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CIVIL PROCEDURE

GARNISHMENT AND THE VALIDITY OF QUASI IN REM JURISDICTION

Jurisdiction has historically been divided into three classes: in personam, in rem, and quasi in rem. Under traditional analysis, in personam jurisdiction, which is based upon the physical presence of the defendant within the forum state, allows adjudication of personal disputes between the parties to a suit.[1] In rem jurisdiction, on the other hand, has traditionally been rooted in the state's right to determine interests in property within its borders and permits the settlement of claims with regard to all claimants, both within and outside the forum state.[2] Quasi in rem jurisdiction, as the name implies, is an amalgam of the other two. It is a vehicle through which a defendant's ownership of property within the forum state may be utilized to expose him to liability up to the value of that property on personal claims unrelated to the property.[3] In light of sweeping changes in the field of personal jurisdiction over the past three decades,[4] *First National Bank & Trust Co. v. Pomona Machinery Co.*[5] presented to the Supreme Court of Arizona the opportunity of resolving interesting questions concerning the continuing validity of quasi in rem jurisdiction.

In *Pomona* the plaintiff, a bank incorporated and doing business in California, brought suit in an Arizona state court on a promis-

1. *See generally* A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 76, 88-99 (1962); Horowitz, *Bases of Jurisdiction of California Courts to Render Judgments Against Foreign Corporations and Non-Resident Individuals,* 31 S. CAL. L. REV. 339, 367 (1958).
2. *See generally* A. EHRENZWEIG, *supra* note 1, at 81; Horowitz, *supra* note 1, at 367-68.
3. *See generally* A. EHRENZWEIG, *supra* note 1, at 76, 99-103; Horowitz, *supra* note 1, at 367-68.
4. *See generally* A. EHRENZWEIG, *supra* note 1, at 71-120; *Developments in the Law—State Court Jurisdiction,* 73 HARV. L. REV. 909 (1960).
5. 107 Ariz. 286, 486 P.2d 184 (1971).

sory note executed by Pomona Machinery Co., a California sole proprietorship. The note was guaranteed in writing by the proprietor and his wife, both California residents, and was payable at one of the plaintiff's California offices.[6] The defendants had accounts in an Arizona bank totaling less than their alleged indebtedness on the note. The plaintiff obtained a writ of garnishment against the Arizona bank and, when the bank returned the writ admitting its indebtedness to the defendants, personally served a copy of the writ and a summons on the defendants in California pursuant to rule 4(e) of the *Arizona Rules of Civil Procedure.*[7] The defendants moved to quash the writ and dismiss the complaint for lack of subject-matter and personal jurisdiction, insufficiency of process and failure to state a claim upon which relief could be granted. The trial court sustained the motion and the plaintiff appealed.[8]

Reversing the trial court decision, the supreme court held that the presence of the bank accounts in Arizona provided a sufficient basis of jurisdiction to allow adjudicaton of the plantiff's claim on the unrelated matter.[9] In so holding, the court followed well-established precedent, the continuing viability of which may be waning in

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6. *Id.* at 288, 486 P.2d at 186; Brief for Appellee at 46, First Nat'l Bank & Trust Co. v. Pomona Mach. Co., 107 Ariz. 286, 486 P.2d 184 (1971).

7. 107 Ariz. at 288, 486 P.2d at 186.

8. On appeal the defendants questioned the constitutionality of prejudgment garnishment of bank accounts in the absence of a prior hearing on the probable validity of the claim. The United States Supreme Court has held that the garnishment of wages, absent such a hearing, violates the due process clause of the fourteenth amendment. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). The Arizona court upheld the garnishment, however, following its dictum in Termplan, Inc. v. Superior Court, 105 Ariz. 270, 272, 463 P.2d 68, 70 (1969), as predicted in "Garnishment," 12 ARIZ. L. REV. 89, 202 (1970). This holding is in serious question not only by the arguments in this commentary, but also as a result of recent decisions. See notes 9, 12 *infra.*

9. 107 Ariz. at 288-90, 486 P.2d at 186-88.

The United States District Court recently held the prejudgment garnishment of bank accounts under Arizona's statutes to be unconstitutional without notice to the defendant and a hearing as to probable validity. Western Coach Corp. v. Shreve, 344 F. Supp. 1136 (1972). *See also* note 12 *infra.* Judge Muecke based his decision in *Western Coach* on Justice Jackson's statement in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), that the essence of due process is the right to be heard, and that such a right is meaningless without proper notice. The *Western Coach* decision came 2 days after the United States Supreme Court held that repossession on an installment contract is a violation of due process when the buyer is given no opportunity to be heard. Fuentes v. Shevin, 407 U.S. 67 (1972). See note 12 *infra.* The *Fuentes* decision apparently invalidates both the Uniform Commercial Code's repossession provision and Arizona's separate replevin statutes. The UCC provision allows the contract holder to "proceed without judicial process if this can be done without breach of the peace." ARIZ. REV. STAT. ANN. § 44-3149 (1967); UNIFORM COMMERCIAL CODE § 9-503. The replevin article authorizes seizure of property by the court upon filing of an affidavit and posting of a double-value bond payable to the defendant upon failure to return the property. ARIZ. REV. STAT. ANN. §§ 12-1301 to -1304 (1956). In *Fuentes,* Justice Stewart said that such "requirements are hardly a substitute for a prior hearing, for they test no more than the applicant's own belief in his rights." 407 U.S. at 84.

light of modern and well-reasoned approaches to problems of jurisdiction being adopted by courts and recommended by scholars.[10]

This analysis will focus on the two important issues of quasi in rem jursdictions presented in *Pomona*: (1) whether the presence of accounts in an Arizona bank was a sufficient basis of jurisdiction to allow garnishment of those accounts and an adjudication of a lawsuit involving a California plaintiff, California defendants and a claim for relief that arose in California; and (2) whether the doctrine of forum non conveniens[11] should be applied in such a situation if a constitutional basis for jurisdiction exists. The current status of in rem, as opposed to quasi in rem, jurisdiction is not within the scope of this analysis.[12]

Historical Background

Garnishment, a quasi in rem proceeding, is an action technically instituted against the defendant's property but based on the plaintiff's personal claim against the defendant.[13] The procedures of attach-

10. *See* Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied*, 357 U.S. 569 (1958) (for discussion of this case, see text & notes 36-43, 107 *infra*); Cole v. Randall Park Holding Co., 201 Md. 616, 95 A.2d 273 (1953) (garnishment denied when both defendant and garnishee were nonresidents, even though garnishee corporation had accounts in Maryland banks and was owned by Maryland residents).

Scholarly discussions of more modern approaches include A. EHRENZWEIG, *supra* note 1, at 76-103; Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962); Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967); D. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 ORE. L. REV. 103 (1971); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: the "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970); Note, *Seider v. Roth: The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58 (1968); Comment, *Podolsky v. Devinney and the Garnishment of Intangibles: A Chip Off the Old Balk*, 54 VA. L. REV. 1426 (1968).

11. Forum non conveniens allows a court of competent jurisdiction to decline to exercise its jurisdiction when, as a practical matter, it would be more convenient for the parties to litigate in another court which also possesses the power to hear the case. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-08 (1947); A. EHRENZWEIG, *supra* note 1, at 121-23.

12. The United States Supreme Court has concentrated in recent years on tightening the procedural requirements used in garnishment, replevin and repossession, rather than on underlying questions of the validity of quasi in rem jurisdiction. Fuentes v. Shevin, 407 U.S. 67 (1972); see note 9 *supra*. The Court's continued emphasis on the defendant's opportunity to be heard "at a meaningful time and in a meaningful manner" before his property is seized, *id.* at 82, could nevertheless have considerable long-range effect on the entire area of both quasi in rem and in rem jurisdiction. While the Supreme Court does not appear ready to condemn such methods of commencement completely, it may in effect be restricting them to a scope roughly coextensive with in personam jurisdiction. *See* authority cited, *supra* note 10.

13. Hook v. Hoffman, 16 Ariz. 540, 557, 147 P. 722, 729 (1915); *see* A. EHRENZWEIG, *supra* note 1, at 99-103; Carrington, *supra* note 10, at 305.

ment and garnishment were originally devised in England as a means of compelling the defendant's appearance in a suit.[14] His property was seized and held by the court until he appeared. Later, courts began to allow the seized property to be used in satisfaction of the plaintiff's claim if the defendant failed to appear. The procedure eventually evolved into its principal present-day use as a means of acquiring jurisdiction over nonresidents or disappearing defendants.[15]

An approach taken by an early American court limited the availability of attachment statutes to local plaintiffs, "[i]t being generally impracticable for a country creditor to entitle himself to receive his proportion in *Britain*, . . . and as therefore, if he had no remedy on the spot, he would suffer a total loss."[16] When the privileges and immunities clause of the United States Constitution cast doubt on the validity of such an interpretation, an alternative analysis required that one party—plaintiff or defendant—be a resident of the forum state.[17] An early Arizona case stated that the garnishment procedure was intended to assure payment on contracts "made or payable in Arizona," but did not expressly limit garnishment to such situations.[18] The majority of cases since those early decisions, however, have held that the attachment of a nonresident's property or assets by a nonresident plaintiff on a foreign claim is permissible.[19]

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14. *See generally* 3 W. BLACKSTONE, COMMENTARIES *279; R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 74-97 (1952).

15. Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335, 1339-40 (E.D. Pa. 1971); Carrington, *supra* note 10, at 303-06.

16. Burk v. M'Clain, 1 Harr. & McH. 236, 238 (Md. 1766).

17. Kincaid v. Francis, Cooke 49, 3 Tenn. 36 (1812). The privileges and immunities question has been raised anew in recent years. In *McGee v. International Life Ins. Co.*, the Supreme Court said that a state could assert jurisdiction over nonresidents because it "has a manifest interest in providing effective means of redress for its residents." 355 U.S. 220, 223 (1957). This statement has led some courts to speculate that foreign garnishment made available only to residents of the forum state might be constitutionally acceptable, since the distinction is made on the basis of residence, not citizenship. Szantay v. Beech Aircraft Corp., 349 F.2d 60, 65 (4th Cir. 1965); Arrowsmith v. United Press Int'l, 320 F.2d 219, 232 (2d Cir. 1963).

18. Dowdy v. Calvi, 14 Ariz. 148, 152, 125 P. 873, 874-75 (1912). The decision dealt only with garnishment of a debt which arose in Arizona, and did not reach the question of out-of-state debts.

19. *See, e.g.*, Ruby v. United Sugar Cos., S.A., 56 Ariz. 535, 109 P.2d 845 (1941) (discussed in text accompanying note 48 *infra*); Aero Spray, Inc. v. Ace Flying Serv., Inc., 139 Colo. 249, 338 P.2d 275 (1959) (attachment of equipment in forum state in suit between nonresident corporations over out-of-state contract); Standard Oil Co. v. Superior Court, 44 Del. 538, 62 A.2d 454 (1948), *appeal dismissed*, 336 U.S. 930 (1949) (garnishment of foreign corporation's assets by nonresident plaintiff on out-of-state contract); State Bank v. Maxson, 123 Mich. 250, 82 N.W. 31 (1900) (garnishment of interest in Michigan property in suit between Kansas residents); Newland v. Reilly, 85 Mich. 151, 48 N.W. 544 (1891) (garnishment of New York resident's assets by Massachusetts resident on out-of-state contract); Lenz v. Young, 262 P.2d 886 (Okla. 1953) (garnishment of Florida resident's personal property in suit by Florida resident on Florida contract); Fairchild Engine & Airplane Corp. v. Bellanca Corp., 391 Pa. 177, 137 A.2d 248 (1958) (garnishment of Pennsylvania corporation's debt to Delaware corporation in suit by Maryland corporation).

Constitutional Bases for Jurisdiction

In the seminal case of *Pennoyer v. Neff*, the United States Supreme Court held that all jurisdiction is based upon a state's physical control over persons and property within its borders.[20] The Court allowed suits against nonresidents with constructive service of process only if the property within the forum state was attached before judgment.[21] This rationale was cited as controlling by the Arizona court in *Pomona*.[22]

The *Pennoyer* reasoning is problematical when the basis of jurisdiction is neither personal presence nor the presence of tangible property. It is no obvious matter to ascribe a location to intangibles such as debts. In *Harris v. Balk*[23] the Supreme Court held that instead of having some mythical situs, debts owed to a defendant were subject to garnishment wherever the debtor (garnishee) could be subjected to in personam jurisdiction—which at that time meant only where he was physically present.[24] In *Pennington v. Fourth National Bank* the Court declared that bank deposits were intangibles subject to the *Harris* rule, and could be garnished at the location of the bank under the state's power to determine rights in property within its borders.[25]

More recent cases dealing with problems of in personam jurisdiction have gone far beyond the *Pennoyer* limitation of physical presence of the defendant within the forum state. In *International Shoe Co. v. Washington* the Supreme Court held that the proper basis for the exercise of in personam jurisdiction is a showing of "minimum contacts" with the forum state consistent with "traditional notions of fair play and substantial justice."[26] The Court in *Inter-*

20. 95 U.S. 714 (1877).

21. The statement in *Pennoyer* that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," 95 U.S. at 722, has been called the "power myth" of jurisdiction. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, supra* note 10. Professor Ehrenzweig contends that many conceptual jurisdictional problems stem from misplaced reliance on Justice Holmes' statement in McDonald v. Mabee, 243 U.S. 90, 91 (1917), that the "foundation of jurisdiction is physical power." A. EHRENZWEIG, *supra* note 1, at 77-78.

22. 107 Ariz. at 288-89, 486 P.2d at 186-87.

23. 198 U.S. 215 (1905).

24. This rule presents a problem even under the restrictive *Pennoyer* concept of jurisdiction. The defendant whose assets are garnished can be forced to defend wherever his debtor (the garnishee) might happen to travel, giving him the unhappy choice of litigating in a far-away forum with which he had no contact whatsoever or forfeiting the debt owed to him. This is not a problem in a *Pomona* situation, however, since banks generally are not itinerant operations and can be expected to remain in the same location where the account was opened.

25. 243 U.S. 269, 271-72 (1917).

26. 326 U.S. 310, 316 (1945). A Delaware corporation whose main offices were in Missouri did continuous solicitation through salesmen in Washington but

national Shoe viewed the requirements of due process satisfied when the nature of the defendant's connections with the state—to be decided on a case-by-case basis—enabled him to partake of the "benefits and protection" of that state's legal system.[27] Physical presence within the state is of course a sufficient contact to fall within that standard, but the exercise of jurisdiction is no longer circumscribed by the "power" rationale which lies at the heart of *Pennoyer*. The extent to which *International Shoe* expanded the range of in personam jurisdiction was further delineated in *McGee v. International Life Insurance Co.*[28] In *McGee* solicitation from out of state and receipt by mail of payments on a single contract were held to be sufficient contacts when the suit was based on that contract.

Both *International Shoe* and *McGee* were cases in which the claim for relief arose within the forum state. The situation in *Pomona*, however, in which none of the parties resided in the forum state and the claim arose outside that state, more closely approximates that in *Perkins v. Benguet Consolidated Mining Co.*[29] There, the foreign defendant's continuing and substantial business activity within the forum state was held sufficient to allow suit on a claim arising elsewhere.[30]

Arizona courts have liberally applied these decisions to in personam suits. In *Phillips v. Anchor Hocking Glass Co.*, a products liability case, jurisdiction was exercised when the only contacts appearing in the record were the presence in Arizona at the time of the

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maintained no offices there. On the basis of these contacts alone, the Supreme Court upheld Washington's right to assert personal jurisdiction over the defendant corporation.

27. *Id.* at 320.

28. 355 U.S. 720 (1955).

29. 342 U.S. 437 (1952). Benguet was a Philippine mining concern which could not be sued at its home base during World War II because of the Japanese occupation. Its president was conducting the company's business from his home in Ohio during the occupation.

30. Lower court interpretations of *Perkins* have varied. It has been read as extending *International Shoe* to allow any state with which the defendant has "minimum contacts" to assume jurisdiction, regardless of where the claim arose. Owen v. Illinois Baking Corp., 235 F. Supp. 257 (W.D. Mich. 1964). Most courts have given it a more restrictive interpretation, however, requiring a higher level of contacts for suits on an out-of-state claim. *See, e.g.*, LeVecke v. Griesedieck W. Brewery Co., 233 F.2d 772 (9th Cir. 1956) (jurisdiction denied although defendant shipped large quantities of beer into the forum state; Strauss v. Delta Air Lines, Inc., 207 F. Supp. 120, 124 (E.D. Pa. 1962) (presence of some employees attached to military offices in Pennsylvania, extensive advertising in Pennsylvania publications, purchase of $5 million in component parts from Pennsylvania manufacturers and maintaining bank accounts up to $3.5 million in Pennsylvania banks "do not constitute doing business here such as to make [defendant] amenable to service of process for a cause of action *wholly unrelated to its activities within the Commonwealth*"); Fannin v. Chesapeake & O. Ry., 204 F. Supp. 154 (W.D. Pa. 1962) (solicitation of a large amount of business through nine fulltime employees in the forum state held insufficient when the defendant had no tracks running through the state).

injury of the allegedly-defective item produced by the defendant, and the subsequent regular circulation of defendant's products within the state.[31] Convenience of the plaintiff and the comparative size and geographical extent of the parties' activities were held to be significant factors in evaluating the sufficiency of the defendant's contacts with Arizona.[32]

From this line of cases has emerged the recognition that, in an increasingly complex and mobile society, the physical presence of the defendant is no longer an adequate basis for the exercise of personal jurisdiction. The courts have placed the focus on fairness to the parties, giving "due process" a common-sense rather than a technical interpretation.[33]

The effect of the expanding scope of in personam jurisdiction on the exercise of quasi in rem jurisdiction is uncertain. While in personam standards have changed, those characterizing in rem jurisdictions have not—and the hybrid, quasi in rem, has been left uneasily in the middle. Most courts have not addressed themselves to this question. There is some judicial opinion, however, and a sizeable body of scholarly literature, taking the position that the expansion of in personam jurisdiction indicates that quasi in rem actions are to be frowned upon, since personal jurisdiction is now available wherever the defendant's contacts make the suit fair.[34]

Supreme Court decisions have been of little help in judging the impact of the *International Shoe* doctrine on quasi in rem jurisdiction. In *Hanson v. Denckla* the Court held that suits to determine rights in property can be brought only where the property—in that case a trust fund—is located.[35] One week later, however, the court denied certiorari in *Atkinson v. Superior Court*, a California case which held that interests in out-of-state trusts may be adjudicated when the forum

31. 100 Ariz. 251, 253, 413 P.2d 732, 733 (1966).

32. *Id.* at 260, 413 P.2d at 738. The decision is discussed at greater length in 8 ARIZ. L. REV. 356 (1967). *See also* "Products Liability," 11 ARIZ. L. REV. 61, 173 (1969).

33. *See* A. EHRENZWEIG, *supra* note 1, at 78; Carrington & Martin, *supra* note 10, at 230; D. Currie, *supra* note 10, at 534.

34. Minichiello v. Rosenberg, 410 F.2d 106, 120, 122 (2d Cir.) (Anderson, J., dissenting), *cert. denied*, 396 U.S. 844 (1969); Simpson v. Loehmann, 21 N.Y.2d 305, 320, 234 N.E.2d 669, 677-78, 287 N.Y.S.2d 633, 644-45 (1965) (Burke, J., dissenting); Carrington, *supra* note 10, at 306; Comment, *Podolsky v. Devinney and the Garnishment of Intangibles: A Chip Off the Old Balk*, 54 VA. L. REV. 1426, 1442 (1968).

35. 357 U.S. 235 (1958). The dispute involved the conflicting claims by Delaware and Florida of jurisdiction to adjudicate interests in a trust fund created in Delaware by a Pennsylvania resident who later moved to Florida where she died. Most of the claimants to the trust resided in Florida. The Supreme Court held that presence of the settlor did not give Florida jurisdiction when the trust remained in Delaware, and that remittance of income to Florida by the trustee was not sufficient contact to allow that state to exercise in personam jurisdiction over him.

state possesses in personam jurisdiction over all claimants.[36] Although there are factual grounds for distinguishing the cases,[37] the two decisions are basically inconsistent. *Hanson* held that jurisdiction to decide interests in a trust fund requires jurisdiction over the fund itself, and "[t]he fact that the owner is or was domiciled within the forum State is not a sufficient affiliation with the property upon which to base jurisdiction *in rem*."[38] Furthermore, to be subject to an in personam judgment the trustee must have performed some act—such as the solicitation of the policy renewal in *McGee*—"by which [he] purposefully avails [him]self of the privilege of conducting activities within the forum State."[39] *Atkinson*, in contrast, held that "[t]he relevant contacts with this state are significant . . . in deciding whether due process permits exercising . . . quasi in rem jurisdiction to determine [the trustee's] and plaintiffs' interests in the intangibles in question."[40]

The confusing situation presented by these two cases has left courts and commentators in somewhat of a quandary as to which represents the proper constitutional interpretation. Despite its language, which seems to hearken back to "physical power" theories, *Hanson* has been viewed as undercutting *Harris* insofar as it holds that debts and similar intangibles may only be attached at the place of their origin.[41] *Atkinson* has been praised as a step toward the destruction of the in personam-in rem-quasi in rem trichotomy.[42] Ulterior motives have been ascribed to the Supreme Court for the *Hanson*

36. 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied*, 357 U.S. 569 (1958). The Supreme Court has stated that "the denial of a petition for certiorari should not be treated as a definitive determination in this Court, subject to all the consequences of such an interpretation." Flynn v. United States, 348 U.S. 235, 236 (1955) (opinion of Frankfurter, J., on application for withholding of notification of order denying certiorari). *See also* United States v. Shubert, 349 U.S. 222 (1955); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950). Nevertheless, the striking similarity in facts between *Atkinson* and *Hanson*, the seemingly irreconcilable results of the cases, and the brief timespan between the *Hanson* decision and the denial of certiorari in *Atkinson* have made speculation inevitable, especially in view of the confusion engendered by Chief Justice Warren's opinion in *Hanson*. Justice Traynor's *Atkinson* opinion is the more clearly reasoned of the two, and appears more in line with modern jurisdictional concepts.

37. In *Aktinson* all parties except the trustee resided in California at the time the trust was created, and the funds were still within the forum state when the suit was filed. The *Hanson* Court, however, did not base its decision on the location of the funds, but rather on the absence of any action by the trustee "purposefully avail[ing] itself of the privilege of conducting activities within the forum state." 357 U.S. at 253.

38. 357 U.S. at 249.

39. *Id.* at 253.

40. 49 Cal. 2d at 346, 316 P.2d at 965.

41. Simpson v. Loehmann, 21 N.Y.2d 305, 320, 234 N.E.2d 669, 678, 287 N.Y.S. 2d 633, 645 (1967) (Burke, J., dissenting).

42. A. EHRENZWEIG & D. LOUISELL, JURISDICTION IN A NUTSHELL 48 (2d ed. 1968).

decision, which permitted lesser claimants to recover from a multi-million dollar estate that would otherwise have gone to one already-wealthy beneficiary.[43]

Faced with this confusion, Arizona courts have declined to follow *Hanson* strictly. The *Phillips* decision viewed *Hanson* as a symbolic statement of the Supreme Court's concern that unlimited long-arm jurisdiction would destroy federalism,[44] but Arizona courts have not made inquiry into the status of quasi in rem jurisdiction since the *Hanson* and *Atkinson* decisions.

To muddy the waters further, the Supreme Court has indicated that the in personam-in rem classification is too vague to be rigidly adhered to in some cases, such as the settling of trusts administered under state statute.[45] Rather, the Court has advocated deciding jurisdictional questions in such cases on the strength of the forum state's interest in regulating its creations.[46]

Arizona Law

Arizona's garnishment statute is not expressly restricted to resident plaintiffs or to claims arising in the state.[47] In *Ruby v. United Sugar Cos., S.A.*[48] the Supreme Court of Arizona upheld garnishment of a bank account in Arizona in a suit on a contract, executed in California for performance in Mexico, between California and Mexican corporations. The suit was brought by an assignee of the California corporation, however, and the decision does not indicate whether he was an Arizona resident. Since *Ruby* was decided before *International Shoe*, its impact could be limited by the effect of the modern jurisdictional analyses. No other Arizona cases have discussed jurisdiction—either in rem or in personam—in suits between nonresidents.

Case Law in Other Jurisdictions

The validity of foreign attachment varies somewhat from state to state because of differences in local garnishment statutes. The

43. It has been suggested that one factor in the *Hanson* decision was "the efforts of Florida to batten upon the assets of 'sick Yankees'." Cleary, *The Length of the Long Arm*, 9 J. PUB. L. 293, 296 (1960).

44. 100 Ariz. at 256, 413 P.2d at 735.

45. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In an action by a bank to consolidate several small trusts for more convenient administration, the Court held that jurisdiction could be exercised even though not all the beneficiaries of the trust were subject to that state's jurisdiction.

46. *Id.* at 312-13.

47. ARIZ. REV. STAT. ANN. § 12-1571(A)(2) (1956).

48. 56 Ariz. 535, 109 P.2d 845 (1941).

majority of cases have held that nonresidents may garnish debts owed to nonresidents on foreign claims.[49] The rationale for such decisions has been that debts are transitory and may be sued upon anywhere the defendant may be reached by process, garnishment being viewed as an alternative to personal service of process and therefore ancillary to the main action.[50] Such an approach can lead to anomalous results. In New York, for example, a resident plaintiff's attempt to sue a nonresident defendant on an out-of-state accident was dismissed for lack of sufficient contact to satisfy the state's long-arm statute.[51] The same court, however, allowed the suit when it was commenced by attaching the defendant's property within the forum state.[52] Thus, the seizure of a party's property provided "due process" where none had previously existed.

The controversial New York rule announced in *Seider v. Roth* allows institution of a suit against a nonresident defendant for an out-of-state claim by garnishment of the defendant's insurance policy, containing the insurer's obligation to defend and indemnify.[53] The only requirement is that the insurer have sufficient contacts with New York to meet the constitutional minimum contacts criterion.[54] The rationale of *Seider* and its progeny, most notably *Simpson v. Loehmann*,[55] was that the state had a legitimate interest in providing a forum for injured plaintiffs and that there was no due process problem since the insurer, who would control virtually all matters of defense, was already subject to in personam jurisdiction.[56] This reasoning would militate against quasi in rem jurisdiction in cases involving nonresidents and garnishment of simple debts, however, since the local garnishees in such cases do not control the course of litigation.

The federal courts have been less than enthusiastic over the rule

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49. *See* cases cited, *supra* note 19.

50. *See, e.g.*, Porter v. Duke, 34 Ariz. 217, 270 P. 625 (1928); Payton v. Swanson, 175 So. 2d 48 (Fla. App. 1965); Sheldon v. Blanvelt, 29 S.C. 453, 7 S.E. 593 (1888).

51. Wilcox v. Pennsylvania R.R., 269 F. Supp. 326, 328 (S.D.N.Y. 1967). Although the decision was based on New York's single-act long-arm statute, which is more restrictive than the full scope of constitutionally-permitted jurisdiction, the court indicated that the defendant's contacts failed to meet minimum due process requirements for in personam jurisdiction.

52. Wilcox v. Richmond F. & P. R.R., 270 F. Supp. 454, 458 (S.D.N.Y. 1967): "Despite the drastic expansion of the permissible limits of in personam jurisdiction . . . there has been little in the recent developments suggesting that the long established practice of basing the exercise of jurisdiction upon the presence of property within the custody of the court has become constitutionally impermissible."

53. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

54. *Id.* at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102.

55. 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). There were four opinions written in *Simpson*, none of which won the support of a majority of the court of appeals. The opinions of Judges Fuld and Burke reflected approaches discussed herein.

56. *Id.* at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.

emanating from *Seider* and *Simpson.* In *Podolsky v. Devinney* it was ruled that *Seider*-type suits failed to meet "traditional notions of fair play and substantial justice."[57] The court rejected basing garnishment on the *Harris v. Balk* rule, noting that since the *International Shoe* decision, "the situs of the *res* is not only New York but every state where the particular insurance company involved is doing business."[58] The use of a more modern analysis also failed to sustain the exercise of jurisdiction, as the court found there were insufficient contacts between the forum state and the named defendants.[59] The United States Court of Appeals for the Second Circuit demonstrated its discomfort with *Seider* by limiting the availability of garnishment of nonresidents' insurance policies to plaintiffs residing in the forum state.[60] While this limitation seems to be based on the tenuousness of the insurer's "debts" prior to judgment,[61] it may also indicate a desire to approach such cases on the basis of contacts between parties and forum rather than by a mechanical application of the *Harris* "situs of the debtor" rule.

Alternative Approaches to Quasi in Rem Jurisdiction

The Supreme Court has never clearly delineated the scope of quasi in rem jurisdiction and the proper tests for invoking it in the wake of *International Shoe.* Examination of the different solutions which have been offered to this problem demonstrates a wide range of possible approaches to quasi in rem jurisdiction in today's judicial system.

The "mechanical" or "ritualistic" approach adopted in *Pomona* simply applies the rule of *Harris v. Balk* in permitting the exercise of quasi in rem jurisdiction wherever the defendant's property or debtor (the garnishee) can be found. This rule is followed in most state courts and has been adopted by the *Restatement (Second) of Conflict of Laws.*[62] It has the advantage of uniformity and predictability

57. 281 F. Supp. 488, 496 (S.D.N.Y. 1968).
58. *Id.* at 493 n.9.
59. *Id.* at 496-97.
60. Farrell v. Piedmont Aviation, Inc., 411 F.2d 812 (2d Cir.), *cert. denied,* 396 U.S. 840 (1969).
61. *Id.* at 816. A New York state court has also declined to exercise jurisdiction in a *Seider* situation on the grounds of forum non conveniens. Vaage v. Lewis, 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (1968).
62. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 68 (1971):

> A state has power to exercise judicial jurisdiction to apply to the satisfaction of a claim an obligation owed to the person against whom the claim is asserted if the obligor is subject to the judicial jurisdiction of the state, even though the state lacks jurisdiction over the person against whom the claim is asserted.

The *Restatement (Second)* sections on jurisdiction clearly highlight the inconsistency between the modern view of jurisdiction and the older, more rigid view still

shared by most rigid rules, but may subject a defendant to judgment in a distant forum in which he could never reasonably have been expected to defend.[63] This approach raises serious due process problems, since the theory behind the *International Shoe* line of cases was to make available for litigation only those forums where trial would not be unfair to the defendant.[64] Defenders of this approach argue that the defendant, by acquiring assets "which by [their] nature can be normally reached wherever the obligor can be found," bears the risk of being sued wherever that obligor chances to travel.[65] The argument is circular, however, since intangibles "can be reached wherever the obligor can be found" only if one accepts the *Harris* concept of their "nature."

The language of the *International Shoe* decision[66] has led some to advocate a simple test of "fairness," determined by examining each case as it comes before the court.[67] This approach seems to form the basis of Judge Burke's dissent in *Simpson v. Loehmann*, the New York case which reaffirmed the *Seider* doctrine: "[W]hile justice or convenience may on occasion require . . . an assignment of situs to intangibles, considerations of the purposes for which such an assignment of situs is necessary and fairness to those claiming an interest in the subject property ought to govern the selection process."[68] Burke felt that in cases like *Seider* and *Simpson* there was an insufficient state interest in either the out-of-state accident or the defendant's relationship with his insurer to make it fair to subject the defendant and the insurer to jurisdiction.[69] While this case-by-case analysis would usually have the advantage of reaching a just result, in the absence of established criteria for decision it is of little predictive value to a plaintiff in choosing his forum and is subject to the whims of individual judges.

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prevalent in the area of garnishment. In contrast to the strict terms of section 68, the rule for in rem jurisdiction over intangibles is conditioned on "the relationship of the state to the thing and to the parties involved mak[ing] the exercise of such jurisdiction reasonable. *Id.* at § 65.

63. Minichiello v. Rosenberg, 410 F.2d 106, 115 (2d Cir.) (Anderson, J., dissenting), *cert. denied*, 396 U.S. 844 (1969); Carrington & Martin, *supra* note 10, at 227; D. Currie, *supra* note 10, at 534; *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 958 (1960).

64. *See* Carrington, *supra* note 10, at 306-07.

65. Leflar, *The Converging Limits of State Jurisdictional Power*, 9 J. PUB. L. 282, 286 (1960).

66. 326 U.S. at 319: "Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."

67. Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970).

68. 21 N.Y.2d 305, 321, 234 N.E.2d 669, 678, 287 N.Y.S.2d 633, 646 (1967) (Burke, J., dissenting).

69. *Id.* at 319-21, 234 N.E.2d at 677-79, 287 N.Y.S.2d at 644-46.

The need to overcome the lack of predictability which hampers the "fairness" approach has led scholars to attempt to distill the relevant factors for inquiry in determining whether a court should exercise jurisdiction in a particular case. By limiting the scope of inquiry and establishing standards for courts to invoke, these "interest analyses"[70] seek a workable compromise between the inflexibility of rules like that announced in *Harris v. Balk* and the unpredictability of the wide-open fairness test. The interest analysis approach weighs the relative merits of alternative forums, abolishing the in personam-in rem-quasi in rem framework for "one integrated test [which] would sustain or deny jurisdiction wholly on the weight of the interests involved."[71]

An interesting and useful approach has been suggested by David Currie.[72] His examination of cases involving defendants' actions outside the forum state—such as *Pomona*—contemplates an analysis of five different considerations.

First, the defendant must reasonably have been able to expect to be held answerable for his actions in the forum state.[73] This point is closely tied to the *Hanson* requirement that the defendant "purposefully avails itself of the privilege of conducting activities" in the forum state[74] and the older *International Shoe* index of the defendant's acceptance of "the benefits and protection of the laws of the forum."[75] Purely fortuitous contact with the forum, such as the classic hypothetical-come-true of service of process on a defendant in an airliner as it passes over the state,[76] or exposure under the *Harris* rationale to judgment wherever the defendant's debtor travels, is clearly inconsistent with this first consideration.

Second, Currie emphasizes the relative "aggressiveness" of the parties, urging an inquiry as to who initiated the dealings that ultimately gave rise to the suit. If it were the defendant, there exists a more compelling reason for summoning him to the plaintiff's forum. Parallel inquiries include determining which parties entered the transaction for monetary gain, whether the defendant sent agents into the plaintiff's jurisdiction, and whether the defendant was buyer or seller

70. The use of the term "interest analysis" for systems of jurisdictional determination should not be confused with the application of the same label in questions involving choice of law. *See* R. CRAMTON & D. CURRIE, CONFLICT OF LAWS 208-334 (1968).
71. *Developments in the Law—State Court Jurisdiction, supra* note 63, at 956.
72. D. Currie, *supra* note 10. *See also* R. CRAMTON & D. CURRIE, *supra* note 70, at 484-86, for a concise listing of the relevant factors.
73. D. Currie, *supra* note 10, at 550.
74. 357 U.S. at 253.
75. 326 U.S. at 320.
76. Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959).

in the transaction.[77] The sum of the aggressiveness investigation serves "to translate a subjective sense of unfairness into concrete distinguishing factors."[78]

The third consideration of Currie's interest analysis focuses on both the legal and economic status of the parties.[79] In suits between a corporate giant and an individual of moderate means—particularly when the claim is small—the individual's legal recourse may be effectively nonexistent if he is forced to travel, for example, from his home in Arizona to the corporate domicile in Delaware or headquarters in New York. The geographic extent of the litigants' activities, used by the Supreme Court of Arizona as a justification for the exercise of long-arm jurisdiction in *Phillips v. Anchor Hocking Glass Co.*, has a bearing on the overall fairness of requiring a party to participate in an action in a foreign forum where the party has had no direct dealings.[80]

The priority which the forum state assigns to those public policies at issue in the suit is the fourth consideration under Currie's approach. A policy of maintaining safe highways to protect its citizens, for example, would justify a state in exercising jurisdiction over a nonresident defendant in an in-state collision case, even though choice-of-law principles might require the application of another state's law to the controversy.[81] No similar state interest in protecting its citizens is present in a suit on a contract made in the forum state between the same two parties, however.[82] In the latter instance,

77. D. Currie, *supra* note 10, at 574-76.

78. *Id.* at 575. A determination of the relative aggressiveness of the parties was a major contributing factor in a Utah case in which the court refused to enforce an Illinois judgment against a Utah resident on the ground that the Illinois plaintiff had taken the initiative in a series of transactions which ultimately gave rise to the controversy. Since the plaintiff had commenced the negotiations through a letter to the defendant and the defendant had completed the contract through a letter mailed from Utah, the court reasoned that the transaction had been completed in Utah, and that Illinois' application of its long-arm statute was therefore invalid. Conn v. Whitmore, 9 Utah 2d 250, 254-55, 342 P.2d 871, 874 (1959). While such an ascription of situs is as clearly fictional as it is in the case of a debt, the aggressiveness analysis underlies the situs language and seems useful in cases of interstate transactions carried on through long-distance negotiations.

79. D. Currie, *supra* note 10, at 577.

80. 100 Ariz. at 260, 413 P.2d at 738. *See also* von Mehren & Trautman, *supra* note 10, at 1167-69.

It has been urged that the distinction between corporations and natural persons found in some long-arm statutes should be eliminated on the theory that the expectations of and injuries to a corporation in any given transaction are no different than those experienced by natural persons. D. Currie, *supra* note 10, at 575. *But see* Ehrenzweig, *Pennoyer is Dead—Long Live Pennoyer*, 30 ROCKY MT. L. REV. 285, 292 (1958); Carrington, *supra* note 10, at 307.

81. D. Currie, *supra* note 10, at 543-44; *cf.* Carrington & Martin, *supra* note 10, at 231-32.

82. *See* D. Currie, *supra* note 10, at 543-44, 572-74. A contract to be performed in the forum state, or involving its residents, could involve the state's interest in maintaining a stable business atmosphere and reputation. Exercising jurisdiction, how-

therefore, jurisdiction would be denied, even though the litigants' connections with the forum state would be identical in both cases. The basic criterion under Currie's analysis is the existence of an identifiable state interest in opening its courts to suits between nonresidents, with the requisite quantum of contacts decreasing as the state interest involved becomes more substantial.[83]

Finally, considerations of trial convenience—the availability, for example, of evidence and witnesses' amenability to compulsory process—bulk large in ensuring that there is a complete and fair litigation of the issues.[84] The site of the accident or the execution of the contract sued upon would normally be viewed as appropriate forums for the adjudication of a controversy simply because they are the locations where trial could be held with the least inconvenience to witnesses. Where both plaintiff and defendant are residents of the same state, on the other hand, the convenience factor for that state would be strong even on a claim arising elsewhere.

The "aggressiveness" and "nature of the claim" factors set Currie's analysis apart from most of the other alternatives proposed by scholars and judges. By including these factors, his approach can make subtler distinctions in its analysis of "fundamental fairness" and the level of contacts needed for jurisdiction than do the "check-list" analyses of other scholars and courts.[85] These strengths create cor-

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ever, solely because the parties were in the state at the time the contract was made (traveling together or attending a convention, for example) or when performance fell due, arguably protects no such significant state interest.

83. *Id.*

84. D. Currie, *supra* note 10, at 557. *See also* International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

85. Another "interest analysis" formula was set forth in *Developments in the Law —State Court Jurisdiction, supra* note 63, at 965. This approach utilized a more exact list of factors than did Currie: (a) whether the defendant owns *tangible* property in the forum state; (b) what state's law is applicable to the controversy; (c) the plaintiff's domicile; (d) the availability of other states for trial; (e) the risk of multiple liability; (f) the availability of evidence in the forum state; (g) the parties' expectations as to the place of suit; and (h) the relation of the defendant's garnished assets to (1) the underlying claim on which the suit is brought or (2) the objective of the suit.

The Arizona Court of Appeals expressed enthusiasm for this approach in an in rem suit, but nevertheless analyzed the case under the traditional system of classification "because the Supreme Court of the United States has not itself abandoned this concept of categorizing actions as in rem or in personam." Bekins v. Huish, 1 Ariz. App. 258, 261-62, 401 P.2d 743, 746-47 (1965).

Professor Carrington and James A. Martin have suggested a "variable minimum contacts" test under which the requisite quantum of contacts would depend on the nature of the case. Thus, a products liability case like *Phillips v. Anchor Hocking Glass Co.*, involving physical injury within the plaintiff's home state, would require less contact than the more delicate area of defamation. Carrington & Martin, *supra* note 10, at 238-42.

Professors von Mehren and Trautman have proposed scrapping the in rem-in personam-quasi in rem categorization for what they label "general" and "specific" jurisdiction, a dichotomy based on whether jurisdiction stems from relations between the forum state and the parties, or between the state and the underlying controversy. Garnishment would fall into the awkward category of "limited general jurisdiction"

responding weaknesses, however, for the increased flexibility and sensitivity of the test make predictions of the outcome more difficult, and leave greater leeway for variations among individual judges.

The interest analysis approach is a comparatively recent product of legal literature and has not yet gained widespread acceptance. Perhaps the best example of its recent application is illustrated by the decision in *Buckeye Boiler Co. v. Superior Court.*[86] In that California case a foreign corporation which regularly shipped component parts of hydraulic lifts to a California manufacturer was sued for injuries resulting from the explosion of one of its products in California. The allegedly defective product had neither been sold in California nor shipped to that state by the defendant. The court found that the defendant's dealings with the California manufacturing plant met the "purposefully availing" test of *Hanson v. Denckla,*[87] but indicated that the establishment of "minimum contacts" was only the first step in determining the propriety of exercising personal jurisdiction:

> Once it is established that the defendant has engaged in activity of the requisite quality and nature in the forum state and that the cause of action is sufficiently connected with this activity, the propriety of an assumption of jurisdiction depends upon a balancing of the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction.[88]

The court then listed the interests favoring the exercise of jurisdiction by California. The plaintiff's interest was in having his case heard, and "suit in a local court may be his only practical opportunity to accomplish this objective."[89] Relevant state interests included the opening of its courts for the protection of its residents, the fact that the evidence was located in California, the applicability of local law, and the possible avoidance of multiple litigation.[90]

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since it is based on the relations of the defendant to the forum state but is limited to disposing of his property within that state. The authors predict that such jurisdiction would gradually be eliminated in favor of their "specific" jursdiction. von Mehren & Trautman, *supra* note 10, at 1136, 1144, 1164.

86. 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

87. *Id.* at 901-02, 458 P.2d at 63-64, 80 Cal. Rptr. at 119-20.

88. *Id.* at 899, 458 P.2d at 62, 80 Cal. Rptr. at 118.

89. *Id.* at 900, 458 P.2d at 62, 80 Cal. Rptr. at 118.

90. *Id.* at 899-900, 458 P.2d at 62, 80 Cal. Rptr. at 118. The principal piece of physical evidence in the case, the defective tank, was located in California. In addition to his injuries suffered at the time of the explosion, plaintiff had developed paralysis while hospitalized and had therefore joined the hospital and physician as defendants in the suit. There appeared to be no basis for subjecting the medical defendants to the jurisdiction of Ohio, Buckeye Boiler Co.'s state of incorporation. Consequently, a denial of jurisdiction over Buckeye in California could have led to multiple suits and possible inconsistent adjudications. *Id.* at 896, 458 P.2d at 60, 80 Cal. Rptr. at 116.

Perhaps most significant in terms of the Currie analysis was the court's declaration that "a nonresident defendant which derives economic benefit from activity in the forum state and thus does more than a purely local business ordinarily has very little basis for complaining of inconvenience when required to defend itself in that state."[91] In Currie's terms, this amounts to an analysis of the relative aggressiveness of the parties and provides a suitable means for reconciling *Hanson v. Denckla* with earier decisions in the *International Shoe* line of cases. *Hanson* may, under Currie's analysis, be viewed as an examination of the nature of the contacts in terms of aggressiveness. It was the settlor, not the trustee, who made the "aggressive" action by moving to Florida; the trustee's subsequent mailing of checks to Florida was responsive, not aggressive. Therefore, it carried less weight in determining sufficient contacts for Florida's exercise of jurisdiction over the trustee.

Professor Ehrenzweig advocates an approach to the problems of jurisdiction differing sharply from that proposed by Currie. He argues that the *International Shoe-McGee* line of cases has extended the limits of jurisdiction within the requirements of due process to such an extent that courts need no longer be concerned with the inquiries suggested by Currie.[92] Instead, Ehrenzweig urges an expansion of the discretionary common law doctrine of forum non conveniens, a doctrine allowing courts to decline to hear a case if a more convenient forum is clothed with the jurisdictional power to entertain the suit.[93] This "forum conveniens" approach differs from the Currie analysis in that it entails more than an inquiry into whether the case is sufficiently connected with a given forum to render trial there reasonably fair. Ehrenzweig would place the presumption of forum conveniens at the defendant's domicile.[94] Other possible forums under his approach would be those states "having such contacts with the case as will justify application of the chosen forum's own law."[95] Although Currie, Ehrenzweig, *et al.* differ in their proposals for reform, all are agreed on the basic point: the central concept of quasi in rem jurisdiction, the use of a defendant's property interests in the forum state as a basis for the exercise of jurisdiction is an unrelated matter, is repugnant to the more modern analytical

91. *Id.* at 900, 458 P.2d at 62, 80 Cal. Rptr. at 118.
92. Ehrenzweig, *From State Jurisdiction to Interstate Venue,* 50 ORE. L. REV. 103 (1971); *cf.* State *ex rel.* White Lumber Co., Inc. v. Sulmonetti, 252 Ore. 121, 128, 448 P.2d 571, 575 (1968) (O'Connell, J., dissenting).
93. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens,* 65 YALE L.J. 289, 312-14 (1956).
94. Ehrenzweig, *supra* note 92, at 111-13.
95. Ehrenzweig, *supra* note 93, at 292.

approaches which have emerged in the wake of *International Shoe.* Thus, several commentators have urged that prejudgment garnishment should not be used except upon a showing that the defendant is likely to dissipate the assets or is keeping them in the foreign state to protect them from execution elsewhere.[96] This rule would not subject the *Harris* type of personal debt to garnishment, since such assets are not normally immediately convertible to cash and are not generally acquired for purposes of avoiding judgment. Bank accounts, however, might plausibly fit within such a categorization.

Of all the alternative analyses, only the mechanical application of the *Harris* rule would favor the exercise of jurisdiction by Arizona in the *Pomona* foreign attachment situation. All the parties to the main action were California residents; the obligation sued upon was incurred and payable in California;[97] defendants' Arizona bank accounts were unrelated to the claim sued upon; defendants owned no tangible property in Arizona; and by any rational choice-of-law rule, California possessed the predominant interests in the litigation, thus requiring the application of California law.[98] While Arizona was not a conspicuously inconvenient or unfair forum, California was clearly several hundred miles more "convenient." Arizona's policy of protecting creditors from absconding debtors is not applicable to a dispute in which all the interested parties reside and, presumably, are subject to suit in California.[99] The only other interest Arizona might have—protecting the garnishee bank, a state-regulated enterprise in which Arizona interests are intimately involved—is not highly

96. Hazard, *supra* note 10, at 281-88; von Mehren & Trautman, *supra* note 10, at 1141. In the absence of federal or uniform state legislation, a state lacking jurisdiction over the main suit could protect the plaintiff against dissipation of the garnished property by dismissing or staying proceedings conditional upon litigation in an appropriate forum. Ehrenzweig, *supra* note 93, at 292; *cf.* Radio Corp. of America v. Rotman, 411 Pa. 630, 192 A.2d 655 (1963) (proceedings in Pennsylvania stayed pending litigation in New Jersey to obtain applicable construction of New Jersey statute). Alternatively, the court might require the defendant to post bond in the amount garnished pending litigation elsewhere. Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684 (1950); Hazard, *supra* note 10, at 282.

97. Brief for Appellee at 46, First Nat'l Bank & Trust Co. v. Pomona Mach. Co., 107 Ariz. 286, 486 P.2d 184 (1971).

98. This situation presents what Brainerd Currie has labeled a "false conflict," Since both plaintiff and defendants are California residents, their relations should be controlled by California law. The fact that the defendant's accounts were located in Arizona is purely fortuitous. B. Currie, *Married Women's Contracts: A Study in Conflict of Laws Method,* 25 U. CHI. L. REV. 227 (1958), in SELECTED ESSAYS ON THE CONFLICT OF LAWS 77 (1963).

Arizona adheres to the "significant contacts" theory in choice-of-law problems, adopted from RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). Under that theory, the Supreme Court of Arizona has held that a suit between New York residents over an accident which occurred in Arizona should be governed by New York law. Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968). A "significant contacts" analysis of *Pomona* would similarly require the application of California law.

99. Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335, 1351 (E.D. Pa. 1971); *Developments in the Law—State Court Jurisdiction, supra* note 63, at 960.

significant, since execution of a California judgment, entitled to full faith and credit under the Constituion, would create no risk of subjecting the bank to double liability.[100]

The Pomona Opinion

In reversing the trial court's dismissal of the suit, the Supreme Court of Arizona held that the garnishment and exercise of jurisdiction were permissible under Arizona law and refused to invoke the doctrine of forum non conveniens to decline the exercise of jurisdiction.[101] In holding that Arizona's courts were empowered to hear the case, Justice Cameron's opinion never discussed the type of contacts which a forum state must have with the main conflict in a garnishment case in order to assert jurisdiction. Instead, the court relied on its decision in the 1915 case of *Hook v. Hoffman*[102] to define garnishment as a quasi in rem proceeding, and followed a 1969 decision[103] in deciding that the *Pennoyer v. Neff* distinction between in personam and in rem jurisdiction was not undercut by *International Shoe Co. v. Washington.* The court failed to deal with the fundamental question of whether, after *International Shoe* and its progeny, ownership of property rights in the forum state *alone* is a sufficient basis for the exercise of jurisdiction on an unrelated claim. There was no discussion of the functional differences between in rem and quasi in rem actions. The two were viewed as imposing identical jurisdictional standards despite the implication of the *Perkins v. Benguet Consolidated Mining Co.* decision that substantially more connections with the forum state are required when the claim sued upon is not directly connected with the forum state.[104]

In refusing to invoke the doctrine of forum non conveniens, the court limited its discussion to two textual paragraphs citing no authorities.[105] The court said that there was not, on the meager record before it, a sufficient showing of circumstances to upset the plaintiff's choice of forum, using language suggesting that its formulation of the doctrine was taken from the *Restatement (Second) of Conflict of Laws.*[106] The court did not indicate what type of circumstances would warrant application of the doctrine of forum non conveniens.

100. *Developments in the Law—State Court Jurisdiction, supra* note 63, at 958.
101. 107 Ariz. at 289-90, 486 P.2d at 187-88.
102. 16 Ariz. 540, 557, 147 P. 722, 729 (1915).
103. O'Leary v. Superior Court, 104 Ariz. 308, 312, 452 P.2d 101, 105 (1969).
104. *See* text & notes 29-30 *supra.*
105. 107 Ariz. at 290, 486 P.2d at 188.
106. *Compare id.* ("since it is plaintiff's right to choose the forum, his choice should not be disturbed except upon adequate showing"), *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84, comment (c) (1971) ("since it is for the plaintiff to

Conclusion

The continuing usefulness of *Pennoyer v. Neff* as an analytical tool for ascertaining the distinctions among in personam, in rem and quasi in rem jurisdiction is questionable. *Atkinson v. Superior Court*[107] suggests that the traditional division be discarded in favor of a "minimum contacts" test for all types of cases, a suggestion that has received some support in United States Supreme Court decisions.[108] Under such an approach, the three traditional forms of jurisdiction would be merged. Garnishment would no longer be used as a means of obtaining jurisdiction, but would return to its original role as a device to assure the plaintiff's ability to recover.[109]

The modern line of Supreme Court decisions, beginning with *International Shoe*, indicates that the situations in which there are sufficient contacts to allow the exercise of in personam jurisdiction, and which force a plaintiff to use garnishment to obtain jurisdiction, are precisely those cases in which the defendant's lack of personal contacts with the forum state makes the exercise of jurisdiction unfair to him.[110] The potential denial of due process in such situations could be avoided by an extension of the minimum contacts analysis to all cases. Such an inquiry—in which the existence of property within the forum and the availability of suit in other forums would be relevant factors—would avoid the type of anomaly generated by the *Pomona* decision, where arguably *every* significant contact was with the State of California.

Fairness to the plaintiff, in cases where garnishment is necessary to prevent concealment or dissipation of the defendant's assets, could be maintained by reversing the Supreme Court of Arizona's presumption in favor of jurisdiction and requiring a threshhold showing by the plaintiff that his claim falls within one of the exceptional categories.[111]

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choose the place of suit, his choice of a forum should not be disturbed except for weighty reasons").

Professor Ehrenzweig has criticized the Arizona courts' reliance on the *Restatement*, claiming that "[b]y relying on the *Restatement*'s adages, initially incorrect at worst, and obsolete at best, the court may have secluded itself from the rest of the nation which is well on its way to a rational law of forum conveniens." Ehrenzweig, *The Restatement as a Source of Conflicts Law in Arizona*, 2 ARIZ. L. REV. 177, 180 (1960).

107. 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied*, 357 U.S. 569 (1958).

108. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). More recently, while rejecting a contacts analysis for deciding conflicting state claims to escheat property, the Court indicated approval of such an approach in suits involving private interests in property, for which jurisdiction need not be exclusive. Texas v. New Jersey, 379 U.S. 674, 678-79 (1965).

109. *See* text accompanying notes 13-15 *supra*.

110. Carrington, *supra* note 10, at 306.

111. *See* text & note 96 *supra*.

Adoption of such a rule would bring this area of jurisdiction into line with the concept of "fair play" which lies at the heart of the constitutional requirement of due process.

COURT-ORDERED MEDICAL EXAMINATION OF THE ILL WITNESS

Trial courts are sometimes confronted with the problem of witnesses who claim that their mental or physical health will be jeopardized by the act of giving testimony.[1] When such a claim is advanced, the trial judge is faced with a dilemma. If the witness is excused, highly relevant or vital testimony may be lost, while if the witness is not excused, his health may be jeopardized. The trial judge, moreover, may have difficulty determining the validity of the witness's claim without further jeopardizing a possibly precarious medical situation. Faced with this quandry in *Lewin v. Jackson*,[2] the Supreme Court of Arizona held that, in order to assess the validity of a claim of disability, a trial court has the inherent power to order the medical examination of a non-party witness.

Plaintiff-petitioner Lewin had been appointed guardian of her aged father who had suffered several heart attacks and strokes. She subsequently filed suit against several relatives for slander and interference with advantageous relationships, alleging that she had been disinherited by her wealthy parents because of the defendants' defamations.[3] During discovery proceedings, the defendants notified Lewin, in her capacity as guardian of her father, of their intent to take the father's deposition. Lewin moved for a protective order under *Arizona Rules of Civil Procedure 26(c)*[4] to prohibit the respondents from taking the deposition, claiming that her ward's age and ill health would make it hazardous for him to be deposed. The superior court issued a conditional protective order preventing the deposition until a court-ordered physical and mental examination could be conducted to determine the extent of the father's disability. Lewin then

1. ARIZ. R. CIV. P. 43(a) (1956), defines a witness as "a person whose declaration under oath or affirmation is received as evidence for any purpose, whether such declaration is made on oral examination or by deposition or by affidavit."

2. 108 Ariz. 27, 492 P.2d 406 (1972).

3. *Id.* at 28, 492 P.2d at 407. The defendants included Lewin's brothers, sisters and cousins.

4. ARIZ. R. CIV. P. 26(c) (Supp. 1971-72) provides:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .

petitioned the court of appeals to overturn the trial court's order, but the court of appeals refused to accept jurisdiction. On appeal, the Supreme Court of Arizona granted the petition for review but rejected Lewin's contention that the trial court had no statutory or common law authority to order the medical examination of a non-party witness.[5] The court held that it was within the inherent power of the trial court to order the physical and mental examination of a proposed non-party witness to determine if a deposition would endanger his health.[6]

This analysis will examine the source and application of the doctrine of inherent powers. The propriety of the use of the doctrine in *Lewin* will be discussed in light of the rationale for the doctrine and the alternatives available to the court. Even if courts have the inherent power to order the medical examination of a non-party witness to determine his ability to testify, there may be instances when the power should not be exercised. Finally, the problem of enforcement of the order for examination will be briefly explored.

Initially, the supreme court found that the trial court in *Lewin* could not have ordered the examination under authority of *Arizona Rules of Civil Procedure 35(a).* Rule 35(a) is the discovery rule which allows an examination "[w]hen the mental or physical condition . . . of a party, or of a person in the custody or under the legal control of a party, is in controversy . . . ."[7] Lewin contended that this language did not authorize the examination, even though her father was under her legal control, since the rule contemplated a situation where the suit has been brought on behalf of the ward. The supreme court found it unnecessary to reach this contention, however, concluding that Rule 35 did not apply to the proposed examination because the rule was intended to be applied to medical examinations for discovery purposes.[8] Ultimately, therefore, the court relied on

5. The petitioner also contended that the physician's report would violate the doctor-patient privilege and that the trial judge exceeded his authority in appointing a doctor to whom the petitioner objected. The privilege contention was rejected because of the absence of a treatment objective. 108 Ariz. at 31, 492 P.2d at 410. *See* ARIZ. REV. STAT. ANN. §§ 12-2235, 13-1802 (1956); M. UDALL, ARIZONA LAW OF EVIDENCE §§ 91, 93 (1960); Copple, PHYSICIAN-PATIENT PRIVILEGE, 6 ARIZ. L. REV. 292 (1965). With respect to physician selection, the court extended the rule of Martin v. Superior Court, 104 Ariz. 268, 451 P.2d 597 (1969), and held the appointment to be within the court's discretion, 108 Ariz. at 28, 492 P.2d at 407. *See "Choice of Physician Under Rule 35(a)"* 12 ARIZ. L. REV. 89, 91 (1970).

6. 108 Ariz. at 30, 492 P.2d at 409.

7. ARIZ. R. CIV. P. 35(a) (Supp. 1971-72).

8. 108 Ariz. at 29, 492 P.2d at 408. It is reasonable to assume that Rule 35 would authorize examination of a ward when the suit is brought on his behalf. It is unclear, however, whether there are instances when an examination may be ordered even though the suit is not brought on the ward's behalf. Arizona Rule 35 is the same as federal Rule 35 which was amended in 1970 to allow examinations of a "person in the custody or under the legal control of a party." The Advisory Com-

the doctrine of inherent power for authority to order the examination.

In discussing the doctrine of inherent powers, it must first be noted that courts are created by constitutions or statutes and the extent of their power is largely a matter of legislative or constitutional mandate.[9] It is generally recognized, however, that courts possess certain inherent powers irrespective of constitutional or legislative grants.[10] These powers come into existence with the creation of a court and are said to be immune from legislative alteration or rescission.[11] The powers are born of necessity, for without them courts would be unable to function adequately.[12]

Some courts thus recognize an inherent power to adopt rules governing pleading, practice and procedure in state courts,[13] such rules being necessary for an orderly and dignified judicial system. Some courts also have the inherent authority to secure attendance of witnesses[14] and enforce judicial processes.[15] Testimony by witnesses is often necessary to a proper resolution of disputes, so courts must be able to compel attendance and provide sanctions for disobedience.[16] Some courts have found an inherent power to order the phys-

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mittee Note for the 1970 amendment, FED. R. CIV. P. 35, indicates that the amendment establishes that "a parent or guardian suing to recover for injuries to a minor may be ordered to produce the minor for examination." Apparently, this applies when the parent is suing on behalf of the child as well as to when he is suing on his own behalf—for example, to recover for the child's medical expenses. The amendment also allows examination of minors to determine their blood groupings in cases in which paternity is in issue. The Committee's Notes indicate this provision followed the decision of Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940), in which the court allowed such an examination. The mother had sued for maintenance and the husband, who had requested the examination, counterclaimed for divorce on grounds of adultery. The court relied on the fact that the suit was beneficial to the child because the mother asked for maintenance, rather than on the fact that the blood test might prove adultery. *Beach*, therefore, supports the argument that the suit must be brought on behalf of the ward, at least when examinations for blood grouping are requested.

9. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Stilwell v. Markham, 135 Kan. 206, 10 P.2d 15 (1932); Stewart v. Sampson, 285 Ky. 447, 148 S.W.2d 278 (1941); Coonradt v. Sailors, 186 Tenn. 294, 209 S.W.2d 859 (1948).

10. *See, e.g.*, State *ex rel.* Mahoney v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954); State *ex rel.* Andrews v. Superior Court, 39 Ariz. 242, 5 P.2d 192 (1931); Mattfeld v. Nester, 226 Minn. 106, 32 N.W.2d 291 (1948); State *ex rel.* Gentry v. Becker, 351 Mo. 769, 174 S.W.2d 181 (1943); Hale v. State, 55 Ohio 210, 45 N.E. 199 (1896).

11. State *ex rel.* Andrews v. Superior Court, 39 Ariz. 242, 248, 5 P.2d 192, 195 (1931).

12. *Ex parte* Peterson, 253 U.S. 300, 312 (1920).

13. *See* Heat Pump Equip. Co. v. Glen Alden Corp., 93 Ariz. 361, 363, 380 P.2d 1016, 1017 (1963); DeCamp v. Central Arizona Light & Power Co., 47 Ariz. 517, 57 P.2d 311 (1936).

14. State *ex rel.* Andrews v. Superior Court, 39 Ariz. 242, 248, 5 P.2d 192, 195; Burttschell v. Shepard, 123 Tex. 113, 69 S.W.2d 402 (1934).

15. *See* Van Dyke v. Superior Court, 24 Ariz. 508, 529, 211 P. 576, 583 (1922) (inherent power to punish for criminal contempt after individual disobeyed court injunction). To insure the integrity of the judicial system, courts can exercise inherent powers to disbar unethical lawyers. *Id.*

16. *See In re* Greathouse, 189 Minn. 51, 248 N.W. 735 (1933).

ical and mental examination of certain individuals. For example, the plaintiff in a personal injury suit can be ordered to submit to a physical examination to determine the extent of any injuries alleged.[17] This result is justified by the fact that once the plaintiff has voluntarily placed his injuries in controversy, it would be manifestly unfair to the defendant not to be allowed to determine the exact extent of the injuries.[18] In addition, courts exercise inherent power to order psychiatric examinations to determine the competency[19] of proposed witnesses.[20] To insure that testimony is as reliable as possible, it is essential that only those witnesses who can perceive, recollect and narrate accurately be allowed to testify. The trial judge, therefore, must have the power to exclude incompetent witnesses.[21]

The precise issue presented in *Lewin*, whether a trial court has the inherent power to order the physical and mental examination of a witness to determine whether his health will be adversely affected by giving testimony, has apparently not been previously considered on the appellate level.[22] It has long been recognized that an ill witness may be excused from attending court if such attendance will endanger his health.[23] This does not excuse the witness from giving testimony, however, if the testimony can be secured by means of a deposition.[24] Trial courts have not formulated any concrete rules for dealing with a witness claiming illness; rather, the trial court's action is usually on an ad hoc basis and is almost wholly discretionary.[25]

Three alternatives were available to the trial judge in *Lewin* when he was requested to issue the protective order prohibiting the de-

17. *See* Western Glass Mfg. Co. v. Schoeninger, 42 Colo. 357, 94 P. 342 (1908); Myers v. Travelers Ins. Co., 353 Pa. 523, 46 A.2d 224 (1946).

18. *See* Sibbach v. Wilson & Co., 312 U.S. 1 (1940).

19. Competency is defined as the ability to perceive, recollect and communicate accurately. Note, *Psychiatric Examination of Witnesses: Standards, Timing and Use by Indigents*, 55 IOWA L. REV. 1286, 1289 (1970). The issue in *Lewin*, in contrast, dealt not with competency but with whether the father was physically strong enough to be deposed.

20. *See* State v. Butler, 27 N.J. 560, 143 A.2d 530 (1958).

21. United Producers & Consumers Co-op, Inc. v. O'Malley, 103 Ariz. 26, 436 P.2d 575 (1968) (competency of expert witness); State v. Brown, 102 Ariz. 87, 425 P.2d 112 (1967) (state witness held to be competent even though committed to state hospital); State v. Guldin, 63 Ariz. 411, 162 P.2d 907 (1945) (competency of child); Keefe v. State, 50 Ariz. 293, 72 P.2d 425 (1937) (competency of child); Sheek v. State, 19 Ariz. 509, 172 P. 662 (1918) (competency of child).

22. Several courts have simply ordered the examination of a witness who claimed to be too ill to give testimony in court. In each case, the court simply assumed it had the power to order an examination and did not discuss the propriety of the action. Fox v. Capital Co., 96 F.2d 684 (3d Cir. 1938) (both trial and appellate courts ordered examinations); Maharaja Nundocomar's Trial, 20 How. St. Tr. 923 (1775).

23. Fox v. Capital Co., 96 F.2d 684 (3d Cir. 1938) (witness purged of contempt because of illness); 8 J. WIGMORE, EVIDENCE § 2205, at 144 (McNaughton rev. 1961).

24. 8 J. WIGMORE, *supra* note 23, § 2204, at 143.

25. *Id.* § 2205, at 144.

fendants from taking the father's deposition. The court could have refused to issue the protective order without inquiring into the validity of Lewin's allegations, thereby possibly jeopardizing the witness's health. Second, the judge could have issued the protective order solely on the basis of the diagnosis of the witness's personal physician.[26] The third alternative, and the one adopted by the trial court, was to issue the protective order conditioned upon a medical examination of the father to determine the exact state of his health.

Summarily refusing to issue the protective order, without any medical advice or in the face of advice not to permit testimony, is the least desirable alternative for a court since it may result in serious harm to the witness if his medical condition is in fact perilous. An example of such action occurred in *Haviland & Co. v. Montgomery Ward & Co.*,[27] in which the defendant first gave notice that the deposition of an officer of the plaintiff-corporation would be taken. The plaintiff then asked the court to vacate the notice on the grounds that the officer was in ill health due to advanced age, and submitted an affidavit from a doctor concluding that the witness's heart condition precluded his deposition. After reviewing the affidavit the court decided the physician's conclusions were erroneous and ordered that the deposition be taken in the officer's home. The court in essence made its own interpretation of medical facts, a task for which a trial judge has little expertise. Similarly, if the trial judge in *Lewin* had disbelieved the witness's doctor and chosen to make his own diagnosis of the father's condition, the judge would arguably have been acting well beyond the scope of his knowledge.

For a court to take the second course of action and excuse a witness from giving a deposition on the basis of his own allegations of ill health or the objections of his guardian might also be an undesirable alternative. In *Lewin*, the father played a critical role in the suit since he allegedly disinherited plaintiff Lewin as a result of statements made by defendants.[28] Though Lewin asserted that she was concerned with her father's health, the defendants believed Lewin was attempting to prevent her ward from giving unfavorable testimony.[29] If the allegations of ill health were untrue, the court would have lost key testimony by excusing the witness without verifying his claim. Since the facts in most cases are brought out primarily by witnesses,

26. Lewin had at least one physician who was prepared to testify that the father was physically or mentally unable to give a deposition. 108 Ariz. at 28, 492 P.2d at 407.
27. 31 F.R.D. 578 (S.D.N.Y. 1962).
28. 108 Ariz. at 28, 492 P.2d at 407.
29. *Id.* at 29, 492 P.2d at 408.

their function is critical.[30] Thus, excusing a witness from giving testimony should be a highly guarded alternative.

The alternative followed by the *Lewin* court provided protection for the witness's health and insured that important testimony was not unnecessarily lost. By securing the opinion of court-appointed physicians representing both parties, the trial judge was able to make a more objective evaluation of the witness's health.[31] Clearly, in this situation this was the best alternative.

It is possible, however, that appointing doctors to conduct an examination of an ill witness may be unnecessary in the normal situation. It is probably sufficient to rely on the opinion of the witness's personal physician if the doctor appears to be credible or, perhaps, on the witness's own allegations of ill health if he has no motive to feign illness.[32] In determining whether a court-ordered examination should be conducted it is suggested that the trial judge should weigh the cost of the examination, the delay which will be caused and the inconvenience involved against the importance of the witness's testimony and the presence of suspicious circumstances. In the absence of circumstances suggesting the possibility of collusion, an examination is arguably unnecessary.

An important question the *Lewin* court did not resolve is how the trial court could enforce the court-ordered examination if the witness refused to allow it. The court did, however, cite *State ex rel. St. Louis Public Service Co. v. McMullan,*[33] which dealt with enforcement of a court order for the examination of the plaintiff's wife in a personal injury suit where her condition was in controversy. The court noted that it could not physically compel the injured wife to undergo the examination. In the event she refused, however, the court indicated that a proper sanction would be to dismiss her husband's claim since he supposedly had control over her and could compel her to submit.[34] This sanction would seem to be appropriate in *Lewin* since the plaintiff was also the guardian of the witness and had control

30. Note, *Psychiatric Evaluation of the Mentally Abnormal Witness,* 59 YALE L.J. 1324 (1950).

31. It has been suggested, however, that even this solution may be undesirable. If the court appoints doctors selected by each party, the reports may lead to a battle of the experts. The judge may then be forced to rely solely on his own evaluation or on the opinion of a third doctor he may have chosen himself. *See* H. Weihofen, *Testimonial Competence and Credibility,* 34 GEO. WASH. L. REV. 53, 78 (1965).

32. *See, e.g.,* Ray v. Henderson, 212 Cal. App. 2d 192, 27 Cal. Rptr. 847 (1963). In *Ray,* the witness was allowed to give a deposition rather than appear in court. Even a deposition, of course, is less desirable than in-court testimony since the trier of fact is unable to observe the demeanor of the witness to assess his credibility.

33. 297 S.W.2d 431 (Mo. 1956).

34. *Id.* at 438.

over him. The plaintiff should not be allowed to allege that defendant interfered with advantageous relationships, and then prevent an examination to determine disability of a witness who could testify to the extent and nature of the relationships. Where the plaintiff has no control over the witness in question, however, such a sanction is obviously inappropriate. It would be unfair to the plaintiff to dismiss the suit because a witness over whom he had no control refused to submit to the examination. In this situation, the witness may nonetheless be in contempt of the court order.

The court's holding in *Lewin* that the superior court can order the mental and physical exam of a witness who claims he cannot testify due to ill health logically must be applied to all witnesses and not just those seeking protection from discovery proceedings. Such examinations are probably unnecessary, however, unless there is reason to doubt the sincerity of the claim of disability. If there is some doubt, court-ordered examinations provide the best means for protecting the health of truly ill witnesses while at the same time insuring that the testimony of those not disabled is not lost.

TIME FOR FILING NOTICE OF APPEAL—REJECTION OF UNIQUE CIRCUMSTANCES DOCTRINE IN ARIZONA

Rules of procedure are necessary for an orderly system of justice. Consistent enforcement of these rules promotes stability in the system and affords notice to litigants that certain steps must be followed. The *Arizona Rules of Civil Procedure*, on the other hand, were meant to assure a just determination of every action and should be liberally construed.[1]

In Arizona, a civil litigant has 60 days from the entry of judgment within which to file a notice of appeal.[2] Rule 73(b)(2) provides that this period for appeal is extended by a "timely" motion for a new trial in the superior court pursuant to Rule 59. If such a motion is timely made, the sixty-day period for appeal does not commence until

1. Union Interchange, Inc. v. Benton, 100 Ariz. 33, 410 P.2d 477 (1966).

2. ARIZ. REV. STAT. ANN. § 12-120.22(a) (Supp. 1971-72) provides that appeals to the court of appeals be taken "in the manner prescribed for appeals to the supreme court and in like time." By statute, then, it is apparent that the legislature provided that procedures for appeals to the supreme court contained in the Arizona Rules of Civil Procedure, promulgated by the supreme court pursuant to *Id.* § 12-109 (1956), are also to apply to appeals to the courts of appeals. *See* ARIZ. CONST. art. 6, § 5, subsec. 5. ARIZ. R. CIV. P. 73(b) requires that appeals to the supreme court be taken by filing notice with the superior court within 60 days of entry of judgment. Thus a litigant would also have 60 days within which to file notice of appeal to the court of appeals. *See also* ARIZ. SUP. CT. R. 47.

the trial court rules on the motion. Rule 59(d) provides that a motion for a new trial shall be served not later than 10 days after entry of judgment. This ten-day period may not be enlarged by the trial court.[3] The Rules clearly provide, therefore, that unless a motion for a new trial is filed within 10 days of entry of judgment, and lacking other motions,[4] the time for filing notice of appeal expires 60 days after that date.

In operation, however, these rules may provide a trap for the unwary. Assume that after entry of judgment for defendant, the attorneys for both parties agree that the plaintiff may have 15 days to file a motion for a new trial. Suppose further that the trial court accepts the motion, and that no question as to timeliness under Rule 59(d) is raised by the court or the litigants. Is the plaintiff then correct in assuming that he may file notice of appeal within 60 days from the date of the denial of this untimely, but accepted, motion, or must he still file notice of appeal within 60 days of the entry of judgment?

This question was before the Supreme Court of Arizona as a matter of first impression in *Edwards v. Young*.[5] On April 9, 1969, the jury rendered a verdict for the defendants. On April 17, the judgment was signed and entered. At that time, plaintiff's attorney was not present in court.[6] Five days later, after receiving notice of the entry of judgment by mail and realizing that only 5 days remained to file a motion for a new trial under the rules, plaintiff's counsel asked his opponent to allow him an additional 5 days to file this motion.[7] The defendant's counsel agreed. Thus, on May 2, 10 days after the date of the agreement, but 15 days from the actual entry of judgment, a motion for a new trial was filed by plaintiff.[8] "The trial court accepted the motion as timely, and ruled on the merits."[9] The motion for a new trial was denied, and 60 days after the denial, but 109 days after the entry of judgment, the plaintiff filed his initial notice of appeal.

The court of appeals, sua sponte, wrote letters to counsel requesting argument on the jurisdictional issue—whether the appeal was time-

3. ARIZ. R. CIV. P. 6(b).
4. *See* ARIZ. R. CIV. P. 73(b).
5. 107 Ariz. 283, 486 P.2d 181 (1971).
6. 107 Ariz. at 284, 486 P.2d at 182.
7. This agreement was confirmed in writing the next day. Letter from J. William Moore (attorney for appellants) to Kenneth Tucker (attorney for appellees), April 23, 1969. Motion for Rehearing, No. 1 CA-CIV 1224 (Court of Appeals, Division One, October 13, 1970), exhibit A.
8. The motion for new trial should have been filed by April 28, 1969, ARIZ. R. CIV. P. 6(a), 59(d), eleven calendar days from the entry of judgment, the tenth day falling on a Sunday.
9. 107 Ariz. at 284, 486 P.2d at 182.

ly.[10] The sole reply, submitted by appellant,[11] contended that reliance on the agreement with the opposing counsel and on the trial court's disposition of the motion for a new trial created "unique circumstances" permitting the appeal to be heard on its merits.[12] The court of appeals held that the appeal was not timely, asserting that it could not carve an exception into the rules nor could it waive jurisdictional defects in the absence of a decision of the state supreme court.[13]

The Supreme Court of Arizona affirmed the court of appeals, also finding the attempted appeal not timely.[14] Although the court could have applied the "unique circumstances" doctrine developed by the federal courts permitting otherwise untimely appeals to be heard on the merits,[15] it declined the opportunity, reasoning that "the Rules of Civil Procedure specifically recognize that the time for filing of a motion for a new trial may not be enlarged, [and] the efficacy of the rule depends upon the willingness of the courts to enforce it."[16] The supreme court recognized that there would be some hardship in this case,[17] but rejected the argument that refusing to hear an appeal on the merits is particularly unjust when a party has relied on the actions of the trial court.[18] This discussion will consider *Edwards* in light of

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10. Edwards v. Young, No. 1 CA-CIV 1224 (Court of Appeals, Division One, State of Arizona, Sept. 29, 1970).

11. That only one reply was received by the court was intentional; the attorney for the appellees was in agreement with his opposing attorney on this matter. Letter from Kenneth L. Tucker to J. William Moore, October 5, 1970.

> We have received the Court's order dismissing the Appeal in Edwards v. Young. This is unfortunate and it is something which we did not foresee at the time of an agreement with you pertaining to the Motion for New Trial. As you can see from the Court's statement of facts within the order, we did not reply to your Motion asserting the appeal should not be dismissed. When contacted by Judge Stevens, we told him we had no disagreement with your statement of the facts of the matter and apparently that is the position which the Court accepted in reaching its decisions.

12. Letter from J. William Moore to Court of Appeals, State of Arizona, Division One, September 10, 1970.

13. Edwards v. Young, No. 1 CA-CIV 1224 (Court of Appeals, Division One, State of Arizona, Sept. 29,1970). The court encouraged the parties to carry the action to the supreme court.

14. 107 Ariz. 283, 486 P.2d 181 (1971).

15. Thompson v. Immigration and Naturalization Serv., 375 U.S. 384 (1964); Pierre v. Jordon, 333 F.2d 951 (9th Cir. 1964); *see* text accompanying notes 22-30 *infra*.

16. 106 Ariz. at 285, 486 P.2d at 183. *See* Thompson v. Immigration and Naturalization Serv., 375 U.S. 384, 390 (1964) (Clark, Harlan, Stewart & White, J.J., dissenting). The court was correct in that opposing counsel cannot by agreement or stipulation confer jurisdiction on the court. That jurisdiction is determined by statutes and constitutions is well settled. Ward v. Stevens, 86 Ariz. 222, 344 P.2d 491 (1959); Jasper v. Batt, 76 Ariz. 328, 264 P.2d 407 (1954); Industrial Addition Ass'n v. Comm'r, 323 U.S. 310 (1945); Federal Trade Comm'n v. Claire Furnace Co., 274 U.S. 160 (1927). The appellant in this case was not advocating attorney-made jurisdiction, but was arguing that reliance on the trial court's actions was the factor which caused the appeal to be untimely made.

17. 107 Ariz. at 285, 486 P.2d at 183.

18. Had the trial court found the motion for new trial untimely when filed, the appellants would still have had time to appeal. The false sense of confidence conveyed by the trial court accepting the motion precluded this possibility. *See* Letter

the federal unique circumstances doctrine. Attention will be given to the countervailing policies stressed by the Supreme Court of Arizona and by the United States Supreme Court in their respective rulings on the timeliness issue under similar circumstances and rules.

The Unique Circumstances Doctrine

The unique circumstances doctrine was first applied in *Thompson v. Immigration and Naturalization Service*,[19] in which the appellant filed a motion for a new trial 12 days after a final order denying his petition for naturalization had been entered by the district court. The government had raised no objection to the timeliness of the motion, and the "trial court specifically declared that the 'motion for a new trial' was made 'in ample time.' "[20] The motion was subsequently denied on its merits. Within 60 days of the denial, but more than 60 days after the original entry of judgment, Thompson filed a notice of appeal. The Court of Appeals for the Seventh Circuit granted a government motion to dismiss the appeal for untimeliness, stating that the untimely motion for a new trial did not stop the running of the time to appeal.[21] The Supreme Court reversed, holding that the spirit of an earlier case, *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*,[22] controlled:

> Here, as there, petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline. And here, as there, the Court of Appeals concluded that the District Court had erred and dismissed the appeal. Accordingly, in view of these 'unique circumstances,' . . . we grant the writ of certiorari, vacate the judgment, and remand the case to the Court of Appeals so that petitioner's appeal may be heard on the merits.[23]

In a vigorous dissent, Justice Clark asserted that the doctrine of *Harris Truck Lines* was being extended to a situation not cognizable

from J. William Moore to Court of Appeals, State of Arizona, Division One, September 10, 1970.

19. 375 U.S. 384 (1964), *noted* 63 MICH. L. REV. 1288 (1965).

20. *Id.* at 385.

21. 318 F.2d 681, 683 (7th Cir. 1963).

22. 371 U.S. 215 (1962). *Harris Truck Lines* involved a decision by a trial judge who enlarged the time in which to appeal, improperly basing his decision on the rule of excusable neglect in FED. R. CIV. P. 73(a). The Court of Appeals for the Seventh Circuit dismissed the appeal as not timely. The Supreme Court reversed, basing its decision on the great hardship to the party who had relied on the trial court's ruling that excusable neglect was present.

23. 375 U.S. at 387 (citation omitted).

under the rules. He argued that the Court was either reading "into the rules, contrary to the specific prohibition of [Rule] 6(b), authorization for the District Court to enlarge the time for filing such motions," or treating "the motions as being within the provisions of Rule 73(a), despite failure to allege any 'excusable neglect.' "[24] Justice Clark regarded the rules as establishing mandatory requirements that could not be enlarged by the courts or the parties. He concluded:

> Changes in rules whose inflexibility has turned out to work hardship should be effected by the process of amendment, not by *ad hoc* relaxations by this Court in particular cases. Such dispensations in the long run actually produce mischievous results, undermining the certainty of the rules and causing confusion among the lower courts and the bar.[25]

Unique circumstances have been found in other federal cases.[26] In *Pierre v. Jordon*[27] the Court of Appeals for the Ninth Circuit allowed the appellant to present her appeal after she had relied on the district court's ruling on a late post-trial motion on the merits. Thirteen days after her complaint had been dismissed, plaintiff had filed a motion to vacate and set aside the order of dismissal.[28] Ten days after her motion was denied, but 37 days after entry of judgment, she filed the notice of appeal. The Ninth Circuit raised the timeliness issue on its own motion, and held that since the district court had kept the appellant's motion under consideration for more than two weeks, she was entitled to conclude that the district court regarded the motion as timely.[29]

"Unique circumstances" in the federal courts thus means that it is unfair for a litigant to lose his right to appeal after relying on words or conduct of the trial court which imply that he need not appeal within the specified number of days after entry of judgment. In every case, had the attorney known that the post-trial motion was untimely, a timely appeal presumably could have been made. The doctrine does not advocate the proposition that any untimely post-trial motion stops the running of the time to appeal. It does require, however, that the appellate court look to all the facts to determine whether the untimeliness was caused by reliance on the trial court's words or actions.

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24. 375 U.S. at 389.
25. *Id.* at 390.
26. Wolfsohn v. Hankin, 376 U.S. 203 (1964); Motteler v. J.A. Jones Constr. Co., 447 F.2d 954 (7th Cir. 1971); Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir. 1967).
27. 333 F.2d 951 (9th Cir. 1964), *cert. denied,* 379 U.S. 974 (1965).
28. FED. R. CIV. P. 59(b) and ARIZ. R. CIV. P. 59(d) both require the motion for a new trial be served not later than ten days after entry of judgment. Mrs. Pierre incorrectly assumed that she had ten days from receipt of notice of entry of judgment to serve her motion. *See* FED. R. CIV. P. 59(b), 77(d).
29. 333 F.2d at 955.

Rejection of the Unique Circumstances Doctrine in Arizona

It is submitted that *Edwards v. Young* fits squarely within the unique circumstances doctrine, for counsel relied on the trial court's treatment of his untimely motion on the merits. Any argument that the appellant's counsel needed the additional 5 days to file for a new trial should, of course, elicit no sympathy; he could have made that motion even before the judgment was entered.[30] Counsel had from April 9, the date the jury rendered its verdict, to April 28, 10 days after the entry of judgment, to file his motion. Nonetheless, it is arguably unfair for the judicial system to deny an appeal as untimely when the attorney relied on that system in making his error.

In rejecting the application of the unique circumstances doctrine, the Supreme Court of Arizona did not distinguish *Thompson* and *Pierre,* reasoning merely that the time for the perfecting of an appeal is "jurisdictional."[31] For the court to rely on this catchword[32] without proper analysis is misleading. The court was not being asked to enlarge the time period in which appeals may be taken, even though this power is within the supreme court's rule-making ability.[33] Rather, the court was asked to construe and interpret the rules by accepting the unique circumstances doctrine in order to avoid an unjust result brought about by reliance on the judicial system.[34]

Another reason given by the *Edwards* court in denying the appeal was that

> . . . opposing parties have their rights too, and one of them is to feel secure in the knowledge that they are finally freed from the burdens of a suit. They cannot do this as long as a case may be reopened because of allegedly 'unique circumstances' occurring after the time for appeal has passed.[35]

This rationale is also unconvincing under the facts presented to the court. The defendant's attorney did not question the timeliness of the appeal, although he had agreed in writing only to an extension of time in which to file a new trial motion. It is apparent that he believed the

30. *See* Dunahay v. Struzik, 96 Ariz. 246, 393 P.2d 930 (1964); Associates Fin. Corp. v. Scott, 3 Ariz. App. 1, 411 P.2d 174 (1966).

31. 107 Ariz. at 284, 486 P.2d at 182.

32. *See* Patterson v. Patterson, 102 Ariz. 410, 415, 432 P.2d 143, 148 (1967).

33. *See* text accompanying note 3 *supra.*

34. Counsel for the appellant advanced this theory by suggesting that the court of appeals examine Professor Moore's article, 9 J. MOORE, FEDERAL PRACTICE ¶ 204.02[2] at 908 (2d ed. 1970), which argues that if the time to appeal was truly jurisdictional, Congress would not have assigned to the Supreme Court the authority to make rules which could change the time limits. *See* 28 U.S.C. § 2072 (1971). In Arizona, where the supreme court has a constitutional duty to make rules, ARIZ. CONST. art. 6, § 5, part of that duty should be to interpret the rules in the light of practical experience.

35. 107 Ariz. at 285, 486 P.2d at 183.

plaintiff's filing of the motion tolled the appeal period. Thus, the *Edwards* appellee did not need the protection offered him by the court. From his standpoint, the case was not being re-opened after the time for appeal had passed, but merely being appealed within the operation of the rules.

Conclusion

It is not disputed that successful parties have their rights, and that one of these is to feel secure in the knowledge that they are finally freed from the burdens of a suit within a designated time after the entry of judgment. When, however, both parties and the trial court have agreed that a post-trial motion has been timely made, there is no overpowering reason why the unique circumstances doctrine should be rejected and the appeal disallowed. The Supreme Court of the United States has chosen to construe broadly the rules of procedure, but the Supreme Court of Arizona has unfortunately chosen a different approach.

STANDING TO CHALLENGE ADMINISTRATIVE DECISIONS

Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is the question of standing to sue.[1] The purpose of the law of standing is to ensure that lawsuits are prosecuted with sufficient adversity to provide for the proper presentation of the issues.[2] In an adversary legal system, it is commonly accepted that the plaintiff with an actual personal stake in the outcome of the litigation will provide a sharp and clear presentation of the issues in his vigorous prosecution of the action.[3] Where the legislature has authorized public officials to perform prescribed acts by statute, however, and has further provided for judicial review of that official conduct, the standing inquiry begins with a determination of whether the statute in question authorizes review at the behest of the plaintiff.[4] These questions of standing were recently before the Supreme Court of Arizona in *Scottsdale v. McDowell Mountain Irrigation District.*[5]

1. Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972).
2. *See* Flast v. Cohen, 392 U.S. 83, 95 (1968).
3. *See* Note, *The Essence of Standing: The Basis of a Constitutional Right to be Heard*, 10 ARIZ. L. REV. 438, 440 (1968).
4. *E.g.*, Sierra Club v. Morton, 405 U.S. 727, 732 (1972); Scottsdale v. McDowell Mountain Irrigation Dist., 107 Ariz. 117, 121, 483 P.2d 532, 536 (1971).
5. 107 Ariz. 117, 483 P.2d 532 (1971).

In 1968, several landowners[6] petitioned the Maricopa County Board of Supervisors pursuant to state irrigation district statutes,[7] proposing the formation of an irrigation and drainage district on their 11,420 acres. The petitioners openly intended not to operate an irrigation and drainage district, but to develop a planned community on the undeveloped acreage.[8] The City of Scottsdale, the League of Cities and Towns[9] and Herb G. Caywood, a county taxpayer, challenged the validity of the formation of the district in the Superior Court of Maricopa County.[10] The court dismissed their suit for lack of standing to challenge the action of the Board and for lack of any triable issue of fact.[11]

On appeal to the Supreme Court of Arizona, two major issues were presented: whether any or all of the appellants had standing to test the validity of the district's organization, and whether the jurisdictional prerequisites existed for the district's formation under the statute.[12] The supreme court determined that the City of Scottsdale was a proper party plaintiff to invoke the judicial review statute, and that the scope of such review was not limited to a determination of whether the board followed proper procedure. Thus, the court did not

6. The landowners included the Four Peaks Cattle Co., the Santa Lucia Corp., Page Land and Cattle Co., McCullock Properties, Inc. and nine couples each owning 5 acres. Scottsdale v. McDowell Mountain Irrigation Dist., 107 Ariz. 117, 120, 483 P.2d 532, 535 (1971).

7. ARIZ. REV. STAT. ANN. §§ 45-1503 & -1505 (1956).

8. *See* Opening Brief for Appellant at 5-7, 47-48, Scottsdale v. McDowell Mountain Irrigation Dist., 107 Ariz. 117, 483 P.2d 532 (1971). By forming such a district, the petitioners would have been able to take advantage of the high debt-to-property ratio permitted irrigation districts rather than the lower ratio required of other municipal corporations. *Compare* ARIZ. REV. STAT. ANN. § 45-1804 (1956) *with* ARIZ. CONST. art. 9, § 8. The petitioners would have further benefited by being free from any housing or building codes, as well as the master plan of Scottsdale. The basic purpose of the plan, however, was to avoid the statute prohibiting the incorporation of a municipality within six miles of an incorporated city having a population of 5000 persons or more. ARIZ. REV. STAT. ANN. § 9-101.01 (Supp. 1971-72). Since the proposed district was within six miles of the city of Scottsdale, the parcel could not have been incorporated as an ordinary municipality.

9. The League of Arizona Cities and Towns is a voluntary, nonprofit, nonpartisan association of all sixty-five of the incorporated cities and towns in the State. The League's basic operating funds are provided by its members through the payment of dues at the rate of 5¾ cents per capita.

The primary purpose of the League is to advance the interests and welfare of the cities and towns in Arizona through a broad program of research, information, technical assistance and legislative activity. This program is implemented through a wide variety of activities which include an annual conference, a monthly newsletter, an inquiry service, research publications, legislative analysis, field service and consultation.

Foreward, 1972 Municipal Policy Statement, League of Arizona Cities and Towns.

10. The plaintiffs brought suit for a writ of mandamus, quo warranto or certiorari in the superior court as provided by ARIZ. CONST. art. 6, § 5. The irrigation district then filed a petition for a writ of prohibition or other appropriate relief in the supreme court, naming the superior court as respondent and the City of Scottsdale, the League of Arizona Cities and Towns and Herb G. Caywood as the real parties in interest.

11. 107 Ariz. at 120, 483 P.2d at 535.

12. *Id.* at 119, 483 P.2d at 534.

accept the theory on which the superior court granted the defendant's motion for summary judgment. The court determined that the proper scope of judicial review was not only to determine whether the statutory steps in the organization of the district were followed by the Board, but also whether certain other jurisdictional facts necessary in order for the Board to act were present.[13] The court found that the statutes required a certain intent on the part of the petitioners before the Board could grant the petition. Since there was no finding in the record that the district organizers possessed the requisite intent of improving arid land for agricultural purposes,[14] or whether the petition for formation was signed by a majority of the resident owners as required by statute,[15] the court remanded the case for a determination of whether these necessary jurisdictional facts existed before the statutory steps for the organization of the district could be taken. This commentary will analyze *McDowell* to determine its effect on the Arizona rules of standing. Since the court used a federal decision[16] for the definition of the standing problem where administrative agencies are involved, the allegations of the *McDowell* plaintiffs seeking standing to contest administrative action will also be analyzed under the federal standards.[17]

Article III of the Federal Constitution requires a "case or controversy" before a federal court can exercise jurisdiction. This mandate has given rise to a series of federal decisions which stand for the proposition that a jurisdictional inquiry must be two-fold: does an actual case or controversy exist, and, if so, is the plaintiff before the court capable of demonstrating the necessary adversity to prosecute that case or controversy with integrity?[18] While the Arizona Constitution does not have a comparable directive, jurisdiction of the Arizona courts is

13. *Id.* at 122, 483 P.2d at 537.

14. The *McDowell* court cited Post v. Wright, 37 Ariz. 105, 289 P. 979 (1930), for the construction of the predecessor to ARIZ. REV. STAT. ANN. §§ 45-1503 *et seq.* (1956), requiring that the petitions for the organization of water irrigation districts must state that the purpose of the organizers is to provide water for the irrigation of their lands. 107 Ariz. at 123, 483 P.2d at 538.

15. ARIZ. REV. STAT. ANN. § 45-1505 (1956).

16. Ass'n of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1969). After early decisions on standing to bring quo warranto proceedings testing administrative actions, Arizona case law on the standing problem has been sparse. *See* O'Neill v. Indus. Furnaces, Inc., 72 Ariz. 149, 231 P.2d 768 (1951); Duffield v. Ashurst, 12 Ariz. 360, 100 P. 820 (1909); Roer v. Superior Court, 4 Ariz. App. 46, 417 P.2d 559 (1966). This is one possible reason for *McDowell's* citation to *Data Processing.*

17. The possible effects of the most recent standing decision of the Supreme Court of the United States, Sierra Club v. Morton, 405 U.S. 727 (1972), will also be considered, even though that case was decided after *McDowell.* See text accompanying notes 44-48 *infra.*

18. *Cf.* Jaffe, *Standing to Sue in Conservation Suits,* in LAW AND THE ENVIRONMENT 123, 126 (M. Baldwin & J. Page, Jr. eds. 1970).

cast in terms of "cases."[19] On the state level, however, there has not been a parallel development of case law defining "cases" to include a plaintiff capable of demonstrating a personal stake in the outcome. It is thus possible that *McDowell's* citation to a United States Supreme Court decision indicates a willingness to adopt the federal standing principles for Arizona.

Early Supreme Court decisions provided a test for standing where Congress had not provided for review by statute. Standing is then based upon the plaintiff's ability to demonstrate a "personal stake in the outcome of the controversy."[20] The allegations necessary to demonstrate the interest and adversity of the plaintiff must show that a "legally protected interest" has been violated—that his constitutional rights have been invaded,[21] his statutory rights have been infringed,[22] or that, as a taxpayer, he will suffer a pecuniary loss due to a violation of constitutional or statutory safeguards.[23]

Initially, the "legally protected interest" test for standing was invoked even where Congress had specifically authorized public officials to perform certain functions, and had provided for judicial review of those actions.[24] The Supreme Court updated and clarified its position on standing to challenge administrative decisions in *Data Processing Service, Inc. v. Camp.*[25] In that case, the Court held that persons had standing to obtain judicial review of federal agency action under the procedural statute authorizing review[26] when they alleged that the challenged action had caused them "injury in fact," and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes claimed to have been violated by agency action.[27] Standing to challenge administrative action is thus conferred when the plaintiff can invoke a procedural statute authorizing judicial review of such official action, and can demonstrate that he is a person aggrieved within the meaning of that statute.

It is the law in Arizona that, in the absence of a special appeal statute, only the Attorney General or County Attorney can bring an

19. ARIZ. CONST. art. 6, § 14.
20. Baker v. Carr, 369 U.S. 186, 204 (1962).
21. *E.g.*, Everson v. Board of Educ., 374 U.S. 203 (1963); Baker v. Carr, 369 U.S. 186 (1962).
22. *E.g.*, Barlow v. Collins, 397 U.S. 159 (1970); Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970).
23. Flast v. Cohen, 392 U.S. 83, 101 (1968). *See generally* Note, *supra* note 3.
24. *See, e.g.*, Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118, 127-39 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464, 479-81 (1938).
25. 397 U.S. 150 (1969). *See also* Barlow v. Collins, 397 U.S. 159 (1969).
26. 5 U.S.C. § 702 (1970).
27. 397 U.S. at 152.

action to test the validity of a Board of Supervisor's action in authorizing the formation of a political subdivision.[28] In this respect, standing is analogous in the Arizona and federal court systems: only after it is determined that judicial review of administrative board action is authorized by statute will the court determine whether the plaintiff before the court is a proper party to the suit.[29] Initially, therefore, the plaintiffs in *McDowell* had to base their claim to standing on such a procedural statute. The *McDowell* court found that the legislature had provided for judicial review of the validity of irrigation district organization by quo warranto.[30] Having determined that the plaintiffs had a procedural statute on which to gain entry to the courts, the supreme court then considered the propriety of each plaintiff's invocation of that statute by examining whether the party had suffered an injury in fact arguably within the zone of interests to be protected by a substantive statute.

The City of Scottsdale based its standing claim on a statute[31] which precludes a territory within an urbanized area[32] from being incorporated as a city. A segment of the district was, in fact, located within the urbanized area adjacent to Scottsdale. Finding that the "intent of the statute is to give existing cities and towns area in which to expand without conflicts from newly created municipalities,"[33] the court concluded that Scottsdale's interest was "real and immediate and within the zone of interests to be protected,"[34] thus granting Scottsdale standing.

Caywood, a taxpayer of Maricopa County, alleged that the district's proposed population of 75,000 would force Maricopa County to expend funds to provide sanitation, police protection and other municipal functions.[35] He argued that the purported district would be unable to finance these services since it would not be endowed with the power to tax in order to raise the necessary revenues. Although the

28. Skinner v. City of Phoenix, 54 Ariz. 316, 95 P.2d 424 (1939); Faulkner v. Board of Supervisors, 17 Ariz. 139, 149 P. 382 (1915).

29. Sierra Club v. Morton, 92 S. Ct. 1361, 1365 (1972); Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 156 (1970); Scottsdale v. McDowell Mountain Irrigation & Drainage Dist., 107 Ariz. 117, 120, 483 P.2d 532, 535 (1971).

30. ARIZ. REV. STAT. ANN. § 45-1522 (1956).

31. *Id.* § 9-101.01 (Supp. 1971-72).

32. An urbanized area is defined as "that land within six miles of an incorporated city or town having a population of 500 or more." *Id.* § 9-101.01 (Supp. 1971-72).

33. 107 Ariz. at 122, 483 P.2d at 537.

34. *Id.* The appellees argued that ARIZ. REV. STAT. ANN. § 9-101.01 (Supp. 1971-72), was inapplicable to the district since the district was not an "incorporated city or town" as specified in the statute. The court rejected this argument, taking cognizance of the fact that the district's admitted purpose was to create a planned urban community and that this intent of the organizers brought the injury alleged within the zone of interest to be protected by the statute. 107 Ariz. at 122, 483 P.2d at 537.

35. 107 Ariz. at 121, 483 P.2d at 536.

court agreed with Caywood that the proper test for taxpayer standing in Arizona was an "ability to show some pecuniary loss to taxpayers as a class,"[36] the court refused to grant him standing. The court found that Caywood's allegation showed no present or past pecuniary loss suffered by the taxpayers of Maricopa County, and that any future pecuniary loss was too "speculative and remote."[37]

The League of Cities and Towns set forth three reasons for granting it standing, only the first of which was discussed by the court. The League alleged that it would suffer "injury in fact" if the district could issue bonds without the statutory controls imposed on bonds issued by regularly formed cities and towns.[38] Since interest rates on tax exempt municipal bonds are determined at least in part by the availability of funds in the entire Arizona market,[39] a proliferation of bodies issuing municipal bonds would affect all bond issuers and bondholders by increasing interest rates. The availability of means to circumvent the municipal bonding statutes was thus argued to permit a violation of the legislative intent expressed in placing a ceiling on the amount of bonded indebtedness a city could incur. The League contended that, as the representative of all the cities and towns required to abide by the municipal bonding statute, it came within the zone of interests to be protected by that statute. The court denied the League standing, however, concluding that "[t]his alleged harm is remote and speculative, and further lacks the concrete adverseness necessary to assure proper presentment of the pertinent issues."[40]

36. Henderson v. McCormick, 70 Ariz. 19, 22, 215 P.2d 608, 610 (1950).
37. 107 Ariz. at 121-22, 483 P.2d at 536-37.
38. *Id.* at 121, 483 P.2d at 536.
39. *Cf.* City of Santa Clara v. Von Raesfeld, 3 Cal. 3d 239, 474 P.2d 976, 90 Cal. Rptr. 8 (1970).
40. 107 Ariz. at 121, 483 P.2d at 536. The League's second claim, not discussed by the supreme court, also arose from the district's attempt to avoid the municipal bonding statutes. Appellant's Opening Brief, at 25-47, Scottsdale v. McDowell Mountain Irrigation & Drainage Dist., 107 Ariz. 117, 483 P.2d 532 (1971). The League argued that innocent buyers would be defrauded since bonds issued by an irrigation district, unlike those issued by a properly formed city or town, may be paid over a twenty or thirty year period, but no payment on the principal may be made until the eleventh year. ARIZ. REV. STAT. ANN. § 45-1802 (1956). Bonds are an obligation on each parcel of land within the district to the extent of their entire amount until they are paid in full. *Id.* § 45-1723. Thus, in the event that there are insufficient funds to pay off the bonds, a property owner's realty may be taxed or sold to pay any deficiency, even if the particular taxpayer has paid in full for his proportionate part of the bonds. In addition, since the current corporate owners of the land planned that the proceeds from the bond sales would be used for municipal improvements, there is no way that a buyer could estimate the extent of this bonded obligation. Since irrigation districts are permitted to be in business in connection with a wealth and income producing undertaking, they are permitted by statute to bond up to 60 percent in excess of their assessed land value. *Id.* § 45-1804. Cities and towns, which are permitted to issue bonds for consumer-oriented services, are allowed to do so only up to four percent in excess of their assessed land value without voter approval. ARIZ. CONST. art. 9, § 8. Since the purported district would actually be functioning as a city in providing consumer-oriented services for its 75,000 potential inhabitants, it would be able to issue bonds for such services in a far greater dollar amount than

It would seem that since the League could demonstrate a double injury, coming within the purview of a statute[41] and of a constitutional provision[42] allegedly violated by agency action, the court should have granted it standing. It appears that the court simply found Scottsdale to be a more "adverse" plaintiff, and having found a proper party plaintiff, wished to avoid redundancy of representation. While there is a legitimate interest in avoiding multiplicity of complainants in order to save court time and costs,[43] multiple representation is not a problem where the interests sought to be represented are not identical.

The Arizona court lacked the benefit of the more recent United States Supreme Court decision in *Sierra Club v. Morton.*[44] The Court concluded in *Sierra Club* that an organization could be granted standing to challenge governmental action only when it alleged that it would be affected in its activities, or, when suing in its representative capacity, that its members would be affected or injured.[45] Once the organization had alleged such a direct injury, it could be granted standing to sue; once having gained access to the courts, the organization could raise other contentions, including those made on behalf of the public interest.[46] Under this test, the League of Cities and Towns not only would have been granted standing since it alleged direct injury to one of its members, it arguably would have been the best possible choice of plantiffs. Having been granted standing, the League could then have raised at trial its claim that future inhabitants of the district would have been injured by the lack of bonding restrictions and that the Arizona public would suffer from misuse of the state's laws. Since the *McDowell* court cited *Data Processing* in support of its decision,[47] it is possible that the *Sierra Club* reasoning would also have been accepted to grant the League standing.[48]

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would a regularly established city. Thus, a purchaser in the irrigation district would not have the protection of the limited bonding capacity and limited budget increases enjoyed by a city or town dweller.

The League's third claim was that the irrigation statute, ARIZ. REV. STAT. ANN. § 45-1503 (1956), should not be misused. By allowing the statute to be used as a vehicle for developing a planned city, the purposes of the urbanized area statute, *id.* § 9-101.01 (Supp. 1971-72), in protecting existing cities and towns from encroaching on municipal organizations would be defeated. As Scottsdale's representative, the League contended that it would suffer injury in fact by the development of a community on Scottsdale's border. The League further argued that it was within the zone of protection of ARIZ. REV. STAT. ANN. § 9-101.01 (Supp. 1971-72), since that statute sought to protect all of the cities and towns in the state, and the League represents all of the cities and towns in Arizona. See text of note 9 *supra.*

41. ARIZ. REV. STAT. ANN. § 9-101.01 (Supp. 1971-72).
42. ARIZ. CONST. art. 9, § 8.
43. Jaffe, *supra* note 14, at 128.
44. 405 U.S. 727 (1972).
45. *Id.* at 735.
46. *Id.* at 740 n.15.
47. 107 Ariz. at 121, 483 P.2d at 536.
48. It is possible that reasoning similar to that in *Sierra Club* would have been necessary had the proposed "irrigation district" in *McDowell* been formed on land not

The importance of *McDowell* lies in its creation of possible standing principles in Arizona.[49] Previously, there was little if any guidance to be derived from reported decisions regarding this area. While the court's reliance on *Data Processing* cannot be said to have been a wholesale adoption of the federal view on the matter, it is a helpful beginning toward developing state standing principles for finding a proper plaintiff in state-court litigation. Hopefully, in the future, the court will adopt the reasoning of *Sierra Club* to allow standing to such plaintiffs as the League of Arizona Cities and Towns.

within an urbanized area. ARIZ. REV. STAT. ANN. § 9-101.01 (Supp. 1971-72). In such a case, presumably none of the plaintiffs would have been granted standing to sue by the supreme court under the irrigation district quo warranto statute, *id.* § 45-1522 (1956), since none of those parties could have demonstrated that their interests fell within a zone of protection. 107 Ariz. at 121, 483 P.2d at 487. In such a case, however, it is still possible that there is a route by which "any party" could challenge the validity of the district's formation. Irrigation districts are municipal corporations, ARIZ. CONST. art. 13, § 7, and, under such franchise, share in a portion of the governmental privileges of other municipalities in the state, among those being the right to issue tax exempt bonds, exercise the taxing power and the right of eminent domain. ARIZ. REV. STAT. ANN. §§ 45-1501, -1866 (1956). Where this franchise is usurped or unlawfully held, the attorney general upon his own information, or upon a verified complaint by any person, may bring an action contesting such usurpation under the general quo warranto statute. *Id.* § 12-2041(A). Furthermore, the attorney general *must* bring such an action "when he has reason to believe" that such usurpation or unlawful holding of the sovereign franchise has occurred. *Id.* § 12-2041(B). If, after complaint, the attorney general refuses to bring the action, he may be compelled to do so by the person filing the complaint bringing an action for a writ of mandamus. *Id.* § 12-2021; Duffield v. Ashurst, 12 Ariz. 360, 100 P. 820 (1909). If this were done, the court might find that the prerequisites for the issuance of a writ of mandamus exist, *see* Davis, *Arizona Administrative Mandamus,* 9 ARIZ. L. REV. 1 (1967), rule on the jurisdictional prerequisites for the formation of an irrigation district as was done in *McDowell* and issue a writ compelling the attorney general to bring a quo warranto proceeding. *See* Duffield v. Ashurst, 12 Ariz. 360, 100 P. 820 (1909); Faulkner v. Board of Supervisors, 17 Ariz. 139, 149 P. 382 (1915); State *ex rel.* Pickerell v. Town of Scottsdale, 99 Ariz. 103, 407 P.2d 72 (1965). *See also* Nelson, *The Rules of Procedure for Special Actions: Long Awaited Reform of Extraordinary Writ Practice in Arizona,* 11 ARIZ. L. REV. 413 (1969).

49. The substantive issues raised in *McDowell* have been mooted by the legislature. ARIZ. REV. STAT. ANN. § 45-1809(B) (Supp. 1971-72), was amended in 1972 to preclude the issuing or selling of any bonds to finance in whole or part the formation of new cities or towns. In addition, the Arizona legislature has enacted a General Improvement District Statute, *id.* §§ 11-771 *et. seq.* (Supp. 1971-72), to establish a general improvement district which permits formation of planned cities or towns only under supervisory legislation. This legislation prevents any use of the statute by a corporation or organization which would build homes solely to make a profit and then retire from the community. *Id.* § 11-771.21 (Supp. 1971-72).

COMMERCIAL AND PROPERTY LAW

TAXATION

STATUTORY CONSTRUCTION IN TAX ADMINISTRATION

> Do not expect anybody's theory of [statutory] interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.[1]

Determining a person's meaning from his words alone is difficult, for interpretations vary among individuals. When courts are confronted with construing laws and their interrelationships, the difficulties can become formidable. The Supreme Court of Arizona faced such a problem in *Nelson Machinery Co. v. Yavapai County*,[2] when the court was specifically asked to decide whether filing an eligibility affidavit within the statutorily-prescribed time period was necessary before asserting a constitutional exemption from taxation of goods held for resale. This required determining whether the statutes prescribing the procedures necessary for claiming the constitutional exemption were intended to apply to an exemption added by a subsequent amendment to the constitution.

When the constitution of Arizona was adopted in 1910, it enumerated several classes of property exempt from taxation.[3] The exempt property included that used by governmental, educational and charitable institutions, public debts and a limited amount of property owned by widows. Since then, the number of exempt classifications has been enlarged by constitutional amendment,[4] including the 1964 amendment adding inventory held for resale by a retailer or wholesaler.[5] In 1929, the Arizona legislature first enacted statutes pre-

1. 2 H. HART & A. SACHS, THE LEGAL PROCESS 1201 (1958).
2. 108 Ariz. 8, 491 P.2d 1132 (1971).
3. ARIZ. CONST. art. 9, § 2; Rev. Stat. of Ariz. 1913, 150.
4. *See* ARIZ. CONST. art. 9, § 2, *amended by referendum*, November 6, 1928, [1929] Ariz. Sess. Laws 493; *amended by referendum*, November 5, 1946, [1947] Ariz. Sess. Laws 401; *amended by initiative petition*, November 3, 1964, [1965] Ariz. Sess. Laws 295; *amended by referendum*, November 5, 1968, [1969] Ariz. Sess. Laws 555.
5. [1965] Ariz. Sess. Laws 295.

scribing the procedure for claiming the constitutional exemptions.[6] These statutes, amended through the years, require affidavits of eligibility to be filed[7] and, in some cases, proof of eligibility to be furnished.[8]

In 1969, Nelson Machinery, a retailer and wholesaler of mining equipment, failed to file the required affidavit prior to the statutory deadline. While the Yavapai County Assessor had assessed a tax on Nelson's inventory in February, the affidavit claiming the exemption was not filed until October, 1969, after the Sheriff had threatened to seize the equipment for nonpayment of taxes.[9] Following further threats of seizure, Nelson Machinery paid the tax under protest and filed suit in superior court to recover the amount paid.[10] Initially, the superior court ruled in favor of Nelson Machinery, allowing recovery of the taxes, interest and penalties plus costs.[11] The following day, however, the Arizona Court of Appeals ruled in *Fry v. Mayor and City Council of Sierra Vista*[12] that failure to file an inventory exemption affidavit resulted in a waiver of the right to the exemption. The superior court then vacated its judgment and ruled that Nelson Machinery was required to pay the assessed tax.[13]

On appeal to the supreme court, Nelson claimed that an affidavit was not required for the inventory exemption, since the affidavit statute had been passed by the legislature prior to the addition of inventory as an exempt classification in the constitution.[14] Yavapai County con-

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6. Ch. 91, §§ 2-4, [1929] Ariz. Sess. Laws 284.

7. ARIZ. REV. STAT. ANN. § 42-274 (Supp. 1971-72), was originally enacted in 1928. Ch. 91, § 3 [1929] Ariz. Sess. Laws 284, *amended*, Ch. 66, § 1, [1951] Ariz. Sess. Laws 27, *amended*, ARIZ. REV. STAT. ANN. § 42-274 (Supp. 1971-72) [hereinafter referred to as the affidavit statute]. In 1969, the affidavit statute provided that "[A] person claiming exemption from taxation under the provisions of § 2, article 9, constitution of Arizona, shall appear before the county assessor and make affidavit as to his eligibility, answering fully all questions appearing on a form provided by the county assessor for such purpose or otherwise propounded . . ."

8. ARIZ. REV. STAT. ANN. § 42-275 (Supp. 1971-72), was originally enacted as ch. 91 § 4, [1929] Ariz. Sess. Laws 284, *amended*, ch. 18, § 1, [1949] Ariz. Sess. laws 27, *amended*, Ariz. Rev. Stat. § 42-275 (1956), *amended*, ch. 4 § 1 [1968] Ariz. Sess. Laws 2d Spec. Sess. 854 (1967), *amended* in 1969, ARIZ. REV. STAT. ANN. § 42-275 (Supp. 1971-72) [hereinafter referred to as the proof statute]. In 1969, the proof statute read as follows:

> The assessor may, in his discretion, require additional proof of the facts stated by the affiant before allowing an exemption. Failure upon the part of a person entitled to exemption to make affidavit or furnish evidence as required by this article between the first Monday in January and April 1 each year shall be deemed a waiver of such exemption.

9. Nelson Mach. Co. v. Yavapai County, 108 Ariz. 8, 491 P.2d 1132 (1971).

10. Abstract of Record at 14, Nelson Mach. Co. v. Yavapai County, 108 Ariz. 8, 491 P.2d 1132 (1971).

11. *Id.* at 15.

12. 11 Ariz. App. 490, 466 P.2d 41 (1970).

13. Abstract of Record at 22, Nelson Mach. Co. v. Yavapai County, 108 Ariz. 8, 491 P.2d 1132 (1971).

14. Opening Brief for Appellant at 12, Nelson Mach. Co. v. Yavapai County, 108 Ariz. 8, 491 P.2d 1132 (1971).

tended, however, that the legislature intended all classifications to be subject to the affidavit requirement, including those added after passage of the affidavit statute.[15] The supreme court held that the affidavit statute applied to the inventory exemption provision of the constitution, and Nelson's failure to file the contested affidavit on time thus resulted in losing the tax exemption for 1969.[16] The court in its decision arguably by-passed established rules of statutory construction and relied instead upon the following circumstances as manifestations of legislative intent: the inclusion of a provision specifically prohibiting the affidavit requirement for the exemption of household goods added in a 1968 amendment to article 9; the re-enactment of the proof statute in 1967; the finding that the affidavit statute was merely procedural; and the court of appeals decision in *Fry* relied upon by the superior court. After examining the rules of statutory construction presented to the court, each of these rationales will be discussed.

Rules of statutory construction, based on years of reason and experience,[17] aid courts in determining legislative intent[18] and help to ensure uniformity of interpretation in recurring situations.[19] Under the generally accepted rules, when one statute "adopts" all or part of another statute by a specific or descriptive reference, the adopting statute is known as a "reference" statute.[20] The reference statute incorporates the language of the adopted statute exactly as it appears at the time of the enactment of the reference statute.[21] Subsequent changes in the adopted statute do not affect the reference statute.[22] The major reason underlying these rules is that statutes are to be construed to arrive at the legislature's intent at the time of enactment.[23] Since the legislature cannot predict what future lawmakers will do, subsequent changes in laws or conditions should not be considered when determining legislative intent.[24]

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15. Brief for Appellee at 12, Nelson Mach. Co. v. Yavapai County, 108 Ariz. 8, 491 P.2d 1132 (1971).
16. 108 Ariz. at 10, 491 P.2d at 1134.
17. Barlow v. Jones, 37 Ariz. 396, 399, 294 P. 1106, 1107 (1930).
18. *See, e.g.*, City of Mesa v. Killingsworth, 96 Ariz. 290, 394 P.2d 410 (1964); State v. Borah, 51 Ariz. 318, 76 P.2d 757 (1938); Automatic Registering Mach. Co. v. Pima County, 36 Ariz. 367, 285 P. 1034 (1930); Deyo v. Arizona Grading and Constr. Co., 18 Ariz. 149, 157 P. 371 (1916); Hicks v. Krigbaum, 13 Ariz. 237, 108 P. 482 (1910). *See generally* MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966).
19. Kendall v. United States, 12 U.S. (12 Pet.) 834 (1838).
20. Clements v. Hall, 23 Ariz. 2, 201 P. 87 (1921).
21. Dairy & Consumers Co-op Ass'n v. Arizona State Tax Comm'n, 74 Ariz. 35, 243 P.2d 465 (1952).
22. Clements v. Hall, 23 Ariz. 2, 201 P. 87 (1921); Noble v. Noble, 164 Or. 538, 103 P.2d 293 (1940).
23. Bushnell v. Superior Court of Maricopa County, 102 Ariz. 309, 428 P.2d 987 (1967).
24. *See* Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 77, 4 P.2d 369, 374 (1931), *modified*, 39 Ariz. 367, 7 P.2d 254

The supreme court was asked to apply these rules to the affidavit requirement for the inventory exemption.[25] Nelson argued that the enactment of the affidavit statute, a reference statute, in 1965 would have adopted article 9 as it appeared in 1956. Since the affidavit statute was not reenacted until 1970, the 1964 amendment of article 9 adding the inventory exemption would not have been adopted by the affidavit statute until 1970. The affidavit statute, therefore, could not have included the inventory exemption in 1969, the year in question, and Nelson Machinery would not have had to file an affidavit to have its inventory exempt from taxation.[26] The majority stated, however, that these rules are merely for the court's convenience and as such are subservient to the actual legislative intent.[27] The supreme court abandoned this application of the rules since it believed contrary intention had been manifested, touching on four factors relevant to this conclusion.

First, the court held that the legislature could provide a reasonable method for claiming the inventory exemption, since nothing in the adoption of article 9 indicated that it should not.[28] In support of this position, the court cited the 1968 amendment of article 9 adding the household goods exemption, which included a specific prohibition against the requirement of affirmative action to receive the benefit of the exemption.[29] The court reasoned that if an affidavit requirement was not intended to be required for the inventory exemption, a specific prohibition would also have been included in the 1964 amendment.[30] The court thought that household goods were sufficiently distinguish-

(1932). Another reason for construing the reference statute to incorporate the adopted statute as it appeared at the time of enactment is to lend stability and certainty to the law. Kendall v. United States, 12 U.S. (12 Pet.) 834 (1838).

25. 108 Ariz. at 9, 491 P.2d at 1133.

26. *Id.* The other *reference statute*, the proof statute, was reenacted in 1967. The proof statute makes no reference to article 9, but only to the affidavit statute. Under the rules of statutory construction, the reenactment of the proof statute in 1967 would have adopted the provisions of the affidavit statute as they appeared in 1967. The affidavit statute did not incorporate the inventory exemption until 1970, however. Therefore, in 1967 when the proof statute adopted the provisions of the affidavit statute by reenactment, the incorporated provisions did not include the inventory exemption. Consequently, at the beginning of 1969, the proof statute did not include the inventory exemption under its requirements and Nelson Machinery would not have had to submit any proof relating to inventory it held in 1969.

27. *Id.*

28. *Id.* at 9, 491 P.2d at 1133.

29. ARIZ. CONST. art. 9, § 2 *as amended* in 1968 provides in part: "All household goods owned by the user thereof and used solely for non-commercial purposes shall be exempt from taxation, and such person entitled to such exemption shall not be required to take any affirmative action to receive the benefit of such exemption."

30. Justice Udall in his dissent discounted this argument by suggesting that the prohibition might refer to ARIZ. REV. STAT. ANN. § 42-632 (1956), which requires an affidavit for household goods moving through the state or held in transitory storage. Nelson Mach. Co. v. Yavapai County, 108 Ariz. 8, 12, 491 P.2d 1132, 1136 (1971) (Udall, J., dissenting).

able from other types of goods and that a different treatment could be justified. Inventory, on the other hand, might not be so readily distinguishable and an affidavit might therefore be desirable.[31] The court failed to note that all of the exemptions until the 1964 amendment were based upon the ownership of the property, and not its inherent nature. Inventory and household goods were the first exemptions not to be classified strictly by ownership. Therefore, a similar variance in the requirements for asserting the exemption might be reasonably justified.

Second, the court believed that the reenactment of the proof statute in 1967 indicated that the legislature intended the affidavit requirement to apply to the 1964 inventory addition to the constitutional exemption classification.[32] This interpretation is at least questionable. If the legislature had intended to extend the affidavit requirement to inventory, it would have been more logical to reenact the affidavit statute at the same time the proof statute was reenacted, thereby eliminating all doubt as to legislative intent. Further, an examination of the proof statute as enacted in 1956 and 1967 reveals that the only difference is a change in the filing deadline from April 30th to April 1st. By reenacting the proof statute alone, the indication seems to be that the legislature intended to change the time period allowed for filing, and not to extend the affidavit to a new exemption.

Third, the court found that the affidavit and proof statutes were merely "procedural" and did not affect the constitutional rights granted under article 9.[33] The procedures for asserting the constitutional exemptions contain a time limitation, and non-compliance with the deadline is deemed to be a waiver of the rights under article 9.[34] The issue whether the legislature could prescribe procedures which would allow inaction on the part of the taxpayer to constitute a waiver of a constitutional exemption from taxation was raised in *Calhoun v. Flynn*,[35] where the court held that the legislature could not so impair a citizen's constitutional rights, and allowed a taxpayer to recover taxes paid when an affidavit had not been timely filed. In 1948, however, *Calhoun* was overruled by *State v. Allred*,[36] which held that the state could impose reasonable requirements for the assertion of a constitutional exemption from taxation, and that failure to comply with these requirements constituted a waiver of those rights.

31. 108 Ariz. at 10, 491 P.2d at 1134.
32. *Id.*
33. *Id.*
34. *See* ch. 4, § 1, [1968] Ariz. Sess. Laws 2d Spec. Sess. 854 (1967).
35. 37 Ariz. 62, 289 P. 157 (1930).
36. 67 Ariz. 320, 195 P.2d 163 (1948); *accord*, St. John's Church v. Los Angeles County, 5 Cal. App. 2d 235, 42 P.2d 1093 (1935).

Although a majority in *Nelson* minimized the impact of the legislatively imposed conditions on constitutional rights by describing the proof statute as merely "procedural,"[37] the dissent pointed out that this "procedural" statute cost Nelson Machinery more than $15,000,[38] a substantial penalty for the violation of a technical procedure. The dissent also objected that the language of article 9 gives no indication that there is any requirement for asserting the rights provided therein, resulting in a tendency to "catch the unwary" and to require taxes where none are due.[39] It is submitted that the reasoning of the court here is basically irrelevant to the issue of determining legislative intent.

The final factor relied upon by the majority for determining legislative intent was electorate knowledge. When considering the same issue in *Fry*, the court of appeals stated, "[W]e presume that when the constitutional amendment was enacted by the electors of this state, without expression of a contrary intent, that they were aware of the existence of A.R.S. § 42-274."[40] The supreme court in *Nelson*, quoting this language, agreed that this was the proper presumption. While as a general rule of statutory interpretation the legislature is presumed to have knowledge of all laws in existence at the time a given statute is enacted,[41] an examination of the history of the 1964 amendment of article 9 reveals that the legislature did not enact this provision. Instead, a business association sponsored the amendment as an initiative petition which was placed on the ballot and approved in the general election of 1964.[42] Although this presumption might be extended to the electorate under some circumstances,[43] its validity is questionable under the circumstances in *Nelson*. Whatever arguments can be made as to the statutory knowledge of the legislature, these arguments are considerably weakened when it is assumed that the electorate is cognizant of a law which will effect but a small portion of the community.[44]

37. 108 Ariz. at 10, 491 P.2d at 1134.
38. *Id.* at 12, 491 P.2d at 1136 (Udall, J., dissenting).
39. *Id.* The reasons for Nelson Machinery's failure to file the affidavit are not disclosed by the record, but the dissent points out that no benefit could accrue to the taxpayer for not filing. *Id.* One logical conclusion is that the taxpayer was unaware of the requirement.
40. Fry v. Mayor and City Council of Sierra Vista, 11 Ariz. App. 490, 494, 466 P.2d 41, 45 (1970).
41. Arizona State Bd. of Directors for Junior Colleges v. Phoenix Union High School Dist., 102 Ariz. 69, 424 P.2d 819 (1967). *See generally* E. CRAWFORD, STATUTORY CONSTRUCTION 420 (1940).
42. STATE OF ARIZONA, INIATIVE AND REFERENDUM PUBLICITY PAMPHLET (1964). The court in its opinion indicated that the 1964 amendment originated in the legislature, rather than by initiative petition. At one point the court discusses "the intent and purpose of the framers (here the legislature) and of the people who adopted it." 108 Ariz. at 9, 491 P.2d at 1133.
43. *Cf.* Stetson v. Seattle, 74 Wash. 606, 134 P. 494 (1913); 42 AM. JUR. 2d *Initiative And Referendum* § 55 (1969).
44. The dissent labeled the presumption "inherently unreasonable." 108 Ariz.

The only cases *Fry* cites in support of this presumption involve statutes enacted by the legislature.[45] Why the *Fry* court extended the presumption of statutory knowledge to the electorate in the passage of an initiative petition remains unexplained.

Another facet to the presumption of electorate knowledge was mentioned in the dissent in *Nelson*.[46] When presented to the voters, article 9 contained a clause stating, "[t]his section shall be self-executing."[47] A constitutional provision is self-executing when it becomes operative without the aid of supplemental or enabling legislation.[48] Although the "self-executing" language does not necessarily mean that the legislature may not enact legislation to carry out the purpose of the constitutional provisions,[49] the inclusion of this clause may have misled voters to believe that no action would be required for claiming the exemption.[50]

In *Nelson* the court was called upon to determine whether an amended constitutional provision exempting certain property from taxation was subject to a statutory affidavit requirement enacted years before the amendment. In determining whether the 1929 legislature intended the statutes to apply to the 1964 constitutional amendment, or whether the 1964 electorate intended the amendment to be subject to the 1929 statutory requirement, the court by-passed traditional rules of statutory construction. Instead, legislative intent, the controlling factor, was determined by an interpretation of subsequent legislation. When, as in *Nelson*, the interpretation leads to a limitation of a constitutionally approved exemption from taxation initiated and approved by the electorate, perhaps a more explicit intent from the legislature should be required. Sanctioning the limitation of constitutional rights should be done cautiously in any event. When it is done without a

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at 11, 491 P.2d at 1135. *See also* Dennis v. Jordan, 71 Ariz. 430, 452, 229 P.2d 692, 704 (1951) (Phelps, J., dissenting):

> If the courts are realistic can they presume that the voters who support an initiative measure have studied it or even read it? To so presume amounts to the creation of a legal fiction upon which to base a finding of legislative intent; a legal fiction I believe to be completely refuted by the facts.

45. Arizona State Bd. of Directors for Junior Colleges v. Phoenix Union High School Dist., 102 Ariz. 69, 424 P.2d 819 (1967) (passage by the legislature of laws providing for an integrated state system of junior colleges); *In re* Adoption of Wilcox, 68 Ariz. 209, 204 P.2d 168 (1949) (legislative enactment of laws regulating adoption).

46. 108 Ariz. at 12, 491 P.2d at 1136 (Udall, J., dissenting).

47. [1965] Ariz. Sess. Laws 295.

48. Miller v. Wilson, 59 Ariz. 403, 129 P.2d 668 (1942).

49. Gherna v. State, 16 Ariz. 344, 146 P. 494 (1915).

50. *See* Downs v. Sulphur Springs Valley Elec. Corp., 80 Ariz. 286, 293, 297 P.2d 339, 343 (1956): "When dealing with words . . . in a constitution which is adopted by a vote of the people, they should be given the meaning most common to the ordinary individual."

clear indication from the people or the legislature, when it is done in retrospect, ratifying administrative rules laid down without clear statutory authorization, with the practical effect of denying an unambiguous exemption from taxation, it may be that the court's interpretation goes beyond legislative contemplation.

COMMERCIAL LAW

THE UNIFORM COMMERCIAL CODE AND HOLDERS IN DUE COURSE

Since the *Uniform Commercial Code* has only been in effect in Arizona since 1968,[1] there have been few occasions for the Arizona courts to review and interpret its provisions. Recently, however, the Supreme Court of Arizona had the opportunity to examine several sections of the Code affecting the free flow of promissory notes in commerce. In *Mecham v. United Bank of Arizona*[2] the court faced the specific problem of distinguishing holders of promissory notes who technically satisfy all the conditions for payment from those who, although technically satisfying those conditions, are so involved in the transactions surrounding the execution of the note that they should be denied the special protection of the Code for holders in due course.

One of the major purposes of the Code is to "simplify, clarify, and modernize the law governing commercial transactions."[3] To accomplish this objective, general guidelines were provided to give the Code flexibility, often without specifically defining all the relevant terms and concepts. This flexibility does not mean, however, that a court should accept those guidelines at face value. A court should not only apply the general standards of the Code, but should analyze how the particular facts and circumstances of the case before it fit within the underlying policies of the applicable provisions. *Mecham* repre-

1. Arizona adopted the *Uniform Commercial Code*, as ARIZ. REV. STAT. ANN. §§ 44-2201 *et seq.* (1967), effective January 1, 1968, *as amended* (Supp. 1971-72). All citations to the Code sections are to the particular section number of the *Arizona Revised Statutes Annotated*, followed by the *Uniform Commercial Code* (1962 Official Text) section number in parentheses.

2. 107 Ariz. 437, 489 P.2d 247 (1971). This analysis will discuss the types of conduct which raise doubts regarding the validity of claims by negotiable instrument holders to be holders in due course. While *Mecham* also considered whether there was consideration given for the note, that issue is beyond the scope of the present analysis.

3. ARIZ. REV. STAT. ANN. § 44-2202(B)(1) (1967) (§ 1-102(2)(A)).

sents the antithesis. It is little more than a recitation of facts followed by a citation of Code provisions and a declaration that the bank was a holder in due course and, therefore, immune to defense against liability by parties to the instrument. In fact, no cases were cited to place the decision in perspective with other cases of this nature. Analysis indicates that because of the extent of the bank's participation in the transaction, the problem presented in *Mecham* was more complicated than such a mechanical approach reveals.

Max Munson, owing a debt to United Bank, offered as payment a note executed by Mecham Pontiac Corporation and payable to Munson Mortgage and Investment Company. Since the note was past due, the bank refused to accept it. A new note payable to Max Munson individual, rather than Munson Mortgage, was made by Evan Mecham as president of Mecham Pontiac Corporation and by Mr. and Mrs. Mecham as shareholders.[4] This note was also refused by the bank due to alterations. Consequently, a third note having the same due date, payee and makers as the second note was prepared by United Bank on one of its forms. Before the bank accepted this note, however, Mecham was instructed to obtain a resolution from the board of directors of Mecham Pontiac Corporation authorizing him to execute the note on the corporation's behalf. Thereafter, the bank became the assignee of this promissory note. United Bank subsequently brought an action against the makers of the note alleging that the note had not been paid when due. At trial, Mecham asserted that the bank accepted the note with the knowledge that it was a conditional promise of payment, thereby destroying the negotiability of the note and the bank's status as a holder in due course. After reviewing the case, the supreme court held that the bank deserved the status of a holder in due course, as defined by the Code, despite its involvement in the transaction.[5]

Initially, a holder of a promissory note must possess a negotiable instrument before he may qualify for the rights of a holder in due course.[6] For a writing to qualify as a negotiable instrument, it must be signed by the maker, contain an unconditional promise or order to pay a sum certain in money, be payable at a definite time or on demand and be payable to order or to bearer.[7] The note sued upon in *Mec-*

4. 107 Ariz. at 440, 489 P.2d at 250.
5. *Id.* at 442, 484 P.2d at 252.
6. ARIZ. REV. STAT. ANN. §§ 44-2502(A)(5), 44-2532 (§ 3-102(1)(e), 3-302).
7. The provision for an amount plus 6 percent interest to be paid when due did not preclude its being for a sum certain. *Id.*, § 44-2504(A)(1)-(4) (§ 3-104(1)(A)-(D)). Similarly, provisions in the instrument for payment of costs of collection and attorney's fees upon default and for payment on or before a stated date satisfied the requirements of negotiability. *Id.* § 44-2506(A)(1) (§ 3-106(1)(A)). *Id.* § 44-2506(A)(5), 44-2509(A)(1) (§§ 3-106(1)(E), 3-109(1)(A)). Finally, the

ham contained nothing on its face that would destroy its negotiability. Although United Bank became a participant in the transaction and had reason to know that the note was given for an executory agreement, conditioned on Mecham Investment's receiving a bankable commitment from the permanent financer,[8] the written promise to pay was unconditional. According to the Code, a promise otherwise unconditional is not made conditional when the note is subject to implied or constructive conditions.[9] The conditional or unconditional character of a promise or order to pay is determined by the contents of the instrument.[10] Only if an express condition had been attached to the promise or order to pay would the paper have been non-negotiable.[11] Therefore, even though the note arose from a separate agreement for rights as to payments, it was unconditional.[12]

Since the note in *Mecham* qualified as a negotiable instrument, the only remaining question was the effect of United Bank's participation in the transaction on its claim to be a holder in due course. A person claiming the status of a holder must be "in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank."[13] To qualify as a holder of an order instrument, there must be delivery with any necessary indorsement.[14] Since the note was delivered to United Bank by Munson as security for a debt after he had indorsed it in blank, United Bank's status as a holder was unquestionable. What was questionable, however, was the bank's status as a holder in due course cutting off any defenses against liability asserted by a party to the instrument.

A holder in due course is a holder who takes an instrument for value, in good faith and without notice that it has been dishonored or of any defense or claim to it on the part of any person.[15] When the note in question was endorsed in blank and delivered to United Bank as security for Max Munson's debt, the bank acquired an interest in

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note was payable to order as it was payable to the order of a person who was not the maker, drawer or drawee. *Id.* § 44-2510(A)(3) (§ 3-110(1)(c)).

8. 107 Ariz. at 441, 489 P.2d at 251.

9. ARIZ. REV. STAT. ANN. § 44-2505(A)(1) (1967) (§ 3-105(1)(A)).

10. 2 UNIFORM LAWS ANNOTATED 20 (WEST 1968). This represents a complete revision of section 3 of the Uniform Negotiable Instruments Law, the predecessor to section 3-105 of the Uniform Commercial Code. The change was intended to make clear that, so far as negotiability is concerned, the conditional or unconditional character of the promise or order is to be determined by what is expressed on the face of the instrument itself. *See* Uniform Commercial Code 3-105, Comment 1.

11. ARIZ. REV. STAT. ANN. § 44-2504(A)(2) (1967) (§ 3-105(1)(B)).

12. *Id.* § 44-2505(A)(3) (§ 3-105(1)(C)).

13. *Id.* § 44-2208(20) (§ 1-201(201)).

14. *Id.* § 44-2524(A) (§ 3-302(1)).

15. *Id.* § 44-2532(A)(1)-(3) (§ 3-302(1)(A)-(C)).

the note for an antecedent obligation and, therefore, took it for value.[16] It is less clear whether the other two requirements were met. Good faith is defined as "honesty in fact in the conduct or transaction concerned."[17] A person has notice of a fact when he has actual knowledge of it or when "[f]rom all the facts and circumstances known to him at the time in question he has reason to know that it exists."[18] These two requirements are at best ambiguous, and the supreme court should have examined them more closely to determine whether in fact they were met.

Broadly construing the concept of knowledge, it has been held that knowledge that an instrument was issued or negotiated for an executory promise or accompanied by a separate agreement does not in itself give the purchaser notice of a claim or defense.[19] Narrowly construing the knowledge concept, it has been held that the more familiar a holder is with the underlying transaction, which is the source of the note assigned to him, and the more he participates in such a transaction, the less he fits the role of a good faith purchaser without notice.[20] The difficulty arises in determining which purchasers, although technically qualified to be holders in due course, have such a knowledge of the transaction that they should be denied the special protections afforded such holders.[21] While the line is difficult to draw, an examination of decisions in other jurisdictions is helpful in developing appropriate criteria.

There has been a trend in consumer transactions to hold that a close business relationship between payee and purchaser of a note may justify imputing knowledge of facts implying bad faith on the part of the purchaser-holder, thus stripping him of the protection afforded a holder in due course.[22] Courts accepting this position have used three distinguishable but overlapping theories.[23] Generally, the theories have

16. *Id.* § 44-2533(2) (§ 3-303(B)).
17. *Id.* § 44-3308(19) (§ 1-201(19)).
18. *Id.* § 44-2208(25) (§ 3-201(25)).
19. *See* Tri-D Acceptance Corp. v. Scruggs, 284 Ala. 153, 157, 223 So. 2d 273, 276 (1969); Cotton v. John Deere Plow Co., 246 Ala. 36, 38, 18 So. 2d 727, 728 (1944).
20. *See* Jones v. Approved Bancredit Corp., 256 A.2d 739 (1969).
21. Note, *The Concept of a Holder in Due Course in Article III of the Uniform Commercial Code*, 68 COLUM. L. REV. 1573, 1577 (1968).
22. Comment, *Judicial and Statutory Limitations on the Rights of a "Holder in Due Course" in Consumer Transactions*, 11 B.C. IND. & COM. L. REV. 90 (1969). While primarily limited to consumer transactions, the concept, nevertheless, offers a situation analogous to that faced by the court in *Mecham*. In cases involving consumer transactions, the courts that have denied a finance company its status as a holder in due course have been motivated by a desire to protect the individual purchaser. Even though this same motive might not be applicable in the case of a bank claiming to be a holder in due course of a merchant's note, an analogy can still be drawn to the consumer-finance company area. In each case a holder, having technically satisfied all the requirements, is claiming the status of a holder in due course despite extensive involvement in the transactions.
23. Comment, *supra* note 23, at 92.

centered around a shift in the risk of the merchant's failure to adequately perform the consideration for which the note is given from the consumer to the finance company, the party better able to bear that risk. Rather than placing the burden on the consumer who purchases on time, these courts deny the status of a holder in due course to the finance company to whom the paper is discounted.

One theory requires a finding that the assignee-finance company was a "co-participant" with the seller in the original transaction. As stated by the court in *Commercial Credit Corp. v. Orange County Machine Works*:

> When a finance company so actively participates in a transaction of this type from its inception, counseling and aiding the future vendor-payee, it cannot be regarded as a holder in due course of the note given in the transaction and the defense of failure of consideration can properly be maintained.[24]

Throughout the entire dealings, Commercial Credit Corporation was intimately involved with the transaction, and even advanced money to the future payee with the understanding that the agreement and the note would be assigned to them immediately after it was received by the payee. In actuality, the finance company was the moving force in the transaction and acted as a party to it.[25] Other courts have applied an agency theory under which they have determined that "the degree of control exercised by the finance company over a given seller's transaction was enough to justify considering the seller as an agent of the finance company."[26] The finance company, as the principal, is considered a party to the original transaction and, therefore, subject to the defenses which can be asserted against a mere holder of an instrument.[27] The Supreme Court of California, in *Morgan v. Reasor Corp.*,[28] clarified this interrelationship when it noted that the meaning of the "rule is that the seller accepts the buyer's note and extends credit, not on its own behalf, but as an agent for the finance company."[29] Courts following a third approach have scrutinized the entire transaction attempting to discover evidence that the holder of the note did not meet the requirements of having obtained the note in good

24. 34 Cal. 2d 766, 771, 214 P.2d 819, 822 (1950). *See also* Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W. 260 (1940). These cases are considered representative of the law in this area. Comment, *supra* note 23, at 92-104.

25. 34 Cal. 2d at 771, 214 P.2d at 822. *But see* Mecham v. United Bank of Arizona, 107 Ariz. 437, 489 P.2d 247 (1971), in which Munson came to United Bank offering the note as security for his then owing debt. United Bank was not the moving force behind the transaction between Munson and Mecham, and Mecham was aware that the note was to be assigned to United Bank as security for Munson's debt.

26. Comment, *supra* note 23, at 99-101.

27. Comment, *supra* note 23, at 99-100.

28. 69 Cal. 2d 881, 447 P.2d 638, 73 Cal. Rptr. 398 (1968).

29. *Id.* at 894, 447 P.2d at 647, 73 Cal. Rptr. at 407.

faith or without notice of irregularities or of claims or defenses.[30] This approach is often used when courts are faced with consumer credit transactions suggestive of fraud or other deceptive business practices.[31] Actual bad faith has been found when an assignee had knowledge of the poor business reputation of his assignor.[32]

Hence, one who seeks the privileges of a holder in due course in the finance company-consumer area must have dealt fairly and honestly in acquiring the instrument. Where circumstances justify the conclusion that a reasonable inquiry would have disclosed a defect in its supporting consideration, the person is not a holder in due course.[33] The consumer transaction cases demonstrate a belief that the protections accorded a holder in due course are not to be mechanically bestowed on a party who is only technically such a holder. In order to obtain this coveted status, the party must have conducted his affairs in a manner actually deserving of the position. Though still a minority view, it can readily be seen that this trend bears directly on the bank-payee relationship presented in *Mecham* and could have been used to clarify and supplement the court's holding.

In *Mecham* the circumstances did not compel an inquiry by United Bank. Although Mecham claimed that he had informed the bank that the consideration for the note had not been performed, the record indicated that the bank did not receive notice prior to accepting the note.[34] The degree of control exercised by the bank over the transaction, although significant, did not justify classlfying Max Munson as an agent. The actions of United Bank in preparing the third note were merely normal precautionary measures which would have been taken by any bank accepting a note for such a large amount. Likewise, the facts failed to indicate a sufficiently close relationship between the bank and Munson to classify the bank as a coparticipant and to imply bad faith on its part. Clearly, United Bank not only qualified technically but met the broader notice[35] and good faith requirements[36] of the code and deserved the status of holder in due course.

30. Comment, *supra* note 23, at 101-104. *See* Nationwide Acceptance Corp. v. Henne, 194 So. 2d 434 (La. 1967). Local Acceptance Co. v. Kin Kade, 361 S.W.2d 830 (Mo. 1962); Norman v. World Wide Distribs. Inc., 202 Pa. Super. 53, 195 A.2d 115 (1962).

31. Comment, *supra* note 23, at 101. *See* Financial Credit Corp. v. Williams, 246 Md. 575, 229 A.2d 712 (1967).

32. Financial Credit Corp. v. Williams, 246 Md. 575, 229 A.2d 712 (1967). *See* Norman v. World Wide Distrib., 202 Pa. Super. 53, 195 A.2d 115 (1963).

33. 202 Pa. Super. at 58, 195 A.2d at 118. *See* Stroudsburg Security Trust Case, 145 Pa. Super. 44, 48-49, 20 A.2d 890, 892 (1941).

34. 107 Ariz. at 442, 489 P.2d at 252.

35. ARIZ. REV. STAT. ANN. § 44-2534(D)(2) (1967) (§ 3-304(4)(B)).

36. *Id.* § 44-2210 (§ 1-203). *See generally* Note, *Pre Existing Duty Rule*, 11 ARIZ. L. REV. 344 (1969).

The foregoing analysis of the complexities involved in defining "true" holders in due course indicates that the court in *Mecham* failed to respond to an opportunity to "simplify, clarify and modernize the law governing commercial transactions."[37] Although theories could have been borrowed from the analogous finance company-consumer area and applied to United Bank's conduct as a means of clarifying why the bank was allowed the status of a holder in due course, no cases were offered as a comparison to similar situations in other jurisdictions. A mechanical approach to the expanding commerical practices employed by banks will no longer suffice. Clarification is needed in order to establish some substantive basis for determining when a holder should be denied the status of a holder in due course. It is suggested that the trend in the finance company-consumer area could prove to be a useful tool in determining a holder's status in a complicated fact situation.

BLUE SKY VAGUENESS: REPEATED OR SUCCESSIVE VS. ISOLATED TRANSACTIONS

Arizona's "Blue Sky Law," is, as the title suggests, designed to prevent the unsuspecting investor from buying nothing more than a patch of Arizona's clear blue sky.[1] It seeks to control the marketing of corporate securities by establishing various requirements to be met before sales can be made.[2] In *State v. Allen*[3] the Supreme Court of Arizona dealt with one of these requirements in deciding whether investors selling their own holdings in "repeated or successive transactions" were required to register as dealers.

Defendant Stanley Allen held 15,000 shares of Regency Inns of America, Inc., an Arizona corporation. He subsequently executed ten separate contracts by which he agreed to sell 3,400 of his shares to seven different vendees.[4] These transactions were agreed upon over a period of approximately six months, but no actual delivery of shares was made since the single certificate held by Allen first had

37. ARIZ. REV. STAT. ANN. § 44-2022(B)(1) (1967) (§ 1-102 (2)(A)).

1. ARIZ. REV. STAT. ANN. §§ 44-1801 *et. seq.* (1967); *see* Corley, *"Blue Sky" Takes Many Forms*, 8 AM. BUS. L.J. 53 (1970).

2. *See* Jackson v. Robertson, 90 Ariz. 405, 368 P.2d 645 (1962); Reilly v. Clyne, 27 Ariz. 432, 234 P. 35 (1925). *See generally* L. LOSS & E. COWETT, BLUE SKY LAW (1958); Armstrong, *Comment: The Blue Sky Laws*, 44 VA. L. REV. 713 (1958); *Student Symposium: Blue Sky Laws*, 17 W. RES. L. REV. 1098 (1966).

3. 107 Ariz. 538, 490 P.2d 10 (1971).

4. *Id.* at 539, 490 P.2d at 11.

to be "broken down."[5] The Securities Division of the Arizona Corporation Commission learned the details of Allen's dealings and filed criminal charges against him for selling unregistered securities[6] and for sales by an unregistered dealer.[7]

The superior court thought the issues sufficiently complex to send two certified questions[8] to the supreme court: whether the statutory prohibition[9] against sales by an owner in "repeated or successive" transactions is void because of indefiniteness and vagueness, and, if not, whether such an owner must register as a dealer or salesman.[10] The supreme court answered the first question in the negative, avoiding a precise definition of "repeated or successive," and declared in answer to the second that an owner participating in an exempt transaction did not have to register as a dealer.[11] In deciding the vagueness question, the court emphasized "that owners who sold their stock in successive and repeated transactions *and* were also selling for the benefit (directly or indirectly) of the issuer or underwriter were not to be entitled to the [statutory] exemption . . ."[12] Hence, although his sales were found to be "successive and repeated," Allen was exempted from dealer registration by virtue of the fact that his sales did not benefit any third party.[13] The dual requirements of the statute apparently must be met in every case before registration will be required.

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5. *Id.*

6. ARIZ. REV. STAT. ANN. § 44-1841 (1967), prohibits sales of unregistered securities.

7. *Id.* § 44-1842 (1967), prohibits sales by unregistered dealers and salesmen.

8. ARIZ. R. CRIM. P. 346 allows the trial court, on questions of law that are "so important and doubtful as to require the decision of the supreme court, [to] certify the case to the supreme court so far as necessary to present the question of law arising therein." The trial proceedings are then stayed until the supreme court renders its decision.

9. ARIZ. REV. STAT. ANN. § 44-1844(3) (1967), exempts the following from registration:

> The sale in good faith and not for the purpose of avoiding the provisions of this chapter of securities by the bona fide owner thereof, other than an issuer or underwriter, in an isolated transaction, in which the securities are sold either directly or through a dealer as agent for the owner but where the sales are not made in the course of repeated or successive transactions of similar character by the owner and are not made directly or indirectly for the benefit of the issuer or an underwriter of the securities.

Both parties stipulated that defendant Allen's sales were made in good faith and were not for the benefit of any issuer or underwriter. State v. Allen, 107 Ariz. 538, 539, 490 P.2d 10, 11 (1971).

10. State v. Allen, 107 Ariz. 538, 490 P.2d 10 (1971). A "dealer" is defined in ARIZ. REV. STAT. ANN. § 44-1801 (1967).

11. Since the answer to the second question followed logically from the first, 107 Ariz. at 540, 490 P.2d at 12, analysis of the second question is unnecessary. Concerning the isolated transaction concept, see L. LOSS & E. COWETT, *supra* note 2, at 81-83, 370-71; Robinton & Sowards, *Florida's Blue Sky Law: The Lawyer's Approach*, 6 MIAMI L.Q. 525, 533 (1952).

12. 107 Ariz. at 540, 490 P.2d at 12.

13. *Id.* After the certification was handed down, the charges against Allen were dropped by the prosecutor.

This commentary will focus initially on the ways that other jurisdictions regulate securities vendors by exemption from registration requirements, both through statutes similar to and quite different from Arizona's. The vagueness question will then be discussed, showing how the supreme court actually avoided the vagueness at the heart of the statute. Finally, a new statute will be suggested to eliminate the problem presented to the court.

The statutory distinction between "repeated or successive" and "isolated" transactions is not easy to perceive. Arizona case law provides little help since, prior to *Allen*, the present statute and its antecedents[14] had been considered in the Arizona appellate courts only three times.[15] One suggested but basically less-than-useful distinction between the two transactions defines isolated sales as "those of a nonrecurring nature engaged in by persons not engaged in the security business."[16] Conversely, repeated sales are said to be those made one after another within a reasonable time, forming part of a general plan.[17] Some jurisdictions attempt to clarify the definition of repeated or successive transactions by attaching specific limits to the permissible number of sales.[18] This type of restriction has been criticized,[19] however, and a statute that, for example, merely limited an unregistered owner to ten sales per year might be ineffective if the ten sales were of worthless securities. The dishonest vendor should not be allowed to reap the

14. The basic wording of what is now ARIZ. REV. STAT. ANN. § 44-1844(3) (1967), was crystallized in 1921. Both the issues and the owner were exempted from registration when the sale was "not made in the course of repeated and successive transactions of a similar nature." Ch. 33, § 2, [1921] Ariz. Sess. Laws 1st Spec. Sess. 38. This appeared as a part of the definition of dealers, *id.* §§ 1, 2, and was not separated and listed with the other exempt transactions until 1951, when the present form was adopted. Ch. 18, § 5, [1951] Ariz. Sess. Laws 51.

15. Jackson v. Robertson, 90 Ariz. 405, 368 P.2d 645 (1962) (no exemption available in an issuance of new stock); Trump v. Badet, 84 Ariz. 319, 327 P.2d 1001 (1958) (all possible exemptions lost due to fraud); Zugsmith v. Mullins, 81 Ariz. 33, 299 P.2d 629 (1956) (similar exemption granted in transfer of stock as ownership of business).

16. Nelson v. State, 355 P.2d 413, 420 (Okla. Crim. 1960).

17. *Id.* For a case dealing with "benefit of the issuer or an underwriter," see Cain v. Solomon, 213 So. 2d 35 (Fla. 1968) (if owner is real party in interest in isolated sale, incidental benefits may accrue to corporation without loss of exemption; but exemption no longer applicable where primary purpose of sale is to benefit the corporation).

18. *See, e.g.*, Young v. Kwock, 52 Hawaii 273, 474 P.2d 285 (1970) (upholding statute allowing up to 25 offers within a 12-month period by an unregistered owner); Allen v. Schauf, 202 Kan. 348, 449 P.2d 1010 (1969) (isolated transactions properly qualified by securities commissioner's regulation limiting solicitation of more than four customers within a 12-month period); Commonwealth v. Allen, 441 S.W.2d 424 (Ky. 1969) (unregistered owner could make offers to no more than ten persons); Dean v. State, 433 S.W.2d 173 (Tex. Crim. App. 1968) (upholding statute prohibiting sales by the issuer without dealer registration when the sales would raise the number of stockholders above thirty-five).

19. Commonwealth v. Summons, 157 Pa. Super. 95, 98, 41 A.2d 697, 699 (1945) ("We have no doubt that the unscrupulous would like to have the limits of 'isolated transactions' defined and would welcome a definite statement of how many fraudulent sales they may make within a given time without risking the penalty of the act").

benefits of illegal sales to a limited number of unwary victims, all within the letter of the law.[20] A large number of states thus function without any mention of the "repeated or successive" transactions in exempting vendors, and *Allen* would not have been litigated had Arizona also deleted such wording.

The problem with the use of terms such as "isolated" or "repeated or successive" to describe which securities must be registered and which are exempt is that of vagueness. In Arizona, a statute is void and unconstitutional if it is "so vague as to fail to give a citizen notice of what conduct on his part will lead to its violation."[21] The supreme court in *Allen* chose not to confront directly the inherent vagueness of the "repeated or successive transactions" clause of the Arizona statute. Instead, the court required that the statute be read in its entirety, emphasizing the interrelationship between the repeated or successive transactions and the benefit to the issuer or underwriter clauses.[22] As applied to the facts of the case, the court found nothing vague in the statute's purpose of putting a person on notice that, "[i]f the ownership is a subterfuge for the unlicensed sale of stock of an issurer [*sic*] or an underwriter he can lose his owner's exemption."[23] It is submitted that the court actually joined two vague phrases, hoping to purge the vagueness with the conjunction "and." In actuality, it is possible that the court has only succeeded in postponing deciding whether the "repeated or successive" language is impermissibly vague.[24]

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20. Another approach can be found in the Uniform Securities Act, UNIF. SEC. ACT, 7 UNIF. L. ANN. 691 (West 1970), drafted in 1956 and adopted at least in part by 25 states, Puerto Rico and the District of Columbia. 1 C.C.H. BLUE SKY L. REP. ¶ 4901 (1970). An exemption from broker-dealer registration, is given to

> a person who has no place of business in this state if (A) he effects transactions in this state exclusively with or through (i) the issuers of the securities involved in the transactions, (ii) other broker-dealers, or (iii) banks, savings institutions, . . . or (B) during any period of twelve consecutive months he does not direct more than fifteen offers to sell or buy into this state to persons other than those specified in clause (A), whether or not the offeror or any of the offerees is then present in this state. UNIF. SEC. ACT § 401(c), 7 UNIF. L. ANN. at 743-44.

While the quantification as to the maximum number of permissible offers is subject to criticism, the rest of the statute presents workable safeguards. In California's Blue Sky legislation, the exemptions are similar to those found in the Uniform Securities Act, in that the definition of "broker-dealer" does not include "any person insofar as he buys or sells securities for his own account . . . but not as a part of a regular business." The statute also excludes from registration those who deal exclusively with issuers or other broker-dealers if they do not maintain a place of business in California for stock transaction purposes. CAL. CORP. CODE § 25004 (West Supp. 1971).

21. State v. Starsky, 106 Ariz. 329, 331, 475 P.2d 943, 945 (1970); *see* State v. Berry, 101 Ariz. 310, 312, 419 P.2d 337, 339 (1966). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

22. 107 Ariz. at 540, 490 P.2d at 12.

23. *Id.*

24. *Compare* People v. Pace, 73 Cal. App. 548, 563, 238 P. 1089, 1096 (1925), in which statutory language similar to Arizona's was held unconstitutionally vague:

The decision in *Allen* leaves a possible loophole for unregistered owners with unscrupulous motives. By statute, dealers, issuers, or underwriters must not sell unregistered stock.[25] *Allen* allows owners to sell their holdings in single transactions, regardless of the party to whom the benefits accrue, or, alternatively, to sell in several transactions if the benefits stop with the owner. The crucial problem is that section 44-1844 exempts both dealer and security registration. Owners can thus sell exempted, unregistered securities, since once the transaction qualifies for an exemption, both the stock and the owner are free from the registration requirements.[26] The position of the ethical stockholder who simply desires to dispose of his own holdings for his own account is not enhanced by the decision in *Allen*. He is now merely made aware of what was probably taken for granted before the case came to court: that he can make as many sales as he desires, so long as he is the sole recipient of the benefits.

It is suggested that Arizona should follow the lead of many states and delete any reference to the isolated or the repeated or successive transaction in determining who must be registered to deal in securities. Professor Loss has drawn a distinction[27] which may lend itself to a statutory solution to this dilemma. He differentiates between dealers and "traders," stating that a trader is an ". . . ordinary investor who buys and sells for his own account with some frequency."[28] Further, traders do not normally perform certain services, such as handling others' money or securities, giving advice, arranging credit or assisting in making a market for the issues. By incorporating this distinction into the definition section of the Arizona statute, requiring those within the definition of dealer to register, but exempting traders by stipulating that the definition of dealer should not include these individuals, a much simpler and more easily understood test might be established.

> [i]t probably would be conceded that two or more transactions would constitute 'repeated transactions,' and necessarily, if one follows the other, they would be 'successive transactions.' But one contemplating the sale of his securities would be at a loss to know, so far as the section in question indicates, whether he would be liable if he should make one sale every 12 months, or every 36 months, or even every 10 years. . . .

with Kneeland v. Emerton, 280 Mass. 371, 183 N.E. 155 (1932), where an isolated transactions clause was found to be not void for vagueness.

25. ARIZ. REV. STAT. ANN. § 44-1841 (1967).

26. The Securities Division is perhaps restricted to two means of enforcement. ARIZ. REV. STAT. ANN. § 44-1844(3) (1967), requires good faith in all transactions, and *id.*, § 44-1991 prohibits fraud.

27. 2 L. Loss, SECURITIES REGULATION 1296-97 (2d ed. 1961).

28. *Id.*

CRIMINAL LAW

PROCEDURE

THE DEATH-QUALIFIED JURY

The practice of allowing the prosecutor in a capital case to challenge for cause those prospective jurors with scruples against the death penalty developed at a time when the imposition of the death penalty was obligatory upon a verdict of guilt in such a case.[1] Arguably, such jurors' opposition to the imposition of the death penalty would require them to vote for acquittal to avoid its application.[2] Most states which retain capital punishment have eliminated this dilemma by increasing the jury's discretion regarding the punishment to be imposed. Nevertheless, most American courts continue to allow disqualification of a prospective juror whose voiced objections to the death penalty stem from predilections which would preclude "an open mind with respect to the death sentence he might have to impose."[3]

In *State v. Schmid*[4] the Supreme Court of Arizona upheld the right of the state to challenge for cause any prospective juror "unequivocally opposed" to the death penalty.[5] The defendant was ar-

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1. H. ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 2 (1968). Such a process is often referred to as securing a "death-qualified" jury. *See* Witherspoon v. Illinois, 391 U.S. 510, 517 n.11 (1968).
2. H. ZEISEL, *supra* note 1, at 2-3.
3. *Id.* at 3.
4. 107 Ariz. 191, 484 P.2d 187 (1971).
5. *Id.* at 195, 484 P.2d at 191. The court also held:

a. The trial judge did not abuse his discretion in failing to grant a change of venue because of voluminous pretrial publicity. This has been a much litigated issue in recent years, and there is ample material available on change of venue and, in general, the relationship of a free press to a defendant's right to a fair trial. *See, e.g.*, Austin, *Prejudice and Change of Venue*, 68 DICK. L. REV. 401 (1964); Fuld, *Free Press—Fair Trial Principles and Guidelines for the State of New York*, 42 N.Y. ST. B.J. 13 (1970); Powell, *The Right to a Fair Trial*, 51 A.B.A.J. 534 (1965); Weclew, *Fair Trial-Equal in Value to Free Press*, 16 DE PAUL L. REV. 353 (1967); Will, *Free Press vs. Fair Trial*, 12 DE PAUL L. REV. 197 (1963); Symposium, *Fair Trial—Free Press*, 2 CRIM. L. BULL. 3 (No. 3, 1966); Symposium, *Free Press and a Fair Trial*, 11 VILL. L. REV. 677 (1966); Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME LAW. 925 (1967).

b. The trial judge did not err in permitting the introduction into evidence of the defendant's previous conviction for a crime, the proof of which tended to establish a motive for the present crime. This is in accord with the generally accepted rule. On the admissibility of evidence of prior crimes see M. UDALL, ARIZONA LAW OF

rested and brought to trial on a charge of first degree murder. During the pretrial *voir dire* of the panel, the judge permitted the state to challenge for cause and exclude any prospective juror who replied negatively when asked whether he could assess the death penalty "in a proper case."[6] After the jury had been selected and the defendant's alleged accomplice had testified for the state, the defendant, acting upon the advice of counsel, entered a plea of guilty to second degree murder. He was subsequently sentenced to a term of fifty years to life in the Arizona State Prison.

Upon review of the defendant's appeal, the court summarily held that "[t]he exclusion of veniremen unequivocally opposed to capital punishment is constitutionally permitted. No prejudice is demonstrated merely by showing that potential jurors are excluded because of their personal opposition to imposing capital punishment under any circumstances whatsoever."[7] To reach this conclusion, the court relied upon *State v. Narten*[8] and *Witherspoon v. Illinois*.[9] In *Narten* the Supreme Court of Arizona held that disqualification of jurors extending "only to those who refuse to impose the death penalty under any circumstances" was permissible,[10] while in *Witherspoon* the United States Supreme Court held that a jury-imposed sentence of death was invalid if prospective jurors were excluded merely because they harbored general, religious, or conscientious objections to the death penalty.[11]

This discussion will explore the argument that death-qualified ju-

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EVIDENCE § 115 (1960); Glick, *Impeachment by Prior Conviction: A Critique of Rule 6-09 of the Proposed Rules of Evidence for U.S. District Courts*, 6 CRIM. L. BULL. 330 (1970); Spector, *Impeaching the Defendant by his Prior Convictions and the Proposed Federal Rules of Evidence: a Half Step Forward and Three Steps Backward*, 1 LOYOLA U.L.J. 247 (1970); Symposium, *The Proposed Federal Rules of Evidence: Part I*, 15 WAYNE L. REV. 1061, 1194-99 (1969); "Use of Specific Prior Acts of Misconduct," 12 ARIZ. L. REV. 89, 146, 147 (1970).

c. The trial judge was not in error in accepting the statement of a juror that, although he had formed a prior opinion about the guilt of the defendant, he believed that he could render a fair and impartial verdict. *But see* Note, 38 ST. JOHN'S L. REV. 136 (1963) (questioning the validity of accepting such statements from jurors).

6. Opening Brief for Appellant at 3, State v. Schmid, 107 Ariz. 191, 484 P.2d 187.

7. 107 Ariz. at 195, 484 P.2d at 191. The court's summary treatment followed equally brief arguments on this issue by both appellant and appellee. *See* Opening Brief for Appellant at 28-29; Answering Brief for Appellee at 14.

8. 99 Ariz. 116, 407 P.2d 81 (1965), *cert. denied*, 384 U.S. 1008 (1966).

9. 391 U.S. 510 (1968).

10. 99 Ariz. at 123, 407 P.2d at 86.

11. 391 U.S. at 522. The Court emphasized, *id.* at 522 n.21, that

> nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*

ries are "conviction-prone," examine the limitations placed on the use of such juries by the United States Supreme Court in *Witherspoon*, and analyze the interpretation given those limitations by the Supreme Court of Arizona.

The "Conviction-Proneness" of Death-Qualified Juries

Many researchers have attempted to discover whether, given that capital punishment is not mandatory, a jury chosen by disqualifying those most opposed to the death penalty is more likely to convict a criminal defendant than is one selected without regard to jurors' attitudes toward that penalty. There has been no conclusive answer to this question.

In *Witherspoon*, the Supreme Court maintained that there was not yet enough evidence to support the petitioner's argument that "jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt."[12] Support for the argument was taken from three then-unpublished studies—the Wilson study,[13] the Goldberg study [14] and the Zeisel study of actual jurors in New York and Chicago.[15] The Court labled the conclusions drawn from those studies as "too tentative and fragmentary."[16]

The Wilson study, which used 187 college students as subjects, examined their reactions in six simulated capital cases. Students who had initially indicated conscientious objection to capital punishment gave fewer guilty verdicts than those who had expressed no such objections.[17] Using 200 college students in sixteen simulated capital cases, the Goldberg study achieved similar results, although the difference in verdicts was not statistically significant.[18] It is readily apparent that these studies were made with atypical subjects in an artificial setting and the results, therefore, can hardly be conclusive of the issue. Zeisel, who interviewed actual jurors immediately after trial, found that those without objection to the death penalty voted guilty

12. *Id.* at 517.
13. W. Wilson, Belief in Capital Punishment and Jury Performance (1964) (unpublished manuscript, University of Texas), *summarized in* Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971).
14. Goldberg, *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 53 (1970).
15. H. ZEISEL, *supra* note 1. At the time of the study (1954-1955), both New York and Illinois placed the imposition of the death penalty for first degree murder in the discretion of the jury: Law of March 17, 1937, ch. 67, [1937] N.Y. Laws 121; Act of March 27, 1874, ch. 38, § 142, [1874] Ill. Laws — (currently codified at ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1961)).
16. 391 U.S. at 517.
17. Jurow, *supra* note 13, at 574.
18. Goldberg, *supra* note 14, at 67.

more often, and not guilty less often, than those with scruples against that penalty.[19] While this study attempted to obtain more realistic results by using actual jurors, the reliability of the entire study was reduced, since no two groups of jurors were examined on the same case.

The *Witherspoon* Court made no judgment on the merits of the "conviction-proneness" issue, but at several points in the opinion indicated that it might be willing to reconsider the question in the future when more evidence was available.[20] Such new evidence is now available in the form of a recent study by George L. Jurow.[21]

Jurow pinpointed three major weaknesses in the previous studies rejected by the Court, and attempted to correct them in his own work. First, he recognized that the earlier studies failed not only to isolate the specific types of objections to the death penalty held by the subjects but also failed to distinguish between how the individual might objectively answer a hypothetical question and how he would act if he were actually a juror. Someone whose answers to abstract questions about capital punishment indicated a favorable or unfavorable attitude may not necessarily respond in the same way, given a similar fact situation, while serving on a jury.[22] Jurow attempted to compensate for this apparent lack of realism by dividing his preliminary questionnaire into two parts. Part one contained questions designed to test the jurors' general attitudes toward the death penalty, while part two asked the jurors how they would consider the death penalty while sitting on a jury.[23] The two parts of this research design would seem to correspond to the *voir dire* and verdict, respectively, in which a juror would participate.

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19. H. ZEISEL, *supra* note 1, at 29.

20. "In light of the presently available information, we are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was." 391 U.S. at 518. If a state excludes only those who would not impose capital punishment, "a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*." *Id.* at 520 n.18.

21. Jurow, *supra* note 13. For additional studies reaching the same general results as those discussed, see Boehm, *Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 734; Bronson, *On the Conviction-Proneness and Representativeness of the Death Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970); Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEXAS L. REV. 545 (1961).

22. There are several possible reasons for this, including a different "sense of duty" when actually sitting on a jury and the pressure, real or imagined, exerted by fellow jurors.

23. Jurow, *supra* note 13, at 577. While this may not approximate the jurors' behavior when involved in a real trial, it does take into account the observation of the *Witherspoon* Court that a juror may be able to distinguish between his personal views and what he perceives "to be his duty to abide by his oath as a juror and to obey the law of the State." 391 U.S. at 514-15 n.7.

The second weakness found by Jurow was that the earlier studies had used printed summaries of simulated cases, which may, or may not, have conveyed the impression of a real trial. Jurow instead used tape recorded presentations to try to involve the jurors in a process as similar as possible to actual trials. While this still leaves the subjects with the knowledge that they are engaged in an experiment and that a life is not at stake, it is perhaps an adequate compromise between the desire to create a sense of realism and the necessity of conducting the experiment without using jurors in actual trials.[24]

Finally, in two of the earlier studies the sample group was restricted to college students. Jurow attempted to broaden his sample and thereby improve the statistical validity of his findings.[25] While the sample group eventually obtained was predominantly male, white, and well-educated, and had a high median family income, it was probably a better approximation of a group of actual jurors than were the groups used in the earlier studies.[26]

Depending on their attitude toward imposition of the death penalty, the subjects were placed into one of five groups. Group one consisted of that portion of the sample who would never impose capital punishment; group five consisted of those who would virtually always impose it if given the opportunity. The other three groups were distributed between these extremes.[27] Jurow's results showed that in determining guilt only groups two and three were capable of acting independently of their predilections. Groups one, four and five were more "predisposed to reach a particular verdict" according to their views of capital punishment.[28] From this result Jurow concluded that the elimination from the jury of those most opposed to capital punishment (group one) does not leave a jury which is "neutral" with respect to guilt, but rather one which is weighted towards a finding of guilt.[29]

It remains to be considered how these results affect the *Wither-*

24. For discussion of the suitability of several types of experimental situations for the study of legal issues, see H. Zeisel, *The Law*, in THE USES OF SOCIOLOGY IN THE PROFESSIONS 81-99 (Lazarsfeld ed. 1967).

25. Jurow, *supra* note 13, at 575-76. Jurow, in fact, attempted to obtain his subjects from actual jury lists but was refused permission to do so. *Id.* at 577.

26. Specifically, the group of 211 subjects, all employees of the Sperry Gyroscope Division of the Sperry Rand Co., consisted of 168 males and 43 females; their annual median family income was $12,740; almost half were Republicans or Conservatives; almost half were Roman Catholics; nearly 40 percent were engineers, while one-third had no college experience at all; approximately one-third had previously served as jurors. Jurow, *supra* note 12, at 577.

27. Those in group two also opposed capital punishment, but to a lesser degree than those in group one, while those in group four also favored it, but to a lesser degree than those in group five. Those subjects "neutral" with respect to the death penalty were placed in group three.

28. Jurow, *supra* note 12, at 588.

29. *Id.*

spoon Court's dismissal of the evidence of conviction-proneness as "too tentative and fragmentary." Certainly, the Jurow study is plagued with too many statistical inadequacies to establish conclusively the conviction-proneness of death-qualified juries.[30] It is uncertain, however, whether enough evidence will ever be assembled to reach this conclusion.[31] If such absolute proof is not possible, the question becomes what quantum of evidence would be sufficient to determine the validity of that conclusion.

While it is clear that, at present, the party who wishes to challenge the impartiality of a juror has the burden of proving the juror's bias,[32] consideration of the quantum of existing evidence supporting the conclusions that a death-qualified jury is conviction-prone yields the conclusion that the defendant in a capital case should not bear the burden of proving that his particular jury is conviction-prone. Rather, it would seem the better reasoned policy to presume, unless the prosecution is able to prove otherwise, that a death-qualified jury is conviction prone, and therefore prohibit challenges for cause of those who would never impose the death penalty.[33]

The "Proper Case" Question

In Arizona, the jury determining guilt also determines, based on the same evidence, whether a defendant whom they convict of first degree murder will be executed or serve a life term in prison.[34] The Supreme Court held in *Witherspoon* that under those circumstances a jury from which all those only "generally" opposed to the death penalty have been excluded cannot fairly determine the punishment to be im-

30. Jurow discusses some of these inadequacies, which included: (a) the limiting of the study to an examination of individual decision-making and not of group interaction; (b) the experimental nature of the study; (c) the middle-class character of the subject group; (d) the methodological problems, such as the timing of the tests, the order of the questionnaires, and the fact that the subjects were paid. *Id.* at 596-97.

31. One serious flaw in all experiments on this subject may be that it is difficult for any experiment to actually duplicate the psychological pressures of a real trial where a life is at stake. Additionally, no study of a limited number of jurors at a limited number of actual trials can have the statistical reliability necessary for "conclusive" proof, since each group of 12 jurors must deal with a different factual situation.

32. Irvin v. Dowd, 366 U.S. 717, 723 (1961); State v. Miles, 103 Ariz. 291, 293, 440 P.2d 911, 913 (1968).

33. An interesting and possibly significant observation is that many prosecutors find it advantageous to charge a defendant with first degree murder, even if they are ultimately seeking a lesser conviction, so as to have the opportunity to "death qualify" the jury. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 90-91 (1968).

34. ARIZ. REV. STAT. ANN. § 13-453(A) (1956). Other crimes in Arizona in which the jury determines whether the death penalty shall be imposed are kidnapping where the victim suffers serious bodily harm, *id.* § 13-492, and train robbery, *id.* § 13-644. Crimes for which the death penalty is mandatory upon conviction are treason, *id.* § 13-701, perjury leading to the execution of an innocent person, *id.* § 13-572, and armed assault by a prisoner serving a life term, *id.* § 13-250.

posed. The Court observed that "[i]f the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty."[35] This observation by the Court has left the states with the problem of determining whether a prospective juror's objection to the death penalty might render it impossible for him even to consider imposing that penalty or whether, considering the nature of his objection, exclusion would be proscribed under the holding of *Witherspoon*.[36]

In *Schmid*, while the issue was formulated in terms of the systematic exclusion from the jury of "all persons who stated they could not assess the death penalty in a proper case,"[37] the court held simply that "[n]o prejudice is demonstrated merely by showing that potential jurors are excluded because of their personal opposition to imposing capital punishment under any circumstances whatsoever."[38] The court thus seemed to imply that a negative reply to the *voir dire* question, "Could you impose capital punishment in a proper case?" would satisfy the requirements of *Witherspoon* and be sufficient grounds for disqualification.

California has rejected the approach taken in *Schmid*. Prior to its abolition of the death penalty,[39] the Supreme Court of California had held that the proper case question, standing alone and unqualified, did not meet the requirements of *Witherspoon*, and could not serve as a basis for disqualifying a prospective juror.[40] The court gave two reasons for finding that the question was a poor gauge of whether an individual juror might be willing to vote for the imposition of the death penalty. First, it observed that, if unqualified, the proper case question gives the prospective juror no indication of who will determine which cases are "proper" for the infliction of capital punishment.[41] Many jurors may not clearly understand that deciding whether the case is a "proper" one for the imposition of the death penalty is left entirely to the conscience of each individual juror. They may in fact believe that if they were to answer the *voir dire* question affirmatively, they could be instructed at the end of the trial that this case *is* a "proper" one and somehow be forced to vote for the death penalty. Such, of course, is not the law.

35. 391 U.S. at 520.
36. See text & note 11 *supra*.
37. 107 Ariz. at 192, 484 P.2d at 188.
38. *Id.* at 195, 484 P.2d at 191.
39. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).
40. People v. Williams, 71 Cal. 2d 614, 456 P.2d 633, 79 Cal. Rptr. 65 (1969).
41. *Id.* at 630 n.3, 456 P.2d at 642 n.3, 79 Cal. Rptr. at 74 n.3.

These difficulties have led California to require the proper case question to be further qualified. Thus, for example, the question might be preceded by an explanation that the question of what is a proper case is a matter left to the sole judgment of each juror; or the prosecutor might inquire of each juror whether he would "under no circumstances" or "in no event" impose the death penalty.[42]

The second reason given by the California court is that the question "embodies an unwarranted assumption"—that the prospective juror being questioned believes that there *are* some cases in which the death penalty would be proper.[43] An affirmative answer to the question may indicate merely that the juror would be willing to impose the death penalty *if* he thought that there were any cases in which such a penalty would be proper; he may, in fact, believe that there are no such cases.[44]

The California court's interpretation of *Witherspoon* seems to meet the intent of the United States Supreme Court more directly than does that of the Arizona court in *Schmid.* In *Witherspoon,* the Court indicated that a prospective juror may not be excluded simply because there are some kinds of cases in which he would refuse to recommend capital punishment; nor can he be required to say before trial whether he would vote for death in the pending case.[45] The most that can be required is that he be willing to consider each possible penalty and that he not be *irrevocably* committed against the death penalty before hearing the evidence.[46]

While all that was specifically at issue in *Witherspoon* was the disqualification of all prospective jurors who expressed only general objections to ever imposing the death penalty, the language of the opinion clearly indicates that a prospective juror should not be disqualified unless it is manifest that there are no circumstances whatsoever under which he would consider imposing that penalty.[47] The

42. *See* People v. Varnum, 70 Cal. 2d 480, 494-95, 450 P.2d 553, 562, 75 Cal. Rptr. 161, 170 (1969).

43. People v. Williams, 71 Cal. 2d at 630 n.3, 456 P.2d at 642 n.3, 79 Cal. Rptr. at 74 n.3.

44. In a recent newspaper interview, Illinois Judge Charles G. Seidel, discussing his 21 years on the bench, observed: "When I took my oath, I affirmed that I would assess the death penalty 'in a proper case.' I can't conceive of a proper case—but I wasn't asked that." The Arizona Daily Star, Mar. 12, 1972, § E, at 11, col. 3.

45. 391 U.S. at 522 n.21.

46. *Id.*

47. *Id.* Many states have been more lenient in allowing disqualifications than the language of *Witherspoon* would seem to permit. *See, e.g.,* State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968); Koonce v. State, 456 P.2d 549 (Okla. Crim. 1969); Commonwealth v. Rightnour, 435 Pa. 104, 253 A.2d 644 (1969); State v. Aiken, 75 Wash. 2d 421, 452 P.2d 232 (1969). *But see* State v. Watson, 20 Ohio App. 2d 115, 252 N.E.2d 305 (1969).

proper case question, as used in Arizona and approved in *Schmid*, does not appear to meet this standard. Through its use, prospective jurors who might be willing to impose the death penalty under certain circumstances may be excluded from the jury;[48] moreover, some who would actually never impose it, because they believe that there are no "proper" cases, may serve.

Conclusion

The evidence indicating the probability that juries biased on the issue of guilt are being empaneled in capital cases continues to increase. One suggested method of reducing the prejudicial effects of such bias is to expand the use of the bifurcated trial.[49] While it is true that allowing the admission of mitigating evidence during the penalty phase of such a trial might reduce certain prejudices of those jurors who sat for the guilt phase, a truly bifurcated trial—one in which a new jury would be seated for the penalty phase—would involve substantial expenditures of both money and time. Though the cost of such a procedure militates against its use in all criminal cases, it may in the future prove to be a sensible method for providing for both the needs of the state and the rights of the defendant, especially in capital cases.[50]

It has also been suggested that the single-jury system could be retained with juries capable of imposing the death penalty, without disqualifying those who would never impose death, by reducing the requirement of a unanimous verdict for conviction.[51] While in the past the United States Supreme Court has emphasized the traditional significance of the unanimity requirement,[52] it has recently held that unanimity is not constitutionally required in certain state criminal proceedings.[53] Neither of the recently decided cases involved attempts

48. Those jurors who do not understand that it is their decision as to what is a "proper" case.

49. Comment, *Toward Assuring Fair Trials in Capital Cases: Some Reflections on Witherspoon v. Illinois*, 42 S. CAL. L. REV. 329, 347 (1968). The term "bifurcated trial" is generally used to refer to a trial conducted in two phases—the "guilt" phase and the "penalty" phase. It is also used in reference to the "insanity" phase and "criminal" phase of criminal trials where insanity is pleaded. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36-505, -509 (Supp. 1970-71) (held unconstitutional, State v. Shaw, 106 Ariz. 103, 471 P.2d 715 (1970)) (insanity); CAL. PENAL CODE § 1026 (West 1970) (insanity). *See generally* Project, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 147-59 (1971); Symposium, *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297 (1969); Note, *The Two-Trial System in Capital Cases*, N.Y.U.L. REV. 50 (1964).

50. *See* Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968).

51. For arguments in favor of the less-than-unanimous verdict, see Comment, *Less Than Unanimous Verdict in Criminal Trials*, 58 J. CRIM. L.C. & P.S. 211 (1967); Comment, *supra* note 49, at 344.

52. *See* Andres v. United States, 333 U.S. 740, 748 (1948).

53. Johnson v. Louisiana, 406 U.S. 356 (1972) (provisions of the Louisiana law

to reduce the unanimity requirement in capital cases, however, and it is unclear what the reaction of the Court would be to such an attempt.

It is suggested, however, that there is a more straightforward solution. There should be no disqualification at all for attitudes towards the death penalty. By eliminating such a challenge for cause a more accurate cross-section of community attitudes could be obtained.[54] Perhaps a particular jury so selected will indeed be unable or unwilling to impose the death penalty. Conversely, it may be entirely capable of imposing that penalty. In either case, a better approximation of the feelings of the community would be represented. The *Witherspoon* Court recognized that a substantial and growing segment of the American population opposes the death penalty.[55] It is also reasonable to assume that a growing number of people will become unwilling to impose that penalty. It is unrealistic and unreasonable to exclude this latter group from the guilt and penalty determination process.

It is important to remember that the jury trial is not meant to be a device used by the state to secure convictions; it is, rather, intended as a buffer between the government and the individual. This idea was recently reaffirmed by the United States Supreme Court when it observed that "a right to trial by jury is granted to criminal defendants in order to prevent oppression by the government."[56]

The Honorable Sir Patrick Devlin, a British jurist, noted in a 1956 lecture that

[t]he second and by far the greater purpose that is served by

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allowing conviction by nine of twelve jurors in non-capital cases do not violate the requirements of the due process clause of the fourteenth amendment). In Apodaca v. Oregon, 406 U.S. 404 (1972), a plurality of the court stated that the sixth amendment guarantee of a jury trial, as made applicable to the states by the fourteenth, does not require that the jury's vote be unanimous. Concurring in the judgment, Mr. Justice Powell stated that while the sixth amendment does require unanimity in federal jury trials, the due process clause of the fourteenth amendment does not incorporate all elements of the jury trial within the meaning of the sixth amendment; one of the elements not incorporated, he suggested, is the requirement of a unanimous verdict. Johnson v. Louisiana, 406 U.S. 356, 369 (1972) (Powell, J., concurring).

54. The importance of having such a cross-section was recognized by the *Witherspoon* Court: "Guided by neither rule nor standard, 'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." 391 U.S. at 519. Justice Douglas in his concurring opinion further states:

> If a particular community were overwhelmingly opposed to capital punishment, it would not be able to exercise a discretion to impose or not impose the death sentence. A jury representing the conscience of that community would do one of several things depending on the type of state law governing it: it would avoid the death penalty by recommending mercy or it would avoid it by finding guilt of a lesser offense.
>
> In such instance, why should not an accused have the benefit of that controlling principle of mercy in the community?

Id. at 528.

55. 391 U.S. at 520 n.16.

56. Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

> trial by jury is that it gives protection against laws which the ordinary man may regard as harsh and oppressive. I do not mean by that no more than that it is a protection against tyranny. It is that: but it is also an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just. . . . It may be . . . that the jury system means that some good and necessary laws are only weakly enforced. Likewise, democracy may mean that some good and necessary measures of government are not taken when they should be. There are no freedoms to be [received] without payment.[57]

As long as we continue, however, to allow the disqualification of jurors by the *Witherspoon* standards, the *voir dire* should at least accurately identify those people who would under no circumstances whatsoever consider imposing the death penalty. The misleading and confusing "proper case" question, therefore, the use of which was upheld in *Schmid*, should not be allowed as the sole criterion for determining whether a prospective juror would be willing to consider imposing capital punishment.

APPELLATE REVIEW OF SENTENCES

> A society which predetermines 'justice' prospectively by legislation—thereby equating justice and positive legality and balancing justice with value and punishment with harm—needs no appellate power beyond that of reviewing the legality of the sentence and proceedings below, for a legal sentence is bound to be a just sentence.[1]

The "minimax" sentencing legislatively mandated in Arizona[2] is essentially prospective in theory,[3] and, as a recent study of appellate review of sentences indicates, is prospective in practice as well.[4] Al-

57. P. DEVLIN, TRIAL BY JURY 160-61 (1966).
[EDITOR'S NOTE: As this issue went to press, the Supreme Court of the United States held that the imposition and carrying out of the death penalty, at least in the three cases before it, would constitute "cruel and unusual punishment." Furman v. Georgia, Jackson v. Georgia, Branch v. Texas, 408 U.S. 238 (1972). It is unclear whether the Court would find the imposition of capital punishment unconstitutional under all circumstances. *See* concurring opinion of White, J., 92 S. Ct. at 2763.]

1. Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671, 674 (1962).
2. ARIZ. REV. STAT. ANN. § 13-1643 (1956), commands the trial court to sentence offenders to indeterminate terms within the minimum and maximum statutory limits for the particular crime for which they are convicted.
3. Prospective determination means generally fixing one sentence for one crime, without reference to the circumstances of the crime or to the individual involved.
4. Dix, *Judicial Review of Sentences: Implications for Individualized Disposition*, 1969 L. & SOC. ORDER 369.

though Arizona appellate courts have the power to reduce lawful but excessive sentences, "[o]btaining relief on that ground is in practice next to hopeless. . . . The Supreme Court of Arizona has virtually renounced its statutory authority to reduce lawful sentences."[5] In fact, sentence review has functioned more as a safety valve for correcting unconscionable sentences than as a device for realizing the broader aims of criminal law.

Last term, however, *State v. McIntyre*[6] intimated both a new trend toward a more vigorous use of the statutory power to review criminal sentences,[7] and a concomitant change in the attitudes of the state judiciary toward the purposes of criminal punishment. In 1967 McIntyre pled guilty to robbery and was sentenced to a term of 7 to 15 years. On December 20, 1967, he was released on post-conviction bond pending appeal. Apparently, because of uncertainty as to who was to represent him, the appeal was not prosecuted until January of 1971. McIntyre had thus been free for 3 years before the supreme court reviewed his case.

After dispensing with McIntyre's due process arguments,[8] the court noted the lengthy period he had been out on bail and the evidence of his complete rehabilitation during that time.[9] Without expansive reasoning, the court vacated the sentence and remanded the case to the superior court for resentencing.[10] In November 1971 McIntyre was placed on probation for 3 years.[11]

As *McIntyre* indicates, sentencing theory is evolving from pros-

5. Wexler & Silverman, *Representing Prison Inmates: A Primer on an Emerging Dimension of Poverty Law Practice*, 11 ARIZ. L. REV. 385, 399 n.89 (1969).

6. 107 Ariz. 515, 489 P.2d 1195 (1971).

7. ARIZ. REV. STAT. ANN. § 13-1717(B) (1956). Sentence review can also be inferred from the general review statute, ARIZ. REV. STAT. ANN. § 13-1716 (1956).

8. The defendant presented five arguments on settled issues which the court summarily dismissed. A discussion of those arguments is beyond the scope of this analysis.

9. In the interim the defendant had married, fathered two children, maintained steady employment, participated in church work, and cooperated with the county attorney in the prosecution of his codefendant. Brief for Appellant at Appendix, State v. McIntyre, 107 Ariz. 515, 489 P.2d 1195 (1971).

10. 107 Ariz. at 517, 489 P.2d at 1197. The court invoked its review power under ARIZ. REV. STAT. ANN. § 13-1717 (1956). Although this section has no provision for a remand for resentencing, such a power has been found in ARIZ. REV. STAT. ANN. § 13-1716 (1956). State v. Hunter, 102 Ariz. 472, 478, 433 P.2d 22, 28 (1967); State v. Tuggle, 101 Ariz. 216, 219, 418 P.2d 372, 375 (1966).

11. State v. McIntyre, No. CR-51075 (Maricopa Co., Ariz., Super. Ct., Nov. 16, 1971). In Arizona, probation is "entrusted solely to the discretion of the trial court" under ARIZ. REV. STAT. ANN. § 13-1657 (Supp. 1971-72). *See* State v. Oliver, 9 Ariz. App. 364, 367, 452 P.2d 529, 532 (1969). It is thus possible that a desire to have the defendant placed on probation was the reason for the remand in *McIntyre*. On the other hand, *Oliver* may have been directed only to the validity of the trial court's discretion and not to the jurisdiction of appellate courts, for nothing in the probation or sentence review statutes denies the power of granting probation to appellate courts. Consequently, it is also possible that the sole purpose for the remand in *McIntyre* may have been the verification of the defendant's rehabilitation.

pective sentencing to "individualized" sentencing based upon the particular circumstances of the crime and the offender.[12] The current practice of indeterminate sentencing, however, remains largely prospective in its treatment of each crime as a member of a class rather than as a distinct occurrence. Without more, such sentencing is only a small step toward more specific treatment with the needs of each offender and society in mind. Perhaps the trend evidenced in *McIntyre* will produce a major step in the evolution of penology in Arizona.

Review of sentence on appeal presumes there should be a means of correcting sentences which, although legal, are excessive in light of penal theory and the circumstances of the case.[13] The rationale for criminal punishment is usually stated as some combination of retribution, restraint, deterrence and rehabilitation.[14] Review should operate to insure that retribution does not surpass the demands of society, that restraint and deterrence do not exceed the needs of society, and that the need for rehabilitation, serving both society and the criminal offender, is not neglected.[15]

Several arguments have been advanced in favor of sentence review, the soundest being that it ensures recourse when the sentence

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12. *See generally* Dix, *supra* note 4. Individualized sentencing is not the utopian end of penology. It has inherent shortcomings, most notably the idea that the state, once it has proclaimed the well-being of the criminal as its primary concern, may infringe upon his rights in the name of benevolence. The experiences of juveniles and mental patients suggest that the adoption of a fully rehabilitation-oriented penal system, without appropriate checks on the limits of the state's paternal discretion, might be as harrowing in practice as it is heartening in theory. *In re* Gault, 387 U.S. 1 (1967), contains an example of the disadvantages a juvenile may suffer. *See also* "Pre-Interrogation Waiver of Constitutional Rights by Juveniles," 14 ARIZ. L. REV. 409, 487 (1972). For a discussion of the rights of mental patients in Arizona, see Special Project, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 29-35, 207-27 (1971).

13. *See* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 21-31 (approved draft 1968) [hereinafter cited as ABA PROJECT]; Dix, *supra* note 4, at 369-71.

14. State v. Howland, 103 Ariz. 250, 252, 439 P.2d 821, 823 (1968). Basically, *retribution* is derived from the notion that a criminal should be made to suffer for his wrongdoing; *restraint* generally entails incarceration to prevent further injury to society; *deterrence* stems from the proposition that awareness of the punishment will dissuade future crimes; and *rehabilitation* rests upon the idea that the individual can be cured of his criminal behavior so as to present no future threat to society. *Cf.* S. RUBIN, THE LAW OF CRIMINAL CORRECTION 645-72 (1963); Dix, *supra* note 4, at 382-84.

15. Given these functions, the *increase* of sentence on appeal would seem to be within the legitimate scope of appellate sentence review. This point is countered not only by the fact that there should be some restraint on the courts' implementation of rehabilitative policy, but also by the fact that most prisons are ill-equipped to foster the rehabilitation of the offender. *See, e.g.*, Singer, *Prison Conditions: An Unconstitutional Roadblock to Rehabilitation*, 20 CATH. U.L. REV. 365, 372 (1971). Moreover, sentence increase would be limited by the rule of North Carolina v. Pearce, 395 U.S. 711, 726 (1969) (sentence may be increased when a defendant is retried only when justified by "identifiable conduct on the part of the defendant accruing after the time of the original sentencing proceeding"); *see* "Sentencing—Granting Credit for Time Served," 13 ARIZ. L. REV. 313, 402 (1972).

imposed is the result of mistake, caprice or malice.[16] The most frequent argument presented by advocates of appellate review, however, is that it will lead to a uniform theory of sentencing within the jurisdiction.[17] Finally, such review may provide an impetus to maintain local sentencing practices in line with the growth of penal theory, as dictated by society and the penal facilities available.[18] It has been contended that the net result of these arguments will be an enhanced respect for the criminal law.[19]

The strongest argument against appellate review is that appellate courts exceed their reasonable powers in taking such a large role in the sentencing process.[20] Traditionally, sentencing has been strictly within the ambit of the trial court and mitigation has been handled by the executive branch. Thus, this review by an appellate court encroaches on the prerogatives of both trial courts and executives. As sentencing is a proper function of the judiciary, however, so also is review of sentences, since it acts as a check on trial court decisions. The executive branch, on the other hand, cannot preempt judicial power.

The second set of arguments against sentence review questions the ability of appellate courts to reexamine sentences because of those courts' remoteness from the defendants and the facts of the cases,[21] their crowded dockets,[22] and their lack of practical and professional expertise in such fields as psychology and sociology.[23] There are several responses to these contentions. First, the appellate court generally has access to all trial documents and can be as well-informed on the facts as the trial court. The remoteness of appellate courts may be in their favor because "a group of jurists detached from the pressures

16. Dix, *supra* note 4, at 369.

17. *Id.* at 370-71; *see* Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193 (1968).

18. The furthering of individualized, rehabilitative sentencing, discussed in text accompanying note 12, *supra*, is an example. *See also* Thomas, *supra* note 17.

19. *See* ABA PROJECT, *supra* note 13, at 21, 26-27. Though it is probable that sentence review would in fact have a beneficial effect on the morale of prisoners, decreasing their hostility toward the penal system, the response of the public might not be so favorable.

20. *See* Mueller, *supra* note 1, at 684-85.

21. As Judge Brewster observed in *Appellate Review of Sentences*, 40 F.R.D. 79, 88 (1966): "[A]n appellate judge could never get the true picture of a defendant and his sentence proceedings from the mere reading of a cold record, any more than he could learn how to milk a cow from reading a book." Since the vast majority of criminal cases are disposed of through guilty pleas, however, the trial judge seldom has an opportunity to observe the defendant. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 1-2 (Tent. Draft 1967); U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

22. Dix, *supra* note 4, at 372.

23. *See* ORFIELD, CRIMINAL APPEALS IN AMERICA 119-20 (1939).

and immediacies of the trial"[24] could be more objective. Moreover, appellate courts should be able to acquire the skills needed for such review.[25] Both branches of the judiciary can and should be as well educated as possible on penal theory, even though judges cannot be expected to be psychiatrists. If the esoteric aspects of sentencing are beyond the capacity of ordinary tribunals, special courts for sentencing or sentence review should be established.[26] Courts need not be overburdened by frivolous appeals from sentence since such appeals can be handled with dispatch,[27] and those appeals with merit would decrease as trial courts adopted the desired sentencing standards.

It is suggested that the arguments favoring appellate sentence review are more convincing than those against it. Such review is fully consonant with our court system, and it provides a vehicle for standardizing and modernizing the sentencing process. The opposing arguments derive from the prejudices of a familiar system and should not prevent needed reforms.

Unsatisfactory resolution of the problems of sentence review has prevented its widespread legislative authorization in this country.[28] Of the states having provisions for such review,[29] only Illinois,[30] Okla-

24. Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 STAN. L. REV. 405, 415 (1968).

25. This has evidently occurred in England. Thomas, *supra* note 17.

26. *See* CONN. GEN. STAT. ANN. § 51-196 (1958); ME. REV. STAT. ANN. tit. 15, § 2141 (1964); MD. ANN. CODE art. 26, §§ 132, 134 (Cum. Supp. 1970); MASS. GEN. ANN. LAWS ch. 278, § 28(B) (1956); Halperin, *Sentence Review in Maine: Comparisons and Comments*, 18 MAINE L. REV. 133 (1966); Mueller, *supra* note 1, at 678; Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960).

27. The English experience has so indicated. Thomas, *supra* note 17, at 223.

28. The practice is widely employed in England, Thomas, *supra* note 17, and other countries. Mueller & LePoole, *Appellate Review of Legal but Excessive Sentences: A Comparative Study*, 21 VAND. L. REV. 411 (1968). The establishment of federal appellate sentence review, often proposed, is unlikely at present in view of strong and consistent opposition by courts and legislators. *See* ABA PROJECT, *supra* note 13, at 86-89; Symposium, *Appellate Review of Sentences*, 32 F.R.D. 249 (1963). Presently, rule 35 of the *Federal Rules of Criminal Procedure* allows district courts to review their own sentences and reduce them within a specified time, subject only to their own discretion.

29. A list of 18 state provisions appears in Note, *Appellate Review of Sentences in Florida: A Proposal*, 23 U. FLA. L. REV. 736, 737 n.10 (1971). The Illinois provision was omitted, ILL. ANN. STAT. ch. 110A, § 615(b)(4) (Smith-Hurd 1968), and the cited version of the New York statute should be updated: N.Y. CRIM. PROC. LAW §§ 470.15, 470.20(6), 470.25 (McKinney 1971).

30. In Illinois, where the power was first given to the courts in 1963, there were signs of a decline in its employment after the first few years. Halperin, *Appellate Review of Sentence in Illinois—Reality or Illusion?*, 55 ILL. B.J. 300, 314 (1966); *see, e.g.*, People v. Bonner, 37 Ill. 2d 553, 229 N.E.2d 527 (1967); People v. Hanserd, 125 Ill. App. 2d 465, 261 N.E.2d 317 (1970). The review statute is often invoked, however, and it may in time produce the expected results. For example, People v. Drewniak, 105 Ill. App. 2d 37, 44, 245 N.E.2d 102, 106 (1969), made the point that "the primary purpose of [the Illinois statute] is to prevent arbitrary or oppressive treatment of offenders and to provide penalties which are both proportionate to the circumstances of the case and recognize the differences in the rehabilitation potential of individual offenders." *Accord*, People v. Wallace, 117 Ill. App. 2d 426, 430, 254 N.E.2d 643, 645 (1969); People v. Hobbs, 56 Ill App. 2d 93, 98, 205 N.E.2d 503, 506 (1965).

homa[31] and New York[32] have made extensive use of that power.[33] Even in these states sentence review has not yet borne the fruits anticipated by its advocates.

Appellate Sentence Review in Arizona

Arizona appellate courts have had ample statutory authority to review sentences for over 30 years through both the general power to render judgment consistent with justice and the specific power to reduce sentence on appeal.[34] Although the general statute, dating from the Penal Code of 1901,[35] has been used in circumstances similar to *McIntyre*,[36] it has generally been called upon to reduce the offense charged.[37]

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31. Oklahoma courts have often resorted to restrictive phrases limiting the exercise of their power of sentence mitigation. *See* Flowers v. State, 457 P.2d 833, 834 (Okla. Crim. App. 1969), in which the court said that the authority to reduce sentence on appeal would be exercised only if the sentence were so excessive as to "shock the conscience." Moreover, the power is often employed in lieu of reversal to compensate for procedural trial errors. Frequent application of the statute, therefore, does not necessarily reflect a particular concern for the rehabilitation of the offender. *See* Kendall v. State, 483 P.2d 757 (Okla. Crim. App. 1971); Boyd v. State, 478 P.2d 980 (Okla. Crim. App. 1970); Riddle v. State, 374 P.2d 634 (Okla. Crim. App. 1962). The cases indicate that procedural errors in criminal trials in Oklahoma will bring sentence mitigation but not reversal. This procedure, though expedient, is injurious to the law of harmless error. On the other hand, it benefits the defendant when the error involved is harmless but some reduction of sentence is still granted.

32. New York courts have tended to abstain from appellate sentence review in recent years. Isolating the reasons for this decline requires a more comprehensive study, but there are several plausible explanations. Perhaps the spate of appeals during the Warren Court era had forced New York appellate courts to grant sentence relief as an expedient, and the practice has simply waned with the overall decline in appeals. On the other hand, it is possible that sentence review has been so effective in setting standards that appellate courts in the state seldom find it necessary to reduce sentences. Mitigation of sentence occurred frequently under the former New York sentence review statute, previously codified as N.Y. CODE CRIM. PROC. § 543 (1958) (repealed 1961).

33. The most extensive sentence review in this country occurs in military courts. ABA PROJECT, *supra* note 13, at 83-85. *See* U.S. MANUAL FOR COURTS-MARTIAL ¶¶ 88, 94, 100, 101 (rev. ed. 1968). The situation in the military courts does not sufficiently parallel that in civilian courts to warrant a comparison in this analysis.

34. ARIZ. REV. STAT. ANN. §§ 13-1716, -1717 (1956), respectively. Similar statutes are found in other states. Mueller, *supra* note 1, at 689-97, app. B.

35. Ariz. Rev. Stat., Penal §§ 1060, 1061 (1901). The substance of these sections is the same as ARIZ. REV. STAT. ANN. § 13-1716 (1956). The power conferred by the earlier statutes was not used, however, until after specific authorization for sentence review had been conferred in 1939.

36. State v. Tuggle, 101 Ariz. 216, 418 P.2d 372 (1966), involved a young man who had committed a robbery in Arizona, was arrested for a similar offense in California, and served 3 years in a California correctional institution where he received medical treatment which aided his psychological rehabilitation. Brief for Appellant at 3-4, State v. Tuggle, 101 Ariz. 216, 418 P.2d 372 (1966). After he had been pronounced rehabilitated and released in California, he was returned to stand trial in Arizona and was given a 6-to-8 year sentence. The Supreme Court of Arizona remanded the case for resentencing as in *McIntyre*, but the trial court, evidently less convinced of the defendant's rehabilitation, refused to grant probation and imposed a 5-year to 5-year-and-1-day sentence. State v. Tuggle, No. CR-46885 (Maricopa Co., Ariz., Super. Ct., Oct. 26, 1966).

37. *E.g.*, State v. Rowland, 12 Ariz. App. 437, 471 P.2d 322 (1970); State v. Thompson, 10 Ariz. App. 301, 458 P.2d 395 (1969); State v. Sexton, 4 Ariz. App. 41, 417 P.2d 554 (1966). In each case the charge was reduced from first to second degree burglary on the basis that the evidence did not sustain the former charge.

Explicit authorization for reduction of legal but excessive sentences was granted in 1939 when the legislature adopted the sentence review provision of the American Law Institute's criminal procedure code.[38] The hesitancy of Arizona appellate courts to use the sentence review power, however, is reflected in the strict guidelines set down by the supreme court. The two standards most often applied by the appellate tribunals have been the "clearly excessive"[39] and "abuse of discretion" standards,[40] both of which have generally been quoted, without explication, as catchall phrases to justify the denial of sentence reduction. By refusing to reduce sentences unless one of these factors is clearly present, Arizona appellate courts have in the past acted merely as guardians against flagrant sentencing blunders.[41]

Until recently, there have been few opinions in which Arizona courts have delineated tangible rules for applying these tests. The most useful has been *State v. Killian*, in which the supreme court stated that factors to be considered in determining abuse of discretion include "the circumstances of the offense charged and the moral character and the past conduct of the defendant" as well as his age.[42] Although there have been factual situations in cases since *Killian* from which other criteria can be inferred,[43] these criteria and the *Killian* factors have not yet been compounded into a general test for sentence mitigation, and *Killian* itself has seldom been cited on this point. This failure prompted the recent remark that "[t]he reluctance of the court to enter the area of appellate sentence review and the inadequacies of its efforts when it has done so suggest . . . that . . . it may be impossible to articulate helpful appellate guidelines for criminal sentencing."[44]

More recently, however, the Arizona appellate courts have begun to develop the *Killian* criteria. Besides the *McIntyre* decision, they

38. ALI CODE OF CRIMINAL PROCEDURE § 459 (Official Draft 1930), adopted without significant changes as Ariz. Code § 44-2537 (1939), *recodified*, ARIZ. REV. STAT. ANN. § 13-1717 (1956). Arizona is the only state that adopted this proposal.

39. *See* State v. Pickard, 105 Ariz. 219, 221, 462 P.2d 87, 89 (1966); State v. Smith, 103 Ariz. 490, 493, 446 P.2d 4, 7 (1968); State v. Fierro, 101 Ariz. 118, 121, 416 P.2d 551, 554 (1966).

40. *See* State v. Davis, 105 Ariz. 498, 503, 467 P.2d 743, 748 (1970); State v. White, 102 Ariz. 162, 164, 426 P.2d 796, 798 (1967); State v. Wilson, 7 Ariz. App. 384, 387, 439 P.2d 831, 834 (1968).

41. Statistically, a defendant has been more likely to be granted executive clemency in Arizona than to have his sentence mitigated on appeal. Dix, *supra* note 4, at 403.

42. 91 Ariz. 140, 142, 370 P.2d 287, 289 (1962); *accord*, State v. Castano, 89 Ariz. 231, 233, 360 P.2d 479, 480 (1961); State v. Fenton, 86 Ariz. 111, 119, 341 P.2d 237, 243 (1959).

43. *See* State v. Valenzuela, 98 Ariz. 189, 194, 403 P.2d 286, 289 (1965) (defendant's death sentence reduced to match the life sentence of his equally culpable codefendant). *See also* State v. Tuggle, 101 Ariz. 216, 418 P.2d 372 (1966).

44. Dix, *supra* note 4, at 406.

reduced sentences in *State v. Seelen*,[45] *State v. Raybould*[46] and *State v. Flores*.[47] *Seelen* involved a conviction for robbery where the defendant had held a gun while others completed the crime. In reducing the sentence of 12-to-15 years to 7-to-10 years, the court noted that the defendant was a young man with no previous criminal record, had received none of the benefits of the robbery, came from a respected family, and had a pregnant wife. It concluded "the ends of justice will be better served if the defendant is given greater opportunity to rehabilitate himself than would be the case if the sentence . . . were permitted to stand."[48]

In *Raybould* the defendant also had no prior record, a pregnant wife, and a clear military record. In reducing a 4-to-8 year sentence for the possession of marijuana to 1-to-2 years, the court cited the statutory provision allowing treatment of a first offense of marijuana possession as a misdemeanor[49] as an additional factor. Although the possession statute is "in keeping with current tendencies and thinking concerning offenses involving possession of marijuana,"[50] the court, preferring to mitigate the sentence for abuse of discretion, refused to reduce the charge. It did, however, base its decision specifically on the *Killian* reasoning.[51]

In *Flores*[52] a 20-to-30 year sentence for robbery, imposed upon revocation of probation, was reduced to 5 to 6 years. The court based the reduction on the length of the sentence given the defendant, the defendant's acquittal on other felony charges, his youth, and lack of a prior record.

Coupling the *Raybould* court's reliance upon the *Killian* standards, and reasoning with the references to rehabilitation in *Seelen* and *McIntyre*, a more vigorous application of the power of appellate sentence review in Arizona is foreseeable. The trend thus initiated suggests that where there is a young first offender and evidence that recidivism can be prevented, the appellate courts will look to mitigation of sentence to further the goal of rehabilitation; where there is strong evidence that the defendant is already rehabilitated, his case will be remanded to the trial court with the implication that he should be placed

45. 107 Ariz. 256, 485 P.2d 826 (1971).
46. 15 Ariz. App. 368, 488 P.2d 1005 (1971).
47. No. 2082 (S. Ct. of Ariz. Apr. 5, 1972).
48. 107 Ariz. at 262, 485 P.2d at 832.
49. ARIZ. REV. STAT. ANN. § 36-1002.05(A) (Supp. 1971-72).
50. 15 Ariz. App. at 369, 488 P.2d at 1006.
51. *Id.*
52. State v. Flores, No. 2082 (S. Ct. of Ariz., Apr. 5, 1972). The *Flores* court declined to remand for resentencing since the trial judge was no longer sitting on the superior court. Since the factual situation was not such as to require a remand for verification, the case indicates that the reason for remanding is to bring trial courts into line with standards dictated by the supreme court.

on probation if the trial court verifies the evidence. Should such a trend continue, it would put Arizona in the vanguard of appellate sentence review.[53]

If the trend of these recent cases is continued, the most significant impact may be a redirection of Arizona penal goals from restraint and deterrence[54] toward rehabilitation.[55] While rehabilitation has been announced as the principal concern of the Arizona penal system,[56] this goal has seldom been met, largely because the "early concept [of penitence] established a policy of punitive law which [Arizona courts] are prone to follow."[57] Before rehabilitation can become an established practice, therefore, trial courts must dispose of their fears of rehabilitation being favored at the expense of retribution,[58] restraint[59] or deterrence.

The main obstacle remaining to the goal of rehabilitation is the fear that de-emphasizing the deterrence of sentences will lead to an increase in crime. Such fears are groundless. Neither the first-time offender nor the habitual criminal will be encouraged to embark upon or continue a criminal career simply because there is a chance of receiving a shorter sentence or probation after sentence review.[60] First, the known criminal is not likely to receive the benefit of mitigation of sentence on appeal, since its application is presently restricted to young first offenders.[61] If the benefit of mitigation should be expanded to include recidivists,[62] the answer may be the same for the courts will

53. *See* text & notes 31-38 *supra*. It should be noted that the percentage of cases in which sentence reduction is granted is still very small, and that the course of this trend is impossible to predict with certainty at this stage.

54. Dix, *supra* note 4, at 404.

55. *See* note 14 *supra*.

56. State v. Maberry, 93 Ariz. 306, 308, 380 P.2d 604, 605 (1963). In *Maberry*, the defendant, with previous felony convictions in 1948 and 1957, was convicted of grand theft. Nevertheless, the court said:

> The fact that there is no evidence of basic moral depravity . . . on appellant's part and that such long periods of time have passed between his offenses indicates that appellant is capable of rehabilitation. Consequently the sentence to be imposed upon him in this instance should be so done with his rehabilitation in mind.

Id. at 309, 380 P.2d at 605. The court declined to reduce the sentence, however, because it found the trial court's sentence consistent with the rehabilitative goal.

57. *Id.* at 308, 380 P.2d at 605.

58. Retribution is simply outdated as a useful penal theory for it is not conducive to the ends of society or the interests of the prisoner. *See generally* K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

59. Restraint is complemented by rehabilitation; insofar as rehabilitation is successful, restraint is unnecessary.

60. Few offenders have a knowledge of sentencing practices. This applies both to *specific* deterrence, focused on the individual offender before the court, and *general* deterrence, deterring others by making examples of those who are caught.

61. See text preceding note 53 *supra*.

62. State v. Maberry, 93 Ariz. 306, 380 P.2d 604 (1963), *discussed, supra* note 56, considered this point, but noted that the sentence should not be so short as to *prevent* the prisoner's rehabilitation. Though it may serve the traditional penal functions, a term in the Arizona State Prison is of doubtful rehabilitative value. Dix, *supra* note 4, at 390.

probably require stronger evidence of rehabilitation before reducing sentences in such cases. This assumes that courts can judge rehabilitation by outward signs—that rehabilitative acts rehabilitate.[63] It is possible, however, that the amount of conditioning of the offender necessary to certify rehabilitation may be more in some cases than we are willing or able to impose.[64]

First offenders meeting the criteria will receive the first benefits of this change in attitude toward rehabilitation. Arguably, some who might have been deterred from committing a first offense will "take a chance" because of the new "soft" attitudes in the courts, but this position is questionable. The first offender should find it as difficult as the recidivist to establish the probability of rehabilitation. Thus, it is submitted that deterrence, itself of doubtful value,[65] will not suffer sufficiently to hinder the development of appellate sentence review in Arizona.[66]

The second major impact of the present trend toward the goal of rehabilitation is the possible influence on the behavior of courts and attorneys. Although the trial courts are constrained to sentence within the minimum-maximum limits,[67] they have the power to grant probation when circumstances warrant,[68] and thus could rapidly implement the suggested changes. The practical effects of *McIntyre*, however, will depend principally upon Arizona attorneys, for the courts cannot be expected to alter voluntarily the tradition of sentencing directed toward restraint and deterrence. It is recommended that during the trial or the hearing in mitigation of sentence,[69] the attorney inform the court of his client's attributes which, in the light of recent decisions, indicate the likelihood of rehabilitation. Youth, lack of prior criminal record, marriage, a good employment record, or any other similarities to the situations in *Tuggle, Seelen, Raybould* and *Mc-*

63. "Rehabilitated, an individual will not have the capacity—cannot bring himself—to injure another or take or destroy property." R. CLARK, CRIME IN AMERICA 220 (1970).

64. *Cf.* note 12 *supra.* Recent writings suggest that this idea is more than idle conjecture. *See* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971) and A. BURGESS, A CLOCKWISE ORANGE (1962) for exploration of some of the more radical possibilities.

65. *See* R. CLARK, *supra* note 63, at 218-20.

66. It is recognized that a balance must be struck between the proof required to establish rehabilitation and the amount of conditioning society is willing to impose. Considering the needs of the offender does not mean the court will grant a reduction of sentence in the absence of convincing evidence of his character. The evidence, however, need not be of social background or wealth, but can be based upon such everyday factors as past record, marital status and employment record. Through these elements, it should be possible to develop straightforward and reliable measures of rehabilitation to guide trial courts in sentencing.

67. ARIZ. REV. STAT. ANN. § 13-1643 (1956).

68. *Id.* § 13-1657 (Supp. 1971-72).

69. ARIZ. R. CRIM. P. 336 dictates that a hearing in mitigation of sentence, if requested, shall be held by the trial court.

Intyre should be emphasized. Further, *McIntyre* indicates that these factors need not all be present at the time of the offense, and that a defendant out on bail can improve his chances of receiving a reduced sentence by demonstrating rehabilitative behavior.[70]

Although most defendants will be unable to get married or become a pillar of the church while free on appeal bond, some may be able to find employment, and steady employment is probably the surest index of rehabilitation.[71] The community can thus take part in modernizing the penal system by offering jobs for those convicted or accused of crimes but not yet imprisoned. Studies have indicated that the value of such an endeavor would be well worth the cost.[72] Arizona appellate courts, as intimated in their shift to a greater emphasis on rehabilitation, may favor a state program of training and jobs for some criminal offenders in lieu of incarceration. Such a program would allow the offender to increase his self-esteem, allow the state to divert funds used for prison facilities to training and employing probation officers and save society part of the rising cost of crime.[73]

Appellate review of sentences has had an unproductive history in this state. Recent judicial concern for sentencing standards and their relation to social ends has brought Arizona to the threshhold of a new era for sentencing. *McIntyre* and other modern cases can be the beginning of a revamping not only of the nature of sentence review but also of the philosophy of penology in Arizona.

PRE-INTERROGATION WAIVER OF CONSTITUTIONAL RIGHTS BY JUVENILES

A juvenile justice system seeks to pursue often-conflicting tasks: protecting and developing the potential of youth, while concomitantly

70. There need not be a complete rebirth during this period; the courts may be willing to institute a half measure, such as temporary probation with periodic review, if the offender can show that he has made a substantial start toward rehabilitation. ARIZ. REV. STAT. ANN. § 13-1657(A)(1) (Supp. 1971-72), provides that probation may be granted under "such terms and conditions as the court determines."

71. *Cf. The Criminal Offender—What Should Be Done?*, 7 CRIM. L. BULL. 242 (1971).

72. *See* Hamilton, *Criminal Rehabilitation Should Be Our Top Priority*, 7 CRIM. L. BULL. 225, 232-33 (1971) (experiments in Alabama, California and New York indicate net saving to society when it makes the initial expenditure for rehabilitation of the offender). *Cf.* K. MENNINGER, *supra* note 58, at 143-56.

73. This should not be interpreted to mean that all prisoners should be released. The present state of knowledge and facilities demands that certain types of criminals remain incarcerated because society cannot tolerate their behavior. The savings in money and anguish that could be effected by training offenders, however, mandates such a program for those offenders who society feels can be effectively rehabilitated by today's methods.

protecting society from further injury by the youthful offender.[1] Realization of these goals requires establishment of a juvenile policy at some point between complete concern for the protection and rehabilitation of youth and complete concern for the efficient investigation of crime and punishment of the youthful offender. While a similar policy must also be established for the adult offender, it is generally recognized that society possesses a special interest in treatment of the juvenile offender—treatment which in the past has been essentially rehabilitative in theory, if not in practice.[2]

State v. Hardy[3] is the latest in a series of cases outlining the policy developed by the legislature and Supreme Court of Arizona to achieve these goals. The decision in *Hardy* was rendered in response to a petition filed by the state seeking an order directing reconsideration of the admissibility of incriminating statements made by a minor defendant[4] after he was taken into custody and advised of his constitutional rights. The state argued that the order of the trial judge barring admission of the minor's statement on the grounds that his parents should have been notified and their consent obtained[5] was improper because inconsistent with rule 18 of the *Arizona Rules of Procedure for the Juvenile Court.*[6] In granting the petition, the court held that rule 18 promulgates the standards to be applied in weighing

1. *Cf.* J. KENNEY & D. PURSUIT, POLICE WORK WITH JUVENILES AND THE ADMINISTRATION OF JUSTICE 5-7 (4th ed. 1970). "In 1968 a majority of all arrests for major crimes against property were of people under 21, as were a substantial minority of arrests for crimes against the person." *Id.* at 5. The authors further note that "[r]ough estimates by the Children's Bureau [of the United States Department of Health, Education and Welfare], supported by independent studies, indicate that one in every nine youths—one in every six male youths—will be referred to juvenile court in connection with a delinquent act (excluding traffic offenses) before his 18th birthday." *Id.* at 6-7.

2. *See In re* Gault, 387 U.S. 1, 15-18 (1967); State v. Shaw, 93 Ariz. 40, 46, 378 P.2d 487, 491 (1963).

3. 107 Ariz. 583, 491 P.2d 17 (1971).

4. The real party in interest, Louis C. Taylor, was 16 years of age at the time of his arrest.

5. The trial judge apparently relied upon State v. Maloney, 102 Ariz. 495, 433 P.2d 625 (1967). See text accompanying notes 17-19 *infra.*

6. ARIZ. R.P. JUV. CT. 18:

> No extra-judicial statement to a peace officer or court officer by the child shall be admitted into evidence over objection unless the person offering the statement demonstrates to the satisfaction of the court that: The statement was voluntary and before making the statement the child was informed and intelligently comprehended that he need not make a statement, that any statement made might be used in a court proceeding, and that he had a right to consult with counsel prior to making a statement and during the taking of the statement, and that, if he or his parents, guardian or custodian could not afford an attorney, the court would appoint one for him prior to any questioning.

Compare id. with ARIZ. R.P. JUV. CT. 6(c), which provides that a child, when appearing before the juvenile court, "may waive counsel if the court finds that his waiver is knowingly, intelligently and voluntarily given in view of his age, education, apparent maturity *and within the presence of his parents, guardian or custodian, at the time of waiver.*" (Emphasis added.)

the admissibility of the statements of a child.[7] "The presence of the child's parents or their consent to a waiver of rights is only *one* of the elements to be considered by the trial court in determining that the statement was voluntary and the child intelligently comprehended his rights."[8] Arizona thus adopted the majority rule that a minor is not per se incompetent to waive constitutional rights[9] without the presence, advice or consent of a parent, guardian or counsel.[10]

Hardy and its effect upon the system of juvenile justice in Arizona are best understood in the context of the development of legislative and judicial attitudes toward the juvenile offender[11] and his capacity, as a matter of fact or law, to waive constitutional rights without adult advice. This approach reveals that Arizona public policy has moved from special concern for protection of the child confronted by police to the present position of exposing the child to the possibility of waiving constitutional rights without adult assistance.

In the recent past, Arizona provided a number of procedural means for protecting the interests of a child. In *State v. Shaw* the court acknowledged the state legislature's recognition of the need for special treatment of the juvenile from the first moment of contact with police.[12] Accordingly, the court interpreted a statutory provision[13] that a probation officer be notified "forthwith" upon the arrest of a child under the age of 18 years to require *immediate* notification. Failure to comply with the requirement would render any statement by the minor in

7. ARIZ. R.P. JUV. CT. 1 describes a child as a person under the age of 18 years.

8. 107 Ariz. at 584, 491 P.2d at 18. State v. Maloney, 102 Ariz. 495, 433 P.2d 625 (1970), was overruled to the extent it was inconsistent with the ruling in *Hardy*. Counsel for the real party in interest in *Hardy* asserted, in a motion for rehearing, that the decision of the court in *Maloney* was based upon concepts of fundamental fairness—including notice to the child's parents of his right to counsel, his right to remain silent, and the possibility that his statements might be used against him in a criminal proceeding—and parental consent to any waiver of these rights. Counsel concluded stating: "This is one further step in eroding the rights of juveniles in this state which have heretofore been zealously guarded. . . . This decision would eliminate any bar to the star chamber interrogation of children." Motion for Rehearing at 5-6, State v. Hardy, 107 Ariz. 583, 491 P.2d 17 (1971).

9. *E.g.*, United States v. Miller, 453 F.2d 634, 636 (4th Cir. 1972): "Although the age of the individual is a factor to be taken into account in ascertaining if the waiver was voluntary, no court has held that age alone is determinative."

10. *See* People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967), *cert. denied*, 392 U.S. 945 (1968). *But cf.* People v. Burton, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971).

11. Arizona's juvenile justice system and public policy toward the juvenile offender are discussed in Molloy, *Juvenile Court—A Labyrinth of Confusion for the Lawyer*, 4 ARIZ. L. REV. 1 (1962). For a discussion of the development of the juvenile justice system nationally see *In re* Gault, 387 U.S. 1, 14-28 (1967). *See generally* Ketcham, *Legal Renaissance in the Juvenile Courts*, 60 NW. U.L. REV. 585 (1965); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

12. 93 Ariz. 40, 47, 378 P.2d 487, 491 (1963), *noted*, 5 ARIZ. L. REV. 286 (1964).

13. Ariz. Rev. Stat. § 8-221(A) (1956) (repealed 1970).

the absence of advice of a probation officer inadmissible without regard to voluntariness.[14]

Another statute provided that the deposition of a child by, or evidence given in, juvenile court was inadmissible as evidence against him in subsequent criminal proceedings.[15] Noting the generally informal atmosphere and the constitutional and statutory safeguards denied the minor in juvenile proceedings, the court in *State v. Fierro* ruled that while such information was inadmissible in subsequent proceedings, it could properly be used in determining the sentence to be imposed upon conviction.[16] Little more than a year later, the court in *State v. Maloney* reinterpreted the statute on the basis of "fundamental fairness" and legislative intent.[17] Although the court broadened the scope of the statute, it added an important exception by holding that

> inculpatory statements made by a child while under the jurisdiction of the juvenile court and before that court waives its jurisdiction, cannot later be used against the child in a subsequent criminal proceeding *unless he and his parents* are advised before questioning not only of the child's right to counsel and privilege against self-incrimination, but also of the possibility that he may be remanded to be tried as an adult (emphasis added).[18]

Curiously, the use of inculpatory statements, which had been forbidden in *Fierro* as a violation of the statute, was now deemed permissible under certain circumstances in the name of "fundamental fairness."

Recently, several significant changes have evidenced a basic shift in state policy regarding the juvenile offender. In 1970, the Supreme Court of Arizona adopted the *Arizona Rules of Procedure for the Juvenile Court* and the legislature repealed the statutes interpreted in

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14. 93 Ariz. at 49-50, 378 P.2d at 493-94. Applying the *Hardy* decision to *Shaw*, it appears that the latter is overruled by analogy to the demise of *Maloney*. See note 8 *supra*. Both *Shaw* and *Maloney* were based upon statutory provisions since repealed. As the import of *Hardy* is that fundamental fairness to the accused can be achieved by adherence to ARIZ. R.P. JUV. CT. 18, it follows that, if notification of the probation officer immediately upon arrest is required at all, failure to notify him is but another element to be considered by the trial court in determining the voluntariness of the child's statements.

15. Ariz. Rev. Stat. § 8-228(B) (1956) (repealed 1970).

16. 101 Ariz. 118, 119-20, 416 P.2d 551, 552-53 (1966).

17. 102 Ariz. 495, 433 P.2d 625 (1967), *noted*, "Juveniles," 10 ARIZ. L. REV. 148, 211, 214 (1968). The phrase "fundamental fairness" was used as in Harling v. United States, 295 F.2d 161, 163 (D.C. Cir. 1961) (footnotes omitted):

> The principles of 'fundamental fairness' govern in fashioning procedures and remedies to serve the best interests of the child. It would offend these principles to allow admissions made by the child in a non-criminal and non-punitive setting of juvenile proceedings to be used later for the purpose of securing his criminal conviction and punishment.

18. 102 Ariz. at 499, 433 P.2d at 629.

Shaw[19] and *Maloney*.[20] A new statute was enacted prohibiting the disposition of a minor in juvenile court from being used in any other court for any purpose except sentencing after conviction of a felony.[21] More significant, however, was the omission from the new statute of the prohibition against the use in subsequent criminal proceedings of *evidence* gained while the minor was under the jurisdiction of the juvenile court.

The *Hardy* decision also radically changes Arizona's system of juvenile justice. The child confronted by police is no longer assured of adult aid in deciding whether to waive constitutional rights. Even with the aid formerly rendered to juveniles the decision was difficult. Should he cooperate with the police and incriminate himself,[22] he risks being transferred to an adult criminal court and convicted on the basis of his damaging admissions. Should he assert his rights, however, he risks being found unamenable to rehabilitation in juvenile court because uncooperative, which results in being transferred to criminal court.[23] Requiring the child to make this decision without aid is unreasonable.

The dangers in determining the "totality of the circumstances" whether the statement of an adult was truly free from coercion, and therefore properly admissible in court, were recognized by the Supreme Court of the United States in *Escobedo v. Illinois*[24] and *Miranda v. Arizona*.[25] These decisions require that "adequate protective devices be employed to dispel the compulsion inherent in custodial surroundings."[26] Accordingly, the Supreme Court outlined specific warnings that are the minimally adequate protective devices required for adults. The significance accorded rule 18 in the *Hardy* decision indicates that the Supreme Court of Arizona believes these warnings to be adequate protective devices for a child as well.[27]

19. Ariz. Rev. Stat. § 8-221(A) (1956) (repealed 1970).
20. *Id.* § 8-228(B) (repealed 1970).
21. ARIZ. REV. STAT. ANN. § 8-207(C) (Supp. 1971-72).
22. ARIZ. R.P. JUV. CT. 2(c) provides that if a child acknowledges his responsibility for a delinquent act, he may be referred to other agencies or his parents, guardian or custodian upon determination by the juvenile probation officer that court action is unnecessary.
23. *Id.* at 14(b) (setting forth the grounds upon which a child may be transferred for criminal proecution).
24. 378 U.S. 478 (1964).
25. 384 U.S. 436 (1966).
26. *Id.* at 458.
27. In *Gault* the Supreme Court held that a child must be afforded certain procedural rights in juvenile proceedings, including the right to counsel and the privilege against self-incrimination. *Gault* has not been read to hold that a child must be treated as an adult, but rather that society must not use methods inconsistent with constitutional guarantees in demonstrating its concern for youth. *See* Lefstein, *In re Gault, Juvenile Courts and Lawyers*, 53 A.B.A.J. 811 (1967); Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 L. & SOC'Y REV. 491 (1969); Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527 (1968).

An after-the-fact determination by the juvenile court judge of the competency of a child's waiver is neither a protective device nor very reliable. Mere statistics as to the child's age, level of education, maturity, or prior dealings with the police or juvenile authorities cannot accurately portray to the judge the reaction of the child accused of crime. The judge, in the comparative calm of the juvenile court, cannot be expected to visualize the reactions of the child standing alone in an inherently coercive atmosphere.[28] For it is in this atmosphere that the child, subject to all the fears peculiar to childhood including fear of parental displeasure,[29] is required to decide whether to assert or waive rights read by an officer who suspects that he has, in fact, committed some crime.[30] The question which society must ask is not whether the individual child has the capacity to waive constitutional rights, but rather whether any child should be required to make this significant decision under such circumstances without aid from some sympathetic adult.

While the position of the *Hardy* court is shared by the majority of jurisdictions,[31] some commentators have questioned the wisdom of such decisions. They suggest that, as a matter of law, every minor be considered incompetent to waive his rights unless he does so with the aid of a parent, guardian or counsel.[32] Further, if a child entering formal juvenile court proceedings cannot be expected, even with the aid of his parents,[33] to comprehend or assert the rights assured him,[34]

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28. Since the "totality of the circumstances" test may be used to determine the competency of the child, the cumulative effect of police testimony that he appeared to be competent and that the atmosphere was not coercive would weigh heavily against a child who, at best, may only be able to assert that he was under undue pressure without being able to identify precisely the subtle tactics routinely used against adults.

29. *Cf. In re* H., 2 Cal. 3d 513, 526, 468 P.2d 204, 211, 86 Cal. Rptr. 76, 83 (1970); Comment, *Does Parental Liability for Legal Fees Infringe upon a Juvenile's Constitutional Rights?*, 10 SANTA CLARA LAW. 347 (1970).

30. *See* Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970), where the authors conclude that only a small percentage of juveniles is capable of knowingly and intelligently waiving their rights after receiving the standard *Miranda* warning given adults. The great majority, by contrast, must be carefully counseled, with particular care being taken to use terms familiar to children, if they are to understand their rights and competently waive them.

31. *See* notes 9-10 *supra*.

32. J. KENNEY & D. PURSUIT, *supra* note 1, at 73 n.13; Note, *Waiver of Constitutional Rights by Minors: A Question of Law or Fact?*, 19 HASTINGS L.J., 223 (1968); Note, *Miranda Guarantees in the California Juvenile Court*, 7 SANTA CLARA LAW. 114 (1966); Comment, *The Juvenile Offender and Self-Incrimination*, 40 WASH. L. REV. 189 (1965). *Contra*, People v. Lara, 67 Cal. 2d 365, 378-81, 432 P.2d 202, 212-13, 62 Cal. Rptr. 586, 596-97, *cert. denied*, 392 U.S. 945 (1968).

33. *See* text accompanying notes 42-46 *infra*.

34. Note, *Rights and Rehabilitation in the Juvenile Court*, 67 COLUM. L. REV. 281, 322 (1967). *See also* Dyson & Dyson, *Family Courts in the United States*, 9 J. FAM. L. 1 (1969); Ferster, Courtless & Snethen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375 (1971); Ketcham, *Legal Renaissance in the Juvenile Court*, 60 NW. U.L. REV. 585 (1965).

then he cannot be expected to do so at the time of arrest. Several jurists have drawn these comments to their logical conclusion and argued that all the protections afforded the child in the courtroom are meaningless unless available to the child at the time of arrest, at least to the extent that the presence of a parent or some other sympathetic adult be required.[35] Other commentators predict that in the near future, either as a result of legislative enactment or court decision, juveniles will not be permitted to waive their right to counsel, as well as other rights, except upon the advice of counsel.[36] Some commentators have alluded to the long-term benefits to be gained by demonstrating to juveniles at the earliest stage of legal proceedings that society retains sufficient interest in them to provide adult assistance in determining whether to waive their rights.[37] Prior to 1970, the Arizona legislature and supreme court, as a matter of public policy, insured that no child should be forced to face alone the inherently coercive presence of the police. Indeed, in 1963, the court observed that "[a] few hours of the treatment sometimes accorded mature and hardened criminals can give the impressionable mind of a youth an indelibly warped view of society and its interests in him."[38] It is suggested that this state's earlier policy expressed the better view.

Were the state of Arizona to reestablish a policy of providing adult assistance for the juvenile offender, someone would have to be designated to aid the child at the time of arrest. This person must be able to approach the accused juvenile with the child's best interest as his primary concern, and with the ability to effectively advise the child of his rights and the consequences of alternative courses of action. Such a person must not have duties conflicting with the child's interests. Furthermore, the advisor must be able to assist the child without contributing to an already coercive situation.

35. People v. Lara, 67 Cal. 2d 365, 395, 432 P.2d 202, 223, 62 Cal. Rptr. 586, 607 (1967) (Peters, J., dissenting). Justice Peters urged that the accusatory stage of the criminal process be recognized as a critical stage at which rights could be irretrievably lost if not asserted, and that a friendly adult be present to advise the child. In support, he cited the dissent of three judges in People v. De Flummer, 16 N.Y.2d 20, 24, 209 N.E.2d 93, 95, 261 N.Y.S.2d 42, 45 (1965), *cert. denied*, 384 U.S. 1018, *reh. denied*, 385 U.S. 892 (1966).

36. Lefstein, Stapleton & Teitelbaum, *supra* note 27, at 562.

37. Ketcham, *supra* note 34, at 595:

> First impressions, we all know, are most important—often indelible. A boy in community trouble for the first time is very much alone. Whether justifiably or not, he sees school authorities, police and court officials as demanding, judgmental and often hostile. In some instances, even his parents appear to be critical and antagonistic. The court-appointed attorney will often be the first 'outsider' to stand up for him. This can create a strong, new impression that the juvenile court law serves the boy, too, and is not just the agent of adult authority.

See also Lefstein, *supra* note 27, at 812; Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 CALIF. L. REV. 694, 715 (1966).

38. State v. Shaw, 93 Ariz. 40, 47, 378 P.2d 487, 491 (1963).

Recent decisions and studies indicate that neither the probation officer nor the parent is the proper party to perform these functions. In *In re Gault,* the United States Supreme Court rejected the contention that the parents and probation officer could adequately protect the interests of the juvenile in formal juvenile court proceedings.[39] The Court recognized that in Arizona the probation officer functioned by law[40] as both arresting officer and witness against the child.[41] This made it impossible for the primary concern of the probation officer to be the best interest of the child.

While many courts have held that the parents of a child should be notified and present before the child is required to either assert or waive his rights,[42] recent studies indicate that parents are not only of little aid to the child,[43] but may actually increase the pressure on him.[44] Parents often do not understand the importance of the child's constitutional rights, and may persuade the child to waive his rights merely to demonstrate a spirit of cooperation.[45] Although the precise connection between family relationships and juvenile delinquency is unclear, the President's Commission on Law Enforcement and the Administration of Justice discovered a high incidence of delinquency among children from both broken homes and homes in which protracted parental discord existed.[46] Thus, while the parent may approach the situation with the best intentions, casting him in a formal advisory role could actually increase the already overwhelming pressure on the child. This could result from any of several factors: a poor parent-child relationship, which may originally have been a primary contributing factor to the child's delinquency, the natural reactions of parental disappointment, or the shame of the child before his parents.

In 1967, the President's Commission recommended that "counsel should be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by the child

39. 387 U.S. 1, 35-36 (1967).
40. Ariz. Rev. Stat. § 8-204(C) (1956), *amended,* ARIZ. REV. STAT. ANN. § 8-205 (Supp. 1971-72).
41. 387 U.S. at 36.
42. *See, e.g., In re* Gault, 387 U.S. 1 (1967); Gallegos v. Colorado, 370 U.S. 49 (1962); Reck v. Pate, 367 U.S. 433 (1961); State v. Councilman, 105 Ariz. 145, 460 P.2d 640 (1969).
43. *See* Cayton, *Emerging Patterns in the Administration of Juvenile Justice,* 49 J. URBAN L. 377, 390 (1971).
44. McMillian & McMurtry, *The Role of Defense Counsel in the Juvenile Court—Advocate or Social Worker?,* 14 ST. LOUIS L.J. 561 (1970).
45. J. MCDONOUGH, D. KING & J. GARRET, JUVENILE COURT HANDBOOK 11 (1970).
46. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 63 (1967). Perhaps the most important factor with regard to boys is their failure to win the affection of their fathers. *Id.* at 64.

or parents."[47] The obvious means of insuring that the child understands and either asserts or intelligently waives his rights upon arrest is through counsel appointed for the limited purpose of advising the child. Counsel could effectively place the child on an equal footing with the police[48] and provide a truly adequate protective device to dispel the coercive atmosphere of custodial surroundings. With the exception of claims of ineffective counsel,[49] such a procedure would relieve the juvenile court judge of much of the burden presently associated with determining whether the child was competent to waive his rights. Perhaps the most significant effect, however, would be to demonstrate to youth that society does, in fact, retain an interest in their welfare, and is not concerned solely with retribution.

For those to whom the thought of court-appointed counsel conjures up visions of police operations stymied by a "juvenile version of the criminal mouthpiece,"[50] there is probably no perfectly acceptable answer. The *Shaw* court noted this problem in the analogous context of requiring the presence of a probation officer and stated:

> We are aware of the problem confronting law enforcement officers in their investigation of a crime when they have good reason to believe an apprehended juvenile is involved therein. On the one hand, they are anxious to obtain information by interrogation concerning any connection which he may have with the crime, and know the advantage of conducting this interrogation before the suspect has had time to dissemble after reflection. On the other hand, they must realize that ordinarily the factor of immaturity induces a greater sense of fear and insecurity on the part of the juvenile, which may amount to unreasonable pressure in inducing statements without real understanding of his legal rights.[51]

The proper role of counsel at any stage of juvenile proceedings remains largely an area of dispute.[52] While *Gault* established the right of the child to the advice of counsel, some commentators fear that the presence of counsel will turn the informal juvenile court into an adversary proceeding, thus destroying the asserted benefits of the juvenile court process.[53] Others, by contrast, maintain that the presence of counsel will ensure greater uniformity in juvenile court decisions,

47. *Id.* at 87.
48. *See* Gallegos v. Colorado, 370 U.S. 49, 54 (1962).
49. *See In re* Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966).
50. Ketcham, *supra* note 34, at 591.
51. 93 Ariz. at 49 n.7, 378 P.2d at 492 n.7.
52. *See* Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFFALO L. REV. 501, 502 (1963).
53. *See* Alexander, *Constitutional Rights in the Juvenile Court*, 46 A.B.A.J. 1206, 1209 (1960).

better records for appeal and, of course, increased protection of the child's rights.[54]

At least three roles for counsel in juvenile court have been suggested:[55] the pure advocate,[56] whose obligations to the juvenile do not differ from those owed an adult; the modified advocate, who functions as advocate during the fact-finding phase and thereafter as an officer of the court assisting in the proper disposition of the minor; and the guardian,[57] who provides for the general welfare of the child, presumably transferring some of the *parens patriae* role from court to counsel. Whichever role counsel assumes at later stages in the juvenile proceedings, his function at the arrest stage should be that of pure advocate. After acquiring a better appreciation of the child's circumstances and potential for rehabilitation, counsel may then be in a position to assume one of the remaining roles. Any other role transfers to some degree the functions of the court to the attorney, a transfer which may not only be unwise as policy,[58] but may even constitute a violation of ethical obligations.[59]

In light of the foregoing discussion, it is recommended that rule 18 of the *Arizona Rules of Procedure for the Juvenile Court* be amended to provide:

> No extra-judicial statement to a peace officer or court officer by the child shall be admitted into evidence in juvenile court over objection unless the person offering the statement demonstrates to the satisfaction of the court that: The statement was voluntary and before making the statement the child was informed and intelligently comprehended that he need not make a statement, that any statement made might be used *against him in either juvenile or criminal proceedings,* that he had a right to counsel during the taking of the statement, and that if he or his parents, guardian or custodian could not afford an attorney, the court would appoint one for him prior to any questioning, *and that the waiver of any of these rights was performed with the advice of counsel either retained or appointed by the court for the limited purpose of advising the child.*[60]

One indicium of civilized society is the manner in which it treats

54. *See* Schinitsky, *Role of the Lawyer in Children's Court,* 17 RECORD OF N.Y. CITY B. ASSOC. 10, 24-25 (1961).
55. *See* Ferster, Courtless & Snethen, *supra* note 34, at 385.
56. Paulsen, *Juvenile Courts and the Legacy of '67,* 43 IND. L.J. 527, 538-39 (1968).
57. *See* Isaacs, *supra* note 52, at 506-07.
58. *See In re* Dobson, 125 Vt. 165, 168, 212 A.2d 620, 622 (1965).
59. *See* Lefstein, *supra* note 27, at 812-13.
60. Italicized portions indicate proposed amendments. Compare with present text of rule 18, *supra* note 6.

juvenile offenders. A system of juvenile justice should be truly rehabilitative. While the ideal cannot perhaps be realized, the rights of society's youthful citizenry must be jealously guarded. As former Chief Justice Warren has noted:

> After all, what we are striving for is not merely 'equal' justice for juveniles. They deserve much more than being afforded only the privileges and protections that are applied to their elders. A niggardly and indiscriminate granting of concepts of justice applied to adults will stunt the growth of the juvenile court and handicap the progress of future generations.[61]

THE PRACTICAL DILEMMA OF APPEALS IN PROPRIA PERSONA

State v. Stevens[1] provided the Supreme Court of Arizona with an opportunity to promulgate a workable procedure for dealing with appellants desiring to proceed in propria persona.[2] Instead, after finding a knowing and intelligent waiver of the right to counsel on appeal, the court deferred to that section of the state constitution providing for representation pro se as well as by counsel,[3] assumed the role of appellate advocate and affirmed the first degree murder conviction of Stanley Grey Stevens.

Stevens, indicted for murder in the course of robbery or burglary,[4] robbery while armed with a deadly weapon,[5] and arson in the first degree,[6] was represented at trial by a public defender. The charge of arson was dropped before trial and the court granted a directed verdict of not guilty on the robbery charge. After the jury had returned a guilty verdict for first degree murder and Stevens had been sentenced to life imprisonment, the court advised him of his right to appeal and to have counsel appointed for that appeal. The defendant, however, filed a notice to proceed in propria persona, which was granted. The court, after thrice granting Stevens extra time to file his briefs, finally ordered the appeal submitted on the record.[7]

61. Warren, *Equal Justice for Juveniles*, 15 JUV. CT. JUDGES J. 14, 16 (No. 3, Fall 1964).

1. 107 Ariz. 565, 490 P.2d 571 (1971).
2. Following existing practice, the terms "in propria persona," "in pro per" and "pro se" will be used interchangeably to denote the situation in which the accused represents himself.
3. ARIZ. CONST. art. 2, § 24.
4. ARIZ. REV. STAT. ANN. §§ 13-451, -452 (1956).
5. *Id.* § 13-641.
6. *Id.* § 13-231.
7. The record on appeal did not reveal a brief or work product of any kind filed

In granting Stevens' request to proceed in propria persona, the court stated that he had a right to appeal on his own which was of "equal stature" to his right of appeal with counsel.[8] The guidelines for dealing with that request were delineated in the per curiam decision of *Swenson v. Bosler*[8] where the United States Supreme Court asserted that failure to request assistance of counsel on appeal did not constitute a knowing and intelligent waiver of the right to that assistance.[9] The *Stevens* court distinguished *Swenson,* however, noting that the "facts in this case . . . go beyond what the Supreme Court anticipated when it wrote *Swenson.*"[10] Stevens knew of his right to counsel on appeal, but chose to proceed in propria persona.

The interesting judicial dilemma presented in *Stevens* is illustrated by the fact that the court felt it necessary to take "the position of advocate for the defendant . . . painstakingly [setting] forth in detail the statement of facts and [searching] the record for error"[11] on his behalf. Either the court was unsure of its decision that a motion to appeal in propria persona constituted a waiver of the right to counsel on appeal,[12] or the appellant was so inept at presenting his case that in order to provide a meaningful appeal the court deemed some legal assistance to be required. This raises the question whether it is desirable for an appellate judge or justice to act as both advocate and impartial arbitrator. This discussion will first explain the existing procedure in Arizona, California and the federal courts for dealing with those attempting to proceed in pro per both at the trial level and on appeal. After analyzing the problems involved, an alternative, arguably both viable and practical, will be proposed.

The Arizona constitution provides the accused with an awkward

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on behalf of Stevens. Record on Appeal, State v. Stevens, 107 Ariz. 565, 490 P.2d 571 (1971).

8. 107 Ariz. at 567, 490 P.2d at 573. "In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel . . . ." ARIZ. CONST. art. 2, § 24. *See* State v. Westbrook, 99 Ariz. 30, 35, 406 P.2d 388, 391 (1965), *vacated,* 384 U.S. 150 (1966); State v. Van Bogart, 85 Ariz. 63, 67, 331 P.2d 597, 599 (1958).

9. 386 U.S. 258, 260 (1967). The only legal assistance on appeal provided by trial counsel for the petitioner in *Swenson* was a motion for a new trial and notice of appeal. The Supreme Court of Missouri investigated the transcript and considered questions raised on appeal on the basis of pro se briefs or no briefs at all. The United States Supreme Court found that this procedure violated the standards announced in Douglas v. California, 372 U.S. 353 (1963), in that the petitioner had neither intelligently waived nor received assistance of counsel on appeal.

10. 107 Ariz. at 566, 490 P.2d at 572.

11. *Id.* at 568, 490 P.2d at 574.

12. *See* State v. Martin, 102 Ariz. 142, 144-45, 426 P.2d 639, 641-42 (1967), where the court asserted that "extreme caution must . . . be exercised before recognizing an assertion of the right to defend oneself as a waiver of the right to counsel." For a discussion of *Martin* see "Constitutional Protections," 10 ARIZ. L. REV. 153, 195, 200-02 (1968).

choice either to "appear and defend in person, and by counsel."[13] Although this option has been deemed to be between rights of "equal stature,"[14] it is nevertheless only those mentally competent persons possessed of full social and civil rights who are allowed to proceed without the aid of counsel.[15] The simple assertion of the right to defend oneself, moreover, does not necessarily act as a waiver of the right to counsel.[16]

If the defendant elects to proceed pro se, the trial judge has the "serious and weighty responsibility" of determining whether there has been an intelligent and competent waiver of the right to counsel.[17] Such a determination requires an examination of all the "factors relating to . . . whether the defendant knew exactly what he was doing when he waived his right to counsel . . . "[18] These factors include, but are not limited to, the defendant's age, education, prior court experience, mental state, understanding of the legal process, and the complexity of the proceedings.[19] In an effort to ascertain the requisite

13. ARIZ. CONST. art. 2, § 24 (emphasis added). Compare the federal statutory counterpart, note 26 *infra*. The sixth amendment to the federal constitution guarantees the accused "the assistance of counsel" which, following Gideon v. Wainwright, 372 U.S. 335 (1963), includes the right to be represented by counsel. While the right to proceed in propria persona has not been declared a constitutional right, it is, nevertheless, a federal statutory right. 28 U.S.C. § 1654 (1970). See text accompanying notes 26-29 *infra*. The California constitution, in language similar to Arizona's, provides the accused with the same alternatives. CAL. CONST. art. 1, § 13.

14. State v. Westbrook, 99 Ariz. 30, 406 P.2d 388 (1965), *vacated*, 384 U.S. 150 (1966). To view these alternative methods of presenting one's case as being "rights of equal stature" is, at best, an opaque way of gauging the situation, for in no real sense are these alternatives "equal." The trial judge is not charged with the same responsibility of finding a waiver of the right to proceed in propria persona when the accused opts to be represented by counsel as he is when the accused wants to waive counsel and proceed pro se.

A more accurate statement would be that the accused has a *right* either to present his case in propria persona or to have it presented by counsel. The right is that of a full and fair adjudication of the issues; the accused has a choice of how he wants his case presented for that adjudication. If he desires to have counsel present his case and qualifies for state-appointed representation, the court is obliged to appoint an attorney. If, on the other hand, the accused desires to present his own case, then the court must allow him to do so after it is convinced that he has the requisite competence to so proceed. Within this context the precautions required before allowing the accused to proceed in propria persona are logical manifestations of the fact that an accused will usually receive better representation by counsel than by proceeding pro se. Chief Justice Bernstein recognized this fact when he noted that in criminal prosecutions lawyers are necessities and not merely luxuries. State v. Martin, 102 Ariz. 142, 144-45, 426 P.2d 639, 643 (1967).

15. Burgunder v. State, 55 Ariz. 411, 426, 103 P.2d 256, 263 (1940) (defendant's request to defend at trial in propria persona against a murder charge denied where the sole defense was insanity).

16. *See* State v. Martin, 102 Ariz. 142, 144-45, 426 P.2d 639, 641-42 (1967).

17. Westbrook v. Arizona, 384 U.S. 150 (1966); Johnson v. Zerbst, 304 U.S. 458 (1937). For the full history and effect of *Westbrook* see 8 ARIZ. L. REV. 347 (1967).

18. State v. Martin, 102 Ariz. 142, 146, 426 P.2d 639, 643 (1967). This determination is vital insofar as the assistance of an attorney in criminal trials and appeals is often necessary for a full and fair adjudication of the issues involved. *See* Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

19. Application of Estrada, 1 Ariz. App. 348, 349, 403 P.2d 1, 2 (1965).

information, the trial judge should conduct a formal hearing.[20]

The procedure established by judicial decisions in Arizona for the waiver of counsel at the trial level has not been implemented at the appellate level, and there appear to be no standards as to what is required.[21] *Stevens* illustrates this lack of criteria and procedure in that the court made no inquiry as to Stevens' background, conduct, prior court experience, or knowledge of the legal process.[22] Further, there was no determination of whether he was mentally competent or sui juris.[23] There was in fact no real inquiry at all. Without expressly waiving his right to counsel, Stevens simply filed notice to proceed in propria persona on his appeal which was accepted by the court as a waiver of his right to counsel.[24] After the court had accepted the waiver, Stevens illustrated his inability to handle the appeal by failing to file any brief at all, even after he was granted several extensions.

By failing to make an independent inquiry, an appellate court not only jeopardizes the rights of the accused,[25] but also places a substantial burden on the appellate judge confronted with an unskilled layman who is attempting to argue highly sophisticated points of law. The very basis of our judicial system consists of an impartial judge and two adverse parties. If this structure is altered, the system will fail to adequately perform its truth-finding function. Just as a prosecuting attorney cannot both prosecute and defend, a judge's impartiality is seriously impaired when he attempts to serve simultaneously as both advocate and judge. Even if it is assumed to be theoretically feasible,

20. *See* State v. Blazak, 105 Ariz. 570, 468 P.2d 929 (1970); State v. Martin, 102 Ariz. 142, 426 P.2d 639 (1967).

21. *See* State v. George, 98 Ariz. 290, 403 P.2d 932 (1965), where the court, when confronted by an appellant desiring to proceed in propria persona, nevertheless appointed counsel to represent him.

22. The only information solicited from Stevens after his conviction was the names of his parents, his age, place of birth, citizenship, occupation, the existence of any siblings, and his residency for the previous year. Record on Appeal, statement of facts on conviction, April 29, 1970, State v. Stevens, 107 Ariz. 525, 490 P.2d 571 (1971).

23. There seems to be a degree of confusion in the Arizona courts as to whether the accused must be "sui juris" or "sui generis" before he is allowed to proceed in propria persona. The supreme court in Burgunder v. State, 55 Ariz. 411, 426, 103 P.2d 256, 263 (1940), used sui juris as a requisite, while the court of appeals in State v. Carter, 1 Ariz. App. 57, 65, 399 P.2d 191, 199 (1965), used sui generis citing *Burgunder* as authority. Although these Latin terms sound very similar, their meanings are markedly different and should not be confused. Sui generis is defined as "[o]f its own kind or class; i.e., *the only one* of its own kind; peculiar." BLACK'S LAW DICTIONARY 1602 (4th ed. 1951). Sui juris, however, refers to one who is "[o]f his own right; possessing full social and civil rights . . ." *Id.* Clearly, the supreme court in *Burgunder* was correct in using sui juris, and it appears that the court of appeals in *Carter* misread that opinion.

24. Although Stevens did choose one of two seemingly mutually exclusive alternatives, he never specifically stated that he did not want to be assisted or represented by counsel.

25. Without the aid of counsel, an appeal may degenerate into a meaningless ritual. *See* Douglas v. California, 372 U.S. 353, 358 (1963).

the appellate court should not be burdened with both functions. The adjudication of a perennially overcrowded docket leaves the members of an appellate court without the time required to adequately prepare and argue a case. The horrible spectres conjured up when one contemplates the consequences of an adversary-judge are reason enough to avoid such a situation.

Arizona courts, however, are not alone in failing to deal adequately with this situation, for the federal court system suffers from a similar deficiency. Although the federal statutory right to proceed in pro per[26] has never been explicitly elevated to a constitutional right, the Supreme Court has asserted that "[t]he right to the assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law."[27] In *Carter v. Illinois,* however, after proclaiming that "[n]either the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself . . . ,"[28] the Court went on to say that the Constitution did not require "that counsel be forced upon a defendant."[29]

This ambiguity has resulted in disagreement among lower federal courts as to the stature of the right to proceed in propria persona. The Second Circuit Court of Appeals has stated that "the right to act pro se . . . is a right arising out of the Federal Constitution and not the mere product of legislation or judicial decision."[30] A district court in the Sixth Circuit has rejected this interpretation, however, stating that "[t]he validity of the deduction that the right to defend oneself without the assistance of counsel as a constitutional right is questionable. All that has really been said by the Supreme Court is that the Sixth Amendment does not *prohibit* the right of self-representation."[31]

In any event, before a trial court may allow the defendant to

26. "In all courts of the United States the parties may plead and conduct their own cases personally *or* by counsel as, by the rules of such courts, respectively are permitted to manage and conduct causes therein." 28 U.S.C. § 1654 (1970) (emphasis added).

27. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942).

28. 329 U.S. 173, 174 (1946).

29. *Id.* at 174-75.

30. United States v. Plattner, 330 F.2d 271, 273 (2d Cir. 1964). The court went on to say that the sixth amendment guarantee of the assistance of counsel

> was surely not intended to limit in any way the absolute and primary right to conduct one's own defense *in propria persona.* Nor is the existence of this right made doubtful by the circumstance that the now all but universal requirement of the assignment of counsel to indigent defendants is the development of a later generation and more enlightened views.

Id. at 274. *See also* Arnold v. United States, 414 F.2d 1056 (9th Cir. 1969); Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969).

31. United States v. Davis, 260 F. Supp. 1009, 1019 (E.D. Tenn. 1966).

present his case in propria persona, it has the responsibility of making certain that the defendant has intelligently and competently waived his right to counsel.[32] As the Supreme Court stated in *Von Moltke v. Gillies,* "[t]o discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand."[33] The Court went on to explain that to be valid, a waiver must be made with a broad understanding of the legal matters involved. The accused must not only be aware of the nature of the charges against him, but he must also understand the defenses to those charges as well as the punishment he may receive if he is found guilty.[34]

Even though this formulation has been followed by a number of courts,[35] others have viewed its stringent requirements as a standard of perfection which simply indicates that there must be a careful inquiry.[36] Probably the most realistic procedure is for the trial judge to make known to the defendant:

> that he has the choice between defense by a lawyer and defense *pro se*; that, if he has no means to retain a lawyer of his own choice, the judge will assign a lawyer to defend him, without expense or obligation to him; that he will be given a reasonable time within which to make a choice; that it is advisable to have a lawyer, because of his special skill and training in the law and that the judge believes it is in the best interest of the defendant to have a lawyer, but he may, if he elects to do so, waive his right to a lawyer and conduct and manage his defense himself.[37]

Even after such an extensive colloquy, however, the judge may still be uninformed as to the defendant's *capacity* to defend himself. Consequently, it has been suggested that the defendant should be offered an advisory counsel to assist him if he so desires.[38]

If after conviction under the federal statutory scheme, an indigent desires to exercise his appeal of right,[39] he may file a motion to pro-

32. Von Moltke v. Gillies, 332 U.S. 708 (1948); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938); *cf.* United States v. Harrison, 451 F.2d 1013, 1015 (2d Cir. 1971) (reversible error for trial court to permit defendant to appear in propria persona even though that defendant was an attorney).

33. 332 U.S. 708, 723-24 (1948).

34. *Id.* at 724.

35. *See* Snell v. United States, 174 F.2d 580 (10th Cir. 1949); People v. Kemp, 55 Cal. 2d 458, 359 P.2d 913, 11 Cal. Rptr. 361 (1961).

36. *See* Arnold v. United States, 414 F.2d 1056, 1058 (9th Cir. 1969).

37. United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).

38. United States v. Spencer, 439 F.2d 1047 (2d Cir. 1971); Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969).

39. 28 U.S.C. §§ 1291, 1294 (1970).

ceed in forma pauperis.[40] If this motion is accepted by the trial court as being in "good faith" or of merit, he is entitled to be represented by counsel on that appeal.[41] If the district court denies the leave to appeal in forma pauperis, the accused has a right to the assistance of counsel in appealing this denial.[42] Although this right may be waived,[43] there appears to be no set procedure for determining the competency of that waiver, and no semblance of the searching inquiry suggested by *Von Moltke* for waiver at the trial level.

The proceedure in California is also instructive. California, like all other states, is required to provide indigent defendants with the aid of counsel at trial.[44] Although this right may be waived, the defendant must first have an "intelligent conception of the consequences of his act."[45] Before a defendant may exercise his constitutional right to proceed in propria persona,[46] "the trial court is duty bound to determine his *competency* to represent himself."[47] This requisite of competence includes a knowledge of the law and court-room precedure.[48] Consequently, the right to proceed in propria persona has been denied when the defendant was found to be ignorant of how many peremptory challenges one is permitted in the selection of a jury and of how many exceptions there are to the hearsay rule.[49] Having waived his right to counsel, the defendant is not entitled to have an attorney appointed to assist him in the presentation of his case.[50] This procedure has nevertheless been implemented and later condoned by the appellate court.[51]

If convicted, the defendant, on his appeal of right, has a right to

40. *Id.* § 1915.
41. Hardy v. United States, 375 U.S. 277 (1964).
42. Johnson v. United States, 352 U.S. 565 (1957).
43. *Id.* at 566.
44. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).
45. People v. Floyd, 1 Cal. 3d 694, 703, 464 P.2d 64, 68, 83 Cal. Rptr. 608, 612 (1970).
46. CAL. CONST. art. 1, § 13; People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959).
47. People v. Carter, 66 Cal. 2d 666, 672, 427 P.2d 214, 219, 58 Cal. Rptr. 614, 619 (1967) (emphasis added); *accord,* People v. Daniels, 71 Cal. 2d 1119, 459 P.2d 225, 80 Cal. Rptr. 897 (1969).
48. People v. Kemp, 55 Cal. 2d 458, 359 P.2d 913, 11 Cal. Rptr. 361 (1961).
49. People v. Floyd, 1 Cal. 3d 694, 464 P.2d 64, 83 Cal. Rptr. 608 (1970). The defendant's age, education, prior criminal record, and conduct were also factors contributing to the denial of the defendant's request to proceed in propria persona.
50. People v. Ruiz, 263 Cal. App. 2d 216, 69 Cal. Rptr. 473 (1968). *See also* People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959); People v. Northcott, 209 Cal. 639, 289 P. 634 (1930). In this context, assisting the defendant in the presentation of his case refers to any aid counsel might render the defendant short of actually arguing the case himself.
51. In People v. Chessman, 38 Cal. 2d 166, 188-89, 238 P.2d 1001, 1015 (1951), the court held it was not "error in refusing to permit the consulting but nonrepresenting attorney to argue the case." In People v. Pilgrim, 160 Cal. App. 2d 528, 325 P.2d 143 (1958), the appellate court acquiesced in the trial court's action of directing counsel to remain in an advisory capacity after granting the defendant's request to proceed in propria persona.

counsel[52] which no longer depends upon a request.[53] As with all other rights, however, the defendant may also waive his right to be represented by counsel on appeal if he does so intelligently. "The determination of whether there has been an intelligent waiver of counsel involves a consideration of the nature of the charge, the facts and circumstances of the case, and the education, experience, mental competence and conduct of the accused."[54] After finding a waiver of the right to counsel on appeal, however, California, like Arizona, has failed to provide a procedure for the appointment of an advisory appellate counsel.

When an appellant makes known his desire to appeal in propria persona, it is suggested that a formal hearing should be held to determine his ability to intelligently and competently waive his right to counsel for that appeal. This is the procedure used to make a similar determination at the trial level.[55] The court's responsibility for determining if the accused has made an intelligent and competent waiver of counsel is at least as "serious and weighty" at the appellate level given the highly technical questions of substantive and procedural law which often confront the appellate advocate.

The need for this hearing at the appellate level may be somewhat lessened if, after a hearing and effectively waiving trial counsel, the appellant has appeared in propria persona at the trial level. If, however, as in *Stevens*, the appellant was represented by counsel at the trial and attempts to proceed in pro per for the first time on appeal, a hearing is necessary to determine if there has been an effective waiver of counsel and to apprise the appellant of the consequences of his choice.

During this inquiry, while ascertaining all the facts relevant to determining whether the accused realizes the consequences of his actions, the court should impress upon the accused the gravity of his decision.[56] By briefly explaining the complex issues involved and the technical procedure the accused will face on appeal, the court might persuade him to accept legal assistance. If, however, the accused still desires to proceed in propria persona and the court is satisfied that there has been a knowing and intelligent waiver of counsel,[57] the court

52. Douglas v. California, 372 U.S. 353 (1963).
53. Swenson v. Bosler, 386 U.S. 258 (1967).
54. People v. Stanworth, 71 Cal. 2d 820, 834-35, 457 P.2d 889, 899, 80 Cal. Rptr. 49, 59 (1969), *quoting* People v. Chesser, 29 Cal. 2d 815, 822, 178 P.2d 761, 765 (1947).
55. See text accompanying note 20 *supra*.
56. *See* State v. Blazak, 105 Ariz. 570, 468 P.2d 929 (1970).
57. It would also be good practice to have this waiver made in writing and of record. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO CRIMINAL APPEALS § 7.3 (1969).

cannot force the appellant to be represented by counsel and should allow him to proceed alone.[58]

After finding an intelligent and competent waiver of counsel, it is further suggested that the court, in order to insure a full and fair review of the appellant's conviction, should, in the vast majority of instances,[59] appoint an advisory counsel to remain at the appellant's disposal for technical or general assistance.[60] This procedure, already acknowledged at the trial level,[61] should also be implemented at the appellate level. By providing the appellant with knowledgeable legal assistance, the advisory counsel would help the appellant present his case in the best possible manner.[62]

Such a procedure could greatly enhance judicial economy. If at any time the appellant decided he wanted counsel to handle his appeal or, as apparently occurred in *Stevens*, it became obvious that the appellant was completely inept, the court could order the attorney to take over the appeal. This would save the time a newly appointed attorney might need to acquaint himself with the case. The advisory counsel would also be in an excellent position to file an amicus brief to assist the court if further clarification of the issues were required.[63]

Whether it was the uncertainty of Stevens' waiver or his inability to present his appeal which compelled the court to act as appellate advocate is uncertain. Irrespective of the reason, however, the result is improper, for a judge should not act as both appellate advocate and impartial arbitrator.

It is evident that the precautions used to insure the knowing and intelligent waiver of counsel at the trial level should also be exercised

58. State v. Carter, 1 Ariz. App. 57, 399 P.2d 191 (1965).

59. There will be infrequent instances where the appointment of advisory counsel might be unnecessary; where, for example, the defendant is an attorney and well acquainted with appellate procedure. *But cf.* United States v. Harrison, 451 F.2d 1013 (2d Cir. 1971), discussed, *supra* note 32.

60. Advisory counsel might assist the appellant in forming narrow questions of law or instruct him in searching the record for procedural error. Counsel could also explain difficult concepts upon which constitutional challenges could be based, since such questions may be raised for the first time on appeal. State v. Pugh, 31 Ariz. 317, 252 P. 1018 (1927). Moreover, any fundamental error which occurred at the trial level may also be raised for the first time on appeal. State v. Stielow, 14 Ariz. App. 445, 449, 484 P.2d 214, 218 (1971).

61. State v. Martin, 102 Ariz. 142, 426 P.2d 637 (1964).

62. Most defendants placed in a position of having advisory counsel assistance have taken advantage of counsel's advice. *See* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 1 (1963).

63. State v. George, 98 Ariz. 290, 403 P.2d 932 (1965), would not preclude this type of assistance despite the statement that an appointed counsel "may not serve as amicus to the court." *Id.* at 291, 403 P.2d at 933. In *George* the court appointed an attorney to *represent* the appellant who had requested to proceed in propria persona. "Advisory counsel" would not be representing the appellant but merely assisting him until such time as the court ordered him to take over the appeal, and would serve not as an amicus to the court but as an advocate for the appellant.

at the appellate level. The aid of counsel is certainly no more a luxury nor less a necesssity on appeal than at trial. By also providing the appellant who has waived counsel with the assistance of an advisory counsel, the right to proceed in propria persona is retained while insuring a more meaningful appeal. Whether this procedure is implemented through a constitutional amendment, legislation, or the courts is unimportant. What is important is protecting the rights of the accused while providing society with a fair and efficient system of justice.

CONSTITUTIONAL ERROR AS HARMLESS ERROR

The harmless error doctrine is a tool of judicial administration which provides that an error at trial will not require reversal unless it has prejudiced a substantial right of the excepting party.[1] The purpose of the rule is to promote judicial efficiency by preventing retrials caused solely by minor or trivial error at trial.[2] Where the error involved is a violation of a federal constitutional right, however, it is of a different class than ordinary error since federal rather than state standards must be used to determine if constitutional error is harmless.[3]

The Supreme Court of Arizona in *State v. Peterson*[4] applied the harmless error rule to an alleged error involving the defendant's fifth amendment right to remain silent upon arrest. At approximately 2:00 a.m. on May 29, 1969, as the victim of the incident out of which Peterson's trial arose stopped at a stop sign, three men opened the door of her pickup truck and forced her to drive to a secluded spot. There they robbed and raped her. The evidence against Peterson consisted of his fingerprints, found on the inside window of the truck, and the victim's testimony at trial that Peterson was about the same height, weight, age, body structure and that he "looked somewhat like the third rapist."[5]

Peterson claimed an alibi at trial, but on cross-examination by the prosecutor admitted that he had not told the police of his alibi

1. *See* Gibbs, *Prejudicial Error: Admissions and Exclusion of Evidence in the Federal Courts*, 3 VILL. L. REV. 48, 50 (1957); Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83, 84 (1967); *cf.* Kotteakos v. United States, 328 U.S. 750, 757 (1946); State v. Brady, 105 Ariz. 190, 196, 461 P.2d 488, 494 (1969).
2. *See* Chapman v. California, 386 U.S. 18, 22 (1967); Kotteakos v. United States, 328 U.S. 750, 757-63 (1946); Gibbs, *supra* note 1, at 49.
3. Chapman v. California, 386 U.S. 18, 21 (1967).
4. 107 Ariz. 268, 485 P.2d 1158 (1971).
5. *Id.* at 270, 485 P.2d at 1160.

when he was arrested. On appeal, Peterson objected to the conduct of the prosecution in eliciting this testimony, claiming it violated his fifth amendment rights.[6] The court declined to rule on the constitutional issue, however, finding that even if the conduct constituted constitutional error it was harmless error.[7] After examining the standards used in classifying constitutional error at trial as harmless, this analysis will focus on whether the standards used by the Supreme Court of Arizona meet the constitutional requirements developed by the United States Supreme Court.

At common law an error was not sufficient to cause a verdict to be set aside "unless upon all the evidence it appeared to the judges that the truth had not been reached."[8] Then, in 1835, the English Court of Exchequer held that a ruling of error created an absolute right to a new trial for the excepting party.[9] The Exchequer rule, criticized because it delayed litigation and led defense counsel to induce error to get retrials, precipitated statutory or judicial adoption of harmless error rules in every state in the United States.[10]

The Arizona statute provides that error will render a proceeding invalid only where the defendant has been prejudiced in respect to a substantial right.[11] In interpreting this statute, the test Arizona courts have developed to determine if a substantial right was affected by error is "whether there was reasonable probability under such facts that a verdict might have been different had the error not been commit-

6. The defendant claimed that the trial court erred by failing to declare a mistrial when the prosecutor elicited testimony on cross-examination that he did not claim to be innocent at the time of his arrest. He claimed that his constitutional right to remain silent at arrest would be nullified by allowing evidence at trial that he exercised that right. Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1968) ("it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation").

In answering the defendant's contention that his rights under *Miranda* were violated, the court quoted from State v. Taylor, 99 Ariz. 85, 407 P.2d 59 (1965): "The defendant, by testifying, waives his constitutional privilege against self-incrimination and must answer all relevant questions even though they may tend to convict him of the crime for which he is on trial." 107 Ariz. at 270, 485 P.2d at 1160.

By indicating that it is in disagreement with the conclusions announced in Fowle v. United States, 410 F.2d 48 (9th Cir. 1969) (defendant's fifth amendment rights are violated when the fact of his silence at arrest is used against him at trial), the court in *Peterson* intimated that it would not follow the dictates of *Miranda* in this regard. In fact, in the later case of State v. O'Dell, 108 Ariz. 53, 492 P.2d 1160 (1972), the court specifically rejected this aspect of *Miranda*. See "Privilege Against Self-Incrimination: Post-Arrest Silence as a Tacit Admission," 14 ARIZ. L. REV. 409, 523 (1972) *State v. O'Dell.*

7. 107 Ariz. at 271, 485 P.2d at 1161.

8. 1 J. WIGMORE, EVIDENCE § 21, at 365 (3rd ed. 1940).

9. Crease v. Barret, 149 Eng. Rep. 1353 (Ex. 1835).

10. Note, *supra* note 1, at 83-84.

11. ARIZ. REV. STAT. ANN. § 13-1598 (1956). This statute was adopted from what is now CAL. PENAL CODE § 1404 (West 1970).

ted."[12] Other states have adopted various standards with similar general goals of judicial efficiency and protection of substantial rights.[13]

While the states have been developing their harmless error doctrines, the United States Supreme Court has been dealing with harmless error from a federal constitutional perspective. The Court first considered whether an error which violates an individual's constitutional rights can ever be harmless in *Tumey v. Ohio*.[14] There, after determining that the trial judge had an economic interest in the outcome of the case, the Court held that the defendant has a constitutional right to a trial before an impartial judge "no matter what the evidence was against him."[15] After *Tumey*, it was unclear whether constitutional error could ever be harmless as "the Court required reversal without discussing the harmlessness of the error in a line of cases involving violations of constitutional provisions."[16]

Forty-five years later, in *Chapman v. California*, the Court finally clarified some of the confusion created by *Tumey*, and expressly repudiated the notion that constitutional error requires automatic reversal.[17] As a result of unclear language in the opinion, however, it is still uncertain whether any type of constitutional error may be harmless in a given circumstance, or if there are still some classes of constitutional error which may never be harmless.[18]

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12. State v. Brady, 105 Ariz. 190, 196, 461 P.2d 488, 494 (1969). *See also* State v. Ybarra, 97 Ariz. 200, 202, 398 P.2d 905, 907 (1965); State v. Dutton, 83 Ariz. 193, 200, 318 P.2d 667, 671 (1957); State v. Thomas, 79 Ariz. 355, 360, 290 P.2d 470, 473 (1955); State v. Polan, 78 Ariz. 253, 261, 278 P.2d 432, 438 (1954); State v. Singleton, 66 Ariz. 49, 66, 182 P.2d 920, 931 (1947).

13. *See, e.g.*, FLA. STAT. ANN. § 924.33 (Supp. 1971-72); Kelly v. State, 145 Fla. 491, 494, 199 So. 764, 765 (1941) (a judgment should not be reversed where it is determined that the error did not affect the substantial rights of an appellant); MICH. STAT. ANN. § 28.1096 (1954); People v. Dunn, 380 Mich. 693, 701, 158 N.W.2d 404, 408 (1968) (review courts should be concerned with substance and not form of error, and the fundamental inquiry is whether there has been a miscarriage of justice); N.Y. CODE CRIM. PROC. § 542 (McKinney 1958); People v. Carborano, 301 N.Y. 39, 43, 92 N.E.2d 871, 873 (1950) (error will be found harmless if judge on appeal adduces from nature of the proof and type of error that the defendant received a fair trial).

14. 273 U.S. 510 (1927).

15. *Id.* at 535.

16. Note, *supra* note 1, at 85. *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963) (admitting into evidence a coerced confession); Rideau v. Louisiana, 373 U.S. 723 (1963) (holding a trial in a community that had been saturated by prejudicial pretrial publicity); Hamilton v. Alabama, 368 U.S. 52 (1961) (denying counsel at arraignment or at other critical stages); Bollenback v. United States, 326 U.S. 607 (1946) (instructing the jury on an unconstitutional presumption).

17. 386 U.S. 18, 22 (1967): "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."

18. Chapman v. California, 386 U.S. 18, 24 (1967); Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 525-26 (1969). Despite the lack of firm guidelines from the Court, it seems logical to assume that certain classes of error can never be harmless. It is difficult to imagine, for example, how denial of counsel at a felony trial, a violation of Gideon v. Wain-

When a state appellate court reviews a case involving federal constitutional error, the state court must apply the federal standard.[19] The problem, then, is to determine the exact nature of the federal standard. The *Chapman* Court established that the burden of proving the harmlessness of constitutional error was on the beneficiary of that error, and that such error must be proven harmless beyond a reasonable doubt.[20] While discussing how this was to be determined, the Court expressed preference for the approach adopted in *Fahy v. Connecticut*.[21] In *Fahy* the concern was not whether there was sufficient evidence to convict without the illegally seized evidence, but "whether there [was] a reasonable possibility that the evidence complained of might have contributed to the conviction."[22] The *Chapman* Court concluded that it was doing no more than following *Fahy* by establishing the harmless error standard in cases involving constitutional error as being "harmless beyond a reasonable doubt."

Two years after *Chapman*, in *Harrington v. California*,[23] the Court reconsidered the standard for harmless error and ruled that a constitutional error was harmless because the tainted evidence was cumulative and the untainted evidence "overwhelming."[24] In so doing, the Court ignored the language in *Chapman*[25] which had rejected relying on the weight of the untainted evidence as a test. Justice Doug-

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wright, 372 U.S. 335 (1963), could be conceived of as harmless under the *Chapman* standards. An appellate court could only speculate on the impact of such a violation on a defendant's conviction, since the court would have no way of assessing what would have happened at trial had the defendant been supplied with counsel. Similarly, error involving the integrity of the jury or the judge would be impossible to assess at the appellate level, and should form a class of error requiring automatic reversal. Conversely, a violation of the *Miranda* warnings occasioned by minor word changes which convey the same meaning would not seem to be within the class of violations such as denial of counsel or admission of a coerced confession.

In cases involving prosecutorial eliciting of testimony on a defendant's silence at arrest, automatic reversal should be required. The effect of such testimony on the jury simply cannot be assessed by the appellate court:

> It would take only one juror to say persuasively to the other members of the panel 'But who can believe he was innocent when he refused to make a statement when he had a chance? I don't believe any of his testimony. It's all something he, or somebody, thought up for this trial.'

United States v. Matos, 444 F.2d 1071, 1075 (7th Cir. 1971) (Pell, J., concurring).

19. Chapman v. California, 386 U.S. 18 (1967).

20. *Id.* at 24.

21. 375 U.S. 85 (1963).

22. *Id.* at 86-87. This test differed from that used by most states in that it stressed the effect of the error on the jury. It was also much stricter than most state rules because reversal was required if there was a reasonable *possibility* that the error *influenced the decision.* Most state tests are less exacting. The test in Arizona, for example, provides only for a reasonable *probability* that the verdict *would have been different.* See text accompanying note 4 *supra.*

23. 395 U.S. 250 (1969).

24. *Id.* at 254. The constitutional error was a violation of Bruton v. United States, 391 U.S. 123 (1968), involving admitting into evidence a confession of a co-defendant which incriminated the defendant.

25. Chapman v. California, 386 U.S. 18, 23 (1967).

las, writing for the majority in *Harrington*, insisted that the Court was not diluting *Chapman* but was instead reaffirming it.[26] Justice Brennan in dissent, however, felt that *Chapman* was really being overruled.[27]

The subsequent judicial history of *Harrington* seems to have proven the dissent correct. In considering constitutional violations as harmless error, courts at all levels have almost uniformly read *Chapman* and *Harrington* together to mean that where there is overwhelming untainted evidence of guilt, the error is harmless. Thus, in *Whiteley v. Warden of Wyoming Penitentiary*,[28] the Court cited *Chapman* and *Harrington* to reject the state's harmless error contention which referred not to the impact on the jury, but only to the lack of sufficient untainted evidence.[29] In *United States ex rel. Rosenberg v. Mancusi*[30] the Court of Appeals for the Second Circuit found a constitutional error harmless where each element of the crime was established by overwhelming evidence properly admitted, so that the appellate court could conclude beyond a reasonable doubt that the defendant would have been convicted by the trial jury without the tainted evidence.[31] The reasoning of the courts appears to be that *Chapman* requires the error to be judged in terms of its impact on the jury, but *Harrington* allows the determination of the impact on the jury to be made by weighing the untainted evidence. If the untainted evidence is overwhelming, the court can determine the error was harmless because the jury would have convicted on the basis of the untainted evidence even in the absence of the error.[32]

It appears that the Supreme Court of Arizona has not followed the United States Supreme Court's statement in *Chapman* that the federal standard for harmless error should be applied where federal constitutional error is involved.[33] Rather, the court has continued to

26. Harrington v. California, 395 U.S. 250, 254 (1969).
27. *Id.* at 255 (Brennan, J., Marshall, J., & Warren, C.J., dissenting):
> Chapman, then, meant no compromise with the proposition that a conviction cannot constitutionally be based to any extent on constitutional error. The Court today by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided 'overwhelming' support for the conviction puts aside the firm resolve of Chapman and makes that compromise.

28. 401 U.S. 560 (1971).
29. *Id.* at 569, 570 n.13.
30. 445 F.2d 613 (2d Cir. 1971).
31. *Id.* at 619.
32. *See, e.g.*, Whiteley v. Warden of Wyoming Penitentiary, 401 U.S. 560 (1971); United States *ex rel.* Rosenberg v. Mancusi, 445 F.2d 613 (2d Cir. 1971); People v. Lyons, 18 Cal. App. 3d 760, 96 Cal. Rptr. 76 (1971) (pre-trial identification was harmless error because the remaining evidence was overwhelming); People v. Bell, 32 Mich. App. 375, 188 N.W.2d 909 (1971) (pretrial identification was harmless error because of overwhelming physical evidence); Mathis v. State, 469 S.W.2d 796 (Tex. Crim. 1971) (error of prosecutorial misconduct was harmless because there was overwhelming untainted evidence which supported the verdict).
33. Chapman v. California, 386 U.S. 18, 21 (1967).

apply the state standard to constitutional error. Thus, in *State v. Daniels*,[34] the court, purporting to follow the guidelines laid down in *United States v. Wade*,[35] determined that a faulty pre-trial identification was harmless error. The standard it applied to determine that the error was harmless was not that of *Chapman* as required by *Wade*,[36] but rather one provided by the Arizona Constitution which states in part that "[n]o cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done."[37]

Similarly, in *State v. Brady*[38] the court applied the established state standard of harmless error[39] to a possible error of constitutional dimension. *Brady* involved an objection to the admission of evidence allegedly obtained as a result of questioning conducted before the defendant was told of her right to remain silent. The court held that the admission of the evidence, even if erroneous, was not prejudicial under the state standard. This is precisely the type of constitutional error which the Court in *Chapman* intended should be judged by the federal standard, and yet the court in *Brady* did not even mention *Chapman*.

The *Peterson* decision attempted to bolster its reliance on harmless error[40] by citing a Ninth circuit Court of Appeals case, *Robideau v. Rhay*,[41] in which the court directed the district court to determine if a similar error was harmless beyond a reasonable doubt. The Arizona court ignored the reference in *Rhay* to *Chapman*, and merely stated that "[w]e think what occurred here was harmless beyond a reasonable doubt."[42]

The use of the words "beyond a reasonable doubt" is not a magic formula. These words only have substance when used with a practical test. In *Chapman* the Court said the test was the impact on the jury.[43] In *Harrington* the emphasis shifted to the weight of the untainted evidence.[44] The net result of *Chapman* and *Harrington* has been that the Supreme Court has set a standard for determining when constitutional error is harmless beyond a reasonable doubt—when the untainted evidence provides such overwhelming proof of guilt that the

34. 106 Ariz. 224, 474 P.2d 815 (1970).
35. 388 U.S. 218 (1967).
36. *Id.* at 242.
37. ARIZ. CONST. art. 6, § 27.
38. 105 Ariz. 190, 461 P.2d 488 (1969).
39. *See* text accompanying note 12 *supra*.
40. 107 Ariz. at 270, 485 P.2d at 1160.
41. 431 F.2d 880, 881 (9th Cir. 1970).
42. 107 Ariz. at 270, 485 P.2d at 1160.
43. 386 U.S. at 23, 24.
44. 395 U.S. at 254.

jury would have returned the same verdict in the absence of the error.[45]

To apply the federal standard in *Peterson*, the court would have had to examine the impact of the error on the jury. Before finding that the error was harmless beyond a reasonable doubt, it would have been necessary to conclude that there was no reasonable possibility that the tainted evidence contributed to the verdict of the jury.[46] This is especially true since *Peterson* did not involve mere technical error. By extracting from the defendant the testimony that he remained silent at the time of his arrest, the prosecutor was in effect penalizing the defendant for the earlier exercise of his constitutional rights. The possible inference to be drawn by the jury was that if the defendant had a valid alibi he would have so informed the police at the time of his arrest. For this error to be harmless, the other evidence would have had to be so overwhelming that there was no reasonable possibility that the verdict would have been different if the error had not been committed. The court, however, did not weigh the untainted fingerprint and identity evidence to determine if it constituted the overwhelming proof of guilt as required by *Harrington*. Instead, the court merely evaluated the evidence in terms of its sufficiency to go to the jury.[47] It concluded that while the state's case other than the fingerprints was weak,[48] the evidence was sufficient to submit the defendant's identity to the jury as a factual question.

45. *See, e.g.*, Whiteley v. Warden of Wyoming Penitentiary, 401 U.S. 570 (1971); Harrington v. California, 395 U.S. 250 (1969); United States v. Faulkner, 447 F.2d 869 (9th Cir. 1971); United States v. Handman, 447 F.2d 853 (7th Cir. 1971); United States v. DeCarlo, 446 F.2d 883 (9th Cir. 1971); United States v. Hubert, 445 F.2d 1328 (2d Cir. 1971); United States *ex rel.* Rosenberg v. Mancusi, 445 F.2d 613 (2d Cir. 1971); United States *ex rel.* Cummings v. Zelker, 329 F. Supp. 4 (E.D. N.Y. 1971); Klingler v. Erickson, 328 F. Supp. 674 (D. S.D. 1971); United States *ex rel.* Siegel v. Lennox, 328 F. Supp. 451(E.D. Pa. 1971); Cline v. Procunier, 328 F. Supp. 205 (C.D. Cal. 1971).

46. *See* text accompanying note 39 *supra.*

47. 107 Ariz. at 270, 485 P.2d at 1160. The court presented the defendant's hypothesis on how his fingerprints were placed on the inside window of the victim's truck. The court also discussed evidence that tended to refute Peterson's hypothesis, but drew no positive conclusion about the reasonableness of his explanation. The court noted only that there was an inference that the prints had been made between the time the truck was washed and the time the crime was committed.

In a criminal case, fingerprints alone will be sufficient evidence of guilt where they could only have been made at the time of the crime. M. UDALL, ARIZONA LAW OF EVIDENCE § 135, at 286 (1960); Borum v. United States, 380 F.2d 595 (D.C. Cir. 1967); Moon v. State, 22 Ariz. 418, 198 P. 288 (1911); State v. McGriff, 7 Ariz. App. 498, 441 P.2d 264 (1968); State v. Brady, 2 Ariz. App. 210, 407 P.2d 399 (1965). Conversely, if the evidence did not preclude the defendant's theory on how the prints came to be on the truck window, then the fingerprints alone would not be sufficient for a conviction. *See, e.g.*, United States v. Butler, 390 F.2d 620 (4th Cir. 1968); United States *ex rel.* Chiarello v. Mancusi, 288 F. Supp. 178 (S.D. N.Y. 1968); Rhoden v. State, 227 So. 2d 349 (Fla. App. 1969); Musgrove v. State, 3 Md. App. 54, 237 A.2d 804 (1968). As a matter of evidence it is questionable whether the prints alone in *Peterson* should have supported conviction.

48. 107 Ariz. at 269, 485 P.2d at 1159. The victim's testimony that "if he was

While the *Peterson* court purported to use the federal standard for harmlessness of "harmless beyond a reasonable doubt," it is clear that the substantive standards of the test were not applied. The federal test is a compilation of elements set out in *Fahy, Chapman* and *Harrington*: untainted evidence must be overwhelming before it can be concluded by the court that there was no reasonable possibility that the error adversely affected the jury.[49] In this case, it is questionable whether the evidence was even sufficient to go to the jury under the rules of evidence.[50] It certainly was not the overwhelming direct evidence required in *Harrington* and in virtually every jurisdiction which has interpreted *Harrington*.[51]

MULTIPLE PUNISHMENT AND DOUBLE JEOPARDY

When held to answer for his conduct, a criminal defendant is frequently charged with committing more than one offense. This may result from alleged violations of more than one criminal statute either through separate conduct on different occasions, or by continuous course of conduct on a single occasion. In the first instance, where each charge arises from separate conduct, it is clear that individual punishments may be imposed for each charge which results in conviction. It is unclear, however, whether the defendant may be punished for multiple convictions arising from a single event. The Arizona legislature, in enacting section 13-1641,[1] apparently intended to proscribe multiple punishment for a single criminal act or omission. In spite of the seeming simplicity of this prohibition, its judicial interpretation and the application of that interpretation to a given set of facts has proven to be a complex task. Much of the difficulty has been in determining whether separate punishments may be imposed for different crimes committed during a single incident.

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the right man, he was the third one to rape her," *id.*, seems to border on rank speculation. While it is well established that a witness's identification need not be positive and free from inconsistencies in order to be considered by the jury, State v. Dutton, 83 Ariz. 193, 198, 318 P.2d 667, 670 (1957), it is difficult to see what value the victim's testimony was in this case.

49. See text & note 45 *supra.*

50. See note 47 *supra.*

51. See text & note 32 *supra.*

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1. ARIZ. REV. STAT. ANN. § 13-1641 (1956) provides:

An act or omission which is made punishable in different ways by different sections of the laws may be punished under either, but in no event under more than one. An acquittal or conviction and sentence under one bars a prosecution for the same act or omission under any other.

The Supreme Court of Arizona recently reconsidered this issue in *State v. Tinghitella*,[2] in which the defendant had been convicted of two charges, "armed assault with intent to commit murder"[3] and "resisting, delaying, coercing or obstructing a police officer,"[4] arising from a single series of events.[5] He was sentenced to serve concurrent prison terms of from 10 to 12 years and 5 to 7 years respectively.[6] Although the defendant argued on appeal that section 13-1641 required the state to elect between charges when they are inextricably intertwined, the court held that multiple punishments may be imposed if the facts are sufficient to establish independently all of the elements of each offense. In reaching this result, the court applied the "practical" test which is to "eliminate the elements in one charge and determine whether the facts left would support the other charge."[7] The court determined that the offense of "obstructing a police officer" was complete before the armed assault began. Likewise, it concluded that, in the absence of those facts establishing the charge of armed assault, the remaining facts were sufficient to establish the elements of the crime of delaying or obstructing a police officer. The court decided that the defendant had committed the acts necessary to establish all the elements of both crimes; consequently, the judgment of the lower court was affirmed.[8]

The decision represents a definite departure from recent California cases construing a statute very similar to section 13-1641.[9] In fact, the *Tinghitella* court indicated that a substantial amount of the confusion emanating from recent Arizona cases interpreting section 13-1641 had been generated by relying upon inconsistent California cases.[10] The California courts have adopted a broad "transactional" approach to the problem, deciding that the proscription against multi-

2. 108 Ariz. 1, 491 P.2d 834 (1971). In addition to the multiple punishment issue, the defendant raised other questions on appeal which are beyond the scope of the present analysis.

3. ARIZ. REV. STAT. ANN. § 13-248 (Supp. 1971-72).

4. *Id.* § 13-541.

5. A law enforcement officer stopped the defendant's car, and, after conducting an investigation, arrested the defendant for driving while intoxicated. The officer then twice asked the defendant to place his hands on the roof of the car in order to facilitate a search of the defendant's person. Instead, the defendant side-stepped and turned away. After the officer grabbed the defendant by the arm, the defendant broke the hold, reached under his coat, withdrew a pistol and aimed it at the officer. The officer grabbed the barrel of the pistol and the two men wrestled for the pistol, which discharged twice before the officer managed to subdue the defendant. 108 Ariz. at 2, 491 P.2d at 835.

6. Tinghitella, having been previously convicted of a felony, was sentenced pursuant to ARIZ. REV. STAT. ANN. §§ 13-1649, -50 (Supp. 1971-72), which provide for increased punishment for recidivists.

7. State v. Mitchell, 106 Ariz. 492, 478 P.2d 517 (1970), *quoted in* State v. Tinghitella, 108 Ariz. 1, 3, 491 P.2d 834, 836 (1971).

8. 108 Ariz. at 4, 491 P.2d at 837.

9. CAL. PENAL CODE § 654 (West 1970).

10. 108 Ariz. at 3, 491 P.2d at 836.

ple punishment applies where a course of conduct violating more than one statute comprises an indivisible transaction.[11] The divisibility of a transaction is determined by the intent and objective of the actor. "[I]f all of the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one."[12]

One difficulty in applying this test lies in determining the intent of the actor, a problem which has resulted in the use of circumstantial evidence to determine intent.[13] Moreover, the approach has spawned an irrational method of determining punishment which does not appear to depend upon the culpability of the defendant.[14] The often anomalous effect of this method is that the criminal who kidnaps his victim for the purpose of committing a robbery, and completes both crimes, can only be punished once,[15] while a criminal who robs his victim before the kidnapping can be punished for both crimes.[16] No court has attempted to explain why the defendant in the last instance is more deserving of two punishments.[17]

In its haste to escape from this legal morass, the Supreme Court of Arizona in *Tinghitella* adopted the "practical" test but failed to provide sufficient criteria for the various situations in which section 13-1641 may be applicable. After a review of selected cases which have contributed to the development of the new approach in Arizona, several issues will be examined in an effort to provide the missing criteria. These issues include the applicability of the statute to sentences and multiple convictions when the defendant is sentenced on only one charge. In addition, it is unclear whether the same test will apply when separate trials result from charges based on a single course of conduct. Finally, there is the possibility that the threat of multiple punishments contravenes either or both of the state and federal constitutional prohibitions against double jeopardy.

Multiple Punishment in Arizona

The *Tinghitella* court reviewed the various approaches taken by Arizona cases which have applied section 13-1641.[18] The first case to

11. *See* People v. Bauer, 1 Cal. 3d 368, 461 P.2d 637, 82 Cal. Rptr. 357 (1969); People v. McFarland, 58 Cal. 2d 748, 376 P.2d 449, 26 Cal. Rptr. 473 (1962).
12. People v. Bauer, 1 Cal. 3d 368, 376, 461 P.2d 637, 643, 82 Cal. Rptr. 357, 362 (1969).
13. *Id.*
14. *See* Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine.* 58 CALIF. L. REV. 357 (1970).
15. *In re* Malloy, 66 Cal. 2d 252, 424 P.2d 929, 57 Cal. Rptr. 345 (1967).
16. People v. Ford, 65 Cal. 2d 41, 416 P.2d 132, 52 Cal. Rptr. 228 (1966).
17. *See* Johnson, *supra* note 14, at 373.
18. 108 Ariz. at 3, 491 P.2d at 836.

construe the statute, *State v. Westbrook*,[19] involved an appeal from a conviction for conspiracy to commit burglary. The conviction was based on evidence almost identical to that which had been produced at a former trial on the charge of attempted burglary, a trial which had resulted in an acquittal. The court, upholding the conviction, adopted the "identical elements" test,[20] commonly referred to as the "same evidence" test,[21] from the United States Supreme Court test for double jeopardy issues.[22] Although the test was developed for use in double jeopardy cases involving separate trials,[23] it has subsequently been applied in the prosecution of multiple charges in a single trial.[24] In order for the court to sustain multiple convictions under this test, each offense must be proven by at least one element not included in the other offense.[25]

The distinction between the "same evidence" test, referred to as the "identical elements" test in *Westbrook*, and the new "practical" test of *Tinghitella*, is that the new test does not permit *any* of the elements of the offenses to be based on the same fact or facts. Since the "same evidence" test was developed by the United States Supreme Court in furtherance of the "firm constitutional commitment . . . against repeated trials for the same offense,"[26] however, it does not necessarily follow that the test is valid for determining a violation of section 13-1641. The fifth amendment proscribes a second jeopardy for the same offense, while section 13-1641 proscribes more than one punishment for the same act. The implication is that the *Westbrook* court considered the word "act" in the statute synonymous with the constitutional term "offense."[27]

Since *Westbrook*, the interpretations of section 13-1641 have been inconsistent, if not contradictory. Initially, the court construed the statute pursuant to *Westbrook*.[28] Then, in *State v. Vallejos*[29] the court applied the statute without mentioning *Westbrook* and an-

19. 79 Ariz. 116, 285 P.2d 161 (1954).
20. *Id.* at 119, 285 P.2d at 164.
21. *See* Ashe v. Swenson, 397 U.S. 436, 464 (1970) (Burger, C.J., dissenting).
22. Gavieres v. United States, 220 U.S. 338 (1911).
23. *Id.*
24. *See* Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299 (1932).
25. Blockburger v. United States, 284 U.S. 299, 304 (1932).
26. Ashe v. Swenson, 397 U.S. 436, 464 (1970) (Burger, C.J., dissenting).
27. 79 Ariz. at 119, 285 P.2d at 164. By using the words act and offense interchangeably, the court in *Westbrook* frustrated the apparent intention of the legislature, which was to prevent cumulative punishments for a single physical act. The federal constitutional proscription was adopted primarily to prevent repeated trials for the same offense. *See* Ashe v. Swenson, 397 U.S. 436, 464 (1970) (Burger, C.J., dissenting).
28. *See* State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1960).
29. 89 Ariz. 76, 358 P.2d 178 (1960).

nounced that Arizona would follow the California cases insofar as their reasoning was sound.[30] After examining pertinent California cases, the court concluded that one criminal act done for the purpose of completing a second criminal act would be considered one "transaction" permitting but one conviction and sentence.[31] Five years later, however, the court in *State v. Green*[32] rejected the *Vallejos* rationale, and refused to apply the transactional approach. In reinstating the "identical elements" test, the court stated that section 13-1641 did not prohibit a sentence on each of two offenses, even though both may have been committed as part of a plan to rape the victim.[33]

The confusion continued through 1970, when two cases applying section 13-1641 used two patently different tests. In *State v. Price*[34] the court revived the transactional approach on the authority of the *Vallejos* opinion, while in *State v. Mitchell*[35] they formulated the new test which vastly improved the *Westbrook* approach. Although the *Mitchell* court referred to the new test as a "practical" test,[36] this new test was labeled the "identical elements" test in *Tinghitella.*[37]

The court in *Tinghitella,* attempting to dispel the ambiguity in prior Arizona cases, inappropriately stated that the most practical method of determining whether section 13-1641 has been violated is the "identical elements" test used in the *Westbrook* and *Mitchell* cases.[38] The statement was improper because the new test enunciated in *Mitchell* was not the same as the "identical elements" test from *Westbrook.* As previously noted,[39] the new test requires each element of the cumulated offenses to be entirely supported by separate and distinct facts. Fortunately, a later case has rectified this misstatement. In *State v. Mays*[40] the defendant had been convicted of both robbery

30. *Id.* at 82, 358 P.2d at 182.
31. *Id.*
32. 98 Ariz. 254, 403 P.2d 809 (1965). *See* Note, "Application of Statute Prohibiting Different Punishments for the Same Offense," 7 ARIZ. L. REV. 322 (1965).
33. State v. Green, 98 Ariz. 254, 257, 403 P.2d 809, 811 (1965). Two supreme court opinions after *Green* indicated a refinement of the "identical elements" test. *See* State v. French, 104 Ariz. 359, 361, 453 P.2d 505, 507 (1969) (second conviction could not stand since the elements were not entirely different); State v. Phillips, 102 Ariz. 377, 381, 430 P.2d 139, 143 (1969) (second conviction proper since the two offenses were distinctly separate). A majority of the cases strictly adhered to the old test as enunciated in *Westbrook. See* State v. Sonders, 106 Ariz. 79, 471 P.2d 275 (1970); State v. Mays, 105 Ariz. 47, 459 P.2d 307 (1969); State v. Enriquez, 104 Ariz. 16, 448 P.2d 72 (1968).
34. 106 Ariz. 433, 477 P.2d 523 (1970). For the most recent Arizona case following the transactional approach see State v. Arce, 107 Ariz. 156, 483 P.2d 1395 (1971).
35. 106 Ariz. 492, 478 P.2d 517 (1970).
36. *Id.* at 495, 478 P.2d at 520.
37. State v. Tinghitella, 108 Ariz. 1, 3, 491 P.2d 834, 836 (1971).
38. *Id.*
39. *See* text accompanying notes 20 to 27 *supra.*
40. 108 Ariz. 472, 494 P.2d 368 (1972).

and assault with a deadly weapon, even though both crimes involved a single physical act, striking the victim with a tire iron. In an earlier appeal, on authority of *Westbrook* and *State v. Enriquez*,[41] the court had held that the defendant could be punished for both crimes since "punishment for one crime bars punishment for the other only where the two crimes have identical components."[42] In the 1972 appeal of Mays' convictions, the supreme court held that the "identical elements" test had been overruled.[43] Striking the victim with the tire iron provided a necessary element of fear for the robbery conviction as well as constituting an essential element in the charge of assault with a deadly weapon. After applying the "practical" test as formulated in *Mitchell*, the court concluded that the facts would not support both convictions.[44] While the opinion does not differentiate between the two tests or state a rationale for the holding, the opinion does affirm the new "practical" test of *Mitchell* and *Tinghitella*. Likewise, it is now clear that the "identical elements" test from *Westbrook* is no longer viable.

Consecutive Sentences, Concurrent Sentences and Multiple Convictions

Even though the California courts have recently been urged to hold that the multiple punishment prohibition applies only where the sentences run consecutively,[45] the rationale of the Supreme Court of California in *People v. McFarland*[46] still prevails. After reviewing the application of similar proscriptions in other states, the court in *McFarland* held that the California statute prohibits double sentences but

41. 104 Ariz. 16, 448 P.2d 72 (1968).
42. State v. Mays, 105 Ariz. 47, 48, 459 P.2d 307, 308 (1969).
43. 108 Ariz. at 473, 494 P.2d at 369. After noting that the decision in the original appeal relied on *Enriquez*, the *Mays* court stated that "*Mendoza* overruled *Enriquez* with regard to the test to be applied" when determining whether section 13-1641 has been violated. *Id.* The *Enriquez* opinion followed the "identical elements" test as enunciated in *Westbrook*, whereas *State v. Mendoza*, 107 Ariz. 51, 481 P.2d 844 (1971), construed section 13-1641 pursuant to the new "practical" test on authority of the *Mitchell* opinion.
44. State v. Mays, 108 Ariz. 472, 473, 494 P.2d 368, 369 (1972).
45. *See* Johnson, *supra* note 14, at 357. Two states with multiple punishment statutes permit concurrent sentencing. The New York statute proscribing multiple punishments is worded to require concurrent sentences when more than one conviction arises from a single act. N.Y. PENAL LAW § 70.25[2] (McKinney 1967). Alabama has ruled that its statute may be served by either single or concurrent sentences. Wade v. State, 42 Ala. App. 400, 166 So. 2d 739 (1964).
46. 58 Cal. 2d 748, 376 P.2d 449, 26 Cal. Rptr. 473 (1962). The California cases are especially appropriate for discussion since section 13-1641 is in accord with CAL. PENAL CODE § 654 (West 1970). Ariz. Rev. Stat. ¶ 1032 (1887), the forerunner of section 13-1641, was worded the same as the present day version and was probably copied from an identical statute enacted by California in 1872. The following state statutes contain similar provisions: ALA. CODE tit. 15, § 287 (1959); OKLA. STAT. ANN. tit. 21, § 11 (Supp. 1971-72); UTAH CODE ANN. § 76-1-23 (1953). The model statute proposed by the American Law Institute, *Model Penal Code* § 1.07 (Off. Prop. Draft 1962), permits prosecution on multiple counts with certain exceptions. All charges arising from a single criminal episode must be prosecuted in a single trial.

permits multiple convictions. The court stated that the proper remedy for a violation of the statute was to eliminate the effect of the judgment as to the lesser offense insofar as the penalty alone was concerned.[47] Thus, by implication, concurrent as well as consecutive sentences can be a violation of the statute. While this solution is in accord with the earlier California case of *People v. Chessman*,[48] the *McFarland* court did note that other cases had, without qualification, reversed the judgment of conviction as to the lesser count, eliminating the effect of the conviction as well as the punishment.[49] In addition, the court was cognizant that the California agency in charge of criminal sentencing[50] might consider the conviction of the lesser offense in fixing the punishment on the more serious crime, and held that such action would be improper.[51]

Initially, the Supreme Court of Arizona in *State v. Boodry*[52] adopted its reasoning from the *Chessman* case, holding that the proper remedy was to retain the convictions but to remove the effect of the lesser sentence. Without attempting to refute the rationale of *Boodry* or the California decisions,[53] however, the Arizona court has since decided to advance one step further. Thus, the court in *State v. Ballez*[54] held that in order to remove any remnant of double punishment, the conviction as well as the punishment must be nullified. The effect in Arizona is that section 13-1641 proscribes concurrent and consecutive sentences as well as multiple convictions arising from a single act.[55]

Multiple Charges in Separate Trials

Section 13-1641 proscribes multiple punishment for a single act. The statute may be violated when multiple charges relating to an act are brought in single or separate trials.[56] Some of the cases dealing

47. 58 Cal. 2d at 762, 376 P.2d at 457, 26 Cal. Rptr. at 481.
48. 52 Cal. 2d 467, 341 P.2d 679, *cert. denied*, 361 U.S. 925 (1959).
49. 58 Cal. 2d at 763, 376 P.2d at 457, 26 Cal. Rptr. at 481.
50. Within the limits set by statutory minimum and maximum terms, an administrative agency known as the Adult Authority sets the actual terms of imprisonment and parole for California prisoners. Johnson, *supra* note 14, at 367.
51. *See* People v. Brown, 49 Cal. 2d 577, 593, 320 P.2d 5, 15 (1958).
52. 96 Ariz. 259, 394 P.2d 196 (1964).
53. The recent California cases follow *Chessman* and *McFarland*. *See* People v. Solo, 88 Cal. App. 3d 201, 86 Cal. Rptr. 829 (1970); People v. Bauer, 1 Cal. 2d 368, 461 P.2d 637, 82 Cal. Rptr. 357 (1969).
54. 102 Ariz. 174, 427 P.2d 125 (1967). *See* State v. Mendoza, 107 Ariz. 51, 481 P.2d 844 (1971).
55. In State v. George, 108 Ariz. 5, 491 P.2d 838 (1971), the defendant had been sentenced to concurrent prison terms for robbery and assault with a deadly weapon. The court, noting that the "very same act of pointing the pistol at the victim" was used for both convictions, vacated the sentence and "set aside the conviction" on the assault with a deadly weapon charge on authority of State v. Mendoza, 107 Ariz. 51, 481 P.2d 844 (1971), which is based directly on the *Ballez* opinion.
56. See text of ARIZ. REV. STAT. ANN. § 13-1641 (1956) note 1 *supra*.

with section 13-1641, such as *State v. Westbrook*,[57] involve separate trials for different offenses arising from a single course of conduct and clearly raise double jeopardy issues. The *Westbrook* court considered the fifth amendment proscription of a second jeopardy for the same offense and referred to United States Supreme Court cases which have construed the double jeopardy clause.[58] While the new "practical" test as enunciated in *State v. Mitchell*,[59] a multiple conviction case resulting from a single trial, has not yet been applied to cases involving separate trials, the old "identical elements" test was used in both situations, so it is reasonable to assume that the court intends to use the new test in the same manner. Although there has been no indication to that effect in recent opinions, such a course would be expected in view of the fact that the federal courts apply the same test regardless of whether the case involves separate trials or a single trial.[60]

Double Jeopardy and Multiple Punishment

The double jeopardy prohibition of the Arizona Constitution[61] is manifest in section 13-1641 in that "an acquittal or conviction and sentence" is a bar to a subsequent prosecution for the same act. The Supreme Court of Arizona has not stated whether the "practical" test from *Tinghitella* and *Mitchell* will apply in cases involving a former jeopardy on a charge arising from a single course of conduct. The new test does not provide protection from double jeopardy in all cases, since a prosecutor could, pursuant to the "practical" test, subject a defendant to successive prosecutions on different charges arising from a single course of conduct.[62] It follows that in *Tinghitella*, the defendant could have been tried and acquitted on either charge and then later prosecuted on the remaining charge without offending the test.[63]

57. 79 Ariz. 116, 285 P.2d 161 (1954).
58. *Id.* at 119, 285 P.2d at 169. *See* cases notes 19-27 & accompanying text *supra.*
59. 106 Ariz. 492, 478 P.2d 517 (1970).
60. *See* cases notes 18-26 & accompanying text *supra.*
61. ARIZ. CONST. art. 1, § 10.
62. Limited protection from this threat is found in ARIZ. REV. STAT. ANN. § 13-145 (1956), barring a subsequent prosecution on the same or a lesser included offense. The test for a same or lesser included offense is "whether one offense can be committed without necessarily committing the other." State v. Sutton, 104 Ariz. 317, 452 P.2d 110 (1969). In order for the bar to attach, all of the elements of one offense must be included in the other offense. Logically, the bar will not attach when each offense contains an element which is not included in the other offense. In essence, there is no difference between this test and the "same evidence" test which would permit a second punishment when each offense requires the proof of an element which the other does not. *See* notes 19-27 & accompanying text *supra.* If the court continues to construe section 13-145 in this manner, the statute will afford less protection from double jeopardy cases than the present interpretation of section 13-1645.
63. The ever-increasing number of criminal statutes has created an expanded threat to double jeopardy protections and, consequently, a series of wrongful acts may

The United States Supreme Court held in *Benton v. Maryland*[64] that the double jeopardy clause of the fifth amendment applies in state prosecutions with the same standards the Court had prescribed for the federal courts. The Court in *Ashe v. Swenson*[65] ruled that the principle of collateral estoppel is embodied in the double jeopardy clause and also applies in state prosecutions. This principle, which has been an established part of federal criminal law for more than fifty years,[66]

> [M]eans simply that when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties. . . . [T]he rule . . . is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'[67]

The Supreme Court of Arizona must therefore apply the principle of collateral estoppel in cases involving a former jeopardy. Thus, when the court applies the new "practical" test in determining whether a subsequent prosecution violates section 13-1641, it must also scrutinize the case to determine if the principle of collateral estoppel will bar the re-prosecution.

While the double jeopardy clause proscribes a second punishment for the same act or offense in a subsequent trial,[68] it is unclear that the clause will prevent a defendant from receiving two or more punishments for the same act or offense in a single trial. Although the Court

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come within the purview of numerous statutory offenses. *See* Kircheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949). Aware of this threat, Mr. Justice Stewart has noted:

> For at common law, and under early federal criminal statutes, offense categories were relatively few and distant. A single course of criminal conduct was likely to yield but a single offense. . . . In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction.

Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970).

64. 395 U.S. 784 (1969).

65. 397 U.S. 436, 445 (1970).

66. *See* United States v. Oppenheimer, 242 U.S. 85 (1916).

67. Ashe v. Swenson, 397 U.S. 436, 443-44 (1970); *see* Mayers & Yarborough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38-39 (1960).

68. Ashe v. Swenson, 397 U.S. 436, 446 (1970).

in *Ashe* was careful to point out that they were not deciding this issue,[69] an earlier case had held that the double jeopardy clause does not prohibit two punishments for the same offense in a single trial.[70] The continued appeal of cases involving multiple convictions first resulted in the development of the "rule of lenity."[71] The Court, unwilling to strike down multiple convictions under the double jeopardy clause, chose to resolve all doubt in favor of the defendant. Thus, unless it was clear that Congress intended multiple punishments, legislative silence would be construed with leniency, and only one sentence could be imposed for different statutory violations arising from a single event.[72] This policy of lenity was curtailed in *Gore v. United States,*[73] however, in which the majority stated that it could not be said that Congress did not intend that the defendant should be punished for each offense violated by a single act. The Court also reiterated the philosophy that multiple convictions in a single trial do not violate the double jeopardy clause.

Conclusion

The Supreme Court of Arizona in *Tinghitella* adopted the new "practical" test, applied by eliminating all the elements of one offense and determining whether the remaining facts will support the other charge.[74] Each offense must be proven with an independent set of facts. In addition, section 13-1641 has been construed as prohibiting multiple convictions as well as concurrent or consecutive prison terms when its provisions are violated. Admittedly, as in *Tinghitella,* the new test does not foreclose multiple punishments in all cases involving different offenses arising from a single course of conduct, nor is it probable that the legislature intended to do so by enacting the statute. It does, however, afford greater protection from double jeopardy or multiple punishment than does the current federal test. Even when it does not proscribe a second prosecution, the principle of collateral estoppel may present a bar to the second trial.

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69. 397 U.S. at 446.
70. Holiday v. Johnston, 313 U.S. 342 (1941).
71. *See* Ladner v. United States, 358 U.S. 169 (1958); Prince v. United States, 352 U.S. 322 (1957). *See also* Case Comment, 43 NOTRE DAME LAW. 1017 (1968).
72. Ladner v. United States, 358 U.S. 169, 177-78 (1958).
73. 357 U.S. 386 (1958). The *Gore* decision also reviewed and affirmed the "same evidence" test from Blockburger v. United States, 284 U.S. 299 (1932). *But see* Ashe v. Swenson, 397 U.S. 436, 452 (1970) (Brennan, Douglas, & Marshall, JJ., concurring) (criticizing the "same evidence" test); Whitton v. State, 479 P.2d 302 (Alas. 1970) (multiple punishments in a single trial violate the state constitutional prohibition against double jeopardy and therefore Alaska will no longer follow the "same evidence" test from *Blockburger*).
74. 108 Ariz. at 4, 491 P.2d at 837.

PRIVILEGE AGAINST SELF-INCRIMINATION: POST-ARREST SILENCE AS A "TACIT ADMISSION"

After his arrest for robbery, the defendant was given *Miranda*[1] warnings and transported to city jail for booking. While waiting to be photographed, the defendant initiated a conversation with the arresting officer by asserting that he did not commit the crime. The officer then confronted the defendant with incriminating evidence and asked for an explanation,[2] but the defendant did not reply. At trial, the arresting officer testified for the prosecution's case-in-chief as to this silence, and the county attorney also emphasized it during final argument in attempting to persuade jurors that an inference of guilt should be drawn.[3] After the defendant was convicted, it was argued on appeal to the Supreme Court of Arizona that the defendant's privilege against self-incrimination had been violated by allowing the state to use his silence as a tacit admission of guilt. The court found the defendant's silence to be admissible evidence, however, distinguishing between post-arrest custodial conversations initiated by the accused, as in this case, and those initiated by the police.

By upholding the use at trial of an accused's silence during custodial interrogation, *State v. O'Dell*[4] raises an issue that arguably was settled by constitutional principles enunciated in recent decisions of the Supreme Court of the United States.[5] This commentary will first discuss the common law tacit admission rule and then focus on later constitutional limitations placed upon it, with emphasis on the divergence

1. In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court held that the following warnings must be given before the police may interrogate a person in custody, in stating at 444 that "[T]he person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

2. State v. O'Dell, 108 Ariz. 53, 54, 492 P.2d 1160, 1161 (1972). It is difficult to tell exactly what the officer wanted explained. The incriminating evidence found in the defendant's possession was a one hundred dollar bill which bore the robbery victim's name in red ink. At trial, after stating that he showed the defendant the bill, the arresting officer testified, "That's correct, the same hundred dollar bill, the one with the victim's name on it. And I said: "That is the victim's name and the defendant, at that time replied: "It sure is." I asked him: 'How do you explain that?' and there was no answer." *Id.* While it is thus unclear whether the defendant was being asked to explain his possession of the money or how the victim's signature became engraved on it, the unclarity is immaterial for a discussion of the case.

3. *Id.* at 55, 492 P.2d at 1162.

4. 108 Ariz. 53, 492 P.2d 1160 (1972). Other issues were raised, and the conviction was reversed on other grounds.

5. Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609 (1965); Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964). For a discussion of these cases see text & accompanying notes 22-27 *infra.*

of *O'Dell* from what otherwise is apparent unanimity among all state and federal courts forbidding the use at trial of an accused's silence during custodial interrogation.

It is a generally established rule of evidence that statements against the interest of the declarant made out of court may be used against him at trial when that interest is involved.[6] The rule has been extended to include "adoptive admissions," where a party makes no response to an inculpating statement made by another in his presence, thereby adopting it as his own.[7] This idea has been further refined into the tacit admission rule:

> When an accused is silent in the face of an accusatory or inculpatory statement, both the statement and the accused's failure to deny its truth are admissible in a criminal action as evidence of acquiescence by the accused in the truth of the statement or as indicative of a consciousness of guilt.[8]

The foundation of the tacit admission rule lies in the temperament of mankind. It has been argued that an innocent man accused of a crime will spontaneously deny the charge, and that silence in the face of an accusation is a tacit confession of guilt.[9] Although criticized, the tacit admission rule has been accepted in every jurisdiction in both civil and criminal cases, particularly in criminal cases involving custodial police interrogation. Aware of the inherent abuses resulting from its use, courts first devised standards which had to be complied with prior to receiving a tacit admission as evidence at trial. It had to be shown that the accusatory statement was made in the presence and hearing of the accused,[10] that he understood it,[11] that it embraced facts within his personal knowledge,[12] that the statement and surrounding circumstances naturally called for a reply[13] and that the accused had an opportunity to reply.[14] The courts also retained the initial deter-

6. 4 WIGMORE, EVIDENCE § 1048 (3d ed. 1940).
7. *Id.* at § 1069.
8. Watson v. State, 387 P.2d 289, 291 (Alas. 1963); *see* Wigmore *supra* note 6, at § 1021, 1071.
9. People v. Simmons, 28 Cal. 2d 699, 412 P.2d 18, 25 (1946).
10. Sorenson v. United States, 168 F. 785 (8th Cir. 1909) (witness admitted he did not know if accusatory statement was heard by defendant); Morse v. State, 27 Ala. App. 447, 173 So. 875 (1937).
11. People v. Davis, 210 Cal. 54, 293 P. 32 (1930) (accused must understand that he himself is accused of the crime); State v. Ksilka, 84 N.J. 6, 87 A. 79 (1913) (defendant did not understand what was being done at time he was accused); People v. Lewis, 238 N.Y. 1, 143 N.E. 771 (1924) (accusation was made in German, but accused spoke only English).
12. Territory v. Corum, 34 Hawaii 167 (1937) (none of the facts upon which the accusation was based would probably be known to the accused).
13. Watson v. State, 387 P.2d 289 (Ala. 1963).
14. *E.g.*, People v. Kozlowski, 368 Ill. 124, 13 N.E.2d 174 (1938) (accused was slapped and kicked by police and told to keep his mouth shut); Geiger v. State, 70 Ohio 400, 71 N.E. 721 (1904) (accused attempted to make reply but was told to wait).

mination of whether it could reasonably be concluded that the silence of the accused was a tacit admission of guilt before allowing the jury to weigh it as evidence.[15]

The first abrogation of the tacit admission rule in the criminal area was in an early Massachusetts case[16] setting forth a "per se" rule forbidding the prosecution from using the defendant's silence when he was under arrest and in custody at the time of confrontation. Both state and federal courts began to follow this precedent, relying on the common law principle that there is no duty to speak upon arrest[17] and, in some instances, holding that state and federal constitutional provisions prohibited the prosecution from using a defendant's silence silence against him.[18] A considerable number of courts, however, continued to adhere fully to the tacit admission rule, recognizing arrest and custody as only additional factors to be considered in its application.[19]

Prior to *O'Dell*, the Supreme Court of Arizona in *Terrasas v. State*[20] had impliedly adopted the per se rule, thus precluding the use at trial of silence as a tacit admission in a post-arrest custodial setting. While holding that all conditions had been met for submitting to the jury the defendant's silence after being accused of stealing a calf, the *Terrasas* court qualified the use of such silence only permitting it because the accused "was not under arrest, nor in custody, but was at liberty to reply or explain if he so chose."[21]

Expansion of the fifth amendment privileges against self-incrimination by the Supreme Court of the United States has tended to eliminate the use of post-arrest silence as a tacit admission of guilt. In *Malloy v. Hogan*[22] the Court held that the fifth amendment's exception

15. Goldsby v. State, 123 So.2d 429 (Miss. 1960).

16. Commonwealth v. Kinney, 53 Mass. (12 Met. 235, 46 Am. Dec. 672 1847) (Shaw, C.J.).

17. *E.g.*, Yep v. United States, 83 F.2d 41 (10th Cir. 1936); McCarthy v. United States, 25 F.2d 298 (6th Cir. 1928); State v. Goldfeder, 242 S.W. 403 (Mo. 1922); People v. Rutigliano, 261 N.Y. 103, 184 N.E. 689 (1933).

18. *See* United States *ex rel.* Smith v. Brierly, 384 F.2d 999 (3d Cir. 1967) (due process clause of fourteenth amendment of federal constitution); Helton v. United States, 221 F.2d 338 (5th Cir. 1955) (self-incrimination clause of fifth amendment of federal constitution); People v. Simmons, 28 Cal. 2d 699, 172 P.2d 18 (1946) (state constitutional privilege); State v. Stump, 254 Ia. 181, 119 N.W.2d 210 (1968) (both state and federal constitution self-incrimination clauses); State v. Bowdry, 346 Mo. 1090, 145 S.W.2d 127 (1940) (state constitution self-incrimination clause); Ellis v. State, 8 Okla. Crim. 522, 128 P. 1095 (1913) (state constitution).

19. People v. Amaya, 134 Cal. 531, 66 P. 794 (1901); *see* Annot., 80 A.L.R. 1235 (1932); Annot., 115 A.L.R. 1510 (1938) for summary of cases which follow and do not follow the per se rule. *See also* Note, *Tacit Criminal Admissions*, U. PA. L. REV. 210, 253 (1963), where the author has tabulated that twenty states reject the per se rule, twelve accept it, six have reserved the question and twelve have no clear position.

20. 25 Ariz. 476, 219 P. 220 (1923).

21. *Id.* at 482, 219 P. at 230.

22. 378 U.S. 1 (1964). The defendant was arrested during a gambling raid

from compulsory self-incrimination when testifying as a witness in a court proceeding is applicable to the states by operation of the due process clause of the fourteenth amendment. It was emphasized that the right to remain silent is the bulwark of the American accusatorial system and that to allow silence to be used against an individual is to impose a penalty on the exercise of that right.[23] In *Griffin v. California*[24] the Court stated that allowing the defendant's refusal to testify at trial to be used as evidence made the exercise of the privilege against self-incrimination a costly assertion. The Court reasoned that there are many reasons to explain silence at trial other than guilt, and to draw any adverse inferences from a refusal to testify was reminiscent of the inquisition.[25]

Escobedo v. Illinois[26] and *Miranda v. Arizona*[27] have had the greatest impact in limiting the use of silence as a tacit admission. In *Escobedo* the defendant was arrested for the murder of his brother-in-law and was extensively questioned despite repeated attempts to consult his retained counsel. The holding of *Escobedo* is very narrow, the Court stating that where the police investigation has "focused" on the accused, where he has requested and been denied consultation with his attorney, and where he has not been warned of his constitutional right to remain silent, he has then been denied his sixth amendment right to counsel.[28] Although *Escobedo* expressly relied on the sixth amendment, the fifth amendment right to remain silent was mentioned.[29] It was *Miranda*, however, which removed all doubt that the fifth amendment privilege is available outside the courtroom. The Court held that prior to any questioning, the accused must be effectively warned that he has a right to remain silent, that any statement he does make may be used against him and that he has a right to the presence of an attorney, either retained or appointed. Before questioning may proceed, the accused must voluntarily, knowingly and intelligently waive these rights.

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and was found guilty of pool selling, a misdemeanor. Some time afterwards he was ordered to testify before a referee appointed by a state court to investigate gambling and other criminal activities in the state. When questioned, he refused to testify and was imprisoned for contempt of court.

23. *Id.* at 8.

24. 380 U.S. 609 (1965). An ex-felon on trial for murder did not take the stand in his own defense, possibly to avoid having his prior convictions revealed to the jury during cross-examination. His failure to take the stand was stressed by the state in the final argument to the jury, the prosecutor pointing out that an innocent man would naturally deny the evidence and accusations set forth against him.

25. *Id.* at 614-15.

26. 378 U.S. 478 (1964).

27. 384 U.S. 436 (1966).

28. 378 U.S. at 490-91.

29. *Id.* at 488, 490, 491.

The significance of *Miranda* in relation to the tacit admission rule lies in the following language, stating that, "[I]n accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."[30] By guaranteeing the accused the privilege against self-incrimination, *Miranda* has made silence during police questioning equal in constitutional status to the right to refuse to testify at trial.[31] In effect, *Miranda* and the other fifth amendment decisions have said that police custodial interrogation is not, as a matter of constitutional law, a situation where a verbal accusation or confrontation with incriminating evidence naturally calls for a reply.

The mandate derived from these recent decisions appears clear. The moment the privilege against self-incrimination attaches,[32] an individual may exercise his right to remain silent without fear of having his silence used against him at trial as evidence of guilt. This constitutional impediment to the use of silence as a tacit admission in a criminal trial has produced a marked change in the attitude of those courts which had previously adhered to the use of post-arrest custodial silence as a tacit admission.[33] In Pennsylvania, for example, the tacit admis-

30. 384 U.S. at 468 n.37.

31. *See* Helton v. United States, 221 F.2d 338 (5th Cir. 1955); State v. Dearman, 198 Kan. 44, 422 P.2d 573 (1967).

32. In *Escobedo* the Court indicated that the right to remain silent attaches at the moment the police interrogation was no longer a general inquiry but began to "focus" on the accused. 378 U.S. at 490-91. This was clarified in *Miranda,* in which police interrogation was defined as "questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way." 384 U.S. at 444.

33. *Compare* Albans v. State, 89 So. 2d 342 (Fla. 1956) (upholding use of in custody tacit admission), *with* Jones v. State, 200 So. 2d 574 (Fla. 1967) (*Miranda* requires abandonment of earlier decisions allowing use of silence at trials and that such tacit admissions are no longer to be allowed in evidence). Other cases illustrating this change include Smith v. Commonwealth, 366 S.W.2d 902 (Ky. 1962) (in custody tacit admission upheld); Cessna v. Commonwealth, 465 S.W.2d 283 (Ky. 1971) (once *Miranda* warnings are given, silence of accused may not be used against him at trial); Moore v. State, 229 Ark. 335, 315 S.W.2d 907 (1958), *cert. denied,* 359 U.S. 930 (1959) (tacit admission upheld); Gross v. State, 246 Ark. 909, 440 S.W.2d 543 (1969) (recognizing *Miranda* but refusing to apply it retroactively); People v. Kregger, 335 Mich. 457, 56 N.W.2d 349 (1953) (in custody tacit admission upheld); People v. Gisondi, 9 Mich. App. 289, 156 N.W.2d 601 (1967) (silence while in custody is admissible only when it occurs as part of the *res gestae*).

Cases recognizing the fifth amendment privilege against self-incrimination as precluding the use of post-arrest, in custody tacit admissions include: United States v. Nolan, 416 F.2d 588 (10th Cir. 1969) (relying on both *Griffin* and *Miranda*); United States v. Wick, 416 F.2d 61 (7th Cir.), *cert. denied,* 396 U.S. 961 (1969); United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969); United States v. Nielsen, 392 F.2d 849 (7th Cir. 1968) (relying on both *Miranda* and *Griffin*); United States v. Mullings, 364 F.2d 173 (2d Cir. 1966) (citing *Miranda*); Ivez v. United States, 344 F.2d 770 (5th Cir. 1965); Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965) (citing *Escobedo*); Gillison v. United States, 399 F.2d 586 (D.C. Cir. 1968); State v. Dearman, 198 Kan. 44,

sion rule has been rejected altogether.[34] Speaking for the court, Justice Musmanno stated succinctly that the decisions of the Supreme Court of the United States "have, in effect, shattered the tacit admission rule. . . . Whatever may be left of the rule after the enfilading fire of the Supreme Court is here overruled."[35]

A few courts which have accepted *Miranda* with some reluctance, however, have insisted on a narrower application.[36] Thus, the use of silence as a tacit admission has been upheld in a post-arrest setting where the accusatory statement has been made by a party not connected with law enforcement,[37] and also where the prosecution has sought to impeach the defendant's credibility as a witness during cross-examination.[38] Despite these occasional attempts at limitation of *Miranda*, no reported decisions have been found where a court has upheld the use of tacit admissions in the prosecution's case-in-chief followed by comment to the jury of the defendant's failure to reply to police questioning during custodial interrogation.[39]

The Supreme Court of Arizona has not failed to observe the expansion of the fifth amendment. In *State v. Simoneau*[40] the court stated it did "not approve [of] the introduction of evidence of an accused's silence in reply to questions when he is in custody or under other circumstances where it is his constitutional right to refrain from incriminating himself under the Fifth Amendment."[41] In *O'Dell*, how-

422 P.2d 573 (1967); State v. Stuart, 456 S.W.2d 19 (Mo. 1970); State v. Ford, 80 N.M. 649, 459 P.2d 353 (1969).

34. Commonwealth v. Dravecz, 424 Pa. 582, 227 A.2d 904 (1967), *overruling* Commonwealth v. Vallone, 347 Pa. 419, 32 A.2d 889 (1943).

35. *Id.* at 590, 227 A.2d at 909.

36. *See* State v. Flanagan, 223 Tenn. 134, 137, 443 S.W.2d 25, 28 (1969).

37. Brown v. State, 121 Ga. App. 228, 173 S.E.2d 470 (1970) (accusatory statement made by co-defendant); People v. Jackson, 103 Ill. App. 209, 243 N.E.2d 551, *cert. denied*, 397 U.S. 957 (1968) (accused by victim). *Contra*, Gosset v. State, 373 P.2d 285 (Okla. Crim. 1962).

38. Sharp v. United States, 410 F.2d 969 (5th Cir. 1969); State v. Schroeder, 201 Kan. 811, 443 P.2d 284 (1968). *Contra*, Fowle v. United States, 410 F.2d 48 (9th Cir. 1969); Gillison v. United States, 399 F.2d 586 (D.C. Cir. 1968).

39. In Johnson v. New Jersey, 384 U.S. 719 (1966), the Supreme Court held that *Escobedo* and *Miranda* were not to be applied retroactively. Thus, many relatively recent appellate court opinions dealing with a "tacit admission" problem have not applied *Escobedo* and *Miranda* because the cases had reached the trial court before those two Supreme Court cases were decided.

40. 98 Ariz. 2, 401 P.2d 404 (1965).

41. *Id.* at 6, 401 P.2d at 406. In State v. Villalobos, 6 Ariz. App. 144, 430 P.2d 723 (1967), the Arizona court of appeals construed *Simoneau* to encompass a situation in which the defendant had not yet been placed under arrest and was silent in the face of an accusation by a third person in the presence of a police officer. The court disallowed the use of such silence as evidence at trial. The supreme court later rejected the reasoning of *Villalobos* in State v. McAlvain, 104 Ariz. 445, 454 P.2d 987 (1969). Although approving the result reached in *Villalobos*, the court did not approve the interpretation given *Simoneau*, seeing no error in allowing the state to elicit testimony that the accused was silent to an accusation by a person not associated with law enforcement prior to being arrested and placed in custody. *Id.* at 447, 454 P.2d at 988.

ever, the court ignored this language and asserted "there is authority for admitting the [tacit admission] because of the peculiar circumstances, in this case, where a defendant, in custody and after being informed of his right to remain silent, voluntarily initiates a conversation attempting to exculpate himself."[42] The court reasoned that the defendant waived his right to remain silent by his denial of guilt. Because the defendant had initiated the conversation, the court said that when asked to explain his possession of incriminating evidence, it would have been more natural to have responded. A failure to do so was not a reassertion of his right to remain silent, but revealed an inability to give an innocent explanation for possession of the evidence. The court concluded, therefore, that the defendant's silence could properly be construed as a tacit admission of guilt.

The sole authority cited in support of the reasoning was *Pope v. State*,[43] a 1957 case decided by the Court of Appeals of Alabama. Three observations can be made as to the weight which should have been given that decision. First, *Pope* antedates *Malloy v. Hogan* by seven years so that the fifth amendment privilege against self-incrimination had not been applied to the states. Second, it is unclear whether the defendant in *Pope* actually initiated the conversation with the police, the distinction sought to be drawn in *O'Dell*.[44] Finally, the Supreme Court of Alabama has since realized the effect of United States Supreme Court decisions on the tacit admission rule. Although it has not been faced with the issue in recent years, the Alabama court has expressed grave doubts as to the continuing validity of past decisions upholding the use of such admissions.[45] Thus, the sole authority

42. 108 Ariz. at 56, 492 P.2d at 1163.

43. 39 Ala. App. 42, 96 So. 2d 441 (1957).

44. The relevant passage in *Pope* is as follows:

> There was no error in allowing the deputy sheriff Cooper to testify that when defendant told the Solicitor, shortly after the homicide, that deceased had stabbed him three times on the back of his shoulder, the Solicitor asked: "Do you mean that this boy Fred Ridley . . . cut or stabbed you on the left shoulder there after you shot the last time?" and that the defendant made no reply to this question. 39 Ala. App. at 47, 96 So. 2d at 445-46.

The question posed by the Solicitor to which the defendant made no reply indicates that the Solicitor had obtained information from someone that the defendant had shot the victim a number of times. It is possible that the source of information was the defendant himself, and quite possible that it was given in response to initial questioning by the Solicitor or deputy sheriff.

45. Caldwell v. State, 282 Ala. 713, 213 So. 2d 919 (1968). In *Caldwell* the Alabama supreme court excluded the use of the defendant's custodial silence on the evidentiary ground that he was intoxicated at the time and was unable to make a responsive reply. The court went on to survey the history of the tacit admission rule, however, and noted for the benefit of state prosecution officers that many jurisdictions have pronounced the view that the United States Supreme Court has dismantled the rule by its decisions extending the fifth amendment to the police station. *Id.* at 719, 213 So. 2d at 924. Also, five years after *Pope* the Alabama court of appeals in Andrews v. State, 41 Ala. App. 563, 140 So. 2d 369 (1962), recognized the constitutional right to refuse to make a statement to police and that this alone would negate

cited by the Supreme Court of Arizona in support of its decision bears little relation to the issue as presented in the contemporary context.

By indulging in a determination of whether the right to remain silent was being exercised by the defendant by what would be the natural or unnatural reaction to confrontation with incriminating evidence, the *O'Dell* court analyzed the silence of the defendant by the same test employed by the courts when the only hurdle to the use of tacit admissions was the rules of evidence.[46] Even so, many courts are aware of the inherent coercive atmosphere of police custody, and realize that the foundation of the tacit admission rule has no basis in such a setting.[47] Silence in response to accusation or when confronted with incriminating evidence while under arrest can hardly be considered unnatural. Upon the abolition of the inquisitorial Star Chamber and High Commission, it became a principle of the common law that there is no duty to speak upon arrest.[48] To distinguish between those instances in which silence of the accused resulted from a reliance upon this principle, or was indeed the product of a guilty conscience was, and still is, an impossible task. The inducements for silence while under arrest and in the custody of police leave to speculation and conjecture the true reason for the silence in any particular case. It follows that the failure to reply to accusation or when confronted with incriminating evidence would have no probative value as evidence at trial.[49]

The added barrier of the fifth amendment precludes an analysis of what is natural or unnatural silence. Silence *is* the exercise of the privilege against self-incrimination. To ask why an accused has remained silent is no longer a valid inquiry. To suggest that when "peculiar circumstances" are present it would be more natural to reply during custodial interrogation is to compel the accused to speak or to suffer a penalty for his refusal to do so. Such reasoning ignores the fifth amendment altogether.

The distinction sought to be drawn in *O'Dell* between accused-initiated and police-initiated interrogations is unique, and of questionable validity. Silence after communications with the police in a post-arrest setting may be invoked for any of numerous reasons, notwith-

any possible inference of guilt which might be drawn from silence arising during custodial interrogation.

46. *See* text accompanying note 4, *supra.*

47. 4 WIGMORE, EVIDENCE § 1071 (3d ed. 1940).

48. *See* Miranda v. Arizona, 384 U.S. 436, 443 (1966); Kemp, *The Background of the Fifth Amendment in English Law: A Study of Its Historical Implications,* 1 WM. & MARY L. REV. 247 (1958).

49. *See generally* People v. Simmons, 28 Cal. 2d 699, 172 P.2d 18 (1946); Commonwealth v. Dravecz, 424 Pa. 582, 227 A.2d 904 (1967). *See also* Note, *Implied Admissions: A Violation of the Privilege Against Self-Incrimination,* 6 U.C.L.A. L. REV. 593 (1959).

standing a voluntary initiation of communication by the accused. In *United States ex rel. Parker v. McMann*[50] it was argued by the prosecution that the defendant had waived his right to remain silent by voluntarily answering some questions and could not reassert that right when asked an embarassing question. Though it did not decide the issue, the court indicated that such reasoning could not stand in light of the statement in *Miranda* that "where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated."[51]

This language in *Miranda* makes clear that the privilege against self-incrimination, once waived by the accused, is not waived for all time. It can be reinstated by indicating in any manner that he no longer desires to answer any further questioning. "At this point he has shown that he intends to exercise his Fifth Amendment privilege. . . ."[52] There is no room for the contention that he is exercising his fifth amendment right only when the court determines that it would seem natural to do so.

The "peculiar circumstances" which the Supreme Court of Arizona found in *O'Dell* could have an immense effect on future custodial interrogations in Arizona. On the basis of this decision, if upon arrest the accused seeks to deny guilt, he has waived his right to remain silent. In the face of incriminating evidence he must respond or his silence may be used at trial to prove guilt. It is an open invitation to law enforcement agents to read *Miranda* warnings to the accused and wait for the defendant to attempt to exculpate himself. It would be easy to extend the reasoning of *O'Dell* to include situations where the accused attempts to exculpate himself and the police, lacking any incriminating evidence with which to confront him, assert a mere verbal accusation. The net effect of *O'Dell*, then, would be to encourage slackness on the part of the police in their search for independent evidence. Maneuvering an individual into denying his guilt so as to allow confrontation with evidence in hand or verbal accusation requires expenditure of less time and energy. Such tactics are inconsistent with the accusatorial criminal system and the fifth amendment which safeguards it from abuse.

50. 308 F. Supp. 477 (S.D.N.Y. 1969). The defendant was arrested for stealing a purse from a woman entering her apartment house. He was questioned by detectives and stated that he had been at the apartment house, but was there for the sole purpose of visiting a friend. When asked to give the address and name of his friend, he made no reply.

51. 384 U.S. at 475-76.

52. *Id.* at 473-74 (emphasis added).

Most alarming is the precarious position in which *O'Dell* places a defendant, whether he be innocent or guilty. After he has denied guilt, the defendant is then forced to make an election. By remaining silent when confronted, he risks having his silence used against him at trial. If he replies, there is the risk of making damaging remarks while under pressure of police questioning. This might then necessitate a further election by the defendant at his trial, forcing him to testify to explain the harmful custodial remarks thus risking attendant damaging cross-examination, or to remain silent and allow the post-arrest statements to stand uncontroverted.

State v. O'Dell, although carefully limited to its facts by the Supreme Court of Arizona, nevertheless imposes an impermissible penalty on the exercise of the fifth amendment privilege against self-incrimination. By equating silence with guilt during post-arrest custodial conversations initiated by the accused, it lies in direct conflict with decisions of the Supreme Court of the United States and other jurisdictions. It is hoped that when this issue is raised in later cases, *O'Dell* will be very narrowly construed. Until that time, the renewed life given the tacit admission rule substantially erodes the constitutional right to remain silent in Arizona.

EFFECTIVE ASSISTANCE OF COUNSEL

Although an accused in criminal proceedings was initially guaranteed only the right to representation by counsel,[1] *Powell v. Alabama*[2] has been interpreted to include a right to the effective assistance of counsel.[3] In *Powell* the Supreme Court of the United States, speaking of appointed counsel in capital cases, said that the "duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[4] The extension of the right to counsel to all felony prosecu-

1. U.S. CONST. amend. VI; ARIZ. CONST. art. 2, § 24; Johnson v. Zerbst, 304 U.S. 458 (1938) (counsel must be appointed for defendants in the federal courts who are unable to employ counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to appointed counsel extended to state courts).

2. 287 U.S. 45 (1932).

3. *See* Mitchell v. United States, 259 F.2d 787, 789 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949); Note, *The Right to Counsel and the Neophyte Attorney*, 24 RUTGERS L. REV. 378, 380 (1970).

4. 287 U.S. at 71. This idea has been reaffirmed in later cases. Anders v. California, 386 U.S. 738 (1967); Ellis v. United States, 356 U.S. 674 (1958); Michel v. Louisiana, 350 U.S. 91 (1955); Hawk v. Olson, 326 U.S. 271 (1945); White v. Ragen, 324 U.S. 760 (1945); Glasser v. United States, 315 U.S. 60 (1942); Avery v. Alabama, 308 U.S. 444 (1940).

tions[5] has also multiplied claims of ineffective assistance.[6]

Courts generally repudiate claims that court appointed criminal defense attorneys have rendered ineffective assistance to their clients. While legal writers have often discussed the elements of ineffective assistance,[7] a majority of courts simply assert that counsel is ineffective when the trial is reduced to a farce or a sham.[8] Since these terms virtually defy definition, to describe them as "standards" would be misleading. Farce and sham are, at best, picturesque expressions used to convey the extreme combination of circumstances necessarily present before a defendant will be considered to be deprived of the effective assistance of counsel. This lack of concrete standards is understandable, since any rules must be "broad enough to encompass the wide variety of factual situations to which they must be applied and narrow enough to be an explicit and specific guide on the subject, yet realistic enough not to inhibit vigorous and zealous advocacy."[9] For the purposes of this analysis, "standard" will be used as a short-hand expression to embrace the terminology used by courts to describe effective or ineffective assistance of counsel.

The Supreme Court of Arizona recently reaffirmed its standards for determining the quality of assistance in *State v. Brown*,[10] in which the validity of a conviction for assault with intent to commit murder was questioned.[11] The court, rejecting the claim of ineffective assistance on the basis of the record before it, said that "counsel must have been so incompetent as to have made the trial a farce or mockery of justice. Counsel in the instant case appears to have adequately represented the

5. Gideon v. Wainwright, 372 U.S. 335, 344 (1963): "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *See* Comment, *Court Appointed Counsel for Indigent Misdemeanants*, 6 ARIZ. L. REV. 280 (1965).

6. *See* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 291 (1964).

7. *See generally* Simpson, *The Right to Effective Assistance of Counsel*, 42 MISS. L.J. 213 (1971); Waltz, *supra* note 6; Note, *supra* note 3; Comment, *Incompetency and Inadequacy of Counsel as a Basis for Relief in Federal Habeas Corpus Proceedings*, 20 SW. L.J. 136 (1966).

8. *See* Allen v. Van Cantfort, 436 F.2d 625 (1st Cir.), *cert. denied*, 402 U.S. 1008 (1971); United States v. Hammonds, 425 F.2d 597 (D.C. Cir. 1970); Bouchard v. United States, 344 F.2d 872 (9th Cir. 1965); United States *ex rel.* Cooper v. Reincke, 333 F.2d 608 (2d Cir.), *cert. denied*, 379 U.S. 909 (1964); State v. Brookshire, 107 Ariz. 21, 480 P.2d 985 (1971).

9. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 6 (Tent. Draft 1970).

10. 107 Ariz. 375, 489 P.2d 12 (1971).

11. Counsel for the appellant filed the appeal pursuant to the mandate of Anders v. California, 386 U.S. 738 (1967), in which the Court held that appointed counsel cannot simply conclude that an appeal lacks merit and thus deprive the defendant of his right to counsel on appeal. If counsel finds the defendant's case to be frivolous, he may request permission to withdraw which must be accompanied by a brief referring to anything in the record arguably supporting the appeal.

defendant."[12] Although the decision constituted only an affirmation of the sham statement previously expressed by the court, effective assistance of counsel is a recurring issue and current standards should be examined because of the constitutional and ethical problems[13] presented. The parameters of these standards are not self-evident, and an examination of their application may demonstrate when a claim of ineffective assistance will be sustained. This analysis will examine the standards which have been said to exist in Arizona and other jurisdictions. Through an evaluation of the judicial tests which have been utilized to determine the effectiveness of a criminal defendant's representation, suggestions for a more workable standard will be set forth.

Of the numerous occasions Arizona courts have considered the issue, only once has a court found the representation of counsel to be inadequate. In *State v. Lopez*[14] the court of appeals determined that several prejudicial factors operated to reduce the trial to a farce. Counsel was inexperienced, being a member of the bar for a mere six months.[15] He failed to prepare by not interviewing the prosecution witnesses and not objecting to improper questioning. In one instance, the court instructed counsel that he should object because the prosecution was asking leading questions. Moreover, counsel conceded the admissibility of crucial items of arguably inadmissible evidence linking the accused to the crime. The court concluded that counsel was seemingly unaware of the duty owed to his client.[16]

Arizona cases consistently state that a defendant is denied the effective assistance of counsel only when counsel's lack of diligence or competence reduces the trial to a "farce,"[17] a "sham"[18] or a "mockery

12. 107 Ariz. at 377, 489 P.2d at 14 (citations omitted). The prosecution in *Brown* was in possession of the iron pipe used to commit the assault, and the money that was stolen was recovered from the car that the defendant was driving. In addition, the victim and two eyewitnesses identified the defendant as the assailant. Brief for Appellant at 1, 2, State v. Brown, 107 Ariz. 375, 489 P.2d 12 (1971). At the arraignment, counsel for the defendant waived the preliminary hearing and entered a plea of guilty. On the basis of this record, the claim of ineffective assistance of counsel appears to be without merit.

13. Although ethical problems presented by ineffective assistance of counsel are beyond the scope of this commentary, it should be noted that attorneys are under an ethical obligation to adequately represent their clients. *See* Commonwealth v. Scoleri, 415 Pa. 218, 202 A.2d 521 (1964); Johns v. Smyth, 176 F. Supp. 949 (E.D. Va. 1959). *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS 6 and 7; ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, (Approved Draft, 1971).

14. 3 Ariz. App. 200, 412 P.2d 882 (1966).

15. For a discussion of the effect of inexperience on the validity of a claim of ineffective assistance, *see* Note, *supra* note 3.

16. 3 Ariz. App. at 206, 412 P.2d at 888.

17. State v. Brookshire, 107 Ariz. 21, 24, 480 P.2d 985, 988 (1971); State v. Bustamante, 103 Ariz. 551, 555, 447 P.2d 243, 247 (1968).

18. State v. Tafoya, 104 Ariz. 424, 428, 454 P.2d 569, 573 (1969); State v. Kruchten, 101 Ariz. 186, 197, 417 P.2d 510, 521 (1966), *cert. denied*, 385 U.S. 1043 (1967).

of justice."[19] Moreover, the trial procedure must have been "shocking to the conscience"[20] of the court and an "extreme" case before relief will be granted.[21] Although *Lopez* enumerated the factors which, taken as a whole, might reduce the trial to a farce, other cases have not delineated the nature and extent of prejudicial effect which must be present before the extreme case necessary for reversal is shown. Cases from the federal court system are instructive in attempting to fill this vacuum.

The right to effective assistance of counsel in the District of Columbia Circuit was described as procedural in *Mitchell v. United States,*[22] requiring only that counsel have a reasonable opportunity to prepare his defense and have no interests conflicting with those of the defendant. Generally, the right is no longer described as procedural, and the defendant must demonstrate the trial to be a mockery or a farce.[23] These words are "not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing requisite unfairness."[24]

The Fifth Circuit requires that attorneys render "reasonably effective assistance."[25] While this language seems to imply that a lesser degree of incompetence is required to render counsel's assistance ineffective, and while writers recognize this as a reformulation of the farce standard,[26] the distinctions between the standards are muddled, if they exist at all. Thus, although the Fifth Circuit consistently cites the "reasonably effective assistance" standard as the constitutionally required standard,[27] it has described the reasonable criteria as encompassing those situations in which the trial is reduced to a "farce" or "shocking to the conscience" of the court and a "mockery of justice."[28] The cases reversed due to ineffective counsel are usually extreme examples of incompetence or indifference.[29]

19. State v. Brookshire, 107 Ariz. 21, 24, 480 P.2d 985, 988 (1971); State v. Lopez, 3 Ariz. App. 200, 204, 412 P.2d 882, 886 (1966).
20. State v. Kruchten, 101 Ariz. 186, 197, 417 P.2d 510, 521 (1966); State v. Cuzick, 5 Ariz. App. 498, 504, 428 P.2d 443, 449 (1967).
21. State v. Hill, 104 Ariz. 238, 239, 450 P.2d 696, 697 (1969); State v. Streett, 11 Ariz. App. 211, 215, 463 P.2d 106, 110 (1969).
22. 259 F.2d 787 (D.C. Cir.), *cert. denied,* 358 U.S. 850 (1958).
23. Bruce v. United States, 379 F.2d 113, 116 (D.C. Cir. 1967).
24. United States v. Hammonds, 425 F.2d 597, 601 (D.C. Cir. 1970), *quoting* Bruce v. United States, 379 F.2d 113, 116 (1967).
25. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), *modified,* 289 F.2d 928 (5th Cir. 1961), *cert. denied,* 369 U.S. 877 (1961).
26. *See* Note, *supra* note 3, at 384; Comment, *supra* note 3, at 141 (called the "stricter test").
27. Bendelow v. United States, 418 F.2d 42, 50 (5th Cir. 1969), *cert. denied,* 400 U.S. 967 (1970); Odom v. United States, 377 F.2d 853, 858 n.3 (5th Cir. 1967).
28. 418 F.2d at 50, 377 F.2d at 858.
29. In MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), the petitioner demonstrated an extreme case of prejudicial circumstances, including short notice of the trial,

The Fourth Circuit has deliniated principles which explain more fully the conduct expected from a trial attorney.[30] Besides being promptly appointed, counsel should confer with his client without delay and as often as necessary. The accused should be advised of his rights and his cooperation solicited for matters of potential defense. Counsel should complete appropriate factual and legal investigations and allow time for reflection and preparation before trial. "An omission or failure to abide by these requirements constitutes a denial of effective representation."[31] Once a defendant successfully demonstrates a violation of these requirements, the state then has the burden of establishing a lack of prejudice against the defendant.[32]

As an indication of the requisite conduct that is demanded of a defense attorney, the Court of Appeals of the Fourth Circuit has cited a checklist prepared for the use of appointed counsel in the District Court of Maryland.[33] This checklist prescribes conferences with the accused, the arresting officers, the witnesses and the prosecution. The form also suggests some 32 possible defenses and tactical motions that trial counsel should consider.[34] While all the points covered may not apply in any given case, the list does display the variety of factors that should be considered and which may be overlooked.[35] The adoption of a checklist may be useful in two respects. First, the defendant may have more confidence in his counsel by knowing that different alternatives have been considered. Second, the attorney may be more adequately protected from charges of ineffectiveness. A checklist, signed by the defendant and containing all the pertinent facts of the case,

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advancement of the trial date without notice and a trial without his witnesses. Moreover, the defendant had the services of two inexperienced attorneys who were seeking employment with the district attorney at the time of the trial. They made no effort to interrogate witnesses, to present defense witnesses or to apply for a continuance. Even under the farce and sham standard, the conviction in *MacKenna* would probably have been reversed. *See also* Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967) (defendant was thrice committed to a mental institution and attempted suicide twice in the same year).

The "reasonably effective assistance" of counsel standard has been cited by the Court of Appeals of Arizona in Lopez v. State, 3 Ariz. App. 200, 412 P.2d 882 (1966). The court cited *MacKenna* for the standard, but simultaneously limited its impact by declaring that appellant successfully demonstrated that the trial had been reduced to a farce and a sham. *Id.* at 203-04, 412 P.2d at 885-86.

30. Braxton v. Peyton, 365 F.2d 563 (4th Cir.), *cert. denied,* 385 U.S. 939 (1966); Martin v. Virginia, 365 F.2d 549 (4th Cir. 1966).

31. Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968).

32. *Id.* at 226.

33. Braxton v. Peyton, 365 F.2d 563, 565 n.1 (4th Cir. 1966); Martin v. Virginia, 365 F.2d 549, 552 n.4 (4th Cir. 1966).

34. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE COMM. TO IMPLEMENT THE CRIMINAL JUSTICE ACT OF 1964, *Proposed Plan of the United States Dist. Court for the Dist. of Md. and suggested procedures under the plan,* 36 F.R.D. 277, 338-41 (1965) (App. 2 C, Form D).

35. Martin v. Virginia, 365 F.2d 549, 552 n.4 (4th Cir. 1966).

could be used as a factor in determining whether counsel has met the requirements of effective representation.

Prisoners present many unsubstantiated and frivolous claims in postconviction appeals,[36] and attorneys might become more reluctant to accept court assignments if their efforts are increasingly maligned.[37] The possibility of legitimate claims, however, requires the adoption of workable standards to separate frivolous claims from those that are meritorious. Neither the farce nor the reasonably effective counsel criteria provide any guidelines for courts, attorneys or defendants. The Fourth Circuit appears to have adopted a flexible position that may provide manageable principles, furnishing protection to both the accused and the legal profession. If this standard proves too ambiguous, a checklist similar to the one used in the District Court of Maryland may be appropriate.

INMATES' RIGHT TO LAWBOOKS

> May I glance at the books: . . . No said the woman . . . that isn't allowed. The books belong to the Examining Magistrate. I see, said K., nodding, these books are probably law books, and it is an essential part of the justice dispensed here that you should be condemned not only in innocence but also in ignorance.[1]

Courts have traditionally exercised a policy of noninterference with the internal administration of prisons.[2] Prisoners have often been considered wards of the state possessing few rights,[3] and consequently subject to the essentially unrestricted discretion of prison administrators. Only in recent years have courts begun to seriously question decisions made by prison officials. *Foggy v. State*[4] presented the Supreme Court of Arizona with an opportunity to examine one aspect of the prisoners' rights issue, whether an inmate is entitled to access to lawbooks.[5]

36. *See* Waltz, *supra* note 6, at 296.
37. Gray v. United States, 299 F.2d 467, 468 (D.C. Cir. 1962).

1. F. KAFKA, THE TRIAL 62 (1964).
2. *See, e.g.*, Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954); Henson v. Welch, 199 F.2d 367 (4th Cir. 1952); Williams v. Steele, 194 F.2d 32 (8th Cir.), *cert. denied*, 344 U.S. 822 (1952).
3. *See* Ruffin v. Comm'r, 62 Va. (21 Gratt.) 790, 796 (1971) (prisoner stripped of rights upon incarceration, privileges granted are those which "the law in its humanity accords to him").
4. 107 Ariz. 532, 490 P.2d 4 (1971).
5. *Foggy* also dealt with the question of whether habeas corpus was the appropriate method of raising this issue. While the court held that the writ could not be used to correct alleged mistreatment of a prisoner incarcerated pursuant to a valid conviction, *id.* at 533, 490 P.2d at 5, it still dealt with the law book issue on the merits.

The petitioner in *Foggy*, an inmate at the Arizona State Prison, was refused permission to consult the Arizona statutes in the prison Diagnostic Center "with the cold turkey explanation that Petitioner could not use the said Statutes."[6] Acting in propria persona, he filed a habeas corpus petition in superior court alleging that he was denied reasonable access to lawbooks and requesting either that such access be granted or that he be discharged from custody. The petition was denied by the court, and on appeal the supreme court affirmed, stating that the petitioner was not entitled to the lawbooks since other alternatives were available, and that "[u]nless there is some persuasive reason to the contrary, the distribution and use of law books at the state prison is a matter better left to prison authorities."[7] This analysis will first examine the state of the law as to an inmate's access to lawbooks, and *Foggy* will then be discussed in light of the evolving rules in that area. It is suggested that in view of a recent case,[8] the decision in *Foggy* is no longer viable.

It is now clear that a prisoner retains some rights in spite of his incarceration.[9] The view that "[a] prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law. . . ."[10] seems to characterize the modern approach to prisoners' rights. A problem arises, however, in determining exactly which rights are taken by "necessary implication." This determination can be made "only after prison policy is taken into consideration."[11] This balancing often weighs against the prisoner due to the lingering effect of the "hands off" doctrine. Under this doctrine, courts have been reluctant to intervene in the internal operation of prison systems.[12] The doctrine is the product of earlier judicial de-

6. 107 Ariz. at 533, 490 P.2d at 5. This commentary will not discuss the remedy of habeas corpus in Arizona, particularly since a Supreme Court case decided subsequent to *Foggy* has reiterated the traditional rule that states should have the widest latitude in fashioning their own rules concerning extraordinary writs. Wilwording v. Swenson, 404 U.S. 249 (1971). *Wilwording* did hold, however, that prisoners' claims of mistreatment could be brought under federal civil rights statutes without the necessity of exhausting alternative state remedies. 404 U.S. at 250. The case does not compel state courts to view habeas corpus petitions as claims under civil right statutes, but merely sets forth an additional federal remedy that prisoners may seek.

7. *Id.* at 534, 490 P.2d at 6.

8. Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub nom.*, Younger v. Gilmore, 404 U.S. 15 (1971).

9. *See* Johnson v. Avery, 393 U.S. 483 (1969) (rights to reasonable access to the courts); Cooper v. Pate, 378 U.S. 546 (1964) (first amendment rights including freedom of religion); Toles v. Katzenbach, 385 F.2d 107 (9th Cir. 1967) (right to equal protection and rights not forfeited by requirement of prison discipline); Sostre v. Otis, 330 F. Supp. 941 (S.D.N.Y. 1971) (rights to read and be free from arbitrary punishment).

10. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

11. Gilmore v. Lynch, 319 F. Supp. 105, 109 (N.D. Cal. 1970).

12. *See* Banning v. Looney, 213 F.2d 771 (10th Cir. 1954); Henson v. Walch, 199 F.2d 367 (4th Cir. 1952).

terminations that "[c]ourts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."[13]

Under this rationale, it has traditionally been held that if there is a compelling countervailing prison policy related to prison discipline, administration or security, the courts may not interfere with denials of a prisoner's rights.[14] The only time courts may properly interfere to afford a remedy is when prison officials arbitrarily deny inmates their basic constitutional rights.[15]

One of the rights a prisoner retains in spite of his incarceration is the right to read,[16] which can be denied only in those severe instances where there is a substantial danger that prison administration will be disrupted.[17] Examples of books which might pose a substantial danger of disruption include those "demonstrating in detail how to saw prison bars with utensils used in the mess hall, or how to provoke a prison riot . . . ."[18] Clearly, lawbooks in the possession of the prisoner should not be considered to pose a substantial danger.

To say that one has a right to read lawbooks in his possession, however, does not necessarily mean that a prisoner has a right to be furnished such books. Arguably, a prisoner has such a right since access to lawbooks facilitates the broader right of access to the courts, a basic right recognized under the due process clause of the fourteenth amendment.[19] In *Johnson v. Avery*[20] the United States Supreme Court concluded that while access to the courts was a fundamental right, the determination of whether the prisoner was in fact afforded access was

13. Banning v. Looney, 213 F.2d 771 (10th Cir. 1954); *see* Note, *Prisoners' Rights—Restrictions on Religious Practices*, 42 U. COLO. L. REV. 387, 388-89 (1970).

14. Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969) (prison need not serve meals after sundown to accommodate prisoner's religious views); Evans v. Ciccone, 377 F.2d 4 (8th Cir. 1967) (prison can prevent prisoner from expounding religious views in manner which disturbs other prisoners).

15. *See, e.g.* Johnson v. Avery, 393 U.S. 483 (1969); Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Sostre v. Otis, 330 F. Supp. 941, 945 (S.D.N.Y. 1971); Fortune Soc'y v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970).

16. Rivers v. Royster, 360 F.2d 593 (4th Cir. 1966) (right to read a nonsubversive black newspaper based on equal protection principles); Sostre v. Otis, 330 F. Supp. 941, 945 (S.D.N.Y. 1971) (prisoner retains the right to read); Fortune Soc'y v. McGinnis, 319 F. Supp. 901, 903 (S.D.N.Y. 1970) (deprivation of constitutional right to read constituted "irreparable and immediate injury").

17. The cases which acknowledge the inmate's right to read generally restrict this right where the literature is pornographic, highly inflammatory or would otherwise present a "clear and present danger to the security of a prison, or to the rehabilitation of prisoners." Sostre v. Otis, 330 F. Supp. 941 (S.D.N.Y. 1971).

18. *Id.* at 945.

19. Dowd v. United States, 340 U.S. 206 (1951); White v. Ragan, 324 U.S. 760 (1945) (prisoners' right of access to state courts); *Ex parte* Hull, 312 U.S. 546 (1941) (right of access to federal courts); Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961); Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd*, Younger v. Gilmore, 404 U.S. 15 (1971).

20. 393 U.S. 484 (1969).

to be made on a case-by-case basis. An inmate in *Johnson* had filed a motion for lawbooks and a typewriter, seeking relief from his confinement in maximum security. The prisoner had been confined for violating a prison regulation prohibiting "jailhouse lawyering." Commenting on the prison regulation in question, the Court held that unless the state provided some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it could not validly enforce such a regulation.[21]

In determining whether a prisoner has been accorded his right of access to the courts, some courts have looked to the accessibility of lawbooks as a factor. In *Hatfield v. Bailleaux*[22] seven inmates of the Oregon State Penitentiary sued to enjoin prison officials from enforcing regulations which limited the times and places during which inmates could engage in legal research and restricted the acquisition and retention of lawbooks and legal materials. Petitioners alleged that they were thereby denied reasonable access to the courts. The Court of Appeals for the Ninth Circuit acknowledged that lawbooks and other legal materials facilitated an inmate's access to the courts, but declined to hold that these legal materials were essential or that the inmate had a right to them. The court concluded that whether reasonable access to the courts is afforded the inmate depends upon all of the surrounding circumstances,[23] and that since petitioners had at least some access to lawbooks, although restricted, they were not deprived of reasonable access to the courts. The court thus impliedly recognized that providing access to lawbooks is one definite means to accommodate the inmate's right of access to the courts, but viewed such access to lawbooks merely as a viable alternative, and not as a right in itself.

Accessibility to lawbooks was recognized as a right in *Gilmore v. Lynch*.[24] The California prisoners in *Gilmore* contested the validity of a prison regulation which limited lawbooks in California prison libraries to specified works, and excluded state and federal reports and annotated codes.[25] A three-judge district court invalidated the regulation because it denied prisoners reasonable access to the courts, notwithstanding the state's argument of the need for economy and standardization.[26] Recognizing that the alternative means of securing post-

21. *Id.* at 490.
22. 290 F.2d 632 (9th Cir. 1961).
23. *Id.* at 637.
24. 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd*, Younger v. Gilmore, 404 U.S. 15 (1971).
25. The regulation limited lawbooks in prison libraries to federal and state constitutions; state penal, welfare, health and safety and vehicle codes; a law dictionary, a work on state criminal procedure, a digest and state rules of court. *Id.* at 107 n.2.
26. The court also rejected the state's contention that prisoners do not need law-

conviction legal aid were inadequate,[27] the court held that "access to courts" encompassed all the means an inmate might require to obtain a fair hearing from the judiciary on all charges brought against him or grievances alleged by him.[28] The court further maintained that inadequate lawbooks in the prison library did not afford the indigent equal protection, since the California prisons allowed financially capable prisoners to purchase lawbooks and other materials for their personal use,[29] thus enhancing their access to the courts and their chance of receiving a meaningful hearing.[30] The court therefore enjoined the enforcement of the regulation, but left it to the Department of Corrections to decide whether to expand the list of basic codes and references, as suggested by the court, or adopt some new method of "satisfying the legal needs of its charges."[31]

The United States Supreme Court affirmed *Gilmore* in a per curiam opinion[32] on November 8, 1971, 6 days after *Foggy* was decided by the Supreme Court of Arizona, and 15 days before a motion for rehearing was denied.[33] It is unknown whether *Gilmore* was even cited to the Arizona court. Indeed, the precise effect of the Supreme Court's brief[34] per curiam affirmance of the three-judge district court opinion in *Gilmore* is itself unclear.[35] Arguably, the court's affirmance indicates its agreement that the prison's countervailing considerations do not offset the prisoner's right of access to lawbooks, and that the right to lawbooks is a major consideration in determining whether

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books because they need not make legal arguments but only allegations of fact, a view expressed in Hatfield v. Bailleaux, 290 F.2d 632, 639 (9th Cir. 1961), and Oregon v. Gladden, 240 F.2d 910, 912 (9th Cir. 1957). The court stated that "[a] prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent. He should know *which* facts are legally significant, and merit presentation to the Court, and which are irrelevant or confusing." 319 F. Supp. at 110.

27. 319 F. Supp. at 111.

28. *Id.* at 110.

29. 319 F. Supp. at 107 n.1.

30. 319 F. Supp. at 111. In this regard the court relied on Gideon v. Wainwright, 372 U.S. 335 (1963) (indigents right to appointed counsel in serious cases), and Griffin v. Illinois, 351 U.S. 12 (1956) (due process and equal protection require that all indigents be furnished free transcripts, at least where petitioner's allegations of error are uncontested).

31. *Id.* at 112.

32. Younger v. Gilmore, 404 U.S. 15 (1971).

33. Foggy v. State, 107 Ariz. 532, 490 P.2d 4 (1971).

34. The court, "[h]aving heard the case on its merits," merely affirmed the lower court opinion on the basis of *Johnson v. Avery*. Younger v. Gilmore, 404 U.S. 15 (1971). Arguably, however, *Gilmore's* concept of "access to the courts" went beyond the rule set forth in *Johnson v. Avery*. *See* text accompanying notes 20-21, *supra*.

35. Since the appeal was from a properly constituted three-judge court, the Supreme Court's jurisdiction was mandatory. 28 U.S.C. § 1253 (1970). Although the Court's per curiam affirmance was a decision on the merits, R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 232-33 (4th ed. 1969), the weight that would have been accorded the decision by the Supreme Court of Arizona is uncertain.

a prisoner has been afforded reasonable access to the courts. The possible implications of *Gilmore* are that the prison should afford the inmate access to an adequate supply of lawbooks, and if the prison's lawbooks are inadequate it should provide at least the basic books suggested by the district court.[36]

Since *Foggy* was decided before *Gilmore* was affirmed by the Supreme Court, the Arizona supreme court was not compelled to accept the view that access to the courts included the right to lawbooks. *Johnson v. Avery* had determined that the requirement of access to the courts was satisfied if any reasonable alternative was available; under this requirement, courts had a wide range of discretion in determining whether an inmate was denied access to the courts. The Arizona supreme court maintained that Foggy's right of access to the courts was not denied because other legal services were available to him, noting that he had been represented by counsel in an earlier case that same year, and that the University of Arizona College of Law conducted a post-conviction clinic at the prison.[37] Now, however, it is submitted that *Gilmore* is dispositive of the issue, and lawbooks must be provided to prisoners to assure their constitutional right of access to the courts.

Apart from the argument that there is a right to lawbooks as an aspect of access to courts, Foggy should have been granted the right to the Arizona statutes as part of his constitutionally protected right to read available books. Under *Gilmore* this right to read essential lawbooks is arguably inviolable, but even under the "balancing" test Foggy clearly should have prevailed. The Arizona State Prison offered no plausible countervailing considerations to overcome the heavy burden it had to meet to justify its denial of lawbooks. Moreover, if the prison counselor was correct in his assertion that the books were for the exclusive use of new and condemned inmates, this would raise equal protection questions in light of *Gilmore*.[38]

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36. The Supreme Court echoed the spirit of *Gilmore* in Cruz v. Hauck, 404 U.S. 59 (1971), in which inmates instituted an action in district court to restrain prison officials from interfering with their reasonable access to hardbound lawbooks and other legal matter. The prison officials maintained that prison security necessitated removing hardback covers as part of an overall scheme to arrest smuggling of contraband. Without conducting a hearing, the district court summarily dismissed the complaint. The Supreme Court remanded the case for further consideration in light of *Gilmore*. Justice Douglas, concurring, maintained that "[w]hatever security measures may be needed respecting books, it is not conceivably plausible to maintain that essential books can be totally banned." *Id.* at 60.

37. 107 Ariz. at 534, 490 P.2d at 6.

38. Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970); *see* Note, *Prisoners' Rights and Equal Protection*, 20 AM. U.L. REV. 482, 483 (1971); Comment, *Rights of Prisoners While Incarcerated*, 15 BUFF. L. REV. 397 (1965).

Gilmore has modified the traditional concept of the right of access to the courts to include every reasonable alternative. The right to read available law books and the right to be supplied essential lawbooks are alternatives encompassed within the expanded notion of access to the courts. Although *Foggy* perhaps correctly interpreted law existing at the time it was decided, if the Arizona courts are faced with the issue in the future, *Gilmore* would seem to require a different result.

ACCEPTANCE OF GUILTY PLEAS

The guilty plea plays a vital role in the American system of criminal justice, for approximately 90 percent of all convictions are the result of such pleas.[1] While convictions secured in this manner are more expedient, less costly and, on the whole, far less burdensome on judicial resources than those secured after a full trial,[2] the procedures followed by many trial courts in accepting a plea of guilty create problems for both defendants and appellate courts. The problem appellate courts often face is that the transcript of the proceedings below offers inadequate information upon which to judge the appellant's claims of unfairness or impropriety.[3] When this problem arises, it is usually the direct result of a failure of the trial court to thoroughly examine the defendant concerning his plea. The record reveals neither merit nor frivolity, and an abuse of a defendant's constitutional rights may thus be hidden.

State v. Lerch[4] presents an example of this problem. Arguing that his guilty plea was void as the result of coercion, Lerch alleged that the doctor who visited him at the jail said that he could obtain medical attention for his drug addiction only by pleading guilty and being sent to the state penitentiary. The Supreme Court of Arizona rejected the appeal, finding that the record offered no support for such allegations. Because the defendant was represented by counsel at the time of the plea and had stated to the trial court that the decision to plead guilty was his own, the court felt justified in upholding the conviction and in rejecting the allegations of involuntariness.[5]

1. McCarthy v. United States, 394 U.S. 459, 463 n.7 (1969); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 8 (1966).
2. D. NEWMAN, *supra* note 1, at 8.
3. *Id.* at 20.
4. 107 Ariz. 529, 490 P.2d 1 (1971).
5. *Id.* at 530-31, 490 P.2d at 2-3. *Lerch* also dealt with procedures that should have been followed had the defendant sought to prove his allegations. Instead of di-

This commentary will consider the pitfalls inherent in the guilty plea, and the waiver of constitutional rights involved. Then, the procedures used in the federal trial courts under Rule 11[6] will be examined. Finally, the problems of the guilty plea in Arizona courts will be analyzed in the context of *Lerch* and in light of the requirements of the due process clause of the United States Constitution.

The Decision to Plead Guilty

The defendant is faced with a difficult task in making his decision to plead guilty. The decision will normally be made without the advantage of having examined witnesses or knowing the weight of the state's case.[7] The fact that a guilty plea is final[8] adds to the gravity of the decision, as does the fact that by pleading guilty the defendant waives not only three basic constitutional rights—the right to trial by jury, the right to confront one's accusers, and the privilege against self-incrimination[9]—but also the right to challenge any prior proceedings.[10] He is thus waiving the right to challenge a prior coerced confession, an unlawful search or an insufficient indictment.[11] Any defenses he might have raised are forfeited. Because defendants sometimes plead guilty for reasons other than guilt in fact,[12] and because these constitutional rights are waived, trial courts must follow certain procedures when accepting a plea in order to ensure that a conviction comports with due process.

The Guilty Plea in the Federal Courts

Rule 11 of the *Federal Rules of Criminal Procedure* and its judicial gloss require federal trial courts to follow procedures intended

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rectly appealing his conviction, Lerch should have filed a motion with the trial court to have his sentence vacated under ARIZ. R. CIV. P. 60(c). It appears from the opinion that the right to this collateral proceeding was forfeited by perfecting an appeal. 107 Ariz. at 532, 490 P.2d at 4. Whether such a "waiver" is valid is beyond the scope of this discussion.

6. FED. R. CRIM. P. 11.

7. McMann v. Richardson, 397 U.S. 759, 769 (1970).

8. Kercheval v. United States, 274 U.S. 220, 223 (1927).

9. Boykin v. Alabama, 395 U.S. 238, 243 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969).

10. Note, *Post-Conviction Relief From Pleas of Guilty: A Diminishing Right*, 38 BROOKLYN L. REV. 182, 184 (1971).

11. Note, *Constitutional Law—Guilty Pleas—A New Voluntariness Standard?*, 45 TUL. L. REV. 1049, 1050 n.6 (1971).

12. There are several reasons why an innocent defendant might plead guilty. A defendant may be totally innocent but emotionally disturbed. A defendant may be guilty of a lesser offense, and yet be ignorant of the legal elements of the higher offense to which he is pleading guilty. An innocent defendant might plead guilty to one crime to avoid prosecution for a more serious crime which took place at the same time but in a different location, or he might plead guilty to protect another person. An innocent man may be so convinced that the jury will find him guilty that he will

to produce a record which will permit a rapid disposition of frivolous appeals while at the same time assuring that the defendant is adequately protected and his plea truly voluntary.[13] Rule 11 sets forth three basic requirements which must be met before a guilty plea may be accepted: the defendant must be personally addressed by the trial court, the plea must be entered voluntarily and with an understanding of the charge and the consequences of the plea and the judge must satisfy himself that a factual basis exists for the plea.[14] The first and third requirements are relatively easy to fulfill. The first is met if the defendant is in court and the trial judge directs his questioning to him personally.[15] That a factual basis for the plea exists may be drawn from questions directed to the defendant or the prosecutor, or from examination of the pre-sentence report.[16]

The second requirement is more troublesome. Voluntariness and knowledge are elusive concepts. The two cannot be considered in isolation, since voluntariness presupposes knowledge, but the trial judge should direct his questioning toward each element separately for the purpose of determining whether each exists. Perfunctory questioning is inadequate to determine whether the plea is voluntary and knowledgeable.[17] The judge may not assume from the fact that the defendant is represented by counsel that his plea is knowingly made.[18] A plea cannot be voluntary if the defendant's decision to plead guilty was prompted by physical coercion or threats, direct or implied promises, or other improper influences.[19]

The Supreme Court has said that a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."[20] Thus, to assure that the defendant understands the nature of the charge, the trial judge must determine whether the defendant understands the legal elements of the charge.[21]

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plead guilty and hope for judicial lenience. D. NEWMAN, *supra* note 1, at 23-24. Plea bargaining may well be responsible for more decisions to plead guilty than any other factor. See Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

13. McCarthy v. United States, 394 U.S. 459, 465 (1969).

14. FED. R. CRIM. P. 11.

15. United States v. Cody, 438 F.2d 287 (8th Cir. 1971); United States v. Tucker, 425 F.2d 624 (4th Cir. 1970).

16. McCarthy v. United States, 394 U.S. 459, 463 n.6 (1969).

17. United States v. Howard, 407 F.2d 1102, 1104 (4th Cir. 1969).

18. United States v. Cody, 438 F.2d 287, 288 (8th Cir. 1971); United States v. Tucker, 425 F.2d 624, 629 (4th Cir. 1970); DuBois v. Mancusi, 325 F. Supp. 694, 698 (W.D.N.Y. 1971).

19. Brady v. United States, 397 U.S. 742, 750 (1970). *See also* Kercheval v. United States, 274 U.S. 220, 224 (1927).

20. McCarthy v. United States, 394 U.S. 459, 466 (1969).

21. Woodward v. United States, 426 F.2d 959, 962 (3rd Cir. 1970).

For example, if intent is a requisite element of the offense charged, the defendant must be cognizant that he is admitting having possessed that intent.

The federal trial judge must also evaluate the defendant's knowledge of the consequences of a guilty plea before concluding that the plea is being entered knowingly and voluntarily. These consequences include the maximum possible sentence under the charge[22] and the fact that, because of a prior criminal record, the defendant will not be eligible for parole.[23] It has also been held that a trial judge should have inquired as to the defendant's awareness of "possible defenses to the charges and circumstances in mitigation thereof."[24] In general, since varying circumstances will require differing degrees of investigative thoroughness, many of these decisions can be made by the trial judge only on a case-by-case basis.[25]

Rule 11, along with the accompanying judicial gloss given it by the Supreme Court, is applicable only to the federal judicial system. In *Boykin v. Alabama*,[26] however, it is possible that the Supreme Court has imposed similar standards on state courts in the acceptance of guilty pleas on the basis of the due process clause of the fourteenth amendment. *Boykin* is written in terms of voluntariness and understanding, and the effect is to leave unclear precisely what due process requires of a trial judge in a state court. For example, the Court states that a waiver of the right to trial by jury, the right against compulsory self-incrimination and the right to confront one's accusers cannot be presumed "from a silent record."[27] There is a question, however, whether the record must show an express waiver of those rights or whether it need only show enough to justify a presumption that the defendant voluntarily and understandingly waived them.[28] At the very least, the Court is saying that if the requirements of Rule 11 are

22. Marvel v. United States, 380 U.S. 262 (1965); Jones v. United States, 440 F.2d 466 (2d Cir. 1971); Hinds v. United States, 429 F.2d 1322 (9th Cir. 1970); Tucker v. United States, 409 F.2d 1291 (5th Cir. 1969).

23. United States v. Smith, 440 F.2d 522 (7th Cir. 1971).

24. Sessions v. Wilson, 372 F.2d 366, 370 (9th Cir. 1970).

25. Note, *Guilty Pleas and the Concept of Waiver*, 5 WILLAMETTE L.J. 575, 584-85 (1969).

26. 395 U.S. 238 (1969). In *Boykin*, the defendant pleaded guilty to five indictments of common-law robbery. "So far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court." *Id.* at 239. Alabama law provided that a jury was to fix punishment after a guilty plea conviction, and the jury set the penalty at death for all five robbery indictments. The Court held that defendant's conviction was void under the due process clause.

27. *Id.* at 243.

28. The Seventh Circuit Court of Appeals has held that due process does not require such express waiver. United States v. Frontero, 452 F.2d 406 (7th Cir. 1971). Although that case dealt with a fifth amendment due process contention, its reasoning is applicable to a fourteenth amendment due process decision.

substantially followed in state-court acceptance of guilty pleas, the requirements of due process will also be met.[29] Whether due process allows less than a literal following of Rule 11 was not, however, made clear.

The Acceptance of a Guilty Plea in Arizona

The Supreme Court of Arizona has interpreted *Boykin* in *State v. Williker*.[30] Admitting that they "may have added to the confusion in Arizona," the court noted that inconsistent statements as to whether *Boykin* requires state courts to adhere to Rule 11 had appeared in earlier opinions.[31] The *Williker* court said that *Boykin* requires adherence not to the letter but only the spirit of Rule 11.[32] It is, however, unclear whether the spirit of Rule 11 can be met without meeting its literal requirements. Consequently, in the decisions in which Arizona courts have fallen short of literal compliance with Rule 11, it is important to determine whether spiritual compliance has been attained.

The first requirement, that the defendant be addressed personally, can be complied with fully or not at all, and the Arizona courts have evidenced no shortcomings in this area. When appeals are based on the second requirement, the claim that the trial court failed to satisfy itself that a factual basis existed for the plea, Arizona's appellate courts are generally able to find that the record furnishes proof that the factual basis determination was made.[33] In many instances, this determination is based on the defendant's express admission to the charge.[34] In other cases, the admissions of the defendant alone may not be adequate to constitute a factual basis, but are sufficient when bolstered by evidence incorporated into the preliminary hearing

29. In his dissenting opinion in *Boykin*, Justice Harlan felt, "[t]he court thus in effect fastens upon the states, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure." 395 U.S. at 245 (Harlan & Black, J.J., dissenting). *See* North Carolina v. Alford, 400 U.S. 25, 29 n.3 (1970).

30. 107 Ariz. 611, 491 P.2d 465 (1971).

31. *Id.* at 614, 491 P.2d at 468.

32. *Id.*

33. Arizona courts have concluded that the factual basis requirement must be fulfilled prior to the entry of judgment, but that it need not be made at the time of entry of the plea. *See* State v. Kuhlman, 15 Ariz. App. 359, 360, 488 P.2d 996, 997 (1971). Out of eleven recent appeals concerning the factual basis determination, only once was the appellate court unable to find that the trial court had failed to satisfy the requirement. State v. Jackson, 14 Ariz. App. 591, 485 P.2d 580 (1971) (defendant's guilty plea conviction vacated where the record disclosed no trial court determination of the existence of a factual basis on which the trial court could have concluded that the conduct admitted to by the defendant constituted the offense charged).

34. State v. Kuhlman, 15 Ariz. App. 359, 488 P.2d 996 (1971); State v. Nelson, 14 Ariz. App. 426, 484 P.2d 195 (1971); State v. Patterson, 14 Ariz. App. 158, 481 P.2d 528 (1971); State v. Wheatley, 106 Ariz. 524, 479 P.2d 409 (1971); State v. Reynolds, 106 Ariz. 47, 470 P.2d 454 (1970).

record or the probation officer's report.[35] Finally, there have been cases where a factual basis for the plea has been found solely on the basis of the probation officer's report or on the record of the preliminary hearing.[36] Thus, the methods used by the Arizona courts to establish a factual basis appear to be similar to those used by the federal courts under Rule 11.[37]

For the requirement that the plea be entered voluntarily and knowingly, the measure of compliance becomes a matter of degree. Arizona courts hold that a plea is void if involuntary,[38] but differences exist between the interpretation given the knowledge requirement by the Arizona courts and that given to Rule 11 by the Supreme Court of the United States. Thus, the Supreme Court of Arizona has stated that *Boykin* does not require that the right to trial by jury and the right to confront one's accusers "must be specifically and expressly waived by the accused prior to acceptance of his guilty plea."[39] Arizona courts have also found it unnecessary to inform a defendant of the possible range of sentence,[40] and when a defendant is represented by counsel, knowledge may in some cases be presumed.[41] Finally, Arizona courts have held that the trial judge need not inform the defendant of the legal elements of the offense to which he is pleading guilty.[42] It is extremely doubtful that these holdings are in spiritual harmony with Rule 11, or are consistent with due process requirements.

An analysis of *State v. Lerch* reveals that the spirit of Rule 11 may have again been disregarded. The following excerpt from that opinion indicates that the Supreme Court of Arizona relied too heavily upon assumptions unwarranted by the record in weighing the voluntariness of the defendant's plea:

> The following excerpts, taken from the record, clearly discount defendant's contention that his pleas were coerced:

35. *See* State v. Sullivan, 107 Ariz. 98, 482 P.2d 861 (1971); State v. Mancini, 107 Ariz. 71, 481 P.2d 864 (1971).

36. State v. Brown, 15 Ariz. App. 48, 485 P.2d 872 (1971); State v. Sutherland, 14 Ariz. App. 344, 483 P.2d 576 (1971); State v. Hogue, 106 Ariz. 532, 479 P.2d 417 (1971).

37. See text accompanying note 16 *supra.*

38. State v. Hogue, 106 Ariz. 532, 479 P.2d 417 (1971); State v. Jennings, 104 Ariz. 3, 448 P.2d 59 (1968).

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

40. State v. Leuck, 107 Ariz. 49, 481 P.2d 842 (1971); State v. Wheatley, 106 Ariz. 524, 479 P.2d 409 (1971).

41. State v. McCallister, 107 Ariz. 143, 483 P.2d 558 (1971); State v. Wheatley, 106 Ariz. 524, 479 P.2d 409 (1971); State v. Martinez, 102 Ariz. 215, 427 P.2d 533 (1967).

42. State v. Kuhlman, 15 Ariz. App. 359, 488 P.2d 996 (1971); State v. Brown, 15 Ariz. App. 48, 485 P.2d 872 (1971); State v. Jackson, 14 Ariz. App. 594, 481 P.2d 583 (1971); State v. Churton, 9 Ariz. App. 16, 448 P.2d 888 (1968).

Q. I assume . . . that you've talked this over to your full satisfaction with your lawyers about whether or not you should proceed to trial or plead guilty?

A. Yes.

Q. And may I ask you this, Mr. Lerch, do you feel like standing here today—that this is your decision to plead guilty to these matters, or do you feel like somebody has talked you into pleading guilty and you're just going along for the ride?

A. *It's my own decision sir.*

Q. Nobody had talked you into it and you feel like it's your decision, is that correct?

A. Yes, sir.[43]

This excerpt reveals only that the defendant consulted his attorney before entering a plea and that the decision to plead guilty was his own. While both factors lend support to the decision of the court that Lerch's plea was entered voluntarily, they do not alone clearly discount the allegation that he believed the only way he could get treatment for drug addiction was to plead guilty. It is entirely possible that such mistaken belief led defendant to "make his own decision" to plead guilty. Had the trial judge asked a simple yet more specific question, such as whether Lerch was pleading guilty for any reason beside the fact that he was guilty, then the answer would have either supported his allegation or shown it to be unfounded.

Conclusion

There are two benefits that would accrue to the state judicial system by following procedures similar to those of Rule 11 for the acceptance of guilty pleas: appellate court time could be saved because appeals would be fewer and easier to decide and the defendant's rights would be protected at the time he pleads guilty. In order to achieve these benefits, two suggestions can be made.

Initially, the appellate courts should vacate all judgments resulting from guilty pleas where an incomplete record appears, and allow the defendant to plead anew. Fair warning would thus be served on all trial courts that deficiencies in the record would not be tolerated, and a flood of new appeals could be prevented by making such a decision prospective only.[44] Second, the trial judge should be required to spend a few extra minutes sufficiently questioning the defendant to satisfy himself, and any appellate court, that the defendant understands

43. 107 Ariz. at 531, 490 P.2d at 3.
44. Halliday v. United States, 394 U.S. 831 (1969).

his situation, and that his plea is voluntary. In order to receive meaningful answers, questions must be asked in terms understandable to the particular defendant.[45] In light of the need to maintain this case-by-case flexibility, it should be unnecessary to require that trial courts adhere strictly to a set of formal questions. Under no circumstances, however, should the need to preserve flexibility serve as a rationale for permitting the trial judge to make presumptions unwarranted by the facts at hand, thereby diluting the protection intended for the defendant. The relatively minor burden, in terms of time and effort, thus cast upon the trial court will be significantly outweighed by the resultant benefits to both the defendant and the system of criminal appeals.

EVIDENCE

STATE OF MIND TO SHOW IDENTITY: ABUSE OF A HEARSAY EXCEPTION

It has been noted, "Much confusion surrounds the hearsay rule as it is understood and applied in Arizona practice."[1] Unfortunately for students of the law of evidence, the Supreme Court of Arizona in the recent case of *State v. Gause*[2] has compounded the confusion.

William Gause was convicted of the first-degree murder of his estranged wife and sentenced to death. It was revealed at his trial that Mary Ellen Gause had feared her husband would kill her. She had recorded this apprehension both in her will and in statements made to other persons, ten of whom testified at the trial. The trial court admitted the statements to show her fear, but instructed the jury to consider the statements solely for the purpose of determining the declarant's state of mind and not for deciding whether the defendant was the murderer.[3] The defendant argued on appeal that evidence showing the state of mind of the decedent to prove the identity of her murderer was inadmissible, and that her state of mind would have been in issue

45. For an example of thorough questioning by a trial judge, see State v. Reynolds, 106 Ariz. 47, 49-50, 470 P.2d 454, 456-57 (1970). *See also* State v. Schmid, 107 Ariz. 191, 197-98, 484 P.2d 187, 193-94 (1971). Perhaps the trial judge was more careful with this defendant due to the notoriety of the crime.

1. M. UDALL, ARIZONA LAW OF EVIDENCE § 171 (1960).
2. 107 Ariz. 491, 489 P.2d 830 (1971).
3. *Id.* at 493-94, 489 P.2d at 832-33.

only if a defense of suicide, self-defense or accidental death had been raised.[4]

In affirming the conviction, the Supreme Court of Arizona held that "expressions of fear by a murder victim, though they may be hearsay, are relevant, have probative value on the issue of identity, and, when in human experience they have sufficient reliability, they should be admitted in evidence."[5] In arriving at this conclusion, however, the court made statements which leave unclear whether the old rules for state of mind evidence admitted under the hearsay exception have been expanded, or new rules which now govern the admissibility of such evidence have been created. In order to appreciate the importance of *Gause*, an understanding of the traditional rules governing admissibility of evidence of state of mind is first required. The effect of the court's language upon these rules must next be evaluated, and only then is it possible to analyze the import of the holding.

Traditional Rules of Hearsay and State of Mind Evidence

In *State v. Coey*[6] the Supreme Court of Arizona said it is hearsay "where an extrajudicial statement made by a person is introduced to prove the truth of the words spoken, and where there was no opportunity to cross-examine the declarant."[7] The rationale for excluding such statements as evidence is their questionable trustworthiness.[8] The declarant may have lacked personal knowledge of an incident or may have intentionally or accidentally made a misstatement,[9] with there being no opportunity to cross-examine the declarant concerning the veracity of the statement.[10] Additional explanations given for the exclusion of hearsay are the impossibility of administering an oath to the original declarant[11] and the lack of an opportunity for the trier of fact to observe his demeanor.[12]

Despite the general policy of refusing to admit hearsay statements

4. *Id.*
5. *Id.* at 495, 489 P.2d at 834. Other issues raised on appeal are beyond the scope of this analysis.
6. 82 Ariz. 133, 309 P.2d 260 (1957).
7. *Id.* at 141, 309 P.2d at 265. *See also* Brown, *The Hearsay Rule in Arizona,* 1 ARIZ. L. REV. 1, 2 (1959).
8. *Id.* at 2. *See* C. MCCORMICK, EVIDENCE § 225 (3d ed. 1954); Seligman, *An Exception to the Hearsay Rule,* 26 HARV. L. REV. 146, 153 (1912).
9. Hinton, *States of Mind and the Hearsay Rule,* 1 U. CHI. L. REV. 394, 413-14 (1934).
10. The lack of opportunity to cross-examine the speaker is considered to be the most important reason underlying the exclusion of hearsay. State v. Izzo, 94 Ariz. 226, 383 P.2d 116 (1963); C. MCCORMICK, *supra* note 9, at § 224; 5 J. WIGMORE, EVIDENCE §§ 1362, 1367 (3d ed. 1940).
11. This reason is no longer considered important. 5 J. WIGMORE, *supra* note 10, at § 1362.
12. C. MCCORMICK, *supra* note 8, at § 224.

in evidence, there are certain exceptions "designed to admit hearsay statements when specially needed and unusually trustworthy."[13] One exception permits hearsay testimony to show the state of mind of the declarant.[14] A distinction must be drawn, however, between direct statements of mental or emotional state, and statements which circumstantially prove mental or emotional condition.[15] The hearsay rule is inapplicable to declarations offered to show circumstantially the feelings or state of mind of the declarant,[16] while the exception to the hearsay rule admits statements for the purpose of directly determining declarant's state of mind by the truth of the statements themselves.[17]

The Gause *Decision*

Unfortunately, introduction of state of mind testimony may have an inadvertently prejudicial effect on the jury. One safeguard against this evil has been the limitation that such statements should be used only when the declarant's state of mind is "in issue."[18] The conduct to be explained in *Gause* was that of the defendant husband, not the declarant wife. The proper admission or exclusion of Mrs. Gause's declarations, therefore, should have hinged on whether it was appropriate to place her mental condition in issue. Expressions of state of mind are considered in issue and admissible when the defenses of accident,[19] self-defense[20] or suicide[21] are raised, or where the statements tend to shed light on the intent or motive of the declarant.[22] In all

13. Brown, *supra* note 7, at 6 n.23.

14. *See generally* C. MCCORMICK, *supra* note 9, at § 228; M. UDALL, *supra* note 1, at § 173.

15. C. MCCORMICK, *supra* note 8, at §§ 225, 228, 268; M. UDALL, *supra* note 1, at § 173(4). This distinction is crucial to an analysis of the court's opinion in *Gause*. See text accompanying notes 36-40 *infra*.

16. An example can be used to clarify this distinction. The statement, "I plan to spend the rest of my life here in New York," is hearsay if offered by a witness to prove directly declarant's plan to remain in New York. The statement, "I have been happier in New York than in any other place," however, may be offered to show circumstantially that the declarant intended to stay in New York. C. MCCORMICK, *supra* note 8, at § 268.

17. Despite the differences in direct statements of mental state and circumstantial statements showing mental state, "the courts tend to treat the two kinds of expressions interchangeably," (C. MCCORMICK, *supra* note 8, at § 268) and allow circumstantial statements to be admitted as if they were hearsay declarations. Thus, statements are sometimes admitted on the ground that they come under the hearsay exception when they are actually circumstantial evidence to which the hearsay rule does not apply.

18. Rule 63(12) of the proposed model Uniform Rules of Evidence provides for the use of statements to show state of mind "when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant." *Handbook of the Nat'l Conf. of Comm'rs on Uniform State Laws* 203 (1953). The comment to this section states that this clause "is accepted in almost all modern decisions." *Id.*

19. State v. Izzo, 94 Ariz. 226, 383 P.2d 116 (1963).

20. People v. Atchley, 53 Cal. 2d 160, 346 P.2d 764 (1959).

21. Shepard v. United States, 290 U.S. 96 (1933).

22. People v. Pope, 130 Cal. App. 2d 321, 279 P.2d 108 (1955).

these situations, it might be argued that, despite the issue which allegedly allowed the admission of the statement, the indirect result of such admission is to infer identity.[23]

The Supreme Court of Arizona apparently renounced the requirement that the state of mind of the declarant be in issue before evidence of state of mind is introduced so long as the identity of the defendant is in issue. This was reflected by the statement that they failed "to grasp the attempted distinction regarding when the state of mind of the victim is or is not in issue."[24] This position is both untenable and unsupported in the opinion.

In three of the four cases reviewed by the court, state of mind was clearly in issue. The State argued that "with a mere substitution of issues," *State v. Izzo*[25] should control the outcome of *Gause*.[26] The defendant in *Izzo*, however, raised the defense of accidental death, one of the accepted categories in which state of mind is considered in issue. The testimony in *Izzo* may also be construed as showing the intent of the declarant, since fear of her husband and an intent to avoid him were inferred from statements showing that the declarant spent the night before her death with a friend. *State v. Vestal*[27] also fails to support the court's position. This case involved the hearsay use of a statement made by the decedent to his wife of his intent to take a trip with the defendant. The wife testified as to the decedent's statement from which it was inferred that he did in fact begin the trip.[28] In *State v. Merkouris*[29] state of mind testimony was allowed to show that the decedents feared and intended to avoid and protect themselves from the defendant. None of these cases specifically discussed whether a question as to identity by itself would be sufficient to place state of mind in issue. The exclusion of state of mind testimony in several California cases[30] where only the identity of the non-declarant was in issue, however, provides case law to support the conclusion that the issue of identity alone is insufficient to allow introduction of state of mind testimony.

Alcala v. State[31] was the only case cited by *Gause* in which iden-

23. Used in this context, the term "identity" refers to the question of who is the murderer, as distinguished from use of state of mind to show the mental attitudes or characteristics of the declarant.

24. 107 Ariz. at 494, 489 P.2d at 833.

25. 94 Ariz. 226, 383 P.2d 116 (1963).

26. Brief for Appellee at 23, State v. Gause, 107 Ariz. 491, 489 P.2d 830 (1971).

27. 278 N.C. 561, 180 S.E.2d 755 (1971).

28. *See* Mutual Life Ins. Co. of New York v. Hillmon, 145 U.S. 285 (1892) (leading case on the hearsay exception of present state of mind to prove future acts).

29. 52 Cal. 2d 672, 344 P.2d 1 (1959).

30. People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); People v. Talle, 111 Cal. App. 2d 650, 245 P.2d 633 (1952).

31. 487 P.2d 448 (Wyo. 1971).

tity was the sole factor in issue. *Alcala* allowed statements indicating the reaction of a woman to a threat by her husband. Her remark, "This is not the first time; he has done this for years,"[32] was permitted to show the declarant's state of mind after the husband was charged with her murder. If the *Gause* court intended to use this case as the foundation for abrogating the "in issue" requirement, the entire structure may be dismantled merely by examining the *Alcala* opinion. In addition to failing to discuss the issue, the *Alcala* decision is based upon sources which state that the traditional "in issue" prerequisite for the admission of state of mind testimony is always necessary.[33]

Although state of mind testimony is usually used to prove the mental state of the declarant, *Gause* may be interpreted as allowing state of mind evidence to be used solely in proving the identity of a person other than the declarant. The logical extension of such a holding would seem to be that a declarant's fear of any of a number of persons would allow testimony regarding that fear as proof of the fact that those whom the declarant feared could have murdered the declarant. It is submitted that without direct relevancy of a declarant's state of mind to the declarant's actions, such as when declarant's state of mind indicates an intent to be with the defendant,[34] use of state of mind testimony to prove identity of a non-declarant is not within the proper scope of the exception to the hearsay rule. This relaxed standard for admissibility of hearsay statements increases the possibility that the rationale underlying the hearsay rule will be ignored, and that statements which are neither necessary nor reliable will be permitted into evidence.

Implications of Gause

By eliminating the traditional requirement that state of mind testimony must be in issue, the *Gause* opinion has left many questions unanswered. Clearly, *Gause* holds that when a declarant's state of mind testimony is shown to be reliable it may be introduced for its "probative value" in proving the identity of a non-declarant.[35] What is not clear, however, is the theory under which the testimony was admitted. After declaring that state of mind evidence for identity purposes "does not completely fit into any of the well recognized categories of exceptions to the hearsay rule,"[36] the court failed to state where it did fit.

32. *Id.* at 455.
33. *Cf.* Romero v. People, 170 Colo. 234, 460 P.2d 784 (1969).
34. *See* text accompanying note 28 *supra.*
35. 107 Ariz. at 495, 489 P.2d at 833.
36. *Id.*

One plausible theory is that the evidence was not permitted within a hearsay exception at all, but rather as direct circumstantial evidence as to a relevant issue, the identity of the murderer. Under this theory, even a direct statement such as "My husband is going to kill me" would not be hearsay since it would not be offered to prove the truth of the words spoken, but rather to circumstantially show the state of mind of the declarant concerning a future event.[37] By reading the decision as admitting the evidence under this theory of hearsay inapplicable, the court can avoid confusion as to the scope of the state of mind exception by announcing at a later date that their previously-discussed dicta, which appears to apply to the hearsay rule, applies only in hearsay inapplicable cases.

A more likely interpretation of *Gause* is that it expanded the number and type of hearsay statements which will be admitted by a court; as a result, identity may now be proved indirectly and circumstantially through hearsay evidence introduced solely for that purpose. This second reading is supported both in the language of the case and in the choice of authorities used to support the holding. The holding of *Gause* speaks of "expressions of fear by a murder victim, though they may be hearsay;"[38] emphasis is also placed on "the indicia of reliability of the hearsay statements."[39] The court specifically mentions the hearsay rule in its discussion of three of the four cases cited, and chose for authority cases which involved hearsay testimony rather than hearsay inapplicable evidence. The court also cited a section of a treatise[40] dealing with the admission of hearsay. These factors present strong support for the argument that the evidence was in fact admitted under an exception to the hearsay rule rather than as circumstantial evidence.

If this interpretation is correct, *Gause* could result in great prejudice in the collective mind of the jury.[41] Jurors often cannot adequately distinguish state of mind from the truth of the matters asserted even when warning instructions are given.[42] The operation of cumulative prejudice may be examined in the context of the *Gause* jury. They

37. *See* text and notes 16-18 *supra.*
38. 107 Ariz. at 495, 489 P.2d at 833.
39. *Id.* at 494, 489 P.2d at 832.
40. UDALL, *supra* note 1, at § 69.
41. More psychological research designed to explore the effect of cumulative prejudice on the decision-making process of the jury is needed. The most comprehensive study in this area, H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966), deals primarily with results of jury decisions and does not develop a workable matrix of jury operation and psychology. A study which analyzes the impact of certain types of evidence on a jury is needed to determine whether, from a psychological perspective, a jury can objectively assess relevant evidence after hearing prejudicial accusations. The information could then assist a judge in determining what evidence to exclude.
42. *See* C. MCCORMICK, *supra* note 8, at § 269.

were presented with many issues, including the admission of statements which exposed the violence and lack of harmony in the Gause marriage. Ten witnesses testified that Mary Ellen had expressed fear of her husband. It is easy to imagine the jury viewing this testimony as the seeming weight of authority which would allow them to synthesize it and to arrive circumstantially at the identity of the murderer. This information could influence the emotions of the jury to the extent their dislike of the defendant would be so great that they would be more easily convinced he committed the crime.[43] This prejudice could also operate subconsciously in the minds of the jurors to decrease the amount of proof required to convict the defendant.

Instead of stressing discretion by the trial judge and instructions to the jury,[44] however, the *Gause* court emphasized a special type of reliability as the criterion for admissibility of statements regarding Mrs. Gause's fear. Unfortunately, the court failed to provide concrete guidelines for dealing with their standard of reliability. The only test suggested was that statements will be admitted "when in human experience they have sufficient reliability."[45] By admitting the statements of a declarant who was seeking a divorce and admittedly at odds with the defendant, however, the court inferred a very loose and nebulous standard for reliability.[46] The court also failed to consider the importance of balancing relevancy against the possible harm of prejudice. Certainly, inferences regarding defendant's identity could have been drawn from fewer than the ten witnesses testifying as to the decedent's fear of the defendant.

It may be argued, therefore, that a much stricter standard is needed to avoid the dangers of both intentional and accidental misstatement through which state of mind testimony may be used to support a "pre-

43. *See generally* Staton, *Psychological Factors Influential in Jury Trials*, 13 FED. OF INS. COUNSEL Q. 91 (1963).

44. It is unclear from the court's language whether Arizona juries must still be given instructions to consider the statements only for their relevance to the declarant's state of mind. The court said only, "We are not impressed with pious instructions to the jury which tell them to consider the statements of the victim only for the purpose of determining the victim's state of mind." 107 Ariz. at 494, 489 P.2d at 833. If this language can be construed to no longer require any instructions, the result could lead to great prejudice to the defendant and is prejudicial error in some jurisdictions. *See* Shepard v. United States, 290 U.S. 96 (1933); People v. Hamilton, 55 Cal. 2d 881, 362 P.2d 473, 13 Cal. Rptr. 649 (1961).

45. 107 Ariz. at 495, 489 P.2d at 823.

46. Similar expressions of fear were excluded in People v. Hamilton, 55 Cal. 2d 881, 362 P.2d 473, 13 Cal. Rptr. 649 (1961), where it was shown that the statements had been made when the decedent wife had been trying to establish a sympathetic and believable reason for carrying a gun in order to avoid going to prison for carrying the weapon. The statements were later used after her murder, in a trial against the defendant-husband, to show that she feared her husband. This use was ruled improper by the appellate court. Had the Supreme Court of Arizona followed the precedents of the California courts, state of mind testimony in *Gause* arguably might have been excluded.

meditated plan to accuse."[47] Since identity is often in issue in a murder case, proof of identity by state of mind testimony must be strictly controlled.

Conclusion

The Supreme Court of Arizona seems purposely to have failed to grasp a number of distinctions in its attempt to eradicate limitations on application of state of mind testimony. By abolishing the requirement that state of mind testimony be in issue, the prerequisites for use of this exception to the hearsay rule are weakened. Expanding circumstantial use of state of mind testimony without regard to the direct relevancy of the statements undermined the basic rule against the use of hearsay statements.

Yet, the main criticism of the *Gause* decision is not the failure of the court to follow the strict traditional rules governing admission of state of mind testimony, but rather its failure to provide alternative standards which would insure continued adherence to the goals and purposes underlying the hearsay exceptions. State of mind testimony was permitted when its relevance and reliability were debatable and its prejudicial nature far outweighed its probative value. If state of mind testimony is to be allowed to prove the identity of a non-declarant, the court should first provide sound objective standards for establishing the reliability of the statement and for controlling the potential prejudice.

SUBSTANTIVE CRIMES

CRIMINAL INTENT AND AIR POLLUTION

In recent years there has been increasing public and governmental interest in the preservation of the environment. This interest is reflected in the fact that by 1970 every state had enacted laws to control air pollution.[1] These laws often authorize county governments and other local administrative agencies to issue regulations to help abate pollution. One method used by many local enforcement agencies to

47. People v. Hamilton, 55 Cal. 2d 881, 362 P.2d 473, 13 Cal. Rptr. 649 (1961).

1. S. DEGLER, STATE AIR POLLUTION CONTROL LAWS 1 (rev. ed. 1970).

control air pollution is a misdemeanor law[2] imposing separate fines for each day in which pollutants are emitted in violation of the regulation.[3]

Following this approach, Arizona Mines Supply Company was charged by the Maricopa County Attorney's office with violating county air pollution regulations[4] enacted pursuant to Arizona air pollution control measures.[5] Before trial, the state filed a motion seeking to exclude any evidence of the amount of money spent by the defendant for air pollution equipment and any testimony which the defendant might introduce as to its lack of criminal intent to violate the statute and regulations. After the motion was denied by the trial court, the state filed a special action with the Supreme Court of Arizona seeking relief from the ruling. Hence, in *State v. Arizona Mines Supply Co.*[6] the supreme court was confronted with the question whether the state must allege and prove criminal intent before it can obtain a conviction for violation of air pollution control laws. The court found that this type of offense was "malum prohibitum,"[7] and that intent was not an essential element of the offense. The court also held that any testimony regarding lack of intent should be excluded at the trial until after the verdict, when any "extenuating circumstances" might be introduced in mitigation of the penalty.[8] While at the time of this decision there was no mention of intent in the state's Air Pollution Act, the Arizona Legislature has since passed an amendment confirming the court's decision.[9]

One of the fundamental principles of our system of criminal jus-

2. For a discussion of the practical aspects of this method, including its effectiveness as an air pollution control technique, see Mix, *The Misdemeanor Approach to Pollution Control*, 10 ARIZ. L. REV. 90 (1968). *See generally Symposium—Air Pollution*, 10 ARIZ. L. REV. 1 (1968).

3. *See* ARIZ. REV. STAT. ANN. § 36-789.01 (Supp. 1971-72).

4. Maricopa County, Ariz., Air Pollution Control Reg. § IV, Reg. 1 (1970), provides that:

> No person shall cause, suffer, allow or permit the discharge into the atmosphere from any single source of emission whatsoever any air contaminants for a period or periods aggregating more than three minutes in any one hour which is:
>
> a. As dark as or darker in shade than that designated as No. 2 on the Ringelmann Chart as published by the U.S. Bureau of Mines, or
>
> b. Of an opacity equal to or greater than an air contaminant designated as No. 2 on the Ringelmann Chart.

5. ARIZ. REV. STAT. ANN. § 36-771 *et seq.* (Supp. 1971-72).

6. 107 Ariz. 199, 484 P.2d 619 (1971). Besides contending that the state must prove knowledge or intent, Arizona Mines advanced other arguments in the special action, all of which were dismissed by the court, and which are beyond the scope of the present discussion.

7. 107 Ariz. at 207, 484 P.2d at 627. Malum in se crimes are acts, such as larceny and murder, which are inherently evil and require a specific state of mind before guilt can be assessed. Malum prohibitum offenses are crimes simply because the act is prohibited, regardless of the state of mind of the individual. BLACK'S LAW DICTIONARY 1112 (4th ed. 1951).

8. 107 Ariz. at 207, 484 P.2d at 627.

9. ARIZ. REV. STAT. ANN. § 36-789.02 (Supp. 1971-72) provides that "[V]iolations under § 36-789.01 shall be malum prohibitum. Lack of criminal intent shall not constitute a defense to such violations."

tice is that "[t]here can be no crime large or small without an evil mind."[10] Clearly, *Arizona Mines* deviates from this premise, and understanding the justification for the decision requires an awareness of the crimes traditionally exempted from the intent requirement.

Under English common law all crimes required mens rea, knowledge and intent, on the part of the offender.[11] Thus, for example, a person could not be convicted of an offense such as selling adulterated goods or unwholesome food if he could show that he was unaware of the impurity.[12] In the middle of the nineteenth century, however, there was a shift in emphasis from the protection of the individual to the protection of the public in certain areas of the law, and specified acts which were made criminal by statute no longer required intent as a prerequisite to conviction. These were generally violations of health and safety regulations enacted pursuant to the police powers of the state,[13] and classified as "public welfare offenses."[14] These acts were distinguished from the "true" crimes, which still required mens rea, in that they did not necessarily involve serious moral turpitude. Even though the offense was inadvertent, the harm to the general welfare was just as great, and, therefore, the intentions of the offender were considered immaterial in determining the question of guilt.[15] The application of the doctrine of malum prohibitum to offenses against the public welfare occurred in the United States at approximately the same time as in England.[16] Thus in *Barnes v. State*,[17] a person was fined for selling liquor to a common drunkard although the seller plead ignorance of the inebriate's habit. The doctrine spread rapidly, and within fifteen years it was generally accepted with regard to certain offenses relating to the health and moral well being of the community.[18] Most of the regulations were directed at manufacturers and sellers of products. It was felt that it was the duty of merchants to know the nature of the goods they were selling, and the duty of manufacturers

10. J. BISHOP, CRIMINAL LAW § 287 (9th ed. 1930).
11. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).
12. Regina v. Stevenson, 176 Eng. Rep. 48 (N.P. 1862).
13. Sayre, *supra* note 11, at 60-61.
14. *Id.* at 56.
15. *See, e.g.*, Regina v. Woodrow, 153 Eng. Rep. 907 (1846) (tobacco dealer convicted of possessing adulterated tobacco although he had purchased it in good faith and believed it was pure); Regina v. Stephens, L.R. 1 Q.B. 702 (1866) (owner of a quarry fined when his employees, notwithstanding specific instructions to the contrary, deposited rubbish into a river, causing a nuisance).
16. Sayre, *supra* note 11, at 62.
17. 19 Conn. 398 (1849).
18. *See* Commonwealth v. Farren, 91 Mass. (9 Allen) 489 (1861) (person found guilty of selling adulterated milk despite his belief of its purity); *citing* Commonwealth v. Boynton, 84 Mass. (2 Allen) 160 (1861) (man fined for selling intoxicating liquors even though he contended that their intoxicating nature was unknown to him).

to dispose of their waste materials without interfering with the rights of others. A failure to fulfill these obligations often led to a conviction and fine.[19]

The rationale for eliminating intent from these crimes was essentially the same in both England and the United States. The unlawful activities were violations of regulatory statutes enacted to protect the entire public.[20] Since private citizens could not maintain an action without alleging special damages, prosecution was retained by the state; since the state could not proceed by civil action, a criminal indictment was brought against the offender. Consequently, though criminal in form, the action on behalf of the public was civil in substance.[21] Because the forbidden acts were not indicative of moral delinquency, the penalty was usually a fine rather than imprisonment.[22] Unlike "real" crimes which required affirmative action coupled with an "evil mind," offenses against the public welfare usually involve nothing more than a lack of reasonable care. This subjective state is very difficult to prove, particularly when the nature of the crime does not lend itself to a presumption of intent.[23] In order to protect the public, therefore, courts and legislatures have chosen to place the burden of prevention on those in the most advantageous position to curtail pollution through the proper exercise of controls.

Since there is no federal constitutional requirement that mens rea be included as an element of a crime,[24] unless the state constitutions provide otherwise legislatures have the power to designate acts as

19. In Regina v. Woodrow, 153 Eng. Rep. 907, 913 (Ex. 1846), after finding a merchant guilty of selling adulterated tobacco even though he had acted in good faith, the court noted:

> It is very true that [this] may produce mischief, because some innocent man may suffer from his want of care in examining the tobacco he has received, and not talking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would very seldom be able to do so.

20. Sayre, *supra* note 11, at 72-73, places crimes not requiring mens rea into the following categories: (1) illegal sale of intoxicating liquor; (2) sales of impure or adulterated food or drugs; (3) sales of misbranded articles; (4) violations of anti-narcotic acts; (5) criminal nuisances; (6) violations of traffic regulations; (7) violations of motor-vehicle laws; and, (8) violations of general police regulations, passed for the safety, health or well-being of the community.

21. *See* Regina v. Stephens, L.R. 1 Q.B. 702, 708-09 (1866).

22. While moral turpitude is not an essential element to these crimes, it may be present in some circumstances. If it can be proven that a person knowingly violated one of these provisions, a more severe penalty might be in order. *See* cases cited note 38 *infra*.

23. For a discussion of the presumption of intent in criminal cases see "Criminal Presumptions," 13 ARIZ. L. REV. 313, 454 (1971).

24. *See* Smith v. California, 361 U.S. 147, 150 (1959). This power is not unlimited, however, particularly in areas involving first amendment freedoms. *See* Stanley v. Georgia, 394 U.S. 557 (1969); Smith v. California, 361 U.S. 147 (1959); Comment, *Private Morality and the Right to be Free: The Thrust of Stanley v. Georgia*, 11 ARIZ. L. REV. 731 (1969).

malum prohibitum.[25] In addition, if the legislation is silent on the issue of intent, then the purpose of the legislature in enacting the regulation will be examined to determine whether mens rea is required.[26] As was pointed out by the United States Supreme Court in *Morissette v. United States*,[27] "mere omission . . . of any mention of intent will not be construed as eliminating that element from the crimes denounced." The Court also stated, however, that there were certain crimes for which intent was not an essential element, regardless of legislative deliberations. The Court explained that:

> These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations . . . merely create the danger or probability of [injury] which the law seeks to minimize. . . . Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element.[28]

The Supreme Court of Arizona in *Arizona Mines* decided that air pollution offenses are malum prohibitum, even in the absence of a specific statutory provision.[29] Although this was a matter of first impression in Arizona, the court followed the precedent of *Morissette* which has been applied to pollution cases in a number of jurisdictions.[30] The state had not only supplied the court with sufficient information showing how these and other jurisdictions had dealt with this problem, but had also furnished materials indicating the apparent intent of the Arizona legislature in passing the Air Pollution Act.[31]

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25. *See* Fitzpatrick v. Board of Medical Examiners, 96 Ariz. 309, 394 P.2d 423 (1964) (practicing medicine without a license); Borderland Constr. Co. v. State, 49 Ariz. 523, 68 P.2d 207 (1937) (violation of the minimum wage law); Troutner v. State, 17 Ariz. 506, 154 P. 1048 (1916) (selling intoxicating liquor).

26. State v. Cutshaw, 7 Ariz. App. 210, 220, 437 P.2d 962, 973 (1968).

27. 342 U.S. 246, 263 (1952).

28. *Id.* at 255-56.

29. *See* text accompanying note 9 *supra.*

30. For example, in United States v. United States Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970), the defendant was convicted of violating the Refuse Act of 1899, 33 U.S.C.A. § 407 (1970), by depositing refuse in navigable waters. The court relied directly on *Morissette* in rejecting the defendant's contention that the information failed to allege a knowledgeable act. 328 F. Supp. at 356. In an air pollution case in New York, it was held that "Proof or admission of the doing of the forbidden thing, regardless of intent, good faith or willfulness, must bring a conviction." People v. Consolidated Edison Co., 116 N.Y.S.2d 555, 560 (App. Div. 1952). An Oklahoma water pollution case held that intent was not a necessary element of the crime of contaminating public waters. Magnolia Pipe Line Co. v. State, 95 Okla. Crim. 193, 243 P.2d 369 (1952).

31. Affidavit of Kenneth C. Cardella [State Senator], Petitioner's Supplemental Memorandum of Points and Authorities, State v. Arizona Mines Supply Co., 107

The court also held that the company would not be allowed to introduce evidence showing that it had purchased air pollution equipment,[32] a position adopted by other courts at an early date.[33] The court thus in effect rejected the New York doctrine of "unavoidable necessity," under which the defendant cannot be convicted for a technical violation of the regulation if he can show that the best air pollution equipment currently available is being used.[34] The New York courts in *City of Buffalo v. Savage* went so far as to require the state to prove that the pollution could be minimized by other means.[35] The wisdom of this decision is questionable. It is submitted that the burden of showing the necessity for violating the law should be on industry. Otherwise, if prosecuted, industry may be content to chance pleading unavoidable necessity rather than actively seeking the best methods of controlling pollution currently available. Similarly, the incentive to develop improved preventive measures can be subverted. If it is within the police power to enjoin a business that is creating a nuisance by polluting the atmosphere,[36] then it arguably is within this same power to impose the lesser penalty of a fine as an "incentive" to develop more efficacious pollution controls.[37] Accordingly, Arizona and other jurisdictions have rejected the doctrine of unavoidable necessity.[38]

There appears to be sound reasoning behind the omission of intent as an element in the crime of air pollution by the *Arizona Mines* court. First, by its nature, the act causes harm regardless of intent.

Ariz. 199, 484 P.2d 619 (1970). Senator Cardella was a sponsor of the Air Pollution Act and was designated by the majority of the State Senate as having primary responsibility for the Act.

32. 107 Ariz. at 207, 484 P.2d 627.

33. *See* Moses v. United States, 16 App. D.C. 428 (D.C. Mun. App. 1900) (no defense that the defendant had purchased smoke consuming equipment and evidence of such purchases was properly excluded).

34. People v. Oswald, 1 Misc. 2d 726, 116 N.Y.S.2d 50 (Magis. Ct. 1952). *But see* People v. Consolidated Edison Co. Inc., 116 N.Y.S.2d 555, 562 (App. Div. 1952).

35. 1 Misc. 2d 337, 148 N.Y.S.2d 191 (Sup. Ct.), *aff'd*, 309 N.Y. 941, 132 N.E.2d 313 (1955) (defendant's effort to alleviate the condition was no defense).

36. In People v. Detroit White Lead Works, 82 Mich. 471, 46 N.W. 735 (1890), injunctive relief was sought against a paint company emitting noxious odors. The court stated:

> Whenever such a business becomes a nuisance, it must give way to the rights of the public, and the owners thereof must either devise some means to avoid the nuisance or must remove or cease the business. It may not be continued to the injury of the health of those living in its vicinity. This rule is founded both upon reason and authority. Nor is it of any consequence that the business is a useful one, or necessary, or that it contributes to the wealth and prosperity of the community.

Id. at 477-78, 46 N.W. at 737.

37. *Id.* at 477-78, 46 N.W. 735, 737 (1890).

38. Dep't of Health v. Owens Corning Fiberglass Corp., 100 N.J. Super. 366, 242 A.2d 21 (1968), *aff'd per curiam*, 53 N.J. 248, 250 A.2d 11 (1969). If some companies are willing to pay this "tax" for the privilege of polluting the atmosphere, even more extreme measures may be appropriate.

Second, effective enforcement of air pollution controls would be extremely difficult if the state were required to prove intent as a prerequisite to conviction. Similarly, evidence showing the efforts exerted and the money expended by a defendant-polluter in its attempt to comply with the pollution regulations was properly excluded. The admission of such evidence might defeat the purpose of the Air Pollution Act[39] by misleading the jury into believing that such evidence is a proper consideration in determining guilt. In addition, "unavoidable" accidents may be the result of the defendant's failure to take the proper precautions. Whatever the reasons for violating pollution regulations, the difficulties of compliance are questions of law going to the reasonableness of the legislation and are not proper questions of fact for a jury.

The law should not be Draconian, however, and it was proper in *Arizona Mines* that extenuating circumstances, such as a good faith effort to comply, could be considered in ascertaining the amount of the fine if guilt were found. Although suspension of any fine might also be in order, it should be remembered that a penalty might prevent another "accident" from occurring. The ultimate objective of anti-pollution legislation is to eliminate the threat to the public health, safety and welfare, not merely to require a good faith effort on the part of potential polluters. Hence, the concept of malum prohibitum is a necessary adjunct to any legislation intended to achieve that objective.

39. *See* ARIZ. REV. STAT. ANN. § 36-77 (Supp. 1971-72).

PUBLIC AND FAMILY LAW

DIVORCE

CORROBORATING EVIDENCE

Arizona's divorce laws, which are predicated on the concept of fault, are entirely statutory in origin.[1] Thus, a divorce may be obtained only when one party establishes that the other is guilty of violating any one of the ten statutory grounds established by the Arizona legislature.[2] The legislature has further provided that the "judgment of the court shall be rendered upon the full and satisfactory evidence sustaining all material allegations of the complaint," and that "no divorce shall be granted upon the testimony or admissions of a party unless they are corroborated by other evidence."[3] Strictly construing these statutes, in *Acheson v. Acheson*[4] the Supreme Court of Arizona held that even when they have a mutual desire to dissolve their marriage, spouses must submit corroborating evidence to substantiate the statutory grounds alleged in order to obtain a divorce decree.[5]

Mrs. Acheson brought an action for divorce against her husband on the ground of cruel and inhuman treatment. Mr. Acheson filed an answer alleging similar grounds of misconduct on the part of his wife and counterclaimed for divorce. The trial court granted the parties a *Brown* Decree,[6] and ordered Mr. Acheson to pay his wife's attorney's

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1. ARIZ. REV. STAT. ANN. §§ 25-311, -321 (1956).
2. *Id.* § 25-312. The grounds enumerated in this statute are adultery, cruelty, desertion, husband's neglect to support wife, habitual intemperance, conviction of a felony, lack of co-habitation for five years, pregnancy by another man at the time of the marriage, conviction of a felony prior to marriage without the other's knowledge and physical incompetence.
3. *Id.* § 25-317.
4. 107 Ariz. 235, 485 P.2d 560 (1971).
5. Thus, in applying ARIZ. REV. STAT. ANN. § 25-317 (1956) to the facts of *Acheson*, the court followed its traditional policy of denying a divorce decree upon the uncorroborated testimony of the parties. *Accord*, Moore v. Moore, 101 Ariz. 40, 415 P.2d 568 (1966); Williams v. Williams, 86 Ariz. 201, 344 P.2d 161 (1959); Hemphill v. Hemphill, 84 Ariz. 95, 324 P.2d 225 (1958).
6. Brown v. Brown, 38 Ariz. 459, 300 P. 1007 (1931). In *Brown* the court held for the first time that there was an exception to the general rule that a judgment which does not show for and against whom it is rendered is void for lack of certainty. In an action where both parties seek and obtain a divorce, the decree is certain as to

fees and to reimburse her for debts and medical and other expenses she had incurred. Mrs. Acheson appealed, alleging that the trial court abused its discretion in failing to award her alimony.[7] The Supreme Court of Arizona reversed and remanded the case, holding the judgment void because the trial court was without jurisdiction to grant the divorce decree due to the parties' failure to corroborate their allegations of cruel and inhuman treatment.

The Achesons, mature adults with no children, mutually desired a divorce.[8] Requiring them, and, other couples in their situation, to comply with rigid statutory and judicial standards raises doubts concerning the efficacy and propriety of the present divorce system in Arizona. This analysis will examine the structure and goals of Arizona's fault-oriented divorce laws and, with emphasis upon the corroboration requirement, evaluate them as they apply in the *Acheson* situation. A comparison of Arizona's laws with those of other states will facilitate a suggestion as to the best system to serve both the needs of the citizens of this state as individuals, and the interests of the state as an entity.

Overview of the Arizona Divorce System

The state's interest in divorce is founded upon a view of marriage as a paramount and permanent social institution which must be preserved and protected.[9] Marriage is regarded by the judiciary as a special form of civil contract giving rise to a "status" which is the concern of both the spouses and the community.[10] Because the state claims an interest in preserving the integrity of marriages,[11] once the contractual relationship is choate, the rights and powers of the parties with

its effect, making application of the general rule unnecessary. In such a case, the court grants a *Brown* Decree—a divorce not specifically granted to either party.

7. A general rule concerning the granting of alimony is that where a divorce is granted to the husband, the wife should not be granted permanent alimony. The court has stated that while it approves of this rule, it is still within the discretion of the trial court as to whether it should be followed in each case. Henning v. Henning, 89 Ariz. 330, 362 P.2d 124 (1961). Factors which are considered in granting alimony include the ability of the husband to pay, the couple's standard of living, the needs of the wife and her ability to support herself. Aliprandini v. Aliprandini, 10 Ariz. App. 23, 455 P.2d 472 (1969). It appears then, that even in cases where the wife is found at fault, she may be granted alimony, and that the fault system is not essential to the determination of alimony payments.

8. Acheson v. Acheson, 107 Ariz. 235, 236, 485 P.2d 560, 561 (1971). Mr. Acheson was 53 years old at the time of the divorce, and his wife was 41. Both had been married twice before.

9. *See* Gordon v. Gordon, 35 Ariz. 357, 278 P. 375 (1929). One must, however, ponder whether the institution of marriage stabilizes society or whether the conjugal union is merely a manifestation of the contemporary society.

10. Southern Pac. Co. v. Industrial Comm'n, 54 Ariz. 1, 91 P.2d 700 (1939). *See also* Mackenna, *Divorce By Consent and Divorce for Breakdown of Marriage*, 30 MOD. L. REV. 121, 132 (1967).

11. Gordon v. Gordon, 35 Ariz. 357, 278 P. 375 (1929).

respect to its termination are subject to state divorce procedure.[12] The Supreme Court of Arizona has staunchly reinforced the state policy of maintaining marriages, referring to these civil contracts as "the foundation of society and civilization."[13] The court has also recognized divorce as a necessary and desirable institution, however, stating that when a marriage has failed and family life has ceased, "public policy will not discourage divorce since the relationship of husband and wife is such that the legitimate functions of marital life have been destroyed."[14]

Even assuming the validity of the powerful state interest in preserving marriage as the basic moral and structural unit of society,[15] one must ask whether the present body of divorce law established by the legislature and applied by the courts still reflects the values of society and serves the function for which it was designed.[16] Many factors indicate that divorce law operates in a negative fashion upon the marital institution. Divorce proceedings are predicated upon the adversary system under which one's eligibility for divorce is derived from the proof that one party has been wronged by the other.[17] Although this approach lends itself to the effective resolution of most types of controversies between adverse parties,[18] its place in the arena of personal marital conflict is questionable. The causes of family discord and marital breakdown are of a complex and emotional nature which are not readily amenable to the simple and objective apportionments of fault between the parties. The adversary procedure demands this, however. Thus, in order for parties in the *Acheson* situation to obtain a divorce, one or both are compelled to engage in a formal, artificial contest or recitation before the court to satisfy the statutory require-

12. Maynard v. Hill, 125 U.S. 190 (1888); Moore v. Moore, 101 Ariz. 40, 415 P.2d 568 (1966). The state is often referred to as an interested but unnamed third party to the marriage contract present in every divorce suit. Gordon v. Gordon, 35 Ariz. 357, 278 P. 375 (1929).

13. Gordon v. Gordon, 35 Ariz. 357, 360, 278 P. 375, 376 (1929).

14. Matlow v. Matlow, 89 Ariz. 293, 296, 361 P.2d 648, 650 (1961).

15. The concept of the family as a "universal human social grouping" has been disputed. *See, e.g.*, MAN AND CIVILIZATION (Farber, Mustacchi, & Wilson ed. 1965).

16. Our present divorce laws are an anachronism from a society which has since undergone the gradual process of social evolution. Many factors including mobility, affluence and liberalization of values have contributed to a change in attitude toward the marital institution and its counterpart, divorce. The legal apparatus regulating divorce has failed to evolve simultaneously with the social institution it is designed to serve, creating a disparity between the law and social reality.

17. A. CARTER & P. GLICK, MARRIAGE AND DIVORCE 369 (1970). In the case of a *Brown* Decree, both parties must show they have been wronged by the other. Acheson v. Acheson, 107 Ariz. 235, 458 P.2d 560 (1971).

18. *See* E. MORGAN, SOME PROBLEMS OF PROOF 3 (1956):

> The theory of our adversary system of litigation is that each litigant is most interested and will be most effective in seeking, discovering, and presenting the materials which will reveal the strength of his own case and the weakness of his adversary's case so that the truth will emerge to the impartial tribunal that makes the decision.

ments. Under this system, it is virtually impossible to eliminate collusion, connivance and perjury, for these are often the only vehicles which will secure the desired decree. Despite Arizona's philosophy and approach to marital law, divorce by consent or agreement is actually the major means by which marital termination is achieved in the United States.[19] The fault approach, however, frustrates the state interest in preserving the integrity of both the marital and judicial institutions.[20]

Restrictive divorce laws also encourage migration to avoid the application of Arizona's laws and to take advantage of the more lenient standards provided by other states.[21] Interpretation of statistical evidence suggests that one out of every ten divorces in the United States is migratory.[22] It seems unfortunate that Arizona fails to serve the needs and desires of its citizens in order to satisfy an outmoded state interest, and forces them to seek legal dissolution of their marriages elsewhere with increased expense and inconvenience.

A serious transgression of the present system is that it tends to promote the invasion of "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[23] The United States Supreme Court has stated that deprivation of privacy in certain aspects of the intimate marital relationship is constitutionally prohibited.[24] By requiring "full and satisfactory evidence" and corroboration of a spouse's statements,[25] the state grants itself the right and power to inquire into the most personal aspects of the marital relationship when the parties seek a divorce. This can lead to embarrassment, bitterness and hostility for the parties involved. Since the state has a monopoly on divorce,[26] the parties must either sacrifice

19. M. MAYER, DIVORCE AND ANNULMENT 57 (1967).

20. *See* Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. FAM. L. 267 (1971).

21. Arizona recognizes divorces validly obtained from foreign jurisdictions. Hack v. Industrial Comm'n, 74 Ariz. 305, 248 P.2d 863 (1952).

22. A. CARTER & P. GLICK, *supra* note 17, at 373. The authors refer to a study of divorce rates in five states which produced an estimate that one in every twenty-one divorces is migratory. From this and other evidence they concluded that possibly one divorce in ten is migratory, but stated that the situation is always changing and that new laws, such as New York's, will reduce migratory divorces from that state.

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

24. *Id.* In *Griswold* the Court held that a state statute forbidding the use of contraceptives was a violation of marital privacy, a privacy found within the penumbra of specific guarantees of the Bill of Rights. The decision can be viewed as an evolution of the concept of a wide zone of personal privacy protected by the Constitution. There may be difficulties, however, in extending the *Griswold* privacy concept to other areas due to the uncertainty and breadth of the opinion. *See* Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?* 64 MICH. L. REV. 197 (1965).

25. ARIZ. REV. STAT. ANN. § 25-317 (1956). See text accompanying notes 28-36 *infra*.

26. In Boddie v. Connecticut, 401 U.S. 371 (1971), the Supreme Court recog-

their privacy to an unfamiliar third party or take the route of perjury and collusion.[27]

The Corroboration Requirement

The corroboration required to support a claim for divorce[28] is evidence in addition to that of the complainant's allegations which "leads the impartial and reasonable mind to believe the material testimony of the plaintiff."[29] This corroboration may be obtained from the testimony or admissions of the adversary party, or from direct or circumstantial evidence produced by any qualified witness.[30] The basic purpose of this evidentiary rule, which evolved from the common law and the English ecclesiastical courts,[31] is to thwart a collusive agreement to have the marriage dissolved.[32] Unfortunately, the application of this rule may place a formidable obstacle in the path of a divorce by mutual agreement where the grounds are not proven.

A minor inroad has been made into the corroboration rule by requiring only slight corroboration when the divorce is contested and there appears to be no collusion.[33] This relaxation seems contradictory, however. By creating an exception when there appears to be no collusion, the court may actually invite the perjury and collusion which

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nized that the state monopolizes the means for dissolving the marital relationship and held that due process prohibits a state from denying individuals access to the courts, to seek judicial dissolution of a marriage, because of an inability to pay court fees and costs.

27. Assuming a constitutional right to divorce and a corresponding right to privacy, current practices arguably require the sacrifice of one of these rights, similar sacrifices having been found improper by the Supreme Court in the area of criminal law. *See generally* Simmons v. United States, 390 U.S. 257 (1960).

28. ARIZ. REV. STAT. ANN. § 25-317 (1956).

29. Sessum v. Sessum, 63 Ariz. 155, 157, 160 P.2d 330, 331 (1945).

30. Lundy v. Lundy, 23 Ariz. 213, 202 P. 809 (1922).

31. While contemporary divorce procedures are a creature of the state, this governmental monopoly is a recent historical development. At the time of the Roman Empire and prior to the Middle Ages, there was no state interference with marriage and divorce, which were considered the personal matters of the parties. The twelfth century witnessed the advent of ecclesiastical courts established by the church to deal with marital problems, which institutionalized the notions of fault, matrimonial sin and the marital bond as an indissoluble covenant with God. Transference of regulatory power from church courts to civil courts of the state was achieved after the Reformation. The fault concept created by the religious courts, however, was and still is incorporated in the legal divorce system. See Rheinstein, *Trends in Marriage and Divorce Laws of Western Countries*, 18 LAW & CONTEMP. PROB. 3 (1953); *A Divorce Reform Act*, 5 HARV. J. LEGIS. 563 (1968).

32. Lundy v. Lundy, 23 Ariz. 213, 202 P. 809 (1922).

33. *Id.* at 223, 202 P. at 812:

> As to whether there is collusion or not must be determined by the court, and each case in that regard is its own problem. No fixed rule applicable to all cases can be laid down. There is one, however, that ordinarily may be trusted to negative collusion, and that is this, if the defendant employ counsel and vigorously and earnestly contest the grounds of divorce by proper pleadings and the introduction of controverting evidence, it is safe to conclude that there is no collusion.

See also Sessum v. Sessum, 63 Ariz. 155, 160 P.2d 330 (1945).

it seeks to avoid. Thus, if a husband and wife desiring a divorce are advised of the exception, they can agree not to call any other witnesses, present a minimum amount of false evidence, and vigorously contest the grounds alleged. This sham contest could persuade the court that there is no collusion, and a divorce would be granted upon slight corroborative evidence under the relaxed rule. In this manner, the statutory and judicial scheme would be satisfied, the parties would achieve their goal, yet the integrity of the entire judicial system would be flaunted.

This relaxation of the rule may also work counter to the aims of the system in a case where one spouse wants a divorce and the other does not. Since the action is contested, a divorce will be granted upon a minimum of evidence. Yet there may be a strong possibility that the marriage is viable and should be preserved. Another inherent danger in this exception is that the court may grant a divorce in one case and not in another where the same quantum and character of evidence exist. For example, where one party contests, a divorce may be granted upon the presentation of only slight corroborative evidence, but where both parties want a divorce and there is no contest more corroborative evidence must be presented to attain a decree. Thus the desires of the parties may be subjugated to the mechanics of the system.

Although the court has recognized the harmful effects of the corroboration statute and the difficulty in obtaining this type of evidence, it has nevertheless steadfastly refused to dispense with the requirement.[34] Through its dedication to sustain the force and meaning of this statute, the court has held some element of corroborating evidence necessary in every divorce case, however hotly contested it may be.[35] Furthermore, where the parties seek a *Brown* Decree, it is implicit that the court's power to grant such a decree is subject to satisfaction of the evidentiary requirement by both parties.[36]

A Comparative View of Other Divorce Systems

The fault concept underlying Arizona's divorce laws, as seen in the corroboration requirement and demonstrated in *Acheson*, does not serve the best interests of our society. Collusion and perjury are often encouraged in practice. There is conflict between the state interest in

34. *See* Williams v. Williams, 86 Ariz. 201, 204, 344 P.2d 161, 163 (1959) (Bernstein, J., concurring).
35. Lawson v. Lawson, 88 Ariz. 352, 356 P.2d 701 (1960).
36. Acheson v. Acheson, 107 Ariz. 235, 485 P.2d 560 (1971); Moore v. Moore, 101 Ariz. 40, 415 P.2d 568 (1966).

preserving the marital institution and the individual's right to privacy. In order to suggest an effective system which will satisfy all interests involved, it is worthwhile to briefly examine recent attempts at reform in California, Texas and New York.

California. In 1970, the California legislature passed a comprehensive act which ostensibly created a no-fault divorce system.[37] The traditional enumeration of fault-oriented grounds for divorce was abolished in favor of granting divorce for "irreconcilable differences, which have caused the irremediable breakdown of the marriage."[38] The act further provides that the court will order dissolution, if from the evidence and the questionnaires that the parties submit, it finds irreconcilable differences causing a breakdown of the marriage.[39] Besides eliminating the fault aspect of the proceeding, evidence of specific acts of misconduct are inadmissible and there is no requirement of corroborative evidence.[40] There are exceptions to this evidentiary ban, however, which seem to have the potential for defeating the liberalization of the law: such evidence is admissible when it is relevant to the issue of child custody or where the court deems it necessary to establish the existence of irreconcilable differences.[41]

In addition to California's failure to eliminate all potential adversity in its proceedings, there exists no clear standard to determine what constitutes a marital breakdown. At best, this is a difficult, subjective judgment, which may prompt the California trial courts to fall back upon old concepts of fault. This enigma also highlights a more pervasive question: who should determine the existence of this indefinable state of the marital relationship—the partners of the marital unit or an objective third party? The answer to this question will vary with each couple. Some individuals, such as the Achesons, may prefer that the decision of dissolution be their own, based upon their personal

37 CAL. CIV. CODE §§ 4000 *et. seq.* (West 1970).

38. *Id.* § 4506. California has retained a second ground of incurable insanity which can be regarded as lying without the realm of a fault approach. The Act has also repealed the previous sections relating to recrimination, condonation, collusion and connivance. The Arizona statutes prohibit the practices of connivance and collusion in regard to adultery. ARIZ. REV. STAT. ANN. § 25-313 (1956). The Arizona courts also apply the doctrine of recrimination, the "clean hands" concept, as an equitable principle to be applied to the facts of each case in consideration of the public interest. Rexing v. Rexing, 11 Ariz. App. 285, 464 P.2d 356 (1970). *See also* Rosenblum, *Modification of the Ancient Doctrine of Recrimination*, 4 ARIZ. L. REV. 88 (1962). The doctrine of condonation has been interpreted by the court as "full and free forgiveness, expressed or implied, of an antecedent matrimonial offense" with the condition that it not be repeated. Henning v. Henning, 89 Ariz. 330, 333, 362 P.2d 124, 126 (1961).

39. CAL. CIV. CODE § 4508 (West 1970).

40. *Id.* § 4509. This evidentiary ban serves to protect the privacy of the parties' marital relationship. *See* text accompanying notes 23-27.

41. *Id.*

determination that the marriage is no longer viable. There are others who will fail to agree upon the state of their relationship and may prefer to seek the opinion and help of an objective professional—judge, marriage counselor or doctor. By allowing each couple to exercise responsibility for such a choice, marital integrity and privacy will be protected.

Even under the California system, a couple such as the Achesons might be compelled to submit personal and perhaps inarticulable reasons for their decision to seek a divorce. To obtain a California divorce, they would first file a petition and questionnaires if they resided in a county with a conciliation court.[42] If it appeared to the court that there was a reasonable possibility of reconciliation, the proceeding would be continued for a maximum of thirty days. If there is no reconciliation, the court may require evidence to substantiate the claim that irreconcilable differences exist. Even after the submission of such evidence, the dissolution may still be denied if the court concludes that it should not be granted. The lack of guidelines in regard to the type of evidence required, and what constitutes a "marital breakdown" warranting dissolution can make this judicial decision both difficult and arbitrary. Consequently, while California has moved toward solving many of the problems in its divorce laws by seeking to eliminate the legal fictions and conflicts inherent in the fault approach, the system may still fail to serve the needs of all the individuals who must resort to it.

Texas. Texas has also recently attempted to modernize its divorce laws.[43] In contrast with California, Texas provides a more expansive list of seven grounds for divorce.[44] During a divorce proceeding, the court may direct the parties to counsel with persons chosen by the court,[45] in contrast to the California counseling procedure which is noncompulsory. Although there is no corroboration rule established by statute as there is in Arizona, a divorce decree must be based upon full and satisfactory evidence and the testimony must be of a clear and convincing nature.[46]

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42. *Id.* § 4508.

43. TEX. FAM. CODE §§ 3.01 *et. seq.* (1971). Arizona originally adopted the corroborative evidence requirements from what is now TEX. REV. CIV. STAT. arts. 4632-33 (1960).

44. The grounds enumerated in TEX. FAM. CODE § 3.01-3.07 (1971), are insupportability due to conflict that destroys the legitimate ends of marriage, cruelty, adultery, abandonment, conviction of a felony, living apart for two years and confinement in a mental hospital for three years.

45. *Id.* § 3.54(a). The expenses of this counseling may be taxed against either or both parties. *Id.* § 3.54(e).

46. Thompson v. Thompson, 231 S.W.2d 496 (Tex. Civ. App. 1950). In spite of Texas' revision of its divorce statutes, it appears that both this case and Dickey v. Dickey, 290 S.W.2d 933 (Tex. Civ. App. 1956), are still good law. The evidentiary

The internal contradictions of the Texas system, which combines aspects of fault and no-fault, detracts from its liberalizing force. The spectrum of grounds ranging from the broad concept of dissolution due to personal conflicts to the narrow category of adultery, coupled with the requirement of evidentiary proof, is a total submission to the adversary system and the guilt-innocence dichotomy. Although the trial court has more discretion in reference to the sufficiency of evidence in divorce cases than in other types of civil cases,[47] it is still required to judge the condition of the marital relationship or the guilt of the defendant. This exclusive categorization of marital discord is unrealistic. Certainly, there are many reasons why two individuals can no longer live together harmoniously, yet the state seeks to distill them into a set number of categories. No matter how seemingly all-inclusive the grounds for divorce may be, if the particular ground must be established and proven to the satisfaction of a third party, these requirements invite fabrication and collusion. In many cases, the parties will be forced to create a myth to conform to the model outlined by the state. Alternatively, if one of the spouses has committed one of the enumerated transgressions, the parties may be compelled to reveal the most personal aspects of their marital relationship.

Had they been citizens of Texas, the Achesons would have been faced with the same dilemma as in Arizona. A list of specified grounds would have been available upon which they could seek a divorce decree. Upon alleging any of these grounds, they would have been compelled to produce full and satisfactory evidence to substantiate the allegations. Their failure to do so would either have resulted in a denial of a decree at the trial level, or a reversal at the appellate level, mirroring what transpired in Arizona.

New York. The New York divorce laws illustrate legal evolution resulting from social change. Prior to 1966, New York had the most restrictive legislation of the fifty states, recognizing adultery as the sole ground for divorce.[48] In 1966, the legislature established five additional grounds for divorce: cruel and inhuman treatment, abandonment for two years, imprisonment for three years, separation for two years under a court decree and separation for two years under a written separation agreement between the parties filed with the county clerk.[49] Effective in 1972, the requirements for the latter two grounds were

requirement, and its discretionary application by the court, has not been modified by the legislature or the judiciary.

47. Dickey v. Dickey, 290 S.W.2d 933 (Tex. Civ. App. 1956).

48. A. CARTER & P. GLICK, *supra* note 17, at 374.

49. DOM. REL. LAW § 200 (McKinney Supp. 1971-72).

reduced from two years to one year.[50]

New York thus provides a fairly realistic alternative to couples in the position of the Achesons who mutually desire a dissolution of their marriage. Living apart for one year under a mutual separation agreement is a rational and objective basis upon which the court can grant a decree of divorce. This method is one way in which the state and, more importantly, the couple can play a decisive role in the dissolution process. The state's interests are expressed and exercised through the legislature and the court, and the marital institution is neither weakened nor flaunted. Bad marriages need not be perpetuated and healthy marriages are permitted to regenerate. Indirectly, the community also benefits by giving the parties more control over their decisions. This increased freedom fosters responsibility for choice of action, allowing the parties to create and abide by their own separation agreement, since no explicit mode of behavior and set of values is imposed upon them. Through this process, many hostilities and conflicts are avoided rather than created, for the parties must cooperate to achieve their common goal.[51]

Through one of its grounds for divorce, New York has thus provided a workable means for the state to grant a couple their desired dissolution, protecting the privacy of the individuals while maintaining the integrity and interests of the state. The separation agreement method may not be suitable for all situations, but it is a practical vehicle for those couples who are in the *Acheson* position of mutually desiring a divorce. Although mutual consent has not been adopted as a ground for divorce per se, New York's divorce after a mutual separation agreement is "close in spirit, if not in law."[52]

Conclusion

It is suggested that the present divorce system in Arizona is inadequate in both form and function. In weighing the several alterna-

50. *Id.* § 170 (McKinney Supp. 1971-72). The New York statutes maintain aspects of the fault system, requiring the traditional court battle if certain grounds are alleged. For example, a plaintiff is not entitled to a divorce although adultery is established on the part of the defendant, if it was committed in connivance with the plaintiff, if the offense has been forgiven by the plaintiff, or if the plaintiff is also guilty of adultery. Therefore, it seems that the fault concept is very much alive along with the defenses of connivance, condonation and recrimination in regard to claims of adultery. *Id.* § 171 (McKinney 1964).

51. The one year time span may have the advantage of providing a cooling-off period in which to reconcile or prepare for the dissolution of the marriage. A specific time limit, however, may lack the flexibility necessary to cope with all types of situations; perhaps the court should have more discretion in limiting this period for certain cases.

52. Comment, *Old Wine in New Wineskins or Mutual Consent Divorces for New Yorkers,* 18 SYR. L. REV. 71, 88 (1966).

tives available for revising the present laws, the essential purpose of divorce legislation must be determined and implemented. The divorce process should be one of honesty and dignity with the proper respect given to both the parties and the judiciary. The public interest, the needs of the individual spouses and the interests of any children must be served and protected. Cooperation and responsibility in solving problems and reaching decisions should be encouraged, enabling final choices to be the result of free will and serious consideration rather than coercion. An alternative to rash decisions should be provided along with a method of alleviating tension and hostility. The system should help the development of new and healthier family realtionships, rather than attempt to maintain ones that have failed. Above all, it is essential that those who design any legal framework realize its inherent limitations.

To effect a change within the present Arizona statutory structure, the list of grounds for divorce could simply be expanded to include more elastic and realistic grounds such as incompatibility and irremedial breakdown of the marriage. This approach, however, would maintain the present fault orientation and the evidentiary requirements exercised in *Acheson*. A more rational choice is that of revamping the system along true no-fault lines and dispensing with the onerous evidentiary requirements presently in effect. The key to this approach would be mutual consent. A couple such as the Achesons could obtain a dissolution of their marriage without being compelled to submit evidence of marital discord. A divorce scheme following the theory of the New York separation agreement could provide a workable plan. Spouses mutually desiring a divorce could privately draft a divorce agreement, including provisions relating to time,[53] financial and social arrangements. Upon the fulfillment of the terms of this agreement, they could seek a decree of divorce from the court. This decree would formalize the marriage dissolution. In a sense, a divorce contract would be substituted for the marriage contract.

A modification of the procedure would be necessary in cases where only one party desired a divorce. Upon petition by one spouse, the court could make an initial referral to a private counselor who would attempt to effect a reconciliation or a workable separation agreement. If either party was uncooperative in this effort, it would perhaps evidence a state of irreconcilability and provide the basis for divorce.

Perhaps a counseling service supported, controlled and super-

53. Although a statutory minimum for the period of separation is imposed by New York, see text accompanying note 50 *supra*, the parties, ideally, should be free to agree upon a period of time that meets the needs of their particular situation.

vised by local service groups could supplement this system. The community could thus actively exercise its interest in the marital institution. This would allow spouses to retain control of their relationship while providing them with free professional aid if they chose to utilize it.[54] It could also work to prevent marital breakdown before a court need be invoked. If children were involved, a representative could be appointed to protect their interests at custody and financial meetings.

A new vehicle for marital dissolution fashioned along the lines suggested would serve to reinforce healthy family relationships and provide a realistic method for the dissolution of unhealthy ones, without artificial and demeaning legal obstacles. "The gradual removal of legal restraints will throw marriage back upon the resources of mutual affection and choice; upon those fundamental instincts . . . which have constantly tended to produce a higher and more permanent relationship."[55]

PUBLIC FINANCE

BONDED INDEBTEDNESS: LOCAL GOVERNMENT FINANCE

> To preserve our independence, we must not let our rulers load us with perpetual debt. We must make our election between economy and liberty, or profusion and servitude . . . . I place economy among the first and most important of republican virtues, and public debt as the greatest of dangers to be feared.[1]

There is continuing concern over methods of local financing which, in order to meet the rising needs and expectations of the community, are aimed at avoiding constitutional and statutory restrictions. It was this conflict between the structure of local indebtedness and Arizona's constitutional prohibitions that the Supreme Court of Arizona faced in *Tucson Transit Authority, Inc. v. Nelson.*[2]

54. *See* Kelly, *Preventing Divorces*, 45 A.B.A.J. 566 (1959). Oklahoma City has established panels of counselors to help couples with their marital problems. These panels are comprised of professionals from different sectors of the community who provide financial, medical, religious and other types of counseling.

55. J. LICHTENBERGER, DIVORCE 222-23 (1969).

1. Thomas Jefferson, *quoted in* 15 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 41.02, at 295 (3d rev. ed. 1970).

2. 107 Ariz. 246, 485 P.2d 816 (1971). Unless otherwise indicated, the term "local government" will be used to refer to counties, municipalities, cities, towns and

This analysis will explore the historical development of limitations on state and local indebtedness. Examples of contemporary limitations will be discussed, especially those in Arizona dealt with in *Tucson Transit Authority*. Several methods of evading statutory and constitutional limitations will also be considered, such as the special assessment device and the contingent obligation. Finally, the limitations will be analyzed to determine their effect on problems of modern governmental financing.

Development of Debt Restrictions

The controversy regarding local indebtedness stems from the depression of 1837. After repudiating their debts, many states imposed constitutional restrictions on the borrowing capacity of state governments.[3] Consequently, during the period of rapid urbanization following the Civil War, the burden of making public improvements shifted to municipalities since they were generally unrestricted in their borrowing power.[4] Cities were also competing for railroad branch lines by issuing bonds, buying stocks and unwisely lending money to the great monopolies.[5] These and other unsound fiscal policies culminated in the disruption of the American economy in 1873 and 1874.[6] Many municipalities were forced to disavow their debts, and constitutional and statutory restrictions were thereafter placed upon their borrowing power.[7]

The rationale behind the debt limiting provisions, products of the socio-economic conditions and philosophies of the period, has been stated to be a desire by the populace to maintain corporate credit on a sound basis and to promote financial solvency.[8] Curtailing extrava-

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special districts. Similarly, the principles of finance discussed are applicable to all levels of local government.

3. Within 15 years, 19 states had adopted debt restrictions. Since the Civil War, all states entering the union have restricted debt incurrance by the state government. A. HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT 9 (1963). See *id.* at 10 (table 3), for a list of states having significant debt limitations and the year of their adoption, and *id.* at 3-12 for a discussion of the development of state debt restrictions.

4. *See* L. CHERMAK, THE LAW OF REVENUE BONDS 53 (1954).

5. *See* Williams & Nehemkis, *Municipal Improvements as Affected by Constitutional Debt Limitations*, 37 COLUM. L. REV. 177, 178-79 (1937). Arizona had similar experiences in territorial days, City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 296, 408 P.2d 818, 836 (1965) (Bernstein, J., dissenting), resulting in a constitutional prohibition on loaning credit to any individual or corporation. ARIZ. CONST. art. 9, § 7.

6. L. CHERMAK, *supra* note 4, at 52-54.

7. For a history of local debt, see L. SHATTUCK, MUNICIPAL INDEBTEDNESS A STUDY OF THE DEBT-TO-PROPERTY RATIO 12-31 (1940); L. GOODALL, STATE REGULATION OF LOCAL INDEBTEDNESS IN THE UNITED STATES 4-17 (1964).

8. Bowers, *Limitations on Municipal Indebtedness*, 5 VAND. L. REV. 37, 41-42 (1951).

gance and corruption,[9] protecting minorities[10] and preventing excessive indebtedness during periods of inflation[11] have also been given as reasons for the restrictions. In construing the borrowing limitations, most courts have traditionally attempted to adhere to these policies, recognizing that since "the ultimate burden of discharging the indebtedness falls on the taxpayer, . . . his assent should be obtained directly, if possible, before the debt is contracted."[12]

Almost every state has now restricted local government indebtedness,[13] either through constitutional provisions for legislative[14] or electoral[15] establishment of debt limits or, when no constitutional requirement exists,[16] through voluntary legislation.[17] Since legislatures possess all powers not expressly denied them,[18] and local entities have only powers delegated to them through constitutions, statutes or charters,[19] control over local fiscal matters is within the province of state legislatures, subject to dispository constitutional provisions. The exercise of fiscal powers at all levels of government, however, must be in pursuit of a "public purpose," an often unclear standard.[20]

Such powers may be further circumscribed by limitations as to amount, the nature of the governmental entity involved and the exact purpose for which they are employed. Although methods of determining limits vary,[21] the amount of permissible indebtedness is most often based upon either available revenue for the current year[22] or the

9. Buntman v. City of Phoenix, 32 Ariz. 18, 22, 255 P. 490, 491 (1927); Rogers, *Municipal Debt Restrictions and Lease-Purchase Financing*, 49 A.B.A.J. 49 (1963).

10. Bowers, *supra* note 8, at 41.

11. L. CHERMAK, *supra* note 4, at 85.

12. Board of Supervisors v. Hawkins, 16 Ariz. 16, 21, 140 P. 821, 823 (1914).

13. For a compilation of local government debt limits, see L. ELISON, THE FINANCES OF METROPOLITAN AREAS 145-48 (1964) (app. I, table A).

14. *E.g.*, MICH. CONST. art. 7, § 21; NEV. CONST. art. 8, § 8.

15. ALAS. CONST. art. 9, § 9; IDAHO CONST. art. 8, § 3 (unlimited amount).

16. *E.g.*, Connecticut, Delaware, Florida, Massachusetts, New Hampshire and Vermont.

17. MASS. LAWS ANN. ch. 44, § 10 (Supp. 1971); N.H. REV. STAT. ANN. § 33:4-a (1970); Bowmar, *The Anachronism Called Debt Limitation*, 52 IOWA L. REV. 863, 865 n.18 (1967).

18. Bethune v. Salt River Valley Water Users' Ass'n, 26 Ariz. 525, 535-36, 227 P. 989, 992-93 (1924). *See generally* 15 E. MCQUILLIN, *supra* note 1, at § 39.20.

19. *See* Buntman v. City of Phoenix, 32 Ariz. 18, 25, 255 P. 490, 492 (1927); 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 5.01 (1967); 1 E. YOKLEY, MUNICIPAL CORPORATIONS § 59 (1956).

20. *E.g.*, ARIZ. CONST. art. 9, § 1; *see* City of Tombstone v. Macia, 30 Ariz. 218, 229, 245 P. 677, 681 (1926); E. MCQUILLIN, *supra* note 1, at § 39.21; Holmberg, *Municipal Powers and the Public Purpose Doctrine*, 21 ROCKY MT. L. REV. 277 (1949).

21. Some states permit voter approval of an increased limit up to a specified amount; *e.g.*, GA. CONST. art. 7, § 2-6003; NEB. CONST. art. 13, § 2. Other states limit the unit's indebtedness to an amount not exceeding annual revenue, but allow a specified increase under the debt-to-property ratio upon voter approval. OKLA. CONST. art. 10, § 26 (up to 5 percent of the assessed valuation, additional).

22. *E.g.*, MO. CONST. art. 6, § 26(a); CALIF. CONST. art. 11, § 18. *See generally* E. MCQUILLIN, *supra* note 1, at § 41.10.

debt-to-property ratio.[23] Some restrictions differ in the limit placed on particular governmental entities such as cities, counties and school districts.[24] Others specifically distinguish between heavily and lightly populated areas,[25] or enumerate certain cities with higher debt allowances.[26] Various exceptions to the limitations based upon the purpose for which indebtedness may be incurred permit additional expenditures for water, lights and sewers,[27] port development[28] or school rental contracts.[29]

Arizona's constitutional debt limitations are similar to the restrictions in most other jurisdictions. Article 9, section 8 allows municipal corporations[30] to incur indebtedness not in excess of 4 percent of the assessed valuation of taxable property within their boundaries without taxpayer approval.[31] Certain other entities are allowed additional indebtedness after approval by the electorate. Thus, counties and school districts may become indebted to a maximum of 10 percent of their assessed valuation for any purpose, while incorporated cities or towns[32] may incur 15 percent additional indebtedness for water, lighting or sewers.[33]

A further restriction placed upon local finances in article 7, sec-

23. The debt-to-property ratio is a fixed percentage of the assessed valuation of the taxable property within the governmental unit. These limits vary from 1.5 percent, WASH. CONST. art. 8, § 6, to 18 percent, VA. CONST. art. 8, § 10(a), and average 5 percent. *See* Bowers, *supra* note 8, at 37-38; Morris, *Evading Debt Limitations With Public Building Authorities: The Costly Subversion of State Constitutions*, 68 YALE L.J. 234, 241 n.18 (1958). For a criticism of the debt-to-property ratio, see Williams & Nehemkis, *supra* note 5, at 38.

24. *E.g.*, WYO. CONST. art. 16, §§ 3 & 5.

25. *E.g.*, ALA. CONST. art. 12, § 225; KY. CONST. § 158.

26. PA. CONST. art. 9, § 12 (13.5 percent limit for Philadelphia, 7 percent for other cities); N.Y. CONST. art. 8, § 4 (New York City has highest limit).

27. *E.g.*, UTAH CONST. art. 14, § 4 (8 percent additional).

28. ORE. CONST. art. 11, § 9 (1 percent additional).

29. ME. CONST. art. 9, § 15.

30. These are counties, cities, towns, school districts and other units that qualify. *See* notes 93-95 *infra*. *See generally* ARIZ. CONST. art. 13.

31. Certain districts are without the limitations of article 9, section 8. ARIZ. CONST. art. 13, § 7, provides, in part: "Irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts, . . . shall be political subdivisions of the State, . . . but all such districts shall be exempt from the provisions of sections 7 and 8 of Article IX of this Constitution." These districts are delegated the power to borrow and their debt limits are established by statute. *See, e.g.*, statutes cited note 95 *infra*.

32. Note that this provision only refers to "incorporated" cities; regarding unincorporated cities, see 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 9.01 (3d rev. ed. 1966); regarding home rule cities, see Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U.L. REV. 27-31 (1956).

33. With the requisite voter approval, debt may be incurred up to a total of 19 percent by combining the two limits. Crawford v. City of Prescott, 52 Ariz. 471, 83 P.2d 789 (1938). The purpose of the indebtedness will determine which category a debt falls within; even if the 15 percent has been reached for water, lighting and sewers, the additional 4 percent may be used for any purpose without voter assent. Walmsley v. Laird, 34 Ariz. 544, 273 P. 536 (1929); Buntman v. City of Phoenix, 32 Ariz. 18, 255 P. 490 (1927).

tion 13 of the Arizona constitution[34] requires voter approval for the issuance of bonds or the levy of special assessments by political subdivisions.[35] Since the amount, purpose of indebtedness or the entities to which the restriction applies are not delineated in the provision, it appears that all bonds and special assessments of political subdivisions require voter approval, including those that do not exceed the article 9, section 8 debt limit.[36]

Avoiding Debt Restrictions

Restrictions on indebtedness that may have seemed beneficial at the time they were made have since shackled local financing. As population and urbanization have increased, accompanied by a rising demand for community services and facilities, the need for liberalized debt limitations has become apparent. As a consequence, therefore, and with judicial sanction, numerous devices for the circumvention of restrictions on local finance have developed throughout this century.[37]

Tucson Transit Authority, Inc. v. Nelson[38] exemplifies an attempt to create a viable financial structure of local government to fulfill the needs of a community—in this instance, the need of adequate public transit. In 1970, pursuant to the Urban Mass Transportation Systems Act,[39] the City of Tucson created the Tucson Transit Authority, Inc., a political subdivision.[40] The Transit Authority was authorized to issue two million dollars in bonds, but upon the required review by the Attorney General,[41] the bond certification was refused. The Transit

34: ARIZ. CONST. art. 7, § 13 provides: "Questions upon bond issues or special assessments shall be submitted to the vote of real property tax payers, who shall also in all respects be qualified electors of this State, and of the political subdivisions thereof affected by such questions." For the constitutionality of this provision, see note 36 *infra.*

Of primary interest to this analysis is the form of indebtedness evidenced by the issuance of bonds. These instruments have been defined as "obligations, negotiable in form and generally under seal, promising to pay, at a fixed future day, to a person named . . . a certain sum with interest . . . ." E. MCQUILLIN, *supra* note 1, at 473. Bonds distribute the burden of financial undertakings among current and future taxpayers. Indebtedness, however, may be evidenced in other forms. *See* L. MOAK, ADMINISTRATION OF LOCAL GOVERNMENT DEBT 39-44 (1970).

35. See text accompanying notes 99-106 *infra* for a discussion of political subdivisions.

36. The concern here is only with when an election is mandatory. The issue of who is permitted to vote when an election is required was before the Supreme Court of the United States in City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970), in which the Court held the real property taxpayer limitation of article 7, section 13 to be violative of the equal protection clause of the fourteenth amendment. This factor, however, did not affect the decision in *Tucson Transit Authority.*

37. For a discussion of these devices and relevant case law in most states, see B. MANN & F. BIRD, STATE CONSTITUTIONAL RESTRICTIONS ON LOCAL BORROWING AND PROPERTY TAXING POWERS (1964).

38. 107 Ariz. 246, 485 P.2d 816 (1971).

39. ARIZ. REV. STAT. ANN. §§ 40-1101 to -1147 (Supp. 1971-72).

40. *Id.* § 40-1111(4).

41. *Id.* § 40-1146.

Authority then brought a special action to compel the Attorney General to certify the bonds.[42]

In upholding the Attorney General's action, the Supreme Court of Arizona found that the Act in actuality authorized "general obligation" bonds[43] rather than the purported "revenue" bonds.[44] Under the Act, the Authority could secure, through the City of Tucson, a property tax levy within the area serviced by the Authority.[45] Since the Authority would pledge its gross income, which included this tax levy, to repayment of the bonds, the court held that the City of Tucson would be directly obligating its general taxing power, thus creating a municipal "debt."[46] The absence of a provision for electorate approval of the bonds, as required by article 7, section 13 of the Arizona constitution, therefore rendered the Urban Transportation Act unconstitutional.

In analyzing the holding of *Tucson Transit Authority*, it is necessary to understand that Arizona courts have interpreted article 7, section 13 to mean that unless a "debt" is created by the issuance of bonds or the levy of special assessments, a "political subdivision" is not "affected" and no prior electorate assent is required.[47] In addition, if no such "debt" is created, the limitations of article 9, section 8 regarding the amount of indebtedness are inapplicable.[48] By judicial interpretation, Arizona has thus hinged the applicability of debt restrictions upon a determination of what constitutes a "debt."

Although a debt has no precise meaning in this context,[49] the nature of the transaction may indicate indebtedness.

> It is . . . essential to the idea of a debt that an obligation should have arisen out of a contract, express or implied, which entitles the holder thereof unconditionally to receive from the promisor a

42. Tucson Transit Authority, Inc. v. Nelson, 107 Ariz. 246, 247, 485 P.2d 816, 817 (1971).

43. *See* text & notes 51-52 *infra.*

44. *See* text & notes 65-74 *infra.*

45. ARIZ. REV. STAT. ANN. § 40-1141 (Supp. 1971-72).

46. Since the Authority was not a municipal corporation, it was not bound by article 9, section 8 and the legislature was thus able to establish a separate debt limit of one million dollars. ARIZ. REV. STAT. ANN. § 40-1138 (Supp. 1971-72). The two million dollars in proposed bonds would not have violated this statute if no "debt" had been created. See text & notes 93-98 *infra.*

47. *See* Tucson Transit Authority, Inc. v. Nelson, 107 Ariz. 246, 251, 485 P.2d 816, 821 (1971); City of Globe v. Willis, 16 Ariz. 378, 382, 146 P. 544, 545 (1915).

48. A bonded "debt" requires voter approval under article 7, section 13 even though it does not exceed the 4 percent limit of article 9, section 8, simply because it is created through the medium of a bond issue. Ackerman v. Boyd, 74 Ariz. 77, 244 P.2d 351 (1952).

49. The computation of existing indebtedness is often difficult. It is necessary to determine when the debt limit has been reached and when a proposed transaction will exceed the limit. *See* Morgan v. Board of Super., 67 Ariz. 133, 192 P.2d 236 (1948) (a sinking fund may offset existing bonded indebtedness). *See generally* Bowers, *supra* note 8, at 42-44.

> sum of money which the latter is under a legal or moral duty to pay, without regard to any future contingency.[50]

Thus, to be a debt within the meaning of article 7, section 13 and article 9, section 8, bonds issued by an entity must be "payable from the general funds of the [entity], or from taxes levied on the taxable property therein . . . ."[51] In the event of default, the bond holder may, through court proceedings, require the issuer to exercise its taxing power,[52] thereby placing the burden of repayment on the individual taxpayer. These "general obligation" bonds were the primary method of long term financing of local governments when debt limitations were first adopted.

Arizona courts have created exceptions to the debt limitation and voting provisions found in the constitution and statutes by refusing to recognize certain transactions as creating debts. For example, a refunding bond may be issued without restriction to consolidate outstanding indebtedness since no further debt is incurred.[53] Similarly, the indebtedness restrictions apply only to debts voluntarily incurred and "not to liabilities which the law itself impose[s] upon the [entity]."[54] Therefore, when a city is required by statute to purchase property from an owner delinquent in payment of special assessments, the obligation does not fall within the purview of debt restrictions.[55] A common law tort judgment against a town is also an involuntarily-incurred obligation free from the debt limits.[56] Such exceptions are consistent with the purpose of the financing restrictions since involuntary obligations are not subject to misuse by political leaders.

Devices have also been created for circumventing constitutional restrictions even though a liability is voluntary. The special assessment, a levy against specific property benefited by an improvement,[57] was the earliest method employed.[58] While the Arizona constitution

50. City of Globe v. Willis, 16 Ariz. 378, 385, 146 P. 544, 546 (1915).
51. Crandall v. Town of Safford, 47 Ariz. 402, 407, 56 P.2d 660, 662 (1936).
52. *See* E. McQUILLIN, *supra* note 1, at § 43.160.
53. Reichenberger v. Salt River Project Agri. Imp. & Power Dist., 61 Ariz. 465, 150 P.2d 758 (1944); Allison v. City of Phoenix, 44 Ariz. 66, 33 P.2d 927 (1934); Citrus Grower's Dev. Ass'n, Inc. v. Salt River Valley Water Users' Ass'n, 34 Ariz. 105, 268 P. 773 (1928); Doan v. Board of Super., 21 Ariz. 240, 187 P. 265 (1920).
54. Wise v. First Nat'l Bank, 49 Ariz. 146, 157, 65 P.2d 1154, 1159 (1937).
55. *Id.*
56. Town of Flagstaff v. Gomez, 29 Ariz. 481, 242 P. 1003 (1926).
57. Such an assessment is distinguished from a tax which is levied against all similarly situated property for purposes which will benefit the public generally. Barry v. School Dist. No. 210, 105 Ariz. 139, 140-41, 460 P.2d 634, 635-36 (1969). An assessment must be apportioned "with approximate equality, upon a reasonable basis of classification, and with due regard to the benefits to the individual property owners." Weitz v. Davis, 102 Ariz. 40, 43, 424 P.2d 168, 171 (1967).
58. L. CHERMAK, *supra* note 4, at 60. *See generally* W. WINTER, THE SPECIAL ASSESSMENT TODAY WITH EMPHASIS ON THE MICHIGAN EXPERIENCE 8-15 (U. of Mich. Gov. Studies No. 26, 1952).

theoretically requires voter approval of all special assessments,[59] the supreme court has stated that if a governmental unit finances a local improvement[60] by pledging only special assessment funds to repayment of the bonds, the unit does not become liable in its capacity as a tax-levying body and no debt is created affecting the entity.[61] The bond holder's only recourse is against defaulting property owners. Since no "debt" is created by special assessments, the property owner has no right to vote even though he is liable for repayment of the bonds. This arguable inequity is compounded when the city creates numerous local special assessment districts[62] in order to make city-wide improvements that, if funded as a whole, would be impermissible under the debt limit or would at least require voter approval. This procedure contravenes the rationale of article 7, section 13, which requires approval of indebtedness by the property owner who may be called upon to satisfy the obligation. Through a series of cases, however, this procedure has become well established in Arizona.[63]

The special assessment device led to the formation of a similar financing scheme, the special fund. Using this financing method, the governmental entity pledges only specific funds to pay the principal and interest on the issued bonds. Since the bond holder can look to no other source, the transaction creates no "debt" within the meaning of the constitution.[64] The most common use of the special fund is the issuance of revenue bonds,[65] instruments which have been referred to as "bonds, the debt service of which is payable solely from the revenues or earnings derived from the operation of a revenue-producing enterprise or facility constructed or acquired with the proceeds of such bonds."[66] The Arizona courts have upheld the use of revenue bonds to finance such facilities as a university addition,[67] a water system,[68] a

59. ARIZ. CONST. art. 7, § 13, *quoted* note 34 *supra.*
60. ARIZ. CONST. art. 9, § 6.
61. City of Globe v. Willis, 16 Ariz. 378, 146 P. 544 (1915).
62. *See* 14 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 38.54 (3d rev. ed. 1970).
63. *See* Tucson Transit Authority, Inc. v. Nelson, 107 Ariz. 246, 485 P.2d 816 (1971); Cyr & Evans Constr. Co. v. Graham, 2 Ariz. App. 196, 407 P.2d 385 (1965); Ainsworth v. Arizona Asphalt Paving Co., 18 Ariz. 242, 248, 158 P. 428, 431 (1916).
64. *See* Guthrie v. City of Mesa, 47 Ariz. 336, 56 P.2d 655 (1936); City of Globe v. Willis, 16 Ariz. 378, 146 P. 544 (1915).
65. *See* ARIZ. REV. STAT. ANN. §§ 9-521 *et seq.* (1956). Originally enacted as the Revenue Bond Act of 1934, ch. 11, *et seq.* [1934] Ariz. Sess. Laws 3rd Spec. Sess., this statute permitting the use of revenue bonds was the result of the critical financial conditions of the 1929 depression. For a discussion of the factors that led to the introduction of these statutes in many states, see FUNDAMENTALS OF MUNICIPAL BONDS 115-22 (4th ed. G. Calvert ed. 1965); Foley, *Some Recent Developments in the Law Relating to Municipal Financing of Public Works*, 4 FORD. L. REV. 13, 26-34 (1935).
66. L. CHERMAK, *supra* note 4, at 62.
67. Board of Regents of the Univ. of Arizona v. Sullivan, 45 Ariz. 245, 42 P.2d 619 (1935).
68. Guthrie v. City of Mesa, 47 Ariz. 336, 56 P.2d 655 (1936).

recreation center[69] and a housing project.[70]

In using revenue bond financing, a distinction is made between a net and gross pledge of revenues from revenue-producing enterprises. Net revenue may be pledged to repayment of bonds without creating a debt.[71] If a gross pledge of income is made, however, by an entity which must continue to operate a facility if revenues are not sufficient to cover both debt service and expenses, a debt may be indirectly incurred. The Supreme Court of Arizona upheld a gross pledge in *Guthrie v. City of Mesa*[72] by requiring that revenues be used to operate an improved facility prior to being committed to bonds. This device is valid only "so long as the income from the old or existing utility is free and unpledged to the payment of any other municipal obligation."[73]

Revenue bond financing has been subject to criticism.[74] While it appears justifiable to charge persons according to their use of beneficial facilities, this rationale falls short when evaluated in light of the original goals of preventing uncontrolled borrowing and an undue financial burden on the public. Using this financing scheme, local governments can undertake, free from voter control, costly enterprises that may involuntarily become the direct responsibility of individual citizens, either as taxpayers or ratepayers. The economic failure of a facility upon which the community had become dependent could place a moral[75] and perhaps political obligation on the governmental unit to continue the service, regardless of the formal financial arrangement employed. The city could make voluntary contributions from the general tax fund to the bond holder, thereby shifting the burden of indebtedness to the taxpayer without his approval.

The special fund doctrine has also been applied in Arizona to funds created other than by revenues derived from a revenue-producing enterprise. In *Arizona State Highway Commission v. Nelson*[76] the supreme court held that the pledging of revenues received from a constitutionally authorized fund,[77] separate and distinct from the gen-

69. Crawford v. City of Prescott, 52 Ariz. 471, 83 P.2d 789 (1938).
70. Humphrey v. City of Phoenix, 55 Ariz. 374, 102 P.2d 82 (1940).
71. Crandall v. Town of Safford, 47 Ariz. 402, 408, 56 P.2d 660, 662 (1936).
72. 47 Ariz. 336, 56 P.2d 655 (1936).
73. *Id.* at 343, 56 P.2d at 658.
74. *See* L. CHERMAK, *supra* note 4, at 91; Bowmar, *supra* note 17, at 879-80; Durisch, *Publicly Owned Utilities and the Problem of Municipal Debt Limits*, 31 MICH. L. REV. 503, 511 (1933).
75. *See* E. DAVIS, OF THE PEOPLE, BY THE PEOPLE, FOR THE PEOPLE 69 (1958).
76. 105 Ariz. 76, 459 P.2d 509 (1969).
77. ARIZ. CONST. art. 9, § 14. The proceeds from fees, excises, licenses or taxes relating to the registration, operation or use of motor vehicles are reserved for highway use.

eral revenues of the issuing entity, did not create a debt against the state and did not require prior electorate approval. The same rationale applies to local government financing. Thus, *Switzer v. City of Phoenix*[78] has been read to mean that a municipality may pledge its share of voluntary contributions from the state "derived from fees, penalties or excise taxes, already in existence and not created in anticipation of the bond issue."[79]

The Arizona courts have recognized another financing arrangement that overlooks fiscal restrictions, the contingent obligation. In *Wise v. First National Bank of Nogales*[80] the court found that a statute, requiring the city to buy unmarketable property encumbered with delinquent special assessments and to pay the debt service on bonds issued for improvements to that property, did not create an indebtedness requiring voter approval. Since the property owners might never become delinquent in their payments or the property might be sold, the city's liability was only a contingency.[81]

The contingency theory has been extended to permit governmental entities to engage in long term leasing of facilities[82] constructed by a private firm or an authority[83] specially created for that purpose. Courts upholding this scheme, which is based upon the common law principle that future rent is not a due and collectable debt,[84] indicate that the arrangement creates no "debt" if periodic rental payments are

78. 86 Ariz. 121, 341 P.2d 427 (1959).

79. Tucson Transit Authority, Inc. v. Nelson, 107 Ariz. 246, 251, 485 P.2d 816, 821 (1971). The court in *Tucson Transit Authority* appears to have read *Switzer* narrowly. *Compare* Switzer v. City of Phoenix, 86 Ariz. 121, 123-24, 341 P.2d 427, 428-29 (1959) *with* Tucson Transit Authority, Inc. v. Nelson, 107 Ariz. 246, 251, 485 P.2d 816, 821 (1971). Requiring that the fund be "already in existence" may seriously affect the financing of some Arizona projects now being undertaken. Petitioner's Motion for Rehearing at 8-10, Tucson Transit Authority, Inc. v. Nelson, 107 Ariz. 246, 485 P.2d 816 (1971).

80. 49 Ariz. 146, 65 P.2d 1154 (1937). This case additionally upheld the "involuntary" debt, *discussed* text & notes 54-55 *supra*.

81. *But cf.* Wickey v. Muscatine County, 242 Iowa 272, 283-84, 46 N.W.2d 32, 38 (1951); Burlington Water Co. v. Woodward, 49 Iowa 58, 62 (1878). It is submitted that the approach evidenced by these authorities is more rational: if the entity has no control over the happening of the contingency, as in *Tucson Transit Authority* and *Wise*, then the transaction constitutes a present obligation and falls within the constitutional or statutory debt limits.

The court confused the present state of the law regarding the contingent liability theory in *Tucson Transit Authority*. In referring to City of Globe v. Willis, 16 Ariz. 378, 146 P. 544 (1915), the court stated that it was "[o]f crucial importance in arriving at this decision (*Globe*) . . . that the city was to incur *no liability, direct or contingent*, in issuing the bonds . . . ." Tucson Transit Authority, Inc. v. Nelson, 107 Ariz. 246, 249, 485 P.2d 816, 819 (1971) (emphasis added). A reading of the *Globe* opinion reveals no such requirement; it is apparently one that the court has since added, perhaps weakening the contingent debt theory.

82. *See* L. ELISON, *supra* note 13, at 111; Rogers, *supra* note 9.

83. *See* text & notes 89-90 *infra*. For a complete discussion of building authorities, see Morris, *supra* note 23.

84. Morris, *supra* note 23, at 256-57.

the fair and reasonable cost of use of the facility.[85] Leases with an option to purchase or automatic conveyance clause have been variously interpreted, some courts holding the agreement to be valid under the debt limitations,[86] others suggesting it to be an evasion of the limits and therefore invalid.[87]

The lease financing scheme contains the same analytical infirmities as the other devices considered herein: the taxpaying public is deprived of control over long term indebtedness and sound fiscal policies may be inhibited. The distinction between leasing and borrowing is tenuous since, using either financing method, a facility is supported with taxes or other revenues from the unit's general funds. A governmental entity is equally committed whether entering a lease or issuing general obligation bonds. The lease arrangement is clearly one in which "[a]nnual rent payments are indistinguishable in fact from annual debt service on bonds."[88]

When confronted with restrictive court decisions, local governments have been able to avoid fiscal limitations by creating special districts[89] and authorities[90] to undertake proprietary functions.[91] The very nature of these entities aids in circumventing financial restrictions. The status of a district as a political and corporate entity is of primary

85. *See* Dean v. Kuchel, 35 Cal. 2d 444, 218 P.2d 521 (1950); City of Los Angeles v. Offner, 19 Cal. 2d 483, 122 P.2d 14 (1942).

86. *See* Protsman v. Jefferson-Craig Consol. School Corp., 231 Ind. 527, 109 N.E.2d 889 (1953); Walinske v. Detroit-Wayne Joint Bldg. Auth., 325 Mich. 562, 39 N.W.2d 73 (1949).

87. *See* Hively v. School City, 202 Ind. 28, 169 N.E. 51 (1930). One such "lease" was rejected by the Supreme Court of Arizona in City of Phoenix v. Phoenix Civic Auditorium and Convention Center Ass'n, 99 Ariz. 270, 408 P.2d 818 (1965). Under this arrangement, an apparent subterfuge, the "rent" payments were substantially equal to the principal and interest on bonds issued by an authority specially created to construct the facility; additionally, title to a valuable building would pass to the city upon expiration of the lease. The court found a present "debt" payable from the city's general funds and exceeding its debt limitation. The court later indicated in a clarifying opinion that special fund financing perhaps would have permitted contracting a "debt" of this nature. 100 Ariz. 101, 412 P.2d 43 (1966), *supplementing* 99 Ariz. 270, 408 P.2d 818 (1965). Another Arizona case invalidated a purported "lease" which pledged the community's general funds. American-LaFrance & Foamite Corp. v. City of Phoenix, 47 Ariz. 133, 54 P.2d 258 (1936). In sum, the success of lease-purchase agreements in Arizona seems to be ill-fated.

88. Magnusson, *Lease-Financing by Municipal Corporations as a Way Around Debt Limitations*, 25 GEO. WASH. L. REV. 377, 392 (1957).

89. There are three primary types of districts: autonomous school districts; dependent special assessment or taxing districts; and local independent, co-terminous or overlapping districts which provide services or benefit particular groups of individuals by levying taxes or fees. The latter type is of interest to this discussion. *See* J. BOLLENS, SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES 45 (1961); L. CHERMAK, *supra* note 4, at 74.

90. Although a distinction is sometimes made between these forms of organization, they will be treated as identical for purposes of the present discussion. *See* Bowmar, *supra* note 17, at 870 n.36; J. BOLLENS, *supra* note 89, at 229.

91. Courts may disallow special districts if they are created solely to avoid debt limitations. *See* Rappaport v. Dep't of Public Health & Hospitals, 227 Ind. 508, 87 N.E.2d 77 (1949); Note, *Constitutional Limitations on Indebtedness*, 25 IND. L.J. 325, 332-37 (1950).

concern here, for it is the determination of this status which governs the applicability of the debt limits and voter requirements.[92]

Arizona's constitutional debt limit applies only to the specific entities listed in article 9, section 8 and to "other municipal corporations." If, as in the case of the Tucson Transit Authority,[93] a district is deemed not to be a municipal corporation, then it does not fall within the constitutional provision[94] and its debt limit is left to the discretion of the legislature.[95] Even if a district is declared a municipal corporation, its constitutional debt limit is in addition to that of local governments within the same area, since it is a separate entity.

The judicially developed principles of finance discussed above determine whether a district's transactions create "debts." So long as the primary governmental entity does not pledge its taxing power or become liable for repayment of the district's bonds, then no indebtedness is created against the entity.[96] The special bond district, however, may pledge its taxing power[97] or revenues from other sources,[98] or it may employ the aforementioned financing schemes and avoid the restrictions completely. Hence, the district functions with a separate debt limit, although it may comprise the same geographic area as the primary unit, and a local governmental entity can, in effect, greatly increase its borrowing capacity.

In Arizona, the voter requirement of article 7, section 13, is applicable only to governmental units that qualify as "political subdivisions." Whether a particular unit falls within this classification is not readily apparent. For example, prior to a constitutional amendment making them political subdivisions,[99] irrigation districts were held

92. Roberts v. Spray, 71 Ariz. 60, 67, 223 P.2d 808, 813 (1950) (legislative power is plenary in creating districts and determining their status).

93. Tucson Transit Authority, Inc. v. Nelson, 107 Ariz. 246, 251-52, 485 P.2d 816, 821-22 (1971). The factors considered in arriving at this decision are not relevant to this discussion.

94. *See* Ramirez v. Electrical Dist. No. 4, 37 Ariz. 360, 294 P. 614 (1930). *See also* ARIZ. CONST. art. 13, section 7, *quoted* note 31 *supra*, excepting certain enumerated districts from the debt limit of ARIZ. CONST. art. 9, section 8, thus leaving their debts to statutory control.

95. *See* ARIZ. REV. STAT. ANN. § 40-1138 (Supp. 1971-72) (Tucson Transit Authority limited to a one million dollar debt); *Id.* § 36-1243 (1956) (hospital district limited to 10 percent assessed valuation of taxable property in district). The identification of municipal corporations has been inconsistent in Arizona, the outcome of the inquiry depending on the constitutional principles involved. *Compare* Uhlman v. Wren, 97 Ariz. 366, 386-88, 401 P.2d 113, 126-27 (1965) (agricultural improvement district held to be a municipal corporation for purposes of eminent domain) *with* Ramirez v. Electrical Dist. No. 4, 37 Ariz. 360, 362-66, 294 P. 614, 615-16 (1930) (electrical district held not to be a municipal corporation within constitutional debt limit).

96. *See* Tucson Transit Authority, Inc. v. Nelson, 107 Ariz. 246, 249, 485 P.2d 816, 819 (1971); *see* text & notes 51-52 *supra*.

97. *See* ARIZ. REV. STAT. ANN. § 36-1324 (1956).

98. *See id.* § 18-603(c) (Supp. 1971-72).

99. ARIZ. CONST. art. 13, § 7.

to be such subdivisions for certain constitutional purposes but not for others.[100] Some general principles can be derived, however, from the opinions considering this problem. The supreme court, in holding an irrigation district not to be a political subdivision,[101] relied on the rule set forth in *Day v. Buckeye Water Conservation & Drainage District*:[102]

> Counties, cities, towns, and municipalities all belong to a class of subdivisions of the state primarily established for what are commonly called political and governmental, as aside from business purposes. . . . On the other hand, irrigation districts and similar public corporations, while in some senses subdivisions of the state, are in a very different class. Their function is purely business and economic, and not political and governmental.[103]

In view of the continuing interpretation of the constitutional principles involved,[104] results similar to that reached in *Tucson Transit Authority* are perhaps avoidable. Whether districts which are not constitutionally[105] or statutorily[106] delineated as political subdivisions would be deemed to exercise a "political function" within the meaning of article 7, section 13, is an unsettled question in Arizona. Local governments could establish numerous such districts to carry out proprietary functions that would be impermissible under the debt limitations, and prior voter approval of their bonds would not be a constitutional requirement. Although Arizona courts have not considered the exact financing scheme hypothesized here, the language of the provisions and the logic of the decisions would appear to permit it. Perhaps this scheme has a role in Arizona's financing future as the demands upon local governments increase.

That the use of special districts can be criticized is apparent.[107]

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100. *Compare* Kinne v. Burgess, 24 Ariz. 463, 211 P. 573 (1922), *with* Maricopa County Municipal Water Conserv. Dist. No. 1 v. LaPrade, 45 Ariz. 61, 40 P.2d 94 (1935) *and* Day v. Buckeye Water Conserv. & Drainage Dist., 28 Ariz. 466, 237 P. 636 (1925).

101. Maricopa County Municipal Water Conserv. Dist. No. 1 v. LaPrade, 45 Ariz. 61, 40 P.2d 94 (1935).

102. 28 Ariz. 466, 237 P. 636 (1925).

103. *Id.* at 474, 237 P. at 638.

In holding a school district to be a political subdivision exercising the governmental function of educating children, the court has noted: " 'Political' has been defined by Webster as 'relating to the management of affairs of state; of or pertaining to or incidental to the exercise of functions vested in those charged with the conduct of government.' " Sorenson v. Superior Court, 31 Ariz. 421, 424, 254 P. 230, 231 (1927).

104. The court of appeals recently relied on the *Day* criteria as expounded in *LaPrade* in determining that a city is a political subdivision, thus indicating *LaPrade*'s current viability. City of Phoenix v. Collar, Williams & White Eng., Inc., 12 Ariz. App. 510, 472 P.2d 479 (1970). *See* text & notes 101-03 *supra*.

105. For an example of a district constitutionally established as a political subdivision, see Shumway v. Fleishman, 66 Ariz. 290, 292, 187 P.2d 636, 637 (1947).

106. For an example of a district statutorily provided to be a political subdivision, see ARIZ. REV. STAT. ANN. § 40-1111(4) (Supp. 1971-72).

107. "Generally there are other answers to fiscal problems of a more efficacious

Their creation has clearly permitted the avoidance of debt limitations and voter requirements. Numerous overlapping units of government drastically increase the debt ceiling within a particular geographic area which concomitantly increases the potential burden on the taxpayer residing within its bounds,[108] and "[t]his heavy tax burden is inconsistent with the ostensible motivation for original indebtedness limitation—attaining the goal of a sound fiscal policy."[109]

Debt Limits in the Current Context

The rationale underlying limitations on local indebtedness enjoys continued viability; curtailment of irresponsible, long term borrowing will always be desirable. Whether the financing schemes developed during this century are aiding in this quest may be seriously questioned. Indeed, it is possible that they are inhibiting solutions to today's fiscal problems.

The success of a particular financial undertaking should depend on the community's ability to shoulder the burden of indebtedness and not on an ability to fit it within one of the recognized financing schemes. Even so, courts have often found it necessary to overlook the constitutional and analytical deficiencies in these devices when faced with the demands of the twentieth century. Perhaps, due to current affluence, increased borrowing by local governments is no longer offensive to the community. The courts' insistence, however, as seen in *Tucson Transit Authority*, that the financing schemes do not create "debts" requiring voter approval, forecloses expression of this sentiment through the electoral process. It has been suggested that the best means of eliciting public response is through strict judicial interpretation of the existing provisions, resulting in restricted governmental borrowing, fewer services and possibly debt limitation revision.[110]

The present local government financing system is inefficient and outmoded. It has been demonstrated that the borrowing devices are

and acceptable nature. As borrowing mechanisms and nothing more, special districts must be condemned." L. ELISON, *supra* note 13, at 106. The consideration here has been the effect of districts and authorities on debt limits and voter requirements. A general discussion of their role in local government may be found in W. CAPE, L. GRAVES & B. MICHAELS, GOVERNMENT BY SPECIAL DISTRICTS (U. of Kan. Gov. Research Series No. 26, 1969).

108. The Chicago metropolitan area contains as many as 960 local governmental units. J. BOLLENS, *supra* note 89, at 49. South Carolina has protected against excessive use of this device by requiring that the aggregate debt for overlapping districts within the same geographic area not exceed a specified limit. S.C. CONST. art. 10, § 5[1].

109. Bowmar, *supra* note 17, at 870.

110. *See* City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 293, 408 P.2d 818, 834 (1965); Prideaux v. Frohmiller, 47 Ariz. 347, 374, 56 P.2d 628, 638-39 (1936) (Lockwood, J., dissenting); Rogers, *supra* note 9, at 53.

far more costly than general obligation pledges by the entity due to the disparity in interest rates on the bonds.[111] Additionally, the time and resources required to maneuver within the established fiscal framework could more profitably be allocated to curing the ailments of local finance.[112]

Foremost among financing problems is that the method used to determine the capacity of a community to support bonded indebtedness, the assessed property valuation,[113] has become an anachronism. In reality, it is a community's wealth that supports its financial undertakings and not the system of financing employed or the type of bond issued. Originally, the *ad valorem* tax was the primary source of wealth for local governments and the assessed valuation was a valid debt limiting standard. Presently, however, revenues are derived from previously unavailable sources: fees, licenses, sales taxes, service charges and excise taxes,[114] thus rendering less meaningful the distinction between real property taxes and other demands upon the public. Any debt limit reform should account for this change in economic conditions.

Recognizing the need for change will foster various proposed solutions. It has been suggested that the constitutional debt limits be abolished completely[115] and that control over debt incurrence be left solely to the legislature.[116] Statutory schemes for state administration of the debt limits[117] or plans that permit "local units to exercise an independent choice in implementing prudent financial policies"[118] have been proposed. Although there are differing opinions,[119] there is a general belief that the taxpayer, who will utimately be responsible for the ramifications of the choice to incur indebtedness, should make the decision directly.[120]

If there is to be a controlling constitutional debt limitation provision in Arizona, its dictates should be followed or the provision

111. *See* A. HEINS, *supra* note 3, at 36-81; L. MOAK, *supra* note 34, at 129-76 (factors which influence interest rates).

112. For discussions of the various financial problems facing municipalities, see L. ELISON, *supra* note 13; L. MOAK, *supra* note 34, at 205.

113. *See* text & note 23 *supra*; Note, *Tax Assessments of Real Property: A Proposal for Legislative Reform*, 68 YALE L.J. 335 (1958).

114. In 1969, only 28.1 percent of municipal government revenues was derived from property taxes. L. MOAK, *supra* note 34, at 55. *See generally* L. ELISON, *supra* note 13, at 62-102.

115. L. ECKER-RACZ, THE POLITICS AND ECONOMICS OF STATE-LOCAL FINANCE 132 (1970).

116. A. HEINS, *supra* note 3, at 35.

117. L. GOODALL, *supra* note 7, at 20-25 discusses proposals in various states. *See* T. MCMILLAN, STATE SUPERVISION OF MUNICIPAL FINANCE 63-75 (1953); Bowmar, *supra* note 17, at 896 n.144.

118. Bowmar, *supra* note 17, at 898.

119. *See* State v. City of Miami, 113 Fla. 280, 296-97, 152 So. 6, 12 (1933).

120. *See* text & note 12 *supra*.

should be changed to correspond to present practices.[121] If, on the other hand, we are to reestablish sound fiscal control by the electorate, substantial change will have to be effected through constitutional amendment, abolishing existing limitations and substituting a more rational basis of regulating local governmental borrowing. Clearly, in any case, the time has come to reexamine the debt limitations confining local financing.

VOTING

VOTER REREGISTRATION

As the right to vote has gained increased recognition as a fundamental right, state election laws qualifying the franchise have come under more exacting judicial scrutiny. The equal protection clause of the fourteenth amendment has been used as the standard for determining whether state laws qualifying the right to vote are constitutionally permissible. The treatment of Arizona's new voter registration law in both the state and federal court systems illustrates recent judicial inquiry into an alleged infringement of the franchise in Arizona.

In early 1970, the Arizona Legislature amended the state's election law to require that county recorders cancel all voter registrations the day after the 1970 general election and every ten years thereafter,[1] thus requiring all voters to reregister every ten years. This amendment, implicitly a rejection of the efficacy of the self-purging mecha-

121. Instead of mainatining that the transactions under consideration do not constitute "debts," some states have chosen to be consistent in their constitutional pronouncements by excepting the financing schemes from their debt limitations. ALAS. CONST. art. 9, § 11 provides:

> The restrictions on contracting debt do not apply to debt incurred through the issuance of *revenue bonds* by a public enterprise or public corporation of the State or a political subdivision . . . . The restrictions do not apply to indebtedness to be paid from *special assessments* on the benefited property, nor do they apply to *refunding* indebtedness of the State or its political subdivisions. [Emphasis added.]

For other examples of constitutional provisions which are consistent with current realities, see ALA. CONST. art. 12, § 222 (refunding and special assessments excepted); HAWAII CONST. art. 6, § 3 (similar to Alaska's); IDAHO CONST. art. 8, § 3 (revenue bonds for specific purposes excepted); MO. CONST. art. 6, § 27 (revenue bonds require a vote); N.Y. CONST. art. 8, § 3 (creation of new districts prohibited); PA. CONST. art. 9, § 10 (self-liquidating projects excepted) & art. 8, § 7(c) (leases are "debts" of the state).

1. ARIZ. REV. STAT. ANN. § 16-150(D) (Supp. 1971-72). (Repealed by House Bill 2190, May 24, 1972, Thirtieth Arizona Legislature, 2d regular session, Ch. 218, § 10, [1972] Ariz. Sess. Laws .)

nisms of the previous process,[2] converted the Arizona voter registration system from a permanent to semi-permanent one.[3] This analysis will discuss both state and federal challenges to Arizona's new periodic reregistration requirement.

In the state court case of *Stillman v. Marston*,[4] Guy Stillman argued that the cancellation of all voter registrations deprived him of his right to circulate initiative petitions,[5] since those persons eligible to sign the initiative petition—"qualified electors"[6]—were eliminated by the cancellation until they requalified to vote by reregistering. The petitioner sought an injunction prohibiting the county recorders from destroying the records identifying those persons who voted in the 1970 election and a declaration that the cancellation of voter registration rolls was unconstitutional. While the Supreme Court of Arizona granted the requested injunctive relief, it refused to declare the amendment unconstitutional. The court reasoned that since the pre-1970 registration lists could still be used to determine "qualified electors," the petitioner still had the right to circulate his petitions.[7] The court merely noted that a federal court had already found the amendment to be "in harmony with the United States Constitution,"[8] and thus refused to address this question.

2. Self-purging mechanisms are intended to cancel a voter's registration upon the occurrence of one of several events: change in residency or party affiliation, death, legal insanity or incompetency, conviction of a felony, or judicial determination that the registration be cancelled. *Id.* § 16-150(A)-(C).

3. Semi-permanent systems are those in which all registrations are cancelled, either periodically or upon command of the state legislature, regardless of the registrant's frequency of electoral participation. Permanent self-purging systems include those in which a voter's initial registration remains valid as long as he regularly participates in elections and notifies the registering authority of any change in his address. The trend has been to replace semi-permanent systems with permanent self-purging systems. Doty, *The Texas Voter Registration Law and the Due Process Clause*, 7 HOUSTON L. REV. 163, 171 (1969). Only six states still utilized semi-permanent registration systems when the Arizona election law was amended. 18 THE BOOK OF THE STATES 41 (1970). California, through an initiative measure, has specifically proscribed adoption of any periodic reregistration requirements by its legislature. CAL. ELECTIONS CODE § 221 (West 1969).

4. 107 Ariz. 208, 484 P.2d 628 (1971).

5. ARIZ. CONST. art. 4, pt. 1, § 1(2).

6. *Id.* The Arizona constitution permits 10 percent of the qualified electors of the state to propose any measure by initiative. *Id.* The exact number of signatures required on an initiative petition is 10 percent of the number of votes cast for all candidates for governor at the general election last preceding the filing of the petition. *Id.* (2), (7). The only practical means of determining whether a potential petition signer is in fact a qualified elector is by checking the voter registration lists. Stillman v. Marston, 107 Ariz. 208, 210, 484 P.2d 628, 630 (1971).

7. 107 Ariz. at 211, 484 P.2d at 631. Finding that "cancellation" did not mean "destruction," the court ordered the county recorders to comply with two statutory provisions requiring the maintenance of permanent records of original affidavits, applications for cancellation of registration and cancelled affidavits. ARIZ. REV. STAT. ANN. §§ 16-144, 16-148(C) (Supp. 1971-72). This assured a reference to check whether initiative petition signers were in fact qualified electors. The court authorized the use of both the pre-1970 registration lists and the newly formed post-1970 lists until the 1972 general election, after which only the post-1970 lists were to be used. 107 Ariz. at 210-11, 484 P.2d at 630-31.

8. 107 Ariz. at 209-10, 484 P.2d at 629-30.

The federal court case of *Johnson v. Marston*,[9] relied on by *Stillman*, did deal directly with the constitutional issues raised by the modification of Arizona's election law. In *Johnson*, plaintiffs brought a class action on behalf of all registered voters in Maricopa county, alleging that the registration cancellation provision and the decennial reregistration requirement were violations of the equal protection and due process clauses of the fourteenth amendment.[10] A three-judge federal court dismissed the complaint for failure to state a claim upon which relief could be granted, and the United States Supreme Court affirmed the decision in a memorandum opinion.[11]

Equal Protection

The threshold question facing any court examining a state statute challenged on equal protection grounds is whether the measure should be judged by the rational basis or compelling state interest standard.[12] The former standard is the traditional gauge by which courts judge the validity of statutes, such as licensing requirements.[13] Under this test the plaintiff bears the burden of proving that the challenged measure discriminates arbitrarily, while the state need only demonstrate that the measure bears some rational basis to the accomplishment of a legitimate legislative goal.[14]

The United States Supreme Court has applied the stricter compelling state interest test[15] where a state statute burdens the exercise of a fundamental constitutional right through classifications which are considered "inherently suspected,"[16] such as classifications based on consid-

9. Civil No. 70-352 Phx. WEC (D. Ariz., filed Nov. 20, 1970) (three-judge court), *aff'd mem.*, 401 U.S. 968 (1971).

10. The court rejected the plaintiff's due process argument that the requirement to reregister every ten years was an impermissible burden on low-income voters, finding any burden on the right to vote "insubstantial." *Id.* at 3. Although the due process "burden" argument seems a logical vehicle for examining registration obstacles imposed equally on all voters, the federal courts have generally foreclosed due process inquiries in favor of the equal protection approach. *Compare* Doty, *supra* note 3, analyzing the Texas annual reregistration requirement in terms of due process violations *with* Beare v. Smith, 321 F. Supp. 1100 (S.D. Tex. 1971) in which the same obstacles examined by Doty resulted in the requirement's invalidation solely on equal protection grounds. Consequently, this discussion will focus on the equal protection argument raised in *Johnson*.

11. Johnson v. Marston, 401 U.S. 968 (1971).

12. For a discussion of the development and application of these tests see Cocanower & Rich, *Residency Requirements for Voting*, 12 ARIZ. L. REV. 477, 487-503 (1970); Note, *The Public School Financing Cases: Interdistrict Inequalities and Wealth Discrimination*, 14 ARIZ. L. REV. 88, 105-13 (1972).

13. *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

14. *E.g.*, Turner v. Fouche, 396 U.S. 346, 360-61 (1970); *see* Note *supra* note 12, at 108.

15. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969).

16. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

erations of race,[17] wealth[18] or political allegiance.[19] Interference with the right to vote, since it is considered a "fundamental" right,[20] should also call for an application of the compelling state interest standard[21] and create a presumption that the challenged statutory measure is invalid.[22] The state can overcome the presumption only by identifying the compelling interest it seeks to promote and by demonstrating that the means selected to further the interests are sufficiently "necessary"[23] and "precise."[24] In addition, the state may also have to show that there are no "less intrusive"[25] alternative methods available to accomplish the desired goal.[26] The complaining party, therefore, gains a substantial advantage if the compelling state interest standard is used.

Johnson underscores a question rarely answered by courts trying to determine if state statutes qualifying the franchise violate equal protection: with what degree of sensitivity must courts search for differential treatment in order to find a violation of the equal protection clause? In evaluating the plaintiffs' equal protection argument, the *Johnson* court, in effect, required that the statutory classification be discriminatory on its face before the compelling state interest standard could be invoked. This approach was taken despite the admonition by the United States Supreme Court that " 'any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.' . . . because statutes distributing the franchise constitute the foundation of our representative society."[27] The court found the statute to be non-discriminatory on its face since it "affects *all* registered voters equally. The registration of *all* voters will be cancelled, and *all* voters will be given an opportunity to re-register before the next election."[28] Since it felt that all voters were treated equally, the court refused to subject the statute to the compelling state interest standard,[29] thereby putting the burden on the plaintiffs to prove invidious discrimination.

17. *See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).
18. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
19. Williams v. Rhodes, 393 U.S. 23 (1968).
20. Reynolds v. Sims, 377 U.S. 533 (1964).
21. *See* Evans v. Cornman, 398 U.S. 419, 422 (1970). For a discussion of the emergence of the compelling state interest standard for measuring governmental impingement on the right to vote see Cocanower & Rich, *supra* note 12, at 487-503.
22. *See* Note, *supra* note 12, at 110.
23. Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).
24. *Id.* at 632.
25. Oregon v. Mitchell, 400 U.S. 112, 238 (1970) (Brennan, White & Marshall, JJ., concurring in part, dissenting in part).
26. *See* Note, *supra* note 12, at 110-11.
27. Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969).
28. Johnson v. Marston, Civil No. 70-352 Phx. WEC (D. Ariz., filed Nov. 20, 1970) at 5.
29. *Id.* at 6.

The court rejected plaintiffs' assertions that, although not discriminatory on its face, the operative effect of the reregistration requirement would be to place "an unequal financial burden on the lower income person wishing to vote" and to penalize ethnic minorities and the uneducated who would be "less aware of the necessity to re-register."[30] Although the court assumed arguendo that "some, albeit not significant, inconvenience" to the lower-income, uneducated electorate and ethnic minorities might take place, it found that any inconvenience was outweighed by the "justified need for the legislation."[31] "There is ample evidence that the legislation here attacked is overdue and will significantly assist the state in assuring the purity of the electorate, which is certainly a compelling interest of the state."[32]

The *Johnson* court reasoned that since approximately one-sixth of 240,000 sample ballots sent to registered voters in Maricopa County before the 1970 election were returned undeliverable, the previous self-purging, permanent registration system was demonstrably inadequate.[33] The court thus concluded that decennial reregistration was a legitimate and necessary means of achieving the twin goals of "purity of the electorate process . . . and prevention of voter fraud."[34] Arguably, the court applied an essentially unprecendented balancing test to conclude that these "compelling"—but undefined—goals could outweigh small burdens on the right to vote.[35] This conclusion was reached without either considering if there were any less restrictive measures available[36] or determining whether the state had sufficiently demonstrated that these interests were in fact compelling.

30. *Id.* The court also rejected a similar due process contention by the plaintiffs, an allegation that the statute failed to provide sufficient notice to each registered voter. *Id.* at 4. The court distinguished Goldberg v. Kelly, 397 U.S. 254 (1970) and Mullane v. Hanover Trust Co., 339 U.S. 306 (1949), as mandating notice only when an "adjudicatory proceeding" was required. *Id.*

31. *Id.* at 7.

32. *Id.* at 7 n.6. This statement is probably an oblique reference to testimony of Maricopa County Recorder Paul N. Marston declaring that cancellation of the voter rolls was the only practical way to implement the proposed computerized voter registration recording system. Affidavit of Paul N. Marston at 3, Johnson v. Marston, Civil No. 70-352 Phx. WEC (D. Ariz., filed Nov. 20, 1970) [hereinafter cited as Affidavit of Paul Marston].

33. Johnson v. Marston, Civil No. 70-352 Phx. WEC (D. Ariz., filed Nov. 20, 1970) at 4. These statistics are the only evidentiary facts mentioned in the opinion as support for the court's conclusion.

34. *Id.* at 3. While this language is taken from the due process section of the opinion, the court alluded to the same interests in dealing with the equal protection arguments.

35. *Id.* at 4.

36. Marston had indicated that an alternative, although possibly impractical, method of purging the rolls and implementing the new record-keeping system would have been for the county recorders to verify information on existing affidavits of registration and manually convert all voter registration information to a format suitable for use in the new system. Affidavit of Paul Marston, *supra* note 32, at 3.

The court's conclusion that the statute was non-discriminatory is supportable only by a narrow reading of earlier cases voiding disenfranchisement statutes. While most state statutes nullified by the Supreme Court excluded easily-ascertainable classes of voters,[37] a notable exception was the case invalidating the Virginia poll tax provision.[38] While the Court noted that a poll tax was non-discriminatory on its face, it recognized that such a tax weighs differently on poor voters than it does on more prosperous ones.[39] The *Johnson* court, on the other hand, refused to go beyond a literal reading of the decennial reregistration provision to determine whether it effectively placed a heavier burden on uneducated, lower-income or minority group voters.

In contrast, *Beare v. Smith*[40] held Texas' yearly voter reregistration requirement[41] invalid under the equal protection clause of the fourteenth amendment on the ground that it created a classification abridging the right to vote.[42] To be sure, there were differences in the operative facts of *Beare* and *Johnson*. The Arizona statute required reregistration only once every 10 years, while the Texas provision required yearly reregistration which had to be accomplished within a four-month period terminating nine months before the election date. The critical difference in judicial analysis, however, was the incisive penetration by the Texas court into the true adverse effects of the reregistration requirements on voters.[43] While the *Johnson* court looked only for prima facie classifications made by the statute,[44] the *Beare* court looked behind the provision to its operational effects.

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37. *See* Evans v. Cornman, 398 U.S. 419 (1970) (disenfranchisement of all residents of a federal enclave improper); Carrington v. Rash, 380 U.S. 89 (1965) (disenfranchisement of all military personnel stationed in state if not residents at time of enlistment improper). *See also* Justice Brennan's concurring opinion in a recent voting rights case:

> [W]hen exclusions from the franchise are challenged as violating the Equal Protection Clause, judicial scrutiny is not confined to the question whether the exclusion may reasonably be thought to further a permissible interest of the state. . . . In such cases 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'

Oregon v. Mitchell, 400 U.S. 112, 241-42 (1970) (Brennan, White & Marshall, JJ., concurring in part, dissenting in part) (citations omitted).

38. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

39. *Id.* at 668.

40. 321 F. Supp. 1100 (S.D. Tex. 1971) (three-judge court).

41. TEX. ELECTION CODE ANN. art. 5.11a (1967) *implementing* TEX. CONST. art. 6, § 2.

42. 321 F. Supp. at 1103.

43. The *Beare* court determined that the Texas statute in effect discriminated in favor of those persons who overcame the necessarily onerous yearly registration requirement and against all those persons otherwise qualified to vote (not only low-income voters) who refused to comply with the requirement and were thereby disenfranchised. *Id.*

44. In addition to the classification uncovered by the *Beare* court, note 43 *supra*, the *Johnson* court arguably could have discovered differential treatment of lower-income, uneducated, unaware or ethnic minority voters.

The variance between the approaches adopted by the *Johnson* and *Beare* courts may be somewhat related to the differences in the quanta of evidence presented to the respective courts. The *Beare* court had the benefit of empirical voter registration data and expert testimony by political scientists.[45] Particularly persuasive were empirical studies demonstrating that if Texas merely shifted to a permanent registration system in lieu of its then semi-permanent system, an additional one million Texans would probably register—a 19 percent increase in registered Texas voters.[46] The data presented supported the theory now generally accepted among political scientists that voter registration requirements must be viewed not only as administrative measures designed to keep elections honest, but as obstacles to voter participation as well.[47]

By contrast, the *Johnson* court had access to little, if any, empirical data which could have demonstrated the effect of the challenged reregistration requirement on voter participation in Arizona. In order to show the existence of an undue burden on plaintiffs' right to vote, their counsel offered to introduce testimony of lower income, less-educated individuals and members of ethnic minorities to prove the "costs" of reregistration to them in terms of both convenience and lost wage-earning time, but this offer of proof was rejected by the court.[48]

Prevention of Fraud, Purity of the Electorate and Administrative Necessity

In justifying the decennial cancellation of voter registrations, the *Johnson* court gave great importance to the state interests of preventing voter fraud and insuring purity of the electoral process. It is questionable, however, whether voter fraud is a serious problem in Arizona. Most informed people recognize that actual voter fraud, if it is to be found at all, is so infrequent as to be considered tolerable by both

45. For a comprehensive discussion of the *Beare* court's evidentiary use both of political scientists as experts and of relevant empirical data on voter registration see Burnham, *A Political Scientist and Voting Rights Litigation: the Case of the 1966 Texas Registration Statute,* 1971 WASH. U.L.Q. 335 (1971). For details of the effects of the Texas system on voter participation see Doty, *supra* note 3.

46. 321 F. Supp. at 1104. The empirical studies presented to the *Beare* court were conducted by Dr. Allen Shinn and corroborated the expert testimony of Professors Stanley Kelley, Jr. of Princeton and Walter D. Burnham of Washington University (St. Louis). *Id.*

47. *See* A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957). For a nation-wide statistical analysis of voter registration data to determine how voter practice conforms to this theory see Kelley, Bowen, & Ares, *Registration and Voting: Putting First Things First,* 61 AM. POL. SCI. REV. 359 (1967).

48. Telephone interview with Jerry Levine, Director of Litigation, Maricopa County Legal Aid Society, in Phoenix, Arizona, Feb. 23, 1972.

political parties.[49] The Maricopa County Recorder, for example, has stated that he knows of no documented instances of voter fraud in the state since 1957.[50] While the reregistration provision might prevent the method of fraud commonly known as "graveyard voting,"[51] it has no effect on multiple voting by one individual, since it merely forces the would-be defrauder to register twice. The most significant method of voter fraud, the transposing of digits when reporting election results, is left unaffected by reregistration legislation.

It may be, however, that rectification of inaccuracies in the voting lists by a complete cancellation of voter registrations was justified to insure purity of the electoral process. The decennial reregistration provision was primarily designed to cope with the inability of the state bureaucracy to keep accurate voter registration rolls. The reregistration provision, along with the entire registration reform package,[52] was prompted by bipartisan committees representing Pima and Maricopa counties. Each committee consisted of the county recorder, the Republican and Democratic county chairmen, several deputy registrars and a representative from the academic community. The consensus of these committees was that something had to be done to rectify the inaccuracies inherent in the then-existing permanent voter registration system.[53] The legislature concluded from the committees' presentation that cancellation of the registration rolls and concomitant reregistration were the only practical, economical ways to accomplish the twin goals of bringing registration information up to date and providing data in a form suitable for use in a uniform statewide record keeping system.[54]

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49. Interview with Donald R. Hall, Associate Professor of Government, University of Arizona, in Tucson, Arizona, March 7, 1972 [hereinafter cited as Interview with Donald R. Hall]. Professor Hall is a respected authority on voting practices in Arizona, and was the academic representative on Pima County's bipartisan recommendation committee that testified before the legislature. *See* text accompanying note 52, *infra*.

50. Record at 29, Cocanower v. Marston, 318 F. Supp. 402 (D. Ariz. 1970).

51. This term refers to the practice whereby local election officials alter reports of their party's returns by adding votes of voters registered with that party who have died but whose names have not been expunged from the rolls. Such altered returns are not conspicuously suspect since the reported totals are clearly within the total number of possible votes as determined by registration statistics.

52. Ch. 151, §§ 1-16, [1970] Ariz. Sess. Laws 533.

53. The Arizona registration system was outdated and inefficient to the point of being unmanageable. With Arizona absorbing a substantial part of the population growth of the Southwest, the normal problems of administrative inaccuracy become more acute: for example, urban populations swell at a geometric rate as newcomers establish residence in the state and entire new communities are established. Interview with Donald R. Hall, *supra* note 49.

54. Maricopa County Recorder Paul Marston, who assumed the responsibility for generating the reregistration measures as a method of achieving these goals, describes the purpose of the provision as purely "mechanical." Telephone interview with Paul Marston, March 16, 1972. *See also* Affidavit of Paul Marston, *supra* note 32. Prior to the 1970 cancellation, the state simultaneously maintained four non-uniform

It is submitted that while administrative necessity might justify legislative conditioning of fundamental rights, mere administrative convenience should not.[55] If the statute permits discrimination, the statute must "be necessary to promote not merely a constitutionally permissible state interest, but an interest of substantial importance."[56] Assuming the existence of a compelling state interest in the administrative necessity of eliminating inaccuracies in the voter registration rolls, however, it must be asked whether the initial cancellation of the registrations of all otherwise-qualified voters is a sufficiently necessary and precise means to accomplish that end.[57] Further, it must be determined whether successive cancellations will produce something more than the constitutionally impermissible "remote administrative benefit."[58] An overwhelming majority of states have adopted permanent self-purging registration systems without undue problems.[59] These states implicitly recognize that the "costs" of reregistration in terms of an annoying imposition on all voters far exceed the financial "costs" that the administrative agencies handling registration assume with the responsibility of accurately maintaining the voter rolls.

Conclusion

It is believed that the Supreme Court of Arizona in *Stillman v. Marston* should not have deferred to the treatment of the equal protection issue in the federal court decision of *Johnson v. Marston.* The *Johnson* court's treatment of this issue disserved modern equal protection standards. *Johnson* did not show how the decennial reregistration plan would prevent voter fraud or ensure the purity of the electoral process, much less how these goals promoted a compelling state interest. Even assuming an administrative state interest in the 1970 roll cancellation, the integrity of the franchise will not necessarily be protected by successive cancellations at future dates, since administrative incompetence should not be readily assumed.[60] The benefits that will

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filing systems in an attempt to keep the rolls current. *Id.* at 2. Marston designed a computerized record keeping system to more easily enable the state to cross-reference voter registration information. Together with a standardized registration affidavit, the 1970 cancellation permitted this new system to be implemented to try to insure accurate, uniform inputs for an efficient roll keeping system. *Id.* at 2, 3.

55. *See* Cocanower & Rich, *supra* note 12, at 502.

56. Oregon v. Mitchell, 400 U.S. 112, 247 n.30 (1970) (Brennan, White & Marshall, JJ., concurring in part, dissenting in part).

57. See text accompanying notes 23-24, *supra.*

58. Carrington v. Rash, 380 U.S. 89, 96 (1965).

59. 18 THE BOOK OF THE STATES 41 (1970).

60. Due to the paramount importance of the right to vote issue, the United States Supreme Court's memorandum affirmance (without discussion) of *Johnson* should be construed as narrowly as possible, and be accorded no greater weight than a denial of certiorari. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 233 (4th ed. 1969).

accrue to the state from further decennial cancellations are remote. When weighed against the obstacles this roll-purging method will present to voter participation, it is hoped that the process will be discontinued.

[EDITORS NOTE: Subsequent to the completion of this commentary, the Arizona legislature enacted House Bill 2190. Among other modifications of the state's election laws, this bill repealed the decennial reregistration requirement of ARIZ. REV. STAT. ANN. § 16-150(D) (Supp. 1971-1972), returning Arizona to a permanent system of voter registration.]

TORTS AND INSURANCE

UNINSURED MOTORIST COVERAGE

"While the number of uninsured drivers varies from state to state, estimates indicate that it includes at least 4% of those operating motor vehicles in every state and that it may be as high as 60% of the motorists in a few states."[1] If these uninsured owners and operators are also impoverished, they may well be judgment proof for injuries they cause to others through the operation of their motor vehicles. Recovery may also be difficult if an accident is caused by a hit-and-run driver who may be carrying adequate insurance but who escapes liability by fleeing the scene of an accident. Conscious of the burdens imposed on innocent victims by these irresponsible drivers, at least one state legislature began taking remedial action as early as the 1920's in order to protect its state's citizens.[2] The attempted methods of providing this protection have ranged from compulsory insurance[3] to the less restrictive methods of financial responsibility laws,[4] unsatisfied judgment funds[5] and uninsured motorist insurance.[6] Arizona is one of

1. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE (1969).

2. *See* ACTS AND RESOLVES OF MASS. ch. 346, §§ 1-13 (1925). By its provisions all private motorists were compelled to insure themselves against the risk of tort liability arising from their own negligent driving.

3. *See* MASS. GEN. LAWS ANN. ch. 90, §§ 34 A. *et seq.* (Supp. 1971). Since 1925, however, only New York, N.Y. VEH. & TRAF. LAW §§ 312-318 (McKinney Supp. 1971-72), and North Carolina, N.C. GEN. STAT. §§ 30-309, -319 (Supp. 1971), have enacted similar legislation. At least a partial explanation for other states not adopting compulsory insurance has been the powerful opposition of the American insurance industry which feared that such a system would lead to political meddling with premium rate structures and reduced profits due to inability of the insurers to select only the "better risks" among the applicants. *See* Wise, *Financially Irresponsible Motorist & the Uncompensated Accident Victim,* 410 INS. L.J. 139 (1957).

4. To ward off the evils envisioned in compulsory insurance, the insurance industry developed and introduced Financial Responsibility Laws as a solution to the problems created by the financially irresponsible driver. These laws have since been enacted by most states in accordance with the Uniform Motor Vehicle Safety Responsibility Act. 7 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4295 (1962). Such statutes generally require every automobile driver involved in a serious accident either to show ability to pay for damages in the event he is found at fault, or to surrender his driver's license until blame can be determined.

Arizona's Financial Responsibility Law is codified in ARIZ. REV. STAT. ANN. §§ 28-1101 *et seq.* (1956), *discussed in* Kepner, *Arizona Automobile Liability Insurance Law—Beyond Mayflower,* 10 ARIZ. L. REV. 301 (1968); Slutes, *Recent Developments in Arizona's Uninsured Motorist Coverage,* 12 ARIZ. L. REV. 749 (1970); Comment, *Automobile Liability Insurers in Arizona—Are They Absolutely Liable?,* 5 ARIZ. L. REV. 248 (1964).

5. North Dakota, New Jersey, Maryland, Michigan and New York have enacted legislation establishing such funds. G. HALLMAN, UNSATISFIED JUDGMENT FUNDS 43-67

forty-six states[7] requiring all liability insurers licensed in Arizona to offer uninsured motorist protection in conjunction with all motor vehicle liability policies issued in the state.

The first case to reach the Supreme Court of Arizona raising questions under the uninsured motorist statute[8] was *Mazon v. Farmer's Insurance Exchange*,[9] in which the insured, while driving his automobile, was injured when struck in the eye by a stone thrown from another vehicle. Neither the identity of the person who threw the stone nor that of the operator or owner of the fleeing vehicle was ever determined.

Mazon's automobile was insured by Farmer's Insurance Exchange, and the liability portion of the policy contained an endorsement for uninsured motorist coverage. The pertinent portion of the endorsement provided that the insurance company would

> . . . pay all sums which the insured or his legal representative shall be legally entitled to recover as damages, from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, caused by accident, and arising out of the *ownership, maintenance or use of such uninsured motor vehicle* . . . .[10]

The policy further provided that injuries caused by a hit-and-run vehicle which made physical contact with the insured vehicle were within the protection of the uninsured motorist endorsement.[11] After giving the required notice to both the police and his insurance company, Mazon filed a claim under the uninsured motorist portion of his policy to recover for his injury. The claim was denied by Farmer's and Mazon commenced a declaratory judgment action to establish the extent, if any, of the insurance company's liability. The trial court absolved the insurance company of liability, reasoning that no causal relationship existed between Mazon's injury and the "ownership, maintenance or

(1968). Under this method of insurance compensation, the innocent victim must initiate an action and secure a judgment against the financially irresponsible driver. The victim is then compensated from a public pool of funds financed either by insurance companies or by an additional assessment in automobile registration fees. *Id.* at 219-51.

6. Similar fears to those which caused the insurance industry to develop Financial Responsibility Laws, *discussed* note 4 *supra*, prompted the industry once again in 1956 to take the initiative and introduce the Standard Uninsured Motorist Endorsement. Both the 1956 and 1966 versions of the endorsement are reproduced in A. WIDISS, *supra* note 1, at 291-305. This insurance permits the insured to obtain financial protection under his own policy against the risk of injury or death resulting from an accident with an uninsured motorist.

7. The states are listed in A. WIDISS, *supra* note 1, at 306.

8. ARIZ. REV. STAT. ANN. § 20-259.01 (Supp. 1971-72).

9. 107 Ariz. 601, 491 P.2d 455 (1971).

10. *Id.* at 602, 491 P.2d at 456.

11. *Id.* n.2, 491 P.2d at 456 n.2. Mazon's policy defined an uninsured vehicle to include a hit-and-run vehicle.

use" of the uninsured vehicle. The court of appeals reversed,[12] but on review the supreme court vacated the court of appeals' decision and affirmed the trial court.[13]

This commentary will discuss the supreme court's disposition of *Mazon* and examine the scope of Arizona's uninsured motorist statute in regard to hit-and-run vehicles. Although the latter topic was not reached by the supreme court since it was able to dispose of the case on narrower grounds, the court recognized that there are questions concerning the scope of the statute which have not yet been resolved.[14] These questions involve whether a hit-and-run vehicle is within the purview of the statute and whether physical contact with the uninsured's vehicle is required.[15] Suggestions will be made as to how these questions could be answered if presented to the court in the future.

Ownership, Maintenance or Use Requirement

The threshold determination in any claim brought under an uninsured motorist endorsement is whether the insured's injury arose out of the ownership, maintenance or use of the uninsured vehicle.[16] Unless this requirement can be satisfied by the insured at the outset, recovery under the endorsement must be denied. When the supreme court in *Mazon* thus failed to discern any causal relationship between an injury resulting from a stone thrown by an unknown person from an unidentified vehicle, and the ownership, maintenance or use of that vehicle, it denied recovery under the policy.[17]

The supreme court in *Mazon* cited *Brenner v. Aetna Insurance Co.*[18] to support its decision. In *Brenner* a passenger riding in the insured's automobile was accidently shot by the insured who subsequently claimed coverage under both his automobile and home-owners' liability policies. Concluding that the claim could not be brought under the automobile policy, the *Brenner* court found that the causal relationship between the injury and the use of the vehicle had not been estab-

12. 13 Ariz. App. 298, 475 P.2d 957 (1970), *vacated,* 107 Ariz. 601, 491 P.2d 455 (1971).
13. 107 Ariz. 601, 491 P.2d 455 (1971).
14. 107 Ariz. at 602-03, 491 P.2d at 456-57.
15. *Id.*
16. Both ARIZ. REV. STAT. ANN. § 20-259.01 (Supp. 1971-72) and Mazon's insurance policy, the pertinent portion of which was cited by the court, 107 Ariz. at 602, 491 P.2d at 456, require that for the insurance company to be liable under the uninsured motorist endorsement, the injured's injuries must have arisen out of the ownership, maintenance or use of the uninsured motor vehicle.
17. 107 Ariz. at 601, 491 P.2d at 457.
18. 8 Ariz. App. 272, 445 P.2d 474 (1968). When the court of appeals considered the ownership, maintenance or use issue in *Mazon,* it also relied on *Brenner* to reach the opposite conclusion than that reached by the supreme court. 13 Ariz. App. 298, 301, 475 P.2d 957, 960.

lished.[19] Another case, although not cited by the supreme court, which tends to support its disposal of *Mazon* on the ownership, maintenance and use clause is *McDonald v. Great American Insurance Co.*[20] In *McDonald* the insured threw a firecracker from the window of his automobile, injuring a pedestrian when the firecracker exploded. In an action to determine if his insurance company was liable for the injuries to the pedestrian, the court held for the company, reasoning that the injuries could not be considered to have arisen "out of the ownership, operation, maintenance, control or use of a motor vehicle."[21]

Both the *Brenner* opinion and the import of the *McDonald* decision indicate that the injury to the insured cannot be attributable solely to human conduct but must be caused by the "inherent nature" of the motor vehicle involved.[22] Applying this criterion to the field of hit-and-run claims, proof of physical contact between the unidentified vehicle and the insured or his vehicle will normally confirm that the accident arose out of the ownership, maintenance or use of the fleeing vehicle.[23] In *Mazon*, however, there was no such physical contact between the vehicles. The injury resulted from the very type of solely human conduct which failed to satisfy the ownership, maintenance or use requirement in *McDonald*.

Hit-and-Run Vehicles

Since hit-and-run vehicles are not expressly included in Arizona's uninsured motorist law, it is necessary to examine the statute's legislative history to determine whether the legislature intended to require Arizona insurers to offer protection for injuries sustained in accidents with this type of vehicle. From the time of its introduction in the state senate on January 25, 1965,[24] until it was signed into law by the Governor on April 3, 1965,[25] the title of this legislation read "Relating to

19. 8 Ariz. App. at 275, 445 P.2d at 477.
20. 224 F. Supp. 369 (D.R.I. 1963).
21. *Id.* at 373.
22. 7 J. APPLEMAN, *supra* note 4, at § 4317. *But cf.* Schmidt v. Utilities Ins. Co., 353 Mo. 212, 219, 182 S.W.2d 181, 184 (1944) (insurance policy did not require the injury to be the direct and proximate result, in any strict legal sense of that term of the use of the vehicle); Carter v. Bergeron, 102 N.H. 464, 471, 160 A.2d 348, 353-54 (1960) ("The fact that the insured vehicle was exerting no physical force upon the instrumentality which was the immediate cause of the injury, and was not itself in physical contact . . . is neither decisive of nor fatal to the plaintiff's claim of coverage. . . . It is sufficient that the use was connected with the accident or the creation of a condition that caused the accident").
23. For a discussion of physical contact in hit-and-run cases see text accompanying notes 32-45 *infra*. *See also* 12 G. COUCH, CYCLOPEDIA OF INSURANCE LAW 2d §§ 45:626, 45:653 (1964); A. WIDISS, *supra* note 1, at 81.
24. Senate Bill 42, [1965] ARIZ. S. JOUR. 59.
25. [1965] ARIZ. S. JOUR. 541.

insurance; prescribing an uninsured motorist and unknown motorist clause."[26] The phrase "unknown motorist" in the context of this statute could only refer to hit-and-run drivers. The term "unknown motorist" was thus in the title of the Act when passed by the Senate but not included when the title of the statute was formulated.[27] The Arizona Constitution places a definite importance on the title of an Act, an importance which is not shared by the title of a section. The title of an Act has legal effect and can void portions of the body if some of the subject matter is not represented by the title.[28] The title to a section, on the other hand, has no legal effect and is printed for convenience only.[29]

It is submitted that, while the term "unknown motorist" was not carried over into the section title or separately mentioned in the body of the statute, this should not work to frustrate the intent of the legislature and may in fact be evidence of improper drawing of the statute. If the question of whether hit-and-run vehicles are within the purview of the Arizona statute should thus arise in a future case, it is hoped the supreme court will follow its own directive in *State ex rel Larson v. Farley*,[30] in which it stated that "[i]n construing the statute, endeavors should be made to trace the history and legislation on the subject in order to ascertain the consistent purpose of the legislature."[31]

Although this examination of the statute's legislative history provides strong support for the proposition that section 20-259.01 was meant to require protection to be afforded for injuries caused by hit-and-run vehicles, it is still unclear what constitutes an accident with such a vehicle. The Standard Uninsured Motorist Endorsement,[32] in-

26. *Id.*

27. *Compare* the title of the Act *with* the title and body of the enacted statute, both of which appear at Ch. 34, § 1 [1965] Ariz. Sess. Law 54. It could be argued that the requirement that protection be offered for accidents with unknown motorists had been intentionally deleted from the body of the Act, and that there had been an oversight in failing to delete it from the Act's title. State Senator David H. Palmer, who led the bill through the senate stated, however, that this was not the case and that the bill had been intended to require the Arizona insurance industry to provide protection for accidents with hit-and-run vehicles as well as accidents with known uninsured motorists. Telephone interview with David H. Palmer, Arizona State Senator from Yavapai County, April 19, 1972.

28. ARIZ. CONST. art. 4, § 13. The situation in *Mazon* is exactly opposite—the title of the Act contains subject matter not expressed in the body. It is possible that art. 4 § 13 may have application to such a reverse situation, but discussion of this problem is beyond the scope of this analysis. For present purposes, § 13 is cited only to show the importance the constitution places on the language of an act.

29. ARIZ. REV. STAT. ANN. § 1-212 (1956).

30. 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970).

31. *See also* Estate of Stark, 52 Ariz. 416, 422, 82 P.2d 894, 896 (1938) ("We have repeatedly held that the cardinal rule of statutory construction is that we must, if possible, ascertain the intent of the legislature.").

32. The 1956 and 1966 versions are reproduced in A. WIDISS, *supra* note 1, at 291-305. For an analysis of the components of the Standard Uninsured Motorist Endorsement in outline format see Dudley, *Uninsured Motorist Problems*, 33 TEXAS B.J. 356 (1970).

corporated in most automobile liability policies,[33] provides protection not only against accidents with known drivers who carry no, or inadequate, insurance, but also protects against accidents with hit-and-run vehicles. The Standard Endorsement defines a hit-and-run vehicle as "a highway vehicle which causes bodily injury to an insured arising out of *physical contact* of such vehicle with the insured or with an automobile which the insured is occupying at the time of the accident. . . ."[34] Whenever a hit-and-run vehicle is involved in a claim, therefore, recovery is available under the policy only when there is actual physical contact. If hit-and-run vehicles are included in the protection required to be offered by Arizona's uninsured motorist statute, however, the insurance industry may be prohibited from making physical contact a condition precedent to recovery.[35] Section 20-259.01 is written only in terms of "uninsured motor vehicles" and contains no separate definition section as does the Standard Uninsured Motorist Endorsement. In such a section the legislature could have affirmatively stated whether hit-and-run vehicle protection was required by the statute and, if so, whether recovery in these cases was restricted to incidents where the insured's injuries were the result of physical contact with the unidentified vehicle. Such physical contact is not required where the identity of the operator or owner of an uninsured vehicle is known.[36] The requirement is unique to hit-and-run cases and is designed to prevent fraudulent claims where the insured's injuries, due in fact solely to his own negligence, are alleged to be caused by a "phantom vehicle."[37]

While the physical contact requirement as expressed in the Standard Endorsement is followed in a majority of jurisdictions,[38] the activ-

33. *See* A. WIDISS, *supra* note 1, at 23.

34. *Id.* at 294 (emphasis added).

35. Referring specifically to the physical contact requirement, some courts have held that policy provisions which impose restrictions on recovery other than those contained in the state's uninsured motorist statute are void and may not be utilized by the insurers to prevent recovery. Butler v. State Farm Mut. Ins. Co., 207 So. 2d 73 (Fla. App. 1968); National Mut. Ins. Co. v. Sours, 205 Va. 602, 139 S.E.2d 51 (1964); Doe v. Brown, 203 Va. 508, 125 S.E.2d 159 (1962); *cf.* Costa v. St. Paul Fire & Marine Ins. Co., 228 Cal. App. 2d 651, 39 Cal. Rptr. 774 (1964).

36. *Cf.* Johnson v. State Farm Mut. Ins. Co., 70 Wash. 2d 587, 424 P.2d 648 (1967).

37. Mazon v. Farmer's Ins. Exchange, 13 Ariz. App. 298, 300, 475 P.2d 957, 959 (1970), *vacated,* 107 Ariz. 601, 491 P.2d 455 (1971). An example would be where an insured motorist fell asleep while driving and his vehicle left the road. He might then file a claim under his uninsured motorist endorsement, alleging he was forced off the road to avoid a collision with an unidentified vehicle. Under such circumstances, the physical contact requirement would properly prevent recovery. *But see* Lawrence v. Beneficial Fire & Cas. Ins. Co., 8 Ariz. App. 155, 444 P.2d 446 (1968), in which the insured really was forced off the road to avoid a collision with an unidentified vehicle and the physical contact requirement prevented recovery despite eyewitness testimony confirming the existence and conduct of the unidentified vehicle.

38. *See* cases collected in Annot., 25 A.L.R.3d 1299, 1302 (1969). Virginia has neither a statutory nor judicially imposed physical contact requirement, VA. CODE

ities which courts have found to satisfy this requirement vary considerably. There are two major types of physical contact: direct and indirect. Direct physical contact occurs when the hit-and-run vehicle itself strikes the insured or his vehicle. Indirect physical contact arises when the hit-and-run vehicle causes some object to be propelled into the insured or his vehicle, such as another vehicle,[39] a rock[40] or snow and ice dislodged from a bumper.[41]

The only recorded opinion in Arizona which has considered the physical contact requirement since section 20-259.01 became effective[42] was the court of appeals decision in *Mazon*. There, the court reasoned that the requirement was only a "secondary standard" to screen out unreliable claims, and that where there was clear evidence of hit-and-run injuries a less stringent interpretation was appropriate.[43] In support of its finding that the facts giving rise to Mazon's injuries satisfied the physical contact requirement, the court of appeals relied on three cases[44] in which the accident occurred when a hit-and-run vehicle struck a second vehicle which subsequently struck the insured's vehicle. The situation in *Mazon* seems clearly distinguishable, however, since the injury arose not from an unidentified vehicle propelling an intervening object at Mazon, but was the result of human conduct independent of the automobile.[45] The only case available which was directly on point was *Aetna Casualty and Security Company v. Head*,[46] in which a soft drink bottle was thrown from an unidentified vehicle and struck the insured's automobile. In an action by the insured to re-

ANN. § 38.1-381(3) (1966); Nationwide Mut. Ins. Co. v. Sours, 205 Va. 602, 139 S.E.2d 51 (1964). *See also* Denny, *Uninsured Motorist Coverage—Present and Future*, 52 VA. L. REV. 538 (1966).

39. State Farm Mut. Auto Ins. Co. v. Spinola, 374 F.2d 873 (5th Cir. 1967); Motor Vehicle Accident Indem. Corp. v. Eisenberg, 18 N.Y.2d 1, 218 N.E.2d 524, 271 N.Y.S.2d 641 (1966); Johnson v. State Farm Mut. Auto. Ins. Co., 70 Wash. 2d 587, 424 P.2d 646 (1967).

40. Barfield v. Insurance Co. of North America, 443 S.W.2d 482 (Tenn. 1969) (although case decided against insured for other reasons, held policy requirement of physical contact met where stone was propelled at insured by the tire of an unidentified truck). *But see* Paige v. Insurance Co. of North America, 3 Cal. App. 3d 121, 83 Cal. Rptr. 44 (1970) (insured's automobile was struck by rocks thrown up by unidentified truck, held this constituted only symbolic touching and did not satisfy policy provision requiring physical contact).

41. Smith v. Great Am. Ins. Co., 35 App. Div. 2d 233, 315 N.Y.S.2d 388 (1970) (policy provision requiring physical contact met where ice and snow struck and broke insured's windshield after being dislodged from unknown tractor-trailer).

42. The physical contact requirement was discussed in Lawrence v. Beneficial Fire & Cas. Ins. Co., 8 Ariz. App. 155, 444 P.2d 446 (1968). The accident involved in that case, however, occurred prior to the adoption of the statute and did not consider its effect.

43. 13 Ariz. App. at 300, 475 P.2d at 959.

44. Inter-Insurance Exchange v. Lopez, 238 Cal. App. 2d 441, 47 Cal. Rptr. 834 (1965); Motor Vehicle Accident Indem. Corp. v. Eisenberg, 18 N.Y.2d 1, 218 N.E.2d 524, 271 N.Y.S.2d 641 (1966); Johnson v. State Farm Mut. Auto. Co., 70 Wash.2d 587, 424 P.2d 648 (1967).

45. *See* J. APPLEMAN, *supra* note 22.

46. 240 So.2d 280 (Miss. 1970).

cover for injuries under an uninsured motorist provision, the court denied recovery, holding that the physical contact requirement had not been satisfied.[47] The *Head* decision would thus seem to be more in accord with the purpose of preventing fraud.

Conclusion

Since the Supreme Court of Arizona was able to dispose of *Mazon* on the threshold issue of the ownership, maintenance and use clause, the other issues raised in the case were never discussed. While there are strong indications that the intent of the legislature was to include hit-and-run vehicles within the scope of the Arizona Uninsured Motorist statute, this point has yet to be decided by the supreme court. Another source of dispute is the status in Arizona of the physical contact requirement. Both of these problem areas could arguably have been avoided by the legislature by a more careful drafting of the uninsured motorist statute, possibly incorporating these topics into the body of the statute or covering them in a separate definition section.

In order to eliminate the confusion, the legislature could amend the statute to include hit-and-run motorists and to provide if the physical contact requirement or some other means of preventing fraudulent claims in hit-and-run cases should be established. Notwithstanding the desirability of statutory clarification, the judiciary is still bound to include unidentified motorists within Arizona's uninsured motorist statute due to the express inclusion of this term in the title of the legislative Act.[48] In the absence of any workable alternative to the physical contact requirement, the Arizona courts should follow the majority of jurisdictions[49] and retain the physical contact requirement as the normal standard for recovery. This requirement should be tempered with judicial discretion,[50] however, and the courts should remain aware

47. *Id.*
48. See text & notes 24-28 *supra.*
49. *See* Annot. 25 A.L.R.3d 1299, 1302 (1969):
> In jurisdictions where there is no statutory authorization for a requirement that there be contact with the unidentified vehicle, the courts have generally recognized this type of provision inserted in an uninsured motorist endorsement as a valid limitation on the insurer's liability, being a proper attempt to protect against fraud in cases where the insured is injured through his own negligence and merely alleges the presence of another vehicle.

50. There is evidence of growing sentiment for a less stringent interpretation of the physical contact requirement where the existence of a hit-and-run vehicle can be determined from other sources. State Farm Mut. Auto. Ins. Co. v. Spinola, 374 F.2d 872 (5th Cir. 1967); Costa v. St. Paul Fire & Marine Ins. Co., 228 Cal. App. 2d 651, 39 Cal. Rptr. 774 (1964); Motor Vehicle Accident Indemn. Corp. v. Eisenberg, 18 N.Y.2d 1, 271 N.Y.S.2d 641, 218 N.E.2d 524 (1966); Barfield v. Insurance Co. of North America, 443 S.W.2d 482 (Tenn. 1969); Doe v. Faulkner, 203 Va. 522, 125 S.E.2d 169 (1962); Johnson v. State Farm Mut. Auto. Ins. Co., 70 Wash. 2d 587, 424 P.2d 646 (1967). *See also* Aksen, *Arbitration of Uninsured Motorist Endorsement Claim,*

of the goal of preventing fraudulent claims. Where the presence of the unidentified vehicle can be reasonably established from other sources, the public policy[51] that state laws should provide financial protection for persons injured on the state's highways through no fault of their own should prevail.

INTERSPOUSAL TORT IMMUNITY

The common law doctrine of interspousal tort immunity[1] has been partially abrogated by the Supreme Court of Arizona in *Windauer v. O'Connor*.[2] The court held that a spouse may, after obtaining a divorce from the tortfeasor, sue to recover damages for an intentional tort committed during coverture. In so holding, the court joined the ranks of a growing minority of jurisdictions which have totally or partially abrogated the doctrine of interspousal tort immunity.[3] There are also several legal writers who favor eliminating the doctrine as being out of step with modern concepts of marriage, equality before the law and women's rights.[4] The court could have used this case as a vehicle for completely discarding the common law rule; instead, it limited its holding to the facts of the case.

Joseph O'Connor and Kathryn Windauer had been married for a

24 OHIO ST. L.J. 602 (1963); Chadwich & Poche, *California's Uninsured Motorist Statute: Scope and Problems*, 13 HAST. L.J. 194 (1961); COX, *Uninsured Motorist Coverage*, 34 MO. L. REV. 1 (1969); Note, *The Requirement of a "Hit" for Coverage Against Hit-and-Run Drivers Under Uninsured Motorists Statutes and Policy Endorsements*, 20 S. CAR. L. REV. 790 (1968).

51. This public policy was apparently underlying the Arizona Supreme Court's decisions in Jenkins v. Mayflower Insurance Exchange, 93 Ariz. 287, 380 P.2d 145 (1963) and Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98 (1967).

1. The doctrine of interspousal tort immunity prevents a husband or wife from maintaining a civil suit against the other for conduct that would be actionable if the parties were not married. An immunity avoids liability for torts because of the status or position of the parties. It does not deny the tortious character of the activity; it merely absolves the offender from liability for that conduct due to his favored position with the injured party. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 970 (4th ed. 1971).

2. 107 Ariz. 267, 485 P.2d 1157 (1971).

3. In 1955, there were 32 American jurisdictions following the majority and 17 following the minority positions. Annot., 43 A.L.R. 2d 632 (1955). As of August, 1972, there were 29 majority, 19 minority jurisdictions and 3 jurisdictions favoring the intermeditate view—cause of action denied for negligent torts but recognized for intentional torts. For cases from all jurisdictions see *id.* and A.L.R.2d LATER CASE SERVICE 332 (1969) supplementing 40-48 A.L.R.2d; Comment, *Intrafamily Immunity—The Doctrine and Its Present Status*, 20 BAYLOR L. REV. 27, 68-69 n.149 (1967) (listing minority jurisdictions only); Comment, *Interspousal Tort Immunity—California Follows the Trend*, 36 SO. CAL. L. REV. 456-58 n.4 (1963).

4. *E.g.*, W. PROSSER, *supra* note 1, at § 122; 1 F. HARPER & F. JAMES JR., LAW OF TORTS § 8.10 (1956); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956).

short time when the defendant Joseph shot the plaintiff Kathryn during an argument. Kathryn sued for divorce, alleging that her husband had attempted to kill her, and the divorce decree was awarded a few months later. Joseph plead guilty to a criminal charge of assault with intent to commit murder. Kathryn commenced an action seeking damages for the personal injuries inflicted by her husband. The trial court dismissed the claim on the grounds of interspousal tort immunity and res judicata,[5] but the court of appeals reversed.[6] The supreme court, although vacating the opinion of the court of appeals, agreed with the reversal and announced the limited abrogation of interspousal immunity.

An understanding of the reasoning behind Windauer is facilitated by consideration of the historical background of the doctrine of interspousal immunity, the present status of the doctrine in the United States generally and, specifically, the development of the doctrine in Arizona. *Windauer* will then be analyzed to determine its scope, possible effect and for future problems which may arise under the decision.

Historical Background

The doctrine of interspousal tort immunity had its origin in the English common law.[7] Under traditional reasoning, it was impossible for one spouse to be civilly liable to the other because of the concept of the unity of legal identity between husband and wife. The marriage partners were one person, and that person was the husband.[8] The legal existence of the wife was suspended during coverture as to her personal and real property rights.[9] Merely by force of marriage, the husband could reduce the wife's personal property, including choses in action, to possession and vest title in himself; as to her real property, he gained title to the rents and profits during coverture.[10]

5. The trial court ruled that the action in tort was barred by principles of res judicata since the prior divorce proceeding was based on the same facts. Windauer v. O'Connor, No. 116863 (Pima County Super. Ct., Mar. 31, 1970). The tort action, therefore, should have been joined with the divorce action. The court of appeals held, however, that joinder of the wife's divorce action and personal injury action was not compulsory. Res judicata did not bar the action since proof to establish each was different. Windauer v. O'Connor, 13 Ariz. App. 442, 446-47, 477 P.2d 561, 565-66 (1970). Under the holding set forth by the supreme court, the action for the intentional tort does not arise until the parties are divorced. Res judicata principles do not apply since the tort action could not be brought as part of the divorce action. Windauer v. O'Connor, 107 Ariz. 267, 268, 485 P.2d 1157, 1158 (1971).

6. Windauer v. O'Connor, 13 Ariz. App. 442, 447 P.2d 561 (1970).

7. W. PROSSER, *supra* note 1, at 859.

8. *Id.*

9. 1 W. BLACKSTONE, COMMENTARIES *443.

10. 2 W. BLACKSTONE, COMMENTARIES *433; 3 C. VERNIER, AMERICAN FAMILY LAWS 167 (1935).

The concept of unity made it procedurally impossible to maintain a civil action between the spouses because a wife could not sue or be sued without the joinder of her husband as a co-party.[11] If the man were the tortfeasor, the woman's right to sue was a chose in action which the husband could reduce to possession. He would then be joined as a co-plaintiff with his wife against himself. If the woman were the tortfeasor, the husband would be liable to himself since during marriage he was responsible for the tortious conduct of his wife, and he would have to be joined as a defendant against himself.[12] Such anomalous results under the traditional rules thus necessitated the non-recognition of any tort action between spouses during coverture.

At common law it was impossible to bring an action for an interspousal tort committed during marriage after the termination of that marriage. If the marriage ended by the death of one of the spouses, the cause of action for the tort would not survive. While before the English Reformation dissolution by divorce was not possible,[13] the enactment of the Divorce and Matrimonial Causes Act of 1857[14] granted English courts the jurisdiction to dissolve marriage. The case of *Phillips v. Barnet*,[15] which arose after passage of the Matrimonial Causes Act, involved a personal tort action between a divorced couple. In holding that an action by a woman against her former husband for assault and battery committed during coverture would not lie, the court reasoned that dissolution by divorce should not create a cause of action when none existed before the divorce. The reasoning was based on the fundamental principle that the husband and wife were one person under the law.[16] There could be no cause of action between them just as there could be no contract between them.[17]

American jurisdictions have traditionally followed the general rule

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11. H.G. CHAPIN, HANDBOOK OF THE LAW OF TORTS § 38, at 133 (1917). A notable exception to the merger of identity at common law was found in the criminal law where the wife was regarded as having a separate legal identity and was therefore held accountable as a *femme sole* for any crimes she may have committed. McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1035 (1930).

12. W. PROSSER, *supra* note 1, at 860; McCurdy, *supra* note 11, at 1033.

13. Some intentional torts involve elements which would establish cruelty, a ground for divorce *a mensa et thoro*. W. PROSSER, *supra* note 1, at 860 & n.18. This was not a complete divorce, but merely a divorce from "bed and board." McCurdy, *supra* note 11, at 1034. In a divorce *a mensa et thoro*, the parties were forbidden to cohabit but the marriage bond itself remained intact. 1 W. BLACKSTONE, COMMENTARIES* 440, 441; BLACK'S LAW DICTIONARY 566 (4th ed. 1951).

14. 20 & 21 Vict., c. 85.

15. 1 Q.B.D. 436 (1876).

16. *Id.* at 438-39.

17. McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 305 (1959).

that interspousal suits for personal torts may not be maintained.[18] Only one year after *Phillips*, the Supreme Court of Maine was confronted with precisely the same question and held that a woman could not maintain an action against her former husband for an assault committed during coverture.[19] "There is not only no civil remedy but there is no civil right, during coverture, to be redressed at any time. . . . Divorce cannot make that a cause of action which was not a cause of action before divorce."[20]

In the mid-nineteenth century, the common law jurisdictions began enacting legislation to rectify the wife's legal inferiority to her husband. The Married Women's Property Acts were passed to secure a separate legal identity to enable her to bring suits in her own behalf and to secure for her a separate legal estate in her own property.[21] The primary objectives of these statutes were to free the wife's property from the husband's control and to allow her to maintain an action against him for any tort to her property.[22] These acts eliminated part of the common law rationale for maintaining the immunity doctrine—the unity concept of the spouses and the procedural necessity of joinder of the husband as a co-party.[23]

Legislation in the United States was first enacted in 1844[24] in an attempt to liberate the married woman from the constraints of the common law rules. While today all of the jurisdictions in this country have some form of Married Women's Statute, there is some controversy as to legislative intent with regard to the kind of interspousal torts allowable.[25] Part of the controversy stems from the wording used in the statutes. Even under many of those which permit a wife to sue or be sued as a *femme sole*, only limited civil actions between the spouses are

18. Comment, *Intrafamily Immunity—The Doctrine and Its Present Status*, 20 BAYLOR L. REV. 27, 34 (1967).
19. Abbott v. Abbott, 67 Me. 304 (1877).
20. *Id.* at 306.
21. W. PROSSER, *supra* note 1, at 861.
22. *Id.*
23. Note, *Interspousal Immunity—A Policy Oriented Approach*, 21 RUTGERS L. REV. 491, 492 n.10 (1967).
24. McCurdy, *supra* note 17, at 308 n.40 cites those states enacting Married Women's Statutes prior to 1850, including Maine, Massachusetts, New Hampshire and New York.
25. *See, e.g.*, Cramer v. Cramer, 379 P.2d 95 (Alas. 1963) (Alaska Married Women's Act broad enough to allow wife to bring action against husband during coverture for personal injury caused by husband's negligent conduct); Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957) (Arkansas Married Women's Act meant to remove all common-law disabilities between husband and wife and allow either spouse to sue the other in tort during marriage); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914) (Connecticut Married Women's Act permits wife to sue husband for assault and battery); Flogel v. Flogel, 257 Iowa 547, 133 N.W.2d 907 (1965) (Iowa Married Women's Act does not change common law rule, wife cannot maintain action against husband for injuries sustained from husband's negligent operation of motor vehicle); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963) (Utah Married Women's Act does not allow wife to bring tort action against husband or his estate for personal injuries inflicted upon her). *See generally* 3 C. VERNIER, *supra* note 10, at 169, 268.

expressly permitted. Most of the acts do not explicitly deal with personal injury suits between spouses, but do allow suits in tort relating to either spouse's property. A majority of jurisdictions preclude tort actions involving personal injuries between husband and wife as being without the statutory provisions.[26]

Notwithstanding such statutes, by weight of authority personal injury suits between spouses have been disallowed by courts on the basis of the fundamental rule of construction that statutes in derogation of the common law must be strictly construed.[27] Since there was no cause of action for a wife to sue her husband for a tort to her person at common law, it is argued that a Married Women's Statute fails to cure that defect unless the act specifically creates the action.[28] The case of *Thompson v. Thompson*[29] is illustrative of the majority view. The Supreme Court of the United States held that the District of Columbia Married Women's Statute[30] did not create a cause of action to permit a wife to sue her husband for assault and battery. In a much noted dissent, Justice Harlan rejected the arguments in support of immunity and construed the Married Women's Act to authorize personal tort actions against a spouse, at least when the torts were intentional.[31]

There is a growing minority of American jurisdictions, however, which construes the Married Women's Acts to allow all types of interspousal tort suits.[32] These courts have adopted the reasoning that damages for personal injuries are a chose in action which the wife can reduce to possession as part of her property.[33] Under the Married Women's Statute, a wife could maintain an action against her husband

26. *See, e.g.*, Corren v. Corren, 47 So. 2d 774 (Fla. 1950) (through judicial interpretation, Married Women's Act has reference only to property rights of the wife and has no effect on fundamental characteristics and disabilities of the marital relationship; wife may not sue husband for personal injuries); Eddleman v. Eddleman, 183 Ga. 766, 189 S.E. 833 (1937) (provisions of state Married Women's Statute change the common law with respect to property rights of the wife, but not with respect to personal torts committed by one spouse against the other); Prince v. Prince, 205 Tenn. 451, 326 S.W.2d 908 (1959) (Tennessee Married Women's Emancipation Statute judicially interpreted not to abrogate the common law rule of interspousal immunity). *See generally* McCurdy, *supra* note 17, at 311-12 & nn. 52-79; 19 DE PAUL L. REV. 590, 591-92 (1970).

27. 3 C. VERNIER, *supra* note 10, at 619.

28. McCurdy, *supra* note 11, at 1050.

29. 218 U.S. 611 (1910).

30. Acts of March 3, 1901, § 1155, 31 Stat. 1189.

31. 218 U.S. at 221-23 (Harlan, Holmes & Hughes, JJ., dissenting). Justice Harlan felt that there was no room for construction of the statute because the words of Congress were sufficiently explicit in stating that a married woman could sue separately "for *torts* committed against *them*, as fully and freely as if they were *unmarried*." *Id.* at 622.

32. *See, e.g.*, Cramer v. Cramer, 379 P.2d 95 (Alas. 1963); Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957); Hay's v. Hay's Adm'r, 290 S.W.2d 795 (Ky. 1956); Lowman v. Lowman, 166 Ohio St. 1, 139 N.E.2d 1 (1956). *See generally* Comment, *Interspousal Tort Immunity—California Follows the Trend*, 36 So. CAL. L. REV. 456 & n.4 (1963).

33. Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914).

for a tort to her property. She could thus sue for damages for personal injuries inflicted by her husband.[34] The leading case expressing this minority view is *Brown v. Brown*,[35] which involved an action by a wife against her husband for assault and battery and false imprisonment. The Supreme Court of Connecticut, broadly construing the state's Married Women's Act, held that the statute altered the legal status of husband and wife: the parties would maintain their separate legal identities during marriage, and their rights to maintain civil suits would be determined in accordance with their separate identities.[36] That court saw nothing "injurious to the public, or against the public good, or against good morals"[37] in allowing an interspousal action to recover damages for an intentional tort.

Current Status

Even though the passage of Married Women's Acts has brought an end to the common law concept of the legal "oneness" of husband and wife, the immunity rule is still followed in many jurisdictions. There are currently two viewpoints regarding the viability of the interspousal immunity doctrine: the majority view, that the common law rule should be maintained except where it is expressly changed by statute,[38] and the minority view, that the doctrine has been abrogated by the statutes and any tort suit between spouses is recognizable.[39] Most jurisdictions hold that the Married Women's Statutes authorize interspousal suits only for torts to property, and refuse to authorize suits regarding torts to the person.[40] Since the common law impediment of the unity concept has been removed by these statutes, the retention of the immunity doctrine is based primarily on policy considerations.[41]

34. Comment, *supra* note 32, at 460.
35. 88 Conn. 42, 89 A. 889 (1914).
36. *Id.* at 44-45, 89 A. at 890. McCurdy, *supra* note 17, at 315; McCurdy, *supra* note 11, at 1046.
37. 88 Conn. at 48, 89 A. at 891.
38. *See, e.g.*, Ferguson v. Davis, 48 Del. 299, 102 A.2d 707 (1954); Corren v. Corren, 47 So. 2d 774 (Fla. 1950); Eddleman v. Eddleman, 183 Ga. 766, 189 S.E. 833 (1937); Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915).
39. *See, e.g.*, Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953).
40. Comment, *supra* note 32, at 460.
41. Five rationales have been employed to uphold the immunity: the fear of destruction of domestic peace and harmony, Corren v. Corren, 47 So. 2d 774 (Fla. 1950); the possibility of fraud or collusion between the spouses against insurance companies, Newton v. Weber, 119 Misc. 240, 196 N.Y.S. 113 (1922); the fear of a deluge of trivial claims on the court system, Thompson v. Thompson, 218 U.S. 611 (1910); the availability of ample protection through other remedies, Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); and the desire of certain courts to defer any change to the legislature, Mountjoy v. Mountjoy, 206 A.2d 733 (D.C. App. 1965). For a discussion of these rationales, see McCurdy, *supra* note 11; Note, *Choice of Law in Arizona:*

Development of the Doctrine in Arizona

The first Arizona cases to deal with interspousal actions involved torts by one spouse to the property of the other, and were brought after the enactment of the Arizona Married Women's Statute.[42] In *Hageman v. Vanderdoes*[43] the Supreme Court of Arizona held that, as a result of the Married Women's Statute, the common law doctrine of interspousal tort immunity was removed as to torts connected with the wife's separate property. The court reasoned that when the rationale for a rule has ceased, the rule itself is no longer necessary.[44] Since the Married Women's Act erased the legal unity of husband and wife and gave the wife exclusive control over her separate property, there was no longer any reason to deny a cause of action between the spouses for property torts. In a later case[45] further construing the Married Women's Statute,[46] the court found that a married woman had sole and exclusive control over her separate property, and held that a woman had a right of action against her husband for his conversion of that property.[47] A claim for personal injury to a wife living separate from her husband has also been held to be the wife's separate property, and she can therefore sue for damages without the joinder of her husband.[48]

The fact that Arizona is a community property state has been a decisive element in the judicial attitude toward the interspousal immunity doctrine. The general rule in community property jurisdictions is that an injury to either spouse during marriage gives rise to a community cause of action.[49] That is the current state of the law in Arizona, and has been for many years.[50] Thus, if an action for per-

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Schwartz v. Schwartz, Something Old, Something New, Something Borrowed . . ., 11 ARIZ. L. REV. 275 (1969); Note, *supra* note 23; Comment, *supra* note 32.

The minority jurisdictions have refuted each of the rationales for maintaining the immunity: the domestic tranquility argument, Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); the possibility of collusion between spouses, Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); the fear of trivial claims, Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); the adequacy of other remedies, Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); and the desire to defer to the legislature, Comment, *supra* note 32, at 468 & n.63.

42. Ariz. Rev. Stat., Civil ¶¶ 3105, 3106 (1901), *as amended*, ARIZ. REV. STAT. ANN. § 25-214 (1956).

43. 15 Ariz. 312, 138 P. 1053 (1914).

44. *Id.* at 320, 138 P. at 1056.

45. Eshom v. Eshom, 18 Ariz. 170, 157 P. 974 (1916).

46. Ariz. Rev. Stat., Civil ¶ 3851 (1913), *as amended*, ARIZ. REV. STAT. ANN. § 25-214 (1956).

47. Eshom v. Eshom, 18 Ariz. 170, 173-74, 157 P. 974, 975 (1916).

48. City of Phoenix v. Dickson, 40 Ariz. 403, 12 P.2d 618 (1932). Whether the wife can sue alone in a personal injury action requires a determination of to whom the right of action belongs: if the claim is the wife's separate property, she can sue alone; but if the claim is community property, the husband must be joined.

49. 3 C. VERNIER, *supra* note 10, at 215.

50. The leading Arizona case deciding this issue is Pacific Construction Co. v. Cochran, 29 Ariz. 554, 243 P. 405 (1926) (personal injuries to a spouse are community property; involved loss of earning capacity of a spouse during coverture). *See also*

sonal injuries were allowed, the injured spouse would be entitled to only fifty percent of any damages awarded. An additional problem is that if the tortfeasor were the husband, the wife would be left with virtually no recovery, since under Arizona community property laws the husband is the manager of the community property[51] and the wife may not make contracts binding on that property except for necessaries.[52] Because of these problems, the doctrine of interspousal tort immunity is arguably necessary in community property states: the tortfeasor-spouse should not be allowed to benefit from his own wrongdoing.[53]

Such problems have been solved in California. In 1957, the California legislature enacted a statute making damages for personal injuries inflicted by one spouse upon the other the separate property of the injured spouse.[54] The Supreme Court of California then abrogated interspousal tort immunity for both intentional[55] and negligent torts,[56] reasoning that since damages awarded to one spouse became his separate property, the other spouse would not be benefitted. In Arizona, however, the status of personal injury damages as community property remains a conceptual bar to the abrogation of the immunity in actions brought during coverture.[57]

Windauer: *The Current Situation*

The present status of the doctrine of interspousal tort immunity in

Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956); Fox Tucson Theatres Corp. v. Lindsay, 47 Ariz. 388, 56 P.2d 183 (1936); Kenyon v. Kenyon, 5 Ariz. App. 267, 425 P.2d 578 (1967); ARIZ. REV. STAT. ANN. § 25-211(A) (1956), which provides:

> All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children while she lives separate and apart from her husband, is the community property of the husband and wife.

Since damages for personal injuries do not fall within the statutory exceptions, they must necessarily be community property.

51. City of Phoenix v. State *ex rel.* Harless, 60 Ariz. 369, 137 P.2d 783 (1943); ARIZ. REV. STAT. ANN. § 25-211 (1956).

52. ARIZ. REV. STAT. ANN. § 25-214 (1956).

53. Note, *supra* note 41, at 289. The application of this rule leaves the injured spouse without an effective remedy, however.

54. Cal. Civ. Code § 163.5 (West 1957), *as amended* CAL. CIV. CODE § 165.5 (West 1968) (currently codified as CAL. § 5109 (West 1970)).

55. Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962).

56. Klein v. Klein, 58 Cal. 2d 69, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

57. Before *Windauer*, Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968), was the most recent case in which the Supreme Court of Arizona examined the status of interspousal immunity in Arizona. In *Schwartz*, a married couple domiciled in New York had been in an automobile accident in Arizona. The court, following the modern trend in conflicts-of-law cases, held that the ability of the wife to sue her husband in tort should be determined by the laws of their state of domicile and not by the laws of Arizona, the location of the accident. For a discussion of conflicts rules in conjunction with the *Schwartz* case see Note, *Choice of Law in Arizona: Schwartz v. Schwartz, Something Old, Something New, Something Borrowed . . .*, 11 ARIZ. L. REV. 275 (1969).

Arizona, as found in *Windauer v. O'Connor*,[58] should not be the final result in the view of those who favor the end of interspousal immunity. The case provided a vehicle for the Supreme Court of Arizona to follow the modern trend and completely abrogate the common law doctrine, but the court chose to limit its holding to allow tort actions between husband and wife only for intentional torts commited during coverture and only after the parties had been divorced.[59] Other tort immunities have not survived so well. In previous opinions the court has completely abrogated governmental[60] and charitable organization[61] immunities, and partially abrogated parent-child immunity in automobile negligence cases.[62] Yet it refused to take any major step forward in the area of interspousal immunity. Instead, the *Windauer* opinion indicated a desire to defer complete abrogation to the legislature.[63]

If the supreme court had let the court of appeals decision stand, the doctrine would have been totally abrogated. The court of appeals held that the doctrine of interspousal tort immunity did not bar the interspousal action, and made no distinction between intentional and negligent torts.[64] The basis for this holding was found within the Arizona statutory provision giving married women the same legal rights and liabilities as men[65] and a rule of civil procedure allowing a married woman to sue alone when the action is between herself and her husband.[66] The court of appeals felt that all interspousal tort actions should be permitted and that the common law rule should be abandoned since it produced unjust results.[67]

One possible reason for the opinion of the supreme court was to narrow the scope of the court of appeals decision. The supreme court apparently feared that the total abrogation of interspousal immunity could not be reconciled with current Arizona community property

58. 107 Ariz. 267, 485 P.2d 1157 (1971).
59. *Id.* at 268, 485 P.2d at 1158.
60. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963).
61. Ray v. Tuscon Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951).
62. Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970). *See also* Comment, *Streenz v. Streenz: The End of an Era of Parental Tort Immunity*, 13 ARIZ. L. REV. 720 (1971).
63. 107 Ariz. at 268, 485 P.2d at 1158.
64. Windauer v. O'Connor, 13 Ariz. App. 442, 477 P.2d 561 (1970).
65. ARIZ REV. STAT. ANN. § 25-214(A) (1956).
66. ARIZ. R. CIV. P. 17(e) provides in part that, "[W]hen a married woman is a party her husband shall be joined with her except when the action concerns her separate property, or is between herself and her husband, in which she may sue or be sued alone."
67. 13 Ariz. App. at 445, 477 P.2d at 564. The court of appeals did anticipate a problem concerning the community property laws as applied to personal injury damages awarded between spouses. The court stated that the community property aspects of such a claim for relief presented only a procedural bar which did not operate in the instant action because the parties were divorced. Thus, the question of how to circumvent this problem when the parties were still married was left unanswered. *Id.* at 445-46, 477 P.2d at 564-65.

laws. By limiting the holding to actions between divorced spouses, the Arizona court has avoided, for the present, the community property problems that might accompany actions between spouses during coverture.[68] One problem not avoided by the decision, however, is the difficulty of determining what actions fall within its purview. *Windauer* held that "a spouse may, after a divorce from the offending spouse, sue to recover damages for an intentional tort."[69] The court reasoned that "an intentional tort inflicted by one spouse on another so clearly destroys the concept of [marital] unity that the basis for the doctrine is lost."[70] The decision failed to establish exactly what intentional conduct would be actionable in tort after divorce. It is conceivable, for example, that a divorce on grounds of adultery could give rise to an attempted tort action based on mental anguish caused by the malicious flaunting of extramarital activities.[71] With only the phrase "intentional tort" as an aid, lower courts will be without guidelines until definite criteria are established for deciding what interspousal tort actions may be maintained after termination of the marriage.

Conclusion

The Supreme Court of Arizona has taken a step in *Windauer* toward complete abrogation of the interspousal tort immunity doctrine. The decision, however, leaves a need for interpretation as to the limits of actionable tortious conduct: should all intentional physical contact between spouses be actionable after divorce if such conduct would be regarded as actionable had the persons not been married?[72] There remains one practical problem with complete abrogation of the doctrine. Since personal injury damages are community property under Arizona's community property laws, recovery for an interspousal personal tort might result in benefitting the tortfeasor. The legislature could solve this dilemma as was done in California, by making damages for personal injuries inflicted by one spouse upon the other the separate

68. The main problem with allowing an action between spouses during coverture in a community property state is that damages for personal injuries are community property; if damages were awarded, the offending spouse could benefit from his own wrongdoing. See text accompanying notes 49-53 *supra*. By holding that such actions would not arise until after the divorce and not be made res judicata by the divorce proceeding, the court has also raised questions concerning the tolling of limitations statutes during coverture.

69. 107 Ariz. at 268, 485 P.2d at 1158.

70. *Id.*

71. *See* W. PROSSER, *supra* note 1, at 55, *citing* Wilkinson v. Downton, [1897] 2 Q.B. 57.

72. Some technically tortious conduct may be considered permissible or forgivable within a marital relationship; for example, one spouse losing his temper and hitting the other, or sexual relations between the spouses which, if they were not married, might constitute assault and battery.

property of the injured spouse. If this action were taken, it is submitted that the only valid bar to personal injury actions between spouses during coverture would be removed, and the supreme court would be free to completely abrogate the interspousal tort immunity doctrine.

LEGAL RIGHTS AND RESPONSIBILITIES OF FOSTER PARENTS

Foster parentage developed in Ireland as a voluntary system under which the fostering relationship was considered a stronger bond than that of blood.[1] Consequently, foster parents and children enjoyed the same general legal rights as natural parents and their children.[2] Today, however, consanguinity[3] has frequently become the determinative factor of such legal rights as custody, wrongful death recovery and inheritance, and often precludes foster parents from claiming statutory benefits available to natural parents. This result is exemplified by *Solomon v. Harmon*,[4] in which the Supreme Court of Arizona not only denied the foster parents the statutory right to recover as beneficiaries in a wrongful death action, but also denied them standing as proper parties plaintiff.

In *Solomon* the decedent, Paul Cargo, began residing with the Solomon's as a foster child after his natural mother was institutionalized for mental incompetency.[5] The fosterage continued until his death resulting from injuries sustained in an automobile collision allegedly caused by the defendant's negligence. A wrongful death suit was initiated by several parties, including the Solomons. When the trial court granted defendant's motion to dismiss all parties plaintiff except the surviving natural mother and the administrator,[6] the Solomons appealed to the supreme court. They alleged that the failure to include

1. KATZ, WHEN PARENTS FAIL 90-91 (1971). The term "foster" is used generally to include two classes of foster relationships, an in loco parentis relationship and a governmentally regulated relationship. In either situation, there is a relinquishment of children by their natural parents to other individuals for rearing.

2. *Id.*

3. Although consanguinity is a term denoting blood relationship, most state statutory schemes treat adoptive relationships as natural. *See* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 10 (1971). Arizona recently adopted this approach. ARIZ. REV. STAT. ANN. § 8-117 (Supp. 1971-72).

4. 107 Ariz. 426, 489 P.2d 236 (1971).

5. No mention of decedent's father was found in the record nor was he a party to the suit. *Id.* at 428, 489 P.2d at 238.

6. Irene Smith, guardian of decedent's mother, and Mr. Solomon as the administrator of the estate of Paul Cargo, were allowed to remain in the original suit, the latter for purpose of recovering funeral and burial expenses pursuant to ARIZ. REV. STAT. ANN. § 14-682 (Supp. 1971-72). The Solomons, as foster parents, and the deceased's brother and sister were dismissed from the suit. 107 Ariz. at 428, 489 P.2d at 238.

them as both proper parties plaintiff and beneficiaries was a denial of due process and equal protection of the laws. To support this contention, the Solomons argued that they were foster parents standing in loco parentis to the deceased, providing care, protection and guidance in return for love and affection from their foster son. The supreme court, however, found the relationship insufficient. The court stated that because fosterage does not impose legal duties and responsibilities on the foster parents, they are not "parents" within the meaning of the statute and should not be accorded the rights of natural parents.

The court first explained that the right to be a plaintiff in a wrongful death action is purely statutory. Thus, the express authorization[7] for the surviving husband or wife, personal representative, parent or guardian to act as plaintiff is controlling as to proper parties plaintiff. The court concluded that the statute is unambiguous, reasoning that the existence of the decedent's surviving natural mother provided a sufficient basis for disallowing the Solomons from bringing an action as the parents. The court continued by noting that a determination of proper parties plaintiff does not necessarily preclude the right to share in the distribution of the amount recovered. A wrongful death action shall be brought "on behalf of the surviving husband or wife, children or parents, or if none of these survive, on behalf of the decedent's estate."[8] Applying this hierarchy, however, the court held that since there was a surviving parent, the statute precluded all others from recovering damages for the death of the decedent. This exclusion might be unfair, but the court asserted that it did not result in arbitrary, unreasonable or invidious discrimination since the interpretation was designed to separate "those who possess the entirety of parental rights and obligations from those who do not."[9]

Prior to the enactment of wrongful death statutes, the death of a human being did not give rise to a cause of action because the right to maintain a suit died with the person.[10] Consequently, statutes were enacted to compensate designated individuals, generally members of the family, "for loss of economic benefit which they might reasonably have expected to receive from the decedent in the form of support, services, or contributions during the remainder of his lifetime if he had not been killed."[11] Given this goal, the question arises whether foster parents should ever be compensated for the wrongful death of

7. ARIZ. REV. STAT. ANN. § 12-612(A) & (B) (1956).
8. *Id.*
9. 107 Ariz. at 431, 489 P.2d at 241.
10. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965).
11. W. PROSSER, THE LAW OF TORTS § 127, at 906 (4th ed. 1971).

their foster child. It is submitted that if significant duties and responsibilities exist, there should also be corresponding rights and benefits. This analysis will delineate the legal duties and responsibilities of foster parents, and examine other statutory rights afforded such individuals. Finally, it is suggested that foster parents be accorded the same rights as natural parents under wrongful death statutes.

Legal Duties and Responsibilities

A dual system of foster parentage has developed in the United States. The two systems, in loco parentis and governmentally regulated foster care, are significantly different, with in loco parentis entailing the more extensive duties and responsibilities:[12]

> The term 'in loco parentis,' according to its generally accepted common law meaning, refers to a person who has put himself in the situtation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies two ideas of assuming parental status and discharging parental duties. . . . Due to the obligations and rights that arise out of such relationship, the assumption of the relationship does not arise by chance, but is the result of intention. . . .[13]

The major distinction between the natural parent and in loco parentis relationship is the right of termination. One standing in loco parentis may abrogate the relationship at will.[14]

In loco parentis is based upon dependency. Once a person declares his intention to stand in loco parentis, he incurs the same liability as natural parents for rearing the child.[15] This is illustrated by cases holding such individuals liable for the child's actions.[16] If an individual assuming this duty were not considered legally responsible to support the child, he could possibly recover for monies expended. Just as the natural parents cannot charge their own children, however, neither can one standing in loco parentis unless there is an express contract to the contrary.[17] The reciprocal of support is the right of the parent to the services and earnings of the child. The in loco parentis

12. While most of the cases defining the rights and duties of persons standing in loco parentis have involved related parties, it has been recognized that unrelated persons may assume this position. *See In Re* Lutz' Estate, 201 Misc. 539, 543, 107 N.Y.S.2d 388, 392 (Sur. Ct. 1951).

13. Niewiaomski v. United States, 159 F.2d 683, 686 (2d Cir. 1947).

14. Fuller v. Fuller, 247 A.2d 767, 770 (D.C. Dist. Ct. 1968).

15. *See* Buelke v. Levenstadt, 190 Cal. 684, 685, 214 P. 42, 43 (1923) (person standing in loco parentis held liable for child negligently driving an automobile).

16. *See id.; cf. In Re* Di Maggio, 65 N.Y.S.2d 613 (Dom. Rel. Ct. 1946).

17. Starkie v. Perry, 71 Cal. 495, 12 P. 508 (1886); Rudd v. Fineberg's Trustee, 277 Ky. 505, 126 S.W.2d 1102 (1939).

parent is entitled to these benefits[18] as a right accruing to the person supporting a child. Thus, when a third party causes injury or death to a child, a person standing in loco parentis has been able to maintain a claim for loss of his services, even to the exclusion of the natural parent.[19]

Since an in loco parentis relationship imposes duties and responsibilities, both statutory and nonstatutory, this apparently is not the type of foster parenthood alluded to in *Solomon*. The supreme court was probably referring to governmentally regulated foster parentage, for foster parents within the sphere of governmental regulation have nearly nonexistent duties and responsibilities. Although the initial concept of such fosterage was to allow the relationship to evolve into a psuedo-adoption,[20] it has since been determined that retention of the natural family relationship is of paramount importance to the child's well-being.[21] Consequently, placement services have emerged "to preserve the child-parent relationship to the fullest extent possible and to enable parents to perform the parental role as adequately as they can."[22]

In the regulated foster care province, the hierarchy of legal duties and responsibilities is based on this concept of retaining the natural family relationship. First, the natural parents voluntarily enter into an agreement with a foster agency.[23] The agency usually procures legal custody of the child which limits, but does not terminate, the parents' rights.[24] "Legal custody denotes the rights and responsibilities associated with day-to-day care of the child. It includes the right to care, custody, and control of the child, and the duty to provide food, clothing, shelter, education and medical care."[25]

The agency's general responsibilities are to preserve the child's own home by offering services, such as financial assistance, counsel-

18. Sparks v. Hinckley, 78 Utah 502, 503, 5 P.2d 570, 571 (1931).

19. *See* Stoddard v. Campbell, 27 Ga. App. 363, 108 S.E. 311 (1921); Atkinson v. Yarborough, 13 Ga. App. 781, 80 S.E. 29 (1913). In both of these cases, the surviving parent had no parental control or authority over the child, and the in loco parentis parents were thus allowed to recover for loss of services. *But see* Corcione v. Zingerman, 111 N.J.L. 75, 166 A. 506 (Ct. App. 1933), in which the in loco parentis parents, who had paid hospital and medical bills for the child and had been receiving the child's earnings, were not allowed to recover for the loss of the child's services. The court stated that, "[o]ur understanding of the law is that only the real parents, and not a person in loco parentis, are entitled to be compensated for the loss of his earnings and for the expenses of his medical care." *Id.* at 80, 166 A. at 508.

20. M. WOLINS, SELECTING FOSTER PARENTS: THE IDEAL AND THE REALITY 11 (1963).

21. *Id.*

22. CHILD WELFARE LEAGUE OF AMERICA, INC., STANDARDS FOR FOSTER CARE SERVICE 13 (1959).

23. *Id.* at 14.

24. *Id.* at 15.

25. *Id.* at 48.

ing, day care and housekeepers. If it is impossible for the child to remain in his home, the agency selects the care best suited to the child's particular needs.[26] The foster parents are then delegated the duties of day-to-day care which, in fact, emanate from the agency. The agency must also assist the foster parents in preparing the child for his eventual reunion with his family. The final mandate is periodic review of the child's physical, emotional and educational progress.[27]

This delineation of the responsibilities and duties within the regulated foster care program clearly demonstrates that the supreme court in *Solomon* was correct in propounding the notion that foster parents have no legal rights and duties. The foster parents' obligations are almost as limited as those imposed on a stranger. The court precluded the in loco parentis relationship, however, a relationship which does give rise to significant duties and responsibilities once it is assumed. Thus, it is submitted that the court erred in its denial of benefits on the basis of legal duties and responsibilities without considering the type of relationship between the decedent and the Solomons.

Statutory Recognition of In Loco Parentis Relationships

Numerous federal and state statutes similar in purpose to the wrongful death statutes have recognized in loco parentis parents or children as entitled to the statutory benefits attending general compensation schemes. There are two ways in which they have benefited under these statutes: express designation by the legislature or construction by the courts to encompass those persons not specifically named.

One of the first federal statutes expressly expanding the in loco parentis relationship was the National Life Insurance Act of 1940:[28]

> The terms 'parent', 'father' and 'mother' mean a father, mother, father through adoption, mother through adoption, persons who have stood in loco parentis to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year, and a stepparent, if designated as beneficiary to the insured.[29]

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26. H. STONE, FOSTER CARE IN QUESTION: A NATIONAL REASSESSMENT BY TWENTY-ONE EXPERTS 12 (1970).
27. *Id.* at 13.
28. 38 U.S.C. § 701 *et. seq.* (1970).
29. *Id.* at § 701(4). Further evidence of express federal statutory recognition of foster child-parent relationships is found in the Internal Revenue Code which entitles the taxpayer to a deduction for the foster dependent. INT. REV. CODE OF 1954, § 152. Another example of an express provision can be found in the Health Insurance Act which defines "members of the family" as including a "stepchild, foster child, or recognized natural child who lives with the employee or annuitant in a regular parent-child relationship." 5 U.S.C. § 8901(5)(B) (1970).

In *Baldwin v. United States*[30] the court awarded the death proceeds to in loco parentis parents over the objection of the natural mother. The court supported its holding by noting that the in loco parentis parents had reared and educated the child as their natural son for six years.[31] Another court denied the natural mother's claim to the proceeds since the persons standing in loco parentis had taken care of the child for fourteen years even though they had received government dependency aid during the child's lifetime.[32] In *Leverly v. United States* it was stated that the purpose of Congress in including persons standing in loco parentis was to "make sure the person or persons who last bore and exercised the parental relationship would be recognized as beneficiaries. . . ."[33] The court said it was, "clear that Congress contemplated a relationship or status based on facts, and not upon the circumstances of birth."[34]

An example of an express provision on the state level is illustrated by Pennsylvania's Workmen's Compensation Act,[35] which defines child as including "children to[ward] whom he [decedent] stood in loco parentis."[36] The term "mother" was said to have "infinitely more meaning than merely indicating the woman who bore the child. It embraces the conception of tender, loving care and mutual affection commonly found between the mother and child, and the rights, duties and liabilities normally incident to such a relationship."[37] Therefore, where such a dependency relationship exists, Pennsylvania courts have held that the persons assuming such a position are allowed to recover under the Act.[38]

There are a number of statutes which have been interpreted to include or exclude those standing in loco parentis. For example, the Housing and Rent Act of 1948[39] has been interpreted to include a child dependent on one standing in loco parentis.[40] Workmen's com-

30. 68 F. Supp. 657 (W.D. Mo. 1946).
31. *Id.* at 662-63.
32. Lorden v. United States, 83 F. Supp. 822 (D. Mass. 1949). *See also* Thomas v. United States, 189 F.2d 494 (6th Cir. 1951); Strauss v. United States, 160 F.2d 1017 (2d Cir. 1947); Neuhard v. United States, 83 F. Supp. 911 (M.D. Pa. 1949); Jensen v. United States, 78 F. Supp. 974 (S.D. Me. 1948); Maldonado v. United States, 69 F. Supp. 302 (E.D. N.Y. 1946).
33. 162 F.2d 79, 85 (10th Cir. 1945).
34. *Id.*
35. PA. STAT. ANN. tit. 77, §§ 1 *et. seq.* (1952), *as amended,* (Supp. 1971).
36. *Id.* at § 477.
37. Custer v. Reitz Coal Co., 174 Pa. Super. 595, 598, 101 A.2d 433, 434 (1953).
38. *See, e.g.,* Boyle v. Dealers Transp. Co., 184 Pa. Super. 38, 132 A.2d 709 (1957); Kransky v. Glen Alden Coal Co., 158 Pa. Super. 544, 45 A.2d 385 (1946); Flinn v. Sonman Shaft Coal Co., 153 Pa. Super. 76, 33 A.2d 525 (1943); Brovdy v. Jones & Laughlin Steel Corp., 145 Pa. Super. 602, 21 A.2d 437 (1941).
39. 50 U.S.C. § 1899(a)(2) (1970).
40. Cicchino v. Biarsky, 26 N.J. Misc. 300, 61 A.2d 163 (Union County Dist. Ct., 1948).

pensation acts have similarly been construed to include in loco parentis relationships.[41] Kentucky thus included a parent standing in loco parentis because it was felt that he "occupied the same statuts as [the child's] own father as compensation law was concerned."[42]

Other states have excluded in loco parentis parents under their workmen's compensation statutes by strict statutory construction. Texas courts have held a dependent of one standing in loco parentis not entitled to compensation feeling that the term "parent" should not be enlarged "to break down the law, by opening up its benefits to every dependent, regardless of age or relationship, which clearly was not within the contemplation of the Legislature."[43] Consequently, all claimants must come within the enumerated classes in order to benefit, regardless of the showing of dependency.[44] The Supreme Court of Alabama has stated that "neither closeness of relationship nor depth of love and affection is included in statutes granting right to benefits under Workmen's Compensation."[45] The court noted that "since the words mother or parent were not expressly broadened by the statutory definition, it appears clear that the usual and accepted definition was intended to apply."[46]

Wrongful death statutes have not been construed to allow a person standing in loco parentis to recover for the death of a foster child, even though the reason for their existence can be likened to that of workmen's compensation statutes.[47] Thus, for example, Georgia[48] and

41. *See* Yellow Cab Co. v. Industrial Comm'n, 42 Ill. 2d 226, 247 N.E.2d 601 (1969), in which the Supreme Court of Illinois included under its act an illegitimate child totally dependent on the deceased for support and maintenance. The court reasoned that the purpose of the act was "to provide some compensation to persons who were dependent upon the deceased employee for support or as to whom a legal obligation to support existed." *Id.* at 230, 247 N.E.2d at 603. *See also* Faber v. Industrial Comm'n, 352 Ill. 115, 185 N.E. 255 (1933). It can thus be inferred that the act would be extended to include children dependent on one standing in an in loco parentis relationship.

42. Black Mountain Corp. v. Jones, 283 Ky. 707, 709, 142 S.W.2d 973, 974 (1940).

43. Consol. Underwriters v. Ward, 57 S.W.2d 964, 965 (Tex. Civ. App. 1949).

44. Rogers v. Texas Employers' Ins. Ass'n, 224 S.W.2d 723, 725 (Tex. Civ. App. 1949).

45. Browning v. Huntsville, 46 Ala. 503, 505, 244 So. 2d 378, 379 (1971).

46. *Id.* at 506, 244 So. 2d at 380. Arizona's Workmen's Compensation Act (ARIZ. REV. STAT. ANN. § 23-901 *et. seq.* (1956)) includes as beneficiaries, "A natural, posthumous or adopted child under the age of eighteen years, or over that age if physically and mentally incapacitated from wage earning, upon the injured parent. Stepparents may be regarded as parents, if dependent, and a stepchild as a natural child if dependent." *Id.* § 23-1064(A)(3). Though it appears that persons standing in loco parentis might be included, the Supreme Court of Arizona in Ocean Accident & Guar. Corp. v. Industrial Comm'n, 32 Ariz. 54, 255 P. 598 (1927), said that children presumed dependent are limited to those specifically mentioned in the statute. This decision, taken in conjunction with *Solomon* suggests that Arizona courts will take a narrow view of the provision.

47. Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisted,* 4 FAM. L.Q. 209 (1970). The wrongful death acts and workmen's compensa-

Texas[49] have continued to construe the wrongful death statutes as excluding persons standing in loco parentis. After the decision in *Solomon*, Arizona has now joined the ranks of those states strictly construing wrongful death statutes.[50]

Conclusion

It has been shown by the delineation of the duties and responsibilities of individuals within the foster parent-child milieu and through analysis of a number of analogous statutes that the concept of consanguinity perpetrates certain inequities with regard to in loco parentis relationships. The original purpose of the wrongful death statutes was to benefit individuals for pecuniary losses which they might reasonably expect to recover. This purpose imports the notion of dependency and not consanguinity, and those individuals who have assumed the obligations of the parent should be awarded the benefits incident thereto. Adopting a theory of dependency will not injure the natural parents' rights if the natural parents are, in fact supporting the child. The legislature through express provisions or the courts through a liberal interpretation of "parent" could harmonize the benefits received with the obligations assumed by in loco parentis parents and thereby fulfill the purpose of the wrongful death statute.

tion statutes are similar "in that both involve recovery by certain interested parties for the death or injury to someone whose loss causes them increased and undue economic and emotional hardship." *Id.* at 214.

48. Limbaugh v. Woodall, 121 Ga. App. 638, 175 S.E.2d 135 (1970); Smith v. Jones, 72 Ga. App. 638, 34 S.E.2d 623 (1945); Weems v. Saul, 52 Ga. App. 470, 183 S.E. 661 (1936); Avery v. Southern Ry. Co., 44 Ga. App. 613, 162 S.E. 648 (1931).

49. Gross v. Frantz, 287 S.W.2d 289, 290 (Tex. Civ. App. 1956); Boudreaux v. Texas & N.O.R. Co., 78 S.W.2d 641, 643 (Tex. Civ. App. 1935); Perez v. Central Power & Light Co., 27 S.W.2d 641, 642 (Tex. Civ. App. 1930).

50. Note, *supra* note 7, at 520. Statutes of descent and distribution generally contain no express provision for the in loco parentis relationship and, as in matters concerning wrongful death, the courts have strictly construed the statutes to exclude these individuals. Other areas in which statutes have been construed to exclude in loco parentis parents include pretermitted children statutes, *see* Bryant v. Thrower, 239 Ark. 316, 394 S.W.2d 488 (1965), and the Federal Employers Liability Act (45 U.S.C. § 51 *et. seq.* (1970)). *See* Deatherage v. Fortworth & D.C. Ry. Co., 154 S.W.2d 918 (Tex. Civ. App. 1941).

TABLE OF CASES