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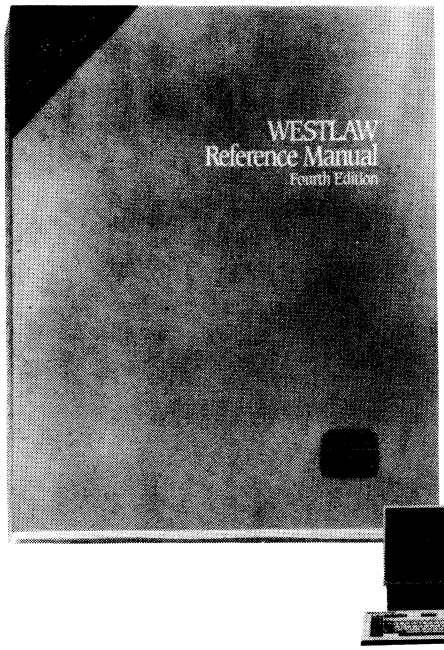

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Editor's Note

With this issue, the *Utah Law Review* achieves its three-year goal of producing the *Review* on a desktop publishing system. The Review gratefully acknowledges the financial support of the R. Harold Burton Foundation, without which this goal would remain unfulfilled. The *Review* also acknowledges the continued support of the Administration, Faculty, and Staff of the University of Utah College of Law.

TOXICS USE REDUCTION LEGISLATION: AN IMPORTANT "NEXT STEP" AFTER RIGHT TO KNOW

Paulette L. Stenzel[*]

I. INTRODUCTION

Disasters resulting from toxic[1] chemicals have increased citizens' awareness of the hazards associated with those chemicals. Such disasters include those in Love Canal, New York,[2] and in Bhopal, India.[3] Additionally, public discussions of the effects of chemicals such as EDB[4] and Alar[5] in food and other consumer products have further heightened citizens' awareness of those hazards. During the 1980s, in direct response to citizens' concerns about toxics, cities, states, and the federal government enacted and

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1. The word "toxic" is used in this Article in the broad sense of harmful or poisonous. *See* M. KAMRIN, TOXICOLOGY—A PRIMER ON TOXICOLOGY PRINCIPLES AND APPLICATIONS 138 (1988). Other relevant definitions include: "[t]oxin: A poison of biological origin" and "toxicity: The quality or degree of being poisonous or harmful to plant, animal, or human life." J. COHRSSEN & V. COVELLO, RISK ANALYSIS: A GUIDE TO PRINCIPLES AND METHODS FOR ANALYZING HEALTH AND ENVIRONMENTAL RISKS 374 (1989).

2. *See generally* M. BROWN, LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS (1981) (describing extensive problems created by chemicals dumped in Love Canal in Niagara Falls, New York; documenting problems with thousands of chemical waste dumps across United States).

3. *See generally* P. SHRIVASTAVA, BHOPAL: ANATOMY OF A CRISIS (1987) (describing 1984 accident in which between 2000 and 3000 people were killed and another 18,000 people were injured; discussing how and why it happened, and consequences for citizens, businesses, government in India, United States, and throughout world).

4. Ethylene dibromide ("EDB") is a pesticide and soil fumigant that was widely used by the citrus and grain industries from 1948 to 1984. In response to public alarm over reports that EDB is a carcinogen, the Environmental Protection Agency banned the use of EDB as a grain fumigant and set standards forcing the removal of certain grain-based products such as cake mixes and breakfast cereals from grocery shelves. *See EDB: What It Is, Why It's Controversial*, U.S. NEWS & WORLD REPORT, Feb. 13, 1984, at 59; *The Muffin-Mix Scare*, TIME, Feb. 13, 1984, at 20; Beck & Hager, *EDB: A Cancer Scare*, NEWSWEEK, Feb. 13, 1984, at 23; *see also* Johnson, *EDB (Ethylene Dibromide)*, RISK COMMUNICATION 83-85 (1987) (discussing EPA's handling of communication with public regarding EDB controversy).

5. Alar is a growth regulator and possible carcinogen. For discussion of the 1989 controversy and public alarm over the use of Alar on apples, see Carlson, *Do You Dare to Eat a Peach?*, TIME, March 27, 1989, at 24. *See also* Ward, *The Catastrophes of March*, SAFETY & HEALTH, June 1989, at 25 (discussing public implications of Alar scare as well as two other major environmental issues in news in March of 1989).

implemented various "Right to Know" ("RTK") laws.[6] The earliest RTK laws were designed to give workers access to information about the presence and identities of, as well as the hazards associated with, toxic chemicals in the workplace.[7] Later in the 1980s, other laws gave citizens access to similar information about toxic chemicals located in business facilities within their communities.[8] Information released pursuant to community RTK laws serves to further heighten public awareness of the presence of toxics in everyday life. For example, based on information released under federal RTK laws, a Detroit newspaper reported that in the year preceding July 1, 1988, American industries released 22 billion pounds of toxic substances into the air and water, and onto the land of this country.[9]

Responses to the information available through worker and community RTK laws have varied. Whether due to ignorance or lack of concern, some citizens have shown no response to such information.[10] Other citizens have taken very specific action. For example, across the United States coalitions of labor and environmental groups have responded to information obtained through RTK laws by asking targeted companies to sign "Good Neighbor Agreements" in which those companies promise to cut their chemical discharges into the air, sewers, land, and water.[11] Also, new Toxics Use Reduction ("TUR") laws have been enacted requiring businesses to develop and implement plans reducing their use and production of toxics. Various forms of TUR legisla-

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6. The phrase "right to know" often appears with hyphens. In order to avoid being cumbersome, however, throughout this Article "right to know" is used as a three word phrase except when used as a part of the proper name of a statute.

7. *See* OSHA Hazard Communication Standard, 29 C.F.R. § 1910.1200 (1987); *see also infra* text accompanying notes 13-18 (discussing history of worker RTK laws).

8. The federal RTK statute, which states and cities have supplemented through their own laws, is the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001-11050 (1988).

9. *See Industrial Pollution "Startling," EPA Says*, Detroit Free Press, Apr. 13, 1989, at 7A, col. 5.

10. *See Firms Have Responded to Title III Disclosure Mandates But Citizens Have Failed to Take Full Advantage of New Data*, HAZARDOUS MATERIALS DIALOGUE, Vol. 1, No. 4, at 1 (1990) (concluding chemical information generally does not reach citizens and citizens are not getting technical assistance they need to understand and interpret data available through Community RTK).

11. Askari, *Sierra Club Calls 14 Plants Chemical Pollution Leaders*, Detroit Free Press, Mar. 13, 1990, at 1A, col. 4.

tion have been adopted in ten or more states.[12] Other states are currently considering proposals for such laws. Therefore, TUR laws merit the attention of lawmakers, businesses, labor groups, consumers, and environmentalists across the United States.

This Article analyzes and explains the basis for TUR legislation. To provide background, section II reviews the history, provisions, and purposes of RTK laws. That section also demonstrates why more regulation is needed and discusses citizens' responses to RTK legislation. The enactment of TUR legislation is among those responses. Section III analyzes TUR legislation through discussion of its purposes, the public policy supporting it, and its feasibility. Then, the Article provides the Massachusetts Toxics Use Reduction Act (the "MTURA") as an example of a strong TUR statute. Section IV discusses issues that have been confronted in drafting existing TUR laws and makes recommendations for a model TUR law. This Article concludes that the adoption and implementation of TUR legislation is a logical and important next step after RTK laws.

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12. For purposes of this Article, the author examined the TUR laws of 10 states: Hazardous Waste Source Reduction and Management Review Act of 1989, CAL. HEALTH & SAFETY CODE §§ 25244.12 to .25 (West Supp. 1991); Georgia Hazardous Waste Management Act, GA. CODE ANN. §§ 12-8-60 to -113 (1988); Toxic Pollution Prevention Act, ILL. ANN. STAT. ch. 111 ½, para. 7951-57 (Smith-Hurd Supp. 1991); Industrial Pollution Prevention and Safe Materials, IND. CODE ANN. §§ 13-9-1-1 to -16 (Burns 1990); Toxics Use and Hazardous Waste Reduction, ME. REV. STAT. ANN. tit. 38, §§ 2301-2312 (Supp. 1990); Massachusetts Toxics Use Reduction Act, MASS. GEN. L. ch. 21I, §§ 1-23 (Supp. 1991); Minnesota Toxic Pollution Prevention Act, MINN. STAT. ANN. §§ 115D.01 to .12 (West Supp. 1991); Toxics Use Reduction and Hazardous Waste Reduction Act, OR. REV. STAT. §§ 465.003 to .037 (1989); Tennessee Hazardous Waste Reduction Act of 1990, TENN. CODE ANN. §§ 68-46-301 to -312 (Supp. 1990); Waste Reduction, WASH. REV. CODE ANN. §§ 70.95c.010 to .240 (Supp. 1991). One model law also was examined. *See* POLLUTION PREVENTION ACT (Am. Leg. Exch. Council) (undated document available from the American Legislative Exchange Council, 214 Massachusetts Ave., N.E., Washington, D.C. 20002, (202) 547-4646).

Depending on how broadly such legislation is defined, the total number of states with TUR statutes may be higher than 10. For example, the Ohio Environmental Protection Agency has compiled a paper outlining pollution prevention laws in 12 states. *See* R. SULLIVAN, FACILITY POLLUTION PREVENTION PLANNING: A MATRIX OF THE PROVISIONS OF TWELVE STATE LAWS (1990) (available from Ohio EPA, P.O. Box 1049, 1800 Watermark Drive, Columbus, Ohio 43266-0149, (614) 644-3020); *see also* WASTE REDUCTION INSTITUTE FOR TRAINING AND APPLICATIONS RESEARCH, INC. (WRITAR), SURVEY & SUMMARIES: STATE LEGISLATION RELATING TO POLLUTION PREVENTION (1991) (summarizing existing and emerging legislation in 26 states dealing with pollution prevention and facility planning) (available from WRITAR, 1313 5th St. S.E., Minneapolis, Minnesota 55414-4502, (612) 379-5996).

II. BACKGROUND—RIGHT TO KNOW LEGISLATION AND RESPONSES TO IT

A. Right to Know

1. History of RTK Legislation

Prior to the 1970s, the term "right to know" was used to refer to freedom of the press and citizens' rights to information about government's activities. In the mid-1970s, however, labor groups began to talk about and advocate "Worker Right-to-Know" laws. These proposed laws demanded access to information about substances in the workplace posing long-term hazards to health, as well as information about individual worker's exposure to such substances.[13] In 1979, Connecticut enacted the first worker RTK law.[14] New York, Michigan, California, and Maine passed their own versions of worker RTK laws in 1980.[15] By 1985 there were at least sixteen municipal RTK laws and twenty-eight state RTK laws.[16]

Meanwhile, the Occupational Safety and Health Administration ("OSHA"), created in 1970, addressed concerns about long-term health risks of workplace exposure to toxic substances. In 1984, OSHA promulgated a final rule entitled the "Hazard Communication Standard" (the "HCS") giving RTK protections to certain workers.[17] On June 24, 1988, OSHA extended the HCS's coverage to workers in all public businesses except the construction industry.[18]

In a pattern similar to the development of worker RTK laws, cities and states first enacted community RTK laws, and federal legislation followed a few years later. In 1981, Philadelphia passed an RTK law that covered both workers and the community.[19]

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13. *See* S. HADDEN, A CITIZEN'S RIGHT TO KNOW: RISK COMMUNICATION AND PUBLIC POLICY 20 (1989).

14. *See id.* at 22.

15. *See id.*

16. *See id.* Another source states that as of 1984 over 40 cities and over 20 states had passed worker RTK laws. *See* Wall St. J., Dec. 14, 1984, at 22, col. 5.

17. *See* OSHA Hazard Communication, 29 C.F.R. § 1910.1200 (1984) (effective November 25, 1985).

18. *See* 53 Fed. Reg. 27,679 (1988).

19. *See* S. HADDEN, *supra* note 13, at 25.

During the next few years, many cities and states passed community RTK laws.[20] Each law differed slightly from the others with respect to details such as particular substances and industries covered and the kinds of information industry was required to reveal.[21] In 1986, community RTK legislation was enacted on a federal level in the Emergency Planning and Community Right-to-Know Act ("EPCRA"), also known as "Title III."[22] Congress enacted EPCRA, part of the Superfund Amendments and Reauthorization Act ("SARA"),[23] in response to public concerns about the 1984 accidental release of methyl isocyanate from a Union Carbide plant in Bhopal, India that killed over 2000 people.[24] The EPCRA has two distinct yet complementary objectives. First, it sets up a mechanism through which communities must establish plans for dealing with emergencies created by chemical spills or leaks.[25] Second, it extends to communities the types of RTK provisions that were guaranteed to workers under OSHA's HCS.[26]

2. Provisions of RTK

It is necessary to review the basic provisions of OSHA's HCS and EPCRA to understand why more regulation is needed.[27] A review also provides useful background for understanding TUR laws because some TUR provisions are cross-referenced to EPCRA.

The HCS requires manufacturers, importers, and distributors to provide to employers evaluations of all hazardous or toxic materials they sell or distribute to those employers.[28] This

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20. *See id.*

21. *See id.* at 22.

22. *See* Emergency Planning and Community Right-to-Know Act of 1986, Pub. L. No. 99-499, Title III, 100 Stat. 1728 (codified at 42 U.S.C. §§ 11001-11050 (1988)).

23. *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C.A. §§ 9601-9675 (West Supp. 1991)).

24. *See* ENVIRONMENTAL LAW REPORTER, SUPERFUND DESKBOOK 13 (1986). Congress passed the Emergency Planning and Community Right-to-Know Act in an effort to prepare for the possibility of such incidents in this country. *See id.*

25. *See infra* notes 35-45 and accompanying text.

26. *See infra* notes 46-59 and accompanying text.

27. Discussion of the various state statutes and city ordinances, although informative, is beyond the scope of this Article. For such a discussion, see S. HADDEN, *supra* note 13, at 19-69.

28. *See* 29 C.F.R. § 1910.1200(g)(6) (1987).

information is compiled in a Material Safety Data Sheet ("MSDS") for each chemical involved.[29] The MSDS must identify the chemical, describe its physical hazards—such as ignitability and reactivity—list associated health hazards, and identify exposure limits set by OSHA.[30] The utility of these data sheets is limited, however. In addition to being quite brief, they depend on information supplied by the chemical manufacturer, who has a strong incentive to present information deemphasizing the risks involved.

After receiving the MSDSs, an employer must assess the potential hazards of all materials used in the workplace, prepare a list of hazardous materials located there, and establish a written program for hazard communication.[31] As a part of this program, the employer must make the MSDSs for all hazardous chemicals on the premises available to its employees.[32]

In addition to requiring MSDSs, HCS requires employers to establish training programs designed to ensure that employees are aware of HCS, know of the hazards of materials in their workplaces, and understand how to use those materials safely.[33] Furthermore, employers must label packages, containers, and storage tanks with the identity of hazardous substances and appropriate warnings.[34]

(a) Emergency Planning

The first of the two major parts of EPCRA is "Emergency Planning." Although EPCRA's Emergency Planning provisions are separate from its community RTK provisions, each set of provisions complements the other. The EPCRA required the governor of each state to establish a State Emergency Response Commission ("SERC") in 1988.[35] In turn, each SERC established "emergency planning districts" and appointed a "local emergency planning committee" ("LEPC") for each district.[36] By October 17,

29. *See id.* § 1910.1200(g)(1).
30. *See id.* § 1910.1200(g)(2).
31. *See id.* § 1910.1200(e).
32. *See id.* § 1910.1200(g)(8).
33. *See id.* § 1910.1200(h).
34. *See id.* § 1910.1200(f).
35. *See* 42 U.S.C. § 11001(c) (1988).
36. *Id.* § 11001(b)-(c).

1988, each LEPC was required to prepare plans for potential chemical emergencies in its communities.[37] Among other requirements, the plans must include: identities of facilities; procedures to be followed in the event of a release; and the identity of a "community emergency coordinator" and of a "facility emergency coordinator" from each business facility subject to EPCRA reporting.[38]

A facility is covered under EPCRA if it has a substance in a quantity that equals or exceeds the "threshold planning quantity" specified on a list of about 400 "Extremely Hazardous Substances" published by the Environmental Protection Agency (the "EPA").[39] Also, a state's governor or SERC may designate additional covered facilities after public notice and comment.[40] Each covered facility is required to provide "facility notification information" to its state's SERC and to designate a "facility coordinator" to work with its LEPC.[41]

EPCRA requires a business to report immediately to the LEPC and SERC any accidental releases or spills of two categories of hazardous substances.[42] The first category of hazardous substances includes those on the EPA's "Extremely Hazardous Substance" list.[43] The second includes substances for which notice of a release or spill is required under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[44] In addition to the initial emergency notice, EPCRA requires follow-up notices and reports.[45]

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37. *See id.* § 11001(a).

38. *Id.* § 11003(c).

39. Pursuant to EPCRA, the EPA published a list of hazardous substances on April 22, 1987 and again on March 1, 1988. *See* 40 C.F.R. § 302.4 (1990). The list is subject to further revision.

40. *See* 42 U.S.C. § 11002(b)(2) (1988).

41. *Id.* § 11002(c).

42. *See id.* § 11004(b).

43. *See supra* text accompanying note 39.

44. *See* 42 U.S.C. § 11004(a)(3) (1988) (incorporating list of chemicals requiring notice under § 103(a) of CERCLA); *see also id.* § 9601(14) (hazardous substances under CERCLA).

45. *See id.* § 11004(c).

(b) Community RTK

Community right to know is the second major part of EPCRA.[46] Information about the presence of chemicals at covered facilities is collected from those facilities and made available to government officials and to the general public.[47] This information is gathered through two sets of annual reports submitted by businesses: the "Hazardous Chemical Inventory"[48] and the "Toxic Chemical Release Form."[49]

As a part of the Hazardous Chemical Inventory, each facility must submit to its local fire department, its LEPC, and its SERC, an MSDS for each chemical on its premises meeting or exceeding a specified threshold quantity.[50] The MSDSs are identical to those required under OSHA's HCS.[51] A list of chemicals may be submitted in lieu of the MSDSs, but, on the request of the LEPC, the MSDSs must be provided.[52] In addition, for each chemical reported under this provision, a "Chemical Inventory Report" must be filed annually by March 1.[53] In the report, a business lists the hazard category for the chemical, based on five categories established by the EPA, and the chemical's locations.[54]

A separate report called the "Toxic Chemical Release Form" must be filed annually by July 1 with the EPA and the appropriate state's SERC.[55] All releases made by the facility during the preceding twelve months are summarized on the Toxic Chemical Release Form,[56] including those made legally pursuant to permits issued by EPA and corresponding state environmental agencies.[57] All companies employing ten or more persons must file the form if the company manufactures, stores, imports, or otherwise uses designated toxic chemicals at or above threshold levels. Specific

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46. *See id.* § 11021.
47. *See id.*
48. *Id.* § 11022(a).
49. *Id.* § 11023(a).
50. *See id.* § 11021(a)(1).
51. *See supra* note 17 and accompanying text; *supra* text accompanying note 26.
52. *See* 42 U.S.C. § 11021(c)(1) (1988).
53. *Id.* § 11022(a)(1)-(2).
54. Reports must be filed on either a "Tier I" or "Tier II" form. *See id.* § 11022(d) (describing two forms).
55. *Id.* § 11023(a).
56. *See id.*
57. *See id.* § 11023(b).

chemicals and the threshold level at which reporting becomes required are on a list published in the *Federal Register*.[58]

The information submitted under both the Emergency Planning and the RTK provisions of EPCRA is available to the public through the LEPCs. Information released pursuant to EPCRA has served as an important catalyst with respect to citizens' petitions for "Good Neighbor Agreements" and proposals for TUR legislation.[59]

3. Purposes of RTK

Worker and community RTK laws signal a significant shift away from crisis-by-crisis, reactive enforcement of environmental law and toward governmental and citizen monitoring of existing and potential environmental hazards. As part of this monitoring process, the EPA and corresponding state environmental enforcement agencies are compiling extensive computerized files of data. The data comes from reports submitted by businesses under EPCRA. Nineteen eighty-eight was the first year in which EPCRA required the filing of Chemical Toxic Release Forms. Those first reports revealed that in the twelve months preceding July 1, 1988, over 22 billion pounds of toxic chemicals were released into the air and water, and onto the land in this country. The EPA labeled those figures "startling," and noted that they undoubtedly underestimate the actual amounts released because the reports do not include all chemicals and because reports are not required of smaller companies and certain industries.[60] In spite of those limitations, this information about the types and quantities of

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58. *See id.* § 11023(c). The first such list was issued in August 1986 by the Senate Committee on Environment and Public Works. *See id.* (referring to STAFF OF SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, TOXIC CHEMICALS SUBJECT TO THE PROVISIONS OF SECTION 313 OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT OF 1986 (Comm. Print 1986)). The amount subject to reporting decreased annually from 1988 to 1990.

59. *See infra* text accompanying notes 93-103 (discussing "Good Neighbor Agreements" and TUR Legislation). It should be noted, however, that there are limitations to the information released through EPCRA. For example, specific chemical identities are protected if that information is shown to be a trade secret. *See* 42 U.S.C. § 11042(a)(2)(A)(i) (1988). On specified conditions, however, health professionals may obtain access to information claimed to be a trade secret to protect the potentially exposed or to treat exposed individuals. *See id.* §§ 11042-11043.

60. *See supra* note 9.

toxic pollutants released into the environment may enable legislators and governmental agencies to make better-informed decisions and to set appropriate priorities when making, funding, and enforcing environmental laws.

A primary purpose of worker and community RTK legislation is to provide information to individual citizens and citizens' groups. "By definition, right to know is an information policy."[61] State and local governments enacted worker and community RTK laws as people became concerned about environmental exposures to toxic chemicals and realized, at the same time, that little or no information about such exposures was publicly available. "[T]he most basic purpose of RTK is to ensure that interested people can find out what chemicals are 'out there.'"[62]

Under this view of RTK laws, once information becomes available, the burden is on individual citizens to understand that information and to choose whether or not to act based on that information. Professor Susan Hadden, who conducted an in-depth study of RTK laws, observes, "[t]his form of RTK is very similar to the theory underlying food labeling as practiced in the United States: The government requires manufacturers to list ingredients but leaves it to consumers to determine whether the risks of any of the ingredients are unacceptable to them."[63]

In tandem with the goal of gathering and making data available, RTK legislation has the goal of empowering citizens to do something about their exposure to toxic chemicals. Citizens will be able to make better decisions about hazardous materials in their workplaces and in their communities as they gain access to the relevant information. In addition to making informed decisions on a personal level, citizens will be more able to participate in governmental decision-making about toxic substances. This is in keeping with the most basic premises of a democratic government. As Thomas Jefferson said, "if we think [the people are] not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."[64]

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61. S. HADDEN, *supra* note 13, at 4.

62. *Id.* at 15.

63. *Id.*

64. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *reprinted in* 7 WRITINGS OF THOMAS JEFFERSON 177, 179 (H. Washington ed. 1855), *quoted*

Thus, information becomes a form of power. Once citizens have access to information and understand it, they can act to change the balance of power, "tipping it away from the 'big' institutions—industry and government—and toward 'the people.'"[65] Under this view of RTK legislation, government's role is not limited to providing information. "[A] more realistic description of this kind of RTK recognizes that government must also create or support institutions for participation and decision-making that will help citizens make use of their new information."[66] Consequently, further laws may be necessary to enable citizens to act on the information they have obtained through RTK programs.[67]

On another level, RTK legislation encourages industry to self-regulate. As businesses compile the various reports required under EPCRA, they become aware of the nature and extent of the hazards on their properties. Rather than reveal the presence and characteristics of toxic chemicals to workers and to the community, businesses may choose to reduce the amounts of toxic chemicals they use or to substitute less hazardous substances for those they are currently using. Further, companies may decide to reveal examples of their voluntary changes in behavior as a means of improving their public image.[68] Fear of increased insurance costs and concern for the health and safety of their employees are two additional reasons for companies to act to reduce their use of toxics.

B. Responses to RTK Legislation

A decade has passed since the enactment and initial implementation of worker RTK laws. It is now appropriate to identify responses to RTK legislation and to ask whether such legislation

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in Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 547 F.2d 633, 655 (D.C. Cir. 1976).

65. S. HADDEN, *supra* note 13, at 16.

66. *Id.*

67. For further discussion of the purposes of RTK legislation, see *id.* at 15-17. *See also* Stenzel, *A Proposal for a National Risk Assessment Clearinghouse*, 14 COLUM. J. ENVTL. L. 549 (1989) (discussing citizens' general need for access to risk assessments and information about exposure to specific risks; proposing legislation creating a risk assessment clearinghouse).

68. *See infra* text accompanying notes 70-73 (discussing examples of companies' responses to RTK laws, reflecting concern about developing goodwill in the community).

is serving the purposes for which it was designed. Documentation of the public's use of and reactions to RTK laws is not extensive, but that which is available reveals that responses have been mixed.

A study conducted by researchers at Tufts University's Center for Environmental Management examined the steps that companies have taken to implement the information disclosure requirements of EPCRA.[69] The researchers concluded that EPCRA has had far-reaching effects on companies, and that industrial practices and attitudes toward chemical risk management and risk communication are changing.[70] For example, the companies studied have reduced the potential for accidental releases of hazardous chemicals by developing safety audit procedures, reducing their chemical inventories, and substituting less hazardous chemicals in their operations.[71] The companies also have implemented new waste reduction programs and adapted and continued previously adopted programs.[72] Since EPCRA's enactment, "companies appear to be more concerned about developing a reservoir of goodwill in the community than before the law's enactment."[73]

On the other hand, the Tufts University researchers concluded that RTK goals related to informing the public remain unfulfilled. They noted a relatively low level of interest in information regarding hazardous substance made available through EPCRA. This lack of interest may be attributable to such factors as the absence of environmental accidents or controversies in the local community, lack of awareness of the availability of EPCRA reports, or lack of interest in chemical risk issues until citizens are personally confronted with threats to their health and safety.[74] But even when citizens are interested in using information released through EPCRA, they are hindered by "gaps between the availability, acquisition, understanding, and use of chemical

69. *See* M. BARAM, P. DILLON & B. RUFFLE, MANAGING CHEMICAL RISKS: CORPORATE RESPONSE TO SARA TITLE III (1990).

70. *See id.* at 83.

71. *See id.* at 78-79.

72. *See id.* at 79.

73. *Id.*

74. *See id.* at 81.

risk information . . . ."[75] The Tufts University researchers noted that businesses are required to provide information to LEPCs, SERCs, local fire departments, and the EPA, but those agencies provide information to citizens only on request.[76] Further, businesses and LEPCs are not offering to community residents the technical assistance necessary to interpret the data.[77] The Tufts University researchers asserted that LEPCs must become aggressive in their use of RTK data, and that they must actively inform citizens of its availability and help them make use of it. They concluded that the long-term effectiveness of community RTK laws depends on citizens making productive use of chemical release information in planning, lobbying, and litigation.[78]

In contrast to the findings of the Tufts University researchers, however, there are examples of specific, active responses to information revealed through RTK laws. Some citizens and citizens' groups argue that more legislation will further empower them to act on the information made available through RTK laws. For example, a coalition of trade unionists and environmental advocates has launched a campaign for "Right to Act" laws. Peter Dooley, an industrial hygienist with the United Auto Workers Health and Safety Department asserts, "'[w]here Right-to-Know told us more about what was killing us, Right-to-Act would give us the power to act upon that knowledge.'"[79] Right to Act legislation is being advocated on the national as well as state level, but it has not been enacted anywhere in the United States. At the national level, the AFL-CIO has proposed a series of revisions to the Occupational Safety and Health Act that would include Right to Act provisions. The AFL-CIO Executive Council issued a policy statement in February 1988 that states, "[u]nion and worker participation should be a cornerstone of all work site safety and health programs. Safety and health committees should be mandated, with the right to inspect workplaces, shut down dangerous jobs and review employer hazard control measures."[80]

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75. *Id.* at 82.
76. *See id.*
77. *See id.*
78. *See id.* at 63-65.
79. *Id.* at 43 (quoting Dooley).
80. Tobey, *Taking Control: Workers and Communities Demand the Right to Act*, MULTINATIONAL MONITOR, June 1990, at 30.

Right to Act legislation being considered in New Jersey would create joint labor-management health and safety committees.[81] In addition, it would provide a mechanism to authorize community organizations to inspect facilities with an expert of their choosing.[82] Further, it would allow such groups to join the owner or operator and workplace health and safety committees in discussions of means for reducing or eliminating environmental hazards.[83] Legislation is being drafted in Michigan that includes similar provisions, yet goes further by requiring facilities to develop toxic use reduction plans.[84] Advocates of Right to Act legislation argue that it will promote closer working relationships between workers and residents of the community.[85]

Some responses to RTK laws have been more localized, often focusing on a single company. For example, Toxic Release Inventory data reported in 1989 revealed that during 1987, Sheldahl, Inc. in Northfield, Minnesota released 794,000 pounds of methylene chloride into the environment.[86] In high concentrations, methylene chloride can cause unconsciousness and death, and may cause liver and brain damage.[87] Release of this data led to the formation of two community groups that met with Sheldahl and the Amalgamated Clothing and Textile Workers Union, representing Sheldahl's workers, to discuss implementation of an emissions control and phase-out plan.[88] During contract negotiations between Sheldahl and the union in 1990, Sheldahl agreed to reduce its emissions by ninety percent by 1993, and to eliminate the use of methylene chloride as quickly as possible.[89]

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81. *See id.*

82. *See id.*

83. *See id.* at 31.

84. *See id.*

85. Further discussion of proposed Right to Act legislation is beyond the scope of this Article. However, I will provide an in-depth discussion of its purposes and provisions in a future article.

86. *See* Freedman, *Fighting Toxics Together: Community Groups and Workers Join Hands*, MICHIGAN TOXICS WATCH, Sept.-Oct. 1990, at 2.

87. *See id.*

88. *See id.*

89. One commentator reports that the company has significantly reduced its methylene chloride emissions by replacing the chemical with flammable substitutes that are being incinerated, and that it is also developing a water-based substitute. *See id.*; *see also* Smith, *Right to Know: A U.S. Report Spurs Community Action by Revealing Polluters*, Wall St. J., Jan. 2, 1991, at A1, col. 6 (reporting that release of information revealed through Toxics Release Inventories has prompted activism in communities across the

Other responses to RTK laws may affect many companies across the country. For example, a coalition of three environmental groups used statistics gathered by the EPA through Toxics Release Inventories to prepare a report on industry's use of ozone-damaging emissions including chlorofluorocarbons, carbon tetrachloride, and methyl chloroform.[90] The report warns that depletion of the earth's ozone layer leads to higher rates of skin cancer, damage to the human immune system, and disruption of ocean life.[91] According to the science director of the Clean Water Action Fund, environmentalists hope to use the report to help gather one million signatures supporting federal legislation requiring that these chemicals be phased out rapidly and replaced with safer alternatives.[92]

Across the United States, coalitions of labor and environmental groups calling themselves the "Right to Know Task Force" have responded to information obtained through RTK laws by asking local industries to sign "Good Neighbor Agreements." One environmental group summarizes the need for and goals of such agreements as follows:

> Communities feel they have almost no protection from toxic releases under laws and regulations which focus on permitting instead of pollution prevention. Companies . . . face long permitting delays when communities take the only route of action open to them and attempt to thwart the permit process every step of the way.
>
> Good Neighbor Agreements are designed to break this cycle by creating a new mechanism for direct negotiation between communities and industry.[93]

Groups proposing good neighbor agreements seek a contract setting pollution reduction goals for a specific facility. Typically,

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nation, including Northfield, Minnesota where the Sheldahl plant is located).

90. *See* Daubenmier, *Michigan a Leader in Damaging Emissions, Report Says*, Detroit News, July 12, 1989, at 2B, col. 1.

91. *See id.*

92. *See id.*

93. Citizens for a Better Environment, What is a Good Neighbor Agreement? (undated fact sheet) (distributed by Citizens for a Better Environment, 3255 Hennepin Avenue South, Minneapolis, Minnesota 55408).

such groups try to convince a targeted company to cut its chemical discharges by one-half within five years.[94] Companies in several states have signed legally binding agreements that include promises to reduce emissions and the use of specified chemicals. Some of the agreements give citizens' groups the right to have their own representative inspect facilities to verify information the company has provided.[95]

In the absence of laws mandating toxics use reduction, however, the potential for use of good neighbor agreements may be limited. For example, in Michigan, which does not have a TUR law, proposals for such agreements have met with mixed reactions. The DuPont Company in Montague, Michigan signed a good neighbor agreement with a group calling itself Citizens United for the Environment. DuPont agreed to host a community forum on citizens' concerns, but it would not agree to the demanded reduction in production of ozone-depleting chemicals.[96] The AuSable Conservation Trust ("ACT") of Grayling, Michigan presented good neighbor agreements to five companies with provisions for lowering toxic emissions, installing warning systems, developing emergency plans, and committing to a policy of zero discharge. Regarding three of the companies, ACT worker Linda Caswell alleges, "[s]o far, officials at Weyerhauser, Georgia Pacific, and Camp Grayling seem interested in little more than P.R. They claim they are 'good neighbors' in the community but then they refuse to sit down at the table with us . . . ."[97]

On the other hand, good neighbor agreements may be more effective in states where they can be used to supplement existing TUR laws. Companies in these states, though facing the legal mandates in TUR laws, will recognize the rewards of working with community representatives. In Minnesota, which has a TUR law called the Minnesota Toxic Pollution Prevention Act,[98] the group Citizens for a Better Environment ("CBE") views community involvement in business planning as an important supplement to Minnesota's statute and has sponsored a seminar for citizens to

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94. *See* Askari, *supra* note 11, at 1A, col. 4.

95. *See* Tobey, *supra* note 80, at 44.

96. *See Good Neighbor Agreements: Citizens Negotiating with Local Industry*, 1 MICHIGAN TOXICS WATCH 5 (1990).

97. *Id.*

98. *See* MINN. STAT. ANN. §§ 115D.01 to 115D.12 (Supp. 1991).

learn more about the use of good neighbor agreements.[99] As an example of CBE's use of such agreements, in 1990, representatives of CBE and residents of the affected neighborhood began negotiations with officials from the Flour City Architectural Metals plant in Minneapolis. Their objective is to reduce or eliminate emissions of chemicals such as methylethylketone (MEK), xylene, and trichlorethane, which citizens suspect have caused problems including coughs, chest pains, nose-bleeding, and foul odors.[100]

TUR laws incorporate, expand on, and add to the kinds of goals and provisions sought through good neighbor agreements. TUR legislation sets up mandates and provides incentives for industries to reduce the numbers of and amounts of toxic chemicals they use. On July 24, 1989, the first two state TUR laws were signed in Massachusetts[101] and Oregon.[102] Since then, TUR legislation has been enacted in at least eight additional states.[103] Further, other states are considering such legislation, either alone or in combination with a Right to Act statute, like the law being drafted in Michigan. Therefore, TUR legislation deserves serious appraisal and consideration by businesses and individual citizens, as well as by labor, environmental, and consumer groups. Attorneys representing such groups, as well as law-makers and regulatory agency personnel, should become familiar with TUR legislation, its provisions, and its rationale. The remainder of this Article discusses the public policy supporting TUR legislation and analyzes its provisions.

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99. The conference was held February 1, 1991, in Minneapolis, Minnesota. For a copy of the agenda or further information, contact Citizens for a Better Environment, 3255 Hennepin Ave. S. #150, Minneapolis, Minnesota 55408, (612) 824-8637. *See also* Doerr, *Get to Know Your Local Polluter: Good Neighbor Agreements Carve New Niche for Citizen Action*, THE COLLECTIVE VOICE, Dec.-Jan. 1991, at 7 (discussing advantages of good neighbor agreements and explaining how federal RTK laws and Minnesota Toxic Pollution Prevention Act provide a basis for incorporating communities into pollution prevention planning process).

100. *See* Bauerlein, *Smoke and Mirrors*, City Pages, Nov. 21, 1990, at 10, col. 1. For further discussion of CBE's goals and activities, see Jacobson, *Industry, Environmentalists Consider the Team Approach*, City Business, Nov. 19-25, 1990, at 16, col. 1.

101. *See* MASS. GEN. L. ch. 21I, §§ 1-23 (1991).

102. *See* OR. REV. STAT. §§ 465.003-465.037 (1989).

103. *See* W. RYAN & R. SCHRADER, AN OUNCE OF TOXIC POLLUTION PREVENTION: RATING STATES' TOXICS USE REDUCTION LAWS 1 (1991) (evaluating TUR laws in 10 different states).

III. PUBLIC POLICY SUPPORTING TOXICS USE REDUCTION STATUTES AND A DESCRIPTION OF THEIR PROVISIONS

Toxics Use Reduction statutes, sometimes called pollution prevention statutes, are designed to motivate businesses to change their production processes and products to reduce their use of toxic chemicals. Environmentalists assert that the goal of such laws is "to reduce all hazards associated with toxics use, including workplace and consumer exposures."[104] Comprehensive TUR statutes include provisions covering the following areas: (1) planning requirements; (2) reporting requirements; (3) protection of proprietary interests; (4) worker and community involvement; (5) technical assistance and research; (6) enforcement mechanisms and penalties for non-compliance; and (7) funding.

A. Public Policy

TUR laws implement good public policy. Proposals for and enactment of TUR legislation show that worker and community RTK laws are, at least to some extent, achieving their Jeffersonian ideals[105] by empowering citizens through education. Through information released pursuant to RTK laws, citizens are realizing that more regulation is needed, and they are taking action based on that realization.

TUR laws represent a continuation of the trend set by RTK legislation, moving away from crisis-by-crisis, reactive enforcement of environmental laws and toward hazard prevention. Many environmental laws enacted over the past two decades have proven weak or only partially effective at best.[106] For example, of more than 59,000 chemicals used in the workplace nationwide, OSHA has developed safety standards for only twenty-three.[107]

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104. *Id.* at 17.

105. *See supra* note 64 and accompanying text.

106. For one group's list of examples of such failures, see PIRG TOXICS ACTION & THE NATIONAL TOXICS CAMPAIGN, TOXICS USE REDUCTION: FROM POLLUTION CONTROL TO POLLUTION PREVENTION 1 (1989) [hereinafter TOXICS ACTION]. For a general discussion of how pollution control methods have failed over the past 20 years and why environmental programs should be reorganized to focus on pollution prevention, see Commoner, *Why We Have Failed*, GREENPEACE, Sept.-Oct. 1989, at 12.

107. *See* Marshall, *An Excuse for Workplace Hazard*, The Nation, Apr. 25, 1987, at 532-33.

As another example, under the Clean Air Act, the EPA is charged with regulation of toxic air contaminants.[108] Under that Act, the EPA has identified 345 contaminants, but it has set numerical standards limiting emissions for only seven of them.[109] The reactive approach established through our environmental laws has allowed industry to adopt a "wait-and-see" approach, abating or preventing toxic pollution only when forced to do so by law.[110] The proactive approach of TUR laws makes sense compared to the weaknesses of the reactive approach upon which we have relied for over twenty years.[111]

The "multi-media" approach taken through TUR laws is also an improvement over past approaches to environmental regulation. Current environmental laws represent a piecemeal approach to regulation with differing statutory approaches to the regulation of toxics in the air and water, and on the land.[112] Even those categories have been further divided into subcategories such as drinking water and ground water, and workplace air and outdoor

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108. *See* Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (West 1983 & Supp. 1991).

109. David Roe of the Environmental Defense Fund cites this as an example of the federal government's inadequate performance in implementing the Clean Air Act. *See* Roe, *Framing Right-to-Know Laws: The Case of Proposition 65*, ICET SYMPOSIUM IV, RIGHT-TO-KNOW: AN OPPORTUNITY TO LEARN 84, 85 (1989).

110. For example, over the past 30 years various studies conducted at Manguagon Creek in southeastern Michigan have revealed high concentrations of a variety of toxic chemicals including 24DP (2,4-ditert-pentylphenol). *See* Betzold, *Exotic Chemical in Creek Found in Carp, Lake Erie*, Detroit Free Press, May 13, 1991, at 4A, col. 4. Atochem North America is one of many companies discharging chemicals into the creek, but it is the only company in the Great Lakes region that makes 24DP. A recent newspaper report described pollution in the creek and citizens' alarm and anger over lack of action by government and industry. The report said that Atochem has made 24DP for 60 years, discharging it into the creek without a permit. *See id.* Based on an interview with Atochem's plant manager, Frank DiMaggio, "Atochem is working with the EPA to develop a plan to assess the plant and its property for environmental hazards. Because the EPA has not found anything wrong, the company does not see a need to act now." Betzold, *Creek May Get Long-Awaited Cleanup*, Detroit Free Press, May 13, 1991, at 1A, col. 1.

111. In recent years, consumer and environmental groups have been highly critical of federal agencies' failures in the area of worker and environmental health and safety. For one consumer group's list of examples of failures of the EPA and OSHA, see TOXICS ACTION, *supra* note 106, at 1. *See also* Roe, *supra* note 109, at 85 (discussing federal government's inadequate performance in implementing Clean Air Act).

112. Examples of such statutes include: The Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 1983 & Supp. 1991); The Clean Air Act, 42 U.S.C.A. §§ 7401-7671 (West 1983 & Supp. 1991); The Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. §§ 6901-6992 (West 1983 & Supp. 1991); and The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1991).

air.[113] A major problem with this approach is that industry can comply with one set of regulations, such as meeting emissions levels set under the Clean Air Act, by shifting its discharges to other media such as the land, water, or even consumer products.[114]

Efforts undertaken to date by the EPA to reduce toxic wastes reflect this segmented approach. For example, the EPA established "waste minimization" programs intended to reduce the volume of the RCRA hazardous wastes[115] shipped from plant sites. The minimization plans, however, include pollution control devices such as treatment of wastes.[116] Further, they do not focus on reducing air and water pollution even though research shows that those wastes may be at least as great in quantity as those regulated under RCRA.[117] In contrast with current laws and the EPA's "waste minimization" programs, TUR laws require reports and plans for reduction of toxics discharged into all media including air, water, sewers, and land. Promotion of this holistic approach is good public policy.

Furthermore, TUR laws emphasize a non-punitive, cooperative approach to regulation. Technical assistance through training programs, hands-on consultation, and advice to individual businesses facilitate compliance by business.[118] Many TUR laws provide penalties for companies that do not comply. In general,

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113. For example, OSHA regulates workplace exposure to airborne contaminants. *See* Occupational Safety and Health Act of 1970, 29 U.S.C.A. §§ 651-678 (West 1983 & Supp. 1991). EPA regulates outdoor exposure to airborne contaminants. *See* Clean Air Act, 42 U.S.C.A. §§ 7401-7671 (West 1983 & Supp. 1991).

114. *See* W. RYAN & R. SCHRADER, *supra* note 103, at 4 (alleging that regulators charged with enforcing environmental laws "often suffer from 'tunnel vision' by overlooking violations not in their area of specialty and allowing toxics users to shift wastes from air to water to land without regulation").

115. "RCRA hazardous wastes" refers to wastes regulated pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. §§ 6901-6992 (West 1983 & Supp. 1991).

116. For discussion of the distinction between toxics use reduction and other methods for reducing toxic wastes, see *infra* text accompanying notes 171-72.

117. *See* W. MUIR & J. UNDERWOOD, PROMOTING HAZARDOUS WASTE REDUCTION—SIX STEPS STATES CAN TAKE 2 (1987).

118. Examples of state statutes providing for such technical assistance include the Toxic Pollution Prevention Act, ILL. ANN. STAT. ch. 111 ½, para. 7955 (Smith-Hurd Supp. 1991); Industrial Pollution Prevention and Safe Materials, IND. CODE ANN. § 13-9-1.3 (Burns 1990); Massachusetts Toxics Use Reduction Act, MASS. GEN. L. ch. 21I, § 7 (Supp. 1991); and Minnesota Toxic Pollution Prevention Act, MINN. STAT. ANN. § 115D.04 (West 1991).

however, those penalties are applied only after the companies have been given an opportunity to take advantage of available assistance and to come into compliance.[119] This preference for cooperation, with enforcement mechanisms being a last resort, also represents good public policy.

It is significant and encouraging that workers as well as environmentalists are supporting TUR laws. For example, a coalition in Michigan currently is proposing TUR and worker Right to Act provisions[120] in one bill supported by a coalition of labor and environmental groups. The Massachusetts Toxics Use Reduction Act ("MTURA") provides another example of such cooperation. Susan Shepard of the Massachusetts Coalition for Occupational Safety and Health was involved in the negotiations that produced MTURA. Shepard states, "The big thing is that Toxics Use Reduction brings together labor and environmental interests."[121] Too often, negotiations related to environmental legislation are reduced to debate over "jobs versus environment."[122] Workers are torn in two directions. As individual citizens, they do not want to expose themselves or their families to toxic substances, yet their labor unions often end up siding with management on environmental issues to avoid the risk of losing jobs. One writer comments:

> It's still more the exception than the rule for unions and environmental groups to unite against corporations. But when they do, the issue that brings them together is often health and safety. If a company is spewing toxic substances into the air or water, it's a reasonable guess that workers' bodies are being poisoned as well.[123]

Coalitions of labor and environmental groups such as those sup-

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119. *See infra* text accompanying notes 157-64 (describing such provisions in Massachusetts Toxics Use Reduction Act).

120. *See supra* text accompanying note 84 (discussing proposed legislation in Michigan).

121. Telephone interview with Susan Shepard, Massachusetts Coalition for Occupational Safety and Health (Feb. 8, 1991).

122. *See, e.g.*, McClure, *Unions and Environmentalists: Working Together*, DEMOCRATIC LEFT, Sept.-Oct. 1990, at 11 ("[t]he jobs-environment debate has come to a head in the Pacific Northwest, where timber companies are battling with environmentalists over the preservation of woodlands and the Spotted Owl").

123. *Id.*

porting TUR legislation represent a new and potentially powerful force in the development and implementation of environmental laws.[124]

B. Feasibility

Even though TUR legislation is only in the beginning phases of implementation, there are many examples of its technological feasibility. The Oregon State Public Interest Research Group ("OSPIRG") published a fact sheet describing how eleven different companies across the country are engaging in toxics use reduction.[125] For example, Cleo Wrap, the world's largest producer of gift wrapping, converted to water-based printing inks in all its operations. Thus, it eliminated the need for organic solvents for cleaning purposes and now relies exclusively on water-based cleaning solutions and soaps.[126] INFORM, Inc., a non-profit research organization, conducted a four-year case study of twenty-nine organic chemical plants in the United States. The report revealed significant achievements in reduction of "toxic wastes at source" at every one of the thirteen plants that had looked for them. Some plants virtually eliminated their hazardous waste streams. Others reduced particular waste streams by eighty percent or more.[127] Recognizing the technological feasibility of TUR, the Office of Technology Assessment issued a report in 1986 recommending that industry reduce all hazardous wastes by ten percent per year.[128]

Economic feasibility for companies subject to TUR legislation goes hand-in-hand with technological feasibility. For example, the 3M Company has undertaken nearly 2000 pollution prevention measures and saved around $300 million since 1975.[129] The

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124. TUR legislation goes beyond traditional concepts of environmental law, also encompassing worker health and safety and consumer protection.

125. *See* Oregon State Public Interest Research Group, Toxics Use Reduction—It Works! (undated fact sheet distributed by OSPIRG, 1235 Willamette, Eugene, Oregon 97401) [hereinafter Toxics Use Reduction—It Works!].

126. *See id.*

127. *See* W. MUIR & J. UNDERWOOD, *supra* note 117, at 3.

128. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, SERIOUS REDUCTION OF HAZARDOUS WASTE: FOR POLLUTION PREVENTION AND INDUSTRIAL EFFICIENCY 25-26 (1986).

129. *See* Toxics Use Reduction—It Works!, *supra* note 125.

Emerson Electric Corporation in North Carolina eliminated worker exposure to organic paint solvents by converting to a water-based paint system. The system allows 99.5% recovery and reuse of paint, saving $600,000 per year.[130] Further, as pollution control regulations under laws such as the Clean Air Act and Clean Water Act become more stringent in the future, the costs to a business of each pound of waste discharged will increase.[131] "Industrial inefficiency is not only bad for individual businesses; it also weakens the United States' competitive position in international markets."[132] Businesses are finding that TUR saves them money now and will save additional costs of meeting increasingly stringent regulatory limits. To supplement companies' independent efforts, a number of states with TUR laws are funding research on toxics use reduction techniques.[133] Such continuing research makes it likely that companies' savings through TUR methods can be increased even further.

Another aspect of economic feasibility is the cost of implementing TUR legislation. The costs of implementing TUR laws must be weighed against the substantial potential benefits of those laws.[134] TUR laws will reduce the public's exposure to toxics in numerous ways. For example, the number of accidents and spills resulting from transporting and storing toxic chemicals and wastes will be reduced. Daily low-level and occasional high-level community and workplace exposures to toxics will drop. Fewer "Superfund" sites requiring lengthy and costly cleanups will be created. Citizens will be exposed to fewer toxics in consumer products. Also, fewer toxic materials from discarded consumer products will end up in waste dumps and sewers.[135] The alternative to toxics

130. *See id.*

131. *See* W. MUIR & J. UNDERWOOD, *supra* note 117, at 2.

132. *Id.*

133. Statutes providing for such research include the Massachusetts Toxics Use Reduction Act, MASS. GEN. L. ch. 21I, § 6 (Supp. 1991) (establishing Toxics Use Reduction Institute at University of Lowell); Toxics Use Reduction and Hazardous Waste Act, OR. REV. STAT. § 465.027 (1989) (subject to available funding, directing Oregon's Department of Environmental Quality to contract with an established institution of higher education for applied research in toxics use reduction and related assistance); and Waste Reduction, WASH. REV. CODE ANN. § 70.95c.070 (Supp. 1991) (office of waste reduction may administer waste reduction research and development program).

134. *See infra* text accompanying notes 210-13 (discussing model for funding of TUR legislation).

135. Those benefits are listed in TOXICS ACTION, *supra* note 106, at 5.

use reduction, continued emphasis on pollution control methods, "will mean that the need for increasingly hard-to-site treatment and disposal facilities will grow. Operation of these facilities can then pose further human health and environmental hazards."[136] These benefits of TUR laws alone are sufficient to justify costs of implementing the legislation.[137]

Finally, the fact that ten or more states have enacted TUR legislation, and that other states are seriously considering TUR proposals illustrates that TUR legislation is politically feasible.[138] Citizens' demands for TUR legislation have resulted directly from information revealed pursuant to worker and community RTK laws. People are not willing to accept complacently the information revealed through MSDSs and Toxic Release Inventories as a "fact of life" with which they must live. Citizens perceive TUR laws as the logical next step in reducing toxic risks. Without TUR legislation, RTK programs are likely simply to add to citizens' discontent and frustration with the way the government has dealt with polluters.

C. Basic Provisions

Although provisions of existing TUR laws vary, they share common objectives and deal with similar concerns. Providing a "point-by-point" comparison of the various state TUR laws is beyond the scope of this Article; such comparisons are available elsewhere.[139] Instead, this section describes the provisions of one existing TUR statute to illustrate the public policy supporting TUR laws and options in drafting them.

The MTURA is considered one of the strongest existing TUR laws and is being used as a model for other states considering

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136. W. MUIR & J. UNDERWOOD, *supra* note 117, at 5.

137. Currently, Massachusetts has one of the highest levels of funding among the various state laws with toxics users fees ranging from $500 to $8500 per year. *See infra* text accompanying notes 169-70.

138. The opening section of Washington's TUR law states, "The Pacific Northwest hazardous waste advisory council has endorsed a goal of reducing, through hazardous substance use reduction and waste reduction techniques, the generation of hazardous waste by fifty percent by 1995." Waste Reduction, WASH. REV. CODE ANN. § 70.95c.010 (Supp. 1991).

139. *See* W. RYAN & R. SCHRADER, *supra* note 103 (describing and comparing TUR laws in 10 states); R. SULLIVAN, *supra* note 12 (matrix of provisions of laws in 12 states).

similar legislation.[140] Consequently, its goals and substantive provisions provide a starting point for understanding what a TUR statute is designed to accomplish. The MTURA lists policy goals including: (1) a statewide goal of reducing toxic waste generated by fifty percent by the year 1997 as compared to the year 1987; (2) establishment of TUR as the preferred means for achieving compliance with state and federal laws and regulations pertaining to toxics; and (3) commitment to sustaining and promoting the competitive advantages of Massachusetts' businesses, while advancing the goals of TUR.[141] The declaration of such goals, particularly a specific numerical goal for reduction of waste generated, is important because such statements keep the pressure on businesses and state agencies to make TUR a high priority.[142] "Toxics use reduction" is defined in the MTURA as

> [i]n-plant changes in production processes or raw materials that reduce, avoid, or eliminate the use of toxic or hazardous substances or generation of hazardous byproducts per unit of product, so as to reduce risks to the health of workers, consumers, or the environment, without shifting risks between workers, consumers, or parts of the environment.[143]

The statute supplements this definition with a list of techniques for toxics use reduction, including input substitution, product reformulation, redesign or modification of production units, modernization of production units, improved operation and maintenance of production units, and recycling, reuse, or extended use of toxics using new equipment or methods.[144]

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140. One major newspaper called the MTURA "the strongest toxics use reduction bill in the country." Foster, *Bill Will Reduce Toxic Chemical Use*, Christian Sci. Monitor, July 25, 1989, at 7, col. 2. *See generally* W. RYAN & R. SCHRADER, *supra* note 103 (summarizing and evaluating provisions of TUR laws from 10 states; concluding that MTURA is by far strongest and best).

141. For the text and complete list of the policy goals, see MASS. GEN. L. ch. 21I, § 1 (Supp. 1991).

142. Lisa Doerr, an active member of the steering committee that drafted the Minnesota Pollution Prevention Act, said, "Goals are one effective way to keep the pressure on state agencies to set priorities for reduction policies." Doerr, *Minnesota Joins Toxics Reduction Trend*, ENVTL. REV. 6, 8 (Fall 1990).

143. MASS. GEN. L. ch. 21I, § 2 (Supp. 1991).

144. *See id.* This definition and the list of techniques are substantially the same as those in other TUR statutes. *See, e.g.*, ILL. ANN. STAT. ch. 111 ½, para. 7953 (Smith-Hurd Supp. 1991); ME. REV. STAT. ANN. tit. 38, §§ 2301.18, 2302 (Supp. 1990).

Companies subject to MTURA are called "large quantity toxics users."[145] Initially, large quantity toxics users are the same firms as those subject to reporting under EPCRA's requirements for Toxic Chemical Release Forms.[146] The Administrative Council on Toxics Use Reduction, which oversees enforcement of MTURA, has the authority to change the Massachusetts list in accordance with additions to or deletions from the EPCRA list. By 1995, the list will expand to include other firms that use chemicals on the federal CERCLA list.[147]

Large quantity toxics users are required to design and implement their own toxics use reduction plans. Initially, each of them must develop an inventory of chemicals flowing into and out of each production process at its facility. Large quantity toxics users also must develop a toxics use reduction plan for each production process at their facility,[148] which includes a projection of the facility's future reductions in toxic emissions. The plan must be certified by a "toxics use reduction planner" who has passed a uniform certification examination.[149] Then, the large quantity toxics user must send the inventory and a summary of the plan to the Massachusetts Department of Environmental Quality Engineering. Each large quantity toxics user must also submit to that Department an annual report for each toxic or hazardous substance manufactured or used at that facility.[150]

Pursuant to MTURA, plans are kept on-site, but must be

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145. MASS GEN. L. ch. 21I, § 2 (Supp. 1991).

146. *See id.* §§ 2, 11.

147. *See id.* § 9(b); *see also* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1991) (provision for CERCLA list).

148. *See* MASS. GEN. L. ch. 21I, § 11 (Supp. 1991).

149. *See* The Toxics Use Reduction Institute at the University of Lowell is developing training curriculum for Toxics Reduction Planners. On July 1, 1991, the curriculum for such training was turned over to the Administrative Council on Toxics Use Reduction. Pilot training sessions will begin in the fall of 1991, and training will be available at various locations around Massachusetts in early 1992. Telephone Interview with Jack Luskin, Associate Director of the Toxics Use Reduction Institute (July 3, 1991).

150. *See* MASS. GEN. L. ch. 21I, § 10 (Supp. 1991). In an effort to protect companies' concerns about revealing proprietary information to competitors, the MTURA includes a provision that does not appear in other TUR laws. Instead of reporting absolute amounts of a chemical substance, companies will use a complicated index/matrix format on plans and reports. *See id.* §§ 10-11. At this point, however, the feasibility of that complicated plan cannot be evaluated since no regulations have been issued implementing the Massachusetts law, and no plans have been filed in Massachusetts pursuant to the law.

available for review by regulatory agency personnel from the Massachusetts Department of Environmental Protection ("MDEP").[151] Although plans are not available to the public, any ten residents living within ten miles of a facility required to prepare a plan may petition to have MDEP examine the plan and any required supporting data to determine their adequacy.[152]

Citizens also have mechanisms for direct surveillance of companies' activities. Annual reports and plan summaries, which must be filed every two years, may be examined by Massachusetts residents.[153] The MTURA requires large quantity toxics users to notify their employees of new plans, or any updates to existing plans, and to solicit comments or suggestions from all employees on toxics use reduction options.[154] Companies preparing plans, plan summaries, and reports are protected by provisions in MTURA that make trade secret information available to MDEP, but restrict such information from public review.[155] The law also establishes penalties for MDEP personnel or authorized agents who divulge trade secret information to outsiders.[156]

To encourage voluntary toxics use reduction, MTURA establishes an Office of Toxics Use Reduction Assistance and Technology, which provides technical assistance to industrial toxics users.[157] The law also establishes a Toxics Use Reduction Institute at the University of Lowell, which develops training programs for toxics users and "toxics use reduction planners,"[158] and conducts research on toxics use reduction methods. In addition, the Institute provides technical assistance to individual firms seeking to adopt pollution prevention techniques and serves as a clearinghouse for successful toxics use reduction methods.[159] The Institute also publishes a newsletter that includes TUR case studies describing individual companies' successes with specific TUR tech-

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151. *See id.* § 11.
152. *See id.* § 18(B).
153. *See id.*
154. *See id.* § 11(E).
155. *See id.* § 20.
156. *See id.* § 20(H).
157. *See id.* § 7.
158. *See supra* note 133 and accompanying text; *see also* MASS. GEN. L. ch. 21I § 12 (Supp. 1991) (explaining role and certification of "Toxics Use Reduction Planners").
159. *See* MASS. GEN. L. ch. 21I, § 6 (Supp. 1991).

niques.[160]

Enforcement of MTURA is overseen by an Administrative Council on Toxics Use Reduction,[161] which, in turn, receives input from an Advisory Board including representatives of industry, environmental groups, and health organizations.[162] Enforcement is divided into two phases. In the first phase, from September 24, 1989 through June 30, 1995, self-help and cooperation will be expected. During this phase, reporting and implementation of plans prepared by businesses themselves will be required. In the second phase, beginning July 1, 1995, the Council has the authority to take a more aggressive approach.[163] The second phase may, but will not necessarily, result in more regulatory involvement in industrial processes. The Council may designate certain industry groups as "priority user segments" and impose performance standards on all firms within that group. Those standards will require that firms achieve a specified level of byproduct quantity generated per unit of product, so long as the level set is based on reasonably proven public domain technologies or industry practices applicable to that group.[164]

Additionally, MTURA allows for citizen participation in enforcing the provisions of the Act. After sixty-days notice to an alleged violator of requirements of the Act or to an official failing to uphold the provisions of the Act, any ten Massachusetts citizens can file a court action for enforcement in the Superior Court of the Commonwealth of Massachusetts.[165] The court has the authority to award costs of litigation, including reasonable attorney and expert witness fees, to a prevailing or substantially prevailing plaintiff other than the Commonwealth of Massachusetts.[166] Through court action, penalties can be imposed on any person who violates the Act. A civil penalty of up to $25,000 per day of the

160. Its fall 1990 issue includes two such studies, one of which describes how Kilmartin Tool Co. cut its purchases of freon used in degreasing operations from 300 gallons per year to 50 gallons per year. The company is saving $5000 per year simply by keeping a lid on its degreaser unit and by pumping the freon into capped 55 gallon drums when the degreaser is not in use. *See* TOXICS USE REDUCTION INST., TURA REPORTS 2 (1990).

161. *See* MASS. GEN. L. ch. 21I, § 4 (Supp. 1991).

162. *See id.* § 5.

163. *See id.* § 14.

164. *See id.* §§ 14-15.

165. *See id.* § 18(B)-(C).

166. *See id.* § 18(C)(3).

violation can be assessed.[167] For willful violations, the court is authorized to impose a fine of between $2500 and $25,000 per violation, or imprisonment for up to one year, or both.[168]

Administration of MTURA is funded through a "toxic users fee."[169] Companies subject to the Act's planning and reporting provisions are assessed a fee ranging from $500 to $8500 per year for each facility. Fees are determined according to the number of employees at the facility and the number of toxic substances reported by the facility.[170]

IV. RECOMMENDATIONS FOR A MODEL TUR LAW

TUR legislation is a useful and important "next step" following the enactment and implementation of RTK laws. The drafters of TUR laws, however, have chosen differing mechanisms designed to achieve their goals. The Massachusetts act discussed above represents but one set of such choices among many alternatives; other states have made different choices. Further, there may be desirable options that have not yet been adopted or considered by any state.

A. Issues, Options, and Recommendations

A significant preliminary issue confronted in drafting each TUR statute is whether the reduction of toxics, which focuses on pollution prevention, should be the sole emphasis of the statute or should be combined with other objectives that can be characterized as means of pollution control. Pollution control includes, for example, waste reduction, waste minimization, and "out-of-process" recycling.[171] Analysts refer to those statutes promoting TUR

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167. *See id.* § 21(A).
168. *See id.* § 21(B).
169. *Id.* § 19.
170. *See id.* § 19(C).
171. "In-process" recycling is considered to be within the definition of toxics use reduction because chemicals never emerge from the production process in waste form. "Out-of-process" recycling differs because chemical wastes are taken from the production site, transported to recycling equipment, and then returned. Thus, the public and the environment are exposed to new risks during the transportation and recycling processes. *See* W. RYAN & R. SCHRADER, *supra* note 103, at 5. It should be noted, however, that in-process recycling is not risk-free because workers can be exposed to the toxics during production and the recycling process.

exclusively or almost exclusively, as having a "pure" focus, as compared to those with a "mixed" focus that explicitly combines TUR with pollution control objectives.[172] It is interesting to note that, of the two statutes that are considered by many observers to be the strongest in the country,[173] that of Massachusetts[174] falls into the pure category, while Oregon's[175] falls into the mixed category. Although this illustrates that there are arguments for both approaches, it could reflect industry's preference for a mixed focus. It appears in states where the mixed focus has been adopted that industry has been able to prevail over or reach a compromise with environmentalists who favor the pure focus.

For psychological[176] and practical reasons, the pure focus offers a better alternative for our society than the mixed focus. To explain those reasons, it is necessary to define toxics use reduction as compared to other related, but not synonymous, terminology. *Toxics use reduction* is a broader concept than *toxics waste reduction*, and it differs from *waste minimization*. Toxics waste reduction focuses solely on using chemicals within production processes more efficiently.[177] Commentators explain that "[w]aste minimization is not truly prevention since recycling and treatment implicitly sanction the production of wastes, instead of preventing their creation."[178] In contrast, toxics use reduction encourages industry and regulators to think about the variety of hazards associated with the use of chemicals, including worker exposure, transportation accidents, and consumer product exposure.[179] TUR's broad approach also prohibits shifting of toxic hazards from the environment to the workplace or to consumer products.[180] Thus, TUR promotes a holistic approach in dealing with toxic chemicals.

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172. *See id.* at iii.

173. *See id.* at 9; *see also* Doerr, *supra* note 142, at 6 (comments on Minnesota's passage of 1990 Toxic Pollution Prevention Act).

174. *See* MASS. GEN. L. ch. 21I, §§ 1-23 (Supp. 1991).

175. *See* Toxics Use Reduction and Hazardous Waste Reduction Act, OR. REV. STAT. §§ 465.003-465.037 (1989).

176. *See infra* notes 181-84 and accompanying text.

177. *See* W. RYAN & R. SCHRADER, *supra* note 103, at 5.

178. *Id.*

179. *See id.*

180. For example, Ryan & Schrader allege "Monsanto eliminated a waste stream by reformulating an industrial adhesive so that hazardous wastes remained in the product." *Id.*

There are significant practical reasons why a TUR statute should not combine toxics use reduction with pollution control methods, such as out-of-process recycling and end-of-process treatment of wastes. Companies and regulatory agencies overseeing those companies' activities cannot be expected to implement pollution control techniques through the same personnel promoting toxics use reduction because the two approaches are fundamentally different. Those involved in pollution control will be inclined to favor old methods over the new ways of thinking needed to implement use reduction.[181] Experts argue that

> [s]uccess of use reduction relies on a fundamental reorganization of companies and agencies so that production process engineers, workers and product designers can take the lead on environmental protection, not pollution control engineers. If pollution control is still given an important focus at the same time that pollution prevention is considered, then such fundamental reorganization is less likely to occur.[182]

It is therefore crucial that old ways of thinking be changed.[183]

Out-of-process recycling may appear on its face to be an equally desirable goal as compared to toxics use reduction. In practice, however, it has been defined to include risky, end-of-process practices involving the handling, storage, and transportation of wastes, and the placement of wastes in the environment. David Allen from the National Toxics Campaign notes that recycling, as defined by the EPA, may include (1) waste burning to recover energy values; (2) off-site recycling of hazardous materials at waste management facilities; (3) land application of wastewater sludge as fertilizer; (4) incorporating hazardous wastes and capturing atmospheric emissions and water discharges into road surfacing materials and construction materials; and (5) placement of wastes in cement blocks on the sea bottom creating

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181. *See id.* at 13.

182. *Id.*

183. It is important to clearly articulate a state's policy preferring toxics use and source reduction techniques "to counteract the strong tendency in both industry and government agencies to turn first toward reactive pollution control (end-of-the-pipe) solutions to waste management problems." W. MUIR & J. UNDERWOOD, *supra* note 117, at 7.

artificial reefs designed to attract marine life.[184]

Classifying such activities as "recycling" raises serious concerns. Waste burning, considered a recycling option under the Resource Conservation and Recovery Act,[185] presents risks related to emissions of toxic air-pollutants, transportation, waste storage and handling, and combustion residues.[186] Waste management facilities at which "recycling" occurs have caused numerous pollution problems. Ten percent of the Superfund sites on the National Priority list in 1986 had engaged in waste recycling and treatment.[187] Those sites include sham recycling operations in Hamilton, Ohio and Seymour, Indiana.[188] The creation of artificial reefs out of blocks containing municipal incinerator ash is an option currently being studied by researchers at the State University of New York. The blocks can be expected to erode over the decades, releasing their contents, which include lead, cadmium, zinc, and copper metals as well as organic contaminants such as dioxins.[189] The inclusion of such activities within the concept of "recycling" illustrates why it is advisable to make a clean start by excluding out-of-process recycling from the pollution prevention methods promoted in a model TUR statute.

It may be argued by proponents of the mixed focus that such an approach reflects reality. Society does not have the technology to substitute nontoxic chemicals for all of the toxics used in products and production processes, and citizens are unwilling to do without all products produced using toxics. Therefore, it may be argued, it is best to promote out-of-process recycling and end-of-pipe treatment for those wastes that are not eliminated through toxics use reduction techniques. The response to that argument is that even with the adoption of a TUR law with a pure focus, companies are unlikely to stop recycling and using end-of-process treatment of wastes. They will continue to use such control

184. *See* D. Allen, Public Comment on EPA's Proposed Pollution Prevention Policy Statement 2 (undated document available from the National Toxics Campaign, 37 Temple Place, 4th Floor, Boston, Massachusetts 02111 (617) 482-1477); *see also* EPA Proposed Pollution Prevention Policy Statement, 54 Fed. Reg. 3845-47 (1989) (outlining EPA's development of multi-media pollution prevention program).

185. *See* 42 U.S.C.A. §§ 6901-6992 (West 1983 & Supp. 1991).

186. *See* D. Allen, *supra* note 184, at 3.

187. *See id.*

188. *See id.*

189. *See id.* at 4.

methods to comply with effluent and emissions limits established through permits obtained pursuant to the Clean Air Act,[190] Clean Water Act,[191] and similar legislation. When it does not amplify risks, out-of-process recycling is more desirable than disposal or treatment followed by disposal. Out-of-process recycling and end-of-process treatment are pollution control methods, however, and not part of a pollution prevention program.

New TUR laws should include provisions requiring toxics use reduction planning and reporting by a wide range of users.[192] Quantitative goals for reducing the use of toxics should be required for input and output of each production process as well as for the facility as a whole. Process-specific data is needed because reduction goals for a facility as a whole might be met merely by eliminating one or more processes or by temporarily cutting back production in a single process.[193] By requiring plans for each production process, industry planners are encouraged to examine each process for potential ways to use fewer chemicals and are dissuaded from simply looking at a cumulative waste stream. Looking only at a cumulative waste stream often leads simply to pollution-control strategies such as out-of-process recycling.

Furthermore, a strong TUR law should include provisions allowing community residents and workers at a facility to monitor facilities' toxics use reduction efforts. In addition to providing ideas on how toxics use reduction might be achieved, workers and neighbors serve as "watchdogs" to supplement agencies' enforcement efforts.

Protecting the proprietary interests of companies required to submit plans and reports presents significant issues.[194] Disagree-

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190. *See* Clean Air Act, 42 U.S.C.A. §§ 7401-7671 (West 1983 & Supp. 1991).

191. *See* Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 1983 & Supp. 1991).

192. Existing TUR laws define the classes of companies covered in a variety of ways. The number of companies covered seems to be primarily a result of political compromise—with environmentalists wanting as much coverage as possible and many companies fighting to limit coverage—rather than of philosophical disagreement among advocates of the legislation. For examples of how various states have defined classes of companies covered under their TUR laws, see ME. REV. STAT. ANN. tit. 38, § 2304 (Supp. 1990); MASS. GEN. L. ch. 21I, § 2 (Supp. 1991); MINN. STAT. ANN. § 115D.07 (West Supp. 1991); and OR. REV. STAT. § 465.015(2) (1989).

193. *See* W. RYAN & R. SCHRADER, *supra* note 103, at 18.

194. Existing TUR laws establish a variety of plans for dealing with these issues. For the scheme used in Massachusetts, see *supra* text accompanying notes 155-56. In

ments arise with respect to the level of detail which should be required in plans and reports, and with respect to public access to the plans. Detail is needed to ensure that facility planners examine each production process carefully. Preparation of the plan is part of that examination process. Detail is necessary, also, so that government officials and concerned citizens can monitor companies' toxics use and their progress in reaching their TUR goals. Understandably, however, companies do not want to reveal details about production processes and product formulation to government officials or to the public because of concerns about proprietary interests related to trade secrets and maintaining competitive advantages. By requiring too much to be revealed, states may discourage companies from engaging in the kind of thorough self-examination needed to find as many ways as possible to reduce toxics use. Thus, there is a tension between citizens' "right to know"—and their potential to monitor compliance—and businesses' need to protect their proprietary interests. Because both citizens and industry have legitimate needs and strong arguments, a careful balance must be struck in the design of planning and reporting requirements in TUR laws. The amount of information revealed to the public may have to be restricted to be able to require highly detailed analysis and to ensure more willing compliance by industry.

A two-level approach to plans and reports is advisable.[195] On the first level, a plan with complete facility-level and process-level inventories should be prepared by the company, kept on-site, and subject to review by a state agency.[196] The plan would include the results of an initial complete audit, including process-

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Minnesota, for example, each facility reporting toxic chemical releases pursuant to EPCRA must develop a detailed Toxic Pollution Prevention Plan. Although the plan remains confidential, the facility must submit an annual progress report to the Minnesota Pollution Control Agency ("MPCA"). That report is open to public review, and citizens can petition the MPCA to review deficiencies in the report. *See* MINN. STAT. ANN. §§ 115D.07-115D.09 (West Supp. 1991).

195. Mark Dorfman, Associate Director of the Chemical Hazards Prevention Program of INFORM, recommends this distinction between facility-level inventories, that would be open to both the state and the public, and process-level inventories, that would be open only to the state. *See* M. Dorfman, INFORM Comments on the New Jersey Pollution Prevention Act 3 (June 15, 1989) (unpublished document available from INFORM, Inc., 381 Park Avenue South, New York, New York 10016).

196. Such information would be subject to removal from the site for in camera review by a court in the event of an enforcement action connected with those documents.

level mass balances accounting for every pound of a chemical that is "a) shipped to the process, b) created in or destroyed in the process, c) delivered as a product from the process, and d) wasted (irrespective of whether it is an air, water, or solid waste)."[197] The law should provide stiff penalties for any employee of the enforcing agency who reveals proprietary information contained in the plan. To monitor progress, complete audits of production processes and revisions of the toxics use reduction plan should be required every three to five years.

By keeping this very detailed plan and its revisions out of the public's reach, plant and process managers are more likely to be honest with themselves and explore vigorously options for achieving toxics use reduction. For example, many companies currently budget their environmental costs at a plant or company-wide level.[198] By planning at that level, it is difficult to distinguish processes that use large amounts of toxics and produce toxic wastes from those that do not. In contrast, if a company has the results of a detailed process-level mass balance audit, it can easily allocate costs of handling toxic wastes back to the specific processes accounting for them.[199] With such specific information, a company will be encouraged to, and is far more likely to, aggressively seek opportunities to implement toxics use reduction techniques.

There are practical reasons for not requiring that the complete plan be filed with the state. It would be a tremendous burden on a regulatory agency to review and comment on each process-level inventory routinely submitted by each facility. "Such a requirement might prove counter productive . . . since so much of the [a]gency's resources might be diverted from other activities such as pollution prevention outreach and technical assistance."[200]

The second level of the two-level approach would include plan

197. W. MUIR & J. UNDERWOOD, *supra* note 117, at 16.

198. *See id.* at 18.

199. Costs that may be allocated to individual processes include: (1) materials costs such as starting materials and lost products; (2) environmental handling costs, such as capital and operational expenses for treatment facilities, regulatory and compliance costs, and waste transportation and disposal costs; and (3) insurance costs and potential liabilities from accidents, worker illness, and injury and waste site cleanups. *See id.*

200. M. Dorfman, *supra* note 195, at 4.

summaries and annual reports. Those summaries and reports, containing only facility-level inventories, would be filed with a designated state agency and made available to the public. Plan summaries and reports would not include trade secret information. The courts can settle disputes over what information constitutes trade secrets. Summaries would include: (1) the identity and total amount of each chemical released on a facility-wide basis with each total broken down into air, land, and water releases; and (2) goals for reduction of each of those totals expressed in pounds and as a percentage of the amount revealed in the initial inventory. Information reported on the annual progress report would parallel the plan summary, revealing: (1) plant-wide chemical identities and total releases into the air, land, and water; and (2) progress in meeting facility-level goals, expressed as a percentage of toxics use as compared to the amount revealed in the initial base-line inventory.

To ensure that the enforcement agency maintains adequate surveillance after these plans are prepared, information revealed to the public should be supplemented with a "citizen trigger" provision such as that employed in the MTURA. That law provides that any ten residents living within ten miles of a facility required to prepare a TUR plan may petition the state agency to examine the facility's toxics use reduction plan. The agency must then examine the plan and any required supporting data to determine its adequacy.[201]

Technical assistance to users and the mandate for research on toxics use reduction methods and technologies must be included in a strong TUR law because such laws rely substantially on self-help by industry. The technical assistance program should be separate from the regulatory agency charged with enforcing the TUR statute to encourage businesses to make use of the program's services without fear of retribution if deficiencies in a company's operations are revealed. The program should serve as a clearing-house for toxics use reduction techniques, provide educational materials and training, and provide outreach, especially to smaller companies that might not affirmatively seek assistance.

Moreover, a TUR statute should provide for assistance to all

201. *See* MASS. GEN. L. ch. 21I, § 18(B) (Supp. 1991).

who seek it.[202] As time passes, more companies likely will be made subject to the coverage of such laws. Providing technical assistance now will make future compliance easier. In addition, even if certain companies, which use smaller amounts of toxics, are never subjected to a TUR law's coverage, it makes good sense in terms of public policy to encourage all companies to reduce their use of toxics. To limit the availability of technical assistance appears to contradict the holistic approach underlying TUR laws.

Technical assistance programs also should address the needs of the general public. The group called Citizens for a Better Environment ("CBE") is advocating amendments to the Minnesota Toxic Pollution Prevention Act that would establish a "citizen liaison" for pollution prevention assistance.[203] This liaison would assist citizens in understanding the technical information contained in and in assessing TUR plans and reports. Providing a citizens' liaison as a part of a TUR law's technical assistance program is a good idea because the success of TUR laws is increased through active citizen involvement.

A strong TUR law should provide for research on TUR techniques at one or more universities within the state.[204] It makes sense to make use of available expertise within the academic world. Also, it is important to make it clear that such research is a high priority for society.

Moreover, to emphasize the importance of the TUR statute, a high level state agency should be responsible for enforcement. Such an agency must, at some point, have the authority to force businesses into action. The MTURA's two-step approach provides a good model. Under that law, companies have an initial six-year period during which plans are prepared, technical assistance is made available, and self-help and voluntary compliance are expect-

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202. States have established a variety of means for providing technical assistance to users and to the general public. For a state-by-state summary of such provisions in 10 states, see W. RYAN & R. SCHRADER, *supra* note 103, at C-22 to -26.

203. Provisions for a "citizens' liaison" were among amendments to the Minnesota Toxic Pollution Prevention Act considered by the Minnesota legislature in 1991. *See* S.F. 841, 1991 Leg., 77th Sess. (sponsored by Sen. Steven Morse); H.F. 1041, 1991 Leg., 77th Sess. (sponsored by Rep. Willard Munger). Although those amendments were defeated, CBE is optimistic that the citizens' liaison provision will be adopted in the future. Telephone interview with Lisa Doerr, Director of CBE (May 3, 1991) [hereinafter Doerr Interview].

204. *See supra* notes 133, 158 and accompanying text.

ed.[205] At the end of that six-year period, the regulatory agency has authority to impose performance standards on companies within an industry group or sector designated as a "priority user segment."[206] By dealing with companies through industrial sectors, the Massachusetts law encourages companies with similar problems to work together to solve common problems. If regulation is deemed necessary after the six-year grace period, companies engaged in similar activities will be subjected to similar regulation.[207] To apply the same standards to companies in different industries might be viewed as failing to distinguish "apples from oranges." Therefore, regulation through industrial sectors promotes a greater sense of fairness than standards applied across the board to differing industries.

Ideally, compliance under a TUR statute would be voluntary by all covered businesses, with no need for penalties. Such an approach, however, is probably unrealistic.[208] Provisions for substantial penalties for violators of the act should be included. For example, there should be provisions for a civil penalty of up to $25,000 per day. For willful violations, a court should be authorized to impose fines between $2500 and $25,000 per violation, or imprisonment for up to one year, or both.[209]

Another important aspect in a TUR law is the choice of a funding mechanism. It is undesirable to rely solely on short-term grants from the EPA[210] or annual or biannual appropriations from a state legislature, because a strong, continuing commitment to a TUR program is needed.[211] A toxics users fee, assessed

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205. *See supra* notes 161-64 and accompanying text.

206. *Id.*

207. *See id.*

208. Under the Minnesota Toxic Pollution Prevention Act, for example, compliance by industry is voluntary. *See* MINN. STAT. ANN. §§ 115D.01-115D.12 (West Supp. 1991). Lisa Doerr, one of the drafters of that Act, is optimistic that future amendments will institute enforcement mechanisms. *See* Doerr Interview, *supra* note 203.

209. These are the provisions of the MTURA. *See supra* notes 167-68 and accompanying text. The model bill proposed by the American Legislative Exchange Council includes similar provisions. *See* Am. Leg. Exch. Council, Pollution Prevention Act § 9 (undated document available from the American Legislative Exchange Council, 214 Massachusetts Ave, N.E., Washington, D.C. 20002 (202) 547-4646).

210. Matching grants for technical assistance programs are available to states through the Federal EPA for fiscal years 1991, 1992, and 1993. *See infra* note 217 and accompanying text.

211. Funding mechanisms for existing TUR laws vary. For a summary of funding sources and levels, see W. RYAN & R. SCHRADER, *supra* note 103, at 15-16.

annually, is a better option.[212] The amount collected should be based on the number of toxic substances and the amount of toxic waste generated in that year by the facility. All money collected should then go into a special toxics use reduction fund.[213] This ensures that fees are used for their intended purposes. Such a fee structure reflects concepts of fairness. As a company reduces its use of toxics, the fees it pays go down or eventually can be eliminated. Funding is removed from the regulatory program as the problem is abated, and the need for oversight of companies' activities is reduced.

B. Should TUR Be State or Federal Law?

In view of this Article's conclusion that TUR laws are worthwhile and important, it is appropriate to discuss whether Congress should enact a federal TUR law instead of relying on individual state action. It might be argued that if businesses must be subjected to the planning and reporting requirements of TUR laws, it would be best to apply one set of requirements to businesses across the nation.

In October of 1990, Congress took an initial step toward developing a TUR law by enacting the Pollution Prevention Act of 1990.[214] That Act directs the administrator of the EPA to develop and implement a strategy to promote "source reduction."[215] The Act establishes a Source Reduction Clearinghouse, which will be open to the public, in which information on management, techni-

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212. Under the MTURA, for example, companies are assessed a fee ranging from $500 to $8500 per year. *See* MASS. GEN. L. ch. 21I, § 19(C) (Supp. 1991). In Minnesota, a pollution prevention fee is assessed for each toxic substance reported in the amount of $150 plus a fee based on the total pounds released. Fees can range up to $30,000 for a facility emitting large quantities. MINN. STAT. ANN. § 115D.12 (West Supp. 1991).

213. *See* MASS. GEN. L. ch. 21I, § 19 (Supp. 1991) (editorial note referring to fund).

214. *See* Pollution Prevention Act of 1990, Pub. L. No. 101-508, §§ 6601-6610, 104 Stat. 1388.

215. "Source reduction" is defined as any practice which:

> (i) reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal; and
> (ii) reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants.

Id. § 6603(5)(A).

cal, and operational approaches to source reduction will be compiled.[216] The Act also provides $8 million per year for fiscal years 1991, 1992, and 1993 for matching grants to states to promote the use of toxics use reduction techniques by business.[217] Further, it requires that any facility filing a Toxic Chemical Release Form[218] pursuant to EPCRA include a toxic source reduction and recycling report for the preceding calendar year.[219] That report must include the quantity of each toxic chemical entering any waste stream prior to recycling, treatment, or disposal, and the percentage change in that quantity from the previous year. The report also must state the amount of the chemical that is recycled at the facility or elsewhere, the percentage change from the previous year, and the process of recycling used.[220] These reporting provisions are designed to deal with what environmentalists call the "recycling loophole." Under EPCRA, companies can take advantage of the recycling loophole and avoid reporting significant quantities of toxic wastes by shipping them to "recycling" facilities.[221] As far as it goes, the Pollution Prevention Act of 1990 is desirable. Its provisions, however, are so limited that it cannot be viewed as a TUR law as defined in this Article.

Because TUR laws are so new and the provisions of various state laws have not been fully implemented and tested through experience, however, it is not yet time for such a law on the federal level. The first two TUR laws, those of Massachusetts and

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216. *See id.* § 6606.

217. *See id.* §§ 6605, 6610.

218. *See supra* notes 55-58 and accompanying text (describing Toxic Chemical Release Forms).

219. *See* Pub. L. No. 101-508, at § 6607(a).

220. *See id.* § 6607(b).

221. One report states:

> The bulk of these off-site 'recycling' shipments are known to be burned in cement kilns, blast furnaces and industrial boilers. Large amounts are also sent off-site to solvents or metal recovery operations. This reporting loophole undermines the public's right-to-know about shipments of toxic wastes and reduces the usefulness of TRI data for monitoring industrial pollution prevention activities.

Working Group on Community Right-to-Know, *Report Targets "Recycling" Loophole*, WORKING NOTES ON COMMUNITY RIGHT-TO-KNOW 1, 2 (Feb.-March 1991); *see also* WORKING GROUP ON COMMUNITY RIGHT-TO-KNOW, ENVIRONMENTAL DEFENSE FUND, NATIONAL TOXICS CAMPAIGN, & CITIZENS FUND, THE "RECYCLING" LOOPHOLE IN THE TOXICS-RELEASE INVENTORY: OUT OF SIGHT, OUT OF MIND (1991) (complete report on recycling loophole prepared by coalition of four citizens' groups—available from those groups).

Oregon, were enacted in 1989, and the remainder were enacted even more recently. Regulations have not been promulgated for many of the states, and plans have not been filed in most states with TUR laws. Initial implementation of many of those TUR laws may take several more years.

After several years experience with state TUR laws, the time should be right for the adoption of a federal TUR law. This approach parallels the development of worker and community RTK laws in this country. Both worker and community RTK laws originated on the city and state levels and were followed by federal action a few years later.[222] Politically, this process seems to work. The public seems more willing to accept new approaches and innovative laws on a local or state level than at the national level. Individual states can choose varying provisions as their tools for achieving the goals of their new laws. Later, those laws can be examined to see which options have proven most practicable and effective. Therefore, it makes sense to delay the design and enactment of a federal TUR law for a relatively short period of time until experience on the state level clarifies options.

Meanwhile, other steps also can be taken to reduce our exposure to toxic substances and to eliminate, or at least to reduce, toxic materials released into our environment. For example, Right to Act legislation may prove to be an effective tool for enabling workers to act on information revealed through worker RTK laws.[223] Further, consumers cannot put all of the blame for exposure to toxics on industry. We must take responsibility for reducing our own use of toxics, reusing materials, and recycling products and packaging.[224] TUR legislation, however, is an approach that promises to take society in a new, productive direction in terms of safeguarding citizens' health and protecting the environment.

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222. *See supra* text accompanying notes 13-16, 19-21.

223. *See supra* text accompanying notes 81-84 (discussing worker Right to Act proposals).

224. Comments made in this Article advocating pollution prevention, as compared to pollution control techniques such as out-of-process recycling, apply to the activities of consumers as well.

V. CONCLUSION

Since 1989, TUR legislation has been enacted in ten or more states, and its adoption is being considered in many others. This legislation represents a significant new direction in environmental law. The 1980s were a decade in which the right to know about toxic substances was developed through the enactment and implementation of worker and community RTK laws. This Article traces the history of RTK laws, their purposes, and citizen's responses to them. The adoption of TUR laws is probably the most significant among those responses to date.

TUR laws make good sense in terms of public policy. Through TUR laws, efforts are redirected at the source of pollution instead of waiting to control toxics in the aftermath of industrial processes. TUR laws encourage voluntary action by industry, facilitate sharing of ideas and technology, and establish means for replacing reliance solely on pollution control with a new emphasis on pollution prevention. Thus, TUR legislation takes significant steps in directions that are crucial for the health of our citizens and our economy.

TUR laws are new, however, and their advocates do not agree on all of the provisions needed to implement their objectives. TUR laws introduce new concepts and practices, and rely on the development of new attitudes, new ways of thinking, and new technologies. Thus, we are still in an experimental period with respect to their implementation. Although it may not yet be time to enact a federal TUR law, state TUR laws can serve as models for a federal TUR law later in this decade after experience is gained through implementation of state statutes.

TUR legislation is not the solution to all of our problems and concerns related to toxic substances in our environment, but it is one of a number of steps that can take this country toward the goal of a cleaner and safer environment. TUR laws are in the best interests of workers, citizens, and industry itself. Therefore, those states that have enacted TUR legislation and are currently implementing it have chosen a wise and desirable course of action. Legislators and other citizens in the remaining states should carefully examine existing TUR laws and analyses of them, and they should make their own best efforts to enact strong, effective Toxics Use Reduction legislation.

TROUBLING TRANSFER TAX TIE-INS

Malcolm L. Morris[*]

I. INTRODUCTION

"It ain't over 'til its over,"[1] may now be the new transfer tax[2] credo. More than fifteen years since its inauguration, a new way of interpreting one of the most basic transfer tax provisions—the estate tax computation itself—has emerged.[3] Recently, in *Estate of Frederick R. Smith v. Commissioner*,[4] the government received judicial approval to revalue adjusted taxable gifts[5] for estate tax purposes, despite the fact it was precluded from doing the same for gift tax purposes. Given that the estate and gift taxes are unified and viewed as separate computations of one tax, it is puzzling that an immutable gift tax value can be altered many years later when the gift is blended into the estate tax computation. Whether the goal was revenue enhancement, improved tax compliance, or a little of both, the end result can be nothing less than increased taxpayer dissatisfaction over current tax administration practices. The *Smith* decision places a severe strain on some of the more practical aspects of estate planning. It also brings to the fore a greater issue, namely, the current Tax Court predilection for strict statutory construction irrespective of the resulting consequences. It is unclear whether the government's gain will outweigh the costs, burdens, and as yet unrealized issues its victory will spawn.

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1. This inartful but trenchant quip is most often attributed to Peter Lawrence "Yogi" Berra, member of the Baseball Hall of Fame.

2. Unless otherwise indicated, "transfer tax system," "transfer tax," or other similar terms refer only to the estate and gift taxes as a unit.

3. The federal transfer tax system is a levy on the privilege of making gratuitous transfers. It is comprised of Subtitle B, Chapters 11-14 of Title 26 (the Internal Revenue Code) of the United States Code. Chapters 11, 12, 13, and 14 are called the "Estate Tax," the "Gift Tax," the "Tax on Generation-Skipping Transfers," and the "Special Valuation Rules," respectively. Throughout this Article, "I.R.C.," the "Code," and "section" refer to Title 26 of the United States Code.

4. 94 T.C. 872 (1990), *acq. recommended, action on decision*, 1990-032 (Nov. 13, 1990) [hereinafter *Smith*].

5. "Adjusted taxable gifts" are post-1976 gift-taxable gifts not otherwise included in the donor-decedent's gross estate. *See* I.R.C. § 2001(b)(2) (West Supp. 1991).

II. BASIC TRANSFER TAX MECHANICS

The *Smith* holding allows adjusted taxable gifts to be revalued for estate tax purposes.[6] Understanding the mechanics of the unified transfer tax system is a prerequisite to appreciating all of the implications of that holding. More specifically, it is necessary to comprehend the tax treatment accorded gifts both at the time they are made and subsequently at the donor's death. Indeed, *Smith*'s significance springs from the dual accounting that gifts are forced to undergo. Taxable gifts are a part of the donor's estate tax computation base,[7] even though the law may have required a separate gift tax accounting on some, none, or all of them when the donor made the gifts.[8] Accordingly, some explanation is in order.

When Congress introduced the unified transfer tax system,[9] its guiding principle was to treat all taxable transfers identically, regardless of when made.[10] The goal was to put all taxable transfers on the same cumulative continuum.[11] Thus, even though the gift tax and estate tax have retained their separate identities,[12] they share both the same rate schedule[13] and the same unified credit.[14] Since the rate schedule is graduated, the

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6. *See Smith*, 94 T.C. at 878.

7. *See* I.R.C. § 2001(b)(1)(B) (West Supp. 1991).

8. *See id.* § 2501(a)(1) (imposing gift tax on transfers of property by gift).

9. The unified transfer tax system was ushered in under the Tax Reform Act of 1976. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, Title XX, §§ 2001-2010, 90 Stat. 1520, 1846 (1976).

10. *See* H.R. REP. No. 1380, 94th Cong., 2d Sess. 11, *reprinted in* 1976-3 C.B. 735, 745; S. REP. No. 1236, 94th Cong., 2d Sess. 617, *reprinted in* 1976-3 C.B. 807, 967.

11. *See* H.R. REP. No. 1380, 94th Cong., 2d Sess. 11, *reprinted in* 1976-3 C.B. 735, 745-46.

12. The gift tax is Chapter 12 and the estate tax is Chapter 11 of Subtitle B, Title 26 of the United States Code. *See* I.R.C. §§ 2001-2024 (1988 & West Supp. 1991).

13. I.R.C. § 2001(c) provides the rate schedule to be used in computing both taxes. *See id.* § 2001(c) (West Supp. 1991).

14. Currently, the unified credit is $192,800. *See id.* § 2010(a). This corresponds to a shelter for $600,000 of taxable transfers. *See id.* § 2001(c). The estate tax credit is permitted by I.R.C. § 2010; its gift tax counterpart by I.R.C. § 2505. Although the credit is allowed by both taxes, the estate tax computation in effect permits every individual only one unified credit amount. *See* R. STEPHENS, G. MAXFIELD, S. LIND & D. CALFEE, FEDERAL ESTATE AND GIFT TAXATION § 9.06[3], at 9-46 (6th ed. 1991) [hereinafter STEPHENS]; *see also* Morris, *The Tax Posture of Gifts in Estate Planning: Dinosaur or Dynasty?*, 64 NEB. L. REV. 25, 46-47 (1985) (demonstrating by use of a hypothetical that a donor-decedent may make only one use of the unified credit).

cumulative nature of the system potentially forces each succeeding taxable transfer, whether made during life or at death, to be taxed at a higher marginal tax rate.[15]

Inter vivos taxable transfers are subjected to a gift tax accounting.[16] To ensure the cumulative effect, the donor's tax liability for the year in which a taxable gift was made is calculated by including all prior taxable gifts.[17] Consequently, any audit adjustment to a gift tax value in one year will have immediate tax ramifications and an impact on all future gift tax calculations. Moreover, the same concept can be applied retroactively. That is, revaluing today a gift made many years earlier would in turn increase the donor's current total cumulative gifts and, by pushing them into a higher marginal tax bracket, generate a higher tax liability for the donor's current year gifts.

In an effort to prevent this "backtracking" Congress enacted I.R.C. section 2504(c).[18] This provision effectively prohibits a revaluation of a prior gift for the purpose of affecting the donor's current total cumulative gifts if the statutory period for assessing any additional tax with respect to the prior gift has expired.[19] In other words, if the government can no longer question the value for the purpose of assessing a deficiency on the return on which

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15. As with any tax rate schedule, there are banded amounts that receive the same tax treatment. For example, all taxable transfers in excess of $750,000 but less than $1,000,000 are subjected to a marginal tax rate of 39%. *See* I.R.C. § 2001(c)(1) (West Supp. 1991). To the extent a current gift, when added to prior taxable gifts, leaves the aggregate sum in the same band as the total of prior taxable gifts, there will not be a higher marginal rate. Over time, however, as a donor makes more and more taxable transfers, it is likely that the aggregate sum of the gifts will be pushed into the next band. There is, of course, a cap. The highest marginal tax bracket is currently 55%. *See id.* § 2001(c)(2)(D). However, the highest marginal tax bracket is scheduled to settle at 50% by 1993. *See id.* § 2001(c)(1). Also, I.R.C. § 2001(c)(3) provides a special rule for large estates that exceed $10,000,000 but do not exceed $21,040,000 ($18,340,000 for post-1992 transfers): It imposes a 5% surcharge that has the effect of eliminating the unified credit and nullifying the benefits of the graduated rate schedule. *See id.* § 2001(c)(3).

16. I.R.C. § 6019 requires a gift tax return in every calendar year in which the donor makes a taxable gift. *See id.* § 6019 (1989).

17. *See id.* § 2502(a) (1988).

18. I.R.C. § 2504(c) prohibits a revaluation of any prior taxable gift for which the statute of limitations with respect to assessing any additional tax has run. *See id.* § 2504(c). Thus, the government could not "push" the donor into a higher tax bracket by returning to earlier gifts and increasing their value. *But see infra* notes 87-101 and accompanying text (discussing revaluation of prior taxable gifts before § 2504(c) was enacted).

19. *See* I.R.C. § 2504(c) (1988).

the gift is reported, it is precluded from challenging the valuation of that gift for all other gift tax purposes.

The estate tax is inherently different from its gift tax counterpart. Whereas a donor can make numerous gifts and have a corresponding number of gift tax accountings over a lifetime, a decedent can die and the decedent's estate can be subject to an estate tax accounting but once.[20] However, this is not an impediment to maintaining tax parity for inter vivos and testamentary transfers. Gifts are made a part of the estate tax computation in order to fully integrate the two taxes. By adding all of the decedent's gifts into the estate tax base, the law achieves a cumulative effect for all taxable transfers.

However, as with many well-intentioned, seemingly simple ideas, putting the cumulative continuum in place has proved to be somewhat complex. Two obstacles became readily apparent: (1) accounting for taxable gifts when the donor died; and (2) avoiding a penalty for the donor-decedent who paid gift taxes on taxable gifts that were to be "taxed" again at death. The latter problem was easily solved. The former took a little more thought.

To eliminate any potential penalty for having made a taxable gift, the estate tax computation allows an offset—essentially a credit—for gift taxes the donor-decedent paid.[21] Although this statement is overly broad and simplifies what the Code actually provides, in many instances it is a quite accurate portrayal of what actually occurs. To be technically correct, however, the credit is not for gift taxes the donor-decedent in fact paid. Instead, it is for "gift taxes payable" computed with respect to taxable gifts by using the rate schedule in effect at the time of the donor-decedent's death,[22] rather than the one that actually was used when any individual gift was made. Using the date-of-death rate schedule creates the possibility that the gift taxes payable credit may be different than the amount of gift tax the donor-decedent

20. I.R.C. § 6018(a)(1) and (4) requires the filing of an estate tax return if the decedent's gross estate or gross estate plus adjusted taxable gifts exceeds $600,000. *See id.* § 6018(a)(1), (4) (West Supp. 1991).

21. *See id.* § 2001(b)(2).

22. The exact language of the provision is "the aggregate amount of tax which would have been payable under chapter 12 with respect to gifts made by the decedent after December 31, 1976, if the provisions of subsection (c) (as in effect at the decedent's death) had been applicable at the time of such gifts." *Id.*

actually paid. In practice, the amounts usually are identical. Anomalies aside, the credit successfully eliminates any extra tax charge for making inter vivos taxable transfers.

Incorporating gifts into the estate tax base proved to be a little more difficult than removing possible penalties for having made a taxable gift. For one thing, not all gifts are taxable.[23] The first $10,000 of value of any gift of a present interest qualifies for the annual exclusion and, therefore, is excluded from gift tax accounting entirely.[24] The remaining value of the gift can be further reduced by the marital[25] or charitable deductions.[26] To the extent either deduction applies, a tax wash results. Thus, gifts made entirely to a spouse or a charity may not generate any gift tax consequences at all. The value of the gift that exceeds the annual exclusion amount and available deductions is by definition a "taxable gift."[27] Only "taxable gifts" can generate a gift tax liability, but they do not always do so. The unified credit will

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23. I.R.C. § 2503(a) defines taxable gifts as "the total amount of gifts . . . less the deductions." *Id.* § 2503(a). Some transfers which would otherwise be gifts are given preferential treatment. For example, I.R.C. § 2503(e) and (f) specifically exempts from gift taxation qualified tuition and medical payments and certain waivers of survivorship rights with respect to qualified retirement plans. *See id.* § 2503(e)-(f). I.R.C. § 2516 protects qualified transfers between former spouses from gift taxation. *See id.* § 2516 (1988). Section 2518 identifies qualified disclaimers that are not considered transfers for purposes of the gift tax. *See id.* § 2518.

24. *See id.* § 2503(b) (West Supp. 1991). The $10,000 annual exclusion, as its name suggests, is permitted each year and is available for each donee. *See id.* The annual exclusion, however, is available only for transfers of present interests. *See id.* Internal Revenue Code § 2503(c) creates a safe harbor from the present interest rule for transfers in trust for minors, provided certain conditions are met. *See id.* § 2503(c). For a more detailed discussion of the annual exclusion, see generally 5 B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ch. 124 (1988) (reviewing $10,000 annual exclusion); STEPHENS, *supra* note 14, at ¶ 9.04[1]-[5] (restating law concerning $10,000 annual exclusion); Bittker, *The $10,000 Annual Per-Donee Gift Tax Exclusion*, 44 OHIO ST. L.J. 447 (1983) (analyzing application of $10,000 annual exclusion); Sherman, *'Tis A Gift To Be Simple: The Need for a New Definition of "Future Interest" for Gift Tax Purposes*, 55 U. CIN. L. REV. 585 (1987) (criticizing Code's current definition of "future interest" for gift tax purposes and suggesting alternatives).

25. I.R.C. § 2523 allows a marital deduction for qualifying transfers made to spouses. *See* I.R.C. § 2523 (West Supp. 1991); *see also* STEPHENS, *supra* note 14, at ¶ 11.03 (providing general discussion of I.R.C. § 2523); McCoy & Moerschbaecher, *Modern Marital/Charitable Estate Planning*, 61 TAXES 3 (1983) (reviewing changes made by Economic Recovery Tax Act of 1981).

26. I.R.C. § 2522 allows a charitable deduction for qualifying transfers to entities identified in subsections (a)(1)-(4). *See* I.R.C. § 2522(a)(1)-(4) (1988); *see also* STEPHENS, *supra* note 14, at ¶ 11.02 (providing general discussion of I.R.C. § 2522).

27. *See supra* note 23 (providing I.R.C. definition of taxable gifts and listing available deductions).

eliminate any out-of-pocket gift tax payments until its dollar amount is exhausted. Once the donor makes sufficient taxable gifts to cause an actual gift tax payment, all subsequent gifts will trigger actual tax payments as well.[28]

Gifts are also an important component of the estate tax computation. The estate tax calculus brings them into play in one of two ways: either indirectly through the gross estate[29] or directly as "adjusted taxable gifts."[30] This incorporation is an "either/or" proposition;[31] thus, a gift is not accounted for twice. Also, regardless of how the gift is brought into play at death, the credit for gift taxes payable with respect to that gift is unaffected. The credit remains available in all instances. A brief discussion of the estate tax computation should assist in clarifying these points.

The starting point for computing the estate tax is the gross estate, which is a sum of the values of all decedent's taxable interests and is computed at the decedent's date of death[32] or an alternate valuation date.[33] Generally, any property transferred away during life is not included in the gross estate, but there are a number of exceptions.[34] Jointly-owned property is a common example.[35] A simple hypothetical applying the tax rules to such an interest demonstrates this exception.

If the owner of Orangeacre decided to place it in joint tenancy with her brother as the only other joint tenant, there would be an immediate gift of one-half of the value of Orangeacre to the brother.[36] Assuming the value of that moiety exceeded the available annual exclusion, both a taxable gift and a gift tax

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28. I.R.C. § 2505(a) provides that the unified credit available to a donor in any given year is $192,800, reduced by any credit used in prior periods. *See* I.R.C. § 2505(a) (West Supp. 1991).

29. Property that was the subject of an inter vivos transfer during the decedent's lifetime may be included in the decedent's gross estate under I.R.C. §§ 2035-2038, 2040, and 2042. *See generally* STEPHENS, *supra* note 14, at ¶¶ 4.07-.10, 4.12, 4.14 (discussing application of these Code sections).

30. *See* I.R.C. § 2001(b)(1)(B) (West Supp. 1991).

31. Adjusted taxable gifts are gifts *other* than those that are included in the gross estate. *See id.* § 2001(b)(2).

32. *See id.* § 2031 (1988).

33. *See id.* § 2032. In general, the alternate valuation date will be the date six months after the date of death, or any earlier date on which property is actually sold or distributed by the estate. *See id.*

34. *See supra* note 23 (listing sections of Code providing exceptions).

35. *See* I.R.C. § 2040(a) (1988).

36. *See* Treas. Reg. § 25.2511-1(h)(5) (as amended in 1986).

accounting would result. The donor would incur an actual out-of-pocket tax cost if there was insufficient available unified credit to offset the gift tax computed with respect to the transfer.

What happens on the donor's death when the surviving tenant is left with full title to Orangeacre? The donor's executrix would have to include the full value of the joint tenancy property in her gross estate, notwithstanding that she made a gift of one-half of it, or that she may even have paid a gift tax on the gift.[37] In this instance, the special estate tax rule regarding joint tenancies effectively ignores the fact that a gift was made. The amount included in the gross estate is based on the applicable estate tax valuation date value. By including the full value of the joint tenancy in the gross estate, any appreciation in the value of Orangeacre from the time of the original gift to the estate tax valuation date will be subjected to transfer taxation. There will not be any separate accounting necessary for the gift at the donor's death. The property is already included in the tax base at death as a part of the gross estate. However, the donor's estate will "recover" any gift tax actually paid as a gift taxes payable credit against the estate tax.

Most taxable gifts are not included in the donor's gross estate. Instead, they are incorporated into the estate tax base as adjusted taxable gifts. Adjusted taxable gifts are by definition taxable gifts not otherwise included in the gross estate.[38] They are brought into the estate tax base at their *date-of-gift values*.[39] Thus, a gift is incorporated into the estate tax calculus either through the gross estate or as an adjusted taxable gift. It comes in one way or the other. Again, regardless of its method of entry, gift taxes payable with respect to the gift reduce the ultimate estate tax

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37. I.R.C. § 2040(a) provides the general rule of including the value of joint interests in the gross estate based on the decedent's contribution with respect to the property. *See* I.R.C. § 2040(a) (1988). In the example cited above, the decedent had furnished all of the contribution; the brother was a donee tenant who supplied no consideration for his interest. Therefore, the full value of the tenancy is includable in her gross estate. *See id.*; *see also* Estate of Peters v. Commissioner, 386 F.2d 404 (4th Cir. 1967) (applying I.R.C. § 2040(a) to gift in joint tenancy).

38. *See* I.R.C. § 2001(b)(2) (West Supp. 1991).

39. "Adjusted taxable gifts" are by definition "taxable gifts." *See id.* § 2001(b). "Taxable gifts" are computed at date-of-gift values. *See id.* § 2512(a) (1988). The interaction of these sections consequently has resulted in valuing adjusted taxable gifts at date-of-gift values. *See, e.g.*, Rev. Rul. 81-85, 1981-2 C.B. 452 ("[t]he adjusted taxable gifts include only the *value* of the *taxable gifts* made by decedent") (emphasis added).

liability. The crucial distinction between the possible manners in which a taxable gift is accounted for at the donor's death lies in its valuation. Inclusion in the gross estate requires either a date-of-gift or alternative date valuation; incorporation as an adjusted taxable gift only adds the date of the gift value of the transferred property into the estate tax computation base. Thus, all post-transfer appreciation is taxed under the former, but escapes taxation under the latter.

Avoiding tax on appreciation is a major benefit associated with gift-giving, and one of the reasons gifts are important estate planning maneuvers. Prior to the *Smith* decision, the value of an adjusted taxable gift for estate tax purposes was frozen at the time the gift was actually made, or at least within the time period prescribed by I.R.C. section 2504(c).[40] Indeed, "backtracking" for adjusted taxable gifts was not given much thought, nor was it widely viewed as an important tax issue, that is, not until *Smith* was decided.[41]

III. THE RULING AND RULE OF *Smith*

Freezing adjusted taxable gifts at gift tax values not only adds to the strategic tax value of gift giving, it also provides some certainty for the estate planner. By having set values to work with, the tax advisor can target for a certain gifting level that can be integrated with remaining testamentary transfers to maximize the use of any remaining unified credit. Similarly, set adjusted taxable gift figures are a prerequisite to any type of sophisticated marital deduction planning. To the extent a marital deduction

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40. Although never officially adopted, this position was the accepted practice of the government and practitioners alike. It was not until more than a decade after the unified credit system was introduced that the government seriously pressed its contrary view. *See* Priv. Ltr. Rul. 84-47-005 (July 26, 1984).

41. Commentators had given the issue some attention prior to *Smith*. *See, e.g.*, Covey, *Recent Developments Concerning Estate, Gift and Income Taxation—1977*, at 12 INST. ON EST. PLAN., ¶ 105.1, at 1-77 (1978) (noting that language of I.R.C. § 2504(c) could allow I.R.S. to "open up" closed gift tax return); *Internal Revenue Service Challenge to Valuation of Assets after Statute of Limitations Has Expired*, 20 REAL PROP. PROB. & TR. J. 1113, 1120 (1985) (concluding that I.R.C. § 2504(c) applies to adjusted taxable gifts) [hereinafter *Internal Revenue Service Challenge*]. The government and tax court also have acknowledged the issue. *See infra* notes 102-06 and accompanying text (describing private letter ruling and Tax Court case suggesting adjusted taxable gifts could be revalued at donor's death).

formula clause fixes the marital bequest as a unified credit maximizing gift, a post-mortem revaluation of adjusted taxable gifts can wreak havoc on the balance of the estate plan. Setting the adjusted taxable gift amount may not be the most important factor in the gift-giving decision, but it is a valuable piece of information for the estate planner. Frozen adjusted gift tax values bring a degree of "certainty" to an ever changing tax game, which is a benefit worth pursuing. Now the *Smith* court, under the rubric of strict construction, has again changed the rules of play. In doing so, it has added to the government's seemingly "heads I win, tails you lose" administration of the tax laws.

The facts of *Smith* can be distilled to their essentials.[42] The decedent made taxable gifts of stock in a closely held corporation more than three years prior to his death. He timely filed the appropriate gift tax return and paid the gift tax due. His return was never audited and the statute of limitations for assessing any additional gift tax expired. The decedent's executor reported the gifts on the estate tax return as adjusted taxable gifts at their date-of-gift values. The government, however, revalued the adjusted taxable gifts, arguing that although the statute of limitations precluded an additional assessment of gift tax it did not foreclose a redetermination of the gift tax valuation, since an estate tax and not a gift tax was at issue. The central question was: can adjusted taxable gifts be recomputed solely for the purpose of increasing the estate tax base, even though the statute of limitations with respect to assessing a gift tax on them had expired? Or more simply stated, does I.R.C. section 2504(c) apply and prevent "backtracking" on adjusted taxable gifts?

A sharply divided Tax Court decided that adjusted taxable gifts could be revalued for estate tax purposes.[43] In so ruling, the court focused primarily on the role section 2504(c)[44] plays as a statute of limitations regarding revaluations for gift tax purposes. The *Smith* court noted that the United States Supreme Court held in *Badaracco v. Commissioner*[45] that a statute of limitations in

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42. The facts are taken from the court's opinion in *Smith*, 94 T.C. 872 (1990), *acq. recommended, action on decision*, 1990-032 (Nov. 13, 1990).

43. *See id.* at 878.

44. *See supra* note 18 and accompanying text (summarizing operation of I.R.C. § 2504(c)).

45. 464 U.S. 386 (1984).

tax legislation is to be strictly construed.[46] Relying on *Badaracco*, the *Smith* majority felt compelled to pay close attention to the precise wording of section 2504(c) and limit its application to gift tax assessments only.[47]

The court reviewed appropriate legislative history[48] and from it characterized I.R.C. section 2504(c) as a gift tax provision prohibiting revaluation of prior gifts for gift tax purposes only. The majority maintained that when the gift and estate taxes were unified into one system, Congress did not "extend the limitation of section 2504(c) to valuation of prior taxable gifts for estate tax purposes."[49] The court buttressed its view by citing to the legislative history relative to the creation of the unified transfer tax system[50] and noting that in Chapter 13 of the Code[51] "Congress showed that it knew how to make gift tax valuations determinative for estate tax purposes."[52]

The *Smith* majority strictly construed I.R.C. section 2504(c) to limit its application to gift tax determinations and admitted as much.[53] It is difficult, however, to discern whether the court adopted this view out of true conviction or obligatory obeisance to a perceived Supreme Court mandate. Regardless of the true motivation, there is little doubt that the court seemed at ease following the "plain language" of the statute.[54] The *Smith* case appeared to provide the Tax Court with a non-controversial opportunity to avoid the strict construction, but it was eschewed. Specifically, the taxpayer requested that section 2504(c) be incorporated into section 2001(b)(2), the provision adding adjusted taxable gifts into the estate tax base, under the *in pari materia* doctrine.[55] If the doctrine were applied, the definition of taxable

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46. *See id.* at 391 (citing E.I. du Pont Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924)).

47. *See Smith*, 94 T.C. at 874-75.

48. *See id.* at 875 (citing H. REP. No. 1337, 83d Cong., 2d Sess. 93 (1954)).

49. *Id.* at 876.

50. *See id.* (citing H. REP. No. 1380, 94th Cong., 2d Sess. 11, *reprinted in* 1976-3 C.B. 735, 745).

51. The court reproduced a provision of the generation-skipping transfer tax that makes specific reference to retaining gift tax values. *See id.* (citing I.R.C. § 2642(b)(1)(A) (1988)).

52. *Id.*

53. *See id.* at 874-75.

54. *See id.* at 877.

55. *See id.* The term "*in pari materia*" refers to a rule of construction that requires

gift as the foundation of adjusted taxable gifts would be identical for both the gift and estate taxes. It would then follow that any provision impacting on the definition of taxable gift, including the limitation imposed by section 2504(c), would apply with equal force to the estate tax. The court, however, held that the doctrine was inapplicable.[56] Relying on language from *Merrill v. Fahs*,[57] the landmark "estate and gift" tax *pari materia* holding, the Tax Court merely stated it was not "confronted with a definitional problem as was the Supreme Court in *Merrill* . . . ."[58]

The *Smith* court further supported its anti-*pari materia* position by citing *Estate of Satz v. Commissioner*.[59] In *Satz*, the court had refused to apply the doctrine to estate tax deductions associated with marital settlements governed by I.R.C. section 2516, a gift tax provision, even though a contrary result had been reached by the United States Court of Appeals for the Second Circuit in *Natchez v. United States*.[60] The court also recognized that its result was opposite to one reached on the same facts by a federal district court in *Boatmen's First National Bank v. United States*.[61] It concluded, however, that the *Boatmen's First National Bank* court had misread the legislative history and relied too heavily on the practical aspects of the issue.[62]

In fairness to the Tax Court, its sympathy to the practical difficulties its decision created must be noted. The court recognized that by permitting revaluations at death for gifts made perhaps many years earlier, executors may well be put in overly burdensome positions.[63] Record keeping and attempts to reconstruct valuations of gifts made years earlier will often be difficult, if not

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related statutes to be read together when being interpreted by the courts. *See* Linquist v. Bowan, 813 F.2d 884, 888 (8th Cir. 1987). This rule of construction is not to be applied unless the statutes are so closely related that it is reasonable to think that the understanding of the statute by members of the legislature, or persons affected by the statute, would be influenced by another statute. *See* 2A SUTHERLAND STATUTORY CONSTRUCTION § 51.03, at 468 (Sands 4th ed. 1984).

56. *See Smith*, 94 T.C. at 877.

57. 324 U.S. 308 (1945).

58. *Smith*, 94 T.C. at 877.

59. 78 T.C. 1172 (1982).

60. 705 F.2d 671 (2d Cir. 1983).

61. 705 F. Supp. 1407 (W.D. Mo. 1988) (cited with approval in Fendell v. Commissioner, 906 F.2d 362, 364 (8th Cir. 1990)).

62. *See Smith*, 94 T.C. at 877-78.

63. *See id.* at 878.

impossible. These severe practical problems notwithstanding, the court, although perhaps not convinced it reached the best result, iterated that it was the only result permissible.[64] Its justification was plain and simple: courts cannot rewrite statutes; they are authorized only to interpret them.[65]

After determining that adjusted taxable gifts can be revalued at death, the court turned its attention to whether the balance of the estate tax computation would be affected. Specifically, it felt obliged to consider the impact of any adjustments from revaluations on the "gift taxes payable" credit. The *Smith* court quickly concluded that the credit should increase accordingly.[66] It was persuaded by the specific language of the statute that permits the credit for gift taxes "payable" instead of those "actually paid."[67] Recognizing that the legislative history behind the statutory language indicated that its purpose was to prevent unfair results in the event of a change in the rate schedule, the court nonetheless could not think of any reason why the "payable-paid" distinction would not be equally applicable to revalued adjusted taxable gifts.[68] Indeed, the court opined that fairness dictated such a result.[69] Thus, the majority established the position that adjusted taxable gifts are susceptible to revaluation for purposes of computing the estate tax base, but any change in value must also be taken into account when calculating the gift taxes payable credit.[70]

There were two dissenting opinions in *Smith*. Judge Chabot limited his dissent primarily to the revaluation issue and concluded that it was necessary to interpret section 2001(b), the estate tax computation provision, in conjunction with Chapter 12, the gift tax provision, in its entirety.[71] Judge Chabot believed it was incorrect

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64. *See id.*

65. The court cited TVA v. Hill, 437 U.S. 153, 194-95 (1978) and E.I. Du Pont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924) as its authority for this proposition. *See Smith*, 94 T.C. at 878.

66. *See Smith*, 94 T.C. at 880.

67. *See id.* at 879.

68. *See id.* at 880 (interpreting H. REP. No. 201, 97th Cong., 1st Sess., *reprinted in* 1981-2 C.B. 352, 376 and STAFF OF JOINT COMM. ON TAXATION, 97TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 229 (Jt. Comm. Print 1981)).

69. *See id.*

70. *See id.*

71. *See id.* at 881 (Chabot, J., dissenting).

for the majority to pick and choose sections from the entire chapter of gift tax provisions and, to the exclusion of others, match only selected ones to I.R.C. section 2001(b).[72] Thus, Judge Chabot opposed revaluation, but to prevent unduly harsh results concurred with the majority on the gift taxes payable issue.[73]

The other dissenting opinion garnered the support of seven judges.[74] Its author, Judge Wells, leveled a more direct attack on the majority's analysis, questioning whether the majority's putative strict construction actually broadened rather than limited the scope of section 2001(b).[75] Moreover, Wells' dissent challenged the view that a strict construction is either required or appropriate because section 2001(b) is "clearly not a statute of limitations provision."[76] The thrust of Wells' argument was that Congress designed section 2001(b) to accomplish *computational* parity for all transfers, and not to be a "substantive valuation provision."[77]

This distinction between serving a mere computational function versus being a license to revalue a prior transfer is the core of the Wells dissent's disagreement with the majority. To support its position, the dissent read the legislative history and specific language of section 2001(b) to imply that there is no substantive difference between adjusted taxable gifts and the actual taxable gifts from which they arise.[78] Rather, there is only the possibility that the two will be subjected to a different tax rate schedule. Section 2001(b) requires that the rate schedule in effect at the date of death be used to calculate the gift taxes payable credit. This, as noted earlier, was designed to prevent quirky results in the event Congress subsequently changed the tax rate schedules. There is no authority in the statute, however, for altering the value of the transfers themselves. Further, since section 2001(b) is a computation section referring to the "amount of the adjusted taxable gifts," Wells' dissent suggested that the legislative intent was to "incorporate those Code provisions which provide the *substantive* basis for calculating such 'amounts'" into

72. *See id.*
73. *See id.* at 881-82.
74. *See id.* at 882 (Wells, J., dissenting).
75. *See id.*
76. *Id.*
77. *Id.* at 883.
78. *See id.*

the computation provision.[79] The only way to determine the amount of any gift, including those to which section 2001(b) specifically refers, is to employ the provisions of Chapter 12, including I.R.C. section 2504(c). Section 2504(c) specifically prohibits revaluation of gifts for tax years beyond the statute of limitations period. Thus, once section 2504(c) is included as a piece of the estate tax mosaic, revaluation of adjusted taxable gifts would not be permitted.

In a parting shot, Wells' dissent questioned the majority's decision to increase the "gift taxes payable" credit on revalued taxable gift values.[80] The dissent asserted that the statute is said to strain under such a reading.[81] The dissent suggested that the majority adopted a pro-taxpayer interpretation of the gift taxes payable credit to "ameliorate the harsh result of its holding,"[82] but the dissent seemingly believed this largesse had a hollow ring. Indeed, the dissent provided examples to show that the tax cost associated with revaluing adjusted taxable gifts will more than outweigh any benefit flowing from a concomitant increase in the gift taxes payable credit.[83] They also criticized the majority for

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79. *Id.* at 884 (emphasis in original).
80. *See id.* at 885.
81. *See id.* at 886.
82. *Id.* at 885.
83. *See id.* at 886. The Wells dissent provided the following examples:

Example I
Assume that the donor made a taxable gift in 1988 in the amount of $300,000 and dies in 1997 with a taxable estate in the amount of $600,000, and the IRS revalues the gift at $600,000 (no change in tax rates between 1988 and 1997).

	Without revaluation	*With revaluation and credit for gift taxes payable on revalued gift*
Taxable estate	$ 600,000	$ 600,000
Plus adjusted taxable gift	300,000	600,000
Total	900,000	1,200,000
Tentative tax on total	306,800	427,800
Less gift tax payable	---	---
Gross estate tax	306,800	427,800
Less unified credit	(192,800)	(192,800)
Estate tax	$ 114,000	$ 235,000

Difference = $121,000

living by the precise wording of the statute for the purposes of interpreting section 2001(b)(1), which relates to "adjusted taxable gifts," while finding flexibility in the statute when defining "taxable gifts" under section 2001(b)(2), which relates to the gift taxes payable credit.[84]

The dissent appears to suggest that under the guise of strict construction the majority has sailed off course and reached the wrong port. The dissent asserts that strict construction should not result in a broadened application of a tax provision.[85] Moreover, courts should not be at liberty to pick and choose those sections that will or will not be strictly construed, or those portions of the statute that will be grafted onto some provisions to the exclusion of others. Finally, the dissent posits that when Congress attempted to harmonize the tax treatment of all gratuitous transfers, it would have been illogical for Congress to repeal a Code section of twenty years standing by a reference in a mere computational rule.[86]

Example II

Assume that the donor made a taxable gift in 1988 in the amount of $1 million and dies in 1997 with a taxable estate in the amount of $2 million, and the IRS revalues the gift at $1,500,000 (no change in tax rates between 1988 and 1997).

	Without revaluation	*With revaluation and credit for gift taxes payable on revalued gift*
Taxable estate	$ 2,000,000	$ 2,000,000
Plus adjusted taxable gift	1,000,000	1,500,000
Total	3,000,000	3,500,000
Tentative tax on total	1,275,800	1,525,800
Less gift tax payable	(53,000)	(363,000)
Gross estate tax	1,122,800	1,162,800
Less unified credit	192,800	(192,800)
Estate Tax	$ 930,000	$ 970,000

Difference = $40,000

See id.

84. *See id.* at 883.

85. *See id.* at 882.

86. *See id.* at 885 (referring to I.R.C. § 2504(c) which if incorporated into § 2001(b) would prohibit revaluation of adjusted taxable gifts).

IV. THINKING THROUGH THEORIES

Before Congress added section 2504(c) to the Code,[87] prior taxable gifts could be revisited for gift tax purposes after the statute of limitations had run. In *Farish v. Commissioner*[88] and *Commissioner v. Disston*,[89] the government was able to make some adjustments to prior taxable gifts beyond the statute of limitations period.[90] *Farish* involved a re-determination of previously allowed annual exclusions and use of the donor's lifetime exemption.[91] The Tax Court permitted the specific exemption claimed in the earlier year to be altered, but did not tamper with the annual exclusions because of prior litigation with respect to them.[92] In *Disston*, the Supreme Court disallowed the annual exclusions for gifts made in a period in which additional tax could not be assessed.[93] In both instances, the net effect was to increase the amount of prior taxable gifts to which the value of the then current gift(s) was added. This resulted in a higher current gift tax liability, courtesy of the graduated tax rate schedule.

Neither *Farish* nor *Disston* specifically involved a revaluation of property that was itself the subject of the gift as was the case in *Smith*. Even so, the decisions established the proposition that even though the statute of limitations period may have expired, a donor's taxable gift amount from prior years was not sacrosanct. Rather, adjustment of a donor's gifts from earlier years that would result in increased current tax liability was permissible.

I.R.C. section 2504(c) was designed to put a quietus on the revaluation issue,[94] but not completely. The provision prevented

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87. I.R.C. § 2504(c) was enacted in 1954. *See* Internal Revenue Code of 1954, Pub. L. No. 591-736, 68A Stat. 405 (1954) (codified as amended at I.R.C. § 2504(c) (1988)).

88. 2 T.C. 949 (1943).

89. 325 U.S. 442 (1945).

90. *See* Johnson, *Revaluation of Lifetime Gifts in the Federal Estate Tax Computation*, 15 S. ILL. U.L. REV. 1, 3-6 (1990) (discussing *Farish* and *Disston*).

91. *See Farish*, 2 T.C. at 949-54. Prior to the introduction of the unified credit in 1976, a donor was entitled to a lifetime exemption of a set dollar amount. The original exemption amount was $150,000, but was reduced to $40,000 by the Revenue Act of 1935. In 1954, the amount was reduced to $30,000. *See* I.R.C. § 2521, *repealed by* Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1525 (1976).

92. *See Farish*, 2 T.C. at 961-62.

93. *See Disston*, 325 U.S. at 449.

94. *See* S. REP. No. 1622, 83d Cong., 2d Sess. 127 (1954), *reprinted in* 1954 U.S.

revaluations of prior taxable gifts only "if a tax under this chapter . . . has been assessed or paid . . . ."[95] Two points are noteworthy. First, the statute did not prevent the government from making adjustments to prior gifts that were improperly valued because of a taxpayer's misinterpretation of tax laws.[96] Second, as the statute itself states, a taxpayer has a defense to revaluation only if a gift tax has actually been assessed or paid with respect to the gift.[97] After the introduction of the unified transfer tax system, a question arose as to whether the use of the unified credit involved the offset of a gift tax assessment or whether the credit could be considered a tax payment itself. Under either scenario, section 2504(c) would apply even when no out-of-pocket expense was incurred because the available credit eliminated any tax liability. The government resolved this issue in its favor, however, by ruling that the use of the unified credit for the purpose of preventing an out-of-pocket gift tax payment was neither a payment of tax itself nor was the amount of tax offset considered to have been assessed.[98] Earlier the government had ruled that taxpayers must use all available credit to eliminate any gift tax liability as it arose.[99] A donor cannot pay a gift tax today and defer use of any available unified credit to tomorrow. Thus, it would seem that all taxable gifts below the taxing threshold[100] are susceptible to revaluation at any time.[101] A somewhat disquieting thought to say the least.

In Private Letter Ruling ("PLR") 8447005, the government shifted its attention from gift tax revaluations to adjusted taxable

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CODE CONG. & ADMIN. NEWS 4623, 4761.

95. I.R.C. § 2504(c) (1988).

96. *See* Treas. Reg. § 25.2504-1(d) (as amended in 1983); *see also* Berzon v. Commissioner, 534 F.2d 528, 530-31 (2d Cir. 1976) (gifts revalued where taxpayer used inaccurate method of valuation); Clark v. Commissioner, 65 T.C. 126, 139-42 (1975) (Commissioner allowed to revalue gift where taxpayer misinterpreted law).

97. *See* I.R.C. § 2504(c) (1988).

98. *See* Rev. Rul. 84-11, 1984-1 C.B. 201.

99. *See* Rev. Rul. 79-398, 1979-2 C.B. 338.

100. The unified credit is $192,800. *See* I.R.C. § 2010(a) (West Supp. 1991). This correlates to a taxable gift amount of $600,000. *See id.* § 2001. That is, $600,000 of taxable transfers will generate a gift tax in the amount of $192,800. Using the credit eliminates any out-of-pocket payments. Thus, $600,000 is the transferred value threshold level for transfer taxations.

101. *See Internal Revenue Service Challenge*, *supra* note 41, at 1114-17 (providing detailed review and analysis of this position).

gift revaluations.[102] PLRs are interesting creatures in that they are of no precedential value whatsoever, and specifically declare this fact.[103] Notwithstanding the disclaimer, because the Code requires the IRS to publish PLRs,[104] they have assumed an important niche for themselves in tax law. It is fair to say that practitioners look to them for guidance on tax planning matters. PLRs may not comprise a body of authoritative law, but they certainly represent a source of current government thinking on impending policy matters and potential future tax pursuits. Thus, when PLR 8447005 was issued asserting that adjusted taxable gifts could be revalued, whether the government would pursue its position in court was not a matter of if, but only a question of when. Moreover, if PLR 8447005 was not indication enough of what was to happen, the government got further encouragement when, in *Ward v. Commissioner*,[105] the Tax Court itself suggested that adjusted taxable gifts were susceptible to revaluation at the donor's death.[106] Therefore, notwithstanding that the opposite result was reached in *Boatmen's First National Bank*,[107] the *Smith* decision did not come as a great surprise to those who had been following this progression of events. Armed with PLR 8447005 and the *Ward* decision, the government was poised to press the issue further. The *Smith* case provided such an opportunity.

Having been given an open invitation, it would not have been unreasonable to assume that the full Tax Court would have been a little more hospitable to the revaluation issue on its arrival. In the final analysis, however, the majority view was adopted by only a two-vote margin.[108] This sharp division among the judges raises the issue of whether the rationale used to support the decision can withstand close scrutiny or survive future review.

Applying I.R.C. section 2504(c) exclusively as a gift tax

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102. *See* Priv. Ltr. Rul. 84-47-005 (July 26, 1984).

103. *See* I.R.C. § 6110(j)(3) (1989).

104. *See id.* § 6110(a).

105. 87 T.C. 78 (1986).

106. *See id.* at 113-14, 114 n.12.

107. *See supra* notes 61-62 and accompanying text (discussing *Boatmen's*).

108. The majority view had ten supporters. There were eight dissenters in total. *See Smith*, 94 T.C. 872, 881, 886 (1990), *acq. recommended, action on decision*, 1990-032 (Nov. 13, 1990).

provision was the linchpin for the majority's opinion in *Smith*.[109] The court fashioned a two-step approach to reach its decision. First, it read that section as a statute of limitations and, following the *Badaracco* decision, strictly construed its provisions.[110] Further satisfied that the narrow reading of the section was justified under the "plain reading" rule, the court had no difficulty in taking the second step to limit its application solely to gift tax assessments. The court did not believe it necessary to carry over section 2504(c) into the estate tax arena, and determined that the doctrine of *in pari materia* was not applicable to the situation at hand.[111] Absent any specific directive to have section 2504(c) limit revaluations of adjusted taxable gifts, the court was not moved to do so itself. Indeed, it believed it was prohibited from doing so on its own. It was quite comfortable that its strict construction of the statute was consistent with the applicable legislative history of the transfer tax system.[112]

The rationale limiting section 2504(c) to gift tax assessments is susceptible to easy attack. The dissenting judges did a fine job countering the majority's position. They also presented strong arguments for prohibiting adjusted taxable gifts from being revalued beyond the period for altering taxable gift values.[113] The basic disagreement between the two camps lies in the roles sections 2001(b)(2) and 2504(c) play in the transfer tax system. The majority viewed section 2504(c) strictly as a gift tax statute of limitations provision and section 2001(b)(2) as an estate tax section unhampered by any restrictions on gift tax valuations. The dissent, on the other hand, viewed section 2001(b) as a purely computational provision, and not one that permits substantive valuations of the elements that are the parts of the gift tax computation. Therefore, the dissent incorporated section 2504(c) into the estate tax provision on the ground that the computation includes adjusted taxable gifts, which are first and *forever* taxable gifts. Taxable gifts are creatures of the gift tax sections. I.R.C. sections 2503 and 2512 define and value taxable gifts, and section 2504(c) essentially makes their value immutable at a specific point

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109. *See id.* at 874.
110. *See id.* at 874-75.
111. *See id.* at 877.
112. *See id.*
113. *See id.* at 881-87.

in time. The dissent argued that its interpretation is supported by legislative history, and questioned whether the majority read modifications into the statutory scheme to meet its own needs.[114] Although the dissent did not specifically invoke the doctrine of *in pari materia*, it analyzed the interrelationship of a number of gift tax provisions and explained how, by necessity, each must be incorporated by reference into the estate tax calculus under section 2001(b).[115] The dissent suggested that a failure to incorporate each of the gift tax provisions into the estate tax calculus would undermine the transfer tax system and leave too many questions unanswered.[116]

Can one say with any certitude that either side makes the more convincing legal case? There is merit to both viewpoints; each employs an approach that has a "tax logic" justifying its position. However, one common denominator makes both sides' arguments vulnerable; namely, each rests on a reading of general rather than specific legislative intent. How can anyone truly determine whether I.R.C. section 2504(c) was intended to be limited to gift tax values only, and not intended to be brought into play when the gifts are, for computational purposes, made a part of the estate tax base? How can others conclude that a gift tax provision, which seemingly is limited by its own words to that chapter of the Code, should nonetheless be used to defeat potential revenue collections arising from a provision in a different chapter of the Code?

Most likely, Congress did not think of the revaluation problem when it drafted the unified transfer tax system provisions. Otherwise, Congress would have made provisions for handling the problem. If Congress had recognized the problem and concluded that special treatment was unnecessary, Congress would have made specific reference to it in the appropriate legislative reports. Neither of these things happened. Now, unsure of what Congress really meant, the courts must make a decision. Trying to determine what Congress originally intended when it probably had not thought of the issue at all may not be the best path to follow when resolving tax statute ambiguities. Instead, this author

114. *See id.* at 882 (Wells, J., dissenting).
115. *See id.* at 884.
116. *See id.* at 884-85.

submits the better approach is to obtain guidance from the manner in which the government has been administering the relevant tax laws, especially when the government is seeking a change in policy.

Courts should determine what the practical ramifications of switching from the existing, accepted practice will be. If the results are untoward, serious thought must be given to maintaining the status quo. If unsatisfied, Congress can intervene and let its previously unstated intent be known. The Commissioner should not receive judicial approval to press new interpretations of existing tax laws at his whim. Enhanced revenue collection simply does not justify such actions. Instead, the Commissioner should meet the responsibility of supplying reliable guidance for taxpayers to follow within a reasonable time after new legislation is enacted. Here, more than fifteen years had passed during which time adjusted taxable gifts were routinely accepted at gift tax values. Then, quite suddenly, there was a push for a different treatment resulting from a new interpretation of the Code.

Although such tax administration practices are currently permitted,[117] they should no longer be countenanced. Instead, the government should be bound by its prior consistent application of a specific tax law. Such an even-handed approach fosters fairness and an improved likelihood of substantial compliance. Accordingly, this author suggests that when the Tax Court is unable to ascertain how Congress intended the courts to apply specific tax legislation, the Commissioner ought to be precluded from abruptly changing a course of prior longstanding interpretation. This is especially important when the practical ramifications outweigh any benefits obtained from the change. Finally, an examination of the practical outgrowths of *Smith* demonstrates that the case was incorrectly decided under the theory postulated.

V. PRAGMATIC PROGNOSIS

What are the practical consequences of *Smith*? Is the brouhaha justified? Before declaiming the revaluation an odious

117. The government is not bound to follow its own established interpretations of tax law and may abandon previously longstanding positions. *See* Dickman v. Commissioner, 465 U.S. 330, 343 (1984).

thing, consideration must be given, inter alia, to the circumstances that will trigger a revaluation of adjusted taxable gifts and the concomitant compliance costs. In addition, it is worth investigating whether the decision raises any non-transfer tax implications. An examination of these practical ramifications will provide an assessment of whether the victory was worth winning.

Adjusted taxable gift revaluations clearly can result in higher estate tax liabilities. The cumulative nature of the transfer tax system, together with the graduated rate schedule, creates greater tax exposure as taxable values are pushed into higher brackets. In many instances, however, the correlative increase in the "gift taxes payable" credit will prevent any "pure" tax increase from the revaluation. That is, to the extent there is a higher adjusted taxable gift figure in the estate tax base, there will also be a higher amount on which the "gift taxes payable" credit will be calculated.

There are, however, two notable exceptions: one in which "pure" tax increases will occur, the other in which a revaluation will not result in any additional tax. The former will occur when the taxable gifts are below the taxing threshold. Revaluation will increase the estate tax base, but there will not be a corresponding increase in credit because there will not be any gift taxes *payable*.[118] The latter will occur when the revised adjusted taxable gifts and the amount used to calculate the credit both begin and end in the same marginal tax bracket.[119]

These exceptions aside, the revaluation will push the taxable estate tax base into a higher marginal bracket. When this happens, there will be additional tax equal to the rate differential between the post-revaluation and pre-revaluation applicable rates as applied to the amount of the increase in the estate tax base

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118. When aggregate taxable gifts are below $600,000 there will never be a gift tax payment because of the availability of the unified credit. *See supra* note 100 (discussing unified credit). The § 2001(b)(2) credit is only for taxes payable—amounts in excess of the credit. *See* I.R.C. § 2001(b)(2) (West Supp. 1991). Thus, if adjusted taxable gifts remain below the $600,000 level, there will be no gift taxes payable. *See infra* notes 127-30 and accompanying text (providing discussion and computations).

119. Once the maximum gift tax marginal rate bracket is reached, any increase in the adjusted taxable gifts should not be harmful. If a taxpayer has a $100,000 increase, the $55,000 increase in tentative estate tax will be offset by the $55,000 increase in gift taxes payable. *See infra* note 126 (providing discussion and computations).

resulting from the revaluation.[120] This tax increase will at best only partially be offset by the potential increased gift taxes payable credit. The increase in credit will always be less than the increase in estate tax unless the estate is in the same marginal tax bracket for both the tentative estate tax and adjusted taxable gifts credit computations, that is, the second exception noted above.

It does not take a sophisticated mathematician to conclude that adjusted taxable gift revaluation can result in greater estate tax exposure. Although math can prove the assertion, common sense leads to the same result. As a good rule of thumb, the previously noted exceptions aside,[121] the higher the amount of the revalued adjusted taxable gifts, the greater the tax exposure. Given the reality that revaluations will result in increased tax liabilities, how much revenue can the government reasonably expect to raise?

The best way to pursue this inquiry is to make some simple comparisons. A "run through the numbers" will show actual revaluation benefits. Although one can always find or conjure up a specific instance for which a general rule will not prove to be representative, this author suggests that these comparisons will provide a satisfactory response to the question raised.

Assume an individual during the course of her lifetime transferred taxable gifts in the amount of $750,000. Her gift tax liability on that sum would have been $55,500.[122] If she then

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120. The following illustration verifies this fact. Assume pre-revaluation adjusted taxable gifts of $1,000,000 and a taxable estate of $500,000. The tentative tax on the estate tax base is $555,800 (tax on $1,500,000). The gift taxes payable are $153,000 (tax of $345,800 reduced by unified credit of $192,800). Thus, the estate tax imposed is $402,800, which is reduced by the § 2010 "unified credit against estate tax" of $192,800 to yield an estate tax liability of $210,000. *See* I.R.C. § 2010 (West Supp. 1991).

If the adjusted taxable gifts are increased on revaluation by $100,000, the tentative tax is computed on a $1,600,000 base and is $600,800. It is then reduced by gift taxes payable on $1,100,000, or $194,000, to give an imposed estate tax of $406,800. The estate tax liability is $214,000.

The pre-revaluation liability was $210,000, and the post-revaluation figure is $214,000. The $4000 increase is attributable to the fact that the marginal tax rate on the tentative estate tax base was 45%. The marginal rate for the taxes payable on the adjusted taxable gifts was 41%. The 4% rate differential applied to the $100,000 increase in adjusted taxable gifts generated the additional tax liability.

121. This is, after all, the Code being discussed, how could there not be an exception.

122. The gift tax computation, which assumes no prior taxable gifts, would be as follows:

died with a taxable estate of $1,000,000, the adjusted taxable gifts would be $750,000 and her estate tax payable would be $420,000.[123] The total transfer taxes paid would have been $475,500: $55,500 of gift tax and $420,000 of estate tax. Consider the consequences of a revaluation that increases adjusted taxable gifts by $250,000 to a total of $1,000,000. The estate tax payable becomes $435,000.[124] The revaluation causes a net transfer tax increase of $15,000.[125] Although this amount is not a paltry sum, when viewed from a broader perspective a different picture comes into focus. The revaluation amounts to a 33 1/3% increase in

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Cumulative Taxable Gifts	$ 750,000
Tax on Cumulative Taxable Gifts	248,300
Less Tax on Prior Taxable Gifts	(0)
Gift Tax Imposed	248,300
Less Unified Credit	(192,800)
Gift Tax Payable	$ 55,500

123. The estate tax payable is computed as follows:

Taxable Estate	$ 1,000,000
Adjusted Taxable Gifts	1,750,000
Tentative Tax on the sum of the Taxable Estate and Adjusted Taxable Gifts	668,300
Less Gift Taxes Payable Credit	(55,500)
Estate Tax Imposed	612,800
Less Unified Credit	(192,800)
Estate Tax Payable	$ 420,000

124. This figure is the result of the following computation:

Taxable Estate	$ 1,000,000
Adjusted Taxable Gifts (revalued)	1,000,000
Tentative Estate Tax Base	2,000,000
Tentative Estate Tax	780,800
Less Gift Taxes Payable Credit*	(153,000)
Estate Tax Imposed	627,800
Less Unified Credit	(192,800)
Estate Tax Payable	$ 435,000

* According to *Smith*, the estate is entitled to a "gift taxes payable" credit computed with respect to the higher revalued "adjusted taxable gifts," even though the actual payment was made on the smaller pre-valuation amount. *See Smith*, 94 T.C. 872, 879-80 (1990), *acq. recommended, action on decision*, 1990-032 (Nov. 13, 1990).

125. The estate tax payable after the revaluation was $435,000, but the decedent still had paid gift taxes in the amount of $55,500. Thus, transfer taxes in the amount of $490,500 will be paid. The revised $490,500 tax payment is $15,000 more than the non-revaluation total of $475,500.

taxable values, but only generated approximately a 3 1/2% tax increase.

The 33 1/3% figure is a hefty increase in value to generate so little additional tax. The net return is small because the gift taxes payable credit is computed on the higher revalued taxable gifts, instead of on the actual date-of-gift values. What the *Smith* dissent criticized as a taxpayer sop to ameliorate a harsh result can often prove to be much more. In many instances, the gift taxes payable credit can substantially or even completely eliminate any additional tax exposure from a revaluation of adjusted taxable gifts. At a minimum, the impact of the gift taxes payable credit will usually reduce the adverse effects of revaluation. Indeed, when the donor-decedent's gift tax and estate marginal tax rate both reach the maximum level, the increase in the gift taxes payable credit will completely eliminate the negative tax impact of a revaluation.[126] On the other hand, revaluation is particularly

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126. This point can be proved by illustrating the effects of revaluation on a taxpayer who was in the 55% tax bracket, currently the highest marginal tax rate for donor-decedents. *See supra* note 15 (discussing marginal tax rates).

The estate tax computation on reported figures would be as follows:

Taxable Estate	$ 1,000,000
Adjusted Taxable Gifts	3,000,000
Tentative Estate Tax Base	4,000,000
Tentative Estate Tax	1,840,800
Less Gift Taxes Payable Credit	(1,098,000)
Estate Tax Imposed	742,800
Less Unified Credit	(192,800)
Estate Tax Payable	$ 550,000

Assume a revaluation of adjusted taxable gifts to $3,500,000. The estate tax computation would be:

Taxable Estate	$ 1,000,000
Adjusted Taxable Gifts (revalued)	3,500,000
Tentative Estate Tax Base	4,500,000
Tentative Estate Tax	2,115,800
Less Gift Taxes Payable Credit	(1,373,000)
Estate Tax Imposed	742,800
Less Unified Credit	(192,800)
Estate Tax Payable	$ 550,000

In both instances, the estate tax payable will be $550,000. The revaluation of adjusted taxable gifts in these instances has no tax significance. Moreover, this tax wash results any time the revaluation does not alter the respective marginal tax rates involved.

pernicious for donor-decedents whose total taxable gifts did not exceed the taxing threshold. In such instances, each dollar added to the estate tax base by the revaluation of adjusted taxable gifts generates a pure tax increase because there will not be any credit for gift taxes payable available to offset the higher tentative estate tax. The following example is illustrative.

Assume the donor made $250,000 of taxable gifts during her life. The gift tax imposed on these transfers would be $70,800,[127] but there would not be any gift tax actually paid or payable because of the unified credit. Indeed, there would still be $122,000 of credit available after these transfers to offset any gift tax imposed on future transfers. If the donor died with a taxable estate of $750,000, both her tentative estate tax and estate tax imposed would be $345,800.[128] There need not be any reduction for gift taxes payable because even though there were taxable gifts they did not generate an obligation to make an actual tax payment. After accounting for the unified credit, the estate tax payable would be $153,000.[129] If adjusted taxable gifts are revalued by $83,250 to $333,250, the estate tax payable would be $187,133.[130] This computes to a $34,133 or 22% tax increase on

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127. As used herein, the term "gift tax imposed" means the tax computed on the taxable gifts before taking the unified credit into account.

128. This figure is based on the following computation:

Taxable Estate	$ 750,000
Adjusted Taxable Gift	250,000
Tentative Estate Tax Base	1,000,000
Tentative Estate Tax	345,800
Less Gift Taxes Payable	(0)
Estate Tax Imposed	$ 345,800

The Gift Taxes Payable amount is zero because there were insufficient taxable gifts to force a gift tax liability payment. There was a gift tax imposed, but the unified credit was more than sufficient to prevent any actual payment. Thus, the tentative and imposed estate tax amounts are identical.

129. This amount is based on estate taxes of $345,800 less the unified credit of $192,800.

the $83,250 adjustment, a 33 1/3% increase in the value of the adjusted taxable gifts.

Compare the two examples. Although the adjusted taxable gifts were increased by the same percentage, both the actual dollar amount and percentage increase in tax in the second example were substantially higher, even though the taxpayer was in a *lower* marginal tax bracket. Intuitively, one would suspect an opposite result, but the seeming anomaly is easily explained. When the tax imposed on gifts has exceeded the unified credit amount, there will be a gift taxes payable credit to minimize the impact of any revaluation at death. This credit will not be available to decedents whose taxable gifts did not surpass the taxing threshold. Therefore, the revaluations will have a dramatic effect on the estates of individuals who have made some gifts, but not enough to generate gift tax payment liabilities. The government could realize substantial revenue from this group of taxpayers.

If there is some gold to be mined in the revaluation field, what are the prospects of the government striking a find? Prudent tax administration policy dictates that there be a reasonable expectation of success before taxpayers are forced to bear the inconvenience and expense of defending a revaluation claim. The government should be aware of the valuation process in general and its impact on specific assets transferred to donees. Such an approach would permit a more meaningful cost-benefit analysis.

When a gift is made, the onus is on the donor to value the transferred property. Donors do not, however, have a free rein in meeting this obligation. A gift must be valued on the date it is made,[131] and there are ample instructions guiding the valuations

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130. The computation is as follows:

Taxable Estate	$ 750,000
Adjusted Taxable Gifts (revalued)	333,250
Tentative Estate Tax Base	1,083,250
Tentative Estate Tax	379,933
Less Gift Taxes Payable	(0)
Estate Tax Imposed	379,933
Less Unified Credit	(192,800)
Estate Tax Payable	$ 187,133

131. *See* I.R.C. § 2512(a) (1988).

of various property interests.[132] Certain assets such as cash, publicly traded securities,[133] and the quantum of other interests such as life estates,[134] annuities,[135] terms for years,[136] and reversions[137] are subject to precise valuation rules. Consequently, these assets and interests should be susceptible to adjustment only on revaluation because of mistake. For example, if the donor gifted publicly held stock and was required to value it at the mean of the high and low prices on the date of gift,[138] there should be no dispute as to what the actual high and low selling prices were. These figures are reported daily in countless journals and newspapers daily. Incorrect valuations can result from math errors or such factual errors as misreading the reported prices, but when all the information is properly gathered the result will be undisputed. The government's potential benefit does not appear to justify the effort of checking all past taxable gifts of these types of assets or interests in the hope of finding an error. Even if an error is found, is it not likely to be of sufficient magnitude to warrant the auditing time and expense. Indeed, gift tax returns are specialized tax forms normally executed by tax professionals putatively schooled in the valuation rules, and penalties are imposed when such forms are not properly completed.[139]

In reality, closely held business entities—primarily corporate stock and partnership interests—and real estate are the most likely targets of the revaluation arrow. *Smith* itself involved a gift of stock in a closely held business. Although there are guidelines for valuing these interests,[140] specific valuation factors are not susceptible to precise application. There is no one "right" value for these types of assets. Instead, a donor must settle for a valuation that falls within a "range of reasonability"; usually with the

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132. *See* Treas. Reg. § 25.2512-1 to -7 (as amended in 1981).
133. *See id.* § 25.2512-2.
134. *See id.* § 25.2512-5(a), (f) Table A.
135. *See id.* § 25.2512-5(b), (f) Tables A and B.
136. *See id.* § 25.2512-5(a), (f) Table B.
137. *See id.* § 25.2512-5(d), (f) Tables A and B.
138. *See id.* § 25.2512-2.
139. *See* I.R.C. § 6660 (1988) (penalty applicable to gift tax return prior to 1989), *repealed by* Pub. L. No. 101-239, § 7721(c)(2), 103 Stat. 2399 (1989); *see also id.* § 6662(a) (Supp. 1991) (penalty imposed for certain underpayments of tax); *id.* § 6662(b)(5) (relating specifically to estate and gift taxes).
140. *See id.* § 2512(b) (1988); Treas. Reg. § 25.2512-3 (as amended in 1981); Rev. Rul. 59-60, 1959-1 C.B. 237.

government opting for the higher and the donor the lower end of the range. Indeed, many transfer tax cases may be more of a battle over thorny valuation issues than a contest of theoretical debate.[141]

Interests in closely held businesses are ripe for revaluations because of the imprecise results that flow from the valuation approach. The major difficulty with pursuing these interests for revaluation purposes is the problem of proof. Because the government is asserting the right to revalue all adjusted taxable gifts, revaluation opens the door all the way back to the beginning of 1977.[142] Is it realistic to believe that the government will be able to prove a case that may be more than a decade stale? Business valuations are largely a function of the attendant business climate. Can the taxpayer or the government realistically be expected to accurately re-create the economic mood that existed many years earlier? In *Smith* only a few years had passed. Would the government's case have been equally effective if Smith himself had survived another twenty years? Under the *Smith* ruling, in such an instance the government still would have had the opportunity for revaluation. Would it have chosen to pursue the matter under such circumstances? Perhaps of greater significance, if the executor is required to do so, what could he reasonably do to defend the return? Will the gift tax return preparer still be alive? Will adequate records be available? The serious practical concerns raised by *Smith* are legion, and trying to respond to them may prove to be overly costly. The case *Estate of Ralph E. Lenheim v. Commissioner*[143] is illustrative.

In *Lenheim*, the first reported post-*Smith* revaluation case, the decedent had made gifts of closely held stock in 1981 and

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141. Because expert practitioners used many different methods to value business interests, and manipulated tax consequences by issuing various classes of stock and other business rights, Congress enacted Chapter 14 of the Code and its special valuation rules. Congress was keenly aware of the high risk of revenue loss associated with its silence on this issue. Chapter 14 should succeed in preventing undue manipulation of business interests for the purpose of frustrating revenue collection, but it offers no assistance in solving the basic business valuation riddle. Consequently, valuation will continue to be one of the more controversial aspects of estate planning.

142. Adjusted taxable gifts are all taxable gifts made after December 31, 1976. *See* I.R.C. § 2001(b)(1)(B) (West Supp. 1991). Thus, pre-1977 taxable gifts are not added into the estate tax base.

143. 60 T.C.M. (CCH) 356 (1990) [hereinafter *Lenheim*]; *see also* Estate of Prince v. Commissioner, 61 T.C.M. (CCH) 2594 (1991) (tax court revalued adjusted taxable gifts).

every year thereafter, including 1984, the year of his death. The primary issue in the case was the revaluation of the adjusted taxable gifts. The opinion consists of 21 pages, 18 of which are devoted to valuation issues.[144] The opinion painstakingly attempts to blend background information and conflicting expert testimony with business facts, figures, and calculations to reach its result. Since the opinion is so detailed, one must wonder how much time, effort, and cost was expended by the litigants. Was it worth all this? An enthusiastic, positive response could be expected from the government, which succeeded in obtaining a deficiency, albeit not for the full amount sought. The government originally claimed a $230,803 deficiency, but raised the amount to $384,868 on appeal. Because the court valued the stock at $144 per share and the government claimed it was worth more than that, the full deficiency was not awarded. The court did not compute the tax liability, but limited its discussion to valuation.[145]

Lenheim also provides a good opportunity to catch a glimpse of the taxpayer's side of the revaluation ledger. Consider the time and expense that the estate must have incurred to defend this action. True, there are usually compliance costs associated with any tax filing, but at best the timing makes it more onerous. Although in *Lenheim*, as in *Smith*, the gifts in issue were transferred within a relatively short time of the donor's death, what accounting and valuation nightmares would have arisen if the decedent died in 1994 instead of 1984? Oral testimony very well could be lost with the death of important witnesses. Of course, this is also a risk with gift tax valuations and the three-year assessment limitation. However, the longer the time period between the gift and the revaluation, the greater the risk of losing key witnesses.

Compliance costs and problems aside, taxpayers will face other practical concerns. One tax benefit attributable to gift giving is achieving a transfer tax value "freeze." The donor knows that each outright gift not otherwise subsequently subject to gross

144. There are six pages devoted to valuation in the findings of fact, six more of expert opinion, and another six in the court's opinion section. *See Lenheim*, 60 T.C.M. (CCH) at 356-76.

145. *See id.* at 367-72.

estate inclusion will have a fixed effect. At the time of the gift the value is set, and the amount of tax paid or credit used is fixed. The taxpayer then can continue planning his or her estate based on reliable information. Frozen gift tax values provide a comfortable certainty that assists in making future tax-oriented decisions. This "certainty" argument appeared to be a motivating factor in the *Boatmen's First National Bank* decision, which disallowed adjusted taxable gift revaluation.[146] One must question why the government should have three years to challenge a gift tax valuation, and if it fails to utilize the opportunity, receive a deferral for an indefinite period of time to get a second bite at the tax apple.[147] Fairness alone would seem to dictate *Smith* may have been incorrectly decided.

Another important, but subtle, tax benefit obtained from gift giving is that the gift tax is tax exclusive. That is, when a gift is made any gift tax paid essentially is excused from any transfer tax accounting. For example, to make a taxable gift of $1,000,000 the donor must part with $1,000,000, assuming it is cash, *plus* the tax on the gift[148] which, assuming no prior taxable gifts, is $153,000 and again is payable in cash.[149] On the donor's death, the $1,000,000 is added to the estate tax base as an adjusted taxable gift, but there is not any accounting to be done for the $153,000. The dollars paid as gift tax are taken out of the transfer tax picture entirely.

Consider the result if the donor had made no gift. The estate would have had not only the $1,000,000 cash, but also the $153,000 that would not have been paid as gift taxes. It makes no difference whether the $1,000,000 is added to the estate tax base as part of the gross estate or as an adjusted taxable gift. When cash is involved, the total amount subject to tax will be identical. The $153,000 is taxed only at death, however, if it was not previously paid out as a gift tax. If the estate were in the 50% marginal estate tax bracket, an additional $71,500 of transfer

146. *See* Boatmen's First Nat'l Bank v. United States, 705 F. Supp. 1407, 1413 (W.D. Mo. 1988).

147. *See Smith*, 94 T.C. 872, 884 n.2 (1990) (Wells, J., dissenting).

148. *See* I.R.C. § 2502(c) (1988) (imposing gift tax on donor).

149. The tax on a $1,000,000 taxable gift is $345,800, but after applying the $192,800 credit, $153,000 is payable.

taxes would be paid.[150] This difference is attributable solely to the tax payment attendant to making the gift. The savings attributable to pulling gift taxes out of the transfer tax base is a valuable tax benefit.[151] The benefit is so valuable that the Code specifically denies it for gift taxes paid within three years of the donor's death.[152]

Smith may allow taxpayers greater use of this benefit. What guarantees are there that an executor will not succeed in reducing the value of the adjusted taxable gifts from that originally reported in the gift tax returns? Indeed, the estate in *Lenheim* responded to the government's suit by seeking to revalue the adjusted taxable gifts at figures below those reported on the gift tax returns.[153] If an estate is successful in its effort, it will have reaped the benefit of pulling the gift taxes actually paid out of the grasp of transfer taxation. The estate then will be able to further reduce the overall tax liability through a reduced adjusted taxable gift amount. Admittedly, it is unlikely even aggressive tax planners would be comfortable playing such a valuation game—reporting "high side" values in gift tax returns in an attempt to obtain this tax benefit—knowing full well that an opportunity for revaluation to a lower figure will be available at death. This may be too risky a maneuver, and not one a prudent advisor should advocate. There may be situations, however, where the "numbers" make it worth the risk. The noteworthy point is that any time the government stretches rules or takes a new approach to reach a favorable result, there are a host of clever tax experts lying in wait to use the result for their own advantage.[154]

The tax-exclusive nature of the gift tax provides other interesting prospects. Most would view the government's position in *Smith* as a defensive measure. That is, in an effort to assure

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150. This figure is based on a 50% tax on the $153,000.

151. For a full discussion, see Morris, *supra* note 14, at 54-55 (full discussion of potential savings).

152. *See* I.R.C. § 2035(c) (1988).

153. In court, the estate claimed the stock values should have been on a per share basis of $43.16, $44.01, and $69.07 instead of the $58.37, $58.37, and $71.11 originally reported on the gift tax returns for years 1981, 1982, and 1984. *See Lenheim*, 60 T.C.M. (CCH) at 361-63.

154. This has been dubbed the "Law of Moses' Rod" in Ginsburg, *The National Office Mission*, 27 TAX NOTES 99, 100 (1985), and is given a fine discussion in Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C.L. REV. 623, 670-73 (1986).

proper overall transfer taxation, the government wants to correctly value all of the components that comprise the estate tax computation base. Gifts made during life that the donor valued improperly could be adjusted to accurately reflect the totality of taxable transfers made by the donor during life and at death. The appropriate tax rate would then be applied to that corrected total. This perspective is not without merit and finds support in legislative history.[155]

What result, however, if the government uses the revaluation opportunity as an offensive revenue collection tool? Specifically, will the government opt to eschew some gift tax audits entirely and prevent taxpayers from obtaining any certainty whatsoever? If the government can make gift revaluations at the donor's death, it might sit back and make all business interest and real estate valuations at that later time. In the final analysis, this might be of very little cost risk to the government. The most that the government could lose by waiting is the additional gift tax due had the higher valuation been obtained on audit of the gift tax return. Since the gift tax is tax exclusive,[156] however, the actual risk of loss is reduced. Moreover, if the government were selective, it could choose to not audit gift tax returns for which the unified credit eliminates any tax payments. As was demonstrated, revaluation of adjusted taxable gifts of a decedent who had these types of returns offers the chance of a "double-barrelled" benefit: maximum estate tax liability resulting from pushing cumulative transfers into a higher marginal tax rate, plus only a limited, *if any*, corresponding gift taxes payable credit increase because of insufficient lifetime transfers.[157]

As a final incentive, with proper management the government possibly could obtain further savings through cost reduction associated with reduced audit functions. Gift tax returns reporting cumulative taxable transfers below the level necessary to trigger

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155. *See* H.R. REP. No. 1380, 94th Cong., 2d Sess. 11, *reprinted in*, 1976-3 C.B. 735, 745-46.

156. The gift tax is not computed with respect to any amount payable to the government as a tax itself. Thus, if the tax on a $1,000,000 transfer is $153,000, the donor parts with $1,153,000. The estate tax is tax inclusive. If the estate tax is computed on a $1,000,000 taxable estate, the $153,000 liability is paid from the $1,000,000, leaving only $847,000 to pass to beneficiaries.

157. *See supra* notes 126-30 and accompanying text.

actual tax payments could be accepted as filed because there will be the opportunity to revisit the valuation issue when the donor dies. Of course, there is the possibility no estate tax return will ever be filed, but this seems unlikely. Individuals making substantial gifts most likely will have sufficient assets at death that when added to the prior gifts will require that an estate tax return be filed.[158]

Although this approach to tax-compliance management may offer a certain administrative appeal to the government, it has serious negative ramifications for taxpayers. It seems only fair that donors complying with filing requirements be entitled to have values fixed when they are ripe. Donors should not have to wait a decade or more to substantiate what they have done. Moreover, when the government makes a revaluation, it probably will carry with it the presumptive correctness normally accorded the Commissioner's positions.[159] This reality exacerbates the unfairness. Not only might an estate be forced to prove a case that could be many years old, it also will have the burden of, in effect, disproving the government's revaluation amount. At a minimum, on revaluation of adjusted taxable gifts for which the statute of limitations has run, the estate should be given the presumption of accuracy of the originally reported gift tax value. The Commissioner should bear the burden of overcoming that presumption. Such a reversal of positions would add some degree of fairness to the adjusted taxable gift revaluation process and offer partial relief to what is clearly a burdensome rule. After all, revaluations are only available because the government has failed to exercise its right to value the gift with an audit of the gift tax return.[160]

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158. I.R.C. § 6018(a)(1) requires an estate tax return to be filed if the decedent's gross estate exceeds $600,000. *See* I.R.C. § 6018(a)(1) (West Supp. 1991). I.R.C. § 6018(a)(3)(A) reduces the $600,000 by the amount of adjusted taxable gifts made by the decedent. *See id.* § 6018(a)(3)(A).

159. *See, e.g.*, Wickwire v. Reinecke, 275 U.S. 101, 105 (1927) (noting decision of Commissioner not conclusive but prima facie evidence of correctness); Rockwell v. Commissioner, 512 F.2d 882, 885 (9th Cir.) (noting "[t]he presumption [of correctness] in favor of the Commissioner is a procedural device which requires the taxpayer to come forward with enough evidence to support a finding contrary to the Commissioner's determination"), *cert. denied*, 423 U.S. 1015 (1975). Tax Court Rule 142(a) also places the burden of proof on the petitioner/taxpayer to overcome the Commissioner's determination. *See* RULES OF PRAC. & PROC. U.S.T.C. Rule 142(a) (1988); I.R.C. § 7453 (1989). *But see* 4 B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 115.4 (1981) (questioning practical meaningfulness of presumption).

160. If the gift tax return is audited the valuation will, at that time, either be agreed

The prospect of the government using its revaluation authority as an audit weapon should not be dismissed too quickly. Consider the government's activities in *Boatmen's First National Bank v. United States*.[161] In that case, along with the revaluation issue, the taxpayer also claimed a deduction for unpaid attorney's and executor's fees.[162] The Commissioner's representatives disallowed the deduction even though applicable Treasury Regulations authorized contrary treatment.[163] In presenting the facts, the court cited statements made by the government's estate tax attorney and district counsel senior attorney to the effect that it was Internal Revenue Service policy not to allow unpaid fees as deductions in "unagreed"[164] cases.[165] The court further noted: "if the taxpayer had agreed with the government on other issues in dispute the unpaid fees probably would have been allowed. That is, allowance or disallowance of the fees depended on agreement on other issues."[166]

It is extremely difficult to consider these Byzantine tactics as acceptable audit procedure. Admittedly, seasoned counselors have probably experienced a wide variety of negotiating ploys and litigation strategies. It must be sobering, however, to see admissions of government personnel in the record stating that legitimate taxpayer claims will not be recognized absent concession on other disputed issues. Denying taxpayers their due to secure agreements, even ones that might otherwise be fair, smacks of governmental "bullying," which to most fair-minded people is intolerable. Yet, despite the distastefulness, holding valid claims hostage for settlements seems to be a case-closing technique that is currently in use.

It is not difficult to conjure up scenarios where the govern-

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on by the parties and bind them, or be subject to a binding determination by the court.

161. 705 F. Supp. 1407 (W.D. Mo. 1988).

162. *See id.* at 1409.

163. *See id.* at 1409-10; *see also* Treas. Reg. § 20.2053-3(b), (c) (as amended in 1981) (providing executor's and attorney's fees are deductible to extent actually paid or "may reasonably be expected to be paid").

164. "Unagreed" in Internal Revenue Service parlance means the government and the estate's representative were unable to reach an agreement as to the disposition of the case. When the government assesses a deficiency that the taxpayer contests at each step of the Internal Revenue Service's administrative appeal process, the "unagreed" case moves forward for judicial resolution.

165. *See Boatmen's First Nat'l Bank*, 705 F. Supp. at 1409.

166. *Id.*

ment will attempt to reach a "compromise" by offering to not revalue the estate's adjusted taxable gifts. Given the *Boatmen's First National Bank* affair, such instances are not as far-fetched as they might appear. The possibility that the government will use its revaluation authority as leverage to settle other estate tax issues is real. Thus, *Smith* may have provided the government a potent addition to an already well-stocked arsenal of revenue collection weapons.

Moreover, there is another extremely interesting issue spinning on the periphery of the revaluation vortex that will undoubtedly soon be drawn into the tax eddy: the interrelationship of "gift splitting" and the *Smith* result. More precisely, what will be the impact of revaluation on "split gifts" that are included in the estate tax base of the "consenting spouse?"

I.R.C. section 2513 permits gifts of one spouse to non-spousal third parties to be considered as if made one-half by the transferor-spouse and one-half by the other spouse.[167] The latter is the so-called "consenting" spouse. This procedure is known as "gift-splitting." When a consenting spouse dies, all split gifts are included in his or her estate tax base as adjusted taxable gifts.[168] Under *Smith*, it would seem these gifts would be susceptible to revaluation. This creates a number of interesting, but frightening, possibilities.

Suppose a husband transfers property valued at $120,000 to his son. The wife consents to split the gift, so each spouse is considered to have made a taxable gift of $50,000 after taking the annual exclusion[169] into account. Each spouse has more than enough unified credit to offset any gift tax liability, so no gift tax is payable. The husband subsequently dies with a taxable estate in excess of the taxing threshold amount.[170] The split gift, now

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167. *See* I.R.C. § 2513(a)(1) (1988).

168. I.R.C. § 2513(a) treats all split gifts as having been made one-half by each spouse. *See id.* § 2513(a). Thus, when the consenting spouse dies, the split gifts attributed to him or her will fall under the definition of "adjusted taxable gifts." *See id.* § 2001(b)(2) (West Supp. 1991); *see also id.* § 2001(d) (special rule with respect to tax paid on split gifts in certain situations).

169. The transfer of cash is that of a present interest. Thus, section 2503(b) will exclude the first $10,000 to the son in the donor's computation of taxable gifts. *See id.* § 2503(b). Because of the split gift rules, each spouse is entitled to an annual exclusion with respect to his or her individual transfers. *See id.* § 2513; *cf.* Treas. Reg. 25.2513-1(c) (as amended in 1988).

170. *See supra* note 100 and accompanying text (explaining taxing threshold

an adjusted taxable gift, can be revalued. If an adjustment is warranted, what impact will that have on the wife's gift tax return, if still open, and on her adjusted taxable gifts when she subsequently dies? The revaluation in her husband's estate should not be res judicata to her because she was not a party to the action. Will the courts consider the prior determination in the husband's estate irrefutable? If the value was judicially determined there can be some merit to such a position. Perhaps the wife could be made a party to the action to prevent future dispute. When, however, a value is fixed by agreement between the estate and government, the surviving spouse's opportunity to be heard may be non-existent. There is a path being cleared for a second valuation of the same adjusted taxable gift. Again, a potentially time-consuming and costly operation.

Similarly, what will be the result if the government does not revalue the split gift in the husband's estate? Can the surviving spouse rely on that "acceptance" and can her estate estop the government from revaluing her half of the gift when she dies? Perhaps not, since the government does not have an affirmative duty to revalue adjusted taxable gifts. The government's inaction in one spouse's estate may not bind it with respect to the other's. Moreover, the problems stemming from this situation do not disappear when the tables are reversed. If the consenting spouse is the first to die, *Smith* seems to permit a revaluation in the first estate as well as the second. But what would be the result if the split gift is only revalued in the survivor's estate when he or she subsequently dies? Will the estate of the first-to-die spouse be reopened to reflect the adjustment? This seems permissible if there has not been a prior audit and the statute of limitations with respect to the estate tax return has not expired.[171]

The split gift scenario elevates the staleness problem to a higher plateau. A wide age disparity between the spouses could create a survival period of fifty years or more for the younger spouse. Yet, if there were a split gift, that gift could be subjected to a revaluation perhaps a half-century after having been made.

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amount).

171. The general rule is the statute of limitation period for assessing a deficiency is 3 years from the filing date or due date, whichever is later. *See* I.R.C. § 6501(a) (West Supp. 1991).

Trying to revalue such a gift would be just plain ludicrous. The surviving consenting spouse could not, however, rule out the possibility of revaluation at death, and any subsequent estate-planning maneuvers could end up doing more tax harm than good. Admittedly, the fifty-year period would be the rare exception and not the rule, but age differences of twenty years or more between spouses are not nearly as uncommon. Thus, to some degree the concern is real.

Another ticklish problem that most likely would arise from a split gift scenario, but theoretically is equally applicable to any adjustable taxable gift revaluation, concerns the estate tax filing requirement itself. The consequences attendant to revaluing a split gift upon the surviving spouse's death already have been examined. Assuming arguendo that the government can go back and revisit adjusted taxable gifts for the estate of the first spouse to die, it would be barred from doing so beyond the statute of limitations period[172] with respect to that return. However, what if the first spouse to die was not required to file a return because the sum of his or her taxable estate and adjusted taxable gifts were below the filing requirement threshold? The statute of limitations does not run unless a return is filed.[173] Many years later a revaluation of adjusted taxable gifts in the second spouse's estate could be carried back to the predeceasing spouse's estate. The increase in adjusted taxable gifts might push the estate over the filing requirement amount. This possibility presents a variety of miseries.

First, if an estate tax return becomes due under such circumstances, who will file it? The executor[174] is charged with the obligation of seeing that the tax is paid.[175] Since "executor" for purposes of the Code is different than that for state probate purposes, theoretically there will always be someone to file the return. Locating and informing that person of the newly created burden, however, might prove to be another matter entirely.[176]

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172. *See id.*

173. *See id.* § 6501(c)(3).

174. Under I.R.C. § 2203, "executor" includes the "executor or administrator," or if none, "any person in actual or constructive possession of any property of the decedent." *Id.* § 2203 (1988).

175. *See id.* § 2002.

176. In a split gift situation it should be relatively easy to find the "executor" for

After the person required to file the return is located and notified, the real difficulties may begin. How does one go about gathering the information necessary to properly execute the return? To the extent the gross estate includes much more than probate assets, for which at least a court inventory exists, what records will be available to identify other includable assets? Reconstructing a gross estate after many years will not be an easy chore.

After the return is filed, who will pay the tax due? As previously stated, the Code places the burden on the executor. However, finding and collecting the revenue from the responsible person(s) may well be something easier said than done. Moreover, what of the failure to file[177] and pay penalties?[178] Can public policy permit these penalties to be avoided on the grounds of reasonable cause[179] given that the facts necessitating the late filing prove the taxpayer was not diligent in his or her original tax reporting efforts? After all, if the donor-decedent had "properly" valued the gifts on the gift tax returns, revaluation would not have been necessary or successful, and the executor would have known that an estate tax return was due when the donor died.

The potential compliance costs and burdens with respect to this situation can be staggering. One prophylactic response might be the filing of an estate tax return for all decedents who filed gift tax returns during their lives, even though an estate tax return would not technically be required. Although such a return would not preclude the government from redetermining the value of any reported adjusted taxable gift, it would at least put a time cap on the problem and would prevent unwanted surprises many years after death. This could generate, however, a flood of unnecessary estate tax return filings designed primarily to prevent a revaluation from rearing its costly head somewhere down the road. This certainly would not be a consequence of victory the government envisioned when it pressed its position in *Smith*.

Finally, there is an income tax issue awaiting resolution. Normally, a donor is entitled to increase the basis of gifted

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purposes of the Code. The surviving spouse may have been the local law executor or at a minimum is likely to be a person in possession of the decedent's property.

177. *See* I.R.C. § 6651(a)(1) (West Supp. 1991).

178. *See id.* § 6651(a)(3) (providing that late filing penalty shall not be imposed if failure to file on time "is due to reasonable cause and not due to wilful neglect").

179. *See id.* § 6651(a)(2), (3).

property by a portion of any gift tax paid with respect to the gift.[180] Also, if property is acquired from a decedent, the date-of-death value of the asset becomes the recipient's basis—the so-called "stepped-up" basis.[181] On a revaluation, the estate tax, not the gift tax, is increased. The property, however, is already in the donee's hands so a date-of-death basis is not available. Arguably, this result is not objectionable because estate taxes are never added to basis. The trade-off for that fact is the step-up in basis for assets included in the gross estate that generated the tax.[182] Here, the estate tax base is increased by values not corresponding to assets included in the gross estate and, therefore, does not qualify for the step-up in basis. On the other hand, there is no authority to increment the basis for gift taxes because the revaluation does not affect the gift tax itself.

Clearly this creates a dilemma. The basis adjustment is seemingly lost, but for no justifiable reason. It could be administratively determined that the additional estate tax would be treated as gift tax, and added to basis in that way, but such a ruling is unlikely. Also, if there is a revaluation on death a decade after the gift, what is the likelihood the donee still owns the gifted property? There may be no asset to which additional basis could be applied, nor any to which it could be rationally transferred.[183] Although not an overwhelming financial burden to taxpayers, the loss of basis raises another fairness issue with respect to adjusted taxable gift revaluations.

After considering these factors, the pragmatist must question what the government has achieved. The government has pressed

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180. *See id.* § 1015(d)(6) (1988) (permitting adjustment to basis for portion of gift tax attributable to difference between value of gift and donor's adjusted basis therein); *see also* 2 B. BITTKER & L. LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 41.3.2, at 41-25 (2d ed. 1990).

181. *See* I.R.C. § 1014(a) (1988). *But see id.* § 1014(e) (providing special rule creating carry-over basis for property acquired from decedent within one year of devisee's transfer of property to decedent); B. BITTKER & L. LOKKEN, *supra* note 180, at ¶ 41.5.

182. *See* Gibbs, *Basic Federal Estate and Gift Taxation*, 17 ST. MARY'S L.J. 809, 824-29 (1986) (discussing issues of basis).

183. This is not a totally new problem. Assets sold by donees, but subsequently included in the donor's gross estate also lose the benefit of I.R.C. § 1014. *See, e.g.*, P.H. Dierks v. United States, 1978-1 U.S. Tax Cas. (CCH) ¶ 9106. For a similar problem and the administrative response in the income tax area, see B. BITTKER AND J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 9.32 (5th ed. 1987 & Supp. 1991) (discussing "[t]he mystery of the disappearing basis").

for and won the right to revalue gifts that, absent a substantial increase in value, will not generate significant additional revenue. Moreover, there are only a limited number of assets that reasonably can be expected to provide opportunities for significant increase in value. Finally, even when such gifts are found, there cannot be any guarantee of success in the revaluation effort. Indeed, these realities must be measured against the taxpayer's burden.

Aside from the uncertainty cast over the entire realm of tax-related estate planning, new compliance costs are heaped on the already burdened camel's back. *Smith* may necessitate record-keeping that, especially in split gift situations, will become overwhelming. Add to this the specter of the aggressive use of the revaluation authority to create an open-ended right to audit returns, or as leverage to create "compromise," and even the most ardent supporters of strict tax compliance shudder. Even if only a few estate tax returns actually experience a tax increase from revaluation efforts, the potential abuse of this newly found authority may be the real cause for concern. Every executor who files an estate tax return runs the risk of being forced to comply with potentially burdensome audit requests. Those who take aggressive positions elsewhere in the return may experience adjusted taxable gift revaluations as routine audit nuisances in the government's attempt to bring matters to a quick and favorable close. This potentially onerous chore of proving old gift tax values may become the most expensive compliance cost yet.

What measures are warranted to guard against the more fulsome or intended effects of *Smith*? At a minimum, taxpayers, not the Commissioner, ought to be accorded the presumption of correctness for valuations revisited after the statute of limitations has expired with respect to the original tax filing. Also, some thought must be given to putting sensible time limits on the government so that unfair results do not arise from the fact that staleness prevented taxpayers from reasonably defending prior valuations. Further, the government must monitor its personnel to assure that revaluation authority is not used improperly.

The revaluation issue is a prickly one whose thorns pierce both the barriers of theory and practice. The Tax Court resolved the matter in the government's favor by using a strict statutory construction theory. This author submits that this approach to the

problem is flawed. When ambiguities in tax statutes are addressed after laying dormant for many years, the better avenue to follow is one that puts the practical necessities first and shapes theory to serve as a coathook to support that view. Hopefully, the concerns noted prove to be the proverbial straw that causes Congress to respond and rebuke this latest judicial advancement in revenue collection.

VI. CONCLUSION

In winning the right to revalue adjusted taxable gifts, the government has increased its prospects for greater revenue collection by gaining an additional audit opportunity. On its face, this does not seem patently unfair and arguably is consistent with the underlying policy that put the unified transfer tax system in place. *Smith*, however, clearly raises disturbing questions concerning the full implications of its effect on estate planning within the transfer tax system. The ruling's impact on other returns, and the potentially horrendous compliance problems, may be just the first marchers in an upcoming parade of horribles. If not overturned, some legislative correction may be warranted. There is much yet to learn about what *Smith* has brought, but, as things presently stand, this new transfer tax tie-in is most troubling.

RETHINKING WHO IS LEFT HOLDING THE NATION'S NUCLEAR GARBAGE BAG: THE LEGAL AND POLICY IMPLICATIONS OF *Nevada v. Watkins*

David H. Topol[*]

> The federal government has determined that it can't live by the law that currently exists, so it has decided that it will try to change the law so that it can carry out its desire to jam the repository down our throats. This is federal government action at its worst.
>
> Nevada Attorney General Brian McKay[1]

> Nuclear wastes have to be stored somewhere, and the place of storage should be chosen without regard to the parochial interests of the states.
>
> *Illinois v. General Electric*[2]

I. INTRODUCTION

By the middle of the 1970s it had become apparent that the policy of storing radioactive nuclear waste in on-site containers at nuclear power plants in the United States was woefully inadequate and that without the development of a long-term solution, the possibility of a nuclear accident would remain present.[3] While on-site storage may be adequate as a short-term policy, it is an incomplete solution because nuclear waste remains radioactive for thousands of years. Yet, fifteen years after the significance of the danger of on-site storage became apparent, the nation has made

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1. Kriz, *If Not Nevada, Where?*, 22 NAT'L J. 2629, 2629 (Oct. 27, 1990).
2. 683 F.2d 206, 214 (7th Cir. 1982).
3. *See generally* S. REP. NO. 282, 97th Cong., 1st Sess. 3-7 (1981) (discussing national problem of nuclear waste); Silberg, *Storage and Disposal of Radioactive Wastes*, 13 TULSA L.J. 788 (1978) (same); *U.S. Nuclear High Drama is Brewing*, L.A. Times, Nov. 18, 1990, at A1, col. 1 (same) [hereinafter *Nuclear High Drama*]; *A Mountain of Trouble*, N.Y. Times, Nov. 18, 1990, § 6 (Magazine), at 37 (same).

very little progress toward implementing a permanent solution for the storage of nuclear waste.

For the last fifteen years, scientific consensus has advocated the construction of a permanent underground nuclear repository as the most effective means to deal with the problem.[4] This has also been the strategy endorsed by the federal government since the passage of the Nuclear Waste Policy Act of 1982 ("NWPA").[5] Although the concept of a permanent nuclear repository for radioactive waste has been widely accepted, the decision about where to locate the repository has proven to be extremely controversial. Everyone appears to recognize the need for a nuclear repository, yet nobody wants it in their home state. The NWPA called for the Department of Energy ("DOE") to investigate a large number of potential sites and slowly narrow the list to the three most scientifically viable locations.[6] However, in 1987, as pressure to deal with the issue of nuclear waste grew, Congress abandoned the process of careful scientific investigation by amending the NWPA ("1987 NWPA Amendments") to direct the DOE to investigate only Yucca Mountain in Nevada as a potential site for permanent storage.[7]

The State of Nevada claims that the decision to place the nuclear repository at Yucca Mountain is scientifically unsound and politically suspect. On the other hand, the DOE argues that scientific evidence demonstrates that the Yucca Mountain site is a well-chosen location for the repository. At the very least, the DOE believes the government should be permitted to conduct extensive investigation of Yucca Mountain to make further scientific assessments. The DOE contends that the only basis for Nevada's complaints is that the State does not want the repository in its backyard.

This Article examines the issues involved in siting the nuclear repository in Nevada. It analyzes the merits of both Nevada's and the federal government's arguments and concludes

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4. *See* Silberg, *supra* note 3, at 788 ("[t]here is a general consensus in the scientific community, backed up by numerous studies, that disposal in geologic media is the safest and most fully explored way of permanently disposing of high level radioactive wastes").

5. Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10101-10270 (1988)).

6. *See id.* § 112(b), 96 Stat. at 2208.

7. *See* 42 U.S.C. §§ 10133-10134 (1988).

that, although the federal government may be justified from a legal perspective, from a policy perspective the decision to force Nevada to accept the repository is flawed. This is true both because Yucca Mountain may not be the best scientific choice for the site and because the current approach has failed to gain the cooperation of Nevada—which is doing everything it can to obstruct the federal government's progress towards its goal of safely storing nuclear waste in Nevada.

Part II of this Article examines the background of the controversy by discussing the events surrounding the passage of the NWPA, the 1987 NWPA Amendments, and the delay strategy that Nevada developed in response to the 1987 NWPA Amendments. Part III examines the legal issues resolved in *Nevada v. Watkins*,[8] the case in which Nevada unsuccessfully sued the federal government to prevent the DOE from beginning its investigation of the Yucca Mountain site. That part focuses on two legal issues—Nevada's Tenth Amendment claim and the issue of federal preemption—that illustrate the heart of the controversy: both the federal government and Nevada believe they should have the final authority over the decision to place the repository in Nevada. Although this Article concludes that the federal government's legal position is stronger, Nevada's arguments raise policy issues that support a reconsideration of the decision process that led to the selection of Yucca Mountain.

Part IV analyzes the procedural and policy flaws of the current siting decision process. It first argues that Nevada is justified in complaining because the decision process was unfair and because the citizens of Nevada must bear the externalities produced by the site. Part IV then contends that the current process may not result in the selection of the best possible repository. Part V examines a variety of policy alternatives for selecting the repository site and concludes that the best solution would be to restart the search for a repository in a more equitable manner. This part concludes that the federal government should provide greater financial incentives to the state that ultimately receives the repository in an effort to create a more cooperative atmosphere.

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8. 914 F.2d 1545 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991).

II. BACKGROUND: PICKING YUCCA MOUNTAIN

A. The Growing Problem of Nuclear Waste

Nuclear power plants and nuclear technology have been used in this nation for over thirty years; however, until the late 1970s, only limited attention was paid to the issue of what to do about the storage of the highly radioactive waste that was being generated. Until that time, the standard procedure for handling waste was to use a system of on-site storage subject to government regulation.[9] By 1980, it had become apparent that although such an approach was adequate as a short-term solution, a permanent method of disposal had to be found.[10] Because nuclear waste remains radioactive and dangerous for 10,000 years,[11] on-site storage at hundreds of sites around the country can create the risk of a serious accident.

For example, storage tanks at a nuclear weapons facility in Hanford, Washington are now emitting hydrogen burps every hundred days.[12] The burps occur when hydrogen gas rises from the bottom of the storage tank and accumulates at the top of the tank until it breaks through a crust of sludge that rests inside the tank. Scientists are uncertain of what chemical reactions at the bottom of the tank are causing the hydrogen to rise, but they are concerned about the possibility of an explosion. Ronald Gerton of the DOE explained that the burps are a sign of potential danger: "'A spark could really set it off . . . . There hasn't been a spark so far, and we have been lucky . . . . We have to get this taken care of before *we* get unlucky.'"[13]

In fact, the Hanford nuclear plant has already been somewhat "unlucky" for a different reason. During the 1950s, engineers with the Atomic Energy Commission dumped large quantities of nuclear waste into the soil because they did not believe it was

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9. *See* S. REP. NO. 282, 97th Cong., 1st Sess., 3-7 (1981).

10. For a discussion of the evolution of thinking on this subject, see *id.*; Silberg, *supra* note 3, at 788.

11. *See The Ten Thousand-Year Decision: Nevada Mountain is Ground Zero for Nuclear Dump Controversy*, Washington Post, Feb. 17, 1988, at A1.

12. *See Nuclear High Drama*, *supra* note 3.

13. *Id.* (quoting R. Gerton) (emphasis in original); *see also* U.S. NEWS & WORLD REPORT, March 18, 1991, at 72 (discussing dangers of on-site storage, including potential terrorist use of nuclear waste).

radioactive.[14] However, it was recently discovered that the waste contained two very long-lived radioactive materials (technetium 99 and iodine 129) that are highly cancerous and can be absorbed easily by the human body.[15]

Nor is the risk of getting "unlucky" unique to the Hanford facility. The military has twenty-seven other nuclear storage tanks in Hanford and fifty-one in Savannah, Georgia.[16] All of that radioactive waste is in need of permanent disposal. In addition, there are more than 100 civil nuclear reactors currently in operation that are generating nuclear waste.[17] Thus, even if all use of nuclear technology ceased today, the nation still would need a permanent solution to deal with the large volume of waste that already has been generated.

A permanent solution to the waste disposal issue also has two important implications for the nation's future. First, widespread use of nuclear energy in the future is closely linked to the issue of radioactive waste disposal. Because the disposal issue has received so much attention, it has become one of the major barriers to the construction of new nuclear power plants.[18] Critics of nuclear energy argue that we shouldn't use an energy source that will produce waste that we are incapable of managing effectively for the next 10,000 years.[19] In fact, in 1983, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Com-*

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14. *See Wider Peril Found in Nuclear Waste From Bomb Making*, N.Y. Times, March 28, 1991, at A1, col. 3.

15. *See id.*

16. *See id.* There are also a number of storage tanks at a military installation in Idaho. *See* Silburg, *supra* note 3, at 799.

17. *See Civilian Nuclear Waste Program: Hearings Before the Comm. on Energy and Natural Resources*, 101st Cong., 2d Sess. 1 (1990) (opening statement of Sen. J. Bennett Johnston, Chairman, Senate Comm. on Energy and Natural Resources) [hereinafter *Hearings on Waste Program*].

18. I.C. Bupp, the managing director of the Cambridge Energy Research Associates explained: "There will be no nuclear renaissance until a waste-disposal program exists that passes some common-sense test of public credibility and acceptability." Greenwald, *Time to Choose*, TIME, April 29, 1991, at 54; *see also* Development, *Nuclear Waste Management*, 8 ECOLOGY L.Q. 725, 791 (1980) (disposal method is key factor in issue of local acceptance); Kriz, *supra* note 1, at 2629 (where to place waste and length of government regulatory reviews are the two major obstacles to construction of new nuclear power plants).

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

mission,[20] the United States Supreme Court upheld California's attempt to block construction of new nuclear power plants because of the State's concern over the issue of waste disposal. If nuclear energy is to become a viable option for future energy production, the waste issue must be resolved.

Second, in addition to its role in the development of civilian nuclear reactors, nuclear technology is closely linked to military and national security issues. Even if no civilian nuclear plants had ever been constructed, an enormous volume of nuclear waste has been, and continues to be, produced in the development of nuclear weapons.[21] If the nation is to continue producing defense items such as nuclear weapons and nuclear submarines, it is imperative to develop an option for the safe disposal of radioactive waste to make the continued production of weapons less dangerous.

Thus, there is little doubt of the need for a long-term solution. The country must find a way to clean up the radioactive waste it has already generated and to preserve the option of continued use of nuclear energy. Nor, in fact, is there much doubt as to the necessary solution—the creation of a permanent nuclear repository for the disposal of high-level nuclear waste. This proposal involves storing the waste deep underground in a geologically stable part of the country where it can remain safe for 10,000 years.[22] This solution has been widely accepted in the scientific community for fifteen years,[23] and was adopted by Congress with the passage of the NWPA.[24] The only major unresolved issue Congress faced in 1982 remains the only major unresolved issue today: choosing the actual site for the nuclear repository.

B. Selecting a Site

A rational approach to locating a site for the nuclear repository would suggest that the site should be chosen by thorough and

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20. 461 U.S. 190 (1983). Although the Court acknowledged that the federal government had preempted the field of nuclear safety, it accepted California's assertion that this decision was based largely on related economic effects of nuclear technology, and not regulation of safety. *See id.* at 216.

21. *See* Silberg, *supra* note 3, at 799.

22. *See id.* at 788; *Hill Conferees Target Nevada for Nuclear Dump*, Washington Post, Dec. 18, 1987, at A110.

23. *See* Silberg, *supra* note 3, at 788.

24. *See* 42 U.S.C. §§ 10101-10270 (1988).

careful scientific analysis. As one court recognized, "[c]ursory evaluation of potential sites today can result in heightened danger and potentially prohibitive control costs tomorrow."[25] Unfortunately, the process of site selection has not proven to be an example of careful scientific analysis, but instead has evolved into a classic NIMBY.[26] Every state is willing to endorse the construction of a nuclear repository as long as it is placed in a different state. The next section of this Article examines the statutory framework that led to the selection of Yucca Mountain as the site for the nation's repository.

1. The Nuclear Waste Policy Act of 1982

The original congressional approach for selecting the site of the nuclear repository was contained in the NWPA,[27] which was the product of extensive congressional negotiation.[28] The outcome was a law that "overlaid the program with the biggest compromise, political and regional, of all . . . ."[29] The key to the compromise appeared to be an agreement not to name any particular site as the location for the repository.[30] As a result, the NWPA was able to garner large support because all legislators were in a position to believe that they could prevent the site from being placed in the legislator's respective state at some future time. In addition, the NWPA provided for the eventual development of two repositories, with one to be located in the eastern part of the country and one in the western part.[31]

The DOE's first task was to narrow the choice to five

25. Nevada *ex rel.* Loux v. Herrington, 777 F.2d 529, 532 (9th Cir. 1985) (allowing funds to research Yucca Mountain site).

26. "Not In My Back Yard."

27. Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10101-10270 (1988)).

28. *See* Stanfield, *How Nevada Was Dealt a Losing Hand*, 20 NAT'L J. 146 (Jan. 16, 1988).

29. *Id.*

30. *See id.*

31. See Pub. L. No. 97-425 § 114(a)(2)(A), 96 Stat. 2201, 2214 (1983) (repealed) (general siting provision). Arguably, by providing for an eastern cite, the drafters were able to avoid having all the western states form a coalition to block passage of the bill. In 1986, however, the DOE abandoned the search for an eastern site. *See* Stanfield, *supra* note 28, at 146.

locations to be considered for selection as potential repository sites.[32] The list would then be narrowed to three, with each site undergoing intensive site characterization to determine which one would be the ideal site for the nation's first nuclear repository.[33] All states could be pleased at the point the statute was passed since the selection process had not yet begun.

By 1986, the DOE had narrowed the list of potential sites to three: Yucca Mountain, Nevada; Hanford, Washington; and Deaf Smith, Texas.[34] The DOE also had indefinitely suspended the search for an eastern site. With the reality of an actual selection approaching, political amicability disappeared and the DOE came under intense pressure. Lawsuits were filed by affected states and environmentalists. Western members of Congress accused the DOE of suspending the search for an eastern site for political reasons—to help Republican political candidates win elections in certain eastern states.[35] United States senators and representatives from the three targeted states were searching for a way to get their states removed from the list. These difficulties placed the issue back in Congress for reconsideration in 1987.

2. *The 1987 NWPA Amendments*

When the siting issue arrived on Capitol Hill at the end of 1987, there were two proposed solutions. The first was presented by Representative Morris Udall, a Democrat from Arizona. Udall was convinced that the program was in trouble because the siting decision had become overly politicized.[36] He proposed a moratorium on a final decision until a new administration came to power. In the meantime, Udall advocated that a scientific commission begin a new site search.[37] In addition, he proposed appointing a special negotiator to see if some state would be willing to accept

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32. *See* Pub. L. No. 97-425, § 112 (b)(1)(A), 96 Stat. 2201, 2208 (1983).

33. *See id.* § 112(b)(1)(B), 96 Stat. at 2208.

34. *See* Stanfield, *supra* note 28, at 146. The two other sites that were part of the original list of five were Davis Canyon, Utah and Richard Dome, Mississippi. These two were dropped from consideration when the list was narrowed to three. *See* 51 Fed. Reg. 19,783-84 (1986).

35. *See* Stanfield, *supra* note 28, at 146.

36. *See* Graham, *Reagan Signs Law to Make Nevada First Site Choice*, NUCLEAR NEWS, Feb. 1988, at 91.

37. *See* Stanfield, *supra* note 28, at 146.

the site voluntarily.[38] The Udall approach attempted to shift the inquiry from political to scientific terms. Further, implicit in Udall's approach were financial incentives for the state willing to accept the nuclear repository, thus fostering a more cooperative relationship between that state and the federal government.

A second proposal by Senator J. Bennett Johnston, a Louisiana Democrat, took the opposite approach and advocated narrowing the list of potential sites to one.[39] Under Johnston's proposal, which eventually prevailed, Congress amended the NWPA with certain provisions of the Omnibus Budget Reconciliation Act of 1987.[40] The amendments made the Yucca Mountain site in Nevada the sole location for the process of site characterization. Henceforth, the DOE was to investigate only Yucca Mountain and determine if it was an appropriate site. If site characterization determined that it was a good site for the repository, then it would be chosen; if not, then Congress would confront the issue again and at that time determine how to proceed.[41]

Johnston's plan prevailed over Udall's for political reasons. At the time, Congress was in a dilemma: it "'either had to expand the universe and ask Members to place their state at risk or narrow the universe to just one site . . . .'"[42] With this realization in mind, it is not at all surprising that Johnston's plan defeated Udall's. Members of Congress had to recognize that a vote for the Udall approach would subject their respective states to the risk of possibly being chosen as the site of the repository; whereas, a vote for Johnston's bill could insulate them from such a risk.[43]

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38. *See id.*

39. *See id.*

40. *See* Pub. L. No. 100-202, 101 Stat. 1329, 1329-121 (1987); Pub. L. No. 100-203, §§ 5001-5065, 101 Stat. 1330, 1330-227 to 1330-255 (1987).

41. *See* Stanfield, *supra* note 28, at 146. The same bill that limited the investigation to Yucca Mountain also established the office of the United States Nuclear Waste Negotiator. *See* Carpenter, *A Nuclear Graveyard*, U.S. NEWS & WORLD REPORT, March 18, 1991, at 74. That office is continuing to search, in vain, for a state or Indian tribe that will voluntarily accept the repository. *See id.*

In addition, Nevada was offered financial incentives to go along with the Yucca Mountain selection. *See* 42 U.S.C. § 10173a (1988). The limits of those incentives are considered in the final part of this Article.

42. Stanfield, *supra* note 28, at 146 (quoting unnamed congressional aide).

43. Obviously Johnston did not sell his bill as a "Screw Nevada Bill." Rather, he claimed two benefits. First, his bill would expedite the construction of the facility and therefore the disposal of the nuclear waste. Second, it would save the government nearly $4 billion in geological tests and exploratory drilling at other sites. *See Hill Conferees*

Apparently, Johnston fully understood the political implications of the issue because he took advantage of them to build the coalition necessary to ensure passage of his bill. Since Johnston's bill eliminated many potential states from the decision process, it gained the support of senators from all of those states that were potentially under consideration by the DOE.[44] Johnston also gained the support of powerful Tennessee Senator Jim Sasser by adding a provision that nullified the 1982 decision to place a temporary nuclear storage facility in Oak Ridge, Tennessee.[45] Finally, the bill dropped a proposal for the creation of a second repository in the east and, as a result, helped garner support for Johnston's proposal from eastern states.[46] To ensure smooth sailing through the halls of Congress, Johnston attached the proposal to an appropriations bill that was attached to a catchall spending bill.[47]

Aware of what was happening, Nevada attempted to fight back. A poll taken in Nevada at the time the amendments were being debated revealed, not surprisingly, that seventy-five percent of the people in Nevada opposed the creation of a high-level repository in the state.[48] Nevada's congressional delegation vigorously protested the siting decision.[49] The problem for Nevada was that it did not have as much political clout as Texas and Washington—the two other prime candidates under consideration for the repository. The Texas delegation to Washington had twenty-nine members including House Speaker Jim Wright and Senate

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Target Nevada for Nuclear Dump, Washington Post, Dec. 18, 1987, at A10, col. 3. This Article, however, argues later that such a rationale is flawed because a faster decision may result in a poorer decision. Further, given the consequences of the decision at issue, cost cutting is not a strong reason to alter the process. *See infra* notes 175-76 and accompanying text (discussing Sen. Johnston's attempt to speed up site-selection process).

44. *See Nevada May End Up Holding the Nuclear Bag*, N.Y. Times, Dec. 20, 1987, § 4, at 4 [hereinafter *Nuclear Bag*]; 42 U.S.C. § 10162(a) (1988).

45. *See Nuclear Bag*, *supra* note 44, at 4.

46. *See* Stanfield, *supra* note 28, at 150.

47. *See Nuclear Bag*, *supra* note 44, at 4.

48. *See* UPI, BC cycle, Dec. 8, 1988 (LEXIS, Nexis library, Upstat file).

49. *See, e.g., Nevada Loses Congressional Power Struggle*, UPI, BC cycle, Dec. 30, 1987 (LEXIS, Nexis library, Upstat file) (Nevada Representative Barbara Vucanovich said "Congress is behaving like a pack of wolves going in for the kill"); Stanfield, *supra* note 28, at 150 (Nevada Senator Harry Reid said on floor of the Senate prior to vote that Johnston Bill was "repulsive and mendacious political backstabbing").

Finance Committee Chairman Lloyd Bentsen.[50] Washington's delegation had ten members, including majority leader Tom Foley.[51] In contrast, Nevada has only four senators and representatives in Washington, and none of them were in high political positions.[52] Nevada simply did not have the political muscle necessary to enable the Udall bill—or a bill targeting a different state—to prevail.

While the 1987 NWPA Amendments did give Nevada some right to participate in the site-selection process, that right is very limited. The 1987 NWPA Amendments, like the original NWPA, provide for participation by the affected states.[53] The problem with the 1987 NWPA Amendments, however, is that they lack teeth. These amendments give Nevada the right to argue and complain to the DOE, but the DOE is not required to act based on such complaints.[54] From Nevada's perspective, without the right to veto the selection of the site, or even to be able to force reconsideration from those who control the decision, the participation permitted in the 1987 NWPA Amendments is quite limited.

The 1987 NWPA Amendments did attempt to pacify Nevada by providing for financial payments. The Secretary of Energy was directed to enter into an agreement to pay Nevada and affected local communities up to $20 million a year, an amount significantly less than the $100 million originally proposed.[55] There was a catch, however. To receive payment, Nevada would have to agree to "waive its rights . . . to disapprove the recommendation of a site for a repository . . . ."[56] Thus, the payment seemed like a bribe to keep quiet.[57]

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50. *See* Kriz, *supra* note 1, at 2629.

51. *See id.*

52. *See id.*

53. *See* 42 U.S.C. § 10136 (1988).

54. *See id.*

55. *See id.* § 10173a(a) (providing for payment of up to $20 million); Stanfield, *supra* note 28, at 146 (original Johnston proposal would have payed Nevada $100 million).

56. 42 U.S.C. § 10173a(b)(2) (1988).

57. A second provision provides for the payment of Nevada's costs of participating in the process. *See id.* § 10136(c). Of course, this does not pay for the externalities that will be imposed on Nevada citizens from the construction and operation of the repository. To the extent that their ability to challenge the siting proves to be meaningless, this provision is of little, if any, value. *See infra* note 63 and accompanying text (Nevada cannot block Yucca Mountain repository).

3. Nevada's Response: Delay, Delay, Delay

While many of those in Congress breathed a sigh of relief that their state had not been chosen, Nevada officials, not surprisingly, did not share their sense of joy. To respond to what Nevada perceived to be an outrageous act of political manipulation, Nevada's political leaders began a strategy designed to do everything possible to delay the DOE from even starting the process of site characterization. As Nevada Governor Bob Miller explained: "'There's an old saying that a gnat can drive an elephant nuts. . . . We recognize we're small, but we're feisty. So they're going to have a hard time getting rid of us.'"[58] Nevada's efforts have been reasonably successful. More than three years after the selection of Yucca Mountain, the DOE has not even been able to get on-site at the mountain, let alone sink a test shaft.[59] Because detailed scientific evaluation cannot occur until the site characterization is underway, and that cannot occur until the DOE can get on-site, efforts to get the program on track have been significantly hampered.[60]

Nevada's strategy has been successful because it did not wait until the DOE recommended the site be approved for construction. Instead, Nevada acted to block the site from being studied in the first place. The State took two major steps to create delay. First, Nevada attempted a legislative veto of the site characterization. The Nevada State Legislature passed a statute declaring that "[i]t is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada."[61] When the DOE ignored the statute and continued to attempt site characterization of Yucca Mountain, Nevada sued to challenge the Secretary of Energy's authority to continue the investigation of Nevada as a potential site for the repository. However, in September of 1990 the United States Court of Appeals for the Ninth Circuit decided *Nevada v.*

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58. Behrens, *Nevada's Miller: DOE will Lose Waste Fray*, INSIDE ENERGY/WITH FEDERAL LANDS, Dec. 17, 1990 (also available on LEXIS, Nexis Library, Inergy file) (quoting Miller).

59. *See Hearings on Waste Program*, *supra* note 17, at 1 (statement of Sen. Johnston).

60. *See id.* at 10-11 (testimony of James Watkins, Secretary, Department of Energy).

61. NEV. REV. STAT. ANN. § 459.910(1) (Michie Supp. 1989).

Watkins,[62] which held that the Nevada legislature has no authority to block the storage of nuclear waste in their State.[63]

The State's second strategy was to delay examination of Yucca Mountain by denying the government the necessary environmental permits to study the site. That decision was also at issue in *Nevada v. Watkins*, where the court established the legal precedent necessary for the DOE to sue for the permits. By refusing to issue the permits, however, the State still may be able to postpone full site characterization for an additional five to eight years.[64] Nevada public officials have admitted that a delay of that length provides hope that the political climate might change and that at some point in the future Yucca Mountain will be removed from consideration.[65]

The DOE currently is attempting to have Congress pass legislation to block Nevada's stall tactics, thereby expediting site characterization. A House subcommittee has now approved legislation that would exempt the DOE from any requirements to obtain permits from the State of Nevada.[66] Undoubtedly, if such legislation is passed, Nevada will sue to prevent its enforcement. Although *Nevada v. Watkins* suggests that the State will lose such a suit,[67] the litigation would provide Nevada with another opportunity to create delay.

The question of whether Nevada's delay tactics are legal, or even reasonable, is addressed in the following section of this Article. It should be apparent, however, that such a question is, in some sense, irrelevant because it is clear that the federal government's current approach is not working. It is now nine years since

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62. 914 F.2d 1545 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991).

63. *See id.* at 1560-61.

64. *See* Hiruo, *Without Legislation, Work At Yucca Mt. May be Delayed 5-8 years, Bartlett Says*, 15 NUCLEAR FUEL, Dec. 24, 1990, at 9.

65. *See* Behrens, *supra* note 58 (Nevada governor Miller reasons, "[r]ight now, from a political vantage point, everyone lines up against us . . . but there are variables that can modify that"); *cf. Western Governors Back Nevada's Miller in Fight Over Waste Site*, INSIDE ENERGY/WITH FEDERAL LANDS, Nuclear Energy Section at 7, July 29, 1991 (also available on LEXIS, Nexis Library, Inergy file) (eighteen-member Western Governors Association has adopted resolution critical of additional federal efforts that would prevent Nevada from regulating DOE activities at repository site) [hereinafter *Western Governors*].

66. *Measure Would Exempt Yucca Mountain From Requirements for Nevada Permits*, Daily Rep. for Executives (BNA) DER No. 177, at A-25 (Sept. 12, 1991) (also available on LEXIS, Nexis Library, Drexel file).

67. *See supra* note 63 and accompanying text.

the NWPA was passed, two billion dollars have been spent,[68] and yet the nation is not much closer now to constructing the repository than it was in 1982. In a best-case scenario, the site, which was originally intended to be completed by the year 2000, will be complete by 2010.[69] Accordingly, this Article contends that the legal merits of Nevada's position are not the only issues that should be considered. Regardless of whether or not Nevada's position is legally justifiable, it has had a significant impact on the federal government's efforts. Consequently, from a policy perspective it is important to consider, as this Article ultimately does, whether there is a better way to select a site for the nuclear repository that might avoid such delay tactics.

III. ANALYZING THE MERITS OF NEVADA'S ARGUMENTS IN *Nevada v. Watkins*

This section of the Article analyzes the fundamental issues involved in the litigation of *Nevada v. Watkins*.[70] It focuses on two of Nevada's most critical arguments: (1) that the siting decision violated Nevada's tenth amendment rights, and (2) that the federal government had not preempted Nevada's veto of the selection of Yucca Mountain. These issues illustrate both sides of the legal dispute: Nevada's claim that it should not have to take a repository that it does not want; and the federal government's position that, since someone must take the site, Nevada should not have the power to block the choice. This Article concludes that the Ninth Circuit was correct in rejecting both of Nevada's arguments. An analysis of these issues also demonstrates, however, that Nevada raised some very valid concerns. Even if the State should not prevail in a court of law, the political process by which the repository is being sited should be altered.

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68. *See Hearings on Waste Program*, *supra* note 17, at 1 (statement of Sen. Johnston).

69. *See id.* at 8 (testimony of James Watkins, Secretary, Department of Energy).

70. 914 F.2d 1545 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991).

A. The Federal Government's Authority to Target Yucca Mountain as the Site for the Repository

The first legal challenge raised by Nevada was the argument that Congress did not have constitutional authority to enact the 1987 NWPA Amendments. That argument essentially boiled down to a conflict between the Property Clause and the Tenth Amendment. Nevada argued that Congress was not constitutionally empowered to select Yucca Mountain as the site for the repository.[71] The Ninth Circuit rejected Nevada's argument, holding that because Yucca Mountain is located on federal land, the Property Clause[72] confers upon Congress "plenary power to regulate its use."[73]

The Ninth Circuit did recognize that even if the federal government has the plenary authority to act on federal lands under the Property Clause, that authority is limited to the extent that it is exercised in a manner inconsistent with another part of the Constitution.[74] Nevada argued that the NWPA violated five different provisions of the Constitution: the Tenth Amendment,[75] the Federal Enclave Clause,[76] the Equal Footing Doctrine,[77] the Privileges and Immunities Clause,[78] and the Port Preference Clause.[79] The Ninth Circuit rejected each of these arguments.[80]

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71. *See id.* at 1552; Petitioner's Opening Brief at 12-13, Nevada v. Watkins, 914 F.2d 1545 (9th Cir. 1990) (No. 90-992), *cert. denied*, 111 S. Ct. 1105 (1991) [hereinafter Petitioner's Opening Brief].

72. The Property Clause provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. CONST., art. IV, § 3, cl. 2.

73. Nevada v. Watkins, 914 F.2d at 1553; *see also* United States v. Vogler, 859 F.2d 638, 641 (9th Cir. 1988) ("well-settled Supreme Court precedent establish[es] the broad power granted to the government in the property clause to regulate federal lands"), *cert. denied*, 488 U.S. 1006 (1989).

74. *See Watkins*, 914 F.2d at 1553-54 (quoting Williams v. Rhodes, 393 U.S. 23, 29 (1968)) (Congressional power is "'always subject to the limitation that [it] may not be exercised in a way that violates other specific provisions of the Constitution'").

75. *See* U.S. CONST. amend X.

76. *See id.* art. I, § 8, cl. 17.

77. Outlined in United States v. Texas, 339 U.S. 707, 715-20 (1950).

78. *See* U.S. CONST. art. IV, § 2, cl. 1.

79. *See id.* art. I, § 9, cl. 6.

80. *See* Nevada v. Watkins, 914 F.2d 1545, 1554-58 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991).

This Article focuses only on the tenth amendment argument for two reasons. First, it appears to this Author to be the strongest of the arguments raised by Nevada.[81] Second, it best illuminates the issue that is the focus of this Article: the conflict between the federal government's right to force the placement of the repository in a particular state and a state's right to refuse to accept the placement under principles of state sovereignty.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."[82] The amendment has been held "to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution."[83] Nevada argued that its tenth amendment rights were violated because it was denied fair and adequate participation in the national political process when Congress debated and formulated the 1987 NWPA Amendments.[84] When the federal government forced the State to take the repository against its wishes and without a meaningful opportunity to have its concerns addressed in the site selection process, Nevada's sovereignty was violated.[85]

Nevada based its tenth amendment argument on two recent Supreme Court cases, *Garcia v. San Antonio Metropolitan Transit Authority*[86] and *South Carolina v. Baker*.[87] These cases suggest that although the Tenth Amendment does not give states the right to challenge congressional legislation on substantive grounds, where the political process should protect their interests, the Tenth Amendment does create procedural protections for states if the political process fails to operate properly.

In *Garcia*, the Court rejected a claim by a local transit authority that federal minimum wage requirements violated the

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81. The *Watkins* court's treatment of Nevada's constitutional arguments, apart from the Tenth Amendment, demonstrates that these arguments were without legal foundation. In ruling on each of these claims, the *Watkins* court briefly reviewed the pertinent law and summarily dismissed the claim. *See id.* at 1554-58.

82. U.S. CONST. amend. X.

83. South Carolina v. Baker, 485 U.S. 505, 511 n.5 (1988).

84. *See* Petitioner's Opening Brief, *supra* note 71, at 40-44.

85. *See Watkins*, 914 F.2d at 1556.

86. 469 U.S. 528 (1985).

87. 485 U.S. 505 (1988).

Tenth Amendment by infringing on state sovereignty.[88] The Court explained that local governments receive their Tenth Amendment protection through the "political process [which] ensures that laws that unduly burden the States will not be promulgated,"[89]—not by challenging the substantive content of laws. While the *Garcia* Court did not "identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States,"[90] the decision implied that if the political process was sufficiently defective, those defects raise grounds for a Tenth Amendment challenge.[91] The Court examined the operation of the political process and concluded that, given the substantive amount of financial assistance provided by Congress to the states in the area of mass transit, the State's role appeared to be adequately protected.[92]

A similar issue arose in 1988 in *South Carolina v. Baker*.[93] In that case the State of South Carolina challenged the constitutionality of an Internal Revenue Code provision denying a federal income tax exemption for interest on certain local bonds. The Court referred to *Garcia* for the proposition that the Tenth Amendment provides procedural, rather than substantive protections.[94] Thus, the Court held that South Carolina would have had to base its claim on a defect in the political process—something it failed to do:

> It suffices to observe that South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless. . . . Where, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated.[95]

The reasoning in *Garcia* and *Baker* provided the basis for

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88. *See Garcia*, 469 U.S. at 555-56.
89. *Id.* at 556.
90. *Id.*
91. *See id.*
92. For this reading of the case, see *The Supreme Court, 1987 Term--Leading Cases*, 102 HARV. L. REV. 143, 227-28 (1988) [hereinafter *Leading Cases*].
93. 485 U.S. 505 (1988).
94. *See id.* at 512.
95. *Id.* at 512-13 (emphasis in original).

Nevada's challenge to the process by which Yucca Mountain was selected. The State argued that the decision process that led to the selection of Yucca Mountain in 1981 was an "exercise in raw political power," and that, as a result, "Nevada's ability to offset the political outcome of repository siting through the political process has been wholly eliminated."[96] The Ninth Circuit rejected this argument. It held that "Nevada cannot point to any defect in the political process that led to the enactment of the 1987 NWPA amendments. . . . [T]he tenth amendment does not protect a State from being outvoted . . . ."[97]

While it seems clear that given the Supreme Court's current approach to the Tenth Amendment, the Ninth Circuit's resolution of this issue was correct, Nevada does raise a strong argument. The interpretation of *Garcia* and *Baker* utilized in *Nevada v. Watkins* is based on the notion that majority rule is always adequate to protect states' interests.[98] That reasoning, however, suffers from a critical flaw. It "assumes that state interests are similar and ignores the possibility that a minority of states might not be able to protect themselves through the political process."[99] As the enactment of the 1987 NWPA Amendments demonstrates, a minority interest may be trampled in the political process.[100] Majority rule in Congress, rather than protecting Nevada from having the Yucca Mountain site selected, actually enhanced the likelihood of the site being selected. Although Nevada's representatives and senators were free to vote against the amendments, it was quite easy for the rest of the nation to outvote them.

The language, as well as the facts, of *Garcia* and *Baker* are better suited for situations in which the federal government encroaches on the sovereignty of all the states. As Nevada argues, the decision of where to site the repository is different because all the states are not being "unduly burdened"; rather, Nevada is being uniquely burdened. Thus, the case of Yucca Mountain might

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96. Petitioner's Opening Brief, *supra* note 71, at 41.

97. Nevada v. Watkins, 914 F.2d 1545, 1556 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991).

98. *See id.*

99. Freilich, Greenhagen & Lamkin, *The Demise of the Tenth Amendment: An Analysis of Supreme Court Decisions Affecting Constitutional Federalism*, 17 URB. LAW. 651, 662 (1985); *see also Leading Cases*, *supra* note 92, at 228 (quoting preceding article).

100. *See supra* notes 36-57 and accompanying text (reviewing 1987 NWPA Amendments).

fall into the exception suggested by *Baker* for situations in which one state is being "singled out." While this argument by Nevada has some merit, other factors suggest that the decision was not as overwhelmingly flawed as Nevada contends.

To begin with, the decision was not so purely political as Nevada suggests. Although this Article argues that the siting decision was more politicized than it should have been, it is also true that Yucca Mountain was one of the initial sites recommended by the DOE after its initial scientific examination.[101] Nevada was singled out in part because Yucca Mountain is a good scientific site and not simply because Nevada was weak and powerless. In fact, while Texas and Washington may have been self-interested in supporting the selection of Nevada, many states (especially in the east) knew that they could not conceivably be selected for the repository and did not have to vote to protect their own interests.[102] This is not to suggest that politics did not play a role in the decision, only that since Yucca Mountain was initially one of the most viable sites recommended by the DOE, the true story is more complex than purely a case of political maneuvering.

In addition, Nevada was not entirely shut out of the political process. Nevada certainly was participating with limited political clout, but it did have congressional representation in Washington. While the strength of Nevada's congressional delegation was limited, so was the strength of many other state delegations. The same factors that left Nevada in a vulnerable position left many other smaller states similarly situated.[103] Thus, while Nevada did not have the votes to overturn the decision on their own, they could have tried to build a coalition with the other affected states.

More importantly, the decision is not as final as Nevada suggests. The State still has many legal and political options available. Legally, the NWPA has a provision for challenging DOE assessments of the technical issues.[104] Politically, Nevada's

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101. *See supra* text accompanying note 34 (discussing original DOE site list).

102. *See* Stanfield, *supra* note 28, at 146.

103. In fact, had the decision occurred a few years earlier, Nevada would have wielded much more political capability because it would have had powerful Senators Paul Laxalt and Howard Cannon, the Democratic Chairman of the Senate Commerce Committee, in office. *See Nevada Loses Congressional Power Struggle*, *supra* note 49.

104. *See* 42 U.S.C. § 10139a(d)-(f) (1988) (United States Courts of Appeals given original and exclusive jurisdiction over technical issues).

Governor Miller has pointed out that Nevada might be able to build a coalition to overturn the NWPA in the future by reshaping the debate in terms that appeal to other western states.[105] By focusing the issue on the fact that a repository in Nevada will result in nuclear waste being driven through all of the western states, it may be possible to build a coalition of those states.[106] Empirically, Nevada's success in delaying the project to this point provides some evidence that these strategies are viable.[107] Although such options obviously have limitations, it would be a mistake to consider the selection of the Yucca Mountain site a "done deal." Thus, while Nevada's argument does suggest that the decision process may not have been very rational from a policy perspective, from a tenth amendment perspective it is not clear that the decision should be reversed.

Moreover, even if the Court were to return to its previous substantive approach to the Tenth Amendment, Nevada would still not prevail. A return to a substantive approach in tenth amendment analysis would involve a determination of whether a federal regulation was invading state sovereignty;[108] a test that Nevada would, in all likelihood, fail because the nuclear repository is a decision that involves significant national interests. Under the previous substantive approach to the Tenth Amendment, the state had to demonstrate that a "core" state function was being violated without federal justification by meeting a four-part test.[109] Nevada could not meet this test because while the NWPA

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105. *See* Behrens, *supra* note 58.

106. *See Western Governors*, *supra* note 65 (resolution of 18-member Western Governor's Association demonstrates viability of this option).

107. *See supra* notes 64-65 and accompanying text (discussing success of Nevada's delay strategy).

108. *See* National League of Cities v. Usery, 426 U.S. 833 (1976) (overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

109. The four-part test requires a demonstration that:

> First, it is said that the federal statute at issue must regulate "the 'States as States.'" Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'" Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission."

Garcia, 469 U.S. at 537 (quoting *Hodel*, 452 U.S. at 287-88 & n.29 (quoting *National League of Cities*, 426 U.S. at 845, 852, 854)).

certainly affects Nevada, it is not undermining a core function of their government. It is true that the federal decision undermines the ability of Nevada to protect its citizens from the dangers of radiation that will come from Yucca Mountain. The statute, however, does so in the limited context of one decision. That is, the decision does not generally undermine the ability of Nevada to regulate the health of its citizens; it only applies to the particular decision of the siting of the nuclear repository.

More importantly, the purpose of the NWPA is strongly linked to a significant national interest. At a substantive level, the storage of nuclear waste is not a decision that is best made at the state level where the result would be maintenance of the status quo—no system for the permanent disposal of nuclear waste. The significance of the national interests that are at stake justifies an intrusion on state sovereignty.

Thus, regardless of whether the Tenth Amendment is analyzed under the current political process framework or under a more substantive standard, such analysis does not provide a justification for overturning the NWPA. At the same time, however, the arguments underlying Nevada's position warrant serious consideration because even if Nevada's limited participation does not prevail as a tenth amendment argument, it does suggest that an unfair decision may have been made. It is apparent that the 1987 decision was not the product of purely rational scientific analysis. Given the fact that Nevada's citizens will have to live with the repository for over ten thousand years, it is worth questioning whether Nevada should receive the site simply because it can be outvoted in Congress.

B. NWPA Preemption of Nevada's Legislative Veto

A second major issue raised in *Nevada v. Watkins* was the attempt of the Nevada legislature to veto the selection of Yucca Mountain as the site for the repository.[110] After Yucca Mountain had been designated as the site of the repository in the 1987 amendments, the Nevada legislature passed a law declaring: "It is unlawful for any person or governmental entity to store high-level

110. *See* Nevada v. Watkins, 914 F.2d 1545, 1560 (9th Cir. 1990), *cert denied*, 111 S. Ct. 1105 (1991).

radioactive waste in Nevada."[111] At the time of the suit, the DOE was ignoring this action by the Nevada legislature because the DOE believed that federal law preempted state law in the area.

The preemption analysis utilized by the Ninth Circuit was based on the 1990 case of *English v. General Electric Co.*[112] In that case, the United States Supreme Court held that an employee's state law claim for intentional infliction of emotional distress that occurred while working at a nuclear power plant was not preempted by the Energy Reorganization Act. The Court explained that preemption under the supremacy clause[113] can occur in three different circumstances. "First, Congress can define explicitly the extent to which its enactments preempt state law."[114] Second, Congress will preempt state law if the state is operating in a field which Congress intended to leave exclusively to the federal government.[115] Third, preemption will occur if state law conflicts with federal law.[116]

The court in *Nevada v. Watkins* held that the third element of the *English* test resolved the conflict.[117] Since Congress had explicitly authorized the study of Yucca Mountain, the Nevada legislature's action was an obstacle blocking the objectives of federal law.[118] The court noted that preemption also may have occurred as a result of the second test since "'"the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States."'"[119]

Just as in the case of the tenth amendment issue considered in the previous section, Nevada raised strong arguments against a court finding federal preemption. This Article contends, however, that the resolution of the preemption issue by the court in *Nevada v. Watkins* achieves the proper result—both because the relevant

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111. NEV. REV. STAT. ANN. § 459.910(1) (Michie Supp. 1989).
112. 110 S. Ct. 2270 (1990).
113. *See* U.S. CONST. art. VI, cl. 2.
114. 110 S. Ct. at 2275.
115. *See id.*
116. *See id.*
117. *See* Nevada v. Watkins, 914 F.2d 1545, 1561 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991).
118. *See id.*
119. *Id.* at 1560 (quoting English v. General Elec. Co., 110 S. Ct. 2270, 2277 (1990) (quoting Pacific Gas & Elec. Co. v. State Energy Resources & Dev. Comm'n, 461 U.S. 190, 212 & n.25 (1983))).

law supports the decision and because it makes sense from a policy perspective.

All of the cases in the area of nuclear energy are consistent with the decision in *English* and recognize the right of the federal government to preempt state law in the area of nuclear power. Rather than having every state determine its own approach to the disposal of nuclear waste, the federal government has created a unified strategy that focuses on constructing a single repository.[120] Congress has implemented this strategy by leaving the issue of safety to the unified control of the Atomic Energy Commission because "the Commission [is] more qualified to determine what type of safety standards should be enacted in this complex area."[121] To make that strategy effective, however, the federal government needs full control over the construction of the repository.

Nevada placed much reliance on the one case that offered an opening into the rigid preemption analysis. In 1983 in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,[122] the United States Supreme Court held that federal law did not preempt a California law conditioning construction of nuclear power plants on state findings that there are adequate nuclear waste storage facilities.[123] Even in that case, however, the Court recognized that the federal government had completely preempted the states on the issue of nuclear safety.[124] The Court nevertheless upheld the California law only because the Court "accept[ed] California's avowed economic purpose as the rationale for [the statute]."[125] Consequently, the Court held that there was no preemption because the California law was not in direct conflict with the federal law since the State was not regulating safety.[126] In contrast, as the court in *Nevada v.*

120. *See supra* note 5 and accompanying text (discussing enactment of NWPA).

121. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 250 (1984) (although federal government has exclusive control over nuclear safety, federal law does not preempt state law tort action against facility to recover for plutonium contamination injuries); *see also Pacific Gas*, 461 U.S. at 205 ("[t]he Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant"); *English*, 110 S. Ct. at 2277 (same).

122. 461 U.S. 190 (1983).

123. *See id.* at 216.

124. *See id.* at 212.

125. *Id.* at 216.

126. *See id.* at 216 & n. 28.

Watkins explained, Nevada's statute was different than California's because it created a direct conflict with federal law. "Although the professed motivation for Nevada's legislative veto is the economic and environmental effects of nuclear waste disposal, the state's action has the actual effect of frustrating Congress' intent."[127]

In *Pacific Gas*, the Court did not consider the California law a frustration of the Congressional goal because Congress did not intend to preclude economic regulation of nuclear power;[128] whereas, in *Nevada v. Watkins*, Nevada's statute was directed at an area that Congress intended to control fully.[129] In addition, although the California law did not create an indefinite barrier to the construction of new facilities because it conditioned the State's approval to progress the federal government was attempting to achieve on its own, the Nevada statute blocked the federal government's progress.

The issue in *Nevada v. Watkins* arguably is distinguishable from the nuclear power cases because in the case of nuclear power all fifty states were subject to the same burden since hundreds of power plants can be constructed. In contrast, in the case of the repository, only Nevada is burdened. That distinction, however, is really an argument about the distribution of burdens, not an argument about the need to have the decision made at the federal level. The preemption issue focuses on who should have the final say in determining if the repository can be located safely in Nevada—the federal government or Nevada. Nevada's argument about the uniqueness of its burden goes to the issue of the legitimacy of the decision-making process. Moreover, this is not the only situation in which burdens are imposed on a limited number of states. For example, the State of Washington is uniquely burdened by the leaky Hanford facility.

Nevada's strongest argument is not the legal claim that the federal government does not have authority to make a decision about the repository; instead, it is that the decision-making process was flawed. Accordingly, this Article contends that while

127. Nevada v. Watkins, 914 F.2d 1545, 1561 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991).

128. *Pacific Gas*, 461 U.S. at 211-12, 216.

129. *Watkins*, 914 F.2d at 1561.

Congress should reconsider its earlier decision, Nevada, or any other state, should not be given an absolute veto right.[130] Bad policy is not necessarily bad law.

Thus, from a policy perspective, the court's preemption analysis also produces a sound outcome. If the preemption issue were decided the opposite way, then Nevada's legislative action would guarantee that Nevada would not receive the repository. Consequently, every state would have a veto over the siting of a repository in their respective state. That result "could enable the states to frustrate the national interest in choosing the safest repository site by forbidding [the] DOE to consider potential sites."[131] Since no state desires the nuclear repository, presumably every state would vote to enact a statute similar to Nevada's. Given the vital need to find a permanent place of disposal for nuclear waste,[132] this result would undermine important national goals.

In 1978, prior to the decision in *Pacific Gas*, Professor Laurence Tribe wrote an article endorsing the California law that prevented the construction of nuclear power plants until a solution for the disposal of radioactive waste was found.[133] He contended that the policy was a rational attempt by California to protect itself from nuclear risks, particularly because they were not barring nuclear power, but just conditioning its use on compliance with safety standards.[134] He reasoned, however, that if a state attempted to bar nuclear power altogether, "[a] congressional decision to override the state's rejection of nuclear power might be justifiable if it were reasonably found that the state's resources or territory had to be harnessed to meet the energy or security needs

130. *See infra* notes 181-86 and accompanying text (discussing merits of allowing states veto power).

131. Development, *supra* note 18, at 800; *see also* Lucas, *Nuclear Waste Management: A Challenge to Federalism*, 7 ECOLOGY L.Q. 917, 952 (1979) ("state laws cannot be allowed to frustrate national goals expressly announced by Congress. This frustration is the essence of what the preemption doctrine is intended to eliminate").

132. *See supra* notes 9-24 and accompanying text (discussing need for permanent waste site).

133. *See* Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 ECOLOGY L.Q. 679 (1979).

134. *See id.* at 708.

of some other part of the nation."[135] The nation's critical need to find a permanent solution for disposal of highly radioactive nuclear waste creates such a justifiable reason for permitting a state's veto to be overridden by federal government preemption.

Professor Tribe's analysis does not deal explicitly with the issue of preemption when a statute such as the NWPA is applied uniquely to one state, instead of all fifty. His justification for preemption, however, would also be applicable in this context because it was based on a strong link to national policies—something that also exists in the case of the nuclear repository. The alternative of requiring every state to build an underground repository would leave forty-nine states worse off, and one no better off.

Some might argue that if the federal government found itself preempted by every state it could attempt to find a way to pay a state to accept the repository.[136] The possibility of payment, however, does not guarantee that any state will actually accept the repository.[137] The reason for this is an inaccurate assessment of public risk. Even if the value of the money paid to the community greatly outweighed the risk to the community, local citizens would be unlikely to evaluate those risks accurately.[138] Their likely reaction will be to say: "There is no amount of money that you can pay me to live near a nuclear repository regardless of how safe the government claims it is." Regardless of whether these public perceptions are accurate, the amount of money required to persuade the public could be too much for the federal government to afford. If there is doubt about the public miscalculation of such risks, one should consider public evaluation of nuclear power. Despite extensive government regulation to ensure adequate safety, most communities balk at the notion of relying on nuclear

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135. *Id.* at 721; *see also* Illinois v. General Elec. Co., 683 F.2d 206, 214 (7th Cir. 1982) ("[n]uclear wastes have to be stored somewhere, and the place of storage should be chosen without regard to the parochial interests of the states"), *cert. denied*, 461 U.S. 913 (1983).

136. For discussion of payments, see *infra* notes 195-212 and accompanying text.

137. *See* Bacow & Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 276 (1982) (citizens might not accept notion of money in exchange for hazardous waste). *But see Tribe Considers Nuclear Dump*, Washington Post, Oct. 21, 1991, at A17 (Mescalero Apaches considering accepting temporary waste facility).

138. *See* Bacow & Milkey, *supra* note 137, at 276-77.

power.[139]

Given the lack of popularity for the decision to voluntarily accept the repository, it would be very unlikely that any politician would negotiate for placement of the repository in a constituent's community on any terms. Though the nation may benefit in the long run, politicians will fear being voted out of office in the short run. Therefore, this is really a type of public choice problem. Construction of a *national* nuclear repository is necessary as a long-term solution; however, because politicians are looking at the situation on a much shorter horizon than the problem requires, the nation could continue with the current stop gap approach for another twenty to thirty years.

These fears of politicians and the public do not suggest that a bidding process, which is intended to get a state to accept the repository in exchange for financial incentives, should be abandoned. They do, however, suggest that the process may be destined to fail. One piece of evidence that suggests this outcome may be inevitable is Nevada's reaction to payments it might receive under the 1987 NWPA Amendments. Nevada has made no attempt to negotiate the amount of money it will receive, but has only argued it should not receive the repository under any circumstances.[140] The fact that the potential payment of twenty million dollars per year drew no interest suggests that payments without preemption may fail.

It is probably true that at some point the amount of money offered could make a difference; however, that amount may be more than the federal government is willing to risk on bidding. If that amount were too high simply because the federal government does not want to pay very much, then Nevada's arguments would be compelling. But, as is most likely the case, if the amount is too high because public fear significantly overstates the risks, then the federal government's argument is much more compelling.

This Article ultimately endorses a solution that involves restarting the search for a repository site and offering compensation to the state that receives it. However, since there is no guarantee that such a proposal will produce a volunteer for the

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139. *See* Greenwald, *supra* note 18, at 56-57, 61.

140. *See* Nevada v. Watkins, 914 F.2d 1545 *passim* (9th Cir. 1990), *cert. denied.*, 111 S. Ct. 1105 (1991).

site, the federal government must prevail at some point. Arguments concerning the Tenth Amendment and preemption should not become substitutes for the political challenges that are really the issue in this case. While those two legal arguments raise many questions concerning the passage of the 1987 NWPA Amendments, they do not justify Nevada's position that the State should have final authority over the issues.

IV. POLICY FLAWS WITH THE SITING PROCESS

Although the preceding part of this Article urged rejection of Nevada's legal arguments, it also suggested that the reasons underlying those arguments raise legitimate policy concerns. This part explores those concerns in greater depth. It first examines Nevada's arguments concerning the fairness of the process. It then argues that independent of fairness concerns, the current procedure for selecting the site of the repository is a bad policy because it may not result in the selection of the ideal site. This failure suggests that it may be time to search for a new approach to selecting the nuclear repository site.

A. The Fairness Issue

> The second principle is that all affected States and Indian tribes should be treated *equally*, and that no single State or tribe should enjoy an advantage over another. The Committee believes that this *equality of treatment* is an essential element in assuring the continued cooperation of all the States that will be considered as having potentially acceptable sites for these facilities.[141]

1. The Process of Choosing a Site

Nevada's major complaint about the selection of Yucca Mountain is that the decision was a result of unfair political maneuvering. As the above statement by the Senate Committee that drafted the original NWPA indicates, the original premise behind the Act was a neutral and rational scientific process in

141. S. REP. NO. 282, 97th Cong., 1st Sess. 29 (1981) (emphasis added).

which every state would take a chance that they had the most viable site. The DOE's charge was to choose the best possible site without letting politics play a significant role. Then in 1987 the NWPA was amended and the original notion of equality was abandoned in what Nevada politicians have characterized as a "Screw Nevada Bill."[142]

As this Article discussed earlier, the 1987 NWPA Amendments were a result of intense political pressure which left Congress in a situation where it had to either narrow the search for a site to one state or expand the search.[143] Congress opted to choose the one-state alternative. A strong factor in the decision of which site to choose was Nevada's lack of political power. Because Nevada's congressional delegation was much weaker than Texas' and Washington's—the other two prime candidates for selection—congressional politics became the basis for the decision.[144] Consequently, the decision process which was originally supposed to be based on rational scientific assessment ultimately abandoned scientific evidence for political factors.

Theoretically, the 1987 NWPA Amendments did not actually select Yucca Mountain as the site, they only selected it as the sole site for site characterization.[145] If, after site characterization is completed, the DOE determines that site should not be recommended, then Yucca Mountain will not be the site of the nuclear repository.[146] Nevada's concern, however, is that the same political factors that led to the 1987 NWPA Amendments will lead to the acceptance of Yucca Mountain as the repository site, regardless of the results of the site characterization.[147]

Past events provide strong support for this concern. By the

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142. 136 CONG. REC. S4201, S4202-03 (daily ed. April 5, 1990) (statement of Sen. Reid); Kriz, *supra* note 1 at 2629 (quoting Governor Miller).

143. *See supra* notes 36-57 and accompanying text (discussing 1987 NWPA Amendments).

144. *See supra* notes 42-47 and accompanying text (setting forth political climate surrounding 1987 NWPA Amendments).

145. *See* 42 U.S.C. § 10134(a), (b) (1988).

146. *See id.* § 10134(a)(1).

147. *See* 136 CONG. REC. S13,465 (daily ed. Sep. 20, 1990) (statement of Sen. Reid) ("[u]nder today's ground rules, the Federal Government has little alternative but to attempt to justify the viability of the Yucca Mountain site as the Nation's nuclear garbage pile"); Behrens, *supra* note 58, at 1, (Governor Miller contends "[t]he economic pressures and the political pressures convince me that they will not make an objective study. They are too driven by the necessity of finding a solution").

time the 1987 amendments were voted on, two billion dollars had already been spent investigating potential sites,[148] and yet the originally proposed careful evaluation of the three leading sites had not occurred. If Yucca Mountain proves to be unacceptable, Congress will have to go back to the drawing board and start the search from scratch. As a result, it is quite possible that the same pressures that led to the passage of the 1987 NWPA Amendments may lead to Yucca Mountain being railroaded through Congress again, even if site characterization suggests that this would be bad policy.[149]

2. *Dealing with the Externalities*

Nevada's unhappiness with the political process that led to the selection of Yucca Mountain is increased by the fact that they will have to deal with the externalities of the site. The federal government's justification for not giving Nevada a veto over the selection of Yucca Mountain is that the mountain is located on federal lands. As a result, the federal government maintains the State should not view itself as significantly affected by the repository. That view, however, makes the false assumption that all of the dangers and negative consequences that go along with a nuclear repository will occur only on federal land. In actuality, problems with a nuclear repository located on federal lands in Nevada also will have consequences for the occupants of non-federal lands in the state.[150]

The most significant factor involved in dealing with externalities is safety. The nuclear repository to be constructed in Nevada is supposed to hold seventy-thousand tons of highly radioactive nuclear waste. If anything goes wrong with the site,

148. *See supra* note 68 and accompanying text (discussing NWPA expenses to date).

149. In the alternative, Yucca Mountain may prove to be a poor site and the DOE will acknowledge that fact and recommend that the site not be approved. In that case, the 1987 NWPA Amendments also will have proven to be a failure. Many years will have been wasted and the nation still will have a great distance to go before construction of the repository can begin.

150. One defender of NIMBY has suggested that this is the flaw with cost-benefit analyses. *See* Masselli, *Obstructionism Reconsidered, or in Defense of NIMBY and LULU*, in MANAGING PUBLIC LANDS IN THE PUBLIC INTERESTS 5, 16 (B. Dysart, III & M. Clawson eds. 1988) ("[o]ne problem with most cost-benefit analyses . . . is that they focus on the macro side . . . while ignoring the micro side").

Nevada residents are the people most likely to have their lives put at risk. As DOE geologist Jerry Szymanski explains, "[a] large release would have an environmental impact that, by some estimates, would exceed that of a nuclear war. For perspective, the explosion of the Chernobyl reactor in the Soviet Union shot into the atmosphere just a few dozen pounds of highly radioactive nuclear waste . . . ."[151] Even a less significant release would effect citizens of Nevada more than citizens of other states. Moreover, the trucks transporting the nuclear waste to the repository will be travelling over Nevada highways.[152]

The safety issue is compounded by the fact that the proposal for the repository does not even conceive of perfect containment of the waste. Instead, it will result in "substantial containment," which "contemplates some transport of radioactive gases from deteriorating waste containers first to the atmosphere and then off-site to the human environment which will adversely affect Nevada citizens."[153] As a result of these safety considerations, it is unreasonable to suggest that Nevada should be a disinterested party simply because the repository is being built on federal, rather than state land. Many of the potential risks associated with the site could directly affect the residents of the state.

Apart from the risk of accident, Nevada citizens will also "bear the psychic and economic costs" of having nuclear waste stored in their state.[154] People do not have a strong desire to live on or visit areas located near a nuclear repository regardless of whether the government declares that the repository is perfectly safe. A study by the Nevada Nuclear Waste Project Office found

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151. *A Mountain of Trouble*, *supra* note 3, at 38-39.

152. *See The Ten Thousand-Year Decision: Nevada Mountain Is Ground Zero for Nuclear Dump Controversy*, Washington Post, Feb. 17, 1988, at A1, col. 3.

153. Petitioner's Opening Brief, *supra* note 71, at 18.

154. Tribe, *supra* note 133, at 708-09 (concluding that although issue of safety standards is exclusively federal concern, resultant economic implications may justify state rejection of nuclear power).

A poll conducted in December, 1987, even before Yucca Mountain had been chosen, revealed the extent of this concern. Seventy-five percent of Nevada residents believed that "Nevada should do everything in its power to prevent the locating of a high-level nuclear waste site in Nevada." UPI, BC cycle, Feb. 8, 1988 (LEXIS, Nexis library, Upstat file). Seventy-two percent anticipated a serious accident in Nevada while the waste was being transported in the state. *See id.* Sixty percent believed that the waste cannot be stored safely. *See id.*; *see also* Carpenter, *supra* note 41, at 74 (four out of five Nevada citizens oppose repository).

that this negative view of nuclear waste is likely to be compounded by the media.[155] As a result, the repository could have a significant harmful effect on Nevada's tourism industry and immigration for business and retirement.[156]

Undoubtedly the federal government will proclaim that the repository is completely safe. Even if the government is correct and there is no safety risk, however, many citizens are reluctant to trust the government on this issue.[157] Moreover, the fact that the nuclear waste issue has been handled so poorly up until now is likely only to increase citizen skepticism.[158] In fact, the DOE has a notably poor record of secret dumping of radioactive and toxic materials.[159] Thus, even if the repository turned out to be immune from accident, Nevada citizens still are likely to face economic externalities.

B. The Outcome Issue

Even if we dismiss Nevada's argument as no more than NIMBY[160] whining, the current process is still defective for two reasons. First, though motivated by self-interest, Nevada's complaints about the siting process do raise the issue of the scientific viability of the site that was chosen. Moreover, even if Yucca Mountain is a good location, Nevada's lack of cooperation because of its perception of coercion is creating difficulties that potentially will hinder an effective construction process.

Obviously Nevada officials have a strong incentive to play up, and even exaggerate, the safety issue. However, at the present time, there is genuine scientific debate about the choice of Yucca Mountain as a site. Much of the debate has revolved around an issue raised by a DOE scientist, not by Nevada officials. This issue relates to the fact that an important factor in the selection of the site is that it be located in a place where the radioactive waste will

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155. *See* Petitioner's Opening Brief, *supra* note 71, at 16; Carpenter, *supra* note 41, at 74.

156. *See* authorities cited *supra* note 154.

157. *See* Bacow & Milkey, *supra* note 137, at 267-68.

158. *See supra* notes 9-24 and accompanying text (discussing growing problem of nuclear waste and past attempts to deal with problem).

159. *See* Carpenter, *supra* note 41, at 74.

160. *See supra* note 26 (defining NIMBY).

not come into contact with water.[161] Jerry Szymanski, a geologist with the DOE, has argued that there is very strong geological evidence pointing to the fact that water could run into the Yucca Mountain repository.[162] He has complained that his evidence is being ignored because of political pressure to approve the site.[163]

A second safety issue relates to the fact that the mountain is located near thirty geological fault lines and may have had volcanic activity occurring within the past 10,000 years.[164] The fault lines and potential volcanic activity raise the risk of major geologic activity that could result in the dispersal of radioactive material.

At this point in time, the safety issue has not been resolved definitively either way, and this Article is not attempting to resolve those scientific issues, or even to speculate whether the federal government or the State of Nevada is on stronger scientific footing. Indeed, the site very well may be ideal for the construction of a nuclear repository. The flaw with the status quo decision process is the fact that it is unclear whether the scientists or the politicians are controlling the decision process.

The federal government's position in *Nevada v. Watkins* was that if their scientists are prevented from gaining access to the site, they cannot even evaluate the validity of Nevada's concerns.[165] From that perspective, Nevada's complaints would appear to have limited merit. How can Nevada argue that the Yucca Mountain is unsafe if the State will not allow anyone to study the site? The answer from the State is that they are concerned that the decision process has already reached the point of no return. If the original proposal for scientifically comparing a number of sites was abandoned because of political pressure in 1987, then it may be just as likely that political pressure will

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161. *See A Mountain of Trouble*, supra note 3, at 38-39.

162. *See id.* at 38. *But see* Behrens, *Study Calls into Question Controversial Yucca Mountain Theory*, INSIDE ENERGY/WITH FEDERAL LANDS Nuclear Energy Section 5, Dec. 31, 1990 (also available on LEXIS, Nexis library, Inergy file) (explaining that recent study funded in part by National Science Foundation and State of Nevada found that Szymanski's concerns were invalid). Carl Gertz, the Yucca Mountain Project Manager for the DOE, has accused the State of holding back evidence that contradicts Szymanski's findings. *See id.*

163. *See A Mountain of Trouble*, *supra* note 3, at 82.

164. *See* Kriz, *supra* note 1, at 2629.

165. *See* Nevada v. Watkins, 914 F.2d 1545, 1551 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991).

undermine an accurate assessment of the one remaining site. Consequently, Nevada feels compelled to challenge the decision-making process before it becomes too late to do so. If Nevada is correct and political factors will create strong pressure to place the repository at Yucca Mountain, it is in the national interest, and not just Nevada's interest, to rethink the decisions that have been made to this point.

Yet, even if Yucca Mountain is an ideal location for the repository, the current process is still defective because it is alienating Nevada and has resulted in the State's delay strategy.[166] Ultimately, the goal of the NWPA is to begin building a nuclear repository. Because Nevada believes that it has been a victim of a flawed decision-making process, it has refused to cooperate with the federal government. Consequently, the NWPA goal is not being achieved. To expedite achievement of this goal, it is necessary to gain Nevada's cooperation. This suggests that although the federal government prevailed in *Nevada v. Watkins*, it may be time to rethink the way in which the siting decision for the nuclear repository was made. If there is a possibility of gaining greater cooperation from the state that will receive the repository, it is worth utilizing such an approach.

V. EXPLORING POLICY ALTERNATIVES

This part of the Article explores some possible procedural alternatives for selecting the nuclear repository site. It begins by analyzing the status quo to obtain a recognition of what flaws must be corrected. It then considers three alternatives: giving the states no role in the process; giving the states a right to veto the selection; and finally, what appears to be the best solution—broadening the search and paying the state that ultimately receives the repository.

Initially, attention should be given to the question of why we should bother considering any change. If, as this Article argues, the federal government is legally correct and should have prevailed in *Nevada v. Watkins*, why should Congress revisit the issue at all? The reason is that the present course suffers from problems

166. *See supra* notes 58-69 and accompanying text (discussing Nevada's delay tactics).

that, as the previous section demonstrated, are distinct from the legal issues. Despite the federal government's victory in court, doubt remains as to the soundness of its policy. In addition, Nevada continues to delay implementation of that policy.

Thus, just because the policy can withstand a legal challenge does not mean that it is a good policy. The Ninth Circuit's decision did not hold that Yucca Mountain was a good site for the repository; it merely held that the federal government had the right to force Nevada to accept the repository. A number of questions remain concerning whether the site is actually an appropriate choice. Because the consequences of selecting a bad site are so great, Congress should revisit the issue to ensure that a proper site is chosen.

In addition, although the decision in *Nevada v. Watkins* placed the federal government in a stronger position, it did not eliminate the State's ability to create obstructions. As this Article noted earlier, Nevada has a great ability to obstruct the federal government's efforts through a variety of delay tactics.[167] That is why nine years after the passage of the NWPA, site characterization remains far from completion.[168] By revisiting the issue and considering compensation combined with a decision process favoring greater state participation, Congress may be able to gain Nevada's support. If the process appeared to be more fair, the State might be more willing to cooperate. This, in turn, would better enable the federal government to accomplish its ultimate goal—building the repository.

The failure of the current approach, however, does provide some ideas about essential requirements for a better process. The first lesson is a recognition that Congress turned what should be a scientific decision into a political decision. As Brooks Yeager of the Sierra Club explained: "It's unfortunate because [the Yucca Mountain decision] establishes a terrible precedent for making an environmental siting decision of unprecedented complexity."[169] The important consequences of the decision demand that it be made in a more rational manner. The DOE should be in a position

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167. *See id.*

168. *See supra* notes 68-69 and accompanying text (discussing DOE's lack of progress with Yucca Mountain).

169. Stanfield, *supra* note 28, at 147.

to evaluate all potential sites regardless of the power of individual congressional delegations. It is also imperative that unresolved technical issues, such as those raised by Jerry Szymanski,[170] be adequately resolved before construction begins.

The second lesson is the importance of attempting to achieve federal-state cooperation. In enacting the NWPA, Congress recognized "[t]he need for significant participation on the part of affected States" in the process of selecting and evaluating sites.[171] If Nevada had been willing to cooperate in the process of evaluating Yucca Mountain, site characterization might have occurred at a much more rapid pace. Ideally, a new decisional framework should create a structure in which the states feel that they are working *with* the federal government, rather than battling against it.

Cooperation is also desirable because "building a waste repository will be a massive undertaking, and maintaining it will require an extremely long-term commitment . . . ."[172] Undoubtedly, complications and difficulties will develop as the process continues and the hostility that currently exists between the DOE and Nevada makes achieving cooperation more difficult. Accordingly, the federal government should attempt to create a decisional framework favoring long-term cooperation, not just cooperation at the site-characterization stage. After a state winds up with the repository, the state should not feel that they were the victim of the tyranny of the majority.

Unfortunately, the approach Congress adopted has three possible outcomes, and two of them are undesirable. First, it might turn out that Yucca Mountain is an ideal site, in which case the federal government got lucky. Second, it might turn out that site characterization will determine that Yucca Mountain is a terrible choice, and Congress will have to start over again after having wasted much time and money since passage of the 1987 NWPA Amendments. In that situation the nation will have to live with the continued danger of on-site storage for a greater period of time than it otherwise would have. The third, and worst, possible

170. *See supra* notes 151, 162-63 and accompanying text (discussing Szymanski's findings at Yucca Mountain).

171. S. REP. NO. 282, *supra* note 141, at 7.

172. Development, *supra* note 18, at 791 n.9.

outcome is that Yucca Mountain may not be an ideal site, but it will be selected over Nevada's legitimate objections because of political pressures.

A. Give the States No Role

An alternative approach would be to give the states no role in the siting process. However, that would produce an even worse outcome than Congress' current approach. At least under the current approach, Nevada is provided with a forum to voice its concern and present evidence that challenges the selection of the site.[173] Although the benefit of that participation is limited because the federal government is not obligated to listen to state complaints,[174] a limited role is better than no role.

Admittedly, eliminating all state participation would have one advantage; it would expedite the decision process. That, in fact, was Senator Johnston's rationale for narrowing the search to one site in 1987.[175] If Nevada were utterly powerless to block the DOE, then the DOE would be able to act much faster. It is for this reason that the DOE is currently before Congress attempting to get legislation passed that would preempt all state permit requirements.[176] Even if Nevada is denied an absolute right to veto the site selection, it does not follow that the DOE should be given unlimited discretion to make the decision without considering state views. Although the DOE is probably correct in asserting that this approach would expedite the process, faster decision making is not necessarily better decision making, and very well may result in a worse outcome.

State complaints may illuminate significant technical problems that call into question the viability of the program. "States and localities arguably have a legitimate interest in having a voice in decisions regarding the storage of waste materials that will remain hazardous for a long time."[177] While state complaints

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173. *See* 42 U.S.C. § 10136(b)(2) (1988).

174. *See supra* notes 53-54 and accompanying text (discussing state's limited participation rights under NWPA).

175. *See supra* note 43 (Johnston Bill aimed at expediting repository construction).

176. *See supra* notes 66-68 and accompanying text (discussing DOE's attempts to overcome Nevada's stall tactics).

177. Development, *supra* note 18, at 791 n.9.

that are intended only to create delay may not be desirable, it is desirable to have states raise genuine scientific challenges. For instance, if Jerry Szymanski is correct and Yucca Mountain may be exposed to water, that is a factor that should be taken into account.[178] Likewise, if there is a true danger of major geologic activity, such as an earthquake or volcano, that also should be taken into account.[179] State officials may, in fact, have the best incentive to seriously consider such dangers. A new bill in Congress could require the DOE to respond adequately to state complaints if such a bill imposed hearing and evidence requirements.

A cooperative atmosphere is also imperative because the states and the federal government will be entering into a long-term relationship. After site characterization is completed, there will be many years of construction, followed by an indefinite period of operation. A cooperative atmosphere will make it easier to work out solutions to unanticipated problems that undoubtedly will arise. In contrast, the current law tries to achieve cooperation by promising Nevada money if they agree not to challenge the site selection.[180] This coercion will not make the states feel as if they have participated in the process.

Thus, eliminating state participation in the process would be a mistake for two reasons. First, state officials may be able to contribute meaningful information to the process of site characterization. Second, even if they do not contribute meaningful information, their participation is likely to make the project operate more successfully, and so it is worthwhile to make them feel that they are part of the process.

B. Let the States Have Veto Power

In theory veto power would be the ideal solution, at least from the state's perspective, because it would force the federal government to select a site through a cooperative and accommodating process. In practice, however, it might not work because

178. *See supra* note 162 and accompanying text (discussing potential for water contamination).

179. *See supra* note 164 and accompanying text (discussing possibility of geological disturbance).

180. *See* 42 U.S.C. § 10173a(b)(2) (1988).

"[i]f all states are free to veto creation of nuclear waste sites, the Federal Government could find itself precluded from developing a waste repository at any suitable site."[181] In a sense, this could be characterized a "reverse commons" problem where "[t]he costs of a facility to the host community outweigh the benefits; as a result, each community refuses to take action in the hope that if it delays long enough, facilities will be sited in other communities."[182] The problem is that if every community takes this approach, there will be nowhere to place the site.

Moreover, while it is important to obtain cooperation, it is also important to choose the best possible site. Given "the considerable significance of site selection in reducing the risk of repository failure and waste release,"[183] it would not be a sound idea to locate the repository in the first state that refuses to exercise its right to veto its selection. This approach would replace one form of irrational NIMBY[184] decision making with a different form of irrational NIMBY decision making. At some point, "deference [to the states] should be abandoned not only to ensure a geologically reasonable site, but to *obtain the safest repository site available.*"[185] Although there is certainly an element of uncertainty in determining what is the best possible site, that uncertainty should not justify a decision to ignore scientific analysis. Local interests should be considered because it is necessary to operate the site effectively, but such interests should not be the only factor.

The failure to adequately consider local cost-benefit analysis does suggest that better compensation to the affected communities may be appropriate, a point addressed in greater depth in the next section. Compensation alone, however, may not be the answer to the problem. "Prior experience with compensation . . . suggests that the social costs of hazardous waste facilities may not be compensable. Many people blanch at the suggestion that they explicitly surrender part of their safety or tranquility in return for

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181. Development, *supra* note 18, at 794.

182. Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307, 324-25 (1982).

183. Lucas, *supra* note 131, at 950.

184. *See supra* note 26 (defining NIMBY).

185. Lucas, *supra* note 131, at 950 (emphasis added).

compensation."[186]

The critical point to recognize is that there may be situations in which a state should be compelled to take the repository no matter how much it dislikes doing so. For example, if Yucca Mountain proves to be the most scientifically viable site for the repository and Nevada refuses to accept it regardless of how much it is paid, Nevada's opposition should be overridden. The absence of a state veto provision, however, does not provide justification for trampling over state's interests. Those state interests still warrant significant attention.

C. Broaden the Search and Pay the "Winner"

This Article endorses a proposal that is much like the amendment proposed by Representative Udall in 1987.[187] The proposal contains three elements. First, the search for the repository should begin again in a more scientifically rational manner. Second, the states should be given meaningful participation in the technical assessments. Finally, greater financial incentives should be offered to encourage the states to accept the repository.

The consequences of deciding where to locate the nuclear repository are too great to rush into a quick decision.[188] When Congress was faced with the dilemma in 1987 that required them to either "expand the universe and ask Members to place their state at risk or narrow the universe to just one site,"[189] they made the wrong decision. Comparing more sites could have resulted in a better evaluation of available options. By expanding the list of sites to be considered for the repository, a more effective scientific, rather than political, analysis can be made. This decision also would have a secondary benefit. If it is subsequently discovered that the initially proposed site is flawed, the nation will be further along in its effort to locate a back-up site.

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186. Bacow & Milkey, *supra* note 137, at 276.

187. *See supra* notes 36-38 and accompanying text (outlining Udall proposal).

188. The need for a slow, deliberate decision has been recognized by other nations. France continues to rely on temporary storage while they study long-term options. As one of their nuclear planners explained: "The most important thing to remember is that we have time to make a proper decision." Greenwald, *supra* note 18, at 58.

189. Stanfield, *supra* note 28, at 146.

Perhaps the best way to expand the list of sites under consideration would be to appoint a politically neutral scientific commission to make the decision. This could be analogized to situations in which Congress must decide which military bases need to be closed. Because that decision is so politically confrontational, a special commission is appointed with authority to make the recommendation of which bases to close. Congress must then either vote to accept or reject all of the recommendations, rather than proceeding on a case-by-case basis.[190] Here, every state could agree to let the commission have final say, rather than voting on each site once it comes close to being selected.

Another analogy, demonstrating that cooperation yields the best result, can be made in the case of oil pooling in Texas and Oklahoma. Because these states discovered that when more oil wells are drilled, the total output diminishes, systems were devised to create a more efficient use of oil. In the most frequently utilized pooling system, field output was prorationed, and shares were adjusted over time as the quality of wells changed.[191] Similarly, in the nuclear waste problem, all states could agree to turn discretion over to the scientific commission and take their chances on the outcome of the inquiry. As in the case of the oil pooling, the rules for the game are set before any party knows how the game will turn out.

It is also important that public input be meaningful. "A myriad of hearings, briefings, meetings, and other forms of interaction are of little value if the end product of the process never differs from the initial proposal."[192] Meaningful state participation in the decision process is beneficial for two reasons. First, at a substantive level, localities may have special knowledge about local conditions and issues that are relevant to construction of the site.[193] At the very least, the affected states have the greatest incentives to ensure that such issues are raised.

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190. *See Powell Urges U.S. to be 'Vicious' in Closing Wasteful Military Bases*, N.Y. Times, Apr. 27, 1991, at A1, col.5 (late ed.).

191. *See* Libecap & Wiggins, *Contractual Responses to the Common Pool: Prorationing of Crude Oil Production*, 74 AM. ECON. REV. 87, 87-91 (March 1984).

192. Masselli, *supra* note 150, at 17.

193. *See* Andreen, *Defusing the "Not in My Backyard" Syndrome: An Approach to Federal Preemption of State and Local Impediments to the Siting of PCB Disposal Facilities*, 63 N.C.L. REV. 811, 845 (1985) (concluding, however, that states should not be able to unilaterally prevent construction of federally approved PCB disposal facilities).

Second, meaningful participation may provide procedural benefits by making states more cooperative because they believe that the federal government is taking their concerns seriously. "Without public understanding and cooperation, successful efforts to site new hazardous waste dumps, to clean up existing ones, or to transport dangerous chemicals may be impossible."[194] In fact, in some cases, it may be possible to address state concerns without terminating the arrangement. For example, if a big concern of Nevada's is the fact that trucks transporting the nuclear waste will be passing close to Las Vegas resorts, it may be possible to develop alternative transportation arrangements so that the waste does not travel near major cities. Thus, by allowing meaningful participation, the government potentially can obtain more cooperation.

The 1987 NWPA Amendments actually work against this goal by conditioning Nevada's right to begin receiving payments on their agreement not to oppose the site characterization process. The issues of payments and participation should be completely decoupled. As long as Nevada believes it has meaningful criticism and challenges to raise, it should be able to do so.

Finally, a solution to the issue of siting the repository should consider making more significant financial payments. The twenty-million dollars currently provided for is inadequate, as reflected by the fact that compensation has had no effect on Nevada's position.[195] Nor, in fact, has any other state shown even the slightest interest in obtaining the nuclear repository. As was discussed earlier, the other states did everything they possibly could to avoid winding up with the repository.[196] It is possible that greater financial incentives could reduce the obstructionism that is currently a barrier to the federal government—a barrier so strong that the government cannot get on-site to begin the study of Yucca Mountain.

Although it may be true that we normally expect every state

194. Rosenbaum, *The Politics of Public Participation in Hazardous Waste Management*, in THE POLITICS OF HAZARDOUS WASTE MANAGEMENT 176, 180 (1983).

195. *See supra* note 140 and accompanying text (discussing refusal to consider compensation in return for acquiescence).

196. *See supra* notes 42-43 and accompanying text (states supported Yucca Mountain site to insulate themselves from receiving repository).

to take its share of externalities without receiving compensation,[197] nuclear waste storage externalities are extremely unique. First, the risk is greater than for other externalities because the consequences of a nuclear accident would be so extreme. Second, the length of time involved is unique because whichever state agrees to accept the repository is going to be burdened with nuclear waste for 10,000 years. Finally, in the short term, there likely will be only one national nuclear repository, and therefore this is not a case where every state must bear a similar risk.[198] So, while every state may be forced to accept a toxic waste dump, every state will not have to accept a nuclear repository. Since nobody wants the repository, it seems reasonable to have the rest of the nation pay compensation to the state that receives it, particularly since most of these other states will be sending waste to the repository.

The proposal in this Article is similar to statutes in Connecticut and Massachusetts that provide compensation to local communities that receive hazardous waste facilities. Just like the case of Yucca Mountain, these statutes deal with an issue that involves a larger governmental entity (a state) imposing a negative externality upon a smaller entity (a local community). Actually, many states provide some compensation for localities that receive hazardous waste. Except for Massachusetts and Connecticut, however, the compensation is generally only for the purpose of paying direct storage expenses, and not for overcoming the externalities that result from hosting a hazardous waste site.[199]

In Connecticut, the compensation system involves two

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197. *See* Illinois v. General Elec. Co., 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). In this case, an Illinois statute barring the storage of out-of-state spent nuclear fuel was declared unconstitutional. The court pointed out that Illinois was already storing spent nuclear fuel that was generated within the State and Illinois' attempt to exclude spent nuclear fuel from out-of-state was an arbitrary burden on interstate commerce. *See id.* at 213-14. Moreover, on-site storage was something that many states were, and still are, involved in.

198. It appears that eventually a second repository may be constructed. *See Compromise on Nuclear Waste*, Christian Science Monitor, Dec. 22, 1987, at 3, col.1. A congressional decision, however, is at least 20 years away. *See id.* Such a decision would not effect this analysis because that fact would simply mean that two states out of 50 were exposed to a unique risk. Thus, the same process of locating a site that is advocated here could also be used in that situation.

199. *See* Bacow & Milkey, *supra* note 137, at 278-79. The NWPA also contains a compensation provision granting Nevada compensation for the costs of participating in the decision process. *See* 42 U.S.C. § 10136(c) (1988).

possibilities. The owner of the hazardous waste facility can either pay an amount that is calculated based on the volume of hazardous waste received[200] or pay the cost of an incentives package negotiated with the local community.[201] The amount of incentives negotiated with the local community, however, cannot exceed the amount as calculated under the first "volume of waste" formula.[202] The statute attempts to achieve "the protection of the public from adverse impacts including but not limited to adverse economic impacts of the facility during its construction and operation and after its operation life . . . ."[203]

The Massachusetts plan actually comes very close to having the same goals and composition as the approach advocated in this Article. "The Massachusetts Act does not attempt to increase state control over local decisions; instead, it seeks to eliminate the causes of local opposition to hazardous waste facilities."[204] Rather than providing a veto right, the Massachusetts plan provides for compensation as part of siting agreement that may include:

> (1) provisions for direct monetary payments from the developer to the host community in addition to payments for taxes and special services and compensation for demonstrable adverse impacts;
> (2) provisions to assure the health, safety, comfort, convenience, and social and economic security of the host community and its citizens;
> (3) provisions to assure the continuing economic viability of the project; and
> (4) provisions to assure the protection of the environment and natural resources.[205]

Under this plan, if the parties are unable to agree on the terms of the payment, they must submit to mandatory arbitration.[206] The reason for requiring negotiation prior to arbitration is to encourage the community and the site operator to develop an

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200. *See* CONN. GEN. STAT. § 22a-128(b) (1991).
201. *See id.* § 22a-128(c).
202. *See id.* § 22a-128(a).
203. *Id.* § 22a-122(b)(1)(D).
204. Bacow & Milkey, *supra* note 137, at 280.
205. MASS. ANN. GEN. L. ch. 21D, § 12 (Law. Co-op. 1988 & Supp. 1991).
206. *See id.* § 15.

amicable relationship.[207] Thus, the Massachusetts approach attempts to incorporate both cooperation and incentives simultaneously.

The Connecticut and Massachusetts statutes provide a good model for creating an incentives approach. Though their implementation has not been problem free,[208] an approach similar to those states' efforts would be a major improvement over Congress' current approach because those statutes include provisions for cooperation as well as financial incentives. The amount of incentives paid should be based on an attempt to calculate the externalities that will be imposed on the state that receives the repository. The four factors listed in the Massachusetts statute suggest a useful starting point. Once the federal government identifies the ideal site, the federal government and the state should attempt to negotiate a package of incentives, with some type of arbitration process being used to resolve disputes. Like the Connecticut statute, the Congressional statute might impose some type of cap on the amount that will be paid. That cap, however, should be much greater than the $20 million provided for in the current statute.[209] While arriving at a precise figure may be difficult, difficulty with precision is frequently true in law (i.e., tort remedies). Nevada should not be paid an inadequate amount simply because it is difficult to precisely calculate costs. One possibility would be to use an arbitrator to settle the difference between the amount the state receiving the repository requested and the amount the federal government offered.

In addition, it may be possible to institute some type of bidding system. If the scientific commission identifies multiple acceptable sites, then the various states should be offered the chance to bid for the site. If the bidding process fails to produce any volunteers, a likely possibility,[210] then the government can preempt a state and select a site, while still providing compensation. "[E]fficiency and fairness suggest that even unwilling communities should receive compensation. Even if it is impossible to make a community whole, the state should not impute a zero

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207. *See* Bacow & Milkey, *supra* note 137, at 280.

208. *See id.* at 302-04.

209. *See* 42 U.S.C. § 10173a(b)(2) (1988).

210. *See supra* notes 131-32 and accompanying text (voluntary acceptance of repository is unlikely).

value to the social costs incurred."[211]

This proposal does not envision simply handing a state money and forcing them to take the repository. Cooperation is also vitally important. But given the fact that part of the anxiety about hosting a nuclear repository is loss of revenue from items such as tourism,[212] financial payments could contribute to the development of a more cooperative spirit. At the same time the other element of the proposal, a fairer approach, could also contribute to federal-state cooperation.

VI. CONCLUSION

It is easy to read articles about Yucca Mountain and conclude that all that is going on is Nevada complaining because they do not want a particular NIMBY. In actuality, the issue is much more complex, and Nevada raises some very troubling concerns about the congressional process that led to the site selection of what is likely to be the nation's nuclear repository. Given the significance of what is at stake, it is time to rethink how that decision was made and consider altering the process of selecting a site before the radioactive waste is buried away.

211. Bacow & Milkey, *supra* note 137, at 304.

212. *See supra* notes 154-59 and accompanying text (discussing Nevada's fears of adverse health and economic effects).

PROTECTING THE INSURED FROM AN ADHESION INSURANCE POLICY: THE DOCTRINE OF REASONABLE EXPECTATIONS IN UTAH

I. INTRODUCTION

In some jurisdictions the doctrine of reasonable expectations protects the insured[1] from unfair and unexpected provisions in an insurance contract. Professor Robert Keeton set forth the classic formulation of the doctrine: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[2] Using this doctrine, courts interpreting insurance contracts ignore plain language in the insurance policy if that language conflicts with or undercuts the reasonable expectations of the insured.[3]

Smith v. Auto-Owners Insurance Co.[4] illustrates the need for the doctrine of reasonable expectations. In *Smith*, Bingham purchased an underinsured-motorist policy from Auto-Owners Insurance Company.[5] After Bingham was killed by an underinsured motorist, his beneficiary Smith brought suit to recover the $10,000 face amount of the policy. A policy provision limited recovery, however, to the difference between the underinsured-motorist policy limits and the limits of the negligent driver's policy. Moreover, under Alabama law all drivers are required to maintain at least $10,000 in liability coverage.[6] Thus, the policy limit of a negligent driver always would equal or exceed $10,000. Because Bingham's policy allowed recovery only to the extent that its limit exceeded the negligent driver's liability policy limit, and

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1. The "insured" is the purchaser of the policy. The "insurer" is the insurance company.

2. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

3. While similar principles may apply to other transactions involving adhesion contracts, this Comment discusses the reasonable expectations doctrine as applied to insurance transactions.

4. 500 So. 2d 1042 (Ala. 1986).

5. *See id.* at 1043-44. The facts of *Smith* are taken from the court's opinion.

6. *See* ALA. CODE § 32-7-22 (1975).

because Bingham's policy limit did not exceed the limit required by Alabama law, the policy actually provided no coverage.

Under traditional contract principles the parties would be held to their bargain and the beneficiary would not be entitled to proceeds under the policy Bingham purchased.[7] The Alabama Supreme Court applied the doctrine of reasonable expectations, however, to avoid a manifestly unjust result.[8]

A majority of jurisdictions in the United States have accepted the doctrine of reasonable expectations in one form or another since its inception in the 1960s.[9] Although Utah has never formally adopted the doctrine, recent cases from both the Utah Supreme Court and the Utah Court of Appeals have discussed its merits.[10] This Comment advocates that Utah formally adopt the doctrine of reasonable expectations.

Part II of this Comment studies the nature of standardized adhesion contracts, which made development of the doctrine necessary. Part III investigates other means used by courts attempting to protect those purchasing adhesionary insurance policies. Next, Part IV provides a historical background of the doctrine's growth, with a focus on two states that have led the way in developing the doctrine of reasonable expectations: Iowa and Arizona. Part V then surveys Utah case law either discussing the doctrine of reasonable expectations or applying similar principles. Finally, in Part VI, this Comment advocates that Utah adopt the doctrine of reasonable expectations.

II. THE NATURE OF ADHESION AND STANDARDIZED INSURANCE CONTRACTS

Most insurance policies are written through standard form adhesion contracts. In this regard, the Utah Supreme Court has remarked that like "credit life and disability insurance, automobile

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7. *See Smith*, 500 So. 2d at 1044.

8. *See id.* at 1044-45.

9. For a survey of all 50 jurisdictions and their treatment of the doctrine of reasonable expectations, see Henderson, *The Doctrine of Reasonable Expectations in Insurance Law after Two Decades*, 51 OHIO ST. L.J. 823 (1990).

10. *See* State Farm Mut. Auto. Ins. Co. v. Mastbaum, 748 P.2d 1042, 1044-45 (Utah 1987) (Durham, J., dissenting); Farmers Ins. Exch. v. Call, 712 P.2d 231, 236-37 (Utah 1985); Wagner v. Farmers Ins. Exch., 786 P.2d 763, 765-69 (Utah Ct. App. 1990); *see also infra* notes 220-42 and accompanying text (discussing these cases).

insurance is generally sold through adhesion contracts that are not negotiated at arms-length. Purchasers commonly rely on the assumption that they are fully covered by the insurance that they buy."[11]

An adhesion contract is a peculiar instrument, described as a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."[12] Thus, the characteristics of an adhesion contract are that the contract is standardized and that its issuer has superior bargaining power.[13] Courts have concentrated on the latter element[14] because the concerns surrounding the adhesion contract are implicated only when the contract is issued by a party with superior bargaining strength.

An adhesion contract requires the party with less bargaining power to either adhere to every term of the agreement without exception or go elsewhere.[15] While in some areas of commerce such freedom of contract might be applauded, the adhesion contract is particularly troublesome when used in the insurance transaction. Nearly all insurers use similar policy contracts containing similar exclusions,[16] with many insurers using form contracts developed by national insurance organizations.[17] Because she will find the same provision in policies offered by rival insurance companies, the insured lacks the ability to reject an unacceptable standard contract provision. The insured must adhere to the standardized agreement presented by the insurer or travel through life uninsured.

Nevertheless, the adhesion contract is essential to the insurance industry. The insurer is able to mass produce the policies and applications, thereby lowering the cost per transac-

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11. *Call*, 712 P.2d at 236.

12. Neal v. State Farm Ins. Co., 188 Cal. App. 2d 690, 694, 10 Cal. Rptr. 781, 784 (1961).

13. *See* Note, *A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U.L. REV. 1175, 1179 (1982) [hereinafter Note, *Common Law Alternative*].

14. *See* Note, *The Adhesion Contract of Insurance*, 5 SANTA CLARA LAW. 60, 60 (1964) [hereinafter Note, *Adhesion Contract*].

15. *See* Note, *Common Law Alternative*, *supra* note 13, at 1179; Note, *Adhesion Contract*, *supra* note 14, at 60.

16. *See* R. KEETON, BASIC TEXT ON INSURANCE LAW § 2.10(b) (1971).

17. *See id.*

tion.[18] The insurer also is able to spread the risk of loss over a large group of insureds with similar risk characteristics.[19]

Perhaps the greatest benefit to the insurer is that "judicial risk"[20] is reduced through the use of standard form policies. Judicial risk is the probability that provisions of the policy will be declared unconscionable or construed in a manner detrimental to the insurer.[21] By using standard policies with provisions that have already been tested in the courts, the insurer is able to reduce judicial risk and attain a degree of certainty in an uncertain industry.

These adhesion form contracts also benefit the insured by allowing the insurer to charge lower premiums because the standard policy groups together those insureds with similar risk characteristics. The insured pays a premium based only on the specific risk she incurs. Prospective insureds who engage in high risk activities are excluded, resulting in lower premiums for the insured.[22] Furthermore, using standard forms saves the insured the time and expense of hiring legal counsel to negotiate each policy term with the insurer.[23]

However, although the adhesion insurance contract is essential and beneficial to the marketing of insurance, such contracts complicate the transaction for the insured. The insurance policy typically is long and written in difficult legal language. Even those policies written in plain, understandable language are typically so complex, and contain print so small, that most insureds are unable to understand the coverage provided.[24] Insureds who read their policies, understanding the ordinary meaning of the words, might not understand the coverage provided because the policy language inevitably contains legal subtleties

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18. *See* Comment, *Insurance Law—Insurance Contract Interpretation: The Doctrine of Reasonable Expectations Has No Place in Illinois*, 1985 S. ILL. U.L.J. 687, 687.

19. *See* I. TAYLOR, THE LAW OF INSURANCE 1 (2d ed. 1968) (function of insurance is to distribute risk of loss among large number of persons exposed to similar risks).

20. *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

21. *See id.*; Note, *Adhesion Contract*, *supra* note 14, at 61-62.

22. *See* Squires, *A Skeptical Look at the Doctrine of Reasonable Expectations*, 6 FORUM 252, 253-55 (1970).

23. *See* Note, *Common Law Alternative*, *supra* note 13, at 1179.

24. *See* Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 13 (1974) [hereinafter Slawson, *Mass Contracts*].

that laypersons may not comprehend.[25]

Moreover, the insured cannot reasonably be expected to read the policy.[26] Several jurisdictions have accepted this principle and released the insured from any duty to read the policy.[27] Many courts adopting the doctrine of reasonable expectations recognize this practical reality.[28] Courts do not expect the insured to read the policy because the nature of the insurance transaction discourages the insured from reading it. Perhaps the most important, yet least recognized, reality in this regard is that the insured assumes the policy will conform to the expectations created by the insurer's advertising and from the representations made by the insurer's agent.[29] The insured expects the policy to reflect those expectations and therefore does not believe it necessary to read the policy. The insured is further discouraged from reading the policy by the industry-wide practice of mailing the policy to the insured several weeks after receiving the application.[30] By the time the policy reaches the insured, the first premium usually has been paid and the insured assumes that the intended coverage is provided by the policy. Additionally, insureds have no incentive to read a policy they know they will not understand. Even where simple language is used to explain exclusions, the relation between the policy's coverage and its exclusions is far from clear.[31]

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25. *See id.*

26. *See* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 174 (Iowa 1975); *see also* 3 A. CORBIN, CORBIN ON CONTRACTS § 559 (1960) ("[h]e may not even read the policy, the number of its terms and the fineness of its print being such as to discourage him").

27. *See* 7 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 906B, at 300 (3d ed. 1963 & Supp. 1991) ("[b]ut where the document thus delivered to him is a contract of insurance the majority rule is that the insured is not bound to know its contents").

28. *See, e.g.*, Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 140 Ariz. 383, 682 P.2d 388, 400 (1984) (insurance contract is adhesion contract that insured neither reads nor understands); *C & J Fertilizer*, 227 N.W.2d at 174 ("[i]t is generally recognized the insured will not read the detailed, cross referenced, standardized, mass produced insurance form, nor understand it if he does").

29. *See* Farmers Ins. Exch. v. Call, 712 P.2d 231, 236 (Utah 1985) ("[p]urchasers commonly rely on the assumption that they are fully covered by the insurance that they buy"); Slawson, *Mass Contracts*, *supra* note 24, at 12; Slawson, *The New Meaning of Contract: The Transformation of Contracts Law Through Standard Forms*, 46 U. PITT. L. REV. 21, 34-35 (1984) [hereinafter Slawson, *New Meaning*].

30. *See* Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 329 (1985); Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPPERDINE L. REV. 267, 270-71 (1986); R. KEETON, *supra* note 16, at § 6.3(a).

31. *See* Spychalski v. MFA Life Ins. Co., 620 S.W.2d 388, 392 n.5 (Mo. Ct. App.

Finally, the insured has little incentive to read a policy that cannot be changed.[32] There are no negotiations in standardized insurance policies.[33] Even the premium is determined from actuarial charts and cannot be altered by the parties. The insured, having no opportunity to change the policy, sees no reason to read it. The insurer, realizing that the insured will not read the policy, uses restrictions and exclusions to diminish sharply the coverage from what was expected by the insured when the policy was purchased.[34] This often is accomplished by offering a broad grant of protection that is brought to the attention of the insured, and then placing exclusions and other key terms in fine print or burying them among unrelated provisions.[35]

The use of adhesion insurance contracts makes it likely that the insured will not understand the policy coverage provided by the policy. If the insured knew what coverage she had obtained and what exclusions existed in the policy, she could "bargain shop" for other policies that did not contain the exclusions to which she objected. Instead, aware that the insured cannot bargain shop, the insurer places exclusions in the policy that limit the coverage. The insured is unable to compare policies because she does not understand her policy exclusions until she suffers a loss that is not covered under the policy. Because the insured does not understand the extent of her coverage, she does not obtain insurance to guard against losses that her primary policy excludes.[36] The insured assumes that the policy will cover all losses suffered under the broad grant of coverage, without understanding or even reading the exclusions to that coverage. Having failed to obtain additional insurance for the risks excluded by the policy, the insured assumes more risk than she ever realizes.

1981).

32. *See* Slawson, *Mass Contracts*, *supra* note 24, at 12-13.

33. *See* R. KEETON, *supra* note 16, § 6.3(a).

34. *See* Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 IOWA L. REV. 843, 844 (1960) (since "most involved standardized form contracts are never read by the party who 'adheres' to them . . . . [t]he proponent of the form is free to dictate terms most advantageous to himself"); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 211 comment b (1981) (drafter of adhesion contract does not expect adhering party "to understand or even to read the standard terms").

35. *See* Note, *Reasonable Expectations Approach to Insurance Contract Interpretation Modified in Missouri*, 47 MO. L. REV. 577 (1982) [hereinafter Note, *Reasonable Expectations*].

36. *See* Note, *Common Law Alternative*, *supra* note 13, at 1178.

While these practical problems are the focus of judicial attempts to mitigate the harshness of adhesionary insurance policies, a conceptual difficulty arises that warrants attention. If the insured has not read the insurance policy, and the insurer is aware of this, but takes no steps to remedy the insured's mistaken understanding of the agreement, has the insured truly assented to those standard provisions in the policy of which she is not aware?[37]

Under traditional contract principles, it is axiomatic that both parties must assent to the terms of the agreement for a contract to be formed.[38] From a public policy and contract law standpoint, however, one may wonder whether the insured's signature on the insurance application manifests assent to every provision of a policy that the insured will neither read nor understand due to the insurer's drafting techniques, and to boilerplate provisions that the insured will not see until several weeks after the policy is in force. Courts have chosen to focus on whether it is "just" to interpret an insurance policy using traditional contract principles when the insured cannot understand a contract that has been written by the insurer's attorneys for distribution to those untrained in insurance law.[39]

Rodemich v. State Farm Mutual Automobile Insurance Co.[40] illustrates the dangers associated with adhesion insurance contracts. Mr. and Mrs. Rodemich purchased comprehensive liability coverage from State Farm for their motor home.[41] The policy covered "upsets" caused by animals on the road, provided the "upset" was caused by *contact* with the animal. On May 7, 1975, the Rodemich's motor home overturned when Mr. Rodemich swerved to avoid an animal. Because the motor home did not hit the animal that caused their accident, the Arizona Court of Appeals denied them relief.[42] As the Arizona Supreme Court

37. *See* Slawson, *New Meaning*, *supra* note 29, at 35.

38. *See* 7 S. WILLISTON, *supra* note 27, § 900, at 10-11.

39. *See* Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 140 Ariz. 383, 389-92, 682 P.2d 388, 394-97 (1984) (en banc).

40. 130 Ariz. 538, 637 P.2d 748 (Ct. App. 1981).

41. *See Rodemich*, 637 P.2d at 749. The facts of *Rodemich* are taken from the court's opinion.

42. *See id.* at 750 ("[w]e find that the language of the policy governs the coverage here, and that unless the motor home actually struck the animal, the loss caused by the upset of the motor home was not within the policy's coverage for loss caused by 'col-

stated three years later, however: "At best, such reasoning, based on patently unfounded assumptions of intent, is result oriented; at worst, it makes no sense."[43]

The balance of this Comment addresses the situation in which the insured believes she has coverage, even though the adhesion contract written by the insurer specifically excludes coverage. In such situations, courts have used a number of methods in an attempt to reduce the resulting inequities; however, these methods have limitations that prevent their use in every instance.

III. TRADITIONAL APPROACHES TO PROTECTING THE INSURED

A. Resolving Ambiguity Against the Insurer

Courts have used various tools in attempts to provide relief from unfair insurance contracts. The most widely accepted tool is the judicial doctrine that ambiguities in a contract must be resolved against the party drafting the agreement.[44] Due to the adhesive nature of insurance policies, courts have been particularly willing to construe ambiguities against the drafters of insurance contracts.[45]

A good example of this doctrine is provided by *Rusthoven v. Commercial Standard Insurance Co.*[46] Rusthoven, a professional truck driver, was covered by an uninsured motorist policy provided by his employer and issued by Commercial Standard Insurance Company.[47] On March 8, 1981, Rusthoven was injured in an accident caused by another vehicle crossing in front of his tractor trailer. Because the vehicle was never located, Rusthoven made a

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lision'").

43. *Darner Motor Sales*, 682 P.2d at 393-94.

44. *See* 2 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 15:74, at 334 (2d ed. 1983). Utah has adopted this principle in cases involving arms-length contracts. *See* Sears v. Riemersma, 655 P.2d 1105, 1107 (Utah 1982); Parks Enters., Inc. v. New Century Realty, 652 P.2d 918, 920 (Utah 1982); *In re* Estate of Orris, 622 P.2d 337, 339-40 (Utah 1980); Wells Fargo Bank v. Midwest Realty & Fin. Co., 544 P.2d 882, 885 (Utah 1975). Utah also has adopted this principle in insurance policy cases. *See* LDS Hosp. v. Capitol Life Ins. Co., 765 P.2d 857, 858 (Utah 1988); American Casualty Co. v. Eagle Star Ins. Co., 568 P.2d 731, 733-34 (Utah 1977).

45. *See* Hollman, *Insurance as a Contract of Adhesion*, 1978 INS. L.J. 274, 275 (1978).

46. 387 N.W.2d 642 (Minn. 1986).

47. *See id.* at 642-43. The facts of *Rusthoven* are taken from the court's opinion.

claim under the Commercial Standard uninsured-motorist policy. The policy contained contradictory provisions. One provision limited liability to $25,000 while another provision limited liability to the sum of the limits applicable on all vehicles covered by the policy. Since Rusthoven's employer insured sixty-seven tractor trailers under the policy, Commercial Standard would be liable for $1,675,000 under this provision. The Minnesota Supreme Court held that the contradictory provisions in the policy should be "strictly interpreted against the insurer," and that Commercial Standard was liable for the entire $1,675,000.[48]

The principle underlying this doctrine is fairness. Because the insurer drafted the policy, the insurer should bear the burden of any deficiencies or contradictions in the policy.[49] A court must find ambiguity in the policy, however, before applying the doctrine. Faced with this requirement, some courts have resorted to creating ambiguity where none existed. One commentator has suggested that the "principle of resolving ambiguities against the draftsman is simply an inadequate explanation of the results of some cases. The conclusion is inescapable that courts have sometimes invented ambiguity where none existed, then [resolved] the invented ambiguity contrary to the plainly expressed terms of the contract document."[50] Because not all courts are willing to engage in this inventiveness, however, the doctrine that ambiguities should be resolved against the insurer is not always adequate to protect the insured.

B. Unconscionability

Courts also have borrowed the doctrine of unconscionability from the law of commerce to protect the insured.[51] Both the Uniform Commercial Code[52] and the *Restatement of Contracts*[53]

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48. *Id.* at 644-45.

49. *See* 2 G. COUCH, *supra* note 44, § 15:74, at 341.

50. Keeton, *supra* note 2, at 972.

51. *See* Kornhauser, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1159-66 (1976); Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 539 (1967).

52. U.C.C. § 2-302(1) provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the con-

recognize that oppressive, surprising, or patently unfair provisions should not be enforced. The purpose of these provisions is to protect the party that lacks bargaining power from unfair surprise or oppression.[54] At least one commentator has applauded this development because unconscionability allows a court to declare the provision unenforceable on policy grounds, rather than strain traditional contract principles to achieve the same result.[55]

The Utah Supreme Court has observed that unconscionability is relevant not only to the bargaining process, but also to the resulting agreement.[56] A contract is procedurally unconscionable if deceptive or oppressive means are used to obtain the agreement.[57] Several factors might render a contract procedurally unconscionable, including the use of extensive "boiler plate" provisions,[58] the use of incomprehensible language,[59] or disguising key terms in a sea of fine print.[60] Alternatively, the agreement is substantively unconscionable if the terms of the contract are patently unfair.[61]

At least one court has used the doctrine of unconscionability in refusing to enforce an unfair insurance policy.[62] However, the doctrine has not been useful in Utah for two reasons. First, the criteria for the doctrine's application are not well defined, and second, the doctrine is used primarily where the agreement is

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> tract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302(1) (1978).

53. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (using language similar to Uniform Commercial Code).

54. *See* U.C.C. § 2-302 comment 1 (1978).

55. *See* Note, *Reasonable Expectations*, *supra* note 35, at 580; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208 comment a (1981) ("[p]articularly in the case of standardized agreements, the rule of this Section permits the court to pass directly on the unconscionability of the contract or clause, rather than to avoid unconscionable results by interpretation").

56. *See* Resource Management Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1041 (Utah 1985).

57. *See id.*

58. *See id.* at 1042.

59. *See id.*

60. *See id.*

61. *See id.* at 1041. For a discussion of procedural and substantive unconscionability, see Leff, *supra* note 51, at 489-512.

62. *See* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 179-81 (Iowa 1975) (court used unconscionability, implied warranty of fitness for purpose, and doctrine of reasonable expectations as alternative grounds for its decision).

patently unfair or oppressive.[63] These limitations have led one commentator to note that the doctrine of unconscionability "stands today primarily as a backstop to catch any creative new practices slippery enough to get past other protective devices, yet odious enough to fall within its timid scope."[64] Perhaps the guidance provided by the Utah Supreme Court will expand the usefulness of this enigmatic doctrine,[65] but until that time the doctrine of unconscionability cannot be relied on to protect the interests of the insured.

C. Estoppel

Courts also have used principles of estoppel to protect the insured.[66] To state a claim for estoppel, the insured must establish that the insurer made a representation on which the insured relied to his detriment.[67]

An excellent example of the doctrine's application in Utah is *American Western Life Insurance Co. v. Hooker*.[68] Hooker purchased two life insurance policies, numbered 43 and 44, from American Western Life Insurance Company.[69] Two years later, Hooker executed change-of-ownership documents naming his wife, Helen, owner of the policies. As owner, Helen's signature was required for subsequent beneficiary changes. Though both ownership forms were processed by American Western, the Hookers received confirmation of the change for policy 43, but not for policy 44. In 1975, the Hookers were divorced. In 1976, Hooker married his second wife, Vonice, and sought to obtain a life insurance policy naming her as beneficiary. American Western's

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63. *See, e.g., Resource Management*, 706 P.2d at 1041 (standard for finding unconscionability is high); Bekins Bar V Ranch v. Huth, 664 P.2d 455, 459 (Utah 1983) (parties permitted to contract freely, but courts will not enforce unconscionable contracts).

64. Davis, *Revamping Consumer-Credit Contract Law*, 68 VA. L. REV. 1333, 1337 (1982).

65. *See supra* notes 56-61 and accompanying text (Utah Supreme Court analysis of unconscionability).

66. *See* Olerich & Connor, *The Creation of Insurance Coverage by Estoppel*, 20 DEF. L.J. 461, 467-68 (1971).

67. *See* American W. Life Ins. Co. v. Hooker, 622 P.2d 775, 779 (Utah 1980); Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689, 695 (Utah 1979).

68. 622 P.2d 775 (Utah 1980).

69. *See id.* at 776-77. The facts of *Hooker* are taken from the court's opinion.

agent assured Hooker that he would not have to purchase another policy naming Vonice as beneficiary, but instead could change the beneficiary on policy 44. American Western approved this beneficiary change without Helen's signature. When Hooker died in 1977, Vonice made a claim and received the proceeds on policy 44. Helen then sought the proceeds under policy 43. While investigating that claim, however, American Western discovered the change of ownership form for policy 44, which the Hookers never had received. Realizing that Hooker's attempt to change the beneficiary in 1976 on policy 44 was void without Helen's signature, American Western requested that Vonice return the proceeds.

The Utah Supreme Court found that American Western had represented to Hooker that he alone could change the beneficiary of policy 44.[70] Hooker relied on this representation to his detriment by not obtaining another life insurance policy naming Vonice as beneficiary. Therefore, American Western was estopped from denying the beneficiary change had occurred, even though technically the change could not have been accomplished without Helen's signature.[71]

American Western thus illustrates how estoppel can be used to protect the insured. The scope of the doctrine, however, is limited. Before it can be applied, the insurer must make a representation that the insured relies on to her detriment.[72] Because the agent and the purchaser rarely discuss provisions other than premium and policy limits, the agent will make no representations regarding most exclusions in the policy. Therefore, estoppel principles usually will not rescue the insured from unfavorable policy provisions.[73]

Another limitation on the use of estoppel is the majority rule that estoppel cannot be used to provide coverage where the policy specifically excludes coverage.[74] Thus, even if the agent represents to the insured that a particular loss is covered, if the policy

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70. *See id.* at 779.

71. *See id.*

72. *See* Perlet, *The Insurance Contract and the Doctrine of Reasonable Expectations*, 6 FORUM 116, 123 (1971).

73. *See* Note, *Common Law Alternative*, *supra* note 13, at 1182.

74. *See* Security Ins. Co. v. Wilson, 800 F.2d 232, 234-35 (10th Cir. 1986) (noting Wyoming's acceptance of majority rule); Annotation, *Comment Note: Doctrine of Estoppel or Waiver as Available to Bring Within Coverage of Insurance Policy Risks not Covered by Its Terms or Expressly Excluded Therefrom*, 1 A.L.R.3d 1139, 1147 (1965).

explicitly excludes coverage the insured cannot recover under estoppel principles. A number of jurisdictions have realized the inequity in applying this rule and have allowed the insured to recover using principles of estoppel even where the policy excludes coverage.[75] These jurisdictions, however, represent the minority.

The doctrine of estoppel thus has not effectively addressed the adhesionary insurance policy. The doctrine does not apply in the situation most troubling to courts: where the insured expects the policy to provide coverage, but the policy excludes the risk through an incomprehensible or hidden provision.

D. Implied Warranty of Fitness for Intended Use

Courts in Iowa have used another method to protect the insured who expects coverage even though the policy excludes coverage.[76] The Iowa Supreme Court has held that insurance policies are subject to an implied warranty that the policy was reasonably fit for the purpose for which it was intended.[77] This implied warranty of fitness traditionally has been applied only to goods.[78] Some commentators, however, have suggested that the insured views the insurance policy not as a contract, but as a chattel or good.[79] The insured purchases "protection" much as she purchases durable goods at a department store. The insured may not understand that the policy is a contract through which the insurer is able to define its rights and liabilities. As a result, the insured may not comprehend that each provision is important in determining the overall coverage provided by the policy. Under this view, the insurance policy should properly be treated as the

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75. *See, e.g.*, Hunter v. Farmers Ins. Group, 554 P.2d 1239, 1243 (Wyo. 1976) (plaintiff can rely, under some circumstances, on agent's representations even as against contrary provision in policy); Harr v. Allstate Ins. Co., 54 N.J. 287, 255 A.2d 208, 219 (1969) (to deny coverage would be an "unfortunate triumph of form over substance").

76. *See* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 177-78 (Iowa 1975).

77. *See id.*

78. U.C.C. § 2-315 provides in relevant part: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required . . . there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose." U.C.C. § 2-315 (1978).

79. For a full treatment of this notion, see Slawson, *Mass Contracts*, *supra* note 24, at 14-20.

insured's property rather than as a contract.[80] The Iowa Supreme Court applied this reasoning in *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*[81] The court found that an insurance policy that defined "burglary" as requiring visible marks of force on the outside of the building was not reasonably fit for its purpose as a comprehensive protection policy for commercial enterprises.[82]

Whatever the merits of treating the policy as a good rather than as a contract, the implied warranty theory has not received much notice in other jurisdictions. Nevertheless, the implied warranty theory demonstrates the extent to which some courts will strive to protect the insured from an adhesionary insurance contract.

E. Summary

Each of the above doctrines has limitations. For courts to resolve ambiguity against the insurer, ambiguity must first exist. The doctrine of unconscionability requires egregious and unfair conduct by the insurer. Estoppel requires a representation by the insurer that is relied on, but later contradicted. Finally, the implied warranty of fitness for intended use represents a conceptual stretch most courts may be unwilling to engage in.

The doctrine of reasonable expectations arose as a method of addressing the adhesion contract where none of the above remedies provided relief. The next section of this Comment provides a history of the doctrine of reasonable expectations and the manner in which Iowa and Arizona courts have provided an established foundation for the doctrine.

IV. HISTORY OF THE DOCTRINE OF REASONABLE EXPECTATIONS

The New Jersey Supreme Court, in *Kievit v. Loyal Protective Life Insurance Co.*,[83] was the first court to hold that an insurance policy must be interpreted in accordance with the insured's reasonable expectations. Kievit had purchased an accident and

80. *See* Leff, *Contract as Thing*, 19 AM. U.L. REV. 131, 144-54 (1970).
81. 227 N.W.2d 169 (Iowa 1975).
82. *See id.* at 177-79.
83. 34 N.J. 475, 170 A.2d 22 (1961).

disability policy from Loyal Protective Insurance Company.[84] The policy promised to compensate Kievit for any disability, but excluded from coverage any "'disability or other loss resulting from or contributed to by any disease or ailment.'"[85] Five years after purchasing the policy, Kievit was struck on the head by a board. After the mishap Kievit suffered disabling tremors that physicians determined were caused either by Parkinson's disease or by a pre-existing personality condition. The doctors surmised that the accident had activated these latent ailments. There was no evidence that Kievit was aware of the disease prior to being struck by the board. Nevertheless, Loyal Protective denied coverage because it believed the disability resulted from or was contributed to by a disease.

The New Jersey Supreme Court held that Loyal Protective was required to provide coverage.[86] The court observed that "[w]hen members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations."[87] The court held the policy should be construed in the insured's favor "to the full extent any fair interpretation will allow."[88] Applying these guidelines, the court held that Kievit reasonably expected coverage for any disability caused by an accident and did not expect the insurer to deny coverage on the basis of a disease about which the insured had no knowledge at the time the policy was purchased.[89] The New Jersey Supreme Court provided few guidelines other than the principle that insurance policies should be construed in accordance with the reasonable expectations of the insured. Nevertheless, *Kievet* remains a landmark case in this area.

The California Supreme Court addressed the doctrine of reasonable expectations in *Steven v. Fidelity & Casualty Co. of New York*.[90] Steven purchased an airline trip life insurance policy

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84. *See Kievit*, 170 A.2d at 22-26. The facts of *Kievit* are taken from the court's opinion.

85. *Id.* at 24 (quoting policy).

86. *See id.* at 26.

87. *Id.* at 26.

88. *Id.*

89. *See id.* at 30.

90. 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

from a machine in the Los Angeles International Airport.[91] Issued by Fidelity & Casualty, the policy provided for benefits of $62,500 if the insured were killed while flying on a scheduled flight. The policy excluded coverage if the insured travelled on a flight which was not "scheduled" as defined in the policy. Steven's scheduled flight was canceled due to poor weather. An agent of the airline arranged for Steven to take an alternate flight on a different airline. This flight crashed and Steven died as a result of injuries suffered in the accident. Fidelity & Casualty denied coverage since the flight was not a "scheduled" flight under the policy.

The California Supreme Court held that Fidelity & Casualty was liable for the full amount of the policy coverage. The court reasoned:

> A reasonable person, having bought his ticket for a fixed itinerary, and thus having at the moment of purchase of the policy gained insurance protection for the whole trip, would normally expect that if a flight were interrupted by breakdown or other causes, his coverage would apply to substitute transportation for the same flight.[92]

The court reached this conclusion by observing that Fidelity & Casualty's actions created an expectation that all flights, scheduled or otherwise, would be covered under the policy.[93] The court based its decision on three findings. First, Fidelity & Casualty did not issue the policy from the machine until after Steven had deposited the premium and completed the application. Therefore, Steven did not know of the exclusion until after he purchased the policy.[94] Second, the machine instructed Steven to mail the policy to the beneficiary and provided no duplicate copy.[95] As a result,

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91. *See Steven*, 377 P.2d at 286-88, 27 Cal. Rptr. at 174-76. The facts of *Steven* are taken from the court's opinion. Due to the impersonal way by which airline trip insurance is marketed, this type of insurance has been particularly susceptible to the doctrine of reasonable expectations. *See* Lachs v. Fidelity & Casualty Co. of New York, 306 N.Y. 357, 118 N.E.2d 555, 559, *reh'g denied*, 306 N.Y. 941, 120 N.E.2d 216 (1954); Cohen, *Flight Insurance, Conforming to the Reasonable Expectations of the Insured*, 30 FED'N INS. COUNS. Q. 19, 21 (1979); Kamarck, *Opening the Gate: The* Steven *Case and the Doctrine of Reasonable Expectations*, 29 HASTINGS L.J. 153, 160-61 (1977).

92. *Steven*, 377 P.2d at 288-89, 27 Cal. Rptr. at 176-77.

93. *See id.*, 27 Cal. Rptr. at 176-77.

94. *See id.* at 293-94, 27 Cal. Rptr. at 181-82.

95. *See id.*, 27 Cal. Rptr. at 181-82.

Steven did not have the policy to consult when he decided to accept the non-scheduled flight.[96] Finally, the policy provisions were insufficient to notify Steven that he would not be covered on non-scheduled flights.[97] Based on these observations, the court found that Steven reasonably would expect coverage for all flights and that this expectation would control despite explicit language in the policy to the contrary.[98]

California returned to the doctrine of reasonable expectations in *Gray v. Zurich Insurance Co.*[99] Dr. Gray purchased a personal liability policy from Zurich Insurance Company.[100] In the policy Zurich agreed to pay all sums for which Gray became legally liable and to defend any suit against Dr. Gray where bodily injury was alleged. However, the policy excluded coverage for bodily injury or property damage "caused intentionally by or at the direction of the insured."[101] Dr. Gray was later sued by John Jones in connection with an altercation between the two. Jones alleged that Dr. Gray intentionally and wilfully assaulted him. Dr. Gray claimed that he acted in self-defense. Zurich refused to defend the suit, relying on the intentional act exclusion.

The California Supreme Court observed that the "doctrine of the adhesion contract" required the court to determine the coverage that the insured would reasonably expect, but that the insured's reasonable expectations would be honored only where the insurance policy was ambiguous.[102] The court found that the initial promise to defend all suits brought against the insured created a reasonable expectation that *all* suits would be defended. The policy was ambiguous because the exclusions were not plainly and conspicuously related to this broad statement of coverage.[103] The ambiguity was resolved in accordance with the insured's reasonable expectations of coverage.

These three cases laid the groundwork for other states to adopt the doctrine of reasonable expectations. However, the states

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96. *See id.*, 27 Cal. Rptr. at 181-82.
97. *See id.*, 27 Cal. Rptr. at 181-82.
98. *See id.*, 27 Cal. Rptr. at 181-82.
99. 65 Cal. 2d 263, 419 P.2d 168, 173-75, 54 Cal. Rptr. 104, 109-12 (1966) (en banc).
100. *See Gray*, 419 P.2d at 169-71, 54 Cal. Rptr. at 105-06. The facts of *Gray* are taken from the court's opinion.
101. *Id.* at 170, 54 Cal. Rptr. at 106.
102. *See id.*, 54 Cal. Rptr. at 106.
103. *See id.* at 173, 54 Cal. Rptr. at 109.

have not treated the doctrine uniformly. Some states, such as California,[104] have refused to apply the doctrine where the policy provision is unambiguous.[105] Other states have used the doctrine when the provision is not clearly worded or is placed in a remote area of the policy.[106] This "fine print" version applies the doctrine of reasonable expectations "if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print."[107] Still other states have applied the doctrine in its broadest form, even where the policy unambiguously and conspicuously denies coverage.[108]

Many courts that initially adopted the doctrine in its more expansive form have retreated from its application because no firm principles guide the doctrine's application.[109] New Hampshire is representative of this retreat. Originally, in *Storms v. United States Fidelity & Guaranty Co.*,[110] the New Hampshire Supreme Court held that the doctrine of reasonable expectations should apply despite unambiguous policy language that denied coverage.[111] Yet three years later, in *Robbins Auto Parts, Inc. v. Granite State Insurance Co.*,[112] the court retreated, holding that the doctrine of reasonable expectations does not apply where the policy clearly and unambiguously denies coverage.[113]

Iowa and Arizona generally have gone further in developing the doctrine of reasonable expectations than other states. These

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104. *See id.*, 54 Cal. Rptr. at 109.

105. *See, e.g.*, Carley v. Lumbermen's Mut. Casualty Co., 10 Conn. App. 135, 521 A.2d 1053, 1058 (1987) ("[s]ince we find no ambiguity in the policy provisions, we don't consider the question of the policy holder's expectations"); Kracl v. Aetna Casualty & Sur. Co., 220 Neb. 860, 374 N.W.2d 40, 43-46 (1985) (policy language is final expression of intent such that denying recovery does not implicate doctrine of reasonable expectations).

106. *See, e.g.*, Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271, 278 (Minn. 1985) (where major exclusions are hidden in definitions section, insured is only required to have reasonable knowledge of terms); Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 927 (Del. 1982) (fine print not allowed to take away what is given in large print).

107. *Hallowell*, 443 A.2d at 927.

108. *See, e.g.*, Gordinier v. Aetna Casualty & Sur. Co., 154 Ariz. 262, 742 P.2d 273, 282 (1986) (doctrine of reasonable expectations applies to unambiguous as well as ambiguous policy language); C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176-77 (Iowa 1975) (doctrine applies to all policy provisions).

109. *See* Note, *Common Law Alternative*, *supra* note 13, at 1187 n.72.

110. 118 N.H. 427, 388 A.2d 578 (1978).

111. *See Storms*, 388 A.2d at 580-81.

112. 121 N.H. 760, 435 A.2d 507 (1981).

113. *See Robbins*, 435 A.2d at 509-10.

states have established principles to determine not only when the doctrine should be applied, but also whether the insured's expectations of coverage are reasonable. The next two sections explore the growth and application of the doctrine of reasonable expectations in these two states.

A. The Iowa Rule

The Iowa Supreme Court perhaps has more experience applying the doctrine of reasonable expectations than any other court.[114] Iowa adopted the reasonable expectations doctrine in *Rodman v. State Farm Mutual Automobile Insurance Co.*[115] Rodman was injured while riding as a passenger in his own vehicle that was covered under a liability policy issued by State Farm.[116] This policy, however, excluded coverage when the person injured was the insured. Rodman brought suit against the driver James Bluml, and State Farm refused to defend the action because the injuries were suffered by Rodman. After obtaining a judgment of $26,555.57 against Bluml, Rodman sued State Farm, alleging that State Farm had a duty to defend Bluml and pay all judgments entered against him. Rodman did not dispute that the policy unambiguously denied him coverage for his own injuries. Instead, Rodman asserted that State Farm was the only insurer in Iowa to write policies that excluded coverage for injury to the insured, and that he thus had a reasonable expectation that the policy would cover his injuries.

The *Rodman* court adopted the doctrine of reasonable expectations, finding "the principle of reasonable expectations undergirds the congeries of rules applicable to construction of insurance contracts in Iowa."[117] Although the court adopted the

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114. For other treatments of Iowa's formulation of the reasonable expectations doctrine, see Kelso, *Idaho and the Doctrine of Reasonable Expectations: A Springboard for an Analysis of a New Approach to a Valuable but Often Misunderstood Doctrine*, 47 INS. COUNS. J. 325, 330 (1980); Leitner, *Enforcing the Consumer's "Reasonable Expectations" in Interpreting Insurance Contracts: A Doctrine in Search of Coherent Definition*, 38 FED'N INS. COUNS. Q. 379, 387-88 (1988); and Note, *Reasonable Expectations: Contract Ambiguity v. Arbitrary Application*, 34 DRAKE L. REV. 1065, 1066-75 (1985).

115. 208 N.W.2d 903 (Iowa 1973).

116. *See id.* at 904-05. The facts of *Rodman* are taken from the court's opinion.

117. *Id.* at 906.

doctrine, it limited the doctrine's application to those instances either where a layperson would not understand the coverage by reading the policy or where the insurer had created an expectation of coverage.[118] Because the court found that the exclusion was understandable to a layperson, and that State Farm had not created any expectation that the insured would be covered for his own injuries, Rodman was denied relief.[119] Under the *Rodman* rule, the insured is charged with knowledge of all provisions of the contract unless the terms are incomprehensible.[120] This formulation gives little weight to the fact that the insured usually does not read the policy provided by the insurer.

The *Rodman* formulation, however, was short lived. Just two years after *Rodman*, the Iowa Supreme Court significantly expanded the doctrine in *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*[121] C & J Fertilizer purchased two comprehensive commercial policies from Allied Mutual.[122] The policies protected against burglary, but defined burglary as requiring visible marks of a break-in on the building's exterior doors. This "visible marks" definition was designed to protect the insurer from "inside job" thefts. C & J Fertilizer's warehouse was burglarized on April 19, 1970. Although the exterior doors showed no marks of being forcibly opened, there were tire tracks leading from the warehouse door. Allied Mutual denied coverage, claiming that no burglary as defined by the policy had occurred.

Before applying the doctrine of reasonable expectations, the court studied the nature of modern insurance transactions. The court concluded that the insurance policy is a contract of adhesion,[123] which most insureds will not read and should not be expected to read.[124] Further, even those insureds who read the policy likely do not understand the coverage actually provid-

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118. *See id.* at 908.

119. *See id.*

120. *See id.*

121. 227 N.W.2d 169 (Iowa 1975). For a discussion of the other grounds for relief given by the court, see *supra* notes 62, 76 and accompanying text.

122. *See id.* at 171-72. The facts of *C & J Fertilizer* are taken from the court's opinion.

123. *See id.* at 175.

124. *See id.* at 174 (citing 7 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 906B (3d ed. 1963)).

ed.[125] Faced with these practical realities, the court observed that "the inevitable result of enforcing all provisions of the adhesion contract, frequently, as here, delivered subsequent to the transaction and containing provisions never assented to, would be an abdication of judicial responsibility in [the] face of basic unfairness . . . ."[126]

The court relied on a comment from section 237 (now section 211) of the *Restatement of Contracts*[127] as the basis for the doctrine of reasonable expectations.[128] Under section 237, the adhering party is not bound by terms that the other party has reason to believe the adhering party would not agree to if brought to her attention.[129] The drafters of the *Restatement* remarked that "reason to believe" could be inferred if the term was bizarre or oppressive, eviscerated a term agreed upon by the parties, or eliminated a dominant purpose of the agreement.[130] Also relevant were any representations made by the insurer that created an expectation of coverage.

The *C & J Fertilizer* court found that the policy created an expectation of coverage by promising in large print to cover all burglaries.[131] Furthermore, statements made by the insurer's agent created an expectation that coverage would be provided if the insured could establish that the burglary was not an inside job.[132] Moreover, the burglary definition did not comport with a layperson's concept of burglary,[133] and therefore, under *Rodman*, the policy would be construed in accordance with the insured's reasonable expectations. The court refused to accept the insurer's burglary definition and granted relief to C & J Fertilizer.[134]

C & J Fertilizer is perhaps the closest any court has come to adopting Keeton's formulation of the reasonable expectations doctrine.[135] The insurance policy unambiguously required that there

125. *See id.* (citing 3 A. CORBIN, CORBIN ON CONTRACTS § 559 (1960)).
126. *Id.* at 174.
127. *See* RESTATEMENT (SECOND) OF CONTRACTS § 237 comment f (1973).
128. *See C & J Fertilizer*, 227 N.W.2d at 176.
129. *See* RESTATEMENT (SECOND) OF CONTRACTS § 237 (1973).
130. *See id.* comment f.
131. *See C & J Fertilizer*, 227 N.W.2d at 177.
132. *See id.*
133. *See id.*
134. *See id.*
135. *See* Keeton, *supra* note 2, at 967.

be exterior, visible marks of burglary. C & J Fertilizer would not have had a reasonable expectation of coverage if someone at C & J Fertilizer had read the policy. However, the Iowa Supreme Court accepted that insureds do not read insurance policies, and therefore the court refused to hold C & J Fertilizer to policy terms of which it was not aware.[136] Thus, the doctrine of reasonable expectations was expanded significantly in *C & J Fertilizer*. No longer would the doctrine be applied only where a layperson could not understand the policy. Rather, the doctrine would apply where the reasonable purchaser of insurance would expect coverage, despite clear policy language to the contrary.

Even after *C & J Fertilizer*, however, the scope of the doctrine remained unsettled in Iowa. This confusion is illustrated in *State Farm Automobile Insurance Co. v. Malcolm*.[137] Malcolm, a postal worker, was involved in an automobile accident with Williams.[138] Williams sued both Malcolm and Malcolm's wife. Pursuant to federal law,[139] the United States was substituted as defendant and Malcolm was dismissed. State Farm then filed a declaratory action alleging that it was not liable to defend or indemnify the United States under the policy issued to Malcolm. The basis for this contention was a policy provision that excluded from coverage any obligations for which the United States may become liable under the Federal Tort Claims Act.

The court partially enforced and partially struck down the policy exclusion.[140] The court found the exclusion unambiguous and, therefore, "there [was] no right or duty on the part of the court to write a new contract of insurance between the parties."[141] Because the exclusion unambiguously excluded coverage for the United States, the court released State Farm from any duty to defend or indemnify the United States.[142]

State Farm also sought to enforce the exclusion against Malcolm's wife. Here, the court departed from its previous reasoning and held that strict rules of construction should not

136. *See C & J Fertilizer*, 227 N.W.2d at 176-77.
137. 259 N.W.2d 833 (Iowa 1977).
138. *See id.* at 834-35. The facts of *Malcolm* are taken from the court's opinion.
139. *See* 28 U.S.C. § 2679(b)-(e) (1982) (Federal Drivers Act).
140. *See Malcolm*, 259 N.W.2d at 836-38.
141. *Id.* at 825.
142. *See id.* at 835-36.

apply to defeat the reasonable expectations of the insured.[143] Finding that a reasonable insured would expect the policy to cover a spouse even if the federal government might become liable, the court held that State Farm could not enforce the exclusion against Malcolm's wife and thus was required to defend her.[144]

In *Chipokas v. Travelers Indemnity Co.*,[145] the Iowa Supreme Court, unhappy with the development of the reasonable expectations doctrine, returned to the *Rodman* formulation.[146] Chipokas, a lawyer, was sued for conspiring to forge a signature on a will.[147] Travelers, Chipokas' insurer, refused to defend Chipokas because his professional liability policy excluded coverage when the plaintiff alleged fraud or deceit. The court, citing *Rodman*, held that the reasonable expectations doctrine was inapplicable if a layperson would understand the coverage by reading the policy and the insurer had not created any expectations of coverage.[148] Since a layperson would understand that no coverage was provided for fraudulent or deceitful acts, Chipokas was denied relief.[149]

Thus, in a mere six years, the Iowa Supreme Court swung from one extreme of the reasonable expectations doctrine to the other, and back again. Clearly, the court was in search of firm principles to guide its application of the doctrine of reasonable expectations.

The court devised such principles in *Farm Bureau Mutual Insurance Co. v. Sandbulte*.[150] Sandbulte owned a 760-acre farm in Sioux County, Iowa and was covered by a farmer's liability policy issued by Farm Bureau.[151] The policy specifically excluded coverage for bodily injury that did not occur on the farm or on the "'ways immediately adjoining'" the farm.[152] Sandbulte's brother was involved in an accident on a road near the farm. Farm Bureau denied coverage, asserting that the accident did not occur on a

143. *See id.* at 837.
144. *See id.* at 837-38.
145. 267 N.W.2d 393 (Iowa 1978).
146. *See id.* at 396.
147. *See id.* at 394-95. The facts of *Chipokas* are taken from the court's opinion.
148. *See id.* at 396.
149. *See id.*
150. 302 N.W.2d 104 (Iowa 1981).
151. *See id.* at 106-07. The facts of *Sandbulte* are taken from the court's opinion.
152. *Id.* at 107 (quoting policy).

"way immediately adjoining" the farm. The court found that the definition of a "way immediately adjoining" the farm included only those roads actually touching or contiguous to the farm.[153] Under this definition, Sandbulte was denied coverage.

Sandbulte argued that he should have been covered under the policy, however, because he reasonably expected coverage. Returning to the Restatement,[154] the court held that the doctrine would only apply if the exclusion: (1) was bizarre or oppressive; (2) eviscerated the terms explicitly agreed on; or (3) eliminated the dominant purpose of the transaction.[155] Significantly, the court also relied on *Rodman* in holding that the doctrine of reasonable expectations would not apply if a layperson would understand the coverage after reading the policy.[156]

Applying these principles, the Iowa Supreme Court found that an insured would not ordinarily expect coverage for an accident that occurred on a road not immediately adjacent to the insured's premises.[157] The court also found that the terms of the insurance policy were neither bizarre nor oppressive, nor did the exclusion eliminate the dominant purpose of the policy.[158] Thus, Sandbulte was denied relief.

Recently, the Iowa Supreme Court applied the *Sandbulte* analysis in *Lepic v. Iowa Mutual Insurance Co.*[159] Lisa Lepic, a minor, was injured while traveling as a passenger in an underinsured vehicle.[160] Iowa Mutual had issued an underinsured motorist policy to Lepic's parents. The policy limited coverage to $100,000 for injuries per person and a total of $300,000 per accident. Lepic sought to recover on the underinsured motorist policy for her bodily injuries. Lepic's parents sought to recover under the same policy for medical expenses paid on Lepic's behalf and for loss of consortium. Iowa Mutual sought to limit coverage to $100,000 for both Lepic's and her parent's claims, asserting that the $100,000 limit was for all injuries to any one person, including

153. *Id.* at 108.
154. *See id.* at 112 (citing RESTATEMENT (SECOND) OF CONTRACTS § 237 (1973)).
155. *See id.*
156. *See id.* at 112-13.
157. *See id.* at 114.
158. *See id.*
159. 402 N.W.2d 758 (Iowa 1987).
160. *See id.* at 759-61. The facts of *Lepic* are taken from the court's opinion.

the derivative claims of her parents. The Lepics argued that the policy was ambiguous and therefore Iowa Mutual should be liable for the full $300,000. The court interpreted the provision to limit liability to $100,000 for both Lepic's and her parent's claims.[161] As for the reasonable expectations doctrine, the court found that the limitation on liability was neither bizarre nor oppressive, nor did it eliminate the dominant purpose of the agreement or eviscerate any terms on which the parties had agreed.[162] Because the Lepics failed to establish any prerequisite to the doctrine's application, there was no need to determine the reasonableness of the Lepics' expectations.[163]

Thus, the Iowa Supreme Court, after a long struggle, has finally established firm principles with respect to the reasonable expectations doctrine. After *Lepic*, the doctrine of reasonable expectations will be applied if the insurance policy provision is bizarre or oppressive, eviscerates terms that the parties had specifically agreed on, or eliminates the dominant purpose of the agreement.

In addition to these sound principles, Iowa has clung to the *Rodman* rule, which does not allow application of the reasonable expectations doctrine where a layperson would understand the policy. This aspect of the Iowa rule ignores the nature of adhesion contracts and the practical reality that the insured will probably not, nor should she be expected to, read the lengthy policy provided by the insurer. The Arizona Supreme Court, on the other hand, understood this reality and integrated it into Arizona's doctrine of reasonable expectations.

B. The Arizona Rule

In 1982, the Arizona Supreme Court adopted the reasonable expectations doctrine[164] in *Sparks v. Republic National Life*

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161. *See id.* at 765.

162. *See id.* at 761.

163. *See id.*

164. For other discussions of Arizona law in this area, see Birnbaum, Stahl & West, *Standardized Agreements and the Parole Evidence Rule: Defining and Applying the Expectations Principle*, 26 ARIZ. L. REV. 793 (1984); Plitt, *When is a Standardized Insurance Contract Binding: The Development of the Reasonable Expectations Doctrine in Arizona*, 23 ARIZ. B.J., Feb-Mar 1988, at 30; and Note, *Decapitation to Cure Dandruff? The Scope of the Reasonable Expectations Doctrine of* Darner Motor Sales, Inc. v.

Insurance Co.[165] and *Zuckerman v. Transamerica Insurance Co.*[166] In *Sparks*, the court held that a brochure sent to the insured before the policy was purchased was relevant to establish the intentions of the parties at the time the agreement was made.[167] The court so held despite the general rule that the written agreement discharges all previous agreements. In *Zuckerman*, the court held that a special statute of limitations inserted in the policy by the insurer would not be enforced where the parties had not bargained for the provision and where the insurer was using the provision in an attempt to avoid paying legitimate claims.[168] In both instances, the court ignored policy language that denied coverage. The court believed that it should "grant the consumer his reasonable expectation that coverage will not be defeated by the existence of provisions which were not negotiated and in the ordinary case are unknown to the insured."[169] *Sparks* and *Zuckerman* provided little guidance, however, as to the requirements for the doctrine's application and the criteria lower courts should use in determining which expectations of the insured were reasonable.

In *Evenchik v. State Farm Insurance Co.*,[170] the Arizona Court of Appeals limited the doctrine's application to those instances where the policy was ambiguous.[171] The Evenchiks were covered under a comprehensive liability policy issued by State Farm.[172] The policy provided both uninsured motorist and underinsured motorist coverage as required by Arizona law.[173] The underinsured motorist coverage applied only where the negligent driver did not have sufficient insurance and excluded coverage where the negligent driver had no insurance at all. In September, 1981, the Evenchiks were involved in an automobile accident with an uninsured motorist. Their bodily injuries

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Universal Underwriters Insurance Co., *140 Ariz. 383, 682 P.2d 388 (1984)*, 20 ARIZ. ST. L.J. 841 (1988).

165. 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 459 U.S. 1070 (1982).

166. 133 Ariz. 139, 650 P.2d 441 (1982).

167. *See Sparks*, 647 P.2d at 1134.

168. *See Zuckerman*, 650 P.2d at 447-48.

169. *Id.*

170. 139 Ariz. 453, 679 P.2d 99 (Ct. App. 1984).

171. *See Evenchik*, 679 P.2d. at 104.

172. *See id.* at 100-04. The facts of *Evenchik* are taken from the court's opinion.

173. *See* ARIZ. REV. STAT. ANN. § 20-259.01 (1990).

exceeded the $100,000 limit on the uninsured motorist coverage. The Evenchiks brought suit against State Farm to recover from the underinsured motorist coverage.

The court held that the doctrine of reasonable expectations applied only where the policy language was ambiguous or contained an exclusion in fine print that limited the coverage provided in the large print.[174] Because the underinsured motorist coverage clearly denied coverage where the negligent driver was uninsured, the Evenchiks were denied relief.[175]

Shortly after *Evenchik*, the Arizona Supreme Court decided *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.*[176] Darner Motors was covered under a "U-Drive" policy issued by Universal Underwriters.[177] The policy provided automobile liability coverage to Darner Motors and to those who leased its automobiles. The policy limited coverage for lessees to $15,000 per person and a total of $30,000 per accident ("15/30"). An "umbrella" policy issued by Travelers Insurance Company covered any additional losses. Darner Motors decided to transfer its "umbrella" coverage to Universal Underwriters. Accordingly, Universal issued a comprehensive liability policy and also renewed the "U-Drive" policy. When Darner Motors received the new policies from Universal, Joel Darner, the owner of Darner Motors, noticed that lessees were still covered at 15/30 under the renewed "U-drive" policy. Darner was concerned because the lease agreement warranted that Darner Motors would provide 100/300 coverage for lessees. Universal's agent assured Darner that the difference between the rental agreement representations and the "U-drive" policy limits would be covered by the comprehensive "umbrella" policy.

Twenty months later, Darner Motors leased an automobile to Crawford. Crawford negligently injured a pedestrian. When the pedestrian brought suit, Crawford referred the action to Universal for defense. Universal accepted the defense, but claimed that coverage was limited to the 15/30 represented in the "U-drive" policy. Crawford then brought suit against Darner for the differ-

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174. *See Evenchik*, 679 P.2d at 104.

175. *See id.* at 103.

176. 140 Ariz. 383, 682 P.2d 388 (1984).

177. *See Darner Motor Sales*, 682 P.2d at 390-92. The facts of *Darner Motor Sales* are taken from the court's opinion.

ence between the 15/30 policy limits and the 100/300 coverage that the lease agreement warranted would be provided. Darner called on Universal to provide this additional coverage under the umbrella policy. In direct contradiction to the agent's representation, Universal denied coverage under the umbrella policy because lessees were not "insureds" under that policy.

Before the Arizona Supreme Court, Darner Motors argued that Universal's agent created a reasonable expectation of coverage when the agent assured Joel Darner that coverage would be provided under the umbrella policy.[178] The court initially observed that the reasonable expectations doctrine was particularly troublesome to apply because the insured develops an expectation that every loss is covered.[179] Therefore, some limitation was needed. The court held that the insured should be limited to those expectations that "'have been induced by the making of the promise.'"[180] Thus, the court's first step was to determine what expectations had been created by the insurer. Following general principles of contract interpretation, the court should determine these expectations by looking to the written contract. The court was hesitant to focus solely on the insurance policy, which might unambiguously exclude coverage, however, because the insured may not have read or even have seen any of the exclusion provisions. Instead, the court turned to section 211 of the *Restatement* to settle the problem.[181] Under section 211, if an insured manifests assent to a writing and "has reason to believe that like writings are regularly used to embody terms of agreements of the same type," then the insured is treated as having assented to all the terms of the writing.[182] Where, however, "the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."[183]

The *Restatement* drafters commented on several situations in which the court may infer that one party had reason to believe that the other party would not assent to terms in the contract.

178. *See id.* at 400-01.
179. *See id.* at 395.
180. *Id.* (quoting 1 A. CORBIN, CORBIN ON CONTRACTS § 1, at 2 (1963)).
181. *See id.* at 396-97 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 (1973)).
182. *Id.*
183. *Id.*

Such "reason to believe" may be inferred if the term is bizarre or oppressive, eviscerates the non-standard terms explicitly agreed on by the parties, or eliminates the dominant purpose of the policy.[184] The prior negotiations between the parties and the inferences arising therefrom also are relevant.[185] Applying these principles, the court held that Universal was estopped to deny coverage because Universal's agent had negotiated with Darner to obtain the 100/300 coverage.[186] To deny coverage would eviscerate the terms the parties had specifically agreed on, so the court required Universal to provide coverage under the umbrella policy.[187]

The principle that standard provisions will not be allowed to undercut provisions agreed on by the parties was further discussed in *State Farm Mutual Automobile Insurance Co. v. Bogart.*[188] John May rented an automobile from Hertz while in Arizona on business for his employer, Xerox.[189] He was involved in an automobile accident with the Bogarts. May was covered by three policies: Hertz provided coverage for the rental vehicle; Xerox covered May under a $500,000 comprehensive liability policy; and May was covered under a personal policy issued by State Farm that provided coverage of $200,000. Hertz defended the action, which resulted in a judgement against May for $609,198, and Hertz paid the first $200,000 of the judgment. State Farm refused to contribute to the remaining liability because its policy contained a provision limiting coverage to the amount not covered by other insurance when May was driving a rental vehicle. Under this "escape clause," Xerox would be liable for May's entire remaining liability.

The *Bogart* court refused to enforce the escape clause because the provision eviscerated the specifically agreed-on terms.[190] The court observed that most policyholders would be "shocked" to find that the substantial coverage they had purchased was reduced to

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184. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 comment f (1981).
185. *See id.*
186. *See Darner Motor Sales*, 682 P.2d at 401.
187. *See id.*
188. 149 Ariz. 145, 717 P.2d 449 (1986).
189. *See Bogart*, 717 P.2d at 450-53. The facts of *Bogart* are taken from court's opinion.
190. *See id.* at 457.

the minimum statutory coverage when driving in a rental automobile.[191] Such a provision dramatically altered the original coverage agreed on by the parties and would not be enforced.[192]

The Arizona Supreme Court further elaborated on the *Darner* rule in *Gordinier v. Aetna Casualty & Surety Co.*[193] Tina and Shawn Gordinier purchased a liability insurance policy from Aetna shortly after their marriage.[194] The policy named Shawn as the insured and Tina as a driver and provided both liability and uninsured motorist coverage. Two years later, when the Gordiniers separated, Tina received the vehicle covered by the Aetna policy. Sixteen months after separation, Tina was injured while riding on an uninsured motorcycle. Tina made a claim on the uninsured motorist coverage. Aetna denied coverage, however, because Tina was no longer a "covered person" under the policy. The policy defined a "covered person" as the insured and any "family member," which in turn was defined as someone both related to the insured and a "resident of the same household." Because Shawn was the insured, Tina ceased to be a "covered person" when the couple separated. The Arizona Court of Appeals held that the doctrine of reasonable expectations was inapplicable because the phrase "resident of the same household" was unambiguous.[195]

The Arizona Supreme Court reversed, stating that "the court of appeals erred when it held that *Darner* was inapplicable simply because the terms in question, taken by themselves, were unambiguous."[196] Drawing on previous cases, the court held that the doctrine of reasonable expectations as set forth in *Darner* applied in four situations: (1) where the provision could not be understood by the average insured;[197] (2) where the provision emasculated expected coverage and no notice was given of the exclusion;[198] (3) where some action attributable to the insurer

191. *See id.*

192. *See id.*

193. 154 Ariz. 266, 742 P.2d 277 (1987).

194. *See Gordinier*, 742 P.2d at 278-80. The facts of *Gordinier* are taken from the court's opinion.

195. *See id.* at 280.

196. *Id.* at 283.

197. *See id.* at 283-84 (citing State Farm Mut. Auto. Ins. Co. v. Bogart, 149 Ariz. 145, 717 P.2d 449 (1986)).

198. *See id.* at 284 (citing Zuckerman v. Transamerica Ins. Co., 133 Ariz. 139, 650 P.2d 441 (1982)); *see also* Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 140 Ariz. 383, 682 P.2d 388, 396-97 (1984).

created an objective expectation of coverage in the insured (such as an advertisement by the insurer);[199] and (4) where the insurer leads the insured to believe she has coverage when the policy excludes coverage.[200] These standards apply whether the provision is ambiguous or unambiguous.[201]

Applying these principles, the court held that the policy exclusion in question was difficult to comprehend and detracted from the original coverage granted.[202] Aetna originally had contracted to insure both husband and wife; to deny coverage merely because one spouse rather than the other was fortuitously named as the insured would eviscerate the coverage originally granted to both spouses.[203]

Thus, in *Gordinier* the Arizona Supreme Court established firm principles to guide the doctrine of reasonable expectations. In Arizona, ambiguous policy provisions are interpreted in accordance with the insured's reasonable expectations of coverage. Even unambiguous policy provisions will not be enforced if they cannot be understood by a reasonably intelligent consumer.[204] Furthermore, the "reason to believe" rule set forth in *Darner* retains its vitality. A provision that the insurer has reason to believe would be unacceptable to the insured will not be enforced where no notice has been given to the insured.[205] Likewise, a provision that diminishes the coverage that the parties agreed on will not be enforced.[206] Finally, if the insurer has created an expectation of coverage, an unambiguous provision will not be enforced, even where the policy specifically denies coverage.[207]

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199. *See Gordinier*, 742 P.2d at 284 (citing Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 459 U.S. 1070 (1982)).

200. *See id.* (citing *Darner Motor Sales*, 682 P.2d at 388).

201. *See id.*

202. *See id.* at 284-85.

203. *See id.* at 285.

204. *See* State Farm Auto Ins. Co. v. Bogart, 149 Ariz. 145, 717 P.2d 449, 449 (1986).

205. *See* Zuckerman v. Transamerica Ins. Co., 133 Ariz. 139, 650 P.2d 441, 448 (1982).

206. *See Darner Motor Sales*, 682 P.2d at 400-01 (1984).

207. *See id.*

V. SURVEY OF UTAH LAW RELATING TO THE REASONABLE EXPECTATIONS DOCTRINE

Although the Utah Supreme Court has never adopted the doctrine of reasonable expectations, the high court has ruled in some cases that insurance coverage exists even where the policy expressly excludes coverage. The first of these cases is *Prince v. Western Empire Life Insurance Co.*[208] Prince applied for a $100,000 life insurance policy with Western Empire.[209] After completing the application and paying the first premium, Prince received a binding receipt. The receipt provided that coverage would take effect on the date Prince underwent a medical examination, provided that Western Empire issued the policy within thirty days of the examination. Prince reported for his medical examination three days after the insurance application was taken. The company physician approved him for insurance. Because Prince had been rejected for military service, however, the insurer requested another medical examination. During this second examination, Prince answered two questions differently than he had previously; therefore, Western Empire required a third examination. Four months later, while still undergoing continuing medical examinations requested by Western Empire, Prince was killed in an accident. Western Empire returned the first premium and denied coverage because the policy had never been issued.

Applying traditional contract principles, the Utah Supreme Court found that Prince's insurance coverage began on the date of his second medical examination.[210] The fact that the policy was not issued within thirty days of the examination as required by the binding receipt was of no consequence. Thus, when Prince had done everything required of him under the binding receipt, the policy took effect even though the policy had not been delivered.[211]

Although this decision purportedly rests on "the regular rules

208. 19 Utah 2d 174, 428 P.2d 163 (1967).

209. *See id.* at 175-76, 428 P.2d at 164-65. The facts of *Prince* are taken from the court's opinion.

210. *See id.* at 177, 428 P.2d at 166.

211. *See id.* at 178, 428 P.2d at 167.

of construction of an ordinary contract,"[212] the ruling departs from the express language of the binding receipt. The court found no ambiguity in the provision stating that coverage would not be provided if the policy was not issued within thirty days of the medical examination. Rather, the court simply held the provision inapplicable because the insured expected that coverage would be provided at the time of the examination.[213]

The Utah Supreme Court returned to the subject of binding receipts in *Long v. United Benefit Life Insurance Co.*[214] On June 16, 1970, Long submitted an application and the first premium for a life insurance policy with United Benefit.[215] He received a binding receipt stating that coverage would begin on the date the application was taken from the insured, but only if the company determined that he was insurable on that date. On July 3, 1970, Long was killed in an automobile accident. Learning of Long's demise, agents for United Benefit sought to return the first premium because the policy had not yet been issued.

The court held that the binding receipt created temporary insurance that could be terminated only if the insured was given notice during his lifetime that the policy application had been rejected.[216] The court reached this conclusion despite language in the binding receipt stating that coverage would not be provided until the home office approved the application.[217] The court relied on a Kansas Supreme Court holding that binding receipts created temporary insurance.[218] The Kansas court had reasoned that if receipt of the premium did not provide any insurance protection, the result would be unfair to the insured and also would create ambiguity to be resolved in favor of the insured.[219] As *Prince* and *Long* illustrate, at least in dealing with binding receipts, the Utah Supreme Court has been willing to ignore insurance policy language that specifically excludes coverage, choosing

212. *Id.* at 176, 428 P.2d at 165.

213. *See id.* at 177, 428 P.2d at 167.

214. 29 Utah 2d 204, 507 P.2d 375 (1973).

215. *See id.* at 204-05, 507 P.2d at 375-76. The facts of *Long* are taken from the court's opinion.

216. *See id.* at 208, 507 P.2d at 379.

217. *See id.* at 207, 507 P.2d at 378.

218. *See id.* at 207-08, 507 P.2d at 378-79 (citing Service v. Pyramid Life Ins. Co., 201 Kan. 196, 440 P.2d 944 (1968)).

219. *See Service*, 440 P.2d at 957-60.

instead to favor the insured's expectations at the time the first premium is submitted with the application.

The first Utah decision to mention the doctrine of reasonable expectations is *Farmers Insurance Exchange v. Call*.[220] John Call, a minor child, was injured by an automobile driven by his mother.[221] Call's father brought suit against Call's mother, seeking the proceeds under a no-fault policy issued to the Calls by Farmers Insurance. Farmers refused to defend Call's mother because of an exclusion that denied coverage to "any member of the same household of such insured except a servant."[222] Mrs. Call claimed that neither she nor her husband ever received a copy of the policy; therefore, they could not have known that the policy excluded injuries to members of the household.

After holding the exclusion unenforceable for injuries less than the statutory minimum,[223] the Utah Supreme Court turned to the issue of whether to enforce the provision against claims exceeding the $3000 statutory limit. Mrs. Call argued that the provision was unenforceable on two grounds. First, the provision violated the public policy behind the Utah no-fault provision.[224] Second, neither she nor Mr. Call had notice of the provision because they never received a copy of the policy.[225]

The Utah Supreme Court accepted Mrs. Call's second theory, leaving for another day the enforceability of the household exclusion for injuries in excess of the statutory amount. The court held that "where the insurer fails to disclose material exclusions in an automobile insurance policy and the purchaser is not informed of them in writing, those exclusions are invalid."[226] To enforce a provision about which the insured received no written notice would disappoint the "reasonable expectations" of the purchaser.[227] Thus, the household exclusion was unenforceable against Mrs. Call because she did not receive notice prior to the

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220. 712 P.2d 231 (Utah 1985).

221. *See id.* at 232-33. The facts of *Call* are taken from the court's decision.

222. *Id.* at 233.

223. *See id.* at 236. The Utah no-fault provision is codified at UTAH CODE ANN. § 31A-22-307 (1991) (providing that insurer must pay first $3000 in reasonable and necessary medical expenses).

224. *See Call*, 712 P.2d at 236.

225. *See id.*

226. *Id.* at 236-37.

227. *Id.*

accident.[228] The court did not, however, discuss the merits of the doctrine or define its scope.

While the Utah Supreme Court did not adopt the doctrine of reasonable expectations in *Call*, it established an essential element of the doctrine. That is, if the insured is not informed of an exclusion, the exclusion will not be enforced where the insured's expectations are frustrated.

In *State Farm Mutual Automobile Insurance Co. v. Mastbaum*,[229] the Utah Supreme Court reached the household exclusion issue left open in *Call*. Thomas Mastbaum had purchased an automobile liability policy from State Farm.[230] Later, Mastbaum and his wife, Kathleen, were injured in an automobile accident. Kathleen brought suit against her husband, alleging he was intoxicated at the time of the accident. State Farm filed a declaratory action alleging that it was not liable to defend Mastbaum because the policy excluded coverage for injuries to the insured or any member of the insured's family. The issue before the *Mastbaum* court, therefore, was whether the household exclusion was valid for injuries to family members that exceeded the $3000 statutory amount.[231] The court held that the policy was enforceable as written so long as the no-fault statute's limits were met.[232] Thus, State Farm was required to pay only the statutory minimum in Mastbaum's defense.[233]

Justice Durham's dissent in *Mastbaum* treated the doctrine of reasonable expectations for the first time in Utah. Justice Durham dissented on the grounds that traditional contract principles ignored the nature of adhesion contracts.[234] She would have remanded the action for a determination of whether the insured freely contracted to exclude coverage for family members.[235] Justice Durham was concerned that Mastbaum may have been unaware of this provision and, if so, should have

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228. *See id.*

229. 748 P.2d 1042 (Utah 1987).

230. *See id.* at 1042-43. The facts of *Mastbaum* are taken from the court's opinion.

231. *See id.*; *see also supra* note 233 (insurer statutorily required to pay first $3000 in reasonable and necessary medical expenses).

232. *See Mastbaum*, 748 P.2d at 1044.

233. *See id.*

234. *See id.* at 1048 (Durham, J., dissenting). Justice Durham also dissented on public policy and interspousal immunity grounds. *See id.* at 1045-49.

235. *See id.* at 1049.

received coverage to meet his reasonable expectations.[236] Throughout her dissent, Justice Durham relied on cases and articles advocating the reasonable expectations doctrine.[237]

The Utah Court of Appeals addressed the doctrine of reasonable expectations in *Wagner v. Farmers Insurance Exchange*.[238] Wagner was killed while riding in his own vehicle as a passenger.[239] The driver was uninsured, but driving with Wagner's permission. Wagner's widow brought suit claiming the $100,000 proceeds of an uninsured motorist policy issued to Wagner. Farmers denied coverage because the vehicle was not "uninsured" as defined in the policy.

The court reviewed the law regarding the reasonable expectations doctrine and concluded that its application should depend on whether the insurer should have known of the insured's expectations, whether the insurer helped to create those expectations, and whether the insured's expectations were reasonable.[240] The court found it unnecessary to reach these issues, however, because there was no evidence that Wagner ever considered the possibility of an accident similar to the one in which he was killed. Thus, he could not have developed a reasonable expectation of coverage.[241] Consequently, the court denied Wagner's widow the proceeds of her husband's uninsured motorist policy. Judge Orme noted in his concurring opinion that the ultimate holding in *Wagner* neither adopted nor rejected the reasonable expectations doctrine.[242]

Thus, while Utah has never officially adopted the doctrine of reasonable expectations, the doctrine's language and concepts have appeared in and influenced Utah decisions. The time is ripe for the Utah Supreme Court to rule on the merits of the doctrine.

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236. *See id.* at 1048-49.

237. *See id.* at 1047-48. Justice Durham cited Transamerica Ins. Co. v. Royle, 202 Mont. 173, 656 P.2d 820 (1983); Stordahl v. Government Employees Ins. Co., 564 P.2d 63 (Alaska 1977); Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966); and Keeton, *supra* note 2, at 961.

238. 786 P.2d 763 (Utah Ct. App. 1990).

239. *See id.* at 764-65. The facts of *Wagner* are taken from the court's opinion.

240. *See id.* at 766.

241. *See id.* at 767 ("[t]here is no evidence . . . that Wagner ever contemplated the present set of circumstances[;] [t]herefore, there is no compelling evidence that respondent knew or should have known of this expectation").

242. *See id.* at 770 (Orme, J., concurring).

VI. UTAH SHOULD ADOPT THE DOCTRINE OF REASONABLE EXPECTATIONS

Under current contract principles, an insured who purchases an adhesionary insurance policy is bound to terms that she did not assent to and that do not reflect the intentions of both parties. The doctrine of reasonable expectations is needed to eliminate these deficiencies and to restore doctrinal integrity to the law of contracts. An essential ingredient in the formation of any contract is the assent of both parties to the terms of the agreement.[243] A party's signature on the written contract typically is held to be a manifestation of assent to the entire agreement.[244] Courts typically have applied these principles without modification to the adhesion contract.

The insured's signature on the insurance application, however, does not manifest the insured's assent to all terms of the written policy. This is necessarily true because the insured will not even receive the policy, which contains the standard provisions, until weeks after the policy is purchased.[245] The insured does not assent to these provisions because she does not, indeed cannot, know of them at the time the agreement is consummated. Even when the policy is received, the insured most likely will not, nor is she expected to, read it.[246] The result is that the insured remains unaware of the vast majority of standard provisions in the policy and, therefore, has not specifically assented to these provisions.[247]

The insured does, however, assent to some terms in the agreement. At the time the policy is purchased the agent and the consumer typically discuss the policy limits, the terms of the

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243. *See* 1 A. CORBIN, CORBIN ON CONTRACTS § 3 (1963).

244. *See* Note, *Common Law Alternative*, *supra* note 13, at 1176; Kessler, *supra* note 20, at 630 n.3 ("[i]n the absence of fraud or misrepresentation parties who have put their contract in writing and signed it will not be heard to say that they have not read it or did not know, understand or assent to its contents provided the document is legible however small the print").

245. *See* Slawson, *Mass Contracts*, *supra* note 24, at 12.

246. *See supra* notes 26-33 and accompanying text.

247. *See* Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 541 (1971) ("[s]ince the recipient is ignorant of its terms or even its existence until after he has consummated the transaction, it cannot possibly be the manifestation of his consent").

coverage, and the premium to be paid [248] The parties also might discuss certain provisions specific to the insured's situation. To these terms, the insured has manifested assent and should be bound.[249]

Thus, in every insurance transaction there is not one contract, but two.[250] The first consists of the terms on which the parties negotiated and specifically agreed. The second contains not only provisions of which the insured was unaware, but also those to which she did not assent. Courts have little trouble enforcing insurance policy provisions when the disputed terms were negotiated and agreed on by the insured and the insurer. Courts and commentators have struggled, however, with the concept of enforcing the second contract.[251] How should the judiciary treat those policy provisions to which the insured did not assent and that were unilaterally inserted into the policy?

Similarly, the adhesionary insurance policy may not reflect the intentions of the parties.[252] The cardinal rule governing contract interpretation is to discover the intentions of the parties.[253] In an insurance transaction, however, only the insurer's intentions are reflected in the written agreement. The insured likely intended that the policy cover all losses resulting from a particular activity, such as operating an automobile.[254] A reasonable insured would expect the policy to reflect this coverage because generally when the insured meets with the insurer's agent they do not discuss specific exclusions to the broad grant of coverage.[255] In this regard, contrary to the requirements of the law of contracts, the insurance policy does not reflect the inten-

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248. *See* Note, *Common Law Alternative*, *supra* note 13, at 1180.

249. *See id.* at 1193.

250. *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (adhering party assents to few dickered terms and provides blanket assent to remaining provisions, so long as they are not unreasonable or indecent).

251. For an in-depth discussion of this problem, see Slawson, *New Meaning*, *supra* note 29, at 21.

252. *Cf.* Grinnell Mut. Reinsurance Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988) ("[b]ecause insureds have no say in how a policy is written, we interpret ambiguous policy provisions in their favor").

253. *See* Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989); Atlas Corp. v. Clovis Nat'l Bank, 737 P.2d 225, 229 (Utah 1987); Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1201, 1205 (Utah 1983).

254. *See* Farmers Ins. Exch. v. Call, 712 P.2d 231, 236 (Utah 1985) (insured assumes that his own injuries are covered by policy purchased).

255. *See* Note, *Common Law Alternative*, *supra* note 13, at 1180.

tions of both parties.

As the cases discussed in this Comment illustrate, to enforce every provision of an adhesionary insurance policy can result in manifest injustice.[256] Because of the nature of insurance policies, the insured usually does not understand the extent of her coverage, and her exposure due to a lack of coverage, until she suffers a loss and the insurer denies coverage. However, the insurance policy is not the instrument of this manifest injustice. The insurer simply is engaging in its legal prerogative to define its rights and liabilities through the policy. Rather, the manifest injustice is perpetrated by the law of contracts, which ignores the practical realities of insurance transactions and enforces provisions of which the insured is unaware at the time the policy was purchased.

Recognizing this injustice, courts have attempted to protect the insured using principles of unconscionability,[257] estoppel,[258] and implied warranty.[259] Each has failed to protect the insured adequately. Even the age-old doctrine that ambiguities should be resolved against the insurer has failed to adequately protect the insured.[260] The time has come for Utah to recognize the limitations of these doctrines and adopt the doctrine of reasonable expectations.

Few would argue that an insurance policy should always be enforced.[261] As the Utah Supreme Court has recognized:

> An insurer has the right to contract with an insured as to the risks it will or will not assume, as long as neither statutory law nor public policy is violated. Thus an insurer may include in a policy any number or kind of exceptions and limitations to which an insured will agree unless contrary to statute or public policy.[262]

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256. For the first discussion of this injustice, see Kessler, *supra* note 20, at 629.

257. *See supra* notes 51-65 and accompanying text.

258. *See supra* notes 66-75 and accompanying text.

259. *See supra* notes 76-82 and accompanying text.

260. *See supra* notes 44-50 and accompanying text.

261. Some commentators do advocate that the insurance policy be treated as a "good" rather than a contract. *See* Slawson, *New Meaning*, *supra* note 29, at 21; Leff, *supra* note 80, at 131.

262. Farmers Ins. Exch. v. Call, 712 P.2d 231, 233 (Utah 1985).

Although the doctrine of reasonable expectations should respect freedom of contract, in some situations enforcing the entire insurance policy will lead to manifest injustice. Therefore, under certain circumstances, courts should refuse to enforce provisions even though the insurance policy unambiguously excludes coverage.

The Utah formulation of the doctrine of reasonable expectations also should recognize that the insured does not read the policy,[263] and, even if she did read it, likely could not understand it.[264] Because the insured cannot be expected to read and understand all the exclusions in the policy, those exclusions and provisions that are uncontemplated by the average consumer should not be enforced unless brought to the attention of the insured.[265] The insured then would be free to purchase the policy with the exclusion, reject the policy, or secure additional coverage under a separate policy for the excluded risk.

The Utah formulation of the doctrine also should recognize that the insured will not receive a written copy of the policy until after the first premium has been paid and the policy has been in force for several weeks.[266] The Utah Supreme Court has taken the first step in this regard, holding that an exclusion is not enforceable before the insured receives written notice of the exclusion.[267] The insured reasonably expects that the insurance policy, which will not arrive until several weeks after she completes the application, will conform to the agreements made between herself and the agent. The Utah Supreme Court has remarked that "[p]urchasers commonly rely on the assumption that they are fully covered by the insurance that they buy."[268] The policy the insured receives should fulfill this assumption. Thus, provisions that eviscerate terms the agent and the insured specifically agreed on should not be enforced.[269]

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263. *See supra* notes 26-33 and accompanying text.

264. *See supra* note 25 and accompanying text.

265. *See* Zuckerman v. Transamerica Ins. Co., 133 Ariz. 139, 650 P.2d 441, 448-49 (1982).

266. *See supra* note 30 and accompanying text.

267. *See* Farmers Ins. Exch. v. Call, 712 P.2d 231, 236 (Utah 1985); General Motors Acceptance Corp. v. Martinez, 668 P.2d 498, 501 (Utah 1983).

268. *Call*, 712 P.2d at 236.

269. *See* Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 140 Ariz. 383, 682 P.2d 388, 401 (1984); RESTATEMENT (SECOND) OF CONTRACTS § 211 comment f (1973).

Following from the assumption that the policy should conform to the agreement of the parties is the notion that exclusions should not be allowed to eliminate the dominant purpose of the transaction.[270] For example, one who purchases underinsured motorist coverage would expect the policy to compensate the insured when the negligent driver's insurance is insufficient.[271] A provision that severely restricts this protection should not be enforced against the insured. The insurance policy should be treated as an integrated agreement between the insurer and the insured. Provisions should be enforced where the insured is aware or should be aware of the terms. Only those provisions that conflict with the public policies surrounding the doctrine of reasonable expectations should not be enforced.

The doctrine of reasonable expectations serves a number of legitimate public policy goals. First, the doctrine increases the flow of information.[272] By refusing to enforce unusual terms unless they are brought to the attention of the insured, courts give the insurer a strong incentive to inform the insured about most exclusions before the policy is sold. The insured then will be more aware of the coverage provided by the policy. The insured is free either to reject the policy offered by the insurer or to purchase additional coverage for that risk. Either way, the insured is allowed to choose the risks she will accept, rather than allowing the insurer to determine these risks through unexpected exclusions in the policy.

Second, forcing the insurer to reveal the details of the insurance policy restores freedom of contract. The adhesion contract is the antithesis of freedom of contract. In most insurance contracts, not only does the insured have no say in choosing the policy terms, but also often must accept the insurer's standard policy to obtain coverage.[273] The reasonable expectations doctrine allows the insured an opportunity to understand what she is purchasing before she has paid the premium. The insured is given the freedom to either accept the policy, reject it and go elsewhere,

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270. *See* Gilbreath v. St. Paul Fire & Marine Ins. Co., 141 Ariz. 92, 685 P.2d 729, 732 (1984).

271. *See* Smith v. Auto-Owners Ins. Co., 500 So. 2d 1042, 1045 (Ala. 1986).

272. *See* Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1169-70 (1981).

273. *See* Kessler, *supra* note 20, at 631.

or engage in her inalienable right to enter into a bad deal.

Finally, economic efficiency is increased.[274] It is axiomatic that consumers will allocate resources to those products that best serve their needs. Without information about the coverage provided by the insurance policy and the exclusions to that coverage, however, the insured cannot determine what insurance will best serve her needs. Through the reasonable expectations doctrine, the insured is more informed about the policy. So informed, the insured is able to select among competing policies, and insurers are forced to compete against one another for premium dollars. Those exclusions that are intolerable to the consumer will be eliminated by the market, and the best policies will rise to the top.

Though these advantages are more quantifiable, the inherent advantage of the doctrine of reasonable expectations is that an element of fairness is restored to the modern insurance transaction. The insurer already controls most of the key elements to this transaction. The insurer drafts the policy for the uninformed consumer in need of insurance protection. Quite simply, there is no reason for the law of contracts to favor the party that already has an enormous advantage in the transaction. The reasonable expectations doctrine reflects this idea and provides some protection and fairness to the insured.

Despite all of its apparent advantages, two arguments have been consistently advanced against the doctrine of reasonable expectations: (1) it diminishes the insurer's freedom to contract,[275] and (2) it leads to uncertainty because the insurer will not know whether policy provisions will be struck down.[276] The doctrine of reasonable expectations, however, restores freedom of contract between the insured and insurer. The insurer still is able to contract freely and to limit its rights and liabilities through the insurance policy. The insurer, however, will not be allowed to place unreasonable policy provisions in the policy after the unknowing insured purchases the policy. Nor does the doctrine of reasonable expectations lead to uncertainty in the insurance transaction.

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274. For a skeptical look at this argument, see Abraham, *supra* note 271, at 1170-74.

275. *See* Ware, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461 (1989); Comment, *supra* note 18, at 687.

276. *See* Squires, *supra* note 22, at 252.

After all, the insurer can negate any reasonable expectations of coverage on the part of the insured, and thereby insure that the exclusion will be enforceable, simply by informing the insured of the provision at the time the policy is purchased. In this regard, certainty is increased.

The doctrine of reasonable expectations should be adopted in Utah to further these informational, economic, and equitable goals. Furthermore, the doctrine resolves many of the legal difficulties created by the adhesionary nature of insurance contracts. The drastic effects forecasted by critics of the doctrine would be alleviated if the insurer simply would inform the insured of the restrictions placed in the policy without the insured's knowledge.

VII. CONCLUSION

Today, the adhesionary insurance contract dominates the consumer insurance industry. The traditional approaches courts use to enforce these contracts do not adequately protect the insured from unbargained-for policy provisions. Furthermore, the courts cannot be confident that the insured assented to all terms of the agreement. The doctrine of reasonable expectations provides a ready remedy for these deficiencies and should be adopted in Utah.

JOSEPH E. MINNOCK

"WAIT 'TIL YOUR MOTHERS GET HOME": ASSESSING THE RIGHTS OF POLYGAMISTS AS CUSTODIAL AND ADOPTIVE PARENTS

> We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.
>
> O.W. Holmes[1]

I. INTRODUCTION

A significant portion of Utah's early history involves the Church of Jesus Christ of Latter-Day Saints[2] and its early practice of polygamy,[3] which was a major doctrinal tenet of the Church from 1843 until 1890. A century later, Utah polygamists in various religious groups[4] continue to cling to their lifestyle in

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1. *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

2. The Church of Jesus Christ of Latter-Day Saints is more commonly known as the Mormon Church. This Comment uses the term "Mormon" for the sake of familiarity and brevity.

The Mormon Church was organized in April, 1830, by Joseph Smith. *See* 1 J. SMITH, HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 2 (2d ed. 1949). Smith was born in rural Vermont in 1805. *See id.* In 1831, Smith left New York in the first of a series of westward moves. *See id.* at 140-46. In 1844, Smith and his brother Hyrum were assassinated by a mob in Carthage, Illinois. *See* 7 J. SMITH, *supra*, at 102-06. Brigham Young succeeded Smith as president of the Church, *see id.* at 294, and led the Mormon pioneers across the Great Plains to Utah.

The belief that God communicates with contemporary prophets is a basic tenet of Mormon doctrine. Two of the Church's *Thirteen Articles of Faith* state: "We believe in the gift of tongues, prophecy, revelation, visions, healing, interpretation of tongues, etc." 4 J. SMITH, *supra*, at 541; and "We believe all that God has revealed, all that He does now reveal, and we believe that He will yet reveal many great and important things pertaining to the kingdom of God." *Id.*

3. The system of plural marriage practiced within the Mormon Church during the 19th century, with only men taking plural spouses, is properly called polygyny. Technically, polygamy is defined as a practice where either sex marries plurally. *See* Nedrow, *Polygamy and the Right to Marry: New Life for an Old Lifestyle*, 11 MEM. ST. U.L. REV. 303, 303 n.1 (1981); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1758 (1976). This Comment, however, uses the term "polygamy."

4. There are several churches in Utah and the surrounding states whose doctrines are loosely based on those of the orthodox Mormon Church, with the exception of polygamy. The two largest of these churches claim roughly 11,000 followers collectively. The Church of Jesus Christ of Latter-Day Saints and the Kingdom of God, more commonly known as the Fundamentalist Church, claims 7300 members in the United States and Canada. Telephone interview with Rulon T. Jeffs, President, Church of Jesus Christ of Latter-Day Saints and the Kingdom of God (July 4, 1991) [hereinafter Jeffs Interview]. Of that number, approximately 6000 live in Utah, with 2500 located in Salt

the face of various state laws prohibiting the practice.[5] The dispersement of polygamists in rural enclaves throughout the State, as well as the secrecy that surrounds the practice, makes it difficult to ascertain the exact number of polygamists in Utah. Current estimates, however, place the number at between 11,000

Lake City and surrounding areas. According to Jeffs, the Mormon Church abandoned the "true gospel" when it renounced polygamy. *See id.* Jeffs also claims to receive revelation from God as a "continuation of the pure gospel that was restored through Joseph Smith." *Id.* The largest concentration of Fundamentalists live in the twin cities of Hilldale, Utah, and Colorado City, Arizona, which have an aggregate population of roughly 3000. *See id.*

The Allred Church is the second largest church in Utah that espouses polygamy and has approximately 4000 members. Telephone interview with Owen Allred, President, Allred Church (July 4, 1991) [hereinafter Allred Interview]. Like Jeffs, Allred claims to receive revelation from God. *See id.*

5. The Utah Constitution provides:

> The following ordinance shall be irrevocable without the consent of the United States and the people of this State:
>
> First:—Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.

UTAH CONST. art. III.

The Utah Code also provides: "(1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, he purports to marry another person or cohabits with another person. (2) Bigamy is a felony of the third degree." UTAH CODE ANN. § 76-7-101(1)-(2) (1990) (effective 1953).

Each of the 50 states and the District of Columbia has statutes proscribing bigamy or polygamy. *See* ALA. CODE § 13A-13-1 (1982); ALASKA STAT. § 11.51.140 (1989); ARIZ. REV. STAT. ANN. § 13-3606 (1989); ARK. STAT. ANN. § 5-26-201 (1987); CAL. PENAL CODE § 281 (West Supp. 1991); COLO. REV. STAT. § 18-6-201 (1986); CONN. GEN. STAT. § 53a-190 (Supp. 1991); DEL. CODE ANN. tit. 11, § 1001 (Supp. 1990); D.C. CODE ANN. § 22-601 (1989); FLA. STAT. ANN. § 826.01 (West 1976); GA. CODE ANN. § 16-6-20 (1988); HAW. REV. STAT. § 709-900 (1988); IDAHO CODE §§ 18-1101, 18-1105 (1987); ILL. ANN. STAT. ch. 38, para. 11-12 (Smith-Hurd Supp. 1991); IND. CODE ANN. § 35-46-1-2 (Burns 1985); IOWA CODE ANN. § 726.1 (West 1979); KAN. STAT. ANN. § 21-3601 (1988); KY. REV. STAT. ANN. § 530.010 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 14:76 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 551 (1983); MD. CRIM. LAW CODE ANN. § 18 (1987); MASS. ANN. LAWS ch. 272, § 15 (Law. Co-op. 1980); MICH. STAT ANN. § 28.694 (Callaghan 1990); MINN. STAT. ANN. § 609.355 (West 1987); MISS. CODE ANN. § 97-29-13 (1972); MO. ANN. STAT. § 568.010 (Vernon 1979); MONT. CODE ANN. § 45-5-611 (1991); NEB. REV. STAT. § 28-701 (1989); NEV. REV. STAT. ANN. § 201.160 (Michie 1986); N.H. REV. STAT. ANN. § 639:1 (1986); N.J. STAT. ANN. § 2C:24-1 (West 1982); N.M. STAT. ANN. § 30-10-1 (1984); N.Y. PENAL LAW § 255.15 (McKinney 1980); N.C. GEN. STAT. § 14-183 (1986); N.D. CENT. CODE § 14-03-06 (1991); OHIO REV. CODE ANN. § 2919.01 (Anderson 1987); OKLA. STAT. ANN. tit. 21, § 881 (West 1983); OR. REV. STAT. § 163.515 (1989); PA. CONS. STAT. ANN. § 4301 (Purdon 1983); R.I. GEN. LAWS § 11-6-1 (Supp. 1990); S.C. CODE ANN. § 16-15-10 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-22-15 (Supp. 1988); TENN. CODE ANN. § 39-15-301 (Supp. 1990); TEX. PENAL CODE ANN. § 25.01 (Vernon 1989); UTAH CODE ANN. § 76-7-101 (1990); VT. STAT. ANN. tit. 13, § 206 (1974); VA. CODE ANN. § 18.2-362 (1988); WASH. REV. CODE ANN. § 9A.64.010 (1988); W. VA. CODE § 61-8-1 (1989); WIS. STAT. ANN. § 944.05 (West 1982); WYO. STAT. § 6-4-401 (1977).

and 30,000.[6]

During the past thirty years, criminal prosecutions against polygamists have ceased[7] and, for most people, polygamy is a quaint relic of a now internationally established religion.[8] Periodically, however, confrontations with state officials,[9] grisly blood feuds among rival polygamist groups,[10] and ritualistic slayings[11]

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6. *See* R. VAN WAGONER, MORMON POLYGAMY: A HISTORY ix (2d ed. 1989) (estimates number of Utah polygamists at 30,000); Jeffs Interview and Allred Interview, *supra* note 4 (leaders of two largest Utah churches espousing polygamy claim total of 11,000 members).

7. *See* R. VAN WAGONER, *supra* note 6, at 198. The most recent criminal prosecution for polygamy in Utah occurred in 1965. For the most part, prosecutions against polygamists in Utah have ceased due to a desire among Utah law enforcement officials to concentrate resources on other problems that pose a greater threat to the general public than does polygamy. *See id.* On a broader level, the prosecutions may have ended as a result of changes during the past three decades in attitudes toward consensual sex between adults and a growing tolerance of divergent lifestyles. *See generally* Slovenko, *The De Facto Decriminalization of Bigamy*, 17 J. FAM L. 297 (1978-1979) (changes in modern society have eroded historic rationale for anti-polygamy laws).

8. The Mormon Church now claims over 7,300,000 members throughout the world and attracts over 300,000 converts annually. *See* DESERET NEWS, CHURCH ALMANAC, 1991-1992, at 342.

9. Perhaps the most publicized confrontation between the State of Utah and polygamists was the saga of John Singer and his family. In 1979, Utah law enforcement officers shot Singer after a protracted conflict over his refusal to allow his children to be educated in public schools. *See* Washington Post, Jan. 20, 1979, at A8, col. 1. The shooting occurred when law enforcement officials made a second attempt to arrest Singer. *See id.*

Ten years later, the Singer family was in the news again when Adam Swapp, who had married two of John Singer's daughters, bombed a local Mormon chapel to usher in Singer's supposedly imminent resurrection. *See* R. VAN WAGONER, *supra* note 6, at 213. Swapp and two of Singer's sons subsequently exchanged gunfire with law enforcement officers who came to the Singer compound to question Swapp about the bombing. In that exchange one of the officers was killed. *See id.* Timothy Singer was convicted of second-degree murder, Swapp was convicted of manslaughter, and Jonathan Jr. and Vickie Singer, John Singer's widow, were convicted of negligent homicide. *See id.*

10. Much of the violence among polygamist sects involves the Church of the Firstborn under the leadership of the LeBaron family. In 1972, a power struggle for church leadership between two LeBaron brothers erupted in violence, ending with the deaths of two people at a polygamist colony in Mexico. *See* R. VAN WAGONER, *supra* note 6, at 204-05. In 1977, two female members of the LeBaron sect gunned down rival polygamist leader Rulon Allred in his Murray, Utah naturopath office. *See id.* at 206-07. Finally, in 1988, three wayward members of the Church of the Firstborn were murdered in Texas by members of their former sect. *See* Chicago Tribune, July 24, 1988, § 1, at 19, col. 1.

11. In July of 1984, two brothers, Dan and Ron Lafferty, murdered their sister-in-law Brenda and her 15-month-old daughter by slitting their throats in ritualistic fashion. *See* R. VAN WAGONER, *supra* note 6, at 208-09. The brothers were members of a polygamist sect known as the School of the Prophets, which taught its members how to receive divine revelations. *See id.* Ron had felt inspired by God to kill Brenda and her daughter because of Brenda's opposition to the brothers' practice of polygamy. *See id.* Dan was sentenced to life in prison; Ron was convicted of capital murder. *See id.*

thrust polygamists into the national spotlight, drawing attention to Utah's esoteric past.[12]

On two occasions during the past five years, the Utah Supreme Court has examined the less dramatic area of the rights of polygamists under Utah family law. In 1987, the court held in *Sanderson v. Tryon*[13] that a parent's polygamous lifestyle, standing alone, is insufficient to deny a child custody award.[14] Similarly, in March of 1991, the court held in *In re Adoption of W.A.T.*[15] that polygamists cannot be disqualified automatically as adoptive parents.[16] These cases represent a marked departure from *State ex rel. Black*,[17] the only case in which the court had addressed the family law rights of polygamists prior to *Sanderson* and *W.A.T.* In *Black*, the court upheld the termination of a polygamous couple's parental rights after finding that their children were being raised in an "immoral"[18] and "evil"[19] environment.

Sanderson and *W.A.T.* represent a more expansive approach toward the family law interests of polygamists than did *Black* and ensure polygamists certain procedural rights in custody suits and adoption proceedings. Neither case, however, defines how a parent's polygamous lifestyle ultimately will affect an effort to adopt or gain custody of a child. Thus, although it is clear that polygamists cannot automatically be disqualified from consideration in a custody dispute or adoption proceeding, it is not clear how polygamy will factor into the final disposition of those proceedings.

This Comment argues that the less stringent judicial approach toward polygamy shown in *Sanderson* and *W.A.T.* raises

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12. Another important Utah case involving polygamy occurred in a civil context. *See* Potter v. Murray City, 585 F. Supp. 1126 (D. Utah), *modified*, 760 F.2d 1065 (10th Cir. 1984), *cert. denied*, 474 U.S. 849 (1985). In that case, Potter, a Murray City police officer, was fired because of his practice of polygamy. *See id.* at 1128. Potter sought an injunction against the city's termination on the grounds that it violated his religious freedom protected by the First and Fourteenth Amendments. *See id.* The United States District Court for the District of Utah denied the injunction, holding that the State's action did not violate Potter's first amendment rights in light of the State's compelling interest in prohibiting polygamy. *See id.* at 1143.

13. 739 P.2d 623 (Utah 1987).

14. *See id.* at 627.

15. 808 P.2d 1083 (Utah 1991) (plurality opinion).

16. *See id.* at 1086.

17. 3 Utah 2d 315, 283 P.2d 887, *cert. denied*, 350 U.S. 923 (1955).

18. *Id.* at 348, 283 P.2d at 911.

19. *Id.* at 352, 283 P.2d at 913.

the possibility that Utah courts more frequently will be asked to define the rights of polygamists in custody disputes and adoption proceedings. This Comment also asserts that the elastic "interests of the child" standard employed under the Utah legislative provisions governing custody awards[20] and adoption[21] bestow a great deal of discretion on the courts. Thus, the question of how a polygamous lifestyle should affect a custody proceeding or adoption petition requires judicial interpretation. Finally, this Comment addresses whether courts *should* consider a parent's polygamous lifestyle in awarding child custody or adoption, and, if so, how that lifestyle should affect the disposition of those proceedings. These recommendations derive from four sources: Utah case law and legislative provisions governing child custody and adoption; approaches taken in Utah and other jurisdictions toward the family rights of persons living alternative lifestyles other than polygamy; sociological studies examining the effect that lifestyles similar to polygamy have on children; and the competing interests of the state, the polygamous parents, and the children subject to custody and adoption proceedings.

Section II provides background information regarding the history of polygamy in Utah and early developments in the family rights of polygamists. This section examines the era of Mormon Church-sanctioned polygamy between 1843 and 1890, including the major Congressional efforts to eradicate polygamy and United States Supreme Court cases dealing with polygamy. Further, it examines *Black* to illustrate the intransigence toward the family rights of polygamists that prevailed in Utah courts until *Sander-*

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20. Regarding custody awards, the Utah Code provides in relevant part:
> If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties.

UTAH CODE ANN. § 30-3-10(1) (1989).

21. Regarding adoption decrees, the Utah Code provides:
> The court shall examine each person appearing before it in accordance with this chapter, separately, and, if satisfied that the interests of the child will be promoted by the adoption, it shall enter a final decree of adoption declaring that the child is adopted by the adoptive parent or parents and shall be regarded and treated in all respects as the child of the adoptive parent or parents.

Id. § 78-30-9 (Supp. 1991).

son was decided in 1987. Section III treats *Sanderson* and *W.A.T.* and the changes in judicial attitudes toward polygamists' family law rights.

Finally, Section IV contends that parties to a custody dispute stand before the courts in a different light than putative adopting parents. Natural parents in a custody proceeding possess certain fundamental rights in the care and custody of their children that can be abrogated only under compelling circumstances. The state's role in a custody proceeding is to either select which of the two parents represents the child's best interests or, where the circumstances are sufficiently compelling to warrant a denial of custody to either parent, terminate parental rights and assume custody of the child.

Conversely, persons seeking to adopt are not endowed with the same parental rights to the child as natural parents in a custody proceeding. Adoption is an extension of a privilege rather than of a right, and courts may deny adoption petitions purely as a matter of discretion. Therefore, the state's role in an adoption proceeding is not to select which of two parties represents the child's best interests, but to determine whether the proposed adoption *promotes* the interests of the child. Rather than having to select from one of only two parties as it does in a custody proceeding, the state may deny an adoption petition even if there is no alternative parent for the child.

With these distinctions in mind, Section IV argues that a natural parent's polygamous conduct should be dispositive in a custody dispute only on a showing that the conduct has harmed the child. Section IV also acknowledges that the state may, as a matter of discretion, categorically deny adoption by polygamists, but argues that a blanket prohibition denying polygamists the privilege of adoption would be imprudent. Fundamentally, the issue turns on what purpose the state seeks to effect through its adoption policy. If the state chooses to enforce criminal prohibitions against polygamy that have fallen into desuetude[22] by denying polygamists' adoption requests, polygamists' prospects as adoptive parents are slim. Conversely, if the state chooses to pursue a policy goal of realizing a child's best interests, the courts

22. *See supra* note 7 and accompanying text (discussing decline of prosecutions for polygamy during last three decades).

should not consider a polygamous lifestyle a per se disqualification from prevailing in a custody dispute or adoption proceeding. Rather, the courts should consider a polygamous lifestyle on a case-by-case basis, accounting for any existing relationship between the prospective adopting parents and the child and determining how the proposed adoption will affect the interests of the child.[23]

II. BACKGROUND

Officially, the Mormon Church designates 1843 as the year when Joseph Smith, founder and first president of the Church, announced to Church members the idea or "revelation"[24] that ushered in the practice of polygamy.[25] There is considerable evidence, however, that Smith was convinced of the righteousness of polygamy as early as 1831[26] and that he took at least eleven plural wives before informing the general Church membership

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23. This Comment does not address the wisdom of governmental proscriptions of polygamy or the constitutionality of those proscriptions. Rather, it discusses the implications of recent cases involving the family law rights of polygamists against the backdrop of existing statutory prohibitions. Accordingly, this Comment does not address possible Free Exercise Clause claims that polygamists might make before courts assessing their abilities as putative custodial or adoptive parents. For a discussion of these first amendment implications relating to polygamists, see generally Note, Potter v. Murray City: *Another Interpretation of Polygamy and the First Amendment*, 1986 UTAH L. REV. 345.

24. *See supra* note 2 (discussing history of Mormon Church).

25. *See* DOCTRINE AND COVENANTS § 132:61-62 (Mormon Scripture). That section provides in part:

> And again, as pertaining to the law of the priesthood—if any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then is he justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth to him and to no one else. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him; therefore is he justified.

Id.

26. *See* D. Bachman, A Study of the Mormon Practice of Plural Marriage Before the Death of Joseph Smith 56. (Dec. 9, 1975) (unpublished M.A. thesis, Purdue University); *see also* 13 O. PRATT, JOURNAL OF DISCOURSES 193 (1869) ("[i]n the fore part of the year 1832, Joseph told individuals . . . that he had inquired of the Lord concerning the principle of plurality of wives, and he received for answer that the principle . . . is a true principle, but the time had not yet come for it to be practiced").

that polygamy was a doctrine of the Church.[27]

In 1852, the Church publicly acknowledged its espousal of polygamy.[28] By that time, however, the Church long had been fighting accusations that its leading officials practiced polygamy,[29] and the fact that polygamy was being practiced in the Territory of Utah already had become a matter of common knowledge to the nation—and to its elected officials in Washington.[30]

A. The Gauntlet

In spite of the widespread awareness of polygamous practices in Utah, the federal government waited several years before making a serious move against the practice. This delay was due less to a general lack of interest than to the fact that polygamy became intertwined with the secessionist politics of the slavery debate in mid-nineteenth century America.[31] With the onset of

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27. According to Ben Johnson, a close associate of Smith's, Smith was married to 11 or 12 women by April of 1843, two months before the revelation concerning polygamy was recorded. *See* D. BACHMAN, *supra* note 26, at 106. Smith is estimated to have married between 20 and 48 women during his lifetime. *See id.* at 113-15.

28. *See* 4 B. ROBERTS, A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 55 (1930).

29. In August of 1835, the Church adopted a resolution refuting accusations that it encouraged its members to practice polygamy: "[W]e believe that one man should have one wife, and one woman but one husband, except in the case of death, when either is at liberty to marry again." 2 J. SMITH, *supra* note 2, at 247.

30. In 1852, Captain John Stansbury of the United States Army Corps of Topographical Engineers, after spending a year surveying the Great Salt Lake Valley, reported to Congress: "But that polygamy does actually exist among them cannot be concealed from any of the most ordinary observation, who has spent even a short time in this community." J. STANSBURY, EXPLORATION AND SURVEY OF THE VALLEY OF THE GREAT SALT LAKE OF UTAH 136 (1851). Similarly, President Fillmore heard charges in 1851 that "plurality of wives is openly avowed and practiced in the Territory, under the sanction and in obedience to the direct command of the Church." CONG. GLOBE, 32d Cong., 1st Sess. 89 (1852).

It is noteworthy that polygamy was never practiced by a substantial portion of Mormon men. *See* L. ARRINGTON & D. BITTON, THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS 199 (1979) (polygamy practiced by five percent of Mormon men between 1850 and 1890); Note, *Polygamy in Utah*, 5 UTAH L. REV. 381 n.3 (1956-1957) (polygamy practiced by two percent of Mormon men during 1800s).

31. The 1856 Republican party platform assailed polygamy and slavery as "the twin relics of barbarism." E. FIRMAGE & R. MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1830-1900, at 131-32 (1988); Linford, *The Mormons and the Law: The Polygamy Cases, Part I*, 9 UTAH L. REV. 308, 311-12 (1964).

the Civil War in 1861, the slavery debate moved from the congressional forum to the battlefields, allowing the polygamy debate to move to the congressional fore. In 1862, Congress passed the Morrill Act,[32] which provided that any person who, having a living wife or husband, married "any other person, whether married or single, in a Territory of the United States" was guilty of bigamy.[33] The Act also revoked all territorial legislation that served to "establish, support, maintain, shield, or countenance polygamy . . . ."[34]

Although the Morrill Act purported to strike at polygamy, it did not immediately yield a spate of convictions, primarily because enforcement depended on a territorial court system that was largely comprised of Mormon judges and jurors.[35] In 1874, Congress asserted federal control over the Utah courts and the jury selection process by passing the Poland Act.[36] The Act implemented a procedure whereby jurors were selected from a list of candidates compiled by federal rather than local authorities.[37] The Poland Act also restricted the jurisdiction of probate courts to matters involving guardianship, settlement of estates, and divorce, specifying that probate courts would "have no civil, chancery, or criminal jurisdiction whatever . . . ."[38] Previously, the territorial legislature had conferred on the probate courts general jurisdiction over virtually all criminal and civil cases.[39]

1. Reynolds v. United States: *Polygamy Reaches the Supreme Court*

Shortly after Congress passed the Poland Act, George

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32. Ch. 126, 12 Stat. 501 (1862) (repealed 1910).

33. *Id.* § 1, 12 Stat. at 501. Bigamy was made punishable by a fine of up to $500 and up to five years in prison. *See id.*, 12 Stat. at 501. The Morrill Act allowed exemptions for remarried persons whose spouses were absent for five years and were not believed to be living during that time. *See id.*, 12 Stat. at 501.

34. *Id.* § 2, 12 Stat. at 501.

35. *See* Linford, *supra* note 31, at 316.

36. Ch. 469, 18 Stat. 253 (1874). The Poland Act was implicitly repealed when Utah was admitted to the Union. *See* Act of July 16, 1894, ch. 138, § 20, 28 Stat. 107, 112. ("all Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of said Territory or by Congress, are hereby repealed").

37. *See* Poland Act, ch. 469, § 4, 18 Stat. 253, 254-55.

38. *Id.* § 3, 18 Stat. at 253.

39. *See* An Act in Relation to the Judiciary, § 30, 1851 Utah Laws 38, 43.

Reynolds, personal secretary to Brigham Young[40] and a prominent member of the Salt Lake Mormon community, was indicted by a federal grand jury for bigamy under the Morrill Act.[41] The jury convicted Reynolds based on the testimony of his second wife, who confessed to their polygamous marriage.[42] The territorial supreme court upheld the conviction without addressing whether Reynolds' practice of polygamy was protected religious conduct.[43]

The principal question on appeal to the United States Supreme Court was whether the Morrill Act unconstitutionally impinged on Reynolds' religious freedom. Specifically, Chief Justice Waite framed the issue as "whether religious belief can be accepted as a justification of an overt act made criminal by the law of land."[44]

The Court first endeavored to define "religion" to address the scope of the first amendment guarantee of religious freedom. Finding no such definition within the text of the Constitution, Chief Justice Waite adopted Thomas Jefferson's position that "'the legislative powers of the Government reach actions only, and not opinions . . . .'"[45] From this vantage point, the Court reasoned that "Congress was deprived of all legislative power over mere *opinion*, but was left free to reach *actions* which were in violation of social duties or subversive of good order."[46] The Court then determined that polygamy was sufficiently subversive to good order to warrant Congressional prohibition:

> Polygamy has always been odious among the Northern and Western Nations of Europe and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offense against society.[47]

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40. *See supra* note 2 (discussing history of Mormon Church).
41. *See* 5 B. ROBERTS, *supra* note 28, at 469.
42. *See* BASKIN, EARLY REMINISCENCES OF UTAH 62-63 (1914).
43. *See* United States v. Reynolds, 1 Utah 226, 227 (1876), *aff'd*, 98 U.S. 145 (1878).
44. Reynolds v. United States, 98 U.S. 145, 162 (1878).
45. *Id.* at 164 (quoting 8 Jeff. Works 113 (1853)).
46. *Id.* (emphasis added).
47. *Id.* (citation omitted).

The Court then declared that polygamy threatened the institution of marriage on which the republican system of government was predicated, and was a precursor to despotism:

> Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous and polygamous marriages are allowed, do we find the principles on which the Government of the People, to a greater or lesser extent, rests . . . . [P]olygamy leads to the patriarchal principle and . . . fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.[48]

Finally, the Court dismissed the argument that persons practicing polygamy out of religious conviction could be exempted from prosecution, stating that to allow a person to violate the law on the basis of religious belief "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[49]

2. *The Aftermath of* Reynolds

Although *Reynolds* established that Congress could proscribe polygamy and other religious practices offensive to society, and the Poland Act had returned Utah's judicial machinery to federal hands, the tradition of secrecy surrounding the practice of plural marriage presented difficult obstacles to proving polygamous relationships. Mormon Church officials performed plural marriages in temples or endowment houses into which only the most steadfast Mormons could enter. Consequently, relatively few witnesses observed these marriages, and those who did were often reticent

48. *Id.* at 165-66.
49. *Id.* at 167.

to divulge the details of the proceedings.[50] A Utah law that prohibited a woman from testifying against her husband[51] posed an additional obstacle. These evidentiary impediments are best illustrated by *Miles v. United States*,[52] in which the United States Supreme Court reversed John Miles' bigamy conviction because it had been secured largely on the testimony of his second wife.[53] The Court held that because the second wife's testimony had been admitted without first establishing the existence and identity of the first wife, she was considered Miles' first wife. Consequently, admitting her testimony as to her polygamous marriage to Miles violated the territorial prohibition against spouses testifying against each other.[54]

Although the Supreme Court reversed Miles' conviction, the case presaged the adoption of refined legislation that ultimately dealt the decisive blow to polygamy. The *Miles* Court ended its opinion by issuing an invitation to Congress to eliminate the evidentiary predicament that had scuttled Miles' conviction. After observing that evidentiary obstacles as well as the Mormons' complicity in protecting each other at polygamy trials made convictions all but impossible, the Court admonished: "We must administer the law as we find it. The remedy is with Congress, by enacting such a change in the law of evidence in the Territory of Utah as to make both wives witnesses on indictments for bigamy."[55]

B. The Decisive Blows to Polygamy

Congress did not wait long to respond to the Court's admonition. During the session immediately following *Miles*, Congress adopted the Edmunds Act,[56] which not only removed the eviden-

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50. *See* E. FIRMAGE & R. MANGRUM, *supra* note 31, at 149.

51. *See* An Act to Regulate Proceedings in Civil Cases in the Courts of Justice of the Territory and to Repeal Certain Acts and Parts of Acts, Title XI, ch. 1, § 379, 1870 Utah Laws 17, 86.

52. 103 U.S. 304 (1880).

53. *See id.* at 315.

54. *See id.* at 313.

55. *Id.* at 315-16.

56. Ch. 47, 22 Stat. 30 (1882). Like the Poland Act, those portions of the Edmunds Act that applied only to Utah were implicitly repealed when Utah entered the Union in 1896. *See* Act of July 16, 1894, ch. 138, § 20, 28 Stat. 107, 112. Congress has explicitly repealed other sections of the Edmunds Act that applied to all territories. *See, e.g.*, Ch.

tiary obstacles that had impeded federal efforts to pursue polygamy convictions, but also stripped polygamists of many basic political rights. The first part of the Act added the new offense of "cohabitation," where a man could be convicted upon proof that he was living with more than one woman.[57] Because a cohabitation conviction could be sustained without proof of a second marriage under the new provisions, the territorial prohibition against a wife's testifying against her husband and the concomitant evidentiary problems were largely circumvented. The Edmunds Act also established grounds to challenge any prospective juror summoned in a prosecution for polygamy, bigamy, or cohabitation who had practiced or been convicted of one of those offenses or who supported the practice of polygamy.[58] Additionally, the Act rescinded the rights to vote and hold public office from any person cohabiting with more than one woman or any woman who was a plural wife.[59]

Congress still was not satisfied. In 1887, it enacted the Edmunds-Tucker Act,[60] the provisions of which were targeted as much against the Mormon Church as against polygamists. The Act made the lawful husband or wife of a person being prosecuted for bigamy a competent witness.[61] It also allowed for the attachment of any witness without a previous subpoena where it was determined that the witness would not obey a subpoena.[62] The Act further required that all marriages in Utah be certified with the

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321, 35 Stat. 1156 (1948) (repealing Edmunds Act § 3); Ch. 231, 36 Stat. 1168 (1911) (repealing Edmunds Act § 5); Pub. L. No. 98-213, 97 Stat. 1462 (1983) (repealing Edmunds Act § 8).

57. *See* Edmunds Act, ch. 47, § 3, 22 Stat. at 31.

58. *See id.* § 5, 22 Stat. at 31.

59. *See id.* § 8, 22 Stat. at 31-32. The Utah territorial legislature granted women the right to vote in 1870. *See* An Act Conferring upon Women the Elective Franchise, § 1, 1870 Utah Laws 8, 8. Congress revoked that grant largely on the notion that Utah women would cast their ballots as their husbands directed, thereby perpetuating polygamy and impeding federal efforts to prosecute those who practiced it. *See* 14 CONG. REC. 3057 (1883) (remarks of Senator Edmunds). This argument was a complete reversal of an earlier movement in Congress to grant Utah women suffrage under the belief that women would vote to abolish polygamy. *See* CONG. GLOBE, 41st Cong., 1st Sess. 72 (1869). The disenfranchisement of polygamists withstood constitutional challenge in Murphy v. Ramsey, 114 U.S. 15 (1885).

60. Ch. 397, 24 Stat. 635 (1887). Those provisions of the Edmunds-Tucker Act that specifically applied to Utah were implicitly repealed when Utah joined the Union. *See* Act of July 16, 1894, ch. 138, § 20, 28 Stat. at 112.

61. *See* Edmunds-Tucker Act, ch. 397, § 1, 24 Stat. 635, 635.

62. *See id.* § 2, 24 Stat. at 635.

territorial probate court, including the name of the official presiding at the ceremony and the marital status of the parties.[63] Moreover, the Act required all prospective male voters in the territory to take an oath swearing that they did not practice or encourage others to practice polygamy.[64]

The stiffest provisions of the Edmunds-Tucker Act, however, were reserved for the Mormon Church. The Act invalidated the Corporation of the Church of Jesus Christ of Latter-Day Saints[65] and authorized proceedings to have any Church property and buildings not used exclusively for religious purposes escheat to the United States.[66] Finally, the Act dissolved the Perpetual Emigrating Fund Company, which made loans to needy Mormons who desired to emigrate to Utah and dictated that the Fund's property and assets escheat to the federal government.[67]

C. The Manifesto

The Edmunds-Tucker Act sounded the death knell for Mormon Church-sanctioned polygamy in Utah. In retrospect, the Act probably was unnecessary, as federal authorities had decidedly gained the upper hand in the battle against polygamy by 1887.[68] By 1890, the weight of this authority had become too much for even the resilient Mormons to withstand. The imprisonment or forced exile of many of the Church's leading authorities had all but decimated the Church.[69] Given Congress' apparent resolve to destroy the Mormon Church if the fight to extirpate polygamy so required, the Church hierarchy was faced with two alternatives: either salvage what remained of the Church by abandoning the practice of polygamy, or cling to the practice and invite total ruin.[70]

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63. *See id.* § 9, 24 Stat. at 636.

64. *See id.* § 24, 24 Stat. at 639-40. A similar provision was upheld in Davis v. Beason, 133 U.S. 333 (1890).

65. *See* Edmunds-Tucker Act, ch. 397, § 17, 24 Stat. at 638.

66. *See id.* § 13, 24 Stat. at 637. This provision was upheld in Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890).

67. *See* Edmunds-Tucker Act, ch. 397, § 13, 24 Stat. at 635.

68. Between 1882 and 1892, at least 988 bigamy-related convictions in the territory of Utah were reported. *See* Linford, *supra* note 31, at 366.

69. *See* E. FIRMAGE AND R. MANGRUM, *supra* note 31, at 205.

70. *See id.*

Finally, on September 25, 1890, the Church capitulated. President Wilford Woodruff issued what is commonly referred to as "The Manifesto," which stated in relevant part:

> Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws, and to use my influence with the members of the Church over which I preside to have them do likewise.
>
> There is nothing in my teachings to the Church or in those of my associates, during the time specified, which can be reasonably construed to inculcate or encourage polygamy; and when any Elder of the Church has used language which appeared to convey any such teaching, he has been promptly reproved. And I now publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriage forbidden by the law of the land.[71]

The Church formally adopted the Manifesto at its general conference of October 6, 1890.[72] Utah became a state on January 4, 1896, and polygamy was explicitly banned under the fledgling state's constitution.[73]

D. Early Developments in the Family Rights of Utah Polygamists

For most Americans, polygamy ceased to be an issue after the Manifesto. Occasionally prosecutors initiated criminal proceedings against isolated polygamists under the *Reynolds* approach,[74] but

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71. DOCTRINE AND COVENANTS Official Declaration—1 (1890).

72. *See* G. LARSON, THE AMERICANIZATION OF UTAH FOR STATEHOOD 266-67 (1951).

73. See supra note 5 (text of constitutional provision prohibiting polygamy). For comprehensive treatments of the formation of the Utah Constitution and its early amendments, see generally Flynn, *Federalism and Viable State Government—The History of Utah's Constitution*, 1966 UTAH L. REV. 311; and Ivins, *A Constitution for Utah*, 25 UTAH HIST. Q. 95 (1957).

74. *See supra* notes 40-49 and accompanying text (discussing *Reynolds*). The Supreme Court reaffirmed *Reynolds* in Cleveland v. United States, 329 U.S. 14 (1946). In *Cleveland*, the Court upheld a conviction for polygamy under the White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended 18 U.S.C. §§ 2421-2424 (1988)), which criminalized the transport of any woman or girl across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose . . . ." *See*

polygamy was largely considered a vestige of Utah's formative years.

Polygamy, however, was still very much an issue in Utah. The Manifesto met with considerable resistance from Mormons who refused to disband their polygamous families. Many Mormons were bewildered that, in the face of secular pressures, the Church would disavow a divinely ordained practice that it had once so ardently defended.[75] Ironically, Mormons who refused to abandon polygamy suddenly found themselves subject to possible excommunication from their church, which had so recently encouraged them to adopt the practice.[76] Polygamists circumvented the new edict and the federal anti-polygamy laws by going

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Cleveland, 329 U.S. at 16 (citing Mann Act). The *Cleveland* Court found that the interstate transport of a woman for the purpose of making her a plural wife violated the Act because polygamy was immoral, based in promiscuity, and within the category of immoral acts that the Mann Act covered. *See id.* at 18-19.

75. *See* E. FIRMAGE & R. MANGRUM, *supra* note 31, at 355.

76. The Church generally tolerated polygamous marriages that were in existence before the Manifesto. *See* Quinn, *L.D.S. Church Authority and New Plural Marriage, 1890-1904*, DIALOGUE: A JOURNAL OF MORMON THOUGHT, Spring 1985, at 51-52. Accusations and reports of occasional polygamous marriages after the Manifesto prompted the Church to issue a series of denials, including a second Manifesto in 1904. *See id.* at 9-10. This statement, given by Church President Joseph F. Smith, stated in relevant part:

> Inasmuch as there are numerous reports in circulation that plural marriages have been entered into contrary to the official declaration of President Woodruff, of September 24, 1890, commonly called the Manifesto . . . I, Joseph F. Smith, President of the Church of Jesus Christ of Latter-Day Saints, hereby affirm and declare that no such marriages have been solemnized with the sanction, consent or knowledge of the Church of Jesus Christ of Latter-Day Saints.

4 J. CLARK, MESSAGES OF THE FIRST PRESIDENCY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 84-85 (1964-1975).

Smith's statement seems somewhat disingenuous in light of evidence that a number of Church authorities, including himself, sanctioned and performed plural marriages until 1904. *Cf.* Quinn, *supra*, at 51-57, 86 ("in 1900 Joseph F. Smith arranged for new plural marriages to be performed . . . in direct opposition to [the] total prohibition of new plural marriages at the time"). Shortly after the Church publicly abandoned polygamy in 1890, the First Presidency of the Church began to authorize and encourage members to marry polygamously in Mexico. *See id.* at 57. Joseph F. Smith personally performed at least one such marriage prior to becoming Church president. *See* R. VAN WAGONER, *supra* note 6, at 159. Additionally, Church officials Matthias Cowley, John W. Taylor, Brigham Young, Jr., George Teasdale, Abraham Woodruff, Marriner Merrill, John Henry Smith, and Anthon Lund performed plural marriages in Mexico, Canada, and the United States between 1890 and 1904. *See id.* at 158. At least two of these apostles, Cowley and Taylor, entered into new polygamous marriages of their own after the 1890 Manifesto. *See* Quinn, *supra*, at 101-03. Teasdale was strongly suspected of marrying polygamously after 1890. *See id.* at 95.

underground[77] or through several ingenious devices, the most common of which involved obtaining a sham divorce from a legal wife and marrying a new wife while continuing to cohabit with the first wife.[78] Others, however, left the Church and formed their own congregations based largely on the doctrines of the Mormon Church, except for the issue of polygamy.[79] From the 1890s until the present, the preponderance of legal activity addressing polygamy in Utah has involved members of the two largest of these churches, the Fundamentalist Church and the Allred Church.

E. State *ex rel.* Black*: Polygamy, Morality, and the Termination of Parental Rights*

On the morning of July 26, 1953, some 100 Arizona law-enforcement officers raided Short Creek, a Fundamentalist enclave of between 200 and 350 inhabitants that straddled the Utah-Arizona state line.[80] The officers arrested every man, woman, and child in the town. During the ensuing week, the arrestees were detained and booked in the local chapel while the officers searched their homes. Eventually, the officers transported the mothers and children to Phoenix and imprisoned the men and childless women until they posted bail.

Leonard Black was one of those arrested in the Short Creek raid. Husband to three women and father to twenty-six children,[81] he had two families on the Arizona side of Short Creek and another on the Utah side. Vera Johnson, the mother of the Utah family, was Black's third wife. Johnson and her eight children were undisturbed by the raid. Shortly after the raid,

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77. *See* Nedrow, *supra* note 3, at 314.

78. *See* Quinn, *supra* note 76, at 53. For a full examination of the various artifices used to enter into new polygamous marriages after 1890, see *id.* at 52-56.

79. *See id.* at 56.

80. The account of the Short Creek raid is taken from the following sources: State *ex rel.* Black, 3 Utah 2d 315, 316-23, 283 P.2d 887, 888-97, *cert. denied*, 350 U.S. 923 (1955); Nedrow, *supra* note 3, at 315; R. VAN WAGONER, *supra* note 6, at 193-99; and H. BLACKMORE, POLYGAMY: WHY AND HOW TO LIVE IT! 92-93 (1978). The Blackmore account, written by a member of the Fundamentalist Church, is a rather polemic yet vivid narrative of the raid and provides an interesting sketch of the fundamentalist view of polygamy.

81. The facts are taken from the court's opinion in *Black*, 3 Utah 2d at 316-23, 283 P.2d at 888-97.

however, a county juvenile court terminated Black's and Johnson's parental rights, finding that their children were not receiving adequate food or medical care and were living in an environment injurious to their morals and welfare.[82] The termination was to be temporarily stayed in the event that the parents abandoned their polygamous relationship and signed a statement promising not to encourage their children to practice polygamy. After Black and Johnson refused to comply with either condition, the juvenile court placed the children in the care of the Utah State Department of Public Welfare. Black and Johnson appealed to the Utah Supreme Court, claiming that terminating their parental rights because of their polygamous lifestyle unconstitutionally impinged on their religious freedom.

On appeal, the Utah Supreme Court first dispatched with Black's and Johnson's claim to religious freedom, quoting *Reynolds* at length to establish that polygamy had always been considered illegal and immoral in the United States.[83] The court then applied the *Reynolds* belief/action[84] distinction in rejecting their claim that polygamy was protected under the First Amendment.[85]

The *Black* court next addressed whether the circumstances underlying the finding of neglect justified terminating Black's and Johnson's parental rights.[86] The court initially observed that the

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82. Both Black and Johnson had been raised in polygamous families. None of the children in Black's three families had received any high school education, and none of his families lived in a home with indoor plumbing or sanitary facilities. The house where Johnson and her children lived consisted of a kitchen and living room combined with one large bedroom. The children and the wife shared two beds, and Black slept in one of those beds when he stayed at Johnson's house.

Neither Black nor Johnson discouraged their children from entering into polygamous relationships. Indeed, six of Black's daughters were married, and five of those daughters had entered into polygamous marriages. The daughters' ages at the time of their marriages was between 15 and 18 years. When asked whether they were aware that their polygamous activity violated state law, both Black and Johnson stated that the laws of God were higher than secular laws. It is unclear, however, whether Black and Johnson actively encouraged their children to enter into polygamous relationships, as their answers to such questions at trial were rather evasive.

83. *See supra* text accompanying notes 47-48 (discussing *Reynolds* Court's characterization of polygamy as immoral and subversive).

84. *See supra* text accompanying note 45 (discussing *Reynolds* Court's attempt to define "religion").

85. *See Black*, 3 Utah 2d at 341, 283 P.2d at 905.

86. At the time that *Black* was decided in 1955, parental rights could be terminated on a showing that a parent or parents had "failed and neglected to provide [the] child with the proper maintenance, care, training and education contemplated and required

purpose of terminating parental rights was "'*to provide the child with an environment such as will save him to the state and society as a useful and law-abiding citizen, and to give him* the educational requirements necessary to attain that end.'"[87] However, it was the policy of the State "'not to deprive or interfere with the important and sacred relationship of parent and child unless absolutely necessary *for the welfare of the child* or *for the protection of society.*'"[88] Therefore, children would not be taken from their parents' custody unless the parents were incompetent, had knowingly failed to provide the child with "'*proper maintenance, care, training and education* contemplated and required by *both law and morals,*'" or if the court determined that "'*public welfare or the welfare of a child* requires that his custody be taken from its [sic] parents.'"[89]

Finally, the court upheld the termination of Black's and Johnson's parental rights, finding that they had neglected to provide their children with the "*proper maintenance, care, training and education . . .* required by *both law and morals.*"[90] In a conclusion reflecting the propensity that many courts of the *Black* era had for moral declarations,[91] the court concluded:

> It would be highly desirable if these children could have the care of their natural mother, but it would be more desirable that they be brought up as law-abiding citizens in righteous homes.
>
> . . . .
>
> The practice of polygamy, unlawful cohabitation and adultery

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by both law and morals . . . ." Act of March 12 1931, ch. 29, § 29, 1831 Utah Laws 51, 62, *repealed by* Act effective July 1, 1965, ch. 165, § 47, 1965 Utah Laws 595, 619 (current version at UTAH CODE ANN. § 78-3a-48 (1990 & Supp. 1991)).

87. *Black*, 3 Utah 2d at 341, 283 P.2d at 905-06 (quoting Mill v. Brown, 31 Utah 473, 481, 88 P. 609, 613 (Utah 1907)) (emphasis in original).

88. *Id.* at 342, 283 P.2d at 906 (quoting State *ex rel.* Bennett, 77 Utah 247, 254, 293 P. 963, 966 (1930)) (emphasis in original).

89. *Id.* at 343, 283 P.2d at 907 (quoting UTAH CODE ANN. § 55-10-32 (1953)) (emphasis in original).

90. *Id.*, 283 P.2d at 907.

91. For a fascinating examination of the departure during the past four decades from the moralism that pervaded *Black* and other decisions dealing with familial relationships, see Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985). Professor Schneider attributes the movement away from moralism to changes in American moral beliefs, notions of individualism, and a legal tradition of noninterference in family affairs. *See id.* at 1807.

> are sufficiently reprehensible, without the innocent lives of children being seared by their evil influence. There must be no compromise with evil.[92]

The *Black* decision is flawed in many respects. The court's reliance on normative moral denunciations of polygamy prevented it from discussing other significant factors. For example, the court ignored the potentially adverse effects of uprooting the children from their homes or separating them from their siblings. Rather, the court's overarching concern was preserving public morals and protecting the state's interests in saving the child as a useful member of society[93] by proscribing religious conduct that violated secular law, as articulated in *Reynolds*. By the time the court decided *Black*, however, the United States Supreme Court had largely abandoned the *Reynolds* strict belief/action distinction. The Supreme Court now balances an individual's claim to first amendment protection of religiously motivated conduct against the state interest advanced by proscribing that conduct.[94]

The *Black* court's heavy reliance on moral pronouncements and the uncompromising quality of those pronouncements prevented *Black's* expansion beyond its own facts and epoch. *Black* has not been explicitly overturned, but developments over the past four decades have essentially neutered its applicability to other cases involving the family rights of polygamists. In 1965, the Utah Legislature repealed the statutory provision that allowed parental rights to be terminated in cases of parental immorality.[95] The

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92. *Black*, 3 Utah 2d at 352, 283 P.2d at 913.

93. *See supra* text accompanying notes 87-89 (discussing *Black* court's reasoning).

94. The erosion of the belief/action distinction began with Cantwell v. Connecticut, 310 U.S. 296 (1940), in which the Supreme Court established the distinction between the Free Exercise Clause and the Free Speech Clause. The court defines the freedom to believe as absolute, while maintaining a state's right to regulate conduct to protect society. The state cannot deny the rights prescribed under the First Amendment, but may regulate the manner in which those rights are exercised. *See* Wisconsin v. Yoder, 406 U.S. 205, 219-22 (1972) (Amish family's interest in insulating its children from perceived evils of secular education outweighed state's interest in educating children). *Reynolds* still is cited frequently for the proposition that governmental interests may outweigh an individual's claim to first amendment protection for religiously motivated activity. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (Jewish merchant's interest in staying open on Sunday because his observance of a Saturday Sabbath prevented him from doing business on Saturday outweighed by community interest in establishing Sunday as community day of rest).

95. *See supra* note 86 and accompanying text (legislative standard for terminating

State apparently has recognized the futility of efforts to terminate polygamists' parental rights: *Black* remains the only case in which a Utah court has terminated polygamists' parental rights, and the Short Creek raid stands alone as the only large-scale raid against polygamy in twentieth century America. The State's laissez faire approach may be attributable to an unwillingness to unleash the sympathies and criticisms that the Short Creek raid and *Black* precipitated in the general public and the media,[96] with one notable exception being the Mormon Church-owned *Deseret News*.[97] The critics of "Operation Short Creek" bristled at the heavy-handed tactics employed in the raid and the $600,000 price tag that

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parental rights prior to 1965).

96. *See* R. VAN WAGONER, *supra* note 6, at 195, 197-98. The Arizona Republic asked: "By what stretch of the imagination could the actions of the Short Creek children be classified as insurrection? Were those teenagers playing volleyball in a schoolyard inspiring a rebellion? Insurrection? Well, if so, an insurrection with diapers and volleyballs!" Arizona Republic, July 28, 1953, at A15, col. 1.

97. *See* R. VAN WAGONER, *supra* note 6, at 197. A house editorial entitled "Police Action at Short Creek" in the July 27, 1953 edition of the *Deseret News* lauded the raid:

> Law-abiding citizens of Utah and Arizona owe a debt of gratitude to Arizona's Governor Howard Pyle and to his police officers who, Sunday, raided the polygamous settlement at Short Creek and rounded up its leaders for trial. The existence of this community on our border has been an embarrassment to our people and a smudge on the reputations of our two great states. We hope Governor Pyle will make good his pledge to eradicate the illegal practices conducted there "before they become a cancer of a sort beyond hope of human repair."
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> . . . .
>
> Any individuals who may have once been members of the LDS Church and who have engaged in the practices which prompted the raid by the Government of the State of Arizona have apostatized or have been excommunicated from the Church. They are in no way connected with the Church and are living in open defiance of its doctrines and laws of the land. As one of its fundamental tenets, the Church teaches that its members believe " [i]n obeying, honoring, and sustaining the law."
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> . . . .
>
> Again, we commend the Governor for his forthright efforts. We have full confidence that the rights of the innocent will be protected, the accused will be given a fair trial, and we hope the unfortunate activities at Short Creek will be cleaned up once and for all.

Deseret News, July 27, 1953, at A8, col. 1.

The Deseret News took a similarly favorable approach to the Utah Supreme Court's ruling in *Black*. In an editorial echoing the language of the *Black* court, the Deseret News opined that although "separating children from their parents is a difficult and heart-breaking thing to do," it was justified: "The continued teaching of children to break the law is an extreme provocation. This practice on the part of parents, as much as abandonment or neglect, justifies the state's intervention both for the welfare of the children and of society." Deseret News, December 5, 1955, at A7, col. 1.

accompanied the effort.[98] Eventually the children of Short Creek, many of whom had been placed in foster homes, returned to Short Creek with their mothers.[99] The men were released from prison, and life in Short Creek returned to normalcy less than two years after the raid.[100] The State of Utah returned Leonard Blacks and Vera Johnson's children to them after they signed an agreement promising compliance with state laws regarding marriage and other sexual conduct and abstinence from teaching the children to practice polygamy.[101]

III. RECENT DEVELOPMENTS IN POLYGAMISTS' FAMILY RIGHTS

While *Black* did not usher in an era of unfettered state action against the parental rights of polygamous parents, over the succeeding three decades it did stunt the expansion of polygamist's rights in other areas of Utah family law. It is not difficult to imagine that *Black*'s thundering diatribe against polygamy precluded polygamists from seeking the courts' aid in the areas of child custody and adoption. Indeed, development in the area of polygamy and family law remained stagnant until a case with facts as improbable as *Black*'s provided the forum for reanalysis.

A. Sanderson v. Tryon: Black *Revisited*

Sanderson v. Tryon[102] involved a custody dispute over the three children of an estranged polygamous couple.[103] Jennifer Sanderson was Robert Tryon's plural wife for seven years. When the couple separated in April of 1982,[104] Sanderson took the couple's two children and bore another child almost nine months

98. *See* R. VAN WAGONER, *supra* note 6, at 195-96. The funding for the raid was secretly appropriated by the State Legislature from a special fund established for emergencies such as searching for lost hunters and flying hay to starving cattle. *See id.* at 196.

99. *See id.* at 196.

100. *See id.*

101. *See id.* at 198.

102. 739 P.2d 623 (Utah 1987).

103. The facts are taken from the court's decision in *Sanderson*, *id.* 739 P.2d at 623-27.

104. Sanderson and Tryon did not need to seek a legal separation because their polygamous marriage was not legally recognized in Utah. *See* UTAH CONST. art. III; *supra* note 5 (polygamous marriages prohibited).

later. Sanderson subsequently joined the Allred Church, which openly espouses the teaching and practice of polygamy.[105] Shortly thereafter, she entered into another polygamous relationship. Conversely, Tryon abandoned polygamy and executed an acknowledgement of paternity shortly after Sanderson's remarriage.

In August of 1983, Sanderson filed an action to increase Tryon's child support obligations and to gain formal custody of the couple's children. Tryon filed a counterclaim, also seeking custody. At trial, the court and counsel stipulated that the central issue was whether the couple's children could be taken from Sanderson solely for the reason that she practiced plural marriage. Both parties submitted motions for summary judgment arguing only that issue.

The trial court found that Sanderson's practice of polygamy established a presumption that she had knowingly failed and neglected to provide the proper maintenance, care, training, and education contemplated and required by both law and morals, and that the children were being reared in an immoral environment.[106] The court further found that absent her involvement in a polygamous marriage, Sanderson would have been a fit and proper parent.[107] Accordingly, the court held that both the public welfare and the welfare of the children mandated awarding custody to Tryon.[108] The court made no specific findings as to the parties' relative parenting capabilities or the best interests of their children.[109]

On appeal to the Utah Supreme Court, Sanderson claimed that the finding that she was involved in a polygamous relationship, standing alone, was insufficient to support the custody award

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105. *See supra* note 4 (discussing Allred Church).

106. *See Sanderson*, 739 P.2d at 625.

107. *See id.*

108. *See id.*

109. *See id.* Utah law currently mandates that courts make custody awards based on a specific assessment of which placement option is more likely to advance the best interests of the child. *See* UTAH CODE ANN. § 30-3-10(1) (1989); *see also supra* note 20 (text of § 30-3-10(1)).

In its original form, the Utah best interests statute permitted a custody award to the father on a finding that the mother was "immoral, incompetent, or otherwise an improper person." Act of March 12, 1903, ch. 82, § 1, 1903 Utah Laws 68, 68-69 (codified as amended at UTAH CODE ANN. § 30-3-10(1) (1989)). For a general discussion of the best interest standard in Utah, see Comment, *Best Interests Revisited: In Search of Guidelines*, 1987 UTAH L. REV. 651.

to Tryon or to permit meaningful review on appeal. At the outset of its opinion, the court emphasized that while the past conduct and demonstrated moral standards of the respective parties to a custody dispute must be considered, custody awards must be supported by written findings and conclusions based on "the numerous factors which must be weighed in determining the 'best interests of the child . . . .'"[110] The court further stressed that the findings and conclusions reached in determining a child's placement under the best interest standard must include "'the particular needs of [each] child and the ability of each parent to meet those needs.'"[111] The court subsequently took notice of the fact that Tryon had been awarded custody solely on the basis of Sanderson's polygamous relationship, without any findings or conclusions regarding the best interests of the couple's children or which parent would be "'the better, more nurturing parent.'"[112]

Ultimately, the court set its sights on *Black*, which had provided the cornerstone for the trial court's decision and the bulwark for Tryon's argument on appeal. The court determined that because *Black* dealt with the termination of parental rights, its analysis and ruling were inapplicable to a proceeding dealing with the child custody rights of polygamists.[113] More significantly, the *Sanderson* court declared that because the legislature had deleted the statutory provisions relied on during the *Black* era permitting the termination of custody rights in cases of parental immorality,[114] the trial court improperly had invoked the language and holding of *Black* in reaching its result.[115]

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110. *Sanderson*, 739 P.2d at 626 (quoting Smith v. Smith, 726 P.2d 423, 425-26 (Utah 1986)). In *Smith*, the court stated:

> [I]f our review of custody determination is to be anything more than a superficial exercise of judicial power, the record on review must contain written findings of fact and conclusions of law by the trial judge which *specifically set forth the reasons*, based on those *numerous factors* which must be weighed in determining the "best interests of the child," and which support the custody decision . . . . [T]he factors relied on by the trial judge in awarding custody must be articulable and articulated in the judge's written findings and conclusions.

Smith, 726 P.2d at 425-26 (citations omitted) (emphasis added).

111. *Sanderson*, 739 P.2d at 626 (quoting Martinez v. Martinez, 728 P.2d 994, 995 (Utah 1986)).

112. *Id.* (quoting Lembach v. Cox, 639 P.2d 197, 202 (Utah 1981)).

113. *See id.* at 626-27.

114. *See supra* note 86 (text of repealed legislation).

115. *See Sanderson*, 739 P.2d at 627.

Finally, the court found that a parent's "[m]oral character is only one of a myriad of factors the court may properly consider in determining a child's best interests."[116] Accordingly, the court held that the trial court's denial of custody to Sanderson, absent written findings as to how her polygamous lifestyle affected her children's best interests, was insufficient to support a custody award or permit meaningful review on appeal.[117] Rather, Sanderson's polygamous status was to be weighed as one of a number of factors in making a custody award based on the children's best interests. The trial court's custody award to Tryon was vacated and remanded.[118]

B. What Sanderson *Meant*

As the first judicial pronouncement addressing the family rights of polygamists since the 1955 *Black* decision, *Sanderson* stood out in sharp relief in several critical respects. In general, the *Sanderson* court's insistence that custody awards be based on written findings as to a child's best interests represented a departure from the *Black* court's preoccupation with terminating parental rights on the sole basis of polygamous activity to save the child to the state and society as a useful and law-abiding citizen.[119]

Most critical, however, was the *Sanderson* court's tacit refusal to adopt *Black*'s denunciation of polygamy as "immoral"[120] and "evil."[121] Although the *Sanderson* court purported to distinguish *Black* on statutory grounds, that distinction alone would not have compelled *Black*'s dismissal. Presumably, had the *Sanderson* court shared the opinion that a polygamous environment is so immoral and evil that children should not be subjected to it, Sanderson's custody action would have been dismissed as summarily as were the *Black* appellants' claims to parental rights. The fact that the *Sanderson* court not only refused to apply *Black*, but vacated the

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116. *Id.*
117. *See id.*
118. *See id.*
119. *See supra* text accompanying notes 87-92 (discussing *Black*).
120. State *ex rel.* Black, 3 Utah 2d 315, 348, 283 P.2d 887, 909, *cert. denied*, 350 U.S. 923 (1955).
121. *Id.* at 352, 283 P.2d at 913.

lower court's decision awarding custody to the monogamous parent that was predicated exclusively on *Black*'s presumptions of immorality and evil further cast a pall over *Black*'s future. Although *Sanderson* did not explicitly overrule *Black*, the message was clear: Polygamists are entitled to the same procedural protections in a custody dispute as any other parent, and polygamy no longer can be considered so immoral and evil that it will automatically emasculate a polygamist's claim to custody.

What was not so clear, however, was exactly how polygamous activity ultimately would factor into the best interests equation. Although the *Sanderson* court held that polygamy alone could not constitute sufficient grounds for denying custody, the court was careful to acknowledge that courts are nevertheless *required* to weigh the "past conduct and demonstrated moral standards of each of the parties" in making a custody determination,[122] and that polygamy remained a factor to be considered in assessing a child's best interests. Thus, *Sanderson* left open the possibility that a polygamous parent might be denied custody if articulable facts established the polygamous relationship to be detrimental to a child's best interests.

Nevertheless, *Sanderson* represented relative tolerance toward polygamists' rights as custodial parents, whether that tolerance was the result of changing societal views toward polygamy, or the heavy premium that the *Sanderson* court placed on a child's best interests. Perhaps the more gratifying result for the polygamist community in general, however, was that *Black*, which had stood as the definitive judicial denunciation of polygamy for thirty-two years, had been largely gutted.

C. *In re* Adoption of W.A.T.

Four years after *Sanderson*, the Utah Supreme Court again had occasion to address the family law rights of polygamists. In *In re Adoption of W.A.T.*,[123] the court held that polygamy, standing alone, is insufficient to automatically disqualify polygamists as adoptive parents.

Petitioners Vaughn and Sharane Fischer were legally married

122. *Sanderson*, 739 P.2d at 626.
123. 808 P.2d 1083 (Utah 1991) (plurality opinion).

and had four children.[124] Vaughn Fischer also maintained a polygamous relationship with a second woman, Katrina Stubbs, with whom he had two more children. In June of 1987, Vaughn Fischer married a third wife, Brenda Thornton. Thornton had previously been the plural wife of Joseph Phil Thornton, with whom she had six children. The Fischers and the Thorntons were members of the Fundamentalist Church, which openly espouses the practice of polygamy.[125] Shortly after Brenda Thornton became Vaughn Fischer's third wife, Vaughn and Sharane Fischer initiated proceedings to formally adopt Thornton's six children. Apparently, Brenda Thornton knew that she was dying of cancer and wanted the Fischers to legally adopt her children.[126] Brenda and Joseph Phil Thornton gave the requisite written consent to the proposed adoption of their children by the Fischers.[127]

Brenda Thornton's father, Calvin Johanson, and her half-sisters, Janet and Patricia Johanson, intervened to dismiss the Fischers' adoption petition. At trial, the sole issue was whether the Fischers' teaching and practice of polygamy disqualified them as adoptive parents. The court ruled as a matter of law that the Fischers' criminal conduct in teaching and practicing polygamy

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124. The facts are taken from the court's opinion in *W.A.T.*, *id.* at 1083-84.

125. *See supra* note 4 (discussing Fundamentalist Church and its beliefs).

126. Brenda Thornton died on August 15, 1987, two months after her polygamous marriage to Vaughn Fischer and the initiation of the adoption proceedings.

127. Section 78-30-4.1 of the Utah Code currently provides that one of the following persons must consent to an adoption or relinquish the child to a licensed child placement agency:

> (a) the adoptee, if he is over the age of 12 years, unless the adoptee does not have the mental capacity to consent;
> (b) the parents of an adoptee who was conceived or born within a marriage, unless the adoptee is 18 years of age or older;
> (c) the mother of an adoptee born outside of marriage;
> (d) the biological father of an adoptee born outside of marriage who . . . proves that after the adoptee's birth he has:
>
> > (i) developed a substantial relationship with the adoptee and has taken some measure of responsibility for the adoptee and for the adoptee's future, and demonstrated a full commitment to the responsibilities of parenthood by participating in raising the adoptee; or
> > (ii) received the adoptee into his home, openly held out the adoptee as his own child, and otherwise treated the child as if it were his legitimate child; and
>
> (e) the licensed child placing agency to whom an adoptee has been relinquished and that is placing the adoptee for adoption.

UTAH CODE ANN. § 78-30-4.1 (Supp. 1991)

made them ineligible to adopt, in essence holding that a home environment where polygamy is taught and practiced can never satisfy the Utah standard that the prospective adoption promote the interests of the child.[128] The court ordered that the Thornton children be turned over to the Utah State Division of Family Services, but the order was stayed pending appeal to the Utah Supreme Court.

W.A.T. produced three opinions at the supreme court, each approaching the relationship between polygamy and adoption from a different perspective. Justice Durham wrote the lead opinion in which Justice Zimmerman joined,[129] Justice Stewart concurred in the lead opinion's result, but wrote a separate concurrence,[130] and Associate Chief Justice Howe wrote a dissent,[131] joined by Chief Justice Hall.[132]

1. *The Lead Opinion*

At the outset, the lead opinion was careful to emphasize that the appeal involved the *dismissal* of a petition for adoption without a hearing, not a denial of a petition for adoption. The Fischers were legally married because Sharane Fischer was Vaughn Fischer's first wife. Thus, the sole issue was whether the trial court could deny the Fischers a hearing on the sole ground that they lived in a polygamous household.[133] The lead opinion next emphasized that under Utah's adoption statute, the sole standard for permitting an adoption is that the trial court be satisfied, after conducting a hearing, that the prospective adoption will promote the adoptee's interests.[134] In dismissing the Fischers' adoption petition without a hearing, the trial court had improvidently engrafted a "'public policy' requirement that prohibits certain kinds of 'wrongdoers' from judicial review of the merits of their petitions for adoption":[135]

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128. *See W.A.T.*, 808 P.2d at 1084 (discussing trial court's application of UTAH CODE ANN. § 78-30-9 (Supp. 1991)).

129. *See id.* at 1086.

130. *See id.* (Stewart, J. concurring).

131. *See id.* at 1088. (Howe, A.C.J. dissenting).

132. *See id.* at 1089.

133. *See id.* at 1084.

134. *See id.* at 1085 (citing UTAH CODE ANN. § 78-30-9 (Supp. 1991)).

135. *Id.*

> The fact that our constitution requires the state to prohibit polygamy does not necessarily mean that the state must deny any or all civil rights and privileges to polygamists. It is true that bigamy is a crime in Utah and that one of the petitioners here is concededly a bigamist . . . . Innumerable other acts are of course defined as crimes by other portions of the criminal code. It is not the role of the trial courts to make threshold exclusions dismissing without consideration, for example, the adoption petitions of all convicted felons, all persons engaging in fornication or adultery, or other persons engaged in other illegal activities. There is likewise no legitimate basis for the courts to disqualify all bigamists (polygamists) as potential adopters.[136]

Justice Durham then explained that the proper role for a trial court in an adoption proceeding is to hold a hearing to examine all evidence regarding the specific characteristics of the petitioning parents and the children they seek to adopt, and make a considered factual determination concerning whether placement with the petitioning parents would promote the child's interests.[137] She further explained that although a prospective adoptive parent's illegal conduct would factor into such a factual determination, "enforcing criminal laws is a matter wholly separate from the function of the court in an adoption proceeding."[138] Rather, "such conduct is subsumed by the interest of the child standard."[139]

Justice Durham acknowledged that on remand a fully developed record might indicate that placing the children with the Fischers might not promote the children's interests for any number of reasons, including the Fischers' polygamous lifestyle.[140] The trial court's error, however, was in declaring that polygamists could *never* adopt children regardless of the circumstances surrounding a particular case. The lead opinion then suggested that courts consider relevant circumstances such as alternatives available to a child whose only prospects for placement were with a polygamous family, the actual nature of the

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136. *Id.* at 1085.
137. *See id.*
138. *Id.* at 1086.
139. *Id.*
140. *See id.*

polygamous family's lifestyle, any special needs of the child, or the existence and extent of any ongoing nurturing relationship between the child and the prospective adopting polygamist parent.[141]

The court also posed a number of hypothetical situations where a blanket exclusion of polygamists' adoption petitions would not promote the adoptee's interests. These included situations where: (1) the only alternative to placing a child with a polygamous family would be foster placement and the possible separation of siblings; (2) practicing polygamists desiring to adopt were strongly committed to maintaining their relationships, but were opposed to promoting a polygamous lifestyle to their children; and (3) a child is "so severely mentally or physically handicapped that he or she could never participate in plural marriages, but facts indicated that a polygamous family could provide optimum specialized care."[142]

2. Justice Stewart's Concurrence

Justice Stewart concurred in the lead opinion's result, but characterized the central issue not as whether polygamists have a right to a hearing in an adoption proceeding, but "whether children subject to adoption should be adopted by adults who are living in a continuous, ongoing violation of the law concerning one of the most fundamental institutions in society."[143] He added that while he did not consider polygamists to be depraved or debased, society has the right to determine how its most basic social unit should be organized.[144] Society and its political representatives established a monogamous system of marriage to advance certain basic societal values.[145] Accordingly, Justice Stewart indicated that he considered polygamy to be presumptively detrimental to its adherents' prospects as adoptive parents:

> Not only is polygamy a factor that weighs against adoption, but it is a factor which I believe must be given

141. *See id.*
142. *Id.*
143. *Id.* at 1087 (Stewart, J., concurring).
144. *See id.*
145. *See id.*

> considerable weight and, at least in some cases, will be the determining factor. I am aware that in so stating, I have not defined a precise, workable standard, but this is the kind of case in which a trial judge should not be bound by such rigid standards that one's best wisdom in the exercise of highly equitable powers must be abandoned . . . . I emphasize that I consider polygamy neither a neutral factor nor a determinative factor as a matter of law in adoption proceedings. There must be clear and solid reasons based on the present and future welfare of the children to *justify* an adoption by polygamous parents.[146]

3. The Dissent

Associate Chief Justice Howe, who had concurred with Chief Justice Hall's majority opinion in *Sanderson*, wrote a dissenting opinion in which Chief Justice Hall joined.[147] The dissent took issue with the plurality primarily on two points. First, the dissenters disagreed with the plurality's determination that the Fischers' adoption petition had been dismissed without an evidentiary hearing. To counter the uncontested fact that they taught and practiced polygamy, the Fischers submitted affidavits from Rulon T. Jeffs, the president of their church,[148] and a social worker's assessment of their home as a potential living environment. For Justices Howe and Hall, the Fischers were allowed to proffer all the evidence they wanted to present, and the trial judge's weighing of that evidence against the Fischers admitted practice of polygamy constituted an evidentiary hearing.[149]

Second, the dissent stressed that adoption is not a right, but the extension of a privilege,[150] and concluded that polygamists in general and the Fischers in particular should automatically be disqualified from adoption:

> If the adoption were granted, the six Thornton children would be permanently added to this family, where on a daily basis

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146. *Id.* (emphasis added).

147. *See id.* at 1088 (Howe, A.C.J., dissenting).

148. *See supra* note 4 (discussing Fundamentalist Church).

149. *See W.A.T.*, 808 P.2d at 1088 (Howe, A.C.J., dissenting).

150. *See id*; *see also infra* notes 208-19 and accompanying text (discussing statutory basis of adoption privilege).

> they would be exposed to the teachings and practice of plural marriage. It would be difficult to conceive of a factor which works more against the "interests of the child[ren]" than ongoing criminal conduct by the adoptive parents in the home where the children are being nurtured and raised . . . . Teaching and demonstrating to children on a daily basis that the statute proscribing bigamy may be ignored and [flouted] may well breed in the children a disrespect for observance of other laws . . . . The state in its role as *parens patriae* of the children owes a high duty to them in approving whoever shall adopt them . . . . That duty would not be met in granting the privilege to adopt to the petitioners, who live on a daily basis outside the law.[151]

4. *What* W.A.T. *Meant*

On the surface, the *W.A.T.* plurality's holding—that adoption petitions cannot be dismissed solely on the grounds that the parties practice polygamy—might be an expansion of polygamists' rights in the area of family law and a logical development after *Sanderson*. However, *W.A.T.* may not be as favorable a statement on the family rights of polygamists as it might appear to be. The basic holding that polygamists are entitled to the same evidentiary hearing as all other prospective adopting parents was the only issue that commanded a clear majority of the *W.A.T.* court. Even though Justice Stewart concurred with the lead opinion on the matter of the evidentiary hearing, his view that the hearing should produce clear and solid reasons to justify an adoption by polygamous parents seems closer to the dissent's position that polygamy should pose an absolute bar to adoption. Thus, while three members of the *W.A.T.* court would not categorically disqualify polygamists from adopting, three members of the court would either support such disqualification or oppose adoption by polygamists absent solid justifications.

IV. NOW W.A.T.?

Sanderson and *W.A.T.* were consistent with the premium that

151. *W.A.T.*, 808 P.2d at 1089 (Howe, A.C.J., dissenting).

Utah courts place on assessing how various placement options will affect the child's interests. Neither decision, however, sheds much light on how a polygamous lifestyle ultimately would affect polygamists' efforts to adopt or gain child custody. A discussion of how the courts should weigh a polygamous lifestyle in future cases involving custody awards or adoption petitions is necessary for two reasons. First, the less hostile judicial posture toward polygamists' family rights reflected in *Sanderson* and *W.A.T.* may usher in a period of intense activity and development in the area of polygamists' rights in familial relationships.[152] Polygamists, knowing at least that they will not be disqualified automatically as custodial or adoptive parents, may increasingly turn to the Utah courts to establish legally recognized parent—child relationships, thus forcing the courts to elucidate more fully what weight a polygamous lifestyle will have in those proceedings.[153] Although *Sanderson* and *W.A.T.* might seem unique and perhaps unlikely to be duplicated, there is every possibility that Utah courts will in the future be faced with scenarios substantially similar to those encountered in those two cases. It has not been uncommon for polygamous wives to abandon their relationships,[154] thus opening the way for possible custody disputes. Although neither party

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152. Shortly after *W.A.T.* was decided in March of 1991, a widow of slain polygamist leader Rulon Allred and 21 of his surviving 42 children filed suit against his confessed murderer, Rena Chynoweth, seeking $130 million in damages for loss of consortium and association. *See* Deseret News, July 13, 1991, at B1, col. 2. The case raises the interesting prospect of separately assessing the value of Allred's relationship with each individual plaintiff to arrive at a damage award.

153. The fairly recent increase in cases involving the rights of homosexuals as custodial and adoptive parents may be instructive. Custody cases involving homosexual litigants were rare until the late 1970s. One commentator attributes this early dearth of reported decisions in this area to factors that also would seem to explain the paucity of cases involving polygamous litigants in family law until *Sanderson*: resignation to the unlikelihood of prevailing in the suit, reticence to discuss the facts openly or to publish a detailed opinion, and fear of the collateral consequences that might be visited on a revelation of homosexuality. *See* Rivera, *Our Strait-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 884-86 (1979). For discussions of homosexuals' rights in various areas of family law, see generally Robson & Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMPLE L.Q. 511 (1990) (analysis of legal approaches to lesbian coupledom); and Note, *Adoption in the Non-Traditional Family—A Look at Some Alternatives*, 16 HOFSTRA L. REV. 191 (1987) (sexual conduct of parents is factor in determining best interests of child).

154. *See* K. YOUNG, ISN'T ONE WIFE ENOUGH? 226-40 (1954). There are no documented cases of polygamist fathers abandoning their families.

would be able to assume the moral high ground in a custody dispute between two polygamous parents, such a dispute does offer the possibility of the state intervening as *parens patriae*[155] and awarding custody to a third party.[156] Moreover, there is a possibility, albeit remote, that a custody dispute might arise wherein one party is a polygamist and the other is not, as occurred in *Sanderson*.

There is a greater possibility that an adoption case similar to *W.A.T.* might recur. Persons who leave polygamous relationships would seem just as likely to remarry or formulate new living arrangements as persons who leave monogamous marriages or relationships. If a polygamous mother enters a second polygamous relationship after leaving another polygamous relationship or being widowed, her new husband might initiate proceedings to formally adopt his new wife's children.[157]

A second reason for discussing how polygamy should ultimately factor into a custody dispute or an adoption proceeding lies in the elasticity of the "best interests of the child" standard employed in custody disputes and the "promoting the interests of the child" standard used in adoption proceedings. Because those legislative standards are largely undefined, the task of determining how polygamy affects the child's interests falls to the courts on a case-by-case basis.

The remainder of this Comment analyzes how the courts should assess a polygamous lifestyle when considering the child's interests in custody disputes and adoption proceedings. Although the interests of the child are the fulcrum of both custody and adoption proceedings, critical differences exist between the rights of natural parents in a custody dispute and the rights of putative adoptive parents. Parties to a custody proceeding carry certain

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155. *Parens patriae* literally means "parent of the country." BLACK'S LAW DICTIONARY 114 (6th ed. 1990). Generally, the term is a concept of standing referring to the state's role as sovereign and guardian of persons under a legal disability, such as juveniles or the insane. *See id.*

156. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 811 (2d ed. 1987).

157. This approach has been approved in a small but growing number of cases involving lesbian-mother families, where one partner adopts the natural-parent partner's child from a previous relationship. *See* Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 GEO. L.J. 459, 522 n.355 (1990).

fundamental rights as the natural parents of the children subject to the dispute,[158] while persons seeking to adopt possess no such rights.[159] The state's interests in the custody proceedings are slight when weighed against those of the natural parents. Conversely, the state's interests become more compelling when weighed against the position of putative adopters. Because the parties to custody disputes and adoption petitions stand before the courts in a different light, the standard for assessing how a polygamous lifestyle should factor into custody disputes differs from that which should apply to adoption petitions. Accordingly, the weight that polygamy should carry in the respective proceedings is assessed separately.

A. Polygamy and Child Custody

Child custody awards in Utah are based on a court's determination of which placement option serves the best interests of the child.[160] The best interests standard is applicable to all custody disputes, including those involving parents who never married or whose purported marriages are not legally recognized.[161] The best interests standard is largely undefined,[162] and although the Uniform Marriage and Divorce Act no longer admonishes courts to consider the moral conduct of a proposed custodian unless that conduct somehow affects the child's interests,[163] courts are free to consider a rather comprehensive list of factors in arriving at a

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158. *See infra* notes 166-69 and accompanying text (discussing Supreme Court cases construing parental rights).

159. *See infra* notes 208-19 and accompanying text (discussing interests of putative adoptive parents).

160. *See* UTAH CODE ANN. § 30-3-10 (1989).

161. *See, e.g.*, Lembach v. Cox, 639 P.2d 197, 199-200 (Utah 1981) (court gave primary consideration to best interests of child when father of illegitimate child opposed trial court's award of custody to mother); Slade v. Dennis, 594 P.2d 898, 901 (Utah 1979) (best interests analysis used to establish father's rights to visit illegitimate child).

162. For criticisms of the best interests standard based on its indeterminate qualities and its reliance on conjecture, see generally Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (best interests standard too dependent on judges' ability to predict which parent is more suitable); Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 11 (1987) (best interests of the child should not be the sole factor in determining custody award).

163. *See* UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 147, 561 (1987). Utah has not adopted the Uniform Marriage and Divorce Act.

custody decision.[164] As such, it is possible that a parent's deviance from majoritarian morality will influence a trial court's custody determination, even in jurisdictions where deviant behavior does not constitute a per se disqualification from obtaining custody.[165]

1. The Rights of Parents and the Interests of the State in Custody Proceedings

The United States Supreme Court has established that parents have fundamental rights to the care, custody, and companionship of their children[166] and to raise the children free from governmental interference absent compelling circumstances.[167] The Court has deemed parental rights to child custody

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164. *See id.* Section 402 of the Uniform Marriage and Divorce Act provides:

> The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
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> (1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
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> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
>
> (4) the child's adjustment to his home, school, or community; and
>
> (5) the mental and physical health of all individuals involved.
>
> The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Id.

165. *See* Elster, *supra* note 162, at 29 (trial judge's reasoning in custody disputes "may be influenced by interests other than the particular child's, interests that are irrelevant under existing law but that they feel are morally pertinent or will lead to socially desirable behavior").

166. *See* Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) (fundamental rights in one's children cannot be terminated absent at least clear and convincing evidence of parental misconduct); *see also* Stanley v. Illinois, 405 U.S. 645, 657 (1972) (terminating father's interest in his illegitimate children without demonstrating parental unfitness constitutes denial of equal protection under law).

167. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944). The *Prince* court stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166; *cf.* Roe v. Wade, 410 U.S. 113, 155 (1973) ("[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest'" (citations omitted)); *see also* Wisconsin v. Yoder, 406 U.S. 205, 219-22 (1972) (state's interest in ensuring child's education may be subordinate to parent's right to direct children's religious education under circumstances of case); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (state prohibition of private schools violated parental right to raise and direct education of children); Meyer v. Nebraska, 262 U.S. 390, 403 (1923)

"far more precious . . . than property rights,"[168] and has declared that those rights do "not evaporate simply because [parents] have not been model parents . . . ."[169]

On the other hand, states have a valid interest in enacting laws or criminal statutes proscribing certain conduct that offends a majoritarian view of morality.[170] The state also has a legitimate interest in protecting the welfare of minor children in its capacity as *parens patriae*.[171] In this role, a child who is the subject of a custody proceeding is a ward of the court, and the court may award custody to a third party, including the state, if it determines that neither parent is fit.[172] Absent a finding that the parents are unfit, however, the state's interest in assuming the custody of a child is de minimus.[173]

2. Judicial Approaches to Applying Deviant Parental Conduct to Custody Proceedings

Generally, courts or legislatures take one of three approaches in assessing a parent's deviant conduct in child custody disputes.

(state prohibition of teaching any language other than English in private schools infringed on liberty of parents and teacher to direct child's education).

168. May v. Anderson, 345 U.S. 528, 533 (1953).

169. *Santosky*, 455 U.S. at 753.

170. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Georgia criminal law proscribing consensual sodomy between adults upheld as an expression of prevailing morality); Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 505 (1965) (White, J., concurring). For example, in *Poe*, Justice Harlan maintained that "the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well." *Poe*, 367 U.S. at 545-46 (Harlan, J., dissenting). In *Griswold*, Justice White stated that "the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal." *Griswold*, 381 U.S. at 505. (White, J., concurring); *see also* Eisenstadt v. Baird, 405 U.S. 438, 448 (1972) (no relationship between restricting sale of contraceptives to married persons and state's asserted interest in regulating extramarital sexual conduct).

171. *See* Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) ("the state as *parens patriae* may restrict the parent's control . . . [and it] has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare").

172. *See* H. CLARK, *supra* note 156, at 811, and authorities cited therein.

173. *See* Stanley v. Illinois, 405 U.S. 645, 657-58 (1972); *see also In re* Marriage of Wellman, 104 Cal. App. 3d 992, 164 Cal. Rptr. 148 (1980) (even in its capacity as *parens patriae*, state has no right to impose its theories of parenting on two persons involved in divorce and custody proceedings).

In some states, the deviant conduct establishes an irrebuttable presumption of parental unfitness, barring the parent from prevailing in the custody proceeding.[174] Other states place a heavy emphasis on deviant parental conduct, which almost invariably results in the denial of custody when balanced against the child's best interests.[175] Finally, some jurisdictions require a showing that a parent's deviant conduct adversely impacts a child for the conduct to become a factor in the custody dispute. This standard has been extended to custody disputes involving a wide range of deviant parental conduct, including promiscuity,[176] adultery,[177] divorced parent cohabiting with a married person,[178] homosexuality,[179] and transexuality.[180]

While the Utah best interests statute requires courts to consider the moral conduct of the parties to a custody dispute,[181] the statute is silent on the weight that should be attached to moral conduct. The Utah Supreme Court, however, has required

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174. *See, e.g.*, M.J.P. v. J.G.P., 640 P.2d 966, 969-70 (Okla. 1982) (custody award to mother modified because of her open lesbian relationship, despite no finding of parental unfitness on mother's part or evidence that her lesbian relationship had adversely affected her child).

175. *See, e.g.*, Jacobson v. Jacobson, 314 N.W.2d 78, 81-82 (N.D. 1981) (custody denied to homosexual mother because her lifestyle was contrary to societal mores); Dailey v. Dailey, 635 S.W.2d 391, 393-94 (Tenn. Ct. App. 1981) (homosexuality sufficient grounds to modify an existing custody arrangement despite the homosexual parent's fitness).

176. *See, e.g.*, Feldman v. Feldman, 45 A.D.2d 320, 358 N.Y.S.2d 507, 510 (App. Div. 1974) (custody modification denied absent showing that mother's promiscuity and presence of pornographic magazines in her home had adversely impacted children).

177. *See, e.g.*, Solly v. Solly, 384 So. 2d 208, 209 (Fla. Dist. Ct. App. 1980) (standing alone, parent's adultery should not be considered in custody dispute unless it had bearing on child's welfare).

178. *See, e.g.*, Christensen v. Christensen, 31 Ill. App. 3d 1041, 1044, 335 N.E.2d 581, 584 (1975) (mother adjudged as fit a parent as father even though she was living with a married man); L.F.H. v. R.L.H., 543 S.W.2d 520, 523 (Mo. Ct. App. 1976) (mother's cohabitation with married man did not automatically make her an unfit parent, but was to be considered only as it related to custodial welfare of child).

179. *See, e.g.*, S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) (lesbian mother denied custody because of social stigma attached to her conduct); Bezio v. Patenaude, 381 Mass. 563, 410 N.E.2d 1207, 1216 (1980) (lesbian mother successfully appealed custody award to guardian on finding that her sexual orientation bore no relationship to her parenting abilities); Doe v. Doe, 452 N.E.2d 293, 296 (Mass. App. 1983) (mother's homosexual lifestyle did not preclude joint custody).

180. *See, e.g.*, Christian v. Randall, 33 Colo. App. 129, 133-34, 516 P.2d 132, 134-35 (1973) (children's interests best served by having them stay in mother's custody, even though she had undergone a sex change operation and married a woman).

181. *See* UTAH CODE ANN. § 30-3-10 (1989).

that parental conduct result in some demonstrable harm to the child for such conduct to constitute grounds for denial of custody. For example, in *Fontenot v. Fontenot*,[182] the court declined to revoke a mother's custody after she had engaged in several relationships with men and had a child out of wedlock as a result of one of the relationships. Although the mother received a number of overnight visitors in the presence of her children, and the circumstances clearly indicated that adultery or fornication had taken place, the court held that absent a finding that the mother's conduct adversely impacted the children, the conduct did not warrant a change in custody.[183]

Similarly, in *Shioji v. Shioji*,[184] the Utah Supreme Court vacated a lower court's custody modification based on a mother's practice of having her boyfriend stay overnight, due to the lack of written findings of fact demonstrating that the mother's conduct had negatively affected her children.[185] After a remand to the trial court to enter such findings, the trial court's ruling that custody should be transferred to the father was affirmed in a second proceeding before the Utah Supreme Court.[186] The opinion emphasized that the change was based on findings that the mother's extramarital conduct had in fact exacted a negative toll on her children.[187]

The Utah Supreme Court has applied a similar standard to deviant parental conduct that is statutorily illegal. In *Kallas v.*

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182. 714 P.2d 1131 (Utah 1986).

183. *See id.* at 1133. Utah courts have long held that adultery itself will not constitute sufficient grounds to deny custody:

> It is generally held that such misconduct as found against plaintiff [adultery], although of course censurable and not to be condoned, will not necessarily of itself deprive a parent of her child . . . . The critical question for consideration is whether the conduct shown is of such a nature as to hazard [the child's] welfare and make it unwise that she be in her mother's custody.

Dearden v. Dearden, 15 Utah 2d 22, 23, 388 P.2d 230, 231 (1964); *see also* Stuber v. Stuber, 121 Utah 2d 632, 637, 244 P.2d 650, 652 (1952) (custodial parent's extramarital sexual relationship alone insufficient to justify a change in custody).

184. 671 P.2d 135 (Utah 1983).

185. *See id.* at 134-36; *see also* Sanderson v. Tryon, 739 P.2d 623, 626 (Utah 1987) (mother's polygamous practice alone insufficient to support review of custody award on appeal).

186. *See* Shioji v. Shioji, 712 P.2d 197 (Utah 1985).

187. *See id.* at 201.

Kallas,[188] the court declined to revoke the visitation rights of a lesbian mother who was a habitual drug user.[189] The court indicated that a parent's sexual conduct[190] is only one of many factors to consider in suits involving custody awards and visitation arrangements.[191] Although homosexuality is concededly different from polygamy in that the latter might be considered a social rather than a sexual deviancy,[192] *Kallas* at least indicates that Utah courts will not deny custodial placement on the basis of a parent's illegal conduct or lifestyle unless there is some nexus between the conduct and some harm to the child.[193] If the court is willing to allow natural parents engaging in illegal sexual conduct to prevail in custody disputes absent a showing of harm to the child, the same standard should be applied to polygamist parents engaging in illegal social conduct. To do otherwise would be to invite inconsistency and tenuous distinctions in the court's treatment of statutorily proscribed alternative lifestyles.

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188. 614 P.2d 641 (Utah 1980).

189. *See id.* at 641, 645.

190. Section 76-5-403 of the Utah Code provides:

> (1) A person commits sodomy when the actor engages in any sexual act with a person who is 14 years of age or older involving the genitals of one person and mouth or anus of another person, regardless of the sex of either participant.
>
> (2) A person commits forcible sodomy when the actor commits sodomy upon another without the other's consent.
>
> (3) Sodomy is a Class B misdemeanor. Forcible sodomy is a felony of the first degree.

UTAH CODE ANN. § 76-5-403 (1990).

191. The *Kallas* court stated that "[a]lthough a parent's sexuality in and of itself is not alone a sufficient basis upon which to deny completely a parent's fundamental right, the manifestation of one's sexuality and resulting behavior patterns are relevant to custody and to the nature and scope of visitation rights." *Kallas*, 614 P.2d at 645.

192. *See* Nedrow, *supra* note 3, at 339-41. Nedrow asserts that the difficulty in balancing the state's interest against the personal constitutional liberties of a person deviating from the social norm "is compounded in the case of plural marriage by the popular confusion of this marriage form with deviant sexual practices . . . . [E]ven sophisticated jurists have mistakenly categorized polygamy with fornication, adultery, and homosexuality." *Id.* at 341. Nedrow further argues that the "plural household is merely an extension of the conventional nuclear family." *Id.* at 339.

193. Other state courts also have refused to apply irrebuttable presumptions against parents engaged in illegal homosexual activity. *See, e.g.*, Doe v. Doe, 284 S.E.2d 799, 805 (Va. 1981) (court declined to deny custody even though parent's homosexual conduct violated state law); DiStefano v. DiStefano, 60 A.D.2d 976, 401 N.Y.S.2d 636, 638 (1978) (mother's homosexuality did not render her per se unfit as a parent, although her sexual practices were crime in state); DH v. JH, 418 N.E.2d 286, 291-93 (Ind. Ct. App. 1981) (holding that homosexuality does not render parent unfit for custody as a matter of law absent showing of adverse impact on child).

3. Polygamous Conduct and the Child's Best Interests

The Utah Supreme Court has demonstrated that it will attach dispositive weight to a parent's deviant or illegal conduct when determining the best interests of a child only where that conduct adversely impacts the child. Therefore, the fundamental question becomes whether daily exposure to a polygamous lifestyle is so demonstrably harmful to children that polygamist parents should be subjected to a different standard than parents who engage in other deviant or illegal behavior.

Although polygamy might be the most universally rejected of all alternative lifestyles, it is almost impossible to assess how a polygamous environment actually impacts a child. There have been no studies examining how exposure to polygamy has affected children in contemporary polygamist families.[194] There are, however, studies involving children raised in "multilateral," or communal, family structures without one set of principal parents.[195] Though the conclusions from these studies cannot be

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194. For studies examining the effects of polygamy on Mormon families in the late nineteenth and early twentieth centuries, see generally K. YOUNG, *supra* note 154; J. EMBRY, MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE (1987). Both studies are based on interviews with persons who lived in polygamist families shortly before or after the turn of the century. Both reported that children from polygamist families often experienced feelings of detachment from their fathers. Embry concluded that approximately 13% of the adults whom she interviewed reported that they had received no attention at all from their fathers when they were children. *See* J. EMBRY, *supra*, at 159. Fifty-two percent reported that they received little or no attention from their fathers, and only 35% stated that they had close relationships with their fathers. *See id.* By contrast, Embry reveals that none of the adults surveyed who had been raised in monogamous families during the same era reported a total lack of attention from their fathers. *See id.*

While the two studies offer insightful conclusions into the problems confronted by children in polygamous families during the late 1800s and early 1900s, radical societal changes that have occurred during the past 100 years strongly militate against applying the comparisons between polygamous and monogamous families of 100 years ago to the current debate on the effect of polygamy on a child. Because the number of single-parent families in America has increased markedly over the past century, the number of children from monogamous families who have little contact with their fathers in contemporary society surely would be much higher than a century ago. In any event, children who are at the epicenter of a custody dispute almost inevitably will be placed in living arrangements where they will have decreased and possibly no contact with the parent who does not get custody.

195. *See* L. CONSTANTINE & J. CONSTANTINE, GROUP MARRIAGE (1973) (study of children living in multilateral families); E. FRANCOEUR, EVE'S NEW RIB: TWENTY FACES OF SEX, MARRIAGE, AND FAMILY (1972) (examination of children raised in the Oneida, New York commune between 1848 and 1869); A. RABIN, GROWING UP IN THE KIBBUTZ (1965) (study of children raised in Kibbutzim system in Israel).

applied wholesale to children in polygamous families, they do shed some light on how alternative lifestyles similar to polygamy might affect children. Generally, these studies conclude that the degree of parental concern and attention bestowed on a child is more important to the proper development of a child than is the composition of the family. One study examining the lives of forty children dispersed among twelve multilateral families concludes that "[o]n most issues, the structure of the family has little bearing on the children's development. What does affect them is the nature and the quality of their parents' interactions with them and with each other. As in nuclear families, good marriages are good for children, bad marriages are not."[196] The studies also find that children raised in group marriages or communal families were "self-reliant but cooperative, competent more than competitive, friendly, robust, and self-confident. They were happy with positive, realistic images of themselves. With few exceptions, children have fared uncommonly well in these families; fear of major emotional damage can be laid to rest, at least."[197]

Admittedly, these studies do not address children raised in polygamous families. However, the group marriages and communal living arrangements that they examine are much more analogous to polygamous families than are other deviations from majoritarian morality that are more sexual in nature than is polygamy. In any event, the available research on group marriage and communal living does not reveal any adverse effect on the children raised in those plural societies.[198] Nor is there any empirical evidence that establishes a negative impact on children raised in polygamous homes.

In the absence of hard evidence demonstrating a link between deviant parental conduct and harm to a child, courts often resort to normative conjecture about how alternative lifestyles will adversely impact children. These assumptions include assertions

196. L. CONSTANTINE AND J. CONSTANTINE, *supra* note 195, at 160.

197. R. LIBBY & R. WHITEHURST, MARRIAGE AND ALTERNATIVES: EXPLORING INTIMATE RELATIONSHIPS 259-60 (1977); *see also* R. FRANCOEUR, *supra* note 195, at 159-68 (commune children raised by parents in group marriages described as independent, confident, and quite normal).

198. There even may be a possibility that the greater number of relationships available to a child in a plural family than in a nuclear family might be a positive factor in the child's development, although no studies address this possibility.

that: (1) the child's moral standards will be compromised by exposure to particular conduct;[199] (2) the parent's conduct will subject the child to ridicule or stigmatization;[200] (3) a living environment where one facet of the law is perpetually violated will imbue the child with a general disrespect for all laws;[201] and (4) the child will eventually assimilate the alternative lifestyle to which he is exposed.[202]

None of these presumptions is sufficient to satisfy the Utah standard requiring a demonstrable adverse impact on the child. The Utah Supreme Court and the United States Supreme Court have explicitly held some of these presumptions unacceptable in the context of child custody disputes. First, in *Kallas*, the Utah Supreme Court acknowledged that a child raised by a homosexual parent may experience some moral conflict, but stated that the assumption that a child will experience such conflict contradicts basic notions of tolerance crucial to a pluralistic society.[203] Second, the United States Supreme Court has rejected the notion that private biases and injuries that may be inflicted as the result of such biases are permissible justifications for denying custody.[204] Third, the fact that a person flouts one area of the law

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199. *See* J.P. v. P.W., 772 S.W.2d 786, 789 (Mo. Ct. App. 1989) ("private personal conduct by a parent which *could well* have an effect on children during the years in which their character, morality, virtues and values are being formed cannot be ignored or sanctioned by courts") (citation omitted) (emphasis added).

200. *See* S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (child custody award to father based on fear that mother's lesbianism would subject child to stigmatization upheld).

201. *See, e.g., In re* W.A.T., 808 P.2d 1083, 1089 (Utah 1991) (Howe, A.C.J., dissenting) ("[t]eaching and demonstrating to children . . . that the statute proscribing bigamy may be ignored . . . may well breed in the children a disrespect for observance of other laws").

202. *See, e.g.*, Black v. Black, 1988 WL 22823, slip op. at 3 (Tenn. Ct. App. March 10, 1988) (not reported in S.W.2d) ("it is unacceptable to subject children to any course of conduct that might influence them to develop homosexual traits, and the facts of this case indicate that there is a strong possibility, because [the mother and her lesbian lover live together], the children would be subjected to such influences").

203. *See* Kallas v. Kallas, 614 P.2d 641, 643 (Utah 1980).

204. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984). In *Palmore*, the court held that a custody denial to a mother who had remarried interracially violated the Equal Protection Clause because the Fourteenth Amendment was designed to eliminate government-imposed racial discrimination. *See id.* at 432-33. While the Court recognized the possibility that the child might be exposed to ridicule, the fear of such possible injury could not support a custody denial. *See id.*

does not necessarily translate to disrespect for all laws.[205] Finally, the contention that children raised in a polygamous home are harmed because they will practice polygamy as adults is a tautology of sorts, as the mere perpetuation of polygamy does not speak to whether or not the practice itself is immoral. More importantly, speculation about the effect that a parent's moral conduct will have on a child hardly satisfies the standard applied by Utah courts requiring that parental conduct adversely impact a child before becoming determinative in a custody dispute.

Whatever the suspected negative impact of a child's exposure to polygamy might be, a polygamist household affords the child a continuity of adult relationships. A child's need for a stable home environment is so paramount that disruption of the parent-child relationship, even in cases where parental care seems to be inadequate, frequently does more harm than good.[206] The stability afforded by a polygamist environment should not be lightly regarded in a custody proceeding.

4. How Polygamous Conduct Should Factor into Custody Proceedings

Perhaps the greatest difficulty in assessing the effect of polygamous activity on a custody proceeding is not surrendering to mainstream society's almost universal repulsion toward polygamy. The critical questions are not whether the state has the right to make polygamy illegal or even whether polygamy itself is immoral. Rather, the fundamental issue in a custody proceeding is whether polygamists may be deprived of their fundamental rights to the care, custody, and nurturing of their children. The Utah Supreme Court requires a showing that deviant or illegal parental conduct adversely impacts children involved in a custody

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205. *See* Rosenhan, *Moral Character*, 27 STAN. L. REV. 925, 926 (1975) (argument that people who behave improperly in one regard are likely to transgress in others is both a logical nonsequitur and a psychological error).

206. *See* Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 473-74 (1983). Dean Hafen states that "[e]mpirical studies establish beyond question 'the need of every child for unbroken continuity of affectionate and stimulating relationships with an adult.' More broadly, '[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child's normal development.'" *Id.* (quoting J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD 6 (2d. ed. 1979)).

dispute to abrogate those fundamental rights.[207] There is no evidence establishing that children raised in a polygamous household suffer any general harm that is directly attributable to their living environment. Rather, presumptions as to how a polygamous lifestyle will adversely impact children are based on conjecture and therefore do not satisfy the requirement that parental conduct demonstrably harm the child. Accordingly, polygamy should be a factor in custody disputes only if it is shown to have a direct negative impact on the children who are the subject of the dispute. Absent such a showing, the courts should preserve the fundamental rights of polygamous natural parents.

B. Polygamy and Adoption

1. The Interests of Putative Adoptive Parents and the Heightened Interests of the State in Adoption Proceedings

Persons seeking to adopt stand before the courts in a much different position than do natural parents who are parties to a custody dispute.[208] Rather than being endowed with the fundamental rights that natural parents have to the care and custody of their children, putative adopters are entreating the courts to extend a statutorily created privilege,[209] as the *W.A.T.* dissent

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207. *See supra* notes 182-93 and accompanying text (discussing Utah Supreme Court's treatment of parental rights in cases involving illegal or deviant conduct).

208. *See* Brunt v. Watkins, 101 So. 2d 852, 855-56, 857 (Miss. 1958). The *Brunt* court stated:

> Petitioners seeking the adoption of a child do not stand before the law in the same relation as natural parents; the protection of the guaranty of due process of law afforded the latter relates to fundamental and fixed rights, while such rights as the former have amounts to an expectation of the extension of a privilege. Adoption was not known to the common law; it is a creature of statute; and no person is entitled to adopt another as of right.

Id. at 855-56.

209. *See, e.g.*, *In re* Pierro, 17 N.Y.S.2d 233, 235 (1940) ("[adoption] may be given or withheld by the legislature either absolutely or conditionally at its pleasure, and a denial thereof or its grant upon conditions which are difficult or impossible of compliance would not constitute the impairment of any inherent right of any person whomsoever"); *see also* *In re* Adoption of Jameson, 20 Utah 2d 53, 54, 432 P.2d 881, 882 (1967) (right to adopt statutorily created, and court will not supply meaning not intended by Legislature); *In re* Adoption of Walton, 123 Utah 380, 383, 259 P.2d 881, 883 (1953) (adoption statute should be construed strictly).

For a comprehensive review of the development of adoption statutes, see Smith, *Adoption—The Case for More Options*, 1986 UTAH L. REV. 495, 496-502 (1986).

observed.[210]

In Utah, petitioners for adoption must satisfy certain threshold requirements before their requests are even considered. For example, they must be at least ten years older than the adoptee, unless they are married to a person ten years older than the adoptee,[211] and married persons seeking to adopt must have the consent of their spouse.[212] The failure to satisfy one of these threshold requirements precludes consideration as an adoptive parent, regardless of other abilities to promote the child's interests.

Utah courts must assess all prospective adoptions in light of whether the interests of the child will be promoted by the adoption.[213] Although the Utah adoption statute generally instructs courts to consider "any [and all] facts and circumstances pertaining to the child and his welfare,"[214] courts are specifically required to find that persons petitioning for adoption are "financially able and morally fit to have [charge of] the care, supervision, and training of the child . . . ."[215] By contrast, a natural parent in a custody dispute will have her moral conduct examined, but she is not required to affirmatively demonstrate her moral probity as is a prospective adoptive parent.[216] Rather, her moral conduct will be assessed only against that of the other natural parent seeking custody, and even then only if the conduct is shown to have adversely affected the child.[217] Similarly, while putative adopters must affirmatively demonstrate that they are of sufficient financial means to promote the interests of the children they seek to adopt,[218] the financial means of a party to a custody dispute are weighed only against those of the other party.[219]

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210. *See In re* W.A.T., 808 P.2d 1083, 1088 (Utah 1991) (Howe, A.C.J., dissenting).

211. *See* UTAH CODE ANN. § 78-30-2 (1987).

212. *See id.* § 78-30-3 (Supp. 1991).

213. *See id.* § 78-30-9.

214. *Id.* § 78-30-14(4)(e).

215. *Id.* § 78-30-14(4)(c).

216. *See id.* § 30-3-10 (1989) ("[i]n determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties").

217. *See supra* notes 160-65 and accompanying text.

218. *See* UTAH ADMIN. R. § R816-28-3E (1991) ("[t]he family shall have sufficient income and exhibit sound money management in order to assure continuing financial stability and security for the child").

219. *See, e.g., In re* J.P., 648 P.2d 1364, 1376 n.11 (Utah 1982) ("judging each parent against all other adults in an official determination of his or her child's best interests 'could lead to a redistribution of the entire minor population among the worthier

Although persons petitioning for adoption have none of the liberty interests or fundamental rights that natural parents in a custody dispute possess, the state, in its capacity as *parens patriae*, has a greater interest in adoption proceedings than it has in custody proceedings. The state has the duty of placing the child in a suitable adoptive home where the child's welfare will be safeguarded.[220] This responsibility becomes particularly weighty in light of the fact that adoption awards are immutable, and the new surrogate parent is vested with full parental rights at the expense of the child's natural parents.[221] Conversely, a natural noncustodial parent retains certain rights to the child,[222] and custody arrangements may be modified on a change in circumstances.[223] In essence, the state's role as *parens patriae* comes into play in a custody dispute only on a demonstration of both natural parents' unfitness. Absent such a showing, the state's only role in a custody proceeding is to craft a custody arrangement after assessing which of the two interested parties is most likely to advance the child's best interests. In contrast, in an adoption proceeding, the state has a duty to select from any number of prospective permanent parents, none of whom possesses the fundamental rights of the parties to a custody suit, the individuals most likely to promote permanently the child's interests. This duty, coupled with the fact that the state is extending a privilege in allowing persons to adopt, vests the state with an enormous amount of discretion in awarding adoptions.

2. *The State's Right to Deny Polygamists' Adoption Petitions*

Obviously, the requirement that petitioners for adoption demonstrate adequate moral fitness to raise children is a very

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members of the community'") (quoting Simpson, *The Unfit Parent: Conditions Under Which a Child May be Adopted Without the Consent of his Parents*, 39 DET. L.J. 347, 355 (1962)).

220. *See* Riding v. Riding, 8 Utah 2d 136, 140, 329 P.2d 878, 881 (1958) ("[t]he state is interested in being assured that before a child, who is an innocent party, shall be adopted its interests and welfare must be safeguarded").

221. *See* UTAH CODE ANN. § 78-30-9 (Supp. 1991).

222. *See, e.g.*, Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982) (loss of custody does not mandate complete denial of visitation rights).

223. *See, e.g.*, *In re* Adoption of Children by D., 61 N.J. 89, 293, A.2d 171, 173 (1972) ("[a]doption, being immutable, is quite different from a mere award of custody, which is impermanent and subject to alteration as changing circumstances require").

difficult burden for polygamists to bear. Courts may refuse to extend the adoption privilege to polygamists based solely on their perpetual commission of a felony, as long the mandatory evidentiary hearing precedes such a denial. Because the state does not have to demonstrate a compelling interest, as is required to interfere with the fundamental custodial rights of polygamous parents, no showing of any harm or potential harm that might be visited on a child placed into a polygamous adoptive home is required.

Any pleas to a right to privacy[224] by polygamists whose adoption petitions have been rejected would be futile. The right to privacy extends only to "those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'"[225] Furthermore, privacy rights "are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition,'"[226] and are "deeply pressed into the substance of our social life . . . ."[227] The courts have consistently found that polygamy is, if anything, an aberration in American history and inimical to the substance of American social life. As the *Reynolds* Court indicated, polygamy has always been expressly illegal in the United States.[228] Though *Reynolds* has been confined in certain aspects,[229] recent judicial pronouncements have rejected the notion that polygamy is protected under a right to privacy as summarily as the *Reynolds* Court would have rejected such a notion.[230]

3. The Interests of the Child: A Reprieve for Polygamists Seeking to Adopt?

From a practical standpoint, polygamists' prospects as

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224. *See* Roe v. Wade, 410 U.S. 113, 152 (1973).

225. Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)); *accord Roe*, 410 U.S. at 152.

226. *Bowers*, 478 U.S. at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

227. Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

228. *See* Reynolds v. United States, 98 U.S. 145, 165-66 (1878).

229. *See supra* note 94 (discussing erosion of *Reynold's* belief/action distinction).

230. *See* Potter v. Murray City, 760 F.2d 1065, 1070-71 (10th Cir. 1985) ("[w]e find no authority for extending the constitutional right of privacy so far that it would protect polygamous marriages . . . [and] we decline to do so"); Paris Adult Theatres I v. Salton, 413 U.S. 49, 68 n.15 (1973) (few today seriously claim that criminalizing bigamy violates First Amendment or any other constitutional provision).

adoptive parents are remote. There is no constitutionally protected right to adopt, and putative adoptive parents do not stand before the courts with the same interests or rights as natural parents. Moreover, the state has a heightened duty in selecting an adoptive home for the children under its care, and the courts are vested with immense discretion in denying adoption petitions. Finally, polygamists have no recourse to a right to privacy claim.

Polygamists, however, may find themselves ancillary beneficiaries of the Utah Supreme Court's policy of making the child's interests paramount in an adoption proceeding. If the State is committed to granting adoptions on the basis of promoting the child's interests, there might be circumstances in which those interests could be advanced only by placing the child with specific polygamous parents, as the lead opinion in *W.A.T.* suggested.[231] In fact, there surely would be circumstances in which the interests of the child would actually be compromised if the courts refused to approve a particular polygamous family as an adoptive home. Such circumstances might include separating a child from his or her siblings or removing the child from a stable, albeit polygamous, home.

Courts should carefully scrutinize the relationship between the prospective adopter and the child. If the adoption request is spawned by a new polygamous relationship wherein the father wishes to adopt the children of a new wife who is the natural mother of the children, the state's interest in finding a different home for the children is de minimus. Because the natural mother would be entitled to the custody of her children as a natural parent, the state would have to demonstrate a compelling interest to override the mother's fundamental rights. Consequently, placing the children in another home would not be an option available to the state. Moreover, if the child whom the polygamous couple seeks to adopt has lived in the home for a significant time period prior to the adoption request, the couple's prospects for adopting should be enhanced by the child's interest in a stable home environment.[232]

Such an approach would almost certainly command a majority of the current Utah Supreme Court. The lead opinion in

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231. *See In re* Adoption of W.A.T., 808 P.2d 1083, 1086 (Utah 1991).
232. *See* Hafen, *supra* note 206, at 473-74.

W.A.T. listed several scenarios illustrating the shortsightedness of a blanket prohibition of polygamists as adoptive parents.[233] Justice Stewart, though not as accommodating as the lead opinion in his views of polygamists as adoptive parents,[234] did indicate that children have an interest in being raised in the home environment most likely to provide "the children reasonable nurture, care, guidance, and love as a foundation for realizing their highest potential as human beings,"[235] thus allowing the possibility of approving polygamists as adoptive parents in cases where the child's interests clearly would be promoted.

Fundamentally, the issue of assessing polygamists as potential adoptive parents comes down not to whether polygamy is illegal or whether the state can proscribe its practice—it is, and it can. Nor does the issue come down to whether the state can or should punish felons by refusing to extend a privilege based on an offense that may be much less a barometer of parenting capabilities than society might think.[236] Rather, the critical issue is whether the state will consider its legitimate interest in enforcing majoritarian morals[237] to be more important than its interest in providing adopted children a stable, nurturing home environment.

V. CONCLUSION

President Abraham Lincoln purportedly responded to a group of Congressmen eager to step up the early campaign against polygamy with an anecdote about an old log on his boyhood farm: "It was too heavy to move, too hard to chop, and to green to burn. So we just plowed around it."[238] Curiously enough, the State of Utah has tacitly adopted Lincoln's policy toward polygamy 130 years later, as polygamy prosecutions have ceased.[239] At the same time, polygamists find themselves the beneficiaries of a

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233. *See W.A.T.*, 808 P.2d at 1086.

234. *See id.* at 1087 (Stewart, J., concurring).

235. *Id.*

236. *See supra* text accompanying notes 194-206 (discussing polygamous conduct and child's best interests).

237. *See supra* notes 170-73 and accompanying text (discussing state's interest in proscribing certain conduct that offends majoritarian view of morality).

238. G. LARSON, OUTLINE HISTORY OF UTAH 196 (1958).

239. *See supra* note 7 (Utah law-enforcement officials have decided to concentrate on crimes that constitute a greater threat to general public than does polygamy).

greater tolerance toward the family law rights of persons engaging in other alternative lifestyles and the Utah courts' firm commitment to emphasizing the interests of children implicated in custody and adoption proceedings. *Sanderson* and *W.A.T.* may represent something of a fortuitous windfall for polygamists because the cases focus more on their children's interests than their own, but what is certain is that with a sizeable polygamous population,[240] no enforced criminal restrictions against polygamy, and a more expansive judicial attitude toward the ancillary family interests of polygamists and their children, the way is paved for new developments in a saga as old as Utah itself.

R. MICHAEL OTTO

240. *See supra* notes 4, 6.

Book Review

Tawfik al-Hakim, *Maze of Justice: Diary of a County Prosecutor*. Abba Eban translator, University of Texas Press 1989. 160 pp.

$22.50

Thomas Lund*

Asked to name any Egyptian writer, some quick-witted lawyer might take a lucky stab at Omar Sharif,[1] the actor who writes a contract bridge column with Charles Goren. Very few would choose Tawfik al-Hakim,[2] an Egyptian who happened to be a lawyer,[3] an acclaimed novelist[4] as well as perhaps the foremost dramatist[5] of the Arab world. Recently the University of Texas Press reissued his profound yet humorous novel, *Maze of Justice*, which describes law practice in the Nile Delta sixty years ago. The book is worthy of a writer who could portray humanity's love of freedom in a drama about a cockroach's struggle to get out of a bathtub.[6] Abba Eban's first rate translation demonstrates the

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1. *See* INTERNATIONAL WHO'S WHO 1991-92, at 1476 (55th ed. 1991). Sharif was born in Cairo, Egypt. *See id.*

2. Hakim died in 1987. *See* 74 AL-QAHIRAH, Aug. 15, 1987. Arabic names present some difficulties in English translation—Col. Kadafi has been a recent newsworthy example—and while Tawfik el-Hakim, Tawfiq Al-Hakim, and Tewfik al-Hakim are all English versions of his name which have been used respectively in translations of *Maze of Justice*, *see* T. EL HAKIM, MAZE OF JUSTICE (A. Eban trans., Harville Press 1947), *Plays, Prefaces and Postscripts*, *see* W. HUTCHINS, PLAYS, PREFACES & POSTSCRIPTS OF TAWFIQ AL-HAKIM, THEATRE OF THE MIND (1981), and *The Tree Climber*, *see* T. AL-HAKIM, THE TREE CLIMBER (D. Johnson-Davies trans., Oxford Univ. Press 1966), a reference to the author as "Hakim," while unorthodox, is apparently not disrespectful. *See* R. LONG, TAWFIQ AL HAKIM, PLAYWRIGHT OF EGYPT v (1979).

3. *See* R. LONG, *supra* note 2, at 22.

4. *See id.* at 27. Hakim's *The Soul's Return* is considered the first novel written in Arabic. *See id.*

5. *See* W. HUTCHINS, *supra* note 2, at 3.

6. *See* T. AL-HAKIM, FATE OF A COCKROACH (1973). The heroic roach inspired another legally trained Semitic writer, Franz Kafka. *See* F. KAFKA, *The Metamorphisis*, in SELECTED STORIES OF FRANZ KAFKA 19 (1952); *see also* Rahv, *Introduction* to SELECTED STORIES OF FRANZ KAFKA xv-xvii (1952).

intellectual affinity of two great Semitic people, the Egyptians and the Israelis.[7]

Although he achieved some prominence as a provincial prosecutor and judge,[8] Hakim found the law far too jealous a mistress,[9] and decamped after a brief debilitating courtship.[10] He retained, however, an appreciation for the affinity of art and the law, and considered prosecutors impresarios of public drama.[11] Hakim thought the position of Legal Officer, responsible for both the investigation and prosecution of crime, a privileged prospect on life:

> A Legal Officer is a little king in his own tiny sphere; if he understands everything that goes on in his kingdom, observes everything, studies men and their natures and instincts, he should be well equipped thereafter to understand the larger kingdom which is his own country, or even the wide world of humanity itself.[12]

By choosing a Legal Officer as the protagonist of *Maze of Justice*, Hakim established a vantage point from which to display life in the Nile Delta. Despite the Legal Officer's obsession with a delicious murder suspect, whom he describes as "a zephyr breeze . . . blown on the parched desert of our emotions in this decrepit village,"[13] Delta life is the real subject of Hakim's novel.

Maze of Justice also pursues Hakim's goal of making literature a mighty force in law reform.[14] This is a technique with historic success, for, as Hafez Afifi suggests, Charles Dickens reformed more law than ever did a Royal Commission.[15] Hakim ex-

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7. As Israeli Ambassador to the United States and commentator on the television series, *Civilization and the Jews*, Mr. Eban has become widely known for his brilliance and charm. *See* INTERNATIONAL WHO'S WHO 1991-92, at 451 (55th ed. 1991).

8. *See* R. LONG, *supra* note 2, at 22.

9. *See id.* at 23. Long comments that Hakim "was appalled to find that the law only brooked discussion of 'shop' matters in off-duty conversations . . . ." *Id.* at 22-23. Long further notes that Hakim also "feared lest his time-consuming official duties snuff out his inspiration for good." *Id.* at 23.

10. *See* Winder, *Introduction* to T. AL-HAKIM, BIRD OF THE EAST vii (1966). Hakim left the legal profession after four years. *See id.*

11. *See* W. HUTCHINS, *supra* note 2, at 13.

12. T. AL-HAKIM, MAZE OF JUSTICE: DIARY OF A COUNTY PROSECUTOR 104 (A. Eban trans., Univ. of Texas Press 1989).

13. *Id.* at 122.

14. *See* W. HUTCHINS, *supra* note 2, at 12-13.

15. *See* Afifi, *Preface* to T. EL HAKIM, *supra* note 2, at vii.

amines the Egyptian legal system from three perspectives: its paralysis from red tape and inefficiency, its corruption, and its impotence in dealing with the root of most social problems, poverty. As a consequence of these difficulties, the lawyers who administer the system are doomed to fall victim to "burnout." *Maze of Justice* has an unabated contemporary appeal. Throughout most of the underdeveloped world, red tape, and inefficiency never go away, and corruption is the rule, not the exception. Within the United States lawyer burnout affects every agency that deals with the poor. But while most readers might doze through a monograph on these problems, Hakim's almost cinematic vision[16] illuminates them with the sparkle of a Woody Allen film.

While no believer in the rule of red tape, the Legal Officer has fallen afoul of it from time to time.

> I remember that I once left a wounded man in the throes of death-agony and began to describe [with due deference to the regs] his trousers, sandals and cap until, when I had finished and leaned over the victim to ask who had attacked him, I found he had expired.[17]

Although he understands "the entire rigmarole of formality [as] the essence of our 'trade,'"[18] the Legal Officer's contempt for boilerplate gobbledegook allows him to surpass his colleagues in the efficient analysis of legal documents: "I found the officer in charge of the police station up to his ears in the compilation of a 'statement' for me to throw into the waste-paper basket."[19] This attitude inspires his colleagues' respect for his "rapid zeal and audacity,"[20] but, when necessary, the Legal Officer will take the time to pad the record in order to satisfy the authorities. Having filed a ten-page report on a successful homicide investigation, he is rebuffed by his superior: "What's all this? A contravention or a misdemeanour? . . . a murder case investigated in ten pages! An assassination! The murder of a human being! All in ten pages?"[21]

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16. *Maze of Justice* has been made into a film. *See* T. AL-HAKIM, *supra* note 12, back cover.
17. *Id.* at 21-22.
18. *Id.* at 47.
19. *Id.* at 20.
20. *Id.* at 128.
21. *Id.* at 26.

He replies, in effect, "But we got the perp. . . ."[22] The superior "paid no attention whatever and went on weighing the Report in his hand with careful accuracy: 'Who would ever have believed that this Report could be of a murder case?' [The Legal Officer] replied instantly, 'Next time, God willing, we shall be more careful about the weight!'"[23]

During the two weeks the novel addresses, one government falls as another is installed, and Hakim zeroes in on the corrupt foundation of the political process. An election monitor observes, "Well, that's my method with elections . . . . Complete freedom. I let the people vote as they like—right up to the end of the election. Then I simply take the ballot box and throw it in the river . . . ."[24] If one political faction overthrows the incumbents, then the lawyers who staff the bureaucracy are responsible for insuring a smooth transition of power through the judicious application of the vagrancy law.

> This was the easiest and most effective weapon the administration possessed: for every notable's son could be charged with "having no fixed occupation," and could thus be arrested and imprisoned for four days by permission of the Legal Department . . . . When I had issued enough of these orders to please God and the police station, I went to have lunch.[25]

Lawyers and judges occasionally act up against these abuses, but a real cattle prod exists to maintain discipline—a notice of transfer to staff the infernal courts of Upper Egypt.[26]

While resistance to wholesale corruption of the electoral process appears pointless, some resist individual acts of corruption. For example, a judge is outraged when a politically connected defendant refuses to pay a judgment: "'I can't be silent on a matter of this kind. This is a flagrant crime! The police are committing a

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22. *See id.*
23. *Id.*
24. *Id.* at 112.
25. *Id.* at 97.
26. *See id.* at 107. Although a chronicle of corruption, *Maze of Justice* provides an account of a surprisingly benign third world government, since a transfer, after all, is not the ultimate penalty for confronting the authorities. In addition, Hakim's ability to publish so slashing an attack on the authorities shows a degree of freedom within Egypt in the 1930s that few might imagine existed. Hakim feared neither the state nor the church. *See infra* notes 28-30 and accompanying text.

crime . . . ."[27] And while the Legal Officer rolls over to allow the use of vagrancy laws for general political purposes, he refuses to detain a witness in a particular case: "For the regulations ought not to be weapons in our hands wherewith we could attack whomsoever we wished whenever we chose."[28] Both judge and lawyer alike disapprove of another area of corruption: that of ecclesiastical judges. The judge recounts:

> One day a peasant turned up at my house with a sheep which he said was a "present". I said to him, "What present, my man?" He replied, "The present we agreed about to get judgment restoring my wife to me." I understood what he was driving at and said immediately, "My dear chap, you've got the wrong house—you want the qadi [the ecclesiastical judge]!"[29]

In tracing the life cycle of burnout, *Maze of Justice* presents a seemingly healthy subject, the Legal Officer's assistant. Upon being entrusted with his first trial, theft of a jar of maize, the assistant

> showed some signs of agitation. It was the first time he was going to interrogate a suspect. He took the file from me and began to read it word by word, and then read the whole thing again; it was not more than five pages. I had finished my share of the files, which was twice as big as his, and looked up to find him still absorbed in preparing exhaustive summaries, and comments on the summaries, and questions carefully prepared beforehand as missiles to be hurled at the purloiner of the jar of maize. I smothered a laugh.[30]

The assistant had planned an elaborate trap for his prey, but all went awry with the first question: "'Did you steal the jar of maize?' The answer came promptly from the depth of [the defendant's] stomach: 'I was hungry.'"[31]

In observing the psychological battle against despair, the Legal Officer watches as reality overwhelms his assistant. "I was

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27. T. AL-HAKIM, *supra* note 12, at 107.
28. *Id.* at 76.
29. *Id.* at 109-10.
30. *Id.* at 55.
31. *Id.* at 56.

possessed by curiosity to know what he was feeling . . . . Was he at all affected? Was there any remnant left of the sensitiveness and fine feeling with which we all begin our official work in the provinces—or was it all dying out?"[32]

Burnout feeds on a fuel of sympathy for the downtrodden, and this the Legal Officer has in full measure. The fellahin[33] are so reduced by poverty that a defendant who has stolen food says when fined, "'Fifty piastres? Heavens alive, sir, I haven't seen what money looks like for two months! I've forgotten what half a piastre looks like. I don't even know if it still has a hole in the middle or if they've made it solid.'"[34] Sentenced to prison, "the man kissed the palm and back of [the assistant's] hand gratefully. 'So what? Prison is just fine. At least we are assured of a bite of food. Good morning!'"[35] The Legal Officer views Egyptian social practice as an added burden on the fellahin. When a village headman is humiliated by a superior official, the Legal Officer observes:

> [T]he humiliation which he endured in the presence of the officials would not just fade away: it would be transmitted in turn to the people of the village which he ruled. The cup of humiliation is handed on from superior to subordinate in the village until it finally reaches the belly of the miserable "people", who swallow its contents in one huge gulp.[36]

But despite this pervasive sympathy, the Legal Officer's resistance to despair is compromised by an overwhelming caseload which has him "chained to [his] work and submerged in responsible affairs which seemed never to halt or come to an end."[37] Lawyers and judges, particularly the assistant who "was not yet accustomed to a twenty-four hour day," continually nod off to sleep during important moments.[38] At the end of an especially intense period the Legal Officer observes: "I had not tasted a morsel of food or stretched myself on a bed since the day before

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32. *Id.* at 60.

33. The term refers to Arab peasants. *See* WEBSTER'S II NEW RIVERSIDE DICTIONARY 256 (1984).

34. T. AL-HAKIM, *supra* note 12, at 57.

35. *Id.*

36. *Id.* at 111.

37. *Id.* at 102.

38. *Id.* at 32.

yesterday."[39]

Stress makes the Legal Officer pay a price. After imposing a fine on a peasant who says, "Payment? Why the fellahin are absolutely destitute, your honour!", the Legal Officer begins to crumble.[40] He exclaims "Oh, for heaven's sake, I've got a headache and it's a waste of time to argue with people like you. The law is quite explicit and I am bound by legal texts tighter than the ropes on your hands."[41] Manifesting a phenomenon observed in warfare, Hakim's lawyer tries to distance himself from life by thinking of the peasants not as people, but as animals or even insects. Wandering the hospital corridors while interrogating a witness, he reflects the peasants look "like monkeys in the zoo gazing at their keepers and visitors";[42] examining their huts, he reflects within these "bits of houses . . . the fellahin lived like worms . . . ."[43]

The costs of burnout appear in a variety of mental and physical ailments[44] which torment the Legal Officer. "The red and green sash [the symbol of office] placed around my neck and under my armpit seemed like a yoke. Was it divine vengeance for all the innocent people whom I had inadvertently sent to prison?"[45] Overstressed, the Legal Officer is liable to overreact. At an autopsy the examining pathologist fails to uncover a bullet in the skull, and decides to inspect the body cavity itself: "I stood behind him, saying 'Go on, cut away!' I was seized by a strange fever in which I had lost all human perception. I began to talk to the doctor: 'Show me the lungs! Show me the intestines! Show me the gall bladder . . . !'"[46] At times he thinks he can not go on with the job: "I'm absolutely fed up! I'm tired of the provinces! I'm utterly sick of peasants' HATS! . . . I want a different sort of crime. I want criminals in jackets and trousers."[47]

But the Legal Officer does go on with his work. The novel's title, *Maze of Justice*, refers not to a labyrinth of court procedure, but rather to the moral perplexity through which a sensitive

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39. *Id.* at 42.
40. *Id.* at 59.
41. *Id.*
42. *Id.* at 51.
43. *Id.* at 53.
44. *See, e.g., id.* at 15, 125.
45. *Id.* at 32-33.
46. *Id.* at 120.
47. *Id.* at 130.

lawyer must progress during a life practicing the law. Some novelists paint a portrait of the heroic lawyer;[48] Hakim shows us instead a lawyer who has made his accommodation with an ethically flawed society, and yet still remains a force for the good. The Legal Officer has been dirtied within the Nile Delta, but he has managed, at considerable psychological cost, to retain a clear sense of moral outrage concerning those wrongs he feels it within his power to right. In the end, Hakim's example is an encouraging one.

48. *See, e.g.*, H. LEE, TO KILL A MOCKINGBIRD (Lippincott 1960).

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