RECENT DECISIONS

I. CRIMINAL LAW

FACILITATION: SHOULD IT BE REGARDED AS A LESSER INCLUDED SUBSTANTIVE OFFENSE WHEN PROSECUTION IS BASED ON THE DEFENDANT'S COMPLICITY?

Read together, Arizona's facilitation[1] and accomplice[2] statutes suggest that the crime of facilitation is a lesser included offense[3] of the crime of

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1. The Arizona facilitation statute provides:

> A person, other than a peace officer acting in his official capacity within the scope of his authority and in the line of duty, commits facilitation if, acting with knowledge that another person is committing or intends to commit an offense, such person knowingly provides such other person with means or opportunity for the commission of the offense and which in fact aids such person to commit the offense.

ARIZ. REV. STAT. ANN. § 13-1004 (Supp. 1983).

The statute as originally enacted and effective at the time of the events underlying this Casenote also contained the following provision: "If the offense is completed, and the other necessary elements are present, such other person shall be accountable as prescribed by Section 13-303." ARIZ. REV. STAT. ANN. § 13-1004 (1978). This would require, per ARIZ. REV. STAT. ANN. § 13-303 (1978), that the facilitator of a completed offense be punished as if he were an accomplice. The statute, as it then existed, however, contradicted itself because facilitation requires commission of an act "which in fact aids such person to commit the offense." ARIZ. REV. STAT. ANN. § 13-1004 (1978). If the facilitator's actions in fact aided the principal to commit the offense, then the offense would necessarily have been completed and the facilitator would be punished as an accomplice. The legislature evidently recognized this contradiction because it amended the statute in April 1980, deleting the provision dealing with completed offenses.

In its Answering Brief in State v. Politte, 136 Ariz. 117, 664 P.2d 661 (Ct. App. 1982), the State attempted to raise the issue of completion of the offense in support of the court's refusal to grant appellant Zucker's request for an instruction on facilitation. Appellee's Answering Brief at 31. The court of appeals, however, ignored the issue in its opinion and, in fact, quoted the statute in its present abbreviated form. *Politte*, 136 Ariz. at 121, 664 P.2d at 665.

2. The Arizona accomplice statutes provides, in pertinent part:

> In this title, unless the context otherwise requires, "accomplice" means a person, other than a peace officer acting in his official capacity within the scope of his authority and in the line of duty, who with the intent to promote or facilitate the commission of an offense: . . .
>
> 3. Provides means or opportunity to another person to commit the offense.

ARIZ. REV. STAT. ANN. § 13-301 (1978).

3. An offense is a lesser included offense of another crime if the greater offense cannot be committed without the lesser necessarily being committed. *In re* Appeal in Maricopa County Juvenile Action No. J-75755, 111 Ariz. 103, 105, 523 P.2d 1304, 1306 (1974). In determining whether a crime is a lesser included offense, the court must look to the statutory elements of the two offenses. State v. Laffoon, 125 Ariz. 484, 487, 610 P.2d 1045, 1048 (1980). To constitute a

complicity. Courts in other jurisdictions have construed statutes similar to Arizona's in this manner.[4] In *State v. Politte*,[5] however, the Arizona Court of Appeals adopted a narrow, technical view which makes a jury instruction on facilitation unavailable to a defendant who is being prosecuted because of his participation as an accomplice but who has been charged with the substantive offense.[6]

This Casenote considers whether the crime of facilitation should be treated as a lesser included offense of a substantive crime when the prosecution is based on the theory that the defendant acted as an accomplice. Careful analysis suggests that the *Politte* decision was incorrect on the facilitation issue and that facilitation should be regarded as a lesser included offense of complicity and therefore of the substantive offense as well.

The Politte *Decision*

In1980, Dr. Michael Zucker, a Tucson optometrist and night club owner, and Gary Politte, who lived with Zucker and was manager of his night club, were indicted with several other defendants on one count of conspiracy[7] to violate the state narcotics laws and on several felony counts of selling cocaine.[8] Politte made the actual sales of narcotics to undercover police officers,[9] but Zucker was charged as a principal in that crime and was prosecuted on the theory that he was an accomplice.[10] The court granted Zucker's motion for a directed verdict of acquittal on eight counts of sale of cocaine and one count of offering to sell cocaine, which reduced the charges against him to one count of conspiracy and one of sale.[11] Zucker was subsequently convicted of both counts.[12]

On appeal, one of the several grounds upon which Zucker challenged his conviction was that the trial court committed reversible error in refus-

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lesser included offense, the lesser offense must be composed solely of some, but not all, of the elements of the greater crime. State v. Celaya, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). An offense may also be considered a lesser included offense if the terms of the charging document describe the lesser offense, even though the lesser offense would not always form a constituent part of the greater offense. State v. Teran, 130 Ariz. 277, 279, 635 P.2d 870, 872 (Ct. App. 1981).

4. *See infra* notes 36-43 and accompanying text.

5. 136 Ariz. 117, 664 P.2d 661 (Ct. App. 1982).

6. *Id.* at 121, 664 P.2d at 665. The Arizona Supreme Court affirmed the *Politte* court's position on the facilitation issue in State v. Gooch, No. 5938 (Ariz. March 1, 1984). *See infra* notes 20, 24, 40 & 55.

7. ARIZ. REV. STAT. ANN. § 13-1003 (1978).

8. ARIZ. REV. STAT. ANN. § 13-3406 (Supp. 1983), Appellant's Opening Brief at 2.

9. Appellant's Opening Brief at 16.

10. *Id.* at 36. The practice of treating a criminal accomplice as a principal was sanctioned, under the pre-1976 criminal code, by ARIZ. REV. STAT. ANN. § 13-139 which explicitly provided that an aider and abettor of an offense was a principal, and by ARIZ REV. STAT. ANN. § 13-140 which provided that an accomplice was to be "prosecuted, tried and punished" as a principal. The status of this practice under the present code is not quite as clear. The legislature repealed Sections 13-139 and 13-140 in 1976 and replaced them with ARIZ. REV. STAT. ANN. § 13-303, which provides that a person is "criminally accountable" for the conduct of another person if he is an accomplice of the other person in the commission of a crime. Although the present statute is much less explicit than its predecessors regarding the procedure for prosecuting a criminal accomplice, its language appears to support the current practice of charging the accomplice as a principal.

11. Appellant's Opening Brief at 4.

12. State v. Politte, 136 Ariz. at 120, 664 P.2d at 664.

ing his requested jury instruction on facilitation.[13] Zucker claimed that, because the fundamental difference between complicity and facilitation is the culpable mental state required,[14] and because the jury might have found that he lacked the requisite intent to be an accomplice,[15] the jury should have been given an instruction on facilitation as a lesser included offense.[16] Rule 23.3 of the Arizona Rules of Criminal Procedure provides that a jury instruction on a lesser included offense is required when the lesser offense is "necessarily included in the offense *charged*."[17] The court of appeals rejected Zucker's contention because he had been *charged* with unlawful sale of narcotics rather than with complicity.[18] The court reasoned that, because unlawful sale of narcotics can be committed without necessarily committing facilitation, facilitation is not a "necessarily included" offense of unlawful sale.[19] Accordingly, the court held that Zucker was not entitled to the instruction on facilitation.[20]

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13. *Id.* at 120, 664 P.2d at 665.

14. Appellant's Opening Brief at 37. *See infra* notes 28-30 and accompanying text.

15. Appellant's Opening Brief at 38.

16. *Id.*

17. ARIZ. R. CRIM. P. 23.3 (Supp. 1983). Rule 23.3 provides, in part, that "(f)orms of verdicts shall be submitted to the jury for all offenses necessarily included in the offense *charged*. . . . The defendant may not be found guilty of any offense for which no form of verdict has been submitted to the jury." (emphasis added)

The words "necessarily included," as they are used in this rule, are not synonymous with the words "lesser included," although necessarily included offenses do fall within the broad category of lesser included offenses. State v. Dugan, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980). An offense may be a lesser included offense of another crime and yet due to the facts of the case, the lesser offense may not be necessarily included in the greater offense. *Id.* For example, when a defendant presents an alibi as his defense, lesser included offenses of the offense charged are not necessarily included because the jury is called upon merely to decide whether the alibi is to be believed. In such a case, the jury is not asked to determine the degree of the defendant's involvement in the crime. If the jury accepts the alibi, the defendant is simply not guilty.

For the court to give an instruction on a lesser included offense, a two-pronged test must be satisfied. First, the offense must be a lesser included offense of the offense charged and second, the evidence presented must support the giving of the instruction. *Id.* The second stage of the test requires the jury to find, in the evidence presented, a disputed factual element which would be required for conviction of the greater but not of the lesser offense. *Id.* (citing Sansone v. United States, 380 U.S. 343 (1965)). Thus, if the jury finds that the state has failed to prove an element of the greater offense but has proven all of the elements of a lesser offense, it may convict the defendant of the lesser but not the greater crime, provided that a form of verdict for the lesser offense has been submitted. *Id.* The missing factual element, however, must be one which necessarily distinguishes the greater from the lesser offense. *Id.* at 196, 608 P.2d at 773.

18. State v. Politte, 136 Ariz. at 121, 664 P.2d at 665.

19. *Id.* "Necessary included"appears in the opinion instead of "necessarily included." For purposes of this Casenote the two expressions will be treated as synonymous.

20. *Id.* Although neither *Politte* nor State v. Harris, 134 Ariz. 287, 655 P.2d 1339 (Ct. App. 1982), the case upon which the *Politte* decision is based, specifically mentions Rule 23.3 of the Arizona Rules of Criminal Procedure, the court's decision in both of these cases rests on its interpretation of this rule. This is demonstrated by the reliance of the *Harris* decision on State v. Malloy, 131 Ariz. 125, 639 P.2d 315 (1982), and State v. Dugan, 125 Ariz. at 194, 608 P.2d at 771, two earlier Arizona cases which interpret Rule 23.3.

In State v. Gooch, No. 5938 (Ariz. March 1, 1983), the Arizona Supreme Court affirmed the *Politte* court's interpretation of the facilitation statute. The appellant in *Gooch* had loaned a loaded gun to his co-defendant for the purpose of shooting someone and then had driven the co-defendant to a location near the victim's apartment, but had not attended the shooting. Gooch appealed his conviction for negligent homicide, claiming that the court had improperly denied his requested facilitation instruction. The supreme court affirmed his conviction on the basis that the charged offense of second degree murder could be committed without necessarily committing facilitation.

Whether facilitation should be considered a lesser included offense of the substantive offense

The *Politte* court relied on *State v. Harris*,[21] a prior Arizona decision in which the court of appeals held that facilitation was not a lesser included offense of burglary or theft.[22] Because the charged offenses of burglary and theft could be committed without necessarily committing the crime of facilitation, the *Harris* court held that facilitation was not a lesser included offense of either of the substantive crimes.[23]

Neither *Politte* nor *Harris* distinguished between prosecution of a defendant as a principal in a crime and prosecution of the defendant as an accomplice. In neither case did the court discuss the relationship of facilitation to the accomplice offense. The *Politte* court viewed facilitation simply as a crime unrelated to unlawful sale, even though the court recognized that the evidence used for Zucker's prosecution on the accomplice theory might also have supported his conviction for facilitation.[24] Because in practice a criminal accomplice is never charged with the accomplice offense but is instead always charged as a principal in the substantive offense,[25] the *Politte* court's decision effectively makes facilitation unavailable as a lesser included offense.

Arizona's Facilitation and Accomplice Statutes

When the Arizona legislature revised the criminal code in 1978, it added facilitation[26] as a new offense intended to extend criminal liability to those persons whose degree of involvement in criminal activity does not rise to the level of complicity.[27] The fundamental distinction between the crimes of facilitation and complicity is the culpable mental state required of the defendant.[28] The mental state required for facilitation is knowledge; the defendant must have known that another person was committing a

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when prosecution is based on the defendant's complicity was a question of first impression for the Arizona Supreme Court. Had the court decided this issue in *Politte* instead of in *Gooch*, one might wonder whether it would have reached a different result. Gooch presented a much less sympathetic appellant than Zucker in that Gooch had been convicted of a much more serious crime and his role in assisting the commission of the crime appeared to be much more critical to its success. Gooch's status as an accomplice, therefore, appears to have been more firmly established than was Zucker's.

21. 134 Ariz. at 287, 655 P.2d at 1339.

22. *Id.* at 288, 655 P.2d at 1340.

23. *Id.*

24. 136 Ariz. at 121, 664 P.2d at 665.

The *Politte* court's view of facilitation as a crime unrelated to the substantive offense, even though the evidence might have supported a conviction for facilitation, was recently affirmed by the Arizona Supreme Court in State v. Gooch, No. 5938 (Ariz. March 1, 1984). Citing *Politte*, the court stated that "[e]ven though the appellant *could* have been prosecuted for facilitation, that possibility does not affect the decision of whether the instruction is proper." *Id.*, slip op. at 3 (emphasis in original).

25. *See supra* note 10.

26. ARIZ. REV. STAT. ANN. § 13-1004. *See supra* note 1 for the text of the Arizona facilitation statute.

27. *See* R. GERBER, CRIMINAL LAW OF ARIZONA 141 (1978). *See supra* note 2 for the text of the Arizona accomplice statute.

28. The elements of facilitation in the Arizona statute require that the defendant knew another person was committing or intended to commit an offense, that the defendant knowingly provided the other person with the means or opportunity to commit the offense, and that the means or opportunity provided by the defendant helped the other person in committing the offense. *See* R. GERBER, *supra* note 27, at 142. By comparison, pertinent provisions of the accomplice statute require that the defendant intended to promote or facilitate the commission of an

crime, and he must have knowingly provided to the other the means or opportunity to commit that crime. Complicity, on the other hand, requires a higher degree of mental culpability, that of intent.[29] In order to have violated the accomplice statute, the defendant must have intended to promote or facilitate the commission of an offense, and he must have intentionally provided another person with the means or opportunity to commit that offense.

By requiring that the defendant act with "intent . . . to facilitate" the commission of an offense, the accomplice statute makes explicit the relationship between facilitation and complicity.[30] Because knowledge is a lesser mental state included in intent, and the elements of complicity and facilitation are otherwise the same, the accomplice offense cannot be committed without necessarily committing facilitation. Facilitation is, therefore, a lesser included offense of complicity. It follows that when the substantive offense is charged on the basis of complicity, facilitation should be regarded as a lesser included offense of the substantive offense as well.

Arizona case law concerning statutory construction lends further support to this view. Adoption by Arizona of a statute from another state carries with it a presumption that the legislature intends to adopt the construction previously given that statute by the courts of the state from which it was adopted.[31] Although the Arizona courts are not bound by this presumption,[32] the original state's construction is persuasive.[33] Because Ari-

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offense by another person, and provided to the other person the means or opportunity for commission of the offense. *Id.* at 37.

The facilitation and accomplice statutes are worded in such a way that their respective elements do not correspond precisely with one another. It is nevertheless apparent that the significant difference between the two statutes is in the mental state required of the defendant. Although the accomplice statute does not contain the requirement specifically included in the facilitation statute, that the defendant must have known that another person intended to commit an offense, it is obvious that he must have possessed such knowledge if he intentionally acted to promote the commission of that offense. Similarly, the accomplice statute does not specifically require that the means or opportunity provided by the defendant "in fact" aided the other person in committing the offense. The inclusion of this requirement in the facilitation statute does not appear to add a significant element to that offense which is not included in the accomplice offense. Perhaps the facilitation statute is more carefully worded than the accomplice statute to prevent its misapplication, since the mental state of knowledge required for facilitation is a lower standard, and thus more easily proven, than the intent required for complicity. The facilitation statute's requirement that the defendant's actions "in fact" aided the other person to commit the offense is perhaps a safeguard included to insure that the person charged with facilitation was in fact involved in the commission of a crime and not simply an innocent person whose services were used to commit a crime without his knowledge that he was providing such assistance.

29. Knowledge is a lesser culpable mental state than intent. The Arizona statute governing the construction of statutes with respect to mental states provides:

> If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts intentionally, knowingly or recklessly. If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly. If acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.

ARIZ. REV. STAT. ANN. § 13-202(c) (1978).

30. *See supra* note 2.

31. Van Cleef v. Aeroflex Corp., 657 F.2d 1094 (9th Cir. 1981); England v. Ally Ong Hing, 105 Ariz. 65, 459 P.2d 498 (1969); *In Re* Estate of McConnell, 101 Ariz. 538, 421 P.2d 895 (1966).

32. State v. Ebner, 126 Ariz. 355, 616 P.2d 30 (1980); England v. Ally Ong Hing, 105 Ariz. at 65, 459 P.2d at 498.

zona's criminal facilitation statute is modeled after a Kentucky statute,[34] the Arizona courts should follow the Kentucky courts in construing the statute, in the absence of strong public policy or justice arguments to the contrary.[35]

The only case in which the Kentucky Supreme Court has considered facilitation as a lesser included offense is *Luttrell v. Commonwealth*.[36] In that case, the defendant was convicted, as an accomplice, of attempted murder of a police officer and assault in the first degree. He had handed a pistol to his codefendant, who then fired the gun at the officer.[37] The Kentucky Supreme Court reversed and remanded the case because the trial court had refused the defendant's request for a jury instruction on criminal facilitation.[38] In deciding this issue, the Kentucky court reasoned that because facilitation is a lesser included offense of complicity, it is also a lesser included offense of the substantive offense charged.[39]

The Arizona Court of Appeals should have reached a similar conclusion in construing Arizona's criminal facilitation statute. Instead, by failing to apply the rule for interpreting statutes adopted from other states, the court has construed the Arizona statute in a manner which produces results that are both unreasonable and unjust.[40]

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33. Mileham v. Arizona Bd. of Pardons and Paroles, 110 Ariz. 470, 520 P.2d 840 (1974); City of Phoenix v. Superior Court, 109 Ariz. 533, 514 P.2d 454 (1973); England v. Ally Ong Hing, 105 Ariz. at 65, 459 P.2d at 498.

34. R. GERBER, *supra* note 27, at 141. The Kentucky facilitation statute provides:

> A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

KY. REV. STAT. § 506.080 (Bobbs-Merrill 1975).

35. *See* State v. Ebner, 126 Ariz. at 361, 616 P.2d at 36.

36. 554 S.W.2d 75 (Ky. 1977).

37. *Id.* at 77.

38. *Id.* at 79.

39. *Id.* In the words of the court:

> [The defendant] would be guilty of criminal facilitation if he furnished [the codefendant] with the means of committing a crime *knowing that he would use it to commit a crime but without intention to promote or contribute to its fruition.* He is guilty of the substantive offense by complicity if he furnished the means of committing the crime *intending to aid in the commission of the crime*. Under these circumstances criminal facilitation is a lesser included offense because it has the same elements except that the state of mind required for its commission is less culpable that [sic] the state of mind required for commission of the other offenses. (emphasis in original)

The court felt that because the defendant was significantly younger (age 17) than his codefendant (age 25), a reasonable juror might find that he lacked the intent to promote the offense.

40. *See infra* text accompanying notes 52-65.

In State v. Gooch, No. 5938 (Ariz. March 1, 1984), which affirms the *Politte* result, the Arizona Supreme Court noted the *Luttrell* decision but distinguished its own holding, that facilitation was not a lesser included offense when prosecution was based on complicity, with the statement that "[t]he Kentucky statute concerning lesser included offenses is much more expansive than the Arizona definition of lesser included offenses." *Id.*, slip op. at 4. A comparison of the Kentucky and Arizona definitions, however, reveals no sound basis for the court's statement.

The Kentucky statute defining lesser included offenses provides, in pertinent part:

> A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
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> (a) It is established by proof of the same or less than all of the facts required to establish the commission of the offense charged; or . . .
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> (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission. . . .

Facilitation as a Lesser Included Offense in Other Jurisdictions

In addition to Arizona and Kentucky, only New York[41] and North Dakota[42] have enacted statutes defining criminal facilitation.

The Appellate Division of the New York Supreme Court has historically interpreted the New York law to permit a jury instruction on facilitation as a lesser included offense when the defendant is prosecuted on the basis of his complicity in the substantive crime with which he has been charged.[43] New York no longer follows its traditional interpretation, however. In *People v. Glover*,[44] the New York Court of Appeals recently repudiated the treatment of facilitation as a lesser included offense and established that a defendant is entitled to a lesser included offense charge only if the proposed lesser offense would be a lesser included offense in all circumstances.[45] *Glover* requires that it be impossible for the greater offense to be committed without the lesser offense being committed concomitantly, by the same conduct.[46] The court stated that the New York statute defining lesser included offenses mandates this requirement[47] and ex-

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KY. REV. STAT. § 505.020(2) (Bobbs-Merrill 1975). Kentucky's procedural rule governing conviction for lesser included offenses provides: "The defendant may be found guilty of an offense included in the offense charged. . . ." KY. R. CRIM. P. 9.86 (Michie 1983).

The Arizona definition of lesser included offenses is discussed *supra* notes 3 & 17. Both the Kentucky and Arizona definitions require that the lesser offense be included in the offense *charged*. The Kentucky court, however, has chosen to permit a jury instruction on facilitation when the defendant was prosecuted on the basis of his complicity. This writer fails to perceive that Kentucky's definition of lesser included offenses is any more expansive than the Arizona definition. Nevertheless, the Gooch court has chosen to interpret the Arizona definition of lesser included offenses more restrictively.

The *Gooch* decision ignores Arizona case law concerning statutory construction. *See supra* text accompanying notes 31-35. The court neither specifically rejects the general rule, that a statute adopted from another state carries with it a presumption that the legislature intended to adopt the prior construction of the statute by the courts of the state from which it was adopted, nor does it furnish any reasons for abrogating the general rule in this instance.

41. The New York statute defining criminal facilitation provides in pertinent part:

> A person is guilty of criminal facilitation . . . when, believing it probable that he is rendering aid:
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> 1. to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony. . . .

N.Y. PENAL LAW § 115.00 (McKinney Supp. 1983).

42. The North Dakota criminal facilitation statute provides:

> A person is guilty of criminal facilitation if he knowingly provides substantial assistance to a person intending to commit a felony and that person, in fact, commits the crime contemplated or a like or related felony employing the assistance so provided. The ready lawful availability from others of the goods or services provided by a defendant is a factor to be considered in determining whether or not his assistance was substantial.

N.D. CENT. CODE § 12.1-06-02 (1976).

43. *See, e.g.*, People v. Velez, 77 A.D.2d 928, 432 N.Y.S.2d 1016 (1980); People v. Valentin, 73 A.D.2d 558, 423 N.Y.S.2d 23 (1979); People v. Lewis, 68 A.D.2d 862, 414 N.Y.S.2d 696 (1979).

44. 57 N.Y.2d 61, 439 N.E.2d 376, 453 N.Y.S.2d 660 (1982). The defendant appealed his conviction of criminal sale of a controlled substance in the second degree on the ground that his request for a lesser included offense charged on criminal facilitation was improperly denied. The New York Court of Appeals upheld the conviction.

45. *Id.* at 63, 439 N.E.2d at 377, 453 N.Y.S.2d at 661.

46. *Id.*

47. The New York statute which defines lesser included offenses provides:

> When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of a lesser grade or degree, the latter is, with respect to the former, a "lesser included offense."

plained that a comparative examination, in the abstract, of the statutes defining the two crimes is necessary to determine whether the requirement has been satisfied.[48] The court stated that theoretically it would be possible for a defendant to sell a drug illegally without intending to aid anyone else in committing a felony.[49] The court therefore held that the trial court did not err in denying the defendant's request that criminal facilitation be charged as a lesser included offense of criminal sale of a controlled substance, even though the defendant was prosecuted as an accomplice.[50]

Although there is no evidence that the *Glover* decision influenced the Arizona court's rulings on the facilitation issue in either *State v. Harris* or *State v. Politte*, the *Glover* opinion marks a turn by the New York courts to the kind of narrow view later taken by the Arizona Court of Appeals in deciding both *Harris* and *Politte*. The defect in the *Glover* approach is that it ignores the status of facilitation as a lesser included offense of the crime of complicity and focuses instead on the substantive offense alone.

The North Dakota state legislature apparently anticipated the controversy involving facilitation as a lesser included offense and resolved the problem by statute. The North Dakota Criminal Code specifically provides that the term "included offense" means an offense "which consists of criminal facilitation."[51] Should the Arizona courts decline to correct the injustice created by *Politte* and *Harris*, the North Dakota statute suggests a means for legislative resolution of the problem in Arizona.

Facilitation as a Lesser Included Offense in Arizona

The Arizona courts have applied a very narrow, literal interpretation to the rule governing jury instructions on lesser included offenses. The courts' interpretation of Rule 23.3 of the Arizona Rules of Criminal Procedure[52] is correct in a technical sense, but the soundness of the reasoning behind such an interpretation is questionable.[53] The purpose of the facilitation statute is to render criminally liable those persons whose involvement does not rise to the level of complicity.[54] By refusing to permit an instruction on facilitation as a lesser included offense of the offense charged, the courts contravene the purpose of the statute, and the

N.Y. CRIM. PROC. LAW § 1.20 (37) (McKinney 1981).

48. 57 N.Y.2d at 64, 439 N.E.2d at 377, 453 N.Y.S.2d at 661.

49. *Id.* at 64, 439 N.E.2d at 377, 453 N.Y.S.2d at 662.

50. *Id.* at 65, 439 N.E.2d at 378, 453 N.Y.S.2d at 662.

51. The definitional section of North Dakota's Criminal Code provides that " 'included offense' means an offense: . . . b. which consists of criminal facilitation of or an attempt or solicitation to commit the offense charged." N.D. CENT. CODE § 12.1-01-04(15) (Supp. 1983).

52. *See supra* note 18 and accompanying text.

53. Because the Rules of Criminal Procedure are a judicial rather than legislative creation, they were not revised simultaneously with the adoption of the facilitation statute and the revision of the Arizona Criminal Code. Therefore, it is likely that the drafters of the facilitation statute were unaware of the effect of Rule 23.3. The Arizona Supreme Court promulgated the Arizona Rules of Criminal Procedure in 1973. Rule 23.3 was amended in 1975 to include an attempt to commit the charged offense in the category of necessarily included offenses. The Arizona facilitation statute was adopted as part of the new criminal code enacted in 1978. ARIZ. REV. STAT. ANN. § 13-1004.

54. Judge Gerber notes that the object of the facilitation offense is to reach the "unintending but knowledgeable aider" of another's criminal act. R. GERBER, *supra* note 27, at 141.

facilitator of an offense must either be acquitted or face conviction for a crime which is much more serious than the one he actually committed.

In the *Harris* opinion, the court of appeals noted that the result of its construction of the facilitation statute is that the prosecutor has the option to charge an offender under that statute rather than as a principal in the substantive offense.[55] In practice, however, it appears that prosecutors have been reluctant to exercise this option and that, for the most part, the facilitation statute has been ignored or overlooked.[56] In the reported Arizona cases dealing with facilitation, the only issue which has been addressed on appeal is whether the trial court should have given the defendant's requested instruction on facilitation as a lesser included offense.[57] No one in this state appears to have been indicted on criminal charges of facilitation.[58] Arizona's criminal facilitation statute, as the courts have construed it, appears to be a statute which serves no purpose, other than its use as a plea bargaining tool. Law enforcement officials seem to prefer to charge an accomplice as a principal in the substantive crime,[59] regardless of the degree of his mental culpability, thus increasing considerably the severity of punishment upon conviction.[60]

The prosecution's practice of ignoring the facilitation statute, combined with the court's refusal to permit a jury instruction on facilitation as a lesser included offense of the substantive crime, may have serious consequences for a defendant, as *Politte* illustrates. Had defendant Zucker been convicted of facilitation of the narcotics sale, he would have faced a presumptive sentence of one and one-half years imprisonment with probation available.[61] Instead, having been convicted as a principal in that crime, he

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55. 134 Ariz. at 288, 655 P.2d at 1340.

In State v. Gooch, No. 5938 (Ariz. March 1, 1984), the Arizona Supreme Court specifically noted its agreement with the *Harris* court's observation that the net result of the facilitation statute is that it gives the prosecutor the option to charge an aider and abettor either under the facilitation statute or as a principal in the substantive offense. The court's view of the facilitation statute serves to strengthen the argument made in the text accompanying notes 56-60, *infra*, that Arizona's facilitation statute has been rendered a law which has no real effect and serves no useful purpose.

56. Mr. Geoff Cheadle, Deputy County Attorney for Pima County, stated that facilitation is "one of our less common offenses" and indicated that it is useful mostly in plea bargaining. Conversation with Geoff Cheadle, October 31, 1983.

Mr. Ron Fountain, Statistical Research Analyst for the Office of the County Attorney for Maricopa County, indicated that use of the facilitation statute is "almost nonexistent." Conversation with Ron Fountain, October 31, 1983.

Mr. R. William Call, Chief City Prosecutor for Tucson, Arizona, stated that the facilitation offense is "not used at all" by Tucson city prosecutors. Conversation with R. William Call, October 31, 1983.

57. *See supra* notes 5-24 and accompanying text. *See infra* note 65.

58. *See supra* note 56.

59. *See supra* note 10.

60. Penalties for facilitation vary with the nature of the substantive crime. Under Arizona's sentencing scheme, facilitation is a:

1. Class 5 felony if the offense facilitated is a Class 1 felony.
2. Class 6 felony if the offense faciliated is a Class 2 or Class 3 felony.
3. Class 1 misdemeanor if the offense facilitated is a Class 4 or Class 5 felony.
4. Class 3 misdemeanor if the offense facilitated is a Class 6 felony or a misdemeanor.

ARIZ. REV. STAT. ANN. § 13-1004(B) (Supp. 1983).

61. ARIZ. REV. STAT. ANN. § 13-1004(B) provides that facilitation of a Class 2 felony (e.g., sale of narcotics) is a Class 6 felony. ARIZ. REV. STAT. ANN. § 13-701 (1978) provides that a first-

received the presumptive sentence of seven years imprisonment, of which he must serve at least five years before he is eligible for parole.[62]

Perhaps the Arizona courts have been reluctant to recognize facilitation as a lesser included offense because, although the drafters of the facilitation statute originally envisioned it as a means for extending criminal liability to those formerly beyond the reach of the law,[63] in practice, facilitation has most often been used by defense attorneys attempting to reduce the criminal liability of their clients.[64] Placed in proper perspective, however, a facilitation instruction could be advantageous to both defense and prosecution. For example, a defendant whose conduct aided the commission of a crime might request such an instruction when he fears that without it the jury could convict him as a principal. Likewise, a prosecutor, unable to prove that a defendant intended to aid in the commission of a crime, might convince a jury that the defendant was aware that a crime was being committed and knew that his actions were providing assistance. The inclusion of a facilitation instruction could mean conviction instead of acquittal for a defendant whose involvement is established but whose degree of mental culpability is in question.[65]

Conclusion

The Arizona Court of Appeals held in *State v. Politte* that, where a defendant is charged with a substantive crime but is prosecuted on the theory that he was an accomplice, facilitation is not a "necessarily included" offense of the substantive crime and therefore a jury instruction on facilitation is not required. Because Rule 23.3 of the Arizona Rules of Criminal Procedure requires a jury instruction on a lesser included offense only when the lesser offense is necessarily included in the offense *charged*, the court's literal interpretation is technically correct. However, the *Politte*

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time offender who commits a Class 6 felony shall be sentenced to one and one-half years imprisonment.

Mr. Nat Schaye, co-counsel for defendant Zucker, believes that because Zucker had no prior convictions on his record and because he was a professional in the community and was unlikely to commit any other offenses, the court would probably have placed him on probation, had he been found guilty of criminal facilitation. Conversation with Nat Schaye, October 17, 1983.

62. Appellant's Opening Brief at 6. ARIZ. REV. STAT. ANN. § 13-3406 (Supp. 1983) provides that sale of a narcotic drug is a Class 2 felony and that a person found guilty of violating the statute is not eligible for "probation, pardon, parole, commutation or suspension of sentence or release on any other basis" until he has served not less than two-thirds of his sentence and at least five years. ARIZ. REV. STAT. ANN. § 13-701 (1978) provides that for a first offense, a Class 2 felon shall receive a prison sentence of seven years. ARIZ. REV. STAT. ANN. § 13-1003(D) (1978) provides that conspiracy is an offense of the same class as the most serious offense which is the object or result of the conspiracy. The court accordingly sentenced Zucker to seven years imprisonment for conspiracy, to be served concurrently with his sentence for sale of narcotics. Appellant's Opening Brief at 6.

63. *See supra* note 26, 27 & 55 and accompanying text.

64. *See, e.g.*, State v. Harris, 134 Ariz. 287, 655 P.2d 1339 (Ct. App. 1982); Luttrell v. Commonwealth, 554 S.W.2d 75 (Ky. 1977); People v. Lewis, 68 A.D.2d 862, 414 N.Y.S.2d 696 (1979).

65. In State v. Wells, No. CA-CR 2922 (Ct. App. 1983) (mem.) a case which was decided after *Politte*, the defendant's conviction on facilitation was reversed because the trial court erred in instructing the jury on facilitation as a lesser included offense of possession of dangerous drugs for sale. The court of appeals, citing *Politte* and *Harris*, held that facilitation is not a lesser included offense of the charged offense because the offense of possessing dangerous drugs for sale could be committed without necessarily committing facilitation.

decision reaches an unjust result which is inconsistent with the nature of lesser included offenses and with Arizona case law on statutory construction and which contravenes the apparent intent of the legislature in adopting the facilitation statute.

The facilitation statute is designed to extend criminal liability to those persons who assist in the commission of a crime but whose culpable mental state does not rise to the level of intent. The advantage of such a statute must be available to defendants as well as to prosecutors. The effect of *Politte*, however, is that the statute will never benefit a defendant. Under *Politte*, a defendant prosecuted on an accomplice theory is not entitled to a jury instruction on the lesser offense of facilitation because an accomplice is never charged as such but is instead always charged as a principal in the substantive offense.

Facilitation is a lesser included offense of complicity and should be regarded as a lesser included offense of the substantive crime itself. If the Arizona courts are unwilling to broaden their interpretation of Rule 23.3 to include facilitation as a lesser included offense where the defendant is prosecuted for a substantive crime on the basis of his complicity, the state legislature must solve the problem. The Arizona legislature should follow the lead of North Dakota and adopt a statutory definition of lesser included offenses which includes facilitation.

E. Hardy Smith

II. INDIAN LAW

CONFUSION IN THE LAND OF INDIAN SOVEREIGNTY: THE SUPREME COURT TAKES A DETOUR

> The general question presented by this case has occupied the Court many times in the recent past, and seems destined to demand its attention over and over again until the Court sees fit to articulate, and follow, a consistent and predictable rule of law.[1]

It is well established that Congress has the authority to modify or abolish any power of a tribal government and to grant to the states jurisdiction over Indians and their territory.[2] The determination of whether Congress has in fact exercised this authority in a particular case, however, is a recurrent and controversial issue in Indian law decisions. In a recent preemption decision, *Rice v. Rehner*,[3] the United States Supreme Court upheld the states' authority to require licensing of all traders who sell packaged liquor on Indian reservations. The Court concluded that state regulation of liquor was not preempted by federal law, but, on the contrary, was expressly authorized by Congress.

Following a brief review of the facts, this Casenote will examine in detail the Court's analysis in *Rice v. Rehner* and will evaluate its consistency with prior preemption decisions in Indian law. The Casenote will conclude with a discussion of the broad implications of the case on future state regulation in Indian country.

Eva Rehner, a federally licensed Indian trader,[4] operated a general store on the Pala Reservation in San Diego, California.[5] Pursuant to a tribal ordinance, the sale of liquor was lawful within the reservation provided that the sale conformed with tribal regulations and the laws of California.[6] After satisfying tribal requirements for liquor sales, Rehner unsuccessfully petitioned the California Department of Alcoholic Beverage Control for an exemption from state licensing. Rehner subsequently filed suit in the United States District Court for the Southern District of

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1. Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 847 (Rehnquist, J., dissenting).

2. United States v. Kagama, 118 U.S. 375 (1886). The plenary power of the federal government is not however absolute but remains subject to constitutional restraints. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977); United States v. Alcoa Band of Tillamooks, 329 U.S. 40, 54 (1946).

3. Rice v. Rehner, 103 S. Ct. 3291 (1983).

4. See *infra* notes 57-61 and accompanying text.

5. Rice v. Rehner, 678 F.2d 1340, 1341-42 (1982), 103 S. Ct. 3291, 3293-94 (1983).

6. Ordinance Legalizing the Introduction, Sale or Possession of Intoxicants, 25 Fed. Reg. 3343 (1960). The Pala Tribe ordinance was adopted with approval of the Secretary of the Interior pursuant to authority granted in 18 U.S.C. § 1161. See *infra* note 8. The proper interpretation of 18 U.S.C. § 1161 is the primary focus of *Rice v. Rehner*.

California seeking declaratory and injunctive relief.[7]

Based upon its interpretation of Section 1161 of Title 18, the district court dismissed the action for failure to state a claim.[8] The statute provided that liquor could be sold in Indian country[9] if its sale conformed with the "laws of the state" and a duly adopted tribal ordinance. Interpreting the phrase "laws of the state" broadly, the district court held that California had the authority to license liquor sales in Indian country.[10]

The United States Court of Appeals for the Ninth Circuit, en banc, reversed.[11] Interpreting the language of 18 U.S.C. § 1161 narrowly, the court concluded that the statute did not constitute a grant of regulatory jurisdiction to the states but, rather, merely required the incorporation of state substantive law into all tribal liquor ordinances.[12]

The United States Supreme Court granted certiorari and reversed the Ninth Circuit's decision.[13] In an opinion written by Justice O'Connor, the Court held that a state may require federally licensed traders in Indian country to obtain a state license in order to sell liquor for off-premises consumption. In order to appreciate fully the breadth and implications of the Court's holding, this Casenote will first present an overview of preemption analysis in Indian law.

Preemption Analysis

Although Indiana law opinions did not use the term "preemption" until 1973,[14] the Court has historically recognized a policy disfavoring the

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7. Rice v. Rehner, 678 F.2d 1340 (9th Cir. 1982).

8. 18 U.S.C. § 1161 (1966) states:

The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

9. "Indian country" is defined in 18 U.S.C. § 1151 (1966) as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

10. Rehner v. Rice, 678 F.2d 1340 (9th Cir. 1982).

11. *Id.*

12. The United States District Court for the Western District of Washington separately considered the issue of whether 18 U.S.C. § 1161 authorized state regulatory jurisdiction over liquor transactions in Indian country. In Muckleshoot Indian Tribe v. State, No. C78-783V (W.D. Wash. March 9, 1979) (order granting summary judgment), and Tulalip Tribes v. State of Washington, No. C78-750V (W.D. Wash. May 22, 1979) (order granting summary judgment), the court interpreted 18 U.S.C. § 1161 to grant to the Indian tribes exclusive jurisdiction over the licensing and distribution of liquor in Indian country. The Ninth Circuit consolidated these decisions for hearing in *Rehner v. Rice. Muckleshoot* and *Tulalip* were remanded to the district court on other issues and, therefore, were not considered in the United States Supreme Court decision. For a summary of the facts and analysis of *Muckleshoot* and *Tulalip* see Lilley, *Regulatory Jurisdiction Over Indian Country Retail Liquor Stores*, 23 NAT. RESOURCES J. 239 (1983).

13. Rice v. Rehner, 103 S. Ct. at 3291.

14. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973). See also F. COHEN, HANDBOOK ON FEDERAL INDIAN LAW 273 (1982).

assertion of state jurisdiction within Indian country.[15] The policy as first articulated in 1832 completely prohibited state authority over Indian territory.[16] Recent Supreme Court decisions, however, have modified this rule of absolute preemption and have identified two independent barriers to a state's attempted jurisdiction over Indian country.[17] First, state authority is precluded if it unlawfully infringes on the inherent sovereign powers of Indian tribes.[18] Second, the exercise of state authority is precluded if the specific area sought to be governed is already extensively controlled by federal law.[19]

Although either barrier is independently sufficient to preclude state authority in Indian country,[20] the Court additionally views tribal sovereignty as a "backdrop" in determining whether existing federal control has preempted state law.[21] In applying this "backdrop," the Court will examine the applicable treaties and statutes in light of the established federal policy of encouraging tribal self-sufficiency. If the language is unclear, the Court will construe the terms liberally and resolve any ambiguities in statutory construction in favor of the Indian tribe.[22] Absent clear congressional delegation of authority to the states, the general presumption is that state action in Indian country is preempted.[23]

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15. McClanahan, 411 U.S. at 168.

"[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Id.* (*quoting* Rice v. Olson, 324 U.S. 786, 789 (1945)).

16. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). An Indian reservation is a "distinct community, occupying its own territory . . . in which the laws of Georgia can have no force." *Id.* at 561.

17. New Mexico v. Mescalaro Apache Tribe, 103 S. Ct. 2378 (1983); Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. at 832; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

18. *See, e.g.*, Williams v. Lee, 358 U.S. 217, 220 (1959) (the state of Arizona lacked jurisdiction over a civil suit against a Navajo Indian because "the state action infringed on the right of reservation Indians to make their own laws and be ruled by them"). *See also* Washington v. Yakima Indian Nations, 439 U.S. 463, 502 (1979); Fisher v. Dist. Ct., 424 U.S. 382 (1976); Kennerly v. Dist. Ct., 400 U.S. 423 (1971).

19. *See, e.g.*, Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965). In *Warren Trading Post*, the Court applied the preemption test to invalidate Arizona's attempt to impose a sales tax on goods sold by a federally licensed trader to reservation Indians. The Court reasoned that since the federal government had exercised such a "sweeping and dominant control" over persons trading with Indians, "no room remains for state laws imposing additional burdens upon traders." *See also* New Mexico v. Mescalaro Apache Tribe, 103 S. Ct. at 2378; Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. at 832; Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980); McClanahan v. Arizona State Tax Comm'n, 411 U.S. at 164.

20. The Court has stated that there is a "trend" away from reliance on the infringement test alone and toward reliance on the barrier of federal preemption. McClanahan v. Arizona Tax Comm'n, 411 U.S. at 172. However, subsequent decisions have unanimously continued to view each test as independently sufficient to bar state action. *See supra* note 17 and accompanying text.

21. See White Mt. Apache Tribe v. Bracker, 448 U.S. at 136, where the Court stated: [T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured." *Id.* at 143.

22. *Id.* at 143-44. See F. COHEN, *supra* note 14, at 275-77. Although the canons of construction were originally developed for use in the interpretation of treaties, the courts apply them also to the interpretation of ambiguous statutes. *See* Bryan v. Itasca County, 426 U.S. 373, 392-93 (1976); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918).

23. It is difficult to formulate a concise definition of the "backdrop" of Indian sovereignty. Although the word "presumption" appears repeatedly throughout its discussion of the "backdrop," the Court has explicitly rejected the proposition that on-reservation activities are presumptively beyond the reach of state laws in the evidentiary sense. Ramah Navajo School Bd. v.

Analysis of Rice v. Rehner

The issue addressed in *Rice v. Rehner* was whether existing federal control over liquor regulation preempted state licensing of liquor vendors on Indian reservations.[24] The majority began by recognizing the traditional rule that, absent congressional delegation of state authority in Indian country, preemption of state law occurs either by infringement of the inherent powers of tribal sovereignty or by extensive federal control over the subject area in question.[25] The Court further acknowledged that these two independent barriers to state authority are related; in preemption analysis, the Court views Indian sovereignty as a "backdrop" against which to examine existing federal regulation in the specific area in question.[26] Because of the importance accorded Indian sovereignty, the Court indicated its reluctance to infer that Congress had delegated authority in Indian country to the states.[27] The Court abruptly diverged from prior preemption decisions, however, by stating that it need not automatically consider tribal sovereignty. Instead, the Court concluded that if the case did not involve a tradition of sovereignty[28] or if the state's interests in regulation outweighed those of the tribe and the federal government, use of the "backdrop" analysis would be inappropriate.[29]

Applying these principles to the facts in *Rehner*, the Court held that the general policy disfavoring state authority in Indian country was not appropriate in this case.[30] First, the Court found that no tradition of tribal control over liquor transactions existed.[31] Second, the Court concluded that the balance of state, federal, and tribal interests favored state regulation in this case.[32] Therefore, interpreting § 18 U.S.C. 1161 without apply-

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Bureau of Revenue, 458 U.S. at 832. Specifically, the use of the word "presumption" does not imply that the state has the burden of proof in justifying any intrusion into Indian territory. Therefore, perhaps it is most accurate to view the concept as merely an abbreviated way of stating that certain canons of construction favoring Indian tribes will be incorporated into all preemption analyses.

24. Although this prong of the preemption test incorporates notions of tribal sovereignty as a "backdrop" in the interpretation of applicable federal statutes, the independent issue of whether the proposed state law is preempted because of infringement upon tribal sovereignty was not brought before the court. Rehner v. Rice, 678 F.2d at 1349 n.18, and 103 S. Ct. at 3298 n.11.

25. Rice v. Rehner, 103 S. Ct. at 3294-95. *See supra* notes 19-23.

26. *Id. See supra* notes 14-23.

27. Rice v. Rehner, 103 S. Ct. at 3295 (quoting *McClanahan*, 411 U.S. at 171).

28. *Id.* at 3296-98. The particular wording used by the Court is ambiguous. The majority formulates the issue as whether a "tradition of *sovereign immunity* that favors the Indians" exists. *Id.* at 3298 (emphasis added). Although the terms "sovereignty" and "sovereign immunity" appear throughout the majority opinion, the terms will be interpreted as used interchangeably to mean sovereignty. The alternative construction would make little sense. As defined in Black's Law Dictionary, "sovereignty" is "the supreme . . . power by which any independent State is governed; the self-sufficient source of political power, from which all specific political powers are derived." BLACK'S LAW DICTIONARY 1252 (5th ed. 1979). In contrast, "sovereign immunity" is the doctrine which "precludes [a] litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless [the] sovereign consents to suit." *Id.*

29. Rice v. Rehner, 103 S. Ct. at 3298.

30. *Id.* at 3297-98.

31. *Id.* at 3296-97.

32. *Id.* at 3297-98. Additionally, the Court asserted that state regulatory jurisdiction was justified on the basis of past and present state involvement in liquor regulation. Precedent, however, does not support the Court's reliance on the existence of prior state actions. *See* New Mexico v. Mescalaro Apache Tribe, 103 S. Ct. at 2378 (federal law preempted state hunting and fishing

ing the canons of construction favoring Indian sovereignty, the Court concluded that state licensing of liquor vendors on the reservation was not preempted.[33] As an alternative ground for its holding, the Court asserted that even if considerations of tribal sovereignty were applicable in this case, state law would not be precluded because Congress had expressly delegated regulatory jurisdiction to the states under 18 U.S.C. § 1161.[34]

The Supreme Court's development of exceptions to general preemption analysis in Indian law creates several problems. First, the recognition of any exception is antithetical to the principles governing preemption analysis in Indian law. Historically, the Court has clearly distinguished preemption analysis in Indian law from preemption analysis in other fields of law.[35] When federal supremacy claims are raised in areas traditionally governed by the states and not involving Indian tribes, the Court is reluctant to allow federal preemption of state law absent clear congressional intent. In contrast, courts traditionally resolve preemption claims involving Indian tribes in favor of preemption of state law.[36]

The primary factor underlying this disparate treatment of preemption analysis in Indian law is the historical recognition of Indian tribes as distinct political sovereigns. To presume the validity of state regulation in Indian country would contradict the federal policy of protecting and encouraging tribal self-government. Based on this policy, the Supreme Court has held that the "tradition of sovereignty" is the "backdrop against which the applicable treaties and federal statutes *must* be read."[37]

Even assuming that the Court could develop appropriate exceptions to general Indian law preemption analysis, Indian law precedent does not support the exceptions created by the Court in *Rehner*. The first exception articulated arises if the Court finds no tradition of sovereignty[38] in the questioned area. Applying this exception to the facts in *Rehner*, the Court concluded that since the tribe had no tradition of regulating liquor, preemption of state licensing laws need not be presumed.[39]

To support this conclusion the majority contrasted the tribal regula-

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regulations despite the fact that the tribe had previously consented to application of state licensing requirements on the reservation).

33. Rice v. Rehner, 103 S. Ct. at 3298.

34. *Id.* at 3302.

35. F. COHEN, *supra* note 14, at 270-75.

36. *Id.*

37. McClanahan v. Arizona State Tax Comm'n, 411 U.S. at 172-73 (emphasis added).

38. 103 S. Ct. at 3295.

39. Justice O'Connor's majority opinion states: "[T]radition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians. The Colonists regulated Indian liquor trading before this Nation was formed, and Congress exercised its authority over these transactions as early as 1802." 103 S. Ct. at 3297. The *Rehner* Court's emphasis on the timing of tribal regulation is inconsistent with prior preemption decisions. Contrast the Court's treatment of the "backdrop" of sovereignty in *Rice v. Rehner* with White Mountain Apache Tribe v. Bracker, 448 U.S. at 136. In its determination that federal law preempted state use taxes and licensing requirements, the *Bracker* Court recognized that the tradition of Indian sovereignty requires that sovereignty principles be viewed as a "backdrop" in the examination of applicable treaties and federal statutes. Unlike the analysis advanced in *Rehner*, however, the *Bracker* Court's analysis did not question whether the tribe had a tradition of imposing use taxes on timber businesses or license taxes on motor vehicles. Clearly, the colonists imposed taxes long before Indian tribes attempted to do so.

tion of liquor at issue in *Rehner* with prior decisions upholding tribal power to tax transactions on the Indian reservation.[40] Unlike taxation, which these decisions recognized as an inherent sovereign power necessary for the maintenance of all governments, the Court reasoned that a tradition of sovereignty did not similarly exist in tribal regulation of liquor. This narrow focus on tribal regulation of liquor, however, is inappropriate. If the issue in *Rehner* were characterized more broadly as involving the general tribal power to regulate trade within the reservation boundaries, application of the Court's analogy to prior tax decisions would be likely to yield a contrary result.[41] Specifically, it must be recognized that the power to license and control trade within a government's jurisdiction is at least as crucial to a sovereign's ability to govern as the power to levy taxes on the items sold.

The *Rehner* Court's second exception to the general requirement that all preemption questions be viewed against a "backdrop" of tribal sovereignty applies when the state's interests outweigh those of the federal and tribal governments.[42] Although a weighing of the relevant state, federal, and tribal interests arguably should determine all preemption issues, the creation of a balancing test as an exception to currently adopted preemption rules is logically unsound and inconsistent with conventional Indian preemption analysis. In conformance with prior Indian law decisions, the *Rehner* Court recognized two independent barriers to state regulation in Indian country. State law is preempted, first, if it infringes on a sovereign power of the tribe and, second, if it conflicts with existing federal control of the specific area.[43] By continuing to articulate this preemption test, the Court reaffirms the view that, under the first barrier, the preservation of inherent tribal sovereignty is sufficient in itself to preclude state authority in Indian country. Hence, the creation of an exception within the second barrier that allows assertion of state authority based on a balancing of all three governmental interests cannot logically be reconciled with the first

40. 103 S. Ct. at 3297. The decisions cited by the Court upholding tribal taxation of non-Indians were not based upon a finding that the tribe had a tradition of taxing cigarettes, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), or mineral resource development, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). Instead, the emphasis was upon the recognition of taxation as an inherent sovereign power of tribal governments. An appropriate analogy, therefore, would compare the regulation of cigarettes with the regulation of alcohol or, conversely, the power to tax with the power to license and regulate trade.

41. A review of similar court decisions which considered whether federal law preempted state action reveals that the courts did not focus upon prior tribal control over the specific item at issue. For example, in Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 102 S. Ct. at 3394, the Court concluded that comprehensive federal regulation of Indian education preempted imposition of a state tax on construction of a school building, despite the fact that no tribe had previously constructed a school on an Indian reservation. *See also* Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) (comprehensive federal regulation of Indian traders preempted the imposition of state licensing requirements on vendors operating "smoke-shops" on the reservation); Mescalaro Apache Tribe v. Jones, 411 U.S. 145 (1973) (state use taxes on a tribal ski resort operated off the reservation held to be preempted without discussion of whether a tribal "tradition" existed in the operation of a ski business).

42. 103 S. Ct. at 3295-96.

43. *Id.* at 3294-95.

barrier, which requires preemption of state law on the basis of sufficient tribal interests alone.[44]

As an alternative ground for its holding in *Rehner*, the Court concluded that even if the facts required application of the backdrop of sovereignty, the clear language and legislative history of section 1161 alone were sufficient to uphold state licensing requirements.[45] This statute provides that liquor transactions within Indian country are not subject to several specific federal criminal prohibitions if they conform with both state and tribal laws.[46] The Court interpreted the statutory language broadly to authorize state regulatory jurisdiction within Indian country.[47]

This interpretation is subject to criticism on several grounds. First, the primary intent of 18 U.S.C. § 1161 was to eliminate existing discriminatory federal statutes that completely prohibited possession of liquor on all Indian reservations.[48] Whether the statute was additionally intended to confer regulatory jurisdiction over liquor to the states, however, is difficult to determine. The majority and dissenting opinions presented several conflicting congressional and Interior Department interpretations of the intent and effect of 18 U.S.C. § 1161. For example, the majority relied on a 1954 Interior Department administrative opinion to support its view that section 1161 was intended to grant regulatory jurisdiction to the states.[49] As Justice Blackmun's dissent points out, however, the issue presented in that opinion was restricted to the scope of *tribal* authority over liquor transactions occurring on the reservation. The Interior Department opinion specifically declined to determine the appropriate socpe of *state* regulatory jurisdiction.[50] Conversely, in a subsequent decision directly considering the scope of state authority granted under section 1161, the Interior Department concluded that the statute merely required the incorporation of state liquor standards into tribal ordinances and did not grant regulatory jurisdiction to the states.[51] Given the quantity and quality of contradictory evidence presented, the Court's assertion that congressional intent can be clearly determined from the statute and the legislative history is insupportable.

The *Rehner* Court also failed to reconcile its interpretation of section

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44. A further criticism can be made of the Court's application of the balancing test in this case. If extension of state jurisdiction into Indian country is to be justified in part on the basis of a balancing test, the court should explicitly identify and weigh all relevant tribal, state, and federal interests. Although the Court articulated state interests in regulating liquor on the reservation, it did not undertake an explicit identification of the tribal interests involved.

45. 103 S. Ct. at 3302.

46. *See supra* note 8 for the full text of 18 U.S.C. 1161.

47. 103 S. Ct. at 3298-3303.

48. *Id.* at 3299-3301, 3306-08.

49. Memo Sol. M-36241 (Sept. 22, 1954), *reprinted in* II OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1917-1974, 1648 (1974).

50. Rice v. Rehner, 103 S. Ct. at 3306-08.

51. Applicability of Liquor Laws of the State of Montana on the Rocky Boy's Reservation, 78 I.D. 39 (1971). The Department there provided:

> If Congress had intended to impose state law here with state enforcement jurisdiction, we think Congress would have expressly granted jurisdiction to the states under 18 U.S.C. § 1161, which it did not do. Rather, we believe the intent was merely to require the state liquor laws to be used as the standard of measurement to define lawful and unlawful activity on the reservation.

Id. at 40.

1161 with two existing federal statutes. Section 261 of Title 25 grants exclusive authority over appointment and regulation of traders in Indian country to the federal government.[52] The regulations promulgated under this statute provide that all persons wishing to trade with the Indians must comply with detailed application requirements and must obtain a federal license.[53] Additionally, the regulations expressly subject the kind, quantity, and price of goods sold to federal control.[54] Although it had previously declared that these statutes and regulations governing trade with the Indians preempted any state regulation of Indian trading on the reservation,[55] the *Rehner* Court dismissed without discussion the question whether these statutes preempted state licensing requirements.[56]

Finally, the majority opinion fails to adequately reconcile its interpretation of section 1161 with the existing Court interpretation of section 1360 of Title 28,[57] which provides that a state's civil laws have equal force and effect within Indian country.[58] Although the statutory language appears to expressly require application of *all* state laws on a reservation, in the past the court has unanimously refused to find that section 1360 constitutes a congressional grant of *regulatory* jurisdiction to the states.[59] As with its treatment of the Indian trader statutes, however, the Court summarily dismissed the necessity of distinguishing this contrary interpretation of substantially similar language in section 1360.[60]

Implications for Future State Regulatory Authority in Indian Country

The effect of *Rice v. Rehner* on the preemption doctrine in Indian law is substantial. Exceptions now exist to the general rule requiring that concepts of tribal sovereignty be viewed as a "backdrop" in determining whether state law is preempted by existing federal control of the area.

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52. 25 U.S.C. 261 (1983) states:

> The Commissioner of Indian Affairs shall have the *sole* power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

(emphasis added).

53. Licensed Indian Traders, 25 C.F.R. §§ 140.1-140.26 (1983). *See* Rice v. Rehner, 103 S. Ct. at 3306-07.

54. 25 C.F.R. at §§ 140.1-140.26.

55. The Court has previously held that Congress has "taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965). The Court further extended this principle in Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160, 163-64 (1980), to preclude state taxation of an unlicensed Indian trader who did not maintain a place of business on the reservation.

56. The majority's only reference to federal trading laws is in a footnote which simply reasserts the belief that 18 U.S.C. § 1161 expressly delegated jurisdiction to the states. 103 S. Ct. at 3303 n.18.

57. See 103 S. Ct. at 3307.

58. Pub. L. No. 85-615 § 4(a), 67 Stat. 589 (1953) (codified as amended at 28 U.S.C. § 1360(a) (1976)) provides that a State's "civil laws . . . that are of general application to private persons or private property shall have the same force and effect within . . . Indian country as they have elsewhere."

59. Bryan v. Itasca County, 426 U.S. 373 (1976). (Held the language of 28 U.S.C. § 1360(A) does not constitute the congressional consent necessary for state taxation of reservation Indians.)

60. 103 S. Ct. at 3302-03 n.17.

Specifically, the Court has held that if the tribe has no tradition of sovereignty in the specific area of regulation or if state interests outweigh those of tribal and federal governments, then the general policy disfavoring state jurisdiction is not applicable.

The Court's holding leaves several questions unanswered. First, what effect does the creation of these exceptions under the preemption barrier based on conflicts with federal law have on the independent barrier based on infringement of tribal sovereignty? Specifically, does the infringement test still constitute an independent barrier to the assertion of state regulatory jurisdiction in Indian country?

Second, what constitutes a "tradition" of tribal sovereignty, and how does the tribe establish it? The opinion is unclear as to whether such a tradition is an inherent right subject to forfeiture for non-use, or whether it is merely a right that can be acquired upon prompt tribal action.[61] To conclude that no tradition of Indian sovereignty existed in *Rehner*, the majority relied in part upon the fact that the colonists had regulated Indian liquor trading long before any tribal regulatory attempts.[62] Does such reasoning imply that the Court will refuse to recognize an Indian tradition of sovereignty unless a tribal entity attempts regulation of a product before any state authority is asserted? Conversely, is the mere fact that a tribe asserts regulatory jurisdiction over a product prior to the state sufficient to constitute a "tradition" of sovereignty?

Third, what is the effect of *Rice v. Rehner* on the states' ability to tax the sale of liquor within the reservation? In *Washington v. Confederated Tribes of the Colville Indian Reservation*, the United States Supreme Court upheld imposition of state taxes on cigarette sales made to non-Indians and non-tribal members, but precluded state taxation of cigarette sales to members of the selling tribe.[63] Consistent application of *Colville* would allow state liquor taxation only on sales to non-Indians and non-tribal members. This result, however, would leave the court in the anomalous position of holding that tribal sovereignty is infringed by state taxation of on-reservation liquor purchases by tribal members, but that it is not infringed by state regulation or potential preclusion of the sale entirely.[64]

Finally, what is the probable effect of *Rehner* on future state attempts to regulate the sale of other products on Indian reservations? The opinion could be narrowly construed, based on its consideration of 18 U.S.C. § 1161, to apply only to the regulation of liquor. Broadly read, however, the opinion may be seen as a mandate that, in any future preemption decision, the court must first ascertain whether a recognized tradition of sover-

61. Neither interpretation, however, is in accordance with the established meaning of a sovereign right. By definition, a sovereign right is a right inherently possessed by a government to enable it to carry out its proper functions for the common benefit of its citizens. BLACK'S LAW DICTIONARY 1252 (5th ed. 1979). Hence, it is contradictory to imply either that a sovereign can be divested of an inherent power by nonuse or that an inherent power is merely an acquired right.

62. 103 S. Ct. at 3296-97.

63. 447 U.S. 134 (1980).

64. *See supra* note 67 and accompanying text. Conversely, it could be argued that since the *Rehner* Court concluded that tribes retain no sovereign interest in liquor transactions, state taxation of liquor sales even to tribal members should no longer be precluded.

eignty exists in the specific area concerned. If no tradition of sovereignty is identified, then the *Rehner* analysis would permit the courts to disregard the protective canons of construction generally applied in Indian preemption decisions.

CONCLUSION

In *Rice v. Rehner* the Supreme Court held that a state may lawfully require all vendors on Indian reservations to obtain a state license in order to sell liquor for off-premises consumption. At a first reading, the Court's decision might seem to carry a minimal impact and only slight economic consequences to liquor vendors on Indian reservations.[65] However, the decision's impact extends beyond the mere requirement that all liquor vendors obtain state licensing. By redefining basic principles of preemption analysis in Indian law, the *Rehner* decision upheld an unprecedented extension of state regulatory jurisdiction within Indian country.

The tribal interests affected by the *Rehner* decision are of considerable magnitude. Unlike the power to tax, for example, the power to regulate cannot be exercised concurrently by two governments. By granting the state the power to license, the Court may have effectively precluded tribal governments from regulating the sale of packaged liquor on reservations. No prior Indian law decision has sanctioned state regulation at the expense of such infringement of a tribal sovereign power.[66]

In recent years the Court has faced repeatedly the difficult task of reconciling substantial economic and political interest of state governments with the historical treatment of Indian tribes as sovereign entities.[67] Conceivably, continued adherence to a policy protective of tribal self-government might result in a public outcry that the Court's decisions create a class of "super citizens who [can] trade in a traditionally regulated substance free from all but self-imposed regulations."[68] However, even though public policy might favor the development of a uniform system of liquor regulation, judicial precedent does not adequately support this extension of state regulatory jurisdiction into Indian country. As Justice Blackmun admonished, this "is activism in which the Court should not indulge."[69]

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65. The charges for a state license include a $6,000 application fee and yearly fees of $409. 103 S. Ct. at 3305 n.1.

66. For example, in the recent case of New Mexico v. Mescalaro Apache Tribe, 103 S. Ct. at 2378, the Court invalidated a state's attempt to impose hunting and fishing laws on non-Indians on the reservation. Rejecting the state's contention that it was entitled to concurrent regulatory jurisdiction, the Court reasoned that this practice would effectively nullify the tribe's right to regulate by state imposition of more stringent conditions or complete prohibitions. The sovereign power to regulate "would have a rather hollow ring if tribal authority amounted to no more than this." *Id.* at 2388.

67. New Mexico v. Mescalaro Apache Tribe, 103 S. Ct. at 2378; Ramah Navajo School Bd. v. Bureau of New Mexico, 102 S. Ct. at 3394; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 134.

68. 103 S. Ct. at 3303.

69. *Id.* at 3308.

III. REMEDIES

ONE MORE MOUTH TO FEED: A LOOK AT PHYSICIANS' LIABILITY FOR THE NEGLIGENT PERFORMANCE OF STERILIZATION OPERATIONS

In *University of Arizona Health Sciences Center v. Superior Court (Heimann)*,[1] the Arizona Supreme Court rendered a decision on the damages recoverable when a healthy child is born after a negligently performed sterilization operation. Jeanne and Patrick Heimann,[2] the parents of three children, chose vasectomy as their method of contraception. A physician at the University hospital performed the vasectomy, but Jeanne subsequently become pregnant and gave birth to a healthy baby girl. The Heimanns sought damages from the doctor and the hospital, claiming that they were financially unable to provide for themselves and their children because of the pregnancy and birth which resulted from the alleged negligently performed vasectomy. The hospital admitted that the Heimanns were entitled to recover pregnancy and birth expenses, but argued that plaintiffs in wrongful pregnancy[3] cases should not recover the future costs of raising and educating an unplanned child.[4]

The court rejected the positions of both parties and adopted the "direct benefit rule."[5] The court held that a plaintiff may recover future costs of raising and educating an unplanned child, but that the recovery is sub-

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1. — Ariz. —, 667 P.2d 1294 (1983) [hereinafter cited as Heimann].

2. The Heimanns are the real parties in interest.

3. "Wrongful pregnancy" is one of a variety of terms that have been used to describe an action in which parents seek compensation, usually from a physician, for the birth of a healthy child following an unsuccessful sterilization operation. *See* Heimann, — Ariz. at —, 667 P.2d at 1296 n.1. Courts have also used the terms "wrongful conception" and "wrongful birth." *See* Ochs v. Borelli, 445 A.2d 883, 884 (Conn. 1982); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 170 (Minn. 1977). The term "wrongful birth" is not used in this casenote because it generally denotes a cause of action brought by the parents for the negligently caused birth of a genetically defective child. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979). "Wrongful pregnancy" must also be distinguished from "wrongful life" claims, in which the infant plaintiff, usually suffering from birth defects, brings an action against a tortfeasor whose negligence caused its birth. Wrongful life claims have generally not been recognized by the courts because of the difficulty in comparing the child's situation (life in an impaired state) with the situation in which it would have been without the defendant's negligence (nonexistence). *See id.*; Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Stewart v. Long Island College Hosp., 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972). *But see* Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (infant plaintiff born with a genetic defect allowed to recover special damages for the medical costs associated with the defect); Harbeson v. Parke-Davis, 98 Wash. 2d 460, 656 P.2d 483 (1983) (a child may maintain a wrongful life cause of action and recover special damages, but only if the parents have not recovered the specials).

4. Heimann, — Ariz. —, 667 P.2d at 1296.

5. *Id.* at —, 667 P.2d at 1299. *See* RESTATEMENT (SECOND) OF TORTS § 920 (1977) (a

ject to a reduction equal to the value of the pecuniary and nonpecuniary benefits which the parents will receive from their relationship with the child.[6] The majority felt that the uniform rules of damages for tort supported the benefit rule and that the benefit rule properly allowed the jury to base its verdict on the facts and circumstances before the court.[7]

Most courts that have dealt with the wrongful pregnancy claim have refused to allow recovery for the costs of raising and educating an unplanned child.[8] By adopting the "direct benefit rule," the Arizona Supreme Court joined the minority.[9] Only one jurisdiction follows a third alternative by allowing full recovery with no offset for the benefits the parents receive from the child.[10]

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benefit conferred upon the plaintiff by the defendant's tortious conduct may be considered in mitigation of damages). *See also* text accompanying notes 46-49.

6. Heimann, — Ariz. —, 667 P.2d at 1299.

7. *Id.* at —, 667 P.2d at 1300.

8. White v. United States, 510 F. Supp. 146 (D. Kan. 1981) (applying Georgia law); Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982); Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980); Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385, *cert. denied*, 104 S. Ct. 149 (1983); Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983); Maggard v. McKelvey, 627 S.W.2d 44 (Ky. Ct. App. 1981); Kingsbury v. Smith, 122 N.H. 237, 442 A.2d 1003 (1982); P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (App. Div. 1981); M. and Wife v. Schmid Laboratories, Inc., 178 N.J. Super. 122, 428 A.2d 515 (App. Div. 1981) (negligence/products liability action against the manufacturer and retailer of a defective condom); Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980); Sala v. Tomlinson, 73 A.D.2d 724, 422 N.Y.S.2d 506 (1979); Mason v. W. Pa. Hosp., 499 Pa. 484, 453 A.2d 974 (1982); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

9. *See* Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir.), *cert. denied*, 104 S. Ct. 425 (1983); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Ochs v. Borelli, 187 Conn. 253, 445 A.2d 883 (1982); Anonymous v. Hospital., 33 Conn. Supp. 125, 366 A.2d 204 (1976); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975).

Other cases which involve the same fact pattern but contain no holding on the damages recoverable are: McNeal v. United States, 689 F.2d 1200 (4th Cir. 1982) (interpreting Virginia law; the plaintiff failed to establish negligence; in dicta, the court stated that a recovery for childrearing costs would be against public policy); Jackson v. Anderson, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970) (holding only that the facts stated a cause of action); Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971) (decided on the basis of the statute of limitations); Stephen v. Spiwak, 61 Mich. App. 647, 233 N.W.2d 124 (1975) (holding only that an attorney's analogy of benefits in a wrongful pregnancy case to damages in a wrongful death case was not prejudicial error); Debora S. v. Sapega, 56 A.D.2d 841; 392 N.Y.S.2d 79 (1977) (negligent failure to diagnose pregnancy in a rape victim); Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (1977) (court refused to award any damages at all and deferred to the legislature); Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974) (holding only that the facts stated a cause of action); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974) (holding that the trial judge erred in directing a verdict for the defendant); Hays v. Hall, 477 S.W.2d 402 (Tex. Civ. App. 1972) (decided on basis of statute of limitations; court stated in dicta that damages for childrearing costs are not allowable), *rev'd on other grounds*, 488 S.W.2d 412 (Tex. 1973); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964) (holding only that the evidence was sufficient to support a jury verdict for the defendant). *See also* Bishop v. Byrne, 265 F. Supp. 460 (D.C. W. Va. 1967) (allowing medical expenses and pain and suffering as elements of damage; the childrearing expense issue was not raised); Bushman v. Burns Medical Center, 83 Mich. App. 453, 268 N.W.2d 683 (1978) (no claim for childrearing costs); Aronoff v. Snider, 292 So. 2d 418 (Fla. App. 1974) (dealing only with a sibling claim).

10. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). *See infra* text and accompanying notes 14-20. *See also* Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (involving not only the birth of a healthy infant, but also of a twin with severe congenital defects. The presence of the unhealthy twin may have influenced the court as to the disposition with respect to the healthy twin).

THE FULL RECOVERY ALTERNATIVE

The court considered the alternative of allowing full recovery of the cost of raising and educating the child with no offset for any benefit conferred on the parents by the unplanned birth. The California Court of Appeals was the first court to allow full recovery. In *Custodio v. Bauer*,[11] on facts similar to those in the present case,[12] the court held that the parents of a child whose birth resulted from the negligent performance of a sterilization operation could recover "the amount which will compensate for all the detriment proximately caused thereby."[13] The court considered application of the direct benefit rule, but not in the context of childrearing costs.[14] In concluding that full recovery should be allowed, the court noted that if Mrs. Custodio had died from foreseeable complications of pregnancy, her husband and nine surviving children presumably would have had a cause of action for wrongful death.[15] If she had been crippled, the defendants would have been liable for her injury, her medical expenses, and her husband's loss of consortium.[16] The court then added: Where the mother survives without casualty, there is still some loss. She must spread her society, comfort, care, protection and support over a larger group. If this change in family status can be measured economically, it should be as compensable as the former losses."[17] Though other courts have cited *Custodio* to support recovery of childrearing costs,[18] the only other court to actually follow the full damage rule was reversed on appeal.[19]

The Heimanns urged the Arizona Supreme Court to adopt the full damage rule.[20] Both the majority and the dissent, however, rejected the

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11. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

12. *Custodio* involved the typical factual pattern—a parent sued a physician for the negligent performance of a sterilization operation which preceded the birth of a healthy child. *Custodio* differs from *Heimann* in that the sterilization operation involved was tubal ligation rather than a vasectomy. Additionally, Mrs. Custodio had been informed by her physician that having additional children would aggravate an existing bladder and kidney condition. *Id.* at 307, 59 Cal. Rptr. at 466.

13. *Id.* at 325, 59 Cal. Rptr. at 477 (citing CAL. CIV. CODE § 3333 (1950)).

14. *Id.* at 323, 59 Cal. Rptr. at 476. The plaintiff, Mrs. Custodio, sought sterilization partially to avoid aggravation of an existing kidney and bladder condition. She claimed damages for increased exposure to injury to those organs. The court stated that if the birth had resulted in a benefit to the plaintiff's kidney and bladder condition, the defendant physicians should be entitled to an offset. *Id.* See *infra* notes 47-53 and accompanying text for a discussion of the "same interest" limitation of the direct benefit rule.

15. 251 Cal. App. 2d at 323, 59 Cal. Rptr. at 476.

16. *Id.*

17. *Id.*

18. Stills v. Gratton, 55 Cal. App. 3d 698, 708, 127 Cal. Rptr. 652, 658 (1976); Anonymous v. Hospital, 33 Conn. Supp. at 127, 366 A.2d at 206; Troppi v. Scarf, 31 Mich. App. at 251, 187 N.W.2d at 516.

19. Cockrum v. Baumgartner, 99 Ill. App. 3d at 271, 425 N.E.2d at 968. In *Cockrum*, the Illinois Court of Appeals characterized the wrongful pregnancy action as "analytically indistinguishable from an ordinary medical malpractice action" and held that the parents could recover "all damages proximately caused by [the] physician's negligence." *Id.* at 272-73, 425 N.E.2d at 969-70. The court rejected application of the benefit rule to the extent that it has been used to allow the emotional benefits of parenthood to offset the pecuniary burdens. *Id. See also* Bowman v. Davis, 48 Ohio St. 2d at 41, 356 N.E.2d at 496 (allowing full recovery in a case involving the birth of one healthy twin and one with congenital defects).

20. Heimann, — Ariz. at —, 667 P.2d at 1297.

rule. The majority found that the rule did not permit the trier of fact to consider "the basic values inherent in the [parent-child] relationship and the dignity and sanctity of human life."[21] The dissent rejected the full damage rule on public policy grounds.[22]

EXCLUSION OF CHILDREARING COSTS AS AN ELEMENT OF DAMAGES

Many jurisdictions follow the rule which excludes childrearing costs as an item of compensable damage.[23] The opinions often evince a judicial reluctance to recognize the birth of a child as an injury to the parents.[24] Other courts, while recognizing that the birth of a child can constitute an injury, argue that several factors require adoption of the limited recovery rule.[25] The factors cited by the courts are: the speculative nature of the damages,[26] the potential effect of a recovery upon the stability of the family unit,[27] the possibility of emotional damage to the unplanned child,[28] and public policy.[29]

Public Policy

The public policy which would preclude recovery appears to vary with each court.[30] The policies set forth by the courts have included: a policy against placing "too unreasonable a burden" upon physicians and obstetricians, even where negligence has been established and "the chain

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21. *Id.* at —, 667 P.2d at 1299.

22. *Id.* at —, 667 P.2d at 1301. (Gordon, J., concurring in part and dissenting in part). The dissent specifically lists as damages that should be recoverable costs of obstetrical care, loss of wages by the mother, hospital costs, and the mother's pain and suffering caused by delivery. For cases that have excluded childrearing costs as an item of compensable damage but that nevertheless have allowed recovery for the cost of the unsuccessful sterilization operation, *see* Wilbur v. Kerr, 628 S.W.2d 568; Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975). For cases which have allowed the husband's claim for loss of consortium, *see* White v. United States, 510 F. Supp. 146 (D. Kan. 1981) (interpreting Georgia law); Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Coleman v. Garrison, 327 A.2d 757 (Del. 1975); Maggard v. McKelvey, 627 S.W.2d 44 (Ky. Ct. App. 1981); P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (App. Div. 1981); Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980). *See also infra* text accompanying notes 33-39.

23. *See* authorities cited *supra* note 8.

24. *See, e.g.*, Coleman v. Garrison, 349 A.2d at 8 (the value of a human life outweighs any damages sustained as the result of a birth); Public Health Trust v. Brown, 388 So. 2d at 1085 (". . . a parent cannot be said to have been damaged by the birth and rearing of a normal healthy child."); Terrell v. Garcia, 496 S.W.2d at 128 (". . . public sentiment recognizes that the benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child").

25. *See infra* notes 26-29 and accompanying text. *See* Heimann, — Ariz at —, 667 P.2d at 1302 (Gordon, J., concurring in part and dissenting in part). The dissent raises two of these factors (the possibility of emotional damage to the child and public policy) in support of its position on exclusion of childrearing costs.

26. White v. United States, 510 F. Supp. at 150; Boone v. Mullendore, 416 So. 2d at 721; Sorkin v. Lee, 78 A.D.2d at 181, 434 N.Y.S.2d at 301; Beardsley v. Wierdsma, 650 P.2d at 292.

27. Boone v. Mullendore, 416 So. 2d at 721.

28. *Id.* at 722; Wilbur v. Kerr, 628 S.W. 568, 571 (Ark. 1982).

29. Schork v. Huber, 648 S.W.2d at 863; Wilbur v. Kerr, 275 Ark. at 244, 628 S.W.2d at 571; Maggard v. McKelvey, 627 S.W.2d at 48; Mason v. West Pa. Hosp., 453 A.2d at 976.

30. *See* Wilbur v. Kerr, 275 Ark. at 245, 628 S.W.2d at 572, where Dudley, J., dissenting, commented, "For some time I have been disquieted by the lack of a standard by which we determine when to apply public policy and the lack of a meaningful definition by which we discover what constitutes public policy."

of causation is complete and direct";[31] a policy against giving the parents a windfall by allowing them to keep the child and recover damages;[32] and a policy against reducing human life to a monetary value that would be violated by attempting to place an economic price tag upon the birth of a health child.[33]

In *Heimann*, the dissent stated that allowing recovery violated public policy because it may "impinge upon the availability and costs of sterilization surgery in Arizona."[34] The majority did not address this policy argument; however, under the majority's reasoning a significant increase in the cost of sterilization seems unlikely. First, the majority did not require a higher standard of care among physicians performing sterilization operations, contrary to the understanding of the dissent.[35] The holding of the majority would result in liability only for those physicians who have violated the existing standard of care. Additionally, physicians may avoid wrongful pregnancy liability merely by meeting the local post-operation fertility testing standard.[36]

The "Emotional Bastard" Theory

Some courts have denied recovery of childrearing costs on the basis of the "emotional bastard" theory.[37] These courts express fear of the adverse effect on the child's emotional stability if the child were to learn of the litigation and infer from this that his parents did not want him.[38] Courts that have allowed recovery despite the possibility of future emotional dam-

31. Rieck v. Medical Protective Co. 64 Wis. 2d at 517, 219 N.W.2d at 244 (1974).

32. Shaheen v. Knight, 6 Lyc. 19, 23, 11 Pa. D. & C. 2d 41, 45-46 (Lycoming Co. 1957).

33. Terrell v. Garcia, 496 S.W.2d at 128.

34. — Ariz. at —, 667 P.2d at 1302 (Gordon, J., concurring in part and dissenting in part). Justice Gordon expresed his fear that allowing recovery would increase the number of unwanted pregnancies since only the wealthy would be able to afford sterilization.

35. *Id.* at —, 667 P.2d at 1302. "If the intended result of the majority is to lessen the number of unwanted pregnancies by requiring more skill and caution in the performance of sterilization procedures, I believe that this case will be self-defeating."

36. Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311 (1982), where the author states,

> Negligence in the actual performance of the operation is so difficult to discover that the physician himself may not be sure whether the failure of the operation was due to his negligence or to an unavoidable natural regeneration of the tubes he severed. . . . The physician who wants to avoid wrongful birth liability may often do so simply by refusing to warrant that his operation is 'a fool-proof thing' and by meeting the local fertility testing standard. Because the physician is able to avoid liability by these inexpensive means, expanding the wrongful birth damage recovery should not appreciably raise the cost of malpractice insurance, or make surgeons reluctant to perform sterilization operations.

Id. at 1329-30. Because of difficulties in proving that the actual operation was negligently performed, most plaintiffs allege instead that the physician was negligent in conducting post-operative sterility tests or in failing to inform the plaintiff of unfavorable results. Sherlock v. Stillwater Clinic, 260 N.W.2d at 171 n.1 (citing Lombard, *Vasectomy*, 10 SUFFOLK U.L. REV. 25 (1975); Note, 56 GEO. L.J. 976 (1968)).

37. Boone v. Mullendore, 416 So. 2d at 722; Wilbur v. Kerr, 275 Ark. at 244, 628 S.W.2d at 571.

38. *See, e.g.*, Heimann, — Ariz. at —, 667 P.2d at 1302 (Gordon, J., concurring in part and dissenting in part) (although only a few children may suffer as a result of learning of the litigation, a few are too many). Wilbur v. Kerr, 275 Ark. at 244, 628 S.W.2d at 572 (". . . the damage to the child will be significant; . . . being an unwanted or emotional bastard who will someday learn that its parents did not want it and, in fact, went to court to force someone else to pay for its

age to the child have recognized that a greater harm may exist in situations where the parents simply cannot afford the burden of raising another child.[39] The child would possibly be subjected to the hardship of growing up in a family where emotional tensions would run high as a result of the unplanned stress on the family budget.[40] At least two courts have tried to lessen the possibility that the child would learn of the litigation by omitting the surname of the plaintiffs from the opinion.[41] The position of the Arizona majority, however, is that the parents, not the courts, should decide whether the potential of emotional injury to the child is sufficiently significant to warrant avoiding litigation.[42]

THE DIRECT BENEFIT RULE

The Arizona Supreme Court adopted a rule that lies between full recovery of childrearing costs and complete exclusion of those costs.[43] The majority followed the rationale of *Custodio*[44] to the extent that it views wrongful pregnancy actions as ordinary medical malpractice actions, in which the plaintiff can recover damages for injuries which are a foreseeable consequence of the defendant's negligence.[45] The majority opinion differs from the *Custodio* opinion, however, on the issue of whether the recovery for the costs of rearing and educating the child should be reduced by the value of the benefit that the parents will derive from the child.[46]

The "Same Interest" Limitation of the Benefit Rule

The controversy surrounding application of the direct benefit rule in wrongful pregnancy cases centers on the "same interest" limitation of the rule. Section 920 of the Restatement (Second) of Torts states:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit *to the interest of the plaintiff that was harmed*, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.[47]

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raising, will be harmful to that child. . . . We have not become so sophisticated a society to dismiss that emotional trauma as nonsense.")

39. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d at 325, 59 Cal. Rptr. at 477.

40. Cockrum v. Baumgartner, — Ill. 2d at —, 447 N.E.2d at 394 Justice Clark, dissenting stated:

> [I]n denying damages for child-rearing, the court may well be accomplishing the very result it seems so intent on avoiding—making a child of an unwanted birth a victim of a very real continuing financial struggle and thus a painful reminder of the obligations of parenthood to a couple who has no appetite for a parental lifestyle.

41. *See, e.g.*, Anonymous v. Hospital, 33 Conn. Supp. 125, 366 A.2d 204 (1976); P. v. Portadin, 179 N.J. Super. at 465, 432 A.2d at 556.

42. Heimann, — Ariz. at —, 667 P.2d at 1300 (citing Hartke v. McKelway, 707 F.2d at 1552 n.8 (D.C. Cir. 1983)). The *Hartke* court stated: "We are not convinced that the effect on the child will be significantly detrimental in every case, or even in most cases; . . . we think the parents, not the courts, are the ones who must weigh the risk.

43. Heimann, — Ariz. at —, 667 P.2d at 1297.

44. 251 Cal. App. 2d at 303, 59 Cal. Rptr. at 463.

45. Heimann, — Ariz. at —, 667 P.2d at 1299.

46. *Id.* at —, 667 P.2d at 1299, n.4.

47. RESTATEMENT (SECOND) OF TORTS § 920 (1977) (emphasis added).

Justice Gordon criticized the majority's application of the benefit rule, stating that a proper application of the "same interest" limitation would require that the pecuniary costs of raising the unplanned child be offset only by pecuniary benefit and that emotional harm be offset only by the emotional benefits of the parent-child relationship.[48] The comments and illustrations following Section 920 appear to consider emotional interests as separate from financial interests so that one may not offset the other.[49] With the sole exception of *Custodio*, however, courts that have allowed recovery of childrearing costs have rejected this strict interpretation of the "same interest" limitation.[50]

Under a broad interpretation of the term "interest" the financial burdens and emotional benefits derived from childrearing would merely comprise two elements of a much larger interest—family stability.[51] If a court

48. Heimann, — Ariz. at —, 667 P.2d at 1304 (Gordon, J., concurring in part and dissenting in part), (citing Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967)); See Comment, *Robak v. United States: A Precedent-Setting Damage Formula For Wrongful Birth*, 58 CHI. KENT. L. REV. 725, 746-47 (1982); Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1416-17 (1977); *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U.L. REV. 127, 158 (1978); Note, *supra* note 36, at 1326.

49. RESTATEMENT (SECOND) OF TORTS § 920 comment b (1977) explains the "same interest" requirement:

> *Limitation to same interest*. Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited. Thus one who has harmed another's reputation by defamatory statements cannot show in mitigation of damages that the other has been financially benefited from their publication. . . , unless damages are claimed for harm to pecuniary interests. . . . Damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant's act. . . . Damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife.

See also RESTATEMENT (SECOND) OF TORTS § 920 illustrations 5-7 (1977); RESTATEMENT (SECOND) OF TORTS § 918 (1977). Justice Gordon's approach in *Heimann* is based on this limited interpretation of the "same interest" requirement. Heimann, — Ariz. at —, 667 P.2d at 1303-1304.

50. See authorities cited *supra*, note 9. Justice Feldman also rejected the strict interpretation. *Heimann*, — Ariz. at —, 667 P.2d at 1299 n.4.

51. In Troppi v. Scarf, 187 N.W.2d at 519, the first case which applied the direct benefit rule in the wrongful pregnancy context, the court named "family interest" as the interest which must be enhanced for the benefit rule to apply. Arguably, both the financial interests of the plaintiffs and the emotional benefit received from a child are encompassed by the "family interest." In Sherlock v. Stillwater Clinic, 260 N.W.2d at 176 (1977), the court applied the benefit rule, and stated that doing so was "in keeping with the 'same interest' limitation of the Restatement." The court in Ochs v. Borelli, — Conn. at —, 445 A.2d at 886, adopted the direct benefit rule although it recognized that ". . . this balancing test requires the jury to mitigate economic damages by weighing them against noneconomic factors. . . ."

In *Heimann*, the court stated that the rule allowed the jury to calculate the "pecuniary and non-pecuniary" costs and to offset them by the value of the "pecuniary and non-pecuniary" benefits. — Ariz. at —, 667 P.2d at 1299. This amounts to offsetting pecuniary and nonpecuniary costs by the value of the nonpecuniary benefits only, since the parents will probably realize no real pecuniary gain from the child. *See* Troppi v. Scarf, 31 Mich. App. at 255, 187 N.W.2d at 518, in which the court recognized that pecuniary gain from a minor child is largely illusory. *Accord* Sherlock v. Stillwater Clinic, 260 N.W.2d at 176 n.12. If this is the case, the Arizona court apparently has chosen to adopt a broad interpretation of the term "interest."

For arguments against a broad interpretation, see Hartke v. McKelway, 707 F.2d at 1553 n.9 ("It has been said that courts should not allow defendants in wrongful conception to thrust upon the plaintiff an unwanted benefit. . . ."); Kashi, *supra* note 48, at 1416 (analogizing defendants in wrongful pregnancy cases to officious intermeddlers, i.e., by thrusting a benefit upon the parents that they did not ask for and may not be able to afford). *See also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 182 (1973). Professor Dobbs states:

> It is certainly strange, to say the least, that benefits conferred in the course of a deliberate

defines the interest damaged by the tortfeasor as the well-being of a family, any benefit arising from the unplanned addition to that family should properly be considered to minimize damages. Considerations of fairness justify a broad interpretation of the "same interest" requirement in wrongful pregnancy cases. Plaintiffs generally are not required to minimize damages by obtaining an abortion or placing the child for adoption; both of these options have been found unreasonble as a matter of law.[52] If the sole methods of minimizing the costs of childrearing have been foreclosed by law, it would be unfair to deny the defendant a credit for a benefit that he has conferred on the plaintiffs. Strict application of the "same interest" limitation of section 920, coupled with a rule that the court cannot require plaintiffs to minimize damages by abortion or adoption, would lead to a remedy formula that heavily favors plaintiffs. The courts should strive rather to achieve a balance between the plaintiffs' need for compensation and the defendant's right to receive credit for a benefit that the plaintiffs are retaining. A broad interpretation of the "same interest" requirement, in addition, would allow the jury to consider all of the burdens and benefits resulting from the defendant's negligence and to balance them to reach an equitable result.[53]

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tort should be paid for without question, when benefits conferred without a tort are condemned as officious intermeddling and go entirely without compensation under standard restitutionary rules. If it is true that no one should be forced to accept a 'benefit' he does not wish to have, then some considerable care must be exercised in offsetting benefits received in the course of a tort. . . . Clear benefits, actually accrued, may well be offset. But doubts, surely, should be resolved against the tortfeasor, and he should have no credit for remote and uncertain benefits, especially if they are unwanted.

52. Heimann, — Ariz. at —, 667 P.2d at 1301 n.5; Sherlock v. Stillwater Clinic, 260 N.W.2d at 176; Troppi v. Scarf, 31 Mich. App. at 260, 187 N.W.2d at 519. Note that in the Restatement illustrations, the plaintiffs are charged with a duty to take reasonable measures to minimize damages. RESTATEMENT (SECOND) OF TORTS § 920, illustrations 5-7 (1977). Additionally, the nature of the benefit conferred on wrongful pregnancy plaintiffs is substantially different from that of the benefits presented in the illustrations. *See, e.g.*, Kingsbury v. Smith, 442 A.2d at 1006 (". . . it is difficult to imagine a malpractice case which is more readily distinguishable. In no other situation is a new human life created.") In many cases a normal healthy child will be the source of tremendous joy to the parents, regardless of whether the child was planned. *See, e.g.*, Heimann, — Ariz. at —, 667 P.2d at 1300.

53. Though courts have adopted the benefit rule to effect an equitable remedy, its application can lead to highly unfavorable results in some cases. Take, for example, the couple who sue their physician because they cannot afford to rear an unplanned child. Though the couple may love the child deeply and receive a large emotional benefit from him the joy they receive from the child does not alleviate the financial burden that the defendant's negligence has placed upon them. *See* Mason v. West Pa. Hosp., 499 Pa. at 496, 453 A.2d at 981 (Larsen, J., concurring and dissenting) ("Whatever those [childrearing] expenses are determined to be, they are simply not reduced by the satisfaction, love, joy and pride which an unplanned child may provide his parents"). The rule itself includes no provision for ignoring the emotional benefit, no matter what financial straits the parents may experience.

The Arizona Supreme Court has provided a means to avoid inequitable results in a situation such as this by expressing its intention that the parents' "preconception calculation of the reasons for preventing procreation" be the major factor in determining the size of the award. Heimann, — Ariz. at —, 667 P.2d at 1300. The court stated: "[T]he parents' preconception calculation of the reasons for preventing procreation is untainted by bitterness, greed or sense of duty to the child and is perhaps the most telling evidence of whether or to what extent the birth of the child actually injured the parents." *Id.* at —, 667 P.2d at 1300 (citing Hartke v. McKelway, 707 F.2d at 1554). By focusing on the reasons behind the sterilization operation in its valuation of emotional benefit, the jury will be able to tailor its award to the actual injury sustained in each case.

The Abortion/Adoption Mitigation Argument

Under the avoidable consequences rule,[54] a person who is injured by the tort of another may not recover for any harm which could have been avoided by the use of reasonable effort. The question whether aborting an unplanned fetus or placing an unplanned child for adoption is "reasonable" has arisen in many wrongful pregnancy cases.[55] At first glance, the mitigation argument may seem to be a good one. Parents who do not want the burden of raising a child could eliminate that burden simply by giving up the child. The actions of aborting a child or placing one for adoption, however, are vastly different from the type of mitigation contemplated by the avoidable consequences rule, e.g., having a broken leg set.[56] Moral and religious considerations are likely to come into play when any parent decides whether to give up a child that has already been conceived.[57] As the Arizona majority noted, the decision to use contraception is entirely different from the decision to abort or to place a child for adoption once it

54. RESTATEMENT (SECOND) OF TORTS § 918 (1977).

In *Heimann*, Justice Gordon criticized the majority for its inconsistent use of emotion, stating that if the court used the logical principles of tort law to reach its conclusion that childrearing costs are recoverable, it should apply all tort principles, including the avoidable consequences rule. Justice Gordon stated that, in the usual tort case, the determination of whether a particular mitigation measure is reasonable is a question for the trier of fact. — Ariz. at —, 667 P.2d at 1303. He did not, however, advocate allowing the issue of mitigation to go to the jury; he discussed the avoidable consequences rule merely to point out what he perceived as a logical flaw in the majority opinion. *Id.* at —, 667 P.2d at 1303 n.1 Justice Gordon (concurring in part and dissenting in part) stated:

> I point these inconsistencies out not because I believe the majority opinion should remedy them. Indeed, the rule adopted by the majority but purged of these inconsistencies would be even less desirable as a matter of policy. I point them out in an attempt to demonstrate that the majority's attempt to avoid the moral and policy problems associated with this area of the law by appealing to strict principles of tort law is flawed. I am convinced that any such attempt would be flawed.

Id.

55. *See* Troppi v. Scarf, 31 Mich. App. at —, 187 N.W.2d at 519 (". . . to impose such a duty [abortion or placing the child for adoption] upon the injured plaintiff is to ignore the very real difference which our law recognizes between the avoidance of conception and the disposition of the human organism after conception"); Sherlock v. Stillwater Clinic, 260 N.W.2d at 176 (the refusal to abort or put the child up for adoption should not be regarded as a failure to mitigate damages). *But see* Robak v. United States 658 F.2d 471, 479 n.23 (7th Cir. 1981) ("Because they [the parents] freely chose not to have an abortion, they should be responsible for the costs of a normal child."); Sorkin v. Lee, 78 A.D.2d at 181, 434 N.Y.S.2d at 301 (disallowing recovery of childrearing costs because "[p]laintiffs do not claim that defendant's conduct prevented them from discovering the pregnancy or terminating it, or that abortion was contraindicated because of any medical condition of the mother").

56. *See* RESTATEMENT (SECOND) OF TORTS § 918 comment d (1977).

57. The Michigan Court of Appeals describes the dilemma with which parents are confronted in Troppi v. Scarf, 31 Mich. App. at 259, 187 N.W.2d at 520:

> As a matter of personal conscience and choice parents may wish to keep an unwanted child. Indeed, parents have been known to keep children that many think should be institutionalized, e.g., mentally retarded children, not because of any anticipated joy or happiness that the child will bring to them but out of a sense of obligation. So, too, the parents of an unplanned, healthy child may feel, and properly so, that whether they wanted the child or not is beside the point once the child is born and that they have an obligation to rear the child as best they can rather than subject him to rearing by unknown persons. Further, even though the parents may not want to rear the child, they may conclude that the psychological impact on them of rejecting the child and placing him for adoption . . . would be such that, making the best of a bad situation, it is better to rear the child than to place him for adoption.

has been conceived.[58] Consequently, the court concluded that parents who choose to raise an unplanned child should not be precluded from recovering childrearing costs.[59] Most courts that have faced the issue have dealt with it in the same manner as the Arizona majority.[60]

SCOPE OF THE DECISION

The negligence of a physician in performing a vasectomy can give rise to claims other than the wrongful pregnancy claim presented in *Heimann*. Two such claims are "wrongful birth" and "wrongful life."[61] A third type of claim is that of the siblings of an unplanned child who seek to recover for the reduction in each child's share of parental affection and the family wealth.[62]

The decision in *Heimann* does not mandate recovery in wrongful life claims. Wrongful pregnancy cases, in which the parents are the plaintiffs, require the trier of fact to compare the actual position of the plaintiffs with the position they would have been in without the negligence; the process involves comparing the parents' situation prior to the birth with their situation after the unplanned birth.[63] The infant wrongful life plaintiffs generally have been unsuccessful because this weighing process would involve comparing the plaintiff's existence in an impaired condition with the void of nonexistence.[64] The unfamiliarity of the trier of fact with the condition of nonexistence precludes it from making this comparison.[65]

Wrongful birth claims, asserted by the parents of a genetically defective child, probably will be resolved through application of the benefit rule. The majority in *Heimann* did not directly address the subject of wrongful birth claims; however, its approach to the wrongful pregnancy claim in *Heimann* is indicative of the reasoning that the court would use in a wrongful birth case, given the identity of interests represented in the two claims. Justice Gordon, dissenting in *Heimann*, stated that he would "hold the health care provider responsible for the cost of lifetime support and

58. Heimann, — Ariz. at —, 667 P.2d at 1301 n.5. *See also* C. MCCORMICK, DAMAGES § 35, 133 (1935). "If the effort, risk, sacrifice or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages."

59. Heimann, — Ariz. at —, 667 P.2d at 1301 n.5.

60. Troppi v. Scarf, 31 Mich. App. at 260, 187 N.W.2d at 520 ("While the reasonableness of a plaintiff's efforts to mitigate is ordinarily to be decided by the trier of fact, we are persuaded to rule, as a matter of law, that no mother, wed or unwed, can reasonably be required to abort (even if legal) or place her child for adoption."); Sherlock v. Stillwater Clinic, 260 N.W.2d at 176 (holding that the refusal to abort or place the child for adoption may not be regarded as a failure to mitigate). *But see* cases cited *supra* note 55.

61. *See supra* note 3.

62. *See* Cox v. Stretton, 77 Misc. 2d at 155, 352 N.Y.S.2d at 834.

63. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d at 325, 59 Cal. Rptr. at 476. Troppi v. Scarf, 31 Mich. App. at 256-57, 187 N.W.2d at 519.

64. *See* cases cited *supra* note 3.

65. Gleitman v. Cosgrove, 49 N.J. at 22, 227 A.2d at 689. Chief Justice Weintraub, dissenting in part, stated: "Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so." *Id.* at 63, 227 A.2d at 711.

care for the child"[66] in a wrongful birth action. Though neither the majority nor the dissent discussed the application of an offset in a wrongful birth action, the majority seems likely to apply the same "uniform rules of damages"[67] that it relied on in the present case and to reach the same result.

The courts that have decided sibling claims have refused to recognize the cause of action.[68] The Arizona Supreme Court is unlikely to recognize a sibling cause of action because allowing recovery would involve an expansion of the existing rules of tort damages.[69]

CONCLUSION

In *University of Arizona Health Sciences Center v. Superior Court*, the Arizona Supreme Court held that the parents of a child whose birth resulted from the negligent performance of a sterilization operation could recover the future costs of raising the unplanned child, subject to an offset for the benefits that the parents will receive by reason of their relationship with the child. With this decision, Arizona has properly established the liability of a physician who negligently performs a sterilization operation at a level which is supported by traditional tort principles. The rule adopted by the court will allow the jury to determine, as nearly as possible, the extent of the actual injury sustained by the parents of an unplanned child and to tailor the award to that injury. The rule serves to further the tort goals of providing adequate compensation to injured plaintiffs, providing a deterrent to negligent medical treatment, and avoiding unjust enrichment.

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66. Heimann, — Ariz. at —, 667 P.2d at 1301 (Gordon, J., concurring in part and dissenting in part).

67. *Id.* at —, 667 P.2d at 12. *See also* Eisbrenner v. Stanley, 106 Mich. App. 351, 308 N.W.2d 209 (1981), and Harberson v. Parke-Davis, Inc., 98 Wash. 2d at 460, 656 P.2d at 483, which apply the benefit rule in wrongful birth cases.

68. *See* White v. United States, 510 F. Supp. at 148 ("there is no basis in law or logic for an action by siblings for the birth of an additional child to the family"); Aronoff v. Snider, 292 So. 2d 418, 419 (Fla. Dist. Ct. App. 1974) ("The Concept of a cause of action in children for a 'wrongful birth' is without foundation in law or logic."); Sala v. Tomlinson, 73 A.D.2d at 725, 422 N.Y.S.2d at 509 (summarily dismissing a claim by the sibling brothers of an unplanned child as "wholly without merit"); Cox v. Stretton, 77 Misc. 2d at 160, 352 N.Y.S.2d at 840 ("there is no 'proportional' share of their parents' worldly goods to which children are entitled and . . . infants are not entitled as a matter of right to any specific share of their parents wealth, much less their 'care', 'affection' or 'training' ").

69. The only court to deal at length with the issue, in Cox v. Stretton, 77 Misc. 2d at 159, 352 N.Y.S.2d at 840, stated that the claim "does not come within any of the recognized tort categories. The infant plaintiffs claim damages but they allege no injuries to themselves. No duty owed to them by the defendant has been breached. No fundamental right has been violated."

IV. TORTS

GOVERNMENTAL TORT IMMUNITY REVISITED: *RYAN V. STATE*

On September 30, 1975, David Ryan was severely injured during the course of an armed robbery of the convenience market where he worked.[1] The assailant was John Myers, an escapee from a facility for juvenile offenders operated by the State of Arizona. Myers, who had a lengthy record of serious, often violent crime, had escaped from similar Arizona institutions on several occasions in the past.[2] Ryan filed suit against the state of Arizona, the Director of the Department of Corrections and the Arizona Youth Center, alleging negligent and grossly negligent supervision of a dangerous inmate. The trial court granted the state's motion for summary judgment based on the public duty doctrine,[3] and the Arizona Court of Appeals affirmed.[4] The Arizona Supreme Court reversed, holding that the state was not immune from liability, thereby abolishing the public duty doctrine in Arizona.[5]

The Rise and Fall of Governmental Immunity

The ancient doctrine of governmental tort immunity, imported from England,[6] was recognized judicially in the United States 172 years ago.[7] In common with other states, Arizona early adopted the view that the state was immune from liability for the tortious acts of its officers, agents, and employees.[8] Although individual state employees were similarly shielded from personal liability for negligent performance of governmental functions,[9] this particular immunity was eventually removed.[10]

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1. Ryan v. State, 134 Ariz. 308, 308, 656 P.2d 597, 597 (1982). The details of the attack appear in State v. Myers, 117 Ariz. 79, 82-83, 570 P.2d 1252, 1255-56 (1977), *cert denied*, 435 U.S. 928 (1978).

2. The chronology of Myers' history with the Arizona Department of Corrections appears in Ryan v. State, 134 Ariz. 327, 327-28, 656 P.2d 616, 616-17 (Ct. App. 1982).

3. The public duty doctrine states that if a duty is owed to the public in general, no duty is owed to an individual member of the public. Illinois v. Maryland Casualty Co., 132 F.2d 850, 852 (7th Cir. 1942); Adams v. State, 555 P.2d 235, 241 (Alaska 1976); Wilson v. Nepstad, 282 N.W.2d 664, 667 (Iowa 1979). *See infra* note 22.

4. Ryan v. State, 134 Ariz. at 327, 656 P.2d at 616.

5. Ryan v. State, 134 Ariz. at 310, 656 P.2d at 599.

6. Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924).

7. Mower v. Inhabitants of Leicester, 9 Mass. 247, 249 (1812).

8. State v. Sharp, 21 Ariz. 424, 426, 189 P. 631, 631 (1920) (holding that the state was not liable to a construction worker injured through the negligence of state employees while building an addition to the state capitol).

9. Larsen v. County of Yuma, 26 Ariz. 367, 371, 225 P. 1115, 1117 (1924) (the state of Arizona, board of supervisors and county engineer were exercising the governmental function of highway maintenance and thus were not liable for the death of a driver whose car ran off a bridge which lacked protective railings).

Across the country, the doctrine of sovereign immunity became riddled with exceptions[11] and gradually eroded until, today, total immunity is virtually nonexistent.[12] The Arizona Supreme Court discarded sovereign immunity in *Stone v. Arizona Highway Commission*,[13] where the court held the defense to be abolished in that case, in all pending cases, and in cases yet to arise.[14] Rejecting the argument that only the legislature should change established dogma, the court emphasized that a doctrine judicially created[15] could be judicially changed.[16] Subsequent cases, following the *Stone* court's observation that "the rule is liability and immunity is the exception,"[17] consistently held the state liable for the negligent acts of its officers, agents, and employees.[18] Arizona's tort liability appeared firmly established.

The Public Duty Doctrine

Six years after *Stone*, however, the Arizona Supreme Court severely limited the scope of governmental liability by invoking the public duty doctrine in deciding *Massengill v. Yuma County*.[19] While acknowledging

10. Ruth v. Rhodes, 66 Ariz. 129, 133, 185 P.2d 304, 307 (1947) (an individual police officer was personally liable for injuries resulting from his negligent driving although his employer, the state of Arizona, was not).

11. Two analytical approaches were commonly utilized. The first distinguished between acts termed "discretionary" (those generally involving basic judgment or policy considerations), for which there was immunity, and those deemed "ministerial" (generally the day-to-day operational acts of persons not in positions of policy formulation), for which there was no immunity. *See, e.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 220, 359 P.2d 457, 462, 11 Cal. Rptr. 89, 94 (1961); Eastman v. Williams, 124 Vt. 445, 446, 207 A.2d 146, 148 (1965). The other common approach distinguished between acts which were uniquely governmental, and thus immune, and those "proprietary" functions which could be shared with private enterprise, for which there was no immunity. *See, e.g.*, Carlisi v. City of Marysville, 373 Mich. 198, 205, 128 N.W.2d 477, 482 (1964); Ramirez v. Ogden City, 3 Utah 2d 102, 106, 279 P.2d 463, 466 (1955). Arizona briefly adopted the latter approach in Hernandez v. County of Yuma, 91 Ariz. 35, 37, 369 P.2d 271, 272 (1962).

12. Only Maryland appears to retain the doctrine. *See* Cox v. St. George's County, 296 Md. 162, —, 460 A.2d 1038, 1040 (1983).

13. 93 Ariz. 384, 381 P.2d 107 (1963).

14. *Id.* at 392, 381 P.2d at 112. *Stone* involved injuries and death to occupants of an automobile which misplaced highway signs directed into the path of an oncoming vehicle. The court held the state liable for negligent sign placement.

15. State v. Sharp, 21 Ariz. at 424, 189 P. at 631; *see supra* note 8 and accompanying text.

16. Stone v. Arizona Highway Comm'n, 93 Ariz. at 393, 381 P.2d at 113. The Supreme Court of Washington expressed a similar position in Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash.2d 162, 178, 260 P.2d 765, 774 (1953): "We closed our courtroom doors without legislative help, and we can likewise open them."

17. 93 Ariz. at 392, 381 P.2d at 112.

18. *See, e.g.*, Patterson v. City of Phoenix, 103 Ariz. 64, 68, 436 P.2d 613, 617 (1968) (city liable for tortious acts of police officers); Veach v. City of Phoenix, 102 Ariz. 195, 197, 427 P.2d 335, 337 (1967) (city liable for negligent failure to supply water for fighting fires, once it assumed the duty to do so); Rodgers v. Ray, 10 Ariz. App. 119, 126, 457 P.2d 281, 288 (1969) (state liable for failure to warn of dangerous road condition); State v. Watson, 7 Ariz. App. 81, 84, 436 P.2d 175, 178 (1967) (state liable for negligent failure to adequately warn of narrow highway bridge); Garcia v. City of Tucson, 1 Ariz. App. 83, 84, 399 P.2d 704, 705 (1965) (city liable to child injured by gate in city park).

19. 104 Ariz. 518, 456 P.2d 376 (1969). A deputy sheriff, after observing two persons leaving a tavern, followed them in his police vehicle as they drag-raced side by side down a narrow, winding mountain road. The deputy sheriff made no attempt to stop them. One of the racers collided with an approaching car, killing five of its occupants and permanently injuring the sixth. 104 Ariz. at 519-20, 456 P.2d at 377-78.

that *Stone* abolished governmental immunity,[20] the *Massengill* court declared that the issue before it was not the immunity of a government officer but, rather, the nature of the officer's duty to the plaintiff.[21] With essentially no discussion, the court resurrected the general rule that a public officer's duty is to the public as a whole and that an individual injured by that officer's performance has no civil recourse.[22] The only exception *Massengill* recognized would occur when the state, by its conduct, had in some way narrowed its duty to the general public so as to create a special duty to an individual member of that public.[23]

Thus, the public duty-private duty dichotomy became established in Arizona. An individual plaintiff injured by an official's performance (or nonperformance) of a "public duty" was without a remedy.[24]

*Post-*Massengill *Development*

The adoption of the *Massengill* public duty doctrine produced inconsistent and unpredictable results. One group of cases, following *Massengill*, denied recovery in a series of progressively restrictive decisions turning on lack of duty.[25] Another group of cases attempted to harmonize *Stone* and *Massengill* in a variety of ways,[26] all emphasizing that the ques-

20. *Id.* at 521, 456 P.2d at 379.

21. *Id.*

22. *Id.* (citing T. COOLEY, A TREATISE ON THE LAW OF TORTS, 385 (4th ed. 1932): ". . . if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution".

23. 104 Ariz. at 523, 456 P.2d at 381. As an example of such narrowing, the court cited Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958). In *Schuster*, the plaintiffs' deceased actively participated in the apprehension of an escaped bank robber and subsequently received threats on his life. These threats were reported to the police, who failed to provide protection. In the action filed by Schuster's survivors after his murder, the court held that because of the deceased's cooperation with the police and their solicitation of his cooperation, the state owed him an individual duty of care. 5 N.Y.2d at 82, 154 N.E.2d at 538, 180 N.Y.S.2d at 271.

24. Massengill v. Yuma County, 104 Ariz. 518, 523, 456 P.2d 376, 381 (1969).

25. Bagley v. State, 122 Ariz. 365, 367, 595 P.2d 157, 159 (1979) (state not liable for death of mine worker following inspector's failure to close mine for violation of safety regulations); DeHoney v. Hernandez, 122 Ariz. 367, 372, 595 P.2d 159, 164 (1979) (no liability for alleged negligent response to silent burglar alarm which had been installed on recommendation of police and in reliance on their response procedures); McGeorge v. City of Phoenix, 117 Ariz. 272, 277, 572 P.2d 100, 105 (Ct. App. 1977) (city not liable for policeman's failure to prevent landowner from killing owner of disabled vehicle parked on his property, despite officer's knowledge of landowner's rage and possession of gun); Wesley v. State, 117 Ariz. 261, 263, 571 P.2d 1057, 1059 (Ct. App. 1977) (State Liquor Department not liable to plaintiffs injured in tavern fight after department failed to use its authority to close the establishment for known repeated episodes of violence); Ivicevic v. City of Glendale, 26 Ariz. App. 460, 462, 549 P.2d 240, 242 (9176) (no duty owed to motorist killed by drunk driver whom police had ordered to drive his car); Delarosa v. State, 21 Ariz.App. 263, 265, 518 P.2d 582, 584 (1974) (no duty owed to motorist injured by unsafe vehicle parked on roadside, which state had failed to inspect); Duran v. City of Tucson, 20 Ariz. App. 22, 27, 509 P.2d 1059, 1064 (1973) (no individual duty owed to mechanic burned in explosion after fire inspector failed to enforce fire code in not ordering removal of open flame from area in which presence of gasoline was foreseeable).

26. For example, in Grimm v. Arizona Bd. of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977), the Supreme Court of Arizona held the state liable for the release on parole of a known dangerous criminal who subsequently murdered plaintiffs' son. The Board "narrowed its duty from one owed to the general public to one owed to individuals by assuming parole supervision over, or taking charge of, a person having dangerous tendencies." 115 Ariz. at 267, 564 P.2d

tion of public or private duty must be handled on a case-by-case basis.[27]

In *Cady v. State*,[28] the Arizona Court of Appeals ultimately characterized the status of the public duty doctrine in Arizona as "no law at all."[29] Expressing discontent with the uncertainty of case-by-case adjudication, and pointedly recognizing the supreme court's "vacillation"[30] and unwillingness to overrule *Massengill*,[31] the *Cady* court attempted to establish workable guidelines for determining governmental tort liability. The court of appeals refined the *Massengill* rule by holding that, in order to successfully maintain an action against the state, the plaintiff must show that the state, by its prior conduct, created such a relationship with the plaintiff that the negligent act worked to his special injury.[32] The court of appeals specifically invited the supreme court to make a policy decision regarding the imposition of duty.[33]

Less than a month after deciding *Cady*, the court of appeals addressed this point again in *Bill Moore Motor Homes, Inc. v. State*.[34] The court expressed the view that the public duty doctrine had reincarnated sovereign immunity.[35] In even more explicit terms than those used in *Cady*, the

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at 1234. In State v. Superior Court, 123 Ariz. 324, 599 P.2d 777 (1979), the court rejected the state's claim that the Arizona Corporation Commission owed no duty to the individual depositors of a defunct thrift association, finding a duty created "by statutory language that is designed to protect a particular class of persons rather than the public as a whole." 123 Ariz. at 333, 599 P.2d at 786. In Oleszczuk v. State, 124 Ariz. 373, 604 P.2d 637 (1979), the court imposed liability where occupants of an automobile were injured and killed when struck by a vehicle whose unconscious driver had a history of seizures and had previously surrendered his license, only to have it reinstated by the Motor Vehicle Department after an inspector filled in false answers on the driver's application for a new license. Further, the department had not established a medical advisory board, as required by statute. The court held that the duties of the department were "obviously designed to protect that portion of the public using the highways," 124 Ariz. at 376, 604 P.2d at 640, and thus the general duty had been narrowed to a particular class. In McCuistion v. City of Huachuca City, 122 Ariz. 341, 594 P.2d 1037 (Ct. App. 1979), the court imposed liability on the city for damage caused when a city-owned landfill washed onto plaintiffs' land. The court relied primarily on the fact that operating the landfill was a proprietary function, thereby eliminating the need to apply the public duty doctrine at all. In its search for liability in the face of *Massengill*, the court relied on the governmental-proprietary function dichotomy. 122 Ariz. at 343, 594 P.2d at 1039. This approach had been explicitly abandoned years earlier. *See* Veach v. City of Phoenix, 102 Ariz. 195, 196, 427 P.2d 335, 336 (1967). See *supra* note 11 for a discussion of the governmental-proprietary distinction.

27. State v. Superior Court, 123 Ariz. at 324, 333-34, 599 P.2d at 777, 786-87. *See* cases cited *supra* note 26.

28. 129 Ariz. 258, 630 P.2d 554 (Ct. App. 1981).

29. *Id.* at 263, 630 P.2d at 559.

30. *Id.*

31. *Id.*; *see supra* notes 25 and 26.

32. Cady v. State, 129 Ariz. at 263, 630 P.2d at 559. The situations in which a plaintiff has established the necessary special relationship with the state prior to injury so as to escape the public duty doctrine are exceedingly rare. *See supra* notes 23 and 34. To bar recovery in all but the most extreme cases, *id.*, is tantamount to re-establishing governmental immunity. *See supra* note 35.

33. Cady v. State, at 264, 630 P.2d at 560.

34. 129 Ariz. 189, 629 P.2d 1025 (Ct. App. 1981). The case involved an inspection by an employee of the Arizona Department of Motor Vehicles which failed to reveal that certain vehicles were stolen. The court found that a public duty existed, but that the prior relationship between Moore and the department was such that sufficient narrowing of that duty had occurred to create liability to Moore individually. 129 Ariz. at 195, 629 P.2d at 1031.

35. The Court of Appeals stated: ". . . we think that the public-private duty dichotomy is a shield very much like the shield of governmental immunity . . . It makes no difference whether

court of appeals implored the Arizona Supreme Court to clarify.[36] The supreme court responded by deciding *Ryan*.[37]

The supreme court acknowledged the confusion surrounding the varied treatment of governmental tort liability in the Arizona courts.[38] In overruling *Massengill* the *Ryan* court returned to the application of basic principles of negligence, as mandated by *Stone*.[39] *Ryan* thus eliminated the necessity for the injured party to show that the state owed a specific duty of care in order to receive compensation for damages.[40]

Ryan *In Practice: The Practical Impact*

In assessing the probable impact of the *Ryan* decision, it is helpful first to note what *Ryan* did not do. It did not eliminate judicial or legislative immunity.[41] It did not impose strict liability on the state.[42] Finally, it did not expose executive level, policy formation activities to tort liability.[43]

The *Ryan* court stated its intention to apply to governmental defendants the principles of negligence which have traditionally applied to every entity which causes injury to another.[44] The elements of negligence—a duty to the plaintiff, a breach of that duty, and harm proximately resulting from that breach[45]—must be proved against the state as a defendant. Sim-

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we call the remaining shield 'no duty' or governmental immunity. Either way, we are finding no liability as a matter of public policy." 129 Ariz. at 193 n. 4, 629 P.2d at 1029 n. 4.

36. *Id.* The court pointed out the impossibility of deciding cases on public policy grounds without knowing what the policy considerations are. "If the Supreme Court were to articulate the policies underlying its decisions in duty cases, we could then analyze novel state negligence cases in terms of these policies." *Id.* at 194 n.4, 629 P.2d at 1030 n.4.

37. Ryan v. State, 134 Ariz. at 308, 656 P.2d at 597. *See supra* notes 1-2 and accompanying text.

38. 134 Ariz. at 309, 656 P.2d at 598.

39. Stone v. Arizona Highway Comm'n, 93 Ariz. at 392, 381 P.2d at 112.

40. Ryan v. State, 134 Ariz. at 310, 656 P.2d at 599. Specifically, the court abolished "the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty, which means recovery." *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. By superimposing the public duty doctrine on traditional negligence principles, the *Massengill* court effectively eliminated the very essence of tort liability as it applied to the state: it made foreseeability irrelevant. By abandoning *Stone* without specifically overruling it, *Massengill* abandoned long-held tenets of tort law. *See supra* note 46. The cases which continued to apply ordinary negligence concepts, as mandated by *Stone*, *see supra* note 26, were later characterized as "aberrations in the law of public duty." Cady v. State, 129 Ariz. at 264, 630 P.2d at 560. The results which followed application of the *Massengill* rule lend support to the proposition that the public duty doctrine was itself the aberration. The irreconcilability of *Stone* and *Massengill* is illustrated by the opposite results which would have been likely in cases which followed the latter's public duty doctrine had those cases been decided under ordinary negligence principles. *See supra* note 25, where the facts and actual holdings of the following cases are discussed. In *Duran*, 20 Ariz. App. at 22, 509 P.2d at 1064, had a private company inspected the garage and not recommended removal of the open flame, that company would have been liable for the injuries resulting from the subsequent explosion. If a private citizen had forced a drunken driver to operate a vehicle in *Ivicevic*, 26 Ariz. App. at 460, 549 P.2d at 240, that person would have been liable to the survivors of the deceased motorist. A private security company which negligently responded to a burglar alarm which it recommended would have been liable for the loss the jeweler suffered in *DeHoney*, 122 Ariz. at 367, 595 P.2d at 159.

45. Ryan v. State, 134 Ariz. at 310, 656 P.2d at 599. *See, e.g.*, Wisener v. State, 123 Ariz. 148, 149, 598 P.2d 511, 512 (1979); Boyle v. City of Phoenix, 115 Ariz. 106, 107, 563 P.2d 905, 906 (1977).

ilarly, the familiar tort law test of negligence—failure to act reasonably under the circumstances to avoid foreseeable harm[46]—is the standard by which courts will judge the actions of the state of Arizona.[47] *Ryan* thus puts the public duty doctrine to rest and places Arizona in the company of a number of other states which have rejected the doctrine.[48]

From a financial standpoint, the *Ryan* decision should have little effect on the state of Arizona. The Risk Management Act[49] authorizes the state to purchase liability insurance for acts or omissions of its officers, agents, and employees acting in the course and scope of their employment.[50] *Ryan* dealt with the only area of state action which the Risk Management Act does not exempt from liability: ordinary negligence.[51] To suggest that Arizona's financial stability is threatened by *Ryan* would be to imply that Arizona's citizens are routinely being injured by state officers, agents, and employees, and that the state has escaped liability for their negligence only through the operation of the public duty doctrine. Were this the case, the six years between *Stone* and *Massengill* should have produced a blizzard of litigation. There is no evidence that this occurred[52] or that it will occur now as a result of Ryan.[53]

The *Ryan* court addressed the question of immunity for "high level"

46. Negligent conduct is that which falls below the standard necessary to protect others against an unreasonable risk of harm. The standrd is that of a reasonable man under the circumstances, and negligence may consist of either an act or a failure to act, when a person is under a duty to do one or the other. RESTATEMENT (SECOND) OF TORTS §§ 282, 283, 284 (1965). The touchstone of negligence is foreseeability: whether or not the actor could reasonably foresee any injury as the result of his act (or omission). W. PROSSER, LAW OF TORTS, § 43 (4th ed. 1971).

47. Ryan v. Stone, 134 Ariz. at 310, 656 P.2d at 599.

48. Adams v. State, 555 P.2d 235, 242 (Alaska 1976) ("[T]he 'duty to all, duty to no-one' doctrine is in reality a form of sovereign immunity."); Martinez v. City of Lakewood, 655 P.2d 1388, 1390 (Colo. App. 1982) ("The concept of a public duty cannot stand . . . where there is a common law duty of a public entity to the plaintiff."); Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1015 (Fla. 1979) (the "efficacy [of the general duty-special duty dichotomy] is dependent on the continuing vitality of the doctrine of sovereign immunity"); Wilson v. Nepstad, 282 N.W.2d 664, 671 (Iowa 1979) (city liable when breach of statutory duty "involves a foreseeable risk of injury to an identifiable class to which the victim belongs"); Stewart v. Schmieder, 386 So.2d 1351, 1358 (La. 1980) (". . . the mere fact that a duty is of a public nature, and benefits the general public, does not require a conclusion that the city cannot be found liable for the breach of that duty."); Brennen v. City of Eugene, 285 Or. 401, 411, 591 P.2d 719, 725 (1979) (employee "had a duty to exercise reasonable care in performing this function so as to avoid creating a foreseeable risk of harm to others"); Coffey v. City of Milwaukee, 74 Wis.2d 526, 540, 247 N.W.2d 132, 139 (1976) ("Any duty owed to the public generally is a duty owed to individual members of the public.").

49. ARIZ. REV. STAT. ANN. § 41-621 (1973).

50. *Id.* at § 41-621(A)(3). Thus, unless the state for some reason fails to obtain the insurance which the act permits, Arizona is protected from financial loss. Ryan v. State, 134 Ariz. at 310, 656 P.2d at 599. Further, the state remains immune by statute from the imposition of punitive damages in the event of wilful and wanton negligence. ARIZ. REV. STAT. ANN. § 41-621(H). In addition, the state has reliability for virtually any felonious act committed by an individual. *Id.* at § 41-621(I)(1) (Supp. 1983).

51. The specificity in the statute makes it appear unlikely that the legislature sought to shield the state from negligence claims but somehow neglected to do so. *See id.* at § 41-621.

52. The five cases cited *supra* note 18 represent all the cases relying on *Stone* which reached the appellate level in the six years prior to *Massengill*.

53. At this writing, only two cases have been reported which rely on *Ryan*: Brown v. Syson, 135 Ariz. 567, 663 P.2d 251 (Ct. App. 1983), and Bischofshausen v. Pinal-Gila Counties Air Quality Control Dist., No. 2 CA-CIV 4443, slip op. (Ct. App. June 1, 1983).

executive activity.[54] Traditionally, even when sovereign immunity has been abolished, government executives have remained free to formulate policies, unfettered by fears of tort liability.[55] This area where immunity has persisted has been variously described as the realm of basic "policy decisions,"[56] "discretionary functions or duties,"[57] and "discretionary acts."[58]

When the *Ryan* court stated that it would not apply a discretionary acts exception to governmental liability for negligent acts,[59] it made clear that it did not mean to abolish the traditional freedom enjoyed by governmental policymakers. Rather, the court simply declined to assign labels extending automatic immunity to specific acts and chose instead a rule which requires examination of governmental planning and implementation activities as they arise.[60] Under the supreme court's formulation in *Ryan*, courts may recognize the defense of governmental immunity only when a governmental function would be "severely hampered" or established public policy "thwarted" by nonrecognition of the immunity.[61] It is unclear, however, what acts of a government official are of such a nature that the imposition of liability would "hamper" governmental functioning or "thwart" public policy.[62]

The Supreme Court of Washington has suggested a three-step analysis to identify activities which would be accorded immunity.[63] First, the act under scrutiny must be performed by a high-level executive.[64] Second, the act must involve the determination of basic governmental policy.[65] Finally, the act must result from a "considered policy decision," as opposed to a decision made routinely in the course of everyday activity.[66]

While such an approach will not ensure the predictability of potential tort liability attendant to every act, it provides a basic analytical framework within which the courts and the executive branch of the government can operate.[67] The category of high-level executives is one which can be administratively defined; identification of those who fall within the defini-

54. Ryan v. State, 134 Ariz. at 310, 656 P.2d at 599.

55. *See, e.g.*, Lippman v. Brisbane Elementary School Dist., 55 Cal.2d 224, 230, 359 P.2d 465, 467, 11 Cal. Rptr. 97, 99 (1961); Evangelical United Brethren Church of Adna v. State, 67 Wash.2d 246, 254, 407 P.2d 440, 444 (1966).

56. King v. Seattle, 84 Wash.2d 239, 246, 525 P.2d 228, 233 (1974).

57. 28 U.S.C. § f2860(a) (1948), sets forth but does not define the exemption for discretionary functions and duties under the Federal Tort Claims Act.

58. Brennen v. City of Eugene, 285 Or. 401, 415, 591 P.2d 719, 727 (1979).

59. 134 Ariz. at 310, 656 P.2d at 599.

60. *Id.*

61. *Id.*

62. *Id.* at 311, 656 P.2d at 600.

63. Chambers-Castanes v. King County, 100 Wash.2d 275, —, 69 P.2d 451, 456 (1983).

64. *Id.*

65. *Id.*

66. *Id.*

67. For example, using this approach, a court might find that the director of a large municipal zoo is a high-level executive making a considered decision regarding basic policy when deciding to build a new lion enclosure. The decision to build is immune. However, the choice of the type of lock for the enclosure is within the realm of a routine decision and is not immune. Thus, if the director selects a lock which the lion can open, the state should be liable for the damages suffered by the person mauled by the lion.

tion should present little difficulty. The requirement that a decision be a "considered" one[68] would eliminte those decisions made in the routine course of everyday business. Thus, the primary question to be resolved would be the identification of basic governmental functions and public policies, a task which courts have traditionally performed.

Conclusion

Ryan v. State, the Arizona Supreme Court's most recent decision regarding governmental tort immunity, specifically overruled *Massengill v. Yuma County*, thereby rejecting the public duty doctrine which had limited the state's liability for tortious acts committed by its officers, agents, and employees. In returning to traditional negligence principles and treating the state as a private litigant, the *Ryan* court made it clear that the plaintiff must establish all the elements of negligence to prevail and that the state may utilize the defenses available to any other defendant in a negligence action. *Ryan* did not impose a standard of strict liability upon the state, nor did it remove the traditional immunity which accompanies judicial, legislative or high-level executive activities.

The court left unresolved the problem of identifying those acts which do not clearly fit into the areas afforded immunity. It is suggested that Arizona consider the three-step process adopted by the Supreme Court of Washington, which requires that an immune act be one performed by a high-level executive, involving basic policy formulation and resulting from a considered decision. Such an analysis, or an equivalent approach, must be adopted to enable both the courts and the executive branch of government to identify those acts which remain immune and those which create state tort liability.

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68. Chambers-Castanes v. King County, 100 Wash.2d at —, 669 P.2d at 456.