# THE END OF INSUBORDINATION

Donal M. Sacken*

The most serious accusation that can be levied against a public school teacher in Arizona is not immorality. Nor is it grossly unprofessional conduct or incompetence. Under this state's law of teacher dismissal, an accusation of insubordination is much more serious. The school district's burden of proof is virtually nonexistent, and the accusation, if provable, is treated as an irremediable act. This insubordination doctrine not only skews authority relations powerfully towards school administration, but also perpetuates an anachronistic image of schools. It fosters an organizational design that frustrates effective school operations.

The insubordination doctrine in Arizona is entirely a common law product, deriving primarily from four relatively recent decisions.[1] It emerged with no particular rationale, apart from some conclusory judicial observations, based on implicit assumptions regarding appropriate authority relationships within a school. The doctrine is not merely unjustifiable, it is mischievous. Not only can it inhibit organizational reforms viewed as essential to renovating public schools, but it also encourages managerial behaviors that are counterproductive and potentially unethical. After reviewing the origin and nature of the insubordination doctrine, I argue that it warrants either abandonment or substantial reformulation, to bring it into line with more reasoned versions extant in other states' public law.[2]

## THE MEANINGS OF INSUBORDINATION

Arizona has not produced many teacher dismissal cases, and only four reported opinions directly turn on insubordination.[3] The doctrine was defined

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* Associate Professor of Educational Foundations and Administration, Adjunct Professor of Law, University of Arizona. B.A., 1970, J.D., 1973, University of Texas; Ph.D., 1977, Georgia State University.

1. Title 15 of the Arizona Revised Statutes does not specify insubordination as a grounds for teacher dismissal. Among the jumble of provisions describing various forms of unprofessional conduct, the legislature has specified that teachers must receive descriptive statements of charges leading to dismissal "alleging unprofessional conduct, conduct in violation of the rules, regulations or policies of the governing board or inadequacy of classroom performance. . . ." ARIZ. REV. STAT. ANN. § 15-539(C) (1985). Thus, even where bases for dismissal are enumerated, the term insubordination is not used. Insubordination is, however, specified as a cause for discipline or dismissal of *state* employees, but the term is not defined. ARIZ. REV. STAT. ANN. § 41-770(A)(6) (1985).

2. *See infra* notes 63 *et seq.* and accompanying text.

3. A logical question raised by the small number of insubordination cases is whether such an infrequently litigated issue is consequential. Given the nature of an insubordination charge, there is little reason for a teacher to dispute an allegation. The small number of cases may be an artifact of the doctrine. If administrators overlook many acts that could sustain an

in almost an off-handed fashion in a 1967 Arizona Supreme Court decision.[4] In that case, a teacher sued after her contract was not renewed. Under Arizona law, the school district was obligated to provide her with a statement of reasons.[5] It specified two causes: lack of cooperation and insubordination. The teacher brought suit and obtained a writ of mandamus from a superior court, compelling the district to renew her contract. The district appealed the writ to the Arizona Supreme Court.

The teacher argued that the stated reasons were merely "gross conclusions" and therefore insufficient to satisfy the district's statutory duty. The court pointed out that school districts did not need to show "good cause" for nonrenewing a teacher because the statute required only a statement of the "undesirable qualities which merit a refusal to enter into further contract."[6] As reasons, insubordination and lack of cooperation were "generic, categorizing the type of conduct . . . found objectionable," and both grounds had "fixed and well-understood meanings so that they do not leave the teacher in ignorance."[7] The court then disclosed its version of these fixed meanings.

> Insubordination imports a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders . . . and lack of cooperation is characteristically a subtle species of insubordination. Both terms are descriptive of a class of censurable practices destructive of the efficiency of the employer's organization.[8]

The only basis cited for this definition was a 1918 decision by the Supreme Judicial Court of Massachusetts, *MacIntosh v. Abbot*.[9] That case involved the dismissal of a farm servant for a "breach of courtesy" followed by a refusal to apologize to his employer. The Massachusetts court actually overturned the servant's dismissal, but noted that "[i]nsubordination imports a willful disregard of express or implied directions and refusal to obey reasonable orders."[10] As captured by the Arizona Supreme Court, the key elements of insubordination seem to be: (1) a direct or implied order, (2) that was reasonable, (3) which the employee willfully refuses to obey. It is difficult to interpret the meaning of the oblique observation that "lack of cooperation" is a "subtle species" of insubordination apart from the context of its decision, but this sweeping addition lends an *in terrorem* quality to the definition, seemingly granting limitless power to school administrators.

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insubordination claim, the occasions of actual charges take on a random, almost pretextual quality. Finally, the overbreadth of this doctrine creates a chilling force in the school. One of my students once described to me a new principal who prophylactically threatened all the teachers with insubordination charges unless they were fully compliant.

4. School Dist. No. 8, Pinal County v. Superior Court of Pinal County, 102 Ariz. 478, 433 P.2d 28 (1967).

5. The statutory requirement of a "statement of reasons" is currently codified at ARIZ. REV. STAT. ANN. § 15-536(B) (Supp. 1990).

6. 102 Ariz. at 481, 433 P.2d at 31.

7. *School Dist. No. 8, Pinal County*, 102 Ariz. at 480, 433 P.2d at 30.

8. *Id.*

9. 231 Mass. 180, 120 N.E. 383 (1918).

10. *Id.* at 181, 120 N.E. at 384. The Massachusetts court did not specify any basis for its definition.

In *Fulton v. Dysart Unified School District No. 89*, Division One of the Arizona Court of Appeals reviewed a superior court's order setting aside a teacher's dismissal on insubordination grounds.[11] Mrs. Fulton had been teaching for seventeen years in her district when the events leading to her dismissal occurred. While acting as playground supervisor at an elementary school on September 12, 1979, she directed two boys to stop playing near a pool of irrigation water and return to a proper playground area. One of the students allegedly spoke to her in an abusive, profane manner, and she slapped him in the face. The student ran to the school office and reported the incident to the school secretary. The principal requested that Mrs. Fulton discuss the matter with him after school. Prior to this meeting, however, Mrs. Fulton spoke with the classroom teacher representative, who advised her to see a lawyer before discussing the matter in detail or submitting a written report.[12]

At her first meeting with the principal, Mrs. Fulton did not respond to his queries despite the fact that the student's parents had already threatened a lawsuit. He agreed that she should see a lawyer, but instructed her to submit a written report by 8:00 a.m. the following day. When no report was submitted the next morning, the principal requested a report at the end of that day, and also asked her to meet with him the following day at 4:00 p.m. When she did neither, he contacted the district office. Meanwhile, Mrs. Fulton's attorney, retained on September 14th, told her not to discuss the matter until he met with her.

On the 17th, the district's superintendent asked Fulton for a report by 4:00 p.m. that day. None was forthcoming. The next day, the principal delivered a letter declaring that 1:00 p.m. that day was the *final* deadline for a report. "This deadline also passed without a response,"[13] although Fulton's attorney did send a letter the same day, requesting a meeting with the superintendent for himself and Fulton. By this point, however, the superintendent had apparently resolved to dismiss her because, on September 21, Fulton received notification that she would be a topic of discussion at the board of education's meeting on the 24th. At that meeting, which she did not attend,[14] the board voted to dismiss her as insubordinate for failure to prepare the requested statement, and as unprofessional for striking the student in violation of district policy. A hearing commission[15] determined that the charges were true, but

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11. 133 Ariz. 314, 651 P.2d 369 (Ct. App. 1982).

12. *Id.* at 315, 651 P.2d at 370. The opinion does not explain why Fulton's colleague believed that she needed protection from her immediate supervisor and fellow educator. The recommendation, however, was fateful for Fulton. Indeed, accepting the student's allegation that Fulton slapped him, the initial facts are inadequate catalysts for the reactions that followed.

13. *Id.* at 316, 651 P.2d at 371.

14. *Id.* Fulton testified that she did not receive any notice of the board's meeting. Under Arizona law, a continuing or tenured teacher whose employment status is to be discussed by a school board is not entitled to prior notice. The proper procedure requires the teacher to request a hearing after receiving notice of the board's intention to dismiss. *Id.* at 316 n.2, 651 P.2d at 371 n.2. *Accord* Cooner v. Board of Educ., Phoenix Union High School Dist. No. 210 of Maricopa County, 136 Ariz. 11, 663 P.2d 1002 (Ct. App. 1983).

15. Previously, Arizona employed a two stage procedure in teacher dismissals. Initially, a three person commission was created to hold a full evidentiary hearing and to provide recommendations to the relevant school board. The board was bound by the commission's factual determinations, but could reject its recommendations, as in *Fulton*. At times, boards apparently chafed at the constraints imposed by an independent fact finder. *See* Knollmiller v. Welch,

found insufficient cause for dismissal. The Board rejected the commission's recommendation, and voted four to two to affirm the dismissal.

The superior court held that the board's action was arbitrary and capricious, thus constituting an abuse of discretion.[16] On appeal, the primary question was whether the board had shown cause to dismiss Fulton. The appellate court was intentionally equivocal about the weight of the slapping incident itself, refusing to "pass on the question whether this isolated instance of 'unprofessional conduct' in the course of Mrs. Fulton's seventeen year career with Dysart Schools was sufficient grounds for her dismissal."[17] Instead, it moved on to the allegation that made their review much simpler.

The court noted that it was "uncontroverted" that Fulton's caution in safeguarding her interests was reasonable, and that her failure to deliver a written report was based on advice of her counsel and an education association representative. Although the fact that both the district's request for a report and Fulton's noncompliance were reasonable might seem to pose a difficult issue, the court found the issue quite facile. The court invoked the supreme court's definition of insubordination to support its conclusion that the board had determined Fulton's conduct to be willful disregard of her employer's request. The board's decisions that Fulton was insubordinate and that dismissal was an appropriate punishment, therefore, did not represent an "unreasoned action."[18] Such decisions are entrusted to school boards, and a court should not sit as a "super school board" by imposing its preferred judgment. Thus, the court avoided a potentially delicate question: Should a single reasonable violation of district policy action, when balanced against seventeen years of service, warrant dismissal, especially absent any evidence of harm to the district?[19]

The third case in this sequence, *Siglin v. Kayenta Unified School District*,[20] arose from a principal's dissatisfaction with Siglin's instructional performance. After giving Siglin preliminary notice of classroom inadequacy,[21] the principal required him to meet daily for the purpose of reviewing

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128 Ariz. 34, 623 P.2d 823 (Ct. App. 1981) (a school board cannot make its own independent or contrary factual determinations, but is bound by those of a commission). The commission was amended out of existence, uniting both the fact finding and adjudicatory functions in local school boards. *See* 1983 Ariz. Sess. Laws ch. 281, § 13.

16. *Fulton*, 133 Ariz. at 316, 651 P.2d at 371. In fairly traditional fashion, Arizona's courts defer to the determinations made by school boards. Thus, a judicial overturning of a teacher's dismissal under a review standard requiring capricious and arbitrary conduct by a board should be a rare event. Appellate courts, as in *Fulton*, occasionally remind their subordinates to hew to this passive judicial line. *See also* Board of Educ. of Tempe Union High School v. Lammle, 122 Ariz. 522, 596 P.2d 48 (Ct. App. 1979) (superior court decision overturned because judge improperly displaced discretionary judgment of school board).

17. *Fulton*, 133 Ariz. at 319, 651 P.2d at 374.

18. *Id.*

19. *Id.* There was *potential* harm to the district represented by the parents' threatened lawsuit. But the district's potential liability where a teacher slapped a student with no indication of an enduring physical injury and in response to the student's profanity to her seems small. Beyond the rather unappealing behavior attached to the prospective plaintiffs' child, Fulton also allegedly violated district policy on student discipline. If so, she might ultimately have been responsible for any damages.

20. 134 Ariz. 233, 655 P.2d 353 (Ct. App. 1982).

21. Incompetence is a remediable deficiency in Arizona. Teachers must receive both a preliminary notice and an opportunity to correct instructional deficiencies. *See* ARIZ. REV.

Siglin's lesson plans. Siglin complied for sixteen consecutive school days, but thereafter refused to continue because he believed the meetings were unproductive. When the principal attempted to discuss the refusal to meet, Siglin apparently lost his temper and "shouted in a loud voice in the presence of students and other school personnel."[22] These behaviors led to charges of insubordination, unprofessional conduct and lack of cooperation. After a commission recommended, by a split vote, for dismissal, the board voted to dismiss Siglin.[23] After losing in superior court, Siglin appealed.

Siglin argued before the court of appeals that his conduct did not constitute insubordination as a matter of law. The first basis for this argument was that he had not willfully disregarded the principal's order because he had attended the meetings for sixteen days. The court briefly noted that the principal's order imposed a continuing obligation to meet on Siglin. Neither did the court accept Siglin's second argument that the order was unreasonable because the meetings were unproductive. It pointed to the principal's testimony that he had observed improvement in the lesson plans as a result of the meetings. The board could thus have reasonably concluded that Siglin's failure to continue the meetings with the principal was insubordinate. Siglin did attempt to persuade the court to remake Arizona's insubordination doctrine. He argued that his actions did not demonstrate lack of cooperation because two isolated incidents could not be characterized as a continuing refusal to cooperate with his superiors. The court observed that Siglin had "attempted to engraft an additional requirement to the definition of insubordination."[24] Arizona's doctrine does not require continuing conduct; a single act of insubordination justifies dismissal. In any event, Siglin's refusal to attend the meetings was a continuing refusal.

These events appear such an obvious instance of teacher insubordination that Siglin's protracted effort to overturn his firing initially defies logic. His last claim perhaps explains his persistence. He argued that the school district lacked good cause to dismiss him and that he was "a victim of a scheme to manufacture a case to support his dismissal. . . ."[25] The principal's requirement of a daily meeting does appear an extreme measure, particularly as Siglin was a continuing or tenured teacher. To the extent that the principal was intent on documenting Siglin's incompetence, however, some "scheme" to create sufficient evidence of Siglin's inadequacies was necessary.[26] However, Siglin

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STAT. ANN. § 15-539(B) (1985). *See also* Claxton, *Remediation: The Evolving Fairness in Teacher Dismissal*, 15 J.L. & EDUC. 181 (1986).

22. *Siglin*, 134 Ariz. at 234, 655 P.2d at 354.

23. *Id.* The board actually voted twice to dismiss Siglin. The first vote was overturned by a superior court, which remanded the case after concluding that the commission and board had made no findings on the charge of "inappropriate response" to the principal's inquiries about Siglin's refusal to attend the daily meetings. The commission reviewed its findings and voted to recommend dismissal by a two to one vote again. The board reconvened and voted to dismiss. Siglin appealed to the superior court, which this time affirmed the board's decision. *Id.*

24. *Id.* at 235, 655 P.2d at 356.

25. *Id.* at 237, 655 P.2d at 357.

26. The school district not only must prove Siglin's incompetence, but also that he received both preliminary notice of his incompetence and assistance in correcting his problems. *See* ARIZ. REV. STAT. ANN. § 15-539(B) (1985). Presumably, the daily meetings were the principal's effort to assist Siglin in overcoming deficiencies, as required by statute.

apparently interpreted the meetings order as harassment aimed at driving him from the school in humiliation or exasperation. The court merely noted that either Siglin's refusal to meet or his intemperate response to the principal's request to discuss his refusal was sufficient cause.

The last case, *Welch v. Board of Education*,[27] arose from facts that represent a school administrator's nightmare. Welch, a high school teacher, had developed "a private, personal relationship, which eventually led to marriage" with a seventeen year old high school student.[28] The student's custodial parent, her mother, approved of the relationship, but her father, who lived in Florida, called Welch's principal to advise him of the situation, suggesting that Welch was possibly sexually involved with his daughter.

When questioned, Welch denied any personal relationship with the student, but school officials nonetheless directed him to avoid any social relationship "which could be construed as an improper teacher/pupil relationship."[29] Approximately one week later, the girl withdrew from the school, transferred to a new district, and married Welch. The board of education moved to dismiss Welch, lodging eight charges of unprofessional conduct against him. A hearing commission found that Welch's "special relationship" developed while the student was not in Welch's classes, that it was conducted discreetly, with the mother's full knowledge, and was nonexploitive, and that it did not disrupt the school or evidence Welch's unfitness to teach. The commission, however, also found that Welch had lied to officials regarding his relationship. In mitigation, it noted that the questions regarding an intimate personal matter placed Welch in an untenable situation, as had the directive to end his personal association with the student.[30] Welch thus emerged from the commission hearing with a rather favorable and sympathetic judgment.

The school board viewed Welch's conduct less sympathetically, voting three to two to dismiss him based on all the misconduct charges. On appeal, a superior court overturned the board's decision, leading the board to appeal. Division One of the Court of Appeals reinstated the board's dismissal.[31] The court initially addressed whether the board must produce specific evidence of Welch's unfitness to teach and the detrimental effects of his conduct, or whether both could be inferred from the conduct itself. In essence, the court was deciding whether an evidentiary nexus existed between Welch's conduct and some proven harm to the district. Historically, teachers were often dismissed based solely on their conduct, apart from any evidence of detrimental impact on the district.[32] Then, during the 1970's, courts increasingly required evidence of detrimental effects, particularly when the conduct in question was part of the

27. 136 Ariz. 552, 667 P.2d 746 (Ct. App. 1983).
28. *Id.* at 553, 667 P.2d at 747.
29. *Id.*
30. *Id.*
31. *Id.* at 554, 667 P.2d at 748.
32. Such dismissals were often effected on *per se* grounds, where the district's sole burden of proof was demonstrating that the charged conduct occurred. The ground for dismissal most susceptible to *per se* treatment was immorality. *See* Gaylord v. Tacoma School Dist., 85 Wash. 2d 348, 535 P.2d 804 (1975), *cert. denied*, 434 U.S. 879, *aff'd*, 88 Wash. 2d 286, 559 P.2d 1340 (1977); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

teacher's nonprofessional life.[33] These issues frequently involved matters over when a teacher could claim some privacy interest. In cases touching marriage, family or procreative matters, this interest became a fundamental constitutional right.[34] Thus, Welch's interest in selecting his bride could be characterized as a fundamental right.

The court avoided the complexities of constitutional analysis, however, because insubordination proved an effective rubric for upholding the district's decision. The court acknowledged a line of cases requiring "evidence of specific findings of specific harm" to provide good cause for dismissal,[35] but it was unwilling to impose such a requirement generally. It suggested that some conduct may be sufficient justification without proof of harm and concluded that courts should resolve this issue in *ad hoc* fashion. Had the basis for Welch's dismissal been his "improper" relationship with a student alone, it is unlikely that the school district could have avoided introducing evidence of harmful effects without violating Welch's fundamental privacy rights.[36] Instead, the court ignored the absence of any proven harmful impact from Welch's conduct by focusing solely on the district's insubordination charge, based on Welch's refusal to cooperate with the school's investigation and lying during it.

Given the school's legitimate interest in investigating the father's claims regarding Welch's impropriety and the possibly "illegal conduct for which it might ultimately be held liable,"[37] the court decided that the school's inquiries to Welch were reasonable. Although Welch's refusal to reveal his relationship was "understandable," the court concluded that the board reasonably could have construed the refusal as insubordination.[38] More importantly, the court held that "insubordination without proof of specific adverse effects on the district,

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33. F. DELON, LEGAL ISSUES IN THE DISMISSAL OF TEACHERS FOR PERSONAL CONDUCT (1982).

34. *Id.* The commission demonstrated some sensitivity to the delicacy of intruding on Welch's privacy interests, concluding that it was "unreasonable to expect Mr. Welch to comply with a directive to refrain from associating with the person he intended to marry." *Welch*, 136 Ariz. at 554, 667 P.2d at 748. Had the board dismissed Welch solely for fundamentally protected conduct, the burden of justification would have been extraordinary. *See generally* Sacken, *The Limits to a Teacher's Privacy Rights: Ponton v. Newport News School Board*, 42 WEST'S EDUC. L. RPTR. 19 (1987); Nolte, *Establishing the Nexus: A School Board Primer*, 38 WEST'S EDUC. L. RPTR. 1 (1987).

35. *Welch*, 136 Ariz. at 555, 667 P.2d at 749.

36. One other possible formulation of a teacher's constitutional claim is illustrated in *Gaylord*, 85 Wash. 2d at 350, 535 P.2d at 806. The Washington Supreme Court argued that an immorality charge with no evidence of detrimental effects on a teacher's performance would be unconstitutionally vague. Thus, in *Gaylord*, the court required evidence that a teacher's homosexuality detrimentally affected his teaching. This burden was met by testimony from students and colleagues that they objected to having a known homosexual teacher at the school. *See also* R. RUBENSTEIN & P. FRY, OF A HOMOSEXUAL TEACHER: BENEATH THE MAINSTREAM OF CONSTITUTIONAL EQUITIES (1981).

37. *Welch*, 136 Ariz. at 555-56, 667 P.2d at 749-50. The possible illegality derived from the assertion by the girl's father that Welch was sexually involved with his daughter. The school thus had a legitimate interest in investigating the allegation, because it might have constituted statutory rape. *Id.* at 556 n.3, 667 P.2d at 750 n.3.

38. *Id.* at 556, 667 P.2d at 750. The court described the case as "extremely close," commenting that "[w]ere we in the position of the school board, we might have decided to reinstate Mr. Welch." *Id.* at 555, 667 P.2d at 749.

may be considered good cause for dismissal."[39] Because insubordination provided an independent basis for dismissal, the remaining charges could be ignored, and the court declined to decide whether Welch's relationship alone, without proof of adverse effects, would justify dismissal.

In these four cases, insubordination emerged as a powerful mechanism for administrative control. Although the courts were equivocal about the appropriate consequences for incidents of unprofessional conduct, a single failure by a teacher to comply with an administrator's reasonable demand provided a sufficient ground for dismissal. So consequential is insubordination that disruption to "the efficiency of the employer's organization"[40] need not be proven; it is an irrebuttable presumption. Unlike incompetency, a single incident is treated as irremediable, and unlike immorality, unprofessional conduct, or evident unfitness to teach, there is no intimation that a district must ever introduce evidence of harmful effects produced by the insubordination. Thus, insubordination is arguably the most efficient and effective means of eliminating a teacher. Indeed, I often tell my classes of prospective administrators that a plausible measure of their administrative competence would be whether they can successfully dismiss for insubordination the best classroom teacher in a building within a single semester. Any employee can be lured into refusing a reasonable command, not to mention the implications of "lack of cooperation" as "a subtle species of insubordination."[41] But what sort of assumptions about schools, or any formal organization, could possibly produce such a doctrine?

## AN IMAGE OF SCHOOLS

The basic assumption underlying this insubordination concept is that school systems are and must be traditional bureaucracies with clearly delineated chains of command and sharply-etched authority structures. That the courts' doctrine should embody such an assumption is not surprising, given its language was lifted almost directly from a 1918 decision, where the key concept of insubordination was categorized under a "Master and Servant" headnote. It is more surprising that the premise and language endure unmodified to this moment.

A corollary assumption is that the essential knowledge to prescribe employee behaviors in all domains of a school's operation, including the classroom,[42] resides exclusively in the managerial cohort. Taken together, these assumptions locate all authority and knowledge at the top of a rigid structure. If disagreements occur regarding operational matters, management should have unquestioned authority to dictate a course of action. Although highly educated,

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39. *Id.* at 556, 667 P.2d at 750.
40. *School Dist. No. 8, Pinal County*, 102 Ariz. at 480, 433 P.2d at 30.
41. *Id.*
42. The "core technology" of a school is teaching and learning. These assumptions are broadly congruent with theories associated with bureaucratic images or structures. *See* G. MORGAN, IMAGES OF ORGANIZATIONS (1988); C. PERROW, COMPLEX ORGANIZATIONS 1-90 (2d ed. 1979).

professionalized employees, teachers should have no formal authority, irrespective of the issue.[43]

Further, these courts assume that the plenary authority that they grant is so fragile or the organizational environment so volatile that any single act of noncompliance, perhaps even the lack of enthusiastic compliance, is sufficiently harmful to the organization's operation that a teacher is immediately dismissable. This presumption is so powerful that it is irrebuttable; no mitigation or showing of inconsequentiality is tolerated. Notably, the appellate courts acknowledged that *both* Fulton and Welch acted "reasonably" in committing their insubordination, but despite some judicial breast-beating upheld both dismissals.[44]

The only defense available to a teacher is to dispute the "reasonableness" of an administrative order. The outer perimeters of reasonableness were left undefined in *Fulton* and *Welch*, because the legitimacy of both districts' inquiries was virtually self-evident. It appears unlikely that "reasonableness" demands that the order be "fair" or "correct" or even "consistent." If an order touches on technical matters, such as a principal dictating instructional strategies, a court will be likely to defer to presumed managerial expertise, again without demanding evidence of necessity or correctness. The *Siglin* court saw no problem with requiring an experienced teacher to meet daily with the principal to discuss what and how to teach. The most logical conjecture about the limits of reasonableness is that any request not patently absurd is acceptable so long as it is not explicitly precluded from acting by local policy, state, federal or constitutional law.[45]

It is particularly appropriate that the anticipated organizational injury justifying this harsh doctrine is to the efficiency of the *employer's* organization. This concern reflects the dominant perspective within the school administration

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43. Teachers do have duties and some authority allocated to them statutorily. For instance, teachers must make student retention decisions, which can be reviewed only by a board of education. *See* ARIZ. REV. STAT. ANN. § 15-521(A)(10) (Supp. 1990). However, even this "authority" is couched as a duty and the failure to perform it is designated unprofessional conduct. ARIZ. REV. STAT. ANN. § 15-521(B) (Supp. 1990).

44. Arizona teacher dismissal cases have presented sufficiently sympathetic facts as to evoke judicial expressions of remorse or about the "closeness" of the case on more than one occasion. *See, e.g., Lammle*, 122 Ariz. at 527, 596 P.2d at 53 ("We agree with the trial court that this is a close case, and had we been on the Board, we may well have voted against dismissal.") Although these statements may stem from generous or empathetic instincts, they also seem to rub salt into the former teachers' wounds, as normally the very next observation is a holding favoring the district.

45. A good example of an "unreasonable request" is found in Bernasconi v. Tempe Elem. School Dist. No. 3, 548 F.2d 857 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977), an Arizona teacher's first amendment case, litigated in federal courts. In that case, the teacher was transferred to a new school, in substantial part because she supported a parent group who ultimately sued the district for failure to provide adequate educational services to limited English speaking children. At one point, the teacher's principal ordered her to obtain parental consent forms for retesting some children. As she believed the retesting would require deception of local residents, she refused. The Ninth Circuit Court of Appeals concluded that her speech act was protected conduct, and could not justify any teacher discipline, even transfer to a new school. If the teacher's actions (which included other complaints to her superiors about educational programs) had not addressed "a governmental practice which . . . tended disproportionately adversely to affect a particular ethnic group" and thus been shielded by the first amendment, her refusal to obtain the consent forms would have been insubordination. *Id.* at 682.

field during the first half of this century.[46] Throughout that period, educators, including administrators, sought to establish their discretionary authority vis-a-vis lay people, such as local board members. The language of social science played a substantial role in establishing what David Tyack memorably called "the one best system."[47] Within increasingly bureaucratized school systems, administrators sought to differentiate their status and to legitimate the authority hierarchy vis-a-vis teachers through the rhetoric of "scientific management," which emphasized that only administrators had the essential expertise to run the schools.[48] Through this rhetoric, administrators pursued what Callahan called a "cult of efficiency."[49] Within the iconography of these nascent bureaucracies, efficiency stood at the apex; its counterpoint was chaos.[50] To promote efficiency, authority must be closely held and enforced by bright line rules. The image is elegant, parsimonious and thoroughly unrealistic.

## THE REALITY GAP

Beyond the fact that school administrators rarely achieve levels of control or power to match the heroic expectations of bureaucratic rhetoric,[51] the insubordination doctrine nests within a set of organizational assumptions that is generally incongruent with what is known about effectively organized and operated schools.

Although current reform initiatives reveal the anachronistic qualities of the insubordination doctrine, its principles embody a greatly exaggerated perception of the control necessary at the top of an efficient organization. Schools are a particularly fluid and ambiguous organizational context, especially in regard to the core function of teaching. As Conley and others have argued, the essential technical knowledge to improve student learning is not concentrated among managers, nor is it fixed and certain, linked to a replicable set of common pedagogic behaviors.[52] In fact, much of the technology of teaching is ambiguous enough that reasonable people may well disagree as to the best or even better response to given instructional problems.[53] Thus, one might expect

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46. *See* Culbertson, *A Century's Quest for a Knowledge Base*, in HANDBOOK OF RESEARCH ON EDUCATIONAL ADMINISTRATION 3 (N. Boyan ed. 1988); D. TYACK & E. HANSOT, MANAGERS OF VIRTUE 105-212 (1982).

47. D. TYACK, THE ONE BEST SYSTEM (1974).

48. *See* D. TYACK & E. HANSOT, *supra* note 46 at 105-212.

49. R. CALLAHAN, EDUCATION AND THE CULT OF EFFICIENCY (1962).

50. As Meyer and Scott have pointed out, schools have responded to the expectations of a culture committed to a larger myth of rationality, which celebrates the virtues of efficiency and demands the appearance of organizational efficiency from schools. Delivering on the promises of a rational, efficient school, however, is normally not organizationally or administratively possible. *See* J. MEYER & W.R. SCOTT, ORGANIZATIONAL ENVIRONMENTS (1983). For a similar perspective, see March, *How We Talk and How We Act: Administrative Theory and Administrative Life*, in LEADERSHIP AND ORGANIZATIONAL CULTURE 18 (T. Sergiovanni & J. Corbally eds. 1984).

51. D. LORTIE, SCHOOLTEACHER 196-200 (1975).

52. *See* Conley, *Reforming Paper Pushers and Avoiding Free Agents: The Teacher as a Constrained Decision Maker*, 24 EDUC. ADMIN. Q. 393 (1988); Bacharach & Conley, *Uncertainty and Decisionmaking in Teaching: Implications for Managing Line Professionals*, in SCHOOLING FOR TOMORROW: DIRECTING REFORMS TO ISSUES THAT COUNT 311 (T. Sergiovanni & J. Moore eds. 1989).

53. There is an enormous surge of research on teaching that suggests new avenues for linking teachers and students' learning outcomes. *See, e.g.*, HANDBOOK OF RESEARCH ON

that school administrators would encourage teaching professionals to use their professional judgment and would tolerate variability, intervening only reluctantly. The sociology of teaching suggests that such managerial behavior largely captures the modality of teacher-administrator relationships. Pedagogic autonomy is commonplace.[54]

Part of the cacophonous reform rhetoric of the 1980's, however, suggested that principals increasingly meet expectations derived from a heroic managerial ideology, the instructional leadership movement.[55] Emanating in part from the influential effective schools literature, this perspective focuses on the principal as the engine of school reform.[56] In an effort to improve instruction, many districts have purchased a single model of instruction. Principals are then pressured to produce its faithful implementation throughout each school. These organizational shifts can disrupt relationships between line managers and teachers, leading to frustration. Where teachers enjoy and expect classroom autonomy, the potential for insubordination is considerable if principals impose on that autonomy.[57]

The assumptions supporting the insubordination doctrine are particularly antagonistic to the so-called "second wave of school reform," occurring nationwide.[58] The characteristic reforms of this wave, such as school restruc-

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TEACHING (M. Wittrock 3d ed. 1986). On complex social policy issues, however, "the improvement of research . . . does not lead to greater clarity about what to think or what to do." Cohen & Weiss, *Social Science and Social Policy: Schools and Race*, 41 EDUC. F. 393, 394 (1977). *Accord* C. LINDBLOM, INQUIRY AND CHANGE (1990).

54. *See* D. LORTIE, *supra* note 51; S. ROSENHOLTZ, TEACHER'S WORKPLACE (1989). An indication of how enduring the social context of teaching has been can be found by comparing the works of Lortie or Rosenholtz with the seminal work in the field, W. WALLER, THE SOCIOLOGY OF TEACHING (1932). This characteristic relationship between administrator and teachers led to a now commonplace description of schools as "loosely coupled," particularly in respect to instructional processes. *See* Weick, *Educational Organizations as Loosely Coupled Systems*, 21 ADMIN. SCI. Q. 1 (1976). *See also* J. Little, The Persistance of Privacy: Autonomy and Initiative in Teachers' Professional Relations (Mar. 30, 1989) (paper presented at the annual meeting of the American Educational Association, San Francisco) (copy on file with author).

55. *See* Murphy, *The Educational Reform Movement of the 1980s: A Comprehensive Analysis*, in THE REFORM OF AMERICAN PUBLIC EDUCATION IN THE 1980S: PERSPECTIVES AND CASES 3 (J. Murphy ed. 1990); Deal, *Searching for the Wizard: The Quest for Excellence in Education*, 2 ISSUES IN EDUC. 56 (1984).

56. *See, e.g.*, Hawley & Rosenholtz, *School Leadership and Student Learning*, 61 PEABODY J. EDUC. 53 (1984); Shoemaker & Fraser, *What Principals Can Do: Some Implications from Studies of Effective Schooling*, PHI DELTA KAPPAN 178 (Nov. 1981). For a general review of "effective schools" research, see Purkey & Smith, *Effective Schools: A Review*, 83 ELEMENTARY SCH. J. 427 (1983).

57. The literature of staff development and school change make clear that a form of covert insubordination is routine in schools. Teachers often leave new policies and practices adopted by the school or district at the door of "their" classrooms, so much so that much of this literature either describes the routine failure of reform efforts or provides various mechanisms for avoiding teachers' "disadoption" of new policies or desired pedagogic behaviors. *See generally* M. FULLAN, THE MEANING OF EDUCATIONAL CHANGE (1982); S. SARASON, THE CULTURE OF THE SCHOOL AND THE PROBLEM OF CHANGE (2d ed. 1982). This form of insubordination is rarely the precipitant of a dismissal proceeding, in part due to norms of teacher autonomy, and the loose coupling between administration and teaching practice. *See supra* note 54.

58. *See* Murphy, *supra* note 55; Conley, *"Who's on First?": School Reform, Teacher Participation, and the Decision-Making Process*, 21 EDUC. & URB. SOC. 366 (1989). The primary distinction between the "first" and "second" waves of educational reform is a movement from school accountability through specification and measurement (e.g., standardized tests of

turing and site-based management, require a more continuously negotiated and fluid understanding of decisionmaking authority and participation.[59] Indeed, in a decentralizing reform like site-based management[60] where increased discretion is directed at each school, the insubordination doctrine creates the danger of principals becoming czars detached from normal bureaucratic constraints on administrative decisionmaking.[61]

Insubordination is also markedly incongruous with the various teacher professionalization reforms.[62] In Arizona, the legislature recently pursued such a policy experiment by allowing school districts to create teacher career ladder plans contingent upon state approval.[63] Such plans often require teachers to perform organizationally unfamiliar roles such as peer evaluators and other quasi-administrative tasks. This differentiation of teacher groups complicate and defuse power patterns, but, more importantly, blur the bright line of demarcation between administrator and subordinate. It produces an interesting question: To whom can a teacher be insubordinate? Although such a dilemma can be answered through district policy, the conceptual problem caused by attempting to simultaneously raise the levels of professionalism of teachers while preserving inviolable administrative authority cannot easily be reconciled.

The unrestrained quality of the insubordination doctrine, moreover, encourages expedient and ethically suspect administrative conduct. For example, complex and time-consuming organizational issues can be quickly resolved by edict, with the threat of insubordination as leverage. Good faith disagreements between teachers and administrators over difficult teaching and learning issues can be recast as dangerous challenges to managerial authority and school

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students and teachers), often imposed at the state level, to decentralization and local control (e.g., site-based management) where districts or even schools are permitted substantial discretion in forging goals and methods to achieve them.

59. *See* Conley, Schmidle & Shedd, *Teacher Participation in the Management of School Systems*, 90 TCHRS. COLLEGE REC. 259 (1988); Murphy, *supra* note 55.

60. *See* Conley, *supra* note 58; Johnson, *Pursuing Professional Reform in Cincinnati*, PHI DELTA KAPPAN 746 (June 1988); J. DAVID, RESTRUCTURING IN PROGRESS: LESSONS FROM PIONEERING DISTRICTS (1989).

61. The descriptive literature emerging on site-based management, essentially a decentralization of decision-making within an organization from the center to operations sites, does not reveal principals using newly available authority at the site level to impose harsh regimes. There are traditional constraints on teacher-principal relationships (e.g., classroom autonomy norms) that inhibit administrative aggrandizement, as well as a current teacher professionalization movement that supports greater teacher involvement in school decisionmaking. Some commentators have discovered substantial disenfranchisement of teachers associated with "first wave" reforms. Moreover, the effects of moving more discretion and authority to sites are impossible to predict and in any case, will vary enormously within the same district. *See* L. MCNEIL, CONTRADICTIONS OF CONTROL: SCHOOL STRUCTURE AND SCHOOL KNOWLEDGE (1986); Caldwell & Wood, *School-based Improvement—Are We Ready?*, 46 EDUC. LEADERSHIP 50 (Oct. 1988).

62. *See* CARNEGIE TASK FORCE ON TEACHING AS A PROFESSION, A NATION PREPARED: TEACHER FOR THE 21ST CENTURY (1986); THE HOLMES GROUP, TOMORROW'S TEACHERS: A REPORT OF THE HOLMES GROUP (1986). *But see* Richardson-Koehler & Fenstermacher, *Graduate Programs of Teacher Education and the Professionalization of Teaching*, in RESEARCH PERSPECTIVES ON THE GRADUATE PREPARATION OF TEACHERS 153 (A. Woolfolk ed. 1989).

efficiency.[64] In that respect, it is strange that injuries to managerial authority are treated more seriously, as *per se* harms, than harm to students from incompetent teaching, which must be meticulously documented under Arizona law.[65] The relative difficulty of demonstrating incompetency or harm from teachers' private conduct thus encourages administrators to seize on insubordination as a more efficient charge than incompetency. In both *Welch* and *Fulton*, the courts skirted difficult issues by only reviewing the insubordination claims, transforming both to easy cases. One could argue that both dismissals were so obviously unfair on equity grounds, that the superior court judges were lured into reversible error.

## SOLUTIONS

The following analysis is predicated on the fact that Arizona's insubordination doctrine is one judicial policy choice among many. Like any common law doctrine, "when the reason for a certain rule no longer exists, the rule itself should be abandoned."[66] Thus, the Arizona Supreme Court has abrogated such doctrines as familial and interspousal immunities and sovereign immunity.[67] In the last occasion, the court described its duty:

> We now are convinced that a court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack. This doctrine having been engrafted upon Arizona law by judicial enunciation may properly be changed or abrogated by the same process.[68]

The argument for abrogating insubordination is strong. As teachers' roles have expanded, lines between superior and subordinate, administrator and teacher blur. Issues of formal authority become complex and fluid, constantly negotiated at the task site. Most importantly, theorists increasingly argue that the key technical knowledge of schools "belongs" to and resides with teachers.[69]

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63. *See* ARIZ. REV. STAT. ANN. § 15-953 (Supp. 1990). *See also* Bacharach, Conley & Shedd, *Beyond Career Ladders: Structuring Teacher Career Development Systems*, 87 TCHRS. C. REC. 563 (1986).

64. *See supra* note 3 for a reflection of just such an administrative attitude. The increase in professionalism among teachers, or their perception of themselves as professionals, will increase expectations that teachers should control their tasks without administrative interference and participate in policy decisions at the building level that affect the teaching environment. *See also* G. BENVENISTE, PROFESSIONALIZING THE ORGANIZATION (1987); Weick & McDaniel, *How Professionals Work: Implications for School Organization & Management*, in SCHOOLING FOR TOMORROW: DIRECTING REFORMS TO ISSUES THAT COUNT 330 (T. Sergiovanni & J. Moore eds. 1989).

65. To dismiss or nonrenew a teacher for incompetency in Arizona requires that the teacher receive prior notice and an opportunity, with district assistance, to correct the deficiencies. In the case of a continuing or tenured teacher, the process would normally take at least one and half years. ARIZ. REV. STAT. ANN. §§ 15-536 to -538 (Supp. 1990).

66. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963) (The court abandoned the doctrine of governmental immunity from tort liability).

67. Fernandez v. Romo, 132 Ariz. 447, 646 P.2d 878 (1982) (interspousal immunity abolished); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970) (interfamilial immunity abolished); *Stone*, 93 Ariz. 384, 381 P.2d 107.

68. *Stone*, 93 Ariz. at 393, 381 P.2d at 113.

69. *See, e.g.*, Bacharach & Conley, *supra* note 52.

These ideas, often associated with enhanced teacher professionalism, also suggest that those teacher behaviors that administrators might arguably need to constrain can be more logically regulated by other doctrines, such as unprofessional conduct, which do not derive purely hierarchical differences but are linked with occupational norms and essential organizational functions.[70] This alternative is more compelling if relying on insubordination does encourage undesirable administrative behaviors. In an expertise-driven, professionalized organization, as schools should be, policy should not promote or protect petty tyrants. The proper question should be whether the use of insubordination makes a necessary contribution to the regulation of schools. The phantom argument of efficiency appears its only prop. If insubordination is retained, the underlying assumptions about the nature of schools must be fundamentally reshaped.

Thus, even if efficiency or some other important organizational ends support continued use of insubordination, some doctrinal reconstruction is both necessary and easily effected. The first change should be definitional. Insubordination should be linked with a presumption for persistent behaviors. Thus it should be treated as remediable misconduct.[71] If a district wishes to dismiss a teacher after a single incident, it should be required to overcome the presumption of remediability, through evidence of substantial harm to the district.[72] Some state statutes already embody this notion in their treatment of noncompliant employee behaviors.[73] The construct "lack of cooperation" as an independent form of insubordination should also be jettisoned, because it trivializes the charge, particularly if dismissal is contemplated.

With respect to a district's burden of proof, courts must require specific evidence of harmful effects caused by the insubordinate conduct.[74] Making such evidentiary determinations may be complicated, particularly if the harm must be demonstrably connected to an important organizational task (e.g., student learning), but no persuasive rationale exists for eliminating that eviden-

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70. Arizona includes many examples of unprofessional conduct in its education code, such as the use or teaching of sectarian or denominational books, ARIZ. REV. STAT. ANN. § 15-535 (1984); failure to enforce a period for silent meditation each day, ARIZ. REV. STAT. ANN. § 15-522 (1984); and failure to perform various duties, including playground supervision or holding students to "strict account for disorderly conduct." ARIZ. REV. STAT. ANN. § 15-521 (Supp. 1990).

71. *See* Claxton, *supra* note 21. In general, such a requirement would anticipate that a teacher receive notice and an opportunity to abandon or improve insubordinate conduct, much as Arizona now treats incompetency. *See supra* note 65.

72. An example of a court permitting a single incident of insubordination to overcome this presumption is Ware v. Morgan County School Dist., 748 P.2d 1295 (Colo. 1988). There, contrary to a superintendent's order, a teacher used extremely offensive language to berate a student.

73. *See* Claxton, *supra* note 21; TEX. EDUC. CODE ANN. § 13.109(4) (Vernon 1972) ("repeated failure to comply. . . ."); CAL. EDUC. CODE § 44932 (West Supp. 1989) ("Persistent violation or refusal to obey. . . ."). *See also* 2 J. RAPP, EDUCATION LAW § 6.12[8] (1988) and statutes and cases discussed therein.

74. A district need not wait to experience the harm so long as it can demonstrate reasonable likelihood that harm will ensue if insubordination is tolerated. *See, e.g.*, Lile v. Hancock Place School Dist., 701 S.W.2d 500 (Mo. Ct. App. 1985) (board not required to show actual harm caused by teacher's alleged immoral conduct to justify termination because it was sufficient to establish that substantial harm was likely to occur if the individual remained as a teacher).

tiary requirement.[75] At present, districts have a virtual *carte blanche* when advancing this claim, and making this change would merely treat insubordination comparably to immorality or incompetence. A parallel concern is to focus more directly on the asserted reasonableness of administrative commands. It appears now that any demand not patently unreasonable, unconstitutional, or otherwise illegal is likely to be interpreted as reasonable. For instance, should an administrator's charge be justified simply because an act of noncompliance might or "does" cause loss of respect from other teachers? At minimum, reasonableness should connote some relationship with an important organizational function, not preservation of an administrator's ego.

The calculus of a functional insubordination doctrine should require a contingency orientation.[76] Whether a teacher's noncompliance with an administrator's order is insubordinate might be influenced by the nature of the order. For example, must a teacher comply with an administrative fiat regarding instruction when there is no evidence that noncompliance injures students and it is not certain or highly probable that compliance would help them? This question emerges as a systemic dilemma when administrators mandate buildingwide or even districtwide models of pedagogy despite the ambiguous consequences of doing so.[77] There are, however, situations when the potential for harm from noncompliance, as well as the facial reasonableness of a policy, could support an insubordination charge, such as when a teacher refuses a directive to supervise students' departure on school buses.[78]

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75. The actual burden of proof is often easily achieved, absent a completely insubstantial accusation. Gross studied 260 decisions by New York hearing commissions in cases involving charges of conduct unbecoming a teacher (roughly equivalent to unprofessional conduct) and incompetency. He discovered what he viewed as a pattern of demonstrable unfairness, caused largely by the lack of empirically useful evidence to prove the effects of teachers' behaviors on student learning. Consequently, case outcomes were determined by "unsophisticated and unsubstantiated assumptions about teachers as role models and the presumed effects of role models on learning. . . ." J. GROSS, TEACHERS ON TRIAL 109 (1988). Thus, requiring evidence of demonstrable harm caused by insubordination will not ameliorate all problems of potential unfairness inherent in the insubordination doctrine. Districts and courts will have to engage in some dialogue regarding *why* an incident, or series of incidents, warrants termination of a teacher's employment. But it will eradicate the global quality of Arizona's current insubordination doctrine.

76. If a contingent perspective were adopted, it would replicate the dominant orientation in both organizational and management theory during the last twenty-five years. *See* Drazin & Van de Ven, *Alternative Forms of Fit in Contingency Theory*, 30 ADMIN. SCI. Q. 514, 514 (1985) ("Structural contingency theory has dominated the study of organizational design and performance during the past twenty years."). Arguably, by using a threshold analysis for public employees' free expression cases, the United States Supreme Court has adopted a contingency perspective. Unless the topic of an employee's speech involves a matter of public interest, it is not protected. Even if the public interest requirement is met, however, courts must balance a set of factors. The court is unwilling to constitutionalize public employment disputes over issues related to everyday organizational life. Although this approach uses an irrebuttable presumption, it is contingency-oriented, as are certain types of issues designated *a priori* for disparate treatment. *See generally* Hooker, *Connick and Beyond*, 20 WEST'S EDUC. L. RPTR. 1 (1985).

77. *See, e.g.*, Sacken, *Rethinking Academic Freedom in the Public Schools: The Matter of Pedagogical Methods*, 91 TCHRS. C. REC. 235 (1989).

78. *See, e.g.*, Lockhart v. Arapahoe County School Dist. No. 6, 735 P.2d 913 (Colo. Ct. App. 1986), where a teacher stubbornly refused to perform hall supervision duties shared among the building's educational professionals. Given the school's legal duty to provide supervision to students during the school day, the teacher's refusal increased the possibility of an unsupervised injury.

Parenthetically, where districts adopt site-based management reforms, schools normally produce building norms for professional duties through joint or shared decisionmaking plans. There, if a teacher persistently fails to comply, the proper charge is unprofessional conduct rather than insubordination, because the offense is to commonly held norms defining the school's professional culture, not to the isolated authority of a manager. Where authority and influence are variably shared on important issues among all professionals, the concept of insubordination is as clankingly, mechanistically anachronistic as time and motion studies, and deserves to be consigned to a conceptual landfill for ideas that have outlived their usefulness. To argue that making the transition may be complicated is not persuasive and as the Arizona Supreme Court commented when abrogating interspousal disability, it is "not a justification for clinging to a rule that has long since outlived its vigor."[79] Insubordination represents a curious, but almost always unfortunate doctrine for Arizona's schools.

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79. *Fernandez*, 132 Ariz. at 451, 646 P.2d at 882.