B. "FEED THE HUNGRY, BUT NOT ON OUR BLOCK"*—ARMORY PARK NEIGHBORHOOD ASSOCIATION V. EPISCOPAL COMMUNITY SERVICES IN ARIZONA

In *Armory Park Neighborhood Association v. Episcopal Community Services in Arizona*,[1] the Arizona Supreme Court addressed three important issues relating to the application of nuisance law in Arizona. The case arose in a controversial context—the location of indigent food distribution centers in or around residential areas. The court held that voluntary associations have standing to bring public nuisance actions on behalf of their members, courts may enjoin lawful businesses for acts committed off their premises by patrons no longer under their direction or control, and courts may enjoin public nuisances without proof of a zoning or criminal violation.[2] *Armory Park* established the rights of citizens living in neighborhoods affected by indigent food distribution programs but created new problems for community and church groups trying to meet their social responsibility to the needy.

On December 11, 1982, Episcopal Community Services in Arizona (ECS) opened the St. Martin's Center (Center) in Tucson, Arizona.[3] A little over a year later, the Armory Park Neighborhood Association (APNA)[4] filed a complaint to enjoin the ECS food distribution program operated at the Center. The complaint alleged that the food program constituted a public nuisance and that transients drawn to the neighborhood to receive the free meals injured Armory Park residents.

At the hearing for a preliminary injunction, the parties stipulated that the Center complied with all applicable zoning laws.[5] Testimony demonstrated that the Center's food distribution program resulted in problems with transients crossing through the Armory Park neighborhood area on their way to and from the daily meal. Although the Center served meals only between 5 p.m. and 6 p.m., many of the Center's patrons remained in the area long after the serving hour, often urinating, defecating, and drinking on the residents' private property.[6]

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* The title derives from a Chicago resident's statement concerning the opening of a work-release center in his neighborhood. The original statement was "We believe in prison reform, but not on our block." Chicago Tribune, July 30, 1975, § 3, at 1, col. 2; *cited* in Comment, *Exclusion of Community Facilities for Offenders and Mentally Disabled Persons: Questions of Zoning, Home Rule, Nuisance, and Constitutional Law*, 25 DE PAUL L. REV. 918 (1976).

1. 148 Ariz. 1, 712 P.2d 914 (1985). The facts of *Armory Park* are set forth in 148 Ariz. at 2-3, 712 P.2d at 915-16.

2. *Id.* at 1-10, 712 P.2d at 914-23.

3. The Center is located on the western boundary of the Armory Park Historical Residential District on Arizona Avenue in Tucson. The Center's goal is to furnish indigents with one free meal daily. *Id.* at 2, 712 P.2d at 915.

4. APNA is a non-profit organization designed to improve and maintain the high quality of life in the Armory Park Historical Residential District. *Id.*

5. *Id.* at 2-3, 712 P.2d at 915-16.

6. The residents also reported break-ins of abandoned storage sheds and unattended homes. The arrest rate in the area rose sharply and many residents rearranged their lifestyles to avoid contact with transients who bothered them and asked for handouts. *Id.* at 3, 712 P.2d at 916.

The trial court granted the preliminary injunction.[7] The court of appeals reversed,[8] holding that the trial court improperly granted the injunction because: 1) the plaintiff failed to allege a criminal violation; 2) the trial judge abused his discretion by finding *sua sponte* both a public and a private nuisance when plaintiffs only alleged a public nuisance; and 3) the center's compliance with zoning provisions provided a complete defense to a public nuisance charge.[9]

The Arizona Supreme Court affirmed the trial court's order granting the preliminary injunction.[10] The court concluded that since the Center's patrons interfered with the Armory Park residents' use and enjoyment of their real property, Armory Park residents faced a damage special in nature and different in kind from any damage Tucson residents in general faced; this special damage provided the Armory Park residents with standing to recover damages and to enjoin the public nuisance.[11] Further, the court stated that APNA had standing to bring the action on behalf of its members.[12] The court also stated that a lawful business is derivatively responsible for the acts of its patrons if the business frequently attracted the patrons to the area.[13] Finally, the supreme court decided that courts may enjoin a public nuisance without proof of a zoning or criminal violation.[14] In fact, a court may enjoin a lawful activity simply because it is conducted in an unreasonable manner.[15]

HISTORY OF NUISANCE LAW

A precise definition of nuisance has eluded legal scholars for centuries.[16] Commentators routinely define nuisance as an unreasonable interference with another's use and enjoyment of real property.[17] In a broad sense, nuisance means nothing more than a hurt, annoyance, or inconvenience.[18]

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7. *Id.*

8. *Id.*

9. APNA then appealed to the Arizona Supreme Court. The court obtained jurisdiction pursuant to ARIZ. R. CIV. P. rule 23, ARIZ. REV. STAT. ANN. § 12-120.24, and ARIZ. R.P. SP. ACT, rule 8(b), *Armory Park*, 148 Ariz. at 3, 712 P.2d at 916.

10. *Armory Park*, 148 Ariz. at 10, 712 P.2d at 923. The supreme court clarified that its decision did not require St. Martin's Center to close permanently. The court stated that the trial judge retained discretion to fashion a less severe remedy, if possible. *Id. See infra* notes 65-71 and accompanying text.

11. *Armory Park*, 148 Ariz. at 5, 712 P.2d at 918.

12. *Id.* at 6, 712 P.2d at 919.

13. *Id.* at 7, 712 P.2d at 920.

14. *Id.* at 8-10, 712 P.2d at 921-23.

15. *See id.* at 8, 712 P.2d at 921.

16. W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 86, at 616 (5th ed. 1984); C. HEPBURN, CASES ON TORTS Ch. 5, at 151 (3d ed. 1954), *quoting* Seavy, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984 (1952).

17. Oleck, *Nuisance in a Nutshell*, 5 CLEV.-MARSHALL L. REV. 148 (1956); Yerke, *The Law of Nuisance in Oregon*, 1 WILLAMETTE L.J. 289 (1960).

18. W. PROSSER & W.P. KEETON, *supra* note 16, § 86, at 617. The nuisance action became a permanent fixture in legal history as early as the 18th century with the assize of nuisance, which was subsequently replaced by the action on the case for nuisance. *Id.* This action became the sole common law remedy for nuisance and was the forerunner of the common law private nuisance claim. *Id.* As the private nuisance action developed, courts created the public nuisance claim on the theory that interfering with the rights of the public in general, or the crown, was a criminal offense. *Id.* Modern public and private nuisance law developed from these theories.

Important differences exist between public and private nuisances. A private nuisance is a civil wrong based on an interference with an owner's use of real property.[19] A public nuisance, however, "is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large."[20] Public nuisance includes an unreasonable interference with rights held commonly by the general public. While involving different interests, both a public and private nuisance may lie where a significant number of people have the use and enjoyment of their property interfered with by third parties.[21] The Arizona Supreme Court recognized this principle in *Armory Park*, however, the court decided the case solely under the public nuisance doctrine.[22]

SIGNIFICANT PRE-ARMORY PARK DECISIONS

Arizona courts have addressed public nuisance issues in a variety of contexts.[23] Existing Arizona law defines a public nuisance as "one affecting rights enjoyed by citizens as part of the public" which "must affect a considerable number of people or an entire community or neighborhood."[24] Arizona adopts a "balancing of rights" test for determining whether a court should enjoin a particular activity as a public nuisance.[25] This test weighs the rights of a party operating a lawful enterprise against the rights of the

19. *Id.* at 618. *See also* City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938).

20. W. PROSSER & W.P. KEETON, *supra* note 16, § 86, at 618. Prosser's well-accepted definition of public nuisance requires that the complained of activity constitute a criminal violation. The Arizona Supreme Court, however, concluded that a court could not dismiss APNA's complaint simply because it failed to allege a criminal violation—even though Arizona precedent suggested otherwise. *Armory Park*, 148 Ariz. at 9-10, 712 P.2d at 922-23. *See infra* notes 50-51 and accompanying text.

21. For examples of Arizona courts distinguishing between these two types of nuisances, *see* Spur Indus. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972); *Johnson*, 51 Ariz. 115, 75 P.2d 30.

22. *Armory Park*, 148 Ariz. at 4-5, 712 P.2d at 917-18. The court recognized that it could have decided *Armory Park* under both private and public nuisance theories. The court opted to apply only public nuisance doctrine because APNA did not raise a private nuisance claim in its complaint, and such a claim might have implicated standing issues not addressed by the parties. *Id.*

23. *See e.g.*, *Spur Industries*, 108 Ariz. 178, 494 P.2d 700 (operation of cattle feeding lot enjoined as both a public and private nuisance); State *ex rel.* Sullivan v. Phoenix Sav. Bank & Trust Co., 68 Ariz. 42, 198 P.2d 1018 (1948) ("Bookie Joint" enjoined as a public nuisance); Engle v. Scott, 57 Ariz. 383, 114 P.2d 236 (1941) (common gambling house enjoined as a public nuisance); McQuade v. Tucson Tiller Apartments, 25 Ariz. App. 312, 543 P.2d 150 (1975) (loud music concerts enjoined as a public nuisance).

24. *Spur Industries*, 108 Ariz. at 183, 494 P.2d at 705.

25. One of the best examples of the application of this balancing test is seen in an Arizona case very similar to *Armory Park*. In *McQuade*, the owners of an apartment complex sought an injunction preventing the defendant shopping center owners from holding well-attended, loud music concerts to promote their business. *McQuade*, 25 Ariz. App. at 313, 543 P.2d at 151. In determining whether the courts should enjoin the concerts as a public nuisance, the Arizona Court of Appeals stated that the courts should employ a balancing test and consider the following factors: the locality and character of the surroundings; the nature of the defendant's business and the manner in which he conducts it; the value to the community of the defendant's activities; the defendant's ability to reduce the harm; and the extent an injunction would damage the defendant and the extent a failure to enjoin would damage the plaintiff. *Id.* The court held that after balancing the rights of each party, it was evident that the plaintiffs' right to use and enjoy their real property outweighed the defendants' right to hold the loud concerts. *Id.* at 314, 543 P.2d at 152. The court affirmed the order for the injunction. *Id.* at 315, 543 P.2d at 153. For a complete discussion of the court's analysis, *see id.* at 314, 543 P.2d at 152. For other examples of Arizona cases applying the balancing

general public harmed by that operation.[26] Although Arizona courts permanently enjoin even lawful businesses that become nuisances, they typically remain flexible and allow the defendant to abate the nuisance by less restrictive means than complete closure.[27]

The Arizona Supreme Court decided an extremely controversial and widely cited nuisance case in *Spur Industries, Inc. v. Del E. Webb Development Co.*[28] In *Spur Industries*, the developer of Sun City, Arizona brought an action to enjoin a cattle feeding operation.[29] There was an interesting twist in the case: the defendant had lawfully conducted the feeding operation for years, well outside the city limits, and the plaintiff attempted to enjoin the operation only after intentionally bringing residents *to the nuisance*, disregarding the foreseeable detriment to the defendant.[30] Nonetheless, the supreme court held that the feedlot constituted both a public and private nuisance to the citizens of Sun City and enjoined the operation.[31]

Spur Industries is equally well-known for requiring that the plaintiff indemnify Spur for reasonable costs incurred in moving or shutting down the operation pursuant to the injunction.[32] The court stated it was reasonable for a developer taking advantage of lower land values on large tracts of rural areas to indemnify those legitimately in the area who suffer damage as a result of the development.[33]

Spur Industries demonstrates the willingness of the Arizona Supreme

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test, see McDonald v. Perry, 32 Ariz. 39, 50, 255 P. 494 (1927); Cactus Corp. v. State *ex rel.* Murphy, 14 Ariz. App. 38, 480 P.2d 375 (1971).

This Casenote discusses the Arizona Supreme Court's application of this balancing test in *Armory Park infra* at notes 56-62 and accompanying text. Other jurisdictions apply a similar balancing test. *See* Bates v. Quality Ready-Mix Co., 261 Iowa 696, 154 N.W.2d 852 (1967); Borsvold v. United Dairies, 347 Mich. 672, 81 N.W.2d 378 (1957); Abdella v. Smith, 34 Wis. 2d 393, 149 N.W.2d 537 (1967).

26. For a listing of factors considered in the test, see *supra* note 25.

27. *Armory Park*, 148 Ariz. at 10, 712 P.2d at 923; State v. Book-Cellar, Inc., 139 Ariz. 525, 532, 679 P.2d 548, 555 (1984); *McQuade*, 25 Ariz. App. at 314, 543 P.2d at 152.

28. 108 Ariz. 178, 494 P.2d 700 (1972). The facts of *Spur Industries* are set forth in 108 Ariz. at 180-83, 494 P.2d at 702-05. Although *Spur Industries* is not directly on point to *Armory Park*, it provides much of Arizona's precedent in the area of nuisance law.

29. *Id.* at 183, 494 P.2d at 705. The complaint alleged that the feeding operation was a public nuisance to the development because of the odor and flies accompanying it. Trial testimony established that the operation produced over one million pounds of wet manure daily. *Id.*

30. The developer bought the land in question because the purchase price was considerably lower than land located closer to Phoenix, Arizona. Also, the land was adjacent to Youngstown, an established retirement community. *Id.* at 182, 494 P.2d at 704.

31. *Id.* at 184, 494 P.2d at 706. The court's decision fails to comport with the usual outcome of "coming to the nuisance" cases. The general rule is that landowners are not afforded relief for damages where they establish a home or development in industrial or agricultural areas. *See, e.g.*, Dill v. Excel Packing Co., 183 Kan. 513, 525, 526, 331 P.2d 539, 548, 549 (1958); East St. Johns Shingle Co. v. City of Portland, 195 Or. 505, 246 P.2d 554 (1952). While acknowledging that the traditional "coming to the nuisance" doctrine would apply had Del Webb been the only party injured, the court instead based its decision on the "legitimate regard of the courts for the rights and interests of the public." *Spur Industries*, 108 Ariz. at 186, 494 P.2d at 708. Hence, the court granted the injunction not because the plaintiff was an innocent, harmed party, but because of the damage to the people encouraged to buy homes in Sun City. *Id.*

32. *Spur Industries*, 108 Ariz. at 186, 494 P.2d at 708. The court limited the holding by stating that such indemnification applies only where "a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief." *Id.*

33. *Id.*

Court to expand the boundaries of nuisance law when lawfully operated businesses infringe upon the property rights of the general public. It was within this framework that the supreme court rendered the *Armory Park* decision.

ANALYSIS OF ARMORY PARK

Standing of APNA

The *Armory Park* court settled a question of first impression in Arizona by addressing whether an organization has the requisite standing to assert a claim on behalf of its members.[34] While discussing the federal judiciary's three-step approach to these situations, the court specifically stated that since standing is not constitutionally mandated, Arizona courts are not bound by the federal test.[35] The court ruled that only factors involving "prudential or judicial restraint" *require* consideration when determining standing issues.[36]

In determining whether APNA in its representational capacity met Arizona's standing requirements, the court found that APNA's purpose of promoting and preserving the historic Armory Park district related sufficiently to the issues to ensure that APNA would properly represent the residents.[37] The court also determined that since APNA sought injunctive relief rather than damages, combining all of the suits into one action promoted judicial economy.[38] Based on these factors, the court held that APNA had standing to bring the action in its representational capacity.[39]

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34. The court previously had determined that the residents could sue in their own right. *Armory Park*, 148 Ariz. at 5, 712 P.2d at 918.

35. *Armory Park*, 148 Ariz. at 5-6, 712 P.2d at 918-19. The Constitution's "case or controversy" requirement provides the basis for the federal test. U.S. CONST. art. III, § 2. For a complete discussion of the federal test, see Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972).

36. *Armory Park*, 148 Ariz. at 6, 712 P.2d at 919. The court stated that the question in Arizona is simply, given the totality of the circumstances, whether the association has a real interest in an actual controversy concerning its members, and whether allowing the representational appearance will promote judicial economy. The factors applied in the federal test, however, can be considered in the analysis of a standing question in Arizona. *Id.*

The court stated that applying judicial restraint to standing questions ensures that Arizona courts do not consider moot questions, thus preventing the issuance of advisory opinions and guaranteeing that adversaries argue cases. *Id. See* State v. Superior Court, 104 Ariz. 440, 454 P.2d 982 (1969), for a public policy exception to this rule. *See also* Camerena v. Department of Public Welfare, 106 Ariz. 30, 470 P.2d 111 (1970); Mesa Mail Publishing Co. v. Board of Supervisors, 26 Ariz. 521, 227 P. 572 (1924).

37. *Armory Park*, 148 Ariz. at 6, 712 P.2d at 919. The court prefaced this statement by reiterating its prior finding that the residents had the requisite standing to sue in their own right. *Id.*

38. *Id.* The court stated that the reason a single action under an injunctive theory could efficiently handle the case was because the relief sought was universal to the residents, compared to the individual quantification required in a damages action. *Id.* The opinion leaves open the possibility that the supreme court may not have granted APNA standing had it requested damages instead of an injunction. Arizona courts have not addressed this question. For a more detailed discussion of the damages remedy as a form of alternative relief in public nuisance actions, see *infra* note 65 and accompanying text.

39. *Armory Park*, 148 Ariz. at 6, 712 P.2d at 919.

The Derivative Responsibility of ECS

ECS argued that it was not responsible for acts committed off its premises by patrons.[40] The court disagreed and concluded that neither precedent nor theory supported ECS' position.[41] The court reasoned that general principles of tort law provide that demonstrating a causal link between the defendant's activity and harm suffered by another justifies enjoining the activity as a nuisance.[42] Testimony established that the Center's practice of serving free meals attracted transients to the Armory Park area.[43] The court held that while the Center may not have directly caused each injury, it was nevertheless responsible for any harm to residents caused by patrons drawn to the area because of the operation of the food service.[44]

The Zoning Compliance Argument

ECS argued that its lawful operation, conducted within the parameters of Tucson's zoning regulations, demonstrated the reasonableness of its actions[45] and precluded a finding of public nuisance. The supreme court agreed that courts must consider compliance with zoning provisions when addressing a public nuisance question.[46] The court continued, however, by stating that while governmental bodies have the power to declare what *type* of business can operate in an area, the courts retain the power to regulate *how* that business is conducted.[47] The court ruled that compliance with zoning provisions does not *per se* prevent a finding of public nuisance.[48]

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40. *Id.* at 6-7, 712 P.2d at 919-20. ECS reasoned that it had no control over the patrons after they left the Center and consequently could not be enjoined for the patron's actions.

41. *Id.* at 7, 712 P.2d at 920. Several cases support the proposition that the critical question in derivative responsibility analysis is not whether the defendant actually caused the nuisance, but whether the defendant's operation attracted persons whose actions subsequently violated the rights of others to use and enjoy their real property. *See, e.g., McQuade,* 25 Ariz. App. 312, 543 P.2d 150; Wade v. Fuyller, 12 Utah 2d 299, 365 P.2d 802 (1961).

42. *Armory Park,* 148 Ariz. at 7, 712 P.2d at 920. The Restatement adopts the position that a party may be liable for nuisance if he is responsible for setting in motion the forces eventually creating the intrusion. RESTATEMENT (SECOND) OF TORTS § 824, comment b (1977).

43. *Armory Park,* 148 Ariz. at 7, 712 P.2d at 920. Testimony showed that many of the transients seen crossing through the Armory Park area were the same people eating at the Center. The supreme court held that this testimony sufficiently established a causal link between the meal program and the injury to Armory Park residents. *Id.*

44. *Id.*

45. *Id.* at 8, 712 P.2d at 921.

46. *Id.* The court concluded that it would "be hesitant" to find a public nuisance had the legislature created full scale rules determining *how* an activity was conducted, as compared to the typical rules present in zoning ordinances simply determining what *type* of activity can be conducted in an area. *Id. citing* RESTATEMENT (SECOND) OF TORTS § 821B, Comment f (1977). The court stated that its equitable powers allowed it to enjoin even permitted activities, if conducted in an unreasonable manner. *Armory Park,* 148 Ariz. at 8, 712 P.2d at 921.

47. *Armory Park,* 148 Ariz. at 9, 712 P.2d at 922. The court tempered its holding on this point by an apparent willingness to abrogate judicial regulation of an activity where the legislature specifically addressed the permitted manner of conducting the activity. *See supra* note 46.

48. The court noted that it "disapproved" Desruisseau v. Isley, 27 Ariz. App. 257, 553 P.2d 1242 (1976), to whatever extent *Desruisseau* conflicted with the determination of the zoning questions in *Armory Park. Armory Park,* 148 Ariz. at 9, 712 P.2d at 922. In *Desruisseau,* the Arizona Court of Appeals held that a trial court may not enjoin as a public nuisance a business complying with applicable zoning regulations. *Desruisseau,* 27 Ariz. App. at 261, 553 P.2d at 1246. The *Desruisseau* court ruled that concerning a private nuisance, however, compliance with zoning regulations is only one factor to be considered in determining the reasonableness of the activity. *Desruisseau,* 27 Ariz. App. at 261, 553 P.2d at 1246.

The Criminal Violation Argument

ECS argued that a valid public nuisance claim must be grounded in a criminal violation.[49] While acknowledging violation of a criminal statute is an element of a public nuisance claim,[50] the *Armory Park* court concluded that APNA's failure to allege a criminal violation did not justify dismissing the claim.[51] The court reasoned that since the applicable statute failed to prohibit specific conduct or define what type of conduct constitutes a public nuisance, the statute was in essence irrelevant to APNA's claim.[52] This forced the court to consider whether it was even possible to have a public nuisance without a statute specifically declaring certain conduct a public nuisance crime.[53]

The court rejected as too restrictive the idea that it is impossible to have a public nuisance without a statute making certain conduct a crime.[54] The court stated that regardless of the presence of a criminal statute, whether conduct constitutes a public nuisance requires an analysis of whether, under the totality of the circumstances, the conduct complained of is unreasonable.[55] The following section discusses the balancing test employed by Arizona courts to determine the reasonableness of conduct in public nuisance actions.

The Balancing Test: The Reasonableness of the Interferences

The *Armory Park* decision does not rest upon the standing, derivative responsibility, zoning or criminal statute issues. Instead, the court clearly stated that the determination of whether certain conduct constitutes a public nuisance in Arizona requires weighing the reasonableness of the conduct against the harm it inflicts.[56] The court reaffirmed the use of the balancing test as a just means of ensuring that courts do not enjoin as public nuisances

49. *Armory Park*, 148 Ariz. at 9, 712 P.2d at 922.

50. *See* State v. B Bar Enters., 133 Ariz. 99, 649 P.2d 978 (1982); State *ex rel.* Sullivan v. Phoenix Sav. Bank & Trust Co., 68 Ariz. 42, 198 P.2d 1018 (1948); MacDonald v. Perry, 32 Ariz. 39, 255 P. 494 (1927); Cactus Corp. v. State *ex rel.* Murphy, 14 Ariz. App. 38, 480 P.2d 375 (1971). The court distinguished these cases by stating that none of them addressed the issue of whether a public nuisance claim exists independent of statute.

51. *Armory Park*, 148 Ariz. at 9, 712 P.2d at 922.

52. *Id.* The statute in question is ARIZ. REV. STAT. ANN. § 13-2917 (1978). The statute declares public nuisances criminal and defines criminal nuisance as interference with the "comfortable enjoyment of life or property." *Id.*

53. *Armory Park*, at 9, 712 P.2d at 922.

54. The court gleaned this determination from the RESTATEMENT (SECOND), which provides that violation of a criminal statute is only one of several factors assessed when determining the reasonableness of a defendant's conduct in a public nuisance action. The RESTATEMENT (SECOND) states that it is clearly recognized that a court need not find a defendant criminally responsible to find him guilty of a public nuisance. RESTATEMENT (SECOND) OF TORTS § 821B and Comment d, at 89 (1977).

55. *Armory Park*, 148 Ariz. at 10, 712 P.2d at 923. The court relied on the RESTATEMENT (SECOND) and MacDonald v. Perry, 32 Ariz. 39, 255 P.2d 494 (1927) for this position. *Armory Park*, 148 Ariz. at 9-10, 712 P.2d at 922-23. For a listing of cases where Arizona courts employed a balancing test in a public nuisance setting, see *supra* note 25.

56. *Armory Park*, 148 Ariz. at 7-8, 712 P.2d at 920-21. Arizona courts have consistently applied a balancing test in determining the reasonableness of an interference. *See MacDonald*, 32 Ariz. 39, 255 P. 494; *McQuade*, 25 Ariz. App. 312, 543 P.2d 150; *Cactus Corp.*, 14 Ariz. App. 38, 480 P.2d 375. For examples in other jurisdictions, see Comment, *Remedies for Intangible Intrusions: The Distinction Between Trespass and Nuisance Actions Against Lawfully Zoned Businesses in California*,

interferences that are tolerable to a reasonable person because they are bothersome to thin-skinned neighbors.[57]

The court stated that the proper test balances the utility and reasonableness of an activity against the harm inflicted and the nature of the neighborhood affected by that activity.[58] Referring to the trial court's minute entry,[59] the supreme court acknowledged that Judge Gin properly balanced all relevant interests. The supreme court stated that the final decision on the issue was properly within the trial judge's discretion.[60] While deferring to that discretion, the court paused and praised the work and purpose of the Center.[61] That praise was short-lived, however, as the court affirmed that the Center unreasonably interfered with the Armory Park residents' use and enjoyment of their property.[62]

Scope of the Decision

Upon upholding the trial court's decision to grant a preliminary injunction favoring APNA, the supreme court held that it was within the trial court's discretion to "fashion a less severe remedy" than permanent closure of the Center.[63] The Center, however, closed indefinitely.[64] Two important

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17 U.C.D. L. REV. 389, 399 n.37 (1983). It should be noted that the *Armory Park* court failed to explicitly address which party carries the burden of proof on the elements of the balancing test.

57. *Armory Park*, 148 Ariz. at 7-8, 712 P.2d at 920-21. The court announced that not all interferences with public rights constitute public nuisances. *Id.*

58. *Armory Park*, 148 Ariz. at 8, 712 P.2d at 921. For a more complete listing of factors considered in the balancing test, see *supra* note 25.

59. Judge Gin addressed the balancing issue as follows:

> It is distressing to this Court that an activity such as defendants [sic] should be restrained. Providing for the poor and homeless is certainly a worthwhile, praiseworthy [sic] activity. It is particularly distressing to this Court because it [defendant] has no control over those who are attracted to the kitchen while they are either coming or leaving the premises. However, the right to the comfortable enjoyment of one's property is something that another's activities should not affect, the harm being suffered by the Armory Park Neighborhood and the residents therein is irreparable and substantial, for which they have no adequate legal remedy.

Armory Park, 148 Ariz. at 8, 712 P.2d at 921, citing Minute Entry, 6/8/84 at 8.

60. *Armory Park*, 148 Ariz. at 8, 712 P.2d at 921. The supreme court stated that the evidence submitted concerning the multiple trespasses and defacement of the residents' property supported Judge Gin's decision. *Id.*

61. The court, referring to the common law, recognized that certain inconvenient activity may nonetheless proceed based on the usefulness of that activity to the community. The court called the Center's actions admirable and noted that courts give charitable purposes "greater deference than pursuits of lesser intrinsic value." *Id.* The court did not elaborate on what comprises the category "pursuits of lesser intrinsic value." In view of the findings that the ECS food distribution program was not "useful" enough to prevent issuance of an injunction, the question becomes what type of charitable enterprise will ever be "useful" enough to remain open even though it interferes with property rights. Feeding the needy appears as, or even more, admirable than other charitable tasks.

62. *Id.* The court based this decision on grounds that a single neighborhood should not bear the entire costs of a charitable enterprise. *Id.* The court insisted that caring for the needy is a concern of the community as a whole, and of the government generally. *Id.* Exactly what the court meant by this statement is unclear. It is possible to speculate that if the government or the community shared the costs and inconveniences of the Center with the Armory Park residents, the court may have refused to issue the injunction. The nature and extent of such "cost-sharing" necessary to influence the court is open to debate.

63. *Id.* at 10, 712 P.2d at 923.

64. To date, the Center remains closed, and the trial court has not held a permanent injunction hearing. This may be due in part to ECS' willingness to await the outcome of the Tucson City Council's plans to establish a center for the homeless. See *infra* note 67. Meanwhile, ECS appears to be continuing its efforts by combining its resources with the local Salvation Army. Telephone inter-

questions remain after the Center's closing: 1) what is the ultimate effect of the preliminary injunction on the continued existence of the Center; and 2) how far does the decision extend, if at all, beyond free food distribution centers in historic residential neighborhoods?

The greatest weakness of the *Armory Park* decision is the court's failure to recognize the holding's *true* impact on the St. Martin's Center—permanent closure. Even though the court appeared to mitigate the consequences of its decision by retaining the trial judge's power to "fashion a less severe remedy," its affirmance of the order to issue the temporary injunction rang the death knell for the Center. Since all of the alternative remedies[65] avail-

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view with Elizabeth C. Peasley, Attorney for Armory Park Neighborhood Association (April 22, 1986).

65. "Alternative remedies" as the term is used here is interchangeable with what the Arizona Supreme Court terms "less severe" remedies. Courts often attempt to impose remedial flexibility in cases where an injunction is sought. Factors influencing the decision to impose an injunction or some other type of "middle ground" remedy are: 1) the type of nuisance involved; 2) the feasibility of enforcing the relief; 3) the defendant's public character and the consequences an injunction would have on the public interest; and 4) whether the injunction will require a cash outlay prohibitive to the defendant. Comment, *Remedial Flexibility in Injunctions Against Nuisances—A Product of the Search for Middle Ground*, 7 WILLIAMETTE L.J. 279 (1971). As stated in the text, the alternative remedies to a full-fledged injunction appear inapposite to the *Armory Park* facts. A brief discussion of the possibilities available to courts, however, deserves mention.

The seminal nuisance case of *Boomer v. Atlantic Cement Co.* addressed the key alternatives available to a court faced with the question of whether to issue an injunction. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). In *Boomer*, seven plaintiffs sought an injunction to prevent the defendant cement plant from emitting dust. The court found both a nuisance and substantial damage to the plaintiff's property. The court considered three potential remedies: 1) immediate imposition of the injunction; 2) granting a "wait and see" injunction; and 3) allowing permanent damages while permitting the defendant to carry on his business. The court refused to immediately grant the injunction due to the harshness of such a remedy on the defendant and the public (reasoning the *Armory Park* court failed to accept). Similarly, the court refused to adopt the "wait and see" approach because the defendant was already a "state of the art" company. Hence, even with extra time, there were no changes that the defendant could incorporate into his business. For further discussion of the "wait and see" approach, hereinafter referred to as the "experimental relief" injunction, and its application to *Armory Park*, see *infra* note 66. In the *Boomer* court's opinion, the fairest result to all parties was to award permanent damages to the plaintiffs, allowing the defendants to keep operating.

A damages remedy, however, is hardly appealing to the *Armory Park* facts. Even if a damages remedy was available in the *Armory Park* context, undoubtedly ECS would be unable to pay. For an example of the damages remedy applied to a nuisance action, see the English case Bunclark v. Hertsfordshire County Carnival, 243 E.G. 381 (1977). *But see* Pendoley v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963).

Another alternative to issuing a full-fledged injunction is entering an injunction limited in scope. This injunction is simply more flexible and specialized than a regular injunction, easing the burden on the defendant while addressing the plaintiff's complaint. This alternative does not appear helpful to the Armory Park situation. Examples of limited injunctions include requiring that 1) the Center only serve meals three days a week, 2) the Center only serve meals at 11 a.m., and 3) the Center only serve meals if uniformed guards are present and are patroling the area. The court's strong language determining the rights of property owners, however, still appears to favor the residents in a balancing test. Further, the effectiveness of these steps in curbing the intrusions is questionable. The Tucson Salvation Army, in response to requests from nearby residents, however, has changed its serving time at two shelters to help avoid possible contact between transients and neighborhood children walking through the area on their way home from school. Arizona Daily Star, February 8, 1986, § B, at 1, col. 3. The effects of this change on the neighborhoods vis-a-vis the shelters may be pertinent in future nuisance actions.

One other alternative deserves mention due to its unique approach to the problem. The approach centers on a type of "inverse condemnation" theory, where the court grants the plaintiff the option of requiring the defendant to purchase all property within some specific distance of the nuisance. This theory has yet to succeed, and it seems highly improbable that it would have had any

able to the trial court, save the "experimental relief" injunction technique,[66] appear unworkable in the *Armory Park* context, the injunction prevents ECS from meeting its goal of feeding the hungry in Tucson.[67]

The following example demonstrates the problem ECS faces in light of the injunction order. From the opinion it appears ECS may operate without interference if ECS relocates the Center to an industrial area,[68] or any area a reasonable distance from a residential setting. Such a relocation, however, virtually prevents the service from reaching its potential users. For a variety of reasons, the transients, needy, and poor utilizing the program tend to congregate near downtown and residential areas.[69] Removing the Center to a location where it no longer bothers residents effectively moves it to a place where no one benefits from it.

Solving the access problem by creating a transportation network that allows the Center's patrons to reach the program necessarily creates new problems. Assume ECS provides a bus to transport the patrons. That bus must leave from *somewhere,* the most logical place being a central location easily accessible to most patrons.[70] This entails a "bus stop," most likely located close to a neighborhood setting, which means patrons will cross through residential areas.

By allowing the preliminary injunction, the court destroyed ECS' hopes for providing free meals to needy people at a convenient location. Any new

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effect in *Armory Park.* A Kentucky court thoroughly discussed this theory in Bartman v. Shode, 353 S.W.2d 550 (Ky. Ct. App. 1962).

66. The experimental relief concept essentially results in a compromise—the injunction vindicates the plaintiff's rights while causing the defendant minimum hardship. The injunction provides the defendant with the opportunity to experiment with measures that *in the defendant's opinion* will produce a suitable result. The concept is divided into two camps. In "pure" experimental relief, the injunction simply declares "defendant, stop doing X that harms the plaintiff," and the defendant then has the chance to develop the mode of relief. In "hybrid" experimental relief, the court holds hearings on the injunction, allowing the parties to produce evidence of means available to alleviate the nuisance. Again, this provides the defendant with the opportunity to suggest a mode of relief. For a complete discussion of this technique, *see* Sedler, *Conditional, Experimental and Substantial Relief,* 16 RUTGERS L. REV. 639 (1962). In *Armory Park,* this approach may have provided ECS the opportunity to see if it was creative enough to develop an acceptable alternative solution to closing the Center.

67. The fight to provide food and shelter to Tucson's homeless continues in other forums. The Tucson City Council recently set aside funds to purchase four acres of county-owned land near Kino Community Hospital for use as a center for the needy. The Council selected the Kino site based upon its accessability to the homeless and minimal impact on surrounding neighborhoods. Arizona Daily Star, April 8, 1986, B2, col. 1. Pima County officials, however, refused to sell the land because the property is earmarked for future development. Arizona Daily Star, March 5, 1986, B3, col. 2. Tucson City Councilman Brent Davis has proposed that the city, without help from the county, proceed with its plans to create a metro center. Davis' plan calls for soliciting donations for a site from individuals and organizations concerned with the homeless problem. Arizona Daily Star, April 8, 1986, B2, col. 1. At the time of this writing, neither the city of Tucson nor Pima County has acted on Davis' proposal, or any other proposal.

68. This proposition is not entirely clear. A factory owner could enjoin a food distribution center if he shows it unreasonably interferes with his property. It just seems far less likely that such an owner could show unreasonable interference.

69. While not based on scientific evidence, logic compels the conclusion that homeless people congregate near populated or downtown areas due to the availability of parks, public restrooms, and transportation services.

70. Governmental entities, such as cities, could solve the problem of transporting patrons to isolated food centers by locating the centers in downtown areas. This remedy is highly unlikely, however, based upon concerns over loss of downtown business and tourism as a result of such a center.

location ECS chooses will either fall prey to a similar suit or will operate in an area that forecloses most of the patrons seeking aid from receiving it.[71]

The most important issue remaining after *Armory Park* concerns just how far the decision extends. The Arizona Supreme Court, applying the balancing test, found that homeowners' property interests outweighed charitable interests in feeding the hungry. Does this balancing suggest that the court will issue injunctions declaring rehabilitative centers for ex-convicts or former mental patients located near residential areas public nuisances too?[72] By the decision's strong language preferring property rights, the supreme court may have painted itself into a corner for nuisance cases involving businesses that are rehabilitative in nature.[73] Logic and consistency appear to dictate that after *Armory Park,* property rights are king in Arizona. It is difficult to imagine what interests can overcome that preference if feeding the hungry could not.

Armory Park may be dangerous precedent in Arizona, not simply because it may force food centers near residential areas to close, but because of the possible extensions that may result from the holding. Such extensions may dictate the closure of other important social programs on public nuisance grounds.[74]

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71. Residents fearful of intrusions into their neighborhood by charitable organizations catering to the needs of "undesirables" have another potent weapon at their disposal: licensing requirements. Organized residents could petition their city councils to pass strict licensing requirements making it impossible or unprofitable for a private party to operate a place of shelter. A complete discussion of such a requirement is found in Comment, *Exclusion of Community Facilities for Offenders and Mentally Disabled Persons: Questions of Zoning, Home Rule, Nuisance, and Constitutional Law,* 25 DE PAUL L. REV. 918 (1976).

72. Other jurisdictions have faced similar questions. *See* Arkansas Release Guidance Foundation v. Needler, 252 Ark. 194, 477 S.W.2d 821 (1972) (operation of paroled prisoners' half-way house in residential area enjoined); Nicholson v. Connecticut Half-Way House, Inc., 153 Conn. 507, 218 A.2d 383 (1966) (construction of facility to house ex-convicts in apartment district not enjoined); People v. HST Meth, Inc., 74 Misc. 2d 920, 346 N.Y.S.2d 146 (1973), *aff'd,* 43 App. Div. 2d 932, 352 N.Y.S.2d 487 (1974) (operation of Methadone maintenance clinic in residential area partially enjoined); Hazel Wilson Hotel Corp. v. City of Chicago, 17 Ill. App. 3d 415, 308 N.E.2d 372 (1st Dist. 1974) (operation of facility housing former mental patients in neighborhood not purely residential not enjoined).

73. For example, rehabilitative institutions for ex-convicts and former mental patients have an interest in locating near populated areas since the key to rehabilitation is readjustment to society. Hence, a halfway house located in the desert is simply not effective for rehabilitation. Because of the necessary location of these institutions, they likely will face nuisance actions. Concerns over the extension of the *Armory Park* analysis to centers for ex-convicts and former mental patients may be unwarranted if the key to the *Armory Park* injunction is the outside nature of the patrons' activity. Centers for ex-convicts and former mental patients necessarily entail a permanent shelter with sleeping, eating, entertainment, and restroom facilities. The presence of such facilities may significantly reduce the problems arising in the *Armory Park* context, possibly distinguishing these centers from the ECS center. The cases discussed *supra* however, indicate that such centers are vulnerable to attack on nuisance grounds.

74. Questions remain over what the court will do with a case involving the location of a commercial enterprise, such as a plasma center, that draws its clientele mainly from the needy. This question may present itself in the near future, as APNA has protested to the Mayor and Tucson City Council concerning the location of a plasma center in the Armory Park area. Arizona Daily Star, March 19, 1986, B1, col. 4. An especially interesting question arising after *Armory Park* is what the court will do with a case where the defendant's program does not deal with "undesirable" citizens. For example, where a nuisance action is brought against a school district by local residents because the students loiter, litter, and destroy the residents' property at noon hour. Can the courts distinguish this case? If so, will they justify the result on the grounds that education is a more important social policy than seeing that indigent citizens survive?

CONCLUSION

In *Armory Park,* the Arizona Supreme Court held that 1) voluntary associations have standing to bring public nuisance actions on behalf of their members; 2) courts may enjoin lawful businesses for acts committed off their premises by patrons no longer under their direction and control; and 3) plaintiffs need not prove a zoning or criminal violation to enjoin a public nuisance. *Armory Park* is not a landmark nuisance decision, although it does provide insight into some unique questions of nuisance law in Arizona. The case *is* dramatic, however, in how far its reasoning applies to limiting important social programs. In that regard, the decision could be disasterous.

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