APPELLATE DECISIONS 1981-82

I. Constitutional Law

TAHTINEN V. SUPERIOR COURT: ARIZONA'S CIVIL COURTS REMAIN CLOSED TO THE INDIGENT

Indigents seeking access to the civil courts face major economic barriers.[1] The number of persons excluded by the costs of litigation however, has been reduced by several developments,[2] including recognition of an indigent's right to proceed *in forma pauperis* in federal court.[3] In addition, statutory provisions for *in forma pauperis* proceedings have been adopted in twenty-seven states, the District of Columbia, and Puerto Rico.[4] Other states have granted *in forma pauperis* relief by judicial decision.[5] Arizona is not among the states providing for such proceedings by either statute or judicial decision.

In *Tahtinen v. Superior Court*,[6] the Arizona Supreme Court consolidated three special actions filed by prisoners of the Arizona State Prison. The first action involved a complaint alleging a denial of procedural due process in a prison disciplinary proceeding.[7] The second action concerned an assault and battery charge.[8] The third action alleged a failure to pay wages due for work done by a prisoner.[9] In the first two actions, the clerk

1. *See* Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 226 (1970).

2. *See* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, Part I, 1973 DUKE L.J. 1153, 1163; *see also* Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253, 258-59 (1968).

3. *See* 28 U.S.C. § 1915 (1976); *see also* Willging, *supra* note 2, at 256. The term *in forma pauperis* "[d]escribes permission given to a poor person [*i.e.* indigent] to proceed without liability for court fees or costs." BLACK'S LAW DICTIONARY 701 (rev. 5th ed. 1979).

4. Willging, *supra* note 2, at 258 (citing AMERICAN BAR FOUNDATION, PUBLIC PROVISION FOR COSTS AND EXPENSES OF CIVIL LITIGATION (1966)). *But see* Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516, 523 (1968).

5. *E.g.*, Martin v. Superior Court, 176 Cal. 289, 293-94, 168 P. 135, 137 (1917); Jeffreys v. Jeffreys, 296 N.Y.S.2d 74, 86-87, 58 Misc. 2d 1045, 1055-56 (Sup. Ct. 1968), *rev'd*, 330 N.Y.2d 550, 38 A.D.2d 431 (1972); Jones v. Aciz, 109 R.I. 612, 622-23, 289 A.2d 44, 49-50 (1972).

6. 130 Ariz. 513, 514, 637 P.2d 723, 724 (1981).

7. *Id.*

8. *Id.*

9. *Id.*

of the Pinal County Superior Court refused to accept the prisoners' civil complaints unless the thirty dollar filing fees were paid.[10] The third action began as a special action in the Superior Court of Pinal County.[11] In this action, the court waived the filing fee, but dismissed the petition for lack of standing.[12] When petitioners tried to file an appeal, the clerk of the Pinal County Superior Court refused to file the notice without the twenty dollar filing fee.[13] The petitioners then took a special action to the court of appeals, but the clerk refused to accept the petition without the requisite filing fee.[14] Petitioners in all three cases then brought their cases individually to the Arizona Supreme Court by special action.[15]

In *Tahtinen*, the Arizona Supreme Court considered whether applicants have the right to file a civil action or civil appeal without paying the filing fee to the appropriate clerk of the court. The Arizona Supreme Court held that: (1) there is no statutory authority for fee waiver in civil cases;[16] (2) when an indigent seeks to file a purely civil suit, waiver of filing fees is generally not required except where the suit involves a fundamental right and the state maintains a monopoly over the settlement of a dispute involving that right;[17] and (3) refusal to waive the fees does not infringe a fundamental right or create an invidious classification and thus does not violate the privileges and immunities clause of the Arizona Constitution.[18]

This Casenote will focus on the right of indigents to a waiver of official filing fees when seeking relief in civil cases.[19] First, the effect of legislative enactments upon the indigent, including legislative adoption of the common law, will be considered. Second, the indigents' right of access to the courts under the federal Constitution will be examined. Third, the Casenote will analyze the court's application of the privileges and immunities clause of the Arizona Constitution to indigents unable to reach the courts because of official fees. Finally, application of a strict scrutiny standard of judicial review[20] to the indigents' right of access and its effect on indigents' rights will be considered.

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 515, 637 P.2d at 725. *See generally* Sloatman v. Gibbons, 104 Ariz. 429, 454 P.2d 574 (1969), *vacated and remanded*, 402 U.S. 939 (1971).

17. *Id.* at 515, 637 P.2d at 725. *See generally* Boddie v. Connecticut, 401 U.S. 371 (1971).

18. *Id.* at 515-16, 637 P.2d at 725-26.

19. It must be noted that the scope of this decision is limited to official filing fees rather than official fees generally. Official fees are the costs of operating the court system, which are taxed to the individual litigant. Included within these official charges are filing fees, the threshold sum which must be paid to the clerk of the court before the court will enter a suit in its files. Also included as official fees is the sum which must be paid to serve process on the opposing party. *See* Goodpaster, *supra* note 1, at 226.

20. For a discussion of the strict scrutiny standard of review and factors relevant to application of strict scrutiny, see Spece, *Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049, 1059-86 (1979).

Indigents' Right of Access Under the Arizona Statutes

There is considerable case law holding that authority to permit prosecution of a civil action *in forma pauperis* must be provided by statute.[21] Arizona does not directly provide for proceedings *in forma pauperis*. The *Tahtinen* court, however, considered two sections of the Arizona Revised Statutes relevant to the treatment of filing fees in cases involving indigent litigants.[22] Section 12-311 of the Arizona Revised Statutes provides that the plaintiff shall pay to the clerk of the court thirty dollars at the commencement of each action or proceeding "except as otherwise provided by law."[23] Section 12-302 of the Arizona Revised Statutes allows the court or any judge to extend the time for paying any court fees "for good cause shown."[24] In interpreting these statutes, the *Tahtinen* court held that section 12-311 allows a court to extend the time for payment of filing fees, but does not permit complete waiver of the fees regardless of the financial status of the litigant.[25]

The *Tahtinen* court failed, however, to consider adequately another statute relevant to the treatment of official fees in cases involving the indigent. Section 1-201 of the Arizona Revised Statutes provides that the common law shall be the rule of decision in the courts of Arizona so long as it is not repugnant to the constitution or laws of the state.[26] Under common law, courts had a discretionary power to waive fees for indigent litigants.[27] The issue in Arizona, therefore, is whether recognition of the courts' inherent common law authority to waive filing fees and the exercise of that authority is repugnant to sections 12-311 and 12-302 of the Arizona Revised Statutes.

In *Sloatman v. Gibbons*,[28] the Arizona Supreme Court had occasion to determine whether adoption of common law fee waiver was repugnant to sections 12-311 and 12-302 of the Arizona Revised Statutes, the same stat-

21. *See* Bradford v. Southern Ry. Co., 195 U.S. 243, 251 (1904); Brown v. Johnson, 99 F.2d 760, 760 (9th Cir. 1938); Stanley v. Swope, 99 F.2d 308, 308 (9th Cir. 1938); Harrison v. Stanton, 146 Ind. 366, 371-72, 45 N.E. 582, 583 (1896); Howe v. Federal Surety Co., 161 Okla. 144, 146, 17 P.2d 404, 406 (1932).

22. *See* 130 Ariz. at 514, 637 P.2d at 724.

23. ARIZ. REV. STAT. ANN. § 12-311 (Supp. 1982-83) provides in part: "At the commencement of each action or proceeding, except as otherwise provided by law, the plaintiff shall pay to the clerk of the superior court thirty dollars."

24. *Id.* § 12-302 (1982) provides: "The court or any judge thereof may for good cause shown extend the time for paying any court fees required by law or may relieve against a default caused by nonpayment of a fee within the time provided by law, but no fees paid shall be refunded."

25. 130 Ariz. at 514-15, 637 P.2d at 724-25.

26. ARIZ. REV. STAT. ANN. § 1-201 (1956) provides:

> The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.

27. There are two existing theories regarding origin of the *in forma pauperis* doctrine in early English common law practice. One theory is that the discretionary power to waive fees for indigent litigants is an inherent power of the judge based upon ancient custom and usage. *See* Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923). The other theory is that authority to waive fees did not exist until the enactment of statutes conferring such authority. *Id.*

28. 104 Ariz. 429, 454 P.2d 574 (1969), *vacated and remanded*, 402 U.S. 939 (1971) (for reconsideration in light of *Boddie v. Connecticut*).

utes under consideration in *Tahtinen*.[29] In *Sloatman*, the court relied upon the intent of the legislature to determine whether passage of sections 12-311 and 12-302 of the Arizona Revised Statutes superseded the courts' common law authority.[30] Legislative intent, the court proclaimed, "is determined by the language of the statute. If that language is plain and unambiguous, leading to only one meaning, the court will follow that meaning."[31] Applying this principle of interpretation, the court found that section 12-302 was not intended to provide for waiver of court fees.[32] The court held that section 12-302 superseded the courts' common law power because that statute provided only for extension of the payment period upon a showing of good cause, rather than complete waiver as recognized by the common law.[33]

The *Tahtinen* court relied upon *Sloatman* in holding that there is no statutory authority for waiving filing fees in civil cases.[34] The precedential value of *Sloatman*, however, is in question. *Sloatman* was vacated by the United States Supreme Court and remanded to be reconsidered in light of that Court's decision in *Boddie v. Connecticut*.[35] In *Boddie*, a right of access to the courts was recognized in cases fulfilling the criteria set forth by the Court.[36] The Arizona Supreme Court never heard *Sloatman* on remand;[37] therefore, the constitutionality of this statute remains unclear since section 12-302 makes no provision for waiver of fees in those cases meeting the criteria enumerated in *Boddie*.[38]

Several states have judicially recognized the courts' inherent equitable power to provide *in forma pauperis* proceedings.[39] California decisions may be particularly significant to the future of *in forma pauperis* proceedings in Arizona, since the California Civil Code adopts the common law as the rule of decision in the same fashion as section 1-201 of the Arizona Revised Statutes.[40] While California has no statute similar to section 12-302 providing for extension of the time limit for payment of fees, sections 68926 and 68927 of the California Government Code pose similar barriers

29. *Id.* at 430, 454 P.2d at 575.
30. *Id.*
31. *Id.* at 430-31, 454 P.2d at 575-76.
32. *Id.* at 431, 454 P.2d at 576.
33. *Id.*
34. 130 Ariz. at 514-15, 637 P.2d at 724-25.
35. 402 U.S. 939 (1971). In view of the Court's holding in *Boddie*, it would appear that a statute such as section 12-302 of the Arizona Revised Statutes, which does not allow for waiver under any circumstances, would be invalid as applied to indigents meeting the *Boddie* requirements.
36. 401 U.S. 371 (1971); *see infra* notes 63-66 and accompanying text.
37. Although the Arizona Supreme Court never heard *Sloatman* on remand, it issued an order providing for waiver of fees in cases where indigents sought divorces. Sloatman v. Gibbons, (Ariz. Jan. 14, 1970).
38. For a discussion of the *Boddie* criteria, see *infra* notes 63-66 and accompanying text.
39. Ferguson v. Keays, 4 Cal. 3d 649, 652, 94 Cal. Rptr. 398, 399, 484 P.2d 70, 71 (1971); Martin v. Superior Court, 176 Cal. 289, 297, 168 P. 135, 137 (1917); Jeffreys v. Jeffreys, 296 N.Y.S.2d 74, 86-87, 58 Misc. 2d 1045, 1055-56 (Sup. Ct. 1968), *rev'd*, 330 N.Y.2d 550, 38 A.D.2d 431 (1972); Jones v. Aciz, 109 R.I. 612, 289 A.2d 44 (1972).
40. CAL. CIV. CODE § 22.2 (West 1970) provides: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state." *Cf. supra* note 25.

to recognition of the common law fee waiver.[41]

In reviewing this legislation posing potential barriers to adoption of the common law, the California Supreme Court adopted a view contrary to the one announced by the Arizona Supreme Court.[42] The California Supreme Court invoked a presumption that absent a clear expression of legislative intent, the courts' inherent power would not be restricted.[43] The court noted that the words contained in the statute were general in nature and could not be deemed to constitute the clear expression of legislative intent required to restrict the courts' inherent common law powers.[44]

The Arizona Supreme Court, however, adopted the presumption that in the absence of a clear expression of legislative intent to maintain the courts' inherent power, exercise of that power would be repugnant to legislative act.[45] This presumption is reflected by the court's interpretation of the word "extend."[46] The court pointed out that the statute does not state a particular period for extension of payment.[47] Under the circumstances, the court presumed that the legislature granted the courts the power to extend the time for payment for a "reasonable period."[48] As a result, the court noted that section 12-302 does not allow a court to extend the time indefinitely, since the court "may not do indirectly what the statute does not give it the power to do directly."[49]

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41. CAL. GOV'T. CODE § 68926 (West 1976) provides:
The fee for filing a notice of appeal in a civil case appealed to a court of appeal is fifty dollars ($50). The fee for filing a petition for a writ within the original civil jurisdiction of the supreme court or of a court of appeal is fifty dollars ($50). Such fees are in full for all services through the rendering of the judgment or the issuing of the remittitur or peremptory writ except the fee imposed by section 68927. The Judicial Council may make rules governing the time and method of payment of such fees, and providing for excuse therefrom in appropriate cases.
Id. § 68927 provides: "The fee for filing a petition for hearing in a civil case in the Supreme Court after decision in a court of appeal is twenty-five dollars ($25)."

42. Martin v. Superior Court, 176 Cal. 289, 297, 168 P. 135, 138 (1917).

43. *Id.* The court stated:
Quite aside from the question as to the power of the Legislature to do this thing, it is obvious that only the plainest declaration of legislative intent would be construed as even an effort to do this thing. We find no such expressed intent. All of the statutes dealing with the payment and prepayment of fees, such as section 4295 of the Political Code, are general in their nature, and have to do with the orderly collection and disposition of fees, payment or prepayment of which is prescribed by law. Neither individually nor collectively are they even susceptible of the construction that the design of the Legislature was to deny the courts the exercise of their most just and most necessary inherent power.
Id. at 297, 168 P. at 138.

44. *Id.*

45. Sloatman v. Gibbons, 104 Ariz. at 431, 454 P.2d at 576.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* The court stated:
When the Legislature placed the word "extend" in the statute they intended that payment of fees be postponed rather than waived altogether. . . . No mention is made in the statute of a particular period for extension of payment. Under the circumstances it is presumed that the Legislature intended the court to have the power to extend the time for payment a reasonable period provided good cause was shown. It was not intended that the power vest to extend the time for payment indefinitely. . . . The court may not do indirectly what the statute does not give it the power to do directly.

This presumption against the courts' common law power appears to be inconsistent with an earlier decision by the Arizona Court of Appeals holding that the courts must read statutes consistent with the common law if possible.[50] Furthermore, the Arizona Court of Appeals has held that where a right exists at common law, and a statute is enacted providing a similar remedy, such statutory remedy is merely cumulative to the common law remedy unless it explicitly provides that it shall be exclusive.[51] In the absence of a rehearing of *Sloatman* and in light of the treatment of common law *in forma pauperis* proceedings by the California Supreme Court, such inherent common law powers may be recognized in Arizona in the future.[52] A ruling by the Arizona Supreme Court that section 12-302 is unconstitutional in light of *Boddie* would remove any potential impediment to recognition of the common law right.

Indigents' Right of Access Under the Federal Constitution

Finding no statutory basis for waiver of filing fees in appellate proceedings, the *Tahtinen* court undertook federal constitutional analysis.[53] The constitutional provisions relevant to fee waiver are the due process and equal protection clauses of the fourteenth amendment.[54]

The *Tahtinen* court aptly summarized the United States Supreme Court's position when it noted that filing fees must be waived in the criminal context when an indigent seeks to file either an appeal from his conviction or a habeas corpus petition concerning the reason for incarceration.[55] The United States Supreme Court's approach to financial barriers in purely civil suits, however, has been quite different.[56] As the *Tahtinen*

Id.

50. *See* Schwartz v. Schwartz, 7 Ariz. App. 445, 446, 440 P.2d 326, 327 (1968); Note, *Filing Fees, Indigents, Constitutional Compulsion and Other Remedies*, 1974 ARIZ. ST. L.J. 241, 250.

51. Tucson Gas & Elec. Co. v. Schantz, 5 Ariz. App. 511, 515, 428 P.2d 686, 690 (1967).

52. *See supra* notes 28-51 and accompanying text.

53. *See* 130 Ariz. at 515, 637 P.2d at 725.

54. U.S. CONST. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

55. 130 Ariz. at 515, 637 P.2d at 725 (citing Bounds v. Smith, 430 U.S. 817, 822 (1977)). *Bounds* is the culmination of a long line of cases holding that state-imposed financial barriers to the adjudication of a criminal defendant's appeal are violative of the fourteenth amendment. *E.g.*, Draper v. Washington, 372 U.S. 487, 495-500 (1963) (indigent criminal defendant granted waiver of transcript fees); Lane v. Brown, 372 U.S. 477, 484-85 (1963) (indigent criminal defendant granted right to counsel on appeal); Smith v. Bennett, 365 U.S. 708, 709-10 (1961) (indigent criminal defendant granted waiver of filing fees for a writ of habeas corpus action); Griffin v. Illinois, 351 U.S. 12, 17-19 (1956) (indigent criminal defendant granted waiver of transcript fees). While a state is not obligated to provide any appeal at all for criminal defendants, the United States Supreme Court has held that once such an appeal is provided, it may not be based upon one's financial status. Ross v. Moffitt, 417 U.S. 600, 607-11 (1974).

56. The United States Supreme Court's application of the due process and equal protection clauses to the waiver of fees in criminal cases has differed greatly from that in purely civil suits. The United States Supreme Court has stated that "where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Bates v. Little Rock, 361 U.S. 516, 524 (1960). Since the United States Supreme Court has not recognized that financial barriers to access in civil cases, such as filing fees, are themselves significant encroachments upon personal liberty, the United States Supreme Court has generally

court ruled, waiver of filing fees is generally not required by the federal Constitution when an indigent seeks to file a purely civil suit.[57] The only exception in which waiver is required in the civil context occurs when (1) the suit involves a fundamental right and (2) the state maintains a monopoly over the settlement of a dispute involving that right.[58] Applying this analysis, the *Tahtinen* court determined that the exception did not apply; therefore, no constitutional right was denied when the petitioners' filing fees were not waived.[59]

The United States Supreme Court's ruling on an indigent's right of access to the courts in civil actions is expressed in a trilogy of cases. The first, *Boddie v. Connecticut*,[60] was a class action brought on behalf of all welfare recipients residing in Connecticut who were prevented from bringing divorce suits because Connecticut statutes required payment of court fees and costs for service of process as a condition precedent to access to the courts.[61] The Court held that a state denies due process of law to indigent persons by refusing to permit them to bring divorce actions except on payment of court fees and service-of-process costs which they are unable to pay.[62] Two factors cited by the Court were particularly significant in reaching this decision. First, the Court noted "the basic position of the marriage relationship in this society's hierarchy of values."[63] Marriage has long been recognized by the United States Supreme Court as a fundamental first amendment associational right.[64] Thus, termination of the marital relationship was accorded similar status.[65] The second factor was "the concomitant state monopolization of the means for legally dissolving

not applied the strict scrutiny standard of review. Ortwein v. Schwab, 410 U.S. 656, 660 (1973); United States v. Kras, 409 U.S. 434, 446 (1973). Absent recognition of a significant encroachment upon personal liberty, such as a filing fee preventing indigents from obtaining divorces, *see* Boddie v. Connecticut, 401 U.S. 371 (1971), the United States Supreme Court has applied very little scrutiny to state-imposed barriers to court access. Such barriers are validated if they bear a rational relation to a legitimate state objective. Ortwein v. Schwab, 410 U.S. 656, 660 (1973); United States v. Kras, 409 U.S. 434, 446 (1972). Application of different levels of scrutiny has resulted in this disparate treatment of criminal and civil litigants. Ortwein v. Schwab, 410 U.S. 656 (1973) (indigent civil litigant denied waiver of filing fees); United States v. Kras, 409 U.S. 434 (1972) (indigent civil litigant denied waiver of filing fees); Draper v. Washington, 372 U.S. 487 (1963) (indigent criminal litigant granted waiver of filing fees); Lane v. Brown, 372 U.S. 497 (1963) (indigent criminal litigant granted waiver of transcript fees); Douglas v. California, 372 U.S. 353 (1963) (indigent criminal litigant granted counsel without change on appeal); Smith v. Bennett, 365 U.S. 708 (1961) (indigent criminal litigant granted waiver of filing fees for filing a writ of habeas corpus).

57. 130 Ariz. at 515, 637 P.2d at 725.

58. *Id.* For a discussion of fundamental rights recognized by the United States Supreme Court, see generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW 564-990 (1978). Earlier United States Supreme Court cases have recognized extrajudicial proceedings as satisfying due process. *See* Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (citing Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950). These cases may support the recent criterion recognized by the court in *Boddie* that where an extrajudicial forum exists and the courts do not provide the sole forum for remedy of the dispute, due process is satisfied by the extrajudicial forum. Ortwein v. Schwab, 410 U.S. 656, 659-60 (1973).

59. 130 Ariz. at 515, 637 P.2d at 725.

60. 401 U.S. 371 (1971).

61. *Id.* at 372.

62. *Id.* at 380-81.

63. *Id.* at 374.

64. Loving v. Virginia, 388 U.S. 1, 12 (1967).

65. *Boddie*, 401 U.S. at 376.

this relationship."[66] Thus, it was apparent that there is a constitutional right of access to the courts where a fundamental right and state monopolization of the means for resolving the dispute are coupled.[67] The extent of this right of access to the courts is not unlimited, however.

In the second case, *United States v. Kras*,[68] the Court reversed a district court decision which, relying on *Boddie*, held that the required filing fee of fifty dollars prior to bankruptcy discharge denied Kras "his Fifth Amendment right of due process, including equal protection." The Court distinguished *Boddie*, stating that access to the courts is not required per se, but the denial of access in a case such as *Boddie*, touching on the marital relationship and related associational interests of "fundamental importance under our Constitution," was invalid.[69] By contrast, Kras' interest in obtaining a bankruptcy discharge was not of the same constitutional significance, because gaining or not gaining a discharge effects no change in "basic necessities."[70]

Commentators have suggested that *Kras* narrowed the reach of the *Boddie* rationale by requiring that a specific constitutional provision provide the source of the right under which the indigent plaintiff seeks protection, if filing fees are to be held unconstitutional.[71] There could be no constitutional right of access to the courts for a bankruptcy discharge, Justice Blackmun noted, because the discharge "is a legislatively created benefit, not a constitutional one."[72] Apart from the different level of right involved, the *Kras* Court stressed the language in *Boddie* referring to the "state monopolization of the means of legally dissolving" the marital relationship.[73] In everyday experience, bankruptcy, like divorce, is the last resort and is subject to monopolization by the state.[74] Following the decision in *Kras*, it is apparent that the absence of an effective and practical alternative for resolving the dispute is largely irrelevant.[75]

Finally, in *Ortwein v. Schwab*,[76] the United States Supreme Court applied the analysis in *Boddie* and *Kras* to an indigent's right to a waiver of filing fees in appellate proceedings.[77] Raymond Ortwein's state old-age assistance benefits were reduced by thirty-nine dollars per month by a county welfare agency.[78] He appealed to the Oregon Public Welfare Division, which, after a hearing, upheld the agency's decision.[79] Following a similar hearing, Ortwein's co-petitioner, Gwendolyn Foubian, objected to

66. *Id.* at 374.
67. *See id.*
68. 409 U.S. 434, 440 (1973). *See* Spector, *The Heirs of Boddie: Court Access for Indigents After* Kras *and* Ortwein, 8 HARV. C.R.-C.L. L. REV. 571, 572 (1973).
69. 409 U.S. at 444.
70. *Id.* at 444-45. *See* Note, *supra* note 50, at 246.
71. 409 U.S. at 447. *See* Spector, *supra* note 68, at 574.
72. 409 U.S. at 447.
73. *Id.* at 444 (citing Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).
74. *See* Arbuckle, *Access to Civil Courts—Indigents—Filing Fees*, 7 AKRON L. REV. 172, 176 (1973).
75. *See* Note, *supra* note 50, at 248.
76. 410 U.S. 656 (1973).
77. *Id.* at 656.
78. *Id.*
79. *Id.* at 656-57.

the disallowance of certain deductions resulting in smaller welfare payments.[80] Appellants, alleging indigency and inability to pay the twenty-five dollar Oregon appellate filing fee, moved to proceed *in forma pauperis* in the Oregon Court of Appeals.[81] Their motion was denied by both the Court of Appeals and the Oregon Supreme Court.[82] Applying reasoning parallel to that in *Kras*, the United States Supreme Court in *Ortwein* held that the interest in increased welfare payments has far less constitutional significance than the interest under consideration in *Boddie*.[83] On the second rationale, the availability of extrajudicial means for resolving the dispute, the Court noted that the appellants had an administrative hearing on their claims not conditioned on the payment of fees, and noted that the state is not required to provide an appellate court system at all.[84] As hearings not conditioned on the payment of fees had been provided, neither the due process nor the equal protection clause required that access to the appellate court be granted.[85]

These three cases may be distinguished from each other on their facts. The *Boddie* appellants were denied a divorce, a possible deprivation of liberty, and the Court directed that they be given a judicial hearing despite nonpayment of filing fees.[86] In *Kras*, the petitioner was denied a bankruptcy discharge, a deprivation which, despite its close relationship to the later acquisition of property, was held by the Court to have far less constitutional significance than the right to dissolve one's marriage, as in *Boddie*.[87] The *Ortwein* appellants, while deprived of property, had hearings prior to the deprivation, and the Court found that those hearings adequately met all due process requirements.[88]

The Court's opinions in this trilogy of cases establishes a doctrine by which court access rights of indigents are largely determined by dividing them into two subclasses: plaintiffs and defendants.[89] Defendants have a strict right of guaranteed access, assuring them not only that they will have adequate notice and fair opportunity to be heard, but also that their opportunity will not be frustrated by court fees which they cannot pay.[90] Plaintiffs, on the other hand, are denied the latter assurance unless two criteria are met: (1) the interest sought to be protected by the litigant must be of "fundamental importance" in the society's value system, and (2) there must be no other effective alternative for the resolution of the dispute.[91] When these two criteria are met, the indigent plaintiff must also be allowed access to the courts without regard to his ability to pay.[92]

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80. *Id.* at 657.
81. Ortwein v. Schwab, 262 Or. 375, 375, 498 P.2d 757, 757 (1972).
82. *Id.*
83. 410 U.S. at 659.
84. *Id.* at 659-60.
85. *Id.*
86. 401 U.S. at 382-83.
87. 409 U.S. at 445.
88. 410 U.S. at 659-60. *See* Spector, *supra* note 68, at 589-90.
89. *See* Michelman, *supra* note 2, at 1178.
90. *Id.*
91. *See Tahtinen*, 130 Ariz. at 515, 637 P.2d at 725.
92. *See* Note, *supra* note 50, at 246.

Indigents' Right of Access Under the Arizona Constitution

After finding no basis for fee waiver under the federal Constitution, the *Tahtinen* court focused upon the privileges and immunities clause of the Arizona Constitution.[93] Petitioners relied upon two recent decisions, *Eastin v. Broomfield*[94] and *New v. Arizona Board of Regents*,[95] to support their contention that refusal to waive the filing fees violated the Arizona Constitution.[96] In *Eastin*, the Arizona Supreme Court invalidated a $2000 cost bond requirement imposed in medical malpractice cases upon litigants who choose to proceed to trial after an adverse finding by the medical liability review panel.[97] The court held that the statute violated the privileges and immunities clause of the Arizona constitution by denying the indigent access to the courts.[98] As to the nonindigent, the court held that the statute was violative of the same clause because it placed a heavier burden upon his access to the court.[99] This reasoning was relied upon by the court of appeals in *New* to invalidate a $500 cost bond for the filing of a breach of contract or negligence claim against the state.[100]

The *Tahtinen* court responded to petitioners' argument by stating that the privileges and immunities clause of the Arizona constitution is not an absolute restriction on the state.[101] The court held that a statute impinging on the equal privileges and immunities of a class of Arizona residents will be upheld if it has a "rational basis," unless a fundamental right is violated or an invidious classification is created.[102] A statute has a rational basis, in the opinion of the court, when it rationally furthers "a legitimate legislative purpose."[103] The court then applied this holding to the previous decisions in *Eastin* and *New*, stating that the cost bond statutes in those cases did not have a rational basis.[104] The statutes were designed, according to the court, to deter frivolous litigation.[105] However, the court found these statutes invalid for they were "grossly overinclusive and underinclusive," since they denied access to the courts to indigents with meritorious claims, while failing to deter frivolous claims brought by the nonindigent.[106]

The court distinguished the filing fees in the instant case from the bond requirements in *New* and *Eastin*, finding that the fees furthered the legislative purpose of recouping some of the administrative costs of open-

93. 130 Ariz. at 515, 637 P.2d at 725. ARIZ. CONST. art. II, § 13 provides: "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."
94. 116 Ariz. 576, 570 P.2d 744 (1977).
95. 127 Ariz. 68, 618 P.2d 238 (Ct. App. 1980).
96. *Tahtinen*, 130 Ariz. at 515, 637 P.2d at 725.
97. 116 Ariz. at 586, 570 P.2d at 754 (1977).
98. *Id.* at 586, 570 P.2d at 754.
99. *Id.*
100. 127 Ariz. at 69, 618 P.2d at 239.
101. 130 Ariz. at 515, 637 P.2d at 725.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* As the Arizona Supreme Court noted "The frivolity vel non of litigation is not related to the financial status of the litigants." *Id.* at 515, 637 P.2d at 725.
106. *Id.*

ing the courts to litigants.[107] The court noted that these costs are incurred regardless of the litigant's financial status, the fees were not excessive, and the time for payment may be extended under section 12-302 of the Arizona Revised Statutes.[108] Finding neither an infringement upon a fundamental right nor the creation of an invidious classification, the court found the filing fees consistent with the privileges and immunities clause of the Arizona Constitution because they furthered a legitimate legislative purpose.[109]

Strict Scrutiny and the Indigents' Right of Access to the Courts

In *Kras*[110] and *Ortwein*,[111] the United States Supreme Court found no constitutional basis for establishing a right to a waiver of filing fees for indigents seeking access to the courts. Previous decisions of the Court, however, suggest the application of a different degree of judicial scrutiny in reviewing the validity of state imposed barriers to access.[112] Relying on other decisions, the Court may establish that: (1) imposition of filing fees which deny indigents access to the courts creates a suspect classification;[113] or (2) access to the courts in civil cases is itself a fundamental right.[114]

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107. *Id.*

108. *Id.*

109. *Id.* at 515-16, 637 P.2d at 725. Although barriers to court access may not be violative of the privileges and immunities clause, the Arizona constitutional provision for jury trial is relevant to fee waiver. ARIZ. CONST. art. VI, § 17 provides in part:

> The superior court shall be open at all times, except on nonjudicial days, for the determination of non-jury civil cases and the transaction of business. For the determination of civil causes and matters in which a jury demand has been entered, and for the trial of criminal causes, a trial jury shall be drawn and summoned from the body of the county, as provided by law. The right of jury trial as provided by this constitution shall remain inviolate, but trial by jury may be waived by the parties in any civil case or by the parties with the consent of the court in any criminal case.

The Arizona Supreme Court has long recognized the importance of trial by jury, referring to it as "a matter of absolute right." Mource v. Wrightman, 30 Ariz. 45, 48, 243 P. 916, 917 (1926); Brown v. Greer, 16 Ariz. 222, 229, 141 P. 841, 846 (1914). While the Arizona Supreme Court has yet to apply this constitutional provision to barriers to court access, a federal appellate court invalidated a surety bond requirement on the basis of a Delaware statute similar to the Arizona statute providing for jury trial. Lecates v. Justice of the Peace, 637 F.2d 898, 909 (3d Cir. 1980). Adoption of similar reasoning by the Arizona Supreme Court in interpreting the Arizona jury provision would result in invalidation of filing fees imposed upon the indigent, at least at the superior court level. *See id.*

110. 409 U.S. 434, 446, 450 (1973).

111. 410 U.S. 656, 659 (1973).

112. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 760 (1968) (strict scrutiny applied to the right to vote); Reynolds v. Sims. 377 U.S. 533, 562 (1964) (strict scrutiny applied to right to vote). Access to the judicial branch, like access to the executive and legislative branches through the exercise of voting rights, plays an important role in the state affairs. *See infra* notes 137-39 and accompanying text.

113. *See* Loving v. Virginia, 388 U.S. 1, 11 (1966) (prohibition of marriage based on racial classification deemed suspect classification); Reynolds v. Sims, 377 U.S. 533, 566 (1964) (those whose right to vote was impaired by malapportionment scheme subject to invidious discrimination as much as those subject to discrimination based upon race). For a discussion of suspect classifications, see L. TRIBE, *supra* note 58, at 1010-82.

114. *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) (fundamental right to vote recognized); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1968) (fundamental right to vote recognized); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (fundamental right to vote recognized). Access to the judicial branch, like access to the executive and legislative branches through the exercise of voting rights, plays an important role in state affairs. *See infra* note 137-39 and accompanying text.

Should the Court find either a suspect classification or fundamental right, the Court would then be bound to apply the strict scrutiny standard of review,[115] invalidating the imposition of such fees unless supported by a compelling state interest.

It is clear from the Court's decision in *San Antonio Independent School District v. Rodriguez*[116] that classifications drawn solely on the basis of wealth are not inherently suspect. The Court stated that it "has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny."[117] However, wealth discrimination coupled with a fundamental right has resulted in application of a strict scrutiny standard of judicial review. In *Harper v. Virginia Board of Elections*,[118] the Court held that the Virginia poll tax statute, requiring payment of a $1.50 tax in order to vote in state elections, violated the equal protection clause. The Court stated that "[l]ines drawn on the basis of wealth and property, like those of race, . . . are traditionally disfavored."[119]

One year after *Harper*, in *McDonald v. Board of Election Commissioners*,[120] the Court had occasion to decide another case involving the fundamental right to vote. There the Court went one step beyond its ruling in *Harper*, stating that a classification based on wealth "may independently trigger a strict scrutiny standard of review."[121] Despite the Court's dictum in *McDonald*, the Court's statement in *Rodriguez* remains correct; wealth classifications have not independently activated application of a strict scrutiny standard of review.[122] Only where a fundamental right is present, such as the right to vote in *Harper*,[123] has the Court applied a strict scrutiny standard of review. *Rodriguez* is illustrative of this; there a strict scrutiny standard of review was not applied to a wealth classification, as no fundamental right was involved.[124] Since *Rodriguez* was decided four years after *McDonald*, it would appear that the *Rodriguez* decision overruled the dicta in *McDonald* providing for application of a strict scrutiny standard in wealth classification cases independent of a fundamental right.[125]

It is therefore apparent that the key to application of the strict scrutiny standard of review is recognition of access to the civil courts as a fundamental right. The Court has not ruled that access to the civil courts is, in itself, a fundamental right,[126] and it has expressed an unwillingness to

115. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1968); Reynolds v. Sims, 377 U.S. 533, 562 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1885).
116. 411 U.S. 1, 29 (1973).
117. *Id.*
118. 383 U.S. 663, 670 (1968).
119. *Id.* at 668.
120. 394 U.S. 802 (1969).
121. *Id.* at 807.
122. *See* Harris v. McRae, 448 U.S. 297, 323 (1980).
123. 383 U.S. 663, 670 (1968).
124. 411 U.S. 1, 35 (1973).
125. *See* Harris v. McRae, 448 U.S. 297, 323 (1980) (citing *Rodriguez*, 411 U.S. at 35).
126. Although the Court has not ruled that access to the civil courts is, in itself, a fundamental right, the Court has recognized a fundamental right to be heard. "The constitutional right to be

adopt a broad view of fundamental rights. *Rodriguez* furthered the Court's narrow view that fundamental rights must be grounded in explicit constitutional rights.[127]

Despite the ruling in *Rodriguez*, dicta contained in the Court's opinion in *Ortwein* suggests that the right of access to the civil courts may itself be viewed as a first amendment right.[128] Recognition of the right of access as a first amendment right opens the door for application of the strict scrutiny standard of review. In a brief footnote to its opinion in *Ortwein v. Schwab*, the Court stated that the appellants' rights under the first amendment had been "fully satisfied."[129] The Court found that the pretermination evidentiary hearing "not conditioned on payment of any fee"[130] satisfied this first amendment requirement. Thus, the Court again recognized that the existence of alternative nonjudicial remedies not conditioned on payment of fees satisfies the requirements of the Constitution, preventing recognition of a right of access to the courts.[131]

This language suggests that there is no fundamental right of access to the courts, only a right of access to a forum to seek redress. While the Court discounted the societal importance of a right in determining whether it should be afforded strict scrutiny in *Rodriguez*, this approach has not been universal.[132] Historically, the Court has considered the societal significance of a right in determining if that right is fundamental.[133] The Court's treatment of the right to vote is illustrative. As early as 1885, the Court considered the societal significance of voting.[134] The Court then stated in dictum that "the political franchise of voting is . . . a fundamental political right, because preservative of all rights."[135] The Court reiterated the societal importance of voting in 1964, declaring that alleged

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heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." Fuentes v. Shevin, 407 U.S. 67, 80 (1972). *See also* Sniadach v. Family Fin. Corp., 395 U.S. 337, 340-41 (1969) (prejudgment garnishment of wages without notice or prior hearing held a violation of procedural due process). *Cf.* Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (hearing required before termination of welfare benefits). *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 619-20 (1974). By upholding a writ of sequestration procedure that did not provide notice-hearing, the Court may have severely limited the right to be heard. *See id.*

127. *Rodriguez*, 411 U.S. at 33-34. The Court said:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly guaranteed by the Constitution.

Id.

128. *Ortwein*, 410 U.S. at 660.

129. *Id.* at 660 n.5.

130. *Id.* at 660.

131. *Id.*

132. McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1968); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1885).

133. *See* cases cited *supra* note 132.

134. Yick Wo. v. Hopkins, 118 U.S. 356, 370-71 (1885).

135. *Id.* at 370.

infringements of that right must be strictly scrutinized.[136]

Following this reasoning the Court may recognize a fundamental right of access to the courts. Access to the judicial branch, like access to the legislative and executive branches, is essential to the preservation of a democratic society.[137] Absent access to an independent branch of government, rights of the minority may not be respected. Only the judicial branch, particularly the higher courts, bears the independence necessary to withstand the demands of the masses and recognize minority rights.[138] Extrajudicial remedies previously recognized by the Court lack the necessary independence to maintain these rights.[139] Should the Court return to its reasoning in the voting rights cases, recognition of a fundamental right of access to the courts appears imminent.

Several lower court decisions have recognized such a right. In *Lee v. Habib*,[140] the District Court of Appeals, held that it has the power to order a transcript for use by an indigent in the appeal of a civil case. "The right of all to have free access to the courts is basic to our democratic system. It too cannot be conditioned on the payment of a fee where such a condition precludes the exercise of the rights."[141] In recent cases closely akin to criminal proceedings—termination of parental rights,[142] civil commitment,[143] and civil contempt[144]—the courts have invalidated financial barriers to access on due process rationale. In light of these decisions, recognition of a general fundamental right of access to the courts may be imminent. Recognition of such a fundamental right would undoubtedly result in invalidation of barriers to access, such as filing fees, under a strict scrutiny standard of review.

Conclusion

Arizona is not among the twenty-seven states which have enacted statutory provisions for *in forma pauperis* proceedings. The *Tahtinen* court held that sections 12-302 and 12-311 of the Arizona Revised Statutes allow the court to extend the time for paying any court fees, but do not provide for complete waiver of such fees. The enactment of these sections, in the

136. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

137. *See* L. TRIBE, *supra* note 58, § 1-6, at 8-9.

138. *Id.* at 9.

139. *See* H. ABRAHAM, THE JUDICIAL PROCESS 38 (3d ed. 1979).

140. 424 F.2d 891, 904 (D.C. Cir. 1970).

141. *Id.* at 901.

142. Cleaver v. Wilcox, 499 F.2d 940, 945 (9th Cir. 1974) (right to counsel in child custody proceeding); Crist v. Division of Youth & Family Servs., 128 N.J. Super. 402, 416, 320 A.2d 203, 210-11 (Law Div. 1974) (right to counsel in child custody proceeding); *In re* Adoption of R.I., 455 Pa. 29, 31, 312 A.2d 601, 602 (1973) (right to counsel in child custody proceeding); *In re* Luscier, 84 Wash. 2d 135, 138, 524 P.2d 906, 908 (1974) (right to counsel in child custody proceeding).

143. Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1092-93 (E.D. Mich. 1974) (right to counsel in civil commitment proceeding).

144. Ottan v. Zaborac, 525 P.2d 537, 538 (Alaska 1974) (right to counsel in contempt proceeding); Rudd v. Rudd, 45 A.D.2d 22, 23, 356 N.Y.S.2d 136, 138 (1974) (right to counsel in contempt proceeding); Tetro v. Tetro, 86 Wash. 2d 252, 255, 544 P.2d 17, 19 (1975) (right to counsel in contempt proceeding). *But see* Sword v. Sword, 399 Mich. 367, 387, 249 N.W.2d 88 (1976) (no right to counsel in contempt case).

opinion of the Arizona Supreme Court, manifested legislative intent to supersede the courts' common law authority to waive such fees.

In *Tahtinen*, the Arizona Supreme Court found that none of the claims asserted by the plaintiffs met the criteria established by the United States Supreme Court for waiver of fees in the civil context. Generally, official fees must be waived where (1) the suit involves a fundamental right and (2) the state maintains a monopoly over the settlement of a dispute involving that right. The *Tahtinen* court concluded that refusal to waive filing fees does not violate the privileges and immunities clause of the Arizona Constitution. Since no recognized fundamental right was violated, and no invidious classification was created, the Arizona Supreme Court upheld the filing fees, because they bore a "rational basis" to the governmental objective of recouping administrative costs.

The *Tahtinen* court's failure to recognize a statutory or constitutional provision for waiver of official fees has maintained the indigent's limited right of access to the civil courts. While the Arizona Supreme Court failed to recognize a fundamental right of access to the courts, previous decisions of the United States Supreme Court may lay the foundation for recognition of a fundamental right of access to the courts under the federal Constitution.

Dana Mark Campbell

II. CRIMINAL PROCEDURE

A. COMPULSORY PROCESS AND THE SCOPE OF THE GOVERNMENT'S DUTY TO AID IN THE AVAILABILITY OF DEFENSE WITNESSES

The sixth amendment to the United States Constitution secures to any defendant in a criminal prosecution "the right to have compulsory process for obtaining witnesses in his favor."[1] At a minimum, the compulsory process clause requires that the state supply a criminal defendant with subpoena power to compel the attendance of favorable witnesses before it can prosecute him.[2] In *Washington v. Texas*,[3] the first full exposition of the compulsory process clause, the United States Supreme Court held that the state may not arbitrarily deny a criminal defendant the right to offer the testimony of witnesses in his behalf.[4]

One of the more troublesome issues left open after *Washington* concerns the extent of the government's duty to aid in the availability of defense witnesses. In the recent Arizona case of *State v. Stewart*,[5] the Arizona Court of Appeals examined the scope of the government's obligation under the sixth amendment's compulsory process clause to obtain witnesses for the defense.[6]

In *Stewart*, defense counsel sought to subpoena a sheriff's deputy who had interviewed witnesses present near the scene of an attempted burglary.[7] The deputy was unable to be served because she had taken a leave of absence to Alaska without leaving a forwarding address.[8] Upon his conviction, the defendant appealed on the ground that his inability to obtain the deputy's testimony violated his sixth amendment right to compel witnesses to testify in his behalf.[9] The Arizona Court of Appeals affirmed the conviction, concluding that there was no violation of the right to compulsory process where the deputy was not made unavailable through the suggestion, procurement, or negligence of the government.[10]

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1. U.S. CONST. amend. VI. Similarly, the Arizona Constitution provides the accused with "compulsory process to compel the attendance of witnesses in his own behalf." ARIZ. CONST. art. II, § 24.

2. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 587 (1977).

3. 388 U.S. 14 (1967).

4. *Id.* at 19. *See infra* note 16 and accompanying text.

5. 131 Ariz. 407, 641 P.2d 895 (Ct. App. 1982).

6. *See id.* at 408, 641 P.2d at 896.

7. *Id. See infra* note 57.

8. 131 Ariz. at 409, 641 P.2d at 897. The defense had not interviewed Deputy McLaughlin before she went to Alaska. *Id.* at 410 n.3, 641 P.2d at 898 n.3.

9. *Id.* at 409, 641 P.2d at 897. The asserted compulsory process challenge was the sole question on appeal. *Id.* at 408, 641 P.2d at 896.

10. *Id.* at 410, 641 P.2d at 898.

This Casenote will discuss the duty of the state to aid in the availability of defense witnesses. First, it will set forth the standard to be applied by the courts when a defendant's right to compulsory process is at issue. Next, the Arizona Court of Appeals' application of that standard to the facts in *Stewart* will be analyzed. Finally, implications of the *Stewart* decision will be considered.

Formulation of a Standard

The right to compulsory process is one of six constitutional guarantees contained in the sixth amendment.[11] While other aspects of the sixth amendment have been the subject of continuous debate,[12] the courts and the bar have generally ignored the compulsory process clause throughout much of our nation's history.[13] Not until 1967, in *Washington v. Texas*,[14] did the United States Supreme Court present an extensive interpretation of compulsory process.[15] The *Washington* Court held that a state statutory scheme disqualifying co-indictees from testifying for one another violated the petitioner's right to compulsory process, as it arbitrarily denied him "the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."[16]

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11. The sixth amendment guarantees that in all criminal prosecutions, the defendant has a right 1) to receive a speedy and public trial; 2) to be tried by a jury; 3) to be informed of the charges against him; 4) to be assisted by counsel; 5) to be confronted by adverse witnesses; and 6) to have compulsory process for obtaining witnesses in his favor. U.S. CONST. amend. VI.

12. *See generally* C. TORCIA, WHARTON'S CRIMINAL PROCEDURE §§ 258, 410-39, (1975) (accused's rights to a speedy trial, a jury trial, and to assistance of counsel); C. WHITEBREAD, CRIMINAL PROCEDURE 430-82, 514-63 (1980) (accused's rights to a speedy and public trial, a jury triall, assistance of counsel, and to be informed of the charges against him).

13. Westen, *supra* note 2, at 594. The United States Supreme Court's reluctance to construe the compulsory process clause is evident in cases which it resolved without reaching the compulsory process issue. *See, e.g.*, Pate v. Robinson, 383 U.S. 375, 378 n.1 (1966) (unnecessary to decide whether the trial court erred in failing to grant defendant a continuance to subpoena witnesses for whom he refused to make an offer of proof); Blackmer v. United States, 284 U.S. 421, 442 (1932) (unnecessary to decide the validity of a statute that granted extraterritorial subpoena power solely to the prosecution and denied it to the defense); *Ex parte* Harding, 120 U.S. 782 (1887) (judgment not invalidated by denial of compulsory process).

14. 388 U.S. 14 (1967).

15. *See* Westen, *Compulsory Process II*, 74 MICH. L. REV. 192, 194-95 (1975). Prior to *Washington*, John Wigmore held the popular view as to the meaning of the clause. For Wigmore, the compulsory process clause meant nothing more than extending to criminal defendants the benefit of whatever subpoena powers were generally available to the prosecution within the jurisdiction. *See* 8 J. WIGMORE, EVIDENCE §§ 2191, at 68-70, 70 n.3, 2192, at 70 n.6, 2195a, at 85 (J. McNaughton rev. 1961). Yet, the courts generally rejected this narrow "parity" approach in the few cases in which it was directly presented. State *ex rel.* Rudolph v. Ryan, 327 Mo. 728, 731-32, 38 S.W.2d 717, 718 (1931) (statute exempting witnesses in prisons within state from appearing and testifying in court violated compulsory process clause); State *ex rel.* Gladden v. Lonergan, 201 Or. 163, 193, 269 P.2d 491, 504-05 (1954) (enforcing defendant's request for a witness held in state prison despite a statute declaring state prisoners beyond the subpoena powers of the courts, finding adherence to the statute would deny compulsory process).

16. 388 U.S. at 23 (1960). In *Washington*, Charles Fuller and defendant Jackie Washington were indicted for murder. Fuller was tried first and convicted. At Washington's trial, Washington testified that he took no part in the actual shooting and that Fuller had acted alone. To corroborate this testimony, Washington called Fuller as a defense witness. Fuller, although ready to corroborate Washington's story, was declared incompetent to testify because of two Texas statutes disqualifying co-indictees from testifying for one another. In reversing Washington's conviction,

Washington v. Texas did not set forth a comprehensive test for determining under what circumstances the state has interfered with a defendant's right to compel witnesses to testify. Rather, it suggested four essential elements which serve to condition the defendant's constitutional right to subpoena witnesses:[17] 1) the witness must be competent;[18] 2) the testimony must be relevant;[19] 3) it must be material;[20] and 4) it must be favorable to the defendant.[21]

Washington stands for the proposition that the defendant cannot be tried unless the state permits him to produce and present the exculpatory testimonial evidence available at the time of trial.[22] Left unanswered by *Washington* was whether the Constitution obligates the state to produce a witness who has become unavailable. After *Washington*, federal courts held that a state has no duty to produce a witness who was no longer available, absent a showing that the state itself was responsible for the witness' absence.[23] This position attempts to reconcile the competing aims of enabling the defendant to present the best possible defense while not unduly restricting the state's ability to prosecute.[24]

Thus, the threshold question in determining whether the state has violated a defendant's right to compulsory process is whether the state's con-

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the United States Supreme Court held the compulsory process clause to be so essential to a fair trial as to be made applicable to the states through the fourteenth amendment:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as the accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 18-19.

17. Westen, *supra* note 15, at 198.

18. 388 U.S. at 23. The Court stated that the witness in *Washington* was "physically and mentally capable of testifying to events that he personally observed." *Id.* Under the constitutional standard, a witness is competent if his ability to give reliable evidence is something about which reasonable people can differ. *See id.* at 22. *See also* Westen, *supra* note 15, at 207.

19. 388 U.S. at 23. FED. R. EVID. 401 defines relevant evidence as "having any tendency to make the existence of any fact that is in consequence to the determination of the action more probable or less probable than it would be without the evidence." This definition would appear to satisfy constitutional requirements; however, exceptions and grants of discretion that often accompany this standard of relevance could possibly violate a defendant's compulsory process rights. *See generally* Westen, *supra* note 15, at 205-13.

20. 388 U.S. at 23. *See infra* notes 44-53 and accompanying text.

21. 388 U.S. at 23. The burden of demonstrating that the evidence was of a favorable nature is a very slight one. Evans v. Janing, 489 F.2d 470, 476 (8th Cir. 1973). The defendant need only show that the evidence he seeks is potentially useful to his case. *Id.* Few defendants ever attempt to produce witnesses whose testimony is not even potentially useful; thus, the requirement that the defendant's witnesses favor his case has rarely been tested. Westen, *supra* note 15, at 232. But see United States v. Valenzuela-Bernal, 102 S. Ct. 3440 (1982) (discussed *infra* text accompanying notes 48-53), where Justice Rehnquist in quoting *Washington v. Texas* emphasized that the absent testimony must be *vital* to the defense. *Id.* at 3446.

22. *See supra* note 16 and accompanying text.

23. United States v. Rhodes, 398 F.2d 655, 657 (7th Cir. 1968) (deceased witness), *cert. denied*, 394 U.S. 962 (1969); United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060, 1073-74 (D. Del. 1972) (dictum) (witness with amnesia), *aff'd*, 481 F.2d 94 (3rd Cir.), *cert. denied*, 414 U.S. 1072 (1973); Moore v. Beto, 320 F. Supp. 469, 472 (S.D. Tex. 1970) (witness who cannot be located); United States *ex rel.* Williams v. Deegan, 279 F. Supp. 53, 59 (S.D.N.Y. 1967) (deceased witness), *aff'd*, 389 F.2d 1002 (2d Cir.), *cert. denied*, 390 U.S. 1034 (1968).

24. *See* Westen, *supra* note 2, at 595.

duct has wrongfully caused the unavailability of the prospective witness.[25] A case frequently cited for this state misconduct requirement is *Ferrari v. United States*.[26] In *Ferrari*, the appellant claimed he had been deprived of his "constitutional rights"[27] because of the government's failure to produce a special employee of the Bureau of Narcotics who aided the undercover officer working on the case.[28] The Bureau fired the employee, Janet Jones, six months before the trial and had no idea of her whereabouts.[29] The Ninth Circuit held that the government was under no duty to look for Miss Jones in the absence of a showing that she was "made unavailable through the suggestion, procurement, or negligence of the [government]."[30]

Thus, in addition to affirmative conduct, governmental negligence appears to be sufficient under *Ferrari* to establish a compulsory process violation.[31] Before the government can be negligent, however, it must owe a duty to the defendant to help make defense witnesses available. For this reason, it is appropriate to consider what the source of that duty is.

The source of the government's duty to aid in the availability of defense witnesses can be traced to the due process clause.[32] In *United States v. Agurs*,[33] the United States Supreme Court considered whether a prosecutor had a constitutional duty to volunteer exculpatory material to the defense.[34] The Court stated that even when there is no specific request by the defense for such evidence, due process would nonetheless be violated by a failure to disclose evidence "obviously of such substantial value to the defense that elementary fairness requires it to be disclosed."[35]

Similarly, the prosecution should also be under a duty (arising out of

25. Singleton v. Lefkowitz, 583 F.2d 618, 624 (2d Cir. 1978), *cert. denied*, 440 U.S. 929 (1979); Ferrari v. United States, 244 F.2d 132, 141 (9th Cir.), *cert. denied sub nom.* Cherpakov v. United States, 355 U.S. 873 (1957).

The deportation of potential witnesses is a good example of government conduct often leading to successful compulsory process challenges. *See* United States v. Tsutaqawa, 500 F.2d 420 (9th Cir. 1974); United States v. Calzada, 479 F.2d 1358 (7th Cir.), *cert. dismissed*, 439 U.S. 920 (1978). *But see* United States v. Martinez-Morales, 632 F.2d 112 (9th Cir. 1980) (no violation where there is no connection between the deported aliens and the crimes for which defendant is later charged); United States v. Castillo, 615 F.2d 878 (9th Cir. 1980) (no violation where defendant had a reasonable amount of time to interview the witness prior to deportation).

The determination of whether the government caused the unavailability of a witness can be a difficult one. In United States v. Ballesteros-Acuna, 527 F.2d 928 (9th Cir. 1975), the United States government released the potential witness, a citizen of both the United States and Mexico, prior to giving defendant's counsel the opportunity to interview him. The Ninth Circuit held that since the government supplied the witness' addresses to the defense, the failure to locate him was not a result of government action. *Id.* at 930.

26. 244 F.2d 132, 141 (9th Cir. 1957), *cert. denied sub nom.* Cherpakov v. United States, 355 U.S. 873 (1957).

27. *Id.* Appellant did not specify which constitutional rights he was deprived of.

28. *Id.*

29. *Id.* Mr. White, head of the Bureau, indicated that because Miss Jones had begun taking drugs again, he had to let her go. *Id.* White told defense attorneys he had no idea of Miss Jones' whereabouts, nor did he have any intention of finding her. *Id.*

30. *Id.*

31. *See id.*

32. U.S. CONST. amend. XIV.

33. 427 U.S. 97 (1976).

34. *Id.* at 107.

35. *Id.* at 110. The Court implied, however, that when there is a request, the evidence is more likely to be considered material to the case than it would be in the absence of a request. *Id.* at 106.

due process notions of fairness) to provide information it has at its disposal which might aid in securing the attendance of a defense witness.[36] In *United States v. Wolfson*,[37] the defendants asserted that their compulsory process rights had been violated when the prosecution allowed a desired witness to return to Canada without informing defense counsel of his presence in Delaware.[38] As a result, the defendants were unable to subpoena him.[39] The federal district court stated that a constitutional violation would be found if the defendants could show, among other things,[40] that some notice was given to the prosecution or that the prosecution was, in fact, aware of the defendants' need for the witness.[41]

The government's duty to aid in the availability of witnesses would only arise, then, when the prosecutor has sufficient notice of the defense's need for the witness.[42] Under *Wolfson* and *Agurs*, sufficient notice exists either when there has been actual notice or when the prospective witness' testimony is so clearly material as to put the prosecutor on constructive notice.[43]

In addition to a showing of governmental misconduct or negligence, the courts have also required that the testimony of the absent witness be material.[44] Testimony of an absent witness is considered material if it creates a reasonable doubt of the defendant's guilt that did not otherwise exist in the judgment of the trier of fact.[45] The absent testimony must be evaluated in the context of the entire record in order to make this determination.[46]

The materiality requirement often involves special problems of fairness, because it requires a defendant to make a showing of materiality where he has had no opportunity to interview the witness.[47] The United

36. *See infra* text accompanying notes 37-41; *see also* Westen, *supra* note 15, at 228 n.129. Although the due process and compulsory process clauses are both designed to afford a defendant a fair trial, they differ in their focus. The right to due process is a general guarantee designed to protect against the residual kinds of unfairness not otherwise enumerated in the more specific provisions of the Bill of Rights; the compulsory process clause is a specific guarantee designed to protect a defendant against the particular unfairness of being tried without the means for compelling the presence of witnesses in his favor. Westen, *supra* note 15, at 228 n.129

37. 322 F. Supp. 798 (D. Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972).

38. *Id.* at 819-20.

39. *Id.* at 820.

40. The court also required a showing that defendant made some effort to obtain the witness' appearance and that the absent witness was material. *Id.*

41. *Id.*

42. *See supra* text accompanying notes 37-41.

43. *See supra* text accompanying notes 35, 41.

44. United States v. Valenzuela-Bernal, 102 S. Ct. 3440, 3446-47 (1982); *see* United States v. Rose, 669 F.2d 23, 27-28 (1st Cir.), *cert. denied sub nom.* Hill v. United States, 103 S. Ct. 63 (1982); United States v. Wolfson, 322 F. Supp. 798, 819-20 (D. Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972).

45. United States v. Agurs, 427 U.S. 97, 112 (1976). The same materiality requirement applies in a compulsory process claim as in a due process claim. United States v. Valenzuela-Bernal, 102 S. Ct. 3440, 3449 (1982).

46. *Agurs*, 427 U.S. at 112.

47. The Ninth Circuit initially decided to alleviate this inconsistency by completely removing the materiality requirement in United States v. Mendez-Rodriguez, 450 F.2d 1, 5 (9th Cir. 1971). In *Mendez-Rodriguez*, the defendant had been convicted of conspiracy to smuggle aliens into the United States. The defendant appealed, contending that the government's deportation of three of

States Supreme Court recently addressed this problem in *United States v. Valenzuela-Bernal*.[48] The respondent, Valenzuela-Bernal, had been arrested for transporting aliens illegally into the United States.[49] Two of the three passengers arrested were deported after an Assistant United States Attorney concluded that they possessed no evidence material to either the prosecution or defense.[50] Even though counsel for the respondent never had an opportunity to interview the two deported passengers, the Court held that to establish a compulsory process violation, the respondent must still make at least some plausible showing of how the testimony would have been both material and favorable to his defense.[51] Justice Rehnquist, in the majority opinion, reasoned that while a relaxation of the specificity required in showing materiality may be supported where neither the defendant nor his attorney have been afforded an opportunity to interview the witness,[52] this would not afford a basis for wholly dispensing with the requirement.[53]

After a successful showing of government misconduct or negligence and of the materiality of the absent witness' testimony, the defendant has made out a strong case for a compulsory process violation. Whether the government acted in good or bad faith is not at issue.[54] Furthermore, the defendant need not show his case has been prejudiced by the absence of the witness to maintain a successful challenge.[55] This framework for ana-

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the six witnesses to the alleged offense before he had the opportunity to interview them violated his right to compulsory process. The Ninth Circuit agreed and reversed the conviction. In regard to materiality, the court stated: "We decline to indulge in any speculation that the interviews would, or would not, have been fruitful to the defense." *Id.* at 5. Subsequently, this position was modified by simply requiring that the defendant show he could have conceivably benefitted from the absent witness' testimony. United States v. Orozco-Rico, 589 F.2d 433, 435 (9th Cir. 1978), *cert. denied*, 440 U.S. 967 (1979). The Second Circuit also established a rule relaxing the materiality requirement in cases "where the government has contributed to the unavailability of witnesses." Singleton v. Lefkowitz, 583 F.2d 618, 623 (2d Cir. 1978), *cert. denied*, 440 U.S. 929 (1979).

48. 102 S. Ct. 3440 (1982).

49. *Id.* at 3443.

50. *Id.*

51. *Id.* at 3449.

52. The Court stated that where a defendant has had no opportunity to interview a witness "it is of course not possible to make an avowal of how a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality." *Id.* at 3448.

53. *Id.* In a footnote, the Court stated its holding applied only to deportation cases and not to what showing must be made with respect to attendance of witnesses within the United States. *Id.* at 3450 n.9. In a concurring opinion, Justice O'Connor voiced her fear that the Court's decision would not adequately protect the interests of either the defense or the prosecution, and would possibly encourage litigation over whether the defendant has made a plausible showing of materiality. *Id.* at 3450-51. She advocated an approach in which the deportation of potential alien witnesses be delayed for a very brief interval to allow defense counsel, as well as the government, to interview them. *Id.* at 3452. Justice Brennan, with whom Justice Marshall joined, also advocated such an approach in his dissenting opinion. *Id.* at 3454-55.

54. United States v. Calzada, 579 F.2d 1358, 1361 (7th Cir. 1978). "The right to compulsory process is not so much a bar against governmental misconduct as it is a protection of the defendant's ability to present his or her case. . . . Thus . . . the policy behind the Sixth Amendment right to compulsory process cannot be fully protected if we require that prosecutorial 'bad faith' be shown . . . ." *Id. See also* United States v. Martinez-Morales, 632 F.2d 112, 115 (9th Cir. 1980).

55. United States v. Calzada, 579 F.2d 1358, 1362 (7th Cir. 1978). Consider Professor Westen's remark as to the requirement of a showing of prejudice:

> To say that evidence is material is simply another way of saying that its exclusion would be prejudicial.

lyzing compulsory process issues is not only helpful in understanding how the court of appeals resolved the compulsory process issue in *Stewart*, but also in understanding why the court did not decide the various other questions that can arise in compulsory process analysis.

Analysis of State v. Stewart

On February 2, 1980, Hervell Stewart was discovered breaking into the back door of the McGuireville Bar by Deputy Sheriff Huff.[56] After Stewart was arrested, several witnesses were questioned on the scene by Deputy Huff and Deputy McLaughlin.[57] Stewart was indicted for burglary and possession of burglar's tools.[58] Some time after the indictment, Deputy McLaughlin was subpoenaed by the defendant.[59] Deputy McLaughlin was unable to be served because she had taken a leave of absence and apparently had gone to Alaska without leaving a forwarding address.[60] Up to and throughout the trial proceedings, the defendant was unable to interview Deputy McLaughlin[61] or obtain her testimony. Prior to trial, the court granted several continuances because of the unavailability of Deputy McLaughlin;[62] however, defendant's last motion to dismiss or continue was denied.[63] After a jury trial, Stewart was found guilty and sentenced to prison.[64] A motion for new trial, made after Deputy McLaughlin had returned to Arizona and was available to testify, was denied.[65]

On appeal, the Arizona Court of Appeals was initially[66] asked to decide whether the defendant's inability to obtain the testimony of Deputy McLaughlin constituted a violation of his sixth amendment right to com-

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. . . .

Since 'prejudicial effect' and 'materiality' when used in this fashion are synonymous, it is superfluous to speak of 'prejudicial error' with respect to a constitutional right like compulsory process that has already been formulated to require a showing of materiality.

Westen, *supra* note 15, at 214-15, 215 n.76. *See* United States v. Valenzuela-Bernal, 102 S. Ct. 3440, 3447-48 (1982).

56. 131 Ariz. 407, 408, 641 P.2d 895, 896 (Ct. App. 1982).

57. *Id.* Deputy McLaughlin did not participate in the investigation of the case until after Stewart had been arrested. Deputy McLaughlin interviewed William Tishey, a friend of the defendant, who testified that he was asleep in the defendant's truck until awakened by Deputy McLaughlin in the early hours of February 2. *Id.* After asking several people on the scene if they could identify Tishey as one of the suspects, Deputy McLaughlin concluded that Tishey was not a suspect. *Id.*

58. *Id.* at 408-09, 641 P.2d at 896-97.

59. *Id.* at 409, 641 P.2d at 897. The court of appeals noted that the defense "failed to present to the trial court any information concerning what Deputy McLaughlin could testify to and the potential usefulness of that testimony to the defendant." *Id.* at 410, 641 P.2d at 898.

60. *Id.* at 409, 641 P.2d at at 897.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 408, 641 P.2d at 896. Stewart was found guilty on one count of burglary and one count of possession of burglary tools. *Id.*

65. *Id.* at 409, 641 P.2d at 897.

66. The court later found it necessary to decide whether the trial court properly denied the defendant's motion for new trial after Deputy McLaughlin had again become available. *Id.* at 410, 641 P.2d at 898.

pel witnesses to testify in his behalf.[67] The court interpreted various federal cases[68] as requiring some governmental conduct interfering with the availability of a witness for there to be a violation of compulsory process.[69] Specifically, the court applied the test used in *Ferrari v. United States*[70] and concluded that there was no violation of the right to compulsory process where Deputy McLaughlin was not made unavailable through the suggestion, procurement, or negligence of the government.[71]

The defendant argued that the state was negligent in: 1) not attempting to detain Deputy McLaughlin until she could be interviewed by the defense;[72] 2) allowing Deputy McLaughlin, an investigating officer, to leave the jurisdiction prior to defense questioning; and 3) failing to request Deputy McLaughlin to leave a forwarding address.[73] The court dismissed the defendant's negligence argument merely by stating that Deputy McLaughlin's unavailability was a result of her own actions in taking a leave of absence.[74] Thus, because no government conduct was involved, the government had no duty to look for Deputy McLaughlin.[75] Once it had determined that no governmental conduct was involved, the court found it unnecessary to decide whether a showing of materiality[76] or prejudice to the defendant's case would be required.[77]

Arguably, in applying the *Ferrari* test, the *Stewart* court should have given deeper consideration to whether the state was negligent in its failure to detain Deputy McLaughlin until she could be interviewed or to require a forwarding address of Deputy McLaughlin.[78] Had it done so, the court

67. *Id.* at 408, 641 P.2d at 896.

68. Washington v. Texas, 388 U.S. 14 (1967); Singleton v. Lefkowitz, 583 F.2d 618 (2d Cir. 1978); United States v. Calzada, 579 F.2d 1358 (7th Cir.), *cert. dismissed*, 439 U.S. 920 (1978); United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974); United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971); Ferrari v. United States, 244 F.2d 132 (9th Cir.), *cert. denied sub nom.* Cherpakov v. United States, 355 U.S. 873 (1957).

69. 131 Ariz. at 409, 641 P.2d at 897.

70. 244 F.2d 132 (9th Cir.), *cert. denied sub nom.* Cherpakov v. United States, 355 U.S. 873 (1957); *see supra* notes 26-30 and accompanying text.

71. 131 Ariz. at 410, 641 P.2d at 898.

72. Some courts have held that compulsory process includes the right to interview a witness in advance of trial. State v. Burri, 87 Wash. 2d 175, 180-81, 550 P.2d 507, 512 (1976); State v. Papa, 32 R.I. 453, 459, 18 A. 12, 15 (1911). Other courts analyze interference with the right to interview a prospective witness under the due process clause. *See* Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966); Coppolino v. Helpern, 266 F. Supp. 930, 935 (D.C.N.Y. 1967).

73. Appellant's Opening Brief at 10-11.

74. 131 Ariz. at 410, 641 P.2d at 898.

75. *Id.* The court made an analogy here to *Ferrari*, where the court found that the witness' absence was not a result of government conduct. *See supra* notes 26-30 and accompanying text. Arguably, the *Stewart* court could have distinguished *Ferrari* in that the witness in *Ferrari* was not a permanent employee of the Bureau of Narcotics. Deputy McLaughlin, however, was a regular employee of the Yavapai County Sheriff's Office, and the state thus had greater control over her actions.

76. United States v. Valenzuela-Bernal, 102 S. Ct. 3440 (1982), discussed *supra* notes 48-53 and accompanying text, had not yet been decided. The appellant argued that by imposing a materiality requirement in the instant case, the court would actually be allowing the government to determine who will be a helpful witness for the accused. Appellant's Opening Brief at 7-8. *See* United States v. Tsutagawa, 500 F.2d 420, 423 (9th Cir. 1974).

77. 131 Ariz. at 410, 641 P.2d at 898. *See supra* note 55 and accompanying text.

78. *See supra* text accompanying notes 72-75. The court merely concluded that there was no negligent government conduct involved and failed to set forth any analysis of the negligence issue. *See* 131 Ariz. at 410, 641 P.2d at 898.

nevertheless might have concluded that the state lacked sufficient notice of the defendant's need for Deputy McLaughlin's testimony, and therefore, had no duty to help secure her presence.[79] The court could have found that Stewart's counsel had not actually notified the prosecution of its need for Deputy McLaughlin's testimony nor was her potential testimony so material as to put the prosecution on constructive notice.[80]

Still to be decided, however, was whether the trial court's denial of defendant's motion for a new trial, after Deputy McLaughlin had returned to Arizona, constituted an abuse of discretion.[81] The court held that no abuse occurred, emphasizing the defendant's failure to interview Deputy McLaughlin before argument on the motion, as well as a failure to present to the trial court any indication as to the expected content of her testimony and its potential usefulness to the defense.[82]

A close examination of the compulsory process analysis in *Stewart*, which focused on the threshold question of whether there existed any government conduct or negligence interfering with the availability of the witness, has revealed what factors are critical to the resolution of that issue. For this reason, the *Stewart* case has some important implications for the manner in which the question of government misconduct or negligence in regard to the availability of witnesses will be dealt with in subsequent cases.

Implications of State v. Stewart

The analysis set forth in *Stewart* simplifies the inquiry into what constitutes a compulsory process violation by adopting a threshold test which asks whether the unavailability of a defense witness has resulted from government suggestion, procurement, or negligence.[83] Although the court's analysis makes clear that government misconduct is sufficient under this test to constitute a compulsory process violation,[84] it is less clear what type of showing must be made for negligence to be the basis for a successful challenge.[85]

The court's finding that the government was not negligent in allowing Deputy McLaughlin to go to Alaska without leaving a forwarding address appears to be an implied recognition that the government simply had no actual or constructive notice of the defendant's need for the witness and thus had no duty to account for her whereabouts.[86] It might have been more helpful, however, for the court to have conducted a more thorough

79. *See supra* text accompanying note 42. Arguably, whether the government has notice of the defendant's need for a witness is a suitable starting point in the negligence analysis. *See* United States v. Wolfson, 322 F. Supp. 798, 820 (D. Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972).

80. *See supra* text accompanying note 43.

81. 131 Ariz. at 410, 641 P.2d at 898.

82. *Id.* The court of appeals looked only to the information before the trial court and concluded that Deputy McLaughlin's testimony would only be cumulative. *Id.*

83. *See supra* text accompanying notes 70-71.

84. *See supra* text accompanying note 69.

85. *See supra* text accompanying note 74.

86. *See supra* text accompanying notes 78-80.

analysis of the negligence issue, outlining what elements are necessary to show governmental negligence in allowing a witness to become unavailable. Arguably, the approach taken by the federal district court in *United States v. Wolfson*,[87] which asserts that the government's duty to help make a witness available does not arise until it has actual or constructive notice, would be a proper starting point in the negligence analysis.[88] In any event, the type of showing that must be made to prove governmental negligence is still unclear and will ultimately be determined in later cases.

Conclusion

Until *State v. Stewart*, what constituted an infringement of the defendant's right to compulsory process had been a topic of little discussion in Arizona. The holding in *Stewart* that there is no violation of the right to compulsory process where the unavailability of a witness has not resulted from government suggestion, procurement, or negligence is a restatement of the rule originated by the Ninth Circuit's decision in *Ferrari v. United States*.

Under the rule adopted by the *Stewart* court, compulsory process is not treated as an absolute right with the sole purpose of protecting the defendant's ability to present his case. Rather, compulsory process is seen as a limited right. The requirement that there must be a showing of government conduct or negligence interfering with the availability of a witness to establish a violation is consistent with the competing goals of enabling the defendant to present the best possible defense without unduly restricting the state's ability to prosecute.

While the threshold "government conduct" requirement does provide a possible starting point for analyzing compulsory process challenges, it does not complete the inquiry. Under *United States v. Valenzuela-Bernal*, a party asserting a compulsory process challenge must also show that the absent witness' testimony would be material. Where governmental negligence is sufficient to sustain a compulsory process violation, materiality would not only be a separate requirement, but would also serve to determine whether the prosecution has constructive notice of the defense's need for the witness and is thus under a duty to aid in securing the availability of the witness.

Although the *Stewart* court emphasized that government misconduct will usually be held to constitute a compulsory process violation, the type of showing that must be made for negligence to be the basis of a successful challenge remains unclear. Thus, defendants will have to look to future cases to delineate the elements necessary to prove governmental negligence leading to the unavailability of defense witnesses.

Brian Neil Spector

87. 322 F. Supp. 798 (D. Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972).

88. *See id.* at 820.

B. Double Jeopardy and Consecutive Sentencing: What Does It Mean in Arizona?

The double jeopardy clause of the fifth amendment[1] embodies a concept that has its roots in early English common law.[2] Yet, despite this venerable ancestry, the actual dimensions of double jeopardy protection continue to be formulated.[3] Specifically, the extent to which the double jeopardy clause limits consecutive sentencing has, in recent years, become a much debated topic.[4] Not surprisingly, the issue was raised in a recent appeal before the Arizona Supreme Court.[5]

Although the Arizona Supreme Court has considered numerous cases involving consecutive sentences,[6] most have involved simply an interpretation of the state's multiple punishment statute.[7] *State v. Rumsey*[8] is one of few cases in Arizona to consider consecutive sentences in light of a constitutional challenge.

On June 6, 1980, the defendant, Dennis Wayne Rumsey, was convicted of first degree murder[9] and armed robbery.[10] He was sentenced by the trial court to life imprisonment, without the possibility of parole for twenty-five years, for the murder conviction and twenty-one years for the armed robbery conviction.[11] The sentences were to run consecutively, pursuant to section 13-708 of the Arizona Revised Statutes.[12]

According to the facts stated in the case, the defendant shot the victim, George Koslosky, in the course of an armed robbery.[13] The murder occurred along Interstate 10 in Arizona, when Rumsey, who had hitchhiked a ride with Koslosky and was subsequently driving the victim's car, pulled over to the side of the road.[14] The defendant ordered Koslosky at

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1. U.S. Const. amend. V.

2. "[T]he plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 W. Blackstone, Commentaries *335.

3. As recently as 1969, the United States Supreme Court held in Benton v. Maryland, 395 U.S. 784, 795 (1969), that the double jeopardy clause was applicable to the states.

4. *See infra* notes 53-80 and accompanying text.

5. State v. Rumsey, 130 Ariz. 427, 636 P.2d 1209 (1981).

6. *See* cases cited *infra* note 31.

7. Ariz. Rev. Stat. Ann. § 13-116 (1978) provides:

> An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other, to the extent the constitution of the United States or this state require.

This statute was formerly § 13-1641, but was renumbered and amended by 1977 Ariz. Sess. Laws ch. 142, § 41 (effective October 1, 1978). The previous statute read:

> An act or omission which is made punishable in different ways by different sections of the laws may be punished under either, but in no event under more than one. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.

Ariz. Rev. Stat. Ann. § 13-1641 (1956).

8. 130 Ariz. 427, 636 P.2d 1209 (1981).

9. *Id.* at 428, 636 P.2d at 1210.

10. *Id.*

11. *Id.*

12. Ariz. Rev. Stat. Ann. § 13-708 (1978).

13. 130 Ariz. at 429, 636 P.2d at 1211.

14. *Id.*

gun point to empty his pockets and get into the trunk.[15] When Kosklosky refused, Rumsey shot him, dragged him off the road and then took his wallet and watch.[16]

The Arizona Supreme Court held that, under the multiple punishment statute, "the intervening crime of murder" did not preclude an additional conviction for armed robbery[17] and it affirmed the trial court's imposition of consecutive sentences.[18] The court also rejected the defendant's contention that the consecutive sentences for armed robbery and murder constituted a double jeopardy violation.[19] It offered only a cursory discussion of the issue, distinguishing a recent United States Supreme Court case, *Whalen v. United States*,[20] in the briefest terms by suggesting that *Whalen* had involved a matter of statutory interpretation rather than constitutional law.[21]

This Casenote first will examine *State v. Rumsey* and its relationship to Arizona's multiple punishment law.[22] Second, in an attempt to understand the court's reasoning in rejecting *Whalen*'s applicability, it will discuss consecutive sentencing within the context of the double jeopardy clause of the United States Constitution. Finally, this Casenote will explore the effects that recently answered constitutional questions have on this area of Arizona law.

Multiple Punishments Under Arizona Law

Arizona's multiple punishment statute reads, "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent."[23] The statutory language varies from that of the fifth amendment: "[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[24] The Arizona statute protects against multiple punishment for the "same act," while the double jeopardy clause protects against multiple punishment for the "same offence." The Arizona court has noted this variation and its significance has been realized in the rule developed by the court to determine whether multiple punishments violate the Arizona statute.[25]

15. *Id.*
16. *Id.* at 429, 636 P.2d at 1211.
17. *Id.* at 430, 636 P.2d at 1212.
18. *Id.*
19. *Id.* at 431, 636 P.2d at 1213.
20. 445 U.S. 684 (1980).
21. *See* 130 Ariz. at 431, 636 P.2d at 1213.
22. It is not within the scope of this Casenote to analyze the state's cross-appeal regarding the failure to impose the death penalty. That aspect of the case is still under appeal; Rumsey was sentenced to death on remand and is currently appealing that sentence. Although the double jeopardy issue raised on that appeal merits attention, this discussion will be confined to the issues raised by Rumsey regarding the consecutive sentences.
23. ARIZ. REV. STAT. ANN. § 13-116 (1978). For text of this section, see *supra* note 7.
24. U.S. CONST. amend V.
25. Because ARIZ. REV. STAT. ANN. § 13-116 (1978) refers to "an act or omission" the Arizona Supreme Court has, in its statutory analysis, focused on the actions of the defendant as shown by the facts of the case. *See* Casenote, *Multiple Punishment and Double Jeopardy*, 14 ARIZ. L. REV. 513, 516-18 (1972). In contrast, the United States Supreme Court has confined its correla-

The rule that is used to determine whether the multiple punishment statute precludes consecutive sentences, which the Arizona court applied in *State v. Rumsey*, is known as the "identical elements" test.[26] This test was adopted in *State v. Tinghitella*[27] in 1971 and has been used by the court in subsequent multiple punishment cases.[28] Under the test, the court eliminates the evidence supporting the elements of one charge and then determines whether the remaining evidence will support the elements of the second charge.[29] Since the decision is based upon the facts of the case, the test is always applied on a case-by-case basis.

To apply the test in *Rumsey*, the court first enumerated the elements of both the murder and armed robbery statutes and then applied them to the facts of the case. The court found that the acts constituting the robbery were separate from the act of murder.[30] Comparing the instant case with *State v. Ferguson*,[31] the court was able to distinguish the latter on its facts. Like *Rumsey, Ferguson* involved charges of armed robbery and murder.[32] The *Ferguson* court held, however, that the robbery conviction could not stand because the only showing of force was necessary to support the murder conviction.[33] In *Rumsey*, the appellant argued that *Ferguson* was applicable to his case.[34] This argument was based on the fact that the force used to commit the murder was the same force used to effect the robbery.[35] But the court observed that under Arizona's robbery statutes a person commits armed robbery if he "uses or threatens to use a deadly weapon or dangerous instrument" in the course of taking property of another.[36] The court held that it was the threat of force, rather than the use of force, in Rumsey's robbery that provided the essential element in the armed robbery conviction.[37] Therefore, the imposition of sentences for both murder and armed robbery did not violate the multiple punishment statute.[38]

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tive double jeopardy analysis to the "offenses" as defined by statute. *See infra* note 47 and accompanying text.

26. *See* 130 Ariz. at 430, 636 P.2d at 1212.

27. 108 Ariz. 1, 3-4, 491 P.2d 834, 836-37 (1971).

28. *See, e.g.*, State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979) (convictions for burglary and felony murder did not violate multiple punishment statute); State v. Helmick, 112 Ariz. 166, 540 P.2d 638 (1975) (convictions for burglary and assault did not violate multiple punishment statute); State v. Collins, 111 Ariz. 303, 528 P.2d 829 (1974) (armed robbery and murder convictions did not violate multiple punishment statute).

29. *Rumsey*, 130 Ariz. at 430, 636 P.2d at 1212.

30. *Id.*

31. 119 Ariz. 55, 579 P.2d 559 (1978).

32. *Id.* at 57, 579 P.2d at 561.

33. *Id.* at 61, 579 P.2d at 565.

34. Appellant's Opening Brief at 6.

35. *See id.*

36. 130 Ariz. at 430, 636 P.2d at 1212; ARIZ. REV. STAT. ANN. § 13-1902 (1978) provides:

> A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

This statute is supplemented by ARIZ. REV. STAT. ANN. § 13-1904(A) (1978) which provides: "A person commits armed robbery if in the course of committing robbery as defined in § 13-1902, such person or an accomplice: 1. Is armed with a deadly weapon; or 2. Uses or threatens to use a deadly weapon or dangerous instrument."

37. 130 Ariz. at 430, 636 P.2d at 1212.

38. *Id.*

Having dispensed with the multiple punishment argument, the court then considered the appellant's double jeopardy claim.

The Double Jeopardy Clause

In 1873, the United States Supreme Court held that the double jeopardy clause of the fifth amendment protected against multiple punishments for the same offense.[39] This view has been repeatedly reaffirmed and it is now frequently stated that the double jeopardy clause offers three separate constitutional protections.[40] It protects against: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense.[41] In 1969, the United States Supreme Court held that the fifth amendment guarantee against double jeopardy is enforceable against the states through the fourteenth amendment.[42]

Therefore, while there is no doubt that protection against multiple punishment exists, the extent of that protection is subject to debate. The major issue has been whether the double jeopardy clause imposes any restraint upon the authority of the legislative branch to prescribe consecutive sentences.[43]

To fully appreciate the complexity of this question, it is necessary to begin with a discussion of *Blockburger v. United States*.[44] A great deal of the recent confusion about the permissibility of consecutive sentencing stems from the ambiguity in this 1931 United States Supreme Court case. In *Blockburger*, the defendant had been convicted and sentenced for violating two provisions of the Harrison Narcotic Act.[45] In appealing his conviction, Blockburger argued that because both violations were due to a single act, the consecutive sentences were unlawful.[46] To determine whether the consecutive sentences could be imposed lawfully, the Court adopted a test that has become known as the *Blockburger* rule. When one act or transaction constitutes a violation of two distinct statutes, the test that the Court applies to determine whether both sentences may be imposed is whether each statute requires proof of a fact which the other does not.[47]

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39. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873). The Court stated:
> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, . . . there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Id.

40. *See* Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1062 (1980).

41. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

42. Benton v. Maryland, 395 U.S. 784, 794 (1969).

43. *See infra* notes 44-80 and accompanying text.

44. 284 U.S. 299 (1932).

45. *Id.* at 300. *See* Harrison Narcotic Act, ch. 1, §§ 1-2, 38 Stat. 785 (1914) (*repealed by* the Internal Revenue Code of 1939).

46. 284 U.S. at 301.

47. *Id.* at 304. This test is different from Arizona's identical elements test, *see supra* notes 29-

The problem with the *Blockburger* rule is that its purpose has been unclear. From the opinion, the rule appears to have two possible functions. It may have been applied as a canon of statutory construction to determine congressional intent,[48] or it may have been used as a constitutional test to determine whether Congress had exceeded a boundary imposed by the double jeopardy clause.[49] This opinion offers few clues to clarify the ambiguity. In adopting the test, the Court cited two cases as authority for the rule. The first, *Gavieres v. United States*,[50] was a multiple prosecution case that specifically referred to the double jeopardy clause in its decision. The second, *Morey v. Commonwealth*,[51] was an 1871 Massachusetts case involving consecutive sentencing which, like *Blockburger*, did not indicate a basis for its rule. Moreover, the *Blockburger* Court disapproved a Fifth Circuit case that used a different test to determine whether acts being punished were "the same offence" for fifth amendment purposes.[52] Thus, while there is some indication of a constitutional basis for the *Blockburger* rule, the lack of certainty as to its purpose has left unanswered the question of whether legislative action is limited by the double jeopardy clause.

More recent cases only added to the confusion. In 1977, Justice Powell, writing for the majority in *Brown v. Ohio*,[53] stated: "[T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments . . . ."[54] This statement seems to imply that the double jeopardy clause imposes no limitations upon the legislature whatsoever. Yet this view cannot be considered conclusive, for the same day *Brown* was decided, Justice Blackmun, in the

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32 and accompanying text, in that it is applied to the statutes involved in the case, while the identical elements test is applied to the facts. For example, if a defendant were charged with assault and burglary, application of the *Blockburger* rule would involve comparing the statutory elements of burglary with the statutory elements of assault. If the assault statute required proof of a fact which was not required by the burglary statute, and vice versa, convictions under both statutes would not violate the rule. Under the identical elements test used by the Arizona court, the facts of the case would be considered. The court would identify the facts that support the assault charge and hypothetically eliminate them. The remaining facts would then be applied to the burglary statute to determine whether they could, independently, support the burglary charge. If both charges are factually supported, the multiple punishment statute is not violated.

48. *See infra* note 72 and accompanying text.

49. *See infra* note 73 and accompanying text.

50. 220 U.S. 338 (1911) (conviction under ordinance for drunkeness and rude and boisterous language did not bar subsequent prosecution for insulting public officer, although latter charge was based on the same conduct and language).

51. 108 Mass. 433, 434 (1871) (a conviction for lewd and lascivious cohabitation was no bar to indictment and conviction for adultery, although proof of the same acts of unlawful intercourse was introduced in both trials). The United States Supreme Court has continued to cite multiple prosecution cases in consecutive sentencing cases, and vice versa. For a discussion of this, see Casenote, *Cumulative Sentences for One Criminal Transaction Under the Double Jeopardy Clause: Whalen v. United States*, 66 CORNELL L. REV. 819, 825-56 (1981).

52. 284 U.S. at 304, *disapproving* Ballerini v. Aderholt, 44 F.2d 352, 352-53 (1930). The test which the Fifth Circuit adopted to determine a double jeopardy violation was applied to the facts alleged in the multiple indictments. *Id.* If, at the time of the first indictment, proving the facts alleged in the second indictment would have resulted in conviction, prosecution under both indictments constituted a double jeopardy violation. *Id.*

53. 432 U.S. 161 (1977).

54. *Id.* at 165.

majority opinion for *Jeffers v. United States*,[55] stated, "[i]f some possibility exists that the two statutory offenses are the 'same offense' for double jeopardy purposes . . . it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties." Although the Court did not actually decide the issue in either case,[56] the implications found in the two opinions, first that the double jeopardy clause imposes no limitations upon the legislature, and second, that the legislature may not enact two separate statutes which punish the "same offense," appeared to be in direct opposition.

Justice Blackmun's view in *Jeffers* was more clearly articulated in *Simpson v. United States*,[57] where Justice Brennan wrote, "[c]ases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing, as here, raise the prospect of double jeopardy and the possible need to evaluate the statutes in light of the *Blockburger* test." However, once again the Court did not reach the issue.[58] Consistent with its policy of avoiding constitutional questions, the Court decided the question on statutory grounds.[59]

This policy of avoiding constitutional questions is precisely why the issue was left unresolved. For a long while all the cases that touched upon consecutive sentencing and double jeopardy were decided upon statutory grounds,[60] with the possible exception of *United States v. Whalen*.[61] In *Whalen*, the Court premised its jurisdiction on the double jeopardy issue[62] and explained its decision in terms of the fifth amendment.[63] Yet the ac-

55. 432 U.S. 137, 155 (1977).

56. Since *Brown* involved multiple prosecutions the language in the opinion referring to multiple punishment was dictum. 432 U.S. at 162-64. In *Jeffers*, the Court decided the cumulative punishment problem on legislative intent grounds, making it unnecessary to reach the constitutional question. 432 U.S. at 155.

57. 435 U.S. 6, 11 (1978).

58. *See id.* at 11-12. For a discussion of the *Blockburger* rule, see *supra* notes 44-50 and accompanying text.

59. *See* 435 U.S. at 11-12. *See* cases cited *infra* note 60.

60. *See, e.g.*, Busic v. United States, 446 U.S. 398, 399-400 (1980) (18 U.S.C. § 924(c) (1976), *amended by* 18 U.S.C. § 924(c) (Supp. V (1980) which authorizes sentence enhancement if a firearm is used during the commission of a felony, may not be applied where the felony is proscribed by a statute that itself authorizes such enhancement); Simpson v. United States, 435 U.S. 6, 16 (1978) (Congress cannot be said to have authorized sentence enhancement under both 18 U.S.C. § 2113(d) (1976), bank robbery committed by the use of a dangerous weapon or device, and 18 U.S.C. § 924(c) (Supp. V. 1980) use of a firearm in committing felony); Jeffers v. United States, 432 U.S. 137, 155 (1977) (Congress did not intend to impose cumulative penalties under 21 U.S.C. §§ 846, 848 (1976); Iannelli v. United States, 420 U.S. 770, 785-86 nn.17-18 (1975) (Congress did not intend to punish violations of 18 U.S.C. § 1955 (1976) separately from 18 U.S.C. § 371 (1976) conspiracy violations).

61. 445 U.S. 684 (1980).

62. *Id.* at 688. The Court stated:

> In this case we have concluded that the customary deference to the District of Columbia Court of Appeals' construction of local federal legislation is inappropriate with respect to the statutes involved, for the reason that the petitioner's claim under the Double Jeopardy Clause cannot be separated entirely from a resolution of the question of statutory construction.

Id.

63. *Id.* at 690. The Court stated:

> Because we have concluded that the District of Columbia Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case, and because that error denied the petitioner his constitutional right to be

tual analysis used to decide the case involved statutory construction.[64] The Court carefully worded its holding by stating, "[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so."[65] This cautious language drew a separate concurring opinion from Justice Blackmun, who departed from his view in *Jeffers* to say that the only function of the double jeopardy clause in multiple punishment cases is to restrain the prosecutor and courts.[66] Although dissenting, Justice Rehnquist expressed the same sentiment in his opinion.[67]

In the 1981 term, the United States Supreme Court again considered a case involving multiple punishments, *Albernaz v. United States*.[68] Justice Rehnquist, who had dissented in *Whalen*, wrote the majority opinion. Citing *Whalen* and *Brown* as authority, he concluded that "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed."[69] In response, Justice Stewart wrote in a separate concurring opinion: "No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not . . . ."[70]

It was the dual characterization of the *Blockburger* rule that prevented a final resolution as to whether the double jeopardy clause limits the legislature. On the one hand, the Court had said the *Blockburger* rule was primarily relevant as a constitutional test to determine when two separately defined crimes constitute the same offense,[71] but on the other, the Court referred to the rule as merely a maxim of statutory construction.[72]

Thus, when confronted with a multiple punishment case, the Court, as a matter of policy, first addressed the statutory question.[73] If the legislative intent was even somewhat ambiguous, the Court applied the *Block-*

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deprived of liberty as punishment for criminal conduct only, we reverse the judgment of the Court of Appeals.

Id.

64. *Id.* at 688.

65. *Id.* at 689.

66. *Id.* at 697 (Blackmun, J., concurring). Justice Blackmun alludes to his about-face on the issue since *Jeffers*, stating: "Dicta in recent opinions of this Court at least have suggested, and I now think wrongly, that the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in which the Legislative Branch *clearly intended* that multiple penalties be imposed for a single transaction." *Id.* (emphasis in original).

67. *Id.* at 705-06 (Rehnquist, J., dissenting).

68. 450 U.S. 333 (1981).

69. *Id.* at 344. It is ironic that Justice Rehnquist cites *Whalen* as support for this point. The issue, while discussed, clearly was not decided in that case, and the position he adopts in the *Albernaz* majority comes directly from his *Whalen* dissent. *See Whalen*, 445 U.S. at 705-06 (Rehnquist, J., dissenting).

70. 450 U.S. at 345 (Stewart, J., concurring). Justice Stewart cited *Blockburger* on this point. *Id.* He was joined in the concurrence by Justices Marshall and Stevens.

71. Simpson v. United States, 435 U.S. 6, 11 (1978).

72. *See Whalen*, 445 U.S. at 691 (the Court interprets § 23-112(2) of the Columbia Code as a codification of the *Blockburger* rule). In its analysis, the Court states, "The clause refers of course to a *rule of statutory construction* stated by this Court in Blockburger v. United States and consistently relied on ever since *to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively.*" *Id.* (footnote omitted) (emphasis added).

73. *See Simpson*, 435 U.S. at 11-12.

burger test to determine that intent.[74] If the test was satisfied, meaning that each statute required proof of a fact that the other did not, then not only did the multiple punishments stand, because the Court held that the legislature intended them, but the constitutional standard, according to those members of the Court who believed that there was one,[75] also had been met. If the statutes failed the test, the Court held that the legislature did not intend multiple punishments and the case was decided on statutory grounds.[76]

The issue was not definitively decided until 1983 when the Court heard a case involving statutes where the legislative intent had been decided by the state court and the prescribed punishment violated the *Blockburger* rule.[77] In *Missouri v. Hunter*,[78] Chief Justice Burger wrote the opinion which reversed the Missouri Appeals Court finding of a double jeopardy violation and held that, "simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes."[79] Although this decision seems to put the controversy to rest, the holding in *State v. Rumsey* is unaffected.[80]

In *State v. Rumsey*, the Arizona court limited its constitutional analysis to the applicability of *Whalen*, giving no indication of the confusion and uncertainty found in that opinion with regard to the multiple punishment aspect of double jeopardy law.[81] In distinguishing *Whalen*, the court stated that the case was decided on the basis of a District of Columbia statute, ignoring the constitutional implications and inferring from dictum that "Congress could have [constitutionally] provided for a different sentencing scheme."[82]

Despite this oversimplified and somewhat misleading summary of the *Whalen* decision, *Rumsey* did not really require a confrontation of the constitutional issue. Rumsey's conviction under the two statutes would have withstood the *Blockburger* test.[83] The fact that the Arizona court

74. *Id.* at 11.

75. This refers to the constitutional standard as defined by the *Albernaz* concurrence. *See supra* note 70 and accompanying text. *See also* Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975).

76. *See supra* note 60 and accompanying text.

77. Missouri v. Hunter, 103 S. Ct. 673 (1983).

78. *Id.*

79. *Id.* at 679.

80. *See infra* notes 81-84 and accompanying text.

81. 130 Ariz. at 431, 636 P.2d at 1213.

82. *Id.*

83. Rumsey was convicted under ARIZ. REV. STAT. ANN. §§ 13-1904 (armed robbery) 13-1105 (first degree murder) (1978 & Supp. 1980-81). *Id.* at 428, 636 P.2d at 1210. According to Illinois v. Vitale, 447 U.S. 410, 419 (1980), to satisfy the *Blockburger* test the court would need to find only that first degree murder under § 13-1105 does not always entail proof of an underlying felony. Since the first degree murder charge under § 13-1105 can be based on either premeditation (§ 13-1105(A)(1)) or murder in the course of one of several felonies (§ 13-1105(A)(2)), the two statutes would appear to satisfy the test.

Yet if the murder conviction actually was based on the underlying felony, this analysis could be seen to conflict with *Whalen*. In *Whalen*, the government argued that the District of Columbia felony-murder statute could apply to any one of several felonies and therefore did not always

chose to incorporate the *Whalen* dictum into its opinion may have been an indication of the Arizona court's view as to the scope of the double jeopardy clause.[84] It seems, however, that in light of *Missouri v. Hunter* the Arizona courts can continue to decide cases on statutory grounds and thereby resolve any constitutional issue at the same time.

Conclusion

In *State v. Rumsey* the Arizona Supreme Court held that the imposition of sentences for both first degree murder and armed robbery did not violate either Arizona's multiple punishment statute or the double jeopardy clause of the fifth amendment. There is not, however, much to be gleaned from *Rumsey*. The case added very little to Arizona statutory law and was able to bypass an in-depth discussion of the morass of constitutional law dealing with multiple punishments. It would seem that, given the subsequent resolution of the constitutional issue by the United States Supreme Court, the effectiveness of a double jeopardy claim in a consecutive sentencing case depends entirely upon the applicable statutory protections. In Arizona this means that the protection against consecutive sentences provided by the double jeopardy clause of the fifth amendment is essentially the protection provided by the multiple punishment statute.

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require proof of rape. 445 U.S. at 694. But the Court held that consecutive sentences were impermissible, because in *Whalen* proof of rape was a necessary element of felony murder. *Id.* at 694. The Court did concede, however, that the matter was not free from doubt and applied the rule of lenity to find in favor the defendant. *Id.* This acknowledgement of the circumstances of the individual case was criticized by Justice Rehnquist in his dissent. He accused the majority of applying the test to the facts alleged in the indictment rather than the actual statutes involved. *Id.* at 711.

This dispute probably has little bearing on *State v. Rumsey*, for even if the Arizona court had followed the *Whalen* majority's approach in its analysis, the indications are that the murder charge was supported by the element of premeditation and was not founded on the robbery as an underlying felony. *See* 130 Ariz. at 430, 636 P.2d at 1212 (*Rumsey* court's enumeration of the elements of each charge).

84. *See supra* note 98 and accompanying text.

III. Defamation

THE SUBJECTIVE DOUBT REQUIREMENT FOR RECKLESS DISREGARD: MISAPPLICATION OF THE ACTUAL MALICE STANDARD IN *HANSEN V. STOLL*

Under the "actual malice" rule established in *New York Times Co. v. Sullivan*,[1] a public official who brings a defamation action is constitutionally required to show that the defendant published a defamatory statement with knowledge of its falsity or in reckless disregard of whether it was false or not.[2] Reckless disregard of the truth exists only where the defendant has a subjective high degree of awareness of the probable falsity of the defamatory matter.[3] To be held liable for defamation, the defendant must actually have entertained serious doubts about the truth of his publication.[4]

In *Hansen v. Stoll*,[5] the Arizona Court of Appeals acknowledged the subjective "reckless disregard" test, but failed to apply it.[6] The *Hansen* court found that defendant Stoll acted in reckless disregard of the truth without determining that he had a high degree of awareness of his statements' probable falsity.[7] Instead, the court focused on the objective unrea-

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1. 376 U.S. 254, 280 (1964).

2. *Id.* at 279-80. The *New York Times* decision overruled the law of defamation in nearly every state. *See* L. ELDREDGE, THE LAW OF DEFAMATION 255 (1978). While earlier cases occasionally mentioned the tension between defamation actions and the first amendment guarantees of free speech and press, they went no further than to find a particular defendant's conduct to be privileged. *Id.* at 252-53. In *New York Times*, the Court held that the first amendment itself requires the showing of a knowing or reckless falsehood, at least where the plaintiff is a "public official." 376 U.S. at 279-80. *See generally* W. PROSSER, LAW OF TORTS 820 (4th ed. 1971). The United States Supreme Court later included "public figures" in the *New York Times* rule. Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-65 (1967). *See also* Gertz v. Welch, 418 U.S. 323, 348 (1974) (*New York Times* rule of "actual malice" does not extend to suits brought by private plaintiffs, even though the defamatory publication concerns an issue of public or general concern).

3. Hansen v. Stoll, 130 Ariz. 454, 458, 636 P.2d 1236, 1240 (Ct. App. 1981). *See* St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Garrison v. Louisiana, 379 U.S. 64, 74 (1964); Sewell v. Brookbank, 119 Ariz. 422, 426, 581 P.2d 267, 271 (Ct. App. 1978). *See also infra* notes 4, 9, 14, 16, 33, 54 and accompanying text.

4. St. Amant v. Thompson, 390 U.S. 727, 731 (1968); *see* Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

5. 130 Ariz. 454, 636 P.2d 1236 (Ct. App. 1981).

6. *Id.* at 458, 636 P.2d at 1240. The plaintiffs were "public officials." *Id.* at 457, 636 P.2d at 1239. *See* Meiners v. Moriarity, 563 F.2d 343, 352 (7th Cir. 1977) (agents from the Office for Drug Abuse Law Enforcement are "public officials"); Rosales v. City of Eloy, 122 Ariz. 134, 135-36, 593 P.2d 688, 689-90 (Ct. App. 1979) (police officers are "public officials"). Therefore, the plaintiffs had the burden of showing that the defendant acted with "actual malice" as defined in *New York Times*. 376 U.S. at 280. *See also* RESTATEMENT (SECOND) OF TORTS § 580A (1976) (a public person must prove that the defamatory statement was made with "actual malice," meaning knowledge that it was false or reckless disregard of whether it was false or not).

7. *See* 130 Ariz. at 458, 636 P.2d at 1240.

sonableness of Stoll's beliefs.[8] Although Stoll actually believed his accusations, the court found that he acted in reckless disregard of the truth because his beliefs lacked factual support.[9] As a result, the court improperly applied a negligence standard in finding liability for defamation where "actual malice" may have been lacking.[10]

This Casenote analyzes the distinction between reasonable belief and actual belief under the *New York Times* "reckless disregard" test. It argues that although objective evidence that beliefs are unreasonable is admissible to show reckless disregard of the truth, it may not suffice to prove the requisite high subjective awareness of probable falsity. Further, it attempts to show that the *Hansen* case illustrates an improper application of a negligence test to the defamation context. Finally, it suggests that Arizona courts should apply the subjective standard more strictly in determining whether reckless disregard of the truth exists.

What is "Reckless Disregard"?

The knowing or reckless falsehood standard of "actual malice" must be distinguished from the ill will and intent to harm that characterize common law legal malice.[11] "Actual malice" involves state of mind as to truth or falsity only.[12] Where "actual malice" is required, a defendant may act with bad motives but be immune from liability absent the elements of knowledge of falsity or reckless disregard of the truth.[13]

"Reckless disregard" is not measured by what reasonable people would do.[14] Rather, the test examines the particular defendant's state of

8. *See id.* The *Hansen* court did not explicitly deviate from the subjective high degree of awareness of probable falsity test. *See id.* Rather, it purportedly showed subjective belief through objective facts. *See id.* The court decided that Stoll closed his eyes to the obvious truth when he should have doubted the truth of his allegations. *Id.* Based on its conclusion that Stoll's beliefs were unreasonable, the court found that Stoll acted in reckless disregard of the truth. *Id.* Actual subjective recklessness was never shown. *See id.*

9. *Id.* at 458, 636 P.2d at 1240.

10. *See id.* The court in *Hansen* conceded that mere negligence in failing to ascertain the truth is insufficient to satisfy the reckless disregard standard. *Id.* As the court correctly noted, the "reckless disregard" test is subjective. *See id.* Nevertheless, the court ultimately analyzed Stoll's behavior under an objective negligence test and concluded that it constituted reckless disregard for the truth. *See id.*

11. *See* Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (the Court ruled that the ill will and bad motives of legal malice are logically separable from actual malice requirements for purposes of free speech protection, and that the *New York Times* rule protects even a speaker motivated by hatred). *See generally* W. PROSSER, *supra* note 2, at 771-72, (legal malice is explained as hatred, ill will and general bad state of mind).

12. The "actual malice" standard requires either knowledge of falsity or reckless disregard of truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). *See also* RESTATEMENT (SECOND) OF TORTS § 580A (1976).

13. *See* Rosenblatt v. Baer, 383 U.S. 75, 84 (1966) (in defamation suit brought by public official, trial court's definition of malice as including ill will and evil motive was constitutionally insufficient); Garrison v. Louisiana, 379 U.S. 64, 78 (1964) (court erred in relying on ill will, enmity or wanton desire to injure as elements of malice where "actual malice" was in issue); Meiners v. Moriarity, 563 F.2d 343, 350 (7th Cir. 1977) (jury instructions on malice referring to "bad faith" and "intention to injure" warranted reversal in defamation suit brought under the *New York Times* rule).

14. *See* Time, Inc. v. Pape, 401 U.S. 279, 291 (1971) (defamatory statements negligently made are not actionable under the *New York Times* rule as long as the publisher avoids a knowing or reckless falsehood); St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (recklessness "is not

mind.[15] It is a subjective test of the defendant's actual doubts.[16] To be found reckless, the defendant must act with a high degree of awareness of his statement's probable falsity.[17] Therefore, a court should not determine the existence of "reckless disregard" based solely upon negligence or legal malice considerations.[18]

The Facts: Was Stoll Reckless?

All courts recognize the subjective nature of the "reckless disregard" test.[19] In *Hansen*, the test was applied where the defendant based his remarks largely upon events he personally witnessed.[20] Defendant Stoll maintained an airstrip on a leased mining claim near Oatman, Arizona.[21] The Federal Drug Enforcement Agency (DEA) sent the plaintiff agents to Oatman to investigate a tip that a marijuana drop would occur in the area.[22] To hide their identity from Stoll, the agents arranged for sheriff's deputies to stage a mock search of them in Stoll's presence on the morning of the marijuana drop.[23] Stoll knew nothing of the drop, but arrived at the

measured by whether a reasonably prudent person would have published, or would have investigated before publishing"); Rosenblatt v. Baer, 383 U.S. 75, 83-84 (1966) (where a public official brings suit, negligent misstatements of fact will not give rise to liability). *See also* RESTATEMENT (SECOND) OF TORTS § 580A comment d ("reckless disregard" cannot be measured by a reasonable man standard).

15. *See* St. Amant v. Thompson, 390 U.S. 727, 730-31 (1968) (the court ruled that there must be sufficient evidence to support the conclusion that "the defendant in fact entertained serious doubts as to the truth of his publication"). *See supra* note 14.

16. *See* Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 867, 330 N.E.2d 161, 173 (1975). In *Stone*, the court emphasized the subjective nature of the "reckless disregard" test in holding that the availability of information which would cause a reasonable man to entertain serious doubts was insufficient to prove the required actual belief. *Id. See supra* note 14.

17. St. Amant v. Thompson, 390 U.S. 727, 731 (1968). In *St. Amant*, defendant St. Amant, a candidate for public office, said in a speech that money "passed hands" between an allegedly corrupt union official and a deputy sheriff. *Id.* at 729. The Court found that St. Amant's failure to verify his information, his lack of consideration toward his statement's consequences, and his mistaken belief that he had no responsibility for the broadcast of his speech fell short of proving reckless disregard. *Id.* at 730. Instead, the Court held that a showing that the defendant in fact entertained serious doubts as to the truth of his publication was necessary. *Id.* at 731. *See also* Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (the Court emphasized that the "reckless disregard" standard requires a showing that the defendant published a false statement with a "high degree of awareness of . . . probable falsity").

18. Legal malice or negligence alone will not support a finding of "actual malice." *See* Henry v. Collins, 380 U.S. 356, 357 (1965); Garrison v. Louisiana, 379 U.S. 64, 73 (1964); *supra* notes 13, 14 and accompanying text. *But see* Note, *The New York Times Rule: An Analysis of Its Application*, 55 MINN. L. REV. 299, 315, 318 (1970) (the author argues that recklessness may just be a great deal of negligence).

19. In Herbert v. Lando, 441 U.S. 153 (1979), the Court recently affirmed the subjective "reckless disregard" test, holding that *New York Times* and its progeny compel plaintiffs to show the defendant's state of mind in order to prove "actual malice." *Id.* at 160. *See* Tagawa v. Maui Publishing Co., 50 Hawaii 648, 652, 448 P.2d 337, 340 (1968) (a county officer must show a high degree of awareness of the probable falsity of allegedly defamatory statements), *cert. denied*, 396 U.S. 822 (1969); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 867, 330 N.E.2d 161, 173 (1975) ("reckless disregard" test is "entirely a subjective one"); Jurkowski v. Crawley, 637 P.2d 56, 60-61 (Okla. 1981) (whether the defendant actually checked the accuracy of an affidavit and its criminal allegations did not conclusively show "reckless disregard," since serious doubts as to truth are required).

20. 130 Ariz. at 456-57, 636 P.2d at 1238-39.

21. *Id.* at 456, 636 P.2d at 1248.

22. *Id.*

23. *Id.* The agents did not know if Stoll was involved in the marijuana activity. *Id.* At the

airstrip that night just as the agents were about to load the marijuana on a truck.[24] He recognized two of the agents as "suspects" from the mock search and held them all at bay with his shotgun until the sheriff arrived.[25] Stoll subsequently was charged with and convicted of felonious assault on federal agents.[26]

After his conviction, Stoll wrote letters to the United States Attorney in Tucson claiming that the DEA agents perjured themselves at the grand jury hearing and changed their testimony at trial.[27] Stoll's letters further charged that the agents were dealing in marijuana.[28] Stoll thereupon demanded that the government discharge the agents.[29] To put an end to Stoll's remarks, Hansen and six other agents brought a defamation action.[30] A jury found Stoll liable for defamation and the Court of Appeals affirmed the jury's verdict.[31]

Objective Evidence of Subjective Beliefs

The *Hansen* court found that Stoll's beliefs, viewed objectively, were so unreasonable as to permit the jury to conclude that he acted in reckless disregard of the truth.[32] The decision recognized that Arizona follows both the *New York Times* test for "actual malice"[33] and the *St. Amant v. Thompson* standard for reckless disregard of the truth.[34] The *Hansen* court concluded that Stoll did not have actual knowledge of the falsity of his statements, and therefore applied the "reckless disregard" standard.[35]

The *Hansen* court purported to hold that mere negligence in failing to ascertain the truth is insufficient to satisfy the "reckless disregard" standard.[36] As the court correctly noted, "reckless disregard" may neverthe-

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agents' suggestion, local sheriff's deputies pretended to search them in front of Stoll. *Id.* The deputies told Stoll that the "suspects" had been smoking marijuana. *Id.*

24. *Id.*

25. *Id.* The sheriff identified the agents to Stoll, who had refused to examine their badges. *Id.* Recent thefts from the mining claim had heightened Stoll's suspicion of the agents. *Id.*

26. United States v. Stoll, 549 F.2d 810 (9th Cir. 1977), *cert. denied*, 430 U.S. 956 (1977).

27. *Hansen*, 130 Ariz. at 457, 636 P.2d at 1239. Discrepancies did in fact exist between the agents' grand jury and trial testimony. *Id.* at 458, 636 P.2d at 1240.

28. *Id.* at 457, 636 P.2d at 1239.

29. *Id.*

30. *Id.*

31. *Id.* at 460-61, 636 P.2d at 1242-43.

32. *Id.* at 458, 636 P.2d at 1240. To prevail in a defamation action, the defamed public official must prove "actual malice" not by a preponderance of the credible evidence, but by proof of "convincing clarity." Gertz v. Welch, 418 U.S. 323, 342 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964). *See also* Miss American Pageant, Inc., v. Penthouse Int'l Ltd., 524 F. Supp. 1280, 1283 (D.N.J. 1981); Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 312, 560 P.2d 1216, 1219 (1977).

33. *Hansen*, 130 Ariz. at 457, 636 P.2d at 1239.

34. *Id.* at 458, 636 P.2d at 1240. *See* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (the Court stressed that the defendant's awareness of probable falsity and serious doubts of the truth tested his recklessness).

35. *Hansen*, 130 Ariz. at 458, 636 P.2d at 1240. The court found that Stoll actually believed his statements, and that the evidence was insufficient to show that he knew they were false. *Id.*

36. *Id. See also* St. Amant v. Thompson, 390 U.S. 727, 730-33 (1968) (political candidate's failure to investigate truth or falsity did not establish actual malice); New York Times Co. v. Sullivan, 376 U.S. 254, 287-88 (1964) (failure to check editorial advertisement against stories in newspaper's own files was negligent, but was not reckless disregard); Washington Post v. Keogh, 365 F.2d 965, 971-72 (D.C. Cir. 1966) (newspaper's negligence in not checking accuracy of column

less be shown by objective facts.[37] A defendant's testimony that he believed his statement to be true may be unpersuasive where the objective evidence is wholly unsupportive or contradictory.[38] In *St. Amant*, the United States Supreme Court ruled that objective facts might be evidence of subjective recklessness where there are "obvious reasons to doubt the veracity of the informant or the accuracy of his reports."[39] For example, a complete absence of facts or statements of record even remotely supporting a defamatory statement permits the use of objective circumstantial evidence to show reckless disregard of the truth.[40] Such objective evidence of recklessness is relevant only insofar as it tends to show the possibility that the defendant possessed serious doubts about the truth of a defamatory publication.[41] Accordingly, objective evidence does not itself show "reckless disregard."[42] It may, however, tend to show the actual subjective doubts of the truth that *St. Amant* requires.[43]

The *Hansen* court interpreted the *St. Amant* rule on use of objective evidence to mean that a person cannot close his eyes to the "obvious truth" and yet claim lack of knowledge.[44] Without making the crucial finding that the truth was actually obvious to Stoll, however, the court ruled that he acted in reckless disregard of the truth.[45]

Unjustified Liability for "Unreasonable" Beliefs

Stoll's beliefs may have been unreasonable.[46] The court ruled that the objective evidence of Stoll's unreasonableness justified a finding that he was reckless.[47] *Hansen* thus illustrates an improper application of the

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did not constitute reckless disregard), *cert. denied*, 385 U.S. 1011 (1967); *supra* note 18 and accompanying text.

37. *Hansen*, 130 Ariz. at 458, 636 P.2d at 1240. The United States Supreme Court established this rule on objective evidence of "reckless disregard" in St. Amant v. Thompson, 390 U.S. 727, 732 (1968):

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation.

38. *See supra* note 37.

39. 390 U.S. 727, 732 (1968).

40. See Cochran v. Indianapolis Newspapers, Inc., 175 Ind. App. 548, 562, 372 N.E.2d 1211, 1221 (1978) where, because there were no facts which in any way supported a newspaper's implication that plaintiffs were engaged in "illegal sex activities," the court admitted evidence of defendant's ill will and attempts to obtain false statements concerning the news story.

41. *See id.* The court emphasized that the evidence could not itself constitute an element of "actual malice," but was relevant only to showing a "state of mind highly susceptible to the entertainment of serious doubts concerning probable falsity." *Id.*

42. *See id.*

43. *See id. See also supra* notes 17, 19, 41.

44. 130 Ariz. at 458, 636 P.2d at 1240.

45. *Id.*

46. *See id. See also* Brief for Appellee at 10 ("surely any *reasonable* man, even Mr. Stoll, should have entertained 'serious doubts' . . . .").

47. *Hansen*, 130 Ariz. at 458, 636 P.2d at 1240. Stoll acted "without factual support" and his

"reckless disregard" test: liability imposed where a defendant's beliefs are unreasonable, but nonetheless are actual.

Stoll actually believed his accusations.[48] Facts, not mere fabrication or imagination, substantiated his view of the incident at Oatman.[49] Stoll saw the sheriff's deputies search the plain-clothed DEA agents.[50] The deputies told him that the "suspects" had been smoking marijuana.[51] Stoll later confronted the same strangers on his land as they were preparing to load 780 pounds of marijuana onto their truck.[52] Thus, personal experience gave Still reason to believe, as he claimed, that the agents dealt in marijuana.[53]

Perhaps Stoll's beliefs were unreasonable in light of the plaintiffs' status as DEA agents.[54] He arguably should have doubted the truth of his allegations, as the plaintiffs contended.[55] Absent further evidence of *actual* doubt, however, Stoll should not have been found reckless under the *St. Amant* test.[56] The *Hansen* court neither concluded nor gave a basis for concluding that Stoll seriously doubted the truth of his accusation that the plaintiffs dealt in marijuana.[57] Moreover, the court never found that Stoll thought his perjury charges could be false.[58] Based on its finding that his beliefs were without factual support, the court nevertheless held that there was sufficient evidence for a jury to find that Stoll acted in reckless disregard of the truth.[59] In so doing, it failed to apply the subjective test it purported to employ.[60]

Reasonableness Versus Recklessness

Hansen has little company; other cases involving unreasonable and negligent beliefs have not found recklessness without discovering actual

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claims were meritless; the court therefore upheld the finding that he acted in reckless disregard of the truth. *Id.*

48. *Id.*

49. *See id.*

50. *Id.* at 456, 636 P.2d at 1238.

51. *Id.*

52. *Id.*

53. *See id.*

54. *Id.*

55. Appellee's Answering Brief at 10.

56. No "reckless disregard" can be found absent actual knowledge or serious doubts as to the truth of the statements made. St. Amant v. Thompson, 390 U.S. 727, 730-31 (1968) (recklessness depends not on whether defendant should have doubted, even as a reasonable man, but rather on whether he actually entertained serious doubts of truth or falsity); *see also* Michaud v. Inhabitants of Town of Livermore Falls, 381 A.2d 1110, 1115 (Me. 1978) (actual state of mind, not objective falsity, is the dispositive question under *New York Times* test; plaintiff who did not present testimony on defendant's state of mind or facts sufficient to enable jury to infer it could not prevail). *See supra* notes 14, 16.

57. 130 Ariz. at 458, 636 P.2d at 1240. The court held that Stoll was acting in reckless disregard of the truth because of his behavior, not his actual state of mind. *See id.* Indeed, the court declared that Stoll truly believed his accusations, as unreasonable as those beliefs may have been. *Id.*

58. *See id.* at 457-58, 636 P.2d at 1239-40. The court conceded that there were differences between the agents' grand jury and trial testimony. *Id.* at 458, 636 P.2d at 1240.

59. *Id.*

60. *See id.*

subjective doubts of the truth.[61] In *Rinaldi v. Holt, Rinehart & Winston, Inc.*,[62] for example, the New York Court of Appeals held that a supreme court justice could not recover from an investigative journalist who asserted that he was incompetent, probably corrupt and unfit for office.[63] The defendant had detected a "disturbing pattern" of "suspicious dispositions" of certain cases by the plaintiff and thereupon advocated his removal from judicial office.[64] The court held that the "actual malice" test protected charges of illegal conduct made against an official.[65] No matter how unreasonable or erroneous the journalist's pejorative opinions may have been, the justice could not recover for them without proof that the defendant actually doubted their truth.[66]

A lack of proof of the defendant's subjective doubts also prevented recovery for possibly unreasonable statements in *Hotchner v. Castillo-Puche*.[67] In that case, Doubleday published an English translation of a book containing a Spanish writer's negative characterization of plaintiff Hotchner.[68] The Second Circuit held that, although the denunciations of Hotchner may have put Doubleday on notice of the writer's animosity toward him, publishing with knowledge of the author's ill will did not constitute reckless disregard of the truth.[69] It may have been unreasonable for Doubleday not to suspect that the hostile writer's opinions were based on "false facts."[70] Nonetheless, lack of evidence that Doubleday actually entertained serious doubts about the statements' authenticity barred Hotchner from recovering.[71] Possible unreasonableness, but not the necessary recklessness, was shown.[72]

Similarly, defendants who act negligently or unreasonably in failing to ascertain the truth, as Stoll might have, are rarely found to have acted

61. *E.g.*, Tagawa v. Maui Publishing Co., 50 Hawaii 648, 654, 448 P.2d 337, 341 (no reckless disregard of the truth found despite defendant's neglect in not making a phone call to see if plaintiff was paying for the use of county equipment on his land), *cert. denied*, 396 U.S. 822 (1969); Foster v. Upchurch, 624 S.W.2d 564, 566 (Tex. 1981) (no "actual malice" found even though newspaper article was unreasonable in being internally inconsistent since more proof was required as to the writer's state of mind); Tait v. King Broadcasting Co., 1 Wash. App. 250, 256, 460 P.2d 307, 310-11 (1969) (radio broadcaster who called plaintiff John Birch Society member a fascist and a "Jew-baiter" had honest belief that the labels applied, and thus did not act in reckless disregard of the truth).

62. 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977).

63. *Id.* at 381-82, 366 N.E.2d at 1306-07, 397 N.Y.S.2d at 951.

64. *Id.* at 376, 366 N.E.2d at 1303, 397 N.Y.S.2d at 947. The defendant concluded, after examining the justice's record, that he was hard on blacks and Puerto Ricans, but lenient with organized crime families and large-scale heroin dealers. *Id.* at 376, 366 N.E.2d at 1303, 397 N.Y.S.2d at 947.

65. *Id.* at 382, 366 N.E.2d at 1307, 397 N.Y.S.2d at 951.

66. *See id.* at 382, 366 N.E.2d at 1306, 397 N.Y.S.2d at 950.

67. 551 F.2d 910 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1977).

68. *Id.* at 911. The book in question was a collection of the author's impressions of Ernest Hemingway. *Id.* Of roughly twenty references made to the plaintiff, who was a traveling companion of Hemingway's in Spain, the jury found six to be libelous. *Id.* at 911-12. The district court found that the plaintiff was a public figure in his relationship with Hemingway, and so required him to show that Doubleday published with "actual malice." *Id.* at 911.

69. *Id.* at 914.

70. *See id.* at 913-14.

71. *Id.* at 914.

72. *See id.*

with "reckless disregard."[73] In *New York Times*, the newspaper's failure to check an editorial advertisement against stories in its own files did not constitute "reckless disregard."[74] In *Washington Post Co. v. Keogh*,[75] the District of Columbia Circuit held that a newspaper's failure to verify a serious charge before publishing it fell short of recklessness.[76] Other courts have also held that neglecting to investigate a belief does not suffice to show reckless disregard of the truth.[77]

A mere denial of an allegation does not mean that it is false or that those making it actually doubt its truth.[78] Therefore, defendants who persist in making defamatory statements after they are denied, as Stoll did, are not necessarily reckless.[79] In *Sewell v. Brookbank*,[80] for example, parents who continued to complain about their childrens' teacher after he denied their charges did not act in reckless disregard of the truth.[81]

Accordingly, "reckless disregard" may not be conclusively inferred from wrongful motive, absence of proper caution, want of justification, lack of reasonable care or bad faith.[82] The *Hansen* court improperly relied upon such factors in finding that Stoll was reckless.[83] It apparently applied a "reasonable man" standard rather than judging Stoll himself.[84] The connection between reasonable and actual beliefs may indeed be

73. *See supra* note 61.

74. 376 U.S. 254, 287-88 (1964).

75. 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

76. *Id.* at 971-72.

77. *E.g.*, St. Amant v. Thompson, 390 U.S. 727, 733 (1968); Tagawa v. Maui Publishing Co., 50 Hawaii 648, 652, 448 P.2d 337, 341 (1968); Jurkowski v. Crawley, 637 P.2d 56, 60-61 (Okla. 1981). *But see* Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (public figure, who was not a public official, was permitted to give evidence of grossly inadequate investigation constituting an extreme departure from ordinary reporting standards to help support inference of "actual malice"); Vandenburg v. Newsweek, Inc., 441 F.2d 378, 380 (5th Cir.) ("actual malice" may be inferred where the investigation for a story which is not "hot news" is grossly inadequate), *cert. denied*, 404 U.S. 864 (1971).

78. *See* Sewell v. Brookbank, 119 Ariz. 422, 426, 581 P.2d 267, 271 (Ct. App. 1978). *But cf.* Curtis Publishing Co. v. Butts, 388 U.S. 130, 161 n.23 (1967) (Justice Harlan suggested that publication after notification by the plaintiffs that the material about to be printed is false might arguably satisfy the "actual malice" standard under proper instructions); Selby v. Savard, 134 Ariz. 222, 226, 655 P.2d 342, 346 (1982) (the Arizona Supreme Court, in this post-*Hansen* case, imputed recklessness "at the very least" to a defendant who published even though his own counsel and a public official advised him that his claims lacked merit and even though he had settled a prior lawsuit over the same allegations with the same party).

79. *See* Sewell v. Brookbank, 119 Ariz. 422, 581 P.2d 267 (Ct. App. 1978).

80. *Id.*

81. *Id.* at 426, 581 P.2d at 271.

82. Phoenix Newspapers v. Church, 103 Ariz. 582, 597, 447 P.2d 840, 855 (1968), *cert. denied*, 394 U.S. 959 (1969). In *Phoenix Newspapers*, the court applied the *New York Times* rule retroactively to reverse and remand a case where the jury instructions on "reckless disregard" would permit a finding of liability based on lack of justification and bad faith. *Id.* at 597, 447 P.2d at 855. The court found that the instructions impermissibly interjected negligence as a basis for finding "reckless disregard." *Id.*

83. In finding that Stoll was reckless, the *Hansen* court reasoned:

> His claims of perjury were adequately laid to rest during the appeals of his conviction. His claims of conspiracy and smuggling were without merit. Nevertheless, he persisted. Although one can appreciate the fact that Stoll was merely trying to vindicate himself, he was attempting to do so by repeatedly making slanderous allegations against the appellee agents without factual support. We hold that there was sufficient evidence to support a determination by the jury that he was acting in reckless disregard of the truth.

130 Ariz. at 458, 636 P.2d at 1240.

84. *See id.*

close, as objective facts may tend to show subjective recklessness.[85] Objective evidence is not, however, a substitute for the actual subjective beliefs of reckless disregard.[86] The court in *Hansen* seems to have committed the error of connecting negligence and defamatory recklessness too closely.

Conclusion

In *Hansen v. Stoll*, the Arizona Court of Appeals ostensibly applied the *New York Times* "actual malice" test for defamation actions brought by public persons. The court imposed liability on a finding of reckless disregard of the truth. Such a finding has, since the *St. Amant* decision, hinged on a showing that the defendant in fact entertained serious doubts about the truth of his statement—that he had a high degree of awareness of its probable falsity. The *Hansen* court, however, applied a standard less stringent than that set forth in *St. Amant*. Defendant Stoll actually believed his allegations, but the court considered his beliefs unreasonable and held him liable on a negligence basis. The Arizona court thus failed to employ the "subjective doubts" test for reckless disregard of the truth.

In *New York Times Co. v. Sullivan*, the United States Supreme Court created the subjective "actual malice" standard to prevent the chilling effect defamation actions have on first amendment rights. Under the *New York Times* analysis, the use of negligence as a basis for liability in defamation suits brought by public officials is constitutionally impermissible. The Arizona courts should seek to protect first amendment rights accordingly. Liability should be imposed only where the defendant knew his statement was false or had the actual subjective doubts of the truth that the "reckless disregard" test requires.

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85. St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (trier of fact may consider whether story is fabricated by the defendant, based wholly on the unverified, or so inherently improbable that only a reckless man could have published it). *See also supra* note 41 and accompanying text.

86. Objective evidence does not itself show "reckless disregard" but allows an inference of the requisite subjective doubts of the truth to be made. *See* Cochran v. Indianapolis Newspapers, Inc., 175 Ind. App. 548, 562, 372 N.E.2d 1211, 1221 (1978); *supra* notes 15, 37-40 and accompanying text.

IV. INDIAN LAW

TRIBAL TAXATION OF MINERAL RESOURCE DEVELOPMENT: AN ANALYSIS OF *MERRION V. JICARILLA APACHE TRIBE*

Determination of the constitutionally permissible scope of tribal authority over nonmembers is a problem which has confronted the United States Supreme Court for over a century.[1] Faced with the existence of diverse tribal entities possessing many attributes of distinct foreign nations while residing within the territory of the United States, the early Court struggled to create a conceptual structure for identification and evaluation of the competing interests of federal, state, and Indian governments.[2] Addressing this concern in the early nineteenth century, Chief Justice John Marshall characterized Indian tribes as "domestic dependent Nations"[3]—distinct political communities that retain sovereign power over their territory and their members despite a relationship with the United States government resembling that of a guardian to a ward.[4]

The most recent United States Supreme Court consideration of tribal sovereignty is articulated in *Merrion v. Jicarilla Apache Tribe*,[5] in which the Court upheld a tribally imposed severance tax on oil and gas production on reservation lands. Authored by Justice Thurgood Marshall, the opinion strongly reconfirms the Court's recognition that tribal governments are vested with inherent sovereign powers, including the authority to impose taxes in the regulation of their members and their territories.[6]

This Casenote will first examine the United States Supreme Court's analysis of *Merrion* within the context of recent court decisions addressing the taxing power of Indian tribes and established principles of Indian sovereignty. Secondly, the major arguments advanced by the petitioners, twenty-one oil and gas lessees operating on reservation lands, will be specifically considered. Finally, the practical implications of the *Merrion* de-

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1. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). For a historical analysis of the development of Indian law policy, see generally FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW ch. 2, at 47-206 (R. Strickland & C. Wilkinson eds. 2d ed. 1982) [hereinafter cited as HANDBOOK].

2. "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831). *See also* United States v. Kagama, 118 U.S. 375, 381-82 (1886). For an analysis of the cultural origins of this relationship, see Lobsenz, *"Dependent Indian Communities": A Search for a Twentieth Century Definition*, 24 ARIZ. L. REV. 1 (1982).

3. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

4. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). "[T]he settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection." *Id.* at 560-61.

5. 455 U.S. 130 (1982).

6. *Id.* at 137-44. ". . . Indian tribes enjoy authority to finance their government services through taxation of non-Indians who benefit from those services. Indeed, the conception of Indian sovereignty that this court has consistently reaffirmed permits no other conclusion." *Id.* at 140.

cision on future tribal attempts to tax non-Indian business will be discussed.

I. THE FACTS OF *MERRION V. JICARILLA APACHE TRIBE*

The Jicarilla Apache Tribe resides in northwestern New Mexico on a reservation established by Executive order in 1887.[7] In 1937, a tribal constitution was adopted and approved by the Secretary of the Interior[8] in conformance with the Indian Reorganization Act of 1934 (IRA).[9] The tribal constitution was revised in 1968 to provide that the inherent powers of the Jicarilla Apache Tribe are vested in and exercised by the tribal council.[10] Pursuant to the revised constitution, the tribal council is authorized to supervise the development of tribal lands and resources, to levy taxes and fees on tribal members, and, subject to approval by the Secretary of the Interior, to enact ordinances imposing taxes on nonmembers of the tribe engaged in business on Indian land.[11]

Petitioners, twenty-one lessees, have extracted oil and gas from reservation lands since 1953 under the authority of long-term leases with the Jicarilla Apache Tribe.[12] In 1976, the Jicarilla Apache Tribe adopted an ordinance pursuant to the revised constitution[13] imposing a severance tax on all oil and natural gas extracted from reservation lands.[14] The ordinance received the requisite approval by the Secretary of the Interior in 1976 through the acting Director of the Bureau of Indian Affairs.[15]

In two separate actions, the petitioners sought to enjoin enforcement of the severance tax.[16] The United States District Court for the District of New Mexico consolidated the cases, allowed leave to intervene, and granted a permanent injunction against enforcement of the tax.[17] The district court ruled that although state and local governments have authority to tax oil and gas production on Indian lands, Indian tribes do not.[18] Additionally, the court held that the tribal tax was in violation of the commerce clause of the United States Constitution.[19] The Tenth Circuit reversed, holding that the power of taxation is protected as an inherent attribute of tribal sovereignty.[20] The United States Supreme Court granted certiorari

7. *Id.* at 134. Reservation establishment by means of Executive order does not affect the analysis of Indian sovereignty. *Id.* at 133-34.
8. *Id.* at 134.
9. 25 U.S.C. §§ 461-479 (1976). *See generally* HANDBOOK, *supra* note 1, at 147-51.
10. 455 U.S. at 134-35.
11. REVISED CONSTITUTION OF THE JICARILLA APACHE TRIBE art. XI, § 1(e), *quoted in Merrion*, 455 U.S. at 135. The Revised Constitution was approved by the Secretary on February 13, 1969. 455 U.S. at 135.
12. 455 U.S. at 135.
13. *See supra* note 11 and accompanying text.
14. 455 U.S. at 135-36. The tax rate of 1.05 per million BTU of gas and $0.29 per barrel of crude oil produced on the reservation will provide an estimated $2 million in revenues annually. *Id.* at 167 (Stevens, J., dissenting).
15. *Id.* at 136.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* For an analysis of the Tenth Circuit opinion, see Casenote, *Tribal Severance Taxes—*

and affirmed, holding that tribal authority to tax non-Indians engaged in business on reservation land is an inherent attribute of tribal sovereignty,[21] not divested by treaty or act of Congress,[22] nor in violation of the commerce clause.[23]

An accurate interpretation of *Merrion v. Jicarilla Apache Tribe*, however, is not limited to an analysis of the Court's reliance on sovereignty principles to validate the tribal power of taxation. The Court implicitly found a further basis for upholding the specific tax ordinance at issue in *Merrion* in the equally well-established principle of congressional plenary power over Indian tribes.[24] Specifically, the *Merrion* Court recognized the congressionally delegated authority of the Secretary of the Interior to screen and approve Indian ordinances prior to valid enactment, and accordingly, deferred to the Secretary's prior judgment.[25] Given the emphasis on the ordinance's due compliance with established review procedure, the practical implications of *Merrion* on future tribal enactments of tax ordinances may therefore substantially diverge from those theoretically drawn from this otherwise strong affirmation of the retained sovereign powers of tribal governments.[26]

RETENTION OF SOVEREIGN POWERS

Although the precise extent of tribal authority over nonmembers remains a contested issue, the doctrine of Indian sovereignty is firmly established in American law. As early as 1832, the Court held that tribes were "distinct, independent political communities" regardless of their dependent relationship with the United States.[27] More than mere voluntary associations, Indian tribes have been recognized as "unique aggregations possessing attributes of sovereignty over both their members and their territory."[28] Further, Indian tribes retain all aspects of sovereignty "not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[29]

Although frequently articulated, this characterization of Indian authority is problematic.[30] Instead of enumerating positive elements of Indian sovereignty, the characterization defines the current scope of sovereign authority to include all original sovereign powers that have not

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Outside the Purview of the Commerce Clause, 21 NAT. RESOURCES J. 405 (1981); Seventh Annual Tenth Circuit Survey, *Indian Lands*, 58 DEN. L.J. 415, 415-22 (1981).

21. 455 U.S. at 137-48, 159. *See infra* notes 27-61 and accompanying text.

22. 455 U.S. at 149-52, 159. *See infra* notes 62-70 and accompanying text.

23. 455 U.S. at 152-58, 159. *See infra* notes 71-82 and accompanying text.

24. 455 U.S. at 154-56. *See also infra* note 82.

25. *Id. See infra* notes 76-82 and accompanying text.

26. *See infra* notes 82-98 and accompanying text.

27. Worcester v. Georgia, 31 U.S. (16 Pet.) 515, 559 (1832). In a concurring opinion, Justice M'Lean noted that tribal governments "have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them." *id.* at 580 (M'Lean, J., concurring).

28. United States v. Mazurie, 419 U.S. 544, 557 (1975).

29. United States v. Wheeler, 435 U.S. 313, 323 (1978).

30. *See generally* HANDBOOK, *supra* note 1, at 246-57.

been expressly or implicitly revoked.[31] Since a definitive list of original sovereign powers has not been enunciated, the characterization therefore offers little guidance for judicial determination of the status of a specific sovereign power.[32]

The extent of sovereign tribal authority is especially difficult to ascertain in the area of civil jurisdiction.[33] Unlike the narrowly defined area of criminal jurisdiction,[34] the extent of tribal authority in civil matters is limited by few explicitly restrictive congressional acts.[35] Accordingly, tribal civil jurisdiction remains broad in scope.[36] Though an exhaustive listing is not feasible, case law has established that tribal authority in the civil sphere necessarily includes the power to determine governmental form,[37] define membership,[38] legislate tribal matters,[39] and levy taxes.[40] Further, in order to protect tribal interests in their members, land, and resources, tribal jurisdiction in civil matters extends to non-Indians as well as to tribal members.[41]

The scope and underlying basis of tribal authority to tax nonmembers in particular, is at issue in *Merrion*. In general, the power of taxation is widely recognized as an essential instrument of any self-governing society.[42] As early as 1879, Congress acknowledged the validity of taxes imposed on non-Indians by Indian tribes in a Senate Judiciary report, which concluded that Indian tribes "undoubtedly possess the inherent right to resort to taxation to raise necessary revenue."[43] Recently, the Court similarly addressed the issue of tribal taxation of nonmember businesses in *Washington v. Confederated Tribes of the Colville Indian Reservation*.[44] The Court held that the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a "fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or

31. *Id.* at 231-32. "[T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.'" *Id.* at 231 (quoting United States v. Wheeler, 435 U.S. 313, 322-23 (1978)).

32. *Id.* at 246. *See also* United States v. Wheeler, 435 U.S. 313, 328 (1978) (the precise limits of Navajo tribal power are not easily defined because tribal authority "is attributable in no way to any delegation to [the tribes] of federal authority").

33. *See generally* HANDBOOK, *supra* note 1, at 246-57.

34. *Id. See also* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976). For an example of this limited criminal jurisdiction, see Major Crimes Acts of 1885, ch. 341 § 9, 23 Stat. 362, 385.

35. *See* HANDBOOK, *supra* note 1, at 246.

36. *Id.* at 246-57.

37. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-63 (1978).

38. *Id.* at 49.

39. *See generally* HANDBOOK, *supra* note 1, at 248-50.

40. *See generally id.* at 255-57.

41. *See* Morris v. Hitchcock, 194 U.S. 384 (1904) (upholding tribal permit tax on non-Indian owned livestock grazing on Indian land); Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) (upholding tribal business license fee on non-Indian traders).

42. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). "It is admitted that the power of taxing the people and their property is essential to the very existence of government." *Id.* at 428.

43. S. REP. No. 698, 45th Cong., 3d Sess. 1-2 (1879), *quoted in Merrion*, 455 U.S. at 140.

44. 447 U.S. 134 (1980). Although *Colville* primarily addresses the state's ability to impose taxes and collection procedures upon on-reservation tribal sales of cigarettes to nonmembers, the Court's discussion of tribal power to tax is crucial to the *Merrion* opinion.

necessary implication of their dependent status."[45]

Citing *Colville* as authority, the majority in *Merrion* upheld tribal sovereignty to tax as a necessary tool for the management of economic activity on the reservation and the defrayal of government service costs.[46] First, the *Merrion* Court reasoned that "[t]he petitioners avail themselves of the 'substantial privilege of carrying on business' on the reservation"[47] and thereby benefit from services such as police protection and from the existence of a civilized society.[48] Secondly, the tax levied by the Jicarilla Apache Tribe is substantially similar to general revenue taxes imposed by other governmental entities providing comparable services.[49] Finally, the Court reasoned that the tribal interest in taxing nonmembers to raise revenues for essential governmental programs is strongest when "the revenues are derived from value generated on the reservation by activities involving the Tribe and when the taxpayer is the recipient of tribal services."[50] The Court therefore concluded that these enterprises could fairly be subjected to tribal taxation to defer general governmental costs.[51]

PETITIONERS' ARGUMENTS

The primary arguments presented against the *Merrion* majority opinion can be divided into three topics for further analysis: sovereign tribal powers and contract law, preemption of tribal powers, and commerce clause infringement.

A. *Sovereign Tribal Powers and Contract Law*

In *Merrion*, the petitioners argued that the tribal power to tax derives solely from the recognized authority of tribal governments to exclude nonmembers and hence, precludes tribal enforcement of taxes initiated during the contractual period upon established lessees.[52] The majority in *Merrion* rejected this argument and identified petitioners' failure to distinguish between the tribe's dual roles as sovereign and as commercial partner as the primary flaw in this analysis.[53] Due to an exclusive focus on the tribal proprietary role as lessor, the majority stated that the petitioners were led

45. *Id.* at 152.
46. 455 U.S. at 137.
47. *Id.* (citing Mobile Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 437 (1980)).
48. *Id.* at 137-38. *See also* Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207, 228 (1980) (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 445 (1979)).
49. 455 U.S. at 138.
50. *Id.* (citing Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 156-57 (1980)).
51. *Id.*
52. *Id.* at 141-44. The Court recognized that tribal power to exclude nonmembers has previously been utilized to uphold tribal taxation, and further that it would alternatively uphold the severance tax on this basis alone. *Id.* at 141-44. *See* Morris v. Hitchcock, 194 U.S. 384, 389 (1904); Buster v. Wright, 135 F. 947, 952 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); Maxey v. Wright, 3 Indian Terr. 243, 247-48, 54 S.W. 807, 809 (Indian Terr. App.), *aff'd*, 105 F. 1003 (8th Cir. 1900).
53. 455 U.S. at 145-46. " 'Over tribal lands, *the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty.*' " *Id.* at 146, n.12 (emphasis in the original) (quoting U.S. SOLICITER FOR THE DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW 439 (1958)).

to erroneously formulate the issue as a violation of contract law, charging that the institution of a severance tax allows a tribe to unilaterally alter contract obligations.[54] If the parties to this action were simply lessor and lessee, the strict contract analysis advocated by the petitioners would be applicable. But the tribal government, similar to state governments, is authorized to both impose taxes and collect rents and royalties.[55] The latter, the Court reasoned, are payments to a commercial partner;[56] the former constitute a commonly levied contribution "to the general cost of providing governmental services."[57] As an essential attribute of original sovereignty, the tribe's power to regulate business transactions within its borders must survive unless expressly divested by congressional action or by necessary implication of the tribe's dependent status.[58]

Finally, the Court rejected the argument that the lease clause in question, providing that no changes may be unilaterally made in the rate of royalty or annual rental, precludes enforcement of a subsequently imposed severance tax.[59] It is an established principle that contract arrangements are subject to subsequent legislation by the sovereign power.[60] Hence, such a provision does not preclude a sovereign who is also a lessor from later imposing a tax, unless this right " 'has been specifically surrendered in terms which admit of no other reasonable interpretation.' "[61]

B. *Preemption of Tribal Powers*

The petitioners next argued that tribal power to tax oil production on the Indian reservation, if an inherent sovereign power, was divested through congressional action.[62] The *Merrion* Court rejected this argument, however, holding that the 1927 Act authorizing state taxation of mineral lessees on executive order reservations,[63] and the 1938 Act establishing procedures for mineral leasing on Indian lands,[64] did not preclude tribal taxation.[65]

First, the Court explained that mere existence of state authority to tax does not pre-empt tribal taxation.[66] It is a well-established principle of

54. *Id.* at 145-46.
55. *Id.* at 138.
56. *Id.*
57. *Id.* (citing Commonwealth Edison Co. v. Montana, 453 U.S. 609, 624-29 (1981)).
58. *Id.* at 146-47. *See also Colville*, 447 U.S. at 152.
59. 455 U.S. at 145-48.
60. *Id.* at 147. *See, e.g.*, Veix v. Sixth Ward Bldg. & Loan Ass'n., 310 U.S. 32 (1940).
61. 455 U.S. at 147-48 (quoting City of St. Louis v. United Ry. Co., 210 U.S. 266, 280 (1908). "Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Id.*
62. *Id.* at 149.
63. 25 U.S.C. §§ 398a-398e (1976).
64. *Id.* §§ 396a-396g.
65. 455 U.S. at 150, 151.
66. *Id.* at 151. The permissible extent of state authority to tax transactions on Indian land was not addressed in *Merrion*, and thus, is beyond the scope of this Casenote. For discussion of this issue, see generally Lynaugh, *Developing Theories of State Jurisdiction Over Indians: The Dominance of the Preemption Analysis*, 38 MONT. L. REV. 63 (1977);Casenote, *Federal Preemption in Indian Law: An Analysis of* White Mountain Apache Tribe v. Bracker *and* Central Machinery v. Arizona State Tax Commission, 24 ARIZ. L. REV. 194 (1982).

taxation that different sovereigns can concurrently tax the same transaction.[67] Secondly, to divest a tribe of an inherent sovereign power, clear congressional intent to do so must be demonstrated,[68] with any ambiguities " 'construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.' "[69] Applying these canons of construction, the *Merrion* Court held that the tribe's inherent authority to tax mining activities on its land was not divested by the plenary powers of Congress.[70]

C. *Commerce Clause Infringement*

Finding no preclusion by federal authority, the *Merrion* Court addressed the petitioners' third contention that the imposition of the severance tax violated the "negative implications" of the commerce clause by discriminating against interstate commerce.[71] Petitioners' failure to distinguish between the interstate commerce and Indian commerce clauses was regarded as the primary flaw in this argument.[72] Under the commerce clause, Congress is authorized to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[73] In accordance with one well-established Court interpretation, tribes constitute a separate category within that clause,[74] thus rendering application of the interstate commerce clause inappropriate.[75]

Further, even conceding that tribal regulation of commerce is subject to the limitations of the interstate commerce clause would not render judicial scrutiny appropriate.[76] Under the interstate commerce clause, judicial review is appropriate only in the absence of congressional action.[77] In this case, Congress has affirmatively acted by mandating the procedures to be followed before a tribal tax can be effected.[78] Specifically, under the Indian Reorganization Act,[79] a tribe must obtain approval of the Secretary of the Interior to adopt or revise a constitution or to enact a new ordinance.[80]

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67. Fort Mohave Tribe v. County of San Bernandino, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). *See also Colville*, 447 U.S. at 158.

68. *See Merrion*, 455 U.S. at 149-52; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978); United States v. Santa Fe Pac. R.R., 314 U.S. 339 (1941).

69. *Merrion*, 455 U.S. at 152 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980)).

70. *Id.* Additionally, the Court held that a tribal severance tax on oil production does not conflict with national energy policies, citing the National Gas Policy Act of 1978, §§ 110(a), (c)(1), 15 U.S.C. §§ 3320(a), (c)(1) (1976 & Supp. IV 1980) which includes Indian tribal taxes as recoverable costs under federal pricing regulations. 455 U.S. at 151-52.

71. 455 U.S. at 152-53.

72. *Id.* at 153-54.

73. U.S. CONST. art. 1, § 8, cl. 3. For an application of the interstate commerce clause to Indian law questions, see Laurence, *The Indian Commerce Clause*, 23 ARIZ. L. REV. (1981).

74. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18-20 (1831).

75. 455 U.S. at 152-54. The Court further held that even assuming applicability of the interstate commerce clause, the severance tax would survive judicial scrutiny under the test formulated in Complete Auto Transit v. Brady, 430 U.S. 274 (1977). 455 U.S. at 154-56.

76. 455 U.S. at 154-56.

77. *Id.* at 154. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 421-27 (1946); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 454 (1979).

78. 455 U.S. at 155.

79. 25 U.S.C. §§ 476, 477 (1976).

80. 455 U.S. at 155.

The Jicarilla Apache Tribe's Constitution and tax ordinance were adopted pursuant to this congressional plan.[81] Since court scrutiny would therefore serve only to unnecessarily duplicate the administrative safeguards established by Congress, the Court concluded that judicial review was rendered inappropriate.[82]

IMPLICATIONS OF *MERRION* FOR FUTURE TRIBAL TAXATION OF MINERAL RESOURCE DEVELOPMENT

The *Merrion* decision is undoubtedly a strong affirmation of the doctrine of Indian sovereignty. However, the Court's discussion of federal review procedures in general, and of the procedural status of the Jicarilla Apache Tribe's severance tax in particular, creates some uncertainties about the decision's implications for future tribal taxation ordinances.[83] The federal government's authority to review tribal ordinances is well established. This federal power to review is supported by explicit congressional actions[84] and by the judicially created guardian-ward relationship.[85] Further, the Jicarilla Apache Tribe Constitution, similar to most Indian Reorganization Act constitutions, specifically mandates Secretary approval of tribal ordinances prior to valid taxation of non-Indians engaged in business on reservation land.[86] But until recently, the criteria necessary for obtaining such approval have not been articulated. The economic interests at stake in approving a tribal severance tax on oil and gas production on Indian land, coupled with the *Merrion* Court's emphasis on federal review procedures of tribal ordinances, however, has prompted promulgation of guidelines by the Interior Department for ensuring fair review of subsequent mineral tax ordinances.[87]

Drafted by the Bureau of Indian Affairs (BIA), the proposed regulations are intended to establish a "procedural framework in which the concerns of Indian tribes, mineral developers, and energy consumers may be

81. *Id.*

82. *Id.* at 155-56. The Court stated that "[I]t is not our function nor our perrogative to strike down a tax that has travelled through the precise channels established by Congress, and has obtained the specific approval of the Secretary." *Id.* at 156.

83. *Id. passim*.

84. Congressional acts invoked to support the approval power invested in the Secretary of the Interior include: (1) 25 U.S.C. § 2, 9 (1976), creating a Commission of Indian Affairs and authorizing the President to prescribe regulations relating to Indian affairs; (2) 25 U.S.C. §§ 461-479 (1976), authorizing reorganization of Indian tribes and adoption of constitutions and bylaws subject to Secretary approval; and, (3) 25 U.S.C. § 81 (1976), restricting tribal rights of contract with relationship to assets held in trust by the federal government. *See generally* 1 AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT 187-89 (1977), *reprinted in* D. GETCHES, FEDERAL INDIAN LAW 306-07 (1979).

85. D. GETCHES, *supra* note 84.

86. *See supra* note 11 and accompanying text.

87. Memorandum from Department of the Interior, Bureau of Indian Affairs to Area Directors (May 26, 1982) (copy on file with the *Arizona Law Review* entitled: Review of Tribal Ordinance Imposing Taxes on Mining Activities on Indian Lands). Subchapter I of title 25 of the Code of Federal Regulations is proposed to be amended to add Part 228. *Id.* at 3. The proposed regulations are similarly applicable to any amendment of a previously approved mineral tax ordinance which changes the rate or scope of tribal taxation. *Id.* at 13 (proposed regulation 25 C.F.R. § 228.8).

addressed in an organized and timely manner."[88] Specifically, the regulations require the Indian tribes, prior to seeking Secretary approval, to prepare an economic impact statement, hold public hearings, and compile a record for review.[89] Failure to submit the required record will result in mandatory invalidation of the tax ordinance in the first level of review by the BIA area official, but will not preclude tribal appeal to the Secretary of the Interior.[90] Final approval must be secured from the Secretary of the Interior and is required by regulation unless the tribe fails to comply with procedural requirements, the ordinance violates federal or tribal law, the ordinance would result in "the imposition of a tax in an unfair and unprincipled manner," or that the tax is "inconsistent with national policies."[91] The proposed regulations further stipulate that a denial of Secretary approval on the grounds that the tax is to be imposed in an "unprincipled" manner or is "inconsistent with national policies" must be based on the written record and include precise justification for the conclusion.[92]

Assuming adoption of the proposed Interior Department regulations in substantially current form, the Court may be confronted with at least two major issues for resolution. The first concerns the regulations' applicability to specific tribes; and the second, the tribal recourse available for adverse disposition of a mineral tax resolution by the Secretary of the Interior.

Addressing the first issue, the proposed regulations stipulate that application is limited to tribal ordinances "where Secretarial review is expressly required by federal law, the constitution of the tribe, the ordinance itself, or other tribal law."[93] Strict compliance with the regulations would necessarily preclude applicability to certain tribes, including those not organized under the Indian Reorganization Act. However, litigation is currently pending in the Tenth Circuit on the issue of whether Secretary approval is a necessary pre-condition to the validity of a tax resolution adopted by such a tribe.[94] In *Southland Royalty Co.*,[95] the trial court held that although no express statutory language existed requiring Secretarial approval of Navajo tax resolutions, the requirement was implicit in the extensive federal regulation of tribal mineral leases, and from the "historical relationship between the Interior Department and the Navajo Tribal Council."[96]

The second question posed by the *Merrion* decision and unanswered by the proposed regulations, concerns the recourse available to tribal gov-

88. *Id.* at 1.
89. *Id.* at 6-8 (proposed regulation 25 C.F.R. § 228.3(a)-(c)).
90. *Id.* at 9 (proposed regulation 25 C.F.R. § 228.5(b)(2)).
91. *Id.* at 11-13 (proposed regulation 25 C.F.R. § 228.7(b) (1)-(5)).
92. *Id.* at 13 (proposed regulation 25 C.F.R. § 228.7(b)(5)).
93. *Id.* at 4 (proposed regulation 25 C.F.R. § 228.1(b)).
94. Southland Royalty Co. v. The Navajo Tribe of Indians, No. C79-0140 (D. Utah June 5, 1980), *appeal docketed*, No. 80-2035 (10th Cir. 1982). For further discussion, see generally Ragsdale, *The Taxation of Natural Resources by Indian Tribes*: Merrion, *a Comment*, 22 NAT. RESOURCES J. 649, 654-56 (1982).
95. Southland Royalty Co. v. The Navajo Tribe of Indians, No. C79-0140 (D. Utah June 5, 1980), *appeal docketed*, No. 80-2035 (10th Cir. 1982).
96. Slip op. at 15-16.

ernments upon an adverse disposition of the taxing resolution by the Secretary of Interior. Specifically, the grounds on which a tribe might successfully challenge an adverse ruling based on the discretionary authority of the Secretary must be ascertained.[97] Though the outcome is uncertain, it appears that a tribe may potentially obtain recourse by alleging a breach of fiduciary responsibility based on the established guardian-ward relationship between the United States and the tribal government.[98] Given the broad deference historically accorded to such discretionary authority, however, the probable success of such a challenge seems tenuous.

CONCLUSION

In *Merrion*, the United States Supreme Court upheld a tribally imposed severance tax on oil and gas production on reservation land as an inherent attribute of tribal sovereign powers. The potential implications to be drawn from *Merrion* for future challenges to tribal taxation are, however, difficult to predict. Read broadly, *Merrion* can be characterized as a strong affirmation of the inherent sovereign powers of Indian tribes. Whether premised on the inherent power of self-government or on the inherent power to exclude, tribal authority to tax non-Indian business on Indian land is clearly recognized. Read narrowly, however, *Merrion* may be indicative of a judicial policy of deference to the executive branch, at least in the narrow area of Indian mineral development. The leasing and taxation of mineral development on Indian lands is of substantial monetary value, and therefore represents an excellent potential source of revenue to support tribal self-government. By expressly recognizing the necessity of taxation as an essential instrument of self-government, *Merrion* implicitly fosters a policy of tribal control of mineral resources. But if the opinion is construed to emphasize the import of compliance with established review procedures, the feasibility and scope of future mineral tax ordinances will be largely dependent upon the final substance of the review regulations and the policy of the current administration toward Indian affairs.

Anne M. Ryan

97. An adverse disposition of the ordinance for noncompliance with regulation procedural requirements could, theoretically, be rectified by the tribe accordingly, and the resolution then resubmitted for Secretary approval.

98. *See* United States v. Creek Nation, 29 U.S. 103 (1935) (holding federal executive accountable for strict compliance to fiduciary duties). *See also* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973). *See generally* HANDBOOK, *supra* note 1, at 225-28.

V. TAX

UNVERT AND THE ERRONEOUS DEDUCTION EXCEPTION TO THE TAX BENEFIT RULE

Taxpayers must prepare each year's federal income tax return based on the facts known at the time the return is filed.[1] Often, deductions are taken in one year, based on facts known in that year, for expenditures which are recovered in later years.[2] Since each taxable period must be treated separately and independently,[3] the recovery of amounts previously deducted cannot be accounted for on the income tax return of the year in which the deduction was taken.[4] Consequently, the recovery must be accounted for in the year the recovery is made,[5] if it is to be accounted for at all.

The tax benefit rule requires reporting of income in the year of recovery of a previously deducted amount, to the extent that the deduction benefited the taxpayer in the prior year.[6] To the extent that a deduction did not reduce tax liability or increase a refund in a prior year, it is excludable from income in the year of recovery.[7] The Tax Court, however, has held that the tax benefit rule does not apply where the original deduction was improperly taken.[8] Therefore, recovery of an item improperly deducted in

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1. Estate of Block v. Commissioner, 39 B.T.A. 338, 341 (1939), *aff'd. sub nom.* Union Trust Co. v. Commissioner, 111 F.2d 60 (7th Cir.), *cert. denied*, 311 U.S. 658 (1940); Bishop, *The tax benefit rule after Unvert: Does it compromise the statute of limitations?*, 51 J. TAX'N 272, 272 (1979); *The Tax Benefit Rule, Claim of Right Restorations, and Annual Accounting: A Cure for the Inconsistencies*, 21 VAND. L. REV. 995, 995 (1968) [hereinafter cited as *Tax Benefit Rule*].

2. Bittker & Kanner, *The Tax Benefit Rule*, 26 U.C.L.A. L. REV. 265, 265 (1978).

3. Burnet v. Sanford & Brooks Co., 282 U.S. 359, 363, 365 (1931); Alice Phelan Sullivan Corp. v. United States, 381 F.2d 399, 403 (Ct. Cl. 1967); Mayfair Minerals, Inc. v. Commissioner, 56 T.C. 82, 86 (1971), *aff'd*, 456 F.2d 622 (5th Cir. 1972); Appeal of Atkins Lumber Co., Inc., 1 B.T.A. 317, 320 (1925); Treas. Reg. § 1.461-1(a)(3) (1960). This concept is known as the annual accounting principle. *See Tax Benefit Rule, supra* note 1.

4. Alice Phelan Sullivan Corp. v. United States, 381 F.2d 399, 401 (Ct. Cl. 1967); West Seattle Nat'l Bank v. Commissioner, 288 F.2d 47, 48 (9th Cir. 1961); Twitchco v. United States, 348 F. Supp. 330, 334 (N.D. Ala. 1972). See Estate of Block v. Commissioner, 39 B.T.A. 338, 341 (1939), *aff'd sub nom.* Union Trust Co. v. Commissioner, 111 F.2d 60 (7th Cir.), *cert. denied*, 311 U.S. 658 (1940), and cases cited therein. *See generally* Plumb, *The Tax Benefit Rule Today*, 57 HARV. L. REV. 129 (1943). For an explanation of the various reasons given in support of this rule, see Bittker & Kanner, *supra* note 2, at 267-69.

5. *See* authorities cited *supra* note 4.

6. I.R.C. § 111(a), (b) (1976); Treas. Reg. § 1.111-1 (1960). The tax benefit rule is implicitly codified in I.R.C. § 111. Section 111 applies to recovery of previously deducted bad debt, prior tax, or delinquency amounts. Treas. Reg. § 1.111-1 (1960) extends coverage of the tax benefit rule to "all other losses, expenditures, and accruals made on the basis of deductions from gross income for prior taxable years." *See generally* Plumb, *supra* note 4; Plumb, *The Tax Benefit Rule Tomorrow*, 57 HARV. L. REV. 675 (1944); Tye, *The Tax Benefit Doctrine Reexamined*, 3 TAX L. REV. 329 (1948).

7. *See* authorities cited *supra* note 6.

8. Southern Pac. Transp. Co. v. Commissioner, 75 T.C. 497, 559-61 (1980); Kingsbury v.

a prior year may not be treated as income in the subsequent year in which the recovery is made.[9] This doctrine is sometimes called the "erroneous deduction exception" to the tax benefit rule.[10] There are situations, however, where the Tax Court will not apply the erroneous deduction exception to a recovery of an amount previously deducted, due to the presence of a misrepresentation made by the taxpayer. In these situations the court applies the doctrine of estoppel or "quasi-estoppel" to prevent the taxpayer from taking a position in the year of recovery which is inconsistent with the misrepresentation made in the year the deduction was taken.[11] The doctrine prohibits the taxpayer from claiming that the deduction taken in an earlier year was improperly claimed. Therefore, the erroneous deduction exception cannot be applied and the tax benefit rule requires recognition of taxable income in the year of recovery.[12]

Recently, the United States Court of Appeals for the Ninth Circuit reviewed a case which had been decided by the Tax Court based on the quasi-estoppel theory.[13] In *Unvert v. Commissioner*,[14] the court of appeals found it unnecessary to consider the estoppel argument because it rejected the erroneous deduction exception altogether.[15] The court stated that the arguments in favor of the exception are unpersuasive[16] and that the exception is "poor public policy."[17]

This Casenote will first review the opposing positions of theTax Court

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Commissioner, 65 T.C. 1068, 1087-88 (1976); LaCroix v. Commissioner, 61 T.C. 471, 481 (1974); Canelo v. Commissioner, 53 T.C. 217, 226-27 (1969), *aff'd on other grounds*, 447 F.2d 484 (9th Cir. 1971); Streckfus Steamers, Inc. v. Commissioner, 19 T.C. 1, 8 (1952). *See also* Twitchco v. United States, 348 F. Supp. 330, 335 (N.D. Ala. 1972).

9. *See* cases cited *supra* note 8. It is important to note that this "erroneous deduction exception" applies only where the deduction taken in a prior year was improper at the time it was taken. *Id.* The exception does not apply where a deduction was proper when taken but became improper in a subsequent period due to the occurrence of some event. *See infra* note 50 and accompanying text. Where an originally proper deduction becomes improper in a later period, this is a proper case for application of the tax benefit rule. *See* Tennessee-Carolina Transp., Inc. v. Commissioner, 582 F.2d 378, 382 (6th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); Bittker & Kanner, *supra* note 2, at 284.

10. Bishop, *supra* note 1, at 272.

11. Askin & Marine Co. v. Commissioner, 66 F.2d 776, 778 (2d Cir. 1933); Mayfair Minerals, Inc. v. Commissioner, 56 T.C. 82, 88 (1971), *aff'd*, 456 F.2d 622 (5th Cir. 1972). "Estoppel" is a bar or impediment which precludes a party from denying, to the detriment of another party, something he has previously represented. *See* BLACK'S LAW DICTIONARY 494 (rev. 5th ed. 1979). Estoppel is sometimes applied to prevent a party from taking advantage of an error barred by the statute of limitations. J. CHOMMIE, FEDERAL INCOME TAXATION 271 (2d ed. 1973). *See* Orange Sec. Corp. v. Commissioner, 131 F.2d 662, 663 (5th Cir. 1942), *aff'g* 45 B.T.A. 24 (1941); *Askin & Marine*, 66 F.2d at 778; *Mayfair Minerals*, 56 T.C. at 88. The term "estoppel" connotes a misrepresentation of fact, but courts have sometimes granted relief based on "equitable estoppel," *see, e.g.*, Commissioner v. Liberty Bank & Trust Co., 59 F.2d 320, 324-25 (6th Cir. 1932), "quasi-estoppel," *see, e.g., Mayfair Minerals*, 56 T.C. at 89, or "duty of consistency," *see, e.g., Mayfair Minerals*, 56 T.C. at 89; *Orange Sec. Corp.*, 131 F.2d at 663, where misrepresentation or some other technical element of estoppel is lacking. *See Orange Sec. Corp.*, 131 F.2d at 663; J. CHOMMIE, *supra*.

12. *See supra* note 11.

13. Unvert v. Commissioner, 72 T.C. 807 (1979), *aff'd*, 656 F.2d 483 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2036 (1982).

14. 656 F.2d 483 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2036 (1982).

15. *Id.* at 485. Rejecting the erroneous deduction exception, of course, renders the estoppel theory moot.

16. *Id.* at 485, 486.

17. *Id.* at 486.

and the Ninth Circuit Court of Appeals in *Unvert v. Commissioner*. Next, a critical analysis of the Ninth Circuit's holding will be presented; the analysis will include discussion of five arguments dealing with elimination of the erroneous deduction exception. Finally, a summary of the status of the erroneous deduction exception to the tax benefit rule in the various jurisdictions will be presented.

UNVERT V. COMMISSIONER

In 1969, Allen Unvert paid $54,500 towards the purchase of some condominiums.[18] On the date of payment, no documents were signed, but Unvert was promised that the required paperwork would be forthcoming.[19] He was told that the payment represented deductible prepaid interest and he deducted the entire amount on his 1969 federal income tax return.[20] In May of 1972, after trying without success to get ownership documents for the condominiums, Unvert made an agreement whereby the $54,500 was returned to him without interest.[21] Unvert filed his 1972 income tax return on October 15, 1973, without including the refunded money in his gross income;[22] the statute of limitations on the 1969 return expired on April 15, 1973.[23]

The Commissioner issued a notice of deficiency for 1972, contending that the recovered money was includible in Unvert's 1972 taxable income under the tax benefit rule.[24] Unvert petitioned to contest the deficiency in the Tax Court, which held for the Commissioner on the basis that Unvert was estopped to deny the impropriety of the 1969 interest deduction.[25] Appeal was taken and the case was reviewed by the Ninth Circuit Court of Appeals.[26]

The Ninth Circuit did not discuss the estoppel issue.[27] Instead, the court affirmed the decision of the Tax Court by rejecting the erroneous deduction exception and applying the tax benefit rule to the refund received by Unvert in 1972.[28] In reaching its decision, the court discussed four arguments in support of its rejection of the erroneous deduction exception. First, the court held that application of the tax benefit rule to recoveries of improperly deducted amounts does not violate the statute of limitations because there is no reopening of a barred year.[29] Barred years

18. *Id.* at 484.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* The return was timely because the due date had been properly extended. *Id.*
23. *Id.*
24. *Id.*
25. 72 T.C. at 814-15, 817-18. *See* Bishop, *supra* note 1, at 272, 274. *See generally supra* notes 11-12 and accompanying text.
26. 656 F.2d 483 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2036 (1982).
27. *See supra* note 15; *infra* note 28 and accompanying text.
28. 656 F.2d at 486. The court stated that "the Tax Court's [estoppel] approach is inferior to rejecting the erroneous deduction exception outright." *Id.* at 486 n.2.
29. *Id.* at 485-86. This holding was based on the court's interpretation of several cases and an article which said that the tax benefit rule does not result in violations of the statute of limitations. For a discussion of these cases and a criticism of this holding, see *infra* notes 54-85 and accompanying text.

are considered only to determine whether there was a deduction of the amount currently recovered.[30]

Second, the court held that, for purposes of the tax benefit rule and the erroneous deduction exception, the character of a recovery of a previously deducted amount, that is, whether it is income or a return of capital, is not determined from the inherent characteristics of the transaction.[31] Instead, such recovery is treated as untaxed income.[32] The recovery can therefore be taxed regardless of whether it would normally be treated as a return of capital.[33] This holding defeated Unvert's argument that the Internal Revenue Service (I.R.S.) was trying to tax a return of capital.[34] Third, the *Unvert* opinion states that the results achieved under the erroneous deduction exception are contrary to public interests, and therefore, the exception is poor public policy.[35] The opinion states that the exception provides more favorable tax treatment for taxpayers who take improper deductions than for taxpayers who file proper tax returns.[36] In addition, the erroneous deduction exception gives taxpayers a double benefit by allowing an undeserved reduction in tax liability, due to an improper deduction, while prohibiting taxation of the recovery of such an amount.[37] Last, the court cited cases from the Second, Sixth, and Seventh Circuits which, in the opinion of the court, also rejected the erroneous deduction exception.[38]

CRITICAL ANALYSIS OF *UNVERT V. COMMISSIONER*

This section will analyze the *Unvert* holding, with a focus on whether sufficient differences exist between recoveries of properly and improperly deducted amounts to justify providing distinct tax treatments for these two types of recoveries. This analysis will be based upon the following topics: (1) the annual accounting principle as a rationale for the erroneous deduction exception; (2) the relationship of the statute of limitations to the tax benefit rule; (3) the immutable characteristics of deductions and recoveries;[39] (4) public policy; and (5) holdings in other jurisdictions.

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30. *Id.* at 485-86.

31. *Id.* at 486. Unvert argued that the deposit he made on the purchase of real estate was a capital outlay for investment purposes, and therefore, recovery of that amount was a nontaxable return of capital which could not be deemed income. *Id.* This is true, he argued, despite the fact that he had erroneously deducted the deposit as interest expense on a prior year's income tax return. *Id.* The court held the recovery to be taxable despite its capital nature. *Id. See infra* notes 32-33 and accompanying text. For further discussion of this holding, see *infra* notes 86-95 and accompanying text.

32. 656 F.2d at 486. The court stated that " '[T]o the extent of deductions taken, a debt looses its nature as capital and takes on the character of the untaxed income which the deduction represents.' " *Id.* (quoting West Seattle Nat'l Bank v. Commissioner, 288 F.2d 47, 49 (9th Cir. (1961)).

33. 656 F.2d at 486.

34. *Id.; see supra* note 31.

35. 486 F.2d at 486. For a criticism of this argument, see *infra* notes 96-111 and accompanying text.

36. 656 F.2d at 486.

37. *Id.*

38. *Id.* For a criticism of this argument, see *infra* notes 112-22 and accompanying text.

39. This topic deals with whether the character of a recovery, that is, whether it is an income

The Annual Accounting Principle

The annual accounting principle requires a taxpayer to prepare his income tax return based on facts as they exist in each annual period;[40] each taxable period must be treated as separate and independent.[41] There are situations, however, where the proper tax liability cannot be determined without the use of facts or events of other periods.[42] The tax benefit rule is designed to compensate for the inability of the annual accounting principle to deal with these situations.[43] For example, a deduction properly taken, based on facts as they existed at the time the deduction was taken, cannot be subsequently disallowed merely because some event occurs in a later period, which is inconsistent with the prior deduction (for example, the recovery of the item deducted).[44] The annual accounting principle prohibits an adjustment on the return of the prior year because it was properly prepared based on facts as they existed at the time the return was prepared.[45] The tax benefit rule, however, provides an adjustment to taxable income in the year of recovery.[46] In this manner, the tax benefit rule compensates for the inadequacy of the annual accounting concept.

The purpose of the tax benefit rule is to compensate for the inadequacies of the annual accounting concept,[47] and the erroneous deduction exception excludes recoveries of improperly deducted amounts from taxable income.[48] The question, therefore, is whether excluding recoveries of improperly deducted amounts from income inhibits the tax benefit rule from compensating for the inadequacies of the annual accounting principle. The inadequacy of the annual accounting principle is that the proper tax treatment for some situations cannot be determined with reference to only a single year.[49] Where a deduction was proper and some inconsistent event occurs in a future year, information from more than a single year is required to determine the proper tax treatment.[50] Where a deduction was

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recovery or a return of capital, should determine what the tax consequences are with respect to the recovery. *See supra* notes 31-34 and accompanying text; *infra* notes 86-95 and accompanying text.

40. *See supra* note 1 and accompanying text.

41. *See supra* note 3 and accompanying text.

42. *See infra* note 50 and accompanying text.

43. Tennessee-Carolina Transp., Inc. v. Commissioner, 582 F.2d 378, 382 (6th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); Mayfair Minerals, Inc. v. Commissioner, 56 T.C. 82, 86 (1971), *aff'd*, 456 F.2d 622 (5th Cir. 1972); Bishop, *supra* note 1; *Tax Benefit Rule supra* note 1, at 996-97.

> The need to assess and collect taxes at fixed and relatively short intervals underpins the principle of taxation that transactions which may possibly be subject to further developments substantially altering their character for tax purposes should nevertheless be treated as final and closed so that their tax consequences can be determined. On the other hand, a taxpayer should not be permitted to take advantage of this governmental exigency to establish a distorted picture of his income for tax purposes. It is this countervailing consideration which spawned the tax benefit rule.

Estate of Munter v. Commissioner, 63 T.C. 663, 678 (1975) (Tannenwald, J., concurring).

44. *See, e.g.*, Estate of Block v. Commissioner, 39 B.T.A. 338, 341 (1939), *aff'd sub nom.* Union Trust Co. v. Commissioner, 111 F.2d 60 (7th Cir. 1940), *cert. denied*, 311 U.S. 658 (1940); Bittker & Kanner, *supra* note 2, at 266.

45. *See supra* note 4 and accompanying text.

46. *See supra* notes 4-5 and accompanying text.

47. *See supra* notes 42-46 and accompanying text.

48. *See supra* note 9 and accompanying text.

49. *See supra* notes 42-46 and accompanying text.

50. Tennessee-Carolina Transp., Inc. v. Commissioner, 582 F.2d 378, 382 (6th Cir. 1978),

improper, however, the proper tax treatment can be determined with reference to a single year,[51] and an adjustment can be made imediately following the filing of the income tax return reporting the deduction.[52] Since the inadequacy of the annual accounting principle is not present where the original deduction was improper, applying the ta benefit ule in these situations will not serve to compensate for the inadequacies of the annual accounting concept. The erroneous deduction exception, therefore, prevents application of the tax benefit rule in situations where the purpose for which the rule was designed would not be fulfilled.

Statute of Limitations

There are two rationales underlying the erroneous deduction exception. The first, discussed above, is that the purpose of the tax benefit rule is not fulfilled where the original deduction was improper.[53] The second is that improper deductions should be corrected by an I.R.S. assessment of a tax deficiency for the year in which the improper deduction was taken,[54] and that assessment should be made prior to the expiration of the statute of limitations for that year.[55] It is often argued that allowing the I.R.S. to assess a deficiency in the year of the recovery of an amount previously improperly deducted has the effect of reopening the year of the deduction, and therefore, results in a violation of the statute of limitations.[56] The court in *Unvert* acknowledged this reasoning but was unpersuaded by it.[57] In support of its rejection of the erroneous deduction exception, the court cited several cases holding that the tax benefit rule does not reopen years closed by the statute of limitations and therefore does not vitiate the statute of limitations.[58] This authority, however, seems inappropriate since the

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cert. denied, 440 U.S. 909 (1979). *See also* Bittker & Kanner, *supra* note 2, at 284. "When recovery, or some other event which is inconsistent with what has been done in the past occurs, adjustment must be made in reporting income for the year in which the change occurs." Estate of Block v. Commissioner, 39 B.T.A. 338, 341 (1939), *aff'd. sub nom.* Union Trust Co. v. Commissioner, 111 F.2d 60 (7th Cir. 1940), *cert. denied*, 311 U.S. 658 (1940). For example, Taxpayer *A* believes in year one that a debt due from *C* is uncollectible. *A* deducts the "bad debt" in year one. In year five a change occurs that was unknowable in year one; *C* pays *A*. Adjustment cannot be made in year one, *see* Liberty Ins. Bank v. Commissioner, 14 B.T.A. 1428, 1434 (1929), *rev'd*, 59 F.2d 320 (6th Cir. 1932); Bittker & Kanner, *supra* note 2, at 266, and the tax benefit rule requires *A* to record income in year five. *See supra* note 4 and accompanying text.

51. *See, e.g.*, Canelo v. Commissioner, 53 T.C. 217, 226-27 (1969), *aff'd on other grounds*, 447 F.2d 484 (9th Cir. 1971).

52. I.R.C. § 6501(a)(1) (1976).

53. *See supra* notes 40-52 and accompanying text.

54. *Unvert*, 656 F.2d at 485; LaCroix v. Commissioner, 61 T.C. 471, 481 (1974); Canelo v. Commissioner, 53 T.C. 217, 226-27 (1969), *aff'd on other grounds*, 447 F.2d 484 (9th Cir. 1971).

55. *See supra* note 54 and accompanying text.

56. *Unvert*, 656 F.2d at 485; Canelo v. Commissioner, 53 T.C. 217, 226-27 (1969), *aff'd on other grounds*, 447 F.2d 484 (9th Cir. 1971).

57. 656 F.2d at 485.

58. *Id.* at 485, 486. The United States Supreme Court case cited in *Unvert* is Dobson v. Commissioner, 320 U.S. 489 (1943). The court in *Unvert* also cited the following authorities for the conclusion that the tax benefit rule does not reopen barred years: First Trust & Sav. Bank v. United States, 614 F.2d 1142, 1145 (7th Cir. 1980) (quoting Estate of Block v. Commissioner, 39 B.T.A. 338 (1939)); Rosen v. Commissioner, 611 F.2d 942, 944 (1st Cir. 1980); Estate of Munter v. Commissioner, 63 T.C. 663, 678-79 (1975) (Tannenwald, J., concurring); Bittker & Kanner, *supra* note 2, at 267-72.

issue is not whether application of the tax benefit rule vitiates the statute of limitations. Rather, the issue is narrower,[59] and really involves two questions: (1) Is there a violation of the statute of limitations when the tax benefit rule is applied to recoveries of properly deducted amounts; and (2) Is there a violation of the statute of limitations when the rule is applied to recoveries of amounts improperly deducted?[60]

The *Unvert* court cited several authorities in support of its conclusion that the statute of limitations is not implicated where the tax benefit rule is applied to recoveries of improper deductions.[61] However, each of the authorities dealt with the issue in the context of a proper deduction recovered in a subsequent year.[62] They did not deal with recoveries of amounts improperly deducted. Therefore, it seems unwarranted to rely on these authorities for the proposition that there is no violation of the statute of limitations where the tax benefit rule is applied to recoveries of amounts improperly deducted. However, the *Unvert* court, based on these authorities and without giving separate consideration to recoveries of improperly deducted items, came to the conclusion that there is no such violation.[63]

While the *Unvert* court did not cite any authority holding that the erroneous deduction exception protects taxpayers from violations of the statute of limitations, such authority is available.[64] Some courts which have refused to apply the tax benefit rule to recoveries of improperly de-

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59. The erroneous deduction exception provides that the tax benefit rule does not apply to recoveries of improperly deducted items. *See supra* notes 8-9 and accompanying text. Since the tax benefit rule does not apply to these situations, determining whether the tax benefit rule violates the statute of limitations does not determine whether there is a violation of the statute of limitations when the erroneous deduction exception is or is not applied. The two questions are distinctly different. The *Unvert* court cited authority which supported the fact that the tax benefit rule does not violate the statute of limitations (*see supra* note 58) and seems to have considered that authority sufficient to cover the exception to the tax benefit rule as well. The relevant part of the *Unvert* opinion reads:

> The logic of the erroneous deduction exception is that an improper deduction should be corrected by assessing a deficiency before the statute of limitations has run, not by treating recovery of the expenditure as income. . . .
>
> We find this unpersuasive. Prior decisions under the tax benefit rule state clearly that inclusion of the recovery as income does not reopen the tax liability for the prior year and does not implicate the statute of limitations.

656 F.2d at 485. Prior decisions have held that the tax benefit rule does not reopen the statute of limitations. *See* cases cited *supra* note 8. However, prior to *Unvert*, the tax benefit rule did not apply where the deduction was improper, and prior decisions have not held that there would not be a violation of the statute of limitations if the tax benefit rule were applied to recoveries of improperly deducted items. To the contrary, there have been decisions which seem to indicate that there would be a violation of the statute of limitations if the tax benefit rule were applied to recoveries of improperly deducted items. *See infra* note 65.

60. This is the issue in *Unvert*. Taxpayer deducted as interest what was later determined to be an investment deposit and therefore was nondeductible. 656 F.2d at 484. The deposit was recovered after the running of the statute of limitations on the deduction, *id.*, and the question is whether it will be a violation of the statute of limitations to apply the tax benefit rule which would treat the recovery as taxable income in the year of recovery (to the extent of benefit received in the year the deduction was taken). *See supra* note 6 and accompanying text.

61. *See infra* note 62.

62. *See* Dobson v. Commissioner, 320 U.S. 489, 491 (1943); First Trust & Sav. Bank v. United States, 614 F.2d 1142, 1144 (7th Cir. 1980); Rosen v. Commissioner, 611 F.2d 942, 943 (1st Cir. 1980); Munter v. Commissioner, 63 T.C. 663, 678-79 (1975) (Tannenwald, J., concurring); Bittker & Kanner, *supra* note 2, at 267-72.

63. 656 F.2d at 485.

64. *See infra* notes 65-66 and accompanying text.

ducted items have been concerned about the effect such an application would have on the statute of limitations.[65] These courts have said that the statute of limitations requires eventual repose, and have indicated that there would be no such repose if the tax benefit rule were applied to improperly deducted items.[66] The *Unvert* court did not take note of these concerns and reached a decision contrary to the one reached by these courts.

As noted, precedent supports a holding that there is a violation of the statute of limitations where the tax benefit rule is applied to recoveries of improper deductions.[67] There are also other considerations which indicate there is a violation of the statute of limitations in such situations. As mentioned above, the tax benefit rule is designed to compensate for the inadequacies of the annual accounting concept.[68] However, where an erroneous deduction is not discovered and corrected prior to the running of the statute of limitations, there are two inadequacies present: (1) that of the taxpayer in taking an improper deduction, and (2) that of the I.R.S. for failing to catch the error.[69] These two inadequacies are present any time a deduction is improper, but in the normal case where there is no subsequent recovery of the amount deducted, neither of these inadequacies results in an adjustment to the taxpayer's return once the statute of limitations has run.[70] Any adjustment must be made prior to the running of the statute of limitations,[71] and must be made for the year in which the deduction was taken.[72]

The statute of limitations is based on two considerations. First, it is unjust not to put an adversary on notice to defend an action within the period of limitations.[73] Second, the right to prosecute claims eventually is overcome by the right to be free from stale claims.[74] Where a deduction was proper, there is no claim until a recovery of the amount deducted is made; the statute of limitations starts to run when the return is filed for the year of the recovery.[75] Where a deduction is improper, however, the claim

65. Twitchco, Inc. v. United States, 348 F. Supp. 330, 335 (N.D. Ala. 1972); La Croix v. Commissioner, 61 T.C. 471, 481 (1974); Canelo v. Commissioner, 53 T.C. 217, 226 (1969), *aff'd on other grounds*, 447 F.2d 484 (9th Cir. 1971); Liberty Ins. Bank v. Commissioner, 14 B.T.A. 1428, 1434 (1929), *rev'd*, 59 F.2d 320 (6th Cir. 1932). *See also* Bishop, *supra* note 1, at 273, 275.

66. *See* cases cited *supra* note 65.

67. *See supra* notes 65-66 and accompanying text.

68. *See supra* notes 40-52 and accompanying text.

69. Both of these elements must exist in order to involve the erroneous deduction exception. If there is no improper deduction, the tax benefit rule is applied to recoveries, *see supra* note 6, and if the I.R.S. catches the error prior to the running of the statute of limitations, an adjustment will be made for the year of the deduction and the tax benefit rule will not be required. *See supra* note 54 and accompanying text.

70. *See generally* Twitchco, Inc. v. United States, 348 F. Supp. 330, 335 (N.D. Ala. 1972); Southern Pac. Transp. Co. v. Commissioner, 75 T.C. 497, 559 (1980); Liberty Ins. Bank v. Commissioner, 14 B.T.A. 1428, 1434 (1929), *rev'd*, 59 F.2d 320 (6th Cir. 1932).

71. I.R.C. § 6501(a) (1976).

72. *See supra* note 4 and accompanying text.

73. *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555 (1974); Order of R.R. Tel. v. Railway Express Agency, 321 U.S. 342, 349 (1944).

74. *See* Order of R.R. Tel. v. Railway Express Agency, 321 U.S. 342, 349 (1944); Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 787, 598 P.2d 45, 53, 157 Cal. Rptr. 392, 400 (1979).

75. *See generally* I.R.C. § 6501(a) (1976); *id.* § 111; Treas. Reg. § 1.111-1 (1956); Plumb, *supra* note 4; Plumb, *supra* note 6; Tye, *supra* note 6.

arises at the time the deduction is taken, and the statute of limitations begins to run when the return is filed for the year in which the deduction was taken.[76]

To be consistent with the rationale of the statute of limitations, a party must be put on notice to defend within the limitations period,[77] and when the period has run, the taxpayer's right to be free of stale claims prevails over the right of the I.R.S. to prosecute him.[78] There is a violation of the statute of limitations, therefore, where a claim is prosecuted subsequent to the running of the limitations period.[79] Where a recovery of a properly deducted amount is made, the tax benefit rule provides for adjustment for that recovery, because the claim arose in the year of recovery.[80] Where a deduction was improper, however, the claim arose when the deduction was taken, and it is consistent with the rationale of the statute of limitations to bar any adjustment for recovery of that item.

The government is understandably concerned about the results where the improper deduction exception is applied. The taxpayer's tax liability was reduced in the year of the deduction by an amount which he later recovered, and no income was recorded in the year of recovery.[81] The result is a windfall to the taxpayer.[82] That, however, is the price paid for the benefits of the statute of limitations;[83] "in the field of taxation, the taxpayer sometimes gets advantages and at other times the Government gets them."[84] *Unvert* is a case where the taxpayer should get the advantage. The government would take away that advantage by adjusting taxable income in the year of recovery to make up for its failure to catch the erroneous deduction. Arguably, when the government is allowed to do this it is perpetrating a wrong (violating the statute of limitations) to make up for the results of a prior wrong (the loss of tax revenue due to its failure to catch the error in time).[85]

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76. *See* Canelo v. Commissioner, 53 T.C. 217, 226-27 (1969), *aff'd on other grounds*, 447 F.2d 484 (9th Cir. 1971); I.R.C. § 6501(a) (1976).

77. Order of R.R. Tel. v. Railway Express Agency, 321 U.S. 342, 349 (1944).

78. *Id.*

79. *Id. See also* I.R.C. § 6501(a) (1976).

80. *See supra* note 75. The claim arose with the recovery (or other event inconsistent with the original deduction).

81. *Unvert*, 656 F.2d at 484.

82. This windfall is one of the things the court in *Unvert* was concerned about. *Id.* at 486. *See infra* notes 102-11 and accompanying text. *See also* Union Trust Co. v. Commissioner, 111 F.2d 60, 61 (7th Cir. 1940), *cert. denied*, 311 U.S. 658 (1940).

83. *See* Twitchco v. United States, 348 F. Supp. 330, 335 (N.D. Ala. 1972).

84. Rothensies v. Electric Storage Battery Co., 329 U.S. 296, 302 (1946). *See also* Twitchco v. United States, 348 F. Supp. 330, 335 (N.D. Ala. 1972). It is the government that gets the advantage where the taxpayer failed to take a deduction in a year closed by the statute of limitations.

85. *See generally* Mayfair Minerals, Inc. v. Commissioner, 56 T.C. 82, 90, 91 (1971), *aff'd*, 456 F.2d 622 (5th Cir. 1972); Canelo v. Commissioner, 53 T.C. 217, 226-27 (1969), *aff'd on other grounds*, 447 F.2d 484 (9th Cir. 1971). "The fact that a taxpayer has paid lower taxes for prior years than those which were rightfully due, because of erroneous computations of taxable income, and that the statute of limitations now bars the assessment and collection of any deficiency for those years, does not justify an erroneous computation of its tax liability for any subsequent year." Appeal of Macmillan Co., 4 B.T.A. 251, 253 (1926) (relying on Appeal of Goodell-Pratt Co., 3 B.T.A. 30, 33 (1925)). *See also* Liberty Ins. Bank v. Commissioner, 14 B.T.A. 1428, 1434 (1929), *rev'd*, 59 F.2d 320 (6th Cir. 1932); Bishop, *supra* note 1, at 274.

Immutable Characteristics

In addition to claiming that the statute of limitations had been violated, Unvert argued that the recovery of the deposit he made on the condominiums was a return of capital, and therefore, could not be taxed as income.[86] This argument was rejected by the court in *Unvert*,[87] and the court clearly was correct in doing so. This is an argument that the tax benefit rule should be rejected.[88] The tax benefit rule recognizes income in the year of recovery of previously deducted amounts, even where these amounts would normally represent a return of capital. This is true even where the original deduction was properly taken.[89] The tax benefit rule is an accepted doctrine,[90] and the *Unvert* court had no choice but to reject the argument.[91]

This holding, however, does not support the court's eradication of the erroneous deduction exception. The assertion is only that recovery of an item which would normally be thought of as a return of capital, in certain circumstances, will be treated as if it were something other than a return of capital;[92] that is, under certain circumstances the recovery can be taxed.[93] It remains to be determined whether the particular circumstances surrounding recovery of an amount improperly deducted are such that the recovery should be taxed. The tax benefit rule provides that where a deduction was proper the recovery of the amount deducted is a circumstance where a recovery will be taxed,[94] but this does not help resolve whether recoveries of amounts improperly deducted should be taxed. The argument remains intact that to tax such amounts would be a violation of the statute of limitations.[95]

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86. *Unvert*, 656 F.2d at 486.

87. *Id.*

88. The tax benefit rule allows taxation on items which normally would be considered capital items and therefore not taxable. *See generally* Bittker & Kanner, *supra* note 2, at 265-69. For example, a bad debt is properly deducted in year one and in year five the debt is collected. Normally this collection would be a return of capital (collection on a loan), J. CHOMMIE, *supra* note 11, at 28, but the tax benefit rule requires this item to be included in income. I.R.C. § 111 (1976); Bittker & Kanner, *supra* note 2, at 265-69.

89. *See supra* note 88 and accompanying text.

90. *See supra* note 6 and accompanying text.

91. The purpose of the tax benefit rule is to counterbalance problems caused by the annual accounting concept, *see supra* notes 40-52 and accompanying text, but the courts have not been consistent on what theory is used to justify the rule. For a discussion of the various theories, see Bittker & Kanner, *supra* note 2, at 267-70. The predominately used theory, and the one used by the Ninth Circuit in *Unvert*, asserts that when an item is deducted the character of that item changes (from, for example, a capital item like a loan) to "untaxed income," and therefore, the item can be taxed if it is later recovered. 656 F.2d at 486; National Bank of Commerce v. Commissioner, 115 F.2d 875, 876-77 (9th Cir. 1940); Bittker & Kanner, *supra* note 2, at 267-68. The *Unvert* court rejected Unvert's argument that the recovery of his deposit was not taxable because of its inherent character as a capital item, *see supra* note 86 and accompanying text, by holding that this argument is inconsistent with the theory of the tax benefit rule. *Unvert*, 656 F.2d at 486. The *Unvert* court did not treat Unvert's argument as a bid for rejection of the tax benefit rule, but this Casenote does. *See supra* note 88 and accompanying text. Regardless of which approach is used, the result is the same. The fact that a recovery of a previously deducted amount would normally be a capital recovery does not prohibit application of the tax benefit rule.

92. *See supra* notes 31-34 and accompanying text.

93. *See supra* note 31.

94. Bittker & Kanner, *supra* note 2, at 266-72.

95. *See supra* notes 54-85 and accompanying text.

Public Policy

In support of its rejection of the erroneous deduction exception, the *Unvert* court indicated that the exception is poor public policy.[96] This conclusion is questionable, however. In *Unvert*, had the taxpayer not recovered his deposit,[97] the statute of limitations would have prevented any deficiency assessment.[98] Unvert recovered the deposit, however, triggering different treatment; that is, the recovery was taxable.[99] One way the *Unvert* court justifies this treatment is by reasoning that it would be poor public policy not to treat these situations differently.[100] The court mentioned two reasons why the erroneous deduction exception constitutes poor public policy.[101] First, where there is a recovery of an amount erroneously deducted, there is not only the reduction of taxable income in the year the erroneous deduction is taken, but there is immunity from taxation on the recovery.[102] Second, more advantageous treatment is given to taxpayers who take erroneous deductions than those who take proper deductions.[103]

Apparently, the *Unvert* court feels there is more of a windfall for a taxpayer who is not taxed on the recovery of an amount improperly deducted, than for a taxpayer who has his taxable income reduced, due to an improperly taken deduction, but does not later recover the amount deducted. This conclusion is questionable, however, since a taxpayer in either situation has received the same tax benefit. There is no second or additional tax benefit where a recovery is made on the amount deducted.[104] While there is no additional tax benefit to the taxpayer who recovers an amount erroneously deducted, that taxpayer does have an advantage that is not shared by the taxpayer who does not make such a recovery; he has the cash received due to the recovery. To the extent of this cash advantage there is more of a windfall to the taxpayer who recovers an amount previously deducted, but it is arguable that this advantage does not justify eradication of the erroneous deduction exception. Contrary public policy and the need to maintain the statute of limitations may easily outweigh the desire to take away this cash advantage given to a taxpayer who recovers an amount improperly deducted.[105]

96. 656 F.2d at 486.
97. *See supra* note 21 and accompanying text.
98. *See* I.R.C. § 6501(a) (1976).
99. 656 F.2d at 484.
100. *Id.* at 486.
101. *Id.*
102. *Id.*
103. *Id.*
104. For example, a taxpayer erroneously deducts a nondeductible item in year one and recovers it in year five. The item is a capital item and is therefore not normally taxable upon recovery. When the deduction was taken in year one, the taxpayer was at an advantage due to the deduction if his tax liability was reduced, but he is not at an additional advantage due to the nontaxability of the recovery since the item was not normally taxable because of its capital nature. There is no additional tax savings due to exclusion from taxable income of the recovery. If the recovery is taxed, this would merely take away the benefit received from the original deduction and would put the taxpayer in the same situation he would have been in had he never taken the deduction.
105. These same arguments can be used to overcome the *Unvert* court's concerns regarding the reward of taxpayers for taking improper deductions. *See infra* notes 106-11 and accompanying text.

The *Unvert* court clearly was correct in stating that, where the erroneous deduction exception is applied, more advantageous tax treatment is given to taxpayers who improperly deduct an item which is later recovered than to those taxpayers who recover items which were properly deducted.[106] Whether this difference is sufficient to justify eradication of the erroneous deduction exception is a matter of judgment.[107] It could be considered that this advantageous treatment given where a taxpayer errs is the price paid for the ability to compensate for the inadequacies of the annual accounting concept without violating the statute of limitations.[108] There is also a balancing of public policies to be considered. It may be poor public policy to reward taxpayer errors,[109] but it is also poor public policy to violate the statute of limitations.[110] The statute of limitations has often been applied regardless of the windfall to the taxpayer,[111] however, and it seems that such a result is warranted here.

Other Jurisdictions

Another way the court in *Unvert* supported its eradication of the erroneous deduction exception was by citing authorities which had implicitly rejected or criticized the exception.[112] The court cited four cases. The first of these cases, *Union Trust Co. v. Commissioner*,[113] decided by the Seventh Circuit, did not involve the improper deduction exception at all, but instead was a typical application of the tax benefit rule.[114] The case did not deal with an improper deduction and the holding is inapposite to the erroneous deduction exception. Furthermore, in 1974, twenty-four years after *Union*, the Seventh Circuit rendered a decision which seems to recognize the vitality of the erroneous deduction exception.[115]

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106. "A taxpayer who properly claims a deduction for an expenditure that is recovered in a later year must treat the recovery as income, while one who claims an improper deduction may not be required to include the recovery as income only because of the impropriety of the deduction." *Unvert*, 656 F.2d at 486.

107. Other courts have considered the issues involved and have chosen to apply the erroneous deduction exception. *See* cases cited *supra* note 8.

108. *See supra* notes 40-42 and accompanying text.

109. *Unvert*, 656 F.2d at 486.

110. *See* Wood v. Carpenter, 101 U.S. 135, 139 (1879); Edwards v. Kearzey, 96 U.S. 595, 603 (1877).

111. "We realize that petitioners herein have received a windfall . . .[b]ut the statute of limitations requires eventual repose." Canelo v. Commissioner, 53 T.C. 217, 226-27 (1969), *aff'd on other grounds*, 447 F.2d 484 (9th Cir. 1971).

112. 656 F.2d at 486.

113. 111 F.2d 60 (7th Cir.), *cert. denied*, 311 U.S. 658 (1940).

114. 111 F.2d at 61. The court in *Union* used the phrase "wrongful deduction" to describe the deduction that was proper in the year taken, but later became improper due to a state law amendment which was given retroactive effect. *Id.* This is a typical application of the tax benefit rule whereby some change in a subsequent year, unknowable at the time of the deduction, creates an inconsistency between the tax treatment given to an item in the prior year and the treatment that would have been given to that item had the change been known in the year of the deduction (*see supra* note 50 and accompanying text). This is a case where the original deduction was proper, based on facts known at the time of the deduction, *see id.*, and therefore falls outside the scope of the improper deduction exception.

115. Southwestern Ill. Coal Corp. v. United States, 491 F.2d 1337, 1339 (7th Cir. 1974). The opinion stated:

> The resolution of this case depends on the applicability of the tax benefit rule. Under that rule, the recovery of property which was once the subject of a *proper* income tax

The other three cases cited by the court, *Askin & Marine Co. v. Commissioner*,[116] *Commissioner v. Liberty Bank & Trust Co.*,[117] and *Kahn v. Commissioner*,[118] were decided on the estoppel theory. In each of these cases, there are indications that the courts were applying estoppel due to misrepresentations or unreasonable behavior of the taxpayer. In *Askin*, the court talks about a "misrepresentation of facts under oath";[119] in *Liberty Bank*, the court spoke of "the duty of the taxpayer to deal fairly and truthfully with the government";[120] and in *Kahn*, the court stated that "the taxpayer must also act reasonably."[121] To the extent that the holdings in these cases were based on taxpayer misrepresentations, they do not involve new principles. The Tax Court has often bypassed the improper deduction exception in cases of misrepresentation,[122] and the *Unvert* court was in error to rely on these cases in support of a rejection of the erroneous deduction exception.

Survey of the Current Status of the Erroneous Deduction Exception

Although the Tax Court still recognizes the erroneous deduction exception,[123] the exception will no longer be applied in the Ninth Circuit.[124] It seems clear, however, that despite the *Unvert* opinion's statement to the contrary,[125] the exception remains alive in the Second, Sixth and Seventh Circuits.[126] The remaining Circuit Courts have not discussed the issue.

As a practical matter, however, the result in the Tax Court and other jurisdictions may be the same as in the Ninth Circuit due to the doctrine of quasi-estoppel prohibiting taxpayer inconsistency.[127] If the doctrine of quasi-estoppel is carried to an extreme and applied to every improper deduction whether intentional or unintentional, then the erroneous deduction exception may never apply.[128] Practitioners should be wary of improper deduction cases in light of the tendency of courts to apply quasi-estoppel where only a minimal showing of misrepresentation is made.[129] The cases cited by the Ninth Circuit in *Unvert* as rejecting the erroneous deduction exception, for example, were quite liberal applications of the estoppel theory since the courts didn't seem to require much of a showing

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deduction must be treated as income in the year of its recovery. Since we conclude that taxpayer's over-billings were *properly deducted*, the tax benefit rule required it to include as income the amount which [was refunded].

Id. (citations omitted, emphasis added).

116. 66 F.2d 776 (2d Cir. 1933).
117. 59 F.2d 320 (6th Cir. 1932).
118. 108 F.2d 748 (2d Cir. 1940).
119. 66 F.2d at 778.
120. 59 F.2d at 325.
121. 108 F.2d at 749.
122. *See, e.g.*, Mayfair Minerals, Inc. v. Commissioner, 56 T.C. 82, 91 (1971), *aff'd*, 456 F.2d 622 (5th Cir. 1972); Lloyd H. Faidley v. Commissioner, 8 T.C. 1170, 1173 (1947). *See also* Bishop, *supra* note 1, at 273.
123. Southern Pac. Transp. Co. v. Commissioner, 75 T.C. 497, 559-61 (1980).
124. *Unvert*, 656 F.2d at 485.
125. *Id.* at 486.
126. *See supra* notes 116-22 and accompanying text.
127. *See supra* note 11 and accompanying text.
128. Bishop, *supra* note 1, at 274-75.
129. *See infra* note 130 and accompanying text.

of misrepresentation.[130]

CONCLUSION

In *Unvert v. Commissioner*, the Ninth Circuit Court of Appeals rejected the improper deduction exception to the tax benefit rule. The tax benefit rule, however, should be retained because it is necessary, in light of our limited foresight, to compensate for the annual accounting principle. Where a prior year's deduction was improper when taken, the tax benefit rule does not serve the function of compensation for the annual accounting principle, but serves only to compensate for the government's failure to catch the improper deduction. This is an unwarranted result in light of the purposes of the statute of limitations. Applying the tax benefit rule to recoveries of improperly deducted amounts results in effectively vitiating the statute of limitations. The United States Supreme Court, however, has denied certiorari in *Unvert*. Those in the Ninth Circuit, therefore, are bound by *Unvert*, and the tax benefit rule shall apply to all recoveries of previously deducted amounts, regardless of the propriety of the original deduction.

Thomas R. Lofy

130. Kahn v. Commissioner, 108 F.2d 748, 748-49 (2d Cir. 1940); Askin & Marine Co. v. Commissioner, 66 F.2d 776, 776-78 (2d Cir. 1933); Commissioner v. Liberty Bank & Trust Co., 59 F.2d 320, 325 (6th Cir. 1932). For a discussion of these cases, see *supra* notes 112-22 and accompanying text.

VI. TORTS

A. LIMITATIONS ON THE INVITEE'S PREFERRED STATUS: AN ANALYSIS OF *NICOLETTI V. WESTCOR*

In Arizona, the duty of a landowner to an entrant on his property depends on the entrant's status as a trespasser, licensee, or invitee.[1] The landowner's duty to an invitee is to make the premises reasonably safe, but that duty may be diluted or extinguished if the invitee exceeds the scope of the invitation.[2]

In *Nicoletti v. Westcor*,[3] the Arizona Supreme Court considered whether a business invitee who was injured while taking a shortcut to the parking lot after leaving work exceeded the scope of her invitation and thereby diluted the duty owed her. Ruth Nicoletti, the appellant, was a department store employee in the Phoenix Metro Center.[4] To accommodate Christmas season shoppers, all employees were instructed to park in a temporary parking lot across Metro Parkway, which circles Metro Center.[5] This lot was accessible by sidewalks and crosswalks illustrated on maps distributed to the employees.[6] On the night of her injury, Nicoletti attempted a shortcut through a raised planter of ornamental shrubbery.[7] She fell, striking her hand and side.[8] Westcor, the appellee, had given strict warnings against taking such shortcuts to children discovered crossing the planter.[9] Nicoletti said the fall must have been caused by a wire in the planter, a piece of which she apparently discovered caught in the pants she wore the night of the incident.[10]

The trial court granted defendant Westcor's motion for summary judgment.[11] The Arizona Supreme Court affirmed the summary judg-

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1. Shannon v. Butler Homes, Inc., 102 Ariz. 312, 316, 428 P.2d 990, 994 (1967); Southwest Cotton Co. v. Pope, 25 Ariz. 364, 379, 218 P. 152, 157 (1923); Robles v. Severyn, 19 Ariz. App. 61, 63, 504 P.2d 1284, 1286 (Ct. App. 1973). *See also* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.1, at 1430 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 58, at 357 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 329, 330, 332 (1965).

2. *See* W. PROSSER, *supra* note 1, § 61, at 391; RESTATEMENT (SECOND) OF TORTS § 332 comment 1 (1965); *see also* F. HARPER & F. JAMES, *supra* note 1, § 27.12, at 1485. *See infra* notes 55-63 and accompanying text.

3. 131 Ariz. 140, 639 P.2d 330 (1982).

4. *Id.* at 141, 639 P.2d at 331.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 141-42, 639 P.2d at 331-32.

9. *Id.* at 144, 639 P.2d at 334.

10. *Id.* at 141-42, 639 P.2d at 331-32. Nicoletti first said she tangled her feet in the bushes, but thirty days later she determined the fall was caused by a wire. *Id.* The wire had since been misplaced, so her allegation is unsupported. *Id.*

11. *Id.* at 142, 639 P.2d at 332.

ment, finding Westcor had no duty to maintain the planter for Nicoletti's safe ingress and egress.[12] Although Nicoletti was a business invitee at the time of the injury,[13] she had exceeded the scope of the invitation by attempting a shortcut across the planter.[14] Nicoletti's conduct thus "diluted or extinguished" landowner Westcor's usual duty to her as an invitee to keep its property reasonably safe.[15] The court rejected Nicoletti's argument that it should imply an invitation to be in the planter,[16] saying that no reasonable person could have thought the planter was offered as a means of egress;[17] therefore, Westcor had no duty to maintain the planter as a pathway.[18] The decision reaffirms Arizona's dependence on status as the analytical tool for premises liability cases.[19]

This Casenote will review the common law status categories and the corresponding duties owed to persons within each group, focusing primarily on the licensee and the invitee. It will then review the elements of the scope of invitation, examine the change in duty to one who exceeds the invitation, and analyze the court's use of these concepts in *Nicoletti*. Finally, the Casenote will briefly contrast the Arizona approach with that of other jurisdictions which have abandoned status as a determinant of a landowner's duty and have replaced it with general negligence analysis.

Status Determines Duty

In a negligence case, the plaintiff must show that the defendant owed a duty to the plaintiff, that the defendant breached the duty, and that the injury was proximately caused by the breach.[20] The initial inquiry centers on the defendant's duty,[21] which generally requires the actor "to conform to the legal standard of reasonable conduct in light of the apparent risk."[22] Failure to exercise reasonable care is ordinarily the basis of liability for negligence.[23]

The extent of the duty owed by an owner or occupier of land to visitors on the land depends on the status of the entrant at the time the injury occurs.[24] *Nicoletti* reaffirms Arizona's reliance on the traditional status categories of visitors on the land of another,[25] which are accepted in the

12. *Id.* at 144, 639 P.2d at 334.
13. *Id.* at 143, 639 P.2d at 333.
14. *Id.* at 144, 639 P.2d at 334.
15. *See id.* at 142-43, 639 P.2d at 332-33.
16. *Id.* at 144, 639 P.2d at 334.
17. *Id.*
18. *Id.*
19. *Id.* at 142, 639 P.2d at 332; *see infra* notes 24-26 and accompanying text.
20. 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); Flowers v. K Mart Corp., 126 Ariz. 495, 497, 616 P.2d 955, 957 (Ct. App. 1980).
21. *See* W. PROSSER, *supra* note 1, § 30, at 143.
22. *Id.* § 53, at 324.
23. *See id.* § 31, at 145; *see also* F. HARPER & F. JAMES, *supra* note 1, § 27.1, at 1430; RESTATEMENT (SECOND) OF TORTS §§ 282, 283 (1965).
24. *See* Southwest Cotton Co. v. Pope, 25 Ariz. 364, 379, 218 P. 152, 157 (1923); Robles v. Severyn, 19 Ariz. App. 61, 63, 504 P.2d 1284, 1286 (1973); RESTATEMENT (SECOND) OF TORTS §§ 332 comment d, 343 comment b.
25. *See* Payne v. M. Greenberg Constr., 130 Ariz. 338, 343, 636 P.2d 116, 121 (Ct. App.

majority of American jurisdictions.[26]

The three traditional status categories are trespasser, licensee, and invitee; the owner or occupier of land owes each class a separate duty.[27] The trespasser, one who enters the land without consent or privilege to do so,[28] assumes the risk of whatever hazards he may encounter.[29] The only limits to this rule are that a possessor of land may not intentionally injure a trespasser,[30] and he may have a greater duty to trespassers known to use a limited area.[31] In contrast, a licensee comes upon the land for his own pleasure or convenience with the express or implied consent of the landowner, whose duty is to warn of known dangers on the premises.[32] Generally, the licensee must look out for his own safety and he has no right to demand that the land be made safe for his use.[33] The consent to enter does not obligate the possessor of the land either to inspect the premises for unknown dangers[34] or to warn of or protect from risks of which the license has reason to know.[35] Persons who take known shortcuts across property or make permissive use of crossings fall within the licensee category.[36] Invitees who exceed the scope of their invitation are treated as either licensees or trespassers, depending on whether the possessor consents to the uninvited use of the land.[37]

1981); Bisnett v. Mowder, 114 Ariz. 213, 214, 560 P.2d 68, 69 (Ct. App. 1977); Robles v. Severyn, 19 Ariz. App. 61, 63, 504 P.2d 1284, 1286 (1973).

26. W. PROSSER, *supra* note 1, § 58, at 357.

27. F. HARPER & F. JAMES, *supra* note 1, § 27.1, at 1430; W. PROSSER, *supra* note 1, § 58, at 357.

28. F. HARPER & F. JAMES, *supra* note 1, § 27.1, at 1430; W. PROSSER, *supra* note 1, § 58, at 357; *see also* RESTATEMENT (SECOND) OF TORTS §§ 329, 333 (1965).

29. W. PROSSER, *supra* note 1, § 58; *see also* Barnhizer v. Paradise Valley Unified School Dist. No. 69, 123 Ariz. 253, 254, 599 P.2d 209, 210 (1979); Spur Feeding Co. v. Fernandez, 106 Ariz. 143, 145, 472 P.2d 12, 14 (1970); RESTATEMENT (SECOND) OF TORTS § 333 (1965).

30. *See* Spur Feeding Co. v. Fernandez, 106 Ariz. 143, 145, 472 P.2d 12, 14 (1970); Payne v. Greenberg Constr., 130 Ariz. 338, 345, 636 P.2d 116, 123 (Ct. App. 1981); Clarke v. Edging, 20 Ariz. App. 267, 269, 512 P.2d 30, 32 (1973).

31. W. PROSSER, *supra* note 1, § 58, at 360:

> Where, to the knowledge of the occupier of the land, trespassers in substantial number are in the habit of entering it at a particular point, or of traversing an area of small size, the burden of looking out for them is reduced and the risk of harm increased, so that most of the courts have held that there is a duty of reasonable care to discover and protect them in the course of any activities which the defendant carries on.

RESTATEMENT (SECOND) OF TORTS § 334 (1965):

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.

See Payne v. Greenberg Constr., 130 Ariz. 338, 346, 636 P.2d 116, 124 (Ct. App. 1981).

32. Bisnett v. Mowder, 114 Ariz. 213, 214, 560 P.2d 68, 69 (Ct. App. 1977); W. PROSSER, *supra* note 1, § 60, at 380-81; RESTATEMENT (SECOND) OF TORTS §§ 330, 341, 342 (1965).

33. *See generally* W. PROSSER, *supra* note 1, § 60, at 376.

34. *Id.* at 376, 380-81; *see also* Shannon v. Butler Homes, Inc., 102 Ariz. 312, 316, 428 P.2d 990, 994 (1967); Sanders v. Brown, 73 Ariz. 116, 120-21, 238 P.2d 941, 944-45 (1951).

35. W. PROSSER, *supra* note 1, § 60, at 376, 380-81; *see* Daugherty v. Montgomery Ward, 102 Ariz. 267, 269, 428 P.2d 419, 421 (1967) (citing Foster v. A.P. Jacobs & Assoc., 85 Cal. App. 2d 746, 193 P.2d 971 (1948)); Downey v. Lackey, 11 Ariz. App. 528, 531, 466 P.2d 401, 404 (1970).

36. *See* W. PROSSER, *supra* note 1, § 60, at 377.

37. W. PROSSER, *supra* note 1, § 61, at 392; *see also* RESTATEMENT (SECOND) OF TORTS § 332 comment 1:

> Thus an invitee ceases to be an invitee after the expiration of a reasonable time within which to accomplish the purpose for which he is invited to enter, or to remain. Whether

An invitee is one who enters land with an express or implied invitation carrying with it a tacit assurance that reasonable care has been used to make the premises safe.[38] The possessor of the land has a duty to protect the invitee from known dangers and dangers discoverable by using reasonable care.[39] In exercising reasonable care, the possessor of land has a duty to inspect the premises for any condition or activity involving an unreasonable risk of harm and to warn of or to eliminate the danger.[40] Liability will not be imposed for injury caused by a risk obvious to the invitee unless the possessor should anticipate the harm despite the invitee's knowledge of the risk.[41]

The Arizona courts have consistently recognized a landowner's duty to invitees to keep his property reasonably safe,[42] but a landowner is not required to insure the safety of invitees on his premises.[43] The duty is only to exercise reasonable care to protect them.[44] Whether a duty is owed the plaintiff is primarily a question of law to be decided by the court.[45] The issue of whether a breach of duty has occurred is initially a question of law also,[46] but if the circumstances are such that reasonable men could differ,

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at the expiration of that time he becomes a trespasser or a licensee will depend upon whether the possessor does or does not consent to his remaining on the land.

Likewise the visitor has the status of an invitee only while he is on the part of the land to which his invitation extends—or in other words, the part of the land upon which the possessor gives him reason to believe that his presence is desired for the purpose for which he has come.

38. *See* W. PROSSER, *supra* note 1, § 61, at 392-93; *see also* RESTATEMENT (SECOND) OF TORTS § 332 comment a (1965).

39. *See* RESTATEMENT (SECOND) OF TORTS § 343 comment d (1965): "An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein." Comment e adds that "the nature of the land and the purposes for which it is used are of great importance" when determining the protection to which an invitee is entitled. *Id.* § 343 comment e. *See also* W. PROSSER, *supra* note 1, § 61, at 385; F. HARPER & F. JAMES, *supra* note 1, § 27.12, at 1487.

40. *See supra* note 39.

41. RESTATEMENT (SECOND) OF TORTS § 343A (1965); *see also* Daugherty v. Montgomery Ward, 102 Ariz. 267, 269, 428 P.2d 419, 421 (1967) (citing Foster v. A.P. Jacobs & Assoc., 85 Cal. App. 2d 746, 193 P.2d 971 (1948)); Forbes v. Romo, 123 Ariz. 548, 550, 601 P.2d 311, 313 (Ct. App. 1979). *Cf.* Yuma Furniture Co. v. Rehwinkel, 8 Ariz. App. 576, 579, 448 P.2d 420, 423 (1968) (bare fact that a condition is open and obvious does not necessarily mean the condition is unreasonably dangerous, but an open and obvious condition is merely a factor to be taken into consideration in determining whether a condition of retail premises was unnecessarily dangerous).

42. *See* Hlavaty v. Song, 107 Ariz. 606, 608, 491 P.2d 460, 462 (1971); Heth v. Del Webb's Highway Inn, 102 Ariz. 330, 333, 429 P.2d 442, 445 (1967); George v. Fox West Coast Theaters, 21 Ariz. App. 332, 334, 519 P.2d 185, 187 (1974).

43. *See* Preuss v. Sambo's of Ariz., Inc., 130 Ariz. 288, 289, 635 P.2d 1210, 1211 (1981); Berne v. Greyhound Parks of Ariz., Inc., 104 Ariz. 38, 41, 448 P.2d 388, 391 (1968); Bloom v. Fry's Food Stores, Inc., 130 Ariz. 447, 449, 636 P.2d 1229, 1231 (Ct. App. 1981).

44. W. PROSSER, *supra* note 1, § 61, at 392; *see also* Hlavaty v. Song, 107 Ariz. 606, 608, 491 P.2d 460, 462 (1971); Bloom v. Fry's Food Stores, Inc., 130 Ariz. 447, 449, 636 P.2d 1229, 1231 (Ct. App. 1981).

45. *See* Flowers v. K-Mart Corp., 126 Ariz. 495, 497, 616 P.2d 955, 957 (Ct. App. 1980); Rodriguez v. Besser Co., 115 Ariz. 454, 459, 565 P.2d 1315, 1320 (Ct. App. 1977); Barnum v. Rural Fire Protection Co., 24 Ariz. App. 233, 235, 537 P.2d 618, 620 (1975); *see also infra* note 117 and accompanying text.

46. *See* Scott v. Scott, 75 Ariz. 116, 121, 252 P.2d 571, 574 (1953); Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 475, 595 P.2d 1017, 1020 (Ct. App. 1979); Moore v. Maricopa County, 11 Ariz. App. 505, 508, 466 P.2d 56, 59 (1970); *see also infra* note 121 and accompanying text.

it becomes a jury question based on the evidence.[47] The facts of a case determine the scope of the invitation, which limits the invitee's status.

Scope of Invitation

An employee is a business visitor.[48] The invitee status pertains only to the area to which the invitation is extended;[49] therefore, the employee remains an invitee as long as he is within the area intended for his use or within an area arranged in a manner that leads the employee reasonably to think it is open to him.[50] The area may be expanded if the invitee is encouraged by the invitor to enter an area not usually included in the invitation,[51] but if the invitee goes solely on his own initiative, his status may be less than that of an invitee.[52]

Nicoletti v. Westcor raised three issues relating to the scope of the invitation.[53] The first two—whether the planter was within the scope of the invitation and what effect Nicoletti's use of the planter had on her status—are considered together in the next section. The third—whether the court could construe an implied invitation extending to the planter—is then discussed. In considering these issues, the court apparently ignored facts that might have precluded summary judgment.[54]

Exceeding the Scope of Invitation

Generally, the area of invitation includes a means of safe entrance to and exit from the property.[55] The duty to provide safe entrance and exit does not require the possessor to furnish the shortest route possible, only a

47. *See* Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 475, 595 P.2d 1017, 1020 (Ct. App. 1979); Moore v. Moricopa County, 11 Ariz. App. 505, 508, 466 P.2d 56, 59 (1970); RESTATEMENT (SECOND) OF TORTS § 434 (1965).

48. *See* RESTATEMENT (SECOND) OF TORTS § 332 comment j (1965).

49. W. PROSSER, *supra* note 1, § 61, at 391; RESTATEMENT (SECOND) OF TORTS § 332 comment l (1965):

> Likewise the visitor has the status of an invitee only while he is on the part of the land to which his invitation extends—or in other words, the part of the land upon which the possessor gives him reason to believe that his presence is desired for the purpose for which he has come. In determining the area included within the invitation, the purpose for which the land is held open, or the particular business purpose for which the invitation is extended, is of great importance.

See also F. HARPER & F. JAMES, *supra* note 1, § 27.12, at 1485, 1486; *supra* note 37 and accompanying text.

50. F. HARPER & F. JAMES, *supra* note 1, § 27.12, at 1486; *see also* Demaree v. Safeway Stores, Inc., 162 Mont. 47, 52, 508 P.2d 570, 573 (1973); Williams v. Morristown Memorial Hosp., 59 N.J. Super. 384, 390, 157 A.2d 840, 843 (1960); Egede-Nissen v. Crystal Mountain, Inc., 21 Wash. App. 130, 135-36, 584 P.2d 432, 437 (1978).

51. Rich v. Tite-Knot Pine Mill, 245 Or. 185, 192-93, 421 P.2d 370, 374 (1966); W. PROSSER, *supra* note 1, § 61 at 392; RESTATEMENT (SECOND) OF TORTS § 332 comment l (1965).

52. W. PROSSER, *supra* note 1, § 61, at 392; *see* Southwest Cotton Co. v. Pope, 25 Ariz. 364, 378, 218 P. 152, 156 (1923); *see also* Taylor v. Baker, 279 Or. 139, 148, 566 P.2d 884, 890 (1977); Rich v. Tite-Knot Pine Mill, 245 Or. 185, 193, 421 P.2d 370, 374 (1966); *infra* notes 55-56 and accompanying text.

53. *See* 131 Ariz. 140, 141, 639 P.2d 330, 331 (1982).

54. *See id.*

55. W. PROSSER, *supra* note 1, § 61, at 391; *see also* Cooley v. Makse, 46 Ill. App. 2d 25, 30, 196 N.E.2d 396, 398 (1964); Gray v. First Nat'l Bank, 250 Minn. 539, 541, 85 N.W.2d 668, 670 (1957); Seng v. American Stores Co., 384 Pa. 338, 344, 121 A.2d 123, 124 (1956).

reasonably safe way of approach and retreat.[56] Westcor, the defendant in *Nicoletti*, distributed maps of lighted sidewalks to employees.[57] Since Nicoletti knew or should have known of these sidewalks as a means of ingress and egress, the court determined she exceeded the scope of her invitation by using the planter.[58]

The leading Arizona case dealing with exceeding the scope of invitation is *Southwest Cotton Co. v. Pope*.[59] The court held that an oil salesman's area of invitation included the prospective buyer's office, but it did not extend to the cotton gin and seed house where his foot was caught in and injured by a seed conveyor.[60] The court determined his status at the time of injury was as a licensee rather than an invitee, and the duty owed him diminished accordingly.[61] *Southwest Cotton* was relied on by the *Nicoletti* court, which stated that its reasoning was analogous.[62] Other status-oriented jurisdictions also follow this analysis.[63]

Although the *Nicoletti* court asserted that the facts warranted using the reasoning employed in *Southwest Cotton*,[64] the court failed to express clearly the conclusions derived from that reasoning.[65] Each case involved a business invitee who the court determined had exceeded the scope of the invitation.[66] *Southwest Cotton*, however, specified that the invitee's act in exceeding the invitation entitled him to "no more care than an ordinary licensee . . . ."[67] While *Nicoletti* relied on *Southwest Cotton* for the proposition that a landowner's duty to make his premises reasonably safe for invitees does not extend to areas to which the visitor was not invited,[68] this court failed to explain exactly how Nicoletti's act of taking a shortcut

56. Harris v. Union Stock Yard & Transit Co., 29 Ill. App. 3d 1072, 1079, 331 N.E.2d 182, 188 (1975). After leaving defendant's building in which he had been working, plaintiff was injured when he attempted a shortcut and fell from a railroad flatcar which was part of a train obstructing his direct passage to the gate of the parking area. While defendant owed him a duty to provide reasonably safe means of ingress and egress, this did not require defendant to provide a specific route or the shortest route to the parking area. *Id. See also* Bolch v. Smith, 158 Eng. Rep. 666, 669-70 (1862):

> It is true the plaintiff had permission to use the path. Permission involves leave and license, but it gives no right. . . . Inasmuch as there was another way by which the plaintiff might have gone, but voluntarily chose the one which was out of order, I think he has no right of action against the defendant, and that he ought to have been nonsuited at the trial.

Regarding contributory negligence in choosing a place to walk, see Bellacome v. Baily, 426 A.2d 451, 453 (N.H. 1981).

57. 131 Ariz. at 141, 639 P.2d at 331.

58. *Id.* at 144, 639 P.2d at 334.

59. 25 Ariz. 364, 218 P. 152 (1923).

60. *Id.* at 379, 218 P. at 157.

61. *Id.*

62. 131 Ariz. at 143, 639 P.2d at 333.

63. *See* Beck v. Sherman Music Co., Inc., 164 Mont. 8, 11-12, 518 P.2d 986, 988 (1974); Egede-Nissen v. Crystal Mountain, Inc., 21 Wash. App. 130, 134-37, 584 P.2d 432, 436-37 (1978). For a case dealing with an analogous situation in which a licensee becomes a trespasser, see Morris v. Atchison, Topeka & Santa Fe Ry. Co., 198 Kan. 147, 159, 422 P.2d 920, 928 (1967).

64. 131 Ariz. at 143, 639 P.2d at 333.

65. *See id.*

66. *Id.* at 143, 639 P.2d at 330; Southwest Cotton v. Pope, 25 Ariz. 364, 379, 218 P. 152, 157 (1923).

67. 25 Ariz. at 379, 218 P. at 157.

68. 131 Ariz. at 143, 639 P.2d at 333.

changed her status and what duty was owed her because of the change.[69] If Nicoletti remained a business invitee, then Westcor owed her a duty to make the premises reasonably safe.[70] If she became a licensee, Westcor would have had a duty to warn of known dangers.[71] In that situation, Westcor's knowledge of the danger should have been a question of fact.[72] Even if Nicoletti became a trespasser, there might have been a factual question of whether Westcor knew that trespassers were using a limited area of the property.[73] Such factual issues would make summary judgment inappropriate.[74]

Instead of giving an affirmative statement of Nicoletti's status and Westcor's duty, the court said what the duty was not.[75] Since Arizona premises liability cases focus on the status of the injured party at the time the injury occurs to determine the defendant's duty and the liability of the owner or occupant,[76] failure to state either Nicoletti's status or Westcor's duty to her leaves unclear the reasoning used by the *Nicoletti* court.[77] The scope of invitation might be expanded if the court determines an invitation is implied by the facts.

Implied Invitation

A question of fact also may have existed regarding the appellant's argument of implied invitation.[78] The *Nicoletti* court disposed of Nicoletti's argument that an invitation to cross the planter should be implied by analyzing Nicoletti's actions instead of Westcor's knowledge and actions.[79] *Nicoletti* contrasted its facts with *M.G.A. Theatres, Inc. v. Montgomery*,[80] which held the owner of a drive-in theater owed a duty to patrons to protect them from dangers caused by moving autos controlled by third persons because this danger could reasonably have been foreseen by the owner.[81] A seven-year-old patron who sat in the unlighted aisle in front of her mother's car was hit by an automobile.[82] Other patrons sat in the unlighted aisle, and no signs warned against such behavior.[83] A prominently displayed sign requested patrons to drive with lights out while in the theater.[84] Considering all the circumstances, the court found the owner ex-

69. *See id.*
70. *See supra* notes 39-41 and accompanying text.
71. *See supra* note 32 and accompanying text.
72. *See supra* note 47 and accompanying text. In fact, Westcor's warnings to children crossing the planter tend to indicate it had knowledge of the danger. *See supra* note 9 and accompanying text.
73. *See supra* note 31 and accompanying text.
74. *See Nicoletti*, 131 Ariz. at 142, 639 P.2d at 332.
75. *Id.* at 144, 639 P.2d at 334. The court says Westcor "did not have a duty to maintain the decorative planter of dense foliage so that adult employees could safely walk through the greenery to jaywalk across a busy parkway." *Id.*
76. *See supra* note 24 and accompanying text.
77. *See* 131 Ariz. at 144, 639 P.2d at 334.
78. *See infra* notes 89-93 and accompanying text.
79. *Nicoletti*, 131 Ariz. at 143-44, 639 P.2d at 333-34.
80. 83 Ariz. 339, 321 P.2d 1009 (1958).
81. *Id.* at 342-43, 321 P.2d at 1011.
82. *Id.* at 340-41, 321 P.2d at 1010.
83. *Id.* at 341, 321 P.2d at 1010.
84. *Id.*

tended an implied invitation to patrons who used areas not originally intended for their use because the proprietor knew or should have known of such use.[85] The *Nicoletti* court emphasized that the *M.G.A. Theaters* holding was based on "*all the circumstances*."[86]

The court's analysis of the circumstances in *Nicoletti* focused on Nicoletti instead of Westcor.[87] This was in marked contrast with the *M.G.A.* analysis, which focused on the defendant's knowledge of invitees' use of the area and his failure to prevent such use.[88] Without analyzing Westcor's knowledge or actions, the *Nicoletti* court concluded that the facts did not warrant construing an implied invitation.[89] The court supported its conclusion with Westcor's assertion that it warned children found crossing the planter against such behavior.[90] This can also be construed to support Nicoletti's contention that Westcor knew people used the planter as a pathway.[91] Nicoletti further supported this contention with testimony in depositions indicating that Westcor's landscape foreman observed people using the planter as a shortcut and that another store in the shopping complex erected a wooden ramp across its planted area.[92] This testimony and Westcor's conceded knowledge of children using the area presented a dispute of fact.[93] If a reasonable person could have inferred Westcor knew or should have known of such use, summary judgment on this issue would have been inappropriate.[94]

Summary judgment requires the court to view facts in the light most favorable to the party opposing the motion,[95] but the court here failed to do so. The court said that since Nicoletti received a map, she knew or should have known of the lighted sidewalks providing egress to the temporary parking area.[96] This implied a burden on Nicoletti to draw a legal conclusion that her invitation was limited to the lighted sidewalks.[97] The court's willingness to observe what Nicoletti knew or should have known and its failure to analyze Westcor's possible knowledge was contrary to the law governing summary judgment.[98]

The court stated that Nicoletti, as a reasonable person, could not have thought the planter an appropriate means of egress.[99] If Westcor's alleged

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85. *Id.*
86. 131 Ariz. at 143, 639 P.2d at 333 (emphasis in the original).
87. *Id.* at 144, 639 P.2d at 334; *see also infra* notes 96-98 and accompanying text.
88. 83 Ariz. at 341-42, 321 P.2d at 1010.
89. 131 Ariz. at 144, 639 P.2d at 334.
90. *Id.*
91. *See id.*
92. Appellant's Reply Brief at 3-4.
93. *See id.*
94. *See Nicoletti*, 131 Ariz. at 142, 639 P.2d at 332.
95. *Id.*
96. *Id.* at 144, 639 P.2d at 334.
97. *See id.*
98. *See supra* note 95 and accompanying text. See also Morelos v. Morelos, 129 Ariz. 354, 355, 631 P.2d 136, 137 (Ct. App. 1981) wherein the court stated:

> If there is the slightest doubt as to whether a factual issue remains in dispute, the granting of summary judgment is erroneous and such doubt must be resolved in favor of a trial on the merits, and, even if there is no factual dispute, where possible inferences to be drawn from the circumstances are conflicting, summary judgment is unwarranted.

99. 131 Ariz. at 144, 639 P.2d at 34.

knowledge of such use and its subsequent failure to prevent it could have been viewed as an implied invitation,[100] a jury may have seen Nicoletti's action as reasonable given all the circumstances of this case.[101] Close factual analysis may have recognized a genuine dispute of material fact which, if viewed most favorably for Nicoletti, would have rendered the summary judgment erroneous.[102] Consideration of all the facts under the general negligence approach may have produced a different result.

Negligence Analysis and Landowner's Duty

As discussed above,[103] Arizona follows the majority common law that bases the duty of an occupier of land primarily on the visitor's status.[104] Recent decisions in some jurisdictions, however, have abandoned the traditional reliance on status, applying instead the general negligence principle of reasonable care to determine the duty owed by an occupier of land.[105] For example, the California Supreme Court recently chose to determine liability based on the reasonableness of the defendant's conduct under the specific circumstances.[106] The entrant's status was not ignored; status was but one of many factors to be considered rather than being the primary factor that determined duty.[107] The court observed that traditional rules "obscure rather than illuminate the proper considerations which should govern determination of the question of duty."[108] California's lead has been followed in seven states[109] and the District of Columbia,[110] with approval from most commentators.[111] The licensee-invitee distinction has been repudiated in five states;[112] however, these states have retained more limited duty rules for trespassers. Courts in other states, including Arizona, have recently declined to overrule the status categories.[113]

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100. *See supra* notes 79-98 and accompanying text.
101. *See supra* notes 91-98 and accompanying text.
102. *See Nicoletti* 131 Ariz. at 142, 639 P.2d at 332.
103. *See supra* note 26 and accompanying text.
104. *Id.*
105. W. PROSSER, *supra* note 1, § 62, at 399; *see infra* notes 106, 109-10.
106. Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
107. *Id.* at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.
108. *Id.*
109. Webb v. City of Sitka, 561 P.2d 731, 732 (Alaska 1977); Mile High Fence Co. v. Radovich, 175 Colo. 537, 548, 489 P.2d 308, 314 (1971); Pickard v. City of Honolulu, 51 Hawaii 134, 135, 452 P.2d 445, 446 (1969); Cates v. Beauregard Elec. Coop., 328 So.2d 367, 371 (La. 1976); Oullette v. Blanchard, 116 N.H. 552, 557, 364 A.2d 631, 634 (1976); Basso v. Miller, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976); Mariorenzi v. Joseph Diponte, Inc., 114 R.I. 294, 307, 333 A.2d 127, 133 (1975).
110. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).
111. *See* Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 512 n.163 (1976).
112. Poulin v. Colby College, 402 A.2d 846, 851 (Me. 1979); Mounsey v. Ellard, 363 Mass. 693, 707, 297 N.E.2d 43, 51 (1973); Peterson v. Balach, 294 Minn. 161, 173, 199 N.W.2d 639, 642 (1972); O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977); Antoniewice v. Reszcynski, 70 Wis. 2d 836, 846-855, 236 N.W.2d 1, 5-10 (1975).
113. Robles v. Severyn, 19 Ariz. App. 61, 63, 504 P.2d 1284, 1286 (1973); Gerchberg v. Laney, 223 Kan. 446, 450-51, 576 P.2d 593, 597-98 (1978); Egede-Nissen v. Crystal Mountain, Inc., 93 Wash. 2d 127, 132, 606 P.2d 1214, 1218 (1980). *See also* Hawkins, *Premises Liability after Repudi-*

One court recognized that adherence to common law classifications often results in resolution of an owner's liability as a matter of law,[114] thus preventing the jury from determining negligence.[115] The jury function is to decide questions of fact upon which reasonable men could differ, while the court administers rules of law and determines facts upon which there could be no reasonable difference of opinion.[116] Duty is a question of law for the court in the general negligence formula,[117] but the existence of such duty may depend upon finding certain facts are true.[118] The defendant's knowledge of a danger or defect and the foreseeability that the plaintiff would encounter the risk may be jury questions.[119] Use of status as determinant of duty in premises liability precludes this jury involvement.[120] Status as the sole determinant of duty has been repudiated by one court because its application imposes a harshness by "preventing the jury from applying changing community standards to a landowner's duties."[121]

The Arizona Supreme Court has not considered the California rationale,[122] but the court of appeals has rejected a challenge to the traditional status categories without discussing alternatives.[123]

Conclusion

In *Nicoletti v. Westcor*, the court held a landowner was not liable to a business invitee who was injured when she took a shortcut to a parking lot because she exceeded the scope of her invitation, thereby diluting the duty owed her. The decision by the Arizona Supreme Court to uphold the trial court's summary judgment purported to follow previous Arizona decisions involving the duty an occupier of land has to visitors. Although the court determined that the duty owed to the appellant was diluted, the court failed to decide exactly what the duty became, thereby making difficult the determination of whether summary judgment was appropriate. Moreover, by focusing solely on Nicoletti's action, the court avoided careful analysis of certain alleged facts pertaining to Westcor. These facts, if viewed in the light most favorable to Nicoletti, might have required reversal of the summary judgment.

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114. Mile High Fence Co. v. Radovich, 175 Colo. 537, 543, 489 P.2d 308, 312 (1971). *But see supra* note 93 and accompanying text.

115. Mile High Fence Co. v. Radovich, 175 Colo. 537, 543-44, 489 P.2d 308, 312 (1971).

116. W. PROSSER, *supra* note 1, § 45, at 289.

117. *Id.* at 206; *see also supra* note 45 and accompanying text.

118. *See* W. PROSSER, *supra* note 1, § 37, at 206.

119. *See* Rowland v. Christian, 69 Cal. 2d 108, 119, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968); *see also supra* note 116 and accompanying text.

120. *See supra* note 114 and accompanying text.

121. Mile High Fence Co. v. Radovich, 175 Colo. 537, 542, 489 P.2d 308, 312 (1971).

122. *See* Barnhizer v. Paradise Valley Unified School Dist. No. 69, 123 Ariz. 253, 254-55, 599 P.2d 209, 210-11 (1979); Hicks v. Superstition Mountain Post No. 9399, 123 Ariz. 518, 520-21, 601 P.2d 281, 283-84 (1979); Berne v. Greyhound Parks of Ariz., Inc., 104 Ariz. 38, 41, 448 P.2d 388, 391 (1968).

123. Robles v. Severyn, 19 Ariz. App. 61, 63, 504 P.2d 1284, 1286 (1973). *See also* Payne v. Greenberg Constr., 130 Ariz. 338, 343, 636 P.2d 116, 121 (Ct. App. 1981).

The result might have been different if Arizona followed the modern rule de-emphasizing the plaintiff's status and focusing instead on the reasonableness of the defendant's conduct in view of all the circumstances. Under this view, the jury would play a role in determining foreseeability of the risk as a basis for the judge's ruling as to the existence of a duty. This process would make summary judgment much less likely.

David K. Gray

B. SCOPE OF EMPLOYMENT: AN EMPLOYER'S LIABILITY TO PERSONS INJURED BY EMPLOYEES WHO ARE REMUNERATED FOR TRAVEL

The imputation of the negligence of an employee to an employer is known as the doctrine of *respondeat superior*.[1] Under this doctrine, before a master will be liable for a servant's wrongdoing, it must be shown that the relation of master and servant existed at the time the injury occurred.[2] If such a relationship existed, then it must be shown that the act in question was within the scope of the servant's employment.[3] If it was, the act will be treated as if the employer himself had committed it.[4]

At least two reasons are given to support this tort concept. First, it is just and reasonable that where one of two innocent persons must suffer from an agent's or servant's wrongful act, the principal or master who has put the agent in a position to commit such a wrong, rather than the injured

1. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 69, 458-59 (4th ed. 1971). The situation in which an employer becomes liable for the employee's action is also commonly known as vicarious liability. *Id.* Professor Prosser explains that an action for vicarious liability is still an ordinary negligence claim to which the rules of liability for negligence should be applied. *Id.*

At early common law the master was held absolutely liable for the wrongful actions of his servants. T.F. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 472 (1956). In the thirteenth century, however, the liability of the master began to turn on whether the master had commanded or consented to the wrongful act of the servant. T.F PLUCKNETT, *supra*, at 472. In the thirteenth century the master was assumed to be the director of the servant's misdeeds. *Id.* As Plucknett explains, this often imposed the burden upon the master of proving his innocence. *Id.* If the servant went beyond the orders of his master and misbehaved, the master was not held liable. *Id.* at 475. As commerce and industry expanded after 1700 so did the vicarious liability of the master with the courts eventually abandoning the fiction that the master had commanded the servant's act. W. PROSSER, *supra*, at 458-59. See RESTATEMENT (SECOND) OF AGENCY § 220 (1957) for a precise definition of who is considered a servant. For a variety of reasons that have been offered for the vicarious liability of the master, see W. PROSSER, *supra*, at 459.

2. *See* Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 133, 65 P.2d 35, 36-37 (1937). *See generally* Ray v. Tucson Medical Center, 72 Ariz. 22, 33, 230 P.2d 220, 228 (1951) (doctrine of *respondeat superior* rests upon the master's right to exercise direction and control over the servant). Although both the employment relationship and the scope of employment issues must be considered in determining the vicarious liability of an employer, this Casenote will focus only on the scope of employment question. The determination of whether a master-servant relationship existed at the time of the injury is generally resolved by examining whether the employer had control over the servant and/or whether liability should be imputed as a cost of doing business. Hinman v. Westinghouse Elec. Co., 2 Cal. 3rd 956, 959-60, 471 P.2d 988, 990, 88 Cal. Rptr. 188, 190 (1970); *infra* notes 9-13.

3. *See* Ray v. Tucson Medical Center, 72 Ariz. 22, 32, 230 P.2d 220, 228 (1951).

4. *See* Driscoll v. Harmon, 124 Ariz. 15, 16, 601 P.2d 1051, 1052 (1979). *See generally* Larsen v. Arizona Brewing Co., 84 Ariz. 191, 198, 325 P.2d 829, 834 (1958) (recovery not permitted where the employee was not deemed to be acting in furtherance of his employer's business or within the employer's control); *infra* notes 6-13 and accompanying text.

person, should bear the financial burden.[5] Second, by undertaking to manage his affairs through others, an employer becomes bound to control his agents so that third persons are not injured while the agents are acting within the scope of employment.[6] The rationale for this second concept appears to be two-fold. First, the master's liability has been said to be based on both the employer's power of control and superintendence over the servant[7] and the fact that the employee is acting in furtherance of the employer's purposes.[8] The second rationale is based not on control, but on risk allocation.[9] Under this rationale, the torts of those employees acting in the scope of employment which cause financial losses should be placed upon the enterprise as a required cost of doing business.[10] The employer is better able to absorb and distribute the costs of business through either liability insurance or higher prices to the public.[11] In essence, it is the employer's responsibility both to hire competent employees[12] and to accept the risks that may be regarded as typical or broadly incidental to the enterprise he has undertaken.[13]

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5. *See* Ohio Farmers Ins. Co. v. Norman, 122 Ariz. 330, 594 P.2d 1026 (Ct. App. 1979) (court imposed liability on the employer even though he had expressly forbidden the employee to perform the act in question); Tillar v. Reynolds, 96 Ark. 358, 131 S.W. 969 (1910) (employer held liable for his agent's act which caused the death of an employee); W. PROSSER, *supra* note 1, at 459.

6. *See* Anderson v. Gobea, 18 Ariz. App. 277, 501 P.2d 453 (1972). In *Gobea*, the court held the employer liable to third parties who were injured due to the employee's negligence while concurrently performing a service for his employer and driving home from work. *Id.* at 282, 501 P.2d at 458. The court reasoned that liability was proper in such an instance based on consideration of public policy, convenience, and justice. *Id.* at 280, 501 P.2d at 456. *See generally* Consolidated Motors, Inc. v. Ketcham, 49 Ariz. 295, 66 P.2d 246 (1937) (the general employer's right to control work done by an employee for another employer determines whether the general employer is liable for negligent acts during such work); RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (sets forth requirements when a master is liable for torts of his servants).

7. *See* State v. Superior Court, 111 Ariz. 130, 132, 524 P.2d 951, 953 (1974); Throop v. F.E. Young & Co., 94 Ariz. 146, 150, 382 P.2d 560, 562-63 (1963); Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 134, 65 P.2d 35, 37 (1937).

8. *See* Ohio Farmers Ins. Co. v. Norman, 122 Ariz. 330, 332, 594 P.2d 1026, 1028 (Ct. App. 1979); District of Columbia v. Davis, 386 A.2d 1195 (D.C. 1978); Park Transfer Co. v. Lumbermens Mut. Casualty Co., 142 F.2d 100 (1944).

9. *See* Hinman v. Westinghouse Elec. Co., 2 Cal. 3rd 956, 960, 471 P.2d 988, 990, 88 Cal. Rptr. 188, 190 (1970) (court adopted the risk allocation theory as the principal justification for *respondeat superior*); W. PROSSER, *supra* note 1, at 459. According to Professor Prosser, the deliberate allocation of risk theory is emerging as the modern justification for vicarious liability. W. PROSSER, *supra* note 1, at 459.

10. *See* Hinman v. Westinghouse Elec. Co., 2 Cal. 3rd 956, 960, 471 P.2d 988, 992, 88 Cal. Rptr. 188, 190 (1970). In reaching a decision, the *Robarge* court could have utilized the approach of *Hinman*, a California Supreme Court decision. The *Hinman* court held that where an employee was traveling in his own car from his jobsite to his home and was paid "travel time" and "travel expense," the doctrine of *respondeat superior* was applicable to make the employer liable for the negligence of the employee. *Id.* at 962, 471 P.2d at 992, 88 Cal. Rptr. at 192. The court did not, as would be done in Arizona, examine whether the employee was under the control of the employer. *Id.* at 960, 471 P.2d at 990, 88 Cal. Rptr. at 190. Instead, the California court chose to put the financial burden on the employer as a cost of doing business. *Id.* at 962, 471 P.2d at 992, 88 Cal. Rptr. at 192. *See* W. PROSSER, *supra* note 1, at 459.

11. W. PROSSER, *supra* note 1, at 459. Professor Prosser explains that, according to the theory of risk allocation, the doctrine of respondeat superior shifts the financial burden of tort-induced loss to society and the community at large. *Id.*

12. *Id.*

13. Hinman v. Westinghouse Elec. Co., 2 Cal. 3rd 956, 960, 471 P.2d 988, 990, 88 Cal. Rptr. 188, 190 (1970) (citing 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1376-77 (1956)).

In *Robarge v. Bechtel Power Corp.*[14] the Arizona Court of Appeals was presented with the question of whether the defendant, Bechtel Power Corporation, could be liable under the doctrine of *respondeat superior* to third parties injured by a Bechtel employee who was compensated for his travel time to and from work. The specific issues in *Robarge* were: 1) whether principles of workmen's compensation law, if any, are applicable in a negligence case, and 2) whether an employee's travel to and from work is within the scope of his employment, under the doctrine of *respondeat superior*, if he is compensated for travel time.[15]

In September 1978, an employee of Bechtel was involved in an automobile accident that caused serious injuries to the plaintiffs.[16] The incident occurred after the employee had finished his work for the day and was driving to his home approximately fifty miles away.[17] Under a provision in the employee's union contract, he received a travel allowance of six dollars per day.[18] The plaintiffs alleged that due to this travel allowance the employer should be vicariously liable for the injuries they sustained in the accident under the theory of *respondeat superior*.[19] This allegation was rejected when the trial court granted summary judgment in favor of the defendant.[20]

On appeal, the plaintiffs challenged the lower court's summary judgment as improper, arguing that the court did not have before it all of the facts necessary to a determination, particularly Bechtel's employment contract with the employee.[21] The plaintiffs contended further that the contract terms might allow the court to view the travel allowance as compensation for travel time rather than travel expense.[22] Whether the allowance was compensation was a disputed factual issue, the plaintiffs argued, that was crucial to a determination of the scope of employment issue.[23] The court of appeals dismissed the first contention that facts were lacking, holding that since the plaintiffs failed to produce evidence demonstrating that a genuine issue of fact existed, summary judgment was appropriate.[24] The court next held that, as a matter of law, Bechtel's employee

14. 131 Ariz. 280, 640 P.2d 211 (Ct. App. 1982).
15. *Id.* at 282, 640 P.2d at 213.
16. *Id.* at 281, 640 P.2d at 212.
17. *Id.* The employee was driving his own car. *Id.*
18. *Id.*
19. *See* Appellant's Opening Brief at 3.
20. 131 Ariz. at 281, 640 P.2d at 212.
21. *Id.* The provision of the employment contract at issue was a travel allowance of six dollars per day. *Id.*
22. *See id.*
23. *Id.*
24. *Id.* Arizona's summary judgment rule provides:

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may at any time after the expiration of 21 days from the service of process upon the adverse party or after service of a motion for summary judgment by the adverse party, move without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

ARIZ. R. CIV. P. 56(a) (1973). The *Robarge* court found that the appellants had not set forth any specific issues of material fact; hence, summary judgment was proper. *See* 131 Ariz. at 281, 640 P.2d at 212.

was not in the scope of employment when the accident occurred.[25] In reaching this decision the court chose not to apply workmen's compensation principles[26] and refused to base a determination of the scope of employment on a distinction between those allowances for "travel expense" and those compensating for "travel time."[27]

This Casenote examines how the Arizona Court of Appeals determined whether the doctrine of *respondeat superior* or principles of workmen's compensation were applicable in this particular case. This Casenote will then discuss why the court ruled that under the doctrine of *respondeat superior* the employee in *Robarge* was not acting within the scope of his employment when traveling home from work.[28]

Determining When an Employee is Within the Scope of His Employment

Arizona follows the general rule that a master is liable only for those torts of his servants that occur while the servant is within the scope of employment.[29] To be considered within the scope of employment, an employee must meet several requisites set forth in Arizona case law.[30] In *Anderson v. Gobea*,[31] the court of appeals followed the standards of section 228 of the Restatement (Second) of Agency in ruling that the acts of a servant are within the scope of employment only if: 1) the act is typical of the kind of work the employee was hired to perform; 2) the act occurs

25. *Id.* at 284, 640 P.2d at 215.

26. *Id.* at 282, 640 P.2d at 213. *See infra* notes 43-44 and accompanying text.

27. *See* 131 Ariz. at 284, 640 P.2d at 215; *infra* notes 78-83.

28. *Robarge* merits attention due to its discussion of how the "going and coming rule" and the "travel time" versus "travel expense" issue relate to whether an employee is within the scope of his employment. The summary judgment challenge will not be considered, since the court followed Arizona precedent in granting the motion. *See generally* Perez v. Tomerlin, 86 Ariz. 66, 340 P.2d 982 (1959) (if a party against whom a motion for summary judgment is granted wants to stay in court, he cannot withhold an appropriate showing until time of trial); Gibson v. Parker Trust, 22 Ariz. App. 342, 527 P.2d 301 (1974) (since no material question of fact existed, summary judgment was properly granted as a matter of law); Scottsdale Jaycees v. Superior Court, 17 Ariz. App. 571, 499 P.2d 185 (1972) (legal conclusions to be drawn from facts in dispute are properly resolved by the court sitting in its judicial capacity).

29. Scottsdale Jaycees, 17 Ariz. App. 571, 574, 499 P.2d 185, 188 (1972); Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 393-94, 381 P.2d 107, 113 (1963).

30. *See* Anderson v. Gobea, 18 Ariz. App. 277, 280, 501 P.2d 453, 456 (1972). *See generally* Scottsdale Jaycees, 17 Ariz. App. 571, 499 P.2d 185 (1972) (tortious acts of the servant can be imputed to the employer only if, among other things, the acts occur substantially within the authorized time and limits and the master has the right of control over the servant); Transamerica Ins. Co. v. Valley Nat'l Bank, 11 Ariz. App. 121, 462 P.2d 814 (1969) (act of a servant is within the scope of employment if it is the kind of act he is hired to perform, occurs within time and space limits, and if the act is done at least in part within the purpose of serving the master).

The RESTATEMENT (SECOND) OF AGENCY § 228 (1958) has a very clear and concise definition of what constitutes within the scope of employment:

(1) Conduct of a servant is within the scope employment if, but only if:
   (a) it is the kind he is employed to perform;
   (b) it occurs substantially within the authorized time and space limits;
   (c) it is actuated, at least in part, by a purpose to serve the master, and
   (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master.

31. 18 Ariz. App. 277, 501 P.2d 453 (1972).

within the authorized time and space; and 3) some part of the act was intended to serve the master.[32] In *State v. Superior Court*,[33] the court ruled that the doctrine of *respondeat superior* applies to hold an employer liable for the negligence of his employee when the employer is in control of the physical conduct and performance of the servant. The test, as set forth by the court of appeals in *Ohio Farmers Insurance Co. v. Norman*,[34] stated that to be within the scope of employment the employee must perform a service in furtherance of his employer's business at the time of the injuries.

An application of the above principles can be seen in the "going and coming" rule. This rule states that an employee is not acting within the scope of employment while going to or coming from his place of employment.[35] Employment begins only when the master has the right to control

32. *Id.* at 280, 501 P.2d at 456. *See generally* Throop v. F.E. Young & Co., 94 Ariz. 146, 382 P.2d 560 (1963) (employer not liable for the negligence of its traveling salesman since the employer had no right of control over the employee's actions); *supra* note 29.

33. 111 Ariz. 130, 132, 524 P.2d 951, 953 (1974). See RESTATEMENT (SECOND) OF AGENCY § 219 (1958) for an explanation of when a master is liable for the torts of his servants. *See generally* Consolidated Motors, Inc. v. Ketcham, 49 Ariz. 295, 66 P.2d 246 (1937) (early Arizona case which utilized the requirements as set forth in the RESTATEMENT (SECOND) OF AGENCY § 219 (1958) in determining whether the employer was liable for the acts of his employee).

34. 122 Ariz. 330, 332, 594 P.2d 1026, 1028 (Ct. App. 1979).

35. State v. Superior Court, 111 Ariz. 130, 132, 524 P.2d 951, 953 (1974); Faul v. Jelco, Inc., 122 Ariz. 490, 492, 595 P.2d 1035, 1037 (Ct. App. 1979). For Arizona cases in support of the going and coming rule, see, for example, Pauley v. Industrial Comm'n, 109 Ariz. 298, 508 P.2d 1160 (1973) (for workmen's compensation purposes, employee is not in the course of her employment while off the employer's premises and not within the employer's control); Burns v. Wheeler, 103 Ariz. 525, 446 P.2d 925 (1968) (employer is not liable for the negligence of employee driving his own car during his lunch hour, since the employee was not paid at time of accident nor within employer's control); and Butler v. Industrial Comm'n, 50 Ariz. 516, 73 P.2d 703 (1937) (two co-employers are liable for workmen's compensation for injuries sustained by an employee while walking from one job to another, with the intention of returning to finish the first job upon completion of the second job).

There are two exceptions to the general "going and coming" rule. One exception is that when travel to and from work involves special hazards an employee is considered to be within the scope of his employment. *See* Faul v. Jelco, 122 Ariz. 490, 492, 595 P.2d 1035, 1037 (Ct. App. 1979). Although this exception was recognized in Kerr v. Industrial Comm'n, 23 Ariz. App. 106, 530 P.2d 1139 (1975), the evidence in *Faul* did not allow for a finding of a special hazard. In *Kerr*, the court ruled that long distance travel alone does not constitute a hazard. 23 Ariz. App. at 108, 530 P.2d at 1141. *But see* Ridgeway v. Combined Ins. Cos. of America, 98 Idaho 410, 565 P.2d 1367 (1977) (because a special hazard existed when an employee's work required him to travel away from the employer's place of business, workmen's compensation benefits were awarded).

A second exception to the "going and coming" rule is the "dual purpose" doctrine. *See* Faul v. Jelco, 122 Ariz. 490, 492, 595 P.2d 1035, 1037 (Ct. App. 1979). The "dual purpose" exception is applied when the commuting employee performs a service for the employer that otherwise would have necessitated a trip by another employee. *Id.* The employer does not have to be the sole cause of the journey but must be a concurrent cause. *See also* Anderson v. Gobea, 18 Ariz. App. 277, 281, 501 P.2d 453, 457 (1972).

Judge Cardozo in Marks' Dependents v. Gray, 251 N.Y. 90, 93, 167 N.E. 181, 183 (1929), explained the "dual purpose" doctrine as follows:

> The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal and personal the risk. . . .

In Butler v. Industrial Comm'n, 50 Ariz. 516, 73 P.2d 703 (1937) and McKay v. Industrial Comm'n, 103 Ariz. 191, 438 P.2d 757 (1968), Arizona adopted the "dual purpose" doctrine as set forth by Judge Cardozo in *Marks*. *See also* Anderson v. Gobea, 18 Ariz. App. 277, 281, 501 P.2d 453, 457 (1972).

the servant's acts and it terminates when the master no longer has such a right of control.[36] Therefore, employment usually does not exist while the employee is in transit because the employee is not performing the work he was employed to do.[37] Confusion regarding the applicability of the "going and coming" rule arises, however, when the employer has paid the employee a travel allowance. It can be argued that such payment may bring an employee within the scope of employment and permit liability to be imputed to an employer for injuries to third persons caused by the employee. It is this problem which the court of appeals was required to address in *Robarge*.

Analysis of the Robarge *Decision*

The defendant corporation in *Robarge v. Bechtel Power Corp.*[38] paid its employees under a union contract for travel to and from work. While commuting, an employee of the defendant corporation injured a third party who sued the employer for her injuries under the doctrine of *respondeat superior*.[39]

The plaintiffs argued that the court should consider the employee within the scope of his employment at the time of the tort because he was being paid for commuting time.[40] The plaintiffs based their argument primarily on an exception to the "going and coming" rule found in workmen's compensation cases.[41] This exception allows the employee to be considered in the scope of employment when the employer pays for travel time.[42] In analyzing this argument, the court considered prior Arizona decisions applying workmen's compensation principles to questions of liability in negligence actions.[43] The *Robarge* court stated, however, that the

36. Scottsdale Jaycees, 17 Ariz. App. 571, 575, 499 P.2d 185, 189 (1972) (quoting RESTATEMENT (SECOND) OF AGENCY § 233(a)(1958)). *See generally* Burns v. Wheeler, 103 Ariz. 525, 446 P.2d 925 (1968) (employer not held liable when employee negligently causes an accident during employee's noncompensated lunch hour).

37. *See* Scottsdale Jaycees, 17 Ariz. App. 571, 575, 499 P.2d 185, 189 (1972) (where an organization had no control over a member in transit to a convention in another city, the master and servant relationship did not exist); RESTATEMENT (SECOND) OF AGENCY § 233 (1958) ("Conduct of a servant is within the scope of employment only during a period which has a reasonable connection with the authorized period"). *See also* RESTATEMENT (SECOND) OF AGENCY § 233 (1958) comment a (employment does not begin at the time it is necessary for an employee to act in order to perform the required service).

38. 131 Ariz. 280, 281, 640 P.2d 211, 212 (Ct. App. 1982).

39. *Id.*

40. *Id.* at 283, 640 P.2d at 214.

41. *Id.* at 282, 640 P.2d at 213. In urging the court to use the workmen's compensation exception to the "going and coming" rule, the plaintiffs in *Robarge* relied on two Arizona workmen's compensation cases holding that when an employee is compensated for travel time while commuting he is deemed to be within the scope of his employment. *See* Serrano v. Industrial Comm'n, 75 Ariz. 326, 256 P.2d 709 (1953); Fisher Contracting Co. v. Industrial Comm'n, 27 Ariz. App. 397, 555 P.2d 366 (1976).

42. 131 Ariz. at 282, 640 P.2d 213. The general rule under the doctrine of *respondeat superior* is that travel to and from work is not within the scope of employment. *Id. See supra* notes 35-37.

43. 131 Ariz. at 282, 640 P.2d at 213. The courts in Arizona have often cited workmen's compensation cases as precedential authority in tort cases. *See, e.g.*, Driscoll v. Harmon, 124 Ariz. 15, 601 P.2d 1051 (1979); State v. Superior Court, 111 Ariz. 130, 524 P.2d 951 (1974); Faul v. Jelco, Inc., 122 Ariz. 490, 595 P.2d 1035 (Ct. App. 1979); Anderson v. Gobea, 18 Ariz. App. 277, 501 P.2d 453 (1972).

application of workman's compensation principles in this case would not be appropriate.[44] The court reached its conclusion based on two cases, *Luth v. Rogers & Babler Construction Co.*,[45] an Alaska Supreme Court decision, and *Driscoll v. Harmon*,[46] an Arizona Supreme Court case.

In *Luth*, the injured occupants of a vehicle sought to hold the employer of a negligent motorist liable under the doctrine of *respondeat superior*.[47] At the time of the accident the employee was returning home from his jobsite, which was located quite a distance from his home.[48] The central question in the case was whether the employee was acting within the scope of employment at the time of the accident. The plaintiffs attempted to use the workmen's compensation exception to the "going and coming" rule, under which the employee would have been considered in the scope of employment since he was paid a daily travel allowance.[49]

The Alaska court rejected the application of workmen's compensation law, pointing out that an award of workmen's compensation benefits turns solely on whether the employee was injured while performing an act that was related to the job,[50] while the principle of *respondeat superior* depends on the employer's right to control the employee at the time of the tortious act.[51] The difference in the tests, the *Luth* court noted, is due to the recognition by courts that, since employers may be subject under *respondeat superior* to liability for injuries suffered by an indefinite number of third persons, their liability should be based on the more limited range of acts defined by the "control" test.[52] Under workmen's compensation, the employer's liability already is limited because it extends only to the injured employee.[53] Consequently, the "scope of employment" under *respondeat superior* defines a narrower range of activities than does the requirement of relatedness under workmen's compensation principles.[54] After a consideration of the two doctrines, the court in *Luth* was not willing to expand the liability of an employer under the doctrine of *respondeat superior* to include acts committed by an employee in "related" activities over which the employer has no control and from which he receives no benefits.[55]

In *Driscoll v. Harmon*,[56] the Arizona Supreme Court used the same type of reasoning in a negligence action, requiring that the doctrine of *re-*

44. 131 Ariz. at 282, 640 P.2d at 213. The court said that workmen's compensation principles should not be mechanically applied in negligence cases. *Id.*

45. 507 P.2d 761 (Alaska 1973).

46. 124 Ariz. 15, 601 P.2d 1051 (1979).

47. *See* 507 P.2d at 762-63.

48. *Id.* at 762.

49. *Id.* at 763. *See supra* note 42 and accompanying text.

50. 507 P.2d at 764.

51. *Id.* The Court in *Luth* ruled that it was a jury issue as to whether the employee was within the scope of his employment. *Id.* In *Robarge*, the court found as a matter of law that Bechtel's employee was not within the scope of employment. 131 Ariz. at 282, 640 P.2d at 213. *See also* Balise v. Underwood, 71 Wash. 2d 331, 428 P.2d 573 (1967) (only when the facts relative to the questioned employer-employee relationship are without dispute or lend themselves to only one conclusion, should the answer be determined by the judge).

52. 507 P.2d at 764.

53. *See id.*

54. *See id.*

55. *See id.*

56. 124 Ariz. 15, 601 P.2d 1051 (1979).

spondeat superior rather than workmen's compensation principles, be used to determine an employer's liability. In *Driscoll*, an off-duty enlisted man struck the plaintiff, who was crossing a street on base, while he was driving to his off-base residence.[57] When sued by the plaintiffs for negligence, the defendant enlisted man moved to dismiss, arguing that the action was prohibited by a federal statute that bars suits against federal employees for acts occurring within the scope of their employment.[58] The trial court granted the motion but was later reversed by the court of appeals, which remanded the case for a determination of whether the defendant was acting within the scope of his employment.[59] On remand, the trial court granted the defendant's motion for summary judgment after it found that he was acting within the scope of his employment.[60] An appeal was taken to the Arizona Supreme Court to determine the scope of employment question.[61] Since the accident occurred while the defendant was on the employer's premises, the defendant argued that he was within the scope of his employment when the accident occurred.[62]

The court noted that generally an employee going to and coming from work is covered by workmen's compensation while he is on the employer's premises.[63] The basis of this rule, the court stated, is that employees should be compensated for injuries incurred while within the range of dangers associated with the employer's premises.[64] The court found, however, that travel to and from work on essentially public streets is not within the dangers associated with the duties of enlisted military personnel.[65] Therefore, the defendant was not within the scope of his employment under workmen's compensation principles.[66] Additionally, the court did not wish to give the benefit of workmen's compensation principles to a defendant who was not an injured worker, since the rule was designed to compensate workers injured within the scope of their employment.[67] Although the defendant could not use the workmen's compensation exception to establish that he was within the scope of his employment, the court next considered whether the employer, the United States, could be liable under the doctrine of *respondeat superior*.[68] Since the defendant had finished his shift and was driving to his off-base residence in his own vehicle when the accident occurred, the court held that the defendant was not acting within his

57. *Id.* at 15.
58. *Id.* at 15-16, 601 P.2d at 1051-52. The Federal Drivers Act, 28 U.S.C. § 2679(b) (1976) bars such suits. 124 Ariz. at 16, 601 P.2d at 1052. A suit against the United States under the Tort Claims Act, 28 U.S.C. § 1346 (1976 & Supp. IV 1980), is the exclusive remedy against a federal employee who is involved in an accident while within the scope of his employment. 124 Ariz. at 16, 601 P.2d at 1052.
59. 124 Ariz. at 16, 601 P.2d at 1052.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *See id.*
67. *Id.*
68. *Id.*

course of employment.[69] Consequently, the United States could not be liable under the doctrine of *respondeat superior*.

After considering *Luth* and *Driscoll*, the *Robarge* court concluded that the appropriate standards for determining liability in this negligence action were the traditional principles of *respondeat superior*, not workmen's compensation.[70] Therefore, it was necessary for the *Robarge* court to determine whether the defendant employee was within the scope of his employment when the accident occurred.[71]

The court set out two preliminary requirements that must exist before an employer can be held vicariously liable: 1) the employee must be within the employer's control; and 2) the employee must be acting in furtherance of the employer's business.[72] In determining whether these two requirements existed at the time of the accident, the court considered the case of *State v. Superior Court*.[73] In that case, a national guardsman was involved in a fatal auto accident while traveling from his home to report for training duty in another city.[74] The court held that the employer was not liable under the doctrine of *respondeat superior* because no master-servant relationship existed when the accident occurred.[75] The employee was not under the control of the state while traveling, even though he was reimbursed ten cents per mile for his travel expenses.[76]

The plaintiffs in *Robarge* attempted to distinguish *State v. Superior Court* on the basis that the employee in that case was paid for travel expenses, while the defendant's employee in *Robarge* was compensated for travel time.[77] The plaintiffs argued that distinguishing travel time from travel expense was crucial in determining whether the defendant's employee was within the scope of his employment.[78]

To determine whether remuneration for travel time affects a determination of scope of employment, the *Robarge* court looked to the recent Wyoming Supreme Court decision of *Beard v. Brown*.[79] In *Brown*, the

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69. *Id.* at 17, 601 P.2d at 1053.

70. 131 Ariz. at 282-83, 640 P.2d at 213-14. The *Robarge* court did not hold that workmen's compensation principles can never be applied to a negligence action. It ruled that on the facts of *Robarge*, it was inappropriate to use workmen's compensation as a standard for determining if the defendant was within the scope of his employment. *Id.* For the principles of *respondeat superior*, see *supra* notes 12-13.

71. 131 Ariz. at 283, 640 P.2d at 214.

72. *Id.* These requirements can be phrased differently by saying that a master-servant relationship must exist when the wrongful act was committed. *See* Ray v. Tucson Medical Center, 72 Ariz. 22, 33, 230 P.2d 220, 227 (1951).

73. 111 Ariz. 130, 524 P.2d 951 (1974).

74. *Id.* at 132, 524 P.2d at 953.

75. *Id.*

76. *Id.* at 133, 524 P.2d at 954. The court quoted from Lundberg v. State, 25 N.Y.2d 467, 472, 306 N.Y.S.2d 947, 951, 255 N.E.2d 177, 179 (1969):

> [T]he mere fact that the State had agreed to pay (his) travel expenses, in the form of a mileage allowance, did not bestow in it any right of control. To hold that by simply paying his travel expenses . . . the State opened itself to liability for any tortious act he might commit while traveling . . . would be patently unfair and beyond the scope of the doctrine of respondeat superior.

77. 131 Ariz. at 283, 640 P.2d at 214.

78. *Id.* at 281, 640 P.2d at 212.

79. 616 P.2d 726 (Wyo. 1980).

injured third party attempted to prove that an employee was acting within the scope of employment when an auto accident occurred by showing that the employee was paid for travel time to and from work.[80] The court held as a matter of law that the employee was not acting within the scope of employment despite the payment for travel time.[81] The court reasoned that payment for time spent traveling to and from work neither bestows any direct benefits on the employer nor gives the employer any control over the employee's acts.[82] Imposing liability in this situation, the court found, not only would be unfair to the employer but also would be beyond the scope of the doctrine of *respondeat superior*.[83]

Therefore, the court concluded in *Robarge* that it would make no difference to the court's determination of "scope of employment" whether the employee had been compensated for travel time or travel expense.[84] Without some elements of control or furtherance of the employer's business, the doctrine of *respondeat superior* could not apply.[85] When the employee's work day ended, the employer did not control the employee's route or method of travel, and the employee had no work to perform for the employer after his shift.[86] Consequently, the *Robarge* court found that the Bechtel employee was not within his scope of employment when the accident occurred.[87]

Conclusion

In attempting to make the line between workmen's compensation and tort cases more distinct, *Robarge v. Bechtel Power Corp.* reaffirmed that although workmen's compensation principles may be applied to tort cases, they are not controlling. The court concluded that in this case the doctrine of *respondeat superior* was the appropriate standard to determine whether the employee was in the scope of employment. In choosing to apply the doctrine of *respondeat superior*, rather than workmen's compensation principles, the court has clearly limited the instances where an employer will be liable to persons injured by an employee who is paid for travel.

Before the court will consider an employee within the scope of employment, and thus impute liability to the employer under *respondeat superior*, the court will require that the employee be within the employer's control and acting in furtherance of the employer's business. Since neither of these elements was present in *Robarge*, it made no difference to the court whether the employee had been paid for travel time or travel expense. Thus, the general rule that the employer is not liable for the negli-

80. *Id.* at 730.
81. *Id.* at 735.
82. *Id.* at 735-36.
83. *Id.* at 736. To be within the scope of employment, the *Brown* court said that the employee's activity must be: 1) activated in part to serve the employer; 2) done with the intention to perform it as a part or incident to a service on account of which the employee is employed; and 3) performed in part to further the business interests of the employer. *Id.* at 735.
84. 131 Ariz. at 284, 640 P.2d at 215.
85. *Id.*
86. *Id.* at 283, 640 P.2d at 214.
87. *Id.* at 284, 640 P.2d at 215.

gent acts of commuting employees who are remunerated for travel is applicable in Arizona.

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