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Prayer in the Well: Some Heretical Reflections on the Establishment Syndrome©

*John E. Dunsford**

> *"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Everson v. Board of Education*[1]

> *"[T]he First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with a prayer . . . . A statute providing for the payment of these chaplains was enacted into law on Sept. 22, 1789." Marsh v. Chambers*[2]

Marsh v. Chambers[3] probably is not a case that will excite a lot of attention in the journals. Its conclusions run sufficiently against the grain of cultural bias to invite if not disbelief at least a practiced disposition to ignore.[4] Beyond that, with a modicum of effort the case can be dismissed by those not cottoning to its premises as a mere historical appendage to the larger issues of church-state jurisprudence. Indeed, a lengthy dissent by Justice Brennan labors mightily to diminish the importance of the majority's work by a patronizing description of it as a "narrow and, on the whole,

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* McDonnell Professor of Law, St. Louis University.

1. 330 U.S. 1, 16 (1947).
2. 103 S.Ct. 3330, 3333 (1983).
3. 103 S.Ct. 3330 (1983).
4. Or perhaps learned commentary, not unlike the popular press, prefers to concentrate on events that represent doctrinal breakthroughs or wrenching social departures rather than simple vindications of traditional interests. How else can the blanket indifference to a case like McDaniel v. Paty, 435 U.S. 618 (1978), be explained, where the fascinating issue was raised of whether the state can disqualify an ordained minister from serving as a legislator or delegate to a constitutional convention? One could argue that there is no greater establishment than where ministers serve as lawmakers. At the least, such an arrangement challenges our conception of what is meant by a separation of church and state. Yet a running of the indices of legal periodicals produces only two entries. *See* 64 A.B.A. J. 890 (June 1978); 24 N.Y.U. L. Rev. 963 (1979). The strange lack of public response was noted by Martin E. Marty. Marty, *Of Darters and Schools and Clergymen: The Religion Clauses Worse Confounded*, 1978 Sup. Ct. Rev. 171, 171-72.

careful opinion."[5] Yet *Marsh* exhibits this remarkable attribute that ought not to go unnoticed: In one simple stroke it exposes the infirmity of each of the three elements of the prevailing judicial test for an establishment of religion under the first amendment.

The facts in the case are simple but they tender a sharp bone to swallow for those who advocate a doctrine of absolute separation of church and state. The Nebraska Legislature, like that in many states, began lawmaking sessions with a prayer offered by a chaplain. Nebraska had engaged in that practice for over a century. A sum of money, $319.75 for each month the legislature was in session, was appropriated to pay the person who served as chaplain. The selection of that individual was made biennially by the Executive Board of the Legislative Council. Since 1965, the Executive Board had chosen the Reverend Robert Palmer, an ordained Presbyterian clergyman. Periodically the prayers offered by the chaplain, which were recorded each day in the legislative journal, were collected and published at public expense.[6]

One of the Nebraska senators, Ernest Chambers, objected to the practice of legislative prayer and brought a suit against Frank Marsh, the state treasurer who distributed the funds in payment to the chaplain. Also joined as defendants were the Reverend Palmer and the various legislators on the Executive Board. Senator Chambers alleged that the selection and payment of the chaplain, and the printing of the prayers at state expense, amounted to an establishment of religion in violation of the first amendment.[7]

In view of the fact that the Supreme Court has been energetically plumbing the meaning of the establishment clause since the case of *Everson v. Board of Education*[8] in 1947, one might assume that the available judicial rulings on the subject would afford clear guidance to a resolution of the Nebraska case. Doubtless that is what Senator Chambers must have thought too, though certainly not in any reliance on the Doric simplicity of the statement of the first amendment that "Congress shall make no law respecting an

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5. 103 S.Ct. at 3337 (Brennan, J., dissenting).

6. Petitioners, the state officials, had not challenged the injunction of the district court prohibiting the use of public funds to publish the prayers. Hence, that phase of the litigation was not before the Supreme Court. *See id.* at 3332 n.3 (majority opinion). However, because the payment of the chaplain to deliver the prayers ultimately was upheld, *id.* at 3336-37, a fine distinction would be necessary to condemn the subsidized publication.

7. Chambers v. Marsh, 504 F. Supp. 585, 591-92 (D. Neb. 1980), *aff'd*, 675 F.2d 228 (8th Cir. 1982), *rev'd*, 103 S.Ct. 3330 (1983).

8. 330 U.S. 1 (1947).

establishment of religion."[9] His confidence would have been placed instead in the rococo glosses that have been added by the judiciary. For the ban respecting an establishment of religion drafted by the First Congress and ratified by the states has gone through a series of pontifical statements by the Supreme Court to emerge in the following form in *Lemon v. Kurtzman*:[10]

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[11]

If this tripartite test faithfully reflects the meaning of the prohibition of an establishment of religion in the first amendment, is there any doubt that a subsidized chaplaincy for the legislature represents a violation? It is hard to imagine a secular legislative purpose for the offering of prayers at the beginning of each session.[12] Further, the primary effect of this legislative activity would seem to advance religion, at least to the extent that it represents an official acknowledgement of the efficacy of prayer. Finally, the degree of government entanglement with religion is total by virtue of the fact that a committee of legislators has chosen an ordained clergyman to serve as an agent of the state in leading prayers.

Nevertheless, in a six to three decision,[13] the Supreme Court

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9. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

10. 403 U.S. 602 (1971).

11. *Id.* at 612-13 (footnote omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

12. Both the district court and the Eighth Circuit mentioned the possibility that the prayer had the secular purpose of "bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner." Chambers v. Marsh, 504 F. Supp. 585, 589 (D. Neb. 1980), *aff'd*, 675 F.2d 228 (8th Cir. 1982), *rev'd*, 103 S.Ct. 3330 (1983). The question begging character of that response becomes apparent when it is asked why a prayer is chosen as the means to that end. The dissent in *Marsh* pointed out that there are nonreligious ways to bring a chamber to order. To use a prayer solely or primarily to achieve secular ends might also be considered blasphemous. "That the 'purpose' of legislative prayer is preeminently religious rather than secular seems to me to be self-evident." 103 S.Ct. at 3338 (Brennan, J., dissenting).

13. Chief Justice Burger wrote the majority opinion, which was joined by Justices White, Blackmun, Powell, Rehnquist and O'Connor. Justice Brennan wrote a dissenting opinion joined by Justice Marshall. Justice Stevens submitted a separate dissenting opinion.

in *Marsh* upheld the validity of the Nebraska arrangements for legislative prayer. In the light of 200 years of history in which American legislatures have opened sessions with prayer, the Court decided that what Nebraska did was not an establishment or even a step toward it.[14]

There is a story about the Englishman who, on reading the Bible for the first time in his own language after the invention of the printing press, exclaimed, "[e]ither this isn't the Bible, or we're not Christian." With comparable surprise, one pondering the acceptability of legislative prayer in the country's history may notice a striking disparity between the founders' meaning of establishment and the jurisprudence that has evolved in its wake. Either the decision in *Marsh* does not fairly reflect the first amendment or the *Lemon* tests are unconstitutional.

If for purposes of assessing the meaning and the reach of a legal enactment, even one of constitutional dimensions, it is appropriate to examine the circumstances leading to its creation and application, the case for the majority in *Marsh* surely is compelling. The very same Congress that proposed the first amendment to the states for ratification—specifically, for our purposes, that part of it containing the establishment clause—also legislated for the appointment and payment of chaplains for each House. Indeed, as the Supreme Court noted, the final congressional agreement on the language in the Bill of Rights that contains the ban on establishments came three days after the appointment of chaplains was authorized.[15] Further, no less a personage than James Madison was a member of the congressional committee that recommended the chaplain system. The Court puts its conclusion firmly and convincingly: "Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress."[16] And, of course, if the federal Congress is not passing a law respecting an establishment of religion when it provides for the appointment and payment of chaplains, the same acts when performed by a state are equally valid.[17]

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14. 103 S.Ct. at 3336.

15. Agreement came on the same day that the President was requested by House motion to set aside a day of thanksgiving to acknowledge "the many signal favors of Almighty God." *Id.* at 3334 n.9 (quoting J. OF THE H.R. 123).

16. *Id.* at 3334.

17. *See id.* at 3335: "In applying the First Amendment to the states through the

I. Opinions of Lower Courts

Unlike the Supreme Court, the lower courts reviewing the Nebraska legislative prayer apparently did not think that they had the latitude to tap original sources. In effect, they were stuck with the rigidities of the *Lemon* test. The district court, in particular, seemed restive under the limitations of the tripartite standard.[18] It first engaged in a brief historical excursion, noting that the legislatures of possibly all 50 states begin their sessions with prayer. The judge also recognized that complaints about the practice, similar to those of Chambers, had been voiced in the past; for example, John Jay and John Rutledge raised objections at the Constitutional Congress in 1774 over the opening of sessions with prayers. Indeed, in the attempt to be fair in this account, the district court may have given undue emphasis to the relatively few instances in which serious opposition had developed to the practice outside the *Everson* era.[19] In any event, the reference to this unavailing opposition through the years appears to lend reinforcement to the conclusion that the practice was not deemed unconstitutional, however wise or unwise certain individuals may have thought it. Caught in the dilemma of the revealing historical pattern on the one hand and the *Lemon* tests on the other, the district judge to his great credit tackled the problem with a minimum of predilections. He raised the interesting question whether a legislative act of self-organization ought to be considered the "making of a law" within the meaning of the first amendment, and whether one possibly could find a primary effect of advancing religion by the mere practice of an invocation.[20] Relying on a prior Eighth Circuit decision,[21] the district judge ultimately concluded[22] that the mere saying of prayers themselves was not prohibited under the Constitution but that paying the chaplain and subsequently publishing the books of those prayers ran afoul of the tests devised by the Supreme

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Fourteenth Amendment . . . , it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." (Citations omitted).

18. Chambers v. Marsh, 504 F. Supp. 585, 589 (D. Neb. 1980), *aff'd*, 675 F.2d 228 (8th Cir. 1982), *rev'd*, 103 S.Ct. 3330 (1983).

19. In his opinion, Chief Justice Burger made the telling point that the fact there was opposition to the practice through the years only strengthened the inference that the judgment of its constitutionality was deliberate. 103 S.Ct. at 3335.

20. 504 F. Supp. at 588.

21. Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979); *see infra* text accompanying note 29.

22. 504 F. Supp. at 592-93.

Court.[23] This crucial distinction seemed to turn on the *Everson* statement ("No tax in any amount . . . ."), which appears in the introductory paragraph of this article.[24] The issue of the legislative appointment of a chaplain was left in limbo with the judge concerned that selection of a representative of the same religion for a sustained period of time might be an advancement of, and entanglement with, religion.[25]

As the Eighth Circuit saw the matter, however, a chaplaincy entailing the offering of prayers for legislators could not be separated from the payment of tax monies for the services rendered and the printing of the book.[26] The court was inclined to agree with the comment of the defendant about the incongruity of the distinction advanced by the district court that "sanctioning a chaplain to offer prayers is deemed permissible but compensating him for doing so is not."[27] Taking a puzzled look at the Nebraska situation as a whole, the court drew what consolation it could from an admission of the Supreme Court that "[t]he line of separation . . . is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[28] Fortunately, there was a precedent at hand to bring the matter into focus. As it happened, three years earlier in *Bogen v. Doty*[29] the appellate court had upheld as constitutional the giving of invocations at county board meetings by a series of invited local clergymen. In that decision, the appellate court expressed some concern about the fact that the uncompensated volunteers delivering the invocations had all been members of the Christian faith. The court cautioned that the county was "near" to a "quagmire" if it should later appear that it was giving public approval to some religious groups and denying it to others.[30] That concern was retrieved and made the decisive consideration in *Marsh*.

The Eighth Circuit announced that "Nebraska ha[d] fallen into that quagmire"[31] because it chose to select and pay a minister from one denomination for sixteen years, as well as publish his

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23. Everson v. Board of Educ., 330 U.S. 1 (1947).
24. *Id.* at 16; *see supra* text accompanying note 1.
25. 504 F. Supp. at 592.
26. Chambers v. Marsh, 675 F.2d 228, 233 (8th Cir. 1982), *rev'd*, 103 S.Ct. 3330 (1983).
27. *Id.* at 233.
28. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).
29. 598 F.2d 1110 (8th Cir. 1979).
30. *Id.* at 1114.
31. 675 F.2d at 234.

prayers for distribution. Though it previously had determined in *Bogen* that (1) there was a clear secular purpose in an invocation; (2) the prayer did not have the primary effect of advancing religion; and (3) there was no excessive entanglement, the court now discovered that all three of those tests were violated by the continued selection of Reverend Palmer as the chaplain for the Nebraska Legislature. In what must have been an astonishing revelation to members of the legislature, the Eighth Circuit announced that Nebraska had as its purpose the advancement of one religious view over another, that the "state ha[d] placed its official seal of approval on one religious view for sixteen years and ha[d] stood behind that seal with its funds"[32] and that the entanglement was present because the use of state monies "engender[ed] serious political division along religious lines."[33] In sober point of fact, none of the court's statements appear to be true.

II. Majority Supreme Court Opinion

The challenge of writing the majority opinion for the Supreme Court must have been exhilarating but frightening, comparable to walking barefoot through a nest of sleeping snakes in darkness. Around Chief Justice Burger on this judicial landscape lay the debris of some thirty-six years of inflamed separationist rhetoric, much of it inflexibly demanding that there be no contact between the state and religion. To traverse the pitfalls on the way to his conclusion of constitutionality, the Chief Justice followed a familiar path of revisionists. He simply ignored, for all practical purposes, the impedimenta of the various criteria created by the Court through the years and approached the question as an original one. Perhaps it would be more accurate to say that, rather than ignore, the Court papered over the real difficulties to be faced in justifying the chaplaincy practice by reference to the restrictive *Lemon* tests. A sample of that approach is found in the disingenuous way the opinion begins its rebuttal to the attacks on its conclusion: "Beyond the bare fact that a prayer is offered . . . ."[34] For the strict separationists, of course, it is that very fact of prayer offered by a reverend who was selected by public officials that sets the teeth on

32. *Id.* at 234.

33. *Id.* at 235. Logically, the entanglement test used by the Eighth Circuit to legitimate legislative prayer would be impossible to meet because it presumably demands a system of choosing ministers or prayer leaders who reflect a perfect and hence unattainable balance of every conceivable religious viewpoint.

34. 103 S.Ct. at 3336.

edge.

To the contention that a preference had been shown for a particular religious view because a Presbyterian had been selected as chaplain for sixteen consecutive years, the Chief Justice responded (quite sensibly it would appear) that the tenure of Reverend Palmer hardly advanced the beliefs of any particular church.[35] In addition, evidence of an impermissible motive in the appointment was totally lacking.[36] To the argument objecting to the compensation of the chaplain with public funds, the Chief Justice retorted that it had always been thus, both on the state as well as the federal levels.[37] Finally, to the assertion that the prayers offered by the chaplain reflected the Judeo-Christian tradition, the Chief Justice answered that the practice had not been used for proselytizing, advancing or disparaging any other faith or belief.[38]

Although those explanations in the majority opinion may not pass the tests of *Lemon*, they do project a rationale for determining the presence of an establishment that is historically based and sound. Reading between the lines, the rationale may be formulated along these lines: Legislative prayer is not an establishment because no one religion is intended to be officially preferred or favored by the practice, and realistically no religion is hurt either. Therefore, the fact that tax money is paid for the service rendered by the chaplain is irrelevant. The exercise is a common expression of reverence for, and petition to, a deity in a form that most of the representatives find compatible. Moreover, the desire to solemnize their governmental service with a brief prayer to God is a positive intuition of the legislators and not in any way oppressive of any other person in the body. Without ever saying so expressly, the majority opinion suggests that there is nothing wrong with the state promoting religion in this general way. The net of the decision on its facts is that the very instruments of government may utilize religion without establishing it.

To be sure, the majority opinion carefully avoids any semblance of rejecting the *Lemon* tests.[39] The Court's conclusion is

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35. *Id.*

36. *Id.*

37. *Id.* at 3336-37. In some states the chaplain does not receive any remuneration for the service. *See id.* at 3337 n.18.

38. *Id.* at 3337.

39. Indeed, the Chief Justice emphasized the "unique history" of legislative prayer, and conveyed only a grudging willingness to be led "to accept the interpretation of the First Amendment draftsmen [that legislative prayer and the first amendment are compatible]." *Id.* at 3335. That phraseology is revealing, implying as it does an exercise of the will rather

anchored safely in history, while a formal obeisance is made to conventional modes of analysis. There is no overt attack on the precedents, many of which fit so uneasily with *Marsh*. The interpretation of the first amendment, however, which necessarily underlies the *Marsh* result, is pregnant with significance. *Marsh* rests on an understanding of establishment that is antithetical to *Everson*. Undoubtedly, the three dissenting justices were aware of the radical implications of that competing view.

III. Dissenting Supreme Court Opinion

The length and tone of Justice Brennan's dissenting opinion demonstrate that a nerve end had been touched.[40] While on the one hand the dissenting opinion is dedicated to fostering the notion that the majority's decision is a narrow one, rooted in the unique history of officially sponsored legislative prayer, on the other it attempts to establish in every way it can that the judgment of the Court is faulty. It is, of course, an easy task for the dissent to show that the practice under review does not meet the tests that have been elaborated by the judiciary through the years. At one point in his analysis, Justice Brennan rather flippantly commented that any group of law students, if asked to apply the principles of *Lemon*, would unanimously find the practice unconstitutional.[41] But that is not the reason such time and effort was lavished on the dissenters' view. The hidden fear of the dissent was this: The same group of law students, if asked to investigate the history of the drafting and ratification of the establishment clause, would unanimously conclude that legislative prayer was not considered a violation of it. Putting the matter in its starkest form, the *Marsh* decision threatens to call attention to the fact that the choice offered in contemporary church-state jurisprudence is between the intentions of the framers and those of the temporary incumbents on the Supreme Court.

There is a comment in a G.K. Chesterton essay about the ab-

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than of the intellect in interpreting the establishment clause. In that connection, Justice Brennan in dissent was even more frank in his description of the majority's work as "carving out an exception to the Establishment Clause," *id.* at 3338 (Brennan, J., dissenting), as if the Justices were a group of legislative draftsmen. The striking aspect of Justice Brennan's remark is that it is offered not as criticism but in apparent satisfaction with the limited nature of the majority's action.

40. One may wonder if the Justice, in the twilight of a long career on the bench, viewed this opinion as his final flourish in the church-state area. The opinion bears some of the marks of an effort at magnum opus.

41. 103 S.Ct. at 3340 (Brennan, J., dissenting).

surdity of trying to pacify a man obsessed with the idea that everyone is conspiring against him.[42] Because he is caught up in his obsession, he will naturally believe that anyone who assures him that everything is all right is part of the conspiracy. A similar circularity of reasoning dominates the dissenting opinion in *Marsh*. Seized by the conviction that legislative prayer is a violation of the establishment clause, the dissenters are blind to the significance of the fact that those who wrote the clause and those who ratified it as part of the Constitution apparently did not think so. The *Marsh* dissenters are convinced the legislative prayer is a first amendment violation because of doctrine that, in earlier cases, they either helped to create or received from others of like mind, a kind of self-legitimating process of error. That attitude sometimes approaches the point of farce, as when, for example, Jefferson and Madison are suggested as opponents of legislative prayer.[43] In fact, Madison was a member of the congressional committee recommending the chaplaincy. No evidence is offered to support the view that either man in his public life ever contested the legitimacy of the congressional chaplains.

The apex of the dissent's attitude is expressed by the finding that legislative prayer "violates both the letter and the spirit of the Establishment Clause,"[44] a shocking state of affairs if true because apparently the Congress has facilitated that gross departure from the Constitution since 1789. Still not content with that hyperbole, however, the dissent finally accused the majority of a "betrayal of the lessons of history,"[45] the basis of the charge ostensibly being that the Court had relied on the intentions of the drafters rather than the "inherent adaptability of the Constitution."[46]

At one point in his dissent, Justice Brennan stuffs into a paragraph every objectionable feature he can think of regarding legislative prayers as measured by the principle of "neutrality and separation," which he contends are embedded in the establishment clause. Putting aside the plaintive comment that legislative prayer "is contrary to the fundamental message of *Engel*[47] and

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42. G.K. CHESTERTON, ORTHODOXY 19 (1938).

43. 103 S.Ct. at 3343 (Brennan, J., dissenting). It is true that much later in his life, Madison expressed misgivings about the constitutionality of legislative chaplains. *See infra* notes 56 & 58.

44. 103 S.Ct. at 3346 (Brennan, J., dissenting).

45. *Id.* at 3349.

46. *Id.* at 3348.

47. Engel v. Vitale, 370 U.S. 421 (1962).

Schempp,"[48] the list is as follows:

> [Legislative prayer] intrudes on the right to conscience by forcing some legislators either to participate in a "prayer opportunity" with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues. It has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a prayer, or even reconsideration of the practice itself, will evoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens.[49]

Whatever may be thought of those objections as policy arguments for asking a legislature to eliminate its chaplaincy, the stopping point as far as the Constitution is concerned is that all of those objections were equally maintainable in 1789. Apparently none of them was thought valid or sufficiently important to deter the same Congress that proposed the first amendment to the states from proceeding to select a chaplain for each House. The evident reason they were not thought important in a constitutional sense is that they did not touch the concept of establishment, and hence did not make legislative prayer forbidden conduct as far as the federal government was concerned.

Despite the quixotic character of the endeavor, Justice Brennan undertook to challenge the historical basis of the majority's holding on three grounds. He could not, of course, deny that those in the First Congress who proposed, drafted and approved the first amendment contemporaneously devised a system for legislative prayer just like that of Nebraska.[50] Rather, Justice Brennan's first resort was to the argument that the legislators may have authorized the practice "influenced by the passions and exigencies of the moment."[51] Several readings of the opinion at this point confirm

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48. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

49. 103 S.Ct. at 3344 (Brennan, J., dissenting) (footnotes and citations omitted).

50. The attitude of the dissent regarding the use of history may be gauged by the following comment: "This is a case, however, in which—absent the Court's invocation of history—there would be no question that the practice at issue was unconstitutional." *Id.* at 3347. There is a wry truth to the remark that surely could not have been intended by Justice Brennan. Earlier expressions of Justice Brennan's doubts about the lessons of history are discussed in R. CORD, SEPARATION OF CHURCH AND STATE 232-34 (1982).

51. 103 S.Ct. at 3347 (Brennan, J., dissenting).

the initial impression that Justice Brennan actually was questioning the majority's assumption that the framers "would not have themselves authorized a practice that they thought violated the guarantees contained in the [establishment] clause."[52] Such a remarkably cynical viewpoint is not accompanied by any explanation as to the motives that might animate the framers to do such a thing. Moreover, there is no suggestion of the type of "passions and exigencies" that would surround the creation of congressional chaplaincies, and indeed, in a footnote, Justice Brennan tried the different tack of insinuating that the creation of a chaplaincy was nothing more than a "carry-over from the days of the Continental Congress," quoting Leo Pfeffer.[53] In that regard, however, the dissent is plainly wrong. There was no "carry-over"; the provisions for legislative prayer were created anew in the young government, and committees were put to work precisely for that purpose.[54] The only support offered for the speculation that the creation of a federal chaplaincy may have been pushed through without "sober constitutional judgment"[55] is the reference to some second thoughts expressed by James Madison in his Detached Memorandum written many years after his major involvement in both the drafting of the first amendment and the bill to authorize legislative prayer.[56] Obviously, the dissent here is appealing from "Philip drunk to Philip sober," but the grounds for preferring the views of an older Madison to the young man who midwifed the first amendment are curious. It was not that Madison changed his mind, the dissent contends, but that he changed his role to "detached observer engaged in unpressured reflection,"[57] again the implication being that as a legislator Madison was irresponsible. In any event, the dis-

52. *Id.* at 3347.

53. *Id.* at 3347 n.31; *see* L. PFEFFER, CHURCH, STATE, AND FREEDOM 170 (rev. ed. 1967).

54. *See* R. CORD, *supra* note 50, at 23-24.

55. 103 S.Ct. at 3347 (Brennan, J., dissenting).

56. Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 558 (1946):

> Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?
>
> In strictness, the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation.

57. 103 S.Ct. at 3347 (Brennan, J., dissenting).

sent's preoccupation with the views of Madison ignores a central consideration: Madison was but one of a committee, a House and a Congress that in 1789 engaged in the conduct under review. His personal change of heart (or of role) should have no significance in terms of assessing what the original understanding was.[58]

On analysis, there is little reason to believe that a second ground of criticism levied by the dissent against the Court's reasoning is meant to be more than a make-weight. The dissent chastised the Court for looking solely to the intent of Congress as the touchstone for the meaning of the first amendment as it applies to legislative prayer, pointing out that the states themselves were the ratifiers of the Bill of Rights and therefore their understanding also should be consulted.[59] But inexplicably, in the footnote referring to this comment, the dissent confessed that nothing much is known about what went on in the state legislatures in ratifying the Bill of Rights, and further that the legislative prayer practices in the states themselves would be of no relevance because the establishment clause did not originally apply to them.[60] Marching up the hill and down, the dissent in effect answered its own criticism of the majority's failure to address those considerations. There is questionable merit to a complaint that the Court has not consulted sources when, according to the dissent, those sources would be unproductive.

While conceding that the state ratifying conventions do not have anything to offer regarding the restrictions on a federal establishment, it does not follow that an examination of the relationship between the federal government and the states in regard to the first amendment would be sterile in the present instance. As the majority opinion pointed out, the use of legislative prayer was linked to established churches in some of the colonies.[61] Whether the link was inevitable and essential, or merely convenient and incidental, must not have been an obscure point in the minds of the people living at that time. If the Congress in banning establish-

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58. Justice Brennan took a much different view of the significance of Madison's "Detached Memoranda" in Walz v. Tax Comm'n, 397 U.S. 664 (1970): "They represent at most an extreme view of church-state relations, which Madison himself may have reached only late in life. He certainly expressed no such understanding of Establishment during the debates on the First Amendment . . . . And even if he privately held these views at that time, there is no evidence that they were shared by others among the Framers and Ratifiers of the Bill of Rights." *Id.* at 684-85 n.5 (citation omitted).

59. 103 S.Ct. at 3347-48 (Brennan, J., dissenting).

60. *Id.* at 3347 n.32.

61. *Id.* at 3333 n.5 (majority opinion).

ment at the federal level was at the same time setting up congressional chaplains without protest, the inference is strong that both the framers and the ratifiers did not confuse one with the other, that is, legislative prayer did not represent an establishment to them. Further, the legislative history of the establishment clause indicates that the word "respecting" was inserted in the proposed amendment specifically to bar the federal government from intruding in any way, for or against, an establishment of religion at the state level.[62] Thus, had it been thought for a moment that the federal government by creating chaplaincies was venturing into the area of establishment, a backlash of discontent surely would have manifested itself in those ratifying states where establishment had been debated and outlawed. History does not record any such reaction. In sum, the second point made by the dissent is academic. If the Court majority, in assessing the relevance of an establishment bar to the creation of chaplaincies, had looked beyond the actions of the framers in the First Congress, it would only have strengthened its case. Nearly all the states, even those without establishments, had legislative prayer, and evidently none of them confused that practice with the "establishment of religion" to which the first amendment referred.

It is the final—and according to the dissent, the most important—argument against using the specific historical practices of the framers to show intent that is most provocative. To put the matter bluntly (and, it is hoped, fairly), the dissent maintained that whatever the framers may have intended establishment to mean with respect to legislative prayer, the Supreme Court in 1983 was free to disregard because the Constitution is "not a static document" and the generalities of the Bill of Rights must be translated into contemporary terms.[63]

Paradoxically, the doctrine of kaleidoscopic meaning was urged despite the fact that earlier the dissent had emphasized that the establishment clause, unlike most of the provisions of the Bill of Rights, "is, to its core, nothing less and nothing more than a statement about the proper role of *government* in the society,"[64] and further that the members of the First Congress were "authors

62. "In other words, it prohibits Congress from passing any law that would affect the religious establishments in the states. This was designed to satisfy people from states, such as Massachusetts, that did have established churches." M. MALBIN, RELIGION AND POLITICS 15 (1978) (footnote omitted).

63. 103 S.Ct. at 3348 (Brennan, J., dissenting).

64. *Id.* at 3341 (emphasis in original).

of a document meant to last for the ages."[65] To the extent that the dissenters merely are saying that the Constitution is a commodious and adaptable instrument whose generalities are open to interpretation in applying them to the problems of a different age, these sentiments would be conventional and noncontroversial. But the dissent seems to be suggesting that the intended meaning of the Bill of Rights, however firmly it may be identified, is subject to repudiation and revision as the incumbents of the Supreme Court deem it expedient. Admittedly, the presence of new facts may force the modification of past applications of a legal norm within the range of its basic coverage. But new situations do not authorize the judiciary to rewrite constitutional norms. To make the point with an example used by the dissent itself, the religious diversity of the American people, from one point of view, is much greater today than in 1789.[66] That increase in diversity, however, does not alter the judgment that the establishment clause was not designed to bar legislative prayer. Whether there are 30 or 130 denominations of religion, whether they are primarily Christian or not, the framers evidently did not consider it a law respecting an establishment of religion to have religiously diverse representatives of the people pray together if they chose to do so.

IV. Taproots of Confusion

How did the Supreme Court achieve a posture in which its historically validated conclusions regarding such issues as the legitimacy of legislative prayer are sharply at odds with the tests for establishment that have been adopted in its church-state jurisprudence? Seen only as a matter of logic, certain rulings of the Court seem incompatible with the strictures of its doctrine. In *Marsh*, Justice Brennan sought to rationalize that pattern of judicial thinking by suggesting the possibility (which he himself rejected) that the acceptance of legislative prayer might be considered an exception to the prevailing rules on establishment.[67] He admitted that the Court, in some instances, had deviated "from an absolute adherence to separation and neutrality" because of the tensions found in the first amendment.[68] He then attempted to define the

65. *Id.* at 3349.

66. *Id.* at 3348 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 240-41 (1963) (Brennan, J., concurring)).

67. *Id.* at 3338.

68. *Id.* at 3344.

various circumstances in which those deviations have been tolerated. The reader may judge whether Justice Brennan's attempted rationalization is convincing, but the observation that the high Court's jurisprudence on this subject is schizophrenic is not an original one, nor is it derived from a consideration of *Marsh* alone.[69] Despite the determined efforts of the dissent to bring order out of the confusion, the most cursory reading of the Supreme Court's establishment clause opinions over the past three decades reveals the contradictory results that have ensued. It is not a secret that there is something fundamentally wrong with a doctrine that has been patched together. *Marsh* is not the first case in which the contradictions have been apparent, and one ventures to predict that it will not be the last.

The words of the first amendment seem straightforward enough: "Congress shall make no law respecting an establishment of religion."[70] The crucial issue seems to be the definition of "an establishment of religion." Where, therefore, did the Supreme Court derive the tripartite test that it announced in *Lemon v. Kurtzman*: "[T]he statute [in question] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "[71] Obviously the three elements of the test are constituents of the extended judicial effort to identify what constitutes a "law respecting an establishment of religion." They are presumably the means employed by the Justices for understanding and administering the constitutional command. The first two elements of the test emerged in 1963 in *Abington School District v. Schempp*;[72] the third was mentioned in *Walz v. Tax Commission*[73] and assimilated into the test in *Lemon*. The separationist philosophy, however, of which these elements are merely the outward sign, emerged in 1947 in the Court's initial effort to define "establishment" in modern times in *Everson v. Board of Education*.[74]

The deficiencies of the *Everson* opinion have been catalogued often enough, though apparently to no avail.[75] Though some ele-

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69. *See, e.g., infra* note 135 and accompanying text.
70. U.S. CONST. amend. I; *see supra* note 9 (quoting first amendment in its entirety).
71. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (footnotes omitted).
72. 374 U.S. 203 (1963).
73. 397 U.S. 664 (1970).
74. 330 U.S. 1 (1947).
75. For one of the earliest and best critiques, see J. O'NEILL, RELIGION AND EDUCA-

ments of the *Everson* approach have been expressly repudiated, its mind set perdures, and the doctrinal havoc introduced by that opinion has remained largely unremedied. *Everson* was the first comprehensive analysis of the meaning of "establishment" undertaken by the Supreme Court, following by just seven years the ruling that the religion clauses of the first amendment applied to the states as well as the federal government by virtue of the due process clause.[76] While holding in a five to four vote that the State of New Jersey did not violate the first amendment by providing bus transportation for children attending parochial schools,[77] Justice Black formulated for the majority a doctrinal summary, which by the dubious virtue of being approximately half right, has been a continuing source of mischief and confusion:

> The "establishment of religion" clause of the First Amendment means at least this: *Neither a state* nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, of whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, *the clause against the establishment of religion by law was intended to erect "a wall of separation between Church and State."*[78]

Those sections of the formulation that have been emphasized above, as a matter of historical meaning attributable to the establishment clause, are either plainly erroneous or seriously misleading. At the time of the passage of the first amendment, the states were unquestionably free to set up a church and establish a religion if they chose. Furthermore, the federal government was entitled to "aid all religions" assuming that by that phrase is meant

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TION UNDER THE CONSTITUTION (1949). For earlier reflections of the present author, not necessarily compatible with those contained in this article, see Dunsford, *The Establishment Syndrome and Religious Liberty*, 2 DUQ. L. REV. 139 (1964).

76. Cantwell v. Connecticut, 310 U.S. 296 (1940); *see also* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (religion clause applies to states by virtue of due process clause).

77. 330 U.S. at 18.

78. *Id.* at 15-16 (citation omitted) (emphasis added).

such actions as appointing and compensating chaplains for the military establishment of the United States, actions which were taken early in the country's history. That taxes, whether large or small, were in fact used to support religious activities is the reminder of the *Marsh* case itself, not to mention the appropriations made by Congress for religious work among the Indians that continued for many years and involved substantial sums of money.[79] Finally, the *Everson* Court's reference to the figure of speech used by Jefferson in a courtesy note to the Danbury Baptists[80] completely ignores the consideration that only the federal government and not the states was subject to the first amendment at the time it was enacted. There were no legally mandated "walls" in state jurisdictions as far as the first amendment was concerned, and Jefferson above all would have been cognizant of that fact. The anachronism of that remark when employed in a case involving one of the states is glaring.[81] This latter consideration is without prejudice to the additional consideration that the image of "a wall of separation" is scarcely self-defining.[82]

Not only in the summarizing paragraph are the inadequacies of *Everson* manifest. Though Justice Black conceded that the task before the Court required an understanding of the meaning of the language in the first amendment, he pursued a rather irregular method of seeking that understanding to say the least. Inexplicably, no reference was made to the history of the drafting of the terms of the religion clauses for submission to the states. Instead of reviewing the various forms that the draft of the amendment had taken as it worked its way through the House, the interchange among the committee members participating in the task and the texts of the drafts in the Senate, the Court relied on loose and inaccurate historical formulations that obscured the true dimensions of its undertaking. For example, the Court made the dramatic comment that the words of the religion clause "reflected in the minds of early Americans a mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity."[83] Such a

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79. A detailed review of the expenditure of federal money for the religious education of the Indians may be found in R. CORD, *supra* note 50, at 61-80.

80. *See supra* note 78 and accompanying text; S. PADOVER, THE COMPLETE JEFFERSON 518-19 (1938).

81. R. CORD, *supra* note 50, at 114.

82. McGowan v. Maryland, 366 U.S. 420, 461 (1961) (Frankfurter, J., concurring).

83. 330 U.S. at 8.

"mental picture" hardly would have dominated the minds of those early Americans in Congress representing states that continued to maintain religious establishments and whose purpose was to insist that the federal government not have the power to disturb them. One of the historical ingredients conspicuously missing in the *Everson* opinion is an appreciation of the first amendment's purpose in serving the needs of federalism, a point to be pursued later in this article.

Alongside the *Everson* Court's fanciful version of historical events told in a bedtime-story fashion,[84] another major failure of the opinion is its facile substitution of transactions occurring in Virginia some four years before the enactment discussions as the touchstone for the meaning of the first amendment to a constitution of the thirteen colonies.[85] Earlier, Virginia had rejected a tax levy for the support of Christian churches, in large part due to the efforts of James Madison climaxing in the writing of his famous Memorial and Remonstrance. Subsequently, a Bill for Religious Liberty, essentially the contribution of Thomas Jefferson, was passed in that state. Putting aside the Court's debatable interpretation of those transactions, the impropriety of substituting them for the events surrounding the drafting by Congress of the first amendment is patent. Nevertheless, Justice Black proceeded to make the sweeping claim that the Court had "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."[86] History does not support the truthfulness of that proposition. First, Jefferson was not a member of the First Congress. Rather, he was serving as Secretary of State in France. Thus, he had no direct part in the drafting and adoption of the first amendment. But of more importance, the cases the Court cited in support of its proposition in no way indicated that the meaning of the establishment clause, as contrasted to the free exercise clause, was intended to be governed by the Virginia experience. While it is true that an earlier Supreme Court opinion in a polygamy case[87] accepted Jefferson as an authoritative voice in ex-

84. *E.g., id.* at 11: "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence."

85. *Id.* at 12-13.

86. *Id.* at 13 (citations omitted).

87. Reynolds v. United States, 98 U.S. 145 (1878).

pressing the meaning of the first amendment, it by no means follows that this made the Virginia history interchangeable with that of the Bill of Rights and certainly not with respect to establishment.[88] Unless the *Everson* Court silently and confusingly restricted its comments to the free exercise clause, the assertion that there was prior judicial support for the position of equivalence between Virginia's Bill of Religious Liberty and the first amendment is indefensible.

V. The Principle of Federalism

As a fountainhead for doctrine, *Everson* is a polluted source. The opinion is shabby history and unacceptable legal analysis. Its pretensions to scholarship, not to mention those of the dissenting Justices, are meager camouflage for what bleeds through as strong personal preferences wrapped in ideological passion. Perhaps the most fundamental weakness in the *Everson* approach lies in the studied neglect of the principle of federalism that induced the need for a Bill of Rights in the first instance.

Since 1947, the nine sitting Justices of the Supreme Court have felt themselves called to preach a gospel of church-state relations to govern every jot and tittle of the relationship between religion and government, reaching out to every state, county and town in the country. The purported authorization to undertake that mission was the incorporation of the religion clauses of the first amendment into the "due process" required by the fourteenth amendment.[89] As to the free exercise of religion, the conclusion of incorporation is easy to justify. But there have been serious doubts expressed as to whether the transference of the no establishment concept to the states has any footing in the Constitution.[90] The Supreme Court simply has applied judicial muscle to force and snap the historic compromise on religion between the federal government and the states, so carefully molded by the framers, into a fourteenth amendment configuration. Having made the adjustment, the Court has proceeded to bend and distort the notion of establishment that was at the core of the original arrangement.

It is a supreme irony of history that the establishment clause

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88. For a comprehensive discussion of *Everson*'s misuse of precedent in asserting that the Supreme Court previously had elaborated the meaning of the establishment clause, see R. Cord, *supra* note 50, at 103-08, 116-20.

89. *Supra* note 76 and accompanying text.

90. *See* M. Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History 31 (1965).

was crafted by the framers for a purpose exactly opposite from the one to which the Supreme Court has put it. Originally, the prime objective was to make sure that the federal government kept its hands off the determination of the working relationship between religion and government at the local level, a question that was to be left to the individual states.[91] As a principle of federalism, the first amendment directed Congress not to meddle with the various choices that the states might decide to make in setting up established churches or conditioning civic rights on religious beliefs.[92] It should not be forgotten that article VI, clause 3 of the new Constitution, which prohibited religious tests for office, applied only to the federal government for the very good reason that religious tests were employed in some of the states at the time of enactment.[93] In a similar way, the first amendment was expressly designed to keep the federal government's hands off of the delicate question of how state governments in general should structure themselves vis-a-vis religion.[94] The final ironic twist in the modern doctrine of the religion clause is that an amendment, which was crafted with every deliberation to preclude the exercise of federal power by members of a democratically elected Congress coming from all parts of the nation, has been converted into a writ of embracing authority for nine persons selected to serve as Supreme Court Justices.

In some circles it is still fashionable to pretend that the legislative history of the establishment clause is compounded of nothing but uncertainties.[95] Those who take their understanding of the history of the establishment clause from the judicial opinions in *Everson* and its progeny are not to be blamed for such a judgment. But such a statement comes as a surprise from a member of a Court which in its controlling opinions has never bothered to trace seriously the evolution of the first amendment from its articulation as a need by the states through its proposal in various drafts and

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91. W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 9 (1964).

92. Obviously, the amendment also protected the citizens of the various states against federal interference with their free exercise of religion. However, that aspect of the amendment is not under review here.

93. *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 92-110 (1964).

94. W. KATZ, *supra* note 91, at 9.

95. 103 S.Ct. at 3347 (Brennan, J., dissenting): "[F]ormal history is profoundly unilluminating on this [legislative prayer] and most other subjects." For those who search for prepackaged answers much as if they were shopping from the shelves of a supermarket, a resort to history, of course, can be frustrating. It also is true that if one does not want to be inhibited by history a devout profession of its utter incomprehensibility is comforting.

discussions in the two Houses of Congress to emergence in its final form for presentation to the states. No doubt Mark DeWolfe Howe is right in his caution that "[w]e are all apt to favor that reading of history which lends support to our own predilections. The consequence is that history is drastically oversimplified."[96] At the same time, one is inclined to believe that John Courtney Murray was not exaggerating when he called it a "very modest feat of scholarship" to master "the historical data that determine the meaning of the First Amendment as first formulated and ratified."[97]

There is little doubt why the creation of a Bill of Rights was undertaken. Indeed, the *Marsh* dissent pointed out that the enactment of the first ten amendments "[was] forced upon Congress by a number of the States as a condition for their ratification of the original Constitution."[98] Specifically, with respect to the need for some limitation on the power of the federal government regarding religion, the record is equally clear about the objective the states had in mind. Resolutions and petitions had been prepared by the various states reflecting the fear that a central government would interfere in the matter of religion by establishing a national church or infringe the rights of conscience. An example of one concern is found in the proposed declaration of rights that both Virginia and North Carolina endorsed:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.[99]

A shorter expression, undoubtedly reflecting a different motivation, is contained in one of the twelve amendments proposed by New Hampshire, a state that had its own established religion: "Congress shall make no laws touching religion, or to infringe the rights of conscience."[100]

Though Madison was one of those who did not believe that an amendment was necessary in view of the limited powers possessed

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96. Howe, *The Constitutional Question*, RELIGION & THE FREE SOCIETY 50 (1958).
97. Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 28 (1949).
98. 103 S.Ct. at 3348 (Brennan, J., dissenting).
99. J. O'NEILL, *supra* note 75, at 112-13.
100. C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 93, at 119.

by the federal government, he concluded that a Bill of Rights, if carefully prepared, would be helpful, but only because it was "anxiously desired by others."[101] In an effort to summarize the various proposals coming from the states on the subject of religion, Madison drafted two amendments to submit for the consideration of the First Congress. Submitted on June 7, 1789, they read as follows:

> The Civil Rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.
>
> . . . .
>
> No state shall violate the equal rights of conscience or the freedom of the press, or the trial by jury in criminal cases.[102]

The proposals made by Madison were referred on July 21 to a select committee of which he was a member. A week later the select committee recommended the "equal rights of conscience" amendment to the House, where it passed without much difficulty.[103] However, the version of the other amendment as it emerged from the committee was somewhat different from Madison's draft: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."[104] On August 15, that committee version was debated on the floor where concern was expressed that it "might have a tendency to abolish religion altogether."[105] The anti-Federalist representative from Massachusetts, Eldridge Gerry, suggested that the proposal under discussion be amended to read "no religious doctrine shall be established by law."[106] In the midst of the debate, James Madison stated that:

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101. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) (quoted in J. O'NEILL, *supra* note 75, at 93). In a speech in Congress on June 8, 1789, Madison expressed his position as follows:

> The first of these amendments relates to what may be called a bill of rights. I will own that I have never considered this provision so essential to the Federal Constitution as to make it improper to ratify it, until such an amendment was added; at the same time, I always conceived, that in a certain form, and to a certain extent, such a provision was neither improper nor altogether useless.

J. O'NEILL, *supra* note 75, at 94-95 (quoting speech by James Madison).

102. M. MALBIN, *supra* note 62, at 4. The review of the legislative history of the first amendment contained in the text essentially is a summary of the highlights of Malbin's excellent study.

103. *Id.* at 4-5.

104. *Id.* at 5.

105. *Id.* at 7.

106. *Id.*

> [H]e apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution and the laws under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish a national religion.[107]

Can anyone reading this statement by Madison, dealing as it does with the establishment of a religion, accept the claim in *Everson* that Madison and Jefferson were effectively pursuing in the federal Congress the same purposes they had pursued four years earlier in Virginia? Still, doubts continued to be expressed by the representatives that, as proposed, the amendment might be "extremely hurtful to the cause of religion" and even "patronize those who professed no religion at all."[108] Madison then suggested that the word "national" be added before "religion," explaining his suggestion, which was a return to his original phrasing, as based on the belief "that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word national was introduced, it would point the amendment directly to the object it was intended to prevent."[109] There were immediate objections from some representatives to the use of the word "national" in view of the implications stirred about the nature of the central government, and the New Hampshire representative proposed as a substitute the language that had appeared in that state's ratifying convention: "Congress shall make no laws touching religion, or infringing the rights of conscience."[110] While the word "touching" obviously would have strengthened the hand of those who thought the federal government should have no contact at all, even indirectly, with the subject of religion, it also unequivocally would have preserved the power of the states in this field. In the context of the debate, however, the impetus for the New Hampshire wording was obviously one of states' rights rather than ideo-

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107. *Id.* at 8.
108. *Id.* at 8-9.
109. *Id.* at 9.
110. *Id.*

logical abhorrence of any contact between religion and government. Madison immediately withdrew his proposal to add the word "national,"[111] and the motion of the select committee was defeated on a vote of thirty-one to twenty in favor of the New Hampshre proposal.[112] Based on the August 15 debate in the House, the only recorded discussion of the religious clauses, the basic objective seems manifest: to bar the central government from any kind of favoritism or preference for a particular religion or formal religious doctrine in order to relieve any anxiety among the states about federal intervention in that area.

While there is no record of the further legislative discussion of the proposal, the various forms that the drafts took as they worked their way toward a final approval in no way suggest any fundamental departure from the themes already expressed. On August 20, a representative of Massachusetts proposed a return to the establishment concept, which was accepted the following day and read as follows: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[113] In substance, this was the version sent to the Senate.

Although the Senate debate was not recorded, the sequence of the competing versions of the establishment clause as they were voted up and down tells a great deal about the nature of the discussion that must have gone on in the Senate. The first substitute version, initially defeated but then accepted on reconsideration, read: "Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience."[114] As the discussion continued, other similar versions were voted down.[115] At the end of the debate on September 3, this version emerged: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof."[116] However, six days later another version, more particularly enunciating what constituted an establishment, was substituted, and that version was sent back to the House: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[117]

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111. *Id.* at 11.
112. *Id.*
113. *Id.*
114. *Id.* at 12.
115. *Id.*
116. *Id.* at 13.
117. *Id.*

Apparently, because of the minimizing of what could constitute establishment by the express reference to "articles of faith or a mode of worship," the House rejected the Senate version and asked for a conference. From the conference committee, of which Madison was a member, the final formulation emerged, one which clearly came closer to the House proposal than to that of the Senate: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[118] Unless the word "respecting" is thought to radically change what had been the evident focus of concern of both Houses of Congress as they considered the various drafts,[119] the conclusion to be drawn is that the purpose of the establishment clause was to prevent the central government from discriminatorily preferring or promoting one religion or religious doctrine over another. It was left to each of the states to make the judgment within its own jurisdiction whether any such favoritism was desirable.

At no point in the recorded debate in the House or in the shifting phraseology of the various competing proposals in the Senate is there any indication that Congress believed it was addressing on the merits the deep complexities of the proper relationship between the body politic and the body religious. Given the diverse views of the members of Congress, the differing political arrangements found in the states that they represented and the relatively small amount of time devoted to the debates (though perhaps great by comparison with the time given to the other provisions of the Bill of Rights), it is certain that the task was a much more pragmatic one. The issue before the House was political and not philosophical or ideological. The representatives were preparing

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118. *Id.* at 14.

119. Justice Rutledge in his *Everson* dissent was one of the first to suggest that the word "respecting" somehow enlarged the object of the prohibition in the first amendment: "Not simply an established church, but any law respecting an establishment of religion is forbidden." Everson v. Board of Educ., 330 U.S. 1, 31 (1947) (Rutledge, J., dissenting). Semantically, as well as historically, such a proposition appears extremely doubtful. *See* J. O'NEILL, *supra* note 75, at 52-55. The word "respecting" means "concerning" or "regarding." In his opinion in Lemon v. Kurtzman, 403 U.S. 602 (1971), Chief Justice Burger nevertheless assumed that the word "respecting" was intended to reach any step of action that could lead to an establishment. *Id.* at 612. That also seems extravagant. It is hard to attribute an unbridled scope to the word in light of Madison's reputation as a precise stylist. While Malbin agrees that the word might be fairly interpreted as synonymous with "tending toward," he points out that a basic purpose of employing "respecting" was to fence Congress in from any attempt to touch state establishments, favorably or unfavorably. M. MALBIN, *supra* note 62, at 15. This also is the persuasive conclusion of O'Neill. J. O'NEILL, *supra* note 75, at 99. In any event, it should be obvious that whatever "respecting" is interpreted to mean, the central notion of "establishment" is left undisturbed.

the guarantees, which some states had demanded as a condition of adopting the Constitution, that the central government would not disturb the freedoms then enjoyed by the states "respecting an establishment of religion," nor would it infringe the rights of individual conscience by interfering with the exercise of religion. To be sure, in taking pains to enunciate that no-establishment rule for Congress in order to protect the autonomy of the states, the framers also were secondarily but inevitably defining a relationship between the federal government and religion itself. The accomplishment of the one necessarily produced the other as a result. For that reason, those who favored the disestablishment of religion in the states might have been particularly satisfied with the first amendment's limitation on Congress, because ideologically the consequence at the national level was similar whether the establishment bar was a fruit of federalism or a principled political expression instead. Nevertheless, as an act of constitution-making, it was solely the former.

The characteristics of an establishment generally were known by the men and women of that time.[120] By disabling the federal government from moving in that direction, the states through their representatives in Congress on this subject were maintaining a system of self-government within their respective jurisdictions. In the process of seeking to formulate the limitations to be imposed on the federal government, the discussions of the framers seem to have centered on three things: (1) whether religion itself might inadvertently be disadvantaged as far as the federal government was concerned, with irreligion being patronized; (2) whether the central government should be expressly stripped of all powers that might reach out and touch religion; and (3) whether the prohibition to be adopted should be limited to the prescription of articles of faith and modes of worship or include as well other methods of favoring one religious view over another.[121] Everything available in the way of objective evidence, including the purpose of the endeavor, the House debates and the phrasing of the various versions of the amendment in the Senate, point to these conclusions: (1) the framers disavowed any intention to favor irreligion over religion; (2) they did not intend to disturb whatever ordinary and necessary powers the federal government might possess to take actions po-

120. *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 93, at 1-29.

121. The final Senate version of the amendment seemingly represented a narrow conception of establishment as restricted to prescribing articles of faith or a mode of worship. *See supra* text accompanying note 117.

tentially affecting religion; and (3) they specifically provided that no preference or favoritism was to be granted to any particular religion or combination of religions, not only in regard to articles of faith or modes of worship but in other ways as well. Those are the guiding principles that the first amendment was designed to embody with respect to the relationship between church and (federal) state.

In the light of this brief historical review, the adventure on which the Supreme Court has been embarked since 1947 is thrown into bold relief. Rather than discerning and following the intentions of the framers in writing the establishment clause, the Court has been weaving a pattern of church-state relationships that is largely of its own design. The essential theme of its strict separationist approach, so radically different from the intentions of the framers, was expressed more effectively by the dissent in *Everson* than it was by the majority:

> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.[122]

Examined against the background of the historical record, the latter judgment is little more than myth-making.

The meaning that the *Everson* Court purported to detect in the words of the first amendment was never placed there by the framers. Indeed the purpose of the first amendment was to leave entirely to the states the decision regarding what intimacy of relationship should exist between religion and government as far as the ordinary citizen was concerned, while the federal government remained aloof and uninvolved in the undertaking because everyone agreed it had no business in that area. In that regard, it is revealing that the standards actually created for the guidance of the federal government were narrowly negative in character: The federal government was not to impose a religious test for holding office; it was not to establish a religion; and it was not to interfere with the free exercise of religion by the citizens of the various states.

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122. Everson v. Board of Educ., 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting).

Yet to go further and to assert that the first amendment also was intended to prohibit the federal government from taking any action that in any way would implicate religion is incorrect, as the course of the debate in the House in 1789 makes clear. As long as the central government did not set out to favor or patronize any particular religious group or view (which would represent in its broadest form what the concept of establishment meant), the first amendment left Congress free to respond to those issues that might entail dealing with religious institutions by taking into account the fact of religious sentiment in American life. Certainly, through the years Congress regularly has manifested its understanding that it has this freedom. In his dissenting opinion in *McCollum v. Board of Education*,[123] for example, Justice Reed cited a number of instances since 1789 in which the federal government had legislated with religion in mind: granting of tax exemption to churches; provision of lunch programs for children, some of whom attended parochial schools; the payment of tuition under the so-called GI Bill of Rights for those studying at church-related universities and colleges, including programs of preparation for the ministry; the requirement of compulsory chapels at military academies; and the payment of salaries for chaplains both in Congress and in the armed forces.[124]

When, beginning with *Everson*, the Supreme Court ventured to redraw the boundaries staked out by the establishment clause and began to shape its own personalized constitutional standards, it exceeded its authority and its warrant. As the mooring to the historical intent and meaning of the first amendment slipped, the Court found itself adrift on a sea of prepossessions and private judgments. Periodic efforts to rationalize the results of the multiplying cases have been futile. Consistency as well as authenticity have been lost because the tests devised along the way have been ignored as often as they have been observed.

There is no need here to describe the superstructure of doctrine that has been built on the shaky and cracked foundation of *Everson* and *McCollum*. That has been done admirably elsewhere.[125] For present purposes, it is enough to note that by 1963 the Court through Justice Clark was making a point of asserting

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123. 333 U.S. 203 (1948).

124. *Id.* at 249-54 (Reed, J., dissenting).

125. *See* Van Patten, *In the End Is the Beginning: An Inquiry Into the Meaning of the Religion Clauses*, 27 ST. LOUIS U.L.J. 1, 13-21 (1983); R. CORD, *supra* note 50, at 102-45; L. MANNING, THE LAWS OF CHURCH-STATE RELATIONS 14-117 (1981).

that it did not intend to reconsider any of the questionable propositions advanced in the *Everson* line of cases.[126] The formidable criticism[127] that had been directed against the Court's doctrine was answered with an ipse dixit. Acknowledging that the history, logic and efficacy of its *Everson* line of cases had been challenged, the Court chillingly commented that "[s]uch contentions, in the light of consistent interpretations in cases of this Court, seem entirely untenable and of value only as academic exercises."[128]

It was Justice Clark who sought to tie up the loose ends of the debate by announcing the standards that he believed embodied the essence of the Court's decisions to that date. In effect, he endeavored to transmute the historical ramblings of *Everson* and *McCollum* into an efficient legal formula that could give direction to the future:

> [T]he Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[129]

In a circuitous fashion, a third standard emerged seven years later in *Walz v. Tax Commission*.[130] In order to justify the constitutionality of tax exemptions to religious organizations for properties used solely for religious worship, in *Walz* Chief Justice Burger used the argument that the alternative of taxation by a state would generate a greater involvement with religion than the exemptions that were under scrutiny.[131] In drawing this comparison between the consequences attributable to taxation or exemption, the Chief Justice introduced another element for consideration, that of "ex-

126. *E.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

127. *E.g.*, Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949); J. O'NEILL, *supra* note 75, at 189-253.

128. Abington School Dist. v. Schempp, 374 U.S. 203, 217 (1963).

129. *Id.* at 222.

130. 397 U.S. 664 (1970).

131. *Id.* at 674-75.

cessive entanglement" between church and state.[132] Because Chief Justice Burger did not subject the matter of tax exemptions to a close or rigorous analysis under the "secular" purpose element of the test, it is plausible that he evoked the entanglement concept only to convince his readers that the objective of the exemption was supportable in view of the alternative, that is, that a legitimate secular end was served by choosing the lesser of two evils. Whatever the explanation for the reference, that element was formally assimilated as a third prong in the prescribed analysis in *Lemon v. Kurtzman*:[133]

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[134]

With the passage of years this tripartite test may have acquired the virtue of familiarity, but in application it surely has not brought any predictability or consistency. To the contrary, employment of the test has produced contradictory and incongruous results, fruit of the diverse views of the Justices as to the meaning and emphasis to be given the three elements in any particular analysis. It is virtually impossible to exaggerate the degree of confusion that has been generated. Taking solely for purposes of an example the subject of aid to parochial schools, one commentator has offered this statement of the paradoxes and peculiarities emerging from the use of the test:

> Lawyer and layman alike must have been wondrously perplexed when the Court told us that the state would be compelled to police the teaching of the partially subsidized secular instructor in the church-affiliated elementary and secondary schools, although surveillance is not mandated to guard against indoctrination by the religious-inspired teacher in the wholly funded public school; that the state may lend textbooks to parochial school students but that it may not lend those same students, or their parents, movie projectors, tape recorders, record players, maps and globes, science kits or weather forecasting charts; that a state may exempt church property

132. *Id.* at 674.
133. 403 U.S. 602 (1971).
134. *Id.* at 612-13 (footnotes omitted).

> from taxation but that it may not provide state income tax credits or income tax deductions for parents who pay tuition to church-related elementary and secondary schools; that the state may provide free bus transportation, to and from school, for children attending parochial schools but it may not provide the same transportation for the same students for trips to governmental, industrial, cultural and scientific centers designed to enrich their secular studies; that the state may provide direct, noncategorical funding of church-related colleges, but may not provide indirect, and restricted financial assistance for church-affiliated secondary schools; that the state may not provide, for children with special needs, remedial and accelerated instruction, guidance counseling and testing, speech and hearing services, on nonpublic school premises, but that it may provide speech and hearing diagnostic services in the nonpublic school; and that the state may provide—in public schools, public centers or mobile units—therapeutic services for deaf, blind, emotionally disturbed, crippled and physically handicapped nonpublic school children but that it may not provide the same services for the same children on the nonpublic school premises.[135]

Descended from the unhistorical premises of the *Everson* case, the tripartite test suffers the same infirmities as that landmark. It converts the nonestablishment notion of the framers, that no one church or dogma or combination of churches and dogmas ought to be singled out and officially favored, into the radical and asocial theory that church and state exist in totally isolated spheres, which are foreign to one another. The deficiencies of the test as a reflector of the framers' intention are found, not so much in the animating spirit of its formulation, as in its rash attempt at a sweeping inclusiveness. An assertion that an enactment always must have a secular purpose certainly is meaningful if understood in the sense that the business of the state does not encompass the definition of what is religiously correct or erroneous, that is to say, a state legislature may not set out to dictate what is religiously orthodox. The state is restricted to secular ends to the extent that it cannot serve as arbiter for religious truths. But it does not follow that a state, in recognition of the religious needs of its people, may not pass laws that seek to accommodate those religious needs, as the First Congress did by creating chaplains for the military and as the states did by passing Sunday closing laws. The distinct objectives of

135. L. MANNING, *supra* note 125, at 114-15. Since the publication of this statement in 1981, the Supreme Court has upheld the constitutionality of a Minnesota statute allowing a tax deduction for certain expenses incurred in sending a child to a parochial school. Mueller v. Allen, 103 S.Ct. 3062 (1983).

those kinds of enactments are to support and accommodate religion in general, not to favor any particular sect. To maintain that the state cannot have that kind of legislative purpose of aiding religion in a nondiscriminatory fashion is to suppress and distort what history plainly shows was a contrary view of the framers.

There are similar difficulties with the other elements of the tripartite test. If the secular effect requirement is taken to mean that the state cannot by any enactment seek to bring pressure on its citizens to engage in religious worship or to abstain from it, little disagreement is encountered. That certainly would be a prohibited effect. A difficulty with this second element is that the effect produced by a statute is examined independently of the purpose behind the enactment. Because the test obviously is designed to assess the effect without regard to what the legislature intended, the Supreme Court is put into the business of deciding not only what the states are constitutionally permitted to do but also what the Justices think is a socially desirable result of a given legislative program. Moreover, underlying all of this as a weakness, there is the assumption that the state may not legislate under the Constitution in order to advance religion generally, either in purpose or effect. As previously noted, it seems patent that the primary purpose and effect of tax exemptions for churches are the advancement of religion generally, the reason for such legislation being that most people believe religion is a good thing and ought to be encouraged.

Finally, the element of the test that forbids excessive entanglement at least has the merit that it recognizes there are some involvements between religion and government that are inevitable and supportable, condemning only those that go too far. Surely no one would dispute the truism that the government ought not to act in excess of its proper role. But in the original historic meaning of establishment, that means the government ought not to set up a church or show favoritism among particular religions or religious views. What excessive entanglement might mean in terms of the current test is something that can be discerned only in the eyes of the beholder.

VI. The Heritage of Dissenting Views

A plea that the Court, even at this late date, acknowledge the spurious character of the *Everson* foundation and rebuild its church-state jurisprudence on authentic and solid historical pilings is not as radical as it may appear at first blush. While some mem-

bers of the Court, from time to time, still echo the bravura of the strict separationists,[136] the fact is that since the days of *Everson* there has always been a strain of judicial thought that has recognized the extravagant misconceptions of the prevailing jurisprudence. Justice Reed was the first in a line of dissenters to protest *Everson*'s misreading of history. Although in *McCollum v. Board of Education*[137] Justice Reed observed that the passing years had brought about acceptance of a view that the establishment clause covered more than the creation of a state church, he flatly repudiated the majority's reading of the first amendment, stating that the circumstances of modern establishment cases were "far from the minds of the authors."[138] His comment on the "wall" metaphor is as telling now as when first uttered: "A rule of law should not be drawn from a figure of speech."[139] His qualification of the sweeping dicta of *Everson* was succinctly stated:

> I agree, as there stated, that none of our governmental entities can "set up a church." I agree that they cannot "aid" all or any religions or prefer one "over another." But "aid" must be understood as a purposeful assistance directly to the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions. "Prefer" must give an advantage to one "over another."[140]

Even the keepers of the ideological flame ignited by Justice Rutledge in his *Everson* dissent find it impossible from time to time to avoid stumbling into a reasonably accurate description of the historical roots of the first amendment, invariably embroidering it with some decoration of separationist color. For example, in *McGowan v. Maryland*,[141] Justice Frankfurter came close to capturing the heart of the matter when he defined "the long colonial struggle for disestablishment" as "the struggle to free all men, whatever their theological views, from state-compelled obligation

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136. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977). Identifying himself as a member of the "[n]o tax in any amount" school, Justice Stevens argued for a return to the simplicities of the *Everson* approach and a "high and impregnable" wall. *Id.* at 266 (Stevens, J., concurring in part, dissenting in part).

137. 333 U.S. 203 (1948).

138. *Id.* at 244 (Reed, J., dissenting). This compilation of judicial viewpoints antithetical to the *Everson* approach is not intended to be exhaustive or comprehensive. For present purposes, it is sufficient merely to demonstrate the degree of dissatisfaction with some of the premises underlying the strict separationist approach.

139. *Id.* at 247.

140. *Id.* at 248.

141. 366 U.S. 420 (1961).

to acknowledge and support state-favored faiths."[142] Unfortunately for the development of the law, however, that insight was immediately swallowed up in a loose and uncritical coupling of the Virginia Act for Establishing Religious Freedom with the legislative drafting of the first amendment, two separate acts of two separate legislatures on two different levels of government four years apart. Another, and perhaps the classic, example of this judicial ambivalence that momentarily recognizes the excesses of the *Everson* approach, only later to embrace them, is found in the opinions of Justice Douglas. His majority opinion in *Zorach v. Clawson*[143] sums up many of the considerations on which Justice Reed had relied:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.
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> . . . .
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> We are a religious people whose institutions presuppose a Supreme Being . . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.[144]

In the long run, however, Justice Douglas petrified into one of the more rigid separationists on the Court.[145]

Following more closely in the footsteps of Justice Reed, other members of the Court, to one degree or another, have resisted stretching the establishment concept to block off all points of contact between religion and state. For example, in *Engel v. Vitale*,[146]

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142. *Id.* at 460 (Frankfurter, J., dissenting).

143. 343 U.S. 306 (1951).

144. *Id.* at 312-14.

145. In Engle v. Vitale, 370 U.S. 421 (1962), Justice Douglas endorsed the separationist views of Justice Rutledge as "durable first amendment philosophy." *Id.* at 443 (Douglas, J., concurring).

146. 370 U.S. 421 (1962).

Justice Stewart gave an early indication that he viewed the first amendment essentially as prohibiting the establishment of a state church, and not as stripping away the numerous traditions of the nation.[147] That view was elaborated later in another dissent where he incisively stated some considerations that *Everson* had obscured:

> As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created National Government. The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to ensure that Congress not only would be powerless to establish a national church but would also be unable to interfere with existing state establishments. Each State was left free to go its own way and pursue its own policy with respect to religion. Thus Virginia from the beginning pursued a policy of disestablishmentarianism. Massachusetts, by contrast, had an established church until well into the nineteenth century.[148]

Among the sitting members of the Court, three or four may be mentioned who have manifested their discomfort with the inflexible formulations and underlying philosophy of the earlier cases. Chief Justice Burger has come tantalizingly close to rejecting the distortions of *Everson* by his reformulation of the dominant considerations in applying the first amendment. In *Walz v. Tax Commission*,[149] he offered this theme, which has become a general part of the subsequent analysis: "It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[150] Without evaluating the merits of this summary of the historical intent, it is plain that it strikes a much different note than *Everson*'s. Under it, the primary question becomes whether the legislative purpose of an enactment is aimed at becoming actively involved with, sponsoring, or supporting a religious activity. According to the Chief Justice, those are the "three main evils against which the Establishment Clause was intended to afford protection."[151] A consequence of that perspective is that the precedents are seen in a different light: "Our prior holdings do not call

147. *Id.* at 444-50 (Stewart, J., dissenting).

148. Abington School Dist. v. Schempp, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting) (footnotes omitted).

149. 397 U.S. 664 (1971).

150. *Id.* at 668.

151. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

for total separation between church and state; total separation is not possible in an absolute sense."[152] Some of the early assertions are rejected summarily: "The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago . . . ,"[153] and Chief Justice Burger's formulation throws into sharp relief certain distinctions, which are important in the administration of the religion clauses:

> The essence of all these decisions . . . is that government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions . . . . [W]here the state law is genuinely directed at enhancing the freedom of individuals, even one involving both secular and religious consequences such as the right of parents to send their children to private schools . . . , the Establishment Clause no longer has a prohibitive effect.[154]

Though perhaps Justice White's challenge to the premises of the dominant interpretation of the first amendment has not been as searching as that of the Chief Justice, he too has expressed views that are in tension with the separationist approach. In *Lemon v. Kurtzman*,[155] he squarely rejected the implications of the *Everson* philosophy by stating: "That religion may indirectly benefit from government aid to the secular activities of churches does not convert that aid into an impermissible establishment of religion."[156] He returned momentarily to this theme in a ringing dissent in *Committee for Public Education v. Nyquist*,[157] only to lapse into a kind of historical and constitutional nihilism:

> No one contends that he can discern from the sparse language of the Establishment Clause that a State is forbidden to aid religion in any manner whatsoever or, if it does not mean that, what kind of or how much aid is permissible. And one cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relations. In the end the courts have fashioned answers to these questions as best they can, the language of the Constitution and its history having left them a wide range of choice among many alternatives. But decision

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152. *Id.* at 614.

153. Tilton v. Richardson, 403 U.S. 672, 679 (1971).

154. Committee for Public Educ. v. Nyquist, 413 U.S. 756, 801-02 (1973) (Burger, C.J., concurring in part, dissenting in part) (citations and footnotes omitted). It should be emphasized, however, that the Chief Justice has never formally repudiated the tripartite test that currently dominates the thinking of the Court.

155. 403 U.S. 602 (1971).

156. *Id.* at 664 (White, J., concurring in part, dissenting in part).

157. 413 U.S. 756 (1973).

> has been unavoidable; and, in choosing, the courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships.[158]

Whether the language of the Constitution truly leaves the Supreme Court with the broad range of discretion that is suggested in Justice White's statement may be doubted. The notion that the first amendment turns over to nine Justices a carte blanche to "fashion answers to these questions as best they can" is neither a democratic nor an appealing one. But while thus seeming to endorse an assertion of almost limitless power by the judiciary, Justice White at least interprets the past decisions in a quiet, nonseparationist way: "The Court . . . has not barred all aid to religion or to religious institutions. Rather, it has attempted to devise a formula that would help identify the kind and degree of aid that is permitted or forbidden by the Establishment Clause."[159] Further, though he seeks to defend the legitimacy of two parts of the prevailing test, Justice White has been unable to accept its third prong of entanglement, which he considers a redundancy:

> As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason—particularly in light of the "sparse language of the Establishment Clause"—to take the constitutional inquiry further . . . . However, since 1970, the Court has added a third element to the inquiry: whether there is "an excessive government entanglement with religion." I have never understood the constitutional foundation for this added element; it is at once both insolubly paradoxical . . . and—as the Court has conceded from the outset—a "blurred, indistinct, and variable barrier."[160]

But the inherent risk in stirring doubts about the validity of one part of the *Lemon* test is that the same inquiry may lap over to the remaining two legs of the stool. Someone else may then inquire about the constitutional foundation for a mechanical insistence on a secular legislative purpose when, as *Marsh* itself demonstrates, one of the first acts of Congress in 1789 was to provide for its own prayer needs as a legislature.[161] And where is the constitutional standing for a test of a primary effect that neither advances

158. *Id.* at 820 (White, J., dissenting).

159. *Id.* at 821.

160. Roemer v. Maryland Public Works Bd., 426 U.S. 736, 768-69 (1976) (White, J., concurring in judgment) (citations omitted).

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

nor inhibits religion when precedents[162] such as religious tax exemptions are on the books?

Whatever criticisms may be leveled at the establishment clause theory espoused by Justice White, he at least recognizes that the extreme separationist position is untenable. The actions of state and federal government inevitably will impact religion, and those actions were not necessarily intended to be proscribed by the Constitution. In that regard, Justice White has argued that the impact may be either affirmative or negative:

> In my view, just as there is room under the Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for state policies that may incidentally burden religion. In other words, I believe the states to be a good deal freer to formulate policies that affect religion in divergent ways than does the majority.[163]

Finally, Justice Rehnquist is another member of the Court who also has been chafing under the yoke of the separationist approach, manifesting a concern that instead of reflecting religious neutrality, the opinions of the Court may be supporting the view of those "who believe that our society as a whole should be a purely secular one."[164] In response to the conventional judgment that there is a tension between the free exercise clause and the establishment clause, Justice Rehnquist has noted that the "tension" is "of fairly recent vintage, unknown at the time of the framing and adoption of the first amendment."[165] The reasons for the development of such a perception include the expansive coverage given to both clauses by the Supreme Court, the growth of social welfare legislation, and the incorporation of the first amendment into the fourteenth amendment.

> None of these developments could have been foreseen by those who framed and adopted the First Amendment. The First Amendment was adopted well before the growth of much social welfare legislation and at a time when the Federal Government was in a real sense considered a government of limited delegated powers. Indeed, the principal argument against adopting the Constitution *without* a "Bill of Rights" was not that such an enactment would be *undesirable*, but that it was *unnecessary* because of the limited nature of

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162. *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (1970).
163. Widmar v. Vincent, 454 U.S. 263, 282 (1981) (White, J., dissenting).
164. Meek v. Pittenger, 421 U.S. 349, 395 (1975) (Rehnquist, J., dissenting).
165. Thomas v. Review Bd., 450 U.S. 707, 720-21 (1981) (Rehnquist, J., dissenting).

the Federal Government.[166]

Although Justice Rehnquist concludes that we cannot know how the drafters would view the amendment in its modern applications, he is convinced that the *Everson* orientation is wrong, for "[t]he Establishment Clause does not require that the public sector be insulated from all things that may have a religious significance or origin."[167]

VII. A Policy for the Future

For thirty-six years, the Supreme Court has invested time and energies in the promotion of a separationist philosophy of the religion clauses that is fundamentally unfaithful to the intentions of the drafters of the first amendment. However misguided the effort, a commitment of that duration is not easily abandoned. Undoubtedly, there are those who, granting the deficiencies of the Court's work in this area, would argue that it is too late for reform. Yet the reasons for the Court to wipe the slate clean and develop a principled doctrine of church-state relations are compelling. A usurpation of power by the judiciary, casting judges in the role of constitutional revisors and legislative policy-makers, is destructive of the integrity of the system.[168] Moreover, in acting as a bevy of Platonic guardians to superimpose their own values on the community, the Justices have spun out a contradictory and chaotic jurisprudence.[169] The need to bring principle and consistency into the interpretation of the establishment clause is palpable. Finally, rather

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166. *Id.* at 721 (emphasis in original).

167. Stone v. Graham, 449 U.S. 39, 45-46 (1980) (Rehnquist, J., dissenting).

168. The issue is not whether judges "make law," but whether they make law within the constraints and traditions of a society where elected representatives are supposed to make basic policy choices. A premise of this article is that there are discernible lines between adjudication and legislation in our system of government. While those lines may not always be exactly traced, they are not so faint as to permit gross intrusions of one branch of government into the affairs of another.

169. Words of Judge Learned Hand first uttered in the Oliver Wendell Holmes lectures in 1958 have not lost their relevancy:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it, I reply, following Saint Francis, "My brother, the Sheep."

L. Hand, The Bill of Rights 73-74 (1958).

than reducing religious tensions as it is often claimed was one of the purposes of the first amendment, the current situation has instead stimulated a deep resentment among those who recognize that the decisions are not constitutionally mandated. Understandably, that recognition tends to breed contempt and distrust of the courts.

There should be no pretense or illusion that the endorsement of a historically valid exegesis of the establishment clause would eliminate all difficulties in this area. Intractable problems and vexing questions will remain even if the strict separationist theology is repudiated thoroughly. Furthermore, a decision to embark on the reformation of the existing jurisprudence undeniably has unsettling implications for the complex of social attitudes and expectations that have crystallized in however a chaotic form since *Everson*. In seeking a starting place for reform, the better approach may be to emphasize broad fundamentals and endeavor to build on them, rather than immediately attempt to achieve a comprehensive and detailed articulation of new doctrine. In any event, no effort is made in this article to reexamine critically the particular case decisions of the past or to specify the precise form a reformation should take.

VIII. Conclusion

The core of the historic meaning of the establishment clause was that the federal government was not to create a national church to which special privileges would attach, nor was it to express any preference or favoritism toward any particular religious body or set of religious doctrines. In its broadest extension, the concept of establishment means that a governmental imprimatur is placed on one or more religious beliefs, with the consequence that they occupy a position putting them at a legal advantage over their rivals. It is that which was forbidden. While the purpose in constructing those restrictions on the federal government originally was to protect the freedoms of the states the prohibitions have been applied to the states by virtue of the fourteenth amendment. But although the ban on establishment has been nationalized, the meaning of the first amendment prohibition has not been changed in the transition. State preference of one or more religions or religious beliefs is still what is put beyond the reach of the law.

If the relevant standard for defining establishment is whether the state expresses a preference for one religion over another, or undertakes to bestow a governmental endorsement on particular

religious beliefs, a number of conventional assertions ought to be reexamined critically. The following comments derive from that judgment: First, separation of church and state is a meaningful phrase that describes a distinctive feature of the government created by the Constitution. Specifically, it means that the rights of citizens to participate in the resolution of political questions relating to their own governments are independent of identification with any particular religious persuasions, or the lack of them. Put another way, the things of Caesar are separated from the things of God as far as the enjoyment of the full claims of citizenship are concerned. But separation of church and state does not properly signify or imply that these disparate institutional embodiments of basic human aspirations must never come into contact, or relate to each other in the civil and social order. As a practical matter, a religious body cannot even exist without at least the sufferance of the civil government of the place where it is located. On a deeper level, the need in a democracy for citizen participation in group determination of issues affecting the common good cannot be met by particular individuals without advertence to the ultimate ends to which they dedicate themselves and which often center in religious beliefs and sentiments. A religious person does not shed his values when he enters city hall, or at least he should not. The metaphor of a "wall of separation" is useful only to the degree that it dramatizes the formal severance of the political authority from that of the religious, but it cannot be taken as a descriptive statement that the religious and the secular are dichotomous. In fact, the religious and the secular continually interact on every level of human existence. Hence, a philosophy of absolute separation is, if nothing else, unrealistic. The church is separate from the state in the sense that each has its own autonomy and proper function. Neither one can properly undertake to perform the role of the other. But that autonomy must be enjoyed in a setting in which each respects and accommodates the other.

Second, the assertion that government must be neutral with respect to religion is an acceptable way of saying that no favoritism can be shown to one group of believers in preference to another. But if taken to mean, as it often is, that the state is or should be indifferent to whether religion develops or thrives in the society, it is at best misleading. In adopting the first amendment, the nation certainly did not intend to announce an indifference to religion, much less to endorse the view that irreligion was an acceptable societal alternative. While sedulously insulating the individual from

any pressure of the federal government to compel any particular religious choice, the first amendment deliberately left to the states the authority to regulate the ways in which religion might be integrated into public life. A progressive nationalization of polity through the fourteenth amendment has served to limit the ways in which the states may pursue such a goal, and has exacted uniformity of standards at both the state and national level. Nevertheless, nationalization does not translate into a constitutional imperative that government be indifferent to religion. Short of expressing preference for one religious body or viewpoint over another, government remains free to recognize the general desirability of a religious orientation for its citizens. That is the reason churches were given exemptions from property taxes.

Third, because government properly may acknowledge the advantages to society of a populace civilized and uplifted by religious sentiments, there is nothing constitutionally suspect about the passage of legislation that has the effect of advancing religion in general or promoting the opportunities for those with religious convictions to enjoy the widest range of civic benefits without sacrificing their spiritual principles. To be sure, a state may not endeavor to promote one particular brand of religion over another because the state has no authority to make the judgments necessary for such a preference. But the general promotion of religion is not only permissible but may be thought to be an indispensable way of maintaining the moral sensitivity and standards of a democratic citizenry. At least that is what some of the founding fathers believed.[170] Furthermore, the measure of whether particular legislation is legitimately ecumenical or instead tainted by a disqualifying favoritism should not be taken with jealous resentment of the principle being applied. The hallmark of favoritism is intention, not effect. It should not be assumed that the adoption of legislative means that accommodate one or more religious groups must necessarily be taken as expressing a preference for them over religious groups that are unable or unwilling to utilize the proffered means. With respect to legislative prayer, for example, since normally only one prayer is said the choice of any one minister, rabbi or other prayer leader results in the exclusion of the others. That does not mean that the election of a specific minister by a legislature represents a state preference for that faith, but only that the nature of

170. W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 11-15 (1970).

the common enterprise requires that one be chosen to serve symbolically for all. Effects that may be produced under legislation broadly patterned to be supportive or accommodating to religion in general, but not designed to prefer or favor one belief over another, are not objectionable if they are attributable to the voluntary responses of those citizens so disposed to act. To measure the propriety of legislation by reference to what people choose to do in the exercise of their religious freedom is not a liberal instinct; to the contrary, it is a form of social repression predetermined by what the measurer believes is acceptable behavior.

Finally, the argument that it is inherently improper for government to appropriate money to be used in support of activities of a religious character, whether directly or indirectly, is simplistic and unhistorical. *Marsh* reminds us that money was appropriated by the First Congress for the payment of a chaplain to offer prayers at the beginning of the legislative sessions. The issue is not whether money is appropriated, but whether legislative action of whatever type is directed toward the preference of one religious body or belief over another. A superficial appeal may attach to the rhetorical argument that one taxpayer's money should not be used to subsidize the teaching of another's beliefs or the practice of another's religion. But that same argument, when transplanted to any other situation involving the expenditure of public funds for purposes to which a taxpayer objects, will be seen as a blatant assault on the principle of representative government. The point is that, other than the establishment of one religion (or several) by favoritism or preference, there are no more constitutional barriers to the authorization of money for activities of a religious character than there are for the government subsidization of nuclear weapons over the protests of those who, by virtue of religious beliefs, find their use sinful.

Restraints on Defense Publicity in Criminal Jury Cases©

*Joel H. Swift**

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I. INTRODUCTION

When the United States Supreme Court reversed the murder conviction of Dr. Sam Sheppard because of the carnival atmosphere under which he was tried, its opinion in *Sheppard v. Maxwell*[1] indicated a number of measures the trial court might have taken to ensure "trial by an impartial jury free from outside influ-

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1. 384 U.S. 333 (1966).

ences."[2] Included was the statement, "[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters . . . ."[3] That brief suggestion has been interpreted as establishing broad authority in trial judges to impose involuntary speech restraints on criminal defendants and their attorneys whenever public interest in the trial has created a potential for publicity.[4]

Just a year after the decision in *Sheppard*, for example, a United States district judge in New Mexico, preparing for the trial of five Mexican-American civil rights activists, issued an order forbidding the attorneys, defendants and witnesses from making "any public statement . . . regarding the case, the evidence . . . , the witnesses or rulings of the [c]ourt."[5] The order was based upon the court's concern, supported by a defense application for change of venue,[6] that pretrial publicity would jeopardize the trial. The court made no findings regarding the nature or extent of the publicity, the possible effectiveness of alternative measures or the effect on the trial of other unrestrained publicity.[7]

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2. *Id.* at 362.

3. *Id.* at 361. Other measures suggested included adoption of strict rules governing the use of the courtroom by news reporters, *id.* at 358, insulation of the witnesses from news reporters, *id.* at 359, warning the newspapers to check the accuracy of their accounts, *id.* at 360, continuance of the trial, *id.* at 363, transfer to another county, *id.*, sequestration of the jury, *id.*, and ordering a new trial, *id.*

4. There is no clear agreement on the standard to be applied in determining whether such a restraint is necessary. Some courts have analyzed the issue in terms of the standards applicable to other trial protective techniques such as continuance or change of venue and have applied a "reasonable likelihood of interference" test. United States v. Mandel, 408 F. Supp. 673, 679 (D. Md. 1975); United States v. Anderson, 356 F. Supp. 1311, 1313 (D.N.J. 1973); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975); Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225, 242-43 (1973); People v. Watson, 15 Cal. App. 3d 28, 92 Cal. Rptr. 860, 868-69 (1971); State v. Carter, 143 N.J. Super. 405, 363 A.2d 366, 369 (1976); People v. Dupree, 88 Misc. 2d 780, 388 N.Y.S.2d 203 (Sup. Ct. 1976). At least one court has seen the problem as one implicating first amendment jurisprudence and has applied a test of "serious and imminent threat." United States v. Marcano Garcia, 456 F. Supp. 1354, 1357-58 (D.P.R. 1978). Still others have created their own tests. Central S.C. Chapter of Professional Journalists, Sigma Delta Chi v. Martin, 431 F. Supp. 1182, 1188-89 (D.S.C.) (substantial likelihood), *aff'd*, 551 F.2d 559 (4th Cir. 1977); State v. Schmid, 109 Ariz. 349, 509 P.2d 619 (1973) (likely to interfere); Hamilton v. Municipal Court, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168, 171 (1969) (high probability of interference with fair trial); State *ex rel.* Miami Herald v. McIntosh, 340 So. 2d 904 (Fla. 1977) (at the court's discretion for good cause). *See generally* KPNX Broadcasting Co. v. Arizona Superior Court, 103 S.Ct. 584 (1982) (Rehnquist, Circuit Justice).

5. United States v. Tijerina, 412 F.2d 661, 663 (10th Cir.) (quoting order issued by district court), *cert. denied*, 396 U.S. 990 (1969).

6. United States v. Tijerina, 407 F.2d 349, 354-55 (10th Cir.) (denying application for change of venue on ground it was unnecessary), *cert. denied*, 396 U.S. 843 (1969).

7. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

Five days later, Jerry Noll, one of the defendants, addressed his civil rights organization's annual convention 200 miles from the place of trial and, "[i]n colorful and demagogic language,"[8] declared that the start of the trial would commence a state of war between the United States and "the Kingdom of the Indies." He continued, "I suggest that a scorched earth policy be used; for every nation that used this policy were [sic] victorious. We must burn every tree, every blade of grass, every building within the Kingdom. Let them burn, burn, burn."[9] Because of that statement, Mr. Noll was found to have "created a danger to the rights of [the] defendants . . . and the Government to a fair and impartial trial by jury,"[10] and was adjudged in contempt of court.

On appeal, the Tenth Circuit, relying directly upon the quoted language from *Sheppard*,[11] found that the trial court's concern about publicity was an adequate basis for the order[12] and that the presence of police officers, three members of the news media, loudspeakers and a television camera made the meeting at which Mr. Noll spoke public.[13] No finding was made that Mr. Noll's state-

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8. United States v. Tijerina, 412 F.2d 661, 665 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

9. *Id.*

10. *Id.*

11. The Tenth Circuit also relied upon another quotation from the *Sheppard* opinion: "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." 384 U.S. at 363. That statement raised the issue of the legitimacy of professional ethical regulations on attorney participation in trial publicity. Because such regulations, being in the nature of a quasi-criminal code, raise considerably different questions than do prior restraints issued in specific cases, their validity is not discussed in this article. Such discussion may be found in A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, RECOMMENDATIONS OF THE ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS (Approved Draft 1968) [hereinafter cited as the REARDON REPORT]; ASS'N OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMM. ON RADIO, TELEVISION AND THE ADMINISTRATION OF JUSTICE, FREEDOM OF THE PRESS AND FAIR TRIAL (Final Report with Recommendations 1967) [hereinafter cited as the MEDINA REPORT]; Comm. on the Operation of the Jury System, Judicial Conference of the U.S., *Report on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391 (1968) [hereinafter cited as the KAUFMAN REPORT], *supplemented* 51 F.R.D. 135 (1971), *revised* 87 F.R.D. 519 (1980); SPECIAL COMM. ON FREE PRESS AND FAIR TRIAL, AMERICAN NEWSPAPER PUBLISHERS ASS'N, FREE PRESS AND FAIR TRIAL (1967) [hereinafter cited as the ANPA REPORT]; *see also* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976); *Restrictions on Attorneys' Extrajudicial Comments on Pending Litigation—The Constitutionality of Disciplinary Rule 7-107:* Hirschkop v. Snead, 41 OHIO ST. L.J. 771 (1980).

12. United States v. Tijerina, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

13. *Id.* at 663-64.

ment was an incitement to action,[14] that the statement was broadcast or reported to the general public, that any juror or potential juror heard or learned of it[15] or that the statement had any effect on the trial.[16] Nonetheless, the defendant's claim that his speech was protected by the first amendment was rejected and his conviction affirmed.[17] Mr. Noll served thirty days in jail and paid a fine of $500.

Four years after *Sheppard*, Frederick Joseph Chase, while awaiting trial in Chicago on charges of having destroyed draft records, requested a continuance because of pretrial publicity. The trial court, finding that a year would have passed between the last of the publicity and the start of the trial, denied the motion.[18] At the same time, however, the court noted that some of the publicity had been sought by the defendant, and took judicial notice of the fact that the defense attorney had been counsel in a selective service case in another jurisdiction and that his co-counsel on appeal in that second case had made extrajudicial statements while defense counsel in a third case, although he should have known that such was improper by virtue of his having represented Jerry Noll in New Mexico. On that basis the court entered the same order against Chase as had been issued against Noll, which effectively restrained his speech for a period of nine weeks until the order was vacated by the Seventh Circuit four days before the trial began.[19]

Ten years following the *Sheppard* decision, during jury selection in the murder trial of Black Muslim Lewis 17 X Dupree, a New York City trial judge stated to the attorneys, "in a case of this nature, you are not to discuss [the case] with anybody except, of course, for the purpose of the preparation of the trial, . . . lawyers,

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14. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969).

15. It appears likely that had the police not been present, the court would have been unaware of the statement.

16. Apparently, no problem was created by the statement. The trial court impaneled a jury and conducted the trial without difficulty. The application for the contempt citation, assertedly to protect the trial, was not made until after the case had gone to the jury. United States v. Tijerina, 412 F.2d 661, 663 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

17. *Id.* at 666-67. As an alternative holding, the court found that the defendant's failure to seek review of the initial order barred an attack on its validity after violation. *Id.* at 666; *accord* Walker v. Birmingham, 388 U.S. 307 (1967).

18. United States v. Chase, 309 F. Supp. 430, 436 (N.D. Ill.), *vacated on mandamus and appeal dismissed sub nom.* Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970).

19. *Id.* at 436-37. On appeal, the Seventh Circuit reversed, holding that the evidence did not disclose a sufficiently serious threat to the trial to justify the restraint. Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970).

judge, and court clerks . . . don't talk about it."[20] Three months later the court issued an opinion, citing the appearance in the courtroom of public figures as friends of the defendant, extensive newspaper publicity (almost all of which occurred after the order was entered)[21] and the desire of defense counsel to discuss the case publicly as justifications for its conclusion that a speech restraint was necessary "to avoid any interference with the integrity of the judicial process."[22] The court also rejected alternative means of protecting the trial as being less desirable[23] and expanded the restraint to cover the defendant himself.

Twelve years after *Sheppard*, a United States district judge in Puerto Rico,[24] apparently oblivious to the fact that he was issuing a prior restraint, "the most serious and least tolerable infringement on first amendment rights,"[25] applied a test devised by the Seventh Circuit[26] to judge the constitutional validity of attorney disciplinary regulations imposing punishment subsequent to the publicity.[27] Moreover, the court saw "the United States Attorney, the Defendants' present and previous attorneys, the Defendants themselves, witnesses, Court staff and United States Marshals"[28] as being equally subject to regulation. Once again, *Sheppard* was deemed to establish the trial court's "inherent facult[y]" to issue the speech restraint.[29]

A careful reading of *Sheppard*, however, makes clear that this reliance is not well placed. Notwithstanding the noncontextual quotation used as authority by lower courts, *Sheppard* clearly was not about defense publicity. It was about a judge who thought he had no authority to control the press,[30] allowing reporters to sit before the bar and handle and photograph exhibits lying on the counsel table.[31] It was about sequestered jurors calling home during their deliberations.[32] It was about a prosecutor publicly criticiz-

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20. People v. Dupree, 88 Misc. 2d 780, 388 N.Y.S.2d 203, 204 (Sup. Ct. 1976).
21. N.Y. Times Index 420 (1976).
22. People v. Dupree, 88 Misc. 2d 780, 388 N.Y.S.2d 203, 205-06 (Sup. Ct. 1976).
23. *Id.* 388 N.Y.S.2d at 209.
24. United States v. Marcano Garcia, 456 F. Supp. 1354 (D.P.R. 1978).
25. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).
26. Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).
27. United States v. Marcano Garcia, 456 F. Supp. 1354, 1355-56 (D.P.R. 1978).
28. *Id.* at 1357.
29. *Id.*
30. Sheppard v. Maxwell, 384 U.S. 333, 357 (1966).
31. *Id.* at 343, 355, 358.
32. *Id.* at 349.

ing the accused for refusing to be questioned on the day of his murdered wife's funeral,[33] and later for refusing to submit to a lie-detector test after nine hours of questioning.[34] It was about a coroner who refused to permit the accused's attorney to participate in the three-day inquest, "staged" in a school gymnasium, who then "received cheers, hugs, and kisses from ladies in the audience" when he forcibly ejected the attorney.[35] It was about extrajudicial publicity that took the Supreme Court almost twelve full pages to describe,[36] but which never in its 3200 words referred to a single specific instance of publicity by the defense attorneys, and which devoted only *nineteen* words to describing out-of-court statements made by the accused.[37] In addition, after indicating the extensive extrajudicial publicity, the Supreme Court stated that it "[could not] say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity . . . ."[38]

Not surprisingly, therefore, the defendants in *United States v. Tijerina*[39] asserted that the language quoted from *Sheppard* was dicta, having no binding force. That claim was rejected by the Tenth Circuit with the statement that "[t]he Court did not make gratuitous remarks which were not relevant to the issue for decision."[40] While this may be true, it was not necessary for the Supreme Court, in order to reach the conclusion that the trial did not comport with due process of law, to list any particular steps the trial court might have taken to prevent the constitutional violation. In that sense, therefore, the quoted portion of the opinion was gratuitous, and not part of the ratio decidendi of the decision. Furthermore, the issue that the Supreme Court decided was limited solely to the requirements of a fair trial. The first amendment implications presented by the case, and by the proposed solutions, were not raised by the parties,[41] and quite clearly were not care-

33. *Id.* at 338.
34. *Id.* at 339.
35. *Id.* at 339-40.
36. *Id.* at 338-49.
37. *Id.* at 340.
38. *Id.* at 354.
39. 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969).
40. *Id.* at 667.
41. *See generally* Brief for Petitioner, Sheppard v. Maxwell, 384 U.S. 333 (1966); Brief for Respondent, *Sheppard.* Both amicus briefs briefly mentioned a possible conflict between free press and fair trial. Brief Amicus Curiae on the Merits on Behalf of the State of Ohio at 9-10, *Sheppard*; Brief of American Civil Liberties Union and Ohio Civil Liberties Union, Amici Curiae at 1-2, *Sheppard.* The ACLU asked the Court to "provide working

fully considered by the Court.[42] In fact, nine years later the Court refused to accept *Sheppard* as final authority even on the issue of due process rights and extrajudicial publicity, pointing out that the constitutional defect in *Sheppard* was primarily the carnival atmosphere of the trial itself.[43] As binding precedent on the issue of the constitutionality of publicity restraints, therefore, *Sheppard* is not particularly strong. At most, *Sheppard* held that trial courts have an obligation to "protect their processes from prejudicial outside interferences."[44] While the opinion suggested speech restraints as a possible way of satisfying that obligation, no such order had been imposed, and their validity was not specifically at issue.[45]

Trial courts undoubtedly do have the authority, and obligation, to protect their trials. Maintenance of control over the courtroom and such techniques as change of venue, postponement of the trial, cautionary jury instructions and sequestration are accepted and appropriate methods for accomplishing that goal.[46] The attempt to deal with potentially prejudicial publicity by imposing speech restraints on defendants and defense attorneys over their objection, however, gives rise to significant first amendment concerns. Among the interests affected are those of the restrained in-

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solutions for some of the difficult and delicate problems of free press and fair trial that currently beset the administration of criminal justice." *Id.* at 28.

42. The references to speech restrictions in *Sheppard* were not unlike Justice Frankfurter's concurrence in the earlier case of Irvin v. Dowd, 366 U.S. 717 (1961), in which he stated:

> This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.

Id. at 730 (Frankfurter, J., concurring). In both cases, the only issue presented for decision was the fairness of the trial, but it was suggested that interference with trials through speech was not necessarily entitled to absolute first amendment protection. That, of course, is a far cry from holding that speech restraint is valid in all circumstances.

43. Murphy v. Florida, 421 U.S. 794, 799 (1975).

44. 384 U.S. at 363.

45. That *Sheppard* is not generally considered to have been the final word on the subject of speech restraints to protect trials is made evident by the enormous amount of literature that has appeared on the subject since that decision. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 627-28 n.26 (1978); REARDON REPORT, MEDINA REPORT, KAUFMAN REPORT, ANPA REPORT, cited *supra* note 11; *Revised Report on the "Free Press—Fair Trial" Issue*, 87 F.R.D. 519 (1980) [hereinafter cited as the SEITZ REPORT]; *Gag Orders on Criminal Defendants*, 27 HASTINGS L.J. 1369 (1976); *Silence Orders—Preserving Political Expression by Defendants and Their Lawyers*, 6 HARV. C.R.-C.L. L. REV. 595 (1971).

46. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-64 (1976); Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966).

dividuals in discussing, and of society in hearing discussion of, the trial, the criminal justice system, and social and political issues related to the criminal charges. Trial judges, perceiving an impending fair trial crisis, often do not give adequate attention to the more abstract, long term consequences of suppression of speech or, for that matter, to the broader consequences of their decision to the criminal justice system. Consideration of those consequences, however, is essential to the proper weighing of these "two basic conditions of our constitutional democracy."[47] It is submitted that when this weighing is properly done, the fundamental judgments inherent in a democratic society, as well as the interests of such a society in the maintenance of an effective criminal justice system, and the prevention of its misuse, argue for an absolute prohibition against speech restraints on criminal defendants. Moreover, they argue for the use of such restraints on defense attorneys only upon a demonstration, with a high degree of certainty, that suppression is necessary to prevent a violation of the attorney's obligations to the criminal justice system. Even then, however, the restraint should be drawn narrowly and subject to immediate judicial review.

II. The Analytical Framework

In *Nebraska Press Association v. Stuart*,[48] the Supreme Court focused on the first amendment issues presented by a restraint on publicity about a criminal jury trial. Faced with a highly publicized sex and mass murder trial in a small, rural Nebraska community, the trial court had found "a clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial"[49] and, ignoring other measures it could have taken to protect the trial, imposed a publication restraint directly on the news media.[50] The Supreme Court's review of this decision indicated that a factual situation that clearly demonstrated a conflict between a criminal defendant's fair trial right and the right of the press to publish information about the case would result in a balance drawn in favor of the former.[51] The Court concluded, however, that no such conflict had been demonstrated.[52] The reasoning that led to this

47. Pennekamp v. Florida, 328 U.S. 331, 367 (1946) (Frankfurter, J., concurring).
48. 427 U.S. 539 (1976).
49. *Id.* at 543.
50. *Id.* at 542.
51. *See id.* at 561-65.
52. *Id.* at 569-70.

conclusion began with an analysis of the evil that can be caused to a criminal jury trial by extrajudicial publicity[53] and an examination of the precedential authority relating to the destruction of jury impartiality.[54] That portion of the opinion concluded with the statement, "What we must decide is . . . whether in the circumstances of this case the means employed [to protect the defedant's right to a fair trial] were foreclosed by another provision of the Constitution."[55]

The Court then examined the first amendment interests with which the trial court's restraint interfered and judged them to be of an extremely high order.[56] It then evaluated the likelihood that the exercise of those first amendment rights would interfere with the trial, insisting that such likelihood must be demonstrated with a very high degree of certainty.[57] In concluding that this test had not been met,[58] the Court noted that there was insufficient evidence concerning the impact of the publicity on potential jurors, thus rendering the trial judge's assessment speculative.[59] The Court also observed that no evidence was present regarding the possible effectiveness of alternatives to the publication restraint,[60] and that the restraint itself would not have been effective in preventing extrajudicial publicity from affecting the trial.[61] Finally, the Court concluded that the restraint, as drafted, was unconstitutionally overbroad and vague.[62]

Perhaps the most intriguing part of the *Nebraska Press Association* opinion was that a majority of the Court, for the first time in its history, adopted the test[63] created by Chief Judge Learned

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53. *Id.* at 547-51.

54. *Id.* at 551-56; *see infra* notes 258-306 and accompanying text.

55. 427 U.S. at 555-56.

56. *Id.* at 556-62.

57. *Id.* at 562-70; *id.* at 571 (Powell, J., concurring); *see also* Capital Cities Media, Inc. v. Toole, 103 S.Ct. 3524 (1983) (Brennan, Circuit Justice).

58. 427 U.S. at 569-70.

59. *Id.* at 562-63. In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the Supreme Court reiterated the view that asserted governmental interests not empirically supported will not justify restrictions on the dissemination of information about criminal trials. *Id.* at 609-10.

60. 427 U.S. at 563-65. At a later point in the opinion, the Court pointed out that where the Court previously had reversed state convictions because of prejudicial publicity, the Court had "carefully noted that some course of action short of prior restraint would have made a critical difference." *Id.* at 569.

61. *Id.* at 565-67.

62. *Id.* at 567-68.

63. *Id.* at 562.

Hand of the Second Circuit, in *United States v. Dennis*,[64] asking whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[65] Although the Court did not explain its use of that test, several explanations are possible and reasonable.[66]

One explanation comes from a group of four opinions, decided prior to *Nebraska Press Association*, which dealt with the authority of a trial court to use its contempt power to punish out-of-court statements in nonjury cases.[67] The first of those opinions involved two contempt citations issued and upheld by California courts. In *Bridges v. California*,[68] the president of a labor organization con-

64. 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

65. *Id.* at 212. This test has been mentioned in only three other Supreme Court opinions: the plurality opinion of Chief Justice Vinson, affirming Judge Learned Hand's opinion, in Dennis v. United States, 341 U.S. 494, 510 (1951); the concurring opinion of Justice Douglas in Brandenburg v. Ohio, 395 U.S. 444, 453 (1969); and the dissenting opinion of Justice Black in Konigsberg v. State Bar, 366 U.S. 36, 64 (1961). Justice Douglas' reference in *Brandenburg* was included as part of a general criticism of the use of tests for the purpose of determining the validity of limitations on speech, rather than the granting of absolute protection to pure speech. Brandenburg v. Ohio, 395 U.S. 444, 450-57 (1969) (Douglas, J., concurring). Justice Black's reference to the test in his *Konigsberg* dissent was part of his criticism of a perceived abandonment of the clear and present danger test in favor of an ad hoc balancing approach to free speech issues. He characterized Judge Hand's test as such a balancing approach, Konigsberg v. State Bar, 366 U.S. 36, 64 (1961) (Black, J., dissenting), a characterization ultimately proven accurate by the manner in which the test was applied in *Nebraska Press Ass'n*.

66. Professor Benno Schmidt, analyzing the use of the *Dennis* test in *Nebraska Press Ass'n*, suggests that, in theory at least, the test provides less protection against suppression of trial publicity than previously had been afforded in Bridges v. California, 314 U.S. 252 (1941), and its progeny. Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 461-66 (1976). Professor Schmidt recognizes, however, that the test, as actually applied, may well afford greater protection because of the required demonstration of a high degree of certainty of interference with the trial. *Id.* at 458-66. A careful analysis of the Court's approach to subsequent suppression and prior restraints in trial publicity suggests that there is no significant difference between the two approaches—in both instances the Court weighs the relative values, gives theoretical priority to fair trials but demands an extremely high level of proof of actual interference.

67. Several other cases, such as Murphy v. Florida, 421 U.S. 794 (1975), Sheppard v. Maxwell, 384 U.S. 333 (1966), Estes v. Texas, 381 U.S. 532 (1965), Rideau v. Louisiana, 373 U.S. 723 (1963), Beck v. Washington, 369 U.S. 541 (1962), Irvin v. Dowd, 366 U.S. 717 (1961), and Stroble v. California, 343 U.S. 181 (1952), also involved the tension between fair trials and publicity. The issue presented in those cases, however, was whether the accused's fair trial rights under the sixth and fourteenth amendments had been violated, and only in *Estes* was a specific first amendment right raised. The *Estes* Court held the broadcast media did not have a first amendment right to televise trials. Estes v. Texas, 381 U.S. at 539-40. Although language in the Court's opinion in *Sheppard* and in Justice Frankfurter's concurrence in *Irvin* suggested that limitations might be imposed on the publicity, neither statement was part of the issues raised or part of the holding of the Court. *See supra* notes 29-38 and accompanying text.

68. 314 U.S. 252 (1941).

testing jurisdiction with another union sent to the Secretary of Labor, and published in a newspaper, a telegram advising (or threatening) that a strike would occur should the trial court rule against his organization.[69] The companion case, *Times-Mirror Co. v. Superior Court*,[70] involved an editorial in which a newspaper expressed its view that two convicted criminals awaiting sentencing should be dealt with severely.

Although the Supreme Court in *Bridges* divided five to four in holding the contempt convictions to be invalid, there were at least two points on which there was unanimity. First, the Justices agreed that these were not situations in which there was an absolute right to freedom of expression. Justice Black, writing for the majority, pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."[71] That suggests, notwithstanding Justice Black's reluctance to choose between free speech and fair trials,[72] that an actual conflict between the two would have been resolved in favor of fair trials.[73] The four dissenters, of course, merely by virtue of their judgment that the convictions should be upheld, rejected any absolute right to engage in publicity about pending litigation[74] and expressed that opinion in no uncertain terms.[75] With respect to the establishment of priorities, therefore, Chief Justice Burger's opinion in *Nebraska Press Association* is wholly consistent with *Bridges*.

The second point of agreement in *Bridges* was that, in determining whether a conflict between the two rights was presented by the facts, some balancing of the social policies behind each was necessary.[76] Thus, Justice Black began his "discussion of the judgments below by considering how much, as a practical matter, they would affect liberty of expression."[77] After reviewing the first amendment interests involved, many of which were similar to

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69. Although this case involved speech restraint imposed on a litigant, the possibility that this factor might have had relevance was not raised by the parties or the Court.

70. 314 U.S. 252 (1941).

71. *Id.* at 271.

72. *Id.* at 260.

73. On at least two other occasions the Supreme Court has expressed the view that an actual conflict would be resolved in favor of fair trials. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569-70 (1976); Estes v. Texas, 381 U.S. 532, 539-41 (1965).

74. *See generally* 314 U.S. at 279 *passim* (Frankfurter, J., dissenting).

75. *Id.* at 284: "Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials . . . ."

76. *See id.* at 262-63 (majority opinion); *id.* at 281-82 (Frankfurter, J., dissenting).

77. *Id.* at 268 (majority opinion).

those presented by the speech suppression in *Nebraska Press Association*,[78] as well as that here under discussion,[79] the opinion went on: "For these reasons we are convinced that the judgments below result in a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert."[80] Justice Frankfurter, discussing the same issue in his dissent, explained that it is "the function of a court to mediate between [the social policies behind the two rights], assigning . . . a proper value to each."[81] The entire Court, therefore, engaged in a weighing of the potentially conflicting constitutional rights and sought a means for determining when the exercise of one constituted an impermissible interference with the other. For the majority, that means was the "clear and present danger" test,[82] a phrase that the Court recognized was not a talismanic formula into which each factual situation could be cast and resolved.[83] Rather, said Justice Black, the test was a means for determining the likelihood that the exercise of speech would bring the evil to pass.[84] Justice Frankfurter's approach appears somewhat less clear. Through a good deal of his dissent, Justice Frankfurter suggested that the state can punish attempts, or speech calculated, to interfere with fair trials.[85] Ultimately, however, Justice Frankfurter resolved the question in the same manner as Justice Black, stating that the question always is "was there a real and substantial threat to the impartial decision."[86] The crux of the decision in *Bridges*, there-

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78. *Id.* at 269.

79. *See infra* notes 151-244 and accompanying text (further discussing those interests).

80. 314 U.S. at 270.

81. *Id.* at 282 (Frankfurter, J., dissenting) (quoting Clark v. United States, 289 U.S. 1, 13 (1932)).

82. *Id.* at 261 (majority opinion) (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

83. *Id.* at 261.

84. *Id.* at 262. In concluding that the clear and present danger test required a prediction of likelihood, Justice Black quoted from Justice Holmes' opinion in Schenck v. United States, 249 U.S. 47, 52 (1919) ("a question of proximity and degree"), 314 U.S. at 261 and from Justice Brandeis' opinion in Schaefer v. United States, 251 U.S. 466, 486 (1920) (Brandeis, J., dissenting) ("the test to be applied . . . is not the remote or possible effect"), 314 U.S. at 262 n.5.

85. 314 U.S. at 279, 280, 291-92 (Frankfurter, J., dissenting).

86. *Id.* at 303; *see also id.* at 291 ("It must . . . constitute in effect a threat to its impartial disposition"); *id.* at 292 ("The power should be invoked only where the adjudica-

fore, is that the right to engage in extrajudicial publicity is not absolute, that some evaluation of the importance of the speech versus the need to protect the administration of justice is necessary and that the likelihood that the two will come into conflict must be demonstrated with quite a high degree of certainty before the speech can be suppressed,[87] an approach identical to that taken in *Nebraska Press Association.*

Five years after *Bridges,* the Court returned to the validity of contempt citations in *Pennekamp v. Florida,*[88] a case in which a newspaper and one of its editors were convicted of contempt of court for publishing editorials critical of a trial court's dismissal of several rape indictments. The Florida Supreme Court, in upholding the convictions, found that the editorials contained a "distorted, inaccurate statement of the facts and . . . were scrambled false insinuations that amounted to unwarranted charges of partisanship and unfairness on the part of the judges."[89] On this occasion, the Court voted unanimously to reverse the convictions, but expressed its reasons in four separate opinions.

The majority opinion, written by Justice Reed, once again made it clear that the right to engage in "public comment . . . upon pending trials or legal proceedings"[90] was not absolute,[91] and followed the *Bridges* approach by applying the clear and present danger test.[92] As in *Bridges,* however, the Court did not apply the test as a mechanical formula, but instead explained:

> Whether the threat . . . must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment *on a balance between the desirability of free discussion and the*

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tory process may be hampered . . ."). Justice Frankfurter cited the Holmes and Brandeis opinions, mentioned *supra* note 84, as authority for his statement: "The phrase [clear and present danger] . . . is an expression of tendency . . . ." 314 U.S. at 296 (Frankfurter, J., dissenting).

87. It appears that the real point of disagreement between the majority and dissenters was on the likelihood of conflict on the facts presented.

88. 328 U.S. 331 (1946).

89. *Id.* at 343 n.5 (quoting Pennekamp v. Florida, 156 Fla. 227, 239-40, 220 So. 2d 875, 882 (1945), *rev'd,* 328 U.S. 331 (1946)).

90. *Id.* at 346.

91. *Id.* at 346-47. The Florida courts deemed the cases to be "pending" because it was clear that the prosecutor intended to seek reindictments; the Supreme Court accepted that judgment. *Id.* at 342, 344-45.

92. *Id.* at 334-35.

necessity for fair adjudication . . . .[93]

The *Pennekamp* Court thus described the clear and present danger test, at least in this context, as a means of balancing the two important rights involved,[94] and, as in *Bridges,* was unanimous in the judgment that the drawing of this balance mandated an examination of the record to determine the probability that a conflict would occur.[95]

The dispute raised in *Bridges* over whether the evidence must disclose an actual potential of the danger occurring, or whether an intent or attempt to cause such a danger is sufficient,[96] continued in *Pennekamp.* Justice Reed's opinion for the Court accepted the Florida court's determination that the intent and motive behind the editorials was "to abase and destroy the efficiency of the courts,"[97] but concluded that there was insufficient evidence that the effort would be successful.[98] Justices Murphy and Rutledge also insisted on a real potential of interference, rather than merely an effort.[99] On the other hand, in his concurring opinion, Justice Frankfurter insisted that punishment was appropriate when the speech was "reasonably calculated to endanger,"[100] "reasonably calculated to disturb,"[101] "intended to influence,"[102] an "attempt to influence"[103] or "psychologically calculated to disturb."[104] Ultimately, however, Justice Frankfurter concurred in the outcome, because he concluded that the cases involved were no longer pend-

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93. *Id.* at 336 (emphasis added).

94. *See id.* at 346 ("We must, therefore, weigh the right of free speech which is claimed by the petitioners against the danger of the coercion and intimidation of courts in the factual situation presented by this record"); *id.* at 349-50 ("As we have pointed out, we must weigh the impact of the words against the protection given by the principles of the first amendment . . . to public comment on pending court cases").

Justice Frankfurter's concurring opinion also made clear his view that formulae are inappropriate "when contending claims are those not of right and wrong but of two rights, each highly important to the well-being of society." *Id.* at 351 (Frankfurter, J., concurring); *see also id.* at 355, 367, 369 (a free press and an independent judiciary are indispensible to a free society; the Court must strike a proper balance between these basic constitutional conditions).

95. *Id.* at 349 (majority opinion); *id.* at 352-54 (Frankfurter, J., concurring); *id.* at 370 (Murphy, J., concurring); *id.* at 372 (Rutledge, J., concurring).

96. *See supra* notes 82-87 and accompanying text.

97. 328 U.S. at 345.

98. *Id.* at 349.

99. *Id.* at 370 (Murphy, J., concurring); *id.* at 372 (Rutledge, J., concurring).

100. *Id.* at 354 (Frankfurter, J., concurring).

101. *Id.* at 355.

102. *Id.* at 361.

103. *Id.* at 365.

104. *Id.* at 366.

ing[105] and because only "judicial hypersensitiveness" could find animus in the editorials.[106]

This disagreement between the "potential for actual interference" approach and Justice Frankfurter's "attempt to interfere" test became the central issue the following year in *Craig v. Harney*.[107] In *Harney*, during the pendency of a motion for a new trial, a newspaper campaign was conducted that was highly critical of the nonlawyer elected judge. The judge's ruling in the case was called " 'arbitrary action' and a 'travesty on justice.' "[108] The newspapers reported that a local group had labeled the judge's ruling a "gross miscarriage of justice," that the judge had properly brought down "the wrath of public opinion upon his head" and suggested that the judge was not "familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel."[109]

The state appellate court, in upholding contempt convictions of the publisher, an editorial writer and a news reporter, saw the issue as "whether the publications . . . were reasonably calculated to interfere with the due administration of justice in the pending case." It held that "there [was] no escape from the conclusion that it was the purpose and intent of the publishers . . . to force, compel, and coerce" the judge into granting a new trial.[110] The Supreme Court did not question that conclusion. Instead, it treated the purpose of the article and editorials as irrelevant, holding "it [was] hard to see on [the] facts how [the publication] could obstruct the course of justice in the case before the courts . . . . [T]here was here no threat or menace to the integrity of the trial."[111] Justice Frankfurter, in dissent, pointed out that the Court's opinion precluded the state from using its contempt power to "deal with direct attempts to influence the disposition of a pending controversy" and limited the state to dealing with misbehavior that "physically prevents proceedings from going on in court."[112] While Justice Frankfurter's description of what could be

105. *Id.* at 368-69.
106. *Id.* at 368.
107. 331 U.S. 367 (1947).
108. *Id.* at 369.
109. *Id.* at 370.
110. *Id.* (citation omitted).
111. *Id.* at 377; *see also id.* at 383 (Murphy, J., concurring) ("The only possible exception is in the rare instance where the attack might reasonably cause a real impediment to the administration of justice").
112. *Id.* at 391 (Frankfurter, J., dissenting).

restricted may have been underinclusive, there seems to be no doubt that he was correct in his complaint that mere attempts to interfere, without a real probability of success, could not be suppressed or punished.

Having put that dispute to rest, Justice Douglas' majority opinion essentially followed the approach of *Bridges* and *Pennekamp,* without engaging in further extensive analysis of the issue. Once again it was made clear that a "forbidden line" beyond which trial publicity could not go was conceivable,[113] but that a strong showing of a real potential for interference was necessary. Although the application of the clear and present danger test in *Bridges* and *Pennekamp* was recognized and approved,[114] the *Harney* Court apparently considered it necessary to restate that test in strong terms, perhaps because it had been applied incorrectly. Justice Douglas thus made it clear that a remote threat was not sufficient, nor was a likely or even probable threat.[115] Discussion of legal proceedings was viewed as being of such great importance to a democratic society[116] that nothing short of immediate peril to the impartial administration of justice could justify its suppression.[117]

Justice Douglas' strong statement appears finally to have persuaded lower courts that the use of the contempt power to suppress discussion of legal proceedings was appropriate only in exceptional circumstances,[118] for fifteen years passed before the issue returned to the Supreme Court.[119] In *Wood v. Georgia,*[120] a local

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113. *Id.* at 376 (majority opinion).

114. *Id.* at 372-73.

115. *Id.* at 376.

116. *Id.* at 374, 377.

117. *Id.* at 376; *see also id.* at 383-84 (Murphy, J., concurring) (only where the attack "might reasonably cause a real impediment to the administration of justice" is suppression justified).

118. Not long after the decision in *Harney,* however, criminal defendants began asserting that trial publicity had interfered with their fair trial rights, claims that generally were unsuccessful, but that met with some success in the late 1950's and early 1960's. *See* Rideau v. Louisiana, 373 U.S. 723 (1963) (refusal to grant change of venue a denial of due process); Beck v. Washington, 369 U.S. 541 (1962) (failed to show violation of constitutional rights); Irvin v. Dowd, 366 U.S. 717 (1961) (conviction void because jury not impartial); Stroble v. California, 343 U.S. 181 (1952) (conviction upheld). A conclusion by trial courts that *Bridges, Pennekamp* and *Harney* rendered them powerless to deal with this problem clearly was incorrect, however, because the Court had made clear in each of those cases that the first amendment right was not absolute and that publicity, which had a high likelihood of actually interfering with the impartial administration of justice, could be suppressed. *See supra* notes 71-75, 90-91 & 113 and accompanying text.

119. Justice Frankfurter had raised the issue obliquely in his concurrence in Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring); *see supra* note 42.

120. 370 U.S. 375 (1962).

judge instructed a grand jury to investigate allegations of voting irregularities among black voters in the county. The following day, while the grand jury was conducting its investigation, James Wood, the black sheriff of the county, issued a statement to the press asserting that the judge's action was "race agitation," and "a crude attempt at judicial intimidation of negro voters" and likened the judge to "a race baiting candidate for political office."[121] As a result of that statement, Wood was cited for contempt pursuant to an allegation that his statement "created . . . a clear, present and imminent danger to the investigation being conducted . . . and . . . to the proper administration of justice."[122] In response to that citation, Wood issued another statement asserting that his defense to the contempt citation would be that he had spoken the truth. That statement led to the inclusion of an additional count to the contempt citation. Wood ultimately was convicted on two counts of contempt of court.

The Supreme Court's opinion by Chief Justice Warren relied on *Bridges*, *Pennekamp* and *Harney* in reversing the convictions. Little additional analysis of the clear and present danger test was deemed necessary. The opinion pointed out that although the Georgia courts had held the standard to be satisfied, a review of the record disclosed "nothing . . . to indicate that the investigation was not ultimately successful or, if it was not, that the petitioner's conduct was responsible for its failure."[123] In other words, the *Wood* Court read the clear and present danger test as requiring even more than a very high degree of potential for interference. Indeed, subsequent proof of actual interference was deemed necessary.[124]

While it is questionable whether actual success, determined after the fact, always is a sine qua non for a valid punishment of a very dangerous speaker,[125] several unique factors present in *Wood* possibly called for such strong language. There was serious doubt as to whether there even existed an evil that the state had a right to prevent. The crux of the decision appears to have been that an investigative grand jury is supposed to receive as much information as possible,[126] while the actions of the judge had the effect of

121. *Id.* at 379-80.
122. *Id.* at 381.
123. *Id.* at 387.
124. *Id.* at 387-88.
125. *See* Dennis v. United States, 341 U.S. 494, 509-10 (1951) (plurality opinion).
126. *See* Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

limiting the grand jury's sources of information to those the judge approved.[127] A related concern expressed by the Court was that the judge used the contempt power to silence an individual because he held divergent views on a political issue.[128]

Furthermore, the effect of the contempt citation on liberty of expression was uniquely great. In the earlier cases, especially *Pennekamp* and *Harney*, the first amendment interest essentially was limited to access to information about the workings of the judicial system. In *Wood*, there existed an additional interest in "information and education with respect to the significant issues of the times."[129] That aspect of *Wood* is especially relevant in light of the fact that in a significant number of cases where involuntary silence orders have been imposed on criminal defendants and their attorneys, the existence of, or potential for, publicity was not created by the nature of the crime committed but by public interest in a political or social issue connected therewith.[130] Those silence orders thus foreclosed the parties not only from discussing the workings of the judicial system, but also from continuing their discussion of the underlying political or social issue.

Another significant factor in *Wood* was that for the first time the Court had before it, and took cognizance of, a case in which the individual whose speech was suppressed was a litigant—in fact, a defendant—in what was essentially a criminal proceeding. With regard to that factor, the Court stated:

> [T]o the extent that the conviction on the [final] count was upheld because petitioner's last statement presented a clear and present danger to the contempt hearing, it is indeed novel that under the circumstances of this case the petitioner might be responsible for a substantial interference with his contempt hearing because he had made public his defense to the charges made against him.[131]

Finally, Justice Harlan, in dissent, considered it significant that the speaker was an officer of the court, whose "words assumed an overtone of official quality and authority that lent them weight

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127. 370 U.S. at 390-91.

128. *Id.* at 391: "If the petitioner could be silenced in this manner, the problem to the people in the State of Georgia and indeed in all the states becomes evident."

129. *Id.* at 388 (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)); *see also* Bridges v. California, 314 U.S. 252, 268-69 (1941) ("timeliness and importance of the ideas seeking expression" are significant factors to the Court's determination of the propriety of out-of-court publications concerning a pending case).

130. *See infra* notes 170-75 and accompanying text.

131. 370 U.S. at 387-88.

beyond those of an ordinary citizen,"[132] a factor which, it was suggested, increased the likelihood of interference with the grand jury's deliberations. The majority responded to that argument in two ways. First, it reviewed the record and noted that there was no finding, nor any evidence to support a finding, that Wood issued his statement in his capacity as sheriff rather than as a private citizen.[133] Second, the Court suggested that even had Wood been acting as sheriff, the appropriate test was not whether that lent greater weight to his statements, but whether the publication of his statements in any way interfered with the performance of his responsibilities as sheriff.[134] That disagreement is of some significance in that Chief Justice Warren was saying that the "first amendment interest" side of the balance was not lessened by Wood's status as an officer of the court, but rather that the nature of the evils against which the Court could protect was different. Justice Harlan, on the other hand, took the view that the "potential for harm" side of the scale was weighted more heavily by the increased authority of an officer's statement.[135]

At this point, it may help to summarize the status, as of 1962, of the first amendment right to engage in out-of-court publicity concerning a pending judicial proceeding. Clearly the right was not absolute, but any restriction placed on it could be justified only on a showing of a clear and present danger of an actual interference with the fair administration of justice. The determination of whether such a danger existed required an identification and evaluation of the first amendment interests being served by the publicity and a weighing of those interests against the nature of the particular interference involved, with the weight assigned to the latter adjusted by the degree of likelihood of its actual occurrence. In *Wood*, the Court viewed as a real and dangerous concern the possibility that a public official would institute a legal proceeding against the political opposition, and then use the proceeding as justification for silencing the opposition. The *Wood* Court also

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132. *Id.* at 401 (Harlan, J., dissenting).

133. *Id.* at 393-94 (majority opinion).

134. *Id.* at 394.

135. In view of the fact that the majority concluded that Wood was not acting in his official capacity, the argument over which side of the scale would be effected was dictum—instructive but not determinative. In fact, both Chief Justice Warren and Justice Harlan probably were correct. Justice Harlan's view that an officer of the court's greater credibility increases the potential for harm is somewhat counterbalanced, however, by society's interest in receiving information from a knowledgeable insider. *See infra* notes 226-27 and accompanying text.

viewed as "novel" the idea of silencing the individual whose alleged wrongdoing was the subject matter of the proceeding. Finally, it was suggested that the status of the speaker as an officer of the court was relevant if the publicity interfered with his particular responsibilities to the court.

When viewed against that background, it is apparent that Chief Justice Burger's application of the *Dennis* test in *Nebraska Press Association* was not significantly different from the application of the clear and present danger test in the earlier cases, particularly in view of his insistence on a demonstration of potential conflict with a high degree of certainty.[136] Precedent, moreover, is not the only explanation for the use of the *Dennis* test. The Supreme Court's experience with the efforts of state trial judges to apply the clear and present danger test in this area had disclosed a notable lack of success. The judge in *Nebraska Press Association*, for example, apparently sensed that an element of probability belonged in his evaluation of the danger caused by the publicity, but saw in the literal language of the clear and present danger test no room for such a prediction. Hence, he concluded that there existed "a clear and present danger that pretrial publicity *could* impinge upon the defendant's right to a fair trial,"[137] clearly an improper approach. The *Dennis* test, on the other hand, alerts the trial judge that he must make a careful evaluation, based upon actual evidence, of the probability that the evil will occur. Similarly, the clear and present danger test, read literally, leaves no room for an evaluation of the relative merit of the speech and the relative seriousness of the evil, although most certainly such an evaluation is necessary.[138] Criminal trial judges, of course, have no difficulty perceiving the seriousness of the evil of a biased jury, but they are considerably less likely to pay careful attention to the invasion of free speech occasioned by a restraint. The *Dennis* test is more likely to alert them to the necessity for including that factor in their analysis.

In a more general sense, the clear and present danger test is appropriate for analyzing cases where the danger is in fact immedi-

136. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-70 (1976).

137. *Id.* at 543 (emphasis added).

138. Bridges v. California, 314 U.S. 252, 263 (1941); *see supra* notes 68-71 and accompanying text; *see also* Dennis v. United States, 341 U.S. 494, 503-05 (1951) (plurality opinion) (Chief Justice Vinson analyzing the Holmes and Brandeis opinions in Schenck v. United States, 249 U.S. 47 (1919), and Schaefer v. United States, 251 U.S. 466 (1920) (Brandeis, J., dissenting)).

ate, such as "falsely shouting fire in a theatre,"[139] but its apparent requirement of imminence renders it inappropriate in situations where the danger is created by an accumulation of speech with no exact moment when it is possible to say "now the danger is imminent."[140] Just as the government need not "wait until the *putsch* is about to be executed"[141] before it may intervene and prevent a longrange scheme of rebellion, it need not wait until the last vestige of impartiality is about to be eliminated from the community before it may prevent a publicity campaign that is almost certain to succeed in destroying that impartiality.

Finally, to the extent that the clear and present danger test mandates an element of temporal imminence,[142] it is clearly intended for situations in which the proper antidote for "bad" speech is "good" speech, provided there is sufficient time for the counsels of right to succeed before the substantive evil occurs. In the context of a criminal jury trial, however, there is no such thing as "good" extrajudicial speech. Publicity by one side that tends to undermine jury impartiality cannot be "corrected" by publicity from the other side. Additional publicity merely exacerbates an already potentially harmful situation.

The use of the *Dennis* test by the Supreme Court in *Nebraska Press Association*, therefore, was quite appropriate in evaluating the validity of a prior restraint upon out-of-court publicity about a criminal jury case. While the several elements of the test certainly differ in many (but not all) respects when the publicity is created by the defendant and defense attorney, rather than the news media, the general analytical framework works quite well and is consistent with Supreme Court decisions going back over forty years.

The similarities between press publicity and defense publicity about a criminal jury case suggest that the Supreme Court's approach in *Nebraska Press Association* is equally appropriate to both. Broadly speaking, the fundamental social issues, free expression and fair trials, are the same. In many respects, the more specific interests coincide as well. The criminal justice interest identi-

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139. Schenck v. United States, 249 U.S. 47, 52 (1919).

140. On the difficulties inherent in determining a point in time when pretrial publicity has become a clear and present danger to jury impartiality, see generally Younger v. Smith, 30 Cal. App. 3d 138, 159-64, 106 Cal. Rptr. 225, 239-42 (1973).

141. Dennis v. United States, 341 U.S. 494, 509 (1951) (plurality opinion).

142. One of the primary criticisms of the *Dennis* test is its subordination of the element of "presence." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 114 (Vintage ed. 1971).

fied in *Nebraska Press Association*—maintenance of jury impartiality—can be affected by extrajudicial publicity whatever the source. Two of the first amendment interests involved—the heavy presumption against the validity of prior restraints on speech and the societal need for information about the workings of the criminal justice system—also exist where a restraint on defense publicity is at issue.

There are, however, several significant differences in the interests present, which may affect the balance ultimately drawn. Two of these differences suggest that restraints on defense publicity may be more necessary to protect the effective performance of the criminal justice system, particularly when the publicity is caused by the attorney. The use of publicity to obtain partisan advantage at the trial, for example, potentially upsets the carefully developed adversary balance that lies at the heart of the Anglo-American criminal justice system.[143] In addition, public confidence in the ability of that system to find justice in accordance with established procedures also is more likely to be undermined by unrestrained partisan attorney publicity.[144]

On the other hand, several differences suggest that the effect of defense publicity, in some respects, may be less harmful to the important interests of the criminal justice system, while a restraint on such publicity may involve a greater invasion of free speech than does a restraint on the press. Defense publicity potentially affects the government's, rather than the accused's, right to an impartial jury, a right that is not constitutionally mandated and which a free society may consider less crucial than the concurrent right of the accused.[145] Moreover, a citizen who is silenced at the very time the government is bringing criminal charges against him sustains a considerably greater personal loss than does the press.

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143. The Supreme Court noted that such a possibility potentially exists in a press publicity case as well, but found it not to be present in *Nebraska Press Ass'n*. 427 U.S. at 555 n.4.

144. A strong argument can be made, of course, that public confidence in the judicial process can be undermined through interference by the press as well. In deciding *Nebraska Press Ass'n*, however, the Supreme Court made no mention of that consideration. At any rate, it appears considerably more likely that unrestrained interference with the trial by a partisan participant, especially the defense attorney, considered by the public to be a part of the judicial system, is more likely to undermine that confidence than is interference by an impartial outsider, whose motive presumably is not to interfere but to disseminate information.

145. Although it is impossible to say what the trial court would have done in *Nebraska Press Ass'n* had the media been publishing prodefense information, the entry of a publicity restraint in such a situation would seem to be considerably less likely.

Finally, a restraint on the defense attorney may interfere with his professional responsibility to represent his client and to protest any deficiencies in the criminal justice system, actions that are permitted but not demanded of the press.

A proper analysis of defense publicity, therefore, must identify both the free speech values invaded by a speech restraint and the substantive evils that such an order might justifiably be used to prevent. The next step requires an evaluation of the probability that the speech actually will conflict with the interests being protected. Assuming such a potential for conflict is disclosed, it then becomes necessary to weigh the social values behind the conflicting interests and judge which interest should prevail. The following section of this article will explore that process by identifying the first amendment interests served by extrajudicial speech by a criminal defendant or by a criminal defendant's attorney. Section IV will examine the substantive evils that might be caused by unrestrained speech and will assess the probability that they will occur. Section V will then attempt to draw a reasoned balance between those interests in cases where the potential for actual conflict appears with a sufficiently high degree of certainty.

III. The Invasion of Free Speech

It is well established that the responsibility of the courts to ensure fair and orderly trials carries with it "incidental powers of self-protection"[146] necessary to meet that obligation, including wide authority to deal with obstructions that occur in the courtroom,[147] even at the cost of restricting what might otherwise be constitutionally protected speech.[148] As Professor Thomas Emerson has pointed out: "It is generally accepted that the system of freedom of expression has no application to the actual conduct of a judicial proceeding itself. The judge presiding over a trial may enforce many kinds of limitations upon the right of persons in the courtroom to express themselves."[149] When the speech occurs

146. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1022 (1924); *accord* Myers v. United States, 264 U.S. 95, 103 (1924); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); United States v. Hudson, 11 U.S. (7 Cranch) 32, 33-34 (1812); M. Fleming, The Price of Perfect Justice 148 (1974).

147. Illinois v. Allen, 397 U.S. 337, 343-44 (1970).

148. Wood v. Georgia, 370 U.S. 375, 383 (1962); Bridges v. California, 314 U.S. 252, 266 (1941).

149. T. Emerson, *supra* note 142, at 449-50. Professor Emerson's implication that the power to regulate speech in the courtroom is absolute may somewhat overstate the case. It is

outside the courtroom and its immediate environs,[150] however, the needs of the judicial system obviously are different and must be balanced against the interests to be served by that speech, including those of society, the defendant and the defense attorney. In examining the interests of the defense attorney, it also is necessary to take into account the court's authority to regulate the defense attorney by virtue of his role as "officer of the court."

A. Prior Restraint

Chief Justice Burger began his discussion of the first amendment interest in *Nebraska Press Association* with an analysis of the significance of the fact that the order involved was a prior restraint. Summarizing the history of prior restraints, he noted that the Court had interpreted the guarantees of liberty of the press and of speech "to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a 'previous' or 'prior' restraint on speech."[151] Chief Justice Burger then reviewed the Court's prior restraint decisions, including *Patterson v. Colorado ex rel. Attorney General,*[152] *Organization for a Better Austin v. Keefe*[153] and *New York Times Co. v. United States,*[154] a case that the Chief Justice described as unanimously holding that prior restraints are "presumptively unconstitutional."[155]

That historical discussion concluded with what probably is the strongest statement ever made by the Supreme Court on the law of

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questionable, for example, whether a trial court may prohibit the wearing of an armband in the absence of evidence demonstrating interference with the judicial process. *Cf.* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 514 (1969) (school officials may not prohibit students from wearing armbands unless there is "substantial disruption of or material interference with school activities").

150. *See* United States v. Grace, 103 S.Ct. 1702 (1983); Cox v. Louisiana, 379 U.S. 559 (1965).

151. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976) (construing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931), and Grosjean v. American Press Co., 297 U.S. 233 (1936)).

152. 205 U.S. 454 (1907). Chief Justice Burger stated: "[T]he main purpose of [the first amendment] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments.' " 427 U.S. at 557 (quoting Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 714 (1931), quoting Patterson v. Colorado, 205 U.S. 454, 462 (1907)).

153. 402 U.S. 415, 418-19 (1971): "[T]he injunction operates . . . to suppress, on the basis of previous publications, distribution of literature . . . ," *quoted in Nebraska Press Ass'n*, 427 U.S. at 558.

154. 403 U.S. 713 (1971).

155. 427 U.S. at 558-59 (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting)).

prior restraints:

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.[156]

Chief Justice Burger then applied those general statements to the specific question of prior restraints on the dissemination of information about criminal trials:

> The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment . . . . For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct.[157]

Notwithstanding those extremely strong statements regarding the evils of prior restraints on the dissemination of information about criminal proceedings, the *Nebraska Press Association* majority was unwilling to impose a blanket prohibition.[158] Instead, it concluded that the presumptive invalidity of such a restraint mandated that a justifying "evil" be demonstrated with an extremely high degree

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156. *Id.* at 559 (citing A. BICKEL, THE MORALITY OF CONSENT 61 (1975)). For other discussions on the dangers of prior restraint, see T. EMERSON, *supra* note 142, at 377-78; L. TRIBE, *supra* note 45, at 725-30.

157. 427 U.S. at 559 (citations omitted). At another point in the opinion, the Chief Justice described the prior restraint as "one of the most extraordinary remedies known to our jurisprudence." *Id.* at 562.

158. It was on this point that the majority opinion diverged from the concurring opinions of Justice Brennan, joined by Justices Stewart and Marshall, *id.* at 572 (Brennan, J., concurring), and apparently Justice Stevens, *id.* at 617 (Stevens, J., concurring). The concurring Justices were of the opinion that interference with a criminal trial simply was not an evil that could ever justify a prior restraint. *Id.* at 588 (Brennan, J., concurring); *id.* at 617 (Stevens, J., concurring). Justice White also leaned in that direction, but deemed it to "be the better part of discretion . . . not to announce [an absolute] rule in the first case in which the issue has been squarely presented here." *Id.* at 570-71 (White, J., concurring).

of certainty. The effect of the Court's decision was to elevate the "probability" element of the *Dennis* test[159] to a requirement of practical certainty.

Although *Nebraska Press Association* dealt with a prior restraint on the news media rather than a private citizen, there is no justification for drawing any particular distinction between the two situations. One of the cases heavily relied on in Chief Justice Burger's opinion, *Organization for a Better Austin v. Keefe*,[160] involved an injunction issued against private citizens rather than the news media, and no distinction was drawn. Moreover, the *Nebraska Press Association* opinion clearly emphasized the danger of "freezing" the communication of information about criminal proceedings, not "freezing" the person or entity disseminating the information.[161] Finally, reference must be made to the statement in *Wood v. Georgia*[162] concerning the "novelty" of even a subsequent punishment of one who made public his defense to the charges against him.

A similar analysis should apply to the defense attorney because the voluntary involvement of a speaker in an important governmental institution does not lessen the "heavy burden" resting on the government to demonstrate the need for a prior restraint.[163] The fact that an attorney has voluntarily enlisted as a functionary in the legal system and as an assistant to the court may give rise to additional considerations when determining what constitutes an evil that the court has a right to prevent, and may increase the probability of the evil occurring, but the obligation to demonstrate that probability with a high degree of certainty should not be lessened.[164] Consequently, whether the speaker is a member of the news media, the defendant or the defense attorney, the rules on prior restraints should be the same—the need to "freeze" the speech in advance must be "demonstrated with the degree of cer-

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159. *See supra* note 65 and accompanying text. To the extent that Professor Thomas Emerson was correct in viewing the *Dennis* test as "virtually abandon[ing] the element of 'clear' " from the *Schenck* test, T. EMERSON, *supra* note 142, at 114, the decision in *Nebraska Press Ass'n* reinstated it in the context of a prior restraint.

160. 402 U.S. 415 (1971).

161. 427 U.S. at 559.

162. Wood v. Georgia, 370 U.S. 375, 387-88 (1962); *see supra* note 131 and accompanying text.

163. *See supra* notes 151-59 and accompanying text.

164. Healy v. James, 408 U.S. 169, 184 (1972) (state college must satisfy heavy burden of proof that student organization will cause disruption before it may refuse to permit constitutionally protected organizational activities).

tainty [Supreme Court] cases on prior restraint require."[165]

B. The Societal Interest

"The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public . . . ."[166] Unfortunately, however, many of those with authority over the criminal justice system distrust publicity about its operations, are concerned over public criticism of their profession and would prefer to keep events secret.[167] "There is no field of governmental activity concerning which the people are as poorly informed as the field occupied by the judiciary."[168]

This fear of publicity disserves both the criminal justice system and the public. Criminal courts, bound by history and tradition, have great difficulty adjusting to new demands imposed by social change.[169] Improvements in the system cannot be achieved without public support, support that will not come without "open and 'robust' discussion of judicial administration."[170] It is not enough for presidential commissions, lawyers and sociologists to write reports and books about the need for improvement in the judicial system. Such efforts, while helpful, do not touch the community in the way that individualized first person reports in the newspapers and on television can.[171] A single person sitting before a television camera and explaining the unjust way in which a governmental agency is dealing with him can do much to arouse public support for change. Information regarding police misconduct will assist in reforming police methods, passing regulatory statutes and removing judges who do not adequately oversee police activ-

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165. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976).

166. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

167. H. JAMES, CRISIS IN THE COURTS 3-4, 226 (1968).

168. *In re* Hearings Concerning Canon 35, 132 Colo. 591, 597, 296 P.2d 465, 469 (1956); *accord* TWENTIETH CENTURY FUND TASK FORCE ON JUSTICE, PUBLICITY AND THE FIRST AMENDMENT, RIGHTS IN CONFLICT 17 (1976) [hereinafter cited as RIGHTS IN CONFLICT].

169. A. BLUMBERG, CRIMINAL JUSTICE 73-74 (1967). For an extensive critique of the inadequacy of the criminal justice system in dealing with crime in a modern society, see generally PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE COURTS (1967) and THE CHALLENGE OF CRIME IN A FREE SOCIETY (Da Capo Press 1968).

170. T. EMERSON, *supra* note 142, at 458; *see* Foreman, *A Free Press and a Fair Trial: A Defense Attorney's View*, 11 VILL. L. REV. 704 (1966).

171. Bridges v. California, 314 U.S. 252, 268 (1941): "It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist."

ity.[172] Information regarding plea bargaining and other areas of prosecutorial discretion "may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions . . . ."[173] Information regarding others implicated in a crime can lead to public demand to know what actions are being taken to prosecute them.[174] Trial judges considering speech restraints, therefore, should not view all discussion of criminal cases as necessarily evil; they also have the "responsibility of considering the public's need to be informed about the administration of justice"[175] and the system's need to have public support for change.

Secrecy regarding the administration of justice also can have a detrimental impact on public confidence. The knowledge that a defendant claiming injustice has been silenced can create serious doubts about the proper workings of the system. "When people feel that the truth about crime, law enforcement, and the administration of justice is being withheld, they become prey to rumors and mistrust."[176] A substantial portion of American society already views the criminal justice system as the instrument of the ruling class, used to achieve political[177] or racial[178] suppression, and speech restraints in cases with political or racial overtones can only reinforce that opinion. Indeed, experience indicates that those cases frequently produce such restraints.[179]

Disclosure of events that occur during the "nonpublic" aspects

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172. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 605-06 (1976) (Brennan, J., concurring); *see also* Monroe, *A Free Press and a Fair Trial: A Radio and Television Newsman's View*, 11 VILL. L. REV. 687, 689-90, 695-96 (1966) (discussing dangers of secrecy of judicial procedures).

173. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 606 (1976) (Brennan, J., concurring); *accord*, Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 252-53 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).

174. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 606 (1976) (Brennan, J., concurring).

175. RIGHTS IN CONFLICT, *supra* note 168, at 7.

176. *Id.* at 10; *accord* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

177. J. SKOLNICK, THE POLITICS OF PROTEST 316-26 (1969).

178. E. CLEAVER, SOUL ON ICE 128-37 (1968).

179. *Compare* United States v. Tijerina, 412 F.2d 661 (10th Cir.) (restraint imposed on civil rights activist), *cert. denied*, 396 U.S. 990 (1969); United States v. Chase, 309 F. Supp. 430, 436-37 (N.D. Ill.) (restraint imposed on anti-war activist), *vacated on mandamus and appeal dismissed sub nom.* Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); Hamilton v. Municipal Court, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969) (restraint imposed on student demonstrator); People v. Dupree, 88 Misc. 2d 780, 388 N.Y.S.2d 203 (Sup. Ct. 1976) (restraint imposed on Black Muslim) *with* United States v. Mandel, 408 F. Supp. 673 (D. Md. 1975) (prosecutor's request for restraint on extrajudicial statements concerning trial of state governor refused).

of criminal proceedings, between arrest and trial, also will result in police, prosecutors and judges doing their jobs more effectively and with greater respect for the rights of the accused and the public.[180] The knowledge that actions are subject to informed, contemporaneous public review is a potent check on abuse of power.[181] The existence of publicity may well provide such officials with the excuse necessary to resist political pressure. "A healthy democracy requires fresh air and light. Public officials, including judges, prosecutors and the police, function best in a goldfish bowl."[182]

The consequences on the political process of a speech restraint also can be significant. Information regarding charges of corruption in government, especially in cases where an election is pending, may have an important effect upon the electoral process.[183] Information about an underlying controversial issue, especially when coming from a spokesperson for one side, is important in resolving the issue.[184] A substantial percentage of the cases in which silence orders have been entered or requested have been a part of more widespread public debates, involving controversial figures[185] or issues.[186] In such cases, "the ban is likely to fall . . . upon the most important topics of discussion . . . . Experience shows that the more acute . . . controversies are, the more likely it is that in some aspect they will get into court."[187] Speech restraints in political cases, therefore, can be especially troublesome, for "discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors."[188]

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180. Wright, *Fair Trial—Free Press*, 38 F.R.D. 435, 436 (1966).

181. *In re* Oliver, 333 U.S. 257, 270 (1948).

182. Wright, *supra* note 180, at 436.

183. *See* United States v. Mandel, 408 F. Supp. 673 (D. Md. 1975); People v. Watson, 15 Cal. App. 3d 28, 92 Cal. Rptr. 860 (1971).

184. Bridges v. California, 314 U.S. 252, 277-78 (1941).

185. *See, e.g.*, United States v. Mandel, 408 F. Supp. 673 (D. Md. 1975) (state governor); State v. Carter, 143 N.J. Super. 405, 363 A.2d 366 (1976) (former world champion prize fighter); People v. Dupree, 88 Misc. 2d 780, 388 N.Y.S.2d 203 (Sup. Ct. 1976) (Black Muslim).

186. *See, e.g.*, United States v. Tijerina, 412 F.2d 661 (10th Cir.) (demonstration by Mexican Americans where two forest rangers were assaulted), *cert. denied*, 396 U.S. 990 (1969); United States v. Chase, 309 F. Supp. 430 (N.D. Ill.) (destruction of selective service registration cards and other government files and records), *vacated on mandamus and appeal dismissed sub nom.* Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); Hamilton v. Municipal Court, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969) (student demonstrations at University of California at Berkeley protesting presence of United States armed services recruiters).

187. Bridges v. California, 314 U.S. 252, 268-69 (1941).

188. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 573 (1976) (Brennan, J.,

A correlative issue to the societal interest in hearing defense speech derives from the role of the news media in acquiring and disseminating to the populace what has been said. The argument has been forcefully made that the guarantee of a free press contained in the first amendment embraces not only a right to publish, but also a right to gather, information free from governmental interference.[189] The situation under consideration here is one where the speaker is willing to speak and the press is interested in hearing and publishing what the speaker has to say, but the government is asserting an interest that in some way interferes with that otherwise open line of communication and distribution.

The Supreme Court, on several occasions, has considered the validity of governmental interference with the transmission of information between a willing speaker and the press and in each case has concluded that when such interference is necessary to ensure the effective operation of the criminal justice system, no press rights have been violated. The issue was first discussed in *Branzburg v. Hayes*,[190] which raised the specific question of whether a newsman could be compelled to disclose his confidential source of information to a grand jury. In rejecting the constitutional claim, the Court held that the burden on news gathering—the possibility that willing speakers would be rendered unwilling—was too uncertain to override the public interest in law enforcement and an effective criminal justice system.[191] No view was expressed as to whether the newsman would have prevailed had he been able to demonstrate clearly a lost source of information.

Two years later the Court considered two cases more analogous to the one under consideration—the loss of the source of information resulting from a governmental restraint on the speech of an otherwise willing speaker. In *Pell v. Procunier*,[192] and *Saxbe v. Washington Post Co.*,[193] the Court held that where the government demonstrated sufficient need to reduce the first amendment rights of the speaker vis-a-vis the general public, the press had no greater right than the general public to hear that speech. A validly imposed reduction in the first amendment rights of a willing speaker,

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concurring).

189. *See generally* ANPA REPORT, *supra* note 11.

190. 408 U.S. 665 (1972).

191. *Id.* at 690-91.

192. 417 U.S. 817 (1974).

193. 417 U.S. 843 (1974).

therefore, may not be offset by an absolute right of the media to receive the information. Indeed, any other conclusion would, in effect, create an absolute right of free speech for any willing speaker possessing information that the press considers newsworthy.

On the other hand, it is unquestionable that the news media play a crucial role in ensuring that the public has the opportunity to be informed about the workings of government, including the criminal justice system.

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations . . . . With respect to judicial proceedings in particular, the function of the press serves to . . . bring to bear the beneficial effects of public scrutiny upon the administration of justice.[194]

This consideration has led the Supreme Court to conclude that the press may not be excluded from attending trials,[195] publishing information that is already on the public record,[196] "reporting events that transpire in the courtroom"[197] or, except perhaps in the most unusual of circumstances, publishing information it has, without regard to the source.[198] The ultimate conclusion to be drawn, therefore, is that although the press does not have an absolute right to gather information, even from a willing speaker, the role of the press as a conduit between the newsmaker and the public must be considered when balancing the first amendment interests.

C. *The Defendant's Interests*

The criminal defendant, presumed by our law to be innocent,[199] is made to suffer the consequences of an accusation of misconduct by an official organ of the government. Where publicity

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194. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

195. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

196. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

197. Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966); *accord* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 568 (1976).

198. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971).

199. *See* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 404 (1970) (the presumption of innocence "represents a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community"); *cf.* Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring) (even after conviction of crime, the right to respect continues).

may be a problem for the trial, it is equally, if not more so, a problem for him. Even without further disclosures by the government, the newspapers may well continue to present the allegations to the public.[200] The defendant's reputation and self-respect can be destroyed. His family is made to suffer. He is forced to face his fellow citizens wearing a stigma of wrongdoing. A restraint on his speech prohibits him from voluntarily disclosing the facts that he thinks will prove his innocence, while in many jurisdictions[201] if those facts constitute an alibi, he can be compelled to disclose them to the prosecution and place them on the record[202] where they can be obtained by the press and published against his will.[203] The defendant, in such cases, is in the anomalous position of having neither a first amendment right to disclose the information nor a fifth amendment right to withhold it, a result somewhat the reverse of what the Bill of Rights—providing its protections to the accused and not the government—was intended to achieve.[204]

Nor is it adequate to suggest that, if the defendant is in fact innocent, his vindication will come at trial. The results of criminal trials often are of less interest to the public, and therefore less widely publicized, than the original accusations, especially in trials ending in acquittals. Many of those who hear the charges may believe that the defendant "wriggled out of the charge by hiring smart lawyers, or on a technicality."[205] Furthermore, notorious criminal trials can remain in the courts for years,[206] and even relatively routine cases take weeks, and often months, from arrest to verdict. The problem of being a silenced criminal defendant was appropriately summed up by one commentator when he stated: "I, for one man, would shudder at the prospect of being charged with some crime, especially one of moral turpitude, and being con-

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200. *See* People v. Watson, 15 Cal. App. 3d 28, 40-41, 92 Cal. Rptr. 860, 868 (1971).

201. *E.g.*, FLA. STAT. ANN. § 3.200 (West 1975); N.Y. CRIM. PROC. LAW § 250.20 (McKinney 1982); PA. R. CRIM. P. 305(C)(1)(a); UTAH CODE ANN. §§ 77-35-16(5)(c), -14-2(1) (1982); VT. R. CRIM. P. 12.1(a), (b).

202. *See, e.g.*, Williams v. Florida, 399 U.S. 78 (1970) (upholding Florida's rule that defendant must name for the record all witnesses he intends to call as alibi witnesses).

203. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (state may not impose sanctions on the accurate publication of information obtained from public judicial records).

204. The defendant in People v. Dupree, 88 Misc. 2d 780, 388 N.Y.S.2d 303 (Sup. Ct. 1976), *see supra* notes 20-22 and accompanying text, would have been in this anomalous position had he alleged the existence of an alibi because his prosecution was in a state requiring pretrial disclosure of the facts surrounding such a claim. *See* N.Y. CRIM. PROC. LAW § 250.20 (McKinney 1982).

205. H. JAMES, *supra* note 167, at 216.

206. Bridges v. California, 314 U.S. 252, 269 (1941).

demned to suffer silence until some distant day when even an acquittal would not be recompense."[207]

Silence also is likely to result in the existence of an antidefense bias in the community from which the jury will be selected. The charge or indictment presents information tending toward guilt. The knowledge in the community that the police, the committing magistrate, the grand jury and the prosecutor all have concluded that there is adequate evidence of guilt to support an exercise of their judgment adverse to the defendant has an effect upon the community's view of the case. Adverse media publicity also affects that view: "Both doctrinally and practically, criminal procedure, as presently constituted, does not give the accused 'every advantage' but, instead, gives overwhelming advantage to the prosecution . . . . Underlying this development has been an inarticulate, albeit clearly operative, rejection of the presumption of innocence in favor of a presumption of guilt."[208] Other more general biases concerning attitudes toward criminals, racism and social and political values also may exist in the community. "Because juries frequently face complex problems laden with value choices . . . the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case."[209] Thus, rather than interfering with a fair trial, the right of a defendant to provide information necessary to overcome already existing biases may well be essential to its maintenance.[210]

Criminal trials also are expensive. In an increasing number of cases, especially those in which either the crime or the prosecution has political overtones,[211] the defense has found it necessary and feasible to request contributions from the public.[212] Obtaining such a defense fund will depend, to a large extent, on the defendant's

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207. Royster, *The Free Press and a Fair Trial*, 43 N.C.L. REV. 364, 369 (1965). Lest there be those who think that such things do not happen to ordinary people, the reader's attention is directed to the Supreme Court's opinion in Sheppard v. Maxwell, 384 U.S. 333 (1966). Dr. Sheppard suffered not only the stigma of a criminal allegation, but 10 years in prison before achieving vindication.

208. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960).

209. Ballew v. Georgia, 435 U.S. 223, 233-34 (1978).

210. H. JAMES, *supra* note 167, at 219-20.

211. J. SINK, POLITICAL CRIMINAL TRIALS 2-8 (1974).

212. Garry & Riordan, *Gag Orders: Cui Bono?*, 29 STAN. L. REV. 575, 581 (1977) (relating an instance in which it was necessary for the defense to speak at public gatherings each night of the trial to pay for the day's transcript); *cf.* Buckley v. Valeo, 424 U.S. 1, 25, 29 (1976) (first amendment interest exists in obtaining contributions to further political views).

ability to convince potential contributors of his innocence, an ability he does not have if his speech is restrained.

Finally, an innocent defendant may need to exercise his first amendment rights to guard against the miscarriage of justice. Courts are political institutions, "depend[ent] on the same political processes that sustain legislative and executive institutions."[213] Most American judges and prosecutors are selected through the partisan political process and at some point must return to that process to retain their positions or to obtain advancement.[214] They come from the same political background as other government officials, are personally friendly with them and tend to view the needs of the government in much the same way.[215] The temptation exists, therefore, to use their power over the criminal law to protect those perceived personal needs.[216]

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.[217]

This "political" responsibility of the jury to serve as a check upon judge and prosecutor, as well as to function as the "conscience of the community"[218] in ensuring morally and socially appropriate enforcement of the law,[219] has created somewhat of a dilemma for the

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213. H. JACOB, JUSTICE IN AMERICA 7 (2d ed. 1972).

214. The prosecution of Dr. Sam Sheppard is a case in point. Both the trial judge and the prosecutor were candidates for the bench in upcoming elections. Sheppard v. Maxwell, 384 U.S. 333, 354 (1966).

215. H. JACOB, *supra* note 213, at 7-13.

216. *See* Wood v. Georgia, 370 U.S. 375, 391 (1962). Indeed, the possibility of using the existence of criminal charges, even if they cannot be proved, as "justification" for silencing a political opponent increases that temptation.

217. Duncan v. Louisiana 391 U.S. 145, 155-56 (1968).

218. United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969); *see* Ballew v. Georgia, 435 U.S. 223, 233-34 (1978); Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

219. The doctrine of jury nullification, through which the community's sense of values

criminal justice system. While recognizing that "the jury has the power to bring in a verdict in the teeth of both law and facts,"[220] the principle is well settled that no information may be presented in the courtroom that might cause it to do so.[221] Rather, the jury that is to serve as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge,"[222] is carefully instructed that its sole responsibility is to determine whether the facts as presented by that prosecutor demonstrate a violation of the law as stated by that judge.[223]

Thus, the jury is expected to bring with it to the trial the information that will enable it to fulfill its political responsibilities.

> The jury gets its understanding as to the arrangements in the legal system from more than one voice . . . . There is the informal communication from the total culture—literature (novel, drama, film, and television); current comment (newspapers, magazines and television); conversation; and, of course, history and tradition. The totality of input generally convey[s] . . . the idea of prerogative, of freedom in an occasional case to depart from what the judge says.[224]

A restraint on the defendant's speech results in the "totality of input" that reaches potential jurors being short by one voice—the voice of that member of society with the single greatest interest in the outcome of the discussion. Certainly there is a potential that

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is applied to a particular prosecution notwithstanding the strict requirements of law, has a long history in Anglo-American jurisprudence. The earliest reported instance of a jury nullifying what it considered to be an unjust law occurred in the libel prosecution of William Penn and others for criticizing the British government. Penn & Mead's Case, 6 How. St. Tr. 951 (1670). An attempt by the trial court to punish the jurors for refusing to return a guilty verdict was subsequently struck down in Bushell's Case, 6 How. St. Tr. 999 (1670). The doctrine appears to have made its first appearance in colonial America in the Trial of John Peter Zenger, 17 How. St. Tr. 675, 9 Harg. St. Tr. 275 (1735); *see infra* notes 367-81 and accompanying text.

The history and implications of this jury power have been widely discussed. *See* Sparf & Hansen v. United States, 156 U.S. 51, 64-107 (1895); United States v. Dougherty, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972); United States v. Simpson, 460 F.2d 515, 518-20 (9th Cir. 1972); United States v. Moylan, 417 F.2d 1002, 1006-07 (4th Cir. 1969); United States v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815); United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545); Case of Fries, 9 F. Cas. 924 (C.C.D. Pa. 1800) (No. 5127); Commonwealth v. Porter, 51 Mass. (10 Met.) 263 (1845); L. FRIEDMAN, THE WISE MINORITY 28-50 (1971); J. STORY, COMMENTARIES ON THE CONSTITUTION § 1064 n.(a) (5th ed. 1891); Kuntsler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L LAW 71 (1969); Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972).

220. Horning v. District of Columbia, 254 U.S. 135, 138 (1920).

221. *E.g.*, United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

222. *See supra* text accompanying note 217.

223. United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972).

224. *Id.* at 1135.

the information so provided will be false, but in a democratic society it is for the people to determine the weight that it shall be given and not for the government to foreclose it from consideration.

A defendant's desire to discuss his case, therefore, is not necessarily motivated by a desire to pervert justice; it often may be his only means of obtaining justice, or reducing the stigmatization of himself and his family, of offsetting community bias, of raising funds to defend himself or of participating in important public discussion and convincing his fellows that his acts were morally, if not legally, blameless.

D. The Defense Attorney's Interests

Much of what has been said about the defendant also applies to his attorney. Substantial first amendment interests are served by the attorney's speech, both in his individual capacity and in his role as representative of his client. "Most lawyers, dealing day in and day out with social problems against political backdrops, are social and political animals."[225] Indeed, his interest in the social or political issues involved in a particular case often is the very reason why a lawyer will undertake the defense of an accused, and a silence order may force him to choose between two methods of advancing his political beliefs.

In addition to his personal interests in speaking out, the lawyer plays an important role in protecting society.

> A profession bound by oath never to reject for any personal consideration the cause of the defenseless or oppressed cannot but be an intolerable obstacle to dictators and tyrants. It is the glory . . . of the bar that . . . the would-be tyrants and oppressors of mankind find the elimination of a free and fearless legal profession a necessary first step in the carrying out of their plans.[226]

Lawyers are a crucial source of information and opinion because they are credible and knowledgeable about pending litigation and are in a unique position to examine and assert the unconstitutionality or injustice of a statute. They have not only the right, but also the obligation, to criticize the state of the law and to point out injustices and misconduct on the part of law enforcement officials, prosecutors and even judges. "Certainly courts are not, and cannot

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225. J. CAVANAGH, THE LAWYER IN SOCIETY 48 (1963).
226. Editorial, *"Let's Kill All the Lawyers!,"* 34 J. AM. JUD. SOC'Y 35 (1950).

be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so."[227]

The accused's right of representation also is disserved by restrictions on the defense attorney's speech:

> [D]efense counsel should not be prevented from conveying to the public the essentials of a client's position with respect to an investigation or the filing of charges. There are times when counsel for a controversial defendant can legitimately speak in support of his client's cause by discussing the propriety of the processes by which his client has been charged and is being tried. When a violation of law results from an attempt to assert a civil right or liberty or can be construed as a protest against official misconduct, defense counsel may feel a need to explain the principles involved.[228]

The accused criminal often is not articulate or informed[229] and may wish to exercise his right to hire another to advance his interest[230] and adopt as his own "the words used by his more fluent or learned friend on his behalf."[231] The client also may be in jail, subject to a substantial limitation on his ability to speak out.[232] The attorney has a duty to protect his client's interests, both inside and outside of court.[233] A restraint may force him to choose between his duty as an attorney and citizen to speak out and his obligation to represent his client, thereby potentially depriving the accused of the attorney of his choice.

The defense attorney, while participating in a governmental function, does not represent that government, but represents a private citizen in conflict with it. He possesses a multifaceted status as a self-employed businessman, a trusted agent of his client and

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227. *In re* Sawyer, 360 U.S. 622, 669 (1959) (Frankfurter, J., dissenting); *see also* Gannet Co. v. De Pasquale, 443 U.S. 368, 383-84 (1979) (when a judicial proceeding has been closed to the public, there is an affirmative obligation on the participants to represent the public interest).

228. RIGHTS IN CONFLICT, *supra* note 168, at 14.

229. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).

230. O'Brien v. Leidinger, 452 F. Supp. 720, 724 (E.D. Va. 1978); *see* Buckley v. Valeo, 424 U.S. 1, 25, 29 (1976).

231. E. CHRISTIAN, A SHORT HISTORY OF SOLICITORS 3 (1896); *accord* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 195 (2d ed. 1898).

232. *See* Pell v. Procunier, 417 U.S. 817 (1974); *FALN Prisoners Isolated Due to FBI Information*, Chicago Tribune, July 9, 1983, § 1, at 4 (warden explained, "[W]e wanted to limit their communications with their community").

233. A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 455 (1833).

an assistant to the court.[234] His function as an officer of the court, therefore, has been recognized as significantly different from that of government employees charged with the single duty of carrying out governmental functions.[235]

> Certainly nothing that was said . . . in any . . . case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks, or judges. Unlike those officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word "officer" as it has always been applied to lawyers conveys quite a different meaning from the word "officer" as applied to people serving as officers within the conventional meaning of that term.[236]

Thus, the Supreme Court has upheld regulations imposed to ensure the attorney's fitness to practice law[237] or to protect clients,[238] while striking down others not supported by a demonstrable need relevant to the regulation.[239] Regulation of private attorneys is not justifiable solely by virtue of their status as officers of the court, but must be supported by some particular aspect of that status that warrants different treatment. An examination of the particular evils that are uniquely susceptible to creation by attorneys will be found in Parts IV-B and IV-C of this article.

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234. Cohen v. Hurley, 366 U.S. 117, 124 (1961).

235. Although attorneys were historically unregulated private citizens who made their services available to those who sought better educated or more fluent persons to appear in court in their behalf, E. CHRISTIAN, *supra* note 231, at 3, by the beginning of the 17th century citizen complaints regarding ethical standards led to the adoption of regulations designed for protection of those clients. *Id.* at 43, 60-61. The concept that an attorney's speech could be regulated to protect the proceedings, however, did not arise until later in the century, when such restrictions began to be imposed on all discussion of cases, *id.* at 70-78, an approach that has been rejected in this country. *See infra* notes 254-57 and accompanying text. It thus appears that historically, regulation of attorneys was designed for the client's, not the court's, protection, and that the imposition of speech restraints was based not on lawyers' unique role, but on the reduced British right, in general, to discuss pending cases.

236. Cammer v. United States, 350 U.S. 399, 405 (1956); *see Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378-79 (1866).

237. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 159-60 (1971).

238. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 461-62 (1978).

239. *In re* Primus, 436 U.S. 412, 434 (1978) (no proof that attorney's solicitation resulted in any evil); Bates v. State Bar, 433 U.S. 350, 368-72 (1977) (no proof that attorney advertising undermined professionalism); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-92 (1975) (no legitimate state interest in establishment of minimum legal fees); *In re* Griffiths, 413 U.S. 717 (1973) (no reasonable relationship between citizenship and practice of law).

Before turning to the examination of the several interests of the criminal justice system that might justify an invasion of free speech, one additional, and possibly conflicting, first amendment interest should be discussed. If, in fact, society, the defendant and the defense attorney all have a strong interest in the defense attorney's speech, does a similar interest exist in publicity by the prosecutor? If, after all, there is a strong public interest in the workings of the criminal justice system, the prosecutor is certainly a knowledgeable source of information. If there are political or social issues inherent in the underlying dispute, both sides of those issues should be presented. The prosecutor, as well as the defense attorney, has a client whom he represents and whose cause he has an interest in promoting both inside and outside the courtroom.

Recognizing the existence of the prosecutor's interest, however, is quite different from suggesting that it is equal to the defense attorney's interest. Both, of course, have voluntarily undertaken a special role as participants in the criminal justice system, generally described as "officer of the court." Their roles, however, are not the same. The prosecutor is an official representative of the government, and while such status does not necessarily justify a total elimination of his free speech rights,[240] it does create considerations not applicable to the defense attorney. The government, as a participant in a criminal trial, has a greater obligation of impartiality than does defense counsel.[241] The free speech rights of the prosecutor are personal rights, and do not belong to the government, which has no existence as a separate being but works through the people it employs. To suggest that each of these people, when acting in his official capacity, has a first amendment right to express the government's point of view is to grant to the government a protected right to freedom of utterance equal to that of citizens. No justification for such a right, either constitutionally or logically, can be perceived.[242]

Moreover, there is a significant difference in the social importance of the respective attorneys' speech. As has been seen, free-

240. *Cf.* Pickering v. Board of Educ., 391 U.S. 563, 572-73 (1968) (first amendment rights of a public school teacher could be restricted when the speech "either impeded the . . . proper performance of his . . . duties . . . or . . . interfered with the regular operation of the schools generally"); *accord* Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979) (teacher's dismissal for expressing her views forcefully was violation of first amendment).

241. *See infra* note 344.

242. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 13 (1966).

dom of expression for the defense attorney is important to him, to the client he represents and to society in general.[243] Unlike a private attorney, however, it is inappropriate for a government employed prosecutor to use his official position to advance personal political views. In addition, he has no need to vindicate his client's reputation, obtain funds to pay for the litigation, explain his client's political position or prevent oppression of his client. Finally, although the public does have an interest in learning about the workings of the prosecutor's office,[244] the need for immediate disclosure of that information is not so great as to justify even a small interference with the accused's fair trial rights.

The defense attorney's unique role results in a level of first amendment rights that differs both from those of the accused and those of the prosecutor. On the one hand, his professional status as an assistant to the court places obligations on him that are not imposed on a private citizen, especially one engaged in a dispute with the government that may result in the loss of his liberty. On the other hand, his status as an independent businessman, his obligations as the trusted agent of a citizen whose liberty is at stake and the social importance of his speech demand protection greater than that afforded one who is employed by the government to carry out its functions.

IV. The Gravity of the Evil Discounted By Its Improbability

> [W]e start with a proposition which is basic: that the judicial process is the central pivot about which a free society revolves. I sometimes marvel at the fact that in over five thousand years of history we have invented no other institution for the disposition of human conflict without violence . . . . I therefore need make no apologies for feeling that it is mighty important to preserve that institution against deterioration.[245]

An unfortunate fact of the current state of human existence is that no society can survive without an effective criminal justice system that reasonably assures the citizenry that those persons who commit crimes will be convicted and dealt with in accordance with the mores of the society. Indeed, transferal of the authority to

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243. *See supra* text accompanying notes 225-33.

244. Spector, *A Free Press and a Fair Trial: A Prosecutor's View*, 11 Vill. L. Rev. 697, 697-98, 700-02 (1966).

245. Rifkind, *When the Press Collides With Justice*, 34 J. Am. Jud. Soc'y 46, 48 (1950).

punish transgressions against the rights of others from the hands of the victim and his family to the state has been a major ingredient in the rise from anarchy to an ordered society. As that process has proceeded, the increases in urbanization, industrialization and mobility have led to a depersonalization of community relationships and a reduction in the concern of each individual for the private property and values of others,[246] thus heightening the need for a structured, accepted means of dealing with crime. Although such a process is central to any social system, be it self-governing or totalitarian, it is of special significance in a society in which the laws are enacted by representatives of the people.[247] It is not enough, however, simply to recognize the importance of the criminal justice system and to suggest that any interference with a preferred "ideal" may be restricted when such restrictions may intrude on another system that also is fundamentally important to a free society—the system of freedom of expression. Rather, it is necessary to identify "the special characteristics of the [judicial] environment"[248] that must be protected in order to ensure the operation of that system, even at the price of a restriction on freedom of speech. In other words, what is the "substantive evil"?[249]

In early discussions of that issue, in *Bridges v. California*,[250] *Pennekamp v. Florida*,[251] *Craig v. Harney*[252] and *Wood v. Georgia*,[253] the Supreme Court made two points quite clear. First, the inclusion of the first amendment in our political scheme was a deliberate rejection of the "broad and somewhat arbitrary jurisdiction"[254] of British courts to restrict discussion of the administration of justice.[255] The Court specifically pointed out that the

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246. L. FRIEDMAN, *supra* note 219, at 513-14; M. LEWIS, W. BUNDY & J. HAGUE, AN INTRODUCTION TO THE COURTS AND JUDICIAL PROCESS 12 (1978).

247. A. MEIKELJOHN, POLITICAL FREEDOM 14 (1948):

> At the bottom of every plan of self-government is a basic agreement, in which all the citizens have joined, that all matters of public policy shall be decided by corporate action, that such decisions shall be equally binding on all citizens, whether they agree with them or not, and that, if need be, they shall by due legal procedure, be enforced upon anyone who refuses to conform to them. The man who rejects that agreement is not objecting to tyranny or despotism. He is objecting to political freedom.

248. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).

249. Schenck v. United States, 249 U.S. 47, 52 (1919).

250. 314 U.S. 252 (1941).

251. 328 U.S. 331 (1946).

252. 331 U.S. 367 (1947).

253. 370 U.S. 375 (1962).

254. D. GILLMORE, FREE PRESS AND FAIR TRIAL 160 (1966).

255. For a discussion and illustration of the application of that standard, see *id.* at 158-76; M. JONES, JUSTICE AND JOURNALISM (1974).

demand for a constitutional guarantee of free expression was in large part motivated by the failure of the British system to provide what was deemed to be sufficient protection in that area.[256] Second, the Court rejected as grounds for suppression of speech the protection of the judicial system from public criticism where that criticism did not interfere with the fair and orderly administration of justice.[257] On the other hand, the Court concluded that extrajudicial publicity could be suppressed if necessary to protect fair and orderly trials.[258] In *Nebraska Press Association v. Stuart*,[259] this latter "evil" was translated by the Court, in the context of criminal jury trials, to require such "distort[ion of] the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court."[260] Although that was the only concern raised by the Court in *Nebraska Press Association*, because that case involved a restraint on the news media rather than a restraint on an "official" participant in the legal system such as the defendant or defense counsel, it is likely that concern also should be shown for protection of what may be called the "adversary balance," as well as public perception of the legitimacy of the criminal court's operation.

A. Jury Impartiality

In assessing the criminal justice interest present in *Nebraska Press Association*, the Supreme Court was concerned with the right of the accused to "trial by an impartial jury" guaranteed by the sixth and fourteenth amendments to the United States Constitution.[261] Although there is no specific constitutional guarantee of

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256. Bridges v. California, 314 U.S. 252, 263-68 (1941).

257. *Id.* at 270-71:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly apprises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

258. Craig v. Harney, 331 U.S. 367, 378 (1947); *id.* at 384 *passim* (Frankfurter, J., dissenting); *id.* at 394, 395 (Jackson, J., dissenting); Pennekamp v. Florida, 328 U.S. 331, 335 *passim* (1946); *id.* at 353 *passim* (Frankfurter, J., concurring); Bridges v. California, 314 U.S. 252, 270 (1941); *id.* at 284 *passim* (Frankfurter, J., dissenting).

259. 427 U.S. 539 (1976).

260. *Id.* at 569.

261. *Id.* at 551. Such a right has been held to be "fundamental to the American scheme of justice" and thus guaranteed in both federal and state prosecutions. Duncan v.

a concomitant governmental right, the history of trial by jury, its judicial application and social policy all argue that such a right must exist.[262] There is reason, however, for concluding that the governmental right does not possess the absolute quality attributable to the accused's constitutional guarantee.

The general right of the prosecution to a trial before an impartial jury has been amply recognized. In *Patton v. United States*,[263] the Court examined the authority of a trial court to try a criminal case without a jury if the defendant so desired. While upholding that authority, the Supreme Court stated:

> Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that before any waiver can become effective, the consent of the government counsel and the sanction of the court must be had . . . .[264]

Again, in *Singer v. United States*,[265] the Court rejected a defend-

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Louisiana, 391 U.S. 145, 157-59 (1968).

262. A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY 23 (1967). Although the origin of the jury is somewhat clouded in antiquity, it generally is agreed that the impetus behind its introduction into the criminal justice system was "not popular but royal," 1 F. POLLOCK & F. MAITLAND, *supra* note 231, at 142, and that its governmental function predated its role as protector of the accused.

Pollock and Maitland have suggested that the jury first appeared in ninth century France, where it was used to determine the king's rights in the community to discover corruption among governmental officials and to learn of crimes committed in the community. *Id.* at 140-41. Under that theory, the jury came into English criminal procedure with the Norman conquest in 1066. *Id.* at 143; 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 245 (1883). Other evidence indicates that it had its origins in Scandanavia, 1 F. POLLOCK & F. MAITLAND, *supra* note 231, at 143, and that it was first used by a British monarch for the purpose of distinguishing between the guilty and the innocent in the Danish District in 997. *Id.* at 142 (citing Statute of Aethelred III.3 (997)).

The jury's original responsibility was akin to that of the modern grand jury, with the judgment of guilt or innocence being determined through trial by combat or ordeal, 1 J. STEPHEN, *supra*, at 245, 251, but by the 13th century the king's interest in keeping peace was viewed as grounds for his right to determine criminal responsibility through a jury rather than rely on the fighting prowess of the complainant. 2 F. POLLOCK & F. MAITLAND, *supra* note 231, at 618-19. The earliest discoverable case of an accused being tried by a jury over his objection occurred in 1303, Trial of Hugo, Y.B. 30 & 31 Edw. 1, app. ii, 529-32 (1303), *reported in* 1 J. STEPHEN, *supra*, at 261-62, and the dual responsibility of the jury to serve the interests of the crown as well as protect the innocent is clearly stated in the writings of Fortesque between 1460 and 1470. 1 J. STEPHEN, *supra*, at 263-64.

263. 281 U.S. 276 (1930).

264. *Id.* at 312; *see also* Hayes v. Missouri, 120 U.S. 68, 71 (1887) ("[Jury] impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held").

265. 380 U.S. 24 (1965).

ant's contention that the prosecution's right to demand a jury trial over his objection deprived him of due process of law, holding "the government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."[266] The limitation of the constitutional guarantee of trial before an impartial jury to the accused, therefore, clearly is not a suggestion that the government has no such right, but is, rather, a recognition that the government controls the mechanism by which trials are conducted and is in a position to deny trial by jury. It is this danger that the sixth amendment was intended to prevent.

Nevertheless, a policy underlying several constitutional guarantees to the defendant implies, under some circumstances, that the defendant's right to be protected against a biased jury is greater than that of the prosecution. Thus, when the trial court determines that waiver of a jury trial over the prosecution's objection is necessary to protect the accused's fair trial rights, such waiver may be granted.[267] That right is precluded the prosecution by the sixth amendment. Similarly, the prosecution may not obtain a change of venue[268] to protect its fair trial rights and may be prevented by the accused's right to a speedy trial from obtaining a continuance over the defendant's objection.[269] Finally, the prosecution is foreclosed by the prohibition against double jeopardy[270] from appealing a verdict returned by a biased jury, a right clearly available to the defendant.[271] While none of those considerations necessarily supports a right of the defense to affirmatively create a bias in the jury, each suggests that when constitutional guarantees to the accused conflict with the prosecution's right to jury impartiality, the social values behind those guarantees frequently outweigh society's interest in ensuring the governmental right.

The trial court considering a speech restraint on the defense in order to protect jury impartiality also must take into account the

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266. *Id.* at 36.

267. *See* Singer v. United States, 380 U.S. 24, 37 (1965); United States v. Houghton, 554 F.2d 1219, 1226 (1st Cir. 1977); United States v. Ceja, 451 F.2d 399, 401 (1st Cir. 1971); United States v. Kramer, 35 F.2d 891, 899 (7th Cir. 1966); United States v. Daniels, 282 F. Supp. 360, 361 (N.D. Ill. 1968).

268. *See* U.S. CONST. amend. VI; Blume, *The Place of Trial in Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59 (1944).

269. *See* U.S. CONST. amend. VII; Barker v. Wingo, 407 U.S. 514 (1972).

270. United States v. Ball, 163 U.S. 662, 665-66 (1896).

271. *See* Irvin v. Dowd, 366 U.S. 717 (1961).

very high level of prejudicial publicity that must exist before bias may be presumed, for under sixth amendment standards not all exposure to publicity will lead to a biased jury,[272] even if it creates an opinion as to guilt or innocence that "it would take some evidence to overcome."[273] There is no computer-like test that can be applied to determine jury impartiality: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."[274]

There seems to be little question that the suggestion of Lord Chief Justice Mansfield that "[a] Juror should be as white Paper,"[275] simply is impossible to attain. As the Supreme Court said in *Irvin v. Dowd*:[276]

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases.[277]

As early as 1807, long before the advent of modern communications, Chief Justice Marshall, presiding over the trial of Aaron Burr, had occasion to discuss the question of bias in the jury ex-

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272. Murphy v. Florida, 421 U.S. 794 (1975); Beck v. Washington, 369 U.S. 541 (1962).

273. Holt v. United States, 218 U.S. 245, 248 (1910).

274. United States v. Wood, 299 U.S. 123, 145-46 (1936). The requirement that the jury be free of prior knowledge of the case was not part of the original institution of trial by jury:

> The jury was a body of neighbours called in, either by express law, or by the consent of the parties, to decide disputed questions of fact. The decision upon questions of fact was left to them because they were already acquainted with them, or if not already so acquainted with them, because they might easily acquire the necessary knowledge.

1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 317 (1903); *see also* 1 J. STEPHEN, *supra* note 262, at 254-56 (trial by "inquest" or "assize" was a trial by witnesses or others with knowledge of the case who swore on oath of fact to be proved). By the late 14th or early 15th century, however, the difficulty of finding 12 persons who had, or could independently obtain, personal knowledge made it necessary to present evidence to the jury, and its role as an impartial factfinding body became predominant, *id.* at 260-65; W. CORNISH, THE JURY 11-12 (1968), although it was not until the 18th century that jury impartiality became a requirement. Mylock v. Saladine, 1 Wm. Blackstone Rpts. 480 (1764).

275. Mylock v. Saladine, 1 Wm. Blackstone Rpts. 480, 481 (1764).

276. 366 U.S. 717 (1961).

277. *Id.* at 722-23.

posed to publicity:

> Were it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required . . . . [L]ight impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection . . . ; but . . . those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection . . . .[278]

The task of predicting when publicity will create such "strong and deep impressions" is indeed a difficult one,[279] with no bright line applicable to all cases. Relevant decisions of the Supreme Court, however, "even if not dispositive, are instructive by way of background."[280] In *Irvin v. Dowd*,[281] the defendant was tried in a community in which extensive publicity concerning his prior criminal record, including a report that he had confessed to a series of heinous crimes, was distributed to ninety-five percent of the homes. Two hundred sixty-eight of the 430 persons called for jury duty admitted to holding fixed opinions, and two-thirds of the seated jurors expressed the existence of an opinion that they believed they could overcome. Finding that this publicity had created "a pattern of deep and bitter prejudice"[282] in the community, amounting to an "influence . . . so persistent that it unconsciously [fought] detachment from the mental processes of the average man,"[283] the Court held that a trial could not be conducted when disturbed "by so huge a wave of public passion."[284]

Two years later, in *Rideau v. Louisiana*,[285] a trial took place after repeated and widespread exposure of the community to a

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278. United States v. Burr, 25 F. Cas. 49, 50-51 (C.C.D. Va. 1807) (No. 14,692g). In subsequent decisions, the Supreme Court held that before an objection for bias can be sustained, the jury's initial opinion of the case must be "positive," "decided and substantial," "fixed" or "deliberate and settled," Reynolds v. United States, 98 U.S. 145, 155 (1878), or such as will make the jury unable to render its verdict based solely on the evidence at trial, Spies v. Illinois, 123 U.S. 131, 168 (1887).

279. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563, 566-67 (1976).

280. *Id.* at 551.

281. 366 U.S. 717 (1961).

282. *Id.* at 727.

283. *Id.*

284. *Id.* at 728.

285. 373 U.S. 723 (1963).

televised confession. The Court held that the extrajudicial publicity was so pervasive that "[a]ny subsequent court proceedings . . . could be but a hollow formality."[286] Similarly, in *Estes v. Texas*,[287] the Court found that substantial trial publicity, courtroom disturbances and the televising of a portion of the proceedings resulted in "extraneous influences intruding upon the solemn decorum of court procedure"[288] and "inherently prevented a sober search for the truth."[289] Finally, in *Sheppard v. Maxwell*,[290] a "massive and pervasive . . . deluge of publicity,"[291] coupled with the trial court's failure to control the courtroom, was held to have made a fair trial impossible.[292]

On the other hand, *Stroble v. California*[293] involved release of the accused's confession by the prosecutor, as well as "notorious widespread public excitement, sensationally exploited by newspaper, radio and television, concerning crimes against children and defendant's crime in particular."[294] Finding that the inflammatory publicity occurred six weeks before the trial, there was no affirmative showing that community prejudice existed or affected the jury's deliberations and the confession was voluntarily made and admissible in evidence, the Supreme Court held that the trial had been constitutionally fair.[295] Similarly, in *Beck v. Washington*,[296] the Court upheld the conviction because the bulk of the inflammatory publicity occurred five months before the trial and later publicity was neither intensive nor extensive and was essentially factual.[297] Finally, in *Murphy v. Florida*,[298] a conviction was upheld in the face of widespread publicity disclosing a previous murder conviction. The Court distinguished *Irvin, Rideau, Estes* and *Sheppard*, stating that those convictions had been "obtained in a trial atmosphere that had been utterly corrupted by press cover-

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286. *Id.* at 726.
287. 381 U.S. 532 (1965).
288. *Id.* at 548.
289. *Id.* at 551.
290. 384 U.S. 333 (1966).
291. *Id.* at 353, 357.
292. *Id.* at 363.
293. 343 U.S. 181 (1952).
294. People v. Stroble, 36 Cal. 2d 615, 620, 226 P.2d 330, 334 (1951), *aff'd*, 343 U.S. 181 (1952).
295. 343 U.S. at 183-98.
296. 369 U.S. 541 (1962).
297. *Id.* at 542-58.
298. 421 U.S. 794 (1975).

age,"[299] whereas in *Murphy* the publicity had not created "a community with sentiment so poisoned . . . as to impeach the indifference of jurors . . . ."[300]

Although those decisions obviously do not provide a clear-cut formula for determining the impact of publicity on jury impartiality, it is evident that the mere disclosure of prejudicial information, whether or not admissible at trial, or the mere existence of widespread publicity, does not inevitably destroy a fair trial, and that cases in which it does are "relatively rare."[301] The imposition of a speech restraint, therefore, based solely on the trial court's concern about publicity,[302] is not justifiable. Instead, there must be evidence demonstrating that the publicity is creating a "buildup of prejudice [that] is clear and convincing,"[303] that its continuance will cause "a sustained excitement and [foster] a strong prejudice among the people"[304] or that it will so "utterly corrupt"[305] the trial atmosphere as to "inherently prevent a sober search for truth."[306]

Even in such a case, however, it is not inevitable that a fair trial cannot be held. "Pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial . . . . [T]he measures a judge takes or fails to take to mitigate the effects of pretrial publicity—the measures described in *Sheppard*—may well determine whether [a fair trial results]."[307] The measures referred to, as outlined in *Sheppard*, include continuance, change of venue, sequestration of the jury and mistrial.[308] Those measures, along with searching questioning of prospective jurors and the use of emphatic and clear instructions to the jury, were held in *Nebraska*

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299. *Id.* at 798.

300. *Id.* at 803.

301. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976). In fact, the Court has found extrajudicial publicity, by itself, to have interfered with a fair trial only twice, in Irvin v. Dowd, 266 U.S. 717 (1961), and Rideau v. Louisiana, 373 U.S. 723 (1963). In Estes v. Texas, 381 U.S. 532 (1965), the primary interference resulted from events that occurred in the courtroom, while Sheppard v. Maxwell, 384 U.S. 333 (1966), turned on the combination of extrajudicial publicity and courtroom disturbances. In *Sheppard*, although the Court devoted almost 12 pages to the pretrial activities, it went on to say that it could not "state that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone." *Id.* at 354.

302. *E.g.*, United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

303. Irvin v. Dowd, 266 U.S. 717, 725 (1961).

304. *Id.* at 726.

305. Murphy v. Florida, 421 U.S. 794, 798 (1975).

306. Estes v. Texas, 381 U.S. 532, 551 (1965).

307. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 544-55 (1976).

308. 384 U.S. at 363.

Press Association to be preferable to a restraint on publicity.[309] Moreover, because sequestration of the jury, control over the courtroom and the ability to order a new trial are adequate to offset prejudicial publicity once the jury has been sworn,[310] a speech restraint during trial to protect jury impartiality should never be necessary.

The availability of effective protective measures to combat pretrial publicity by the defense, however, is limited. No defendant bent on influencing prospective jurors through publicity is likely to consent to devices designed to thwart that effort. Thus, change of venue, prohibited if against the defendant's wishes in federal courts and most state jurisdictions, is not likely to be available.[311] Furthermore, the effectiveness of that device is questionable in light of the pervasiveness of modern communications,[312] and a mere change of venue would not prevent the defense from instituting a new publicity campaign in the new community. Similarly, a postponement of the trial over the objections of the defendant would at least create problems under the sixth amendment "speedy trial" clause[313] and, again, would not prevent a continuation of the campaign. In fact, postponing the trial might well increase, rather than decrease, the likelihood that the publicity would saturate the community. Searching voir dire, generally considered by trial judges to be the least effective of protective devices,[314] primarily serves to weed out the already biased juror, and is of little value once the entire community has been effected.

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309. 427 U.S. at 562, 565.

310. *Id.* at 601 (Brennan, J., concurring). Although a new trial undoubtedly places a substantial burden on the parties and on society, we are willing to accept it to protect the administration of justice when made necessary, for example, by a witness' reference to inadmissible information. Its use as a means of protecting freedom of expression should be accepted without reluctance. *See* A. FRIENDLY & R. GOLDFARB, *supra* note 262, at 82.

311. *See supra* note 268 and accompanying text.

312. Rifkind, *supra* note 245, at 51.

313. Barker v. Wingo, 407 U.S. 514, 531-32 (1972): "The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Other factors to be considered include the length of the delay, the reason for the delay and prejudice to the defendant. *Id.* at 530. On the facts of the *Barker* case, which the Court considered to be close, the finding that the right to a speedy trial had not been violated was based almost entirely on evidence that the defendant did not want a speedy trial. In *Barker*, the Court also indicated that the prejudice to be considered was not limited to prejudice at trial but included prejudice to his rights as a citizen, including his first amendment rights. *Id.* at 527, 532-33 & n.33 (citing Klopfer v. North Carolina, 386 U.S. 213, 221-22 (1967)).

314. STAFF REPORT OF SENATE SUBCOMM. ON CONSTITUTIONAL RIGHTS, COMM. ON THE JUDICIARY, 94th Cong., 2d Sess., *Report on Free Press—Fair Trial* (1976).

The remaining devices, emphatic instructions and jury sequestration, do not, of course, violate any constitutional guarantee to the defendant, but they are also of little effect in offsetting a fixed opinion. At best, they "enhance the likelihood of dissipating the impact of pretrial publicity and emphasize the elements of the jurors' oaths."[315] Working together with other devices, these techniques will help; working alone, they are unlikely to be of much value in combating pervasive and concentrated pretrial publicity.

The use of a speech restraint on the defense to protect jury impartiality thus involves considerations similar to, but differing in impact from, those involved in a restraint on the media. Alternatives to the restraint, of significance in the Supreme Court's decision in *Nebraska Press Association*, will not be as important a tool for a trial court dealing with defense publicity. On the other hand, the fact that the prosecution's right to an impartial jury may not carry as much weight as the sixth amendment right of the accused, that an extremely high level of prejudice must exist before the bias will be found even under sixth amendment standards and that defense publicity is likely to be less persuasive than that of the press, all suggest that the occasions on which a restraint on the defense will be necessary to protect the government's right to an impartial jury are extremely rare. Indeed, in no reported case to date has there been a finding of facts adequate, under the *Nebraska Press Association* standard, to justify a speech restraint on the defense in order to protect jury impartiality.[316]

The extremely high level of community bias that must exist before "fair trial" standards are violated leads one, in evaluating the improbability that the evil will occur, to consider whether the potential for conflict exists at all.[317] The criminal case that gener-

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315. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 (1976).

316. This does not suggest, however, that such a fact situation could never arise. *See infra* notes 325-26 and accompanying text.

317. Furthermore, the use of a jury trial to determine guilt or innocence has given way, in the overwhelming majority of American criminal prosecutions, to the process of negotiation generally referred to as plea bargaining. A. BLUMBERG, *supra* note 169, at 5; H. KALVEN & H. ZEISEL, THE AMERICAN JURY 14 (1966). "[A]bout one-seventh of all felony prosecutions end in jury trials." *Id.* at 17. Other commentators have estimated the number of prosecutions ending in guilty pleas at 75 to 90%, Wright, *supra* note 180, at 436, and as high as 95%, D. NEWMAN, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 n.1 (1966). A study of the 15-year period between 1950 and 1964 in the District of Columbia disclosed a guilty plea rate for felonies ranging from 91 to 95%. The same study indicated that only between two and four percent of the indictments returned by a grand jury were disposed of by trial. A. BLUMBERG, *supra* note 169, at 28-30.

ates significant publicity of any sort is unusual[318] and situations in which publicity poses a serious threat to jury impartiality are extraordinary.[319] Publicity by a partisan defense is much less likely than antidefense publicity to be seriously received and accepted as true by the community.[320] The public recognizes that almost every defendant claims he is innocent and views information generated by an obviously biased defense as having less authority than statements made by prosecutors, who are viewed as being somewhat constrained by the general obligation of the government to maintain impartiality,[321] or by the press, which is considered the community's most reliable source of information.[322] There generally exists, as well, a bias in the community against the defendant, created by the information already released concerning the arrest and charges, and by a commonly held belief that the police do not arrest, judges do not hold, prosecutors do not charge and grand juries do not indict people who are not probably guilty. Discussion by the defense must overcome that bias before it can begin to create a bias in the defendant's favor. Finally, under normal circumstances, prodefense publicity is much less likely to receive substantial press coverage than is adverse publicity.[323] The number of cases, therefore, in which the defense is likely to be able to create a

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318. A. FRIENDLY & R. GOLDFARB, *supra* note 262, at 55-72. The Friendly and Goldfarb report refers to one study that indicated that the New York Daily News, which provides the greatest coverage of crime news, mentioned only 41 of 11,724 felonies committed during a sample one-month period. *Id.* at 63 n.6. Judge J. Skelly Wright estimated that less than one percent of all criminal cases receive publicity. Wright, *supra* note 180, at 436.

319. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551, 554 (1976); RIGHTS IN CONFLICT, *supra* note 168, at 9-10; H. JAMES, *supra* note 167, at 217.

320. Stroble v. California, 343 U.S. 181, 201 (1951) (Frankfurter, J., dissenting); Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689, 692 (N.D. Ill. 1974), *modified*, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976); T. EMERSON, *supra* note 242, at 72; REARDON REPORT, *supra* note 11, at 37, 42-43, 73. *See generally* Garry & Riordan, *supra* note 212, at 581; Younger, *Some Thoughts on the Defense of Publicity Cases*, 29 STAN. L. REV. 591, 597-99 (1977).

321. Berger v. United States, 295 U.S. 78, 88 (1935).

322. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515, 517 (1977).

323. The prosecution of Dr. Sam Sheppard is illustrative:

> From the beginning, favorable information seems to have been played down or buried. Newspapers placed police comment on the front page; they relegated to page four, and confined in a small story, the favorable news that the Sheppard family was offering a reward for information leading to the arrest of the killer, and a statement by Dr. Sheppard that he was ready to cooperate in the investigation in every way.

A. FRIENDLY & R. GOLDFARB, *supra* note 262, at 15-16; *see* Sheppard v. Maxwell, 384 U.S. 333 (1966).

community bias sufficient to cause a conflict is undoubtedly very limited.

On the other hand, such infrequency, while it certainly may suggest that trial courts should be extremely cautious, does not in itself justify the conclusion that a restraint on defense speech is foreclosed by the first amendment. As we are reminded by Justice Black, writing in *Bridges v. California*,[324] "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper"[325] and, one might add some forty years later, through television, a medium offering "fantastic opportunities . . . for informing, educating and shaping the American mind."[326] Absolute protection for defense publicity would allow those wealthy enough to do so[327] the freedom to conduct a pretrial campaign similar to that which surrounds one of the most protected of American events, the electoral process, complete with broadside after broadside of mail, hired planes towing sky banners, full page newspaper advertisements prepared by professional public relations specialists and a "major television manipulation of the public."[328] In addition to discussions of the evidence, the publicity could include derogatory descriptions of the prosecutor and judge, positive descriptions of the defendant and defense counsel, the publication of opinion polls, investigations into the backgrounds of prospective prosecution witnesses and disclosure of irrelevant "skeletons." The difficulty of obtaining media cooperation also could be overcome easily.[329] The very existence of the activity would be newsworthy.[330] In addition, one with the funds to conduct such a campaign likely would have personal friends in the media.[331] "The web of American communications, influence and politics is so sensitive

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324. 314 U.S. 252 (1941).

325. *Id.* at 271.

326. T. WHITE, THE MAKING OF THE PRESIDENT 1960, at 280 (1961).

327. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (striking down expenditure limitations on the personal exercise of first amendment rights).

328. T. WHITE, *supra* note 326, at 110 *passim*.

329. It should be noted that in many instances defense publicity will require the "collaboration" of the press in order to be effective, thus giving rise to the question, not considered here, of whether the court can require a news reporter to disclose the identity of an individual who provided information in violation of a restraint on publicity. *See* Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975) (upholding such authority); RIGHTS IN CONFLICT, *supra* note 168, at 19-20. *See generally* Branzburg v. Hayes, 408 U.S. 665 (1972) (no newsman's privilege to refuse disclosure to a grand jury of the source of information regarding criminal acts).

330. T. WHITE, *supra* note 326, at 93.

331. *Id.* at 179.

that when touched in the right way by men who know how, it clangs with instant response."[332]

The maintenance of such a carnival-type campaign, of course, could well fail to persuade the entire community that the accused was innocent. Indeed, it is likely that a substantial portion of the community would reach the opposite conclusion. From the defendant's perspective, however, that would make little difference. His goal would be to "so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court."[333] Whether that distortion would be positive or negative is irrelevant; if a jury could not be found that had not already decided the case, the defendant could not be tried.[334]

Furthermore, aside from specific fair trial grounds, the preparation of the community for a criminal trial as though it were a political election violates the social concepts behind the American system of criminal justice.[335] Theodore White, in comparing the two, has pointed out that in a political campaign, the purpose is to reach emotions; issues are secondary. The election that ultimately ensues is "a primitive and barbaric trial . . . as irrational as any of the murderous, or conspiratorial, choices of leadership made elsewhere in great states."[336] Many may question the wisdom of selecting a political leader in this way; none would question the foolishness of its use to determine criminal responsibility.

It is not suggested that this type of publicity is likely to be common. "[T]he purchase of recognition, or the staging of those performances that excite publicity, are rich men's games."[337] Nor is it suggested that such a campaign is necessarily the only way in which a defendant could successfully use free speech to upset fair trials.[338] What is suggested is that while the probability is small,

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332. *Id.* at 26.

333. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976).

334. Irvin v. Dowd, 366 U.S. 717 (1961).

335. A. FRIENDLY & R. GOLDFARB, *supra* note 262, at 33.

336. T. WHITE, *supra* note 326, at 211.

337. *Id.* at 33.

338. The prosecution of Lewis 17 X Dupree, for example, illustrates another manner in which a conflict is possible. *See* People v. Dupree, 88 Misc. 2d 780, 388 N.Y.S. 2d 203 (Sup. Ct. 1976); *supra* text accompanying notes 20-22. Unrestrained publicity contending that the prosecution was racially motivated and intended to discredit the Black Muslim organization could well have created an emotional division between black and white members of the community, making a fair trial impossible. Should such a claim be true, however, it would appear to be precisely the type of information the first amendment is intended to

the potential exists, and it is therefore possible that the "trying task" of choosing between "two great constitutional principles"[339] may become necessary when a defendant seeks to avoid conviction through publicity.

B. The Adversary System

The maintenance of strict jury impartiality is not the only obligation placed upon a criminal trial court faced with extrajudicial publicity. The adversary system of finding justice also requires the use of procedures that "hold the balance nice, clear and true between the State and the accused"[340] and ensure that both sides have a fair opportunity to present proofs and arguments to the jury within an orderly frame.[341] The introduction of evidence to potential jurors outside the courtroom by a participant in the litigation, even if it does not go so far as to create the fixed opinion that will destroy jury impartiality, may upset the balance necessary to maintain a "fair fight." Such evidence is unsworn and may well be false. It is unscreened by rules respecting relevance, hearsay, opinions and conclusions. No opportunity for confrontation or cross-examination exists, nor is the evidence subject to contradiction by opposing testimony. It also may introduce emotion and personalities into what is supposed to be a search for facts. The adversary balance is especially important insofar as it relates to the attorneys who, as participants in the criminal justice system, serve as "champions" for their respective clients.[342]

The adversary or combat theory of justice is the foundation on

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protect from governmental suppression.

339. Rifkind, *supra* note 245, at 48.

340. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

341. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30, 30-31, 41 (H. Berman ed. 1961). The importance of maintaining a balance between prosecution and defense was highlighted by the injustices that occurred as a result of the inquisitorial techniques used by British courts in the 17th century. C. SCHRAG, CRIME AND JUSTICE: AMERICAN STYLE 161 (1971). To maintain that balance, modern procedure provides a presumption of innocence and requires that guilt be proved beyond a reasonable doubt to offset the state's investigatory advantages, *In re* Winship, 397 U.S. 358, 363 (1970), and provides statutes of limitation and speedy trial rights to offset the state's advantage in deciding when to institute prosecutions, and grants greater rights in the defense to pretrial discovery. *See* Brennan, *The Criminal Prosecution, Sporting Event or Quest for Truth*, 1963 WASH. U.L.Q. 279. *Compare* Williams v. Florida, 399 U.S. 78 (1970) (pretrial disclosure of facts relating to alibi defense may be required to enable prosecution to investigate) *with* Wardius v. Oregon, 412 U.S. 470 (1973) (disclosure may not be required without reciprocal disclosure by prosecution).

342. 1 J. STEPHEN, *supra* note 262, at 245, 251.

> which we have built our elaborate procedures . . . within the courtroom. Instead of knives and guns, we use lawyers to settle disputes . . . . [A] good defense attorney attempts to put his client in the best possible light and discredit as much incriminating evidence as possible. Prosecutors pursue the interests of their client—the state—with equal zeal. The result is acceptable, present day dueling.[343]

The violation of those elaborate procedures by one of the opposing attorneys will inevitably damage the ability of the system to provide a balanced evaluation of the evidence in the courtroom.

The probability that publicity by the defense attorney will create an imbalance serious enough to necessitate a restraint on his right to speak, however, is significantly less than the probability that such an imbalance will result from prosecution publicity. The mere fact of arrest and prosecution generally creates some opinion in the community as to the accused's probable guilt, an opinion that operates to reduce the effectiveness of prodefense information but that will be reinforced by antidefense publicity. Prodefense statements also are less likely to receive widespread media coverage. Finally, the public views defense counsel not as an impartial agent of the criminal justice system, but as the representative of a single individual charged with a crime, and thus almost certain to be biased. The fact that defense attorneys frequently represent clients they know to be guilty undoubtedly undermines their credibility, while the public view of the prosecutor, even though his adversary role is recognized, is that he is unlikely to assert the guilt of one he knows to be innocent.[344] The probability that prosecution statements will be accepted as an impartial evaluation of the case, thus providing an advantage at the trial, is therefore considerably greater.

Some existing court rules,[345] moreover, already provide a sub-

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343. M. Lewis, W. Bundy & J. Hague, *supra* note 246, at 14.

344. Berger v. United States, 295 U.S. 78, 88 (1935):

> [The prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . .
>
> It is fair to say that the average jury . . . has confidence that these obligations . . . will be faithfully observed. Consequently, improper [statements] are apt to carry much weight against the accused . . . .

See In re Sawyer, 360 U.S. 622, 667 (1959) (Frankfurter, J., dissenting); Shephard v. Florida, 341 U.S. 50, 52 (1951) (Jackson, J., concurring); Carsey v. United States, 392 F.2d 810, 812 (D.C. Cir. 1967).

345. *E.g.*, United States v. Vealey, 308 F. Supp. 653, 655 (N.D. Ohio 1970); Seitz Re-

stantial publicity advantage to the government. The rules recommended by the Judicial Conference of the United States, for example, permit the prosecutor to publicize "a brief description of the offense,"[346] a disclosure of the investigating and arresting officer or agency, the length of the investigation[347] and the facts and circumstances of the arrest, including information on resistance, pursuit, the use of weapons and a description of evidence seized.[348] Much of this information is clearly irrelevant to guilt or innocence, but may well reinforce community bias to the point that it threatens the defendant's fair trial rights.[349]

A speech restraint on the defense attorney to protect the adversary balance, therefore, even if valid under the first amendment, should not be imposed automatically to equal a restraint on the prosecutor, but should be considered independently, taking into consideration the already existing imbalance as well as the variant effects that result from discussion of the case by the opposing sides. The presence of substantial antidefense information in the public domain, even in the face of a restraint, coupled with the likelihood that statements by the prosecutor will reinforce the community view of probable guilt, will receive more widespread coverage and are more likely to be accepted as true, all suggest that restraints on the prosecutor are more necessary than restraints on the defense.

C. *Public Confidence*

A third interest of the criminal justice system that is in potential conflict with unrestrained publicity by an officer of the court involves not so much the conduct of a single trial, but the cumulative effect of small failures to operate the system in accordance with the public's image of the system—the necessity of maintaining the "legitimacy" of the system.[350] "[T]o perform its high function in the best way 'justice must satisfy the appearance of

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PORT, *supra* note 45, at 525-27.

346. SEITZ REPORT, *supra* note 45, at 526.

347. *Id.*

348. *Id.*

349. One Supreme Court Justice has expressed the view that information about the arrest is "strongly implicative" of guilt and should not be released. Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 1333 (1975) (Blackmun, Circuit Justice) (granting stay).

350. C. BLACK, THE PEOPLE AND THE COURT 36 (1960): "The mere existence of a real and substantial doubt as to the legitimacy of a government must surely enfeeble it and strip it of moral force, even while the lack of anything better keeps it going a while longer."

justice.' "[351]

> The process functions successfully only as long as the public feels that it grinds out what they can accept without . . . a "sense of injustice." Law loses its normative function the minute the public loses faith in the judicial process and feels that it is a mill that grinds out sometimes justice and sometimes injustice. Then order can be maintained only by the force of tyranny.[352]

The inability of a criminal justice system to demonstrate that evidence is being impartially considered in conformity with established procedures will destroy community acceptance of the results.[353] "[T]he public's impression about a crime and the guilt of a defendant may, as a result of publicity about a case, be different from that of the ultimate jury that tries the case and makes the decision after considering a different set of facts."[354] Disposition of the case on a lesser charge will raise questions as to whether the prosecutor has been influenced by the publicity.[355] The impression that justice can be subverted by an official participant in the system will reduce the willingness of injured persons to submit the dispute to governmental resolution and will undermine the deterrent effect of swift and certain punishment.[356]

The public image of the judicial system is significantly different from its view of other governmental institutions.[357] "Courts and law occupy a special position in Western nations as objects of peculiar reverence and distinctive expectations."[358] The dignity and solemnity with which courts operate, the trappings, dress and language, the excessive courtesy and elaborate procedure, the respect shown to the man or woman who presides, all create an almost sacred aura of "judicial serenity and calm"[359] viewed by society as a necessary ingredient to the process through which the liberty of a citizen may be taken away.[360] The intrusion of unseemly conduct by one of its officers is wholly inconsistent with the societal view of how such ceremonies should be run, and the knowledge that the system cannot prevent such intrusion will un-

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351. *In re* Murchison, 349 U.S. 133, 136 (1955).
352. Rifkind, *supra* note 245, at 48.
353. C. SCHRAG, *supra* note 341, at 161.
354. A. FRIENDLY & R. GOLDFARB, *supra* note 262, at 90.
355. RIGHTS IN CONFLICT, *supra* note 168, at 7.
356. M. FLEMING, *supra* note 146, at 6.
357. H. JACOB, *supra* note 213, at 14.
358. *Id.* at 13.
359. Estes v. Texas, 381 U.S. 532, 536 (1965).
360. M. LEWIS, W. BUNDY & J. HAGUE, *supra* note 246, at 13.

dermine the respect and trust in the courts that is "indispensable to a well-ordered national life."[361]

V. The Balance

A comparison of the interests served by allowing free discussion of criminal trials, especially by the defense, and those served by suppression of such discussion, unfortunately, seems to lead to the conclusion that Justice Black's wish that we not have to choose[362] simply may be impossible to fulfill. A facial analysis makes it quite clear that at least some potential for conflict exists. The accused's right to publicly protest a potential miscarriage of justice, coupled with the jury's responsibility to serve as a protector against governmental oppression and as the community's conscience in the courtroom, directly conflicts with the need of the criminal justice system to ensure that jury verdicts be based on the evidence presented in court and on the law as stated by the judge. The importance of maintaining public confidence in the criminal justice system and in the correctness of jury verdicts, conflicts with the need to publicize deficiencies in the system and injustices that might occur. The important role of the legal profession in the administration of justice obligates the defense attorney to do nothing that would undermine that process and, at the same time, to fearlessly object to its inadequacies or abuses. The importance of maintaining solemnity in the judicial process conflicts with the need to ensure that discussion of important issues not be cut off at the very time that public attention is most highly focused.[363]

The choice between those conflicting societal interests is one on which a consensus is unlikely. In deciding the right of the media to publish information about criminal jury trials, the Supreme Court balanced the sixth amendment right of the accused to jury impartiality against the serious infringement of first amendment freedoms occasioned by a prior restraint, the interests of the public in receiving information about the administration of justice and the right of the media to be free from editorial interference.[364] Although it found no conflict between those interests on the facts before it, the Court indicated that in the event of such a conflict the accused's fair trial rights were to be considered paramount to

361. Frankfurter & Landis, *supra* note 146, at 1010-11.
362. Bridges v. California, 314 U.S. 252, 260 (1941).
363. *Id.* at 277-78.
364. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551-56, 559-61 (1976).

the nonabsolute first amendment rights of the press.[365]

Establishing a balance when the publicity is being created by the defense, however, involves criminal justice and first amendment interests that differ from those present where antidefense press publicity is at issue. While interference with the government's right to jury impartiality probably is not as destructive of the social values underlying our legal system, the use of publicity for partisan advantage, especially by the defense attorney, is more likely than press publicity to undermine the balanced adversary process and public confidence in the criminal justice system. On the other hand, the invasion of free speech occasioned by a prior restraint on one who is being subjected to criminal prosecution, or on his legal representative in that prosecution, is considerably greater. Finally, the probability that interference will occur is increased by the fact that alternatives to the restraint are unlikely to be effective, but is reduced by public recognition of the partisan interests of the defense, the existence of an antidefense bias in the community and the difficulties faced by the defense in obtaining wide press coverage.

A. The Defendant

Of the three criminal justice interests identified in Part IV, jury impartiality, maintenance of the adversarial balance and protection of the image of legitimacy, only the first can realistically be said to be applicable to the defendant himself. If any one lesson has been clearly delivered by the Supreme Court in this area, it was that taught by the unanimous view expressed in *Pennekamp v. Florida*[366]—the right of a free people to raise questions concerning the legitimacy of their judicial system is inherent in the first amendment. Similarly, the need to maintain a balance of adversaries almost by definition applies only to the attorneys. As long as they are consistent in the proper performance of their functions, their "combat" inside the courtroom is unlikely to be imbalanced by the defendant's out-of-court statements.

The one place where a potential conflict exists between speech by an accused and an important interest of the criminal justice system, therefore, is that situation in which the defendant may destroy jury impartiality. As unlikely as that may be, the possibility exists, and when the conflict arises the decision must be made

365. *Id.* at 569-70.
366. 328 U.S. 331 (1946).

whether more is lost by silencing the defendant and conducting the trial, or protecting the speech and losing the trial. Drawing that balance involves several considerations that, viewed both from the perspective of the role of freedom of expression and the role of the criminal justice system in our society, argue for an absolute prohibition against suppression of his speech.

One of those considerations derives from what may be described as a pre-Constitution constitutional law precedent—the *Trial of John Peter Zenger*.[367] While suggestions that this trial "established"[368] freedom of speech and press in the colonies may be extravagant,[369] there is no doubt that citizen rejection of the attempt by the colonial governor of New York to use the criminal courts to suppress criticism of his administration had a lurking presence behind the insistence upon formal guarantees of those rights in the Constitution. Read narrowly, the legal principle on which Zenger's acquittal was based—the right of an American to criticize a public official's performance of his duties—has been well established[370] and is not directly related to the issue under discussion here. Broader principles, deriving from the background of the trial and events surrounding it, however, are quite instructive of views held by the colonial government concerning its power to silence public discussion of judicial proceedings. To understand those broader principles, some recollection of the history of the case and the times is helpful.

The origins of the case began with a lawsuit between New York's provincial governor, William Cosby, and Rip Van Dam, a prominent citizen of what was then a community of about 10,000 people.[371] Seeking to avoid the necessity of submitting the dispute to a potentially hostile jury, Cosby directed the state's supreme court to sit as a court of equity. When the suit arrived in that court in April 1733, Lewis Morris, chief judge of the court, and a Van Dam ally, delivered an opinion concluding that the granting of

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367. 17 How. St. Tr. 675, 9 Harg. St. Tr. 275 (1735). Reprints of the trial transcript appear in L. RUTHERFORD, JOHN PETER ZENGER 63-125 (1963). *See also* J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 58-101 (Katz 2d ed. 1972).

368. L. RUTHERFORD, *supra* note 367, at 131.

369. *See generally* J. ALEXANDER, *supra* note 367, at 1-36; Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 430 n.8, 439 (1983).

370. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history").

371. The following account of the background of Zenger's trial is taken generally from L. RUTHERFORD, *supra* note 367, and J. ALEXANDER, *supra* note 367.

equity jurisdiction to a court of law, without legislative approval, was beyond the authority of the governor. Cosby thereupon removed Morris from the bench, leaving the court with two, rather than its customary three, judges.

It was at that point that Zenger entered the picture. As a printer squeezing out a living on small jobs, Zenger was presented an opportunity by Morris and other Van Dam allies to increase his fortunes by establishing a newspaper. Although it seems unlikely that Zenger had any personal interest in the dispute, in November 1733 he began publishing anonymous articles and letters, probably written primarily by Morris and James Alexander, Van Dam's attorney, attacking Cosby, his position in the dispute with Van Dam and his asserted manipulation of the judicial system. Two months later, in January 1734, the new chief judge charged a grand jury on the law of seditious libel, obviously referring to the Zenger publications concerning Van Dam's case. The grand jury refused to return any indictments. After the failure of several efforts to use other methods to suppress the publications, Cosby turned again to the courts with an attempt to obtain indictments in November 1734. Once again, the grand jurors refused to indict, but Zenger was arrested nonetheless, on November 17, 1734, on the authority of a warrant of questionable validity issued by the provincial council. Formal charges were not brought until January 28, 1735, when the attorney general filed an information accusing Zenger of seditious libel.

Although Zenger provided an affidavit indicating that his worth was not more than forty pounds, his bail was set at 400 £, which forced him to remain in jail for over eight months. For the first few days he was prohibited communication with the outside world, resulting in the November 18, 1734 issue of his newspaper not being published. He was soon allowed to provide instructions to his wife, however, who managed the newspaper and published an issue every succeeding week until Zenger's release.

James Alexander and William Smith, another attorney affiliated with the Morris-Van Dam faction, began Zenger's defense almost immediately after his arrest. On April 18, however, both attorneys were disbarred and John Chambers, an ally of the governor, was appointed to represent Zenger. Jury selection began on July 29, punctuated by a short-lived effort by the court clerk to limit the jury panel to individuals obligated to the governor. Ultimately, a representative jury was impaneled, and Andrew Hamilton of Philadelphia undertook Zenger's defense, arguing that

Zenger should be acquitted notwithstanding his admission that he published the articles. A verdict of not guilty was returned on August 4, 1735.

The high-handed attitude of the colonial governor throughout the entire incident is quite evident. William Cosby was not one to permit criticism of his authority to stand in the way of achieving his goals, and his actions, and those of his appointees, constituted almost a litany of violations of what became the Constitution of the United States. The governor removed a judge because he disagreed with the judge's holding on an issue concerning his court's jurisdiction, and that judge's replacement was appointed to serve at the governor's pleasure, rather than during good behavior.[372] After two unsuccessful efforts to obtain an indictment, Zenger ultimately was charged through a prosecutor's information, "generally regarded as a high-handed, unfair procedure that undercuts the popular basis of the jury system."[373] Bail was set in an amount far in excess of what Zenger could pay, forcing him to remain in jail for eight months, even though as a married man with six children and a business there was very little likelihood that he would leave the jurisdiction.[374] Zenger's attorneys were disbarred in a blatant attempt to deprive him of competent counsel.[375] He languished in jail for over eight months before he was tried.[376] An attempt was made to impanel a biased jury.[377] Nonetheless, the one step that would have successfully prevented the continued publication of challenges to the governor, and which did in fact cause Zenger to miss one edition of his newspaper, was almost immediately discontinued. Although Zenger was denied "the liberty of speech with

372. J. ALEXANDER, *supra* note 367, at 20. The Constitution provides that judges of the United States "shall hold their Offices during good Behavior." U.S. CONST. art. III, § 1.

373. J. ALEXANDER, *supra* note 367, at 20. The Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V.

374. U.S. CONST. amend. VIII: "Excessive bail shall not be required . . . ." In Stack v. Boyle, 342 U.S. 1 (1951), the Supreme Court, in interpreting that provision, said: "[T]he fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Id.* at 5.

375. J. ALEXANDER, *supra* note 367, at 20-21; L. RUTHERFORD, *supra* note 367, at 49-56. The Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

376. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ."

377. J. ALEXANDER, *supra* note 367, at 21-22; L. RUTHERFORD, *supra* note 367, at 56-57. The Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

any persons"[378] for a few days, that decision was reversed and Zenger's newspaper continued to be published.[379] Moreover, and significantly, in a community with fewer than 1000 potential jurors, the articles published in Zenger's newspaper during his imprisonment "were carefully written with the intention of thoroughly instructing all possible jurors" of their power to nullify the law of seditious libel.[380] Not surprisingly, when Andrew Hamilton presented that argument at the trial, the jurors readily accepted it and voted to acquit.[381] In other words, the trial of John Peter Zenger is a classic illustration of a defendant using his right to speak about his trial to persuade potential jurors that he should be acquitted. One can only speculate, of course, why Governor Cosby, so heedless of other generally accepted individual liberties, did not take the one step that would have achieved his purposes, and thereby permitted his defeat. In engaging in such speculation, however, it is not unreasonable to conclude that Cosby and his personally selected judges viewed silencing a criminal defendant while his trial was pending as being beyond even their overblown opinion of their own power and authority.

Historical considerations behind the guarantee of free speech, however, are not the only basis upon which the balance can be drawn. Principles underlying the criminal justice system in our society also suggest an absolute prohibition against speech restraints on defendants. As former Dean Abraham S. Goldstein of the Yale Law School has observed:

> The principal objective of criminal procedure, like that of procedure generally, is to assure a just disposition of the dispute before the court. But because time, resources and the ability to determine what is just are limited, a procedural system inevitably represents a series of compromises. Justice to society is sometimes taken to require that a given case be used not only to deal with the situation immediately before the court but also to serve a larger public interest . . . . The underlying premise is that of a social utilitarianism. If the criminal goes free in order to serve a larger and more important end, then social justice is done, even if individual justice is not.[382]

Thus, the value judgment has been made that society's interest in convicting guilty defendants is outweighed by the greater societal

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378. J. ALEXANDER, *supra* note 367, at 48; L. RUTHERFORD, *supra* note 367, at 46-47.
379. J. ALEXANDER, *supra* note 367, at 19; L. RUTHERFORD, *supra* note 367, at 60.
380. L. RUTHERFORD, *supra* note 367, at 60-61.
381. J. ALEXANDER, *supra* note 367, at 101; L. RUTHERFORD, *supra* note 367, at 125.
382. Goldstein, *supra* note 208, at 1149.

good of ensuring that such convictions are not obtained through the use of illegally seized evidence,[383] coerced confessions, [384] a biased jury[385] or denial of counsel.[386] Enforcement of the fourth, fifth and sixth amendments to the Constitution simply is considered more important than conviction of a single guilty defendant.

A similar judgment should apply to enforcement of first amendment rights. While it is true that an unrestrained right to publicize the case may result in the acquittal of a guilty man, it also is true that a restraint on publicity may result in the conviction of an innocent man. It is, however, "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[387] Indeed, the Supreme Court has approved the suggestion that error leading to the conviction of an innocent defendant is ten times more harmful to society than that which acquits a guilty one.[388] Our criminal justice system has thus recognized that a larger societal good derives from the enforcement of those guarantees designed to protect innocents from injustice, and that the occasional release of a guilty person is not too high a price to pay for those protections.

Furthermore, the criminal justice system has acknowledged that pretrial disclosure of some evidence is an acceptable means of achieving its own goals, and one with which the system can live. The existence of an alibi, and the facts supporting it, clearly is information that normally should be excluded from public knowledge until disclosed at trial. The need of the prosecution to investigate the claim in advance of trial, however, has led many jurisdictions to require that defendants notify the prosecution of those facts.[389] Once such information is placed in the record, the societal interest in it is of such "critical importance to our type of government"[390] that the right to publish it outweighs any need of the criminal justice system for secrecy, even to protect an accused's

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383. Mapp v. Ohio, 367 U.S. 643 (1961).

384. Brown v. Mississippi, 297 U.S. 278 (1936).

385. Irvin v. Dowd, 366 U.S. 717 (1961).

386. Gideon v. Wainwright, 372 U.S. 335 (1963).

387. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); *accord* Lego v. Twomey, 404 U.S. 477, 494 (1972) (Brennan, J., dissenting).

388. Ballew v. Georgia, 435 U.S. 223, 234 (1978). The suggested ten-to-one ratio apparently derives from Blackstone's statement, "It is better that ten guilty persons escape than that one suffer." 4 W. BLACKSTONE, COMMENTARIES *358.

389. *See supra* notes 201-03 and accompanying text.

390. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975); *accord* Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966); Craig v. Harney, 331 U.S. 367 (1947).

fair trial rights.[391]

A final consideration, of a somewhat more generalized nature, was suggested by the Supreme Court in *Wood v. Georgia*,[392] where particular concern was shown that the speech suppression was imposed upon a litigant,[393] and that a significant political issue was involved on which the judge and the litigant held opposing views.[394] Where a political or social issue is present, as frequently is true in publicity restraint cases,[395] the likelihood is great that the defendant will be a principal spokesperson for one side in the controversy, often the side with which the prosecuting authorities disagree. It is a sad fact that there are "corrupt or overzealous prosecutor[s] and . . . compliant, biased, or eccentric judge[s],"[396] and the speech restraint offers them a means of achieving a result, the prevention of which lies at the core of the first amendment—silencing a "dangerous" political or social enemy, simply by charging him with the commission of a crime. Since the merits of the prosecution, or the seriousness of the crime charged,[397] are irrelevant to a determination of the need to protect the trial, unfounded charges, brought for the purpose of silencing the accused, are as effective as charges grounded in the strongest of evidence. Indeed, it is difficult to imagine a situation more inconsistent with the first amendment guarantee of free speech and the sixth amendment guarantee of fair trial by jury than the institution by the government of an unfounded criminal charge to oppress a political opponent, and the use of that prosecution as the excuse for suppressing not only his political message, but also his effort to communicate to his fellow citizens the actual oppressive purpose and nature of the prosecution.

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391. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 568 (1976) (confession publishable if disclosed at an open pretrial suppression hearing; no distinction drawn between voluntary and involuntary confessions).

392. 370 U.S. 375 (1962).

393. *See supra* note 131 and accompanying text.

394. *See supra* notes 128-29 and accompanying text.

395. *See supra* notes 130, 185-87 and accompanying text.

396. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

397. Involuntary speech restraints have been imposed, for example, on defendants charged with, or convicted of, conflict of interest, People v. Watson, 15 Cal. App. 3d 28, 92 Cal. Rptr. 860 (1971), committing a public nuisance and unlawful occupation of real property or structures, Hamilton v. Municipal Court, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969), and assault and conversion, United States v. Tijerina, 407 F.2d 349 (10th Cir.), *cert. denied*, 396 U.S. 843 (1969). It is not coincidental that in each of those cases the potential for publicity existed because of community interest in a social, political or racial issue directly related to the prosecution.

B. The Defense Attorney

Examination of a speech restraint on the defense attorney does not include all of the considerations applicable to the defendant and brings into play additional considerations. When viewed against the standard applied by the Supreme Court in *Nebraska Press Association v. Stuart*,[398] it is evident that the potential for and probability of harm to the administration of justice are greater when the speaker is an attorney, while the first amendment interests of the attorney are less significant than those of the defendant.

Unlike the defendant, whose sole involvement with the criminal justice system results from his having been involuntarily charged by the government, the defense attorney has voluntarily accepted a multifaceted role in that system. The damage done to the adversary process and to public confidence in the criminal justice system when such an assistant makes partisan use of extrajudicial publicity is more serious than when the same is done by one in whom the system has placed neither trust nor responsibility. The adversary process, which relies upon the use of advocates, inevitably causes collisions between the prosecuting and defense attorneys. The exacerbation of such collisions, through the use of what the prosecutor will view as "unfair" tactics, may well affect future cases in which the attorneys confront one another.[399]

The probability that attorney publicity will cause harm is greater, not only because there are more ways in which harm can result, but also because statements by the attorney are more influential. Although the defense attorney is unlikely to be as effective as the prosecutor[400] or the press,[401] his statements have a higher degree of credibility than those of the defendant because of his position within the system, his greater knowledge and his lesser incentive to be biased.[402]

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398. 427 U.S. 539, 562 (1976) (whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger").

399. Future clients of the defense attorney, for example, may be injured by a resentful prosecutor's resistance to plea negotiations or recommendation of harsher sentences. It is not suggested, of course, that the defense attorney's obligation to avoid conflict with the prosecutor is greater than his obligation to represent his client. Such clashes, however, do have harmful consequences and thus must be weighed in determining the gravity of the evil.

400. *See supra* notes 344-49 and accompanying text.

401. Simon, *supra* note 322, at 517.

402. Wood v. Georgia, 370 U.S. 375, 401 (1962) (Harlan, J., dissenting); *cf.* James v. Board of Educ., 461 F.2d 566, 571 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972) ("[I]t is not unreasonable to assume that the views of a teacher occupying a position of authority may carry more influence . . . than would those of students . . .").

Finally, the first amendment interests served by attorney speech, although substantial, do not carry the same weight as speech by the defendant. Society's need for the information provided by attorneys is tempered by its need that they fulfill their responsibilities to the administration of justice. The attorney's obligation to represent his client is not of first amendment origin,[403] and the defendant's right to pay another to advance his interests is not absolute, but may be restricted when its effect will undermine the other's performance of his obligations to society.[404] The attorney's personal interests in speaking also fall short of those of the defendant for it is not he, after all, who will be imprisoned if injustice occurs. The different considerations that apply to attorney speech do not suggest that restraints can or should be imposed freely, but rather indicate that the defense attorney's right to discuss a pending criminal jury trial is not absolute. When such discussion adequately can be shown to create a probability of interference with the administration of justice, invasion of free speech for purposes of preventing that evil is justified.

The trial court considering a restraint on the defense attorney, however, must recall that the heavy presumption against the validity of prior restraints exists even under circumstances where the speaker voluntarily has involved himself in a governmental institution of fundamental importance,[405] especially when the restraint "falls upon the communication of news and commentary on current events."[406] The danger that the technique will be overemployed is great and "the potential for arbitrary and excessive judicial utilization of any such power [is] exacerbated by the fact that judges and committing magistrates might in some cases be determining the propriety of publishing information that reflects on their competence, integrity, or general performance on the bench."[407] The imposition of a restraint on the defense attorney, therefore, must be supported by facts sufficient to meet the heavy burden of demonstrating, "with the degree of certainty [Supreme

403. The professional standards that create this obligation, moreover, subordinate it to the lawyer's obligation to the administration of justice. A.B.A. STANDARDS RELATING TO THE DEFENSE FUNCTION § 1.1 commentary at 172 (Approved Draft 1972) ("The lawyer's highest obligation, like that of every citizen, is to the administration of justice, whether as prosecutor or defense counsel").

404. Buckley v. Valeo, 424 U.S. 1 (1976).

405. *See* Healy v. James, 408 U.S. 169, 184 (1972).

406. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

407. *Id.* at 607 (Brennan, J., concurring).

Court] cases on prior restraint require,"[408] that interference with a legitimate interest of the criminal justice system is probable.

Furthermore, the order must be narrowly and clearly drawn,[409] limited to that publicity that the facts have demonstrated actually creates a probability of harm to an interest the court has a right to protect. "Even in the presence of sufficient justification for curtailing certain first amendment utterances, an order must be drawn narrowly so as not to prohibit speech which will not have an effect on the fair administration of justice along with speech which will have such an effect."[410] Thus, orders such as those prohibiting "any prejudicial statement which is or tends to be prejudicial to a fair trial"[411] must be avoided, for "any restraint must comply with the standards of specificity always required in the First Amendment context."[412]

The necessary factual determination and the drafting of the order should be the result of a formal hearing,[413] apparently mandated by the due process rights of the attorney whose speech may be restricted.[414] Freedom of expression is a liberty within the meaning of the due process clauses of the fifth and fourteenth amendments[415] and, "[a]s such, it is protected from arbitrary governmental invasion."[416] Given the substantial public interest in information regarding the criminal justice system, the press, as a

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408. *Id.* at 569 (majority opinion); *see* New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

409. *E.g.*, Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Buckley v. Valeo, 424 U.S. 1, 76-82 (1976); NAACP v. Button, 371 U.S. 415 (1963).

410. Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970); *see also* Procunier v. Martinez, 416 U.S. 396, 413 (1974) (mail censorship regulations of prison inmate's correspondence must advance substantial or important governmental interests unrelated to suppression of expression, and the limitations must be no greater than are necessary to protect the essential governmental interests).

411. *In re* Kinlein, 15 Md. App. 625, 292 A.2d 749, 751 (1972).

412. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 572 (1976) (Powell, J., concurring); *accord* Buckley v. Valeo, 424 U.S. 1, 77 (1976); Carroll v. President of Princess Anne, 393 U.S. 175, 183 (1968); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

413. United States v. Schiavo, 504 F.2d 1 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974); A.B.A. LEGAL ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, RECOMMENDED COURT PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS 2 (Revised Draft 1975).

414. Carroll v. President of Princess Anne, 393 U.S. 175 (1968).

415. Procunier v. Martinez, 416 U.S. 396, 418 (1974). *See generally* A. MEIKELJOHN, *supra* note 247, at 36-38 (arguing the existence of two constitutional grants of free speech: a nonabridgable, first amendment "freedom of speech," and an abridgable, fifth amendment "liberty of speech" falling within the definition of "liberty under that amendment's due process clause").

416. Procunier v. Martinez, 416 U.S. 396, 418 (1974).

representative of that public interest, also should be afforded the opportunity to present its views.[417]

Because of the importance that timing plays in the discussion of current issues,[418] the immediate damage caused by an improper restraint is significant, and the delay inherent in judicial proceedings could make review of little value.[419] Where the use of prior restraint is found necessary, therefore, provision must be made for immediate appellate review, and the criminal proceedings should be stayed pending a decision on the order's validity.[420]

VI. Conclusion

The Supreme Court's approach to the interaction between the system of freedom of expression and the criminal justice system has been characterized by an expressed attempt to avoid the assignment of priorities.[421] Nevertheless, on the only occasion in which a conflict was found to exist, that conflict was resolved in favor of the proper administration of justice.[422] When dealing with discussion of a criminal jury trial by the defense attorney, this appears to be the appropriate judgment. An absolute right to freedom of expression would place the attorney who chooses to totally disregard his obligation to assist the court in finding justice beyond the reach of the judicial system. The criminal justice system, so important to a democratic society, and so dependent upon attorneys, cannot afford such a situation. Nevertheless, the attorney has other important rights and obligations, and when we silence one who represents a criminal accused, we take a significant risk that we must be very certain is necessary. Thus, while a restraint may

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417. The press may well assert a first amendment right to attend the hearing in its reportorial capacity. Such attendance, however, would undermine the very purpose of having a hearing before the various interests are determined. Press representation, therefore, should be limited to its attorneys, with the clear understanding that all information obtained is in confidence.

418. Bridges v. California, 314 U.S. 252, 258-69 (1941); *see* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559, 560 (1976).

419. *E.g.*, Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970). For a discussion of the difficulties inherent in obtaining appellate review, see Rendelman, *Free Press—Fair Trial: Review of Silence Orders*, 52 N.C.L. Rev. 127 (1973).

420. Rights in Conflict, *supra* note 168, at 18.

421. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976).

422. Estes v. Texas, 381 U.S. 532 (1965). The *Estes* Court indicated that its decision to not allow a trial to be televised might be different should the conflict cease to exist. "When the advances in these arts permit reporting . . . by television without [its] present hazards to a fair trial we will have another case." *Id.* at 540. These advances apparently have now come to pass. *See* Chandler v. Florida, 449 U.S. 560 (1981).

be imposed to prevent a grave violation of the attorney's responsibility to the criminal justice system, the serious nature of such a restraint mandates that its use be limited to those instances in which the potential violation is shown with the very high degree of certainty the Supreme Court has found necessary to justify a prior restraint.

The weight of the social values involved when the speaker is the accused, however, requires that the balance be drawn in favor of free speech. Absolute protection of the defendant's speech, of course, may also result in an unfair trial, but that is unlikely to happen often and will involve only a single trial. Our society can afford the occasional escape of a guilty person in order to protect our fundamental rights. What it cannot afford is to permit the government to silence a citizen whom it may be oppressing.

UTAH LEGISLATIVE SURVEY—1983

I. INTRODUCTION

The Utah Legislative Survey provides a brief overview of selected enactments of the Forty-Fifth General Session of the Utah

Legislature, and also includes one enactment from the 1982 Utah Legislative Budget Session. The following sections are intended to keep our readers abreast of recent legislation and to provide useful research material regarding the new enactments.

II. ATTORNEY'S FEES

Equal Access to Justice for Small Business

The Utah Small Business Equal Access to Justice Act[1] (the "Act") allows a court to award reasonable litigation expenses to small businesses that successfully defend themselves in business regulatory actions improperly brought by the state. Patterned after the federal Equal Access to Justice Act[2] ("EAJA"), the Act was passed primarily in response to a legislative concern that "small businesses may be deterred from seeking review of or defending against substantially unjustified government action because of the expense involved . . . ."[3] The sponsors of the bill also expected the potential liability for expenses to deter state regulatory agencies from arbitrarily promulgating and enforcing business regulations.[4]

The Act conditions an award of expenses on six requirements. First, the Act limits the recovery of expenses to "civil judicial action[s] commenced by the state"[5] and to "civil judicial appeal[s] taken from an administrative decision [when] the administrative action was commenced by the state."[6] The requirement that the state initiate the action reflects the legislature's concern that allowing recovery of litigation expenses for actions initiated by small

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1. Act of May 10, 1983, ch. 298, §§ 1-6, 1983 Utah Laws 1184 (codified at UTAH CODE ANN. §§ 78-27a-1 to -6 (Supp. 1983)).

2. Pub. L. No. 96-481, 94 Stat. 2327 (1980) (codified as amended at 28 U.S.C. § 2412 (Supp. V 1981)).

3. UTAH CODE ANN. § 78-27a-2 (Supp. 1983). In drafting the statute, the bill's sponsors primarily were concerned with implementing the Act's major policies. Minor administrative details were omitted on the understanding that they would be supplied as needed by the courts. Telephone interview with Rep. David L. Tomlinson, sponsor of the Act (Sept. 9, 1983). For example, the Act fails to specify a time limit for filing a petition for an award of expenses. The federal Equal Access to Justice Act ("EAJA") requires applications for fees to be filed within 30 days after the final judgment. 28 U.S.C. § 2412(d)(1)(B) (Supp. V 1981).

4. Floor Debate by Reps. David L. Tomlinson and Lyle W. Hillyard, 45th Utah Leg., Gen. Sess. (Feb. 18, 1983) (H.R. Recording Tape No. 6, side 1).

5. UTAH CODE ANN. § 78-27a-4 (Supp. 1983).

6. *Id.* § 78-27a-5(1). When a judicial appeal is taken from an administrative decision, the responsible agency may require that the small business exhaust administrative remedies before making a claim under the Act for expenses incurred in the judicial appeal. *Id.* § 78-27a-5(2).

businesses would encourage small businesses to bring frivolous actions against the state.[7] The Act's other requirements, however, that the small business prevail[8] and that the government's position be without substantial justification,[9] provide substantial safeguards against spurious suits. Moreover, because the policy of the Act is to encourage state regulatory agencies to act responsibly, as well as to recompense small businesses for their legal costs, it is arguable that small businesses should be able to recover expenses for challenging unjustified business regulations as well as for defending against unjustified government suits. Often, a small business will comply with an unreasonable business regulation because of the state's coercive powers,[10] thereby giving the regulation unwarranted precedential strength.[11] Governmental responsibility in business regulation would be advanced if small businesses were awarded litigation expenses for successfully challenging unreasonable regulations.[12]

The Act's second requirement limits the recovery of expenses to actions involving "business regulatory functions of the state."[13] Although the Act designates the political entities included in "state,"[14] it does not define a "business regulatory function."[15] Therefore, the courts, in applying the Act, will have to determine the scope of the Act's coverage.

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7. Floor Debate by Rep. Richard L. Maxfield, 45th Utah Leg., Gen. Sess. (Feb. 18, 1983) (H.R. Recording Tape No. 6, side 1). In contrast to the Utah Act, the EAJA awards expenses in actions brought by or against the government. 28 U.S.C. § 2412(a) (Supp. V 1981).

8. *See infra* notes 21-28 and accompanying text.

9. *See infra* notes 29-35 and accompanying text.

10. A major reason for the EAJA's including actions brought against the government was Congress' assessment that "[a]t the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position." H.R. REP. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4988.

11. In passing the EAJA, Congress noted that: "Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decisionmaking process." *Id.*

12. A small business, however, may be able to make the Act applicable by refusing to comply with arguable regulations and thereby force the government into initiating legal action. This technique, however, is inefficient and may not have a substantial effect in promoting a policy of governmental regulatory responsibility.

13. UTAH CODE ANN. §§ 78-27a-4, -5(1) (Supp. 1983).

14. *Id.* § 78-27a-3(4): " 'State' means any department, board, institution, hospital, college or university of the State of Utah or any political subdivision thereof."

15. *See id.* Antitrust actions, however, are expressly excluded. *Id.*

The Act's third requirement limits the recovery of expenses to "small businesses."[16] The Act defines a small business as a "commercial or business entity, including a sole proprietorship, which does not have more than 250 employees," but excludes "a subsidiary or affiliate of another entity which is not a small business."[17] It is likely that the eligibility requirements are intended to limit the recovery of expenses to those parties who otherwise would be deterred from vigorously defending or seeking judicial review of government initiated actions because of the expense involved.[18] The exclusion of affiliates and subsidiaries of larger businesses serves that purpose because parties who have access to extensive corporate resources will not be deterred from seeking judicial review because of burdensome expenses.[19] The Act, however, does not provide a method for including entities, such as tax exempt organizations, that may have over 250 employees but lack the financial resources to defend against the government.[20]

The Act's fourth requirement, that the small business must prevail before expenses will be awarded,[21] raises two policy questions. First, because the small business need only prevail on the "most significant issue or set of issues" to recover expenses,[22] it is unclear if the small business should recover the expenses incurred

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16. *Id.* §§ 78-27a-4, -5(1).

17. *Id.* § 78-27a-3(3).

18. Comparable eligibility standards in the EAJA were intended to limit fee awards to those litigants for whom the cost of litigation was prohibitive. H.R. REP. No. 1418, *supra* note 10, at 9, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS, at 4988.

19. *See generally* Robertson & Fowler, *Recovering Attorneys' Fees From the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903, 926 (1982) (suggesting that subsidiaries and affiliates of ineligible corporations should be excluded from the EAJA).

20. In contrast to the Utah Act, the EAJA does not require tax exempt organizations or certain agricultural cooperatives to meet eligibility standards. 28 U.S.C. § 2412(d)(2)(B) (Supp. V 1981). The federal law also allows individuals whose net worth does not exceed $1,000,000 to qualify for a recovery of litigation expenses in eligible proceedings. *Id.* The decision to extend eligibility to individuals "rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy." H.R. REP. No. 1418, *supra* note 10, at 10, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS, at 4988.

21. UTAH CODE ANN. §§ 78-27a-4, -5(1) (Supp. 1983).

22. *Id.* § 78-27a-3(1). The Act defines a prevailing party as one who "obtains a favorable final judgment, the right to all appeals having been exhausted, on the merits, on substantially all counts . . . and with respect to the most significant issue or set of issues . . . ." *Id.* The EAJA defines a prevailing party in the terms that have been developed in the case law interpreting other fee-shifting statutes. H.R. REP. No. 1418, *supra* note 10, at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS, at 4990. Accordingly, a prevailing party need not prevail on all issues. Hensley v. Eckerhart, 103 S.Ct. 1933, 1939 (1983); *see also infra* notes 25-26 and accompanying text (discussing traditional federal and Utah practices for awarding attorney's fees in actions that are settled).

in presenting minor losing issues. Courts and commentators considering that question under the EAJA have differed in their opinions, with some suggesting that only expenses for prevailing claims should be awarded,[23] and others suggesting that, because every reasonable argument should be presented on behalf of a client, expenses for all reasonable claims should be recoverable.[24]

A second policy issue is raised by the Act's denial of expenses where a case is settled out of court.[25] Denial of expenses in settled cases is inconsistent with other Utah attorney's fees statutes, which allow recovery if the case is settled,[26] and creates a serious trap for the unwary litigant who may not realize that his claim for expenses will be forfeited if the case is settled. Although the exclusion may have been intended to prevent the recovery of expenses for settlements reached in administrative proceedings,[27] the requirement that an administrative decision be judicially appealed before expenses can be awarded achieves the same result without also denying fee awards for settlements reached after a judicial

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23. *See, e.g.*, United States v. Miscellaneous Pornographic Magazines, 541 F. Supp. 122, 126 (N.D. Ill. 1982) (holding that the EAJA allows recovery of only those expenses incurred in presenting prevailing claims).

24. *See, e.g.*, Note, *Civil Procedure—Attorney's Fees—Recovery of Attorney's Fees Against the United States—The Equal Access to Justice Act*, 10 FLA. ST. U.L. REV. 723, 726 (1983) (criticizing the holding in United States v. Miscellaneous Pornographic Magazines, 541 F. Supp. 122 (N.D. Ill. 1982), as having the potential of deterring the "best efforts of counsel"). For a related policy discussion of fee awards in a civil rights context, compare Northcross v. Board of Educ., 611 F.2d 624, 636 (6th Cir. 1979) (suggesting that fee awards should encourage lawyers "to take the most advantageous position on their clients' behalf that is possible in good faith") with Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978) (holding that the amount of court awarded attorney's fees should be based on the work performed on the successful claims).

25. UTAH CODE ANN. § 78-27a-3(1) (Supp. 1983). Recovery of expenses is barred "whether or not the settlement occurs before or after any hearing or trial." *Id.* Although the EAJA does not specifically grant attorney's fees in cases of settlement, the legislative history indicates approval of allowing a party who has obtained a favorable settlement to recover fees to the same extent as a party who has prevailed on the merits. H.R. REP. No. 1418, *supra* note 10, at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS, at 4990.

26. *See, e.g.*, Highland Constr. Co. v. Stevenson, 636 P.2d 1034, 1038 (Utah 1981) (holding that a plaintiff who recovers money in a settlement is a "prevailing party" within the meaning of UTAH CODE ANN. § 14-1-8 (1953) (repealed 1980) (replaced by *id.* § 14-1-16 (Supp. 1983)) (awarding attorney's fees in actions brought against a bonded public contractor).

27. Telephone interview with Rep. David L. Tomlinson, *supra* note 3. A distinction between judicial proceedings and administrative proceedings may be defended as an attempt to limit the potential costs of the Act along readily discernible boundaries. For a discussion of the practical difficulties encountered in implementing coverage of administrative proceedings under the EAJA, see generally Note, *The Award of Attorney's Fees Under the Equal Access to Justice Act*, 11 HOFSTRA L. REV. 307, 312 (1982).

appeal.[28]

The Act's fifth requirement conditions an award on a court finding "that the state action was undertaken without substantial justification."[29] The "without substantial justification" requirement raises two policy issues. First, it is unclear whether expenses may be recovered only when the litigation posture of the government is substantially unjustified or whether expenses also may be recovered when the regulation underlying the government's position is substantially unjustified.[30] Although there is a split of authority with regard to that issue under the EAJA,[31] it is arguable that the Utah Act should be interpreted to include recovery in both instances, because the Utah Legislature expressly intended the Act to discourage illegal regulations as well as capricious enforcement litigation.[32]

There also is an issue as to which party has the burden of proving whether the state action was substantially unjustified.[33] The difficulty inherent in proving a negative and the general prac-

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28. UTAH CODE ANN. § 78-27a-5(1) (Supp. 1983).

29. *Id.* §§ 78-27a-4, -5(1). The federal "substantial justification" requirement is found at 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981). *See also* H.R. REP. No. 1418, *supra* note 10, at 14, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS, at 4993 (rejecting a Department of Justice suggestion that fees be awarded only where the government action was "arbitrary, frivolous, unreasonable, or groundless, or the United States continued to litigate after it clearly became so"; instead defining the "substantial justification" standard as "an acceptable middle ground between an automatic award of fees and the restrictive standard proposed by the Department of Justice").

30. The substantial justification requirement should not deter the government from advancing novel but credible arguments. The legislative history of the EAJA indicates that the "substantial justification" standard imposed on the federal government was not intended to deter the "novel but credible extensions and interpretations of the law [that are characteristic] of vigorous enforcement efforts." H.R. REP. No. 1418, *supra* note 10, at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS, at 4990. Moreover, even after a showing that the state action was unjustified, the court retains the discretionary power to deny an award of expenses. UTAH CODE ANN. §§ 78-27a-4, -5(1) (Supp. 1983) ("a court *may* award . . .") (emphasis added); *see also* 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981) (permitting a denial of fees when "special circumstances make an award unjust").

31. *Compare* Operating Eng'rs Local Union No. 3 v. Bohn, 541 F. Supp. 486, 495 (D. Utah 1982) (Winder, J.) (suggesting that the substantial justification standard must apply only to the government's litigation posture because "[o]therwise the underlying action would rarely . . . be . . . justified when the government did not prevail") *with* Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 352 n.7 (D.D.C. 1982) (suggesting that it would "contradict the remedial purpose of the Act to interpret it [as isolating] a single element of the government's actions").

32. Floor Debate by Rep. David L. Tomlinson, *supra* note 4.

33. In contrast to the Utah Act, the EAJA places the burden of proof on the government by awarding litigation expenses to the prevailing party "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981).

tice of placing the burden of proof on the party who has control of the evidence[34] favors placing the burden of proof on the government.[35]

Finally, the Act allows a court to award "reasonable litigation expenses,"[36] including "court costs, administrative hearing costs, attorney's fees, and witness fees of all necessary witnesses, not in excess of $10,000."[37] Although the award is conditioned on a judicial finding that the expenses were "reasonably incurred,"[38] the Act does not specify what factors indicate a "reasonable litigation expense."[39] Also, although the $10,000 limit may not totally reimburse a successful litigant for expenses reasonably incurred, the limit may be justified as a substantial effort by the state to defray the costs of litigation.[40]

The Utah Small Business Equal Access to Justice Act is a creative attempt by the legislature to use the costs of litigation as a sanction for unjustified state regulation of small businesses. In order to preserve the deterrent effect of the Act, the legislature would be well advised to reconsider the Act's exclusion of actions brought against the state and actions that are settled. The courts also would be well advised to issue generous guidelines on the

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34. *See generally* Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11-14 (1959) (discussing the policy considerations underlying the allocation of burdens of pleading and proof).

35. The EAJA places the burden of proving substantial justification on the government because "[that] allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question." H.R. REP. No. 1418, *supra* note 10, at 10-11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS, at 4989. Additionally, "it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its actions than it is for a private party to marshal the facts to prove that the Government was unreasonable." *Id.* at 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS, at 4989.

36. UTAH CODE ANN. §§ 78-27a-4, -5(1) (Supp. 1983).

37. *Id.* § 78-27a-3(2). Expenses awarded under the Act shall be paid from funds in the regular operating budget of the state entity. If funds are unavailable in the entity's budget, the award will be considered a claim against the state. An annual accounting of the amount awarded and paid under the Act must be made by state entities to the governmental body that appropriates its funds. *Id.* § 78-27a-6.

38. *Id.* § 78-27a-3(2).

39. For a recent discussion of factors relevant to determining the amount of a judicially discretionary attorney's fee award between private litigants made pursuant to statute, see Kerr v. Kerr, 610 P.2d 1380, 1385 (Utah 1980).

40. Telephone interview with Rep. David L. Tomlinson, *supra* note 3. Under the EAJA, the amount of fees that may be awarded is based on the prevailing market rate. Compensation for expert witnesses may not exceed the highest rate of compensation paid for expert witnesses by the litigating governmental body. Attorney's fees may not exceed $75 an hour unless special factors justify a higher fee. 28 U.S.C. § 2412(d)(2)(A) (Supp. V 1981).

claims for which a partially prevailing party may recover and broadly define a "substantially unjustified" governmental action.

III. CONSTITUTIONAL LAW

Cable Television

The Utah Cable Television Programming Decency Act[41] (the "Cable Act") creates a new civil penalty for the knowing distribution of "indecent material" over cable television.[42] The Cable Act employs a nuisance theory to justify the regulation of material that is protected by the first amendment standard enunciated in *Miller v. California*.[43] Unlike prior legislative attempts that prohibited the showing of constitutionally protected material,[44] the Cable Act is intended to channel indecent material to hours when the material will be less accessible to children.[45]

The Cable Act makes distribution of indecent material over cable television a public nuisance,[46] punishable by up to a $1000 fine for the first offense and up to $10,000 for repeat offenses.[47] Material is "indecent" if: (1) It depicts or describes sexual acts, human excretory organs or specified states of undress, and (2) the average person, applying contemporary community standards, would find the material "patently offensive" for the time, place, manner and context of programming.[48] The Cable Act also makes

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41. Act of Mar. 7, 1983, ch. 207, § 7, 1983 Utah Laws 825 (codified at UTAH CODE ANN. §§ 76-10-1701 to -1708 (Supp. 1983)).

42. UTAH CODE ANN. § 76-10-1702 (Supp. 1983).

43. 413 U.S. 15 (1973); *see infra* notes 50-55 and accompanying text.

44. UTAH CODE ANN. § 76-10-1229(1)-(4) (1981) (declared unconstitutional); *see* cases cited *infra* note 53.

45. UTAH CODE ANN. §§ 76-10-1702(4) to -1703 (Supp. 1983). The legislative intent to merely channel indecent material to late night hours rather than prohibit it altogether is indicated by Senator Rogers' remarks during senate debates. Floor Debate by Sen. Paul Rogers, 45th Utah Leg., Override Sess. (Mar. 19 & 20, 1983) (S. Recording Tape No. 3, side 1); *see also* Floor Debate by Sen. Karl Swan, 45th Utah Leg., Override Sess. (Mar. 19 & 20, 1983) (S. Recording Tape No. 3, side 1); Floor Debate by Rep. James Moss, 45th Utah Leg., Override Sess. (Mar. 19 & 20, 1983) (H.R. Recording Tape No. 4, side 2).

46. UTAH CODE ANN. § 76-10-1703 (Supp. 1983).

47. *Id.* § 76-10-1704(3)-(4). A person found to have violated the Act also is bound to pay attorney's fees. *Id.* § 76-10-1704.4.

48. *Id.* § 76-10-1702.4. Indecent material is specifically defined as a verbal or visual description of:

> (a) A human sexual or excretory organ or function; or (b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or (c) An ultimate sexual act,

it an affirmative defense that the distribution of the indecent material was restricted to persons having scientific, educational, governmental or similar interests.[49]

In *Miller v. California*,[50] the United States Supreme Court held that while obscene material was not constitutionally protected,[51] prohibitions on nonobscene material were in violation of the first amendment.[52] Previous statutes prohibiting the cablecast of nonobscene material, as well as obscene material, have been held to be unconstitutionally overbroad.[53] The Cable Act, however, is different from those statutes because it does not prohibit the showing of nonobscene material; rather, it merely regulates the time, place, manner and context under which the material may be shown.[54] Thus, proponents of the Cable Act argue that *Miller* does not apply to the Cable Act because it does not prohibit nonobscene material but merely channels that material to late night hours

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normal or perverted, actual or simulated; or (d) Masturbation, which the average person applying contemporary community standards for cable television . . . would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented.

Id. § 76-10-1702. Liability under the Cable Act extends to both "distribution" and "providing for distribution" of indecent material over cable television. *Id.* § 76-10-1702.2.

49. *Id.* § 76-10-1706.1.

50. 413 U.S. 15 (1973).

51. Under *Miller*, material is not protected by the first amendment if: "(a) The average person, applying contemporary community standards, would determine that the work taken as a whole appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; (c) the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *Id.* at 24; *see* UTAH CODE ANN. §§ 76-10-1201 to -1208 (1953) (codifying the *Miller* obscenity standard). The Utah obscenity statute has withstood constitutional challenges in State v. Piepenburg, 602 P.2d 702 (Utah 1979) and State v. Haig, 578 P.2d 837 (Utah 1978).

The Cable Act's definition of "indecent material" may include material that would not be considered obscene under *Miller*. For example, the showing of the buttocks or the female breast may be "indecent" under the Cable Act, yet the United States Supreme Court repeatedly has held that nudity per se is not obscene. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (city ordinance making it a public nuisance for a drive-in movie theater to exhibit movies containing nudity visible from any public place held facially overbroad because it prohibited nudity per se); Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (city statute overbroad where nudity per se prohibited).

52. 413 U.S. at 34.

53. *See, e.g.*, Cruz v. Ferre, 571 F. Supp. 125, 132 (S.D. Fla. 1983) (Miami ordinance attempting to prohibit nonobscene material held to exceed limits of *Miller*); Community Television, Inc. v. Roy City, 555 F. Supp. 1164, 1171 (D. Utah 1982) (Roy City ordinance overbroad under *Miller* because prohibits nonobscene material); Home Box Office v. Wilkinson, 531 F. Supp. 987, 994 (D. Utah 1982) (statute overbroad under *Miller* because prohibits nonobscene material).

54. *See supra* notes 45 & 48.

when children are unlikely to be in the viewing audience.[55]

To justify the regulation of nonobscene material, proponents of the Cable Act rely on the nuisance rationale of *FCC v. Pacifica Foundation*.[56] In *Pacifica*, the United States Supreme Court held that the Federal Communications Commission ("FCC") had the authority to regulate the radio broadcasts of material not considered obscene under the *Miller* standard.[57] The Court justified the FCC's regulation of nonobscene material by noting that: (1) radio broadcasts intrude into the home environment where the individual's privacy outweighs the first amendment rights of the intruder; (2) prior warnings of possible offensive programs are ineffective where the listening audience constantly tunes in and out; (3) the state has a legitimate interest in protecting children from offensive material that is "uniquely" accessible in the home; and (4) limited radio frequencies justify regulation that promotes programming that appeals to the general public.[58]

Proponents argue that the *Pacifica* rationale should be extended to cable television programming because of the pervasive nature of cablecasts.[59] Just as with radio, cable is received in the

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55. Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 36, Community Television, Inc. v. Wilkinson, 555 F. Supp. 1164 (D. Utah 1982) (Civ. Nos. C-83-0551A & C-83-0581A) (filed Oct. 25, 1983) [hereinafter cited as Defendant's Memorandum].

56. 438 U.S. 726 (1978). *Pacifica* involved a radio broadcast of a monologue by George Carlin entitled "Dirty Words." The program was broadcast at 2:00 p.m. Carlin listed those words that were never heard on television or radio and repeated them over and over. A man heard the broadcast while driving with his young son and complained to the Federal Communications Commission ("FCC"). The FCC issued a declaratory order notifying the radio station that it would be subject to sanctions for the "Dirty Words" broadcast.

Recognizing that Carlin's monologue was not obscene, and hence was accorded first amendment protection, the FCC relied on nuisance law and a federal statute, which made it a crime to "utter any obscene, indecent or profane language by means of a radio communication." 18 U.S.C. § 1464 (1976). The FCC held the broadcast indecent because it was aired at a time when young children were likely to hear it. The FCC wanted to channel such broadcasts to the late night hours when, preceded by warnings, they would be less accessible to children. *See* Pacifica Foundation, 56 F.C.C. 94, 98-99 (1975), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

57. 438 U.S. at 741. Reasonable state regulation of nonobscene material also has been upheld in Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (upholding ordinance that controlled adult theater location but did not prohibit material).

58. 438 U.S. at 748-50.

59. Defendant's Memorandum, *supra* note 55, at 23-25. Proponents claim that a media form is "pervasive" under the *Pacifica* rationale if the programs themselves are widely accessible. Thus, cablecasts are pervasive because they are available in many homes. *Id.* Opponents of the Cable Act claim that a media form is not pervasive unless the broadcast medium is pervasive. Hence, the *Pacifica* rationale applies to radio because "its medium, the air, is pervasive," but it should not apply to cablecasting because its medium is re-

individual's home, prior warnings are no more effective for cablecasts than for radio and children may be more influenced by visual material over cablecasts than by audio material over radio.[60]

Opponents argue that *Pacifica* does not apply to cable television.[61] First, the Supreme Court suggested a limited application of *Pacifica*, emphasizing that "differences between radio, television and perhaps closed circuit transmission may be relevant."[62] Other courts have followed that suggestion and held that *Pacifica* does not apply to cable television because of the significant differences between radio, television and cable.[63] Finally, opponents argue that the supporting rationales of *Pacifica* do not apply to cable television.[64] For example, cable television is not an intruder in the home but is introduced by paid subscription only. Thus, parents can protect their children from indecent material over cable television by not subscribing to cable television or by using cable keys and lock boxes.[65] Similarly, the "scarce resource" theory invoked to justify FCC regulation of radio and television[66] is inapplicable to cable television. Unlike radio or television, cable television frequencies are limitless. Thus, the regulation of cable television to promote programming that appeals to the public is unnecessary.[67]

If the *Pacifica* rationale is not extended to cable television, the Cable Act likely will be found unconstitutionally overbroad under the *Miller* standard because it regulates nonobscene material in addition to obscene material. Even if *Pacifica* applies, the Cable Act may be unconstitutionally vague. A vague statute is one that does not give fair warning of the conduct proscribed.[68] Although

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stricted. Memorandum in Support of Plaintiff's Motion for Summary Judgment and Final Certification of Defendant Class, Community Television, Inc. v. Wilkinson, 555 F. Supp. 1164 (D. Utah 1982) (Civ. No. C-83-0551-A) (filed Aug. 15, 1983) [hereinafter cited as Plaintiff's Motion].

60. Defendant's Memorandum, *supra* note 55, at 23-30.

61. Plaintiff's Motion, *supra* note 59, at 20-33.

62. 438 U.S. at 750.

63. *See* Cruz v. Ferre, 571 F. Supp. 125, 128 (S.D. Fla. 1983); Community Television, Inc. v. Roy City, 555 F. Supp. 1164, 1166-69 (D. Utah 1982).

64. *See supra* text accompanying note 58.

65. Memorandum in Support of the Individual Plaintiff's Motion for Summary Judgment at 15, Community Television, Inc. v. Wilkinson, 555 F. Supp. 1164 (D. Utah 1982) (Civ. No. C-83-0551-A) (filed Aug. 19, 1983). Only one percent of current cable television subscribers, however, buy lock boxes. Defendant's Memorandum, *supra* note 55, at 29.

66. *See supra* text accompanying note 58.

67. *See, e.g.*, Krattenmaker & Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 FORDHAM L. REV. 606, 633-35 (1983).

68. *See, e.g.*, Rabe v. Washington, 405 U.S. 313 (1972) (notice standard defined). *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW 83-89 (3d ed. 1972) (discussing cases defin-

the types of material that may be considered indecent are defined clearly by the Cable Act, the context that may render material "indecent" is not defined.[69] Hence, the statute does not give fair warning of the context that will render cable programming "indecent." Moreover, the meaning of "continuing course of conduct" may be too vague to give warning of the specific conduct proscribed.[70]

Opponents also argue that the Cable Act violates the equal protection clause of the fourteenth amendment.[71] Cable television is singled out for disparate treatment under the Cable Act.[72] Material viewed by means of video recorder on home television is not regulated, but if that same material originates with a cable transmission it may be deemed indecent. A statute that does not deal evenhandedly with content-based material protected by the first amendment is unconstitutional unless the state can demonstrate that the law is necessary to promote a compelling governmental interest.[73]

The Cable Act cannot withstand constitutional challenges of overbreadth and vagueness unless *Pacifica* is extended to cable television regulation. Given the judicial reluctance to so apply *Pacifica*, the Cable Act may be facially overbroad. Furthermore, even if *Pacifica* is extended to cable television, the Cable Act still may be unconstitutionally vague because of the legislature's failure to define the context in which material will be subject to regulation.

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ing notice standard).

69. UTAH CODE ANN. § 76-10-1702.4 (Supp. 1983). Broadcasting indecent material alone is not prohibited. The average person also must find the material to be "patently offensive . . . for the time, place, manner and context in which the material is presented." *Id.* § 76-10-1702. Utah Attorney General David Wilkinson defined the time, place, manner and context requirement as meaning that indecent material must be programmed between 12:00 midnight and 7:00 a.m. Utah Att'y Gen. Op. (Oct. 17, 1983) [hereinafter cited as Att'y Gen. Op.].

70. UTAH CODE ANN. § 76-10-1703 (Supp. 1983). The showing of an isolated "indecent" scene is not proscribed by the Cable Act, for only a "continuing course of conduct" in maintaining a nuisance is prohibited. *Id.* The attorney general interpreted a "continuing course of conduct" as three complaints in one month. Att'y Gen. Op., *supra* note 69.

71. Plaintiff's Motion, *supra* note 59, at 33-37; *see, e.g.*, Community Television, Inc. v. Roy City, 555 F. Supp. 1164, 1170 (D. Utah 1982).

72. UTAH CODE ANN. § 76-10-1705 (Supp. 1983).

73. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98-100 (1972) (content based activities protected by the first amendment are subject to strict scrutiny under the equal protection clause); *cf.* New York v. Ferber, 456 U.S. 1113 (1982) (state's interest in protecting children is "compelling").

IV. CONTRACTORS' BONDS

Performance and Payment Bonds on Public Construction Projects

The 1983 Utah Legislature passed a bill requiring the primary contractor on a public construction project to furnish both a performance bond and a payment bond to the political entity awarding the contract[74] if that political entity is not already covered by the Utah Procurement Code.[75] Although the new Act was intended to correct the perceived exclusion of local political units from coverage by the Utah Procurement Code,[76] the new Act does not clear up the ambiguity it was meant to resolve.

Performance and payment bonds are third-party beneficiary contracts, executed by the contractor and a surety company.[77] A performance bond guarantees that the contractor will complete the construction within the terms of the contract, thereby protecting the political entity from cost overruns and uncompleted projects.[78] A payment bond is for the benefit of subcontractors and materialmen, protecting them against nonpayment by the general contractor.[79] The new Act provides that any person who has furnished labor or material to a contractor or subcontractor on a public

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74. Act of Feb. 24, 1983, ch. 61, 1983 Utah Laws 315 (codified at UTAH CODE ANN. §§ 14-1-13 to -17 (Supp. 1983)).

75. UTAH CODE ANN. §§ 63-56-1 to -73 (Supp. 1983).

76. Remarks by Sen. Richard J. Carling on S. 2, 45th Utah Leg., Gen. Sess. (Jan. 18, 1983) (S. Recording Tape 22, side 1) [hereinafter cited as Remarks].

77. UTAH CODE ANN. § 14-1-13 (Supp. 1983). Each bond must be equal to 100% of the contract price. *Id.* Both bonds must also be made payable to the political entity awarding the contract. *Id.* § 14-1-13(2)(c). The political entity may require additional security at its discretion. *Id.* § 14-1-13(3).

78. Under the usual performance bond, if the contractor defaults the surety must complete the contract or pay damages up to the limit of the bond. *See* 17 AM. JUR. 2D *Contractors' Bonds* § 1 (1964).

79. UTAH CODE ANN. § 14-1-13(1)(b) (Supp. 1983). This statutory protection is necessary because contractors often are poor credit risks and because the subcontractors are prevented by law from holding a lien on a public building. *See* Remarks, *supra* note 76; *see also* UTAH CODE ANN. §§ 38-1-3, -1 (1974 & Supp. 1983). Utah has protected subcontractors by requiring contractors to furnish payment bonds since 1909. Act of Mar. 11, 1909, ch. 68, 1909 Utah Laws 115; Act of Feb. 26, 1917, ch. 36, 1917 Utah Laws 105; *cf.* Act of Mar. 9, 1905, ch. 87, 1905 Utah Laws 101 (describing conditions under which political subdivisions may be liable to subcontractors and materialmen). The current Act's immediate predecessor UTAH CODE ANN. §§ 14-1-5 to -8 (1973) (repealed 1980), was passed in 1963. That act apparently was based on the federal Miller Act, 40 U.S.C. §§ 270a-270d (1976 & Supp. V 1981), which was originally enacted in 1935. *See* Remarks, *supra* note 76 (referring to the previous act as the "little Miller Act"). The 1963 act was repealed in 1980 when the legislature enacted the Utah Procurement Code. Act of Feb. 2, 1980, ch. 75, 1980 Utah Laws 407 (currently codified at UTAH CODE ANN. §§ 63-56-1 to -73 (Supp. 1983)).

construction project and has not been paid in full within ninety days of the date the last of the labor or materials were supplied may sue on the payment bond for the amount still owing.[80] If the political entity awarding the contract fails to require a payment bond, it must pay the subcontractor itself on demand.[81]

The new Act was enacted to correct a perceived inadequacy in the Utah Procurement Code. Although the Procurement Code was intended to cover all public contracts,[82] it was not clear to what extent the Code applied to local governmental units. By its language, the Procurement Code applied only to expenditures of public funds "by any state agency" and to "the disposal of state supplies."[83] The definition of "state agency" did not specifically mention political subdivisions such as counties and cities.[84] To fill this gap in the Procurement Code, the new Act was passed. The

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80. UTAH CODE ANN. § 14-1-14(1) (Supp. 1983). If the person has a contract with a subcontractor but not with the contractor who furnished the bond, he must first give the prime contractor written notice of that contract within the 90-day period. *Id.* § 14-1-14(2). The person contracting with the subcontractor then has the same right to sue on the payment bond as the subcontractor does. *Id.* Action on a payment bond must be brought within one year of furnishing the materials or labor, unless the claimant is a subcontractor of the contractor, in which case he must bring the action within one year from the date the final payment under the subcontract became due. *Id.* § 14-1-14(4). No statute of limitations is mentioned for actions on the performance bond. The statute allows the prevailing party to recover attorney's fees in actions under both payment and performance bonds. *Id.* § 14-1-16.

81. *Id.* § 14-1-15. In such cases the statute gives the unpaid party a direct right of action against the political entity. *Id.*

82. *See* Remarks, *supra* note 76. The Code also was meant to "simplify, clarify, and modernize" the law governing procurement by the state. UTAH CODE ANN. § 63-56-1(1) (Supp. 1983). Its most significant changes were to create two new bodies: (1) a procurement policy board with broad authority to promulgate rules and regulations governing procurement, *id.* §§ 63-56-6, -7; and (2) a part-time procurement appeals board to settle disputes arising out of public contracts, *id.* §§ 63-56-51 to -58.

83. UTAH CODE ANN. § 63-56-2(2) (Supp. 1983).

84. *Id.* § 63-56-5(26). A state agency is defined as "any department, division, commission, council, board, bureau, committee, institution, government corporation, or other establishment or official of this state." *Id.* The legislature apparently intended that definition to cover political subdivisions because the Utah Procurement Code was enacted to replace a statute that applied to political subdivisions. *See supra* note 79. It could be argued, however, that had the legislature meant "state agency" to include political subdivisions, it would have said so expressly, as it did in defining local public procurement units in the Utah Procurement Code. *See* UTAH CODE ANN. § 63-56-5(12) (Supp. 1983) (a "local public procurement unit" is "any political subdivision or institution of higher education of the state . . ."). On the other hand, the definition of "local public procurement unit" may be further evidence that the Utah Procurement Code was meant to apply to political subdivisions. The Utah Procurement Code expressly exempts local public procurement units (which include certain political subdivisions) from some of its provisions. *Id.* § 63-56-2(3). It would be pointless to exempt expressly political subdivisions from some provisions of the Utah Procurement Code if the Code did not apply to them in the first place.

new Act applies only to those units not subject to the provisions of the Utah Procurement Code.[85]

The chief problem with the new Act is the ambiguity as to the coverage of the two statutes. The Act arguably applies to all political subdivisions of the state, and the Procurement Code applies to all other public entities of the state, that is, to "state agencies." In other contexts, however, political subdivisions have been held to be "state agencies."[86] Therefore, political subdivisions may already have been covered by the Procurement Code. Because the new Act only applies to those units not covered by the Procurement Code, political subdivisions may be subject to the Procurement Code rather than to the new Act.

Because the bonding provisions of the new Act[87] and of the Utah Procurement Code[88] are similar, it will make little difference which act controls in most cases involving public contractors' bonds. However, there are at least two significant differences between the two statutes that could affect any litigation over contractors' bonds. First, under the new Act, if the political entity fails to require a bond, it risks having to pay any unpaid subcontractors.[89] Under the Procurement Code, however, the procurement unit may be able to waive the bonding requirements "where a bond is deemed unnecessary for the protection of the state."[90] Thus, if the unit awarding the contract fails to get a bond, it may not be liable if the new Act does not apply.

Furthermore, under the new Act, the subcontractor or supplier must bring its action on the payment bond in the appropriate court.[91] Under the Utah Procurement Code, however, the subcontractor or supplier has the option of having its claim decided by the procurement appeals board,[92] which may result in a much earlier decision.[93]

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85. UTAH CODE ANN. § 14-1-17 (Supp. 1983). The new Act is essentially a reenactment of the statute the Utah Procurement Code replaced in 1980. *See* Remarks, *supra* note 76.

86. *See* Salt Lake County v. Salt Lake City, 42 Utah 548, 554, 134 P. 560, 563 (1913) (state government may treat counties as state agencies "for the purpose of augmenting the public good and welfare"); *see also* Salt Lake County v. Liquor Control Comm'n, 11 Utah 2d 235, 237, 357 P.2d 488, 489 (1960) ("a county is but an agency of the state").

87. UTAH CODE ANN. §§ 14-1-13 to -15 (Supp. 1983).

88. *Id.* §§ 63-56-38, -39.

89. *Id.* § 14-1-15.

90. *Id.* § 63-56-38(2).

91. *Id.* § 14-1-14(4).

92. *Id.* § 63-56-54.

93. *See* Minutes of the State and Local Affairs Study Comm. (Oct. 17, 1979) (one

In short, the new Act fails to correct a fundamental flaw in the Procurement Code itself—the ambiguity as to whether the Code applies to political subdivisions. The answer to that question may now affect a subcontractor's remedies under Utah law.

V. Criminal Law and Procedure

A. *Fireworks*

The new Utah Fireworks Act[94] (the "Act") represents a significant liberalization of fireworks laws in Utah. The Act repeals and replaces prior Utah law,[95] which prohibited the sale, possession or use of virtually all fireworks,[96] except sparklers,[97] because they endangered public health and safety.[98] The Act legalizes certain class C fireworks,[99] establishes dates on which such fireworks may be sold[100] or discharged[101] and establishes penalties for the sale of fireworks not authorized by the Act.[102] In addition, the Act authorizes the State Fire Prevention Board to promulgate regulations

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purpose of the appeals board was to facilitate the handling of disputes and lighten the caseload of the courts).

94. Act of Mar. 8, 1983, ch. 127, 1983 Utah Laws 539 (codified at Utah Code Ann. §§ 11-3-1 to -11 (Supp. 1983)).

95. Utah Code Ann. §§ 11-3-1 to -8 (1953) (repealed 1983). The former act was enacted in 1939. Act of Mar. 7, 1939, ch. 125, 1939 Utah Laws 160. Legislation that would have legalized certain, but not all, fireworks passed both houses of the Utah Legislature in 1981. Because of a procedural error, however, the senate approved and passed on to the Governor another version of the bill. Because it did not reflect the will of the legislative majority, the Governor vetoed the legislation. Floor Debate by Sen. William T. Barton, 45th Utah Leg., Gen. Sess. (Mar. 8, 1983) (S. Recording Tape No. 288, side 1).

96. Prior law made it illegal "to offer for sale, expose for sale, sell, possess, or use, or explode" fireworks. Utah Code Ann. § 11-3-2 (1953) (repealed 1983). However, it exempted sparklers, toy pistols, toy canes and toy guns. *Id.*

97. *Id.* Sparklers were legal under the former law despite the fact that they burn at temperatures from 1200 to 2000 degrees Fahrenheit, making them one of the more dangerous fireworks to children. 41 Fed. Reg. 9521 (1976).

98. Utah Code Ann. § 11-3-1 (1953) (repealed 1983).

99. Class C fireworks are those common fireworks and firecrackers that, under federal law, may be sold for consumer use. *See* U.S. Consumer Prod. Safety Comm'n, Product Safety, Fact Sheet No. 12: Fireworks (May 1983). For definition and listing of class C fireworks, see 49 C.F.R. § 173.100(r) (1982). The new Act legalizes four categories of class C fireworks. *See* Utah Code Ann. § 11-3-2(2)-(5) (Interim Supp. 1983); *infra* note 110. Remaining class C fireworks are illegal. Utah Code Ann. §§ 11-3-3, -11 (Interim Supp. 1983).

100. Utah Code Ann. § 11-3-6 (Interim Supp. 1983) (authorizing the sale of fireworks on or between June 20 and July 25, December 20 and January 2, and the Chinese New Year and the preceding 15 days).

101. *Id.* § 11-3-7. Authorized fireworks may be discharged three days prior to, on the day of and three days following July 4, July 24, January 1 and the Chinese New Year.

102. *Id.* §§ 11-3-4(2), -11.

for the storage, handling and sale of fireworks by retail operations.[103] An analysis of the Act suggests that the legislature unduly subordinated safety considerations to commercial objectives, thereby exposing the public to unnecessary dangers.[104]

Two factors precipitated passage of the Act. First, a number of city councils had legalized cones, fountains and other fireworks on the theory that, because they emitted sparks, they were "sparklers" and therefore legal under state law.[105] Much of the initiative for such liberalized fireworks ordinances had come from fireworks companies and local merchants.[106] Second, in 1981, Utah's attorney general determined that enforcement of the then-existing fireworks act was exclusively a local matter,[107] thus precluding the state's power to enforce the act. The result was a patchwork of inconsistent local fireworks ordinances.[108] The new Act is a compromise

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103. *Id.* § 11-3-5.

104. In the entirety of the house and senate debates on the Fireworks Bill (H.R. 141), only one legislator addressed the safety implications of the bill. *See* Floor Debate by Rep. Lorin Pace, 45th Utah Leg., Gen. Sess. (Feb. 10, 1983) (H.R. Recording Tape Nos. 9, 10, side 1) (arguing in favor of the bill). One legislator dismissed safety concerns voiced by fire marshalls, stating that if the legislature "had, by mistake, passed a bill that outlawed matches and then [was] back here trying to get matches allowed, [the fire marshalls would] be back and saying they would be against having matches allowed because people could burn down homes and start fires." Floor Debate by Rep. J. Kirk Rector, 45th Utah Leg., Gen. Sess. (Feb. 10, 1983) (H.R. Recording Tape Nos. 9, 10, side 1).

105. *See* Salt Lake Tribune, June 28, 1981, at B9, col. 3. An earlier attempt by business to classify cones, fountains and similar fireworks as "sparklers" was rejected in Sundries Supply Co. v. Salt Lake County, No. 126198 (3d Dist. Ct. Utah 1960). Apparently, the reason this case was not relied on in later controversies is because none of the parties were aware of its existence.

106. *See* Salt Lake Tribune, June 28, 1981, at B9, col. 3.

107. *See id.*; *see also* Letter from Marvin C. Kimball, Salt Lake City Fire Marshall, to Utah Senators (Feb. 18, 1983) (referring to attorney general's unpublished determination). The attorney general apparently relied on a provision in the prior law that stated, "municipalities and counties outside of incorporated cities of [Utah] are hereby charged with the enforcement of all the provisions of this act . . . ." UTAH CODE ANN. § 11-3-8 (1953) (repealed 1983). No corresponding enforcement responsibility was assigned by the statute to state agencies or officials.

108. In the summer of 1982, for example, local fireworks ordinances in effect in the Salt Lake valley differed markedly. *See, e.g.*, SALT LAKE CITY, UTAH, REV. ORDINANCES § 15-6-1 (1965) (repealed 1983) (proscribing all fireworks other than those specifically allowed by state law and, in addition, proscribing the use of sparklers in public places); SANDY CITY, UTAH, REV. ORDINANCES § 8-6-2 (1982) (repealed 1983) (legalizing all class C fireworks except those that could be aimed, left the ground, or which had as their main purpose explosion or noise); SOUTH SALT LAKE CITY, UTAH, REV. ORDINANCES § 16-1-2 (1981) (legalizing all class C fireworks except those that exploded or left the ground); WEST JORDAN, UTAH, REV. ORDINANCES § 6-6-101 (1982) (repealed 1983) (legalizing "cones and fountains, provided that their sparks extinguished themselves in two seconds"); BOUNTIFUL, UTAH, REV. ORDINANCES § 4-13-101 (1982) (repealed 1983) (proscribing several categories of fireworks; by omission, legalizing cones, fountains and possibly other fireworks as well).

between the interest of fireworks companies and local merchants in satisfying consumer demand and the interest of the public in ensuring its safety.[109]

Although the Act purports to designate which fireworks may be legally sold and discharged throughout the state, uniform application of the law may prove difficult because the definitional scheme employed by the Act fails to clearly differentiate between legal and illegal fireworks. Using technical definitions, the Act initially lists and defines those common fireworks that are legal.[110] All others are considered illegal.[111] Some of the definitions, however, allow multiple interpretations, resulting in a corresponding contraction or expansion of the class of proscribed fireworks, depending on which interpretation is accepted.[112] Furthermore, because fireworks are classified using technical definitions, rather than familiar terms, such as wire sparklers, cone fountains or firecrackers,

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Dates for which the sale and discharge of fireworks were legal also varied significantly. *See, e.g.*, SANDY CITY, UTAH, REV. ORDINANCES § 8-6-3(6) (1982) (repealed 1983) (June 24 to July 5, July 22 to July 25 and Dec. 26 to Dec. 31); SOUTH SALT LAKE CITY, UTAH, REV. ORDINANCES § 16-1-3 (1981) (June 28 to July 25 and Dec. 26 to Dec. 31); WEST JORDAN, UTAH, REV. ORDINANCES § 6-6-104(b) (1982) (repealed 1983) (June 20 to July 26 and Dec. 26 to Jan. 2).

109. *See* Floor Debate by Sen. Wilford R. Black, 45th Utah Leg., Gen. Sess. (Mar. 8, 1983) (S. Recording Tape No. 288, side 1) (noting that the bill was a compromise worked out by fire safety officials and fireworks companies). Legislative concern for public safety may be inferred from several provisions of the Act. For example, the more dangerous class C fireworks were not legalized, and the State Fire Prevention Board was given authority to establish minimum safety standards covering retail sale, handling and storage of common fireworks. UTAH CODE ANN. § 11-3-5 (Interim Supp. 1983). Safety also was cited as a specific reason for the selective legalization of, rather than a total ban on, fireworks, on the grounds that a total ban promotes "smuggling" and that people, under such circumstances, "don't restrict themselves to less dangerous fireworks." Floor Debate by Rep. Lorin Pace, *supra* note 104. In contrast, safety was cited by the State Fire Marshall's Association as its reason for initially opposing the new Act. *See, e.g.*, Letter from Marvin C. Kimball, *supra* note 107.

110. UTAH CODE ANN. § 11-3-2(2)-(5) (Interim Supp. 1983). Categories of fireworks legalized by the Act include "ground or hand-held sparkling devices," "ground audible" devices, "combination fireworks devices" and "trick noisemakers." *Id.*

111. *Id.* §§ 11-3-3, -11.

112. For example, according to the Act, "ground or hand-held sparkling" device means "(a) Any cylindrical tube (cylindrical fountain) not exceeding three-quarters of an inch in inside diameter and containing not more than 75 grams of pyrotechnic composition which produces a shower of sparks upon ignition and may whistle or pop." *Id.* § 11-3-2(2)(a). If regarded as a definition of "cylindrical fountain," the description coincides with the definition of cylindrical fountain found in the Code of Federal Regulations, 49 C.F.R. § 173.000(r)(4) (1982), and is unambiguous. If, however, the parenthetical "cylindrical fountain" is regarded as an illustration—an inference the sentence structure allows—rather than the subject of the definition, the definition may include both firecrackers and Roman candles, as those terms are defined in the federal regulations. *See id.* § 173.000(r)(10) (defining firecrackers); *id.* § 173.000(r)(1) (defining Roman candles).

uniform regulation will be difficult because of the ambiguity inherent in interpreting a complex definition.[113] Moreover, ambiguity regarding prohibited fireworks may hinder enforcement because the Utah Supreme Court has noted that "[t]o be convicted of a crime, one's conduct must be plainly and *unmistakably* prohibited by statute."[114]

Apart from the issue of ambiguity, other problems may hinder enforcement of the Act. For example, the Act prohibits the retail sale of illegal fireworks, but not the wholesale of illegal fireworks,[115] thus making enforcement more difficult. The statute also fails to prohibit possession of banned fireworks,[116] thus undermining enforcement by narrowing the illegal act to either discharge or sale of illegal fireworks. Additionally, although the Act designates a penalty for sale of unauthorized fireworks, no penalty is designated for the discharge of unauthorized fireworks.[117] Under Utah law, failure to designate a penalty results in the crime being punished as an "infraction,"[118] which may constitute an inadequate deterrent to

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113. Many law enforcement agents apparently chose to rely on a "rule of thumb" definition that evolved after passage of the Act, rather than on the technical definitions contained in sections 11-3-2(2) to (5). *See infra* note 124. An alternative, less ambiguous, approach would be to use "common" fireworks terms, such as "firecrackers," "sparklers," "chasers," etc., referring to federal regulatory definitions. *See, e.g.*, IND. CODE ANN. §§ 22-11-14-1 to -9 (Burns Supp. 1983). Improving and simplifying definitions was one of the recommendations made by the Utah Fire Marshall's Association for improving the new law. Minutes of the Utah State Fire Marshall's Association Meeting (Oct. 11, 1983) [hereinafter cited as Minutes].

114. Parker v. Rampton, 28 Utah 2d 36, 38 & n.1, 497 P.2d 848, 850 n.1 (1972) (emphasis added); *see also* State v. Kennedy, 616 P.2d 594 (Utah 1980) (recognizing statutory vagueness as a defense, but upholding a sexual abuse statute challenged on grounds of vagueness); Logan City v. Carlson, 585 P.2d 449 (Utah 1978), *cert. denied*, 439 U.S. 1131 (1979) (recognizing statutory vagueness as a defense in a criminal action, but upholding a traffic ordinance challenged on grounds of vagueness).

115. *See* UTAH CODE ANN. § 11-3-11 (Interim Supp. 1983) (declaring that "any person who sells [unauthorized fireworks] *at retail* is guilty of a class B misdemeanor") (emphasis added). The words "at retail" were inserted by amendment in the senate; thus, the bill that passed the house would have subjected wholesalers, as well as retailers, to sanctions for sales of unauthorized fireworks. *See* Substitute H.R. 141, 45th Utah Leg., Gen. Sess. § 11-3-11 (Feb. 7, 1983).

116. *See* UTAH CODE ANN. § 11-3-3 (Interim Supp. 1983). The former statute, by contrast, banned possession, as well as use, of unauthorized fireworks. *Id.* § 11-3-2 (1953) (repealed 1983).

Similarly, the Act fails to proscribe nonsale transfers such as gifts. A statutory prohibition against "sale" of fireworks was held not to include "gifts" in Calkins v. Albi, 163 Colo. 370, 431 P.2d 17, 22 (1967).

117. Although the sale of unauthorized fireworks is designated a class B misdemeanor, UTAH CODE ANN. § 11-3-11 (Interim Supp. 1983), no such designation is made for the discharge of unauthorized fireworks. *Id.* § 11-3-3.

118. *Id.* § 76-3-105 (1953). A person convicted of an infraction may not be imprisoned,

use of illegal fireworks.[119] Furthermore, a drafting cross-reference error may undermine enforceability of the section declaring the sale of unauthorized fireworks to be a class B misdemeanor. The Act declares that "any person who sells at retail fireworks other than those listed in section 11-3-3 is guilty of a class B misdemeanor."[120] As enacted, however, no fireworks are expressly authorized by that section.[121] Moreover, the Act invites enforcement problems by allowing fireworks sales well before, and after, permissible discharge periods.[122] Finally, the Act fails to provide for funding for its enforcement on a state level.[123] As a practical matter, then, enforcement of the law is still a local responsibility and means a return to jurisdiction-by-jurisdiction determination of what fireworks are legal—a situation supposedly rectified by the new Act.[124]

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id. § 76-3-205(1), but may be fined up to $299 or up to $500 if the offender is a corporation or government instrumentality. *Id.* §§ 76-3-205(2), -301(4), -302(4).

119. The general adequacy of the Act's penalty provisions has been questioned by the Utah State Fire Marshall's Association. Minutes, *supra* note 113.

120. UTAH CODE ANN. § 11-3-11 (Interim Supp. 1983).

121. *See id.* § 11-3-3. The accurate cross-reference would have been to section 11-3-2(2)-(5). Inasmuch as section 11-3-3 specifically refers to section 11-3-2(2)-(5), however, section 11-3-11 might be construed to refer to section 11-3-2(2)-(5) by process of incorporation. Thus, *id.* § 76-1-106 (1953), which provides that "[a]ll provisions of this code . . . shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law," likely would save that provision. *But see* State v. Archuletta, 526 P.2d 911 (Utah 1974) (refusing to apply section 76-1-106 to save a statute hobbled by a similar, but more blatant, drafting error). In *Archuletta*, the defendant was charged and convicted of aggravated assault. The statute under which the accused was convicted read: "(1) A person commits aggravated assault if he commits assault as defined in section 76-5-101 . . . ." Section 76-5-101 defined "prisoner," but did not define "assault." The court noted the reference was "an obvious statutory error" and the "legislature undoubtedly meant" to refer to section 76-5-102, which defined assault. *Id.* at 911-12. Nevertheless, the court held the provision to be unenforceable, concluding "[the provision] simply does not state a crime, and we are not empowered to state one for the legislators simply because it seems certain that they intended to state one themselves." *Id.* at 912. The court rejected the lenient construction called for by section 76-1-106, noting "there [was] no ambiguity in the statute." *Id.*

122. *See* UTAH CODE ANN. §§ 11-3-6, -7 (Interim Supp. 1983).

123. The initial version of H.R. 141 would have provided for an extra five percent sales tax to be collected from fireworks sales. Proceeds would have gone to the State Fire Marshall to aid in enforcement of the Act. H.R. 141, 45th Utah Leg., Gen. Sess. § 11-3-7 (Jan. 13, 1983). The tax-funding provision, however, was not included in substitute H.R. 141. The State Fire Marshall estimated annual state enforcement costs of the Act to be $93,500. OFFICE OF THE LEGISLATIVE FISCAL ANALYST, MANAGEMENT AND FISCAL ANALYSIS (appended to H.R. 141 as originally introduced). Localities may raise monies for enforcement of the Act through their licensing procedures. No comparable mechanism exists, however, for raising funds to be used for state enforcement.

124. In interviews with fire marshalls and industry officials, it frequently was said that the intent of the Act was, as a "rule of thumb," to prohibit all fireworks that "explode" or "shoot into the air." One fireworks company staged clinics throughout the state during the

Although the Act was an attempt to balance business interests with public safety, several omissions in the area of public safety are apparent. First, the Act fails to specify a minimum age for the purchase of fireworks.[125] In addition, the Act fails to regulate public displays of class B fireworks.[126] The prior law governing such displays[127] was repealed by the new Act,[128] thereby leaving a relatively dangerous activity[129] virtually unregulated.[130]

The new Act also includes a preemption provision, stating that localities may not adopt ordinances or regulations that conflict with the state fireworks Act.[131] It is unclear, however, at what

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summer of 1983, displaying and setting off different fireworks. City officials in attendance, relying on the "rule of thumb" definition mentioned above, then made checklists of what fireworks they considered legal and illegal in their jurisdictions. Determinations were not uniform. Interview with Dennis Mathews, Vice President of Galaxie Fireworks, in Salt Lake City, Utah (Nov. 4, 1983). This divergence of interpretation was predictable, given the ambiguity of definitions used in the Act. *See supra* notes 112-13.

125. However, regulations issued by the State Fire Prevention Board declare that "fireworks shall not be sold to any person under the age of 16 years, unless accompanied by an adult." STATE FIRE MARSHALL, MINIMUM RULES & REGULATIONS FOR FIRE & LIFE SAFETY IN THE RETAIL STORAGE, HANDLING & SALE OF CLASS "C" FIREWORKS § 305 (May 18, 1983) [hereinafter cited as FIRE MARSHALL RULES & REGULATIONS]. Enforcement, however, is limited to revocation of permit and confiscation of merchandise from violators. *Id.* § 303.

Nationwide, children account for a disproportionate share of fireworks-related injuries. In 1982, an estimated 8500 people were treated in hospital emergency rooms for injuries caused by fireworks. U.S. CONSUMER PROD. SAFETY COMM'N, *supra* note 99. Forty-three percent of victims were less than 15 years old; 75% were under 25. *Id.*

126. Public displays involve so-called "special," or class B, fireworks. For definition of class B fireworks, see 49 C.F.R. § 173.88(d) (1982). Class B fireworks are not covered by the new Act. UTAH CODE ANN. § 11-3-2(1) (Interim Supp. 1983).

127. UTAH CODE ANN. § 11-3-3 (1953) (repealed 1983).

128. *Compare id. with id.* §§ 11-3-1 to -11 (Interim Supp. 1983).

129. An accident at one public display in the summer of 1983 resulted in 13 eye injuries. The lack of adequate uniform standards for public displays has resulted in situations where people running the displays were not properly trained. Deseret News, Oct. 3-4, 1983, at 10A, cols. 1-2 (quoting Deputy State Fire Marshall David Pingree).

Fire marshalls have urged that the new Act be amended to require training for class B fireworks operators and to subject public displays to state regulation. *See* Gary Whitney, Public Information Officer, Dep't of Public Safety, Press Release (Sept. 30, 1983); *see also* Minutes, *supra* note 113 (calling for regulation of class B operations).

130. Interview with David Pingree, Deputy State Fire Marshall, Salt Lake City, Utah (Sept. 14, 1983). Some cities, however, have ordinances that cover such displays. *See, e.g.*, SALT LAKE CITY, UTAH, REV. ORDINANCES §§ 15-6-4 to -15 (1965).

131. UTAH CODE ANN. § 11-3-8 (Supp. 1983): "A county, city, or town may not adopt an ordinance or regulation in conflict with this chapter." The Utah Attorney General ruled that section 11-3-8 does not compel statewide uniform regulation of fireworks. Utah Att'y Gen., Informal Op. No. 83-40 (May 6, 1983) [hereinafter cited as Att'y Gen. Op.]; *see also* Redwood Gym v. Salt Lake City Comm'n, 624 P.2d 1138, 1144 (Utah 1981) ("local governments may legislate by ordinance in areas previously dealt with by state legislation, provided the ordinance in no way conflicts with existing state law (*i.e.*, permitting that expressly prohibited by statute, or forbidding that expressly permitted by statute)"). *But see*

point a local ordinance or regulation "conflicts" with the state fireworks Act. For example, cities and towns are empowered to regulate or prevent the discharge of fireworks.[132] While the new Act implicitly repeals localities' authority to *prevent* discharge of fireworks within their jurisdictions,[133] localities retain authority to *regulate* such discharge, so long as the regulations do not conflict with the new Act.[134] Precisely when such regulations conflict, however, is unclear. Similarly, the Act expressly authorizes localities to require licenses and reasonable fees of vendors[135] and permits localities to enact supplementary safety regulations covering retail sales.[136] The Act provides little guidance, however, as to how high fees[137] or how rigorous licensing or safety requirements[138] can be

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Letter from W. Robert Wright and Jeffrey L. Fillerup, Jones, Waldo, Holbrook & McDonough (representing ACME Specialties) to Utah State Fire Prevention Board, in care of Comm'r Walter T. Axelgard (May 3, 1983) (drawing attention to the title of the Utah Fireworks Act, which reads, "An act relating to fireworks; providing for *state regulation of* the sale and discharge of fireworks; and providing penalties." UTAH CODE ANN. § 11-3-1 title of act (Interim Supp. 1983) (emphasis added)); *see also* Letter from James V. Olsen, President, Utah Retail Grocers Ass'n, to Comm'r Walter T. Axelgard (May 10, 1983) (arguing that the legislature's intent was to enact "one statewide law").

132. UTAH CODE ANN. § 10-8-47 (Supp. 1983); *id.* § 10-13-9 (1953). Two earlier versions of the Act would have amended sections 10-8-47 and 10-13-9 to delete the words "rockets" and "fireworks" from the list of those items that cities and towns may regulate or prevent the discharge of. H.R. 141, 45th Utah Leg., Gen. Sess. (Jan. 13, 1983); Substitute H.R. 141, 45th Utah Leg., Gen. Sess. (Feb. 7, 1983). The fact that the amendments were dropped from the final bill suggests an intent to preserve some local control over the regulation of fireworks.

133. The new Act's legalization of certain fireworks, UTAH CODE ANN. § 11-3-2(2)-(5) (Interim Supp. 1983), and specification of dates on which authorized fireworks may be discharged, *id.* § 11-3-7, cannot be reconciled with a locality's authority to prevent discharge of fireworks, as granted by *id.* § 10-8-47 (Supp. 1983) and *id.* § 10-13-9 (1953). Where two statutes cannot be reasonably construed to coexist, the prior statute is repealed by implication. Bartch v. Meloy, 8 Utah 424, 32 P. 694, 695 (1893); *see also* Att'y Gen. Op., *supra* note 131 (ruling that localities may regulate, but not prohibit, the discharge or sale of fireworks).

134. Att'y Gen. Op., *supra* note 131.

135. UTAH CODE ANN. § 11-3-9 (Interim Supp. 1983).

136. *Id.* § 11-3-5 (authorizing the fire prevention board to establish minimum safety standards for the retail storage, handling and sale of fireworks). Moreover, the State Fire Prevention Board expressly provided that localities are not prohibited from enacting safety regulations concerning retail sales of fireworks more restrictive than those enumerated in its regulations. FIRE MARSHALL RULES & REGULATIONS, *supra* note 125, § 100. Technically, localities' authority to regulate the sale of fireworks stems not from the Act, but from implied police powers granted under UTAH CODE ANN. § 10-8-84 (Supp. 1983). *See* Att'y Gen. Op., *supra* note 131 ("[s]uch ordinances may not prohibit anything allowed by the state law nor allow anything proscribed by state law, but in areas such as time, place and/or manner of discharge or sale of fireworks, will be valid if they bear a reasonable relationship to the express power of cities and towns to assure the health and safety of their citizens").

137. UTAH CODE ANN. § 11-3-9 (Interim Supp. 1983) specifies that the fee charged must be "reasonable," but does not indicate how reasonableness is to be determined. An

before they become tantamount to a prohibition of authorized fireworks, and thus conflict with the state fireworks Act.

Although the new Utah Fireworks Act was an attempt to balance business interests and safety interests, early reports indicate dramatic increases in injuries and property losses since the new Act took effect.[139] The policies of allowing fireworks on a limited basis and protecting the public need not be mutually exclusive. Absent comprehensive legislation, however, written with greater sensitivity to public safety, it is unlikely that public safety will be adequately assured.

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earlier version of H.R. 141, which passed the house, provided that fees were not to exceed $300 per retail outlet. Substitute H.R. 141, 45th Utah Leg., Gen. Sess. § 11-3-9 (Feb. 7, 1983). The $300 maximum, however, was abandoned in favor of "reasonable" in the final legislation. Because the $300 ceiling was abandoned, it may be inferred that the definition of "reasonable" may, under some circumstances, exceed $300. Reportedly, the highest per outlet fee currently charged in the state for a license is $350. Pingree Interview, *supra* note 130; *see* SANDY CITY, UTAH, REV. ORDINANCES § 8-6-8(1) (1983) (specifying a $350 fee per stand, trailer or building).

138. Disparity exists, for example, as to the insurance coverage required by localities for fireworks retailers as a precondition to the granting of a license. Sandy City, for example, requires each applicant to show evidence of $1,000,000 to $3,000,000 public liability coverage, $3,000,000 property damage coverage and $1,000,000 product liability coverage. SANDY CITY, UTAH, REV. ORDINANCES § 8-6-8(3) (1983). Salt Lake City's fireworks ordinance, by contrast, does not require evidence of insurance. *See* SALT LAKE CITY, UTAH, REV. ORDINANCES §§ 20-38-1 to -11 (1983).

139. Fireworks-related fires increased from 245 in all of 1982 to 402 for June, July and August of 1983. OFFICE OF THE STATE FIRE MARSHALL, BREAKDOWN OF 1983 FIREWORKS DATA (1983). Property losses from fireworks related fires amounted to $112,980. *Id.* Fireworks-related injuries reported by fire departments increased 1400% following implementation of the new fireworks legislation (28 injuries were reported for summer of 1983 compared with 2 for all of 1982). Hospitals reported 81 fireworks related injuries for summer of 1983. Salt Lake Tribune, Oct. 1, 1983, at B5, col. 3. Forty-seven percent of the injuries reported by hospitals involved second-degree burns; 40% involved first-degree burns. OFFICE OF THE STATE FIRE MARSHALL, *supra*. Thirty-five percent of the persons injured were 10 years old or younger; 56% were persons aged 16 or younger. *Id.* The import of the fire marshall's study, however, is difficult to assess. An absence of comparable baseline data makes comparisons between years tenuous. Because a detailed questionnaire similar to that sent in 1983 was not sent to fire departments in 1982 and hospitals were not asked to supply accident data in 1982, 1982 injuries may have been underreported, thus inflating the reported percentage increase. On the other hand, the low reporting rate (only 20% of Utah's fire departments and 28% of its hospitals participated) suggests that 1983 data also may be underreported.

The data also include injuries and fires caused by fireworks that the new Act was intended to outlaw. Bottle rockets and firecrackers, for example, accounted for at least 31% of the 1983 fires. *Id.* Arguably, such fires (and injuries) would have occurred anyway and therefore should not be cited as evidence of the Act's inadequacies. On the other hand, definitional problems, *see supra* notes 112-13, and other enforcement deficiencies may account for the presence of some of the "illegal" fireworks, and thus some of the "illegal" fireworks-related fires and injuries. For example, an $85,000 fire at a Layton warehouse may have been caused by an "illegal" jumping-type firework, sold as a legal firework within the state. Salt Lake Tribune, Oct. 1, 1983, at B5, col. 4.

B. Alternative to the Exclusionary Rule

In the 1982 budget session, the Utah Legislature passed the Fourth Amendment Enforcement Act—1982[140] (the "Act"). The Act creates a civil remedy[141] and is intended to replace the exclusionary rule as the exclusive remedy for violation of a citizen's fourth and fourteenth amendment rights against unreasonable search and seizure.[142] The Act allows for the admissibility of evidence obtained in violation of a defendant's[143] search and seizure rights if the violation was not substantial or was committed in good faith.[144] In cases where such evidence is not excluded,[145] the defendant may sue the officer and his employing agency, jointly and severally, for negligent violation of his search and seizure rights.[146] The Act attempts to provide Utah courts with an effective statutory scheme promoting judicial integrity and respect for fourth amendment rights while avoiding the problems created by application of the exclusionary rule.

The exclusionary rule is a judicially created remedy,[147] which mandates that evidence obtained in violation of a defendant's fourth amendment rights must be excluded from his criminal trial.[148] At present, the rule is mandatory whether the violations

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140. Ch. 10, 1981-1982 Utah Laws 84 (codified as amended at UTAH CODE ANN. §§ 63-30-10, 67-15-5, 77-23-12, -35-12, 78-16-1 to -11 (1953, Supp. 1982 & Interim Supp. 1983)).

141. UTAH CODE ANN. §§ 78-16-3, -6 (Interim Supp. 1983).

142. *Id.* § 78-16-1.

143. A citizen whose fourth amendment rights have been violated is a "victim" of a fourth amendment rights violation, a "defendant" in his criminal trial and a "plaintiff" under the Fourth Amendment Enforcement Act—1982 (the "Act"). For convenience, "defendant" will be used through the remainder of this section.

144. UTAH CODE ANN. § 78-16-5 (Interim Supp. 1983). Evidence that is otherwise admissible is not excluded unless there is a substantial violation of fourth amendment rights, as defined by section 77-35-12(g). *Id.* § 77-35-12(g)(1) (evidence not excluded unless violation was substantial and not committed in good faith); *id.* § 77-35-12(g)(2) (standards for determining whether violation was substantial).

145. If the violation of the defendant's fourth and fourteenth amendment rights against unreasonable search and seizure is both substantial and not in good faith, the defendant may move to have the evidence excluded from court. *Id.* § 78-16-3. In that case, however, the defendant forfeits his right to civil damages under the Act. *Id.* § 78-16-11.

146. *Id.* §§ 63-30-10(2), 78-16-6, 78-16-7. For a discussion of available remedies, see *infra* notes 168-71 and accompanying text. The Act also provides that all police officers are required to receive a minimum of 25 hours of basic training and five hours of annual training in search and seizure law. UTAH CODE ANN. § 67-15-5 (Interim Supp. 1983).

147. A judicially created remedy is one developed by a court to promote a constitutional right, as opposed to a rule that is mandated by the Constitution.

148. The exclusionary rule was first applied by the United States Supreme Court in the 1914 case of Weeks v. United States, 232 U.S. 383 (1914). The Court held that evidence obtained illegally by a federal marshall could not be admitted in a federal criminal proceed-

committed were substantial and in bad faith or relatively minor and in good faith.[149]

The exclusionary rule is intended to promote several policies. First, the rule is designed to deter police and other government officials from violating fourth amendment rights.[150] Theoretically, if police know that illegally obtained evidence will be excluded at a defendant's trial, they have no incentive to seize or obtain evidence illegally.[151] The deterrence value of the rule has been questioned,[152]

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ing, *id.* at 398, because it was inconsistent for courts to hold that the fourth amendment protected citizens from unreasonable search and seizure while allowing evidence obtained by such methods to be used to convict the citizen of a crime. *Id.* at 393. In Wolf v. Colorado, 338 U.S. 25 (1949), the Court held that the fourth amendment right of protection against unreasonable searches and seizures was a fundamental right under the Constitution and therefore binding on the states through the due process clause of the fourteenth amendment. *Id.* at 27-28. The Court, however, also held that the exclusionary rule was a judicially created remedy and that mandatory exclusion of illegally seized evidence did not extend to state criminal trials. *Id.* at 33.

In Mapp v. Ohio, 367 U.S. 643 (1961), the Court partially overruled *Wolf*, holding that states must exclude illegally obtained evidence from state criminal trials. *Id.* at 655. Further, the Court apparently held that the exclusionary rule was inherent in the fourth amendment's protections. *Id.*; *see id.* at 657 ("our holding [is] that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . ."). That holding was clarified, however, in United States v. Calandra, 414 U.S. 338 (1974). In *Calandra*, the Court stated that the exclusionary rule was not a personal constitutional right of the defendant, but rather "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." *Id.* at 348.

After deciding that the exclusionary rule was not constitutionally mandated, *id.*, the *Calandra* Court applied a balancing test to determine if the exclusionary rule should apply in a grand jury proceeding, *id.* at 348-52, holding that in a grand jury proceeding, society's interest in truth outweighed the deterrent effect to be gained by excluding the illegally seized evidence. *Id.* The Court has since used that balancing approach in other situations to determine whether the exclusionary rule should be applied. *See, e.g.*, United States v. Havens, 446 U.S. 621, 627 (1980) (illegally seized evidence may be used to impeach defendant who testifies in his own behalf); United States v. Ceccollini, 435 U.S. 268, 280 (1978) (testimony of witness not excluded even though derived from unconstitutional search); United States v. Janis, 428 U.S. 443 (1976) (evidence seized illegally by state police not excluded in federal civil tax case); Stone v. Powell, 428 U.S. 465 (1976) (defendant not entitled to benefit of new fourth amendment law on collateral habeas corpus attacks); United States v. Peltier, 422 U.S. 531 (1975) (where police relied on interpretation of statute that was declared unconstitutional in intervening case, exclusionary rule not given retroactive effect).

149. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 418-19 (1971) (Burger, C.J., dissenting) (arguing that failure to distinguish between minor and substantial police errors is irrational).

150. For cases stating that the purpose of the exclusionary rule is to deter police from violating fourth amendment rights by removing the incentive to disregard the rights, see Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Calandra, 414 U.S. 338, 347-48 (1974); Elkins v. United States, 364 U.S. 206, 217 (1960).

151. Elkins v. United States, 364 U.S. 206, 217 (1960).

152. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 416-18 (1971) (Burger, C.J., dissenting). Chief Justice Burger argued that the exclusionary rule may not

however, especially in cases where the officer, reasonably and in good faith, believed that he was not violating the defendant's rights.[153]

Second, the exclusionary rule is intended to promote judicial integrity. Under that theory, the judiciary should not become a party to governmental lawlessness by admitting illegally obtained evidence at trial,[154] and thereby allow the state to benefit from the wrongs of its agents.[155] By excluding illegally obtained evidence, the courts demonstrate that the right to be secure from governmental lawlessness is enforced.[156] Critics of the judicial integrity theory maintain that the defendant's rights are violated when the evidence is seized,[157] not when the evidence is admitted.[158] Therefore, the judiciary does not necessarily become a party to the violation of the defendant's rights by admitting the illegally obtained evidence.[159] Further, if the exclusionary rule requires a court to suppress evidence seized illegally but in good faith, the court may be tempted to alter other fourth amendment requirements to circumvent the application of the rule,[160] sacrificing the substance of

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have its intended deterrent effect because: (1) it does not apply a direct sanction to the offending officer; (2) the rule assumes that law enforcement is a "monolithic government enterprise," when, in fact, prosecutors can rarely instigate direct sanctions against an officer if evidence is suppressed; (3) officers have neither time nor inclination to keep abreast of judicially developed doctrines defining fourth amendment protections; and (4) a lengthy lapse of time between an officer's illegal conduct and the application of the exclusionary rule diminishes the deterrent effect that exclusion might otherwise produce. *Id. See generally* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 655 (1970) (no evidence to show that exclusionary rule actually has its intended deterrent effect, but no proof that it is ineffective). *But see* Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398, 400 (1979) (application of the exclusionary rule can deter police misconduct).

153. Stone v. Powell, 428 U.S. 465, 538-40 (1976) (White, J., dissenting). The officer will not be deterred from illegal activity if he does not know that his actions are illegal. *Id.* at 538-39. The rule even may be counterproductive in some cases because the officer will be reluctant to exercise his reasonable good faith judgment, fearing that if he is wrong, evidence obtained will be suppressed and the criminal will be set free. *Id.* at 540-41.

154. Elkins v. United States, 364 U.S. 206, 222-23 (1960).

155. United States v. Calandra, 414 U.S. 338, 356 (1974) (Brennan, J., dissenting).

156. *Id.*

157. Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting).

158. California v. Minjares, 443 U.S. 916, 924 (1979) (Rehnquist, J., dissenting from denial of stay) ("[W]hile . . . courts are not to be participants in 'dirty business,' neither are they to be ethereal vestal virgins of another world, so determined to be like Caesar's wife, Calpurnia, that they cease to be effective forums . . .").

159. *Id.* at 925 ("Although someone undoubtedly should be disciplined when a deliberate violation of the Fourth Amendment occurs, that proposition does not require the conclusion that the whole criminal prosecution must be aborted to preserve judicial integrity"); Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting).

160. *See, e.g.*, Illinois v. Gates, 103 S.Ct. 2317, 2339 (1983) (White, J., concurring) ("In

the fourth amendment law to form. Finally, society tends to lose respect for the court system when criminals are acquitted because of "technicalities"—such as the exclusionary rule.[161]

Critics of the indiscriminate application of the exclusionary rule have argued for a good faith exception to the rule.[162] Such an exception would admit evidence obtained by an officer who reasonably and in good faith believed that his search and seizure did not violate the fourth amendment.[163] In such cases, it is argued that

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today's opinion, the Court eschews modification of the exclusionary rule in favor of interring the [two-pronged probable cause] test . . ."); *see also* United States v. Williams, 622 F.2d 830, 847 (5th Cir.) (Hill, J., concurring specially) (the good faith exception to the exclusionary rule "allows us to come to a just result without cutting away at the Fourth Amendment . . ."), *cert. denied*, 449 U.S. 1127 (1980).

161. Stone v. Powell, 428 U.S. 465, 490-91 (1976).

162. At least four present Justices have advocated some modification of the exclusionary rule. *See* California v. Minjares, 443 U.S. 916, 916 (1979) (Rehnquist, J., dissenting from denial of stay, joined by Burger, C.J.); Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting) (advocating acceptance of a good faith exception to the exclusionary rule); Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., concurring); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting) (advocating a legislatively enacted tort remedy similar to that which the Utah Act provides).

At least two other present Justices, however, have maintained that the exclusionary rule is constitutionally required. *See* United States v. Janis, 428 U.S. 433, 460 (1976) (Brennan, J., dissenting, joined by Marshall, J.); United States v. Calandra, 414 U.S. 338, 355 (1974) (Brennan, J., dissenting, joined by Douglas, J., and Marshall, J.).

The exclusionary rule already has been modified in other forums. The Fifth Circuit adopted a good faith exception to the rule in United States v. Williams, 622 F.2d 830 (5th Cir.), *cert. denied*, 449 U.S. 1127 (1980). The *Williams* case produced two separate opinions, both of which were concurred in by a majority of the court. One opinion held that the evidence was not illegally obtained, and consequently did not consider the application of the exclusionary rule. *Id.* at 839. The second opinion held that the evidence was admissible under a good faith exception to the exclusionary rule. *Id.* at 840. Because there was a sufficient ground to support the holding, independent of the exclusionary rule holding, certiorari was denied. Williams v. United States, 449 U.S. 1127 (1980); *see Williams*, 622 F.2d at 851 (Rubin, J., specially concurring) (expressing dissatisfaction at announcing the good faith exception as an alternative ground for decision, thus immunizing the holding from Supreme Court review). The Fifth Circuit subsequently split to form two circuits, the Fifth Circuit and the new Eleventh Circuit, both of which presumably are bound by that precedent. Illinois v. Gates, 103 S.Ct. 2317, 2340 (1983) (White, J., concurring). In addition, Colorado has passed a good faith exception statute, COLO. REV. STAT. § 16-3-308 (Supp. 1982), and California has passed a state constitutional amendment by initiative, CAL. CONST. art. I, § 28(d), which admits all relevant evidence unless the state legislature, by a two-thirds majority, passes statutory exceptions to allow exclusion.

In Illinois v. Gates, 103 S.Ct. 2317 (1983), the Supreme Court ordered the parties to brief the question of whether and to what extent the exclusionary rule should be modified. *Id.* at 2321. Although the case was decided on other grounds, *id.* at 2327-28, the Court left open the question of whether the rule should be modified in the future. *Id.* at 2325.

163. Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting). Good faith violations may be of two types: The officer could be reasonably mistaken that he had probable cause to conduct the search or the officer could rely in good faith on an invalid warrant, an unconstitutional statute or a court precedent, which is later overruled. United States v. Wil-

the benefits of accepting the evidence outweigh the deterrent effect of exclusion.[164] The good faith exception is disadvantageous, however, because if the fourth amendment rights violation was the result of a reasonable, good faith mistake, the defendant is left without remedy for the violation of his constitutional rights.[165]

Against that background, the Utah Legislature passed the Fourth Amendment Enforcement Act—1982. The Act is designed to promote the same policies as the exclusionary rule, but to avoid the problems involved in the rule's application. Further, the Act has several theoretical advantages over the proposed good faith exception.

First, the Act will deter police and government officials from violating fourth amendment rights. The Act provides for civil liability for offending officers[166] and waives governmental immunity in cases where an officer's violation was negligent.[167] If the defendant establishes that his fourth amendment rights were violated, the

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liams, 622 F.2d 830, 841 (5th Cir.), *cert. denied*, 449 U.S. 1127 (1980).

Two cases involving officer reliance on invalid warrants will be before the United States Supreme Court during the 1983-1984 term. *See* United States v. Leon, 701 F.2d 187 (9th Cir.) (warrant not based on probable cause; the district court applied probable cause test that was modified by Illinois v. Gates, 103 S.Ct. 2317, 2327-28 (1983)), *cert. granted*, 103 S.Ct. 3535 (1983) (No. 82-1771); Massachusetts v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982) (judge produced constitutionally defective warrant for officer), *cert. granted*, 103 S.Ct. 3534 (1983) (No. 82-963). The Court also was scheduled to hear a case involving an officer's reasonable mistake that probable cause existed, Colorado v. Quintero, 657 P.2d 948 (Colo.) (officer did not have probable cause to arrest stranger to the neighborhood who was hiding a television under his shirt because no crime had been reported), *cert. granted*, 103 S.Ct. 3535 (1983) (No. 82-1711), but the case was dismissed because the respondent died, Colorado v. Quintero, *cert. dismissed*, 104 S.Ct. 543 (1983); *see also Review of Supreme Court's Docket*, 52 U.S.L.W. 3201, 3201-02 (Sept. 27, 1983) (discussing these cases and the arguments in support of the good faith exception).

164. *See Review of Supreme Court's Docket*, *supra* note 163, at 3201-02.

165. For a court to apply a good faith exception, it must assume that the defendant's fourth amendment rights have been violated. Because the violation was in good faith, however, the exclusionary rule will not remedy the violation. Further, if the officer's violation of fourth amendment rights was a result of his use of reasonable, good faith discretion, he should be immune from suit under 42 U.S.C. § 1983 (Supp. V 1981). *See* Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 HOFSTRA L. REV. 501, 515 (1977) (good faith is an affirmative defense from police officer liability); *cf.* Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526, 536 (1977) (police officers are afforded the defense of good faith *and* probable cause); Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights*, 59 MINN. L. REV. 991, 991 (1975) (good faith is being allowed as a defense, but this standard misinterprets United States Supreme Court precedent); *see also infra* note 187 (discussing 42 U.S.C. § 1983 (Supp. V 1981)).

166. UTAH CODE ANN. § 78-16-3 (Interim Supp. 1983).

167. *Id.* § 63-10-10(2) (waiver of immunity); *id.* § 78-16-7 (officer and his employing agency jointly and severally liable for negligent violation).

Act provides for payment of nominal[168] and proved actual damages[169] plus costs and attorney's fees;[170] in some situations, exemplary or punitive damages[171] also may be awarded. That remedy probably will have a stronger deterrent effect than exclusion of evidence, becaue the sanction is applied directly against the offending officer.[172] Further, in contrast to the exclusionary rule, which provides a remedy only at a defendant's trial,[173] Utah's civil remedy is available for both criminal and noncriminal victims of fourth amendment rights violations.[174] Finally, the Act provides that where the violation of the defendant's fourth amendment rights was both substantial and not in good faith,[175] the defendant may move to have the evidence excluded rather than sue for damages.[176] Thus, exclusion of evidence remains a remedy under the

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168. *Id.* § 78-16-6. The defendant is entitled to recover $100. *Id.*

169. *Id.* Although a defendant's conviction may be caused by the use of illegally seized evidence and therefore constitutes actual damage, the Act precludes recovery of damages resulting from conviction. *Id.*

170. *Id.* The state is liable for nominal and actual damages, plus costs and attorney's fees, even if the officer's violation was in good faith. *Id.* §§ 78-16-6, -7. However, it is an affirmative defense against recovery from the officer that he was acting in good faith. *Id.* § 78-16-7.

171. *Id.* § 78-16-6: "If a [defendant] . . . establishes by a preponderance of the evidence that the violation . . . was substantial, grossly negligent, willful, or malicious, damages may include . . . exemplary or punitive damages."

172. *See* Oaks, *supra* note 152, at 709-12 (special deterrence compared with general deterrence). Some public officials opposed the Act because they thought that civil liability was more threatening than application of the exclusionary rule. Interview with Ronald N. Boyce, Professor of Law, University of Utah College of Law, in Salt Lake City, Utah (Nov. 3, 1983).

173. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting) (because the exclusionary rule provides no direct remedy for noncriminal victims of fourth amendment rights violations, the Supreme Court constructs its own civil remedy in cases of actual damage).

174. UTAH CODE ANN. § 78-16-3 (Interim Supp. 1983). The Code indicates that any victim of a fourth amendment rights violation is entitled to sue. *Id.* However, the defendant may not bring an action "if a prosecutor dismisses prosecution or declines to commence prosecution against the [defendant] based upon a fourth amendment rights violation." *Id.* § 78-16-11. Because those defendants technically are innocent of crimes, and because the legislature intended the civil remedy to act in lieu of the exclusion of evidence, *id.* § 78-16-1, one could conclude that despite the Act's apparent inclusion of all victims, the legislature actually intended only criminal victims to recover for violations of their fourth amendment rights.

175. *See supra* note 144 and accompanying text. Under the Act, all police officers are required to receive a minimum of 25 hours basic training and five hours annual training in current search and seizure law. UTAH CODE ANN. § 67-15-5 (1953 & Supp. 1982). Because the officers are required to receive such training, the courts will be better able to judge whether officers' violations of fourth amendment rights were committed in good faith.

176. *See supra* note 144 and accompanying text. If the evidence is excluded, the defendant may not bring an action under the Act. UTAH CODE ANN. § 78-16-11 (Interim Supp.

Act in cases where its application is most likely to have the intended deterrent effect.[177]

A second advantage of the Act is that it promotes judicial integrity more effectively than either the exclusionary rule or the proposed good faith exception. Because the civil remedy under the Act exists for all violations of fourth amendment rights, courts can admit illegally obtained evidence and still provide a forum to redress the defendant's grievances.[178] In contrast, the exclusionary rule mandates that the evidence must be suppressed even for good faith mistakes, giving a criminal the benefit of an officer's technical mistake.[179] The good faith exception would admit evidence but deny the defendant a remedy for the violation of his rights.[180] Thus, the Utah Act provides the most satisfactory result in cases of good faith violations.[181]

However, there are several problems with the new Act. First, the Act gives jurisdiction in cases arising under it to the circuit or district court,[182] rather than to an administrative or quasi-judicial forum.[183] Juries may be hesitant to award damages for a relatively technical violation of a defendant's fourth amendment rights by police when, while violating those rights, valuable evidence was ob-

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1983).

177. Comment, *Utah's Alternative to the Exclusionary Rule*, 9 J. CONTEMP. L. 171, 187 (1983); *see also* Illinois v. Gates, 103 S.Ct. 2317, 2343 n.14 (1983) (White, J., concurring) ("there are lawless invasions of personal privacy that shock the conscience and the admission of evidence so obtained must be suppressed as a matter of Due Process, entirely aside from the Fourth Amendment").

178. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting) (if effective alternative remedy is available, admitting illegally seized evidence does not affect judicial integrity); *see also supra* notes 166-71 and accompanying text (discussing relief available under the Act).

179. *See supra* notes 161-62 and accompanying text.

180. *See supra* note 165 and accompanying text.

181. Further, critics of the good faith exception have argued that if such a modification were accepted by the courts, it "could stop dead in its tracks judicial development of Fourth Amendment rights." United States v. Peltier, 422 U.S. 531, 544 (1975) (Brennan, J., dissenting). The argument basically is one of standing. If the officer's conduct involved at most a good faith violation, the evidence would be admitted, and the court would not reach the issue of whether the officer had violated the fourth amendment. *See id.* However, because the Utah Act allows damages without reference to the officer's good faith, UTAH CODE ANN. § 78-16-6 (Interim Supp. 1983), fourth amendment law should continue to develop. *See* Illinois v. Gates, 103 S.Ct. 2317, 2346 nn.18-19 (1983) (White, J., concurring) (listing several ways to reach the question of a fourth amendment rights violation, including a tort action).

182. UTAH CODE ANN. § 78-16-3 (Interim Supp. 1983).

183. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting) (advocating administrative or quasi-judicial forum because that trier of fact would be more objective than a jury).

tained.[184] If juries are unwilling to award damages in such cases, the remedy proves illusory.[185]

Second, the remedy provided for in the Act is restricted, even if juries are willing to award damages. The Act limits the amount of damages recoverable unless the defendant can prove actual damages or meet the requirements for punitive damages.[186] If the violation of the defendant's rights was both substantial and not in good faith, the defendant probably will elect to exclude the evidence,[187] especially if he is likely to serve a jail term on conviction. Further, any civil judgment received by the defendant is subject to a lien in favor of any victims of his crime.[188] Thus, a defendant may not receive any compensation for a violation of his fourth amendment rights.

Finally, the protection of the fourth amendment is a fundamental right of the defendant.[189] Under the Act, a defendant is entitled to $100 nominal damages when he proves a violation of his fourth amendment rights.[190] Thus, in many cases the Act arbitrar-

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184. *Id. But cf.* California v. Minjares, 443 U.S. 916, 926 (1979) (Rehnquist, J., dissenting from denial of stay) (stating that "modern juries can be trusted to return fair awards in favor of injured plaintiffs who allege constitutional deprivations").

185. *See* Comment, *supra* note 177, at 188-89. However, judges have power to direct a verdict or instruct the jury on the minimum acceptable amount of damages. Boyce Interview, *supra* note 172.

186. *See supra* notes 168-71 and accompanying text.

187. *See supra* note 176 and accompanying text. In cases where the officer's violation of the defendant's fourth amendment rights is substantial and not in good faith, the officer's actions might fall outside the scope of his qualified immunity, *see supra* note 165 and accompanying text, thus giving the defendant a cause of action under 42 U.S.C. § 1983 (Supp. V 1981). The employing agency is only liable for a substantial violation under the Utah Act if "the violation was the result of a general order of the agency." UTAH CODE ANN. § 78-16-7 (Interim Supp. 1983). In such a case, the defendant also might have a cause of action under section 1983 against the employing agency. *See* Illinois v. Gates, 103 S.Ct. 2317, 2346 n.19 (1983) (White, J., concurring) (citing Monnell v. Department of Social Servs., 436 U.S. 658 (1978)) ("local governing bodies are subject to suit for constitutional torts resulting from implementation of local ordinances, regulations, policies or even customary practices . . ."). The major difference between the Act and 42 U.S.C. § 1983 (Supp. V 1981) is that under the Act, the employing agency is liable for an officer's good faith violation of the defendant's rights, whereas under 42 U.S.C. § 1983 (Supp. V 1981), the state would not be liable for an officer's good faith violation unless the case came within the standards of *Monnell*, 436 U.S. 658 (1978).

188. UTAH CODE ANN. § 78-16-10 (Interim Supp. 1983). However, the defendant's willingness and ability to make restitution are considered when a criminal applies for parole. In such cases, a recovery by the defendant is a remedy even if subject to a lien under the Act. Boyce Interview, *supra* note 172.

189. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949); *see* Illinois v. Gates, 103 S.Ct. 2317, 2324 (1983) (the Court's various opinions indicate that substantive fourth amendment rights questions are distinct from applicability of the exclusionary rule).

190. UTAH CODE ANN. § 78-16-6 (Interim Supp. 1983).

ily values the defendant's fourth amendment rights at $100 and allows the government to purchase them against the defendant's will.[191]

The Fourth Amendment Enforcement Act—1982 provides the Utah courts with an alternative to the exclusionary rule or the proposed good faith modification.[192] The civil remedy provided by the Act promotes both judicial integrity and respect by police officers of fourth amendment rights. At the same time, the Act admits at trial the highly probative and reliable evidence that the exclusionary rule suppresses. Further, the civil remedy is available for all violations of a defendant's rights, thus providing more comprehensive protection for a defendant than would the good faith exception to the exclusionary rule. Thus, the Act is preferable to either the blanket application of the exclusionary rule or the proposed good faith exception.

C. *Inclusion of Unborn Child in Criminal Homicide Statute*

The failure of Utah's previous criminal homicide statute[193] to punish the killing of an unborn child,[194] and the Utah Supreme Court's plea for curative legislation,[195] prompted the 1983 Utah Legislature to amend the statute to specifically include unborn children as potential homicide victims.[196] Although the amendment

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191. United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting) ("Respondent is told that he must look to damages to redress the concededly unconstitutional invasion of his privacy. In other words, officialdom may profit from its lawlessness if it is willing to pay a price").

192. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 402 U.S. 388, 420-21 (1971) (Burger, C.J., dissenting) (expressing the need for an alternative to the exclusionary rule to be developed before the rule itself can be modified). However, because the Utah Act would admit illegally seized evidence under a broader standard, *see supra* note 144 and accompanying text, than would the good faith exception, *see supra* note 163 and accompanying text, the Utah Act might be unconstitutional even if the good faith exception were accepted by the United States Supreme Court. Finally, if the good faith exception is permitted, the legislature may want to repeal the Act. In exchange for the slightly broader standard for determining admissibility of evidence, Utah will be paying $100 for evidence that it could admit under the good faith exception with no civil liability.

193. UTAH CODE ANN. § 76-5-201 (1978) (amended 1983).

194. State v. Larsen, 578 P.2d 1280 (Utah 1978) (killing of a six-month-old fetus by a drunk driver was not automobile homicide under sections 76-5-201 and 76-5-206 of the Code because fetus was not "another" within the meaning of those statutes).

195. *Id.* at 1282.

196. Act of May 10, 1983, ch. 95, 1983 Utah Laws 437 (codified at UTAH CODE ANN. § 76-5-201 (Interim Supp. 1983)). The criminal homicide statute now punishes the killing of an unborn child as either first-degree murder, second-degree murder, manslaughter, negligent homicide or automobile homicide. UTAH CODE ANN. § 76-5-201(2) (Interim Supp. 1983). Sections 76-5-202, 76-5-203 and 76-5-205 through 76-5-207, which define the specific homi-

serves to clarify the scope of homicide liability, the unqualified language of the amendment may give rise to unintended liability.

Prior to the 1983 amendment, the statute punished one who "intentionally, knowingly, recklessly, or with criminal negligence unlawfully cause[d] the death of another."[197] The Utah Supreme Court held that an unborn child was not "another" within the meaning of that statute.[198] Therefore, for example, a drunk driver who collided with another car and caused the death of a six-month-old fetus would not be guilty of automobile homicide.[199]

Every court[200] reaching that issue has agreed that neither reckless,[201] negligent[202] nor intentional[203] feticide is murder. That view originated with the early common law rule that the killing of a fetus was not murder, although it could be a misdemeanor.[204]

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cide offenses, retain the language "causes the death of another" without adding the further definition of unborn children. Because those offenses are included in the general definition of criminal homicide in section 76-5-201(2), however, which now contains the revision including unborn children, the statute should add unborn children as potential victims of each of the homicide offenses.

Under similar circumstances, however, the Louisiana Legislature amended the statutory definition of "person" in its criminal code to include fetuses, LA. REV. STAT. ANN. § 14:2(7) (West 1974 & Supp. 1983), but did not change the specific definition of homicide. *Id.* § 14:29. The Louisiana Supreme Court held that for fetuses to be included as potential victims of homicide, the homicide statute had to be changed explicitly. State v. Brown, 378 So. 2d 916, 917 (La. 1980).

The Act specifically excludes a cause of action for a legal abortion: "There shall be no cause of action for criminal homicide against a mother or a physician for the death of an unborn child caused by an abortion where the abortion was permitted by law and the required consent was lawfully given." UTAH CODE ANN. § 76-5-201 (Interim Supp. 1983).

197. UTAH CODE ANN. § 76-5-201 (1978) (amended 1983).

198. State v. Larsen, 578 P.2d 1280, 1282 (Utah 1978).

199. *Id.* at 1282.

200. People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203, 207 (1980); *infra* notes 202-03.

201. *See, e.g.*, State v. Willis, 98 N.M. 771, 652 P.2d 1222 (Ct. App. 1982) (reckless); State v. Amaro, 448 A.2d 1257 (R.I. 1982) (reckless).

202. People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980) (negligent).

203. *See, e.g.*, Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970). In *Keeler*, the defendant met his estranged wife on a mountain road and forced her to stop her car. He told her he knew she was pregnant by another man and assaulted her until he was satisfied the fetus was destroyed. The fetus later was delivered by caesarian section, stillborn and with a severly fractured skull. The court held that because a fetus was not a "human being" as defined in the statute the defendant could not be guilty of murder, although he could be guilty of involuntary abortion or assault on the mother. *See id.* at 624, 470 P.2d at 622, 87 Cal. Rptr. at 483.

204. "If a woman be quicke with childe, and . . . if a man beat her, where by the childe dyeth in her body and she is delivered of a dead childe, this is a great misprison [*i.e.*, misdemeanor], and no murder . . . ." 3 E. COKE, INSTITUTES *50 (1648), *quoted in* Note, *Criminal Law—Feticide—The Unborn Child as a "Human Being,"* 45 TUL. L. REV. 408, 408 (1971). Prior to Coke's writing, however, the killing of a fetus was considered murder. Note, *supra*, at 408 n.3.

That concept then developed into the rule that a fetus was not a person in the law and that its killing was punishable only if it had been "born alive" and had developed an existence separate and independent from that of the mother.[205] That concept was reinforced by *Roe v. Wade*,[206] in which the United States Supreme Court held that unborn children are not persons within the meaning of the fourteenth amendment.[207] The Utah Supreme Court subsequently refused to digress from the common law rule and concluded that changing the law to punish feticide was the responsibility of the legislature.[208]

To correct the deficiency in the law, the legislature redefined "another"[209] by amending the statute to punish those who "unlawfully cause the death of another *human being, including an unborn child.*"[210] The amended statute, however, has two major weaknesses: (1) it fails to specify the defendant's required mens rea toward the fetus; and (2) it fails to specify the point of development at which destruction of a fetus becomes murder.

The statute is silent on whether the defendant must possess a

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205. People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203, 207 (1980) (the fetus need only survive for a few seconds); *cf.* People v. Chavez, 77 Cal. App. 2d 621, 176 P.2d 92, 94 (1947) (viable fetus in the process of being born has status as a human being).

206. 410 U.S. 113 (1973).

207. *Id.* at 158.

208. State v. Larsen, 578 P.2d 1280, 1281-82 (Utah 1978).

209. Interview with Sen. E. Verl Asay, sponsor of the amendment, in Salt Lake City, Utah (Sept. 9, 1983). Statutes punishing feticide generally are of three types: amendments to existing homicide law (such as Utah's), assaultive abortion statutes and separate feticide statutes. California, which amended its existing homicide law, included only the intentional killing of fetuses as murder, thereby excluding automobile homicide. *See* CAL. PENAL CODE § 187 (West 1970 & Supp. 1983) (murder); *id.* § 192(3) (vehicular homicide).

Assaultive abortion statutes punish the intentional or willful killing of a fetus that results from an assault to the mother, which would be murder if the death of the mother resulted. *E.g.*, GA. CODE ANN. § 26-1105 (1983); MICH. STAT. ANN. § 28.554 (Callaghan 1982). Those statutes, however, have been interpreted not to cover homicides where the defendant had the requisite mens rea toward the fetus only, and not toward the mother. *E.g.*, Passley v. State, 194 Ga. 327, 21 S.E.2d 230, 233 (1942) (construing GA. CODE ANN. § 26-1103 (1942)) (current version at GA. CODE ANN. § 26-1105 (1983)); *see also* People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775, 778 n.5 (1980) (interpreting Michigan assaultive abortion statute, MICH. STAT. ANN. § 28.554 (current version at MICH. STAT. ANN. § 28.554 (Callaghan 1982)), as inapplicable to negligent feticide).

Perhaps separate feticide statutes provide the most useful construction. *See* WIS. STAT. ANN. § 940.04 (West 1982). Those statutes do not treat unborn children as persons, but treat them as separate legal entities, therefore avoiding conflicts with the common law concept of the fetus as a nonperson. *See* Comment, *Feticide in California: A Proposed Statutory Scheme*, 12 U.C.D. L. REV. 723, 738-39 (1979); *see also infra* notes 216 & 219 and accompanying text; *infra* text accompanying note 223.

210. UTAH CODE ANN. § 76-5-201 (Interim Supp. 1983) (emphasis added to denote amendment).

special mens rea where the homicide victim is a fetus. Because life generally is more fragile before birth than after birth, general homicide mens rea requirements may be inadequate. For example, under the felony-murder rule,[211] the specific mens rea of murder is not required if one causes death while committing another felony. That means that an unarmed robber, whose victim suffered a miscarriage as a result of the emotional trauma of being robbed, is guilty of murder. It is unclear whether the legislature intended liability to extend that far.

The Act also fails to specify the point of development at which destruction of a fetus becomes murder. Other jurisdictions facing that issue have relied on the United States Supreme Court's analysis in *Roe v. Wade*.[212] In *Roe*, the Court held that, for purposes of abortion, a woman's right to privacy is *outweighed* by the state's interest in protecting life only when a fetus becomes a "person," and therefore has a right to life.[213] The *Roe* Court then held that a fetus becomes a person when it reaches "viability," or when it can sustain life independent of the mother.[214] By using the *Roe* analysis, some jurisdictions have resolved the development issue by attaching culpability for feticide only after viability.[215] For example, by applying the *Roe* Court's distinction between a fetus and a person, the California courts have interpreted the statutory term "fetus" to mean a viable fetus.[216] Because, according to those courts,

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211. *Id.* § 76-5-203(1)(d) (1978).

212. 410 U.S. 113 (1973). For an excellent critique of *Roe* as it involves due process, see Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Process*, 23 U.C.L.A. L. REV. 689 (1976).

213. 410 U.S. at 158, 164-65.

214. *Id.* at 160. A fetus is viable when it is sufficiently developed to be capable of sustaining life outside the womb, albeit with artificial aid. *Id.* Viability has been defined in the context of criminal homicide as that stage of development at which the unborn child has an independent heartbeat and brain waves and can move itself about in the womb. People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775, 777 (1980) (quoting Larkin v. Cahalan, 389 Mich. 533, 208 N.W.2d 176, 180 (1973)).

215. *See, e.g.*, People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498, 502 (1976); Larkin v. Cahalan, 389 Mich. 533, 208 N.W.2d 176, 180 (1973) (construing MICH. STAT. ANN. § 28.554 (current version at MICH. STAT. ANN. § 28.554 (Callaghan 1982)), which proscribes the "willful killing of an unborn quick child") (analyzed in *Smith*, 129 Cal. Rptr. at 502-03). A "quick" child is a fetus displaying recognizable movement in utero. *Id.* at 178.

216. People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498, 502 (1976) ("Legally and factually, a nonviable fetus does not possess the capability for independent existence and has not attained the status of independent human life"); *see* People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830, 836 (1978) (the court, citing *Smith*, did not reach the constitutional question of standard of viability because of uncontradicted medical testimony that the fetus was viable at the time of the killing). California's statute, like Utah's, is silent on the point of development at which destruction of the fetus becomes murder. CAL. PENAL

human life does not exist until viability,[217] then as a matter of constitutional law, any destruction of a nonviable fetus cannot be a taking of human life and therefore cannot constitute homicide.[218]

By using the *Roe* analysis in that manner the courts seem to have ignored the fundamental holding of *Roe*. The *Roe* Court only distinguished between a fetus and a person for the purpose of determining when a state's interest in protecting the fetus outweighs the mother's interest in privacy.[219] A drunken driver, however, has no privacy interest to weigh against the state's interest in protecting life. Without that limitation on its protective interest, the state arguably has the right to protect the fetus from destruction by third persons from the moment of conception. Although *Roe* defines first trimester fetuses as nonpersons[220] for purposes of establishing a woman's right to have an abortion,[221] first trimester fetuses need not be defined as "persons" to punish their destruction by feticide.[222] Utah's amendment could be interpreted not to define unborn children as persons, but merely to include unborn children, along with "persons," as another class of potential homicide victims.[223] Viewed in that way, the amended homicide statute and *Roe* stand independent of each other, and both may have full effect.

The amended Utah criminal homicide statute now includes an unborn child as a potential homicide victim. Although the amendment can be faulted for failure to specify either the mens rea requirement or the point of development at which destruction of a fetus becomes murder, the statute does serve to clarify an ambiguity in the law. In that sense, the statute is good because citizens should know what the criminal law forbids without having to spec-

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CODE § 187 (West Supp. 1983): "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

217. People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498, 502 (1976).

218. *Id.*

219. 410 U.S. at 154.

220. *Id.* at 158.

221. Comment, *supra* note 209, at 734.

222. *Id.* at 738-40 (proposing that a statute may protect fetuses without treating fetuses as persons); *see also* Comment, *The Fetus as a Legal Entity—Facing Reality*, 8 SAN DIEGO L. REV. 126, 134-35 (1971) (discussing the fundamental conflict between determining unborn child status for purposes of homicide and for purposes of abortion).

223. *See supra* note 209 (separate feticide statutes); *cf.* Larkin v. Cahalan, 389 Mich. 533, 208 N.W.2d 176, 179 (1973) (homicide, the "destruction of viable human life," is a crime against the person, and because unviable fetuses are not persons, feticide can't be homicide).

ulate as to a statute's meaning.[224] Furthermore, punishment under a statute that specifically proscribes the citizen's conduct not only punishes the wrongdoer, but also is more likely to deter future misconduct[225] and justifiably mete out society's vengeance.[226]

D. Insanity Defense

Public dissatisfaction with the insanity defense reached a new high following John Hinckley's acquittal for the attempted assassination of President Ronald Reagan.[227] Many state legislatures,[228] as well as Congress,[229] have responded by attempting to reform the insanity defense. Legislators face the dilemma of answering public demand for conviction of mentally ill defendants while ensuring adequate care and custody of that special class of offenders. The Utah Insanity Defense Act[230] is Utah's solution to that dilemma.[231]

The Utah Insanity Defense Act (the "Act") applies to all crimes having a mens rea requirement.[232] The Act eliminates the

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224. People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830, 835 (1978) (citing Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

225. *See* Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949, 951-52 (1966).

226. *See* Wilson, *Vengeance and Mercy: Implications of Psychoanalytic Theory of Punishment*, 60 NEB. L. REV. 276, 281-84 (1981).

227. diGenova & Toensing, *Bringing Sanity to the Insanity Defense*, 69 A.B.A. J. 466, 468-69 (1983).

228. The states generally have followed one of two approaches in reforming their insanity defense laws: (1) increasing the power of the courts to determine when to release a mentally ill offender, thereby making the determination judicial rather than medical, *see, e.g.*, MD. ANN. CODE art. 59, § 28 (1979); and (2) adopting "guilty but mentally ill" as an alternative verdict, *see, e.g.*, MICH. STAT. ANN. § 28.1059 (Callaghan Supp. 1983); *see also infra* note 265 (discussing the "guilty but mentally ill" verdict).

229. S. 2572, 97th Cong., 2d Sess. § 701 (1982). The Senate proposal, which would eliminate insanity as an affirmative defense, also has been adopted in a few states. *See, e.g.*, IDAHO CODE § 18-207 (Supp. 1983).

230. Ch. 49, § 1, 1983 Utah Laws 263, 263-70 (codified at UTAH CODE ANN. § 76-2-305 and scattered sections of *id.* tit. 77 (Interim Supp. 1983)).

231. The Act is the result of two task force committees, one formed by Governor Scott Matheson and the other formed by the Utah Legislature. Working independently, the two committees made essentially the same recommendations. Their conclusions were: First, some form of insanity defense is necessary, but the current insanity defense is inadequate; second, persons acquitted by reason of mental illness need better attention from the mental health system; and third, a new plea and verdict is necessary to provide better care and custody for mentally ill offenders. *See* UTAH STATE TASK FORCE ON THE INSANITY DEFENSE, REPORT Introduction (1982) [hereinafter cited as TASK FORCE REPORT].

232. Mens rea denotes a criminal state of mind, of which there are four levels: Intent, UTAH CODE ANN. § 76-2-103(1) (1978); knowledge, *id.* § 76-2-103(2); recklessness, *id.* § 76-2-103(3); and criminal negligence, *id.* § 76-2-103(4). Although that classification has been the law since 1977, the Utah Supreme Court sometimes still relies on the common law distinction between general and specific intent. *See, e.g.*, Peck v. Dunn, 574 P.2d 367 (Utah 1978).

affirmative defense of insanity,[233] restricting evidence of a defendant's mental condition to the issue of whether he had the mens rea required for the crime charged.[234] If the defendant's insanity prevented him from having that mens rea, the Act totally exonerates the defendant.[235] The Act also, however, requires the defendant to give notice if he intends to assert a claim of insanity.[236] Additionally, the Act creates two new pleas and verdicts: "not guilty by reason of insanity"[237] and "guilty and mentally ill."[238] Those two

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233. UTAH CODE ANN. § 76-2-305(1) (Interim Supp. 1983); *see infra* notes 251-54 and accompanying text. Elimination of the affirmative defense of insanity does not mean that the defendant cannot come forward with evidence of insanity; rather, he must use evidence of insanity as he would use any other evidence that negates the requisite mental element of the crime.

234. UTAH CODE ANN. § 76-2-305(2) (Interim Supp. 1983). The Act also precludes exculpation by involuntary intoxication, *id.*, and defines mental illness simply as "a mental disease or defect." *Id.* § 76-2-305(3). The statute further provides that a "mental defect may be a congenital condition or one the result of injury or a residual effect of a physical or mental disease." *Id.*

235. *Id.* § 76-2-305(1). The Act also allows a finding of diminished mental capacity, *id.* § 77-14-3(1), whereby the defendant is "not guilty of the crime charged but guilty of a lesser included offense." *Id.* § 77-35-21(a).

236. *Id.* § 77-14-3(1). The defendant also must give notice if he intends to assert a claim of diminished capacity. *Id.* The new Act requires 30 days notice while the prior law required only 10 days notice. *Id.* § 77-14-3(1) (1978) (amended 1983). If a defendant does not meet the notice requirement, he may not introduce evidence of insanity or diminished capacity unless the court finds good cause to allow it. *Id.* § 77-14-3(2) (Interim Supp. 1983).

Because evidence of insanity now goes to the mens rea of the crime, *see infra* notes 251-54 and accompanying text, preventing a defendant from proffering that evidence because of his failure to comply with the notice requirement may raise a constitutional due process question. *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1. In *In re* Winship, 397 U.S. 358 (1970), the United States Supreme Court held that "the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. Precluding evidence that relates to the essential element of mens rea arguably denies that protection. The constitutional issue is at what point and under what circumstances the state can deny the defendant's right to rebut an essential element of the crime, *i.e.*, the mens rea element, because the defendant failed to meet the notice requirement.

The purpose of the notice requirement is to allow time for an examination of the defendant's mental condition and to give the prosecution adequate time to prepare its case. UTAH CODE ANN. § 77-14-4 (Interim Supp. 1983). Once notice is given, two qualified mental health examiners must evaluate the defendant. *Id.* § 77-14-4(1). If the defendant does not cooperate fully in that evaluation, expert testimony concerning the defendant's mental health may be barred. *Id.* Once again, there may be constitutional ramifications to barring such testimony.

237. UTAH CODE ANN. §§ 77-14-1(4), -35-21(a) (Interim Supp. 1983).

238. *Id.* §§ 77-13-1(5), -35-21(a). The Act created two additional new verdicts: "not guilty of the crime charged but guilty of a lesser included offense" and "not guilty of the crime charged but guilty of a lesser included offense and mentally ill." *Id.* § 77-35-21(a). Those two verdicts reflect the diminished capacity standard of mens rea and result in a defendant's being sentenced for any lesser included offense for which he had the mens rea.

pleas and verdicts replaced the prior law's "not guilty by reason of mental illness"[239] plea and verdict. Finally, the Act provides extensive new procedures for the treatment of convicted mentally ill offenders.[240]

1. Elimination of Affirmative Defense of Insanity—Prior to the new Act, Utah's insanity defense was identical to that used in the John Hinckley trial.[241] That defense, known as the "substantial capacity" standard,[242] excused a person's criminal conduct if the person lacked "substantial capacity" to "appreciate the wrongful-

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239. *Id.* § 77-2-305 (1978) (repealed 1983). "Insanity" is a legal term meaning mental illness that negates the mens rea; "mental illness," on the other hand, is a medical term. The use of the legal term was intended to clarify the difference between the standard for exoneration and the standard for special disposition of defendants. TASK FORCE REPORT, *supra* note 231, at 1.

240. UTAH CODE ANN. §§ 77-14-5, -35-21.5 (Interim Supp. 1983); *see infra* notes 266-82 and accompanying text.

241. *See* UTAH CODE ANN. § 76-2-305 (1978) (repealed 1983); *cf.* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (adopting the "substantial capacity" test, discussed *infra* note 242).

242. The "substantial capacity" standard has its roots in M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843). The *M'Naghten* Rule, or "right-wrong test" as it came to be known, states:

> To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

Id. at 722.

As knowledge of mental illness increased, *M'Naghten*'s Rule was criticized for failing to consider a defendant's volition. A defendant might have known what he was doing and that it was wrong, but he might have been unable to control his actions because of his mental disease. Thus, the "irresistible impulse" test was added to the *M'Naghten* Rule in Davis v. United States, 160 U.S. 469 (1895). *Davis* also placed the burden of proof on the prosecution to show a defendant sane beyond a reasonable doubt once the defendant had introduced evidence that raised a question about his sanity. *Id.* at 487-88.

The *M'Naghten* Rule plus the irresistible impulse test eventually were refined further by the American Law Institute ("ALI") into the "substantial capacity" standard. *See infra* note 243 (quoting MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962)). The ALI standard:

> combines the basic concept of the *M'Naghten* Rule—lack of understanding that one's conduct is wrong—with the essence of the volitional tests—inability to control one's conduct. Beyond that, however, it expands the coverage of those tests by permitting exculpation on a showing of only a "substantial" rather than a total incapacity and by substituting the broader term "appreciate" for "know," thus excusing a person who "knows" in an intellectual sense that his conduct is criminal but who lacks a deeper comprehension of that fact.

Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 Mo. L. REV. 605, 608 (1982). The author of that statement, William French Smith, is the United States Attorney General.

ness of his conduct" or to "conform his conduct to the requirements of the law."[243] Insanity was an affirmative defense,[244] used by the defendant to excuse criminal conduct rather than to deny the mental element of the crime charged.[245] Once the defendant established a prima facie case of insanity,[246] the law placed the burden on the prosecution to prove the defendant sane beyond a reasonable doubt.[247]

In practice, the prior Utah insanity defense invited both parties to seek expert witnesses from the behavioral and forensic psychology sciences who would support the parties' respective positions.[248] Typically, those experts gave contradictory and technical testimony on the defendant's ability to appreciate the criminality of his actions, the defendant's volition at the time he committed the crime and the credibility of the behavioral sciences, which often confused the jury.[249] Because the behavioral sciences were unable to give reliable guidelines to use in assessing the defendant's mental processes, it was difficult to draft meaningful jury instructions, and juries were left without reasonable or understandable standards by which to fairly judge a defendant's mental condition.[250]

The new Act eliminates the affirmative defense of insanity,[251] focusing the factfinder's attention on the narrow issue of whether the defendant had the mens rea required for the crime charged.[252]

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243. *See* UTAH CODE ANN. § 76-2-305 (1978) (repealed and reenacted as *id.* § 76-2-305 (Interim Supp. 1983)). The language of Utah's prior law was almost identical to that of the MODEL PENAL CODE, which states that: "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of the law . . . ." MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

244. *See* UTAH CODE ANN. § 76-2-305 (1978) (repealed and reenacted as *id.* § 76-2-305 (Interim Supp. 1983)).

245. For example, in a trial involving insanity, the defendant's commission of the act usually is conceded. Smith, *supra* note 242, at 611. The defendant does not commonly use insanity to deny the intent to kill, but rather to explain and excuse his conduct. *Id.* at 609.

246. State v. Holt, 22 Utah 2d 109, 449 P.2d 119 (1969).

247. State v. Green, 86 Utah 192, 40 P.2d 961 (1935); State v. Hadley, 65 Utah 109, 243 P. 940 (1925).

248. Smith, *supra* note 242, at 611. One commentator, pointing out the selectiveness with which experts are chosen, stated that expert witnesses are "preselected by defense counsel on the basis of their philosophical equation of criminal acts and illness and their persuasive flair, and by government counsel on the basis of their rejection of traditional behaviorist theory." *Id.*

249. *Id.* at 610-12.

250. *Id.*

251. UTAH CODE ANN. § 76-2-305 (Interim Supp. 1983).

252. TASK FORCE COMM. ON THE INSANITY DEFENSE, A REPORT ON THE INSANITY DE-

For example, in a murder trial the focus of inquiry would be, "Did the defendant intend to kill the victim?" rather than "Could he tell right from wrong and control his behavior?"[253] Therefore, a defendant now may use the insanity defense only to deny the requisite mental element of the crime rather than to excuse his conduct.[254]

The new Act eliminates confusing and contradictory testimony on the question of whether the defendant "possessed substantial capacity to appreciate the moral wrongfulness of his conduct, or whether he was unable—as opposed to unwilling—to control his actions."[255] The defendant still can rely on expert testimony to show that mental illness precluded him from forming criminal intent,[256] but the limited scope of inquiry reduces substantially a defendant's ability to seduce the court with a false insanity claim.[257] At least one commentator thinks that the new law allows judges to formulate meaningful jury instructions on more familiar concepts that juries already must consider, such as the defendant's intent.[258]

Although the new Act narrows the question of the defendant's "subsantial capacity to appreciate the wrongfulness of his conduct" to a question of "intent," there still is a question as to whether the defendant was able to "control his actions."[259] Because a criminal act must be "voluntary,"[260] an insane defendant could be acquitted if his insanity precluded him from controlling his actions, although he may have known that his act was wrongful.[261] Eliminating insanity as an affirmative defense, however, creates one potential problem: an insane defendant found to have the required intent might be convicted and incarcerated.[262] Incarceration

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FENSE IN CRIMINAL PROSECUTION AND PROPOSED LEGISLATION 3-4 (1982) [hereinafter cited as TASK FORCE COMM. ON INSANITY DEFENSE].

253. Smith, *supra* note 242, at 616.

254. Denial of the requisite mental element precludes finding a defendant guilty of the commission of a crime. *In re* Winship, 397 U.S. 358 (1970). However, if the defendant formed the mens rea for the crime, he will be convicted if all other elements of the crime are present, despite his mental condition.

255. Smith, *supra* note 242, at 615-16.

256. Some critics suggest that creative attorneys and judges will expand the scope of evidence permissible on mens rea. The result would be a continuation of the "battle of the experts." *See, e.g.*, diGenova & Toensing, *supra* note 227, at 469-70.

257. Smith, *supra* note 242, at 616 n.50.

258. *Id.* at 617.

259. TASK FORCE COMM. ON INSANITY DEFENSE, *supra* note 252, at 4.

260. UTAH CODE ANN. § 76-1-601(1) (1978) (defining "act" as a "voluntary bodily movement").

261. "Knowledge" is a standard of criminal intent. *Id.* § 76-2-103(2).

262. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 195-96

in such cases may be unsuitable for the treatment of insanity.[263] Utah solves that problem by providing special disposition for persons who are both guilty and mentally ill.

2. *Adoption of Guilty and Mentally Ill Verdict*—Prior to the new Act, a jury was faced with the dilemma of finding a defendant either "guilty" or "not guilty by reason of mental illness."[264] The law did not allow for the possibility that a defendant could be both guilty and mentally ill. The new Act recognizes that possibility, creating a new plea and verdict of "guilty and mentally ill."[265]

Under the new Act, when a defendant pleads "guilty and mentally ill" he is first advised that his plea is not contingent on a finding that he is "mentally ill," but rather is an irrevocable plea of guilty.[266] The court then conducts a hearing to determine whether the defendant is currently mentally ill.[267] Similarly, when a jury finds a defendant "guilty and mentally ill,"[268] a hearing is necessary to determine the defendant's current mental condition.[269] If the court finds that the defendant is not mentally ill,[270] the de-

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(1982). One commentator illustrates that problem with a case where a woman shot and killed her aunt, who she believed was possessed. Although the woman clearly intended to kill her aunt, examining psychiatrists said the woman was acutely psychotic. Abolition of the insanity defense, without more, would mean that this woman could be convicted and incarcerated. *Id.*

263. Gerber, *Is the Insanity Test Insane?*, 20 AM. J. JURIS. 111, 137 (1975).

264. UTAH CODE ANN. § 77-35-21(a) (1978) (amended 1983).

265. *Id.* §§ 77-13-1(5), -35-21(a) (Interim Supp. 1983); TASK FORCE REPORT, *supra* note 231, at 2. "Guilty and mentally ill" is a deliberate variation of the "guilty but mentally ill" provision adopted by some states. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 115-4(j) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-36-2-3(4) (Burns Supp. 1983); MICH. STAT. ANN. § 28.1059 (Callaghan Supp. 1983). The legislative committee thought that the words "guilty but mentally ill" implied a causal connection between the mental illness and the crime. That implied connection, however, is inappropriate under the Utah statute because "guilty and mentally ill" focuses on the defendant's state of mind at the time of sentencing, regardless of his state of mind at the time of the crime. Interview with Ronald N. Boyce, member of Legislature's Task Force Committee, Salt Lake City, Utah (Sept. 9, 1983).

266. UTAH CODE ANN. § 77-35-21.5(1) (Interim Supp. 1983). The defendant also is examined by the trial judge according to the procedures for accepting guilty pleas. *Id.* §§ 77-35-21.5(1), -11(e) (1978 & Interim Supp. 1983). A defendant who cannot understand all that is required to tender an acceptable plea of "guilty and mentally ill" may be deemed incompetent and held in custody until he regains competence. *Id.* § 77-15-2 (1978).

267. *Id.* § 77-35-21.5(1) (Interim Supp. 1983).

268. *Id.* § 77-35-21.5(2). A plea of "not guilty by reason of insanity" requires that the court instruct the jury on the other possible pleas, including "guilty and mentally ill." *Id.*

269. *Id.*

270. "Mental illness," for the purposes of this section of the law, is defined as "a psychiatric disorder . . . which substantially impairs a person's mental, emotional, behavioral, or related functioning." *Id.* § 64-7-28(1) (Supp. 1981).

fendant is sentenced as any other offender.[271] On the other hand, if the courts finds the defendant currently mentally ill, the court has the option of sentencing him as a "mentally ill offender."[272]

A mentally ill offender is subject to any sentence that could be imposed on conviction of the offense charged.[273] In addition, however, the new Act allows for special disposition of mentally ill offenders to a custodial or therapeutic setting for the purpose of treating the mental illness.[274] Because of limited resources,[275] only mentally ill offenders who meet specific statutory criteria[276] are eligible for that special disposition. A defendant who satisfies those criteria is either hospitalized in a suitable facility[277] or placed on probation conditioned on his continuing with treatment.[278]

When a mentally ill offender is committed to a mental institution, further procedures ensure constant review of his situation. For example, at six-month intervals the offender is entitled to a rehearing by the sentencing court.[279] If the court determines that the mental illness no longer persists, the board of pardons may place the offender on parole.[280] In no case, however, may the period of commitment for mental illness exceed the maximum sentence

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271. *Id.* § 77-35-21.5(1) (Interim Supp. 1983).

272. *Id.*

273. *Id.* § 77-35-21.5(3).

274. *Id.* § 77-35-21.5(4); TASK FORCE COMM. ON INSANITY DEFENSE, *supra* note 252, at 6.

275. Both task forces knew of the state's limited mental health resources and the danger of overburdening the system with those who could be dealt with effectively in a correctional setting. TASK FORCE COMM. ON INSANITY DEFENSE, *supra* note 252, at 6. The impact statements in one report reflect those concerns on behalf of the institutions involved. TASK FORCE REPORT, *supra* note 231, Impact Statements. At least one member, however, thought that the recommendations inadequately addressed those concerns. *See id.* Minority Report, at 2.

276. UTAH CODE ANN. § 77-35-21.5(4)(a)-(e) (Interim Supp. 1983). The special disposition criteria are the same as those outlined in the civil commitment statute:

(1) The defendant must have a mental illness;
(2) The defendant must pose an immediate physical danger to self or others, or else be incapable of providing the necessities of life, such that correctional or probationary disposition would be improper;
(3) The defendant must be incapable of rationally weighing the costs and benefits of treatment;
(4) Hospitalization is the only appropriate alternative; and
(5) Hospitalization will meet the defendant's conditions and needs.

Id. § 64-7-36(10) (1953). Each criterion must be established by clear and convincing evidence. *Id.* § 77-35-21.5(4) (Interim Supp. 1983).

277. *Id.* § 77-35-21.5(4) (Interim Supp. 1983).

278. *Id.* § 77-35-21.5(9).

279. *Id.* § 77-35-21.5(6). The defendant must petition the court for that rehearing. *Id.*

280. *Id.* § 77-35-21.5(8). Continued treatment can be made a condition of parole. *Id.*

imposed by the sentencing court under the Act.[281] Of course, an offender who still is mentally ill at the expiration of the criminal sentence may be committed through the civil commitment process.[282]

Under prior Utah law, the defendant who successfully invoked the insanity defense was absolved of criminal responsibility[283] but was not usually set free. The court, without specific guidelines, determined when the defendant had recovered from the mental illness that he suffered at the time of the offense.[284] As long as the court found that the defendant had not recovered from the mental illness, the defendant remained committed in the Utah State Hospital.[285] The anomalous result was that a person acquitted of a crime often spent more time in a mental institution than he would have spent in prison had he been convicted.[286] Although the United States Supreme Court recently held that result constitutionally permissible,[287] some critics question whether it is morally desirable.[288]

3. Conclusion—Utah lawmakers, responding to public outrage, have come to terms with the inadequacies of prior insanity laws. The Utah Insanity Defense Act overcomes the legal charade prompted by the former open-ended defense. Focusing on the issue of intent will eliminate much of the mystique and confusion created by the inexact science of behavioral psychology. Allowing alternative verdicts will relieve juries of the dilemma of choosing between conviction and acquittal, while giving them meaningful standards by which to judge a defendant's guilt or innocence. Additionally, the Act should enhance the criminal justice system's credibility as being competent to address both society's concerns and the defendant's needs.

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281. *Id.* § 77-35-21.5(7).

282. *Id.* § 64-7-36 (1978).

283. *See supra* notes 244-45 and accompanying text.

284. UTAH CODE ANN. § 77-14-5 (1978) (amended 1983).

285. *Id.*

286. This is a perennial problem with the insanity defense. In England, a mentally ill offender customarily was confined, even after acquittal, "until his majesty's pleasure [was] known." Criminal Lunatics Act of 1800, 40 Geo. III, ch. 94, § II.

287. Jones v. United States, 103 S.Ct. 3043 (1983); *see also* State v. Jacob, 669 P.2d 865, 869 (Utah 1983) (doctrines of due process and equal protection do not require that a person found criminally insane be treated the same as a person found civilly insane).

288. *See, e.g.*, Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477, 505 (1982).

E. Object Rape

The 1983 Utah Legislature created two new rape crimes: object rape and object rape of a child.[289] The purpose of the new Act is to punish crimes of object rape as severely as rape.[290] Although

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289. Act of Mar. 9, 1983, ch. 88, §§ 19-20, 1983 Utah Laws 403, 414-15 (codified at UTAH CODE ANN. §§ 76-5-402.2, -402.3 (Supp. 1983)). Both new offenses were enacted as part of comprehensive H.R. 209, which reformed Utah law in the areas of child kidnapping, sexual offenses against children and sexual offenses against adults. The essential sections of both statutes are identical:

> A person who . . . causes the penetration, however slight, of a genital or anal opening of [a victim] . . . by any foreign object, substance, instrument, or device, not including a part of the human body, with intent to cause substantial emotional or bodily pain to the [victim] or with the intent to arouse or gratify the sexual desire of any person, commits an offense . . . .

UTAH CODE ANN. §§ 76-5-402.2, -402.3 (Supp. 1983).

290. Interview with Richard Lambert, Assistant U.S. Attorney and co-author of the Act, in Salt Lake City, Utah (Sept. 22, 1983). A second purpose was to enable more accurate recordkeeping. *See* Presentation of H.R. 209 to the Utah State Senate by Sen. Paul Rogers, 45th Utah Leg., Gen. Sess. (Mar. 8, 1983) (S. Recording Tape No. 209) (available at the Utah State Senate Office).

Prior to the new Act, object rape was punishable only as assault, aggravated assault or forcible sexual abuse. UTAH CODE ANN. §§ 76-5-102, -103, -404 (1978 & Supp. 1981) (amended by *id.* § 76-5-404 (Supp. 1983)). Under Utah law, an assault is an attempt or threat to do bodily injury to another, accompanied by an immediate show of force. *Id.* § 76-5-102(1) (1978). Aggravated assault is assault plus serious bodily injury intentionally caused to another, or the use of force likely to produce death or serious bodily injury. *Id.* § 76-5-103(1). Prior to the 1983 Act, a person committed forcible sexual abuse if

> under circumstances not amounting to rape or sodomy, or attempted rape or sodomy the actor touche[d] the anus or any part of the genitals of another, or otherwise [took] indecent liberties with another, or cause[d] another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

Id. § 76-5-404(1) (Supp. 1981) (amended 1983). The 1983 legislature amended that statute by establishing a minimum age limit of 15 for the victim, explicitly forbidding the touching of additional bodily parts, and upgrading the crime to a second-degree felony.

Although the forcible sexual abuse statute's language apparently would have prohibited object rape, in State v. Kennedy, 616 P.2d 594 (Utah 1980), the Utah Supreme Court held that *an act* of rape was punishable as forcible sexual abuse. That construction raised the possibility that the court had grafted the additional specific intent requirements of rape onto forcible sexual abuse. That possibility caused many prosecutors to abandon forcible sexual abuse in object rape cases.

Assault is a class B misdemeanor, UTAH CODE ANN. § 76-5-102(2) (1978), punishable by imprisonment "for a term not exceeding six months," *id.* § 76-3-204(2), a fine not to exceed $299, *id.* § 76-3-301(4), or both, *id.* § 76-3-201(1) (1978 & Supp. 1983). Aggravated assault is a third-degree felony, *id.* § 76-5-103(2) (1978), punishable by an indeterminate prison term not to exceed five years, *id.* § 76-3-203(3) (1978 & Supp. 1983), a fine not to exceed $5000, *id.* § 76-3-301(2) (1978), or both, *id.* § 76-3-201(1) (1978 & Supp. 1983). Forcible sexual abuse was a third-degree felony, *id.* § 76-5-404(2) (Supp. 1981), but the 1983 amendments upgraded forcible sexual abuse to a second-degree felony, *id.* § 76-5-404 (Supp. 1983), punishable by an indeterminate prison term of "not less than one year nor more than 15 years,"

the legislature should be commended for making a needed change in the law, it is unclear whether certain provisions are justified.

Under the new Act, a person is guilty of object rape where he or she causes[291] penetration,[292] by any foreign object or instrument,[293] of the anal or genital openings of a victim.[294] In addition, the act must be committed with the intent of either inflicting substantial emotional or bodily pain upon the victim or arousing or gratifying any person's sexual desire.[295] Where the victim is fourteen years or older, there is the additional requirement that the act be committed without the victim's consent.[296] Where the victim is younger than fourteen, there is no consent requirement.[297] In those cases, the offender is guilty of the separate offense of "object rape

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id. § 76-3-203(2), a fine not to exceed $10,000, *id.* § 76-3-301(1) (1978), or both, *id.* § 76-3-201(1) (1978 & Supp. 1983).

The argument for equivalent treatment of rape and object rape is illustrated by the wide variety of objects that have been used, which arguably subject the victim to as much shame and humiliation as rape. *See, e.g.*, Winman v. State, 266 Ark. 380, 583 S.W.2d 67 (1979) (baseball bat); People v. Lopez, 110 Cal. App. 3d 1010, 168 Cal. Rptr. 378 (1980) (stones, bits of sticks and pieces of sod); State v. Cain, 28 Wash. App. 462, 624 P.2d 732 (1981) (finger); N.Y. PENAL LAW § 130.70 practice commentary (McKinney Supp. 1982-1983) (broom handles, gun barrels, night sticks, closet poles and hangers); NATIONAL INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, FORCIBLE RAPE—FINAL PROJECT REPORT 15 (1978) (bottles, gun barrels and sticks); *see also infra* note 306 (discussing the policy behind sexual assault statutes).

291. UTAH CODE ANN. §§ 76-5-402.2, -402.3 (Supp. 1983). The violator need only cause the insertion of the object, rather than commit the act individually. UTAH CODE ANN. §§ 76-5-402.2, -402.3 (Supp. 1983). For an example of such a case, see Kneedler, *Sexual Assault Law Reform in Virginia—A Legislative History*, 68 VA. L. REV. 459, 471 n.35 (1982).

292. Penetration, "however slight," is enough to satisfy the statute. UTAH CODE ANN. §§ 76-5-402.2, -402.3 (Supp. 1983). That is consistent with the majority common law position, which requires, for purposes of rape, only the slightest intrusion into the labia. *See, e.g.*, State v. Knaubert, 27 Ariz. App. 53, 550 P.2d 1096, 1103 (1976); People v. Karsai, 131 Cal. App. 3d 224, 182 Cal. Rptr. 406 (1981); State v. Poole, 161 Or. 481, 90 P.2d 472, 480 (1939); State v. Snyder, 199 Wash. 298, 91 P.2d 570 (1939).

293. Both statutes specifically exclude human bodily parts as being a "foreign object, substance, instrument, or device." UTAH CODE ANN. §§ 76-5-402.2, -402.3 (Supp. 1983); *see also infra* notes 305-09 and accompanying text (discussing the appropriateness of that exclusion).

294. UTAH CODE ANN. §§ 76-5-402.2, -402.3 (Supp. 1983).

295. *Id.*

296. *Id.* § 76-5-402.2. Because there is a consent requirement, object rape of a person 14 or older is similar to rape. In Utah, rape is defined as "sexual intercourse with another person, not the actor's spouse, without the victim's consent." *Id.* § 76-5-402(1).

297. *Id.* § 76-5-402.3. Because there is no consent requirement, object rape of a child is similar to statutory rape. Utah's statutory rape provision states: "A person commits rape of a child when the person has sexual intercourse with a child who is under the age of 14." *Id.* § 76-5-402.1. For both statutory rape and object rape of a child, it is no defense that the actor was mistaken about the child's age. *Id.* § 76-2-304.5.

of a child."[298]

The penalties for "object rape" and "object rape of a child" differ. Object rape is a first degree felony,[299] and the offender is sentenced under the first degree felony guidelines[300] unless it is a repeat offense, in which case an additional mandatory prison term must be served.[301] Object rape of a child also is a first degree felony,[302] but overriding the sentencing guidelines for a first degree felony is a mandatory ten-year prison term that must be served by all offenders.[303]

With the enactment of these provisions, Utah joined the ma-

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298. *Id.* §§ 76-5-402.2, -402.3.

299. *Id.* § 76-5-402.2. Contrary to the usual policy of reducing the level of the crime for inchoate crimes, attempts and conspiracies to commit object rape are first-degree felonies. *Id.* §§ 76-4-102, -202. It was thought that an attempt to commit object rape was a crime sufficiently serious to justify punishment as a first-degree felony. Interview with Richard Lambert, Assistant U.S. Attorney and co-author of the Act, in Salt Lake City, Utah (Nov. 23, 1983).

300. On conviction of a first-degree felony, the offender may be sentenced to an indeterminate term with a five-year minimum, UTAH CODE ANN. § 76-3-203(1) (Supp. 1983), sentenced as a second-degree felon, *id.* § 76-3-402, placed on probation, *id.* § 76-3-201(1), placed on parole, *id.* § 77-27-11(1), or fined, *id.* § 76-33-201. The sentence upon conviction of a second-degree felony is an indeterminate term from one to 15 years. *Id.* § 76-3-203 (1978 & Supp. 1983). Object rape, however, was omitted from section 77-27-11(4), which removes the discretion of the board of pardons to parole, commute or terminate the sentence of a felon convicted of the crimes of rape, forcible sexual abuse, forcible sodomy, aggravated sexual assault, aggravated assault, kidnapping or aggravated kidnapping, if the victim was less than 18 years old. *Id.* § 77-27-11(4). The omission was due to the fact that section 77-27-11(4) was an amendment passed earlier in the session, when the crime of object rape did not yet exist. That omission should be corrected as soon as possible.

301. Sentences must be increased by three years if the offender previously has been convicted of any crime described in section 76-5-4. *Id.* § 76-3-407. Nor may the board of pardons parole the felon until he or she has served the additional mandatory years. *Id.* § 77-27-11(3). If there are two previous convictions of crimes described in *id.* §§ 76-5-402 to -402.3, -403, -403.1, -404, -404.1 or -405, the felon must be given a life sentence without possibility of parole. *Id.* § 76-3-408.

302. *Id.* § 76-5-402.3. Attempts and conspiracies to commit object rape of a child are first-degree felonies. *Id.* §§ 76-4-102, -202; *see supra* note 299.

303. UTAH CODE ANN. §§ 76-3-201(5), -5-402.3 (Supp. 1983). If the actor caused substantial bodily injury to the child during the commission of object rape, the offender must be sentenced to a minimum term of 15 years. *Id.* § 76-3-201(10). Sentences also must be increased if the offender has been previously convicted of certain sex crimes. *Id.* §§ 76-3-407, -408; *see supra* note 301. If there are aggravating circumstances, the maximum sentence may be increased to 15 years. UTAH CODE ANN. §§ 76-3-201(5), -5-402.3 (Supp. 1983). If there are mitigating circumstances, however, the minimum sentence may be decreased to five years. *Id.* The judge has no discretion to reduce the degree of the crime, *id.* § 76-3-406(1), nor to impose probation, *id.* The board of pardons also may not parole the offender until the minimum sentence is served. *Id.* § 77-27-11(3). Furthermore, the sentence may not be suspended, nor the convict hospitalized, if either would shorten the prison sentence. *Id.* § 76-3-406(1).

jority of states that have enacted object rape statutes.[304] There are, however, at least two criticisms of the Utah statute. First, the statute provides that bodily parts are not "objects" within the meaning of the object rape statute.[305] That exclusion, however, may not be justified. The modern rationale behind sexual assault laws is to protect an individual's interest in the sanctity of his or her body.[306]

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304. At least 37 states, including Utah, have enacted object rape statutes. Three general approaches have been taken. The majority of states define some general term such as "sexual penetration" or "sexual act" to include the insertion of an object into a victim's genital or anal openings. That term then is used in subsequent provisions to define one or more crimes, such as "sexual assault" or "sexual battery." ALASKA STAT. §§ 11.81.900(53), .41.410, .420, .434, .436, .440, .450, .455 (1983); ARIZ. REV. STAT. ANN. §§ 13-1401(3), -1405, -1406, -1408 (1978 & Supp. 1983-1984); ARK. STAT. ANN. §§ 41-1801(1), -1803, -1804, -1805, -1806, -1807, -1810, -1811 (1977 & Supp. 1983); COLO. REV. STAT. §§ 18-3-401(5), -403 (1978); CONN. GEN. STAT. §§ 53a-65(2), -70, -70a, -71, -72a, -72b, -81 (1983); HAWAII REV. STAT. §§ 707-700(7), -730, -731, -732, -741, -750, -751 (1976 & Supp. 1980); ME. REV. STAT. ANN. tit. 17-A, §§ 251(1)(C), -253, -254 (1983); MD. ANN. CODE art. 27, §§ 461(e), 464, 464A, 464C (1982); MICH. STAT. ANN. §§ 28.788(1)(h), .788(2), .788(4), .788(7) (Callaghan 1982); MINN. STAT. ANN. §§ 609.341(12), .342, .344, .364(14), .3641, .3643 (West Supp. 1983); MISS. CODE ANN. §§ 45-2-101(61), -5-503, -507, -601 (1983); NEB. REV. STAT. §§ 28-318(5), -319 (1979); NEV. REV. STAT. §§ 200.364(2), -366 (1981); N.H. REV. STAT. ANN. §§ 632-A:1(V), :2, :3 (Supp. 1981); N.J. STAT. ANN. §§ 2C:14-1(c), -2 (West 1982); N.C. GEN. STAT. §§ 14-27.1(4), .4, .5 (1981); N.D. CENT. CODE §§ 12.1-20-02(3), -03 to -06, -09 (Supp. 1983); R.I. GEN. LAWS §§ 11-37-1, -2, -6, -8 (1981); S.C. CODE ANN. §§ 16-3-651(h), -652 to -656 (Law. Co-op. Supp. 1982); S.D. CODIFIED LAWS ANN. §§ 22-22-1, -2 (Supp. 1983); TENN. CODE ANN. §§ 39-2-602(11), -603 to -605, -608 (1982); TEX. PENAL CODE ANN. §§ 21.01(1), .04 to .07, .09 to .11 (Vernon 1974 & Supp. 1982-1983); VT. STAT. ANN. tit. 13, §§ 3251(1), 3252, 3253 (Supp. 1983); WASH. REV. CODE ANN. §§ 9A.44.010(1), .040, .050 to .090 (Supp. 1983-1984); WYO. STAT. §§ 6-2-301(vii), -302 to -304 (1983). The disadvantage of this approach is that it makes it difficult to keep accurate statistics about object rape. Lambert Interview, *supra* note 299.

A second approach is to include object rape within a general statute, such as rape. FLA. STAT. ANN. § 794.011 (West 1976); IND. CODE ANN. § 35-42-4-2 (Burns Supp. 1983); LA. REV. STAT. ANN. § 14:43.1 (West Supp. 1983); N.M. STAT. ANN. § 30-9-11 (1978); WIS. STAT. ANN. § 940-255 (West 1982 & Supp. 1983-1984). These statutes also make accurate statistic keeping difficult.

A third approach, such as that taken by Utah, is to enact a separate object rape statute. CAL. PENAL CODE § 289 (West Supp. 1983); IDAHO CODE § 18-6608 (Supp. 1983); N.Y. PENAL LAW § 130.70 (McKinney Supp. 1982-1983); OHIO REV. CODE ANN. § 2907.12 (Page Supp. 1982); OKLA. STAT. ANN. tit. 21, § 1111.1 (West 1983); OR. REV. STAT. §§ 163.408, .411, .412 (1981); VA. CODE § 18.2-67.2 (1982); W.VA. CODE § 61-8B-4 (1977). That approach allows for the accurate keeping of crime statistics.

305. UTAH CODE ANN. §§ 76-5-402.2, -402.3 (Supp. 1983). In other states, where the statutory language has been unclear, the courts have been split on whether bodily parts are objects. *Compare, e.g.*, State v. Hooper, 57 Ohio St. 2d 87, 386 N.E.2d 1348 (1979) (a finger is not an object) *with* State v. Cain, 28 Wash. App. 462, 624 P.2d 732 (1981) (a finger is an object).

306. State v. Bourn, 139 Vt. 14, 421 A.2d 1281, 1282 (1980): "[T]he clear legislative intent behind the sexual assault statute is that the criminal nature of the conduct stems from the aggressive violation of the sanctity of the human body and the consequent destruction of the victim's self-worth." *See also* CAL. PENAL CODE § 263 (West Supp. 1983) ("The essential guilt of rape consists in the outrage to the person and feelings of the victim of the

It is unclear why a person's bodily interest is violated less in the case of object rape by use of bodily parts than when other objects are used.[307] Moreover, twenty-two states expressly include bodily parts within their object rape statutes,[308] while only three states, including Utah, expressly exclude bodily parts.[309]

A second criticism arises out of the mandatory ten-year prison term for all persons convicted of object rape of a child. In not allowing discretion on the part of the judge or parole board to evaluate each case on its merits, there is great potential for injustice. Apparently, only California has a mandatory object rape imprisonment provision as harsh as Utah's imprisonment provisions,[310] im-

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rape"). That also was the rationale behind Utah's adoption of the object rape statute. Lambert Interview, *supra* note 290. That rationale is reflected nationally in various reforms of rape laws that have removed sex-specific language, provided for passage of object rape laws, penalized forcible sodomy as severely as rape, eased or eliminated the "reasonable resistance requirement" and limited the admission of the victim's sexual history at trial. *See generally* Kneedler, *supra* note 291. Utah has adopted many of those reforms over the past few years. For example, in 1979 sex-specific language was removed from the definitions of sexual offenses. Act of Mar. 6, 1979, ch. 73, §§ 1-4, 1979 Utah Laws 437, 437 (codified at UTAH CODE ANN. §§ 76-5-401, -402, -403, -404 (Supp. 1983)).

307. Object rape and object rape of a child are both first-degree felonies. UTAH CODE ANN. §§ 76-5-402.2, -402.3 (Supp. 1983). Assuming forcible sexual abuse would be applicable, *see supra* note 290, use of a bodily part would be a second-degree felony.

Furthermore, the provisions do not resolve whether an animate, nonhuman bodily part is a "foreign object, substance, instrument, or device" within the meaning of the statute. *See, e.g.*, Kneedler, *supra* note 291, at 471 n.35 (discussing the failure of Virginia's object rape law to include a nonhuman bodily part); *see also* State v. Hooper, 57 Ohio St. 2d 87, 386 N.E.2d 1348 (1979) (only inanimate objects are objects); State v. Cain, 28 Wash. App. 462, 624 P.2d 732 (1981) (no distinction between animate and inanimate objects is made by the use of the word "object").

308. *See* ALASKA STAT. § 11.81.900(53) (1983); ARIZ. REV. STAT. ANN. § 13-1401(3) (1978); ARK. STAT. ANN. § 41-1801(1) (1977); CAL. PENAL CODE § 289 (West Supp. 1983); COLO. REV. STAT. § 18-3-401(5) (1978); HAWAII REV. STAT. § 707-700(7) (Supp. 1980); ILL. REV. STAT. ch. 38, § 11a-4.1 (Supp. 1983-1984); LA. REV. STAT. ANN. § 14:43.1 (West Supp. 1983); MICH. STAT. ANN. § 28.788(1)(h) (Callaghan 1982); MINN. STAT. ANN. § 609.341(12) (West Supp. 1983); MISS. CODE ANN. § 97-3-97(a) (Supp. 1983); MONT. CODE ANN. § 45-2-101(61) (1983); NEB. REV. STAT. § 28-318(5) (1979); NEV. REV. STAT. § 200.364(2) (1981); N.J. REV. STAT. ANN. § 632-A:1(v) (Supp. 1983); R.I. GEN. LAWS § 11-37-1 (1981); S.C. CODE ANN. § 16-3-651(h) (Law Co-op. Supp. 1982); S.D. CODIFIED LAWS ANN. § 22-22-2 (Supp. 1983); TENN. CODE ANN. § 39-2-602(11) (1982); VT. STAT. ANN. tit. 13, § 325(1) (Supp. 1983); WIS. STAT. ANN. § 940.225 (West 1982 & Supp. 1983-1984); WYO. STAT. § 6-2-301(vii) (1983).

309. *See* OR. REV. STAT. §§ 163.408, .411 (1981) (actor's bodily parts); UTAH CODE ANN. §§ 76-5-402.2, -402.3 (Supp. 1983) (human bodily parts); VT. STAT. ANN. tit. 13, § 3251(1) (Supp. 1983) (fingers). Some states, however, specifically exclude from their object rape statutes the mouth, tongue or penis as bodily parts because those parts are included within those states' rape and sodomy statutes. *See, e.g.*, WYO. STAT. § 6-2-301(vii) (1983).

310. *See* CAL. PENAL CODE §§ 289, 1192.5, 1203.065 (West 1982 & Supp. 1983). California's statute includes a three-year mitigation provision and an eight-year aggravation provision. *Id.*

posing a six-year mandatory term.[311] Thus, Utah's ten-year mandatory term appears unnecessarily harsh when compared with other jurisdictions and arguably robs the judicial system of the discretion necessary to ensure justice.

The Utah object rape statute represents a needed addition to the Utah Penal Code. It is not clear, however, whether the exclusion of bodily parts from coverage under the statute and the mandatory ten-year prison term for all those convicted of object rape of a child are justified.

VI. HEALTH CARE REGULATION

A. *Certificate of Need*

The 1983 Utah Legislature significantly modified Utah statutory health planning[312] by amending the Utah Pro-Competitive Certificate of Need Act of 1981[313] and extending the act through December 31, 1984.[314] The 1983 amendments significantly affect future health planning by streamlining the certificate of need ("CON")[315] review process and by substantially increasing the minimum expenditure necessary before CON review is required.[316] In

311. *Id.* §§ 289, 1170 (Supp. 1983). Because California's statute does not distinguish between object rape and object rape of a child and Utah's imposes a heavier sentence for object rape of a child, Utah's sentencing provisions for object rape are substantially more lenient than California's.

312. Health planning is the regulatory scheme for allocating resources and controlling unnecessary capital investment in new health care facilities. *See* Blumstein & Sloan, *Health Planning and Regulation Through Certificate of Need: An Overview*, 1978 UTAH L. REV. 3, 9. Because competitive market forces generally are absent in the health care market, most health care economists think that some type of regulation is necessary, at least in the short run, to prevent overinvestment in health care. *Id.* at 3 nn.2 & 4.

313. Ch. 126, 1981 Utah Laws 21 (codified at UTAH CODE ANN. §§ 26-22-1 to -22 (Supp. 1981) (amended 1983)).

314. Utah Certificate of Need Amendments of 1983, ch. 136, 1983 Utah Laws 557 (codified at UTAH CODE ANN. §§ 26-22-3, -4, -6 to -8, -12, -17 to -19, -21, -22 (Interim Supp. 1983)).

315. A certificate of need ("CON") is the mechanism that implements health planning. For an overview of the CON regulatory schemes, see generally *Certificate of Need Laws in Health Planning*, 1978 UTAH L. REV. 1 (symposium on CON laws). Under the statutory scheme, certain health care projects must be authorized by the Department of Health on a need basis before the projects may be started. UTAH CODE ANN. § 26-22-6(1) (Supps. 1981 & 1983); *see also id.* § 26-22-4(1) (defining projects subject to review). Failure to receive prior authorization means the project may not be licensed. *Id.* § 26-22-6(1).

316. The previous threshold was $150,000 for health care projects, regardless of type. UTAH CODE ANN. § 26-22-3(4) (Supp. 1981) (amended 1983). The new levels are $400,000 for health care equipment and $600,000 for all other projects subject to review. *Id.* § 26-22-7(4) (Interim Supp. 1983). A major exception is that any expenditure by an existing hospital

addition, the amendments permit deregulation of significant sectors of the Utah health care market.[317] Although the amendments should make CON review more effective in the short run, failure to extend the program beyond 1984[318] may invite dramatic increases in health care spending.

The Utah Pro-Competitive Certificate of Need Act originally was passed in 1979.[319] The Act was intended to control new capital investment in health care facilities and to assist in the development of price-competitive health care markets.[320] The Act originally covered virtually all major new health care projects initiated in the state.[321] That market intervention was to be reduced slowly as market forces "matured," that is, until the health care market became price sensitive.[322]

The 1983 amendments improve the statutory scheme in several ways. First, they simplify and expedite CON review.[323] While under prior law an applicant had to give notice of intent to seek

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must exceed $1 million to be subject to review. *Id.* § 26-22-7(4).

317. *See id.* § 26-22-7(3)-(4) (Interim Supp. 1983).

318. *Id.* § 26-22-22.

319. Act of Mar. 8, 1979, ch. 95, 1979 Utah Laws 496 (codified at UTAH CODE ANN. §§ 26-34-1 to -21 (Supp. 1980) (amended 1981, 1983)). That law was reviewed in *Utah Legislative Survey—Pro-Competitive Certificate of Need*, 1980 UTAH L. REV. 203. In 1981, the Utah Legislature reenacted the 1979 Act with some minor changes. *Health Code Revision*, ch. 126, 1981 Utah Laws 21 (codified at UTAH CODE ANN. §§ 26-22-1 to -22 (Supp. 1981) (amended 1983)). The 1981 Act was effective through June 30, 1983, or until federal funding was eliminated. UTAH CODE ANN. § 26-22-22 (Supp. 1981) (amended 1983).

The 1979 Utah Act was passed in response to the National Health Planning and Resources Development Act of 1974 ("NHPRDA"), 42 U.S.C. §§ 300k-300n-5 (1976). *Utah Legislative Survey, supra*, at 203 n.317. The NHPRDA created a national health planning network made up of state health planning and development agencies, who contract with the Department of Health, Education and Welfare (now the Department of Health and Human Services) to administer health planning for a specific area. 42 U.S.C. § 300m (1976). The NHPRDA also contained certain minimum requirements for agencies contracting with the department. *Id.* § 300m-2. Receipt of federal funds was conditioned on the state meeting those standards. *Id.* § 300m-4.

320. UTAH CODE ANN. § 26-22-2(1), (4) (Supp. 1980) (amended 1981, 1983). The Utah Act is based on the recommendations of a study commissioned by the state to analyze the health care market in Utah. LEWIN & ASSOCS., THE MEDICAL ECONOMY OF UTAH EXECUTIVE SUMMARY, TASK ONE REPORT OF THE UTAH HEALTH CARE COST MANAGEMENT STUDY (Apr. 1979) (available on request from the Utah State Department of Health Care Financing) [hereinafter cited as LEWIN STUDY].

321. *See generally* UTAH CODE ANN. § 26-22-4 (Supp. 1981) (enumerating covered projects) (amended 1983).

322. LEWIN & ASSOCS., COMPREHENSIVE ACTION PLAN, TASK FOUR REPORT, UTAH HEALTH CARE MANAGEMENT STUDY (July 1979); *see also* UTAH CODE ANN. § 26-22-3(9) (Supp. 1981) (defining "price competition").

323. UTAH CODE ANN. § 26-22-7(3)(a) (Supp. 1983).

review at least thirty days before filing the CON application,[324] under the new amendments that requirement has been eliminated.[325] In addition, the amendments institute a formal prehearing conference for framing issues and otherwise expediting the hearing stages of review.[326] Also, to expedite the prehearing conference and committee hearings, the amendments allow for the appointment of a hearing examiner.[327] Finally, the ex parte contacts rule,[328] requiring disqualification of advisory committee members who have had contact with CON applicants prior to the review, has been eliminated.[329]

Perhaps the most important change the 1983 amendments make is the provision that allows the Utah Department of Health ("Department of Health") to exempt projects from CON review where the review process is not cost effective.[330] Because the CON review process can be very expensive,[331] and that expense, of course, increases health care costs, projects should be reviewed only where necessary. A 1982 Utah study, however, indicates that requiring a CON review is an effective deterrent where projects clearly cannot meet CON approval standards.[332] Therefore, the new provision is beneficial because it still provides the threat of CON review as a deterrent, but it allows the Department of Health the flexibility to waive CON review where the requirements have

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324. *Id.* § 26-22-7(5)(a) (1981) (amended 1983).

325. *Id.* § 26-22-7(5)(a) (Supp. 1983).

326. *Id.* § 26-22-7(5)(g).

327. *Id.* § 26-22-7(5)(j).

328. *Id.* § 26-22-7(5)(o) (1981) (amended 1983).

329. *Id.* § 26-22-7(5)(o) (Interim Supp. 1983). Committee members, however, are prohibited from voting on any application if they have a conflict of interest. *Id.* § 26-22-8(4).

330. *Id.* § 26-22-7(3). The statute expressly eliminates in-home health care programs from CON review. *Id.* § 26-22-3(8). One applicant claimed expenditures of $200,000 for the CON application process. Deseret News, Oct. 11, 1982, at A5, col. 1.

331. ERNST & WHINNEY, STUDY OF ESTIMATED COSTS ASSOCIATED WITH HISTORICAL EXCESS BED CAPACITY AND THE ESTIMATED IMPACT ON CERTAIN HEALTH COSTS IN THE WASATCH FRONT AREA IF THE UTAH CERTIFICATE OF NEED ACT IS NOT AMENDED (1982) (indicating that failure to extend the Utah CON law to 1984 would result in approximately $13 million of investment in excess hospital beds in 1985) [hereinafter cited as ERNST & WHINNEY STUDY].

332. *Id.* at 4. To be approved, a project must demonstrate either that it is "needed" within the meaning of the statute, or that it is an innovation in providing health care that will encourage price competition. *See generally* UTAH CERTIFICATE OF NEED PROJECT REVIEW MANUAL (available from the Utah Department of Health Care Financing).

Most projects reviewed receive CON approval. For example, in 1982, 56 projects requested CON review. Of these, 41 were approved, but 10 projects were voluntarily withdrawn by the applicants. Only five projects were denied CON approval (although the dollar volume of projects denied was in excess of $60 million). UTAH DEP'T OF HEALTH, SUMMARY OF PROPOSALS PROCESSED UNDER THE UTAH PRO-COMPETITIVE CERTIFICATE OF NEED ACT (1982).

been met but where it would not be cost effective to hold a review.

The procedural changes in the CON review process are supplemented by significant increases in the minimum expenditures necessary before CON review is required.[333] Those changes likely are to be less significant, however, because of the amendment allowing the Department of Health to waive CON review for projects that are not cost effective. Additionally, review of smaller projects is likely not to be cost effective and thus are likely to be exempted from CON review by the Department of Health even if they are required to apply. The combined changes are important, however, because they mean that the state will intervene only where a new health care facility is large enough to affect substantially the cost of health care.

Another major provision of the 1983 amendments allows the deregulation of large segments of the health care market at the discretion of the Department of Health.[334] On finding that a segment of the health care market is price sensitive, the Department of Health may exempt that market sector from CON review.[335] For example, studies by the Department of Health had indicated that alcohol abuse treatment was a price sensitive segment where capital investment was relatively low and risk of economic failure lay with the program, not the patient.[336] Those market forces, in conjunction with licensing requirements[337] designed to ensure high quality care, indicated that continued market intervention in alcohol abuse programs was unnecessary. Therefore, under the new amendments the Department of Health can exempt this market sector from review.[338]

Although deregulation of selected health care market sectors is

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333. UTAH CODE ANN. § 26-22-3(4) (Supp. 1983). The amendment increased minimum expenditures from $150,000 to $400,000 for health care equipment and $600,000 for the other eligible projects. *Id.* Because projects under $400,000 will not require a CON, health care providers now have a realistic incentive to scale down projects to avoid CON review. The effect of that incentive, coupled with the exemption of smaller projects, should mean review of fewer projects.

In keeping with the procompetitive philosophy of the Act, the increased thresholds will decrease intervention in the market. That philosophy also is reflected in the change allowing waiver of projects for which review is determined not to be cost effective. *Id.* § 26-22-7(3)(a); *see supra* notes 330-32 and accompanying text.

334. UTAH CODE ANN. § 26-22-7(3) (Supp. 1983).

335. *Id.* § 26-22-7(3)(b).

336. *See* STAFF REPORT, UTAH HEALTH SYSTEMS AGENCY, SHOULD ALCOHOL ABUSE TREATMENT CENTERS BE EXEMPTED FROM CERTIFICATE OF NEED REVIEW? (July 15, 1983) (available in official minutes of the Statewide Health Coordinating Council).

337. *Id.*

338. *Id.*

appropriate, the 1983 amendments anticipate total elimination of health planning in Utah on December 31, 1984.[339] On deregulation, health care providers in Utah can be expected to expand the supply of medical facilities beyond the existing demand.[340] While in traditional competitive markets new and unnecessary entrants into the market enter at their own risk,[341] the health care market may react by creating demand.[342] That reaction, known as the "Roemer" effect,[343] indicates that new facilities, in the absence of competition, tend to increase utilization of health care facilities, adding to the overall cost of health care.[344]

The total cessation of health care market intervention in Utah was based on the assumption that strong, competitive market forces would develop, obviating the need for CON review.[345] Studies indicate, however, that market forces have not matured as expected.[346] With no new evidence that the health care market is now price sensitive and controlled by the "invisible hand" of the marketplace, discontinuing health planning at the end of 1984 seems premature.

The 1983 amendments to the Utah Pro-Competitive Health Planning Act are substantial steps toward deregulating entry into the health care market. Higher review thresholds and an expedited review process will reduce both the number of projects subject to review and the time and expense involved in reviewing the projects still subject to the program. Eliminating CON review of segments of the market adequately controlled by market forces also will eliminate unnecessary regulation. Although those changes are both timely and appropriate, the total abolition of health planning at

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339. UTAH CODE ANN. § 26-22-22 (Supp. 1983).

340. *See* ERNST & WHINNEY STUDY, *supra* note 331 (predicting the economic impact of failing to extend the 1981 Act through 1983). A 1982 Utah study concluded that Utah was a good place to provide health care, based on such factors as lower bad debt ratios, fewer medicare and medicaid patients and a relatively healthier population than most states. *Id.* Estimates by the Department of Health indicate that as much as $100 million in capital costs for excess bed capacity alone could result over a two to three-year period. Dr. James O. Mason, Remarks on Certificate of Need to the Utah Health System Governing Body (Aug. 4, 1982). At the time Dr. Mason spoke, he was the director of the Utah Department of Health.

341. Blumstein & Zubkoff, *Perspectives on Government Policy in the Health Sector*, 51 MILBANK MEMORIAL FUND Q. 395, 405-07 (1973).

342. Bovbjerg, *Problems and Prospects for Health Planning: The Importance of Incentives, Standards, and Procedures in Certificate of Need*, 1978 UTAH L. REV. 83, 85-87.

343. *Id.* at 87.

344. *Id.*

345. *See* LEWIN STUDY, *supra* note 320.

346. ERNST & WHINNEY STUDY, *supra* note 331, at 4.

the end of 1984 is neither warranted nor wise. The Utah Legislature should seriously consider extending the program until market forces develop that will better control the health care market.

B. Medicaid Payments

The 1983 amendment to the Utah Medical Assistance Act[347] directs the Department of Health to implement regulations requiring medicaid recipients to share in the cost of the medical services they receive.[348] Presently, the Department of Health has implemented a limited copayment system, only requiring a three dollar copayment fee for the nonemergency use of emergency services. Use of cost sharing, however, particularly as a comprehensive system, should be cautioned. Although the legislature included cost sharing to reduce state medicaid expenditures, it actually may increase state costs and have a detrimental effect on both providers[349] and recipients.

Medicaid is a federal grant-in-aid program designed to provide health care to low income individuals.[350] States electing to participate in medicaid must conform their programs to federal regulations, which require them to provide "mandatory"[351] medical services to the "categorically needy."[352] States also may elect to extend their medicaid program by including "medically needy"[353]

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347. Ch. 135, 1983 Utah Laws 557 (codified at UTAH CODE ANN. § 26-18-3.5 (Supp. 1983)). All provisions of the Utah Medical Assistance Act appear at UTAH CODE ANN. §§ 26-18-1 to -10 (Supp. 1983). The Act grants the Department of Health authority to administer Utah's medicaid program pursuant to title XIX of the Social Security Act. *See id.* § 26-18-3.

348. UTAH CODE ANN. § 26-18-3.5 (Supp. 1983): "The department shall selectively provide for enrollment fees, premiums, deductions, cost sharing or other similar charges to be paid by recipients, their spouses, and parents, within the limitations of federal law and regulation."

349. A provider is any individual or entity furnishing medicaid services under the provider agreement with a state medicaid agency. 42 C.F.R. § 430.1 (1983).

350. *See* 42 U.S.C. § 1396b (1976) (regulating federal payments to state medicaid programs).

351. Federal law distinguishes between mandatory services that must be included in a state plan and optional services that may be included in a state plan. *See* 42 C.F.R. §§ 440.210, .220 (1983).

352. The "categorically needy" are families with dependent children and blind, aged and disabled individuals, all of whom also must fall within specified income groups. *See id.* §§ 435.100-.135 (listing individuals who must receive coverage under a state plan); *see also id.* §§ 435.400-.404, .600-.604 (guidelines for determining the eligibility of both categorically and medically needy individuals).

353. The "medically needy" are those who meet all the "categorically needy" eligibility requirements except the income guidelines. *See id.* §§ 435.300-.340 (setting out the medically needy requirements). However, the medically needy also either must have income within certain standards established by the state, *id.* §§ 435.800, .811-.814, or must have

individuals in the program or by offering "optional" medical services.[354]

Federal law permits states to implement cost sharing systems that require medicaid recipients to pay nominal amounts toward their medical care.[355] The four types of cost sharing systems authorized under federal regulations are copayments,[356] coinsurance,[357] deductibles[358] and enrollment fees.[359] Although the primary aim of all types of cost sharing is to reduce state program expenditures, copayment and coinsurance systems are distinguishable from other cost sharing systems because they discourage the unnecessary use of medical services by imposing a fee on the recipient for each unit of medical service received.[360] Under prior federal regulations, states could impose cost sharing on all services provided to the medically needy, but only on optional medical services provided to the categorically needy.[361] Although the Department of Health had authority to implement that limited type of cost sharing prior to the enactment of the current cost sharing amendment,[362] it elected not to do so.[363]

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incurred medical expenses at least equal to the difference between their income and the applicable income standard. *Id.* § 435.301(a)(1)(i)-(ii).

354. 42 U.S.C. § 1396d(a)(17) (1976 & Supp. V 1981). Those optional services may be provided to the categorically needy and the medically needy. If optional services are provided to the medically needy, however, they must be provided to the categorically needy as well. 42 C.F.R. § 440.240 (1983) (comparability of services for medically and categorically needy individuals).

355. *See* 42 U.S.C. § 1396a(14).

356. A copayment is a fixed per unit of service charge assessed to the recipient. *See* 42 C.F.R. § 447.54(a)(3) (1983) (setting out maximum allowable charges).

357. Coinsurance systems require the recipient to pay a fixed percentage of the cost for the service. *See id.* § 447.54(a)(2) (establishing maximum percentages).

358. Systems imposing deductibles require the recipient to pay a fixed monthly amount before the state will provide medicaid coverage. *See id.* § 447.54(a)(1) (providing maximum monthly amounts).

359. Enrollment fees are monthly charges computed on the basis of family income. *See id.* § 447.51 (1982).

360. *See supra* notes 356-57.

361. *See* 42 C.F.R. § 447.53 (1983).

362. The authorization to impose cost sharing implicitly was granted by the Medical Assistance Act, which gave the Department of Health sole authority to "develop implementing policy in conformity with the requirements of title XIX and with regulations adopted pursuant thereto by the federal agency." UTAH CODE ANN. § 26-18-3(2) (Supp. 1983).

363. Approximately 80% of the medicaid recipients in Utah are categorically needy. UTAH DEP'T OF HEALTH, MEDICAID DISTRIBUTION/PERCENT CLIENTS AND EXPENDITURES, graph fiscal year 1981 (Attachment to Medicaid Subcomm. Minutes Apr. 20, 1982) (on file, Utah State Capitol, Legislative Research Office) [hereinafter cited as MEDICAID SUBCOMM. MINUTES]. Thus, under prior federal regulations, the majority of recipients would have been exempted from cost sharing requirements. That may explain why the Department of Health did not implement cost sharing under the prior regulations.

Recent amendments to the federal regulations allow states greater latitude in implementing cost sharing systems.[364] Under the new regulations, charges may be imposed for all medical services except family planning, emergency and pregnancy-related services, and on all categories of recipients except children, certain institutionalized individuals[365] and categorically needy health maintenance organization enrollees.[366] For outpatient services, coinsurance charges may not exceed five percent of the state payment for the service, and copayment charges may range from fifty cents to three dollars per unit of service.[367] For inpatient services, neither coinsurance nor copayment charges may exceed fifty percent of the state's payment for the first day of care.[368]

Utah's cost sharing amendment was enacted in response to the liberalization of federal cost sharing regulations, and is part of the state's multifaceted effort[369] to control its medicaid expendi-

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364. 48 Fed. Reg. 5730-36 (1983) (to be codified at 42 C.F.R. pts. 431, 435, 436, 440, 447). Federal law was changed to allow states to more effectively control the overutilization of services by recipients. *Id.* at 5731.

365. Institutionalized individuals must be exempted from cost sharing if federal regulations require the individual to pay all but that portion of his income required for personal necessities in exchange for receiving institutional care. 42 C.F.R. § 447.53(b)(3) (1983).

366. *See id.* § 447.53.

367. *Id.* § 447.54. The copayment amount also is dependent on the amount paid by the state for the service:

TABLE 1

State's payment for the service	Maximum Copayment Chargeable to Recipient
$10.00 or less	$ .50
$10.01 to $25	$1.00
$25.01 to $50	$2.00
$50.01 or more	$3.00

Id. § 447.54(a)(3).

States may elect to impose a cumulative maximum cost sharing amount that a family or individual can be assessed during a specified period of time. 42 C.F.R. § 447.54(a)(3)(d) (1983). That option would guard against cost sharing charges that are nominal when viewed individually but unaffordable in the aggregate. Utah has not implemented that option.

Originally, Congress intended the amount of the cost sharing charges to be determined by the recipient's income. *See* MEDICARE & MEDICAID GUIDE (CCH) ¶ 24,557 (1983). That intent is not reflected in federal regulations, which base cost sharing amounts on the state's cost for the service. *See, e.g.*, 42 C.F.R. § 447.54 (1983) (providing for copayment and coinsurance charges on the basis of the state's payment for the service); *see also* Chavkin & Cypen, *Cost-Sharing Under Medicaid: Lessening the Impact on Institutionalized Recipients*, 12 CLEARINGHOUSE REV. 285, 287 n.25 (1978) (fixed cost sharing amounts violate the intent of Congress).

368. 42 C.F.R. § 47.54(c) (1983).

369. There also have been other regulatory efforts to reduce the cost of the medicaid

tures.[370] The amendment requires the Department of Health to "selectively provide[371] for enrollment fees, premiums, deductions, cost sharing or other similar charges . . . ."[372] Although the Department of Health may implement any of the four types of cost sharing permitted under federal regulations, the legislative history of the amendment indicates that legislators intended that the Department of Health experiment with copayments or coinsurance.[373] Those systems are designed to reduce state costs by deterring the overutilization of medical services and by reducing state medicaid

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program. The Division of Health Care Financing has obtained a federal waiver enabling it to implement a "case management" program that limits recipients to one physician of their choice. In the past, recipients had free access to physicians, with the result that one-half of the recipients used three or more doctors. By limiting recipients to a single "primary care" physician, the program strives to reduce the unnecessary utilization of medical services. Division of Health Care Financing, Utah Dep't of Health, Choice of Health Care Delivery (unpublished, undated paper) (on file with the UTAH L. REV.) [hereinafter cited as Choice of Health Care]. Another program, known as the "lock-in program," is designed to reduce program costs by eliminating known abusers' access to certain medical services. 5 DIVISION OF HEALTH CARE FINANCING, UTAH DEP'T OF HEALTH, MEDICAL ASSISTANCE 1982, at 17 (1983) [hereinafter cited as MEDICAL ASSISTANCE].

370. Utah's medicaid expenditures rose from $64 million in fiscal year 1978 to $105 million in fiscal year 1982. *See* MEDICAID SUBCOMM. MINUTES, *supra* note 363, table: Department of Health/Medical Assistance; MEDICAL ASSISTANCE, *supra* note 369, at 16. The state receives reimbursement from the federal government for 68.64% of its program costs. *Id.* at 2; *see* 42 U.S.C. § 1396d(b) (Supp. V 1981) (provisions regarding federal financial participation in state medicaid programs).

Utah is not the only state to try to reduce spiraling medicaid expenditures. Most states are experimenting with a variety of cost cutting measures. *See* INTERGOVERNMENTAL HEALTH POLICY PROJECT, GEO. WASH. U. & STATE MEDICAID INFORMATION CENTER, RECENT AND PROPOSED CHANGES IN STATE MEDICAID PROGRAMS: A FIFTY STATE SURVEY (Apr. 1982). As of May 1982, 29 states and the District of Columbia had instituted copayment systems. *See* Kinney, *Medicaid Copayments: A Bitter Pill for the Poor*, 10 J. LEGIS. 213, 218 n.44 (1983). *See generally* Demkovich, *For States Squeezed by Medicaid Costs, The Worst Crunch is Still to Come*, 13 NAT'L J. 44 (1981) (discussing the growth of the medicaid program and cost cutting alternatives at both the state and federal levels).

371. The Department of Health's Division of Health Care Financing sought guidance from the legislature on the meaning of "selectively provide" in the amendment. The legislature informed the Department of Health that it had intended that cost sharing be imposed on selected *services* on a trial basis. The Division of Health Care, however, initially had proposed a comprehensive system, *see infra* note 375 and accompanying text, on the assumption that "selectively provide" meant that cost sharing was to be imposed on all recipients and services except those expressly excluded by federal law. Prior to implementation, that system was limited to comply with legislative intent. Interview with Sandra Widlitz, Health Programs Specialist, Division of Health Care Financing, Utah Department of Health, in Salt Lake City, Utah (Aug. 25, 1983).

372. UTAH CODE ANN. § 26-18-3.5 (Supp. 1983). That is the first specific statutory requirement imposed on the Department of Health beyond that of administering the medicaid program in accordance with federal regulations.

373. *See* Second Reading of S. 12, 45th Utah Leg., Gen. Sess. (Jan. 18, 1983) (S. Recording Tape No. 27, side 1) (discussing charges imposed per unit of service).

expenditures by the cost sharing amount.[374] In response to the cost sharing directive, the Department of Health implemented a limited cost sharing system[375] that imposes a copayment charge of three dollars on the nonemergency use of emergency services.[376]

Cost sharing is subject to several criticisms.[377] First, there is little evidence that cost sharing has a significant or lasting impact on reducing the utilization of medical services.[378] Because medicaid providers cannot deny services to recipients who are unable to pay the cost sharing amount,[379] it is unlikely that recipients will be de-

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374. Proponents of Utah's amendment originally believed that state reimbursement expenditures would be reduced by approximately $129,000. That broke down into $38,000 in state savings and $90,000 in federal savings. Half of the projected savings was attributable to a reduction in state reimbursement expenditures by the cost sharing amount, and the other half was attributable to a projected five percent decrease in the utilization of services. *See* OFFICE OF LEGISLATIVE FISCAL ANALYST, 45TH UTAH LEG., GEN. SESS., DATA ON S. 12 [hereinafter cited as FISCAL ANALYST]. Those estimates, however, were based on the original comprehensive system that was not implemented. *See infra* note 375 and accompanying text.

375. DIVISION OF HEALTH CARE FINANCING, UTAH DEP'T OF HEALTH, RULE: IMPOSITION OF COST SHARING CHARGES UNDER MEDICAID (Aug. 15, 1983) [hereinafter cited as RULE]. The Division of Health Care Financing originally proposed a rule providing for coinsurance to be imposed on all eligible recipients and on all services furnished under the state program. DIVISION OF HEALTH CARE FINANCING, UTAH DEP'T OF HEALTH, PROPOSED RULE: IMPOSITION OF COST SHARING CHARGES UNDER MEDICAID (June 30, 1983) (specifying details of original plan). Under the original plan, the coinsurance rate was three percent of the state's average reimbursement cost for the service (two percent below that permitted under federal regulations). After critical public response to the comprehensiveness of the proposed rule, the Division of Health Care implemented a more limited cost sharing system. Widlitz Interview, *supra* note 371.

376. RULE, *supra* note 375.

377. *See* Utah Issues, Community Action Program, Utahns Against Hunger and Intermountain Health Care, Written Comments in Response to the Proposed Rule (Aug. 15, 1983) (on file with Department of Health) [hereinafter cited as Written Comments]. For criticisms of cost sharing as a method of reducing state medicaid expenditures, see generally J. HOLAHAN, CONTROLLING MEDICAID UTILIZATION PATTERNS (1977); Chavkin & Cypen, *supra* note 367; Kinney, *supra* note 370.

378. One study indicated that the implementation of a cost sharing system on physician services in Canada decreased office visits to physicians by approximately 20%. The copayment plan gradually lost its deterrent effect, however, and the use of physician services returned to preplan levels after about five years. *See* J. HOLAHAN, *supra* note 377, at 5-7. A Stanford study on the effect of copayments found a marked decrease in utilization. That decrease, however, may have been attributable to the size of the copayment (25% of the cost of the service) and the fact that medical services *could* be denied for failure to make the copayment. *See id.* at 9. Results of other studies indicating that nominal copayments reduce the utilization of services are distorted by the existence of a concurrent "prior authorization" requirement, whereby recipients had to obtain permission from the state to obtain more than a certain level of services. It is unclear whether the decrease in utilization was attributable to the prior authorization requirement or the copayments. *See id.* at 9-13.

379. 42 C.F.R. § 447.15 (1983). That rule does not affect an individual's liability for such charges and does not preclude the provider from attempting to collect them. *See* 48

terred from using medical services. Furthermore, copayments will be ineffective in deterring utilization when applied to medical services that are not typically initiated by the patient, such as inpatient care.[380]

Cost sharing also has been criticized as placing an inappropriate financial burden on medicaid recipients.[381] Although cost sharing charges are nominal in amount, indigent recipients who require a number of services may have an aggregate cost sharing obligation that they are unable to afford.[382]

Finally, cost sharing actually may increase state medicaid expenditures. One study analyzing data from California's medicaid program found that a cost sharing requirement deterred recipients from seeking necessary preventative care, which ultimately led to increased hospitalization at a greater cost to the state.[383] Additionally, because providers cannot deny services for a recipient's inability or failure to pay cost sharing charges,[384] and because payment of cost sharing charges by the recipient[385] or the state[386] is unlikely, providers are likely to shift those losses to the state and private

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Fed. Reg. 5735 (1983); *see also infra* note 382 (recipients are not excused from paying cost sharing charges because they cannot afford them).

380. The rationale behind imposing cost sharing on inpatient care is that unnecessary hospital admissions will be deterred if physicians are conscious of the cost to the patient. *See* J. HOLAHAN, *supra* note 377, at 16. It seems unlikely, however, that a nominal copayment will enter into a physician's decision to refer a patient. *See* Chavkin & Cypen, *supra* note 367, at 286 & n.18 (discussing the inappropriateness of applying copayments to inpatient care); *see also* Kinney, *supra* note 370, at 224 (questioning the effectiveness of copayments where physicians determine the level of utilization).

381. *See* Kinney, *supra* note 370, at 220-21; Written Comments, *supra* note 377.

382. *See* Kinney, *supra* note 370, at 221; Written Comments, *supra* note 377. Many medicaid recipients simply will not have the money to pay the charges. An analysis of the income of individuals on public assistance in Utah suggests that those individuals cannot afford cost sharing. The annual income of individuals on public assistance ("Basic Maintenance Standard") in Utah is approximately 60% of the poverty level as defined by the Department of Health and Human Services. *See* 45 C.F.R. pt. 1611 (1983). The Basic Maintenance Standard for a family of four in Utah is $554 per month. Six dollars of that $554 is allowed for medical expenses. *See* Choice of Health Care, *supra* note 369, table: Components of Basic Maintenance Standard/Based Upon 9/1/83 Grant Table. With copayments characteristically ranging from fifty cents to three dollars, as few as two services per month at the maximum allowable charge would deplete the medical allowance in the monthly grant. *See* 42 C.F.R. § 447.54 (1983).

383. *See* Roemer, *Copayments for Ambulatory Care: Penny-Wise and Pound Foolish*, 13 MED. CARE 457 (1975). The California study, however, has been criticized for its methodology. *See* J. HOLAHAN, *supra* note 377, at 13; Kinney, *supra* note 370, at 223 n.74.

384. *See supra* note 379 & 382 and accompanying text.

385. *See supra* note 382 and accompanying text.

386. States are not required to reimburse providers for the unpaid cost sharing amount, but they may do so at their option. *See* 42 C.F.R. § 447.57 (1982).

individuals in the form of increased prices for services.[387] The high administrative expense of cost sharing systems also may substantially diminish state savings.[388]

In summary, the Utah Legislature responded to federal regulations allowing cost sharing to be imposed on a greater number of medicaid recipients and services by directing the Department of Health to experiment with the implementation of a cost sharing system. Although the Department of Health could elect to implement a comprehensive cost sharing system in the future, an analysis of the problems of cost sharing suggests that a comprehensive system would be counterproductive. Such systems are expensive to administer and may not deter the overutilization of medical services. Furthermore, comprehensive cost sharing systems may indirectly increase state expenditures. Providers might offset unpaid cost sharing charges by increasing prices, and recipients might forego necessary preventative care and eventually require hospitalization at a greater cost to the state.

VII. INTOXICATION

A. *Drunken Driving Standards*

The 1983 Utah Legislature continued[389] its attempt to deal with the problem of the drinking driver.[390] New and amended code

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387. *See* J. HOLAHAN, *supra* note 377, at 15. Some critics suggest that providers may choose not to participate in the medicaid program if cost sharing is adopted. *See* Written Comments, *supra* note 377.

388. State officials have found that high administrative expenses diminish the cost effectiveness of cost sharing systems. Kinney, *supra* note 370, at 222 & nn.65-66. Utah's system may be subject to that criticism. The estimated first-year cost to implement the current system is $69,000. Interview with Sandra Widlitz, Health Programs Specialist, Division of Health Care Financing, Utah Department of Health, in Salt Lake City, Utah (Sept. 26, 1983). Costs in subsequent years are estimated at approximately $30,000 per year. *See* FISCAL ANALYST, *supra* note 374. The estimated yearly savings in "cost avoidance" from shifting recipients from more expensive emergency room care to less expensive nonemergency care is $69,000. *See* RULE, *supra* note 375. It is unclear how much will be collected from cost sharing payments.

389. The Utah drunken driving statutes have been a subject of much public debate and legislation. *See Utah Legislative Survey—Driving While Intoxicated*, 1980 UTAH L. REV. 181. Amendments in 1979 added a mandatory jail sentence for second time DUI offenders, UTAH CODE ANN. § 41-6-44(e) (1981) (renumbered as *id.* § 41-6-44(5) (Supp. 1983)), and created presumptions of accuracy for breath tests. *Id.* §§ 41-6-44.3, -44.5. Amendments in 1981 expanded the powers of police officers to arrest and test drivers suspected of driving under the influence ("DUI"). *Id.* § 41-6-44.10.

390. The amendments enacted by the 1983 Utah Legislature are codified in scattered sections of title 41 UTAH CODE ANN. and at *id.* §§ 32-6-1, 63-43-10 (Supp. 1983). Alcohol is

sections reduce the illegal per se standard,[391] remove evidentiary presumptions from the incapacity standard[392] and require a minimum of forty-eight continuous hours in jail,[393] rehabilitation[394] and a ninety-day license suspension for first time driving under the influence ("DUI") offenders.[395] In addition, the legislature instituted a series of new procedures and fees designed to significantly increase a driver's cost for violating the DUI laws.[396] The new DUI legislation should reduce drunken driving in Utah.

The legislature amended both[397] of the DUI criminal standards. The illegal per se standard—(1) driving or being in actual

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the largest single factor involved in fatal highway accidents. *See* Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1674 (1981) [hereinafter cited as *Alcohol Abuse*]; Note, *VASAP: A Rehabilitation Alternative to Traditional DWI Penalties*, 35 WASH. & LEE L. REV. 673, 673 (1978) [hereinafter cited as *Rehabilitation Alternative*].

The Utah Supreme Court has decried the excessive loss of life and property caused by drunken drivers. *See* Cavaness v. Cox, 598 P.2d 349, 353 (1979). The United States Supreme Court also has voiced concern about the increasing number of highway deaths due to drunken drivers. *See* South Dakota v. Neville, 103 S.Ct. 916, 920 (1983).

391. UTAH CODE ANN. § 41-6-44(1) (Supp. 1983).

392. *Id.*

393. *Id.* § 41-6-44(4). The court may assign two days work in a community service program instead of jail. *Id.*

394. *Id.* Rehabilitation at a licensed facility includes an assessment of how often the driver drinks and an information discussion regarding the effects of alcohol on a person's ability to drive. *See infra* notes 405-08 and accompanying text.

395. UTAH CODE ANN. § 41-6-44(9) (Supp. 1983).

396. *See, e.g., id.* § 41-6-44.30 (vehicle impoundment on DUI arrest); *see infra* notes 413-19 and accompanying text.

To insure adequate funding of the new laws, the legislature tripled the excise tax on beer and designated $4.35 million of that revenue for the exclusive use of enforcing alcohol related laws. UTAH CODE ANN. §§ 32-6-1, -1-24 (1981 & Supp. 1983). A more equitable source of funds also would include a tax, or increased state profit margin, on liquor. The new provisions also require drunken drivers to contribute to the cost of DUI-related programs. *See infra* notes 407, 414-19 and accompanying text.

397. Utah's new law raises a question as to whether violation of the illegal per se standard and violation of the incapacity standard constitute two separate offenses. The Utah Supreme Court construed Utah's former DUI statute as one offense: a presumption of DUI up to .10% blood alcohol content ("BAC"), and DUI per se at and above .10%. Murray City v. Hall, 663 P.2d 1314, 1319 (Utah 1983). However, the California Supreme Court construed its statute, which is similar to Utah's former statute, as constituting two separate offenses. Burg v. Municipal Court, 143 Cal. App. 3d 169, 192 Cal. Rptr. 531, 532 (1983).

If the offenses are separate, there is a question as to whether both offenses can be charged. *See* UTAH CODE ANN. §§ 76-1-401, -402 (1978) (separate offenses may arise out of a single criminal episode). *But see* ME. REV. STAT. ANN. tit. 29 § 1312-C(1) (1982) (state attorney can choose to *prosecute* under either the DUI provision or under the illegal per se provision, but not both at the same time); *see also* Hupp v. Johnson, 606 P.2d 253 (Utah 1980) (prosecution for DUI and driving without a license involve separate offenses). If both offenses may be charged, there is an additional question as to whether conviction may result under both offenses. *See* IOWA CODE ANN. § 321.281(3) (West 1982) (statutory prohibition against *conviction* for both DUI offenses for the same occurrence).

control of a vehicle with (2) a prohibited blood alcohol content ("BAC")—was reduced from the prior level of .10%[398] to .08%.[399] The second standard, "incapacity"—(1) driving or being in actual control of a vehicle while (2) under the influence of alcohol, drugs or both to a degree that renders the person incapable of safely driving[400]—was not changed, but evidentiary presumptions relating BAC level to alcohol "influence" were repealed.[401]

Under the incapacity standard, BAC is part of the evidence that a jury can consider to determine if a person was "under the influence to a degree which rendered the person incapable of driving safely."[402] Under prior law, a defendant could rebut the presumption that he was "under the influence of alcohol" when his BAC was between .08% and .10%.[403] Now, under the illegal per se standard, a BAC of .08% or more, if proved, satisfies one element of the standard, and there is no argument about whether or not a driver is "under the influence."[404]

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398. UTAH CODE ANN. § 41-6-44.2 (1981) (repealed and reenacted as *id.* § 41-6-44(1) (Supp. 1983)).

399. *Id.* § 41-6-44(1) (Supp. 1983). BAC is the percent of alcohol in the blood by weight. *Id.* § 41-6-44(2). Academic writers differ on the effectiveness of illegal per se laws. *Compare Alcohol Abuse, supra* note 390, at 1678 (general deterrence increases with increased chance of conviction) *with* Ross, *The Scandanavian Myth: The Effectiveness of Drinking and Driving Legislation in Sweden and Norway*, 4 J. LEGAL STUD. 285, 308 (1975) (unproven deterrent effect). Despite some scholarly skepticism, the number of states with illegal per se laws has increased from 10 in 1978 to 21 in 1981. U.S. DEP'T OF TRANSP., ALCOHOL AND HIGHWAY SAFETY LAWS: A NATIONAL OVERVIEW 43 (1981) [hereinafter cited as SAFETY LAWS]; Kearney, *Differences Among Traffic Laws in the United States*, TRAFFIC LAWS COMMENTARY, March 1978, at 11. The validity of illegal per se DUI laws is based on the substantial scientific support for the BAC tests as an objective measure of the impairment of alcohol on driving ability and on the high reliability of BAC measuring technology. SAFETY LAWS, *supra*, at 43.

400. UTAH CODE ANN. § 41-6-44(a) (1981) (amended as *id.* § 41-6-44(1) (Supp. 1983)).

401. *Id.* § 41-6-44(b) (1981) (repealed 1983). Under the prior law, a person was presumed not under the influence if his BAC was .05% or less. *Id.* Between .05% and .08% there was no presumption, and between .08% and .10% the driver was presumed to be under the influence. *Id.* All of those presumptions have been repealed.

402. *Id.* § 41-6-44(1) (Supp. 1983).

403. For an interpretation of the prior law, see Murray City v. Hall, 663 P.2d 1314, 1319 (Utah 1983). Under the revised code section, however, the defendant still may contest whether his BAC actually was above .08%. UTAH CODE ANN. § 41-6-44.5 (1981 & Supp. 1983).

404. UTAH CODE ANN. § 41-6-44(1) (Supp. 1983). The other element is "driving or being in actual physical control of a vehicle within Utah." *Id.* Under the prior law, a BAC of .08% was only an evidentiary presumption of the substantive element that a person was "under the influence" of alcohol. *Id.* § 41-6-44(b)(3) (1981) (repealed 1983).

Although one court has held that a .10% BAC level prohibited by the illegal per se law is a crime regardless of intoxication, Burg v. Municipal Court, 143 Cal. App. 3d 169, 192 Cal. Rptr. 531, 532 (1983), the same court recognized that it is unlikely that a driver with a BAC

In addition to modifying the standards for DUI offenses, the legislature responded to academic criticism of Utah's and other states' DUI laws[405] and enacted provisions to treat a driver for the alcohol related causes of his conviction. The amended code sections provide for mandatory participation by first time DUI violators[406] in an assessment and educational series at a licensed alcohol rehabilitation facility.[407] That rehabilitation is in addition to, rather than in lieu of, the traditional penalties of confinement and fines.[408]

The legislature also amended the minimum mandatory sentence provisions for DUI convictions to provide for "forty-eight consecutive hours"[409] in jail, instead of "two days" as under the former law.[410] Additionally, the Utah Department of Public Safety now must suspend for ninety days all first time DUI offenders' li-

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of .10% or higher (California's per se limit) is not intoxicated. It could be argued that a .08% BAC level does not raise as strong a guarantee of intoxication as did the .10% BAC level.

405. *See Utah Legislative Survey*, *supra* note 389, at 182-83 (harsher punishment not effective; treatment needed to deter alcoholics who compose the majority of drunken drivers); *see also* Crampton, *The Problem of the Drinking Driver*, 54 A.B.A. J. 995, 998-99 (1968) (treatment of problem drinkers required); *Alcohol Abuse*, *supra* note 390, at 1681 (long term success in reducing DUI requires effective rehabilitation). *But see* Ross & Blumenthal, *Sanctions for the Drinking Driver: An Experimental Study*, 3 J. LEGAL STUD. 53, 61 (1974) (fines or probation as effective and less costly than therapeutic measures). *But see generally* Powell v. Texas, 392 U.S. 514, 539 (1968) (Black, J., concurring) (jail can serve individual and general deterrent effect on alcoholics).

406. UTAH CODE ANN. § 41-6-44(4) (Supp. 1983). Under the prior law, rehabilitation was mandatory only for the third or subsequent offense. *Id.* § 41-6-44(f) (Supp. 1982) (amended and renumbered as *id.* § 41-6-44(5) (Supp. 1983)).

407. *Id.* § 41-6-44(4) (Supp. 1983). Rehabilitation facilities must be approved by the Department of Social Services. *Id.* § 41-6-44(6). Utah has resolved the problem of funding a rehabilitation program by assessing a portion of the cost to each convicted driver. *Id.* § 63-43-10 (Supps. 1981 & 1983); *see, e.g.*, *Alcohol Abuse*, *supra* note 390, at 1676 & n.130 (cost problems of other rehabilitation programs).

408. UTAH CODE ANN. §§ 41-6-44(e), -44(f) (Interim Supp. 1982) (amended and renumbered as *id.* §§ 41-6-44(4), -44(5) (Supp. 1983)). Under the prior law, the judge had discretion to order rehabilitation treatment in lieu of ordering the offender to jail or to a work program. *Id.*

409. *Id.* §§ 41-6-44(4), -44(5) (Supp. 1983). Maximum imprisonment, however, remains the same: "not less than 60 days nor more than 6 months, or by a fine of $299, or by both . . . ." *Id.* § 41-6-44(d) (1981) (renumbered as *id.* § 41-6-44(3) (Supp. 1983)). Under the new law, the judge still may order the offender to perform community service in lieu of jail. *Id.* § 41-6-44(4) (Supp. 1983).

410. *Id.* § 41-6-44(e)-(f) (1981 & Interim Supp. 1982) (amended and renumbered as *id.* § 41-6-44(4) -(5) (Supp. 1983)). Under the prior law, the two-day jail sentence could be served as one day on two separate weekends and therefore was less disruptive of a convicted driver's time.

censes.[411] Persons with two or more DUI convictions may not have their license reinstated until all fines, restitution costs and fees have been paid.[412]

The new legislation also increased the monetary penalties to drunken drivers by assessing them for the costs of administering DUI-related programs for license reinstatement, vehicle impoundment and victim restitution.[413] In order to cover state administrative costs,[414] drivers who refuse to take a chemical BAC test now must pay a twenty-five-dollar fee in addition to the normal fee to have their license reinstated.[415] In addition, when a police officer makes a DUI arrest, she now must impound the driver's vehicle in a state approved impoundment yard.[416] The owner then must appear in person at an office of the state tax commission and pay an impoundment fee of twenty-five dollars plus all towing and storage fees to recover the vehicle.[417] Those two fees are assessed whether or not the driver is later convicted of DUI.[418] Finally, all drivers who are convicted of, or who plea bargain from, an alcohol or drug-related offense will be assessed an additional $100 fee to provide funds for victim restitution.[419]

To better insure that the new penalties are applied to all drunken drivers as the legislature intended, the legislature added four provisions designed to prevent discretionary treatment of DUI offenders.[420] First, courts no longer have the option of diversion[421]

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411. *Id.* § 41-6-44(9) (Supp. 1983). Any subsequent DUI conviction results in a required one-year license revocation. *Id.* Under the prior law, there was not a specified amount of time for which the license was revoked. *Id.* § 41-6-44(i) (Interim Supp. 1982) (amended and renumbered as *id.* § 41-6-44(9) (Supp. 1983)).

412. *Id.* § 41-6-44(5) (Supp. 1983).

413. *Id.* §§ 41-6-44.10(2), -44.30, -25-1 (Supp. 1983).

414. *Id.* §§ 41-6-44.10(2). Examples of additional state administrative cost are police paperwork and hearings on license revocation.

415. *Id.* The normal license reinstatement fee for other offenses is five dollars. *Id.* § 41-2-8(7) (1981).

416. *Id.* § 41-6-44.30 (Supp. 1983).

417. *Id.*

418. *Id.* §§ 41-6-44.10(2), -44.30.

419. *Id.* § 41-25-1. The victim restitution fund will be administered by the Utah Department of Public Safety, and money will be appropriated from general revenues each year. *Id.* § 41-25-2. Claims can be made only after all civil and criminal remedies are exhausted, and are limited to a maximum of $25,000 for all noncompensated actual damages. *Id.*; *see also infra* notes 467-504 (discussing victim restitution plan in detail).

420. *See infra* notes 422, 424-26 and accompanying text. In addition, the legislature required that local ordinances dealing with DUI and reckless driving be consistent with state statutes. UTAH CODE ANN. § 41-6-43 (Supp. 1983).

Although some writers have criticized removal of judicial discretion because the penalty may not "fit the crime," *see Utah Legislative Survey, supra* note 389, at 183 & nn. 173-74,

for alcohol and drug-related offenders.[422] Second, penalty and rehabilitation provisions triggered by "prior convictions"[423] now apply to convictions both under Utah state law and under ordinances similar to Utah state law.[424] Third, punishment and rehabilitation sections are applicable to both DUI convictions and alcohol-related convictions.[425] Finally, drunken drivers who have had their driver's license suspended or revoked may no longer be granted a "restricted license."[426]

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reduced discretion may increase the general deterrent effect of the law by increasing the likelihood that all violators will receive the full extent of the authorized penalties. *Cf. Alcohol Abuse, supra* note 390, at 1678-79 (deterrence is increased when an illegal per se standard is used because there is an increased likelihood of conviction).

421. "Diversion" involves suspending criminal proceedings on the condition that the defendant agree to participate in rehabilitation or fulfill some other condition, after which the criminal charges are dropped and the defendant has no criminal record of conviction. UTAH CODE ANN. §§ 77-2-2, -6, -7 (1982).

422. *Id.* § 77-2-9 (Supp. 1983). Despite the deterrent effect of denying discretion, *see supra* note 420, this may be an unwise provision because in situations where a prosecutor thinks the facts of a case do not warrant the statutory punishment, the only other option is to not prosecute the case.

423. Because punishment is based on prior convictions, there is an issue as to whether the provisions constitute an unconstitutional ex post facto law. An ex post facto law is a law that imposes criminal punishment for conduct that occurred prior to the enactment of the law. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 478 (1978). A California court held that a California statute, which based DUI punishment on prior convictions, was not an ex post facto law even though the defendant's prior conviction occurred before enactment of the statute because the law imposed an increased penalty only for the latest crime, which occurred after the statute was passed. People v. Lujan, 141 Cal. App. 3d 15, 192 Cal. Rptr. 109, 119 (1983); *see also* Gryfer v. Burke, 334 U.S. 728 (1948) (statute providing for increased punishment for habitual criminals is not an ex post facto law because it imposes an increased penalty only for the latest crime and not an added penalty for prior crimes).

424. UTAH CODE ANN. § 41-6-44(5) (Supp. 1983). Under the prior law, only convictions under the state statute were considered prior convictions for purposes of the penalty provisions. *Id.* § 41-6-44(e) (1981) (amended and renumbered as *id.* § 41-6-44(5) (Supp. 1983)). Under the new Act, it could be argued that alcohol-related convictions in other states qualify as "prior convictions" in light of such interstate agreements as the Drivers License Compact. *Id.* § 41-17-3. However, the phrase "similar ordinances" is followed by the words "adopted in *compliance* with Section 41-6-43." *Id.* § 41-6-44 (Supp. 1983) (emphasis added). Thus, that provision could be interpreted as being limited to jurisdictions within Utah because the legislature can only mandate compliance by state entities. *Id.* § 41-6-44(5); *see also supra* note 420 (discussing section 41-6-43).

425. *See* UTAH CODE ANN. § 41-6-44(6) (Supp. 1983) (a conviction for alcohol or drug-related reckless driving serves as prior conviction for the DUI law purposes and also requires rehabilitation).

426. *Id.* § 41-2-18(d). This provision applies both to drivers convicted of DUI and drivers who refuse BAC tests. *Id.* Under the prior law, the Department of Public Safety could grant a limited driving privilege to drivers whose licenses were suspended or revoked due to drunken driving. *Id.* § 41-2-18(d) (1981) (amended 1983). The restricted license permitted driving to and from work and was granted to prevent an undue hardship on the driver. *Id.*

Deterring drunken driving is the primary goal underlying Utah's new DUI statutes.[427] That goal likely will be met because the new Utah DUI statute provides (1) general deterrence for social drinking[428] and (2) subjects pathological drinkers and other drinkers for whom the general threat of punishment is not a deterrent to state control for rehabilitation, incapacitation and individual deterrence measures.[429]

An essential step in general deterrence of drunken drivers is successful prosecution of DUI cases.[430] The chances of successful prosecution of drunken drivers in Utah are increased as a result of the new mandatory ninety-day license suspension and the tightened illegal per se standard. Under prior law, the license suspension period for a DUI conviction was not specified,[431] but there was a one-year license revocation period if the driver refused to take the BAC test.[432] Therefore, because the drunken driver could get a longer license suspension by taking the BAC test than by refusing, there was some incentive for refusing to take the BAC test. Under the new law, the specified ninety-day license suspension for the first DUI conviction[433] is likely to encourage drivers to consent to a BAC test rather than be subject to the alternative of a one-year license revocation for refusing to take the test.[434] Increased consent to take the BAC test, in turn, aids prosecution of DUI offenders by allowing prosecution under the illegal per se standard.[435] Increased consent to take the BAC test also aids the state when it prosecutes a driver under the "incapacity" standard because, although the BAC level is not one of the elements of that standard, the BAC level is more objective evidence than other indicators of "being under the influence" such as slurred speech.[436]

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427. *See supra* note 390.

428. *See Alcohol Abuse, supra* note 390, at 1676-78.

429. *See id.*; *Utah Legislative Survey, supra* note 389, at 182 & n.172.

430. *See Alcohol Abuse, supra* note 390, at 1678.

431. UTAH CODE ANN. § 41-6-44(i) (Interim Supp. 1982) (amended and renumbered as *id.* § 41-6-44(9) (Supp. 1983)).

432. *Id.* § 41-6-44.10(2). Under the Utah Implied Consent Law, a person, by operating a motor vehicle in Utah, is deemed to have given consent to a chemical BAC test if a peace officer reasonably believes that the person is DUI. *Id.* § 41-6-44.10(1). A person who refuses to take the test automatically loses her license. *Id.*

433. *Id.* § 41-6-44(9) (Supp. 1983).

434. *See supra* note 432.

435. *See supra* notes 398-99 & 402-04 and accompanying text.

436. *See, e.g.*, Cavaness v. Cox, 598 P.2d 349, 352 (Utah 1979) (quoting People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393: "The value of such objective scientific data of intoxication [chemical BAC test results] to supplement the fallible observations by humans of behavior seemingly symptomatic of intoxication cannot be disputed"; *see* SAFETY

Successful prosecution allows the state to reduce future DUI recidivism through rehabilitation, punishment and incapacitation. The new rehabilitation provisions[437] treat the causes of DUI[438] and treat them early by requiring rehabilitation after the first offense, rather than waiting for subsequent offenses as under the prior law.[439] Through the rehabilitation program, the convicted drunken driver is made aware of the effect of alcohol on her ability to drive safely and, if necessary, may be treated for an alcoholism problem.[440] While the rehabilitation program is designed to reduce alcoholism-related recidivism, license suspension and jail provisions allow for incapacitation of the driver.[441] Because the new penalties for violating the law cause more disruption in the offender's life[442] and are more costly,[443] they also may have an individual deterrent effect on drivers.[444]

Although the new and amended DUI provisions apparently meet the goal of reducing drunken driving,[445] they also present sev-

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LAWS, *supra* note 399, at 43.

437. *See supra* notes 405-08 and accompanying text.

438. *See supra* notes 390 & 405.

439. *See supra* note 406.

440. Although the court may not order *alcoholism treatment* on the first offense, it has the option of ordering such treatment for the second offense, and must order such treatment for any subsequent offenses. UTAH CODE ANN. § 41-6-44(4)-(5) (Supp. 1983).

The mandatory alcohol abuse education and assessment sessions are a significant step toward reducing DUI recidivism, especially for social drinkers. *See, e.g., Alcohol Abuse, supra* note 390, at 1675-76, 1681 (comments on the Alcohol Safety Program, funded by the National Highway Traffic Safety Administration). However, academic critics of DUI laws maintain that education and assessment is only the first step and that alcoholic drivers require further treatment. *Id.*

441. "Incapacitation" prevents recidivism by keeping the driver off the road by either jailing the driver, suspending her license or both. New Utah provisions for stricter enforcement of suspended driving privileges, UTAH CODE ANN. §§ 41-2-30(2), -6-44.8 (Supp. 1983), meet part of the criticism that most drivers continue to drive even without a license. *See Alcohol Abuse, supra* note 390, at 1676-77.

442. *See, e.g.*, UTAH CODE ANN. § 41-6-44(4) (Supp. 1983) (48 consecutive hours in jail); *see also supra* note 410 and accompanying text (discussing minimum jail term).

443. *See, e.g.*, UTAH CODE ANN. § 63-43-10 (Supp. 1983) (cost of rehabilitation assessed to the convicted driver). Some costs are incurred whether or not the person is convicted, *see, e.g., id.* § 41-6-44.30 (DUI suspect's vehicle impounded) and some sanctions are subject to stricter enforcement, *see, e.g., id.* §§ 41-2-30(2), -6-44.8 (driving while license suspended or revoked for an alcohol or drug-related driving offense is now a class A misdemeanor enforceable by local prosecutors).

444. *See* Powell v. Texas, 392 U.S. 514, 539 (1968). *But see Utah Legislative Survey, supra* note 389, at 182 & n.172 (punishment does not deter alcoholic drivers).

445. During the first three months the new DUI laws were in effect, the number of alcohol-related accidents dropped 30% and the number of alcohol-related fatalities dropped 35% compared to the same period in 1982. Vetter, *Drunk Driving Laws: Are They Working?*, Ogden Standard-Examiner, Nov. 6, 1983, at 1B, col. 5.

eral constitutional questions. First, the new illegal per se statute may be unconstitutionally vague. Despite the rulings of constitutionality by most courts,[446] at least one court[447] has found a DUI statute similar to Utah's new law to be unconstitutionally vague because, although the statute gave *notice* of proscribed actions, potential violators had no rational means of *measuring* the level of BAC that the statute forbade.[448]

Second, evidence of the accused's BAC level may be constitutionally inadmissible in a criminal DUI proceeding if the accused consented to give the breath sample only to avoid losing her license for a greater period by refusing to consent to the test. The Utah Supreme Court has ruled that the Utah Constitution provides broader protection than the fifth amendment of the United States Constitution,[449] in that it protects the accused from being

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446. Most courts, including Utah's, have found the illegal per se DUI standard to be constitutional. *See, e.g.,* Burg v. Municipal Court, 143 Cal. App. 3d 169, 192 Cal. Rptr. 531 (1983) (.10% BAC); Cox v. State, 281 A.2d 606 (Del. 1971) (.10% BAC); Greaves v. State, 528 P.2d 805 (Utah 1974) (.10% BAC); State v. Franco, 96 Wash. 2d 816, 639 P.2d 1320 (1982) (.10% BAC).

447. People v. Alfaro, 143 Cal. App. 3d 528, 192 Cal. Rptr. 178 (1983) (.10% BAC).

448. 192 Cal. Rptr. at 181. *But see* Burg v. Municipal Court, 143 Cal. App. 3d 169, 192 Cal. Rptr. 531 (1983) (statute valid; BAC level can be measured approximately by a chart that relates weight and number of drinks to BAC level).

The ruling in People v. Alfaro, 143 Cal. App. 3d 528, 192 Cal. Rptr. 178 (1983), expands the scope of the vagueness standard. Previously that standard only required that a statute give a person adequate *notice* of what was proscribed and explicit standards for enforcing the statute. *See, e.g.,* Kolender v. Lawson, 103 S.Ct. 1855 (1983) (loitering statute that required a suspect to provide "credible and reliable" identification held to be unconstitutionally vague). Due process does not require that a violator be absolutely certain of what acts fall within the meaning of the statute, a fact recognized by the Utah Supreme Court in holding that the former Utah illegal per se DUI standard of .10% BAC gave a person adequate notice of what was unlawful, and therefore was not unconstitutionally vague. Greaves v. State, 528 P.2d 805, 808 (Utah 1974).

A second constitutional issue, similar to the *Alfaro* issue, was raised by Judge Tuckett in his dissent in *Greaves*. Judge Tuckett argued that the statute did not specify and prohibit conduct, but instead made criminal the *status* of one's blood. *Id.* at 808 (Tuckett, J., dissenting); *see also* Robinson v. California, 370 U.S. 660 (1962) (unconstitutional to make narcotics addiction a crime when the individual has not used narcotics within the state nor engaged in any irregular behavior). The status argument fails to recognize that the DUI law does not punish a person merely for drinking, but instead punishes a defendant for the voluntary act of drinking and then driving, a public act that creates a substantial health and safety hazard. *See Alcohol Abuse, supra* note 390, at 1675 (a driver with a .08% BAC is four times as likely to cause a fatal accident as a driver who has not been drinking); *cf.* Powell v. Texas, 392 U.S. 532 (1968) (punishing a person for public intoxication is not unconstitutional punishment for mere status).

449. The privilege against self-incrimination under the United States Constitution and most state constitutions is only a bar against compelling "testimonial" evidence and not against requiring a suspect to provide "real or physical" evidence. *See* Schmerber v. California, 384 U.S. 757 (1966) (extraction of a blood sample for BAC measurement); *see also*

compelled to perform affirmative acts[450] that provide self-incriminating evidence.[451] The standard breathalyzer test requires the accused to make an exerted act of blowing into a device, which measures blood alcohol content.[452] Therefore, a driver who submits to the BAC test only because of the longer license revocation period for refusing to submit[453] may be able to challenge successfully the use of the BAC test as unconstitutionally compelled self-incriminating evidence.[454]

Third, the new provision that denies license renewal until all monetary costs are paid[455] may violate the equal protection clause of the fourteenth amendment to the United States Constitution. The Department of Public Safety has no discretion to reinstate the license of a driver who nonnegligently fails to pay all fines and costs.[456] Thus, although the statute appears neutral on its face, it in fact operates to the disadvantage of the poor[457] because a poor person who nonnegligently is unable to pay the fines and costs is denied a driver's license solely because of economic status. Denial of a driver's license beyond the statutory period therefore becomes an imposition of additional punishment because of a person's economic inability to pay a fine. In analogous cases, the United States Supreme Court has held that such state actions deny equal protection because the defendant is "subject to imprisonment solely because of his indigency."[458] If there is an equal protection problem,

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People v. Ramirez, 199 Colo. 367, 609 P.2d 616, 620 n.8 (1980) (citing cases from 19 jurisdictions that classify field sobriety tests as real evidence).

450. *Compare* Hansen v. Owens, 619 P.2d 315 (Utah 1980) (handwriting sample is an affirmative act) *with* State v. McCumber, 622 P.2d 353, 358 (Utah 1980) (dictum) (giving a hair sample is not an affirmative act).

451. Hansen v. Owens, 619 P.2d 315, 316-17 (Utah 1980) (giving a handwriting sample is an affirmative act that produces self-incriminating evidence and is protected under the Utah Constitution).

452. In Powell v. Cox, 608 P.2d 239 (Utah 1980), the Utah Supreme Court held that failure to give a deep lung air sample by passing mouth air into the breathalyzer constituted a refusal under Utah's Implied Consent Law. *Id.* at 241.

453. *See supra* notes 431-34 and accompanying text.

454. Alternatively, the court may overturn Hansen v. Owens, 619 P.2d 315 (Utah 1980), and recognize BAC test results as "real" evidence, unprotected against self-incrimination. *See* Salt Lake City v. Carner, 664 P.2d 1168, 1172-73 (Utah 1983) (Durham, J., concurring in result) (*Hansen* should be overruled as wrongly decided).

455. UTAH CODE ANN. § 41-6-44(5) (Supp. 1983).

456. *Id.*

457. *Cf.* Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization provision most likely to affect the poor and minorities); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1010-11 (1978) (discussing *Skinner*).

458. Tate v. Short, 401 U.S. 395, 398 (1971) (holding unconstitutional a jail sentence imposed when only a fine was statutorily authorized because of the defendant's economic

due process would at least require a hearing to consider the issue of whether the defendant's failure to pay is without fault.[459]

In addition, the new provision denying license reinstatement until all monetary costs are paid does not provide for a hearing. The United States Supreme Court has recognized that the Constitution requires some kind of procedures to minimize the risk of an erroneous decision when the state suspends or revokes a driver's license.[460] Therefore, the provision denying license reinstatement may be a denial of procedural due process because the driver is not provided a hearing. Arguably, the statute can be read as providing for a hearing, but a hearing where the only issue the Department of Public Safety may consider is: "Have the monetary costs been paid?"[461]

Finally, the provision expanding the definition of "prior convictions" to include alcohol-related convictions in other states, as well as in Utah,[462] may be unconstitutional if the right to counsel was not available in the prior conviction and that prior conviction

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inability to pay the fine); *see* Bearden v. Georgia, 103 S.Ct. 2064 (1983) (holding unconstitutional a revocation of probation because of economic inability to pay a fine and restitution); Williams v. Illinois, 399 U.S. 235 (1970) (holding unconstitutional a jail sentence beyond the maximum authorized sentence because of the defendant's economic inability to pay a fine).

It should be noted, however, that each Supreme Court case was a criminal case involving imprisonment. Imprisonment is a greater deprivation of a person's liberty than the failure to reinstate a driver's license. However, the Court also has recognized that a driver has a constitutionally protected interest in the use and possession of his license. *See* Boll v. Burson, 402 U.S. 535, 539 (1971). In *Bearden*, however, the Court did not focus on the right that was being deprived, but rather on the justification for depriving that right. In an analogy to revocation of probation of a chronic alcoholic who cannot control his chronic drunken driving, the Court indicated that indigency, unlike chronic drunken driving, is itself not a threat to the safety and welfare of society. 103 S.Ct. at 2070 n.9 (dictum). Thus, it is questionable whether a driver can be denied license reinstatement, not because of chronic drunken driving, but because of indigency. On the other hand, the state has a valid interest in the financial solvency of drivers as indicated by the requirement that car owners have insurance as a prerequisite to obtaining license plates or a safety inspection. UTAH CODE ANN. § 31-41-13(2)(a) (Supp. 1979). Despite that requirement, there remain situations where the insurance requirement is met despite the indigency of the driver—for example, where an indigent person drives a company provided vehicle, which is licensed and insured by the company.

459. The Supreme Court's opinion in Bearden v. Georgia, 103 S.Ct. 2064 (1983), can be read as allowing probation revocation and imprisonment as long as the state provides the defendant with a hearing at which the person can present the fact that his or her failure to pay the fine was without fault, and if the state has no other alternatives than imprisonment. *Id.* at 2074.

460. *See* Dixon v. Love, 431 U.S. 105, 112 (1977); Boll v. Burson, 402 U.S. 535, 539 (1971); *see also* Mackey v. Montrym, 443 U.S. 1, 10 n.7, 13 (1979).

461. UTAH CODE ANN. § 41-6-44(5) (Supp. 1983) ("furnished evidence satisfactory to the department that all fines and fees . . . and rehabilitation costs . . . have been paid").

462. *Id.*; *see supra* notes 423-24 and accompanying text.

is being used to increase the DUI penalty.[463] A driver can be prosecuted for DUI or other alcohol-related offenses without a right to counsel where no imprisonment is involved.[464] The mandatory minimum imprisonment provision[465] of the Utah DUI statute may be applied unconstitutionally because it increases the minimum amount of jail time based solely on prior convictions, without allowing judicial consideration of whether a prior conviction was obtained without the right to counsel.[466]

The new and amended DUI laws are a significant step in reducing drunken driving within Utah. Although the new laws raise several constitutional problems, they also reconcile many of the problems common to DUI programs and provide a model for other states.

B. DUI Victim Restitution

A law[467] enacted during the 1983 Utah legislative session provides relief to DUI victims who would not otherwise receive compensation for their losses. A $100 fee imposed on all Utah DUI convicts[468] will provide revenue for administration and disbursement to eligible victims. Although the new law reflects increasing legislative concern for the DUI victim,[469] problems in program

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463. *See, e.g.*, Baldasar v. Illinois, 446 U.S. 222, *reh'g denied*, 447 U.S. 930 (1980) (defendant's prior misdemeanor conviction, at which he was not given the right to counsel, could not be used to convert a subsequent misdemeanor into a felony with a prison term).

464. *See* Scott v. Illinois, 440 U.S. 367, 373 (1979) (right to counsel only required if defendant actually is imprisoned).

465. UTAH CODE ANN. §§ 41-6-44(4), -44(5) (Supp. 1983).

466. For example, if one of two prior DUI convictions was obtained without giving the defendant the right to counsel (because the judge would not impose imprisonment), then punishment for a third DUI violation, which occurred in Utah, would require at least 20 days of additional punishment (statutory minimum of 30 days for a third conviction, minus a maximum statutory requirement of 10 days for a second conviction). *Id.* § 41-6-44(5). The increased imprisonment would be based solely on the prior conviction where the defendant was not afforded the right to counsel, and thus, unconstitutionally circumvents Scott v. Illinois, 440 U.S. 367 (1979). *See supra* note 464 and accompanying text.

467. Victim Restitution Act of Mar. 30, 1983 (codified at UTAH CODE ANN. §§ 41-25-1 to -7 (Supp. 1983)). The enactment originated as H.R. 143, was cosponsored by Reps. Stephen J. Rees and J. Kirk Rector and became effective May 10, 1983.

468. UTAH CODE ANN. §§ 41-25-1 to -3 (Supp. 1983). The statute imposes a $100 fee on violators convicted under the automobile homicide statute, *id.* § 76-5-207, under local DUI ordinances not inconsistent with state DUI statutes, *id.* § 41-6-43(1), or under the state DUI statute, *id.* § 41-6-44. The fee also applies to convictions resulting from plea bargaining, where one of the above-mentioned violations originally was charged. *Id.* § 41-25-1.

469. The new law forms part of the legislative response to growing public outrage over drunken driving in Utah. Public opinion surveys showed strong support for a DUI victim restitution program. Floor Debate, Remarks of Sen. Dix McMullin, 45th Utah Leg., Gen.

mechanics both threaten adequate funding and discourage victim recovery.

While the Utah Code already mandates restitution to victims of crime,[470] the new law establishes a fund to reimburse victims who otherwise would be unable to recover from their offenders.[471] Collection often is impossible where the offender is indigent and uninsured,[472] or where actual damages exceed insurance coverage and proceeds from the sale of the offender's property.[473] The new law provides restitution to DUI victims in that predicament.

To qualify for reimbursement, the statute requires a criminal conviction of the DUI offender as well as a final judgment "in a court of competent jurisdiction."[474] Although sponsors of the bill intended that provision to require a civil judgment[475] in addition to a criminal conviction, the language is broad enough that a post-conviction criminal restitution order may suffice.[476] Eligible victims may receive up to $25,000 of their unpaid "actual damages."[477] It is unclear, however, whether the legislature intended actual damages to include "pain and suffering," or merely pecuniary "out-of-pocket" expenses.[478]

Sess. (Feb. 16, 1983) (S. Recording Tape No. 161, side 1); *see also* THE GOVERNOR'S COMM'N ON DRINKING & DRIVING, RECOMMENDATIONS OF THE GOVERNOR'S COMMISSION ON DRINKING AND DRIVING 20 (Nov. 5, 1982) (recommending a victim restitution program funded by DUI offender contributions and other related legislation). For a discussion of related DUI legislation, see *supra* notes 389-466 and accompanying text.

470. UTAH CODE ANN. § 76-3-201(3) (Supp. 1983). The statute requires court-ordered restitution to the victim for his pecuniary damages unless the court specifically finds restitution inappropriate. *Id.*

471. *Id.* § 41-24-1.

472. Remarks of Sen. McMullin, *supra* note 469. The Department of Transportation estimates that 40% of Utah drivers do not carry no-fault insurance. *Id.*

473. *Id.*

474. UTAH CODE ANN. § 41-25-2(1) (Supp. 1983).

475. Interview with Rep. Stephen J. Rees, cosponsor of H.R. 143, in Salt Lake City, Utah (Sept. 5, 1983); Interview with Rep. Ralph Finlayson, drafter of H.R. 143, in Salt Lake City, Utah (Aug. 27, 1983).

476. Criminal courts have jurisdiction to adjudge a victim's pecuniary damages and order the convict to make restitution. UTAH CODE ANN. § 76-3-201(3) (Supp. 1983).

477. *Id.* § 41-25-2(1). The spouse of a DUI offender is ineligible to receive restitution funds. *Id.* § 41-25-3(1)(a). For other eligibility restrictions, see *id.* § 41-25-3(1)(b)-(e).

478. Actual damages are not defined by the new law or by any other Utah Code provision. Although other legislators questioned whether actual damages encompassed a broader scope of losses, during house and senate debates, sponsors of the legislation mentioned only reimbursement of pecuniary damages. Floor Debate, Remarks by Rep. Stephen J. Rees, 45th Utah Leg., Gen. Sess. (Feb. 1, 1983) (H.R. Recording Tape No. 23-3, side 1); Remarks by Sen. McMullin, *supra* note 469. Pecuniary damages are statutorily defined as all special damages recoverable in a civil action, including property damages, lost earnings and medical expenses. UTAH CODE ANN. § 76-3-201(4)(b) (Supp. 1983). Utah courts interpreting "actual

The Utah Department of Public Safety will administer the program[479] with legislative apportionments from the $100 fees.[480] That novel funding approach shifts the burden of unrecovered victim losses from the victim to DUI offenders as a group. The Utah Department of Public Safety will hold a hearing to determine a victim's eligibility within 90 days of an application.[481] At the hearing, the applicant must show that he searched with reasonable diligence for property belonging to the judgment debtor[482] and that enforcement of a writ of execution failed to recover sufficient property to satisfy the judgment.[483] The Utah Department of Public Safety will acquire judgment creditor rights for the amount of reimbursement to the victim.[484]

Although the new law authorizes administrative oversight and provides eligibility guidelines, the practical impact of the program is unclear. For example, neither the drafter nor the sponsor of the legislation compiled statistics to assess whether revenue from the $100 fees would meet the projected demands on the fund.[485] Studies of other state victim compensation programs, however, suggest

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damages" under the new statute will find support for both broad and narrow constructions. On one hand, common law actual damages traditionally include all compensatory damages, including pain and suffering. *See* United States v. State Road Dep't, 189 F.2d 591, 595 (5th Cir. 1951); Anderson v. Alcus, 42 S.W.2d 294, 296 (Tex. Civ. App. 1931); Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1003, 1009 (1900). On the other hand, the Utah Supreme Court has limited restitution awards to pecuniary loss. *See* State *ex rel.* Besendorfer, 568 P.2d 742, 744 (Utah 1977).

Policy considerations also may compel a narrow interpretation. Twenty-six of 30 state restitution programs expressly refuse reimbursement of pain and suffering damages, in part because such awards substantially deplete restitution funds. *See* Ramker & Meagher, *Crime Victim Compensation: A Survey of State Programs*, 46 FED. PROBATION Q., Mar. 1982, at 73-74. For example, Hawaii reported that 39.2% of its 1977 awards were for pain and suffering alone. Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUDICATURE 485, 492 (1980).

479. UTAH CODE ANN. §§ 41-25-2 to -6 (Supp. 1983).

480. *Id.* § 41-25-2(2). No applications may be filed until the legislature has appropriated funds to the victim restitution fund for that year. *Id.* Sponsors expect the first legislative appropriation to be made in early January 1984. At that time, the legislature will review incoming revenue and make legislative revisions in the restitution program. Rees Interview, *supra* note 475.

481. UTAH CODE ANN. § 41-25-3(1) (Supp. 1983).

482. *Id.* § 41-25-3(1)(e).

483. *Id.* § 41-25-3(1)(d). "Judgment" here refers to actual damages for incurred losses, as distinct from punitive or other civil damages. *See id.* § 41-25-2(1); *see also supra* note 478 and accompanying text (discussing the meaning of actual damages).

484. UTAH CODE ANN. § 41-25-6 (Supp. 1983). The statute provides that any amounts later recovered by the Department of Public Safety shall be deposited in the general fund. *Id.*

485. Rees Interview, *supra* note 475; Finlayson Interview, *supra* note 475.

that the new program may suffer from inadequate funding[486] and unusually high claim costs.[487] Moreover, administrative costs are uncertain.[488]

Serious problems also may result from over-restrictive eligibility requirements. By requiring criminal conviction of the DUI offender,[489] the statute excludes uncompensated victims in two situations: First, where the offender dies in a collision injuring the victim, no prosecution or conviction will ensue.[490] Thus, even if the coroner's report confirms an illegal blood alcohol level in the body,[491] the victim or victim's survivors are ineligible for funds under the new program.[492] Second, where the offender avoids conviction on technical grounds, the new Act also denies reimbursement. Thus, despite proof of the offender's drunkenness in subsequent civil litigation, failure to meet the DUI conviction

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486. A study of five state victim restitution programs funded solely by offender contributions showed that Texas and Tennessee have failed to meet claim demands. Ramker & Meagher, *supra* note 478, at 71-72. Texas collected less than one-third of the projected revenue from DUI offender victim restitution fines, citing negligent county court collection as the reason for the shortfall. *Id.* at 72. Utah court clerks also have objected to proposed additional collection tasks. Floor Debate, Remarks by Sen. Dale E. Stratford, 45th Utah Leg., Gen. Sess. (Feb. 16, 1983) (S. Recording Tape No. 161, side 1).

487. Senate sponsor McMullin anticipated that claims would surpass the amount generated by the $100 fees. Remarks by Sen. McMullin, *supra* note 469. In California, restitution claims by vehicular crime victims run about 50% higher than all other claims. Hoelzel, *supra* note 478, at 492. Moreover, other states' programs temper claim costs with various restrictions not found in the Utah statute: (1) Over one-half of the programs require that the victim incur some minimum loss, typically $100 to $200, Ramker & Meagher, *supra* note 478, at 72; (2) Applicants in about one-third of the programs must show financial need, *id.* at 75; (3) Only four state programs compensate victim pain and suffering, *id.* at 73; (4) No other state program covers property damages, Hoelzel, *supra* note 478, at 485.

488. The Department of Public Safety does not anticipate any need for additional staffing. Rees Interview, *supra* note 475. However, the average administrative costs of other state programs comprise a significant percentage of the total program budget. *See* Ramker & Meagher, *supra* note 478, at 69 (administrative costs average 6 to 8% of the total budget); Hoelzel, *supra* note 478, at 488 (administrative costs average 30% of the total budget).

489. UTAH CODE ANN. § 41-25-2(1) (Supp. 1983).

490. *Id.* § 41-6-44(1). The statute refers only to persons, not deceased persons. At common law, a "person" is defined as a living human being. *See, e.g.*, Telefilm, Inc. v. Superior Court, 194 P.2d 542, 547 (Cal. Ct. App. 1948), *rev'd on other grounds*, 33 Cal. 2d 289, 201 P.2d 811 (1949). Utah follows the English common law as developed and expounded by courts in the United States where not repugnant to, or in conflict with, the United States or Utah constitutions or laws. *See* Cahoon v. Pelton, 9 Utah 2d 224, 230, 342 P.2d 94, 97-98 (1959) (interpreting UTAH CODE ANN. § 68-3-1 (1953)).

491. Dead or unconscious drivers are presumed not to have withdrawn consent to blood alcohol tests as authorized under section 41-6-44.10(1). UTAH CODE ANN. § 41-6-44.10(3) (Supp. 1983).

492. That exclusion is particularly harsh because collisions involving one fatality increase the probability of serious injury to the victim.

requirement[493] would preclude victim recovery of uncompensated losses.

A more pervasive barrier to victim restitution is the likely prerequisite of a civil judgment against the DUI offender.[494] Utah statutes already require criminal courts to assess the victim's pecuniary damages and order restitution.[495] Thus, there is no need for victims seeking only unpaid pecuniary damages to relitigate the damage issue.[496] Moreover, by the end of a criminal proceeding, the victim has invested many hours in assisting the prosecution and in reliving a painful experience. The requirement that the victim expend additional time, energy and money to relitigate issues already adjudicated[497] probably will discourage applications for reimbursement under the new program. The civil judgment prerequisite thus not only works counterproductively to the compensatory purpose of the new law,[498] it also creates unnecessary litigation.[499]

Another potential problem with the new law stems from the $100 "fee" imposed on all DUI offenders.[500] Arguably, the $100 charge constitutes a fine rather than a fee when imposed on victimless DUI offenders.[501] A court ruling embracing that rationale would remove many DUI cases from trial before justices of the peace by pushing the total DUI fine beyond the justices' statutory jurisdiction.[502] However, it may be argued that the $100 charge

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493. UTAH CODE ANN. § 41-25-2(1) (Supp. 1983).

494. *Id.*; *see supra* notes 474-76 and accompanying text.

495. UTAH CODE ANN. § 76-3-201(3) (Supp. 1983). That statute directs courts to order restitution of up to twice the amount of pecuniary damages incurred. *Id.*

496. For many victims, pecuniary loss alone will exceed the $25,000 reimbursement limit in property damages, medical expenses and work disability. Other victims may want reimbursement only for out-of-pocket expenses.

497. The legislature has safeguarded somewhat against such duplicative litigation. UTAH CODE ANN. § 76-3-201.2(2) (Supp. 1983): "If conviction in a criminal trial necessarily decides the issue of a defendant's liability for pecuniary damages of a victim, that issue is conclusively determined as to the defendant if it is involved in a subsequent civil litigation."

498. The litigation requirement is especially burdensome because the new law does not offer emergency assistance to alleviate immediate victim hardships. By contrast, 70% of state restitution programs in the United States provide such emergency assistance. Ramker & Meagher, *supra* note 478, at 73.

499. *But see supra* note 497.

500. UTAH CODE ANN. § 41-25-1 (Supp. 1983).

501. A fine is a "pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor." *See* Frazier v. Terrill, 65 Ariz. 131, 175 P.2d 438, 441 (1946). Requiring an offender to pay $100 for actual damages not caused by his conduct may constitute punishment. Floor Debate, Remarks by Sens. Terry Williams and Karl G. Swan, 45th Utah Leg., Gen. Sess. (Feb. 16, 1983) (S. Recording Tape No. 161, side 1).

502. UTAH CODE ANN. § 78-5-4(1)(a) (Supp. 1983) limits justice of the peace jurisdiction to violations with penalties of up to six months in jail and $299 in fines. Section 41-6-

constitutes a fee because its primary purpose is to fund the compensation program and not to punish the offender.[503]

Overall, the new law represents an important first step toward ensuring restitution for DUI victims. Although administrative uncertainties and over-restrictive eligibility requirements threaten the program's efficacy, the legislature can make needed amendments before the program commences in 1984.[504]

VIII. JUVENILE LAW

Youth Corrections Victim Restitution

The 1983 Utah Legislature passed an act granting the Division of Youth Corrections ("DYC") authority to establish public service work programs that will enable offenders under the DYC's jurisdiction to make restitution for their crimes.[505] The Act corrects the jurisdictional and funding limitations that hampered prior restitution efforts and thereby extends the benefits of restitution work programs to serious juvenile offenders and their victims. Restitution efforts still may be hampered, however, by ambiguities in the Act.

Prior to the 1983 Act, juvenile restitution programs in Utah were administered only by the juvenile court.[506] Under the court-operated programs, restitution efforts often were hampered by jurisdictional limitations because the court's jurisdiction ended when a youth was placed in a secure facility under DYC custody.[507]

44(3) punishes first-time DUI offenders "by imprisonment for not less than 60 days nor more than 6 months, or by a fine of $299, or by both such fine and imprisonment . . . ." *Id.* § 41-6-44(3) (Supp. 1983). For a discussion of additional punishment procedure, see *supra* notes 409-19 and accompanying text.

503. Rees Interview, *supra* note 475.

504. Remarks by Rep. Rees, *supra* note 478.

505. Act of Mar. 9, 1983, ch. 289, §§ 1-7, 1983 Utah Laws 1160, 1160-63 (codified at UTAH CODE ANN. §§ 55-11b-1 to -25 (Interim Supp. 1983)).

506. *See* UTAH CODE ANN. § 78-3a-39(7)-(8) (Supp. 1982) (formerly *id.* § 55-10-10(7)-(8) (1973)). That statute authorized the juvenile court to order the offender "to repair or replace or to otherwise make restitution for damage or loss caused by his wrongful act . . . ." *Id.* § 78-3a-39(7). In 1973, a pilot program was set up through a nonprofit corporation called Youth, Inc., funded by "interested citizens," to enable youths to pay restitution through court operated public service work projects. SECOND DISTRICT COURT FOR THE STATE OF UTAH RESTITUTION WORK PROGRAMS (1981). Additional funds were provided by a 1979 amendment, which allowed the juvenile courts to keep up to 20% of all fines collected for use in the work programs. UTAH CODE ANN. § 78-3a-54 (Supp. 1981). Prior to that amendment, the counties kept all fine money. *Id.* § 78-3a-54 (1978).

507. *See* UTAH CODE ANN. § 78-3a-40 (Interim Supp. 1983). *But see* State v. Schroe-

Without continuing jurisdiction, the court was unable to enforce its restitution order.[508]

The new Act eliminates that jurisdictional problem by giving the DYC statutory authority to develop and administer its own restitution work programs.[509] Only "youth offenders" in the DYC's custody may participate in the work programs,[510] and victim reimbursement is conditioned on the youth's involvement in the program.[511] The Act also requires that the work programs be "public service work projects."[512]

Prior to passage of the new Act, funding shortages limited the number of youths that could be involved in the juvenile court's

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der, 598 P.2d 373, 375 (Utah 1979) (where the court specifically retains jurisdiction to assess restitution, temporary commitment to the Youth Development Center does not end that jurisdiction). Note that not all youths in the Division of Youth Corrections' ("DYC") custody are placed in institutions; some are placed in community placements, in a group home or a "proctor home" where the youth lives in a one-on-one relationship. Telephone interview with Wayne Holland, DYC (Sept. 9, 1983).

508. Although the juvenile court had no legal authority to enforce its restitution order while the youth was in the DYC's custody, the division traditionally had cooperated with the court to see that restitution was paid whenever possible. Interview with Dan Davis, Police-Victim Liaison Services, Second District Juvenile Court for the State of Utah, in Salt Lake City, Utah (Sept. 12, 1983).

509. UTAH CODE ANN. § 55-11b-5(9) (Interim Supp. 1983).

510. *Id.* § 55-11b-1(11). A "youth offender" is defined as any juvenile admitted by the juvenile court to the custody, care and jurisdiction of the DYC. *Id.*

511. *Id.* § 55-11b-23(1). For a discussion of that requirement, see *infra* notes 531-33 and accompanying text. Youths are to be assigned to the work programs according to their need. Memorandum, Region I Youth Corrections Restitution Program (undated) (on file with the DYC, Salt Lake City, Utah). The DYC will use three criteria to determine which youths are to be included in the program:

(a) The amount of restitution ordered. As the amount of restitution increases, so does the difficulty of paying it. Therefore, youths with the largest restitution orders will receive priority in the program.

(b) The perceived difficulty a youth will have in finding a job outside the program. Those who are committed to an institution rather than an in-community placement, and thus are unable to work outside the program, will be given priority, as will those without skills or job experience.

(c) The length of time the restitution has gone unpaid. Those who have been in the system with an unpaid restitution order for the longest periods will be given priority.

Holland Telephone Interview, *supra* note 507.

512. UTAH CODE ANN. § 55-11b-1(12) (Interim Supp. 1983). In developing its work program, the DYC will make use of the system set up by the juvenile court. Memorandum from Dan R. Davis, Police-Victim Liaison Services, Second District Juvenile Court for the State of Utah, to Sue Marquardt, DYC Program Supervisor (Aug. 30, 1983) (on file with DYC, Salt Lake City, Utah) (discussing youth corrections restitution program). The court has placed youths with over 45 local government agencies in Salt Lake, Tooele and Summit Counties alone. *See* Letter from Dan R. Davis, Police-Victim Liaison Services, Second District Juvenile Court for the State of Utah, to agencies involved in work programs (undated) (on file with Utah Second District Juvenile Court, Salt Lake County, Utah).

restitution program.[513] The new Act eliminates funding shortages by establishing a special "nonlapsing restricted account" in the general fund to finance the DYC's work programs.[514] Except for an initial deposit of $30,000 from the state,[515] the account will be funded entirely by the "youths or their parents," who may be ordered by the court to contribute to the cost of the youths' care.[516] All money received will be used to pay crime victims according to the number of hours the offenders work.[517] Administrative and overhead costs are to be paid out of the DYC's budget and not the special account.[518]

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513. In 1981, approximately 15,000 youths were referred to the Utah Juvenile Court. UTAH STATE JUVENILE COURT 1981 ANNUAL REPORT 24 (1982) [hereinafter cited as 1981 ANNUAL REPORT]. In 1982, only 1155 juveniles were involved in the court's work projects. Letter from Dan R. Davis, *supra* note 512. During the flooding in the spring of 1983, the court sent so many youth offenders to assist in sandbagging efforts that the program's funds were depleted and no more work assignments were made for over 45 days. Davis Interview, *supra* note 508.

514. UTAH CODE ANN. § 55-11b-24 (Interim Supp. 1983). The account is part of the general fund, but at the end of each fiscal year any excess is carried over to the next year's special account instead of being returned to the general fund.

515. *See* Floor Debate by Rep. Olene Walker, 45th Utah Leg., Gen. Sess., (Mar. 3, 1983) (H.R. Recording Tape No. 5, side 1); Memorandum from Sue Marquardt, DYC Program Supervisor, to Carole Floyd, Bureau of Finance (Sept. 14, 1983) (on file with DYC, Salt Lake City, Utah) (discussing restitution funds).

516. UTAH CODE ANN. § 55-11b-25 (Interim Supp. 1983). Those fees are assesed by the court and collected by the Utah Office of Recovery Services. *See id.* § 55-15c-4(4) (Supp. 1981). After subtracting a collection fee, half of the money is turned over to the DYC for deposit in the special account. *Id.* § 55-11b-25 (Interim Supp. 1983). The other half of the money is given outright to the DYC. *See* Floor Debate by Rep. Olene Walker, *supra* note 515. Unfortunately, the youth's parents may be unable to pay the cost of the offender's care. Nationwide research shows that poor youths come into juvenile court more frequently than do middle or upper class youths. Braithewaite, *Delinquency and the Question of Values*, 25 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 273, 273 (1981). Because of the problems of offender-financed restitution, some states have turned to state-financed victim compensation schemes. *See, e.g.*, CAL. GOV'T CODE §§ 13959-13969.1 (West 1980 & Supp. 1983); N.Y. EXEC. LAW §§ 620-635 (McKinney 1982).

517. UTAH CODE ANN. § 55-11b-24 (Interim Supp. 1983). The DYC expects its program to work like the court-operated program and even will use the court's forms in setting up work arrangements with agencies. Under the DYC program, the youth will receive a three-dollar-per-hour credit towards his or her restitution. The DYC will then notify the court of the juvenile's hours worked, and the court will disburse money out of the special fund to the victims as directed by the DYC. *See* Memorandum from Kathy Gee, Supervisor of Region II Youth Corrections, to Nancy Hogarty, Regional Administrator of DYC (Sept. 13, 1983) (discussing procedures for youth corrections restitution payment); Memorandum from Paul Curtis, Director of Region III Division of Youth Corrections, to Russ Van Vleet, Director of Division of Youth Corrections (Sept. 12, 1983) (discussing procedures for payment of restitution). In order to "eliminate duplication and confusion between the Juvenile Court and Youth Corrections Programs," the DYC will use the juvenile court's services to pay victims. *See* Memorandum from Dan Davis, *supra* note 512.

518. In house debates, the bill's sponsor, Rep. Olene Walker, said that there would be

The Act also gives the DYC authority to condition parole, placement or release on the payment of restitution[519] and to assess monetary or nonmonetary[520] restitution "where there is no court order requiring restitution,"[521] or where a subsequent violation results in parole revocation while the youth is in DYC custody.[522] Those newly granted powers, however, must be exercised in accordance with due process requirements.[523]

By providing restitution opportunities to DYC offenders and their victims, the new Act benefits individuals who were excluded from previous restitution programs.[524] Although youths in DYC custody comprise only five percent of all youths in the juvenile court system,[525] the extension of the Act to those youths is significant because DYC offenders usually are the most serious offenders.[526] Thus, the serious offenders now can benefit by learning job skills, victims of serious juvenile crime no longer are denied restitution because of jurisdictional or funding strictures [527] and society may benefit through reduced recidivism rates.[528]

"absolutely no administrative costs in this bill," and indicated that all operating costs would come from DYC's regular operating budget. Floor Debate by Rep. Olene Walker, *supra* note 515. DYC administrators agree that funds from the special account will be used solely to pay victims. Telephone interview with Sue Marquardt, DYC Program Supervisor (Sept. 11, 1983). However, that interpretation is contrary to the statutory language, which reads "[t]he money shall be used exclusively for *establishing* the work programs . . . ." UTAH CODE ANN. § 55-11b-25(2) (Interim Supp. 1983) (emphasis added).

519. UTAH CODE ANN. § 55-11b-23(2) (Interim Supp. 1983). The DYC has authority to parole youths and to stipulate conditions of parole. *Id.* § 55-11b-10.

520. *Id.* § 55-11b-23(2). The DYC has no current plans for nonmonetary restitution programs. Holland Telephone Interview, *supra* note 507. Other jurisdictions have experimented with such programs with limited success. *See generally* Hudson, Galway & Cheaney, *When Criminals Repay Their Victims: A Survey of Restitution Programs*, 60 JUDICATURE 312, 314-16 (1977) (discussing types of service restitution programs used throughout the country).

521. UTAH CODE ANN. § 55-11b-23(2) (Interim Supp. 1983).

522. *Id.* The DYC has authority to revoke parole. *Id.* § 55-11b-11.

523. In State *ex rel.* D.G.W., 70 N.J. 488, 361 A.2d 513 (1976), the New Jersey Supreme Court held that conditioning a juvenile's probation on the payment of restitution required a summary hearing. 361 A.2d at 521. The court reasoned that because the youth's liberty and property were at stake, due process requirements had to be met. *Id.* at 520-21. Balancing the youth's interests against the state's interest in a speedy resolution of the dispute, the court held that a summary hearing was sufficient. *Id.* at 521.

524. *See supra* note 507 and accompanying text.

525. 1981 ANNUAL REPORT, *supra* note 513, at 24.

526. *Id.*

527. *See supra* notes 510-17 and accompanying text.

528. In 1979, Jim Marchel of the Second District Juvenile Court for the State of Utah compared the recidivism rates of 199 juveniles involved in the court's work program with the recidivism rates of 208 juveniles who had been ordered to pay restitution but who did not participate in the program. The study showed that one year later, "the treatment group

Unfortunately, however, ambiguities in the Act may hamper restitution efforts. For example, it is unclear whether the Act will allow offenders to work for private enterprise as part of the DYC work program. Although the statute defines "work programs" as "public service work projects,"[529] the legislative history indicates that the term "work programs" was intended to include private work projects.[530] Precluding private work projects would deprive the restitution program of valuable resources that could enable more youths and their victims to benefit from restitution programs.

Similarly, the Act requires that victim reimbursement be conditioned on the offender's involvement in a work program.[531] That requirement may preclude a youth from paying restitution on his own volition while under DYC custody. The Act's primary purpose, however, is victim compensation.[532] If a youth has the resources to pay restitution, he should be allowed to do so, regardless of participation in the work program. The better interpretation is that involvement in a work program is required only if the youth's restitution order is to be paid from the fund established by the Act. Although that interpretation would mean that some youths will pay restitution without receiving the rehabilitative benefits of participation in the work programs,[533] it would ensure that the Act's primary goal of victim compensation is met.

The DYC Restitution Act provides a self-supporting system for the restitution of victims of serious juvenile crimes.[534] The Act

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showed a significant reduction in recidivism . . . over the control group." J. Marchel, Second District Juvenile Court for the State of Utah, Progress Summary, Victim and Police Liaison Project (Aug. 6, 1979); *cf.* Cheaney, Hudson & McLagen, *A New Look at Restitution: Recent Legislation, Programs and Research*, 61 JUDICATURE 348, 357 (1978) (criticizing studies showing no decline in recidivism rates of adult offenders as a result of involvement in restitution programs). One explanation for the deterrent effect of the restitution work program is that when offenders have to work off their restitution they realize that they have injured an individual and not just the anonymous state. Schafer, *Restitution to Victims of Crime: An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243, 249 (1965).

529. UTAH CODE ANN. § 55-11b-1(12) (Interim Supp. 1983).

530. Floor Debate by Rep. Olene Walker, *supra* note 515. Additionally, the DYC has indicated that it might use private enterprise in the future, although it has no current plans to do so. Telephone interview with Sue Marquardt, DYC Program Supervisor (Sept. 2, 1983).

531. UTAH CODE ANN. § 55-11b-23(1) (Interim Supp. 1983).

532. *See* Floor Debate by Sen. Dale Stratford, 45th Utah Leg., Gen. Sess. (Mar. 9, 1983) (S. Recording Tape No. 299, side 1); Floor Debate by Rep. Olene Walker, *supra* note 515.

533. *See supra* note 528 and accompanying text.

534. Floor Debate by Sen. Dale Stratford, *supra* note 532. Although the initial deposit

removes the funding and jurisdictional limitations that have precluded serious offenders and their victims from the benefits of the juvenile court's work programs. Ambiguities in the Act, however, may be interpreted in a manner that would hinder restitution efforts. To maximize restitution benefits, courts should interpret the Act to allow private involvement in restitution programs and to permit offenders to pay restitution voluntarily, regardless of their participation in the work programs.

IX. Parent and Child

Parental Notification of Minor's Contraceptive Use

The 1983 Utah Legislature enacted a statute[535] requiring any person providing contraceptives[536] to a minor[537] to first notify, "whenever possible," the parents or guardian of the minor.[538] The two purposes of the new statute are to inform parents of their child's sexual activity and to foster communication between parents and child regarding such activity.[539] Three problems with the statute are its failure to clarify the requirement that a parent or guardian be notified "whenever possible," the possibility that the notification requirement breaches a minor's constitutional right of privacy and the possibility that the notification requirement is preempted by federal funding provisions as it applies to federally funded contraceptive distribution.

The first problem with the statute is that it fails to adequately define the requirement[540] that those providing contraceptives to minors notify, whenever possible, the parents or guardians of those minors. No specifications regarding the form or the timing of noti-

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comes out of the state's general fund, the DYC's restitution program is expected to be self-supporting. Debates in both the house and the senate centered on concern over the cost of the program to the state. *Id.*; Floor Debate by Rep. Olene Walker, *supra* note 515.

535. Act of May 10, 1983, ch. 94, 1983 Utah Laws 436 (codified at Utah Code Ann. § 76-7-325 (Interim Supp. 1983)).

536. "Contraceptives" is defined as "appliances (including, but not limited to intrauterine devices), drugs, or medicinal preparations intended or having special utility for prevention of conception." Utah Code Ann. § 76-7-325(1) (Interim Supp. 1983).

537. A "minor" is defined as "any person under the age of 18 who is not otherwise emancipated, married, or a member of the armed forces of the United States." *Id.* § 76-7-321(3).

538. *Id.* § 76-7-325(1).

539. Interview with Rep. Kevin C. Cromar, sponsor of H.R. 343, in Salt Lake City, Utah (Sept. 13, 1983).

540. Utah Code Ann. § 76-7-325(1) (Interim Supp. 1983).

fication are set forth in the statute. Similarly, the phrase "whenever possible" is not defined by the statute. However, in a similar statute, requiring doctors to notify, "if possible," the parents of minors having an abortion,[541] the Utah Supreme Court held that the phrase "notify, if possible," did not give the physician discretion, but *required* him to notify a minor's parents.[542] If the phrase "whenever possible," as used in the new statute, were similarly construed, that requirement would present practical notice problems for some persons providing minors with contraceptives, such as grocery and drugstore clerks. For example, the clerk would be required to ask for and determine the validity of the customer's age identification, take time to notify the minor's parents and deal with the possible surprise of and abuse by the parents. Further, "contraceptives" is defined to include nonprescription as well as prescription contraceptives,[543] thereby creating a long list of items that may be subject to the notice requirement. Uncertainty as to when notification must occur, and for what items it must be given, probably will lead to arbitrary and inconsistent enforcement of the statute.

The second problem with the statute involves the potential conflict with minors' privacy rights. Although the right of privacy is not expressly set forth in the Constitution,[544] the United States Supreme Court has recognized that the fundamental right to privacy is protected by the fourteenth amendment[545] and encompasses decisions involving abortion[546] and contraception.[547]

The right of privacy is not absolute,[548] however, and when in

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541. *Id.* § 76-7-304(2) (1978).

542. H.L. v. Matheson, 604 P.2d 907, 913 (Utah 1979) (construing the requirement in UTAH CODE ANN. § 76-7-304(2) (1978) to "notify, if possible" the parents of a minor seeking an abortion to mean that a physician must notify a minor's parents "if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location and it is feasible or practicable to give them notification"), *aff'd*, 450 U.S. 398 (1981) (plurality opinion).

543. UTAH CODE ANN. § 76-7-325(1) (Interim Supp. 1983).

544. Roe v. Wade, 410 U.S. 113, 152 (1973).

545. *Id.* at 153.

546. *Id.* at 154.

547. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (plurality opinion) (a total ban on distribution of contraceptives to minors would violate a constitutional right to privacy); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (individual's right of privacy includes decisions pertaining to contraception); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (statute prohibiting use of contraceptives found to violate the marital right of privacy); *see also* Doe v. Irwin, 615 F.2d 1162, 1166 (6th Cir. 1980) (minor's privacy rights include access to contraceptives).

548. Carey v. Population Servs. Int'l, 431 U.S. 678, 685-86 (1977) (plurality opinion)

conflict with state action, it must be weighed against state interests.[549] The Supreme Court has employed a two-tiered test in balancing the right to privacy against state interests.[550] First, the state interest must be deemed "compelling"[551] in order to outweigh a minor's privacy interest. Second, regulations promoting those interests must be drafted so as to further only those state interests found to be compelling.[552] Evidence also is required to show that those interests clearly are furthered by the statute.[553]

Although minors, as well as adults, have been held to have the same constitutionally protected privacy rights,[554] a different standard is used for minors.[555] The Supreme Court has indicated that

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(constitutional right of privacy does not automatically invalidate state regulations); Roe v. Wade, 410 U.S. 113, 154 (1973).

549. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154-55 (1973).

550. *See* H.L. v. Matheson, 450 U.S. 398, 413 (1981) (plurality opinion); Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977) (plurality opinion); Eisenstadt v. Baird, 405 U.S. 438, 463-64 (1972) (White, J., concurring in result).

551. *See, e.g.*, Carey v. Population Servs. Int'l, 421 U.S. 678, 688 (1977) (plurality opinion); Roe v. Wade, 410 U.S. 113, 155, 163 (1973) (state's interest in protecting potential life becomes "compelling" when fetus reaches viability; state's interest in mother's health becomes "compelling" after first trimester).

552. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) (burden on fundamental rights justifiable only if regulations are narrowly drawn to serve compelling state interests); Eisenstadt v. Baird, 405 U.S. 438, 463-64 (1972) (White, J., concurring in result) (discussing *Griswold* standard); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (unnecessarily broad regulations may not be used to achieve state's purpose) (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)).

553. Carey v. Population Servs. Int'l, 431 U.S. 678, 690, 696 (1977) (plurality opinion) (no evidence that distribution of contraceptives bore a relation to state's health protection interest); Eisenstadt v. Baird, 405 U.S. 438, 463-64 (1972) (White, J., concurring in result); *see also* Bolger v. Youngs Drug Prods. Corp., 103 S.Ct. 2875, 2883-85 (1983) (finding statute an inadequate means of reaching a legitimate goal); Doe v. Bolton, 410 U.S. 179, 193-95 (1973) (absence of proof that statute requiring abortions to be performed in accredited hospitals only was significantly related to the state's protection of health interest resulted in finding of unconstitutionality); Comment, *H.L. v. Matheson—A Minor Decision About Parental Notice*, 1982 UTAH L. REV. 949, 957-58 (state should provide evidence that statute rationally serves state interest).

554. Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) (plurality opinion); Bellotti v. Baird, 443 U.S. 622, 632 (1979) (plurality opinion) (*Bellotti II*); Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976); *see also In re* Gault, 387 U.S. 1, 13 (1967) ("Neither the fourteenth amendment nor the Bill of Rights is for adults alone").

555. Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976) (minor's privacy rights subject to greater state control than that of adults because minors presumed to have less ability in making important decisions); *see also* H.L. v. Matheson, 450 U.S. 398, 411 (1981) (plurality opinion) (noting greater risks for minors giving informed consent) (quoting Bellotti v. Baird, 428 U.S. 132, 147 (1976) (*Bellotti I*)); Carey v. Population Servs. Int'l, 431 U.S. 678, 692-93 (1977) (plurality opinion) (state has greater power to restrict conduct of minors than conduct of adults); City of Akron v. Akron Center for Reproductive Health, Inc., 103 S.Ct. 2481, 2491 & n.10 (1983) (minors less capable than adults in making certain decisions protected by right of privacy).

only a "significant" state interest is necessary for a state to validly restrict the privacy rights of minors,[556] thus allowing states greater latitude in the regulation of minors.[557] Using that test, the Court has indicated that, although a total ban on the distribution of contraceptives to minors is unconstitutional,[558] restrictions on distribution may be upheld if the state interest is "significant."[559]

Utah's interest in fostering parent-child communication and protecting minors from making uninformed decisions regarding contraception arguably is significant. The United States Supreme Court has recognized promotion of family integrity and protection of adolescents as significant state interests.[560] To determine whether Utah's interest is significant, however, those state interests must be balanced against the competing individual interest of the minor to make decisions about the use of contraceptives in his or her own sexual life.[561] In *H.L. v. Matheson*,[562] the United States Supreme Court upheld the constitutionality of a similar Utah statute that required parental notification before a doctor could perform an abortion on an unemancipated minor.[563] The Court stressed the state's "significant" interests in promoting family integrity, obtaining sufficient medical information[564] and safeguarding the health of adolescents,[565] and concluded that the statute was drawn narrowly enough to protect only the significant state

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556. *See* H.L. v. Matheson, 450 U.S. 398, 411 (1981) (plurality opinion); Carey v. Population Servs. Int'l, 431 U.S. 678, 696 (1977) (plurality opinion); Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976); *see also* Comment, *supra* note 553, at 956 (state statute rationally related to significant state interest can in some cases overcome minor's constitutional rights).

557. Carey v. Population Servs. Int'l, 431 U.S. 678, 693 n.15 (1977) (plurality opinion).

558. *Id.* at 694.

559. *Id.* at 697 (less than total restrictions on contraceptive distribution to adults and minors also must pass constitutional scrutiny).

560. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398, 411 (1981) (plurality opinion) (interests the Court had previously identified in Bellotti v. Baird, 443 U.S. 622, 634-39 (1979) (plurality opinion) (*Bellotti II*)); *see also* Comment, *supra* note 553, at 954-55 (discussing interests in *Matheson* as "safeguarding the health of the pregnant minor and encouraging the minor to consult with her parents prior to making the important decision about abortion").

561. *See supra* notes 548-59 and accompanying text.

562. 450 U.S. 398 (1981) (plurality opinion).

563. *Id.* at 413. In *Matheson*, the statute was construed narrowly to refer only to unmarried, unemancipated minors. *Id.* at 405-07. The Utah Legislature has attempted to remedy the overbreadth problem by adding a definition of "minor" to the abortion statute. UTAH CODE ANN. § 76-7-321(3) (Interim Supp. 1983); *see* Cromar Interview, *supra* note 539.

564. 450 U.S. at 411.

565. *Id.* Perhaps the state's interest in safeguarding the minor's health is significant because of the minor's presumed difficulty to appreciate the consequences of his or her actions. *See supra* note 555 and accompanying text.

interests.[566]

Although the state's interests were found to be significant and the statute to be sufficiently narrow in *Matheson*,[567] that finding may not result if Utah's new contraceptive notification statute were constitutionally challenged.[568] The decision to have an abortion is distinguishable from the decision to obtain contraceptives, involving more serious medical implications[569] and an irrevocable decision,[570] which might warrant parental communication. The decision to use contraceptives, on the other hand, is made before conception,[571] guards against venereal disease in some cases[572] and prevents unwanted pregnancies.[573]

Ideally, Utah's parental notification requirement will foster family communication and aid minors in making informed decisions about their sexual activity. Practically, however, the requirement either may cause more strain on the family relationship[574] or deter minors from obtaining contraceptives.[575] Rather than increase parent-child communication, the statute may result in de

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566. 450 U.S. at 413.

567. *Id.* at 411-13.

568. The Utah statute already has come under constitutional attack in Planned Parenthood Ass'n v. Matheson, No. 83-0607W (D. Utah May 9, 1983) (granting temporary restraining order).

569. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (plurality opinion) ("protection of the mental and physical health of the pregnant minor, and . . . protection of potential life [are state interests that] are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive"); *see also* T.H. v. Jones, 425 F. Supp. 873, 881 (D. Utah 1975) (physicians, social workers and other personnel at Planned Parenthood Association of Utah were found to be sufficiently trained so as to protect minors adequately from "physical harms associated with birth control"), *aff'd mem.* 425 U.S. 986 (1976). In *Matheson*, the Court stressed the need for medical information and the problem of adequate informed consent in the case of performing an abortion on a minor. 450 U.S. at 411.

570. T.H. v. Jones, 425 F. Supp. 873, 882 (D. Utah 1975), *aff'd mem.* 425 U.S. 986 (1976).

571. Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001, 1007 (1975).

572. Plaintiffs' Memorandum of Law in Support of Motion for Injunctive Relief at 3-4, Planned Parenthood Ass'n v. Matheson, No. 83-0607W (D. Utah May 9, 1983).

573. *Id.*; *see* Planned Parenthood v. Schweiker, 559 F. Supp. 658, 663-65 (D.D.C. 1983).

574. Plaintiffs' Memorandum of Law in Support of Motion for Injunctive Relief at 4-5, Planned Parenthood Ass'n v. Matheson, No. 83-0607W (D. Utah May 9, 1983); Note, *The Right of Minors to Confidential Access to Contraceptives*, 47 ALB. L. REV. 214, 235, 239 (1982).

575. Carey v. Population Servs. Int'l, 431 U.S. 678, 695-96 (1977) (plurality opinion); Planned Parenthood v. Schweiker, 559 F. Supp. 658, 666 (D.D.C. 1983); Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 3, Planned Parenthood Ass'n v. Matheson, No. 83-0607W (D. Utah May 9, 1983); *see* Comment, *supra* note 553, at 958-59.

facto regulation of the sale and distribution of contraceptives to minors. Therefore, because the state interests may not be significant, and even if significant, may not be furthered by the statute, the statute may be unconstitutional.

The third problem with the parental notification statute involves a possible conflict with federal funding provisions. Under federal law, state agencies receiving title X funding must comply with federal regulations governing the sale and distribution of contraceptives[576] or be found in violation of the supremacy clause.[577] For example, in *Planned Parenthood Federation, Inc. v. Schweiker*,[578] a federal district court invalidated the Department of Health and Human Services' attempt to require parental notice in the case of distribution of contraceptives, finding it to be inconsistent with federal law and therefore preempted under the supremacy clause.[579] It also has been held that, for the same reason, money paid under Aid to Families with Dependent Children[580] may not be conditioned on eligibility requirements in addition to those set forth in the Act.[581]

Legislative history behind title X funding[582] indicates Congress' intent to make contraceptives available to sexually active minors voluntarily seeking them,[583] while ensuring confidentiality.[584] Because Utah's law apparently conflicts with federal regulations governing the confidential sale and distribution of contraceptives by imposing the requirement of parental notification, the new law may be found to conflict with federal funding provisions and

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576. Planned Parenthood v. Heckler, 712 F.2d 650, 663-64 & n.57 (D.C. Cir. 1983) (under the supremacy clause, state laws must conform with existing title X regulations and requirements); *see also* Planned Parenthood v. Schweiker, 559 F. Supp. 658, 669 n.18 (D.D.C. 1983) (state laws regarding parental notification and consent must be consistent with intent of title X to be valid).

577. When state law conflicts with federal law, the supremacy clause requires preemption of state law. U.S. CONST. art. VI. Because the new Utah statute may conflict with federal regulations, it may be preempted by the federal regulations.

578. 559 F. Supp. 658 (D.D.C. 1983).

579. *Id.* at 668-69.

580. Aid to Families with Dependent Children is a federally funded program administered under the Social Security Act. 42 U.S.C. §§ 601-644 (1976).

581. Planned Parenthood v. Schweiker, 559 F. Supp. 658, 668 (D.D.C. 1983); T.H. v. Jones, 425 F. Supp. 873, 878 & n.3 (D. Utah 1975), *aff'd mem.* 425 U.S. 986 (1976).

582. S. REP. No. 102, 95th Cong., 1st Sess. 26 (1977) (title X reauthorization report expressly acknowledging need for confidentiality with respect to teenagers).

583. T.H. v. Jones, 425 F. Supp. 873, 878 (D. Utah 1975), *aff'd mem.* 425 U.S. 986 (1976).

584. *See* Planned Parenthood v. Heckler, 712 F.2d 650, 659-60 (D.C. Cir. 1983); 42 C.F.R. § 59.11 (1982).

therefore be preempted under the supremacy clause as it applies to agencies receiving federal funds.[585]

Although Utah's new parental notification contraceptive statute arguably serves significant state interests, it also presents significant problems. Implementation and enforcement problems may occur as a result of terms used in the statute. The statute also may violate the constitutionally protected privacy rights of minors. Finally, because Utah's new law imposes eligibility requirements in addition to those contained in the federal regulations, it may, in its application to federally assisted agencies, be preempted by federal funding provisions.

X. PUBLIC LANDS

Project BOLD Implementation

Project BOLD is a plan to increase revenue to the Utah school trust fund by exchanging scattered sections of state land for consolidated, more manageable tracts of federal land.[586] The Project BOLD Implementation Act[587] is an effort to accommodate various interests affected by a federal-state land exchange.[588] Although Project BOLD's goal of augmenting revenue to the school trust is proper, the means embodied in the Project BOLD Implementation Act may conflict with school trust responsibilities.[589]

Utah's entrance into the union was facilitated by the Enabling Act of 1894,[590] which granted the state four one-square-mile sec-

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585. In Planned Parenthood Ass'n v. Matheson, No. 83-0607W (D. Utah May 9, 1983) (order granting temporary restraining order), plaintiffs allege that the new Utah parental notification statute is preempted by title X of the Public Health Service Act and the Social Security Act. Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 1. On November 16, 1983, United States District Judge David K. Winder granted a preliminary injunction providing that the Department of Health and Human Services may no longer provide title X funds to the Utah State Health Department if the state continues to enforce sections 76-7-322 and 76-7-323 of the Utah Code, which require parental consent for minors receiving family planning services.

586. *See* H.R. Con. Res. 6, 45th Utah Leg., Gen. Sess. (1983).

587. Act of February 22, 1983, ch. 324, 1983 Utah Laws 1332 (codified as amended at UTAH CODE ANN. §§ 65-1-14, -29, -44, -45, -70 (Interim Supp. 1983)).

588. *See* State Legislation on Utah's Land Blocking Proposal (unpublished memorandum) (on file at the Office of the Utah State Attorney General, Natural Resource Agencies). The Project BOLD Implementation Act (the "Act") also is important because it establishes a new policy for state land management. *See infra* note 605.

589. *See infra* notes 624-31 and accompanying text.

590. Utah Enabling Act, ch. 138, 28 Stat. 107 (1894).

tions from federal lands in each township[591] to be held in trust for the support of the common schools.[592] Congress intended the state to sell the school sections and place the proceeds in a trust fund,[593] with only the interest from the trust fund being spent to support the schools.[594] In addition, it was thought that taxes levied on state and federal land transferred to private ownership would benefit the school system by providing the state with a considerable tax base.[595] Although prime state school land was sold under that scheme, less desirable sections remained under state ownership, scattered among federal lands in a checkerboard pattern.[596]

Utah receives some revenue from private use of the remaining

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591. The Land Ordinance of 1785 originally established the land survey system using 36-square-mile townships of six miles on a side. Each township was divided into 36 one-mile-square sections. Upon statehood, Utah received sections 2, 16, 32 and 36 of each township. Utah Enabling Act, ch. 138, § 6, 28 Stat. 107, 109 (1894). That land grant was part of a bilateral agreement whereby Utah agreed not to tax federal lands, and the United States agreed to convey the school sections to compensate the state for lost tax revenues. *See* Andrus v. Utah, 446 U.S. 500, 507-08 (1980).

The United States also agreed to replace or "indemnify" the state for those sections that would have gone to the state had the federal government not disposed of them prior to Utah's entrance into the union. Utah Enabling Act, ch. 138, § 6, 28 Stat. 107, 109 (1894). The Act will apply to Project BOLD if Project BOLD is approved by Congress. Presently, however, the Act applies to indemnity selection lands recently acquired from the United States. *See* UTAH CODE ANN. §§ 65-1-44, -45(3) (Interim Supp. 1983); *see also* Salt Lake Tribune, Aug. 10, 1983, at A-10 (on Aug. 8, 1983, Utah received title to 93,804 acres of indemnity selection land).

592. Section 6 of the 1894 Enabling Act states that "upon the admission of [Utah] to the Union, [school sections] . . . are hereby granted to said State for the support of common schools." Utah Enabling Act, ch. 138, § 6, 28 Stat. 107, 109 (1894). In analyzing the state's obligation under that section of the Enabling Act, the Utah Supreme Court held that revenues derived from those lands are held by the state "as a trustee of an express trust, limited in the amount that can be expended, and the purposes and uses thereof." Duchesne County v. State Tax Comm'n, 104 Utah 365, 371, 140 P.2d 335, 337 (1943); *see also* Jensen v. Dinehart, 645 P.2d 32, 35 (Utah 1982) (mineral revenues from school land must be placed in the Uniform School Fund). Similarly, the United States Supreme Court interpreted the New Mexico-Arizona Enabling Act, ch. 310, § 6, 36 Stat. 557, 561 (1910), as "unequivocally demand[ing] both that the trust received the full value of any lands transferred from it and that any funds received be employed only for the purpose for which the land was given." Lassen v. Arizona *ex rel.* Highway Dep't, 385 U.S. 458, 466 (1967).

593. *See* Lassen v. Arizona *ex rel.* Highway Dep't, 385 U.S. 458, 463 (1967).

594. UTAH CONST. art. X, § 3.

595. *See* UTAH DEP'T OF NATURAL RESOURCES AND ENERGY, PROJECT BOLD: ALTERNATIVES FOR UTAH LAND CONSOLIDATION AND EXCHANGE 14 (Sept. 1982) [hereinafter cited as PROJECT BOLD].

596. *See id.* at 3. Apparently, during the early years of statehood, Utah sold all marketable state school land under a policy favoring disposition of public land. During the last 30 years, however, state land policies have changed in favor of retention. *See id.* at 30. Federal policy also has changed to favor retention of public lands. *See* 43 U.S.C. § 1701(a)(1) (1976).

state school sections, but those revenues are minimized because much of the school land is situated in national forests, national parks, military reservations, Indian reservations[597] or Bureau of Land Management ("BLM") lands.[598] That checkerboard pattern of federal-state ownership precludes any logical scheme of state land management[599] because isolated one-square-mile sections are not suited to most types of development.[600]

Under the current pattern of federal-state ownership, revenues from private use of school land grants yield slightly more than two percent of the cost of supporting the public schools.[601] Motivated by a longstanding state policy of maximizing state school section revenues,[602] Governor Scott Matheson and the Utah Attorney General's Office formulated a plan to augment school land revenues.[603] That plan, labelled "Project BOLD," consolidates scattered state lands and land rights into more logical and manageable units.[604]

To accommodate the consolidation, the Project BOLD Implementation Act (the "Act") establishes comprehensive school land management policies using multiple-use and sustained-yield principles.[605] Multiple use is the combined use of surface and subsur-

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597. *See* PROJECT BOLD, *supra* note 595, at 2.

598. *See* H.R. Con. Res. 6, 45th Utah Leg., Gen. Sess. (1983); *see also* PROJECT BOLD, *supra* note 595, at 114-227 (maps showing distribution of state and federal land).

599. *See* PROJECT BOLD, *supra* note 595, at 3; Matheson, *Elements of a Utah Growth Management Strategy*, 1982 UTAH L. REV. 483, 492-94.

600. For example, developing a coal mine on an isolated section is economically and physically prohibitive unless adjacent land also is developed. In addition, a single section cannot support significant amounts of grazing for prolonged periods; continually moving cattle from one section to another is infeasible. *See* McCormack, *Land Use Planning and Management of State School Lands*, 1982 UTAH L. REV. 525, 528-29. The existence of state inholdings also is a hindrance to federal land management. For example, for purposes of mineral exploration, mineral lessees must obtain access to state land within areas under Bureau of Land Management ("BLM") wilderness consideration. Utah v. Andrus, 486 F. Supp. 995, 1010 (D. Utah 1979).

601. R. Dewsnup, Project BOLD: An Approach to Value 3 (unpublished paper) (on file at the Office of the Utah State Attorney General, Natural Resource Agencies).

602. *See* McCormack, *supra* note 600, at 527-28 nn.17-21.

603. *See* PROJECT BOLD, *supra* note 595, at 6.

604. Through selective consolidation of state land, Utah can improve management practices and increase revenue from state school land. H.R. Con. Res. 6, 45th Utah Leg., Gen. Sess. (1983). The revenues from school land must be paid into the school trust fund. *See* UTAH CONST. art. X, § 3; Lassen v. Arizona *ex rel.* Highway Dep't, 385 U.S. 458, 466 (1967).

605. UTAH CODE ANN. § 65-1-14 (Interim Supp. 1983). Formerly the state ignored the long term impact of management schemes on school land in favor of maximum immediate revenue. *See* McCormack, *supra* note 600, at 525-28. Multiple-use and sustained-yield policies reflect a balancing of long term state benefits against short term monetary gain. *See* Matheson, *supra* note 599, at 496.

face resources to maximize present and future benefits to the people of Utah;[606] sustained yield is the achievement and maintenance of maximum output of renewable resources without hindering the productivity of the land.[607] The multiple-use and sustained-yield provisions are responses to the concern of educators that revenues from the school grants be maximized and to the request of environmentalists that state management objectives be clarified.[608]

The Act also requires the State of Utah to preserve property rights created under prior federal management.[609] That was necessary to prevent unconstitutional takings that could result from the

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606. UTAH CODE ANN. § 65-1-14 (Interim Supp. 1983).

607. *See id.*

608. Environmental groups conditionally favored Project BOLD because it potentially could protect environmentally sensitive federal lands, such as national parks and wildlife refuges, from damage caused by development of state inholdings. *See* UTAH DEP'T OF NATURAL RESOURCES & ENERGY, SUMMARY OF COMMENTS ON PROJECT BOLD FROM PUBLIC MEETINGS 2-3 (Jan. 4, 1982) (reprinted in PROJECT BOLD, *supra* note 595, at 241) [hereinafter cited as SUMMARY OF COMMENTS]. Environmentalists were concerned, however, with the state's management policy favoring maximum immediate economic return. McCormack, *supra* note 600, at 530. Educators simply wanted school trust revenues maximized, but expressed no preference for either multiple-use or immediate maximum-yield management schemes. *See* SUMMARY OF COMMENTS, *supra*.

609. UTAH CODE ANN. § 65-1-44 (Interim Supp. 1983). The state specifically must honor all "stocking rates, grazing fee levels, access rights, and all [other] existing activities that currently or historically have dictated an understanding of usage between the land user and the federal government." *Id.* The Act further requires the state to allow all prior federal grazing permittees to retain any existing improvements. *Id.* Earlier state statutes would not have protected prior federal permittees' interest in their improvements following a federal-state land exchange. *See* PROJECT BOLD, *supra* note 595, at 38.

Similarly, the Act provides that land acquired through exchange or indemnity selection from the federal government "shall be subject to the vested rights of unpatented mining claimants under the Mining Law of 1872." UTAH CODE ANN. § 65-1-45(3) (Interim Supp. 1983). The Act also allows the state to negotiate the conversion of mining rights vested under the federal system to any system acceptable to the parties. *Id.* In some cases, shifting land from federal control to state control is advantageous to mining interests, thereby encouraging mining and increasing mining revenues. *See* PROJECT BOLD, *supra* note 595, at 75. For example, under federal management, unpatented oil shale claims are tenuous because market conditions discourage claimants from making the annual improvements necessary to maintain their claim. Under the state leasing system, the developer's claim is not contingent on making annual improvements. *See id.* Thus, under state management, oil shale developers can afford to hold their mineral rights and continue to develop their technology in anticipation of improved market conditions. Increased mineral production of oil shale or other minerals from state school lands means increased revenue to the school trust. *See* UTAH CONST. art. X, § 3 (the proceeds from the disposition of minerals from state school land must be placed in the Uniform School Fund).

The Act concludes its enumeration of specifically protected rights with a blanket protection clause: "[U]pon acceptance of exchanged lands, the state shall honor all vested rights." UTAH CODE ANN. § 65-1-70 (Interim Supp. 1983). That broad language includes all specific rights discussed previously and seemingly extends to a broad range of property interests not specifically enumerated in the Act.

imposition of state management programs on federal lands acquired in the exchange. For example, under current federal grazing management programs, preference in the issuance and renewal of grazing permits is given to operators in or near the grazing district who either own land or control the water rights necessary to properly use the land.[610] Because no written state policy recognizes such a preference, imposition of a state grazing management program could deprive a prior federal permittee of that preference.[611] Similarly, under the federal system, a claimant who locates "hardrock"[612] minerals obtains exclusive rights in the mineral estate, including extralateral rights,[613] but is not required to pay royalties to the federal government.[614] Under state management, however, extraction of minerals is permitted only on a lease or royalty basis,[615] and leases do not include extralateral rights.[616] Federal law also differs from Utah law by allowing a federal mining claimant to obtain a fee simple title to his claim by patent.[617] Under the state leasing system, however, the fee simple title remains in the state.[618] Thus, the Act's preservation requirement is necessary to preserve a variety of preexisting rights, which otherwise could be denied in a federal-state land exchange.

The Act also seeks to maintain the prior policy[619] of allowing political subdivisions to purchase neighboring BLM land for public purposes for less than its market value.[620] Because initial formula-

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610. 43 U.S.C. § 315b (1976).

611. PROJECT BOLD, *supra* note 595, at 35. An already existing unwritten state policy based on precedent, however, would protect the permittees' preference. *Id.*

612. Hardrock minerals include gold, silver, lead and copper. *See id.* at 54; 30 U.S.C. § 23 (1976).

613. *See* 30 U.S.C. § 26 (1976). Under federal mineral management, on location of hardrock minerals, a claimant, after complying with certain filing and improvement requirements, obtains exclusive possession of the surface area of a claim and the subsurface mineral rights, including extralateral rights. Extralateral rights entitle a person to follow and extract commercial grade ore beyond the imaginary plane that extends beneath the claim boundary line. *Id.*

614. *See* PROJECT BOLD, *supra* note 595, at 56.

615. UTAH CODE ANN. § 65-1-15 (Interim Supp. 1983). That lease or royalty system is consistent with the state's school trust responsibility because it provides income to be paid into the school trust. *See supra* note 592 and accompanying text; UTAH CONST. art. X, § 3.

616. 3 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, AMERICAN LAW OF MINING § 12.14 (1982): "With the exception of [Arizona], mineral rights under state leases are intralimital and mining must be confined within planes extended vertically downward through the boundary lines of the leased land."

617. 30 U.S.C. § 29 (1976).

618. UTAH CODE ANN. § 65-1-15 (Supp. 1981).

619. *See* 43 C.F.R. §§ 17-25.2-1, 2430 (1982).

620. UTAH CODE ANN. § 65-1-29 (Interim Supp. 1983).

tions of Project BOLD did not guarantee that the former BLM land could be purchased below its market value, cities opposed those exchanges.[621] To silence that opposition and solicit local subdivisions' support for Project BOLD, the legislature provided[622] in the Act that Utah may sell land, when it is in the public interest, for "less than [its] appraised value" to political subdivisions of the state for public purposes.[623]

In its quest to accommodate various interests affected by federal-state land exchanges, the Act may violate the school trust responsibility imposed by the Enabling Act.[624] In *Lassen v. Arizona ex rel. Highway Department*,[625] the Supreme Court interpreted the New Mexico-Arizona Enabling Act[626] as "unequivocally demand[ing] . . . that the trust receive the *full value* of any lands transferred from it."[627] The clear implication of *Lassen* is that the trust fund must be compensated by all users of school land, including state agencies.[628] Under *Lassen*, the mining provisions of the Act[629] may violate the school trust responsibility by allowing hardrock claimants to extract minerals[630] and to reduce their claims to a fee simple title without compensating the trust.[631] Similarly, allowing political subdivisions to purchase land for less than its fair market value is inconsistent with the school trust responsibility because the trust is not fully compensated.[632]

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621. *See* PROJECT BOLD, *supra* note 595, at 29.

622. Third Reading of H.R. 327, 45th Utah Leg., Gen. Sess. (Feb. 22, 1983) (statement of Rep. Gayle F. McKeachnie).

623. UTAH CODE ANN. § 65-1-29 (Interim Supp. 1983).

624. For a discussion of the school trust responsibilities, see *supra* note 592.

625. 385 U.S. 458 (1967).

626. Ch. 310, § 10, 36 Stat. 557, 563 (1910).

627. 385 U.S. at 466 (emphasis added). The *Lassen* Court held that the state highway commission could not obtain a right-of-way across state school land without compensating the trust for the fair market value of the property. *Id.* at 469.

628. PROJECT BOLD, *supra* note 595, at 18.

629. UTAH CODE ANN. § 65-1-45 (Interim Supp. 1983).

630. PROJECT BOLD, *supra* note 595, at 56; *see supra* notes 612-16 and accompanying text.

631. *See supra* notes 617-18 and accompanying text. Preserving the federal hardrock claimant's right to obtain the fee simple title to the claim also is inconsistent with Project BOLD's goal of land consolidation. As federal hardrock claims are converted into private ownership, the checkerboard pattern of ownership will be perpetuated. The state, however, could mitigate that problem by seeking to accommodate hardrock claimants' interests with preference leases. In many situations, however, claimants may be unwilling to enter into such leases. Theoretically, the perpetuation of a checkerboard pattern of ownership reduces the advantages of Project BOLD. Its practical effect, however, can only be determined as future land exchanges are consummated.

632. *See supra* note 627 and accompanying text.

Proponents of Project BOLD favor a loose reading of *Lassen* and argue that the uncompensated disposition of interests in school land in the hope of obtaining greater future benefits is harmonious with the school trust responsibility.[633] Those proponents claim that both the mining provisions and the disposition provisions benefit the school trust by facilitating the implementation of Project BOLD, which in turn removes barriers to logical state management schemes, thus enabling more efficient use of state lands.

In summary, the Project BOLD Implementation Act protects preexisting property rights, establishes a long range management policy for state lands and solicits the support of local governments for the state land consolidation scheme. The imposition of a new management policy on state lands will benefit the school system by maximizing long range benefits to the school trust. Furthermore, consolidation of school land into manageable units will increase revenues by facilitating efficient management schemes. Those long term benefits, which may not be possible without the accommodation of vested rights and political subdivisions' interests, should not be vitiated by a strict interpretation of *Lassen*.

XI. SALES

Pyramid Schemes

The 1983 Utah Pyramid Scheme Act[634] clarifies and strengthens the law against pyramid schemes in four basic ways: First, the criminal penalty for operating a pyramid scheme is raised from a class A misdemeanor to a third-degree felony.[635] Second, victims of pyramid schemes may now bring private actions to recover their losses, along with interest, costs and reasonable attorney's fees.[636] Third, a pyramid scheme now may be prosecuted civilly as a violation of the Utah Consumer Sales Practices Act.[637] Finally, "pyra-

633. *See* McCormack, *supra* note 600, at 525-47 (discussing case law, legislative history and trust principles that provide justification for this viewpoint).

634. Ch. 89, 1983 Utah Laws 429 (codified at UTAH CODE ANN. §§ 76-6a-1 to -6 (Supp. 1983)) (repealing *id.* § 76-6-519 (1978)).

635. UTAH CODE ANN. § 76-6a-4(1) (Supp. 1983); *see infra* notes 672-73 and accompanying text. Setting up or operating a pyramid scheme was a class A misdemeanor under the old law. UTAH CODE ANN. § 76-6-519(1) (1978) (repealed 1983); *see infra* notes 664-65 and accompanying text.

636. UTAH CODE ANN. § 76-6a-6(1); *see infra* notes 668 & 675 and accompanying text.

637. UTAH CODE ANN. § 76-6a-3(2)-(4) (Supp. 1983); *see infra* notes 667, 675-84 and

mid scheme" is defined more precisely[638] to avoid the prior law's possible constitutional problem of vagueness.[639]

A pyramid scheme is a fraudulent version of a multilevel marketing organization, which victimizes members of the organization. Multilevel marketing plans differ from conventional distribution in that each level in the multilevel marketing network is comprised of independent contractors, rather than employees.[640] Multilevel marketing also is different in that it is organized to expand in a pyramid fashion. Each distributor is encouraged to recruit additional distributors to work under him, thus allowing for multiple levels with an expanding number of distributors at lower levels.[641] Each distributor buys the product from the distributor above him in the distribution network and retails it to consumers or wholesales it to those below him in the distribution network, usually distributors whom he has recruited.[642] Distributors profit from sales made by their recruited distributors as well as from their own retail sales.[643]

Two factors distinguish pyramid schemes from legitimate multilevel marketing organizations. First, on joining the organization, new members of pyramid schemes must pay for the right to sell the product and for the right to recruit other distributors.[644] Typi-

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accompanying text.

638. UTAH CODE ANN. § 76-6a-2(4) (Supp. 1983).

639. *See infra* notes 669 & 687-88 and accompanying text. Additionally, certain defenses to the charge of operating a pyramid scheme are eliminated. UTAH CODE ANN. § 76-6a-5 (Supp. 1983).

640. Comment, *Multi-Level or Pyramid Sales Systems: Fraud or Free Enterprise*, 18 S.D.L. REV. 358, 359-61 (1983). For a detailed description of one multilevel marketing organization, see Amway Corp., 93 F.T.C. 618, 634-78 (1979).

641. Comment, *supra* note 640, at 359-61.

642. *Id.*

643. *Id.*

644. Koscot Interplanetary, Inc., 86 F.T.C. 1106 (1975), *aff'd sub nom.* Turner v. FTC, 580 F.2d 701 (D.C. Cir. 1978). In 1975, the Federal Trade Commission defined an illegal pyramid scheme as one

> characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product *and* (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to the sale of the product to ultimate users . . . . As is apparent, the presence of this second element, recruitment with rewards unrelated to product sales, is nothing more than an elaborate chain letter device in which individuals who pay a valuable consideration with the expectation of recouping it to some degree via recruitment are bound to be disappointed.

Id. at 1180. A pyramid scheme constitutes an unfair and deceptive act and practice and an unfair method of competition in violation of section 5 of the Federal Trade Commission Act. *Id.* (holding pyramid schemes to be in violation of 15 U.S.C. § 45 (1973)).

Although the emphasis on recruitment and the promise of future profits are key characteristics of pyramid schemes, pyramids are not always easily distinguishable from legitimate

cally a new member purchases those rights by buying an amount of nonreturnable inventory[645] and a portion of the money paid is retained by the person who recruited the new member.[646] Second, in pyramid schemes recruiting new distributors is not a means to selling more of the product but is, itself, a source of profit.[647] The product is relatively unimportant, except as a vehicle for recruitment.[648]

When these two factors become present in a multilevel marketing organization, the basis for creating wealth becomes unsound, thus often leading to the use of deception to recruit new members and eventually resulting in financial loss to at least some

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multilevel marketing plans. Because multilevel marketing typically involves door-to-door selling, and door-to-door selling is a difficult occupation, multilevel marketing plans typically suffer from a high rate of attrition among their distributors. Three out of four Amway distributors, for example, quit after the first year, a turnover rate said to be lower than that of most direct selling companies. Amway Corp. 93 F.T.C. 618, 679 (1979). Of necessity, multilevel marketing plans emphasize and offer incentives for recruitment of new distributors. Hence, the distinction between a legitimate multilevel marketing plan and a pyramid scheme is a subtle one—it turns on whether the rewards offered for recruitment are derived primarily from the recruitment process itself or whether the rewards are derived from the enterprise of selling to consumers, the success of which, at least in part, is dependent on recruitment. Comment, *supra* note 640, at 361-65.

Furthermore, even legitimate multilevel marketing plans are subject to pyramid scheme abuses. In light of the difficulties of door-to-door sales, the stress on recruitment for the purpose of increased consumer sales easily can shift to an emphasis on recruitment per se, accompanied by misleading claims of easy profits, "inventory loading" (requiring or encouraging new distributors to purchase an excessive amount of inventory) or other related deceptive practices. *Id.* Amway Corp., for example, is a multilevel sales organization that appears to have come quite close to crossing over the line into illegal pyramid scheme activity. The Federal Trade Commission found that although Amway was not a pyramid scheme, it was guilty of deceptive recruitment practices similar to those typically used by pyramid schemes. Amway Corp., 93 F.T.C. at 659-70, 715-17, 729-32.

645. *See, e.g.*, Koscot Interplanetary, Inc., 86 F.T.C. 1106, 1179 (1975), *aff'd mem. sub nom.* Turner v. FTC, 580 F.2d 701 (D.C. Cir. 1978); Ger-Ro-Mar, Inc., 84 F.T.C. 95, 108-10 (1974).

646. Koscot Interplanetary, Inc., 86 F.T.C. 1106, 1179 (1975), *aff'd sub nom.* Turner v. FTC, 580 F.2d 701 (D.C. Cir. 1978). New members in the Koscot marketing plan paid an initial amount up to $5000 for inventory and for the right to recruit others; $2650 of the $5000 was received by the recruiting member. *Id.*

647. *Id.* at 1180.

648. Holiday Magic, Inc., 84 F.T.C. 748, 1035 (1974). In a suit against Koscot Interplanetary, Inc. for alleged pyramid scheme violations, a Kansas court found "[t]hat the sale of Koscot Cosmetics was an incidental part of the business conducted by the defendants; that the sale of cosmetics was used as a vehicle through which to conduct a spurious wholesale business with nothing much to wholesale except the sale of so-called 'positions' within the company." State *ex rel.* Sanborn v. Koscot Interplanetary, Inc., No. C 22475 (Dist. Ct. Sedgwick County, Kan. 1972), *quoted in* Comment, *supra* note 640, at 365. For a description of the recruiting techniques and promises employed in one major pyramid scheme, see Note, *Dare To Be Great, Inc.: A Case Study of Pyramid Sales Plan Regulation*, 33 OHIO ST. L.J. 676, 676-86 (1972).

members of the organization. New members are recruited into pyramid schemes by promises of high profits to be made by recruiting additional distributors who will, in turn, recruit others.[649] Those promises rarely are fulfilled for the very reason that they appear so alluring to the uninitiated—the geometric increase in the number of new distributors as one level recruits another.[650] The fatal flaw in the scheme is that the number of new recruits needed to sustain the growing pyramid soon exceeds the available supply of potential recruits.[651] For example, a pyramid scheme in which each recruit would recruit five others would exceed the population of the United States at the thirteenth level.[652] When the point of market saturation is reached, which may occur quickly and unexpectedly, the pyramid collapses and a great many distributors are left with the worthless "right to recruit," accumulated debts from the costs of recruiting or nonreturnable inventory.[653] Because there is no sound basis for creating wealth, but money merely is channeled from the pockets of many to the pockets of a few, pyramid schemes typically engage in numerous deceptive practices such as promising unrealistically high earnings or claiming that recruiting and selling are easy.[654] The fundamental deception, however, lies in the fact that pyramid schemes are not true sales organizations[655] and market saturation precludes most members from ever recovering their investments.[656] Some courts have viewed pyramid schemes as disguised chain letter schemes, not organized to sell goods to consumers, but rather aimed at extracting money from their own members.[657]

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649. Note, *Pyramid Schemes: Dare To Be Regulated*, 61 GEO. L.J. 1257, 1259 (1973).

650. Oregon Attorney General's Office, Multilevel Sales Plans in Oregon 2 (undated) (copy on file with UTAH L. REV.).

651. *Id.*

652. Comment, *supra* note 640, at 361 n.8. In addition to exhausting the supply of potential recruits, the geometric growth in the number of distributors also undercuts the possibility of success in making consumer sales. Annot., 54 A.L.R.3d 217, 220 (1973).

653. Note, *supra* note 648, at 686-87; Oregon Attorney General's Office, *supra* note 650, at 2.

654. Comment, *supra* note 640, at 363-69.

655. *See supra* note 648 and accompanying text.

656. Oregon Attorney General's Office, *supra* note 650, at 2.

657. *See, e.g.*, Koscot Interplanetary, Inc., 86 F.T.C. 1106, 1180 (1975), *aff'd sub nom.* Turner v. FTC, 580 F.2d 701 (D.C. Cir. 1978); Holiday Magic, Inc., 84 F.T.C. 748, 1035 (1974); People v. Koscot Interplanetary, Inc., 37 Mich. App. 447, 195 N.W.2d 43, 53 (1972). A chain letter is "[a] letter sent to a number of recipients requesting each to write similar letters to an equal number of recipients and often employed as a money-making scheme by the inclusion with each letter of a list of persons to whom money is to be sent." WEBSTER'S NEW INTERNATIONAL DICTIONARY 369 (3d ed. unabridged 1961). Like a pyramid scheme, a

Utah, which has been called "the fraud capital of America"[658] with the highest investment fraud losses per capita in the country,[659] has experienced an "epidemic of pyramid schemes" in recent years.[660] As much as $78 million may have been lost to Utah-based pyramid schemes during 1981 to 1982 alone.[661] Utah law enforcement authorities had little success in combating pyramid schemes in the state, in part because of the prior act's[662] inadequacy.[663]

The 1973 act was ineffective for several reasons. First, it was solely a criminal statute, making a person who set up or operated a pyramid scheme guilty of a class A misdemeanor.[664] Because the maximum penalty for a class A misdemeanor is one year imprisonment and a $1000 fine,[665] it is likely the threat of conviction had little deterrent effect because of the large profits that could be re-

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chain letter is a recruiting scheme that grows downward from its origin, expanding at its base like a pyramid. Each new member recruits additional members who, in turn, recruit more members. An individual joins a chain letter by paying money to members higher in the chain in the hope that he will receive a greater amount of money from the growing number of members who join after him. One who is fortunate enough to join a chain letter early in its growth may profit by receiving money from others joining later. However, because a chain letter is only a scheme for channeling money from the pockets of many persons into the hands of a few, and because the scheme cannot expand indefinitely, it will collapse with most members losing money.

658. Salt Lake Tribune, Oct. 5, 1983, at B9, col. 1 (citing Los Angeles Times).

659. Crichton, *The Outbreak of Pyramid Schemes in Utah*, VENTURE, Dec. 1982, at 44.

660. *Id.* at 44. For a description of a pyramid scheme operating in Utah, see Louis, *The Pyramid Scam: Greedy Games in Sugarhouse Park*, UTAH HOLIDAY, July 1980, at 11.

661. Crichton, *supra* note 659, at 44. Fraudulent schemes of various kinds have taken an estimated total of $200 million from some 9000 Utahns (one out of every 100 adults) over the last several years. Stern, *Now You See It, Now You Don't*, FORBES, June 20, 1983, at 33.

662. UTAH CODE ANN. § 76-6-519 (1978) (repealed 1983).

663. Summary Sheet, H.R. 219, Pyramid Scheme Bill, 45th Utah Leg., Gen. Sess. at 1 (1983) (copy on file with UTAH L. REV.) [hereinafter cited as Summary Sheet]; Crichton, *supra* note 659, at 44. Because until recently many states lacked adequate pyramid scheme laws, pyramids also have been attacked as illegal lotteries, unregistered securities and contracts in restraint of trade. *See* Comment, *supra* note 640, at 370-78, 387-89; Note, *supra* note 648, at 690-99; Annot., *supra* note 652, at 227-31, 237-48.

664. UTAH CODE ANN. § 76-6-519(1) (1978) (repealed 1983). Conviction under the 1973 law required proof of setting up or operating a pyramid scheme beyond a reasonable doubt and the showing of a "culpable mental state." *Id.* § 76-2-102 (1978) (specifying the culpable mental states required for a criminal conviction). Showing a culpable mental state in the case of a pyramid scheme is especially difficult because the organizer easily can claim that he neither intended nor knew of the activities of other participants who, as independent contractors, were not under his control. Crichton, *supra* note 659, at 44, 45. The criminal section of the 1983 Pyramid Scheme Act, however, does not lessen that burden. *See* UTAH CODE ANN. § 16-6a-4(1) (Supp. 1983).

665. UTAH CODE ANN. §§ 76-3-204(1), -301(3) (1978).

alized from pyramid schemes. Second, the prior law provided no civil penalties for organizing a pyramid scheme[666] and a pyramid scheme was not defined as a deceptive practice under the Utah Consumer Sales Practices Act.[667] Third, the law did not provide for compensation to the victims of pyramid schemes.[668] Finally, the 1973 law may have been unconstitutionally vague because it seemed to include organizations that paid any compensation for the recruitment of others into the organization.[669] Because of the deficiencies in the 1973 law, the 1983 Utah Legislature sought to strengthen the law and thereby halt pyramid scheme activities.[670] The 1983 Pyramid Scheme Act increases the penalty for setting up

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666. *See id.* § 76-6-519 (1978) (repealed 1983).

667. *See id.* § 13-11-4 (Supp. 1981). The Utah Trade Commission, however, using its rulemaking authority under the Utah Consumer Sales Practices Act, *id.* § 13-11-8(2), promulgated a rule making a pyramid scheme an unfair or deceptive practice. Utah Trade Comm'n, Trade Commission Rules—Utah Consumer Sales Practices Act § XI(B)(2), at 29 (1974) (copy on file with UTAH L. REV.).

668. *See* UTAH CODE ANN. § 76-6-519 (1978) (repealed 1983).

669. The 1973 law was declared unconstitutional by Judge Gibson of the Utah Fifth Circuit Court on the ground that the statute was too vague to give an ordinary person notice as to what kind of activity was subject to criminal penalties. State v. Blatter, No. 79 CRS 836 (5th Cir. Ct. Utah 1979), *rev'd and remanded*, No. CRA 79-52 (3d Dist. Ct. Utah 1980) (copy on file with UTAH L. REV.). Although the judge's opinion did not explain which provision of the law was unconstitutionally vague, Judge Gibson apparently focused on the statutory definition of "pyramid scheme," which read: " 'Pyramid scheme' means a scheme whereby anything of monetary value is distributed among persons who have paid compensation for the chance to receive compensation: (i) For introducing another person into participation in the scheme; or (ii) When any person introduced into participation in the scheme introduces another person into participation." UTAH CODE ANN. § 76-6-519(2)(a) (1978) (repealed 1983). That statutory definition appears to encompass almost any organization that provides compensation for recruitment regardless of the purpose of the recruitment or the source of the compensation. The Federal Trade Commission has ruled that one multilevel sales organization, Amway Corp., is not a pyramid scheme, in part, because its purpose in recruiting additional distributors was solely to increase consumer sales and because recruitment compensation was derived solely from the consumer sales of the recruited distributor. Amway Corp., 93 F.T.C. 618, 699-700, 715-16 (1979).

The Utah Fifth Circuit decision was reversed by the Utah Third Judicial District Court in a memorandum decision, which simply asserted that the law was not vague. State v. Blatter, No. CRA 79-52 (3d Dist. Ct. Utah 1980) (copy on file with UTAH L. REV.). The Utah Legislature, in passing the 1983 Act, may have been confused about the outcome of the court challenge to the old law because the legislative summary sheets indicated that the district court had affirmed, rather than reversed, the circuit court decision. Summary Sheet, H.R. 59 Pyramid Bill, 44th Utah Leg., Budget Sess. (H.R. 59 was not enacted); Summary Sheet, *supra* note 663.

670. Summary Sheet, *supra* note 663, at 1: "Utah is currently experiencing a wave of marketing schemes . . . which are in fact pyramid schemes. One such scheme has damaged Utah consumers to the extent of approximately $250,000 . . . . Without new legislation on the subject, law enforcement agencies are hindered in their efforts to fight these inherently deceptive schemes."

or operating[671] a pyramid scheme from a class A misdemeanor to a third-degree felony.[672] The more severe felony penalties[673] may give the new law a stronger deterrent effect.[674]

The primary thrust of the 1983 Act is to deter pyramid schemes through civil penalties, rather than criminal penalties, as under the previous Act.[675] The new Act allows civil actions against pyramid schemes as deceptive business practices by both private parties and the government. Investors may declare their investment contracts void and sue for recovery of their investments, less whatever compensation they have received.[676] In addition, the Act provides for recovery of interest, court costs and reasonable attorney's fees.[677] Thus, the Act encourages private actions to facilitate the collapse of pyramid schemes.[678]

The application of the Consumer Sales Practices Act to pyra-

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671. The 1973 law prohibited "setting up or operating" a pyramid scheme. UTAH CODE ANN. § 76-6-519(1) (1978) (repealed 1983). The new law prohibits "organizing, establishing, promoting, or administering" a pyramid scheme. *Id.* § 76-6a-3(1) (Supp. 1983). The significance of the change in language is unclear. Although the change may expand the scope of the law to encompass all participants in a pyramid scheme, another provision, *id.* § 76-6a-6(1), suggests a contrary intention. *See infra* note 678 and accompanying text.

672. UTAH CODE ANN. § 76-6a-4(1) (Supp. 1983); *see supra* note 664 and accompanying text.

673. A third-degree felony is punishable by imprisonment for up to five years, absent the use of a firearm in the commission of the crime, UTAH CODE ANN. § 76-3-203(3) (Supp. 1983), and by a fine of up to $5000. *Id.* § 76-3-301(2) (1978). The maximum penalty for a class A misdemeanor is one year imprisonment and a $1000 fine. *Id.* §§ 76-3-204(1), -301(3).

674. The difficulty of obtaining a criminal conviction in a pyramid scheme case, however, remains the same as under the 1973 law. *See supra* note 664.

675. UTAH CODE ANN. § 76-6a-3 (Supp. 1983). A civil violation of the 1983 Act is made a violation of the deceptive practices section of the Utah Consumer Sales Practices Act. *Id.* § 76-6a-3(3). The Utah Consumer Sales Practices Act was amended in 1983 by the inclusion of pyramid schemes among the enumerated deceptive practices, thereby creating a redundancy in the law. *Compare id. with* § 13-11-4(2)(n). A criminal conviction under the new law also is prima facie evidence of a violation of the Utah Consumer Sales Practices Act. *Id.* § 76-6a-3(2). On the deceptive practices approach to pyramid schemes, see Comment, *supra* note 640, at 367-69; Note, *supra* note 648, at 699-704; Annot., *supra* note 652, at 233-37.

676. UTAH CODE ANN. § 76-6a-6(1) (Supp. 1983).

677. *Id.* § 76-6a-6(1). The Consumer Sales Practices Act also authorizes consumers to take the same actions that the Division of Consumer Protection is authorized to take under section 13-11-17. *Id.* § 13-11-19.

678. Position Paper on H.R. 59, Pyramid Scheme Bill, 44th Utah Leg., Budget Sess. at 5 [hereinafter cited as Position Paper on H.R. 59]. House Bill 59, which did not become law, included a private action provision similar to that included in the 1983 Act. Without a provision for private action, victims are less likely to act or testify against pyramid scheme organizers out of fear of losing whatever small chance they may have of recovering their investments. *Id.* The fact that the 1983 Act encourages investors to sue on their own behalf suggests that such persons are not intended to be targets of criminal prosecutions. *See supra* note 671.

mid schemes provides Utah law enforcement officials with a powerful set of tools with which to attack pyramid schemes. The Division of Consumer Protection now is authorized to adopt substantive rules prohibiting specific practices[679] and exercise broad investigatory powers.[680] The attorney general, on behalf of the Division of Consumer Protection, now may bring an action in court: (1) to obtain a declaratory judgment that a plan constitutes an illegal pyramid scheme;[681] (2) to enjoin the scheme's operation;[682] (3) to sue for actual damages on behalf of consumers individually or as a class;[683] and (4) to ask for other "appropriate orders," including the appointment of a master or receiver of the plan or the sequestration of its assets in order to ensure reimbursement to consumers.[684]

Finally, the Act attempts to cure potential problems of constitutional vagueness by defining a pyramid scheme as "any sales device or plan"[685] in which a person provides consideration "for compensation or the right to receive compensation which is derived *primarily* from the introduction of other persons into the sales device or plan rather than from the sale of goods, services or other property."[686] Thus, even if a multilevel plan involves a product

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679. UTAH CODE ANN. § 13-11-3(1) (Supp. 1983). Prior to 1983, the enforcing authority was the Trade Commission of Utah. *Id.*

680. *Id.* § 13-11-8(1) (authorizing the Division of Consumer Protection to conduct research, hold public hearings and publish studies); *id.* § 13-11-16(1) (authorizing the Division of Consumer Protection to administer oaths, subpoena witnesses or matter and collect evidence).

681. *Id.* § 13-11-17(1)(a).

682. *Id.* § 13-11-17(1)(b).

683. *Id.* § 13-11-17(1)(c), (2)(a).

684. *Id.* § 13-11-17(2)(b).

685. *Id.* § 76-6a-2(4). Because the new law defines a pyramid scheme as "any sales device or plan," chain letter schemes, which do not pretend to market a service or product, may not be covered by the new law. Pyramid schemes, as defined under the old law, were not limited to "sales" schemes. *Id.* § 76-6-519(2)(a) (1978) (repealed 1983). A chain letter scheme, however, may be construed as a sales scheme because it sells the right to recruit. The Oregon "Pyramid Club" law solved that problem by broadly defining a sales device: " 'Pyramid Club' also includes any such sales device which does not involve the sale or distribution of any real estate, goods or services, including but not limited to a chain letter scheme." OR. REV. STAT. § 646.609 (1981).

686. UTAH CODE ANN. § 76-6a-2(4) (Supp. 1983) (emphasis added). The Utah definition of a pyramid scheme is similar to, but narrower than, the Federal Trade Commission ("FTC") definition. *See supra* note 644. The FTC definition encompasses all schemes in which payment is made for the right to receive any profit from recruitment unrelated to sales. While the Utah definition requires profit to be derived primarily from recruitment, the FTC definition requires only that it be derived "to some degree" from recruitment. *Id.* Because the typical pyramid scheme is designed to generate profit primarily, if not entirely, from recruitment, the Utah definition should be adequate in most cases. However, organiza-

that profitably may be sold to the consumer, it is still an illegal pyramid if the promised profits are derived primarily from recruitment. That definition does not appear to be unconstitutionally vague[687] because it distinguishes more clearly than the 1973 law between genuine multilevel marketing plans and pyramid schemes by requiring that compensation be derived *primarily* from introduction of others into the scheme, rather than including organizations that pay *any* compensation derived from introduction of others into the scheme.[688]

Several of the Act's provisions, however, may not meet the objectives for which they were intended. For example, the ability of private parties or law enforcement officials to prove that an organization meets the statutory definition of a pyramid scheme remains uncertain. Proving that compensation primarily is derived from recruitment rather than sales may be the most difficult task.[689] Because an organization may be actively marketing a product as well as recruiting new members, determining the primary source of compensation may be a complex factual issue.[690] It also is uncertain whether the new law actually will curtail pyramid schemes in Utah by encouraging private suits by victimized investors. It is unlikely that creating the right of action will eliminate prevalent attitudes that may inhibit victims from bringing suit, such as feelings of embarrassment[691] and the feeling that because

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tions that genuinely market a product, as well as provide compensation for recruiting, would be pyramid schemes under the FTC definition but not necessarily under Utah law. The FTC definition is a more effective tool than the Utah law for attacking organizations in the gray area between clearly legitimate multilevel sales organizations and obviously illegal pyramid schemes. *See id.* The Utah definition also may create problems in proving the existence of an illegal pyramid scheme that the FTC definition would not. *See infra* note 689 and accompanying text.

687. *See supra* note 669.

688. Representatives of Amway Corp. and Direct Selling Association, a national trade association of door-to-door sales companies, lobbied during the 1983 Utah legislative session for a pyramid scheme law that clearly would distinguish pyramid schemes from legitimate multilevel sales organizations. The 1983 law apparently pleased those organizations for they reportedly are advocating it as a model statute. Interview with Assistant Utah Attorney General Neal Gooch, in Salt Lake City, Utah (Sept. 16, 1983); *see also supra* note 669.

689. Under the FTC's definition, no such proof would be necessary. *See supra* notes 644 & 686.

690. Some courts have dealt with the problem of the source of a scheme's income by showing that, in light of factors such as the design of the scheme, the amount of initial investment required and the size of the potential market for the product involved, recruitment must be the primary source of compensation. Thus, the difficulty in establishing such a case likely will vary with the sophistication of the scheme involved. *See, e.g.*, People *ex rel.* Kelley v. Koscot Interplanetary, Inc., 37 Mich. App. 447, 195 N.W.2d 43, 51-53 (1972).

691. According to a former Utah Assistant Attorney General, pyramid schemes are

participants "know" multilevel sales are a "gamble" they should accept the risk of loss along with the chance of gain.[692]

The 1983 Pyramid Scheme Act represents a significant improvement over the 1973 law it replaced. Although the Act can be criticized because several of its provisions may fail to achieve their intended objective, taken as a whole, the new Act should provide enough structure to allow the elimination of pyramid schemes.

XII. TORTS

Limited Immunity to Good Samaritans

The 1983 Utah Legislature passed a new "Good Samaritan Act,"[693] extending limited immunity from civil liability to all persons who "render emergency care at or near the scene of an emergency."[694] The new Act supplements Utah's original Good Samaritan Act,[695] which granted full immunity to all medical personnel rendering services in an emergency.[696] Although it is commendable to extend limited immunity to all persons giving aid in an emer-

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difficult to prosecute "because the victims are usually too embarrassed to report it. If the victims who lost $1000.00 don't care enough to try to stop it, what can they expect from us?" Statement of Ernie Jones, *quoted in* Louis, *supra* note 660, at 11.

692. In the past, law enforcement officials have complained about the unwillingness of victims to cooperate. According to a former Utah Assistant Attorney General, "suing a multi-level is like stepping in quicksand. People don't care and in fact they're mad at you when you do." Statement of Mike Martinez, *quoted in* Jarvik, *Have You Heard the One About the Multi-Level Marketing Salesman? It's No Joke*, UTAH HOLIDAY, May 1982, at 38, 47. The recent popularity in Utah of chain letter schemes suggests that some people participate in them knowing they are gambling. Louis, *supra* note 660, at 12. Participants in pyramids have been described as "almost a cult" or as "multilevel junkies" who are of two types: true believers, who adhere to their pyramids "with near-religious devotion," and those who join as many pyramid schemes as they can hoping to strike it rich by entering at a high level. Jarvik, *supra*, at 42-43. Such persons are said to be hostile to governmental interference with pyramids, believing in "the freedom and right to get hurt." *Id.* at 48. If such characterizations are at all accurate, the private action provisions of the new law may have a limited impact on the problem of pyramid schemes in Utah. The pyramid scheme bill submitted to the 1982 Budget Session of the Utah Legislature included a provision making mere participation in a pyramid scheme a class A misdemeanor. The provision, expressing perhaps an awareness of victims' enthusiasm for the schemes, was intended "to chill people's interest in these get-rich-quick schemes." Position Paper on H.R. 59, *supra* note 678, at 5.

693. Ch. 111, 1983 Utah Laws 504 (codified at UTAH CODE ANN. § 78-11-22 (Interim Supp. 1983)).

694. UTAH CODE ANN. § 78-11-22 (Interim Supp. 1983).

695. Act of March 9, 1961, ch. 135, 1961 Utah Laws 455 (currently codified at UTAH CODE ANN. § 58-12-23 (1953 & Supp. 1981)).

696. *Id.*; *see infra* notes 702-06 and accompanying text.

gency, it is unclear why medical personnel should continue to receive greater immunity in emergency situations than other persons.

Good Samaritan laws were developed in response to a peculiarity in tort law that discourages individuals from volunteering emergency assistance. In tort law, a passerby has no duty to aid an injured party.[697] Voluntarily attempting to give aid, however, exposes the good Samaritan to liability for simple negligence under the common law's assumption of duty rule.[698] That anomaly in the law has been criticized as deterring persons from giving needed aid.[699] The first state to remedy that problem was California, which passed the first Good Samaritan Act in 1959.[700] Since then, each of the fifty states and the District of Columbia have adopted some form of good Samaritan legislation.[701]

Utah's original good Samaritan statute, as adopted in 1961, applied only to persons licensed under the Medical Practices Act.[702] Later, that Act was amended to include nurses[703] and dentists,[704] but never was extended to include laypersons. The Medical Practices Act currently affords the named groups complete immunity from civil liability for any good faith rendition of care at the

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697. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

698. *Id.* § 324. No Utah case has expressly adopted the assumption of duty rule. Because a majority of states have adopted that rule, however, the Utah Supreme Court likely would do so as well. The likelihood of adoption of the assumption of duty rule was expressly affirmed in Barnson v. United States, 531 F. Supp. 614, 621 (D. Utah 1982), in which the court suggested that the legislature adopted the 1961 Good Samaritan Act in anticipation of judicial adoption of the common law rule.

699. One commentator has stated that:

> The result of all this is that the good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their way rejoicing. It has been pointed out often enough that this in fact operates as a real, and serious, deterrent to the giving of needed aid.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS 344 (1971).

700. Good Samaritan Act, ch. 1507, 1959 Cal. Stat. 2873 (currently codified at CAL. BUS. & PROF. CODE § 2395 (West Supp. 1981)). The original California law granted full immunity to all physicians rendering good faith emergency care. California later enacted a law extending that same immunity to all citizens. *See* CAL. HEALTH & SAFETY CODE § 1799.102 (West Supp. 1981).

701. A synopsis of the various state laws is provided in Mapel & Weigel, *Good Samaritan Laws—Who Needs Them: The Current State of Good Samaritan Protection in the United States*, 21 S. TEX. L.J. 327 (1980).

702. Act of March 9, 1961, ch. 135, 1961 Utah Laws 455 (currently codified at UTAH CODE ANN. § 58-12-23 (1953 & Supp. 1981)).

703. *See* Act of March 7, 1967, ch. 138, 1967 Utah Laws 320 (currently codified at UTAH CODE ANN. § 58-12-23 (1953 & Supp. 1981)).

704. *See* Act of March 8, 1979, ch. 13, § 2, 1979 Utah Laws 214, 218 (currently codified at UTAH CODE ANN. § 58-7-10 (1974 & Supp. 1983)).

scene of an emergency.[705] No exception to immunity was made for injuries caused by intentional, reckless or grossly negligent conduct.[706]

The new statute extends limited civil immunity to all persons not included within the prior Act who render aid at or near the scene of an emergency.[707] That limited immunity specifically excludes "grossly negligent" conduct.[708] Although the gross negligence standard was intended originally to apply to medical personnel as well as laypersons, the legislature amended the Act to apply only to laypersons.[709]

The new Act also clarifies several terms that are unclear in the original Act. Emergency is defined as "an unexpected occurrence involving injury, threat of injury or illness to a person, including motor vehicle accidents, disasters and other accidents or events of a similar nature."[710] The geographical scope of the immunity also is broadened to include aid rendered "near" the scene,[711] rather than just aid rendered "at" the scene of the emergency.[712] Those

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705. UTAH CODE ANN. § 58-7-10 (1974 & Supp. 1983).

706. *Id.* At least one commentator, however, has suggested that the "good faith" requirement may be construed as a limitation on immunity. *See* Mapel & Weigel, *supra* note 701, at 338. The good faith requirement could allow the courts to require *some* degree of care. It also is possible that the Utah courts would create an exception at least for intentionally injurious acts or omissions, but no cases have appeared to date. It should be noted, however, that immunity extends only to *civil* liability. Intentional, reckless or criminally negligent acts may be punished under the criminal code. *See* UTAH CODE ANN. § 76-2-101 (1978).

707. *See* UTAH CODE ANN. § 78-11-22 (Supp. 1983). That grant of immunity to all good Samaritans is consistent with a national trend toward immunizing all persons who voluntarily offer assistance in an emergency. *See* Mapel & Weigel, *supra* note 701, at 327. As of 1981, Utah was one of only seven states that limited immunity to medical personnel. Most states provided universal coverage. *Id.* For a list of state laws providing immunity to all citizens, *see id.* at 333-37.

708. *See* UTAH CODE ANN. § 78-11-22 (Supp. 1983). The Utah Code does not specifically define "gross negligence," but the term generally has been defined as something less than a reckless disregard, differing from negligence in degree only but not in kind. *See* Comment, *First Aid to Passengers: Good Samaritan Statutes and Contractual Releases from Liability*, 31 SW. L.J. 695, 708-09 (1977).

709. The first draft of the new law was intended to repeal the original act and cover *all* people—including those previously covered by the original act. However, during the second reading, the bill's sponsor, Sen. Lowell Peterson, said that because members of the medical profession thought they required special protection, the former law would not be repealed and the new law would apply only to persons not covered by the original act. *See* Floor Address by Sen. Lowell Peterson, 45th Utah Leg., Gen. Sess. (S. Recording Disk No. 73) (Jan. 27, 1983).

710. UTAH CODE ANN. § 78-11-22 (Supp. 1983).

711. *Id.*

712. *Id.* § 58-7-10 (Supp. 1983). Laws that provide immunity only for aid rendered at the scene of an emergency can be interpreted as thwarting the protective functions of the

clarifications should help Utah avoid some of the interpretive problems faced by other states.[713]

Another distinction in the new Act is that emergency care must be rendered "gratuitously" to fit within the immunity provision.[714] There is no such requirement under the Utah law applying to medical personnel.[715] Both statutes, however, require the assistance to be rendered "in good faith."[716]

By extending immunity to all persons, Utah's Good Samaritan Act provides protection and encouragement to those who render emergency assistance. The Act recognizes that laypersons are capable of rendering effective emergency assistance[717] and are more likely to be at the scene of an accident than are medical personnel. Furthermore, the Act eliminates the tort law anomaly that protects those who refuse to provide assistance, while exposing good Samaritans to liability for charitable acts.[718]

The Act, however, does perpetuate an unwarranted distinction by submitting laypersons to a greater standard of care than medical personnel. Medical personnel argue that this distinction is justified because doctors are more likely targets for lawsuits than laypersons, and the mere occurrence of malpractice litigation can harm a physician's professional reputation regardless of the lawsuit's validity.[719] Statistics indicate, however, that malpractice

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good Samaritan legislation. For example, an individual who renders aid to a victim who has wandered from the wreckage may no longer be covered by the statutory immunity. *See* Maple & Weigel, *supra* note 701, at 340.

713. In states without such definitions, it often is unclear what constitutes an "emergency." *See, e.g.*, McKenna v. Cedars of Lebanon Hosp., 93 Cal. App. 3d 282, 155 Cal. Rptr. 631 (1979) (emergency in hospital is an "emergency"); Dahl v. Turner, 80 N.M. 564, 458 P.2d 816, 823-24 (Ct. App.) (taking plaintiff to motel after accident was not an "emergency"), *cert. denied*, 80 N.M. 608, 458 P.2d 860 (1969).

714. UTAH CODE ANN. § 78-11-22 (Supp. 1983).

715. *Id.* § 58-12-23 (1953 & Supp. 1981). That distinction may be a result of the quasi-contract principle that allows compensation to physicians who render unsolicited services where there is reason to believe the recipient would have requested the services had he been able to do so. *See* Mapel & Weigel, *supra* note 701, at 339.

716. UTAH CODE ANN. §§ 58-12-23, 78-11-12 (1953, Supps. 1981 & 1983). In the good Samaritan context, good faith generally is defined as implying an "honesty of intention." *See* Mapel & Weigel, *supra* note 701, at 339. *See generally supra* note 706 (good faith requirement may provide handle for courts to limit immunity).

717. A majority of states have rejected the argument that laypersons should not be encouraged to give emergency aid because their lack of skill might render their assistance more detrimental than beneficial. *See* Maple & Weigel, *supra* note 701, at 327. All emergency situations do not involve a need for complex medical care. Good Samaritan actions may concern nothing more complicated than driving a victim to a nearby hospital.

718. *See supra* notes 697-99 and accompanying text.

719. *See* Mapel & Weigel, *supra* note 701, at 329.

suits arising from alleged negligence at the scene of an accident virtually are nonexistent.[720] Furthermore, it seems anomalous to require certain levels of competence in a hospital setting, yet permit lesser standards to apply in emergency situations, particularly where the statute does not require physicians to render the emergency care "gratuitously."[721] Finally, the gross negligence standard itself may be unworkable because the distinction between simple negligence and gross negligence is not clearly defined.[722]

The new Utah Act is significant because it bars an action for simple negligence against anyone rendering emergency aid. As a practical matter, however, the effect probably will be negligible. As one commentator noted, there have been virtually no cases where a "good Samaritan" was sued for his benevolence.[723] Although some have argued that the law removes a deterrent against rendering emergency aid,[724] others have denied that any effect exists even in states with the broadest immunity provisions.[725]

Regardless of the practical effects of the Good Samaritan Act, its adoption is meaningful from a legal and moral standpoint. Utah has joined the majority of states in recognizing the need to encourage, rather than discourage, humanitarian acts. Expanding immunity to cover all good Samaritans is a significant step in that direction.

XIII. WRONGFUL LIFE AND WRONGFUL BIRTH

Wrongful Life Actions

The Utah Wrongful Life Act[726] (the "Act") precludes any per-

720. *See id.*; Note, *Torts: California's Good Samaritan Legislation—Exemption from Civil Liability While Rendering Emergency Medical Aid*, 51 CALIF. L. REV. 816, 817 & n.11 (1963).

721. *See supra* notes 714-15 and accompanying text.

722. There is no statutory or judicial definition of gross negligence in Utah. The idea of "degrees of negligence" has been criticized as "vague and impractical in its nature, unfounded in principle." W. PROSSER, *supra* note 699, at 182.

723. Comment, *supra* note 708, at 705. There have been no good Samaritan cases in Utah.

724. That was an argument presented for passage of the Utah legislation. *See* Floor Address by Sen. Lowell Peterson, *supra* note 709.

725. *See* Mapel & Weigel, *supra* note 701, at 348. One reason given is that the wide diversity among state laws makes it unlikely that many citizens are aware of the statutory provisions governing their actions. *Id.*

726. Act of Feb. 28, 1983, ch. 167, 1983 Utah Laws 687 (codified at UTAH CODE ANN. §§ 78-11-23 to -25 (Supp. 1983)). Three states have similar statutes. *See* CAL. CIV. CODE § 43.6 (West 1981); MINN. STAT. § 145.424 (Supp. 1983); S.D. CODIFIED LAWS ANN. §§ 21-55-1 to -4

son from claiming a child's birth as injury in an action where, had the wrongdoer not been negligent, the child would have been aborted.[727] The Act also precludes, as an affirmative defense, the assertion by a defendant that he should pay no child support or other damages because of the plaintiff's failure or refusal to have an abortion.[728] The Act is a response to recent decisions allowing recovery for wrongful life and wrongful birth.[729]

Wrongful life actions are brought by handicapped children[730] who, but for the negligence of another, would not have been born.[731] Wrongful life damages are based on the difference between the value of the child's life and the value of no life.[732] Only two states have recognized a cause of action based on wrongful life.[733]

Wrongful birth actions are brought by the parents or siblings of an unwanted child who was born as a result of a negligently performed sterilization[734] or abortion,[735] the negligent dispensing of

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(Supp. 1983).

727. UTAH CODE ANN. § 78-11-24 (Supp. 1983): "A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted."

728. *Id.* § 78-11-25: "The failure or refusal of any person to prevent the live birth of a person, shall not be a defense in any action, and shall not be considered in awarding damages or child support, or imposing a penalty, in any action." The statute prevents the defendant from escaping liability on the theory that the plaintiff failed to mitigate damages because she failed to have an abortion. Plaintiffs who are injured by actionable conduct ordinarily are denied recovery for damages that reasonably could have been avoided. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.7, at 186 (1973). Courts, however, consistently have held that it is not reasonable to require a mother to abort a child in order to mitigate damages. *See* Robertson, *Civil Liability Arising From "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 19 JURIMETRICS J. 140, 164 (1978); *see also* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 520 (1971); Martineau v. Nelson, 247 N.W.2d 409, 416 n.15 (Minn. 1976).

729. Third Reading S. 149, 45th Utah Leg., Gen. Sess. (Feb. 28, 1983) (statement by Sen. E. Verl Asay); *see* cases cited *infra* notes 730-44.

730. *See, e.g.*, Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483, 494 (1983) (wrongful life is the child's equivalent of the parent's wrongful birth action).

731. *See, e.g.*, Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, 858 (1963) (first action on behalf of a child alleging his "wrongful life" as his injury).

732. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 692 (1967) (measure of damages in wrongful life action is the difference between nonlife and an impaired life).

733. Those two states are California and Washington. *See* Turpin v. Sortini, 31 Cal. 3d 220, 240, 643 P.2d 954, 966, 182 Cal. Rptr. 337, 349 (1982) (wrongful life action allowed where physician failed to advise parents of possibility of hereditary deafness); Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 831, 165 Cal. Rptr. 477, 489 (1980) (wrongful life recovery allowed where physician negligently performed amniocentesis); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483, 497 (1983) (wrongful life recovery allowed for negligent failure to inform mother of material risks of treatment during pregnancy).

734. *See, e.g.*, Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883, 885 (1982) (wrongful birth

a contraceptive[736] or the negligent performance of genetic testing and counseling.[737] Wrongful birth damages are based on a variety of grounds including the deprivation of a mother's opportunity to make a procreative choice,[738] the added financial burden imposed on a family as a result of an unwanted or unexpected birth,[739] the costs of pregnancy and delivery,[740] the costs of raising the child,[741] the medical costs of caring for the child,[742] the parents' emotional distress[743] and the spouse's loss of consortium during the pregnancy.[744] Many jurisdictions allow recovery for wrongful birth.[745]

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action allowed for negligent sterilization); P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556, 559 (1981) (wrongful birth action allowed for negligent sterilization); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496, 499 (1976) (wrongful birth action allowed for negligent sterilization).

735. *See, e.g.*, Stills v. Gratton, 55 Cal. App. 3d 698, 709, 127 Cal. Rptr. 652, 658 (1976) (wrongful birth action allowed for failure of abortion attempt); Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496, 508 (1979) (wrongful birth action allowed for failure of abortion attempt).

736. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511, 516 (1971) (wrongful birth recovery allowed for pharmacist negligently supplying a tranquilizer rather than a birth control pill).

737. *See, e.g.*, Gildener v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 695 (E.D. Pa. 1978) (wrongful birth recovery allowed where doctor negligently performed amniocentesis to determine whether infant would be born with Tay-Sachs disease); Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 14 (1979) (wrongful birth recovery allowed where doctor failed to inform pregnant woman of availability of amniocentesis procedure); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483, 488 (1983) (wrongful birth recovery allowed where physician failed to inform mother of material risks of treatment during pregnancy).

738. *See, e.g.*, Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834, 840 (1981) (failure to diagnose cystic fibrosis in time to prevent pregnancy or abort child impaired mother's procreative choice); Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 13 (1979) (failure to inform pregnant woman of availability of amniocentesis procedure impaired mother's right to make a procreative choice).

739. *See, e.g.*, Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883, 884 n.3 (1982) (unwanted child should not deprive the other members of the family of what originally was their share of the family income).

740. *See, e.g.*, P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556, 559 (1981) (damages awarded for medical costs related to pregnancy and delivery).

741. *See, e.g.*, Robak v. United States, 658 F.2d 471, 478 (7th Cir. 1981) (recovery allowed for projected costs of raising child because physician negligently failed to diagnose pregnant mother's rubella). *But see* P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556, 559 (1981) (court denied recovery for projected costs of raising the child).

742. *See, e.g.*, Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834, 842 (1981) (awarding damages for expenses attributable to the child's disease); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 814, 413 N.Y.S.2d 895 (1978) (allowing damages for medical costs of caring for the child).

743. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 15 (1979) (parents recovered for mental and emotional anguish they suffered and will continue to suffer as a result of their child's condition). *But see* Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496, 509 (1979) (denying damages for emotional distress).

744. *See, e.g.*, P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556, 559 (1981) (husband

The Utah Act precludes all causes of action based on the theory that but for the negligent conduct of another, a child would have been aborted.[746] The Act was intended to prevent abortions[747] by curbing the perceived trend towards genetic counseling performed routinely.[748] Proponents of the Act believed that recent decisions allowing recovery for wrongful life and wrongful birth[749] encouraged physicians to perform such genetic testing in order to avoid malpractice liability.[750] Routinely performed genetic testing supposedly encourages abortions by informing parents of their unborn child's defects.[751] Thus, to discourage such testing, the legislature passed legislation that purportedly removes malpractice liability due to a physician's failure to perform genetic tests routinely.[752]

The Act fails to implement legislative intent, however, because liability for negligent genetic testing still exists under the Act. For example, a woman has a right to make a fully informed procreative choice,[753] and courts have held that when negligent counseling interferes with that right a woman is entitled to damages, irrespective of whether she would have had an abortion.[754] Thus, because

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may recover for loss of consortium); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496, 498 (1976) (damages awarded for spouse's loss of consortium during the pregnancy).

745. *See* Comment, *Wrongful Life: A Misconceived Tort*, 15 U.C.D. L. REV. 447, 453 (1981).

746. UTAH CODE ANN. § 78-11-24 (Supp. 1983). The "but would have been aborted" language was added to the original bill to provide focus to the Act. Interview with Sen. E. Verl Asay, sponsor of the Act, in Salt Lake City, Utah (Oct. 3, 1983).

747. Third reading S. 149, *supra* note 729.

748. Interview with Lynn D. Wardle, Prof. of Law, Brigham Young University College of Law, Provo, Utah (Oct. 4, 1983) (Wardle was instrumental in writing the proposed senate bill, which had been based on a proposed uniform bill promulgated by Americans United for Life). Genetic testing increasingly is being performed across the country. *See* H. HAMMONDS, HEREDITARY COUNSELING—AMERICAN GENETIC SOCIETY (1977) (from 1960 to 1974, the number of genetic counseling centers increased from 13 to 350); PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SCREENING AND COUNSELING FOR GENETIC CONDITIONS 23 (1983) (genetic service centers performed amniotic fluid analyses on 42,003 specimens in 1979 and 1980). However, there is no apparent trend towards routine or mandatory prenatal screening. *See* Damme, *Controlling Genetic Disease Through Law*, 15 U.C.D. L. REV. 801, 820-28 (1982) (although most states have mandatory newborn screening laws for genetic disorders, the constitutional problems associated with mandatory prenatal screening are deterring states from adopting mandatory genetic screening for the unborn).

749. *See supra* notes 730-45 and accompanying text.

750. Wardle Interview, *supra* note 748.

751. *Id.*

752. *Id.*

753. *See supra* note 738 and accompanying text; *infra* notes 761-62 and accompanying text.

754. Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979). The *Berman* court considered a wrongful birth cause of action based on the denial of procreative choice and held that the

the Act does not remove all liability for negligent genetic counseling, doctors may continue feeling compelled to routinely counsel women and thereby thwart the legislative intent.[755]

It also is unclear to what extent the Act precludes wrongful birth actions. Although the title of the Act refers only to the prohibition of wrongful life actions,[756] the text of the Act is broad enough to preclude wrongful birth actions also.[757] However, even if the Act does preclude wrongful birth actions, that prohibition involves only those cases where, but for the negligent conduct, there would have been an abortion.[758] Thus, a plaintiff could argue that wrongful birth actions based on negligent sterilization or negligent dispensing of contraceptives are not precluded by the Act.

Additionally, there may be a question as to the scope of wrongful life actions barred by the Act. While the title of the Act implies an absolute bar,[759] the more specific language of the Act requiring an abortion nexus[760] may allow infant plaintiffs to recover wrongful life damages for negligent sterilization operations or negligent dispensing of contraceptives.

The Act also may violate a woman's right to an abortion. In *Roe v. Wade*,[761] the United States Supreme Court held that women, during the first trimester of pregnancy, have the right to

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cause of action existed, irrespective of whether the mother would have had an abortion. 404 A.2d at 18 (Handler, J., concurring): "The moral affront [in impairing a mother's decision] . . . is not diminished because the parents, if given the choice, would have permitted the birth of the child. The crucial moral decision, which was theirs to make, was denied them." *See also* Jacobs v. Theimer, 519 S.W.2d 846, 848 (Tex. 1975) (allowing wrongful birth recovery, despite illegality of abortion, on the theory that doctor impaired parents' procreative choice by failing to accurately inform them of the risk of genetic defects in their unborn child).

755. *See supra* notes 747-52 and accompanying text.

756. The title reads: "An Act relating to life; barring any cause of action and any award of damages for wrongful life." Act of Feb. 28, 1983, ch. 167, 1983 Utah Laws 1 (codified at UTAH CODE ANN. §§ 78-11-23 to -25 (Supp. 1983)). The title of a bill can be considered in ascertaining legislative intent or in assisting with the interpretation of intent when there are ambiguities in or doubts concerning the wording of a bill. Young v. Barney, 20 Utah 2d 108, 433 P.2d 846 (1967); Donahue v. Warner Bros. Pictures Distrib. Corp., 2 Utah 2d 256, 272 P.2d 177 (1954).

757. UTAH CODE ANN. § 78-11-24 (Supp. 1983): "A cause of action shall not arise and damages shall not be awarded on behalf of *any person* . . . ." (Emphasis added). That language is broad enough to include both the child and the parents.

758. *Id.*

759. *See supra* note 756.

760. UTAH CODE ANN. § 78-11-24 (Supp. 1983); *see* language of statute cited *supra* note 727.

761. 410 U.S. 113 (1973).

make informed procreative decisions without state interference.[762] The integrity of the woman's decisional right can be preserved only by ensuring that she is informed concerning matters that are material to her decision.[763] If the Act is interpreted as limiting the situations in which a woman may sue a doctor for failure to provide her with accurate information,[764] the state may be impairing the woman's constitutionally protected right to informatively choose an abortion.[765]

The Utah Wrongful Life Act bars causes of action and affirmative defenses based on the claim that a child should have been aborted. Although the intent of the legislature was to discourage abortions, it is unclear whether the Act will effectively implement that intent. Moreover, the extent to which the Act affects wrongful life and wrongful birth actions is unclear. The Act also may unconstitutionally burden a woman's right to choose an abortion if construed as removing one of the physician's incentives—fear of liability—to provide that woman with accurate information concerning her procreative decision.

762. *Id.* at 177.

763. Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1508 (1978).

764. *See supra* notes 747-52 and accompanying text.

765. *See, e.g.*, Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883, 885 (1982) ("public policy cannot support an exception to tort liability when the impact of such an exception would impair the exercise of a constitutionally protected right"); Comment, *supra* note 745, at 455 n.44 ("Denying a claim of wrongful birth . . . , which otherwise meets the traditional requirements of a tort action, because it is based on the exercise of a woman's constitutional right to make a procreative choice, is analogous to those cases . . . calling for strict scrutiny. Thus, to deny a claim of wrongful birth, the state would have to show a compelling state interest and a means closely related to protecting that interest").

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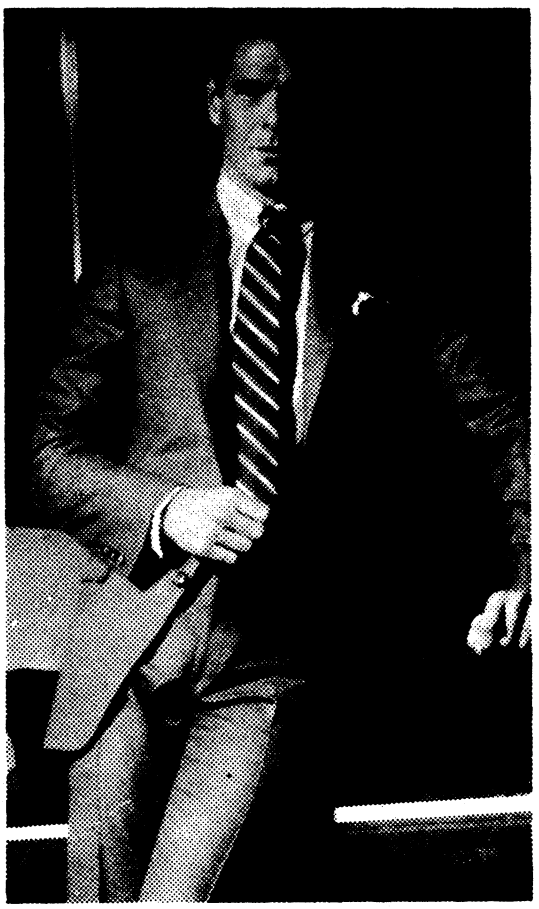

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