THE ARIZONA SUPREME COURT
1969-70

CONTENTS

Page

I. PUBLIC AND ADJECTIVE LAW

A. Civil Procedure

1. Choice of Physician Under Rule 35(a)
Martin v. Superior Court 91

2. Effect of Lost Record on Appeal
Rodriquez v. Williams 101

3. Sanctions for Incomplete Answers to Interrogatories
Carver v. Salt River Valley Water Users Ass'n 105

B. Criminal Law and Procedure

1. Constitutional Protections
a. Right to Counsel—Misdemeanants
Burrage v. Superior Court 111
b. Right to Counsel—Preliminary Hearings
State v. Sheffield 116
c. Lineups
State v. Dessureault 122
d. Search and Seizure—Informants
State v. Watling 127

2. Evidence
a. Anti-Marital Fact Privilege
State v. Crow 142
b. Use of Specific Prior Acts of Misconduct
State v. Goldsmith 146

3. Insanity
a. M'Naghten's Rule Revisited
State v. Malumphy 149
b. Burden of Proof
State v. Blazak 156

4. Misdemeanor Compromise Statute
State ex rel. Schafer v. Fenton 162

5. Narcotics—Forfeiture of Vehicles
In re One 1965 Ford Mustang 166

6. Sentencing—Application of Double-Time Statute
Walsh v. State ex rel. Eyman and
State v. Rhodes 171

C. Public Officials

1. Quo Warranto
State ex rel. Nelson v. Jordan 176
Ahearn v. Bailey 183

II. COMMERCIAL AND PROPERTY LAW

A. Contracts and Sales

1. Real Property
a. Rescission— Innocent Misrepresentation
Lehnhardt v. City of Phoenix 186
b. Rescission—Recoverable Losses
Jennings v. Lee 189

2. Indemnity
Southern Pacific Co. v. Gila River Ranch, Inc. 192

B. Creditors' Rights

1. Contractors' Bonds
Arizona Gunite Builders, Inc. v. Continental Casualty Co. 198

2. Garnishment
Termplan, Inc. v. Superior Court 202

III. TORTS AND LIABILITY INSURANCE

A. Insurance

1. Duty to Defend
Damron v. Sledge 213

2. Omnibus Clause—Exclusion of Insured from Coverage
New York Underwriters Ins. Co. v. Superior Court 222

3. Setting Aside Defaults
Camacho v. Gardner 225

B. Negligence

1. Duty of Public Officials
Massengill v. Yuma County 229

PUBLIC AND ADJECTIVE LAW

CIVIL PROCEDURE

CHOICE OF PHYSICIAN UNDER RULE 35(a)

Martin v. Superior Court[1] brought the problem of selection of an examining physician before the Supreme Court of Arizona for the first time.[2] The defendant in an action for personal injuries had moved for a physical examination of the plaintiff under Rule 35(a) of the *Arizona Rules of Civil Procedure.*[3] Plaintiffs opposed this motion on the ground that the nominated physician was a former client of defendant's counsel, and offered to submit to an examination by any other specialist in Phoenix. The trial court nonetheless granted the motion and appointed movant's nominee as the examining physician.[4]

The supreme court granted certiorari to review the alleged abuse of judicial discretion. It vacated the trial court's order and held that the movant does not have an absolute right to choose the examining physician. The court noted that the appointment of any physician, including movant's nominee, is within the trial court's discretion, but that where there is a "serious objection" it is incumbent upon the trial court to hold a special hearing to examine the objection to the nominee.[5]

The Arizona provision is identical to Rule 35 of the *Federal Rules of Civil Procedure.* In fact, the latter was enacted to bring federal practice in line with that of the states[6] which had similar provisions in

---

1 104 Ariz. 268, 451 P.2d 597 (1969).

2 For a brief history of court ordered medical examinations and a discussion of the good cause requirement under rule 35, see Young, *Physical Examination Under Rule 35,* 16 FED'N OF INS. COUNSEL Q. 57 (Winter 1965).

3 ARIZ. R. CIV. P. 35(a):

> In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

4 On plaintiffs' motion for rehearing, the trial judge said:

> 'I am strongly inclined to honor the request of the defendant . . . but I just don't do it as a matter of course. I mean I am willing to listen to the various factors and facets . . . some of which are the issue of prejudice, competency, [and] availability . . . .' *Quoted in* State v. Martin, 104 Ariz. 268, 269, 451 P.2d 597, 598 (1969).

5 *Id.* at 271, 451 P.2d at 600.

6 Vopelak v. Williams, 42 F.R.D. 387 (N.D. Ohio 1967). Adoption of the rule in the federal system conflicted with some states' laws and made choice of forum by personal injury plaintiffs a more important matter in those jurisdictions. *See, e.g.,* Sibbach v. Wilson & Co., 312 U.S. 1 (1941), in which the plaintiff was injured in Indiana, brought suit in the northern district of Illinois, and refused to appear for an ordered examination on the ground that such an order violated her "substantive rights." *Id.* at 13. If the law of Indiana were applied (ignoring rule 35 appli-

force.[7] For instance, the physical examination of opposing parties had already been provided for in Arizona when the federal rules were adopted in 1938,[8] and had been in effect in various forms since 1921.[9]

Once it is probable that an examination of a party will be ordered under rule 35 or similar provision,[10] several possible issues arise: First, as in *Martin*, the examinee may object to the particular physician nominated by the movant on the ground that he will not be impartial. Next, the examinee may wish to object to the circumstances of the proposed examination on the basis of inconvenience, particularly where he must travel some distance. As a part of these two issues, the examinee's party position should be considered, although in most cases the determination of a rule 35 motion will not depend upon whether the movant is a plaintiff or defendant. Indeed, the United States Supreme Court in *Schlagenhauf v. Holder*[11] stated that the basic requirements of such a motion are not changed by the movant's party position.[12] Notwithstanding the broad dicta

---

cation) the order would be valid; if that of Illinois, the order would be void. *Id.* at 7. Diversity and forum shopping questions, choice of state or federal law or between state laws, and the balancing of interests tests involved in such cases are not within the scope of the present work. *Cf.* Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965); Symposium, *Conflict of Laws*, 28 Mo. L. REV. 335 (1963); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966).

[7] It has long been settled that the federal courts, under congressional mandate, may provide for compulsory physical or mental examination in those cases in which a party's condition is in issue and where good cause has been shown. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

Further, such an examination does not violate the constitutional right to privacy or any other substantive right. Schlagenhauf v. Holder, 379 U.S. 104 (1964). In *Schlagenhauf*, Justice Goldberg cites *Sibbach* for this proposition, but it is not entirely clear that the right to privacy was specifically examined in that case. The conflict in *Sibbach* centered around whether rule 35 could modify substantive rights in contravention of the Rules Enabling Act (Act of June 19, 1934, ch. 651, 48 Stat. 1064). 312 U.S. at 13 *et seq.*; *accord*, Countee v. United States, 112 F.2d 447 (7th Cir. 1940), *citing* Camden & Sub. Ry. v. Stetson, 177 U.S. 172 (1900).

Shortly after the *Schlagenhauf* decision, Justice Goldberg gave recognition to "the right of privacy . . . within the meaning of the Ninth Amendment." Griswold v. Connecticut, 381 U.S. 479, 499 (1965). The effect of this newfound constitutional right upon *Schlagenhauf* is unclear. *See* Note, *Federal Rule 35 Held Applicable to Defendants in Personal Injury Suits*, 26 OHIO ST. L.J. 679, 682 (1965).

[8] [Ariz.] Rev. Code of 1928 § 4468, ch. —, [1928] Laws of Ariz. —, (S.B. 100; *see* ch. 6, [1928] Laws of Ariz. 5th Spec. Sess. 470; [1928] Senate Journal 320), *as amended*, ch. 5, [1929] Laws of Ariz. 13, *and* ch. 18, [1929] Laws of Ariz. 49, (repealed 1939), which read:

> **Physical examination of plaintiff in personal injury case.** On or before the trial of an action brought to recover damages for injury to the person, the court may, on application of either party and at his expense, order an examination of the person injured, as to the injury complained of, by one or more disinterested physicians, to qualify the person making such examination to testify in the action as to such injury.

[9] Ch. 131, [1921] Laws of Ariz. 284 (court to set time and place of examination), *amended*, ch. 30, [1923] Laws of Ariz. 102 (costs to be assessed against moving party) (repealed 1939). The scarcity of reported cases on physician selection problems during the 49 years of this rule's existence in Arizona is surprising.

[10] *I.e.*, when good cause is shown for examination and the condition of the party is in controversy.

[11] 379 U.S. 104 (1964).

[12] *Id.* at 115 n.12, 116.

of *Schlagenhauf*, there is a controversy over the role of a court-appointed physician vis-à-vis the parties,[13] and a question regarding the apparent difference in the treatment given *plaintiffs* upon objection to the location of examination. The examinee's initial problem, however, is to obtain a thorough consideration of his objection.

Standards for choice of physician under rule 35 were first examined in the federal courts in *The Italia*,[14] where defendant had nominated a doctor to X-ray the plaintiff. Plaintiff, while objecting to the physician, did not oppose the examination and offered to be examined by any impartial doctor. Although the court stated that "it is probably best" in most cases to appoint movant's nominee,[15] it held that where the examinee raises a strenuous objection, "it is best" to name a different physician.[16] More importantly, the determination of whether any examination would be held, as well as the final choice of the physician, was found to be a matter of judicial discretion and not an absolute right of the movant.[17] This reliance on the trial court's discretion has been generally observed in rule 35 cases.[18]

The *Martin* court, relying on *The Italia* guidelines, found that there had been a "serious objection" to the defendant's nominee.[19] While "serious," "strenuous,"[20] and "reasonable"[21] have all been used to designate objections worthy of consideration, these adjectives are unfortunately of little value in illustrating the type of objection that will require an in-depth examination of the movant's nominee.[22] Absent evidence of incompetency or lack of integrity,[23] challenges to a particular physician are usually based either on the relationship of the nominee to the movant or to his counsel,[24] or on inconvenience to the party to be examined.[25]

A connection with the opposing side is probably the most certain

---

[13] Given that the plaintiff in such actions has probably carefully prepared his medical testimony, does the defendant have a right to a doctor on his side? *See* text accompanying notes 34-40 *infra*.

[14] 27 F. Supp. 785 (E.D.N.Y. 1939).

[15] *Id.* at 786.

[16] *Id.* at 787.

[17] "Thus, even after determining that a physical or mental examination is advisable the power still rests with the court to determine the physician who shall conduct the examination." *Id.* at 786.

[18] *E.g.*, Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952); Stuart v. Burford, 42 F.R.D. 591 (N.D. Okla. 1967); Adkins v. Eitel, 2 Ohio App. 2d 46, 206 N.E.2d 573 (1965); Richardson v. Johnson, 444 S.W.2d 708 (Tenn. App. 1969).

[19] 104 Ariz. at 271, 451 P.2d at 600.

[20] The Italia, 27 F. Supp. 785, 787 (E.D.N.Y. 1939).

[21] Wasmund v. Nunamaker, 277 Minn. 52, 62, 151 N.W.2d 577, 583 (1967). *See* HAWAII REV. STAT. § 625-12 (1968) ("reasonable and valid").

[22] It should make no difference whether the objection is impassioned (strenuous) or calmly rational (reasonable). Since the courts do not generally use these adjectives interchangeably within given jurisdictions, they would appear to have some meaning at least to the authors of the opinions.

[23] Adkins v. Eitel, 2 Ohio App. 2d 46, 48, 206 N.E.2d 573, 574 (1965).

[24] *E.g., id.*

[25] *E.g.*, Vopelak v. Williams, 42 F.R.D. 387 (N.D. Ohio 1967); Simon v. Castille, 174 So. 2d 660 (La. App. 1965).

ground for challenge, as the court must choose an impartial[26] doctor and "render a decision based upon all the facts which . . . [the examinee] is entitled to have considered."[27] That the requested physician is or has been a client of movant's counsel is usually a sufficient objection to the appointment.[28] Defendant's counsel in an Ohio case, for example, nominated a doctor who had been his client and next door neighbor for over 30 years.[29] The attorney refused to answer questions regarding their business relationship, claiming the attorney-client privilege. The appellate court held that although the privilege was properly asserted it was an abuse of discretion for the trial judge to have appointed the movant's nominee without a thorough examination of the relationship in open court.

Not all prior relationships are sufficient grounds for refusal to appoint movant's nominee, however. An attorney's personal conflict with the nominated physician, resulting from a confrontation at a previous trial, was held insufficient to defeat his selection.[30] Similarly, in 1931 New York held insufficient under a rule similar to rule 35(a)[31] an examinee's deep dislike for the nominated physician.[32] However in a 1960

---

[26] *See* The Italia, 27 F. Supp. 785, 786 (E.D.N.Y. 1939) (dictum).

[27] Adkins v. Eitel, 2 Ohio App. 2d 46, 48, 206 N.E.2d 573, 575 (1965).

[28] *E.g.*, Maine v. Sheston-Luxor Cab Co., 249 Iowa 973, 89 N.W.2d 865 (1963) (court rejected movant's nominee and ordered an examination by three medical school physicians).

[29] Adkins v. Eitel, 2 Ohio App. 2d 46, 206 N.E.2d 573 (1965); *accord*, Gale v. National Transp. Co., 7 F.R.D. 237 (S.D.N.Y. 1946), where the plaintiff successfully challenged a notary public nominated to take his deposition because the latter was associated with defendant's counsel.

[30] Wasmund v. Nunamaker, 277 Minn. 52, 151 N.W.2d 577 (1967), in which the trial judge's sustaining of the objection was reversed on appeal. The court stated that "a party may not thwart the rule under which the motion was made by an unreasonable objection to a physician chosen by his opponent." *Id.* at 62, 151 N.W.2d at 583.

[31] N.Y. CIV. PRAC. ACT § 306, [1920] 4 N.Y. Laws 118, *as amended*, ch. 622, [1935] N.Y. Laws 2157, (repealed 1963), did not allow for exchange of medical reports between parties. The conflict between the more modern federal rules and section 306 is evident in such New York cases as Swiatlowski v. Kasprzyk, 2 Misc. 2d 707, 154 N.Y.S.2d 543 (Sup. Ct. 1956), in which the trial court granted a motion for examination of plaintiff and ordered defendant to furnish plaintiff with copies of the report, but denied reciprocal exchange.

> It is urged that to insure equality the injured party's physician should be required to furnish a copy of his report to the defendant. This is plausible and not without merit, but there is no such inherent power in the court [nor is there power under section 306]. *Id.* at 712, 154 N.Y.S. 2d at 548.

On appeal, the trial court was reversed for even ordering defendant to supply a report of his physician's examination:

> The benefits supposed to flow from a 'liberalized' practice should in no way alter or affect our construction of § 306. . . . If that statute is to be amended, it should be by legislation and not by judicial construction. Swiatlowski v. Kasprzyk, 3 App. Div. 2d 261, 264, 160 N.Y.S.2d 362, 364 (1957).

The legislature finally responded in 1963 by enacting N.Y. CIV. PRAC. LAW § 3121 (McKinney 1963):

> (a) Notice of examination. . . .
> (b) Copy of report. A copy of a detailed written report of the examining physician . . . shall be delivered by the party seeking the examination to any party . . . [willing to exchange copies of other reports].

[32] Black v. Bisgier, 139 Misc. 100, 248 N.Y.S. 555 (Sup. Ct. 1931).

New York case an order under the same rule appointing movant's physician over the examinee's objection was vacated, although the specific allegations against the doctor were not reported.[33] It may be that this case represents the sustaining of an objection based on personal dislike.

The success of any objection to the appointment of a particular doctor may depend upon the amount of preference normally given by that forum to the movant's nomination. Some jurisdictions strongly emphasize the movant's right to select at least one examining physician.[34] *The Italia* court said that although "it is probably best" to choose movant's physician, a "strenuous" objection would defeat the presumption that his nominee is acceptable.[35]

In some courts, however, the movant has little if any influence in the selection of the physician. A Connecticut statute[36] provides that a party need merely file a written objection to defeat the nominee.[37] The *Martin* court has placed Arizona with the weight of authority which generally holds that the trial judge must carefully exercise his discretion so as to provide an impartial examination.[38] So long as most jurisdictions look upon the appointed physician as an officer of the court regardless of who nominates him,[39] it may be good practice to refuse to appoint movant's nominee in all cases where there are nonfrivolous objections.[40]

Perhaps the most controversial—and least litigated[41]—objection is to "defendant physicians," who repeatedly seem to discern little injury and almost no pain upon examination of plaintiffs. "It is known that some physicians continuously engaged by the parties become partisan and their

---

[33] Pink v. Valentine, 10 App. Div. 2d 583, 195 N.Y.S.2d 956 (1960). This case carried on the controversy over copies of reports. *See* note 31 *supra*. It was held improper to require that before plaintiff could receive a copy of the examination report by defendant's physician, he must furnish a report of a previous examination by his own doctor. *But see* FED. R. CIV. P. 35(b).

[34] *E.g.*, Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966). The court held that so long as the plaintiff may select his own physician to testify to his injuries, fairness demands that the defendant be allowed to choose a medical expert to counter that testimony. *Accord*, Baird v. Quality Foods, Inc., 47 F.R.D. 212 (E.D. La. 1969).

[35] 27 F. Supp. at 787.

[36] CONN. GEN. STAT. REV. § 52-178a (1965).

[37] Mulligan v. Goodrich, 28 Conn. Supp. 11, 246 A.2d 206 (Super. Ct. 1968).

[38] *E.g.*, Helton v. J.P. Stevens Co., 254 N.C. 321, 118 S.E.2d 791 (1961).

[39] *E.g.*, Warrick v. Brode, 46 F.R.D. 427 (D. Del. 1969). The examination is divested of its adversary character because "[t]he examining doctor is, in effect, an 'officer of the court.'" *Id.* at 428; *accord*, Maine v. Sheston-Luxor Cab Co., 249 Iowa 973, 89 N.W.2d 865 (1963).

[40] *See* The Italia, 27 F. Supp. 785 (E.D.N.Y. 1939); Helton v. J.P. Stevens Co., 254 N.C. 321, 118 S.E.2d 791 (1961); Richardson v. Johnson, 444 S.W.2d 708 (Tenn. App. 1969).

[41] It may be that these objections are litigated, but not directly, so that the opinions do not reflect that the real objection is to the nature of the doctor's viewpoint on injury generally. Some cases in which no specific reason is given for not selecting movant's physician may represent considerations of this sort. *See, e.g.*, Leach v. Greif Bros. Cooperage Corp., 2 F.R.D. 444 (S.D. Miss. 1942).

reports are colored."[42] One possible system to obtain impartial testimony has been used by the Eastern District of Pennsylvania since 1958:

> The so-called impartial medical testimony plan involves the appointment . . . in appropriate cases where the record discloses a substantial divergence of medical opinion, of a doctor from a panel of experienced physicians recommended by the appropriate Medical Society . . . .[43]

Under this plan the Pennsylvania Medical Society furnishes lists of doctors, categorized by specialty and location, from which the court may choose an examining physician. These court selections are resorted to when it appears that settlement efforts will be stymied by, and valuable trial time consumed in, a "battle of the experts" over disparate opinions of an examinee's true condition. Because such an examination is employed at a late stage in the discovery process, the parties' rights would not appear to be abridged in any way since each has already had the benefit of examination by a doctor chosen by him, or at least selected on his motion. Moreover, settlements would be encouraged[44] since the court's physician will be the best available specialist and his opinion will carry great weight with both parties.[45] In 78 cases where motions for impartial examinations were granted,[46] and in which medical reports were returned and settlement conferences begun under the plan, 35 cases were settled before, and eight during, trial.[47] These statistics are quite favorable in view of the fact

---

[42] Swiatlowski v. Kasprzyk, 2 Misc. 2d 707, 713, 154 N.Y.S.2d 543, 548 (Sup. Ct. 1956), *rev'd on other grounds*, 3 App. Div. 2d 261, 160 N.Y.S.2d 362 (1957). *Contra*, Timpte v. District Court, 161 Colo. 309, —, 421 P.2d 728, 729 (1966), where the court said:

> It is suggested that certain doctors testify only for the defense in matters of personal injury and that in itself suggests bias and prejudice and demands disqualification. . . . We do not agree. Such matters are relevant only as to weight and credibility, and cross-examination affords full protection to the plaintiff's rights.

The *Timpte* court would probably say that "plaintiffs' doctors," insofar as they exist, would testify subject to the weight their association with the patient might have on the fact-finder.

[43] Van Dusen, *A United States District Judge's View of the Impartial Medical Expert System*, 32 F.R.D. 498, 498 (1963).

[44] The policy of the court is explained in a memorandum:

> 'H. After counsel have had a chance to discuss the report with their clients, a conference is held to discuss settlement of the case on the basis of the report by the panel doctor. If settlement cannot be achieved, an attempt is made to secure agreement on as many medical issues as possible in order to shorten the time of the trial and narrow the medical fact issues. The great majority of cases are settled between the time of this conference and the time of trial. Sometimes the report recommends further medical procedures, which the defendants have been willing to finance.
>
> 'If the procedure followed in the above paragraph does not achieve settlement, some judges make an effort to have the impartial doctor meet with the partial doctors, in the absence of judge, lawyers and parties, in an effort to reach as many agreements on medical points as possible. It is understood that such conferences of doctors have been successful in New York, both in achieving settlements and in reducing the length of the trial through limiting the number of disputed medical points.'] *Id.* at 506-07.

[45] "The success or failure of the plan is largely dependent upon securing on the panel of doctors men of experience and of the highest integrity." *Id.* at 512.

[46] The judge may initiate the process on his own motion.

[47] Van Dusen, *supra* note 43, at 512.

that the system becomes operable only at a stage when, it may be assumed, negotiations are deadlocked.

Similar plans are in use elsewhere,[48] but apparently no court has used impartial doctors on a regular basis except in cases of extreme divergence of existing medical opinion. Perhaps the benefits of the Pennsylvania plan[49] should be available in every case upon motion of either party or the judge.[50] This system has its opponents,[51] but so long as "[e]xperience shows that the opposing parties still search until they find experts whose testimony supports their positions,"[52] some method must be found to provide the court with medical experts who are as impartial as possible.

The second type of objection an examinee frequently makes to the movant's choice of physician relates to the inconvenience and expense of traveling long distances for a court-ordered examination. When a plaintiff-examinee seeks to avoid examination in the district where the court sits, his objection will get short shrift from most judges.[53] He is deemed to have chosen his forum, and must be prepared to conduct pretrial business there.[54] Even if he has chosen the forum out of necessity—to acquire personal jurisdiction over the defendant, for instance—he may not normally object to travel over long distances at his own expense.[55]

---

[48] *See, e.g.*, Peck, *Impartial Medical Testimony*, 22 F.R.D. 21, 23-26 (1958). A short bibliography on the subject appears in Van Dusen, *supra* note 43, at 513.

[49] Specifically, the plan has had these results, among others:

> A. It has decreased a formerly growing reluctance on the part of the best doctors of our community to come into court, due to their frustration at having their well-considered opinions condemned by doctors, who they considered unqualified on the medical issues before the court.
>
> B. It has decreased the number of cases where one doctor would testify one way and another in an exact opposite way, leaving the jury in a most difficult position.
>
> C. It has enabled plaintiffs to secure competent medical testimony in malpractice cases.
>
> D. In some few cases, it has enabled the court to secure by agreement additional medical treatment (including operations and observation) for impecunious plaintiffs, often assisting in their rehabilitation as well as in settlement of the cases. Van Dusen, *supra* note 43, at 512.

[50] It may be argued that protection must be given the opposing party faced with examinee's doctor and a neutral expert by allowing him his own appointment as well. However, the jury may be told which doctor is whose, and remain free to give more weight to the court's witness.

[51] *See, e.g.*, Berry, *Impartial Medical Testimony*, 32 F.R.D. 539 (1963).

[52] Van Dusen, *supra* note 43, at 500.

[53] Vopelak v. Williams, 42 F.R.D. 387, 389 (N.D. Ohio 1967), where the court said:

> [P]laintiff has no right to undertake to handicap the search for truth by requiring the defendant to rely upon the testimony of witnesses that it cannot practically produce in court . . . [because they are not within the jurisdiction of the forum].

See also Pierce v. Brovig, 16 F.R.D. 569, 570 (S.D.N.Y. 1954), where the plaintiff was ordered to travel from Georgia to New York when the court found no extraordinary circumstances barring the trip.

[54] Gale v. National Transp. Co., 7 F.R.D. 237 (S.D.N.Y. 1946). The plaintiff, who resided in Massachusetts, could not object to traveling to New York for examination.

[55] Warren v. Weber & Heidenthaler, Inc., 134 F. Supp. 524 (D. Mass. 1955). The plaintiff was required to travel 200 miles by land and 10 by water at his own

The insistence that the examining physician reside within the jurisdiction of the forum court arises from a desire to guarantee his availability as a witness.[56] While this rule is generally followed strictly, some courts recognize exceptions. Arkansas has held that the examination may take place in another jurisdiction if the movant can show *"that a satisfactory examination by a competent and qualified physician cannot be had at a nearer locale."*[57] Dicta in the opinion stated that the greater the distance to be traveled, the greater the cause that must be shown by the movant. However, an examinee avoided unnecessary travel when an Oklahoma federal district court rejected movant's physician in Oklahoma City when more than 40 doctors of the same speciality practiced in Tulsa, the examinee resided there, and Oklahoma City was outside the district.[58] A New York court vacated the appointment of a Connecticut physician but said the trial court had power to send a New York doctor to Connecticut to conduct the exam.[59]

The trial judge has a great deal of discretion in all phases of rule 35 orders, but a survey of the cases does not provide a comprehensive standard for its exercise when an examinee (plaintiff or defendant) in one part of a very large district is asked to travel a long distance for examination within the district,[60] or an examinee did not choose the forum

---

expense to be examined in Boston. It later appeared that plaintiff was destitute and the defendant was required to pay plaintiff's travel expenses, subject to recovery if plaintiff won. *Id.* at 525 n.(*).

Unless he could show that the travel was injurious to his health, the plaintiff in Baird v. Quality Food, Inc., 47 F.R.D. 212 (E.D. La. 1969), was ordered to travel from Oklahoma to New Orleans at his own expense.

[56] *See* FED. R. CIV. P. 45(e)(1), which provides in part:

> A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

The textual discussion assumes that a physician residing within 100 miles of the forum court would be treated as resident within the forum for appointment purposes.

[57] Reed v. Marley, 230 Ark. 135, 143, 321 S.W.2d 193, 197 (1959). The plaintiff, in order to avoid a nonsuit, was required to travel 121 miles from Fayetteville, Ark., to Tulsa, Okla., to be examined for the second time by the insurance company's doctor. Three judges dissented, pointing out that evidence not introduced at the hearing but in the appeal record showed that there were qualified specialists within the state at plaintiff's home town and at Fort Smith, Ark., 62 miles away.

The examination was ordered under ARK. STAT. ANN. § 28-357 (Supp. 1969), which reads in part: "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to . . . examination by a physician selected by the petitioner." However, the court construed the statute so that the defendant had no more right to choose the physician than he would under rule 35. 230 Ark. at 137, 321 S.W.2d at 196.

[58] Stuart v. Burford, 42 F.R.D. 591 (N.D. Okla. 1967).

[59] Genovese v. Wheatality Bakery, Inc., 27 Misc. 2d 325, 207 N.Y.S.2d 307 (App. Div. 1960).

[60] *E.g.*, a plaintiff in the northwestern corner of Arizona requested to appear for examination in Tucson, a distance of approximately 350 miles.

and does not reside there.[61] Such a standard should be based on the theory that greater distance should require a greater showing of good cause.[62] In most cases appropriate specialists should be available relatively close to the examinee's residence and, if that is also within the forum, the court should be strongly disposed toward the appointment of such a doctor to avoid unnecessary inconvenience and expense to the examinee. A disposition favoring this type of appointment logically follows in those jurisdictions where the doctor is considered to be an impartial officer of the court. If the court follows the principle that the movant should have a doctor favorable to his side,[63] there should still be sufficient cause shown to justify the distance examinee must travel.[64]

Where an examinee resides outside of the forum, and inconvenience or hardship is shown, a more difficult question arises. Though it may be reasonable to require that the doctor be subject to the process of the forum court,[65] an out-of-district doctor who agrees in advance to appear at trial should be allowed to conduct the examination. If he is also the movant's nominee, the physician probably would have already agreed to be available. Sending a doctor from within the jurisdiction would present a difficulty primarily of expense, which might be borne by the examinee[66] or shared equally by the parties, at the court's discretion. Certainly more considerations than now appear in the cases should be examined when a party is saddled with a distant forum.[67]

An attorney should not overlook objections based on other inconveniences to his client. Although the convenience of a female physician for a woman examinee was denied in one case,[68] another court allowed a friend of a female examinee, but not her attorney, to be present at an examination by a strange doctor.[69] Similarly, a last-minute request for a physical examination was successfully opposed when the movant had had new information regarding plaintiff's condition a month before the trial.[70] The inconvenience of a continuance was stressed by the court.

---

[61] *E.g.*, a plaintiff who sues in the district of Arizona but whose case is moved under forum non conveniens to New York.

[62] *See* Reed v. Marley, 230 Ark. 135, 321 S.W.2d 193 (1959).

[63] *See, e.g.*, Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966).

[64] Few courts fall in this last category in any case. *See* notes 34-40 and accompanying text *supra.*

[65] See note 56 *supra.*

[66] *See* Warren v. Weber & Heidenthaler, Inc., 134 F. Supp. 524 (D. Mass. 1955).

[67] *But see id.* If, as in *Warren*, a plaintiff forced to sue in a particular forum is allowed no special consideration, then perhaps a plaintiff moved under forum non conveniens or a defendant in a distant forum deserves none either.

[68] Gale v. National Transp. Co., 7 F.R.D. 237 (S.D.N.Y. 1946). The court noted that her personal physician was a male.

[69] Simon v. Castille, 174 So. 2d 660 (La. App. 1965). For a summary of medical discovery in Louisiana, and a discussion of remedies when the plaintiff refuses to be examined before the filing of suit, see Note, *Civil Procedure—Discovery—Personal Injury—Plaintiff's Refusal to Submit to Defendant's Medical Examination Before Suit is Filed*, 44 TUL. L. REV. 174 (1969).

[70] Richardson v. Johnson, 444 S.W.2d 708 (Tenn. App. 1969). Plaintiff's doctor, who had previously found no permanent partial disability existed from a neck injury, testified to a 10 percent disability on deposition.

Though rule 35 or similar provisions are in widespread use throughout the country,[71] the courts vary in providing remedies for the examinee upon objection. Of course, one can hope that his objection is sustained and the nominee rejected. But most courts will not name another doctor merely because an objection is made. The Arizona court has chosen the most used method of exercising informed discretion—a hearing to determine the impartiality of the proposed physician. A hearing should be held simply to avoid the *appearance* of favoritism.[72] At least it will provide latitude for probing possible grounds for disqualification. It should be noted that in all cases surveyed where the objection was successful, counsel had indicated a willingness to have the examination made by any other doctor, and often had provided the court with lists of available specialists,

If the court cannot be convinced to reject movant's doctor, it may still be possible to control the form of the examination. The right of the movant to nominate the examining physician is always "subject to protective orders by the trial court such as, among others; those limiting the number of doctors who may examine; those providing who may be present at the examinations, including [examinee's] attorneys . . . and those setting the time, place, scope and conduct of the examination."[73]

In *Martin* the Supreme Court of Arizona joined the majority of jurisdictions holding that the movant does not have an absolute right to appoint the examining physician and that the court must carefully exercise its discretion in choosing an impartial doctor. The requirement or a hearing upon "serious objection" guarantees a record for appeal while providing a method by which the trial court can ascertain possible prejudice. The court refrained from adopting a rule that any objection merely not frivolous on its face warrants a hearing. The current rule requires something more. However, with nonfrivolousness as the sole criteria, trial courts might more carefully consider objections to movant's nominees. The practice of using "defendants' physicians" should be more closely examined in all jurisdictions, and methods developed to discourage such partiality.[74] Insofar as such doctors exist, their effect on lawsuits could

---

[71] In 1961, 25 states, Puerto Rico and the District of Columbia had rules identical with or similar to rule 35; another seven states provided for physical examinations under differing rules. In 10 states, the courts have been held to have "inherent power" to order examinations, but in five states (Mississippi, South Carolina, Massachusetts, Oklahoma, and Texas) orders for examination are expressly forbidden by statute. 2A BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE §§ 821-821.1 nn.7.1, 7.2 (Rules ed. 1961). Approximately the same distribution existed in 1966. Urbom, *Medical Discovery in the Fifty States Plus Two*, 33 INS. COUNSEL J. 376, 381 (July 1966).

[72] *Cf.* Helton v. J.P. Stevens Co., 254 N.C. 321, 118 S.E.2d 791 (1961).

[73] Timpte v. District Court, 161 Colo. 309, —, 421 P.2d 728, 729 (1966); *accord*, Simon v. Castille, 174 So. 2d 660 (La. App. 1965).

[74] For some pointers in the not-too-nice game of "get the medical expert," see McConnell, *Doctors Are People Too: Cross Examination of the Medical Expert*, 47 MICH. STATE B.J. 12 (Oct. 1968).

be attenuated by allowing examinations to be conducted only by physicians drawn from a court-approved list.[75]

EFFECT OF LOST RECORD ON APPEAL

In *Rodriquez v. Williams*[1] the Supreme Court of Arizona placed on appellants in civil appeals the ultimate risk of loss in cases of accidental destruction of the record, and perhaps more importantly, defined the procedure to be followed in such cases. The appellants had brought an unsuccessful action for personal injuries. Shortly after their appeal was perfected,[2] the trial court informed the parties that the court clerk had inadvertently destroyed all of the exhibits in the case. Appellants' motions for a new trial in both the trial court and court of appeals were denied by both courts for lack of jurisdiction. They appealed to the Supreme Court of Arizona from these rulings.

In a unanimous decision, the supreme court held: First, that the denials in the lower courts were proper. The trial court had no jurisdictions once the appeal had been perfected,[3] and the appellate court had no jurisdiction to hear a motion for new trial which involves determination of questions of fact for which only the trial court is suited. Second, that in a civil case a motion for new trial is not the proper remedy when a necessary part of the trial record is destroyed after the appeal has been perfected. Appellant's remedy is to file in the appellate court a motion to suspend the progress of the appeal and to reinstate the trial court's jurisdiction for the limited purpose of reconstructing the record. Finally, the court decided that if the record is incapable of reconstruction the appeal will be dismissed.[4]

While the various jurisdictions differ in their treatment of record deficiencies that are no fault of the appellant, all appellate courts lay great stress on procedural rules, and generally view with disfavor any failure to

---

[75] Such a list could be prepared by a panel made up of equal numbers of plaintiffs' attorneys and defense counsel, with an absolute veto exercised by the state or county medical society, which would act as an impartial third party. Random selection by the trial judge from such a list would eliminate even the appearance of partiality.

---

[1] 104 Ariz. 280, 451 P.2d 609 (1969).

[2] ARIZ. R. CIV. P. 73(d):

> The appeal is perfected when the notice of appeal and the bond for costs on appeal, or the affidavit in lieu of bond, are filed. When appellant is not required by law to give a bond for costs on appeal, the appeal is perfected by filing the notice of appeal.

[3] *But see* Karasik, *Jurisdiction of Trial Court After Notice of Appeal*, 53 ILL. B.J. 30 (1964), for a discussion of powers retained by the trial court after the perfection of appeals.

[4] Rodriquez v. Williams, 104 Ariz. 280, 282-83, 451 P.2d 609, 611-12 (1969).

observe them.[5] Because the burden of perfecting and prosecuting the appeal is on the appellant,[6] he usually bears liability for any failure to follow the rules with particularity.[7]

Where an appellant does so fail with regard to sufficiency of the record, the courts differ in their willingness to nonetheless grant appellant a remedy. Some courts follow a presumption that the decision of the lower court is correct; if the record is insufficient the appeal will be dismissed.[8] Generally, in those jurisdictions "[i]t is the responsibility and the duty of the appellant to provide the appellate court with a record sufficient to review the matter."[9]

At the other end of the spectrum are those courts that will entertain a motion for a new trial,[10] or will even hear an appeal despite material deficiencies in the record.[11] Some courts will allow an appeal if the

---

[5] *See, e.g.*, Bernstein, *The Disposition of Civil Appeals in the Supreme Court*, 5 ARIZ. L. REV. 175 (1964). This article is a good summary of the attitude of the Supreme Court of Arizona toward its work, and of the procedural detail in initiating and sustaining an appeal.

[6] For a discussion of who bears the burden of costs in appellate cases, see Greenberger, *Appellate Review in England and the United States—Who Bears the Ultimate Burden?*, 1 DUQUESNE U.L. REV. 161 (1963).

[7] *E.g., In re* Plankinton Bldg. Co., 133 F.2d 900 (7th Cir. 1943). *See generally* ARIZ. R. CIV. P. 73-76.

[8] Burns v. Brown, 76 Cal. App. 2d 639, 643, 173 P.2d 716, 718 (1946); Woods v. R.D. Hunt & Son, Inc., 207 Va. 281, 148 S.E.2d 779 (1966).

See Guarnacci v. Ferguson, 28 App. Div. 2d 839, 287 N.Y.S.2d 471 (1968), where both parties had stipulated to the sufficiency of the record, but the court nonetheless held that it would be the arbiter of such matters and dismissed the appeal, *and* Liberty Loan & Thrift Co. v. Meeks, 115 Ga. App. 846, 156 S.E.2d 172 (1967), in which no reporter had been present at the trial, opposing counsel refused to agree to a narrative account prepared by appellant, and the trial judge refused to approve the offered transcript because he was unable to remember the facts of the case. The appellate court affirmed the lower court's judgment, overruling previous Georgia law which held that where parties could not agree on a narrative, a certification by the trial judge that he couldn't recall the evidence would validate the appellant's transcript. The appellate court held that the trial judge was not obligated either to appoint a reporter or to inform counsel of his right to hire one. *Id.* at 847, 156 S.E.2d at 173, *overruling* Holloway v. Poppell, 114 Ga. App. 531, 152 S.E.2d 4 (1966); *cf.* GA. CODE ANN. § 6-805(g) (Supp. 1969).

[9] Conlee Const. Co. v. Cay Const. Co., 221 So. 2d 792, 797 (Fla. App. 1969). A copy of the supersedeas bond at issue was not included in the record; judgment was affirmed as to that issue for lack of an appealable record.

[10] *E.g.*, Scharff v. Holschbach, 220 Mo. App. 1139, 296 S.W. 469 (1927). Loss of the court reporter's notes without fault of the appellant was held a sufficient basis for a new trial.

[11] Ench Equip. Co. v. Lorenzo, 23 N.J. Super. 63, 92 A.2d 480 (App. Div. 1952), in which an appeal was allowed even though the record failed to show an amendment to the original pretrial order relevant to a counterclaim at issue. Though for some reason the orders relating to a counterclaim and answer were never properly filed by the court clerk, the appellate court held that the issues were ascertainable from the later orders and the trial judge's notations in other parts of the appeal record. *Id.* at 68, 92 A.2d at 483.

Louisiana courts "have held that the right of appeal is a 'constitutional right' . . . that an appeal can be dismissed 'only for substantial causes.'" Hood, *The Right of Appeal*, 29 LA. L. REV. 498 (1969), and cases cited therein. This article discusses the civil and common law origin of present-day appeals and extraordinary writs, with a special emphasis on the history of appeals courts and related constitutional considerations in the United States.

record, though it be "meagre,"[12] is sufficient to present the issues with reasonable certainty.[13] Such permissive treatment is usually given when the court considers the appeal meritorious.[14]

Most jurisdictions, including Arizona, fall somewhere between these extremes, offering some chance to correct the record, but dismissing the appeal if it cannot be done. It is incumbent on the appellant to start the proceedings to reconstruct the record without undue delay.[15] He will then be allowed a fair chance to accomplish this by a remand to the trial court.[16] The opportunity to rebuild the record has been given the appellant when the reporter's notes have been inadvertently lost or destroyed,[17] and when the reporter had died and there was no other way to obtain a transcript.[18] The responsibility of effecting a timely reconstruction remains, however, on the appellant. Failure to respond to a notice that the record is deficient may result in dismissal of the appeal.[19] Similarly, a Texas court refused to grant a delay of an appeal to give a court reporter time to transcribe his notes when the appellant had waited 38 days after the perfection of his appeal to contact the reporter, who was by then on his vacation.[20]

The *Rodriquez* holding was not totally without precedent in Ari-

---

12 Ricci v. Bove's Estate, 116 Vt. 406, 412, 78 A.2d 13, 18 (1951).

13 *E.g.*, Timberlake v. J.R. Watkins Co., 209 N.E.2d 909 (Ind. App. 1965). The record had been certified by the court clerk and the appellee failed to supply the omissions he alleged existed. "The record in a duly authenticated transcript imports absolute verity." *Id.* at 911.

14 Davis v. Kleindienst, 64 Ariz. 67, 71, 165 P.2d 995, 997 (1946). A conflict between the old rules adopted from ARIZ. REV. CODE (1928) and the new *Arizona Rules of Civil Procedure*, both of which were operative under ARIZ. CODE ANN. (1939), resulted in the failure of the trial court clerk, operating under the old rules, to forward the record within the time prescribed. The status of this case may be uncertain after the opinion in *Rodriquez*, but it fits the Arizona court's often repeated statement "that we prefer to determine cases on their merits rather than on points of procedure." Rodriquez v. Williams, 104 Ariz. 280, 283, 451 P.2d 609, 612 (1969). *See also* Goodman v. State, 96 Ariz. 139, 393 P.2d 148 (1964); Colbach v. Aviation Credit Corp., 64 Ariz. 88, 166 P.2d 584 (1946).

15 Sherriffs v. Scott, 109 Cal. App. 438, 292 P. 1088 (1930) (appeal dismissed because of appellant's year-long delay in starting any proceedings to reconstruct a "misplaced" judgment roll required on appeal). For an examination of procedural steps in the California appeal system, see Chamberlin, *Loss of the Right of Appeal in Civil Actions*, 15 HASTINGS L.J. 39 (1963).

16 Easter v. Dundalk Holding Co., 233 Md. 174, 195 A.2d 682 (1963).

17 Duriron Co. v. Bakke, 431 P.2d 499 (Alas. 1967); Cassella v. Manikas, 8 App. Div. 2d 587, 183 N.Y.S.2d 618 (1959).

18 *In re* Society for the Prevention of Cruelty to Children, 8 Misc. 2d 123, 165 N.Y.S.2d 861 (Sup. Ct. 1957).

19 Van Horn State Bank v. Bennett, 428 S.W.2d 468 (Tex. Civ. App. 1968).

20 Dellerman v. Trager, 327 S.W.2d 667 (Tex. Civ. App. 1959). *See* Note, *Appeal & Error—Practice & Procedure—Absence of Court Reporter on Vacation Not Good Cause for Delay of Appeal—Conflicting Official Business of Court Reporter is Good Cause for Delay of Appeal*, 39 TEXAS L. REV. 102 (1960), for a comparison of *Dellerman* and Harrison v. Benavides, 327 S.W.2d 610 (Tex. Civ. App. 1959), where the court allowed such a delay because, although the appellant waited 50 days after perfecting the appeal to contact him, the reporter was at that time on official business instead of on vacation. This was held to be "good cause" for a delay. *Id.* at 613. The judge who wrote the court's opinion in *Dellerman* entered a strong dissent in *Harrison*.

zona. *Yerger v. Bross*[21] was the first case in this jurisdiction in which the record was incomplete through no fault of the appellant. After appeal had been perfected, the appellant won several extensions of time for filing the record, due to the illness of the court reporter. It was finally shown that the reporter was permanently disabled, and that no one else could read his notes. On that ground, the appellant moved in the appellate court for a new trial. The court held that the appeal would be dismissed in the absence of an agreed statement of facts in narrative form prepared pursuant to Rule 75(k) of the *Arizona Rules of Civil Procedure.*[22]

The holding in *Yerger*, urged as controlling by the appellee in *Rodriquez*,[23] seems to allow only this agreed statement as a reconstruction.[24] *Rodriquez*, however, demonstrates that an appellant is not limited solely to this statutory remedy when faced with the unavailability of a transcript or exhibits, because the trial court is available to assist in curing an insufficient record.[25] This broader holding may have been prompted by the fact that missing exhibits usually cannot be adequately replaced by a narrative statement.

A motion for new trial, denied in *Rodriquez, is* a proper remedy in Arizona for a destroyed record only in criminal cases. In criminal cases, a motion should be filed to suspend the progress of the appeal and reinstate the trial court's jurisdiction. There, however, the trial court's jurisdiction extends not only to hearing evidence and making findings regarding reconstruction of the record, but also to granting a motion for a new trial if that is necessary.[26] In a civil case, on the other hand, remand jurisdiction is limited to reconstruction of the record, and the motion to reinstate such jurisdiction must be supported by an affidavit showing "the cause of the loss of the record, the materiality of the lost items, the impossibility of reproducing them," and that the deficiencies are not due to any fault of the appellant.[27]

---

21 68 Ariz. 104, 201 P.2d 121 (1948).

22 ARIZ. R. CIV. P. 75(k):

> If a stenographic report of the evidence or proceedings at a hearing or trial cannot be obtained by reason of the death, disability or inefficiency of the reporter taking the evidence or proceedings, or the loss or destruction of the notes thereof, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. The statement shall be served on the appellee who may serve objections or propose amendments thereto within ten days after the service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the superior court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal.

23 104 Ariz. at 282, 451 P.2d at 611.

24 "Relying upon statement of counsel for the appellant to the effect that he cannot secure a copy of the transcript . . . [or] an agreed statement of facts in narrative form . . . it appears that the appeal will have to be dismissed." Yerger v. Bross, 68 Ariz. 104, 108, 201 P.2d 121, 123 (1948).

25 *See* 104 Ariz. at 282, 451 P.2d at 611.

26 *Id.*; State v. Sims, 99 Ariz. 302, 409 P.2d 17 (1966).

27 104 Ariz. at 283, 451 P.2d at 612.

This double standard is a result of the fact that a criminal defendant's constitutional right to equal protection on appeal[28] may not be abridged.[29] The right to a transcript in criminal proceedings may extend to protection against loss of appeal rights due to a court official's destruction of the record.[30] However, in the view of the Arizona court, the parties in a civil case have started on an equal footing, one has won out, and "[w]e cannot lightly deprive him of his victory," even though "the appellant's right to a meaningful appeal is also valuable."[31] The *Rodriquez* court reasoned that since any decision is going to affect adversely the rights of one of the parties, it is a just decision to place the risk on the appellant. Although "the appellant is entitled to all the relief possible,"[32] a new trial will not be granted; his relief hinges on the possibility of reconstruction. While the *Rodriquez* court did not expressly recognize a presumption in favor of the lower court's decision, it is implicit in its opinion that the appellant is presumed to have received a fair trial and that due process requirements have been met.[33]

By its decision in *Rodriquez* the Supreme Court of Arizona has reaffirmed the rule it laid down in *Yerger*. It has also defined with more particularity the precise method of correcting an insufficient record. There remains, however, the very real possibility that appellate review may be shut off through no fault of the appellant. *Rodriquez* is very much in the mainstream of American procedure in the limited remedy it provides. If the rule is harsh, it is clearly in line with the remedial procedure generally followed by most courts on prosecutions of appeals.[34]

SANCTIONS FOR INCOMPLETE ANSWERS TO INTERROGATORIES

In *Carver v. Salt River Valley Water Users' Association*[1] the Supreme Court of Arizona considered the scope of Rules 33 and 37 of the

[28] It may be that the right of appeal will extend further into civil cases in the future. *See* Note, *The Right to Appeal*, 44 J. URBAN L. 505 (1967), which discusses a civil case in which a tenant was ejected because he was unable to post an appeal bond. It is possible to argue that under Griffin v. Illinois, 351 U.S. 12 (1956), a state court would have to provide reconstruction or other costs to protect a civil appeal where a loss of property would result from inability to prosecute the appeal due to indigency. *Cf.* Williams v. Shaffer, 385 U.S. 1037 (1967) (Douglas, J., dissenting), *denying cert. to* 222 Ga. 334, 149 S.E.2d 668 (1966).

[29] *See In re* Gault, 387 U.S. 1, 57-58 (1969); Douglas v. California, 372 U.S. 353 (1963); Rodriquez v. Williams, 104 Ariz. 280, 282, 451 P.2d 609, 611 (1969).

[30] *Compare* Griffin v. Illinois, 351 U.S. 12 (1956), *with* Eskridge v. Washington State Bd., 357 U.S. 214 (1958), *and* Draper v. Washington, 372 U.S. 487, 499 (1963) (petitioners must be granted a "record of sufficient completeness" to allow appellate review).

[31] 104 Ariz. at 282, 451 P.2d at 611.

[32] *Id.* at 283, 451 P.2d at 612.

[33] *See, e.g.*, Burns v. Brown, 76 Cal. App. 2d 639, 173 P.2d 716 (1946).

[34] *Cf.* Bernstein, *supra* note 5; Chamberlin, *supra* note 15.

[1] 104 Ariz. 513, 456 P.2d 371 (1969).

Arizona Rules of Civil Procedure, which, respectively, govern interrogatories and the application of sanctions for violations of the discovery rules. Reasoning that the rules should be interpreted broadly to promote the purposes of discovery,[2] the court indicated the factors to be considered in determining whether a trial judge has abused his discretionary power under rule 37 and also under Rule VIII(a) of the *Uniform Rules of Practice of the Superior Court* to apply sanctions for failure to make discovery.

Plaintiff brought an action for personal injuries sustained when a tree, growing between defendant county's highway and the other defendant's irrigation lateral, fell on her automobile. At the pretrial conference the court ordered that additional discovery could be made not later than 20 days prior to trial. The next day, the defendant county served plaintiff with interrogatories pursuant to rule 33, requesting *inter alia* the names of all of plaintiff's witnesses. Plaintiff's answer gave the name of one witness. Two working days before trial and 14 days after the discovery deadline set in the pretrial order, plaintiff's attorneys notified defendants that they intended to call four additional witnesses. At the trial, the court determined that defendants were prejudicially misled in the preparation of their case, and on defendants' motion excluded these witnesses and denied plaintiff's motion for a continuance. The court of appeals[3] and the supreme court both affirmed the lower court's judgment on this point.

The *Carver* decision has thus approved the use of strict sanctions for violations of discovery rules in certain situations not explicitly mentioned in the rules. Moreover, it indicated the principal factors which should be considered in determining whether a court's discretionary power to apply discovery sanctions had been abused.

Rule 37 of the *Arizona Rules of Civil Procedure* provides sanctions both for violation of an order compelling discovery[4] and for wilful failure of a party to answer interrogatories.[5] However, the rule makes no provision for sanctions against parties who give incomplete or incorrect answers in response to written interrogatories. This omission has created controversy over what powers the courts have in this area, if any, and from what authority courts derive these powers.[6]

---

2 Two broad purposes are listed in Hickman v. Taylor, 329 U.S. 495, 501 (1947):

> The various instruments of discovery . . . serve (1) as a device . . . to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as the existence or whereabouts of facts relative to those issues.

See also Watts v. Superior Court, 87 Ariz. 1, 347 P.2d 565 (1959).

3 Carver v. Salt River Valley Water Users' Ass'n, 8 Ariz. App. 386, 446 P.2d 492 (1968).

4 ARIZ. R. CIV. P. 37(b).

5 *Id.* 37(d).

6 Courts differ over whether authority for this power can be found in the discovery rule. In Southard v. Pennsylvania R.R., 24 F.R.D. 456, 457 (E.D. Pa. 1959), the court said:

In 1959, in *Schwartz v. Schwerin*,[7] the Supreme Court of Arizona indicated that a trial court had power to deal with incomplete or incorrect answers in some situations. There a party had evasively answered certain interrogatories, and the court had barred his attempt to introduce the requested but undisclosed evidence at trial. The exercise of the power of sanction over a party who did not entirely fail to answer but who answered incompletely was unprecedented in Arizona. *Schwartz*, however, did not indicate where the court had derived the power to deal with the situation.[8]

While almost all courts have found the power to apply sanctions,[9] their authority to do so has often been found not in rule 37 but in other statutes, rules of procedure,[10] or in inherent powers.[11] *Carver* indicates

---

> Rule 37(b)(2)(iii) [of the *Federal Rules of Civil Procedure*] empowers the court to enter a judgment against a party who refuses *to obey an order* made under subdivision (a) of Rule 37. There was no such order outstanding against defendant in this case. Furthermore, Rule 37 deals with a 'Refusal to Make Discovery,' e.g., a refusal to answer an interrogatory. Defendant here filed answers to all plaintiff's interrogatories. Even if the defendant had filed false answers it is extremely doubtful that such filing should be considered tantamount to refusal to answer.

See also 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 855, at 554 (Wright ed. 1961). *But see* Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 486 (1958), where the author states:

> There is no justification for the courts' practice of bypassing rule 37, and the practice can only cause trouble. So important a mechanism as discovery should rest upon a coherent and integrated foundation of enforcing power. . . .
>
> . . . .
>
> Preferably, the courts should enforce discovery exclusively by rule 37.

Accord, Thompson v. Calmar S.S. Corp., 331 F.2d 657 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964); Newsum v. Pennsylvania R.R., 97 F. Supp. 500 (S.D.N.Y. 1951).

[7] 85 Ariz. 242, 336 P.2d 144 (1959).

[8] Perhaps because of this shortcoming, *Schwartz* was not included among the many authorities cited in *Carver*.

[9] *See, e.g.*, Stevens v. Consolidated Mut. Ins. Co., 352 F.2d 41 (1st Cir. 1965); Thompson v. Calmar S.S. Corp., 331 F.2d 657 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964); Newsum v. Pennsylvania R.R., 97 F. Supp. 500 (S.D.N.Y 1951); Central & S. Truck Lines v. Westfall GMC Truck, Inc., 317 S.W.2d 841 (Mo. Ct. App. 1958); Evtush v. Hudson Bus Transp. Co., 10 N.J. Super. 45, 76 A.2d 263 (App. Div. 1950), *aff'd*, 7 N.J. 167, 81 A.2d 6 (1951). *See also* Battershell v. Bowman Dairy Co., 37 Ill. App. 2d 193, 202, 185 N.E.2d 340, 344 (1962), where the court stated:

> Only for such reasons as failure to make timely objection or that a continuance has been granted in lieu of exclusion or that the testimony complained of has not been harmful, have courts held proper the testimony of such witnesses.

[10] *See* Rosenberg, *supra* note 6, at 484:

> The courts in penalizing evasion of discovery have not hesitated to rely upon other rules—notably rule 41(b). . . .
>
> . . . .
>
> Another collateral source of discovery sanctions is found in subdivision (f) of rule 45, dealing with subpoenas. . . .
>
> Going outside the rules, one court has utilized a contempt statute to enforce discovery, declaring that under the statute a party could be punished for giving untrue answers. . . . The penalty was assessment of the expenses of depositions made necessary by false answers.

that in Arizona the basis of the court's power to impose sanctions for incomplete answers is found in the discovery rules in general, and in rules 33 and 37 in particular. The court noted that the objects of discovery are to " 'narrow and clarify the basic issues between parties,' "[12] and to allow the parties to " 'obtain the fullest possible knowledge of the issues and facts before trial.' "[13] The circumvention of interrogatories through incomplete answers not only defeats these purposes but also "lull[s] defendants into a false sense of security."[14]

Thus, the power to exclude witnesses of a party who incorrectly or incompletely answers interrogatories has a rational basis. Moreover, since it is derived from more than one rule, the power to deal with incomplete answers appears to be free from the express limitations found in any particular rule.[15] The courts are free to apply sanctions where incomplete answers are given whenever discretion so prescribes.[16]

Carver also provided the first clear indication of what standards the supreme court would utilize in determining whether a trial court abused its discretion in imposing a sanction under the discovery rules and under Rule VIII(a) of the *Uniform Rules of Practice of the Superior Court.*[17]

Compare Stevens v. Consolidated Mut. Ins. Co., 352 F.2d 41 (1st Cir. 1965), *with* Crosley Radio Corp. v. Hieb, 40 F. Supp. 261, 263 (S.D. Iowa 1941).

[11] *See* Rosenberg, *supra* note 6, at 485:

> Besides invoking other rules and statutory provisions, courts occasionally fall back on the 'shadowy concept' of 'inherent power' to enforce discovery by dismissals, stays and other limits upon the right to proceed of a party who has failed to comply with a court order. Sometimes the various sources of power are explicitly recognized and declared to be cumulative.

See also Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 293 (1968). *See, e.g.*, First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Elec. Co., 245 F.2d 613 (8th Cir. 1957) (alternative holding); Evtush v. Hudson Bus Transp. Co., 10 N.J. Super. 45, 76 A.2d 263 (App. Div. 1950), *aff'd*, 7 N.J. 167, 81 A.2d 6 (1951).

[12] 104 Ariz. at 515, 456 P.2d at 373, *quoting* Hickman v. Taylor, 329 U.S. 495, 501 (1947).

[13] 104 Ariz. at 515, 456 P.2d at 373, *quoting* Hickman v. Taylor, 329 U.S. 495, 501 (1947).

[14] 104 Ariz. at 515, 456 P.2d at 373.

[15] *E.g.*, rule 37(d) is applicable only when the failure to answer is wilful. Thus, if incomplete answers are to be treated as failures to answer under this rule, the power to apply sanctions could be exercised only when the failure is wilful. This would seriously limit the court's power to deal with incomplete answers.

[16] At the time it decided *Carver*, the court had already affirmed the broad discretionary powers of trial courts under other parts of the rules of civil procedure. *See, e.g.*, Patterson v. City of Phoenix, 103 Ariz. 64, 436 P.2d 613 (1968) (rule 10 (b)); Yoo Thun Lim v. Crespin, 100 Ariz. 80, 411 P.2d 809 (1966) (rule 59 (m)); Nordale v. Fisher, 93 Ariz. 342, 380 P.2d 1003 (1963) (rule 42(d)); Daru v. Martin, 89 Ariz. 373, 363 P.2d 61 (1961) (rule 63). In *Carver*, the court cited its decisions under these rules to emphasize its position that, in general, "the discretion of a trial court will not be disturbed unless it is made to appear that there has been an arbitrary use thereof." 104 Ariz. at 516, 456 P.2d at 374.

[17] ARIZ. R. PRAC. SUPER. CT. VIII(a):

> Prior to the commencement of the trial the trial judge shall review the pretrial order and ascertain whether counsel have complied therewith and with these rules, and in particular Rule V(f). In the event of noncompliance the *trial judge shall make such order as he deems appropriate,* including those specified in Rule VI(e). (emphasis added).

Two principal factors were relied upon by both the court of appeals and the supreme court in *Carver* as determinative: (1) the amount of prejudice resulting from the failure of a party to answer an interrogatory fully, and (2) whether due diligence had been used in attempting to answer.[18]

In *Carver*, the Arizona court, like many before it,[19] found that the amount of prejudice resulting from the failure of one party to follow the rules of discovery was an important factor in determining which sanctions should be applied. While the sanction of exclusion was "extreme in nature and seldom invoked,"[20] the court emphasized the fact that defendants "were misled to their prejudice."[21] Partly for this reason, the court found that application of the sanction of exclusion had not represented a "clear abuse"[22] of the trial court's discretionary powers.[23]

The second factor which the court emphasized was the degree of diligence used by the offending party in attempting to comply with the rules:

> The trial judge found that there was *no showing that 'with due diligence these witnesses could not have been discovered prior to the deadline,'* noting that the pretrial judge asked and counsel had assured him that they would be prepared for trial on the day fixed.[24] (emphasis added).

The utilization of both the prejudice and diligence factors in *Carver* indicates that the appropriateness of discovery sanctions should be determined by examining both factors.

Other courts have varied in their approach to the problem, some

---

Rule V(f) prohibits further discovery five days before the pretrial conference or afterwards unless the court expressly allows additional discovery. Thus, rule VIII(a) places particular emphasis on enforcement of discovery rules, and it permits the trial judge to make any order which he deems appropriate to attain these ends. Possible orders mentioned in rule VI(e) include reassignment of the case to a later position on the active calendar, reassignment to the inactive calendar, the taxation of plaintiff's costs against defendant, or a ruling of contempt of court.

[18] 104 Ariz. at 516-17, 456 P.2d at 374-75; 8 Ariz. App. at 390, 446 P.2d at 496. The court of appeals had also suggested the value and utility of these factors in other decisions. Zakroff v. May, 8 Ariz. App. 101, 443 P.2d 916 (1968) (court upheld sanctions less drastic than dismissal for violation of pretrial order where such failure had not been wilful and had not caused sufficient prejudice to predicate reversal); Kelch v. Courson, 7 Ariz. App. 365, 439 P.2d 528 (1968) (in determining appropriateness of sanction for failure to update answers, court considered whether violation was wilful, deliberate, or inadvertent).

[19] *See, e.g.*, Stevens v. Consolidated Mut. Ins. Co., 352 F.2d 41 (1st Cir. 1965); Scott v. Daigle, 309 F.2d 105 (8th Cir. 1962); Reske v. Klein, 33 Ill. App. 2d 302, 179 N.E.2d 415 (1962); Gebhard v. Niedzwiecki, 265 Minn. 471, 122 N.W.2d 110 (1963); Central & S. Truck Lines v. Westfall GMC Truck, Inc., 317 S.W.2d 841 (Mo. Ct. App. 1958).

[20] 104 Ariz. at 516, 456 P.2d at 374.

[21] *Id.*

[22] *Id.* Some courts have refused to overturn discretionary decisions under the discovery rules unless there has been a "gross abuse" of power. *See, e.g.*, Lutsky v. Lutsky, 274 Ala. 185, 183 So. 2d 782 (1966), *cert. denied*, 385 U.S. 952 (1967).

[23] The court of appeals in *Carver* also pointed out: "[W]e cannot say that for flagrant violations . . . the exclusion of evidence is too extreme a sanction." 8 Ariz. App. at 391, 446 P.2d at 497.

[24] 104 Ariz. at 516, 456 P.2d at 375.

strongly emphasizing the prejudice factor,[25] others applying both factors.[26] The Arizona supreme court's decision to follow the latter approach is desirable because the consideration of prejudice alone allows the courts to view only the effect of the violation. It does not allow consideration of the circumstances surrounding the cause of the violation.

The standard used in *Carver* providing for consideration of both factors better enables a court to evaluate the seriousness of the violation and to apply an appropriate sanction.[27] The less diligence used in attempting to comply with the rules of discovery and the more prejudice caused, the more severe should be the sanction applied. Where a wilful violation seriously prejudices an opponent's case, a default judgment may well be appropriate.[28] Where the violation results from an excusable lack of diligence, and where the resulting damage is minor, a less severe sanction, such as permitting the admission of the material in question after a stay in proceedings, accompanied by an award of expenses to the aggrieved party, might be more suitable.[29]

The Supreme Court of Arizona first established the power to deal with incomplete answers in *Schwartz v. Schwerin.* In *Carver,* the court has clarified the scope of this power by articulating the basis of the court's power to apply sanctions. The broad grant of power to deal with incomplete answers found in *Schwartz* and *Carver* is consistent both with precedent and apparent trends.

Recently adopted amendments to Rule 37 of the *Federal Rules of Civil Procedure*[30] will remove the weakness of the present rule 37 by expressly providing sanctions for incomplete answers. Amended rule 37(a)(3) provides that an incomplete or evasive answer may be treated as a failure to answer,[31] while the new rule 37(d) would eliminate the

---

[25] *See, e.g.,* Scott v. Daigle, 309 F.2d 105 (8th Cir. 1962); Newsum v. Pennsylvania R.R., 97 F. Supp. 500 (S.D.N.Y. 1951); Central & S. Truck Lines v. Westfall GMC Truck, Inc., 317 S.W.2d 841 (Mo. Ct. App. 1958).

[26] Courts differ on exact terminology. While the *Carver* court relies on lack of diligence, other courts have used words which mean essentially the same thing though they may differ in strength. *E.g.,* "bad faith," Zakroff v. May, 8 Ariz. App. 101, 443 P.2d 916 (1968); "oversight," Warriner v. Ferraro, 177 So. 2d 723 (Fla. Dist. Ct. App. 1965); "wilful," Gebhard v. Niedzwiecki, 265 Minn. 471, 122 N.W.2d 110 (1963); "mistake," "inadvertence," "excusable neglect," and "honest misunderstanding," Evtush v. Hudson Bus Transp. Co., 10 N.J. Super. 45, 76 A.2d 263 (App. Div. 1950), *aff'd,* 7 N.J. 167, 81 A.2d 6 (1951).

[27] It should now become easier for a court to recognize the presence of other important considerations, such as the precise nature of the interrogatories and the discovery situation presented by the case, Carver v. Salt River Valley Water Users' Ass'n, 8 Ariz. App. 386, 446 P.2d 492 (1968) (not mentioned in the opinion of the supreme court), and the types of witnesses involved and the content of their testimony. *See* Wright v. Royse, 43 Ill. App. 2d 267, 193 N.E.2d 340 (1963).

[28] *See* ARIZ. R. CIV. P. 37(b)(2)(iii), 37(d).

[29] *See id.* 37(b)(2)(iii); ARIZ. R. PRAC. SUPER. CT. VI(e).

[30] Adopted by the Supreme Court of the United States on March 30, 1970, effective July 1, 1970.

[31] This clarification of "failure" in subsection (a) should provide the basis for a parallel interpretation of "failure" in subsection (d) of the same rule. On the

factor of wilfulness. On July 1, 1970, when these rules become effective, federal courts will no longer need to search for the power to deal with incomplete answers.

Although Arizona normally adopts federal amendments promptly,[32] *Schwartz* and *Carver* will provide Arizona courts with the basis for exercising their powers to sanction until the Arizona rules are actually amended. The *Carver* decision promulgated a useful test to determine which sanctions should be applied for discovery violations. Consideration of the principal factors used in this test, prejudice and diligence, will help the trial courts to impose sanctions which are appropriate in light of both the cause and the effect of such violations.

CRIMINAL LAW AND PROCEDURE

CONSTITUTIONAL PROTECTIONS

Right to Counsel—Misdemeanants

In its 1964 decision in *State v. Anderson*,[1] the Supreme Court of Arizona established the embarkation point for the expansion and clarification of the right to appointed counsel in Arizona.[2] That decision guaranteed an indigent criminal defendant the right to appointed counsel in all felony prosecutions and in misdemeanors which are deemed to be "serious offenses." The court stated that "the nature of the offense, the extent of the potential penalty, and the complexity of the case" were the factors to be considered in determining whether a misdemeanor is serious.[3] The proper application of the last two elements of this test has been partially clarified in *Burrage v. Superior Court*.[4]

The indigent defendants in *Burrage* were charged with unlawful possession of dangerous drugs.[5] At their trial in justice court, the de-

other hand, the clarification of "failure" in the amended rule 37(a)(3) may be limited to that rule by the words "for purposes of this subdivision."

[32] Brown, *Proposed Changes to Rule 33 Interrogatories and Rule 37 Sanctions*, 11 ARIZ. L. REV. 443, 445 (1969). Presently proposed changes are under consideration by the Arizona State Bar Committee on Rules of Practice and Procedure. *Id.* at 444.

[1] 96 Ariz. 123, 392 P.2d 784 (1964).

[2] *See generally* Comment, *Court Appointed Counsel for Indigent Misdemeanants*, 6 ARIZ. L. REV. 280 (1965).

[3] 96 Ariz. at 131, 392 P.2d at 790. For a consideration of analogous problems in defining the "serious offense" category in order to determine the right to a jury trial, see Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Considerations*, 48 MINN. L. REV. 1, 62-88 (1963). *See also The Arizona Supreme Court 1968-69*, 11 ARIZ. L. REV. 61, 99 (1969).

[4] 105 Ariz. 53, 459 P.2d 313 (1969).

[5] ARIZ. REV. STAT. ANN. § 32-1964 (Supp. 1969-70); ARIZ. REV. STAT. ANN. § 32-1965 (1956). These statutes define certain dangerous drugs by their chemical

fendants were not represented by counsel; they entered guilty pleas and received sentences of five months at hard labor. An appeal was then taken to the superior court, where the judge was uncertain whether the charge, which carried a maximum punishment of five months or a $300 fine, or both, required appointed counsel under *Anderson*. Defendants' request for court-appointed counsel was denied, but the judge did appoint counsel for the sole purpose of applying to the supreme court for a writ of mandamus. The application sought a clarification of the criteria spelled out in *Anderson*.[6]

In considering the application, the supreme court decided that, because of the nature of the dangerous drug statutes, "there may be complex legal issues in this case, and a fair trial might be impossible without legal counsel."[7] The writ was made permanent as to the defendants. The court rejected the feasibility of laying down a uniform standard in the volatile right to counsel area in favor of what it considered to be a reasonable interpretation of the Constitution in light of federal[8] and state[9] standards. The court declared that

> counsel for the indigent misdemeanant *must* be provided in all cases where the maximum punishment exceeds $500 in fines or six months imprisonment, or both, and *may* be provided if the trial court in its discretion believes that the complexity of the case is such that the ends of justice require legal representation.[10]

The *Burrage* court offers no concrete guidelines as to what degree of complexity will require counsel in a misdemeanor prosecution. Even if the decision may be read to leave this entirely to the discretion of the trial judge, the standards by which he is to be guided are unclear.[11] Should the judge, for example, use an objective standard to determine if the reasonable man would require counsel, or in the alternative evaluate the age, intelligence, and experience of each defendant with respect to the issues presented?[12]

---

names and specify those persons who may lawfully possess and sell such drugs. The statutes do not exempt from prosecution one who is in possession of such drugs pursuant to a physician's prescription.

6 105 Ariz. at 54, 459 P.2d at 314.

7 *Id.* at 54-55, 459 P.2d at 314-15.

8 18 U.S.C. § 3006(A) (Supp. IV, 1965-68).

9 *See, e.g.*, State *ex rel.* Plutshack v. Department of Health & Social Serv., 37 Wis. 2d 713, 155 N.W.2d 549 (1968). There is, however, no unanimity in defining an arbitrary point at which counsel must be provided, and many states provide counsel whenever an indigent may be deprived of liberty. *See* Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 734 (1968).

10 105 Ariz. at 55, 459 P.2d at 315.

11 An interesting analogy may be drawn between the situation of the Arizona state courts after *Burrage* and state courts in general after *Betts v. Brady*, 316 U.S. 455 (1942), which also placed discretionary powers for appointment of counsel in the trial courts. For a pre-*Gideon* view of *Betts*, see Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962).

12 Although both defendants in *Burrage* were 19, the court did not expressly consider this factor in their decision. However, in reference to the determination

The *Burrage* guidelines leave additional questions unanswered when the presiding judge initially determines that there is no right to appointed counsel. Assume that the defendant is not given appointed counsel and during a seemingly simple trial complex legal issues arise. At this point should the judge declare a mistrial and hear the case again after the appointment of counsel? Should the judge appoint counsel for the remainder of the trial? Or should the judge let the trial proceed and leave it to the appellate courts to use conventional harmless error standards to determine whether there was reversible error?[13]

The proper solution should be to acknowledge that any criminal charge is too complex for a layman to defend effectively.[14] Absent this, the lower courts must comply with the guidelines of *Burrage*. However, the discretionary aspect of *Burrage* would at least seem to permit, if not require, the trial court to declare a mistrial whenever complex issues arise during a trial in which counsel has not been appointed. Such a procedure would have the effect of avoiding future problems stemming from convictions obtained without counsel.[15]

Even though *Burrage* clearly recognizes a right to appointed counsel for misdemeanors which are serious offenses, whether that right applies to all serious offenses or only those prosecuted in the superior court remains unsettled. Since *Burrage* arose from the superior court, a restrictive interpretation may well be advanced to deny its application to misdemeanor prosecutions in justice courts. Indeed, such an interpretation is suggested by *Johnson v. Board of Supervisors*,[16] which held that an attorney appointed by a justice of the peace for a preliminary hearing was not entitled to court compensation because the judge was not statutorily em-

---

of an intelligent waiver of the right to counsel, the *Anderson* court recognized the importance of considering the background and experience of the accused. 96 Ariz. at 131, 392 P.2d at 790.

[13] *See* Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

[14] Writing for the Court in Powell v. Alabama, 287 U.S. 45, 68-69 (1932), Justice Sutherland noted:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

When it is remembered that the state is always represented by counsel, the inherent disadvantage of the layman defendant becomes even more apparent.

[15] *See, e.g.*, State v. Reagan, 103 Ariz. 287, 440 P.2d 907 (1968), where the state was precluded from increasing punishment under a recidivist statute because counsel had not been provided at a prior trial for a misdemeanor which resulted in conviction. *See also The Arizona Supreme Court 1968-69*, 11 ARIZ. L. REV. 61, 123 (1969).

[16] 4 Ariz. App. 33, 417 P.2d 546 (1966).

powered to appoint counsel. However, inasmuch as *Burrage's* clarification of the *Anderson* test expresses a constitutional mandate defined only in terms of the nature, severity, and complexity of the offense,[17] without distinction between justice or superior court, it would seem that a justice court could not statutorily be precluded from complying with this mandate.[18] It is inconceivable that a misdemeanant tried in justice court would be required to defend himself without the aid of counsel when, for the same offense with the same potential penalty tried in superior court, he would be appointed counsel.[19] The argument that the misdemeanant appealing from a justice court conviction will receive a trial de novo as of right in superior court does not answer the question whether the misdemeanant will have the intelligence to comply with the statutory requirements for an appeal. Furthermore, a narrow interpretation of the scope of *Anderson* and *Burrage* would emasculate their intended purpose—expansion of the right to appointed counsel in Arizona.

The actual implementation of the *Burrage* requirement in the justice courts will involve a host of practical difficulties. Assuming *Burrage* creates a right to counsel in certain cases in the justice court, a concomitant authority to appoint counsel must logically follow in order to fulfill this constitutional requirement. The Public Defender Act,[20] however, applies only to felonies, and will not, in its present form, aid in the satisfaction of this right. Therefore, the justice courts must now rely on private attorneys acting without compensation to fulfill the requirements of *Burrage*. In order to facilitate the appointment and provide for the compensation of private attorneys in justice court, *Johnson* must be overruled either judicially or statutorily.

---

[17] 105 Ariz. at 55, 459 P.2d at 315.

[18] The court in *Johnson* reasoned that the legislative elimination of the word "superior" in ARIZ. REV. STAT. ANN. § 13-1673 (Supp. 1969-70) with respect to "the court" which is empowered to compensate appointed counsel *did not* evidence an intent to make that statute applicable to all courts. However, the Supreme Court of Arizona has amended Rule 16 of the *Arizona Rules of Criminal Procedure* to provide that a justice of the peace may appoint a public defender for indigents at preliminary hearings in counties having a Public Defender System. This grant of power questions *Johnson's* continued validity in justice court proceedings since the question of appointment of counsel in *Johnson* concerned a preliminary hearing. Further, there is no doubt that after *Burrage* certain "serious offense" misdemeanors which are triable in justice court would carry the right to compensated appointed counsel if tried in superior court. Therefore, it could be argued that in light of the supreme court's intent derived from rule 16 and *Burrage*, all that is left from *Johnson* is that in counties with no public defender system, a justice court lacks power to compensate appointed counsel only in misdemeanor cases which do not fall within the *Burrage* guidelines.

[19] Although *Anderson* referred to the superior court's determination whether a misdemeanor is a "serious offense," 96 Ariz. at 131, 392 P.2d at 790, that case itself dealt with an offense punishable by up to two years' imprisonment and thus not triable in justice court. ARIZ. REV. STAT. ANN. § 22-301(4) (1956). The reference to "superior court" in *Anderson*, 96 Ariz. at 131, 392 P.2d at 790, therefore has no applicability to the question of whether *Burrage* applies in justice court.

[20] ARIZ. REV. STAT. ANN. §§ 11-581 to -586 (Supp. 1969-70). These statutes provide for the creation of a Public Defender System in counties with populations of 100,000 persons or more.

Other alternatives may, however, provide stopgap solutions. The Public Defender Act could, for example, be amended to include the responsibility of defending accused misdemeanants upon the order of a justice of the peace. Third year law students could be permitted to represent defendants who are given a right to counsel under *Burrage* but who are not covered by the Public Defender Act.[21] The use of this untapped source of legal skills may well prove to be a reasonable and economical approach.

Aside from the practical problems involved in the application of *Burrage* in the justice courts, there is a serious question produced by the court's refusal to recognize a right to appointed counsel whenever a possibility of incarceration exists.[22] A number of misdemeanors still exist which carry jail sentences in which counsel need not be appointed under the *Burrage* court's interpretation.[23] Although not entitled to the protection of the sixth amendment, the indigent defendant may still be entitled to appointed counsel under the fourteenth amendment equal protection clause when faced with a possible deprivation of liberty.

Griffin v. Illinois[24] presented the case of an indigent criminal defendant who had been denied a trial transcript solely upon his inability to pay for it. Justice Black authored the opinion which held that the refusal to provide an opportunity for appellate review was a denial of due process and equal protection. Similarly, in *Douglas v. California*[25] the Court held the denial of counsel to an indigent appellant was an unconstitutional discrimination in violation of the fourteenth amendment. Although both cases dealt strictly with appellate proceedings, the crucial factor influencing both decisions was the discriminatory dispensation of justice. The *Griffin* opinion recognized that "[i]n criminal trials a state can no more discriminate on account of poverty than on account of religion, race, or color."[26]

In light of the underlying rationale of *Douglas* and *Griffin* it is argu-

---

[21] A proposal to permit third year law students to practice in a limited capacity is under consideration by the Supreme Court of Arizona. This attempted solution would not entirely solve the problem as only two of the 14 counties in Arizona have law schools and the student population is not always present during vacations. Although this would not be an adequate solution to the entire problem it could lessen the financial burden on the county.

[22] *See* State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 893-94 (1967). The court in *Borst* recognized that a misdemeanant is as helpless as a felon and also is deprived of his liberty if convicted. The court concluded that any time a jail sentence may be imposed, counsel should be furnished.

[23] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-374 (1956) (willful disturbance of public school or a public meeting is a misdemeanor punishable by a fine of $50 to $100 or by not more than three months in the county jail); ARIZ. REV. STAT. ANN. § 13-377 (1956) (the use of obscene or abusive language in the presence of women or children is punishable by a fine of $5 to $50 or by not more than two months in the county jail).

[24] 351 U.S. 12 (1956).

[25] 372 U.S. 253 (1963).

[26] 351 U.S. at 17.

able that where a possibility of incarceration exists and the pecunious defendant has the ability to retain counsel, the indigent criminal defendant must be provided with appointed counsel. Since the Constitution makes no distinction between long and short deprivations of liberty,[27] the cost of implementing the right to counsel for all misdemeanants who may be deprived of their liberty should be a modest fee for securing fairness in all criminal prosecutions.[28]

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.[29]

Right to Counsel—Preliminary Hearings

The robbery prosecution of Henry Sheffield[1] again questions Arizona's interpretation of the "critical stage" doctrine of *Hamilton v. Alabama*[2] and *White v. Maryland*[3] as applied to the right to appointed counsel at preliminary hearings. Moreover, the Arizona supreme court's handling of the case indicates its continued reticence towards the *Stovall v. Denno*[4] due process approach to lineups not governed by *Wade v. United States*[5] and *Gilbert v. California.*[6]

The defendant allegedly robbed a Circle K market on November 4, 1966. The market employee reported the incident and shortly thereafter the police apprehended the defendant. About an hour after the incident the police brought defendant to the scene of the robbery for a one-man lineup, where a positive identification was made by the market employee. No transcript was made of the proceedings at the preliminary hearing, and counsel was not appointed until arraignment. At trial, the defendant was found guilty of robbery[7] and sentenced to a term of 15 to 20 years.

On appeal, the defendant questioned the constitutionality of one-man lineups and urged the court to reconsider *State v. Villegas*,[8] which con-

---

27 James v. Headley, 410 F.2d 325 (5th Cir. 1969); Evans v. Rives, 126 F.2d 633, 638 (D.C. Cir. 1942). *But see* Duncan v. Louisiana, 391 U.S. 145 (1968).
28 *See In re* Stevenson, — Ore. —, 458 P.2d 414, 418-19 (1969).
29 Griffin v. Illinois, 351 U.S. 12, 19 (1956).

1 State v. Sheffield, 104 Ariz. 278, 451 P.2d 607, *rehearing denied*, 104 Ariz. 432, 454 P.2d 864 (1969).
2 368 U.S. 52 (1961).
3 373 U.S. 59 (1963).
4 388 U.S. 293 (1967).
5 United States v. Wade, 388 U.S. 218 (1967). In *Wade*, the court found a post-indictment lineup to be a "critical stage" of a criminal prosecution because of the lineup's inherent prejudices and problems with respect to a meaningful trial. Consequently, the court held that the accused was entitled to the presence of counsel at the lineup. *Id.* at 236-37.
6 Gilbert v. California, 388 U.S. 263 (1967), was substantially similar to *Wade* differing only with respect to the subsequent in-court identification.
7 ARIZ. REV. STAT. ANN. §§ 13-641, 13-643(A) (1956).
8 101 Ariz. 465, 420 P.2d 940 (1966). *See also* State v. Martinez, 102 Ariz. 178,

trolled pre-1967 lineups in Arizona, in light of *Wade* and *Gilbert*. The court dismissed this contention, noting that *Stovall* held that *Wade* and *Gilbert* were to be applied prospectively.[9] The defendant also contended that his sixth amendment rights were violated when he was denied counsel at the allegedly "critical" preliminary hearing. This contention was also dismissed, the court reasoning "that the failure . . . to appoint counsel to represent a defendant at his preliminary hearing is not error unless defendant's position is prejudiced thereby."[10]

Due Process and the One-Man Lineup

In *Stovall* the Court applied a due process standard to lineups not governed by the 1967 *Wade* and *Gilbert* mandates:

> We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independnt of any right to counsel claim . . . . However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to [the victim] in an immediate hospital confrontation was imperative.[11]

The "imperative" nature of the *Stovall* confrontation was due to the fact that the critically wounded victim might die at any moment without the opportunity of identifying or exonerating the defendant. It was this possibility and the impracticality of holding a standard lineup in a hospital room which led the Court to find that Stovall's one-man lineup did not violate due process.[12]

In order for the state to comply with the *Stovall* due process standard in one-man confrontations, extenuating circumstances such as these must

---

427 P.2d 129 (1967), *discussed in The Arizona Supreme Court 1967-68*, 10 ARIZ. L. REV. 202 (1968). In *Villegas*, the court stated that "any deficiencies in line-up go to the credibility of the evidence and not to its admissibility." 101 Ariz. at 466, 420 P.2d at 941.

[9] The Supreme Court, in *Stovall*, refused to hold the *Wade* and *Gilbert* rules retroactive. 388 U.S. at 300. Since both *Wade* and *Gilbert* were decided subsequent to the Sheffield confrontation, these rulings were unavailable to *Sheffield*.

[10] 104 Ariz. at 279, 451 P.2d at 600. *See* State v. Miranda, 104 Ariz. 174, 450 P.2d 364, *cert. denied*, 90 S. Ct. 140 (1969), *discussed in The Arizona Supreme Court 1968-69*, 11 ARIZ. L. REV. 85 (1969); State v. Moses, 101 Ariz. 426, 420 P.2d 560 (1966); State v. Gherna, 99 Ariz. 42, 406 P.2d 396 (1965); State v. Gortarez, 98 Ariz. 160, 402 P.2d 992 (1965). In *Moses*, the court held that the defendant was not prejudiced when he did not plead or lose any available defenses. 101 Ariz. at 429, 420 P.2d at 563.

For another view of the current state of Arizona law regarding lineups, see State v. Dessureault, 104 Ariz. 380, 453 P.2d 951, *rehearing denied*, 104 Ariz. 439, 454 P.2d 981 (1969), *cert. denied*, 90 S. Ct. 1000 (1970), *discussed* p. 122 *infra*.

[11] 388 U.S. at 301-02.

[12] *Id.* at 302.

be present. In *United States v. Gilmore*,[13] the witness, who was unable to describe the bank robber shortly after the robbery, identified the defendant in the presence of a sheriff and an FBI agent four months later. The Seventh Circuit held that the absence of extenuating circumstances meant that there was no justification for failing to arrange a multiparty lineup.[14] Similarly, in *In re Hill*,[15] the Supreme Court of California ruled that the identification of the three defendants while they were in a jail cell was unduly prejudicial and, absent extenuating circumstances, was violative of due process.[16] However, the court ultimately sanctioned the in-court identification because it had a basis independent from the illegal lineup—an acceptable method expressed in *Wade* and *Gilbert* to purge the original illegality.[17]

Upon analysis of *Stovall* and its lower court interpretations,[18] a two-step inquiry emerges for *any* confrontation not controlled by *Wade* and *Gilbert*. First, it must be determined whether the lineup was so unduly suggestive as to violate due process. Second, if a violation has occurred, the court must determine whether there is an independent basis for the in-court identification which can purge the taint of the illegal lineup. The Supreme Court of Arizona in *Sheffield*, however, failed to consider any form of this test and relied solely on *Villegas* to justify the validity of the confrontation. This reliance may be questionable in light of a subsequent Supreme Court decision in *Foster v. California*.[19]

Villegas involved a lineup in which all four persons exhibited were suspected of having been involved in the commission of the same offense. The court sanctioned the lineup, reasoning that its deficiencies, if any, went to the credibility of the resulting identification and not to its admissibility.[20] Although the credibility of a witness may be a factor properly considered by the jury, some procedures may be so unfair that they constitutionally require exclusion of the resulting identification. In *Foster*, for example, the Court pointed out:

> The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury. But it is the teaching of Wade, Gilbert, and Stovall . . . that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law.[21]

---

[13] 398 F.2d 679 (7th Cir. 1968).
[14] *Id.* at 682.
[15] 71 Cal. 2d 1039, 458 P.2d 449, 80 Cal. Rptr. 537 (1969).
[16] *Id.* at —, 458 P.2d at 454-55, 80 Cal. Rptr. at 544-45.
[17] The Court in *Wade* applied the test of Wong Sun v. United States, 371 U.S. 471 (1963), to determine whether the in-court identification was "'sufficiently distinguishable to be purged of the primary taint.'" 388 U.S. at 241, *quoting* 371 U.S. at 488.
[18] *See, e.g.*, United States v. Gilmore, 398 F.2d 679 (7th Cir. 1968); *In re* Hill, 71 Cal. 2d 1039, 458 P.2d 449, 80 Cal. Rptr. 537 (1969).
[19] 394 U.S. 440 (1969).
[20] 101 Ariz. at 466, 420 P.2d at 941.
[21] 394 U.S. at 442-43 n.2.

No problem is encountered in applying *Stovall* retroactively because it deals with a due process test which is always an available method of attacking a conviction.[22] *Villegas*, then, which calls for submission of all such discrepancies to the jury, is in conflict with *Foster*. Since *Villegas* was the sole precedential justification for sustaining the *Sheffield* lineup, and since *Foster* puts *Villegas* in question, a serious flaw is revealed in the Arizona court's analysis.

There are, no doubt, valid reasons for seeking identification as soon as possible. The increased reliability of the identification and the avoidance of unnecessary detention of those who may be exculpated after a negative identification are certainly strong arguments in favor of early confrontations.[23] There were, however, no circumstances present in *Sheffield* to preclude a short delay in which to arrange a multiparty lineup. Although it is true that a possibility exists that the witness' memory would not be as fresh, the increased reliability of the identification of an individual from a group should outweigh the minor delay.

The Preliminary Hearing as a Critical Stage

The "critical stage" doctrine of *Hamilton v. Alabama*[24] and *White v. Maryland*[25] granted a right to appointed counsel for indigents at particular stages of criminal proceedings. The doctrine has evolved from its inception in *Powell v. Alabama*[26] as a right to appointed counsel in capital offenses, to *Massiah v. United States*[27] and *Escobedo v. Illinois*[28] where it was extended to post-indictment interrogations under surreptitious circumstances and to accusatory investigations.

---

[22] United States v. O'Connor, 282 F. Supp. 963, 964 (D.D.C. 1968).

[23] *Cf.* Salley v. United States, 353 F.2d 897 (D.C. Cir. 1965); Cannady v. United States, 351 F.2d 817 (D.C. Cir. 1965).

[24] 368 U.S. 52, 54-55 (1961), where the Court said:

> Whatever may be the function and importance of arraignment in other jurisdictions . . . in Alabama it is a critical stage in a criminal proceeding. What happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes . . . . Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.

[25] 373 U.S. 59 (1963). The *White* decision was substantially similar to *Hamilton*, differing only in its application of the "critical stage" doctrine to the preliminary hearing in Maryland's criminal proceedings.

[26] 287 U.S. 45 (1932). In *Powell*, where defendants were not appointed counsel until trial, the court felt that the period between arraignment and trial was so critical that defendants needed representation by counsel in order to secure a fair trial.

[27] 377 U.S. 201 (1964). In *Massiah*, the defendant was released on bail after indictment and made an incriminating statement to a supposed friend who was actually an informant. The Court found this incident to be a critical stage where the absence of counsel was a denial of the defendant's sixth amendment rights.

[28] 378 U.S. 478 (1964). In *Escobedo*, where the police prohibited defendant's attorney from seeing him during the interrogation, the Court held that when an investigation becomes more than a general inquiry the proceedings become "critical" and the defendant should be entitled to counsel.

In *White*, the Court emphasized that the holding in *Hamilton* did not rest on a showing of prejudice, but rather on the necessity of counsel at that particular stage of the criminal proceedings.[29] In spite of this emphasis, Arizona[30] and other jurisdictions[31] have circumscribed the application of *Hamilton* and *White* to preliminary hearings by requiring a post-trial showing that the defendant's position was prejudiced by the failure to appoint counsel at that stage. Since the purpose of the "critical stage" doctrine is to protect the trial from becoming a meaningless gesture, Arizona's emasculation of the doctrine appears to be unjustified.

The absence of appointed counsel at the preliminary hearing in *Sheffield* may have irreparably damaged the defense. On appeal, the defendant claimed that the crucial prosecution witness had given testimony at the trial which was inconsistent with that which he gave at the preliminary hearing. This situation illustrates the problems besetting an indigent defendant who attempts to prepare his defense without the benefit of an attorney at the preliminary hearing. In *Tynan v. Eyman*,[32] which arose out of facts similar to those in *Sheffield*, the Ninth Circuit observed:

> An unrepresented defendant may not be aware of the importance of having a transcript of the victim's testimony under oath. We are morally certain that if appellant had had the aid of competent counsel at his preliminary examination, his counsel would have required such testimony to be preserved for possible use for impeachment purposes at the trial.[33]

Although the Supreme Court of Arizona has refused to recognize the preliminary hearing as a critical stage, the legislature has authorized appointment of a public defender at preliminary hearings for indigents accused of a felony.[34] This legislative authorization is a recognition of the importance of the right to counsel at the preliminary hearing.

Although the statutory purpose of the preliminary hearing in Arizona is the establishment of probable cause, its principal use in practice is as a

---

[29] 373 U.S. 59, 60 (1963).

[30] See cases cited note 10 *supra*.

[31] *See, e.g.*, People v. Daniels, 49 Ill. App. 2d 48, 199 N.E.2d 33 (1964); State v. Baier, 194 Kan. 517, 399 P.2d 559 (1965); Matthews v. State, 237 Md. 384, 206 A.2d 714 (1965); Commonwealth v. O'Leary, 347 Mass. 387, 198 N.E.2d 403 (1964); Rainsberger v. State, 81 Nev. 92, 399 P.2d 129 (1965); Sanders v. Cox, 74 N.M. 525, 395 P.2d 353 (1964).

[32] 381 F.2d 764 (9th Cir. 1967).

[33] *Id.* at 768.

[34] ARIZ. REV. STAT. ANN. § 11-581 (Supp. 1969-70):

> In any county with a population of one hundred thousand persons or more the board of supervisors may establish the office of public defender and appoint a suitable person to hold that office.

ARIZ. REV. STAT. ANN. § 11-584 (Supp. 1969-70):

> The public defender shall perform the following duties:
>
> 1. Upon order of the court, he shall defend, advise and counsel without expense to the defendant any person who is not financially able to employ counsel and who is charged with the commission of a felony. The public defender shall also defend, advise and counsel such defendants at the preliminary hearing . . . .

discovery device.[35] Thus, the indigent suffers a distinct disadvantage if his counsel must begin preparation of the defense at the arraignment stage rather than at the preliminary hearing.[36] For example, although Sheffield later claimed that a crucial prosecution witness had altered his testimony, defendant's counsel made no attempt to impeach that testimony at trial. Had a transcript of the preliminary hearing been available, any inconsistency in the witness' testimony would have been apparent and defense counsel could have used the transcript to impeach the witness.[37] In order for Sheffield to have preserved testimony of the preliminary hearing, a request for a transcript would have been necessary.[38] However, the unaided defendant is not trained to foresee the tactical importance of a preliminary hearing transcript.[39]

Furthermore, other rights afforded at the preliminary hearing stage in Arizona presume the presence of counsel for their full protection. In Arizona, the preliminary hearing in felony cases is a right and not a privilege.[40] The defendant at this time has the right to cross-examine witnesses.[41] Since cross-examination necessarily embraces the right to cross-examine "through counsel,"[42] criminal defendants should have the aid of court-appointed counsel in order to effectively utilize their right to cross-examine.

The defendant does have a right to *retained* counsel at the preliminary hearing in Arizona.[43] Justice Black in *Griffin v. Illinois*[44] stated that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[45] Consideration of the *Griffin* equality principle with the Court's recognition of the importance of the right to *appointed* counsel in *Gideon v. Wainwright*[46] leads to the conclusion that in Arizona the statutory right to *retained* counsel at the pre-

35 State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965).

36 Siegal, *Gideon and Beyond: Achieving an Adequate Defense for the Indigent,* 59 J. CRIM. L.C. & P.S. 73, 79 (1968).

37 It is clear that on appeal a defendant is bound by the record made at trial. *See* State v. Sheffield, 104 Ariz. 432, 454 P.2d 864 (1969).

38 *See* State v. Moses, 101 Ariz. 426, 429, 420 P.2d 560, 563 (1966). *See also* ARIZ. R. CRIM. P. 28 which provides: "The testimony of the witnesses . . . shall, upon request of the defendant . . . be reduced to writing . . . ."

39 Tynan v. Eyman, 371 F.2d 764, 768 (9th Cir. 1967).

40 "No person shall be prosecuted . . . for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination." ARIZ. CONST. art. 2, § 30.

41 ARIZ. R. CRIM. P. 23 provides that at preliminary examination: "All witnesses shall be examined in the presence of the defendant and may be cross-examined."

42 The United States Supreme Court found in *Pointer v. Texas,* 380 U.S. 400 (1965), that the defendant was denied his sixth amendment guarantees of confrontation and cross-examination when a transcript of a witness' testimony was introduced at trial after the witness became unavailable. The rationale for the decision was that the defendant was denied the right to cross-examine the witness through counsel.

43 ARIZ. R. CRIM. P. 16(2) provides that the magistrate shall inform the defendant "[o]f his right to the aid of counsel during the preliminary examination."

44 351 U.S. 12 (1956).

45 *Id.* at 19.

46 372 U.S. 335 (1963).

liminary hearing should also afford indigent criminal defendants a right to *appointed* counsel.[47]

The traditional argument against the further expansion of the right to appointed counsel—increased cost to the state[48]—is not, in light of several factors, entirely persuasive in this instance. If the defendant has an attorney at the preliminary hearing, probable cause may not be established, the effect of which would be to remove the case from the court's consideration immediately. Through the earlier appointment of counsel, the guilty defendant may decide to plead guilty after seeing the limitations of his case. Similarly, counsel will be available to the defendant for the purposes of plea bargaining.

These mitigating factors indicate that the state's increased financial burden for court-appointed counsel at the preliminary hearing stage may not be as great as supposed. However, even assuming the cost to be great, to continue to deprive an indigent of court-appointed counsel at preliminary hearings can only be characterized as a prostitution of justice.[49]

[EDITOR'S NOTE—In *Coleman v. Alabama,* No. 72 (U.S. June 22, 1970), the Supreme Court held that an accused indigent has a right to appointed counsel at a preliminary hearing.]

Lineups

The traditional station house lineup with its inherent possibilities for prejudice and suggestibility has long been viewed as a thorny area in the field of criminal law. This method of criminal identification and its relationship to the constitutional right to counsel reached the United States Supreme Court in 1967. Read together, *United States v. Wade*[1] and *Gilbert v. California*[2] held that a suspect has a right to counsel at his lineup and, consequently, that testimony describing an out-of-court identification elicited in the absence of counsel must be excluded unless the suspect has expressly waived his right.[3] In addition, *Wade* and *Gilbert* would exclude an in-court identification made without reference to a prior unconstitutional lineup unless the prosecution can show by "clear and convincing" evidence that such in-court identification bears no taint of the prior illegal lineup.[4]

---

[47] *See generally* Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants,* 47 MINN. L. REV. 1054 (1963).

[48] *See, e.g.,* Burrage v. Superior Ct., 105 Ariz. 53, 55, 459 P.2d 313, 315 (1969), *discussed* p. 111 *supra.*

[49] *Cf.* Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

---

1 388 U.S. 218 (1967).

2 388 U.S. 263 (1967).

3 *Id. See also* Note, *Lawyers and Lineups,* 77 YALE L.J. 390 (1967).

4 United States v. Wade, 388 U.S. 218, 241-42 (1967); Gilbert v. California, 388 U.S. 263, 272 (1967).

In 1969, the Supreme Court of Arizona, in reviewing the conviction of Robert Gary Dessureault for armed robbery,[5] was faced with the task of interpreting this constitutional mandate.[6]

On June 20, 1967, a Circle K Market in Phoneix, Arizona, was held up at gunpoint by a man the victim described as having a beard and a mustache. The following morning Dessureault was arrested at his home and later that same morning was placed in a lineup with three other persons. Dessureault appeared in the lineup unrepresented by counsel and as the only suspect sporting a mustache and a beard; he was identified as the culprit.[7] At the trial, the robbery victim again identified Dessureault as the armed robber and testified on cross-examination that the earlier lineup had facilitated his in-court identification.[8]

On appeal to the Supreme Court of Arizona, the conviction of the lower court was affirmed.[9] In an opinion delivered by Justice Struckmeyer, it was held that the defendant had not been denied his right to counsel under the *Wade-Gilbert* ruling, distinguishing *Dessureault* as a pre-indictment lineup not affected by *Wade*, which had dealt with a post-indictment lineup.[10] Viewing the "totality of circumstances" test under *Stovall v. Denno*[11] as the only applicable test, the court went on to conclude that, although the lineup had been unduly suggestive, Dessureault had not

---

[5] Dessureault was charged and convicted of armed robbery in violation of ARIZ. REV. STAT. ANN. § 13-641 (1956).

[6] State v. Dessureault, 104 Ariz. 380, 453 P.2d 951, *rehearing denied,* 104 Ariz. 439, 454 P.2d 981 (1969), *cert. denied,* 90 S. Ct. 1000 (1970).

[7] 104 Ariz. at 383, 453 P.2d at 954 (a photograph of the lineup appears in the opinion).

[8] *Id.* at 385, 453 P.2d at 956.

[9] The arguments made by the defendant on appeal were not limited to the constitutionality of the lineup. It was also contended that the trial judge had committed error during a voir dire examination by asking of the prospective jurors whether they would feel the defendant had something to hide if he failed to take the stand. *Id.* at 386, 453 P.2d at 957. The court held that a comment such as the one objected to would be "palpably erroneous" had the defendant, not, in fact, taken the stand. Determining from the record that Dessureault had taken the witness stand at the trial, the court dismissed that ground for appeal. By failing to prohibit such a practice, the Supreme Court of Arizona approved a form of procedure which is at least questionable in light of the privilege against self-incrimination guaranteed by the fifth amendment to the Constitution.

What is even more astonishing, however, is that on motion for rehearing, it was revealed that the defendant had not taken the witness stand in the presence of the jurors. However, because the objection had not been raised at the trial level, the court denied the motion for rehearing. State v. Dessureault, 104 Ariz. 439, 454 P.2d 981 (1969). The court's reasoning, in addition to its interpretation of the *Wade* decision, renders the constitutional validity of *Dessureault* subject to question. For other decisions of the supreme court which have failed to apply the *Wade-Gilbert* rule to pre-indictment lineups and have failed to take notice of the objection that the trial judge commented upon the defendant's failure to testify, see State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); State v. Thorne, 104 Ariz. 392, 453 P.2d 963 (1969).

[10] State v. Dessureault, 104 Ariz. 380, 383, 453 P.2d 951, 954.

[11] 388 U.S. 293 (1967). In *Stovall,* the Court held that because the only person who could identify the defendant was in danger of dying, the usual police lineup was virtually impossible. Thus, in light of the exigent circumstances, a one-man, pre-indictment lineup was justified under the "totality of circumstances" and the due process clause of the fourteenth amendment.

been denied due process of law because the in-court identification was supported by a substantial independent confrontation.[12]

The fact that *Wade* and *Gilbert* both involved post-indictment identifications has operated as a source of confusion in the lower courts.[13] Nevertheless, the Arizona court's decision denying Dessureault his right to counsel on this basis can only be viewed as a myopic misapplication of the *Wade* mandate. Regardless of the basis for any confusion, the contention that the right to counsel attaches at any criminal lineup, irrespective of its occurrence in time, is supported by the greatest weight of authority and logic.

The lineup must be viewed as a "critical" stage[14] of the criminal process regardless of whether it occurs prior to or subsequent to the formal indictment. It represents a confrontation of the accused by the prosecuting witness where the results might well determine the suspect's fate, thereby reducing the trial to a mere formality.[15] When one considers the potential for prejudice and the obstacles to effective defense cross-examination at the trial, the presence of counsel at such a confrontation is indispensable. The language of the Court in *Stovall* supports this notion: "We have, therefore, concluded that the confrontation is a critical stage and that counsel is required at all confrontations."[16]

The risk involved in a police lineup as a result of the potential mistaken identification by eyewitnesses has been widely recognized.[17] The various factors contributing to the danger of error in identification evidence have been delineated by Professor Borchard in his study, *Convicting the Innocent.*[18] It is this inherent possibility of human error and prejudice that compelled a majority of the Justices on the *Wade* Court to reach the conclusion that the lineup represents a crucial stage of the criminal process, thereby necessitating the presence of counsel.[19] Mr. Jus-

---

12 104 Ariz. at 385, 453 P.2d at 956.

13 *E.g.*, Note, *Lawyers and Lineups*, 77 YALE L.J. 390 (1967).

14 On the concept of "critical" stage, *see, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932). *See also* Comment, *Photo Identifications—Stovall Prospectivity Rule Invoked to Avoid Extension of Right to Counsel*, 43 N.Y.U.L. REV. 1019 (1968).

15 United States v. Wade, 388 U.S. 218, 224 (1967); Gilbert v. California, 388 U.S. 263 (1967).

16 388 U.S. 293, 298 (1967).

17 *See, e.g.*, P. WALL, EYE WITNESS IDENTIFICATION IN CRIMINAL CASES 192 (1965); Wigmore, *Corroboration by Witness' Identification of an Accused on Arrest*, 25 ILL. L. REV. 550, 551 (1931).

18 E. BORCHARD, CONVICTING THE INNOCENT 50 (1932).

19 388 U.S. at 243, 245-47, 262. The *Wade* opinion indicates, however, that the sixth amendment does not guarantee an absolute right to appointed counsel at a lineup. Rather, it suggests that certain legislative or police regulations might be substituted at a confrontation in order to eliminate the risk of abuse and undue suggestibility, thus placing the lineup without the realm of the "critical stage." *Id.* at 239. Procedural regulations which might eliminate this inherent risk are discussed by the Court in a footnote. *Id.* n.30 (possibility of having the suspect placed in sound films with other men of various races, ages, and physical charac-

tice White, in a separate concurring opinion in *Wade*, in which four other Justices joined, made clear the intention of this majority:

> The rule applies to any lineup, to any other techniques employed to produce an identification and a fortiori to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information.[20]

Further support for the proposition that the right to counsel at a lineup is not contingent upon the time of its occurrence is found in the Court's opinion in *Stovall*. There it was held that the petitioner had not been deprived of due process of law under the fourteenth amendment by his compelled appearance in a one man, pre-indictment lineup. In view of the fact that the only living person who could identify the assailant was close to death, the Court found the usual police lineup to be out of the question.[21] In reaching these conclusions, Mr. Justice Brennan, speaking for the majority, justified the decision by indicating clearly that *Wade* and *Gilbert* were to be given only prospective application and, thus, were to affect only those cases arising after June 12, 1967.[22] The fact that the majority chose *Stovall*, a case dealing with a *pre-indictment* lineup, as the vehicle for determining the retroactivity of *Wade* and *Gilbert*, indicates that a similar situation, absent the emergency circumstances of *Stovall*, would fall squarely within the *Wade-Gilbert* rule if it were to occur subsequent to June 12, 1967.[23]

People v. Fowler,[24] a 1969 decision by the Supreme Court of California appears to reflect the intention underlying the *Wade* mandate. In holding that the critical nature of a lineup always requires the presence of counsel,[25] Justice Sullivan, writing for the court, stated: "We have con-

---

teristics who would be required to read certain standard passages and engage in a number of stock movements). Having provided such safeguards, the state would no longer be required to ensure the presence of counsel at the lineup. The Court's purpose appears to have been to provide the states with alternatives which would eliminate the possible impracticalities of having the attorney present at the lineup in the capacity of a witness.

In a 1969 decision the Supreme Court of Arizona held that the identification of the suspect by two witnesses from a mere four photographs was sufficient to eliminate the requirement of counsel and thus to validate a subsequent in-court identification of the suspect by the same two eyewitnesses. State v. Tafoya, 104 Ariz. 400, 401-02, 454 P.2d 145, 146-47 (1969). Such procedure can hardly be viewed as a correct reading of the effective alternatives to the presence of counsel suggested by the Court in *Wade*. That the state has to provide either counsel at a lineup, or some equally effective alternative is evident from the applicable language in *Wade*. In *Tafoya* the Supreme Court of Arizona allowed the state to provide neither and get away with it.

[20] 388 U.S. at 251. *See also* Comment, *Presence of Counsel Requisite to Conduct of Post-Indictment Lineup in the Absence of Intelligent Waiver*, 34 BROOKLYN L. REV. 301, 306 (1968).

[21] See note 11 *supra*.

[22] 388 U.S. at 296-301.

[23] For a worthwhile discussion of the reasoning employed by Mr. Justice Brennan in determining the prospectivity of *Wade* and *Gilbert*, see Note, *Right to Counsel*, 81 HARV. L. REV. 176, 178-80 (1967).

[24] 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969).

[25] For other decisions following the *Fowler* line of reasoning, see United States

cluded that the *Wade-Gilbert* rules are not limited in their application to lineups occurring after indictment."[26] Moreover, the *Fowler* court viewed the language concerning the post-indictment lineup in *Wade* as descriptive rather than limiting in view of the fact that Justice Brennan made no mention of information as opposed to indictment.[27] If the pre-indictment/post-indictment distinction had been the major consideration, it is logical to assume that the Court would have directed its attention to both forms of procedure.

The abuse inherent in the application of a contrary rule is readily evident. If the right to counsel were made to attach at a post-indictment lineup only, law enforcement officials could easily circumvent this guarantee by conducting all lineups prior to filing a formal accusation against the accused. It is difficult to accept the notion that it was the Court's intention to make such a fundamental guarantee as that of the right to counsel contingent upon the time of the lineup's occurrence.

The potential for prejudice and the inability of the defense to engage in effective cross-examination at the trial have been given as reasons for the presence of counsel at the confrontation conducted for the purpose of identification. Having ascertained the necessity for the lawyer's presence, it becomes necessary to determine the counselor's role at a lineup and the extent to which he may actively engage in safeguarding the constitutional guarantees of the accused.

Considering the language in *Wade*, it is clear that nothing the suspect is required to do at the usual police lineup violates his fifth amendment privilege against self-incrimination.[28] What is required of the defendant at a lineup is solely to facilitate identification and has been held not to fall within the realm of "testimonial" or "communicative" evidence as that distinction has been delineated in *Schmerber v. California*.[29] Hence, it is logical to conclude that the lawyer may not advise his client to refuse to participate in the activities normally required of him at a lineup. The lawyer's role, therefore, is a limited one. Why then has the Court felt compelled to view counsel's presence at this stage as an absolute necessity?

The answer to this question becomes apparent by recalling the Court's opinion in *Stovall*. Should the prior lineup be brought out at the trial as a possible basis for the in-court identification of the defendant, it then becomes the task of the defense counsel to show that the lineup, as a result of its prejudicial nature, has failed to measure up to the due process standards which *Stovall* demands.[30] Consequently, the lawyer assumes

v. Clark, 289 F. Supp. 610 (E.D. Pa. 1968); United States v. Wilson, 283 F. Supp. 914 (D.D.C. 1968); Thompson v. State, 451 P.2d 704 (Nev. 1969) (*Wade* ruling operative at a pre-indictment photographic display for identification purposes).

[26] 1 Cal. 3d at 342, 461 P.2d at 648, 82 Cal. Rptr. at 368.

[27] *Id.* at 342-44, 461 P.2d at 649-50, 82 Cal. Rptr. at 369-70.

[28] United States v. Wade, 388 U.S. 218, 221-23 (1967).

[29] 384 U.S. 757 (1966). *See also* Holt v. United States, 218 U.S. 245 (1910).

[30] The language of *Wade* and *Gilbert* has frequently been construed as placing

an evidentiary role. His presence is required at the lineup so that he may be able to recall his lineup observations at the later trial in his capacity as an effective advocate and to be able to object effectively to an in-court identification as being the fruit of a prior illegal lineup.[31] Without this assistance by counsel, the defendant at trial is rendered virtually helpless to challenge the lineup identification.

Following the reasoning set forth by the Supreme Court of Arizona in *Dessureault*, an accused criminal in Arizona has no right to counsel at a pre-indictment or pre-information lineup. The right to counsel represents one of the most fundamental of constitutional safeguards. *Dessureault*, through its misreading of the *Wade-Gilbert* mandate, has dangerously restricted the applicability of this basic guarantee.

Search and Seizure—Informants

In *State v. Watling*[1] the Supreme Court of Arizona was confronted by a twofold problem in determining the validity of a search warrant used in the prosecution of Michael Lee Watling for the possession of marijuana. The first issue centered upon the extent to which corporate police knowledge operates when the last officer in the corporate link subscribes to an affidavit based upon information received by him from another police officer, who in turn received his information from an allegedly reliable informant. The defendant contended that probable cause for the warrant could not be established as the information set forth in the affidavit was hearsay upon hearsay. Since the United States Supreme Court had not decided this precise issue, the Arizona court attempted to do so in light of a previous Arizona decision and similar cases from other jurisdictions.[2] It upheld the validity of the "corporate knowledge" or "police entity"

---

upon the prosecution the heavy burden of showing that the in-court identifications were based upon observations of the accused independent of the lineup. Thus, it seems to follow that the defense must then put on evidence at the trial to show that the in-court identification was not of independent origin. On the other hand, *Stovall* indicates that the lawyer's objection at trial would be directed toward the undue suggestibility of the lineup as a violation of due process of law under the fourteenth amendment. Reading *Wade, Gilbert,* and *Stovall* together, it is not clear whether or not these two functions of the lawyer are equivalents.

31 Note, *United States v. Wade—Right to Counsel at Pre-trial Lineup*, 63 Nw. U.L. REV. 251 (1968); Note, *Lawyers and Lineups*, 77 YALE L.J. 390, 396-402 (1967).

---

1 104 Ariz. 354, 453 P.2d 500 (1969).

2 Spinelli v. United States, 393 U.S. 410 (1969); United States v. Ventresca, 380 U.S. 102 (1965); Aguilar v. Texas, 378 U.S. 108 (1964); Rugendorf v. United States, 376 U.S. 528 (1964); Jones v. United States, 362 U.S. 257 (1960); Chin Kay v. United States, 311 F.2d 317 (9th Cir. 1962); United States v. McCormick, 309 F.2d 367 (7th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963); United States v. Thoresen, 281 F. Supp. 598 (N.D. Cal. 1967); State v. Kelly, 99 Ariz. 136, 407 P.2d 95 (1965).

rule, provided that the information furnished the magistrate satisfies the tow-pronged test of *Aguilar v. Texas*.[3]

The second issue presented to the court was whether the information supplied to the magistrate must be wholly within the affidavit or whether an insufficient affidavit may be cumulated with testimony of the affiant officer given before the issuing magistrate in order to supply the requisite probable cause. This raises the question whether such testimony need be reduced to writing for purposes of review by trial and appellate courts. The defendant argued that since the testimony before the magistrate was not transcribed, and since the magistrate did not testify at the subsequent hearing on the motion to suppress, the officer's testimony alone, allegedly repeating what he had orally given the magistrate, could not be considered. The court rejected this contention and stated that the information need not be wholly in the affidavit, but may be supplied in part by sworn testimony of any competent witness having knowledge of the facts and who was present at the application for the warrant.[4] Thus, at the motion to suppress, the affiant officer's testimony as to what he told the magistrate is admissible to provide the additional basis for issuance of the warrant.

Background

An officer of the Tempe Police Department presented an affidavit for a search warrant to a Tempe magistrate.[5] The affidavit recited that a campus police officer gave the affiant information that marijuana and narcotics were on the defendant's premises, and further that the information was received from a reliable informer who had furnished accurate information on five previous occasions.

The magistrate died shortly before the hearing on the motion to suppress. Because he had made no written record of anything the officer had told him, the only testimony given to establish probable cause, in addition to the information in the insufficient affidavit,[6] was that of the affiant. He testified that he personally knew nothing about the informer other than what the campus officer had told him. At the motion to sup-

---

[3] 378 U.S. 108 (1964).

[4] *Accord*, State v. Sherrick, 98 Ariz. 46, 402 P.2d 1 (1965), *cert. denied*, 384 U.S. 1022 (1966).

[5] The affidavit stated:

'Russ Baldwin, a campus police officer, has provided the affiant with information that Kimbrough Maier has in his possession at his home located at 934 East Spence, Tempe, Arizona, a usable amount of narcotics, marijuana, and dangerous drugs.'

. . . .

'Det[ective] Baldwin of campus police has received this information from a reliable source, which has furnished reliable information on five past occasions. The informant came forth with this information of his own free will.' 104 Ariz. at 355, 453 P.2d at 501.

[6] The affidavit failed because it did not express the underlying circumstances from which the informant concluded that the narcotics and marijuana were at the specific premises to be searched. *Id.* at 358, 453 P.2d at 504.

press, the officer still did not know whether the informant did in fact exist. The reconstruction of the events preceding the issuance of the warrant, solely by the testimony of the affiant officer, was nonetheless held to establish probable cause when viewed in light of the affidavit.

The Corporate Knowledge Theory

The corporate knowledge theory or police entity doctrine, whereby fellow officers—even officers of different law enforcement agencies—share collective information of criminal activity in order to obtain probable cause, has received little consideration from the United States Supreme Court. That Court has examined situations in which there is no record of an *informant* actually involved with the governmental investigators who pass information on to the affiant.[7] A problem arises, however, when the chain of collected information originates with an informant and the information is then passed on to investigators other than the affiant. The Supreme Court has not yet decided whether information acquired by the affiant in this latter manner may be used to establish the requisite probable cause.

Ventresca v. United States[8] concerned a defendant's conviction for operating an illegal distillery discovered by officers while executing a search warrant. The lengthy affidavit used to obtain the warrant failed to set forth specifically who made each observation stated therein. The First Circuit held that the affidavit never sufficiently ascertained how the information was acquired, and noting the strong possibility that it might have been obtained from unreliable anonymous informers, reversed the conviction.[9] Although the Supreme Court reinstated the warrant on review,[10] its decision was not based on any disagreement with the court of appeals on the applicable law but rather the application of such law to the

---

[7] *E.g.*, United States v. Ventresca, 380 U.S. 102 (1965).

[8] 324 F.2d 864 (1st Cir. 1963), *rev'd*, 380 U.S. 102 (1965).

[9] In reaching its conclusion, the court discussed similar cases, including some relied upon by the Arizona court in its disposition of *Watling*. In United States v. McCormick, 309 F.2d 367 (7th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963), the affiant was without personal knowledge of the averments in the affidavit, but each factual statement was prefaced by the declaration that all the information received was from FBI agents who were present and observed each described event as it occurred. In Giacona v. United States, 257 F.2d 450 (5th Cir.), *cert. denied*, 358 U.S. 873 (1958), the affiant had no personal knowledge, but his informant was identified as a member of the Federal Bureau of Narcotics who personally observed the narcotics hidden under the building to be searched.

United States v. Pearce, 275 F.2d 318 (7th Cir. 1960), involved an affiant who alleged that his information came from a source which proved reliable in the past. Here, the affiant, contrary to his allegations in the affidavit, received his information from a superior, who received his information by telephone from an agent in another part of the country. This "distant" agent acquired his information from an informant, a stranger previously unknown to any member in the relay team. The court noted that "[o]bviously, the statement in the affidavit that [the affiant] obtained the information 'from a source which in the past has proved reliable' is false." *Id.* at 322.

[10] United States v. Ventresca, 380 U.S. 102 (1965).

facts of the case. As to the "distinct possibility of hearsay-upon-hearsay"[11] originating from unreliable anonymous informers, the Court said:

> We disagree with the conclusion of the Court of Appeals. Its determination that the affidavit might have been based wholly upon hearsay cannot be supported in light of the fact that Mazaka . . . swore under oath that the relevant information was in part based 'upon observations made by me' and 'upon personal knowledge' as well as upon 'information which has been obtained from Investigators . . . .' It also seems to us that the assumption of the Court of Appeals that all of the information in Mazaka's may be in fact have came from unreliable anonymous informers, passed on to Government Investigators, who in turn related this information to Mazaka is without foundation. Mazaka swore that, insofar as the affidavit was not based upon his own observations, it was 'based upon information received officially from other Investigators . . . and reports orally made to me describing the results of their *observations* and investigation.'[12]

It may be concluded, then, that observations by fellow officers engaged in a common investigation are a reliable basis for a warrant sought by one of the investigators. Although the Court implied that had there been hearsay on hearsay *alone* the warrant would be invalid, it did not reach the question whether an affidavit is sufficient when based on information which a reliable informer has given to investigators who in turn have passed the information on to the affiant.

Although the *Watling* court relied in part on *Ventresca* to validate the hearsay on hearsay procedure resulting in issuance of the warrant, *Ventresca* alone does not provide a foundation upon which the conviction in *Watling* may rest. Since *Watling* involved an informer, an element not present in *Ventresca*, the court found it necessary to sanction the practice employed in *Watling* in light of *Aguilar v. Texas* which has laid down certain requirements to be met when issuance of a search warrant is supported by information coming from an informer.

The Supreme Court in *Aguilar* expressly required that the magistrate "be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' "[13] The constitutionality of a search warrant must be evaluated in light of the rule that "the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests."[14] Indeed, the language of the fourth amendment dictates that "no Warrants

---

11 Ventresca v. United States, 324 F.2d 864, 869 (1st Cir. 1963).
12 380 U.S. at 110-11.
13 378 U.S. at 114.
14 United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

shall issue, but upon probable cause," and this must be read to apply to arrest as well as to search warrants.[15]

In their examination of the affidavit, the *Aguilar* Court noted that the "mere conclusion"[16] that the defendant possessed narcotics was made by an unidentified informant and not by the affiant himself. The affidavit expressed "no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,"[17] and it did not even include "an affirmative allegation that the affiant's unidentified source spoke with personal knowledge. For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession."[18]

The court in *Watling* found the procedure employed by the police officers entirely consistent with the standards prescribed by *Aguilar*. It based its conclusion on the fact that the affiant alleged in his affidavit that the information was furnished by another officer "who had received this information from a reliable source which has furnished reliable information on 5 past occasions."[19] In addition, the court noted that although the affidavit did not allege the underlying circumstances from which the informant concluded that the articles sought would be found in the place designated, the officer's subsequent testimony at the hearing on the motion to suppress could be found to provide the basis upon which the magistrate could conclude that the informer's conclusions were reliable and thereby satisfy the second requirement of *Aguilar*. However, in the record certified to the supreme court of the proceedings on the motion to suppress, there was no indication whether the affiant officer testified to such facts. Presumably when the trial court reconsidered the motion in light of the *Watling* opinion, it ascertained whether there was such testimony.

The method employed by the court to reconcile the informer reliability test of *Aguilar* with the facts of *Watling* was by recognizing the police entity theory in the context of searches with a warrant and extending this theory to include information gathered from an informer.[20]

---

15 Giordenello v. United States, 357 U.S. 480, 485-86 (1958).
16 378 U.S. 108, 113 (1964).
17 *Id.*
18 *Id. at* 113, 114.
19 104 Ariz. at 356, 453 P.2d at 502.
20 The Supreme Court of Arizona's reliance upon cases from other jurisdictions where an informant was present manifests a misinterpretation of those decisions. In Chin Kay v. United States, 311 F.2d 317 (9th Cir. 1962), an affiant narcotics officer obtained his information from another officer who had used a hidden listening device planted upon an informer for the purpose of obtaining incriminating statements implicating the defendant in narcotics traffic. Apparently, this does not warrant the inference that hearsay on hearsay was the basis of probable cause for the warrant to issue, since the information was electronically conveyed *directly* to the nonaffiant officer.

In Rugendorf v. United States, 376 U.S. 528 (1964), the information concerning *where* the stolen goods were located was *directly* related from an in-

However, there is some doubt as to whether this doctrine can, consistent with *Aguilar's* requirements, be applied to applications for a search warrant.

In *Smith v. United States*[21] the United States Court of Appeals for the District of Columbia upheld a warrantless arrest where one officer's basis for concluding that his informant was reliable was not communicated to the arresting officer. Judge, now Chief Justice, Burger, writing for the court, said that

> probable cause is to be evaluated by the courts on the basis of the collective information of the police rather than that of only the officer who performs the act of arresting . . . . Certainly two or three government agents together could go before a Commissioner to procure a warrant on the sum of their information . . . .
>
> The knowledge or information of the arresting officer at the time of arrest is relevant only where an arrest is predicated on that officer's personal observations and information concerning the criminal act. The correct test is whether a warrant if sought *could have* been obtained by law enforcement agency application which disclosed its corporate information, not whether any one particular officer could have obtained it on what he individually possessed.[22]

The arresting officer in *Smith* did not attempt to procure a warrant, possibly because he would have been unable to relate to the magistrate why he believed the informant was reliable. *Smith*, therefore, seems to apply solely in warrantless arrest circumstances. It may be that the police entity theory is applicable only where no warrant is sought, for under this theory the arresting officer is not personally required to know of facts which would in an application for a warrant be needed to satisfy the two-pronged test of *Aguilar*. *Watling*, however, specifically stated that both

---

former to the affiant. The informer stated that he had seen the merchandise in the basement of the defendant's home. Although *Watling* emphasized the fact that in *Rugendorf* other information reaching the affiant was hearsay on hearsay, without this informer's conclusion that the goods were located in the basement there would have been no basis for the warrant's "particularly describing the place to be searched." U.S. CONST. amend. IV. *See also* United States v. Thoresen, 281 F. Supp. 598 (N.D. Cal. 1967).

[21] 358 F.2d 833 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1008 (1967).

[22] 358 F.2d at 835; *accord*, People v. Horowitz, 21 N.Y.2d 55, 233 N.E.2d 453, 286 N.Y.S.2d 473 (1967), in which the court reasoned that it was not necessary for an arresting officer to know of an informant's reliability or to be himself in possession of sufficient information to constitute probable cause, provided that he was acting under the direction of or as a result of communications with other officers, or even other police departments. The police entity as a whole, however, must be in possession of information sufficient to constitute probable cause to make a valid arrest. *See also* State v. Pederson, 102 Ariz. 60, 65, 424 P.2d 810, 815, *cert. denied*, 389 U.S. 867 (1967), where the Supreme Court of Arizona stated:

> We are not aware of any constitutional principle which requires an arresting officer to personally verify every bit of information which he possesses, in order to have probable cause for a warrantless arrest. In many, if not most cases, personal verification would be impossible.

Aguilar's prongs need be satisfied at the time the officer seeks the warrant.[23]

The Supreme Court of Appeals of Virginia applied the police entity doctrine in *Riggan v. Commonwealth*[24] to a fact situation somewhat analogous to that in *Watling*. The affiant, seeking a search warrant, based his affidavit on "[p]ersonal observation of the premises and information from sources believed by the police department to be reliable."[25] At a hearing on the motion to suppress, the affiant testified that in addition to his personal observations of the defendant's apartment building, he received information from other police officers and two reliable informants that a lottery was being conducted in the apartment. The Virginia court refused to quash the search warrant and affidavit.

The United States Supreme Court reversed[26] per curiam, citing only *Aguilar*. Although the majority wrote no opinion, it appears from the Virginia decision setting out the affidavit that the allegations in the affidavit failed to meet the two-pronged test of *Aguilar*. The affidavit recited none of the underlying reasons why the police believed the source of information was reliable, or why the informers believed a numbers game was being operated in the apartment.

Smith and *Riggan* may indicate that the police entity theory is incompatible with the requirements of *Aguilar*. The point of the corporate knowledge theory is that the affiant may rely on the credibility of his fellow officer and believe that an informant does in fact exist whether or not it is only a pure fiction. However, in *Aguilar*, furthering an expression of dissatisfaction with the affidavit, the Court emphasized that

> [t]o approve this affidavit would open the door to easy circumvention of the rule announced in *Nathanson*[27] and *Giordenello*.[28] A police officer who arrived at the 'suspicion,' 'belief' or 'mere conclusion' that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he had 'received reliable information from a credible person' that the narcotics were in someone's possession.[29]

The Supreme Court apparently limited the use of hearsay involving an informant to cases in which the affiant officer personally knew of the informant's reliability and of the grounds upon which the informant based his conclusions.[30] In warrantless circumstances there is a presumption that the nonarresting officer has complied with *Aguilar's* standards. However,

---

23 104 Ariz. at 358, 453 P.2d at 504.
24 206 Va. 499, 144 S.E.2d 298 (1965), *rev'd per curiam*, 384 U.S. 152 (1966).
25 206 Va. at 503, 144 S.E.2d at 301.
26 Riggan v. Virginia, 384 U.S. 152 (1966).
27 Nathanson v. United States, 290 U.S. 41 (1933).
28 Giordenello v. United States, 357 U.S. 480 (1958).
29 378 U.S. at 114 n.4.
30 *Id.* at 112.

when a warrant is sought, there is the need under *Aguilar* for conveying to the magistrate the basis upon which the original officer arrived at his conclusions. The affiant must personally know of the informant's existence. Apparently, this enhances the proposition that when an officer seeks a warrant the requirements are more stringent than those when no warrant is sought.[31] The incongruity between standards may well mean that the police entity rule is only applicable to warrantless situations.

However, the apparent incompatibility between police entity and *Aguilar's* requirements may be resolved in part by allowing an affiant to supply some of the facts necessary to constitute probable cause by means of corporate knowledge. However, with the admonition of *Aguilar* against the use of this procedure where an informant is concerned, it should be limited to providing corroborative facts to complement otherwise insufficient information from an informant. This may have been provided for in *Spinelli v. United States*[32] where, although the Court rejected the manner in which the FBI presented its information to the magistrate, it may be inferred that had the investigators properly informed the judicial officer of their informant's reliability and how the information was secured, the warrant's validity would have been recognized.[33] *Spinelli* apparently necessitates that the investigators corroborate otherwise insufficient information received from an informer. The court said:

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.
>
> The detail provided by the informant in Draper v. United States [34] . . . provides a suitable benchmark.[35]

Presumably, in the absence of sufficient detail, the corroboration can be derived from the corporate knowledge of the investigators.

Police entity in lieu of *Aguilar*, therefore, does not seem to be permissible. However, when information reaching the affiant is the product of independent police corroboration, as in *Spinelli*, and it is then properly presented to the magistrate, this procedure appears sanctionable. The court in *Watling* seemingly followed the theory of *Spinelli*, but the facts it approved would not meet the latter's criteria. It must be emphasized

---

[31] This is contrary to the Supreme Court's rulings. *See* Beck v. Ohio, 379 U.S. 89 (1964).

[32] 393 U.S. 410 (1969).

[33] *See id.* at 413 n.3.

[34] 358 U.S. 307 (1959). In *Draper*, although the arrest occurred without a warrant, had a warrant been sought a magistrate would have been confronted with such detail that he could have reasonably inferred that the informant had gained his information in a reliable way.

[35] 393 U.S. at 416.

that *Aguilar* attempted to prevent one officer, with only a suspicion and no basis for a warrant, from relaying this suspicion to another officer who could then procure a warrant relying on the first officer's credibility. This is exactly what the police entity theory permits. Although it is true that in *Watling* the first officer may have been precluded from obtaining a warrant because of jurisdictional problems, this does not negate the possibility that he was acting on mere suspicion or an alleged tip from an informant who may not even have existed.[36] In either event, the defendant was foreclosed from investigating this possibility because of the operation of the police entity doctrine. Under the facts of *Watling*, it appears doubtful whether the safeguard announced in *Aguilar* accompanies the two-pronged test.

Curing an Affidavit Insufficient on its Face

The question remains unsettled whether an insufficient affidavit may be cured by the affiant's testimony repeating, at a hearing on a motion to suppress, what he had told the issuing magistrate. Those courts sanctioning such a practice apparently find refuge in the negative pregnant that the fourth amendment does not explicitly require that probable cause be supported by an "oath or affirmation" in writing. A uniform and mandatory procedure applicable to the states is yet to be prescribed by the Supreme Court. It must be noted, however, that when reviewing courts pass upon the validity of a warrant they may only consider information brought to the magistrate's attention.[37] The dissenters in *Aguilar* argued that nothing in the record showed what the officers verbally told

---

[36] The following portion of dialogue, given on cross examination at the hearing on the motion to suppress, was also certified to the Supreme Court of Arizona. *See* Transcript at 6, 7, State v. Watling, No. 55676 (Super. Ct. Maricopa County 1967) [hereinafter cited as Transcript]:

Q: But officer, you don't even know if there was an informant except insofar as Detective Baldwin told you so?
A: That is correct.
Q: But officer, you don't even know if there was an informant, much less a reliable one?
A: That is correct.
Q: So, Detective Baldwin told you?
A: Yes.
Q: That's the only basis upon which you were talking to the Justice about the informer?
A: Yes.
Q: Now, do you know who the informant was, by any chance?
A: No.
Q: Never have, I mean never have known the name of the informer or anything about him other than what Detective Baldwin told you?
A: That is correct.
Q: Did Detective Baldwin ever tell you the name of the informer?
A: No.
Q: And you to this very day, to your own knowledge, knew nothing about this informant other than what Detective Baldwin told you?
A: Correct.

[37] Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964). *See* Giordenello v. United States, 357 U.S. 480 (1958).

the magistrate. They implied that a defective affidavit *might* be cured by what the judge was told at the time the warrant was sought and later repeated in the testimony of the affiant officer at the hearing on the motion to suppress.[38]

The conflict between jurisdictions is plainly apparent. In *State v. Jasso*[39] the Supreme Court of Utah declared that a warrant may not issue from an oral deposition.[40] Maryland has also firmly established a principle that the showing of probable cause must be confined solely to the affidavit.[41] A crucial element recognized by the Court of Appeals of New York is the better practice of establishing probable cause in writing. Such writing, however, need not be limited to the affidavit alone:

> When the Judge is not 'satisfied of the existence of sufficient grounds for granting the application' . . . and obtains additional proof from the applicant . . . the Judge should see to it that such additional information is recorded by the redrafting of the affidavit or by setting out such additional information in the Judge's own minutes or his clerk's minutes or by a stenographic record.[42]

The Arizona rule evidenced by *Watling* conflicts with the positions taken by Utah and Maryland.[43]

Those states which demand that the prosecution establish probable cause solely from the contents of the affidavit have apparently patterned their rule after that used in federal courts. Rule 41(c) of the *Federal Rules of Criminal Procedure* provides:

> A warrant shall issue only on *affidavit* sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant . . . . (emphasis added).

The lower federal courts have interpreted this languge to require that

---

38 378 U.S. at 120 (Clark, J., dissenting).

39 21 Utah 2d 24, 439 P.2d 844 (1968).

40 The Utah court's decision was based upon that state's statute implementing the fourth amendment's provisions. *See* UTAH CODE ANN. § 77-54-4 (1953).

41 Scarborough v. State, 3d Md. App. 208, 238 A.2d 297 (1968).

42 People v. Schnitzler, 18 N.Y.2d 457, 461, 223 N.E.2d 28, 30, 276 N.Y.S.2d 616, 618-19 (1966). Although the court upheld the warrant based partly upon oral testimony of the affiant (the reliability of the informant was not recorded in the affidavit), the affidavit contained the name of the defendant, a close physical description of him, and the precise address of his apartment. The affidavit further alleged that a confidential informant was present at the defendant's apartment when a large quantity of marijuana was delivered. Apparently, the issuing magistrate, when confronted with such detail, could reasonably infer that the affiant had gained his information from a reliable informant. It must be noted also that the name of the informant was disclosed to the defense at the suppression hearing. *See also* note 34 *supra*.

43 *Cf.* State v. Greenleaf, 11 Ariz. App. 273, 464 P.2d 344 (1970), where *unsworn* statements were not reduced to writing and a search warrant was issued. The court of appeals held that these unsworn statements supplementing the affidavit and testified to at the hearing on the motion to suppress could not be considered.

the probable cause for a warrant's issuance be included in the affidavit.[44] This procedure differs from that followed in Arizona, where sworn oral testimony is acceptable in addition to information expressed in the affidavit. The leading case describing such practice is *State v. Sherrick*,[45] where the Supreme Court of Arizona, conceding that the affidavit alone was insufficient to constitute probable cause, upheld the warrant on the basis of information orally presented to the magistrate at the time the warrant was sought. The court noted that "it would have been advisable for the magistrate to have a transcript made of the officer's testimony, which he gave in addition to the affidavit, and he should have recited on the record what facts presented to him constituted 'probable cause.' "[46] This deficiency, however, was not deemed fatal under the circumstances presented.[47] Those circumstances are readily distinguishable from *Watling*. In *Sherrick*, both the magistrate and the officer testified at the subsequent hearing on the motion to suppress, while in *Watling* only the officer testified.

The statutory provisions construed by the court in *Watling* would, however, seemingly require a result more in keeping with the federal rule. Section 13-1443 of the *Arizona Revised Statutes Annotated* provides that "[n]o search warrant shall be issued except on probable cause, supported by affidavit. . . ."[48] Further, section 13-1444 provides:

> A. The magistrate shall, before issuing the warrant, examine on oath the complainant and witnesses the complainant produces, *take their depositions in writing*, and cause them to be subscribed by the parties making them.
>
> B. *The depositions shall set forth the facts tending to establish the grounds of the application or probable cause for believing they exist.*[49] (emphasis added).

Even a cursory examination of these statutes appears to portray a requirement that the grounds constituting probable cause for the issuance of a warrant be in writing. These statutes do not preclude an officer from supplying the magistrate additional information, but they explicitly state that the depositions shall set forth the facts tending to establish probable cause, and that such depositions must be in writing.

---

[44] *See* Wangrow v. United States, 399 F.2d 106, 114 (8th Cir.), *cert. denied*, 393 U.S. 933 (1968); United States v. Sterling, 369 F.2d 799, 802 n.2 (3d Cir. 1966); United States v. Freeman, 358 F.2d 459, 462 (2d Cir.), *cert. denied*, 385 U.S. 882 (1966); Rosencranz v. United States, 356 F.2d 310, 314 (1st Cir. 1966).

[45] 98 Ariz. 46, 402 P.2d 1 (1965), *cert. denied*, 384 U.S. 1022 (1966).

[46] 98 Ariz. at 53, 402 P.2d at 6.

[47] On petition for a writ of habeas corpus the Ninth Circuit upheld the Arizona procedure as constitutional. It said the fourth amendment did not require that the oath or affirmation of the truth of the statement of facts constituting probable cause be attached to a written document. Sherrick v. Eyman, 389 F.2d 648, 652 (9th Cir.), *cert. denied*, 393 U.S. 874 (1968). *See also* State v. Van Meter, 7 Ariz. App. 422, 440 P.2d 58 (1968), where both requirements of *Aguilar* were orally satisfied.

[48] ARIZ. REV. STAT. ANN. § 13-1443 (1956).

[49] *Id.* §13-1444.

The Arizona court of appeals, in *State v. McMann*,[50] expressed the view that the Arizona statutes require that all pertinent information be contained in the affidavit, which was held to be synonymous with the word deposition. This view was based upon the Arizona legislature's adoption of the statutes from California.[51] This ruling in *McMann* would appear to preclude an affiant offering additional information to a magistrate without including it in the affidavit.[52]

Watling has implicitly overruled this interpretation. Insofar as *McMann* requires a writing, however, it is apparently founded upon a much stronger argument, for the United States Supreme Court has indirectly suggested in *Giordenello v. United States*[53] and *Aguilar* that the grounds establishing issuance of a warrant must be included in a written statement. *Giordenello* was decided under Rules 3 and 4 of the *Federal Rules of Criminal Procedure*,[54] which provide that an arrest warrant shall be issued only upon a written and sworn complaint showing probable cause

---

[50] 3 Ariz. App. 111, 412 P.2d 286 (1966).

[51] *See* CAL. PENAL CODE § 1526 (West 1969), *amending* CAL. PENAL CODE § 1526 (West 1957), providing:

> The magistrate may, before issuing the warrant, examine on oath the person seeking the warrant and any witness he may produce and must take his *affidavit or their affidavits in writing*, and cause the same to be subscribed by the party or parties making same. (emphasis added).

See also CAL. PENAL CODE § 1527 (West 1969), *amending* CAL. PENAL CODE § 1527, (West 1957), which provides:

> The affidavit or affidavits must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

It must be noted that California amended its statutes after Arizona's adoption of them to require the taking of "his affidavit or their affidavits" rather than their depositions and also insisting that such affidavit or affidavits, rather than the depositions, set forth the facts establishing probable cause.

[52] The interpretation placed upon the amended statutes by the California courts emphasize that the "warrant can be upset only if the *affidavit* fails as a matter of law to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause . . . ." (emphasis added). People v. Stout, 66 Cal. 2d 184, 193, 424 P.2d 704, 710, 57 Cal. Rptr. 152, 158 (1967). The supporting affidavit must show competent evidence, sufficient on its face to support a finding of probable cause. In Dunn v. Municipal Court, 220 Cal. App. 2d 858, 874, 34 Cal. Rptr. 251, 262 (1963), the court stated:

> Because this court must look to the affidavits supportive of the search warrant in order to determine the sufficiency of the evidence to sustain a finding of probable cause, we are obliged to consider the sole affidavit before us, and are not required to speculate whether other evidence was presented to the magistrate before he issued the warrant.

It appears questionable whether the *McMann* court's reliance upon the interpretation of the California statutes by the California courts was proper. The California statutes were amended, but contained the word "deposition" when Arizona adopted them.

[53] 357 U.S. 480 (1958).

[54] FED. R. CRIM. P. 3 reads in part: "The complaint is a written statement of the essential facts constituting the offense charged."

FED. R. CRIM. P. 4:

> [I]f it appears from the *complaint*, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue . . . . (emphasis added).

to believe an offense has been committed.[55] The Court held that the complaint did not pass "constitutional muster"[56] because no basis was provided under rule 4 for a commissioner's determination that probable cause existed. It noted that the affiant neither spoke with personal knowledge of the matters contained in the complaint nor indicated any source for his beliefs. The Court emphasized:

> [I]f this complaint were upheld, the substantive requirements would be completely read out of Rule 4, and the complaint would be of only formal significance, entitled to perfunctory approval by the Commissioner. This would not comport with the protective purposes which a complaint is designed to achieve.[57]

The *Aguilar* Court explained that the principle announced in *Giordenello* was derived from the fourth amendment and not from the Supreme Court's supervisory powers.[58] This suggests that the rule 4 requirement that the complaint establish probable cause in writing should be applicable to the states.

It is difficult to find a strict rule of thumb expressive of the present law regarding whether a defective affidavit might be cured. There are advantages in negating such a practice, since the fourth amendment seemingly manifests a preference for having a written record of the events preceding the issuance of a warrant. Justice Stewart, speaking for the majority in *Beck v. Ohio*,[59] wrote:

> An arrest without a warrant bypasses the safeguards provided by an objective *predetermination* of probable cause, and substitutes instead the far less reliable procedure of an *after-the-event* justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.[60] (emphasis added).

Where there is no written record of what an officer has orally given an issuing magistrate, as in *Watling*, the policeman himself may determine the validity of his own search.[61] As one commentator stated:

---

[55] Although the language of rule 4 states that probable cause may be found from an affidavit or affidavits filed with the complaint, the *Giordenello* Court has apparently included the word "affidavit" within the meaning of the word "complaint." Giordenello v. United States, 357 U.S. 480, 485-86 (1958).

[56] *Id.* at 487.

[57] *Id.* at 486.

[58] 378 U.S. at 112 n.3.

[59] 379 U.S. 89 (1964).

[60] *Id.* at 96.

[61] Testimony of the affiant was given at the hearing on the motion to suppress on the prosecutor's direct examination. *See* Transcript at 2-4. The prosecution continued:

> 'Q. Would you please tell us what you said to Judge Fowler as best you can remember?
>
> 'A. I had gone to him for a Search Warrant to be issued. It listed the location and listed the individual that we knew to be living there. I informed him of this situation of one individual, that I had personal knowledge that he was at that time out on bond for a similar charge of possession of marijuana out of his court that being Kimbrough Maier. I further informed him that it had come to my attention on two

> [T]he policeman perceives his job not simply as requiring that he arrest where he finds probable cause. In addition, he sees the need to be able to reconstruct a set of complex happenings in such a way that, subsequent to the arrest, probable cause can be found according to appellate court standards. In this way . . . 'the policeman fabricates probable cause.' . . . [The policeman] finds it necessary to construct an *ex post facto* description of the preceding events so that these conform to legal arrest requirements, whether in fact the events actually did so or not at the time of the arrest. Thus, the policeman respects the necessity for 'complying' with the arrest laws. His 'compliance,' however, may take the form of *post hoc* manipulation of the facts rather than before-the-fact-behavior.[62]

This "*post hoc* manipulation of the facts" has been demonstrated by a quantitative study of the effect of the *Mapp v. Ohio*[63] decision on police behavior.[64] Subsequent to the date of the *Mapp* decision, the percentage of cases in which policemen alleged abandonment of narcotics by a defendant rose drastically.[65] It may be concluded that a substantial propor-

---

previous occasions regarding his connections with the use of marijuana and that being Mr. Watling.

'Q. Did you tell him anything else?

'A. Yes. I explained to him that the information had been gathered by myself and another police officer through an informant of the second police officer, Detective Baldwin, and that informant had provided Detective Baldwin with reliable information on several occasions in the past.

'Q. Was there any further conversation as to the informant?

'A. In what regard?

'Q. In regard to—

MR. JOHNSON: Pardon me, Your Honor, I object.

'THE COURT: Sustained.

'MR. ROSENTHAL: (continued)

'Q. Did you tell the magistrate anything concerning when the marijuana was supposed to have been there?

'A. Yes, the information the informant had was that it had been seen there within the last day and a half previous to the issuance of a search warrant.

'Q. Did you tell the magistrate, based on your information, who had seen the marijuana?

'A. The informant.'

Compare transcript of the motion to suppress *with* the following colloquy between the defense counsel and the issuing magistrate at the preliminary hearing, *quoting* State v. Watling, 104 Ariz. at 358, 453 P.2d at 504 (1969):

'Mr. Johnson: May I ask a little indulgence from the Court? Do you recall when I had Your Honor * * *

'The Court: Listen, I am not going to testify about this thing. Everything is right there in black and white.

. . . .

'The Court: Those documents speak for themselves, right there.

. . . .

'The Court: That's it right there. Everything speaks for itself. He was sworn in. Just what it says there, and he was under oath.'

62 J. SKOLNICK, JUSTICE WITHOUT TRIAL 214-15 (1966). *See also* Younger, *The Perjury Routine*, NATION, May 8, 1967, at 596-97.

63 367 U.S. 643 (1961).

64 P. CHEVIGNY, POLICE POWER 187-88 (1969).

65 *Cf.* Younger, *supra* note 62, at 597, where the author states:

> After the decision in *Mapp*, . . . [f]or the first few months, New York policemen continued to tell the truth about the circumstances of their searches, with the result that evidence was suppressed. Then the police

tion of the post-*Mapp* allegations were false. After *Mapp*, the number of "dropsies" seemingly should have decreased, for it would have been far more advantageous to the defendant to keep the narcotics on his person.

It does not appear to be too great a burden to require that the grounds tending to establish probable cause for the issuance of a warrant be reduced to writing. This does not preclude an officer who is seeking a warrant from furnishing the magistrate information in addition to that in the affidavit. It appears that the magistrate should, however, reduce this additional information to writing for purposes of review by the trial and appellate courts. The inconvenience of having a judicial officer testify at a subsequent hearing on a motion to suppress appears far more burdensome then the process of transcribing information. The necessity of having the magistrate's conclusions present at the motion to suppress is apparent. Mr. Justice Jackson, in *Johnson v. United States*,[66] stressed:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[67]

The testimony of the policeman, allegedly repeating what he had orally given the issuing magistrate, should not be presented at the motion to suppress when the disinterested opinion of the magistrate is not available. The Supreme Court of Arizona, in *Watling*, expressed a contrary view by adjudging the policeman as competent to reconstruct alone the discussion with the magistrate preceding the issuance of the warrant. It appears questionable whether this practice should survive, for the opportunity and apparent propensity of police officers to justify their searches on the basis of what they learn as a result of these searches is manifestly present.

Conclusion

Under the *Watling* decision two rules have been set forth. It appears

---

made the great discovery that if the defendant drops the narcotics on the ground, after which the policeman arrests him, then the search is reasonable and the evidence is admissible. Spend a few hours in the New York City Criminal Court nowadays, and you will hear case after case in which a policeman testifies that the defendant dropped the narcotics on the ground, whereupon the policeman arrested him. Usually the very language of the testimony is identical from one case to another.

This is now known as . . . 'dropsy testimony.' . . . Surely, though, not in *every* case was the defendant unlucky enough to drop his narcotics at the feet of a policeman. It follows that at least in some of these cases the police are lying.

[66] 333 U.S. 10 (1947).

[67] *Id.* at 13-14.

that an affiant officer who alleges in his affidavit that information has been secured from a reliable informant and then passed on to another officer, who in turn has relayed this information to the affiant, need not personally know whether an informant does in fact exist. Further, if the affidavit is defective, the officer alone may relate at the hearing on the motion to suppress what he had orally told the magistrate before the warrant was issued. Although only one of *Aguilar's* requirements was orally satisfied here, the logical extension appears to be that both requirements may be orally satisfied and a warrant may issue from an oral deposition.

EVIDENCE

Anti-Marital Fact Privilege

In *State v. Crow*[1] the Supreme Court of Arizona limited the anti-marital fact privilege[2] by expanding certain exceptions to the rule stated in Section 13-1802 of the *Arizona Revised Statutes Annotated.*[3] The court held that in a trial for murder, where the victims had been the father and brother of the defendant's wife and where prior to the killings the defendant and his wife had agreed to a divorce, the wife's testimony regarding events surrounding the killings was admissible against her husband.[4]

---

[1] 104 Ariz. 579, 457 P.2d 256 (1969).

[2] For a discussion of the anti-marital fact privilege and the related inter-spousal communication privilege, see M. UDALL, ARIZONA LAW OF EVIDENCE §§ 85 & 92 (1960).

[3] ARIZ. REV. STAT. ANN. § 13-1802 (1) (Supp. 1969-70) reads in pertinent part:

> A person shall not be examined as a witness in the following cases:
> 1. A husband for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without consent of the other, examined as to any communication made by one to the other during the marriage. These exceptions do not apply in a criminal action or proceeding for a crime committed by the husband against the wife, or by the wife against the husband. . . .

[4] It would seem that the court's decision was based on a consideration of the amended version of the statute, or at least an interpretation of the former statute which reaches the same practical result. Section 13-1802 was amended in 1961 by Ch. 36, § 1, [1961] Laws of Ariz., prior to the commission of the alleged crime. It is unfortunate that the court cited the old section 13-1802 instead of the amended version, but the effect on its decision appears to be negligible. It would seem that the old statute, on its face, did not apply the enumerated exceptions to the competency aspect, but only to spousal communications. However, in practice this distinction apparently did not exist. The laws from which section 13-1802 was derived were nearly identical to the current amended version. When the *Arizona Code* Commission undertook revision of the 1939 *Arizona Code Annotated*, resulting in the *Arizona Revised Statutes Annotated* (1956), included in the directions and limitations imposed upon it by the legislature was the power to divide "long and confused sections of existing statutes" into shorter sections. Report of Chief Counsel, Arizona Code Commission 7, 11 (Sept. 1, 1955). This

At the trial, the two murder charges were joined with a related count of assault with intent to commit murder which arose from defendant's attack on his wife immediately subsequent to the killings. While there was no question as to the admissibility of the wife's testimony on the assault charge,[5] the joinder resulted in her testimony being considered with respect to the murder counts as well. The defendant claimed that the use of the wife's testimony as to the murder charges was reversible error.[6]

The basis for the supreme court's decision is unclear because it combines two otherwise independent lines of reasoning, either of which standing alone could have supported the result. First, the crime of murdering the father and brother was held the equivalent of a crime against the wife, and therefore was within the statutory exception to the general rule prohibiting one spouse from testifying against the other. Second, since the husband and wife had already agreed to terminate the marriage, there was no longer a public policy toward preserving the relationship, and thus the husband no longer had a right to prevent the wife from testifying. By allowing the defendant's wife to testify against him, based upon either rationale, the court indicates a broadening of this exception to the anti-marital fact privilege.

The inclusion of murders of this type within the crime against the spouse exception appears to be the more substantial basis for the decision and constitutes a significant expansion of the traditional rule. Dating back at least to the time of Lord Coke, the common law rule prohibited testimony by one spouse either for or against the other.[7] However, this rule has been modified by statute in one form or another by every state, with the extent of modification varying greatly. Some states have completely abrogated the rule,[8] while others have retained only the protection against

---

apparently was done with ARIZ. CODE ANN. § 44-2702(1) (1939), which was divided into two subsections, ARIZ. REV. STAT. ANN. § 13-1802(1) & (2) (1956). Subsequently, the legislature realized the impact of the division and amended section 13-1802, as noted *supra*. There were no cases which resulted in an interpretation of the 1956 version of section 13-1802 during the six years of that particular version's existence. According to UDALL, *supra* note 2, § 85, and the use of the section by the court — either mistakenly relying on the old 13-1802 or actually considering the new 13-1802 but mistakenly quoting the old version — it appears that there never was any acknowledged difference in the statutes.

[5] *See* Stein v. Bowman, 38 U.S. (13 Pet.) 209 (1839); *cf.* Bassett v. United States, 137 U.S. 496 (1890) (dictum) (applying *Stein* to a criminal case).

[6] The defendant made several other claims of error. He claimed that the joinder of trials contravened his fifth amendment rights since as to the murder charges, he argued self-defense and needed to testify in order to substantiate this. This, however, forced him to testify as to the assault with intent to commit murder charge which he had no desire to do. The court rejected this, holding that he failed to show any prejudice to his defense to the assault charge. The court also rejected his claim that there was insufficient evidence to support a first degree murder verdict, largely because the claim was predicated upon the inadmissibility of his wife's testimony.

[7] 8 J. WIGMORE, EVIDENCE § 2227 (3d ed. 1940); *see* Commonwealth v. Allen, 191 Ky. 624, 231 S.W. 41 (1921) (indicating that the origin of the rule may be undiscoverable).

[8] *E.g.*, ME. REV. STAT. ANN. tit. 15, § 1315 (Supp. 1970); S.C. CODE ANN. § 26-403 (1962).

compelling such testimony.[9] The remainder have generally retained the rule with specific exceptions, such as Arizona's,[10] with a variety of offenses involving the spouse[11] or children[12] giving rise to the loss of privilege.

In *Crow*, the supreme court, relying upon *O'Laughlin v. People*,[13] and *Chamberlain v. State*,[14] stated the principle that spousal testimony is admissible "in all cases in which the crime committed so closely touches or affects the other spouse as to render the reason for the rule—promotion of marital peace and apprehension of marital dissension—inapplicable."[15] *Chamberlain* and *O'Laughlin* held that a crime committed against the spouse's child was the equivalent of a crime committed against the spouse. The Arizona court found no relevant distinction between a crime against a child of the spouse and a crime against the father and brother of the spouse. Thus, the common law justification for the exception—the prevention of injustice to an injured spouse due to lack of a remedy[16] appears to have been replaced in Arizona with the above quoted language from *Crow*.

The *Crow* holding is a departure from previous interpretations which have limited the exception to offenses against the spouse or children. Cases which have gone so far as to include crimes against the child within the crime against the spouse exception at least have had a logical basis: the duty-dependency axis which exists between a parent and his minor child. However, to base such an extension on the mere fact of family relationship is a weakening of what has, heretofore, apparently been the required degree of closeness to affect the marriage. It would now seem that a crime against a close family member may be construed to be a crime against the spouse. Moreover, an even broader application is

---

9 *E.g.*, ALA. CODE tit. 15, § 310 (1958); Ky. REV. STAT. § 421.210 (1962).

10 ARIZ. REV. STAT. ANN. § 13-1802 (Supp. 1969-70).

11 *E.g.*, Wyatt v. United States, 362 U. S. 525 (1960) (violation of Mann Act, 18 U..S.C. § 2421 (1964)); Bassett v. United States, 137 U.S. 496 (1890) (dictum) (crime against person of the wife); People v. Schlette, 139 Cal. App. 2d 165, 293 P.2d 79 (1956) (crime against wife's property); Schell v. People, 65 Colo. 116, 173 P. 1141 (1918) (bigamy); Dill v. People, 19 Colo. 469, 36 P. 229 (1894) (perjury by husband in divorce action).

12 *E.g*, Balltrip v. People, 157 Colo. 108, 401 P.2d 259 (1965) (murder of minor child); Read v. People, 122 Colo. 308, 221 P.2d 1070 (1950) (same); O'Laughlin v. People, 90 Colo. 368, 10 P.2d 543 (1932) (same); Wilkinson v. People, 86 Colo. 406, 282 P. 257 (1929) (molestation of child); State v. Kollenborn, 304 S.W.2d 855 (Mo. 1957) (same); Chamberlain v. State, 348 P.2d 280 (Wyo. 1960) (same). However, a crime against a child is not always considered to be within the exception. *E.g.*, Rogers v. State, 368 S.W.2d 772 (Tex. Crim. App. 1963). Other than *Crow*, which could logically be extended to include such an offense, Arizona has never recognized a crime against a child as a crime against a spouse. *See* note 18 *infra*.

13 90 Colo. 368, 10 P.2d 543 (1932).

14 348 P.2d 280 (Wyo. 1960).

15 104 Ariz. 579, 585, 457 P.2d 256, 262 (1969) (emphasis omitted).

16 Bentley v. Cooke, 3 Doug. 422, 424, 99 Eng. Rep. 729 (K.B. 1784) (Mansfield, L.C.J.):

> [T]hat necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury.

possible. When the court recognized that the exception permitted testimony when "the crime committed *so closely touches or affects the other spouse*," it did not limit the exception by its terms to kinship ties.

It may be inferred that after *Crow*, a result may be reached which is incompatible with the justification given for the holding—that the marriage had been so closely affected that there was no longer a need to protect it by statute. In Arizona, when the crime committed is a crime against the spouse it acts as a removal of all bars to competency and the question of privilege is not involved.[17] Therefore, if a crime falls within the exception, testimony can be compelled, having been removed from the area of privilege.[18] However, even though the crime is now said to be against the spouse, there may still be a state interest in the preservation of the marriage due to the attitude of the spouse who subjectively may feel that the marriage relationship has not been disturbed.

The second justification for the holding in *Crow* was that "[t]he reasons for not permitting a wife to testify against her husband are not present in the instant case because it had already been agreed that the marital relationship would be terminated."[19] In effect, the court is treating the case as if a divorce had already been granted.

The general rule has been that the divorce exception is applicable when there is an actual divorce[20] or annulment.[21] The various stages between a successful marriage and a divorce have generally been held not to remove the incompetency of one spouse as a witness against the other.[22] The rationale behind this has been the possibility of avoiding divorce as evidenced by the success of the courts in reconciliation.[23] Therefore, it has been reasoned that the courts should not allow one spouse's adverse testimony to be the final blow to the marriage.[24]

---

17 ARIZ. REV. STAT. ANN. § 13-1802(1) (Supp. 1969-70).

18 *See* Pazos v. Superior Court, 8 Ariz. App. 560, 448 P.2d 130 (1968), where the court distinguished a crime against the wife's daughter from a crime against the wife and refused to compel a wife's testimony. The prosecution's argument was based on Chamberlain v. State, 348 P.2d 280 (Wyo. 1960), but, as the Arizona supreme court had not yet adopted this liberal interpretation, the court followed Zumwalt v. State, 16 Ariz. 82, 141 P. 710 (1914), in which the court did not classify a rape of a daughter as a crime against the spouse.

19 104 Ariz. at 586, 457 P.2d at 263.

20 *See* Pereira v. United States, 347 U.S. 1 (1954).

21 *See* Cooper v. United States, 282 F.2d 527 (9th Cir. 1960).

22 State v. McMullins, 156 Miss. 663, 126 So. 662 (1930) (husband and wife were separated and not living together but were not divorced); State v. Mageske, 119 Ore. 312, 249 P. 364 (1926) (husband and wife living separate and apart from each other are still incompetent as witnesses for or against each other); Acker v. State, 421 S.W.2d 398 (Tex. Crim. App. 1967) (it was error to allow a wife to testify against her husband where a divorce decree had been granted but was on appeal); Johnson v. State, 27 Tex. App. 135, 11 S.W. 34 (1889) (where husband and wife were living apart and wife had no intention of returning, it did not act as a dissolution of the marriage or render her competent to testify against her husband).

23 Hawkins v. United States, 358 U.S. 74 (1958).

24 *Id.* There the court rejected the Government's argument that if one spouse was willing to testify, the reason for the common law rule no longer existed. (The position the Arizona court is taking in *Crow*, is, in effect, that of the Govern-

The problem with the court's position in *Crow* is that even if they have agreed to a divorce, few defendants would be unwilling to attempt reconciliation if it meant the spouse's adverse testimony could not be admitted. However, Arizona's position, which views the marriage as ended upon the agreement to divorce, seems to preclude the possibility of later reconciliation.

It is not clear why the court used both justifications when either could have supported the result. If the decision rested upon the termination of the marriage alone, there would be no reason to mention the crime against the spouse exception because the wife would be just another witness, except as to communications between the husband and wife during the marriage.[25] If it had been decided on the crime against the spouse exception alone, the status of the marriage would be irrelevant and there would have been no reason to add a rationale based on the separation. It therefore seems reasonable to assume that the court is using this opportunity to establish the groundwork for future interpretation of this statute which will further weaken the bar to competency that prevents one spouse from testifying against the other.

Use of Specific Prior Acts of Misconduct

In *State v. Goldsmith*[1] the Supreme Court of Arizona held that neither on cross-examination nor in presenting rebuttal evidence can specific acts of misconduct unsupported by a conviction be used to impeach the veracity of a witness. In reaching this decision, the court reaffirmed its prior holdings and defined the limitations on the use of such evidence.

Goldsmith was convicted of molesting his 4½-year-old daughter and was sentenced to one to two years in prison. At the trial, the defendant's daughter had related the alleged act of fellatio between her and her father.[2] The defendant then testified, specifically denying the act of fellatio. On cross-examination, the prosecution, relying on the specific denial as putting into issue the entire scope of defendant's sexual conduct, asked whether the defendant had ever engaged in fellatio. The trial court overruled the defense counsel's objections to this line of questioning and the

ment in *Hawkins*.) The *Hawkins* court pointed out that the marriage may be saved absent an unforgiveable act such as one spouse adversely testifying against the other.

[25] ARIZ. REV. STAT. ANN. § 13-1802(1) (Supp. 1969-70).

[1] 104 Ariz. 226, 450 P.2d 684 (1969).

[2] The child was 5 years old at the time of trial. The lower court found her competent to testify, and the supreme court did not disturb this finding. *Id.* at 231, 450 P.2d at 689.

defendant made a general denial of such conduct.[3] The prosecution then recalled the defendant's wife, who testified in rebuttal that the defendant had required her to perform the act. On appeal, the supreme court reversed the conviction, holding that it was error to admit the wife's testimony for the purpose of impeaching the defendant.

The general rule in Arizona is that evidence tending to show specific acts of misconduct is, absent a conviction for the acts, not admissible.[4] This rule also extends to such evidence when offered for impeachment, a position which is in opposition to the majority of states.[5] However, there are well recognized exceptions to the general rule which have been accepted by the Arizona court and which allow the use of such evidence for substantive purposes.[6] These purposes include showing "specific sexual inclinations" or "specific emotional propensity,"[7] provided that the acts be specifically similar to those in issue and also relatively recent in time as well as not merely suggestive of criminal tendencies.[8] Moreover, in order to fall within this exception, the "prior acts must tend to show 'a system, plan or scheme embracing the commission of two or more crimes so related to each other that the proof of one tends to establish the other.' "[9]

It is apparent that the use of prior acts to impeach veracity is substantially different from the substantive purpose of trying to prove "a system, plan or scheme."[10] The *Goldsmith* court found the use of such evidence in the instant case to be reversible error in that it was not offered to show a system, plan, or scheme and in addition was extremely preju-

---

[3] On appeal, "the defendant contend[ed] that both the asking of the question of defendant on cross-examination and the court's admission of the answer was error." *Id.* at 228, 450 P.2d at 686. The court acknowledged this contention but elected, instead, to base its reversal upon the use of the wife's rebuttal testimony to show specific acts of prior misconduct.

[4] Taylor v. State, 55 Ariz. 13, 97 P.2d 543 (1940); M. UDALL, ARIZONA LAW OF EVIDENCE §§ 67-68, 115 (1960).

[5] The *Goldsmith* court recognized its minority position, *quoting* State v. Harris, 73 Ariz. 138, 142, 238 P.2d 957, 959 (1951):

> 'The majority of courts will allow on the cross-examination of the witness, specific acts of misconduct not sustained by a conviction to be shown which affect veracity. . . . But this court has allied Arizona with the minority of states by holding that on cross-examination specific acts of misconduct cannot be shown unless the witness has been convicted of that crime.' 104 Ariz. at 228, 450 P.2d at 686.

[6] The exceptions are when the evidence is to show identity, intent, knowledge, history of the crime, motive, or common scheme. *See* Dorsey v. State, 25 Ariz. 139, 213 P. 1011 (1923); M. UDALL, *supra* note 4, § 115. For an investigation into the unique nature of sex crimes in this regard, *see generally* Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses,* 6 ARIZ. L. REV. 212 (1965).

[7] State v. McDaniel, 80 Ariz. 381, 388, 298 P.2d 798, 802 (1956).

[8] *Id.*

[9] State v. Goldsmith, 104 Ariz. 226, 230, 450 P.2d 684, 688 (1969), *quoting* Taylor v. State, 55 Ariz. 13, 19, 97 P.2d 543, 545 (1940).

[10] The purpose of impeachment is merely to make the witness look unreliable in the eyes of the trier of fact. In contrast, the substantive use of prior specific acts of misconduct requires the prosecution to demonstrate the increased likelihood that the defendant committed the acts currently in question.

dicial since it improperly negated the only testimony presented on the behalf of the defendant.

To be admissible as substantive evidence, the court stated that prior acts must not only fall within one of the enumerated exceptions, but must also be offered at the proper time in the trial. "The question of 'a system, plan or scheme' would have to be determined by the trial court at the time it was offered in evidence by the State in its case-in-chief."[11] Presumably this means that the judge must pass upon the issue of admissibility before the jury hears either the question or the answer. The only justification for admitting such evidence at all is that the risk of prejudice to the defendant[12] is outweighed by the probative value of the evidence in establishing a scheme. On this basis it would seem that the limitations on the evidence, to wit, scheme, time, and specific similar acts, would require an in camera decision on the probative value.

The court reaffirmed its rejection of the California exception[13] which allows the use as impeachment evidence of " 'specific acts of misconduct not amounting to felony convictions when the defendant makes broad, all-inclusive statements that he never at any time committed an offense of the kind for which he is on trial.' "[14] *Goldsmith* seems to allow a defendant to make such general denials, even on direct examination, without fear of rebuttal since the court did not distinguish the use of the evidence after a denial on direct examination as opposed to a denial resulting from cross-examination.

The *Goldsmith* decision seems to indicate that the Supreme Court of Arizona is firmly committed to its minority position, as the court continues to hold that despite broad denials by the defendant, specific acts of misconduct may not be used as impeachment evidence.

---

[11] 104 Ariz. at 230, 450 P.2d at 688.

[12] State v. Johnson, 94 Ariz. 303, 306, 383 P.2d 862, 863 (1963):
> The danger is twofold: First, that the jury may conclude that the defendant is a 'bad man' and convict on lesser evidence than might ordinarily be necessary to support a conviction, and second, that if the door is opened to such evidence, the defendant is in danger of having to defend every incident of an entire lifetime in a single trial.

[13] *See* People v. Westek, 31 Cal. 2d 469, 190 P.2d 9 (1948); People v. Whipple, 192 Cal. App. 2d 179, 13 Cal. Rptr. 378 (1961); People v. Downs, 114 Cal. App. 2d 758, 251 P.2d 369 (1953), *cert. denied*, 348 U.S. 944 (1955), sentence modified, 202 Cal. App. 2d 609, 20 Cal. Rptr. 922 (1962); People v. Lindsey, 90 Cal. App. 2d 558, 203 P.2d 572 (1949).

[14] 104 Ariz. at 229, 450 P.2d at 687, *quoting* State v. Johnson, 94 Ariz. 303, 305, 383 P.2d 862 (1963).

INSANITY

M'Naghten's Rule Revisited

Arizona follows the unmodified *M'Naghten*[1] test of legal sanity.[2] Under this rule the test of criminal responsibility is whether an accused had, at the time of the act in question: "(1) Such a defect of reason as not to know the nature and quality of the act, *or* (2) If he did know, that he did not know he was doing what was wrong."[3] *State v. Malumphy*[4] presented the Supreme Court of Arizona with two questions concerning this test. First, whether the wrong involved is to be defined in a legal or a moral sense, and, second, whether the test itself is sufficient in the light of modern developments in psychiatry and medicine. Unfortunately, the court did not address itself to the first question, and summarily dismissed the second by adhering to the *M'Naghten* rule on the basis of precedent. However, Justice McFarland raised the basic issues in a lengthy concurring opinion.

Timothy Malumphy wanted to commit suicide, but lacked the nerve to do so. Instead, he chose two acquaintances who he felt "didn't deserve to live" and murdered them so that the state might satisfy his death wish through imposition of the maximum penalty. Although he knew that his actions violated the law of society, he felt that in God's sight he had done no wrong.[5] Thus, his conviction raised the question whether the knowl-

---

1 M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

2 Lauterio v. State, 23 Ariz. 15, 201 P. 91 (1921).

3 State v. Schantz, 98 Ariz. 200, 207, 403 P.2d 521, 525 (1965); *accord*, State v. Preis, 89 Ariz. 336, 362 P.2d 660 (1961); State v. Crose, 88 389, 357 P.2d 136 (1960); State v. Coey, 82 Ariz. 133, 309 P.2d 260 (1957); State v. Eisenstein, 72 Ariz. 320, 235 P.2d 1011 (1951); Lauterio v. State, 23 Ariz. 15, 201 P. 91 (1921).

4 105 Ariz. 200, 461 P.2d 677 (1969).

5 *Id.* at 206-07, 461 P.2d at 683-84, where Justice McFarland, concurring, quoted the defendant's statements at the trial:

'Q. Do you feel you had a right to do this?
'A. Definitely. I definitely had the right to do it.
'Q. Why?
'A. Because I was doing something for society that really society consciously wouldn't say, yes, do it.
But subconsciously would—would want it done because these were no good people. I was doing society a favor in it's [sic] own way — in my own way, I should say and the Man upstairs showed that this was right, that I was doing a service to society, that He condoned it.
'Q. How do you know that?
'A. Well, if He hadn't had condoned it, He would have stopped it. That's the same—same as I said before. The gun wouldn't have fired, I wouldn't have got the shells, I couldn't have got the gun, the man wouldn't have come to work, he wouldn't have been where I wanted it, so I could make it happen without involving too many people or letting somebody get hurt in that fashion and if He didn't want it done, anything could have happened. I could have had a car wreck. If my thinking was wrong and I wasn't right the Lord—He would have changed it, He wouldn't have let me go through with it, He wouldn't have let me think the way I think.
. . . .
'Q. Do you deserve to die?
'A. Definitely.

edge of wrong under the *M'Naghten* rule involves a moral, as well as a legal, aspect.

The language of *M'Naghten* does not answer the specific question, but a 1952 English case has declared that the test must be whether the act is contrary to the law.[6] This viewpoint, which the Arizona court seems to have adopted in *Malumphy*, has found some acceptance in this country, due mainly to the fact that it provides an objective test that can easily be implemented by the courts.[7]

Other jurisdictions feel that, in order to be held criminally responsible, a person must be able to realize that his acts are contrary to both the law of God and the law of the land.[8] In such courts the defendant cannot be convicted if he could not know his act was morally wrong even though he knew it was prohibited by law. Similarly, he cannot be convicted if he was mentally incapable of knowing his act was legally wrong, even though he knew that it was wrong morally.[9] It has been suggested that the remaining majority of jurisdictions have purposefully left the term undefined, and leave to the jury the decision of which standard to apply.[10]

From a review of the history of the right-wrong test prior to and at the time of the *M'Naghten* decision, Justice Cardozo concluded that the terms right and wrong included a moral aspect.[11] He used "moral" in a social, rather than a strictly religious sense. Under such an analysis, knowledge that an act is forbidden by law will normally permit the inference of knowledge that, according to the accepted standards of mankind, it is also condemned as an offense against good morals. However, he suggested, as have others,[12] that an exception to this use of good morals as a standard should be allowed when, for example, one acts under the delusion that God has commanded his actions.[13] In such a situation one's personal conviction, albeit delusory, would be allowed to prevail over the customary value judgment of society if it could be proven that the actions resulted from such a delusion.

'Q. Why?
'A. Because I broke the law of the land.
'Q. Do you feel you broke God's law?
'A. Definitely not.'

6 Regina v. Windle, [1952] 2 Q.B. 826.

7 *E.g.*, State v. Andrews, 187 Kan. 458, 357 P.2d 739 (1960); McElroy v. State, 146 Tenn. 442, 242 S.W. 883 (1922).

8 *E.g.*, Kearny v. State, 68 Miss. 233, 8 So. 292 (1890); Hawe v. State, 11 Neb. 537, 10 N.W. 452 (1881); People v. Wood, 12 N.Y.2d 69, 187 N.E.2d 116, 236 N.Y.S.2d 44 (1962); State v. Thorne, 239 S.C. 164, 121 S.E.2d 623 (1961); Morris v. State, 96 Tex. Cr. 63, 255 S. W. 744 (1923).

9 State v. Kirkham, 7 Utah 2d 108, 319 P.2d 859 (1958).

10 Sauer v. United States, 241 F.2d 640 (9th Cir. 1957); *See* Durham v. United States, 214 F.2d 862, 876 (D.C. Cir. 1954); R. SIMON, THE JURY AND THE DEFENSE OF INSANITY, ch. 9 (1957).

11 People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915).

12 *E.g.*, Guiteau's Case, 10 F. 161 (D.D.C. 1881); State v. Terry, 173 N.C. 761, 92 S.E. 154 (1917).

13 People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915).

Although a delusion that one is acting under the direction of God may in certain cricumstances actually lend credence to the premise that one is suffering from mental illness,[14] Arizona has rejected any exception based on delusions or partial insantiy.[15] Since the *Malumphy* court did not concern itself with such defects in the cognitive process, the Arizona rule apparently remains that as announced in *State v. Macias*.[16] In *Macias* the court ruled that delusions and degrees of interference with the cognitive process should not be considered because such factors are repugnant to the application of "principles of law . . . [which necessarily must be based upon] some definite standard . . . practical and workable in its nature."[17] Possibly the court feels that partial insanity would open an easy avenue to freedom for defendants who would otherwise have been found guilty. However, such a fear ignores indications that this is not a necessary result,[18] and disregards the admonition of the United States Supreme Court that even if some aquittals do result,

> [t]he possibility of such results must always attend any system revised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, . . . the recognition and enforcement of which are demanded by every consideration of humanity and justice.[19]

The Arizona court's failure to allow such exceptions is also difficult to reconcile with some of the traditional ideas underlying our legal system:

> The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*) commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where those acts stem from and are the product of a mental disease or defect . . . moral blame shall not attach, and hence there will not be criminal responsibility.[20]

Juxtaposing the facts of *Malumphy* to such notions leaves one to puzzle over the outcome in the instant case. The defendant had a history of mental disturbance which included at least one incident similar

---

14 *Id.* at 337, 110 N.E. at 949.

15 State v. Macias, 60 Ariz. 93, 131 P.2d 810 (1942). Although the Supreme Court of Arizona does not recognize such exceptions, they may be allowed in practice. In the recent trial of an Air Force sergeant who killed two "hippies" in a rage of anger, the judge instructed the jury that, "Insanity of short duration [often referred to as temporary insanity] is as fully recognized as a defense as an insanity of a longer duration." Although the bracketed material was omitted from this standard California instruction by the Arizona trial court, the instruction clearly conveyed the message that temporary insanity is a valid defense. The defendant was acquitted on the basis of his momentary insanity. State v. Palacios, No. A 17-444 (Pima County Super. Ct., Oct. 2, 1969).

16 60 Ariz. 93, 131 P.2d 810 (1942).

17 *Id.* at 96, 131 P.2d at 811.

18 *See* Overholser v. Leach, 257 F.2d 667 (D.C. Cir. 1958); A. GOLDSTEIN, THE INSANITY DEFENSE 23-25 (1967).

19 Davis v. United States, 160 U.S. 469, 493 (1895).

20 Durham v. United States, 214 F.2d 862, 876 (D.C. Cir. 1954).

to the one for which he was convicted.[21] His mother felt that he needed psychiatric treatment, but would not have him committed to the state hospital. Of the two expert witnesses testifying at the trial, one said that the defendant was suffering from a chronic paranoid state accompanied by delusions of grandeur and persecution, and that this mental illness was connected with the crime.[22] The other diagnosed the defendant as suffering from a personality pattern disturbance of the paranoid type, but that he knew right from wrong according to society's standards.[23] And finally, at a special evidentiary hearing to establish the defendant's ability to represent himself before the supreme court, evidence was introduced which cast serious doubt on his normalcy.[24] However, due to the restrictions of the *M'Naghten* rule, and its emphasis on knowledge of right and wrong, such evidence would not have been admissible at the original trial.[25]

The result at the trial in *Durham v. United States*[26] is even more illustrative than *Malumphy* of the inadequacy of a strict adherence to the *M'Naghten* test. The defendant had a long history of imprisonment, as well as hospitalization for mental illness. The charges were pressed to a trial because the prosecutor felt Durham should be committed to a mental institution,[27] which would have been mandatory if he were acquitted by reason of insantiy.[28] Although the case was tried to the court without a jury, this result was not reached because the judge felt that the defendant failed to meet the criteria of the *M'Naghten* rule. In recognition of the inadequacy of the *M'Naghten* test, the appellate court in *Durham* adopted a different rationale.[29]

Considering the fact situations in cases such as *Malumphy* and *Durham*, and the results reached under a strict application of *M'Naghten*, the wiser course would be to allow a liberalization of the rule in such cases. If restricted to such exceptional circumstances, it seems unlikely that

---

[21] While in the Air Force Malumphy was reported for being AWOL. To punish the man who had reported him, he took that man's roommate as a hostage and shot him in the knees. Compare the following testimony from the trial for that incident with the testimony quoted in note 5 *supra*.

'Q. Do you feel that it was the Lord in this case that was using you?
'A. I have to answer the question, yes, again because if He wasn't using me in the sense of instructing this punishment, then He wouldn't have let it go. He would have stopped it in some way or fashion.'

105 Ariz. at 205, 461 P.2d at 682.

[22] *Id.* at 207, 461 P.2d at 684.

[23] *Id.* at 207-08, 461 P.2d at 684-85.

[24] *Id.* at 208, 461 P.2d at 685.

[25] State v. Intogna, 101 Ariz. 275, 419 P.2d 59 (1966); *accord*, State v. Narten, 99 Ariz. 116, 407 P.2d 81 (1965).

[26] 214 F.2d 862 (D.C. Cir. 1954).

[27] *Id.* at 865.

[28] At that time in the District of Columbia, an accused who was acquitted by reason of insanity was presumed to be insane and was automatically committed to a mental institution. *Id.* at 876 n.57. This presumption has been discarded in order to insure equal protection for those suffering from temporary insanity. Now it must be determined that the person is still insane before he can be committed. Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968).

[29] *See* note 49 *infra*.

there would be any appreciable increase in the number of acquittals. This is especially true under the Arizona bifurcated trial statute,[30] which leaves to the jury's determination whether the defendant who is found not guilty by reason of insantiy shall be released or committed to an appropriate mental institution.[31] Once committed, the defendant may be released *only* after a jury trial, conducted as a civil proceeding, which may be had only upon certification by two psychiatrists that he is no longer a danger to himself or others.[32] This procedure is very similar to that used with the *Durham* rule,[33] and that proposed in the *Model Penal Code.*[34] Thus, it would seem that the concrete benefits to be gained by adopting a new test of criminal responsibility far outweigh the alleged disadvantages, which are at best quite nebulous in light of current procedures.

The question of the sufficiency of the *M'Naghten* rule is one of the most controversial problems existing in criminal law today,[35] and was raised in Arizona not only in *Malumphy*, but also by the recent decision of *State v. Makal*,[36] where the difficulty of applying the right-wrong test was demonstrated. Although the supreme court reversed since it felt the evidence was overwhelming that Makal was insane at the time he murdered his wife and two children, the jury had found him to have been sane.

M'Naghten was an advisory opinion given when little was known of psychic phenomona. As such, it is no consonant with any present medical theory.[37] Although it is generally recognized that individuals must be dealt with as complex, integrated personalities,[38] *M'Naghten* attempts to analyze one's mental condition on the basis of one symptom and fails to

---

30 ARIZ. REV. STAT. ANN. § 13-1621.01 (Supp. 1969-70).
31 *Id.* § 13-1621.01(D) to (H).
32 *Id.* § 13-1621.01(I).
33 Durham v. United States, 214 F.2d 862, 876 n.57 (D.C. Cir. 1954).
34 MODEL PENAL CODE § 4.08 (Proposed Official Draft 1962). When a defendant is acquitted on the ground of mental defect or disease he is committed to the Commissioner of Mental Hygiene to be placed in an appropriate institution. He can be released only after having been certified by that official and examined by two qualified psychiatrists appointed by the court, and these determinations having been scrutinized by the court to its satisfaction.
35 *See, e.g.*, A. GOLDSTEIN, THE INSANITY DEFENSE (1967); R. SIMON, THE JURY AND THE DEFENSE OF INSANITY (1957); Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325 (1955); Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761 (1956); Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917 (1956); Roche, *Criminal Responsibility and Mental Disease: Medical Aspects*, 26 TENN. L. REV. 222 (1959); Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793 (1955); Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 331 (1955). For a discussion of other controversies in the area of insanity as a criminal defense in Arizona, see p. 156 *infra, noting* State v. Blazak, 105 Ariz. 216, 462 P.2d 84 (1969).
36 104 Ariz. 476, 455 P.2d 450 (1969).
37 B. CARDOZO, *What Medicine Can Do For the Law*, in LAW & LITERATURE AND OTHER ESSAYS 70, 106 (1931); Roche, *Criminal Responsibility and Mental Disease: Medical Aspects*, 26 TENN. L. REV. 222, 225 (1959).
38 United States v. Currens, 290 F.2d 751 (3d Cir. 1961); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

take account of psychic realities.[39] The mere fact that most patients in mental institutions know the difference between "right and wrong"[40] indicates the futility of the test as a meaningful measure of responsibility.

The knowledge test of *M'Naghten* treats one's mental capabilities merely on the basis of the cognitive processes, but a mental illness cannot be considered in such an elementary fashion. A mental illness is not an entity that enters a person and makes him ill, and then leaves him unscathed and fully in possession of all his faculties of reason and will.[41] Rather, the term is a misnomer which nibbles at the edge of paradox, since the illness is not limited to the "mind," but refers to "an altered internal status of the individual vis-à-vis his external world as interpreted by others."[42]

The proponents of *M'Naghten* feel that it has redeeming features even in the wake of present criticisms. Supposedly, the knowledge of psychiatry is not sufficient to formulate a new test with *M'Naghten's* concreteness,[43] although the jury's verdict in *Makal*[44] casts serious doubts on the objectivity of the right-wrong test. Some say that the new formulations[45] take the question from the jury and deliver it into the hands of expert witnesses,[46] while others state that change is unnecessary since the jury disregards the specific instructions and forms a moral judgment based upon the composite of the moral values of individual jurors.[47] However, as Mr. Justice Frankfurter has said, such a situation with regard to the *M'Naghten* test makes it very difficult for conscientious people who would like to follow the rule, but feel it would be unjust, and does not sufficiently restrain those who would completely disregard the rule.[48]

As a result of weighing such factors, some jurisdictions have adopted new tests.[49] It is not within the purview of this analysis to discuss in de-

---

[39] United States v. Currens, 290 F.2d 751 (3d Cir. 1961); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[40] Guttmacher, *supra* note 35, at 328.

[41] Zillboorg, *supra* note 35, at 328.

[42] Roche, *supra* note 37, at 240.

[43] Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761 (1956); Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917 (1956), *in rebuttal to* Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793 (1955).

[44] *See* text accompanying note 34 *supra.*

[45] See note 49 *infra.*

[46] Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917 (1956); Wertham, *supra* note 35.

[47] Sauer v. United States, 241 F.2d 640 (9th Cir. 1957); A. GOLDSTEIN, *supra* note 35; R. SIMON, *supra* note 35, ch. 9.

[48] Royal Commission on Capital Punishment, Cmd. No. 8932, at 102 (1953) (testimony of Mr. Justice Frankfurter).

[49] There are four major proposals to modify or change the M'Naghten rule. The first is the irresistible impulse test, which states that an accused cannot be held criminally responsible if, at the time of committing the act, he (1) did not know the nature and quality of the act, or (2) did not know that it was wrong, or (3) was incapable of preventing himself from committing it. State v. White, 58 N.M. 324, 270 P.2d 727 (1954); *accord*, Parsons v. State, 81 Ala. 577, 2 So. 854 (1886); Commonwealth v. Chester, 337 Mass. 702, 150 N.E.2d 914 (1958).

tail the merits of each proposal, but only to consider why the Arizona court refuses to adopt any such alternative.

The court indicated in *State v. Schantz*[50] that the *Model Penal Code* formulation[51] represents a desirable approach to dealing with mental illness in criminal cases, but stated that it did not have the constitutional power to adopt it, and that it would be hesitant about merely adopting portions of it.[52] The major concern of the court was that if the test were adopted the jury would be compelled to release dangerous criminals upon society after they were found not guilty by reason of insanity.[53] However, by the provisions of the bifurcated trial statute[54] this danger has been alleviated. Now the jury is not compelled to release one acquitted on the basis of insanity, but may designate that he be committed to an appropriate mental institution to be released only after a jury determines that he is no longer a danger to himself or to others.[55] The only substantive difference between this procedure and the one suggested in the *Model Penal Code* is that under the latter the acquitted defendant is automatically committed to such an institution.

The court in *Schantz* also expressed concern over the lack of a provision such as Section 4.05 of the *Model Penal Code*, which provides for pretrial examinations of defendants. The important procedural safeguards of that section have already been incorporated into Section 13-1621 of the *Arizona Revised Statutes Annotated* (Supp. 1969-70) and the dif-

---

The second is the disease-product rule, which declares that the test is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease. Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954).

The third is section 4.01 of the MODEL PENAL CODE (Proposed Official Draft 1962):

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms 'mental disease' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Fourth is England's present test of criminal responsibility set forth in the Homicide Act of 1957, 5 & 6 Eliz. 2, ch. 11, § 2:

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

[50] 98 Ariz. 200, 403 P.2d 521 (1965).

[51] See note 49 *supra*.

[52] 98 Ariz. at 212-13, 403 P.2d at 529.

[53] *Id.*

[54] ARIZ. REV. STAT. ANN. § 13-1621.01 (Supp. 1969-70); *see* text accompanying notes 30-32 *supra*.

[55] ARIZ. REV. STAT. ANN. § 13-1621.01(I) (Supp. 1969-70).

ferences between the two are insignificant.[56]

This leaves only the constitutional power argument which is the weakest link in the court's decision against adoption of the *Model Penal Code* test. The argument is essentially that a judge-made rule which has been in effect for a long period of time has been considered by the legislature and has been adopted sub silentio when other rules have been formulated in the given area. The lack of persuasiveness of such logic was recognized by the court itself in *Stone v. Arizona Highway Commission.*[57] Overruling the doctrine of sovereign immunity in that decision, the court stated:

> We are now convinced that a court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack. This doctrine having been engrafted upon Arizona law by judicial enunciation may properly be changed or abrogated by the same process.[58]

Therefore, it seems that the court either expanded its constitutional powers in *Stone*, or is using a convenient argument to avoid implementing the *Model Penal Code* test of criminal responsibility. It seems highly probable that the latter possibility is the correct one.

M'Naghten was originally implemented by the court,[59] and has been adhered to on the basis of stare decisis.[60] The court recognizes that the *Model Penal Code* offers a better test and the legislature has removed the court's major objections to its adoption. Therefore, the way was open in *Malumphy* and *Makal* for the court to replace the M'Naghten rule. This course should be taken at the next opportunity in order to insure a more just criminal procedure in this state for the mentally ill or defective. Failing this, it will be up to the legislature to correct the deficiency created by the reluctance of the court.

Burden of Proof

The Supreme Court of Arizona, in *State v. Blazak*,[1] reversed the conviction of Mitchell T. Blazak for robbery and assault with intent to

---

[56] ARIZ. REV. STAT. ANN. § 13-1621 (Supp. 1969-70) also incorporates the substance of the provisions of MODEL PENAL CODE §§ 4.03, 4.04, 4.06 (Proposed Official Draft 1962).

[57] 93 Ariz. 384, 381 P.2d 107 (1963).

[58] *Id.* at 393, 381 P.2d at 116; *accord*, United States v. Freeman, 357 F.2d 606, 628 (2d Cir. 1966) (Waterman, J., concurring); Terry v. Commonwealth, 371 S.W. 2d 862, 867 (Ky. 1963).

[59] Lauterio v. State, 23 Ariz. 15, 201 P. 91 (1921).

[60] State v. Schantz, 98 Ariz. 200, 403 P.2d 521 (1965); State v. Crose, 88 Ariz. 389, 357 P.2d 136 (1960); State v. Eisenstein, 72 Ariz. 320, 235 P.2d 1011 (1951); State v. Macias, 60 Ariz. 93, 131 P.2d 810 (1942).

[1] 105 Ariz. 216, 462 P.2d 84 (1969).

commit murder. The trial had been conducted under the provisions of Arizona's newly adopted bifurcated trial statute.[2] At the first trial defendant entered a plea of guilty to the commission of the overt physical acts constituting the crimes charged,[3] and at the second trial, which dealt only with the issue of insanity, defendant waived his right to a jury trial and was tried before the court.[4] The trial judge made a lengthy comment indicating that "he believed the burden was on the defendant to prove insanity beyond a reasonable doubt,"[5] and then ruled that the defendant was sane beyond a reasonable doubt at the time he committed the acts. Defendant was found guilty of both crimes and appealed.

Defendant claimed and the supreme court agreed that it was error for the trial judge to assert that the burden of proof was on the defendant to prove insanity beyond a reasonable doubt. The court based its reversal on the trial court's "basic misconception of the law to be applied," commenting that it was analogous to an improper declaration of the law by a judge in a jury instruction.[6] The court stated that prior to the

---

[2] ARIZ. REV. STAT. ANN. § 13-1621.01 (Supp. 1969-70). The main provisions are:

> A. In any case where the defense of not guilty by reason of insanity is asserted, two trials shall be set unless good cause for a single trial is shown.
>
> B. The first trial shall determine the issue of guilt or innocence and, if appropriate, the degree of the crime. The multiple trial concept shall not affect the traditional burden of proof or the applicability or § 13-131. At the discretion of the court, the jury may be informed that there may be two trials and what issues will be decided at each.
>
> C. If the defendant is found guilty at the first trial, there shall be a second trial following promptly after the first trial. At the second trial, the jury shall consider the defense of insanity and, if appropriate, the defendant's present mental condition with regard to commitment to a mental institution.

There is to be one trial dealing with the issue of the commission of the overt physical acts and, if the defendant is found guilty, there is to be a second trial on the issue of insanity. In this manner all evidence of insanity is theoretically removed from the first trial, thus eliminating confusion and expediting the overall process of determination of guilt.

[3] A defendant under ARIZ. REV. STAT. ANN. § 13-1621.01(L) (Supp. 1969-70) may enter a plea of guilty as to the issue of the first trial "without waiving his right to the second trial."

[4] A defendant under ARIZ. REV. STAT. ANN. § 13-1621.01(L) (Supp. 1969-70) may waive his right to a jury trial at either the first or the second trial "if the state and the court concur."

[5] 105 Ariz. at 217, 462 P.2d at 85.

[6] *Id.* at 218, 462 P.2d at 86. Defendant also contended that the new statute was in violation of the Arizona Constitution "as a legislative usurpation of the rule-making powers granted exclusively to the Supreme court." *Id.* at 217, 462 P.2d at 85. The provisions allegedly violated were ARIZ. CONST. art. 3, and ARIZ. CONST. art. 6, § 5. The court, citing Arizona Podiatry Ass'n v. Director of Ins., 101 Ariz. 544, 422 P.2d 108 (1966), noted that the power to promulgate procedural rules was vested exclusively in the supreme court, and that the legislature should avoid promulgating procedural legislation as it may infringe on the separation of powers. The court also noted, however, that these new procedural rules were necessary to supplement new substantive rights. Since the main function of the legislation was the creation of substantive rights, the court held that "the statutory rules accompanying the newly created statutory rights shall be deemed rules of court and shall remain in effect as such until modified or suspended by rules promulgated by this Court pursuant to Art. 6, § 5 of the Arizona Constitution." 105 Ariz. at 218,

adoption of the bifurcated trial statute it had been "definitely ruled that once the defendant introduced sufficient evidence to raise a doubt as to his sanity under the rule of M'Naghten's Case, the burden shifted to the state to establish sanity beyond a reasonable doubt."[7] The rule as viewed by the trial judge, on the other hand, would impose the entire burden of proof on the defendant. Noting that the bifurcated trial system did not affect the previously existing burden of proof,[8] the court concluded "that the rule of State v. Martin . . . is still the law in Arizona."[9]

The rule of *M'Naghten's Case*[10] was affirmed as the test of legal sanity in Arizona in *State v. Schantz*,[11] where the court determined that in order to be legally insane:

> [a]n accused must have had at the time of the commission of the criminal act:
>
> (1) Such a defect of reason as not to know the nature and quality of the act, *or*
>
> (2) If he did know, that he did not know he was doing what was wrong.[12]

As pointed out in *State v. Griffin*,[13] this definition requires that if the jury be convinced of the existence of one of the elements but not convinced of the existence of the other element, it must return a verdict in favor of the defendant.

According to the *Schantz* court, when insanity is an issue the burden is cast on the state to prove beyond a reasonable doubt "that the defendant knew the nature and quality of his act *and* that he knew that what he was doing was wrong."[14] In light of this, the court held in *State v. Brock*[15] that once the state had the burden of proof, it must satisfy the jury of the nonexistence of both of the elements set forth in *Schantz*. However, the question of what evidence the accused must produce to raise the issue of insanity and thus place the burden on the state was not discussed by the *Schantz* court,[16] which only clarified what the state had to prove once the

462 P.2d at 86. Thus, the court reserved the right to nullify the procedural aspects of the new rules by possible future action.

[7] 105 Ariz. at 218, 462 P.2d at 86, *citing* State v. Martin, 102 Ariz. 142, 426 P.2d 639 (1967).

[8] ARIZ. REV. STAT. ANN. § 13-1621.01(B) (Supp. 1969-70). *See* note 2 *supra.*

[9] 105 Ariz. at 218, 462 P.2d at 86, *citing* 102 Ariz. 142, 426 P.2d 639 (1967) (noted in 10 ARIZ. L. REV. 200 (1968)). For a discussion of the current test of insanity in Arizona, see p. 149 *supra, noting* State v. Malumphy, 105 Ariz. 200, 461 P.2d 677 (1969).

[10] 8 Eng. Rep. 718 (H.L. 1843).

[11] 98 Ariz. 200, 403 P.2d 521 (1965), *cert. denied*, 382 U.S. 1015 (1966).

[12] 98 Ariz. at 207, 403 P.2d at 525.

[13] 99 Ariz. 43, 50, 406 P.2d 397, 401 (1965); *accord*, Judd v. State, 41 Ariz. 176, 16 P.2d 720 (1932).

[14] 98 Ariz. at 207, 403 P.2d at 525.

[15] 101 Ariz. 168, 416 P.2d 601 (1966).

[16] The court did mention that there is an inference that evidence of insanity which the defendant introduces, if not rebutted by "expert medical witnesses" for the state, is true. 98 Ariz. at 213, 403 P.2d at 530. This inference may be defeated by showing that the accused refused to submit to a competent medical examination requested by the state. *Id.* at 214, 403 P.2d at 530.

burden was on it.

State v. Martin affirmed the *Schantz* ruling on the state's burden of proof.[17] In *Martin* the court also addressed itself to what the defendant must do in order to raise the issue of insanity, thereby shifting the burden of proof to the state. The opinion stated that "insanity will be deemed to be 'an issue' once the defendant introduces sufficient evidence to raise a doubt as to his sanity under the rule of M'Naghten's Case."[18] Thus, it appears that the accused need only introduce evidence sufficient to cause the jury to believe that at the time of the crime he may have been suffering from *one* of the defects set forth in *M'Naghten.*[19] In *Martin* the court left the rule incomplete by not addressing itself to what constitutes *sufficient* evidence to shift the burden to the state.

The *Martin* court did note that if the defendant failed to introduce evidence of insanity "the presumption that all men are sane will prevail."[20] The court, however, failed to clarify the operation of this presumption once the defendant introduced evidence sufficient to raise a doubt as to his sanity. By not doing so, the court did not clarify the state's burden. This lack of clarification in *Martin* of the effect of the presumption of sanity coupled with the failure of *Schantz* to state what constitutes evidence sufficient to raise a doubt as to the accused's sanity, establishes only a vauge standard to which the state is bound.

State v. Ganster,[21] decided in 1967, is an illustration of how the court, under this vague standard, can permit the state to easily satisfy its burden of proof. In *Ganster* the evidence which had been introduced by the defendant to raise the issue of insanity was apparently employed by the state to meet its burden of proof.[22] In addition, the court apparently per-

---

[17] The *Martin* court emphasized that the state's burden must be set forth in the conjunctive in any instructions given the jury. 102 Ariz. at 148, 426 P.2d at 645.

[18] *Id.*

[19] Although the accused need only cause the jury to doubt the existence of one of the elements in order to raise the issue, once the defendant does so, it is incumbent upon the state to prove the nonexistence of both of these elements. The definition of legal insanity is in the disjunctive; the state's burden is set forth in the conjunctive. *See* text accompanying note 13 *supra.*

[20] 102 Ariz. at 148 n.5, 426 P.2d at 645 n.5. The court takes this common law presumption from Foster v. State, 37 Ariz. 281, 294 P.2d 268 (1930).

[21] 102 Ariz. 490, 433 P.2d 620 (1967).

[22] *Id.* at 492-93, 433 P.2d at 622-23 (discussion of testimony). The defense introduced testimony of two psychiatrists and the state introduced the testimony of one psychiatrist. The court found that

> while each of the psychiatrists did state that the defendant was apparently *not legally sane* at the time of the commission of the alleged crime; *the time lapse between the act and the examinations,* the brain damage caused by the self-inflicted bullet wound, the motivation to exaggerate symptoms in the face of prospective criminal prosecution, and *the fact that background information for the studies had been obtained only from the defendant and his mother,* were all obvious incidents to these examinations which a jury could justifiably consider. *Id.* at 493, 433 P.2d at 623 (emphasis added).

In this manner the court permitted the jury to consider the defendant's psychiatric evidence in a light favorable to the prosecution, thus bypassing the inference set

mitted the jury to give great weight to the presumption of sanity.[23] By such tactics the court confused the question of whether or not the defendant had properly raised the issue of insanity with the question of whether or not the state had proved sanity beyond a reasonable doubt. The court was thus able to affirm the conviction without stating how the standard had been satisfied.

Then in 1968 the court in *State v. Cano*,[24] relying on *Ganster*, increased the defendant's burden by stating that the defendant must clearly prove one of the defects set forth in *M'Naghten* to cast the burden of proof on the state.[25] The court's statement in *Cano* would in effect require the defendant to prove his case, rather than simply raise a doubt in the jury's mind as *Martin* would require. Such a procedure pays lip service to the state's traditional burden of proof but in reality lessens it considerably.

In both *Ganster* and *Cano* the court affirmed the *Martin* rule. However, in both instances the court applied the rule in an obfuscating manner.[26] Continued application of the vague standard in such a manner

---

forth in *Schantz, see* note 16 *supra*, which would require affirmative medical testimony for the prosecution. In addition, the court allowed the jury to use its evaluation of the defendant when he took the witness stand in determining defendant's sanity at the time of the commission of the criminal acts. Such observation would seem to be relevant only to the issue of present sanity, or competency to stand trial, and not relevant to defendant's mental state at some time in the past.

[23] *Id.* at 491-92, 433 P.2d at 621-22 (evidence possibly insufficient to overcome presumption of sanity). For a discussion of the admissibility and evidentiary value of expert psychiatric testimony, see Allen, *Admission of Psychiatric Evidence*, 8 ARIZ. L. REV. 205 (1966).

[24] 103 Ariz. 37, 436 P.2d 586 (1968).

[25] In discussing the defendant's burden the court stated that

> in order to cast this burden on the state, defendant must establish this defense by a showing of facts. In State v. Schantz . . . this court set forth defendant's duty in this respect as follows: '"[T]o establish a defense on the ground of insanity, *it must be clearly proved that*, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."' 103 Ariz. at 40-41, 436 P.2d at 589-90, *quoting* M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843) (emphasis added by *Cano* court).

[26] The rule in Arizona as to burden of proof would appear to be a strict one and favorable to the defendant. However, this researcher could not find a case, in which a defendant had asserted the defense of insanity, where the court had reversed for the state's failure to carry its burden. *See, e.g.*, State v. Blazak, 105 Ariz. 216, 462 P.2d 84 (1969) (reversed and remanded for improper statement by trial judge); State v. Malumphy, 105 Ariz. 200, 461 P.2d 677 (1969) (conviction affirmed), *noted* p. 149 *infra;* State v. Makal, 104 Ariz. 476, 455 P.2d 450 (1969) (reversed and remanded for admitting improper testimony); State v. Cano, 103 Ariz. 37, 436 P.2d 586 (1968) (conviction affirmed); State v. Ganster, 102 Ariz. 490, 433 P.2d 620 (1967) (conviction affirmed); State v. Martin, 102 Ariz. 142, 426 P.2d 639 (1967) (reversed for failure to permit defendant to take witness stand); State v. McGill, 101 Ariz. 320, 419 P.2d 499 (1966) (reversed and remanded for failure to allow proper testimony); State v. Intogna, 101 Ariz. 275, 419 P.2d 59 (1966) (reversed and remanded for allowing improper psychiatric testimony); State v. Brock, 101 Ariz. 168, 416 P.2d 601 (1966) (reversed and remanded for improper jury instruction); State v. Griffin, 99 Ariz. 43, 406 P.2d 397 (1965) (reversed and remanded for improperly excluding evidence); State v. Schantz, 98 Ariz. 200, 403 P.2d 521 (1965), *cert. denied*, 382 U.S. 1015 (1966) (conviction affirmed); State v. Triplett, 96

might eventually have shifted the ultimate burden of proof.[27] Perhaps this was what the court sought to discourage when in *Blazak* it referred back to *Martin* and did not refer to either *Ganster* or *Cano*.

The *Blazak* decision should put Arizona in a favorable position for compliance with the possible imposition of a new constitutional mandate through a recent United States Supreme Court decision. *In re Winship*[28] possibly imposes on the states, through the fourteenth amendment due process clause, the requirement that the prosecution must prove every necessary element of a crime beyond a reasonable doubt.[29] If this is the proper interpretation to be given *Winship*, then it may become incumbent upon the state to prove beyond a reasonable doubt the requisite mental state where a mental state is necessary to the crime. If proof beyond a reasonable doubt is thus elevated to a constitutional requirement, future attempts by the states to avoid the effect of the requirement by operational modifications such as found in *Ganster* and *Cano* probably will not be tolerated.

The Supreme Court of Arizona decided in *Martin* that once the issue of insanity was raised by the defendant the burden was on the state to prove sanity beyond a reasonable doubt. The defendant had only to

---

Ariz. 199, 393 P.2d 666 (1964) (reversed and remanded for failure to allow change of plea to not guilty); State v. Preis, 89 Ariz. 336, 362 P.2d 660, *cert. denied*, 368 U.S. 934 (1961) (conviction affirmed); State v. Crose, 88 Ariz. 389, 357 P.2d 136 (1960) (conviction affirmed); State v. Reid, 87 Ariz. 123, 348 P.2d 731 (1960) (conviction affirmed); State v. Coey, 82 Ariz. 133, 309 P.2d 260 (1957) (conviction affirmed); State v. Eisenstein, 72 Ariz. 320, 235 P.2d 1011 (1951) (conviction affirmed); State v. Voeckell, 69 Ariz. 145, 210 P.2d 972 (1949) (conviction affirmed); State v. Geurez, 61 Ariz. 296, 148 P.2d 829 (1944) (reversed and remanded for admission of improper psychiatric testimony); State v. Macias, 60 Ariz. 93, 131 P.2d 810 (1942) (conviction affirmed); Brugunder v. State, 55 Ariz. 411, 103 P.2d 256 (1940) (conviction affirmed); Judd v. State, 41 Ariz. 176, 16 P.2d 720 (1932) (conviction affirmed); Foster v. State, 37 Ariz. 281, 294 P.2d 268 (1930) (conviction affirmed); Lauterio v. State, 23 Ariz. 15, 201 P. 91 (1921) (conviction affirmed); Ellias v. Territory, 9 Ariz. 1, 76 P. 605 (1904) (conviction affirmed); Territory v. Davis, 2 Ariz. 59, 10 P. 359 (1886) (reversed and remanded for improperly excluding testimony).

[27] For an illustration of what can happen, *compare* Shepherd, *Not Guilty by Reason of Insanity*, 2 So. CAL. L. REV. 53 (1928), *with* Louisell and Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805 (1961).

[28] 90 S. Ct. 1068 (1970).

[29] The Court makes the following broad statement:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id.* at 1073.

In the discussion of this fourteenth amendment due process requirement, it is interesting to note that the Court draws upon the dissent of Mr. Justice Frankfurter in Leland v. Oregon, 343 U.S. 790, 802-03 (1952). In *Leland* the Court had been confronted with the Oregon requirement that where insanity was a defense the defendant had the burden of proving insanity beyond a reasonable doubt. The Court had refused to apply a constitutional standard in that case. The *Winship* Court also draws upon Davis v. United States, 160 U.S. 469 (1895), another well known insanity case. It is interesting and perhaps of significance that the Court employs these two cases in laying the foundation for the sweeping statement quoted above.

introduce evidence sufficient to raise a doubt as to the existence of one of the defects set forth in the *M'Naghten* definition of insanity. If no such evidence was introduced, the presumption of sanity prevailed. In *Blazak* the court reaffirmed *Martin* and further held that it should not be affected by the operation of the new bifurcated trial system. By not referring to the decisions rendered in the interval between *Martin* and *Blazak*, the court has provided itself with the opportunity to readily comply with the possible imposition of a constitutional requirement.

The Supreme Court of Arizona has thus asserted that under the bifurcated trial concept the burden of raising the issue of insanity rests on the defendant. If the defendant introduces no evidence of insanity, the state may rely on the presumption of sanity. It has not been clearly stated, however, what evidence the defendant must produce to overcome this presumption, nor what weight the presumption is to carry once the defendant raises the issue. In failing to clarify such procedural matters, the court has provided grounds for modification of the respective burdens of the defendant and the state. In light of *In re Winship*, the Arizona court should direct its attention to such matters in order to eliminate the possibility of allowing the state to comply superficially with the applicable burden of proof, while in actuality avoiding its effect.

[EDITOR'S NOTE—In *State v. Shaw*, No. 2088 (Ariz. June 18, 1970), the Supreme Court of Arizona held the bifurcated trial statute unconstitutional on due process grounds. The court directed a return to the original procedure wherein the issues of insanity and guilt are dealt with in one trial. Although worthy of mention, *Shaw* has little effect on the questions raised in the preceding discussion.]

MISDEMEANOR COMPROMISE STATUTE

In *State ex rel. Schafer v. Fenton*[1] the Supreme Court of Arizona indicated the types of situations in which settlement of civil damages could be grounds for dismissal of a misdemeanor prosecution. Section 13-1591 of the *Arizona Revised Statutes Annotated* provides that "[w]hen a defendant is accused of a misdemeanor for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised . . . ."[2] The specific issue before the court was the extent to which the act giving rise to civil liability had to be related to the "act constituting the offense" in order for the misdemeanor to be dismissed.

---

[1] 104 Ariz. 160, 449 P.2d 939 (1969), *aff'g* 7 Ariz. App. 507, 441 P.2d 273 (1968).

[2] ARIZ. REV. STAT. ANN. § 13-1591(A) (Supp. 1969-70). At no time does defendant have a *right* to compromise. The statute says only that the court "may" dismiss the prosecution. At the time the information was filed in *Fenton*, misdemeanors could not be compromised under this section (1) when committed by or upon an officer of justice in the execution of the duties of his office, (2) when committed riotously, or (3) when committed with an intent to commit a felony. ARIZ. REV. STAT. ANN. § 13-1591 (1956), *as amended* ARIZ. REV. STAT. ANN. §

The defendant, Parsons, crashlanded a borrowed airplane. A test for intoxication administered by police revealed a high blood alcohol content. Thereafter, a criminal information was filed against respondent charging him with flying while intoxicated.[3] After Parsons made a settlement with the owner of the aircraft for the damage done to the plane, he successfully petitioned the trial court to exercise its discretion under section 13-1591 and dismiss the criminal information.

In affirming the court of appeals' order to reinstate the information, the supreme court held: "The compromise statute applies only to a specific act which necessarily inflicts injury upon the person or property of a private citizen and at the same time is made punishable by law as a misdemeanor."[4] The court distinguished *State v. Garoutte*[5] in which the compromise of a prosecution for vehicular manslaughter was upheld.[6] The *Fenton* court observed that in *Garoutte* the civil liability and the criminal prosecution "arose out of the specific act for which the defendant was being prosecuted, i.e., the negligent homicide of the deceased."[7] However, "[i]n the instant case the damage to the airplane was only incidental to the commission of the crime and did not constitute any of the elements of the crime."[8]

The California case of *People v. O'Rear*[9] was cited by the *Fenton* court in support of its decision. In *O'Rear* the court held that the prosecution of a defendant who had been charged with failing to stop at the scene of an accident could not be compromised, even after settlement of damages incurred in the accident had been made. The court stated that the California compromise statute[10] should be applied only to "those misdemeanors in which by their very nature there is an overlapping of the civil remedy and the public remedy by way of prosecution for a crime."[11] As in *O'Rear*, the misdemeanor in *Fenton* did not by its very nature create an overlapping civil remedy. The crime of failing to stop at the scene of an accident is similar in this respect to that of flying while intoxicated. In both misdemeanors, other parties "might or might not suffer personal or property damage."[12] For this reason the compromise statutes were not applicable in either case.

It is important to note that *Fenton* appears to render immaterial any

13-1591 (Supp. 1969-70). The amendment added another exception—vehicular manslaughter.

3 ARIZ. REV. STAT. ANN. § 2-204(B) (Supp. 1969-70).

4 104 Ariz. at 162, 449 P.2d at 941.

5 95 Ariz. 234, 388 P.2d 809 (1964).

6 *See* ARIZ. REV. STAT. ANN. §§ 13-456(A)(3)(b) & -457(C)(2) (Supp. 1969-70). Since *Garoutte* was decided, the misdemeanor of vehicular manslaughter has been excepted from the compromise statute.

7 104 Ariz. at 162, 449 P.2d at 941.

8 *Id.*

9 220 Cal. App. 2d 927, 34 Cal. Rptr. 61 (1963).

10 CAL. PENAL CODE §§ 1377-79 (West 1956). The Arizona compromise statute was taken from the California statute.

11 220 Cal. App. 2d at 930, 34 Cal. Rptr. at 63.

12 *Id.* at 931, 34 Cal. Rptr. at 64.

causal connection between criminal acts as a cause and civil damage as an effect. It is probable that the act of flying while intoxicated, which constituted the misdemeanor in *Fenton*, was the proximate cause of the crashlanding which resulted in civil liability. The existence of this causal connection was not sufficient to unite the incidents into one occurrence compromisable under the statute.

The rationale used in *Fenton* in construing section 13-1591 follows that used by most of the state courts which have examined similar statutes.[13] One type of misdemeanor which has been found to be compromisable in other states is assault and battery.[14] Under the *Fenton* rule, assault or battery would also be compromisable in Arizona,[15] since the criminal acts of assault and battery necessarily inflict injury on an individual.

Other types of crimes commonly compromised in other states should also be compromisable in Arizona. The obtaining of money under false pretenses is such a crime.[16] Since by its very nature the criminal act of obtaining money under false pretenses inflicts property damage, it could, if treated as a misdemeanor, be compromised in Arizona under the *Fenton* rule.[17] Other compromisable misdemeanors include malicious mischief,[18] writing a check on insufficient funds,[19] and petty theft.[20] These crimes

---

[13] At least six other states currently have compromise statutes: ALASKA STAT. §§ 12.45.120-.140 (1962); CAL. PENAL CODE §§ 1377-79 (West 1956); GA. CODE ANN. § 27-1701 (1953); N.Y. CODE CRIM. PROC. §§ 663-66 (1958); ORE. REV. STAT. §§ 134.010 to .040 (Supp. 1969); VA. CODE ANN. § 19.1-18 (Supp. 1968). At least two other states had compromise statutes until their recent repeal: No. 427 § 9 [1860] Pa. Laws, *as amended*, No. 1816, § 1, [1949] Pa. Laws (repealed 1965); Title X, ch. VII, §§ 2540-42, [1895] Mont. Laws (repealed 1967).

[14] *See* People v. O'Rear, 220 Cal. App. 2d 927, 930, 34 Cal. Rptr. 61, 63 (1963) (dictum); People v. Bishop, 5 Wend. 111 (N.Y. Sup. Ct. 1830). *See also* No. 427, § 9, [1860] Pa. Laws, *as amended*, No. 1816, § 1, [1949] Pa. Laws (repealed 1965), which specifically included assault and battery as a compromisable action.

[15] *See* ARIZ. REV. STAT. ANN. §§ 13-243 & -244 (1956) (*simple* assault and *simple* battery are misdemeanors).

[16] *See* Rothermal v. Hughes, 134 Pa. 510, 19 A. 677 (1890); Geier v. Shade, 109 Pa. 180 (1885); Orndorff v. Bond, 185 Va. 497, 39 S.E.2d 352 (1946).

[17] ARIZ. REV. STAT. ANN. § 13-312 (Supp. 1969-70) makes obtaining money or goods by false pretenses either a misdemeanor or a felony depending on the sentence handed down. In order to move for dismissal by compromise in this action, therefore, it would be necessary first to make a preliminary motion that the charge be treated as a misdemeanor. If the prosecution and court agreed to reduce the requested sentence to a misdemeanor level, a motion for dismissal on the basis of compromise could then be made.

[18] *See* People v. Bombacie, 17 Misc. 2d 9, 184 N.Y.S.2d 753 (Magis. Ct. 1957). ARIZ. REV. STAT. ANN. § 13-501 (1956) makes malicious mischief a misdemeanor in Arizona.

[19] *See* New York Life Ins. Co. v. Nydes, 2 F. Supp. 381 (W.D. Pa. 1932). Under ARIZ. REV. STAT. ANN. § 13-316(A)(3) (Supp. 1969-70), the crime of writing a check on insufficient funds is a misdemeanor if the amount of the check is $25 or less.

[20] *See* People v. O'Rear, 220 Cal. App. 2d 927, 931, 34 Cal. Rptr. 61, 63 (1963) (dictum); Childs v. State, 118 Ga. App. 706, 165 S.E.2d 577 (1968); Commonwealth *ex rel.* Merritt v. Meneilly (No. 2), 15 Pa. D. & C. 17 (Allegheny County Ct. 1931). ARIZ. REV. STAT. ANN. § 13-663(B) (Supp. 1969-70) designates any theft in the amount of $100 or less as petty theft, except theft of money or property from the person of another or theft of various domesticated animals.

may be contrasted with crimes which have been considered not amenable to compromise, such as speeding,[21] drunken driving,[22] and leaving the scene of an accident.[23] In the latter group, the criminal act can be committed without inflicting personal or property damage on an individual.

Two hypothetical situations will demonstrate how the *Fenton* rule clarifies the meaning of section 13-1591 in difficult cases. In the first case, a man driving down a street swerves into a parked car. The act of reckless driving and the act of damaging the parked car appear inseparable. Yet, a court under *Fenton* should deny a section 13-1591 motion to dismiss reckless driving charges,[24] since the act of reckless driving does not by its very nature involve the act of damaging property. It *sometimes* causes damage to property; however, causal connection alone is not sufficient to render the compromise statute applicable.

In the second situation, a man ruins another man's suit in a fight. Thereafter, an information is filed against the first man for simply battery.[25] According to the *Fenton* rule, the battery charge may be compromised only if the injured party is willing to settle for any personal injuries which were incurred in the battery. If damages for only the suit are settled, a motion to compromise should be denied, since battery does not by its very nature involve property damage.

At least one potential problem under the *Fenton* rule remains: will compromise of a misdemeanor be permitted when the defendant has a complete defense to civil liability, such as consent, so that the victim has not been compensated? Although section 13-1591 provides that a misdemeanor may be compromised only when the injured party has a civil "remedy"[26] and receives "satisfaction,"[27] *Fenton* held that misdemeanors which necessarily inflict injury could be compromised. The court also quoted language from *O'Rear* that a misdemeanor must be one which almost always creates a civil remedy.[28] This possibly indicated that the court considered the recovery of a tangible remedy unnecessary for compromise.

However, counterarguments tend to diminish the acceptability of this interpretation of the *Fenton* holding. The court could reason that a guilty party should not escape criminal punishment under the compromise statute when there are no means of obtaining punitive results through civil action. This argument would be consistent with the policy followed in

---

21 *See* People v. O'Rear, 220 Cal. App. 2d 927, 931, 34 Cal. Rptr. 61, 63 (1963) (dictum).
22 *See* Commonwealth v. Harple, 36 Pa. D. & C. 2d 436 (Lancaster County Ct. 1965).
23 *See* People v. O'Rear, 220 Cal. App. 2d 927, 34 Cal. Rptr. 61 (1963).
24 *See* ARIZ. REV. STAT. ANN. § 28-693 (Supp. 1969-70).
25 *See id.* § 13-244 (1956).
26 *Id.* § 13-1591(A) (Supp. 1969-70).
27 *Id.* § 13-1591(B).
28 104 Ariz. at 162, 449 P.2d at 941.

other jurisdictions, but as yet not mentioned in Arizona, of permitting compromise only when the interests of the state or society have been satisfied.[29] It could be argued, for example, that the only state interest involved in the crime of assault and battery is that of securing punishment. When there is a civil remedy available to the injured party, that state interest is satisfied. However, where there is no civil remedy available, the state interest has not been satisfied and compromise should not be permitted. Moreover, in light of the general tone of the *Fenton* decision and the view expressed in *Garoutte* regarding the concept of compromise as inherently inequitable,[30] it seems most probable that the court will not permit compromise where a defense bars civil liability and the injured individual has received no compensation.

NARCOTICS—FORFEITURE OF VEHICLES

In *In re One 1965 Ford Mustang*,[1] the Supreme Court of Arizona limited the extent to which an owner would have his automobile forfeited because it was used in transporting narcotics. The court held that the forfeiture statutes, Sections 36-1041 to -1046 of the *Arizona Revised Statutes Annotated* (1956),[2] could not be invoked unless the owner: (1) had some connection with the unlawful act; or (2) intended to permit the automobile to be used by a third person in the commission of the unlawful act; or (3) knew the automobile was to be so used.

---

[29] *See, e.g.*, People v. Borregine, 52 Misc. 2d 996, 276 N.Y.S.2d 734 (Syracuse City Ct. 1967); Geier v. Shade, 109 Pa. 180 (1885); Cook v. Commonwealth, 178 Va. 251, 16 S.E.2d 635 (1941).

This rule has long been used by courts to limit strictly those types of misdemeanors which may be compromised. The courts have used this rule when dealing with a misdemeanor which, though technically compromisable under the statute, seems not proper for compromise to the court. *See, e.g.*, Pearce v. Wilson, 11 Pa. 14, 2 A. 99 (1885), where the court refused to compromise an embezzlement action not because it did not create a civil remedy, as statutorily required, but because it involved, in part, important state interests. The court said it would not permit these interests to be extinguished by private settlement. Thus, the rule worked to eliminate compromise even in technically compromisable actions.

Arizona has not as yet adopted the rule permitting compromise only where the state has suffered no injury, and until it does embezzlement of an amount not in excess of $100, a misdemeanor under ARIZ. REV. STAT. ANN. § 13-688 (1956), should be compromisable.

[30] 95 Ariz. at 237, 388 P.2d at 811. The validity of section 13-1591 measured by the equal protection clause of the fourteenth amendment has not been established to date.

---

[1] 105 Ariz. 293, 463 P.2d 827 (1970), *rev'g* 10 Ariz. App. 45, 455 P.2d 995 (1969).

[2] Section 36-1041 reads:

> The interest of the legal owner or owners of record of any vehicle used to transport unlawfully a narcotic drug, or in which a narcotic drug is unlawfully kept, deposited or concealed, or in which a narcotic is unlawfully possessed by an occupant, shall be forfeited to the state.

A state undercover agent asked Michael Lewis to obtain some marijuana for him. The following evening Michael, driving his mother's car, met the agent at a shopping center. The agent paid Michael, and a short time later Michael returned with the marijuana. The state subsequently filed an action seeking to forfeit the car, alleging that it had been unlawfully used to transport marijuana.

At trial, Mrs. Lewis denied any knowledge that her car was being used for this purpose, or that her son was engaged in the use or transportation of marijuana. She further testified that she had permitted her son to take the car that evening for the express purpose of traveling to a library. The trial court denied forfeiture on the ground that since the forfeiture statutes did not give an innocent owner the opportunity to avoid forfeiture, the statutes were unconstitutional in that they deprived an owner of property without due process of law.

The court of appeals reversed,[3] holding that the absence of a provision enabling subjectively innocent owners to avoid forfeiture did not render the statutory forfeiture proceeding unconstitutional. The court reasoned that a forfeiture action is an action solely in rem and directed only against the property involved. Since knowledge of the illegal use of one's property would be relevant only in a criminal or in personam proceeding, the property owner's state of mind is irrelevant.[4]

On appeal the supreme court reversed. The court recognized that a literal reading of section 36-1041 would permit forfeiture of the automobile of an innocent owner. The court noted that such a construction would permit the forfeiture of a vehicle even in the extreme situation where a third party entered a parking lot and placed narcotics in the automobile of an individual who had no knowledge of or connection with the illegal act.[5] Such a construction, the court said, would in effect make the statute unreasonable and arbitrary and, therefore, of questionable constitutional validity.[6] Recognizing its duty to give statutes a meaning that will render them constitutional if it can reasonably be done,[7] the court chose to construe the statute in a manner that would avoid questions of due process.

---

[3] *In re* One 1965 Ford Mustang, 10 Ariz. App. 45, 455 P.2d 995 (1969).

[4] *Cf.* Van Oster v. Kansas, 272 U.S. 465 (1926); *accord*, United States v. One 1951 Oldsmobile Sedan, 135 F. Supp. 873 (E.D. Pa. 1955); United States v. Childs, 43 F. Supp. 776 (N.D. Ga. 1942). *See also* People v. One 1948 Chevrolet Convertible Coupe, 45 Cal. 2d 613, 290 P.2d 538 (1955).

[5] 105 Ariz. at 297, 463 P.2d at 831, *citing* Hoover v. People, 68 Colo. 2d 249, 187 P. 531 (1920).

[6] 105 Ariz. at 300, 463 P.2d at 834.

[7] *Id. See* State v. A.J. Bayless Markets, Inc., 86 Ariz. 193, 342 P.2d 1088 (1959), in which the court implied that where different constructions of a statute are possible, it is the court's duty to construe it in such a manner that it will be constitutional. *Accord*, McManus v. Industrial Comm'n, 53 Ariz. 22, 28, 85 P.2d 54, 56 (1938). *Cf.* State v. Locks, 91 Ariz. 394, 372 P.2d 724 (1962), where the supreme court examined the constitutional necessity of scienter in construing obscenity laws.

The court first examined the issue whether a forfeiture proceeding is an action in rem, directed solely against the property involved, or a proceeding of a criminal nature.[8] The court relied on two United States Supreme Court cases for the proposition that this type of forfeiture proceeding is quasi-criminal, and thus forfeiture of an automobile is punishment for a criminal offense.[9] Because of this penal nature, the court then held that the Arizona criminal intent statute was applicable to section 36-1041.

> In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused.[10]

The requirement of criminal intent, the court stated, would make it essential that the owner of the vehicle must either intentionally permit a third person to use the automobile for transportation of narcotics, or have connection with or possess knowledge of the illegal activity. Since the inquiry must include the element of criminal intent, the case ceases to be one strictly in rem, and the personal knowledge of the individual whose property is sought must be established.[11]

Arizona was not the first state to rule that the owner's knowledge of the criminal activity involved is an essential element for the forfeiture of his automobile.[12] The Supreme Court of Illinois, in arguing that a statute must be given a reasonable and commonsense interpretation, said:

> [S]erious as the evils of the narcotic traffic undoubtedly are, it is not to be supposed that the legislature intended a forfeiture unless the owner has some connection therewith or was otherwise at fault in some respect.[13]

Arizona, by refusing to follow the decisions which interpret similar forfeiture statutes as validily imposing a type of strict liability, has realistically elevated substance over form, and now protects those whose sole

---

[8] Forfeiture statutes have been classified into two categories by the courts. The first type provides for loss of property that is contraband per se, such as heroin. These statutes have been held to be constitutional because the mere possession of the article is itself a crime. *See, e.g.*, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). The second category includes those statutes which provide for the forfeiture of derivative contraband. This may be property, such as an automobile, which is used to transport contraband per se. It is with regard to this latter type of statute that the issue of constitutionality usually arises. *See In re* One 1965 Ford Mustang, 105 Ariz. 293, 296, 463 P.2d 827, 830 (1970).

[9] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Boyd v. United States, 116 U.S. 616 (1885).

[10] ARIZ. REV. STAT. ANN. § 13-131 (1956).

[11] 105 Ariz. at 299, 463 P.2d at 833.

[12] *See, e.g.*, People v. One 1952 Chevrolet Bel Aire, 128 Cal. App. 2d 414, 275 P.2d 509 (1954). For an interesting construction of a forfeiture statute in favor of an innocent owner of personal property, see State v. Washington, 172 So. 195 (La. App. 1937).

[13] 1957 Chevrolet v. Division of Narcotic Control, 27 Ill. 2d 429, 433, 189 N.E.2d 347, 349 (1963).

misdeed is a misplaced confidence in others.[14] The innocent driver who picks up a hitchhiker possessing marijuana, or the visitor to Mexico who is ignorant of the fact that his vehicle is being used to smuggle, are both afforded a greater degree of protection in Arizona than in jurisdictions where the personal guilt of the owner of the automobile is irrelevant.[15]

Ford Mustang, by declining to impose strict liability, has raised at least two otherwise latent issues. The first issue which was not considered concerns the question of the burden of proof. In Arizona, in order to avoid forfeiture of his interest, a lienholder or mortgagee must prove that the interest was created only after a reasonable investigation into the danger that the possessor might use the vehicle to transport narcotics.[16] Such interests have frequently been forfeited because the lienholder or mortgagee failed to sustain the burden of proof that he had no knowledge or notice of the illegal use.[17]

---

[14] The situation in People v. One 1948 Chevrolet Convertible Coupe, 45 Cal. 2d 613, 290 P.2d 538 (1955), is similar to that in the *Ford Mustang* case. The mother had entrusted the automobile to her son, who had full knowledge that the passenger riding with him possessed narcotics. Justice Traynor held that the automobile was subject to forfeiture because the person to whom the owner had entrusted the car had knowledge of the transportation of the narcotics, and that it was not necessary for the owner to know of the illegal use. Moreover, by entrusting the vehicle to her son, the mother accepted the risk that he would use it to transport contraband. Interestingly, the 1967 California legislature repealed the forfeiture statute upon which Justice Traynor's decision was based. *In re* One 1965 Ford Mustang, 105 Ariz. 293, 297, 463 P.2d 827, 831 (1970).

[15] Note, *Forfeiture of Property Used in Illegal Acts*, 38 NOTRE DAME LAW. 727, 738 (1962-63):

> [Drastic] changes in such long established practices as forfeiture do not come easily and the present system has certain advantages for the government and its enforcement officers. Recognizing forfeiture as a criminal punishment would increase the difficulties of enforcing forfeitures . . . . Prohibiting forfeiture of the property of innocent persons might also cut down considerably on the amount of revenue presently realized from forfeiture proceedings. . . . To continue the present practice of forfeiting property of innocent owners because it produces revenue, and makes enforcement easier would, however, be a perversion of the real purpose of forfeiture laws.

See also Note, *Forfeiture of Innocent Owner's Automobile to the State is Constitutional*, 36 TEX. L. REV. 220 (1957-58).

[16] ARIZ. REV. STAT. ANN. § 36-1045 (1956):

> A claimant of any right, title or interest in the vehicle may prove his lien, mortgage or conditional sales contract to be bona fide, and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser, and without knowledge that the vehicle was being, or was to be used for the purpose charged . . . .

A similar statute was interpreted in Strickland Motors, Inc. v. State, 81 Ga. App. 824, 826, 60 S.E.2d 254, 257 (1950), where the court stated:

> It would seem that the provisions of this act cast upon the bonafide lienholder the burden to show, in order that his lien in said property is fully protected, that the illegal use of the property was without [his] knowledge, connivance, or consent, express or implied . . . .

Cf. Annot., 14 A.L.R.3d 221, 227 (1967).

[17] *E.g.*, Snyder v. State, 247 Ala. 278, 24 So. 2d 266 (1945), where the court stated that in a forfeiture proceeding the burden was upon the claimant to establish his lack of knowledge of the illegal use of the forfeited motor vehicle by a third party. *Accord*, One Buick Automobile v. State, 204 Ala. 428, 85 So. 739 (1920).

This raises the question of whether the state or the owner of a vehicle has the burden in a forfeiture proceeding of proving the presence or absence of the requisite criminal intent. Since the statute as drafted makes no mention of such intent, it provides no guidance as to the burden of proving intent or the lack thereof. The court's opinion, however, intimates that the burden may be on the registered owner when, in response to the trial court's assertion that the statute did not give the owner *an opportunity to avoid forfeiture,* the court stated "we do no hold that the owner does not have such right."[18]

In support of this intimation, it could be argued that, relying on the United States Supreme Court's characterization of forfeiture proceedings as only *quasi*-criminal,[19] the allocation of the burden of proof is not governed by the usual criminal standard. However, such a distinction seems untenable in view of the end result of such proceedings and it would seem that the state, and not the registered owner of the vehicle should have the burden of proving beyond a *reasonable doubt* that the registered owner of the vehicle possessed the necessary mens rea to be held criminally responsible.[20]

A related issue which the court did not clarify involves the substantive form of the required scienter. The Arizona criminal intent statute provides that "[i]n every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence."[21] The *Ford Mustang* court's singular requirement of actual knowledge may be the result of mere oversight or a careless choice of words.[22] Dicta in the opinion indicates, however, that mere negligence may also satisfy the requirement for mens rea.[23]

A number of jurisdictions have held vehicles subject to forfeiture

---

[18] The opinion of the trial court as stated in *In re* One 1965 Ford Mustang, 105 Ariz. 293, 299, 463 P.2d 827, 833 (1970).

[19] Boyd v. United States, 116 U.S. 616 (1882).

[20] *See In re* Winship, 90 S. Ct. 1068 (1970), in which the United States Supreme Court held that the due process clause of the fourteenth amendment requires that the conviction of a criminally accused be based upon proof of guilt beyond a reasonable doubt. *Cf.* State v. Cutshaw, 7 Ariz. App. 210, 221, 437 P.2d 962, 973 (1968).

[21] ARIZ. REV. STAT. ANN. § 13-131 (1956) (emphasis added).

[22] The actual language is less then enlightening on this point. The court first hold[s] that an automobile may not be forfeited . . . unless the owner had some *connection* with the unlawful act, or *intended* to permit the automobile to be used by a third person in the commission of the unlawful act, or had *knowledge* it was to be so used. 105 Ariz. at 300, 463 P.2d at 834 (emphasis added).

The court goes on to note that there was "no evidence . . . circumstantial or otherwise . . . that she had any knowledge *or reason to believe* that the boy would use the automobile for an illegal purpose . . . ." *Id.* at 301, 463 P.2d at 835 (emphasis added).

[23] *Id.* at 298, 463 P.2d at 832. In this regard it should be noted that although criminal intent must ordinarily exist to support a conviction of a crime, the legislature may enact a law making negligent conduct a crime in the absence of criminal intent. *See* Borderland Constr. Corp. v. State, 49 Ariz. 523, 68 P.2d 207 (1937); *accord,* Fitzpatrick v. Board of Medical Examiners, 96 Ariz. 309, 394 P.2d 423 (1964).

merely because the owner failed to show that, by the exercise of reasonable diligence, it would have been impossible for him to have obtained knowledge of the allegedly illegal activity.[24] The fact that a bailee of a vehicle has a general reputation for violating the state's contraband liquor laws may constitute sufficient notice to the bailor of the danger that his vehicle might be used illegally.[25]

It is possible that in the future the Supreme Court of Arizona will be faced with a situation in which an owner, although unaware of the illegal activity, was exposed to facts that would or should apprise him of the possible misuse of his vehicle. Since *Ford Mustang* incorporates the criminal intent statute into the forfeiture statute, and since the intent statute includes criminal negligence, it is likely that the court will find that the above facts fall within the principle of *Ford Mustang* and hold such an owner subject to forfeiture proceedings.

SENTENCING—APPLICATION OF DOUBLE-TIME STATUTE

An Arizona prisoner may be granted three types of credit on his sentence. Normal or "flat" time gives the prisoner one day's credit for each day served.[1] Arizona's statutory time or "copper time" statute allows the prisoner extra credit of from two to five months per year for time served while conforming in all respects to the prison rules.[2] The double time or two-for-one statute allows a prisoner two days credit for every day served performing certain types of jobs involving confidence and trust.[3]

---

[24] Snyder v. State, 247 Ala. 278, 24 So. 2d 266 (1945). *See also* Vance v. State, 130 Miss. 251, 93 So. 881 (1922).

[25] *See, e.g.*, May v. State, 211 Ala. 449, 100 So. 780 (1924), in which the claimant failed to make any inquiry as to the character, habits, or reputation of the automobile purchasers with respect to their illegal traffic in the transportation of liquors.

---

[1] ARIZ. REV. STAT. ANN. § 13-1652 (1956):

> The term of imprisonment fixed by the sentence commences to run only upon actual delivery of defendant at the place of imprisonment, or from the time fixed by the court as the time when the term of imprisonment begins. If, thereafter, during such time, the defendant by legal means is temporarily released from the imprisonment and subsequently returned thereto, the time during which he was at large shall not be computed as part of the term.

[2] ARIZ. REV. STAT. ANN. § 31-251(B) (1956):

> Every prisoner faithfully performing such labor and conforming in all respects to the rules, or if unable to work, but complying in all respects to the rules, shall be allowed, if a first offender, from the minimum term of his sentence, or, if a second offender or more, from the maximum term of his sentence, a deduction of two months in each of the first two years, four months in each of the next two years, and five months in each of the remaining years of the term.

[3] ARIZ. REV. STAT. ANN. § 31-252(A) (1956):

> A prisoner in the state prison, while working on the public highways

Prior to the decisions of *Walsh v. State ex rel. Eyman*[4] and *State v. Rhodes*,[5] a prisoner sentenced by an Arizona court but incarcerated in another jurisdiction could receive none of these credits. A state prisoner in an Arizona county jail, awaiting trial on other charges, was allowed "flat" time credit on his sentence in some cases, but even then he could not be given "copper time" or "two-for-one" credit because of the belief that these credits could be earned only while serving in the Arizona State Prison.[6]

The question raised in *Walsh*—whether an Arizona prisoner could receive credit on his sentence for the time spent in the custody of California authorities—was one of first impression in this jurisdiction. The Supreme Court of Arizona held that the petitioners, having been extradited from this state to stand trial in California after their sentences had begun to run, were entitled to receive "flat" time credit for the time spent in California. There were three reasons why the court construed the "flat" time statute to allow credit for the time spent in the custody of another jurisdiction. First, it was the court's belief that the governor did not have the power to increase the punishment of a prisoner after his sentence had been imposed. By not giving credit for the time spent in California, the petitioners' sentences would, in effect, be increased because on return from California their release date would be postponed by the number of days necessary to make up for the "dead" time spent in California. Next, the court felt there were strong policy reasons for giving credit for the time. For example, one purpose of extradition was found to be the promotion of prison morale by allowing the prisoner to answer pending prosecutions in other jurisdictions. If the prison term was increased as a result of extradition, the court believed much of the morale benefit would be lost. Finally, the court agreed with the holding of the Supreme Court of Minnesota that a prisoner should be credited for all the time which "he was by law restrained of his liberty and confined in quarters not of his choosing."[7]

The court, noting that all three sentencing accreditation statutes would have to be considered in arriving at the amount of credit given for time served out-of-state, further held that "copper time" credit would also be given, while "two-for-one" credit was not applicable to the facts of the case. The court reasoned that "copper time" credit would be given simply

---

or the prison farm as a trusty outside the prison walls and without requiring armed guards, or performing any other assignment of confidence and trust either within or without the prison walls, shall be allowed double time while so employed, and each day so employed shall be counted as two days in computing time on his sentence which shall be deducted, if a first offender, from the minimum term of his sentence, or, if a second offender or more, from the maximum term of his sentence.

[4] 104 Ariz. 202, 450 P.2d 392 (1969).

[5] 104 Ariz. 451, 454 P.2d 993 (1969).

[6] OP. ATT'Y GEN. 83 (1965).

[7] State *ex rel.* Siehl v. Jorgenson, 176 Minn. 572, 574, 224 N.W. 156, 157 (1929).

for good conduct, but that "two-for-one" credit would not be applicable because a prisoner could not be performing an assignment of confidence and trust with respect to his Arizona imprisonment while in the custody of authorities of another state.

The related issue concerning the validity of concurrent out-of-state sentences was resolved in *Rhodes*. The court there held that an Arizona sentence could, at the discretion of the sentencing court, be made to run concurrently with a sentence imposed by the court of another state. The court found that Rule 339 of the *Arizona Rules of Criminal Procedure*[8] was intended to allow a court to impose a sentence to run concurrently with a prior sentence of another court.[9] The court further decided that Section 13-1652 of the *Arizona Revised Statutes Annotated* permits a court to allow the sentence to begin before delivery to the Arizona State Prison—even while the prisoner is incarcerated in another state. The decision is apparently based upon the rule in California where Section 669 of the *California Penal Code* has been interpreted to allow California courts such discretion.[10]

The *Rhodes* decision is compatible with the American Bar Association's proposal concerning the desirability of having separate state sentences served concurrently under one correctional authority.[11] The proposal is based upon the finding that a failure to integrate prison sentences of different states prevents a consistent treatment program during confinement.

The ABA's proposed steps to implement prison term integration include legislative acts requiring sentencing courts to consider all sentences imposed by other states, and a directive from the legislature to prison authorities requiring an automatic credit against the maximum term of an in-state sentence for all time served in an out-of-state institution after the commission of the offense. The legislative acts requiring states to consider out-of-state sentences would ideally provide:

> (i) The court should not be empowered to impose a sentence which when added to the out-of-state sentence would exceed any limitations which would be in effect had all of the offenses occurred within the state of the sentencing court;
>
> (ii) The court should be authorized to impose a sentence to run concurrently with out-of-state sentences, even though the time will be served in an out-of-state institution.[12]

---

[8] ARIZ. R. CRIM. P. 339:

> When the defendant has been convicted of two or more offenses charged in the same indictment or information, the terms of imprisonment shall be served concurrently unless the court expressly directs that they or some of them be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment or information shall be served consecutively unless the court expressly directs that they or some of them be served concurrently.

[9] *See* Odekirk v. Ryan, 85 F.2d 313, 315 (6th Cir. 1936).

[10] *See In re* Riddle, 240 Cal. App. 2d 707, 49 Cal. Rptr. 919 (1966).

[11] ABA INSTITUTE OF JUDICIAL ADMIN., SENTENCING ALTERNATIVES AND PROCEDURES § 3.5(a) (Tent. Draft 1967).

[12] *Id.* § 3.5(b).

The holdings of the Arizona court in *Walsh* and *Rhodes* would be classified by the ABA as unilateral steps which may be taken by courts before legislative action. These steps move Arizona towards what the ABA feels the practice should be. Under common law, multiple sentences are presumed to be concurrent unless the judge imposing the sentence states otherwise.[13] However, statutes in many jurisdictions have changed this presumption and do not allow a subsequent sentence to be imposed to run concurrently with a former sentence.[14] A number of other statutes follow the common law rule and leave the nature of the sentence to the discretion of the sentencing judge, but most do not expressly provide for consideration of out-of-state sentences.[15]

Taken together, *Rhodes* and *Walsh* have substantially altered sentencing administration in this state. These decisions allow prisoners to receive Arizona sentences which run concurrently with sentences they are presently serving out-of-state, as well as "flat" time and "copper time" credit for time spent in another jurisdiction's custody after sentencing in Arizona.

Given the underlying reasons for the court's extension of the "copper time" statute in *Walsh*, it follows that under the proper circumstances—for example, if an inmate is serving in a position of confidence and trust—the "two-for-one" statute should be extended to prisoners either in custody out-of-state on extradition or serving Arizona sentences concurrently out-of-state. The purpose of both statutes is to encourage prisoners to obey the rules and work faithfully.[16] This purpose should not differ when a prisoner is incarcerated in another state. Good-time deductions are given to prisoners serving their sentences in Arizona as a matter of right.[17] If this right is extended to some out-of-state situations, there is no apparent reason why it cannot be extended to other similar situations.

This interpretation has presumably been adopted by the State Department of Corrections.[18] The prison officials are now recomputing the sentences of several inmates at Arizona State Prison with a view toward granting them not only "copper time" but also "two-for-one" credit for the time served in foreign institutions conforming to the rules and performing "two-for-one" type jobs.[19]

---

[13] United States v. Daugherty, 269 U.S. 360 (1926).

[14] *See, e.g.*, MISS. CODE ANN. § 2567 (1956); MO. REV. STAT. § 222.020 (1959); MONT. REV. CODES ANN. § 94-4761.1 (Supp. 1967); UTAH CODE ANN. § 76-1-33 (1953).

[15] *See, e.g.*, ALASKA STAT. § 11.05.050 (1962); ARK. STAT. ANN. § 43-2312 (1964); N.M. STAT. ANN. § 40A-29-10 (Supp. 1969); OHIO REV. CODE ANN. § 2941.43 (Supp. 1970); PA. STAT. ANN. tit. 19, § 894 (1964); R.I. GEN. LAWS ANN. § 12-19-5 (1956).

[16] *See* Beaty v. Shute, 54 Ariz. 339, 95 P.2d 563 (1939).

[17] *See* Watson v. Industrial Comm'n, 100 Ariz. 327, 414 P.2d 144 (1966); Orme v. Rogers, 32 Ariz. 502, 260 P. 199 (1927).

[18] Wexler, *Counseling Convicts: The Lawyer's Role in Uncovering Legitimate Claims*, 11 ARIZ. L. REV. 629, 635 n.34 (1969).

[19] *See* case files UA-1969-45, UA-1969-173, Post-Conviction Legal Assistance Clinic, College of Law, University of Arizona, Tucson, Ariz.

Although the prison administration is liberally interpreting the decisions of *Walsh* and *Rhodes*, several problems still remain to be solved. One such problem not mentioned in either decision is that created by detainers.[20] Detainers are usually filed for one of two reasons: to insure that the prisoner will be available for trial in another jurisdiction, or to insure that the prisoner will serve his entire sentence in those cases where the detaining state's sentence is longer than the concurrent sentence of the state of incarceration. Detainers should be used only when necessary. When they are used, the treatment of the prisoner should not change in most cases, although at the present time a detainer has many undesirable effects on the prisoner.

> He may be held under maximum security, and may be denied many opportunities which other prisoners have: for example, transfer to a minimum security area, the privilege of becoming a trusty, or assignment to any job which involves some degree of trust.[21]

Prison officials reason that a prisoner is a greater escape risk because of the detainer, but the ABA finds this argument to be overworked and unpersuasive.[22] It has been suggested that further imprisonment, often the result of the detainer, may undo whatever the institution has been able to accomplish in rehabilitation.[23]

Some of these problems could be alleviated by cooperation between judges and prison officials of different jurisdictions.[24] When prisoners are faced with sentences in different jurisdictions it would be possible for one judge to suspend sentence in view of the time served in the other jurisdiction.[25] The parole boards could also do a great deal to relieve the prisoner's uncertainty over detainers. It has been proposed that state parole boards may release a prisoner on parole to answer a warrant when a detainer is filed.[26]

The decisions of *Walsh* and *Rhodes* bring Arizona into the class of progressive states in the area of sentencing administration. In this area the consequences are of the highest order. If the sentence is too severe

---

[20] State v. Milner, 6 Ohio Op. 2d 206, 207, 149 N.E.2d 189, 190 (Montgomery C.P. 1958), where the court defines a detainer as "an informal demand by one exercising public authority for the possession of a person already in lawful custody of another."

[21] Note, *Detainers and the Correctional Process*, 1966 WASH. U.L.Q. 417, 418-19 (footnotes omitted).

[22] SENTENCING ALTERNATIVES AND PROCEDURE, *supra* note 11, at 186.

[23] R. CALDWELL, CRIMINOLOGY 686 (2d ed. 1965).

[24] Prisoners currently out-of-state with Arizona detainers should receive "two-for-one" credit on their concurrent Arizona sentences if in "two-for-one" type jobs. Giving this credit, however, would require the periodic recomputation of the prisoners' Arizona sentences to insure that the proper credit is given and that detainers are lifted if the sentences are reduced to the point where they are no longer necessary.

[25] Perry, *Effect of Detainers on Sentencing Policies*, 9 FED. PROB. 11, 12 (July-Sept. 1945).

[26] S. RUBIN, THE LAW OF CRIMINAL CORRECTIONS 423 (1963).

for the crimes involved, and this can be the result when good-time statutes are not given liberal interpretation, "it can reinforce the criminal tendencies of the defendant and lead to a new offense by one who otherwise might not have offended so seriously again."[27] The progress should not end with credit for time served in other jurisdictions. Administrative initiative, such as that evidenced by the Arizona State Prison, should continue in the areas of detainer use and parole administration. If such practices are changed, rehabilitation of prisoners sentenced in Arizona will likely continue to improve.

PUBLIC OFFICIALS

QUO WARRANTO

Prior to the 1968 general election the state auditor of Arizona was a constitutional office.[1] At that election the legislature referred to the electors two proposed constitutional amendments, both intended to amend Article 5, Section 1, of the Arizona Constitution. Proposition No. 108 was designed to abolish the office of state auditor[2] and Proposition No. 104 sought to increase the constitutional terms of office for the executive department from two to four years.[3] However, the latter amendment included the office of state auditor since it was an existing office at the time of referral. Both resolutions carried by a majority of the votes cast, but Proposition No. 104 received 266,035 affirmative votes and Proposition No. 108 received 206,432. On December 4, 1968, both amendments were declared to be law by proclamation of the governor.

At the same general election the respondent, Jewel W. Jordan, was reelected to the office of state auditor. Shortly thereafter the attorney general, on behalf of the state, initiated an action in quo warranto, asking

[27] SENTENCING ALTERNATIVES AND PROCEDURE, *supra* note 11, at 1.

[1] ARIZ. CONST. art. 5, § 1, which in pertinent part provides:
The Executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for two years beginning on the first Monday of January next after his election.

[2] Proposition No. 108 read in its pertinent part:
Section 1. The Executive Department shall consist of Governor, Secretary of State, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for two years beginning on the first Monday of January after his next election.

[3] Proposition No. 104 read in its pertinent part:
Section 1. The Executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for four years beginning on the first Monday of January, 1971 next after the regular general election in 1970.

the Supreme Court of Arizona, in the exercise of its original jurisdiction,[4] to adjudge the respondent not entitled to hold the office of state auditor, and to enter a judgment of ouster against her. On December 31, 1968, in *State ex rel. Nelson v. Jordan* (hereinafter *Jordan # 1*),[5] the court, by a vote of 3 to 2, entered judgment that Proposition No. 108 was not adopted as a constitutional amendment and that the respondent was legally entitled to hold the office of state auditor for the two years for which she was elected.

Mrs. Jordan took her oath of office on January 6, 1969, and continued the duties of the state auditor. Three days later, the attorney general filed in the supreme court a motion for rehearing asking for a reconsideration on the merits of the state's position. In *State ex rel. Nelson v. Jordan*,[6] (hereinafter *Jordan # 2*) a reconstituted court[7] granted a rehearing and the earlier judgment was vacated. The court held the respondent was entitled to discharge the duties of state auditor as a de facto officer[8] until a commissioner of finance had been appointed and had qualified for office,[9] at which time a judgment of ouster would issue to the respondent.

Article 4 of the Arizona Constitution provides *inter alia* that when two or more amendments are approved by the people at the same election, the amendment "receiving the greatest number of affirmative votes shall prevail in all particulars as to which there is conflict."[10] The 3 to 2 split in *Jordan # 1* centered on the justices' differing conclusions as to whether the two amendments were in conflict. The original majority determined that irreconcilable conflict existed. They noted the impossibility of determining the will of the people as expressed in the vote totals because of the confusion necessarily resulting from having overlapping amendments on the

---

[4] ARIZ. CONST. art. 6, § 4, which in pertinent part provides: "The Supreme Court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers."

[5] 104 Ariz. 90, 449 P.2d 18 (1968).

[6] 104 Ariz. 193, 450 P.2d 383, *appeal dismissed*, 90 S. Ct. 24 (1969).

[7] *Id.* at 197 n.1, 450 P.2d at 387 n.1 (1969) (dissenting opinion):

> The present minority was joined then by Mr. Justice Bernstein in the majority opinion filed on Dec. 31, 1968. Since then, but prior to the filing of the petition for rehearing, Mr. Justice Bernstein has been replaced on this Court by Mr. Justice Hays who joins with the former minority in the present judgment.

[8] To express the reasoning underlying this procedural decision, the majority cited language used by the Supreme Court of Appeals of West Virginia in Lively v. Board of Educ., 115 W. Va. 314, 316, 175 S.E. 784, 785 (1934):

> It is quite generally recognized that when a public office is abolished by a duly constituted authority, the incumbent thereof ceased to be an officer, unless it is necessary to hold the persons assuming to act to be de facto officers to prevent great public injury.

See also Rogers v. Frohmiller, 59 Ariz. 513, 130 P.2d 271 (1942).

[9] Ch. 89, [1968] Ariz. Laws provided for a commissioner of finance to assume the duties of the state auditor. Section 100 of the act provided: "This act shall not become effective until January 2, 1969 and not until the Constitution of Arizona is amended by vote of the people abolishing the office of state auditor."

[10] ARIZ. CONST. art. 4, pt. 1, § 1, ¶ 12.

ballot.[11] Furthermore, the justices of that majority refused to engage in "judicial legislation of the worst sort" by "picking and choosing" phrases in an attempt at reconciling the amendments.[12] Article 4 of the constitution was declared controlling, and Proposition No. 104, having received the greater number of affirmative votes, was deemed to prevail.

The dissenting justices in *Jordan # 1* concluded that the amendments were not in conflict, reasoning that "while Art. V, §1 consists of one sentence, structurally it has two distinct clauses, hence it is divisible into two severable parts."[13] They determined the legislative purpose in submitting two propositions was to allow the people to amend each clause individually. In this manner the electorate was permitted to decide separately "whether the terms of the executive department would be increased to four years and whether the office of State Auditor would be abolished."[14] On the basis of this determination, the dissenting justices concluded that a reasonable interpretation was possible under which both amendments could be enforced without creating a conflict.

In *Jordan # 2*, the original majority and dissenting justices exchanged positions, with the "new majority" adopting the view of the original dissent and the earlier majority opinion becoming the basis of the new expression of dissent. Relying on the rule that where "separate parts of a constitution are seemingly in conflict, it is the duty of the court to harmonize both so that the constitution is a consistent workable whole,"[15] the three justices comprising the new majority declared that both amendments could be reconciled and would be adopted as the amended article 5, section 1.[16]

The most significant questions placed before the justices in *Jordan # 2* were the related procedural issues of whether the court has the power to grant a motion for reconsideration of a judgment rendered under its original jurisdiction, and, if so, what would constitute sufficient grounds to merit the granting of such a motion. The same issues had arisen earlier in connection with *State ex rel. Smith v. Bohannan*,[17] a 1966 quo war-

---

[11] 104 Ariz. 90, 98, 449 P.2d 18, 26 (1969):

> We call attention to the fact that, since Proposition 104 provided that the State Auditor be elected for a term of office of four years, a large number of voters may have been voting for Proposition 108 for the purpose of keeping the terms of office at two years.

[12] *Id.* at 100, 449 P.2d at 28.

[13] *Id.* at 102, 449 P.2d at 30 (dissenting opinion).

[14] *Id.*

[15] 104 Ariz. at 196, 450 P.2d at 386.

[16] *Id.*:

> Since the people have abolished the State Auditor's office, we hold that Art. 5, § 1 has been amended by the adoption of Proposition No. 108 and No. 104 to read:
>
> Section 1. The Executive Department shall consist of Governor, Secretary of State, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for four years beginning on the first Monday of January, 1971 next after the regular general election in 1970.

[17] 101 Ariz. 520, 421 P.2d 877 (1966).

ranto proceeding. There the court denied respondent Bohannan's motion for rehearing without, however, expressing the grounds underlying its decision.

In justifying its decision to grant a rehearing, the *Jordan # 2* majority considered Rule 1 of the *Rules of the Supreme Court of Arizona*, which sets forth the procedure for filing and hearing applications invoking the court's original jurisdiction. The court pointed out that while the rule does not set forth a procedure for a rehearing, "neither does the rule expressly prohibit a rehearing."[18] The court reasoned that "[i]t would be absurd to argue that a court, empowered to correct errors in every other court in this state cannot correct its own."[19]

The rule in a number of jurisdictions is that an appellate court enjoys the power to grant rehearings by virtue of its inherent power to modify and correct its own judgments.[20] The Supreme Court of Arizona, on at least one occasion, has alluded to the same policy.[21] However, in refusing to grant rehearings in appellate cases in several other instances, the court has taken the inflexible stand that "in the absence of statute, an appellate court has no power to reconsider, alter or modify its decision."[22]

Justices McFarland and Lockwood pointed out in their dissenting opinion in *Jordan # 2* that when respondent Bohannan had applied to the court for a rehearing of the judgment rendered earlier in *Bohannan*, the attorney general[23] had vigorously argued against the motion on the grounds that a rehearing of a decision rendered in an original jurisdiction case was not provided for in the rules of the court.[24] The dissenters noted that the rules of the court were exactly the same at the time of *Jordan # 2* as when the *Bohannan* motion was filed and that the only difference between the situation in *Bohannan* and the case at bar was that in the former the attorney general was opposing a rehearing while in this case he was seeking it. In addition, the dissenting justices questioned whether the philosophy adopted by the majority with regard to rule 1 was "in keeping with the 'rule-making' power of this Court."[25] They expressed their inability to understand how the court could deny jurisdiction in cases where no explicit statute conferred the same, "but in this case can assume jurisdiction be-

---

[18] 104 Ariz. at 194, 450 P.2d at 384.

[19] *Id., quoting* Lindus v. Northern Ins. Co., 103 Ariz. 160, 162, 438 P.2d 311, 313 (1968).

[20] *E.g.*, Metropolitan Water Dist. v. Adams, 19 Cal. 2d 463, 122 P.2d 257 (1942); *In re* Nelson, 103 Mont. 43, 60 P.2d 365 (1936); Utility Comm'n v. Norfolk S. Ry. Co., 224 N.C. 762, 32 S.E.2d 346 (1944).

[21] Lane v. Mathews, 75 Ariz. 1, 251 P.2d 203 (1953). As the *Jordan #2* dissenters noted, however, *Mathews* involved an appeal and not the court's original jurisdiction. 104 Ariz. at 198, 450 P.2d at 385.

[22] Overson v. Martin, 90 Ariz. 151, 152, 367 P.2d 203, 205 (1961). *See also* State v. Phelps, 67 Ariz. 215, 193 P.2d 921 (1948).

[23] Darrell F. Smith was the Attorney General in *Bohannan*. Gary Nelson was the Attorney General in both *Jordan* cases.

[24] 104 Ariz. at 199, 450 P.2d at 389 (dissenting opinion).

[25] *Id.*

cause no rule prevents it."[26]

Once an appellate court concludes that it may exercise the power to grant a motion for rehearing, it is then faced with the task of determining what grounds it deems sufficient to invoke such action. In most jurisdictions the generally applied rule holds that a rehearing will be granted only where it is conclusively shown that the court overlooked a material fact or decisive issue of the case, that the decision was based on a wrong principle of law, or that an authority determinative of the issues of the case was overlooked by the court.[27]

Although few jurisdictions have attempted to codify the grounds on which applications for rehearing will be granted,[28] the appellate courts of most jurisdictions agree that certain grounds are insufficient. There is general agreement that a rehearing will not be granted merely for the purpose of allowing a reargument of matters previously determined by the decision—"on this rules, cases, and justices speak with one voice,"[29] and the Supreme Court of Arizona has emphatically taken this position in several cases.[30] The allegation that questions of great public importance are involved in a case ordinarily will not provide sufficient grounds in itself for the granting of a rehearing.[31] On occasion, however, appellate courts in several jurisdictions have reconsidered decisions where the cases involved were ones "of great precedent potential or of grave public concern,"[32] and the Arizona court has demonstrated its willingness to accept "the importance of the case" as a sufficient ground for granting a motion for rehearing in at least one previous case.[33] Finally, the general rule is that a court will not grant a rehearing merely because a change in the membership of the court is about to take place or has already occurred.[34]

---

[26] *Id.* at 200, 450 P.2d at 390.

[27] *In re* Aguirre's Estate, 57 Nev. 275, 65 P.2d 685 (1937); Utility Comm'n v. Norfolk S. Ry. Co., 224 N.C. 762, 32 S.E.2d 346 (1944); Hamilton Nat'l Bank v. Woods, 34 Tenn. App. 360, 238 S.W.2d 109 (1948); Degnan & Louisell, *Rehearing in American Appellate Courts*, 44 CALIF. L. REV. 627, 633 (1956).

[28] For an exception, see MONT. R. APP. CIV. P. 34, which provides in part:

> A petition for rehearing may be presented upon the following grounds and no other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed.

[29] Degnan & Louisell, *supra* note 27, at 635. *See also* London Guar. & Acc. Co. v. Officer, 78 Colo. 441, 242 P. 989 (1925); Geller v. McCown, 64 Nev. 106, 178 P.2d 380 (1947); Town of Glenrock v. Chicago & N.W. Ry. Co., 73 Wyo. 395, 281 P.2d 455 (1955).

[30] Phelps Dodge Corp. v. Industrial Comm'n, 90 Ariz. 379, 368 P.2d 450 (1962); Climate Control, Inc. v. Hill, 87 Ariz. 201, 349 P.2d 771 (1960); Copper Queen Mining Co. v. Arizona Prince Copper Co., 2 Ariz. 169, 11 P. 396 (1886).

[31] Newton v. Woodley, 55 S.C. 132, 32 S.E. 531, *rehearing denied*, 33 S.E. 1 (1899).

[32] Degnan & Louisell, *supra* note 27, at 633. *See also* Parks v. Western Union Tel. Co., 45 Nev. 411, 204 P. 884 (1922).

[33] Copper Queen Mining Co. v. Arizona Prince Copper Co., 2 Ariz. 169, 11 P. 396 (1886).

[34] *E.g.*, Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 440, 369 P.2d 114 (1962); Carroll v. New York Life Ins. Co., 49 N.D. 798, 193 N.W. 471 (1923).

A number of jurisdictions, when confronted with the possibility of a reconstituted court passing on an application for rehearing, have ruled that a member who joins the court after it has rendered a decision in the original hearing is not entitled to participate in the consideration of the application.[35] The circumstances surrounding the instant case give rise to speculation as to whether application of such rule might not have been appropriate.[36]

A decision to grant a rehearing, implying as it does a judicial conclusion that the interest of justice in a particular instance is important enough to outweigh the competing interest in finality of litigation, should of necessity be based on concrete grounds. The failure of the *Jordan # 2* majority to express specifically the reasoning underlying its decision to reconsider the original judgment results in confusion concerning the minimal grounds which will warrant acceptance of a motion for rehearing. For example, the silence of the majority leaves room for conjecture that under particular circumstances the presentation of nothing more than a reargument of his initial position will suffice to secure for a petitioner a rehearing of his cause.[37] In light of its earlier decisions denying petitions based on this inadequate ground,[38] such an implication suggests an inconsistency in the court's decisions on this point.

There appeared to be little doubt in the minds of the dissenting justices that the vital factor in the decision to grant a rehearing was the reconstituted court.[39] The Supreme Court of Montana, in denying a petition for rehearing which it suspected was submitted mainly as a result of a recent change in the court's personnel, warned of the detrimental effects which would stem from the granting of a reconsideration based solely on this factor:

> Every citizen is desirous of having our laws definitely established, and the decision of the majority of this court upon any legal proposition coming before it is the law of the state, and should not be subject to change upon the change of the personnel of this court. Rights of persons and of property would never be secure if such were the case.[40]

A tacit acquiescence by an appellate court to a policy of granting petitions for rehearings solely on the ground of a revised court member-

---

[35] Gas Prods. Co. v. Rankin, 63 Mont. 372, 207 P. 993 (1922); Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1946); Cordner v. Cordner, 91 Utah 474, 64 P.2d 828 (1937).

[36] *See* note 7 *supra.*

[37] In the opinion of the dissenting justices, the attorney general's petition for rehearing set forth nothing more than "a restatement of the arguments presented prior to the original judgment." 104 Ariz. at 200, 450 P.2d at 390.

[38] *See* note 30 *supra.*

[39] The dissent noted that "[a] case particularly apt to the situation here is Woodbury v. Dorman, 15 Minn. 341 (15 Gil. 274), where the majority of a newly constituted court, although in obvious disagreement with a decision of the former majority, refused to grant a rehearing." 104 Ariz. at 200, 450 P.2d at 390 (dissenting opinion).

[40] Gas Prods. Co. v. Rankin, 36 Mont. 372, 397, 207 P. 993, 1000 (1922).

ship portends deleterious consequences. The establishment of such a precedent would invite certain abuse. Every change in the court's personnel would be closely followed by a flood of petitions, initiated by parties who had sustained adverse judgments by vote of a divided court and who would then seek to obtain different dispositions of their causes by the votes of the new members.

Several other adverse effects on the proper functioning of the state's judicial system could result from the court's performance in *Jordan # 2*. A certain degree of finality in litigation is required to protect the welfare of the citizenry. Never-ending litigation results not only in general confusion with regard to the state of the law, but in increased expenses as well. Moreover, every court of law is designed to function in an apolitical manner, and any implication that considerations lying outside the fabric of the law may produce substantial effects on the decisions of a court will inevitably undermine the court's public image and general effectiveness. The prime justification of rehearing as a procedural device is its usefulness as a safety valve, permitting "an element of accommodation in an otherwise rigid system."[41] The manner with which this device was employed in *Jordan # 2*, however, may well have introduced an undesirable degree of flexibility into the system. The failure of the majority to set forth express standards to be utilized by the court in evaluating future petitions for rehearing left the members of the state bar without proper guidelines in this area of practice. As a result, attorneys are deprived of the benefit of a "non-judicial screening device"[42] to furnish concrete criteria for determining whether contemplated requests for rehearings have possible merit, and therefore warrant investment of their time and their clients' money, or whether the petitions are conclusively doomed to denial, and should therefore be avoided.[43]

In the final analysis, perhaps the most detrimental repercussions will focus on the court itself. The dissenting justices expressed fear that the manner in which this case was handled may work to place the court in a perilous position on future occasions, for "[i]t would seem that this Court can no longer, in good conscience, deny petitions for rehearing in any case coming before us, no matter how repetitious they may be."[44] Unfortunately, that expression of concern appears to be very well-founded.

---

41 Degnan & Louisell, *supra* note 27, at 641.

42 *Id.* at 634. In other words, members of the bar are left without a means, outside of a judicial ruling on the petition, to evaluate the merit of a contemplated petition for rehearing.

43 *See* State *ex rel.* Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. Ct. App. 1958), where the court sets forth guidelines to aid members of the bar in evaluating the circumstances under which a petition for rehearing should or should not be filed.

44 State *ex rel.* Nelson v. Jordan, 104 Ariz. 193, 201-02, 450 P.2d 383, 391-92 (1969) (dissenting opinion).

QUO WARRANTO

In *Ahearn v. Bailey*,[1] the Supreme Court of Arizona found itself faced with the task of delineating the constitutional allocation of power between the executive and legislative branches with regard to the power of removal from office of appointed public officials.[2] In January, 1966, the petitioner, John L. Ahearn, was appointed by then Democratic Governor Samuel Goddard to serve a six-year term as a member of the Industrial Commission of Arizona. He qualified, was approved by the Senate, and took office as one of the three members then comprising the commission. During a special session of the legislature, in May, 1968, Section 23-101(B) of the *Arizona Revised Statutes Annotated* (Supp. 1969-70) was amended, shortening the terms of the three commissioners so that they ended on January 8, 1969, the effective date of the amendment. Further, the size of the commission was increased to five members who were to be appointed by Republican Governor Jack Williams. The three respondents were appointed as new commissioners, together with two of the previous commissioners.

Petitioner, the only incumbent not reappointed, sought a writ of quo warranto to test the right of the respondents to hold office as members of the commission. The petition charged that the legislature, in shortening the terms of the three incumbent commissioners, had exercised a power allocated by the Arizona Constitution to the executive. The court reviewed the reasons announced by the governor for calling the special session of the legislature and outlined the principal objectives of the legislation enacted at that time,[3] concluding that the provisions enlarging the commission from three to five members and truncating the terms of the incumbent commissioners were minor features of a comprehensive plan and bore no discernible relationship to the objects to be accomplished by the remainder of the enactment. In light of such findings, the court held that the amended act was an unconstitutional usurpation by the legislature of the executive's power of removal and would be read as though it did not contain the terminating clause. Therefore, the three members holding office prior to

---

[1] 104 Ariz. 250, 451 P.2d 30 (1969).

[2] ARIZ. CONST. art. 3:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

[3] 104 Ariz. at 255, 451 P.2d at 35:

> [T]he 28th Legislature was called into the 4th Special Session on May 8, 1968, by the Governor who urged it to consider 'any and all matters affecting the Industrial Commission, employers' liability, workmen's compensation, occupational disease disability and any matter relating thereto.' The Legislature thereafter enacted House Bill No. 1 . . . . The principal effect of the Act was to remove the rate making powers from the jurisdiction of the Commission and the investment and control of the State Insurance Fund.

January 8, 1969, would be considered the lawful incumbents for the terms specified in their original appointments, and a judgment of ouster would issue to each respondent.

In reaching the conclusion that the power to remove appointed officials is vested in the executive, and not in the legislature, the *Ahearn* court reasoned thusly: By order of the state constitution, the governor is charged with the duty of transacting all executive business and ensuring that the laws are faithfully executed.[4] The effective performance of this duty necessarily requires that he have the power to select subordinates and to remove them where necessary. Therefore, the power to remove must be an executive function. This line of reasoning is in complete harmony with that expressed by the United States Supreme Court in the leading case of *Myers v. United States*.[5] Declaring unconstitutional any restrictions imposed by Congress on the power of the President to remove first class postmasters, the Court there reasoned that

> the power of removal is incident to the power of appointment . . . and when the grant of executive power is enforced by a express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.[6]

---

[4] ARIZ. CONST. art. 5, § 4, which in its pertinent part provides:

> The Governor shall transact all executive business with the officers of the Government, civil and military, and may require information in writing from the officers in the Executive Department upon any subject relating to the duties of their respective offices. He shall take care that the laws be faithfully executed.

[5] 272 U.S. 52 (1926).

[6] *Id.* at 122. Notwithstanding the *Myers* decision, most courts, including the United States Supreme Court, do not view the removal power of the executive as being absolute in character. *E.g.*, Holder v. Anderson, 160 Ga. 433, 128 S.E. 181 (1925); State *ex rel.* Nagle v. Sullivan, 98 Mont. 425, 40 P.2d 995 (1935); Hunter v. Quick, 183 Okla. 19, 79 P.2d 590 (1938). Where an office is created by statute it generally has been held that the power of the legislature creating it extends to the stipulation of specific standards for appointment and removal with regard to the office. *E.g.*, Holmes v. Osborn, 57 Ariz. 522, 115 P.2d 775 (1941); Trimble v. People, 19 Colo. 187, 34 P. 981 (1893). Employing this general rule, the Supreme Court of Arizona has held that "[w]hen the appointment is to be approved by the senate, the governor may not remove except in the manner and for the cause or causes named by the legislature." Holmes v. Osborn, 57 Ariz. 522, 539, 115 P.2d 775, 783 (1941). This limitation on the governor's removal power has particular significance with regard to the statutory provisions relating to the Industrial Commission which require Senate approval of the governor's appointments to the commission and specifically restrict the grounds for removal of a commissioner to "inefficiency, neglect of duty, malfeasance, misfeasance or nonfeasance in office." ARIZ. REV. STAT. ANN. § 23-101(B), (E) (1956).

Humphrey's Executor v. United States, 295 U.S. 602 (1935), limited *Myers* by declaring that the character of the office involved would determine whether the power of the executive to remove an officer should prevail over the authority of the legislature to condition that power by fixing a definite term and precluding removal except for cause. The Supreme Court said that where Congress, in creating the Federal Trade Commission, had intended for it to be independent of executive authority and quasi-legislative, quasi-judicial in function, and had prescribed grounds for the removal of commissioners, the President was without authority to remove such officers on any other grounds. In light of the Arizona court's recognition that in executing its statutory duties the Industrial Commission often acts as a "quasi-judicial" body, Butler v. Industrial Comm'n, 57 Ariz. 119, 111 P.2d 628

The Arizona court did acknowledge the power of the legislature to abolish any office created by statute, and concomitantly to fix or alter the term, mode of appointment and removal, and compensation for such office. However, it refused to recognize this legislative power as pre-empting the executive power of removal: "[T]he absolute power to abolish an office does not necessarily include the right to remove an office holder."[7] The Supreme Court of Utah, in *State v. Maxfield*,[8] expressed the reasoning behind such a conclusion:

> [W]hile the right to abolish an office is in the power which created it, the right to remove an officer . . . is generally the [constitutional] prerogative of the power which appoints the officer . . . and therefore the legislature cannot use its power to create or abolish in such way as to encroach on the power to remove.[9]

Can the exercise of the legislative power to abolish an office ever lead directly to the removal of the officeholder? In *Maxfield*, the Utah court outlined three situations in which, according to legal tradition, a legislature could validly exercise its power to abolish a public office and thus remove the officer: (1) where the office is abolished and no substitute created; (2) where two or more offices are abolished and their duties are then combined under one office, if done for reasons of economy or genuine reorganization; or (3) where an office is abolished and a new one created which has substantially new, different, or additional functions, duties, or powers so that even though it may embrace all of the duties of the old office, it is an office different from the one abolished.[10]

Furthermore, it is generally recognized that an officeholder has no vested right in the office which he occupies.[11] Therefore, he has no ground for complaint if the existence of his office is terminated by execution of a legislative plan of reorganization which appears necessary, expedient, or conducive to the public good. The Court of Appeals of New York recently concluded that "there is no constitutional inhibition against the mere shortening of the term of an existing statutory office by legislation aimed at the office rather than its incumbent."[12]

On the basis of this reasoning, the Supreme Court of Arizona concluded that where a legislature merely abolishes an existing office and creates in its place another by the same or different name but with sub-

---

(1941), the decision in *Humphrey's Executor* reinforces the authority of the state legislature to limit the removal of commissioners by specifying a limited number of grounds therefor.

7 104 Ariz. at 254, 451 P.2d at 34.

8 103 Utah 1, 132 P.2d 660 (1942).

9 *Id.* at 12-13, 132 P.2d at 665.

10 *Id.* at —, 132 P.2d at 663.

11 104 Ariz. at 254, 451 P.2d at 34. *See also In Re* Carter, 141 Cal. 316, 74 P. 997 (1903); Trimble v. People, 19 Colo. 187, 34 P. 981 (1893).

12 Lanza v. Wagner, 11 N.Y.2d 317, 324, 183 N.E.2d 670, 673, 229 N.Y.S.2d 380, 385 (1962).

stantially the same duties, such action should be considered a design to unseat the incumbents and, therefore, an encroachment upon the power of the executive. The thoughts expressed by the Supreme Court of Pennsylvania, in ruling in *Suermann v. Hadley*[13] on an attempt by the legislature of that state to shorten the terms of a board of appointed officers, appear equally applicable to the situation in *Ahearn*:

> [H]ere, leaving out all consideration of the character of the changes in the department affected, the Legislature did not even purport to abolish the offices of the present board members; it merely terminated their term, or, in other words, attempted to remove them.[14]

The fundamental test of the validity of an exercise of legislative power to truncate the incumbency of a public officer appointed for a fixed term rests on the purpose for which the action is taken. When the legislative power to create and abolish offices is legitimately used for purposes of reorganization, such use of authority is within the power of the legislature and the incidental removal of an officer affords no ground for curtailing it. As the Supreme Court of Utah concluded in *Maxfield*: "The legislature should be halted only where it is plain that it was using its powers for the purpose of usurping or circumventing the constitutional power of another who had in such case the only right of removal."[15]

COMMERCIAL AND PROPERTY LAW

CONTRACTS AND SALES

REAL PROPERTY

Rescission—Innocent Misrepresentation

"It is an ancient and well established principle, that whenever suppressio veri or suggestio falsi occur, and more especially both together, they afford a sufficient ground to set aside any release or conveyance."[1] This question has been treated differently by American courts, with at least one jurisdiction ruling that innocent misrepresentation is not grounds for rescission.[2] However, the majority of courts have taken the position

---

13 327 Pa. 190, 193 A. 645 (1937).
14 *Id.* at 197, 193 A. at 650.
15 103 Utah at —, 132 P.2d at 665.

---

1 Smith v. Richards, 38 U.S. (13 Pet.) 26, 36 (1839).
2 Livermore v. Middlesborough Town-Lands Co., 106 Ky. 140, 163, 50 S.W. 6, 13 (1899), where the court stated:

that innocent misrepresentation of material facts which operates as an inducement to the formation of a contract may be grounds for the rescission of that contract.[3]

In *Lehnhardt v. City of Phoenix*[4] the defendant city mailed the plaintiff a quitclaim deed accompanied by a sketch which purported to illustrate the property covered by the deed's legal description and asked the plaintiff to execute the deed dedicating the property to the city for roadway purposes. This sketch was sent for the express purpose of illustrating that portion of the plaintiff's property which was to be dedicated, and was a material inducement to the plaintiff in executing the quitclaim deed. The sketch, however, was "ambiguous, erroneous, and did not correspond to the description contained in the quitclaim deed,"[5] in that the deed conveyed roughly 4,131 square feet more than the sketch indicated. The defendant was unaware that its sketch did not correspond to the legal description; thus, the false representation was subjectively an innocent one.

Mrs. Lehnhardt did not discover the misrepresentation until approximately four years later when she had the property surveyed at the request of a prospective buyer. Immediately thereafter she instituted this suit for rescission. The court held that rescission of a contract may be granted where there has been a material, false representation which was the inducing cause for the agreement even though the misrepresentation was innocent. This leaves some question as to whether any elements other than those specifically mentioned may be necessary for a rescission of contract based upon innocent misrepresentation.

The right to rely on a fraudulent misrepresentation is one of the nine elements of fraud necessary in a claim for damages.[6] Although it is

---

> To establish actionable fraud, or fraud against which equity will relieve . . . the misrepresentation . . . must be made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth.

[3] *See* Smith v. Richards, 38 U.S. (13 Pet.) 26, 36 (1839), *quoting* Ainslie v. Medlycott, 32 Eng. Rep. 504, 507 (Ch. 1803), where the court stated:

> 'No doubt, by a representation a party may bind himself just as much as by an express covenant. If, knowingly, he represents what is not true, no doubt he is bound. If, without knowing that it is not true, he takes upon himself to make a representation to another, upon the faith of which that other acts, no doubt he is bound; though his mistake was perfectly innocent.'

Accord, Prudential Ins. Co. of America v. Anaya, 78 N.M. 101, 428 P.2d 640 (1967); Watkins v. Soil & Water Conservation Dist., 438 P.2d 491 (Okla. 1968); Lanners v. Whitney, 247 Ore. 223, 428 P.2d 398 (1967).

[4] 105 Ariz. 142, 460 P.2d 637 (1969).

[5] *Id.* at 143, 460 P.2d at 638.

[6] The nine elements necessary to establish fraudulent misrepresentation are set out in Carrel v. Lux, 101 Ariz. 430, 434, 420 P.2d 564, 568 (1966) as:

> '(1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) his consequent and proximate injury.' *Quoting* Moore v. Meyers, 31 Ariz. 347, 354, 253 P. 626, 628 (1927).

clearly not necessary to prove all nine elements of fraud in an action for rescission,[7] the question remains whether it is necessary to prove a right to rely. In *Horne v. Timbanard*[8] the Arizona court of appeals recognized that a right to rely was still questionable as one of the elements necessary in order to have a rescission based upon innocent misrepresentation.[9] The court was not forced to decide whether a right to rely was a necessary element since it was clearly present in *Horne*. The *Lehnhardt* court made no mention of the right to rely. It did say that "[c]onceding the absence of fraud, plaintiff is nevertheless entitled to rescission because of the *representation* of the City, its *falsity*, its *materiality*, and the fact that it was the *inducing cause* for her execution of the Quit Claim Deed."[10] The court seems to be saying that the above four elements are all that are necessary to rescind a contract. By making no mention of a right to rely, or how it has been satisfied, the *Lehnhardt* court might be eliminating it as a necessary element of rescission. However, the fact that the misrepresentation must be the inducing cause for the execution of the agreement might indicate that "the hearer's ignorance of [the representation's] falsity [and] his reliance on its truth"[11] are also included as necessary elements for rescission based upon innocent misrepresentation.

The significance of this decision is found in the fact that until the instant case the Supreme Court of Arizona had never ruled on the issue of rescission based on innocent misrepresentation,[12] and as late as 1967 the question was still unanswered.[13] However, *Lehnhardt* sets clear precedent for the rule that innocent, material misrepresentation which is the inducement for the contract is grounds for rescission.

---

[7] *See* Berry v. Robotka, 9 Ariz. App. 461, 453 P.2d 972 (1969); Horne v. Timbanard, 6 Ariz. App. 518, 434 P.2d 520 (1967); Miller v. Boeger, 1 Ariz. App. 554, 405 P.2d 573 (1965).

[8] 6 Ariz. App. 518, 434 P.2d 520 (1967).

[9] *Id.* at 521, 434 P.2d at 523. The court in discussing the right to rely as an element in a suit for rescission made the following statement:

> *If* 'right to rely' is a necessary element in a suit to rescind for innocent misrepresentation, then this issue falls in the same category under the undisputed facts of this case. (emphasis added).

In qualifying the necessity of right to rely by using the word "if" the court recognized the uncertainty of its necessity.

[10] Lehnhardt v. City of Phoenix, 105 Ariz. 142, 144, 460 P.2d 637, 639 (1969) (emphasis added).

[11] The hearer's ignorance of the representation's falsity and his reliance on its truth are two of the nine elements of fraudulent misrepresentation cited in note 6 *supra*.

[12] The earlier cases in Arizona concerning rescission based upon innocent misrepresentation have only gone as far as the court of appeals. *See, e.g.*, Berry v. Robotka, 9 Ariz. App. 461, 453 P.2d 972 (1969); Horne v. Timbanard, 6 Ariz. App. 518, 434 P.2d 520 (1967); Miller v. Boeger, 1 Ariz. App. 554, 405 P.2d 573 (1965).

[13] *See* Horne v. Timbanard, 6 Ariz. App. 518, 520, 434 P.2d 520, 522 (1967).

Rescission—Recoverable Losses

In *Jennings v. Lee*[1] the Supreme Court of Arizona was confronted with several issues arising from the attempted rescission of a contract for the exchange of two parcels of real property. In its decision the court liberally construed the general rule that a party seeking rescission of a contract must restore the defendant to his status quo ante.[2] The court held that "[t]he defrauded plaintiff will not lose her right to rescind when the defendant is directly responsible for plaintiff's inability to return the subject matter of the rescinded contract."[3]

The *Jennings* court was presented with another problem in defining the scope of the remedy available in an action for rescission. Defendant Lee had encumbered the plaintiff's property with two mortgages, and the plaintiff was obligated to pay a broker's fee. The court held that the plaintiff "must be allowed to recover . . . such sums as are necessary to restore her to her position prior to entering into [the] agreement."[4]

In 1946 the plaintiff asked defendant Mosier, a real estate broker and close family friend, to assist her in exchanging her Phoenix property for something that would produce more income. It seems the real estate broker was also the agent of defendant Lee,[5] who was interested in selling a restaurant located in Page, Ariz. In an attempt to induce the plaintiff into exchanging her Phoenix property for the restaurant, Mosier showed her a statement that purportedly represented the restaurant's income for an eight-month period in 1964. The statement showed an operating profit of nearly five times the actual profit during that period. The plaintiff, relying on this false statement, exchanged her Phoenix property for the restaurant. Lee then encumbered the Phoenix property with two mortgages amounting to approximately $120,000. After managing the restaurant for about two months plaintiff realized that the actual amount of business the retaurant was doing could not be reconciled with the profits as represented to her by Mosier.

Plaintiff filed a suit for rescission of the contract. The plaintiff's "statement in the complaint that she stood ready to return the property she had received constituted a proper tender"[6] as well as notice of plaintiff's intention to rescind the contract. She continued to operate the

---

1 105 Ariz. 167, 461 P.2d 161 (1969).
2 Fish v. Valley Nat'l Bank, 64 Ariz. 164, 167 P.2d 107 (1946).
3 105 Ariz. at 172, 461 P.2d at 166.
4 *Id.* at 172, 461 P.2d at 167.
5 The court does not reach the problem discussed in Light v. Chandler Improvement Co., 33 Ariz. 101, 261 P. 969 (1928), concerning ratification of the agent's misrepresentation prior to liability for damages or rescission. Defendant Lee ratified the misrepresentations of his agent Mosier when he refused to rescind the contract and under the ruling of *Light* the plaintiff could then seek any remedy against Lee that she would have had if he had made the false representations himself.
6 105 Ariz. at 172, 461 P.2d at 166.

restaurant for a week after the suit was filed so that Lee might step back into a going business. After she determined that the defendant was not going to take back the restaurant, she had the premises winterized. Mrs. Jennings also discontinued payments on a mortgage on the restaurant which she had assumed under the contract of exchange. This mortgage was foreclosed during the pendency of the suit.

Prior to the *Jennings* decision the Arizona courts had been laboring under the rule set out in *Fish v. Valley National Bank*,[7] which held that in order to rescind a contract the plaintiff must return the defendant to his condition which existed prior to the contract. Some jurisdictions have carved an exception to this general rule in cases where the defendant is directly responsible for the plaintiff's inability to return the defendant to his status quo ante. In these jurisdictions this inability is not grounds to prevent a rescission.[8] In *Jennings* the plaintiff could not restore Lee to his prior status because of the latter's refusal to make any payments on the restaurant's mortgage after he had been notified of the plaintiff's intent to rescind the contract. The resulting foreclosure was the sole cause of the plaintiff's inability to return the property.

The question was not presented in *Jennings* as to whether the plaintiff may rescind the contract if his inability to restore the defendant is due to destruction of the defendant's consideration by either the plaintiff's own negligence, by that of a third party, or by some natural cause. If the court were to accept the view that the defendant's fraudulent misrepresentation should suffice to render him responsible for *any* subsequent inability to restore him to his prior status, the result would be a much broader exception to the rule that requires a restoration of the parties regardless of the reason why restoration is impossible. However, the *Jennings* court preferred to carve a more narrow exception.[9]

Rescission of the contract is not the only remedy available to the victim of a fraudulent misrepresentation. Arizona follows the generally

---

[7] 64 Ariz. 164, 167 P.2d 107 (1946); *accord*, Morgan v. Bruce, 76 Ariz. 121, 259 P.2d 558 (1953).

[8] In Delta Investing Corp. v. Moore, 366 F.2d 516 (6th Cir. 1966), when the plaintiff discovered that the income from the leased property was not as represented, he notified the defendant of his intent to rescind and refused to make further rent payments. The defendant would not rescind the contract and also refused to make the rent payments. Due to the lack of rent payments, the lease was cancelled. The court held that defendant responsible for the plaintiff's inability to return the lease and allowed rescission. In Rhoads v. Leonard, 113 F. Supp. 411 (W.D. Okla. 1953), the plaintiff could not return certain equipment that she had purchased from the defendant because a mortgage on it had been foreclosed. The court held that the plaintiff should not be denied rescission "for the sole reason that the equipment cannot be returned to the defendant *inasmuch as the conduct of the defendant was directly responsible for plaintiff's inability to return the subject matter of the rescinded contract.*" *Id.* at 414.

[9] 105 Ariz. at 172, 461 P.2d at 166, where the court stated the exception:

> The defrauded plaintiff will not lose her right to rescind when the defendant is directly responsible for plaintiff's inability to return the subject matter of the rescinded contract.

accepted rule that "a party to an executed contract who discovers that material misrepresentations were made to him may either affirm the contract and sue for damages, or he may repudiate the contract and recover that with which he has parted."[10] In the instant case the plaintiff elected to rescind and the court stated that "[a]ny rights she may have in this matter must rise or fall with the theory of rescission."[11]

The court granted rescission, but in order to return the plaintiff to her status quo ante it further stated that she should be allowed to recover whatever sums were necessary to do so including the $120,000 encumbrance on the Phoenix property and an $11,000 broker's fee which she was obligated to pay. The case was remanded for a determination of what sums were necessary to make the plaintiff whole. In support of this decision the *Jennings* court cited four cases from other jurisdictions which follow the theory that in order to effect complete justice a plaintiff will be allowed to recover incidental damages or expenses incurred in reliance upon the misrepresentation.[12] These incidental damages[13] must be reasonably incurred because of reliance on the misrepresentation.

The *Jennings* decision is not in conflict with the election of remedies doctrine. The court affirms the rule that, when a party elects to affirm the contract and sue for damages, his measure of damages is limited to either the benefit of the bargain or the out of pocket costs.[14] Neither is recoverable in an equitable action for rescission of a contract.

---

[10] Kent Homes, Inc. v. Frankel, 128 A.2d 444, 445 (D.C. Mun. Ct. 1957). *See* Mahurin v. Schmeck, 95 Ariz. 333, 390 P.2d 576 (1964); Hutchason v. Marks, 54 Cal. App. 2d 113, 128 P.2d 573 (1942); Clark v. Kirby, 204 App. Div. 447, 198 N.Y.S. 172 (1923).

[11] 105 Ariz. at 171, 461 P.2d at 165.

[12] Hammac v. Skinner, 265 Ala. 9, 89 So. 2d 70 (1956), which was followed in the instant case, allowed recovery of moving expenses incurred by a plaintiff in traveling to and from the Republic of Panama. The move was contemplated in the fraudulently induced contract and recovery was allowed because the expenses were "incidental" rather than "general" damages. In Holland v. Western Bank & Trust Co., 56 Tex. Civ. App. 324, 118 S.W. 218 (1909), the plaintiff was allowed to recover expenses incurred in attempting to utilize land that he was fraudulently induced to purchase. In Sidney Stevens Implement Co. v. Hintze, 92 Utah 264, 67 P.2d 632 (1937), the court allowed a plaintiff to recover the value of parts furnished by him which became a permanent part of the trailer that he purchased. In Kent Homes, Inc. v. Frankel, 128 A.2d 444 (D.C. Mun. Ct. 1957), the plaintiff recovered the cost of additions to a house in a suit for rescission. In each of these suits the incidental damages and expenses recovered were incurred because of the fraudulent misrepresentations of the vendors.

[13] These "incidental damages" should not be confused with the damages recoverable when a party elects to affirm the contract and sue for damages. When a party elects to sue for damages he recovers either the benefit of the bargain or the out of pocket costs, depending on which rule the particular jurisdiction follows. For the Arizona rule, *see, e.g.*, Ulan v. Richtars, 8 Ariz. App. 351, 358, 446 P.2d 255, 262 (1968).

[14] 105 Ariz. at 173, 461 P.2d at 167. The damages recoverable under the "benefit of the bargain" rule are the difference between the actual value of the subject matter and the value it would have had if the false representations had been true, Carrel v. Lux, 101 Ariz. 430, 441, 420 P.2d 564, 575 (1966), while the "out of pocket" damages are measured by the difference between the actual value of the subject matter and the consideration parted with or the price paid, Ulan v. Richtars, 8 Ariz. App. 351, 358, 446 P.2d 255, 262 (1968).

The *Jennings* decision is important in two respects. First, Arizona now recognizes an exception to the general rule that complete restoration of the parties is necessary to rescind a contract based on fraudulent misrepresentation. The exception is that if the defendant is directly responsible for the plaintiff's inability to restore him to his prior status, that inability will not be a bar to the action for rescission. Second, in order to do complete justice, the court will allow the plaintiff to recover whatever money is necessary to completely restore him to his position quo ante. The court's reliance on the cases noted may be an indication that it will extend this recovery to all incidental damages and expenses incurred as a direct result of the fraudulent misrepresentation.

INDEMNITY

In *Southern Pacific Co. v. Gila River Ranch, Inc.*,[1] the Supreme Court of Arizona was confronted with the problem of determining whether the broad, seemingly all-inclusive language of an indemnity provision should extend to losses sustained by the indemnitee, where these losses were proximately caused by the indemnitee's own negligence. Following the generally accepted rule of construction,[2] the court held that such language will not be construed to encompass losses occasioned by the indemnitee's negligence unless the indemnitor's intent to assume such responsibility is unequivocally manifested in the terms of the contract.

In 1934, Southern Pacific entered into a "Private Road Crossing Agreement" with Gillespie Land & Irrigation Co., allowing Gillespie to construct and use a road across Southern Pacific's railroad tracks. In consideration for this privilege, Gillespie consented to maintain the crossing in good repair, and to indemnify Southern Pacific against all loss and expense " 'of every kind and nature, from any cause whatsoever, resulting directly or indirectly from the maintenance, presence or use of the crossing.' "[3] In 1957, Gillespie, with Southern Pacific's consent, assigned the

---

[1] 105 Ariz. 107, 460 P.2d 1 (1969).

[2] United States v. Wallace, 18 F.2d 20, 21 (9th Cir. 1927), where the court stated:

> The established principle is thought to be that general words alone do not necessarily import an intent to hold an indemnitor liable to an indemnitee for damages resulting from the sole negligence of the latter; it is but reasonable to require that an obligation so extraordinary and harsh should be expressed in clear and unequivocal terms.

Accord, Auto Owners Mut. Ins. Co. v. Northern Ind. Pub. Serv. Co., 414 F.2d 192 (7th Cir. 1969); Mostyn v. Delaware L. & W. R.R., 160 F.2d 15 (2d Cir.), *cert. denied*, 332 U.S. 770 (1947); Norkus v. General Motors Corp., 218 F. Supp. 398 (S.D. Ind. 1963); Vinnell Co. v. Pacific Elec. Ry., 52 Cal. 2d 411, 340 P.2d 604 (1959); Bohannon v. Southern Ry., 97 Ga. App. 849, 104 S.E.2d 603 (1958); Employers Mut. Liab. Ins. Co. v. Griffin Constr. Co., 280 S.W.2d 179 (Ky. 1955); Southern Pac. Co. v. Layman, 173 Ore. 275, 145 P.2d 295 (1944); Brotherton Constr. Co. v. Patterson-Emerson-Comstock, Inc., 406 Pa. 400, 178 A.2d 696 (1962); Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907).

[3] 105 Ariz. at 107, 460 P.2d at 1.

contract to the Gila River Ranch, Inc. On December 3, 1964, a collision occurred at the crossing between one of Southern Pacific's trains and a cotton trailer immobilized on the tracks.

Southern Pacific brought an action ex contractu under the indemnity provision of the crossing agreement to recover for damages to its locomotive. The jury found that Southern Pacific was not negligent in its operation of the train, but that the railroad's negligence in failing to mantain the crossing properly was the proximate cause of the collision.[4] The jury returned a verdict in favor of the defendant. The court of appeals reversed, holding that the language of the indemnity provision revealed a "clear intention to insure Southern Pacific against *all* losses, not excepting those occasioned by Southern Pacific's negligence."[5] On review, the supreme court vacated the opinion of the court of appeals and affirmed the judgment of the superior court.

A strict adherence to the literal terms of the indemnity provision would seem to militate against exclusion of the indemnitee's own negligence. However, implicit in the court's rationale for limiting the scope of indemnification is the assumption that the language of the contract is susceptible of more than one meaning. Thus, it became necessary to transcend the literal terms and take cognizance of extrinsic circumstances in attempting to ascertain the intent of the contracting parties.[6] In considering the circumstances surrounding the parties at the inception of the contract, the Arizona court concluded that it would be unreasonable to presume that a rancher, in consideration of a simple crossing easement, would intentionally agree to indemnify a railroad against every conceivable loss, including those occasioned by the railroad's own negligence.[7] The court referred to the disparity in bargaining power between the rancher and the railroad as additional support for deciding that the indemnitor did not intend to assume such an onerous burden.[8] An opposite conclusion would appear contrary to the principle of preferring a reasonable to an unreason-

---

[4] Although under the terms of the contract, the licensee-ranch was obligated to maintain the crossing in good repair, the parties stipulated that "the property and the crossing were at all times owned and maintained exclusively by the railroad." 105 Ariz. at 107, 460 P.2d at 1.

[5] Southern Pac. Co. v. Gila River Ranch, Inc., 9 Ariz. App. 570, 573, 454 P.2d 1010, 1013 (1969).

[6] *See, e.g.*, Henderson v. Jacobs, 73 Ariz. 195, 239 P.2d 1082 (1952); Crone v. Amado, 69 Ariz. 389, 214 P.2d 518 (1950); Branker v. Bowman, 62 Ariz. 214, 156 P.2d 898 (1945).

[7] 105 Ariz. at 108, 460 P.2d at 2. The court adopted the rationale of the Supreme Court of Oregon in Southern Pac. v. Layman, 173 Ore. 275, 145 P.2d 295 (1944), where the same railroad and an identical indemnity provision were involved. *See also* Mitchell v. Southern Ry., 124 Ky. 146, 74 S.W. 216 (1903).

[8] 105 Ariz. at 108, 460 P.2d at 2. *See also* Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 269, 419 P.2d 168, 171, 54 Cal. Rptr. 104, 107 (1966), where the court states:

> [A] contract entered into between two parties of unequal bargaining strength expressed in the language of a standardized contract, written by the more powerful bargainer . . . carries some consequences that extend beyond orthodox implications.

able interpretation.[9]

Covenants to indemnify are ordinarily entered into for the purpose of providing against loss or liability of the indemnitee resulting from conditions over which the indemnitor has had control.[10] In the instant case, the railroad had assumed exclusive responsibility for maintenance of the crossing,[11] although at the time the contract was consummated, the indemnitor had been obligated to maintain the crossing in good repair. There appears to be no provision in the agreement whereby the rancher's duty to indemnify exists only so long as he has control over the maintenance of the crossing. However, it seems unreasonable to contend that the rancher would consent to assume the risk of subjecting himself to possible ruinous liability resulting from circumstances over which he had no control.[12] Thus, it is the conduct of the parties subsequent to the formation of the contract that provides the court with an additional justification for excluding the railroad's own negligence as a cause for indemnification.

Several other considerations appear to be implicit in the court's rationale. Where a contract is ambiguous, the terms employed therein should be construed most strongly against the party drafting the instrument,[13] and here Southern Pacific appears to have prepared the agreement.[14] Any doubts as to the nature of the indemnitor's duty should be resolved against the railroad, since it was the party responsible for creating the ambiguity.

While contracts which clearly purport to indemnify against a party's

---

[9] *See* Bank of Cashton v. La Crosse County S.T. Mut. Ins. Co., 216 Wis. 513, 518, 257 N.W. 451, 452 (1934), where the court noted:

> [W]here one construction would make a contract unusual and extraordinary while another equally consistent with the language used would make it reasonable, just, and fair, the latter must prevail.

Accord, Employer's Liab. Assur. Corp. v. Lunt, 82 Ariz. 320, 313 P.2d 393 (1957); Tyson v. Tyson, 61 Ariz. 329, 149 P.2d 674 (1944). RESTATEMENT OF CONTRACTS § 236(a) (1932) provides:

> An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestation unreasonable, unlawful or of no effect.

[10] *E.g.*, North Am. Ry. Constr. Co. v. Cincinnati Traction Co., 172 F. 214, 216 (7th Cir. 1909); Southern Pac. Co. v. Layman, 173 Ore. 275, 145 P.2d 295 (1944); Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907).

[11] *See* note 4 *supra*.

[12] 105 Ariz. at 108, 460 P.2d at 2.

[13] This "secondary rule of construction" is utilized by the courts when recourse to the "primary rules of construction" fail to indicate with clarity the intention of the parties in relation to the ambiguous terms. *See, e.g.*, Hamberlin v. Townsend, 76 Ariz. 191, 261 P.2d 1003 (1953); Central Housing Inv. Corp. v. Federal Nat'l Mortg. Ass'n, 74 Ariz. 308, 248 P.2d 866 (1952). RESTATEMENT OF CONTRACTS § 236(d) (1932):

> Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed.

[14] Although the fact that the railroad prepared the agreement is not specifically mentioned in the court's opinion, the Supreme Court of Oregon, construing the identical provision, refers to the railroad as the drafter of the contract. Southern Pac. Co. v. Layman, 173 Ore. 275, 145 P.2d 295 (1944).

own negligence are usually enforced,[15] most courts have indicated a policy of disfavor toward such agreements.[16] As the Supreme Court of Utah has stated:

> [T]he law does not look with favor upon one exacting a covenant to relieve himself of the basic duty which the law imposes on everyone: that of using due care for the safety of himself and others. This would tend to encourage carelessness . . . .[17]

Thus, where the indemnitor has not expressly assumed responsibility for the indemnitee's negligence, the courts will refrain from imputing such an intent to the contracting parties, providing that another meaning can be reasonably inferred from the language of the contract.[18]

It appears that the Arizona court may have disregarded this qualification by failing to suggest a reasonable alternative interpretation of the indemnity provision. This oversight may have rendered the crossing agreement completely inoperable. If the collision had occurred because of the indemnitor's breach of his contractual duty to maintain the crossing in good repair, it would seem reasonable to hold the ranch liable for the resulting damage to Southern Pacific. This would, in effect, be a reasonable interpretation sustaining the effectiveness of the indemnity provision without including the indemnitee's negligence within its terms. However, this contractual obligation of the ranch has apparently been waived by Southern Pacific.[19] Consequently, it is difficult to conceive of circumstances under which the indemnity provision might become operative.[20] It is submitted that the only interpretation which will sustain the effectiveness of the clause, under these circumstances, is the inclusion of the railroad's negligence within the terms of indemnification. The practical effect of the court's conclusion is that Southern Pacific, by assuming the task of

---

[15] *E.g.*, Ryan Mercantile Co. v. Great N. Ry., 294 F.2d 629 (9th Cir. 1961); Chicago & Nw. Ry. v. Rissler, 184 F. Supp. 98 (D. Wyo. 1960); Rhinehart v. Southern Pac. Co., 38 F. Supp. 76 (S.D. Cal. 1941); Northern Pac. Ry. v. Thornton Bros. Co., 206 Minn. 193, 288 N.W 226 (1939); United States Fire Ins Co. v. Northern Pac. Ry., 30 Wash. 2d 722, 193 P.2d 868 (1948).

[16] *See* cases cited note 2 *supra.*

[17] Union Pac. R.R. v. El Paso Natural Gas Co., 17 Utah 2d 255, 259, 408 P.2d 910, 913 (1965).

[18] *See, e.g.*, United States v. Wallace, 18 F.2d 20 (9th Cir. 1927); Vinnell Co. v. Pacific Elec. Ry., 52 Cal. 2d 411, 340 P.2d 604 (1959); Mitchell v. Southern Ry., 124 Ky. 146, 74 S.W. 216 (1903); Union Pac. R.R. v. El Paso Natural Gas Co., 17 Utah 2d 255, 408 P.2d 910 (1965). *See also* RESTATEMENT OF CONTRACTS § 236(a) (1932).

[19] *See* note 4 *supra.*

[20] The possibility of the ranch being called upon to indemnify Southern Pacific for loss occasioned by a third party is somewhat remote, in that the use of the crossing was restricted by the terms of the contract. *See* Provision (7) of the "Private Road Crossing Agreement," which provides:

> Licensee shall not permit said crossing to be used by the public or by any person or persons except Licensee, Licensee's family, tenants and employees, it being expressly understood and agreed that said crossing is a private one and is not intended for public use. Southern Pac. Co. v. Layman, 173 Ore. 275, 277, 145 P.2d 295, 295-96 (1944).

The Arizona court noted that this is the identical agreement involved in the dispute between Southern Pacific and the Gila Ranch. 105 Ariz. at 108, 460 P.2d at 2.

maintaining the crossing, relinquished its right to be indemnified against loss arising from the "maintenance, presence, or use" of the crossing. Indeed, it is questionable whether there remains sufficient consideration to support the privilege, enjoyed by the ranch, of crossing Southern Pacific's right of way.

The court's reference to the disparity in bargaining power between Southern Pacific and the ranch poses a problem which transcends the attempt to ascertain whether the parties *intended* to include the railroad's negligence within the terms of indemnification. In actuality, the railroad's allegedly superior bargaining capacity relates more directly to the threshold matter of the *validity* of contracts purporting to indemnify against the indemnitee's own negligence. If the railroad's bargaining strength is attributable to its financial position as a common carrier, and if it is contracting in this capacity, an agreement to exempt itself from the consequences of its own negligence would constitute an illegal bargain, and *as such* would be unenforceable, regardless of the intent of the contracting parties.[21] While acting as a common carrier, Southern Pacific owes a duty of care to the public. It is universally acknowledged that one engaged in an activity clothed with a public duty cannot exempt himself from the consequences of his negligence in the performance of that duty.[22] The rationale underlying this rule was set forth by the Supreme Court of the United States in *Santa Fe, Prescott & Phoenix Railway v. Grant Brothers Construction Co.*:

> The great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community. A carrier who stipulates not to be bound to the exercise of care and diligence 'seeks to put off the *essential duties* of his employment.'[23]

If, on the other hand, Southern Pacific is acting in its capacity as a private landowner, it seems that the railroad should enjoy the same freedom of contract that the law affords any private person.[24] Accord-

---

[21] Red Rover Copper Co. v. Industrial Comm'n, 58 Ariz. 203, 214, 118 P.2d 1102, 1107 (1941), where the court stated, "No contractual consent, no statute of limitations, no laches nor estoppel can prevail against public policy, and any agreements made and any acts done in violation of it are necessarily void."

[22] United States v. Atlantic Mut. Ins. Co., 343 U.S. 236, 239 (1952), where the court stated:

> There is a general rule of law that common carriers cannot stipulate for immunity from their own or their agents' negligence. While this general rule was fashioned by the courts, it has been continuously accepted as a guide to common carrier relationships for more than a century and has acquired the force and precision of a legislative enactment.

Accord, Union Pac. R.R. v. Burke, 255 U.S. 317, 321 (1921); Boston & M.R.R. v. Piper, 246 U.S. 439 (1918); Santa Fe, P. & P. Ry. v. Grant Bros. Constr. Co., 228 U.S. 177 (1913); Jacob v. Pennsylvania Ry., 203 F.2d 290 (6th Cir. 1953); Curtiss-Wright Flying Serv., Inc. v. Glose, 66 F.2d 710 (3d Cir. 1933); RESTATEMENT OF CONTRACTS § 575(1)(b) (1932).

[23] 228 U.S. 177, 184-85 (1913).

[24] *Id.* at 185, where the Court stated:

ingly, the railroad should be able to enter into a covenant granting the privilege of constructing and using a road across its right of way in exchange for a promise to indemnify the railroad against *all* loss and expense resulting from the existence of the crossing.

The Arizona court does not articulate the basis for concluding Southern Pacific enjoyed a superior bargaining position. Since the court does not inquire into the threshold question of the legality of the contract, it must be assumed that Southern Pacific was regarded as having entered into the agreement in its private capacity as a property owner. However, the fact that Southern Pacific contracted in its private capacity does not obviate the possibility that a disparity in bargaining power existed between the rancher and the railroad at the time the contract was consummated:

> In order to encourage the development of this country, railroads were granted by governmental subsidy rights-of-way which cut a swath across this state and many others. While this grant was undoubtedly in the best interests of the country, for those owning property in the immediate vicinity of the railroad, particularly when their holdings were divided by this right-of-way, there was created a situation of economic subservience.[25]

The court's opinion, construing a contract of indemnity so as to exclude an indemnitee's negligence, unless the terms of the contract manifest an unequivocal intent to include such negligence, is apparently in accord with the weight of authority.[26] However, a close inquiry into the circumstances surrounding the parties in the instant case, as evidenced by their conduct subsequent to the consummation of the crossing agreement, offers as a reason for including the railroad's negligence in the terms of indemnification, that without such inclusion the contract is without effect. It is difficult, in light of the court's conclusion to the contrary, to envision circumstances under which the indemnity provision could become operable.

> Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service.

Accord, Ryan Mercantile Co. v. Great N. Ry., 294 F.2d 629 (9th Cir. 1961); Minneapolis-Moline Co. v. Chicago M., St. P. & P.R.R., 199 F.2d 725 (8th Cir. 1952); Rhinehart v. Southern Pac. Co., 38 F. Supp. 76 (S.D. Cal. 1941); Russell v. Martin, 88 So. 2d 315 (Fla. 1956); Northern Pac. Ry. v. Thornton Bros. Co., 206 Minn. 193, 288 N.W. 226 (1939); Fredrick v. Great N. Ry., 207 Wis. 234, 240 N.W. 387 (1932).

[25] Southern Pac. Co. v. Gila River Ranch, Inc., 9 Ariz. App. 570, 575, 454 P.2d 1010, 1015 (1969) (Molloy, J., dissenting) (footnote omitted).

[26] *See* note 2 *supra*.

CREDITORS' RIGHTS

CONTRACTORS' BONDS

In *Arizona Gunite Builders, Inc. v. Continental Casualty Co.*,[1] appellant instituted suit against the defendant surety on a bond issued under Section 32-1152 of the *Arizona Revised Statutes Annotated*[2] in connection with codefendant's contractor's license. Gunite recovered judgment against Continental's bond for the labor provided, but its claim for the rental of a welding machine used by the contractor was denied by the trial court.

On appeal, the Supreme Court of Arizona said that the only question presented was "whether the rental of equipment can be the subject of a claim against the bond under the statutory phrase 'labor or materials.' "[3] The court's affirmative answer rested on two grounds: first, that section 32-1152 must be read with Arizona's Mechanic's and Materialman's Lien Law;[4] and second, that their analysis would be influenced by a federal court's interpretation of similar language in the Miller Act[5] in *Moran Towing Corp. v. M.A. Gammino Construction Co.*[6]

In determining the legislative intent underlying section 32-1152, the court first examined section 32-1162, which states: "Nothing in this chapter . . . shall be deemed to affect the mechanic's lien law."[7] This provision would seem to mean only that a materialman should not be required to elect one remedy to the exclusion of the other.[8] The *Gunite*

---

[1] 105 Ariz. 99, 459 P.2d 724 (1969).

[2] ARIZ. REV. STAT. ANN. § 32-1152(D) (Supp. 1969-70) provides in part:

> The bonds required by this chapter shall be in favor of the state for the benefit of any person covered by this subsection. The bond shall be subject to claims by any person who, after entering into a construction contract with the principal is damaged by the failure of the principal to perform the contract *or by any person furnishing labor or materials used in the direct performance* of a construction contract. (emphasis added).

[3] 105 Ariz. at 100, 459 P.2d at 725.

[4] ARIZ. REV. STAT. ANN. § 33-981 (1956):

> A. Every person who labors *or furnishes materials, machinery, fixtures or tools* in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien thereon for the work or labor done or materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent.
>
> B. Every contractor, sub-contractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement, is the agent of the owner for the purposes of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent. (emphasis added).

[5] 40 U.S.C. § 270(b) (1964), the pertinent portion of which reads: "Every person who has furnished labor and materials in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished . . . shall have a right to sue on such payment bond . . . ."

[6] 363 F.2d 108 (1st Cir. 1966).

[7] ARIZ. REV. STAT. ANN. § 32-1162 (1956).

[8] The *Gunite* court notes precedent to the effect that the intent of the legisla-

court not only recognized this purpose but also took section 32-1162 to mean that in order "to properly construe 32-1152 it must be read in the light of, and harmonized with the Mechanics' and Materialmen's Lien Law, §§ 33-981 *et seq.*"[9] The court viewed this requirement of section 32-1162 and the " 'rule of construction that statutes *in pari materia* must be read . . . together and . . . all parts of the law on the same subject must be given effect, if possible' "[10] as a mandate to include in the "labor or materials" phrase of section 32-1152 the "machinery, fixtures or tools" expressly included in section 33-981.[11] The court reasoned that to hold otherwise would create a preferred class of materialmen who would have recourse to both lien and bond remedies.[12] The court further reasoned that the legislature could not have intended to create such a preferred class and thus must have intended both statutes to protect the same interests of the same parties.[13]

Construing these two statutes in this manner may not be well-founded.[14] Section 33-981 specifically protects "[e]very person who

---

ture in passing section 32-1152 was to prevent forced election of remedies. It quotes from United States Fidelity & Guar. Co. v. Hirsch, 94 Ariz. 331, 333, 385 P.2d 211, 212 (1963), where the court held that " '[t]he clear intent of the legislature in enacting § 32-1152 . . . was to make sure that an election by a materialman to sue under A.R.S. § 32-1152 . . . would not preclude him from proceeding under the materialman's lien law for any amount due in excess of the amount of the bond.' " 105 Ariz. at 101, 459 P.2d at 726.

[9] 105 Ariz. at 101, 459 P.2d at 726.

[10] *Id., quoting* Home Owners' Loan Corp. v. City of Phoenix, 51 Ariz. 455, 461, 77 P.2d 818, 820 (1938). The *Gunite* court relies on 82 C.J.S. *Statutes* § 366 (1953) for the rule that " '[s]tatutes which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose are in pari materia.' " 105 Ariz. at 101, 459 P.2d at 726.

[11] It is interesting to note that while the court here uses section 33-981 as authority for the proposition that the legislature intended the "labor and materials" to include rentals of construction equipment, and while that statute does expressly provide liens to cover those who furnish tools, nowhere has the Arizona court expressly held that section 33-981 includes rentals. In Kerr-McGee Oil Indus., Inc. v. McCray, 89 Ariz. 307, 361 P.2d 734 (1961), plaintiff asserted a lien for the balance due for furnishing a well-drilling rig. There, however, the rig was manned by plaintiff's employees and plaintiff sued for "work done." *Id.* at 309, 361 P.2d at 735. Jurisdictions vary as to whether a materialman renting equipment to a contractor may place a lien on the owner's property, but this variance is due at least in part to differences in the wording of state lien statutes. *See generally* Annot., 3 A.L.R.3d 573 (1965).

[12] 105 Ariz. at 101, 459 P.2d at 726.

[13] *Id.* at 101-02, 459 P.2d at 726-27.

[14] *See* United States Fidelity & Guar. Co. v. California-Arizona Constr. Co., 21 Ariz. 172, 186 P. 502 (1920), wherein a similarly worded predecessor to section 32-1152 was held not to cover lumber provided to a contractor because it did not become part of the structure, nor was it substantially consumed. The *Gunite* court noted that *United States Fidelity & Guaranty* supported Continental's position but distinguished the case in light of the legislative intent discerned from subsequent statutory revisions. The *Gunite* court cited Employment Sec. Comm'n v. Fish, 92 Ariz. 140, 375 P.2d 20 (1962), for the revisionary history of the bond statute; however, a reading of that case reveals that only minor changes have in fact taken place and that there is little basis for the *Gunite* court's contentions regarding an historical change in legislative intent. As to the protective intent of the Arizona legislature, see United States Fidelity & Guar. Co. v. Aire-Flo Products Inc., 94 Ariz. 330, 385 P.2d 211 (1963); Employment Sec. Comm'n v. Fish, 92 Ariz. 140, 375 P.2d 20 (1962); Kerr-McGee Oil Indus., Inc. v. McCray, 89 Ariz. 307, 361 P.2d 734 (1961).

labors or furnishes materials, machinery, fixtures or tools . . . ."[15] If the legislature intended section 32-1152, which was enacted 48 years after the lien law, to protect materialmen who furnish tools, it could clearly have used the language of section 33-981 instead of the phrase "labor or materials."[16]

This finding of an analogy of purpose between a statute which allows contractors and materialmen to place liens on an owner's property,[17] and a statutory contractor's bond which protects materialmen[18] may be unfortunate. By reasoning that the same interests were intended to be protected by sections 33-981 and 32-1152, the *Gunite* court raised questions as to whether other subsidiary doctrines in the lien law should be considered to be part and parcel of section 32-1152. Will materialmen who are not in privity of contract with the contractor be limited to the reasonable value of the goods supplied, as materialmen who have an analogous relationship with the owner are limited under the lien law?[19] Will materialmen who furnish tools which are used only on a standby basis be left without remedy?

Although section 33-981(A) expressly provides that "[e]very person who labors or furnishes materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien thereon,"[20] the Arizona court has found that the lien law was only intended to protect those who actually enhance the value of the owner's property.[21] Thus, lessors of standby equipment are precluded from asserting liens on the improved property.[22] It appears probable that these same materialmen are also without the protection of the contractor's bond when it is noted that the language of section 32-1152 is even more amenable to such an interpretation than is

---

15 ARIZ. REV. STAT. ANN. § 33-981(A) (1956).

16 Section 32-1152 was enacted in 1961. Section 33-981 was enacted in essentially its present form in 1913.

17 *Cf.* Lenslite Co. v. Zocher, 95 Ariz. 208, 388 P.2d 421 (1964).

18 *See* ARIZ. REV. STAT. ANN. § 32-1152(D) (Supp. 1969-70) which provides in part: "The bond shall be subject to claims by any person who, after entering into a construction contract with the principal is damaged by the failure of the principal to perform the contract . . . ." This wording would seem amenable to an interpretation allowing owners to sue contractors under the bond for nonperformance or misfeasance. However, the Arizona courts have not yet been presented with this question and most bond statutes in other states (for private and public construction projects) do not contain language to the same effect. *See, e.g.*, text accompanying notes 26-28 *infra*; ALA. CODE tit. 50, § 16 (1958); CONN. GEN. STAT. REV. § 49-41 (1958); KAN. STAT. ANN. §§ 60-1110 & -1111 (1964); MICH. STAT. ANN. §§ 26-321 to -325 (1953); MISS. CODE ANN. § 9014 (1942). However, in some states, the materialmen's bond statute is included in the statute providing for performance bonds. *See, e.g.*, ARK. STAT. ANN. §§ 51-632 to -635 (Supp. 1967); GA. CODE ANN. §§ 23-1705 to -1715 (1966).

19 *See* Lenslite Co. v. Zocher, 95 Ariz. 208, 388 P.2d 421 (1964).

20 ARIZ. REV. STAT. ANN. § 33-981 (1956).

21 Ranch House Supply Corp. v. Van Slyke, 91 Ariz. 177, 370 P.2d 661 (1962); Arizona E.R.R. v. Globe Hardware Co., 14 Ariz. 397, 129 P. 1104 (1913).

22 Kerr-McGee Oil Indus., Inc. v. McCray, 89 Ariz. 307, 361 P.2d 734 (1961).

the language of the lien law.[23]

In adopting the First Circuit's interpretation in *Moran* of similar language in the Miller Act as "the better rule,"[24] the *Gunite* court adhered to its stated constructional preference of giving serious consideration to another jurisdiction's interpretation of a similarly worded statute.[25] However, the court did not follow through on this proposition and consider interpretations from several other states with similarly worded bonds and lien statutes. Among these states there is a split of authority as to whether the statutes protect the rental of construction equipment, but this variance is due at least in part to differences in the wording of the statutes.[26] A now repealed California bond statute provided that "[p]ersons who have . . . performed work upon the contract, or supplied materials for the execution thereof, shall receive payment of their respective claims . . . upon giving notice by filing statements as provided in Section 1192.1 of the Code of Civil Procedure."[27] Section 1192.1, however, enables "any person renting or hiring teams or implements or machinery for or contributing to the work to be done" to file a claim.[28] The California court has held that the bond covers not only rental equipment, but also repair of rental equipment if those repairs "were a part of the necessary cost of providing implements and machinery used in the performance of the contract."[29]

It is unclear why the Arizona court quoted *Moran* for the further proposition that " 'the surety's obligation not only include[s] the rental, but if the principal has undertaken to repair, or to assume the expense of ordinary wear and tear, its failure to perform in this respect may be a matter covered by the bond.' "[30] This dictum in *Gunite* may well imply that the court, if faced with the question, will decide that "labor or materials" in section 32-1152 also includes maintenance of rental equipment, at least in a situation where the contractor has agreed to pay that expense.

---

23 ARIZ. REV. STAT. ANN. § 32-1152(D) (Supp. 1969-70) protects "person[s] furnishing labor or materials *used in the direct performance* of a construction contract." (emphasis added).

24 105 Ariz. at 102, 459 P.2d at 727.

25 *See In re* Stark's Estate, 52 Ariz. 416, 422, 82 P.2d 894, 896 (1938).

26 Maulhardt v. Director of Pub. Works, 168 Cal. App. 2d 723, 336 P.2d 631 (1959), where the court held that the California bond statute protecting persons who have performed work or supplied materials covered those who rent equipment to contractors. However, *see* text accompanying note 27 *infra*. *See also* Williams Constr. Co. v. Construction Equip. Inc., 253 Md. 60, 251 A.2d 864 (1969) (holding that the words "labor and materials" did not include rental equipment); Lembke Constr. Co. v. J.D. Coggins Co., 72 N.M. 259, 382 P.2d 983 (1963) (holding that "labor and materials" did not include equipment rentals). *See* Annot., 44 A.L.R. 381 (1926).

27 Cal. Stats. 1957, ch. 66, p. 635, § 3, *repealed by* CAL. CIVIL CODE § 3251 (West Supp. 1970).

28 CAL. CIV. PRO. CODE § 1192.1 (West 1966), *as amended* (West Supp. 1970).

29 Maulhardt v. Director of Pub. Works, 168 Cal. App. 2d 723, 732-33, 336 P.2d 631, 638 (1959).

30 Arizona Gunite Builders, Inc. v. Continental Cas. Co., 105 Ariz. 99, 102, 459 P.2d 724, 727 (1969), *quoting* Moran Towing Corp. v. M.A. Gammino Constr. Co., 363 F.2d 108, 115 (1st Cir. 1966).

The *Gunite* court clearly held that the rental of equipment actually used in the performance of a construction contract is protected by the contractor's bond. They implied that maintenance of this equipment will also be covered.[31] In addition, the court's adoption of the First Circuit's interpretation of the Miller Act as the "better rule" with regard to section 32-1152 bonds strongly suggests that equipment rentals and their maintenance will also be protected by Arizona's "Little Miller Act."[32]

GARNISHMENT

In *Sniadach v. Family Finance Corp.*,[1] the United States Supreme Court held that a prejudgment garnishment[2] of wages levied under a Wisconsin statute that failed to give notice to the debtor and provide for a hearing prior to the garnishment was violative of due process. Since the Wisconsin procedure was comparable to those of other states,[3] *Sniadach* casts doubt on the validity of similar attachment proceedings in other jurisdictions. In *Termplan, Inc. v. Superior Court*,[4] the Supreme Court of Arizona had the task of interpreting *Sniadach*. This discussion will summarize the *Termplan* decision as a basis for evaluating whether it has fairly interpreted *Sniadach*, review the rationale of *Sniadach* and its recent lower court interpretations in an attempt to determine its intended scope, and finally, compare *Termplan* with *Sniadach* and recent lower court interpretations of *Sniadach* to determine what impact *Termplan* may have future garnishment and attachment proceedings in Arizona.

---

31 105 Ariz. at 102, 459 P.2d at 727.

32 ARIZ. REV. STAT. ANN. § 34-222(A)(2) (Supp. 1969-70) provides, "A payment bond in an amount equal to the full contract amount solely for the protection of claimants supplying *labor or materials* to the contractor or his subcontractors in the prosecution of the work provided for in such contract." (emphasis added). This bond is for the protection of laborers and materialmen on state (or any lesser political subdivision) construction projects.

1 395 U.S. 337 (1969).

2 " 'Garnishment' denotes a proceeding by a creditor to obtain satisfaction of indebtedness out of property or credits of the debtor in the possession of, or owing by, a third person." 6 AM. JUR. 2d *Attachment and Garnishment* § 2 (1963). *See* Posselius v. First Nat'l Bank, 264 Mich. 687, 251 N.E. 429, *cert. denied*, 292 U.S. 627 (1933). "Attachment is a remedy for the collection of an ordinary debt, proceeding by seizure, under legal process termed a writ or warrant of attachment of the property of the debtor." 6 AM. JUR. 2d *Attachment and Garnishment* § 1 (1963). *See* Wilder v. Inter-Island Nav. Co., 211 U.S. 239 (1908). Although garnishment is a form of attachment reaching the funds, effects, and credits belonging to a principal defendant which are in the hands of a third person, what is technically a garnishment is often referred to as an attachment. 6 AM. JUR. 2d *Attachment and Garnishment* § 3 (1963). *See also* CAL. CIV. PRO. CODE § 544 (West Supp. 1969) ("attachment" includes "garnishment").

3 Since attachment and garnishment exist only by legislative enactment, reference to specific statutes is required to determine the extent and scope of each state's process. *See, e.g.*, Roth v. Kaptowsky, 401 Ill. 424, 429, 82 N.E.2d 611, 664 (1948).

4 105 Ariz. 270, 463 P.2d 68 (1969).

Termplan

Termplan, Inc., an Arizona finance company, instituted a garnishment action against Figueroa, the defendant, and St. Joseph's Hospital and Medical Center, the garnishee, to recover a debt owed by Figueroa to Termplan.[5] Termplan executed affidavits on attachment and garnishment and provided a bond,[6] but the clerk of the superior court, who was apparently aware of the *Sniadach* decision, refused to issue these writs without execution of another affidavit by Termplan stating that the writ of garnishment would not be levied against Figueroa's wages. Termplan refused to execute this affidavit and sought a writ of mandamus from the superior court to require the clerk to issue the writ of garnishment. After refusing to issue the writ sought by Termplan, the superior court entered an order which broadly stated that the clerk should not issue writs of garnishment or attachment without a hearing on the merits of the claim against the alleged debtor. The language of the order not only included wage garnishments but also required a hearing for attachment actions and garnishments of other property.

On appeal, Termplan contended that substantive and procedural differences existed between the garnishment statutes of Arizona and those invalidated in *Sniadach.* In essence, Termplan argued that the Arizona provisons for a bond before issuance of the writ of garnishment afforded an adequate substitute for the hearing required by *Sniadach.*[7] The Supreme Court of Arizona rejected the necessity of a detailed comparison of the Wisconsin and Arizona statutes, remarking that petitioner's argument "misses the point"[8] since in Arizona the debtor is neither given notice of garnishment until the garnishee is notified nor provided the opportunity for a hearing prior to garnishment.[9] The court held "that the

---

[5] ARIZ. REV. STAT. ANN. § 12-1571(A)(2) (1956) provides that a writ of garnishment shall issue:

> When the plaintiff sues for a debt and makes affidavit that the debt is just, due and unpaid, and that defendant has not within his knowledge, property in his possession within this state subject to execution sufficient to satisfy such debt, and that the garnishment applied for is not sued out to injure either defendant or the garnishee. The term 'debt' includes every claim or demand for money, not arising from tort.

[6] ARIZ. REV. STAT. ANN. § 12-1572 (1956):

> In the cases mentioned in paragraph 2 of subsection A, § 12-1571 [*supra* note 5], the plaintiff shall execute a bond to be approved by the officer issuing the writ, payable to defendant in the action in the amount of the debt claimed therein, conditioned that he will prosecute the action to effect and pay all damages and costs sustained by defendant by reason of the wrongful suing out the writ of garnishment.

[7] *Cf.* Brief for Legal Aid Society as Amicus Curiae at 2, Termplan, Inc. v. Superior Ct., 105 Ariz. 270, 463 P.2d 68 (1969).

[8] 105 Ariz. at 272, 463 P.2d at 70.

[9] ARIZ. REV. STAT. ANN. § 12-1575 (1956):

> In cases of garnishment, the clerk of a court or a justice of the peace shall not make public the fact of filing the complaint or the issuance of a writ of garnishment, nor shall a sheriff or deputy disclose that the writ of garnishment is in his possession until service thereof.

procedure for garnishment of wages in this state does not measure up to the standard set forth in *Sniadach*, and that prior to the issuance of a prejudgment garnishment of wages there must be some provision for notice to the defendant and hearing on the validity of plaintiff's claim."[10] The language of the decision was restrictive, however, as the court stressed that the decision applied only "to the prejudgment garnishment *of wages* (as was the opinion of *Sniadach*)."[11] Accordingly, the supreme court vacated that part of the superior court's order which prohibited the issuance of both writs of attachment and writs of garnishment covering property *other* than wages.

Rationale and Scope of Sniadach

Although it concluded that the Wisconsin garnishment statute violated due process, the *Sniadach* Court emphasized that in certain "extraordinary situations" summary attachment would be justified to protect some unspecified "state or creditor interest."[12] By noting that the debtor in *Sniadach* was a resident of Wisconsin, the Court impliedly included as extraordinary the situation where attachment is required to obtain jurisdiction over an out-of-state resident. However, although the Court acknowledged that there may be a procedural rule which would satisfy due process for attachments in general,[13] Justice Douglas was concerned with the validity of an "interim freezing of wages . . . a specialized type of property presenting distinct problems in our economic system."[14] The Court then supported its conclusion by citing congressional reports and empirical studies that focused on the tremendous hardships inflicted on poor wage earners by such prejudgment proceedings.

In a concurring opinion, Justice Harlan expressed his concern over the loss of the "*use* of the garnished wages during the interim period be-

---

[10] 105 Ariz. at 272, 463 P.2d at 70.

[11] *Id.*

[12] 395 U.S. at 339. The Court indicated that such procedure had been permitted in Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950) (seizure of misbranded vitamin products permitted to protect purchasers); Fahey v. Mallonee, 332 U.S. 247 (1947) (appointment of a conservator prior to hearing permitted to protect funds of a federal savings and loan association); Coffin Bros. & Co. v. Bennet, 277 U.S. 29 (1928) (executions against stockholders of insolvent banks permitted to allow State Superintendent of Banks to pay depositors); Ownbey v. Morgan, 256 U.S. 94 (1921) (foreign writ of attachment permitted against stock held in an in-state corporation by an out-of-state defendant). In addition to *Ewing* and *Fahey*, Justice Harlan suggested that there are other times when a hearing is not required in order to protect vital government interests. *See, e.g.*, Bowles v. Willingham, 321 U.S. 503 (1944) (Office of Price Administration order fixing rents prior to hearing with landlords permitted); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (state seizure and destruction of unsafe food permitted without prior notice).

[13] McKay v. McInnes, 279 U.S. 820, *aff'g per curiam*, 127 Me. 110, 141 A. 699 (1928). The Supreme Judicial Court of Maine had held that the practice of instituting a writ of attachment without affidavit, bond, notice, or prior hearing complied with due process.

[14] 395 U.S. at 340.

tween garnishment and the culmination of the main suit."[15] He felt the due process standards of "notice" and "prior hearing" should be applied in order to establish "the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use."[16] Justice Black, dissenting, claimed the decision was a "judicial usurpation of state legislative power to decide what the State's laws shall be."[17]

The *Sniadach* rationale supports a wide variety of interpretations. Its scope may, however, be categorized in one of at least three ways. First, *Sniadach* could be read broadly to require extension of the due process notice and hearing requirements to *any* summary proceeding that temporarily restricts the use of a person's property. Any protection afforded by the due process clause should not be dependent upon the nature of the property in question, whether it be a wage earner's salary or a large corporation's land. Certain aspects of the opinion, however, such as the Court's recognition of an exception for "extraordinary situations," militate against this broad interpretation. In addition, by acknowledging a procedural rule which may satisfy due process for attachments in general, the Court impliedly sanctioned the validity of at least some attachment procedures not measuring up to *Sniadach* standards.

An alternative to this broad application of *Sniadach* is a narrow interpretation applying due process protections only in prejudgment wage garnishment situations. Such a restrictive application, however, would fail to consider the thrust of the *Sniadach* rationale which focused on the hardships inflicted on poor wage earners. Certainly the attachment of a small businessman's accounts receivable or the garnishment of a debtor's savings account would create as great a hardship as the garnishment of wages earned from an employer. However, in support of such a limited application of *Sniadach* is the impracticality of lower courts' effectively determining what "property" is affected by *Sniadach.* Moreover, by limiting *Sniadach* narrowly to prejudgment garnishment of wages, the courts could protect the wage earner while permitting legislatures wide discretion in solving questions raised by *Sniadach.*

Between the broad and narrow interpretations lies a third possibility which would allow lower courts to apply *Sniadach* on a case by case basis. Such an interpretation uses the rationale of protecting persons from an interim deprivation of property without notice and hearing by examining each alleged due process violation on its merits. This ad hoc approach would allow lower courts to deal with the problem of delineating those "extraordinary situations" for which a taking of property does not necessarily require prior hearing and notice. The difficulty with this interpre-

---

[15] *Id.* at 342.
[16] *Id.* at 343.
[17] *Id.* at 345.

tation is that legislatures are in a better position than courts to establish specific guidelines that would satisfy *Sniadach's* demands. Unless legislative action appears, however, this method may be the only alternative for providing for guarantees of due process in debtor-creditor disputes.

Absent proper legislation, many questions raised by *Sniadach* may go unanswered. For example, what kind of "extraordinary situations" should be excluded from notice and hearing requirements? What type of hearing was envisioned by the Court? Should *Sniadach* apply to postjudgment proceedings as well as prejudgment garnishment? Should property other than wages be afforded notice and hearing protection? If such interpretations are left to the courts on a case by case basis, the result will be unnecessary cost in terms of judicial administration that could be avoided by proper legislation.

Interpretations of Sniadach

Despite the questions posed and the criticism that *Sniadach*, as an indignant response to an existing practice, fails to delineate an acceptable procedure for attachments,[18] the United States Supreme Court has rejected an opportunity to clarify the scope of its decision, and lower courts have attempted to answer few of the questions presented. In *Moya v. De Baca*[19] the federal district court was presented with a postjudgment garnishment of wages action under a New Mexico statute that allowed a $500 exemption to debtors not owning a homestead.[20] The exemption did not apply to the first one-third of the wages due a wage earner.[21] The lower court reasoned that it could "not declare a statute unconstitutional solely upon the ground that it is unjust and oppressive and will work hardship upon the poor."[22] The Supreme Court, in a per curiam decision, dismissed the appeal, but Justices Harlan and Brennan indicated they would vacate judgment and remand the case in light of *Sniadach.*

It is unfortunate that the Supreme Court dismissed *Moya* since considering the case on its merits could have clarified whether *Sniadach* should be applied to garnishment in aid of execution of a judgment. The interesting question, however, concerns the reason for the dissents of Justices Harlan and Brennan, who may have felt that the lower courts should consider hardships upon the poor even when the garnishment was in aid of execution. On the other hand, they may have felt that *Moya* provided an appropriate setting in which to consider the retroactivity of *Sniadach.*[23] Whatever may be implied from the dismissal, it certainly

---

18 *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 62, 113, 115 (1969).
19 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed*, 395 U.S. 825 (1969).
20 286 F. Supp. at 608.
21 *Id.* n.2.
22 *Id.* at 609.
23 *Sniadach* was decided on June 9, 1969, and *Moya* was decided by the district court on July 19, 1968.

did not aid in clarifying *Sniadach*.[24]

In *Larson v. Fetherson*,[25] the Supreme Court of Wisconsin held that *Sniadach* applies to garnishment of property other than wages. The court reasoned that even though the language of *Sniadach* made considerable reference to hardships upon the wage earner, there was no valid distinction between the garnishment of wages and other property. *Larson* extended *Sniadach* to property other than wages and debtors other than wage earners by disallowing garnishment of funds of a debtor travel agency which were deposited in the garnishee's bank.

Another expansive interpretation of *Sniadach* is illutrated by *McConaghley v. City of New York*,[26] where *Sniadach* was applied to prevent witholding of a debtor's funds which were deposited with a hospital.[27] A general order of the department of hospitals allowed the hospital to retain money deposited by a patient, without notice or hearing, until the hospital determined whether the patient was pecunious. The court reasoned that the procedure was not different than the one declared to be violative of due process in *Sniadach*.

On the other hand, an opinion by the North Dakota Attorney General has interpreted *Sniadach* as applying only to prejudgment situations.[28] Though the state statutory execution provisions relating to garnishment would violate due process by freezing property without giving the debtor the right to be heard, the opinion suggested that garnishment in aid of execution is not deemed invalid if a judgment was properly obtained.

Also in *Bolthazar v. Mari Ltd.*,[29] a federal district court noted that *Sniadach* dealt only with wages and determined it to be inapplicable to land sold at public auction to recover taxes due from delinquent owners. The procedure upheld provided for objections to be made by the delinquent taxpayer before a judgment of sale was entered by a court, and for notice to him before the public sale. Although such procedure would likely meet the requirements of *Sniadach*, the court's indication that *Sniadach* applied only to wages demonstrates a tendency to limit the opinion strictly to prejudgment wage garnishments.

A potentially narrow interpretation of *Sniadach* was given by the Supreme Court of California in *McCallop v. Carberry*,[30] where the plaintiff debtor sought an injunction to prevent the sheriff from attaching[31] wages

---

[24] However, the Court recently has partially clarified what type of hearing may be required by apparently accepting Justice Harlan's suggestion in his concurring opinion. *See* Goldberg v. Kelly, 90 S. Ct. 1011 (1970).

[25] 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

[26] 60 Misc. 2d 825, 304 N.Y.S.2d 136 (New York City Civ. Ct. 1969).

[27] *Id.* at 827, 304 N.Y.S.2d at 138.

[28] 2 CCH. Pov. L. REP. ¶ 10,403 (1969).

[29] 301 F. Supp. 103 (N.D. Ill. 1969).

[30] 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

[31] In California a levy of garnishment is made by serving writs of attachment. CAL. CIV. PRO. CODE § 544 (West Supp. 1969).

at the plaintiff's place of employment. The California attachment differed from the Wisconsin garnishment procedure in that it required notice to the debtor before a prejudgment attachment. However, since one-half of a debtor's wages could be subject to attachment prior to a hearing, the court concluded "a defendant wage earner with a family to support could undergo the extreme hardship emphasized by *Sniadach*."[32] The court held that California's prejudgment attachment procedure fell within the rationale of *Sniadach* and accordingly invalidated the statute. Interestingly, the California court recognized the "similar conclusion"[33] made by the Supreme Court of Arizona in *Termplan.*

Though the interpretations of *Sniadach* demonstrate varied applications by different jurisdictions, the most striking obervation is that they portend a trend of avoiding the problems posed by *Sniadach.* One possible explanation for this failure to answer some of *Sniadach's* questions may be that the particular factual circumstances requiring an answer have yet to come before the courts. The more probable explanation is that the intent of *Sniadach* is so unclear, due to the cryptic language of Justice Douglas' opinion, that the lower courts are reluctant to expand the decision beyond what it declares on its face. Whatever the explanations, it is evident that the lower courts are not properly equipped to suggest specific remedies ranging from a narrow interpretation limiting *Sniadach* to its facts to a complete abolition of all prejudgment garnishment and attachment proceedings. Consequently, state legislatures should act to resolve the problems.[34] Additionally since the protection of the consumer-debtor sought in *Sniadach* has been the subject of legislation that protects the debtor's livelihood from unscrupulous collection devices, if this legislation satisfies due process requirements, future broad constructions of *Sniadach* by the courts may become unnecessary.[35]

Termplan's Potential Impact

In comparing *Termplan* with other interpretations of *Sniadach,* the approach will be first to consider how the Supreme Court of Arizona and other courts have responded to some of the specific questions raised in *Sniadach,* and then to evaluate what *Termplan's* impact will be on Ari-

---

[32] 1 Cal. 3d at 907, 464 P.2d at 125, 83 Cal. Rptr. at 669.

[33] *Id.* at 907 n.8, 464 P.2d at 125 n.8, 83 Cal. Rptr. at 669 n.8. However, there is no language in *McCallop* which expressly limits the decision to prejudgment attachment of wages while the *Termplan* opinion contains specifically limiting language. *See* 105 Ariz. at 272, 463 P.2d at 70.

[34] Some states do not allow prejudgment garnishment of wages, *e.g.,* PA. STAT. tit. 42, § 886 (1966). Some allow garnishment only in special situations, *e.g.,* IOWA CODE § 693.3 (1966). *See also* WIS. STAT. ANN. §§ 267.01-.24 (Supp. 1969) (revising garnishment procedures in light of *Sniadach*).

[35] *See, e.g.,* UNIFORM CONSUMER CREDIT CODE § 5.104 (prohibiting prejudgment garnishment for consumer debts); Consumer Credit Protection Act, 82 Stat. 146 (Act of May 29, 1968) (establishing, *inter alia,* proportional monetary limits to permissible garnishment actions).

zona garnishment and attachment proceedings.

Neither *Termplan* nor other state court decisions have directly considered what might constitute an "extraordinary situation" within the terms of *Sniadach.* However, there are certain recognized situations, such as fraud and concealment, in the statutes of some states which may be characterized as extraordinary.[36] In states which permit prejudgment garnishment but do not have statutes specifying extraordinary situations, the courts have failed to delineate these situations in their decisions. The anomaly is that even though *Sniadach* assumes circumstances whereby a garnishment and attachment can be made without strict adherence to the notice and hearing requirements, there is no method of determining whether an extraordinary situation exists until after a plaintiff-garnishor is denied the writ. Therefore, an additional court action is required to determine whether the situation was "extraordinary." This would be unnecessarily costly in terms of time and unnecessary litigation.

This situation has been avoided in *wage* garnishments by allowing a judge to determine before issuance of a writ whether an "extraordinary situation" exists.[37] However, such a solution assumes that it is a proper procedure for an independent judge, instead of a legislature, to determine what constitutes extraordinary situations beyond those specifically indicated in *Sniadach.* Furthermore, it leaves unanswered whether such a procedure satisifes the hearing and notice requirements contemplated by *Sniadach.* Some states have statutes allowing garnishment only in special situations[38] and it is submitted that such specific legislation provides a satisfactory solution to the problem of determining any additional special circumstances contemplated by *Sniadach.* By limiting its application to prejudgment wage garnishments, and by not considering extraordinary situations specifically, *Termplan* has allowed the Arizona legislature wide discretion in delineating circumstances where prejudgment garnishments are permissible.

Though lower courts interpreting *Sniadach* have suggested no solution to the problem of what type of hearing may satisfy due process, a recent Supreme Court decision has clarified the requirement. In *Goldberg v. Kelly,*[39] the Court, in response to appellants' contention that it was denial of due process for the state to terminate welfare payments without notice or a hearing of any kind, held that an evidentiary hearing was required but declared that such a hearing need not "take the form of a judicial or

---

[36] CCH CONSUMER CREDIT GUIDE ¶ 99,904 (1969).

[37] For example, in Pima County upon a showing of special circumstances a Superior Court Judge can order the clerk of the court to issue writs of garnishment. Telephone conversation with clerk of the court, March 31, 1970.

[38] *E.g.,* IOWA CODE § 639.3 (1966). *See also* CCH CONSUMER CREDIT GUIDE ¶ 99,904 (1969).

[39] 90 S. Ct. 1011 (1970). *See also* Wheeler v. Montgomery, 90 S. Ct. 1026 (1970) (invalidating California procedure for terminating old age benefits before an evidentiary hearing as required by *Goldberg*).

quasi-judicial trial."[40] Additionally, analogizing to *Sniadach*, the Court emphasized that the function of such a hearing was "to produce an initial determination of the validity of the welfare department's ground for discontinuance of the payment in order to protect a recipient against an erroneous termination of benefits."[41]

Not only is this decison helpful in suggesting a type of hearing that could apply to prejudgment wage garnishments but it also indicated that the same hearing procedures will apply to situations similar to the interim deprivation of wages considered in *Sniadach*. However, *Goldberg* leaves to lower courts the problem of delineating a method of getting a debtor before the court to test the validity of a creditor's claim prior to garnishment. The difficulty of satisfying these hearing requirements may, as a practical matter, make it impossible to establish an effective procedure permitting prejudgment garnishments. Indeed, one of the purposes of *Sniadach* may have been to abolish most prejudgment summary deprivations of property. *Termplan* neither dealt with nor suggested a procedure that would satisfy the hearing requirements of *Goldberg*. Hence, in the absence of legislative enactment, the Supreme Court of Arizona will be forced to determine whether *Goldberg* requires that an evidentiary hearing be applied to attachments or garnishments of property other than wages.

As suggested in *Moya v. De Baca* and as specifically determined by the Attorney General of North Dakota, there is support for restricting *Sniadach* to prejudgment procedures, thereby permitting garnishment of even the poor wage earner who has suffered a judgment against him.[42] In this respect, *Termplan* falls in line by its limited holding which invalidates only *prejudgment* wage garnishments. However, the Supreme Court of Arizona's action does not preclude the Arizona legislature from effectively barring garnishments in aid of execution by enacting a proposed bill prohibiting issuance of a writ of garnishment or attachment for any "earnings."[43] If legislation is enacted which restrains garnishment of *all* earnings, such action would suggest that the legislature wants to broaden

---

40 Goldberg v. Kelly, 90 S. Ct. 1011, 1020 (1970).

41 *Id.*

42 *See also* Endicott Co. v. Encyclopedia Press, 266 U.S. 285 (1924) (which suggests that postjudgment garnishment would not violate due process). *But see* Sackin v. Kersting, 10 Ariz. App. 340, 343, 458 P.2d 544, 547 (1969) (suggesting that *Sniadach* may be applied to require a hearing to protect a garnishee in a fraudulent conveyance even though the garnishor has a judgment against the debtor).

43 Ariz. H.B. 157 introduced Jan. 27, 1970, if passed, would repeal ARIZ. REV. STAT. ANN. §§ 12-1594, 12-1601 to -1604 (1956) and would amend ARIZ. REV. STAT. ANN. § 12-1571 (1956) to add:

> c. Notwithstanding any other provision of this section, no writ shall issue for earnings, and earnings shall not be subject to garnishment. For the purpose of this section, the term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payment pursuant to a pension or retirement program.

Sniadach in one aspect by extending its rationale to garnishments in aid of execution. Conversely, the proposed legislation would also narrowly interpret *Sniadach* in another respect since it is restricted to protecting earnings from garnishment.

The broadest trend demonstrated in interpreting *Sniadach* is an application of its due process protections to summary proceedings depriving a person of property other than wages.[44] Such an extension is justifiable based on *Sniadach's* rationale of protecting the poor, but it is an inappropriate extension if it necessitates a judicial determination of what property should be protected when state legislatures are better equipped to determine that question. However, in jurisdictions such as Arizona where *Termplan* has restricted *Sniadach* to wage garnishments, there is no alternative to legislatitve action if extension of *Sniadach* is to occur.

Although *Termplan* appears to have narrowly restricted *Sniadach*, it is submitted that a careful consideration of its rationale suggests methods by which the Supreme Court of Arizona could expand its decision. The fundamental question concerning *Termplan* is whether the court, in emphasizing that its holding was limited to the prejudgment garnishment of wages, effectively foreclosed consideration of whether other summary procedures or other types of property may be within the *Sniadach* rationale. Several factors militate against such an interpretation.

First, attachment of a specific type of property was not actually in issue in *Termplan.* Though Termplan sought writs of garnishment and of attachment, it sought a writ of mandamus to require the clerk of the superior court to issue only a writ of garnishment. The superior court order restricting the issue of the writs of garnishment and attachment was therefore overextensive. It is unfortunate that as a result of this order Termplan was able to argue that *Sniadach* should not apply to attachments when, in fact, there was no showing as to what property Termplan intended to attach.[45] If the case had presented a different factual situation, for example, had Termplan intended to garnish Figueroa's bank account, attach a debt owing by some third person to Figueroa,[46] or attach some other type of property belonging to Figueroa that he utilized in earning a living, then the court might have been inclined to extend the decision to protect specific property other than wages. *Termplan,* by

---

[44] *See* notes 30-35 *supra,* and accompanying text.

[45] Termplan inferentially put wages in issue by refusing to execute an affidavit stating that the writ of garnishment would not be levied against the debtor's wages. However, judging from the opinion, the Supreme Court of Arizona merely speculated about the nature of the property to be attached. Therefore, *Termplan's* restriction of *Sniadach* as applicable only to prejudgment wage garnishment situations appear to be a strained result considering the fact situation which confronted the court.

[46] *See* Hill v. Favor, 52 Ariz. 561, 570-71, 84 P.2d 575, 578 (1938), where the Supreme Court of Arizona stated, in dictum, that if the note and mortgage on a parcel of real estate could be brought into the possession of the attaching officer, the debt itself could be thereby attached.

this analysis, could be no more than a reprimand to the lower court for issuing an overextensive order and an acknowledgment by the court that *Termplan* presented poor facts on which to extend *Sniadach.*

Second, the court's out-of-hand rejection of Termplan's argument that *Sniadach* will destroy in Arizona "in rem jurisdiction based on the garnishment"[47] of a debtor may indicate that the court contemplates being called upon to decide some of the other problems presented by *Sniadach.* By this analysis, the court certainly did not intend to foreclose further consideration of the requirements of due process in garnishment proceedings.

Finally, the Supreme Court of Arizona failed to comment on the prior Arizona appellate court decision of *Arnold v. Knettle,*[48] where it was reasoned that *Sniadach* required holding the principal Arizona garnishment statute unconstitutional. As it is now, the Arizona prejudgment garnishment procedure has been invalidated by an appellate court but condoned by the supreme court with the exception of prejudgment garnishment of wages. If the supreme court honestly intended to interpret *Sniadach* narrowly, they should have at least overruled *Arnold.* Failing to do so suggests that the court was either ignorant of the *Arnold* decision or wanted for the present to address itself only to prejudgment wage garnishments.

Whatever the Supreme Court of Arizona meant in *Termplan,* clarification is required. Though clarification of summary procedures in general would be appropriate action for legislative initiative, the court at least should clarify the confusion caused by the conflicting judicial interpretations of *Sniadach* by Arizona courts. It is additionally suggested that the rationale of *Sniadach* as correctly interpreted in some jurisdictions applies the due process safeguards of hearing and notice to garnishments of property other than wages to prevent hardships to the debtor. Therefore, if due to legislative inactivitiy it is necessary to extend *Sniadach* on a case by case basis, the Supreme Court of Arizona should not consider *Termplan* a foreclosure to extension, but it should be willing to enlarge its impact as appropriate fact situations are presented.

---

[47] 105 Ariz. at 272, 463 P.2d at 70.
[48] 10 Ariz. App. 509, 460 P.2d 45 (1969).

TORTS AND LIABILITY INSURANCE

INSURANCE

DUTY TO DEFEND

In *Damron v. Sledge*[1] the plaintiffs alleged that they had been injured when defendant Sledge negligently struck their car while he was driving defendant Polk's vehicle. Both Polk's and Sledge's insurers refused to defend the suit against Sledge who was then forced to procure counsel himself.[2]

Sledge's attorney soon found himself in what appeared to be a time-consuming case with little chance of remuneration. He unsuccessfully applied to the trial court for permission to withdraw. The plaintiffs then entered into a covenant not to execute against Sledge. This agreement further provided that plaintiffs were to pay Sledge's attorney's fees and, in return, Sledge assigned to the plaintiffs whatever claims he had against the insurers for their failure to defend.[3]

On the date set for trial, plaintiffs moved to amend their complaint by dismissing with prejudice against Polk. In the argument that ensued, Sledge's attorney revealed that he intended to allow a default by withdrawing his answer. Polk's counsel, who was employed by her insurer and who had learned of the covenant not to execute during the hearing on the motion to dismiss, opposed plaintiffs' motion and argued instead that plaintiffs' entire complaint should be dismissed.[4] Although no testimony had been taken, the trial judge indicated that he thought the agreement was collusive, and on defendant Polk's motion, he dismissed plaintiffs' action against both defendants.

On appeal, the Supreme Court of Arizona reversed the order dismissing the complaint. The court based the reversal on three separate grounds: first, that a plaintiff has an absolute right to a voluntary dis-

---

1 105 Ariz. 151, 460 P.2d 997 (1969).

2 The insurers' refusals to defend were predicated on the assumption that Sledge was driving without Polk's permission. No evidence was taken on this question and it is unclear whether permission was given. It appeared that under the policies involved, the acts of Sledge were not covered under either policy if he was driving without Polk's permission. *See* Note, *Insurance—Automobile Liability Policy—Coverage of a Second Permittee Under the Omnibus Clause*, 5 ARIZ. L. REV. 299 (1964).

3 105 Ariz. at 152-53, 460 P.2d at 998-99.

4 Defendant Polk's attorney was provided by her insurer, National Union Insurance Co. It was his worry concerning the interests of that company, not the interests of Polk, which prompted his objection to his dismissal from the case. A dismissal with prejudice would ordinarily be the best result a defendant could hope for because it acts as an adjudication on the merits of all of the issues presented and forever bars that plaintiff from suing that defendant on the cause of action underlying the case. Smoot v. Fox, 340 F.2d 301 (6th Cir. 1964).

missal with prejudice of his complaint; second, that the arrangement between plaintiffs and Sledge was not ipso facto collusive; and third, that where an arrangement is not ipso facto collusive, the trial court must hear testimony from sworn witnesses in order to determine if collusion exists. The following discussion deals with these particular points, and analyzes the general problems encountered by an insurer whose duty to defend is unclear.

In response to plaintiffs' motion to dismiss, Polk's attorney had contended that under Rule 41 of the *Arizona Rules of Civil Procedure* "he had a right to object to the dismissal against Polk, so that he could continue as an attorney in the trial, and thus be able to rebut evidence of any severe injury that he expected plaintiffs to try to prove."[5] He further contended that to allow the dismissal "would permit plaintiff to secure an unjustifiably large verdict completely ex parte," and then proceed to "stick" the insurance companies. After noting that rule 41 provided no foundation for the attorney's claim since it dealt only with dismissals without prejudice, the court reasoned that since the ultimate aim of defense counsel is to obtain a favorable verdict or a dismissal with prejudice, Polk's attorney had no basis for his objection.[6] Accordingly, it held that "a plaintiff has an absolute right to a voluntary dismissal of his complaint with prejudice."[7] The court further held

> that collusion is not evident from the record which for the most part consists of arguments of the attorneys. . . .
>
> . . . .
>
> There is no question but that the trial court has inherent power to dismiss a case which is collusive. Before doing so, however, it must hold a hearing and take evidence which will prove or disprove the presence of such collusion. It cannot be held as a matter of law collusion exists simply because a defendant chooses not to defend when he can escape all liability by such an agreement, and must take large financial risks by defending. If, at a hearing, where testimony comes from sworn witnesses rather than from arguments of the attorneys, it appears that the defendant instead of defaulting agrees to perjure himself and testify falsely to statements that are untrue, and that plaintiff is a party to the agreement, or if some other definite evidence of collusion is adduced by proper testimony, a dismissal of the entire action may be justified.[8] (emphasis omitted).

Necessary to the validity of this holding that the trial court must take

---

[5] 105 Ariz. at 153, 460 P.2d at 999.

[6] *Id.* at 155, 460 P.2d at 1001. *See* note 4 *supra.*

[7] 105 Ariz. at 154, 460 P.2d at 1000; *see* Smoot v. Fox, 340 F.2d 301 (6th Cir. 1964).

[8] 105 Ariz. at 154-55, 460 P.2d 1000-01; *cf.* Pellet v. Sonotone Corp., 26 Cal. 2d 614, 160 P.2d 783 (1945). It should be noted that the court's statement that the "defendant . . . must take large financial risks by defending" is an incorrect characterization of defendant Sledge's position, as the plaintiffs had already covenanted not to execute. It should also be noted that defendant Sledge's intention to default was not admitted to be part of the quid pro quo for the Damrons' covenant not to execute.

testimony before finding collusion, was the further holding that the prejudgment assignment and covenant not to execute was not in itself collusive. In reaching that holding, the court stated that "[i]t is well established that a claim by an insured against his insurer for failure of the insurer to defend may be assigned to the injured party."[9] To support this contention, the court cited *Hatfield v. State*,[10] and *Critz v. Farmers Insurance Group*.[11] Interestingly, *Hatfield* was a criminal case dealing with admonitions made by the court to the defendants for their raucous behavior in the courtroom. *Critz* was also inapposite since it dealt with the validity of a prejudgment assignment of a claim against an insurer for bad faith refusal to *settle*, rather than refusal to *defend*. Although it is well established that an insured may assign claims for the insurer's bad faith refusal to *settle*,[12] and the modern trend allows prejudgment assignments of claims for breach of contract in general,[13] no case was found expressly supporting the court's contention regarding claims for refusal to *defend*. Nonetheless, the *Damron* court mistakenly characterized *Critz* as an exhaustive consideration of "this type of prejudgment assignment of a claim against an insurance company for failure to *defend*."[14] Without properly distinguishing it, and relying solely on it for authority and rationale, the court quoted extensively from *Critz* and then merely said: "Accordingly, we hold that the assignment in the instant case was not ipso facto collusive."[15] On the whole, the manner in which the court used *Critz* assumed that the consequences to an insured and the culpability of an insurer are the same in a bad faith refusal to settle as those in a wrongful refusal to defend. Such, however, is not the case.

The court quoted from *Critz's* discussion of prejudgment assignments of claims for bad faith refusals to settle:

> 'In our opinion, the present assignment is not violative of public policy if in fact a bad faith rejection had already occurred. If, on the other hand, the carrier was not guilty of bad faith, the plaintiff-assignee will lose the lawsuit regardless of the public policy aspects of the assignment.'[16]

---

9 105 Ariz. at 153, 460 P.2d at 999.

10 325 P.2d 972 (Okla. Crim. 1958).

11 230 Cal. App. 2d 788, 41 Cal. Rptr. 401 (1964).

12 *Id.* This is so despite any policy clause to the contrary, Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 329 P.2d 198 (1958), and the claim is assignable whether it is considered to sound in tort or in contract, Brown v. Guarantee Ins. Co., 155 Cal. App. 2d 679, 319 P.2d 69 (1964). In general, a breach of the insurer's duty to act in good faith in dealings affecting the insured's interests, including its duty to defend, releases the insured from any contractual duties or prohibitions save a duty of reasonable, good faith activity. Watson v. Ocean Accident & Guar. Corp., 28 Ariz. 573, 238 P. 338 (1925). *See generally* Annot., 49 A.L.R. 2d 694, 737-60 (1956).

13 The contract must be in existence at the time of assignment. Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 800, 41 Cal. Rptr. 401, 407 (1964).

14 105 Ariz. at 153, 460 P.2d at 999 (emphasis added).

15 *Id.*

16 *Id., quoting* 230 Cal. App. 2d at 803, 41 Cal. Rptr. at 409.

By advancing this rationale that only culpable insurance companies will suffer, the court fell into the fallacy of the petitio principii. The court justifies its public policy upon a misconstrued interpretation of a failure to defend. By equating a refusal to defend with a refusal to settle,[17] the court fabricated much too black a picture of the insurer's culpability without actually investigating the consequences to the insured of a failure to defend.

Where an insured's liability is fairly certain, and there is high risk of a judgment in excess of policy limits, the insurer's refusal of a settlement offer at or below policy limits is almost uniformly held to constitute a breach of the insurer's implied covenant to use good faith in its dealings concerning the insured,[18] and any subsequent judgment in excess of the policy limits is clearly attributable to the insurer's refusal to settle.[19] Thus, when a refusal to settle is found to be in bad faith, the insurer will be liable for the total amount of the judgment and the insured will be allowed to assign his cause of action for the breach.[20]

This rule has been justified by the need to give an injured party a stronger bargaining position with a company which has forced him to the trouble and expense of litigation.[21] The possibility of assignment may also cause insurers to give the interests of their policy holders proper consideration and thus prevent bad faith exposures of defendants to increased personal liability. Moreover, the ability to assign claims places the insured in a bargaining position vis-à-vis the plaintiff from which he may mitigate any exposure to personal liability by trading for a covenant not to execute judgment. The small possibility of collusion in such cases does not warrant allowing an insurance company to selfishly expose its insured to great financial danger.[22]

The strong policy reasons for this treatment of bad faith refusals to settle, however, do not necessarily apply to refusals to defend. A wrongful refusal to settle is actionable as a breach of an implied covenant of good faith.[23] A wrongful refusal to defend, on the other hand, is actionable as a simple breach of contract and does not necessarily involve bad faith.[24] Those cases where an insurer decides that the claim against

---

[17] 105 Ariz. at 153, 460 P.2d at 999.

[18] General Accident Fire & Life Assur. Corp. v. Little, 103 Ariz. 435, 443 P.2d 690 (1968); Farmers Ins. Exch. v. Henderson, 82 Ariz. 335, 313 P.2d 404 (1957); Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958); Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 41 Cal. Rptr. 401 (1964); *see* Ivy v. Pacific Auto. Ins. Co., 156 Cal. App. 2d 652, 320 P.2d 140 (1958).

[19] *See* cases cited note 18 *supra.*

[20] Watson v. Ocean Accident & Guar. Corp., 28 Ariz. 573, 238 P. 338 (1925); Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958); Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 41 Cal. Rptr. 401 (1964).

[21] Critz v Farmers Ins. Group, 230 Cal. App. 2d 788, 800-03, 41 Cal. Rptr. 401, 408-09 (1964).

[22] *Id. See* Gray v. Nationwide Mut. Ins. Co., 422 Pa. 500, 223 A.2d 8 (1966).

[23] Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 659, 328 P.2d 198, 201 (1958).

[24] Carvin v. Standard Accident Ins. Co., 395 F.2d 326 (6th Cir. 1968); *cf.*

the policy is without merit and for that reason refuses to defend are more likely to involve collusive, fraudulent behavior than are those in which the insurer wrongfully refuses to settle, where the plaintiff's claim is often prima facie valid. By refusing to settle, the insurer fails to give his insured's interest proper consideration since by forcing the case to trial, he risks a judgment in excess of policy limits.

Conversely, in the refusal to defend situation, the defendant usually can retain his own attorney, who would presumably be as competent as any that the insurance company might have provided.[25] Since the insurer's evaluation of the claim as without merit would have precluded a settlement, the fact that the case is taken for trial has not increased the insured's potential liability. If the insurance company is found to have wrongfully refused to defend, the great weight of authority allows the defendant to recover his reasonable expenses in defending the suit, whether he wins or loses.[26] The courts do not, however, presume that any portion of the judgment against the defendant is proximately caused by the insured's breach, as they do when there is a wrongful refusal to settle. Instead they put the burden on the insured to prove that any part of the judgment in excess of the policy limits was proximately caused by the insurer's breach.[27] The courts thus impliedly admit by their post-judgment allocation of damages that bad faith refusals to settle are inherently more serious and directly damaging than the ordinary wrongful refusal to defend. The *Damron* court does the insurer an injustice by equating the severity of bad faith refusals to settle with wrongful refusals to defend, and then using the comparison as a reason for adopting the same public policies in both circumstances. The court could have treated the insurer's refusal to defend as a simple breach of contract, as most courts have done,[28] and still have properly protected the insured's legitimate interests.

Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958); Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 41 Cal. Rptr. 401 (1964). *See generally* Annot., 49 A.L.R.2d 694 (1956).

[25] *See* Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 659-60, 328 P.2d 198, 201 (1958).

[26] Carvin v. Standard Accident Ins. Co., 395 F.2d 326 (6th Cir. 1968); Watson v. Ocean Accident & Guar. Corp., 28 Ariz. 573, 238 P. 338 (1925); Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958); Henkel v. Pacific Employment Ins. Co., 140 Cal. App. 2d 301, 295 P.2d 80 (1956); Pandlebury v. Western Cas. & Sur. Co., 89 Idaho 456, 406 P.2d 129 (1966); Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 136 N.E.2d 484, 154 N.Y.S.2d 10 (1956); Lawrence v. Northwest Cas. Co., 50 Wash. 2d 282, 311 P.2d 670 (1957).

[27] Seward v State Farm Mut. Auto. Ins. Co., 261 F. Supp. 805 (D. Fla. 1967); Pennsylvania Threshermen & Farmer's Mut. Cas. Ins. Co. v. Robertson, 157 F. Supp. 405 (D.N.C. 1958); Gould v. Country Mut. Cas. Co., 37 Ill. App. 2d 265, 185 N.E.2d 603 (1963); *cf.* Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958). *See generally* Annot., 49 A.L.R.2d 694, 720-21 (1956).

[28] State Farm Mut. Auto. Ins. Co. v. Arnold, 276 F. Supp. 765 (D.S.C. 1967); Kershaw v. Maryland Cas. Co., 172 Cal. App. 2d 248, 342 P.2d 72 (1959); Peterson v. Allstate Ins. Co., 164 Cal. App. 2d 517, 330 P.2d 843 (1958); Ritchie v. Anchor Cas. Co., 135 Cal. App. 2d 245, 286 P.2d 1000 (1955); Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 136 N.E.2d 484, 154 N.Y.S.2d 10 (1956); Prashker v. United States Guar. Co., 1 N.Y.2d 584, 136 N.E.2d 871, 154 N.Y.S.2d 910 (1956); Lawrence v. Northwest Cas. Co., 40 Wash. 2d 614, 245 P.2d 470 (1952).

After formulating this improper equation, the *Damron* court then in effect suggested that the insurance company in the instant case got only what it asked for or deserved. The court's tacit approval of Sledge's proposed default[29] was unwarranted by the insurer's presumably good faith refusal to defend. It was, in addition, contrary to established principles of law. There is a general legal duty to mitigate damages resulting from a breach of contract,[30] which is applicable to insurance policies.[31] In *Elder v. Elder*,[32] for example, the insured failed to defend a suit brought by his mother. The insurer was allowed to intervene and set aside the default in spite of its possibly wrongful refusal to defend at the trial. The *Elder* court noted that if the insured had retained counsel and defended himself, he could have refused the belated intervention of the insurer. The court held, however, that where the defendant had not retained counsel and allowed a default judgment to be taken, intervention by the insurer was proper. *Elder* thus implies that an insurance company has some right to a judgment on the merits which cannot be defeated even by its own wrongful action. The insurance company whose policy potentially covers the allegedly negligent acts of an insured is in fact a real party in the action and has a definite interest in the outcome.[33] On the remand of *Damron*, therefore, the defendant Sledge should be given a choice of either defending his case and then suing the insurer for his expenses, or of allowing the insurance companies to assume control of his defense.

In *Damron* the insurers need not worry about a judgment in excess of policy limits because they will be liable for that excess only if it is a result directly attributable to a wrongful refusal to defend.[34] Sledge has a covenant relieving him of any financial danger and is represented by counsel whom the court has bound to the case. Under these circumstances, Sledge has little excuse for not defending himself. If Sledge refuses to defend where he could and should with little personal danger, any contention that the insurers' refusals to defend caused an excess judgment is obviously without merit.

---

[29] 105 Ariz. at 154, 460 P.2d at 1000.

[30] Coury Bros. Ranches, Inc. v. Ellsworth, 103 Ariz. 515, 446 P.2d 458 (1968); Rio Grande Oil Co. v. Pankey, 50 Ariz. 529, 73 P.2d 707 (1937); Cain v. Grosshaus & Petersen, Inc., 196 Kan. 497, 413 P.2d 98 (1966).

[31] Elder v. Elder, 9 Ariz. App. 140, 449 P.2d 977 (1969); Lawrence v. Burke, 6 Ariz. App. 228, 431 P.2d 302 (1967).

[32] 9 Ariz. App. 140, 143, 449 P.2d 977, 980 (1969). *See also* Rom v. Gephart, 30 Ill. App. 2d 199, 173 N.E.2d 828 (1961).

[33] Camacho v. Gardner, 104 Ariz. 555, 560, 456 P.2d 925, 930 (1969); Elder v. Elder, 9 Ariz. App. 140, 143, 449 P.2d 977, 980 (1969); Lawrence v. Burke, 6 Ariz. App. 228, 236, 431 P.2d 302, 310 (1967); *see* State Farm Ins. Co. v. Roberts, 97 Ariz. 169, 398 P.2d 671 (1965).

[34] Seward v. State Farm Mut. Auto. Ins. Co., 261 F. Supp. 805 (D. Fla. 1967); Pennsylvania Threshermen & Farmer's Mut. Cas. Ins. Co. v. Robertson, 157 F. Supp. 405 (D.N.C. 1958); Geddees & Smith Inc. v. St. Paul-Mercury Indem. Co., 51 Cal. App. 2d 588, 334 P.2d 881 (1959); Gould v. Country Mut. Cas. Co., 37 Ill. App. 2d 265, 185 N.E.2d 603 (1963); *cf.* Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 564, 328 P.2d 198 (1958). *See* Annot., 49 A.L.R.2d 694, 720-21 (1956).

When an insured does obtain an attorney and defends the suit, the insurer is guaranteed a decision on the merits. Where the defendant defaults, however, the insurers will be unfairly held liable for the amount of the actual judgment up to the policy limits which is in excess of what the judgment would have been had there been an adjudication on the merits. If a jury would have found that there was no negligence or proximate cause or that the plaintiffs were contributorily negligent, *any* judgment for which the insurance companies are held liable would be unfair. Even where the insured's liability is clear, the amount of damages as determined in an ex parte proceeding following a default may well be much greater than if the issue of damages had been vigorously litigated, since when the defense defaults as to damages, the plaintiffs need only present prima facie proof of the extent of their injury.[35]

The *Damron* court's approval of the arrangement between the insured and the injured parties, and of the insured's proposed default, places the insurers in a position where their liability is no longer predicated on the merits of plaintiff's claim. It is instead based solely on the correctness of the insurance companies' original decisions that the claims alleged in the complaint were without the coverage of their respective policies. In the absence of some procedural irregularity or collusion in the default judgment, the insurance companies will be estopped from relitigating the issues material to that judgment.[36]

The insurance companies might have avoided placing themselves in this dangerous and unfair predicament through the use of any one of several preliminary procedures. The modern trend[37] and Arizona rule[38] determine the insurer's duty to defend by the facts alleged in the com-

---

[35] Rueda v. Galvez, 94 Ariz. 131, 382 P.2d 239 (1963); *cf.* Camacho v. Gardner, 6 Ariz. App. 590, 435 P.2d 719 (1967), *vacated on other grounds*, 104 Ariz. 555, 456 P.2d 925 (1969).

[36] Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98 (1967), *noted in The Arizona Supreme Court 1967-68*, 10 ARIZ. L. REV. 179 (1968); Geddees & Smith Inc. v. St. Paul-Mercury Indem. Co., 51 Cal. 2d 588, 334 P.2d 881 (1959); Howe v. Howe, 87 N.H. 338, 179 A. 362 (1935); Note, *Use of the Declaratory Judgment to Determine a Liability Insurer's Duty to Defend—Conflict of Interests*, 41 IND. L.J. 87, 88 (1965-66); *cf.* Travelers Ins. Co. v. McElroy, 359 F.2d 529 (9th Cir. 1966).

[37] Paulin v. Fireman's Fund Ins. Co., 1 Ariz. App. 408, 403 P.2d 555 (1965); Eichler Holmes, Inc. v. Underwriters at Lloyds, 238 Cal. App. 2d 532, 47 Cal. Rptr. 843 (1966); Hoffine v. Standard Accident Ins. Co., 191 Kan. 63, 379 P.2d 246 (1963); Spatz v. Aetna Cas. & Sur. Co., 36 Misc. 2d 950, 237 N.Y.S.2d 133 (1963); Crist v. Potomac Ins. Co., 243 Ore. 254, 413 P.2d 407 (1966); Travelers Ins. Co. v. Newsom, 352 S.W.2d 888 (Tex. Civ. App. 1962); Tieton v. General Ins. Co., 61 Wash. 2d 716, 380 P.2d 127 (1963). *See generally* 29A AM. JUR. *Insurance* § 1452 (1960); Annot., 50 A.L.R.2d 458 (1956). *Contra*, United Waste Mfg. Co. v. Maryland Cas. Co., 85 Misc. 539, 148 N.Y.S. 852 (dictum), *aff'd mem.*, 169 App. Div. 906, 153 N.Y.S. 1148 (1956); United States Fidelity & Guar. Co. v. Briscoe, 205 Okla. 618, 239 P.2d 754 (1951) (dictum). The duty to indemnify is, however, dependent on the facts proven at trial. Firco, Inc. v. Fireman's Fund Ins. Co., 173 Cal. App. 2d 524, 343 P.2d 311 (1960); Hering v. St. Paul-Mercury Indem. Co., 50 Wash. 2d 321, 311 P.2d 673 (1957).

[38] Paulin v. Fireman's Fund Ins. Co., 1 Ariz. App. 408, 403 P.2d 555 (1965); *see* Lawrence v. Burke, 6 Ariz. App. 228, 431 P.2d 302 (1967).

plaint rather than by the facts ultimately proven. On the other hand if an insurer is uncertain of its duty to defend, but proceeds to do so, most jurisdictions hold that it is estopped from subsequently pleading noncoverage or from pleading any other policy defense.[39] This dilemma can be avoided by obtaining a nonwaiver agreement with the insured which provides that the insurer will undertake the defense but that it reserves the right to later contest liability. If this agreement is obtained before the insurer takes part in the investigation or defense, and if it specifies what defenses it is reserving, the majority of courts will hold the agreement effective against both the insured and the injured parties.[40] Such an agreement is of limited use in Arizona, however, because no policy defenses may be pleaded against either the injured or the insured.[41] The insurer's allegation in the instant case, that the acts complained of are without the policy coverage, is still a good defense and may be effectively preserved by a nonwaiver agreement.

The insurance company may achieve the same results by sending a reservation of rights notice to the insured.[42] This notice informs the insured that the company will defend the suit but that it reserves the right

---

[39] Damron v. Sledge, 105 Ariz. 151, 155, 460 P.2d 997, 1001 (1969); Arizona Title Ins. & Trust Co. v. Pace, 8 Ariz. App. 269, 445 P.2d 471 (1969); Tomerlin v. Canadian Indem. Co., 61 Cal. 2d 638, 394 P.2d 571, 39 Cal. Rptr. 731 (1964); Bogle v. Lonway, 199 Kan. 707, 433 P.2d 407 (1968); O'Dowd v. American Sur. Co., 3 N.Y.2d 347, 144 N.E.2d 359, 165 N.Y.S.2d 458 (1957); Schwartz v. Sun Corp., 19 Misc. 2d 660, 195 N.Y.S.2d 496 (1960); Annot., 38 A.L.R.2d 1148 (1954).

[40] General Accident Fire & Life Assur. Corp. v. Mitchell, 128 Colo. 11, 259 P.2d 862 (1953); McCann v. Iowa Mut. Liab. Ins. Co., 231 Iowa 590, 1 N.W.2d 682 (1942); Nichols v. American Cas. Co., 423 Pa. 480, 225 A.2d 80 (1967); State Farm Mut. Auto. Ins. Co. v. Hinojosa, 367 S.W.2d 933 (Tex. Civ. App. 1963); Utilities Ins. Co. v. Montgomery, 138 S.W.2d 1062 (Tex. 1940); Note, *Liability Insurance Policy Defenses and the Duty to Defend*, 68 HARV. L. REV. 1436, 1446 (1955); *cf.* Cahoon, *Company's Duty to Defend—Recent Developments*, 458 INS. L.J. 151 (1961).

[41] Harleysville Mut. Ins. Co. v. Clayton, 103 Ariz. 296, 440 P.2d 916 (1968) (insurer cannot exclude insured's husband from the policy coverage); Universal Underwriters Ins. Co. v. Dairyland Mut. Ins. Co., 102 Ariz. 518, 433 P.2d 966 (1967) (insurer cannot exclude operation of the vehicle by garage employees from the policy coverage), *noted in The Arizona Supreme Court 1967-68*, 10 ARIZ. L. REV. 179 (1968); Dairyland Mut. Ins. Co. v. Anderson, 102 Ariz. 515, 433 P.2d 963 (1967) (insurer cannot exclude a specific individual from the policy coverage); Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98 (1967) (insurer cannot raise failure to give notice as a defense); Jenkins v. Mayflower Ins. Exch., 93 Ariz. 287, 380 P.2d 145 (1963) (insurer may not exclude members of the armed forces from the policy coverage); Kepner, *Arizona Automobile Liability Insurance Law—Beyond Mayflower*, 10 ARIZ. L. REV. 301 (1968) (policy defenses denied the insurer include noncooperation of the insured, failure of insured to notify insurer of accident or action, and any other clause in the policy excluding or voiding coverage under the policy); Comment, *Automobile Insurers in Arizona—Are They Absolutely Liable?*, 5 ARIZ. L. REV. 248 (1964).

[42] Ging v. American Liberty Ins. Co., 293 F. Supp. 756 (D. Fla. 1969); Damron v. Sledge, 105 Ariz. 151, 155, 460 P.2d 997, 1001 (1969); Henry v. Johnson, 191 Kan. 369, 381 P.2d 538 (1963); O'Dowd v. American Sur. Co., 3 N.Y.2d 347, 144 N.E.2d 359, 165 N.Y.S.2d 458 (1957); State Farm Mut. Auto. Ins. Co. v. Hinojosa, 367 S.W.2d 933 (Tex. Civ. App. 1963); Note, *Liability Insurance Policy Defenses and the Duty to Defend*, 68 HARV. L. REV. 1436 (1955); *cf.* Lawrence v. Burke, 6 Ariz. App. 228, 431 P.2d 302 (1967).

to contest liability on grounds expressly set out in that notice.[43] A major problem with this device is determining what constitutes effective consent to the reservation by the insured. Most courts hold that the insured's silence constitutes consent.[44] There is, however, disagreement over whether the insured may object at all, and if he may, what he must do to refute effectively the insurance company's ambivalent stand.[45]

Even if the insurer finds that it cannot defend the suit while maintaining the right to contest liability, it may still be able to obtain a declaratory judgment on the issue of coverage.[46] In *Connolly v. Great Basin Insurance Co.*,[47] the Court of Appeals of Arizona said:

> Once a claim of liability against a person who contends he has liability insurance protection is actually being made, if such contention is denied by the insurance company, we hold that a justiciable controversy exists between these two which may be litigated without jurisdictional defect, providing the substance of this controversy is laid before a court of competent jurisdiction by appropriate allegations in an appropriate pleading.[48]

The declaratory judgment would determine the carrier's duty to defend and relieve it of any liability for breach of that duty if the court should find that no duty exists.[49] The *Connolly* court noted that it felt the trial court would be under a duty to cause the injured party to be joined in the declaratory action if feasible.[50] Be that as it may, it would behoove the insurance company to join the injured party if at all practical, because if the injured party is not joined in the declaratory action, its outcome is not res judicata as to him, and he may force the insurer to relitigate the issue of coverage when suing for indemnification of any judgment he has re-

---

[43] Defenses which an insurer might wish to reserve include lack of coverage, lack of cooperation by the insured, and failure of the insured to notify the insurer of the accident.

[44] Bruce v. Lumbermen's Mut. Cas. Co., 127 F. Supp. 124 (D.N.C. 1955); State Farm Mut. Auto. Ins. Co. v. Anderson, 104 Ga. App. 815, 123 S.E.2d 191 (1962); Apex Mut. Ins. Co. v. Christner, 99 Ill. App. 2d 153, 240 N.E.2d 742 (1969); United States Cas. Co. v. Home Ins. Co., 79 N.J. Super. 493, 192 A.2d 169 (1963).

[45] Apex Mut. Ins. Co. v. Christner, 99 Ill. App. 2d 153, 240 N.E.2d 742 (1969) (holding that service of process on the insured for a declaratory action brought by the insurer to deny liability constituted effective notice of its reservation of rights); United States Cas. Co. v. Home Ins. Co., 79 N.J. Super. 493, 192 A.2d 169 (1963) (holding that the consent of the insured is necessary, but that his silence may be deemed to be consent); Connolly v. Standard Cas. Co., 76 S.D. 95, 73 N.W.2d 119 (1955) (holding that insured's consent is necessary). *See generally* Annot., 38 A.L.R.2d 1148 (1954); Note, *Liability Insurance Policy Defenses and the Duty to Defend*, 68 HARV. L. REV. 1436, 1447 (1955).

[46] Connolly v. Great Basin Ins. Co., 6 Ariz. App. 280, 431 P.2d 921 (1967); Annot., 49 A.L.R.2d 694 (1956); Note, *Use of the Declaratory Judgment to Determine a Liability Insurer's Duty to Defend—Conflict of Interest*, 41 IND. L.J. 87 (1965-66); *cf.* Lawrence v. Burke, 6 Ariz. App. 228, 431 P.2d 302 (1967).

[47] 6 Ariz. App. 280, 431 P.2d 921 (1967).

[48] *Id.* at 286-87, 431 P.2d at 927-28.

[49] General Ins. Co. v. Whitmore, 235 Cal. App. 2d 670, 45 Cal. Rptr. 556 (1965); Temperance Ins. Exch. v. Carver, 83 Idaho 487, 365 P.2d 824 (1962); Country Mut. Ins. Co. v. Murray, 97 Ill. App. 2d 61, 239 N.E.2d 498 (1968); *cf.* Phoenix Ins. Co. v. Haney, 235 Miss. 60, 108 So. 2d 227, *cert. denied*, 360 U.S. 917 (1959).

[50] 6 Ariz. App. at 287 n.2, 431 P.2d at 928 n.2.

ceived against the insured.[51]

In summary, the *Damron* court uses questionable authority to analogize the consequences to insureds in bad faith refusals to settle with those in wrongful refusals to defend. It then relies solely on that authority in concluding that the public policy governing assignments of claims against the insurer should be the same in both types of breach. The court's failure to investigate the actual consequences of a wrongful refusal to defend may well result in unjust damage to insurance companies if an insured, subsequent to the insurer's refusal to defend, defaults. Insurers do, however, have recourse to several procedures by which they might avoid the awkward position of the insurer in *Damron*. However, the insurers should institute which ever procedure that they choose to employ as soon as their duty to defend appears questionable; otherwise, they may well be deemed to have waived the right to so act.

OMNIBUS CLAUSE—EXCLUSION OF INSURED FROM COVERAGE

In *New York Underwriters Insurance Co. v. Superior Court*,[1] the Supreme Court of Arizona was presented with the question of the validity of a clause in a motor vehicle liability policy which disclaimed coverage for bodily injury to the insured or any member of his family who resided in the same household. The court held that the clause was valid and enforceable since it was not in contravention of the omnibus clause of the Uniform Motor Vehicle Safety Responsibility Act.[2]

Trujillo was the named-insured in an automobile liability policy issued by Civil Service Employees Insurance. While riding as a passenger in his own automobile, Trujillo was injured due to the negligence of Hickey, the driver. Trujillo's insurer sought a declaratory judgment nam-

[51] Boulter v. Commercial Standard Ins. Co., 175 F.2d 763 (9th Cir. 1947); Shapiro v. Republic Indem. Co., 52 Cal. 2d 450, 341 P.2d 389 (1959); *see* Annot., 69 A.L.R.2d 858 (1960).

[1] 104 Ariz. 544, 456 P.2d 914 (1969).

[2] ARIZ. REV. STAT. ANN. §§ 28-1101 *et seq.* (1956), *as amended*, (Supp. 1969-70).

The omnibus clause provides that an owner's liability insurance policy "shall insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the motor vehicle or motor vehicles . . . ." *Id.* § 28-1170(B)(2) (Supp. 1969-70).

The statutory omnibus clause has been construed by the court to be a part of *every* motor vehicle liability policy rather than being strictly limited to policies certified under the Arizona Uniform Motor Vehicle Safety Responsibility Act. Jenkins v. Mayflower Ins. Exch., 93 Ariz. 287, 380 P.2d 145 (1963). *See generally* Kepner, *Arizona Automobile Liability Insurance Law—Beyond Mayflower*, 10 ARIZ. L. REV. 301 (1968), and Comment, *Automobile Liability Insurers in Arizona—Are They Absolutely Liable?*, 5 ARIZ. L. REV. 248 (1964).

ing Hickey's insurance liability coverage as primary and excusing Civil Service from liability for Trujillo's injuries because of an exculpatory clause in the policy negating coverage for bodily injuries to the insured.

Hickey's insurer petitioned the supreme court for a writ of prohibition to prevent the superior court and Civil Service from proceeding further in the declaratory judgment action. Hickey's insurer contended that the exculpatory provision conflicted with the statutory omnibus clause incorporated in all motor vehicle policies and was, therefore, illegal and void. The court, in upholding the validity of the clause, noted that the principal purpose of the Uniform Motor Vehicle Safety Responsibility Act was to protect " 'the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons.' "[3] Reasoning that the named-insured did not come within the category of the public, the court concluded that an exclusion of the insured was not contrary to the purpose of the Act. The court buttressed this conclusion by saying that individuals should be free to contract with insurance carriers to the extent that such freedom does not detract from the protection which the Act seeks to provide.

The general rule, in the absence of an express exclusion, is that an automobile liability policy covers an injury to the named-insured caused by the negligent operation of the insured automobile by one who is insured under the same policy, usually by virtue of an omnibus clause.[4] When the policy does contain an express exculpatory clause, it is necessary to determine what the probable intent of the contracting parties was in providing for the exclusion in the insurance contract. One court explained the purpose of such exclusions: "The obvious purpose of a 'family' exclusion clause is to exempt the insurer from liability to those persons to whom the insured, on account of close family ties, would be apt to be partial in case of injury."[5]

This purpose has merit in light of the need to protect the insurer from collusive lawsuits. The resulting lower risk to insurers would allow them to decrease policy premiums. Allowing the named-insured and the insurer the freedom to exclude coverage in situations where the potential injured party is either the named-insured or a member of his family contravenes no recognizable public policy.

Often a party becomes an additional insured under the named-in-

---

[3] 104 Ariz. at 545, 456 P.2d at 915, *quoting* Schecter v. Killingsworth, 93 Ariz. 273, 280, 380 P.2d 136, 140 (1963).

[4] Mayflower Ins. Co. v. Osborne, 326 F.2d 461 (4th Cir. 1964); Travelers Ins. Co. v. Norwich Union Fire Ins. Soc., 221 Cal. App. 2d 150, 34 Cal. Rptr. 406 (1963); Iowa Mut. Ins. Co. v. Meckna, 180 Neb. 516, 144 N.W.2d 73 (1966). *Contra*, Cain v. American Policyholders Ins. Co., 120 Conn. 645, 183 A. 403 (1936).

[5] State Farm Mut. Auto. Ins. Co. v. Thompson, 372 F.2d 256, 258 (9th Cir. 1967); *accord*, Tomlyanovich v. Tomlyanovich, 239 Minn. 250, 58 N.W.2d 855 (1953).

sured's policy solely by virtue of the fact that he is driving the insured automobile with the permission of the named-insured. In such a case it becomes necessary to analyze a clause in the policy which excludes liability coverage for an additional insured when his negligent operation has caused injury to the named-insured or members of his family. This situation, precisely the one which faced the court in *New York Underwriters*, places the driver in a position where he has liability exposure to the insured owner but is without the protection of the owner's liability insurance coverage. No difficulty would be created provided the additional insured is protected by a clause in his *own* liability insurance policy which provides coverage when he is driving an automobile owned by another. However, many permittees may not own an automobile, much less a policy with such a clause. The situation is thus foreseeable wherein such a driver has no insurance covering other passenger-insureds.

If the permittee's negligent operation of a named-insured's automobile caused injury to the named-insured, even while the owner was afoot or driving another vehicle, an exclusionary clause of the type upheld in the instant case would render the named-insured unable to recover from his insurance company. Although this result would appear to be the plain import of the decision in *New York Underwriters*, it might be unrealistic to reason that the parties intended to contract for such a far-reaching exclusionary clause.

In 1966 a California district court of appeal, considering the same issue presented in *New York Underwriters* under a similar fact situation and identical exclusionary clause, reached an opposite conclusion.[6] It reasoned that where there are two possible interpretations of an insurance policy, the interpretation that favors the insured is preferred[7] and that the word "insured" refers to the person who actually drives the vehicle, whether such driver be the named-insured or some other person who drives with his permission.[8] The court decided that the exclusionary provision only excludes coverage for bodily injury to the driver whether he is the named-insured or a permittee.[9] It was further emphasized that if an insurer wishes to exclude persons other than the driver from a benefit to which any other member of the public is entitled, the language in the policy must specifically state such intention.[10] A year later, however, another California district court of appeal refused to follow this rationale and recognized the weight of authority which supports the position that exclusions of this nature are valid.[11]

---

[6] Farmers Ins. Exch. v. Frederick, 244 Cal. App. 2d 776, 53 Cal. Rptr. 457 (1966).

[7] *Id.* at 779, 53 Cal. Rptr. at 459.

[8] *Id.* at 783, 53 Cal. Rptr. at 461.

[9] *Id.*

[10] *Id.* at 782, 53 Cal. Rptr. at 461.

[11] Hale v. State Farm Mut. Auto. Ins. Co., 256 Cal. App. 2d 177, 63 Cal. Rptr. 819 (1967); *accord*, Tenopir v. State Farm Mut. Co., 403 F.2d 533 (9th Cir. 1968); Frye v. Thiege, 253 Wis. 596, 34 N.W.2d 793 (1948).

The Supreme Court of Arizona in *New York Underwriters* has aligned with this recognized weight of authority. The Arizona court will apparently continue to uphold insurance clauses such as that held to be valid in *New York Underwriters* unless and until a legislative policy is promulgated to the effect that such clauses are against public policy.

SETTING ASIDE DEFAULTS

In *Camacho v. Gardner*[1] the Supreme Court of Arizona upheld the trial court's action in setting aside a default and default judgment against a defendant who had failed to notify his insurer of the pendency of the action. The defendant, who was insured by Farmers Insurance Exchange, was involved in an automobile collision with a vehicle in which the plaintiff was a passenger. The defendant was served with a summons and complaint, and was informed by the process server that he should notify his insurance company of the pending lawsuit. However, he neither informed his insurer nor appeared to defend. As a result, a default was entered against him and judgment given to the plaintiff for $50,000.

Farmers subsequently learned of the judgment, and within seven days filed a motion under Rule 60(c) of the *Arizona Rules of Civil Procedure*[2] to vacate the default and default judgment. The trial court granted the motion. The court of appeals, however, reversed as to setting aside the default and affirmed the setting aside of the judgment, remanding for trial on the issue of damages alone.[3] However, on rehearing, the appellate court affirmed the setting aside of both the default and default judgment.[4]

On appeal to the Supreme Court of Arizona, the supreme court affirmed the trial court's decisions. It held that in view of the confusing circumstances surrounding the notification of the action, the defendant could be excused under rule 60(c) for defaulting. Further, Farmers could be similarly excused, since in fact, if not in law, Farmers stands in place of its insured and the same equitable considerations should apply.

---

[1] 104 Ariz. 555, 456 P.2d 925 (1969).

[2] ARIZ. R. CIV. P. 60(c):

> On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time,* and for reasons (1), (2), and (3) not more than six months after the judgment, order or proceeding was entered or taken. (emphasis added).

[3] Camacho v. Gardner, 6 Ariz. App. 590, 435 P.2d 719 (1967), *vacated,* 7 Ariz. App. 483, 441 P.2d 249 (1968). The court took a position unprecedented in Arizona by allowing the default as to liability but not as to the amount of damages. Chief Judge Hathaway, dissenting, would have affirmed the trial court's setting aside of the default as to both liability and damages.

[4] Camacho v. Gardner, 7 Ariz. App. 483, 441 P.2d 249 (1968).

Therefore, Farmers would be allowed to defend on the merits of the tort claim. Finally the court held that although an insured's failure to comply with the notification clause cannot be asserted as a defense in an action against the insurer on a judgment, this failure can be grounds for an insurer's motion to vacate under rule 60(c).

The court stated that the requirements under rule 60(c) for one seeking to open a default judgment are that he "present a good excuse for having failed to appear and defend" and also show "that he has a good defense."[5] The standard applied in judging the defaulting defendant's conduct is that of a reasonably prudent person under the circumstances.[6] The reasons submitted in the motion by the insurer were the lack of notice of the pendency of the lawsuit, and, as a meritorious defense, that the plaintiff had run a stop sign.

It is the settled rule in Arizona that the decision to set aside a default judgment is left to the discretion of the trial court and will be overturned only when there has been an abuse of discretion.[7] Moreover, there exists a well-settled preference for trials on the merits, and in all cases where doubt exists as to whether the default should be set aside, it should be resolved in favor of the trial on the merits.[8] It is evident, therefore, that the dual burden of showing good cause and a meritorious defense in order to set aside a default judgment is a minimal one.

The *Gardner* decision is a logical aftermath of *Sandoval v. Chenoweth*,[9] where the supreme court held the insurer liable up to policy limits when it delayed nine weeks after learning of a default judgment before moving to set it aside. The *Sandoval* court stressed the significance of the nine-week delay; thus, it is not surprising that the court in *Gardner* was willing to grant Farmers, which had acted promptly, its day in court. *Gardner* provides significant protection for insurance companies by manifesting a clear preference for allowing them to be heard before being subjected to liability. The court recognized that even though the nominal defendant in a personal injury action is the insured, the party with the real monetary interest is the insurer, whose ultimate liability is substantially dependent upon the outcome of the tort action. This is especially true in Arizona since the policy defense of failure to give notice is not a valid defense for the insurer in an action on a judgment brought against the insurer by the injured party.[10]

It appears that the impact of *Gardner* will be to guarantee to the

---

[5] 104 Ariz. at 559, 456 P.2d at 929.
[6] Gray v. Dillon, 97 Ariz. 16, 396 P.2d 251 (1964).
[7] Campbell v. Frazer Constr. Co., 105 Ariz. 40, 459 P.2d 300 (1969); Schering Corp. v. Cotlow, 94 Ariz. 365, 385 P.2d 234 (1963).
[8] Rogers v. Tapo, 72 Ariz. 53, 230 P.2d 522 (1951).
[9] 102 Ariz. 241, 428 P.2d 98 (1967), *discussed in The Arizona Supreme Court 1967-68*, 10 ARIZ. L. REV. 179 (1968).
[10] *Id.*

insurer the right to defend on the merits where a default judgment has been entered against its insured because of his inadvertence or neglect and the insurer did not have notice of the action prior to the entry of judgment. A question remains whether the insurer would be allowed an opportunity to defend on the merits after an insured, without giving notice to his insurance company, undertakes the defense on the merits and has judgment rendered against him. It is arguable that the insurer should have such an opportunity since it is doubtful that its interests will be adequately safeguarded by an insured who may have little financial incentive in the outcome of the case.

The real effect of *Gardner* will become clear only when the concept of notice is clarified. The Arizona court has offered little in the way of concrete guidelines, stating only that these matters "must be decided on a case-to-case basis."[11] Although it seems clear that notice given to the insured will not constitute constructive notice to the insurer, actual notice of the pendency of the lawsuit given to the insurer will be sufficient. In short, something less than formal notice should suffice as long as the insurer is apprised of the pending lawsuit. The insurer's failure to act promptly after receiving such notice will eliminate its opportunity to set aside a resulting default judgment against the insured.

Where the insurer with a prima facie defense to the tort action has no advance notice of the proceeding and the insured fails to defend, the default judgment becomes a fruitless gesture and results in waste of valuable court time and frequently in economic waste to the plaintiff.[12] In analyzing the plight of the plaintiff, it is necessary to consider the means he has available to alleviate the problems that may occur. In jurisdictions where there is a statutory requirement for drivers to carry automobile liability insurance or where such policies are construed to be primarily for the benefit of the public, joinder of the insurance company is allowed.[13] The joinder of an insurance company was disallowed in the early Arizona case of *Smith Stage Co. v. Eckert.*[14] However, *Smith* would not seem to bar the joinder of an automobile liability insurer since that decision pertained to an indemnity contract rather than a liability policy.[15] Automobile liability policies in Arizona appear to be in the liability category since the insurance company becomes liable at the moment the injury

---

11 104 Ariz. at 561, 456 P.2d at 931.

12 The trial court may lessen the economic hardship to the plaintiff by awarding costs to the plaintiff when a default judgment is set aside. The discretionary power of the trial court to make such an award was affirmed in Haenichen v. Worthington. 9 Ariz. App. 83, 87, 449 P.2d 319, 323 (1969).

13 *See, e.g.*, Connel v. Clark, 88 Cal. App. 2d 941, 200 P.2d 26 (1948) (joinder of insurance carrier allowed where statute or policy provides that the policy shall inure to the benefit of the public); Wray v. Garret, 185 Okla. 138, 90 P.2d 1050 (1939) (joinder of motor carrier and liability insurer allowed where liability policy was mandatory by statute).

14 21 Ariz. 28, 184 P. 1001 (1919).

15 The two types of policies are distinguished in 7 J. APPLEMAN, INSURANCE LAW

or damage occurs.[16] It seems then, that there is justification for joining a liability insurer since its financial interests are imperiled as soon as its insured is involved in an accident.

A California court, in considering the propriety of the joinder of an insurance company, stated:

> The California Rule is that in order for one to have a direct cause of action against an insurer an intent to make an obligation inure to the benefit of a third party must clearly appear, and if there is any doubt it should be construed against such intent.[17]

It is arguable that such an intent to benefit exists in Arizona in light of the extension of the omnibus clause of the Uniform Motor Vehicle Safety Responsibility Act to *all* motor vehicle liability policies for "the protection of the public."[18] However, while joinder of the insurance company promotes the plaintiff's interest in obtaining a final judgment in the most convenient manner, it does place a significant burden on the insurance company by forcing it to enter every lawsuit as a party in order to protect its interests.

Another alternative open to a plaintiff to prevent waste of time and money is the giving of notice directly to the insurer. Such a procedure promotes expeditious litigation and is less burdensome to the insurance company. This procedure has been utilized in other jurisdictions,[19] and it is submitted that such a procedure would be sufficient in Arizona to preclude the insurer's avoidance of any resulting default. In Arizona the critical concern seems to be that the insurer receive notice of the lawsuit, and there is no reason to believe that it would matter whether the notice comes from the insured or from the injured plaintiff. The insurance

---

AND PRACTICE § 4261, at 35 (1962):

> The chief difference between a liability policy and an indemnity policy is that under the former a cause of action accrues when the liability attaches, while under the latter there is no cause of action until the liability has been discharged, as by payment of the judgment by the insured.

[16] ARIZ. REV. STAT. ANN. § 28-1170(F)(1) (Supp. 1969-70):

> The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute when injury or damage covered by the motor vehicle policy occurs.

In Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98 (1967), the court extended the above section to *all* automobile liability insurance policies issued in the State of Arizona. *See generally* Kepner, *Arizona Automobile Liability Insurance Law—Beyond Mayflower*, 10 ARIZ. L. REV. 301 (1968).

[17] Rupley v. Huntsman, 159 Cal. App. 2d 307, 312, 324 P.2d 19, 21 (1958).

[18] Jenkins v. Mayflower Ins. Exch., 93 Ariz. 287, 290, 380 P.2d 145, 147 (1963), *quoting* Schecter v. Killingsworth, 93 Ariz. 273, 280, 380 P.2d 136, 140 (1963). *See generally* Comment, *Automobile Liability Insurers in Arizona—Are They Absoluetly Liable?* 5 ARIZ. L. REV. 248 (1964).

[19] *See, e.g.*, American Fire & Cas. Co. v. Collura, 163 So. 2d 784 (Fla. Ct. App.), *cert. denied*, 171 So. 2d 389 (Fla. 1964); McClellan v. Madonti, 313 Pa. 315, 169 A. 760 (1934). As the *Gardner* court pointed out, although the plaintiff's attorney has no legal duty to inform the defendant's attorney that a suit has been filed, it is in the best interests of the plaintiff if his attorney inquires about insurance and notifies defendant's insurer if he has one. 105 Ariz. at 561, 456 P.2d at 931.

company, once it receives notice of the lawsuit, would be forced to pursue one of three courses: to provide the defense on behalf of the insured, to enter as a party to the lawsuit, or to abide by the handling of the action by the insured. The last choice would be binding on the insurer and would eliminate any need for a later action to set aside a default judgment. This procedure would promote finality in litigation and would safeguard the interests of the insurer with only a minimal burden upon the plaintiff and the insurance company.

In the second part of its *Gardner* holding, the court noted that the defense of failure to give notice is invalid in an action by an injured plaintiff against the insurer. This position follows the public policy promulgated in *Jenkins v. Mayflower Insurance Exchange*[20] of assuring that injured plaintiffs will be compensated. *Gardner*, however, does allow such failure of notice to constitute rule 60(c) grounds for setting aside a default judgment. Nevertheless, it can be said that this is consistent with *Mayflower* since it would seem the policy announced there should not act to compensate an injured plaintiff by precluding consideration not only of the merits of his claim but also the reasons advanced for failing to defend against it.

NEGLIGENCE

DUTY OF PUBLIC OFFICIALS

In *Massengill v. Yuma County*[1] the administrators of two persons killed in a head-on automobile collision sued Yuma County, the Sheriff of Yuma County, and a deputy sheriff for damages for wrongful death. The deputy sheriff was on duty in a marked patrol car in the parking lot of an establishment which reputedly served alcoholic drinks to minors. Two cars, each driven by a minor, left the parking lot and proceeded recklessly down a dangerous stretch of highway. The deputy sheriff followed the cars for several minutes immediately prior to the collision. During this time, the drivers were continuously violating the traffic laws of Arizona in plain view of the deputy sheriff who made no attempt to stop the cars or arrest their drivers. The plaintiffs' decedents' car was struck by one of the minors' cars which was traveling on the wrong side of the road.

The complaint alleged that the deputy sheriff had a duty to arrest the

[20] 93 Ariz. 287, 380 P.2d 145 (1963).

[1] 104 Ariz. 518, 456 P.2d 376 (1969).

minors[2] but failed to do so despite adequate opportunity. It was further alleged that his breach of this duty was the proximate cause of the fatal collision.[3] In the trial court, the defendants successfully moved to dismiss the complaint for failure to state a claim on the ground that the duty to arrest was not owed to the particular plaintiffs, but only to the general public. The court of appeals reversed, holding that the duty to arrest was one owed to individual members of the public.[4]

The Supreme Court of Arizona vacated the judgment of the court of appeals and affirmed the judgment of the trial court. Purporting to reaffirm its abrogation of the doctrine of sovereign immunity in Arizona,[5] the court noted that previously it had "in the most unquestionable terms relegated that archaic doctrine to the dustheap of history."[6] In abrogating sovereign immunity the court did not eliminate the necessity of alleging all of the elements of actionable negligence: a duty owed to the plaintiff, a breach of that duty, and an injury proximately caused by that breach.[7] The court based its decision on the plaintiff's failure to properly allege the first of these elements and held that the statutory duty of the police to arrest law violators is not owed to individual citizens.[8] This discussion will consider the impact of *Massengill* on the abrogation of the doctrine of sovereign immunity in Arizona.[9]

Stone v. Arizona Highway Commission[10] was the landmark Arizona case repudiating governmental immunity from tort liability.[11] There the

---

[2] ARIZ. REV. STAT. ANN. § 11-441 (1956) provides in part:

A. The sheriff shall:

1. Preserve the peace.

2. Arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense.

3. Prevent and suppress all affrays, breaches of the peace, riots and insurrections which may come to his knowledge.

[3] The court did not reach this issue but disposed of the case on the ground that no duty was owed to the plaintiffs. 104 Ariz. at 520, 456 P.2d at 378.

[4] Massengill v. Yuma County, 9 Ariz. App. 281, 451 P.2d 639 (1969).

[5] Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); *accord*, Patterson v. City of Phoenix, 103 Ariz. 64, 436 P.2d 613 (1968); Veach v. City of Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967).

[6] 104 Ariz. at 521, 456 P.2d at 379.

[7] *Id.*

[8] *Id.* at 523, 456 P.2d at 381.

[9] For a discussion of the background of sovereign immunity, Arizona's position prior to Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963), and the impact of *Stone* on Arizona law, see Comment, *Governmental Immunity in Arizona—The Stone Case*, 6 ARIZ. L. REV. 102 (1964).

For a general view of governmental immunity in the United States, *see, e.g.*, Borchard, *Governmental Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-25), and *Governmental Responsibility in Tort* (pts. 4-6), 36 YALE L.J. 1, 757, 1039 (1926-27); Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941); Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); James, *Tort Liability of Government Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1965); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41 (1949).

[10] 93 Ariz. 384, 381 P.2d 107 (1963).

[11] In *Stone* the court stated:

court allowed a claim against the highway commission for wrongful death and injuries resulting from an automobile accident. The plaintiff was misled into turning left across the path of oncoming traffic by old signs which had not been removed when a newly constructed highway was linked to an old one. The court found that the state had a statutory duty[12] to maintain all state highways and that by negligently failing to remove the signs the state was liable to the injured motorist.

Subsequently, in *Veach v. City of Phoenix*[13] the court found that the city, which owned a municipal water distribution system, had a duty to furnish water for fire protection purposes to the individual plaintiff who had requested it. In reaching its decision the court held that in the operation of a water system, a municipality is a public service corporation which is under a legal obligation to render adequate service impartially and without discrimination to all members of the general public who are within the scope of its operation.[14] The court expressly repudiated the majority rule, based on a distinction between governmental and proprietary functions,[15] that since maintenance of a fire department is a governmental

---

> We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled. *Id.* at 387, 381 P.2d at 109.

12 ARIZ. REV. STAT. ANN. § 18-109 (Supp. 1969-70).

13 102 Ariz. 195, 427 P.2d 335 (1967).

14 *Id.* at 196, 427 P.2d at 336.

15 The governmental-proprietary dichotomy has been described by Dean Prosser as follows:

> Municipal corporations are regarded as having a rather curious dual character, which has given the courts a great deal of difficulty, and has left the law in a tangle of disagreement and confusion. On the one hand they are subdivisions of the state, endowed with governmental powers and charged with governmental functions and responsibilities. On the other they are corporate bodies, capable of much the same acts as private corporations, and having the same special and local interests and relations, not shared by the state at large. They are at one and the same time a corporate entity and a government. The law has attempted to distinguish between the two functions, and to hold that in so far as they represent the state, in their 'governmental,' 'political,' or 'public' capacity, they share its immunity from tort liability, while in their 'corporate,' 'private,' or 'proprietary' character they may be liable. W. PROSSER, THE LAW OF TORTS § 125, at 1004 (3d ed. 1964).

Absolute immunity from tort liability is usually extended to judges, and members of national, state, and local governments for acts performed within the scope of their duties. A different situation exists with regard to lower administrative officers, such as police officers where:

> [T]he whole situation has been much complicated by the drawing of another line of distinction, which in effect achieves a rather uneasy compromise. The courts have set up a finespun and more or less unworkable distinction between acts which are regarded as 'discretionary,' or 'quasi-judicial,' in character, requiring personal deliberation, decision and judgment, and those which are merely 'ministerial,' amounting only to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own. *Id.* § 126, at 1015.

Immunity is usually recognized as to discretionary acts but not as to ministerial acts. *Id.*

function, a city never has a duty to provide firefighting water and thus is immune from liability in this regard.[16] Noting that this distinction no longer has validity in Arizona,[17] the court made it clear that while a municipality does not have an absolute duty to provide water for firefighting purposes,

> when a city assumes the responsibility of furnishing fire protection, then it has the duty of giving *each* person or property owner such reasonable protection as others within a similar area within the municipality are accorded under like circumstances.[18] (emphasis added).

In *Patterson v. City of Phoenix*,[19] the parents of two young girls sued the city for trespass, false imprisonment of the girls, malicious prosecution, and defamation. The court stated that "although police officers exercise some discretion in the exercise of their duties . . . nevertheless, under the doctrine of respondeat superior a municipality is liable for those acts of its police officers within the scope of their employment."[20] The court found for the defendants, however, because the police officer was justified in acting the way she did.[21]

By finding no duty to individuals in *Massengill*, the court appears to be extending a partial immunity to local governments for suits based on the actions of their police officers. There seems to be little justification for this since the following comparison of *Massengill* with *Stone*, *Veach*, and *Patterson* demonstrates that despite couching the *Massengill* rationale in terms of duty, the only real distinction is between nonfeasance in the former and misfeasance in the latter, a distinction that generally has been discredited.

The court in *Massengill* does not distinguish *Stone*, where liability was

---

16 102 Ariz. at 196-97, 427 P.2d at 336-37. For a discussion of the majority approach, see 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 53.52-.53 (3d ed. 1963) and cases cited therein.

17 Relying on *Stone*, the court said "the distinction between proprietary and governmental functions is no longer valid as a method of allocating municipal liability in this state." 102 Ariz. at 196, 427 P.2d at 336. Subsequently, in Patterson v. City of Phoenix, 103 Ariz. 64, 67, 436 P.2d 613, 616 (1968), the court laid to rest the ministerial-discretionary distinction by quoting, with apparent approval, from Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218 (1963): "The dichotomy between 'ministerial' and 'discretionary' is at the least unclear, and one may suspect that it is a way of stating rather than arriving at the result."

18 102 Ariz. at 197, 427 P.2d at 337.

19 103 Ariz. 64, 436 P.2d 613 (1968).

20 *Id.* at 68, 436 P.2d at 617.

21 The allegedly tortious acts arose from a report that the health, morals, or welfare of the daughters were endangered by the alleged sexual activities of their parents. The court found no trespass in the officer's entry into the home without a warrant because the girls had permitted her to enter. The officer was acting within her statutory authority in taking the children into custody since there was an apparent immediate danger to the girls' health, morals, or welfare. See ARIZ. REV. STAT. ANN. § 8-221 (1956). The court went on to determine that the city had probable cause to prosecute the parents and the subsequent dismissal of the charges in no way diminished the probable cause, and that the officer was conditionally privileged in making the defamatory statements.

found, even though both cases involved the alleged negligence of a governmental agency. In jurisdictions which have not abrogated the doctrine of sovereign immunity, a distinction might be made by describing the activities of the highway commission as proprietary functions and those of the sheriff's department as governmental functions, and holding the government liable only for proprietary acts.[22] But this distinction has been abandoned in Arizona.[23] Perhaps the only difference is that in *Massengill* the alleged negligent act was one of omission or nonfeasance (failure to arrest) whereas in *Stone* the alleged negligent act was one of commission or misfeasance (creating a dangerous condition by building a highway intersection and failing to remove the old signs and markings).

The *Massengill* court indicated that a government can by its conduct create a duty to an individual, and distinguished *Veach* by finding there such a "relationship" which gave rise to a "special duty" owing to individuals.[24] The court in *Massengill* likened this relationship in *Veach* to that found by the Court of Appeals of New York in *Schuster v. City of New York*.[25] In *Schuster* the court upheld, as stating a cause of action, a complaint which alleged that the plaintiff's decedent was shot to death three weeks after providing the police department with information which led to the arrest of a notorious criminal. The decedent, who had received widespread publicity for his part in the capture, was killed allegedly because of the city's negligent failure to exercise reasonable care in supplying police protection after the decedent requested it because of threats he had received. The New York court said that the government's active use of FBI flyers in calling on the aid of persons such as the decedent to aid it in its law enforcement work, had given rise to a relationship which required that reasonable police protection should have been extended to the informant.[26]

The distinction between *Massengill* on the one hand and *Veach* and *Schuster* on the other in terms of relationship is highly subjective. Depending on the result one wishes to reach, it is possible to find the appropriate relationship in any one of these three cases. If the *Massengill* court can find a relationship in *Veach* between the city, which merely *assumed* the responsibility of furnishing fire protection,[27] and the individual members of the public, then surely it does not stretch the imagination too far to find a relationship in *Massengill* between the deputy sheriff, who is under a *statutory obligation* to arrest all persons committing an offense before his eyes,[28] and motorists who are using the highways.[29]

---

22 See note 15 *supra.*
23 See note 17 *supra.*
24 104 Ariz. at 523, 456 P.2d at 381.
25 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).
26 *Id.* at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 270.
27 102 Ariz. at 197, 427 P.2d at 337.
28 ARIZ. REV. STAT. ANN. § 11-441 (1956).
29 There is also an analogy between the city's lack of heed to the threats on the

Again, a distinction can arguably be found between the nonfeasance in *Massengill* and the misfeasance in both *Veach* and *Schuster*. The alleged negligence in *Veach* constituted misfeasance because the city took affirmative action in assuming responsibility for fire protection and then furnished the service in an incomplete and unequal manner.[30] *Schuster* was concerned with misfeasance since the police had taken affirmative actions in urging citizens to provide information on the whereabouts of a notorious criminal, then assumed partial responsibility for the protection of the informer who answered their call, but then gave him inadequate protection resulting in his being shot to death.[31]

In *Massengill*, the court did not distinguish *Patterson*, in which the alleged torts—false imprisonment, trespass, malicious prosecution, and defamation of character—were all acts of misfeasance. Thus, the only recognizable distinction between *Massengill* and the *Stone-Veach-Patterson* trilogy is between nonfeasance and misfeasance, although the *Massengill* court did not expressly base its decision on this ground. Interestingly, however, the authorities cited by the court, in support of the rule that police officers do not owe a duty to individuals, reveal that all but one of the alleged negligent acts were of omission with recovery denied while recovery was granted in the one instance of misfeasance.[32]

Furthermore, *Schuster* was quoted at length in *Massengill* in support of the rule of non-duty to individuals,[33] the cases cited in *Schuster* in

---

informer's life in *Schuster*, and the deputy sheriff's insensitivity to the threats posed by the driver on the wrong side of the road to all other users of that road in *Massengill*. It is true that in *Schuster* the informer demanded protection from the threatened actions and in *Massengill* the injured motorists did not, but it is obvious that if they had known of the threats, as did the informer in *Schuster*, the motorists in *Massengill* would also have demanded that the deputy sheriff protect them by arresting the violators.

30 102 Ariz. at 197, 427 P.2d at 337.

31 Judge McNally, in a concurring opinion in *Schuster*, explained that "[t]he voluntary assumption of plaintiff's intestate's partial protection carried with it the obligation to exercise reasonable prudence in regard to the foreseeable risks engendered thereby." 5 N.Y.2d at 87, 154 N.E.2d at 541, 180 N.Y.S.2d at 275. *Compare* Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968), in which recovery was denied to a girl injured by a rejected suitor who had terrorized her for six months with threats on her life. She had continually asked for police protection but protection was denied. This case involved nonfeasance as the police never attempted to protect her.

32 Tomlinson v. Pierce, 178 Cal. App. 2d 112, 2 Cal. Rptr. 700 (1960) (nonfeasance—failure to arrest); Jacobson v. McMillan, 64 Idaho 351, 132 P.2d 773 (1943) (nonfeasance—sheriff was faced with two conflicting duties, first to the public to keep the prisoner in custody, and second to the prisoner to safeguard his mental health by placing him in the care of a mental hospital. While in the hospital the prisoner escaped. The complaint alleged that although the sheriff was aware that the prisoner had escaped and knew of the latter's whereabouts, he made no attempt to apprehend him); Annala v. McLeod, 122 Mont. 498, 206 P.2d 811 (1949) (nonfeasance—failure to prevent riot); Libertella v. Maenza, 21 Misc. 2d 317, 191 N.Y.S.2d 191 (Sup. Ct. 1959), *aff'd*, 16 App. Div. 831, 229 N.Y.S.2d 299 (1962) (nonfeasance—failure to arrest); *cf.* Scott v. City of New York, 2 App. Div. 854, 155 N.Y.S.2d 787 (1956), *aff'd*, 9 N.Y.2d 764, 174 N.E.2d 745, 215 N.Y.S.2d 72 (1961) (misfeasance—recovery was permitted).

33 104 Ariz. at 522-23, 456 P.2d 380-81, *quoting* Schuster v. City of New York, 5 N.Y.2d 75, 80-83, 154 N.E.2d 534, 537-38, 180 N.Y.S.2d 265, 269-71 (1958).

support of this proposition either were decided on the basis of the governmental-proprietary distinction,[34] abandoned in Arizona, or are for other reasons inapplicable to the *Massengill* facts.[35] It is significant that the court omitted from the middle of its quote from *Schuster* a paragraph citing the New York cases which have permitted recovery for injuries resulting from police actions. All of these omitted cases involved misfeasance.[36] Thus, it appears that consciously or unconsciously the court is adopting the misfeasance-nonfeasance distinction. This hypothesis is strengthened by the following language in *Patterson*:

> [W]e conclude that although police officers exercise some discretion in the execution of their duties that, nevertheless, under the doctrine of respondeat superior a municipality is liable for those *acts* of its police officers within the scope of their employment.[37] (emphasis added).

While it would appear from *Patterson* that recovery would be allowed for police misfeasance, the question of liability for nonfeasance was left open.[38]

The misfeasance-nonfeasance distinction has been discredited by some authorities.[39] Indeed, there seems to be little logical justification for it

---

[34] Murrain v. Wilson Line, 270 App. Div. 372, 59 N.Y.S.2d 750 (1946), *aff'd*, 296 N.Y. 845, 72 N.E.2d 29 (1947).

[35] Moch v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928). This case was decided before the doctrine of sovereign immunity was abrogated in New York. Its decision and rationale were implicitly repudiated in Arizona by *Veach*. Thus, it is somewhat incongruous for the *Massengill* court to indirectly adopt *Moch* as authority through its reliance on *Schuster*. The decision in Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945), was based on the *Moch* case. Rocco v. City of New York, 282 App. Div. 1012, 126 N.Y.S.2d 198 (1953), is a memorandum decision with no opinion or facts reported.

[36] Lubelfeld v. City of New York, 4 N.Y.2d 455, 151 N.E.2d 862, 176 N.Y.S. 2d 302 (1958); O'Grady v. City of Fulton, 4 N.Y.2d 717, 148 N.E.2d 317, 171 N.Y.S.2d 108 (1958); Meistinsky v. City of New York, 309 N.Y. 998, 132 N.E.2d 900 (1956); Flamer v. City of Yonkers, 309 N.Y. 114, 127 N.E.2d 838 (1955); Wilkes v. City of New York, 308 N.Y. 726, 124 N.E.2d 338 (1954); Dunham v. Village of Canisteo, 303 N.Y. 498, 104 N.E.2d 872 (1952); McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947); Adamo v. P.G. Motor Freight, 4 App. Div. 2d 758, 164 N.Y.S.2d 874 (1957); Benway v. City of Watertown, 1 App. Div. 2d 465, 151 N.Y.S.2d 485 (1956).

The *Schuster* court characterized the acts in *Meistinsky* and *McCrink* as instances of nonfeasance, but they would more easily fit into the misfeasance category. In *Meistinsky* the city was held liable because a poorly trained police officer shot a bystander during a gunbattle with robbers. In *McCrink* the city was found liable for retaining an incompetent policeman when it should have foreseen he would constitute a danger to others.

[37] 103 Ariz. at 68, 436 P.2d at 617.

[38] 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.80, at 337 (3d ed. 1963), points out the reluctance of courts generally to hold police officers liable for acts of omission:

> The rule that a municipality is not liable for mere nonfeasance of police officers in the performance of governmental duties, obtains generally even in those states in which the municipality is not immune from liability for the torts of such officers.

[39] *E.g.*, Massengill v. Yuma County, 9 Ariz. App. 281, 286-87, 451 P.2d 639, 644-45, *rev'd*, 104 Ariz. 518, 456 P.2d 376 (1969); Moch v. Rensselaer Water Co., 247 N.Y. 160, 167, 159 N.E. 896, 898 (1928). W. PROSSER, *supra* note 15, § 126, at 1017, states: "Still less reason is apparent in the further distinction, made by

when "some misfeasances are minor slips, some nonfeasances are major misdeeds."[40] Since the distinction between misfeasance and nonfeasance is of questionable validity, it would be helpful to establish an alternative means of determining whether or not a duty exists.

The deputy sheriff in *Massengill* had a statutory duty to arrest the minors, but the statute is silent as to whom the duty is owed.[41] In *Stone* the court found that the state had a statutory duty to maintain all state highways,[42] and that failure to mark the highway correctly could result in liability to motorists injured as a result of being misled. The duty to maintain highways and remove misleading signs and the duty to arrest reckless drivers who endanger other motorists should be owed to members of the same class of persons; *i.e.*, any member of the public who happens to travel those particular roads. Yet the court held that the governmental unit involved was liable to the injured parties for breach of the former duty in *Stone*, but not for breach of the latter duty in *Massengill*.

The presently prevailing law, that a duty of police protection is owed only to the general public and not to the individual, leads to an impossible conclusion which was aptly summarized by Judge Kenneth Keating of New York: "Because we owe a duty to everybody, we owe it to nobody."[43] He called for a test of reasonableness to replace the existing rule.[44] Professor Jaffe has characterized such a test as

> a balancing of certain important factors, some of these being factors which neither courts nor writers have been concerned to isolate. These factors are the following: [1] the character and severity of the plaintiff's injury, [2] the existence of alternative remedies, [3] the capacity of a court or jury to evaluate the propriety of the officer's action, and [4] the effect of liability whether of the officer or of the treasury on effective administration of the law.[45]

This reasonableness test could be broader in scope and more empirical in application than the "relationship" fiction of *Schuster* and *Veach*. Indeed, either *Schuster* or *Veach* could easily fit within the reasonableness test. The New York court in *Schuster* found that the police were negligent in failing to exercise *reasonable* care for the protection of the informer.[46]

---

some courts but rejected by most of the rest, between ministerial 'misfeasance' and 'nonfeasance.'" *See* Ham v. Los Angeles County, 46 Cal. App. 148, 189 P. 462 (1920); First Nat'l Bank v. Filer, 107 Fla. 526, 145 So. 204, 87 A.L.R. 267 (1933); Gage v. Springer, 211 Ill. 200, 71 N.E. 860 (1904); Raynsford v. Phelps, 43 Mich. 342, 5 N.W. 403 (1880); Farmer v. State, 224 Miss. 96, 79 So. 2d 528 (1955); Hale v. Johnston, 140 Tenn. 182, 203 S.W. 949 (1918); C. MORRIS, SELECTED STUDIES IN THE LAW OF TORTS 148 (1952); Hale, *Prima Facie Torts, Combination and Non-Feasance*, 46 COLUM. L. REV. 196, 213-16 (1946).

40 C. MORRIS, *supra* note 39, at 148.

41 ARIZ. REV. STAT. ANN. § 11-441 (1956).

42 ARIZ. REV. STAT. ANN. § 18-109 (Supp. 1969-70).

43 Riss v. City of New York, 22 N.Y.2d 579, 585, 240 N.E.2d 860, 862, 293 N.Y.S.2d 897, 901 (1968) (dissenting opinion).

44 *Id.* at 586, 240 N.E.2d at 863, 293 N.Y.S.2d at 902.

45 Jaffe, *supra* note 17, at 219.

46 5 N.Y.2d at 80, 154 N.E.2d at 537, 180 N.Y.S.2d at 269. *See also* Runkel v.

And in *Veach* the Supreme Court of Arizona said:

> [W]hen a city assumes the responsibility of furnishing fire protection, then it has the duty of giving each person or property owner such *reasonable* protection as others within a similar area within the municipality are accorded under like circumstances. A municipality has discretion, governed by the extent of need and other economic considerations, to determine what is a *reasonable* protection for each area—but this discretion cannot be arbitrary, and must be fairly and *reasonably* exercised. Hence, in suits such as the instant one, a city is entitled to assert as a defense the *reasonableness* of its exercise of discretion.[47] (emphasis added).

The Supreme Court of New Jersey described the test as follows:

> The question is not simply whether a criminal event is foreseeable, but whether a *duty* exists to take measures to guard against it. Whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.[48]

If Professor Jaffe's standards are applied to *Massengill* the following would result: (1) the plaintiffs' injuries were fatal; (2) the only alternative remedy would be an action against the reckless drivers who may be judgment proof; (3) whether or not the deputy sheriff violated his statutory duty to arrest the intoxicated motorists is typical of questions which are commonly resolved by juries; and (4) the effect on the county's effective administration of law would probably be beneficial resulting in greater officer efficiency. As to the effect of liability of the treasury, the *Massengill* court feared the enormous potential liability that could arise from holding that the general duties of police officers are owed to individuals.[49] Such a fear does not seem justified. The court in *Patterson* took judicial notice[50] of the Arizona statutes which permit counties,[51] municipalities,[52] and the state[53] to carry liability insurance. Judge Keating discounted the magnitude of this liability.[54] Thus, it would appear that if the reasonableness test were applied to *Massengill*, a claim would be stated upon which relief could be granted, and the question of the exist-

---

Homelsky, 286 App. Div. 1101, 145 N.Y.S.2d 729, *aff'd*, 3 N.Y.2d 857, 145 N.E.2d 23, 166 N.Y.S.2d 307 (1957), where the court held the city liable for failure to order the removal of a vacant building when a city inspector had actual notice that the building was in imminent danger of collapse but took no action.

47 102 Ariz. at 197, 427 P.2d at 337.

48 Goldberg v. Housing Auth., 38 N.J. 578, 583, 186 A.2d 291, 293 (1962).

49 104 Ariz. at 523, 456 P.2d at 381.

50 103 Ariz. at 67, 436 P.2d at 616.

51 ARIZ. REV. STAT. ANN. § 11-261 (1956).

52 *Id.* § 9-497.

53 *Id.* § 38-641.

54 Riss v. City of New York, 22 N.Y.2d 579, 585, 240 N.E.2d 860, 863, 293 N.Y.S.2d 897, 901 (1968) (dissenting opinion). Judge Keating points out that New York City has been spending less than 0.2 percent of its annual budget on tort claims of all kinds. He quotes a figure of $8 million which if apportioned throughout the population of New York City would average less than $1 per person.

ence and breach of a duty would go to the jury. By a similar analysis the reasonableness test could have been applied in *Stone*, *Veach*, and *Patterson* without altering their results.

The decision in *Massengill* clearly limits *Stone's* abolition of governmental immunity from tort liability in Arizona. Judge Keating of New York has stated that "although 'sovereign immunity,' by that name, supposedly died . . . it has been revived in a new form. It now goes by the name 'public duty.' "[55] While paying lip service to *Stone*, the court in effect held local governments immune from liability for at least some police omissions which consist of failure to perform statutory duties. It would be better if the court would expressly state that it is not applying *Stone* to cases of police nonfeasance rather than cloaking its rationale in the guise of lack of duty. The lower courts would then have guidance as to the meaning and scope of the *Massengill* decision.

Adoption of the reasonableness test would give the Arizona courts more flexibility in formulating case law in this area. It would be a question of fact whether, under all the circumstances, an officer's act or failure to act was reasonable. According to the rule now promulgated by *Massengill*, a person who was attacked on a street in full view of a police officer would have no civil remedy against that officer, or the local government which employed him, if the officer refused to go to that person's aid. If, on the other hand, the officer in the course of aiding the victim negligently struck and injured him, under the *Patterson* rationale the officer and the local government could be civilly liable to the victim for misfeasance. The unfortunate possibility is that police officers will be tempted to be overly cautious and avoid interference in any situation where there is a risk of committing an act of misfeasance. In that way they would safeguard themselves and their employer from possible tort liability. Adoption of the reasonableness test would preclude such a temptation because the officer, and the local government, would be judged on the basis of what was reasonable conduct under the circumstances. Acts whether nonfeasance or misfeasance could be measured by standards such as those suggested in this note to determine if the officer acted reasonably and if it was fair to hold him and his local government employer liable for those acts.

Alternatively, the legislature could spell out the standards of governmental immunity in Arizona.[56] A more limited remedy by the legislature

---

[55] *Id.* at 591, 240 N.E.2d at 866, 293 N.Y.S.2d at 906.

[56] In 1946 Congress waived the United States' immunity from tort liability when it enacted the Federal Tort Claims Act. 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1964). For a before-and-after perspective of the Federal Tort Claims Act, see Gottlieb, *Tort Claims Against the United States*, 30 GEO. L.J. 462 (1942) (before); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1 (1946) (after); Gottlieb, *The Tort Claims Act Revisited*, 49 GEO. L.J. 539 (1961) (after). The Act makes the United States liable, under the laws of the state in which the tort occurs, for the negligent

might be to amend the statutes relating to police and sheriffs' duties to express clearly whether the duties are owed to the public at large or to individuals.

Whatever course is taken, by the courts or by the legislature, Judge Keating's epigram: "Because we owe a duty to everybody, we owe it to nobody,"[57] should be a caveat to the legislature, the judiciary, and the people of Arizona.

acts or omissions of federal employees within the scope of their employment. There are a number of exceptions in the Act which maintain immunity for the United States for certain activities. *See, e.g.*, 28 U.S.C. § 2680(h) (1964) (no liability for any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights).

[57] Riss v. City of New York, 22 N.Y.2d 579, 585, 240 N.E.2d 860, 862, 293 N.Y.S.2d 897, 901 (1968) (dissenting opinion).