Privately Owned Parking Areas in Arizona Need Better Protection from Unauthorized Vehicles; A Proposal to Amend the Statutory Garageman's Lien

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Ample parking space for customers' automobiles is crucial to the successful operation of many business enterprises.[1] Privately owned parking areas adjacent to commercial buildings are often posted with signs advising motorists that parking is restricted to those who transact business there and that unauthorized vehicles will be towed away at the vehicle owners' expense.[2] Recent Arizona decisions[3] appear to emasculate the tow-away threat. The problem demands a legislative solution.

In *Currie v. Dooley*,[4] the court of appeals held that Arizona's statutory garageman's lien,[5] which under certain conditions permits the impoundment of an automobile for payment of charges including towing and storage,[6] does not apply to trespassing vehicles towed without their owners' consent.[7] Thus, a tow operator who removed a trespassing vehicle from private property at the property owner's request could not claim a possessory lien[8] against the vehicle to compel payment of towing and storage

1. Today's shopper prefers to drive rather than to walk, even if the driving distance is ten times greater. J. ARANGO, THE URBANIZATION OF THE EARTH 66 (1970). People like the convenience of the shopping center. *See id.* at 51, 65, 76. A 1978 survey of shoppers in five major markets found that 71% considered adequate parking an important factor in deciding where to shop. The percentage increased to 76 in 1981. 14 LAND USE DIGEST No. 11, at. 2 (November 15, 1981). "Only downtown commercial [land] uses, such as office buildings and department stores, are likely to make no provision for off-street parking and to rely upon on-street or commercial parking." A. Lachowicz, *A Land-Use Intensity System for Commercial Uses*, 1971 LAND-USE CONTROLS ANNUAL 177, 184 (D. Heeter, ed.).

2. See *infra* note 67.

3. Capson v. Superior Court, No. 17150-SA, slip op. (Ariz. Feb. 8, 1984); Currie v. Dooley, 132 Ariz. 584, 647 P.2d 1182 (Ct. App. 1982).

4. 132 Ariz. 584, 647 P.2d 1182 (Ct. App. 1982).

5. ARIZ. REV. STAT. ANN. § 33-1022(B) (1974) provides:

> Proprietors of garages, repair and service stations shall have a lien upon motor vehicles of every kind, and the parts and accessories placed thereon, for labor, materials, supplies and storage for the amount of the charges, when the amount of the charges is agreed to by the proprietor and the owner.

6. *Id.*

7. 132 Ariz. at 587, 647 P.2d at 1185.

8. A possessory lien gives the creditor the right to hold possession of the specific property

charges.[9] The *Currie* court found no contractual agreement between the towing company and the owner of the towed vehicle.[10] As a result, when the towing company impounded the vehicle for payment of towing and storage charges, it committed a conversion[11] even though it was authorized by the landowner to remove non-customers' vehicles.[12]

In *Capson v. Superior Court*,[13] the Arizona Supreme Court confirmed the result in *Currie*: no possessory lien exists to secure the costs of removing unauthorized vehicles from private property.[14] The *Capson* court held that any lien for the towing or storage of an automobile in this state must have a statutory basis.[15] When urged to apply the statutory garageman's lien, however, the court followed *Currie* in refusing to extend the lien to the removal of trespassing vehicles.[16] In addition, the *Capson* court held that a towing company's failure to yield possession of a vehicle on demand can constitute theft under Arizona's Criminal Code—an issue not addressed in *Currie*.[17]

In the wake of *Currie* and *Capson*, adequate protection for private parking areas does not seem possible without legislation giving towing companies the right to impound unauthorized vehicles until towing and storage charges are paid.[18] The Arizona businessman faces a dilemma: whether to preserve customer parking by paying towing fees out of his own pocket or to endure the possible loss of business opportunity caused by trespassing vehicles.

This Note examines the limited remedies available to Arizona landowners under present law with respect to the removal of unauthorized ve-

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until satisfaction of the debt or performance of an obligation. BLACK'S LAW DICTIONARY 1048 (5th ed. 1979).

9. 132 Ariz. at 587, 647 P.2d at 1185.

10. *Id.*

11. *See id.* "Conversion is any act of dominion wrongfully asserted over another's personal property in denial of or inconsistent with his rights therein." Neither good nor bad faith, care nor negligence, knowledge nor ignorance are the gist of the action. Scott v. Allstate Ins. Co., 27 Ariz. App. 236, 240, 553 P.2d 1221, 1225 (1976). An act which would otherwise constitute conversion may be precluded from having that effect by the plaintiff's express or implied consent to the act. *Id. See infra* text accompanying notes 118-38.

12. 132 Ariz. at 587, 647 P.2d at 1185. A related decision, *Currie v. Sechrist*, absolved the shopping center of any liability for the towing company's actions because the towing company was not acting as an agent of the shopping center, but rather as an independent contractor. Currie v. Sechrist, 119 Ariz. 466, 581 P.2d 700 (Ct. App. 1978). *See infra* note 179.

13. No. 17150-SA, slip op. (Ariz. Feb. 8, 1984).

14. *Id.* at 6.

15. *Id.* at 3.

16. *Id.* at 4.

17. *Id.* at 7. The Arizona Criminal Code provides, in pertinent part:

> A person commits theft if, without lawful authority, such person knowingly:
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> 1. Controls property of another with the intent to deprive him of such property. . . .

ARIZ. REV. STAT. ANN. § 13-1802(A) (Supp. 1984). The code further provides: "Deprive means to withhold the property interest of another. . . . with the intent to restore it only upon payment of reward or other compensation. . . ." ARIZ. REV. STAT. ANN. § 13-1801(2) (1978). Although the court found that the defendant's acts satisfied the elements of the crime, it excused the defendant from liability, giving the holding prospective application only. The court reasoned that the defendant may have acted under a plausible but incorrect interpretation of the law. Capson v. Superior Court, No. 17150-SA, slip. op. at 7 (Ariz. Feb. 8, 1984).

18. *See infra* text accompanying notes 108-16.

hicles[19] and proposes possessory lien legislation[20] designed to provide those landowners with an effective means of preserving their parking areas for authorized vehicles only.

BACKGROUND

Currie v. Dooley

Tempe Shopping Center is adjacent to the campus of Arizona State University.[21] John Currie parked his automobile in the shopping center's lot and departed to attend a class at the University.[22] Currie knew of signs restricting use of the parking lot to customers of the shopping center.[23] The signs stated that unauthorized vehicles would be impounded at the owners' expense.[24] The defendant towing company had an agreement with the shopping center to remove non-customers' vehicles from the parking lot.[25] When Currie returned to his car, he discovered that the defendant had lifted it onto dollies in preparation for towing.[26] Currie demanded that the tow truck operator release the car, but the operator told him he would have to pay a $25.00 fee.[27] When Currie refused to pay, the operator towed the vehicle to a storage yard and impounded it to await payment of the $25.00 plus additional fees and storage charges.[28] In finding that the towing company's actions constituted conversion of Currie's automobile,[29] the court held that no lien attached to the car at any time while it was in the parking lot or in the towing company's possession.[30] The court refused to extend the garageman's lien to parking lots.[31] The court added that even if the lien did extend to parking lots, agreement concerning the amount of the charges, as required by the statute, did not exist between

19. *See infra* text accompanying notes 46-107. Towing involving vehicles illegally parked on public property is not the focus of this Note. *See infra* notes 100-143. For examples of cases dealing with police towing, and the accompanying public safety and other considerations see: Goichman v. Rheuban Motors, Inc., 682 F.2d 1320 (9th Cir. 1982); Stypmann v. City and County of San Francisco, 557 F.2d 1338 (9th Cir. 1977); Tedeschi v. Blackwood, 410 F. Supp. 34 (D. Conn. 1976). In *Tedeschi*, a Connecticut statute was held unconstitutional to the extent that it provided for police-ordered towing, detention, and sale of motor vehicles without the right to a hearing before or after the taking. 410 F. Supp. at 45. In *Stypmann*, a hearing five days after the taking did not meet constitutional due process requirements in light of the substantial private interest in the use of an automobile. 557 F.2d at 1342-44. In *Goichman*, however, a delay of forty-eight hours, when balanced against the government's "considerable interest in retaining possession of the vehicle as security for the owner's payment of towing and storage charges," did not deny due process. 682 F.2d at 1325. The *Goichman* court stated that to determine what procedural requirements are necessary to satisfy due process in any one situation requires a "sensitive inquiry into the competing governmental and private interests affected." *Id.* at 1324.

20. *See infra* text accompanying notes 141-51; *see also* appendix (proposed amended statute).

21. Currie v. Dooley, 132 Ariz. at 585, 647 P.2d at 1183. For another recital of the facts in this case, see Currie v. Sechrist, 119 Ariz. 466, 467-68, 581 P.2d 700, 701-02 (Ct. App. 1978).

22. Currie v. Dooley, 132 Ariz. at 585, 647 P.2d at 1183.

23. *Id.*

24. *Id. See infra* note 68.

25. 132 Ariz. at 585, 647 P.2d at 1183.

26. *Id.*

27. *Id.* at 586, 647 P.2d at 1184.

28. *Id.*

29. *Id.*

30. *Id.* at 587, 647 P.2d at 1185.

31. *Id.*

Currie and the towing company.[32]

Capson v. Superior Court

The defendant towing company in *Capson*[33] removed Alan Thompson's automobile from private property near an apartment complex in Phoenix.[34] The area was posted with signs prohibiting parking. The signs specified a $75.00 towing fee. When Thompson later demanded that the defendant release the vehicle from a locked storage yard, the towing company refused, insisting that Thompson pay the $75.00 fee. Thompson called the police, who eventually obtained the defendant's cooperation by threatening to forcibly remove the car from the storage yard.[35] In a special action brought during superior court criminal proceedings, the Arizona Supreme Court held that the defendant's acts were not protected by any lien for towing or storage.[36] The court further held that because the defendant had no lawful authority to deprive the owner of the possession of his vehicle, the defendant committed theft by refusing to relinquish possession on demand.[37]

The *Currie* and *Capson* decisions removed any assurance of prompt compensation ordinarily provided by a garageman's lien: the right to impound a vehicle for payment of fees.[38] Today, a towing company which impounds a vehicle in Arizona without the support of a possessory lien subjects itself to possible civil and criminal liability.[39] As a result, towing companies may refuse to respond to calls from private landowners who wish to remove unauthorized vehicles unless each caller is willing to pay the towing charges himself.[40]

After *Currie* and *Capson*, business interests could suffer serious harm in areas where parking space is limited and unauthorized parking occurs frequently.[41] Property owners could find prohibitive the cost of continually removing trespassing vehicles at their own expense.[42]

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32. *Id.*
33. No. 17150-SA, slip. op. (Ariz. Feb. 8, 1984).
34. *Id.* at 2.
35. *Id.*
36. *Id.* at 6.
37. *Id.* at 7.
38. *See supra* note 5 (text of the garageman's lien statute).
39. *See* 132 Ariz. at 587, 647 P.2d at 1185.
40. Surveyed informally by telephone, some Tucson towing operators stated that after *Currie* and *Capson* they no longer respond to calls from private property owners unless the vehicle has been abandoned for a period of several days. Others, unaware of the decisions until contacted in the survey, indicated that they may alter their procedures to avoid possible legal problems.
41. *See supra* note 1.
42. The Pennsylvania Supreme Court has observed that without prompt compensation to the towing company a property owner's right to remove unauthorized vehicles would become a nullity. The court stated:

> [T]he property owner would be forced to pay the towing service *in advance* for the removal of vehicles and then initiate legal action against the vehicle's owner for those expenses. It is extremely unlikely that many property owners would endure the time and expense of litigation to recover the amount of the towing fee and the right . . . would atrophy.

Apartment Owners and Managers Comm. of State College Area Chamber of Commerce v. Brown, 487 Pa. 548, 552, 410 A.2d 747, 749 (1980) (emphasis in original).

As an example of the magnitude of the problem, Chris-Town Shopping Center in Phoenix

The dilemma confronting business parking lot owners in the wake of *Currie* and *Capson* appears to have no resolution short of legislation.[43] The right to withhold possession of a towed vehicle until its owner pays the cost of removal is an effective legal tool with which to protect private parking areas and related business interests.[44] In circumstances involving trespassing vehicles, however, courts have been unable to ground a possessory lien upon the principles of existing law.[45] To highlight the need for a statutory possessory lien, it is useful to examine the limitations of the current means of legal recourse available to the owners of private parking areas in Arizona.

LANDOWNERS' RIGHTS UNDER CURRENT LAW ARE INADEQUATE

Under existing law, privately owned parking areas enjoy only limited protection from unauthorized vehicles.[46] While tort principles of trespass allow a landowner to remove unauthorized vehicles from his premises and to sue for resulting expenses, they do not allow him to impound the vehicle to compel payment of those expenses.[47] In contract, parties can agree expressly or impliedly that if either breaches the terms of an agreement certain consequences may result.[48] Contract law, however, fails to support a possessory lien on a trespassing automobile.[49] Existing state statutes[50] and local ordinances[51] lend some support to a landowner's efforts to regulate parking on his property,[52] but no current Arizona law supports a possessory lien for landowners or their agents who impound trespassing

towed away 195 unauthorized vehicles in a four-month period in 1971. Fendler v. Texaco Oil Co., 17 Ariz. App. 565, 568, 499 P.2d 179, 182 (1972). An Illinois towing company, a business consisting solely of removing trespassing automobiles from private property, towed 9,156 cars to its storage lot in 1979. This towing generated a gross annual income to the company of over $376,000 at the Illinois Commerce Commission's maximum rate at the time ($45 per tow). Pioneer Towing, Inc. v. Illinois Commerce Comm'n, 99 Ill. App. 3d 403, 404, 425 N.E.2d 1109, 1110 (1981).

43. Several states have solved the problem legislatively. *See infra* text accompanying notes 117-40.

44. Younger v. Plunkett, 395 F. Supp. 702, 714 (Dist. Pa. 1975).

45. Apartment Owners and Managers Comm. of State College Area Chamber of Commerce v. Brown, 252 Pa. Super. at 539, 382 A.2d at 473, *rev'd in part on other grounds* 487 Pa. 548, 410 A.2d 747 (1980); Fitzhugh v. City of Douglas, 122 Ariz. 599, 600, 596 P.2d 737, 738 (Ct. App. 1979); Kunde v. Biddle, 41 Ill. App. 3d 223, 227, 353 N.E.2d 410, 414 (1976). *See* Annot., 85 A.L.R.3d 240 (1978).

46. *See supra* text accompanying notes 4-18 and *infra* text accompanying notes 54-107.

47. *See infra* notes 54-62 and accompanying text.

48. *See infra* notes 63-65 and accompanying text.

49. *See infra* note 68 and accompanying text.

50. A vehicle is deemed abandoned and subject to sale at auction if left without contract in a public parking lot more than fifteen days. ARIZ. REV. STAT. ANN. § 28-1403 (Supp. 1983). Incorporated cities and towns may provide by ordinance for the disposition of vehicles abandoned on private property. ARIZ. REV. STAT. ANN. § 28-1408 (1976). Statutory provisions are not to be construed to limit property owners' right to regulate the use of their property. ARIZ. REV. STAT. ANN. § 28-628 (1976).

51. *See infra* text accompanying notes 84-96.

52. In *Fendler v. Texaco Oil Co.*, for example, a shopping center in Phoenix had the right to remove an unauthorized vehicle without relying on police participation. A Phoenix City Code provision allowing police to remove unauthorized vehicles from private property did not vest exclusive authority in the police to remove such vehicles. The removal of plaintiff's automobile, which was parked in violation of a private no-parking sign, did not constitute conversion. Fendler v. Texaco Oil Co., 17 Ariz. App. at 569-70, 499 P.2d at 183-84.

automobiles.[53]

Trespass

A landowner is privileged to protect his interest in the land from a trespassing chattel as long as he uses no more force than reasonably necessary to accomplish his purpose.[54] He may recover as damages the cost of any harm attributable to the trespass, including expenses incurred in removing the chattel.[55] However, a landowner may not impound or otherwise incapacitate[56] a trespassing chattel unless he must do so to prevent further damage to his land.[57] The landowner may not hold the chattel merely to compel its owner to pay for damage already done by the trespass.[58] Thus, under tort law, the owner of a private parking area, threatened with loss of business opportunity, may remove an unauthorized vehicle to make room for vehicles which will utilize the space in compliance with the conditions he has imposed.[59] The landowner's privilege allows removal of a trespassing vehicle and suit for damages against the owner of the vehicle, but under tort law the landowner or his agent may not impound the vehicle for payment of towing charges.[60] Unlawful impoundment of a vehicle can give rise to a claim of conversion,[61] for which punitive damages may be awarded,[62] and may also result in criminal lia-

53. *See infra* text accompanying notes 90-105.

54. "[W]hen it is necessary to avoid or terminate a trespass upon land by a chattel in the possession of another, a person in possession of the land may employ reasonable force to remove the chattel. . . ." RESTATEMENT (SECOND) OF TORTS § 260 Comment b (1965). Placement of a one-foot-square warning sticker on the windshield of a trespassing automobile (obstructing the driver's vision) was not a reasonable use of force to abate a trespass. Reed v. Esplanade Gardens, 91 Misc. 2d 991, 993, 398 N.Y.S.2d 929, 931 (1977), *aff'd* 93 Misc. 2d 71, 403 N.Y.S.2d 416 (1978).

55. One whose rights have been invaded by trespass can recover for all damages occasioned thereby. Coop. Refinery Ass'n v. Young, 393 P.2d 537 (Okla. 1964). A possessor of land is entitled to prove whatever damages, if any, resulted from a trespass and may, in a proper case, recover exemplary damages as well. Brown v. Dorfman, 251 Ore. 522, 526, 446 P.2d 672, 674 (1968). *See also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 335, 344-45 (1973).

56. A device known as the "Denver boot" is sometimes used to incapacitate a motor vehicle. The boot consists of metal clamps and screws with a padlocking device which can be attached to one of the wheels of a motor vehicle to immobilize the wheel. Baker v. City of Iowa City, 260 N.W.2d 427, 428 (Iowa 1977). Obstruction of the driver's view caused by the placement of large warning stickers incapacitates a vehicle temporarily. *See supra* note 54. In any event, the use of a device which incapacitates a trespassing automobile is inconsistent with the objective of a landowner who wishes to keep parking space open for his customers' use. Where, as on business premises, the presence of unauthorized vehicles causes the harm, removal is arguably the only reasonable method of terminating a vehicular trespass.

57. Sears v. Summit, Inc., 616 P.2d 765, 769 (Wyo. 1980). Defendant Sears held trespassers at gunpoint and refused to allow them to remove their expensive construction equipment from his land until they paid for the damage caused by the trespass. In so doing, the defendant committed an actionable trespass against the equipment and vehicles of the plaintiff. *Id.* at 768, 770 (1980).

58. *Id.* at 769-70.

59. *See* Fendler v. Texaco Oil Co., 17 Ariz. App. at 570, 499 P.2d at 184.

60. *Capson v. Superior Court*, No. 17150-SA, slip. op. at 5-6 (Ariz. Feb. 8, 1984) Currie v. Dooley, 132 Ariz. at 586, 647 P.2d at 1184; Sears v. Summit, Inc., 616 P.2d at 769.

61. *See supra* note 11.

62. Currie v. Dooley, 132 Ariz. at 589, 647 P.2d at 1187. Punitive damages were awarded in *Currie*. Currie's father, who attempted to negotiate with the towing company by long distance telephone, testified, in part:

I asked . . . why they had doubled the charges on him and explained that he was a

bility for theft.[63]

Existing tort law enables the landowner to rid his parking lot of unauthorized vehicles. As a practical matter, however, if towing companies refuse to respond to calls from private parties because trespassing vehicles cannot legally be impounded to compel payment, tort theory contributes little toward solving the *Currie/Capson* problem.

Contract

An enforceable contract may exist even though the parties have not reached an oral or written agreement.[64] Through their behavior, parties may manifest a mutual understanding that they will be bound by certain conditions and that they may be liable for damages if they breach those conditions.[65] This type of court-imposed agreement is commonly called an implied-in-fact contract.[66]

A court will not find an implied consensual relationship, however, unless the terms are sufficiently specific to allow the court to ascertain the parties' obligations.[67] In cases involving trespassing automobiles, courts have been unable to find the requisite factual support for any obligation to

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> student . . . and was having a hard time of it . . . and that I would be . . . willing to pay a reasonable amount. . . .
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> I was told that the only thing that was going to get the car was somebody show up with the cash and that the longer it took . . . the more it was going to cost.
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> When we tried to discuss the per-day cost, I was informed that depended a lot on my attitude. . . .
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> I indicated that we may just have to see a lawyer to get the car back. And they said words to the effect, "Well, trouble is our business. We have a lawyer that handles these for us; we keep him pretty busy; we've never lost a one, so you can pay us now or pay us later; it's up to you."

Id. at 589, 647 P.2d at 1187.

In an apparent attempt to qualify the vehicle for sale at public auction, the towing company filed a false report with the Abandoned Vehicle Section of the Arizona Department of Transportation, indicating that no claim had been made for the vehicle, when in fact Currie, his father, and their attorney had demanded the vehicle's release. *Id.* at 588-89, 647 P.2d at 1186-87. The towing company kept Currie's automobile for almost eleven months. *Id.* at 588, 647 P.2d at 1186. The jury returned a verdict of $2,000 punitive damages in addition to $2,000 compensatory damages—the rental value of an equivalent vehicle for the period of deprivation. *Id.* at 587, 589, 647 P.2d at 1185, 1187.

Perhaps the outcome of the *Currie* case might have differed had the detention period been shorter or had dishonesty and lack of cooperation not pervaded the towing company's conduct. The *Currie* holding is consistent, however, with cases which have invited legislation in other states. The Arizona court concluded that impounding the automobile constituted conversion, but unlike other courts it made no comment on the adequacy of existing legal remedies for the defendant towing company or the shopping center. *See generally* Younger v. Plunkett, 395 F. Supp. 702 (D. Pa. 1975); *cf.* Kunde v. Biddle, 41 Ill. App. 3d 223, 353 N.E.2d 410 (1976). *See supra* note 43, *infra* note 114.

63. *See also supra* note 17 and accompanying text.

64. An implied contract is one not created or evidenced by explicit agreement, but inferred by law, as a matter of reason and justice, from acts and conduct of the parties and from the circumstances surrounding their transaction. John A. Artukovich & Sons, Inc. v. Reliance Truck Co., 126 Ariz. 246, 248, 614 P.2d 327, 329 (1980).

65. *See id. See generally* J. MURRAY, JR., MURRAY ON CONTRACTS 14-16 (1974). *See also* E. FARNSWORTH, CONTRACTS 124 (1982).

66. The propriety of the use of the term "implied-in-fact contract" has been questioned. *See* J. MURRAY, *supra* note 65, at 15, 16 (1974).

67. Aztec Film Prod. v. Tucson Gas and Elec. Co., 11 Ariz. App. 241, 463 P.2d 547 (1969).

pay towing or storage charges.[68] The Arizona courts in *Currie*[69] and *Capson*[70] left open the question whether sufficient specificity of terms on warning signs could give rise to an implied contract.[71] Courts in other states, however, have refused to base a common-law possessory lien solely on the fact that a driver has left his vehicle unattended on private property in violation of specific posted parking restrictions.[72] Contract law, like tort law, thus appears to be inadequate protection for private parking areas in Arizona.

Statutory Law

Arizona statutes contain provisions designed to assure compensation for the expenditure of labor and materials in the repair or other treatment of an item of personal property.[73] A repairman has the right to retain possession of a chattel until the amount due for repairs is fully paid.[74]

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68. *See supra* note 45 and accompanying text.

The defendant towing company urged the court in *Currie* to find an implied agreement to pay towing and storage charges. Currie v. Dooley, 132 Ariz. at 587, 647 P.2d at 1185. Warnings were posted in the parking area of the shopping center where Currie left his car to attend class at the adjacent Arizona State University. *Id.* at 585, 647 P.2d at 1183. The signs, typical of those most often used for the purpose, stated: "Private parking for Tempe Shopping Center customers only while transacting business herein. Violators will be impounded at vehicle owner's expense. To reclaim vehicle call [telephone number]." *Id.* Regarding the importance of the words "only while transacting business herein," *see infra* note 177.

The defendant argued that Currie, by parking in the lot while aware of the posted signs, had impliedly agreed to abide by the restrictions or to pay any charges which might result from violating those restrictions. 132 Ariz. at 587, 647 P.2d at 1185. However, the court held that the circumstances of the case did not justify finding an implied contract between Currie and the shopping center. The character of the asserted contractual obligation was so indefinite that the duties and obligations could not be stated with certainty.

The court refused to accept the towing company's alternative theory that even though the signs did not specify a rate of compensation, Currie impliedly agreed to pay a reasonable amount for the charges. In holding against the towing company, the *Currie* court did not indicate whether an implied agreement could be found in a similar case if the signs had stated specific charges for towing and storage. According to the Arizona Supreme Court in *Capson v. Superior Court*, the language in *Currie* could be read to acknowledge the possibility of an implied agreement arising from sufficiently specific warning signs. The *Capson* court did not directly address the question, however, holding instead that "any lien for towing or storage of an automobile in Arizona must have a statutory basis." No. 17150-SA, slip op. at 3-4 (Ariz. Feb. 8, 1984).

A recent Ninth Circuit Court of Appeals opinion seems to suggest that an implied contract could arise under circumstances involving specific terms on posted warnings. *See* Goichman v. Rheuban Motors, Inc., 682 F.2d 1320, 1325 (9th Cir. 1982). Statutes which impose constructive consent upon the driver of a trespassing vehicle require specificity of terms on the warning signs. *See infra* text accompanying notes 119-28.

69. Currie v. Dooley, 132 Ariz. at 584, 647 P.2d at 1182.

70. Capson v. Superior Court, No. 17150-SA, slip. op. (Ariz. Feb. 8, 1984).

71. No precedent exists for an implied contract based on such signs, regardless of specificity. *But see supra* note 68. It is important to note that even if an implied contract existed, the landowner would still be limited to the remedies available for breach. *See Capson*, No. 17150-SA, slip op. at 4 (Ariz. Feb. 8, 1984). The time and expense required to pursue contract remedies in court are inconsistent with the need for prompt compensation for the person doing the towing. Further, the contract approach lacks the deterrent effect of a threat of immediate impoundment for payment of towing charges.

72. *See supra* note 45 and accompanying text.

73. ARIZ. REV. STAT. ANN. § 33-1021 (1974) applies to all personal property except motor vehicles. ARIZ. REV. STAT. ANN. § 33-1022 (1974) applies to animals and equipment placed in the care of livery stables and to motor vehicles placed with proprietors of garages, repair shops, and service stations. *See supra* note 5.

74. ARIZ. REV. STAT. ANN. § 33-1021.

Proprietors of garages, repair shops, and service stations have a possessory lien upon all vehicles for labor, materials, and storage when the proprietor and the vehicle owner agree on the amount of the charges.[75] The garageman's lien can be foreclosed by sale of the vehicle at public auction.[76] While this lien may be adequate to protect repairmen in situations involving voluntary placement of the vehicle and agreement concerning the charges to be assessed, it is unavailable to impounders who remove trespassing vehicles from private parking lots.[77]

The *Currie* court expressly limited the scope of the garageman's lien to the language in the statute:[78] garages, repair shops, and service stations.[79] Although proprietors of garages, repair shops, and service stations probably have a lien for services performed by them on vehicles wherever located, whether on or off the premises specified in the statute,[80] the lien nevertheless does not attach to a trespassing vehicle in a private parking lot.[81] The possessory lien cannot attach unless the garageman and the vehicle owner have reached an agreement concerning the charges involved.[82] A trespassing vehicle's owner either could be absent, as in *Capson*, at the time the car is towed and therefore be unable to agree to pay, or, like Currie, could appear during preparation for towing and protest the removal of his automobile. In neither situation would the parties have reached an agreement which could invoke the garageman's lien.[83] Statute statutory law thus fails to remedy the *Currie/Capson* problem.

Local Ordinances

Cities commonly have ordinances dealing with unauthorized parking on private property.[84] The Tempe[85] and Phoenix[86] city codes provide that

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75. *Id.* at § 33-1022.

76. *Id.* at § 33-1023 (Supp. 1983).

77. *Capson*, No. 17150-SA, slip op. at 4 (Ariz. Feb. 8, 1984); *Currie*, 132 Ariz. at 587, 647 P.2d at 1185 (1982).

78. 132 Ariz. at 586-87, 647 P.2d at 1184-85. A statutory lien, if in derogation of the common law, is to be strictly interpreted according to the statutory wording. *Id. See also*, *Capson*, No. 17150-SA, slip op. at 3 (Ariz. Feb. 8, 1984).

79. 132 Ariz. at 587, 647 P.2d at 1185. The court stated that the lien "only applies to garages, repair, and service stations." *Id.* More precisely, the lien applies to the *proprietors* of garages, repair [shops], and service stations. *See* ARIZ. REV. STAT. ANN. § 33-1022(B). Logically, a disabled vehicle towed to the garageman's premises at the request of its owner can be considered placed with the repairman and covered by the lien.

The language in Capson suffers from a similar lack of precision. The court stated: "The statute does not authorize a lien for the towing of automobiles, and there is, then, no statutory basis for allowing a lien on an automobile for towing." A strict interpretation of this language could lead to an anomalous result. In a case where a vehicle owner requested that his car be towed to a garage for repairs, the garageman would have a lien for all repairs to the vehicle, including parts and labor, but not for the cost of towing the vehicle to the repair shop. A sensible interpretation of the statutory language would include towing under the term "labor," if not under "supplies" as well, and the *Capson* language should be applied only to trespassing automobiles removed from private property without the vehicle owners' consent.

80. *See supra* note 79.

81. *Capson*, No. 17150-SA, slip op. at 4 (Ariz. Feb. 8, 1984); *Currie*, 132 Ariz. at 586-87, 647 P.2d at 1184-85.

82. *Capson*, No. 17150-SA, slip op. at 4 (Ariz. Feb. 8, 1984); *Currie*, 132 Ariz. at 587, 647 P.2d at 1185.

83. *See supra* text accompanying notes 64-69.

84. *See, e.g.*, PHOENIX, ARIZ., CITY CODE, art. XI, § 36-144 (Supp. 5-31-82); TEMPE, ARIZ.,

the person in lawful possession of a private parking area other than a driveway is deemed to have consented to unrestricted parking by the general public unless he has posted the area with signs "clearly visible and readable from any point within the parking area and at each entrance thereto."[87] The signs must state parking restrictions, disposition of trespassing vehicles, maximum costs which could be assessed for violation of the restrictions, the telephone number or address where the violator can locate his vehicle, and the number of the applicable city code section.[88] Compliance with these requirements allows towing companies to remove trespassing vehicles.[89] Neither Tempe nor Phoenix, however, provides for impoundment of vehicles as security for towing or storage charges. The Phoenix City Code requires the custodian of a towed vehicle to return it to the owner upon proof of identity and ownership, and to "request" that the owner pay the towing fees.[90] The Tempe Code expressly forbids private towing carriers to hold vehicles as security for accrued towing and storage charges.[91] As a result, Tempe and Phoenix towing companies which remove trespassing vehicles from private property are limited to recovering their costs and fees through billing and collection procedures.[92]

Unlike Tempe and Phoenix, Tucson has no code provisions dealing with towing or impounding carried out without police participation. Under the Tucson Code, driving or parking upon private property is illegal without the written permission of the person legally entitled to possession of the property is illegal.[93] The police department may impound any

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CITY CODE, ch. 33A, §§ 33A-5, -6 (1982) (as amended by Ordinance 992, November 1982); TUCSON, ARIZ., CODE, § 20-223 (1983).

85. TEMPE, ARIZ., CITY CODE, ch. 33A.

86. PHOENIX, ARIZ., CITY CODE, art. XI, § 36.

87. The full text of the Phoenix provision is as follows:

a. No person shall park a vehicle in any private driveway or on private property or private parking areas without the express or implied consent of the owner or person in lawful possession of such property.

b. The owner or person in lawful possession of any private parking area shall be deemed to have given consent to unrestricted parking by the general public in such parking area unless such parking area is posted with signs as prescribed by this section which are clearly visable [sic] and readable from any point within the parking area and at each entrance thereto. Such signs shall contain, as a minimum, the following information:

(1) Restrictions on parking.

(2) Disposition of vehicles found in violation of parking restrictions.

(3) Maximum cost to the violator, including storage fees and other charges, that could result from the disposition of his unlawfully parked vehicle.

(4) Telephone number or address where the violator can locate his vehicle.

(5) Each sign shall state "Phoenix City Code Sec. 36-144."

c. No tow truck operator acting under the authority of this section shall tow a vehicle from a private parking area unless the signs are posted as required by paragraph b. and contain all the information specified in paragraph b., nor shall he charge fees in excess of the amounts specified on the signs.

PHOENIX, ARIZ., CITY CODE, art. XI, § 36-144. The Tempe provision is virtually identical. TEMPE, ARIZ., CITY CODE, ch. 33A, § 33A-6.

88. PHOENIX, ARIZ., CITY CODE, art. XI, § 36-144; TEMPE, ARIZ., CITY CODE, ch. 33A, § 33A-6.

89. PHOENIX, ARIZ., CITY CODE, art. XI, § 36-144; TEMPE, ARIZ., CITY CODE, ch. 33A, § 33A-6.

90. PHOENIX, ARIZ., CITY CODE, art. II, § 36-8.

91. TEMPE, ARIZ., CITY CODE, ch. 33A, § 33A-8.

92. *See id. See also supra* note 90.

93. TUCSON, ARIZ., CODE, § 20-223.

unauthorized vehicle left unattended on private property for a period longer than half an hour.[94] To redeem a vehicle impounded by the police, the vehicle owner must pay the city a fee and "all other costs of removal and storage that may have accrued thereon."[95] A vehicle not redeemed within thirty days may be sold pursuant to state statute to recover the penalty, charges, and costs.[96] Tucson police, however, apparently do not enforce the impoundment feature of the code with respect to vehicles trespassing on private property.[97]

Where local ordinances authorize police departments to tow and impound trespassing vehicles, police assistance is ostensibly available to a landowner who wishes to rid his property of such vehicles.[98] As a practical matter, however, a city ordinance of this type may be of limited value where unauthorized parking occurs frequently.[99] Economic and social realities necessitate priorities of police activity.[100] Because removal of trespassing vehicles may be a relatively low priority, police response to a trespassing vehicle call may not be rapid enough to be effective.[101] Further, a departmental policy may exist against enforcing the ordinance due to legal, administrative, or other considerations.[102] If the availability of local police-authorized impoundment of trespassing vehicles is limited, the private landowner cannot rely on ordinances or statutes requiring police participation for effective protection of his parking area.

Where ordinances provide for private towing without police participation,[103] but impoundment is unavailable, the private property owner has

94. *Id.*

95. *Id.* at § 20-14 (1983).

96. *Id., citing* ARIZ. REV. STAT. ANN. § 28-1405.

97. Tucson Police Department officials explain that the departmental policy is to encourage citizens to solve disputes without police involvement whenever possible. The Department prefers not to participate in towing vehicles unless they are a threat to public safety, a condition which generally occurs only on public streets. In the case of a vehicular trespass on private property, the police will stand by to ascertain that the citizen can obtain a tow, but will not order a tow unless, despite diligent efforts, the citizen has failed to obtain one. The Department seeks to limit its involvement to making sure that no breach of the peace occurs and that a tow is available. Even where a criminal rule applies, the police may try to resolve conflicts through civil means instead. See *supra* note 93 and accompanying text. Police impoundment of vehicles is usually restricted to the safekeeping of evidence. Telephone conversations with Officers Colvin and LaFrance, Tucson Police Department, April, September, 1983.

98. *See supra* text accompanying notes 94-97.

99. *See supra* note 42. "The police have limited resources to devote to preventing violations of parking regulations." Sutton v. City of Milwaukee, 672 F.2d 644, 648 (7th Cir. 1982). Arguably, if police involvement were required in every instance, departmental resources and manpower would be unduly burdened.

100. The state's interest in towing parked automobiles is the strongest where they pose a threat to public safety. Tedeschi v. Blackwood, 410 F. Supp. 34, 44 (D. Conn. 1976). To determine the constitutionality of a Connecticut statute, the *Tedeschi* court distinguished among various priorities of police towing according to their urgency and potential for danger. *Id.* at 44-45. *See also infra* notes 153-54.

101. For example, the Tucson Code requires that a trespassing vehicle be parked unattended for at least one-half hour before the police may remove it. TUCSON, ARIZ., CODE, § 20-223. A business dependent on rapid ingress and egress of customers, such as a fast-food restaurant or convenience market, might find police-ordered towing with that limitation to be of relatively little assistance. A single trespass of one half hour might obstruct parking space for a series of potential customers, each of whose transactions at the restaurant or convenience market would take only a few minutes.

102. *See supra* note 97.

103. *See supra* text accompanying notes 85-92.

no complete remedy for unauthorized parking.[104] Local ordinances, like existing state statutes and common law,[105] fall short of providing an effective tool with which to protect privately owned parking areas in Arizona.

Even if individual communities enacted ordinances creating a possessory lien against trespassing vehicles, the lack of uniformity among such ordinances could pose serious problems which statewide regulation would avoid. Today's urban population is highly mobile, thanks to the automobile.[106] In many locations only invisible political boundaries separate two or more neighboring municipalities. The confusion resulting from inconsistent rules and enforcement among communities would be unfair to motorists and landowners alike. For this reason, a possessory lien to abate and deter vehicular trespass must have statewide application.[107] Resolution of the *Currie/Capson* problem must come from the legislature.

STATUTORY PRIVATE TOWING LIENS IN OTHER STATES

Arizona is not the first state to be faced with the problem posed by cases like *Currie* and *Capson*.[108] Courts of other states, finding existing law inadequate, have deferred to their respective legislatures.[109] Although the resulting statutes differ,[110] they provide a key element not found in prior law—reimbursement as a matter of right for services rendered without the vehicle owner's consent.[111] An Illinois case[112] and the resulting statute[113] illustrate the evolution of a legislative remedy for the *Currie/Capson* problem.

On facts similar to those in *Capson* and virtually identical to those in *Currie*, an Illinois appellate court reached the same result.[114] Unlike the Arizona courts, however, the Illinois court strongly recommended that the

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104. *See infra* text accompanying notes 114-116.

105. *See supra* text accompanying notes 54-83.

106. *See supra* note 1.

107. A short-sighted businessman might be content to have something enacted on the local level for his immediate benefit, but it is in his best interest to get compliance (no trespassing) rather than merely an opportunity to tow and impound a car.

108. *See infra* text accompanying notes 114-40.

109. Kunde v. Biddle, 41 Ill. App. 3d 223, 228, 353 N.E.2d 410, 415 (1976). Younger v. Plunkett, 395 F. Supp. 702, 714-15 (D. Pa. 1975). *See supra* note 45.

110. *See infra* text accompanying notes 117-38.

111. Younger v. Plunkett, 395 F. Supp. at 714.

112. Kunde v. Biddle, 41 Ill. App. 3d at 223, 353 N.E.2d at 410.

113. ILL. ANN. STAT. ch. 82, § 47a (Smith-Hurd Supp. 1983). The statute was amended by Pub. Act 80-1459, approved September, 1978; effective January, 1979, 1978 LAWS OF THE STATE OF ILLINOIS 1752-53. *See infra* note 119.

114. Kunde v. Biddle, 41 Ill. App. 3d at 223, 353 N.E.2d at 410.

The plaintiff in *Kunde v. Biddle*, like the plaintiffs in *Currie* and *Capson*, challenged a towing operator's right to assert a possessory lien against wrongfully parked automobiles removed from privately owned parking lots without the vehicle owner's permission. *Id.* at 225, 353 N.E.2d at 413. Like John Currie, the plaintiff in *Kunde* was present at the towing and attempted unsuccessfully to halt the towing procedure. *Id.* at 225, 353 N.E.2d at 412. The conclusions of law in *Kunde* were identical to those in *Currie*; a mere possessor had no authority to create a lien against an automobile without the owner's consent, *Id.* at 226, 353 N.E.2d at 413, and a garageman did not create a common law lien merely by towing a vehicle to a storage area. *Id.* at 225, 353 N.E.2d at 413. "An automobile taken from a private parking lot without the lawful possessor's consent may not be withheld from him for his failure to pay the expense of the towing and storage." *Id.* at 226, 353 N.E.2d at 415. The *Kunde* court decided that the plaintiff had proved conversion, *id.* at 227, 353 N.E.2d at 414, and held the towing company liable as a result. *Id.* at 228, 353 N.E.2d at 415.

legislature seek a solution to the problem.[115] Recognizing that private landowners do not have an adequate remedy unless the towing company is reimbursed as a matter of right under a lien system, the Illinois court placed upon the legislature the burden of establishing protection for both the landowner and the vehicle owner.[116]

Shortly after the Illinois decision, the state legislature amended the statutory repairman's lien[117] to include unauthorized vehicles towed from private parking areas.[118] Under the amended statute, the operator of an unauthorized vehicle consents to the towing and to the lien by parking in violation of properly posted warning signs.[119] The Illinois provision employs constructive consent[120] to bring the trespassing automobile within

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See also supra text accompanying notes 17, 36 & 37. In addition to possible civil liability, the defendant in *Capson* faced criminal charges for theft.

115. *Id.* at 227, 353 N.E.2d at 414. The Illinois court stated that it was "troubled : . . by the absence of meaningful remedies available to protect the use and operation of private parking lots." *Id.* at 227, 353 N.E.2d at 414.

116. *Id.* at 228, 353 N.E.2d at 415, *citing* Younger v. Plunkett, 395 F. Supp. 702, 714-15.

117. ILL. ANN. STAT., ch. 82, § 47a.

118. ILL. ANN. STAT., ch. 82, § 47a. *See infra* note 119.

119. The statute, with emphasis added to indicate the 1978 amended language, reads, in part:

> Every person expending labor, services, skill or material upon or furnishing storage for any chattel at the request of *or with the consent of* its owner, authorized agent of the owner, or lawful possessor thereof, in the amount of $200 or less, shall have a lien upon such chattel beginning upon the date of commencement of such expenditure of labor, services, skill, or materials or furnishing of storage, for the contract price for all such expenditure of labor, services, skill, or material, until the possession of such chattel is voluntarily relinquished to such owner or authorized agent, or to one entitled to the possession thereof.
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> *For the purposes of this Act, a person, other than a driver or a person otherwise in control of a fire, police, emergency or public utility vehicle on official business, consents to removal by towing of his or her vehicle when he or she without authorization parks such vehicle upon private property while having notice that unauthorized vehicles will be towed from such property by the owner of such property, or agent thereof, at the vehicle owner's expense, where such notice is provided pursuant to State law, local ordinances or regulation by any state or local agency.*

ILL. ANN. STAT. ch. 82, § 47a (emphasis added).

In 1979, Pub. Act 81-332, 1979 LAWS OF THE STATE OF ILLINOIS 1570-71 added the following specific requirements for warning signs, completing the text of the statute:

> Such notice must include a sign of at least 24 inches in height by 36 inches in width posted in a conspicuous place in the affected area at least 4 feet from the ground but not more than 8 feet from the ground. Such sign shall be either illuminated or painted with reflective paint, or both and shall state the amount of towing charges to which the person may be subjected. However, the requirement of the sign provided for in this section shall not apply to residential property which, paying due regard to the circumstances and the surrounding area, is clearly reserved or intended exclusively for the use or occupation of residents or their vehicles.

Id.

In tandem with the amendments to the lien statute, the legislature created the Illinois Commercial Relocation of Trespassing Vehicles Law, Pub. Act 80-1459, approved September, 1978, effective January, 1979. 1978 LAWS OF THE STATE OF ILLINOIS 1755-65 (1978). Under the relocation law, the Illinois Commerce Commission licenses and regulates the fees and activities of "commercial vehicle relocators." Relocators are any persons or entities engaged in the business of removing trespassing vehicles from private property and storing them elsewhere. ILL. ANN. STAT. ch. 95½, §§ 18a-200 to 700 (Supp. 1983).

120. Constructive consent is imputed to a party by legal interpretation or construction of his conduct, as distinguished from a consent which he actually expresses. BLACK'S LAW DICTIONARY 284 (5th ed. 1979). Adequately posted warnings can give rise to constructive consent. For example, a large sign at the entrance to a military base stated: "WARNING. U.S. AIR FORCE BASE . . . . WHILE ON THIS INSTALLATION ALL PERSONNEL AND THE PROPERTY UNDER THEIR CONTROL ARE SUBJECT TO SEARCH." The Tenth Circuit held that any

the class of chattels subject to a possessory lien for services rendered, labor performed, storage furnished, and materials added.[121] By amending an existing statute, the legislature accomplished what the courts could not.[122] Statutory constructive consent overcame the obstacles of lack of privity and mutual assent between trespasser and towing company.[123] At the same time, the statute assured vehicle owners that adequate warning signs would advise them of any parking restrictions imposed by real property owners.[124]

Florida has a separate statutory lien for recovering, towing, or storing vehicles.[125] More detailed than its Illinois counterpart,[126] it provides in part for filing a complaint and posting bond to enable the owner to recover his vehicle pending a dispute concerning the validity of the taking.[127] The Florida provision does not speak in terms of consent, but notice is required; parking areas must be posted with adequate warning signs before the lien can attach.[128]

Similarly, recent amendments to Pennsylvania's Vehicle Code[129] re-

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persons who entered the base impliedly consented to be searched. United States v. Vaughan, 475 F.2d 1262, 1264 (Okla. 10th Cir. 1973). Similarly, a prospective airline passenger who appealed a firearms conviction was deemed to have consented to an x-ray scan of his briefcase where "the public [is] increasingly aware of the security measures used in airports[,] [s]igns were posted . . . clearly informing passengers that they could refuse to submit to any inspection," and "the alternatives presented to a potential passenger approaching the screening area are so self-evident that his election to attempt to board necessarily manifests acquiescence in the initiation of the screening process." United States v. Henry, 615 F.2d 1223, 1228-29 (9th Cir. 1980). *See also* United States v. Wehrli, 637 F.2d 408, 409 (5th Cir.), *reh'g denied*, 642 F.2d 1210, *cert. denied*, 452 U.S. 942 (1981) (consent to search can be implied at an airport security checkpoint).

The wholly voluntary nature of the placement of a car on private property is analogous to a prospective passenger's voluntary acquiescence to the conditions of an airport security checkpoint. Moreover, the alternatives presented to the driver who considers parking on private property are more numerous than the options available to the prospective airline passenger. The driver can park elsewhere. The traveler must decide whether to submit to a possible search or to forego the flight. In light of cases like *Vaughan, Henry*, and *Wehrli*, drivers who park in violation of properly posted parking restrictions should be subject to constructive consent because the circumstances satisfy the aforementioned factors of notice, voluntariness, and available alternatives.

121. *See supra* note 119.

122. *See supra* text accompanying notes 116.

123. *See supra* text accompanying notes 77-83; note 119.

124. *See supra* note 119.

125. FLA. STAT. ANN. §§ 713.78, § 715.07 (Supp. 1983). *See supra* note 119.

126. ILL. ANN. STAT. ch. 82, § 47a. *See supra* note 119.

127. FLA. STAT. ANN. § 713.78(4)(b) and (c). The amendments to Arizona's garageman's lien proposed in this Note are designed to avoid participation of government officials in any aspect of the removal of trespassing vehicles. If, however, private towing under the proposed statute constitutes state action, procedural due process may require a hearing of the type found in the Florida statute. *See infra* text accompanying notes 141-58. California's vehicle code requires notice and hearing for most types of towing, but specifically exempts from that requirement trespassing vehicles removed from private property. CAL. VEH. CODE § 22852(3)(c) (West Supp. 1983).

128. FLA. STAT. ANN. § 715.07(2)(a)(5) (Supp. 1983).

129. PA. CONS. STAT. ANN. tit. 75, § 3353 (Purdon Supp. 1983-84). The statute reads, in pertinent part:

> (b)(1) No person shall park or leave unattended a vehicle on private property without the consent of the owner or other person in control or possession of the property except in the case of emergency or disablement of the vehicle, in which case the operator shall arrange for the removal of the vehicle as soon as possible.
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> (2) The provisions of this subsection shall not apply to private parking lots unless such lots are posted to notify the public of any parking restrictions and the operator of the vehicle violates such posted restrictions. For the purposes of this section "private parking lot" means a parking lot open to the public or used for parking without charge;

quire that any parking restrictions be posted. The operator of the vehicle must have violated those restrictions before the lien can attach.[130] The statute further provides that any municipality may set rates and regulate towing services in connection with the removal of unauthorized vehicles,[131] and it imposes a fine for violation of any of the provisions of the statute either by the vehicle operator or by any other person.[132]

The California Vehicle Code allows the lawful possessor of private property to remove unauthorized vehicles[133] and provides a possessory

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or a parking lot used for parking with charge. The department shall define by regulation what constitutes adequate posting for public notice.

(c) Property owner may remove vehicle.—The owner or other person in charge or possession of any property on which a vehicle is parked or left unattended in violation of the provisions of subsection (b) may remove or have removed the vehicle at the reasonable expense of the owner of the vehicle. Such person who removes a vehicle left parked or unattended in violation of the provisions of subsection (b) shall have a lien against the owner of the vehicle, in the amount of the reasonable value of the costs of removing the vehicle. Any city, borough, incorporated town or township may, by ordinance, provide for rates to be charged for removal of vehicles and for municipal regulation of authorized towing services.

(e) Penalty.—Any person violating any provision of this section is guilty of a summary offense and shall, upon conviction, be sentenced to pay a fine of not more than $15.

130. PA. CONS. STAT. ANN. 75 § 3353(b)(2).

131. *Id.* at (c).

132. *Id.* at (e).

133. CAL. VEH. CODE § 22658 (West Supp. 1983) provides:

(a) The owner or person in lawful possession of any private property may, subsequent to notifying, by telephone or, if impractical, by the most expeditious means available, the city police or county sheriff, whichever is appropriate, cause the removal of a vehicle parked on such property to the nearest public garage, if there is displayed, in plain view . . . at all entrances to the property, a sign prohibiting public parking and indicating that vehicles will be removed at the owner's expense, and containing the telephone number of the local traffic law enforcement agency. The sign shall be of such size as specified by ordinance.

(b) The person causing removal of such vehicle shall, if the person knows or is able to ascertain from the registration records of the Department of Motor Vehicles the name and address of the registered and legal owner thereof, immediately give, or cause to be given, notice in writing to the registered and legal owner of the fact of such removal, the grounds for the removal, and indicate the place to which the vehicle has been removed. In the event the vehicle is stored in a public garage, a copy of the notice shall be given to the proprietor of the garage. The notice provided for in this section shall include the amount of mileage on the vehicle at the time of removal. If the person does not know and is not able to ascertain the name of the owner or for any other reason is unable to give the notice to the owner as provided in this section, the person causing removal of a vehicle shall comply with the requirements of Section 22853 relating to notice in the same manner as applicable to an officer removing a vehicle from private property.

(c) The provisions of this section shall not limit or affect any right or remedy which the owner or person in lawful possession of private property may have by virtue of other provisions of law authorizing the removal of a vehicle parked upon such property.

(d) The owner of a vehicle removed from private property pursuant to subdivision (a) may recover for any damage to the vehicle resulting from any intentional or negligent act of any person causing the removal of, or removing, the vehicle.

(e) Any owner or person in lawful possession of any private property causing the removal of a vehicle parked on that property, shall be liable for any storage or towing charges whenever there has been a failure to post a sign as provided for in subdivision (a).

(f) No person shall cause the removal of any vehicle from a privately owned and operated fee-paid parking facility until at least 12 hours after the expiration of the period for which the fee is paid for the vehicle. This subdivision does not apply to any parking space or stall rented to a person and reserved or otherwise clearly marked or designated for the use of that person.

lien for the garageman who tows and stores them.[134] Each entrance to the property must display a sign prohibiting public parking and advising motorists that vehicles will be removed at the owners' expense. Each sign must contain the telephone number of the local traffic law enforcement agency. The dimensions of the sign are to be specified by local ordinance. Notice of the towing and storage must be given both to the appropriate law enforcement agency before towing can occur[135] and to the vehicle owner immediately afterward.[136] The landowner is liable for towing or storage charges if he has failed to comply with the posting requirements;[137] he is also liable for damage to the vehicle resulting from any negligent or intentional act of a person removing the vehicle or causing its removal.[138]

The effect of the lien is the same in all of the foregoing examples. A person who lawfully removes a trespassing vehicle from private property avoids potential liability and gains some assurance of prompt reimbursement for towing and storage charges.[139] The owner of a parking area has an effective means of controlling the use of his property.[140]

ARIZONA SHOULD AMEND ITS GARAGEMAN'S LIEN

There is no need to draft a wholly new statute to solve the *Currie/Capson*[141] problem. The existing garageman's lien[142] can be amended to protect private property from trespassing vehicles.[143] By deleting pres-

134. CAL. VEH. CODE § 22851 (West Supp. 1983) provides:

(a) Whenever a vehicle has been removed to a garage under the provisions of this chapter and the keeper of the garage has received the notice or notices as provided herein, the keeper shall have a lien dependent upon possession for his compensation for towage and for caring for and keeping safe such vehicle for a period not exceeding 60 days or, if an application for an authorization to conduct a lien sale has been filed pursuant to Section 3068.1 of the Civil Code within 30 days after the removal of the vehicle to the garage, 120 days and, if the vehicle is not recovered by the owner within . . . such period or the owner is unknown, the keeper of the garage may satisfy his lien in the manner . . . prescribed in this article. The lien shall not be assigned.

(b) No lien shall attach to any personal property in or on the vehicle. Such personal property in or on the vehicle shall be given to the registered owner or such owner's authorized agent upon demand. The lien holder shall not be responsible for property after any vehicle has been disposed of pursuant to this chapter.

135. CAL. VEH. CODE § 22658(a).

136. *Id.* at (b).

137. *Id.* at (e).

138. *Id.* at (d).

139. *See supra* text accompanying notes 38-44, 73-76; *see infra* notes 146-49.

140. *See supra* text accompanying note 44.

141. Currie v. Dooley, 132 Ariz. 584, 647 P.2d 1182 (Ct. App. 1982). Capson v. Superior Court, No. 17150-SA, slip op. (Ariz. Feb. 8, 1984). *See supra* text accompanying notes 3-18, 38-44.

142. ARIZ. REV. STAT. ANN. § 33-1022(B) (1974). *See supra* note 5.

143. *See infra* text accompanying notes 149-51, 171-80. An alternative to amending the garageman's lien would be to enact an entirely new statute. ARIZ. REV. STAT. ANN. §§ 28-871 to -874 regulate "stopping, standing or parking." Provisions could be added under those sections to allow the lawful possessor of properly posted private property to remove unauthorized vehicles, and could provide a possessory lien for any non-governmental person who causes removal of a vehicle to a public garage. California's provisions to that effect appear in the vehicle code, integrated with related laws regulating towing originated by law enforcement officials. *See* CA. VEH. CODE §§ 22658, 22851, 22852.

Police-ordered towing involving vehicles parked or abandoned on public property is not the focus of this Note. *See supra* notes 19,100. *But see infra* notes 153-54. The author has chosen a conservative approach to the *Currie/Capson* problem by proposing statutory changes affecting only private towing from private property. Although it would be convenient to have all provisions

ent language which limits the beneficiaries of the lien to proprietors of garages, repair shops, and service stations,[144] and by adding provisions based on statutes enacted by other states,[145] the Arizona Legislature can preserve the existing effect of the garageman's lien[146] while extending its scope to meet the needs of private property owners.

This Note proposes an amended statute which solves the *Currie/Capson* problem while preserving the function of the original lien. The amended language preserves the requisite contractual or consensual relationship.[147] Where the vehicle owner voluntarily places the vehicle with the proprietor of a garage, repair shop, or service station, agreement must exist between the parties before the lien can attach, and the contract price determines the amount of the lien.[148] Proprietors of garages, repair shops, and service stations therefore continue to qualify for the lien by virtue of their expenditure of labor and materials in making repairs requested by automobile owners.[149]

In addition to accomplishing the purposes of the original lien, however, the proposed amended version protects private property from unauthorized parking. Persons who tow trespassing vehicles from properly posted private property acquire the lien, which assures reimbursement for their services and protects them from potential civil and criminal liability.[150] The amendment imposes constructive consent[151] upon drivers who park their cars in violation of posted restrictions.[152] Trespassers thus impliedly consent to the services and to the accompanying lien. The proposed version includes other features designed to avoid disputes and prevent abuses. The appendix discusses those features in detail.

CONSTITUTIONALITY OF THE PROPOSED LIEN

A person's car is property,[153] and the state may not deprive him of it without due process of law.[154] A statute granting a possessory towing and

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dealing with all types of towing and towing liens carefully integrated in one body, as exemplified by the California Vehicle Code, *supra*, there is no need to undertake a task of that magnitude to solve the problem. In fact, attempts to attach provisions, inspired by *Currie*, to proposed legislation of larger scope have been unsuccessful. House Bill 2097, introduced for the third consecutive year in 1983, contained new provisions and extensive revisions of existing statutes, designed to provide a possessory lien for towing ordered by either the vehicle owner or a law enforcement officer. The legislature rejected amendments adding towing of unauthorized vehicles requested by the owner of private property. House Bill 2097 died near the end of the 1983 legislative session.

144. *See supra* note 5 and text accompanying notes 78-83.

145. *See supra* notes 117-38 and accompanying text.

146. *See supra* text accompanying notes 75-76.

147. *Capson*. No. 17150-SA, slip op. at 4 (Ariz. Feb. 8, 1984); *Currie*, 132 Ariz. at 587, 647 P.2d at 1185. *See also supra* text accompanying note 82.

148. *See* ILL. ANN. STAT. ch. 82, § 47a, *supra* note 119.

149. *See supra* text accompanying notes 73-75.

150. *See supra* note 11. Section 252 of the RESTATEMENT (SECOND) OF TORTS states: "One who would otherwise be liable to another for trespass to a chattel or for conversion is not liable to the extent that the other has effectively consented to the interference with his rights."

151. *See supra* notes 119-20.

152. *See supra* note 119.

153. Sutton v. City of Milwaukee, 672 F.2d 644, 645 (7th Cir. 1982).

154. *See id.* The fourteenth amendment to the United States Constitution provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or

storage lien only to non-governmental persons who remove unauthorized vehicles from private property probably does not trigger constitutional due process analysis.

Several factors suggest that the proposed statute does not raise constitutional issues. First, the activities authorized by the proposed statute may not involve state action. As a result, constitutional due process requirements may not apply.[155] Second, case law evidences no challenges to the constitutionality of similar statutes in other states.[156] Third, at least one state legislature has specifically exempted private towing activity from post-taking hearing requirements, presumably because of no perceived need to provide a hearing where the government plays no role in the towing and impoundment.[157] Despite these factors, however, no clear answer emerges.

State Action

Procedural due process does not apply to purely private conduct; it applies only to conduct attributable to the state.[158] State action, therefore, is a threshold requirement where an individual deprived of his property wishes to invoke constitutional protection.[159] If no state action is involved in the activities authorized by the proposed amendment to Arizona's garageman's lien, constitutional due process strictures will not apply.

The leading authority on state action and prejudgment takings is *Flagg Brothers v. Brooks*.[160] In *Flagg Brothers*, the United States Supreme Court held that where an individual acts pursuant to a state statute author-

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property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

155. Some form of due process is required where the state participates directly in towing and impounding. *See supra* note 19. Due process is a flexible concept, and its procedural protections vary depending on the nature of the deprivation. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). To determine what procedural safeguards are required in a given situation calls for a "sensitive inquiry" into the competing governmental and private interests affected by the state action. Goichman v. Rheuban Motors, Inc., 682 F.2d 1320, 1324 (9th Cir. 1982). The United States Supreme Court set the standards for this inquiry in Mathews v. Eldridge, 424 U.S. at 335. Under the *Mathews* test, the court must balance various factors. It must quantify the private interest affected by the official action. It must evaluate the risk of an erroneous deprivation of that interest under the existing procedures and consider the probable value of additional or substitute safeguards. Further, it must assess the fiscal and administrative burdens that any additional or substitute safeguards would entail. *Id.*

Courts applying the *Mathews* test to automobile impoundment, while acknowledging that the private interest in the uninterrupted use of automobiles is significant, have focused on the length of the deprivation to quantify the owner's property interest. *See, e.g.*, Goichman v. Rheuban Motors, Inc., 682 F.2d at 1320; Sutton v. City of Milwaukee, 672 F.2d at 644; Stypmann v. City and County of San Francisco, 557 F.2d 1338 (9th Cir. 1977). *See also supra* note 19. The Ninth Circuit, applying the balancing test to vehicles held under California's towing lien, found a five-day deprivation unconstitutional, but held a forty-eight-hour detention insufficient to outweigh the government's interest in efficient and inexpensive towing of illegally parked automobiles. *See* Stypmann v. City and County of San Francisco, 557 F.2d at 1344 (a five-day delay between impoundment and hearing was "clearly excessive"); Goichman v. Rheuban Motors, Inc., 682 F.2d at 1325.

156. *See infra* text accompanying notes 167-68.

157. *See infra* text accompanying notes 169-70.

158. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978). *See infra* text accompanying notes 169-70.

159. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982).

160. Flagg Bros., Inc. v. Brooks, 436 U.S. at 149.

izing his private conduct, and the state does not participate beyond the enactment of the statute itself, state action does not exist.[161] So long as the activities authorized by the statute are carried out without the participation of state officials or their equivalent, constitutional due process requirements are inapplicable.[162]

Flagg Brothers may not settle the question, however. A distinction between the activities authorized by the New York statute in *Flagg Brothers* and those authorized by the proposed amendments to Arizona's garageman's lien may be crucial. The warehouseman's lien upon which Flagg Brothers, Inc. sought to foreclose existed at common law before it was codified in the Uniform Commercial Code and adopted by the state of New York.[163] In contrast, no nonconsensual possessory lien on trespassing chattels existed at common law.[164] Accordingly, *Flagg Brothers* may not apply where a statute authorizes a private action for which there was no common law right. As a result, the mere existence of the statute, even without overt participation by government officials in the activities it authorizes, could constitute state action. Although the statutory lien would not compel private conduct, it would authorize private conduct that historically was impermissible.

A related problem arises when *Flagg Brothers* is applied to the proposed expansion of the garageman's lien. While the initial relationship between the parties in *Flagg Brothers* was consensual, the proposed Arizona statute imposes only a *constructive* debtor-creditor relationship between a towing company or landowner and the owner of an unauthorized vehicle.[165] Thus, to regard either the towing company or the landowner in a *Currie/Capson* situation as a creditor for purposes of *Flagg Brothers* analysis requires an additional step not expressly supported by the *Flagg Brothers* holding. Courts may be unwilling to reach that far in order to bring the proposed prejudgment possessory lien under the *Flagg Brothers* umbrella.

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161. *Id.* at 164. In support of its holding, the Court in *Flagg Bros.* emphasized the "total absence of overt official involvement" in the circumstances of the case. *Id.* at 157. In *Flagg Bros.* the seizure and sale of plaintiff's personal property stored without payment of warehouse fees were private and analogous to common law self-help remedies. *Id.* at 162 n.12. The Court pointed out that where a statute actually delegates to private parties powers previously exclusively reserved to the government, the individual may be regarded as an arm of the state, and thus his conduct will be subject to constitutional scrutiny. *Id.* at 157-66. However, where the state does not compel private conduct, but only authorizes it, state action cannot exist unless the state overtly participates in the questioned activity. *Id.* at 164-66. Recently, in an apparent retrenchment of the broad rule of *Flagg Bros.*, the Court found state action where the involvement of state officials was only minimal—filling out forms and serving process. Lugar v. Edmondson Oil Co., Inc., 457 U.S. at 922. Nevertheless, the mere enactment of a state statute authorizing one citizen to seize the property of another does not constitute state action. Flagg Bros., Inc. v. Brooks, 436 U.S. at 164-66.

162. Lugar v. Edmondson Oil Co., 457 U.S. at 939 (action by a private party pursuant to a state statute, without more, does not make that party a "state actor").

163. 436 U.S. at 161-62, nn.11-12.

164. *See supra* notes 54-62 and accompanying text.

165. *See supra* text accompanying notes 64-72. The Arizona Court of Appeals refused to find an implied agreement between Currie and the towing company or the shopping center. Currie v. Dooley, 132 Ariz. at 587, 647 P.2d at 1185. Similarly, the Arizona Supreme Court found no implied agreement between a towing company and a driver whose car was removed without the driver's permission. *Capson*, No. 17150-SA, slip op. at 4, 5 (Ariz. Feb. 8, 1984).

Despite their factual dissimilarities, however, *Flagg Brothers* and the private towing cases invite argument by analogy. In *Flagg Brothers*, the plaintiff had stopped paying storage fees at the Flagg Brothers, Inc. warehouse. The company sought to dispose of plaintiff's chattels in order to free up its valuable storage space and, presumably, to recover all or part of the unpaid fees.[166] To the extent that unauthorized chattels occupy valuable warehouse space without compensation to the owner, the harm done to the business opportunity and to the owner's right to control the use of his warehouse space closely resembles the potential harm facing a parking lot owner in a *Currie/Capson* situation.[167]

No meaningful basis may exist for a distinction in terms of the injuries to the real property interests. One could further argue that *Flagg Brothers* should not be strictly limited to its facts—that the holding encompasses remedies *analogous* to those existing at common law, even when in fact they cannot be found at common law.

If *Flagg Brothers* encompasses remedies not found in the common law but analogous to creditors' self-help remedies, the proposed statute involves no state action. The statute neither specifies nor contemplates governmental activity. The authorized actions are wholly private in character. Thus, under this interpretation of *Flagg Brothers*, the statute, like others authorizing purely private conduct, escapes constitutional due process proscriptions.

No Recorded Challenges to Constitutionality

Various states have enacted private possessory towing liens of the type proposed in this Note,[168] but no recorded cases have challenged the constitutionality of those lien statutes. The absence of any such cases could indicate a generally negative assessment of the likelihood of a successful challenge. In addition, local ordinances may supply sufficient procedural safeguards to obviate any need to seek those protections elsewhere.[169] Speculation concerning the absence of cases, however, contributes only minimally toward determining whether a private possessory towing lien must satisfy procedural due process requirements. At most, the absence of recorded decisions suggests that potential litigants believe the mere enactment of a statutory possessory towing lien is not enough to invoke constitutional constraints.

Specific Legislative Exemption From Procedural Protection

Although California requires a timely post-taking hearing to deter-

166. 436 U.S. at 162 n.12 (1978).

167. The *Currie/Capson* problem is perhaps worse because unlike the warehouseman, the parking lot owner has no opportunity to screen his potential "debtors" in an effort to reduce the risk of an unlawful infringement upon his property interest.

168. *See supra* text accompanying notes 117-38.

169. For example, although a California statute did not by itself meet due process requirements for police-ordered towing and impounding, the statute could be saved if implemented in conjunction with an ordinance providing a sufficiently prompt hearing. Goichman v. Rheuban Motors, Inc., 682 F.2d at 1323.

mine the validity of any towing or impoundment involving public officials or their agents,[170] the California Vehicle Code specifically exempts from that requirement wholly private activity involving vehicles removed from private property without police participation.[171] Apparently, the California legislature saw no need to provide a hearing under those circumstances.

None of the foregoing factors disposes of the question whether constitutional requirements apply to the proposed statute. Taken together, however, they suggest that private towing and impounding enjoy a freedom from constitutional strictures not shared by governmental activity. Resolution of the question must await judicial action.

CONCLUSION

Ample parking for customers' automobiles is crucial to the success of many business enterprises. Existing Arizona law fails to adequately protect business property from unauthorized parking. In *Currie v. Dooley* and *Capson v. Superior Court* the Arizona courts held that the state's statutory garageman's lien, which gives automotive repairmen a right of possession until they receive reimbursement for parts and labor, does not apply to trespassing vehicles towed without their owners' consent. Under common law a lawful possessor of real property has the right to call a towing company to remove a trespassing vehicle, but neither he nor the towing company can legally impound the vehicle for payment of towing or storage fees. After *Currie* and *Capson*, private tow-away warnings which threaten impoundment are unsupported by existing law. With no protecting lien, towing companies that remove and impound trespassing vehicles risk civil and criminal liability. In addition, they may be reluctant to respond without the assurance of prompt reimbursement.

In the wake of *Currie* and *Capson*, the Arizona businessman faces a dilemma: whether to preserve customer or tenant parking by paying uncollected towing fees out of his own pocket or to endure the possible loss of business opportunity caused by trespassing vehicles. Without a possessory lien, a landowner has no effective means of restricting the use of his parking area. The problem demands a legislative solution. Other states have responded accordingly. The Arizona Legislature should amend the garageman's lien to include trespassing vehicles towed from private parking areas. This Note proposes an amended statute to accomplish that purpose.

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170. CAL. VEH. CODE § 22852 reads, in pertinent part:

> Whenever an authorized member of a public agency directs the storage of a vehicle, as permitted by this chapter, or upon the storage of any vehicle as permitted herein. . . the agency or person directing the storage shall provide the vehicle's registered and legal owners of record, or their agents, with the opportunity for a post-storage hearing to determine the validity of the storage. . . . Any such hearing shall be conducted within 48 hours of the request, excluding weekends and holidays.

171. *Id.* at § 22852(a)(3)(c).

APPENDIX

PROPOSED STATUTE

Be it enacted by the Legislature of the State of Arizona:

Section 33-1022, Arizona Revised Statutes, is amended to read:

33-1022. Proprietors of garages and livery stables, and any persons towing unauthorized vehicles from private property[172]

A. Proprietors of public stables shall have a lien on all animals placed with them for feed or care and upon vehicles or other equipment placed in their care for the amount of the charges against them.[173]

B. Every person expending labor, services, skill or material upon or furnishing storage for any automobile or other motor vehicle at the request of or with the consent of its owner, authorized agent of the owner, or lawful possessor thereof, shall have a lien upon such vehicle beginning upon the date of commencement of such expenditure of labor, services, skill, or materials or furnishing of storage, for the contract price for all such furnishing of storage, expenditure of labor, services, skill, material, or storage space, until the possession of such vehicle is voluntarily relinquished to such owner, or authorized agent, or to the one entitled to the possession thereof.

1) For purposes of this Act, a person, other than a driver or a person otherwise in control of a fire, police, emergency or public utility vehicle on official business, consents to removal by towing and to storage of his or her vehicle when he or she without authorization parks such vehicle upon private property posted with notice prohibiting public parking and stating that unauthorized vehicles will be towed from such property by the owner of such property, or by any person acting at the request thereof, at the vehicle owner's expense, where such notice is provided pursuant to state law, local ordinances, or regulation by any state or local agency. Such notice must include a sign of at least 24 inches in height by 36 inches in width posted in a conspicuous place in the affected area at least 4 feet from the ground but not more than 8 feet from the ground. Such sign shall be either illuminated or light-reflective, or both, and shall state the amount of towing and storage charges to which the person may be subjected. Such sign shall also state a telephone number that the owner, authorized agent, or the person entitled to possession may call to discover the location of the vehicle. However, the requirement of the sign provided for in this section shall not apply to residential property which, paying due regard to the circumstances and the surrounding area, is clearly reserved or intended exclusively for the use or occupation of residents or their vehicles.

2) The lien against a vehicle parked without authorization on private property shall attach at the instant at which towing equipment is brought into physical contact with the unattended vehicle. The lien and accompanying right to tow and to detain the vehicle shall cease upon tender of cash payment for all reasonable towing and storage charges pro-

172. Proposed new title. Compare with existing ARIZ. REV. STAT. ANN. § 33-1022.

173. The language of Paragraph A is unchanged. *See* ARIZ. REV. STAT. ANN. § 33-1022(A).

rated as posted on the warning sign. If the registered owner or other legally authorized person in control of the vehicle shall arrive during removal or towing of the vehicle and shall agree to remove the vehicle, the vehicle shall be disconnected from the towing or removal apparatus and that person shall be allowed to remove the vehicle without interference upon the cash payment of a reasonable service fee of not more than one half of the rate for such towing service as posted on the warning sign.[174]

C. The lien shall not impair any other lien or conditional sale of record at the time the labor, materials, supplies and storage were commenced to be furnished, unless furnished with the knowledge and consent of the record lienor or vendor.[175]

COMMENTS

The proposed amendments to section 33-1022(B) borrow heavily from the language of the Illinois and Florida statutes,[176] but with important modifications. First, automobiles and other motor vehicles are the sole subjects of the amended section 33-1022(B). Other items of personal property remain governed by section 33-1021. Second, the proposed language extends constructive consent to storage in addition to towing for the purpose of avoiding inconsistent interpretation. Third, the amendment utilizes the words "posted with notice" in place of the words "while having notice" as found in the Illinois statute.[177] The intended effect of the change is to require the driver to look for adequately posted warning signs rather than placing the burden on the landowner to show that the driver had *actual* notice of the signs' message.[178] Fourth, the amended version does not limit the right to tow to the landowner or "agent" thereof.[179] Instead, the landowner or "any person acting at the request" of the landowner can acquire a lien pursuant to the proposed amendment. This change is intended to avoid disputes over whether a towing company or other person impounding an automobile is acting in the capacity of agent or independent contractor.[180] Fifth, consistent with the need to include

174. The language of Paragraph B has been entirely rewritten. *Cf. supra* note 5.

175. The language of Paragraph C is unchanged. *See* ARIZ. REV. STAT. ANN. § 33-1022(C).

176. *See supra* notes 119, 125-28 and accompanying text.

177. *See supra* note 119 (amended portion of the Illinois statute in italics).

178. Although the proposed amendment does not specify the exact language needed to prohibit public parking, a recent California decision suggests a need for careful wording to accomplish the landowner's purposes. The California statute requires adequate signs "prohibiting public parking." CAL. VEH. CODE, § 22658(a). *See supra* note 120. In People v. James, 122 Cal. App. 3d 25, 177 Cal. Rptr. 110 (1981), the court held that signs restricting parking "to customers only" could reasonably be construed to allow those parking in the lot to utilize the lot as a public parking area while doing their errands so long as they patronized the landowner's business. The *James* court suggested that the landowner make his intent clear by allowing parking "while shopping at El Don Liquor" or by setting a brief time limit. *Id.* at 36-37, 177 Cal. Rptr. at 117. The sign posted at the Tempe Shopping Center permitted parking for customers "only while transacting business herein." *See supra* note 68.

179. *See supra* note 119 (amended portion of the Illinois statute in italics).

180. *See* Currie v. Sechrist, 119 Ariz. at 469, 581 P.2d at 703 (because the towing company which removed plaintiff's trespassing automobile was acting as an independent contractor with respect to the shopping center authorizing and requesting the towing, the shopping center was not liable for the act of conversion committed by the towing company). Arguably, both the landowner and the towing company should be liable for the erroneous removal and detention of a

storage in the provision for constructive consent, storage fees must be stated on the warning sign along with towing charges. Sixth, the sign must provide a telephone number for use in ascertaining the whereabouts of a towed vehicle, a feature not included in the Illinois statute. This is intended to avoid undue anxiety on the part of the driver, who might otherwise attribute the car's absence to theft, and to allow him to begin recovery efforts. Seventh, a feature not found in the Illinois, Florida, or Pennsylvania statutes, the amendment fixes an exact, readily determinable instant at which the lien attaches—physical contact between the towing apparatus and the trespassing vehicle.[181] The primary objective of this provision is to avoid disputes at the scene and possible resulting breaches of the peace. Further, this provision places the risk of an abortive mission upon the towing company. If the automobile's owner appears before the towing begins, the tow truck operator may have to return to base without compensation for the callout. This could encourage restraint on the part of the caller, whose credibility with the towing companies could suffer if often at the same location owners return for their automobiles before the towing operators affixes his equipment. Alternatively, of course, some arrangement could be made between the caller and the towing company for minimum compensation to be paid by the caller himself in the event of a frustrated callout. In like fashion, this could result in some exercise of restraint by the landowner.

vehicle. In any event, unambiguous language in the amended statute could protect *any person* who removes a trespassing vehicle pursuant to the statute.

181. California's Vehicle Code states that the lien attaches "when the vehicle has been removed to a garage." CAL. VEH. CODE § 22851. The California Court of Appeals construed those words literally, finding no possessory lien until the vehicle is "physically within [the] garage." People v. James, 122 Cal. App. 3d at 38, 177 Cal. Rptr. at 117 (1981). As a result, in California the tow operator is required to relinquish possession on demand at any time prior to completing his return to the storage yard. He can be flagged down, for example, by the vehicle owner following in another car. *See id.* at 37, 177 Cal. Rptr. at 117. The California approach may be dangerous because it encourages hasty hookups and hurried returns to the garage. Proper hookups and careful driving are essential to avoid property damage and to reduce the risk of accidents on public streets. For this reason, the proposed Arizona law fixes the lien's point of attachment at the instant of initial contact between the towing equipment and the vehicle to be towed. Admittedly, some tow operators will still hurry to arrive and bring their equipment into contact with the trespassing vehicle, but under the proposed scheme at least the return leg of the towing trip, the one with the greatest potential for danger, lacks any motive for haste.