most overt sort of action has been directed against doctors because of their affiliation with group-practice prepayment plans. Whether judicial protection will be applied against the more subtle methods of coercion, or to the individual practitioner, remains a matter for speculation.

For this purpose, the cases provide little guidance except insofar as they delineate more technical problems such as proof of conspiracy and permissible defenses. They indicate that organized medicine can justify the regulation of its members' practices through ostensible enforcement of the code of medical ethics, except where the economic interests of third parties are affected. There, justification must be shown, and enforcement must not be contrary to public policy or law (i.e., in restraint of trade). Whether attempts by organized medicine to curtail or destroy prepaid medical service plans will conform to public policy in this sense is at best arguable and at least doubtful.

LAW APPLICABLE TO CLAIMS OF UNITED STATES FOR CONTRIBUTION OR INDEMNITY IN FTCA CASES

The Federal Tort Claims Act[1] provides that tort actions against the government shall be governed by the law of the place where the tort occurred.[2] In accordance with this provision, the rights and liabilities of parties in proceedings under the Act have generally been determined according to local law.[3]

The FTCA contains no provision for contribution or indemnity, either in

[1] 60 Stat. 842 (1946), 61 Stat. 722 (1947), 28 U.S.C.A. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1950).

[2] 28 U.S.C.A. § 1346 (Supp., 1954) confers on the federal district courts "exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. § 2674 (1948) provides that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

[3] E.g., Rushford v. United States, 204 F. 2d 831, 832 (C.A. 2d, 1953); United States v. Gaidys, 194 F. 2d 762, 764 (C.A. 10th, 1952).

But local law has been found inapplicable to determine certain questions arising under the Act where uniform federal standards were deemed appropriate. Thus, federal rather than local standards are employed to determine when a tortfeasor is an employee of the United States within the scope of his employment. United States v. Sharpe, 189 F. 2d 239, 241 (C.A. 4th, 1951); Field v. United States, 107 F. Supp. 401, 405 (N.D. Ill., 1952); Williams v. United States, 105 F. Supp. 208, 209 (N.D. Cal., 1952); see Hubsch v. United States, 174 F. 2d 7 (C.A. 5th, 1949). Other courts, however, have decided this question without reference to federal standards, e.g., United States v. Stewart, 201 F. 2d 135 (C.A. 5th, 1953); Murphey v. United States, 179 F. 2d 743 (C.A. 9th, 1950).

The class of permissive plaintiffs under the Act has also been found to constitute a question for federal rather than local determination. Feres v. United States, 340 U.S. 135 (1950), denied the right of a serviceman or survivor to institute a claim under the Act for service-connected injuries. Accord: Sigmon v. United States, 110 F. Supp. 906 (W.D. Va., 1953);

favor of or against the United States.[4] Such claims, however, have been allowed in a number of cases. Claims *against* the government for contribution and indemnity have uniformly been decided in accordance with local law.[5] But the choice of law for determination of claims *by* the government has not been uniform.[6]

In *United States v. Arizona*,[7] the United States Court of Appeals for the Ninth Circuit applied state law in upholding the dismissal of a claim by the United States for contribution or indemnity against a joint tortfeasor. The *Arizona* case is the first to consider expressly the question of whether state or federal law should be applied to claims for contribution and indemnity arising out of actions under the FTCA.[8]

Shew v. United States, 116 F. Supp. 1 (M.D. N.C., 1953) (federal prisoners may not be claimants regardless of local law).

The Act contains various exceptions to the rule that local law shall determine liability (see, e.g., 28 U.S.C.A. § 2680). Such an exception "must be interpreted under the general law rather than under some peculiar interpretation of a State or Territory." Stepp v. United States, 207 F. 2d 909, 911 (C.A. 4th, 1953). And the limitation provision of the Act has been held to prevail over a local statute of limitations. Maryland v. United States, 165 F. 2d 869, 871 (C.A. 4th, 1947); Young v. United States, 184 F. 2d 587, 589–90 (App. D.C., 1950).

[4] Consult note 23 infra.

[5] Contribution against the United States: United States v. Yellow Cab Co., 340 U.S. 543 (1951); Patterson v. Pennsylvania R. Co., 197 F. 2d 252, 253 (C.A. 2d, 1952) where contribution was awarded, apparently under the "applicable Pennsylvania statute." In Brown & Root, Inc. v. United States, 198 F. 2d 138 (C.A. 5th, 1952), a claim for contribution was disallowed because the Texas statute did not provide for contribution where the claimant had settled the original claim. See Englehardt v. United States, 69 F. Supp. 451, 452 (D. Md., 1947).

Indemnity against the United States: St. Louis-S.F. Ry. Co. v. United States, 187 F. 2d 925, 927 (C.A. 5th, 1951) (held that since the facts would give rise to an action under Mississippi law if private parties were involved, "a case is made out against the United States under the [FTCA]"). Accord: United States v. Acord, 209 F. 2d 709, 714 (C.A. 10th, 1954). See Terminal R. Ass'n of St. Louis v. United States, 182 F. 2d 149 (C.A. 8th, 1950).

[6] Showers v. United States, 113 F. Supp. 350, 352 (M.D. Pa., 1953), allowed the government to recover contribution, stating that "the right of contribution of the United States . . . is governed by the law of Pennsylvania." Accord: Di Benedictis v. United States, 103 F. Supp. 462, 463–64 (W.D. Pa., 1952).

In United States v. Savage Truck Line, 209 F. 2d 442, 446–47 (C.A. 4th, 1953), the government was allowed indemnity under "generally recognized" principles. Since local law was "in line with these conclusions," the court did not consider the question of applicable law.

In United States v. Gilman, 347 U.S. 507 (1954) state law was disregarded in the determination of the government's right to indemnity from its negligent employee. See discussion in text, p. 724 infra. But in Burks v. United States, 116 F. Supp. 337, 340 (S.D. Tex., 1953), on similar facts the court found the claim a valid one under federal common law.

[7] 214 F. 2d 389 (C.A. 9th, 1954), petition for rehearing en banc denied 216 F. 2d 248 (C.A. 9th, 1954).

[8] In none of the earlier cases, despite their divergent results, has the question of applicable law been placed in issue. See cases cited in notes 5 and 6 supra.

Although the pleadings in the original appeal in the Arizona case do not indicate that the parties contested the issue of applicable law, the court's express ground for upholding dismissal is that Arizona law prevents recovery. United States v. Arizona, 214 F. 2d 389, 392

Early in 1949, the State of Arizona had been deeded various tracts of a former military reservation by the War Assets Administration. About April 2, 1949, Krause, a boy scout allegedly permitted on the reservation by Arizona, was injured while "fooling around with a bazooka shell" which he had found on the premises. Krause brought an action against the United States under the FTCA, alleging that his injuries were the result of the negligence of a United States Army decontamination team. The United States denied negligence, alleging that any fault lay with Arizona, and filed a third-party complaint against Arizona "for contribution and/or indemnity." The district court separated the third-party claim from the main action. Judgment on the main action was for the injured scout against the United States.[9] The district court, without opinion, later granted Arizona's motion to dismiss the third-party complaint.

On appeal the Ninth Circuit upheld dismissal.[10] The court believed that the Supreme Court's decision in *United States v. Yellow Cab Co.*[11] required the application of state law,[12] and found that state law did not permit recovery.[13] In

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(C.A. 9th, 1954). The question of applicable law was expressly placed before the court in the petition for a rehearing en banc. 216 F. 2d 248 (C.A. 9th, 1954).

[9] Krause v. United States, D. Ariz., Civil No. 543 (Dec. 3, 1951) (not reported). Appeal was dismissed, the record not having been forwarded in time. United States v. Krause, 197 F. 2d 329 (C.A. 9th, 1952).

[10] Appeal was first dismissed on the ground that notice of appeal was defective. United States v. Arizona, 206 F. 2d 159 (C.A. 9th, 1953). On appeal the Supreme Court held that notice was adequate and ordered the claim reinstated. United States v. Arizona, 346 U.S. 907 (1953).

Upon reinstatement by the Ninth Circuit, the parties were in disagreement as to the grounds on which the district court had dismissed the claim. The United States contended that the grounds were jurisdictional and procedural. In its brief the government argued: (1) that the proceedings did not fall within the exclusive jurisdiction of the Supreme Court; (2) that the United States was not required to comply with the conditions prescribed by Arizona in waiving its immunity from suit. Brief for United States at 7–11, 11–18, United States v. Arizona, 214 F. 2d 389 (C.A. 9th, 1954). Arizona contended that dismissal was on substantive grounds and should be upheld since the United States did not state an adequate claim for relief under the common-law rules for indemnity or contribution. It cited no Arizona case or statute exemplifying these rules, but did cite various federal common-law cases. Moreover, Arizona argued that since it had not waived its immunity to suit for tort, it could not be sued in such an action. Brief for Arizona at 4–6, 6–12, ibid.

[11] United States v. Yellow Cab Co., 340 U.S. 543 (1951).

[12] "[T]he implications of the Yellow Cab case . . . are clear that the lower court would have been justified in dismissing the third party complaint . . . on the ground that the law of Arizona does not permit contribution among tort-feasors under the . . . facts. . . ." 214 F. 2d 389, 394–95 (1954).

[13] The court cited Schade Transfer & Storage Co. v. Alabam Freight Lines, 75 Ariz. 201, 254 P. 2d 800 (1953), as its sole authority for the applicable Arizona law. In that case a defendant, who had been held liable for injuries resulting from an unloading operation conducted jointly by its employee and an employee of the third-party defendant, sued for indemnity. The court asserted that such recovery was allowable only where the defendant could prove the third-party defendant guilty of independent negligence that was the sole proximate cause of the jury. Finding that such facts were not proved, recovery was denied.

In its petition for a rehearing en banc, the United States contended that the Schade case was not conclusive since it dealt solely with a claim for indemnity, recovery being denied on the

a second opinion, denying a petition for a rehearing en banc, the Ninth Circuit rejected the contention that the decisions of the Supreme Court in *United States v. Gilman*[14] and *United States v. Standard Oil Co.*[15] rendered state law inapplicable.

I

In the *Yellow Cab* case the Supreme Court allowed a joint tortfeasor to recover contribution from the government under the FTCA. Viewing the "breadth of purpose . . . [of] the bill as a whole . . . ,"[16] the Court held that claims for contribution were included. Contribution was allowed in accordance with local law.[17] But the Court expressly noted in a footnote that the issue of the applicability of local law, not being in dispute, was not before it.[18] The only other reference to applicable law is contained in the following passage:

> Of course there is no immunity from suit *by* the Government to collect claims . . . due it from its joint tort-feasors. . . . [T]his right . . . [should be enforceable] by impleading the joint tort-feasor. . . . See 3 Moore's Federal Practice (2d ed. 1948) 507, *et seq.* . . . [I]f the Act is interpreted as now urged by the Government, it would mean that if an injured party recovered judgment against the Government, the Government could then sue its joint tort-feasor (*local substantive law permitting*).[19]

The holding itself furnishes scant authority for the *Arizona* decision. It is solely a determination of the scope of the liability *of* the government under its waiver of immunity in the Act. Presumably, local law is applied to the claim only because it falls within the scope of the waiver. In the *Arizona* case, where the claim is *by* the government, this rationale for the application of local law is absent.

The Ninth Circuit, however, may have based its use of local law upon the words of the *Yellow Cab* opinion quoted above. The parenthetical clause in the quoted passage may indicate the Supreme Court's belief that local law should be applied to a claim for contribution by the government. But the value of the parenthetical expression as authority for this contention must be discounted. First, it is interjected in an argument not adopted by the Court, and no such

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facts and not because common-law indemnity did not exist in Arizona. The court dismissed this contention, conceding that the Schade case might not be identical, but stating that it provided sufficient ground for concluding that Arizona law would probably not sanction the requested recovery. 216 F. 2d 248, 249 (1954).

[14] 347 U.S. 507 (1954).

[15] 332 U.S. 301 (1947).

[16] 340 U.S. 543, 550 (1951).

[17] The Yellow Cab case resolved a conflict between circuits: aff'g Howey v. Yellow Cab Co., 181 F. 2d 967 (C.A. 3d, 1950), and rev'g Capital Transit Co. v. United States, 183 F. 2d 825 (App. D.C., 1950). In the Howey case, the contribution claim was held to fall within the waiver of immunity, and contribution was permitted under Pennsylvania law. The Capital Transit case, however, held such a claim outside the scope of the waiver of sovereign immunity, although local law sanctioned such recovery between private parties. The government's contention before the Supreme Court was that the waiver did not extend to such a claim: it made no contention as to the applicability of local or federal law.

[18] 340 U.S. 543, 546 n. 2 (1951).

[19] Ibid., at 551–52 (italics added).

qualification is stated or implied at any other point in the opinion.[20] Secondly, the Court earlier expressly noted that it was not deciding the question of applicable law, even as to claims against the government.[21] Finally, the question of the government's right to contribution was not before the Court, and any reference to it is dicta. Yet the Ninth Circuit found that the "implications" of the *Yellow Cab* case sufficed to make state law applicable to the facts of the *Arizona* case.

The *Arizona* court asserted that the *Yellow Cab* decision was based upon the rule of *Erie R. Co. v. Tompkins*.[22] But neither that case nor its rule are mentioned in the *Yellow Cab* opinion. Since *Yellow Cab* finds that a contribution claim against the government is included under the terms of the Act, application of the *Erie* rule seems superfluous, and the inference that it was applied is unsupported in the opinion. Thus, nothing in the *Yellow Cab* opinion dictates the use of local law in a claim for contribution by the United States.

Another basis for the *Arizona* decision can perhaps be found in what may be called the "parity" theory. Under this view, the government has by passage of the FTCA consented, with only stipulated exceptions, to be placed on a parity with a similarly situated private tortfeasor. Since the right to contribution is not included among the exceptions, it arguably should be governed by local law, as would a like claim by a private counterpart.[23] The application of the "parity" theory to claims by the government arising from actions under the FTCA was presented to the Supreme Court for the first time in *United States v. Gilman*.[24]

[20] This qualification is not introduced in the first sentence of the quoted passage, which announces the existence of a right to contribution in the government. The authority cited by the Court at this point, 3 Moore, Federal Practice § 14.29 (2d ed., 1948), contends, in the very section cited, that the government's claim is a matter for federal rather than state law. The Supreme Court presumably was aware that the proposition that state law was applicable was an arguable one. Had the Court intended to make such an assertion, they might easily have done so in a less elliptical fashion.

[21] Consult note 18 supra.

[22] 214 F. 2d 389, 391–92 (1954). The Erie case is reported in 304 U.S. 64 (1938).

[23] The parity theory may be inferred from an expansive reading of the words of the Act: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C.A. § 2674 (1948). This theory is also consistent with all of the cases dealing with the derivative liability of the United States under the Act. See cases cited in note 5 supra. And see United States v. Aetna Surety Co., 338 U.S. 366, 370 (1949), where the Supreme Court, upholding the right of subrogees to sue under the Act, said: "the language of the Act indicates a congressional purpose that the United States be treated as if it were a private person in respect to torts committed by its employees, except for certain specified exceptions enumerated in the Act. . . ."

Legislative history, in particular the omission from the Act of an early proposal for a right over, has been thought to indicate congressional intent to relegate such rights to local law determination. But the extraordinary complexity of the legislative history of the Act has led at least one commentator to "question whether the congressional intent to *enact* law on . . . contribution . . . became sufficiently specific . . . that the courts should feel bound to interpret the statute in accordance with these brief statements that preceded enactment by several years." 3 Moore, Federal Practice § 14.29, at 514–15, n. 19 (2d ed., 1948).

[24] 347 U.S. 507 (1954).

The *Gilman* case involved a claim by the government for indemnity from its employee for whose negligence it had been held liable under the FTCA. The government argued that passage of the FTCA placed it on a parity with a private employer respecting suit by its tort victim, and it was thereby entitled to the same right of indemnity; the *Yellow Cab* decision was said to "show the way."[25]

The Supreme Court, however, distinguished the situation from that in the *Yellow Cab* case:

> In that case . . . the claim was within the class covered by the waiver of sovereign immunity. . . .
>
> The present case is quite different. We deal not with the liability of the United States, but with the liability of its employees.[26]

The Court took notice of the important governmental problems arising from the relation of the United States to its employees and of the fiscal problem involved in governmental liability under the FTCA.

The proper disposition of a case involving such governmental problems was said to be dictated by *United States v. Standard Oil Co.*,[27] in which the Court declined to extend the common-law action of *per quod servitium amiset* to cover the government-soldier relationship, stating that the problem involved federal policy which Congress, not the Supreme Court, should formulate. The Court in the *Gilman* case stated that "the reasons for following that course in the present case are even more compelling,"[28] since "here a complex of relations between federal agencies and their staffs is involved."[29] The claim "presents questions of policy on which Congress has not spoken,"[30] and the selection of that policy is appropriately for Congress.

Thus the *Gilman* case clearly removes claims against a government employee from the scope of the "parity" argument. But the status of the "parity" theory as to claims by the government against strangers cannot be determined from the *Gilman* opinion. In any event, the first Supreme Court opinion to deal with the "parity" theory respecting claims for contribution and indemnity rejected its application. It is not clear, moreover, that the *Arizona* decision was based upon the "parity" theory.[31] Insofar as the "parity" theory was relied upon the decision stands on uncertain ground.

II

On the basis of the *Gilman* decision the United States in the *Arizona* case petitioned the Court of Appeals for the Ninth Circuit for a rehearing en banc.[32]

[25] Ibid., at 509.

[26] Ibid.

[27] 332 U.S. 301 (1947).

[28] 347 U.S. 507, 511 (1954).

[29] Ibid.

[30] Ibid.

[31] See 214 F. 2d 389, 394 (1954).

[32] The government also protested that the court misapprehended the Arizona law on contribution and indemnity. See note 13 supra.

The Ninth Circuit delivered a second opinion[33] considering the impact of the *Gilman* decision and of *United States v. Standard Oil Co.*[34] on its previous determination that state law should apply.

The *Standard Oil* case did not arise under the FTCA. The government sought reimbursement for hospitalization and loss of services of a soldier injured through the negligence of the defendant. The Court found that *Erie R. Co. v. Tompkins* was irrelevant to the determination of "the question of whether this issue is to be determined by federal or state law,"[35] since the case involved the legal relations of the federal government and was not primarily of local interest. The Court declined to apply state law to the issue because of (1) the distinctively federal character of the relationship between government and soldier; (2) the absence of peculiarly local interests; (3) the absence of valid reason for local variance and the desirability of uniformity; and (4) the incidence upon the fiscal powers of the federal government.

The Court then refused to create, by analogy to established common-law liabilities, a new liability to cover the situation. Since "the issue comes down in final consequence to a question of federal fiscal policy,"[36] the making of such policy is appropriately for Congress, not the Supreme Court.[37]

The *Arizona* situation, in the view of the Ninth Circuit, did not fall within the federal law area defined by the *Standard Oil* and *Gilman* cases. The basis for employing a federal rule in these cases, according to the Ninth Circuit, was that, "in both *Gilman* and *Standard Oil*, the Supreme Court finds elements in the relationship of the government and its employee or soldier that justify a federal rule overriding ordinary state rules."[38]

Thus it appears to the court that:

> [B]efore a court is justified in venturing into the field of creating a [new] federal rule for contribution or indemnity under the Tort Claims Act there must be some element in the case affecting the affairs of the United States above and beyond the fact that the United States has had to pay money for the negligence of its employees.[39]

But here the court finds that "no fiscal problem above and beyond the payment of the original judgment is presented"[40] nor is "the internal management of the government . . . involved in some special way."[41]

[33] 216 F. 2d 248 (1954).

[34] 332 U.S. 301 (1947).

[35] Ibid., at 303.

[36] Ibid., at 314.

[37] The Court also mentions as factors that impel it to defer to Congress: (1) Congress' long inaction while knowing of such losses; (2) the possibility of surprise; (3) the power of the United States, itself one of the litigants, to create such liability at its pleasure. 332 U.S. 301, 315–16 (1947).

[38] 216 F. 2d 248, 249 (1954).

[39] Ibid.

[40] Ibid.

[41] Ibid. The "intendment" of the Yellow Cab case (apparently considered anew in the light of the Gilman and Standard Oil decisions) is that "state law will apply on contribution or indemnity unless the internal management of the Government is involved in some special way." Ibid. The court does not indicate whether or not this "internal-management" criterion is

The "fiscal problem" in the *Standard Oil* and *Gilman* cases, however, does not differ in kind from that in the *Arizona* case. In each the government has, in fulfillment of an obligation, suffered a loss as the result of a negligent act. In each, the government seeks to recoup this loss from the negligent party. The court correctly indicates that the "internal-management" problem of the *Gilman* case is not present in the *Arizona* situation; but the "internal-management" problem in *Standard Oil* is not so readily distinguishable. Although the government-soldier relationship was involved, the Supreme Court indicated that the outcome of the suit against *Standard Oil* would have only a negligible effect on the government's relation to, or obligation toward, the injured soldier.[42] In both *Standard Oil* and *Arizona* the primary question is whether the United States may recover its loss from a negligent stranger.

Secondly, the Ninth Circuit, in distinguishing the *Standard Oil* case, employs different criteria for the application of federal law than were used in that case. The "internal-management" problem is regarded by the Ninth Circuit as being of controlling importance. But it is not the element of "internal management" that leads the Court in *Standard Oil* to eschew state law. That factor is considered along with the desirability of uniformity, the absence of peculiarly local interests, and the federal fiscal problem. The Court accords the greatest emphasis to the last, stating that "the question, therefore, is chiefly one of federal fiscal policy, not of special or peculiar concern to the states or their citizens."[43] The Ninth Circuit, however, substitutes a new criterion, referring to "elements of fiscal policy above and beyond the payment of the original judgment."[44] There seems to be no basis in the *Standard Oil* opinion for the introduction of this "above-and-beyond" requirement.

Thirdly, the *Arizona* court uses, in distinguishing the *Gilman* case, tests which were employed in *Gilman* not in choosing between federal and state law, but in deciding whether to defer to Congress or to create a judicial rule. Two levels of decision are involved: first, whether state law is mandatory; and second, whether the question is for congressional or judicial determination.[45] In the *Gilman* case, too, it is important to distinguish between the Court's failure to employ state law and its unwillingness to inaugurate employee liability. The gravity of the consequences of allowing recovery against government employees convinced the court that the reasons for following *Standard Oil* in deferring to Congress are "even more compelling."[46] The *Gilman* opinion operates only on the second level and does not explicitly consider the applicability of federal or

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identical with the "element . . . above and beyond payment" standard that it postulates earlier.

[42] 332 U.S. 301, 310–11 (1947).

[43] Ibid., at 311.

[44] 216 F. 2d 248, 249 (1954).

[45] The two levels of decision are explicitly displayed in the Standard Oil case. 332 U.S. 301, 303–11, 311–17 (1947).

[46] 347 U.S. 507, 511 (1954).

state law.[47] The Court's justification for not applying state law is left to conjecture. The "internal-management" criterion is employed primarily as a basis for deferring to Congress; only inferentially is it a factor in rejecting the applicability of state law. The Ninth Circuit, however, decides that absent the "internal-management" problem state law is to be applied. This argument appears unjustified, for there is no indication that the Court in *Gilman* considered the "internal-management" issue controlling in their disregard of state law.[48]

Although in fact state law is applied in the *Yellow Cab* case and ignored in the *Gilman* case, neither opinion offers guidance as to the law applicable in the *Arizona* situation.

III

The court in the *Arizona* case mentions the rule of *Erie R. Co. v. Tompkins* in both of its opinions.[49] The court implies that in the absence of some expressly defined area of federal law, the *Erie* rule dictates the application of state law. But the *Erie* rule has been found by the Supreme Court to be mandatory only in cases where the jurisdiction of the federal court arises from diversity of citizenship of the parties.[50] The court's jurisdiction over the *Arizona* case, however,

[47] In the court below, 206 F. 2d 846, 848 (C.A. 9th, 1953), the United States had requested recovery in accordance with state law. After finding that the requisite quasi-contractual basis for recovery was absent, the court noted that "[t]he cause of action which the government here sought to enforce was not one under the [FTCA] which adopts local law for the purpose of defining the Government's tort liability." It declared that the question of the duty of a government employee to the government was properly one for determination by federal rather than state law. But since the government was found to lack the basis for such a claim under state or federal law, it was unnecessary to decide this question.

In its petition for certiorari and in its brief before the Supreme Court, the government conceded that the matter was for determination by federal common law and alleged that such a right of recovery existed. It asserted that the case was distinguishable from the Standard Oil case in that creation of a new cause of action was not sought and deferral to Congress was thus unnecessary. Petition for Certiorari at 7, 17, United States v. Gilman, ibid.; Brief of United States at 9, 14, 22, ibid. Cf. Burks v. United States, 116 F. Supp. 337, 340 (S.D. Tex., 1953).

[48] The Ninth Circuit implies that the Gilman-Standard Oil criteria for applying federal law may operate to restrict, but not to permit, recovery by the government. "[I]t is significant that in [the Gilman and Standard Oil cases] the Supreme Court limits the right of the United States to recover over when a private citizen, perhaps, would not be so restricted. There is yet no case where the Supreme Court has created a liability over where none would exist between private citizens similarly situated." 216 F. 2d 248, 249 (1954).

But once it is recognized that the Gilman opinion does not use the "internal-management" criterion in connection with the problem of applicable state law, this point loses its force. The Gilman court found "internal management" to be the controlling factor in deferring to Congress. Since the Arizona case is said to have no comparable "internal-management" element, the logical conclusion of the Ninth Circuit's argument is not that federal law is inapplicable, but that the Arizona situation does not call for deferral to Congress.

[49] In its original opinion the court found Erie underlying the Yellow Cab decision. See note 22 supra. In its second opinion the court refers to an argument for removing the situation from the scope of the Erie case. 216 F. 2d 248, 249 (1954). But in adhering to its view that the case is not to be removed from the "intendment" of the Yellow Cab case, it would seem to reassert its faith in the applicability of Erie.

[50] United States v. Standard Oil Co., 332 U.S. 301, 307 (1947); cf. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945), where the Supreme Court states that "the intent of [Erie] was

arises from a different source—the power of the federal judiciary to hear all civil proceedings commenced by the United States.[51]

The *Erie* rule has been found inapplicable to cases involving matters which are exclusively federal.[52] In the *Standard Oil* case the Court stated:

> Whether or not, therefore, state law is to control in such a case as this is not at all a matter to be decided by application of the *Erie* rule. For . . . the question is one of federal policy, affecting not merely the federal judicial establishment and the groundings of its action, but also the Government's legal interests and relations, a factor not controlling in the types of cases producing and governed by the *Erie* ruling.[53]

In terms of its federal character, the *Arizona* situation has been shown to be substantially similar to the *Standard Oil* case.[54] The reasoning that led to rejection of the *Erie* rule there would seem to preclude its application by the Ninth Circuit.

The government has, both before and after the *Erie* decision, enjoyed the right to sue in tort,[55] and federal courts have not been bound to apply state law.[56]

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to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court." In Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946), the Supreme Court held that the York decision requiring the application of state law, in accordance with the Erie doctrine, was "inapplicable to enforcement of federal equitable rights" since the case did not come before the Court under diversity jurisdiction. Cf. D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942), where the scope of the Erie rule was clearly identified with diversity jurisdiction.

[51] 62 Stat. 933 (1948), 28 U.S.C.A. § 1345 (1950).

[52] Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); United States v. Standard Oil Co., 332 U.S. 301 (1947); United States v. Allegheny County, 322 U.S. 174, 183 (1944); United States v. Jones, 176 F. 2d 278 (C.A. 9th, 1949); Girard Trust Co. v. United States, 149 F. 2d 872 (C.A. 3d, 1945). And the law for determination of federally created rights and obligations is federal, not state, law. Board of Comm'rs v. United States, 308 U.S. 343 (1939); Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946); Dietrick v. Greaney, 309 U.S. 190 (1940); D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942).

[53] 332 U.S. 301, 309–10 (1947). In regard to applicable law, the Standard Oil situation was held to fall within the rule of Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943), where the Supreme Court found state law and the Erie doctrine inappropriate for the determination of the rights and liabilities that devolve upon the United States consequent to the exercise of its federal powers. The court there applied federal common law. Cf. United States v. Allegheny County, 322 U.S. 174, 183 (1944).

[54] See discussion, pages 725–26 supra.

[55] E.g., Cotton v. United States, 11 How. (U.S.) 229, 231 (1850); United States v. Silliman, 167 F. 2d 607, 610 (C.A. 3d, 1948), where the court said: "[t]he United States can sue those who commit tortious acts which result in pecuniary loss to the United States. . . . [A]uthorities clearly [demonstrate] the standing of the United States as plaintiff to recover pecuniary loss sustained through a tort recognized at the common law."

[56] United States v. Silliman, 167 F. 2d 607 (C.A. 3d, 1948); Tennessee v. Hill, 60 Fed. 1005 (C.A. 6th, 1894); cf. United States v. Standard Oil Co., 332 U.S. 301, 308–10 (1947). But compare cases where the suit is to assert rights consequent to ownership of land. Cotton v. United States, 11 How. (U.S.) 229, 231 (1850); Denver & R. G. R.R. Co. v. United States, 241 Fed. 614, 618 (C.A. 8th, 1917).

The FTCA removed the bar to action in tort against the government and provided for recovery in accordance with local law. But the words of the Act—"the United States shall be liable . . . in the same manner and to the same extent as a private individual. . . . "[57]—do not in themselves dictate the application of local law to a claim by the government. These words apply only to the liability of the government; it is only when they are construed as embodying the "parity" theory that they prescribe the application of local law to the government's claim for recovery from its joint tortfeasor. But, in view of the *Gilman* opinion, the persuasive force of that theory is not great. It seems, therefore, that the Act did not modify the pre-existing right of the government to prosecute claims for losses inflicted by the torts of another.

Thus, the Ninth Circuit could have applied the existing federal law of contribution and indemnity to the *Arizona* case.[58] Or, if the court found it inappropriate to extend the cases in this area to a claim resulting from the waiver of sovereign immunity,[59] it might have found both reason and precedent for denying the claim where Congress had not acted.[60] But neither the FTCA nor the rule of *Erie v. Tompkins* dictates that state law be applied to the *Arizona* case.

[57] 28 U.S.C.A. § 2674 (1948); see note 2 supra.

[58] The federal law of contribution and indemnity comprises a considerable body of cases. The leading federal case is Washington Gaslight Co. v. District of Columbia, 161 U.S. 316 (1896) (where the offense does not involve moral turpitude and is merely *malum prohibitum*, the principal delinquent may be held responsible to his co-delinquent if they are not "equally criminal"). Recovery was not permitted under this rule where both wrongdoers were "guilty of a like neglect." Union Stock Yards v. Chicago, B. & Q. R.R. Co., 196 U.S. 217, 227 (1905). The rules of these cases have been applied and modified by federal (and other) courts. See, e.g., Geo. A. Fuller Co. v. Otis Elevator Co., 245 U.S. 489 (1918); Central Surety & Ins. Corp. v. Mississippi Export R. Co., 91 F. 2d 125 (C.A. 5th, 1937); Standard Oil Co. v. Robins Dry Dock & Repair Co., 32 F. 2d 182 (C.A. 2d, 1929); Derry Electric Co. v. New England Tel. & Tel. Co., 31 F. 2d 51 (C.A. 1st, 1929); Curtis v. Welker, 296 Fed. 1019 (App. D.C., 1924); Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co., 194 Fed. 1011 (N.D. W.Va., 1912). See George's Radio v. Capital Transit Co., 126 F. 2d 219 (App. D.C., 1942); Knell v. Feltman, 174 F. 2d 662 (App. D.C., 1949).

[59] Had the court found it inappropriate to apply the federal contribution and indemnity cases to the FTCA area, it might have adopted the local rule as the federal rule. But cf. United States v. Standard Oil Co., 332 U.S. 301, 309–10 (1947), as to the relevant considerations.

[60] United States v. Gilman, 347 U.S. 507 (1954); United States v. Standard Oil Co., 332 U.S. 301 (1947).

In the first reported opinion to rely on the Gilman case, United States v. Hendler, 123 F. Supp. 383 (D. Colo., 1954), the court dismissed a claim by the government for reimbursement for premiums paid on a former serviceman's commercial insurance policy pursuant to the Soldiers and Sailors Civil Relief Act of 1940. Such proceedings, it was held, are "within the sweep of [Gilman] which places the selection of policy concerning personal liability in the discretion of Congress rather than the courts and precludes the latter . . . from inaugurating a policy with respect thereto by implication." Ibid., at 385. Contra: United States v. Nichols, 105 F. Supp. 543 (N.D. Iowa, 1952), where recovery was permitted on similar facts, the court finding no evidence of congressional intent to deprive the government of its common-law right to reimbursement.