim would appear to be without merit and the issue was properly perceived and decided by the Supreme Court of Arizona.[33]

A grand jury, however, is not completely unrestrained in pursuing its investigation. Court intervention has long been recognized as appropriate when a grand jury witness asserts certain constitutional rights, or statutory or common law privileges.[34] For instance, the fifth amendment protection against self incrimination is afforded to witnesses before a grand jury.[35] The common law privilege of marital communications[36] and lawyer-client privilege[37] have also been held applicable in grand jury inquiries. It would appear that a prohibition against the use of illegally obtained wiretap evidence before a grand jury could also be embodied in a statute. While the dicta in *Berger* did not consider this possibility, a full consideration of the issue necessarily requires an analysis of relevant federal statutes.

---

30. Katz v. United States, 389 U.S. 347 (1967) (electronic bugging of telephone booth without a search warrant was violative of fourth amendment guarantees against unreasonable searches and seizures), *rev'g* Olmstead v. United States, 277 U.S. 438 (1925).

31. Berger v. New York, 388 U.S. 41 (1967). In *Berger*, the Court struck down a New York statute authorizing warrants for electronic surveillance as being unconstitutionally vague under forth amendment requirements. Probable cause to believe a search will be productive must be shown and the warrant must specifically name items to be seized. *Id.* at 55-58.

32. *See* text accompanying notes 25-29 *supra.*

33. State *ex rel.* Berger v. Meyers, 108 Ariz. 248, 249, 495 P.2d 844, 845 (1972).

34. *See* Branzburg v. Hayes, 408 U.S. 665, 707 (1972); United States v. Bryan, 339 U.S. 323 (1950); 8 J. WIGMORE, EVIDENCE § 2192, 70 (McNaughton rev. 1961).

35. Counselman v. Hitchcock, 142 U.S. 547, 562-64 (1891); *see* United States v. Scully, 225 F.2d 113 (2d Cir. 1955); *In re* Fried, 161 F.2d 453 (2d Cir. 1947); United States v. Cleary, 164 F. Supp. 328 (S.D.N.Y. 1958).

36. Blau v. United States, 340 U.S. 332 (1951); *see* PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES § 505.

37. United States v. Judson, 322 F.2d 460 (9th Cir. 1963); *see* PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES § 503.

The Omnibus Crime Control and Safe Streets Act of 1968

In 1968, as Title III of the Omnibus Crime Control and Safe Streets Act,[38] congress enacted comprehensive legislation pertaining to wiretapping and electronic surveillance.[39] Title III contains provisions prohibiting the manufacture, distribution, possession, and advertising of devices used for electronic surveillance;[40] providing for government seizure and confiscation of devices;[41] prohibiting the use of intercepted communications as evidence in various judicial and administrative proceedings;[42] outlining the circumstances and procedures under which interception may be authorized[43] and allowing for limited disclosure of authorized interceptions.[44] In addition to providing criminal sanctions for violations of the provisions of the Act, a civil cause of action is created in favor of a person who has been the subject of violations.[45] Title III of the Act was enacted expressly to protect the privacy of wire and oral communications, and delineates the circumstances and conditions under which the interception of these communications may be authorized.[46] The legislation was purportedly made applicable to both state and federal governments in the exercise of the plenary power of congress found in the commerce clause.[47]

Title III contains provisions expressly prohibiting the use of evidence gained from acts in violation of its guidelines.[48] The Title makes illegal the interception and disclosure of wire communications by any person knowing or having reason to know the information was obtained through an interception in violation of the Act.[49] The Act, in broad language, prohibits the use as evidence of any communication received in violation of the Act before various administrative and judicial bodies, including grand juries.[50] In a separate section,

38. Omnibus Crime Control and Safe Streets Act of 1968, ch. 119, title I-V. 82 Stat. 212 (codified in scattered sections of 18 U.S.C.).
39. 18 U.S.C. §§ 2510-20 (1970).
40. *Id.* § 2512.
41. *Id.* § 2513.
42. *Id.* § 2515.
43. *Id.* § 2518.
44. *Id.* § 2517.
45. *Id.* § 2520. This section also provides, however, that a good faith reliance on a court order constitutes a complete defense to criminal or civil actions brought under the chapter. *But see* Abramson v. Mitchell, 459 F.2d 955 (8th Cir. 1972) (section 2520 does not constitute a complete bar to a damage action).
46. S. REP. No. 1097, 90th Cong., 2d Sess. 89 (1968).
47. *Id.* While neither the United States Supreme Court nor the Supreme Court of Arizona has been directly confronted with the question of whether Title III is applicable to the states, there is language in recent Arizona cases indicating tentative acceptance of applicability. *See* State v. Ford, 108 Ariz. 404, 412, 499 P.2d 699, 707 (1972) (by implication); State *ex rel.* Flournoy v. Wren, 108 Ariz. 356, 360, 498 P.2d 444, 448 (1972).
48. 18 U.S.C. § 2515 (1970).
49. *Id.* § 2511(1)(c-d).
50. *Id.* § 2515.

Congress provided that any aggrieved person[51] could move to suppress illegally obtained evidence in any trial, hearing or proceeding.[52] Grand juries, while expressly included in the prohibition section, are not mentioned in the section dealing with suppression.[53] A conflict was thereby created by first prohibiting the use and disclosure of illegally obtained interceptions to a grand jury, and then denying an aggrieved party the right to suppress such evidence if presented to a grand jury.

The Supreme Court recently had occasion to construe these conflicting statutory provisions in *Gelbard v. United States*,[54] which was decided after the Supreme Court of Arizona decided *Berger*.[55] The petitioners in *Gelbard* had been convicted of civil contempt[56] stemming from their refusal, as witnesses before grand juries, to answer questions they felt would be based on information obtained through illegal wiretapping. The Court expressly limited its decision to the question of whether a grand jury witness, in a separate civil contempt proceeding, could successfully raise a violation of Title III[57] as a defense for not complying with a court order to testify.[58] The Court determined that a showing by a witness that interrogation was based on illegal interception of a witness's communications constitutes a showing of just cause, thereby precluding an adjudication of contempt.[59] The holding in *Gelbard* forces the government into a separate hearing to show the legality of surveillance, pursuant to Title III, before a witness can be convicted of contempt.

In the course of its decision in *Gelbard*, the Court clearly indicated that its decision was narrowly confined to the issue of whether section 2515 provided a defense to an adjudication of contempt.[60] It distinguished the facts before it as not dispositive of the conflict between sections 2515 and 2518,[61] as they relate to any possible pre-

51. *Id.* § 2510(11) (defines an "aggrieved person" as a person who was a party to any intercepted communication or the person against whom the interception was directed). For legislative history of the definition see S. REP. No. 1097, 90th Cong., 2d Sess. 106 (1968).

52. 18 U.S.C. § 2518(10)(a) (1970).

53. *Compare id.* § 2515 *with id.* § 2518(10)(a).

54. 408 U.S. 41 (1972).

55. *Berger* was decided on April 8, 1972 and *Gelbard* was decided on June 26, 1972.

56. Petitioners Gelbard and Egan were found in contempt in separate, unrelated contempt hearings under 28 U.S.C. § 1826(a) (1970) (providing for an adjudication of civil contempt for refusing to comply, without just cause, with a court order to testify).

57. Petitioners relied on 18 U.S.C. § 2515 (1970) (general prohibition of illegal interceptions as evidence). 408 U.S. at 46.

58. The Court specifically refused to reach any constitutional issues of the fourth amendment or of Title III. The Court did not question whether an aggrieved person, under Title III, could move to exclude illegally seized wiretap evidence. 408 U.S. at 45, n.5.

59. *Id.* at 60.

60. *Id.* at 45.

61. See text accompanying notes 48-53 *supra*.

indictment suppression by defendants and potential defendants of interceptions in violation of Title III. The Court, however, in making clear the limitations of its opinion, noted that the only relevant legislative history plainly indicated that Congress did not intend the legislation to deviate from the holding of *Blue v. United States*, which allowed the admission of illegally seized evidence before a grand jury.[62] The Court speculated that the intentional omission of grand juries from the section providing for suppression was intended to preclude the possibility of defendants impeding the indictment issuing process through motions to suppress.[63]

Applicability of Title III to Berger

The *Gelbard* decision, in light of the Court's dicta pertaining to the legislative history of Title III, would seem to support the holding of the Supreme Court of Arizona in *Berger* if suppression were sought to be based on section 2518.[64] It is arguable, however, that neither *Gelbard* nor section 2518, construed with section 2515,[65] would support the supreme court's premature conclusion that it is without jurisdiction to issue an injunction. The power to issue an injunction to prevent impropriety on the part of a state prosecutor, although not similar to a motion to suppress, may ultimately act as a supression technique in preventing illegally seized evidence from being presented to the grand jury.

In *Berger*, the court acknowledged superior court jurisdiction to enjoin public officials from acting illegally.[66] Subsections 2511(1)(c-d)[67] of Title III forbid a person knowing or having reason to know of the illegality of a wiretap from the use or disclosure of such information. Consequently, if a prosecutor knowingly attempts to introduce evidence derived from an illegal interception, his conduct can be characterized as illegal or wrongful because of the specific prohibitions contained in subsections 2511(1)(c-d)[68] and section 2515.[69] This characterization of a prosecutor's conduct would seem to argue in favor of equitable jurisdiction in the superior court.

Consistent with traditional principles of equity, however, those Arizona cases which would permit injunctive relief against a public

62. 408 U.S. at 59, *citing* S. REP. No. 1097, 90th Cong., 2d Sess. 106 (1968).
63. 408 U.S. at 60.
64. 18 U.S.C. § 2518 (1970).
65. *Id.* § 2515. See note 57 *supra.*
66. 108 Ariz. at 250, 495 P.2d at 846. See text accompanying note 12 *supra.*
67. 18 U.S.C. § 2511(1)(c-d) (1970).
68. *Id.*
69. *Id.* § 2515.

officer require that the petitioner have no adequate remedy at law.[70] While it is arguable that there is no adequate remedy at law for the wrongful use of illegal evidence which results in an indictment, the argument is undercut by the availability of a subsequent remedy.

Illegal evidence presented to the grand jury can be effectively attacked at a pretrial hearing aimed at surpressing any illegally obtained evidence.[71] Under the Arizona Rules of Criminal Procedure, the defendant is given ample opportunity to suppress evidence at a pretrial omibus hearing.[72] To allow a preindictment injunction against suspected illegally seized evidence would result in fragmentation of the omnibus hearing and ultimately produce a duplication in expensive court procedures and an elongated pretrial time delay.

A second possible remedy against the wrong done by the introduction of illegally obtained evidence at a grand jury hearing is provided an aggrieved party by section 2520 of Title III.[73] This section allows for a civil cause of action to a victim against the perpetrator or user of an illegal interception.[74] A violation may entitle the victim to actual damages, punitive damages, court costs and attorney's fees.[75] On close analysis, a civil remedy against the illegal use of wiretap evidence cannot be deemed an adequate remedy at law as to prohibit the issuing of injunctive relief. To satisfy the prerequisites of an adequate remedy at law, relief must be immediate and the alternative aimed at correcting irreparable injury that stems from the introduction of illegal evidence. Civil litigation has several frustrating problems. First, this type of action is usually lengthy and provides no immediate relief. Secondly, the action will have no effect on the evidence presented at a criminal hearing. Finally, the success of civil action is further hampered by a good faith reliance on a court order or legislative authorization constituting a complete defense to any criminal[76] or civil action.[77] The nebulous effect of such civil action can be measured by the reliance of the *Wolf*[78] court on this type of civil contraceptive and its subsequent rejection by *Mapp*.[79]

Given the remedy of pretrial suppression, the apparent availability

70. *See* Hislop v. Rodgers, 54 Ariz. 101, 106, 92 P.2d 527, 530 (1939).
71. See text & notes 23-25 *supra*.
72. ARIZ. R. CRIM. P. 16.
73. 18 U.S.C. § 2520 (1970).
74. *Id.*; *see* Kinoy v. Mitchell, 331 F. Supp. 379 (S.D.N.Y. 1971) (civil cause of action stated both under 18 U.S.C. § 2520 and the fourth amendment against federal officers for illegal interception of wire or oral communications).
75. 18 U.S.C. § 2520 (1970).
76. *Id.* § 2511(1)(c-d) (1970) (providing for $10,000 fine or 5 years in prison or both).
77. *Id.* § 2520.
78. Wolf v. Colorado, 338 U.S. 25 (1949).
79. See text & notes 23-25 *supra*.

of a civil action against Title III violators, and the traditional judicial reluctance to interfere with grand jury proceedings, it would appear that a person aggrieved by an illegal wiretap is without a preindictment remedy. The interests of the aggrieved party before indictment, therefore, are protected only by the ethics of the prosecutor.[80] While it can be hoped that this is sufficient in most cases, an additional step can be taken to protect the aggrieved party from flagrant violations. It would seem advisable, by rule or statute, to require the prosecutor to respond to a preindictment allegation of the anticipated use of illegal wiretap evidence by producing the written authorization for the interception or, where appropriate, an affidavit indicating the prosecutor's belief that the interception was legally made without a written order.[81] This minimal demonstration of the propriety of an interception could be accomplished quickly, with little or no interruption of the grand jury proceedings, while at the same time serving to deter an overzealous prosecutor from the willful use of illegally obtained evidence.

Conclusion

In *State ex rel. Berger v. Meyers*,[82] the Supreme Court of Arizona, in dicta, stated that there is nothing to preclude the introduction of illegal wiretap evidence before a grand jury. Although the court did not discuss the possible effect of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 on the issue, it would appear that consideration of relevant sections of Title III would yield the same result. While preindictment suppression of illegally obtained evidence is not required to protect against the willful use of evidence derived from illegal interceptions at a subsequent trial, the supreme court by rule, or the legislature by statute, should require some minimal showing of the propriety of any interception.

80. Arizona's code of ethics provides for sanctions for bar members violating existing laws. CODE OF PROFESSIONAL RESPONSIBILITIES AND RULES OF THE SUPREME COURT, E.C. 7-2 (1971) (duty of lawyer, both to client and legal system, is to represent client within bounds of the law); *id.* at D.R. 7-102 (1971) (representing client within the bounds of the law). A county attorney, representing the state of Arizona, is bound to adhere to these rules and faces sanctions for his failure to do so. *Id.* at D.R. 7-103.

81. Such a procedure was suggested by Mr. Justice White in his concurring opinion in Gelbard v. United States, 408 U.S. 41, 69-70 (1972) (White, J., concurring). For a statute which satisfies this requirement see 18 U.S.C. § 3504(a)(1) (1970).

82. 108 Ariz. 248, 495 P.2d 844 (1972).

B. Admissibility of Other Crimes: The "Common Plan or Scheme" Exception

A basic tenet of Anglo-American jurisprudence is the principle that an accused shall stand trial only for the crime with which he is charged. From this doctrine extends a general rule excluding evidence of other misconduct to prove the guilt of an accused merely on the grounds that he has a "bad" character.[1] If, however, the evidence of the other acts establishes a specific element of the crime in question instead of merely showing that the defendant probably committed the crime because of his criminal character, the courts have created exceptions to the general exclusionary rule. In such circumstances the probative value is deemed sufficient to justify possible prejudice to the defendant.[2]

Legal commentators are not in complete accord regarding the number and uses of these exceptions. Most courts, however, admit evidence of other "bad acts" if that evidence establishes: (1) intent, (2) motive, (3) the absence of mistake or accident, (4) a common plan or scheme embracing the commission of two or more crimes, so related to each other that proof of one tends to establish the others, or (5) the identity of the person charged with the commission of the crime.[3] Determining when evidence falls under one of these exceptions is a difficult task. In *State v. Moore*,[4] the Supreme Court of Arizona was called upon to decide if evidence of other misconduct was admissible under either the common plan or scheme or the identity exception to the general rule.

Moore was charged with robbing a convenience market. At the trial, the prosecution was allowed, over defense objection, to introduce evidence that the defendant participated in the robbery of a service station 42 days after the robbery of the market. Evidence was also introduced showing that in both crimes a gun was used, that both robberies were "hit and run" type, with a getaway vehicle being used in both, and

1. Boyd v. United States, 142 U.S. 450, 458 (1892); Quen Guey v. State, 20 Ariz. 363, 181 P. 175 (1919); C. McCormick, Law of Evidence § 190, at 447 (2d E. Cleary ed. 1972); M. Udall, Arizona Law of Evidence § 115, at 227 (1960); 1 J. Wigmore, Evidence § 194, at 651 (3d ed. 1940).

2. *See generally* Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988 (1938).

3. Glasser v. U.S., 315 U.S. 60 (1942); State v. Hays, 17 Ariz. App. 202, 496 P.2d 628 (1972). Udall and McCormick also list: (1) impeachment, (2) completing the story of the crime, (3) specific sexual propensity, and (4) distinctive plan or device. C. McCormick, *supra* note 1, § 190, at 448-451; M. Udall, *supra* note 1, § 115, at 229-34.

4. 108 Ariz. 215, 495 P.2d 445 (1972).

that both robberies were timed so that no customers were present.[5] The state offered the evidence of the service station robbery under both the common plan or scheme and the identity exceptions to the general rule against admission of evidence of other bad acts.

In determining that the evidence did not fall under the common plan or scheme exception, the supreme court applied a "similarities" test previously formulated in *State v. Akins*.[6] Under this test, before evidence of other acts can be admitted, there must be similarities in the evidence of the other crime and the one charged "in those important aspects where normally there could be found differences."[7] The *Moore* court held that the similarities described by the state were not of such a nature, and they did not give rise to the likelihood of a plan of which the market robbery was a part.

The court also held the identity exception inapplicable. The circumstances surrounding the two robberies, including the amount of time between them, and the indistinctiveness of the *modus operandi* of the robberies rendered the evidence insufficint to prove a common identity of the perpetrators of the two crimes. The admission of the evidence was held to be prejudicial error.[8]

Since much confusion surrounds the common plan or scheme exception, this discussion will undertake an analysis of the exception by examining the treatment afforded it by three noted legal writers on the law of evidence. Their understanding of the exception's function and the tests that they would establish for evidence sought to be offered pursuant to it will be studied. The *Moore* decision will then be discussed to determine whether the court scrutinization of the evidence coincides with generally accepted legal principles.

Common Plan or Scheme: Three Writers' Views

There are three basic situations within the parameters of the common plan or scheme exception. The first occurs when the evidence offered is of other misconduct or acts which are not similar to the one charged. These non-similar acts may give rise to an inference of some larger plan of which the crime charged is either a part, or the consummation. In the second situation, related to the first, the evidence is

5. *Id.* at 217, 495 P.2d at 447.
6. 94 Ariz. 263, 267, 383 P.2d 180, 182-83 (1963).
7. *Id.*
8. 108 Ariz. at 218, 495 P.2d at 448. The conviction was also reversed on other grounds. One was the prejudicial introduction into evidence of a picture of the defendant, labeled "mug shot." *Id.* at 219, 495 P.2d at 449. The conduct of the prosecuting attorney at the trial was also held to be prejudicial. *Id.* at 222, 495 P.2d at 452.

of other misconduct similar to the act charged. This evidence also may create an inference of a larger plan conceived prior to the commission of either the crime in question or the crime of which evidence is sought to be introduced.[9] The third situation also involves evidence of other similar acts committed by the accused. While there may be a plan "common" to all of the acts in this last situation, the common nature of the plan lies in an unusual or distinctive methodology, and not in the fact that the acts are related because they are individual parts of some master plan.

McCormick and Udall label the first two situations "continuing scheme or plan."[10] Wigmore calls them "design or plan or system."[11] Implicit in the approach of all three writers is the precedent or prior contemplation element of the plan. The third type of situation is called the "distinctive plan or device" by McCormick and Udall.[12] There is no precedent dimension required in this situation. Wigmore has no "distinctive plan" approach per se. He covers the third situation by using evidence which the others would use to create a distinctive plan to directly show an element of the crime, such as identity, rather than creating a separate common plan exception.[13] For purposes of further discussion, the first two situations will be called the "larger plan" exception, and the third will be referred to as the "distinctive plan" exception. Many courts have confused the larger plan with the distinctive plan.[14] The difference between the two is the precedent contemplation dimension.

The writers also differ as to the various tests which they propose to determine whether the evidence falls under either the larger plan or distinctive plan situation. Evidence which is offered under McCormick's "continuing plan" exception must prove a "continuing plan or conspiracy of which the present crime is a part."[15] Under the same exception, Udall requires that the evidence must establish a plan which serves as

9. A plan of a crime which is conceived prior to its commission is simply a plan which has included all aspects of a particular crime. Such a plan accounts for contingencies of execution and also may include the commission of other crimes which would culminate in the crime in question. Therefore, a plan of prior contemplation simply means that the crime was the end product of a course of action formulated with exactly the crime in mind.

10. C. MCCORMICK, *supra* note 1, § 190, at 448; M. UDALL *supra* note 1, § 115, at 233.

11. 1 J. WIGMORE, *supra* note 1, § 102, at 534; 2 J. WIGMORE *supra* note 1, § 304, at 202.

12. C. MCCORMICK, *supra* note 1, at 449; M. UDALL *supra* note 1, § 115, at 234.

13. 2 J. WIGMORE, *supra* note 1, § 411, at 384-388; *see* Comment, *A Proposed Analytical Method for the Determination of the Admissibility of Evidence of Other Offenses in California*, 7 U.C.L.A.L. REV. 463, 473 (1960).

14. *See* Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecuting for Sexual Offenders*, 6 ARIZ. L. REV. 212, 228 (1964); Note, *Admissibility of Evidence of Previous Crime: Instructions to Jury*, 35 CALIF. L. REV. 136, 143 (1947).

15. C. MCCORMICK, *supra* note 1, § 190, at 448.

a link between the crime charged and the acts to be evidenced.[16] These tests, or requirements, are applicable whether similar or nonsimilar acts are being used to establish a larger plan. The important elements of Wigmore's "design or plan" exception in the situation where the acts to be proven are *not* similar to those charged, are: (1) the fixed or absolute quality of the design; that is, its subjection to no contingencies or conditions, and (2) its application, not merely to a class of acts indefinitely foreseen, but to the exact deed in question.[17] Where the acts to be admitted into evidence are similiar to the one charged, Wigmore demands that the evidence must show more than mere similarities. He states, much like the other writers, that the evidence must show "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations."[18] This general plan must be of precedent design.[19]

If evidence of similar crimes does not establish a larger plan, it still may be admissible under the distinctive plan exception. This exception is commonly used to establish the identity of the accused, when in question. Before such evidence is admissible under this exception, McCormick and Udall would require that there be an element or elements in the acts which are so "unusual" or "distinctive" as to be like a "signature."[20] Under his corresponding identity exception, Wigmore speaks of "common marks" which are to be found in acts which are committed by the same person. The higher the degree of "commonness" in the marks, the more likely the accused was implicated in both crimes.[21]

---

16. M. UDALL, *supra* note 1, § 115, at 233.
17. 1 J. WIGMORE, *supra* note 1, § 102, at 534-35.
18. 2 J. WIGMORE, *supra* note 1, § 304, at 204.
19. *See* note 9 *supra.*
20. C. MCCORMICK, *supra* note 1, § 190, at 449; M. UDALL *supra* note 1, § 115, at 233.
21. 2 J. WIGMORE, *supra* note 1, § 411, at 385; The writers differ in their analyses of the use of the larger plan situation. McCormick and Udall would admit evidence of such a plan only if it establishes a disputed material element of the crime charged, such as intent, identity, or motive, or guilty knowledge. C. MCCORMICK, *supra* note 1, § 119, at 449; M. UDALL, *supra* note 1, § 115, at 233. Wigmore would allow evidence of a larger plan when the "very doing of the act charged is still to be proved." 2 J. WIGMORE, *supra* note 1, § 304, at 202.

Similar confusion surrounds the use of the distinctive plan exception. McCormick and Udall do not make it clear where they would use it. They appear to use it chiefly to establish the element of identity. Udall states that it is to be used when the accused denies his guilt. C. MCCORMICK, *supra* note 1, at 449, 451; M. UDALL, *supra* note 1, at 234-35. When faced with a fact situation where the other writers would prove a distinctive plan in order to prove an element of the crime, Wigmore would directly prove the element itself, such as identity. *See* note 13 *supra. See also* State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960), where Arizona adopted the "double inference" test where the crime itself was in question. In that case the defendant denied the commission of the crime (selling narcotics). This case particularly lends itself to the Wigmore analysis because the only evidence that the crime had been committed was the testimony of a police informer. The test set up by the court in *Little* was the "double inference" test. According to this test, the evidence of other

From an examination of the writers' analyses of the common plan or scheme exception it is clear that there are several facets to an understanding of that exception's proper role. While under both the larger plan and the distinctive plan the acts sought to be introduced and the acts charged have something in common with each other, only the larger plan has the precedent contemplation of a plan inherent in it. It is suggested that the existence of a preconceived plan is the vital element which provides the link between other crimes (similar and nonsimilar) and the crime charged, and therefore is the rationale for admitting evidence of other crimes. The distinctive plan exception provides a link between two or more seemingly unrelated acts by showing that the person who committed one of the acts probably was involved in the others. In such circumstances the connection between the acts is also the essential element in proving the specific crime charged. Evidence which shows that there was a distinctive device, or *modus operandi* which is personal to the accused will be admitted to establish his identity. A common *modus operandi* is relevant only in so far as it is connected with the accused. In *Moore* the identity of the defendant was in issue, and both the larger plan and the distinctive plan exceptions were examined by the court.

Moore: A Plan Neither "Large" Nor "Distinct"

The element in dispute in *Moore* was the identity of the robber of the convenience market. The state introduced evidence of the service station robbery and attempted to defend its admissibility on two grounds. The first contention was that the evidence was admissible because it tended to establish that there was a common plan or scheme of which both robberies were a part. The state contended once this plan was established, and the accused connected with one of them his identity as a participant in the second could be inferred. The second argument advanced by the state was that even in the absence of an overall plan, there were sufficient similarities in the two crimes to infer that the person who committed one of the acts also perpetrated the other. The court rejected both of these arguments.

The test employed by the court in *Moore* to determine whether the evidence was admissible unded the larger plan exception, the *Akins* test,[22] is similar to those proposed by Wigmore, McCormick and Udall.

acts must first provide an inference of the existence of a plan, and second, the crime charged must be part of that plan. Here none of the traditional elements of a crime itself is in question and the test formulated is specifically for that situation. 2 J. WIGMORE, *supra* note 1, § 304, at 202.

22. See text & notes 6-7 *supra.*

There was, however, one additional component. The acts sought to be introduced by the state were similiar in nature to the crime charged. The court held that before these similar acts would be admissible it must be demonstrated that the similarities are those that do not normally exist. The court found that the acts did not fit his criterion.

It is important to note that the finding of such unexpected similarities is only the first element of a two part test. The second, and most important, is that the similarities must point to an overall plan of which the crime charged is a part. The court emphasized this second element by stating that before evidence can be admitted under the common plan or scheme exception the court must use "the utmost caution and that the court must perceive a visual connection and in case any doubt is entertained, it is to be resolved in favor of defendant."[23] The visual connection referred to by the court would have been the preconceived plan to commit both robberies, had such a plan been found to exist. By articulating this second part of the larger plan test, when in fact the evidence had failed the first part, the court stressed the point that more than mere unexpected similarities are required before evidence of other bad acts will be permitted to show a larger plan.

The court also considered whether the evidence was admissible to show identity by demonstrating the existence of a distinctive plan. Since there are different standards applied to the larger plan and distinctive plan exceptions, evidence which is not admissible under one exception may nevertheless be admitted under the other.[24] The court apparently used the distinctive plan test of McCormick and Udall. This test, which involves unusual and distinctive devices and similar *modus operandi,* is very much like the first element of the *Akins* test, the unexpected similarities. Had the court been able to find that the service station and market robberies contained certain elements of a unique *modus operandi* which linked the accused to both crimes, such evidence would have been admissible. It was determined, however, that the similarities in the two crimes did not warrant such a conclusion.

Conclusion

The Supreme Court of Arizona correctly found that the evidence presented in *State v. Moore* was not admissible under either the larger plan or distinctive plan exceptions. In doing so, it recognized the need to protect defendants from being prejudiced, and possibly convicted,

23. 108 Ariz. at 218, 495 P.2d at 448.
24. 2 J. WIGMORE, *supra* note 1, § 237, at 32.

because of the implications arising out of the introduction of evidence of other crimes. Mere similarities between the acts sought to be introduced and the crime charged are not sufficient to satisfy the larger plan exception unless they tend to establish a preconceived plan which resulted in the commission of the crime charged. Under the corresponding distinctive plan exception, the similarities should be so unique that there should be little doubt but that the same person committed both acts. Such judicial scrutiny should be scrupulously carried out at the trial level to avoid prejudice to the defendant by the admission of evidence of acts not related to the crime for which he is being tried.

VI. LABOR LAW

A. PUBLIC EMPLOYEE LABOR RELATIONS IN ARIZONA

In recent years, federal, state and local government employment has expanded tremendously to provide additional and improved public services.[1] Accompanying this increase has been the dynamic emergence of public employee unionism.[2] To deal with this phenomenon 40 states and the federal government have enacted measures providing procedures for collective bargaining by public employees.[3] Arizona has not done so.[4]

Some of the policy issues involved in public employment labor relations came under judicial examination as a matter of first impression in Arizona in two cases decided by the Court of Appeals of Arizona in 1972. *Board of Education v. Scottsdale Education Association*[5] arose out of an employment agreement voluntarily executed in August, 1971, by the Boards of Education of Scottsdale High School District and Scottsdale Elementary School District (collectively hereinafter referred to as the Board) with the Scottsdale Education Association (SEA), the teachers' union. When the parties were unable to reach an accord during salary negotiations for 1972, the Board disavowed the entire 1971 agreement. The effect of this action was to avoid the impasse procedure contained in the earlier agreement. SEA brought a special action in superior court to compel the Board to comply with the 1971 agreement[6] and the court issued an injunction requiring the Board to implement the designated impasse procedure.[7]

The court of appeals reversed the trial court and quashed the injunction.[8] After first recognizing the right of public employees to

1. Barrett, *Governmental Response to Public Employee Unionism and Recognition of Employee Rights: Trends and Alternatives for Resolving Issues*, 51 ORE. L. REV. 113 (1971).
2. Edwards, *The Developing Labor Relations in the Public Sector*, 10 DUQUESNE L. REV. 357 (1972). If the highly organized public school teachers are statistically excluded, more than one-third of all full time employees of states, counties, school districts and other local subdivisions are organized into major unions, as compared with less than 30 per cent of the non-agricultural workers in the private sector. Furthermore, organization among public employees is increasing at a rapid rate while union membership in private industry has been declining relative to total employment. *Id.*
3. *See* text & notes 23-29 *infra.*
4. *See* note 28 *infra.*
5. 17 Ariz. App. 504, 498 P.2d 578 (1972).
6. *Id.* at 507, 498 P.2d at 581.
7. *Id.* at 506, 498 P.2d at 580.
8. *Id.* at 512, 498 P.2d at 586.

organize, the court of appeals considered the legality of a public entity entering into a binding collective bargaining agreement.[9] The court determined that the statutorily expressed "power to hire teachers, fix their salaries and to control the operation of the school district," only authorized the Board to engage in collective bargaining where such bargaining was limited to the Board voluntarily meeting and consulting with either an individual teacher or some designated representative.[10] The court refused to allow the Board to enter into a binding collective bargaining agreement as it is commonly known in the private sector on the ground that this would constitute an invalid delegation of legislative authority.[11] It thus concluded that the 1971 agreement was an invalid delegation of the authority to manage and control and was therefore void.[12] Although this decision could have been an expansive statement against application of collective bargaining to the public sector in the absence of legislation, the court significantly limited its holding. It stated that the opinion should not be taken as a limitation on the Board's power to promulgate rules and regulations[13] which, in effect, could embrace "many" of the provisions contained in the 1971 agreement. Furthermore, it announced that the opinion should not be construed to limit the power of the Board to enter into a written contract where the terms were reached by voluntary meetings and consultation with a representative of the teachers as long as these terms were within the statutory authority of the Board and could be included in a standard contract with an individual teacher.[14]

The other court of appeals case concerning public employee labor relations was *Communications Workers of America v. Arizona Board of Regents*.[15] Subsequent to the repeated refusal of the Board of Regents to recognize the Communications Workers of America as the collective bargaining representative for the physical plant employees at Northern Arizona University, a strike was called and picket lines were established at the main entrances of the University.[16] The Board

9. *Id.* at 508, 498 P.2d at 582.

10. *Id.* (referring to ARIZ. REV. STAT. ANN. § 15-443(A) (Supp. 1972-73), which provides in pertinent part that: "[t]he board of trustees may . . . enter into contracts with and fix the salaries of teachers . . . for the succeeding year. The contracts of all certified employees shall be writing . . . .") The court also cited ARIZ. REV. STAT. ANN. § 15-441(A) (Supp. 1972-73), which empowers the board to "prescribe and enforce rules for the government of the school . . . ."

11. 17 Ariz. App. at 510, 498 P.2d at 584.

12. *Id.* at 511-12, 498 P.2d at 585-86.

13. ARIZ. REV. STAT. ANN. § 15-441 (Supp. 1972-73).

14. 17 Ariz. App. at 512, 498 P.2d at 586.

15. 17 Ariz. App. 398, 498 P.2d 472 (1972).

16. 17 Ariz. App. at 399, 498 P.2d at 473. Because of the strike a large number of the day-to-day maintenance and sanitation requirements of the University were not attended to. Although all the entrances were not picketed, workers on construction projects in progress on the campus honored the picket lines. *Id.*

of Regents promptly obtained a temporary restraining order and eventually obtained a permanent injunction.[17] In affirming the issuance of the injunction, the court examined the relevant statutes and concluded that the legislature had conferred on the Board of Regents the responsibility to hire, fire and determine salaries of certain employees.[18] This legislative mandate, the court reasoned, prohibited the Board of Regents from entering into a binding contract with an employees' union that would deprive it of the absolute power to make the decisions necessary to carry out the above responsibilities.[19] Therefore, it held that the Board of Regents could not be compelled to recognize an employees' union for collective bargaining purposes without specific legislative authorization.[20] As a consequence of these statements, the court of appeals also denied the appellant union the right to strike, the right to picket, and the right to invoke Arizona's "Little Norris-LaGuardia Act" which prohibits injunctions in certain labor disputes.[21]

Focusing on the issues in *Scottsdale Education Association* and *Communications Workers of America,* this casenote will analyze public sector labor relations at the federal and state level particularly in regard to collective bargaining. An analysis of the state of the law in Arizona as well as suggestions for future steps in public labor relations will also be made.

Collective Bargaining in the Public Sector

Because of the apparent success of traditional collective bargaining for private sector employees, this system has been increasingly attractive to public employees. Aside from seeking economic benefits through collective strength, public employees also seek the negotiation process to provide them with the chance to participate in matters significantly affecting their own welfare and status.[22] Many govern-

17. *Id.*

18. ARIZ. REV. STAT. ANN. § 15-725(A) (Supp. 1972-73).

19. 17 Ariz. App. at 400, 498 P.2d at 474. The court of appeals made this ruling with the acknowledgment that "[t]he Constitution and the statutes do not expressly authorize the Board of Regents to recognize and bargain with unions, nor do they expressly prohibit such action." *Id.*

20. *Id.* at 401, 498 P.2d at 475. Unlike the decision in *Scottsdale Education Association,* the court in *Communications Workers of America* expressly refrained from stating an opinion on whether the Board of Regents could voluntarily meet and confer with a labor union. *Id.*

21. *Id.* at 400-1, 498 P.2d at 474-75.

22. Morris, *Public Policy and the Law Relating to Collective Bargaining in the Public Service,* 22 S.W.L.J. 585, 594 (1968). In *Scottsdale Education Association* the court expressed a willingness to permit limited "collective bargaining" which would involve no more than the Board meeting and consulting with a representative of the teachers on proposed contractual provisions. 17 Ariz. App. at 508-10, 498 P.2d at 582-84. For purposes of this discussion, however, the terminology "collective bargaining" shall mean the process of negotiation between a union, representing a ma-

mental bodies have acquiesced in their employees' desires by providing by legislation or otherwise for collective bargaining.

Asserting authorization from the enabling clause of the Civil Service Acts, the presidential power to regulate the conduct of employees, and the general power of the executive office, President Kennedy promulgated Executive Order No. 10,988 in 1962.[23] The order gave federal employees the right to organize and gain exclusive recognition for their representatives. It also required federal agencies to meet and confer with employee organizations on issues not specifically excluded by law and suggested that final written agreements result. In 1969, President Nixon issued Executive Order No. 11,491,[24] to continue the protections of the Kennedy order, but at the same time formalized the negotiation and impasse procedures and established a central authority to administer the program rather than the individual agency approach of the Kennedy order.[25] Both of the orders were based on the thesis that public employment policies in the federal sector should adapt to the concept of collective bargaining.[26] Since more than half of all federal employees are presently represented in negotiations by labor organizations, this thesis appears to have been realized. Without any specific legislative authorization, these negotiations have resulted in the consummation of nearly 1,400 basic labor management agreements and a substantial number of supplemental agreements.[27]

---

jority of the employees in a bargaining unit, and management concerning wages, hours, working conditions and grievances, with the results of the negotiations eventually being incorporated in a binding written agreement. See Cornell, *Collective Bargaining by Public Employee Groups*, 107 U. PA. L. REV. 43 (1958).

23. 3 C.F.R. 521 (1959-63 Compilation). The federal government had historically disregarded employee organizations by asserting the sovereignty theory. *See* text & note 41 *supra*. This attitude changed abruptly, however, when President Kennedy appointed a special committee to study public employee relations. The committee consisted primarily of strong labor supporters such as Secretary of Labor Arthur Goldberg, his Undersecretary Willard Wirtz and Theodore Sorenson. *See* Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 460-61 (1971). From this committee's final report came the basis for the Executive Order. The basic thrust of the report was that it was neither possible nor desirable to transfer the entire private sector experience with collective bargaining into the sphere of public employment, but rather to extend the best existing policies which could be applied to public labor relations. Matthews, *Federal Labor Relations: A Program In Transition*, 21 CATH. U.L. REV. 512, 517-18 (1972).

24. 3 C.F.R. 191 (1969 Compilation). A study committee appointed by President Nixon in 1969 reported that the 1962 order had produced excellent results for both agencies and employees. The report noted that substantial accomplishments and improved personnel policies and working conditions had been achieved in a number of areas. Rosenblum & Steinbach, *Federal Employee Labor Relations: From the "Gag Rule" to Executive Order 11,491*, 59 KY. L.J. 833, 846 (1971).

25. Exec. Order No. 11,491, 3 C.F.R. 191 (1969 Compilation); *id.* Sec. 4 (Federal Labor Relations Council); *id.* Sec. 5 (Federal Service Impasses Panel); *id.* Sec. 6 (Assistant Secretary of Labor for Labor-Management Relations).

26. Hampton, *Federal Labor-Management Relations: A Program in Evolution*, 21 CATH. U.L. REV. 493, 495 (1972).

27. *See* Rosenblum & Steinbach, *supra* note 24, at 845.

State legislative action specifically directed toward public employee labor relations was insignificant prior to 1962. Since that year, however, primarily on the impetus of the Kennedy order,[28] 40 states have enacted legislation authorizing some form of collective bargaining procedures by public employees.[29] Of these states, 25 have mandatory provisions either requiring the political subdivision to "meet and consult" or providing for stronger collective bargaining relationships. The remaining 15 states have statutes which are either permissive in nature or provide merely for the right of association and submission of proposals.[30]

Although an improvement, the overall effect of state legislative activity in this area has not proved to be a panacea for public employees. Of those states with some form of legislation, only half make it applicable to all public employees. The remaining 20 states limit the statutory coverage to only certain groups.[31] This limitation, along with a failure to incorporate efficient and effective negotiation and impasse procedures, has diminished the success of these enactments. The less than satisfactory legislation in those states adopting some form of collective bargaining laws is evidenced by the fact that public employee strikes have occurred in at least 35 states in the last decade with at least as many strikes occurring in states with collective bargaining laws as in states without such laws.[32]

In the absence of legislation specifically directed toward public employees, most state courts have been reluctant to permit collective bargaining in the public sector.[33] Despite the absence of any authorizing legislation, however, many governmental entities are engaging in de facto collective bargaining which is producing agreements that

28. Dupont & Tobin, *Teacher Negotiations into the Seventies*, 12 WM. & MARY L. REV. 711, 715 (1971). *But see* Board of Educ. v. Scottsdale Educ. Ass'n, 17 Ariz. App. 504, 511, 498 P.2d 578, 585 (1972). "There is no question that Arizona has no such legislation in the context of public employee collective bargaining agreements." *Id.*

29. REPORT OF THE TASK FORCE ON STATE AND LOCAL GOVERNMENT LABOR RELATIONS, NATIONAL GOVERNORS' CONFERENCE 5 (1970 Supp.).

30. *Id.*

31. *Id.* Adequate coverage of state legislation concerning public employee labor relations is beyond the scope of this discussion. There are a number of sources that cover the area in a detailed manner. *See generally id.* (1967 ed. thru 1970 Supp.); H. ROBERTS, LABOR-MANAGEMENT RELATIONS IN THE PUBLIC SERVICE 192 (1970).

32. Anderson, *Public Employee Collective Bargaining: The Changing of the Establishment*, 7 WAKE FOREST L. REV. 175, 177 (1971).

33. *See* note 36 *infra*. Professor Cornell has also observed that few of the recorded cases dealing with this area have had the main subject of public sector collective bargaining placed directly before the deciding courts. Collective bargaining has usually been a secondary consideration and judicial statements on that subject have often been in the nature of dicta. Cornell, *Collective Bargaining By Public Employee Groups*, 107 U. PA. L. REV. 43, 63 (1958).

This same observation may be applicable to both the *Scottsdale Education Association* and *Communications Workers of America* decisions. In *Scottsdale Education Association* the issue before the court of appeals was the 1971 agreement, which the

have all the appearances of traditional bargaining agreements.[34] The 1971 agreement at issue in *Scottsdale Education Association* was the result of de facto collective bargaining since it was promulgated without specific legislative authorization.[35] When such agreements reach the courts, employee organizations frequently contend that the power to conduct the bargaining process is implied within the powers to hire and fix salaries expressly granted to the governmental unit. A majority of courts have refused to accept this contention.[36]

The basis for the reluctance of most state courts to allow collective bargaining in the public sector can be attributed to either of two legal doctrines. The first and one of the most frequently imposed limitations on collective bargaining in the public sector developed from the theory of sovereignty of power.[37] Because collective bargaining challenges the exclusive authority of the sovereign to govern the terms and conditions of employment of its employees, it is per se illegal to attempt to force collective bargaining on a public employer according to the sovereignty theory.[38] The notion of sovereignty has been thus invoked by the

---

parties had voluntarily negotiated. Instead of any analysis of the specific agreement, the court discussed its interpretation of collective bargaining in general and thereby declared the agreement void. In *Communications Workers of America*, the basic issue presented was whether the Board of Regents could be legally compelled to bargain with a union. The court, however, broadened the scope of the discussion and prohibited the Board of Regents from entering a collective bargaining agreement concerning the terms and conditions of employment.

34. Miller, *The Alice-in-Wonderland World of Public Employee Bargaining*, 50 CHI. B. REC. 223, 229 (1969). *See* REPORT OF THE TASK FORCE ON STATE AND LOCAL GOVERNMENT LABOR RELATIONS, NATIONAL GOVERNORS' CONFERENCE 29 (1967 ed.).

35. 17 Ariz. App. at 507, 498 P.2d at 581. It seems likely that similar agreements have been implemented in other school districts, municipalities and governmental bodies. Furthermore, where collective bargaining relationships have not developed, they will quite probably develop in the near future in response to ad hoc displays of strike power as well as to political expediency. Morris, *supra* note 22, at 593.

36. *See* New Jersey Turnpike Authority v. American Fed'n of State, County & Municipal Employees, Local 1511, 83 N.J. Super. 389, 395, 200 A.2d 134, 139 (1964); *cf.* Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 296, 168 P.2d 741, 745 (1946).

37. The general attitude held under the theory of sovereignty can effectively be presented by an excerpt from an oft-quoted letter that President Franklin D. Roosevelt wrote to the head of a public employee union in 1936:

> All government employees should realize that the process of collective bargaining as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.

City of Springfield v. Clouse, 356 Mo. 1239, 1247, 206 S.W.2d 539, 542-43 (1947).

38. *See* Morris, *supra* note 22, at 598. The sovereignty of the employer is not an argument peculiar to the public sector. In an attempt to prevent collective bargaining in the private sector, this theory was vigorously asserted in the 1800's, but was discarded early as merely a make-weight argument for anti-unionism. In *The Case of the Twenty Journeyman Tailors*, People v. Faulkner, N.Y. (1836), a judge observed

courts and employers in the public sector primarily because of a fear that collective bargaining will infringe on the prerogatives of management, and thereby weaken the authority of the government.[39]

Inherent in the concept of sovereignty, however, is the ability of the state to elect to surrender some of its sovereign power. Participation in the bargaining process would constitute such a surrender.[40] Such participation is often limited, however, by the doctrine of illegal delegation of power, a sub-category of the sovereignty theory.[41] Indeed, many courts rely upon the delegation of power theory to prohibit collective bargaining in the public sector.[42] The reasoning in most cases is that the powers involved in public employer-employee relationships were legislatively created in the designated governmental entity and that that body had no right to delegate these powers. The establishment of collective bargaining agreements is considered a delegation of powers because it removes from a governmental body the legislatively granted power over its employees and vests that control, at least in part, in a private organization—a union.[43] Many courts, including the court in *Scottsdale Education Association*,[44] have found that, although the exercise of this legislative power may conceivably permit the establishment of a "meet and confer" type of relationship,

---

that if collective bargaining in the private sector were "tolerated, the constitutional control over our affairs would pass away from the people at large and become vested in the hands of conspirators. We should have a new system of government, and our rights [would] be placed at the disposal of a voluntary and self-constituted association." Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1109 (1969).

39. M. MOSKOW, J. LOEWENBERG & E. KOZIARA, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 18 (1970). *But see* Anderson Fed'n of Teachers v. School City of Anderson, 252 Ind. 558, 564, 251 N.E.2d 15, 19 (1969) (DeBruler, C.J., dissenting). "This assumes an old-fashioned, out-dated view of the purpose and value of collective bargaining." *Id.*

40. Anderson, *Recent Developments Involving Public Employee Organization and Bargaining*, in PUBLIC EMPLOYEE ORGANIZATION AND BARGAINING 24 (H. Anderson ed. 1968); M. MOSKOW, J. LOEWENBERG & E. KOZIARA, *supra* note 39, at 18.

41. Wellington & Winter, *supra* note 38, at 1109.

42. One of the most important steps in any collective bargaining process occurs when an employee's union gains exclusive recognition as the bargaining agent for the employees. Yet, exclusive recognition has proved to be a major theoretical barrier to judicial acceptance of the collective bargaining process in the public sector. Until recently, many courts ruled that it was an abuse of discretion for a public employer to grant exclusive recognition, without legislative authorization, to an employee representative who was not supported by all the employees of a unit. *See* Philadelphia Teachers' Ass'n v. Labrum, 415 Pa. 212, 203 A.2d 34 (1964); Mugford v. Mayor & City Council of Baltimore, 185 Md. 266, 44 A.2d 745 (1945). Most of the recent cases that have approved voluntary collective bargaining have accepted exclusive recognition of a representative if at least a majority of the employees in a unit support the representative. *See* Chicago Div. of Ill. Educ. Ass'n v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authority*, 54 IOWA L. REV. 539, 548-49 (1969). Neither of the two Arizona court of appeals decisions under consideration in this casenote dealt with the question of the propriety of exclusive recognition because the courts disposed of the cases on narrower grounds without reaching that issue.

43. Fellows v. LaTronica, 151 Colo. 300, 305, 377 P.2d 547, 550 (1962).

44. 17 Ariz. App. at 510, 498 P.2d at 584.

the ultimate responsibility for the determination of wages, hours and working conditions must remain within the discretion of the governmental employer and may not be abdicated by contract.[45]

Although this may be a majority view, a contrary position is conceivable. At least one court has observed that the proper judicial analysis of implied powers should be that specific legislation is necessary to prevent collective bargaining in the public sector, rather than the need for specific legislation to authorize bargaining.[46] Additionally, one commentator has observed that specific legislation authorizing collective bargaining is not necessary if the governmental unit has been granted power to contract, from which the power to execute a collective bargaining agreement may be implied.[47] If either of these minority positions were adopted and it was accepted that a political subdivision could validly engage in collective bargaining even in the absence of specific legislation, then there would appear to be no reason why each subdivision could not voluntarily enter into negotiations culminating in a binding contract without judicial interference.[48] It would not follow, however, that a court should compel a governmental body to bargain and to reach agreement with a union representative.[49]

Arizona Public Employment Labor Relations

Because the *Scottsdale Education Association* and the *Communications Workers of America* decisions are sui generis, they are the

45. Fellows v. LaTronica, 151 Colo. 300, 306, 377 P.2d 547, 551 (1962); *accord*, Newport News Firefighters Ass'n, Local 794 v. City of Newport News, 339 F. Supp. 13 (E.D. Va. 1972); Wichita Pub. Schools Employees Union, Local 513 v. Smith, 194 Kan. 2, 397 P.2d 357 (1964); Mugford v. Mayor & City Council of Baltimore, 185 Md. 266, 44 A.2d 745 (1946); Minneapolis Fed'n of Teachers, Local 59 v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358 (1966).

46. Chicago Div. of Ill. Educ. Ass'n v. Board of Educ., 76 Ill. App. 2d 456, 460, 222 N.E.2d 243, 248 (1968).

47. *See* Dole, *supra* note 38, at 544. Under Arizona law, the Board of Regents, school boards and municipal corporations all have the general power to contract. ARIZ. REV. STAT. ANN. § 15-724 (1956); ARIZ. REV. STAT. ANN. § 15-443 (Supp. 1972-73). In Local 266, International Bhd. of Elec. Workers v. Salt River Project Agricultural Improvement & Power Dist., 78 Ariz. 30, 275 P.2d 393 (1954), the Supreme Court of Arizona stated: "That such a municipal corporation may enter into binding legal contracts is beyond dispute." *Id.* at 39, 275 P.2d at 399. *See also* Tolleson Union High School Dist. v. Kincaid, 53 Ariz. 60, 85 P.2d 708 (1938).

48. Norwalk Teachers' Ass'n v. Board of Educ. of the City of Norwalk, 138 Conn. 269, 83 A.2d 482 (1951); *cf.* Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 168 P.2d 741 (1946).

49. The important issue of *Communications Workers of America* was whether the Board of Regents could be compelled to recognize and bargain with a union and the court answered the question in the negative. 17 Ariz. App. at 401, 498 P.2d at 475. The court's response followed the general attitude of courts in other jurisdictions that have refused to compel a governmental body to engage in collective bargaining in the absence of specific authorizing legislation. *See* Newport News Firefighters Ass'n, Local 794 v. City of Newport News, 339 F. Supp. 13 (E.D. Va. 1972); Norwalk Teachers' Ass'n v. Board of Educ. of the City of Norwalk, 138 Conn. 269, 83 A.2d 482 (1951); American Fed'n of State, County & Municipal Employees v. City of Keene, 108 N.H. 68, 227 A.2d 602 (1967).

primary guideposts in an analysis of public sector labor relations in Arizona. The Court of Appeals of Arizona, without any true guidance from either the legislature[50] or the state supreme court, followed the example of a majority of other jurisdictions by recognizing the right of public employees to organize but restricting collective bargaining in the public sector. The court found that Arizona public employees may be able to meet and confer with their respective employers. Political subdivisions and their employees, however, cannot enter into binding collective bargaining agreements, at least as they are known in the private sector, unless the legislative branch implements effective legislation. The *Communications Workers of America* decision also emphasized this need for legislation before a political subdivision could be compelled to meet with employees' representatives. Although it is apparent that labor contracts similar to the private sector are still being made, the result of the two court of appeals decisions is that those agreements lack any legal effect if they become disputed.

The answer to this dilemma between the de jure and de facto inconsistencies of public sector collective bargaining agreements is comprehensive and realistic legislation that produces fair and efficient labor relations. The determination of the particular procedures must come from the state legislature, which should establish its own particular procedures to meet the peculiar problems of collective bargaining in the public sector. Until comprehensive legislation becomes a reality, the burden rests with the courts to maintain some semblance of peaceful labor relations within governmental operations.

Conclusion

Because the courts presently have the primary responsibility in maintaining public employment labor relations in a relatively peaceful state, they must carry out their task in an enlightened manner. Courts that have emphatically refused to accept collective bargaining in the public sector have seen the concept as it is normally conceived in private industry. The fear of the bargaining process is centered on the implication that any assimilation of collective bargaining would mean full use of the strike, binding arbitration and other concepts that have been used in the private sector. There is the further implication that there will exist two bargaining entities of equal stature and unlimited powers of contract, which is not permissible or possible in the public domain.[51] Such a complete assimilation from the field of pri-

50. Board of Educ. v. Scottsdale Educ. Ass'n, 17 Ariz. App. 504, 511, 498 P.2d 578, 585 (1972).

51. State Bd. of Regents v. United Packing House Food & Allied Workers, Local

vate labor law seems neither necessary nor desirable. The policies and practices that collectively make up the labor-management relations in the private sector are a product of many years of American labor history. These policies and practices have developed and evolved to solve the special problems of private industry.[52] It would probably be a grave mistake to apply the total concept of collective bargaining to the public sector. It would also, however, be a mistake to totally deny some form of collective bargaining in the public sector merely because the entire process should not be assimilated. Many of the ideals and accomplishments of collective bargaining in the private sector are desirable for public employee labor relations. The collective bargaining process can claim the major role in establishing relative industrial peace, industrial democracy and effective political representation of a cohesive group.[53] The answer to the dilemma in the public sector is a statutory system that incorporates the positive aspects of the private sector experiences while recognizing the special needs of effective government.

125, 175 N.W.2d 110 (Iowa 1970); Wichita Pub. Schools Employees Union, Local 513 v. Smith, 194 Kan. 2, 5, 397 P.2d 357, 359 (1964); Civil Service Forum v. New York City Transit Authority, 4 A.D.2d 117, 163 N.Y.S.2d 476 (1957).

52. See Hampton, *supra* note 26, at 496.

53. Wellington & Winter, *supra* note 38, at 1114-17.

VII. PROPERTY

A. JUDICIAL REVIEW IN EMINENT DOMAIN PROCEEDINGS

You spend the first part of your life working for the land, and the rest of your life trying to keep it.[1]

Neither tax burdens nor urban encroachment motivated this statement by a California rancher. He was referring to the awesome power of eminent domain with which he had been confronted on four separate occasions. His experience is not unique. It is estimated that federal and federally assisted programs alone condemned in excess of 17 million acres during the decade ending in 1971. Hundreds of thousands of property owners were affected by these proceedings.[2]

The recent case of *Citizens Utilities Water Co. v. Superior Court*[3] provided an occasion for the Supreme Court of Arizona to re-evaluate the permissible scope of the power of eminent domain. In *Citizens* the city of Tucson had instituted an action to condemn all of Citizens' property in Pima County. The condemnation of property which was within the city, serving city residents, or connected to city facilities was not contested by the company. At issue was the city's right to take the company's facilities lying wholly outside its boundaries and which were not serving its residents. The trial court held that this property could be condemned by the city.[4] In a special action[5] the Supreme Court of Arizona affirmed the trial court's reasoning that the condemnation met the Arizona constitutional requirement[6] that property be taken only for a public use. Whether the taking was necessary was deemed to be a legislative decision and not judicially reviewable in the absence of fraud or arbitrariness. General statutory limitations[7]

---

1. McIntire, *"Necessity" in Condemnation Cases—Who Speaks for the People?*, 22 HASTINGS L.J. 561, 570 (1971).

2. STAFF OF HOUSE COMM. ON PUB. WORKS, SELECTED SUBCOMMITTEE ON REAL PROPERTY ACQUISITION, 88TH CONG., 2D SESS., STUDY OF COMPENSATION & ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL & FEDERALLY ASSISTED PROGRAMS 10-12 (Comm. Print 1965), *cited in* Hulen, *Abusive Exercise of the Power of Eminent Domain-Taking a Look at What the Taker Took*, 44 WASH. L. REV. 201 n.16 (1968).

3. 108 Ariz. 296, 497 P.2d 55, *cert. denied*, 409 U.S. 1022 (1972).

4. 108 Ariz. at 299, 497 P.2d at 56.

5. The special action in Arizona takes the place of the common law extraordinary writs of certiorari, mandamus and prohibition. ARIZ R. P. SPECIAL ACTIONS 1.

6. ARIZ. CONST. art. 2, § 17.

7. ARIZ. REV. STAT. ANN. § 12-1112 (1956).

on the exercise of the eminent domain power were held to be inapplicable in this case.

Two issues, the scope of public use and the necessity of the taking, formed the crux of the litigation in *Citizens*. This casenote will evaluate the definition accorded by the court to the term public use and the significance it has in eminent domain proceedings. Secondly, the soundness of the court's determination that necessity is not normally a justiciable issue will be reviewed.

Public Use

Eminent domain is the power to take private property for public use without the owner's consent.[8] This power is inherent in every sovereign government,[9] and constitutional provisions dealing with the scope of eminent domain, therefore, are not grants of the power, but rather limitations on its exercise.[10] The power of eminent domain is not inherent, however, in a state's political or administrative subdivisions. It is acquired by these entities only through specific legislative delegation.[11] Such conditions and restrictions as are deemed necessary may be imposed on the exercise of this delegated power.[12]

It is widely recognized that property may be condemned only for a public use,[13] condemnation for private use generally being a violation of due process.[14] The general prohibition against condemnation for private use is embodied in the Arizona Constitution,[15] as is the

8. United States v. 4,450.72 Acres of Land, 27 F. Supp. 167, 172 (D. Minn. 1939), *aff'd sub nom.*, Minnesota v. United States, 125 F.2d 636 (8th Cir. 1942); *In re* Forsstrom, 44 Ariz. 472, 479, 38 P.2d 878, 881-82 (1934), *overruled on other grounds,* County of Mohave v. Chamberlin, 78 Ariz. 422, 281 P.2d 128 (1955) *and* State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960).

9. *See, e.g.*, Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924); United States v. Jones, 109 U.S. 513, 518 (1883); *In re* Forsstrom, 44 Ariz. 472, 479, 38 P.2d 878, 882 (1934).

10. City of Cincinnati v. Louisville & N.R.R., 223 U.S. 390, 400 (1912); *In re* Forsstrom, 44 Ariz. 472, 479, 38 P.2d 878, 882 (1934). The fifth amendment to the United States Constitution prohibits the taking of private property for public use without just compensation. This limitation is strictly applicable only to the federal government. Winous Point Shooting Club v. Caspersen, 193 U.S. 189 (1904). A similar limitation is imposed on the states through the fourteenth amendment and the state constitutions. Chicago, B. & Q.R.R. v. City of Chicago, 166 U.S. 226, 236 (1896); 1 J. LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 9 (3rd ed. 1909); 1 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1.3 (3rd ed. rev. 1964) [hereinafter cited as NICHOLS].

11. I. LEVEY, CONDEMNATION IN U.S.A. § 3.02(3) (1969); *see* City of Cincinnati v. Vester, 281 U.S. 439, 448 (1930).

12. State v. King County, 74 Wash. 2d 673, 675, 446 P.2d 193, 195 (1968); 1 NICHOLS, *supra* note 10, at § 3.21.

13. *See, e.g.*, Cole v. City of La Grange, 113 U.S. 1, 7 (1884); *In re* Forsstrom, 44 Ariz. 472, 477, 38 P.2d 878, 881 (1934); Inspiration Consol. Copper Co. v. New Keystone Copper Co., 16 Ariz. 257, 259, 144 P. 277, 278 (1914).

14. City of Cincinnati v. Vester, 281 U.S. 439 (1930); Madisonville Traction Co. v. St. Bernard Min. Co., 196 U.S. 239, 252 (1905).

15. ARIZ. CONST. art. 2, § 17. The Arizona Constitution specifically authorizes the taking of property for private use under certain circumstances. "Private property

proviso that the determination of whether a proposed use is public is "a judicial question . . . without regard to any legislative assertion."[16]

There exists no precise definition of what constitutes a public use,[17] and attempts to formulate one have proven to be futile. State policy is controlled in any particular situation primarily by the local conditions and necessities of the community involved. This situation has contributed greatly to the varied judicial interpretations of the term public use.[18] In addition to variations due to the influence of local policy, the term public use has been given two different interpretations.[19] The narrower view equates the term with actual use by some segment of the public.[20] The broader doctrine defines public use in terms of public benefit or advantage without requiring that the public physically use the property condemned.[21] At differing periods in the development of American law both views have been favored by a majority of courts.[22] Although some support for the narrow definition can still be found, it has been generally rejected,[23] and the broader view is currently followed by a majority of courts.[24] This approach is necessary to allow adequate flexibility to provide for ever-increasing public needs. While a broadened definition of public use expands the permissible scope of eminent domain, judicial review and

---

shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches . . . ." *Id.* A minority of states have similar constitutional provisions. These provisions are founded on the principle that private development of certain resources and industries is essential to the welfare of the state and the public benefit. *See generally* Cienega Cattle Co. v. Atkins, 59 Ariz. 287, 126 P.2d 481 (1942); 2A NICHOLS, *supra* note 10, at § 7.212(2).

16. ARIZ. CONST. art. 2, § 17. A majority of jurisdictions entertain a presumption favoring the legislative declaration that a use is public. Even in these jurisdictions, however, the question is ultimately judicial, since taking for a use which is clearly not public is unconstitutional. United States *ex rel.* T.V.A. v. Welch, 327 U.S. 546, 552 (1946); 2A NICHOLS, *supra* note 10, at §§ 7.4-7.4(1).

17. Inspiration Consol. Copper Co. v. New Keystone Copper Co., 16 Ariz. 257, 260, 144 P. 277, 278-79 (1914); 2A NICHOLS, *supra* note 10, at § 7.2.

18. *See* Clark v. Nash, 198 U.S. 361, 367 (1905). The great importance accorded to local conditions is shown by the fact that the United States Supreme Court has never reversed a state court ruling that a use was public. 2A NICHOLS, *supra* note 10, at § 7.212(1).

19. 2A NICHOLS, *supra* note 10, at § 7.2.

20. Inspiration Consol. Copper Co. v. New Keystone Copper Co., 16 Ariz. 257, 268, 144 P. 277, 281 (1914) (concurring opinion). *See generally* 2A NICHOLS, *supra* note 10, at § 7.2(1).

21. *See* Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707 (1923); Oury v. Goodwin, 3 Ariz. 255, 26 P. 376 (1891). *See generally* 2A NICHOLS, *supra* note 10, at § 7.2(2); Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas,* 44 TEXAS L. REV. 1497 (1966).

22. *See* Nichols, *The Meaning of Public Use in the Law of Eminent Domain,* 20 BOSTON U.L. REV. 615, 617-30 (1940).

23. *See* Comment, *The Public Limitation on Eminent Domain: An Advance Requiem,* 58 YALE L.J. 599 (1949), *reviewed in,* Comment, *The Public Use Doctrine: "Advance Requiem" Revisited,* 1969 LAW AND THE SOCIAL ORDER 688 [hereinafter cited as *"Advance Requiem" Revisited*].

24. 2A NICHOLS, *supra* note 10, at § 7.2(3). *See* Comment, *Eminent Domain—The Meaning of the Term "Public Use"—Its Effect on Excess Condemnation,* 18 MERCER L. REV. 274, 275 (1966).

constitutional limitations still act as restraints on the inevitable encroachment on private property rights.[25]

A restrictive definition of public use was first rejected in Arizona in 1891. The Supreme Court of Arizona, in *Oury v. Goodwin*,[26] authorized condemnation for the purpose of providing an irrigation canal for private farm lands.[27] The broader doctrine was recognized as an essential instrument for fully developing the state's natural resources, thereby enhancing the general welfare despite the fact that the public could not actually use the property.[28]

The court narrowed its definition of public use somewhat in *Inspiration Consolidated Copper Co. v. New Keystone Copper Co.*[29] Inspiration sought to have condemned an underground right of way connecting two of its mines in order to facilitate the economical transportation of ore. The company contended that this was essential to the profitable operation of the new ore mill which it was erecting in the area. The court specifically rejected what it termed a strained construction of the term public use, and found the condemnation to be for a private purpose.[30] Subsequent cases involving a definition of public use have never referred to the narrow view enunciated in *Inspiration*, but rather, have relied on the broad doctrine set forth in *Oury*.[31]

In *Citizens* the company contended that inasmuch as the city was not obligated to provide water service to residents outside its corporate limits,[32] that segment of the public could be denied the use of the

25. *See* I. LEVEY, *supra* note 11, at § 17 at 210; 2A NICHOLS, *supra* note 10, at § 7.2(3); Benbow, *supra* note 21, at 1510-14.

26. 3 Ariz. 255, 26 P. 376 (1891).

27. The condemnation of private property for irrigation canals and ditches was authorized by existing legislation. ARIZ. REV. STAT. ¶¶ 3201-02 (1887).

28. 3 Ariz. at 274, 26 P. at 382.

29. 16 Ariz. 257, 144 P. 277 (1914).

30. *Id.* at 261, 144 P. at 279. This decision has been criticized in light of the essential role of the copper industry in the growth and development of the state. L. HOWARD, TRIAL HANDBOOK-LAW OF EMINENT DOMAIN IN ARIZONA § 1.3 (1967).

Although the Arizona Constitution allowed condemnation for private ways of necessity, no legislative authorization to do so had been enacted. Noting that the power of eminent domain lies dormant in the state until the legislature authorizes its use, the court held that condemnation for private use would have to be specifically authorized by the legislature. In response to *Inspiration*, this authorization was enacted in 1919, and is still in force. ARIZ. REV. STAT. ANN. §§ 12-1201-02 (1956).

31. *See* City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 408 P.2d 818 (1965) (defining civic auditorium as a public use; citing *Oury* with approval); Humphrey v. City of Phoenix, 55 Ariz. 374, 102 P.2d 82 (1940) (defining acquisition and maintenance of housing for rental to low income families to be a public use); Cordova v. City of Tucson, 16 Ariz. App. 447, 494 P.2d 52 (1972) (defining acquisition and maintenance of housing for rental to low income families as a public use; defining preservation of historic sites as a public use); *cf.* City of Phoenix v. Superior Court, 65 Ariz. 139, 175 P.2d 811 (1946) (defining housing for war veterans to be for a public purpose thereby authorizing the expenditure of city funds).

32. In City of Phoenix v. Kasun, 54 Ariz. 470, 474, 97 P.2d 210, 212 (1939),

property. Absent this element of legal obligation, the company alleged that the taking could not be considered to be for a public use.[33] In rejecting this argument, the court again refused to define public use narrowly.[34] Strong precedent supports the court's continued reliance on the broad doctrine as a general rule.[35] It is also widely recognized that the specific function of providing water service to a community is a public use which is "within the unquestioned limits of the power of eminent domain."[36]

The precise breadth of the *Citizens* court's definition of public use, however, is unclear. While the court specified that it "might not go so far as some of the jurisdictions embracing the broad view,"[37] it gave no indication of what might be considered overly broad. Attempts to determine the ultimate limits of the holding must, therefore, be purely speculative. It is significant, however, that Arizona courts have consistently found the use proposed by the condemning authority to be public and there is no indication that these courts will narrow their approach in the future.[38]

A broad doctrine of public use is essential in order to maintain the flexibility required to meet expanding public needs. Nevertheless, it must be recognized that a necessary consequence is an expansion of the power of condemnation,[39] and a limitation on the court's role in reviewing legislative determinations.[40] While such an approach may be necessary with respect to whether a proposed use is public, new restrictions and expanded judicial review may be called for on the issue of whether a particular taking is necessary.

Necessity

Underlying the power of eminent domain is the concept that the property to be taken must be necessary for the public use.[41] This can-

---

the court said that a city which provided water to nonresidents was acting in a private capacity, not a governmental one.

33. 108 Ariz. at 298, 497 P.2d at 57. This argument has been rendered moot in part. A statutory amendment now prohibits a city from discontinuing service to nonresident users once service is established. ARIZ. REV. STAT. ANN. § 9-516(c)(d) (Supp. 1972-73). The city is not required, however, to establish new service to nonresidents.

34. 108 Ariz. at 299, 497 P.2d at 58.

35. *See* text & notes 23-25 *supra.*

36. Long Island Water Supply Co. v. City of Brooklyn, 166 U.S. 685, 689 (1897).

37. 108 Ariz. at 299, 497 P.2d at 58.

38. *See* cases cited note 31 *supra.*

39. *See "Advance Requiem" Revisited, supra* note 23, at 696; Comment, *supra* note 24, at 275-76.

40. *See* Berman v. Parker, 348 U.S. 26, 32 (1954).

41. West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 523 (1848); Town of Williams v. Perrin, 70 Ariz. 157, 160, 217 P.2d 918, 920 (1950); Sanford v. City of Tucson, 8 Ariz. 247, 253-54, 71 P. 903, 905 (1903).

not, however, be considered to be an effective limitation on the condemnation power because "[t]he overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review."[42] Consequently, any non-statutory restrictions on the condemning agency must be self-imposed. Jurisdictions adhering to this doctrine apply it regardless of whether the determination of necessity is made by the state legislature or by a legislative or administrative body to which the power has been delegated by the state.[43] Judicial review is limited to those cases where there is a showing of bad faith, arbitrariness, fraud or capriciousness.[44] Some courts have held that even allegations of these factors do not render the question justiciable.[45] Only a minority of jurisdictions require more expansive judicial review.[46] Constitutional provisions compelling judicial review are virtually nonexistent,[47] and few states have enacted any statutory requirement that the necessity of the condemnation be determined or reviewed by a court.[48]

It is evident, then, that the possibility of obtaining judicial review of the necessity of a proposed taking is extremely limited. All reasonable presumptions in favor of the condemning agency are indulged,[49] and its determinations must have been totally unreasoned or "without adequate determining principle" before they will be overturned.[50] The test of capriciousness or arbitrariness is not met by the fact that an action may be unwise and unlikely to succeed;[51] errors in judgment, however erroneous, are not reviewable.[52] In addition, the

42. 1 NICHOLS, *supra* note 10, at § 4.11.
43. *See* I. LEVEY, *supra* note 11, at § 15.
44. *See, e.g.*, United States v. Carmack, 329 U.S. 230, 243-48 (1946), *noted in* 27 BOSTON U.L. REV. 229 (1947); Simmonds v. United States, 199 F.2d 305, 306 (9th Cir. 1952); Redevelopment Authority v. Owners or Parties in Interest, 1 Pa. Commonwealth Ct. 378, 382, 274 A.2d 244, 247 (1971); City of Tacoma v. Welcker, 65 Wash. 2d 677, 684, 399 P.2d 330, 335 (1965).
45. United States v. Mischke, 285 F.2d 628 (8th Cir. 1961); People *ex rel.* Dep't of Pub. Works v. Chevalier, 52 Cal. 2d 299, 340 P.2d 598 (1959), *discussed in* McIntire, *supra* note 1 and *noted in* 48 CAL. L. REV. 164 (1960).
46. *See* 1 NICHOLS, *supra* note 10, at § 4.11(4).
47. The constitutions of New York and Montana require that necessity be determined by a jury when the taking is for a private roadway. N.Y. CONST. art. 1, § 7; MONT. CONST. art. 3, § 15. However, the constitutions of Michigan and Wisconsin have recently been amended to remove the requirement that necessity be determined by a jury. MICH. CONST. art. 10, § 2 (1963), *formerly* art. 13, § 2 (1908); WIS. CONST. art. 11, § 2 (1961).
48. *See* MONT. REV. CODES ANN. §§ 93-9905 (Supp. 1971), 93-9911 (1947); VT. STAT. ANN. tit. 19, § 227(a) (Cum. Supp. 1972), tit. 24, § 3029a(d) (1964).
49. *See* Embry v. City of Caneyville, 397 S.W.2d 141 (Ky. 1965); 1 NICHOLS, *supra* note 10, at § 4.11(4).
50. United States v. Carmack, 329 U.S. 230, 243 (1946).
51. State *ex rel.* Shafer v. Ohio Turnpike Comm'n, 159 Ohio St. 581, 113 N.E.2d 14 (1953).
52. City of Tacoma v. Welcker, 65 Wash. 2d 677, 684-85, 399 P.2d 330, 335 (1965).

condemnee bears the burden of proving that the taking is so unnecessary as to be an arbitrary or capricious exercise of the power.[53]

The requirement of necessity has been embodied in Arizona law through legislative enactments.[54] This has not proven to be an effective restraint on condemning authority, however, since judicial review of the issue of necessity is for all practical purposes nonexistent. While the determination of necessity was once considered to be a judicial issue,[55] in *Mosher v. City of Phoenix*[56] the Arizona supreme court adopted the majority view that legislative or administrative determinations of necessity are conclusive. This doctrine of limited judicial review results in the virtual impossibility of contesting the necessity of any condemnation.[57]

Citizens is illustrative of the means employed by courts to abstain from reviewing the issue of necessity. The trial court had held that the city could condemn the company's facilities lying wholly outside the city, even though they were "being used exclusively to supply persons living outside the city, and . . . [were] not necessary at this time to provide water service within the city."[58] The supreme court emphasized the conclusiveness of the legislative determination of necessity, and limited its review to the question of fraud or arbitrariness.[59]

Relying primarily on an offer of proof provided by the city at the trial,[60] the court found the condemnation to be free of fraud or arbitrariness.[61] Particular emphasis was placed on the contention that all of Citizens' property would be necessary to the city at some future time.[62] While it is widely recognized that future needs may be an-

53. The Arizona supreme court has held that the condemnor need not plead compliance with ARIZ. REV. STAT. ANN. § 12-1115(A) (1956) which requires that the condemned property be selected so as to produce the greatest public good and least private injury. Rather, the condemnee must raise the issue and he bears the burden of proof thereon. Chambers v. State, 82 Ariz. 278, 284, 312 P.2d 155, 159 (1957) (by clear and convincing proof); *accord,* Gray v. Ouachita Creek Watershed Dist., 234 Ark. 181, 186, 351 S.W.2d 142, 145 (1961) (preponderance); State *ex rel.* State Highway Comm'n v. Crosser-Nissen Co., 145 Mont. 251, 255, 400 P.2d 283, 285 (1965) (heavy burden of proof). *See generally* 1 NICHOLS, *supra* note 10, at § 4.11 (2).

54. ARIZ. REV. STAT. ANN. § 12-1112 (1956) requires that the use for which property is taken be one authorized by law. It also requires that the taking be necessary to such use, and where the property to be condemned is already dedicated to a public use it can only be taken for a "more necessary" public use.

55. Sanford v. City of Tucson, 8 Ariz. 247, 71 P. 903 (1903).

56. 39 Ariz. 470, 7 P.2d 622 (1932), *overruled on other grounds, In re* Forsstrom, 44 Ariz. 472, 38 P.2d 878 (1934).

57. The condemnee bears all burdens of proof when contesting the issue of necessity. *See* text & note 53 *supra.*

58. City of Tucson v. Citizens Utility Water Co. of Arizona, No. 110899 (Pima County, Super. Ct. Nov. 29, 1971).

59. 108 Ariz .at 299, 497 P.2d at 58.

60. The court did not explain its reliance on the offer of proof which was not admitted into evidence, nor did it rule on the admissibility of the material.

61. 108 Ariz. at 299, 497 P.2d at 59.

62. 108 Ariz. at 299, 497 P.2d at 59. The city had contended that the condem-

ticipated, this provision is not unlimited. Generally, property can be condemned only for those needs which may be anticipated within a reasonable time.[63]

The Arizona supreme court has previously recognized limitations on the power to condemn for future needs. In *City of Phoenix v. Donofrio*[64] the city attempted to condemn land to be used immediately for offstreet parking facilities, but ultimately for the establishment of an administrative building. The court first disallowed condemnation for offstreet parking facilities since the city was not authorized to condemn for that purpose.[65] The court then rejected the condemnation for the administrative building, holding that an ultimate need is "too highly remote and highly in the abstract."[66]

Citizens, however, clearly indicates that considerable latitude will be afforded the condemnor when it alleges that it is providing for future needs. The court made no reference to the limitation in *Donofrio*; rather the condemnation was upheld on the basis of the city's potential growth and the contention that the city would eventually require all of Citizens' property. It appears, therefore, that in the process of upholding the validity of the condemnation, the court has further expanded the power of eminent domain by embracing a liberal concept of condemnation for future needs.

In the resolution of another aspect of necessity the *Citizens* court again avoided review of the condemnor's determination of necessity. The doctrine of "prior public use" acts as a limitation on the condemnation of property which is already devoted to a public use.[67] Under this doctrine property already dedicated to a public use can be condemned only when a specific legislative authorization can be discerned.[68] The principles of this doctrine are embodied in section 12-1112(c) of the *Arizona Revised Statutes Annotated*. The statute al-

---

nation would be desirable because it would: (1) allow a "metropolitan concept" of the supply and control of water and equalize supply and demand, (2) provide the capability to "beef up" fire protection through an integrated water system, (3) allow control over utility facilities in areas of *potential growth*, and (4) preclude additional litigation, since the city would eventually require all of Citizens' properties. *Id.* at 300, 497 P.2d at 58-59. The court found these contentions to provide "very powerful arguments for permitting all the properties to be condemned." *Id.* at 299, 497 P.2d at 58.

63. Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707 (1923); 1 NICHOLS, *supra* note 10, § 411(2) at 561; *see* Note, *Problems of Advanced Land Acquisition*, 52 MINN. L. REV. 1175, 1177-79 (1968).

64. 99 Ariz. 130, 407 P.2d 91 (1965).

65. Condemnation for offstreet parking facilities was authorized at that time only for cities having a population of less than 150,000. Ch. 127, § 2, [1964] ARIZ. SESS. LAWS 283. The population of Phoenix was more than 150,000 in 1965. VALLEY NAT'L BANK, ARIZ. STATISTICAL REVIEW 10 (21st ed. 1965).

66. 99 Ariz. at 136, 407 P.2d at 95.

67. *See generally* 1 NICHOLS, *supra* note 10, at § 2.2.

68. State *ex rel.* State Pub. Works Bd. v. City of Los Angeles, 256 Cal. App. 2d 930, 64 Cal. Rptr. 476 (1967).

lows the subsequent condemnation of such property only for a "more necessary" public use. While this legislation would appear to require a determination of relative necessity, such a determination has generally been avoided by the courts.[69]

In Arizona, legislative authorization to exercise the power of eminent domain is obtained through two sources. In addition to the power delegated in the statutes governing eminent domain proceedings generally, of which section 12-1112 is a part, specific authorization is conferred in statutes which govern the operation of various political and administrative subdivisions of the state.[70] In *Desert Waters v. Superior Court*[71] it was held that any eminent domain proceeding authorized by a specific statutory grant would be exempt from the "more necessary" test required by section 12-1112. Since the power of condemnation has been delegated directly to the city of Tucson by section 9-516 of the *Arizona Revised Statutes Annotated*, the *Citizens* court was able to avoid the "more necessary" test by following *Desert Waters* and simply exempting the city from the requirement of the statute. This approach by the court in *Citizens* seems inconsistent with both the statutory requirement and the doctrine of "prior public use." A mere legislative grant of eminent domain power does not necessarily infer that any subsequent condemnation will be for a "more necessary" use; neither can it be construed as specifically authorizing the condemnation of property already devoted to a public use.

The test applied in *City of Mesa v. Salt River Project*[72] appears to be more in keeping with the purpose of section 12-1112. Under similar factual circumstances, the *Mesa v. Salt River Project* court did not adhere to the broad exemption announced in *Desert Waters*. Without mentioning *Desert Waters*, the court found that the property would be "put to a higher use when operated by a municipality"[73] thereby satisfying the "more necessary" requirement. The opportunity for a case by case evaluation provided by the approach taken in *City of Mesa v. Salt River Project* would insure that any subsequent condemnation was, in fact, more necessary. In contrast, the position taken by the

69. *See* Flecha Caida Water Co. v. City of Tucson, 4 Ariz. App. 331, 420 P.2d 198 (1966). *See also* Chambers v. State, 82 Ariz. 278, 312 P.2d 155 (1957); Solana Land Co. v. Murphey, 69 Ariz. 117, 210 P.2d 593 (1949); Mosher v. City of Phoenix, 39 Ariz. 470, 7 P.2d 622 (1932).

70. *E.g.*, ARIZ. REV. STAT. ANN. § 9-516 (Supp. 1972-73) (cities and towns); ARIZ. REV. STAT. ANN. § 45-1264 (1956) (drainage districts); ARIZ. REV. STAT. ANN. § 45-2301 (1956) (flood control districts).

71. 91 Ariz. 163, 370 P.2d 652 (1962); *accord*, Flecha Caida Water Co. v. City of Tucson, 4 Ariz. App. 331, 420 P.2d 198 (1966).

72. 92 Ariz. 91, 373 P.2d 722 (1962), *appeal dismissed*, 372 U.S. 704 (1963); *accord*, City of Tucson v. Tucson Gas, Elec. Light & Power Co., 152 F.2d 552 (9th Cir. 1945), *cert. denied*, 327 U.S. 799 (1946).

73. 92 Ariz. at 104, 373 P.2d at 731.

Citizens court totally disregards any limitations on the power to condemn property which is already devoted to a public use and creates a broad exemption from the statutory requirement.

Ramifications of the Current Doctrine

The significance of *Citizens* is that it exemplifies the near total absence of any form of control over condemnation proceedings. Unrestrained legislative grants of power, combined with minimal judicial review, result in limitations insufficient to insure that the eminent domain power is exercised in the best interests of the public. The exercise of the power is left almost exclusively to the discretion, competency and good faith of the condemning authority.

A principal failing of current condemnation procedures is that no method exists for effectively balancing the competing interests which may develop between the condemning authority and the public as a whole.[74] It is inherent in the concept of eminent domain that the public interest will be best served by dedicating the property in question to a public use. Yet while the use which is to be made of the condemned property may be defined as public, and the condemnation of specific property may be necessary for that purpose, it does not conclusively follow that the condemnation is in the best public interest.

Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.[75] is illustrative of the conflicts which can occur. Texas Eastern, an interstate transporter of natural gas,[76] sought to condemn a right-of-way through a wildlife sanctuary. The preserve was reputed to be "the finest inland, natural fresh water wetland in the entire Northeastern United States."[77] The trial court denied a hearing on the issue of necessity. The condemnee then appealed, contending that the corporation's refusal to consider an alternate route constituted arbitrary and capricious action. This contention was successful, the incompatibility of the differing interests being readily apparent to the New Jersey supreme court. Noting the significant public interest in wildlife conservation,[78] the court remanded the case for litigation of the issue of arbitrariness.

As illustrated by *Texas Eastern*, the decision to condemn is rarely

74. *See generally* McIntire, *supra* note 1; Comment, *Balancing Public Purposes: A Neglected Problem in Condemnation*, 35 ALBANY L. REV. 769 (1971).

75. 48 N.J. 261, 225 A.2d 130 (1966), *aff'd on retrial*, 49 N.J. 403, 230 A.2d 505 (1967).

76. *See* 15 U.S.C. § 717a (1970). The company had obtained a certificate of convenience and necessity as provided for by 15 U.S.C. § 717f (1970), thus becoming empowered to condemn property under authority of 15 U.S.C. § 717f(h) (1970).

77. 48 N.J. at 270, 225 A.2d at 135.

78. *Id.* at 272, 225 A.2d at 137.

made by an objective body which impartially evaluates the needs of the public as a whole.[79] Many of these proceedings are instituted by administrative agencies which are often insulated from the public and not responsive to public needs.[80] Additionally, the condemnor's self interest may conflict with an objective evaluation.[81] While the condemnor must necessarily exercise its condemnation power to accomplish its specific objectives, this narrow perspective often precludes an overall evaluation of the potential social costs.[82]

These deficiencies are not remedied by the condemnee's ability to contest the condemnation, because in the absence of a clear statutory violation or a showing of fraud, bad faith, or arbitrariness, necessity does not become a litigable issue.[83] Additionally, the condemnor may muster its entire resources to defend its position while the condemnee is often constrained by a limited availability of funds.[84]

A majority of the problems of controlling the condemnor are the result of the broad legislative delegation of the condemnation power and the notable absence of effective limitations on its exercise. Judicial abstention on the issue of necessity serves only to compound the problem. Through the allocation of burdens of proof and liberal statutory interpretation the courts have virtually eliminated most restrictions on the power of eminent domain.

Alternatives

The need for the revision of eminent domain procedures is evident. While detailed analysis of the possible solutions to the problem will not be attempted here, methods of reducing the potential detrimental impact on both the condemnee and the public as a whole have been recognized.[85] A Vermont statute[86] is an example of legislative enactments which expand the reviewability of condemnations. The

79. *See generally* Note, *Pressures in the Process of Administrative Decisions: A Study of Highway Location,* 108 U. PA. L. REV. 534 (1960).

80. *See generally* District of Columbia Fed'n of Civic Ass'ns v. Airis, 391 F.2d 478, 483-85 (D.C. Cir. 1968); Reich, *The Law of the Planned Society,* 75 YALE L.J. 1227 (1966).

81. Hulen, *supra* note 2, at 237-57.

82. *See generally* McIntire, *supra* note 1; Comment, *supra* note 74.

83. *See* text accompanying notes 44-48 *supra.*

84. *See* Comment, note 74 *supra,* at 774-75.

85. An alternative not discussed here is considered by some commentators to be the ultimate solution. It is the creation of a state board of condemnation, or some other centralized condemnation agency. It has been argued that an impartial agency, unrestricted by pursuit of functional goals, would provide for a more objective evaluation of the condemnation. The impact of the condemnation would be viewed from a broadened perspective, and conflicting objectives could be harmonized. For a detailed analysis of the factors involved in creating a central condemnation agency, see Comment, *supra* note 74, at 777-80.

86. VT. STAT. ANN. tit. 19, §§ 222-28 (1968).

statute provides for judicial review of the issue of necessity whenever a condemnation is instituted by the highway department. Not only is judicial review required, but the highway board has the burden of proving necessity by a "fair preponderance of the evidence." Additionally, there exists no presumption that the highway board is acting with reasonable discretion in exercising its power of eminent domain.[87]

Although restrained by their reluctance to infringe upon legislative determinations of necessity, some courts have also participated in efforts to constrain the power of eminent domain. While *Citizens* illustrates judicial abstention from consideration of the issue of necessity, other courts have employed familiar legal concepts as limitations on the unfettered right to condemn.[88] For example, the Massachusetts highway department is specifically authorized to condemn public property for highway development purposes.[89] Despite this specific delineation of power, the state supreme court has prohibited it from condemning public parkland. Applying the doctrine of "prior public use,"[90] that court has found that the statute did not reflect the necessary legislative intent to authorize such a condemnation. The Massachusetts supreme court has held that condemnation of the state's parklands would be authorized only by specific legislation which indicates that the legislature is cognizant of the current use being made of the land.[91]

The New Jersey court, in *Texas Eastern*,[92] held that the refusal to consider an alternate route for a gas pipeline proposed to be put through a wildlife sanctuary was arbitrary and capricious, and remanded the case for trial on the merits. The court also reallocated the burden of proof. The condemnee was required to provide only "reasonable proof"[93] of damages and of the availability of an alternate route to establish a prima facie case of arbitrariness. The burden of defending the choice of the route would then shift to the condemnor. Thus, while judicial intervention in determinations of necessity is not commonplace, several available alternatives have been used. In addi-

87. *Id.* § 227(a).

88. A method not discussed here involves the application of the doctrine of public trust. On rare occasions courts have relied on this doctrine to intervene in condemnations when they were clearly detrimental to the environment. *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

89. ACTS & RESOLVES OF MASS. 1965, ch. 679, § 1, incorporating ACTS & RESOLVES OF MASS. 1956, ch. 718, § 6.

90. See text accompanying notes 67-68 *supra*.

91. *See* Robbins v. Department of Pub. Works, 355 Mass. 328, 244 N.E.2d 577 (1969); Sacco v. Department of Pub. Works, 352 Mass. 670, 227 N.E.2d 478 (1967).

92. Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 225 A.2d 130 (1966); *see* text accompanying notes 75-78 *supra*.

93. 48 N.J. at 275, 225 A.2d at 138.

tion to strict statutory construction, courts have applied the doctrine of "prior public use" and have expanded the concept of what constitutes arbitrary or capricious action, thereby justifying judicial intervention.

Conclusion

The Arizona legislature has delegated the power of eminent domain to hundreds of state and local agencies.[94] Legislative restrictions on the exercise of this power are minimal and there exists no effective procedure for balancing conflicting public needs and private interests.

While the broad definition of the term public use delineated by the court in *Citizens Utility Water Co. v. Superior Court* is essential to allow for the implementation of state and local public programs, the court's resolution of the remaining issues is overly broad. The general exemption from the statutorily imposed "more necessary" requirement creates a broad exemption and may preclude the implementation of the doctrine of "prior public use." Additionally, the court's indication of a liberal policy of condemnation for future needs may prove to be a significant expansion of eminent domain powers.

With regard to the issue of necessity, the ultimate responsibility for the establishment of condemnation procedures which insure the efficient and beneficial use of resources lies with the legislature. Absent these procedures, cases from other jurisdictions have shown that narrow statutory construction, strict adherence to the doctrine of "prior public use" and the reallocation of burdens of proof are effective methods of judicial intervention. While such intervention may be justified only in exceptional cases, the Arizona supreme court should not needlessly foreclose those means of judicial intervention which may be necessary to protect the best interests of the state and its peoples.

B. BANK NIGHT DEPOSITORIES AND "SOLE RISK" CLAUSES

The law of bailment provides an interface between the law of contracts and the law of torts. The former emphasizes the importance of "freedom of contract," while the latter stresses compensation for wrongfully inflicted injuries. On contract principles, the parties to a bailment should be allowed to allocate risks between themselves by determining who shall bear the loss if the bailed object is stolen, dam-

94. *See* note 70 *supra.*

aged or destroyed. On tort principles, however, a person who by his own negligence causes injury to another's chattels should be liable for those injuries. The tension created by these competing principles is acute when one of the parties attempts to contractually eliminate or limit his liability for his own negligence. Considering these competing policies in *Valley National Bank v. Tang*[1] the Arizona court of appeals held that public policy permits a bank to contract with its customers to provide that use of its night depository is at the sole risk of the depositor, and that such a provision would relieve the bank from liability for its negligence in providing inadequate facilities at the time the contract was made.

In *Tang*, the plaintiff had made a deposit in the night depository of a bank during the Labor Day weekend.[2] The night depository was robbed prior to the bank's reopening for business. The plaintiff commenced a suit for negligence, and was awarded verdict and judgment.[3] The bank appealed from orders denying its motions for summary judgment and a directed verdict. On appeal, the primary issue was whether a contractual provision was enforceable when it limited a bank's liability for its own negligence in connection with the use of its night depository.

The primary concern of this commentary will be whether arguments which justify allowing an ordinary bailee to relieve himself from liability for his own negligence by means of exculpatory clauses are applicable to the bank night depository situation. This will be approached through an examination of the different types of bailment to determine which is most similar to that found in the night depository situation. The circumstances where exculpatory clauses have been allowed, and the reasons adduced for allowing them, will then be studied to determine whether those conditions are present in the night depository situation, and thus whether the exculpatory provisions should be given effect.

Courts considering the issue have either assumed or expressly stated that the use of a night depository creates a bailment relationship between the bank and the depositor while the deposit is in the facility.[4]

1. 18 Ariz. App. 40, 499 P.2d 991 (1972).
2. The court presumed that the deposit was properly made. *Id.* at 41-42, 499 P.2d at 992-93.
3. Apparently, the jury found that the defendant bank had been negligent in failing to provide adequate facilities. *See* Abstract of Record at 45, Valley National Bank v. Tang, 18 Ariz. App. 40, 499 P.2d 991 (1972).
4. *See, e.g.*, Lacour v. Merchants Trust & Sav. Bank, 153 So. 2d 599 (La. Ct. App. 1963); Gardner v. Warren Bank, 14 Mich. App. 548, 165 N.W.2d 869 (1968); Bowling Corp. of Plainview v. Long Island Nat'l Bank, 57 Misc. 2d 337, 292 N.Y.S.2d 562 (Nassau County Ct. 1968); Kolt v. Cleveland Trust Co., 89 Ohio App. 347, 93 N.E.2d 788 (1950), *aff'd*, 156 Ohio St. 26, 99 N.E.2d 902 (1951);

A determination that a bailment relationship exists between the customer and the bank is salutary for both parties. The bank will not be held liable as a debtor until it actually accepts the deposit by an unequivocal act,[5] and the depositor is assured that the bank will protect his funds from negligent loss in the absence of an effective exculpatory provision to the contrary.[6] By itself, a determination that a bailment exists, however, does not delineate the duties and liabilities of the bailee bank, nor the degree to which it may contractually reduce the care which it would otherwise owe. The degree of care owed by a bailee is, in part, a function of which party benefits or expects to benefit from the bailment. If a bailment is for the mutual benefit of the parties, the bailee has a duty to exercise ordinary care under the circumstances of the bailment.[7] Even though the bank is not paid directly for its services, the bailment is for the mutual benefit of the parties since an object is received as an incident to a lucrative business.[8] Furthermore, by offering a night depository the bank expects to retain present customers and attract new ones; the customer expects to obtain a higher degree of security than if he kept the deposit and awaited the regular opening of the bank.[9] Since the bailment is for

---

Irish & Swartz Stores v. First Nat'l Bank, 220 Ore. 362, 349 P.2d 814 (1960); Bernstein v. Northwestern Nat'l Bank, 157 Pa. Super. 73, 41 A.2d 440 (1945).

To create a bailment of any kind there must be an actual or constructive delivery of personal property to another who accepts it and lawfully excludes the owner from the exercise of any dominion or control over the bailed object. Phillips v. City of New York, 71 Misc. 2d 861, 337 N.Y.S.2d 303 (N.Y. City Civ. Ct. 1972). *See also* Blair v. Saguaro Lake Dev. Co., 17 Ariz. App. 72, 495 P.2d 512 (1972); Allright Phoenix Parking, Inc. v. Shabala, 6 Ariz. App. 21, 429 P.2d 513 (1967); Farmer's Butter & Dairy Co-op v. Farm Bureau Mut. Ins. Co., 196 N.W.2d 533 (Iowa 1972); Smalich v. Westfall, 440 Pa. 409, 269 A.2d 476 (1970); Moore v. Relish, 53 Wis. 2d 634, 193 N.W.2d 691 (1972); 9 S. WILLISTON, CONTRACTS § 1030 (3d ed. Jaeger 1967). In the night depository situation, the depositor is deprived of all dominion over or access to his personal property after he has made a deposit in the facility. The bank has accepted the initiation of a bailment relationship by providing the customer with the means for using the night depository.

5. Carlyon v. Fitzhenry, 2 Ariz. 266, 15 P. 273 (1887); Fogg v. Tyler, 109 Me. 109, 82 A. 1008 (1912); Gardner v. Warren Bank, 14 Mich. App. 548, 165 N.W.2d 869 (1968); Kolt v. Cleveland Trust Co., 89 Ohio App. 347, 93 N.W.2d 788 (1950); Bernstein v. Northwestern Nat'l Bank, 157 Pa. Super. 73, 41 A.2d 440 (1945).

6. *See* 45 MICH. L. REV. 908, 910 (1947).

7. Preston v. Prather, 137 U.S. 604 (1890); Marine Sales & Serv., Inc. v. Greer Steel Co., 312 F. Supp. 718 (N.D. W. Va. 1970); Perry Bros. v. Weinberg, 105 Ariz. 406, 466 P.2d 11 (1970); Windeler v. Scheers Jewelers, 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 (1970); Low v. Park Price Co., 95 Idaho 91, 503 P.2d 291 (1972); Wright v. Heil Equip. Co., 357 Mass. 74, 256 N.E.2d 318 (1970); Castner v. Insurance Co. of North America, 40 App. Div. 2d 1, 337 N.Y.S.2d 52 (1972); *see* J. STORY, LAW OF BAILMENTS, § 15 (4th ed. 1846). *But see* Clott v. Greyhound Lines, Inc., 278 N.C. 378, 180 S.E.2d 102 (1971) (abandoning the standard classifications of bailment and stating that the degree of care was always that of a man of ordinary prudence as adapted to the particular circumstances of the bailment).

8. *See* Tierstein v. Licht, 174 Cal. App. 2d 835, 345 P.2d 341 (1959); Global Tank Trailer Sales v. Textilana-Nease, Inc., 209 Kan. 314, 496 P.2d 1292 (1972); Miller v. Hand Ford Sales, Inc., 216 Ore. 567, 340 P.2d 181 (1959); Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. Civ. App. 1972).

9. *See* Bernstein v. Northwestern Nat'l Bank, 157 Pa. Super. 73, 77, 41 A.2d

the mutual benefit of the parties[10] the bank has a duty to exercise ordinary care.

The terms of the bailment contract and any exculpatory provisions it may contain provide a further means for determining the duties and liabilities of the bailee. Exculpatory provisions relieving a party from liability for his own negligence are not favored because they are often the result of overreaching and because public policy dictates that negligent practices be thwarted.[11] In line with these concerns, courts have devised a number of independent conditions which must be fulfilled before a bailee will be allowed to relieve himself from liability for his own negligence.

As indicated by Professor Williston, a bailee performing a service for which the public has a substantial need should not be allowed to contractually exempt himself from liability for his own negligence.[12] Those bailees who provide a service much needed, if not required by practical necessity by members of the public are frequently designated as professional bailees.[13] The professional bailee generally holds himself out as willing to deal with all, or virtually all, members of the public on a uniform basis, often employing adhesive contracts, and frequently enjoying limited competition.[14] The nature of the professional bailee's business and the need of members of the public for his services give the professional bailee far more bargaining power than his customers. This has resulted in a general rule that a professional bailee may not relieve himself from liability for his own negligence.[15] Thus

---

440, 442 (1945). In the night depository cases which have ruled in favor of the bank, the benefits of the facility to the customer and the risks to the bank are stressed. Little or no mention is made of the benefits which the bank receives. *See, e.g.*, Valley Nat'l Bank v. Tang, 18 Ariz. App. 40, 499 P.2d 991 (1972); Kolt v. Cleveland Trust Co., 89 Ohio App. 347, 93 N.E.2d 788 (1950); Irish & Swartz Stores v. First Nat'l Bank, 220 Ore. 362, 372-73, 349 P.2d 814, 819-20 (1960). Moreover, it should be noted that since each of these courts found an enforceable contract, it follows that there was a legal benefit to the bank.

10. Lacour v. Merchants Trust & Sav. Bank, 153 So. 2d 599 (La. Ct. App. 1963); Bernstein v. Northwestern Nat'l Bank, 157 Pa. Super. 73, 41 A.2d 440 (1945).

11. *See* notes 20 & 23 *infra*.

12. 15 S. WILLISTON, *supra* note 4, § 1751, at 157-59.

13. 44 CALIF. L. REV. 120, 126 (1956).

14. *See* General Grain, Inc. v. International Harvester Co., 142 Ind. App. 12, 232 N.E.2d 616 (1968); Irish & Swartz Stores v. First Nat'l Bank, 220 Ore. 362, 349 P.2d 814 (1960); 44 CALIF. L. REV. 120 (1956).

15. Ellerman v. Atlanta American Motor Hotel Co., 126 Ga. App. 194, 191 S.E.2d 295 (1972); Simmons v. Columbus Venetian Stevens Bldgs., 20 Ill. App. 2d 1, 155 N.E.2d 372 (1959); General Grain, Inc. v. International Harvester Co., 142 Ind. App. 12, 232 N.E.2d 616 (1968); Althoff v. System Garages, Inc., 59 Wash. 2d 860, 371 P.2d 48 (1962). A warehouseman, who is a professional bailee, may not lower the degree of care by means of a contractual provision which he would otherwise owe, and such a provision would be void. Arizona Storage & Distrib. Co. v. Rynning, 37 Ariz. 232, 243, 293 P. 16, 20 (1930). Bailees subject to the UNIFORM COMMERCIAL CODE are not allowed to contractually renounce their liability for their own negligence, *see* text & notes 16-18, and it has been urged as incongruous that bailees subject to the code should be treated differently from other bailees, Low

warehousemen,[16] innkeepers[17] and common carriers[18] have been classified as professional bailees and are generally not allowed to reduce the degree of care they owe or renounce their liability for their own negligence while they are acting in their capacity as professional bailees.[19]

Another reason for not allowing a professional bailee to relieve himself from liability for his own negligence is the public's interest in discouraging negligent practices.[20] Particularly when a person has complete control over another's property,[21] it has been suggested that the policy of discouraging negligence would be thwarted if such a bailee were allowed to incorporate exemptions from liability for his own negligence into his bailment contracts.[22] Thus, public policy, as well as public duty, has been invoked to strike down exculpatory clauses introduced by a professional bailee.[23]

While a professional bailee may not completely divest himself from liability, sometimes he may limit his liability. He may limit his liability from specific risks which are not attributable to his own negligence.[24] In addition, where the price for keeping the goods is based

---

v. Park Price Co., 95 Idaho 91, 94, 503 P.2d 291, 294 (1972); National Fire Ins. Co. v. Morgan, 186 Ore. 285, 294-5, 206 P.2d 963, 972-3.

16. Arizona Storage & Distrib. v. Rynning, 37 Ariz. 232, 293 P. 16 (1930); Denver Union Terminal Ry. Co. v. Cullinan, 72 Colo. 248, 210 P. 602 (1922); Nopco Chemical Div. v. Blaw-Knox Co., 59 N.J. 274, 281 A.2d 793 (1971); ARIZ. REV. STAT. ANN. § 44-2909 (1967); UNIFORM COMMERCIAL CODE § 7-204.

17. Simmons v. Columbus Venetian Stevens Bldgs., Inc., 20 Ill. App. 2d 1, 155 N.E.2d 372 (1959); Dispeker v. New S. Hotel Co., 52 Tenn. App. 379, 373 S.W.2d 897 (1963).

18. Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357 (1873); Muelder v. Western Greyhound Lines, 87 Cal. Rptr. 297, 8 Cal. App. 3d 319 (1970); Otis Elevator Co. v. Maryland Cas. Co., 95 Colo. 99, 33 P.2d 974 (1934); Tri-State Gas Co. v. Kansas City Ry. Co., 484 S.W.2d 252 (Mo. 1972); ARIZ. REV. STAT. ANN. § 44-2924 (1967); UNIFORM COMMERCIAL CODE § 7-309.

19. Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n, 67 N.M. 108, 353 P.2d 62 (1960); RESTATEMENT OF CONTRACTS § 575 (1932).

20. Bisso v. Inland Waterways Corp., 349 U.S. 85, 90-91 (1955).

21. *See generally* Stevens v. White City, 285 U.S. 195, 200 (1932); Laskowski v. Manning, 325 Mass. 393, 91 N.E.2d 231 (1950); 44 CALIF. L. REV. 120, 128 (1956).

22. *See generally* Simmons v. Columbus Venetian Stevens Bldgs., 20 Ill. App. 2d 1, 30-33, 155 N.E.2d 372, 386-87 (1958).

23. The clearest test for whether an institution has a public duty was articulated in Tunkyl v. Regents of the Univ. of Calif., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963). The factors noted, while not exhaustive, are: (1) whether the business is subject to public regulation; (2) whether the service in question is of great importance to the public and a matter of practical necessity for some members of the public; (3) whether the service is held out to all members of the public or any member coming within established standards; (4) whether the customer is in a position to obtain deletion of the exculpatory clause or obtain more complete protection by paying a higher price; and (5) whether the customer or his property are placed under the exclusive control of the other party. *Id.* at 98-101, 383 P.2d at 444-46, 32 Cal. Rptr. at 36-38. The public policy of discouraging negligence is a different but related ground for not enforcing an exculpatory clause. Thus, a court may refuse to enforce an exculpatory clause even if the party seeking exemption does not owe a public duty.

24. Tunkyl v. Regents of Univ. of Calif., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal.

on the value of the goods or where the bailor may obtain more complete protection by paying a higher price, a limitation of liability to a fixed sum will generally be upheld.[25] Similarly, where the amount of compensation to be paid the bailor in the event of the loss or destruction of the bailed goods is fixed by the bailor's valuation of the goods, a provision limiting the bailee's liability to that amount will be upheld.[26] An exculpatory provision is upheld in these situations since the bailor cannot fairly claim that the compensation to be paid for the goods is unreasonable. Nor may the bailor claim that he has been overreached since he had the opportunity to obtain more protection. In each case, the bailor could freely choose how much protection he would obtain. Upholding exculpatory clauses under these conditions would not encourage negligent practices or allow an abuse of bargaining power even if the theory that payment of damages discourages negligent practices were true. Consequently, for analytical purposes, the professional bailee who provides the bailor with an opportunity for obtaining increased protection should be dealt with in the same manner as an ordinary bailee as to whether he may limit his liability for his own negligence.

If a majority rule may be discerned, it is that an ordinary bailee may relieve himself from liability for his own ordinary negligence.[27] In an ordinary bailment it is reasonable to believe that the parties have acted as free agents from relatively equal bargaining positions, and their bargain should be given effect.[28] In addition, the reason for not permitting a professional bailee to limit his liability for his own negligence[29] is due to the need of the public for his services. There is, as a rule, no comparable need by the public for the services of an ordinary bailee. Thus an ordinary bailee is generally allowed to allocate the risks of loss as freely as any other private party.

The court in *Tang* might have characterized the bank as a professional bailee acting without its scope of regular business or as an

---

Rptr. 33 (1963); Samelson v. Harper's Furs, Inc., 20 Conn. Supp. 37, 120 A.2d 429 (1955); D'Alossio v. Morton's Inc., 342 Mass. 231, 172 N.E.2d 819 (1961); Terry v. Southern Ry. Co., 81 S.C. 279, 62 S.E. 249 (1908).

25. Gold v. Swiss Air Transp. Co., 33 App. Div. 2d 777, 307 N.Y.S.2d 166 (1969); 6A A. CORBIN, CONTRACTS § 1472 (1962).

26. *See* Samelson v. Harper's Furs, Inc., 20 Conn. Supp. 37, 120 A.2d 429 (1955).

27. Some states, by statute, require a bailee for hire to use ordinary care. *See* OKLA. STAT. ANN. tit. 15, § 466 (1966); CAL. CIV. § 1852 (1954); GEORGIA CODE ANN. § 12-404 (1936). In those jurisdictions which do not have such statutes, an ordinary bailee is allowed to limit his liability for his ordinary negligence when the terms are specific, brought home to the plaintiff and entered into knowingly and willingly. Precisionware, Inc. v. Madison County Tobacco Warehouse, Inc., 411 F.2d 42 (5th Cir. 1959); California & Hawaii Sugar Ref. Corp. v. Harris County Ship Channel Nav. Dist., 27 F.2d 392 (S.D. Tex. 1928); Weaver v. American Oil Co., — Ind. —, 276 N.E. 2d 144 (1971).

28. *See* RESTATEMENT (SECOND) OF TORTS, § 496B (1965).

29. *See* text accompanying notes 13-23 *supra*.

ordinary bailee.[30] The court stated that while a customer may not be in a position to bargain for different terms on a night depository agreement, he is "free to use or not to use the facility,"[31] and if he chooses to use it, the bank may make the facility available under terms and conditions which place the risk of loss on the customer.[32] The court accepted a characterization of a bank offering a night depository as an ordinary bailee without considering the reasons why a professional bailee is not allowed to relieve himself from liability for his own negligence.[33] If the court had examined those reasons, it might have characterized the bank differently.[34]

In the law journal article approved by the court, the reasons discussed for not allowing a professional bailee to exempt himself from liability for his own negligence focus on the absence of arm's length bargaining, inequality of bargaining power and the need of the cus-

30. Even though a bank offering a night depository has some of the attributes of a professional bailee, a determination that the provision of a night depository is outside its regular line of business might allow the bank to relieve itself from liability for its own negligence through contractual provisions. Special deposits, which are analogous to night deposits, are sometimes considered to be within the regular line of business of the bank. *Compare* Bank of California v. City of Portland, 157 Ore. 203, 69 P.2d 273 (1937) *and* Rodgers v. First Nat'l Bank, 68 S.W.2d 371 (Tex. Civ. App. 1934) *with* Bedford v. Colorado Nat'l Bank of Denver, 104 Colo. 311, 91 P.2d 469 (1939). However, if an institution holds itself out as possessing particular facilities for the services, even though the bailment is gratuitous, the bailment is for the mutual benefit of the parties. *See* Leach v. Hale, 31 Iowa 69, 7 Am. Rep. 112 (1870); Baehr v. Downey, 133 Mich. 163, 94 N.W. 750 (1902); Miller v. Bank of Holly Springs, 131 Miss. 55, 95 So. 129 (1922). For this reason and the fact that many banks offer such services, it would appear that the offering of a night depository is an incident to, if not a part of, the bank's regular line of business.

31. 18 Ariz. App. at 41-2, 499 P.2d at 992-93.

32. *Id.* The court of appeals refers to W. PROSSER, THE LAW OF TORTS, § 67, at 458-59 (3d ed. 1964), which states in part that "[i]t is also necessary that the express terms of the agreement be applicable to the particular misconduct of the defendant." The court declined to consider whether the terms of the night depository agreement were "brought home to the plaintiff", see note 27 *supra*, or whether the terms were expressly applicable to the particular misconduct of the defendant.

The contract provided that each use of the night depository would be at the customer's sole risk and made no reference to conditions existing at the time the contract was signed. If, as the court suggests, this language permits the limitation of liability for one's own negligence at the moment the contract is made, it may also permit the limitation of liability for one's future negligence even though the court denies this. 18 Ariz. App. at 43-44, 499 P.2d at 994-95. The contemplated use of the facility is in the future, so if the provision relieves the bailee from liability for negligence in the use of the facility, it arguably relieves the bailee from liability for his future as well as his present negligence.

The court ignores the fact that the degree of care which the bank must exercise is prescribed by law. Anderson v. City Van & Storage Co., 86 Ariz. 58, 340 P.2d 566 (1959) (failure to provide a safe building might well indicate failure to exercise the degree of care which a reasonably careful owner of similar goods would provide); Carlyon v. Fitzhenry, 2 Ariz. 266, 15 P. 273 (1887) (a depository is bound to take the same degree of care of the deposit that he is in the habit of bestowing on his own money). Under these circumstances, it is not readily apparent how the language of the contract could clearly show the acceptance of the facilities at the time the contract was made.

33. 18 Ariz. App. at 42, 499 P.2d at 993 *citing* Dykstra, *The Uses of a Bank's Night Depository Facility*, 70 BANK. L.J. 121, 126 (1953).

34. See text accompanying notes 12-23.

tomer for the service.[35] It is further stated by that commentator that in an ordinary bailment, unlike a professional bailment, both parties bargain at arm's length from positions of economic parity, and the customer has more than the semblance of choosing a different bailor and different services.[36] The court, however, did not examine these characteristic features of ordinary and professional bailees to determine the status of the bank in the case before it.

In noting that the bank was an ordinary bailee,[37] the court relied on *Southwest Forest Industries, Inc. v. Westinghouse Electric Corp.*[38] There it was observed that "[t]he general rule is to permit contracts limiting liability when they have been bargained between large corporate enterprises as here."[39] Tang, however, was not a large corporate enterprise and was not, according to the court, able to bargain for different terms in the agreement. Tang was not able to bargain for different terms because of the bank's superior bargaining position, the adhesive nature of the contract and his need for the service. These factual differences between *Southwest Forest Industries* and *Tang* appear to make the court's reliance on that case inapposite. Moreover, the court's contention that the customer's freedom to use or not to use the facility affords the customer with a choice is facile. A person may choose between, and is free to use or not to use, attended garages, common carriers, parcel checkrooms and warehouses, yet they have all been classified, at one time or another, as professional bailees. The court's application of the freedom to use or not to use criterion effectively reclassifies all professional bailees as ordinary bailees.

Another rationale by which the court determined that the bank was not a professional bailee was that no substantial need for the service had been shown. The court cited *Irish & Swartz Stores v. First National Bank*[40] for the proposition that until a substantial need for night depositories could be shown, a bank should not be subjected to almost absolute liability.[41] Whether there is any less need for night depositories than for the services of such professional bailees as parcel checkers or warehousemen, for example, was not discussed. Indeed, it would be difficult to demonstrate that while there is a substantial need for a place to store packages, there is no substantial need for a place to

35. Dykstra, *supra* note 33, at 126.
36. *Id.*
37. 18 Ariz. App. at 42, 499 P.2d at 993.
38. 422 F.2d 1013 (9th Cir. 1970) (applying Pennsylvania law).
39. 422 F.2d at 1020. The court, in *Tang*, cited the case as authority for the proposition that "the general rule was to permit contracts limiting tort liability when they have been properly bargained for." 18 Ariz. App. at 41, 499 P.2d at 992. The difference between the statements is significant.
40. 220 Ore. 362, 377, 349 P.2d 814, 822 (1960).
41. 18 Ariz. App. 40, 43, 499 P. 2d 991, 994 (1972).

store funds. Moreover, the issue in *Tang* was not whether the bank should be subjected to "almost absolute liability," or even strict liability, but whether a bank, offering a night depository, may contractually relieve itself from liability for its own negligence. Even if a bank were not permitted to relieve itself from liability for its own negligence by contractual provisions, a depositor seeking recovery would still have to prove that he properly deposited the sack and that the bank was negligent.[42]

Even if the *Tang* court was correct in characterizing a bank as an ordinary bailee while it is in control of a customer's funds in a night depository, other requirements must be met before it will be allowed to limit its liability for its own negligence.[43] One such requirement is that the exculpatory provision must be properly bargained for between the parties acting as free agents. Almost as a matter of definition, a professional bailee's bargaining power is far greater than that of the typical member of the public. It may also be true, however, that there will be a gross disparity in bargaining power between an ordinary bailee and a member of the public. In other words, while the absence of genuine bargaining may be presumed from the fact that the bailee is a professional bailee, whether a genuine bargain has been reached with an ordinary bailee requires investigation of several factors, including whether there was a gross disparity in bargaining power. In *Tang*, there was no evidence presented that Tang acquiesced to the provision or assented to it as the result of negotiations with the bank.[44] In fact, the best available evidence is that even if he knew what the provision meant when he signed the contract it would have been pointless for him to object to the provision since all the banks in the area which offer a night depository use a similar provision.[45]

Even if bailment principles were not applied with the greatest of care to the facts of *Tang*, at least a fair and careful reading of other cases dealing with night depositories would have provided the court with a firm basis for decision. In fact, by finding that the provision was not contrary to public policy, the court went beyond what has been decided in the other night depository cases. Prior to the decision

42. *See* Alabam's Freight Co. v. Jiminez, 40 Ariz. 18, 9 P.2d 194 (1932).

43. *See* note 27 *supra.*

44. One of the usual tests for allowing a person to relieve himself from liability for his own negligence is that the contract must have been mutually assented to. Whether a person would voluntarily and knowingly enter into a bailment contract whereby he was not afforded any protection against loss occasioned by the bank's negligence is subject to a not inconsiderable doubt.

45. It has been recognized that the widespread use of particular clauses by members of an industry makes it futile for a person to seek another party who does not employ such a provision. *See generally* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69(1960).

in *Tang* the case law on night depositories could be summarized, and the cases reconciled with each other, by saying that a bank would be allowed to insert exculpatory clauses in its night depository forms when the bank was not permitted to open the deposit bags, but that where it was allowed to open the bags, or where there was no contract between the parties, the bank would be held liable after a showing that a deposit had been made and that the bank was negligent. *Tang* is the only reported case where the bank opened the depositor's bag in his absence, was found to have been negligent by the jury and yet not found to be liable.[46] In the cases most heavily relied on by the court, the principal question was whether a deposit had been made. In *Tang*, the court assumed that the deposit had been properly made.[47] In those cases, as distinguishable from *Tang*, the bank was not permitted to open the depositor's bag.

The issue in *Irish & Swartz Stores v. First National Bank* was whether a deposit had been made and if it had, at what time in the process of depositing the bag the deposit was consummated.[48] The jury in that case found that there had not been a delivery. The court stated that "[w]here the bailment contract provides that the deposit bag is to be opened by the bank out of the presence of the customer, a different rule may be called for."[49] The Oregon court clearly indicated that if presented with facts like those in *Tang*, it might take a very different position from the one which it took in dealing with the facts before it. Not only do the cases relied upon by the court not support its conclusion but there are two cases which are inconsonant with it.

In *Ramsey Outdoor Store, Inc. v. Chase Manhattan Bank*,[50] the court indicated that if called upon to decide the question of the bank's liability, it would either not give effect to the exculpatory provision or

46. *See* note 4, *supra*.
47. 18 Ariz. App. at 41, 499 P.2d at 992.
48. 220 Ore. 362, 370-71, 349 P.2d 814, 819 (1960). Whether the provision excused the defendant in that case from liability was not even advanced in argument. *Id.* The court merely used the provision as an aid to determine the intention of the parties "as to the point [in time] which defendant was to be regarded as having received the bags deposited in the depository." *Id.* at 373, 349 P.2d at 820.
49. *Id.* at 377, 349 P.2d at 822. In Kolt v. Cleveland Trust Co., 89 Ohio App. 347, 358, 93 N.E.2d 788, 793 (1950) (also relied on in *Tang*) it was observed that "the instant case is not concerned with property admittedly in the possession of the bailee. Here the primary consideration is whether the 'deposit sack' actually came into the possession of the defendant at all." It should be observed that the bank in this case was not allowed to open the deposit bag in the absence of the depositor.
50. 169 N.Y.S.2d 772 (N.Y. City Ct. 1957). The court noted that "[h]ere the bank was authorized to open and examine the contents of the bag [distinguishing this case from *Kolt v. Cleveland Trust*] in the absence of the depositor in order to credit the moneys, checks, etc. found therein to the depositor's account." *Id.* at 774.

would construe it in such a way that it would not immunize the bank from liability for its own negligence.[51] The contract in *Ramsey* provided, as was the case in *Tang*, that the use of the night depository would be at the sole risk of the customer and that the safeguards employed by the bank would be such as the bank might at any time institute without liability to the depositor for their sufficiency.[52] The judge offered two reasons why these clauses did not amount to an exemption from liability for negligence of any and every kind. "It may be that the agreement merely precludes the plaintiff from complaining about the procedure therein outlined for the making of night deposits . . . ."[53] Moreover, the judge pointed out that the law does not look with favor upon attempts to avoid liability for one's own fault and consequently will examine attempts to do so very closely to insure that it is absolutely clear that the limitation of liability extends to negligence or other fault of the party seeking to shed his ordinary responsibility.[54] In *Bernstein v. Northwestern National Bank*[55] there was no written contract between the parties, but the bank was allowed to open the deposit bag. The case was decided on bailment principles for the customer. The case may be interpreted as saying that the bank will be held liable once the depositor has established that the bank was negligent and that a deposit was made.

The Arizona court of appeals may have been misled by the fact that those courts which have ruled in favor of the bank in the night depository cases have uniformly emphasized that at the time of the deposit the bailee is not present.[56] Emphasis of this fact is fostered by a concern about exposing the bank to fraudulent claims of delivery.[57] However, after the depositor establishes that a deposit has been properly made, the bank is exposed to no greater risk of fraudulent claims of delivery than any other bailee.[58] A different, and more serious concern is that the bank may be exposed to fraudulent or exaggerated claims concerning the amount of the deposit. While this is a

51. 169 N.Y.S.2d 772 (N.Y. City Ct. 1957). *See also* Bisso v. Inland Waterways Corp., 349 U.S. 85, 120-21 (1955) (Frankfurter, J., dissenting, stating that the phrase "sole risk" was not sufficient by itself to exclude liability for negligence).

52. 169 N.Y.S.2d at 773.

53. *Id.*

54. *Id.*

55. 157 Pa. Super. 73, 41 A.2d 440 (1945).

56. *See* Kolt v. Cleveland Trust Co., 89 Ohio App. 347, 93 N.E.2d 788 (1950); Irish & Swartz Stores v. First Nat'l Bank, 220 Ore. 362, 349 P.2d 814 (1960).

57. Kolt v. Cleveland Trust Co., 89 Ohio App. 347, 93 N.E.2d 788 (1950); Irish & Swartz Stores v. First Nat'l Bank, 220 Ore. 362, 349 P.2d 814 (1960).

58. Even where the bailed object "mysteriously disappears" a bailee must bear the loss. Perry Bros. v. Weinberg, 105 Ariz. 406, 466 P.2d 11 (1970); *accord*, United States Fidelity & Guar. Co. v. Allright Shreveport, Inc., 256 So. 2d 479 (La. App. Ct. 1972); First Nat'l City Bank v. American Broadcasting Corp., 328 N.Y.S.2d 326 (N.Y. Super. Ct. 1971).

genuine problem, the important point is that traditionally the question of the extent of damages recoverable has been treated independently from whether the defendant is liable. If, as in *Tang* there is no dispute as to the amount of the deposit, the bank cannot fairly claim that it has been exposed to a fraudulent or exaggerated claim. The question presented to the court in *Valley National Bank v. Tang* was whether the bank was liable and only after that question had been answered would the question of the extent of its liability arise.

Conclusion

With few decisions to guide it, the Court of Appeals of Arizona decided that the public policy of Arizona did not require judicial interference with the "freedom of contract" between a bank offering a night depository and its customer. The court further concluded that so long as the bank was not grossly negligent, a contractual provision would relieve it from any liability to the bailor for its negligence which resulted in the theft of the bailed items. To reach these conclusions the court imprecisely quoted one case, relied on cases factually quite dissimilar to the one before it, and ignored two cases which were factually similar to *Tang*.

If the rule in *Tang* is followed, persons whose funds are not accounted for in bank night depositories, even where the loss has been occasioned by the bank's failure to provide a reasonably secure depository, may be precluded from recouping their loss. The better rule is that if the bank is unwilling to provide the bailor with some contractual protection against loss, or at least the opportunity of obtaining such protection, it should be liable for its own negligence once a proof of deposit has been made.

VIII. TAXATION

A. CHALLENGING REAL PROPERTY TAXES IN ARIZONA

Statutory appeal procedures are available in every state to taxpayers who want to challenge the legality or amount of their real property taxes.[1] However, the extent of judicial and administrative review of questions relating to property taxes varies. By granting broad review powers to its courts as well as to administrative agencies,[2] Arizona seems to participate in what has been called a national trend toward liberalization of property tax review procedures.[3]

A recent Arizona court of appeals decision, *County of Maricopa v. Chatwin*,[4] interpreted the three major avenues of appeal available in Arizona to a taxpayer who wants to raise factual questions concerning the valuation[5] or classification[6] of his real property, or legal or constitutional questions regarding the tax imposed on it. *Chatwin* recognized that real property taxes could be challenged in an administrative appeal,[7] in a direct appeal[8] to the courts, or in what might briefly be denominated a section 204 action.[9] Usually, the route a taxpayer chooses depends on the issues he seeks to raise.[10]

---

1. Ehrman, *Administrative Appeal and Judicial Review of Property Tax Assessments in California—The New Look*, 22 HASTINGS L.J. 1, 19 (1970). *See generally* Hellerstein, *Judicial Review of Property Tax Assessments*, 14 TAX L. REV. 327 (1959); "Constitutionality of Property Tax Classifications," 13 ARIZ. L. REV. 313, 528 (1971); "Capital Judicial Review of Property Assessments," 13 ARIZ. L. REV. 313, 538 (1971).

2. *See* ARIZ. REV. STAT. ANN. §§ 42-122, -141, -146, -204, -245, -246 (Supp. 1972-73).

3. *See* Ehrman, *supra* note 1, at 21.

4. 17 Ariz. App. 576, 499 P.2d 190 (1972).

5. Valuation is the determination by the county assessor of the "full cash value" or market value of the property to be taxed. ARIZ. REV. STAT. ANN. § 42-201(7), (13) (Supp. 1972-73).

6. Real property is placed into one of five classifications, set out in ARIZ. REV. STAT. ANN. § 42-136 (Supp. 1972-73), *as amended* ch. 182, § 3 [1973] Ariz. Sess. Laws. The classification depends on the use to which the property is put. To determine a property's assessed valuation, or the sum upon which a property tax is to be levied, a percentage of the full cash value is computed. The percentage is different for each class of property. *Id.* § 42-277(B). Thus, changing the classification of one's property may mean a substantial change in property taxes. Review of property classifications may be taken in the same manner as review of property valuations. *Id.* § 42-254.

7. *Id.* §§ 42-146, -221, -241.01, -245 (Supp. 1972-73). See text & notes 17-23 *infra*.

8. *Id.* § 42-246. See text & notes 24-33 *infra*.

9. *Id.* § 42-204. See text & notes 34-39 *infra*.

10. See text & notes 15-16 *infra*. In *Chatwin* the court also mentioned the in-

In *Chatwin*, the complaint of the real party in interest, the First National Bank of Arizona, alleged errors in the valuation and classification of its uncompleted office building. The complaint also alleged unconstitutional discrimination because the assessor had not similarly valued and classified other comparable buildings. Finally, plaintiff contended that the valuation was tardy and that this had resulted in further unconstitutional discrimination. Plaintiff requested relief by way of mandamus or declaratory judgment. The defending tax authorities moved to dismiss the case.[11] When the motion was denied, this special action was filed in the court of appeals seeking to prohibit the trial court from proceeding further with the case. The court of appeals concluded that the complaint as originally constituted should have been dismissed by the trial court because the plaintiff had not pursued the appropriate review procedure.

In reaching its conclusion, the court examined in detail the available methods of protesting real property taxes[12] and found that the bank had erred in its choice of appeal procedures. The court held

---

junctive remedy, formerly used but no longer widely applicable due to legislative prohibition by ARIZ. REV. STAT. ANN. § 42-204 (B) (Supp. 1972-73). 17 Ariz. App. at 580, 499 P.2d at 194. This statute prohibits the use of any injunction, writ of mandamus or other extraordinary writ to prevent or enjoin the extending on the tax roll of any assessment, or the collection of any tax imposed or levied. State Tax Comm'n v. Superior Court, 104 Ariz. 166, 450 P.2d 103 (1969), held that notwithstanding this statute an injunction would lie when there is no semblance of authority for the imposition of a tax, or when the mode of assessment produces discriminatory inequality within the same class of property. *State Tax Comm'n* cited as precedent Nelssen v. Elect. Dist., 60 Ariz. 145, 132 P.2d 632 (1942), *modified & aff'd on rehearing*, 60 Ariz. 175, 133 P.2d 1013 (1943), and McCluskey v. Sparks, 80 Ariz. 15, 291 P.2d 791 (1955). In *Nelssen*, the court had held that an injunction was available to prevent an electrical district from assessing and taxing property not within the district. In *McCluskey*, taxpayers had alleged that their property was systematically valued differently from similar property elsewhere in the same county. The court held in that case that an injunction was available because such issues could not be tried under the statutory appeals remedy. However, although injunctions had been granted in both cases, *State Tax Comm'n* emphasized that when taxes have been imposed under semblance of authority and adequate statutory remedies exist, the taxpayer must pursue such remedies to secure relief. 102 Ariz. at 169, 450 P.2d at 106.

11. 17 Ariz. App. at 578, 499 P.2d at 192. The tax authorities contended that the trial court had no jurisdiction to grant the extraordinary relief requested. They further contended that classification of property could only be tested pursuant to ARIZ. REV. STAT. ANN. § 42-146(A) (Supp. 1972-73), and that before an appeal could be taken the protested tax must be paid.

12. Another method of relief not discussed by the court because not germane is authorized by ARIZ. REV. STAT. ANN. § 42-124.02 (Supp. 1972-73). That statute permits interested persons to appear before the Department of Property Valuation, a central agency of the State of Arizona, prior to determination of a property's value by the department. This procedure applies only to valuations performed by the department: mines and their subsidiary mills and smelters, producing oil and gas interests, gas, water, and electric utilities and pipelines, and community antenna television systems and microwave services, as specified in ARIZ. REV. STAT. ANN. §§ 42-124, -124.01, -124.03 (Supp. 1972-73). Informal adjustment of the valuation is thus possible before the department has formally valued the property. In contrast, appeals to a county assessor may be lodged only after valuation of the property. For a discussion of Arizona property tax statutes applicable to the mining industry, see Note, *Property Taxation of the Mining Industry in Arizona*, 12 ARIZ. L. REV. 763 (1970).

that the constitutional issues raised in the complaint could only be treated in a section 204 action.[13] Further, the injunctive relief requested was barred by statute.[14] In addition, *Chatwin* held that in a direct appeal to the courts, or in an administrative appeal, only factual issues relating to the classification and valuation of the property in question may be raised.[15] However, the court stated that when a taxpayer is using the third route of appeal, the section 204 action, he may invoke both factual and legal questions.[16] Using the distinctions drawn by the court as a basis, this casenote will outline the different methods of appeal and the advantages and disadvantages of each.

The Three Statutory Methods

The first of the three major approaches is the administrative appeal. Prior to March 10, the taxpayer must determine from the county assessor the valuation of his property.[17] Thereafter an appeal may be filed with the assessor.[18] The assessor must reply in writing within

13. 17 Ariz. App. at 583, 499 P.2d at 197. In the meantime plaintiff taxpayer had paid its taxes and had filed a motion in superior court to amend its original complaint so as to present a section 204 action. The court of appeals ordered the trial judge, on remand, to grant the motion to amend. The plaintiff at this time was apparently also in the process of filing an appeal pursuant to ARIZ. REV. STAT. ANN. § 42-151 (Supp. 1972-73). The court noted the possibility of consolidation. 17 Ariz. App. at 582, 499 P.2d at 196.

14. ARIZ. REV. STAT. ANN. § 42-204(B) (Supp. 1972-73). See note 10 *supra.*

15. 17 Ariz. App. at 581, 499 P.2d at 195.

16. *Id.* at 582, 499 P.2d at 196. *See* "Constitutionality of Property Tax Classifications," 13 ARIZ. L. REV. 313, 528 (1971).

17. ARIZ. REV. STAT. ANN. § 42-221(C) (Supp. 1972-73).

18. *Id.* § 42-221(D). This section prescribes that the appeal must be filed before March 15 and must be in a form prescribed by the Department of Property Valuation. The following general scheme of the valuation process is provided in the statutes: On January 1 of each year the county assessors shall determine through the use of the manuals furnished them by the Department of Property Valuation the full cash value and correct classification of all property to be assessed by their respective offices. Each assessor then lists the value of each parcel of property within his jurisdiction on the tax rolls. *Id.* § 42-221(B). The completed roll must be delivered to the county board of supervisors on or before April 20. *Id.* § 42-239(A). At its May meeting, the county board, in its function as the county board of equalization, must hear any protests regarding valuations or classifications changed from the previous year's roll, and may change any of the assessor's valuations or classifications. *Id.* §§ 42-241(B), (C). (Although this statute does not include changes in classification, their inclusion is implied by section 42-254, which specifies that review of classifications may be had in the same manner as review of valuations. At the board's monthly meeting in June, it will decide whether to let stand the changes in the tax roll proposed at its May meeting. *Id.* § 42-241(B). If any property valuation is to be raised, notice of the proposed raise must be mailed by certified or registered mail, at least 5 days prior to the June meeting, to the person in whose name the property is listed. *Id.* § 42-242.

Independent of the valuations or classifications determined by the county assessors, the state board of property tax appeals may compare and equalize the valuations of property within the state. *Id.* § 42-143. No increase in valuation shall be made without giving the property owner at least 5 days' notice of the hearing at which his property's valuation is to be considered. *Id.* § 42-144.

After the valuation process is complete, the assessment process begins. On the second Monday in August, pursuant to section 42-108.01(B), the state tax commission

30 days and specify his reasons if he denies the appeal.[19] Should the taxpayer not accept the assessor's decision, he may appeal it to the county board of equalization[20] by filing with the board a copy of the petition he had filed with the assessor and a copy of the assessor's decision.[21] If the decision of the county board is adverse to the taxpayer, he may appeal further to the State Board of Property Tax Appeals.[22] Finally, should the decision of the State Board not be satisfactory, the taxpayer may obtain review in superior court.[23]

The second method of challenging property taxes described by *Chatwin* is the direct appeal. Under this method, review in superior court of an assessor's decision is available regardless of whether a taxpayer has initiated or completed an administrative appeal. Although authorized by a separate statute,[24] a direct appeal differs only in some procedural details from a court review obtained after an administrative appeal.[25] The court in *Chatwin* held that whether a taxpayer appeals by the direct or by the administrative route, he need not pay the tax under protest before filing the appeal.[26] The tax

---

shall levy upon the property within the state the taxes necessary to defray the cost of state government in the current fiscal year, and shall fix the rate of taxation necessary to produce the amount of the levy. On or before the third Monday in August, after a series of public notices and hearings, the governing body of each county, city or town shall fix, levy and assess the amount to be raised by direct taxation. *Id.* §§ 42-302, -303, and -304. Immediately thereafter it shall assess the taxes for each person and enter them on the tax roll. *Id.* § 42-309 (1956). The completed roll is then delivered to the county treasurer. *Id.* § 42-310. The receipt of the tax roll by the treasurer of the county is his authority to collect the taxes levied by the roll. Such taxes are due in two installments, the first due on September 1, delinquent on November 1, the second due the following March 1 and delinquent May 1. *Id.* § 42-342 (Supp. 1972-73).

19. *Id.* § 42-221(F).

20. A board of equalization is a county board of supervisors sitting as the county board of equalization. *Id.* § 42-241(A).

21. *Id.* §§ 42-241.01(A), -221(F). The taxpayer must file his complaint with the board within 15 days of the date the assessor had mailed the unsatisfactory decision to him. The board may hear such testimony as is produced and may subpoena witnesses. *Id.* § 42-241.01(B). The appeal must be heard within 20 days of filing, *id.* § 42-241(B), and the board must render a decision within 10 days of the hearing. *Id.* § 42-241.01(C).

22. *Id.* § 42-245(A)(2). The statutes do not specify the form of the proceedings of the state board, nor are its subpoena powers delineated. However, section 42-142 permits one or more members of the board to hold hearings and take testimony, to be reported for action by the board, when he is authorized to do so by rule or order of the board. The taxpayer has 20 days after the county board's decision is mailed to appeal to the board, on a form prescribed by the board. *Id.* § 42-245(A)(2). Although there is no specific time within which the state board must hear the appeal, it must be before July 25, and a written decision must be given the applicant within 30 days of the date of the hearing, but in no case later than July 25.

23. *Id.* § 42-146(A). *Id.* §§ 42-245(A)(1) and -241.01(E) also provide for appeal to the superior court after a valuation or classification is fixed by the board of equalization. These provisions are redundant in view of the provisions of section 42-246.

24. *Id.* § 42-246. Appeal to superior court under this section may be made at any step in the administrative appeal; the administrative route need not be exhausted if it is begun. *Id.*

25. See text & notes 50-52 *infra.*

26. 17 Ariz. App. at 580, 499 P.2d at 194, *construing* ARIZ. REV. STAT. ANN. § 42-151(E) (Supp. 1972-73).

must be paid, however, prior to the date it becomes delinquent.[27] The court further held that under both methods of appeal only factual questions regarding classification or valuation of the property in issue could be raised.[28]

Whether a property tax question is brought to superior court by administrative or direct appeal, the disputed valuation or classification of the property is presumed correct and lawful and the plaintiff taxpayer has the burden of showing its invalidity.[29] As a prerequisite to determination of the correct classification the court must first find that the original classification was erroneous. Similarly, before determining the value of the property, the court must find that the valuation by the county assessor was excessive.[30] The court need not find that the original valuation was "fundamentally unfair, arbitrary, fraudulent, or equitably excessive,"[31] as required by some states, but merely, as provided by statute, that it was "excessive."[32] After the court has established that the protested valuation is excessive or the classification is erroneous, it must then determine the correct valuation or classification within the same proceeding. Evidence considered by the court in its finding of excessiveness may also be used to establish the new valuation of the property.[33]

---

27. If the tax is not paid prior to the date it becomes delinquent, the appeal must be dismissed. *Id.*

28. 17 Ariz. App. at 581, 499 P.2d at 193, *construing* ARIZ. REV. STAT. ANN. § 42-152 (Supp. 1972-73). See text & note 45 *infra.*

29. ARIZ. REV. STAT. ANN. § 42-152(B) (Supp. 1972-73).

30. *Id.* § 42-152(C).

31. Navajo County v. Four Corners Pipe Line Co., 106 Ariz. 511, 519, 479 P.2d 174, 182 (1970), *rehearing denied*, 107 Ariz. 296, 486 P.2d 778 (1971).

32. *Id.* The term "excessive" is inexact but appears to mean that a reasonable, thus necessarily imprecise margin of discretion will be allowed the assessor. The *Four Corners* court in its original opinion noted that a court's general function in reviewing tax valuations is to impose its opinion only in the event that the agency abused its legislatively imposed duty. 106 Ariz. at 522, 479 P.2d at 185. Later cases interpreting *Four Corners* have emphasized that the burden is on the taxpayer in an administrative or direct appeal to show by competent evidence that the assessor's valuation is excessive, yet they have not articulated a standard for determining excessiveness. *See* Talley v. Paradise Mem. Gardens, Inc., 107 Ariz. 585, 587, 491 P.2d 439, 441 (1971); Graham County v. Graham County Elec. Coop., 16 Ariz. App. 554, 555, 494 P.2d 754, 755 (1972); Pima County v. Trico Elec. Coop., 15 Ariz. App. 517, 519, 489 P.2d 1219, 1221 (1971); Yuma County v. Tongeland, 15 Ariz. App. 237, 238, 488 P.2d 51, 52 (1971).

33. Navajo County v. Four Corners Pipe Line Co., 107 Ariz. 296, 298, 486 P.2d 778, 780 (1971). Finally, the statute prescribing relief for the two appeal methods further indicates their similarity. ARIZ. REV. STAT. ANN. § 42-152(C) (Supp. 1972-73). In both types of appeal, judgment may be found in an amount equal to any excess tax levied and assessed. *Id.* § 42-152(C) (Supp. 1972-73). When judgment is awarded to a taxpayer who has paid his taxes the county treasurer shall pay any refund out of sums collected from property taxes in the next fiscal year, unless the board of supervisors allows the refund to be paid from current funds. The board may also allow the amount of the judgment to be credited toward any taxes which remain due on the property. ARIZ. REV. STAT. ANN. § 42-152(C) (Supp. 1972-73). Necessarily, these provisions apply only to direct appeals.

Because it is not possible to pay one's property taxes before the date an administrative appeal is complete, no statutory provisions for refunds arising from administra-

The third avenue of challenging real property taxes outlined in *Chatwin* is the section 204 action.[34] This method differs substantially from the administrative and direct appeals. First, if a taxpayer uses this approach, he must pay his property tax under protest before filing suit,[35] and then commence an independent action in superior court to recover any tax illegally collected. Second, *Chatwin* noted that a section 204 action is not governed by the procedural provisions attendant to a direct or administrative appeal.[36] Thus, although the legislature has provided that a court must hear a direct or administrative appeal within 90 days after the appeal has been docketed,[37] no such procedural advantage inheres in a section 204 action.[38] The

---

tive action are necessary. For a discussion of the valuation and assessment timetable, see note 18 *supra*. It should also be noted that this refund provision differs from the refund provisions for section 204 actions. See note 38 *infra*.

34. ARIZ. REV. STAT. ANN. § 42-204 (Supp. 1972-73). This remedy has been found by the Arizona supreme court to have existed at common law. State Tax Comm'n v. Superior Court, 104 Ariz. 166, 169, 450 P.2d 103, 106 (1969).

35. ARIZ. REV. STAT. ANN. § 42-204(A) (Supp. 1972-73). Thus, filing a section 204 action is precluded until the amount of the tax has been determined. See note 18 *supra* for the approximate date of the determination.

36. 17 Ariz. App. at 580, 499 P.2d at 194. The direct appeal and administrative appeal to the superior court are governed by ARIZ. REV. STAT. ANN. §§ 42-151 & 152 (Supp. 1972-73). It is possible that, since a section 204 action is not governed by these sections, the plaintiff in a section 204 action need not first show that the valuation is excessive, as is necessary in a direct or administrative appeal to the court. Also, it is unclear whether the assessor's valuation in a section 204 suit must be presumed correct and lawful, as is the case in an appeal governed by section 42-152. Navajo County v. Four Corners Pipe Line Co., 106 Ariz. 511, 479 P.2d 174 (1970), offers some guidance regarding the applicability of these rules in a section 204 action. The Supreme Court of Arizona noted in its original opinion in *Four Corners* that the trial court should defer to the determination of the administrative body unless it clearly abused its duty. *Id.* at 522, 479 P.2d at 185. Although the court was construing an earlier provision, ARIZ. REV. STAT. ANN. § 42-147 (1956) (repealed 1965), which required a presumption of correctness, the court relied not so much on the requirements of the statute as on well settled principles regarding the reviewability of administrative decisions:

> It is not the function of the judiciary to promulgate tax assessment regulations in the form of judicial opinions. The court's function in this area of taxation is the same as in other traditional areas of administrative law; that is to review the actions of such administrative bodies and to super-impose its opinion only in the event that the agency abused its legislatively-delegated duty.

106 Ariz. at 522, 479 P.2d at 185. Therefore, the plaintiff's burden of showing excessiveness and the presumption of validity likely will be applied by the superior court in section 204 actions even though the statute does not require it.

37. ARIZ. REV. STAT. ANN. § 42-152(A) (Supp. 1972-73).

38. Likewise, provisions for relief differ between the section 204 action and the direct and administrative appeals. Should a taxpayer win a section 204 action, a refund *shall* be made by the county treasurer within the current fiscal year, if funds are available. *Id.* § 42-204.01(A). The refund provisions for direct or administrative appeal, however, require that the board of supervisors approve any refund made during the current fiscal year. *Id.* § 42-152(E). Otherwise, payment will be budgeted for the next fiscal year. Thus, if the protesting taxpayer anticipates that the size of a potential tax refund might influence his county board to postpone payment of his refunded tax until the next fiscal year, a section 204 action may be the most appropriate method of protest, even if the suit involves only factual questions.

Although on its face section 42-204.01, the statute governing refunds for section 204 actions, does not limit its applicability to those actions, such a limitation must be presumed to avoid conflict with the refund provisions embodied within section 42-152, which governs direct and administrative appeals. Logically, the latter provisions, be-

most notable distinguishing feature of a section 204 action, however, is that the issues one may raise are broader than those in a direct or administrative appeal. Here, *Chatwin* held, constitutional and legal issues as well as factual issues may be raised.[39] Thus, as noted above, a taxpayer's choice of a method of appeal may be limited by the issues he wants to present.

Analysis of Section 42-152

At the core of the court's restriction of the issues which may be raised on administrative or direct appeal lies its understanding of section 42-152(B), (C).[40] That statute specifies that at a superior court hearing pursuant to a direct or administrative review, both parties may present evidence of any matters that relate to the classification or to the full cash value of the property in question.[41] It is arguable that the statute could be read as merely providing for evidence and findings by the court on matters of classification and full cash value, without necessarily excluding consideration and decision of other pertinent issues. That is, it could be permissive rather than restrictive. The *Chatwin* court, however, found that the statute was exclusive: it specified all the issues on which evidence could be introduced and on which findings could be made.[42] This interpretation, argued *Chatwin,* prevents a court sitting in a direct or administrative review from hearing constitutional issues.

Several unexpressed reasons may explain the court's restrictive interpretation. If the court were to interpret broadly the provisions of section 42-152, the function of the administrative and direct appeal methods would duplicate the function of the section 204 suit, the statutory version of the tax recovery suit at common law.[43] *Chatwin*

---

cause of their inclusion within section 42-152 must countermand, with regard to direct and administrative appeals, any more general refund provisions outside that section. Legislative intent to limit the applicability of section 42-204.01 is further shown by the section's enumeration as a subsection of section 42-204.

39. 17 Ariz. App. at 582, 499 P.2d at 196. Section 204 actions, the court held, are not governed by ARIZ. REV. STAT. ANN. § 42-152 (Supp. 1972-73), which limits the issues a court can consider to factual matters. See text & notes 40-45 *infra.*

40. ARIZ. REV. STAT. ANN. § 42-152(B), (C) (Supp. 1972-73).

> At the hearing both parties may present evidence of any matters that relate to the classification or to the full cash value of the property in question as of the date of its assessment. The valuation or classification as approved by the appropriate state or county authority shall be presumed correct and lawful.

Id. § 42-152(B).

> If the court finds that the valuation is excessive or insufficient, the court shall find the full cash value of the property. If the court finds that the classification is in error, it shall determine the correct classification.

Id. § 42-152(C).

41. *Id.* § 42-152(B).

42. 17 Ariz. App. at 581, 499 P.2d at 195.

43. *Id.* at 580, 499 P.2d at 194.

alluded several times to the distinction between the legislative origin of the administrative and direct appeals and the common-law origin of the section 204 suit as a reason for its differentiation of their present purposes. The two appeals procedures stand merely as legislatively permitted, legislatively restricted, alternatives to the section 204 action, and need not be interpreted as duplicating it.[44] A second reason for the court's interpretation of the statute, again alluded to but never fully articulated in the opinion, is that administrative bodies are not competent to consider strictly legal or constitutional issues; and that these issues therefore may not be raised on appeal from such a body.[45] This reasoning, of course, applies only to an administrative appeal, not to a direct appeal, for which no prior administrative decision is needed.

Selecting the Appropriate Method

A taxpayer choosing a procedure to question the amount or legality of a real property tax must consider several factors. As already noted, the issues to be raised may determine which route is chosen. Time and expense may also be considerations. For instance, although a section 204 action may be brought solely on factual questions, it is unlikely that a taxpayer would pursue such a route. There is no requirement that a court hear the matter within 90 days of the date the suit is docketed, as is required in an administrative or direct appeal.[46] The requirement of prior payment of the tax for a section 204 action also discourages the use of this procedure unless necessary.[47] Further, since a section 204 suit cannot be filed until the protested tax is paid, this necessitates waiting until the tax rate has been set and the amount of the tax on the property calculated.[48] Finally, legal fees insure that the cost of a section 204 suit is likely to exceed that of an administrative appeal.[49]

44. *Id.* at 582, 499 P.2d at 196.

45. *Id.* at 581, 499 P.2d at 195. Although the court did not use precedent directly to support its textual analysis, the reasoning of prior cases supports the court's position that administrative bodies are not competent to consider legal issues regarding property taxes. Southern Pac. Co. v. Cochise County, 92 Ariz. 395, 377 P.2d 770 (1963); McCluskey v. Sparks, 80 Ariz. 15, 291 P.2d 791 (1955); Guard v. Maricopa County, 14 Ariz. App. 187, 481 P.2d 873 (1971). *Southern Pacific* is a landmark case which has precipitated much of the change in Arizona property statutes in the last decade.

46. ARIZ. REV. STAT. ANN. § 42-152(A) (Supp. 1972-73).

47. *But see* note 38 *supra.*

48. *Id.* § 42-204(C). See notes 18, 35 *supra.*

49. Very few of the 1196 administrative appeals filed with the Pima County, Arizona, assessor's office protesting valuations or classifications for 1973 were handled by attorneys. Most appeals involved valuations on residential units that were filed personally by the homeowners. Nor are appeals to the Pima County Board of Equalization often handled by attorneys. No filing fees or other charges are required by

Deciding whether to pursue an administrative or a direct appeal may be more difficult. Again, the legal expenses involved in litigating a direct appeal in court would probably exceed the cost of appeals before administrative bodies. Beyond this consideration a distinction between the two methods lies in the different deadlines the statutes impose on a protesting taxpayer. To begin the administrative appeal route, appeal must be filed with the assessor by March 15,[50] but direct appeal may be filed any time before the following November 1,[51] the date upon which the first installment of the property tax becomes delinquent.[52] Thus if a taxpayer delays his protest past March 15 he may still file a direct appeal in superior court, although administrative appeal is precluded. Significantly, should a taxpayer not ask the county assessor before March 10 the amount of his property's new valuation or classification, he may well receive no notice of any change until 5 days before the June meeting of the board of equalization,[53] by which time the deadline for instituting an administrative appeal will have passed. If a taxpayer does file an administrative appeal before March 15, on the other hand, there is a possibility of obtaining relief in three administrative tribunals before the question is taken to court.

Finally, a taxpayer presenting both factual and legal issues may wish first to present his factual arguments in administrative review while reserving his legal arguments for a section 204 suit. Since the administrative route is probably faster and entails fewer legal costs, it may be wise to pursue that route as long as possible. Should his factual arguments prove ineffective before administrative officials, the taxpayer may then either take them to superior court under the administrative or direct review routes, or combine them with his legal arguments in a section 204 action.

Conclusion

The court in *Chatwin* fashioned a dual approach to the problem of real property tax appeals: one approach for factual questions, one primarily for constitutional or legal issues. The effect of the decision,

---

the assessor's office or by the board of equalization. Telephone interview with Mr. Gerd O. Danneman, Chief Deputy County Assessor, Pima County in Tucson, Arizona, September 17, 1973.

50. ARIZ. REV. STAT. ANN. § 42-221(D) (Supp. 1972-73).

51. *Id.* § 42-246.

52. *Id.* § 42-342.

53. *Id.* §§ 42-242, -221. If property is revalued by the state board of property tax appeals rather than by the county assessor, notice of a proposed change also may be received by the property owner too late to comply with the March 15 deadline for administrative appeal. *Id.* §§ 42-143, -144.

when taken in conjunction with statutory requirements, is to narrow the usefulness of each appeal method. The statutory requirements of prior payment for a section 204 action limit the attractiveness of that route of protest, while the utility of the methods of administrative and direct appeal is limited by the court's narrow construction of their scope. A taxpayer planning to appeal a tax valuation or classification must consider these and other factors prior to choosing the form of his appeal.

IX. TORTS

A. Effect of Judgment for Personal Injury on Subsequent Malpractice Suit Against Attending Physician

In *Cimino v. Alway*[1] the Court of Appeals of Arizona was confronted with the issue of whether the satisfaction of a judgment by a tortfeasor who inflicted personal injury automatically bars a subsequent malpractice action against an attending physician. Since this was a case of first impression, the court had to determine whether to adopt the traditional, or "unity of discharge" rule, or to follow the trend of recent decisions and choose the "modern rule." The traditional view holds that if the liability of the original tortfeasor is extinguished by a release[2] or satisfaction of a judgment,[3] then a subsequent malpractice action against the negligent attending physician is barred. The modern rule permits a suit against the negligent physician unless the plaintiff received full compensation for the injuries caused by the malpractice in the original action or as consideration for the release.[4] The modern rule, however, in no way limits the original tortfeasor's liability for the proximate foreseeable consequences of his act if the injured party seeks to recover full compensation from him.[5] The court of appeals adopted the modern view and held that the trial court must first determine the extent of the plaintiff's compensation in the original action before deciding whether to allow the subsequent malpractice claim. If the judgment was not intended to represent full satisfaction of the malpractice claim, the injured party could assert his claim against the physician.[6]

Cimino concerned a woman who sustained a foot injury while shopping in a Phoenix department store during May, 1966. As a result of her injury, surgery was performed by Dr. Alway. Despite this

1. 18 Ariz. App. 271, 501 P.2d 447 (1972).
2. *See, e.g.*, Farrar v. Wolfe, 357 P.2d 1005 (Okla. 1960); Hartley v. St. Francis Hosp., 24 Wis. 2d 396, 129 N.W.2d 235 (1964); Tidwell v. Smith, 27 Ill. App. 2d 63, 169 N.E.2d 157 (1960). *See also*, W. Prosser, The Law of Torts 301 (4th ed. 1971).
3. *See* Wells v. Gould, 131 Me. 192, 160 A. 30 (1932).
4. *See, e.g.*, Leech v. Bralliar, 275 F. Supp. 897 (D. Ariz. 1967); Ash v. Mortenson, 24 Cal. 2d 654, 150 P.2d 876 (1944); Derby v. Prewitt, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962).
5. *See* Keown v. Young, 129 Kan. 563, 283 P. 511 (1930); W. Prosser, *supra* note 2, at 320-21.
6. 18 Ariz. App. at 276, 501 P.2d at 452.

operation and the doctor's subsequent treatment, Ms. Cimino continued to experience pain. She finally consulted a second physician in May, 1968, and corrective surgery was performed. During the interim, a negligence action had been initiated against the department store. About 3 months after the second operation, this suit resulted in Ms. Cimino recovering a $5,000 judgment. In September, 1969, she filed the present malpractice action alleging Dr. Alway's treatment had resulted in a separate injury from that sustained in the accident.[7] The trial court, apparently adhering to the traditional view, granted the defendant's motion for summary judgment. The court of appeals reversed, holding that the action was not barred without a determination of whether the plaintiff had litigated the malpractice issue in the suit against the department store and whether she had received full compensation for her injuries caused by the malpractice.

This casenote will examine the historical bases of the traditional view and the flaws in its supporting logic which led the Arizona court of appeals to reject it. The reasoning upholding the modern view will also be discussed, as will the major procedural difficulty in applying this rule—proper allocation of the burden of proof on the issue of whether the attending physician was released from liability by either an earlier judgment or settlement with the original tortfeasor.

The Traditional View: Unity of Discharge

Three legal concepts have tended to promote the result reached by courts following the traditional view. The first, and probably most significant, emanates from the "unity of discharge" rationale regarding the common law liability of multiple tortfeasors. At common law, torts committed by persons acting in concert were regarded as creating a joint liability and a single, indivisible cause of action. There being a single cause of action, a release or judgment involving one of the tortfeasors was deemed to extinguish the liability of the other joint tortfeasors. Justification for this result was generally based on the close proximity of time and place of the defendants' acts and the impossibility of distinguishing the injuries and segregating the damages. Additionally, there existed a conclusive presumption that where a settlement was reached or a judgment was rendered, the amount paid by the tortfeasor constituted full compensation for all the victim's injuries.[8] Relying on these common law principles, some courts have mistakenly

7. There was also an issue involving alleged false testimony on the part of the physicians, but this was not involved in the summary judgment or the appeal. 18 Ariz. App. at 272, 501 P.2d at 448.

8. *See* 2 E. COKE, COMMENTARY UPON LITTLETON § 376 (15th ed. 1794).

considered the original tortfeasor and a negligent attending doctor to be joint tortfeasors and hence, their independent acts to have created a single claim. Since malpractice by an attending physician ordinarily does not occur at the same time and in the same place as the original injury, the tortfeasors do not normally act in concert, and the damages are usually divisible. It is clearly erroneous, therefore, to term the wrongdoers "joint tortfeasors".

Also contributing to the result reached by adherents of the traditional view is the doctrine of proximate cause. Since a wrongdoer is responsible for the proximate, forseeable consequences of his negligent acts, the original tortfeasor generally can be held liable for the doctor's aggravation of the plaintiff's injuries.[9] Adherents of the traditional view apparently have concluded that since the original tortfeasor *can* be held liable for the entire amount of the plaintiff's damages, including those attributable to malpractice, he *must* be held liable for the total damage sustained.[10] This plainly does not follow.

The third concept promoting the traditional view is the liberal American construction of the rules of joinder. These liberal rules have allowed parties whose independent acts have united to produce a single injury to be joined in one action. Such joined parties have often been mislabeled "joint tortfeasors".[11] In sum, courts following the traditional view have conglomerated independent torts into one omnibus claim with the original wrongdoer generally paying the entire toll and the injured party allowed one opportunity to recover.

Strict application of the traditional view has produced unjust results. For example, under this rule, an injured party has been barred from asserting a subsequent malpractice claim although he was unaware of the malpractice at the time of the initial suit.[12] This result is inequitable to the plaintiff and has the effect of discouraging the prompt filing of suits because recovery will be barred for injuries which are not immediately apparent at the time of the action. Application of the traditional view can also be inequitable to the original tortfeasor. Since the plaintiff is allowed only one action, to assure complete recovery he will likely sue the original tortfeasor. This will allow him to collect

9. *See, e.g.*, Edwards v. Goergen, 256 F.2d 542 (10th Cir. 1958); Aubuschon v. Witt, 412 S.W.2d 136 (Mo. 1967); Herrero v. Atkinson, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964). *See also* W. PROSSER, *supra* note 2, at 278-79.

10. *See* Keown v. Young, 129 Kan. 563, 283 P. 511 (1930); Borden v. Sneed, 291 S.W.2d 485 (Tex. Civ. App. 1956).

11. *See* DeNike v. Mowery, 69 Wash. 2d 357, 418 P.2d 1010 (1966); Litts v. Pierce County, 5 Wash. App. 531, 488 P.2d 785 (1971); Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 420 (1937). Parties do not become true joint tortfeasors simply because they can be joined as defendants in a single action.

12. Guth v. Vaughan, 231 Ill. App. 143 (1923).

both for the injuries caused by the original tortfeasor as well as any which appear to have been caused by the attending physician.[13] Since the original injury could not be found to be proximately caused by the attending physician's negligence, the physician could not be held liable for the antecedent acts of the original tortfeasor. The original tortfeasor, therefore, may be liable for damages for malpractice which greatly exceed the amount necessary to compensate the injury he inflicted.

Some courts have demonstrated a willingness to avoid the harsh results of the traditional view by creating exceptions to meet the circumstances. Reasoning that a party should not be foreclosed from a claim that has not accrued, some courts which otherwise adhere to the traditional view have found that a subsequent suit against an allegedly negligent physician is not barred by a release antedating the alleged malpractice.[14] A second exception to the traditional view allows the subsequent suit where the attending physician is allegedly guilty of gross negligence.[15] Since the original tortfeasor has not been found liable for the gross negligence of the attending physician,[16] it would be manifestly unjust to bar a suit against the attending physician.

In sum, the traditional view has resulted from an illogical adaptation of an old common law rule and is unjustifiable.[17] Dean Wigmore has called it "a relic of the Cokian period of metaphysics" and maintains that only false logic prevents the rule from being completely repudiated.[18] Dean Prosser has found it "deplorable that common law notions as to the unity of a cause of action have survived to such an extent."[19] There is a claim for each tort, he argues, and a release of one claim cannot be found to release another of independent origin.[20] Other commentators likewise have condemned the unity of discharge rule.[21] Recent decisions adopting this rule in the negligent attending

13. *See* note 9 *supra.*

14. *See* Noll v. Nugent, 214 Wis. 204, 252 N.W. 574 (1934); Mainfort v. Giannestras, 49 Ohio Op. 440, 111 N.E.2d 692 (Hamilton County C.P. 1951). *Contra* Guth v. Vaughan, 231 Ill. App. 143 (1923).

15. *See* Fletcher v. Hand, 358 F.2d 549, 553 (D.C. Cir. 1966).

16. *Id.*

17. *See* Wigmore, *Release to One Joint-Tortfeasor*, 17 ILL. L. REV. 563 (1923).

18. *Id.* at 563; *cf.* Adams v. Dion, 109 Ariz. 308, 509 P.2d 201 (1973).

19. Prosser, *supra* note 11, at 424.

20. *Id.* at 425.

21. *See, e.g.*, Baer, *Effect of Release Given Tortfeasor Causing Initial Injury in Later Action for Malpractice Against Treating Physician*, 40 N.C.L. REV. 88 (1961); Note, *Release to One Tortfeasor Held Not to Bar Suit Against Others Liable for Same Injury*, 63 COLUM. L. REV. 1142 (1963); Note, *The Release of an Original Tortfeasor is Not a Bar to Malpractice Action Against Treating Physician*, 18 DRAKE L. REV. 306 (1969); Note, *Joint Tortfeasors—Release of One Not Release of All*, 62 MICH. L. REV. 1089 (1964). *See also* Note, *Torts-Release: Action Not Barred Against Concurrent Tortfeasors*, 14 SYRACUSE L. REV. 526 (1963); Note, *Effect of Release of Original Tortfeasor as to Subsequently Negligent Physician*, 6 WILLAMETTE L.J. 335 (1970).

physician situation give little vitality to what must be considered a fading principle.[22]

The Modern View

The progressive courts which have adopted the modern rule have avoided the disconcerting notion of eroding the traditional view by creating exceptions to it.[23] The courts subscribing to the modern view have refuted two of the concepts supporting the traditional view: that the acts of the original tortfeasor and the physician create a single claim and that a settlement or judgment is presumed to constitute full compensation. Addressing the first of these, since the negligence of the original tortfeasor and the malpractice of the attending physician cause different injuries, occurring at different times, it is asserted that two independent claims arise. Judge Fuld recognized this principle in the leading New York case of *Derby v. Prewitt*:[24] "[T]heir wrongs were independent and successive rather than joint, and this being so, the plaintiff had not one but two separate and distinct causes of action, one against the [original tortfeasor] and the other against the doctor for his alleged malpractice . . . ."[25] The resolution of one claim should, therefore, have no effect on the other. As independent torts giving rise to independent claims, either could be asserted first without barring a subsequent action on the other.[26] Applying this reasoning to the facts in *Cimino*, the plaintiff could have brought her claim against Dr. Alway prior to the suit against the department store, if the circumstances had been amenable to this sequence. The second reason for the traditional view, that settlement with one tortfeasor is presumed to be full compensation, was also discredited by Judge Fuld in *Derby*:

22. Farrar v. Wolfe, 357 P.2d 1005 (Okla. 1960) is one of the most recent cases adopting the traditional view, yet this case has been severely criticized in more recent opinions. *See* Hanson v. Collett, 79 Nev. 159, 380 P.2d 301 (1963); Hull v. Wolfe, 393 P.2d 491 (Okla. 1964).

23. The modern rule was first espoused by the New Hampshire supreme court in Wheat v. Carter, 79 N.H. 150, 106 A. 602 (1919), but was not accepted in another jurisdiction until 1944, when the California supreme court decided Ash v. Mortenson, 24 Cal. 2d 654, 150 P.2d 876 (1944). New Hampshire and California remained the only jurisdictions adhering to the modern rule until 1955, yet by 1969 11 additional jurisdictions, including the United States District Court for Arizona, in Leech v. Bralliar, 275 F. Supp. 897 (D. Ariz. 1967), had adopted the modern rule. No jurisdiction has shifted from the modern rule to the traditional view. For a study of the increase in popularity of the modern rule, see Miller, *Does the Release of the Original Tortfeasor Release a Subsequent Negligent Attending Physician*, 36 INS. COUNS. J. 360 (1969).

24. 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962). There the plaintiff was injured in a taxicab accident and subsequently was the victim of the attending physician's malpractice. After releasing the taxicab driver, the plaintiff brought suit against the attending physician.

25. *Id.* at 105, 187 N.E.2d at 559, 236 N.Y.S.2d at 958.

26. Ash v. Mortenson, 24 Cal. 2d 654, 657, 150 P.2d 876, 877 (1944).

> Irrebuttable presumptions have their place in the law but only where public policy demands that inquiry cease. Where the cause of action is single and the liability of one wrongdoer is identical with that of the other, there may be warrant for erecting such a barrier to suit after settlement.[27] However, where, as here, neither of these elements is present, there is no basis or justification for preventing the plaintiff, by an artificial rule of law, from recovering the full compensation to which she would otherwise be entitled for her injuries.[28]

For the injured party to commence an action against a negligent attending physician under the liberalized modern rule, several prerequisites must be satisfied. First, there must be an adequate showing that there is no risk of double compensation in the second action. The compensation received as a result of the initial action must not represent payment for injuries sustained from the doctor's improper treatment.[29] The question to be answered in any subsequent action, therefore, is not what compensation the plaintiff received, but rather what the compensation represented.[30] Where the action against the initial tortfeasor culminated in a judgment, the record of the trial must indicate that the injured party did not intend to seek compensation for the malpractice claim.[31] If the initial tortfeasor's liability was extinguished by a release, it must be clear that the consideration for the release was not full compensation for all injuries.[32] The second prerequisite is that the injured party must not have intended to release the attending physician in the instrument executed to the original wrongdoer.[33] Finally, the injuries suffered must be distinguishable or apportionable so there will be no difficulty in determining whether the plaintiff received full compensation in the original action.[34] If the injuries were not distinguishable the claim would properly be governed by the rules of joint liability.[35]

---

27. *See also* Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33 (1961); Apodaca v. Haworth, 206 Cal. App. 2d 209, 23 Cal. Rptr. 461 (1962); RESTATEMENT (SECOND) OF TORTS § 433A (1965); W. PROSSER, *supra* note 2, at 243. The Arizona supreme court faced a situation in which a barrier to a second suit is properly erected in Holtz v. Holder, 101 Ariz. 247, 418 P.2d 584 (1966). In this case the plaintiff was involved in two automobile accidents within 10 minutes. The court held that two or more tortfeasors, neither acting in concert nor concurring in cause, may be jointly and severally liable if their negligent acts occur closely in time and place and the plaintiff suffers indistinguishable injuries.

28. 12 N.Y.2d at 106, 187 N.E.2d at 559, 236 N.Y.S.2d at 958.

29. Smith v. Conn, 163 N.W.2d 407, 411 (Iowa 1968).

30. Knutsen v. Brown, 96 N.J. Super. 229, 235, 232 A.2d 833, 836 (App. Div. 1967).

31. *See id.*

32. Derby v. Prewitt, 12 N.Y.2d 100, 106, 187 N.E.2d 556, 559, 236 N.Y.S.2d 953, 958 (1962).

33. DeNike v. Mowery, 69 Wash. 2d 357, 418 P.2d 1010 (1966). Generally the trier of fact should determine whether the injured party intended to release the negligent attending physician. *Id.* at 370, 418 P.2d at 1018. In resolving this issue,

It might appear that adhering to the modern rule and finding multiple claims, where formerly only one existed, would burden the courts with increased litigation. It is also possible, however, that the modern rule will facilitate out of court settlements with the initial tortfeasor, particularly if the injury inflicted was slight. This contention seems likely because the injured party would not be barred from later suing the attending physician. If the injured party was able to sue the attending physician independently, the original tortfeasor's liability would be limited to compensation for the damages directly resulting from his negligent act. This approach also spreads the burden of compensation more equitably among those parties individually responsible for the specific injuries. The modern rule should also encourage prompt claim filing since the risk of being foreclosed from a second action for a subsequent wrong is eliminated. Additionally, the burden of increased litigation is far outweighed by the public policy to be served by allowing injured parties a full and fair opportunity to receive complete compensation.[36]

Burden of Proof

Courts following the modern view have been inconsistent in their approach to allocating the burden of proving whether the plaintiff was fully compensated in the initial action. *Cimino* placed the burden of proving full compensation on the defendant.[37] This allocation follows the reasoning of the appellate division of the New Jersey superior court in *Knutsen v. Brown*.[38] In that decision the burden of proving that a previous judgment included compensation for injuries caused by malpractice was equated with the defendant's responsibility for establishing

---

the parol evidence rule generally has been held not to apply when one who was not a party to the instrument seeks to claim release by it. Under this construction of the parol evidence rule, oral testimony would be admissible to determine the intent of the parties to the release. *See* Smith v. Conn, 163 N.W.2d 407 (Iowa 1968); Dickow v. Cookinham, 123 Cal. App. 2d 81, 266 P.2d 63 (1954). The attending physician could allege that he was covered by the release, although not a party to it, on the ground that the release is deemed to extinguish all claims which the releasor intends, not merely to absolve a party to the instrument of liability. Smith v. Mann, 184 Minn. 485, 488, 239 N.W. 223, 224 (1931), *overruled on other grounds*, Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 236, 92 N.W.2d 96 (1958). See Litts v. Pierce County, 5 Wash. App. 531, 533, 488 P.2d 785, 787 (1971): "A release is a surrender of a claim which may be given for less than full consideration, even gratuitously."

34. *See* McKenna v. Austin, 134 F.2d 659, 664 (D.C. Cir. 1943).

35. *See* note 27 *supra*.

36. Ms. Cimino's initial injury was relatively minor, resulting in a $5,000 judgment against the department store, yet the relief prayed for against Dr. Alway was approximately $500,000. Brief for Appellant at 6, Cimino v. Alway, 18 Ariz. App. 271, 501 P.2d 447 (1972). Under the traditional rule, the $500,000 claim would have been barred by the $5,000 recovery against the department store.

37. 18 Ariz. App. at 271, 501 P.2d at 453.

38. 96 N.J. Super. 229, 237, 232 A.2d 833, 837 (App. Div. 1967).

the validity of his plea for collateral estoppel. The defendant doctor must, therefore, prove that his liability has been previously litigated or extinguished by an earlier judgment or settlement.[39]

Normally, determining the proper allocation of the burden of proof "is merely a question of policy and fairness based on experience in different situations."[40] In allocating the burden, however, several factors can be considered. First, the court can look to which party has greater access to the available evidence.[41] Arguably, it is fairer to place the burden on the party who has the power to produce the evidence. In the *Cimino* situation, however, both parties have equal access to the primary evidence—the record of the previous trial. To find the extent of the plaintiff's compensation in the original action, the court should examine the record of that trial and determine whether the judgment represented an award for the injured party's entire loss.[42] A second factor to consider in placing the burden of proof "is the extent to which a party's contention departs from what would be expected in light of ordinary human experience."[43] It has been contended that one who asserts that the unusual is true should bear the onus of the proof.[44] In a situation like *Cimino*, then, the question is whether it is fair to assume that the plaintiff would seek all damages in the first action. Arguably, if a plaintiff is aware of an aggravation of an injury caused by malpractice, he would attempt to recover full compensation in the first action, thereby avoiding the necessity of a second suit. In fact, the traditional view had a presumption of full satisfaction and although this presumption has been discarded by adherents of the modern view[45] it indicates that some courts have concluded that a plaintiff would usually seek full recovery from the original tortfeasor. The third possible consideration in allocating the burden of proof involves the tendency of the law to use procedural devices like the burden of

39. The issue of discharged liability is properly raised as an affirmative defense and, since the defendant is contending that satisfaction of the previous judgment compensated the plaintiff for the entire loss, the defendant properly has the burden of proof. Knutsen v. Brown, 96 N.J. Super. 229, 237, 232 A.2d 833, 837 (App. Div. 1967). *Contra*, Selby v. Kuhns, 345 Mass. 600, 188 N.E.2d 861 (1963) (also involving a judgment rendered against the original tortfeasor). The *Selby* court cited Derby v. Prewitt, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962) and Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958) as authority for placing the burden of proof in the subsequent action upon the plaintiff. Since both *Derby* and *Couillard* involved releases, not judgments in the initial action, the *Selby* court's reliance on these two cases is misplaced.

40. 9 J. WIGMORE, EVIDENCE § 2486, at 275 (3d ed. 1940).

41. F. JAMES, CIVIL PROCEDURE § 7.8, at 257 (1965).

42. Knutsen v. Brown, 96 N.J. Super. 229, 236, 232 A.2d 833, 836 (App. Div. 1967). The *Knutsen* court found that, unlike the situation where a release is involved, oral testimony is inadmissible to resolve whether the plaintiff has received full compensation when the previous claim has been litigated to judgment. *Id.*

43. F. JAMES, *supra* note 43, at 257.

44. *Id.*

45. See text accompanying notes 27-28 *supra*.

proof to handicap disfavored contentions.[46] Since the law disfavors multiple suits, this factor favors placing the burden upon the plaintiff to show the necessity of the second trial. On the other hand, there should be a strong policy in favor of insuring full compensation. If this latter factor is considered the more important, a defendant who argues that full compensation already has been made should carry the burden.

When the original tortfeasor's liability has been terminated by a release, properly allocating the burden of proving the scope of the release is more troublesome. The problem arises when the plaintiff has given the original tortfeasor a release and the attending physician alleges that his liability was also released. Since a party is generally expected to prove that which he alleges, New Jersey courts have held that a party who advances a release as a bar can reasonably be expected to carry the burden of the defense.[47] This view, however, discounts the potential difficulty of proof. Since the defendant was not a party to the instrument, he clearly will not have equal access to any available witnesses and documents surrounding the release. Probably a better reasoned view of allocating the burden of proof in trials subsequent to the release of the original tortfeasor was set forth in *Derby v. Prewitt*.[48] There, Judge Fuld argued that whether the settlement in the initial action was satisfaction for all the damages is a question of fact for the jury. Judge Fuld found that the plaintiff should have the burden of proving the release executed in return for the settlement was not intended to include the physician.[49] This reasoning draws support from the fact that the plaintiff-releasor is a party to the instrument of release and therefore has greater ability to prove the subjective intent of the release. Furthermore, releases are traditionally construed in the light least favorable to the releasor because he had the opportunity to make the document clearly reflect his intent.[50] Therefore, this view concludes that the burden of proving the physician does not come within the release is logically placed on the releasor.

The best view appears to be a pragmatic case-by-case approach which would place the burden on the party who argues that the release means something other than what is indicated on its face. The burden would be placed upon the plaintiff to prove that a general release was not intended to release the physician. Conversely, if the releasees are

46. F. JAMES, *supra* note 41, at 257.
47. Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958).
48. 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962).
49. *Id.* at 106, 187 N.E.2d at 559, 236 N.Y.S.2d at 953.
50. *See* COKE *supra* note 8. *Compare* Hawber v. Raley, 92 Cal. App. 701, 268 P. 943 (1928); Cocke v. Jennor, 80 Eng. Rep. 214 (K.B. 1614).

specifically named, the burden would be placed on the doctor to demonstrate that the instrument has extinguished his liability. This approach was taken by the New Jersey supreme court in *Daily v. Somberg*.[51] There, the release did not suggest any intent to release the physician and it did not indicate that the plaintiff had received full compensation for his injuries. The court found that where the release disclosed on its face the individual releasees, the alleged tortfeasors who were strangers to the instrument could fairly be called upon to show that the release was intended to discharge them or that the plaintiff had received full compensation.[52] Had the release been less specific, the burden would clearly rest on the plaintiff.[53]

Conclusion

While in the past the traditional view has commanded support in a majority of jurisdictions, the basic legal concepts supporting it are no longer viable. Due to the unjust results that it has produced, the traditional view has undergone a process of erosion through judicially created exception. The modern view, which had been dormant for nearly half of a century began gaining support in the mid 1950's. This modern rule more equitably spreads the burden of compensation among parties responsible for the individual injuries. While the modern view may burden courts with the threat of increased litigation, this burden is far outweighed by the stronger guarantee of full compensation. If a plaintiff chooses to recover in multiple actions under the modern rule, the burden of proving the scope of the judgment or settlement in the earlier action should be allocated on a case-by-case basis. Normally if the earlier action was litigated to judgment, the burden should be placed upon the defendant-physician to prove that his liability was extinguished by the preceding judgment. If the initial action was resolved by a release, the scope of the instrument should be analyzed and the party claiming an intent contrary to that expressed on the face of the instrument should carry the burden of proof.

By joining the growing number of jurisdictions adopting the modern rule,[54] the Arizona court of appeals has avoided the inequities of the unity of discharge rule. The court was not compelled to reach the issue of whether an action against a negligent attending physician

51. 28 N.J. 372, 145 A.2d 676 (1958).
52. *Id.* at 385, 146 A.2d at 684.
53. *Compare* Ash v. Mortenson, 24 Cal. 2d 654, 150 P.2d 876 (1944) *with* Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958). In *Ash*, as indicated by the *Daily* court, the terms of the release were not specific and thus the plaintiff was properly allocated the burden of proving he did not intend to release the subsequent tortfeasor.
54. Miller, *supra* note 23.

subsequent to the release of the original wrongdoer would be adjudicated in the same manner. The main thrust of the *Cimino* opinion, together with its reliance on *Derby v. Prewitt*,[55] however, indicate that the court would find the same result when the original tortfeasor's liability has been extinguished by a release.

B. MEDICAL MALPRACTICE LITIGATION: PARTIAL ABROGATION OF THE LOCALITY RULE

Expert testimony is generally indispensable in a medical malpractice action to establish the standard of care that should have been exercised by the defendant-physician.[1] The courts in most jurisdictions have held the physician to a standard based on the care and skill exercised by physicians in good standing in the defendant's community or a similar community.[2] In order for a doctor to qualify as an expert witness, therefore, it is necessary to establish that he is familiar with the standard of care exercised in the defendant's community or a similar community. Although this rule may take one of several different forms, it is generally referred to as the "locality rule."

In *Kronke v. Danielson*,[3] the Supreme Court of Arizona abrogated the locality rule with respect to physicians who represent themselves as specialists. Adopting the position of the *Restatement (Second) of Torts*, the court held that a specialist should be judged by a standard measured in accordance with the skill and knowledge common to other specialists in the same medical field, without reference to his geographic locality.[4] In dictum, however, the court declined to change the rule for general practitioners. The court stated that the standard of care for the general practitioner would continue to be determined according to the "same or similar community" rule.[5]

In critically examining the locality rule, this commentary traces its origin and evolution. Emphasis is first placed on identifying the

55. 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962).

1. Phillips v. Stillwell, 55 Ariz. 147, 99 P.2d 104 (1940). *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 13 (2d E. Cleary ed. 1972); M. UDALL, ARIZONA LAW OF EVIDENCE § 23 (1960). *See generally* J. WALTZ & F. INBAU, MEDICAL JURISPRUDENCE 54-56 (1971).

2. For a list of states following the locality rule, see 18 DEPAUL L. REV. 328, 332 *nn.*13, 14 (1968).

3. 108 Ariz. 400, 499 P.2d 156 (1972).

4. *Id.* at 403, 499 P.2d at 159, *citing* RESTATEMENT (SECOND) OF TORTS § 299 A, comment *d* (1965).

5. 108 Ariz. at 403, 499 P.2d at 159.

rationale traditionally used to justify relating the standard of care required of a physician to the locality where he practices. *Kronke* and cases from other jurisdictions are then discussed to illustrate recent developments within the medical profession and society that have influenced many courts to abandon the locality rule. Finally, it is concluded that these developments justify abrogation of the locality rule as applied to general practitioners as well as to specialists.

Origin and Evolution of the Locality Rule

The rule relating the standard of care required of a physician to his geographic locality was first articulated in the late nineteenth century. Of the early decisions establishing the rule, two are particularly illustrative of the circumstances that led to its adoption in most jurisdictions. In 1870 the Kansas supreme court held that although physicians were required to exercise the degree of skill ordinarily possessed by the profession, the location of the defendant's practice might be a crucial factor. The court reasoned that since a country doctor had neither the same opportunity for daily observation or experience with advanced surgical techniques, he would not be held to the same degree of knowledge and skill as urban physicians who had greater access to such knowledge and skill.[6] Similarly, the Massachusetts supreme court in 1880 approved an instruction to the jury that the defendant, a small town general practitioner,

> was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practising in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons practising in large cities, and making a specialty of the practice of surgery.[7]

These early decisions reflect an appreciation of the disparity between conditions in the city and in the country existent at that time. Due to poor communication and transportation during the late nineteenth century, the small town doctor rarely had adequate means of keeping himself informed of the latest developments in his profession, nor did he have access to the more sophisticated equipment and facilities available to his urban counterpart.[8] The level of skill attained by

6. Tefft v. Wilcox, 6 Kan. 33, 42-43 (1870).

7. Small v. Howard, 128 Mass. 131, 132, 35 Am. R. 363 (1880). The court also approved an instruction to the jury that if the general practitioner found that a higher degree of skill was necessary to treat the patient, the doctor should have advised him to seek treatment with a surgical specialist living in a town 4 miles away. *Id.* at 133, 35 Am. R. at 365.

8. Waltz, *The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation,* 18 DEPAUL L. REV. 408, 411 (1969). For further discussion of the

the physician was the paramount factor in the formulation of the standard of care. The locality of his practice and the consequent degree of isolation from advances in medicine were to be considered in determining the required level of skill. While conditions which resulted in wide variations in the quality of medical care once justified basing the standard of care on the physician's geographic locality, there no longer appears to be any rational basis for this approach. Perhaps as a result, the locality rule has been construed and applied with considerable inconsistency and confusion.[9]

The locality rule has been adopted by most jurisdictions in one of two forms. Some states have followed the "strict locality rule,"[10] under which a physician is held to the standard of care exercised by other physicians and surgeons practicing in his own community. This rule can impose major hardships on a plaintiff attempting to obtain expert testimony. In what is termed the "conspiracy of silence,"[11] local physicians are reluctant to testify against their fellow doctors.[12] Additionally, application of the strict locality rule makes it impossible to secure an independent expert witness where the defendant is the only physician in his community.[13]

Conscious of the injustice resulting from this strict rule, other jurisdictions have broadened the standard to encompass the skill and knowledge of physicians practicing not only in the same community as the defendant, but also in similar communities.[14] Several theories have been developed to determine what constitutes a "similar community." In New Hampshire, the courts have employed a definition based solely on the population of the area in which the physician practices.[15] In Michigan and Rhode Island, however, the courts have defined "similar

conditions which originally justified the locality rule and the forces which gradually rendered it inappropriate, see Wiggins v. Piver, 276 N.C. 134, 171 S.E.2d 393 (1970).

9. *See* cases cited note 20 *infra.*

10. See states listed at 18 DEPAUL L. REV. 328, 332 *n.*13 (1968).

11. Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment,* 1 VILL. L. REV. 250 (1956); *see* Huffman v. Lindquist, 37 Cal. 2d 465, 483-84, 234 P.2d 34, 46 (1951) (Carter, J., dissenting). *See also* J. WALTZ & F. INBAU, *supra* note 1, at 75-76.

12. This stumbling-block to successful malpractice litigation has caused frustrated claimants' counsel to charge that doctors deliberately refuse to provide needed expertise in meritorious cases. These lawyers suggest that the asserted reluctance of doctors to be witnesses in malpractice cases stems either from a conscious desire to provide unwarranted protection to medical colleagues or from a fear of reprisal by medical societies and malpractice insurers.

J. WALTZ & F. INBAU, *supra* note 1, at 75.

13. Waltz, *supra* note 11, at 411.

14. For a list of states following this rule, see 18 DEPAUL L. REV. 328, 332 n.14 (1968).

15. *See* Michael v. Roberts, 91 N.H. 499, 23 A.2d 361 (1941), where, although the plaintiff's expert witness resided in a city of comparable size to that of the defendant, because his actual practice was in a much larger city, his testimony was excluded. *Id.* at 501, 23 A.2d at 362.

community" in terms of comparable medical facilities.[16] A third theory expands the concept of a similar community to encompass essentially the entire state.[17] The adoption of the "same or similar community" rule clearly eases the plaintiff's task by permitting him to secure the testimony of an expert from outside the defendant's own community. The rule still rests, however, on the premise that the physician's particular locality is determinative of the level of skill that he should exercise in treating his patients.

In Arizona, the locality rule was first alluded to in *Butler v. Rule.*[18] The issue in that case was the degree of care required of a physician, and in formulating the standard the Supreme Court of Arizona made only passing reference to the physician's locality.[19] It is not clear whether the court intended to include locality as a factor in determining the required level of skill, but the *Butler* decision has nevertheless been cited as direct support for the application of the locality rule in Arizona.[20] The Arizona courts have vacillated between the "same community" and "same or similar community" standards, and some decisions have made no reference at all to the physician's locality.[21]

The Decline of the Locality Rule

The problems inherent in defining and applying the locality rule combined with the gradual disappearance of conditions that once justi-

16. Sampson v. Veenboer, 252 Mich. 660, 666-67, 234 N.W. 170, 172 (1931); Cavallaro v. Sharp, 84 R.I. 67, 72, 121 A.2d 669, 672 (1956).

17. Gist v. French, 136 Cal. App. 2d 247, 271, 288 P.2d 1003, 1018 (1955); Turner v. Stoker, 289 S.W. 190, 194 (Tex. Civ. 1926).

18. 29 Ariz. 405, 242 P. 436 (1926).

19. *Id.* at 418, 242 P. at 440.

20. *See, e.g.*, Stallcup v. Coscarart, 79 Ariz. 42, 46, 282 P.2d 791, 794 (1955); Acton v. Morrison, 52 Ariz. 139, 142, 155 P.2d 782, 783 (1945); Harris v. Campbell, 2 Ariz. App. 351, 355, 409 P.2d 67, 71 (1966).

21. The *Butler* decision has been cited in the following cases in support of all three interpretations. Boyce v. Brown, 51 Ariz. 416, 420, 77 P.2d 455, 457 (1938), restricting the standard to "the degree of skill and learning which is possessed by the average member of the medical profession in good standing in the community in which he [defendant] practices."; Cole v. Town of Miami, 52 Ariz. 488, 496, 83 P.2d 997, 1001 (1938), indicating that a physician must only meet the standard of practice of "other members of the medical profession in good standing," with no reference to the physician's locality; Acton v. Morrison, 62 Ariz. 139, 155 P.2d 782 (1945), citing *Butler* in support of a "similar localities" rule; Stallcup v. Coscarart, 79 Ariz. 42, 282 P.2d 791 (1955), restricting the standard to that of the defendant's own community. The court of appeals has followed two different standards: Harris v. Campbell, 2 Ariz. App. 351, 355, 409 P.2d 67, 71 (1965) (same or similar community); Fiske v. Soland, 8 Ariz. App. 585, 588, 448 P.2d 429, 432 (1968) (same community).

The inconsistency apparent in these cases is not confined to Arizona. In California, for example, three distinct lines of cases have promulgated three different standards. *See*, Meier v. Ross General Hosp., 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968) (same community rule); McNamara v. Emmons, 36 Cal. 2d 199, 97 P.2d 503 (1939) (same or similar community); Ley v. Bishop, 88 Cal. 313, 263 P. 369 (1928) (no reference to defendant's geographic locality). All three standards were employed at the same time in Gluckstein v. Lipsett, 93 Cal. App. 2d 391, 209 P.2d 98 (1949).

fied its existence have led to its partial or total abrogation in many jurisdictions. The approaches taken in modification of the rule have been as varied as those used in its development. In several jurisdictions, certain medical procedures have been held to be so fundamental and standardized that the necessity of applying the locality rule is eliminated in cases where they are involved.[22] Alabama has partially avoided the rule by permitting the introduction of medical treatises as expert evidence.[23] The plaintiff may therefore establish the standard of care which the defendant should have exercised in a particular treatment or procedure without the necessity of obtaining the testimony of another physician and without reference to any particular geographic locality. Georgia has codified the standard of care requirement in a statute that makes no reference to geographic locality.[24] As a result, the standard of care in the physician's community has been held to be only one factor to be considered by the jury in deciding the question of negligence.[25] This approach recognizes that while geographic locality should not determine the skill and knowledge which the physician possesses, it may affect his ability to exercise that skill and knowledge by the absence of sophisticated equipment and facilities.[26]

Several states have preceded Arizona in modifying the locality rule with respect to specialists, holding them to the national standard of care exercised by other members of their medical specialty.[27] Arizona adopted this modification in *Kronke v. Danielson*.[28] *Kronke* was a medical malpractice action in which the plaintiff called as an expert witness a Los Angeles neurosurgeon who had no personal experience with neurosurgical practice in Phoenix, the defendant-physician's community. The trial court ruled that his testimony was inadmissible because he was not qualified by personal experience to state that the standard of practice in his community was the same as that in the defendant's community. On a petition for special action, the supreme court ruled that the trial court erred in excluding the specialist's testimony. The court held that a specialist, as distinguished from a gen-

22. *See, e.g.*, Murphy v. Little, 112 Ga. App. 517, 145 S.E.2d 760 (1965) (fractures); McElroy v. Frost, 268 P.2d 273 (Okla. 1954) (X-ray treatment); Hundley v. Martinez, 151 W.Va. 977, 158 S.E.2d 159 (1967) (cataract operation).

23. *See* City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939). By statutory provision, Massachusetts and Nevada also permit the introduction of medical treatises into evidence. MASS. ANN. LAWS ch. 233 § 79c (1965); NEV. REV. STAT. § 51.040 (1971).

24. GA. CODE ANN. § 84-924 (1970).

25. Murphy v. Little, 112 Ga. App. 517, 523, 145 S.E.2d 760, 764 (1965).

26. See text accompanying note 44 *infra*.

27. *See, e.g.*, McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950); Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953); Hundley v. Martinez, 151 W.Va. 977, 158 S.E.2d 159 (1967).

28. 108 Ariz. 400, 499 P.2d 156 (1972).

eral practitioner, is to be judged "on a standard measured by the skill and knowledge common to other specialists."[29] To qualify as an expert, a witness is required only to be familiar with "the standard of care and treatment commonly practiced by physicians engaged in the same type of specialty as the defendant"—not with the particular standard in the defendant's community.[30]

By its holding in *Kronke*, the court has taken a step toward reshaping the law in Arizona to reflect the reality of medical training and practice. As the court noted, the education and certification of a specialist follow a standard virtually uniform throughout the country. There is no reason, therefore, to suggest that the practice of one specialist differs significantly from that of any other doctor in the same specialty.[31]

The Locality Rule and General Practitioners

Developments within the medical profession and society indicate that continued application of the locality rule to the general practitioner no longer serves a valid purpose. Improvements in transportation and communication since the nineteenth century have benefited the specialist and the general practitioner equally, and the isolation which once required judicial recognition of varying standards of care no longer exists.[32]

The medical profession, led by the American Medical Association (AMA), has actively sought the development of national standards for all doctors. After an extended campaign in cooperation with the Association of American Medical Colleges (AAMC) and state licensing boards, the AMA succeeded in closing all medical schools that did not meet its minimum standards.[33] As a result, the curricula utilized in training doctors are substantially uniform throughout the country.[34] Furthermore, almost every doctor belongs to his county medical society which serves as an agency for informing both specialists and general practitioners of the latest developments in all areas of medicine through lectures, meetings and publications.[35]

---

29. *Id.* at 403, 499 P.2d at 159.
30. *Id.*
31. *See* W. CURRAN, LAW AND MEDICINE 6, 677 (1960).
32. *See* Tvedt v. Haugen, 70 N.D. 338, 349, 294 N.W. 183, 188(1940).
33. "In 1908 when the AMA with the help of the Carnegie foundation began its campaign to raise standards, there were 160 'medical schools' in the United States. In *ten years* the number of schools was cut to 96." By 1960, there were 81 medical schools in the United States, and all were AMA approved. W. CURRAN, *supra* note 31, at 677.
34. *Id.* at 4.
35. In addition to county medical publications, the AMA publishes ten monthly journals, in various areas of medicine, all designed to continue the physician's educa-

The development of national standards for the general practitioner has been augmented by an increasingly widespread view of the general practitioner as a "specialist" in family medicine. The American Academy of General Practice functions much the same as the various specialty boards, but unlike the latter, requires its members to return to school periodically to update their knowledge.[36] Additionally, hospitals are beginning to develop residency programs in family practice.[37]

The existence of national standards for all doctors is further reflected in the licensing requirements of most states. Licensing of physicians is mandatory in all states, and the requirements are established, directly or indirectly, by the medical profession through the AMA.[38] The recognition by a majority of states of licenses issued by other states through endorsement and reciprocity agreements reflects a realization that a national standard of care is adhered to in most states.[39]

Some jurisdictions have already recognized that the existence of national standards in medical education and uniform state licensing requirements warrants the total abrogation of the locality rule. The Washington supreme court has held that the standard of care to be applied to general practitioners is that exercised by "the average practitioner in the class to which he belongs, acting in the same or similar circumstances. This standard of care is that established in an area coextensive with the medical and professional means available in those centers that are readily accessible for appropriate treatment of the patient."[40] The locality of the defendant remains a factor to be considered, but the standard of care is that of the average practitioner in the class to which the defendant belongs—specialist or general practitioner.[41] The Massachusetts supreme court has ruled that the general

---

tional process regardless of whether he is a specialist or a general practitioner. *Id.* at 676-77.

36. THE AMERICAN ACADEMY OF GENERAL PRACTICE, THE CORE CONTENT OF FAMILY MEDICINE 20 (1967).

37. *Id.* at 6-7.

38. Forgotson, Roemer, Newman, *Licensure of Physicians*, 1967 WASH. L.Q. 249. Arizona's requirements are typical. To obtain a license to practice in Arizona, a physician must have graduated from a medical college approved by the AMA and the AAMC, and pass an examination devised and administered by a board of local members of the AMA. Completion of an internship and residency program approved by the AMA is also required. ARIZ. REV. STAT. ANN. §§ 32-1401, -1402, -1423, -1428 (Supp. 1972-73).

39. Forgotson, Roemer, Newman, *supra* note 41, at 277. See ARIZ. REV. STAT. ANN. §§ 32-1425, -1426 (Supp. 1972-73).

40. Pederson v. Dumouchel, 72 Wash. 2d 73, 79, 431 P.2d 973, 978 (1967).

41. The defendant's geographic locality is important in the application of the standard, but not in its formulation. This point was illustrated in Douglas v. Bussabarger, 73 Wash. 2d 476, 438 P.2d 829 (1968), where the court noted that "rural and small-town doctors should not enjoy advantage not given by the law to any other class of rural and small-town tort defendants." *Id.* at 490, 438 P.2d at 838.

practitioner and the specialist would each be held to the standard of the average member of his professional class, with available medical resources as only one consideration.[42] The court noted that existing conditions rendered continued application of the locality rule inappropriate.[43]

Arizona should follow the rule adopted by Washington and Massachusetts, basing the standard on the care and skill of the average member of the defendant's professional class, specialist or general practitioner, without regard to his geographic locality. Under such a rule, negligence would consist of a failure to treat a patient in a manner which the average general practitioner would know was necessary but not of a failure to utilize unavailable equipment or personnel where a reasonable effort had been made to obtain them.[44]

Conclusion

The locality rule was originally developed in recognition of regional variations in the quality of medical care. In abrogating the locality rule with respect to specialists, the Arizona supreme court in *Kronke v. Danielson* has begun the process of realigning the law with contemporary conditions. The standard adopted by Washington and Massachusetts, however, is more consonant with current conditions in the medical profession. The education and training received by doctors nationwide is virtually uniform, based on standards developed by the entire profession through the American Medical Association. There is no longer any reason for suggesting that the rural general practitioner should not be held to the same degree of skill and knowledge as his counterpart in the city. Each should be held to a national standard of care common to each member of his professional class, as is presently the rule for specialists. This standard should relate to the physician's knowledge and the utilization of that knowledge in a variety of circumstances, and the physician's geographic locality should only be considered as one of those circumstances. Since medicine recognizes

42. Brune v. Belinkoff, 354 Mass. 102, 109, 235 N.E.2d 793, 798 (1968).
43. *Id.* at 108-09, 235 N.E.2d at 798.
44. The courts have long recognized the duty of a general practitioner to call on the services of a specialist where they are required. *See* Small v. Howard, 128 Mass. 131, 133, 35 Am. R. 363 (1880). The definition of a general practitioner given by the American Academy of General Practice indicates that this is also the standard that the medical profession has set for itself:

> A general (or family) practitioner is a legally qualified doctor of medicine who does not limit his practice to a particular field of medicine or surgery. In his general capacity as family physician and medical advisor he may, however, devote particular attention to one or more special fields, recognizing at the same time the need for consulting with qualified specialists when the medical situation exceeds the capacities of his own training or experience.

THE AMERICAN ACADEMY OF GENERAL PRACTICE, *supra* note 36, at 8.

a uniform standard of care for all doctors, the law should also require adherence to this standard. The supreme court should abrogate the locality rule with respect to general practitioners as well as specialists.

C. WIFE'S RIGHT OF ACTION FOR LOSS OF CONSORTIUM

Despite the reluctance of judges "reared in the tradition of natural male dominance"[1] to accord women the same treatment as men, some progress toward fuller legal equality for women is being made.[2] The holding in *City of Glendale v. Bradshaw*[3] represents one halting step by the Supreme Court of Arizona toward establishing an equal status for women under the law.

In *Bradshaw*, the plaintiff pressed a claim as guardian of her husband for severe and permanent injuries he had suffered in an automobile accident; in a separate count, she sued in her own right for the loss of his consortium. The jury awarded $280,000 for the husband's injuries, but the trial judge dismissed the consortium complaint. The court of appeals affirmed the dismissal,[4] but the Supreme Court of Arizona departed from the common law rule adopted in *Jeune v. Del Webb Construction Co.*[5] to hold that Mrs. Bradshaw had an action for loss of consortium.[6]

The first reason given by the supreme court for recognizing the action for loss of consortium was that married women's status has changed from what it was at common law, where a wife had no such action. Blackstone wrote in the 18th century, "[b]y marriage, the husband and the wife are one person in the law."[7] The wife was not a distinct legal person but was rather a servant or chattel of her husband. The court asserted that with the passage of Married Women's

1. *See* L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 1 (1969).

2. On the national level, the Equal Rights Amendment, the title Ms., Roe v. Wade, 410 U.S. 113 (1973) (the abortion decision), and Frontiero v. Richardson, 93 S. Ct. 1764 (1973) (dependent benefits awarded husband of woman in military service) have appeared. Arizona is also experiencing its own women's rights legal phenomena. The thirty-first legislature has equalized community property management statutes, which formerly favored husbands over wives. Distinctions between male and female were also erased in the language of most other Arizona laws. ARIZ. REV. STAT. ANN. §§ 25-211, -214 (Supp. Aug. 1973).

3. 108 Ariz. 582, 503 P.2d 803 (1972).

4. City of Glendale v. Bradshaw, 16 Ariz. App. 348, 493 P.2d 515, *rev'd*, 108 Ariz. 582, 503 P.2d 803 (1972).

5. 77 Ariz. 226, 269 P.2d 723 (1954).

6. 108 Ariz. at 584, 503 P.2d at 805. The case was remanded for determination of damages for loss of consortium.

7. 1 BLACKSTONE, COMMENTARIES *430.

Property Acts, beginning in the mid-19th century, changes occurred in the legal rights of the married woman.[8] She now had a recognized legal personality. The court also noted the trend in other jurisdictions toward recognizing a wife's right of action for loss of her husband's consortium.[9]

The defendants contended that such a rule would allow double recovery if the husband recovers for personal injury and the wife for loss of consortium, but this argument was dismissed by the supreme court. Citing a South Dakota court's discussion of this problem,[10] Justice Lockwood said that although recovery for personal injuries is always community property, each spouse has suffered a separate loss, and each element of damages can be distinguished.

Finally, in rejecting the argument that the right of consortium in negligence cases has not been established in Arizona, the court noted that Arizona has recognized consortium as a viable interest in an alienation of affections suit,[11] an action for willful sale of intoxicating liquor to an alcoholic husband[12] and indirectly in the wrongful death statute.[13] Likewise, the court rejected the city of Glendale's alternate

8. 108 Ariz. at 583, 503 P.2d at 804.

9. 108 Ariz. at 584, 503 P.2d at 805. The landmark case recognizing a wife's right to recover for loss of consortium was Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), *overruled on other grounds*, Smither & Co. v. Coles, 242 F.2d 220 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957). This right was recognized in 26 states and the District of Columbia before the *Bradshaw* decision. Guyton v. Solomon Dehydrating Co., 302 F.2d 283 (8th Cir. 1962); Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950); Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961); Missouri Pac. Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Muhe v. Mitchell, 166 Colo. 108, 442 P.2d 418 (1968); Yonner v. Adams, 53 Del. 229, 167 A.2d 717 (1961); Gates v. Foley, 247 So. 2d 40 (Fla. 1971); Brown v. Georgia-Tennessee Coaches, 88 Ga. App. 519, 77 S.E.2d 24 (1953); Nishi v. Hartwell, 52 Hawaii 188, 473 P.2d 116 (1970); Nichols v. Sonneman, 91 Idaho 199, 418 P.2d 562 (1966); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Troue v. Marker, 253 Ind. 284, 252 N.E.2d 800 (1969); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970); Deems v. Western Md. Ry. Co., 247 Md. 95, 231 A.2d 514 (1967); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969); Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963); Bush v. Westinghouse Air Brake Co., Second Judicial Dist. Ct., Washoe County, Nev., (Oct. 16, 1970), *abstracted in $3,650,000 Verdict in Products Liability Case*, 13 AM. TRIAL LAWYERS NEWSLETTER 394-95 (Nov. 1970), 447-48, 474-75 (Dec. 1970); Bromfield v. Seybolt Motors Inc., 109 N.H. 501, 256 A.2d 151 (1969) (by statute); Ekalo v. Constructive Serv. Corp. of Am., 46 N.J. 82, 215 A.2d 1 (1965); Millington v. Southeastern Elev. Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968); Umpleby v. Dorsey, 10 Ohio Misc. 288, 227 N.E.2d 274 (1967); Ellis v. Fallert, 209 Ore. 406, 307 P.2d 283 (1938); Mariani v. Nanni, 95 R.I. 153, 185 A.2d 119 (1962); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959); Moran v. Quality Alum. Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967). RESTATEMENT (SECOND) OF TORTS § 695 (Tent. Draft No. 14, 1969) also lists Fox v. Fox, 75 Wyo. 390, 296 P.2d 252 (1956), which contains dictum to the effect that legal rights of husbands and wives are equal in Wyoming.

10. Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959).

11. McNelis v. Bruce, 90 Ariz. 261, 367 P.2d 625 (1961).

12. Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940).

13. ARIZ. REV. STAT. ANN. § 12-612 (1956).

contention that if there was such a right in the husband "it would be more logical to abolish the right of consortium for the husband than to grant the right to the wife."[14] While no loss-of-consortium suits brought by a husband have been reported in judicial decisions in Arizona, the established recognition of a wife's action in willful tort cases convinced the court that denying the action for loss of consortium by both spouses in negligence cases would not be a consistent course for Arizona to follow.

This discussion will analyze *Bradshaw* to evaluate its soundness and potential impact. The meaning of consortium, its evolution in the common law, and current judicial treatment of actions for loss of consortium in other states will be examined. Some problems related to the *Bradshaw* opinion will then be discussed. Finally, the possible application of *Bradshaw* to the related doctrine of interspousal tort immunity will be suggested.

Foundations of Consortium

The exact meaning of the term consortium as used by the courts has been the cause of considerable confusion. Two early cases awarding damages to a husband defined consortium as including company and services.[15] In a 1618 case where the husband had been deprived of his wife's consortium when she went with the defendant and lived with him in a "suspicious" manner, a sexual interest was implicitly included in consortium.[16] One year later the same court gave consortium more meaning by stating that the plaintiff husband had been deprived of his wife's comfort, partnership, counsel and help in things domestic.[17]

Courts today disagree about the precise meaning of consortium. Some courts emphasize the element of services to the spouse.[18] On the other hand, it has been urged that the tendency under the common law to plead an extensive list of component parts should not lead to the conclusion that consortium can be divided into "economic" and "sentimental" items. The better position is that consortium refers to the entire domestic relationship.[19] Modern society recognizes that con-

14. 108 Ariz. at 584, 503 P.2d at 805.
15. Hyde v. Scyssor, Cro. Jac. 538, 79 Eng. Rep. 462 (1619); Guy v. Livesey, Cro. Jac. 501, 79 Eng. Rep. 428 (1618).
16. Guy v. Livesey, Cro. Jac. 501, 79 Eng. Rep. 428 (1618).
17. Hyde v. Scyssor, Cro. Jac. 538, 79 Eng. Rep. 462 (1619).
18. *See, e.g.*, Marri v. Stamford St. R.R. Co., 84 Conn. 9, 78 A. 582 (1911); Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925).
19. Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950); Montgomery v. Stephan, 35 Mich. 33, 101 N.W.2d 227 (1960); Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 667 (1930).

jugal affection is as much a part of consortium as the services and sexual interests recognized at common law.[20] In *Bradshaw*, the court quoted a South Dakota case, enumerating the elements of consortium as society, companionship, conjugal affections and assistance.[21]

This confusion over the elements of consortium has had an important impact on the right of a wife to recover. Loss of consortium at common law limited the right of action to the husband. The rationale for not allowing a wife to recover was twofold. First, the husband's right to sue was based on his proprietary interest in the wife's company and services. The husband's loss of a wife's consortium was compared to his loss of a servant's services.[22] The wife had no corresponding right to her husband's consortium, since she held the legal position of a servant or chattel. Second, the wife was not a legal entity. In the eyes of the law, she had been absorbed in her husband's identity and could not bring an action for loss of consortium in her own name.[23] This was true even if the wife had a legally recognized right to her husband's consortium, as one early case suggested she did.[24]

Modern courts have given several reasons for denying a wife the right to recover for loss of consortium.[25] One group of courts bases denial on the premises that services are the chief element in consortium and that the wife has no legally enforceable right to a husband's services, though he has always had a right to hers.[26] Not only is this concept of consortium as primarily composed of services inaccurate, but such a view of marriage is at best anachronistic.[27] Another view

20. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 894 (4th ed. 1971).
21. Hoekstra v. Helgeland, 78 S.D. 82, 107, 98 N.W.2d 669, 682 (1959).
22. Hyde v. Scyssor, Cro. Jac. 538, 79 Eng. Rep. 462 (1619).
23. 3 BLACKSTONE, COMMENTARIES *142-43; L. KANOWITZ, *supra* note 1, at 81-83; W. PROSSER, *supra* note 20, at 894.
24. Lynch v. Knight, 9 H.L.C. 577, 589, 11 Eng. Rep. 854, 859 (1861).
25. Many of the reasons for denying the wife's right of action are well summarized in Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950).
In Jeune v. Del Webb Constr. Co., 77 Ariz. 226, 269 P.2d 723 (1954), which *Bradshaw* overruled, the Arizona court merely labeled the wife's claim for loss of consortium "novel," since at common law the husband alone had a cause of action for all damages resulting from personal injury to him.
26. Marri v. Stamford St. R.R. Co., 84 Conn. 9, 78 A. 582 (1911); Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933).
3 BLACKSTONE, COMMENTARIES *142-43 contains a candid explanation:
> We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relationship itself or at least the advantage accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in any thing during her coverture.
27. *See* Hitaffer v. Argonne Co., 183 F.2d 811, 819 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), *overruled on other grounds*, Smither & Co. v. Coles, 242 F.2d 220 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957).

emphasizes the primacy of the service element coupled with a fear of double recovery. This fear is based on the fact that the husband is already being compensated for loss of wages in his personal injury action; a wife's consortium recovery would include compensation for the "service" of support which the husband owes her.[28] Such a view again neglects the fact that the wife has lost the "sentimental elements" of consortium, not just services provided by the husband.

In addition to these "service" objections, some courts have embraced the idea that a wife's injuries are too remote and indirect to be measured monetarily when her husband is negligently injured.[29] This argument may distinguish loss of consortium in cases of negligent injury from the loss in cases of such willful injury as alienation of affections, but it fails to explain why a husband may recover damages for loss of consortium when the wife is negligently injured. There is a basic inconsistency in treating the husband's loss as actionable while finding the wife's loss to be indirect and remote.

In those jurisdictions which have passed Married Women's Property Acts, courts denying a wife's recovery for loss of consortium take the position that the acts created no new rights of action but only removed certain common law procedural disabilities. Courts relying on this reasoning frequently shift the burden of change onto the legislature.[30] While this may be a valid view of the Married Women's Property Acts, it does not justify perpetuation of court-made legal inequities which have no contemporary validity.[31]

Rather than preserving the common law's denial of the wife's right of action for loss of consortium, a few jurisdictions have chosen to equalize the legal position of the spouses by abolishing the husband's right to recovery.[32] Such reasoning, however, fails to recognize that each spouse does have a valid interest in the other's well-being. Similarly, another line of authority denies actions for loss of consortium by both spouses because the common law view of the wife as a chattel or servant which gave rise to the husband's cause of action is obsolete and

28. *See* Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968).

29. *See, e.g.*, Deshotel v. Atchison, T. & S.F. Ry., 50 Cal. 2d 664, 328 P.2d 449 (1958); Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956); Feneff v. New York Central & H.R.R. Co., 203 Mass. 278, 89 N.E. 436 (1909).

30. *See* Hoffman v. Dautel, 192 Kan. 406, 388 P.2d 615 (1964); Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962).

31. The Supreme Court of Arizona, for example, has committed itself to the principle that when the reason for a rule is no longer valid, the rule should be abandoned. Lueck v. Superior Court, 105 Ariz. 583, 585, 469 P.2d 68, 70 (1970).

32. *See* Kronenbitter v. Washburn Wire Co., 4 N.Y.2d 254, 151 N.E.2d 896, 176 N.Y.S.2d 354 (1958); Floyd v. Miller, 190 Va. 303, 57 S.E.2d 114 (1950). One reason given for this result is that the Married Women's Property Acts have put husband and wife in the same legal position, so that neither has any claim to the consortium of the other.

offensive, rendering the action similarly obsolete.[33] But as noted above, the interests included in consortium now go beyond those on which the common law action was based.[34]

The majority of modern courts allow both spouses to recover for loss of consortium rather than denying the right of action to one or both.[35] Most courts in this third group follow the reasoning of *Hitaffer v. Argonne Co.*[36] They reject arguments based on double recovery, remoteness of injury, and legislative prerogative. As the *Hitaffer* court stated it, "after piercing the thin veils of reasoning employed to sustain the rule [against a wife's recovery], we have been unable to disclose any substantial rationale on which we would be willing to predicate a denial of a wife's action for loss of consortium due to a negligent injury to her husband."[37]

Among those courts granting the wife the right to sue, a small number have placed their decision on even more positive grounds, namely fourteenth amendment equal protection of the law.[38] This argument was offered in the *Bradshaw* case but not reached by the court of appeals[39] or the supreme court.[40]

In sum, courts have followed three courses in considering a wife's claim for loss of consortium. Those which continue to deny the wife's right while allowing the husband's do not offer convincing arguments for their position. The rationales of double recovery, remote injury, and legislative responsibility do not stand up under analysis. Furthermore, denying the wife a reciprocal right to her husband's consortium is an unfortunate policy because the wife's legal inferiority is tolerated and reinforced.[41] The wife continues to be treated as the legal, social,

---

33. *See* Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960).
34. *See* text & notes 19-20 *supra.*
35. *See* cases cited at note 9 *supra.*
36. 183 F.2d 811 (D.C. Cir.), *cert. denied,* 340 U.S. 852 (1950), *overruled on other grounds,* Smither & Co. v. Coles, 242 F.2d 220 (D.C. Cir.), *cert. denied,* 354 U.S. 914 (1957).
37. 183 F.2d at 813.
38. *See* Karczewski v. Baltimore & O.R.R. Co., 274 F. Supp. 169 (N.D. Ill. 1967); Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966).
Unfortunately, in at least one decision, the fourteenth amendment was interpreted to allow a denial of the wife's right to recover. The court relied on the double recovery argument and justified the discriminatory result by pointing out that only about half as many married women as married men are gainfully employed; thus the court found that wives' suits for loss of consortium would cause double recovery twice as often as husbands'. Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968). Logically, of course, both spouses could also be denied a right to sue for loss of consortium under the equal protection clause.
39. City of Glendale v. Bradshaw, 16 Ariz. App. 348, 493 P.2d 515 (1972), *rev'd,* 108 Ariz. 582, 503 P.2d 803 (1972).
40. Brief for Cross-Appellants at 15-16, City of Glendale v. Bradshaw, 108 Ariz. 582, 503 P.2d 803 (1972).
41. *See* L. KANOWITZ, *supra* note 1, at 162. His comment about a decision based on wives' statistical employment inferiority applies equally here:

and economic dependent of the husband.

Equalizing the legal position of husband and wife by denying both an action for loss of consortium is also an unsatisfactory conclusion; it fails to compensate either spouse for an actual injury—deprivation of the partnership of the other. This position also ignores society's interest in protecting one of its basic institutions, the marriage relationship, by compensating injuries to that relationship.

The most appropriate of the three possibilities—and the one now adopted in Arizona—accords a right of action to both wife and husband. Broadly read, *Bradshaw* could stand for the proposition that Arizona wives should enjoy the same legal status as their husbands. The decision is probably less far-reaching, however, since the court failed to examine a number of complications.

Problems Related to the Decision

The Supreme Court of Arizona reached the only rational conclusion in *City of Glendale v. Bradshaw*, but the opinion failed to examine or resolve several underlying inconsistencies. The court noted that with the passage of Married Women's Property Acts, great changes occurred in married women's legal status. The Married Women's Property Acts generally established rights of action for married women with regard to their own property and contracts, but the effect of the various acts on married women's common law disabilities in personal tort actions is quite limited.[42]

In *Thompson v. Thompson*[43] the United States Supreme Court set forth the basic arguments on the extent to which married women's common law rights have been changed by the acts. The majority interpreted the District of Columbia statute as an abolition of the common law theory of marital unity, so that a wife could sue separately on claims involving her own property or torts against her. The Court also held, however, that the statute gave no new rights of action, such as a wife's right to sue against her husband; it merely removed the previous requirement that the husband be joined as plaintiff.[44]

> [T]he disparity in husbands' and wives' employment rates may be the result of of past discriminatory practices which, because not previously prohibited by law, can be regarded as law-approved. . . . [T]he court's approach once more justifies a practice without discerning the discriminatory features of the latter—a common analytical failing where sex-based legal discrimination is in question. *Id.*

42. *See* Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960) (both majority and dissenting opinions); ARIZ. REV. STAT. ANN. § 25-214 (Supp. 1972-73), *as amended* ARIZ. REV. STAT. ANN. §§ 25-214 (Supp. Aug. 1973); W. PROSSER, *supra* note 20, at 861-64.

43. 218 U.S. 611 (1910).

44. *Id.* at 617.

Justice Harlan dissented in *Thompson*, noting that the statute said married women could sue on injuries as if they were not married. He read this as permitting a woman to sue her husband for assault, since an unmarried woman would certainly be able to sue anyone who assaulted her. He pointed out the absurdity of allowing a wife to sue her husband for damage to her property but not for damage to her person.[45]

An early Arizona decision, *Hageman v. Vanderdoes*,[46] resolved a number of questions about the effect of Arizona's Married Women's Property Act.[47] The supreme court there ruled that a husband must still be joined as a defendant in personal injury actions against his wife under *Arizona Rules of Civil Procedure* 17(e),[48] although he is not liable. The justification for requiring a husband's joinder in Arizona was that he was manager of the community property,[49] and a wife's recovery or any recovery made against her would affect the community. Engaging in some artful dodging, however, the Arizona supreme court has held in other opinions that section 25-214[50] gave the wife an independent action for loss of consortium in cases of intentional tort, namely alienation of affections[51] and willful sale of intoxicating liquors.[52] By making the claim for loss of consortium the wife's own, the court has circumvented the joinder rule, even though recovery for loss of consortium still becomes community property, logically involving the husband's interests. The court has ignored the wife's legal

45. *Id.* at 619 (dissenting opinion).
46. 15 Ariz. 312, 138 P. 1053 (1914).
47. ARIZ. REV. STAT. ANN. § 25-214 (Supp. 1972-73), *as amended* ARIZ. REV. STAT. ANN. §§ 25-211, -214 (Supp. Aug. 1973). Prior versions of the statute contain substantially the same provisions as ARIZ. REV. STAT. ANN. § 25-214 (Supp. 1972-73).
48. ARIZ. R. CIV. P. 17(e) provides:
> When a married woman is a party her husband shall be joined with her except when the action concerns her separate property, or is between herself and her husband, in which she may sue or be sued alone. If a husband and wife are sued together, the wife may defend in her own right. The husband and wife shall be sued jointly for all debts contracted by the wife for necessaries furnished herself or children.

49. Formerly, ARIZ. REV. STAT. ANN. § 25-211 (1956) provided:
> A. All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children while she lives separate and apart from her husband, is the community property of the husband and wife.
>
> B. During coverture, personal property may be disposed of by the husband only.

Versions of the statute before 1956 contained substantially the same provisions. The statute now reads:
> All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, is the community property of the husband and wife.

ARIZ. REV. STAT. ANN. §§ 25-211 (Supp. Aug. 1973).
50. ARIZ. REV. STAT. ANN. § 25-214 (Supp. 1972-73), *as amended* ARIZ. REV. STAT. ANN. §§ 25-214 (Supp. Aug. 1973).
51. McNelis v. Bruce, 90 Ariz. 261, 367 P.2d 625 (1961).
52. Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940).

handicaps, then, not removed them.

The limited effect of Arizona's Married Women's Property Act is demonstrated again in the matter of interspousal tort immunity. The Arizona courts have refused to interpret the act broadly in order to allow a woman to bring a tort action against her spouse, preferring to cling to the common law doctrine of interspousal immunity which is based on the wife's legal nonexistence.[53]

Not only did the court in *Bradshaw* fail to acknowledge the minimal effect of the Married Women's Property Acts on women's legal status in tort actions, but it also chose not to deal carefully with the problem of possible double recovery when one spouse has a personal injury suit and the other a loss of consortium action. The court discussed double recovery rather summarily, acknowledging that recovery for personal injuries is shared by spouses as community property but indicating that no double recovery occurs as long as "each element of the damages is separate and distinct from all others."[54] The court then quoted *Hoekstra v. Helgeland*'s list of the elements of damages in a wife's consortium recovery. These are "the so-called sentimental elements of consortium"—society, companionship, conjugal affections and assistance of the other.[55]

In order to be absolutely clear and to avoid possible future confusion, the *Bradshaw* court would have done well to distinguish a prior definition of consortium in *McNelis v. Bruce*,[56] the Arizona alienation of affections case. There the wife's consortium recovery was said to include support by the husband. Since no personal injury suit is brought by the husband in an alienation of affections case, however, the consortium action is the wife's only opportunity to recover for loss of her husband's support. The different definitions of consortium thus depend on whether the husband is compensated for loss of income in his separate suit. The *Bradshaw* court could have clarified why the definition of consortium is different in cases of willful and negligent injury.[57]

53. Huebner v. Deuchle, No. 11068-PR (S. Ct. Ariz., Sept. 26, 1973); Windauer v. O'Connor, 107 Ariz. 262, 485 P.2d 1157 (1971); Schwartz v. Schwartz, 7 Ariz. App. 445, 440 P.2d 326 (1968). See text accompanying notes 61-65, *infra*.

54. 108 Ariz. at 584, 503 P.2d at 805. One authority says that the common law origins of a consortium action are alien to the community property system, wherein the wife has always been treated as a partner rather than a servant. 1 W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY §§ 2, 3, 82 (2d ed. 1971). Although once seen as "the crowning point of women's legal emancipation," however, the effect if not the intent of community property arrangements is dubious in this respect. See L. KANOWITZ, *supra* note 1, at 63-64; Comment, *Community Property: Male Management and Women's Rights*, 1972 LAW & SOC. ORDER 163-64.

55. Hoekstra v. Helgeland, 78 S.D. 82, 107, 98 N.W.2d 669, 682 (1959).

56. 90 Ariz. 261, 263, 367 P.2d 625, 627 (1961).

57. In the intentional tort cases, *Pratt* and *McNelis*, notes 51 and 52 *supra*, the

Furthermore, the *Bradshaw* court should have established procedural safeguards against double recovery in cases of negligent injury where both spouses sue, one for personal injury and one for loss of consortium. Other courts considering the double recovery problem have set forth specific procedures to avoid double recovery. One such practice is simply requiring joinder of the action for loss of consortium with the personal injury action, the elements of each claim being specified so that only one includes lost income.[58] Maryland allows a joint action by the spouses for damages to their relationship; this is brought in conjunction with the personal injury action.[59]

Impact of the Decision on Interspousal Tort Immunity

Because the reasoning in *Bradshaw* was stated generally with little analytical development, the decision is unlikely to have a broad impact. The policies implicit in it are significant, however. In addition to treating a wife and husband equally, *Bradshaw* demonstrates that a married woman's injuries are to be compensated like those of any other legal person. Such a reading of policy, taken with the *Bradshaw* court's willingness to diminish the doctrine of marital unity, has logical application to the doctrine of interspousal tort immunity, still alive in Arizona.[60]

Interspousal tort immunity was originally based on the idea that a person cannot sue himself, and his legal self at common law included his wife.[61] If, as the Supreme Court of Arizona stated in *Bradshaw*, the doctrine of legal unity of the spouses is no longer totally viable and the Married Women's Property Acts have recognized the wife as a distinct legal personality, she logically should be able to bring an action whenever she is injured.[62] Justice Harlan made this argument in 1910 in his dissent in *Thompson v. Thompson.*[63]

In *Schwartz v. Schwartz,*[64] however, the court said that Arizona's

husbands brought no personal injury action, so the double recovery problem was never considered, although both spouses in the community were still benefitting from the wife's recovery for loss of consortium.

58. Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965).

59. Deems v. Western Md. Ry. Co., 247 Md. 95, 231 A.2d 514 (1967).

60. *See* Windauer v. O'Connor, 107 Ariz. 262, 485 P.2d 1157 (1971); Huebner v. Deuchle, 18 Ariz. App. 241, 501 P.2d 417 (1972), *rev'd,* No. 11068-PR (S. Ct. Ariz., Sept. 26, 1973). W. PROSSER, *supra* note 20, at 864, incorrectly claims that Arizona is one of the jurisdictions which have totally rejected interspousal tort immunity. See text accompanying notes 67, 70 *infra.*

61. W. PROSSER, *supra* note 20, at 859-60.

62. See Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971) and Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970). The husband should of course have a reciprocal right to sue his wife.

63. 218 U.S. 611, 619 (1910) (Harlan, J., dissenting).

64. 7 Ariz. App. 445, 440 P.2d 326 (1968).

Married Women's Property Act has definitely not done away with interspousal tort immunity in Arizona. More recently, in *Windauer v. O'Connor*,[65] the court declined to abolish interspousal tort immunity and limited an Arizona court of appeals decision to the facts of the case. The spouses were divorced before the wife brought suit against the husband for an intentional tort. The *Windauer* court noted that the difficulty in abolishing tort immunity lay in questions of community property. This is so because all personal injury damages in Arizona are community property; if the immunity were abolished, a member of the community would be able to profit by his own wrong against the other member of the community. The *Windauer* court noted that only after the California legislature made personal injury recoveries personal property did that state abrogate interspousal tort immunity.[66] A more recent justification for interspousal tort immunity is that interfamily suits would destroy family harmony. Indeed, by its decision and opinion in *Huebner v. Deuchle*[67] in 1972, the Arizona court of appeals affirmed its determination to preserve interspousal tort immunity except when the marriage has terminated. The reason given was neither common law unity nor the community property complication, but rather the danger of domestic discord.[68] The Supreme Court of Arizona ruled in *Huebner* that interspousal tort suits are allowable only in cases of intentional tort which are brought after divorce, as in *Windauer*.[69]

The validity of these arguments for preserving interspousal tort immunity is questionable. With the widespread use of liability insurance, an insurer is usually the real defendant, and family harmony is thus not actually threatened by suits between family members.[70] It

65. 107 Ariz. 262, 485 P.2d 1157 (1971); *see* Note, *Interspousal Tort Immunity*, 14 ARIZ. L. REV. 608 (1972).

66. Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

67. 18 Ariz. App. 241, 501 P.2d 417 (1972).

68. 18 Ariz. App. at 243, 501 P.2d at 419. This argument had also supported parent-child immunity, which Arizona disposed of in negligence cases in Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970). *See* Comment, *Streenz v. Streenz: The End of an Era of Parental Tort Immunity*, 13 ARIZ. L. REV. 720 (1971). Originating in Mississippi in 1891, Hewellette v. George, 66 Miss. 703, 9 So. 885 (1891), parent-child immunity lacks the historical roots of interspousal immunity, which grew out of common law's view of husband and wife as one legal person. At common law the child was a separate legal person. W. PROSSER, *supra* note 20, at 864.

69. Huebner v. Deuchle, No. 11068-PR (S. Ct. Ariz., Sept. 26, 1973). The supreme court dismissed the wrongful death action, noting clear legislative intention that only those who could have sued in tort can sue for wrongful death. Since the deceased wife could not have sued her husband for damages if she survived, the court refused her administratrix the right to sue the husband for wrongful death. Thus the supreme court rejected the court of appeals' broader "termination of the marriage" language and definitely repeated that interspousal tort immunity is still the rule in Arizona, the *Windauer* facts being the only exception.

70. *See* W. PROSSER, *supra* note 20, at 868. The domestic harmony argument fails in cases of intentional torts because in such situations there is obviously little

is sometimes argued that parties to interspousal tort suits might conspire to defraud insurance companies, but such fears have yet to be established.[71]

Since it ostensibly rests not only on the family discord rationale but also involves practical community property problems, Arizona's doctrine of interspousal tort immunity probably will not be affected by the *Bradshaw* decision. The Supreme Court of Arizona apparently is willing to dispose of the doctrine of unity of the spouses to allow a wife a remedy for loss of consortium when her husband is negligently injured, yet it gives her no remedy for injuries to her own person if they are caused by her husband. Unless personal injury recoveries are made personal property, it is unlikely that the court will abandon the rule which it affirmed so recently in *Windauer* and *Huebner*.

Conclusion

The Supreme Court of Arizona made a sound decision in awarding the wife a right of action for loss of consortium in *City of Glendale v. Bradshaw*. When deprived of her husband's full partnership, the wife suffers an injury for which she should be compensated, just as the husband is in similar circumstances. Since society has an interest in compensating injured individuals and in protecting the marriage relationship, it is more reasonable to extend the action for loss of consortium to both spouses than to deny it to both. Recognizing the action in cases of intentional torts such as alienation of affections but not negligent injury, although technically justifiable because of double recovery distinctions,[72] would have been essentially arbitrary. Unfortunately, the reasons for decision stated in the *Bradshaw* opinion are not thoroughly articulated, and related problems are not examined.

Had the *Bradshaw* opinion explored these inconsistencies involving the Married Women's Property Act, double recovery, and community property, the decision could have been placed upon firmer logical and legal grounds and the legal position of Arizona wives could have been clarified further. Thus, instead of illustrating a conscious policy of exposing and correcting the legal handicaps married women face in Arizona, the decision stands only as another welcome but limited advance in married women's legal rights.[73]

---

domestic harmony left to preserve. Furthermore, it is unclear why interspousal tort suits should bother domestic harmony any more than interspousal property suits do.

71. *See* Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); Comment, *Interspousal Immunity Held Unavailable as a Defense to Tort Liability in Automobile Accident Case*, 3 RUTGERS-CAMDEN L.J. 183 (1971).

72. See note 57 *supra*.

73. The Arizona legislature is also excessively cautious where women's rights are

concerned. In response to pressure generated by proponents of the Equal Rights Amendment, the 31st session of the legislature amended most state statutes which were sexually discriminatory in their language. ARIZ. REV. STAT. ANN. §§ 25-211, -214 (Supp. Aug. 1973). This has now become an excuse, however, for Arizona's not joining the states which have ratified the Equal Rights Amendment. The Equal Rights Amendment would of course be a more comprehensive and permanent guarantee of sexual equality before the law. See interviews reported in Kay, *Arizona's New Law Still Not All Rosy, Say Equal Rightists*, The Arizona Daily Star, May 13, 1973, § E at 3, col. 5.