Notes

ASSIGNMENTS — PERSONAL INJURY CLAIMS — ASSIGNMENT TO INSURANCE CARRIER HELD INVALID. — *Harleysville Mutual Ins. Co. v. Lea* (Ariz. Ct. App. 1966).

Defendant was injured in an automobile accident. Plaintiff, defendant's insurance company, paid defendant's medical expenses. As required by the insurance policy, defendant executed an agreement by which he assigned to the plaintiff any cause of action arising from the accident, limited to the extent of the medical expenses received from the plaintiff. Afterward, the defendant entered into a settlement of his accident claim with the tortfeasor, but refused to honor the agreement with the company and repay the plaintiff; whereupon, the plaintiff then brought suit to recover the amount previously paid for medical expenses. The trial court gave judgment for the defendant. On appeal, *held*, affirmed. Even though by statute an action for personal injuries may survive death,[1] an action for personal injuries may *not* be assigned, either in whole or in part *before* it is reduced to judgment or otherwise liquidated. *Harleysville Mutual Ins. Co. v. Lea*, 2 Ariz. App. 538, 410 P.2d 495 (1966).

The common law rule is that a cause of action for personal injuries cannot be assigned.[2] The primary and usually the only reason given for the common law rule was that a cause of action for personal injuries did not survive the death of the injured party.[3] Today, substantially all jurisdictions have enacted, in one form or another, statutes providing that causes of action for personal injuries do survive the death of the injured party.[4] However, the courts of these jurisdictions have apparently not agreed on whether these statutes allow a cause of action for personal injuries to be assigned.

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[1] ARIZ. REV. STAT. ANN. § 14-477 (1956):

> Every cause of action, except a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium or invasion of the right of privacy, shall survive the death of the person entitled thereto or liable therefor, and may be asserted by or against the personal representative of such person, provided that upon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed.

[2] Employers Cas. Co. v. Moore, 60 Ariz. 544, 548, 142 P.2d 414, 415 (1943); Kithcart v. Kithcart, 145 Iowa 549, 554, 124 N.W. 305, 306 (1910) states: "At common law claims growing out of tort could not be assigned. . . ." See also cases collected in Annot., 40 A.L.R.2d 500, 502-505 (1955).

[3] *E.g.*, Employers Cas. Co. v. Moore, 60 Ariz. 544, 548, 142 P.2d 414, 415 (1943); Staley v. McClurken, 35 Cal. App. 2d 622, 96 P.2d 805, 807 (Dist. Ct. App. 1939); Slauson v. Schwabacher, 4 Wash. 783, 785, 31 Pac. 329, 330 (1892).

[4] *E.g.*, ARIZ. REV. STAT. ANN. § 14-477 (1956); IND. ANN. STAT. § 2-403 (Burns 1955); DEL CODE ANN. § 10-3704 (1953).

At least one statute provides,[5] and some are construed to mean,[6] that a cause of action for personal injuries is not assignable. Without discussing legislative intent, the courts of several jurisdictions hold that personal injury actions are not assignable even if a statute provides for their survival.[7] These decisions often state or imply that (1) survival of a cause of action is not the test of assignability,[8] or (2) the assignment of personal injury actions is barred by public policy,[9] or (3) nothing is assignable except a property right, and the statute does not transform the survival of a cause of action into a property right.[10]

The other major line of authority is that "causes of action for tort which survive, are assignable."[11] The reasoning of these decisions is that (1) the survival statutes have eliminated the basis for the common law rule against assignability,[12] or (2) the cause of action for personal injuries is a property right that can be assigned,[13] or (3) there is no significant difference between personal injury claims and property damage claims in the context of assignability.[14]

Apart from these views, a distinction has been made between assigning the cause of action for personal injuries, and assigning the proceeds of a judgment.[15] New York has held that an assignment of the proceeds *yet to be recovered* on a cause of action for personal injuries is enforceable by an assignee as an equitable assignment, notwithstanding that the cause of action could not be assigned.[16] The Arizona Court of Appeals has apparently ruled out this approach by implication when they state that a " . . . claim for personal injuries *which has been reduced to judgment* or otherwise liquidated" may be

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[5] N.Y. GEN. OBL. LAW § 13-101(1).

[6] City of Richmond v. Hanes, 203 Va. 102, 107, 122 S.E.2d 895, 899 (1961); Hereford v. Meek, 132 W. Va. 373, 52 S.E.2d 740, 749 (1949).

[7] *E.g.*, Bethlehem Fabricators, Inc. v. H. D. Watts Co., 286 Mass. 556, 566, 190 N.E. 828, 833 (1934) where the court said: "A cause of action for personal injuries not reduced to a judgment though it survives . . . is not assignable." *Accord*, Weller v. Jersey City, H. & P. St. Ry., 68 N.J.E. 659, 61 Atl. 459, 460 (Ct. Err. & App. 1905); Lisenby v. Patz, 130 F. Supp. 670 (E.D.S.C. 1955).

[8] Goldfarb v. Reicher, 112 N.J.L. 413, 171 Atl. 149, 150 (Sup. Ct. 1934).

[9] North Chicago St. Ry. v. Ackley, 171 Ill. 100, 108, 49 N.E. 222, 225 (1897).

[10] Hereford v. Meek, 132 W. Va. 373, 52 S.E.2d 740, 750 (1949).

[11] *E.g.*, Doremus v. Atlantic Coastline R.R., 242 S.C. 123, 142, 130 S.E.2d 370, 379 (1963). *Accord*, Davenport v. State Farm Mut. Ins. Co., 404 P.2d 10 (Nev. 1965); McCloskey v. San Antonio Traction Co., 192 S.W. 1116, 1119 (Tex. Civ. App. 1917).

[12] *E.g.*, McWhirter v. Otis Elevator Co., 40 F. Supp. 11, 15 (W.D.S.C. 1941); Grand Rapids & I. Ry. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N.W. 56, 60 (1910); Wells v. Edwards Hotel & City Ry., 96 Miss. 191, 50 So. 628, 629 (1909).

[13] Alexander v. Creel, 54 F. Supp. 652, 656 (E.D. Mich. 1944).

[14] Hair v. Savannah Steel Drum Corp., 161 F. Supp. 654, 655 (E.D.S.C. 1955).

[15] See generally Annot., 40 A.L.R.2d 500, 512 (1955).

[16] *In re* Wood's Estate, 144 N.Y.S.2d 880, 884 (Surr. Ct. 1955); Richard v. National Transportion Co., 158 Misc. 324, 285 N.Y. Supp. 870, 872 (Munic. Ct. N.Y.C. 1936).

assigned.[17] (Emphasis supplied.)

In the instant case, Arizona adopted the view that even though a cause of action for personal injuries survives by statute, it is not assignable in whole or part. Thus, to the extent of medical payments made to the insured, an agreement under an insurance policy to assign to the company the insured's *claim* for damages arising from bodily injury against an alleged tort-feasor is an invalid assignment of part of a cause of action for personal injuries. Although this may be the necessary result under the view Arizona has adopted, the court points out that this area could be modified by the legislature:

> Although we are not called upon to discuss the absence of legislation which would authorize the control of policy provisions in medical benefit insurance, allowing the subrogation or assignment of a cause of action for personal injuries is so fraught with possibilities, that the rule in Arizona against assignment should remain the same until changed by the legislature . . . [18]

The effect of the instant case is that the insured may not contract away the possibility of a double recovery. This is unfortunate because if the enforceability of such agreements were recognized, one less risk would be inherent in the policy, and it follows that a lower premium could (and should) be charged. It appears that the primary thing the insured would lose is the possibility of collecting his medical expenses twice. The argument that because he paid his premium he should be able to collect twice if he desires is specious. Among other things, he paid his premium for the peace of mind that he would not be financially inconvenienced by medical bills, but not for a "double your money" speculative investment on his own misfortune. It seems reasonable that many people would choose a lower premium over the possibility of a double recovery. Such a choice should be encouraged, not prohibited, as a matter of public policy. The Arizona Legislature should enact a statute which would declare these agreements valid.[19]

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[17] Harleysville Mut. Ins. Co. v. Lea, 2 Ariz. App. 538, 543, 410 P.2d 495, 500 (Ct. App. 1966).

[18] *Id.* at 542, 410 P.2d at 499.

[19] This does not necessarily have to include assignability for all purposes, but could be limited to the protection of the subrogation rights of the insurance company. Arizona Statutes currently allow assignment of personal injury claims under the Workmen's Compensation Act. See ARIZ. REV. STAT. ANN. § 23-1023 (Supp. 1965).

ATTORNEYS — MALPRACTICE — IN UNCONTESTED DIVORCE SUIT ATTORNEY REPRESENTING BOTH PARTIES MAY BE NEGLIGENT IN FAILING TO EXPRESSLY APPRISE ONE PARTY OF THE NATURE AND DANGER OF DUAL REPRESENTATION. — *Ishmael v. Millington* (Cal. Dist. Ct. App. 1966).

Defendant-attorney had represented plaintiff's husband in business matters and had advised the husband regarding his impending divorce. The husband engaged defendant to represent plaintiff in the proceedings. Defendant-attorney, never having met plaintiff, drafted a divorce complaint naming plaintiff as complainant and also drafted a property settlement relying on the husband's figures. Defendant-attorney then gave the property settlement agreement to the husband who procured plaintiff's signature. Unknown to plaintiff, the figures had not been verified by defendant-attorney, and plaintiff thereby surrendered her right to $82,500 in community assets. In this action for the difference, defendant-attorney was granted a summary judgment. On appeal, *held*, reversed. The trier of fact might find an attorney negligent in his handling of a divorce by his not verifying the husband's financial statement or by not telling the wife he had not done so, and where the attorney represents both parties, a jury might find that he was negligent in failing to disclose to the parties the limited nature of dual representation and in failing to suggest to his clients the advisability of independent legal representation. *Ishmael v. Millington*, 241 Adv. Cal. App. 634, 50 Cal. Rptr. 592 (Dist. Ct. App. 1966).

It is generally held that a lawyer is bound to exercise such skill, prudence, and diligence as do lawyers of ordinary skill and capacity.[1] Attorneys are not held liable for all their mistakes,[2] nor for mere errors in judgment.[3] Assuming he acts in good faith, an attorney is not bound to insure the results of litigation nor to insure that he will not err in the conduct thereof,[4] nor is he held to insure the validity of instruments he drafts.[5] However, an attorney may be negligent in his failure to be aware of the contents of a document and his subsequent failure

[1] See, *e.g.*, Savings Bank v. Ward, 100 U.S. 195 (1879); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), 4 ARIZ. L. REV. 100 (1962); *In re* Kruger's Estate, 130 Cal. 616, 63 Pac. 31 (1900); Annot., 45 A.L.R.2d 5 (1956); Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959); Note, 63 COLUM. L. REV. 1292 (1963).

[2] Savings Bank v. Ward, 100 U.S. 195 (1879); Lally v. Kuster 177 Cal. 783, 171 Pac. 961 (1918); 7 AM. JUR. 2d *Attorneys at Law* § 170 (1963); 7 C.J.S. *Attorney and Client* § 143 (1937).

[3] See, *e.g.*, Meagher v. Kavli, 256 Minn. 54, 60, 97 N.W.2d 370, 375 (1959); Patterson v. Powell, 31 Misc. 250, 253, 64 N.Y. Supp. 43, 46 (App. T.), *aff'd*, 56 App. Div. 624, 68 N.Y. Supp. 1145 (1900); Hill v. Mynatt, 59 S.W. 163, 167 (Tenn. Ct. Ch. App. 1900); Comment, 63 COLUM. L. REV. 1292, 1295 (1963).

[4] Annot., 45 A.L.R.2d 5, 13 (1956); Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 760 (1959).

[5] Savings Bank v. Ward, 100 U.S. 195 (1879); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961); McCullough v. Sullivan, 102 N.J.L. 381, 132 Atl. 102 (Ct. Err. & App. 1926); 7 AM. JUR. 2d *Attorneys at Law* § 174 (1963).

to disclose such contents to his client.[6] A lawyer may likewise be negligent where he accepts documents on behalf of his client without verifying the accuracy of the contents thereof.[7]

The general standard of care has been developed in cases where an attorney has represented only one party or interest. When an attorney attempts to represent adverse parties, he assumes a more precarious position. An attorney may not under any circumstance represent adverse interests without full disclosure to and consent of all parties.[8] There are cases in which the parties' interests are so adverse that dual representation would be utterly impossible.[9] It has been said that in divorce proceedings, an attorney may not represent dual interests even with the parties' consent,[10] or prepare papers for, advise, or recommend counsel for his client's adversary.[11]

Dual representation has formed the basis for direct attack on judg-

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[6] Mageary v. Hoyt, 91 Ariz. 41, 369 P.2d 662 (1962).

[7] Sarti v. Udall, 91 Ariz. 24, 369 P.2d 92 (1962).

[8] Acorn Printing Co. v. Brown, 385 S.W.2d 812 (Mo. Ct. App. 1964); Jedwabny v. Philadelphia Transport. Co., 390 Pa. 231, 135 A.2d 252 (1957), *cert. denied*, 355 U.S. 966 (1958); American Bar Association, Canons of Professional Ethics, Canon 6: *Adverse Influences and Conflicting Interests.*

> It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.
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> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
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> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

[9] Acorn Printing Co. v. Brown, *supra* note 8; Jedwabny v. Philadelphia Transport. Co., *supra* note 8. For the test used in cases where an attorney seeks to represent one client against a former client, see Hoffman v. Hogan, 345 Mo. 903, 137 S.W.2d 441, 446 (1940).

[10] Todd v. Rhodes, 108 Kan. 64, 193 Pac. 894 (1920); *In re* Themelis, 117 Vt. 19, 83 A.2d 507 (1951); *Symposium on the Law of Domestic Relations in Oklahoma*, 14 OKLA. L. REV. 279, 433 (1961); American Bar Association, *Opinions of the Coommittee on Professional Ethics and Grievances* [hereinafter cited as ABA], *compare* Opinion 243 (1942) *with* Opinion 245 (1942). See Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 HARV. L. REV. 443, 453 (1953): "Where the public interest is involved, it has been held that the consent of the immediate parties is insufficient." The author goes on to point out that the mere hiring or recommendation of a lawyer by the husband should pose no problem where the lawyer proposed to represent the wife has not previously represented the husband.

[11] Drinker, *supra* note 10, at 464; see ABA Opinion 245 (1942) and Opinion 58 (1931).

ments[12] and has subjected judgments to collateral attack.[13] In divorce proceedings, the husband's paying his wife's attorney may be regarded as strong evidence of collusion.[14] In one case, an attorney's "breach of fidelity to a client's interest" in representing two parties to an uncontested divorce was held to be constructive fraud as a matter of law, and the wife was successful in her suit to set aside the property settlement involved.[15]

While Arizona has not had occasion to pass upon the precise issue raised in the instant case, the doctrine would seem to be a logical extension of Arizona case law. Concerning the failure to verify aspect, in *Sarti v. Udall*[16] the court adhered to the generally accepted standard of care to which an attorney should be held, and summary judgment for defendant-attorney was reversed where the defendant had accepted an erroneous property description from opposing counsel. In *Mageary v. Hoyt*,[17] the Arizona Supreme Court held that the trier of fact must determine whether defendant-attorney had a duty to inform himself of the extent of a leasehold estate involved in the transaction. Given any such information, an attorney has a duty as a matter of law to inform his client of that information which would adversely affect the client's interests.

Courts naturally abhor dual representation. The Arizona Supreme Court left important questions of breach of duty by an attorney, under the general standard of care, to the juries in the *Sarti* and *Mageary* malpractice cases. It would seem to follow that the court would probably leave to the jury the question of whether an attorney may be negligent in failing to warn his clients of the dangers of dual representation where such attorney undertakes to represent conflicting interests.

In the instant case, plaintiff and defendant-attorney did not confer on the matter of the property settlement agreement, and plaintiff

[12] Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 149 N.E.2d 482 (1958); Gardine v. Cottey, 360 Mo. 681, 230 S.W.2d 731 (1950); Jedwabny v. Philadelphia Transport. Co., 390 Pa. 231, 135 A.2d 252 (1957), *cert. denied*, 355 U.S. 966 (1958). *But see* Todd v. Rhodes, 108 Kan. 64, 193 Pac. 894 (1920) (husband who hired attorney to represent his wife in divorce has no standing to attack the judgment on dual representation grounds); Acorn Printing Co. v. Brown, 385 S.W.2d 812 (Mo. Ct. App. 1964) (client who heard the attorney's position explained in open court not allowed to attack judgment on nondisclosure grounds). "We do not propose to allow our Canons of Ethics to be used as tools by those who seek to prevent their purpose." 385 S.W.2d at 819.

[13] Gardine v. Cottey, *supra* note 12; Comment, 15 ALA. L. REV. 461, 502 (1963).

[14] See 24 AM. JUR. 2d *Divorce and Separation* § 192 (1966).

[15] Gardine v. Cottey, 360 Mo. 681, 230 S.W.2d 731 (1950).

[16] 91 Ariz. 24, 369 P.2d 92 (1962). A carport was to be included in the description of certain real estate involved in a divorce property settlement agreement. The jury was allowed to determine if, under the customary standard of care, defendant-attorney had breached the duty owed his client by relying on the word of opposing counsel without verifying the property description given him by said counsel.

[17] 91 Ariz. 41, 369 P.2d 662 (1962).

dealt at arm's length with her husband at all times.[18] Without discussing the fact that a husband involved in a property division with his wife has a fiduciary duty to disclose correctly even those assets which the wife might easily discover,[19] the court observed that an attorney should verify such statements or inform his client that he had not done so, stating that "an attorney of ordinary professional skill would demand some verification of the husband's financial statement; or . . . inform the wife that the husband's statement was unconfirmed, that wives may be cheated, that prudence called for investigation and verification."[20] Such a rule by itself should form a sufficent basis for reversal in the instant case, but the court went further and also ruled that *where the attorney attempts to represent both parties,* he may be negligent in failing to apprise the parties of the possible ill effects of his limited representation.[21] Any less disclosure by the attorney may not be sufficient to permit the clients' "free and intelligent choice."[22]

Just how widespread the practice of dual representation is in its many and varying forms is a matter for conjecture. Whether or not the practice is common, it is unquestionably borderline on ethical grounds[23] and is fraught with professional risk.[24] Such facts in themselves should raise the flag of danger, causing an attorney engaged in such practice at least to articulate his position.

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[18] Ishmael v. Millington, 241 Adv. Cal. App. 634, 50 Cal. Rptr. 592, 594 (Dist. Ct. App. 1966).

[19] Vai v. Bank of America Nat'l Trust and Sav. Assn., 56 Cal. 2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961).

[20] 50 Cal. Rptr. at 596.

[21] *Id.* at 597.

[22] *Id.* at 596. *Accord,* Anderson v. Eaton, 211 Cal. 113, 293 Pac. 788 (1930); Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 149 N.E.2d 482 (1958).

[23] Staedler v. Staedler, 6 N.J. 380, 78 A.2d 896 (1951); *In re* Themelis, 117 Vt. 19, 83 A.2d 507 (1951); Drinker, *Problems of Professional Ethics in Matrimonial Litigation,* 66 HARV. L. REV. 443, 453 (1953); *Symposium on the Law of Domestic Relations in Oklahoma,* 14 OKLA. L. REV. 279, 433 (1961); ABA Opinion 245 (1942) and Opinion 243 (1942). The ethical problem of dual representation in divorce cases has been the subject of disciplinary action by the Arizona Supreme Court in *In re* Maltby, 68 Ariz. 153, 202 P.2d 902 (1949), where the attorney represented a wife in a divorce suit and some time later, and over her objection, represented her husband in a change of custody suit. *Compare* State Bar of Arizona, Committee on Rules of Professional Conduct, Opinion No. 77, July 14, 1961, where the question presented was, "May an attorney represent both husband and wife in a bankruptcy proceeding and subsequently represent the husband in a divorce action initiated by the wife while the bankruptcy proceeding is still pending?" and the practice was found to be not objectionable, *with* State v. Carpenter, 1 Ariz. App. 522, 529, 405 P.2d 460, 467 (1965), where a court appointed attorney defended a husband and wife in a criminal action during the pendency of which he was retained by the wife in her divorce suit against the husband. The court found that counsel's conduct was not prejudicial to either defendant in the criminal action but deplored the attorney's conduct in undertaking to represent the wife in the divorce suit.

[24] See, *e.g.,* Anderson v. Eaton, 211 Cal. 113, 293 Pac. 788 (1930) (suit for attorney's fee); Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 149 N.E.2d 482 (1958) (direct attack by insured on declaratory judgment for insurer); Gardine v. Cottey, 360 Mo. 681, 230 S.W.2d 731 (1950) (attack on divorce property settlement).

It would appear that the court in the instant case could have reversed simply on the basis that the defendant-attorney may have been negligent in failing to verify the husband's financial statement. Whether or not it was compelled by the necessities of the case to include in its holding that a jury may find an attorney negligent in failing to warn of the risks inherent in dual representation, the court may well be applauded for adding judicial weight to a common sense rule of practice.[25]

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CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — TRIAL COURT HAS DUTY TO DETERMINE DEFENDANT'S COMPETENCY TO WAIVE RIGHT TO COUNSEL. — *State v. Westbrook* (Ariz. 1966).

Defendant, prior to the start of his trial for murder, dismissed his counsel and conducted his own defense. Although the court examined the defendant and found him competent to stand trial and to assist in his own defense, it made no attempt to determine his competency to waive his right to counsel and conduct his own defense. Defendant's conviction of first degree murder was affirmed by the Arizona Supreme Court.[1] On writ of certiorari to the United States Supreme Court,[2] the judgment was vacated and the case remanded. On remand, *held*, reversed. Where a defendant waives his right to counsel the trial court must make a determination not only of the defendant's ability to understand the proceedings against him and assist in his defense, but, in addition, a determination must be made of his ability to make an intelligent and competent waiver of right to counsel and his ability to conduct his own defense. *State v. Westbrook*, 417 P.2d 530 (Ariz. 1966).

It is generally recognized that the accused in a criminal case may

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[25] See Bjornstrup v. Cole, 393 P.2d 316 (Wyo. 1964), where the husband's attorney strongly urged the wife to seek her own attorney. She insisted that the attorney represent her as well as her husband. When the wife later attempted to attack the property settlement as unfair, the court held that the attorney had done all he could by warning her of the dangers inherent in dual representation. The attorney could be expected to do no more. The wife had been fairly warned and even though the settlement may have been unfair, she could not attack it.

[1] State v. Westbrook, 99 ARIZ. 30, 406 P.2d 388 (1965).

[2] Westbrook v. Arizona, 384 U.S. 150 (1966).

waive counsel and conduct his own defense[3] when such waiver has been made intelligently.[4] However, state court determinations of the validity of a waiver of right to counsel have been characterized by lack of a uniform test to determine the intelligence of the waiver. In state criminal proceedings the defendant's pleading guilty in the absence of counsel[5] or his failure to request counsel[6] has been held to amount to a valid waiver of the right to counsel.

The difficulty has been eliminated in the federal courts by the application of a specific set of guidelines to determine the defendant's competency to make an intelligent waiver of counsel. In *Von Moltke v. Gillies*,[7] the United States Supreme Court stated that to be a valid waiver of the right to counsel, as guaranteed by the sixth amendment to the United States Constitution, it must be made with (1) an apprehension of the nature of the charges, (2) a knowledge of the statutory offenses included within the charges, (3) a knowledge of the range of the allowable punishment therefor, and (4) an apprehension of the possible defenses to the charges and the circumstances in mitigation thereof.[8] Lower federal courts have stated that the trial court's duty upon waiver of counsel by the accused includes a diligent inquiry into the circumstances of the case and an investigation of the accused's personal background,[9] and they have said that the trial court must insure that the defendant is possessed of sufficient knowledge of the nature of the offense charged to make an intelligent waiver.[10]

In *Carnley v. Cochran*,[11] the United States Supreme Court held that the federal standards for an intelligent waiver of right to counsel would apply to state criminal proceedings in cases where the absence of counsel would be a denial of due process of law as guaranteed by

[3] See, *e.g.*, State v. Van Bogart, 85 Ariz. 63, 331 P.2d 597 (1958); People v. Bush, 32 Ill. 2d 484, 207 N.E.2d 446 (1965); People v. Sinko, 21 Ill. 2d 23, 171 N.E.2d 9 (1961); Palacorolle v. State, 239 Md. 416, 211 A.2d 828 (1965); ARIZ. CONST. art. 2, § 24. See generally Annot., 77 A.L.R.2d 1233 (1961).

[4] *E.g.*, State v. Anderson, 96 Ariz. 123, 392 P.2d 784 (1964); *In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965); People v. Butcher, 174 Cal. App. 2d 722, 345 P.2d 127 (Dist. Ct. App. 1959); Simmons v. State, 175 So. 2d 215 (Fla. 1965); People v. Bush, 32 Ill. 2d 484, 207 N.E.2d 446 (1965); Palacorolle v. State, 239 Md. 416, 211 A.2d 828 (1965); People v. Witenski, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965).

[5] Commonwealth v. Cavell, 195 Pa. Super. 196, 171 A.2d 630 (1961).

[6] Commonwealth v. Kruger, 180 Pa. Super. 374, 119 A.2d 870 (1956).

[7] 332 U.S. 708 (1948).

[8] *Id.* at 724.

[9] *E.g.*, Day v. United States, 357 F.2d 907 (7th Cir. 1966); Twining v. United States, 321 F.2d 432 (5th Cir. 1963); Williams v. United States, 231 F. Supp. 382 (E.D. Ky. 1964). See also Application of Estrada, 1 Ariz. App. 348, 403 P.2d 1 (1965).

[10] *E.g.*, Day v. United States, *supra* note 9; Twining v. United States, *supra* note 9; Cherrie v. United States, 179 F.2d 94 (10th Cir. 1949); Behrens v. Hironimus, 166 F.2d 245 (4th Cir. 1948); Williams v. United States, *supra* note 9; *cf.* Von Moltke v. Gillies, 332 U.S. 708 (1947).

[11] 369 U.S. 506 (1962).

the fourteenth amendment to the Constitution of the United States. The obvious question then became: In which cases is right to counsel a necessary part of due process of law? The question was partially answered by the landmark case of *Gideon v. Wainwright*[12] wherein the United States Supreme Court held that the right to counsel was a fundamental right made applicable to all state criminal proceedings of a serious nature by the due process clause of the fourteenth amendment to the United States Constitution.

The fact that the United States Supreme Court in *Johnson v. Zerbst*[13] said that the right to be protected from an incompetent waiver of right to counsel derives from the constitutional right to counsel, coupled with the broader application to state criminal proceedings of the fundamental right to counsel by *Gideon v. Wainwright*,[14] indicates that a duty to protect the accused from an incompetent waiver of counsel, in criminal proceedings of a serious nature, has been placed upon the state trial courts.[15] To properly fulfill this duty, the state courts should apply the federal guidelines for determining an accused's competency to waive counsel given in the *Von Moltke* case.[16]

The Arizona court, in *State v. Anderson*,[17] has recognized that to be valid a waiver of right to counsel must be intelligently made. However, Arizona courts have applied no consistent criteria for making a determination of the competency of a waiver of counsel.[18] The need for a proper test to determine a defendant's competency to waive counsel was apparent in the original appeal to the Arizona Supreme Court by Westbrook.[19] There a test was suggested when the court held that if a defendant was competent to stand trial, he was also competent to conduct his own defense.[20] This test was, however, rejected by the

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[12] 372 U.S. 335 (1963).
[13] 304 U.S. 458 (1938).
[14] 372 U.S. 335 (1963).
[15] Johnson v. Zerbst, 304 U.S. 458, 465 (1938), wherein it was stated that the fact that the defendant had waived his constitutional right to counsel "imposes the serious and weighty responsibility upon the [state] trial judge of determining whether there is an intelligent and competent waiver by the accused."
[16] See Malloy v. Hogan, 378 U.S. 1 (1964), wherein the court, in reversing a state conviction of contempt for refusing to answer questions in a state gambling inquiry on the ground that the state constitutional privilege had been improperly invoked, held that the fourteenth amendment guaranteed the petitioner the protection of the fifth amendment's privilege against self-incrimination, and whether the privilege was properly invoked should be determined by the applicable federal standard.
[17] 96 Ariz. 123, 392 P.2d 784 (1964).
[18] See, *e.g.*, State v. Sherrick, 98 Ariz. 46, 402 P.2d 1 (1965) (time served in prison enabled defendant to have knowledge required for intelligent waiver); State v. Peats, 97 Ariz. 133, 397 P.2d 631 (1964) (three previous trials supplied sufficient knowledge for valid waiver); State v. Franklin, 2 Ariz. App. 414, 409 P.2d 573 (1966) (waiver intelligent when defendant informed of his constitutional rights).
[19] State v. Westbrook, 99 Ariz. 30, 406 P.2d 388 (1965).
[20] *Id.* at 34, 406 P.2d at 391.

United States Supreme Court.[21]

The weakness in the Arizona court's suggestion that one competent to stand trial is also competent to waive counsel and conduct a defense is obvious when it is compared with the federal guidelines for making these same determinations. In *Duskey v. United States*,[22] the United States Supreme Court held that in order to be competent to stand trial the defendant must have "sufficient present ability to consult with his lawyer . . . as well as factual understanding of the proceedings . . . ."[23] These factors simply establish competency to stand trial. In addition to this, federal courts require that in order to be held competent to waive counsel the accused have a knowledge of the range of allowable punishment, an apprehension of possible defenses, and a knowledge of circumstances in mitigation of the charges.[24] Thus a person may be competent to assist in his defense, as in *Duskey*, and fail to meet the added requirements for waiving counsel and conducting a defense.[25]

While this recognition of a defendant's right to be protected by the trial court from his own incompetency in waiving counsel[26] is a step in the right direction, the problem has not been completely solved. Since the right of the accused to be protected from an incompetent waiver of counsel is derived from the constitutional right to counsel,[27] the right to be protected from an incompetent waiver must arise when the right to counsel arises.[28] In cases where the accused waives the right to counsel at first opportunity,[29] he is left unprotected until his waiver can be evaluated by the trial court. This gives rise to the possibility of the accused making an incompetent waiver of right to counsel when the right first arises, and thereby being deprived of the benefit of counsel from that time until he is brought before the trial court. Thus, a hearing to determine the accused's competency to waive is im-

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[21] Westbrook v. Arizona, 384 U.S. 150 (1966).
[22] 362 U.S. 402 (1960).
[23] *Id.* at 402.
[24] Von Moltke v. Gillies, 332 U.S. 708, 724 (1947).
[25] *Ibid.*
[26] The Supreme Court's insistence on an inquiry to determine the competency of the waiver of right to counsel stems from its recognition of the fact that a high level of legal knowledge is required to conduct a criminal defense. *E.g.*, Johnson v. Zerbst, 304 U.S. 458, 463 (1938); Powell v. Alabama, 287 U.S. 45, 68-69 (1932). This recognition has stimulated a general awareness of the trial court's duty to protect a defendant from an incompetent waiver of right to counsel. Johnson v. Zerbst, *supra* at 465.
[27] Johnson v. Zerbst, 304 U.S. 458, 465 (1938).
[28] See Escobedo v. Illinois, 378 U.S. 478, 490 (1964), wherein the court held that the right to counsel arises at the time the investigation ceases to be one of a general inquiry and focuses upon the accused as a suspect.
[29] See Miranda v. Arizona, 384 U.S. 436 (1966), wherein the court held, in part, that prior to any questioning, the accused must be warned that he has the right to remain silent which may be exercised at any time during the proceedings, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed.

perative as soon as a waiver is attempted. One method of assuring a proper determination would be to take the accused to a committing magistrate immediately upon arrest and before custodial interrogation begins.[30] There the accused could be informed of his constitutional rights, and, should he choose to make a waiver, a determination of his competency to do so could then be made in a proper judicial forum.

Gerald William Alston

CONSTITUTIONAL LAW — CRUEL AND UNUSUAL PUNISHMENT — EIGHTH AMENDMENT PROHIBITS CHRONIC ALCOHOLIC'S CRIMINAL CONVICTION FOR PUBLIC INTOXICATION. — *Driver v. Hinnant* (4th Cir. 1966).

Petitioner, a chronic alcoholic with a record of 203 convictions for public drunkenness and related crimes and a history of 25 of the last 36 years spent in jail, was convicted of three acts of public intoxication within twelve months and, under a North Carolina statute,[1] was sentenced to two years imprisonment. He applied for a writ of habeas corpus in the United States District Court which found that petitioner was a chronic alcoholic but refused to issue the requested writ.[2] On appeal, *held,* reversed. The "cruel and unusual punishment" clause of the eighth amendment prohibits the criminal conviction of a chronic alcoholic for public intoxication. *Driver v. Hinnant,* 356 F.2d 761 (4th Cir. 1966).[3]

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[30] ARIZ. R. CRIM. P. 16 (1956), provides for the taking of an accused before a committing magistrate after arrest, to inform him: (1) of the charges against him, (2) of his right to counsel, and (3) of his right to waive preliminary examination. To these duties could be added the duty, in the event the accused waives the right to counsel, to make a determination as to his competency to do so. An addition of this nature to the duties of the committing magistrate is one for the legislature to make.

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[1] N.C. GEN. STAT. § 14-335 (1953), as amended, N.C. GEN. STAT. § 14-335.12 (Supp. 1965).

> If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting . . . he shall be guilty of a misdemeanor . . . and for the third offense within any twelve months' period such offense is declared a misdemeanor, punishable as a misdemeanor within the discretion of the court.

Public intoxication is a crime in most jurisdictions.

[2] 243 F. Supp. 95 (E.D.N.C. 1965), noted in 2 GA. S.B.J. 339 (1965).

[3] Noted in 15 CATHOLIC U.L. REV. 259 (1966); 1966 DUKE L.J. 545 (1966); 54 GEO. L.J. 1422 (1966); 44 N.C.L. REV. 818 (1966); 18 S.C.L. REV. 504 (1966); 3 TULSA L.J. 175 (1966); 7 W. & M.L. REV. 394 (1966).

The eighth amendment proscription of cruel and unusual punishment has traditionally been invoked to prevent barbarous methods of punishment[4] or degrees of punishment grossly out of proportion to the crime committed.[5] It has also been used to bar criminal punishment for a non-criminal act.[6] In the 1962 decision of *Robinson v. California*,[7] the United States Supreme Court held unconstitutional a California statute making the mere *status* of being addicted to the use of narcotics a crime.[8] Mr. Justice Stewart, speaking for the majority, reasoned that the statute made a crime of merely having the disease of drug addiction, an affliction not fundamentally different from mental disease, epilepsy, or venereal disease. Sending a man to jail for having one of these diseases "would doubtless be universally thought to be an infliction of cruel and unusual punishment."[9]

The *Robinson* decision, with its five opinions, is subject to two different interpretations. The court condemned making a mere passive status, without any accompanying anti-social *action*, a crime.[10] But there is also language stressing the *involuntary* nature of addiction,[11] leading to a possible interpretation that it is unconstitutional to convict a person of any crime which he is unable to avoid committing due to a

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[4] *E.g.*, Trop v. Dulles, 356 U.S. 86 (1958) (expatriation for desertion in war time); Dear Wing Jung v. United States, 312 F.2d 73 (9th Cir. 1962) (alien convicted of making false representations in naturalization proceedings given choice of serving prison term or leaving the United States, amounting to banishment); Howard v. State, 28 Ariz. 433, 237 Pac. 203 (1925), *overruled on other grounds*, Ridgway v. Superior Court of Yavapai County, 74 Ariz. 117, 245 P.2d 268 (1952) (prisoner's deprivation of all food save bread and water for 30 days and solitary confinement for five months, seemingly based on ARIZ. CONST. art. 2, § 15: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

[5] *E.g.*, Weems v. United States, 217 U.S. 349 (1910) (public officer convicted of making false entries in public records regarding 616 pesos sentenced to 12 years at "hard and painful" labor); Harper v. Wall, 85 F. Supp. 783 (D.N.J. 1949) (beating of 15 year old boy to obtain confession, conviction of burglary without benefit of counsel, sentence of ten years and subjection to county camp labor system); Mayor and Council of City of Hoboken v. Bauer, 26 N.J. Misc. 1, 55 A.2d 883 (Rec. Ct. City of Hoboken, N.J. 1947), *aff'd on other grounds*, 137 N.J.L. 327, 59 A.2d 809 (Sup. Ct. 1948) (possible $24,600 fine or 30 years imprisonment for owning and possessing in defendant's store an unlicensed penny bubble gum machine for four months).

[6] Stoutenburgh v. Frazier, 16 App. D.C. 229, 48 L.R.A. 220 (D.C. Ct. App. 1900) (applying the eighth amendment); State *ex. rel.* Bissell v. Devore, 225 Iowa 815, 281 N.W. 740 (1938) (applying state constitutional prohibitions against imprisonment for civil indebtedness as well as cruel and unusual punishment).

[7] 370 U.S. 660 (1962) (6-to-2 decision). This was the first case expressly bringing the "cruel and unsual punishment" clause within the fourteenth amendment "due process" requirement, thus making it applicable to the states.

[8] The Court emphasized that there was no evidence that any unlawful act had occurred within the boundaries of the state of California. 370 U.S. at 665, 666.

[9] 370 U.S. at 666.

[10] See *Id.* at 665, 666 (majority opinion), 674, 677-78 (Douglas, J., concurring), 679 (Harlan, J., concurring), 682 (Clark, J., dissenting).

[11] See *Id.* at 667 (majority opinion), 670, 671 (Douglas, J., concurring), 684 (Clark, J., dissenting), 688-89 (White, J., dissenting); *The Supreme Court, 1962 Term*, 76 HARV. L. REV. 54, 146 (1962).

disease with which he is afflicted. Although no Arizona court has ruled on the point, most federal and state courts that have considered the question have adopted the first, more narrow interpretation. Where drug addicts have invoked the *Robinson* decision as a defense to their convictions for "possession,"[12] "use,"[13] and "being under the influence of"[14] narcotics, they have been unsuccessful, the judges reasoning that since these crimes require some *overt act, e.g.,* use or possession of narcotics, rather than merely the *passive status* of being an addict, *Robinson* does not apply. The courts have also refused to recognize involuntariness as a defense to the crimes of public drunkenness,[15] driving an automobile while addicted to the use of narcotic drugs,[16] narcotic vagrancy,[17] sexual deviation,[18] and murder.[19]

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[12] Lloyd v. United States, 343 F.2d 242 (D.C. Cir. 1964), *cert. denied,* 381 U.S. 952 (1965); People v. Bowens, 229 Cal. App. 2d 590, 40 Cal. Rptr. 435 (Dist. Ct. App. 1964); People v. Zapata, 220 Cal. App. 2d 903, 34 Cal. Rptr. 171 (Dist. Ct. App. 1963), *appeal dismissed,* 377 U.S. 406 (1964); People v. Nettles, 34 Ill. 2d 52, 213 N.E.2d 536 (1966); Murray v. State, 236 Md. 375, 203 A.2d 908 (1964), *cert. denied,* 381 U.S. 940 (1965); Martinez v. State, 373 S.W.2d 246 (Tex. Crim. App. 1963), *cert. denied,* 377 U.S. 937 (1964). *But cf.* Castle v. United States, 347 F.2d 492 (D.C. Cir. 1964), *cert. denied,* 381 U.S. 929, 953 (1965); Lloyd v. United States, *supra* at 243 (Bazelon, C.J., dissenting opinion).

[13] United States v. Reinke, 344 F.2d 260 (2d Cir. 1965), *cert. denied,* 382 U.S. 869 (1965); Lloyd v. United States, 343 F.2d 242 (D.C. Cir. 1964), *cert. denied,* 381 U.S. 952 (1965); *In re* Carlson, 64 Adv. Cal. 72, 410 P.2d 379, 48 Cal. Rptr. 875 (1966); *In re* Trummer, 60 Cal. 2d 658, 388 P.2d 177, 36 Cal. Rptr. 281 (1964); *In re* Becerra, 219 Cal. App. 2d 244, 32 Cal. Rptr. 910 (Dist. Ct. App. 1963); State *ex rel.* Blouin v. Walker, 244 La. 699, 154 So. 2d 368 (1963), *cert. denied,* 375 U.S. 988 (1964); State v. Brown, 25 Wis. 2d 413, 130 N.W.2d 760 (1964); Browne v. State, 24 Wis. 2d 491, 129 N.W.2d 175 (1964), *cert. denied,* 379 U.S. 1004 (1965).

[14] State v. Margo, 40 N.J. 188, 191 A.2d 43 (1963); State v. Dennis, 80 N.J. Super. 411, 194 A.2d 3 (Super. Ct. App. Div. 1963); Salas v. State, 365 S.W.2d 174 (Tex. Crim. App. 1963), *appeal dismissed,* 375 U.S. 15 (1963); *cf.* People v. Davis, 240 Adv. Cal. App. 532, 49 Cal. Rptr. 663 (Dist. Ct. App. 1966). *Contra,* People v. Davis, 27 Ill. App. 2d 57, 188 N.E.2d 225 (1963); *cf.* Morales v. United States, 344 F.2d 846, 849 n.2 (9th Cir. 1965) (dictum); State v. Bridges, 360 S.W.2d 648 (Mo. 1962) (holding to "become addicted to" indistinguishable from to "be addicted to").

[15] Easter v. District of Columbia, 209 A.2d 625 (D.C. Ct. App. 1965), *rev'd on other grounds,* 361 F.2d 50 (D.C. Cir. 1966). The United States Court of Appeals for the Seventh Circuit has made the most liberal use of *Robinson* with regard to alcoholics, holding that requiring a known chronic alcoholic to refrain from drinking as a condition for parole is unreasonable. Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965).

[16] People v. O'Neil, 62 Cal. 2d 748, 401 P.2d 928, 44 Cal. Rptr. 320 (1965); People v. Lamb, 230 Cal. App. 2d 65, 41 Cal. Rptr. 157 (Dist. Ct. App. 1964). Both cases concern CAL. VEHICLE CODE § 23105.

[17] Wilson v. United States, 212 A.2d 805 (D.C. Ct. App. 1965); Rucker v. United States, 212 A.2d 766 (D.C. Ct. App. 1965). Both cases concern D.C. CODE § 33-416(a)b(1)B (1961).

[18] United States v. Maroney, 235 F. Supp. 588 (W.D. Pa. 1964), *rev'd on other grounds,* 355 F.2d 302 (3d Cir. 1966); Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); People v. Schaletzke, 239 Adv. Cal. App. 971, 49 Cal. Rptr. 275 (Dist. Ct. App. 1966); Commonwealth v. Maroney, 203 Pa. Super. 293, 201 A.2d 319 (1964).

[19] White v. Rhay, 390 P.2d 535 (Wash. 1964) (Dissenters cite *Robinson* as requiring Durham or Model Penal Code insanity standard rather than M'Naghten rule.).

The instant case marks a decisive break with the usual application of the *Robinson* decision, and thus with the accompanying construction of the eighth amendment. The court found that the *acts* of becoming intoxicated, and further, of appearing in public in this condition were involuntary, arising uncontrollably from the alcoholic's disease.[20] It then reasoned that the considerations which prohibited punishment for merely having a disease must also logically prohibit punishment for the involuntary and uncontrollable results of that disease. When an alcoholic's physical and mental disease forces him to be intoxicated in a public place, punishing the public intoxication is no different from punishing the addiction itself. Stating that *Robinson* sustained, *if it did not command,* its decision, the court drew this analogy:

> The California statute criminally punished a "status" — drug addiction — involuntarily assumed; the North Carolina Act criminally punishes an involuntary symptom of a status — public intoxication. . . . All of the opinions [in the *Robinson* decision] recognize the inefficacy of such a statute when it is enforced to make involuntary deportment a crime.[21]

The court has shifted the emphasis of the *Robinson* decision onto the distinction between voluntary and involuntary conduct. In doing so it relies on the historical requirement of a *mens rea,* a guilty mind, in addition to an *actus reus,* a guilty act, to constitute a crime.[22] A *mens rea* is established when one with a free will, faced with right and wrong alternatives, knowingly chooses the wrong. Where insanity, infancy, or coercion intervenes to destroy the mind's ability or capacity to choose, there can be no *mens rea* and, therefore, no *criminal* transgression.[23] This court found the same principle to apply where volition

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[20] The court points out that many chronic alcoholics have the additional handicap of being without family and friends to keep them from public view. This observation hardly seems necessary to show that the drunk's appearance in public is involuntary. Once he becomes inebriated he loses control over his actions.

[21] Driver v. Hinnant, 356 F.2d 761, 764-65 (4th Cir. 1966).

[22] The Supreme Court has upheld convictions involving "strict liability" or "public welfare" offenses, for which no criminal intent or *mens rea* is necessary. United States v. Behrman, 258 U.S. 280 (1922); United States v. Balint, 258 U.S. 250 (1922). Bryan, J., dismisses this objection in the *Driver* case by equating the alcoholic's presence in public with the movements of an imbecile or a person in a delirium or fever. "None of them by attendance in the forbidden place defy the forbiddance." *Driver* at 764. Fahy, J., in Easter v. District of Columbia, 361 F.2d 50, 52 (D.C. Cir. 1966), seems to be on more stable grounds in classifying public drunkenness as *malum in se,* involving a moral wrong and personal conduct, rather than as *malum prohibitum,* an act which would not be wrongful in absence of statute. *Contra,* People v. Hoy, 3 Mich. App. 666, 143 N.W.2d 577 (Ct. App. 1966).

[23] Morissette v. United States, 342 U.S. 246, 250-52 (1952); *cf.* Carter v. United States, 102 App. D.C. 227, 252 F.2d 608 (D.C. Cir. 1957). Two state courts have held unconstitutional attempts to remove the defense of insanity to a charge of murder. Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931) (5-to-1 decision, based on the "cruel and unusual punishment" clause of the state constitution); State v. Strasburg, 60 Wash. 106, 110 Pac. 1020 (1910) (7-to-2 decision, based on the "due process" clause of the state constitution).

was destroyed by disease:

> Although his misdoing objectively comprises the physical elements of a crime, nevertheless no crime has been perpetrated because the conduct was neither actuated by an evil intent nor accompanied with a consciousness of wrong-doing, indispensable ingredients of a crime.[24]

The court does not prohibit the arrest and jailing of a drunken alcoholic:

> [A]ny person found in the street or other public areas may be taken into custody for inquiry or prosecution. But the Constitution intercedes when *on arraignment* the accused's helplessness comes to light.[25] (Emphasis added.)

If the instant case is widely followed,[26] its implications will be felt in three different areas: the law of public intoxication, the law of narcotic addiction, and the law of involuntary drunkenness as a defense to crime in general. Barred from imprisoning chronic alcoholics for public drunkenness, governments at all levels will have to provide rehabilitation facilities in order to protect society from the annoyances and intrusions of these persons.[27] It would seem that the logic of the instant case would also apply to punishing a drug addict for purchasing, transporting, possessing, using, and being under the influence of narcotics, insofar as these acts are necessary to fulfill the addict's cravings. Notwithstanding the court's disclaimer,[28] the decision also suggests the possibility of a defense of "not guilty by reason of chronic alcoholism" to prosecution for any crime.[29]

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[24] Driver v. Hinnant, 356 F.2d 761, 764 (4th Cir. 1966).

[25] *Id.* at 765.

[26] The *Driver* decision has been repudiated by two courts in recent months. People v. Hoy, 3 Mich. App. 666, 143 N.W.2d 577 (Ct. App. 1966) (reasoning that the offense of public intoxication is *malum prohibitum*, not requiring an intent for conviction, that there was insufficient evidence that the petitioner was a chronic alcoholic, and that the imprisonment of chronic alcoholics protects them as well as the public); Easter v. District of Columbia, 361 F.2d 50 (1966) (recognizing the defense of chronic alcoholism, based, however, on a 1947 Congressional enactment, not the eighth amendment). A similar case has been denied certiorari by the Supreme Court, over the strong dissent of Fortas and Douglas, JJ. Budd v. California, 35 U.S.L. WEEK 3139 (U.S. Oct. 18, 1966) (declining to review the California Supreme Court's denial of petitioner's application for a writ of habeas corpus, Crim. No. 9697, Jan. 6, 1966).

[27] Compulsory civil commitment to such institutions is constitutional, even though accompanied by criminal sanctions for refusing to comply with treatment procedures. Robinson v. California, 370 U.S. 660, 664-65 (1962) (dictum); *In re* De La O, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489 (1963), *cert. denied*, 374 U.S. 856 (1963).

[28]

> [O]ur excusal of the chronic alcoholic from criminal prosecution is confined exclusively to those acts on his part which are compulsive as symptomatic of the disease. With respect to other behavior — not characteristic of confirmed alcoholism — he would be judged as would any person not so afflicted. 356 F.2d at 764.

[29] Such a defense has almost always been rejected in the past. Choice v. State,

The Court of Appeals for the Fourth Circuit rendered a courageous decision in the *Driver* case. Reacting to recent medical findings concerning the nature of chronic alcoholism[30] and widespread revulsion at the criminal treatment of alcoholics,[31] the court took a step toward solving the dilemma of the "revolving door" drunk. The result is just, for the addict and for society. Where conduct cannot be controlled, there is no reason for punishment. Neither deterrence nor rehabilitation are served, and imprisonment for the sole purpose of sequestration is inhuman. We have progressed far beyond the era of jailing the insane. The court has now placed squarely on the shoulders of the legislatures the burden of creating institutions compatible with the "standards of decency that mark the progress of a maturing society."[32]

John Morley Greacen

CONSTITUTIONAL LAW — DUE PROCESS — INJURIOUSLY DEFECTIVE PRODUCT MAY ENTITLE STATE TO TAKE IN PERSONAM JURISDICTION OVER NONRESIDENT MANUFACTURER. — *Phillips v. Anchor Hocking Glass Corp.* (Ariz. 1966).

Plaintiff sued in the Arizona Superior Court for personal injuries sustained when a baking dish manufactured by the defendant corporation in Ohio broke while being handled by the plaintiff in Arizona. The complaint did not allege that the dish had been purchased in Arizona nor that the defendant had been doing business in Arizona

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31 Ga. 424 (1860); State v. Haab, 105 La. 230, 29 So. 725 (1901); Flanigan v. People, 86 N.Y. 554, 40 Am. Rep. 556 (1881); Flanagan v. People, 52 N.Y. 467, 11 Am. Rep. 731 (1873); State v. Potts, 100 N.C. 457, 6 S.E. 657 (1888). *Contra*, State v. Pike, 49 N.H. 399, 6 Am. Rep. 533 (1870) (held that the question of responsibility was for the jury). But involuntariness has been recognized as a defense in cases involving the acts of narcotic addicts. Johnson v. State, 32 Ala. App. 217, 24 So. 2d 228 (Ct. App. 1945); Prather v. Commonwealth, 215 Ky. 714, 287 S.W. 559 (1926).

[30] See generally JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM (1960).

[31] The plight of the chronic alcoholic has been described as "life imprisonment on the installment plan." Speech by Presiding Justice Bernard Botein of the New York State Supreme Court, Appellate Division, to the Conference on the Handling of Offenders in the City of New York, January, 1965. See generally Logan, *May a Man Be Punished Because He Is Ill?*, 52 A.B.A.J. 932 (1966); Murtagh, *The Derelicts of Skid Row*, ATLANTIC MONTHLY, March, 1962, p. 77; PITTMAN & GORDON, REVOLVING DOOR: A STUDY OF THE CHRONIC POLICE CASE INEBRIATE (1958).

[32] Trop v. Dulles, 356 U.S. 86, 101 (1958).

prior to the filing of the complaint.[1] Service was made in Ohio by registered mail[2] and upon motion by the defendant the trial court dismissed the suit for lack of jurisdiction. The Arizona Court of Appeals affirmed the dismissal. On petition for review to the Arizona Supreme Court, *held,* reversed and remanded. In a product liability case, an injury caused by a single defective product within the state may provide sufficient contact to justify personal jurisdiction over the nonresident manufacturer if the maintenance of the suit will not offend traditional notions of fair play and substantial justice. *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966).

During the nineteenth century, personal jurisdiction was principally a territorial concept and nonresident defendants could only be subjected to *in personam* judgments when they had been served within the state or had consented to the court's jurisdiction.[3] Thus it was formerly held that personal jurisdiction, in the absence of actual consent, could not be maintained over a nonresident corporation.[4]

As corporations grew in size and number and as the scope of their activities expanded across state boundaries it became evident that this doctrine of nonjurisdiction over foreign corporations was causing considerable inconvenience as well as injustice. To cope with the problem, most states have enacted statutes providing for service of process on officers or agents of foreign corporations doing business within their borders.[5] The constitutionality of these statutes has been upheld by the United States Supreme Court on the ground that a state may properly impose upon a foreign corporation, as a condition for doing business within the state's boundaries, the requirement that such corporation appoint a statutory agent to accept service of process.[6]

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[1] Plaintiff's "Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss for Want of Jurisdiction" alleged that the defective product *had* been purchased in Arizona. This allegation was abandoned, however, in subsequent appellate briefs and was not considered by the Arizona Supreme Court.

[2] ARIZ. R. CIV. P. 4(e)2 (Supp. 1965) provides in part, "When the defendant is a . . . corporation . . . which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state." ARIZ. R. CIV. P. 4(e)2(a) (Supp. 1965) provides for service by registered mail when the whereabouts of a defendant outside the state is known.

[3] Pennoyer v. Neff, 95 U.S. 714 (1877); Buchanan v. Rucker, 9 East 192, 103 Eng. Rpt. 546 (K.B. 1808). See generally Annot. 94 L.Ed. 1167 at 1178 (1949).

[4] Corporations were generally deemed to have no legal existence outside of the state granting their charter. See Peckham v. North Parish in Haverhill, 33 Mass. (16 Pick.) 274 (1834); McQueen v. Middleton Mfg. Co., 16 Johns. 5 (N.Y. 1819). See historical statement in St. Clair v. Cox, 106 U.S. 350, 354 (1882).

[5] St. Clair v. Cox, *supra* note 4. See generally *Developments in the Law — State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

[6] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).

If the nonresident corporation complied with the statutory agent procedure, it was said to have expressly consented to the jurisdiction of the state in which it was doing business.[7] When the corporation, although doing business within the state, failed to appoint the necessary agent as required by statute, it was deemed to have nevertheless consented by implication.[8] Alternatively, jurisdiction over the nonresident corporation has been upheld on a theory of "presence" if the corporation was found to be doing business in the forum state.[9]

The test for determining jurisdiction under both the "presence" and "implied-consent" theories was whether the corporation was doing business in the state seeking the jurisdiction.[10] It was generally held that the standard of doing business was not met by a single or isolated commercial transaction.[11]

In the 1945 landmark case of *International Shoe Co. v. Washington,*[12] the United States Supreme Court discarded the rigid requirements of "presence" and "implied-consent" and substituted the more flexible requirements of "minimal contacts" and "traditional notions of fair play and substantial justice" as the prerequisites for personal jurisdiction over nonresidents. Where the old test of "doing business" had looked primarily to the *quantum* of activities sufficient to establish a basis for *in personam* jurisdiction, the new approach emphasized the *nature* of the activities and their resulting *impact* within the forum state.[13] This new and more flexible standard acted as an invitation to the states to "lengthen their reach" for jurisdiction over nonresidents.[14]

As numerous states began searching for the outer limits of the *International Shoe* doctrine, the Supreme Court in *Hansen v. Denckla*[15] gave warning that not all of the earlier concepts of *in personam* jurisdic-

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[7] *Ex parte* Schollenberger, 96 U.S. 369 (1877); Lafayette Ins. Co. v. French, *supra* note 6.

[8] Simon v. Southern Ry., 236 U.S. 115 (1915); Old Wayne Life Ass'n v. McDonough, 204 U.S. 8 (1907) (implied-consent theory acknowledged in both cases but judgments voided on other grounds). For a discussion and criticism of these cases, see Reiblich, *Jurisdiction of Maryland Courts Over Foreign Corporations Under the Act of 1937,* 3 MD. L. REV. 35 (1938).

[9] The "presence" theory was first suggested in 1882 in St. Clair v. Cox, 106 U.S. 350 (1882), but was not used independently to sustain jurisdiction until 1914 in the case of International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

[10] International Harvester Co. v. Kentucky, *supra* note 9; *Developments in the Law — State-Court Jurisdiction,* 73 HARV. L. REV. 909, 922 (1960).

[11] See Isaacs, *An Analysis of Doing Business,* 25 COLUM. L. REV. 1018, 1028-29 (1925); Reiblich, *Jurisdiction of Maryland Courts Over Foreign Corporations Under the Act of 1937,* 3 MD. L. REV. 35, 75 (1938).

[12] 326 U.S. 310 (1945).

[13] *Id.* at 319-20. See also McGee v. International Life Ins. Co., 355 U.S. 220 (1957), which held that personal jurisdiction over a nonresident corporation could be maintained when only contact with the forum state had been a single insurance contract.

[14] Cleary, *The Length of the Long Arm,* 9 J. PUB. L. 293 (1960).

[15] 357 U.S. 235 (1958).

tion had been abandoned, that " . . . it is a mistake to assume that this trend [toward expanding personal jurisdiction over nonresidents] heralds the eventual demise of all restrictions on the personal jurisdiction by state courts."[16] The *Hansen* Court then noted, "[I]t is essential in each case that there be some act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[17] (Emphasis added.)

Among those states which have enacted "long arm" statutes based on the *International Shoe* doctrine of minimal contacts, the "purposeful activity" language of *Hansen* has created some confusion when applied to product liability situations.[18] Some jurisdictions have interpreted the language to require an intentional placing of the nonresident manufacturer's product within the forum state as a prerequsite for *in personam* jurisdiction when the product proves to be injuriously defective.[19] Other jurisdictions have deemed it to be sufficient "purposeful activity" when the nonresident manufacturer placed his product into interstate commerce, if it were reasonably foreseeable that such product might come to rest in the forum state.[20]

In the instant case,[21] the Arizona Supreme Court has taken the somewhat singular position that *Hansen* involved an unusual situation[22] and therefore has questionable applicability in product liability cases.[23] The court reasoned that a jurisdictional requirement of "purposeful activity" within the state would resurrect the discarded "implied-consent" theory, reverse the trend of expanding jurisdiction over nonresidents, and undermine the notion that each case is to be examined on its own

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[16] *Id.* at 251.

[17] *Id.* at 253.

[18] See generally Cummins, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Cases*, 63 MICH. L. REV. 1028 (1965).

[19] Breckenridge v. Time Inc., 179 So. 2d 781 (Miss. 1965); Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). But note, the New York Legislature has subsequently amended its "long arm" statute. The current N.Y. CIV. PRAC. ACT § 302, which became effective September 1, 1966, will probably change that state's position.

[20] See, *e.g.*, Ewing v. Lockheed Aircraft Corp., 202 F. Supp. 216 (D. Minn. 1962); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961); Atkins v. Jones & Laughlin Steel Corp., 258 Minn. 571, 104 N.W.2d 888 (1960). *Contra,* Hellriegel v. Sears Roebuck & Co., 157 F. Supp. 718 (N.D. Ill. 1957); Mueller v. Steelcase, Inc., 172 F. Supp. 416 (D. Minn. 1959).

[21] Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966).

[22] Hansen v. Denckla, 357 U.S. 235 (1958) involved a Delaware trust established by a Pennsylvania resident. The settlor died domiciled in Florida and the Florida courts sought jurisdiction over the nonresident trust company although the settlor had never performed any acts in Florida which bore any substantial relationship to the trust agreement. The United States Supreme Court held that there had been insufficient contact with the nonresident trust company to entitle Florida to take personal jurisdiction by constructive service.

[23] Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732, 735 (1966).

facts to determine if jurisdiction may be fairly taken.[24] The court argued that any rule limiting jurisdiction to defendants who "purposefully" conduct activities within the state cannot properly be applied in product liability cases in view of the fortuitous route by which products enter any particular state.[25] The court then decided that the *International Shoe* principles of "minimal contacts" and "fair play and substantial justice" remained the basic determinants of nonresident jurisdiction in product liability cases.[26] As guidelines for the trial courts, the Arizona Supreme Court proceeded to list several factors which it deemed relevant for consideration by a trial court in determining whether personal jurisdiction over a nonresident manufacturer could be fairly maintained. These factors (which the court pointed out were not exclusive) were the nature and size of the manufacturer's business, the economic independence of the plaintiff, the foreseeability of the manufacturer's product coming to rest in this state, and the nature of the cause of action, including the applicable law and the practical matters of trial.[27]

Thus, the Arizona Supreme Court has determined that our "long arm" statute may be sufficient to give *in personam* jurisdiction over nonresident manufacturers even in those instances in which the manufacturer has not acted directly in placing his product within our state. This conclusion appears sound in light of modern merchandising practices. It is generally conceded that most national manufacturers are more concerned with the act of product consumption than with the place of such consumption. In addition, any reputable national manufacturer should have an interest in defending the integrity of its product wherever that integrity is challenged. Therefore, it is not unjust that these manufacturers should be required to defend in any forum where their products prove defective and cause injury. This position is entirely consistent with modern production, modern mobility, fair play, and substantial justice.

Michael J. O'Grady

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[24] *Ibid.*

[25] *Ibid.*

[26] 413 P.2d at 737.

[27] 413 P.2d at 738.

CONSTITUTIONAL LAW — DUE PROCESS — VIRGINIA'S MISCEGENATION STATUTE DOES NOT DENY DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW. — *Loving v. Commonwealth* (Va. 1966).

In this case, presently on appeal to the United States Supreme Court,[1] the defendants, a Caucasian male and a Negro female, were indicted and convicted for violating a state evasion statute[2] which prohibits temporarily leaving the state to evade the state miscegenation statute[3] prohibiting marriages between Negroes and Caucasians. Each was sentenced to one year in jail, but the sentences were suspended.[4] The defendants moved to vacate the judgment and set aside the sentence alleging that the statute under which they were convicted was unconstitutional, and thus the sentences imposed upon them were invalid. The trial court denied this motion. On writ of error, *held*, affirmed in part and reversed in part.[5] The Virginia evasion statute and the miscegenation statute are not violative of the Constitution of Virginia or the Constitution of the United States. *Loving v. Commonwealth*, 206 Va. 924, 147 S.E.2d 78 (1966).

Miscegenation is the intermarrying, cohabiting, or interbreeding of persons of different races.[6] In the United States it is popularly defined as the intermarriage of Caucasians with Negroes or persons having a specified percentage of Negro blood.[7] In 1944 thirty states had statutes dealing with miscegenation,[8] this number being reduced by 1962 to twenty-four states.[9] Presently, there are sixteen states which

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[1] *Appeal docketed, sub nom. In re Loving*, No. 395, 35 U.S.L. WEEK 3090 (U.S. Sept. 20, 1966).

[2] VA. CODE ANN. § 20-58 (1950):

> If any white person and colored person shall go out of this state, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this state. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

Cf. Annot., 3 A.L.R.2d 236 (1949).

[3] VA. CODE ANN. § 20-59 (1950):

> If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.

[4] The court suspended the sentences for a period of twenty-five years upon the provision that both the accused leave the state and not return at the same time to the state for a period of twenty-five years.

[5] The case was remanded with directions to re-sentence the defendants, attaching to the suspended sentences conditions not inconsistent with the views expressed in the opinion of the court.

[6] 36 AM. JUR. *Miscegenation* § 2 (1941).

[7] *Ibid.*

[8] Comment, 32 CALIF. L. REV. 269 (1944).

[9] Walton, *The Present Status of Miscegenation Statutes*, 4 W. & M.L. REV. 28 (1963).

have statutes prohibiting miscegenation.[10] Arizona repealed its miscegenation statute in 1962.[11]

Miscegenation statutes have been held constitutional by state courts in all of the jurisdictions in which the statutes have been challenged,[12] with the exception of California.[13]

In holding these statutes constitutional, the courts have set forth a number of reasons including the interest of the state in marriage,[14] the desire to maintain racial purity,[15] the prevention of half-breed children,[16] and that the issue is legislative rather than judicial.[17]

California held its miscegenation statute unconstitutional in *Perez v. Lippold*[18] where the California court stated:

> Marriage is . . . more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means. . . . Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws.[19]

In holding Virginia's miscegenation statute constitutional as against due process and equal protection objections, the instant case follows a long line of decided cases.[20] The Virginia court relied heavily upon the case of *Naim v. Naim*[21] wherein the United States Supreme Court declined review of Virginia decisions which had sustained the consti-

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[10] Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

[11] Ariz. Laws 1962, ch. 14, § 1.

[12] Wilson v. State, 20 Ala. 137, 101 So. 417 (1924); Dodson v. State, 61 Ark. 57, 31 S.W. 977 (1895); Jackson v. City and County of Denver, 109 Colo. 196, 124 P.2d 240 (1942); Scott v. State, 39 Ga. 321 (1896); State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42 (1871); State v. Brown, 236 La. 562, 108 So. 2d 233 (1959); Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948); State v. Jackson, 80 Mo. 175, 50 Am. Rep. 499 (1883); State v. Kennedy, 76 N.C. 232 (1877); Bartelle v. United States, 2 Okla. Crim. 84, 100 Pac. 45 (1909); Lonas v. State, 50 Tenn. 287 (1871); Flores v. State, 60 Tex. Crim. 25, 129 S.W. 1111 (1910); Kinney v. Commonwealth, 71 Va. (30 Gratt.) 284 (1878).

[13] Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948). *But see* Burns v. State, 48 Ala. 195, 17 Am. Rep. 134 (1872), *overruled in,* Green v. State, 58 Ala. 190, 29 Am. Rep. 739 (1877).

[14] Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, *remanded,* 350 U.S. 891 (1955).

[15] State v. Brown, 236 La. 562, 108 So. 2d 233 (1959).

[16] *Ibid.*

[17] McLaughlin v. State, 153 So. 2d 1 (Fla. 1963), *rev'd. sub nom.* McLaughlin v. Florida, 379 U.S. 184 (1964).

[18] 32 Cal. 2d 711, 198 P.2d 17 (1948).

[19] 198 P.2d at 18-19.

[20] Loving v. Commonwealth, 206 Va. 924, 147 S.E.2d 78, 82 (1966). The court there said: "[W]e . . . rule that Code, §§ 20-58 and 20-59 . . . are not violative of the Constitution of Virginia or the Constitution of the United States." See notes 11 and 12 *supra.*

[21] 197 Va. 80, 87 S.E.2d 749, *remanded,* 350 U.S. 891 (1955).

tutionality of Virginia's miscegenation statute. The Virginia court reasoned further that recent Supreme Court decisions applying the principles of due process of law and equal protection of the laws to racial discrimination do not cover the miscegenation problem and should not be construed to override the state's interest in protecting the community against the evils of mixed breeding.[22]

In *McLaughlin v. Florida*,[23] the Supreme Court held that the Florida statute which made it a crime for a Caucasian and a Negro, not married to each other, to habitually live in and occupy the same room was unconstitutional as it required a different burden of proof and imposed a different penalty than did statutes relating to adultery and fornication by members of the same race, thus denying due process and equal protection of the law. The Supreme Court in *Anderson v. Martin*[24] held that the requirement of racial designation on official ballots was a denial of due process and equal protection of the law. In *Coleman v. Alabama*,[25] the Supreme Court held that the defendant was entitled to show systematic exclusion of Negroes from grand juries and petit juries. Such exclusion on racial grounds would be a violation of due process and equal protection of the law. The above cases and many others indicate the trend the Supreme Court has followed in striking down racial discrimination, almost as if per se unconstitutional.[26]

On the other hand, the Supreme Court has sustained legislation involving other classifications against equal protection objections where the classification was not patently arbitrary and unreasonable.[27] As

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[22] Loving v. Commonwealth, 206 Va. 924, 147 S.E.2d 78, 82 (1966). The court there said: "[I]t must be pointed out that none of them [decisions in civil rights] deals with miscegenation statutes or curtails a legal truth which has always been recognized — that there is an overriding state interest in the institution of marriage."

[23] 379 U.S. 184 (1964). The United States Supreme Court had the opportunity to rule on Florida's miscegenation statute but did not as they reversed the case on other grounds. Noted 48 MARQ. L. REV. 616 (1965); 25 MD. L. REV. 41 (1965); 17 N.Y.L.F. 154 (1965); 16 SYRACUSE L. REV. 876 (1965).

[24] 375 U.S. 399 (1964), 53 KY. L.J. 379.

[25] 377 U.S. 129 (1964), 50 A.B.A.J. 986.

[26] *E.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (restaurant refused to serve a Negro); Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959) (literacy test a device for racial discrimination); Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (racial discrimination in public education); Shelley v. Kraemer, 334 U.S. 1 (1948) (restrictive covenants as racial discrimination). For Supreme Court decisions involving racial questions see generally Porter, *The Supreme Court and Individual Liberties Since 1952*, 48 KY. L.J. 48 (1959); Waite, *The Negro in the Supreme Court*, 30 MINN. L. REV. 219 (1946).

[27] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911), where Mr. Justice Van Devanter stated the rules by which the equal protection contention must be tested:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and

against state citizenship clause objections (art. IV, sec. 2), the Supreme Court has sustained classifications worded in terms of "citizenship" or "residence" on the basis of a reasonable relation to a valid police power objective.[28] Miscegenation statutes conceivably could be sustained on the same basis, namely that their police power objective is a reasonable one which can be accomplished only by prohibiting racial intermingling; therefore, they necessarily must be worded in terms of race. In other words, a per se invalid approach does not apply to a racial classification if it is necessary for a valid police power objective. The United States Supreme Court may have to select which of the two lines of cases to follow in deciding the constitutionality of Virginia's miscegenation statute.

Upon consideration of the appeal, there is always the possibility that the Supreme Court will avoid decision of the constitutionality of Virginia's miscegenation statute.[29] It is possible that the Supreme Court might decide the constitutionality of the miscegenation statute by applying principles other than those suggested by this writer.[30]

The trend among state legislatures to do away with miscegenation

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therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary.

Accord, Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

[28] *E.g.,* Korematsu v. United States, 323 U.S. 214 (1944) (exclusion of persons of Japanese ancestry from the Pacific coast area); Clarke v. Deckebach, 274 U.S. 392 (1927) (state's power to exclude aliens from operating pool halls); La Tourette v. McMaster, 248 U.S. 465 (1919) (requirement of residency for insurance brokers).

[29] Naim v. Naim, 350 U.S. 891 (1955), where the Supreme Court ruled that the question involving Virginia's miscegenation statute was not presented in a clean-cut, unclouded form. Rescue Army v. Municipal Court, 331 U.S. 549, 584 (1947). The Supreme Court there stated:

> [J]urisdiction here should be exerted only when the jurisdictional question presented by the proceeding . . . tenders the underlying constitutional issues in clean-cut and concrete form, unclouded by any serious problem of construction relating either to the terms of the questioned legislation or to its interpretation by the state courts.

[30] Griswold v. Connecticut, 381 U.S. 479, 486 (1965), where Mr. Justice Douglas speaking for the court stated:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. . . . Yet it is an association for as noble a purpose as any involved in our prior decisions.

Mr. Justice Goldberg, concurring at page 497:

> [W]here fundamental personal liberties are involved, they may not be abridged by the states simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose.

statutes,[31] the fact that our society has proven itself strong enough to withstand other changes in cultural patterns, and the realization that there is strong evidence that racial mixture produces no disadvantageous results from a biological point of view[32] indicate to this writer that the Supreme Court will find miscegenation statutes are no longer a valid exercise of police power. There is no rational basis for these statutes because they are based on a racial classification without rational justification in current biological and sociological thinking. They violate both due process and equal protection of the laws.

T. Scott Higgins

CRIMINAL LAW — JURY TRIAL — DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR IS SERIOUS CRIME WHICH MUST BE TRIED BEFORE JURY — *Rothweiler v. Superior Court* (Ariz. 1966).

Defendant, in a non-jury trial, was convicted in the City Court of Tucson of driving while under the influence of intoxicating liquor.[1] On appeal to the Superior Court,[2] his demand for a jury trial was denied. Defendant petitioned the Arizona Court of Appeals for a writ of prohibition to prevent the Superior Court from trying him without a jury. The Arizona Court of Appeals issued the writ.[3] Upon petition for review to the Supreme Court of Arizona, *held*, affirmed. One charged with the offense of driving while under the influence of intoxicating liquor is entitled, under the Arizona Constitution, to a jury trial in the city court and since the matter must be tried de novo on

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[31] See notes 7, 8, and 9 *supra*. See generally Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49 (1964); Riley, *Micsegenation Statutes — A Re-evaluation of Their Constitutionality in the Light of Changing Social and Political Conditions*, 32 So. CAL. L. REV. 28 (1958).

[32] BERRY, RACE RELATIONS 255 (1951). An excellent treatment of race relations from a sociological viewpoint. See Shapiro, *Revised Version of UNESCO Statement on Race*, 10 AMERICAN JOURNAL OF PHYSICAL ANTHROPOLOGY 363 (1952).

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[1] Defendant was charged with violating ARIZ. REV. STAT. ANN. § 28-692 (Supp. 1966) within the city limits of Tucson, Arizona. City Court thus had jurisdiction under ARIZ. REV. STAT. ANN. § 22-402 (1956).

[2] ARIZ. REV. STAT. ANN. §§ 22-374, 22-425 (1956) provide that an appeal may be taken to the Superior Court (Arizona's court of general jurisdiction) where the case shall be tried de novo.

[3] Rothweiler v. Superior Court, 1 Ariz. App. 334, 402 P.2d 1010 (1965).

appeal,[4] is entitled to a jury trial in the Superior Court.[5] *Rothweiler v. Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966).

Under the early English common law, a jury trial was afforded in every criminal prosecution.[6] The increasing number of criminal cases required more frequent sessions of the court, which resulted in increased demands upon the time of local citizens sitting as jurors. In order to provide speedier trials and to avoid calling local citizens to sit as jurors, parliament gradually adopted the practice of providing that certain new criminal offenses could be tried summarily before a justice without a jury.[7] There was no definite classification of the crimes that could be tried by the summary procedure although the great majority of offenses so tried were aptly characterized as "petty" violations.[8] The demarcation between those offenses serious enough to warrant a jury trial and those which could be summarily adjudicated was then, as now, a problem to which there was no precise solution.[9]

The right to a speedy public criminal trial by jury has generally been guaranteed by the state constitutions[10] as well as the federal constitution.[11] These provisions have generally been interpreted as preserving the right to a trial by jury only as it existed under the common law at the time of the adoption of the respective constitutions.[12] The word "crime" as used in these constitutional provisions has

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[4] See note 2 *supra*.

[5] The case also includes an issue, not treated herein, regarding the propriety of the writ of prohibition to test a party's right to a jury trial.

[6] Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 923 (1926):

> To the Englishman of the 14th century, however, it had already become an "ancient prerogative" to have twelve laymen stand between him and the vengeance of the king in a criminal prosecution of any kind, whether the charge was tippling at the inn or murder.

[7] *Id.* at 924.

[8] *Id.* at 927. "Those offenses classified as 'petty' were those which did not offend too deeply the moral purposes of the community... and were stigmatized by punishment relatively light."

[9] *Compare*, District of Columbia v. Colts, 282 U.S. 63 (1930) (reckless driving), Vazzano v. Superior Court, 74 Ariz. 369, 249 P.2d 837 (1952) (allowing disorderly persons to remain on premises), *and* Bowden v. Nugent, 26 Ariz. 485, 226 Pac. 549 (1924) (conducting a gambling game) (all requiring jury trials), *with* District of Columbia v. Clawans, 300 U.S. 617 (1937) (selling second hand property without a license), State v. Cousins, 97 Ariz. 105, 397 P.2d 217 (1964) (drunk or disorderly in a public place), *and* Guiterrez v. Gober, 43 N.M. 146, 87 P.2d 437 (1939) (use of vile and abusive language) (all denying jury trials). See generally Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

[10] See, *e.g.*, ARIZ. CONST. art. 2, §§ 23, 24; CAL. CONST. art. 1, § 7; CONN. CONST. art. 1, §§ 9, 21.

[11] U.S. CONST. art. III, § 2; U.S. CONST. amend. VI. These provisions were held not to be obligatory upon the states in Maxwell v. Dow, 176 U.S. 581 (1900).

[12] See, *e.g.*, District of Columbia v. Clawans, 300 U.S. 617 (1937); Patton v. United States, 281 U.S. 276 (1930); United States Fid. & Guar. Co. v. State, 65 Ariz. 212, 177 P.2d 823 (1947); Brown v. Greer, 16 Ariz. 215, 141 Pac. 841 (1914); Guiterrez v. Gober, 43 N.M. 146, 87 P.2d 437 (1939).

been held to embrace only offenses of a serious character; petty offenses can be tried without a jury.[13]

As driving while under the influence of intoxicating liquor was not an offense at common law,[14] the determination of whether a jury trial is constitutionally required must rest on its current classification as a serious or petty violation. The United States Supreme Court in *Schick v. United States*,[15] where the defendant violated the Oleomargarine Act,[16] ruled that the nature of the offense and the amount of punishment prescribed were determinative of the classification as serious or minor.[17] The state courts that have considered the question are divided on whether a jury trial for driving while intoxicated is constitutionally required.[18] When the question first came before the Ari-

[13] See, *e.g.*, Cheff v. Schnackenberg, 384 U.S. 373 (1966); District of Columbia v. Colts, 282 U.S. 63 (1930); Schick v. United States, 195 U.S. 65 (1904); Callan v. Wilson, 127 U.S. 540 (1888); State v. Cousins, 97 Ariz. 105, 397 P.2d 217 (1964); *In re* Davis, 28 Ariz. 312, 236 Pac. 715 (1925), Bowden v. Nugent, 26 Ariz. 485, 226 Pac. 549 (1924).

[14] State v. Rodgers, 91 N.J.L. 212, 102 Atl. 433 (Ct. Err. & App. 1917).

[15] 195 U.S. 65 (1904).

[16] 32 Stat. 193 (1902), 21 U.S.C. § 25 (1964).

[17] *Accord*, District of Columbia v. Colts, 282 U.S. 63, 73 (1930) (reckless driving), where the court explained:

> Whether a given offense is to be classed as a crime so as to require a jury trial or as a petty offense triable summarily without a jury depends primarily upon the nature of the offense. The offense here charged is not merely *malum prohibitum* but in its very nature is *malum in se*.

In the recent case of Cheff v. Schnackenberg, 384 U.S. 373, 86 Sup. Ct. 1523, 1526 (1966), the court said: "[S]entences exceeding six months for criminal contempt may not be imposed by federal courts unless a jury trial has been received or waived." In Shillitani v. United States, 384 U.S. 364 (1966), the court said that although a sentence of two years was imposed for contempt (refusing to testify), the fact that the accused could free himself at any time by testifying eliminated the necessity for a jury trial.

[18] Compare, *In re* Davis, 28 Ariz. 312, 236 Pac. 715 (1925) (violation of city ordinance), State *ex rel.* Sellers v. Parker, 87 Fla. 181, 100 So. 260 (1924) (violation of city ordinance), State v. Rodgers, 91 N.J.L. 212, 102 Atl. 433 (Ct. Err. & App. 1917) (violation of statute), *and* Hamilton v. Walker, 65 N.M. 470, 340 P.2d 407 (1959) (violation of statute) (all denying jury trials), *with* Miller v. Winstead, 75 Idaho 262, 270 P.2d 1010 (1954) (violation of city ordinance), *and* State v. Hauser, 137 Nebr. 139, 288 N.W. 518 (1939) (violation of city ordinance) (both denying jury trials in the municipal courts but requiring them in the district courts on trial de novo under statutory provisions similar to those in Arizona). See City of Cannon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958), wherein it was held that since there was a statute making drunken-driving a crime, the counterpart of the statute in an ordinance of a home-rule city must be tried and punished as a crime, and not as a proceeding civil in nature. In State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959), it was held that under a Minnesota statute which required any local ordinance on a subject covered by the Highway Traffic Regulation Act to provide a *penalty* identical with the state act, violation of a city ordinance prohibiting driving while intoxicated also entitled the defendant to the protection of the criminal *procedure* (including trial by jury) as provided by the state law. In Evans v. Lambert, 418 P.2d 217 (Okla. Crim. 1966), where defendant was charged in the Municipal Court of Record of Oklahoma City with driving while under the influence in violation of a city ordinance, it was held that he was entitled to a jury trial in the municipal court under a general statute that provided for trials de novo on appeal from other municipal courts throughout the state, and under a constitutional provision that general laws shall be applied uniformly throughout the state.

zona Supreme Court in *In re Davis*,[19] the court, at that time, ruled that the offense of driving while intoxicated in violation of a Phoenix city ordinance was a *petty offense* and did *not* require a jury trial. The same court, forty years later, has distinguished *Davis* on the fact that in the instant case the punishment was more severe.[20] The court also noted that the offense in *Davis* was in violation of a city ordinance; whereas, in the case at bar, a state statute was violated.[21] The Arizona Supreme Court also noted that the "power to suspend the right to use the public highways should be protected by the fundamental individual right of a trial by jury."[22]

In determining that the penalty in the instant case was so harsh as to bring the charge into the serious crime classification, the Arizona Supreme Court apparently applied the *Schick*[23] test and determined that the nature of the offense today, coupled with the increased statutory penalty, was sufficient to require the reclassification. It was noted that although the early common law authorized summary adjudication of offenses with penalties in excess of six months imprisonment, standards of severity of punishment have changed with time, and some punishments that at one time were commonplace are now abolished.[24] Upon determining that the offense was a serious crime, the court was bound by the Arizona Constitution to afford the petitioner a jury trial.[25]

Appeals from a court not of record are tried de novo.[26] The court, therefore, determined that since the defendant was entitled to a jury trial in the lower court, he was entitled to a jury in his trial de novo on appeal.[27] Allowing a jury trial in municipal court and again on

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[19] 28 Ariz. 312, 236 Pac. 715 (1925).

[20] In the *Davis* case the maximum punishment prescribed was a fine of $300 or confinement at hard labor for three months. The penalty provided for violation of the statute in the instant case was a fine of not less than $100 nor more than $300, imprisonment for not less than ten days nor more than six months, or both. In addition, the violator's drivers license could be suspended for a period not to exceed ninety days. ARIZ. REV. STAT. ANN. § 28-692.01 (Supp. 1966).

[21] It should be immaterial whether the charge arises under a city ordinance or a state law.

[22] Rothweiler v. Superior Court, 100 Ariz. 37, 44, 410 P.2d 479, 484 (1966). Compare REV. CODE WASH. ANN. § 3.50.280 (Supp. 1966): "In all trials for offenses in municipal court, a jury trial shall be allowed only in offenses involving the revocation or suspension of a driver's license or other gross misdemeanor."

[23] 195 U.S. 65 (1904).

[24] 100 Ariz. at 43, 410 P.2d at 484.

[25] ARIZ. CONST. art. 2, § 24: "In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

[26] ARIZ. REV. STAT. ANN. § 22-374 (1956):

> A. The appeal shall be tried de novo in the superior court, and the superior court shall, upon conviction, impose such sentence as it deems proper within the limits which might have been imposed by the justice of the peace or presiding officer of the police court.

[27] Rothweiler v. Superior Court, 100 Ariz. 37, 47, 410 P.2d 479, 486 (1966).

appeal places Arizona with the minority[28] and in the somewhat unusual position of allowing one charged with the relatively minor crime of driving while intoxicated the possibility of two jury trials, while one charged with a felony such as murder is entitled to only one.

It would seem that the court made the best decision consistent with the *defendant's* right to a trial by jury. However, the imposition upon the public of the expense of two jury trials seems unwarranted and inconsistent with the *public's* right to reasonably economical law enforcement. In order to serve both interests, a better rule might be to provide for a jury in the Superior Court on a de novo trial only if the defendant had not had a jury trial in the lower court.[29] When the defendant has been convicted by a jury in the lower court, his demand for the jury in that court should be deemed a waiver of the right to a jury in the Superior Court.[30] In the instant case, constrained by existing statutory provisions[31] and case law,[32] the Arizona Supreme Court could not have so ruled.

Loren W. Counce

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[28] Of the cases considered, absent a statute providing for jury trial in the municipal court, none allowed a jury trial in the municipal court. Miller v. Winstead, 75 Idaho 262, 270 P.2d 1010 (1954), and State v. Hauser, 137 Nebr. 139, 288 N.W. 518 (1939), allowed a jury trial on appeal. State *ex rel.* Sellers v. Parker, 87 Fla. 181, 100 So. 260 (1924), State v. Rodgers, 91 N.J.L. 212, 102 Atl. 433 (Ct. Err. & App. 1917), and Hamilton v. Walker, 65 N.M. 470, 340 P.2d 407 (1959), denied jury trials entirely in driving-while-intoxicated cases. City of Cannon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958), State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959), and Evans v. Lambert, 418 P.2d 217 (Okla. Crim. 1966), with some statutory assistance, permitted jury trials in the municipal court. City of St. Louis v. Moore, 288 S.W.2d 383 (Mo. Ct. App. 1956), State v. Edwards, 4 Ohio App. 2d 261, 208 N.E.2d 758 (1965), and Artis v. Rowland, 64 Wash. 2d 576, 392 P.2d 815 (1964), permitted jury trials under statutory authority.

[29] See MINN. STAT. ANN. § 484.63 (Supp. 1965).

[30] It is submitted that this result could be obtained by *redrafting* ARIZ. REV. STAT. ANN. § 22-374 (1956) to read:

> A. The appeal shall be tried de novo in the superior court, and the superior court shall, upon conviction, impose such sentence as it deems proper within the limits which might have been imposed by the justice of the peace or presiding officer of the police court.
>
> B. Upon acquittal the court shall discharge the defendant and exonerate his bail.
>
> *C. The demand for a trial by jury in a lower court, if granted, shall be considered a waiver of the right to a jury trial on appeal.*

(Italicized material is the writer's suggested addition.) It is believed that if the defendant were made aware of the existence of such a statute at the time he requested a jury trial in the lower court, his constitutional rights would not be infringed.

[31] ARIZ. REV. STAT. ANN. § 22-374 (1956).

[32] Burris v. Davis, 46 Ariz. 127, 46 P.2d 1084 (1935), which ruled that the case should be heard in the same manner, on trial de novo, as if it were an original proceeding in the superior court; State v. Cousins, 97 Ariz. 105, 397 P.2d 217 (1964) (drunk or disorderly conduct in a pulic place), held that a defendant was not entitled to a jury trial on appeal in the superior court unless he was entitled to one in the inferior court. The court in the instant case after determining that a jury trial was constitutionally required, either had to overrule *Cousins* or hold that the defendant was entitled to a jury trial both in the municipal court *and* on appeal.

CRIMINAL LAW — MURDER — GROSS NEGLIGENCE IS NOT SUFFICIENT TO CONSTITUTE MALICE. — *State v. Chalmers* (Ariz. 1966).

Defendant, who had been drinking, drove a car at an estimated eighty to one hundred miles per hour, swerved to the wrong side of the highway, forced several automobiles off the road, and finally collided head-on with two other cars. Two people in the vehicles struck by defendant's car were killed in the collision. Defendant was charged with murder and manslaughter for each of the deaths and convicted of second degree murder for each.[1] On appeal, *held,* reversed. Arizona's motor vehicle manslaughter statute[2] withdraws any application of the general murder statute[3] to a death caused by a vehicle, unless accomplished with malice aforehought, and this malice cannot be shown by evidence of grossly negligent conduct. *State v. Chalmers,* 100 Ariz. 70, 411 P.2d 448 (1966).

In automobile cases with similar facts, most jurisdictions which have faced the question of heedless conduct as the basis for malice aforethought have ruled that if the act goes so far beyond the norm of acceptable conduct as to constitute wilful *or* wanton misconduct, then malice may be implied, and a conviction of murder obtained.[4] The majority of the courts allowing an implication of malice have based their decisions on the theory that the particular conduct involved is an unlawful act done in conscious disregard of unreasonable risk to human

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[1] Three others were injured, so defendant was also charged with and convicted on three counts of assault with a deadly weapon.

[2] ARIZ. REV. STAT. ANN. § 13-456(A)3 (Supp. 1965):

> A. Manslaughter is of three kinds: . . .
> 3. In the driving of a vehicle: (a) In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death in an unlawful manner, and with gross negligence. (b) In the commission of an unlawful act, not amounting to felony, without gross negligence.

[3] ARIZ. REV. STAT. ANN. § 13-451 (1956):

> Murder and Malice aforethought defined: A. Murder is the unlawful killing of a human being with malice aforethought. B. Malice aforethought can be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart.

[4] Burness v. State, 38 Ala. App. 1, 83 So. 2d 607 (Ct. App. 1953); People v. McIntire, 213 Cal. 50, 1 P.2d 443 (1931); Huntsinger v. State, 200 Ga. 127, 36 S.E.2d 92 (1945); State v. Bolsinger, 221 Minn. 154, 21 N.W.2d 480 (1946); State v. Trott, 190 N.C. 674, 130 S.E. 627 (1925); Williams v. State, 63 Okla. Crim. 234, 74 P.2d 632 (1937); Edwards v. State, 202 Tenn. 393, 304 S.W.2d 500 (1957); Cockrell v. State, 135 Tex. Crim. 218, 117 S.W.2d 1105 (1938); Goodman v. Commonwealth, 153 Va. 943, 151 S.E. 168 (1930); Maxon v. State, 177 Wis. 379, 187 N.W. 753 (1922). But *cf.* Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944); People v. Angelo, 246 N.Y. 451, 159 N.E. 394 (1927) (Dictum).

life.[5] The implication of malice is, in these states, a *question for the jury* under proper instructions.[6]

A great deal of confusion arises because of the varied conceptions of the terms "gross negligence," "recklessness," and "wanton and wilful misconduct."[7] The terms "reckless" and "wanton," when used in the context of an automobile situation, seem to be considered by the courts as substantially equivalent conduct, at least in their applicability to criminal liability.[8] Nearly all courts, however, distinguish between these terms and "gross negligence." The latter term involves merely a high degree of carelessness in doing the act, while the former terms involve intentional utter disregard of unreasonable risk to human life and safety.[9] They are still to be distinguished from intentional conduct, however, in that wanton conduct involves conduct where there is a high degree of probability that the harm will result from the act,[10] because of the utter disregard of safety under the circumstances; and intentional conduct involves conduct where the harm is substantially certain to result from the act,[11] because the act is directed at producing the result.

Although the court in the instant case speaks of gross negligence, the opinion admits that the conduct involved *was wanton conduct,* when it states: " . . . there is sufficient evidence for the jury to find gross negligence *and utter disregard of the safety or welfare of any*

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[5] *E.g.,* People v. McIntire, 213 Cal. 50, 1 P.2d 443 (1931); Williams v. State, 63 Okla. Crim. 234, 74 P.2d 632 (1937); Edwards v. State, 202 Tenn. 393, 304 S.W.2d 500 (1957). In other states, a few have statutes specifically worded to allow malice implications in similar situations to that of the instant case. See, *e.g.,* Powell v. State, 193 Ga. 398, 18 S.E.2d 678 (1942); Maxon v. State, 177 Wis. 379, 187 N.W. 753 (1922). Although the statute in *Maxon* deals with manslaughter, its requirements of malice are those of common law murder. Still other states consider the automobile a deadly weapon and allow implications of malice from its use in wanton conduct because of that consideration: See, *e.g.,* State v. Massey, 20 Ala. App. 56, 100 So. 625 (Ct. App. 1924); People v. Chatham, 43 Cal. App. 2d 298, 110 P.2d 704, 706 (Dist. Ct. App. 1941).

[6] Hyde v. State, 230 Ala. 251, 160 So. 237 (1935); People v. McIntire, *supra* note 5; Powell v. State, *supra* note 5; Williams v. State, *supra* note 5; Cockrell v. State, 135 Tex. Crim. 218, 117 S.W.2d 1105 (1938).

[7] No attempt will be made in this casenote to treat exhaustively the definitions of and distinctions between these terms. A real need exists in Arizona law for such treatment, but it is impossible within the limitations of "casenote" format.

[8] See Commonwealth v. Welansky, 316 Mass. 383, 398, 55 N.E.2d 902, 910 (1944), where the court states:

> The words "wanton" and "reckless" are practically synonomous in this connection [the conduct], although the word "wanton" may contain a suggestion of arrogance or heartlessness that is lacking in the word "reckless." But intentional conduct to which either word applies is followed by the same legal consequences as though both words applied.

[9] Commonwealth v. Welansky, *supra* note 8, 316 Mass. at 399, 400, 55 N.E.2d at 910-11. *Accord,* State v. Bolsinger, 221 Minn. 154, 21 N.W.2d 480 (1946); Tarvers v. State, 90 Tenn. 485, 16 S.W. 1041 (1891).

[10] PERKINS, CRIMINAL LAW 32 (1957).

[11] *Id.* at 658.

persons who might have been in the vicinity. . . ."[12] (Emphasis supplied.) Thus it appears that while the holding as stated is perfectly proper in disallowing malice as implied from gross negligence, it is not wholly applicable to the facts of this case, for the reason that *wanton conduct* was involved, *not gross negligence* alone. This is pointed out clearly in Justice Udall's "specially concurring" opinion (in reality a dissent):

> The conduct surpasses the usual vehicle manslaughter case and demonstrates characteristics of wanton conduct and an abandoned and malignant heart. The jury found that the accused should have known of the plain and obvious likelihood that death or great bodily injury could have resulted from his driving his automobile in such a manner.[13]

Wanton conduct has been historically one of the "man-endangering-states-of-mind"[14] used for the implication of malice. Professor Perkins says:

> Assuming the absence of justification, excuse, or substantial mitigation, an act may involve such a wanton and wilful disregard of an unreasonable human risk as to constitute malice aforethought even if there is no actual intent to kill or injure.[15]

It is made quite clear by the overwhelming majority of states which have prosecuted for murder because of the driver's wanton conduct that the mere fact that the situation involves automobiles is not enough to change the settled rule.[16] Wanton conduct clearly fulfills the requirement of an "abandoned and malignant heart" in the states with statutes similar to Arizona's,[17] and convictions for murder for wanton conduct driving are secured.[18] Furthermore, those statutes merely repeat the common law rule of implied malice whereby, "When an action, unlawful in itself, is done with deliberation . . . or of mischief indiscriminately, fall where it may, and death ensue, against or beside the original intention of the party, it will be murder."[19]

The issue presented is one of first impression in Arizona. However,

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[12] State v. Chalmers, 100 Ariz. 70, 411 P.2d 448, 452 (1966).
[13] 411 P.2d at 454.
[14] PERKINS, CRIMINAL LAW 38 (1957).
[15] *Id.* at 32.
[16] See cases cited note 4 *supra.*
[17] ARIZ. REV. STAT. ANN. § 13-451 (1956), see text cited, note 3 *supra.* For a valuable discussion of problems arising from the wording of this statute see: *Ambiguous Abandon and Murky Malignancy: Charging the Jury on Implied Malice,* 114 U. PA. L. REV. 495 (1966).
[18] *E.g.,* Webb v. State, 68 Ga. App. 466, 23 S.E.2d 578, 580 (Ct. App. 1942); Owen v. State, 188 Tenn. 459, 221 S.W.2d 515, 519 (1949); see cases cited *supra* note 4.
[19] Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698 (1883).

in a case where a police officer fired recklessly at a car with fatal results, the court quoted the following language with approval: "If an act is unlawful or is such as duty does not demand, and of a tendency directly dangerous to life, the destruction of life by it, however unintended, will be murder."[20]

The justification offered by the court in the instant case is that since *State v. Balderrama*[21] held that criminal intent could not be shown by evidence of wilful and gross negligence, therefore "malicious intent"[22] in the instant case cannot be shown by evidence of gross negligence. The very use of the words "malicious intent" demonstrates that the court in this decision has equated *intent with malice.* There is respectable authority that malice has broader scope than intent.[23] They have distinct technical meanings. "Malice aforethought is an unjustifiable, inexcusable, man-endangering-state-of-mind," one of which "states of mind" is wanton conduct.[24] Intent, on the other hand, " . . . is commonly taken to mean either (1) a purpose, design, or hope that certain consequences will occur from the act, or (2) a knowledge that they are substantially certain to be produced by it."[25]

Perhaps the clearest way to demonstrate the difference between the two is to examine the crime of Voluntary Manslaughter. In that crime there is actual intent to kill (hence, voluntary) but no malice, and so there is no murder. Wanton conduct causing death is the other side of the coin. There is no actual intent to kill, but there is malice because of the person's utter disregard of human life and safety, according to the majority of the courts ruling on automobile murder cases.[26] It is clear that the question of intent is immaterial in the instant case; therefore, the *Balderrama* case is not in point.

This case represents a clear departure from the classical rules of the implication of malice. It is an anomaly in Arizona law, because the principle applied, that gross negligence cannot supply malice, is undoubtedly a correct statement of the law, but the facts of this case do not support the application of that principle. By the statement of the court itself, the facts indicate that wanton conduct was involved here, which should clearly support the jury's finding of malice and its verdict of murder. Even if the court feels that murder convictions for automobile homicides may be unwise, the law appears to be clear: Where there is substantial evidence to support the jury's verdict that the

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[20] Wiley v. State, 19 Ariz. 346, 357, 170 Pac. 869, 874 (1918).
[21] 97 Ariz. 134, 397 P.2d 632 (1964); noted in 8 ARIZ. L. REV. 152 (1966).
[22] State v. Chalmers, 100 Ariz. 70, 411 P.2d 448, 452 (1966).
[23] *Cf.* MODEL PENAL CODE § 210.2 (1), (Proposed Official Draft, 1962).
[24] PERKINS, CRIMINAL LAW 40 (1957).
[25] Moreland, *A Rationale of Criminal Negligence,* 32 KY. L.J. 127, 189 (1944).
[26] Cases cited *supra* note 4.

defendant's conduct was wanton, in "utter disregard of the safety or welfare of any person who might have been in the vicinity,"[27] such implies malice, and the "court should exercise caution and restraint in reversing the jury's verdict."[28]

Michael Mulchay

CRIMINAL LAW — RESPONSIBILITY — A PERSON IS NOT RESPONSIBLE IF HE LACKS SUBSTANTIAL CAPACITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT OR TO CONFORM TO THE LAW BECAUSE OF MENTAL DISEASE OR DEFECT. — *United States v. Freeman* (2d Cir. 1966).

The defendant, a narcotics addict and alcoholic whose excesses over a fifteen year period left him mentally impaired, was charged with the illegal sale of narcotics. The prosecution's psychiatric expert testified that although the defendant had experienced a "dulling" of his thinking processes, he knew right from wrong at the time of the illegal sale. The defendant's psychiatric expert testified that although the defendant was cognizant of what he did on the night in question, he did not appreciate the social consequences of his acts. The defendant was convicted under a strict application of the *M'Naughten* right from wrong test of criminal responsibility. On appeal, *held,* reversed. 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 wrongfulness of his conduct or to conform his conduct to the requirements of the law.[1] *United States v. Freeman,* 357 F.2d 606 (2d Cir. 1966).

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[27] State v. Chalmers, 100 Ariz. 70, 411 P.2d 448, 452 (1966).
[28] 411 P.2d at 454.

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[1] The court stated that the terms "mental disease or defect" do not include an abnormality manifested solely by repeated criminal or otherwise antisocial conduct. United States v. Freeman, 357 F.2d 606, 625 (2d Cir. 1966).

In an unusual footnote preceding the body of the opinion, four Second Circuit Court Judges who did not hear the case indicated that they had read the opinion and approved its standard for use in the district courts of the circuit, thus giving rather strong notice to the lower courts.

Thirty-two states[2] adhere to the rule in *M'Naughten's Case*,[3] *i.e.*, the test of criminal responsibility is whether the accused was 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 what he was doing was wrong. It has occasionally been reworded but remains essentially the same.[4] There is some controversy over the question of whether the Supreme Court has adopted the *M'Naughten Rule*, thereby binding the lower federal courts to that rule.[5]

Twelve states[6] and eight circuit courts[7] have added to the rule

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[2] Alaska, Arizona, California, Florida, Georgia, Hawaii, Iowa, Idaho, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming. See Annot., 45 A.L.R.2d 1451 (1956).

A number of states have expressly reaffirmed their application of the *M'Naghten Rule* in recent decisions. *E.g.*, Chase v. State, 369 P.2d 997 (Alaska, 1962); Cole v. State, 172 So. 2d 898 (Fla. 1965); State v. Gramenz, 256 Iowa 134, 126 N.W.2d 285 (1964); Dare v. State, 378 P.2d 339 (Okla. Crim. 1963); Spurlock v. State, 212 Tenn. 132, 368 S.W.2d 299 (1963); State v. White, 60 Wash. 2d 551, 374 P.2d 942 (1962). Ohio has reaffirmed *M'Naghten* but is extremely dissatisfied with it. State v. Colby, 6 Ohio Misc. 19, 215 N.E.2d 65 (C.P. 1966). California is unhappy with *M'Naghten*, but views it as a matter for the legislature to change and not the courts. People v. Lawhon, 220 Cal. App. 2d 311, 33 Cal. Rptr. 718 (Dist. Ct. App. 1963).

[3] 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843). The actual formulation of the *M'Naghten Rule* was made by Lord Chief Justice Tindal in 1843 in response to inquiries from Parliament as to the standard being applied by courts to judge criminal responsibility.

[4] Connecticut, for example, reworded its *M'Naghten Rule* in 1959:

> To be the subject of punishment, an individual must have mind and capacity, reason and understanding enough to enable him to judge of the nature, character and consequences of the act charged against him, that the act is wrong and criminal, and that the commission of it will justly and properly expose him to penalty. State v. Davies, 146 Conn. 137, 148 A.2d 251, *cert. denied*, 360 U.S. 921 (1959).

[5] In 1957 the Ninth Circuit stated that the Supreme Court had decided the question and the circuit courts were not at liberty to reject or modify *M'Naghten* beyond addition of the irresistible impulse doctrine. Sauer v. United States, 241 F.2d 640, 643 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957). The Ninth Circuit relied primarily on two opinions. Davis v. United States, 165 U.S. 373 (1897); Davis v. United States, 160 U.S. 469 (1895). The Second Circuit in the instant case distinguishes these cases on substantive merits as not representing "a square holding as to the sufficiency of *M'Naghten*." United States v. Freeman, 357 F.2d at 613-14.

The Third Circuit has said that it does not feel constrained to adhere to and to uphold *M'Naghten*. United States v. Currens, 290 F.2d 751, 771 (3d Cir. 1961). The Tenth Circuit views the law of criminal responsibility as a matter of common law in the federal courts and constantly open to review. Wion v. United States, 325 F.2d 420, 425 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964).

One writer, disagreeing with the Ninth Circuit that the Supreme Court has endorsed *M'Naghten*, suggests that "the Supreme Court's inaction in this area is not mere coincidence, but is motivated by a desire to encourage the Circuits to discuss and develop alternative tests before making such a definitive ruling." Moore, *M'Naghten Is Dead — Or Is It?* 3 HOUSTON L. REV. 58, 60 (1965).

[6] Alabama, Arkansas, Colorado, Connecticut, Delaware, Indiana, Massachusetts, Michigan, Montana, New Mexico, Utah and Virginia. See Annot., 45 A.L.R.2d 1451, 1453 (1956).

[7] The First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits. See

of *M'Naughten's Case* the "irresistible impulse rule," *i.e.*, one is not responsible when, because of mental disease or defect, he cannot control his choice between right and wrong.[8] A few jurisdictions have made other modifications of *M'Naughten.*[9]

In 1954 the District of Columbia adopted what has become known as the *Durham Rule, i.e.*, an accused is not criminally responsible if his unlawful act was the product of mental disease or defect.[10] A similar rule has been applied since 1870 in New Hampshire.[11]

The most recently proposed alternative to the *M'Naughten Rule* is the 1962 final draft of the American Law Institute's Model Penal Code § 4.01, which provides:

> 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 of his conduct or to conform his conduct to the requirements of law.

Annot., 45 A.L.R.2d 1451, 1453 (1956). Prior to their rejection altogether of *M'Naghten*, the Second, Third, and Tenth Circuits had also added the irresistible impulse rule. These three circuits now apply the Model Penal Code Rule, adopted by the Second Circuit in the instant case.

[8] Irresistible impulse, as recognized by the courts, is an impulse induced by, and growing out of, some mental disease affecting the volitive, as distinguished from the perceptive, powers so that the person afflicted, while able to understand the nature and consequences of the act charged against him and to perceive that it is wrong, is unable, because of such mental disease, to resist the impulse to do it. 14 AM. JUR. *Criminal Law* § 35 (1938). It must be the product of mental insanity as distinguished from moral insanity. 21 AM. JUR. 2d *Criminal Law* § 36 (1965). The use of the term "irresistible impulse" has been criticized as connoting only sudden spontaneous feeling, while such urges may be the result of long periods of brooding reflection. Sauer v. United States, 241 F.2d 640, 650 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957).

[9] Some jurisdictions make mental disease grounds for reduction of the grade of crime even though they apply *M'Naghten* as to responsibility generally. *E.g.*, Washington v. State, 165 Neb. 275, 85 N.W.2d 509 (1957); State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959); State v. Green, 78 Utah 580, 6 P.2d 177 (1931). Georgia excuses criminal acts carried out under insane delusions if the delusions were such that if true they would have excused the acts. Drewry v. State, 208 Ga. 239, 65 S.E.2d 916 (1951). See generally 21 AM. JUR. 2d *Criminal Law* § 41 (1965).

[10] Durham v. United States, 94 App. D.C. 228, 214 F.2d 862 (D.C. Cir. 1954). The term "mental disease or defect" has been subsequently defined to mean: "Any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavioral controls." McDonald v. United State, 312 F.2d 847, 851 (D.C. Cir. 1962).

[11] State v. Pike, 49 N.H. 399, 6 Am. Rep. 533 (1870). See generally Reid, *The Companion of the New Hampshire Doctrine of Criminal Insanity*, 15 VAND. L. REV. 721 (1962); Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367 (1960); Weihofen, *The Flowering of New Hampshire*, 22 U. CHI. L. REV. 356 (1955).

The *Durham* test is statutory in the Virgin Islands. See Virgin Islands v. Smith, 278 F.2d 169 (3d Cir. 1960). Although *Durham* has not been adopted in any other jurisdiction, the Michigan Supreme Court has said it would consider its adoption if it were properly presented to the court. People v. Krugman, 377 Mich. 559, 141 N.W.2d 33 (1966).

Five states[12] and three circuit courts[13] now apply the Model Penal Code Rule, either verbatim or in modified form.

Arizona applies the *M'Naghten Rule*[14] and has refused to modify it by adding to it the irresistible impulse doctrine.[15] Arizona has expressly rejected the *Durham Rule.*[16] Recently the Arizona Supreme Court, in *State v. Schantz,*[17] rejected the Model Penal Code Rule as "another of the various formulations of the irresistible impulse rule."[18] The court stated: "Whatever may be the theoretical merits in the medical evaluation of the volitional aspects of the human mind, we, like California, do not adopt Section 4.01 of the Model Penal Code as the test for criminal responsibility in this state."[19]

The Second Circuit in the instant case has adopted the Model Penal Code Rule almost verbatim. Only one word was changed by the court. Where the Model Penal Code read, "if . . . he lacks substantial capacity either to appreciate the *criminality* of his conduct . . .," the Second Circuit Court substituted "wrongfulness" for "criminality." (Emphasis added.) This was done to include the case where the perpetrator appreciates that his conduct is criminal, but because of an insane delusion, which if true would have justified the conduct, believes it to be morally justified.[20]

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[12] Illinois, Maine, New York, and Vermont have adopted the Model Penal Code Rule by statute. ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd 1961); ME. REV. STAT. ANN. ch. 15, § 102 (1961); N.Y. REV. PEN. L. § 30.05; VT. STAT. ANN. § 13.4801 (1957). Kentucky has adopted the rule by court decision in Terry v. Commonwealth, 371 S.W.2d 862 (Ky. 1963), *overruling* Newsome v. Commonwealth, 366 S.W.2d 174 (Ky. 1963) where *M'Naghten* had been reaffirmed and the Model Penal Code Rule rejected by a four to three decision.

Wisconsin has refused twice in four years to replace *M'Naghten* with the Model Penal Code Rule, in each case by a four to three division. State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458 (1966); State v. Esser, 16 Wis. 2d 567, 115 N.W.2d 505 (1962). In the more recent of the two cases, there is a dissenting opinion that quotes extensively from the instant case.

[13] The Second Circuit adopts the Model Penal Code Rule in the instant case. The Third and Tenth Circuits have adopted it in modified form. Wion v. United States, 325 F.2d 420, 430 (10th Cir. 1963), *cert. denied,* 377 U.S. 946 (1946). The court adopted the form of the Model Penal Code Rule but in an accompanying proposed jury instruction changed the requirement that the accused "lack substantial capacity to *appreciate* . . . criminality" to one that the accused "lack substantial capacity to *know* . . . criminality." (Emphasis added.) United States v. Currens, 290 F.2d 751, 774 (3d Cir. 1961):

> The jury must be satisfied that at the time of committing the prohibited act, the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.

[14] *E.g.,* 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).

[15] State v. Crose, 88 Ariz. 389, 357 P.2d 136 (1960).

[16] *Id.* at 392, 357 P.2d at 138.

[17] 98 Ariz. 200, 403 P.2d 521 (1965).

[18] *Id.* at 208, 403 P.2d at 526.

[19] *Id.* at 211, 403 P.2d at 528.

[20] 357 F.2d at 622.

In adopting its standard in the instant case, the Second Circuit makes a painstaking effort to avoid the criticisms made of the broader *Durham Rule*, the most damaging of which is that *Durham* fails to give the fact-finder a standard by which to measure the criminal responsibility of the accused.[21] The court pointed out that, while eschewing rigid classification, the Model Penal Code Rule is couched in sufficiently precise terms to provide the jury with a workable standard.[22]

However, the Second Circuit in the instant case has undertaken a far more significant goal than just to overcome the defects of the *Durham Rule*. In justifying its rejection of the *M'Naghten Rule*, the court seeks to show that the latter rule is not only inferior to the Model Penal Code but has been totally undesirable from its very inception.[23] The court condemns the right from wrong dichotomy of the *M'Naghten Rule* as a demand for unrealistic and misleading testimony by expert psychiatric witnesses that amounts to professional perjury.[24] Modern psychiatry views the mind and personality as an integrated unit and often not subject to clear distinctions such as "sane" or "insane," or "able" and "not able" to tell right from wrong.[25] Unlike *M'Naghten*, the Model Penal Code Rule allows the criminal capacity of a defendant to be measured in degrees of incapacity.[26]

The *M'Naghten Rule*, according to the Second Circuit, encourages imprisonment of mentally ill individuals only to release them at a set time, uncured and potentially dangerous. The Model Penal Code allows a great deal more discretion by juries to acquit defendants on mental grounds and thus allow such defendants to be placed under proper psychiatric care.[27]

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[21] 357 F.2d at 621-22. See generally Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905 (1961); Weihofen, *The Flowering of New Hampshire*, 22 U. CHI. L. REV. 356 (1955).

[22] 357 F.2d at 623.

[23] The trend in the law prior to the formulation of the *M'Naghten Rule* had been towards a more flexible test, as evidenced by the acquittal of Charles M'Naghten who apparently knew what he was doing was wrong but acted anyway because of insane delusions. The intense pressure applied by an outraged public and a frightened Queen led to the formulation of a strict and unyielding test that cemented unrealistic and unscientific concepts of insanity into the law. 357 F.2d at 616-18. See generally GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 403 (1952)

[24] 357 F.2d at 619. Seen generally, Remarks, Judicial Conference (2d Cir.), *Insanity As A Defense*, 37 F.R.D. 365, 387 (1964).

[25] 357 F.2d at 616. See generally GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 418 (1952).

[26] 357 F.2d at 618-19.

[27] However, the Second Circuit notes an existing void in the federal judicial system in provisions for treatment and commitment of defendants acquitted on mental grounds. There is a need, the court says, for Congress to explore its power to authorize commitment of those acquitted on such grounds. 357 F.2d at 625-26.

ARIZ. R. CRIM. P. 288 requires that immediate steps be taken to institute civil proceedings for commitment against those acquainted on mental grounds.

In following the Model Penal Code, the Second Circuit in the instant case has chosen a middle ground between the inflexible test of *M'Naghten* and the overly general languge of *Durham.* The court has adopted a rule which allows the full employment of psychiatric knowledge to help the fact-finder judge the responsibility of each defendant for his acts, but at the same time has carefully defined the terms of the rule.[28] The decision in the instant case is the best reasoned and most persuasive voice to date calling for this needed change in the field of criminal responsibility.

William C. Porter

EMINENT DOMAIN — COMPENSATION — OFFSET OF "GENERAL" AS WELL AS "SPECIAL" BENEFITS AGAINST SEVERANCE DAMAGES — *State v. Atchison, Topeka & Santa Fe Ry. Co.* (N.M. 1966).

The State Highway Commission condemned parts of three parcels of land, each owned by a separate defendant, for roadway construction. In the trial to determine the amount of compensation to be made for the taking, the jury verdict was favorable to the defendant landowners. The state appealed, claiming, *inter alia,* error in the trial court's instructions pertaining to deduction of benefits to the remaining land. On appeal, *held,* affirmed subject to remittitur. The trial court correctly and sufficiently instructed the jury that any benefits, special and general, resulting from the construction of the improvement and enhancing the value of the remaining land were to be offset against severance damages to the remaining land in determining the fair market value of the land remaining after condemnation. *State v. Atchison, T. & S.F. Ry.,* 417 P.2d 68 (N.M. 1966).

The power to condemn through eminent domain, when exercised by a state or one of its subdivisions, is rarely contested. The issue litigated in most cases is the extent of damages suffered by a landowner

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[28] The court points out that mere recidivism, narcotics addiction, and repeated criminality cannot alone justify acquittal or even be sole grounds for a finding of mental disorder. 357 F.2d at 625.

The court also took notice of the use of certain words in the Model Penal Code:

> By employing the telling word "substantial" to modify "incapacity" the rule emphasizes that "any" capacity is not sufficient to justify avoidance of criminal responsibility but that "total incapacity" is also unnecessary. The choice of the word "appreciate," rather than "know" in the first branch of the test also is significant; mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of moral or legal import of behavior, can have little significance. 357 F.2d at 622-23.

resulting from the taking of his land by the condemning authority. The United States Constitution provides that just compensation must be made for the taking of privately owned land in the exercise of the power to condemn.[1] Similar constitutional mandates exist in all but one of the states.[2] The object of eminent domain proceedings is to determine what constitutes "just compensation" in each particular case.

In most eminent domain cases the condemning authority acquires title to only part of a parcel of land.[3] There are two separate elements of damage which a landowner is entitled to recover when only part of his land has been condemned:[4] (a) the value of the land actually

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[1] U.S. CONST. amend. V provides: "nor shall private property be taken for public use without just compensation." While the fifth amendment is applicable only to the federal government, similar protection is afforded against state action by the fourteenth amendment's due process clause. Chicago, B. & Q.R.R. v. City of Chicago, 166 U.S. 226 (1897).

[2] North Carolina is the only state without a constitutional provision requiring payment of just compensation for land taken by condemnation. The constitutions of New Hampshire and Virginia contain provisions declaring that private property may not be taken without the owner's consent, or that of the representative body of the people of the state. N.H. CONST. pt. 1, art. 12; VA. CONST. art. 1, § 6. Early cases in both states held that these provisions required compensation to be paid for the taking of private property. Great Falls Mfg. Co. v. Fernald, 47 N.H. 444 (1867); Swift & Co. v. City of Newport News, 105 Va. 108, 52 S.E. 821 (1906). Arizona's constitutional provision is representative of those existing in most states. ARIZ. CONST. art. 2, § 17: "No private property shall be taken or damaged for public use without just compensation having first been made, or paid into court for the owner. . . ."

[3] Two other types of eminent domain takings are:

a.) the condemning authority acquires full title to an entire privately owned tract; and

b.) the condemning authority acquires only some lesser estate or interest in the land, or imposes some burden thereon, thereby diminishing the interest of the owner therein and, therefore, lessening its value to him.

[4] 72 YALE L.J. 392, 395 (1962):

> So, in a partial taking situation, where the sum of the individual values of the component parts does not equal the value of the whole, the property owner is compensated for the value he has lost — *i.e.*, the value of the part taken, plus damages to the remainder, or the value of the whole tract before the taking, minus the value of the remainder after the taking — rather than the market value of what was taken.

ARIZ. REV. STAT. ANN. § 12-1122A (1956) provides, in part:

> The court or jury shall ascertain and assess:
>
> 1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein, and if it consists of different parcels, the value of each parcel and each estate or interest therein separately.
>
> 2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

Similar statutes exist in a number of other states, *e.g.*, CAL. CIV. PRO. CODE § 1248; MASS. ANN. LAWS ch. 79, § 12 (1931); N.M. STAT. ANN. ch. 22, § 9-9 (1953). See Suffield v. State, 92 Ariz. 152, 375 P.2d 263 (1962); State Highway Dep't. v. Weldon, 107 Ga. App. 98, 129 S.E.2d 396 (1962); State Highway Comm'n. v. Burwell, 205 Miss. 490, 39 So. 2d 497 (1949); *In re* Northern Boulevard, 225 App. Div. 1018, 8 N.Y.S.2d 523 (1938).

taken, and (b) any reduction in the value of the remaining land caused by the severance of the part actually taken and the construction of the improvement in the manner planned by the condemnor.[5] The latter element is referred to as "severance damage." It is usually held, however, that some elements of damage may be reduced, or offset, by certain benefits which accrue to the remaining land as a result of the condemnation.[6] Some states have allowed offset of benefits against both the value of the land actually taken and severance damages.[7] However, in most states benefits subject to offset may only be deducted from severance damages.[8]

The benefits which accrue to the remaining land are classified as either "special" or "general." Special benefits are those which enhance the value of the remaining land because of its peculiar relationship to the improvement for which the condemnation was effected.[9] General benefits are those which the land remaining after condemnation shares in common with other tracts of land in the community.[10] Which class of benefits[11] may be used to offset severance damages resulting from condemnation has been subject to more diversity of opinion and rules than any other aspect of eminent domain proceedings.[12] Consideration here is limited to cases of condemnation for highway purposes

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[5] Damages are assessed differently in the two other types of takings mentioned in note 3 *supra*. Where the entire parcel is taken, there can be no severance damages, hence the damages are limited to the value of the land taken. If only some interest or estate in the land less than full title is taken, or a burden is imposed thereon, the only element of damage is the diminution in value of the land to the owner.

[6] *E.g.*, City of New Orleans v. Giraud, 238 La. 278, 115 So. 2d 349 (1959); State *ex rel.* State Highway Comm'n. v. Cady, 400 S.W.2d 481 (Mo. Ct. App. 1965); Esso Standard Oil Co. v. State, 9 App. Div. 2d 840, 192 N.Y.S.2d 823 (1959).

[7] *E.g.*, McRea v. Marion County, 222 Ala. 511, 133 So. 278 (1931); Commonwealth, Dep't. of Highways v. Sherrod, 367 S.W.2d 844 (Ky. 1963); City of Tucumcari v. Magnolia Petroleum Co., 57 N.M. 392, 259 P.2d 351 (1953); Smith v. City of Greenville, 229 S.C. 252, 92 S.E.2d 639 (1956).

[8] *E.g.*, City of Hayward v. Unger, 194 Cal. App. 2d 516, 15 Cal. Rptr. 301 (Dist. Ct. App. 1961); State Highway Bd. v. Bridges, 60 Ga. App. 240, 3 S.E.2d 907 (1939); State v. Ahaus, 223 Ind. 629, 63 N.E.2d 199 (1945); State v. Meyer, 391 S.W.2d 471 (Tex. Civ. App. 1965).

[9] Board of Comm'rs. v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953); State *ex rel.* State Highway Comm'n. v. Bailey, 212 Ore. 261, 319 P.2d 906 (1957).

[10] State v. Smith, 237 Ind. 72, 143 N.E.2d 666 (1957); Board of Comm'rs. v. Gardner, *supra* note 9. A distinction is sometimes made of "local" benefits. They are not limited to the land remaining after condemnation, but are restricted to tracts in a particular neighborhood rather than tracts in the entire community. See 3 NICHOLS, EMINENT DOMAIN § 8.6202 (3d ed. 1965) [hereinafter cited as NICHOLS].

[11] No consideration is here given to the extremely difficult problems of classifying benefits as "special" or "general." It will be assumed that an accurate distinction between types of benefits can be and has been made. For a discussion of the problem, see 3 NICHOLS § 8.6202-8.6203 (3), at 65-80.

[12] 3 NICHOLS § 8.62, at 57; § 8.6211. Rules governing offset of benefits vary from one jurisdiction to another because of distinctions concerning:

a.) the nature of the condemning authority: whether a state, county, municipality, private corporation or private individual;

b.) the purpose of the condemnation: whether for highway construction or

by a state or one of its subdivisions.

Where the power to condemn is exercised for the purpose of constructing or improving highways, the great majority of jurisdictions hold that only special benefits may be offset.[13] Two bases for this rule have been advanced. It is first argued that general benefits, because of their inherent nature, are too speculative and conjectural to assess with any degree of accuracy;[14] consequently, any pecuniary value placed on general benefits would be little more than a guess, not predicated on provable facts.[15] Second, it is contended that any deduction of general benefits would deprive the landowner of just compensation. This contention is based on the recognition that condemnation for highway construction or improvement is undertaken in order to produce certain general benefits.[16] These benefits are intended to result to all parcels of land in the community and allowing their value to be deducted from severance damages would withhold from a particular landowner those same benefits received by all others in the area. As a result, the landowner would be forced to pay in land for those general benefits received free by his neighbors.[17]

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improvement, railroad right-of-way, utility easement, etc.;

c.) the quantity condemned: whether a taking of all, part, or none of a parcel of land; and

d.) the quality of the taking: whether a taking of complete title, or only some of the incidents of land ownership.

[13] 38 ORE. L. REV. 86, 88 (1958):

> The distinction [between special and general benefits] is important primarily because of the rule followed in most jurisdictions that only special benefits are deductible from the condemnation award. 3 NICHOLS, EMINENT DOMAIN sec. 8.6205 (3rd ed. 1950); Annot., 145 A.L.R. 40 (1943).

At this time, some thirty-three states restrict offset to special benefits only: Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, and Washington. Three states, Iowa, Mississippi, and Oklahoma, do not allow offset of any benefits, special or general.

[14] See State v. Hudson County Bd. of Chosen Freeholders, 55 N.J.L. 88, 25 Atl. 322 (Sup. Ct. 1896).

[15] *Id.* at 92, 323-24.

> There is, however, a possibility of benefit to accrue from certain public uses for which land is taken, like the opening of highways, which should not be considered, for two reasons: *First*, because this benefit is to arise, if at all, in the indefinite future, while the compensation must be such as is just, at the time of the taking; *second*, because it is so uncertain in character as to be incapable of present estimation. Such benefit is that which may spring from the growth of population, if it should be attracted by the public improvement for which the land is taken, and from similar sources. It is usually styled "general benefit," because it affects the whole community or neighborhood.

[16] 3 NICHOLS § 8.6205, at 85: "The owner may also well argue that the general taxes which he pays are justified only by the general benefit that he receives from the undertakings and improvements made under public authority."

[17] Territory v. Mendonca, 46 Hawaii 83, 94, 375 P.2d 6, 13 (1962), where the

The instant case illustrates the rule followed in a minority of states that both special and general benefits may be offset against severance damages.[18] These states emphasize that just compensation is universally regarded as requiring *pecuniary* compensation.[19] States utilizing the minority rule seek to ascertain whether or not the landowner is in a worse position *financially* as a result of the condemnation.[20] Any factor which a real-estate appraiser, qualified as an expert witness, can assess as actually contributing to the value of the remaining land may be considered in reducing severance damages and is not considered in law as being speculative or conjectural.[21] Therefore, general benefits which in fact enhance the value of the remainder may be offset.[22] The test employed in determining the monetary loss to the landowner is the difference in the fair market value of the whole tract before the taking and the remaining land after the taking.[23] The instant case affirms the long-standing position taken by New Mexico that *any benefits*, either

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court stated:

> [I]t is unfair for a landowner to be taxed specially through the reduction or refusal of compensation by offsetting benefits which his neighbors, whose lands are not taken, nonetheless receive free of charge. It is to avoid the unfairness of making one man pay in land for that which another received free that special benefits are narrowly conceived.

[18] *Alabama:* State v. Jacks, 272 Ala. 107, 128 So. 2d 734 (1961); Morgan County v. Hill, 257 Ala. 658, 60 So. 2d 838 (1952); *Illinois:* City of Chicago v. Lord, 276 Ill. 544, 115 N.E. 8 (1916); *New Mexico:* Board of Comm'rs. v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953); *New York:* Vanech v. State, 50 Misc. 2d 259, 270 N.Y.S.2d 357 (Ct. Cl. 1966); Brand v. State, 46 Misc. 2d 645, 260 N.Y.S.2d 239 (Ct. Cl. 1965); *North Carolina:* Barnes v. State Highway Comm'n., 257 N.C. 507, 126 S.E.2d 732 (1962); *Virginia:* State Highway Comm'n. v. Crockett, 203 Va. 796, 127 S.E.2d 354 (1962); *West Virginia:* State *ex rel.* State Road Comm'n. v. Evans, 131 W. Va. 744, 50 S.E.2d 485 (1948); *Wisconsin:* Carazalla v. State, 269 Wis. 593, 70 N.W.2d 208 (1955).

[19] Mandl v. City of Phoenix, 41 Ariz. 351, 18 P.2d 271 (1933); People v. Reed, 139 Cal. App. 258, 33 P.2d 879 (Dist. Ct. App. 1934); State v. Smith, 25 Wash. 2d 540, 171 P.2d 853 (1946). See Mandl v. City of Phoenix, *supra* at 355, 18 P.2d at 272-73:

> The medium of payment of compensation is ready money or cash. The condemnor cannot compel the owner to accept anything but money, nor can the owner compel or require the condemnor to pay him on any other basis than the value of the property in money. . . . When the power of eminent domain is resorted to, there must be a standard medium of payment, binding upon both parties, and the law has fixed that standard as money or cash.

[20] City of Chicago v. Lord, 276 Ill. 544, 115 N.E. 8 (1916); Brand v. State, 46 Misc. 2d 645, 260 N.Y.S.2d 239 (Ct. Cl. 1965); Williams v. State Highway Comm'n., 252 N.C. 514, 114 S.E.2d 340 (1960).

[21] Pryor v. Limestone County, 222 Ala. 621, 134 So. 17 (1931); State v. Atchison, T. & S.F. Ry., 417 P.2d 68 (N.M. 1966); Templeton v. State Highway Comm'n., 254 N.C. 337, 118 S.E.2d 918 (1961); May v. Malcom, 202 Va. 78, 116 S.E.2d 114 (1960); Carazalla v. State, 269 Wis. 593, 70 N.W.2d 208 (1955).

[22] Illinois invokes a rule by which *all* benefits which are not speculative or conjectural are considered as "special" benefits. In Sanitary Dist. v. Boening, 267 Ill. 118, 124, 107 N.E. 810, 813 (1915), the court stated: "Any benefits which are not conjectural or speculative, and which enhance the market value of such property, are to be considered as special benefits, and not as general benefits."

[23] State v. Jacks, 272 Ala. 107, 128 So. 2d 734 (1961); City of Albuquerque v. Chapman, 76 N.M. 162, 413 P.2d 204 (1966); Williams v. State Highway Comm'n., 252 N.C. 514, 114 S.E.2d 340 (1960).

general or special, which in fact enhance the value of the remaining land must be deducted from damages to the remaining land resulting from condemnation.[24]

The United States Supreme Court has not ruled on the constitutionality of a state's or the federal government's application of either the majority or minority rule. Arizona is one of the few states which has yet to rule on which type of benefits may be offset.[25] In any case, an Arizona statute allows offset only against severance damages.[26] Sound reasons exist for adoption of the minority rule allowing offset of both special and general benefits. First, it appears that the minority rule would satisfy Arizona's constitutional requirement of payment of just compensation to the property owner. Utilization of this rule would allow the landowner to recover for his *actual financial losses*,[27] yet prevent him from realizing a profit merely because part of his land was needed by the condemning authority. Second, the minority rule is more realistic because it emphasizes a much more simple and clear-cut method of ascertaining damages. Consideration is given to every element of value which in fact exists in a given situation. Real-estate appraisers who must testify as to the amount of damages are allowed to include all items which do in fact affect the value of the remaining land. They are not constricted by an abstract and artificial scheme of appraisal which wholly ignores certain real and pertinent factors which significantly affect actual value.[28] Third, the minority rule eliminates the

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[24] City of Albuquerque v. Chapman, *supra* note 23; State *ex rel.* State Highway Comm'n. v. Mauney, 76 N.M. 36, 411 P.2d 1009 (1966); Board of Comm'rs. v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953); City of Tucumcari v. Magnolia Petroleum Co., 57 N.M. 392, 259 P.2d 351 (1953).

[25] Other states which have not answered this question are: Alaska, Florida, Montana, Nevada and Wyoming.

[26] The problem lurks in Arizona within the phraseology of ARIZ. REV. STAT. ANN. § 12-1122A (1956):

> The court or jury shall ascertain and assess . . .
>
> 3. How much the portion not sought to be condemned and each estate or interest therein will be benefitted separately, if at all, by construction of the improvement proposed by the plaintiff. If the benefit is equal to the damages assessed under paragraph 2 of this subsection [severance damages], the owner of the parcel shall be allowed no compensation except for the value of the portion taken, but if the benefit is less than the damages so assessed, the benefit shall be deducted from the damages, and the remainder shall be the only damages allowed in addition to the value.

No Arizona case has as yet construed the meaning of the word "benefits" as used in this statute.

[27] The landowner might argue that he suffers a financial loss through the loss of value of general benefits which his neighbors enjoy. However, there is no obligation on the part of the condemning authority to grant general benefits to a particular individual. Moreover, the landowner is not precluded from utilizing the improvement in the same manner as any other member of the community; his "loss" is only of the particular pecuniary advantages the improvement might have rendered to him. But if the state owes no obligation to supply such pecuniary advantages, how can the property owner complain because he has not received them?

[28] Bohm v. Metropolitan Elevated Ry., 129 N.Y. 576, 29 N.E. 802, 805 (1892),

intricate problems of classifying benefits as special or general. Thus it is, in short, far easier to apply than the majority rule. In eminent domain proceedings, the Arizona courts should be mindful to award the property owner all that he honestly deserves; he should recover every dollar that he has lost — but not one penny more.

Paul E. Wolf

PHYSICIANS AND SURGEONS — MALPRACTICE — DOCTOR HELD TO HAVE DUTY TO DISCLOSE RISKS INVOLVED IN PROPOSED MEDICAL TREATMENT. — *Scott v. Wilson* (Tex. Civ. App. 1965).

Defendant doctor performed a stapedectomy[1] on plaintiff's ear and as a result of the operation plaintiff lost his sense of hearing in that ear. This was not an emergency operation and plaintiff had a choice of having it performed or living with impaired hearing. Plaintiff sued defendant for malpractice claiming defendant had not warned him of the risk of loss of hearing. The trial court directed a verdict for the defendant. On appeal, *held,* reversed.[2] Where no emergency exists a doctor has a duty to make full disclosure to his patient of all known risks involved in the proposed operation and where testimony conflicts as to whether or not a full disclosure was made, a fact question is presented which must be determined by the trier of fact. *Scott v. Wilson,* 396 S.W.2d 532 (Tex. Civ. App. 1965).

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though dealing with condemnation of an easement by a private corporation, is applicable:

> A theoretical course of reasoning may be adopted, by which it could be claimed . . . that the value of the easements, in and of themselves, is represented by the amount of depreciation in value to the adjoining land their taking would occasion, with no reference to the agency by which the taking was accomplished. . . . [I]f the taking by the railroad actually had the effect of enhancing the value of the remaining land, the inquiry as to the amount of loss that might otherwise have been occasioned (if there had not happened to be the actual benefit) would be the purest guess and speculation in the world, and, even, if arrived at, would be but proof of what might have happened if something else had not occurred which prevented it, and caused the contrary to happen.

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[1] Trimming or cutting away a part of the stirrup bone, which is the innermost of the three minute bones found in the middle ear. BLAKISON, NEW GOULD MEDICAL DICTIONARY 980 (1949).

[2] The court's opinion fails to make clear which theory was relied upon in making this reversal. Authority supporting recovery on grounds of both negligence and battery was cited and it is not apparent whether the court felt that it was a negligent tort or the intentional tort of battery for which the plaintiff might be able to recover.

In Anglo-American law it is axiomatic that every adult of sound mind is the master of his own body.[3] Following this rule the courts have consistently held that a person's consent must be obtained before surgery or any other medical treatment can be performed upon him.[4] In cases where the physician has failed to disclose known risks inherent in proposed medical treatment the courts have reasoned that any consent given by the patient is invalid because it was uninformed and recovery has been allowed for *battery*.[5]

By bringing an action for "battery" in a nondisclosure suit the plaintiff obtains distinct advantages which he would not have if he brought an action for "negligence." The testimony of expert witnesses, which is often difficult to obtain,[6] is not necessary.[7] In proving causation the plaintiff is not held to as strict a standard[8] and actual damage need not be shown.[9] In addition, the doctor cannot escape liability by showing that he has complied with the standard of care normally exercised by physicians.[10]

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[3] *E.g.*, Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960); Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914). In the *Schloendorff* case Cardozo, J. makes the often quoted statement: "Every human being of adult years and sound mind has the right to determine what shall be done with his own body. . . ."

[4] *E.g.*, Rogers v. Lumbermen's Mut. Cas. Co., 119 So. 2d 649 (La. Ct. App. 1960); Rolater v. Strain, 39 Okla. 572, 137 Pac. 96 (1913). See Mohr v. Williams, 95 Minn. 261, 264, 104 N.W. 12, 14-5 (1905), where the court said:

> The patient must be final arbiter as to whether he will take his chance with the operation, or take his chance living without it. Such is the natural right of the individual, which the law recognizes as a legal one. Consent, therefore, of the individual must be either expressly or impliedly given before a surgeon may have the right to operate.

[5] Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906); Bang v. Charles T. Miller Hosp., 251 Minn. 427, 88 N.W.2d 186 (1958); See Paulsen v. Gundersen, 218 Wis. 578, 260 N.W. 448 (1935), where the court held failure to disclose nature of treatment vitiates consent.

[6] See Huffman v. Lindquist, 37 Cal.2d 465, 483, 234 P.2d 34, 44 (1951) (dissenting opinion by Carter, J.); Tadlock v. Lloyd, 65 Colo. 40, 44, 173 Pac. 200, 202 (1918). Two articles which strongly condemn this "conspiracy of silence" are Belli, *"Ready for the Plaintiff!"*, 30 TEMP. L.Q. 408 (1957), and Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1956). See generally Note, *The California Malpractice Controversy*, 9 STAN. L. REV. 731 (1957), which discusses expert witnesses and the result of a questionnaire sent to doctors concerning their unwillingness to testify in malpractice cases and the reasons for it.

[7] When the action is for battery the plaintiff may rely entirely on non-expert testimony, particularly his own. Wall v. Brim, 138 F.2d 478 (5th Cir. 1943); Hunt v. Bradshaw, 242 N.C. 517, 526, 88 S.E.2d 762, 767 (1955) (concurring opinion by Bobbitt, J., implying that had the action been for assault and battery the lack of expert testimony would not have stopped the case from going to the jury).

[8] In an action for an intentional tort the courts will disregard foreseeability and find even remote causation sufficient. See Derosier v. New England Tel. & Tel. Co., 81 N.H. 451, 463, 130 Atl. 145, 152 (1925); PROSSER, TORTS at 30, 302 (3d ed. 1964).

[9] Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905); *cf.* Tabor v. Scobee, 254 S.W.2d 474 (Ky. 1952). The mere invasion of the plaintiff's right to be free from an unwarranted touching is sufficient to establish damages.

[10] Perry v. Hodgson, 168 Ga. 678, 148 S.E. 659 (1929); Franklyn v. Peabody, 249 Mich. 363, 228 N.W. 681 (1930).

In recent years many courts have allowed recovery for nondisclosure only on the ground of negligence rather than following the traditional battery approach,[11] and several writers contend that this is the better view.[12] They reason that the doctor usually acts in good faith for the benefit of his patient, while in the traditional battery case the defendant usually acts intentionally in an "anti-social" manner.[13]

The major problem the courts have encountered in actions for "negligence" where there has been a lack of disclosure is establishing a criterion by which to measure the doctor's duty of disclosure.[14] It is recognized that a patient does have a right of self-determination and is entitled to sufficient disclosure to enable him to make an informed choice.[15] However, many courts say that a doctor may withhold information at his discretion if the circumstances or the custom of the medical profession warrant it.[16] It is reasoned that, even in the absence of an emergency, something less than full disclosure is often in the patient's best interest for therapeutic reasons.[17] The effect of basing the determination of the doctor's duty to disclose upon the custom of the medical profession for that particular operation is to

[11] *E.g.*, Shehee v. Aetna Cas. & Sur. Co., 122 F. Supp. 1 (W.D. La. 1954) (Battery lies for a willful act of violence, not merely an inadvertent failure to obtain patient's consent); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, *rehearing denied but decision explained*, 187 Kan. 186, 354 P.2d 670 (1960); Hershey v. Peake, 115 Kan. 562, 223 Pac. 1113 (1924). See RESTATEMENT (SECOND), TORTS § 311, comment *b* (1965).

[12] McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment.* 41 MINN. L. REV. 381 (1957) (a comprehensive article on this issue); 75 HARV. L. REV. 1445 (1962); 34 So. CAL. L. REV. 217 (1961).

[13] McCoid, *supra* note 12, at 414. Of course it is not necessary that the touching be done with malice for it to constitute a battery.

[14] See introduction to Annot., 79 A.L.R.2d 1028 (1960).

[15] *E.g.*, Salgo v. Leland Stanford, Jr., Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (Dist. Ct. App. 1957); Mitchell v. Robinson, 334 S.W.2d 11 (Mo. 1960) (doctor has duty to inform patient of collateral hazards involved in treatment); DiRosse v. Wein, 24 App. Div. 2d 510, 261 N.Y.S.2d 623 (1965) (doctor obligated to make a reasonable disclosure). See also *Symposium — Morals, Medicine and the Law*, 31 N.Y.U.L. REV. 1157 (1956), discussing a patient's rights to know the truth from the viewpoints of medicine, religion, philosophy and law.

[16] *E.g.*, DiFilippo v. Preston, 53 Del. 539, 173 A.2d 333 (1961); Roberts v. Young, 369 Mich. 133, 119 N.W.2d 627 (1963); Watson v. Clutts, 262 N.C. 153, 136 S.E.2d 617 (1964).

[17] Roberts v. Wood, 206 F. Supp. 579 (S.D. Ala. 1962). See Lund, *The Doctor, the Patient and the Truth*, 19 TENN. L. REV. 344 (1946), pointing out that under some circumstances it is better for the patient if full disclosure is not made; and Smith, *Therapeutic Privilege to Withhold Specific Diagnosis from Patient Sick with Serious or Fatal Illness*, 19 TENN. L. REV. 349 (1946), discussing the legal problems resulting from nondisclosure for therapeutic reasons. See also Kennedy v. Parrott, 243 N.C. 355, 90 S.E.2d 754 (1956); Jackovach v. Yocom, 212 Iowa 914, 929, 237 N.W. 444, 451 (1931), in a case involving an emergency, the court said:

> If the surgeon is not to be permitted to honestly use his best judgment upon the necessity of an operation without waiting to get the consent of either the patient or his parents, then is the skilled hand of the expert stayed by an unreasonable rule, often to the detriment of the patient and humanity at large.

See generally Smith, *Antecedent Grounds of Liability in the Practice of Surgery*, 14 ROCKY MT. L. REV. 233 (1942).

place upon the patient the burden of showing this custom through the testimony of expert witnesses.[18]

The opposing point of view, which finds expression in both judicial decision and legal articles, is that it should not be left to the medical profession to determine what their duty of disclosure should be.[19] These legal writers contend that in a nondisclosure case the jury's traditional function should not be transferred to experts who have a self-interest in the outcome.[20] Cases supporting this view state that it should not be necessary to establish what constitutes proper medical practice in nondisclosure cases as it is in other malpractice actions; consequently, the use of expert witnesses should not be required.[21] It is argued that these cases do not involve a technical area of medical science in which the lay jury would be incompetent to pass judgment; therefore, the jury should be permitted to find that a practice of nondisclosure may be negligent even when it is generally followed by the medical profession.[22]

The Arizona Supreme Court has agreed with the general rule in holding that a doctor's relationship with his patient is one of trust.[23] In absence of an emergency he is held to have a duty to inform his patient of the nature of the proposed treatment and any accompanying risks.[24] However, the Arizona Court of Appeals recently held that a patient's consent is informed and effective if he understands *substantially*

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[18] DiFilippo v. Preston, 53 Del. 539, 173 A.2d 333 (1961); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, *rehearing denied but decision explained,* 187 Kan. 186, 354 P.2d 670 (1960). The difficulty of obtaining expert witnesses often makes this requirement an insurmountable obstacle, see note 6 *supra.* However, in recent years Medical Malpractice Screening Panels, consisting of both doctors and lawyers have been formed in many parts of the country. These panels review malpractice charges and if they feel the plaintiff has a valid basis the medical profession provides medical witnesses to give expert testimony.

[19] Steele v. Woods, 327 S.W.2d 187 (Mo. 1959), where the court said expert testimony was not necessary but it should be left to the jury to decide if the doctor was negligent when he failed to advise his patient of the necessity of an operation. 75 HARV. L. REV. 1445 (1962). See Curran, *Professional Negligence — Some General Comments,* 12 VAND. L. REV. 535, (1959); Polsky, *The Malpractice Dilemma: A Cure for Frustration,* 30 TEMP. L.Q. 359 (1957).

[20] Curran, *supra* note 19, at 545; 75 HARV. L. REV. 1445, 1447 (1962).

[21] *Accord,* Gray v. Weinstein, 227 N.C. 463, 42 S.E.2d 616 (1947) (absence of expert witnesses not fatal to a malpractice case where facts speak for themselves); Francis v. Brooks, 24 Ohio App. 136, 156 N.E. 609 (1926) (expert witnesses need not be called where doctor's violation of his duty is apparent from other competent evidence).

[22] 75 HARV. L. REV. 1445, 1447 (1962); *Accord,* Fredrickson v. Maw, 119 Utah 385, 227 P.2d 772 (1951), in which the court says cases which depend on knowledge of the scientific effect of medicine must be established by expert witnesses but where the facts can be ascertained by laymen, expert witnesses are not needed. See also Shafer v. H. B. Thomas Co., 53 N.J. Super 19, 146 A.2d 483 (App. Div. 1958); PROSSER, TORTS §§ 32-33, at 167-70 (3d ed. 1964).

[23] Acton v. Morrison, 62 Ariz. 139, 155 P.2d 782 (1945), *reversal upheld on rehearing,* 68 Ariz. 27, 198 P.2d 590 (1948); Batty v. Arizona State Dental Bd., 57 Ariz. 239, 112 P.2d 870 (1941).

[24] *Ibid.*

the nature of a proposed operation and its *probable* results.[25] The court stated that the duty to warn was determined by the normal practice of the medical profession in the community.[26]

In the instant case the Texas court arrived at a conclusion which is consistent with existing law, but it is not apparent in the court's opinion whether the decision is based upon the theory of negligence or upon the theory of battery. After citing authority for the proposition that the physician has a duty to disclose any risks involved and is negligent in failing to do so, the court said that the doctor was liable for battery if he had failed to obtain an informed consent.[27]

This case is illustrative of the confusion that exists as to the proper legal basis for prosecuting a claim for relief in a nondisclosure case.[28] Decisions would be more consistent and the liability imposed more appropriate if a single basis for liability were adopted in cases involving lack of informed consent.[29] Negligence is the more appropriate ground upon which to impose liability. The duty to disclose should neither be absolute nor placed, in effect, at the discretion of the medical profession by *requiring* the *plaintiff* to produce expert witnesses as to the custom of disclosure; the plaintiff should *not* be required to show this custom in order for the jury to determine if the doctor was acting reasonably in assuming the patient would have consented had he known the risk.[30] However, if the duty of disclosure is to be determined by the medical profession, as indicated in the recent decision of the Arizona Court of Appeals,[31] the patient should be allowed to make out a *prima facie* case merely by showing the risk in question was not disclosed.[32] This will

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[25] Shetter v. Rochelle, 2 Ariz. App. 358, 370, 409 P.2d 74, 86 (1965). The court bases its reversal of the verdict for the plaintiff on the ground that the doctor's failure to disclose was not the proximate cause of the plaintiff's injury.

[26] *Id.* at 370, 409 P.2d 86.

[27] Scott v. Wilson, 326 S.W.2d 532, 535 (Tex. Civ. App. 1965). See 44 TEXAS L. REV. 799 (1966).

[28] Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, *rehearing denied but decision explained*, 187 Kan. 186, 187, 354 P.2d 670, 671 (1960), in the second opinion the court said:

> It is charged that the court has confused a malpractice suit, where negligence is an essential element, with an assault and battery case, where negligence is not an essential element, thereby giving rise to a hybrid action which is neither one of negligence nor one of assault and battery but may be a combination of the two.

[29] McCoid, *supra* note 12, at 434.

[30] See 75 HARV. L. REV. 1445, 1447 (1962), which says:

> . . . the inquiry should be whether a reasonable man in the doctor's position and with his knowledge of the patient would have been justified in concluding with substantial certainty that the patient, if informed of this risk, would have withdrawn his consent.

[31] Shetter v. Rochelle, 2 Ariz. App. 358, 409 P.2d 74 (1965).

[32] McCoid, *supra* note 12, at 434; McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 632 (1959). See Goodwin v. Hertzberg 201 F.2d 204 (D.C. Cir. 1952).

place upon the *doctor* the burden of coming forward with evidence as to what constitutes proper medical procedure, which is justifiable since he is in a better position to obtain testimony from his colleagues than is the patient.

J. Dee Flake

REAL PROPERTY — LANDLORD AND TENANT — LIBERAL INTERPRETATION GIVEN TO AMBIGUOUS RESTRICTIVE COVENANT IN COMMERCIAL LEASE. — *Renee Cleaners, Inc. v. Good Deal Super Markets of N.J.* (N.J. 1965).

Plaintiff was the lessee of a portion of a shopping center owned by the defendant. The lease contained covenants limiting plaintiff's use of the leasehold to the operation of his dry cleaning business and restricting the defendant from leasing to anyone engaged in a similar business. The defendant sold a portion of the shopping center to a purchaser, who then leased that portion to a competing business. The plaintiff sued defendant for breach of covenant and the lower court entered summary judgment for the defendant. On appeal, *held*, reversed.[1] Where a covenant to refrain from leasing to a competitor, considered in light of the circumstances under which it was written, indicates the parties' intentions to provide freedom from competition to the extent that such protection can be afforded by the lessor, the lessor who sells the adjacent premises without including the covenant will be liable to the lessee in damages for breach of covenant. *Renee Cleaners, Inc. v. Good Deal Super Markets of N.J., Inc.*, 89 N.J. Super. 186, 214 A.2d 427 (App. Div. 1965).

A major problem involved in interpreting covenants against competition is the lack of judicial uniformity with regard to their utility.[2] The courts have traditionally been against the enforcement of such covenants since they tend to limit business opportunities and retard the transfer of land by limiting its permissible use.[3] Thus, although restrictive covenants are seldom held void as restraints of trade,[4] the courts generally state that the covenant must be strictly construed against the party seeking to enforce it and any doubt as to its meaning

[1] *Cert. denied* in 46 N.J. 216, 216 A.2d 9 (1966).
[2] See generally Annot., 97 A.L.R.2d 4 (1964).
[3] See CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH THE LAND 105 n.38 (2d ed. 1947).
[4] *E.g.*, Vanover v. Justice, 180 Ky. 632, 203 S.W. 321 (1918); Fenton v. Crook, 88 N.J. Eq. 432, 102 Atl. 834 (Ch. 1918), *aff'd* 90 N.J. Eq. 274, 106 Atl. 891 (Ct. Err. & App. 1919); Janet Realty Corp. v. Hoffman's, Inc., 154 Fla. 144, 17 So. 2d 114 (1944).

should be resolved against enforcement.[5] This is generally referred to as the "strict rule."

On the other hand, courts have recognized that a "limited restraint" may serve a useful purpose[6] and will abide by the intentions of the parties in interpreting such covenants.[7] Thus the strict rule is tempered by equitable relief[8] and the aid of parol evidence of surrounding circumstances when an ambiguity concerning the manifest intentions of the parties exists.[9]

A distinction should be made between the situation in the instant case and situations where the lessee elects to sue, not his lessor, but his lessor's successor in interest. Where this is done, the following legal and equitable considerations become important. At law it is generally held that where the lessor covenants not to compete with his lessee this "burden" does not run with the land; it falls upon him personally in relation to his other land, thereby rendering the covenant merely collateral to the lease and not "touching and concerning" the land.[10] Regarding the lessee, however, the benefit of the covenant against competition *does* run with the land (against the original lessor-covenantor only) and protects the lessee's successors in interest.[11] In equity,

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[5] See Carr v. King, 24 Cal. App. 713, 142 Pac. 131 (Dist. Ct. App. 1914); Postal Telegraph Co. v. Western Union Tel. & Tel. Co., 155 Ill. 335, 40 N.E. 587 (1895); Topol v. Smoleroff Dev. Corp., 264 App. Div. 164, 34 N.Y.S.2d 653 (1942).

[6] South Buffalo Stores v. W. T. Grant Co., 153 Misc. 76, 274 N.Y. Supp. 549 (Sup. Ct. 1934), *aff'd* 273 N.Y. 660, 8 N.E.2d 335 (1937), wherein the court said such covenants result in higher rentals, longer leases, and a better type of tenant.

[7] Hiatt Inv. Co. v. Buehler, 225 Mo. App. 151, 16 S.W.2d 219 (Ct. App. 1929); Fulway Corp. v. Ligget Drug Co., 1 Misc. 2d 527, 148 N.Y.S.2d 222 (Sup. Ct. 1956).

[8] The subsequent lessee or purchaser taking with notice of the restrictive covenant is enjoined from further violation. *E.g.*, Rosen v. Wolff, 152 Ga. 578, 110 S.E. 877 (1922); Aiello Bros. v. Saybrook Holding Corp., 106 N.J. Eq. 3, 149 Atl. 587 (Ch. 1930); Jay v. Richardson, 30 Beav. 563, 54 Eng. Rep. 1008 (Ch. 1862).

[9] See *e.g.*, Lathrop v. Gauger, 127 Cal. App. 2d 754, 274 P.2d 730 (Dist. Ct. App. 1954); Cray v. Bellows Falls Ice Co., 108 Vt. 190, 184 Atl. 695 (1936); Smith v. Ostemeyer Realty Co., 102 Ind. App. 164, 197 N.E. 743 (1935).

[10] Herbert v. Dupaty, 42 La. Ann. 343, 344, 7 So. 580, 581 (1890), where the covenantor sold to a competitor after promising not to compete. The court said " . . . [the covenant] was not a burden placed on the property itself, but an obligation he impressed on himself." *Accord*, Thomas v. Hayward [1869] 4 Exch. 311. See generally Comment, 31 YALE L.J. 127 (1922).

[11] Although a conflict of authority exists, the better view seems to be that the tenant's assignee may enforce the restrictive covenant against the person holding the reversionary interest because it affects the value of the land. *E.g.*, Bank at Dover v. Segur, 39 N.J.L. 173 (Sup. Ct. 1877); Natural Products Co. v. Dolese & Shepard Co., 309 Ill. 230, 140 N.E. 840 (1923); Francisco v. Smith, 143 N.Y. 488, 38 N.E. 980 (1894).

The conflict results from the lack of a standard defining "touching and concerning" the land. Those courts holding that such covenants do not run have taken the position that covenants affecting only the commercial value of the property, as distinguished from its physical use and enjoyment, are personal and do not touch and concern the land. *Compare* Thomas v. Hayward, [1869] 4 Exch. 311, *and* Napa Valley Wine Co. v. Boston Block Co., 44 Minn. 130, 46 N.W. 239 (1890), *with* Norman v. Wells, 17 Wend. 136 (N.Y. 1837).

where the doctrine of equitable servitudes is applicable, the purchaser of the lessor's other property is bound to adhere to "burdens" imposed on the lessor by a covenant against competition in favor of the lessee.[12] Courts base this departure from the result reached on the "law side" of the court on the principle of "privity of conscience."[13]

Courts liberally interpreting such covenants generally rely either on the presence of an ambiguity[14] or an implied obligation of the lessor not to derogate from the force of his covenant.[15] In *Cragmere Holding Corp. v. Socony Mobil Oil Co.*,[16] the landlord agreed not to operate a similar business within a specified distance from the leased premises; the court imposed the burden of a covenant not to compete on property acquired *after* the execution of the lease. The covenantor's contention that the restrictions applied only to property owned by it at the time the lease was executed was rejected on the ground that such an interpretation would frustrate the obvious purpose of the covenant.[17] There the court found an *implied* obligation not to derogate from the force of the covenant by using adjoining property so as to impair the lessee's enjoyment of the leased premises.[18] By extending the intended protection of the covenant to transactions by the covenantor with subsequent *purchasers,* without recourse to equitable remedies, the principle laid down in *Cragmere* is taken to its logical conclusion in the instant case.

It is also required that the parties intend that the covenant run. See generally Annot., 97 A.L.R.2d 4 (1964).

[12] Gonzales v. Reynolds, 34 N.M. 35, 275 Pac. 922 (1929); Oliver v. Hewitt, 191 Va. 163, 60 S.E.2d 1 (1950).

Of course where both the benefit and the burden of the covenant not to compete run with the land, as in the case of the lessee, this remedy would not be available since the remedy at law would be adequate.

[13] Rosen v. Wolff, 152 Ga. 578, 110 S.E. 877 (1922); Goldberg v. Siegel, 182 Misc. 1068, 47 N.Y.S.2d 678 (Spec. T. 1944). A true covenant which runs with the land does so by reason of privity of estate and can only be enforced at law by the parties thereto and their privies. Equity, however, will enforce a covenant that does not run with the land against any person taking with actual or constructive notice of the covenant since the violator of the agreement is a privy "in conscience" with the maker.

This doctrine was first clearly enunciated in Tulk v. Moxhay, 2 Phil. 774, 778, 41 Eng. Rep. 1143, 1144 (Ch. 1848), wherein the court said " . . . the question does not depend upon whether the covenant runs with the land . . . for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

[14] See Mettler v. Braly, 148 Cal. App. 2d 652, 307 P.2d 419 (Dist. Ct. App. 1957).

[15] See Stockton Dry Goods Co. v. Girsh, 36 Cal. 2d 677, 227 P.2d 1 (1951); Carter v. Adler, 138 Cal. App. 2d 63, 291 P.2d 111 (Dist. Ct. App. 1955). See also Snavely v. Berman, 143 Md. 75, 121 Atl. 842 (1923).

[16] 65 N.J. Super. 322, 167 A.2d 825 (App. Div. 1961); *c.f.*, Daitch Crystal Dairies, Inc. v. Neisloss, 16 Misc. 2d 504, 185 N.Y.S.2d 188 (Spec. T. 1959).

[17] Cragmere Holding Corp. v. Socony Mobil Oil Co., 65 N.J. Super. 322, 167 A.2d 825 (App. Div. 1961), wherein the court indicated that covenants to refrain from competition would be realistically construed in furtherance of their obvious purpose.

[18] *C.f.*, University Club v. Deakin, 265 Ill. 257, 106 N.E. 790 (1914).

The basic conflict found in *Renee* is not novel, although the question presented is one of first impression in New Jersey. However, few courts have approached the problem as squarely as was done in the instant case. The strict rule[19] appears to be based on a public policy against restrictions on alienation.[20] This court has, by disregarding the strict rule, elected to apply a rule of contract construction which allows a consideration of surrounding circumstances when the intentions of the parties are not clearly manifested.[21]

While there has been no Arizona case in point,[22] the supreme court, in construing other restrictive covenants,[23] has followed doctrines which could lead to an interpretation as liberal as that found in *Renee*. In *Ainsworth v. Elder*[24] the court recognized that the manner of using one parcel of land may directly and significantly affect the use and value of the surrounding area. Rejecting the early common law application of the strict rule, the court applied the doctrine of *sic utere tuo alienum non laedas* (enjoy your own property in such a manner as not to injure the rights of another), calling for considerations of the general purpose of the restrictions, the surrounding circumstances and the manner in which they have been interpreted by those concerned.[25] The court has, however, emphasized that this doctrine has no application unless the language of the covenant is ambiguous.[26]

A recent federal court decision[27] applied Arizona law in a situation analogous to that found in the instant case. There the lease contained a covenant not to *permit* competition within a designated area. Following the sale of space within the area to a competitor, the court, in an action against the lessor, awarded the lessee damages and cancelled the lease as well. These decisions indicate the likelihood that, if the facts found in *Renee* were presented to the Arizona court, it would reach the same result.

While such covenants are by no means a recent legal development, their importance has perhaps been enhanced by the rise of the modern shopping center. This is due to its plan of a grouping of basically non-competitive and diversified, but interrelated, businesses. The in-

[19] *E.g.*, Norwood Shopping Center, Inc. v. MKR Corp., 135 So. 2d 448 (Fla. Ct. App. 1961); Postal Telegraph Co. v. Western Union Tel. & Tel. Co., 155 Ill. 335, 40 N.E. 587 (1895); Sylvester v. Hotel Pasco, 153 Wash. 175, 279 Pac. 566 (1929).

[20] See cases cited note 5 *supra*.

[21] See cases cited note 9 *supra*.

[22] *But see* City of Glendale v. Barclay, 94 Ariz. 358, 385 P.2d 230 (1963), where the court said a real covenant created a contractual duty which could not be terminated simply by a transfer of the property.

[23] Ainsworth v. Elder, 40 Ariz. 71, 9 P.2d 1007 (1932); O'Malley v. Central Methodist Church, 67 Ariz. 45, 194 P.2d 444 (1948).

[24] Ainsworth v. Elder, *supra* note 23.

[25] *Accord*, Whitaker v. Holmes, 74 Ariz. 30, 243 P.2d 462 (1952).

[26] Leonardi v. Furman, 83 Ariz. 61, 316 P.2d 487 (1957).

[27] Rental Development Corp. of America v. Lavery, 304 F.2d 839 (9th Cir. 1962).

stant case averts the inevitable hardships of an excessively strict construction and enforces the intentions of the parties. Careful draftsmanship is clearly desirable because each case of this type may be governed by the degree of clarity with which its covenant is expressed.[28] It is hoped that this decision will accelerate the trend away from interpretations that have hampered the effective use of covenants against competition in modern commercial leases.

Michael A. Beale

TAXATION — FEDERAL INCOME TAXATION — RENTAL PAYMENTS RESULTING FROM GIFT-LEASEBACK TRUST ARRANGEMENT NOT DEDUCTIBLE WHERE NO LEGITIMATE BUSINESS PURPOSE ACCOMPLISHED. — *Van Zandt v. Commissioner* (5th Cir. 1965).

Taxpayer, a physician, transferred his medical offices and equipment to two irrevocable ten-year trusts, designating his children as beneficiaries and appointing himself as trustee. The settlor, acting in his capacity as trustee, then leased the assets back to himself, and, for federal income tax purposes, deducted the rental payments thus made to the trusts as "ordinary and necessary" business expenses under Section 162 of the Internal Revenue Code.[1] The Commissioner of Internal Revenue disallowed the deductions and assessed a deficiency. The Tax Court of the United States upheld the disallowance on the grounds that the rental payments were not "necessary" within the meaning of section 162(a).[2] On petition for review, *held*, affirmed. Although a trust involving a gift-leaseback arrangement meets the statutory tests for permitting the rental payments to be taxed as trust income under Sections 671-78 of the Internal Revenue Code, the payments will not be deductible as "necessary" business expenses when no legitimate business purpose is accomplished. *Van Zandt v. Commissioner*, 341 F.2d 440 (5th Cir. 1965).[3]

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[28] For a discussion of drafting problems, see 63 HARV. L.REV. 1400 (1950).

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[1] INT. REV. CODE OF 1954, § 162, provides in part:
(a) . . . There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . (3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

[2] I. L. Van Zandt, 40 T.C. 824 (1963).

[3] *Cert. denied*, 382 U.S. 814 (1965), *affirming* 40 T.C. 824 (1963).

The family trust, as an income splitting device, is a congressionally sanctioned method of reducing the income tax burden.[4] However, when coupled with a leaseback arrangement, the efficacy of the family trust has not been clearly established. The intra-family gift-leaseback involves transferring a taxpayer's business assets to family members, or more frequently, as in the instant case, to a trust for their benefit. The initial transfer is combined with a leaseback of the assets to the settlor, which, if successful, results in the rental payments being deductible under Section 162 of the Internal Revenue Code.[5]

In general, under section 162, the deductibility of business expenses for income tax purposes depends upon their being "ordinary and necessary."[6] Rentals and other lease payments are specifically deductible if required to be made as a condition to the continued use or possession of property in which the taxpayer has not taken title or has no equity.[7] While the deductibility of the more common types of lease payments is well established under section 162, Congress has not set any explicit guidelines as to when rentals resulting from a gift-leaseback may be deducted.

In the leading case on gift-leaseback transactions, *Skemp v. Commissioner*,[8] the Court of Appeals for the Seventh Circuit upheld as deductible a rental payment similar to that in the instant case. There, the taxpayer, a practicing physician, transferred a building in which he was one of the tenants to an irrevocable twenty-year trust for the benefit of his wife and children. Unlike the instant case, the transfer in *Skemp* was made to an independent trustee with the settlor retaining no significant control. The Seventh Circuit, in reversing the Tax Court and upholding the rental deductions, emphasized the independence of the trustee,[9] the reasonableness of the rentals, and the "substance" of the entire transaction.[10]

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[4] See INT. REV. CODE OF 1954, §§ 671-78. See generally Froehlich, *Clifford Trusts: Use of Partnership Interests as Corpus; Leaseback Arrangements*, 52 CALIF. L. REV. 956, 968-77 (1964); Gibbs, *Income Shifting—Recent Trends in Leaseback Transactions*, 19 SW. L.J. 273 (1965).

[5] Allowing the deduction: Brown v. Commissioner, 180 F.2d 926 (3d Cir. 1950); Skemp v. Commissioner, 168 F.2d 598 (7th Cir. 1948); Alden B. Oakes, 44 T.C. 524 (1965); John T. Potter, 27 T.C. 200 (1956). Denying the deduction: Van Zandt v. Commissioner, 341 F.2d 440 (5th Cir.), *cert. denied*, 382 U.S. 814 (1965); Kirschenmann v. Westover, 225 F.2d 69 (9th Cir.), *cert. denied*, 350 U.S. 834 (1955); White v. Fitzpatrick, 193 F.2d 398 (2d Cir. 1951), *cert. denied*, 343 U.S. 928 (1952).

[6] INT. REV. CODE OF 1954, § 162(a).

[7] INT. REV. CODE OF 1954, § 162(a)(3).

[8] 168 F.2d 598 (7th Cir. 1948), *reversing* 8 T.C. 415 (1947).

[9] See Alden B. Oakes, 44 T.C. 524, 529 (1965), where the court, in upholding a similar gift-leaseback deduction, stated: "While the line of demarcation might be thin between the *Skemp* [168 F.2d 598 (7th Cir. 1948)], *Brown* [180 F.2d 926 (3d Cir. 1950)], and *Felix* [21 T.C. 794 (1954)] cases on one side and *Van Zandt* [341 F.2d 440 (5th Cir. 1965)] on the other, a difference nevertheless exists and we have recognized it. One of the pivotal factors is the *actual independence* of the trustee."

[10] 168 F.2d at 599-600.

The gift-leaseback deduction cannot be upheld where the court finds that the gift element of the transaction is invalid for failure of the grantor to divest himself of control, thereby obviating the necessity of leasing the property back.[11] Thus the grantor's retention of a reversionary interest in the property transferred and of a discretionary right to approve and settle the accounts of the trustee have defeated the claimed deduction.[12] Similarly, a section 162 deduction was not allowed where a purported transfer of property from husband to wife with the leaseback to the husband represented "a mere paper reallocation of income among family members."[13]

However, as evidenced by the instant case, a valid transfer of control may not be enough to support a rental deduction where the transaction serves no business purpose. The courts reason that where the gift-leaseback transaction lacks a valid business purpose, the accompanying obligation to pay rent is not "necessary" within the meaning of section 162.[14]

In the principal case, while emphasizing that a perfectly valid trust was established from the standpoint of taxability of trust income,[15] the court found that no real business purpose was served by the intricate transaction; but rather, that it could "be explained *only* because of the salutary effect it has on the affairs of one of the two parties."[16] However, the court indicated that it regarded its holding as consistent with the *Skemp* case, pointing out that there "the property transferred contained considerably more space than was rented back to the doctor for his

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[11] For an analysis of the delivery requirement as an essential element of an effective transfer of ownership by inter-vivos gift, see generally 1 AIGLER, SMITH & TEFFT, CASES ON PROPERTY 230-46 (1960); BROWDER, CUNNINGHAM & JULIN, BASIC PROPERTY LAW 575-604 (1966).

[12] Hall v. United States, 208 F. Supp. 584 (N.D.N.Y. 1962).

[13] White v. Fitzpatrick, 193 F.2d 398, 402 (2d Cir. 1951), *cert. denied*, 343 U.S. 928 (1952).

[14] See, *e.g.*, Kirschenmann v. Westover, 225 F.2d 69 (9th Cir.), *cert. denied*, 350 U.S. 834 (1955); 58th Street Plaza Theater, Inc. v. Commissioner, 195 F.2d 724 (2d Cir. 1952); White v. Fitzpatrick, 193 F.2d 398 (2d Cir. 1951), *cert. denied*, 343 U.S. 928 (1952); Armston Co. v. Commissioner, 188 F.2d 531 (5th Cir. 1951) (heavily relied on by the *Van Zandt* court to support its holding). In *Armston*, *supra* at 533, it was stated that the sale and leaseback of heavy equipment, owned and used by a corporation, must be disregarded for tax purposes in that "the only logical motive and purpose of the arrangement under consideration was the creation of 'rentals,' which would form the basis for a substantial tax reduction...."

[15] See INT. REV. CODE OF 1954, § 671-78, dealing primarily with the problems raised by Helvering v. Clifford, 309 U.S. 331 (1940), the landmark case requiring inclusion by the settlor of the income of a short term trust on the basis of his retention of substantial elements of control over the trust corpus and income, his family relationship with the wife-beneficiary, and the short duration (five years) of the trust. Sections 671-78 are frequently referred to as the "Clifford" sections, and a "Clifford" trust is commonly known as a short term trust designed to comply with all the requirements of sections 671-78 so that the trust income will be taxed either to the trust or the beneficiary, but not to the settlor as was the result in Helvering v Clifford, *supra*.

[16] 341 F.2d 440, 442 (5th Cir. 1965).

use. Thus, there may have been a proper business purpose of conveying the property to the trustees for management. . . ."[17]

In arriving at its restrictive, but realistic, ruling, the Fifth Circuit did not specifically clarify what type of gift-leaseback transaction would satisfy the business purpose test. Admitting the standard to be flexible, the court stated, "[T]he result ultimately depends on the factual evaluation of the particular case . . . . factors such as the short term of the trust, reversion to the settlors, predetermination of the right to possession of the property . . . bear heavily on the element of business purpose."[18] The court also alluded to the lack of an independent trustee as precluding a normal business relationship, pointing out that at the very moment the property was conveyed to the trustee, he became obligated to lease it back to the settlor. Thus the obligation to pay rent was not an ordinary and necessary incident in the conduct of business, "but was in fact created solely for the purpose of permitting a division of the taxpayer's income tax."[19]

Although the court indicates that each case must be approached on an *ad hoc* basis, it implies that most prearranged gift-leasebacks, being motivated solely by tax minimization, will not meet the business purpose test.[20] It is difficult to reconcile the court's language with that of the Seventh Circuit in the *Skemp* case, where it was pointed out that mere voluntariness in creating a legal obligation does not make satisfaction of the obligation unnecessary.[21]

The principal case, although restrictive in its application of the business purpose test, presents a more realistic approach to the section 162 deduction than does the uncertain doctrine of *Skemp*. The fact that most gift-leasebacks involving a family trust would be expected to fail the business purpose test does not seem reason to object to the approach of the instant case. However, at least one writer, in criticizing the inquiry into a business purpose motivation when an individual transfers property, has stated, "The test of business necessity should be made by viewing the situation as it exists after the gift is made . . . . and if the rental paid is reasonable, there is no basis for saying that the rent is not, in terms of section 162, 'ordinary and necessary' and 'required to be made as a condition to the continued use . . . of property.' "[22]

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[17] *Ibid.*
[18] *Id.* at 444.
[19] *Id.* at 443.
[20] To borrow a phrase from Blum, *Knetsch v. United States: A Pronouncement on Tax Avoidance*, 1961 SUP. CT. REV. 135, 157, perhaps the case may ultimately be explained by "the usual judicial unfriendliness toward clever tax schemes that are highly or exclusively tax motivated."
[21] 168 F.2d 598, 600 (7th Cir. 1948). For an excellent detailed analysis of the current leaseback dilemma, see generally Gibbs, *Income Shifting—Recent Trends in Leaseback Transactions*, 19 SW. L.J. 273 (1965).
[22] Froehlich, *Clifford Trusts: Use of Partnership Interests as Corpus; Leaseback Arrangements*, 52 CALIF. L. REV. 956, 974 (1964).

Thus, an alternative to the approach of the instant case would be to allow the section 162 rental deducation if the transfer met the requirements of sections 671-78 which allow the income from the property to be taxed to the trust.[23] While assuring a workable standard, this would protect against the adverse double taxation effect of the Fifth Circuit's decision.[24] However, such a standard could not reasonably be expected to evolve judicially, but would appear to require legislative action.

Nicholas G. Stucky

TORTS—NEGLIGENCE—DUTY OF POSSESSOR OF LAND TO TAKE AFFIRMATIVE STEPS TO PROTECT A BUSINESS INVITEE FROM A KNOWN DANGER.—*Taylor v. Centennial Bowl, Inc.* (Calif. 1966).

Plaintiff was in defendant's cocktail lounge when an abusive patron twice asked her if she would "go home and go to bed" with him. She rebuffed the stranger's uninvited queries and complained to the defendant's bouncer of this insult to her moral character. Later, the bouncer, who had overheard the man's repulsive remarks, saw this same man in defendant's parking lot adjacent to the building. When the plaintiff left defendant's establishment the bouncer did not escort her to her automobile but simply warned her of her accoster's presence outside. When plaintiff reached the parking lot she was stabbed by this abusive patron of the defendant. In plaintiff's suit for damages, the trial judge directed a verdict for the defendant. On appeal, *held,* reversed. A possessor of land has an affirmative duty to secure his patron's right to reach and enter her automobile safely when he has notice of the danger jeopardizing the safety of his patron. *Taylor v. Centennial Bowl, Inc.,* 65 Adv. Cal. 107, 416 P.2d 793, 52 Cal. Rptr. 561 (1966).

Today, it is well settled that an owner or occupier of business prop-

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[23] For general discussions on the use of Clifford trusts, see generally Ehrlich, *The Effective Use of Support Trusts,* N.Y.U. 19TH INST. ON FED. TAX 729 (1961); Ervin, *Income, Estate and Gift Tax Problems in Planning Family Trusts Under the 1954 Internal Revenue Code,* 29 SO. CAL. L. REV. 1 (1955); Miller, *Appropriate Forms of Gifts to Minors,* N.Y.U. 16TH INST. ON FED. TAX 765 (1958); Yohlin, *The Short-Term Trust—A Respectable Tax-Saving Device,* 14 TAX L. REV. 109 (1958).

[24] The settlor of the trust will be taxed on his business income, including the nondeductible sum payable to the trust as rent, and the trust or beneficiary will be taxed on the rental income received from the settlor.

erty is not an insurer of his invitee's safety,[1] nor is he required to keep the premises absolutely safe.[2] However, he must give his invitee a warning adequate to enable him to avoid known harm,[3] or otherwise protect the invitee against such harm.[4] Restated, he is universally required to use reasonable[5] or ordinary[6] care to protect his patron where he has notice of potential danger to that patron.[7]

Where intoxicants are sold on the premises, the courts are sometimes more strict in their construction of "reasonable" and "ordinary."[8] Thus, due to the inherent likelihood of heated tempers, most jurisdictions have required that these occupiers protect their invitees by controlling their patrons[9] and maintaining order,[10] or providing proper policing and supervision.[11] If a patron is known to be prone to violence, either when intoxicated or sober, reasonable care has been held to demand his exclu-

[1] Sherman v. Arno, 94 Ariz. 284, 383 P.2d 741 (1963); Owen v. Beauchamp, 66 Cal. App. 2d 750, 152 P.2d 756 (Dist. Ct. App. 1944); Peck v. Gerber, 154 Ore. 126, 59 P.2d 675 (1936); Weihert v. Piccione, 273 Wis. 448, 78 N.W.2d 757 (1956). See generally RESTATEMENT, TORTS § 348 (1934) which required that invitees be protected by controlling the conduct of the third party or by giving the invitee an adequate warning. *E.g.*, Twin City Amusement Co. v. Salater, 237 Ark. 206, 372 S.W.2d 224 (1963); Funari v. Gravem-Inglis Baking Co., 40 Cal. App. 2d 25, 104 P.2d 44 (Dist. Ct. App. 1940); Paubel v. Hitz, 339 Mo. 274, 96 S.W.2d 369 (1936); Caron v. Grays Harbor County, 18 Wash. 2d 397, 139 P.2d 626 (1943); Gross v. Wiley, 231 Ore. 421, 373 P.2d 421 (1962). These cases rely on the *Restatement, Torts* § 348 (1934).

[2] Gadowski v. Union Oil Co., 326 F.2d 524 (1st Cir. 1964); Curland v. Los Angeles County Fair Ass'n., 118 Cal. App. 2d 691, 258 P.2d 1063 (Dist. Ct. App. 1953); Stevenson v. Kansas City, 187 Kan. 705, 360 P.2d 1 (1961).

[3] Johnson v. A. Schilling & Co., 170 Cal. App. 2d 318, 339 P.2d 139 (Dist. Ct. App. 1959); Western Auto Supply Co. v. Campbell, 373 S.W.2d 785 (Tex. Civ. App. 1963); Sadler v. Lynch, 192 Va. 344, 64 S.E.2d 664 (1951).

[4] M. G. A. Theaters, Inc. v. Montgomery, 83 Ariz. 339, 321 P.2d 1009 (1958), 19 LA. L. REV. 890 (1959); Edwards v. Hollywood Canteen, 27 Cal. 2d. 802, 167 P.2d 729 (1946); McFadden v. Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943); Naegele v. Dallen, 158 Neb. 373, 63 N.W.2d 165 (1954).

[5] *E.g.*, Chicago, T.H. & S.E.R.R. v. Fisher, 61 Ind. App. 10, 110 N.E. 240 (1915); Schubert v. Hotel Astor, 168 Misc. 431, 5 N.Y.S.2d 203 (Trial T.) *aff'd.*, 255 App. Div. 1012, 8 N.Y.S.2d 567 (1938); Gross v. Wiley, 231 Ore. 421, 373 P.2d 421 (1962).

[6] *E.g.*, Sherman v. Arno, 94 Ariz. 284, 383 P.2d 741 (1963); Winn v. Holmes, 143 Cal. App. 2d 501, 299 P.2d 994 (Dist. Ct. App. 1956); Blakeley v. White Star Line, 154 Mich. 635, 118 N.W. 482 (1908); Weaver v. Wiman, 278 S.W.2d 947 (Tex. Civ. App. 1955).

[7] Grasso v. Blue Bell Waffle Shop, Inc., 164 A.2d 475, (D. C. Munic. Ct. App. 1960); Adamson v. Hand, 93 Ga. App. 5, 90 S.E.2d 669 (1955); Nevin v. Carlasco, 133 Mont. 512, 365 P.2d 637 (1961); Sinn v. Farmers' Deposit Savings Bank, 300 Pa. 85, 150 Atl. 163 (1930). See generally 2 HARPER & JAMES, TORTS § 27.13, at 1489-98 (1956).

[8] Reilly v. 180 Club, Inc., 14 N.J. Super. 420, 82 A.2d 210 (App. T. 1951); Fisher v. Robbins, 78 Wyo. 50, 319 P.2d 116 (1957). See generally Annot., 70 A.L.R.2d 628, 651-58 (1960).

[9] Mastad v. Swedish Brethern, 83 Minn. 40, 85 N.W. 913 (1901); Weihert v. Piccione, 273 Wis. 448, 78 N.W. 2d 757 (1956).

[10] Brink v. James Arthur Ashe Post, V.F.W., 75 Pa. D. & C. 496 (C.P. 1949).

[11] Frances v. Insurance Company of North America, 186 So. 2d 416 (La. Ct. App. 1966); Gross v. Wiley, 231 Ore. 421, 373 P.2d 421 (1962); Ford v. Brandan, 51 Tenn. App. 338, 367 S.W.2d 481 (1962).

sion from the establishment,[12] or, if violence should erupt, to require that he be expelled[13] or the police called.[14]

In cases where alcohol was not a factor, the courts have nevertheless defined "reasonable" care as requiring that the occupier control and police his clientele and eject or order to desist those who are boisterous or unruly.[15]

The court in the instant case, following the *Restatement*[16] and the guidelines of prior cases,[17] found that the facts of the case presented a situation in which a warning would not place plaintiff in a position such that she could then avoid the harm herself and still exercise her right to reach her car.[18] Under the circumstances, the court felt that reasonable care would require that the defendant accompany plaintiff to her vehicle, and held that his failure to do so after notice of the danger was a breach of duty.[19]

In the instant case, assumption of the risk was not asserted as a defense and not considered by the court. However, the law is well settled that one may not be coerced to assume any risk where circumstances require that he pursue a perilous course of action in order to protect a vested right or privilege.[20] Even though the plaintiff was

[12] Schwartz v. Cohn, 240 Misc. 142, 119 N.Y.S.2d 124 (Trial T. 1953); Mastad v. Swedish Brethren, 83 Minn. 40, 85 N.W. 913 (1901); Puffer v. Hub Cigar Store, Inc., 140 W. Va. 327, 84 S.E.2d 145 (1954).

[13] Priewe v. Bortz, 249 Minn. 488, 83 N.W.2d 116 (1957); Mastad v. Swedish Brethern, *supra* note 12.

[14] Priewe v. Bortz, *supra* note 13; Schwartz v. Cohen, 240 Misc. 142, 119 N.Y.S.2d 124 (Trial T. 1953).

[15] Edwards v. Hollywood Canteen, 27 Cal. 2d 802, 167 P.2d 729 (1946); Thomas v. Studio Amusements, Inc., 50 Cal. App. 2d 538, 123 P.2d 552 (Dist. Ct. App. 1942); Moone v. Smith, 6 Ga. App. 684, 65 S.E. 712 (1909).

[16] RESTATEMENT (SECOND), TORTS § 344 (1965):

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such purpose, for physical harm caused by the . . . intentionally harmful acts of third persons . . . and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

[17] Winn v. Holmes, 143 Cal. App. 2d 501, 299 P.2d 994 (Dist. Ct. App. 1956); Thomas v. Studio Amusements, Inc., 50 Cal. App. 2d 538, 123 P.2d 552 (Dist. Ct. App. 1942); Edwards v. Hollywood Canteen, 27 Cal. 2d 802, 167 P.2d 729 (1946).

[18] 416 P.2d at 799, 52 Cal. Rptr. at 567.

[19] 416 P.2d at 799, 52 Cal. Rptr. at 567.

[20] PROSSER, TORTS 466 (3d ed. 1964):

> The plaintiff is not required to surrender a valuable legal right, such as the use of his own property as he sees fit, merely because the defendant's conduct has threatened him with harm if the right is exercised.

See, *e.g.*, Brandt v. Thompson, 252 S.W.2d 339 (Mo. 1952), where the mere fact that plaintiff used a delapidated stairway, where no other exit was available, was not assumption of the risk as a matter of law; Dollard v. Roberts, 130 N.Y. 269, 29 N.E. 104 (1891), where plaintiff's only means of entrance was through a hallway with a loosely plastered ceiling, it was not negligence for him to walk through it when he knew of the defect; Clayards v. Dethick, 12 Q.B. 439, 116 Eng. Rep. 932 (1848), held that plaintiff had a legal right without respect to consent of defendant

aware of the man's presence in the parking lot, recalled the incident inside and knew of the establishment's reputation for violence, the walk across the lot was her sole means of access to her car. In the instant situation, the assumption of risk defense probably would have failed since it lacked the element of voluntary election in choosing the apparently dangerous route to her car.

While stating repeatedly that the occupier is not an insurer,[21] Arizona has always held him to the standard of using reasonable care to protect his patron when he has notice of the danger.[22] Arizona has not had occasion to consider a case involving the instant situation. However, in *M. G. A. Theaters, Inc. v. Montgomery*,[23] an invitee was run over by another patron's automobile while in defendant's drive-in theater. The court held that the duty owed to the invitee was to protect him from reasonably forseeable dangers caused by the third party, and reasoned that the failure to use warning signs or provide aisle attendants was a breach of defendant's duty.[24] Although that case was concerned with a negligent rather than an intentional tort of a third person toward an invitee, the court did recognize that an *affirmative duty* may be required of the occupier to protect his customers. This recognition of the need for affirmative action when conditions merit such action, coupled with the Arizona court's consistent avowal that it will look to the *Restatement* in situations devoid of precedent or statute,[25] suggests that Arizona would hold in accord with the instant case if ever confronted with a similar fact situation.

In applying the *Restatement* requirements of using reasonable care under the circumstances to protect the patron from known danger where a warning is likely to be insufficient, prior California decisions involved the use of ejection or exclusion of the offender, or of summoning the police. In the instant case, where the defendant failed to afford plaintiff these protections, the California court ruled that it was for the jury to decide whether in light of all the evidence the defendant had breached its duty of reasonable care in failing to provide plaintiff safe escort off the premises instead of a mere warning of the danger in the parking lot.

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to get a horse from stable to street by means of the only exit. See generally RESTATEMENT (SECOND), TORTS § 496E (1965); Keeton, *Assumption of the Risk and the Landowner*, 22 LA. L. REV. 108, 118 (1961).

[21] Safeway Stores, Inc. v. Cone, 2 Ariz. App. 151, 406 P.2d 869 (1965); Sherman v. Arno, 94 Ariz. 284, 383 P.2d 741 (1963).

[22] Busy Bee Buffet v. Farrell, 82 Ariz. 192, 310 P.2d 817 (1957); Lyric Amusement Co. v. Jeffries, 58 Ariz. 381, 120 P.2d 417 (1941); Tucson Fox Theaters Corp. v. Lindsay, 47 Ariz. 388, 56 P.2d 183 (1936); *cf.* O'Rielly Motor Co. v. Rich, 3 Ariz. App. 21, 25, 411 P.2d 194, 199 (1966).

[23] 83 Ariz. 339, 321 P.2d 1009 (1958), 19 LA. L. REV. 890 (1958).

[24] 83 Ariz. at 343, 321 P.2d at 1011 (1958).

[25] MacNeil v. Perkins, 84 Ariz. 74, 324 P.2d 211 (1958); Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945); Waddell v. White, 56 Ariz. 525, 109 P.2d 843 (1941).

The language of the opinion indicates that the court adhered to the standard of reasonable care under the circumstances to protect the patron from a known danger; the application has simply been broadened. California has noticed that when factors such as the nature and reputation of the business, the nature of the danger and the parties involved are all considered, the quantum of care that will meet the "reasonableness" standard may be substantially increased.[26]

Peter J. Rathwell

[26] 416 P.2d at 780, 52 Cal. Rptr. at 568, where the court sustains admissibility of evidence of prior disturbances on the premises.