VOLUME 1974 SUMMER NUMBER 2

UTAH LAW REVIEW

UNIVERSITY OF UTAH COLLEGE OF LAW

UTAH LAW REVIEW

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EDITORAL OFFICES: The *Utah Law Review* is published at the University of Utah College of Law, Salt Lake City, Utah 84112 by the Utah Law Review Society. Second-class postage paid at Salt Lake City, Utah. All communications should be sent to the editorial offices.

SUBSCRIPTIONS: The *Utah Law Review* is published quarterly: Spring, Summer, Fall, and Winter. The subscription rate is $12 for one year, $23 for two years, and $34 for three years. Single issues may be obtained for $3.50 per issue and reprints of articles and notes for $2 per copy. If the subscriber wishes his subscription discontinued at its expiration, notice should be sent; otherwise, it is assumed that continuation is desired.

Printed in the United States of America
by the University of Utah Printing Service

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UTAH LAW REVIEW

Member, National Conference of Law Reviews

VOL. 1974 SUMMER

1974–75 BOARD OF EDITORS

UTAH LAW REVIEW

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STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION
(Act of August 12, 1970; Section 3685, Title 39, United States Code)

1. Date of Filing
   September 17, 1974

2. Title of Publication
   UTAH LAW REVIEW

3. Frequency of Issue
   Four (4) issues per year: Spring, Summer, Fall & Winter

4. Location of Known Office of Publication
   College of Law, University of Utah, Salt Lake City, Utah 84112

5. Location of the Headquarters or General Business Offices of the Publishers
   College of Law, University of Utah, Salt Lake City, Utah 84112

6. Names and Addresses of Publisher, Editor, and Managing Editor
   Publisher
   Utah Law Review Society (address as above)
   Editor
   Ellen Maycock, 1574 Laird Avenue, Salt Lake City, Utah
   Managing Editor
   Michael D. Terry, 2850 Blair No. 5, Salt Lake City, Utah

7. Owner
   Utah Law Review Society
   College of Law, University of Utah
   Salt Lake City, Utah 84112

8. Known bondholders, mortgagees, and other security holders owning or holding 1 percent or more of total amount of bonds, mortgages, or other securities — None

9. The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes have not changed during the preceding 12 months.

10. Extent and nature of circulation.

		Average No. Copies Each Issue During Preceding 12 Months	*Single Issue Nearest to Filing Date*
A.	Total No. Copies Printed	1200	1400
B.	Paid Circulation		
	1. Sales through dealers and carriers, street vendors, and counter sales	0	0
	2. Mail Subscriptions	860	1062
C.	Total Paid Circulation	860	1062
D.	Free Distribution (including samples) by mail, carrier, or other means	160	160
E.	Total Distribution	1020	1222
F.	Office Use, Left-over, Unaccounted, Spoiled After Printing	180	178
G.	Total	1200	1400

I certify that the statements made by me above are correct and complete — MICHAEL D. TERRY, Managing Editor.

Mining Claims on Public Lands: A Study of Interior Department Procedures

*Peter L. Strauss**

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* Professor of Law, Columbia University School of Law.

** This article, in preliminary form, served as the basis for Recommendation 74–3 of the Administrative Conference of the United States. A second article based on the study is presently to appear as Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Some Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. (Nov. 1974). The Recommendation is set out as Appendix. The author expresses his thanks to the Conference, which provided invaluable support for the project, to its Committee on Licenses and Authorizations, to James Potter, J.D., Columbia, '73, and William McKeown, J.D., Columbia, '74, and to his colleagues Walter Gellhorn, Arthur Murphy, and Abraham Sofaer.

I. INTRODUCTION

The Department of the Interior's disposition of mining claims on public lands, largely unknown to lawyers outside the West, is a significant field of federal administrative activity and an important element in planning rational use of the public lands. While energy minerals found under public lands typically pass by lease and common varieties such as sand and gravel are subject to sale, most other mineral deposits on federal property are claimed for possible exploitation by the mining claim, or "location."

The location system arose out of miners' custom, at a time when the federal lands were vacant and no federal law governed acquisition of mining rights. During the turbulent "rushes" of the mid-nineteenth century, each mining district worked out and enforced, however colorfully and informally, its own rules on the important matters of acquiring and holding a mineral claim. These rules tended to embody similar features: physical marking of the land, filing the claim in a local record center, and continuing work on the claim to preserve its validity.

When Congress finally passed the first federal mining law in 1866,[1] almost twenty years after the California gold strike, the tradition of local administration had been firmly established; the public had grown accustomed to treating possession of federal land as establishing a priority right to it; and the principal policy applied in managing the public domain was outright disposal. Although the Constitution gives Congress plenary authority over the disposition of federal land, Congress chose to recognize both "squatters' rights" and the techniques which had evolved for making and maintaining claims. The law of 1866 and its successor, the General Mining Law of 1872,[2] embodied those techniques. The latter statute, with minor changes, is the law in force today.

This study had its origin in amazement, sparked by chance litigation, at the longevity of the General Mining Law of 1872 and at the difficulties which the government apparently faces in learning of claims made under this statute and in eliminating them, when spurious, from its lands. Despite periodic movements for its reform, the General Mining Law remains essentially unaltered; suggestions for change are again afoot, but passage of a revision is anything but certain. It seems relevant to ask what burdens the statute imposes upon the Department; what steps are possible

[1] Act of July 26, 1866, 30 U.S.C. §§ 43, 46 (1970) (14 Stat. 251).

[2] Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified in scattered sections of 30 U.S.C.). A recent historical account may be found in a report for the Public Land Law Review Commission. P. GATES & R. SWENSON, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

without legislation to lighten that burden; and, to the extent legislation may be forthcoming, what procedural measures it should incorporate.

When the General Mining Law was passed, disposal of the public domain was the governing policy; a plenitude of statutes then identified the possible uses of the public domain and provided for its allocation to private citizens who could give some indication that they would put it to appropriate use — in the case of mineral lands, by discovery of a mineral deposit and the performance of limited development work. Since that time, we have rid ourselves of the notion that our public land resources are infinite and adopted instead a policy of retention and development of the remaining lands by the public; sale of them or provision for unimpeded access to their use is now exceptional. Whether or not one believes, as mining industry spokesmen do, that free exploration of public lands and acquisition of possessory rights upon discovery are the most effective stimulants for mineral development, the General Mining Law permits such rights to be acquired in secret, and makes no provision for use regulation, for fair compensation for value, or for demonstration by the claimant at an early point of the merit and good faith of his claim. These latter elements, tolerable enough in an era of freely encouraged land disposal, are inconsistent with the necessary management approach of today.

This inconsistency undoubtedly has led the Department into a grudging and somewhat tightfisted approach toward claims under the mining laws. In an effort to prevent unwarranted dispositions and misuse, standards are applied with increasing rigor and dramatic consequences are visited upon failure to meet them. Understandably, this approach both distresses miners seeking to use the laws in good faith, and teaches them by its consequences to avoid contact with the Department whenever they can. Yet their most frequent complaint, that the Department "makes policy" rather than "applies the law," is somewhat misplaced. What the miners disapprove is that the Department no longer acts as if it were 1872 in applying this 1872 statute. But it *is* no longer 1872, and the Department cannot tenably be required to ignore the striking changes in its general mandate, even if this particular statute has been more durable than most. In the years since congressional action, the Department, like all other administrative bodies, has had to make policy to conform the statute as closely as possible to its other tasks and general charge. The appropriate questions are how, and how well, the Department has done that work. This assessment cannot be made simply from the perspective of efficiency, either in processing claims or in retaining the lands subject to them in government hands; fairness to claimants in procedures and in honoring their reasonable expectations, and to the residual congressional purpose expressed in the statute, must also be considered.

Under the 1872 statute, a prospector who has found a valuable mineral (or, in practice, has found a likely spot for mineral occurrence) may mark off, or locate, a limited area of the ground as a claim. A single claim by a single prospector may never exceed twenty acres, although the statute

does not limit the number of separate claims one person may locate. The locator must mark the corners of the claim and post a notice of his claim prominently on the land, but the details of this ritual are left to state law.[3] Typically, he may put a pile of stones at each of the four corners, and then drive a stake into the land somewhere within the area thus demarked, attaching a piece of paper naming himself and the claim, and stating its geographic location and the date when it was made.

The locator is under no requirement to notify the federal government more directly of the claim he has placed on its land. Rather, the statute instructs him to record his claim at the local county courthouse, where state law again governs the precision with which he must indicate where his claim may be found. State law may or may not require him to file a map showing where the claim is, or to tie it into the public land survey. In the past, if not today, claims might be described as "bearing on the flank of Red Mountain, about five-hundred feet southwest of the low point of the saddle to Henderson Mountain, with the northeast corner marked by a lone scrubby pine tree." Nor is there uniformity in the manner in which these records are filed. In Wyoming, for example, they are indexed by geographical area — section, township and range; elsewhere they may be filed indiscriminately with other real estate documents, or kept chronologically in a separate record book. Other documents affecting claims — conveyances, wills, and the like — may or may not be filed with them. Unless the locator applies to purchase the land, the federal government will be apprised of his claim only if its agents discover a record of it in the county files, or find traces of his workings on the ground.

Nor does the federal statute require the prospector to state as part of his claim what mineral he believes he has found. That matter is also left to state law. A few states require the notice of claim to specify what has been found and where it has been found on the claim. But most do not, and even where state law imposes such a requirement it is very doubtful whether the information thus given binds the claimant in his dealings with the federal government. He certainly is not limited to those assertions; and if he can establish others, he probably does not have to show that the information originally given was even colorable.

Finally, with the possible exception just stated, the law does not require the locator to find anything before he performs the rituals of marking and recording the claim. Again, state law establishes the requirements of timing. Commonly, all that is necessary is an affidavit that a certain amount of "discovery work" — not the discovery itself — has been accomplished; and frequently an accurate map of the claim is accepted in

[3] 30 U.S.C. §§ 26, 28 (1970); *cf., e.g.*, 43 C.F.R. § 3831.1 (1973) (location of placer claims). The state laws are described in 1 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, AMERICAN LAW OF MINING §§ 5.45–5.80 (1974) [hereinafter cited as AM. L. MINING], and in a report prepared for the Public Land Law Review Commission: H. TWITTY, R. SIEVWRIGHT & J. MILLS, NONFUEL MINERAL RESOURCES OF THE PUBLIC LANDS 503–48 (rev. 1970) [hereinafter cited as NONFUEL MINERALS].

lieu even of that work. The following describes a colorful, but not atypical, example of the process:

> On a Friday, the U.S. Geological Survey released its official minerals study of the area as required by the Wilderness Act. The document reported that some copper was found during the field sampling, and further editorialized: "It seems to be a promising target for further work."
>
> By the very next morning, four men from Texas Gulf [Sulphur Co.] had raced to the southwestern Colorado town of Durango. There they chartered a helicopter, loaded it with mining claim stakes, and were making ready for a flight into Navajo Basin, in the very center of the Wilsons. However, both the Forest Service and the Civil Air Patrol warned that avalanche danger and foul mountain weather made prospects of sudden death greater than prospects of a copper strike. So plans were somewhat revised: The chopper dropped down near the comparatively safe summit of 10,022-foot Lizard Head Pass and deposited the men from Texas Gulf, along with toboggans, 40 six-foot 4 x 4 survey stakes and a complement of winter camping gear. From there, the four modern sourdoughs took over, packing and hauling the works up into Navajo Basin on foot. The following Monday, they emerged from the snowy wilds, leaving behind stakes marking precisely 40 unpatented mining claims covering 800 acres at elevations from 12,400 to 13,600 feet above sea level . . . . Texas Gulf cleared its wilderness prospecting permit last spring, and core-drilling started in earnest last summer. More prospecting, this summer and perhaps next, will be necessary before a decision on actual mining is reached.[4]

The claims are "located," but no one asserts that on one wintry weekend four men could or did find valuable minerals beneath the deep snow covering each of their forty claims.

Under the 1872 law, no rights are acquired against the federal government until the actual discovery of a "valuable mineral." At that moment, assuming that all other necessary rituals have been performed, the locator acquires an absolute right of possession against the government to use the land for mining purposes — a right which has been strongly and uniformly described as "property in the fullest sense of that term." [5] It is taxable, inheritable, and indefeasible save by condemnation so long as the claim is maintained. Only state law, however, protects possession during the period of search preceding discovery, and that law protects only against forcible interference by other prospectors — the so-called right of *pedis possessio*.[6] No right against the federal government yet exists; the moment of discovery is thus in theory a crucial event.

In practice, however, once a claim has been recorded any person wishing to interfere with it has the burden of going forward to show his

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[4] Summer, *Wilderness and the Mining Law*, THE LIVING WILDERNESS 8, 16 (Spring 1973).

[5] *E.g.*, Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 316 (1930); Black v. Elkhorn Mining Co., 163 U.S. 445, 449 (1896).

[6] Duguid v. Best, 291 F.2d 235, 238–39 (9th Cir.), *cert. denied*, 372 U.S. 906 (1961).

superior right. Thus, should there be any private dispute over possession of the land, the fact that a claim has been recorded will require the adverse claimant to show that he has made a discovery, or in some other manner obtained a claim to title, before he can show that the first claimant has made no discovery. In a dispute between the government and the locator, the government currently undertakes to show prima facie reason to believe that the claim is invalid, for example because no discovery has been made, before the locator is called upon to prove his claim. In practice, then, recordation gives the appearance of creating the right which the law indicates matures only upon actual discovery. Miners and prospectors generally believe that once they have recorded a claim they have acquired a property right in the government land thus located. Having marked his corners, pounded in his stake, and filed his forms at the county courthouse, the prospector believes that he has — and in practice is often treated as if he does have — an absolute possessory right to that land and its minerals.

Claims can attach only to land available for location at the time the acts of location, including discovery, are made. Such land includes unreserved public domain managed by the Department's Bureau of Land Management, certain other public lands, such as the national forests, and limited areas of former public domain for which surface rights are now privately owned. Thus, not all federal lands are available; mineral deposits on "acquired lands," [7] for example, may be obtained only by lease, and public domain lands may be closed to location by withdrawal from the operation of the mining laws — an action which may be taken either legislatively, as Congress has done in creating national parks, or administratively, by the Secretary of Interior.[8] Generally speaking, administrative withdrawals take effect as soon as they are noted on the government's land records, and remain in effect, however temporary they may be in name, until affirmatively removed from those records. No new location is possible while lands are withdrawn from the operation of the mining laws.

Land may also be unavailable for location because someone else has claimed it first. The 1872 law makes only a limited provision for supplanting the rights of a prior locator. The locator must perform at least $100 worth of "assessment work" annually for the benefit of each claim, and file an affidavit in the county courthouse that he has done this work.[9] In

[7] 30 U.S.C. § 351 (1970). Acquired lands are those obtained from state or private ownership, distinct from land which has continuously been part of the public domain. Some nonfederal lands *are* available for location, if they were originally public domain and mineral rights were reserved by the United States when they were first disposed of. 1 AM. L. MINING, *supra* note 3, §§ 3.23–3.41.

[8] *See* United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 444–45 (9th Cir. 1971); PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 42–44, 52–56 (1970) [hereinafter cited as P.L.L.R.C. REPORT].

[9] 30 U.S.C. § 28 (1970). This filing, like the filing of the original location, is indexed in accordance with local, not national, rules. The $100 requirement, it may be

some years Congress has permitted substitution of an affidavit in lieu of assessment work. Failure to do the work, however, does not automatically void the claim; absent some intervening event, it lies dormant and may be returned to full vigor if the locator or his successors resume assessment work.[10]

A lapse in assessment work has one clear result: it reopens the land to mineral locations during the period of lapse. A rival prospector may go on the land and make his own location, disregarding the previous claim. Prospectors working the same area, however, may quietly agree not to take advantage of one another's lapses in performing this work.[11] Others are not as clearly entitled to ignore such claims, even during a period of assessment work lapse. For example, persons desiring to lease the land for energy minerals, or to acquire it for farming purposes, must do so through the government; and they can acquire no greater claim to possession than the government has to give them.

Until recently, the "relocation" provision was said to have no bearing at all in disputes between prospectors and the government. That is, once the miner acquired his possessory right, subsequent failure to perform the annual assessment work was thought to give no right of recapture to the government or persons claiming through it; the claim persisted until it was affirmatively abandoned, and the failure to do assessment work did not prove abandonment.[12] A recent Supreme Court decision [13] has stated a less drastic rule, at least for those cases in which relocation of the land by competing miners has been prohibited by withdrawal of the land from the operation of the mining laws: a failure to comply substantially with the assessment work requirement after the withdrawal permits the government to defeat an otherwise valid claim. It remains unclear, however, whether the same reasoning applies to unworked claims on land which remains open to location. More importantly for present purposes, the government has never felt able simply to ignore apparently lapsed claims encumbering its lands, no matter how long the lapse. Following early court pronouncements that the property character of perfected mining claims requires notice and hearing before a claim may be found invalid,[14] the government has consistently felt required to search out all claimants and bring administrative proceedings to declare their claims invalid.

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noted, means far less than it did in an era when labor was valued at twenty cents per hour.

[10] *Id.*; 2 AM. L. MINING, *supra* note 3, § 7.26.

[11] M. CLAWSON, THE BUREAU OF LAND MANAGEMENT 124 (1971).

[12] Ickes v. Virginia-Colorado Dev. Corp., 295 U.S. 639, 645–46 (1935); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 317–18 (1930); Rocky Mountain Mineral Law Foundation, Annual Assessment Work Manual 1–23 to –25, 6–21 to –24 (D. Sherwood ed. 1972).

[13] Hickel v. Oil Shale Corp., 400 U.S. 48, 57 (1970).

[14] *E.g.*, Cameron v. United States, 252 U.S. 450, 460–61 (1920).

The simple and near-anonymous acts of location, then, create a cloud of some density on the government's title.[15] Even if years have passed and little work has been done, the government's ability to devote the land to other uses may be compromised by the possibility that the locator or his heirs will reappear and reassert a right to the lands. If the claim is valid — if a discovery was made and it cannot be shown that the claim has lapsed — the locators will prevail.

The authors of the General Mining Law can hardly have intended to encumber public lands with such obscure yet tenacious claims .The Act provided that a miner might acquire a patent to his claim, fee simple title, on payment of a few dollars per acre and demonstration to the Department of the Interior that he had made a discovery and had invested at least $500 work in the development of his claim. Evidently, Congress believed that any serious claimant would quickly avail himself of this procedure, and that the claims of the less serious would simply disappear, leaving no trace.[16] But the passage of years without change in the statute has encumbered state land records with several million unpatented claims.[17] Over the same period, the possibility that the serious miner will seek to patent his claims has become remote. The application process has become increasingly complex, time consuming, and expensive. Miners are almost as well protected by the laws governing possession as they would be by a patent. Under well established policy, the Department does nothing to challenge the validity of claims unless they are presented for patent or the government immediately needs the lands involved. Since the Department does not distinguish between "discovery" for the purpose of possession and the "discovery" required to obtain a patent, it treats denial of a patent application for want of discovery as demonstrating the invalidity of the underlying claim.[18] This threat to the underlying claim places a premium on "lying low" if any doubt whatever exists of its validity.[19] Whatever

[15] *E.g.*, N.Y. Times, May 27, 1973, § 1, at 16, col. 4, describing one speculator's activities, suggests the ease with which this cloud may be created. Merle Zweifel asserts that in thirteen years he staked more than thirty million acres of land with claims, at a cost to him and his co-locators of two to ten cents per acre. While his methods were imprecise, to say the least, and he is now the subject of several legal actions seeking to halt his activities and undo the resulting mess, the law's permissiveness toward location methods and the timing of discovery is such that his challengers regard his claims as prima facie valid. It is evident that their expense in removing the claims will be much higher than Mr. Zweifel's cost in making them.

[16] *Cf.* Casey v. Northern Pac. R.R., 15 L.D. 439 (1892); Shreve v. Copper Bell Mining Co., 11 Mont. 309, 28 P. 315 (1891).

[17] The Public Land Law Review Commission adopted the common estimate of six million claims. Estimates of the number of active claims range from 100,000 to 500,000. In Colorado, for example, Bureau of Land Management officials believe there may be as many as one million claims on the county records, but on only ten to thirty thousand has assessment work recently been done.

[18] Kenneth F. & George A. Carlile, 67 Interior Dec. 417, 423–27 (1960); Terry & Stocker, 10 I.B.L.A. 158 (1973); *see* Barton v. Morton, 498 F.2d 288, 292 n.8 (9th Cir. 1974).

[19] Between 1961 and 1970, only 631 mineral patents, covering 81,697 acres were issued; an additional three hundred mill sites, small tracts associated with mineral claims, were also patented. *Hearings on H.R. 7211 Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., ser. 92–20, at 148 (1971).

Congress's original anticipation regarding the life of claims in unpatented status, their duration today is lengthy.

Aside from the now rare cases in which the claimant applies for a patent to the lands involved, the validity of location is determined through government initiation of "contest" proceedings, typically on the ground that no discovery of a valuable mineral has been made. Although contests can be initiated at any time after location, in general they are brought only if an actual conflict exists over the use of the land, such as would be brought about by a withdrawal, or if it is proposed to deny a patent application. In the former case, the absence of records requires the government to identify the claims possibly at issue. To do this, departmental employees make painstaking searches of the disorganized and ancient county records for each possibly valid claim and evidence of its descent. For each claim thus discovered and put in issue, the government also undertakes to show that no discovery of any valuable mineral has been made. No obligation is placed on the claimant to define his claim, as by stating the nature of the minerals discovered, before the government puts on its case. The practical impact of this practice is that a mineral examiner must be sent to inspect every claim that may be asserted.

Processing patent applications, initiating contests, and effecting proposed withdrawals of federal lands are all primarily the responsibility of the Bureau of Land Management (BLM), a constituent part of the Department of the Interior under the control of the Assistant Secretary for Public Lands. As the manager of over 465 million acres of public domain, the BLM has numerous other responsibilities, many of which are considered more important than these. But the Bureau's Washington office includes a branch within its Resources Department responsible for coordinating minerals policy; and each BLM state office includes a number of mineral examiners and a land law examiner responsible for the technical aspects of these procedures. The Bureau's personnel control the effecting of withdrawals and the granting of patents; once they decide to oppose a patent application, however, or to contest the validity of a location, conduct of the administrative litigation becomes the responsibility of the local representative of the Departmental Solicitor. An administrative law judge of the Department's Office of Hearings and Appeals hears that litigation and the result may be appealed to the same Office's Board of Land Appeals. Judicial review, not presently provided for by statute, is regularly had in United States district courts.

In general, the Bureau's responsibility for procedures involving withdrawals and mining claims includes land for which other government agencies or other parts of the Interior Department have primary administrative responsibility. A withdrawal for the Bureau of Reclamation, or a validity question involving mining claims on lands administered by the Department of Defense, will still be processed within the BLM and litigated, if necessary, as briefly described above. In most instances, the BLM or the Solicitor's Office does this work on a reimbursible basis, with the

referring agency paying the estimated costs of the project. The notable exception to this pattern involves the Forest Service in the Department of Agriculture. Most of the 185 million acres of national forest are open to mineral location, and the scenic and commercial value of the lands often leads to efforts to misuse the mining laws to acquire possession of timber stands or, perhaps more frequently today, a summer cabin site. The problems recur sufficiently to warrant the Service's maintaining its own corps of mineral examiners in each forest region of the public land states. Under a working agreement between the Service and the BLM, these examiners have primary responsibility for investigating mineral questions when issues arise concerning Forest Service lands; the Office of General Counsel of the Department of Agriculture presents the government's side in any administrative contest involving mineral claims. The final decision whether to make a withdrawal, to issue a patent, or to charge invalidity remains with the BLM, however, and the Department of the Interior's hearing procedures and substantive rules concerning claim validity govern any contests. Very recently, the National Park Service has established its own body of mineral examiners and begun to exercise examination functions somewhat independently of the Bureau.

This study examines the expensive and extended processes briefly described above and proposes alternatives. An excellent general study of the administrative procedure of the Department of Interior has already been made.[20] This previous study, however, failed to deal with many of the problems arising under the General Mining Law, or to treat the difficulties arising in connection with stale claims.[21] One aim of this study is to fill those gaps.

In addition to the fairly extensive literature generated by the importance of the matters discussed to the mining industry, by the work of the Public Land Law Review Commission, and by the prospects of reform that Commission's work has generated, this study draws on extensive interviews conducted during the summer of 1972. Four weeks in Denver, and one in Salt Lake City, permitted interviews with most of the personnel responsible for the minerals program in the Colorado and Utah state offices and the Denver (Regional) Service Center of the Bureau of Land Management, the Denver and Salt Lake City Regional Solicitor's offices of the Department of Interior, the Department's Salt Lake City Administrative Law Judges, and the corresponding officials of the Department of Agriculture and its National Forest Service. It was possible

[20] C. McFarland, Administrative Procedures and the Public Lands (1969). Professor McFarland prepared this study for the Public Land Law Review Commission. Its principal findings and recommendations remain valid today.

[21] Professor McFarland undertook to grasp the whole of the Department's procedures; within its mass, his principal concern appears to have been with departmental statutes offering far greater apparent discretion to the administrator than does the General Mining Law. The major criticism which has been leveled at Professor McFarland's report has been that it fails to connect with substance, and thus to understand procedural quirks as in part a response to the strains of administration. Bloomenthal, *Administrative Procedures*, 6 Land & Water L. Rev. 241 (1970).

to obtain unrestricted access to the files in all these places. During the same period, it was also possible to talk with a number of lawyers who had had a broad range of experience with the Department in these matters, in both private and public practice.[22] Conversations in Washington with members of the Solicitor's Office, the Bureau of Land Management, and the Office of Hearings and Appeals, both before and after this period, confirmed much of what had been learned.

II. WHO IS ON THE LAND? THE NEED FOR REGISTRATION

A prospector interested in looking for minerals in a given area will wish to satisfy himself of the land's availability: Is it government land, or land for which the government has retained mineral rights? If so, is it open to location under the General Mining Law? Have other locations been made, and are they currently valid? These questions obviously concern the government as well; it must maintain an inventory of its property and, for sensible management, must know its characteristics and availability. How many claims encumber lands which are wanted for a possible withdrawal? To whom should notice be given regarding a proposed withdrawal? What are the bases for those claims which have been made against government land? As will appear, the present information system serves neither the government nor the prospector well.[23]

A. For Efficient Land Management

Responding principally to its own concerns, the government has long kept detailed maps and indexes recording transactions involving its lands. These are freely available for use by the public at the various state offices of the Bureau of Land Management. For any given tract of land once in the public domain,[24] these records show whether the government retains ownership, and whether, if so, the land is subject to restrictions on the operation of the mining laws. If the land has been patented to a private

[22] These included a former Assistant Attorney General of the United States responsible for litigation involving the Department, now in private practice; house counsel for a large mining firm; counsel for a conservation organization; and several counsel in private practice who frequently represent mining interests, both large and small.

[23] The same conclusion applies regarding knowledge of the land in the geophysical sense. Geophysical characteristics have obvious significance for the government's land management planning; the Bureau's resource inventory appears to be, at present, its highest priority task. If the government could acquire the results of prospectors' searches, that would add dramatically to its stock of information. It can do so, and regularly does, with regard to explorations undertaken under lease for oil and other leasible minerals. *See, e.g.*, 5 AM. L. MINING, *supra* note 3, at 1021–22, 1045 (B.L.M. Form Oil and Gas Lease), 1087 (B.L.M. Form Coal Prospecting Permit). It has no authority to require the provision of such information under the General Mining Law. State mining associations and others provide some information voluntarily, but a poorer data base results.

[24] With limited exception, the records do not include lands acquired by the United States from private ownership. Meek, *Federal Land Office Records*, 43 U. COLO. L. REV. 177, 186–87 (1971). The omission, while possibly questionable from the government's point of view, is not troubling to our hypothetical miner, since acquired lands are not available for location in any event. For definition of acquired lands see note 7 *supra*.

citizen, the records will show whether the government has retained mineral rights which permit a subsequent location. The government maintains these records principally for its own purposes, and their use requires some skill.[25] But their availability to the public is assured by regulation,[26] and the government personnel in charge of them — at least in the two offices visited — were both cooperative and helpful in assisting an anonymous visitor to find his way.

In a few respects, however, the prospector may find these records incomplete or misleading. They do not show existing mining claims on locatable land, although they will show claims for which patent applications have been rejected or which have been declared null and void. While they will reveal withdrawals or classifications which have been made or proposed and which would preclude operation of the mining laws, issues regarding the time at which that segregation takes place remain open, and the risk of error in the records appears to be placed wholly on the prospector.

1. Registration of Claims — Land office records show only matters to which the government is a party; the statute makes no provision for notifying the government of mining claims and no effort has been made administratively to secure this information from the county courthouses where it is filed or to record it even when, in the course of other business, the information comes to hand. Consequently, the prospector or other individual interested in the land must also check county records if he wishes to identify rival mining claims. These records are not often indexed, as the federal records are, on the simple and regular basis of the public land survey. The Bureau must also repair to the county courthouse if it needs to know what claims encumber government lands. Not all matters regarding mining claims are noted on county records; no indication is placed there if a claim has been declared null and void, or patented, or, perhaps most important from the viewpoint of a subsequent purchaser, limited because of conflict with prior claims.[27]

The prospector probably suffers less inconvenience from this state of affairs than the government. If he is interested in a particular twenty acres, or even 160, his eye may suffice to tell him whether other prospectors have been on the tract within the past year or so; once a year has gone by without assessment work, the land opens again for location, and he need not be concerned about the possibility of pre-existing claims as long as

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[25] A detailed description of their contents and use appears in Meek, *supra* note 24, at 192-96; *see also* Edwards, *The Silk Purse and the Sow's Ear: Benefits and Limitations of the Project to Improve the Federal Land Records,* 12 ROCKY MT. MIN. L. INST. 243, 247–52 (1967).

[26] 43 C.F.R. § 1813.2–1 (1973).

[27] Edwards, *supra* note 25, at 259; Meek, *supra* note 24, at 197 describes the tax sale by one Colorado county of a mining claim which appeared on its records as a twenty acre tract. The case file in the Bureau of Land Management shows thirty-nine exclusions at patent, amounting to 19.5 acres — leaving twelve scattered parcels amalgamating one-half acre to the unhappy purchaser.

they have not been taken to patent. Even if assessment work has been excused for past years, a frequent dispensation in the past, it may not take him too long to review two or three years' records in the county courthouse to see whether the required affidavits have been filed. For his purposes, the current records may be enough. County registration of his own claim, moreover, is an economic necessity. The claim, if valid, is property in the fullest sense — taxable, inheritable, deviseable, and assignable. It must be on record in the place where lawyers, bankers, and others accustomed to dealing with property interests will expect to find it, and where recording is required if constructive notice is to be given to other interested parties.

No inconsistency need exist, of course, between federal and local registration systems. Miners argue that a requirement of double registration would substantially impair the economic value of the claim by making it harder to pass secure title. Moreover, any variation between the systems would produce uncertainty, and landsmen would be reluctant to warrant a location simultaneously free of impairment on two sets of records. The very chaos of many county records may also confer a certain advantage on the naturally secretive prospector: the fact that a single prospector has been blanketing a particular area of interest with claims will be much less readily apparent in county records than in federal records tied to the public land survey; inquisitive persons will find it less convenient to go from county to county gathering news of recent activity than to deal in one place with records for the whole state;[28] and if the federal government cannot easily discover a claim, it is that much less likely to be challenged.

The inability of the federal government to acquire readily information about its lands imposes burdens not only on contest proceedings, but also on federal land management and other uses of federal records, such as preparing land use proposals. These burdens do not seem to be balanced by the advantages to particular miners of nonregistration — "advantages" which from a quite proper government perspective lack substance.[29]

Proposals for federal registration have repeatedly been made, but have never succeeded on a national basis.[30] The report of the Public Land Law Review Commission recommends such a system,[31] as do all three

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[28] Edwards, *supra* note 25, at 257. Compare the assertion in Meek, *supra* note 24, at 190, that some dislike the Bureau's transfer of its records to microfilm for essentially the same reason — loss of privacy; *see* Ritchie, *Title Aspects of Mineral Development on Public Lands,* 18 ROCKY MT. MIN. L. INST. 471, 484–85 (1973).

[29] The argument might be made that serious mining claims today are likely to involve large, diffuse ore bodies, requiring many claims and several years of development before a showing could be made that would satisfy the Department's current discovery criteria; secrecy, the argument runs, makes it more likely that the claims will survive the development era without interference. But this argument, in reality, disputes the test for "discovery" and the current rules regarding *pedis possessio,* which require ongoing work on each claim sought to be held during the prediscovery developmental period. Whatever changes are warranted in those rules, the government is entitled to know what use is being made of its lands.

[30] *See, e.g.,* Edwards, *supra* note 25, at 245–46, 267.

[31] P.L.L.R.C. REPORT, *supra* note 8, at 129–30.

of the major bills introduced in Congress during the 1971 session to reform the General Mining Law, and the administration bill introduced during the last session.[32] The BLM has had limited experience with registration under three statutes: Public Law 84–359, concerning mining claims on power site withdrawals;[33] Public Law 84–357, concerning mining claims on lands previously withdrawn as valuable for coal;[34] and the Act of April 8, 1948 reopening to mineral location extensive forest lands in Oregon.[35] These acts all require that a copy of the location notice be filed with the state office of the Bureau within a brief period after filing in the county records.[36] The experience under these statutes reveals no particular hardship on prospectors who register their claims.[37] The Forest Service has also attempted to acquire information about claims made in wilderness areas, with mixed success, by regulation under the Wilderness Act.[38]

One possible reason for the failure of registration proposals has been the varying enthusiasm of Bureau employees for receiving and managing the information thus acquired. Some feel that the volume would tend to clutter the land records, that many claims are evanescent, and that the information acquired would not always be given in a useful form — most notably, where claims are not tied to the public land survey, and hence cannot easily be placed on the Bureau's plats. For these reasons, they suggest, information provided the Bureau under occasional special statutes has been stored rather than used. At a time of increasingly intense land management, however, the argument against knowing what is happening on the government's land becomes increasingly unacceptable.

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[32] S. 921, 92d Cong., 1st Sess. § 211(b) (1971); S. 2542, 92d Cong., 1st Sess. (1971); S. 2727, 92d Cong., 1st Sess. § 6 (1971). The current bill, S. 1040, 93d Cong., 1st. Sess. (1973) would substitute a leasing system for the location system, § 102, and for existing claims would require registration within one year and ordinarily an application for patent within three, §§ 123(d), (e).

[33] 30 U.S.C. §§ 621–25 (1970). The pertinent regulations appear at 43 C.F.R. § 3730 (1973).

[34] 30 U.S.C. §§ 541–541(i) (1970). The act is restated and to a limited degree explained in 43 C.F.R. §§ 3720–24 (1973).

[35] Act of April 8, 1948, Pub. L. No. 80–477, 62 Stat. 162; the pertinent regulations appear at 43 C.F.R. § 3821 (1973). The lands in question were originally granted to the Oregon and California Railroad and the Coos Bay Wagon Road to aid their development, but subsequently revested in the United States. Because of the fear that the mining laws would be abused to obtain them for their rich timber stands, these lands had been closed to mineral location in 1937.

[36] In other respects, the acts are rather typical of public land statutes in their diversity. As interpreted by the Department, two require, with minor variations, that the notice tie the claim to the public land survey. The third does not. Under the coal lands statute, claims, unless brought to patent, are limited in duration. 30 U.S.C. § 541(i) (1970). Under the other two, annual assessment work statements must be filed. 43 C.F.R. § 3722.1 (1973) (coal lands), § 3821.3 (Oregon and California lands).

[37] *See* M. CLAWSON, *supra* note 11, at 125.

[38] 43 C.F.R. §§ 3823.2(a), (c) (1973); 36 C.F.R. §§ 293.13–.15 (1973); 38 Fed. Reg. 34817 (1973) (notice of proposed rulemaking); Sumner, *supra* note 4, at 13. *But cf.* Ferguson & Haggard, *Regulation of Mining Law Activities in the National Forests,* 8 LAND & WATER L. REV. 391 (1973).

The one reported judicial decision construing the registration requirements of the special statutes has also had a dampening effect. The case involved a miner actively working his several claims and known in fact to Bureau personnel, who had not registered his claim during the statutory period. He succeeded in obtaining a judicial order prohibiting the Bureau from forfeiting his claim on the ground of nonregistration, apparently on the ground that forfeiture would have been a penalty for which Congress had not clearly provided.[39] While defensible on the fact of actual notice, the opinion may mean that the Bureau cannot safely ignore even those unregistered claims of which it has no such notice.[40] That reading clearly deprives the registration requirement of meaning.

The chief impediments to federal registration today appear to be the incompleteness of the public land survey in mountain and desert regions where minerals seem most often to be found, and the inaccuracy of a number of the older surveys still relied upon in BLM state office records. Miners recount tales of claims safely outside withdrawal lines indicated on Bureau plats, which were found to be within lines when the withdrawal was finally marked on the ground. Where the survey is incomplete, an obligation to extend the survey to a claim, or to tie the claim to some other geological marker, could be a significant expense for the smaller miner. Yet these objections go less to the propriety of a registration requirement than to the need for prompt completion of an accurate survey, a matter increasingly within the government's grasp. Mapping of the country has already reached the point where a satisfactory if not ultimately precise statement of a claim's geographical location can be made. Any sensible registration scheme would admit the possibility of adjusting a claim description to suit the physical location of the markers should inaccuracy in the survey be found. The argument regarding possible expense is less one of fairness than the assertion that mineral finds will be discouraged; the expense is one which must be met to obtain a patent, and

[39] MacDonald v. Best, 186 F. Supp. 217 (N.D. Cal. 1960). The Act specified that for pre-existing, valid claims, nothing in it "shall be construed to limit or restrict the rights of the owner," 30 U.S.C. § 624 (1970), and the court concluded that this lent emphasis to its interpretation. This reading largely obliterates the registration requirement for pre-existing claims.

[40] *B.E. Burnaugh,* 67 Interior Dec. 366 (1960) acquiesces in *MacDonald* and gives it force as well for claims located after the Act's passage. That extension is questionable; the savings clause of 30 U.S.C. § 624 (1970) does not extend to such claims, and nonrecognition in this context more properly seems to reflect a failure to meet a condition of initial validity than a penalty assessed against a valid claim for noncompliance. The Department's acceptance was based on the conclusion that the issue was "not . . . of great administrative importance." 67 Interior Dec. at 367. As the discussion within should make apparent, this conclusion is valid only when there is actual notice of the claim notwithstanding the fact of nonregistration. Such notice assures that the informative purpose of the registration requirement is satisfied. If the statute permits the Bureau safely to ignore unregistered claims of which it has no actual notice, then the absence of authority to initiate contests against unregistered claims it does know about is not a great loss. But if *MacDonald* means that a "diligent search" of county records must be carried out whenever it is desired to assure that the land is free for a future use inconsistent with mining, a substantial administrative burden does appear. Unless the statute frees the Bureau of that burden, casting the responsibility for notice on the locator's shoulders, it means nothing at all.

the requirement seems equally warranted whenever a prospector wishes to assert an exclusive possessory right.

The proposal of the Mineral Leasing Bill [41] to require registration of all mining claims as a condition of their continued validity, then, is sound.[42] Indeed, the Department should consider whether it could acquire

[41] S. 1040, 93d Cong., 1st Sess. § 123(d) (1973).

[42] Extending the registration requirement to interests acquired before its adoption is constitutionally sound, provided adequate notice and opportunity to protect claims are given. Wichelman v. Messner, 250 Minn. 88, 108–10, 83 N.W.2d 800, 816–20 (1957); Schroeder v. City of New York, 371 U.S. 208, 211–14 (1962); Note, *Constitutionality of Marketable Title Legislation,* 47 IOWA L. REV. 413, 418–23 (1962); *see* text accompanying notes 103–11 *infra.* However, the Supreme Court's recent invalidation of several statutes restricting distribution of governmental benefits for overbreadth of statutory criteria (or irrebuttable presumptions, as the Court called them) suggests the need for caution in articulating the mechanism adopted. *E.g.,* Vlandis v. Kline, 412 U.S. 441 (1973); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973).

Under the present draft, any mining claim not registered within a year would be "conclusively presumed" to have been abandoned. S. 1040, 93d Cong., 1st Sess. § 123(d) (1973). As applied to most circumstances in which no registration occurred despite a well publicized requirement, that presumption would be sound. But, as was the case for the food stamp program at issue in *Murry,* the few cases in which it is likely to be tested will be just those in which it breaks down — bona fide prospectors with plausible and appealing explanations for their failure to register in time, or operating miners, as in MacDonald v. Best, 186 F. Supp. 217 (N.D. Cal. 1960), whose workings, known to the Bureau without need for registration, demonstrate that abandonment has not occurred. To be sure, the doughtiness that might lead a miner to ignore a well publicized registration requirement has the flavor of the eccentric to it. But the prospector's interest is a fully vested property right after discovery, *see* note 5 *supra,* and that well understood fact may make judges hostile to a rule that takes away all power of exception. Language of conclusive presumption is decidedly inadvisable in the current judicial environment.

What is essential for the Bureau is (1) that it be freed of the burden of finding and then challenging mining claims on governmental lands when other, mutually exclusive use is desired; and (2) if the patent system is to be replaced, that claims under the old law are rather quickly adjusted. The first of these purposes seems equally well served by a simple *presumption* of abandonment, which would permit the Bureau to rely on the fact of nonregistration as an adequate basis for ignoring the possibility that other claims, unknown to it, exist; claims which are well known to the Bureau's local officials, as MacDonald's was, or claims, the validity of which could later be established in all particulars despite the presumption of abandonment, are likely to be rare. And the Bureau is less likely to be begrudged a skeptical attitude toward assertions that facts overcoming the presumption have been shown, than to be grounded on the shoal of an irrebuttable presumption.

Alternatively, a quiet title procedure could be employed, on the model of the Multiple Mineral Use Act of 1954, 30 U.S.C. §§ 521–31 (1970), and the Surface Resources Act of 1955, 30 U.S.C., §§ 612–15 (1970). Under these acts, described more fully within (text accompanying notes 97–109 *infra*), a limited search for claims is made, and claimants are then called upon, after notice given personally or by publication, to respond or forfeit their interest — in the case of the statutes cited, a partial interest in their claim. The salient difference from S. 1040 is the provision for individual notice of the obligation to respond, notice which must be *personal* in the case of easily discovered claims. No possibly rebuttable "presumptions" are employed; the statutes rather provide an understandable and fair registration procedure, grounded in the government's undoubted interest in knowing and controlling the uses to which its land is put.

The Bureau's second purpose — quick adjustment of claims under law — is approached through the vehicle of discovery. Failure to apply for a patent within three years of registration is made presumptive of invalidity; "clear evidence" of validity must be presented to overcome that presumption. S. 1040, 93d Cong., 1st Sess. § 123(e) (1973). In establishing a simple rather than an irrebuttable presumption, the draft appears sound. Failure to apply, under pressure, may rationally be taken to signify doubt on the part of the prospector that he had made the discovery required for claim validity by the date the Act was passed; in any event, the burden of demonstrating validity is properly the claimant's. See text accompanying notes 145–48 *infra.* Few are

significant information regarding mining claims and claimants through action that would not require a new statute. The most dramatic step would be to impose a registration requirement by rule, as by making failure to register presumptive of a failure to meet the requirements of good faith mining purpose, discovery, or the like. Although staff members have suggested this step from time to time, the Department has never acted, probably because of fear that authority would be found lacking. The number of failing efforts to require registration by statute makes the concern legitimate, although not conclusive.[43] Moreover, the Department could employ even noncoercive measures to encourage registration. State officials willing to cooperate with the Department might use carbon copy forms for new filings and affidavits of assessment work.[44] This clerical change would permit the Bureau to assess current mineral activity rather quickly. Voluntary registration of claims could also be advantageous to claimants, both by assuring them individual notice of any proposed segregation of the land affecting their claims, and by facilitating the Bureau's consideration of existing mineral activity in connection with proposed withdrawals.[45]

2. *Notification of Pending Withdrawals* — Unlike mining claims, withdrawals or segregations of land from operation of the mining laws are noted on BLM state land office records. The time at which that segregation occurs can be of crucial importance, since discovery and location must be complete by then if the claim is to be valid. The Department generally notes proposals for withdrawal or other segregation of land both on the land office records and in the *Federal Register*;[46] the latter usually occurs a few days later. The date of noting on the records — indeed, in some instances, the date on which proposals for segregation of lands arrive in the office — is treated as the effective date. Infrequently,

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likely to be able even to make a showing of facts warranting hearing on this issue, much less prevail, once the presumption has attached.

[43] In particular, the failures to persuade Congress to adopt *general* registration schemes could not foreclose a rule requiring registration of claims located within an area withdrawn from future operation of the mining laws. See text accompanying notes 122–38 *infra*. Such a rule would have the benefit of particularly strong regulatory need, and would also be considerably narrower than the statutes which have been proposed. The Forest Service has recently adopted what amounts to registration of all claims "which might cause a significant disturbance" — most, today — on an environmental protection rationale. 39 Fed. Reg. 31317 (1974).

[44] *Cf.* P.L.L.R.C. REPORT, *supra* note 8, at 126.

[45] See text accompanying note 57 *infra*. Similar benefits were offered for registration under the Multiple Mineral Development Act of 1954, 30 U.S.C. § 527(d) (1970). Such registration has been very infrequent in practice, an outcome which may be due in part to the distrust with which the Bureau and the Department are often viewed, and a corresponding disinclination to put a claim at risk by exposing it to Bureau personnel. *See* Mock, *Human Obstacles to Utilization of the Public Domain*, 12 ROCKY MT. MIN. L. INST. 187 (1967); Sherwood, *Mining Law at the Crossroads*, 6 LAND & WATER L. REV. 161, 170 (1970). No registration scheme is likely to work well unless that distrust can be dispelled.

[46] In limited circumstances, withdrawals are noted *only* on the land office records. Buch v. Morton, 449 F.2d 600, 602 (9th Cir. 1971); C. WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATION OF PUBLIC DOMAIN 412 (1969). No adequate reason for this failure to use the *Federal Register* appears.

the posting of the records, the notice in the *Federal Register,* or both, err in describing the lands withdrawn or segregated. The description in the proposal is treated as controlling.

(a) Effective Date — Variations in the time at which segregations become effective, unless required by inflexible statute, are hard to justify. Under the Department's regulations, however, the date an application is filed controls where private persons or states seek land for airports, for exchange, or for stock driveways,[47] but the date that an application is noted on the land office records controls where federal agencies propose withdrawal or reservation.[48] By statute, classifications under the Classification and Multiple Use Act of 1964, now defunct, did not take effect until publication in the *Federal Register.*[49] Two considerations compete here: the need to prevent any other appropriation of the land once a proposal for its use has been put forward, and fairness to the prospector seeking to use apparently open federal land. (A timely discovery of valuable minerals, it might be added, reflects not only reliance on the prospector's part but also a factor which if known should influence the administrative assessment of the use to which the land would be put.) This conflict makes questionable any segregation of the land without notice — that is, automatically upon the filing of an application for exchange or other disposition. The government doubtless acts lawfully in adopting the earlier time,[50] and in the usual case little time elapses between receipt of the application and its notation. But where substantial time is taken, both fairness and a concern for promoting the wisest use of the land suggest insistence upon actual or constructive notice of the segregation before it may take effect.

(b) Notice in the Federal Register — Whether that notice may be given through the land office records, rather than the *Federal Register,* is more troublesome. The Federal Register Act requires publication of all "Executive orders, except those not having general applicability and legal effect," and provides that such orders do not become effective until filed with the Office of the Federal Register and available for public inspection.[51] The issue whether an order segregating public lands has general applicability and legal effect appears not to have troubled any court, despite the Department's conclusion that the Act does not govern, although in some instances the time lapse between notation and publication may be significant.[52] Some have argued that the order does have

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[47] 43 C.F.R. §§ 2091.2–2 to –4 (1973); *cf.* Frank Melluzzo, 72 Interior Dec. 21 (1965); C. WHEATLEY, *supra* note 46, at A-6. *But cf.* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30022 (1973).

[48] 43 C.F.R. § 2091.2–5 (1973). *But cf.* C. WHEATLEY, *supra* note 46, at 411.

[49] 43 U.S.C. § 1414 (1970).

[50] Lutzenhiser v. Udall, 432 F.2d 328, 331 (9th Cir. 1970).

[51] 44 U.S.C. §§ 1505(a), 1507 (1970).

[52] Thus, when the Forest Service seeks a protective withdrawal, there is an interval of at least two weeks between notation and publication, during which the Service is

general applicability [53] on the basis of the wide range of interests the action may affect, the Department's strong recognition of the need for publication,[54] and the general analogy which exists between the Department's procedures for considering withdrawals [55] and ordinary notice-and-comment rulemaking proceedings. The Department's contrary position, however, seems more persuasive. The order affects a particular tract of federal land, thus is both individual in nature and peculiarly within executive discretion, and the possibility of an encumbrance arising makes plain the need for speedy action. Attenuated as the notion of constructive notice may be,[56] most users of the public domain are more likely to receive notice through the land office records than the daily editions of the *Federal Register* (which indexes withdrawal orders only by state); and it seems likely that errors will infect the land office plats less often than the *Federal Register.*

Overall, the Bureau's provisions for notice of orders segregating lands in conjunction with a proposed withdrawal are exemplary in design and execution. It instructs its officers to arrange for publication in nearby newspapers in addition to the *Federal Register,* to post copies in appropriate Bureau offices and on or near the lands in question, to send copies to the county recorder, other possibly interested local officials, and local Congressmen, and to send copies "to individuals and others who have demonstrated an active or potential interest in the lands."[57] These instructions are regularly followed.

(c) Error in the Land Records — The Department's apparent resolution of the problem presented by mistake or omission in notation on the land records is less satisfactory. It holds that in the case of omission, the reservation is still valid [58] and that in the case of error, both the lands erroneously included and those erroneously excluded are withdrawn.[59] The Department's freedom from the need to publish its orders in the

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to talk with mining interests who might seek to oppose it, in order to determine whether a hearing is desirable. V BUREAU OF LAND MANAGEMENT MANUAL § 4.5.29 (1958) [hereinafter cited as BLM MANUAL]; C. WHEATLEY, *supra* note 46, at 413, 483.

[53] C. WHEATLEY, *supra* note 46, at 399–400, 481–83.

[54] 43 C.F.R. § 2351.4 (1973); V BLM MANUAL, *supra* note 52, § 4.1.9.

[55] 43 C.F.R. §§ 2350.0–1 to 2357.1 (1973).

[56] Departmental regulations treat the notation of segregation on the tract books as affording constructive notice of that action. However, the Department has resisted suggestions that these records be made the subject of constructive notice in proceedings outside the Department. It does not wish to have the land records encumbered with records of wholly private transactions, such as lease sales, or subjected to regular use by title searchers in connection with such transactions. Edwards, *supra* note 25, at 251 n.22.

[57] V BLM MANUAL, *supra* note 52, § 4.1.9.

[58] St. Paul, M.&M. Ry., 36 L.D. 167, 168 (1907).

[59] C. WHEATLEY, *supra* note 46, at A–7 to –8, *citing* Richard L. Oelschlaeger, 67 Interior Dec. 237, 240–41 (1960), and Bert L. Ruark, 40 L.D. 599 (1912); *cf.* Frank Melluzzo, 72 Interior Dec. 21 (1965). The problem is made more serious by survey errors or the placing of a withdrawal on unsurveyed land; mining claims are small enough so that failure to mark the withdrawals in the field — and they may not be marked there for a long time — creates great uncertainty.

Federal Register may imply that it is not bound by omissions or errors there,[60] but that argument is not convincing for erroneous entries in the office records. The citizen expects to find accurate information about the availability of the public lands there, and as a matter of fairness and sound policy, that expectation should be protected by giving such entries an effect like that which required publication in the *Federal Register* would be given.[61]

Recognition of a "vested right" to mining claims maturing during the period afflicted by the error might be an excessive response. Congress has permitted the executive branch enormous discretion in dealing with the public lands. Land office records are essentially a creature of regulation, not statute;[62] and although Congress could make those records or publication in the *Federal Register* conclusive, it has done so only in the now defunct Classification and Multiple Use Act of 1964.[63] The inappropriateness of binding the government to the mistakes of its employees in managing government property has long been recognized.[64] Parties with inside information must also be prevented from frustrating the government's control of its property.

Recoupment of expenditures undertaken in reliance on the error and recognition of the legitimacy of any profits made during the period, however, would be appropriate measures of relief. To say that these records are not kept "for" the public but simply made available to them as a convenience, however accurate as a formal matter, is inappropriate as applied to records of governmental action. Recognizing the fact of reliance upon the records, even to so limited an extent, would emphasize the need for accuracy; it is not that the government must transfer the lands but rather that it must give consideration to the substance of a claim it otherwise could ignore. The principal cases which have held that the government is not estopped by the conduct of its agents in dealings with the public lands have recognized the justice of these reliance claims.[65]

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[60] *See* Foster v. Jensen, 296 F. Supp. 1348 (S.D. Cal. 1966). *But see* Lutzenhiser v. Udall, 432 F.2d 328 (9th Cir. 1970); United States v. Chatham, 323 F.2d 95, 99 (4th Cir. 1963) (condemnation action; "gross" misdescription was ineffective to confer possessory right on government without personal notice).

[61] 5 U.S.C. § 552(a)(1) (1970). The Bureau provides by rule that "[r]eliance . . . on records maintained by land offices cannot operate to vest any right not authorized by law," 43 C.F.R. § 1810.3(c), but if the government would otherwise be found estopped, reliance on this rule would be no better than a bootstrap operation.

[62] Meek, *supra* note 24, at 177.

[63] 43 U.S.C. § 1414 (1970).

[64] *See* note 61 *supra;* Shotwell v. United States, 163 F. Supp. 907, 915–16 (E.D. Wash. 1958); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 17.01–.04 (1958); Comment, *Never Trust a Bureaucrat: Estoppel Against the Government,* 42 So. CAL. L. REV. 391 (1969).

[65] United States v. California, 332 U.S. 19, 39–40 (1947); United States v. San Francisco, 310 U.S. 16, 31–32 (1940). In each instance, an initial interpretation by the Department's officers erroneously favored the party subsequently opposing the United States in court; California was given to believe it controlled the seabed off its coasts, and San Francisco, that it was permitted to sell electric power generated by a federally supported project to a private utility for resale. No one representing the interests of the United States would have been heard to test the correctness of these interpreta-

Where the situation is readily clarified for the future by correction of the records, and the error involved is a simple factual one, sound policy favors giving the land office record at least partial effect.[66]

The common perception that the Department has failed to recognize just reliance claims is one of the most fertile sources of discontent within the private bar regarding the administration of the mining law. The Department must remain free to change its interpretation of governing law when a previous position appears to have been in error, even though there are adverse consequences for the future expectations of those who acquired benefits under the prior rule. Absent such authority, venal or shallow administrators could too easily commit valuable resources to perpetual waste. No contemporary corrective is available to the government, and Albert Fall's ghost still stalks the Department's corridors. But it does not follow that the interpretation in question may be given no force for the period during which it persisted. Reliance, appropriate in the existing circumstances, may indeed have been placed on the existing state of the law. For example, the Secretary now appears to have erred in concluding that the government had no interest in a locator's failure to perform assessment work on claims located on lands subsequently withdrawn from location by the Mineral Leasing Act of 1920.[67] Freedom to revise his interpretation need not be taken as establishing the proposition that a failure to do the work in 1957, when the erroneous conclusion was in full and notorious effect, may be relied upon by the government in some adverse proceeding. The bar's perception — not yet proved valid in this instance — is that this unnecessary link will be made. Absent an error so clear that it itself serves notice of its absurdity, or some other notice that the interpretation is under question, the justice in a rule permitting the government to ground adverse consequences in another's reliance on existing interpretation is difficult to find.[68] Nothing in the decided cases endorses, much less requires, that result; since the private citizen may acquire no rights by reliance on erroneous government interpretation, neither should he be found to have lost any through that reliance.[69]

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tions in court at the time; if binding on the government when made, it is unlikely that these constructions could later have been reversed by statute. That the Supreme Court felt unconstrained by these constructions in considering the legal issues posed when departmental officers reconsidered and rejected them is hardly surprising under the circumstances. But neither case sought to recoup such profit as may have been extracted by California or San Francisco under the erroneous interpretation in the past; in the *California* case the suggestion was precisely the opposite — that a just government would surely recognize interests in such values as had been created on the basis of the previous, erroneous view. 332 U.S. at 40.

[66] *Cf.* Seaton v. Texas Co., 256 F.2d 718, 724 (D.C. Cir. 1958) (Secretary of Interior required to give priority over subsequent lessee to a lease application made in the wrong form as a result of error in land office record).

[67] Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), *on remand sub nom.* Oil Shale Corp. v. Morton, 370 F. Supp. 108 (D. Colo. 1973).

[68] *Cf.* Lemon v. Kurtzman, 411 U.S. 192 (1973); James v. United States, 366 U.S. 213, 221–22 (1961).

[69] *Cf.* Carver, *Administrative Law and Public Land Management,* 18 AD. L. REV. 7, 9–10 (1965).

The effect of the Department's approach to error in its records is heightened by its insistence that claims must be perfected before the withdrawal or segregation takes effect. If a discovery of valuable minerals has not been made as of that moment, the locator has no recognized interest in the land, no matter how heavy his investment or diligent his search.[70] Withdrawal documents typically reserve valid existing claims; that reservation extends only to claims perfected by discovery before the withdrawal is put into effect; once it is in effect, a subsequent discovery is to no avail.

This approach is unnecessary.[71] Both the Mineral Leasing Act of 1920,[72] which withdrew from location all lands valuable for fuel minerals, and the Pickett Act of 1910,[73] authorizing temporary withdrawals to protect those lands, provided that prospectors who were already on the land diligently searching for minerals would be permitted to continue diligent pursuit of discovery. These prospectors would have been protected under state law by the doctrine of *pedis possessio,* but would not yet have had a valid federal claim. Recognition was prompted by equitable concerns. The search for petroleum, with which these acts were principally concerned, required substantially greater investment and work to reach the point of discovery than did prospecting generally at that time. For metallic ores, discovery was assumed to occur at or quite near the surface, after primitive tools had been used to find an outcrop or enriched bed of gravel; but to develop a producing oil well, subtle geologic inferences were required, and thousands of feet of well might have to be drilled before discovery occurred. Recognition of this difference, and of the sizable investments made in drill holes which at the moment of withdrawal might not yet have reached producing zones, led Congress to acknowledge a federal right of *pedis possessio* in petroleum claims. The requirement of diligence in pursuit of actual discovery on these claims was, properly, narrowly construed; substantial and continuing work was required to keep claims alive until a discovery was made.[74] But the result was to lighten the consequences faced by the prospector who was acting in good faith, but had not yet been able to verify the inference that valuable minerals would be found on his claim.

The realities of prospecting today resemble the practices of the petroleum industry more than the prayerful scratchings of the sourdough with pickaxe and mule.[75] Diffuse ore bodies, deeply buried and requiring sophisticated geological techniques for location and sophisticated tech-

[70] Cameron v. United States, 242 U.S. 450, 456–60 (1920); Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30018 (1973); cases cited note 18 *supra.*

[71] *See* NONFUEL MINERALS, *supra* note 3, at 348–68.

[72] Mineral Leasing Act, 30 U.S.C. § 193 (1970).

[73] Pickett Act, 43 U.S.C. § 142 (1970).

[74] 1 AM. L. MINING, *supra* note 3, §§ 2.62, 4.32.

[75] *See, e.g.,* Twitty, *Amendments to the Mining Laws,* 8 ARIZ. L. REV. 63, 64 (1966).

nology for extraction, are more likely than an exposed vein or nugget. Consequently, prospectors are likely to be caught by a segregation of the lands in the same state of half development that characterized the search for petroleum when it was removed from the purview of the mining laws at an earlier time. The Secretary's authority to follow the congressional practice is ample, and that measure might significantly increase public acceptance of his administration of the lands.[76] Indeed, he could condition continued recognition of unperfected claims on prompt registration of them with the local land office,[77] and in this manner possibly avoid some of the difficulties now experienced in identifying and dealing with these claims.

There may, of course, be policy reasons for refusing to recognize claims in the course of development, even under conditions which assure both cooperation and diligence. The disrepute into which the General Mining Law has fallen undoubtedly contributes to that refusal. But force of habit and a failure to consider the effects of nonrecognition on other departmental procedures may also play a part. Indeed, one aspect of the unperfected claim which seems clear is that it gives its holder a particular interest in actions affecting the availability of the land for mineral location. In the past that interest has been reflected in the Department's painstaking searches for possible claimholders and case by case hearing procedures for determining validity in each instance. That procedure, discussed below, is overelaborate and inefficient for the interests involved. But the obverse of that proposition is some greater recognition of the claimant's interest in connection with withdrawal — a recognition not only of the opportunity to participate but also of the chance to demonstrate, as by further diligent development, the validity of his claim and the mineral potential of the lands in question. The information provided over a relatively short time by persons diligently pursuing the development of their claims might also prove significant in evaluating the desirability of the proposed action.

B. For Clearing Title to Needed Land

Wholly apart from the desirability of knowing about mining claims as an incident of sound public land management, knowledge of the existence of claims is important to particular transactions affecting discrete tracts of public land. A miner may wish to obtain a patent for his land. Others might wish to assert competing claims. Alternatively, the land may be required for a competing use inconsistent with the encumbrance of an existing claim; a withdrawal or segregation will protect the land against future claims but not past valid ones. Finally, legislation limiting the incidents of future mining claims requires ascertainment of already valid

[76] Negotiations between a state mining association and the Bureau over a proposed withdrawal were reported to the author as having led to such an accommodation in at least one case.

[77] See text accompanying notes 41–45 *supra*.

claims, for which the limitation will not be effective. Fair and efficient procedures must be adopted in each instance for identifying possible claims and claimants affected by departmental action.

The central focus of this study is on the procedures the Department follows when withdrawn or segregated land is to be cleared of existing claims for some competing use. The General Mining Law refers only to an application for patent, and even in that context does not explicitly provide for a hearing on the application should the government seek to controvert any of the matters alleged in it.[78] But the Law has long been interpreted to permit the Department to challenge claim validity whether or not an application for patent has been made.[79] If a dam is to be built, claims must be discovered and tested before its waters drown the land; afterwards, resolution of the discovery issue would be virtually foreclosed.[80] While national parks, picnic grounds, and buildings present less dramatic prospects should a miner asserting his prior right arrive several years after their creation, the tendency has been to view the inconvenience as the same. Chains of title are shorter than they would be years hence, and failure to discover claimants or their heirs, in the Department's view, makes any action ineffective as to them. The time to act, then, is at the outset — while the land can still be inspected, claimants are easier to track, and their heirs are less numerous.

To prosecute every mining claim that might come to the government's notice would be senseless. So long as the land remains open to mineral location, vacating a particular claim is meaningless for management purposes; absent injunctive relief, it may be instantly resurrected, even

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[78] 30 U.S.C. § 29 (1970). Notice of the application is published and posted on the land for a sixty-day period to permit adverse claims to be made by other locators. *Id.* But such claims, if made, are not passed upon by the Department. Its proceedings are stayed while a "court of competent jurisdiction" entertains the adverse claim. *Id.* § 30. The statute on its face, then, envisions no adjudicative function for the Department; the grant or denial of the applications it processes is not characterized as a quasi-judicial act.

[79] Cameron v. United States, 252 U.S. 450, 459–64 (1920). The Department has no *obligation* to decide the validity of claims respecting which a patent application is not outstanding. It could proceed to make whatever use it wished of land possibly subject to claims, or sue to enjoin alleged trespass, without first convening a formal or adversary inquiry into the existence and validity of mining claims extant on the land. If the use of any valid claims was thus prevented, the claimants would have an action for just compensation (or, should the sovereign immunity barrier be waived, an action to clear title) or a defense to an action in trespass. That is, the Department could leave the question of validity for assertion and hearing in court. The choice of the administrative over the judicial tribunal for hearing can be attacked or defended on all the bases commonly referred to in arguing such matters, and commonly is. Mining interests complain of institutional bias, delay, and the overrating of expertise, and others assert the values of uniformity, relative informality, and experience. But the choice of tribunal is a free one. The Department need not provide hearings; rather, it *may* do so, as it has done, as a means of obtaining greater control over the outcome of cases by pre-empting the fact-finding process. *But cf.* C. McFARLAND, *supra* note 20, at 204–05 nn. 113 & 116.

[80] For the small earth dams used for flood control or watering livestock, the useful life of the dam is short enough and the acreage affected slight enough that the Bureau is willing to take the chance of relying solely on the absence of any apparent mining activity at the site. The elaborate procedures described in the text are not followed.

by the parties to the contest proceeding. Recognizing this and the need to assure miners of its good intentions, the Bureau adopted (and widely disseminated) a firm policy of not bringing contests unless a patent was being sought or the land was required for some other, inconsistent use, and hence had been withdrawn from the possibility of further location.[81] The need for a determination of validity in the patent setting is clear; when government land has been segregated from further mining claims, that fact at the same time justifies the inquiry into the validity of existing claims and assures the finality of the decision — a claim once cancelled cannot be located again.[82]

In order to place these clearance procedures in context, the pages which follow provide a general description of all the contexts in which the issue of claim validity can arise, and a step by step analysis of clearance processes with suggestions for reduction of their present complexity and expense without impairment of their fairness to claimants.

1. Contexts — (a) Patent Application. The patent process is initiated by the mineral claimant's application to purchase the land on which his claim is located for the statutory price of $5.00 or $2.50 per acre.[83] No particular form is provided for application, but the information and acts

[81] Directive from Harrison Loesch, Assistant Secretary of the Interior, to Boyd L. Rasmussen, Director, Bureau of Land Management, Oct. 31, 1969.

[82] The Forest Service has never accepted the Bureau's self-imposed limitation on the initiation of contests. Under its 1957 agreement with the Bureau allocating responsibility for handling mineral matters, it reserved the authority to decide whether or not a contest would be brought; the Bureau is responsible only for drawing the complaint to the Forest Service's specifications, assuring that the charges preferred are ones which might be recognized under the General Mining Law, and so forth. As administrator of land often spectacularly scenic and heavily timbered, the Forest Service has been particularly sensitive to the possibility of abuse of the mining laws and quick to contest claims which it believes to have been made for other than mining purposes, even though the land remains formally open for location. FOREST SERVICE MANUAL § 2811.5.3 (1972). Some regional supplemental instructions describe this responsibility in great detail. FOREST SERVICE MANUAL, tit. 2800 (Supp. I, 1966) (Region 6); FOREST SERVICE MANUAL, tit. 2800 (Supp. VII, 1971) (Region 1); *see* Ferguson & Haggard, *supra* note 38, at 391. In such circumstances, the Forest Service is sometimes also able to secure injunctive relief against the alleged abuser. United States v. Denarius Mining Co., Civil No. C-2441 (D. Colo., filed Feb. 11, 1972). Often what it seeks is the removal of facilities, such as a summer cabin, the claimant may have installed. But estimations of what constitutes abuse may vary and the decision to take litigative action rarely receives intense supervision. Undoubtedly, persons mining in good faith, whether or not with much hope of ultimate success, are caught in the net.

The Bureau has recently expanded its policy to include aggravated cases of abuse of the mining laws, but evidently with the risks of futility and of overreaction in mind. Bureau of Land Management Instruction Memorandum No. 72-404 (October 12, 1972). Such contests are to be limited to actions in aid of other remedies — such as prosecutions for trespass or efforts to obtain injunctive relief against the continuance of objectionable behavior — against which a valid mining claim might be a defense. By associating actions in this way, the Bureau avoids the problem of futility; the particular malefactor, against whom the remedies are sought, is effectively prevented from reasserting his claim. A court action requires the cooperation of the Regional Solicitor's office and the Justice Department, and that affords further practical assurance against overuse. On the whole, the Bureau has adequate and efficient safeguards against the possibility of abusive or harassing filing of contests. The occasional suggestions of commentators to the contrary may accurately reflect folk myth; but nothing encountered supports them.

[83] The $5.00 price is for lode claims (minerals in place), 30 U.S.C. §§ 29, 37 (1970); $2.50 for placer claims (alluvial beds), 30 U.S.C. § 37 (1970).

required are set forth in the departmental regulations in considerable detail.[84] Among the requirements are the following: a precise survey of the physical location of the claim, showing any conflicts with other claims and the amount of work done on the claim;[85] a certificate or abstract of title; a precise description of the minerals found, specifying their location on the claim, the dimensions and richness of the find, and the amount and value of ore already extracted; and a showing that the land is available for location. The claim must be posted, and notice of the application published weekly over a sixty-day period in the newspaper nearest to the claim.

The applications are processed in the state offices of the Bureau by land law examiners (until recently called "adjudication officers"). Where applications are deficient in some remediable respect, the examiners so inform the applicant; their responses, although sometimes slow, appear genuinely helpful, and generally occasion no complaint. The land law examiners are also responsible for checking the availability of the lands in question; if the lands were withdrawn at the time of location, they are to issue a decision "declaring" the claim void and rejecting the application on that basis.[86] No hearing is afforded, since the decision is made wholly on the basis of departmental records; but an examiner's adverse decision is appealable as if made after hearing before an administrative law judge,[87] and a hearing may then be ordered if a factual controversy appears.[88] Although it might be described as adjudication, the land law examiner's function is the essentially administrative one of determining whether and to what extent the Department's lands are available for the use proposed.

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[84] 43 C.F.R. §§ 3861.1 to 3864.1–4 (1973). In a few respects — for example, the documents required to support the application of a corporation — the requirements are set out only in VI BLM MANUAL, *supra* note 52, § 3.1.8F(1). These omissions from the regulations could be easily remedied, and should be. See Strauss, note ** *supra*.

[85] The survey is performed by a private mineral surveyor who has been certified by the Bureau for this purpose, 43 C.F.R. § 3861.5 (1973), under the supervision of the cadastral engineer in the local Bureau office. For placer claims located on surveyed lands and conforming to the legal subdivisions, the official survey is not required. 43 C.F.R. § 3863.1(a) (1973).

[86] VI BLM MANUAL, *supra* note 52, §§ 3.1.10–11, 5.2.18.

[87] The Dredge Corp., 65 Interior Dec. 336 (1958), *aff'd sub nom.* Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966); 43 C.F.R. § 4.410 (1973); *cf.* Ferris F. Boothe, 66 Interior Dec. 395 (1959). It might be thought that this appeal should be taken to the administrative law judge, who would hear any factual disputes, rather than to the Board of Land Appeals.

[88] United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 440–42 (9th Cir. 1971); *cf. id.* at 452–54 (supplemental opinion). Informal contact is occasionally made with claimants regarding locations made on restricted land, to ascertain whether they assert any claims predating the segregation, and these inquiries have sometimes uncovered earlier claims whose history was otherwise unclear or hidden in the county records. The making of the inquiry reflects conscientious practice, but suggests no need for notice or hearing concerning the validity of the post-segregation claims. Indeed the inquiry assumes their invalidity. Adoption of a verified statement procedure, as is suggested in the text, would serve equally well to reveal all bases for asserted claims.

Once the application is formally complete and the necessary fees have been paid, the Bureau issues the applicant a "final certificate" which conveys equitable but not legal title to the land, and suspends the ordinary application of the mining laws.[89] At this point — or, in practice, as soon as it appears likely that a final certificate will be issued — a copy of the application is referred to a mineral examiner in the Bureau or, if national forest lands are involved, to the Forest Service for inspection of the claim. If the result is favorable to the claim, a patent is then issued; no one outside the Bureau (or the Forest Service) and few within it will review the correctness of this action. If the report is unfavorable, formal charges will be drawn up and a contest initiated. If the government prevails, the application will be rejected and the claim declared invalid, whether or not the land is still available for location;[90] but an application may be withdrawn at any point prior to hearing without prejudice to the claim, and Bureau employees often encourage that step, given the consequences of a rejection.

Although 167 patents covering 28,000 acres were issued as recently as 1960,[91] both application for and grants of patents have slowed to a trickle. In 1971, fifty-one applications were made and eighteen patents issued, covering 1,666 acres. Of the fifty cases acted on, twenty-seven, involving 131 of the 186 claims for which application was made,[92] ended in recommendations against patent; in addition, fifteen contests, involving sixty-four claims, were heard by departmental hearing examiners during the year.[93] Considering the development which precedes any well inten-

[89] That is, assessment work will no longer be required to prevent relocation; the lands could not be affected by a subsequent withdrawal, and so forth. The effect of thus conferring equitable title is to make clear the claimant's due process right to hearing in any future adverse proceedings concerning his claim. Orchard v. Alexander, 157 U.S. 372, 385–86 (1895).

[90] Kenneth F. & George A. Carlile, 67 Interior Dec. 417, 422–26 (1960). The result is hardly a necessary one. Although the opinion is written as if invalidation of the claim underlying the rejected application was absolutely required by the statutory language (rather than the product of a conscious choice among policy alternatives), the necessity seems never to have been noticed in the ninety-odd years of prior administration of the statute. It is unlikely that anyone believed the matter not open to choice. The demanding discovery standard was formulated in cases in which the lands involved were needed for a competing, inconsistent use or were being abused. In contests between rival prospectors, where mineral use is not at issue, a less rigorous test has traditionally been applied. Chrisman v. Miller, 197 U.S. 313, 323 (1905). A patent application, if granted, would foreclose any other use of the lands involved, and such a demanding discovery standard to judge its sufficiency is entirely appropriate; but if the land will remain available to mineral entry once a patent application has been denied, the less rigorous test could be chosen to assess the continuing validity of the underlying claim as against rival miners.

[91] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS table 35 (1960).

[92] Patent applications may and often do comprehend more than one claim.

[93] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS tables 83, 84, 110 (1971). The figures represent a composite, since the fifty-one applications made in 1971 could not have been finally processed by the end of the year, and many applications were pending when the year began. The substantial number of recommendations against patent — that is, against validity — is typical of recent years. Over the past eight years, such recommendations were made in fifty percent of all cases. Also apparently typical is a greater tendency for recommendations against patents on application for Forest Service lands — eleven of eighteen cases in 1971, or sixty-

tioned claim, the attrition rate is staggering. Since rejection means loss of the claim as well as failure of the application, and an unpatented claim provides lower tax visibility and almost the same degree of security as is experienced under a patent,[94] the active miner has little incentive to apply for a patent. The chief present advantages of a patent — control over the surface resources and elimination of the necessity of appearing to be performing mining work in order to protect the claim — are attractive principally to persons with other than mining purposes for the land once acquired.

(b) Adverse Claims — During the sixty-day publication period preceding issuance of a final certificate to a patent applicant, rivals for the land may intervene in a variety of ways. A rival prospector, depending on a separate claim in conflict with that for which patent is sought, may make an "adverse claim"; this has the effect of suspending the patent application while he initiates suit in state court (or, in the event of diversity jurisdiction, federal court) to resolve the issue of priority. The final judgment in the action is determinative of the asserted conflict in the patenting process. A co-locator with the applicant, believing that he has been unfairly excluded from the application or that the claim is in fact his, may file a "protest" which permits him party status in the proceedings; so may any person who asserts a nonmineral right to the land, for example, one holding a right of entry under the homestead laws. Any other person may also protest the application, but absent some claim of right to the land he will not be afforded any measure of control over the proceedings, merely the chance to make his views known. "Private contests," like government contests, may be brought against claims for which no patent application is pending by any person with a claim of title or interest in the

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one percent, as against sixteen of thirty-two cases, or fifty percent, for the remainder. Over the past eight years, the Forest Service has recommended rejection in almost two-thirds of its cases (sixty-four percent), as against forty-two percent of the total received, but its cases typically involve less land than other applications (2.5 claims per case, as against six claims per case elsewhere in 1971; over the past eight years, 4.5 claims per case as against 6.3). The Forest Service's record is not necessarily the product of greater hostility to mining claims as such. Rejected applications generally are characterized by fewer claims per application than those recommended for grant — an average of 4.9 claims per rejected application as against 6.3 claims per application recommended for grant over the past eight years, and this characteristic could be explained in a number of ways: a need for relatively large acreage (many associated claims) for efficient development of most mineral deposits found today, so that small areas are less likely to support a finding of discovery; the relative disability of the small miner (who is not, to be sure, necessarily the claimant of a smaller area) to command the legal and other resources necessary to deal effectively with the bureaucracy; or the greater frequency of applications made to acquire land for other than mining purposes (for example, as a summer cabin site) among smaller claims. Forest Service land, generally more valuable both for recreational and commercial (timber) purposes than Bureau or other government land, seems particularly subject to the last abuse. *Cf.* text following note 180 *infra.*

[94] Security of title is somewhat greater under a patent, but the unequivocal characterization of perfected claims as property, taken together with the Bureau's policy against testing validity unless the land is required for other purposes, makes the difference slight. To the extent a patent invites state taxation which would not otherwise apply, it is actually disadvantageous.

land adverse to a mining claimant. Although the Department's rules provide fully for these contests,[95] they are very rare, and are not further considered here.[96]

(c) Statutory Validity Hearings — A variety of statutes passed during the mid-1950's also provide occasionally for hearings in which validity is at issue, not for the purpose of cancelling the claim outright, but to determine some perquisite of claims located prior to the effective date of the statute, a perquisite which had been eliminated by the statute in question. For example, the Multiple Mineral Use Act of 1954,[97] Public Law 585, permitted the coexistence of mineral leases and mineral locations on the same land; previously, leased lands had been unavailable for location, and locators of lands subsequently found valuable for leasible minerals had been able to control those minerals both before and after patent. The Act opened leased lands to location and, for the future, reserved leasible minerals on located lands to the United States. Finally, for locations made before the effective date of the Act, procedures were specified for determining the claims' validity as of that date on motion of any applicant, offeror, permittee, or lessee. This determination was to be made for the limited purpose of imposing the same restriction on the preexisting claim. That is, a finding that the claims were invalid at the Act's passage resulted in a reservation of leasible minerals and the right to develop them on the claim to the United States; if the claims were valid then, the right of control remained with the locator. Similarly, the Surface Resources Act of 1955,[98] Public Law 167, reserved the management of surface resources, such as forage and timber, to the United States for all subsequently located claims, and stated a procedure by which the United States could determine the validity of pre-existing claims as of the Act's effective date. The reservation of surface resources would be imposed on all previously located claims found invalid as of that date, but not on those claims found to have been valid then. The striking reverence in which mining claims have often been held is reflected in the limited change thus accomplished. In fact, miners had never been entitled, prior to patent, to use surface resources unnecessary for mining — as, for example, by renting their claims for grazing. But they had been able to exclude the government from their claims; thus the Act made clear the government's right to manage the surface despite the "exclusive possessory right" ordinarily ascribed to mining claims.

Nearly twenty years after their passage, these statutes are rarely

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[95] Duguid v. Best, 291 F.2d 235 (9th Cir.), *cert. denied*, 372 U.S. 906 (1961); 43 C.F.R. §§ 4.450–1 to –8 (1973).

[96] One such proceeding was heard in 1971, one in 1970, and none in 1969. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS table 110 A (1971); *id.* (1970); *id.* (1969).

[97] 30 U.S.C. §§ 521–31 (1970).

[98] 30 U.S.C. §§ 611–15 (1970).

invoked.[99] Each, however, may be remarked for its procedures, since each involves the same problem that confronts the government in bringing validity contests: the need to identify existing, largely inactive mining claims and to determine the effect of those claims by efficient means which are fair to the claimants.

The prescribed procedure under each statute begins with a physical examination of the lands and a "reasonable" inquiry to find the names and addresses of others having mining claims on the land involved. The whole body of county records need not be searched, however. The statutes require inspection only of tract indexes [100] — that is, indexes compiled on a geographical basis — and the formal Requests for Notice which each Act permits mining claimants to file for record in the county record office.[101] Notice of the proceeding is mailed to each claimant thus discovered at the address given in the records, and published weekly for nine consecutive weeks in the nearest local newspaper of general circulation.[102] If these procedures have been correctly observed,[103] the rights in question are extinguished for all claims whose owners do not respond within a stated time by filing a verified statement of claim. The verified statement must identify with precision [104] the claim, its location, and the persons known to the respondent/claimant to have an interest in it. The discovery claimed need not, however, be specified.

If a verified statement is filed and the rights in question are not waived, a contest proceeding may then be brought to determine the validity of the claim for the limited purposes of the statute, following "the then established general procedures and rules of practice of the Department of Interior in respect to contests or protests affecting public lands of the United States." [105] The determination of validity made under these statutes rests on precisely the same inquiry as a patent application or a

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[99] In 1971, there were five hearings and sixteen cases initiated under Public Law 167; one hearing and an indeterminate number of cases were initiated under Public Law 585. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS tables 109, 110A, 110B (1971). The Forest Service initially made extensive use of Public Law 167, but has now essentially completed its program; the Bureau has abandoned the statute in all but unusual situations.

[100] Public Law 167 is explicit as to this limitation. 30 U.S.C. § 613(a) (1970). Public Law 585 refers to "indices" generally. 30 U.S.C. § 527(a) (1970). Among mining states, only Wyoming has such an index.

[101] 30 U.S.C. §§ 527(d), 613(d) (1970). The notice filed must give precise information regarding the physical location of each claim.

[102] *Id.* §§ 527(a), 613(a).

[103] *Id.* §§ 527(e), 613(e) reserve the rights of any person for whom the challenger failed to comply with the requirements of personal notice. Presumably, this is no more than a restatement of the constitutional doctrine that notice of publication will not suffice to bind persons whose interest is readily ascertainable. *E.g.*, Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 309–18 (1950); *cf.* Schroeder v. City of New York, 371 U.S. 208, 212–13 (1962). As the statutes elsewhere recognize, the interests of claimants not revealed by current activity on the land, by tract indexes, or by current statements of interest adequately identifying both claim and claimant, are not readily ascertainable.

[104] 30 U.S.C. §§ 527(a), (b), 613(a), (b) (1970).

[105] *Id.* §§ 527(c), 613(c).

government contest. The sole difference lies in an artificially limited date of inquiry — the effective date of the act in question[106] — and the artificially limited impact of a finding of invalidity.

The limited impact of an adverse finding under these statutes encourages waivers or acquiescence in the proceedings. But the same limits make these proceedings seem inefficient to the Bureau, and some claimants fear their use as a possible occasion for harassment. Claimants fear multiple proceedings, or the potential for change from the comparatively innocent proceedings under the Surface Resources Act to validity proceedings intended to eliminate a questioned claim. Indeed, the Forest Service may on occasion have brought full scale contest proceedings when the refusal of a claimant to waive his surface rights under the Act required a hearing.[107] The Bureau, for reasons both of efficiency and fairness, has essentially ceased bringing cases under the Act and it has undertaken not to switch to full scale contest in midstream when it does bring such proceedings.[108]

Proceedings under the Surface Resources Act have proved relatively efficient. Perhaps 400,000 claims existed on the 53,000,000 acres of land cleared by the Forest Service by January 1, 1962. Less than five thousand were asserted by verified statement; after negotiation, 4,100 statements were withdrawn and 642 claims stipulated to be valid. Apparently, few hearings were held.[109] Cost figures are unavailable, but the Bureau estimates its processing costs to have been less than one dollar per claim.

(d) Withdrawal or Segregation — No such efficiency characterizes the procedures followed when public lands are to be cleared of claims in connection with a proposed withdrawal or segregation. Although some claims may be easy to identify, because they are being worked at the time and their locators are readily found, the bulk (eighty-five percent by common estimate) are inactive. No application papers speed the examiner's task. For the claim located in 1890, 1914, or 1932, and long since untouched, physical markers on the land will have disappeared and evidence of development will be overgrown. The managers of the land and persons living in the vicinity will have no reliable knowledge. County records are the only possible source of information; but these are not usually arranged or indexed on a tract-by-tract basis,[110] and the claims in them — particularly the older ones — are not usually tied to the

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[106] The Department has asserted the right to contend against claims valid on the Act's effective date that discovery was subsequently lost. A. Speckert, 75 Interior Dec. 367, 371–72 (1968). *But see* 30 U.S.C. §§ 527(c), 613(c), (1970).

[107] Ed Bergdal, 74 Interior Dec. 245, 246, 249 (1967).

[108] *See id.* at 247–48.

[109] *Compare* 1 AM. L. MINING, *supra* note 3, § 1.44 (Supp. 1974) (no hearings held), *with* Letter from J. Phil Campbell, Acting Secretary of the Dep't of Agriculture, to George P. Smith III, representing the official views of the Dep't of Agriculture on the Report, at 5, May 28, 1974, on file with the Administrative Conference of the United States [hereinafter cited as Letter] (limited hearings, no claims found valid).

[110] Name indexes are common, but useless unless the claimant's name is known; claim indexes, where they exist, still do not place the claim on the land.

public land survey. Uncovering all the claims made on a particular tract of land, then, is an arduous process.

Nevertheless, it is a process regularly undertaken when a withdrawal or other segregation of government land appears to make determination of the validity of outstanding claims essential. The Bureau insists that it cannot compromise these matters, or permit other agencies on whose behalf it acts to do so, for fear of encouraging nuisance claims. In the ordinary case, a Bureau mineral examiner will spend the winter months, when field work is difficult, seated in the county courthouse searching the chronological records for mining claims and — since the claimants must also be found — evidence of transfers of interest.[111] Trained to this work by the Bureau, the examiner will often find many more claims affecting the land in question than the professional abstracters who are occasionally hired on a contractual basis for such examinations.

The problem of identifying claimants is handled in a similar, perhaps even more tortuous, manner. For patent applications, the problem does not exist; the applicant is directed to identify all persons with an interest in his claim by providing a certificate or certified abstract of title,[112] which must show full title in the applicant. Notice of the application must be conspicuously posted on the claim and published weekly for a sixty-day period in the newspaper published nearest to the claim.[113] This suffices to establish the claim's priority over any competing claim — to deprive the competing claimant, to that extent, of his "property right" — if an adverse claim is not timely made in response.[114] Thus, *no* search for competing claimants need be made.[115]

Old and inactive claims, however, involve the Bureau in quicksand. Oil shale claims, for example, were located before 1920, usually by more

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[111] Examiners commonly estimate that one-half to three-fourths of their time in working on contests is spent in these searches or the associated hunt for claimants.

[112] 43 C.F.R. § 3862.1–3 (1973).

[113] *Id.* § 3862.4–1.

[114] *E.g.*, Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co., 196 U.S. 337, 354 (1905); Black v. Elkhorn Mining Co., 49 F. 549, 552–54 (C.C.D. Mont. 1892), *aff'd*, 163 U.S. 445 (1896).

[115] The certificate of title relates only to the applicant's own location, and instruments or actions of record purporting to affect it. 43 C.F.R. § 3862.1–3(d) (1973). The field survey of the claim is intended to include any conflicts with prior surveys and with unsurveyed claims which may be encountered on the ground. *Id.* § 3861.2–1 (a)(2)(4). Land already patented, of course, will be excluded from the patent applied for. But regarding unpatented land — notably, unsurveyed claims which are encountered — exclusion is not ordered in the absence of a successful adverse claim, *and there is no apparent requirement of personal notice to the owner of the conflicting claim*, even when it has been discovered during the survey. *See* 30 U.S.C. §§ 29–30 (1970). It may be noted that only active claims are likely to be encountered on the ground; and at the time the General Mining Law was passed, if not today, it could be supposed that a posted and locally published notice of application for a patent would usually reach any competing, active miner. *Cf.* Black v. Elkhorn Mining Co., 49 F. 549 (C.C.D. Mont. 1892), *aff'd*, 163 U.S. 445 (1896) (unsuspecting widow). The proposition that the valid claim of a *known* adverse claimant could be eliminated without personal notice to him seems highly suspect today. Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804 (U.S. May 28, 1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

than one man, often by as many as eight. Assessment work filings typically ceased in the early 1920's; while there have been some subsequent sales of partial interests, nothing appears of record for most locators since that date.[116] Since then, most of the locators have moved from the vicinity, often long years ago; most have died; the property of some has passed intestate or through probate in distant places; the claim may or may not have been mentioned in any will; the inheritors of each locator's interest by this time may be numerous. Tracking down the locators, ascertaining how and to whom their estates passed, finding these persons (and perhaps *their* heirs), requires painstaking inquiry. Probate records, cemetery headstones, old folk in the vicinity, postal records, and regional telephone directories are among the sources checked; while the mineral examiners who do this work will not ordinarily be able to leave the state to pursue it, they can and do call upon the corresponding officers of other state offices to assist them, and by mail and telephone have at times extended their search even beyond the nation's borders.[117] Perhaps the most striking example, although one made somewhat special by its history, is the Bureau's special Oil Shale Project, centered in Denver. A sizable task force has been working since the late 1960's to identify all mineral claims affecting almost eight million acres of land in Colorado, Utah, and Wyoming thought to be valuable for oil shale. The effort is to extinguish those claims, where possible, so that a leasing program for

[116] Purchases of partial interests often have led to transactions which, like the patent application procedures, *see* note 115 *supra,* suggest the overscrupulousness of the Bureau's efforts. Under the General Mining Law, one of a group of co-locators may perform the assessment work obligation of a claim and then call on the other members of the group for contributions; a noncontributor's share may then be forfeited to him. The statute provides that notice of the obligation to contribute may be either "personal notice in writing or [weekly] notice by publication in the newspaper published nearest the claim . . . for ninety days." 30 U.S.C. § 28 (1970). This option to use notice by publication has been said to exist "regardless of knowledge, express or implied, as to location or proximity of the defaulting co-owner." 2 AM. L. MINING, *supra* note 3, § 8.14, *citing* Evalina Gold Mining Co. v. Yosemite Gold Mining & Milling Co., 15 Cal. App. 714, 115 P. 946 (1911); *see also* Rocky Mountain Mineral Law Foundation, Annual Assessment Work Manual 7–40 (D. Sherwood ed. 1972). However suspect this conclusion may be in cases of actual knowledge or of knowledge which is "very easily ascertainable," active search for a locator or his heirs is not required. Schroeder v. City of New York, 371 U.S. 208, 212–13 (1962); see note 127 *infra.* The purchasers of partial interests have used this procedure to acquire full ownership of the claims: they perform assessment work for a year or two; "advertise out" the other owners through notice in the local weekly newspapers; and, upon the predictable failure of response from the original locators' distant grandchildren, nieces, and nephews, have full rights to the claim. While the Bureau may wisely conclude that a reasonable search is nonetheless appropriate when it proceeds against a claim, that search can be kept within dimensions corresponding to the possibility that the persons found would in fact resist and might prevail — that is, owners of currently active claims.

[117] On one set of claims located late in the nineteenth century in what is now Dinosaur National Monument, a recent search identified 135 persons presently holding an interest in the claims. Nancy M. Ayers, Colo. Contest No. 469 (Bureau of Land Management 1974). The search documents reflect conversations with twenty-eight residents of six different localities and the clerks of four local courts, and inspection of probate and county land records, and several phone directories; the addresses of all but thirteen of the claimants were discovered. Cases involving sixty to eighty heirs are a fairly frequent occurrence in the Utah office.

which the land has been withdrawn can be put into effect. Although the use of a task force has permitted specialization and use of sophisticated data retrieval techniques, the group must follow the usual Bureau procedures in its mineral investigations and contacts with claimants. By mid-1972, it had barely touched the surface of the work to be done. Its full-time process, and the use of computer memory capabilities, undoubtedly produce greater efficiencies — but these are efficiencies in a fundamentally inefficient process. Even though, with good will and hard effort, information can be obtained from county records, the extent of effort required when that is the *only* indication of the claims' existence is so great as to be unreasonable. The question which ought to be asked is whether the effort is really necessary, from either the theoretical or the practical viewpoint, to assure clear title to the government and fairness to mining claimants.

In virtually all cases the conclusion is that the claim is probably invalid;[118] hence a contest is prepared, a complaint is served, and if answered, the case goes to hearing. The issues and procedures are identical with those of a patent contest, but the attrition rate is much higher. Thus, in 1971 the Bureau noted 6,149 new mineral entries and investigations among its adjudication operations, of which substantially more than half appear to have involved validity investigations.[119] A similar order of magnitude characterizes prior years. Yet only forty-eight adverse proceedings were referred for hearing in 1971, affecting 425 claims; the previous two years each saw eighty-three cases referred for hearing, affecting 3,234 and 341 claims, respectively.[120] The disparity is explained by the failure of claimants or their heirs to respond. Cases set for hearing include only those in which a timely response has been received to the Bureau's contest charges.

The expense of these proceedings is considerable. Individual proceedings would be the most costly mode, and the amount of detective work required of the Bureau in these contests adds to the costs. Thus, one

[118] The Bureau's Utah office, after investigating over 4,900 of the 12,258 claims in the new Canyonlands National Park, found none it thought valid; the experience of the Bureau's special Oil Shale Project has been the same.

[119] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS table 108 (1971). The figures include 2,691 reimbursable investigations (that is, investigations of mining claim validity undertaken for other agencies); 1,797 "other mineral cases," probably relating to mining claims; 841 land disposal conflicts and 314 multiple use (non-disposal) conflicts, which probably concerned mining claim validity; and 506 other matters relating either to mineral entries (patent applications), surface use, multiple mineral development, or mineral classification. Only the last group clearly falls outside the present subject; the manner in which the statistics are reported permits no greater precision.

[120] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS table 110B (1971); *id.* (1970); *id.* (1969). A similar rate of attrition is reflected in the experience of a single reimbursable project, the Canyonlands National Park project. *See* note 118 *supra*. Of 3,843 complaints issued, only twenty-four claimants asserting interests in 345 claims responded to the Bureau's statement of charges; 128 of these claims were nullified on bases requiring no hearing and the rest were set for hearing. The Bureau's mineral examiners believe there is no more than one disputable group of claims in the lot.

project undertaken for the Bureau of Reclamation in Colorado bears an estimated cost of $115,000, about three-fourths of which was said to have been incurred in searching county records for claims and claimants. About 450 claims were found ($256/claim); no more than twenty are expected to be put in issue. Another reclamation project, in California, cost $256,802.39, about $400 for each of the 667 claims examined. Answers were received only as to fourteen, and only three were found valid. The Canyonlands National Park Project,[121] yet to develop a valid claim from 4,900 examined, had cost $185,000 by mid-1972.

2. *A Suggested Procedure for Mining Claim Clearance* — The government's purpose in seeking to identify existing claims is to assure effective notice to all mining claimants of the need to establish the validity of their claims. Its extraordinary diligence is the product of the Department's view that contests are essentially in personam proceedings, in which any person who could possibly be found must be personally served from the outset if his interest is to be affected. Thus, the Department's rules provide that service of a contest complaint must ordinarily be made personally upon every contestee,[122] including each heir should the original locator have died. While the government, unlike a private contestant, is not disabled from proceeding by a failure to join all interested parties,[123] any judgment in its favor may be ineffective as to persons not named or served.[124] Only a limited provision for service by publication is made: the private contestant must show by affidavit, or the government by statement, the last known address of the contestee and the detail of the efforts and inquiries made in a "diligent search" to locate him; notice is then published for five weeks in a county newspaper of general circulation, sent to the contestee at his last known address and the post office nearest the land, and posted on the land and in the office where the contest is pending.[125] The "diligent search" is the extraordinary process described above. The BLM Manual appears to endorse that concept, describing it generally as involving "all 'reasonable' means of locating a contestee" and then adding such examples as interviews with residents and other miners, checking with local postmasters, and other steps similar to those commonly taken.[126]

If personal notice to each claimant were required to determine his possible interest in the land, the present exercise would be required; indeed, any claim not discovered as a result of the search through the records, however diligent, could not be affected. But this assumes that the principal orientation of these actions involves the individual claimant's

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[121] See note 118 *supra.*

[122] 43 C.F.R. § 4.450–5 (1973).

[123] *Id.* § 4.451–2(b). *But see* Johnson v. Udall, 292 F. Supp. 738, 749 (C.D. Cal. 1968).

[124] Pinkett v. United States, 105 F. Supp. 67, 71 (D. Md. 1952); *see* Union Oil Co., 72 Interior Dec. 313, 315–16 (1965).

[125] 43 C.F.R. §§ 4.450–5(b), 4.451–2(f)–(h) (1973).

[126] VI BLM MANUAL, *supra* note 52, App. 1, § 5.2 (August 1, 1958).

personal rights and not, at least to the point where claimants come forward to assert those rights, ascertaining generally the existing interests in the lands involved. If the government's efforts are viewed as a whole, the latter characterization is more accurate. Needing a particular tract of land for its own purposes, the government seeks to determine all claims that others might have in that tract. The proceedings are then essentially actions to quiet title. Consequently, personal notice is not constitutionally required to determine each claimant's interests, so long as reasonable efforts have been made overall to discover and personally notify all those who might have an interest.[127] Those who are not found after such efforts can be bound, nonetheless, by alternative forms of notice, such as publication.

The operative question here is what constitutes a "reasonable" effort to discover and notify persons claiming an interest in the land. That question is not without difficulty. The fact that a person's name appears in the county records, together with Congress' designation of those records as the place where claims are to be recorded, might be thought to make him and his claim "known," and hence necessarily the subject of personal notice. But that is rather too simple an argument. County records were specified at a time when Congress anticipated that claims would have only a short life before patent. The provision for relocation of claims by others upon one year's default in assessment work both makes the significance of any particular claim recorded in the county books uncertain and suggests a judgment that only claims reflected in contemporary records need be seriously considered. As a practical matter, it is clear that the records are obscure, and "knowledge" of claims recorded there could only be imputed. So, too, distant relatives of the locators of an aged, unworked claim rarely know of its existence, much less have the knowledge and interest to prevail in a contest over its validity. If the locator himself has moved away, he has thus delivered his own verdict on the economic viability of the claim; even if he lacked the resources to develop it himself, he would not readily leave untended a valuable right subject to peremptory seizure by others, relocation, once it is left unmaintained.

Perhaps most important, Congress has since expressed the judgment that a complete search need *not* be undertaken to support a proceeding intended to determine government rights in land possibly subject to

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[127] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950). As the Court there recognized, the question whether personal notice is required is no longer meaningfully dealt with on the basis of the traditional common law classification of actions as in personam or in rem, although those categories may be instructive. Rather, the issue is determined by balancing the state interest in final resolution of the issue (here considerable), the private right to notice and an opportunity to be heard, and the practicalities of identifying and notifying the parties at interest. What is reasonably possible must be done; but the notice required need not be so extensive that it forecloses final resolution. *Id.* at 314, 317. *See also* Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974); Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956).

previous mining claims. That is, both the Surface Resources Act of 1955 and the Multiple Mineral Use Act of 1954 provide only for a partial search of the county records (unless organized on a tract-by-tract basis), to supplement information on claims discovered through physical reconnaissance of the land, or otherwise known. Since title to the land remains in the government until patent, personal service plainly is not required for the Department to acquire jurisdiction over the subject matter of the dispute; only the fairness of the method to notify possible claimants of the opportunity to litigate could be questioned. Moreover, the judgment that the more recently adopted procedures of these acts are sufficient for fairness is not open to serious challenge.[128] "A state may indulge the assumption that one who has left tangible property [there] either has abandoned it, in which case proceedings against it deprive him of nothing . . . or that he has left some caretaker under a duty to let him know that it is being jeopardized." [129] In the condemnation context — where, as here, the action undertaken may appear from the state's perspective to affect a host of indeterminate private interests in a broad expanse of land — the state is forbidden to indulge this assumption only with respect to one "whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." [130] Even in such cases it has been suggested that the personal notice to be provided can be informal.[131] The procedures of the above statutes, which provide for mailed notice in such cases, plainly meet these tests, and thus define a "reasonable" effort to discover and notify mining claimants.

This conclusion would be equally valid if the same procedures were adopted for validity contests generally. The procedures authorized by the more recent statutes determine only a part of the miner's interest in his claim — the right to possession of leasing act minerals after patent, or to exclusive possession of the surface during the life of the claim. But these rights were considered by Congress to have been part of the "property" interest which attaches to a valid claim. Had Congress believed otherwise, it would simply have imposed the restrictions without providing any procedure for determining validity. It did not impose them, lest it be found to have impaired property interests, at the cost either of invalidity or an obligation to pay compensation. The conclusion that the specified procedures were constitutionally apt is unaffected by whether the result governs the validity of all or only some of the incidents of those claims. "Property" is equally at stake in either case; the value of the rights need not be dramatically different.[132] The congressional judgment, then, is fully

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[128] *See, e.g.*, 1 AM. L. MINING, *supra* note 3, § 1.42.

[129] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950).

[130] Schroeder v. City of New York, 371 U.S. 208, 212–13 (1962).

[131] "Even a letter would have apprised him . . . ." Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956).

[132] Consider a marginal location for uranium astride an oil field, or one for gold in the midst of commercial forest. The entire value of the claim may lie in the rights affected by Public Laws 167 or 585.

applicable to the contest situation. All that is lacking is a procedure through which to give it effect.

From the practical viewpoint, too, the current practice appears unwarranted. It is by far the most expensive means for ascertaining claimants and their interests. Bureau staff members quickly concede the futility of the procedure for identifying valid claims. Except perhaps in the special case of oil shale, where unfortunate Supreme Court decisions combined with a lengthy period of withdrawal to produce the expectation that claims unworked for decades might yet be taken to patent,[133] those claims which the Bureau has had to search county records to find uniformly prove invalid. In reality, they have been abandoned; but the effort taken to find the locators or their heirs and inquire regarding their interest in the claim is enough to convince a few that some value might exist and therefore lead them to make statements that preclude cancellation on that ground.[134]

The practice may already be disappearing under the influence of a recently adopted rule stating that the Bureau will regard substantial noncompliance with assessment work requirements as a ground of invalidity.[135] Claims unworked for five or more years, in all probability,

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[133] The decisions in *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935), and *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930), seemed to state that oil shale claims remained valid encumbrances on government lands whether or not they were maintained, and despite the withdrawal of the lands from further location in 1920. That reading was accepted by the Department for almost a quarter century. Since 1960, when the Department issued the last oil shale patent, it has been engaged in a prodigious and as yet inconclusive effort to determine the validity of the outstanding claims and begin a leasing program. The teeth of *Krushnic* and *Virginia-Colorado* have been withdrawn. Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), *on remand sub nom.* Oil Shale Corp. v. Morton, 370 F. Supp. 108 (D. Colo. 1973). Discovery of a valid claim will now require that a present value for oil shale be demonstrated by evidence that a prudent man could profitably market the mineral; it appears unlikely that a present value of oil shale could be established as long as liquid petroleum can be marketed more profitably. Frank W. Winegar, 16 I.B.L.A. 112, 4 ENV. L. RPTR. 30005 (1974). The Oil Shale Project, described in the text, is seeking to identify all claims and claimants affecting the lands in question, so that their availability for leasing can be finally determined. *See* United States Smelting & Ref. Co., 6 I.B.L.A. 253, 255 (1972). The twenty-five years which elapsed between the earlier decisions and the Department's about face in 1960, however, undoubtedly produced expectations regarding validity and patentability which may influence the outcome of the Department's effort. Hickel v. Oil Shale Corp., *supra; see* text accompanying notes 58–70 *supra*. See Widman, Brightwell & Haggard, *Legal Study of Oil Shale on Public Lands*, V Energy Fuel Mineral Resources of the Public Lands (December 1970), for a lengthy and excellent analysis of the subject. C. WELLES, THE ELUSIVE BONANZA (1970) gives a popular account.

[134] Abandonment, as the Department interprets it, requires both acts of abandonment and intention to abandon. Proving that intention against a locator's statement that he always had some hope for the claim, although he was unable to work it, has been difficult enough to dissuade the Bureau from using that charge in contests. It is effective only when proved by the claimant's failure to answer the complaint. The Bureau has provided for accepting "relinquishments" of claims, formal waivers of right from persons willing to agree not to put it to the trouble of bringing a contest. But although form relinquishments appear in VI BLM MANUAL, *supra* note 52, § 5.2.25, efforts to obtain them in the past led to charges of coercion and over-reaching against Bureau personnel. The consequence was a set of cautionary instructions under which a claimant must virtually force a relinquishment upon the Bureau, substantially ending the usefulness of the device. *Id.* App. 2, § 5.2 (November 19, 1958).

[135] 43 C.F.R. § 3851.3(a) (1973).

could always have been safely ignored; it is now clear that that step could be taken. But even the new rule requires application if a claim is to be determined invalid; and, consistent with its present practice, the Bureau apparently plans to continue searching earlier records for all claims, whether or not assessment work has recently been done, in order to give individual notice of this possible ground for finding of invalidity and permit a hearing on it.[136]

The Department should adopt a form of verified statement procedure for identifying those claims burdening withdrawn or classified lands for which individual proceedings challenging validity may be necessary. Short of what the Constitution forbids, the Department has full authority to structure the procedures it follows. "The United States, which holds legal title to the lands, plainly can prescribe the procedure which any claimant must follow to acquire rights in the public sector. . . . [It] is not foreclosed from insisting on resort to the administrative proceedings for a determination of the validity of those claims." [137] No statute requires the contrary, and since the effort is to establish the encumbrances on title for a possibly extensive tract of land — and the task of identifying individual claimants is correspondingly difficult — use of the model provided by the 1954 and 1955 Acts is fully appropriate.

The proceedings in question, like the proceedings under the Surface Resources Act, would begin as a single inquiry into all claims affecting the land withdrawn or classified. Notice of the proceeding would be personally served on all claimants known to the Bureau or readily found by it through tract indexes, reconnaissance of the land, the knowledge of local land managers, or indications of activity in county records sufficiently recent to meet the requirements of the new assessment work rule. It has already been suggested that provision be made for voluntary registration of claims with the Bureau, corresponding to the special registers provided for by Public Laws 167 and 585;[138] claimants so registered would also be personally served. But all other notice would be effected by publication, according to the Department's usual practice, in local papers of general circulation.

Persons wishing to assert claims affecting the segregated lands would then be required to provide at least the information demanded in the two "model" acts — a verified statement regarding the date, location, and recording of the claim and the identity of co-locators.[139] Unless the

[136] The phrasing of the rule fits well the established pattern of presuming the validity of untested claims. Failure to comply substantially with the assessment work requirement "will render the claim subject to cancellation." *Id.* That is, all claims are treated as effective, requiring affirmative cancellation whether or not a discovery has been made or other prerequisites of validity — including substantial compliance — performed. This failure to distinguish between conditions of validity and misfeasances which might be grounds for cancellation is the key to the Bureau's procedural bind.

[137] Best v. Humboldt Placer Mining Co., 371 U.S. 334, 339–40 (1963).

[138] See text accompanying notes 41–46 *supra.*

[139] 30 U.S.C. §§ 527(a), 613(a)(1970). It is suggested below that claimants in these proceedings *and* in proceedings under Public Laws 167 and 585 may also be

claimant were able to show that proper notice had not been effected, a failure to respond in timely fashion would result in extinction of any claim. The responses received would identify the claims whose validity must be determined, without either unfairness to the claimants or the grinding and largely futile exercise of traversing county records to discover inactive claims.

III. The Validity Determination

Once the claims and claimants have been identified, the validity question can be squarely faced: Was the land on which the claim was located open to mineral entry at the time? Has all necessary work on the claim been performed? Has a discovery of a valuable mineral deposit been made? What, if any, charges are appropriate in a validity contest? The process of passing upon patent applications (and thus, validity) was early characterized as a "judicial function" [140] and long treated within the Department as calling for hearings in the event of factual controversy. Since 1956, the Department has regarded these hearings as adjudication required to be determined on the record under section 5 of the Administrative Procedure Act.[141] Despite its express reference to hearings required "by statute," the Supreme Court had earlier interpreted section 5 as also applying to quasi-judicial hearings required by constitutional due process.[142] Valid mining claims had long been characterized as "property in the fullest sense," [143] so that a hearing in some form was required by due process before matters affecting such a claim could be decided.[144] Thus, the Department reasoned, validity contests must be treated as section 5 proceedings.

That conclusion is overdrawn. Recognition of claimants' property interests in their claims grew out of cases in which local officials had

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required to indicate the date, place, and quality of the discovery on which he bases his claim once an individual contest is begun. See text accompanying notes 164–68 *infra*.

[140] Smelting Co. v. Kemp, 104 U.S. 636, 640 (1881); *see* Knight v. United States Land Ass'n, 142 U.S. 161, 211–12 (1891) (Field, J., concurring). The question in these cases was the effect to be given the Department's findings in subsequent judicial proceedings, not what fairness might require within the Department. The conclusion reached was that departmental findings of fact, if within the Department's jurisdiction, were conclusive against collateral attack. *See* text accompanying notes 292–305 *infra*.

[141] Keith V. O'Leary, 63 Interior Dec. 341 (1956); 5 U.S.C. § 554 (1970).

[142] Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). The holding with which this interpretation was announced, that the Administrative Procedure Act governed certain proceedings involving aliens, was promptly reversed by Congress. Act of Sept. 27, 1950, ch. 1052, 64 Stat. 1048; *see* Marcello v. Bonds, 349 U.S. 302 (1955); 8 U.S.C. § 1252(b) (1970). That might have been taken as impugning the interpretation as well. Congress was unlikely to express displeasure with the whole in any other way. The reversal has not been so viewed, however, and the interpretation has survived intact. In effect, the APA has been understood to embody Congress's assessment of what the due process clause of the Constitution requires to achieve fairness in administrative hearings.

[143] *E.g.*, Manuel v. Wulff, 152 U.S. 505, 510–11 (1894).

[144] Cameron v. United States, 252 U.S. 450, 460 (1920).

signified the probable validity of the claims by preliminary acts on application for grant, and the Secretary then sought to reverse this decision.[145] While patent applications may have reached a similar stage before a contest is brought, other challenges to claim validity can occur when the claim has barely been located on the ground. The Department's view of the hearing question has been somewhat confused by a tendency to assume that the presumptive validity of a mining claim is established by the formal rituals of location — staking, posting, and filing. But the possessor of an unperfected (invalid) claim has no rights against the government. Before the question of hearing arises, a claimant could appropriately be required to demonstrate some reason to believe that the conditions of validity have been fulfilled — that he is in a position to make showings which, if believed, will demonstrate the existence of a valid claim.[146] The fact that a claim has been filed on county records may give a basis for presuming that the necessary physical identification of the claim on the ground has occurred. The simple facts of staking, posting, and filing, however, afford no rational basis for presuming that other requirements for perfection of mining claims have been met — in particular, the requirement that a valuable mineral deposit be discovered.

Yet the Department's present rules in effect make that presumption. No hearing is afforded if a claim is unregistered, or if the records of registration show that it was located after the land in question had been withdrawn from location. But the Department treats a hearing as required for claims registered during a period when the land in question was open to mineral claims, without regard to whether a showing of probable discovery has been made. In that proceeding, the claimant has the ultimate burden of persuasion regarding the perfection of his claim. The Department, however, first assumes the burden of making a prima facie showing that no valuable mineral deposit has been found.[147] Its acceptance of this obligation presumes that perfection will ordinarily have occurred — that because the claim is located on land open to mining claims, a discovery has probably been made and the probability of the contrary pro-

[145] Orchard v. Alexander, 157 U.S. 372, 383 (1895) (once equitable title vests, on acceptance of proofs and payment, government may not divest homestead claimant of right without due process).

[146] A possible analogy is suggested by the Supreme Court's recent decision in two cases involving termination of teaching contracts. Perry v. Sinderman, 408 U.S. 593 (1972); Regents v. Roth, 408 U.S. 564 (1972). The decision to terminate (the decision to treat as invalid an asserted mining claim) was held to come within the scope of the due process clause protection against impairment of property interests only in those cases in which a property relationship, tenure (perfection of claim), could be shown. Absent tenure, no hearing on termination need be afforded. Obviously, someone must decide whether tenure exists; subject to the unlikely application of the "constitutional fact" doctrine, 4 K. DAVIS, *supra* note 64, §§ 29.08–.09 & (Supp. 1970), that may be either agency or court. But as to this issue, the clear implication is that the burden of persuasion lies with the teacher, and, consequently, that he may be required to demonstrate a factual basis for the claim as a preliminary to any inquiry into it. *Cf.* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973). Any other conclusion would require a hearing in every case in which "tenure" was alleged, regardless of the ultimate conclusion.

[147] *E.g.*, T.C. Middleswart, 67 Interior Dec. 232, 235 (1960).

position must be shown before the claimant can be required to make his case.[148] The consequence of this approach is that the government cannot afford to ignore mining claims on its lands, however tenuous their validity, if it wishes to devote the lands to any use that will make it difficult to investigate claim validity in the future.

A. Investigating the Claim

On an application for patent, most necessary information is provided in the application, and the administrative investigation and work-up of the claim amount to little more than checking its accuracy. The required survey reveals conflicts with prior withdrawals and patents, and whether the $500 development work required for a patent has been performed. Discovery and, to a degree, the good faith of the applicant in seeking the land for a mining purpose,[149] are checked through an inspection of the premises by a Bureau or Forest Service mineral examiner. In contrast to the "diligent search" for claims and claimants, the examinations involve work which the examiners, who are mining engineers, are professionally trained to perform.[150] So far as could be determined, the examinations are performed in exemplary fashion. Both the Bureau and the Forest Service Manuals explain in detail the procedure to be followed.[151] The application must fully and adequately describe the discovery made. The

[148] One is hard put to explain the Department's acceptance of this obligation — or, indeed, the fact that until shortly before *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959), the government usually seems to have accepted the burden of proof as well as the burden of proceeding. Had it chosen to rely on judicial rather than administrative proceedings, note 79 *supra*, the claimant — whether as trespass defendant or condemnation plaintiff — would have had to show the validity of his claim. Perhaps the explanation for the Department's formal tenderness toward claimants, this willingness to assume the likely sufficiency of a claim once it has been recorded, lies in the statute's history as a disposal device, adopted at a time when the anticipated disposition of federal lands and their best use was sale into private hands. At least in the past, it has been easy to forget that discovery as well as physical identification of a claim on the ground is required for validity, and thus to attach to every recorded claim the presumption of validity that, once established, requires a hearing before governmental action impairing the claim can be taken. *See* 1 AM. L. MINING, *supra* note 3, § 4.60, at 694. In gold rush days, when the presence of one miner invited a multitude and prospecting was based chiefly on surface manifestations, failure quickly to develop a claim to the point that made a presumption of validity reasonable invited top filing by another. While the standard of discovery was never as demanding in contests between miners as in other settings, note 90 *supra*, it was still necessary to show "reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or . . . that [the claim] is valuable for [placer] mining." Chrisman v. Miller, 197 U.S. 313, 323 (1905). One would think the same showing could be required of a claimant asserting a right to hearing on the validity of his claim to government land.

[149] Good faith must be averred to by applicants for placer claims but not by applicants for lode claims. *Compare* 43 C.F.R. § 3862.1 (1973) *with id.* § 3863.1–3(a). Want of good faith is rarely used as a contest charge because of the inconvenience of proving it; when used, it is equally available against lode claims. VI BLM MANUAL, *supra* note 52, § 5.3.13; *see* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30021 (1973).

[150] A fuller description of the technical side of examinations may be found in Payne, *Examination of Mining Claims and Compliance with Law: Clear-Listing or Adversary Proceedings*, 5 ROCKY MT. MIN. L. INST. 163, 173–89 (1960).

[151] V BLM MANUAL, *supra* note 52, § 5.3.8; FOREST SERVICE MANUAL, *supra* note 82, § 2811.42.

examiner is to sample the points of discovery, mineralization, or ore extraction so described, and have them assayed. If at all possible, this sampling, and the inspection generally are to be done in the presence of the applicant, and his agreement is to be secured to the assaying laboratory used and other matters.[152] A wide variety of information regarding ore extraction, market expectations, and development plans is to be obtained. These responsibilities appear to be smoothly and fairly carried out. Applicants are in fact given ample notice of inspections and encouraged to be present; mineral examiners appear willing to go out of their way to assure that the inspection is a cooperative one. Although there was much complaint regarding the "unrealistic" discovery standard, none was heard about the procedure by which the matter is inquired into. The result is a detailed report with recommendations for action — a report which is generally available to the applicant under the Freedom of Information Act.[153]

The same ethos, carried into a situation in which the claimant is neither applying nor pliant, again produces an excessively heavy burden on the administrator. Until he applies for patent, the mineral claimant may never have to announce what he has found, where, in what quantities, or what he intends to do with it. From the deceased locator's nephews and heirs in Philadelphia, who have no idea what their uncle may have found but hope the government will treat them "fairly" by looking to

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[152] *Cf.* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30021 (1973).

[153] The only possible controversy regarding its availability concerns whether the report is an "intra-agency memorandum . . . which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1970). That brings the Department's deficient discovery powers, see note 166 *infra*, to the fore: under the discovery rules of federal district courts and most agencies, the documents would be so available in litigation with the agency, subject to possible excision of recommendations for action; but under the Department's limited subpoena powers, they are not. The Department's initial response was to continue to deny the report, resting the availability question on its own discovery powers. Under pressure in a case in which broad discovery had been stipulated by the parties, the Solicitor directed that the factual portions of reports be made available. Frank W. Winegar, 74 Interior Dec. 161 (1967), *rev'd on other grounds*, 16 I.B.L.A. 112 (1974). But this compromise was found insufficient on review, *id. sub nom.* Shell Oil Co. v. Udall, Civ. No. 67–C–321 (D. Colo., filed September 15, 1967), on the basis, reflected in the legislative history (S. REP. No. 813, 89th Cong., 2d Sess. 9 (1966)) and in other judicial opinions (Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 804 (S.D.N.Y. 1969); Benson v. General Services Administration, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878, 880 (9th Cir. 1969)) that "availability" was to be determined in light of the broad discovery powers of the district courts. That holding appears to have been accepted, and the reports are regularly made available to claimants who ask for them. There remain standing instructions that recommendations as distinct from factual matter not be disclosed; and this restriction seems fully justified by the statute and the prevailing understanding of it. EPA v. Mink, 410 U.S. 73, 85–94 (1973); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); S. REP. No., 813, 98th Cong., 2d Sess. 9 (1966). Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047 (1973). The opinion mentioned, however, recognized no such limitation, and the disposition of those who know about it is that the possibility of excising a portion of these reports is not sufficiently important to insist upon. Full reports, therefore, are often provided. In *Mink*, government counsel conceded in the Supreme Court that "low-level, routine factual reports" were fully disclosable. 410 U.S. at 91. The reports here fit that description.

see before proceeding against the claim, to the active but pugnacious locator who says to the examiner, "You're the expert — you tell me!", to the claimant who is simply unreachable but whose claim must nonetheless be proceeded against, the potential respondents in contests are frequently uncooperative. The mineral examiners often must examine the claim — ranging from twenty to 160 acres — without any information what to expect or where to expect it. Drawing on their knowledge and skills as geologists, they prospect the claim. Nor is this burden undertaken simply as a defensive precaution; the government's obligation to make a prima facie case of invalidity invites the claimant's defensive contention that the survey made was inadequate to support the government's case. To be sure, an indication that the claimant refused to cooperate will influence an administrative law judge's assessment of the matter; and when claimants assert additional points of discovery or minerals discovered at hearing after the examiner's evidence has been given, continuance for reinspection may be ordered. But the risk and delay involved are often unacceptable, and so the examiner must be able to give a respectable account of himself.[154]

As in the case of patent applications, the mineral examinations associated with validity contests are performed by Bureau examiners unless Forest Service lands are involved, in which case the Forest Service performs the examination.[155] In both cases, manuals and practice combine to stress thoroughness. Thus, the BLM Manual calls for the examiner to begin by reviewing the mineral characteristics of the neighborhood: geological literature, known mines, patents, and claims in the vicinity. For the field examination, he is encouraged, as on patent examinations, to contact the claimant and give him a chance to go along. During the examination, he is to find the claim on the ground (the claim corners and any discovery post or notice), survey the general geology, and "locate and inspect *all* mineralized exposures and excavations on the claim," giving special attention to the discovery point and taking necessary samples.[156] The examiners are told they need not make the discovery for the claimant — that is, dig beneath the surface or enter any dangerous

[154] While other approaches to the problem are preferable, giving failure or refusal to point out discovery points presumptive force on the discovery issue might serve to encourage greater cooperation. No self-incrimination principle exists to inhibit the drawing of this rational inference. As for the distant and unknowledgeable uncles or nieces who occasionally inherit claims, it is hard to require the government to respect as theirs an "asset" in which they have insufficient interest to prospect or develop—even in cases in which the original locator, had he survived, could have made the requisite showing.

[155] Where the report comes from the Forest Service, the Bureau sits in a reviewing posture. While the BLM has been held to have no authority to refuse a technically sound contest recommended by the Forest Service, *Ed Bergdal,* 74 Interior Dec. 245 (1967), it asserts but rarely exercises the right to review recommendations for patent and, if necessary, perform its own examination. BLM Directive, August 7, 1963. This oversight function has been the source of occasional friction. Letter, *supra* note 109, at 2.

[156] VI BLM MANUAL, *supra* note 52, § 5.2.9. If the claimant is not yet known, the inspector is also to try to identify him, and then provide him an opportunity to take part in a re-examination. *Id.* § 5.2.8.

or flooded workings — but the emphatic obligation to visit all exposures on the claim is more demanding than the duty owed to the patent applicant. The latter's application must precisely describe the discovery made, and the inspection of his claim is limited to the matters thus described.

In practice these rigorous instructions may be mediated somewhat by the examiner's sense of the occasion. Claimants may not be invited to accompany the examiner on his first survey when large projects involving a substantial number of claims are involved, either because identification of the claimants has not yet been completed, or because the inspector wants to appraise the claim before talking with the claimant or taking him to inspect the claim. A claimant's refusal to provide information may be met by a polite, but emphatic, explanation of the likely impact of that behavior when reported in the course of the contest hearing. Where the claimant is vague about what he has found and where, samples may be taken, but not with the care that would attend sampling at an identified discovery point. Statements can be found in departmental opinions to the effect that no more than reconnaissance is required for unworked claims.[157] The degree of casualness in such circumstances, however, should not be overestimated. Particularly as the inspection seeks to develop the geological character of the land and its suitability for mining, it calls upon the examiners in their professional capacity. A number of examiners voiced strong feelings about their professional responsibility here. Acknowledging their employment by the government and its interest in freeing the land of spurious claims, they nonetheless believed themselves professionally obliged to give each claimant the benefit of a thorough and professional examination, whether or not he was willing to cooperate.

The thoroughness and concomitant expense of the government's inspection is also influenced by its present obligation to negate discovery, prima facie, at any subsequent hearing. Uncertain what the claimant's assertions will be, the Department must be thorough enough in its search to exclude all reasonable possibilities of claim. Several of the officials interviewed believed, although without precise figures to back their belief, that the resulting expense was the largest single item of government cost in validity proceedings.

Although not all claims unearthed by the Bureau's "diligent search" are examined, the screening which does occur is limited. In the past, the screened out group has consisted principally of claims located during periods when the land in question was segregated from application of the mining laws, and thus subject to *ex parte* administrative nullification by the land law examiner.[158] The remainder are then referred to the mineral examiner for inspection before it is known whether any interest in the

[157] Frank Coston, No. A–30835 (Dep't of Interior, February 23, 1968).

[158] See text accompanying notes 86–88 *supra*.

claim will be asserted, and all are inspected unless relinquishments are volunteered.[159]

Under the Department's new regulation making a failure substantially to comply with the assessment work requirement a ground for cancellation,[160] further preinspection screening may be possible. Whether the work has been performed will be reliably shown by the county records; if no entry appears for the preceding few years — however many make credible the charge of failure of substantial compliance — that failure could also be asserted as a preliminary ground of invalidity, further reducing the need for mineral examination. Only if the assessment work charge is controverted would it be necessary to make an examination, in order to join in one hearing all charges affecting the claims.[161] The result should be a significant limitation of inspections. The Bureau appears ready to take this step.

If the assessment work rule is valid, it adds to the force of the congressional judgment reflected in Public Laws 167 and 585 that painful searches for claims and claimants in disorganized county records are not required for fairness in establishing the government's clear title to withdrawn or segregated land. Inactive claims, defined by the failure of substantial compliance, may now safely be presumed invalid;[162] the burden can be placed on their owners, after notice suitable to the character of proceedings to quiet title, to assert the claims and establish their validity. The government need search no further than to find all claims that might be deemed active, on which assessment work has been substantially and contemporaneously performed, and the claimants who have contributed to that activity.[163]

A verified statement or show cause procedure would nonetheless be preferable. The projected use of the assessment work rule continues to presume the validity of any claim once noted in the county records, requiring a "diligent search" to find all claims and their owners, however old and remote. Although the rule may reduce the number of mineral inspections which must be performed, it is ineffective in enlisting the claimant's cooperation in those inspections which do occur.

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[159] See note 134 *supra*. Thus, in the Auburn (Cal.) Project for the Bureau of Reclamation, 667 claims were examined, but only fourteen answers received; the Canyonlands National Park project examined 4,900 claims, but only 345 were defended by answer.

[160] 43 C.F.R. § 3851.3(a) (1973); *see* note 136 *supra*.

[161] A hearing will often be necessary if the assessment work allegations are denied. The question of "substantiality" presents factual issues, and others are possible; more important, the Department has no established summary judgment procedure. Since the assessment work ground leads to "cancellation" rather than a finding of nullity, note 136 *supra*, the Department would treat it as a ground for contest rather than "administrative adjudication."

[162] The historical record of the past decade, in which fewer than ten percent of claims challenged have been supported against the government's challenge and a tiny proportion sustained, would equally support such a presumption.

[163] *See* text accompanying notes 128–36 *supra*.

Neither Public Law 167 nor Public Law 585 provides a model for requiring that cooperation. While each requires identifying information to be provided in a verified statement, in neither case does the information include notice regarding the claimant's asserted discovery. Rather, the Acts provide that once possible claims and claimants have been identified, each asserted claim is to become the subject of notice and hearing under "the then established general procedures and rules of practice of the Department of the Interior in respect to contests . . . affecting public lands of the United States." [164] Those rules and procedures, then and today, impose no obligation on the claimant to reveal the character of his claim until the government has completed its prima facie case. And while pending proposals for change in the Department's procedural rules create a prehearing deposition and interrogatory practice which could readily incorporate inquiry into discovery,[165] the Department's authority to engage in mandatory discovery is open to question.[166]

If claimants were required to identify their discovery as part of their answer in contest proceedings filed against their individual claims, neither obstacle would be disabling.[167] Public Laws 167 and 585, and the model

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[164] 30 U.S.C. §§ 527(c), 613(c) (1970).

[165] Proposed Interior Dep't Reg. §§ 4.469–72, 37 Fed. Reg. 12543–44 (1972).

[166] The Department's direct statutory subpoena power in mining contests is limited to subpoenas directing the attendance of witnesses, and even these are limited in effect to the county in which the hearing in question is to be held; depositions could be taken of witnesses more distantly located. 43 U.S.C. §§ 102, 105 (1970). In 1968, the Department attempted to assert authority to compel prehearing production of documents by rule. 33 Fed. Reg. 10394 (1968). Apparently catalyzed by miner complaints, the House Committee on Government Operations began an inquiry into this effort, not because "[t]he issuance of the invalid regulation was . . . a notorious act of tyranny. . . . But [because] it would result in subjecting citizens to inconveniences which Congress has not seen fit to require of them." HOUSE COMM. ON GOV'T OPERATIONS, UNAUTHORIZED BUREAU OF LAND MANAGEMENT SUBPOENA REGULATIONS, H.R. REP. No. 916, 91st Cong., 2d Sess. 1 (1970). The Department backed down. *See* 43 C.F.R. § 4.425 (1973). It has since sought legislative authority for investigative powers comparable to other agencies, most recently in connection with the pending Organic Act for the Bureau of Land Management (H.R. 5541, 93d Cong., 1st Sess. (1973)). The handicap under which it presently operates is hard to understand except as a relic of earlier times, when agency investigative powers were not so well accepted as they are today. The authority should be granted.

The Department's hearing procedures do provide for an optional prehearing conference, at which an exchange of information might be agreed upon. 43 C.F.R. § 4.430 (1973). In conformity with the Department's understanding that it lacks discovery power, however, these rules make no provision for mandatory production of information at these conferences, or sanctions, such as a presumption that the withheld facts would be unfavorable to the withholder, for failure to produce it. In private conferences, departmental hearing examiners remarked that they did what they could to encourage the production of information, including the issuing of discovery orders they knew to be unenforceable; that practice is as questionable as it is understandable. The handicap should be removed. *See* Administrative Conference of the United States, Recommendation 70–4, 1 ACUS 37, 571 (1971); Tomlinson, *Discovery in Agency Adjudication,* 1971 DUKE L.J. 89.

[167] It would be more efficient from the Department's perspective to require that the verified statement include the discovery information. That would put the Department in possession of all the information it typically possesses regarding patent applications, at the very outset. The failure of Public Laws 167 and 585 to make a similar provision does not *demonstrate* that the Department could not so provide in its rules. The Department might consider, however, whether the cost to the small miner of generating such information (*see* text accompanying notes 175, 229–30 *infra*)

proceeding discussed here each begin as collective actions, involving a wide expanse of governmental land clouded with possible numerous unidentified claims. The stages thus far discussed, analogous to quiet title proceedings, lead to identification of the active or defended claims; the statutes then provide for the validity of those claims to be individually determined, for limited purposes, through the Department's usual contest procedures. No effort is made to influence or define what those procedures shall be. Like the General Mining Law, the two statutes leave definition of sensible contest procedures to the Department.[168] If the Department would free itself of its present irrational presumption that filing a notice of claim in a county courthouse (or a verified statement in the proceedings here discussed) demonstrates the discovery of a valuable mineral, a fair procedure putting the burden of showing probable validity on the claimant could be readily constructed. Where a verified statement has been filed, the Department must afford an opportunity to establish validity but fairness does not require a full, quasi-judicial hearing where a plausible showing of validity cannot first be made.[169] Such a showing could be insisted upon in the detail now required for patent applications, as part of the answer to the individual contest complaint.[170] The mineral examination, performed subsequent to its receipt, would then serve the confirmatory function characteristic of patent proceedings to which it is best adapted.

Requiring specificity of answer in response to a general complaint, in this case a recitation that "no discovery has been made," would mark no striking procedural departure. The Bureau would have obtained sufficient geological information to ground the complaint through its reconnaissance surveys in connection with the withdrawal and with initiation of the verified statement procedures. In a variety of contexts, civil action defendants are required to plead with specificity matters likely to be within their personal knowledge.[171] Respondents in administrative actions, as

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makes it more fair to wait for an individual determination that his claim must be cleared before requiring him to incur that cost. These two considerations, in any event, explain the more limited recommendation made here at the acknowledged cost of somewhat more cluttered procedural lines.

[168] Best v. Humboldt Placer Mining Co., 371 U.S. 334, 339–40 (1963); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[169] *See, e.g.,* Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964); *see* notes 145–46 *supra.*

[170] The Denver Regional Solicitor has made similar proposals. In support of the proposal, the Solicitor remarked:

> As the situation exists in a mineral contest, a Government mineral examiner can accompany a claimant on an examination of the lands and be advised of one discovery point and certain minerals claimed. However, the mining claimant, as has been done on many occasions, can appear at the hearing and claim other points of discovery and additional minerals. This creates undue confusion of time so that additional examinations of the claim may be made. We feel the proposed regulation will eliminate these delaying tactics.

Denver Regional Solicitor, Internal Memorandum of April 28, 1971, § 1852.1–3(a)(5).

[171] *E.g.,* FED. R. CIV. P. 9 (capacity, fraud, performance, or occurrence of conditions precedent); N.Y. CIV. PRAC. § 3015(a) (McKinney 1974) (condition prece-

well, have been similarly burdened as a condition of obtaining a hearing on matters sharply affecting their interests.[172] The Department has the power to define the contents of a well pleaded answer, and the particular obligation here discussed is strongly supported by the historical record of contestants' failure to establish the validity of their claims.

Another possible objection to the procedure lies in the constant concern of miners that the Bureau or Forest Service would harass them by bringing contests without warrant if free to force their hand in this manner. The requirement would impose a measure of cost on the locator, should he be forced to seek a mining engineer's professional help in drawing up his response; the obligation to make an elaborate response, particularly during months when weather may make his claim inaccessible, may require additional time for answer. The concerns are legitimate but should be met directly. The initiating government agency could be required to show good cause for bringing contests; reasonable extensions of time for answering the contest complaint could be given; and an outcome favorable to the claimant could be given conclusive effect (absent dramatically changed circumstances) for the future.[173] "Good cause" for bringing a contest is *not* a prima facie basis for belief that no discovery has been made; rather, it is established by any of the reasons to which the Bureau now administratively limits itself in bringing contests: withdrawal or classification of the land for uses inconsistent with mining, or substantial reason to believe that a claim is being abused.[174] Once sound reason to insist on assessment of the claim is shown, it is not unfair to require the miner to make a showing of his claim's probable validity. Indeed, the pending proposals for change in the mining laws assume the propriety of requiring even the possessors of valid rights under the present law to apply for patent within a brief period after passage of the reform legislation or forfeit those rights.[175] Within that assumption lies the proposition that the burden of demonstrating discovery may properly be placed on the claimant, that nothing about a claim implies a license to be secretive about discovery or puts on the government the burden of proving the negative when a proper occasion for determining its validity arises.[176]

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dent); *see* Sweeney v. Buffalo Courier Express, Inc., 35 F. Supp. 446, 447 (W.D.N.Y. 1940) (defenses to libel); Winslow v. National Elec. Prods. Corp., 5 F.R.D. 126, 129 (W.D. Pa. 1946) (Fair Labor Standards Act — defendant may be required to respond with particularity regarding matters within its knowledge).

[172] *See* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973).

[173] *Cf.* 30 U.S.C. §§ 527(c), 613(c) (1970) (prohibiting successive challenges under those acts).

[174] See note 82 *supra.*

[175] S. 1040, 93d Cong., 1st Sess. § 123(d) (1973).

[176] The proposals go further, requiring claimants to undertake the expense of cadastral survey and to undergo the other tests, procedures, and costs of a patent application. Whether or not these additional burdens can be imposed on a claimant able to demonstrate the validity of his claim, the judgment that demonstration can be required, and the claimant forced to take the initiative in making it, is the feature to which attention is drawn here.

Once the government is notified of the precise nature of the claims, its mineral examiners will have a basis they now lack for conducting their inquiries. Thus, except for reconnaissance missions intended to uncover obvious, active workings as part of the government's effort to discover active claims, no mineral inspections need be made before this point; when made, they should follow the pattern set in inspecting claims for which patent application has been made, restricting themselves to the exact locations and minerals specified. The point is to save and focus work, for the benefit of the claimant in good faith as well as for the government. The examination should continue to be made in accordance with the present practice of proceeding with the claimant's cooperation, taking samples where he directs, and using laboratories mutually agreed upon to assay them.

B. Formulation of Charges

The mineral examiner's report of his inspection contains both a thorough description of his investigation and its results and a recommendation for action. In the Bureau, it will be transmitted to the minerals specialist, the senior mineral examiner of the state office, for a technical review limited to assuring "a professional job," [177] and to the land law examiner, who makes the final decision whether to contest and draws up the charges made in the complaint. The Regional Solicitor is not necessarily involved.[178] In the Forest Service, the mineral examiner himself will decide what if any charges are to be brought, after consultation within his local office; actual preparation of the request for contest is done by attorneys of the Department of Agriculture's Office of General Counsel. The recommendation is then sent to the Bureau's land law examiner. Under the Bureau/Forest Service operating memorandum, initiative in this matter substantially belongs to the Forest Service;[179] its requests are honored unless formally deficient or insupportable on the report, or unless a report requires further study or re-examination by a Bureau examiner (a rare occurrence). In Forest Service cases, then, the land law examiner primarily performs drafting services.

The land law examiner's decisions, including decisions to "clearlist" (forego challenges to) particular claims, rarely receive close review. The poor repute in which the General Mining Law is now held by some land law examiners and the lingering impact in the Department of the Teapot Dome scandal may make it unlikely that examiners will resolve doubts about clearlisting in a claimant's favor. This reluctance may also be

[177] Technical proficiency is also assured by initial and brushup training at the Bureau's Phoenix, Arizona training center. Since there are fewer than ten examiners in any state, supervision tends to be quite informal.

[178] In Colorado, where the land law examiner is a lawyer and the State Office is miles from the Regional Solicitor's Office, the Solicitor is consulted only occasionally, on an informal basis. In Utah, a single state Region with joint offices, the Solicitor's Office shares the drafting function with the land law examiner, who is not a lawyer.

[179] Ed Bergdal, 74 Interior Dec. 245 (1967); see note 155 *supra*.

encouraged by the realization that a decision to clearlist is largely personal; initiation of a contest is one way to pass responsibility on to others. This skepticism is fully appropriate in the withdrawal/classification context, given the procedural burdens under which the government labors and the usual absence of any reason to suppose that the claims will be valid. But in the patent context, it seems less apt. Together with miners' general perception that the process is inefficient and slow and their fear of risking the invalidation which now accompanies rejection of patent applications,[180] the examiners' uncharitability is one of the factors discouraging patent applications.

Some differences exist between the Forest Service and the Bureau in the processes by which charges are drawn up. The former entertains justifiably higher suspicions that mining claims on its lands have been located for purposes other than mining: patents, once granted, pass title to all timber on the claims; and the sudden appearance of a cabin may suggest the wish to have a pleasant place to spend the summer. As a result, the Service is more likely than the Bureau to allege matters bearing on the good faith of the claimants. In the past, the Bureau has usually limited itself to the assertion that no discovery of valuable mineral has been made.[181] With adoption of the new assessment work rule, a failure to comply with the work obligation may also be regularly alleged.

On the whole, however, the practice is strikingly uniform in its emphasis upon the "discovery" question. The principal determinant is neither the mineral examiner's report nor discretionary preference for one rather than another form of charge. Emerging clearly and uniformly from discussions at every level is a strong sense of futility about developing any issue but discovery, because that is the only issue on which the administrative law judges will base a holding adverse to the claim. However apt charges of abandonment, want of good faith, lack of mining purpose, or the like might be,[182] want of discovery will be seized upon as sufficient basis for declaring the claims invalid, leaving the other issues unresolved.

The reasons for this preference lie in the apparent objectivity of the criterion. "Discovery" is quantifiable, determinable, or at least apparently so, on the basis of examination, chemical assay, and economic calculation,

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[180] See note 90 *supra.*

[181] Complaints may also assert on occasion that the land in question is not "mineral in character." The claim is one which adds nothing to the assertion that no discovery has been made; the land might be mineral in character and yet discovery wanting, were the claimant lazy or unlucky; but a discovery could not be made were it not "mineral in character." Nor does the General Mining Law make validity turn on the question. The characterization is important, however, to classification of lands for certain dispositions to nonfederal applicants. Where contests are brought to establish the land's availability for those dispositions, making the assertion may be thought significant for the subsequent disposal process. Absent mining contests, however, no formal proceedings are brought to establish whether the land is "mineral" or not; the charge may be used chiefly by force of habit. Confusing and irrelevant to the contest outcome, it should be dropped.

[182] *See, e.g.,* Coleman v. United States, 363 F.2d 190, 202 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 599 (1968); Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017 (1973).

without any need to refer to the shadow world of purpose, intention, or personal conduct.[183] Application of a universal, quasi-scientific rule to the well reported and often uncontradicted [184] characteristics of a particular claim is far simpler than divining from conflicting testimony and impressions an individual's prior intent to abandon or maintain his claim, or his present purpose to use it for mining or other purposes.[185]

C. Default

The Department's ability to deal with mining claims encumbering its lands is further restricted by its practice concerning failure to respond to notice of the resulting contests. The patent applicant is fully identified by his application papers, which include an address of record. He will ordinarily defend his claim if contested; but should he not respond to a notice of contest, the Department is unimpeded in resolving the dispute by default. In other contest situations, however, no address of record is provided. Claimants are hard to find and, when found, rarely respond to notice of contests.[186] With virtually all cases thus resolved by default, the question under what circumstances these judgments may be reopened or treated as ineffective is central. The Department has long been criticized for excessively rigid enforcement of the time limits it sets for response to notices of contest when received.[187] That problem is counterbalanced by another; when response to a complaint is never received, the Department is remarkably ready to conclude that proper service was never effected and hence that the resulting default judgment was ineffective.

An example of the first of these characteristics is given by a recent Board of Land Appeals decision in a contest brought by the Forest

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[183] Some readers may object that the test for discovery involves assessments regarding the likely behavior of the "reasonably prudent miner"; when discovery is present, he would develop a mine; when not, in the usual formulation, he would be justified only in continuing to explore the prospects for development. *Cf.* note 90 *supra.* Deciding how a reasonably prudent miner would behave, like assessing the actions of the reasonable man of negligence actions, obviously involves judgment of a delicacy surpassing mere recital and manipulation of numerical data. Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017 (1973). That judgment, nonetheless, need not penetrate the subjective realm.

[184] See text accompanying note 214 *infra.*

[185] The readiness with which the "discovery" ground is seized upon in lieu of perhaps more accurate judgments regarding purpose has its impact on the content of the standard. See text accompanying notes 271–76 *infra.* In order to avoid the necessity of discriminating between those acting in and out of good faith, the test becomes stringent enough to invalidate all of the subjectively questionable claims. But, made to do this work, the discovery standard then imperils the bona fide, but marginal claim, with the result already seen: fewer applications for patent, and a desire to avoid contact with the Department at virtually any cost. The Board's recent decision in Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017 (1973), might be understood as an effort to reverse this trend.

[186] Since each claimant may hold whole or partial interests in an unlimited number of claims, and contests are initiated against claims, not claimants, the proportion of claimants who respond to complaints cannot be precisely stated. Well under ten percent of claims are defended. *See* note 120 *supra.*

[187] *E.g.,* McCarty, *A View of the Decision-Making Process Within the Department of the Interior,* 19 AD. L. REV. 147, 164–68 (1967).

Service.[188] Reflecting the working memorandum, the complaint in the contest was signed by Forest Service officials and drawn up on Forest Service stationery. In the body of the complaint, however, the contestees were directed to file their answer within thirty days with the local Bureau office. It is in the Department of the Interior that any adjudication, whether after default or hearing, takes place.[189] An answer was filed with the Department of Agriculture within the regulatory period; by the time the claimants could be apprised of their error and a new answer submitted, the period for answer had barely expired. The Department's regulations provide a grace period of ten days for its receipt of papers timely mailed.[190] The answer was received well within that period. The fact that it was not transmitted until after the thirty days had ended, however, was held conclusive. A default judgment was entered. The regulations state, and the Hearing Examiners and Board of Land Appeals assume, no basis on which a failure to direct an answer in time to the proper office can be excused.

At one level this result can be attributed to carelessness on the claimant's part. Even if the heading and signature on the complaint might be somewhat misleading, its body clearly stated to what office response was to be made, and sufficient time was provided for the response. Still, the potential for misreading was there, and in bringing these contests the Department often encounters claimants who can afford no more than cursory legal services, if any at all.[191] No statute requires such sternness. If discretion were thought available, it would certainly have been exercised in the claimant's favor here. The Bureau could afford to recognize the frequent unsophistication of the citizens involved in contest proceedings rather than give the appearance of relying on technicalities to avoid the merits. Mistakes of the kind made could be indulged without prejudice to the Bureau or any threat to the integrity of its processes.

While the Department is unbending in its refusal to reopen default adjudications, it is also — perhaps in unconscious compensation for this rigidity — extraordinarily ready to declare those actions ineffective. Service is ordinarily achieved by registered or certified mail, return receipt requested. Because claimants have no address of record, this service is frequently ineffective; or the receipt may be signed by a spouse, child, or employee rather than the person to whom it is addressed. In the former case, the resulting default adjudication may be treated as final, if a "diligent search" had been made and the last known address was used.[192] In the latter situation, however, the apparent default will be treated as ineffective

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[188] James D. Lindsay, 10 I.B.L.A. 238 (1973).

[189] 43 C.F.R. § 4.506 (1973).

[190] *Id.* § 4.422(a).

[191] *See* text accompanying notes 229–31 *infra*.

[192] Roy Jones, 10 I.B.L.A. 112 (1973). The conclusion is entirely justified, particularly given the character of the proceedings as a whole. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 25, 57, 59 (1971).

to end that person's interest in the claim should it later be challenged [193] unless written authorization for the signature appears on record. Since claims may have as many as eight locators, and by the time a contest is brought, each of these may have passed on his interest to several heirs, the trap the Department has set for itself is apparent. Almost inescapably, some of the partial interests in any claim under contest will escape valid service by this test.[194] Even if other owners should respond and defend, so that a determination on the merits is made, the resulting judgment is treated as ineffective for those not "properly" served.

No principle of fairness requires such a narrow view of effective service. All that is required is a method reasonably calculated to give persons interested in the land, known or unknown, knowledge of the proceedings in which their claims may be determined.[195] Notice delivered and received at the claimant's address suffices at least to raise a presumption of effectiveness which he may be called upon to defeat.[196] Contests associated with withdrawals or classifications may and should be begun on a verified statement basis, so that through a combination of notice and publication constitutionally effective notice of the proceedings is assured. Provision in the verified statement for incorporation of an address of record will eliminate the problem for further proceedings.[197]

Whether or not a verified statement procedure is adopted, the requirement of *personal* delivery of the contest complaint should be eliminated from the Department's rules.[198] Nothing in the nature of service by registered or certified mail, as distinct from personal service, requires that delivery be made only to the contestee. The questions whether service was made at the proper place, to a responsible person in the claimant's household or employ, are the same as they would be with regard to personal service. The manner of proof may differ from what it is when a process server is employed, but the identity and signature of a spouse or employee are no less subject to demonstration than the purported signature of the claimant himself, on which the Department agrees it is proper

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[193] United States Smelting & Ref. Co., 6 I.B.L.A. 253 (1972); Union Oil Co., 72 Interior Dec. 313 (1965).

[194] Thus, in *Union Oil Co.*, not one of the more than two hundred claims involved had been fully cancelled; the usual defect was that a spouse or co-locator signed the receipt. 72 Interior Dec. at 313.

[195] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 25, 57, 59 (1971); RESTATEMENT OF JUDGMENTS § 6 (1942).

[196] See note 131 *supra;* Shushureba v. Ames, 255 N.Y. 490, 175 N.E. 187 (1931). The Department recognized this in *Union Oil Co.* as the usual rule in judicial proceedings, but felt obliged by the early departmental precedents interpreting its regulations to take the narrower view. 72 Interior Dec. at 320–21.

[197] 43 C.F.R. § 4.401(c)(2) (1973), dealing with service of documents generally, states that once a record address has been furnished, 43 C.F.R. § 4.22(d) (1973), service by registered or certified mail may be proved by a post office return receipt showing that the document was delivered at the person's record address.

[198] *Id.* §§ 4.450–5, 4.451–2(h) (receipt must be shown by "personal delivery").

to rely. In other settings where service by mail is permitted, personal delivery is not thought essential.[199]

D. Hearing Procedures [200]

Contests concerning the validity of mineral locations are heard by Departmental administrative law judges headquartered in Sacramento, California and Salt Lake City, Utah. The hearings themselves are held in cities close to mining areas, to which the administrative law judges travel whenever a sufficient number of cases to make up a docket — five or so — have accumulated, or if the oldest case has been pending for an unusual length of time. In general, the hearings are conducted as formal section 5 adjudication; all testimony is transcribed by a reporter, and that transcript becomes part of the record of the proceedings.

The number of hearings is not large, averaging 120 per year [201] during 1967–1971; nor are the hearings themselves usually complex. For reasons already stated, "discovery" is usually the only seriously contested issue, and testimony ordinarily takes less than a day. The cases represent a substantial part of the docket, nonetheless; in Salt Lake City, where four administrative law judges are centered, mineral contests occupy about half of the Office's time.

From the point of complaint forward, hearing procedures are closely controlled by Departmental regulation.[202] Under the present rules, contests are not referred to the Office of Hearings and Appeals for hearing, or to the Solicitor's Office for prosecution, unless a timely answer to the Bureau's complaint has been received. Default adjudications and determinations regarding the timeliness of response are made within the Bureau subject to appeal to the Board of Land Appeals; together with the cases the Bureau decides on the ground that invalidity is shown by record of a prior withdrawal, they represent at least ninety percent of the adjudications made. Once the complaint and answer have been referred to the administrative law judges, an administrative assistant screens the papers, referring to the senior hearing officer those which seem likely to involve substantial controversy; in these cases, the latter will suggest

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[199] Combs v. Chambers, 302 F. Supp. 194, 197–98 (N.D. Okla. 1969); Shushureba v. Ames, 255 N.Y. 490, 175 N.E. 187 (1931); *cf.* Bucholz v. Hutton, 153 F. Supp. 62, 67–68 (D. Mont. 1957) (statutory wording required narrower interpretation).

[200] The issues dealt with in the next two sections of this article are the subject of Chapter X of Professor McFarland's Report (C. MCFARLAND, *supra* note 20, at 154–231). His chief focus, however, is upon discretionary decision, the Department's usual process, rather than the few occasions, such as mining contests, for which formal hearing procedures are routine. Particularly is this so with respect to the hearing stage. The criticisms generated by his focus are generally inapplicable in the present context. He finds the details of the formal hearing process largely unexceptionable, *id.* at 169; little change, other than consolidation of the regulations governing those hearings in Part 4 of the Department's Rules, 43 C.F.R. §§ 4.1 *et seq.* (1973), and movement of the Bureau's hearing examiners to the newly created Office of Hearings and Appeals, has occurred since his report was written.

[201] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS table 110 (1971); *id.* (1970); *id.* (1969); *id.* table 71 (1968); *id.* (1967).

[202] 43 C.F.R. §§ 4.1 to .30, 4.400 to 4.452–9 (1973).

to the parties the possibility of a prehearing conference to define issues and otherwise prepare for hearing. Cases that appear routine are filed according to the probable location of the hearing, to await accumulation of a sufficient number. If the parties themselves do not suggest prehearing, they will next hear from the Office sixty days before a suggested hearing date, when they will be notified of its place and occurrence. The length of the warning thus afforded reflects the sedate pace of action of these matters.[203] The slow pace perhaps has, however, both reduced the incidence of requests for continuance and encouraged the administrative law judges to careful scrutiny and frequent denial of those requests they do receive.

As previously noted, the Department's statutory authority to discover the basis on which a locator asserts his claim in prehearing inquiry is sharply limited — or at least considered by the Department to be limited — by its deficient subpoena power.[204] The administrative law judges consider themselves powerless to order prehearing disclosures upon which the parties cannot agree. In cases tried by lawyers familiar with the federal rules a substantial measure of agreement may be achieved;[205] and some hearing officers may enter a discovery order for whatever good it will do, knowing it to be unenforceable. Nonetheless, because no more is now required in answer to the government's complaint than a general denial of its necessarily general assertion that no discovery of a valuable mineral has been made, most cases now reach hearing without any prior opportunity for screening or for making particular the issues for trial.

The genesis of the hearing requirement has already been explained. Under the statute, a claim once perfected by discovery of a valuable mineral is considered property in every sense, entitling its owner to exclusive possession of the minerals discovered, such use of the land as may be necessary for their extraction, and, if he wishes, purchase of the associated lands at statutorily fixed prices. Some mechanism had to be provided for determining in individual cases whether perfection had occurred, and the Department has consistently provided such procedures, including a form of hearing for entertaining and resolving disputed factual issues.[206] While remarking that such procedures were required,[207] courts which early faced the issue did not suggest that more than a chance to state the basis of one's claim was essential; and, indeed, they gave near conclusive force to the Secretary's factual determinations.[208] It was not

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[203] The NLRB, for example, requires only ten days notice, with continuances available only through an administrative official. 29 C.F.R. § 102.90 (1973).

[204] See notes 153, 166 *supra.*

[205] *Id.*

[206] *See, e.g.,* Franklin Bush, 2 L.D. 788 (1884).

[207] *E.g.,* Cameron v. United States, 252 U.S. 450, 460–61 (1920).

[208] *Id.* at 464; Standard Oil Co. v. United States, 107 F.2d 402, 409, 410 (9th Cir. 1939); Peck, *Judicial Review of Administrative Actions of Bureau of Land Management and Secretary of the Interior,* 9 ROCKY MT. MIN. L. INST. 225, 232–42 (1964); see note 140 *supra; cf.* C. MCFARLAND, *supra* note 20, at 168, 205–06 n.116.

until 1956 that the Department concluded that validity determinations require quasi-judicial hearings in which the Administrative Procedure Act's provisions for formal adjudication must be observed.[209] This conclusion was quickly endorsed.[210]

Formal adjudication is appropriate in the unusual case in which the locator's claim is given substance by prior proceedings. A patent application, for example, will almost invariably show that the claimant's dominion over the land and mineral findings have reached a level giving strong color to his claim.[211] Until such color appears, however, the argument for a fact-finding hearing is not persuasive. The assertion of an interest in purchasing or acquiring possessory control over government property would not usually be considered an occasion requiring a formal hearing, even though decision is necessarily made case-by-case. Moreover, the notion that, in the absence of a colorable claim, the government must first undertake to show that there is no right to the lands involved is indefensible. Neither statute nor any principle of fairness requires anything of the kind. Taken together with the absence of any procedure for requiring the claimant to reveal the nature of his claim, the Department's acceptance of an unqualified right to a hearing in which it bears the burden of going forward results in a notable degree of wasted motion and needless delay.[212]

During 1971, the Department's Salt Lake City hearing examiners held sixty-seven hearings, of which twenty-seven were contests involving mining claims — four patent applications and twenty-three validity contests. Of these, only three involved more than one day of hearing. Only fourteen involved any conflicting evidence or substantial legal issue warranting adversary presentation; in nine of the remaining thirteen, the claimant put on no evidence after the government had completed its prima facie case, and in four the claimant gave evidence that confirmed

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[209] *See* text accompanying notes 141–44 *supra.*

[210] Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958).

[211] Cameron v. United States, 252 U.S. 450 (1920), the case most cited for the proposition that notice and hearing must be afforded before the Department may declare a claim invalid, itself relied on cases in which denial of the claim had been preceded by initial acceptance of the application in the local land offices. This preliminary clearance of the claim, when it occurs, results in the passage of "equitable title" to the land to the claimant. The proposition that one has a right to notice and hearing before "equitable title" may be affected, Orchard v. Alexander, 157 U.S. 372, 383 (1895), is stronger than and distinguishable from the assertion that anyone privately asserting the validity of a mining claim has the same right. *Cameron* provided no occasion to address the question what showing of probable right was required to generate a right to hearing, since a hearing had in fact been afforded in the case; the Court glided over the problem. *See* note 146 *supra.*

[212] The Department *has* consistently distinguished, as not requiring a hearing, the case in which invalidity of a claim appears on the face of its records, as where a location is not filed until after the effective date of a withdrawal. The Dredge Corp., 64 Interior Dec. 368, 374–75 (1957), *aff'd,* 65 Interior Dec. 336 (1958); Clear Gravel Enterprises, Inc., 64 Interior Dec. 210, 213 (1957); see notes 87–88 *supra* and accompanying text. The problem in the cases under discussion arises from the Department's willingness to assume, rather than require demonstration of, the proposition that facts are in issue there. *See* text accompanying notes 140–48 *supra.*

the absence of discovery.[213] Had there been a prehearing requirement to show a plausible basis for belief that qualifying mineral values existed, most of these hearings would have been avoided. A partial survey of cases heard in the Salt Lake City Office in 1972 reaches similar results: of sixteen hearings, two on patent applications and the remainder validity contests, only two occupied more than a single day of hearing, and only seven involved conflicting evidence or legal controversy; no evidence of discovery was presented by the claimants in any of the remaining nine cases.

These inefficiencies are aggravated, as might be expected, if only the thirty-seven validity contests are considered. Of the six patent applications, only one was "no contest"; the applicant, apparently a party to other claims in which an element of fraud had been found, made no appearance. The remainder were strongly contested and two of the five resolved, at least partially, in the applicant's favor. Twenty-one, fifty-seven percent, of the validity contests were issueless; of the sixteen that were disputed only four were resolved, even partially, in the applicant's favor.[214]

These fruitless hearings have an impact beyond their immediate waste of several government officials' energy and time. They contribute to a diminishing, but still substantial, backlog of cases; on the average, a case takes more than sixteen months to progress from receipt by the Salt Lake City Office, after the complaint has been answered, to hearing. The hearings also contribute to delay in the decisional process; unable, as they see it, to decide such cases from the bench, the administrative law judges must call for proposed findings and for briefing, adding to a burden of opinion writing which requires an average of six months from hearing to decision.[215] Inevitably, issueless hearings must distract attention from real controversy and contribute to attitudes which disserve miners asserting claims in good faith. Finally, pending decision, the government is deprived of its use of the land, and the claimant able to extend his enjoyment of what is, by hypothesis, a baseless claim.[216] Indeed, loca-

[213] For example, testimony that on the basis of what he had found, the claimant wanted to keep looking; or that a profitable mine could not be operated on the basis of the findings so far made. *E.g.*, Robert Kelty, 11 I.B.L.A. 38 (1973).

[214] Industry critics of the Department frequently assert the impossibility of obtaining favorable consideration from the Department. If "no contest" cases are discounted as they should be, the sample here, while small, suggests that claimants enjoy a fair rate of success.

[215] While comparisons are hazardous, it may be noted that as of December 31, 1972, two-thirds of United States district court judges had no cases held under advisement for more than sixty days. Of the 203 cases that were in that status, 171 — over eighty percent — had been held less than six months. In the following six months, 3,604 civil cases were terminated during or after trial. The median time elapsed from filing to disposition in tried cases was sixteen months. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1973 SEMI-ANNUAL REPORT OF THE DIRECTOR 64–65, A–22 (1973). The median time from filing to disposition in the Salt Lake City office was twenty-two months.

[216] Where the land has been affirmatively misused, the government has several times been able to secure preliminary injunctive relief in district court. United States v. Noqueira, 403 F.2d 816, 824–25 (9th Cir. 1968); United States v. Zweifel, Civil No. 5784 (D. Wyo., Dec. 26, 1973) (quiet title action); United States v. Foresyth, 321

tors who are the subject of validity contests are served by delay and, unlike patent applicants, have no incentive to avoid it.

At least four possibilities suggest themselves for dealing with the substantial inefficiencies and overprotectiveness thus revealed. Claimants could be required to specify as part of their answers what discovery they claim, where they claim to have made it, and how rich a find they have — all in detail equivalent to that set forth in a patent application, and similarly subject to initial verification by a mineral examiner's inspection; failure to include such information in an answer could be treated as an admission of invalidity for want of discovery. Second, if government allegations denying discovery were supported by a mineral examiner's report, that report submitted in verified form could be treated as sufficient to warrant summary judgment unless the claimant could document its contrary assertions by competing, professional surveys. Third, the order of proof at the hearing might be reversed, to reflect the burden of persuasion and the claimant's position as true proponent of the claim. Finally, provision might be made for summary action if, after hearing, no substantial dispute of evidence or relevant law emerges. The first of these possibilities has already been examined.[217] Each of the remainder is discussed, in turn, below.

A mineral examiner's report finding facts indicating a discovery or its absence (or some other requisite of validity), submitted in verified form, should be sufficient to authorize summary judgment on the issue unless conflicting or discrediting evidence, also verified, can be presented. The model is drawn from the Food and Drug Administration's procedures, recently upheld by the Supreme Court,[218] for determining the effectiveness of prescription drugs regarding which only a finding of safety had previously been made. Faced with a statutory grant of hearing, yet the necessity of passing upon the effectiveness of thousands of drugs within a limited time span, the FDA adapted a mode of preliminary screening through a professionally qualified body. A finding by this body that the drug in question was probably "ineffective" triggered a complaint mechanism in which the committee finding would be considered sufficient

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F. Supp. 761 (D. Colo. 1971); United States v. Springer, 321 F. Supp. 625 (C.D. Cal. 1970), *aff'd*, 478 F.2d 43 (9th Cir. 1973). Such actions burden the government's finite litigating resources, and cannot readily be extended to ostensible mining uses, at least absent some major environmental affront. *Cf.* United States v. Denarius Mining Co., Civ. No. C-2441 (D. Colo., filed Feb. 11, 1972).

Immediate possession could also be secured through condemnation proceedings, and it might be suggested that Rule 71(A) proceedings in district court would be more efficient than the present departmental proceedings to clear lands required for a particular withdrawal. So to act would not require the district court to decide the validity of any mining claims asserted in the proceedings; it could refer that issue to the Department for decision. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). Ordinarily, however, the Department's preference is to leave valid claims undisturbed, rather than to condemn the miner's interest; and the risk that a district court might not refer the validity issue to it is also a source of concern. A change to such an approach, then, is not to be expected.

[217] See text accompanying notes 162–76 *supra*.

[218] Weinberger v. Hynson, Westcott & Dunning Co., 412 U.S. 609 (1973).

to support summary judgment on the effectiveness issue — judgment without a hearing — unless the manufacturer was able to submit "adequate and well controlled" scientific studies supporting the claim of effectiveness. Only when it was clear issue would be joined would a hearing be afforded. The Court found this procedure fully satisfied the FDA's statutory (and constitutional) hearing obligation.

The Department of the Interior does not operate under the FDA's emergent circumstances, but the constraints of resources and manpower it experiences are real enough to support an otherwise sensible and fair procedure. On the matters concerning which the Department's mineral examiners are professionally most adept — the geological character and mineral potential of the lands they inspect — the questions in issue before the Department seem as susceptible to scientific judgment as those on which the FDA bases its effectiveness proceedings. Mineral examiners' reports, traditionally, have been professional and thorough. The basic facts typically reported are objective in nature and capable of replication by a trained observer; and inferences from those facts are drawn according to established professional methods in ample detail to permit a reader to assess the reasoning used. Such reports would be fully appropriate to frame the findings which the claimant must be prepared to contradict. If the Department adopts its pending proposal to grant summary decision power to its administrative law judges,[219] as it should, a mineral examiner's report should be furnished to the claimant at an early stage and considered sufficient to establish all facts and projections reported unless opposed by affidavits establishing either a basis for impeachment of the report or well supported showings of contradictory findings. If the only dispute will be whether the government examiner's findings demonstrate discovery or its absence, as proved to be the case in over half the hearings inspected, summary decision will usually prove sufficient.

Alternatively, the Department could consider giving its examiners a decisional rather than an investigative role, by providing for initial determination of discovery and like issues through an inspection procedure. The Administrative Procedure Act recognizes the possibility of using "inspection, tests, or elections" as an alternative to formal adjudication.[220] While theoretical and judicial discussions have been scarce, inspections seem appropriate for any matters that turn "either upon physical facts as to which there is little room for difference of opinion, or else upon technical facts like the quality of tea or the condition of airplanes, as to which administrative hearings have long been thought unnecessary." [221] The

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[219] 37 Fed. Reg. 12544, § 4.473 (1972).

[220] 5 U.S.C. § 554(a)(3) (1970).

[221] Door v. Donaldson, 195 F.2d 764 (D.C. Cir. 1952); ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT: ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. 8, 77th Cong., 1st Sess. 36–38 (1941) [hereinafter cited as ATTORNEY GENERAL'S COMMITTEE]; see, in particular, the Committee's

facts central to determination of discovery seem to fit this description: technical findings subject to replication in the field by trained professionals are generally more clearly apparent there or in the assay laboratory than in testimony at a formal hearing.[222] Administrative law judges are less well placed to determine the prospects for mineral development of a given piece of land than a trained mineral examiner, traversing the claim in the company of the claimants, familiarizing himself with past and present activity in the area, and sampling for chemical assay.

The Department uses inspection procedures in lieu of hearing in other contexts, notably in connection with mine safety laws.[223] These procedures, and the limited writings in the field, suggest the requisites of fairness: prior articulation, by rule, of the standards to be applied,[224] the definition of discovery so strikingly absent from the Department's regulation;[225] a provision for reinspection on demand and/or hearing in the event of demonstrable controversy regarding the initial inspector's findings;[226] an opportunity to be present at the inspection and to have a voice in any choice of the procedures to be followed during it;[227] and reasonable assurance of impartiality on the part of the government inspector. The last goal could be achieved by dissociating some mineral examiners from the Bureau and placing them in the Office of Hearings and Appeals, as referees.[228] Except where an application for patent has been made, requiring a bureaucratic decision to clear it or not, a careful inspection is not required as part of the complaint procedure; the government's "good cause" for placing discovery in issue, as has already been suggested, is not the want of mineral findings but either the competing need for land encumbered with a claim or the appearance of palpable abuse. An inspection would then be made on an impartial basis, like a judge's or

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full description of the procedures for grading under the Grain Standards Act in *id.*, Part 7, S. Doc. 186, 76th Cong., 3d Sess. 15–17 (1940); 1 K. DAVIS, *supra* note 64, § 7.09.

[222] *See* Payne, *Examination of Mining Claims and Compliance with Land: Clear-Listing or Adversary Proceedings,* 5 ROCKY MT. MIN. L. INST. 163 (1960).

[223] *E.g.,* Federal Metal and Non-Metallic Mine Safety Act of 1966, 30 U.S.C. § 727 *et seq.* (1970) (mine inspections); 43 C.F.R. §§ 4.650–4.666 (1973); *cf.* Day, *Administrative Procedures in the Department of the Interior: The Role of the Office of Hearings and Appeals,* 17 ROCKY MT. MIN. L. INST. 1, 11–12 (1972).

[224] 30 U.S.C. § 725 (1970) (mandatory safety standards to be enforced by inspection procedures).

[225] *See* text accompanying notes 266–78 *infra.*

[226] 30 U.S.C. §§ 728(a), 730 (1970); 43 C.F.R. § 4.663 (1973); ATTORNEY GENERAL'S COMMITTEE, *supra* note 221, FINAL REPORT at 36 (remarking, *inter alia,* how infrequently review provisions are invoked); COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, LEGAL SERVICES AND PROCEDURE 65 (1955) (Rec. 39: absent emergency conditions, review of inspection procedures must be provided for, but costs may be imposed if unsuccessfully invoked).

[227] *Cf.* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30021 (1973) (joint sampling and selection of assay laboratory). Such cooperative approaches are already well established.

[228] In other contexts, private parties have been allowed to choose from a list of certified inspectors. 43 C.F.R. § 3861.5 (1973) (cadastral surveyors for patent applications); ATTORNEY GENERAL'S COMMITTEE, *supra* note 221, Part 7, at 15–17. Here, that choice would too closely resemble the choice of one's judge to be acceptable.

jury's "view," with representatives of both the Bureau (or the Forest Service) and the locator entitled to be present; the report would ordinarily be conclusive on *both* sides, with each having the opportunity to seek reinspection, to impeach, or to introduce conflicting findings.

The hardship faced by smaller miners in contest proceedings is apparent, and arguably prejudicial. The cost of resisting a contest under the present procedures is staggering. Attorneys in well-established firms, familiar with mining laws and their administration, estimate fees in the tens of thousands of dollars for defending a contest, as against one or two thousand for preparing a straightforward patent application for bureaucratic processing. The smaller prospector could not afford legal representation at this level; at best, he may be able to hire, but not educate, a general practitioner lacking substantial experience in mining matters. The administrative law judges uniformly report both a sense of dissatisfaction with the level of practice before them and recognition that the handicap of being unrepresented is not readily overcome, even when government counsel and the hearing officer take pains, as they do, to explain the proceedings as they progress and otherwise adjust for the handicap. The Salt Lake City files, too small in number and too strongly influenced by a variety of factors to be conclusive,[229] are nonetheless suggestive. Only one of the seventeen claimants who appeared *pro se* succeeded in protecting his claim in any respect; six of the twenty-six claimants represented by attorneys achieved some measure of success. But on even a hasty scanning of the files, it appears that four more of these twenty-six were positively disserved by their counsel's representation.[230]

The experience bespeaks the need for simplified rules, which untutored lawyers can more quickly and efficiently learn, and for some means which will permit the smaller miner either to avoid the necessity for hearing altogether, or to garner some assistance in meeting the often substantial cost of expert help. One such measure would be to provide independent

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[229] For example, it was not possible to tell whether underlying claims in cases where representation was present were comparable to those in which it was lacking; the locator of a rich claim might be more likely than one more doubtful of his find to make the sacrifices and to secure the financing required to hire an attorney.

[230] This disservice typically occurred through counsel's concession, or solicitation of testimony conceding, that the mineral resources to support a paying mine had not yet been found, but that there were "good indications" — that is, a reason to look further. The concession is an admission that no discovery has been made; hence, that there was no real issue for hearing. *Cf.* Robert Kelty, 11 I.B.L.A. 38 (1973); Multiple Use, Inc. v. Morton, 353 F. Supp. 184, 193 (D. Ariz. 1972). This fatal concession was most poignant when made in the case of an elderly, blind miner who had applied for patent on his claim — the one thing that kept him going. The land was not under withdrawal, so that the Department would have permitted him to withdraw his application and continue to work his claim; firm departmental policy, however, required that if the application were finally denied, the claim would also have to be cancelled. *See* note 90 *supra.* Counsel evidently neither understood the discovery concept nor was aware of this policy. When the administrative law judge found discovery absent, on the miner's own testimony, he neglected to order that the claim be cancelled, perhaps in recognition of the pathetic circumstances. Counsel, however, filed an appeal and that "error" was promptly corrected by the Board of Land Appeals. Terry & Stocker, 10 I.B.L.A. 158 (1973).

mining consultants, or subsidized legal assistance, to locators able to make a threshold showing of need and of diligence in seeking to develop their claims.[231] The first of these possibilities has in fact been considered within the Department, but never carried to the funding stage. Obviously, significant expense might be involved; and the government would be put in the position of subsidizing claimants whom, from its perspective, had not yet established a color of right to their locations. Assuring adequate guidelines and the impartiality of inspections already professionally performed seem the preferable measures.

The third suggestion for change made above is that the locator, as true proponent, be made to bear the obligation of going forward as well as the burden of proof. The basis for this proposal has already been lengthily stated, and need not be repeated here.[232] It is a change long sought by Department and Bureau officials in the Denver area, but apparently rejected in Washington. That rejection should be reexamined. Requiring that the government prove, as an initial matter, the negative of a proposition which the locator is uniquely situated to establish is self-evidently ill-conceived. The present, highly unusual structure is not imposed upon the Department by statute, and the Department has ample power to eliminate it by regulatory redefinition of the procedures to which claims must be submitted when their validity is called into question.[233] Again, the only possible unfairness lies in the remote risk that locators will be called upon to justify their claims without real need, but the Bureau has adequate policies to avoid that danger. Assuming sound reason to investigate the validity question, justice does not require that the government bear the burden of going forward at any resulting hearing.

The final suggestion — a practice of ruling from the bench where real dispute proves absent after hearing — leaps out of the files of the Salt Lake City Office. Thirty-eight of the forty-three contest hearings examined there took no longer than one day. Twenty-two of these would not have reached the hearing stage had the techniques already suggested been used. These twenty-two, and perhaps half of the remaining sixteen, could in any event have been decided at the conclusion of the hearing, as presenting no difficult question either of fact or of law. Instead, as the Department's rules and, apparently, section 8 of the Administrative Procedure Act require,[234] the cases were continued until a transcript of the hearing could be prepared and distributed; then, any briefs filed; and, finally, a decision written and served. The median time between hearing and decision in the no-issue cases was two and one-half months with the longest taking eleven months; for the single day, but contested, hearings,

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[231] *Cf.* 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 38–39 (1973) (Rec. 71–6 (D)) [hereinafter cited as RECOMMENDATIONS].

[232] *See* text accompanying notes 140–48 *supra.*

[233] Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); *see* text accompanying notes 164–68 *supra.*

[234] 5 U.S.C. § 557(c) (1970); 43 C.F.R. § 4.452–8 (1973).

the median was seven months and the longest time, twenty. Only in the latter cases were briefs ordinarily filed, and the time elapsed there was undoubtedly increased, not only by the need to write opinions in other cases but also by permissiveness regarding the dates when briefs must be filed and extensions of those dates upon counsel's request.[235] Nonetheless, more than half the time taken falls after all briefs have been filed.[236] In the interim, all memory of the events at the hearing — particularly a brief one — fades; when the administrative law judge comes to write his decision,he must rely on the transcript to re-create the event. Credibility is not a usual problem, but judging the relative soundness of competing expert opinions may be; and under present practice, that must be done principally on the basis of the transcript.

The remoteness of the administrative law judge from the inquiries on which "discovery" turns has already been remarked.[237] His inability, or at least disinclination, to rule on the matter while his perceptions of the witnesses are fresh compounds that difficulty. Not only has he not viewed the claim as an expert himself, his judgment when finally made is only remotely based on having seen and heard the witnesses who did. For a complex hearing, the model to which administrative law theorists are perhaps accustomed, this distance is perhaps the better course. After days or weeks of hearing, better judgment may be achieved by insisting that a transcript be awaited and the parties given an opportunity to argue from it before a decision is made; otherwise, memory of the most recent events in the hearing may tend to distort overall judgment.[238] But where hearings consume less than a day, as over eighty-five percent of the hearings examined here did, and issues are frequently simple and well defined, it is hard to imagine that judgment is improved by putting the case aside for a number of months. In such cases, it should be possible to state at the conclusion of the hearing a tentative opinion regarding the outcome; hear brief argument, which may persuade, *inter alia,* to the need for further thought; and then, unless there is reason to postpone, make a ruling. Formal findings of fact and of law may subsequently be provided, and service of them upon the parties made the starting point for administrative review. But the decision will have been made, as the administrative law judges agree it readily can be in such cases, at the point when memory and impression are still fresh.

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[235] The practice reported by the administrative law judges was to permit counsel to agree upon the date for filing of briefs and then routinely to permit extensions for as long as six months. The limited data suggest that more time was indeed likely to be taken where the claimant was represented by counsel. Such representation was present in ten of the sixteen one-day, but contested, hearings and in these ten cases the median time between hearing and decision was eleven months as compared to seven overall. In the eight no-issue cases in which counsel appeared at the hearing, no similar effect appears; there would have been no reason to file briefs in those cases.

[236] *See* note 215 *supra.*

[237] *See* text accompanying notes 220–28 *supra.*

[238] *See* Walker, Thibaut & Andreoli, *Order of Presentation at Trial,* 82 YALE L.J. 216, 222–25 (1972).

The Department's administrative law judges and some others treat section 8(b) of the Administrative Procedure Act as the chief barrier to any such practice. It provides that "before a recommended, initial, or tentative decision . . . the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions — (1) proposed findings and conclusions. The record shall show the ruling on each finding [or] conclusion . . . presented."[239] Although it was initially suggested that the proposed findings could be oral in form where that mode of presentation would be adequate,[240] the Senate Committee to which this view was addressed and the House Committee which subsequently reviewed the draft act understood the section to mean that "briefs on the law and facts must be received and fully considered by every recommending [or] deciding . . . officer." [241] Subsequent commentators also appear to take the view that there is a right to present written findings and briefs after hearing, and *before* decision is reached.[242] That view is reified in the Department by a regulation requiring a written decision in each case, after the parties have had "a reasonable time . . . considering the number and complexity of the issues and the amount of testimony," unless findings and conclusions are waived by stipulation.[243]

Whether the ordinarily broad commands of the Administrative Procedure Act in fact do prohibit prompt resolution of simple disputes of fact or law application seems doubtful despite the legislative history. The language will allow the broader construction. No such wooden rule is imposed upon federal district courts, although they too are under an obligation to state findings of fact and conclusions of law in support of each judgment;[244] and, unlike the findings of administrative law judges, such fact finding is controlling on review unless "clearly erroneous." In appropriate circumstances, an administrative law judge's oral statement of findings would fully suffice "to preserve objections in the record and to inform the parties and any reviewing body of the disposition of the case and the grounds upon which . . . 'decision' is based." [245] Written findings may indeed provoke care by the trier of facts in the face of complexity;[246]

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[239] 5 U.S.C. § 557(c) (1970).

[240] Letter from Francis Biddle, Attorney General of the United States, to the Senate Comm. on the Judiciary, S. REP. No. 2752, 79th Cong., 1st Sess. 43 (App. B) (1945).

[241] *Id.* at 24; H.R. REP. No. 1980, 79th Cong., 2d Sess. 46 (1946).

[242] UNITED STATES DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 85–87 (1973); 1 K. DAVIS, *supra* note 64, § 8.17; Netterville, *The Administrative Procedure Act: A Study in Interpretation,* 20 GEO. WASH. L. REV. 1, 79–80 (1951).

[243] 43 C.F.R. § 4.452–8 (1973). The same rule, somewhat more elaborately stated, appears in the Interior Department's proposals for rulemaking. 37 Fed. Reg. 12,546 § 4.493 (1972). *Cf.* Geissinger, *Rules of Procedure Governing Department of the Interior Contests,* 7 ROCKY MT. MIN. L. INST. 477, 507–08 (1962).

[244] FED. R. CIV. P. 52(a); *see* Hodgson v. Humphries, 454 F.2d 1279, 1282 (10th Cir. 1972); Makah Indian Tribe v. Moore, 93 F. Supp. 105 (W.D. Wash. 1950).

[245] Borek Motor Sales, Inc. v. NLRB, 425 F.2d 677, 681 (7th Cir. 1970).

[246] United States v. Forness, 125 F.2d 928, 942–43 (2d Cir.), *cert. denied sub nom.* City of Salamanca v. United States, 316 U.S. 694 (1942).

but if neither counsel nor brief proceedings persuade the administrative law judge that the issues are more complex than they seem, delay for briefs followed by written findings is a wasteful enterprise.[247]

Whether or not the statute compels such delays in all cases in which a hearing on the record is required "by statute," [248] the Department need not accept them. Application of the Administrative Procedure Act to departmental hearings on mining contests arises, not out of a specific legislative judgment, but from the Supreme Court's holding in *Wong Yang Sung v. McGrath* [249] that the Act's requirement of an impartial hearing examiner also applies to proceedings in which hearings are required as a matter of constitutional due process. That holding, despite its prompt overruling in the particular circumstances of the case,[250] has been taken to impose all the Act's strictures on all federal adjudicatory hearings required by due process.[251] Brief consideration, however, should suggest that the holding has force only for those elements of the Act which respond to issues of constitutional fairness. A claim of right to an impartial decision maker, for example, presents constitutional issues which the *Wong Yang Sung* Court would have been required to resolve had not the Act been available as a model;[252] it would be reasonable to ascribe to Congress a definition of the due process interest, and to avoid the constitutional issue by adopting it. No similar force warrants disregarding the specific limitation of sections 5, 7, and 8 to hearings required "by statute," where the procedural issue concerns a technical requirement unlinked to considerations of fundamental fairness — such as whether an opportunity for *written* submission must be afforded all parties between the close of a hearing and the rendering of decision. Here the natural judg-

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[247] The Postal Service permits its presiding officers in hearings on denials of second class mailing privileges to determine whether the parties' proposed findings of fact and conclusions of law "shall be oral or written." 39 C.F.R. § 954.18(a) (1973). "Upon request of either party the presiding officer may render an oral initial decision at the close of the hearing when the nature of the case and the public interest warrant." *Id.* § 954.19(a). The hearings in question are required by statute (39 U.S.C.A. § 4352(b) (1962)) and so unquestionably fall within the purview of section 8. Similar rules govern mail fraud issues. 39 C.F.R. §§ 952.23–.24 (1973). These rules have been upheld by the Service's Judicial Officer against objections based on section 8. *In re* Soberin Aids Co., Postal Service Doc. No. 2136 (Oct. 1, 1973). *See* 14 C.F.R. § 421.32 (1974) (permitting National Transportation Safety Board to render decisions by a similar procedure).

[248] 5 U.S.C. § 554(a) (1970).

[249] 339 U.S. 33 (1950).

[250] *See* note 142 *supra.*

[251] Whether this reading will withstand the recent proliferation of "due process" decisions involving relatively simple individual claims is open to doubt. The Court has shown some tendency to propitiate fears of excessive formality in such cases. *E.g.,* Goldberg v. Kelly, 397 U.S. 254, 267 (1970). While these have generally been state cases, the Court may now find that, having there resolved the due process issues, it has no substantial reason to deny the same realities in the federal sphere. The legislative reversal of *Wong Yang Sung* would surely permit such flexibility. Lower federal courts encountering due process claims, for example from a discharged federal employee, often seem oblivious to *Wong Yang Sung* and the possibility that more than the due process clause might apply. *E.g.,* McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973).

[252] *E.g.,* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

ment is that "by statute" expressed a deliberate limitation, more or less congruent with the complex regulatory decision-making processes with which Congress was most familiar and concerned. There is reason neither to suppose it intended a broader sweep nor, unlike *Wong Yang Sung,* to disregard its intention.[253]

There remains the possibility that some feature of the Department's overall decisional process warrants the delays and inefficiencies introduced by permitting briefing after hearing and before decision in every case. The papers submitted become part of the record on appeal to the Board of Land Appeals, and so might complete the record on which the Board will decide. Yet in the kind of case in which it is here asserted that immediate decision should be available, it is questionable whether completion is either possible or required. Once oral *or* written rulings are made at the hearing level, objections can still be forcefully stated in exception form, and annotated to the transcript. Postponing decision costs the Board just that function that a hearing officer can most usefully perform — prompt and measured assessment of credibility and demeanor.

Although the Department's four Salt Lake City administrative law judges find themselves burdened with a considerable backlog and, indeed, recently found it necessary to shift part of their caseload to the Sacramento Office, the amount of actual controversy coming before them in mining cases is considerably less than the commitment of resources to them implies. Rules which permitted adequate prehearing screening and on the spot decision when the circumstances warrant, and procedures which made clear the nature and placement of the claimant's burden of proof, should permit the same load to be carried by far fewer judges, freeing resources for the apparent demands of mine safety enforcement.

E. Appeal Procedures

The Department's Board of Land Appeals (of which the Director of the Office of Hearings and Appeals, is an *ex officio* member) hears all appeals in public lands cases, including those arising under the mining laws in Washington, D.C. Except for a still theoretical possibility of secretarial intervention, its decision is final and binding on the government; judicial review is available at the behest only of a disappointed private litigant. The Board's participation may be invoked by any party adversely affected by a decision of a departmental administrative law judge, by filing a notice of appeal within thirty days after the person taking the appeal has been served with the challenged decision. A state-

[253] Similarly, the application of the Administrative Procedure Act to mineral contests for some purposes does not require application of its rule that "[e]xcept as otherwise provided by statute, the proponent of a[n] . . . order [declaring a claim invalid] has the burden of proof." 5 U.S.C. § 556(d) (1970). The Department's contrary rule, placing the burden on the locator is not statutory in nature. *See* text accompanying notes 140–48 *supra.* But the question of allocating the burden of proof in these cases is one not significantly influenced by considerations of due process; therefore no reason exists to disregard the limitation of the quoted language to hearings required "by statute." Compare C. MCFARLAND, *supra* note 20, at 205–06.

ment of reasons for the appeal must be filed with the notice or within thirty days thereafter, and written arguments must also be filed during this period. The respondent has a like period to reply, but need not, and usually does not, avail himself of this opportunity. Rather, the arguments supporting the judgment below are left to the record. The high incidence of hearings involving no significant dispute of law or fact provides ample explanation for this willingness of respondents, usually the government, to trust the outcome to the record.

The Board's operations were not a focal point of this study.[254] Nonetheless, two matters warrant comment. First, the Board, like the administrative law judges, appears to lack tools for distinguishing the routine, essentially uncontested case from more important appeals. Second, no mechanism exists for discretionary departmental review or rejection of Board decisions in the unusual case in which important policy is made and the Secretary, acting for the Department, might reach a different conclusion.

1. Distinguishing Routine From Important Appeals — This problem may be brought into focus by a brief description of the ordinary handling of an appeal. When the appeal documents are complete an administrative officer chooses a panel of three of the seven members of the Board. The documents are sent to one of the designated panel members, and he and a staff assistant write an opinion in the case. No formal consultation with the other two members of the panel is provided for and none usually occurs. A predecision conference will be held only if the opinion writer wishes it. The opinion, when complete, is sent to the other panel members with the supporting documents; they may propose changes, note their agreement, or prepare opposing opinions. Oral argument is a matter for discretion and is limited to the rare case in which a request is made. Each opinion is circulated to all members of the Board for possible comment, dissent, or invocation of en banc consideration before release — without a requirement of oral argument or notice to the parties that the appeal is being considered by the Board as a whole.

The problem here is that the Board's cloistered approach may lead, in the routine case, to unnecessary and even misleading opinions; in more important cases, to a failure sharply to focus on the matters in issue. Of course, appellate bodies, notably the federal courts of appeal, increasingly dispose of appeals to them without oral argument, but there are salient differences. No appellate court contemplates decision before argument where there is significant controversy or where the outcome will have any shaping impact upon the law. The panel member who initially receives an appeal to the Board, however, must write fully even if the case appears a simple one, since his colleagues' views are not yet known. The Board neither identifies its uncontroversial holdings with brief opinions and in-

[254] A brief description of its operations by the first director of the Office of Hearings and Appeals appears in Day, *supra* note 223, 1–11; see also Strauss, note ** *supra*.

structions not to publish or cite them, nor limits its individualistic, record-only review procedures to such cases; the opinions seem equally elaborate and the processes equally remote in all cases. The dryness and remoteness of the procedure contrast sharply with the Board's authority to act as administrative *alter ego,* reformulating significant policy without any institutionalized check beyond the possibilities of reconsideration or, remotely, secretarial review. If a case *is* cut-and-dry under departmental precedent and rules, oral argument is indeed a waste; but so is *seriatim* consideration, the writing of lengthy opinions, or any indication that those opinions may be significant for the Department's future business. It would be equally suitable, and fully sufficient against the possibility of judicial review, for the panel to agree after review of the record that no real controversy exists and to issue a judgment to that effect, adopting the findings and conclusions made below. The Board should consider formal adoption of screening mechanisms that would permit such summary action in appropriate cases.

Where significant controversy exists, on the other hand, the Board should not refuse oral argument,[255] but consider instead possible measures to encourage it.[256] Without oral argument and the initial collegiate consideration that it implies, the individual members of the panel never face the discipline of preparing for argument at a particular time, do not experience the sharpening focus of adversary presentation of central issues, and have little sense of post-consideration agreement regarding the simplicity or complexity of the issues presented. The infrequency of oral argument may encourage respondents not to respond to appeals, and the non-writing Board members to give somewhat unfocused attention to the case. Collegiate consideration might well produce both an accelerated pace of decision from filing to judgment, and deeper, more sharply focused consideration where controversy is genuine.

2. *Policy Decisions* — For those cases in which significant policy questions are presented, explicit provision should also be made for some form of secretarial control over the policy conclusions reached, in order to assure uniformity and intelligibility in the Department's interpretive application of the mining laws. The Office of Hearings and Appeals was created in response to the pressure of criticism from the private bar that policy and adjudication functions in the Department were too closely linked; with it, division of function became complete.[257] The Director of

[255] *Compare* 43 C.F.R. § 4.25 (1973) *with* 8 C.F.R. §§ 3.1(d)(1-a), (e) (1974) (Board of Immigration Appeals; oral argument mandatory on request unless appeal is frivolous or technically deficient).

[256] Oral argument is doubtless discouraged by the fact that the Board sits fifteen hundred miles from the nearest mining district or significant concentration of public lands, requiring at least one of the parties to hire local counsel or fly half the continent or more to attend. Relocation of the Board to one or more of the western law centers, a step apparently under consideration in the Department, would markedly alleviate that problem.

[257] *See, e.g.,* 35 Fed. Reg. 12,081 (1970); P.L.L.R.C. REPORT, *supra* note 8, at 253; McCarty, *A View of the Decision Making Process Within the Department of the*

the Office is placed immediately under the Secretary in the Department's table of organization. Members of the Board, although typically drawn from within the Department, are almost completely isolated from contact with the rest of the Department. The point is strongly made in the Department's regulations that government counsel appearing before the Board of Land Appeals "shall represent the Government agency in the same manner as a private advocate represents a client" [258] and that there shall be no oral or written *ex parte* communication between "any" party and a member of the Office of Hearings and Appeals concerning the merits of a proceeding.[259]

The result is that although departmental officials can argue policy matters — the desirability of overruling outdated or erroneous departmental precedent, for example — through their briefs, the operating divisions have no control over the outcome; they cannot impose their policy choices or preferences, except by previous adoption of a rule.[260] The isolation of the Bureau, ostensibly the principal source of policy concerning mining matters, is particularly dramatic. Before creation of the Office of Hearings and Appeals, the Bureau had a deciding role in litigation as well as in legislative approaches. An intermediate appeal ran to the Director from the hearing examiner's decision, and that permitted the Bureau a measure of policy control. This appeal was eliminated, however, as a source of oppressive delay and an example of the combined functions which the proponents of the Office believed must be separated. The result was isolation of the Bureau from any contact with a case once a complaint had been made and answered (and, perhaps, evidence had been given by Bureau experts) — all distinctly local functions. To the extent policy in mining matters is made by decision rather than rule, the higher levels of the Bureau no longer contribute significantly to its formulation.

To be sure, the independence of the Office is not without formal limit; the Secretary retains his power of personal decision.[261] The regulations, however, make no formal provision for secretarial review; rather, they state that no departmental appeal will lie from a decision of an appeals board.[262] Even if that provision, important to assure finality of administrative decision before judicial review is sought, were not seen to preclude a corrective, personal intervention, such intervention would be extraordinarily difficult as a political matter; flaunting the very pressures that

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Interior, 19 AD. L. REV. 147, 172–74 (1966). The history and criticisms are briefly recounted in Day, *supra* note 223, at 1–8.

[258] 43 C.F.R. § 4.3(b) (1973).

[259] *Id.* § 4.27(b).

[260] Although the issue has not been squarely tested, members of the Office of Hearings and Appeals feel able to disregard lesser policy statements, such as Manual directions and Solicitor's Opinions, if convinced of another interpretation.

[261] 43 C.F.R. § 4.5 (1973).

[262] *Id.* § 4.21(c). Reconsideration or hearing en banc is provided for, and the filing of a motion to that end would permit the Secretary to intervene were he so minded.

led to creation of the Office, it could be afforded only in the most urgent cases if at all. In fact, the Secretary has not yet intervened, although departmental demands for rehearing have been frequent enough and the Solicitor's policy arguments have often been rejected.

Certain informal lines of communication do exist — incursions, perhaps necessary ones, on the spirit if not the letter of the "as a private advocate" rule. Private communications between the Department and the Director of the Office, who does not ordinarily sit on appeals, have been quite free. While there is some disagreement whether he is ever approached on the merits of policy matters, he will be told if a particular matter is regarded as "important," and is occasionally asked either to have matters considered en banc or to place himself on the panel. The effect is to underscore the policy implications of the particular case. Communication exists as well in the opposite direction: departmental regulations or forms which by their obscurity have proved particularly productive of litigation are called to attention, sometimes with suggestions for changes that might produce greater clarity or otherwise reduce the litigative load. The opinions themselves, concrete examples of the Office's independence, may produce a somewhat greater incentive at higher levels in the Department to act by rule.[263]

The total picture, however, remains quite different from one's ordinary expectations about the rulemaking/adjudication choice. Instead of a single decider, rationally or irrationally allocating choices between the two procedures and itself making the fundamental policy choices whichever mode is chosen, one finds a frequently unconscious process of allocation and, more important, a process which leads ultimately to different authorities. Whatever its deficiencies as a maker of rules, the National Labor Relations Board which makes a rule is the same body as that which, encountering a troublesome point in litigation, announces a new departure in that format. For the Department of the Interior, the procedural choice — rule, Manual, Solicitor's Opinion,[264] decision — determines the body which makes the decision as well as the format in which policy appears. The effect is "to isolate the Secretary and others within the Department most concerned over policy from any feel for the impact of the flow of

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[263] *Cf.* Day, *supra* note 223, at 3–5, 23–24. It must be emphasized that the only suggestions of contact made related to matters of policy and interpretation; on questions of fact and of rule application, no basis whatever exists to suspect that the independence of the Office has been compromised. It would be surprising were there even an effort in that direction. But the point about policymaking by adjudication, which warrants the present *excursus,* is that it permits "judges" to announce decisions which could equally be made in a legislative format.

[264] The Solicitor's Office once exercised what amounted to direct interpretative rulemaking authority through publication of Solicitor's Opinions, stating a departmental interpretation of governing statutes independent of particular litigation. *E.g.,* Rights of Mining Claimants to Access over Public Lands to Their Claims, 66 Interior Dec. 361 (1959). While the practice of giving opinions on matters within the Department remains, public notice of them has become quite rare; even when the opinions are published, they may no longer be considered binding in departmental adjudication.

decisions on policy," [265] and to bifurcate the policy function. Although impartiality in the application of established rules is essential, adjudication has been and remains an important mode of policy formulation within the Department. While that remains so, it seems an arid concept of fairness that purchases independence of function at the cost of coherent policy.

(a) Example: "Discovery" and "Valuable Mineral Deposit" Policy — The preceding generalizations may be illustrated by a consideration of the principal criterion by which the Department tests the validity of mining claims under the General Mining Law: whether "discovery" of a "valuable mineral deposit" has been made. The requirement of discovery of a valuable mineral is imposed, but left undefined, by sections 1 and 2 of the General Mining Law;[266] subsequent statutes, notably the Mineral Leasing Act of 1920 and the Common Varieties Act of 1955, have limited somewhat the types of minerals which may be considered "valuable" (coal, oil, and common sand and gravel, for example, no longer may be so considered) but have left unanswered such questions as how much ore, of what richness, must be found in the case of minerals which remain locatable.

The view sometimes articulated, that these undefined terms present questions of law to be resolved through a *judicial* search for some fixed meaning,[267] is untenable. To the extent the Secretary or his delegate decides that discovery of a valuable mineral *has* been demonstrated, the issue can rarely arise in a judicial setting; in effect, final definitional power for the grant of patents and confirmation of claims has been placed with the administrator. Thus unable to fix the inner limit of meaning, a court can say only when the administrator has been too grudging. Realizing that it will never be called upon to say whether the Secretary has treated "discovery" as meaning too little, a court should be reticent to conclude that he has construed it to require too much. The Secretary has in fact been permitted substantial leeway in his definition of the terms.[268]

The definition, changing over the years, has clearly been the instrument of policy.[269] In early years, when the government's lands were still

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[265] Bloomenthal, *supra* note 21, at 257. The problem here is not significantly different from that often predicted in response to recommendations for radical separation of adjudicatory and legislative functions in the major federal agencies. *E.g.*, Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 485–86 (1970). Loevinger, Book Review, 68 COLUM. L. REV. 371 (1968).

[266] 30 U.S.C. §§ 22, 23 (1970).

[267] *See, e.g.*, Reeves, *The Origin and Development of the Rules of Discovery*, 8 LAND & WATER L. REV. 1 (1973).

[268] United States v. Coleman, 390 U.S. 599 (1968).

[269] *See* Hochmuth, *Government Administration and Attitudes in Contest and Patent Proceedings*, 10 ROCKY MT. MIN. L. INST. 467 (1965) (an unusually forthright and sound statement of the policy); NONFUEL MINERALS, *supra* note 3, at 390–410, 419–20; Note, *Government Initiated Contests Against Mining Claims — A Continuing Conflict*, 1968 UTAH L. REV. 102, 129–35. In one of its most recent pronouncements, however, the Board took a rather limited view. Kosanke Sand Corp., 12

viewed as goods held for disposal, securing a patent was easy and quick. More attention was paid to the accuracy of the cadastral survey that fixed its location on the public land records, than to any mineral survey to determine whether or not minerals had in fact been found. Even then, a higher showing of discovery was asked of a miner competing with another proposed use of the land than of one seeking to establish his priority over another prospector, where no competition existed regarding use.[270] With increasing awareness that remaining public lands were a trust to be managed for the benefit of all — and with increasing sophistication, as well, in the available technology for processing mineral ores — mineral surveys became more careful, and the standards applied more rigorous. The discovery that lands ostensibly claimed for their mineral values were being used for residential development, timber production, summer homes, or long-term speculation after patent, rather than developed as mineral properties, contributed as well. There were also practical choices: a rigorous, objective standard of discovery might appear more workable, less productive of expensive litigation and difficult questions of credibility or purpose, than a standard which sought to assess the element of good faith or mining purpose. The very age of the statute produced substantial strain; the statute lacks any express provision for ongoing regulation of claims, and so its definitional provisions have been made to serve functions for which supervisory measures might ordinarily be used. The consequence, however, is that the Department can only determine the validity of claims; it is powerless to take any less severe step.[271]

Throughout this development, the Department has never attempted to state its construction of the "discovery" or "valuable mineral deposit" requirements in rule form. Although lengthy descriptions of these concepts are included in the BLM Manual, which ostensibly controls mineral examinations and the formulation of complaints, the standards lack force as an instrument of departmental or Bureau policy. Strikingly, they are not presented simply as statutory interpretations grounded in policy considerations; rather, each is supported by reference to numerous prior adjudications. The decisions referred to were made at a time when insouciance about separation of functions permitted them to be made by persons in the main stream of administration; the Manual standards themselves were adopted after an intricate bureaucratic procedure.[272] Yet the effect of the citation format is to suggest that the standards are no more than a digest of the Department's case law. Consequently they may be disregarded if a rereading of the cases or analysis of subsequent cases

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I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30019–21 (1973). This may in part have resulted from the needs of the immediate moment — rebutting a claimed entitlement to an Environmental Impact Statement before a patent could be issued. See also Frank W. Winegar, 16 I.B.L.A. 112, 4 ENV. L. RPTR. 30005 (1974).

[270] Chrisman v. Miller, 197 U.S. 313 (1905); *see* AM. L. MINING, *supra* note 3, §§ 2.4, 4.19, 4.53 (1973).

[271] Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30019–20 (1973).

[272] *See* Strauss, note ** *supra*.

suggests a different synthesis. That has in fact been their fate. Unrevised in seventeen years, they are presently ignored.

This period, however, has not been lacking in efforts to reshape the "discovery" standard into an instrument that would permit the Department to administer the mining laws sensibly pending the passage of reform legislation. Patent applications have been slowed to a trickle both by a tightening of standards, approved by the Supreme Court's acceptance of the role of secretarial discretion in interpreting the statute,[273] and by the Department's policy of declaring invalid any claim for which a patent application is denied.[274] The discovery standard applicable to oil shale claims, once differentiated in the hope of encouraging shale development, has now been conformed to that generally applicable to mining claims.[275]

Individual Department employees who must apply the discovery standard in their work are well aware of its flexibility and policy implications, and use that flexibility within the limits imposed on them by staff review or current case law to achieve what appears to them to be useful change. Thus, a mineral valuation expert bases his recommendations for contesting a claim on his belief about what the discovery standard ought to become as well as upon his understanding of what it is. His recommendations are supervised for conformity to Bureau policy, but he has a fair amount of initiative. The expert would not think of provoking a legislative type of process; that is too impersonal and clogged with obstacles. Case work, on the other hand, involves dealing with a few well known individuals, and involves relations with peers or near peers, not a belittling chain of command. The case is a matter of individual responsibility; hence, the individual employee has a ready medium for policy expression. A prototype rule cannot easily be so regarded.[276]

(b) Suggestions for Unifying Policy Formulation — At the same time, the consequences of fractionating the policy-making function within the

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[273] United States v. Coleman, 390 U.S. 599 (1968).

[274] Kenneth F. & George A. Carlile, 67 Interior Dec. 417 (1960); *see* note 90 *supra.*

[275] Frank W. Winegar, 16 I.B.L.A. 112, 4 ENV. L. RPTR. 30005 (1974). In the first quarter of the century, both the potential value and the current uselessness of oil shale seemed clear; the differential standard of discovery, foregoing the necessity to show current value with respect to oil shale, was adopted with the clearly expressed policy purpose of fostering in this manner the development of this enormous energy resource. The policy did not work. Its adoption is, however, a striking example of the flexibility with which the statute was interpreted, even then, to achieve desirable objectives. *See* text accompanying notes 267–68 *supra.*

[276] This possibility of individual initiative contributes to the prospector's fear of arbitrariness, as eloquently remarked by a Denver attorney:

> The antiquity of the General Mining Law makes it less acceptable to staff in the field than it might once have been; today's mineral examiner or field attorney is offended by the notion of J. Jones getting 160 valuable acres virtually for free, and the ghost of Albert Fall, still stalking the Department's corridors, reinforces his disposition to resist. A tradition of decision by adjudication, in these circumstances, may permit efforts to develop new policy; my fear is that in a setting of marginal supervision, no one will get a claim if it can be helped.

Carver, *Administrative Law and Public Land Management,* 18 AD. L. REV. 7, 14–15 (1965); *see* Hochmuth, *supra* note 269.

Department have begun to appear. Whether in expressing skepticism that they can be bound by Solicitor's Opinions or in making subtle changes in the discovery concept which seem to point away from the direction taken in *United States v. Coleman*,[277] the members of the Board of Land Appeals assert an independence of other departmental policy makers which is both intended and productive of possibly destructive antagonisms.[278] Should the Board recant the existing policies on discovery, and order issuance of a patent where none would have been granted before, no appeal to the courts is possible to check the validity of that position. Internal check, after the fact of an unacceptable decision, is possible, but at the cost of destroying both the finality of the Board's decision and the appearance of impartiality which has been so emphatically sought after. Permitting policy making to continue as predominantly adjudicatory under the present institutional arrangements assures a loss of control; the issue is not simply which is the more suitable procedure to formulate policy, but who is to decide the ultimate policy question. The operating divisions of the Department have a necessary and, indeed, proper interest in having some assurance that the outcome will conform to the policies of the Department generally. The Secretary's position vis á vis that office is not that of a coordinate and coequal branch. To the extent that it is not merely applying existing rules to disputed facts, the Board of Land Appeals cannot be insulated and impartial in its function without raising some risk of prejudice to the government's proper interests in its lands. The interest in uniform policy cannot be wholly disregarded. If, for the sake of fairness to private litigants, the Board of Land Appeals is to be insulated from secretarial policy control, the concomitant of that remoteness must be an interest on the Secretary's part to assert that some legal or factual conclusion is in error.

Whether an independent board to decide administrative appeals is a sensible institution is, itself, an interesting question.[279] One possible response would be adoption for use by the Board of a hybrid procedure under which policy issues would be certified for secretarial decision after public notice and an opportunity for comment, with the question of applying the procedure adopted to the particular case reserved for decision by the Board. Any such procedure would magnify the need for screening mechanisms in the Board's processes, to identify in advance the possibly

[277] 390 U.S. 599 (1968); *cf.* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017 (1973).

[278] Letter, *supra* note 109, at 1, 4.

[279] C. MCFARLAND, *supra* note 20, at 302–04; P.L.L.R.C. REPORT, *supra* note 8, at 254. Both the Public Land Law Review Commission and its reporter on procedural matters, Professor McFarland, recognized the divided administrative responsibilities which would attend any independent review board; but both also stressed the public apprehension that disinterested justice could not be obtained, as possibly warranting steps in that direction. As has also been apparent in more general studies of the problem, the two considerations are not readily reconciled. Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969); Loevinger, *supra* note 265; Robinson, *supra* note 265; Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 970 (1971).

significant cases.[280] Alternatively, provision could be made for discretionary secretarial review, the reactive approach which seems to have been anticipated by the Administrative Conference and the A.B.A. in prior recommendations for formulation of intermediate appellate bodies.[281] Or the Secretary might take the lesser measure (since it involves neither the formulation of policy nor reversal of its application in the particular case) of voicing disapproval of particular Board decisions, with the effect of leaving the question unsettled for the future. Finally, the Board's holdings would be given maximum effect consistent with any secretarial control were he authorized to seek judicial review of adverse holdings — as, for example, the Commissioner of Internal Revenue may from decisions of the Tax Court — and otherwise were considered bound by them.[282]

A provision for discretionary secretarial review would be the most orthodox response. Models can be found in the executive departments as well as in the multimember independent agencies that were the apparent focus of the A.B.A. and Administrative Conference recommendations.[283] But a three-level tier of administrative decision involves elements of possible unfairness to private litigants, particularly if, as in the Department's public land matters, their capacity to support the expense of litigation is often marginal. The Department's elimination of the appeal to the Director of the Bureau, previously an intermediate step to final departmental decision, was itself made in recognition of possible unfairness worked by the costs of a multistage procedure. Where the issue is unifying the policy-making function, the fairness of imposing the risks and expense of additional proceedings entirely on particular litigants is doubtful.[284]

The Solicitor's Opinion offers a less costly means to individual litigants for blunting the force of unacceptable appellate board decisions. Just as the Internal Revenue Service announces its acquiescence or occasional nonacquiescence in decisions of the Tax Court, the Solicitor's Office might be authorized to announce reasoned disagreement with decisions of the Office of Hearings and Appeals. That opinion, obviously, would not affect the outcome of the particular case. But it could be given the effect of removing precedential force from the decision disapproved, leaving the issue involved subject to redetermination either in ensuing litigation or by rule. The fact that its prior decision had been rejected, together with the reasons stated for rejecting it, might have forceful effect should the Board again be called upon to resolve the issue. As a published docu-

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[280] *See* text accompanying notes 254–56 *supra.*

[281] RECOMMENDATIONS, *supra* note 231, at 20, 125 (Rec. 68–6) (1971); *see* statements of the Administrative Conference of the United States on the ABA Proposals to Amend the Administrative Procedure Act, 1972–73 ANN. REP. 51 (1973).

[282] *Cf.* S&E Contractors, Inc. v. United States, 406 U.S. 1, 60–68 (1972) (Brennan, J., dissenting); INT. REV. CODE OF 1954, § 7483.

[283] *E.g.*, 8 C.F.R. § 3.1(h) (1974) (Attorney General may review decisions of the Board of Immigration Appeals sua sponte or at the behest of the Board or the Commission of the Immigration and Naturalization Service).

[284] *Cf.* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017 (1973).

ment, the Solicitor's Opinion would be available to both sides for citation in the case and doubtless would be cited. The appellate board, however, would again remain formally free to make its own reading of the issue presented.

The judicial model has its flaws when adapted to the administrative context. But if the Department feels compelled to grant court-like independence to the Board of Land Appeals, giving up centralized policy control, it might also assert that the judicial model of appeal by either side should apply. The Department's Solicitor might wish equal redress for his "grievances" as any private party.[285] In some cases, notably those involving Forest Service lands, neither litigator before the Board has any formal connection with the Department of the Interior. The Forest Service, in pursuit of its own statutory and regulatory mandates to manage its lands efficiently, may come to believe that the Board (or, through it, the Department of the Interior) has failed to recognize some special factor, misread the governing statutes, or encumbered Forest Service lands without substantial evidence in support. Judicial review at its behest would be one means, and perhaps the fairest to all parties concerned, for resolving the dispute.[286] This last possibility is perhaps unlikely. It would

[285] It is not inconceivable that private claimants would be benefitted thereby. Their prevailing complaint is that the Department remains too conservative regarding recognition of claims — that the ghost of Albert Fall still stalks the corridors, rendering departmental bureaucrats unwilling to recognize private claims of right. The unreviewability of decisions to recognize claims must (and on the evidence of informal discussions does) influence decisions; an erroneous denial can always be reviewed, but not an erroneous grant, and hence it is safer to deny in cases of doubt. The Board of Land Appeals might be led to greater evenhandedness in managing its doubts if assured that both parties appearing before it had an opportunity to correct its errors.

Yet more speculative is the possibility that reviewing courts, faced with contentions that the Board had been too solicitous of private claims as well as claims that it was not solicitous enough, would acquire a more balanced view of the Board's decisional processes. When court decisions speak of the limited nature of judicial review, they perhaps already recognize and adjust for its present negative character. As cases asserting insufficient agency aggressiveness have slowly begun to appear, the courts entertaining them have voiced perceptions of a "new era" in judicial-administrative relations. *E.g.*, Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971). What seems to be involved is just this recognition — that the consistently negative character of traditional provisions for review, responding only to private assertions that the agency had gone "too far" in encroaching on private right, tended to foster caution within the agency; it had to fear judicial assault only on one front. So far as the Department is concerned, however, there is no indication that in recent years judicial control has been a significant factor; final reversals of its actions have been quite rare.

[286] The obvious difficulties regarding the existence of a constitutional case or controversy, less severe for the Forest Service, would be avoided were the Board given independent status by statute, *cf.* INT. REV. CODE OF 1954, §§ 7441, 7483, or were the Department merely to repudiate the unacceptable internal holding and await private suit. In a suit brought by a patent applicant to compel the issuance of a patent, or by a locator for the value of land "taken" by government action, or in a locator's defense to a government action seeking an injunction against continuing trespass, the claimant would prove the Board's decision, and the Department would seek to resist on the ground of error. The necessity of demonstrating error, it may be observed, would tend to limit invocation of review to a quite narrow class of cases; discretionary review within the Department, if provided for, would permit review, as well, of all matters within the Secretary's leeway.

require statutory authorization, and the more broadly sweeping substantive reforms now proposed would moot the problem.

Agencies are not courts, and for a variety of reasons may be left to resolve such disputes through the internal mechanisms of the executive branch. Lapses by the Board may offer encouragement to rulemaking, and the government's interest in the particular land affected by arguable error is not usually so great as to render the other possibilities suggested inadequate, nor is the incidence of internal or interdepartmental disputes regarding the correctness of the Board's decisions now substantial.[287] Yet the absence of a judicial remedy when disputed issues of law are resolved against the position of the government's attorneys appearing before the Board should stand as a caution against excessive insulation of the Board from the rest of the Department's policy setting apparatus.

The better course might be in the form of hybrid procedures, introducing elements of rulemaking into those cases in which large issues of interpretation, unresolved or imperfectly dealt with on the Department's rules, appear. Hybrid procedures seem to be most frequently viewed as a mode for increasing the discipline of rulemaking proceedings, but as some have suggested,[288] they are equally apt for expanding the scope of adjudication when an issue of general importance is found to be involved in pending litigation. Published notice of the problem posed and a proposed ruling would avoid the problems of participation and representation which critics have noted in the past, while possibly easing the financial burden for the individual respondent. Incorporation of the result in the Department's rules as well as its reported decisions would tend to simplify the presently overcomplex task of finding its governing law. The Department, not formally subject to the Administrative Procedure Act's rule-

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The posture in such a case would be essentially that which the government stated existed in S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972), where the litigation took the form of a claim asserted by a contractor against the government. The Justice Department properly viewed the action as government-initiated review of findings of fact and conclusions of law reached by an AEC hearing examiner, specially designated by the agency to act much like an independent contract review board — that is, much like the Board of Land Appeals within the Interior Department. There the majority, over a strong dissent, protested sharply what it deemed the unfairness of requiring a litigant, successful before the AEC, to run the further "gauntlet" of "review" by other agencies (the General Accounting Office and the Justice Department) as a prelude to those agencies precipitating judicial review on behalf of the United States. *Id.* at 15. The majority found both the administrative "review" by the other agencies and judicial review at the request of the United States to be unauthorized by statute. Had the statute been explicit, however, nothing suggests the Court would have found a constitutional barrier to the procedure. And the assessment that forcing the litigant to run the further gauntlet is "unfair" ignores the deliberate effort to make the board whose decision is thus appealed "independent" of agency influence, itself in the interests of fairness. One cannot have it both ways.

[287] *But see* Letter, *supra* note 109, at 2.

[288] *E.g.*, Clagett, *Informal Action — Adjudication — Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 83; *cf.* RECOMMENDATIONS, *supra* note 231, at 24, 175 (Rec. 71–3).

making or adjudicatory procedures,[289] is in a particularly favorable position to undertake procedural experimentation of this sort.

Such procedures would be more appropriate at the Board level than before the Department's administrative law judges. Awaiting appeal permits a more accurate assessment of the importance of the issues, and the record compiled at the initial hearing should both illustrate the ambiguity or insufficiency of existing policy guides and afford a basis for resolution of the immediate controversy. The suggestion is that the Board be empowered, either on motion of a party or sua sponte, to publish in the *Federal Register* notice of policy issues thus framed and of their suggested resolution. The suggested resolution might be the Board's but reliance on the departmental Solicitor's position would reflect the Secretary's proper authority over policy issues. Notice-and-comment rulemaking would ensue. Once all comments had been received, final decision of the policy issue should be possible, at least formally, at the secretarial level. In any event, the less confining strictures of rulemaking processes would apply. Application of the policy in the particular case, however, or decision of the case should legislative statement prove infeasible or unnecessary, should be left to the Board's present adjudicatory processes.

Adoption of such a procedure undoubtedly would stir arguments regarding the "prospective" application of rules and permissible "retroactivity" of adjudication. The claim would be that, having infected the adjudicatory process with general public participation and open consideration of concededly unresolved policy issues, the Department could no longer fairly apply the result of its proceedings to the case at hand. The prospectivity-retroactivity distinction, however, like other formal differences between rulemaking and adjudication, has been considerably overdrawn.[290] If properly subject to the possibility that his rights would be determined by adjudication, a claimant suffers no discernible injury from the choice of a slightly different, fair, and yet more catholic procedure to investigate the policy questions involved. At most, he is entitled to an opportunity — such as he would have in a strictly adjudicatory context as well — to show equitable bases for a claim not to have the new standards applied to his detriment: for example, that prior law, upon which he properly relied, was clearly in his favor; that past events, in particular, should not be judged by a standard clearly different from that which seemed to govern at the time; or the like.[291] Where prior law has been uncertain, or the question is what future showing must be made

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[289] 5 U.S.C. § 553(a)(2) (1970) ("public property"); *see* text accompanying notes 206–10 *supra*.

[290] Robinson, *supra* note 265, at 517–19; *see* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 933, 925–58 (1965); NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 94 S. Ct. 1757, 1770–72 (1974).

[291] *See* text accompanying notes 62–70 *supra; cf.* Massey Motors, Inc. v. United States, 364 U.S. 92 (1960); K. DAVIS, *supra* note 64, § 5.09 (Supp. 1970); Robinson *supra* note 265, at 525–26; Shapiro, *supra* note 290, at 952.

or conduct performed with respect to existing claims, such bases could not be established, and full application of the determination made in the hybrid proceedings to all claims would be entirely justified. The common practice under regulatory statutes such as the Mineral Leasing Act is to include in the lease agreement an undertaking to be bound by future changes in governing regulations; that practice should apply here. In the context of a claim to government property gratuitously made available, not private property subjected to outside control, the citizen's claim to "nonretroactivity" is fairly limited to the avoidance of adverse consequences from behavior apparently lawful when undertaken — without regard to the character of the proceedings in which the rules governing his obligation are eventually defined. While existing claims obviously could not be abrogated by fiat, neither Congress nor the Department lacks authority to clarify governing law or to alter for the future the circumstances under which the claims are held.

F. Judicial Review

No statute provides for review of the Department's decisions in mining contests. At least since the Mandamus and Venue Act of 1962 [292] authorized nonstatutory actions for review to be brought in the district where land in question is located, however, applicants for patent or locators whose claims are held invalid in government contests have had no difficulty in securing district court review of those decisions. Once the administrative hearing process has been traversed,[293] their standing to complain of an adverse impact on arguable statutory rights is clear. Although the doctrine of sovereign immunity might theoretically be invoked to bar actions seeking a mandate that a patent issue,[294] no claim for review of a decision denying a patent or declaring a claim invalid under the General Mining Law has ever been refused on that basis.[295]

The most perplexing issue on review of government contests has been the judicial standard to be applied. The initial decisions, perhaps mindful of Congress' particularly broad power of regulation over public lands and its sweeping delegation of that authority to the Secretary of the Interior, made the Secretary's factual findings conclusive and gave substantial

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[292] 28 U.S.C. §§ 1361, 1391(e) (1970).

[293] An interesting recent decision suggesting that under section 10(c) of the Administrative Procedure Act, exhaustion of administrative appellate remedies is not required for judicial review absent a specific requirement imposed by statute or rule, United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971), has been mooted for the Department by adoption of such a rule. 43 C.F.R. § 4.21(b) (1973).

[294] *E.g.*, Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306 (1930).

[295] The theoretical confusion is elegantly set out in Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From the Public Lands Cases*, 68 MICH. L. REV. 867 (1970), which finds in the irreconcilable lines of cases confirmation of the common law judge's historically oriented approach. *See* C. MCFARLAND, *supra* note 20, at 187–88, 224–27 & nn.271–79.

weight to his interpretations of statutes governing discretionary matters.[296] Recently, the tendency on factual issues has been further to incorporate the Administrative Procedure Act, resulting in application of the usual test of "substantial evidence on the record as a whole." [297] The Department seems not to have conceded the propriety of this standard, however,[298] and some courts still appear uncertain whether its findings are not entitled to a higher measure of respect.[299] Professor McFarland, while acknowledging that the question has never been litigated, appears to suggest precisely the opposite view: that since these hearings are not required by *statute* to be decided on the basis of a formal record, courts are free to disregard the Department's factual conclusions and to try factual issues de novo.[300] On questions of statutory interpretation, the Department's views continue to be given substantial weight.[301]

Obtaining review may be considerably more difficult where one private party is disappointed by a decision favoring another. The problems may arise either after a private contest or following a decision against the government in a proceeding in which the Department's litigating position had been supported by an intervenor. In a rare private contest, the disappointed litigant may be required to await issuance of a patent to the victor and then relitigate the preferential right question in local courts, without presence of government officials.[302] Should a government contest

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[296] Cameron v. United States, 252 U.S. 450, 464 (1920) ("conclusive in the absence of fraud or imposition"); United States v. Schurz, 102 U.S. 378, 396 (1880); Standard Oil v. United States, 107 F.2d 402, 409–10 (9th Cir. 1940); Peck, *Judicial Review of Administrative Actions of Bureau of Land Management and Secretary of the Interior,* 9 ROCKY MT. MIN. L. INST. 225, 232–42 (1964); *see* note 140 *supra.*

[297] Coleman v. United States, 363 F.2d 190 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 599 (1968); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958).

[298] *See* Udall v. Garula, 405 F.2d 1181 (10th Cir. 1968); Udall v. Snyder, 405 F.2d 1179 (10th Cir. 1968).

[299] Pruess v. Udall, 359 F.2d 615 (D.C. Cir. 1965); Multiple Use, Inc. v. Morton, 353 F. Supp. 184, 188 (D. Ariz. 1972) ("judicial relief is not available unless the administrative action was arbitrary and capricious and unsupported by substantial evidence," meaning, apparently, some evidence rather than substantial evidence on the record as a whole); *cf.* Camp v. Pitts, 411 U.S. 138 (1973); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971).

[300] C. MCFARLAND, *supra* note 20, at 168, 204–06 nn.113 & 116. The interpretation, questionable even if only the Administrative Procedure Act were considered to bear on this problem (*see* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)) is impossible to reconcile with the pre-APA decisions regarding scope of review (*see* authorities cited note 296 *supra*); nor could it be convincingly argued that passage of the Act was supposed to work such a reversal. The Supreme Court may be said to have settled the point in Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963), which recognized the appropriateness of a district court's reference of a claim validity question to the Department; that reference need hardly have been made if, the Secretary having decided, the district court would have been empowered to try the factual issues afresh.

[301] United States v. Coleman, 390 U.S. 599 (1968); Udall v. Tallman, 380 U.S. 1, 16–17 (1965).

[302] C. MCFARLAND, *supra* note 20, at 186–87, 223–24 nn.267–70 points up the complexities and possible frustrations. In some circumstances, *see* text accompanying notes 95–96 *supra,* the dispute over possessory right must be resolved in state court *before* the patent application will be acted upon; the loser, having lost his claim to possessory interest in such cases, could neither participate in the departmental proceed-

fail in a proceeding in which an intervenor supported the government's contention, it might be supposed that the intervenor could seek the review the Department (or the Department of Agriculture) ordinarily could not obtain. In the latter case, however, acquiring jurisdiction over all necessary parties may be extremely problematic;[303] as a practical matter, review may be infeasible. With regard to mining contests, neither of these difficulties will frequently arise; competing applications are unlikely and are usually resolved judicially before any administrative decision. Intervention on other bases is extremely rare.

Any modification of the present review practice would require a statutory change, a change that may not be necessary when the location system seems to be teetering to an end. If the system is maintained, however, statutory provision for review would be advisable. Given a formal hearing process within the agency, the results of that process should have the consequences normally accorded agency hearings on the record: a review proceeding brought directly to the United States Court of Appeals [304] in which the standard applied for review of factual issues is substantial evidence upon the record as a whole. District courts have no special expertise or function to warrant continuation of the present two-tiered structure for review; rather, they have seemed somewhat confused, and far from uniform in their approach to review of the Department's decisions. Nor does continuing reason appear for giving greater than usual deference to the Secretary's findings of fact. They emerge from a hearing procedure indistinguishable from that of other agencies and, while somewhat technical in nature, are hardly shielded by the demands of expertise from the possibility of review for support on the record. The problems of distinguishing findings of fact from conclusions of law for analytic purposes are not materially different for the Department than for

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ings nor demonstrate the requisite standing for any form of review. Where the dispute is administratively resolved, judicial review is appropriate in the sense that res judicata could not be asserted, but the Department's availability as a party to review of a decision in which it did not participate as a litigant — and hence, the availability of effective relief —is conceptually troublesome. Perhaps for this reason, the Department has recently indicated that in the most common modern form of private contest, under the Multiple Mineral Development Act, 30 U.S.C. § 527 (1970), a government contest may often be substituted with the private proceeding to abide the event. The problem, in any event, is not significant in practical terms.

[303] As Professor McFarland points out, the Mandamus and Venue Act may be invoked only if *each* defendant is a government officer or employee. C. MCFARLAND, *supra* note 20, at 189, 229 n.288; 28 U.S.C. § 1391(e) (1970). Omission of the successful private party as a defendant is hard to justify, since a successful appeal will deprive him of the fruits of victory before the agency; it is hard to imagine that the occasional case permitting review in his absence will survive hard questioning. C. MCFARLAND, *supra* note 20, at 189, 229 n.288. The Secretary (or the United States) could be omitted only at peril — unless the government had entirely disposed of its interest in the land, as by issuing the patent, its indispensability would defeat the action. *Id.* at 189, 229 n.287.

[304] No reason exists for limiting such review to the District of Columbia; the western circuits, where the land and the claimants are located, have acquired substantial familiarity with the questions since passage of the Mandamus and Venue Act of 1962, and are more likely to draw for their membership upon lawyers familiar with the problems of mining practice.

other agencies. In short, it is hard to justify the proposition that the Secretary's findings, unless tainted by fraud or arbitrariness, are "conclusive" upon the reviewing court.

At root is the perennial difficulty of assessing the weight to be given the Secretary's determination of the legal effects to be given the facts once found — whether they do or do not constitute a "discovery," for example. Both the authority of Congress over the public lands, and Congress's delegation of that authority to the Secretary, are remarkably broad. The consequence is, at the same time, a broad range of uncertainty regarding the meaning of governing statutes and an initial commitment to the Secretary of the authority to order matters within that range by his decision. The Secretary's law-applying decision may therefore indeed be entitled to special respect.[305] That proposition, already recognized, would be unaffected by explicit statutory adoption of court of appeals review under the "substantial evidence" test. Any statutory provision for review would, and should, eliminate the jurisdictional difficulties that some private participants in departmental hearings now experience in obtaining review.

APPENDIX

RECOMMENDATION 74–3: PROCEDURES OF THE DEPARTMENT OF THE INTERIOR WITH RESPECT TO MINING CLAIMS ON PUBLIC LANDS (Adopted May 30–31, 1974)

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Although largely unknown to lawyers outside the West, the Department of the Interior's disposition of mining claims on public lands is a significant field of Federal administrative activity and an important element in planning rational use of the public lands.

The procedures for establishing or "locating" mining claims are set out by the General Mining Law of 1872, which has not been significantly amended since its passage. A claim is located by marking the corners of the acreage claimed, posting a notice on the land, and, if state law requires, performing specified work. Notice is then filed in the county courthouse. No valuable mineral need have been found, nor is the prospector under any obligation to reveal what mineral he believes to be present in order to exclude possible rivals from the land. A valid possessory interest is acquired against the United States, however, only if a "valuable" mineral deposit has been "discovered." If certain formalities are then complied with, the prospector may convert this possessory interest into full title, or "patent," for a modest sum; the possessory interest in

[305] United States v. Coleman, 390 U.S. 599 (1968); Udall v. Tallman, 380 U.S. 1 (1965); Work v. United States *ex rel.* Rives, 267 U.S. 175, 183 (1925) ("as the statute intended to vest in the Secretary [of the Interior] the discretion to construe the land laws . . . no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary").

a demonstrably valid claim is so secure, however, that such purchases are rarely sought. Claims are neither registered with the Federal Government nor paid for unless a patent is sought; nor need any discovery of valuable mineral be formally recorded anywhere in advance of a possible application for patent.

In the view of the Department of the Interior, a claim may be valid even if inactive; all claims are regarded as potential clouds on the Government's title. Thus, when a dam is to be built or a National Park secured, obtaining clear title to the land requires the Government to identify claims for which patent applications have not been made. This currently requires Bureau of Land Management employees to make a painstaking search of disorganized and ancient county records for each possibly valid claim and for evidence for its descent. Part A of the present recommendation urges the elimination of this wasteful and uncertain system by establishment of a registration process, and suggests interim measures which the Department may take until that legislation is enacted.

Once the identity of existing claimants is known, the present system provides for testing the validity of their claims by formal administrative adjudications in which, although the burden of persuasion is upon the claimant, the Government must first establish prima facie that no "discovery" of any "valuable" mineral has been made. It must do this without the benefit of subpoena power, or even of any requirement that the claimant define his claim (*e.g.*, by stating the nature of the minerals discovered) before the Government puts on its case. The practical effect of these hearing procedures is that a mineral examiner must be sent to inspect every claim that may be asserted. Adjudication is performed by administrative law judges in the Department's Office of Hearings and Appeals, subject to de novo review by the Board of Land Appeals in the same Office. Although the Department has full rule-making authority, it has typically used case adjudication to develop positions on such central issues as what constitutes the "discovery" necessary to render a claim valid against the Government. To the extent cases are decided on the basis of interpretations or policy that a court would find within the Secretary's discretion, the Department's Office of Hearings and Appeals exercises important policy-making functions; yet at present no provision is made for Secretarial review of its conclusions. Judicial review of these adjudicatory determinations can be obtained only in United States District Court, in accordance with the so-called "nonstatutory review" provisions of 5 U.S.C. § 703. The "substantial evidence" standard of 5 U.S.C. § 706(2)(E) is of course applicable, but some confusion remains as a result of early cases treating the Department's findings of fact as near-conclusive. Part B of the present Recommendation seeks to rationalize the Department's adjudicatory system by providing fairer and more efficient hearing procedures, bringing the Department's case law more closely within a unified policy-making structure, and establishing

judicial review provisions in appellate rather than trial-level federal courts, with explicit affirmation of the APA standard of review.

Although not required to do so by statute, the Department of the Interior commendably makes use of notice-and-comment rulemaking procedure, both for adoption of regulations to be codified in the Code of Federal Regulations and for actions withdrawing public lands from use under the various public land laws, including the mining laws. Public participation in such rulemaking, however, is substantially impaired by the lack of ready access to geologic data and other Government-developed data and views relating to rulemaking proposals. Moreover, other information important to the public, pertaining to matters of law, policy, procedure and Departmental organization, is not available as readily, or in as comprehensible a form, as it should be. Part C of the present Recommendation suggests requirements to render the Department's rulemaking process more effective and to facilitate citizen receipt of needed information.

Recommendation

A. Identification of Claims

1. Whether it is achieved separately or in conjunction with more general mining law reform, mandatory Federal registration of claims and records of required assessment work is important for sound management of the public domain. The Congress should enact legislation to impose that requirement; and the Department should consider whether it may impose such a requirement under its existing rulemaking powers and management authority over the public lands.

2. Pending the implementation of mandatory registration procedures, the Department should afford facilities for voluntary federal registration of claims by persons who wish to be assured personal notice of governmental actions possibly affecting their interests. Moreover, when clear title must be established for particular tracts of public domain during this period, fairness permits and efficiency demands that the Department adopt procedures which require the unknown owners of the claims, or the holders of unknown claims, to identify themselves and their claims before any more formal government action can be called for. Procedures for identifying claims, modeled on those specified in the Multiple Mineral Use Act of 1954 and the Surface Resources Act of 1955, should include the following:

(a) The search for claims and claimants should be limited to what can be readily discovered by visual inspection of the land, by limited inquiry in the vicinity, by listing in tract indexes, and by reference to the Department's own records and knowledge.

(b) Personal notice should be given only to those claimants thus discovered; otherwise, notice may be effected by posting the land and by appropriate publication.

(c) All persons wishing to assert the validity of claims affecting the lands in question should be required to file verified statements with the Department precisely identifying themselves, their claims, and other parties in interest.

(d) Claims not asserted within a reasonable period of time should be deemed abandoned.

B. Hearing and Review Procedures

1. The Department should by rule require that once the Government initiates proceedings to determine the validity of mining claims located on particular tracts of public land, claimants must specify all matters necessary to establish this validity — in particular, what discovery of valuable mineral is claimed, with supporting geological and economic information. Until such matters are specified, the claimant has not established a basis for a fact-finding hearing; failure to make adequate specification should subject the claim to summary judgment declaring its invalidity. In the administration of this rule, the Department should take measures to protect the interests of smaller prospectors, acting in good faith, who may not be financially able to provide full technical data regarding their claims. Such measures might include joint inspection and assay using government experts (once the nature and points of discovery asserted are identified and adequately defined), and reliance upon the resulting reports as adequate to support summary judgment in accordance with their conclusions of fact.

2. Because the nature and quality of his claim is a matter uniquely within his knowledge, the claimant should be made to bear the burden of going forward as well as the burden of proof in any fact-finding hearings. Moreover, the Department should make clear by rule that where such hearings prove brief and the issues of fact or law involved prove simple, the presiding administrative law judge has the authority to decide the case immediately from the bench upon conclusion of the hearing and receipt of argument, without need to await the transcript or written briefs.

3. Effectively conferring final decision-making authority upon the Board of Land Appeals risks a bifurcation of the Department's policy-making function. The Department should adopt measures that will reconcile the appropriate adjudicative role of the Board with the Secretary's policy-making responsibility.

4. The Congress should enact legislation which would help to bring the adjudicative procedures of the Department into line with usual administrative practice:

(a) by conferring on the Bureau of Land Management discovery authority commensurate with that enjoyed by most federal agencies; and

(b) by explicitly providing for review of the final agency decision in adjudicated cases in the appropriate Court of Appeals under the

Administrative Procedure Act, with "substantial evidence" review of findings of fact.

C. Rulemaking Procedures — Public Information

1. The Department's rulemaking procedures should be improved and the availability of its information to the public increased by various means, including:

(a) Adoption of procedures providing interested parties adequate opportunity to inspect and to comment upon geologic data and other Government-developed data or views relating to a pending rulemaking proposal and otherwise available under the Freedom of Information Act, 5 U.S.C. §552. This may require extension of the ordinary comment period.

(b) Reduction of the number and complexity of law-sources which must be consulted to determine governing law and authority within the Department. Matters substantially affecting the public, but now incorporated in staff manuals or other internal documents, should be included in the published regulations, and policies generated through the adjudicatory process should be codified in regulations periodically. In addition, the Bureau of Land Management should publish regularly, in the Code of Federal Regulations and in pamphlet form, a full and current description of its central and field organization, showing lines of authority, and a full and current description of its operating procedures for dealing with mining matters, including the full requirements for patent applications.

Repair or Capital Expense: The Tenth Circuit's General Plan of Betterment Rule

*J. Wendell Bayles** and *Clair R. Rich***

Of the many intransigent issues of fact generated by the federal income tax law, none exceeds the repair-capital expense issue in its complexity, variety, and unpredictability. When a taxpayer pays or incurs an expenditure for the maintenance or improvement of business property, the issue arises whether the expense may be charged to current revenue under either section 162 [1] or section 212 [2] of the Internal Revenue Code, or must be charged to capital under section 263.[3] If the item is "repair," it is deductible in the current year; if it is "capital," the deduction is deferred until depreciation or amortization deductions are allowed under section 167.[4] Although courts have decided numerous cases presenting the repair-capital expense issue, no clear standard for determining the proper classification has evolved. The lack of predictability in this area results from the fact that many such expenses have both repair and capital characteristics.

One tool used by courts in an effort to find a clear standard for decision in repair-capital expense cases is the "general plan of betterment" rule. In a recent Tenth Circuit case, *United States v. Wehrli*,[5] the court an-

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[1] INT. REV. CODE OF 1954 § 162 provides in part:

> There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . .

Repairs are deductible insofar as they qualify as ordinary and necessary expenses.

[2] INT. REV. CODE OF 1954 § 212 provides:

> In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year —
> (1) for the production or collection of income;
> (2) for the management, conservation, or maintenance of property held for the production of income; or
> (3) in connection with the determination, collection, or refund of any tax.

[3] INT. REV. CODE OF 1954 § 263 provides in part:

> No deduction shall be allowed for — (1) any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate.

The repair-capital expense issue is constantly litigated since its determination governs the extent to which the taxpayer may reduce present tax liability by decreasing taxable income. If an item is deducted, money which might have been spent to pay current taxes becomes available as working capital. If the item is capitalized, the outlay must be recovered gradually through depreciation or amortization, resulting in less current working capital and a loss of the interest or investment value of the currently nondeductible expense outlay.

[4] INT. REV. CODE OF 1954 § 167 provides in part:

> There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) —
> (1) of property used in the trade or business, or
> (2) of property held for the production of income.

[5] 400 F.2d 686 (10th Cir. 1968).

nounced its intention to follow this rule in repair-capital expense cases after stating:

> In the continuing quest for formularization, the courts have superimposed upon the criteria in the repair regulation an overriding precept that an expenditure made for an item which is part of a "general plan" of rehabilitation, modernization, and improvement of the property, must be capitalized, even though, standing alone, the item may appropriately be classified as one of repair.[6]

According to the *Wehrli* court the jury's function in such a case is to determine the existence and extent of such a plan. Once the plan is found, everything within its scope must be capitalized as a matter of law.[7]

The court's labeling the general plan rule an "overriding precept," and the assertion that formularization is the desired goal in repair-capital expense cases, if taken literally, would lead to a singularly mechanical application of preset standards to the facts of any disputed "repair" case. The search for a pat formula of controlling weight in the repair-capital expense area evinces a basic misunderstanding of the pertinent statutory provisions and their judicial interpretation which makes fruitless any attempt to extract some overriding rule of law from the myriad factors to be considered.[8]

I. REPAIR OR CAPITAL EXPENSE: BACKGROUND

A. Statutory Framework

Under the Code, all "ordinary and necessary" business expenses paid or incurred in the taxable year are deductible from that year's revenue,[9] except those amounts paid out for permanent improvements or betterments made to increase the value of the property.[10] Permanent improvement expenditures must be capitalized, then deducted under section 167 as depreciation or amortization. In computation of taxable income, the taxpayer's method of accounting must be used unless it fails to clearly reflect income.[11] Within these statutory guidelines, the courts have been free to

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[6] *Id.* at 689.

[7] *Id.* at 690. The court expressly approved a proposed jury instruction requiring the jury to capitalize all expenses within the scope of a general plan if one were found.

[8] Some of the better treatments of the complex considerations are: Cook, *Repair Expense Versus Capital Expenditures,* 13 TAX L. REV. 231 (1958); Graves, *Capital Expenditures v. Current Deductions,* 37 TAXES 1126 (1959); Holzman, *Repairs versus Capital Expenditures,* N.Y.U. 9TH INST. OF FED. TAX. 717 (1951); Shugerman, *Basic Criteria for Distinguishing Revenue Charges for Capital Expenditures in Income Tax Computations,* 49 MICH. L. REV. 213 (1950); Simon, *How Far Do the Courts Go in Upholding Accounting Principles for Determining Income,* 96 J. OF ACCOUNTANCY 683 (1953); Simon, *Permanent Improvements vs. Ordinary Repairs,* 5 AM. BUS. L.J. 47 (1967); Wilkins, *Important Developments in Deductibility of: Repairs; Depreciation; Depletion Allowances,* N.Y.U. 6TH INST. ON FED. TAX. 637 (1948); Note, *Income Tax Accounting: Business Expense or Capital Outlay,* 47 HARV. L. REV. 669 (1934).

[9] INT. REV. CODE OF 1954 § 162(a).

[10] INT. REV. CODE OF 1954 § 263(a).

[11] INT. REV. CODE OF 1954 § 446.

fashion criteria to aid in deciding what expenses may or may not be deducted from current revenue.

Fundamental to any discussion of the deductibility of repair expense is the Supreme Court's interpretation of "ordinary and necessary" business expense.[12] A necessary expenditure is simply one "for the development of the business." [13] The Court is reluctant to label any good faith business expenditure unnecessary;[14] some necessary expenses, however, are not ordinary,[15] and may not be deducted.[16] Each taxpayer and his claimed deduction must be reviewed individually,[17] and his expenditures classified neither by their frequency [18] nor their size.[19] Ordinary expense can be occasioned by an event which occurs only once if the expense is of a type encountered with some regularity in the same general category of business as that engaged in by the taxpayer [20] or is not unreasonable under the

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[12] In *Welch v. Helvering,* 290 U.S. 111 (1933), Justice Cardozo made it plain that deductible business expenses must be found concurrently "ordinary and necessary" given the taxpayer's business and circumstances. *Accord,* Parkersburg Iron & Steel Co. v. Burnet, 48 F.2d 163 (4th Cir. 1931).

[13] Welch v. Helvering, 290 U.S. 111, 113 (1933). A necessary expenditure need not be vital to the continued operation of the business; if the expense is appropriate and helpful to the smooth operation of the business in the customary manner, the expense is "necessary." Cravens v. Commissioner, 272 F.2d 895 (10th Cir. 1959).

[14] Welch v. Helvering, 290 U.S. 111, 113 (1933).

[15] The principal function of the term "ordinary" in section 162 is to clarify the distinction between those expenses which are currently deductible and those in the nature of capital expenditures, which, if deductible at all, must be amortized over the useful life of the asset. Commissioner v. Tellier, 383 U.S. 687 (1966).

[16] *Id. Accord,* Deputy v. DuPont, 308 U.S. 488, 497 (1940) ("[C]ongress has not decreed that all necessary expenses may be deducted. Though plainly necessary, they cannot be allowed unless they are also ordinary").

[17] In *Welch v. Helvering,* 290 U.S. 111 (1933), the Court stated:

> Now, what is ordinary, though there must always be a strain of constancy within it, is nonetheless a variable affected by time and place and circumstance.

Id. at 113–14. *Accord,* Commissioner v. Heininger, 320 U.S. 467 (1943). The Tenth Circuit, in *Denver & R.G.W.R.R. v. Commissioner,* 279 F.2d 368 (10th Cir. 1960), stated a similar belief:

> It is not easy to draw the line between capital investments and current expenses, and each case stands on its own facts to such an extent that reasoning by analogy is of little help.

[18] Deputy v. DuPont, 308 U.S. 488, 495 (1940) (dicta).

[19] Toledo Home Fed. Sav. & Loan Ass'n v. United States, 203 F. Supp. 491 (N.D. Ohio 1962), *aff'd,* 318 F.2d 292 (6th Cir. 1963); American Bemburg Corp., 10 T.C. 361 (1948), *aff'd sub nom.* Commissioner v. American Bemburg Corp., 177 F.2d 200 (6th Cir. 1949); Southern Press Cloth Mfg. Co., 10 B.T.A. 303 (1928).

In *Regenstein v. Edwards,* 121 F. Supp. 952 (M.D. Ga. 1954), the taxpayer was allowed to charge to repair expense the entire $15,750 required to shore up the sagging third floor of his office building, even though the expenditure was large in relation to the total value of the building.

[20] In *Midland Empire Packing Co.,* 14 T.C. 635 (1950), the Tax Court rejected the Commissioner's assertion that the taxpayer's costs of protecting its underground meat storage facilities from oil seepage must be capitalized:

> [The Commissioner] contends that the encroachment of an oil nuisance on petitioner's property was not an "ordinary" expense in petitioner's particular business. But the fact that petitioner had not theretofore been called upon to make a similar expenditure to prevent damage and disaster to its property does not remove that expense from the classification of ordinary" . . . .

Id. at 641. *Accord,* Hotel Kingkade v. Commissioner, 180 F.2d 310 (10th Cir. 1950) (dicta); Hales-Mullaly, Inc. v. Commissioner, 131 F.2d 509 (10th Cir. 1942) (dicta).

circumstances.[21] Of fundamental importance are the nature and scope of the particular business out of which the expense in question accrued.[22] Whether an expense is ordinary and necessary is determined by factual circumstances, including the kind of business the taxpayer operates, his past history of expense, the expenses of similar businesses, the reason for the expenditure, and the effect upon the asset purportedly "repaired." Although these facts are important indicia of deductibility, no single fact or any combination of them can guarantee that the expense is one for repair. Any listing of criteria for a paradigm repair expense, while helpful, is not complete. As Justice Cardozo aptly commented, "One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." [23]

Decisions interpreting the deduction provisions place the burden on the taxpayer to show that his proposed deduction fits comfortably within the conceptual boundaries of the ordinary business expense deduction;[24] he must also bring forth convincing evidence to overcome the presumption of correctness attaching to the Commissioner's factual finding of a capital expenditure.[25]

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[21] In unusual situations, courts have often looked to the taxpayer's purpose in undertaking the disputed expenditure. In *American Bemburg Corp.*, 10 T.C. 361 (1948), *aff'd sub nom. Commissioner v. American Bemburg Corp.*, 177 F.2d 200 (6th Cir. 1949), the taxpayer's factory was falling into several underground fissures. The taxpayer spent $1,000,000 to secure the foundation. In holding this extraordinary expense deductible, the court stated:

> [T]he purpose of the expenditures was to enable petitioner to continue the plant in operation not on any new or better scale, but on the same scale and, so far as possible, as efficiently as it had operated before.

10 T.C. at 376. *Accord,* Illinois Merchants Trust Co., 4 B.T.A. 103 (1926).

[22] It is the factual situation from which the expenditure arose and the effect of the expenditure on the business involved which must be examined closely to determine the nature of the expenditure. Cases cited notes 14, 19 *supra. Accord,* Commissioner v. Heininger, 320 U.S. 467 (1043); Russell Box Co. v. Commissioner, 208 F.2d 452 (1st Cir. 1953); Griffin & Co. v. United States, 389 F.2d 802 (Ct. Cl. 1968); Cook, *supra* note 8.

[23] Welch v. Helvering, 290 U.S. 111, 115 (1933).

[24] As the Court stated in *New Colonial Ice Co. v. Helvering,* 292 U.S. 435 (1934), the allowance of any deduction is dependent upon congressional grace. Hence, a taxpayer must show clear application of a deduction provision to his situation for the deduction to be allowed. *But see* Griswold, *An Argument against the Doctrine that Deductions Should Be Narrowly Construed as a Matter of Legislative Grace,* 56 HARV. L. REV. 1142 (1943); Griswold, *Gross Income and Deductions,* 18 TENN. L. REV. 539, 560–61 (1945).

[25] Failure to bear the evidentiary burden of proving clear error in the Commissioner's factual determination that an expense should be capitalized has cost many taxpayers their repair expense deductions. In *Manger Hotel Corp.,* 10 T.C. 520 (1948), the Tax Court found that the entire expense of refurbishing an aging hotel must be capitalized since the taxpayer had failed to show clear error in the Commissioner's determination. *Accord,* First Am. Nat'l Bank v. United States, 327 F. Supp. 675 (M.D. Tenn. 1971), *aff'd,* 467 F.2d 1098 (6th Cir. 1972); Tovrea Land & Cattle Co., 10 T.C. 90, 97 (1948); North St. Trust, 6 B.T.A. 947 (1927); Indiana Stove Works, 8 B.T.A. 1008 (1927); Modesto Lumber Co., 5 B.T.A. 598 (1926).

B. The Original Understanding

Before any permanent income tax law was enacted, the Supreme Court explained the distinction between repair and capital expense:

> Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof.[26]

In a subsequent case, the Court explained the underlying rationale of the capital expense rule:

> It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year.[27]

With these broad admonitions before it,[28] the Board of Tax Appeals decided what became the leading case dealing with the repair-capital expense question, *Illinois Merchants Trust Co.*[29] In terms echoed in hundreds of later cases, the Board of Tax Appeals set forth those basic qualities which make the outlay deductible or relegate it to capitalization and depreciation over the asset's useful life:

> In determining whether an expenditure is a capital one or is chargeable against operating income, it is necessary to bear in mind the purpose for which the expenditure was made. To repair is to restore to a sound state or to mend, while a replacement connotes a substitution. A repair is an expenditure for the purpose of keeping the property in an ordinary efficient operating condition. It does not add to the value of the property, nor does it appreciably prolong its life. It merely keeps the property in an operating condition over its probable useful life for the uses for which it was acquired. Expenditures for that purpose are distinguishable from those for replacements, alterations, improvements or additions which prolong the life of the property, increase its value, or make it adaptable to a different use. The one is a maintenance charge, while the others are additions to capital investment which should not be applied against current earnings.[30]

This standard, in language similar to that of the current repair regulations [31] and their predecessors,[32] sets forth two main criteria by which to

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[26] Union P.R.R. v. United States, 99 U.S. 402, 420 (1878).

[27] Illinois C.R.R. v. ICC, 206 U.S. 441, 462 (1907).

[28] These early railroad cases were first used in the Board's analysis of capital expenditures and repair expense in *Simmons & Hammond Mfg. Co.*, 1 B.T.A. 803 (1925).

[29] 4 B.T.A. 103 (1926).

[30] *Id.* at 106.

[31] Treas. Reg. § 1.263(a)-1 (1965):
Capital expenditures; In General — (a) Except as otherwise provided . . . no deduction shall be allowed for —

distinguish the type of expense: the purpose of the expense and its result. Thus, in *Illinois Merchants Trust,* a large sum spent to replace rotted segments of pilings underneath a warehouse was held fully deductible. Before the restoration, one wall had partially collapsed and the structural integrity of the building had been undermined. The Board found:

> The work done was in the nature of repairs for the purpose of keeping the property in a serviceable condition . . . these expenditures did not add to the value or prolong the expected life of the property over what they were before the event which made the repairs necessary occurred.[33]

Commentators have proposed more refined analyses, enlarging upon the criteria of purpose and result. Early expositors emphasized the need to maintain a theoretically correct notion of net income as a guide to the timing of any particular deduction.[34] More modern writers have pointed to extension of useful life as the critical factor in any determination of what constitutes capital expense,[35] or proposed objective tests based upon the end result of the expenditure.[36] Some writers, lamenting the lack of hard and fast standards, have approved a stare decisis determination, item by item, of those items to be capitalized and those to be treated as expenses.[37]

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(1) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate, or

(2) Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made in the form of a deduction for depreciation, amortization, or depletion.

(b) In general, the amounts referred to in paragraph (a) of this section include amounts paid or incurred (1) to add to the value, or substantially prolong the useful life, of property owned by the taxpayer, such as plant or equipment, or (2) to adapt property to a new or different use. Amounts paid or incurred for incidental repairs and maintainence of property are not capital expenditures . . . .

[33] Treas. Reg. § 39.24(a)-2 (1953), promulgated under INT. REV. CODE OF 1939, §§ 24(a)(2), (3), 53 Stat. 16.

[33] 4 B.T.A. at 107.

[34] *See, e.g.,* R. MAGILL, TAXABLE INCOME (rev. ed. 1945). The Supreme Court, however, has actively discouraged any analytical approach to the determination of the repair-capital expense issue. In *Anderson v. The Forty-Two Broadway Co.,* 239 U.S. 69 (1915), the Court held that a lower court's attempt to find "a theoretically accurate definition of net income instead of adopting the meaning which is so clearly defined in the Act itself" was reversible error. *Id.* at 72. The Court then adopted the attitude that the concept of net income was a simple one, adequately defined by Congress in the various revenue laws. *See* United States v. Kirby Lumber Co., 284 U.S. 1 (1931). For an extensive review of the role of the Supreme Court in the molding of our present tax structure, see Gray, *The Supreme Court, Accounting, and the Tax Accrual of "True" Income,* 28 WASH. & LEE L. REV. 1 (1971).

[35] 4A J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.20 (1972); Cook, *supra* note 8, at 235; Note, *Income Tax Accounting: Business Expense or Capital Outlay,* 47 HARV. L. REV. 669, 677 (1934); HARVARD LAW SCHOOL INTERNATIONAL PROGRAM IN TAXATION, WORLD TAX SERIES: TAXATION IN THE UNITED STATES § 7/2.11 (1963). Treas. Reg. § 1.263(a)-2(a) (1958) states that the prolongation of useful life is a factor to be considered in the determination of capital expense.

[36] *See, e.g.,* Cook, *supra* note 8.

[37] *See* Shugerman, *supra* note 8, at 232.

The judiciary has not yet consciously followed a stare decisis system or other wholly objective method. The result is a case by case approach and a welter of inconsistent decisions. For example, one taxpayer was allowed to deduct as repair expense an expenditure to refloat and repair a sunken barge,[38] but the cost of substantial repair to the stern of another taxpayer's barge was held to be capital expense.[39] One water company was not allowed to deduct the cost of connecting the lines of new customers;[40] another water company was allowed to reline its pipes with asphalt and charge the entire cost to repair expense.[41] A railroad company was allowed to deduct the cost of driving poles into its roadbed to stabilize the track, even though the poles were found to have a useful life of fifteen years.[42] When much of the roof of a theater was replaced with roofing material found to have a life of at least fifteen years, the court disallowed any repair deduction since the asset's useful life had been extended.[43] Money spent for grouting, engineer's fees, and reconditioning a plant built over a fault area and in danger of collapse into underground fissures was allowed as repair expense, though the sums expended were very large;[44] yet small sums spent to fix the sagging corner of a cigar stand were held capital expense.[45]

Given the apparently confused state of the law, the courts' search for an easy to apply formula to resolve repair-capital expense issues is understandable. In close cases, however, reliance on a formula may be a substitute for essential analysis of difficult fact questions.

II. Formularization

Both Congress and the courts have reacted to the longstanding uncertainty of outcome in repair-capital expense cases with experiments at formularization.[46] The most significant and ambitious attemp at formularization to date is the Asset Depreciation Ranges,[47] (ADR) enacted in

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[38] Zimmern v. Commissioner, 28 F.2d 769 (5th Cir. 1928).

[39] P. Dougherty & Co. v. Commissioner, 159 F.2d 269 (4th Cir. 1946), *cert. denied,* 331 U.S. 838 (1947).

[40] Union Hollywood Water Co. v. Carter, 238 F. 329 (9th Cir. 1917).

[41] Plainfield-Union Water Co., 39 T.C. 333 (1962).

[42] Kansas City S. Ry. v. United States, 112 F. Supp. 164 (Ct. Cl. 1953).

[43] Amsterdam Theatres Corp., 24 B.T.A. 1161 (1931). However, the Board of Tax Appeals allowed a taxpayer to treat as repair expense the cost of a temporary roof on a building being constructed since the roof was removed as construction progressed. Robert Buedingen, 6 B.T.A. 335 (1927).

[44] American Bemburg Corp., 10 T.C. 361 (1948), *aff'd sub nom.* Commissioner v. American Bemburg Corp., 177 F.2d 200 (6th Cir. 1949).

[45] Ezra Z. Eaton, 2 B.T.A. 463 (1925).

[46] The term "formularization," apparently coined by the Tenth Circuit in *United States v. Wehrli,* exemplifies the belief of many courts that the solution of the complex problems underlying the repair-capital expense area lies in the application of predetermined conventions to varying fact situations. The duty of the fact finder becomes that of application of the convention to the facts in dispute.

[47] Int. Rev. Code of 1954 § 263(f); Treas. Reg. § 1.167(a)–11(d)(2), T.D. 7272, 1973–1 Cum. Bull. 82; Treas. Reg. § 1.167(a)–11(f)(4)(ii)(c), T.D. 7272, 1973–1 Cum. Bull. 82; Rev. Proc. 72–10, 1972–1 Cum. Bull. 721. Int. Rev. Code

1971. Under ADR guidelines, an expenditure for repair, maintenance, rehabilitation, or improvement of an asset, the amount of which does not exceed the "asset guideline class repair allowance" of the unadjusted basis of the asset, will be treated as repair expense.[48] To the extent that the expenditures in respect to the property exceed the repair allowance, they are capitalized as "property improvements."[49] The ADR treatment is elective[50] and does not apply to certain kinds of depreciable property.[51] Since the ADR formula avoids decision of the repair-capital expense issue altogether by applying a flat mathematical computation, it does not foster predictability when the controversy involves a nonelecting taxpayer or ineligible assets.

The judicial search for predictability has led to reliance upon several tools. For example, under the one-year rule,[52] if the expenditure is for a

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OF 1954 § 263(f) is the legislative authority for the promulgation, by the Secretary of the Treasury or his delegate, of amounts which a taxpayer may elect as allowable annual repair expense. The Treasury Regulations noted above are the current administrative regulations creating the repair allowances. Rev. Proc. 72–10, 1972–1 CUM. BULL. 721 specifies the percentage of acquisition cost which may be allowed as annual repair expense on certain classes of assets. For special regulations concerning railroad rolling stock, see INT. REV. CODE OF 1954 § 263(e); Treas. Reg. § 1.263(e)–1 (1973).

[48] Such expenditure is not deductible if for an "excluded addition," that is, an improvement which alters the productivity, use, or capacity of an asset. Treas. Reg. § 1.167(a)–11(d)(2)(vi), T.D. 7272, 1973–1 CUM. BULL. 82. Excluded additions do not include "any expenditure in connection with the repair, maintenance, rehabilitation, or improvement of an identifiable unit of property which does not exceed $100." The precise computation of the repair allowance is governed by Treas. Reg. § 1.167(a)–11(d)(2)(iii)(a), T.D. 7272, 1973–1 CUM. BULL. 82. "Unadjusted basis" is defined in Treas. Reg. § 1.167(a)–11(c)(1)(v).

[49] Treas. Reg. § 1.167(a)–11(d)(2)(vii), T.D. 7272, 1973–1 CUM. BULL. 82.

[50] INT. REV. CODE OF 1954 § 263(f) provides for the election:

> The Secretary or his delegate may by regulations provide that the taxpayer may make an election under which amounts representing either repair expenses or specified repair, rehabilitation, or improvement expenditures for any class of depreciable property —
>
> (1) are allowable as a deduction under section 162(a) or 212 (whichever is appropriate) to the extent of the repair allowance for that class, and
>
> (2) to the extent such amounts exceed for the taxable year such repair allowance, are chargeable to capital account.
>
> Any allowance prescribed under this subsection shall reasonably reflect the anticipated repair experience of the class of property in the industry or other group.

[51] Notably, most depreciable real estate is not now qualified for the repair allowance because no applicable guidelines have been promulgated by the Secretary of the Treasury. See Rev. Proc. 72–10, 1972–1 CUM. BULL. 721, which lists the kinds of assets with respect to which the Secretary of the Treasury has authorized repair allowances. Establishment of repair allowances is subject to the administrative discretion of the Secretary. INT. REV. CODE OF 1954 § 263(f), quoted at note 50 *supra*. Rev. Proc. 72–10 has been frequently modified to add or adjust classifications. *E.g.*, Rev. Proc. 73–30, 1973–2 CUM. BULL. 484; Rev. Proc. 73–26, 1973–2 CUM. BULL. 479.

[52] Early decisions often required capitalization upon a finding that the benefits lasted longer than the yearly accounting period. W. B. Harbeson Lumber Co., 24 B.T.A. 542 (1931); Georgia Car & Locomotive Co., 2 B.T.A. 946 (1925); Everett L. Mills, 4 CCH Tax Ct. Mem. 863 (1945). For an eloquent statement of the strict one-year rule, see Note, *Income Tax Accounting: Business Expense or Capital Outlay*, 47 HARV. L. REV. 669, 677 (1934).

Modern courts make use of the one-year doctrine as a guide in determining what kind of benefit has been gained by a particular expenditure. If the benefit is substantial and longlasting, the expenditure is a capital outlay. Sears Oil Co. v. Commissioner, 359 F.2d 191 (2d Cir. 1966); United States v. Akin, 248 F.2d 742 (10th

substantial item expected to have a useful life in excess of one year, the item must be captalized.[53] In other, more scattered instances, the courts have given the accounting provisions of the Code strong probative value where they form a separate mechanism for determination of what items are to be considered in the computation of taxable income.[54] For the purposes of this article, the most important judicial formula is the general plan of betterment rule, which requires capitalization if, in light of all the circumstances, the taxpayer is found to be engaged in a general plan leading to betterment, replacement, or other extension of the useful life of the asset.[55]

A. The Origins of the General Plan Rule

Amidst the wide diversity of decisional law, the finding of a general plan of improvement has occasionally figured to require capitalization of groups of items viewed as a single transaction by the examining court. The rationale for application of the doctrine has, however, varied from case to case. The Board of Tax Appeals first used general plan language in *I. M. Cowell.*[56] In *Cowell,* the Board found a general plan of improvement because the taxpayer failed to keep accurate records allocating repair and capital expense incurred in bringing an old hotel into compliance with the local building code.[57] The *Cowell* taxpayers let a single contract

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Cir. 1957), *cert. denied,* 355 U.S. 956 (1958); P. Dougherty Co. v. Commissioner, 159 F.2d 269 (4th Cir. 1946), *cert. denied,* 331 U.S. 838 (1947). See J. MERTENS, *supra* note 35.

[53] Thus, in Fall River Gas Appliance Co. v. Commissioner, 349 F.2d 515 (1st Cir. 1965), installation costs for leased gas appliance incurred by the taxpayer fuel company were found chargeable to capital because the life of the improvements was twelve years. Items such as roofs which are normally expected to remain in use for several years must generally be capitalized. *E.g.,* George W. Ritter, 5 CCH Tax Ct. Mem. 849 (1946).

Even though an expenditure might otherwise be considered capital in nature, a deduction is implicitly allowed where the useful life of the property is less than one year. Treas. Reg. § 1.263(a)–2(a) (1958).

[54] *See* Cincinnati, N.O. & T.P. Ry. v. United States 424 F.2d 563 (Ct. Cl. 1970), where the Court of Claims held that the taxpayer's accounting method of charging virtually all items under $500 to repair expense validly reflected income, even though some of the items had a useful life in excess of one year. *Accord,* Fort Howard Paper Co., 49 T.C. 275 (1967).

INT. REV. CODE OF 1954 § 446 allows a taxpayer to employ his own method of accounting unless the method fails to reflect income. Treas. Reg. § 1.446–1(a)(2) (1957) grants the taxpayer some measure of autonomy in determining his accounting method.

[55] Viewing an item or series of items as one transaction is useful for combating unwarranted division of a single capital outlay into separate parts deductible under the "repair" provisions. However, some writers contend that the "general plan" theory is often used as a license to lump unrelated items into one predominantly capital item, thus requiring the unrelated items to be capitalized. *See* Shugerman, *supra* note 8.

An offshoot of the "general plan" theory is the "put-keep" distinction. If expenditures, viewed in light of the surrounding circumstances, are required to put the property into useful condition the expenditures must be capitalized. If the expenditure serves only to keep the property in useful condition, the outlay is charged to repair expense. This approach avoids confusion because it does away with a search for motivation and concentrates instead on what the expenditure accomplished. *See* Jones v. Commissioner, 242 F.2d 616 (5th Cir. 1957).

[56] 18 B.T.A. 997 (1930).

[57] *Id.* at 1002.

for work ranging from painting and plastering to replacement of the entire roof and exterior siding of the hotel. The whole outlay was claimed as deductible repair expense. Understandably, the Commissioner disagreed with this wholesale treatment of traditionally capital items and disallowed the entire deduction. Since much of the outlay had gone to permanent improvement and no adequate allocation of expense to repair and capital was available, the Board concurred. Despite the use of general plan language, the decision in *Cowell* hinged upon the taxpayer's failure to produce evidence upon which an allocation could be predicated.

In *Home News Publishing Co.*,[58] promulgated the same year as *Cowell,* the Board made new use of its general plan language. In response to the persistent prodding of a building inspector, the *Home News* taxpayer had hired an architect to supervise the renovation of his building's facade, the replacement of wooden with steel girders, and cleanup work incidental to the renovation. Viewing the work as one completed project, the Board found that

> all the work for which the expenditures were made was pursuant to a general plan of reconditioning and improving and altering the property as a whole to make it suitable for the petitioner's purposes.[59]

Despite an attempt at allocation, the Board held that the concurrence of purpose to renovate the building and its accomplishment required capitalization of all the expenses which had combined to render the building serviceable as a newspaper facility. Hence, in *Home News,* the basis of decision was the traditional purpose-result analysis originated in *Illinois Merchants Trust.*

General plan language was also used in *Ethyl M. Cox.*[60] In *Cox,* the unsuspecting taxpayer paid full value for a refrigerated warehouse later found to be in need of substantial repairs. Before the building could be used, it was necessary to shore up the cooling tower, replace pipes, install a new pump, replaster the walls, and lay a new cement floor in the ice box. The court found a general plan of improvement mandating capitalization of the disputed items;[61] however, the following sentence from the opinion sets forth much more clearly the reason why capitalization was required:

> [I]t is rather evident from the type of repairs set forth in our findings that most of them added to the life of the building, or were material replacements, and this Court has consistently held expenditures for such repairs to be capital expenditures.[62]

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[58] 18 B.T.A. 1008 (1930).

[59] *Id.* at 1010.

[60] 17 T.C. 1287 (1952).

[61] "The expenditures were pursuant to a general plan of reconditioning, improving, and altering the property, and hence were capital expenditures." *Id.* at 1293.

[62] *Id.*

Thus, the *Cox* decision was based on a determination that every important disputed expense resulted in material improvement or addition to the asset value of the taxpayer's property. Although the court was primarily concerned with the result, it nonetheless made use of general plan language in requiring capitalization.

In *United States v. Wehrli*,[63] the Tenth Circuit cited *Cowell, Home News,* and *Cox,* among others, as forerunners of the general plan analysis. Yet none of these cases was decided by superimposition of the general plan rule on the controversy at hand. Instead, each court made use of traditional modes of analysis in requiring capitalization of the items involved.

Pre-*Wehrli* decisions containing general plan language are roughly divisible into three types, exemplified by the three decisions noted above. First, as in *Cowell,* general plan language is used to point to an evidentiary deficiency. Because the taxpayer has failed to support his assertions of repair expense with accurate records and convincing evidence, he must capitalize the entire expense. This evidentiary deficiency may be cured simply by keeping detailed records. For example, separate repair and construction contracts to be completed at different times could be let,[64] thereby separating deductible expenditures from those for improvements.[65] A host of decisions indicates that proper recordkeeping could warrant partial allocation to repair of amounts lumped together in the capital category for lack of sufficient evidence.[66] Second, as in *Home News,* plan language may be used to characterize a single completed transaction involving a single definable structure. Such cases involve structures such as railroad bridges,[67] hotels,[68] or industrial buildings.[69] If improvement is effected and purpose to renovate is found, the item must be capitalized.[70]

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[63] 400 F.2d 686 (10th Cir. 1968).

[64] Graves, *supra* note 8. Graves advocates advance planning of a "repair strategy" in order to take full advantage of the Code's repair deduction allowances:

> [I]t is important that repairs be separated from improvements. This is not so much a question of the nature of the repairs themselves as it is a question of the interpretation of the facts when a repair is made as part of an improvement program.

Id. at 1130.

[65] Several commentators note that the Commissioner's finding of capital expenditure is often allowed to stand because of a failure to adequately separate repair from capital expense and failure to keep adequate records. *See* Seidman & Johnson, *Tax Clinic,* 118 J. OF ACCOUNTANCY 67, 68 (July, 1964); Wilkins, *supra* note 8.

[66] *See, e.g.,* cases cited note 13 *supra.*

[67] Denver & R.G.W.R.R. v. Commissioner, 279 F.2d 368 (10th Cir. 1960). The court held that the replacement of eighty-five to ninety percent of the wooden stringers on a railroad viaduct could only be viewed as a substantial improvement to the entire structure, and therefore must be capitalized.

[68] Hotel Kingkade v. Commissioner, 180 F.2d 310, 312 (10th Cir. 1950).

[69] Ethyl M. Cox, 17 T.C. 1287 (1952). *But see* Buckland v. United States, 66 F. Supp. 681, 682 (D. Conn. 1946); Mellie Esperson, 10 P-H Tax Ct. Mem. ¶ 41,086 (1941).

[70] *E.g.,* United States v. Akin, 248 F.2d 742, 744 (10th Cir. 1957), *cert. denied,* 355 U.S. 956 (1958); Bank of Houston, 29 P-H Tax Ct. Mem. ¶ 60,110 (1960). In *Bank of Houston,* the Tax Court, viewing the taxpayer bank as one assert, found that the

Third, as in *Cox*, many decisions employing general plan language have actually focused on the result of the work performed. Breaking down a single capital result into an artificially segmented series of deductible repairs is viewed by most courts as a clumsy effort at tax avoidance. In these cases, courts invoke the traditional rule that substance and not form rules the decision of tax cases.[71] Here also, the one-year rule finds useful application.[72] If long lasting benefit is obviously obtained, only the result need be scrutinized in order to find a charge against capital rather than against current revenue. Thus, it is confusing when general plan language is used to describe this result-oriented analysis. A prime example of a "result" case containing general plan language is *Coca-Cola Bottling Works*,[73] in which an entire series of separable and substantial outlays lavished on the taxpayer's plant were held to create a capital result.[74] Similarly, in *Manger Hotel Corp.*,[75] money spent on the taxpayer's hotel was held to result in a capital improvement. In both cases, a close examination of the effect of the outlay rather than the search for a general plan dictated the outcome.

Analyzed in this manner, the results in general plan cases cited by the *Wehrli* court for support of its formularization approach have hinged upon the traditional criteria of repair-capital cases. The general plan language in each simply indicates that, for one reason or another, the court has chosen to view a claimed group of "repairs" as a single transaction chargeable to capital expense. *Wehrli* not only followed this confusing approach, but also elevated the general plan of betterment rule to the status of "an overriding precept."

B. The Tenth Circuit's Overriding Precept

Since previous cases purportedly decided under the "general plan" doctrine seem to employ traditional repair-capital expense criteria, it is

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work performed resulted in a single improvement, thus requiring capitalization of the expense. In so holding, the court stated:

> The question presented is one of fact, *i.e.*, in reaching a decision in this area, the purpose of the work performed, the physical nature of the work, and the effect of the work must be considered.

Id. at 60–659.

[71] The doctrine, enunciated in *Eisner v. Macomber*, 252 U.S. 189, 206 (1920), remains valid. A modern restatement of the doctrine as applied to the repair-capital expense issue reads as follows:

> There is no precise verbal formula by which an expenditure can be classified as capital or noncapital . . . . The Court must, again, look to the substance rather than the legal form of the transaction . . . on a case-by-case basis . . . .

Smith v. United States, 266 F. Supp. 814, 821 (S.D. Tex. 1967), *rev'd on other grounds*, 418 F.2d 589 (5th Cir. 1969).

[72] See notes 52–53 *supra* and accompanying text.

[73] 19 B.T.A. 1055 (1930).

[74] *Id.* at 1056. The entire facade, an entire wall, new joists, and new window frames constituted expenditures claimed by the taxpayer to be partly repair items. The cost of such improvements totaled over $11,000 in 1924 and were concededly necessary to make the building fit for the taxpayer's occupancy.

[75] 10 T.C. 520 (1948).

difficult to understand the need for an "overriding precept" to determine the deductibility of a given item. In *Wehrli,* the taxpayer secured an old building and immediately gutted the inside, added structural steel support and an air conditioning system, renovated the exterior of the building, painted, plastered, and made many incidental repairs. All this work was done in anticipation of leasing the premises to a third party who demanded decent working quarters before the lease was signed. The taxpayer capitalized approximately one-third of the total cost of renovation and claimed the rest as repair expense. Acquisition of a building and its immediate, substantial renovation is difficult to view as anything other than a single completed transaction. Accordingly, viewing the matter as a whole, the Commissioner found renovation to be both the purpose and result of the taxpayer's expenditures.[76] Thus, the "result" as well as the "purpose-result" analysis would demand capital treatment for the entire transaction.

Analyzed on its facts, the outcome in *Wehrli* flows from the purpose-result test enunciated in *Illinois Merchants Trust,* making superfluous the overriding precept language. While the *Wehrli* court was correct in remanding the case to the lower court which had allowed allocation, its choice of language was unfortunate. The general plan notion is useful only in aiding the trier of fact to view a series of related expenditures as a continuum, rather than as a compartmentalized series of unrelated events. The doctrine's proper thrust, therefore, reflects the advice proffered by the Supreme Court in *Welch v. Helvering*[77] and in circuit,[78] district,[79] and Tax Court[80] opinions. If the Tenth Circuit meant to express the accepted view that surrounding circumstances must be considered in arriving at a just result in a repair-capital case,[81] the "overriding precept" language is inappropriate. The precept would thus become makeweight for the Commissioner to employ in an argument for capitalization in a close case. If, on the other hand, the court meant to impose a new test to be used in such instances, the endeavor was unnecessary given the clear capital nature of the expenditures.

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[76] 400 F.2d at 690.

[77] 290 U. S. 111 (1933).

[78] *E.g.,* Cravens v. Commissioner, 272 F.2d 895 (10th Cir. 1959).

[79] *E.g.,* Jaffa v. United States, 198 F. Supp. 234 (N.D. Ohio 1961); Buckland v. United States, 66 F. Supp. 681 (D. Conn. 1946).

[80] Bank of Houston, 29 P-H Tax Ct. Mem. ¶ 60,110 (1960).

> A remodeling project, taken as a whole, is but the result of various steps and stages. . . . Each phase of this preparation, removed in time and context, might be considered a repair item. The Code, however, does not envision the fragmentation of an over-all project for deduction or capitalization purposes.

Id. at 660–60. *Accord,* California Casket Co., 19 T.C. 32 (1952).

[81] In *Wehrli,* the proposed instruction recommended for use by the trial court contained no terms distinguishing between a general plan of *repair* and a general plan of *improvement.* No court has suggested that the finding of a planned expenditure should lead automatically to its capitalization.

C. Confusion of Issues in "General Plan" Approach

1. Issues of Fact — An obvious failure of the general plan of betterment formularization is that it removes from the fact finder the function of considering the variety of circumstances which are characteristic to the issue.[82]

Another effect of the general plan rule is to increase the taxpayer's burden of proof. Under *Wehrli,* the taxpayer must first negate the Commissioner's determination that there is a general plan of betterment, and then prove which expenditures were properly repairs. The result is a two-tiered burden of proof for the taxpayer. In effect, the fact finder must preliminarily indulge the presumption that a general plan of improvement exists; only after the hypothesis is affirmatively found false may the traditional search for the proper classification of individual items proceed. With this implicit presumption in his favor, the Commissioner has a diminished incentive to attempt a settlement with the taxpayer. Thus, it is likely that the Commissioner will obtain larger capitalizations when settlements do occur and that litigation will be protracted by the additional fact issue with which the taxpayer and the court will now be burdened.

In addition, since many repair-capital expense cases are decided by juries, an instruction to look for a general plan of betterment could well prove unfair. Untrained laymen might easily misapprehend their task to be that of uncovering a general plan lurking somewhere in a tangled fact situation. Since most well-run businesses plan both work chargeable to capital and work chargeable to repair, legitimate deductions might well be jeopardized. Moreover, the amorphous concept of general plan of betterment has yet to be defined by a court. The definition was not attempted by the *Wehrli* court; perhaps if the attempt had been made, the court would have found the definition as elusive as the distinction between capital expense and repair expense. Since a jury instruction on the general plan rule would necessarily include a definition of "betterment," the trial judge would have to distinguish between items of repair and capital expenditures, thus returning full circle to the ultimate issue. Viewed in this way, the general plan rule only confuses and delays the jury's factual determination. A simple instruction to view the surrounding circumstances as a whole rather than in artificially segmented and

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[82] "Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal." Pokora v. Wabash Ry. Co., 292 U.S. 98, 105–06 (1934). The background of Justice Cardozo's statement in *Pokora* relates to the current discussion only by analogy. In Baltimore & Ohio R. Co. v. Goodman, 275 U.S. 66 (1927), Justice Holmes had superimposed as a rule of law, the stop, look, and listen rule upon the fact issue of contributory negligence in a railroad crossing case. The Tenth Circuit's pronouncement of the general plan of betterment rule in *Wehrli* bears a striking resemblance to Holmes's statement:

> It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct and when the standard is clear it should be laid down once and for all by the courts.

For a brief discussion of formularization in the tort area, see W. PROSSER, TORTS § 35 (4th ed. 1971).

segregated parts would accomplish the legitimate purposes of a general plan instruction without misleading the fact finder.

2. Accounting Method — In enacting the accounting methods provision of the Code, [83] Congress intended the taxpayer's method of accounting to play an important part in the determination of income unless that method failed to accurately reflect the taxpayer's financial situation.[84] By use of the *Wehrli* overriding precept, the Tenth Circuit has effectively ignored the intent of those provisions. For example, in *Mountain Fuel Supply Co. v. United States,*[85] when a public utility attempted to raise the issue of clear reflection of income as a governing factor in determination of the deductibility of certain items incurred in unearthing and recoating a segment of its gas pipeline, the court brushed the issue aside. In deference to its overriding precept,[86] the court directed its attention to the search for a general plan. Because the life of the segment was lengthened by well planned expenditures, the court viewed the matter as one general plan and required all the expenditures to be capitalized.

This method of arriving at the decision did not include an analysis of the interaction of the capitalization and accounting methods provisions [87] in the repair-capital area, although the issue was fully briefed.[88] Both the Tax Court [89] and the Court of Claims [90] have held these Code sections to be

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[83] INT. REV. CODE OF 1954 § 446. Treas. Reg. § 1.446–1(a)(2):

> It is recognized that no uniform method of accounting can be prescribed for all taxpayers. Each taxpayer shall adopt such forms and systems as are, in his judgment, best suited to his needs. However, no method of accounting is acceptable unless, in the opinion of the Commissioner, it clearly reflects income. A method of accounting which reflects the consistent application of generally accepted accounting principles in a particular trade or business in accordance with accepted conditions or practices in that trade or business will ordinarily be regarded as clearly reflecting income, provided all items of gross income and expense are treated consistently from year to year.

[84] The changes embodied in your committee's bill are designed to bring the income-tax provisions of the law into harmony with generally accepted accounting principles, and to assure that all items of income and deductions are taken into account once, but only once, in the computation of taxable income.

H.R. REP. No. 1337, 83d Cong., 2d Sess. 48 (1954). Similar language is found in S. REP. No. 1622, 83d Cong., 2d Sess. 62 (1954).

[85] 449 F.2d 816 (10th Cir. 1971), *cert. denied,* 405 U.S. 989 (1972).

[86] Only fleeting reference was made by the Tenth Circuit to the status of the "general plan" doctrine: "The significance of a plan of rehabilitation or improvement is referred to in United States v. Wehrli . . . ." *Id.* at 821.

[87] INT. REV. CODE OF 1954 §§ 263, 446.

[88] Brief for Appellant at 16–19, Brief for Respondent at 23–31, Mountain Fuel Supply Co. v. United States, 449 F.2d 816 (10th Cir. 1971), *cert denied,* 405 U.S. 989 (1972). Mountain Fuel argued strenuously that its accounting method was determinative and that the Commissioner's own evidence supported Mountain Fuel's position in part.

[89] Fort Howard Paper Co., 49 T.C. 275 (1967) (alternative holding). The court held that sections 263 and 446 must be viewed together as complementary standards, neither taking precedence over the other:

> A contrary view would encase the general provisions of section 263 with an inflexibility and sterility neither mandated to carry out the intent of Congress nor required for effective discharge of respondent's revenue-collecting responsibilities. Accordingly, we turn to a determination as to whether petitioner's

"inextricably intertwined." In fact, section 446 permits expense treatment of items ordinarily considered chargeable to capital where the item costs little [91] or is worn out quickly in the trade.[92] There appears no good reason why tax accounting methods must be governed by a judicial formularization of the business expense provisions of the Code. Rather, the statute should have greater authority than judge-made rules.

One apparent intention of Congress in enacting the accounting provisions was to allow taxpayers and their accountants some control of the art of accounting method. The superimposition of the general plan rule stifles all flexibility and development of such method.[93] If the preoccupation with overriding precepts obscures the operation of the accounting methods provision, the search for a general plan thwarts the intent of Congress and ignores the unique and complex situation of each individual taxpayer.

3. Allocation — The *Wehrli* court noted that once a general plan of betterment is found, everything within its scope must be capitalized. The justification for this blanket capitalization remains unclear. In the Repair Allowance Regulations, the Internal Revenue Service view [94] is stated as follows:

> Expenditures, or a series of expenditures, may have characteristics both of deductible expenses and capital expenditures. Other expenditures may have the characteristics of capital expenditures, as in the case of an "excluded addition". . . .[95]

Upon sufficient showing, courts have often allowed deductions for expenditures clearly for repair rather than improvement.[96] Sums expended by the

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method of accounting "clearly reflects income" pursuant to the provisions of section 446.

Id. at 283–84.

[90] Cincinnati, N.O. & T.P. Ry. v. United States, 424 F.2d 563, 569 (Ct. Cl. 1970).

[91] *Id.* The Commissioner's challenge of the taxpayer's method of accounting which deducted as repairs all items under $500 was dismissed because the taxpayer's accounting method was held to meet the section 446 test of "clear reflection of income."

[92] Expenditures for items such as tires, though ordinarily having a relatively long useful life, may be charged to expense where the experience of the industry indicates such items are usually fully used up within one year. Rev. Rul. 134, 1968–1 CUM. BULL. 63; Rev. Rul. 249, 1959–2 CUM. BULL. 55.

[93] In its official pronouncements, the American Accounting Association has leveled scathing criticism at the courts for unwonted and unskillful tampering with the timing of items.

See, e.g., American Accounting Ass'n Committee on Standards Underlying Corporate Financial Statements, *Accounting Principles and Taxable Income*, 27 ACCOUNTING REV. 427 (1952):

> [N]either the Congress nor the administrative authorities nor the Courts should undertake to modify the application of generally accepted accounting principles consistently used by the taxpayer for published statement purposes, solely to alter the timing of recognition of income or expense for tax purposes.

Id. at 428.

[94] In Revenue Rulings dealing with the proper treatment of outlays having a dual effect of repair and replacement, the IRS has allowed allocation to be made by the taxpayer. *E.g.*, Rev. Rul. 476, 1969–2 CUM. BULL. 41.

[95] Treas. Reg. § 1.167(a)–11(d)(2)(i)(a), T.D. 7272, 1973–1 CUM. BULL. 99.

[96] In *Mellie Esperson*, 10 P-H B.T.A. Mem. ¶ 41,086 (1941), an allocation was allowed of expense incurred in repairing and improving the elevators serving the tax-

taxpayer at the same time are not necessarily expenditures of the same nature.[97] If the taxpayer can meet the burden of showing that some of the expenditures fall within the scope of ordinary and necessary repair, the items should be deductible. In any tax case, the court must determine the tax liability of the party before it. A rule that lumps together all items of expense can only obscure a clear analysis of the taxpayer's true condition, often resulting in distortion of income through excessive capitalization.[98] A cogent judicial determination of a repair-capital question need not begin with and remain structured by the search for a general plan of betterment. Formularization stifles much-needed flexibility in the adjudication of the correct result in each individual case.

III. Conclusion

By elevating the general plan rule to a first principle in the repair-capital expense field, the Tenth Circuit has encouraged application of an oversimplified mechanical test to an area abounding in unusual and complicated fact situations. The traditional and useful function of the doctrine is to remind the fact finder to view a disputed item as part of the transaction from which it arose. Converted to a rule of law, the doctrine only clouds and complicates the fact finder's duty to examine and classify each disputed item in light of all the circumstances. Instead, the fact finder is enjoined to focus upon finding a general plan of betterment requiring capitalization of all items within its scope. This constriction of the fact finder's function could result in the sacrifice of many legitimate deductions merely to promote mechanical facility of decision.

The attempt to superimpose the general plan doctrine as controlling in the repair-capital expense area is conceptually unsound. Given the right circumstances, questions of consistency of accounting method, clear reflection of income, result of the expenditure, concurrence of capital purpose and result, and evidentiary sufficiency should and do determine the nature of the outlay. To color the subsequent factual analysis by a mindless ap-

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payer's office building. *Accord,* Southern Press Cloth Mfg. Co., 10 B.T.A. 303, 305 (1928).

A number of cases indicate that an allocation would have been appropriate had the taxpayer kept clear records delineating repair and capital expenditures. Cases cited note 13 *supra.* However, as pointed out by the Tax Court in *Bank of Houston,* 29 P-H Tax Ct. Mem. ¶ 60,110 (1960), most recent decisions have attempted no allocation between repair and capital expense.

[97] Mellie Esperson, 10 P-H B.T.A. Mem. ¶ 41,086 (1941):

> If the taxpayer chooses to repair and improve properties at the same time, the fact that he makes improvements does not preclude him from making deductions for the necessary repairs, provided he shows to the satisfaction of the [court] the amounts allocable to this latter activity.

Id. at 41–190. *Accord,* Connecticut Light & Power Co. v. United States, 299 F.2d 259, 313 (Ct. Cl. 1962); Addressograph-Multigraph Corp., 4 CCH Tax Ct. Mem. 147, 174–75 (1945).

[98] Significantly, no discussion is given the converse notion that a finding of a general plan of repair should trigger the wholesale expensing of all items within its scope. While the issue has yet to be litigated, it is unlikely that this liberal expensing procedure will be allowed as the necessary concomitant of the "betterment" doctrine.

plication of the general plan doctrine in repair-capital cases is not the answer. Rather, the most cogent approach to the problem lies in a realization that no formularization can cope with the multiplicity of situations presented to the fact finder. Admittedly, this realization supplies no bright line test capable of supplying the "right" answer in every repair-capital case. Yet a more narrow approach deprives the taxpayer of legitimate deductions and confuses the jury.

Ballot Access Rights: The Constitutional Status of the Right to Run for Office

James S. Jardine *

The history of electoral litigation is one of nearly exclusive attention to the "right to vote." Constitutional amendments, statutes, and judicial decisions have, for the most part, ignored the ballot access rights of potential candidates. The scant judicial protection that candidate rights have received has been the indirect result of constitutional concern either for voting rights or for racial neutrality.[1] Candidacy rights are often closely related to voting rights; recent cases, however, suggest that the right to run for office is a significant separate element in evaluating the constitutional claims of candidates. The increasing sophistication of state electoral regulations and the concomitant potential for discrimination have made the imprecise judicial analysis that fails to differentiate between the right to run and the right to vote inadequate.

This article will examine the constitutional status of the right to run for elected office in state and local elections. The discussion is divided into three major sections: a survey of recent constitutional history of both the right to vote and the right to run for office; an examination of several current theories for resolving constitutional issues regarding ballot barriers to candidates and parties; and a survey of specific problem areas, reviewing present statutory framework and case law, with particular attention to Utah. Finally, this article will propose several pivotal conceptions to aid in the present explanation and future adjudication of cases.

I. The Historical Perspective

A. The Right to Vote

Because article I, section 2 of the Constitution effectively delegates to the states the determination of qualifications for electors in Congressional elections,[2] the right to vote has historically been treated as a right derived

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[1] The leading historical case on candidate rights, *Snowden v. Hughes*, 321 U.S. 1 (1974), and the first major article on the topic, Comment, *Legal Obstacles to Minority Party Success*, 57 Yale L.J. 1276 (1948), are of comparatively recent vintage. There are only two attempts at comprehensive treatment of the issue of candidacy rights: R. Claude, The Supreme Court and the Electoral Process (1970), and Note, *The Emerging Rights to Candidacy in State and Local Elections: Constitutional Protection of the Voter, the Candidate, and the Political Group*, 17 Wayne L. Rev. 1543 (1971) [hereinafter cited as *The Emerging Right to Candidacy*], both of which reflect the only recent interest in the topic. Commentary on specific facets of ballot access rights has appeared only in the last six years.

[2] "The Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2.

from state citizenship.[3] The Supreme Court, however, interpreted the explicit language of the fourteenth and fifteenth amendments [4] as authorizing federal protection of the right to vote. Thus, the Court rendered doctrinally uniform voting rights decisions for half a century until the mid-1950's. Opinions vindicating voting rights during this period were based primarily upon article I, section 2,[5] or the fifteenth amendment,[6] and were characterized by judicial reluctance to intervene in state electoral processes unless racial discrimination was involved.[7] During the 1930's and 1940's, intimations of the future potency of the fourteenth amendment appeared in several suffrage decisions,[8] leading to the expansive application of the equal protection clause in the last two decades.

The apportionment cases of the early 1960's gave franchise rights a full independent status apart from racially discriminatory conduct for the first time.[9] Those decisions were the initial step in recognizing the preferred position or "fundamentality" of the right to vote, and the consequent "strict scrutiny" with which any infringements were evaluated. The decisions in *Harper v. Virginia Board of Education,*[10] invalidating a Virginia poll tax as unconstitutionally burdening the "fundamental" right to vote, and *Kramer v. Union Free School District,*[11] striking down school board election voter requirements of enrolled children or property ownership, crystallized the structure of the "two-tiered" [12] equal protection analysis which has dominated the last two decades and gave additional definition to the parameters and substance of the "compelling state interest" test.[13] Until recently, the Supreme Court has straightforwardly applied the compelling

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[3] *E.g.,* Abbot v. Bayley, 23 Mass. (6 Pick.) 89 (1827) (dictum); *see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Pope v. Williams, 193 U.S. 621 (1904).

[4] "[W]hen the right to vote at any election for the choice of electors . . . is denied to any of the [qualified voters] . . . the basis of representation therein shall be reduced in . . . proportion . . . ." U.S. CONST. amend. XIV, § 2.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State . . . ." U.S. CONST. amend. XV, § 1.

[5] *E.g.,* Wiley v. Sinkler, 179 U.S. 58 (1900); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

[6] *E.g.,* Guinn v. United States, 238 U.S. 347 (1915) (holding unconstitutional a state constitutional amendment establishing a literacy requirement coupled with a "grandfather" clause).

[7] *Compare, e.g.,* United States v. Reese, 92 U.S. 214 (1875), *with* Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd,* 336 U.S. 933 (1949).

[8] Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927). For a case rejecting a fourteenth amendment challenge to state infringement not based on racial discrimination, see United States v. Classic, 313 U.S. 299 (1941).

[9] Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[10] 383 U.S. 663 (1966).

[11] 395 U.S. 621 (1969).

[12] *See* text accompanying notes 110–14 *infra.*

[13] *See* text accompanying notes 111–20 *infra.* An interesting aspect of the compelling state interest test is that its two nerve ends — fundamental rights and suspect classifications — have respective parallels in the right to vote and classification by race. Therefore, the frequent relationship between racial classifications and voting rights has had a synergetic effect in the development of constitutional protections of the franchise. One possible explanation for the weakening of the constitutional protection afforded voting rights is the absence of racially discriminatory impact.

state interest test in voiding nearly all state laws shown to have a substantial impact on franchise rights.[14]

As the more burdensome state election laws were cut down by activist courts or changed by legislatures, courts were faced simultaneously with two new problems: (1) challenges to election provisions with either less than substantial or only arguably discriminatory impact,[15] and (2) a growing dissatisfaction with the two-tiered equal protection model.[16] The voting rights decisions of the Burger Court reflect the tension created by close questions and inadequate analytical tools. For example, in *Dunn v. Blumstein,*[17] the Court struck down a Tennessee law requiring voter residency of one year in the state and ninety days in the county by apparently applying a compelling state interest test based on infringement of the fundamental rights of travel and voting. Although Justice Marshall's opinion seems to be an example of the strict scrutiny analysis, it is questionable whether the opinion employs the two-tiered approach. In earlier opinions, Marshall had expressed preference for a "multi-factor, sliding scale" analysis, looking to the "character of the classification . . . the individual interests affected . . . and the governmental interests asserted in support of the class." [18] *Dunn* may be viewed, therefore, not as the application of the *Harper-Kramer* two-tiered model, but as the polar case in Marshall's spectrum analysis — a point at which he would apply the equivalent of "strict scrutiny." [19] This balancing approach may also be inferred by his language describing the judgment involved as a "matter of degree." [20]

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[14] For an analysis of the "compelling state interest" test, *see* text accompanying notes 110–14 *infra*; *Developments in the Law — Equal Protection,* 82 HARV. L. REV. 1065, 1087–1131 (1969). Until the 1972 term, only two cases escaped the Court's strict scrutiny of state action where fundamental rights were involved. In *McDonald v. Board of Election Commissioners,* 394 U.S. 802 (1969), the Court reverted to a rational relation analysis in rejecting a challenge to the Illinois ballot provisions by inmates not included within them. Although the Court said that the right to vote was not clearly shown to be involved, it reached its decision on the views that the absentee ballot statute extended rather than restricted the franchise, and that other alternatives might have been available to plaintiffs. *McDonald* now appears discredited by *O'Brien v. Skinner,* 414 U.S. 524 (1974). In 1970, in *Oregon v. Mitchell,* 400 U.S. 112 (1970), the Court suggested a wide range of theories for constitutional protections of the federal right to vote and the eighteen-year-old age restriction. Neither the *McDonald* nor the *Oregon* decision has had much influence upon later cases.

[15] Examples of such litigation involve durational residency requirements, party switching limitations, and special purpose unit voter restrictions. For a specific example of the increasingly sophisticated problems presented to modern courts, *see* Kyser v. Board of Elections, 33 Ohio App. 2d 52, 291 N.E.2d 775 (1972), *rev'd* 303 N.E.2d 77 (1973), *appeal dismissed,* 94 S. Ct. 863 (1974), involving the application of residency requirements to the occupant of a motor home.

[16] *See* Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 10–12 (1973).

[17] 405 U.S. 330 (1972).

[18] *Id.* at 335. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 124 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting).

[19] *See* text accompanying notes 138–54 *infra. But see* Nowak, *Realigning the Standards of Review under the Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications,* 62 GEO. L.J. 1071, 1083–84 (1974).

[20] 405 U.S. at 343. Later cases, which ignore the "compelling state interest" test, retain as critical the "less drastic means" inquiry.

Moreover, a primary factor in the *Dunn* result was a "less drastic means" inquiry. Although similar language can be found in strict scrutiny cases, it is an alternative rather than a supplemental approach.[21] Finally, since the stricter test was premised on two fundamental rights, it is possible to view the case as a right to travel decision, a reading supported by later opinions.[22] *Dunn* has been cited by the Court for the compelling state interest test,[23] but the application of that test is unclear in the opinion. Since *Dunn* is the strongest indication of a continuation of strict scrutiny and perfunctory invalidation of infringing state laws in the 1972-73 term, the true character of the opinion is significant to an understanding of later voting rights–equal protection decisions.

Two 1973 Supreme Court decisions raise further doubt as to the continued fundamental status of voting rights. In *Salyer Land Co. v. Tulare Lake Basin Water Storage District,*[24] a six-to-three majority upheld a California statute permitting only property owners to vote for directors of water storage districts and allocating votes on the basis of each $100 of assessed property. The Court applied a "rational relation" test in upholding the statute, only the second time since the 1964 decision in *Reynolds v. Sims* [25] that it had not invoked the compelling state interest test.[26] In earlier voting cases dealing with special purpose districts, the Court left open the possible validity of preferential voting in certain circumstances, but had uniformly applied the compelling state interest test.[27] Although the state interests in support of the statutorily limited electorate were unquestionably legitimate, the Court's result is neither warranted by precedent nor demanded by the facts; thus, the failure to apply a compelling state interest test to the statute raises doubts as to the fundamentality of the right to vote.

In *Rosario v. Rockefeller,*[28] the Court dismissed an equal protection challenge to a New York statute requiring voters to register thirty days before the general election in order to qualify to vote in primary elections the following year. The petitioners' failure to comply with the

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[21] *See* text accompanying notes 155–57 *infra;* Kusper v. Pontikes, 414 U.S. 51 (1973).

[22] *Compare* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (compelling state interest test applied in a right to travel case), *with* Rosario v. Rockefeller, 410 U.S. 752 (1973) (rational relation test applied in a voting rights case).

[23] *But see* Storer v. Brown, 94 S. Ct. 1274, 1279 (1974).

[24] 410 U.S. 719 (1973). See *The Supreme Court, 1972 Term,* 87 HARV. L. REV. 57, 94–105 (1973).

[25] 377 U.S. 533 (1964).

[26] *See* note 14 *supra.*

[27] City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (general obligation bond election); Hadley v. Junior College Dist., 397 U.S. 50 (1970) (school district board election); Cipriano v. City of Houma, 395 U.S. 701 (1969) (revenue bond election); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (school board election). *See also* Hill v. Stone, *appeal docketed,* No. 73–1723, N.D. Tex., May 17, 1974, involving the question of whether the right to vote in a general obligation tax bonds election can be limited exclusively to property owners.

[28] 410 U.S. 752 (1973).

registration requirements did not come within the statutory exceptions for new voters. The Court tested that statute on the basis of "whether the time limitation imposed . . . is so severe as itself to constitute an unconstitutionally onerous burden on the petitioners' exercise of the franchise or on their freedom of political association." [29] Finding that voters were not totally deprived of the franchise, because all had the opportunity to register at some time, the Court answered the question negatively. By doing so, the Court wholly ignored its earlier concern with the actual burden of the requirement — in this case, a remote registration deadline with an absolute exclusionary penalty. The Court also found persuasive the presence of a legitimate state interest: "the preservation of the integrity of the electoral process" by preventing raiding between parties.[30] Justice Powell's dissent pointed out that "[t]he Court's formulation, though the terminology is somewhat stronger, resembles the traditional equal protection 'rational basis' test." [31] Justice Powell also criticized the Court for failing even to make a "less restrictive means" inquiry.[32] Read with *Salyer, Rosario* suggests that the preferred position and nearly automatic vindication of voting rights is no longer certain.[33]

The confusion of equal protection standards in voting cases continued in three cases of the most recent term. In *Kusper v. Pontikes,*[34] an Illinois statutory scheme precluding the switching of parties for primary voting during the preceding twenty-three month period was held to have "substantially abridged [petitioner's] ability to associate effectively with the party of her choice." [35] Although the basis for the decision seems to be the right of free association, the Court failed to articulate the test it applied. Instead, the Court listed a number of independently relevant factors, including: that the means unnecessarily restricted constitutionally protected rights; that there existed the possibility of less restrictive means; and that the barrier involved, though not absolute, did preclude the petitioner from voting in the primary in question. The majority distinguished *Rosario* on the substantiality of the barrier to primary voting and the presence of less restrictive means. Thus, *Kusper* is notable for the complete absence of strict scrutiny-compelling state interest language in a case sustaining voting rights claims.

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[29] *Id.* at 760.

[30] *Id.* at 761–62. The Court notes that this is a *"particularized* legitimate purpose." *Id.* (emphasis added). Both Professor Gunther and the dissent view such "particularization" as one element of a "tougher" rational relation test. *See* Gunther, *supra* note 16, at 20–24, 45–46.

[31] 410 U.S. at 767 (Powell, J., dissenting).

[32] *Id.* at 770.

[33] Additionally, *Rodriguez* dictum suggests that instead of receiving preferred protection against any infringement as an affirmative constitutional right, voting rights would merely be protected against invidious discrimination, a qualitatively less vigorous standard. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 60 (1972) (Stewart, J., concurring).

[34] 414 U.S. 51 (1973).

[35] *Id.* at 58. Justices Rehnquist and Blackman, in dissent, explicitly opted for a rational relation test.

A more recent voting rights decision, *O'Brien v. Skinner,*[36] held that the state court construction of a statute allowing absentee registration for persons legitimately disabled from in-person registration or voting, so as not to include pretrial detainees or persons serving misdemeanor sentences, was an unconstitutional deprivation of equal protection. Although the Court cited both an earlier inmate voting case, *Goosby v. Osser,*[37] which had invalidated arbitrary absentee ballot provisions, and the "onerous burden" language of *Rosario,* the Court rested its decision on the fact that petitioners were "not allowed to use the absentee ballot and are denied any alternative means of casting their vote although they are legally qualified to vote." [38] The majority opinion fits the ambiguous mold of *Rosario.* Justice Marshall's concurrence rested on the usual compelling state interest–less restrictive means standard, but failed to explain or criticize the majority's approach, leaving both lines of reasoning unclear.

Finally, in *Richardson v. Ramirez,*[39] holding that the disenfranchising of ex-felons by California did not violate the equal protection clause, the Court found the exception in section 2 of the fourteenth amendment,[40] facially allowing the exclusion of felons, to be critical. However, Justice Marshall's strong dissent, arguing for invalidation of the law under the compelling state interest test, demonstrates that a viable position vindicating voting rights was available to the Court, casting the majority opinion as a less than vigorous protection of those "fundamental" interests.

These developments in the past two terms have upset the state of equal protection voting rights law. The century of momentum leading to nearly absolute protection of franchise rights has now slowed considerably. Thus, the underpinning of supporters' voting rights, upon which candidates asserting constitutional claims have always relied, is in jeopardy. The premise of a clear and encompassing protection of voting rights from which the conceptual calculus of candidacy rights has proceeded is suddenly insecure.

B. The Right to Run for Office

The right to be a candidate for public office, while intimately connected to the right to vote, has had some independent life. Candidacy rights were mentioned only a few times during the constitutional debates,[41] and received minimal judicial recognition until the last century, when expansion of the franchise led to increased concerns with ballot access rights.

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[36] 414 U.S. 524 (1974).

[37] 409 U.S. 512 (1973) (invalidating a statutory bar to inmate absentee balloting).

[38] 414 U.S. at 530.

[39] 414 U.S. 816 (1974).

[40] "[The right to vote shall not be abridged] except for participation in rebellion, or other crime . . . ." U.S. CONST. amend. XIV, § 2.

[41] *See* Note, *Durational Residence Requirements for Candidates,* U. CHI. L. REV. 357, 365–66 (1973).

The first modern Supreme Court decision on candidacy rights was *Snowden v. Hughes.*[42] The Illinois State Primary Canvassing Board was to have certified two candidates for the general election ballot nominated by the Republican primary, but certified only one. Since nomination was tantamount to election, plaintiff as the second highest vote getter sued under the fourteenth amendment. The Court, in denying plaintiff's claim, held that "[t]he right to become a candidate for state office, like the right to vote for the election of state officers, is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause." [43] This rationale was the controlling theme of ballot access cases for the next twenty-five years.[44]

The Court eschewed the hands-off approach of *Snowden* for the first time in *Williams v. Rhodes,*[45] decided on the eve of the 1968 presidential election. Two parties, the American Independent Party and the Socialist Labor Party, challenged a number of Ohio election provisions, particularly the requirement that minority parties file petitions signed by qualified electors totalling fifteen percent of the number of votes cast in the last preceding gubernatorial election. The two major parties had only to poll ten percent of the vote to maintain ballot status. The Ohio laws also made no provision for candidates not associated with a political party. The Court held that the qualification scheme violated both the first amendment "right of individuals to associate for the advancement of political beliefs" and the fourteenth amendment "right of qualified voters, regardless of their political persuasion, to cast their votes effectively." [46] The Court found that the state had failed to demonstrate a compelling state interest justifying "such heavy burdens on the right to vote and to associate."[47] The conspicuous absence of any mention of *Snowden* in the opinion and the strong reliance on first amendment cases, however, has led some courts [48] and commentators [49] to conclude that *Williams* is a first amendment rather than "right to run" decision. Moreover, in 1968, prior to *Kramer,* the imposition of a compelling state interest test was more typical of a first amendment than of an equal protection decision. The

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[42] 321 U.S. 1 (1944).

[43] *Id.* at 7.

[44] In 1948, another decision, *MacDougall v. Green,* 335 U.S. 281 (1948) (overruled in *Moore v. Ogilvie,* 394 U.S. 814, 819 (1969), continued the non-interventionist philosophy of the Court, and the first law review article exploring barriers to ballot access appeared: Comment, *Legal Obstacles to Minority Party Success,* 57 YALE L.J. 1276 (1948).

[45] 393 U.S. 23 (1968). Chief Justice Warren dissented on the grounds that the decision was too broad, especially given the time constraints imposed by the exigencies of the suit.

[46] *Id.* at 30.

[47] *Id.*

[48] *E.g.,* Draper v. Phelps, 351 F. Supp. 677, 680 (W. D. Okla. 1972).

[49] *E.g.,* Note, *The Constitutional Limitations Upon State Regulation of Its Ballot — Williams v. Rhodes,* 30 OHIO ST. L.J. 202 (1969). *But see* Barton, *The General-Election Ballot: More Nominees or More Representative Nominees?,* 22 STAN. L. REV. 165, 175 (1970).

failure of *Williams* to produce the offspring its broad language warrants, and its currently limited citation, may indicate that the Court is confining its holding exclusively to cases involving political parties. At any rate, it appears that *Williams* is no longer strong precedent for applying a compelling state interest test to party and candidate ballot access claims, although it does provide a checklist of burdensome requirements for *party* ballot qualification against which statutory schemes are measured.

Three cases following *Williams* hinted that the right to run might receive fundamental status within the equal protection framework. In *Moore v. Ogilvie,*[50] the Court used a "one man, one vote" equal protection analysis to invalidate a requirement that nominating petitions contain at least two hundred signatures of registered voters from fifty of Illinois's 102 counties. No voters were included as co-plaintiffs, but the decision rested wholly on the right to vote, with no explicit discussion of candidacy rights. In *Turner v. Fouche,*[51] the Court struck down a Georgia statute requiring members of the Board of Education to be freeholders, holding that the requirement "must fall even when measured by the traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective." [52] Thus, the Court, while alluding to a "federal constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications," [53] avoided the issue of fundamentality. In *Jenness v. Fortson,*[54] the Court upheld a Georgia ballot qualification scheme like that in *Williams,* distinguishing *Williams* on several counts; Georgia freely provided for write-in candidates, fully recognized independent candidates, did not have an unreasonably early filing deadline, and did not impose upon new parties "the Procrustean requirement of establishing elaborate primary election machinery. . . . [I]n sum, [the Georgia laws did] not operate to freeze the political status quo." [55] One of the specific provisions which the Court approved was a five percent nominating petition signature requirement for independent candidates, rejecting the argument that it was unconstitutionally more burdensome than winning a party primary. The Court found an important state interest in requiring a preliminary showing of significant support and in restricting the number of candidates at the general election to avoid voter confusion.

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[50] 394 U.S. 814 (1969).

[51] 396 U.S. 346 (1970).

[52] *Id.* at 362. However, *Turner* has been cited by a number of lower courts for the proposition that the right to run for office is fundamental, thereby requiring the courts to apply the compelling state interest test. *E.g.,* Anderson v. City of Belle Glade, 337 F. Supp. 1355 (S.D. Fla. 1971); Stapleton v. Clerk for the City of Inkster, 311 F. Supp. 1187 (E.D. Mich. 1970). Other courts have taken it as simply applying the rational basis test. *E.g.,* Walker v. Yucht, 352 F. Supp. 85 (D. Del. 1972).

[53] 396 U.S. at 362. The Court also left open the possibility that property ownership, tax-paying lessee status, or parenthood might be valid qualifications for office-holding in certain circumstances. *Id.* at 364.

[54] 403 U.S. 431 (1971).

[55] *Id.* at 438.

Except for a comparison of the Georgia provisions with those in *Williams,* the opinion provided no test of constitutionality.

During the early 1970's, and prior to the Supreme Court's decision in *Bullock v. Carter,*[56] the adjudication of ballot access claims by lower courts proceeded along two lines. Roughly half of the opinions viewed candidacy rights as fundamental, thus requiring strict scrutiny of challenged election procedures;[57] the other opinions upheld various ballot recognition conditions by applying a rational relation test.[58]

In early 1972, the Court rendered its opinion in *Bullock,* the first candidacy decision of major conceptual proportions since *Williams.* Texas statutes provided that very large filing fees, from $1424 for county commissioner to $8900 for district judge, be paid to party county committees by primary candidates. No alternative means were provided for qualification. In striking down the filing fee scheme, the Court purported to invoke a "close scrutiny" test. Since *Bullock* involved both the right to run for office and a wealth classification, it offered the Court an opportunity to adjudge the former a fundamental right or the latter a suspect classification.[59] Declining the suspect classification approach, the Court said:

> The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. . . . The existence of such barriers [to candidate access to the primary ballot] does not of itself compel close scrutiny. . . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.[60]

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[56] 405 U.S. 134 (1972).

[57] *E.g.,* Duncantell v. City of Houston, 333 F. Supp. 973 (S.D. Tex. 1971); Gonzales v. City of Sinton, 319 F. Supp. 189 (S.D. Tex. 1970); Socialist Labor Party v. Rhodes, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom.* Sweetenham v. Gilligan, 409 U.S. 942 (1972); Thomas v. Mims, 317 F. Supp. 179 (S.D. Ala. 1970); Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y.), *aff'd,* 400 U.S. 806 (1970); Jenness v. Little, 306 F. Supp. 925 (N.D. Ga. 1969), *appeal dismissed,* 397 U.S. 94 (1970); Minielly v. State, 242 Ore. 490, 411 P.2d 69 (1966). Most of these cases cite *Williams, Moore,* or *Turner* for the proposition that the right to run is fundamental. For an example of a case finding a compelling state interest and upholding the challenged election provision, see Jackson v. Ogilvie, 325 F. Supp. 864 (N.D. Ill.), *aff'd,* 403 U.S. 925 (1971).

[58] *E.g.,* Wood v. Putterman, 316 F. Supp. 646 (D. Md.), *aff'd,* 400 U.S. 859 (1970); Wetherington v. Adams, 309 F. Supp. 318 (N.D. Fla. 1970); Rees v. Layton, 6 Cal. App. 3d 815, 86 Cal. Rptr. 268 (1970); Hayes v. Gill, 52 Hawaii 251, 473 P.2d 872 (1970), *appeal dismissed,* 401 U.S. 968 (1971); Schweitzer v. Clerk for the City of Plymouth, 381 Mich. 485, 164 N.W.2d 35 (1969), *cert. denied,* 397 U.S. 906 (1970); Landes v. Town of North Hempstead, 20 N.Y.2d 417, 231 N.E.2d 120, 284 N.Y.S.2d 441 (1967). For an example of a case, like *Turner,* invoking only minimum scrutiny to invalidate a ballot qualification provision, see Mogk v. City of Detroit, 335 F. Supp. 698 (E.D. Mich. 1971).

[59] Moreover, the combination of a wealth classification and franchise rights had triggered a strict scrutiny analysis in *Harper,* and had the same potential in *Bullock.*

[60] 405 U.S. at 142–43 (citations omitted).

Notwithstanding its rejection of fundamental status for candidacy rights while retaining it for voting rights, the language of the opinion departs from the standard articulation of the compelling state interest test. The Court's phrasing of the test — "that the laws must be 'closely scrutinized' and found *reasonably necessary to the accomplishment of legitimate state objectives* in order to pass constitutional muster" [61] — is a deviation from the "necessary to promote a compelling state interest" language of *Dunn*. In *Bullock*, the Court focused not on the state interest involved, normally a significant inquiry in the compelling state interest analysis, but on the necessity of the filing fee, the absence of alternative means, and the possibility of less drastic means.[62] The failure of *Bullock* to provide any standard for measuring candidacy claims independently of their impact on voter rights left lower courts without doctrinal tools to evaluate ballot access rights on their own constitutional merits. These courts were forced to translate candidacy barriers into franchise burdens without guidelines to evaluate the constitutional tolerability of such franchise burdens.[63] Thus, *Bullock* left the area of candidacy rights, and lower courts, more confused than it found them.[64]

Since *Bullock*, the Court has decided four cases involving candidacy rights. All four employ ambiguous standards comparable to their voting

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[61] *Id.* at 144 (emphasis added).

[62] One reason that Chief Justice Burger did not invoke the customary strict scrutiny test may be found in his dissent in *Dunn*, in which he criticized the test for its inflexibility: "No state law has ever satisfied this seemingly insurmountable standard and I doubt one ever will, for it demands nothing less than perfection." Dunn v. Blumstein, 405 U.S. 330, 363–64 (1972) (Burger, C.J., dissenting). *See* Nowak, *supra* note 19, at 1084–85.

[63] For example, is a barrier that would preclude candidates with the support of one percent of the voters a sufficiently onerous burden? Or five percent? Or one-half of one percent?

[64] For an opinion in which the majority and dissent reach contradictory views of *Bullock* and a special concurring opinion attempts reconciliation by an elaborate and thoughtful third reading, see Swanson v. Kramer, 82 Wash. 2d 511, 512 P.2d 721 (1973). Candidacy cases which cite *Bullock* can be divided into three groups: those citing it for the compelling state interest test, those citing it for the rational relation test, and those reading and following it as applying a middle ground test. See text accompanying notes 121–32 *infra*.

For authorities citing *Bullock* as commanding a compelling state interest test, see Jenness v. Miller, 346 F. Supp. 1060 (S.D. Fla. 1972); Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972), *aff'd*, 485 F.2d 1151 (3d Cir. 1973). *See* Gunther, *supra* note 16, at 15; Note, *Bullock v. Carter*, 22 DRAKE L. REV. 664 (1973).

For cases treating *Bullock* as a rational relation case, see Manson v. Edwards, 482 F.2d 1076 (6th Cir. 1973); Communist Party v. Austin, 362 F. Supp. 27 (E.D. Mich. 1973), *vacated*, 94 S. Ct. 1919 (1974); Blassman v. Markworth, 359 F. Supp. 1 (N.D. Ill. 1973); Wilson v. Moore, 346 F. Supp. 635 (N.D.W. Va. 1972); Swanson v. Kramer, 82 Wash. 2d 511, 512 P.2d 721 (1973).

Several of the rational relation cases involve either a less drastic means or balancing approach characteristic of more demanding scrutiny. Those cases may be read along with a group of authorities that interpret *Bullock* as creating a new middle ground test. *E.g.*, Green v. McKeon, 468 F.2d 883 (6th Cir. 1972); Stoner v. Fortson, 359 F. Supp. 579, 584 (N.D. Ga. 1972); Fair v. Taylor, 359 F. Supp. 304 (M.D. Fla. 1973), *vacated*, 94 S. Ct. 1916 (1974); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), *aff'd* 414 U.S. 802 (1974); Comment, *The Validity of Primary Filing Fees*, 18 N.Y.L.F. 451, 455 (1972); Comment, *Durational Residence Requirements for Candidates*, 40 U. CHI. L. REV. 357, 375 (1973) (although the article concludes by grouping *Bullock* with *Williams* and *Turner* to "imply" fundamentality).

rights counterparts, *Rosario* and *O'Brien*. The first, *Communist Party v. Whitcomb*,[65] essentially a loyalty oath case, is notable chiefly for Justice Powell's concurring opinion criticizing the majority's first amendment ground of decision. Since evidence in the case indicated that such oaths were not demanded of major party candidates or officers, Powell thought that the oaths were invalid on the basis of a compelling state interest test.

In three 1974 candidacy rights decisions, the Court seems to have resurrected the two-tiered approach to equal protection claims apparently abandoned in other areas. In *Lubin v. Panish*,[66] the Court unanimously struck down a $700 filing fee required of candidates for county supervisor in Los Angeles. While recognizing a legitimate state interest in limiting ballot size by precluding frivolous candidates, the Court held that the fees were not *necessary* to the relevant state purposes and that serious candidates without sufficient resources had no other means of access to the ballot. In dictum, the Court indicated that write-in spaces were not a sufficiently viable alternative to overcome an otherwise total exclusion.[67]

In *American Party v. White*,[68] the Court rejected the challenges of both independent candidates and parties to Texas's ballot qualification laws. Texas provided four alternative routes to ballot status for minority parties or independent candidates, depending on their demonstrated amount of voter support.[69] The Court noted that Texas might constitutionally require a legitimate showing of support for ballot recognition, that the barriers to an aspiring new party were not insurmountable, and that the political status quo was not frozen. The Court upheld the provision requiring an independent candidate to procure five hundred signatures on his nominating petition,[70] but held unconstitutional a provision which placed only major party candidates on absentee ballots even though a minority party had qualified in advance. The Court found that such differentiation totally deprived that class of absentee voters which supported the minority party of its franchise rights.[71]

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[65] 414 U.S. 441 (1974).

[66] 94 S. Ct. 1315 (1974).

[67] *Id.* at 1321, n.5. In a concurring opinion, Justices Blackmun and Rehnquist adopted the contrary view that write-in spaces were a sufficient alternative to ballot nonrecognition. *See* notes 164–65 *infra* and accompanying text.

[68] 94 S. Ct. 1296 (1974).

[69] *Id.* at 1299. If a party's candidate for governor in the last election polled 200,000 votes, that party could qualify candidates for the general election ballot by holding primary elections. If a party's candidate polled more than two percent of the vote but less than 200,000, its candidates might receive ballot recognition through primary elections or nominating conventions. If a party's candidate polled less than two percent, it had to qualify its candidates by precinct nominating conventions or nominating petitions with notarized signatures totalling one percent of the last gubernatorial vote. Independent candidates could qualify by nominating petitions with various percentage requirements depending on the office, but with a maximum limit of five hundred signatures.

[70] Utah also has a maximum petition requirement of five hundred signatures for new parties to qualify, UTAH CODE ANN. § 20–3–2(g)(2) (1969), and three hundred signatures for state-wide independent candidates, UTAH CODE ANN. § 20–3–38 (1969).

[71] 94 S. Ct. at 1313.

In both *Lubin* and *White* the equal protection tests invoked are not cearly articulated. However, Justice Brennan's dissent in the third case, *Storer v. Brown,*[72] claimed that the *White* decision was in fact a two-tiered, strict scrutiny, equal protection approach.[73] In *Storer,* two prospective candidates for Congress challenged California's one year disaffiliation statute which barred the independent candidacies of people who either had been registered members of a political party during the previous year or had voted in its last primary election. The Court applied a compelling state interest test, the result of "substantial burdens on the right to vote or to associate for political purposes." [74] Recognizing the state's interests in preventing "splintered parties and unrestrained factionalism" and in maintaining "the stability of its political system" the Court held that the interests were "not only permissible, but compelling and . . . outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status." [75] Proceeding to a "less drastic means" analysis, the Court found no reason to conclude that the statute "was not an essential part of [California's] overall mechanism to achieve its acceptable goals." [76]

Two aspects of the *Storer* analysis are notably original. First, the Court had never before in two-tiered equal protection analysis explicitly held a state interest to be compelling.[77] Justice Brennan's dissent also invoked a strict scrutiny analysis, based explicitly on the fundamentality of voting as a first amendment right, but did not find the asserted state interests to be compelling. Second, the burden of proof in a less drastic means analysis had in previous cases rested upon the state to justify its statutory burdens, rather than upon the claimant.

Another issue in *Storer* involved a challenge by independent candidates for President and Vice President to California's five percent nominating petition provisions requiring signatures to be collected within twenty-four days following the primary elections from among registered voters who had not voted in the primary. The majority remanded for further findings of fact in order to evaluate the potential pool from which signatures could be drawn,[78] and suggested that the requirement would thereafter be judged

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[72] 94 S. Ct. 1274 (1974).

[73] *Id.* at 1291–92 ("whether . . . the legislation, strictly scrutinized, is necessary to a compelling state interest").

[74] *Id.* at 1279.

[75] *Id.* at 1282.

[76] *Id.*

[77] *See* note 62 *supra* and accompanying text. In *Dunn,* the Court *implicitly* held the state interest in a thirty day registration deadline "compelling."

[78] As the Court observed, the signature requirement of five percent of the previous general election total vote would be a considerably higher percentage of voters not voting in the primary. For example, if one million votes were cast in the previous general election, independent candidates' nominating petitions would be required to have the signatures of fifty thousand registered voters. If in the following election year, the number of registered voters remained at one million and 500,000 voted in the primary and thereby disqualified themselves from signing nominating petitions, independent candidates would be required to obtain the fifty thousand signatures out of a pool of 500,000 eligible signatories, resulting in a requirement of ten percent.

by a *reasonableness* standard: "could a reasonably diligent independent candidate be expected to satisfy the signature requirements." [79] This again is a standard much less demanding than the traditional protections exemplified in the dissenting opinion. The dissent would have invalidated the twenty-four day limit because no compelling state interest existed to justify the burden; because less drastic means were available; and because of the unfavorable comparison with the Georgia statute upheld in *Jenness,* which provided for a six month period and did not disqualify primary voters.[80] Hence, *Storer,* and by its light, *Lubin* and *White* have certainly diluted the protection previously given to candidacy rights and failed to provide either analytical clarity or direction in the wake of *Bullock.*

II. Doctrinal Models for the Protection of Ballot Access Rights

A review of electoral process decisions reveals progressive irresolution of the Supreme Court in its disposition of candidacy suits. The perplexity is magnified by lower court constitutional analysis. Since the doctrinal model selected in equal protection adjudication has great influence on the outcome, this section will first classify state and federal court decisions into the several models by which candidacy rights cases are being decided. Second, the section will evaluate the trends, strengths, and weaknesses of these models.

A. The Relationship Between the Right to Vote and the Right to Run for Office

Because suffrage rights developed earlier and faster than the right to run, almost all suits by candidates have included voters as plaintiffs in order to marshal the maximum constitutional claim.[81]

> This blending of the rights of voters and candidates is common in cases in which qualification requirements for candidacy are challenged. Typically, the prospective candidate asserts his right to appear on the ballot, and he and his supporters (if they are coplaintiffs) maintain that the barriers to his candidacy deny his supporters the right to vote for the candidate of their choice. When faced with such challenges, courts focus their attention on the voters' rights . . . .[82]

Although courts have seldom distinguished the right to run from the right to vote in order to dispose of a case, the presence of the distinction exerts constant pressure on decision making. The critical question is not whether

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[79] 94 S. Ct. at 1285.

[80] 94 S. Ct. at 1295–96.

[81] Evidencing this are the number of lower court records with amended pleadings bringing in voters as additional plaintiffs, obviously resulting from post-filing research insights. *E.g.,* Carter v. Dies, 321 F. Supp. 1358 (N.D. Tex. 1970), *aff'd sub nom.* Bullock v. Carter, 405 U.S. 134 (1972).

[82] 71 Mich. L. Rev. 854, 856 (1973).

the rights are identical, but whether, because of their parallel nature and common importance, they ought to receive identical protection. In the developmental decade after *Reynolds,* however, few courts analyzed the individual nature of ballot access rights, their constitutional sources, the particular state interests relevant to their regulation, or the degree of scrutiny which ought to be employed in their protection.[83] Most courts either accepted the notion of inextricability or reached decisions without making the distinction.[84]

The models discussed below focus primarily on the right to run for office, but references to the right to vote are inevitable, since the relationship between the rights is likely to be part of most courts' analysis. Undiscriminating reasoning by analogy is, however, insufficient in light of the attenuation of voting rights in recent sophisticated ballot access cases,[85] and in light of the current suspicion that the Supreme Court is reducing the vigor of its protection of voting rights.[86]

B. State Interests in Regulating the Ballot

In any doctrinal model chosen, asserted state interests receive primary consideration and are often conclusive in the adjudication of ballot access claims. The general power of the state to regulate ballot access is unquestioned.[87] The state interests asserted may be grouped into four broad categories: (1) maintaining the integrity of the ballot, (2) preventing voter confusion, (3) ensuring competent candidates, and (4) administrative convenience.

1. Ballot integrity — The most persuasive state interest, and the one most often recognized by courts is that of maintaining ballot integrity. Several more specific state interests are combined under this label. The first of these is protection against fraud.[88] Fraudulent candidates, who

[83] Even when courts have considered candidacy rights as distinct from voting rights, the results have often been unenlightened. For example, the Michigan Supreme Court upheld a city charter property ownership requirement for officeholding by simply finding candidacy rights lacking in prior preferred protection. The court viewed such restrictions as a majoritarian political decision and upheld the provision under a rational relation test. Schweitzer v. Clerk for the City of Plymouth, 381 Mich. 485, 164 N.W.2d 35 (1969), *cert. denied,* 397 U.S. 906 (1970). For a similar decision, see State *ex rel.* Bible v. Board of Education, 22 Ohio St. 2d 57, 258 N.E.2d 227 (1970).

[84] *E.g.,* Mogk v. City of Detroit, 335 F. Supp. 698 (E.D. Mich. 1971); Gangemi v. Rosengard, 44 N.J. 166, 207 A.2d 665 (1965). Of interest is the Supreme Court's decision in *Moore v. Ogilvie,* 394 U.S. 814 (1969), in which the failure to include voters as plaintiffs was wholly ignored by the Court in upholding a candidacy claim by straightforward right to vote reasoning.

[85] For an article concluding that ballot access rights ought to be fundamental because franchise rights are fundamental, see Comment, *Durational Residence Requirements for Candidates,* 40 U. CHI. L. REV. 357 (1973).

[86] *See* text accompanying notes 24–41 *supra.*

[87] This power of the states to reasonably regulate the ballot is variously ascribed to the "times and manner" clause of the Constitution: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." U.S. CONST. art. I, § 4; *e.g.,* Ring v. Marsh, 78 F. Supp. 914 (D.N.J. 1948), *appeal dismissed,* 335 U.S. 849 (1948); or to the general police power, *e.g.,* Holley v. Adams, 238 So. 2d 401 (Fla. 1970).

[88] *Cf.* Dunn v. Blumstein, 405 U.S. 330, 344 (1972), recognizing a state interest in winnowing fraudulent voters from voting roles.

seek ballot access either to frustrate a serious candidate or to pursue a goal other than election to office, have used a variety of techniques, among them the use of names similar to those of other candidates.[89] States most often try to prevent fraudulent candidacies by requiring some objective authentication of an independent candidate's genuineness: either by an initial showing of minimum support, such as voter nominating petitions; the payment of filing fees; or compliance with filing form deadlines. In *Jenness v. Fortson,*[90] for example, the Court recognized the state interest in "some preliminary showing of a significant modicum of support before printing the name of [a candidate] on the ballot — the interest . . . in avoiding confusion, deception, and even frustration of the democratic process at the general election." [91] The requirement of nominating petitions to protect that interest seems the most justified of all the alternatives, since the effort in accumulating the requisite number of signatures is evidence of the genuineness of a candidacy and of sufficient minimum support.

The concept of ballot integrity also includes a state's interest in preserving the stability of its political system from the adverse consequences of intraparty feuds, splinter parties, and "unrestrained factionalism." The justifications for limiting ballot size to maintain ballot integrity are that it prevents major parties from promoting independent candidacies designed to dilute the other major party's vote (by the requirement that independent candidates not be registered with a party for one year before the election), and that it prevents "independent candidacies prompted by short-range political goals, pique, or personal quarrel." [92] Although of more dubious legitimacy, these interests were recognized by the Court in *Storer,* and were adjudged to be compelling because of their relation to the stability of the state's political system.[93] One problem with this conclusion is that it implicitly contradicts the *Williams* premise that minority parties should be fairly accommodated, if not encouraged, even though they could be characterized as splinter groups.[94] Although the states do have a legitimate interest in avoiding voter confusion by limiting ballot size, ballot integrity does not require, nor should *Storer* be read to indicate, a constitutional preference for only *two* candidates per office on any given ballot. Likewise, candidates whose independent candidacy results from intraparty

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[89] *E.g.*, State *ex rel.* Johnson v. Marsh, 120 Neb. 297, 232 N.W. 104 (1930); *see* Kelman, *Ballot Designations: Their Nature, Function, and Constitutionality,* 12 WAYNE L. REV. 756 (1966).

[90] 403 U.S. 431 (1971).

[91] *Id.* at 442. *Accord, e.g.*, American Party v. White, 94 S. Ct. 1296 (1974); Storer v. Brown, 94 S. Ct. 1274 (1974); Communist Party v. Austin, 362 F. Supp. 27 (E.D. Mich. 1973), *vacated,* 94 S. Ct. 1919 (1974).

[92] Storer v. Brown, 94 S. Ct. 1274, 1282 (1974).

[93] *Id.*

[94] Williams v. Rhodes, 393 U.S. 23, 31 (1968).

feuds should not be for that reason disfavored.[95] Rather, courts should carefully balance the legitimacy of the state's asserted interests in ballot integrity against the need for a viable and dynamic evolution of the structure of the political system. Arguably any evaluation of candidacy claims should limit state interests in ballot integrity to those of protection against fraud and inadequate candidate support.

2. *Preventing Voter Confusion* — The argument for limiting ballot size[96] to prevent voter confusion is that merely "[t]he presence of a plethora of political parties [or candidates] would necessarily be a source of confusion to the electorate." [97] However, there is a state interest in having a larger pool of candidates as well.[98] Allowing enough candidates on the ballot to represent all voter views is called the "political spectrum" approach; limiting ballot size to achieve maximum voter opportunity for candidate analysis and identification is called the "two party system." The ideal approach lies in a compromise between the two extremes. Under an ideal political spectrum approach, a one-to-one ideological ratio would exist between candidates and voters. Conceding the impossibility of that structure, the theory nonetheless holds that as the number of candidates increases, so does the representativeness of candidate selection. Too many candidates, however, would hamper the voter in identifying the most suitable candidate for him; thus, some limits are essential. Under the two party system theory, voters with little political sophistication are more able to cast their votes in a reasonable manner; hence, the vote is not as confused as it would be if more than two candidates were on the ballot.

These considerations certainly do not necessarily result in a presumption that two, three, or even four candidates per race are in the best interest of the state. Reasonable ballot access regulatory provisions are essential, but if a court finds that the purpose or effect of a particular restriction is to mechanically limit the ballot to two or three candidates per race, then the state's asserted interest should be suspect.[99]

3. *Competent Candidates* — The third general set of state interests is that of ensuring competent candidates. Although this interest has been recognized by some courts,[100] its underlying premise is least convincing.[101]

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[95] If that view were to be accepted, it would ignore American political history. For example, the candidacy of Theodore Roosevelt in 1912 arose out of an intraparty feud. Moreover, every new party would be, in one sense, a splinter party.

[96] *See* Chief Justice Burger's brief historical discussion of ballot size ideology in Lubin v. Panish, 94 S. Ct. 1315, 1318 (1974).

[97] Wood v. Putterman, 316 F. Supp. 646, 650 (D. Md.) *aff'd,* 400 U.S. 859 (1970).

[98] *See* Mancuso v. Taft, 476 F.2d 187, 193 (1st Cir. 1973).

[99] For a rejection of the political spectrum view in favor of a criteria for ballot size that looks to a "minimum right to throw the [incumbent] out," see Barton, *The General-Election Ballot: More Nominees or More Representative Nominees?,* 22 STAN. L. REV. 165, 184–85 (1970). The goal of Professor Barton's minimum right analysis is that the electoral scheme must be such as to "allow each group [to] have [an] equal opportunity to enter into a coalition [with] a fair share in choosing a challenging candidate." *Id.* at 185.

[100] *Cf.* Hayes v. Gill, 52 Hawaii 251, 473 P.2d 872 (1970), *appeal dismissed,* 401 U.S. 968 (1971).

States argue that age and durational residency requirements prevent political carpetbagging and ensure knowledge and political maturity in candidates. For example, an age requirement of thirty-five is based on the assumption that persons over thirty-five are sufficiently knowledgeable and mature for that particular elective office and that those under thirty-five are not. This premise is subject to so many exceptions that the requirement is both over- and underinclusive. Another and more devastating flaw, however, is the attitude of paternalism which underlies this kind of state interest. It results in legislative generalizations about competency of doubtful validity in a situation which ultimately demands the individual judgment of the voter. There is support both in case law [102] and among commentators [103] for reliance on the collective judgment of the electorate. The Sixth Circuit, in striking down a two year residency requirement for city elective office, concluded: "[I]n our republican form of government, the voters are the arbiters of suitability of candidates for public office." [104] This is especially true in the modern electoral era of wide media exposure since voters have greatly increased opportunities to evaluate candidates.[105] Therefore, an asserted state interest premised on a legislative judgment of characteristics of competency ought to be disregarded.

4. Administrative Convenience — The fourth state interest, general administrative convenience, includes consideration of mechanical or logistical problems, such as the capacity of voting machines or the preparation of ballots, and the cost increase resulting from numerous candidacies. The state offsets part of its expense by requiring candidates to pay filing fees, but any restriction on the number of candidates or the processing of petitions for candidacy results in a cost savings to the state. In *Bullock,* the Supreme Court recognized a state interest in requiring candidates to pay the cost of their participation in the election.[106] But given the importance of the election procedure, and the recent sentiment that at least some campaign expenses should be publicly borne, the savings argument has little force.[107]

Close examination of these state interests reveals that many of the previously accepted justifications for state ballot access regulation are suspect. The Supreme Court's recent exclusive reliance on the "prelimin-

[101] Comment, *Age and Residency Requirements as Qualifications for Candidacy,* 1973 U. ILL. L.F. 161, 172–74.

[102] *E.g.,* Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972), *aff'd,* 485 F.2d 1151 (3d Cir. 1973).

[103] *E.g.,* Comment, *Durational Residence Requirements for Candidates,* 40 U. CHI. L. REV. 357, 378–79 (1973); 71 MICH. L. REV. 854, 865 (1973).

[104] Green v. McKeon, 468 F.2d 883, 885 (6th Cir. 1972).

[105] *Cf.* Draper v. Phelps, 351 F. Supp. 677, 685 (W.D. Okla. 1972), in which the court notes that because of the weaker media coverage resources in Oklahoma, there is less opportunity for electors to assess candidates.

[106] Bullock v. Carter, 405 U.S. 134, 147 (1972). For an analysis and appraisal of this aspect of the *Bullock* holding, see 22 DRAKE L. REV. 664 (1973).

[107] *See* Lubin v. Panish, 94 S. Ct. 1315 (1974), in which a filing fee was struck down with no mention of the "savings" rationale.

ary showing of minimum support" rationale may be an implicit recognition of that fact.[108] In addition, the increasingly explicit tendency to balance interests in this area necessitates a clearer and more considered appraisal of state interests. Such weighing of state interests will prevent courts from allowing the mere choice of tests to be determinative, while ignoring the actual legitimacy of those asserted state interests.[109]

C. Equal Protection Models

The present state of equal protection theory with regard to candidacy rights can best be understood by reference to the two-tiered analytical model left by the Warren Court, in which strict scrutiny of state interests by courts resulted when fundamental interests were infringed.

1. The two-tiered analytical model — The conventional description of this model is as follows: In adjudication of equal protection claims, one of two tests — "minimum" or "strict" scrutiny — is applied. The first tier, minimum scrutiny test, applied in the normal case, follows the traditional rule that the equal protection clause is not violated if the challenged state legislation is rationally related to a legitimate state interest. The state legislature is presumed to have acted fairly and equitably and courts may postulate any conceivable state interest to justify the legislation. Consequently, very few state laws have been invalidated under the test.[110] The strict scrutiny tier is invoked when the state statute creates a suspect classification (race, alienage, illegitimacy) or infringes on a fundamental interest (the right of procreation, the right to vote, the right to travel). Under this test, the statute violates equal protection standards unless the state can show a compelling interest in the statute, a burden which, prior to 1974, was "strict in theory and fatal in fact." [111] Consequently, a number of state laws have been invalidated under this test.[112]

In the adjudication of candidacy rights, the steps critical to invoking the strict scrutiny test were, first, to prove the infringement of a *fundamental*

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[108] *E.g.*, Lubin v. Panish, 94 S. Ct. 1315 (1974); American Party v. White, 94 S. Ct. 1296 (1974); Storer v. Brown, 94 S. Ct. 1274 (1974).

[109] An example of an opinion applying the rational basis test with only minimal consideration of the asserted state interests is *Walker v. Yucht*, 352 F. Supp. 85 (D. Del. 1972). *See* Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791, 802–03 (1974) (Powell, J., concurring), in which the Court struck down on due process grounds mandatory early pregnancy leaves for school teachers. In both the majority opinion and in Justice Powell's concurrence on equal protection grounds, there was an unusually full discussion of the legitimacy and underlying purpose of state interests, perhaps predictive of future developments.

[110] *E.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40–59 (1973); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); *see Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077–87 (1969). For a case finding no rational relation and therefore invalidating the challenged law, see Morey v. Doud, 354 U.S. 457 (1957).

[111] Dunn v. Blumstein, 405 U.S. 330, 363–64 (1971) (Burger, C.J., dissenting). *See* Gunther, *supra* note 16, at 8.

[112] *E.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Skinner v. Oklahoma, 316 U.S. 535 (1942); *see Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1087–1131 (1969). For a much-quoted critical exposition of the two-tiered model, see Justice Harlan's dissenting opinion in Shapiro v. Thompson, 394 U.S. 618, 658–63 (1969) (Harlan, J., dissenting).

right, and second, to prove that the infringement was *substantial*. Third, the burden shifted to the state to demonstrate the presence of a *compelling state interest*. Fourth, the state had to show that the statutory scheme was *necessary* to protect the compelling state interest, and that no less drastic means were available to procure that result. What limited flexibility the formula allows occurs at two points: judgment of the substantiality of infringement [113] and evaluation of the necessity of the provision to protect the state interest.[114] The formula has, however, proved insufficiently flexible. Virtually the only issue which courts considered under the formula was whether the classification was suspect or the interest fundamental. If the plaintiff could establish either of those conditions, thus shifting the burden of justifying the statutory scheme onto the state, the conclusion was inevitable. Consequently, most candidacy claims litigation involved the attempt to attain fundamental status for ballot access rights.

The Court has not denominated the "right to run" fundamental. Earlier hints in *Williams* and *Turner* were negatived by *Bullock*, which stated that "the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." [115] Even with that disclaimer, however, the ambiguity of the *Bullock* language and its seeming reliance on a "strict scrutiny" measure has led a number of lower courts either to read into the opinion "fundamentality" for ballot access rights or to feel free to determine the question for themselves.[116] In addi-

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[113] Adjudicating insubstantial infringements of fundamental rights has been a troublesome problem for the test. Undoubtedly the spectre of wholesale judicial invalidation of laws that only "lightly brush" fundamental interests has led to reticence in extending the compelling state interest test's purview. This concern seems also to be responsible for the limitations on the test that reflect a disinclination to void relatively innocuous legislation. Illustrative of the dilemma is the First Circuit's reference to it in a recent candidacy case:

> It is not entirely clear whether the allegation of any infringement of a fundamental interest triggers strict review or whether the infringement must be substantial before the statute requires more than a "reasonableness" review. . . . Since a substantiality requirement might be read into the word infringement, the matter may be of no moment. Nevertheless, we need not decide this issue because we find that, after considering the matter before us, there is here a substantial burden on both voting and First Amendment rights sufficient to invoke the rigor of strict equal protection review.

Mancuso v. Taft, 476 F.2d 187, 193 n.7 (1st Cir. 1973) (citations omitted). This uncertainty, while leading some courts to explicitly go through a "substantiality" evaluation, *e.g.*, Blassman v. Markworth, 359 F. Supp. 1 (N.D. Ill. 1973); Zautra v. Miller, 348 F. Supp. 847 (D. Utah 1972), contributed to the rigidity that led to dissatisfaction with the two-tiered approach.

[114] The *Bullock* opinion, which relaxes the state showing from a compelling to a legitimate interest, placed particular emphasis on the necessity part of the inquiry and softened strict scrutiny by modifying the standard to "*reasonably* necessary." 405 U.S. at 144 (emphasis added). Some courts have looked past the "insurmountable" barrier of finding a compelling state interest to make a genuine judgment of necessity. *E.g.*, People's Party v. Tucker, 347 F. Supp. 1 (M.D. Pa. 1972); Chote v. Brown, 342 F. Supp. 1353 (N.D. Cal. 1972) (per curiam), *aff'd*, 411 U.S. 452 (1973). Since most courts have rejected state claims of compelling interests, few ever reach the moderating inquiry into necessity. Thus, the failure of the two flexible elements of the test to have a significant role causes most of the disenchantment with the two-tiered approach.

[115] 405 U.S. at 142–43.

[116] *See* note 64 *supra*.

tion to the lower courts which have independently adopted that view,[117] a recent opinion by Justice Brennan suggested for the first time a definite and specific constitutional source for electoral process rights.[118] But such acceptance is not likely to be widespread without Supreme Court leadership, and that Court does not seem disposed to grant fundamental status.

The rigidity of the strict scrutiny approach has led to criticism from both the Court and commentators.[119] Several opinions of the Court suggested hybrid equal protection theories, but because none of these theories has yet gained wide support, the compelling state interest test persists.[120]

2. *The Middle Ground Approach* — Professor Gunther's foreword to the 1972 Supreme Court issue of the *Harvard Law Review* [121] first noted a small and unprecedented change in the two-tiered formulation, focusing primarily on several cases of that term which invalidated legislation on a rational basis ground.[122] This tougher rational relation standard has historical roots in such cases as *Turner v. Fouche,*[123] wherein the Court found no support for the asserted state interest even under a minimum scrutiny test. This stiffened minimum scrutiny contemplates more than just voiding laws when there is no rational basis: it proposes to narrow judicial deference to state legislatures by demanding a showing of a more direct relation between legislation and legitimate state interests.[124] Unfortunately, the tougher rational relation standard of the 1971 term has not consistently reappeared in subsequent decisions of the Court.[125]

In addition to stiffening the minimum scrutiny test, it is also possible to soften the standards of the strict scrutiny test. The latter approach seems apparent in *Bullock v. Carter,*[126] as shown by the Court's search for *legitimate* state interests and its addition of *reasonableness* to the "necessity" inquiry. This approach does not employ the same absolutist terms of most compelling state interest analyses,[127] and is more sensitive

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[117] *E.g.,* Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973); Zeilenga v. Nelson, 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971) (en banc).

[118] Storer v. Brown, 94 S. Ct. 1274, 1291 (1974) (Brennan, J., dissenting).

[119] *E.g.,* Dunn v. Blumstein, 405 U.S. 330, 363–64 (1972) (Burger, C.J., dissenting); Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach,* 58 VA. L. REV. 1489 (1972); Comment, *Equal Protection in Transition: An Analysis and a Proposal,* 41 FORD. L. REV. 605 (1973) [hereinafter cited as *Equal Protection in Transition*]. *See The Supreme Court, 1972 Term,* 87 HARV. L. REV. 57, 113–14 (1973).

[120] *Compare* Storer v. Brown, 94 S. Ct. 1274 (1974), and Memorial Hosp. v. Maricopa County, 94 S. Ct. 1076 (1974), *with* Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974), and O'Brien v. Skinner, 94 S. Ct. 740 (1974).

[121] Gunther, *supra* note 16.

[122] *Id.* at 18–20.

[123] 396 U.S. 346 (1970). *Accord,* United Ossining Party v. Hayduk, 357 F. Supp. 962, 967–68 (S.D.N.Y. 1971); *see* Note, *Equal Protection and Property Qualifications for Elective Office,* 118 U. PA. L. REV. 129 (1969).

[124] *See* Gunther, *supra* note 16, at 19–20.

[125] *But see* Frontiero v. Richardson, 411 U.S. 677 (1973).

[126] 405 U.S. 134 (1972).

[127] *See* Swanson v. Kramer, 82 Wash. 2d 511, 512 P.2d 721 (1973) (en banc) (Finley, J., concurring), in which the *Bullock* standard was characterized as "a tendency away from overly precipitate categorization toward more careful analysis." 512 P.2d at 727.

to the dilemma of the Court in cases where the plaintiff's right deserves preferred treatment, but the challenged legislation seems fair. Another more recent middle ground decision is *Storer v. Brown,* where the strict scrutiny test was applied to restrictions on independent candidacies, but the state interest was found to be compelling and the legislative scheme upheld.[128] Although *Storer* was the first Supreme Court decision to moderate strict scrutiny by explicitly finding a compelling state interest,[129] lower courts had previously employed the technique.[130]

The appeal of either middle ground approach is its familiarity for lower courts since this approach retains the terms and forms of two-tiered analysis. Also, its retention of some absolutes, *e.g.,* the right to travel,[131] and its appearance of objectivity, make it attractive from both a procedural and administrative standpoint. However, the recent decline in frequency of application of the two-tiered formula and its current acceptance by less than half the Justices [132] warrant skepticism about the future viability of the middle ground approach.

3. Gunther's means-end analysis — Professor Gunther proposes a standard similar to the tougher "rational relation" test: "that legislative means must *substantially* further legislative ends." [133] Gunther suggests putting teeth into the rational relation test by changing "rationally related"

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[128] An unanswered question in the traditional strict scrutiny formulation is whether particular state interests have continuing "compellingness." That is, once a state interest is found to be compelling, is it so in every succeeding related case? Since the Court had not previously held a state interest to be compelling, the point has not been raised. However, the state interests in *Storer* of ensuring stability by preventing "intra-party feuds in the general election" and "avoiding splinter parties" are hard to distinguish from the asserted state interests in *Kusper v. Pontikes,* 414 U.S. 51 (1973), wherein the state interests were rejected as not sufficient, *i.e.,* not compelling, to support a statute precluding party switching for a twenty-three month period. There is perhaps the factual distinction in *Storer* that splinter parties are more likely to be produced by switching candidates, but the Court makes no mention of that. In any event, it does seem likely that the Court will advert to a "contextual compellingness" for pragmatic reasons, evaluating state interests on a case-by-case basis despite the possible logical problems in such an approach.

[129] While there is some debate, most commentators view *Korematsu v. United States,* 323 U.S. 214 (1945), as finding a compelling interest in wartime national security exigencies to justify the interment of Japanese Americans (a suspect classification). But the exceptional circumstances and relative "remoteness" in time of *Korematsu* make its relevance to present developments very limited. The *Dunn* Court, in recommending a thirty day residency requirement under a strict scrutiny test, implicitly found a compelling state interest, notwithstanding Chief Justice Burger's dissent that such a standard was seemingly impossible to meet. The Court also found a compelling state interest in state regulation of abortions for the last trimester of pregnancy in *Roe v. Wade,* 410 U.S. 113 (1973), but the decision was based on the right to privacy and not the equal protection clause.

[130] *E.g.,* Jackson v. Ogilvie, 325 F. Supp. 864 (N.D. Ill.) (per curiam), *aff'd,* 403 U.S. 925 (1971); Stout v. Black, 8 Ill. App. 3d 167, 289 N.E.2d 456, 460 (1972).

[131] Memorial Hosp. v. Maricopa County, 94 S. Ct. 1076 (1974).

[132] Only Justices Powell, Brennan, and Marshall have written recent opinions applying the strict scrutiny branch of two-tiered analysis, with the exception of Justice White's majority opinion in *Storer,* which is an ambiguous application. This does not include, however, concurrences with strict scrutiny opinions, which would include others in the group, particularly Justice Douglas, whose opinions do not reveal a disaffection with the rigid standard.

[133] Gunther, *supra* note 16, at 20 (emphasis added).

to "substantially related." In that restricted context, "means-end" analysis and the tougher "rational relation" approach may be confluent. But the approach is admittedly one of more modest intervention, and seems better suited for the adjudication of "new property" rights, such as minimum housing, than for the adjudication of more traditional and basic constitutional interests, such as candidacy rights. The democratic values inherent in the electoral process, including the right to candidacy, merit a scrutiny of more demanding proportions than the Gunther model seems suited to give.

Additionally, Gunther suggests that governmental ends be clearly articulated by the state and not hypothesized by the Court. While no Supreme Court or lower court decision has explicitly adopted Gunther's test, his formulation has at least identified, if not initiated, some distinct elements of present equal protection adjudication. Several opinions have referred to the need for specifically articulated state goals or ends.[134] The strongest hint of such an element in election cases came in *Rosario v. Rockefeller*,[135] wherein the Court upheld a primary voter disqualification statute by stating it was tied to a *particularized* legitimate purpose. Requiring the state to articulate the ends sought by questioned legislation has two purposes. The first is to place upon the state the burden of clearly identifying the interests the legislation is supposed to protect, thus avoiding the imaginative suggestions of courts. The second purpose is to give effect to the theory that forcing a state to articulate the purposes of its laws informs the electorate, thereby "encouraging a full airing in the political arena of the grounds for legislative action." [136] An argument advanced against requiring states to articulate the ends of challenged legislation is that a review of them leads to judicial value judgments, the equivalent of "substantive due process." [137]

4. The Balancing Approach — A thoughtful argument for a balancing approach for equal protection cases has been made in several opinions by Justice Marshall.[138] His "multi-factor, sliding scale" measure actually has roots in the instrumental election case of *Williams v. Rhodes*,[139] wherein Justice Black said that a court "must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classi-

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[134] *See* Storer v. Brown, 94 S. Ct. 1274 (1974) (Brennan, J., dissenting) (rejecting "no less drastic means" discussion because not relied upon by the state in argument); Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791, 803 n.2 (1974) (Powell, J., concurring).

[135] 410 U.S. 752, 762 (1973).

[136] Gunther, *supra* note 16, at 44.

[137] *See Equal Protection in Transition, supra* note 119, at 635–37, also suggesting that the Gunther approach is more concerned with fairness than with similar treatment for those similarly situated.

[138] *See* notes 18–20 *supra* and accompanying text.

[139] 393 U.S. 23 (1968).

fication." [140] Justice Marshall referred to *Williams* in promulgating a similar sliding scale test in *Dandridge v. Williams*: [141]

> [C]oncentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.[142]

Reliance on the first amendment in *Williams* may explain the Court's use of the balancing test, since first amendment cases do combine a balancing and a compelling state interest analysis.[143] Whatever the explanation, *Williams* is precedent for applying a balancing test in electoral cases. For example, Marshall's majority opinion in *Dunn v. Blumstein* [144] repeated the multi-factor language. However, interpreting *Dunn* as a balancing case which accorded the right to vote the protection of the compelling state interest test (a result certainly appropriate for harmonizing the balancing approach with other voting rights precedents) makes several of Marshall's later opinions hard to explain. In *O'Brien v. Skinner*,[145] for example, the vague majority opinion provided a convenient and logical forum for Marshall to explain his multi-factor balancing approach, but his concurring opinion was limited to a cryptic application of the compelling state interest test. Moreover, in the recent trio of candidacy cases,[146] two of which revert to a strict scrutiny approach based on the right to vote, Marshall concurred in a straightforward compelling state interest dissent by Justice Brennan, when he could have offered his balancing approach for the solution of the cases. Thus, although Justice Marshall has again recently advocated his balancing approach,[147] his limited use of it may be due to its failure to attract other support.

While the present status of the "balancing" equal protection model is ambiguous, its advantages remain attractive.[148] An explicit balancing test requires independent valuation of the right to run for office, and exhibits for public examination the weight given state administrative goals against important personal interests. Under the balancing model, the classification

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[140] *Id.* at 30.

[141] 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting).

[142] *Id.*

[143] *Cf.* Sherbert v. Verner, 374 U.S. 398 (1963).

[144] 405 U.S. 330, 335 (1972).

[145] 94 S. Ct. 740 (1974).

[146] Cases cited note 108 *supra.*

[147] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 124 (1973) (Marshall, J., dissenting).

[148] In the theoretical aftermath of Professor Gunther's article, at least two reviewers have expressed preference for an equal protection "balancing." *See* Note, *Fundamental Personal Rights: Another Approach to Equal Protection,* 40 U. CHI. L. REV. 807 (1973); Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach,* 58 VA. L. REV. 1489 (1972). *See* Note, *A Question of Balance: Statutory Classifications under the Equal Protection Clause,* 26 STAN. L. REV. 154 (1973), recommending a balancing analysis for suspect classification adjudication without considering its appropriateness for personal interests litigation.

of candidacy rights as fundamental, almost fundamental, or not fundamental will not automatically determine the outcome; instead, it will weigh accordingly in the balance against state interest. Of course, the candidate can marshal considerable argument for the fundamentality of his rights, a summary of which follows. Although the United States Constitution does not explicitly guarantee the right to vote, the five voting rights amendments [149] give electoral rights, including the right to run, a constitutionally preferred position. There is also precedent for the view that the first amendment is a constitutional source and protection of the right to run for office.[150] Moreover, even if the right to run is less fundamental than the right to vote, it is still of fundamental proportions.[151] That the right to run for office is fundamental to a republican form of government has been recognized independently by a number of state courts [152] and commentators.[153] Thus, it can be argued that only very significant state goals and interests should outweigh the personal interests in ballot access rights. With the primacy of candidate rights as one factor, a balancing test compares state aims and interests with those personal rights in an open and direct way, producing a clear computation subject to review by other courts, legislatures, and, most importantly, the citizenry. Hence, a positive aspect of the test is its requirement that courts be explicit about their decisional processes and value judgments. A final argument, sensitive to the uncertainties besetting the Court, suggests that the fourteenth amendment is tied to the political direction of the nation and that a balancing approach enables the Court to keep open its categories until new social imperatives become clear.[154]

On the other hand, the advantages of a balancing test also reveal its weaknesses. Since the weighing of factors in any controversy is often unique and not susceptible to generalization, an increased case-by-case review by the high court would become inevitable. The delegated law application function of lower courts would be strained by the lack of easily identifiable standards. Moreover, there would be a consequent loss of certainty and predictability with regard to restriction of ballot access rights by states. Finally, courts explicitly balancing the interests of states and candidates would be subject to charges of substituting their value

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[149] U.S. CONST. amends. XIV, XV, XIX, XXIV, XXVI.

[150] *E.g.*, Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973); *see* text accompanying notes 166–69 *infra*.

[151] *See* Wellford v. Battaglia, 343 F. Supp. 143, 146–47 (D. Del. 1972).

[152] *E.g.*, Fisher v. Taylor, 210 Ark. 380, 196 S.W.2d 217, 220 (1946); Zeilenga v. Nelson, 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971) (en banc); Gangemi v. Rosengard, 44 N.J. 166, 207 A.2d 665 (1965); Sorenson v. City of Bellingham, 80 Wash. 2d 547, 496 P.2d 512, 515 (1972).

[153] *E.g.*, Note, *The Constitutionality of Candidate Filing Fees*, 70 MICH. L. REV. 558 (1972); Comment, *Durational Residence Requirements for Candidates*, 40 U. CHI. L. REV. 357, 365–69 (1973).

[154] Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489, 1510 (1973).

judgments for those of the state legislature. Thus, although an explicit balancing approach has much to recommend it, its preferability is not without reservation.

D. Some Consistently Critical Factors

One strategy for planning litigation and for decisional prognostication is to forego guessing which analytical model future decisions will use, and instead identify the elements which have been pivotal under all the various formulations. At present, three factors in equal protection electoral process cases seem to be critical to the decision.

1. The "Necessity"–"Less Drastic Means" Inquiry — As much of the formal two-tiered analysis has come to be ignored in substance by the Supreme Court, its central inquiry in many equal protection cases has been whether the challenged state law is necessary to asserted state goals.[155] The necessity analysis, which is qualitatively different than a "means" scrutiny, inquires whether the state objective could not, in fact, be achieved in a less restrictive way than by the law in question. Courts have come to abbreviate the test as an inquiry for "less drastic means." [156] Such an approach is susceptible of ready application by lower courts and has consequently been relied upon by many tribunals.[157] Because of the nature of the interests involved in ballot access cases, upon a showing of substantial infringement, the failure of the state to demonstrate that there are not less drastic means is customarily dispositive of the issue.

2. The Total Deprivation–No Alternative Factor — In recent electoral rights cases, the pivotal fact has been whether the state infringement resulted in total deprivation of the asserted right, or whether there was an alternative whereby the claimant might secure it. For example, in *American Party v. White,*[158] the Court struck down an absentee ballot provision with only two printed candidates because there were no alternative means for electors to vote for independent candidates. In *Lubin v. Panish,*[159] a filing fee requirement was invalidated because no alternative means were available for a serious candidate without sufficient funds to obtain a place on the ballot.[160] Similarly, in voting cases where restrictions have totally precluded exercise of the franchise in a particular election, courts have explicitly grounded invalidation on that fact.[161] Conversely, the absence

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[155] *E.g.,* Storer v. Brown, 94 S. Ct. 1274 (1974); Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974); *cf.* Dunn v. Blumstein, 405 U.S. 330 (1972).

[156] *E.g.,* Memorial Hosp. v. Maricopa County, 94 S. Ct. 1076 (1974); Stoner v. Forston, 359 F. Supp. 579 (N.D. Ga. 1972).

[157] *E.g.,* People's Party v. Tucker, 347 F. Supp. 1 (M.D. Pa. 1972); Yale v. Curvin, 345 Supp. 447 (D.R.I. 1972).

[158] 94 S. Ct. 1296 (1974).

[159] 94 S. Ct. 1315 (1974).

[160] *Accord,* Jenness v. Little, 306 F. Supp. 925 (N.D. Ga. 1969), *appeal dismissed,* 397 U.S. 94 (1970); Zapata v. Davidson, 24 Cal. App. 3d 823, 101 Cal. Rptr. 438, 448 (1972).

[161] *E.g.,* O'Brien v. Skinner, 94 S. Ct. 740 (1974). In *Kusper v. Pontikes,* 94 S. Ct. 303 (1973), the Court noted that while the twenty-three month rule did not deprive

of an absolute bar has been part of the justification for upholding a statute regulating the franchise.[162] Moreover, there is an arguable parallel to the "total deprivation" factor in recent due process decisions involving classifications predicated on "irrebuttable presumptions." [163]

Until recently, an unresolved question in this area has been whether a write-in space is a sufficiently viable alternative to potential candidates precluded from ballot recognition by statute. In *Lubin v. Panish*,[164] the Court stated in dictum that the write-in alternative falls far short of having the candidate's name printed on the ballot and that "the intimation that a write-in provision . . . would constitute 'an acceptable alternative' appears dubious at best." [165] Therefore, any state law burdening ballot access rights which provides no alternative and acts as an absolute bar is susceptible to constitutional challenges on that ground alone.

E. The First Amendment Model

The first amendment has been advanced as one source of the right to run for office and as a basis for the fundamentality argument. But the role of the first amendment in candidacy cases is yet unclear, although some cases have made it the focal point of the decision. One well-reasoned opinion employing the first amendment within the equal protection strict scrutiny equation is *Mancuso v. Taft*.[166] A Rhode Island provision required a police chief to relinquish his job upon filing as a candidate for elective office. Holding the plaintiff's right to run fundamental under the first amendment, the First Circuit adjudged the state interest to be compelling, but concluded that the statute was not reasonably necessary to protect the state's interest because less restrictive alternatives were available. *Mancuso* employed a moderated strict scrutiny analysis under the equal protection clause, relying on the less restrictive alternative inquiry and the suggestion that the law had a "prior restraint" effect characteristic of first amendment analysis. A number of cases, indicating that the right to run for office is a first amendment right, have invalidated statutes where no compelling state interest could be shown, without specifying whether the decision was based on first amendment or equal protection grounds.[167]

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voters in that class "of all opportunities to associate with the political party of their choice," it did "absolutely preclude [the petitioner] from voting in that party's 1972 primary election." *Id.* at 308.

[162] *See* Rosario v. Rockefeller, 410 U.S. 752 (1973).

[163] *E.g.*, Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974); Vlandis v. Kline, 412 U.S. 441, 446 (1973); *see* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974). A support for this interrelation can be found in *LaFleur's* citation of the early voting rights case of *Carrington v. Rash*, 380 U.S. 89 (1965), as an "irrebuttable presumption" case. 94 S. Ct. at 799.

[164] 94 S. Ct. 1315 (1974).

[165] *Id.* at 1321, n.5.

[166] 476 F.2d 187 (1st Cir. 1973).

[167] *E.g.*, People's Party v. Tucker, 347 F. Supp. 1 (M.D. Pa. 1972) (both first and fourteenth amendment basis); Minielly v. State, 242 Ore. 490, 411 P.2d 69 (1966) (en banc). *But see* Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), *aff'd*, 414 U.S. 802 (1974); Johnston v. State Civil Serv. Dep't, 280 Minn. 61, 157 N.W.2d 747 (1968) (based on first amendment only).

Other cases have invalidated ballot access barriers, indicating that the presence of *both* first amendment and equal protection claims was necessary to the decision.[168]

The explicit grounding of the right to vote in the first amendment by the dissenters in *Storer* provides further support for the use of first amendment theory. Although the right to vote has long been recognized as fundamental, the *Storer* dissent is the first opinion linking the fundamentality of the right to a specific constitutional provision. Courts looking for a constitutional source to legitimize other electoral rights decisions can look to the first amendment,[169] and candidates seeking vindication of their rights should assert first amendment claims.

F. The Protection From State Constitutions

There is little doubt that the present Court has adopted a less interventionist attitude than its immediate predecessor. As a result, the neglected alternative of basing claims upon state bills of rights is now being reconsidered with new enthusiasm.[170] This approach to protecting candidacy rights rests on two propositions. First, since the fourteenth amendment requirements are only minimum standards, state courts may read into their bills of rights more protective substantive standards. Second, state bills of rights and constitutional provisions covering the electoral process [171] create a distinct and often stronger basis of claimed protection of candidacy rights than does the federal constitution.[172]

Because of the previously pervasive application of the Equal Protection Clause, most candidacy precedents are in the setting of three-judge federal courts. However, a few cases provide state constitutional precedent for ballot access rights. For example, state law barriers to the ballot have been struck down under state constitution equal protection clauses,[173] privileges and immunities clauses,[174] and special election provisions.[175] Some state courts seem prepared to go further in extending equal protection

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[168] *E.g.,* United Ossining Party v. Hayduk, 357 F. Supp. 962 (S.D.N.Y. 1971); Zeilenga v. Nelson, 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971).

[169] *See generally* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920 (1973), for a view that courts have an obligation to explain constitutional premises and holdings in terms of specific constitutional provisions.

[170] *See Project Report: Toward An Activist Role for State Bills of Rights,* 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271 (1973) [hereinafter cited as *Project Report*]; Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents,* 45 S. CAL. L. REV. 365, 378–83 (1972).

[171] *E.g.,* MICH. CONST. art. II, § 8 ("shall enact laws to preserve the purity of elections [and] to guard against abuses of the elective franchise").

[172] *See generally Project Report, supra* note 170, at 284–86, 315–17.

[173] *E.g.,* Rees v. Layton, 6 Cal. App. 3d 815, 86 Cal. Rptr. 268 (1970).

[174] *E.g.,* Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958).

[175] *E.g.,* Hallahan v. Moody, 419 S.W.2d 770 (Ky. Ct. App. 1967) ("all elections shall be free and equal"); Elliott v. Secretary of State, 295 Mich. 245, 294 N.W. 171 (1940) (per curiam) ("to preserve the purity of elections and guard against abuses of elective franchise").

guarantees than the Supreme Court.[176] Although no such Utah cases exist, the language of Utah's constitution may be so interpreted.[177] The viability of this approach, however, obviously depends on the willingness of state judges to go beyond the minimum constitutional standards of the federal constitution.

III. SPECIAL AREAS OF CONFLICT IN CANDIDACY RIGHTS ADJUDICATION: A SURVEY

Prospective independent candidates are currently raising a substantial number of challenges to various ballot access provisions. The recurrence and sophistication of these suits pose genuine problems for a judiciary unsure of its doctrinal tools. Discussed below are the issues within the candidacy rights field generating the most litigation, with recommendations for future disposition.

A. Continuing Ballot Qualification Requirements

Frequently, there are two requirements which a minority party must meet in order to list all of its candidates on the ballot without additional measures: (1) obtaining a specified percentage of the vote in the immediately preceding election, and (2) establishing a certain level of organization throughout the state.

1. Specified percentage of the vote — The Court has not yet drawn a line between valid and invalid percentage requirements. In *Williams v. Rhodes,*[178] for example, the Court bypassed discussion of a ten percent requirement in holding a nominating petition of fifteen percent unconstitutional. The Court did note that the percentage requirement could not be higher for new parties qualifying by nominating petition than that for old parties qualifying by their percentage of the last vote. Whether the latter could be higher than ten percent, or higher than that for new parties, were questions left unanswered by the Court.

In *American Party v. White,*[179] however, both of these questions were implicitly answered in the affirmative. The Court upheld a Texas scheme which provided four methods of ballot access, one of which was a continuing ballot qualification requirement of twenty percent (much higher than the nominating petition requirement under the same scheme). Because the plan provided alternative methods for access to the ballot, however, the cases should not be read to hold that a twenty percent requirement without alternatives is valid. But since the Court in *Jenness*

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[176] *See* cases cited note 152 *supra; cf.* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187, *supplemented,* 119 N.J. Super. 40, 289 A.2d 569 (1972), *cert. denied,* 414 U.S. 976 (1974).

[177] UTAH CONST. art. I, § 2.

[178] 393 U.S. 23 (1968).

[179] 94 S. Ct. 1296 (1974).

v. Fortson [180] approved a five percent nominating petition requirement, five percent is probably a reasonable continuing ballot qualification requirement under the *Williams* rules.

Commentators have proposed that parties be compelled to show substantial voter support in the preceding election in order to qualify for continuing ballot recognition,[181] but have not suggested what percentage of the vote would be sufficient. The difficulty presented by high continuing ballot qualification requirements is that minority parties may be forced repeatedly to undergo the considerable expense of a nominating petition drive in order to get on the ballot for each election.[182] The money, time, and energy which might otherwise be used in spreading the party philosophy would be consumed in the nominating petition drive. Hence, a minority party that once qualifies by nominating petition but fails to meet the higher vote percentage requirement in an election and is thus forced to requalify can present strong arguments, based on both the right to associate and the equal protection clause, against requirements that are excessively high or substantially different from nominating petition requirements. Although the courts have indicated that different requirements, if reasonable, are permissible for differently situated political groups,[183] no case to date has dealt with these arguments.

2. Party structure — States have sometimes required political groups to have minimum state, and even county organizations, to qualify for the ballot.[184] The *Williams* decision involved an Ohio statute requiring, among other things, that new parties seeking ballot recognition have a state central committee with two elected members from each congressional district, county central committees, and delegates to a national convention.[185] Since the *Williams* opinion did not specify which elements of the Ohio scheme were unconstitutional, that case left open the question whether the organization requirements were unconstitutional alone. Two

[180] 403 U.S. 431 (1971). Other courts have sustained three percent nominating petition requirements. Christian Nationalist Party v. Jordan, 49 Cal. 2d 448, 318 P.2d 473 (1957); People's Constitutional Party v. Evans, 83 N.M. 303, 491 P.2d 520 (1971).

[181] *See* Ireland, *The Political Arena: Revolution in the Barriers to Entry,* 1970 LAW & SOC. ORDER 213 (1970); Comment, *Legal Obstacles to Minority Party Success,* 57 YALE L.J. 1276 (1948) [hereinafter cited as *Legal Obstacles*].

[182] In 1957, the California Supreme Court estimated that the cost of a nominating petition drive with a ten percent signature requirement was $100,000. Christian Nationalist Party v. Jordan, 49 Cal. 2d 448, 318 P.2d 473 (1957). Although inflation has increased that figure, in each state it will be subject to the variables of respective percentage requirements and populations.

Utah has a statutory percentage requirement (two percent) for continuing parties, much higher than the initial petition requirement (five hundred signatures) for new parties. UTAH CODE ANN. § 20–3–2 (Supp. 1973). The cost of obtaining five hundred signatures, even with the ten county distribution requirement, is minimal.

[183] *E.g.,* Wood v. Putterman, 316 F. Supp. 646 (D. Md.), *aff'd,* 400 U.S. 859 (1970); Barnhart v. Mandel, 311 F. Supp. 814 (D. Md. 1970).

[184] *See* UTAH CODE ANN. 20–3–2(g) (Supp. 1973), which seems to require at least a state convention, state committee, and certain officials, although no case has so held.

[185] Williams v. Rhodes, 393 U.S. 23, 25 n.1 (1968).

years later, however, *Williams* was cited by a federal district court in holding unconstitutional a subsequent Ohio statute requiring that a political party hold a state convention every other year attended by all state officers, county chairmen, county committee members, candidates, and five hundred delegates.[186]

The state interests served by organization requirements are two-fold: a preliminary showing of minimum support and state-wide dispersion. The first of these interests can be achieved through nominating petitions or voter percentage requirements, as less drastic means. The state-wide dispersion interest was held not to justify signature distribution requirements in *Moore v. Ogilvie,*[187] Because the remaining state interest can be achieved by the less restrictive alternative of nominating petition requirements, a state scheme requiring a certain minimum party structure is vulnerable to challenge.

B. Nominating Petition Requirements

Nominating petition requirements generally present four categories of issues: numerical standards, signatory qualifications, deadlines, and distributional requirements.[188] Since the requirements are generally identical for minority parties and independent candidates, they will not be treated separately.

1. Numerical Standards — The *Williams* decision, in striking down a ballot access statute requiring a new party to have nominating petitions signed by fifteen percent of the registered voters, suggested in dictum that the usual one percent requirement would be satisfactory.[189] In the dominant case on point, *Jenness v. Fortson,*[190] however, the Court upheld a Georgia signature requirement of five percent. Although the *Jenness* opinion distinguished the *Williams* scheme and stressed that percentage requirements are to be considered in the context of the total ballot access requirements, it seems apparent that a numerical requirement up to and including five percent is valid.[191] In fact, the recent Supreme Court decision of *Storer v. Brown* [192] hints that a five percent figure may not be the upper limit. In that case, the Court heard a challenge to a five percent nominating petition requirement for independent presidential and vice

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[186] Socialist Labor Party v. Rhodes, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd,* 409 U.S. 942 (1972).

[187] 394 U.S. 814 (1969).

[188] *See Legal Obstacles, supra* note 181.

[189] Williams v. Rhodes, 393 U.S. 23, 33 n.9 (1968) (dictum).

[190] 403 U.S. 431 (1971).

[191] *E.g.,* American Party v. White, 94 S. Ct. 1296 (1974) (five hundred signature requirement upheld); Jackson v. Ogilvie, 325 F. Supp. 864 (N.D. Ill.), *aff'd,* 403 U.S. 925 (1971) (five percent upheld); Socialist Labor Party v. Rhodes, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd,* 409 U.S. 942 (1972) (seven percent requirement struck down); People's Constitutional Party v. Evans, 83 N.M. 303, 491 P.2d 520 (1971) (three percent upheld). *But see* Coffelt v. Bryant, 238 Ark. 363, 381 S.W.2d 731 (1964) (fifteen percent requirement upheld).

[192] 94 S. Ct. 1274 (1974).

presidential candidates. The time period accorded for the gathering of signatures was the twenty-four days following the primary elections of other parties; the pool of eligible signatories was comprised of registered voters not voting in the immediately preceding primary, thus excluding all primary voters, including those voting on nonpartisan races and issues. The Court struck down the nonpartisan primary voter exclusion, and remanded the case to the lower court to determine whether the number of possible signers of the petitions was so diminished by the disqualification of primary voters that the percentage provision would be unduly burdensome. The dissent disdained remanding, arguing that available figures showed the requirement to be approximately nine percent of the electorate, that such a figure served no compelling state interest, that the situation in *Jenness,* where there was no exclusion of primary voters and the time period was six months, was substantially different, and that less drastic means were available.[193] In view of the evidence relied upon by the dissent, the reluctance of the majority to strike down the provision casts doubt on five percent as an upper limit. Whether the decision portends a weakening of the *Williams-Jenness* standard is unclear. The majority suggested that there might well be reasonable and less drastic alternatives to the twenty-four day period; but it also proposed the more modest test of whether "a reasonably diligent independent candidate [could] be expected to satisfy the signature requirements."[194] Read broadly, the decision may mean that percentage requirements in excess of five percent will be upheld.[195]

2. Signatory Qualifications — States have imposed an assortment of qualificational requirements for signers of nominating petitions, the minimum condition typically being that of registration as a voter.[196] Requirements precluding signatories who have signed another petition for the same office or voted in a primary election in that electoral year seem likely to withstand challenge.[197]

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[193] *Id.* at 1295–96 (Brennan, Douglas & Marshall, JJ., dissenting).

[194] *Id.* at 1285. The Court suggests that the answer to that test can be found by referring to the previous success of other independent candidates in meeting the nominating petition requirements. However, reliance on such data could be misleading since the actual burden of the requirement is more accurately reflected by the composite statistics of (1) the number of independent candidates who have met the requirement, (2) the number who have attempted but failed to meet the requirement, and (3) the number who, but for the requirement, would have run as independent candidates. Since the third figure is impossible to determine and the second difficult to obtain, courts should hesitate to place too much reliance on the success figure in isolation.

[195] Under UTAH CODE ANN. § 20–3–2 (Supp. 1973), the numerical requirement for new parties is five hundred signatures. The maximum for independent candidates is three hundred. *Id.* § 20–3–38 (1969).

[196] *See* Stout v. Black, 8 Ill. App. 3d 167, 289 N.E.2d 456 (1972); Note, *Minority Party Access to the Ballot,* 1971 DUKE L.J. 451, 458–60; *Legal Obstacles, supra* note 181.

[197] *See* Storer v. Brown, 94 S. Ct. 1274 (1974); Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y.), *aff'd,* 400 U.S. 806 (1970). One of the elements which the Court took into account in upholding the Georgia scheme in *Jenness* was the absence of such a restriction. But it was not a major point and a challenge rest-

On the other hand, the court in *Socialist Workers Party v. Rockefeller,*[198] struck down a provision limiting signatories to persons who had been registered to vote in the last general election. Another state restriction open to constitutional challenge is one requiring that all signatures be notarized.[199] This requirement places an additional financial burden on the aspirant, since the cost may run as high as fifty cents per signature. If the purpose of the law is to ensure valid signatures, it may be achieved by checking signatures against voting rolls; if the purpose is to penalize citizens who falsely represent themselves as qualified signatories, it is unjust to penalize the candidates by increasing their costs. Although less burdensome and less expensive means to achieve the desired end are available in the normal course of election procedures, the Supreme Court impliedly approved notarization requirements in *American Party v. White.*[200] Because the ballot access scheme upheld in that case was so complicated, however, the notarization question is still unsettled.

3. Deadlines — The issues in the area of nominating petition requirements involve early filing deadlines, perhaps remote from the general election, and short time periods for obtaining signatures. An equal protection question arises as to whether independent candidates ought to be required to meet the same filing deadlines as party primary candidates. While the advantage to the state of having one filing deadline is minimal, the disadvantage to independent candidates is telling. Independent candidacies operate on a different timetable than party candidacies, since preparation for party conventions or primaries is not necessary. Furthermore, many independent candidacies are prompted by the final selection of party candidates. Hence, early deadlines coinciding with those for party hopefuls might force premature independent candidacy decisions, precluding the entrance of some potential candidates. In the few decisions on point, however, courts have held that an early filing deadline, if not different than that for party candidates, is constitutionally permissible,[201] but that a deadline too remote from the general election is invalid.[202]

Logically, even more vulnerable to constitutional invalidation are short periods for obtaining signatures. In *Jenness v. Fortson,*[203] a Georgia provision allowing six months to obtain signatures was noted by the Court as one reason for sustaining the statutory scheme. The few lower court cases

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ing on that argument alone would be weak. Under Utah law, the signers must declare their "desire to become members of the party or group," but there are no provisions covering multiple signatures. UTAH CODE ANN. § 20–3–2 (Supp. 1973).

[198] 314 F. Supp. 984 (S.D.N.Y.), *aff'd,* 400 U.S. 806 (1970).

[199] Utah has such a notarization requirement for the petitions of independent candidates. UTAH CODE ANN. § 20–3–38 (1969).

[200] 94 S. Ct. 1296 (1974).

[201] *E.g.,* Ring v. Marsh, 78 F. Supp. 914 (D.N.J.), *appeal dismissed,* 335 U.S. 849 (1948).

[202] *E.g.,* People's Party v. Tucker, 347 F. Supp. 1 (M.D. Pa. 1972).

[203] 403 U.S. 431 (1971).

dealing with short periods have invalidated them.[204] However, in *Storer,* faced with a twenty-four day signature acquisition period commencing upon the completion of party primaries, the Court remanded on other grounds, with a conspicuous lack of any condemnatory language about the shortness of the period. Consequently, the opinion may reflect a view that short qualification periods are not per se suspect.[205] The only conceivable state interests for justification of short qualification periods are those of a minimum initial showing of support, which arguably may be indicated by the speed with which signatures can be collected, and of protection of the electorate from being hounded for signatures in a manner either annoying or diversionary. The latter seems both insubstantial and subject to the arguments against legislative paternalism in election regulation. The preliminary minimum support interest is served by the less drastic means of requiring the nominating petition. Thus, although not a common statutory feature, brief period requirements ought not to withstand constitutional scrutiny.

4. Distribution Requirements — Until 1969, many states required a certain geographical dispersion of nominating petition signatures to ensure more than localized support for candidates for state office. In that year, the Court in *Moore v. Ogilvie*[206] struck down an Illinois signature distribution requirement of two hundred signatures from fifty of the state's 102 counties out of a total requirement of 25,000 signatures. The Court relied upon the "one man, one vote" reapportionment theory of *Reynolds v. Sims.*[207] Lower courts subsequently began invalidating distribution requirements.[208] For example, the Illinois legislature, in response to the *Moore* decision, changed the law by limiting the number of signatures obtainable from any one county to 13,000 out of the required 25,000, but a federal court invalidated that provision as well.[209]

Although the *Moore* holding will likely continue to be dispositive of such cases, where the distribution requirements are relatively minor, they may be upheld. In *Zautra v. Miller,*[210] for example, a Utah federal district court compared the distribution requirements with other burdens imposed on independent candidates or minority parties utilizing nominating

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[204] *E.g.,* People's Party v. Tucker, 347 F. Supp. 1 (M.D. Pa. 1972) (twenty-one day period held unconstitutional).

[205] Storer v. Brown, 94 S. Ct. 1274 (1974). Justice Brennan's dissent would have struck down, rather than have remanded, the California scheme, with the shortness of the twenty-four day period as one basis. *Id.* at 1296 (Brennan, Douglas & Marshall, JJ. dissenting).

[206] 394 U.S. 814 (1969).

[207] 377 U.S. 533 (1964).

[208] *E.g.,* Baird v. Davoren, 346 F. Supp. 515 (D. Mass. 1972) (a maximum of one-third of signatures from any county); Socialist Labor Party v. Rhodes, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd,* 409 U.S. 942 (1972) (at least two hundred signatures from thirty different countries); Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y.), *aff'd,* 400 U.S. 806 (1970) (at least fifty signatures from each county of the state).

[209] Communist Party v. Ogilvie, 357 F. Supp. 105 (N.D. Ill. 1972).

[210] 348 F. Supp. 847 (D. Utah 1972).

petitions. A Utah distribution requirement of ten signatures from at least ten different counties out of five hundred signatures required was sustained as reasonable because none of the other burdens was significant, and because the state, under the five percent *Jenness* rule, might have required eighteen thousand signatures. The court concluded that a five hundred signature requirement with a minimum distribution provision was less burdensome than a constitutionally permissible eighteen thousand signature requirement and therefore was logically constitutional.

C. Filing Fees

Filing fee requirements have been common in most modern state ballot regulation statutes. As of 1970, approximately half of the states required filing fees of all candidates, and some other states required filing fees as an alternative to nominating petitions.[211] For example, Utah requires a filing fee of all party primary candidates of one-fourth of one percent of the office's salary for the entire term.[212] Filing fees had been sustained in a number of jurisdictions [213] prior to the 1972 decision in *Bullock v. Carter* [214] invalidating a statute requiring fees up to $8,900 for prospective candidates, because it had a substantial impact on the right to vote and provided no alternative means for serious candidates. The Court, emphasizing "that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees . . . in other contexts," [215] left lower courts free to evaluate the reasonableness of filing fees and the presence of alternative methods of ballot access. Nevertheless, one lower court, citing *Bullock,* struck down a filing fee statute without considering the reasonableness of the fee or the existence of alternative means.[216] Other courts have based their decisions on the reasonableness of the fee requirements or the presence of alternative ballot access methods.[217]

The recent decision of *Lubin v. Panish,*[218] striking down much smaller fee requirements (two percent of annual salary), was primarily grounded on the absence of alternative means for indigent candidates to obtain ballot status. Thus, statutes like Utah's,[219] which require fees of primary candi-

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[211] *See* Comment, *The Primary Filing Fee: Reasonable Regulation or Equal Protection Violation?,* 9 SANTA CLARA LAW. 169 (1968).

[212] UTAH CODE ANN. § 20–3–14 (1969). See also *id.* §§ 20–3–15 to –38.

[213] *Cf.* Thomas v. Mims, 317 F. Supp. 179 (S.D. Ala. 1972); Wetherington v. Adams, 309 F. Supp. 318 (N.D. Fla. 1970).

[214] 405 U.S. 134 (1972).

[215] *Id.* at 149.

[216] Jenness v. Miller, 346 F. Supp. 1060 (S.D. Fla. 1972) (holding unconstitutional a fee of ten cents per name on nominating petitions).

[217] *E.g.,* Fair v. Taylor, 359 F. Supp. 304 (M.D. Fla. 1973), *vacated,* 94 S. Ct. 1916 (1974) (held fee of five percent of annual office salary reasonable but unconstitutional because there was no alternative means to ballot access); Zaputa v. Davidson, 23 Cal. App. 3d 638, 101 Cal. Rptr. 438 (1972); Swanson v. Kramer, 82 Wash. 2d 511, 512 P.2d 721 (1973) (held fee of one percent of annual salary plus costs of state-produced election pamphlet unconstitutional).

[218] 94 S. Ct. 1315 (1974).

[219] UTAH CODE ANN. § 20–3–14 (1969). Additional sophistication in the Utah interpretation is provided by an Attorney General opinion, which stated that the nominating

dates without providing alternative means of getting on the ballot, are clearly unconstitutional. The Court did not suggest guidelines for fees if alternatives such as nominating petitions were available to prospective candidates. Therefore, difficult questions remain unresolved, particularly regarding two situations: (1) a statutory system in which an independent candidate may qualify either by paying a filing fee or by filing a nominating petition, but where both the size of the filing fee and the number of signatures required are excessive; and (2) where both qualification alternatives exist, but only the required number of signatures is excessive. In either situation, there is arguably no real alternative to the filing fee; hence, a strong argument could be made on the basis of *Lubin* that both situations are unconstitutionally restrictive.

Reading *Bullock* and *Lubin* together, however, it is unlikely that filing fees will be held per se unconstitutional. Commentators have so concluded,[220] although there is little supporting case law.[221] The Court's present disinclination to apply a compelling state interest test to wealth classifications makes unlikely a per se rule on that ground.[222] Other courts, following that trend, will probably not utilize a compelling state interest test in filing fee challenges, so that a reasonable filing fee, *if* coupled with an alternative means for independent candidacy qualification, will probably be upheld.

D. Property Ownership Requirements

Although there are meaningful precedents in the candidacy area, decisions invalidating property requirements for voters can be applied to cases in which property ownership requirements for candidates are challenged.[223] The 1970 Supreme Court decision of *Turner v. Fouche*[224] struck down a Georgia freeholder requirement for school board candidacy "[w]ithout excluding the possibility that other circumstances might present themselves in which a property qualification for office holding could survive constitutional scrutiny."[225] That decision resolved conflict in

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petition method without filing fee is sufficient, conditioned on an objective showing of financial disability. Letter from Frank V. Nelson, Assistant Attorney General of Utah, to Clyde L. Miller, Secretary of State of Utah, May 8, 1974, *citing* Harper v. Vance, 342 F. Supp. 136 (N.D. Ala. 1972). *Lubin* does not discuss that issue, and it is open whether the alternative means must exist for all prospective candidates.

[220] Note, *The Constitutionality of Candidate Filing Fees*, 70 MICH. L. REV. 558, 586 (1972); Comment, *The Constitutionality of Qualifying Fees for Political Candidates*, 120 U. PA. L. REV. 109, 133–35 (1971). The argument for per se invalidity is based both on the tenuousness of filing fees in proving the seriousness of candidacy, and on the desirability of relying on the much more accurate and nondiscriminatory method of nominating petitions for demonstrating initial minimum support.

[221] *See* Jenness v. Miller, 346 F. Supp. 1060 (S.D. Fla. 1972).

[222] *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[223] *E.g.*, Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Kramer v. Union Free School Dist., 395 U.S. 621 (1969). *But see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

[224] 396 U.S. 346 (1970).

[225] *Id.* at 364.

decisions among lower courts,[226] and has led to judicial invalidation of nearly all property qualifications for candidates.[227]

Notwithstanding the language quoted above, the Supreme Court in *Turner* utilized the rational relation arm of the two-tiered equal protection analysis to strike down the freeholder provision, thus implying that virtually no legitimate state interest is connected to property qualifications. That interpretation is tempered, however, by the Court's decision in *Salyer Land Co. v. Tulare Lake Basin Water Storage District,*[228] upholding property ownership requirements for voters in a "special purpose" unit election for directors of a water storage district. By analogy, a property ownership requirement for director candidates in the *Salyer* situation would also be valid.[229] Although *Salyer* stands as a threatening exception, a number of cases precluding freeholder restrictions on voting constitute most of the "special purpose" unit doctrine.[230] Moreover, since the primary state interest which can be asserted is that of assuring competent candidates, the justification for such ballot access restrictions is minimal.[231]

E. Durational Residency Requirements

Durational residency requirements for candidates, mandating a certain period of residency as a qualification to run, have been one of the most frequently challenged ballot barriers during the past several years. Such litigation has focused on whether the Constitution permits durational residency requirements for candidates to be longer than those for voters and, if so, whether there is any limit to the length of such candidacy requirements. The federal model provides little guidance. Although the United States Constitution contains a fourteen year residency requirement for the President,[232] the Constitutional Convention rejected several proposed durational residency requirements for Representatives.[233]

The amount of current litigation over candidacy durational residency requirements undoubtedly results from the 1972 decision of *Dunn v.*

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[226] *Compare* Landes v. Town of North Hempstead, 20 N.Y.2d 417, 231 N.E.2d 120, 284 N.Y.S.2d 441 (1967), *with* Schweitzer v. Clerk for the City of Plymouth, 381 Mich. 485, 164 N.W.2d 35 (1969), *cert denied,* 397 U.S. 906 (1970); *see* Comment, *Equal Protection and Property Qualifications for Elective Office,* 118 U. PA. L. REV. 129 (1969) (a pre-*Turner* analysis).

[227] *E.g.,* Duncantell v. City of Houston, 333 F. Supp. 973 (S.D. Tex. 1971); Stapleton v. Clerk for the City of Inkster, 311 F. Supp. 1187 (E.D. Mich. 1970).

[228] 410 U.S. 719 (1973).

[229] There is a converse argument that since the voters in such an election are limited to freeholders, a further limitation on candidates is unnecessary since it would preclude qualified non-property owning professionals from running and deprive the freeholding voters of the opportunity of selecting such a candidate. The argument suggests that the exclusively limited voter group can judge which candidates best represent their interests, thus obviating the necessity of an additional restriction on candidates. However, the argument seems to be one of policy rather than constitutional considerations.

[230] *See* cases cited note 27 *supra.*

[231] *See* text accompanying notes 100–05 *supra.*

[232] U.S. CONST. art. II, § 1.

[233] II THE RECORDS OF THE FEDERAL CONVENTION OF 1787 217–19 (M. Farrand ed. 1911) (rejecting proposals of seven, two, and one years).

Blumstein,[234] a Tennessee voter durational residency case in which the Supreme Court struck down requirements of one year in the state and ninety days in the county. The decision in *Dunn* raised the possibility that durational residency requirements for candidates of more than minimal periods might be struck down on similar reasoning. It also raised implicitly the question of whether candidacy residency requirements quantitatively different from voter residency requirements are constitutionally tolerable.

Lower court decisions prior to *Dunn* struck down candidacy durational residency requirements in a number of contexts, *e.g.,* three years for mayor,[235] five years for county commissioner,[236] five years for county supervisor,[237] and three years for the city charter commission.[238] One explanation for those decisions is the comparatively long time periods challenged. Moreover, the "compelling state interest" test was still in an expanding stage at that time and was frequently used to invalidate those requirements. Later developments, however, have undermined those explanations.

To the extent that *Dunn* is applicable to the candidacy setting, strict scrutiny of candidacy durational residency requirements seems appropriate, since the fundamental right to travel is infringed, albeit on a much smaller numerical scale than when, as in *Dunn,* the right to vote is involved. Yet paradoxically, most candidacy cases since *Dunn* have upheld durational residency requirements[239] of from six months to three years.[240] These decisions might be explained by the reasonableness of the time periods imposed, since the time periods were relatively shorter than the contrary pre-*Dunn* cases. However, that analysis is at least partially belied by a 1973 federal decision, *Chimento v. Stark,*[241] upholding a New Hampshire seven year residency requirement for gubernatorial candidates, and two impressive recent opinions have invalidated durational residency requirements without regard to the length of the period.[242] Another

[234] 405 U.S. 330 (1972) (limiting voter residency requirements to thirty days for Congressional elections). A prior case, *Oregon v. Mitchell,* 400 U.S. 112 (1970), sustained Voting Rights Act Amendments of 1970, 42 U.S.C. § 1973aa-1 (1971).

[235] Bolanowski v. Raich, 330 F. Supp. 724 (E.D. Mich. 1971).

[236] McKinney v. Kaminsky, 340 F. Supp. 289 (M.D. Ala. 1972).

[237] Zeilenga v. Nelson, 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971) (en banc).

[238] *E.g.,* Mogk v. City of Detroit, 335 F. Supp. 698 (E.D. Mich. 1971). *But see* Moe v. Alsop, 288 Minn. 323, 180 N.W.2d 255 (1970) (six month requirement upheld).

[239] *But see* the post-*Dunn* cases striking down residency requirements: Green v. McKeon, 468 F.2d 883 (6th Cir. 1972) (all city offices, two years); Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972), *aff'd,* 485 F.2d 1151 (3d Cir. 1973) (mayor, five years).

[240] *E.g.,* Walker v. Yucht, 352 F. Supp. 85 (D. Del. 1972) (state assemblyman, three years); Draper v. Phelps, 351 F. Supp. 677 (W.D. Okla. 1972) (state representative, six months); State *ex rel.* Gralike v. Walsh, 483 S.W.2d 70 (Mo. 1972) (state senator, one year).

[241] 353 F. Supp. 1211 (D.N.H. 1973), *aff'd,* 414 U.S. 802 (1974).

[242] Green v. McKeon, 468 F.2d 883 (6th Cir. 1972); Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972), *aff'd* 485 F.2d 1151 (3d Cir. 1973).

explanation for the divergent holdings is a distinction between constitutional provisions and local ordinances, with the latter being voided; but such a refinement lacks explicit support in case language.[243] In fact, the decisional disparity of the cases has apparently resulted simply from conflicting choices of doctrinal models, thus providing an occasion to analyze both the state interests asserted and the appropriate mode of judicial response.

Candidacy durational residency requirements have been justified by the states on three grounds: (1) the state interest in the increased familiarity of candidates with their constituencies resulting from requiring a certain period of residence among the voters; (2) the state interest in the increased opportunity for voters to observe candidates during the protracted residency periods prior to candidacy; and (3) the state interest in preventing political carpetbagging.[244] These three state interests prove, upon individual scrutiny, to be of insufficient weight to exonerate the burdens upon ballot access rights and the right to travel. The interest of increased contact of candidates with constituencies and the resulting candidate knowledge is another example of legislative paternalism.[245] The sufficiency of a candidate's familiarity with local problems is a matter distinctly appropriate for the voters to decide. Moreover, the length of a candidate's presence in the district is an imperfect indicator of his knowledge of constituency views. The state interest of increased voter observation of prospective candidates is plausibly legitimate, but is not precisely achieved by durational residency requirements. The imprecision results from the obvious fact that some life-long residents would be relatively unknown to voters while residents of short periods might be widely known through the publicity they are able to generate. Moreover, now that the length of time which states can impose as voter residency qualifications is limited by *Dunn,* the voter half of the state's "contact equation" is no longer assured.[246] The state interest of preventing political carpetbagging also constitutes patent paternalism and such an interest may not always be in harmony with the views of the majority of voters. Finally, the argument sometimes made that candidates are only temporarily precluded from running fails to obscure the fact that the hopeful candidate is absolutely excluded from the immediate election.[247]

Since the state interests asserted for durational residency requirements are relatively insubstantial, any kind of balancing test that properly values

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[243] Comment, *Durational Residence Requirements for Candidates,* 40 U. CHI. L. REV. 357, 371 n.97 (1973).

[244] *See* Comment, *Age and Durational Residency Requirements as Qualifications for Candidacy: A Violation of Equal Protection?,* 1973 ILL. L.F. 161, 170–72 [hereinafter cited as *Age and Durational Residency Requirements*].

[245] *See* text accompanying notes 96–99 *supra*; Note, *The Durational Residency Requirement as a Qualification for Candidates for State Legislature: A Violation of Equal Protection?,* 22 SYRACUSE L. REV. 1079 (1971).

[246] *See Age and Durational Residency Requirements, supra* note 244, at 173–74.

[247] *See* Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), *aff'd,* 414 U.S. 802 (1974).

the right to run for office (and the right to travel) ought to invalidate most state statutes in the area. While an argument for strict equality between candidate and voter durational residency requirements does not, of itself, seem mandated by the Constitution, a consideration of state purposes in these statutes leads to the same conclusion that all but minimal qualification periods should be struck down.

F. Age Requirement

The issue in this area of electoral litigation is whether any difference between the age requirements for candidates and for voters is constitutionally tolerable. The only state interest involved in candidate age requirements is that of assuring maturity of elected officials. A classification based on a prescribed age requirement is not only over- and under-inclusive, but also is a legislative generalization supplanting voter evaluation of individual candidates. Thus, the state interest justifying candidacy age requirements higher than those for voters is highly questionable.

Nevertheless, age has not been held to be a "suspect" criterion,[248] and does not generate a compelling state interest test by itself.[249] Courts which have considered the constitutionality of candidacy age qualifications higher than those for voters have usually upheld them. In *Manson v. Edwards,*[250] the Sixth Circuit reversed a trial court decision which struck down a Detroit Charter requirement that city council candidates be at least twenty-five, rejected the compelling state interest test, and held that age requirements are to be judged by a rational basis test. Two federal district courts have followed the *Manson* holding. In *Blassman v. Markworth,*[251] the court sustained a twenty-one year age requirement for school board candidates under the minimum scrutiny standard, holding that the law was not invidiously discriminatory and that it did not permanently exclude potential candidates.[252] In *Raza Unida Party v. Bullock,*[253] the court rejected challenges to the Texas age requirements of thirty years for governor and lieutenant governor on the grounds that the age requirement is precedented in the federal model, that there is no fundamental interest in the right to run for office, and that a court ought not to intervene for institutional reasons. Of the three cases, only the *Manson* decision comprehensively weighed the interests of the state and the rights of potential candidates under the Constitution.

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[248] Manson v. Edwards, 482 F.2d 1076, 1077 (6th Cir. 1973).

[249] In *Oregon v. Mitchell,* 400 U.S. 112, 294–95 (1970) (Stewart, J., concurring), Justice Stewart's concurring opinion pointed out that no age requirement could ever satisfy a compelling state interest test.

[250] 482 F.2d 1076 (6th Cir. 1973).

[251] 359 F. Supp. 1 (N.D. Ill. 1973).

[252] The court is obscure on its temporary bar point, since the age restriction does preclude the candidacy in the immediate election. The court may have in mind the different point sometimes suggested as an element of suspect classifications: that the characteristic of the classification is unchangeable, *e.g.,* illegitimacy.

[253] 349 F. Supp. 1272 (W.D. Tex. 1972), *aff'd in part, vacated in part,* 94 S. Ct. 1296 (1974).

Despite the trend of the cases in this area, one commentator has suggested that a clear examination of the frail state interests involved, and the application of a necessity analysis under either minimum or strict scrutiny should result in the invalidation of most age requirements.[254] Such a conclusion is also favored by the analysis suggested herein.

G. Multiple Officeholding

Provisions in many statutes require a candidate upon filing to resign from any other governmental job, prohibit him from holding two offices simultaneously, or prohibit him from being a candidate for two offices. Such provisions are enforced by compelling resignation either at the time of filing for candidacy[255] or at the time of assuming the elected office. Only forced resignation at the time of filing involves a question of ballot access. Lower courts have split on the validity of such a provision,[256] but in 1973, the First Circuit held, in *Mancuso v. Taft*,[257] that a provision requiring a police chief running for office to resign was invalid. Applying a strict scrutiny standard, because it found the right to run fundamental under the first amendment, the court adjudged the state interest in protecting the integrity of its civil service compelling, but concluded that the "resign to run" statute was not reasonably necessary to the achievement of the state interest. The court stated that less restrictive alternatives, such as leaves of absence, were available and suggested that a "resign to run" statute was much like a prior restraint on speech in its chilling effect upon candidacies. The state interest in protecting the civil service system would be sufficient to satisfy a rational relation test; therefore, such a law can be voided only under a compelling state interest or less drastic means analysis. Since many courts may not adopt a strict scrutiny standard, even with the presence of first amendment overtones, the success of actions challenging "resign to run" statutes will largely turn on the willingness of courts to go through a necessity or less drastic means inquiry and to accept as viable the alternatives suggested in *Mancuso*.

H. Loyalty Oaths

Two kinds of loyalty oaths are imposed upon independent candidates or minority parties as conditions to gaining ballot recognition. The first

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[254] *See Age and Durational Residency Requirements, supra* note 244, for an argument that the compelling state interest test should be applied because of the absolute bar to young candidates and because of the limitation on the field of candidates and its consequent impact on the right to vote. *See also* Human Rights Party v. Secretary of State, 370 F. Supp. 921 (E.D. Mich. 1973), upholding an eighteen-year-old requirement for school board candidates as being rationally related.

[255] *See The Emerging Right to Candidacy, supra* note 1, at 1576–77.

[256] For cases striking down "resign to run" provisions, see Kinnear v. City and County of San Francisco, 61 Cal. 2d 341, 392 P.2d 391, 38 Cal. Rptr. 631 (1964); De Stefano v. Wilson, 96 N.J. Super. 592, 233 A.2d 682 (1967); Minielly v. State, 242 Ore. 490, 411 P.2d 69 (1966) (en banc). For cases upholding such statutes, see Deeb v. Adams, 315 F. Supp. 1299 (N.D. Fla. 1970); Holley v. Adams, 238 So. 2d 401 (Fla. 1970); Johnson v. State Civil Serv. Dep't, 280 Minn. 61, 157 N.W.2d 747 (1968).

[257] 476 F.2d 187 (1st Cir. 1973).

type is that requiring each candidate to swear allegiance to the United States and various other political principles, and courts have voided those requiring allegiance to particular forms of government or political theories on first amendment rather than right to run grounds.[258] Such an oath is more accurately a "condition" than a "barrier" to candidacy, and is subject to pre-election adjudication in declaratory judgment actions.

The second kind of loyalty oath — an oath of party candidates to abide by the primary results — is a barrier to ballot access. The only cases on point hold that such an oath is not binding or enforceable,[259] but presumably a party could initially preclude candidates who refuse to take such an oath.

I. Ballot Position

A recent article has provided statistical vindication for the suspicion that the top position on a ballot gives a candidate advantage over other candidates.[260] Several courts have already taken judicial notice of that fact,[261] and the proof presented by that study provides valuable source material for challenges to state electoral provisions not allowing the rotation of names on ballots. The overwhelming majority of states rotate names on their ballots,[262] although Utah simply lists them alphabetically.[263] The only arguable state interests — administrative convenience and avoiding the additional cost in printing up several ballot forms — do not justify the de facto discrimination against alphabetically-displaced candidates. Therefore, even though most cases to date have involved interpretation of statutes or state constitutional provisions,[264] attacks on such failure to rotate names ought to succeed under even modest fourteenth amendment standards.

J. Candidate Identification on Ballots

In *Anderson v. Martin,*[265] the Supreme Court struck down a state provision requiring the identification on the ballot of a candidate's race. No other case has dealt with ballot identification; thus states may be able to accomplish such discriminatory purposes through other means, such as candidate photographs on the ballot, especially where racially dis-

[258] *E.g.,* Socialist Workers Party v. Hill, 483 F.2d 554 (5th Cir. 1973); Communist Party v. Ogilvie, 357 F. Supp. 105 (N.D. Ill. 1972).

[259] Toporek v. South Carolina State Elections Comm'r, 362 F. Supp. 613 (D.S.C. 1973); *see* Canton v. Todman, 367 F.2d 1005 (3d Cir. 1966).

[260] Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents,* 45 S. CAL. L. REV. 365 (1972).

[261] *E.g.,* Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958).

[262] Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents,* 45 S. CAL. L. REV. 365, 379 n.37 (1972).

[263] UTAH CODE ANN. §§ 20–3–20, 20–7–5 (1969); *id.* § 20–12–1 (Supp. 1973).

[264] *E.g.,* Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969); Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958); Elliott v. Secretary of State, 295 Mich. 245, 294 N.W. 171 (1940). For a rare case in which such a challenge was dismissed, see Voltaggio v. Caputo, 210 F. Supp. 337 (D.N.J. 1962), *appeal dismissed,* 371 U.S. 232 (1963).

[265] 375 U.S. 399 (1964).

criminatory motives are less clear. Whether the possibility for racial discrimination would be sufficient to invoke *Anderson* would probably depend on the circumstances of the case, if it ever arises.

The converse of the *Anderson* problem is presented when a candidate seeks an identifying caption, such as incumbency, or the listing of married and separate names for women candidates, or the listing of professional or political titles for independent candidates, such as "liberal" or "conservative." In *Rees v. Layton*,[266] a suit by candidates seeking to list their professions, a California court held that there was no rational basis for a statute which allowed only the incumbent to list his profession. In *Voltaggio v. Caputo*,[267] a federal district court upheld a statute prohibiting an independent candidate from using an identifying slogan which contained any part of the name of any other party. These cases seem to stand for the proposition that discriminatory listing of identifying captions between incumbents and nonincumbents, or between professions will not be tolerated under the equal protection clause.[268] Where titles will produce more accurate voter identification, such as a married woman's full married and independent name or a further distinction between candidates with similar names, there is reason for allowance.[269] It is doubtful, however, that the claimed right to include identifying captions is of constitutional proportion; thus most successful actions will likely involve unequal treatment.

K. Miscellaneous

Several other ballot access regulations merit passing mention. A state law prohibiting a candidate from representing more than one party on the ballot has been struck down.[270] By liberal statutory construction, a state court voided a practice where candidates could only be drawn from among those who voted in the previous state general election.[271] The exclusion of persons previously convicted of felonies is of recently reaffirmed validity.[272] No case has yet challenged a constitutional provision limiting the number of terms a person can hold an elective office, but that also seems likely to withstand challenges.

IV. CONCLUSION

Constitutionally, the right to run for office is a critical and basic right. Given the present doctrinal drift of the Supreme Court, the effort

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[266] 6 Cal. App. 3d 815, 86 Cal. Rptr. 268 (1970).

[267] 210 F. Supp. 337 (D.N.J. 1962), *appeal dismissed*, 371 U.S. 232 (1963).

[268] Williamson v. Fortson, 43 U.S.L.W. 2017 (N.D. Ga. June 19, 1974) (holding that designation of incumbency on the primary ballot was permissible).

[269] *See* Kelman, *Ballot Designations: Their Nature, Function, and Constitutionality*, 12 WAYNE L. REV. 756 (1966).

[270] United Ossining Party v. Hayduk, 357 F. Supp. 962 (S.D.N.Y. 1971).

[271] Cottingham v. Vogt, 60 N.J. Super. 576, 160 A.2d 57 (1960).

[272] Richardson v. Ramirez, 94 S. Ct. 2655 (1974).

to achieve fundamental status for the right may now be misguided or useless. Hence, efforts ought rather to be directed toward clear articulation and demonstration of the inherent and distinct importance of ballot access rights to our constitutional form of government and its practical operation, so that these rights will be protected by courts regardless of the doctrinal test which they choose to apply. This is particularly important if the presages of lessened protection for voting rights are accurate. Furthermore, future litigation can be successfully pursued by claimants and satisfyingly adjudicated by courts only through the careful balancing of the real state interests involved against the ballot access rights asserted. Because of the importance of the ballot to the American citizen, the constitutional standards which ballot access barriers must meet should be very demanding.

The Need for Counsel in the Juvenile Justice System: Due Process Overdue

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[1]

I. Introduction

The Supreme Court has held that a person accused of a crime "requires the guiding hand of counsel at every step in the proceedings against him." [2]

> [I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.[3]

Despite this well recognized right to counsel at every "critical stage" of a criminal proceeding,[4] the Supreme Court has only recently in *In re Gault* [5] extended the right to counsel to the juvenile justice system. Moreover, although the Court in *Gault* implied that the right to counsel may be required at every stage of the proceeding, it limited its holding to requiring counsel only at the formal delinquency hearing.[6] As a result, the scope of the juvenile's right to counsel is unsettled.

This Note will consider the juvenile's right to counsel in the juvenile justice system.[7] It will include an analysis of the procedure and the need

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[1] Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

[2] *Id.* at 69. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972).

[3] United States v. Wade, 388 U.S. 218, 226 (1967).

[4] The right to counsel has been extended to the following criminal proceedings: (1) pretrial — United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Berry v. New York, 375 U.S. 160 (1963); White v. Maryland, 373 U.S. 59 (1963; Hamilton v. Alabama, 368 U.S. 52, 54 (1961); (2) trial — Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); and (3) post-trial — Mempa v. Rhay, 389 U.S. 128 (1967); Swenson v. Bosler, 386 U.S. 258 (1967); Douglas v. California, 372 U.S. 353 (1963).

[5] 387 U.S. 1 (1967).

[6] While the Court in *Gault* was concerned only with the adjudication stage of the delinquency proceedings, the Court in citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932), declared that "the child requires the guiding hand of counsel at every step in the proceedings against him." 387 U.S. at 36.

[7] Generally, the juvenile courts have jurisdiction over children in three different circumstances:

for counsel at the various stages of the juvenile proceedings, including: (1) the police custodial stage where the juvenile is initially taken into custody and often interrogated; (2) the intake stage where juvenile court personnel review the case with a view to dismissal, informal disposition, or referral to the court for a formal delinquency hearing; (3) the delinquency hearing; (4) the dispositional hearing where the court determines the appropriate disposition with respect to society's and the child's best interest; and (5) post-dispositional proceedings.

To the juvenile who is being prosecuted, each stage of the juvenile proceedings is "critical." Thus, this Note will argue that the right to counsel should be granted at each stage as a matter of fundamental fairness and in the interests of efficient administration.

II. From Parens Patriae to the Right to Counsel

The doctrine of *parens patriae* is part of a legal and social philosophy used to justify a separate judicial system for juveniles. Application of the doctrine diminishes the importance of counsel in the juvenile proceedings since the proceedings are considered nonadversarial and the judge's responsibility is to protect the "best interests" of the child.

A. The Development of the Doctrine of Parens Patriae

The doctrine of *parens patriae* had its historical antecedents in the English Court of Chancery. *Parens patriae* described the doctrine by which the sovereign, as *pater patriae,* assumed an obligation to oversee the welfare of the children of the state who, "because of the frailties intrinsic to their minority, might be abused, neglected, or abandoned by their parents or other guardians." [8] Although the doctrine permitted state intervention in cases of child abuse, neglect, or abandonment, the chancery court seldom exercised its jurisdiction. The common law presumption that parents fulfilled their legal duties to their children required a clear demonstration that the child was in severe danger before the chancery court would intervene.[9] Once it exercised jurisdiction, the chancery court had limited means to provide for the child's custody and care.[10]

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(1) those who have committed acts harmful to themselves or others and thereby have given a sign of a need for care [juvenile delinquency]; (2) those whose need arises from their parents' or custodians' refusal or neglect to care for them [neglect]; and (3) those whose need arises from their parents' or custodians' inability to care for them [dependency].

Paulsen, *The Delinquency, Neglect, and Dependency Jurisdiction of the Juvenile Court,* in Justice for the Child 44–45 (M. Rosenheim ed. 1962).

This Note treats the right to counsel only in cases where the juvenile court's jurisdiction is based on delinquency actions.

[8] Ketcham, *The Unfulfilled Promise of the Juvenile Court,* 7 Crime & Delinq. 97, 98 (1961).

[9] *Id.* at 98 & nn.4 & 5, *citing* J. Pomeroy, A Treatise on Equity Jurisprudence § 1307 (5th ed. 1941) and E. Snell, The Principles of Equity 400 (19th ed. 1925).

[10] "It is not from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction, because the court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this

The exercise of *parens patriae* was additionally hampered in the United States by the fourteenth amendment which was held to protect the right of the parents to the custody of their children and to preclude state intervention without due process of law.[11] As a result, courts in the United States seldom exercised jurisdiction under *parens patriae* unless "clearly necessary in order to prevent injury to the child." [12]

Parens patriae as originally conceived had no application in the criminal sphere. Where the child's misfortunes were due to his own misdeeds rather than his parents', equity would not intervene. At the turn of the twentieth century, however, the theory of *parens patriae* was revised in the United States and expanded into a doctrine supporting an innovative form of juvenile proceedings.

The first juvenile court acts in the United States [13] established a separate judicial system for juvenile offenders. The juvenile court system was designed to focus on rehabilitation rather than punishment, and to preserve juvenile offenders from the stigma of criminality:

> To get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma, — this is the work which is now being accomplished by dealing even with most of the delinquent children through the court that represents the *parens patriae* power of the state, the court of chancery.[14]

This revised version of *parens patriae,* in providing an alternative judicial system for juveniles who had committed criminal or objectionable acts, quickly gained nearly universal acceptance,[15] despite the fact that it departed drastically from the earlier doctrine which protected children only in the case of parental neglect, abuse, or abandonment.

In the juvenile courts, the judge as the "benevolent parent dealing with an erring child" theoretically served the combined role of advocate, judge,

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jurisdiction fully and practically only where it has the means of applying property for the maintenance of the infant."

Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 105 (1909), *quoting the Wellesley* case, 2 Russ. 1, *aff'd,* 2 Bligh N.S. 124 (1827).

[11] Ketcham, *supra* note 8, at 98.

[12] *Id.* For a discussion of the theories supporting state intervention to protect the child where the parents have failed their obligations, see Note, *Rights of Juveniles to Constitutional Guarantees in Delinquency Proceedings,* 27 COLUM. L. REV. 968 (1927); Note, *The Constitutionality of Juvenile Court Acts,* 19 HARV. L. REV. 374 (1906); Note, *Misapplication of the Parens Patriae Power in Delinquency Proceedings,* 29 IND. L.J. 475 (1954).

[13] ILL. LAWS, 41st Gen. Ass., THE JUVENILE COURT ACT § 21, at 137 (1899), *cited in* Ketcham, *supra* note 8, at 99 n.11.

[14] Mack, *supra* note 10, at 109. *See also* Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court,* 12 BUFF. L. REV. 501, 503 (1963); Comment, *The Role of the Lawyer in Preparation for a Delinquency Hearing in the Juvenile Court,* 12 ST. LOUIS U.L.J. 631 (1968) [hereinafter cited as *The Role of the Lawyer*].

[15] Ketcham, *supra* note 8, at 99. H. LOU, JUVENILE COURTS IN THE UNITED STATES (1927); Hopson, *Introduction to Juvenile Court Symposium,* 43 IND. L.J. 523 (1968); Mack, *supra* note 10.

and jury. Procedural rights, including the right to counsel, were meaningless and probably inconsistent with the purpose of the system:

> There was no recognized right to counsel because the lawyer with his bag of adversary tactics would presumably be only sand in a well-ordered machine.[16]

Under this theory, the introduction of counsel would only "detrimentally formalize the proceedings," since "with all parties interested solely in the child's welfare there was thought to be no need to have an independent protector of the child's rights." [17] Since juvenile proceedings were not criminal, the sixth amendment did not require the presence of counsel.[18]

The theory of *parens patriae* notwithstanding, constitutional objections to juvenile proceedings, especially as to the lack of procedural safeguards, were consistently raised. Except in a few early cases, however, courts upheld the juvenile court systems against all constitutional challenges.[19] In justifying the constitutionality of the juvenile proceedings, the courts relied heavily on the theoretical ability of wise and benevolent judges to serve both the best interest of the child and preserve the child's legal and natural rights.

> The judge of any court, and especially a judge of a juvenile court, should . . . be willing at all times, not only to respect, but to maintain and preserve, the legal and natural rights of men and children alike. . . . The fact that the American system of government is controlled and directed by laws, not men, cannot be too often nor too strongly impressed upon those who administer any branch or part of the government. Where a proper spirit and good judgment are followed as a guide, oppression can and will be avoided.
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> . . . The juvenile court law is of such vast importance to the state and society that it seems to us it should be administered by those who are learned in the law and versed in the rules of procedure, to the end that the beneficent purpose of the law may be made effective and individual rights respected. Care must be exercised in both the selection of a judge and in the administration of the law.[20]

The fact that juvenile judges were unable to fulfill this omnipotent role led to a critical reevaluation of the doctrine of *parens patriae*.[21]

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[16] *The Role of the Lawyer, supra* note 14, at 632.

> The lawyer's role was minimal in this ideal structure for the overriding goals were to analyze, evaluate and provide treatment for the child, not to attach blame or fix guilt. The advocate was simply an unneeded and unwanted element.

Id. at 631.

[17] Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach,* 61 GEO. L.J. 1401, 1403 (1973).

[18] U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence."

[19] Mack, *supra* note 10, at 109–16; Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547, 549 (1957); Note, *Misapplication of the Parens Patriae Power in Delinquency Proceedings,* 29 IND. L.J. 475, 479–80 (1954).

[20] Mill v. Brown, 31 Utah 473, 487–88, 88 P. 609, 615 (1907).

[21] In contrast to the American juvenile court system and the revised doctrine of *parens patriae* in the United States, in England criminal rights are extended to

B. Parens Patriae Challenged — Gault to Winship and McKeiver

Despite the benevolent motives associated with the original development of the juvenile justice system, "the inequities which could and did result from such a system became more and more apparent." [22] Commentators recognized that "the restrictions and deprivations imposed by the juvenile courts are *in effect* punitive." [23] Further, given the rehabilitative objectives of the juvenile court system, the courts were dependent upon legislative and judicial support which was not forthcoming; consequently, "it was not surprising that this minor and low prestige legal institution fell into a state of slovenly behavior ripe for criticism and judicial scalpel." [24] Instead of creating a judicial system sensitive to the juvenile's best interests,

> the juvenile courts simply shut their eyes to whatever rights the child may have had all with the idea of creating a system that would function in the "best interest of the child." [25]

The attempt to rid juvenile proceedings of "the stark adversary context of adult criminal proceedings" [26] by not requiring or even approving of the assistance of counsel, in fact jeopardized the fair administration of the proceedings and worked against the court's theoretical objective.

In the early 1960's, several states, apparently in recognition of the deficiencies of the juvenile justice system, revised their juvenile court statutes to accommodate procedural safeguards, including the right to counsel.[27] In 1966, the Supreme Court in *Kent v. United States* [28] applied constitutional principles of due process to juvenile proceedings for the first time. In evaluating juvenile justice under *parens patriae,* Mr. Justice Fortas observed that

> [t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[29]

The following year, the Supreme Court in *In re Gault* [30] reiterated the

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juvenile criminal proceedings even though the dispositions in English cases are similar to those provided by American juvenile courts. Ketcham, *supra* note 8, at 100. This Note recommends that a similar practice be adopted in American juvenile proceedings, with the rehabilitative objective of the juvenile justice system accomplished through proper disposition rather than through the sacrifice of due process.

[22] Comment, *The Attorney-Parent Relationship in the Juvenile Court,* 12 ST. LOUIS U.L.J. 603 (1968).

[23] Cohen, *An Evaluation of Gault by a Sociologist,* 43 IND. L.J. 614, 615 (1968).

[24] Hopson, *supra* note 15, at 523.

[25] *The Role of the Lawyer, supra* note 14, at 632. *See also* Paulsen, *supra* note 19, at 550.

[26] Kay & Segal, *supra* note 17, at 1403.

[27] *E.g.,* CAL. WELF. & INST'NS CODE § 500 *et seq.* (West 1972); N.Y. FAMILY CT. ACT § 741 (McKinney 1963).

[28] 383 U.S. 541, 554–56 (1966). The Court stated that *parens patriae* philosophy of the juvenile court "is not an invitation to procedural arbitrariness." *Id.* at 555.

[29] *Id.* at 556.

[30] 387 U.S. 1 (1967).

view that *parens patriae* would no longer justify depriving juveniles of procedural safeguards long recognized in criminal courts:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[31]

The Court detailed the vital functions of counsel in a fair juvenile proceeding:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him." [32]

The Court, however, limited its holding to the facts of the case, declining to require that all the procedural safeguards recognized in adult criminal proceedings be recognized in juvenile proceedings:

> [W]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. . . . We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.[33]

Despite the Court's limited holding in *Gault*, commentators viewed Gault and Kent as the death knell of *parens patriae*.[34]

> The mandates of [*Gault* and *Kent*] may indicate a trend toward judicial recognition that juveniles are entitled to every constitutional protection afforded an adult in both civil and criminal proceedings.[35]

That view was reinforced in 1970, in *In re Winship*,[36] where the Court held that delinquency findings based on claims of criminal law violation must be proved beyond a reasonable doubt.

In 1971, however, the Court refused to terminate the juvenile justice experiment, holding in *McKeiver v. Pennsylvania* [37] that juveniles are

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[31] *Id.* at 41.

[32] *Id.* at 36, *quoting* Powell v. Alabama, 287 U.S. 45, 69 (1932).

[33] 387 U.S. at 13.

[34] Kay & Segal, *supra* note 17, at 1408.

[35] *The Role of the Lawyer, supra* note 14, at 633.

[36] 397 U.S. 358 (1970). *Winship* was held to apply retroactively in *Ivan V. v. City of New York*, 407 U.S. 203 (1972).

[37] 403 U.S. 528 (1971). The Court held that trial by jury was not a fundamental element of due process and consequently was not required in juvenile cases.

not entitled to trial by jury. Notwithstanding the *Kent, Gault, Winship* trends, *McKeiver* demonstrates that the Supreme Court intends to permit experimentation in the juvenile justice system so long as the experiment does not violate "fundamental fairness." What is not clear is to what extent *McKeiver* affects the extension of the right to counsel beyond the delinquency hearing to other stages of the juvenile proceeding:

> *McKeiver,* with its endorsement of some of the non-adversary aspects of juvenile courts, left the juvenile justice system situated somewhere between the discretionary, paternalistic process of the pre-*Gault* era and the rigid, highly regularized, adversary procedure of the adult criminal process.[38]

Although *McKeiver* "emphasized the right of the state to deal with juveniles in a way different from the way it treated adults," [39] it does not permit violations of the "fundamental fairness" standard. The right to counsel is inherent in any reasonable standard of fairness and is equally applicable to judicial proceedings as to criminal proceedings. Without counsel the value of other rights, including the privilege against self-incrimination, is substantially lessened. Accordingly, while states may be allowed to vary the form of the proceedings, due process demands that the assistance of counsel be provided at every "critical" stage of the juvenile proceeding.

III. STAGES OF THE JUVENILE JUSTICE SYSTEM AND THE RIGHT TO COUNSEL

Proceedings in the juvenile justice system can be generally categorized as follows: (1) police contact and temporary detention, (2) intake, (3) transferral, (4) adjudication, (5) disposition, and (6) continuing jurisdiction. Each of these stages offers opportunities for "rehabilitative treatment," but each is also a potential source of discretionary abuse violative of individual rights.

A. Police Contact

The importance of a juvenile's initial contact with the police cannot be overemphasized: "[T]he vast majority of juveniles who appear in court are police referrals and half of all police contacts are settled without referral." [40] Since courts have held that in criminal proceedings procedural due process requires the appointment of counsel as soon as possible after the accused is taken into custody and prior to custodial interrogation,[41] the same protection should be afforded to juveniles. Furthermore, other

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[38] Kay & Segal, *supra* note 17, at 1409.

[39] *Id.*

[40] Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice,* 79 HARV. L. REV. 775, 776 (1966) [hereinafter cited as *Juvenile Delinquents*].

[41] *E.g.,* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

rights associated with pretrial prosecutorial proceedings require the assistance of counsel for their recognition.

1. Arrests, Searches and Seizures — Statutes governing the juvenile justice system typically provide that the taking into custody of a juvenile shall not be deemed an arrest, but "for all practical purposes, this has been a legal fiction since the child is being held in involuntary custody." [42] Where juveniles are placed into custody for delinquent acts, the law of arrest for adults is often incorporated by reference.[43] Thus, constitutional protections against unlawful arrests should be as applicable in juvenile cases as it is in adult criminal cases.[44]

Some recent cases suggest that the prohibition against unlawful arrests and the requirement of probable cause will be extended to juveniles when they are taken into custody for acts that would be criminal if committed by an adult.[45] Therefore, the assistance of counsel should be required in either a *habeas corpus* proceeding where the accused is seeking release from detention pending adjudication or in efforts to suppress evidence obtained incident to an unlawful arrest.

Courts have also held that the fourth amendment limitations on search and seizure earlier recognized in criminal proceedings are applicable to juvenile proceedings.[46] The assistance of counsel is necessary in efforts to suppress evidence obtained in unlawful searches.

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[42] U.S. DEP'T OF HEALTH, EDUC., & WELFARE, CHILDREN'S BUREAU, LEGISLATIVE GUIDE FOR DRAFTING FAMILY & JUVENILE COURT ACTS 20 (1969) [hereinafter cited as LEGISLATIVE GUIDE]. It should be noted that, under the LEGISLATIVE GUIDE § 18, taking a child into custody for a delinquent act is to be deemed an arrest. *Id.*

[43] *See, e.g.*, MD. ANN. CODE art. 26, § 70–9 (1973); NEV. REV. STAT. § 62.170(1) (1973); M. MIDONICK, CHILDREN, PARENTS AND THE COURTS: JUVENILE DELINQUENCY, UNGOVERNABILITY AND NEGLECT 27 (1972).

[44] *See, e.g.*, OHIO REV. CODE ANN. § 2151.31 at 239 (Supp. 1973) (which provides that while taking a juvenile into custody is not to be considered an arrest, the constitutional standards pertaining to arrests are nonetheless applicable).

[45] *E.g.*, Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969); Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969), *rev'd on other grounds*, 442 F.2d 29 (7th Cir. 1971); Buckley v. Rambeau, 266 Cal. App. 2d 1, 72 Cal. Rptr. 171 (1968); *see also In re* Lang, 44 Misc. 2d 900, 255 N.Y.S.2d 987 (N.Y. County Family Ct. 1965).

In *Cooley v. Stone*, the district court granted a writ of *habeas corpus* because the juvenile had been detained pending adjudication without a judicial inquiry into probable cause for arrest and detention, stating that

> [n]o person can be lawfully held in penal custody by the state without a prompt judicial determination of probable cause. The Fourth Amendment so provides and this constitutional mandate applies to juveniles as well as adults. Such is the teaching of *Gault* and . . . *Kent*.

414 F.2d at 1213.

In *Baldwin v. Lewis*, in granting a writ of *habeas corpus* on the ground that the juvenile had been arrested and detained without a probable cause hearing, the district court stated that statutory rhetoric to the effect that the taking of a juvenile into custody is not to be deemed an arrest does not negate the constitutional mandate that probable cause must exist before a juvenile may be taken into custody on suspicion of having committed an act which would constitute a crime if committed by an adult. 300 F. Supp. at 1230.

[46] *E.g.*, *In re* Williams, 49 Misc. 2d 154, 168–69, 267 N.Y.S.2d 91, 109 (Ulster County Family Ct. 1966); *In re* Ronny, 40 Misc. 2d 194, 242 N.Y.S.2d 844 (Queens County Family Ct. 1963).

In *In re Ronny*, the court held search and seizure limitations applicable to juvenile proceedings:

2. Pretrial Identification — The Supreme Court has held that in-court identification by a witness, based on a prior identification at a police lineup, can only be admitted where counsel was present at the lineup or where the right to counsel was voluntarily waived.[47] In *In re T.*,[48] a California court held that the exclusionary rules recognized in criminal courts apply to juvenile proceedings. The defendant claimed that the pretrial identification in the case violated constitutional standards. Applying the exclusionary rule, the court noted that "juvenile proceedings of this character must meet the text of constitutional due process of law." [49] The court further held that all pretrial identifications arranged by the police are unconstitutional when the accused is denied assistance of counsel:

> A suspect needs the assistance of counsel to insure the fairness of any in-person pretrial identification arranged by the police and to prepare his counsel for effective cross-examination at the trial of the People's witnesses participating in the identification . . . .[50]

In *Gault,* the Court recognized that juveniles have a right to counsel and a right to effective cross-examination at the adjudicatory stage. Since the right to counsel at the lineup is predicated on these rights, pretrial identifications in the juvenile setting should adhere to the same constitutional standard. Some courts have adopted this reasoning and have extended the protection of the lineup doctrine to juvenile court proceedings.[51]

3. Privilege Against Self-Incrimination — The privilege against self-incrimination is often abused by the police where the juvenile is in custodial care. *Gault* applied this privilege to juvenile proceedings, thus impliedly extending the *Miranda* [52] standard to the juvenile process.

Prior to *Gault* and *Miranda,* the Supreme Court had held that due process prohibited the use of involuntary confessions by juveniles. In *Haley v. Ohio,*[53] the Court suppressed a confession obtained after five hours of continuous police questioning of a fifteen-year-old on the basis

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> [S]uch an approach [denying protection against unreasonable searches and seizures to a juvenile because of the "civil" statutory label of delinquency] has no proper place in the delinquency and need-of-supervision jurisdiction of the Family Court. I can think of few worse examples to set for our children than to visit upon children what would be, if they were older, unreasonable and unconstitutional invasions of their all-too-limited privacy and rights, merely because they are young. In this sense, our proceedings are not "civil". They are perhaps, for this purpose "quasi-criminal" in character.

40 Misc. 2d at 209–10, 242 N.Y.S.2d at 860.

[47] Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

[48] 1 Cal. App. 3d 344, 81 Cal. Rptr. 655 (1969).

[49] *Id.* at 352, 81 Cal. Rptr. at 659.

[50] *Id.* at 353, 81 Cal. Rptr. at 660.

[51] *E.g.,* Jackson v. State, 249 Ark. 653, 460 S.W.2d 319 (1970) (dictum); *In re* T., 1 Cal. App. 344, 81 Cal. Rptr. 655 (1969); *In re* McKelvin, 258 A.2d 452 (D.C. App. 1969) (dictum); *In re* Holley, 107 R.I. 1615, 268 A.2d 723 (1970).

[52] Miranda v. Arizona, 384 U.S. 436 (1966).

[53] 332 U.S. 596 (1948).

of due process. In *Gallegos v. Colorado*,[54] the Court suppressed a confession of a juvenile which had been obtained after five days of incommunicado detention. In determining the constitutionality of the use of the confession, the Court in *Gallegos* established a voluntariness test which has been generally followed to the present:

> There is no guide to the decision of cases such as this, *except the totality of circumstances* . . . . The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend — *all these combine* to make us conclude that the formal confession on which this conviction may have rested . . . was obtained in violation of due process.[55]

The Supreme Court in *Gault* reaffirmed the thesis expressed in *Gallegos* and *Haley*, suggesting that the presence of counsel may be essential to sustain the voluntariness of any confession:

> We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique — but not in principle — depending upon the age of the child and the presence and competence of parents. *The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege.* If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.[56]

Since *Gault* many courts have concluded that the *Miranda* requirements apply to juvenile interrogations.[57] Other courts and commentators have suggested that even the *Miranda* warnings may be inadequate in many delinquency cases where due to age or mental immaturity the juvenile may not have the ability to comprehend their significance, and that other methods of protecting the juvenile's privilege against self-incrimination should be devised:

> The *Miranda* warnings were devised to protect the adult offender against the abuses of police interrogation. . . . Should not juveniles

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[54] 370 U.S. 49 (1962).

[55] *Id.* at 55 (emphasis added).

[56] 387 U.S. at 55 (emphasis added).

[57] *E.g.*, Lopez v. United States, 399 F.2d 865 (9th Cir. 1968); *In re* M., 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969); State v. Sinderson, 455 S.W.2d 486 (Mo. 1970); Commonwealth v. Darden, 441 Pa. 41, 271 A.2d 257 (1970), *cert. denied*, 401 U.S. 1004 (1971); Leach v. State, 428 S.W.2d 817 (Tex. Civ. App. 1968); State v. Prater, 77 Wash. 2d 526, 463 P.2d 640 (1970); *cf. In re* W., 115 N.J. Super. 286, 279 A.2d 709 (App. Div.), *aff'd*, 61 N.J. 118, 293 A.2d 186 (1971). *See* M. MIDONICK, *supra* note 43, at 51. *See generally* Glen, *Interrogation of Children: When are Their Admissions Admissible?*, 2 FAM. L.Q. No. 3, 280 (1968).

> be afforded a safeguard sufficient to protect their rights against these same abuses? [58]

In *In re L.*,[59] the court took this approach. Although the accused juvenile had been "meticulously" warned of his *Miranda* rights,[60] the court concluded that the accused had not received the intended benefits of *Miranda,* particularly the presence of parent or counsel to which he was entitled.[61] Relying on *In re L.,* the court in *In re W.*[62] suppressed an admission made at arraignment, apparently because the juvenile had been without counsel at the time he made his admission.

Authorities have also suggested that any confession by a juvenile without counsel should be excluded from any subsequent delinquency adjudication.[63]

> If the *Miranda* requirements, including the right to counsel, are necessary to prevent erosion of the privilege in the case of an adult, then the case of a juvenile is *a fortiori* because of considerations of age and immaturity. . . . When there is added the extraordinary detention powers over juveniles provided by the laws of many states, the risk that the privilege will in fact be eroded is so great that the case for the *Miranda* requirements becomes compelling.[64]

Many juvenile court acts, including the Standard Juvenile and Family Court Acts, strictly limit police authority over juveniles after arrest, requiring that the child either be released to his parents or guardian or taken "without unnecessary delay to the [juvenile] court or a place of detention or shelter designated by the court."[65] Where juvenile acts require that arrested children be taken immediately to juvenile court facilities, courts have held that confessions obtained during custodial questioning are inadmissible in subsequent adjudicatory proceedings.[66] In jurisdictions where custodial questioning is permitted, the privilege against self-incrimination precludes the use of confessions obtained in violation of constitutional standards.[67] Whatever rehabilitative purposes juvenile confessions serve could be preserved by immunizing "the juvenile from the

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[58] Note, *Interrogation — Parens Patriae v. Miranda: Conflicting Interests — State v. In the Interest of R.W.,* 3 SETON HALL L. REV. 482, 489 (1972).

[59] 29 App. Div. 2d 182, 287 N.Y.S.2d 218 (1968).

[60] *Id.* at 184, 287 N.Y.S.2d at 221.

[61] *Id.*

[62] 29 App. Div. 2d 873, 288 N.Y.S.2d 380 (1968).

[63] Dorsen & Rezneck, *In re Gault and the Future of Juvenile Law,* 1 FAM. L.Q. No. 4, 1 (1967).

[64] *Id.* at 39.

[65] NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD JUVENILE COURT ACT § 17(6) (6th ed. 1959) [hereinafter cited as STANDARD ACT]. *See* similar provisions in state juvenile court acts: *e.g.,* CAL. WELF. & INST'NS CODE § 626(c) (West 1972); COLO. REV. STAT. ANN. § 22-2-2(3)(b) (1964); ILL. REV. STAT. ch. 37, § 703-2(1) (1971).

[66] United States v. Glover, 372 F.2d 43 (2d Cir. 1967); State v. Arbeiter, 408 S.W.2d 26 (Mo. 1966).

[67] *E.g., In re* Carlo & Stasilowicy, 48 N.J. 224, 225 A.2d 110 (1966); *In re* W. & S., 19 N.Y.2d 55, 224 N.E.2d 102 (1966).

use of his statements, and any evidence obtained therefrom in any subsequent proceedings to adjudicate him a delinquent." [68] This is the approach taken by the Council of Judges' (National Council on Crime and Delinquency) proposed rule to govern the admissibility of out-of-court statements made by juveniles:

> No extra-judicial statement by a child to a peace officer or court officer shall be admited into evidence unless made in the presence of a parent or guardian of the child, or of the child's counsel. No such statement shall be admitted into evidence unless the person offering the statement demonstrates to the satisfaction of the court that, before making the statement, the child and his parents were informed and intelligently comprehended that the child need not make a statement, that any statement made might be used in a court proceeding, and that the child has a right to consult with counsel prior to ordering the making of a statement.[69]

The privilege against self-incrimination explicitly extended to juvenile proceedings in *Gault* requires at a minimum that the *Miranda* warnings be given prior to any police questioning. Where the warnings are inadequate to protect the child from the abuses of police interrogation, statements made without the assistance of counsel should be inadmissible in subsequent adjudicative proceedings.

4. Police Screening and Sanctions — Police officers have several options on their first encounter with a juvenile:

> (1) release the juvenile, with or without a warning, but without making an official record or taking further action; (2) release the juvenile, but write up a brief "field report" for the juvenile bureau describing the contact, or file a more formal report referring the matter to the juvenile bureau for possible action; (3) turn the youth over to the juvenile bureau immediately; or (4) refer the case directly to the juvenile court.[70]

Standards to guide the police officer's decision vary with jurisdiction and are generally as much the result of informal procedure as of formal instructions. Some jurisdictions require immediate referral to juvenile facilities upon arrest. Others mandate referral to the juvenile bureau only for certain offenses or where the juvenile is currently on parole or probation. In some jurisdictions where an automatic court referral is not mandatory, an informal proceeding commonly referred to as a police hearing is conducted to determine whether judicial proceedings are necessary. The procedure at the police hearing generally follows a certain pattern:

> A notice of the time and place of the proceeding is . . . either mailed to the juvenile's parents or delivered to them by a patrolman. The juvenile and his parents appear before a "hearing officer" or "counselor," and the juvenile is questioned about his participation in the offense under in-

[68] Dorsen & Rezneck, *supra* note 63, at 40.

[69] COUNCIL OF JUDGES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS, R. 25 at 53 (1969) [hereinafter cited as MODEL RULES].

[70] *Juvenile Delinquents, supra* note 40, at 777.

> vestigation. Only rarely is the youth accompanied by counsel or advised of a right to remain silent. In none of the notice forms that were examined is there any mention of a right to counsel. Indeed, to the police the "right" to counsel or to remain silent is simply not in accord with the nature of the process, because both the hearing and the decision are matters completely within their discretion.[71]

If the juvenile denies any involvement in the alleged offense, "[t]he police generally refer [the case] to court . . . in order to prevent the referral threat from losing its potency." [72] If the juvenile confesses, the officer may

> release the child to his parents with a reprimand or warning; direct the child (and perhaps his parents) to a community social service agency; or refer the case to court. Some hearing officers have the additional alternative of imposing direct sanctions on the juvenile.[73]

The juvenile's initial encounter with the police, therefore, is a "critical" stage of the juvenile proceeding requiring the appointment of counsel at the earliest practicable time. The assistance of counsel is essential not only to ensure that juvenile cases are properly handled outside the juvenile court process, but also to ensure that individual rights are protected.

B. Intake

Intake is a preliminary proceeding unique to the juvenile justice system. It differs from the preliminary procedures of the criminal court process in that it involves a determination not only of whether the court has jurisdiction and whether a *prima facie* case exists, but also whether formal adjudication is most appropriate.[74] In 1967, fifty-three percent of all cases referred to juvenile courts were screened out at intake. Intake, therefore, is a "critical" stage of the juvenile proceeding and consequently requires that an accused be afforded the right to counsel:

> From the pragmatic standpoint, the pre-judicial stage provides the most frequent and the best opportunity for dispensing justice and "treatment" to the alleged juvenile offender. It also provides an opportunity for abuse, discrimination, and extra-legal measures.[75]

Counsel can serve an important function at intake both in assisting the intake department in the efficient administration of justice and in protecting the juvenile from unnecessary restrictions of his constitutional rights.

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[71] *Id.* at 780.

[72] *Id.* at 781.

[73] *Id.*

[74] The intake process differs from police screening in two important respects: first, intake screening personnel are usually trained and experienced in "social investigation"; second, they are generally under the immediate supervision of the juvenile court judge . . . .
Id. at 788.

[75] Foster, *Notice and "Fair Procedure": Revolution or Simple Revision?*, in GAULT: WHAT NOW FOR THE JUVENILE COURT? 51, 57 (V. Nordin ed. 1968).

The right to counsel will be analyzed with respect to: (1) the privilege against self-incrimination; (2) the intakes officer's decision to refer the case for a formal delinquency hearing; (3) informal disposition alternatives available at intake; (4) pretrial discovery; and (5) the right to a pretrial detention hearing where detention is proposed pending further adjudication.

1. Intake and the Privilege Against Self-Incrimination — Informal disposition at intake often depends upon admissions of the accused; consequently, intake "is a prolific source of juvenile admissions." [76] The preceding discussion of the privilege against self-incrimination and the applicability of *Miranda* to police investigatons also applies to intake and suggests the following: first, if the juvenile is encouraged to make admissions under the threat of further court proceedings notwithstanding *Gault's* clear mandate extending the privilege against self-incrimination to juvenile proceedings, the juvenile should be immunized from the use of such admissions at ensuing delinquency proceedings.[77] Second, in jurisdictions where admissions at intake are admissible in subsequent delinquency proceedings due process requires that counsel be appointed at intake to advise the accused concerning his privilege against self-incrimination.

2. The Intake Officer's Decision to Refer the Case to a Formal Delinquency Hearing — The chief function of the intake officer is to determine which cases should be referred to the juvenile courts. The criteria and procedures used in this determination vary substantially depending upon the jurisdiction. The intake officer generally dismisses cases where (1) the court lacks jurisdiction, (2) there is insufficient evidence, or (3) filing a petition would not be in the best interests of the child or the public. To some extent, at least, the intake officer must ascertain whether "it is useful to [adjudicate] in the light of community norms and resources and the case situation." [78]

Jurisdictional questions to be resolved at intake are generally regulated by statute. The intake officer ordinarily "is able to determine whether the court has jurisdiction, but he may need to consult legal counsel if he encounters difficult jurisdictional questions." [79] Where jurisdictional problems cannot be resolved by the parties, a formal hearing may be necessary.[80]

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[76] Dorsen & Rezneck, *supra* note 63, at 41.

[77] The difficulties of ascertaining the voluntariness of admissions during custodial interrogation by the police are even greater at the intake stage where the interrogating officer has the discretion to dismiss the case or provide for an informal disposition.

[78] Ferster, Courtless & Snethen, *Separating Official and Unofficial Delinquents: Juvenile Court Intake,* 55 IOWA L. REV. 864, 865 n.6 (1970), *quoting* A. KAHN, STUDIES IN SOCIAL POLICY AND PLANNING 86–87 (1969).

[79] Ferster, Courtless & Snethen, *supra* note 78, at 869; Rosenheim & Skolar, *The Lawyer's Role at Intake and Detention Stages of Juvenile Court Proceedings,* 11 CRIME & DELINQ. No. 3, at 167, 169–70 (1965); Sheridan, *Juvenile Court Intake,* 2 J. FAM. L. 139, 148 (1962).

[80] *See* authorities cited note 79 *supra.*

Once jurisdiction is established, the intake officer determines whether sufficient evidence exists to support the delinquency charges. In some jurisdictions the intake investigation is limited to reviewing police reports and interviewing complainants and witnesses; in others the intake officer makes extensive fact-finding investigations. This fact-finding role in preliminary investigations often leads to abuse of intake authority. As originally formulated the preliminary inquiry was merely

> to determine whether the best interest of the child or of the public require the filing of a petition. It was mistakenly interpreted to mean the making of social studies to help the court arrive at a disposition. As a result, full probation investigations were made . . . even when parents and children denied the allegations of the petition.[81]

In the preliminary investigation the assistance of counsel is necessary to protect the interests of the accused. Since the investigation's purpose is merely to ascertain probable cause, "intake officers must avoid usurping the judge's prerogative to try the case on its merits." [82]

After establishing jurisdiction and probable cause, the intake officer must decide whether formal adjudication is in the best interests of the child or the public. The officer often holds a hearing "inviting the juvenile, his parents, and any complainants. At such a conference, the officer may attempt to make an *adjustment* that will make further, i.e. involuntary, proceedings unnecessary." [83] Specific criteria to determine the "best interest" of the child, however, are seldom articulated.[84] Also, "[j]uvenile courts . . . normally fail to provide written guidelines. Even organizations which propose model standards refer only to 'best interests.' " [85]

Several studies indicate that the criteria generally used to determine whether to refer cases to the juvenile court are whether the juvenile admits to the charges [86] and consideration of the "age of the child; previous record; family background; seriousness of the offense; and the attitudes of both the juvenile and his parents." [87] Some jurisdictions restrict the intake officer's discretion by requiring that all contested cases, all cases involving serious offenses or juveniles who are repeated offenders, and all cases where the parents or the juvenile requested the filing of a petition, be

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[81] Wallace & Brennan, *Intake and the Family Court,* 12 BUFF. L. REV. 442, 445 (1963).

[82] Waalkes, *Juvenile Court Intake — Unique and Valuable Tool,* 10 CRIME & DELINQ. 117, 119 (1962). *See also* Sheridan, *supra* note 79, at 147: "[A]n extended investigation . . . involving highly personal matters, cannot be justified before the filing of a petition."

[83] Levine, *The Current Status of Juvenile Law,* in JUVENILE JUSTICE MANAGEMENT 547, 564 (G. Adams, R. Carter, J. Gerletti & D. Pursuit eds. 1973) [hereinafter cited as JUVENILE JUSTICE MANAGEMENT].

[84] *See* statutes collected in Ferster, Courtless & Snethen, *supra* note 78, at 872 n.37.

[85] *Id.* at 872. *See, e.g.,* LEGISLATIVE GUIDE, *supra* note 42, § 13(a); MODEL RULES, *supra* note 69, R.3 at 10.

[86] Informal disposition at the intake level often requires that the accused admit to the facts charging acts of delinquency. JUVENILE JUSTICE MANAGEMENT, *supra* note 83, at 564; *Juvenile Delinquents, supra* note 40, at 788.

[87] JUVENILE JUSTICE MANAGEMENT, *supra* note 83, at 564.

referred to the juvenile court for adjudication.[88] The President's Commission on Law Enforcement and Administration of Justice has suggested that:

> [W]ritten guides and standards should be formulated and imparted in the course of inservice training. Reliance on word of mouth creates the risk of misunderstanding and conveys the impression that prejudicial dispositions are neither desirable nor common. Explicit written criteria would also facilitate achieving greater consistency in decision-making.[89]

Such an approach is necessary because "[q]uite often the intake officer decides to detain a youth on the basis of criteria quite apart from any rational consideration." [90]

> The few empirical studies made examined on-the-spot decisions by juvenile officers rather than hearings, but confirm in that setting the tendency to rely on improper criteria. One study concluded that the determinative factors are the juvenile's demeanor, his appearance and his race; another confirms the reliance on race and notes wryly that "athletes and altar boys will rarely be referred to court for their offenses." [91]

Accordingly, counsel should be appointed to ensure that the decision to refer cases from intake to the juvenile courts is fairly made.

3. Informal Disposition at Intake — In the juvenile justice system intake frequently operates as a dispositional agency. A case may be settled informally by (1) adjustment, (2) probation, or (3) a consent decree. Informal disposition proceedings are justified in terms of three functions which they purportedly serve: "saving judicial time by reducing the number of formal hearings; preventing delinquency by giving service to children who are showing signs of getting into trouble; and avoiding stigmatizing a child by adjudicating him a 'delinquent.' " [92] In attempting to accomplish these functions, however, intake is subject to criticism for unduly encroaching on the responsibilities of the court, and for restricting juveniles' rights.

(a) Informal Adjustment — Approximately one-third of the states provide by statute [93] for informal adjustment procedures which dispose

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[88] *E.g.*, N.Y. FAMILY CT. ACT §§ 424(b), 734(b), 823(b) (McKinney 1963). *See also Juvenile Delinquents, supra* note 40, at 789.

[89] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELIQUENCY AND YOUTH CRIME 21 (1967) [hereinafter cited as TASK FORCE REPORT].

[90] Comment, *The Attorney-Parent Relationship in the Juvenile Court,* 12 ST. LOUIS U.L.J. 603, 634 (1968).

[91] *Juvenile Delinquents, supra* note 40, at 782.

[92] Ferster, Courtless & Snethen, *supra* note 78, at 877.

[93] ALASKA STAT. § 47.10.020 (1971); COLO. REV. STAT. ANN. § 22–3–1 (1964); CONN. GEN. STAT. ANN. § 17–61 (Supp. 1969); HAWAII REV. STAT. § 571–21 (1968); ILL. ANN. STAT. ch. 37, § 703–8 (Smith-Hurd 1972); IOWA CODE ANN. § 232.3 (1969); MD. ANN. CODE art. 26, § 70–7 (Cum. Supp. 1971); MISS. CODE ANN. § 7187–05 (Cum. Supp. 1972); MONT. REV. CODES ANN. § 10–605.1(1) (Supp. 1973); N.Y. FAMILY CT. ACT § 734 (McKinney 1963); N.D. CENT. CODE § 27–20–10 (1974);

of cases by remedies less severe than delinquency adjudication, "such as restitution or referral to a community agency." [94] Adjustment is used in certain cases where, for example, "the complainant may have . . . in the judgment of an experienced and neutral probation officer, magnified an incident out of proportion." [95]

Only five of the states that provide for informal adjustment detail the procedure to be used.[96] The Children's Bureau recommends that informal adjustment be used "in order to expedite the intake process as well as to discourage the use of so-called unofficial probation and other services of a continuing nature without properly invoking the jurisdiction of the court."[97] The Bureau also recommends specific informal adjustment procedures:

> The intake officer of probation services shall have the authority to refer the case to an appropriate public or private agency or to conduct conferences for the purposes of affecting adjustments or agreements which will obviate the necessity for filing a petition. During such inquiries, a party may not be compelled to appear at any conference, to produce any papers, or to visit any place. Such inquiries and conferences shall not extend for a period beyond 30 days from the date the complaint was made.[98]

Model Rules provide for the right to counsel at intake and recommend that notice be given at the intake interview where informal adjustment occurs:

> If any party wishes to be represented by counsel, the interview shall end and all further interviews shall take place with counsel present unless the right is waived. If the officer thinks that the child should be represented by counsel at the interview even though counsel has not been requested, he shall so advise the child and his parents.[99]

(b) Informal Probation — Many states authorize the use of informal probation under certain circumstances.[100] The primary advantage of this form of disposition is that it avoids the long lasting consequences of formal delinquency adjudication: "curtailment of employment opportunity, quasi-criminal record, harm to personal reputation in the eyes of family

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OKLA. STAT. ANN. tit. 10, § 1103 (Supp. 1974); S.D. COMPILED LAWS ANN. § 26–8–1.1 (Supp. 1974); UTAH CODE ANN. § 55–10–83 (Supp. 1973); VA. CODE ANN. §§ 16.1–16.4 (Supp. 1973); WASH. REV. CODE ANN. § 13.04.056 (Supp. 1973); WIS. STAT. ANN. § 48.19 (1957).

[94] Ferster, Courtless & Snethen, *supra* note 78, at 879.

[95] MODEL RULES, *supra* note 69, Comment at 12.

[96] CONN. GEN. STAT. ANN. § 17–61 (Supp. 1969); ILL. ANN. STAT. ch. 37, § 703–8 (Smith-Hurd 1972); MD. ANN. CODE art. § 70–7 (Cum. Supp. 1971); N.Y. FAMILY CT. ACT § 734 (McKinney 1963); N.D. CENT. CODE § 27–20–10 (1974).

[97] LEGISLATIVE GUIDE, *supra* note 42, Comment at 15.

[98] *Id.* § 13, at 14.

[99] MODEL RULES, *supra* note 69, R.3 & Comment at 12.

[100] *E.g.*, COLO. REV. STAT. ANN. § 22–3–1 (1964); CONN. GEN. STAT. ANN. § 17–61 (Supp. 1969); N.Y. FAMILY CT. ACT § 734 (McKinney 1963); N.D. CENT. CODE § 27–20–10 (1974); S.D. COMPILED LAWS ANN. § 26–8–1.1 (Supp. 1974); UTAH CODE ANN. § 55–10–83 (Supp. 1973).

and friends and public reinforcement of antisocial tendencies." [101] Of secondary importance and questionable validity is the advantage of saving judicial time.[102] The disadvantages of informal probation, however, far outweigh the advantages:

> The merits of continuing informal supervision are dubious. The advantages of restricting the rights of children who are thought to be delinquent on the basis of not labeling them as delinquent are not compelling.[103]

The use of informal probation has been severely criticized [104] on several grounds. First, although intake proceedings are predicated on the accused's consent, the voluntary nature of consent at this stage is questionable, "where the present threat of use of authority is present." [105] Although the intake department lacks authority to compel informal dispositions, "[t]he threat of a formal petition is usually sufficient." [106] Second, since informal probation is generally used in cases where the accused admits the charges,[107] the juvenile's privilege against self-incrimination is jeopardized by the proceeding.[108] Third, despite the fact that a juvenile on informal probation may have his freedom restricted for substantial periods of time, his case may later be brought before the court on the original petition and admissions made at the intake interview are often admitted at trial.

Proponents of informal probation assert that its defects can be lessened by implementing the procedural safeguards.

> [T]he juvenile must admit his offense; the juvenile must agree to the informal process; self-prejudicing statements made during the informal process shall not be used in subsequent judicial proceedings; a specified time limit shall be placed on the informal probation period; and a petition on the original complaint shall not be allowed after an agreement has been worked out with the child or his parents.[109]

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[101] TASK FORCE REPORT, *supra* note 89, at 16.

[102] Fradkin, *Disposition Dilemmas of American Juvenile Courts,* in JUSTICE FOR THE CHILD 125 (M. Rosenheim ed. 1962).

[103] Ferster, Courtless & Snethen, *supra* note 78, at 887.

[104] LEGISLATIVE GUIDE, *supra* note 42, § 13 at 15.

[105] Ferster, Courtless & Snethen, *supra* note 78, at 882 n.91, *quoting* Sheridan, *Intake Through Disposition,* PROCEEDINGS OF THE ALABAMA WORK CONFERENCE FOR JUVENILE COURT JUDGES 36 (1965).

[106] Note, *Informal Disposition of Delinquency Cases: Survey and Comparison of Court Delegation of Decision-Making,* 1965 WASH. U.L.Q. 258, 271.

[107] Several states require that the accused admit to the facts of the offense before informal adjustment is permitted: COLO. REV. STAT. ANN. § 22–3–1 (1964); CONN. GEN. STAT. ANN. § 17–61 (Supp. 1969); IOWA CODE ANN. § 232.3 (1969); MD. ANN. CODE art. 26, § 70–7 (Cum. Supp. 1971); N.D. CENT. CODE § 27–20–10 (1974); S.D. COMPILED LAWS ANN. § 26–8–1.1 (Supp. 1974); UTAH CODE ANN. § 55–10–83 (Supp. 1973). MODEL RULE 4 also requires that informal adjustment only be permitted where the allegations are not controverted. MODEL RULES, *supra* note 69, at 13.

[108] Model Rule 4 provides that any admissions made during informal adjustment are inadmissible in a subsequent delinquency adjudication. MODEL RULES, *supra* note 69, at 13.

[109] Ferster, Courtless & Snethen, *supra* note 78, at 883.

None of the state or model laws, however, incorporates all these protections.[110] If use of informal probation is not discontinued counsel's presence at the intake interview should be a constitutional requirement.

(c) Continuance and Supervision without Adjudication: Consent Decrees — Consent decrees may be used in lieu of informal probation where both adjudication and dismissal are inappropriate.[111] A petition for a consent decree, by either the prosecuting officer or counsel for the juvenile, must be filed to initiate the proceeding,[112] and all parties must agree to the decree's provisions. The court decides the appropriateness of a consent decree if challenged by the prosecution and must proceed to delinquency adjudication if the juvenile objects to it.[113] The decree is in force for six months and contains an extension provision for an additional six months,[114] but the original charge may be petitioned to the court if the juvenile violates the decree.[115]

Since the consent decree is similar to informal probation, it is subject to many of the same criticisms: it restricts the juvenile's freedom without due process of law, jeopardizes a juvenile's privilege against self-incrimination, and presents a double jeopardy problem. The consent decree's primary advantages over informal probation are that it involves a more formal procedure, which anticipates the presence of counsel to ensure that the child's rights are protected, and that the proceedings are actually in the best interest of the accused.

On the other hand, the consent decree's advantages cannot compensate for the restrictions it imposes on the rights of individuals in comparison to formal adjudication where effective representation of counsel is constitutionally mandated and procedural safeguards are judicially enforced. Although informal dispositions allow juveniles to avoid the stigma of being adjudicated delinquent, "juvenile court hearings occur behind closed doors, children adjudicated delinquent carry no civil liability, and in most states, juvenile court records are treated as protected information, unavailable to public or press without court order." [116] The assertion that consent decrees save judicial time is also questionable.[117] A consent decree proceeding requires that petitions be filed, counsel appointed, intake personnel assigned to prosecute the case, and judicial intervention exercised where objections are raised incident to the proceedings; violations of consent decrees are referred to the courts for formal delinquency proceedings.

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[110] *Id.*; *see* authorities cited note 100 *supra*.

[111] *See* LEGISLATIVE GUIDE, *supra* note 42, § 33 at 35–36.

[112] *Id.* § 33(a).

[113] *Id.* § 33(b).

[114] *Id.* § 33(c).

[115] *Id.* § 33(d).

[116] Fradkin, *supra* note 102, at 124.

[117] Ferster, Courtless & Snethen, *supra* note 78, at 886–87.

Although intake screening provides an important opportunity for individualized treatment of juvenile cases which is consistent with *parens patriae* theory, "[i]t also provides an opportunity for abuse, discrimination, and extra-legal measures." [118] These informal disposition proceedings, therefore, are critical stages of the juvenile justice system requiring the assistance of counsel to ensure that the proceedings are fair, to protect the juvenile's rights, and to assist the intake personnel in arriving at appropriate informal dispositions.

4. Pretrial Discovery at Intake — Pretrial discovery is vital in the juvenile justice system both because it is fair to the accused, and because it expedites the judicial proceeding. Although discovery is generally governed by statute, three general points can be made about discovery in juvenile cases: (1) the considerations that have prompted the American Bar Association to recommend that discovery in criminal proceedings be "as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security," [119] apply also to juvenile proceedings; (2) due process requires the availability of certain types of discovery [120] to any accused; and (3) participation of counsel is indispensable to meaningful pretrial discovery. Although at least one court has urged that extending broad discovery to juvenile proceedings would impede the speedy adjudication of juvenile cases,[121]

> [t]here is much to be said in favor of extending the scope of discovery in juvenile proceedings beyond that available in adult criminal proceedings. They are, after all, civil proceedings. Their treatment rationale implies that trial should be more a quest for truth than a sporting event, and their informality and flexibility should encourage innovation and experimentation.[122]

In recommending broad discovery in criminal proceedings, the American Bar Association assumes that the assistance of counsel is necessary to the fair and efficient administration of criminal justice. The ABA standards, for example, state that "meetings between defense counsel and the prosecuting attorney where, without court intervention, they will engage in required discovery, explore additional discretionary discovery, conduct investigation as needed, and enter upon plea discussions" are necessary for effective trial preparation.[123] Moreover, the recommended standards state:

> Prosecution and defense counsel should take the initiative and conduct required discovery willingly and expeditiously, with a minimum of

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[118] Foster, *supra* note 75, at 57.

[119] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL, § 1.2 (Tentative Draft 1969) [hereinafter cited as ABA STANDARDS].

[120] M. MIDONICK, *supra* note 43, at 84.

[121] *In re* R.L., 3 Cal. App. 3d 100, 106, 83 Cal. Rptr. 81, 84–85, *cert. denied*, 401 U.S. 913 (1970).

[122] M. MIDONICK, *supra* note 43, at 85.

[123] ABA STANDARDS, *supra* note 119, § 1.3(a).

> imposition on the time and energies of the court, counsel, and prospective witnesses. Counsel should be astute and diligent in defining issues which can most efficiently be disposed of prior to trial, and should engage in plea discussions in an effective and timely manner. Only through the initiative and cooperation of counsel in effecting these standards can criminal cases be fairly and timely disposed of, as justice requires.[124]

Moreover, courts have recognized a due process right to certain types of discovery that are as vital to the fair administration of justice in juvenile proceedings as in adult criminal proceedings. For example, the accused has a right to exculpatory information in the prosecution's possession,[125] as well as prior inconsistent statements of witnesses.[126]

In the absence of specific discovery standards in juvenile court proceedings, the defense is severely hampered in preparing for trial; the accused juvenile may even be detained pending formal adjudication, without knowledge of the particulars that will be raised at trial. Permitting broad pretrial discovery at intake would increase the possibility that the case may be informally settled rather than formally adjudicated. The assistance of counsel in pretrial discovery efforts, would not only expedite the juvenile proceedings, but also safeguard the juvenile's rights.

5. The Right to a Pretrial Detention Hearing Where Detention is Proposed Pending Further Adjudication — Counsel's participation in pretrial juvenile proceedings is also essential where the juvenile may be detained pending further adjudication. Juvenile court acts typically require that a child taken into custody either be detained or released to his parents pending the court hearing. In most jurisdictions, statutes provide for pretrial detention without a hearing.[127] Some states provide for a hearing, recognize the juvenile's right to counsel and privilege against self-incrimination at the hearing, and require that notice of the charges be given.[128] Many juvenile court acts do not provide any standard for the pretrial detention decision;[129] as a consequence, many juveniles are detained unnecessarily: "In one study, almost two-thirds of those detained pending hearing were thereafter released on probation or without adjudication." [130] The broad language in most juvenile court acts authorizes the juvenile's detention when

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[124] *Id.* § 1.4(b).

[125] *See* Giles v. Maryland, 386 U.S. 66 (1967); Miller v. Pate, 386 U.S. 1 (1967); Brady v. Maryland, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294, U.S. 103 (1935).

[126] People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448, *cert. denied,* 368 U.S. 866 (1961). This requirement pertains to the defense's preparation for trial and effective cross-examination, and is included in the ABA standards. ABA STANDARDS, *supra* note 119, § 2.1(a).

[127] *E.g.,* MASS. GEN. LAWS ANN. ch. 119, § 68 (Supp. 1973).

[128] *E.g.,* CAL. WELF. & INST'NS CODE §§ 630–33 (West 1972) (requiring a hearing within two judicial days of the taking into custody); *see In re* Macidon, 240 Cal. App. 2d 600, 49 Cal. Rptr. 861 (1966).

[129] *E.g.,* COLO. REV. STAT. ANN. § 22–2–2 (1964).

[130] JUVENILE JUSTICE MANAGEMENT, *supra* note 83, at 601 n.134a.

> there is a likelihood that he will flee, his home is unfit, his parents are unable to control him, it is necessary to protect the child or the person or property of another, the child may harm himself or others, or there is . . . "a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime." [131]

Pretrial detention hearings necessitate the assistance of counsel to challenge the court's jurisdiction, to determine if there is probable cause to detain the juvenile and, in cases of unlawful detention, to file a writ of *habeas corpus* challenging the court's decision to detain the accused.

Some courts have interpreted *Gault* to require (1) a probable cause hearing prior to the granting of a temporary detention order,[132] and (2) incorporation of the facts and documents affecting the court's determination at the hearing into the record to be made available to counsel for inspection.[133] The Supreme Court has not yet explicitly required a pretrial detention hearing accompanied by the right to counsel.

The right to counsel in pretrial detention hearings may also secure the juvenile's release on bail where permitted. Most states do not extend the right to bail to juvenile proceedings despite the informal procedure associated with pretrial detention,[134] probably because juvenile proceedings

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[131] M. MIDONICK, *supra* note 43, at 75–76.

[132] In *Baldwin v. Lewis,* the court granted a writ of *habeas corpus* to a fifteen-year-old youth who had been detained pending trial without a probable cause hearing, stating:

> A detention hearing . . . is, by its very nature, a proceedings which may result in the deprivation of a juvenile's liberty for an indeterminate period of time pending disposition of the accusations against him. It is the opinion of this Court that a logical interpretation of the Supreme Court's decision in re Gault . . . requires that such a hearing satisfy all the requirements of due process under the Fourteenth Amendment.

300 F. Supp. 1220, 1232 (E.D. Wis. 1969), *rev'd on other grounds,* 442 F.2d 29 (7th Cir. 1971).

In *Cooley v. Stone,* the circuit court affirmed the following language of the district judge:

> No person can be lawfully held in penal custody by the state without a prompt judicial determination of probable cause. The Fourth Amendment so provides and this constitutional mandate applies to juveniles as well as adults. Such is the teaching of *Gault* and . . . *Kent.*

414 F.2d 1213 (D.C. Cir. 1969).

[133] The district court in *Baldwin v. Lewis* stated that the requirement that a probable cause hearing be held included the right to counsel and the inspection of information used to support a detention order:

> With regard to the manner in which the detention hearing is actually conducted, *In re Gault* . . . held that the constitutional right to counsel applies to juveniles who stand accused of an act which may result in their incarceration. The right to counsel is but a hollow right, however, if the court conducting the detention hearing may base its conclusion and order upon facts or documents which are never identified, made part of the record, or made available to counsel for inspection.

300 F. Supp. at 1232.

[134] *E.g.,* Fulwood v. Stone, 394 F.2d 939, 944 (D.C. Cir. 1967) (statutory substitute for bail); People v. Castro, 243 Cal. App. 2d 402, 52 Cal. Rptr. 469 (1966); *Ex parte* Cromwell, 232 Md. 305, 192 A.2d 775, *rev'd on other grounds,* 232 Md. 409, 194 A.2d 88 (1963); Estes v. Hopp, 73 Wash. 2d 263, 438 P.2d 205 (1968).

are characterized as noncriminal.[135] Prior to *Gault,* however, some courts had held that bail was a constitutional right applicable to juvenile detention, despite its civil label.[136] Since *Gault,* some courts have held that juveniles have a right to bail under the eighth and fourteenth amendments.[137]

Two points should be noted with respect to detention and the juvenile's right to release. First, a probable cause hearing should be a prerequisite to pretrial detention. Since detention constitutes incarceration which is arguably within the scope of *Gault's* limited holding, courts should recognize a constitutional right to counsel at the detention hearing. Second, where detention is proposed solely because of the likelihood that the child will not return for trial, bail or other methods of release are desirable, if not constitutionally required. The President's Commission on Law Enforcement supports this conclusion:

> [D]etention of children appears to be far too routinely and frequently used, both while they are awaiting court appearance and during the period after disposition and before institution space is available. The notorious inadequacy and overcrowding of child detention centers and

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[135] *E.g., Ex parte* Cromwell, 232 Md. 305, 192 A.2d 775, *rev'd on other grounds,* 232 Md. 409, 194 A.2d 88 (1963). *See* Harling v. United States, 295 F.2d 161, 163 (D.C. Cir. 1961).

[136] In *Trimble v. Stone,* the court stated:

> [T]he juvenile court act is silent on the subject of bail. The higher law of the Constitution, however, prevails. The Eighth Amendment is self-executing and no statute is necessary to implement it. . . . A serious Constitutional question would arise if the statute expressly or by necessary implication denied the right to bail.

187 F. Supp. 483, 485 (D.D.C. 1960). *See* State v. Franklin, 202 La. 439, 12 So. 2d 211, 213 (1943); *Ex parte* Osborne, 127 Tex. Crim. 136, 75 S.W.2d 265 (Crim. App. 1934).

The Supreme Court in *Stack v. Boyle* referred to the federal law's consistent recognition of the right to bail:

> [F]ederal law has unequivocally provided that a person arrested for a noncapital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

342 U.S. 1, 4 (1951) (citation omitted). *See also* Kinney v. Lenon, 425 F.2d 209 (9th Cir. 1970) (which held that a minor has a due process right to be released to prepare his defense where appointed counsel requested his assistance).

[137] *See* authorities cited in M. MIDONICK, *supra* note 43, at 78 n.3.

Some courts and commentators have suggested that bail is inappropriate in juvenile proceedings. *See* Paulsen, *supra* note 19, at 552; Note, *Right to Bail and Pre-Trial Detention of Juveniles Accused of Crime,* 18 VAND. L. REV. 2096 (1965). The Standard Juvenile Court Act, for example, provides that criminal provisions regarding bail shall not be applicable to children detained under juvenile court proceedings. STANDARD ACT, *supra* note 65, § 17(6). The President's Commission on Law Enforcement expressed a similar view that bail "is one of those attributes of the criminal process that it is wise for the juvenile court system to be free of." TASK FORCE REPORT, *supra* note 89, at 36. Moreover, it has been asserted that "[w]hat is vital is not a right to bail as such but a right to release for the juvenile, which may take different forms and be subject to various conditions." Dorsen & Rezneck, *supra* note 63, at 36, *citing* The Bail Reform Act of 1966, 18 U.S.C.A. § 3146 (Supp. 1966) (which has replaced the traditional bond system with release on personal recognizance subject to conditions intended to assure appearance in court at the set time). *Id.* n.139. Such theories notwithstanding, the Federal Juvenile Delinquency Act and a number of states provide for bail in juvenile proceedings. 18 U.S.C. § 5035 (1970).

> the not uncommon use of adult jails and lockups make the practice even less tolerable.[138]

Thus, if pretrial detention is to be continued on the contention that it serves rehabilitative purposes, juvenile detention facilities must be candidly appraised. Pretrial detention, with no provision for bail or release on personal recognizance, violates both the purpose of the juvenile court system and standards of due process.

6. Conclusion: Right to Counsel at Intake — While holding that the right to counsel "is essential for the determination of delinquency," the Supreme Court in *In re Gault* [139] did not extend that right to pre-adjudication procedures such as intake.[140] Few states provide for counsel at intake.[141] Nonetheless, intake is a "critical stage" of the delinquency proceeding and requires the presence of counsel for a number of reasons.

First, the informal proceedings of intake depend upon the admissions of the accused. Since *Gault* expressly extended the privilege against self-incrimination to delinquency proceedings, either the juvenile should be insulated against subsequent use of the admissions made at intake, or the presence of counsel should be strictly required. Otherwise, the privilege against self-incrimination would be substantially undermined due to the inherently coercive circumstances that surround intake questioning. Second, "intake is a 'critical stage' of juvenile court proceedings because the question of whether or not the case will go to court is decided at this stage." [142]

Third, since informal disposition is determined at intake, counsel should be present to ensure that informal disposition is utilized as an alternative to referral or dismissal in appropriate cases:

> Cooperation between the attorney and the intake or juvenile officer can result in a satisfactory handling and adjustment of the case while alleviating the need for a court hearing.[143]

Also, "at the point of intake . . . an attorney may present arguments for the point of view which parents might assert, [in the best interest of the child] were they gifted with communication skills." [144]

Fourth, in order for pretrial discovery to operate effectively counsel should be present during the intake proceeding to investigate the charges and evidence in order to expedite the proceedings and to ensure that

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[138] TASK FORCE REPORT, *supra* note 89, at 36.

[139] 387 U.S. at 36.

[140] *Id.* at 31.

[141] *Cf.* COLO. REV. STAT. ANN. §§ 22-3-1(2)(d)(i)-(ii) (1964) (which permits informal adjustment only where the child and his parents were informed of their rights including the right to counsel at every stage of the proceeding).

[142] Ferster, Courtless & Snethen, *supra* note 78, at 891; Skoler, *Counsel in Juvenile Court Proceedings — A Total Criminal Justice Perspective,* 8 J. FAM. L. 243, 260 (1968).

[143] *The Role of the Lawyer, supra* note 14, at 637.

[144] Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases,* in 1966 THE SUPREME COURT REVIEW 167, 188–89 (P. Kurland ed. 1966).

certain types of constitutionally required discovery are extended to accused juveniles.

Fifth, the presence of counsel is critical at intake when detention is proposed pending formal adjudication. Counsel can challenge the intake officer's decision by requiring that probable cause be established to justify detention; when the hearing is not held, counsel can file a writ of *habeas corpus* or petition for bail.

C. Transferral

In spite of the procedural defects of the juvenile justice system,[145] it may be to the child's advantage to be prosecuted as a juvenile rather than an adult:

> Under virtually all state and federal statutes, a youth found delinquent by a juvenile or family court can be incarcerated only until his twenty-first birthday, cannot be mixed in jail with adult offenders, does not face the loss of civil rights after incarceration, and does not have an arrest or conviction placed permanently on his record for possible use in future sentencing or for possible disqualification from future public employment — in short, is entitled to a far better opportunity for rehabilitation than the convicted adult.[146]

As a result, the determination whether a particular case should be transferred to adult criminal proceedings is a "critical stage" of the juvenile justice system.

Transfer procedure generally is regulated by statute and varies in different jurisdictions. Many statutes permit transfer of a child sixteen years of age or older who is charged with an act which would be a felony if committed by an adult.[147] Some states permit transfer of a child of a lesser age for serious crimes;[148] others permit transfer at any age.[149] Whether a particular juvenile case should be transferred to the criminal courts depends upon "the nature of the offense, the juvenile's amenability to treatment in available facilities, and the best interests of the public." [150]

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[145] *See, e.g.*, Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7.

[146] Comment, *Youthful Offenders and Adult Courts: Prosecutorial Discretion vs. Juvenile Rights*, 121 U. PA. L. REV. 1184 (1973) [hereinafter cited as *Youthful Offenders*]. The consequences of a transferral may be severe. In *Hall v. State*, 284 Ala. 569, 226 So. 2d 630 (1969), for example, a fourteen-year-old youth was transferred to a criminal court and as a result received a sentence of life imprisonment.

[147] *E.g.*, CAL. WELF. & INST'NS CODE § 707 (West 1972); COLO. REV. STAT. ANN. § 22–1–4(4)(a) (1964); LEGISLATIVE GUIDE, *supra* note 42, § 31(a)(1); STANDARD ACT, *supra* note 65, § 13.

[148] *E.g.*, UTAH CODE ANN. § 55–10–86 (Supp. 1973) (fourteen years of age).

[149] In some states the juvenile and criminal courts have concurrent jurisdiction, with the police or the prosecutor deciding in which court to try the case. *E.g.*, IOWA CODE ANN. § 232.62 (1969).

[150] M. MIDONICK, *supra* note 43, at 80. *See, e.g.*, United States *ex rel.* Crowson v. Brierley, 411 F.2d 910 (3d Cir. 1969); Guenther v. State, 279 Ala. 596, 188 So. 2d 594 (1965); B.P.W. v. State, 214 So. 2d 365 (Fla. Dist. Ct. App. 1968); *In re* Doe, 50 Hawaii 620, 446 P.2d 564 (1968); State *ex rel.* Londerholm v. Owens, 197 Kan. 212, 416 P.2d 259 (1966); Knott v. Langlois, 102 R.I. 517, 231 A.2d 767 (1967).

In *Kent v. United States,*[151] the Court, in interpreting a District of Columbia statute,[152] held that a transfer proceeding must satisfy due process standards:

> [W]e conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel.[153]

Although the Court decided *Kent* on statutory grounds, the decision was influenced by constitutional considerations.[154] Subsequently, the Court in *Gault* [155] noted that the opinion in *Kent* had emphasized "the necessity that 'the basic requirements of due process and fairness' be satisfied in such proceedings." [156] The Court reemphasized that a waiver hearing must satisfy due process standards. Thus, the statutory requirement in *Kent* of the assistance of counsel at transferral proceedings was firmly established in *Gault* as a constitutional right.

Kent and *Gault* have subsequently been interpreted as demanding that minimum constitutional rights, including the right to counsel, be extended to juveniles at transferral or waiver hearings.[157] Some courts, however, distinguish *Kent* on the ground that it involves statutory interpretation rather than constitutional mandates,[158] and *Gault* on the ground that its holding is limited to the adjudicatory stage of the delinquency proceeding.[159]

The weight of authority [160] and the public interest in protecting the rights of juveniles, however, demand that counsel be present at the transfer hearing. Accordingly, the Model Rules require counsel's participation at

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[151] 383 U.S. 541 (1966).

[152] D.C. CODE ANN. § 11–1553 (1967).

[153] 383 U.S. at 557.

[154] Although the Court limited its holding to interpreting the statute, the following language of the Court seems to belie a strictly statutory rationale:

> [T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony — without hearing, without effective assistance of counsel, without a statement of reasons.

Id. at 554.

[155] 387 U.S. 1 (1967).

[156] *Id.* at 12.

[157] *E.g.,* Powell v. Hocker, 453 F.2d 652, 654 (9th Cir. 1971); Kemplen v. State, 428 F.2d 169 (4th Cir. 1970); *In re* Harris, 67 Cal. 2d 876, 434 P.2d 615, 64 Cal. Rptr. 319 (1967); Summers v. State, 248 Ind. 551, 230 N.E.2d 320 (1967); Hopkins v. State, 209 So. 2d 841 (Miss. 1968); State v. Yoss, 10 Ohio App. 2d 47, 225 N.E.2d 275 (1967); Knott v. Langlois, 102 R.I. 517, 231 A.2d 767 (1967). For a collection of relevant cases, see United States *ex rel.* Turner v. Rundle, 438 F.2d 839, 842 n.11 (3d Cir. 1971).

[158] State v. Hance, 233 A.2d 326 (Md. 1967); State v. Acuna, 78 N.M. 119, 428 P.2d 658 (1967).

[159] *E.g.,* Powell v. Sheriff, 85 Nev. 684, 462 P.2d 756 (1969).

the transfer hearing [161] and the Comment emphasizes the importance of counsel in these proceedings:

> Counsel is necessary in the transfer hearing even more than in the adjudicatory hearing, because the child must contest not the existence of a set of alleged facts, but the assertion of opinions, more or less expert, about his suitability for treatment under various modes of disposition. While a minor may have the intelligence and experience to waive his right to counsel in a proceeding to determine whether he did or did not violate a specific law, he scarcely can have the capacity to controvert the statements of psychologists and trained social workers. . . . Therefore, the rule does not permit waiver of the right to counsel at the transfer hearing.[162]

For these reasons, the assistance of counsel during a transfer hearing should be a constitutional requirement. Assuming that the relevant factor examined in the transferral proceeding is the possibility of rehabilitating the juvenile, balanced against society's need for protection, the right to counsel is required not only by due process, but also on public policy grounds to ensure that the juvenile's and society's interests are best served by transferring the case to the criminal courts.

D. The Right to Counsel at the Delinquency Proceeding

Although the Supreme Court extended the right to counsel to delinquency proceedings in *Gault,* it failed to define a standard by which adequate provision for counsel could be measured. Several issues are left open by *Gault:* (1) what constitutes adequate notice and sufficient advice concerning the right to counsel; (2) what constitutes adequate provision for counsel; and (3) under what circumstances the right to counsel can be waived.

1. Adequacy of Notice of Right to Counsel — Despite its limitations on the holding in *Gault,* the Court emphasized the importance of counsel at every step in the proceeding.

> A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him." [163]

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[160] *See* cases cited note 157 *supra;* MODEL RULES, *supra* note 69, R.11 at 26 (requires that counsel be appointed to represent the child at the transfer hearing); Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited,* 43 IND. L.J. 583, 587 (1967); Skoler, *The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings,* 43 IND. L.J. 558, 571 (1967); *Youthful Offenders, supra* note 146, at 1185.

[161] MODEL RULES, *supra* note 69, R.11 at 26.

[162] *Id.* Comment at 27–28.

[163] 387 U.S. at 36.

The Court did not, however, analyze the necessary elements of "adequate" advice. *Gault's* mandate can be substantially nullified if the juvenile receives either incomplete or prejudicial notice of the right to counsel. One court study vividly demonstrates this point:

> In fact the juvenile is often discouraged from retaining counsel. Such discouragement may take the form of express disparagement by police or intake workers of the amount an attorney can accomplish. In the court itself, the parent's inquiry as to whether a lawyer is needed is often answered with the statement "that is a decision you must make for yourself," coupled with a reminder that if an attorney is to be retained the proceedings will have to be continued to another date [with the resulting inconvenience]. Moreover, parents who are told by the judge that he is willing to proceed immediately and will make every effort himself to ensure that the rights of the child are protected may well fear that to bring in an attorney would be an implicit insult to the judge, an especially unattractive prospect when the judge has such wide discretion in making decisions.[164]

For notice of the right to counsel to be constitutionally adequate, (1) it should be given sufficiently in advance of the delinquency proceeding to enable counsel to properly prepare for the case; (2) it should be given in a neutral manner; (3) it should be given in writing and orally; and (4) it should expressly point out that it is the court's duty to appoint counsel in the case of indigency.

(a) Timeliness of Notice of the Right to Counsel — In *Gault* the Court required, as a matter of due process, that notice of the specific charges be given "at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation." [165] To accomplish that objective, notice of the right to counsel should be given in writing along with the notice of the charges. Arguably, the juvenile should be given notice of the right to counsel when first taken into custody.[166]

Furthermore, the "[r]ight to counsel at the adjudication stage necessarily includes the right to have counsel appointed sufficiently in advance of the hearing to allow for adequate pre-trial preparation." [167] Any other interpretation would be inconsistent with the requirement of effective assistance of counsel as outlined in *Gault*.[168] Both the Uniform Act and the Model Rules recommend that the initial summons or notice sent to the child and his parents be used to notify the child and the parents of the right to counsel.[169]

(b) Manner of the Notice to the Parents and Child — The manner in which the notice is given may determine its effectiveness.

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[164] *Juvenile Delinquents, supra* note 40, at 796–97.

[165] 387 U.S. at 33.

[166] *See* note 57 *supra* and accompanying text.

[167] Skoler, *supra* note 160, at 568.

[168] *See* note 163 *supra* and accompanying text.

[169] UNIFORM JUVENILE COURT ACT §§ 22(d), 26; MODEL RULES, *supra* note 69, Comment, R.21 at 46.

> Unfortunately, many juveniles receive notice which is either incomplete or prejudicial. . . .
>
> If the right to counsel is not to be prejudiced, the judge's counsel advice should be neutral as well as complete. This right will not be exercised freely if a judge makes it obvious that he regards the presence of counsel as unwise or unnecessary.[170]

Studies indicate that advice is often given in a prejudicial manner; for example:

(1) "I notice you are not here with an attorney and I assume that you do not wish an attorney. You may have one but it is not required." [171]

(2) I certainly hope you don't want an attorney.[172]

(3) "At this time, I'd like to inform you that you have a right to have an attorney. If you cannot afford an attorney, I'll appoint an attorney for you. Or, on the other hand, if you'd like, we can have the case heard today." [173]

(4) "I take it that you came without a lawyer because you think you didn't need it." [174]

(5) "Do you want a lawyer or do you want to speak for yourself?" [175]

In addition, notice may be prejudiced by "a question so framed, or uttered with such emphasis, or accompanied by such non-verbal conduct of the questioner as to suggest the desired answer." [176] Conversely, advice given in a neutral manner may encourage exercise of the right to counsel.

(1) "Larry, I'd like to advise you that you are entitled to a lawyer and I'll be happy to appoint a free lawyer for you if you have no money." [177]

(2) The judge continued that the law obliges him to tell them that they have a privilege of engaging an attorney. If they wish to get an attorney, the proceedings would be continued for them to do so. If they didn't have sufficient funds, he would appoint one.[178]

In considering meaningful, as well as literal, compliance with *Gault*, the manner in which notice of the right to counsel is communicated is crucial. Any prejudicial statement associated with that notice, coupled with the typical trepidation felt by a juvenile in these circumstances, would invalidate the voluntariness of the waiver.

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[170] Ferster, Courtless & Snethen, *The Juvenile Justice System: In Search of the Role of Counsel,* 39 FORD. L. REV. 375, 378 (1971).

[171] *Id.* at 379.

[172] *Id.*

[173] Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice: Gault and its Implementation,* 3 LAW & SOC'Y REV. 491, 512 (1969).

[174] *Id.* at 513.

[175] Ferster, Courtless & Snethen, *supra* note 170, at 379.

[176] Lefstein, Stapleton & Teitelbaum, *supra* note 173, at 511.

[177] *Id.*

[178] *Id.*

(c) Mode of Communication — Both the Uniform Act and the Model Rules recommend that notice of the right to counsel be given in writing at the earliest practicable time and, thereafter, orally at the initiation of any formal or informal hearing.[179] The reasons for requiring both forms of notice are that the child and his parents may not fully comprehend the written notice; and the courts should continue to advise the child and his parents of their right to counsel notwithstanding an earlier waiver, especially where the parties previously failed to thoroughly consider the matter.

(d) Complete Notice of the Court's Duty to Appoint Counsel in the Case of Indigency — The Court in *Gault* explicitly rejected the view, asserted previously by some courts in jurisdictions where the state constitution grants the right to counsel in juvenile proceedings, that a juvenile need not be informed of his right to counsel.[180] *Gault* requires that the juvenile and his parents be advised of the right to counsel, and further, that they be instructed that counsel will be appointed in the case of indigency.[181] In an effort to comply with *Gault,* some courts have required not only notice that informs the juvenile and his parents of the duty of the court to appoint counsel in the case of indigency, but also ascertainment by the court of whether the juvenile and his parents can in fact afford counsel:

> [A] court has the inherent duty of satisfying itself by ascertaining from any person, adult or infant, whether or not he has funds with which to hire counsel . . . and . . . where indigency is found to exist, and after full advice, if the accused does not waive an offer of court-appointed counsel, the court has the further duty of appointing counsel to represent him before proceeding with trial.[182]

As a minimum standard of fairness, any notice of the right to counsel that neglects to mention the court's duty to appoint counsel if the child and his parents are unable to afford counsel, should be held constitutionally defective.

2. Provision for Effective Representation — Effective legal representation in delinquency cases will depend upon not only complete and neutral notice at the earliest practicable time, but also immediate access to counsel who can effectively prepare and present the case.

> How many lawyers can we expect to appear for respondents on delinquency petitions? The answer to the question will depend, in large part, on how conveniently lawyers are made available to juveniles. If asking for a lawyer means a substantial delay in the proceedings, the right to counsel is likely to be waived by a youngster and his parents. In many cases working fathers and mothers will not choose to come

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[179] *See* authorities cited note 169 *supra.*

[180] *See Juvenile Delinquents, supra* note 40, at 797.

[181] 387 U.S. at 41.

[182] Phillips v. Cole, 298 F. Supp. 1049, 1052 (N.D. Miss. 1968). *See also In re* Haas, 5 N.C. App. 461, 464, 168 S.E.2d 457, 459 (1969).

> back another day when an assigned lawyer can be present. The feeling, "let's get it over with," must be very strong.[183]

Experience with providing counsel in criminal cases has shown that

> the mode of organizing defender services is all-important in assuring zeal, competence, and loyalty to a client. The lawyers assigned must be paid an adequate fee (or salary). A public or voluntary defender organization can provide lawyers who quickly gain the special skills useful in juvenile courts. . . . Any scheme which brings a particular lawyer into juvenile court only one [sic] every year or two is not likely to produce much effective legal assistance for respondents.[184]

Two systems of providing counsel for indigents in juvenile courts have been used, assignment of a public defender or private counsel.[185]

(a) Public Defender System [186] — Public defender systems generally consist of salaried attorneys, financed either publicly or privately, and volunteer attorneys. Usually, statutes create the system and specify the classes of cases for which counsel is provided. Proponents of the public defender system assert that it provides specially trained and experienced attorneys who are familiar with the system and can work efficiently within it.

(b) Assigned Counsel System — In jurisdictions using the assigned counsel system, judges generally use one of three methods in assigning counsel: "appointment from a roster supplied by the local bar association, appointment from a list established by the judge, and appointment of any member of the bar who happens to be present in court." [187] The strengths of the assigned counsel system are individualized service and introduction of experienced advocates into juvenile proceedings. It is criticized on the ground that the assigned advocate is usually unfamiliar with juvenile court proceedings and the modified role that he may be required to assume in particular circumstances. Moreover, assigned counsel systems often have difficulties in financing the services of experienced bar members,[188] often resulting in inadequate representation.

(c) Effective Representation — The American Bar Foundation has concluded that a well financed and efficiently run assigned counsel system

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[183] Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527, 528 (1968).

[184] *Id.* at 529.

[185] NCCD COUNCIL OF JUDGES, PROVISION OF COUNSEL IN JUVENILE COURTS 27 (1970) [hereinafter cited as PROVISION OF COUNSEL].

[186] "Public Defender" refers to legal aid or neighborhood legal service agencies which provide salaried attorneys for indigent defendants. For a description of various public defender systems, *see* Cleary, *National Defender Project — A Progress Report*, 26 LEGAL AID BRIEFCASE 99 (1968).

[187] PROVISION OF COUNSEL, *supra* note 185, at 28.

[188] The most fortunate lawyers receive moderate compensation and full reimbursement, while those at the other extreme receive nothing but intangibles such as gratitude and the satisfaction of rendering a needed service.
1 L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 16 (1965).

has distinct advantages over public defender systems,[189] but other authorities have concluded that

> the system chosen to provide representation is not as important as the caliber of the staff, the availability of investigative and non-legal resources, and adequate funds for the representation of indigent criminal defendants.[190]

These considerations will determine, in large part, whether counsel will in fact be used in juvenile court proceedings:

> We know . . . from experience in New York City under the New York Family Court Act that if lawyers are conveniently provided, their assistance is readily accepted. In New York City, legal aid lawyers called "law guardians" are housed in the Family Court buildings. To consult with counsel, therefore, involves no delay. According to the most recent statistics, ninety-six percent of all youngsters called to respond to a delinquency petition were represented by counsel . . . .[191]

3. Waiver of the Right to Counsel — The question of whether the right to counsel in delinquency proceedings can be knowingly and intelligently waived has not yet been resolved. Although the issue was not directly addressed in *Gault*, the Court noted in reference to the privilege against self-incrimination that "special problems may arise with respect to waiver." [192] The Court also cited with approval several studies recommending that counsel be appointed as a matter of course in all delinquency hearings.[193] The Children's Bureau has since recommended that legislation go further and provide a nonwaivable right to counsel.[194] Some commentators suggest that a nonwaivable standard will eventually become nationwide either as a result of legislative changes or court decisions.[195]

Assuming that a child may validly waive his right to counsel, questions as to what constitutes a valid waiver arise. They include: (1) the standard

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[189] *Id.* at 15–17.

[190] PROVISION OF COUNSEL, *supra* note 185, at 32.

[191] Paulsen, *supra* note 183, at 528.

[192] 387 U.S. at 55.

[193] *Id.* at 38 n.65.

[194] LEGISLATIVE GUIDE, *supra* note 42, § 25. Kansas has adopted this rule. KAN. STAT. ANN. § 38–817 (Supp. 1973).

[195] The time may soon come when the recommendation of the President's Crime Commission, that "counsel should be appointed as a matter of course whenever coercive action is a possibility, without requiring any affirmative choice by child or parent," may be capable of implementation. As legal representation in juvenile courts increases, and as judges, lawyers, and probation officers become more familiar with each other's roles, the way will be smoothed for altering the concept that a child can validly relinquish all of his rights, including the right to legal representation. While it may only be premature speculation, we predict that in the not too distant future, either as a result of legislative changes or court decisions, juveniles will not be permitted to waive their right to an attorney.

Lefstein, Stapleton & Teitelbaum, *supra* note 173, at 562.

Furthermore, there is support for the proposition that a minor, without the assistance of a parent, guardian, or counsel, is incapable of competently and intelligently waiving his constitutional rights. *See* Johnson, *The Supreme Court of California* 1967–1968, 56 CAL L. REV. 1612, 1716–17 (1968).

by which waiver is to be measured; (2) whether or not both parent and child must waive the right to counsel; and (3) what constitutes coercive influence so as to invalidate waiver.

(a) Standard by Which Waiver is Measured — The preceding discussion has noted that where the judge frames the notice in terms suggesting that he would prefer that the right not be exercised, or where the notice fails to explain the court's responsibility to appoint counsel in the case of indigency, waivers should be considered involuntary.

Several commentators have suggested that where a valid waiver is a possibility, the standard for ascertaining voluntariness for juveniles should exceed the standard used in adult criminal proceedings:

> There is no reason why due process for juveniles need only equal and not go beyond that accorded adults. Indeed, proponents of the juvenile court system have often been insistent in claiming the necessity of special care beyond that accorded adults and this position, where soundly based on the realities of juvenile disability, might well be extended to procedural rights.[196]

> Far from being weaker than in adult criminal proceedings, the argument in favor of the right to counsel is *stronger* in juvenile proceedings. It has long been accepted that the juvenile lacks the legal competence to take many steps that would bind him if he were an adult . . . . His presumed "incompetence" in contracts is difficult to reconcile with the notion that when brought into the juvenile court, he has the competence to waive his right to counsel. Counsel is required in juvenile cases even where the child states that he does not want a lawyer to represent him.[197]

Accordingly, stringent standards should be adopted to evaluate the voluntariness of any waiver:

> Logic suggests that waiver of the right to an attorney will be permitted, but only after the court is satisfied that the juvenile and his parents reasonably understand the value of legal counsel and the consequences of such a choice. Rules relating to the age of the juvenile, his level of intelligence, conflicts of interest between parent and child, and the context in which the waiver was tendered will regulate judicial acceptance of a juvenile's waiver of his right to counsel and other associated rights.[198]

A nonwaivable right to counsel in juvenile proceedings would both ensure a fair proceeding and avoid the waiver validity issue. If waiver remains a possibility, specific rules should be followed in testing voluntariness. If specific rules are not followed, courts may avoid administrative burdens by either consciously or unconsciously discouraging juveniles from exercising their constitutional rights.

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[196] Skoler, *supra* note 160, at 572.

[197] *Id.* at 573 n.72, *quoting* Position Statement for Nat'l Conf. on the Role of the Lawyer in Juvenile Court, Chicago, Ill., Feb. 27–29, 1964 in NATIONAL COUNCIL OF JUVENILE COURT JUDGES, COUNSEL FOR THE CHILD 2 (1964).

[198] Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal,* 53 VA. L. REV. 1700, 1712 (1967).

(b) Who Must Waive the Right to Counsel — It is the juvenile who will be incarcerated if found delinquent; thus, it should be the juvenile's decision, tested by a stringent voluntariness standard, to waive counsel. The Model Rules also require waiver by the parents on the grounds that a parent may be more capable of assessing the value of counsel and that their right to the child's custody is at stake.[199]

(c) Coercive Influence and Waiver — A final consideration involves the issue of whether counsel can be validly waived where waiver is the result of the child's desire to avoid having his parents billed for counsel fees. In *In re H.*,[200] a child apparently waived his right to counsel to avoid the parental reprisal he expected when his parents were charged with the legal fees. In rejecting the waiver, the California Supreme Court held:

> [W]aiver of appointed counsel made to avoid or reduce parental pressure or displeasure can be characterized as neither intelligent nor voluntary, being in essence the product of coercion or fear.[201]

In assessing the voluntariness of a waiver the totality of circumstances must be examined to determine if the waiver is "an intentional relinquishment or abandonment of a fully known right," [202] without undue pressure from external sources.

E. Right to Counsel at Disposition and Beyond

No governmental body having power to substantially restrict individual freedom should be allowed to impose its sanctions without the minimal requirements of due process. The right to counsel must be recognized "as an essential element of due process, applicable to all proceedings, whether they be classified as civil, criminal, or administrative, where individual liberty is at stake." [203]

1. The Right to Counsel at Disposition — The dispositional phase of the juvenile proceeding provides the real basis for distinction between adult criminal and juvenile proceedings. The rehabilitative objective of *parens patriae* is most relevant at this stage when the community's resources are available, at least in theory, to provide individualized care and treatment. The judge also exercises an almost unbridled discretion in deciding, typically on the basis of a presentencing report, the appropriate disposition of the case. This decision is so crucial to the juvenile that the assistance of counsel, as a matter of due process, should be mandatory.

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[199] MODEL RULES, *supra* note 69, R.39 (which provides that the court must appoint counsel for the child if, in its opinion, the interests of the child and those of his parents conflict). CAL. WELF. & INST'NS CODE § 634 (West Supp. 1974).

[200] 2 Cal. 3d 513, 468 P.2d 204, 86 Cal. Rptr. 76 (1970).

[201] *Id.* at 526, 468 P.2d at 211, 86 Cal. Rptr. at 83; *see* Comment, *Does Parental Liability for Legal Fees Infringe Upon a Juvenile's Constitutional Rights?*, 10 SANTA CLARA LAW. 347 (1970).

[202] 2 Cal. 3d at 527, 468 P.2d at 211, 86 Cal. Rptr. at 83.

[203] People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 388, 267 N.E.2d 238, 242 (1971) (where the court held that an adult has a constitutional right to counsel in a parole revocation hearing).

The right to counsel requires not only counsel's presence but also effective legal representation. Representation is effective only where counsel (1) has access to the presentencing report so that the opinions and facts relied upon in determining the disposition can be challenged; (2) has an opportunity to cross-examine the witnesses and experts relied upon; and (3) is given the opportunity to recommend alternative dispositions.

(a) Counsel at Disposition — Although *Gault* limited its holding to the adjudicatory stage of delinquency proceedings,[204] the model laws [205] and many state laws [206] extend the juvenile's right to counsel to the dispositional stage. The reason for this extension is that "[t]he outcome is [so] critical for the life of the child [that] justice requires that he have the assistance of counsel." [207] One juvenile court judge has stated: "The essence . . . of the Juvenile Court is the disposition: the individualized treatment, the proffer of help, the prospective rehabilitation [is] the only real protection for society." [208] Commentators have reflected the same sentiment:

> I would go so far as to suggest that, consonant with the philosophy of the juvenile court, the dispositional phase of the proceeding is the most crucial aspect of the process and that it is in this phase that adequate protection of the juvenile's rights is most important.[209]

One commentator has outlined eight basic functions which can be performed by the lawyer at the dispositional hearing:

> He can insure impartiality by acting as a counterbalance to unreasoned pressures exerted on the judge by newspapers and the public. He can insure that the basic elements of due process are present, such as the right to be heard and the right to test the facts upon which a disposition is to be made. He can insure compliance with statutory requirements with respect to detention and the authorized limits of judicial intervention. He can insure that the disposition is based upon complete and accurate facts. He can test expert opinion to make certain that social work, psychological and psychiatric reports are not based on mistakes arising either from the factual premises on which they rest or from the limited expertise or lack of it on which the conclusions derived from these facts are based. He can give the child and its family a voice in the proceeding by acting as their spokesman. He can participate in

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[204] 387 U.S. at 41.

[205] LEGISLATIVE GUIDE, *supra* note 42, § 25(a); MODEL RULES, *supra* note 69, R.39; STANDARD ACT, *supra* note 65, § 19; UNIFORM JUVENILE COURT ACT § 26(a).

[206] *See, e.g.*, D.C. CODE ANN. § 166–2304 (Supp. 1973); GA. CODE ANN. § 24–2418.1 (Supp. 1971); MD. ANN. CODE art. 26, § 70–18(d) (Supp. 1973); MINN. JUV. CT. R. 2–1(1) (1971); NEB. REV. STAT. § 43–205.06 (1968); N.D. CENT. CODE § 27–20–26 (Supp. 1969); OHIO REV. CODE ANN. § 2151.352 (Supp. 1970); OKLA. STAT. tit. 10, § 1109(a) (Supp. 1970); S.D. COMPILED LAWS ANN. §§ 26–8–22.1, .2 (Supp. 1974); TEX. REV. CIV. STAT. art. 2338–1, § 7–B (Supp. 1970); UTAH CODE ANN. § 55–10–96 (Supp. 1973).

[207] TASK FORCE REPORT, *supra* note 89, at 33.

[208] Arthur, *Disposition: The Forgotten Focus*, 21 JUV. CT. JUDGES J. 71 (1970).

[209] Isaacs, *The Lawyer in the Juvenile Court*, 10 CRIM. L.Q. 222, 235 (1968); *accord*, Dorsen & Reneck, *supra* note 63, at 42–43; Ferster, Courtless & Snethen, *supra* note 170, at 392.

> the formulation of a proper plan for disposition, since in many cases cooperation between counsel and the probation staff of the court may result in new insights into the youth and his family. Finally, he can interpret the court to the family and thus help to get the child and his family to accept a proper disposition by the court.[210]

The argument that the presence of counsel at disposition would undermine the informal nature of the proceeding has been refuted by *Gault* and subsequent cases. The Court in *Gault* noted:

> [R]ecent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness — in short, the essentials of due process — may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.[211]

In *State ex rel. D.E. v. Keller,*[212] the court held that a juvenile should be given a full hearing before a suspended commitment was enforced. The court stated that "certain passages of the [*Gault*] opinion indicate that the fundamentals of due process should be applied in other critical stages affecting the liberty of a juvenile." [213] Another court, in a case dealing with the waiver of counsel, noted: "The need for legal representation is just as fundamental and essential at a dispositional hearing as at a fact-finding hearing." [214] In *Steinhaurer v. State* the Court stated that "[i]t would be less than fair to hold that an accused [child] is entitled to counsel at a trial, but not at a hearing where the results and consequences to him could be much more serious." [215]

Disposition, therefore, is perhaps the most critical stage in the juvenile proceeding, and requires the assistance of counsel to review the presentencing report, cross-examine witnesses and experts upon whom the disposition will depend, and present suitable alternative dispositions for the particular juvenile.

(b) Access to Social Reports — Proper disposition in juvenile proceedings depends upon the judge's ability to review social reports concerning the juvenile's background and psychological makeup with a view to appropriate individualized treatment. Typically, the social reports consist of

> (1) prior findings, (2) prior arrests, (3) psychological or psychiatric evaluations, and (4) interviews with the child and his relatives, friends, employers and others with whom he has associated or come in contact.

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[210] Isaacs, *supra* note 209, at 235.

[211] 387 U.S. at 26.

[212] 251 So. 2d 703 (Fla. Dist. Ct. App. 1971).

[213] *Id.* at 705.

[214] *In re* F., 30 App. Div. 2d 933, 293 N.Y.S.2d 873, 374 (1968).

[215] Steinhauer v. State, 206 So. 2d 25, 27 (Fla. Dist. Ct. App. 1967), *rev'd on other grounds,* 216 So. 2d 214 (Fla. 1968), *vacated,* 217 So. 2d 590 (Fla. Dist. Ct. App. 1969), *cert. denied,* 398 U.S. 914 (1970).

> Typically the pre-sentence report also includes a recommendation to the judge concerning disposition.[216]

Critics of efforts to extend the right of counsel at dispositional hearings to include access to social reports argue that the judge and his professional staff are better prepared to provide guidance than an advocate, who might transform the dispositional proceeding into a second adversary proceeding. The importance of counsel's access to the investigative reports, however, can be demonstrated. Despite the well intended efforts of judges and their staffs, attempts to rehabilitate through individualized treatment are often unsuccessful.[217] One reason is that individualized treatment requires a professional staff with the training and experience necessary to recommend such treatment. According to a 1967 survey,

> [o]nly 4 per cent of the agencies maintain the preferred educational standard of a master's degree in social work . . . .
>
> . . . .
>
> [M]ost of the country's juvenile courts employ as probation officers . . . persons who lack professional training in diagnosis and treatment.[218]

Given the failure of the courts to rehabilitate, several courts have reasoned that counsel should have investigative reports upon which disposition is based. In *Baldwin v. Lewis*,[219] the court stated:

> The right to counsel is but a hollow right, however, if the court conducting the detention hearing may base its conclusion and order upon facts or documents which are never identified, made part of the record, or made available to counsel for inspection.[220]

Although *Baldwin* involved reports relied upon in determining whether or not a juvenile should be detained pending trial, the court's reasoning is applicable to dispositional proceedings where detention can be imposed for the remainder of the juvenile's minority. In *In re A.W.*,[221] the court held that, while the social records containing reports of investigations, treatment, and other confidential information were not open to public inspection, it was prejudicial error to refuse to allow inspection by the attorney of a properly interested person since the records were part of the evidence of the case.[222] The Supreme Court in *Kent* stated: "If the staff's submissions include materials which are susceptible to challenge or

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[216] M. MIDONICK, *supra* note 43, at 146; Mueller & Besharov, *Bifurcation: The Two Phase System of Criminal Procedure in the United States*, 15 WAYNE L. REV. 613, 637 *et seq.* (1969).

[217] TASK FORCE REPORT, *supra* note 89, at 30.

[218] National Council on Crime & Delinquency, *Correction in the United States*, 13 CRIME & DELINQ. 1, 57 (1967).

[219] 300 F. Supp. 1220 (E. D. Wis. 1969), *rev'd on other grounds*, 442 F.2d 29 (7th Cir. 1971).

[220] *Id.* at 1232.

[221] 230 So. 2d 200 (Fla. Dist. Ct. App. 1970).

[222] *Id.* at 204.

impeachment, it is precisely the role of counsel to 'denigrate' such matter." [223]

Several model juvenile court acts and secondary authorities have also recommended that counsel be given access to social investigation reports.

> The outcome is critical for the life of the child and justice requires that he have the assistance of counsel in advancing his own interest before the court — by offering alternative plans, for example, or by calling attention to the factual and theoretical assumptions, the speculations, the degree of thoughtfulness and thoroughness of the probation officer's report.[224]

Counsel should be present at disposition and should have access to all social investigative reports [225] to avoid inappropriate dispositions and to provide a meaningful appellate record.

(c) Cross-Examination at Disposition — Effective representation by counsel requires the opportunity to cross-examine the juvenile officer who prepared the social investigative report and the witnesses appearing at the disposition proceeding. The right to cross-examine has been recommended by model juvenile court acts [226] and by secondary authorities:

> Regardless of the method followed, the facts presented — either orally or written — upon which the court relies, should be open to rebuttal by the child, his family, or their counsel, and witnesses may be introduced to rebut them. . . . [I]nformation in the record referred to by the judge or incorporated in the summary report upon which the court relies in making disposition should be made known to the child, parent, guardian, or counsel. Probation officers or persons who have presented reports should be subject to cross-examination and required to present the facts upon which their recommendations are based.[227]

> Cross-examination of social work experts within the bounds of the informal dispositional hearing, therefore, promises to be a most effective method of getting at truth and of discouraging falsehood and exaggeration.[228]

(d) Recommendation of Alternative Disposition — Appellate courts have reversed disposition orders where (1) the lower court has failed to order a social investigation and to consider that information on disposition [229] and denied the juvenile the right to present evidence concern-

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[223] 383 U.S. at 563. Although *Kent* involved an interpretation of a transfer of jurisdiction statute, the reasoning of the Court is applicable to the issue of access to social investigative reports at disposition.

[224] TASK FORCE REPORT, *supra* note 89, at 33.

[225] McMillian & McMurtry, *The Role of the Defense Lawyer in the Juvenile Court — Advocate or Social Worker?*, 14 ST. LOUIS U.L.J. 561, 594 (1970).

[226] LEGISLATIVE GUIDE, *supra* note 42, § 23(e); MODEL RULES, *supra* note 69, R.30; UNIFORM JUVENILE COURT ACT § 29(d).

[227] CHILDREN'S BUREAU. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, STANDARDS FOR JUVENILE AND FAMILY COURTS 74 (1966).

[228] Schultz, *The Adversary Process, The Juvenile Court and the Social Worker*, 36 U. Mo. K.C.L. REV. 288, 293 (1968).

[229] *E.g.*, Norwood v. City of Richmond, 203 Va. 856, 128 S.E.2d 425, 428 (1962) (where the court reversed a disposition due to the court's failure to make the investi-

ing disposition;[230] and (2) the disposition was not in the best interest of the child.[231] Counsel should be present to challenge inappropriate dispositions and to recommend alternatives more conducive to rehabilitation. The President's Commission on Law Enforcement and Administration of Justice has supported this position: "The contribution of lawyers in choosing the most suitable dispositional alternative for the child . . . cannot be overestimated." [232]

Since disposition is not necessarily determined according to the substantive offense, the attorney can render invaluable aid by recommending possible alternative dispositions.[233] The attorney may recommend that (1) the child be given medical, psychological, or psychiatric examinations where necessary; (2) welfare services and agencies be utilized even if institutions only available in another state are necessary; (3) where existing institutional facilities are inadequate, consideration be given to leaving the juvenile in the home environment, possibly on probation; (4) where probation is proposed, the conditions are fair and the time period is reasonable under the circumstances and that counseling services are provided; (5) restitution in connection with limited treatment be utilized in certain cases; (6) removal of privileges be considered when related to the offense committed; and finally (7) commitment to a state training institution be considered where appropriate.[234]

2. *Post-Disposition and Counsel* — The right to counsel has been extended to post-sentencing proceedings and appellate review in criminal proceedings, and there is no reason for doing otherwise in the juvenile justice system. Both appellate proceedings and proceedings to revoke probation or aftercare status are critical stages in the court's continuing jurisdiction over a delinquent. Cases on appeal are often brought as

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gation required by statute); Strode v. Brorby, 478 P.2d 608, 610 (Wyo. 1970) (where the court reversed due to the juvenile court's failure to order a social investigation and to consider that information on disposition).

[230] *E.g., In re* Mikkelsen, 226 Cal. App. 2d 467, 38 Cal. Rptr. 106, 108 (1964) (where the court concluded that failure to permit a juvenile to present evidence relating to the disposition of his case violated due process); State v. A.H., 115 N.J. Super. 268, 279 A.2d 133, 134 (1971) (where the case was remanded for further dispositional proceedings because the juvenile court had "abruptly terminated" defense counsel's attempt to recommend a disposition).

[231] *E.g., In re* Walter, 172 N.W.2d 603, 606 (N.D. 1969) (where the court reversed a juvenile's commitment to a training school, holding that such disposition was not in the best interest of the child or the public); *In re* Braun, 145 N.W.2d 482, 487 (N.D. 1966) (reversals of commitments to training schools as inappropriate dispositions); State v. Myers, 22 N.W.2d 199, 202 (N.D. 1946).

[232] TASK FORCE REPORT, *supra* note 89, at 33.

[233] Comment, *The Attorney and the Dispositional Process,* 12 ST. LOUIS U.L.J. 644 (1968). The disposition should give the community needed protection but must also be in the child's best interest:

> The overt act is important, but it must not become the sole determinant of disposition. The judge must be able to distinguish between what the child has done which necessitated his referral and his overall pattern of behavior, of which the specific act in question may or may not be an integral part.

Id. at 650, *quoting* Gill, *When Should a Child be Committed?,* 4 N.P.P.A.J. 1, 3 (1958).

[234] *Id.* at 651–54.

trials de novo in courts of general jurisdiction, and revocation hearings have both adjudicatory and dispositional phases. Since the nature of such proceedings so obviously resembles the adjudicatory process, the assistance of counsel at post-dispositional proceedings should be constitutionally required as an essential element of fundamental fairness.

(a) Appellate Proceedings — Although firmly established in adult proceedings,[235] the constitutional right to counsel on appeal is generally not extended to juvenile cases. Statutes requiring that counsel be provided "at every critical stage of the proceedings," however, may be interpreted by analogy to criminal proceedings to include the right to counsel on appeal.[236] Further, since "[o]ne not uncommon form of appeal from juvenile court adjudications is the trial de novo in a court of general jurisdiction," [237] *Gault* would require that counsel be provided.[238]

(b) Revocation of Probation — The juvenile court may have authority to revoke probation and provide an alternative disposition. Prior to 1967, courts commonly revoked probation without a hearing,[239] but *Gault* and *Mempa v. Rhay* [240] have provided substantial impetus for courts and legislatures to require that a hearing be held. All the model laws require a court hearing with the right to appointed counsel before probation can be revoked,[241] and several states have followed their recommendations.[242] A comment to Rule 33 of the Model Rules states:

> If . . . revocation of probation is sought, a hearing is necessary to protect the child's due-process right to test the truth of the alleged violation. . . .

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[235] Swenson v. Bosler, 386 U.S. 258 (1967); Douglas v. California, 372 U.S. 353 (1963).

[236] *E.g.*, Chambers v. District Court, 261 Iowa 31, 152 N.W.2d 818 (1967):

> The conclusion is inescapable that the legislature intended to afford all persons coming before the juvenile court a full and complete review on appeal. . . .
>
> . . . .
>
> We see no reason why the appointment of counsel for plaintiff [under the relevant statute] should be construed to terminate when the hearing before the juvenile court was concluded.

152 N.W.2d at 821.

[237] Skoler, *supra* note 160, at 570 n.56, *citing* B. GEORGE, GAULT AND THE JUVENILE COURT REVOLUTION 50 (1968).

[238] Some courts have further held that counsel should be provided a transcript of the trial record for use on appeal. *See, e.g., In re* Boykin, 39 Ill. 2d 617, 237 N.E.2d 460 (1968); Chambers v. District Court, 261 Iowa 31, 152 N.W.2d 818 (1967).

[239] A few states, however, required that a hearing be held before modifying an order. *See* CAL. WELF. & INST'NS CODE §§ 775–77 (West 1972); MINN. STAT. ANN. § 260.185(4) (1959); ORE. REV. STAT. § 419.529 (1959). Also, several courts required that such a hearing conform to the standards of due process. *See Ex parte* Rixen, 74 N.D. 80, 19 N.W.2d 863 (1945); State *ex rel.* Richey v. Superior Court, 59 Wash. 2d 872, 371 P.2d 51 (1962).

[240] 389 U.S. 128 (1967). While *Mempa* involved an adult's right to counsel at probation revocation-deferred sentence hearings in criminal courts, its reasoning in light of *Gault* appears equally applicable to the juvenile justice system; *see* Skoler, *supra* note 160, at 570.

[241] LEGISLATIVE GUIDE, *supra* note 42, § 39; MODEL RULES, *supra* note 69, R.33 & R.39; UNIFORM JUVENILE COURT ACT §§ 26, 37. *See also* PROVISION OF COUNSEL, *supra* note 185, at 12.

[242] *E.g.*, N.D. CENT. CODE § 27–20–26 (Supp. 1974).

> . . . Revocation must be based on an ascertainable fact . . . .
> . . . .
> . . . This procedure insures that the reasons for the proposed action have been considered and articulated for the benefit of the court and the parties; it encourages the supervising authority to evaluate its own conduct critically; and it screens marginal cases out of the court.[243]

Several courts have required that the probation hearing meet the due process standards expressed in *Gault*. In *State ex rel. D.E. v. Keller*,[244] in holding that the probation hearing had not met due process standards, the court stated that "certain passages of the opinion [*Gault*] indicate that the fundamentals of due process should be applied in other critical stages affecting the liberty of a juvenile." [245] Moreover, the language of the Court in *Mempa* that "a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing" [246] is equally applicable to juvenile probation revocation hearings, especially since the disposition alternatives available for the juvenile court judge are so varied. Accordingly, counsel should be constitutionally required at juvenile probation revocation hearings.

(c) Revocation of Parole or Aftercare Status — The due process standards applicable to probation revocation hearings are also relevant to revocation of aftercare status — the juvenile equivalent of adult parole. Although some statutes provide that the institution or administering agency in which the juvenile is confined may establish the conditions of aftercare and later revoke the status without any judicial process,[247] some courts have held that such a practice violates due process:

> Since due process demands notice, a hearing and the aid of counsel, it is beside the point that there is no statute requiring that a juvenile be afforded a hearing in a parole revocation proceeding.[248]

Requiring due process standards at judicial, but not administrative, proceedings [249] is untenable in light of recent Supreme Court opinions that have extended due process protection to crucial decisions made by governmental bodies even in a nonjudicial context.[250]

To the argument that extending the right to counsel to parole revocation proceedings would be disruptive, one court responded:

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[243] MODEL RULES, *supra* note 69, Comment, R.33 at 72–73.

[244] 251 So. 2d 703 (Fla. Dist. Ct. App. 1971).

[245] *Id.* at 705.

[246] 389 U.S. at 137.

[247] *E.g.*, ARIZ. REV. STAT. ANN. § 41–1608 (Supp. 1971); ME. REV. STAT. ANN. tit. 15, § 2716 (Supp. 1974); W.VA. CODE ANN. § 28–1–6 (1971).

[248] People *ex rel.* Silbert v. Cohen, 29 N.Y.2d 12, 16, 271 N.E.2d 908, 910 (1971).

[249] MODEL RULES, *supra* note 69, Comment, R.33, extends the right to counsel to parole revocation hearings unless parole revocation under state law is not a court action.

[250] *E.g.*, Goldberg v. Kelly, 397 U.S. 254, 261–63 (1970) (extending the right to a hearing to situations involving the termination of welfare payments).

> There is no warrant for the fear that to give the juvenile a right to such basic procedural safeguards will provoke friction in the hopefully beneficent relationship between him and his social worker and, certainly, no justification for the belief that a hearing and the presence of an attorney will unduly prolong the parole revocation proceeding or transmute it into a full-blown trial. A lawyer's assistance is needed in order to marshal the facts and introduce evidence of mitigating circumstances, in short, to help the juvenile to present his case.[251]

The advantages of extending due process protection, including the right to counsel, to parole revocation hearings far outweigh the dubious advantages of keeping such hearings discretionary and informal.

IV. Role of Counsel in the Juvenile Justice System and Conclusion

> Depending on one's point of view, the introduction of counsel into juvenile court proceedings has been viewed either as a beneficent circumcision or a radical castration of the juvenile court process. Some commentators have praised the decision as a Magna Carta of children's rights. Others have bemoaned it as the death knell of the juvenile court philosophy.[252]

A. Role of Counsel

The proper role of the attorney in the juvenile justice system is currently in dispute.[253] Prior to *Gault,* the general view of counsel's role in juvenile proceedings was that counsel should cooperate with juvenile court authorities in an effort to serve the best interests of the child. *Gault* and *Winship* suggest that counsel's role is more adversarial and require that due process protections recognized in adult criminal proceedings be stringently enforced in the juvenile setting. The most recent Supreme Court interpretation takes a middle position, suggesting that counsel's role, while tending toward that of an advocate, must be tempered to accommodate the unique features of juvenile proceedings. To properly consider the role of counsel in juvenile proceedings, the tenets of each of these theories must be examined.

1. Counsel as a Nonadvocate — Despite the mandate of *Gault,* the *parens patriae* theory that due process considerations, including the right to counsel, are inappropriate in juvenile proceedings, particularly in pre- and post-adjudicative proceedings, has persisted. Proponents of this view argue

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[251] People *ex rel.* Silbert v. Cohen, 29 N.Y.2d 12, 17, 271 N.E.2d 908, 911 (1971).

[252] Isaacs, *supra* note 209, at 223.

[253] *See* Ferster, Courtless & Snethen, *supra* note 170; Greenspun, *Role of the Attorney in Juvenile Court,* 18 Clev.-Mar. L. Rev. 599 (1969); Isaacs, *supra* note 209; Johnston, *The Function of Counsel in Juvenile Court,* 7 Osgoode Hall L.J. 199 (1970); Kay & Segal, *supra* note 17; Paulsen, *supra* note 183; Comment, *In re Gault and the Persisting Questions of Procedural Due Process and Legal Ethics in Juvenile Courts,* 47 Neb. L. Rev. 558 (1968); Comment, *The Role of the Attorney in the Treatment Phase of the Juvenile Court Process,* 12 St. Louis U.L.J. 659 (1968); Comment, *In re Gault: Understanding the Attorney's New Role,* 12 Vill. L. Rev. 803 (1967).

that the right to counsel should be strictly limited to the delinquency hearing as required in *Gault*. The *parens patriae* approach would limit counsel's role even at the hearing itself, since it would allow the admission of evidence previously unlawfully obtained.

Under this theory, counsel's role must be strictly limited since the "bag of adversary tactics would presumably be only sand in a well-oiled machine." [254] Because the overriding goals of the juvenile proceedings are analyzing, evaluating, and providing treatment for the child, rather than attaching blame or guilt, intervention by counsel would jeopardize the child's "best interest." Proponents of *parens patriae* assert that an attorney who uses legal technicalities to avoid having his client adjudicated delinquent "possesses no social conscience or is constitutionally contentious or vainly legalistic or mentally myopic." [255] This practice, it is urged, is at odds with "greater justice to the child: to teach him honesty and encourage him to *reveal* the truth . . . [not] to pave the way for him to lie and *conceal* the truth." [256] In addition, an attorney may be ill-prepared to evaluate the needs of the juvenile and thus has no place in dispositional proceedings.

> The decision-making process [concerning proper disposition] raises very serious problems with respect to the competence of lawyers to evaluate the complex factors which contribute or detract from a child's well-being. The juvenile court and its professional staff have been established precisely to provide such expertise. The lawyer might be said to usurp the court's function when he makes an *a priori* decision as to what outcome is desirable and then tailors his tactics to achieve that result.[257]

Theorists further maintain that the role of counsel is one of "validating the work of the experts," [258] or approving the work of juvenile court personnel who are experienced in securing the "best interests of the child."

2. *Counsel as Advocate* — *Gault* required counsel's participation to ensure that the proceedings are fair. The Court also felt that the efforts of counsel would have some therapeutic value.

> [R]ecent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness — in short, the essentials of due process — may be a more impressive and more therapeutic attitude so far as the juvenile is concerned. . . . "Unless appropriate due process of law is followed, even the juvenile

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[254] *The Role of the Lawyer, supra* note 14, at 632.

[255] Alexander, *Constitutional Rights in Juvenile Court,* 46 A.B.A.J. 1206, 1209 (1960).

[256] *Id.*

[257] Kay and Segal, *supra* note 17, at 1414.

[258] Ferster, Courtless & Snethen, *supra* note 170, at 398.

> When the lawyer feels that use of exclusionary tactics can block a justifiable finding of delinquency it may well be appropriate for him to evaluate the child and the probability of various dispositions resulting from a finding of delinquency.

Kay & Segal, *supra* note 17, at 1413.

> who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel." [259]

In response to the view that lawyers will transform juvenile into adversary proceedings, the Court noted:

> No doubt this is partly true, but it is partly desirable. Informality is often abused. The juvenile courts deal with cases in which facts are disputed and in which, therefore, rules of evidence, confrontation of witnesses, and other adversary procedures are called for.[260]

One survey of juvenile court judges reinforces the view expressed in *Gault:*

> [T]he lawyer may aid the court in its attempt to reform the youth. . . . Thus, many judges believe that presence of counsel not only impresses a youth with the importance of the proceedings, but also instills a sense of security. The juvenile's confidence in the proceeding's fairness, and awareness that he is receiving individualized attention, may amplify the sobering effect of court exposure and direct it toward rehabilitative ends.[261]

Furthermore, most commentators are critical of juvenile justice administered under the doctrine of *parens patriae:*

> Few academicians and few informed officials find the [juvenile justice] system useful or beneficial to the youth involved in it. Today for example, in State after State, an informed consensus is rather vigorously maintaining that juvenile courts, and especially training schools, are a "mess." There is widespread conviction that the juvenile justice system is, in large part, an out-right failure. It not only frequently fails to rehabilitate, but it also fails to live up to ordinary standards of human decency.[262]

Proponents of the adversary view propose that the adversary system, with all of its advantages and defects, be imposed upon the juvenile justice system. If that is done the role of the attorney, as outlined in the Canons of Ethics, is clear. As with every other client, counsel for a juvenile is obligated to represent his client "zealously within the bounds of the law," [263] and to make every effort to establish his client's innocence.[264]

3. Modified Advocacy — In emphasizing the right of the state to administer juvenile justice differently from the way it administers criminal justice, the Court in *McKeiver* suggests that the attorney's role be modified to accommodate the unique aspects of juvenile proceedings. The attorney must consider each case individually. The juvenile's guilt or innocence and the available rehabilitative facilities should be studied to

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[259] 387 U.S. at 26.

[260] *Id.* at 39 n.65.

[261] Note, *Rights and Rehabilitation in the Juvenile Courts,* 67 COLUM. L. REV. 281, 324–25 (1967).

[262] U.S. DEP'T OF HEALTH, EDUC. & WELFARE, TOWARD A POLITICAL DEFINITION OF JUVENILE DELINQUENCY 2 (1970).

[263] ABA CANONS OF PROFESSIONAL ETHICS No. 7.

[264] Kay & Segal, *supra* note 17, at 1409–18.

ascertain whether counsel should act as an advocate or as an official of the court to reach the appropriate disposition.[265] The role of an attorney in the juvenile justice system may vary, depending on the stage of the proceeding and the community's ability to provide effective rehabilitation alternatives.

B. Conclusion

The role of counsel must ultimately be determined in relation to the purposes for which counsel is constitutionally required. Briefly stated, those purposes are to ensure (1) that the proceedings are fairly and efficiently conducted, and (2) that dispositions formally or informally imposed are well suited to accomplish the rehabilitative objective for which the juvenile justice system was originally formulated. The ineffectiveness of the juvenile justice system under the doctrine of *parens patriae* indicates that procedural guarantees are not mere surplusage, but are necessary for the efficient administration of justice.

For the right to counsel recognized in *Gault* to be effective, it cannot be limited solely to the adjudicatory proceeding. Absence of counsel at any "critical stage," formal or informal, in court or out, severely restricts the accused's right to a fair trial. The right to counsel is an essential element of fundamental fairness and should not be limited to adult criminal proceedings.

R. COLLIN MANGRUM

[265] *See generally* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft 1971).

A Proposal for America's Housing Dilemma — The Urban Homeowners Association

The provision of adequate housing for all citizens of the United States has been a national priority for the last twenty-five years,[1] yet America's housing situation continues to be "the most pressing unfulfilled need of our society." [2] An alarmingly large number of Americans continue to live in substandard housing,[3] despite the creation and efforts of numerous governmental programs designed to address housing problems.[4] To supplement present housing efforts, this note will propose that "urban homeowners associations" be organized and structured to meet the underlying causes of urban housing blight. Urban homeowners associations are institutions designed to place emphasis on the individuals who are present or future victims of inadequate housing. Using Salt Lake City as a backdrop against which to present the proposal, this Note will analyze Salt Lake City's housing problems and will describe the urban homeowners association with special emphasis on its potential for meeting local housing problems.

I. Housing Trends in Salt Lake City

A. Changing Household Composition

Salt Lake City is changing from a community primarily composed of families with young children, to one- and two-member households composed of senior citizens and young adults.[5] This change is partially evidenced by the fact that between 1960 and 1970, the proportion of Utah residents living in Salt Lake City in all age groups declined except those seventy years of age and older.[6] In addition, one-member households in the city increased thirty-five percent and two-member sixteen percent, while the number of households with three or more persons

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[1] The Housing Act of 1949, 42 U.S.C. § 1441 (1949) called for, "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family."

[2] Report of The President's Committee on Urban Housing, A Decent Home 1 (1969).

[3] "About 7.8 million American families — one in every eight — cannot now afford to pay the market price for standard housing that would cost no more than twenty percent of their total incomes." *Id.* at 7.

[4] Special Revenue Sharing for Urban Community Development, and Planning and Management Assistance for State and Local Governments — Message from The President of The United States, H.R. Doc. No. 92–61, 92d Cong., 1st Sess. (1971).

[5] Twenty-two percent of the 20–25 year-old age group in Utah reside in Salt Lake City in comparison to just twelve percent of the 35–40 year-old age group. The most noticeable group to have abandoned the city is families with school age children. Between 1960 and 1970, for example, the number of students enrolled in the Salt Lake City School District declined fifteen percent, from 42,786 to 36,233. Salt Lake City Planning Comm'n, A Report of Housing 18–19 (March, 1972) [hereinafter cited as Housing]. Enrollment has since decreased to 27,798. Interview with Stanley R. Morgan, Administrator for Research and Public Information, Salt Lake City Board of Education, in Salt Lake City, Aug. 5, 1974.

[6] Housing, *supra* note 5, at 18.

decreased.[7] Consequently, the average household unit in Salt Lake City dwindled from 3.1 members in 1960 to 2.7 in 1970,[8] and projections indicate that this number will continue to decline.[9]

The decline in numbers of families with children living within the city indicates a trend toward suburbanism in Salt Lake County,[10] which had adversely affected the city in two ways: (1) it has eroded the city's tax base;[11] and (2) it has caused the city to suffer from a sociologically unstable environment.[12]

B. Increased Multi-Family Dwelling

Historically, Salt Lake City has in large part consisted of single-family, detached houses, with a relative scarcity of multiple-family apartments.[13] Thus, the city has generally avoided the deleterious effects of high density living conditions incident to many large cities.[14]

Since 1968, however, over fifty percent of the total new housing structures built in the city have been multi-family units.[15] In 1973, only eight percent of the housing units authorized for construction were single-family dwellings or duplexes; the remaining units were multi-family apartment buildings.[16] In addition, demolition activity is depleting the number of single-family units.[17] As a result, single-family units comprised only fifty-

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[7] *Id.* at 20. In 1960, one- and two-member households were 49.1 percent of all households in the city. By 1970, this figure had increased to 58.7 percent. During the same period, households consisting of five or more persons decreased from 20.5 percent of all households to 14.9 percent. Salt Lake City & County Bds. of Comm'rs, Salt Lake City/County Housing Element, Vol. I: Housing Needs 9 (July, 1972) [hereinafter cited as Housing Needs].

[8] Housing, *supra* note 5, at 20.

[9] Housing Needs, *supra* note 7, at 58.

[10] While the population of Salt Lake City decreased 13,454 from 1960–70, Salt Lake County increased 89,141. Housing Needs, *supra* note 7, at 7. During the same period, 94.5 percent of new housing construction in the county occurred outside Salt Lake City. *Id.* at 18.

[11] The move of middle income individuals to the suburbs results in taxable wealth being accumulated in suburban zones. A. HAWLEY, URBAN SOCIETY: AN ECOLOGICAL APPROACH 256–57 (1971). In Salt Lake City, "[p]opulation is declining, the loss taking place in the middle income families which traditionally have provided the stability and tax base needed to run a city successfully." Salt Lake City Planning Comm'n, Community Improvement Program 2 (March, 1972). *See also* Gans, *The White Exodus to Suburbia Steps Up,* in UP AGAINST THE URBAN WALL (T. Venetoulis & W. Eisenhauer eds. 1971).

[12] "Salt Lake City is losing its families and the permanency and stability they represent." Housing, *supra* note 5, at 32. *See also* A. HAWLEY, *supra* note 11, at 255.

[13] Note, *Housing in Salt Lake County — A Place to Live for the Poor,* 1972 UTAH L. REV. 193.

[14] Overcrowding is often accompanied by a lack of privacy, lack of neighborhood services, poor sanitation and health, and deviant behavior. *See* Clinard, *The Nature of the Slum,* in CRIME IN THE CITY 13, 17–22 (D. Glaser ed. 1970). A recent book dealing with the general effects of high density, multiple family conditions is O. NEWMAN, DEFENSIBLE SPACE (1973). *See also* L. MUMFORD, THE URBAN PROSPECT 244 (1968).

[15] Housing, *supra* note 5, at 20.

[16] Prudential Federal Savings & Loan Ass'n, Summary of Economic Conditions Related to Housing in Utah 37 (March 5, 1974) [hereinafter cited as Economic Conditions].

[17] During the 1960's, an average of 519 single-family units were demolished annually. Only one out of every three of these units was replaced by a single-family dwelling. Housing Needs, *supra* note 7, at 19–20.

six percent of the city's total housing stock in 1970 in comparison to sixty-three percent in 1960.[18]

C. Increased Renter-Occupied Housing

In conjunction with increasing multi-family dwellings, Salt Lake City is experiencing a gradual reduction in owner-occupied homes and an accompanying increase in the number of renter-occupied units with absentee landlords. Thirty-seven of the city's forty-nine census tracts showed a decline in the number of owner-occupied dwelling units during the 1960's.[19] Owner-occupied units decreased from 34,171 to 32,189 while renter-occupied units increased from 26,718 to 30,928.[20]

The disadvantage of increasing numbers of renter-occupied housing units is that a neighborhood primarily composed of renter-occupied units is generally not as well maintained as one composed of homeowners.[21] Conversely, the absentee landlord often has no incentive, other than the profit motive, to provide adequate maintenance of the property.[22] Thus, property is allowed to deteriorate when upkeep and repair of the premises will not produce financial rewards.

D. Structural Deterioration

The Community Improvement Program Structural Survey,[23] a study conducted by the Salt Lake City Planning Commission, reveals that of the 38,388 housing structures in Salt Lake City in 1969, approximately seven percent, or 2,552 structures, were dilapidated and should have been replaced,[24] and approximately thirty-two percent, or 12,300 structures, were deteriorating and needed major rehabilitation.[25] One of the most decrepit areas in Salt Lake City is the central city community,[26] where thirty-three

[18] Housing, *supra* note 5, at 20. Between 1960 and 1969, Salt Lake City had a net decrease of 8.8 percent in its single-family residential stock, in contrast to a 20.2 percent increase in the number of multi-family units. Housing Needs, *supra* note 7, at 19.

[19] Housing, *supra* note 5, at 32.

[20] *Id.* at 33–34.

[21] It has been suggested that absentee landlords, speculator owners who are holding the property anticipating a more profitable use in the future, costs of maintenance, poor education, and lack of income of renters are among the reasons why neighborhood quality is generally lower in modest neighborhoods when renters rather than owners predominate. Housing Needs, *supra* note 7, at 42. *See also* A. STEGMAN, HOUSING INVESTMENT IN THE INNER CITY: THE DYNAMICS OF DECLINE 180–226 (1972). Although Stegman is hesitant to support the above proposition, his book nevertheless contains much supportive data.

[22] Housing Needs, *supra* note 7, at 42.

[23] The structural survey was conducted as part of the initial projects of Salt Lake City's total Community Improvement Program. For details as to the study methods used, see Housing, *supra* note 5, at 115 and Community Improvement Program, *supra* note 11, at 4.

[24] Housing, *supra* note 5, at 5, 111. A dilapidated structure is defined as one with one or more critical defects, such as cracks in the walls or foundations, which prevent the house from providing safe and adequate shelter. *Id.* at 35.

[25] *Id.* at 5, 111. A deteriorating unit is defined as one in need of more repair work than would be provided in the course of regular maintenance. *Id.* at 35.

[26] The Central City portion of Salt Lake City includes the area from roughly North Temple to Twenty-First South and from Thirteenth East to the I-15 Freeway. Housing, *supra* note 5, community map.

percent of the city's total residential stock is located.[27] Of the housing structures located within this area, sixty-one percent require rehabilitation or clearance.[28] A study of the growth pattern of urban blight between 1960 and 1970 further indicates an expansion of this blight from the older, central areas of Salt Lake City to surrounding neighborhoods.[29]

One of the causes of this deterioration is the age of the city's residential stock.[30] A typical city will continuously demolish and rebuild, completely renewing itself every one hundred years;[31] Salt Lake City, however, appears to have ceased this process.[32] There is presently little demand to demolish old structures within the city to make way for new housing because the preponderance of new construction is taking place in the county, where the demand is greatest.[33] Thus, many older buildings are being occupied long past their useful life.

E. Housing Shortage

While the population of Salt Lake City declined 7.2 percent between 1960 and 1970,[34] total housing units within the city increased 2.2 percent.[35] These figures suggest that because the city's available housing is growing more rapidly than its population, any housing shortage is being alleviated. The trend toward smaller households,[36] however, clarifies the present housing picture. The number of occupied household units increased 3.6 percent between 1960 and 1970,[37] thus exceeding the increase of available housing units. That Salt Lake City presently has less available housing than it had several years ago is further evidenced by the fact that in 1966 the county vacancy rate for apartments was 10.5 percent, compared to 1.6 percent in 1971.[38]

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[27] *Id.* at 5.

[28] *Id.* at 6. A study conducted by the Central City Tenant Union found that of the units surveyed, twenty-one percent were without plumbing that functioned, thirteen percent were without furnaces, seventeen percent did not have lights or electrical outlets that worked, fifty percent had holes in the walls, forty-three percent had holes in the ceilings, and twenty-seven percent had mice, rats, or roaches. *Id.*

[29] *Id.* at 36–37. It is estimated that by 1995, 12,000 more residential structures will have become substandard. Housing Needs, *supra* note 7, at 23.

[30] The average age of housing structures in Salt Lake City is forty-four years; ninety-two percent of all housing structures are twenty years of age or older. Housing, *supra* note 5, at 3.

[31] Housing Needs, *supra* note 7, at 19.

[32] *See* Salt Lake City Planning Comm'n, A Report of Existing Blight Conditions 3 (March, 1972).

[33] *See* note 10 *supra.*

[34] Housing, *supra* note 5, at 17–18.

[35] *Id.* at 11.

[36] *See* text accompanying notes 7–9 *supra.*

[37] Housing Needs, *supra* note 7, at 7.

[38] Housing, *supra* note 5, at 12. Unfortunately, Salt Lake City statistics are unavailable, but should be reflected in Salt Lake County statistics, since the city composes a major portion of the county. A study conducted during the first week of April, 1974, indicates that the over-all vacancy rate in Salt Lake County is now 7.1 percent. X-1 University of Utah Bureau of Economic & Business Research, Real Estate Activities in Salt Lake, Davis, Weber and Utah Counties 52 (Spring, 1974). This statistic,

This shortage of available housing has probably contributed to the substantial increase in the cost of both renter- and owner-occupied units during 1960–70.[39] Consequently, middle income families can now only afford the housing that low income families once occupied. Low income families are being moved down the scale of quality housing as they are displaced by higher income groups.[40] The effect is substandard housing conditions among low income [41] and minority groups.[42]

II. Causative Factors

The following four factors play a substantial role in the city's gradual decline in residential attractiveness and quality:

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however, is not representative of Salt Lake City, as evidenced by the following vacancy figures for apartments over one year old in Salt Lake City:

	Total Number	*Vacant*	*% of Vacancy*
Apts. under $75	613	8	1.3%
$76–$99	1239	49	3.9
$100–$149	2263	92	4.0
$150–$199	1089	50	4.6
$200+	357	12	3.4
Totals	5561	211	3.8 (avg.)
Statistics for apartments completed after April 1, 1973, show:			
Apts. under $75	0	0	0
$76–$99	0	0	0
$100–$149	39	0	0
$150–$199	288	30	1.0
$200+	185	67	36
Totals	512	97	18.9 (avg.)

These data indicate that the vacancy rate in Salt Lake City is much lower than the county-wide figure, especially among lower priced apartment units. It is also important to note that the majority of newly constructed apartments in the city are in the upper price range. *Id.* at 55, 57, 60–61.

[39] Between 1960 and 1970, the median rent for an apartment in the city increased from $60 to $80. In the same period the median value of owner-occupied units had increased from $13,400 to $16,000. Housing, *supra* note 5, at 35. The average sale price for a home in the Salt Lake City Metropolitan Area in 1970 was $22,884 and has since increased to $30,752. Economic Conditions, *supra* note 16, at 45.

[40] Housing, *supra* note 5, at 13–14.

[41] Low income is clearly associated with structural deficiencies. *See, e.g.*, C. Nelson, This Is A Community 148 (1971). This conclusion is verified by the fact that the areas within the city with the greatest number of deteriorated units (Capitol Hill and Central City) also had the highest percentage of individuals with annual income below $3,500. Housing, *supra* note 5, at 57.

[42] The minority population in Salt Lake City makes up such a small proportion of the total city population that it is difficult to assess its housing situation. In 1970, approximately three percent of Salt Lake City's population were minorities. Housing, *supra* note 5, at 42. Available data indicate that the over-all condition of minority housing in the city is substandard. Of the fifteen census tracts in Salt Lake City having a substantial minority group population, for example, eight are located in the Central City, where sixty-one percent of the residential structures are substandard. *Id.* at 50.

[43] "Red-lining" is a term originating from the apparent practice of some lending institutions drawing a red line around certain areas of cities designating them for special treatment.

A. Lending Practices of Financial Institutions — Red-Lining [43]

Housing authorities have recently come to recognize the adverse effect that discriminatory practices of lending institutions have on housing.[44] These discriminatory procedures [45] are collectively known as "red-lining," which involves the designation of particular neighborhoods or streets as high risk mortgage areas.[46] An application for a mortgage on a home within an area so designated is either rejected outright or accepted on less than customary loan terms — a higher down payment, a higher interest rate, or a shorter repayment period.[47] A neighborhood victimized by red-lining may have "difficulty in obtaining conventional mortgage and home improvement loans, plummeting property values, growing numbers of absentee landlords, and neighborhood schools and churches struggling to survive." [48]

A survey of lending institutions serving Salt Lake City [49] reveals that although red-lining is not generally practiced in the city in its customary

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[44] *See, e.g., Hearings on S. Res. 32 Before the Subcomm. on Anti-Trust and Monopoly of the Senate Comm. on the Judiciary,* 92d Cong., 2d Sess., pt. 1, at 5 (1972); Searing, *Discrimination in Home Finance,* 48 NOTRE DAME LAW. 1113 (1973); Council on Urban Life, Red-Lining in Milwaukee 1 (1974).

A community's health and well-being depends on a viable mortgage money market. When the mortgage market is constricted, the victim neighborhood atrophies. An area subjected to red-lining will typically pass through five stages:

(1) *Healthy Neighborhood* — Typified by ready access to conventional mortgage loans, stability in the housing market, prosperous businesses, and well-maintained residences.

(2) *First Symptom* — Lending institutions begin to fear that homes in a certain area may not be worth full market value in the event of foreclosure in the distant future. Accordingly, appraised values are lowered for the purposes of establishing a loan figure.

(3) *Early Stage* — Buyers seeking a home in the subject area are offered less than standard terms: higher down payment requirements, higher interest rates, shorter repayment periods.

(4) *Advanced Stage* — Conventional loans for the purchase of a home in the subject area are virtually nonexistent. FHA and VA loans are relied upon exclusively. This stage is symptomized by the entrance of real estate speculators, abandoned businesses, increase in absentee landlordism, and a decline in services.

(5) *Final Stage* — The area is completely deteriorated, soon to be abandoned, and eventually declared an urban renewal area and razed. *Id.* at 2–14.

[45] In December, 1973, the Federal Home Loan Bank Board issued a policy statement condemning lending discrimination based on the age of the home or area, inasmuch as such practices may have an indirect effect on minority groups. *See* 12 C.F.R. § 531.8(c)(4) (1974).

[46] Another form of red-lining used to achieve racial discrimination involves the designation of a specific neighborhood as the only area in which a loan will be made to minority buyers. This form of red-lining was adopted in 1968 by a coalition of twenty-two Boston banks, known as the Boston Banks Urban Renewal Group (BBURG). This group created a pool of $20,000,000 and made it available to low and moderate income home buyers. The unfortunate aspect of this seemingly worthy project was the stipulation that anyone making use of the pool must purchase a home within a defined area. Consequently, BBURG created its own ghetto. *Hearings on S. Res. 32 Before the Subcomm. on Anti-Trust and Monopoly of the Senate Comm. on the Judiciary,* 92d Cong., 2d Sess., pt. 1, at 5 (1972).

[47] For a detailed description of red-lining see Searing, *Discrimination in Home Finance,* 48 NOTRE DAME LAW. 1113 (1973).

[48] Council on Urban Life, Red-Lining in Milwaukee 1 (1974).

[49] Between May 20–22, 1974, interviews were conducted with mortgage loan officers of nine lending institutions in Salt Lake City, Utah. To ensure candor, each interview was prefaced with a pledge to preserve the anonymity of the interviewee and his or her

form, it does exist. The lenders interviewed rely on three criteria in deciding whether to accept a conventional mortgage application — location, condition, and age of the structure.[50] A conventional mortgage on a newer home in good condition, located in a healthy neighborhood, will normally require a ten to twenty percent down payment with payments extended over twenty-five to thirty years at the institution's prime interest rate. If the loan application is for a home located in a deteriorating neighborhood, or if the home is in poor condition or relatively old, the institution may require a forty percent down payment with a fifteen to twenty year repayment period at an interest rate one-fourth to one-half of one percent above the prime rate.[51] Individual credit is not an issue at this point in the lending process. Two prospective buyers with equal credit ratings, seeking to purchase similar homes, will be offered dissimilar terms if one is purchasing a home located in central city and the other is buying a home on the east bench.[52]

A majority of those interviewed claimed that they had not "red-lined" any area in Salt Lake City, but did admit that there are certain areas in which they were hesitant to make a loan.[53] Although they acknowledged that the practices of lending institutions in the area might be a partial cause of the city's blight and housing shortage,[54] the lenders justified their institutions' lending practices by citing sound economic principles.[55]

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institution. Interviewees represented institutions responsible for $255,402,124 in conventional, FHA, and VA loans in 1973, forty-two percent of the total market for Salt Lake County. Security Title Company, Summary of Trust Deeds and Mortgages Recorded in Salt Lake County for the Month of December, 1973 (January, 1974). The nine institutions interviewed represented a cross section of the business institutions involved in the local mortgage market, savings and loan associations, commercial banks, and mortgage companies.

[50] Six of the interviewed officers listed the neighborhood in which the home is located as the most important criterion, followed in importance by the condition and age of the home. The interviewees indicated that if the loan application did not meet standards on location, condition, and age, the application for a conventionally financed mortgage was rejected. The buyer is then forced to rely on an FHA or VA loan. If this alternative is not feasible, he will normally enter into an installment land contract with the seller.

[51] The institutions interviewed differed in the manner in which they adjust the terms of a loan. Several interviewees stated that they vary only one of the terms, one institution varied two of the terms, and six adjusted all three. The effect of an adjustment upward in loan terms can be decisive to the buyer. For example, an increase of one percent in the interest rate removes 3.4 million potential home buyers from the market, nationwide. EDITORIAL RESEARCH REPORTS, FUTURE OF THE CITY 63 (1974).

[52] The loan officers disclaimed any discrimination against individuals, basing their variance in treatment on the home, not the buyer.

For a comparison of the practices of Salt Lake City lenders with those elsewhere in the country, see Bentley & Macbeth, *Mortgage Lenders and the Housing Supply,* 57 CORNELL L. REV. 149 (1972).

[53] One loan officer stated, however, that there were streets in the city on which his institution would not finance a loan for a home. In addition, certain areas such as Rose Park and Glendale Gardens were mentioned as suspect neighborhoods. Three interview responses indicated that in the past year only two to three percent of the institutions' total loans were made in the Central City area, despite the fact that thirty-three percent of the city's residential stock is located therein. *See* note 27 *supra* and accompanying text.

[54] Two of the loan officers volunteered that these practices were not just a reaction to the marketability of a certain home, but rather were the cause of housing deterioration. *See* note 44 *supra.*

One factor responsible for discriminatory lending practices in Salt Lake City is the secondary mortgage market, which consists of insurance companies, savings and loan associations, and three national corporations — the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Corporation, and the Government National Mortgage Corporation.[56] These institutions purchase mortgages from local primary lenders, thus creating a market for mortgages by increasing the liquidity of such investments.[57] One lender interviewed estimated that sixty percent of the mortgages created in Salt Lake County are sold by a primary lender to a secondary buyer.[58]

Primary lenders handle a mortgage application in one of two ways. Upon receiving an application, the primary lender contacts a secondary buyer and offers to sell the mortgage. If the buyer accepts, the lender approves the application, makes the loan, and sells the mortgage immediately. Alternatively, the institution approves and makes the loan and then attempts to sell it individually or as a block. In either event, the primary lender's major concern is the marketability of each mortgage in his portfolio, and whether the collateral accepted on a loan is acceptable to the secondary buyer.

Secondary buyers have placed standard qualifications upon mortgages they will purchase which have adversely affected housing in Salt Lake City. It is difficult, for example, to sell the mortgage on a home over twenty years old,[59] or on homes located in particular areas of the city.[60]

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[55] The justification is as follows: when a loan is made on a home, the home becomes the collateral for the mortgage. In the event of foreclosure at some future time, the institution must be able to recover value from the home to cover the outstanding debt. If the institution fears that because of the home's location, condition, or age it will not retain sufficient value, they adjust the terms of a loan to obtain an accelerated return. If a lender projects that an area is going to decline in market value, thereby decreasing the value of a home, the terms are adjusted to make loans in the area less available.

[56] One loan officer stated that if discrimination or red-lining exists in Salt Lake City, it is caused by the secondary marketeers located outside the state.

For an in-depth discussion of the secondary market and its impact upon primary lending institutions see Bartke, *Fannie Mae and the Secondary Mortgage Market,* 66 NW. U.L. REV. 1 (1971). *See generally* Bartke, *Home Financing at the Crossroads— A Study of the Federal Home Loan Mortgage Corporation,* 48 IND. L.J. 1 (1972).

[57] The secondary market has been created as a result of:

(1) the reliance of the home construction and home purchase market upon financing;

(2) the fact that the home purchase market suffers certain disadvantages as compared to other markets with which it must compete — lack of fungibility, inability of the small investor to investigate the financial responsibility of the borrower or the quality of the security, and the fact that the large units involved are beyond the reach of modest investors;

(3) problems involved in servicing and reinvesting; and

(4) absence of liquidity in the investor's portfolio.

Bartke, *Fannie Mae and the Secondary Mortgage Market,* 66 NW. U.L. REV. 1 (1971).

[58] Interviews conducted revealed that four of the five largest lenders rely almost exclusively on the secondary market.

[59] This is critical in light of the fact that ninety-two percent of the residential structures in Salt Lake City are over twenty years old. Housing, *supra* note 5, at 3.

[60] One west coast investor will not purchase a loan on an existing home west of State Street. This is important in light of the fact that in recent years this area of

B. Inefficient Code Enforcement

A potential method of curbing urban deterioration is the adoption and enforcement of an effective housing code designed to give the city the necessary tools to enforce certain minimum housing standards. Salt Lake City has adopted such a code,[61] but has failed to effectively enforce it. The Uniform Housing Code defines substandard housing in terms of such conditions as inadequate sanitation and structural hazards,[62] details standards for space and occupancy and exit and fire protection, and sets structural and mechanical requirements.[63]

To enforce its provisions, the code authorizes building inspections.[64] A building found in violation of the code is declared a public nuisance,[65] which results in one of the following actions: (1) the owner is charged with a separate misdemeanor for each day the violation continues;[66] (2) the city repairs the building and charges the owners; or (3) the city demolishes the building and charges the owner.[67]

Although the housing code provides an effective means by which to reduce deterioration and blight, statistics indicate that the city is failing to meet its obligation to see that local housing complies with the code. For example, from 1968 through 1973, Salt Lake City succeeded in removing only 3,362 housing structures from the substandard housing category,[68] in spite of the fact that the 1969 structural survey disclosed that approximately 15,000 structures within the city were not in compliance with the code.[69]

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the city is experiencing as much new residential construction as the area east of State Street. Economic Conditions, *supra* note 16, at 42.

[61] UNIFORM HOUSING CODE, adopted by reference in SALT LAKE CITY, UTAH, REV. ORDINANCES § 5–3–1 (1973). The city has also adopted the Salt Lake City and County Housing Code, SALT LAKE CITY, UTAH, REV. ORDINANCES §§ 18–14–1 to –74 (1965), which is primarily enforced by the City-County Health Department. Interview with Roger Evans, Housing Assistant in the Salt Lake City Department of Building and Housing Services, in Salt Lake City, Utah, June 12, 1974.

[62] UNIFORM HOUSING CODE chs. 5–9.

[63] *Id.* ch. 10.

[64] *Id.* § 201(b). If the building is occupied, the inspector must present credentials and demand entry. If the building is not occupied, the inspector must make a reasonable effort to contact the owner or person holding authority over the building to demand entry. A person who refuses to allow the inspector's entry is guilty of a misdemeanor.

[65] *Id.* § 202. Once a city inspector has determined that a building is substandard, proceedings are commenced to ensure compliance with the code. *Id.* § 1101(a). Notice is sent to the owner ordering that the illegal conditions be corrected. *Id.* § 1101(b). The owner can appeal the notice to a Housing Advisory and Appeals Board. *Id.* §§ 1201(a), 1301–05.

[66] *Id.* § 204.

[67] *Id.* §§ 1401(c)(3), 1601–02, 1604–05(a).

[68] This statistic was compiled from a combination of sources including: Salt Lake City's Application for Workable Program Certification or Recertification (1973); Salt Lake City's Application for Review of Workable Program for Community Improvement (1970); interview with Roger Evans, note 61 *supra*.

[69] See notes 24–25 *supra* and accompanying text.

Insufficient housing code enforcement is not a problem peculiar to Salt Lake City. The problem as it exists in other cities has been studied in detail and a plethora of suggestions have been made for its correction. *See* Boggan, *Housing Codes as a*

Furthermore, the city has failed to use all methods at its disposal to enforce the code. There is no indication, for example, that the city has ever repaired a structure and then charged the costs of repair to the owner.[70] In addition, the city has had very little success in prosecuting offenders.[71] Code compliance has been achieved primarily through demolition of nonconforming housing structures.[72]

C. Ineffective Zoning Ordinances

Salt Lake City's approach toward land use planning, as evidenced by its zoning ordinance, is in part responsible for recent housing trends. A major portion of the city, including many single-family residential neighborhoods, has been zoned to allow multi-family dwellings.[73] Consequently, most neighborhoods have the potential to become dominated by high density, multi-family apartment buildings that are often accompanied by a deterioration in the quality of life.[74]

Salt Lake City's zoning ordinance allows for an incompatible mixture of various building uses. For example, with the exception of heavy manufacturing districts, the ordinance allows commercial, residential, and industrial uses to exist side by side.[75] Rising property values and decreased residential attractiveness caused by commercial and industrial development within such areas eventually force out the local residents, leaving behind dilapidated, uninhabitable housing structures.[76]

D. Property Tax

Much has been written in recent years on the impact of property taxation on housing and urban problems,[77] and whether it encourages the disuse or misuse of property, thereby having a regressive effect upon housing. A study of the consequences of property taxes in Salt Lake City

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Means of Preventing Urban Blight: Constitutional Problems, 6 WAKE FOR. L. REV. 255 (1970); Castrataro, *Housing Code Enforcement: A Century of Failure in New York City,* 14 N.Y.L. FORUM 60 (1969); Marco & Mancino, *Housing Code Enforcement — A New Approach,* 18 CLEV. MAR. L. REV. 368 (1969); Comment, *Housing Codes and a Tort of Slumlordism,* 8 HOUST. L. REV. 522 (1971).

[70] Interview with Roger Evans, note 61 *supra.* This might be due to the expense and administrative time that would be required to maintain a city-wide maintenance program.

[71] *Id.*

[72] *Id.*

[73] Only five residential areas within the city are zoned exclusively for single-family units. Use District Map of Salt Lake City, and SALT LAKE CITY, UTAH, REV. ORDINANCES § 15–13–1 (1965).

[74] *See* discussion in note 14 *supra.*

[75] SALT LAKE CITY, UTAH, REV. ORDINANCES § 15–13–1 (1965).

[76] *See generally,* Salt Lake City Planning Comm'n, A Report of Existing Blight Conditions 4 (March, 1972); Salt Lake City Planning Comm'n, Housing Element 31 (February, 1974) [hereinafter cited as Housing Element]; Note, *Housing in Salt Lake County — A Place to Live for the Poor,* 1972 UTAH L. REV. 193.

[77] *See, e.g.,* A. KING, PROPERTY TAXES, AMENITIES, AND RESIDENTIAL LAND VALUES (1973); C. NELSON, *supra* note 41, at 33–75; THE URBAN INSTITUTE, PROPERTY TAX REFORM (1973); Zimmerman, *Tax Planning for Land Use Control,* 5 URBAN LAW. 639 (1973); Note, *Housing in Salt Lake County — A Place to Live for the Poor,* 1972 UTAH L. REV. 193.

concluded that the present tax system does have a detrimental effect on the city's housing conditions.[78] The taxation of improvements, for example, often tends to discourage the most effective use of the property. An absentee landlord who owns a residential structure that is marginally profitable for housing purposes may find it expedient to demolish the structure and use the property for a nonresidential purpose such as a parking lot, thereby decreasing his property tax.[79] Also, the property tax discourages land improvements since the landowner of a marginally profitable residential unit may forestall improving the premises for fear of increased taxes resulting from greater property evaluation.[80]

III. The Proposal — Urban Homeowners Association [81]

A. Organization of the Urban Homeowners Association

The apparent inability of existing programs to cope with Salt Lake City's housing problem suggests the need to explore new methods of attack. One such alternative is the creation of homeowners associations on a neighborhood basis in urban Salt Lake City.[82] Such associations would be initially organized through the efforts of citizens enlisting membership of neighbors who would thereafter enter into a common set of covenants, conditions, and restrictions. Successive owners of property subject to the covenants, conditions, and restrictions would automatically become members upon purchase. The homeowners association would be incorporated as a nonprofit corporation,[83] financed largely from internal resources.[84] Its primary functions would include the provision of rehabilitation projects for member homes, maintenance of member yards and neighborhoods, and financial assistance to facilitate home ownership among nonmembers.

1. Organization and Membership — A major flaw in neighborhood organizations in the past has been the lack of citizen participation. Americans are not inclined to participate in localized decision making despite the fact that such processes may have an immediate impact upon their lives.[85] Even organizations with an active membership often find them-

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[78] C. Nelson, *supra* note 41, at 68.

[79] *Id.* at 68–69.

[80] *Id.*

[81] Homeowners associations are not to be confused with those found in connection with condominiums, cooperatives, or planned unit developments.

[82] Homes associations had their American origins in the state of New York in 1831. C. Berger, Land Ownership and Use 483 (1968). Seventy-four nonprofit homeowners and property owners associations have been incorporated in Utah in the last five years. Utah Secretary of State, Incorporation Records.

[83] Utah Code Ann. § 16–6–18 to –111 (1973).

[84] *See* text accompanying notes 109–16 *infra.*

[85] A typical example of citizen participation is recorded in a recent study:
> However, the record is much less encouraging concerning the degree to which programs of neighborhood participation have been able to promote widespread community involvement. Although all meetings visited for this study were open to all residents of the neighborhood, it was found in almost

selves minimally effective in the absence of some form of independent authority or power by which they can achieve desired goals.[86] The success of the urban homeowners association, therefore, would hinge upon its ability to enlist the participation of homeowners in the neighborhood.

The urban homeowners association (UHOA) would probably attract membership and participation for several reasons. First, the UHOA is organized so that it carries institutionalized power and has the ability to effectuate change.[87] In addition, housing problems confronting the city are so urgent that citizen concern is widespread.[88] The UHOA would also attract those wishing to take advantage of its rehabilitation and home ownership programs.

2. *Incorporated as a Nonprofit Corporation* — Homeowners associations would be incorporated under the "Utah Nonprofit Corporation and Co-operative Association Act," [89] to avoid taxation and protect participants from unlimited liability.[90] One of the keys to the UHOA's success would be the effective employment of the members' efforts through committees [91] organized to provide for (1) communication among the members of the association;[92] (2) maintenance of common areas;[93] (3) rehabilita-

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every case that the elected members of the program's board or council far outnumbered the neighborhood attendants. In almost a fourth of the meetings, in fact, no neighborhood residents other than elected representatives were present.

R.L. COLE, CITIZEN PARTICIPATION AND THE URBAN POLICY PROCESS 131 (1974). Another study conducted in Syracuse, New York, found that less than one percent of the adult population had participated in any of thirty-nine major community decisions over a five year period, other than voting in an election or referendum. Bloomberg, *Community Organization,* in READINGS IN COMMUNITY ORGANIZATION PRACTICE 91, 112 (R. Kramer & H. Specht eds. 1969).

[86] *See* Rossi, *Theory, Research, and Practice in Community Organization,* in READINGS IN COMMUNITY ORGANIZATION PRACTICE 56–57 (R. Kramer & H. Specht eds. 1969).

[87] The urban homeowners association's ability to control the use of the land by covenants, conditions, and restrictions, as well as its fund raising capabilities, enables the organization to effectuate change within its own area. Furthermore, experience in Houston, Texas, indicates the willingness of people to enter into such associations to protect their neighborhoods. *See* notes 120–23 *infra* and accompanying text.

[88] There are indications that many citizens in Salt Lake City desire to organize citizen participation organizations on a neighborhood basis and/or strengthen those already existing. *See* Citizens Committee, Central Community Citizen Development Policies i (1974) [a report compiled by residents of the Salt Lake Central City Community]; Housing Element, *supra* note 76, at 21; Housing Needs, *supra* note 7, at 45.

[89] UTAH CODE ANN. §§ 16–6–18 to –111 (1973). Section 16–6–21 states: "Corporations whose object is not pecuniary profit may be organized under this act for any lawful purpose or purposes, including . . . charitable . . . civic . . . recreational . . . ." *See also* URBAN LAND INSTITUTE, THE HOMES ASSOCIATION HANDBOOK 338 (rev. ed. 1970) [hereinafter cited as HANDBOOK]; Lowell, Prahl, Alessio & Cazares, *Land Use and Operational Controls in the Planned Development,* 9 SAN DIEGO L. REV. 28, 37–38 (1971), wherein this type organization has been acknowledged as a superior form for homeowners associations.

[90] UTAH CODE ANN. § 16–6–26 (1973).

[91] *Id.* § 16–6–38.

[92] *See* HANDBOOK, *supra* note 89, at 263–69. This committee's duties could include such activities as publishing an association newsletter and printing and disseminating the covenants, conditions, and restrictions.

[93] See *id.* at 260–61, 293 for a discussion of the workings of such a committee. *See also* note 139 *infra* and accompanying text.

tion programs;[94] (4) home ownership programs;[95] and (5) neighborhood nuisance control and abatement.[96]

Membership meetings [97] would be called periodically to set association policies, approve budgets, hear committee reports, facilitate communications, and elect trustees. In these meetings each member would be entitled to participate in the association's decision-making processes. Leadership positions should be filled by association members whenever possible. If, however, specialized leaders are required, professionals, university personnel, or VISTA volunteers could be utilized.

3. Financing the Urban Homeowners Association — The UHOA would require funds for the administration of rehabilitation projects, home ownership programs, and other neighborhood projects. The necessary capital would be obtained primarily from within the organization by means of a periodic assessment,[98] and secondarily from outside benefactors. The funding process would be greatly aided, therefore, if the UHOA were to qualify as a charitable,[99] tax exempt [100] organization.

4. Covenants, Conditions, and Restrictions — Upon organizing an association, the membership body would meet and draft a list of covenants,

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[94] *See* notes 128–35 *infra* and accompanying text.

[95] *See* notes 127–37 *infra* and accompanying text. This committee could also provide an educational program dealing with the many facets of home ownership. *See generally* Housing Needs, *supra* note 7, at 30.

[96] *See* notes 124–25 *infra* and accompanying text; HANDBOOK, *supra* note 89, at 209–10, 298, 300.

[97] The calling and conducting of such meetings are regulated in UTAH CODE ANN. §§ 16–6–27 to –33 (1973).

[98] *See* notes 109–16 *infra* and accompanying text.

[99] Neither assessments nor rehabilitation and maintenance services will be tax deductible, although unreimbursed expenditures made incident to rendering such services may be. Rev. Rul. 72–102, 1972–1 CUM. BULL. 149; Treas. Reg. § 1–170A-1(g) (1973).

It is conceivable, however, that donations from benefactors to help in rehabilitation programs may be deductible as a charitable contribution. INT. REV. CODE OF 1954, § 170. Contributions to the UHOA would also probably be deductible from state income tax. UTAH CODE ANN. § 59–14–5(5)(b) (1974).

[100] INT. REV. CODE OF 1954, § 501(c)(3) provides that an organization operated exclusively for charitable purposes is exempted from federal income taxes. More specifically, an organization that accomplishes its charitable purposes through providing housing for low, and in some instances, moderate income families is tax exempt. Rev. Rul. 70–585, 1970–2 CUM. BULL. 115. Since this is a primary goal of the UHOA, it would appear that it is tax exempt.

The proposed association will also be involved, however, in activities beyond the provision of housing, such as assisting in the maintenance and preservation of each member's home and neighborhood. This aspect of the UHOA is not charitable in nature. Its exempt status must therefore arise out of INT. REV. CODE OF 1954, § 501(c)(4), which exempts organizations operated exclusively for the promotion of social welfare. Since the UHOA's primary functions could conceivably fall under the "social welfare" category, the UHOA should be given tax exempt status. *Cf.* Rev. Rul. 72–102, 1972–1 CUM. BULL. 149; Rev. Rul. 74–99, 1974 INT. REV. BULL. 1974–9, at 11.

Under Utah law, corporations operating within the state are subject to a six percent franchise tax on their net income. UTAH CODE ANN. § 59–13–3 (1974). Corporations that are organized for charitable purposes, of which no part of the net earnings inure to an individual, are tax exempt. *Id.* § 59–13–4(4). In addition, an organization created exclusively for the promotion of the public welfare is also exempt. *Id.* § 59–13–4(6).

conditions, and restrictions (CC&R's) with which each member would contract to comply.[101] The covenants would then be recorded within the property deed of each member,[102] and filed with the county recorder in order to give notice to all successors in interest.[103] Individuals subsequently joining the association would adopt and record the CC&R's in their deeds.

To ensure their continuity, the CC&R's must run with the property and be binding upon subsequent homeowners. In Utah all that is necessary for a restrictive covenant to be enforceable against successors to the original promisee is that the successor take title with notice of the covenant.[104]As previously noted, notice of the CC&R's would be given subsequent purchasers both in the deed and county recorder's files. Because of the simplicity of enforcing restrictive covenants against successors, CC&R's should be phrased in restrictive terms whenever feasible.[105]

An affirmative covenant running with the land and requiring the performance of an obligation or duty on the part of the successor is more difficult to enforce under Utah law. The Utah Supreme Court has held that a covenant of this nature may run with the land only if it has some permanent physical effect upon the land itself, affecting its usefulness and/or its value.[106] In addition, intent that the covenant run to subsequent transferees must expressly appear in the wording or in the nature of the transaction.[107] The Utah Supreme Court has indicated that if there is any

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[101] Contrary to a typical home association where the developer drafts the CC&R's which bind each lot purchaser, the UHOA membership would draft its own CC&R's. *See, e.g.,* Korn v. Campbell, 192 N.Y. 490, 85 N.E. 687 (1908); M. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 4.35 (2d ed. 1963); R. POWELL, THE LAW OF REAL PROPERTY 670 (1971), for discussion of such a method. An alternative approach would require the initial participants to deed their property to a straw-man developer who, in turn, would deed the property back subject to the adopted CC&R's.

Covenants, conditions, and restrictions should be sufficiently flexible to encourage nonmembers to join at a later time, and should not include provisions that accomplish the same objectives as zoning ordinances. Flynn, *Practical Problems of a Subdivider's Counsel in Creating a Subdivision,* 58 ILL. B.J. 110, 113 (1969).

[102] UTAH CODE ANN. § 25–5–1 (1969) requires that every interest or estate in land be in writing. In *Knight v. Southern Pacific Railroad,* 52 Utah 42, 172 P. 689 (1918), a parol covenant was held not to run with the property.

[103] UTAH CODE ANN. § 57–1–6 (1974).

[104] *See* Metropolitan Inv. Co. v. Sine, 14 Utah 2d 36, 376 P.2d 940 (1962) Hayes v. Gibbs, 110 Utah 54, 169 P.2d 781 (1946).

[105] In light of the goals to be achieved by the UHOA, sample covenants imposing restrictions on the use of the land could include the following:

(a) a covenant forbidding the accumulation of rubbish, trash, debris, etc. in a member's yard;

(b) a covenant forbidding the deterioration of the yard, shrubbery, exterior walls, etc.;

(c) a covenant stating that the property cannot be used for a commercial use if presently residential;

(d) a covenant stating that property cannot be utilized to construct rental units without approval of the Nuisance Committee.

[106] Lundeberg v. Dastrup, 28 Utah 2d 28, 497 P.2d 648 (1972); First Western Fidelity v. Gibbsons & Reed Co., 27 Utah 2d 1, 492 P.2d 132 (1971).

[107] First Western Fidelity v. Gibbons & Reed Co., 27 Utah 2d 1, 492 P.2d 132 (1971).

doubt as to the validity of a covenant's ability to run with the land, the issue will be resolved in favor of the free and unrestricted use of the property.[108]

One desirable affirmative covenant levies a periodic assessment on each member's property.[109] Although present Utah law offers no guidance as to whether such a covenant is enforceable, other jurisdictions have enforced such levies as liens against the encumbered property,[110] or against the successor in ownership as a personal obligation.[111] Thus, it seems likely that the Utah Supreme Court would uphold the enforceability of such a covenant in light of other jurisdictions' holdings[112] and recent Utah legislation.[113]

The assessment covenant should be drafted so that it would be enforceable as both a personal liability against the owner and a lien upon the subject property.[114] If the assessment is treated as a personal debt it may be enforced in Small Claims Court,[115] where an action to enforce a personal covenant would be more expeditious than a suit in a district court to enforce a lien.

To ensure that association members can meet periodic assessments, payment in the form of labor or sweat-equity should be allowed.[116] In addition, the amount of the assessment, other than perhaps a minimum, should not be fixed by covenant, but should be periodically set by member vote.

5. Enforcement of the Covenants, Conditions, and Restrictions — Individual members of the homeowners association would be allowed to bring suit to enforce CC&R's.[117] The covenants should also give the

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[108] Parrish v. Richards, 8 Utah 2d 419, 336 P.2d 122 (1959).

[109] *See* HANDBOOK, *supra* note 89, at 314. Depending upon the size and economic make-up of the association's membership, the assessment need only be $10–$50 annually.

[110] *See, e.g.,* Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938).

[111] *See, e.g.,* Stephens Co. v. Lisk, 240 N.C. 289, 82 S.E.2d 99 (1954).

[112] New Jersey has been one of the most conservative states in matters of covenant law. In a recent decision, however, the highest New Jersey court adopted the doctrine of equitable servitude as a basis to enforce an assessment on property. *See* 26 RUTGERS L. REV. 929 (1973).

[113] *Cf.* UTAH CODE ANN. § 57–8–1 et seq. (1974) which allows for covenants, conditions, and restrictions, including the levying of an assessment, to run with the land and to be enforceable as equitable servitudes. *Id.* §§ 57–8–10 to –20. If the Utah courts hold that such an affirmative covenant does not run with the property, so as to bind successive property owners, it is recommended that legislation be passed that would specifically permit the running of such covenants.

[114] *See* notes 110–11 *supra* and accompanying text.

[115] *See* UTAH CODE ANN. §§ 78–6–1 to –15 (1953).

[116] A sweat-equity program is generally one in which the individual creates an equity in the property he is purchasing, or pays for the rent on property he is leasing, through his own labor. In the UHOA context, a sweat-equity program would allow an individual to perform maintenance or rehabilitation work on a neighbor's home or a recreational area to pay off his assessment. *See* Housing Element, *supra* note 76, at 17–18, 25; Housing Needs, *supra* note 7, at 4–5; Sengstock & Sengstock, *Homeownership: A Goal for All Americans,* 46 J. URBAN L. 313, 483–503 (1969).

[117] *See, e.g.,* Gunnell v. Hurst Lumber Co., 30 Utah 2d 209, 515 P.2d 1274 (1973); Schick v. Perry, 12 Utah 2d 173, 364 P.2d 116 (1961), where the Utah Supreme Court has permitted such actions.

association standing to bring suit as the members' agent.[118] Problems arise, however, as to the practicality of private enforcement given the time and expense required for litigation.[119] A feasible alternative has been adopted in Houston, Texas, where the municipality enforces private covenants, conditions, and restrictions,[120] primarily because the city has never adopted a comprehensive zoning ordinance. Since the city relies exclusively on land use planning through private restrictive covenants, the Texas Legislature enacted legislation enabling the city to enjoin the breach of private covenants,[121] and to withhold a commercial building permit when the prospective structure is in violation of a private residential restriction.[122] Since Houston has been able to enforce private CC&R's effectively,[123] the Utah Legislature may wish to consider similar enabling legislation.

6. Neighborhood Nuisance Committee — An essential element of the proposed UHOA is the creation of a nuisance committee that would be given quasi-judicial responsibilities derived from the contractual relationships of the members of the association to settle disputes among members by acting as an arbitration board.[124] In addition, the committee would promulgate a housing code to effectuate provisions of the CC&R's, and would enforce covenants dealing with the maintenance and appearance of yards and buildings.[125]

7. Duration and Termination — The initial CC&R's would be effective for twenty-five years, subject to automatic renewal thereafter for ten year periods unless a majority of the membership elected to terminate at the end of the effective period. The covenants would be terminable at any time if all of the parties to the covenants so agreed, or if there were an

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[118] *See, e.g.*, Merrionette Manor Homes Improvement Ass'n v. Heda, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956); Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938); *cf.* UTAH CODE ANN. § 57-8-8 (1974), which permits the condominium management committee to bring an action to enforce the covenants.

[119] Some developers have provided self-help provisions within development covenants. *See* Lundberg, *Restrictive Covenants and Land Use Control: Private Zoning*, 34 MONT. L. REV. 199, 215 (1973).

[120] It is estimated that Houston, Texas, population 1.3 million, has between seven and eight thousand individual subdivisions and subsections of subdivisions subject to restrictive covenants of varying types. B. SIEGAN, LAND USE WITHOUT ZONING 33 (1972).

[121] TEX. REV. CIV. STAT. ANN. art. 974a–1 (Supp. 1973).

[122] *Id.* art. 974a–2.

[123] *See* B. SIEGAN, *supra* note 120, at 31; Note, *Land-Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335 (1972).

[124] *See* HANDBOOK, *supra* note 89, at 209–10, 297–300 for a discussion of the responsibilities of such a committee. Unsettled disputes would ultimately be resolved in court.

[125] Compare this proposal with those contained in Babcock & Bosselman, *Citizen Participation: A Suburban Suggestion for the Central City*, 32 LAW & CONTEMP. PROB. 220 (1967); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 762 (1973).

alteration of such magnitude in the neighborhood that the covenants' benefits would be neutralized.[126]

B. Activities of the Urban Homeowners Association

The purpose of the UHOA would be to confront the underlying causes of Salt Lake City's housing problems and to assist in their solution in the following manner:

1. Red-Lining — The UHOA is in a position to provide housing for low income families without reliance upon lending institutions. One proposed scheme to furnish such housing begins with the acquisition of a residential structure through gift or purchase.[127] The rehabilitation committee would then rehabilitate the home,[128] and upon completion of the project, would sell it to a low income family on an installment land contract with payments adjusted to the family's ability to pay.[129] Proceeds from the sale would then be used for the rehabilitation of another structure.

An alternative method of supplying low income housing would involve the services of the local redevelopment agency. Local redevelopment agencies have been created pursuant to enabling legislation [130] for the purpose of selecting and formulating plans for the redevelopment of project areas.[131] A joint UHOA and redevelopment agency program would begin by designating an area encompassed by a UHOA as a project area.[132] Thereafter, the redevelopment agency would obtain approval from the city commission of a redevelopment plan designed to rehabilitate existing homes, construct new units,[133] and/or remove neighborhood blight. Initial funding would be procured through the issuance of tax

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[126] *See* Metropolitan Inv. Co. v. Sine, 14 Utah 2d 36, 376 P.2d 940 (1962).

[127] This type of donation would be plausible if such were deductible under INT. REV. CODE OF 1954, § 170. *See* note 99 *supra*. Absentee landlords may find it to their financial advantage to contribute a home and take the deduction rather than take the depreciation on the structure. Realistically, the contribution of a home is more plausible than the possibility of the UHOA purchasing a dwelling, although the latter is not impossible.

[128] It is important that emphasis be placed on the rehabilitation of units when feasible. The alternative of tearing down to rebuild is not always the most economical or consistent approach. *See* M. STEGMAN, HOUSING INVESTMENT IN THE INNER CITY: THE DYNAMICS OF DECLINE 180–226 (1972); Housing Element, *supra* note 76, at 16–18; Housing Needs, *supra* note 7, at 4.

[129] For a discussion of the use of installment land contracts in solving America's housing problems, see Stegman, *Low-Income Ownership: Exploitation and Opportunity*, 50 J. URBAN L. 371, 378 (1973).

[130] UTAH CODE ANN. §§ 11–19–1 *et seq.* (1973), *as amended*, ch. 4, [1974] Laws of Utah.

[131] *Id.* § 11–19–12.

[132] *Id.* §§ 11–19–20, –21.

[133] There is still much vacant land in the city upon which new housing could be constructed. In 1970, there were approximately 1,970 acres of such property, enough acreage for 47,517 more housing units. Housing, *supra* note 5, at 89–90.

exempt bonds,[134] the repayment of which would be secured through a pledge of tax increment financing.[135]

The UHOA, redevelopment agency, and individuals seeking to purchase homes would work together to formulate a program wherein down payments could be earned through labor by assisting in the rehabilitation and/or construction of the home. The family would purchase the unit on an installment land contract upon completion, one of the conditions of purchase being that the family become a member of the UHOA. The home would then revert back to the tax roll and assist in the retirement of the bonds.

Making home ownership available within Salt Lake City to lower income families would not only encourage the purchase of homes within the city, thereby partially reversing the flight of middle aged families to the suburbs,[136] but would also curb the trend toward renter-occupied units with its accompanying disregard for property maintenance.[137]

2. Housing Code — Deteriorated housing in Salt Lake City would be partially solved as the rehabilitation committee of each association engaged in a program of rehabilitation and maintenance of the member homes and neighborhood. The association would have the advantage of an accessible work force as well as the capacity to organize, plan, and disseminate information. Most labor performed would be voluntary, although rehabilitation projects would also allow payment of assessments through labor. All work projects performed by outside religious, charitable, and service organizations would be funneled through the UHOA. Strict enforcement by the nuisance committee[138] of CC&R's would partially mitigate lax housing code enforcement.

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[134] UTAH CODE ANN. §§ 11–19–23.2 to 11–19–28 (1973), *as amended,* ch. 4, [1974] Laws of Utah.

[135] Ch. 4, §§ 6–11, [1974] Laws of Utah. Tax increment financing permits the pledging of increased property tax revenue within a project area toward the payment of interest and principal of bonds issued and sold to finance the redevelopment project. As redevelopment occurs, the assessed valuation of the area increases due to the development itself, resulting in greater tax revenues from the same property without an increase in the rate of the tax levy.

For example, assume that all of the property within a UHOA area prior to designation as a redevelopment project is valued at $1,000,000. If the tax rate is a constant ten percent, $100,000 is extracted each year in property tax and distributed among the various taxing agencies (county, city, school, etc.). Upon the designation of the area as a redevelopment project, the total amount of assessed tax is frozen. Bonds are issued to finance the project and redevelopment begins. Existing homes are rehabilitated, new units built, and blight removed. Upon completion of the project, the total assessed value of the property within the UHOA is $3,000,000. With the constant ten percent rate, $300,000 is taken each year in property tax. The frozen $100,000 still goes to the various agencies, but the newly created $200,000 is utilized to pay interest and principal on the bonds.

Upon retirement of the bonds, the entire $300,000 is distributed to the taxing agencies. For an evaluation of tax increment funding of urban redevelopment projects in general, *see* E. Jacobs, Community Development and Tax Increment Financing (June 29, 1973).

[136] *See* notes 10–12 *supra* and accompanying text.

[137] *See* notes 19–22 *supra* and accompanying text.

[138] *See* notes 124–25 *supra* and accompanying text.

3. Zoning — Through the use and enforcement of CC&R's, the association would control undesirable activities within its geographical boundaries. For example, covenants restricting the transfer of property to certain economic interests could prevent the transition of the neighborhood into a commercial or manufacturing area. The association might also succeed in preventing areas from becoming dominated by multi-family dwellings by limiting the property available for such construction.

In addition to privately zoning its neighborhood in accordance with local needs, the UHOA would also be able to upgrade the quality of its residential neighborhood through the development and maintenance of local recreational sites and vest-pocket parks.[139] This could be accomplished by the organization's renting or purchasing a lot, utilizing a member's unused property or, if the association qualifies as a charitable organization, using property donated for that purpose. Common areas would be maintained by volunteer and donated labor.

4. Property Tax — The UHOA is not designed to precipitate property tax reform. Through working in conjunction with the redevelopment agency in a renewal project financed by tax increment funding, however, the association could channel property tax funds directly to projects to alleviate Salt Lake City's housing problems.

IV. Conclusion

This Note has suggested a proposal designed to arrest the decline in the quality and quantity of available housing by placing increased reliance upon local, neighborhood action. The UHOA has the potential of circumventing at least in part discriminatory lending practices, lax code enforcement, ineffective zoning, and inhibitory taxation. Additional threats to the quality of local housing both in Salt Lake City and elsewhere might be checked through variations in a particular UHOA's organization and functions. This proposal is certainly not a panacea for the housing problems of Salt Lake City or any metropolitan area. It does, however, explore a method of tapping one of America's great natural resources — its people.

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[139] There is citizen demand for such areas. *See* Citizens Committee, Central Community Citizen Development Policies i (1974); Housing Needs, *supra* note 7, at 44. A private recreational facility of this nature is permitted within a residentially zoned district under Salt Lake City, Utah, Rev. Ordinances § 51-6-9 (1965).

Dewell v. Lawson: Expanding the Scope of the Civil Rights Act

Douglas Dewell suffered a diabetic reaction, became incoherent, and disappeared from his home. His wife promptly reported his acute medical condition and need for immediate treatment to the Oklahoma City Police Department. The Department issued an all points bulletin describing Dewell, his diabetic condition, and his need for medical attention. Later that night the Oklahoma City Police arrested and jailed Dewell, who was carrying both personal and diabetic identification, on a charge of public drunkenness. Although Dewell's wife made repeated calls to the Department after his arrest, she was advised that his whereabouts were unknown. Dewell received no medical treatment until four days later, when he was found in his cell in a diabetic coma. Due to complications resulting from the lack of insulin during his incarceration, Dewell suffered brain damage and permanent impairment to his nervous system.[1]

Dewell filed an action against the City of Oklahoma City and the Chief of Police, claiming violation of his constitutional rights [2] under section 1983 of title 42 of the United States Code.[3] The district court sustained motions to dismiss as to both defendants. The Tenth Circuit reversed in part, holding that the amended complaint did not fail to state a cause of action under section 1983 against the individual defendant, Police Chief Lawson.

I

A. Section 1983 Generally

Section 1983 is a broad fourteenth amendment-based provision which provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[4]

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[1] Dewell alleged a loss of earnings, medical expenses, and other damages in excess of one million dollars. Dewell v. Lawson, 489 F.2d 877, 880 (10th Cir. 1974).

[2] The complaint alleged a violation of Dewell's rights under the first, fourth, eighth and fourteenth amendments of the United States Constitution. *Id.* at 879. Specifically, Dewell alleged that Lawson, as police chief, had negligently: (1) failed to establish procedures whereby jail personnel were notified of missing persons listed on all points bulletins; (2) failed to establish procedures and to train personnel to examine arrestees for possible medical disability; and (3) failed to train personnel in the detection of diabetic reactions of persons taken into custody. *Id.* at 879–80.

[3] 42 U.S.C. § 1983 (1970).

[4] *Id.* Congress first enacted section 1983 as § 1 of the Civil Rights Act of 1871 intending to protect the newly-acquired rights of the emancipated Negro under the thirteenth, fourteenth and fifteenth amendments. Note, *The Civil Rights Act of 1871: Continuing Vitality,* 40 NOTRE DAME LAW. 70 (1964).

Hague v. CIO [5] was the first significant interpretation of section 1983. In his concurring opinion in *Hague,* Justice Stone set the tone for future decisions under section 1983, reasoning that the rights of free speech and peaceful assembly were secured against infraction by the due process clause and that violation of those rights was actionable under section 1983.[6] The *Hague* decision created a period of greater acceptance of section 1983 in the federal district courts, as evidenced by the dramatic increase in the number of section 1983 claims during the 1950's.[7]

The most comprehensive and significant treatment of section 1983, however, did not occur until 1961, when the Supreme Court decided *Monroe v. Pape.*[8] In *Monroe,* the plaintiffs alleged that Chicago policemen broke into their home purporting to investigate a murder, forced the family to stand naked in the living room while ransacking the house, and then arrested Monroe. Although the police acted without search or arrest warrants, Monroe, who named the city and the police officers involved as defendants, alleged that the officers had acted under color of state law in violating the plaintiffs' rights.[9] The Supreme Court affirmed the dismissal of the City of Chicago as a defendant on the ground that municipalities are not "persons" within the meaning of section 1983. As to the individual police officers, however, the Court held that a cause of action was stated under section 1983 for a deprivation of rights secured against state action by the fourteenth amendment,[10] even though the officers had acted in violation of state law.[11] The Court also held that the remedy under section 1983 was supplementary to, and not limited by, any relief available in the state courts,[12] and that recovery under section 1983 was not dependent upon any specific intent by the defendants to deprive the plaintiffs of their constitutional guarantees.[13]

B. The Official Immunity Barrier

One of the most difficult barriers to recovery under section 1983 has been the doctrine of official immunity. Under common law, judges [14]

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[5] 307 U.S. 496 (1939).

[6] *Id.* at 527 (Stone, J., concurring).

[7] In 1945, only twenty-one civil actions were brought under the civil rights acts in the district courts; by 1954, however, the number had increased to 162 suits. In the fiscal year ending June 30, 1961 the number was 270; two years later it was 424. *Annual Rep. of the Dir. of Admin. Office of the United States Courts,* table C-2 for respective years.

[8] 365 U.S. 167 (1961).

[9] *Id.* at 170.

[10] *Id.* at 171.

[11] *Id.* at 172.

[12] *Id.* at 183.

[13] *Id.* at 187.

[14] *E.g.,* Pierson v. Ray, 386 U.S. 547, 553 (1967); Gately v. Sutton, 310 F.2d 107, 108 (10th Cir. 1962). This rule has also been extended to include justices of the peace and officials routinely identified with the judicial process. Bradford Audio Corp. v. Pious, 392 F.2d 67 (2d Cir. 1968) (court-appointed receiver); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965) (bailiff).

and legislators [15] are absolutely immune from liability for acts committed within the scope of their official duties.[16] Although police officers have no such absolute immunity, they are protected when they can show good faith and the existence of probable cause for their actions.[17] Most courts grant qualified immunity to supervisory officials [18] by making a distinction between discretionary and ministerial functions performed by those officials [19] — immunity being granted for discretionary functions.[20]

Several section 1983 decisions have extended this qualified immunity to supervisory officials for discretionary acts.[21] These cases, however, were questioned in *Norton v. McShane* [22] where the court stated that official immunity "may be given more limited application" under section 1983 than under common law.[23] Since *Norton,* the Second,[24] Seventh,[25] and District of Columbia [26] Circuits have indicated that official immunity for supervisory officials in section 1983 suits is more limited than at common law.

In *Carter v. Carlson,*[27] a case very similar factually to *Dewell,* the District of Columbia Circuit, refusing to grant official immunity, held a precinct captain and the chief of police liable on alternative possible grounds: either (1) negligence in failing to train and supervise a subordinate officer,[28] or (2) negligence imputed on a respondeat superior basis arising from torts of the officer in the performance of his duties.[29]

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[15] Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislator not personally liable to plaintiff injured by legislative committee).

[16] Liability has been imposed upon judicial officials when performing nonjudicial functions. *E.g.,* Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970).

[17] Pierson v. Ray, 386 U.S. 547 (1967).

[18] Comment, *Carter v. Carlson: The Monroe Doctrine at Bay,* 58 VA. L. REV. 143, 150 (1972) [hereinafter cited as *The Monroe Doctrine*].

[19] The difficulty inherent in this distinction was recognized and clearly stated in Ham v. Los Angeles County, 46 Cal. App. 148, 162, 189 P. 462, 468 (Ct. App. 1920):

> The main perplexity . . . is to determine where the ministerial . . . duties end and the discretionary powers begin. It is said by some of the authorities that a public official is absolved from liability for negligence if the act is such as to involve "any discretion on his part . . . ." [I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.

[20] In *Tenney v. Brandhove,* 341 U.S. 367 (1951), the only Supreme Court case involving official immunity under section 1983, the Court held that section 1983 did not abrogate the traditional absolute immunity of legislators from civil liability. Most federal courts have interpreted this holding as a general retention of common law official immunity.

[21] *See, e.g.,* Franklin v. Meredith, 386 F.2d 958 (10th Cir. 1967); Erlich v. Glasner, 274 F. Supp. 11 (C.D. Cal. 1967), *aff'd,* 418 F.2d 226 (9th Cir. 1969).

[22] 332 F.2d 855 (5th Cir. 1964), *cert. denied,* 380 U.S. 981 (1965).

[23] *Id.* at 861.

[24] Jobson v. Henne, 355 F.2d 129, 133–34 (2d Cir. 1966).

[25] McLaughlin v. Tilendis, 398 F.2d 287, 290–91 (7th Cir. 1968).

[26] Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

[27] *Id.*

[28] *Id.* at 360.

[29] *Id.* at 361.

Although most federal courts have retained the official immunity defense for discretionary actions of supervisory officials, they have disagreed over the appropriate test to determine whether official immunity should be granted.[30] The tests frequently used are: (1) the "degree of discretion" test; (2) the "inhibitory effect" test; and (3) the "balancing of interests" test.

When courts apply the degree of discretion test [31] immunity is recognized for acts which require a substantial degree of judgment on the part of the official. In one Tenth Circuit case, for example, the court stated that "the wider the scope of discretion, the greater . . . the need for the privilege." [32] Some courts have abandoned this distinction in favor of the more practical inhibitory effect test. In *Elgin v. District of Columbia,*[33] for example, the court held that whether an activity is classified as discretionary is dependent upon whether the imposition of liability would inhibit other public officials in the performance of their tasks.[34] In *Garner v. Rathburn,*[35] which was cited with approval in *Dewell,* the Tenth Circuit applied the *Elgin* test, holding that immunity relieves an official from personal liability for acts done within the framework of his duties involving the exercise of discretion "which public policy requires be made without fear of personal liability." [36] Courts have also used a balancing test. In *Smith v. Losee,*[37] for example, the Tenth Circuit applied a test for qualified immunity which required the court to take into consideration "all of the factors including the broadness of the duties imposed and the extent of the powers granted to the particular public officials in the exercise of those duties." [38] In *Smith,* the court also indicated that the appropriate test for the application of immunity requires a balancing of

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[30] *The Monroe Doctrine, supra* note 18, at 150.

[31] A clear expression of this test appears in Continental Bank & Trust Co. v. Brandon, 297 F.2d 928, 933 (5th Cir. 1962), *quoting Ex parte* Thompson, 52 Ala. 98, 98–99 (1875):

> " 'When the power is clearly defined and enjoined, does not involve the exercise of discretion or judgment, and no alternative is left to the officer charged with its execution; when he must act without inquiry, and without evidence, and the mode of action is expressly declared, the power is purely ministerial. When, however, the power involves the exercise of judgment and discretion; when it is to be exercised only in an ascertained event and on the concurrence and existence of particular facts, and the officer charged with the execution of the power must determine whether the event has arisen, or the facts exist requiring its exercise, then the power is judicial, or in its nature judicial.' "

[32] Smith v. Losee, 485 F.2d 334, 343 (10th Cir. 1973), restating Barr v. Matteo, 360 U.S. 564 (1959).

[33] 337 F.2d 152 (D.C. Cir. 1964).

[34] *Id.* at 154–55.

[35] 346 F.2d 55 (10th Cir. 1965).

[36] *Id.* at 56.

[37] 485 F.2d 334 (10th Cir. 1973). The plaintiff, a college professor, brought suit under section 1983 for a violation of his first amendment right to free speech against Dixie College administrators and the members of the Utah State Board of Education when he was denied tenure.

[38] *Id.* at 344.

the harm to the citizen with the effective administration of the government.[39] All three tests have been repeatedly applied by the Tenth Circuit in decisions involving official immunity.[40]

C. Tort Standard of Liability

The standards for determining liability under section 1983 are analogous to traditional tort standards. Justice Douglas, writing for the Court in *Monroe,* stated that the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." [41] One author, noting the trend toward a tort-oriented analysis, observed:

> It thus appears that what is developing is a kind of "constitutional tort." It is not quite a private tort, yet contains tort elements; it is not "constitutional law," but employs a constitutional test.[42]

Some courts have applied a reasonableness standard in determining liability under section 1983,[43] holding that an intentional failure to provide essential medical care may constitute cruel and unusual punishment,[44] that reckless conduct of prison officials may be actionable,[45] and that a failure to inform interested persons regarding the whereabouts of a prisoner may be a basis for liability under section 1983.[46] Plaintiffs have also successfully sued under the theory of negligent omission,[47] as opposed to negligent overt misconduct. Many other courts, including the Tenth

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[39] *Id.* at 341, quoting Barr v. Matteo, 360 U.S. 564, 565 (1959):

> " '[O]n the one hand, the protection of the individual citizens against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.' "

[40] *See, e.g.,* Smith v. Losee, 485 F.2d 334 (10th Cir. 1973); Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968); Franklin v. Meredith, 386 F.2d 958 (10th Cir. 1967); Garner v. Rathburn, 346 F.2d 55 (10th Cir. 1965); Knox v. First Security Bank, 196 F.2d 112 (10th Cir. 1952).

[41] 365 U.S. at 187. Justice Douglas further interpreted section 1983 as granting a federal right in federal courts because, by reason of prejudice, passion, *neglect,* intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.
Id. at 180 (emphasis added).

[42] Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond,* 60 Nw. U.L. REV. 277, 323–24 (1965).

[43] *E.g.,* Bowens v. Knazze, 237 F. Supp. 826 (N.D. Ill. 1965).

[44] *E.g.,* Redding v. Pate, 220 F. Supp. 124 (N.D. Ill. 1963).

[45] *E.g.,* Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied sub nom.* Roberts v. Smith, 404 U.S. 866 (1971).

[46] Roberts v. Trapnell, 213 F. Supp. 49 (E.D. Pa. 1962).

[47] *E.g.,* Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967). In *Whirl v. Kern,* 407 F.2d 781 (5th Cir. 1968), *cert. denied* 396 U.S. 901 (1969), a Texas sheriff unintentionally maintained custody of the plaintiff in the county jail for nine months after the charges against him had been dismissed. In *Roberts v. Williams,* 456 F.2d 819 (5th Cir.), *cert. denied sub nom. Roberts v. Smith,* 404 U.S. 866 (1971), a prison superintendent failed to supervise and train a trustee guard who had negligently shot a prisoner. In both *Whirl* and *Roberts* the Fifth Circuit held that such action "constituted a sin of omission" which was actionable against the defendants.

Circuit, have refused, however, to impose liability upon a state officer where the act complained of was "one of failing to do something [the officer] was not compelled by the duties of his position to do." [48]

II

The Tenth Circuit, in reversing the district court's grant of Police Chief Lawson's motion to dismiss, devoted most of its discussion to the standard of official immunity for the defendant and the appropriate standard of liability for a section 1983 suit.

A. The Standard of Official Immunity

The *Dewell* court, citing its earlier *Smith* holding, concluded that the defense of official immunity available to supervisory officials affords intermediate protection between the absolute immunity of legislators and the good faith defense available to police officers.[49] The standard adopted by the court for determining the availability of immunity was one which takes into consideration all of the factors relating to the exercise of the official's duties.[50] The court, however, further announced that "governmental immunity of a limited nature" will be recognized where the duties imposed upon the official are discretionary in nature.[51] The court then defined a "discretionary function" as any activity done within the framework of official duty "involving the exercise of discretion 'which public policy requires be made without fear of personal liability.' " [52]

B. The Standard of Liability Under Section 1983

The plaintiff argued that "conduct may be actionable as a deprivation of constitutional rights where no force or violence has been utilized and where the conduct constitutes an act of omission."[53] The *Dewell* court held that the test for liability where the plaintiff alleges cruel and unusual punishment is "whether the plaintiff proves exceptional circumstances and conduct so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to basic fairness." [54] Under this standard, the court recognized that a failure to procure needed medical attention

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[48] Franklin v. Meredith, 386 F.2d 958, 961 (10th Cir. 1967). Other courts have also refused to hold negligent omission to be a basis for recovery. *E.g.*, United States *ex rel.* Gittlemacker v. Pennsylvania, 281 F. Supp. 175 (E.D. Pa. 1968), *aff'd sub nom.* United States *ex rel.* Gittlemacker v. County of Philadelphia, 413 F.2d 84 (3d Cir. 1969), *cert denied*, 396 U.S. 1046 (1970). *But see* Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967). It has been suggested that cases refusing to accept negligent omission as a basis of a section 1983 action are wrongly decided, and that the better reasoned cases recognize that negligent conduct under appropriate circumstances may support a claim under section 1983. C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE § 88 (1971).

[49] 489 F.2d at 882.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 883, *quoting* Garner v. Rathburn, 346 F.2d 55, 56 (10th Cir. 1965).

[53] *Id.* at 881.

[54] *Id.* at 882; *accord*, Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970); Bishop v. Cox, 320 F. Supp. 1031 (W.D. Va. 1970).

may constitute a breach of duty amounting to cruel and unusual punishment.[55] The court also recognized, however, that city ordinances imposing only discretionary duties upon state officials may be significant in determining whether the state official had breached the duty owed to the plaintiff, and furthermore, in determining whether the official enjoyed qualified immunity under established judicial tests.[56]

III

The *Dewell* decision should be analyzed in terms of the two major issues addressed by the court: (1) the proper test to be applied to determine whether official immunity should be granted; and (2) the appropriate standard of care to determine liability under section 1983.

A. The Test for Official Immunity

All three tests for determining whether immunity should be granted were articulated in *Dewell*.[57] Two of these tests — the inhibitory effect and the degree of discretion tests — are inconsistent in effect and purpose. The third — the balancing of interests test — is consistent with sound policy and will make the decision-making process in section 1983 actions much more equitable because it forces courts to focus on the substantive, rather than the technical, issues in a case.

1. The Inhibitory Effect Test — This test, which grants qualified immunity when public policy requires the action to be performed "without fear of personal liability," [58] is generally applied at the pleading stage and has the effect of balancing the interests of the state against those of the plaintiff. A determination against the plaintiff at this stage forecloses any possibility of his prevailing on the ultimate issue of liability.[59] A judicial balancing of interests at the pleading stage resolves the conflict without expressly setting out the underlying rationale for the decision. This may have the effect of both reducing the predictability of the decision-making process and concealing the ultimate basis of the court's decision.[60] The inhibitory effect test is also inconsistent with other tort doctrines which

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[55] 489 F.2d at 882; *accord,* Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957); Owens v. Alldridge, 311 F. Supp. (W.D. Okla. 1970).

The dissenting judge in *Dewell* reasoned that the allegations in the complaint were insufficient to constitute a finding of cruel and unusual punishment under the eighth amendment and merely stated an action for negligence. 489 F.2d at 883 (Pickett, J., dissenting in part). Furthermore, he reasoned that there was no precedent for imposing liability upon a supervisory official for negligent "failure to provide procedures and services alleged to have been denied [a prisoner] following his arrest." *Id.* at 884. *Contra,* Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971). Judge Pickett felt that a standard of care imposing such liability "places an intolerable burden upon those persons in charge of the operation of state institutions where individuals are committed or arrested persons are received." 489 F.2d at 884.

[56] 489 F.2d at 882.

[57] *Id.* at 882–83.

[58] *Id.* at 883.

[59] *The Monroe Doctrine, supra* note 18, at 143.

make "a man responsible for the natural consequences of his actions." [61] Finally, since many states and municipalities now provide counsel by statute for officials accused of official misconduct [62] and for indemnification [63] of officials held liable for tortious conduct in the performance of their duties, the concern that officials will be unduly harassed by citizens bringing suit against them for exercising official duties may lack a strong factual basis.

2. The Degree of Discretion Test — When the *Dewell* court interpreted a "discretionary duty" as one which is "discretionary in nature" [64] the court adopted a standard which sidesteps important considerations in any determination whether immunity should be granted. The test is vague at best and difficult to apply equitably in every case. Moreover, although the test seems conducive to predictability in results, its application inevitably results in either mechanical dismissal of a case without reaching the merits where the official exercised some "judgment," or a blind refusal of immunity where no discretion was involved in performing the act. The decision to grant or withhold immunity therefore becomes no more than an undisclosed subjective determination by a judge, who has not had an opportunity to hear the merits of the case, that the act should or should not be punished. Furthermore, in many cases lower-echelon public employees such as police officers exercise a great deal of discretion,[65] yet the immunity provided under the "degree of discretion" test is unavailable to protect them from wrong decisions.[66] A test for immunity based on the degree of discretion unreasonably restricts courts in their judgments and may produce inequitable results.

3. The "Balancing of Interests" Test — The test announced in *Smith v. Losee* [67] and *Doe v. McMillan* [68] and applied in *Dewell,* requiring bal-

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[60] These consequences were perceived by the Tenth Circuit in *Jones v. Hopper,* 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970), where the court stated that:

> The allegations necessary to state . . . a claim [under section 1983], as in the case of any other civil action in the federal courts, are not to be held insufficient unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Id. at 1326–27.

[61] Monroe v. Pape, 365 U.S. 167, 187 (1961).

[62] *E.g.,* ALA. CODE tit. 55, § 378(1) (Supp. 1969) (state pays for counsel); CAL. GOV'T CODE § 825 (West 1966) (state may provide counsel); GA. CODE ANN. § 89–920 (1971) (state may provide counsel); MICH. COMP. LAWS ANN. § 691.1408 (1969) (state may provide counsel).

[63] *E.g.,* CAL. GOV'T CODE § 825 (West 1966); CONN. GEN. STAT. ANN. § 7–465 (1958); ILL. ANN. STAT. ch. 24, § 1–4–5, –6 (Smith-Hurd 1962); MINN. STAT. ANN. § 466.07 (1963); Ch. 31, [1974] Laws of Utah.

[64] 489 F.2d at 882.

[65] These lower level employees often exercise of great deal of discretion in such activities as arrest, search and seizure, and custody termination.

[66] These lower level employees often exercise a great deal of discretion in such of their good faith or lack of intent to do harm; no threshold immunity is available for their protection. 489 F.2d at 882.

[67] 485 F.2d 334 (10th Cir. 1973).

[68] 412 U.S. 306 (1973).

ancing of the harm to the citizen with the effective administration of government, is more consistent with the realities of the decision-making process. This test provides a basis for an equitable determination on the merits of the case on the basis of tort doctrines. The adoption of this test in *Dewell,* however, is inconsistent with the *Dewell* court's recognition of qualified immunity and with the inhibitory effect and degree of discretion tests announced by the court.

Under a true balancing of interests test, the interests of the state are balanced against those of the plaintiff without regard for any official immunity. Qualified immunity is thus theoretically inconsistent with a balancing of interests test. That is, qualified immunity requires not only that the plaintiff prove that his interests prevail over those of the state — which is all that plaintiff need prove under a balancing of interests test — but also requires that the plaintiff prove bad faith or intent on the part of the defendant. The *Dewell* court, by recognizing both the balancing of interests test and qualified immunity, reached a very curious result. Under the court's reasoning, the automatic immunity which is theoretically eliminated by the balancing test is disposed of only at the expense of forcing the plaintiff to prove a higher level of culpability of the defendant.[69] The court stated that, on remand, consideration must be given to any intent, malice, wilfullness, or bad faith on the part of the defendant.[70] Such a requirement is merely an indirect method of retaining official immunity.[71] Under the balancing of interests test, a finding of liability can be reached even in the case of negligent violation of an individual's constitutional rights if the violation outweighs the governmental interest involved. A test which balances interests of and injuries to the parties would negate any common law notions of official immunity and allow all claims to be decided upon the merits rather than upon a subjective determination that discretion was not exercised, or upon an artificial finding of an inhibitory effect.

One of the most important justifications advanced for allowing official immunity was that the separation of powers required [72] that public officials be able to perform their duties without fear that the courts will disagree with their choice of actions.[73] If courts use the balancing of interests test, greater access by individual citizens to the courts will result without serious violation of the separation of powers principle. Thus, by weighing all the interests involved in a section 1983 case, courts can protect both individuals and governmental officials from *unreasonable* economic injury.

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[69] *The Monroe Doctrine, supra* note 18, at 150.

[70] 489 F.2d at 883.

[71] *See The Monroe Doctrine, supra* note 18, at 150.

[72] *Id.*

[73] *E.g.,* Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973); Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). *Cf.* Barr v. Matteo, 360 U.S. 564 (1959).

B. Tort Doctrine Under Section 1983

The express language of section 1983 makes clear that all state officials have a general duty not to violate the constitutional rights of citizens. Although some courts have held that the duty arises under state law, the better view is that

> The authority by virtue of which the defendant was able to take action must have come to him from the state. . . . But the duty the defendant breaches when he deprives another of a constitutional right is imposed upon him by the fourteenth amendment and made actionable by section 1983, not by state law.[74]

Although the *Dewell* court recognized the general duty under section 1983, the court failed to resolve the issue whether the defendant was under a duty to supervise or train his subordinates. Even more specifically, the court failed to determine, on the basis of whatever economic, moral, or administrative factors it considered important, whether the defendant owed the plaintiff a duty under the *Dewell* facts. Instead, the court directed the trial court to consider relevant city ordinances in resolving this issue. The vagueness of the court's treatment of this important issue affords little guidance to the trial court.

The *Dewell* court also failed to provide the trial court with any guidance in resolving two questions under the negligence issue: (1) should the defendant, as an ordinary, reasonable person, under the circumstances prevailing at the time of the plaintiff's injury, have reasonably foreseen some general injury to the plaintiff of the nature which he suffered; and (2) did the defendant fail to exercise reasonable care to avoid the injury?[75]

Finally, the court failed to provide the trial court with any substantial guidance as to whether a plaintiff may recover on a theory of negligent omission in a section 1983 action. In a prior Tenth Circuit case, *Franklin v. Meredith*,[76] the court considered a similar case of negligent omission and refused to impose liability, holding that the defendant's action was "one of failing to do something [defendant] was not compelled by the duties of his position to do and he had no legal duty to do." [77] The *Franklin* court thus implied that failure to act cannot be the basis of liability unless affirmative action is demanded by statute, ordinance, or prior ruling. The same implication exists in *Dewell* where the court stated that the existence of relevant ordinances of "the City of Oklahoma City . . . may be significant." [78] Negligent omission, however, has in other cases been held actionable where a failure to act would violate the defendant's

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[74] Note, *The Civil Rights Act of 1871: Continuing Vitality*, 40 NOTRE DAME LAW. 70, 81–82 (1964).

[75] *See* Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 563 (1962).

[76] 386 F.2d 958 (10th Cir. 1967).

[77] *Id.* at 961.

[78] 489 F.2d at 882.

standard of care.[79] The defendant, under these circumstances, may well have foreseen that a failure to (1) establish procedures to determine whether persons on departmental all points bulletins were in the jail, or (2) detect summarily that an inmate was a diabetic, would result in an injury to an inmate in a diabetic condition.

IV

Section 1983 has achieved overwhelming importance in recent years, primarily because it provides a means for compensating injured persons who otherwise would have been without an adequate remedy. Nevertheless, there remain many obstacles in the path of a section 1983 plaintiff. Among the most difficult to overcome are the doctrine of official immunity and a failure to base the standard of liability on carefully reasoned tort doctrines. As the defenses of sovereign and official immunity are abolished by statute and cases, the courts may be less hesitant to undertake the difficult balancing and weighing functions imposed upon them by proper tort analysis.

D. GARY CHILD

[79] Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967).

Peoples Finance & Thrift Co. v. Perry: The Use of Lender Credit to Avoid Consumer Protection Provisions of the UCCC

In *Peoples Finance & Thrift Co. v. Perry*,[1] defendant borrowed money from a finance company to purchase a used truck and, at the same time, executed a security agreement covering the truck. In making the loan, the finance company drew the check payable jointly to defendant and the used car dealer. When defendant defaulted on his payments, the finance company sought to foreclose its security interest in the truck as well as to recover the balance due on the promissory note. The trial court found that section 70B–5–103 of the Utah Uniform Consumer Credit Code [UCCC][2] required the finance company to elect between taking a money judgment on the promissory note and repossessing the security.[3] The Utah Supreme Court reversed, holding that the transaction was a "consumer loan" [4] and that section 70B–5–103, since it applied only to "consumer credit sales," [5] was inapplicable. Plaintiff could therefore

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[1] 30 Utah 2d 282, 516 P.2d 1400 (1973).

[2] UTAH CODE ANN. § 70B–5–103 (Supp. 1973). The applicable parts of this section provide:

> (1) This section applies to a consumer credit sale of goods or services.
>
> (2) If the seller repossesses or voluntarily accepts surrender of goods which were the subject of the sale and in which he has a security interest and the cash price of goods repossessed or surrendered was $1,000 or less, the buyer is not personally liable to the seller for the unpaid balance of the debt arising from the sale of the goods, and the seller is not obligated to resell the collateral.
>
> . . . .
>
> (6) If the seller elects to bring an action against the buyer for a debt arising from a consumer credit sale of goods or services, when under this section he would not be entitled to a deficiency judgment if he repossessed the collateral, and obtains judgment
>
> (a) he may not repossess the collateral, and
>
> (b) the collateral is not subject to levy or sale on execution or similar proceedings pursuant to the judgment.
>
> (7) The amounts of $1,000 in subsections (2) and (3) are subject to change pursuant to the provisions on adjustment of dollar amounts (section 70B–1–106).

Pursuant to section 70B–1–106, the $1,000 limit has been increased to $1,200 in Utah.

[3] 30 Utah 2d at 283, 516 P.2d at 1400.

[4] "Consumer loan" is defined as

> a loan made by a person regularly engaged in the business of making loans in which
>
> (a) the debtor is a person other than an organization;
>
> (b) the debt is incurred primarily for a personal, family, household, or agricultural purpose;
>
> (c) either the debt is payable in installments or a loan finance charge is made; and
>
> (d) either the principal does not exceed $25,000 or the debt is secured by an interest in land.

UTAH CODE ANN. § 70B–3–104(1) (Supp. 1973).

[5] "Consumer credit sale" is defined as "a sale of goods, services, or an interest in land in which (a) credit is granted by a seller who regularly engages as a seller in credit transactions of the same kind . . . ." *Id.* § 70B–2–104(1)(a).

take advantage of the cumulative remedies of the Uniform Commercial Code [UCC].[6]

I

A. Creditor's Cumulative Remedies

Prior to the enactment of the UCCC [7] a creditor could foreclose his security interest in collateral, resell it, and recover any deficiency remaining on the debt plus expenses and attorneys' fees.[8] Creditors sometimes used the cumulative remedy concept to reach inequitable and uneconomical results.[9] The expenses of repossessing and reselling the collateral often exceeded the amount for which the collateral was resold, thus increasing the balance owed by the debtor.[10] For example, in *Imperial Discount Corp. v. Aiken,*[11] the debtor purchased a battery for $29.30 plus a $5.70

[6] In case of conflict between the UCCC and the UCC, the provisions of the UCCC control. If there is no conflict the two are supplementary. *Id.* § 70B–1–103. There is a direct conflict between the UCC and the UCCC as to the creditor remedies available if the transaction involved is a "consumer credit sale." *Compare id.* § 70B–5–103 *with id.* § 70A–9–504(2) (1968). Consumer loans, however, are not covered by section 70B–5–103, and therefore the provisions of the UCC control the deficiency judgment rights of parties to a "consumer loan" transaction.

[7] The UCCC became law in Utah on July 1, 1969. *Id.* § 70B–9–101(1).

[8] 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.2, at 1188–90 (1965). At common law, in a conditional sales situation, if a secured creditor chose to ignore his secured position and sue on the debt as a general creditor, at some point before collection (either execution or levy) he lost his rights in the secured collateral. If the creditor unconditionally repossessed the collateral, he could not later sue on the note. Since the remedies were alternative and inconsistent, the election of one remedy rendered the other unavailable. Cook v. Covey-Ballard Motor Co., 69 Utah 161, 253 P. 196 (1927); I. X. L. Stores Co. v. Moon, 49 Utah 262, 162 P. 622 (1916); 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.6 (1965).

In *Moon,* the creditor, after repossession, sued on the entire unpaid balance without giving the debtor credit for the reasonable value of the goods repossessed. The creditor was not allowed to first treat the contract as rescinded and repossess the goods and then treat it as in force and sue on the contract amount. The court, however, left open the possibility of obtaining a deficiency judgment where the creditor did allow credit for the reasonable value of the goods repossessed. 49 Utah at 267, 162 P. at 624. In *Jensen's Used Cars v. Rice,* 7 Utah 2d 276, 323 P.2d 259 (1958), the court, in a conditional sale, assumed that the creditor had a right to a deficiency judgment after selling the repossessed collateral. *See also* Yellow Mfg. Acceptance Corp. v. Handler, 249 Minn. 539, 83 N.W.2d 103 (1957).

[9] *See, e.g.,* Jefferson Credit Corp. v. Marcano, 60 Misc.2d 138, 302 N.Y.S.2d 390 (N.Y. City Civ. Ct. 1969); Imperial Discount Corp. v. Aiken, 38 Misc.2d 187, 238 N.Y.S.2d 269 (N.Y. City Civ. Ct. 1963); Schwegler Bros., Inc. v. Johnson, 161 Misc. 451, 291 N.Y.S. 321 (Buffalo City Ct. 1936). *See generally* Robertson, *Consumer Protections under the Uniform Consumer Credit Code,* 41 MISS. L.J. 36 (1969); Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale,* 22 STAN. L. REV. 20 (1969).

[10] Berlin, Roisman & Kessler, *Analysis of the Uniform Consumer Credit Code,* in 2 CONSUMER VIEWPOINTS: CRITIQUE OF THE UNIFORM CONSUMER CREDIT CODE 419, 479 (1969). *See* Jordan & Warren, *The Uniform Consumer Credit Code,* 68 COLUM. L. REV. 387, 441 (1968):

> Even if the collateral is sold for a fair market price, the lack of any strong second-hand market for goods other than autos makes it likely that the price obtained for the goods will be substantially less than their value to the debtor.

A study has been made in Connecticut concerning repossession and resale of automobiles indicating the amount obtained from resale is about half the fair market value. This is because the finance company invariably sells to a dealer. The dealer later sells the car for twice the price he paid for it. Shuchman, *supra* note 9, at 26–42.

[11] 38 Misc.2d 187, 238 N.Y.S.2d 269 (N.Y. City Civ. Ct. 1963).

credit charge. After paying $23.25 he defaulted, leaving an unpaid balance of $11.75. The creditor repossessed the debtor's car pursuant to the contract and resold it for $50. After repossession and storage charges, and auctioneer's and attorney's fees, the debtor was confronted with a deficiency judgment of $128.80. Because he could not pay $11.75, the buyer lost his battery, his car, and was faced with a debt ten times greater than the unpaid balance on the battery.[12]

Admittedly, such a result seems more outrageous when the unpaid balance is small, but the costs of repossession and resale and the probability of a price less than the market value of the collateral frequently make the deficiency judgment remedy uneconomical. Further, many sellers routinely obtain deficiency judgments to harass debtors, even when no prospect of repayment exists.[13] The debtor's wages can then be garnished; he may lose his job and have difficulty finding other employment.[14] The deficiency judgment can thus create a vicious cycle in which the debtor's inability to pay is further increased.

The UCC preserves the foreclosure-deficiency judgment system by making the secured party's remedies cumulative,[15] but imposes some limitations on a creditor's right to a deficiency judgment: the resale must be commercially reasonable,[16] reasonable notification of resale must be given to the debtor,[17] the debtor may redeem at any time before resale,[18] and, if sixty percent or more of the purchase price has been paid, resale must occur within ninety days.[19] Some courts have held that creditors who do not strictly follow these procedures are precluded from obtaining deficiency judgments,[20] but through careful compliance with the UCC provisions, a

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[12] The court found the creditor's claim to be "oppressive, confiscatory, and unconscionable" and refused to grant a deficiency judgment. 238 N.Y.S.2d at 271.

[13] *See* Robertson, *supra* note 9, at 68.

[14] *Id. See* 15 U.S.C. § 1674 (1970). This section makes it unlawful for an employer to discharge an employee because his wages have been garnished. It is, however, difficult to enforce since the employer can claim he discharged the employee for some other reason. It also does not treat the case where a potential employee is denied employment because his wages have previously been garnished. Employment applications often require this information.

[15] UTAH CODE ANN. § 70A–9–501(1) (1968).

[16] *Id.* § 70A–9–504(3).

[17] *Id.*

[18] *Id.* § 70A–9–506.

[19] *Id.* § 70A–9–505(1). If the creditor fails to resell within ninety days the debtor has the option of either recovering in conversion or proceeding under section 70A–9–507(1) (respecting a secured party's liabilities). *Id.*

[20] The position of a majority of courts is that if the sale was not held in a commercially reasonable manner, the creditor loses his right to obtain a deficiency judgment. *See, e.g.*, Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 1009, 104 Cal. Rptr. 315, 321 (1972); Vic Hansen & Sons, Inc. v. Crowley, 57 Wis. 2d 106, 203 N.W.2d 728, 732 (1973); Aimonetto v. Keepes, 501 P.2d 1017, 1019 (Wyo. 1972).

A conflict exists as to whether the creditor's failure to give the debtor notice of resale deprives the creditor of his deficiency judgment remedy. *Compare* Turk v. St. Petersburg Bank & Trust Co., 281 So. 2d 534 (Fla. App. 1973); Twin Bridges Truck City, Inc. v. Halling, 205 N.W.2d 736 (Iowa 1973); and Aimonetto v. Keepes, 501 P.2d 1017 (Wyo. 1972) *with* Community Management Ass'n v. Tousley, 505 P.2d 1314 (Colo. App. 1973).

creditor can foreclose his interest in the security, sue on the promissory note, and obtain a judgment for any deficiency on the debt after resale.[21]

B. The Impact of the Uniform Consumer Credit Code

Recognizing the need to protect consumers against the abuses of the credit industry, the drafters of the UCCC further restricted creditors' rights to obtain deficiency judgments [22] in transactions classified as "consumer credit sales." [23] Section 70B–5–103 of the UCCC provides that, where the cash price of the collateral is $1,200 or less, if the seller repossesses or voluntarily accepts surrender of collateral the buyer is not liable for any deficiency arising from its resale.[24] Moreover, if the same seller elects to sue on the debt he may neither repossess the collateral nor accomplish the same result as obtaining a deficiency judgment by levying on the collateral.[25]

This restriction on deficiency judgments does not apply to transactions classified as "consumer loans":

> The provisions of the UCC outlined above are modified to some extent by [section 5.103] with respect to proceedings to enforce rights arising from consumer credit sales. The UCC provisions remain unchanged as to consumer loans.[26]

This distinction has resulted in the creation of the so-called "direct loan" loophole,[27] which allows creditors to avoid the deficiency judgment

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[21] UTAH CODE ANN. §§ 70A–9–504(1), (2) (1968).

[22] *See* Robertson, *supra* note 9, at 69:

> When the loss to the creditor is balanced against the effect that a deficiency judgment can have upon the individual debtor for years thereafter, it is submitted that some restriction on the right to obtain a deficiency judgment is clearly justifiable.

[23] UTAH CODE ANN. § 70B–5–103(1) (Supp. 1973).

[24] *Id.* § 70B–5–103(2). See note 2 *supra* for the text of this subsection.

[25] UTAH CODE ANN. § 70B–5–103(6) (Supp. 1973). *See* Comment, *The Uniform Consumer Credit Code and Article 9 of the Uniform Commercial Code,* 65 NW. U.L. REV. 838, 842 (1970). Even the limited protection afforded consumers in consumer credit sales may be subject to more abuses than it cures. Section 70B–5–103(2) allows the seller to repossess the collateral without any obligation to resell. Since the seller has no obligation to resell, arguably he owns the collateral. Thus the creditor can apparently resell at a profit without any obligation to account to the buyer for the excess. The buyer may also be precluded from redeeming the collateral even before resale. There may be no need to resell the collateral as required by the UCC if more than 60% of the purchase price has been paid. These abuses do not exist under the provisions of the UCC. Since where there is conflict the provisions of the UCCC control, the UCCC seems to have eliminated important consumer remedies. *See* Comment, *Repossession and Deficiency Judgments — Will the Consumer Credit Code Aid the Consumer or Vendor?,* 2 CONN. L. REV. 202 (1969).

Another source of consumer discontent is the $1,000 limit on the consumer's right to be free of a deficiency judgment. This eliminates most sales from the protection offered by section 5.103 of the UCCC. *See* Shuchman, *supra* note 9, at 46–48.

[26] UNIFORM CONSUMER CREDIT CODE § 5.103, Comment 2.

[27] *See, e.g.,* Hogan, *Integrating the UCCC and the UCC — Limitations on Creditors' Agreements and Practices,* 33 LAW & CONTEMP. PROB. 686 (1968); Kripke, *Consumer Credit Regulation: A Creditor Oriented Viewpoint,* 68 COLUM. L. REV. 445 (1968); Littlefield, *Preserving Consumer Defenses: Plugging the Loophole in the New UCCC,* 44 N.Y.U.L. REV. 272 (1969); Miller, *An Alternative Response to the Supposed Direct Loan Loophole in the UCCC,* 24 OKLA. L. REV. 427 (1971);

restrictions by separating credit sales into two transactions: (1) a direct loan from the lender and (2) a cash sale of goods by the seller.[28] Since such direct loans fall within the UCCC definition of consumer loan, the provisions of the UCC apply and the creditor is entitled to a deficiency judgment after resale of the collateral.[29]

The primary justification advanced for the distinction between consumer credit sales and consumer loans in the UCCC is to allow the time-price doctrine, which applies only to credit sales,[30] to be retained for "consumer credit sales." The time-price doctrine is a legal fiction developed by courts to circumvent stifling usury laws. Simply stated, the doctrine provides that when an item is sold in a credit sale for a price payable over a period of time, courts will not "look through" the price to determine how much of it constitutes interest.[31] As far as the policies and objectives of the UCCC itself are concerned, there is no reason to retain the "time-price" doctrine. The UCCC sets maximum interest rates at such high levels that no legal fiction is needed to render normal interest charges non-usurious.[32] Further, the doctrine is artificial because the "time-price differential" — the difference between the cash price and the time-price in a credit sale — is economically no different than the "interest obligation" of a loan.[33]

The drafters of the UCCC nevertheless decided to treat consumer loans and credit sales separately in order to provide an incentive to those states that have statutory usury restrictions but have not enacted the UCCC to use its provisions by analogy.[34] Since such statutes set legal interest rates at such low levels, some legal outlet is needed to avoid their effect. The time-price doctrine performs this function. If the time-price doctrine were

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Note, *Direct Loan Financing of Consumer Purchases,* 85 HARV. L. REV. 1409 (1972); Note, *Utah's UCCC: Boon, Boondoggle, or Just Plain Doggle,* 1972 UTAH L. REV. 133.

[28] *See* Note, *Direct Loan Financing of Consumer Purchases,* 85 HARV. L. REV. 1409, 1410 (1972).

[29] *See* discussion in note 6 *supra.*

[30] *See* Robertson, *supra* note 9, at 45–46; Shay, *The Uniform Consumer Credit Code: An Economist's View,* 54 CORNELL L. REV. 491 (1969).

[31] *See* Shay, *supra* note 30, at 509.

[32] One purpose of the UCCC is "to foster competition among suppliers of consumer credit so that consumers may obtain credit at reasonable cost." UTAH CODE ANN. § 70B–1–102(2)(c) (Supp. 1973). This is supposedly accomplished by the setting of high interest rate ceilings. The theory is that with high rate ceilings, the free enterprise system will work to establish the cost of credit on a competitive basis.

[33] *See* UNIFORM CONSUMER CREDIT CODE XXI (Prefatory Note to 1969 Rev. Final Draft).

[34] [T]he Committee was and is aware that, sociologically and economically, sales credit and loan credit are alike and that their separate treatment results in much duplication in drafting. Nevertheless, we are mindful of the weight given to Uniform Acts by Courts of States which have not enacted them. Thus, long before the Uniform Commercial Code was enacted or even introduced in New York, the New York Court of Appeals relied in part on a provision of the Uniform Commercial Code in overruling the Court's prior decisions on privity of contract and determining who may recover upon a breach of warranty in a sale of goods. The Committee believes that any encouragement to the courts of a State which has not enacted the Uniform Con-

eliminated in such a jurisdiction, not only could that state not apply the UCCC provisions by analogy, but also the very existence of its installment credit would be threatened.[35] The distinction between seller and lender credit in the UCCC permits a state to apply its time-price doctrine to consumer credit sales and thus release such credit sales from any conflict with statutory usury restrictions.[36]

According to one commentator, however, distinguishing between sales and loans in order to retain the time-price doctrine has been disastrous to the achievement of basic objectives of the UCCC:

> If a Code is being drawn up to replace statutes based upon obsolescent court doctrines, is it worth the extra cost of trying to preserve the doctrines until the Code is passed? [37]

Moreover, two of the drafters questioned the wisdom of the sales-loan distinction solely on the ground that the UCCC treats them almost identically in other situations.[38] A recent study noted that:

> Although the Code recognizes some differences between sales and loan credit, its basic approach is to treat all credit transactions alike as far as concerns disclosure, prepayment, late charges, deferrals, renewals, credit insurance and for purposes of collection practices.[39]

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sumer Credit Code to rely on the Code's provisions to reject the time sale price doctrine would have most unfortunate social and economic consequences for both consumers and credit grantors.

Id. at XXI–XXII.

[35] *See* Warren, *Regulation of Finance Charges in Retail Installment Sales,* 68 YALE L.J. 839, 866–67 (1959).

[36] It would also be impossible for a state with low constitutional usury restrictions to apply the UCCC provisions without the aid of the time-price doctrine. The doctrine relieves sales credit from these restrictions. *See* Robertson, *supra* note 9, at 45–46 n.61, where the author states:

> [T]he primary purpose for making a distinction between consumer credit sales and consumer loans in the UCCC was to preserve the time-price doctrine for consumer credit sales in those states which have usury restrictions embodied in their constitutions. Obviously, such constitutional restrictions might seriously affect the whole operation of the UCCC by keeping credit service charges and loan finance charges below the level at which they would otherwise be set by competition. The preservation of the time-price doctrine in consumer credit sales in those states with such constitutional provisions will permit such states to enact the UCCC and still give the free enterprise theory behind it a fair chance to work.

[37] Shay, *supra* note 30, at 511. Two objectives of the UCCC are to simplify the law in the areas of consumer credit and small loans and "to provide rate ceilings to assure an adequate supply of credit to consumers." UTAH CODE ANN. §§ 70B–1–102(2)(a), (b) (Supp. 1973). Retention of the time-price doctrine allows seller credit to be virtually free of the rate ceilings, thus creating a lack of uniformity in credit transactions having equivalent economic status in the market. It creates constraints on high-rate lenders without providing similar constraints upon sellers who are competitors with the lenders in the high-rate credit field. The objective of simplicity is lost to a great extent because of the increased length of the UCCC resulting from the separate treatment of seller credit and lender credit. Shay, *supra* note 30, at 510.

[38] Jordan & Warren, *supra* note 10, at 387. Consumer credit sales are treated in Article 2 of the UCCC, consumer loans in Article 3.

[39] THE STUDY COMMISSION ON THE UNIFORM CONSUMER CREDIT CODE AND ITS ADVISORY COMMITTEE, REPORT ON THE UNIFORM CONSUMER CREDIT CODE 5 (Conn. 1970).

Whatever distinctions that remain work to the creditor's advantage. Certain important consumer protection provisions apply only to consumer credit sales and not consumer loans; for example, (1) limitations on holder in due course status,[40] (2) the invalidity of waiver of defenses clauses,[41] and (3) restrictions on rights to a deficiency judgment.[42] Through use of the direct loan, creditors can avoid the effects of these consumer protection provisions.

II

In *Peoples Finance,* the court had to determine whether the transaction was a consumer credit sale or a consumer loan. Defendant argued that the transaction was actually a consumer credit sale,[43] since: (1) the check was drawn payable jointly to defendant and the automobile dealer, (2) plaintiff finance company was fully aware of the use to be made of the loan, and (3) plaintiff was fully aware of the terms of the agreement between defendant and the dealer.[44] Defendant also argued that the relationship between the dealer and the finance company could be characterized as a partnership or joint venture and that plaintiff's remedies should be limited to those of the seller.[45] The court rejected these contentions and classified the transaction as a consumer loan, reasoning that nothing indicated that plaintiff was regularly engaged "as a seller in credit transactions of the same kind." [46] The court held that the facts were not sufficient to transform the loan into a sale, or to establish a joint venture relationship between the seller and the lender.[47]

Since the transaction was a consumer loan, the finance company was not required to elect a single remedy, but could repossess the security *and* secure judgment on the promissory note.[48] The court acknowledged that its holding allowed creditors to use the direct loan to avoid the effects of section 70B–5–103, but concluded that elimination of the loophole was a legislative function.[49]

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[40] UTAH CODE ANN. § 70B–2–403 (Supp. 1973). This section provides that a seller cannot take a negotiable instrument other than a check from a consumer in a consumer credit sale, and an assignee of such a negotiable instrument is not a holder in due course if he had notice the seller was in violation of the section. This would include most financers since they are undoubtedly aware of the UCCC provisions.

[41] *Id.* § 70B–2–404. This section provides that in a consumer credit sale the assignee of the seller's rights is subject to all claims and defenses of the buyer notwithstanding an agreement to the contrary. In a consumer loan situation these provisions are inapplicable and the lender may separate the buyer's obligation to pay from the seller's obligation to perform.

[42] *Id.* § 70B–5–103.

[43] Brief for Appellee at 4–15, Peoples Finance & Thrift Co. v. Perry, 30 Utah 2d 282, 516 P.2d 1400 (1973).

[44] *Id.* at 3–4.

[45] *Id.* at 11.

[46] 30 Utah 2d at 285, 516 P.2d at 1401, *quoting* UTAH CODE ANN. § 70B–2–104(1)(a) (Supp. 1973), which section defines "consumer credit sale."

[47] 30 Utah 2d at 285, 516 P.2d at 1401.

[48] *See* note 6 *supra* and accompanying text.

[49] 30 Utah 2d at 285, 516 P.2d at 1402.

III

A. The Lender Credit—Seller Credit Distinction

An evaluation of the result reached in *Peoples Finance* depends upon the validity of the distinction between consumer credit sales and consumer loans in Utah. Since Utah has already passed the UCCC, the questionable policy basis for the distinction is absent.[50] The consumer who obtains a loan directly from a finance company and the consumer who obtains credit from a seller who later assigns his interest to a lender are in substantively the same position. Yet in the former case the creditor may pursue cumulative remedies, while in the latter his remedies are restricted. The fact that the average consumer does not know that these two transactions receive different legal treatment [51] frustrates the basic UCCC goal of promoting consumer understanding of credit transactions.[52] Separate treatment of sale credit and loan credit also allows creditors to avoid consumer-oriented limitations placed on creditor remedies. In Utah, the sales-loan distinction frustrates UCCC objectives without furthering the policy behind the distinction.

B. The Role of the Court

In view of the lack of any valid policy basis for the statutory direct loan loophole in Utah, the question is whether the Utah court could have interpreted the statute so that the loophole would be closed. Since section 70B–5–103 applies only to consumer credit sales, the only way for the court to avoid the loophole is to classify the transaction as a consumer credit sale by placing the lender in the legal position of a seller. Clearly, a lender who knows the purpose to which the loan is to be put and also knows that a buyer forfeits important protections by obtaining the loan from the lender rather than a seller is taking advantage of the buyer's ignorance.[53] The inherent unfairness of the direct loan loophole should prompt the court to construe the financing arrangement strictly against a lender who participates in the sales transaction.[54]

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[50] *See* notes 30–36 *supra* and accompanying text.

[51] A survey taken by the Oklahoma Department of Consumer Affairs showed that forty-nine out of fifty consumers did not know the differences between seller financing and lender financing. Miller, *supra* note 27, at 443. Miller suggests that the one factor that allows the direct loan procedure to work is consumer ignorance. He suggests combating the problem by providing full disclosure of the effects of a direct loan, rather than by equalizing sales and loans. He gives no reason, however, for the separate treatment of sales and loans.

[52] UTAH CODE ANN. § 70B–1–102(2)(c) (Supp. 1973).

[53] *See* Miller, *supra* note 27, at 444. Section 70B–6–111 permits the Utah Commissioner of Financial Institutions to bring a civil action to restrain a creditor from "engaging in a course of fraudulent or unconscionable conduct in inducing debtors to enter into consumer credit sales, consumer leases, or consumer loans." UTAH CODE ANN. § 70B–6–111(1)(b) (Supp. 1973). Consideration is to be given to the fact that the creditor "has knowingly taken advantage of the inability of the debtor reasonably to protect his interests by reason of physical or mental infirmities, *ignorance,* illiteracy or inability to understand the language of the agreement, or similar factors." *Id.* § 70B–6–111(3)(e) (emphasis added).

[54] Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967). The *Unico* court said that in order to impose community standards of fairness and decency "consumer goods con-

In *Peoples Finance,* the court could have avoided the unconscionable effects of the direct loan loophole and classified the transaction as a consumer credit sale by adopting either of two theories provided by the defendant: the close connection theory or the joint venture theory.

1. The Close Connection Approach to the Seller-Lender Relationship — Where a close relationship exists between seller and lender, there is no reason to distinguish between consumer credit sales and consumer loans. Instead of the usual transaction, a credit sale with an assignment to the lender,[55] the seller directs the buyer to the lender who then makes a loan to cover the purchase.[56] In pre-UCCC assignment cases, courts subjected assignee-lenders who were closely related to a sale to all defenses the buyer may have had against the seller.[57] Representative of these cases is *Unico v. Owen,*[58] which involved the question whether an assignee-lender who was closely related to the seller's sales transactions could retain holder in due course status. In *Unico,* the purchaser entered into an executory sales contract which the seller immediately assigned to Unico. When, after the seller's default, the purchaser refused to make further payments, Unico sued for the balance. The court held that Unico was not a holder in due course because of its close relationship with the seller and its participation in the transaction.[59] Unico was, therefore, subject to the purchaser's no consideration defense.

The *Unico* sale-assignment situation is directly analogous to the direct loan situation where the seller and lender are also closely related. In *Unico,* the assignee-lender was held to be a *party* to the sales transaction and was therefore unable to avoid the buyer's defenses.[60] Since a lender should not

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tracts and their concurrent financing arrangements should be construed most strictly against the seller who imposed the contract on the buyer, and against the finance company which participated in the transaction, directly or indirectly, or was aware of the nature of the seller's consumer goods sales . . . ." 232 A.2d at 411.

[55] In consumer sale situations, the UCCC makes the "sale-assignment" method of freeing the lender of buyer defenses legally unavailable. *See* UTAH CODE ANN. §§ 70B–2–403, –404 (Supp. 1973), and notes 40–41 *supra* and accompanying text.

[56] Creditors will probably use the direct loan method more frequently in order to avoid consumer protection provisions of the UCCC. Oklahoma, under the UCCC, has experienced a large increase in the number of direct loans made to finance consumer sales. *See* Miller, *supra* note 27, at 434–37.

It has been said that "[a]ny industry with the ingenuity to get around the problems incident to taking a chattel mortgage by inventing such devices as the conditional sales contract, the chattel deed of trust, the factor's lien, the trust receipt, and the like, is surely capable of inventing a device for avoiding the teeth of § 2.404" — which deals with waiver of defenses clauses. Robertson, *supra* note 9, at 57. The same could be said of the avoidance of the deficiency judgment restrictions of section 70B–5–103.

[57] *See, e.g.,* Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W.2d 260 (1940); Commercial Credit Corp. v. Orange County Mach. Works, 34 Cal. 2d 766, 214 P.2d 819 (1950); Mutual Fin. Co. v. Martin, 63 So.2d 649 (Fla. 1953); International Fin. Corp. v. Rieger, 272 Minn. 192, 137 N.W.2d 172 (1965); Local Acceptance Co. v. Kinkade, 361 S.W.2d 830 (Mo. 1962); Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967); American Plan Corp. v. Woods, 16 Ohio App. 2d 1, 240 N.E.2d 886 (1968).

[58] 50 N.J. 101, 232 A.2d 405 (1967).

[59] 232 A.2d at 417.

[60] *Id. See* Note, *Direct Loan Financing of Consumer Purchases,* 85 HARV. L. REV. 1409, 1426 (1972).

be able to avoid buyer defenses by simply changing the form of the transaction, he should also be viewed as a *party* to the sale in the direct loan situation.

> [T]he seller may suggest to a potential customer that credit for a purchase is available from a particular lender. The seller then may escort the customer to the loan office where a direct advance would be made ostensibly to the buyer. The proceeds, however, would be paid directly to the seller or in cases where procedural niceties are observed, a check would be handed to the buyer *jointly payable* to the buyer and seller or carrying a prepared endorsement to the seller. The buyer would then sign the check and turn it over to the seller.
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> . . . .
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> . . . [A] direct loan transaction in which the seller recommends the lender, accompanies the buyer to the loan office, and immediately takes the check or receives payments from the lender, would seem to be an indivisible transaction in which the lender was a full participant.[61]

A close relationship between the lender and seller can, in this way, obliterate the distinction between consumer credit sales and consumer loans.

In *Peoples Finance,* the court did not find the seller-lender relationship to be close enough to impute seller status to plaintiff finance company, but left open the possibility that, if a sufficiently close relationship were found to exist, a lender could be held to be engaged as a seller in a consumer credit sale. Nevertheless, by taking a different view of the facts, the court could have furthered instead of frustrated the objectives of the UCCC.[62]

Despite the fact that no continuing relationship existed between the lender and seller where the lender routinely financed the seller's sales and the seller routinely referred customers to the lender,[63] a close relationship existed in this particular transaction. Plaintiff finance company drew the check payable jointly to defendant and the dealer, was fully aware of the terms of the sale agreement and of the use to be made of the loan proceeds,

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[61] Note, *Direct Loan Financing of Consumer Purchases,* 85 HARV. L. REV. 1409, 1418, 1427 (1972) (emphasis added).

[62] *See* notes 32, 37, 51–52 *supra* and accompanying text. One of the main objectives of the UCCC is to protect the consumer against the abuses of the credit industry. UTAH CODE ANN. § 70B–1–102(2)(d) (Supp. 1973). Considering the abuses that accompany the routine obtaining of deficiency judgments, the existence of the direct loan loophole has been detrimental to the achievement of this objective. *See* notes 7–14 *supra* and accompanying text.

One author expresses the belief that courts will see through the transaction where a closely related lender and seller use the direct loan financing technique: "If schemes are devised to station a loan office next to an auto dealer's showroom to make 'loans' to customers 'referred' by the dealer, the financer runs the risk that a court will see through the device and treat the deal as 'sale credit' subject to article 2." Hogan, *supra* note 27, at 690.

[63] Brief for Appellant at 3, Peoples Finance & Thrift Co. v. Perry, 30 Utah 2d 282, 516 P.2d 1400 (1973). It is unfortunate that facts of the relationship that existed between the seller and plaintiff finance company were not brought out in more detail at trial. Since judgment was entered pursuant to stipulation it is possible that the seller-lender relationship was continuous and routine, but since these facts did not appear in the record the supreme court had only the plaintiff's assertions of no continuous relationship to deal with. Had the facts been developed as they should have been in the court below, the supreme court's decision might have been clearer as to the extent of the direct loan loophole.

and obtained a purchase money security interest in the truck.[64] Because of this relationship, and construing the transaction strictly against the financer, the court could have forced plaintiff to elect between repossessing the truck or suing on the note.

2. The Joint Venture Approach to the Seller-Lender Relationship — The relationship between a closely related seller and lender may be characterized as a joint venture.[65] A joint venture is usually defined as "a special combination of two or more persons where in some *specific* venture a profit is jointly sought without any actual partnership or corporate designation." [66] In Utah, to establish a joint venture, "an agreement, express or implied, for the sharing of profits" [67] is required.

Because of the "agreement" requirement in Utah, the joint venture theory may be more difficult to use than the close connection theory as a means of classifying a transaction as a consumer credit sale. But the relationship between the finance company and the seller used car dealer in *Peoples Finance* was clearly profitable for both. As one commentator has noted:

> Generally, when it can be shown that but for a particular sale a particular loan would not have occurred, and but for a particular loan a particular sale was not possible, the collaboration essential to any profit may make seller and lender partners or joint venturers, thus assuring the vulnerability of the lender to the defenses available against the seller.[68]

In *Peoples Finance,* the dealer supplied the truck and the selling ability while plaintiff supplied the capital; the dealer benefited by obtaining immediate cash for the sale of the truck and plaintiff furthered its business of lending money. In all likelihood, no loan would have been made if plaintiff had not obtained a purchase money security interest in the truck and had not known that the loan proceeds would be used to purchase the truck from the particular car dealer.[69] The court in *Peoples Finance* could

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[64] A "purchase money security interest" is defined as a security interest
(a) taken or retained by the seller of the collateral to secure all or part of its price; or
(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.
UTAH CODE ANN. § 70A–9–107 (1968). The seller and the lender who obtain security interests in collateral to be purchased with the credit extended are treated identically under the UCC. This supports the argument that where the lender obtains a "purchase money security interest" he is so involved in the sales transaction that he should be treated the same as the seller.

[65] Note, *Direct Loan Financing of Consumer Purchases,* 85 HARV. L. REV. 1409, 1425–27 (1972).

[66] Commercial Lumber Co. v. Nelson, 181 Okla. 122, 72 P.2d 829, 830 (1937) (emphasis added).

[67] Bates v. Simpson, 121 Utah 165, 170, 239 P.2d 749, 752 (1952).

[68] Note, *Direct Loan Financing of Consumer Purchases,* 85 HARV. L. REV. 1409, 1427 (1972).

[69] Most lenders are aware of the use to which the loan proceeds will be put because the usual loan application solicits such information. *Id.* at 1422. Of course, where the

easily have furthered the policy objectives of the UCCC [70] by characterizing the lender-seller relationship as a joint venture consumer credit sale.

IV

Because of the statutory direct loan loophole, and especially because *Peoples Finance* sanctions its use, section 70B–5–103, as well as sections 70B–2–403 and 70B–2–404, only give the appearance of consumer protection. The National Conference of Commissioners on Uniform State Laws has attempted to remedy this defect by proposing a statute which would subject the lender to consumer defenses — including the restriction on deficiency judgments — under certain circumstances where a close seller-lender relationship exists.[71] Even more beneficial, however, would

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lender acquires a "purchase money security interest" in the collateral he has a substantial interest in the sales transaction.

[70] *See* note 62 *supra* and accompanying text.

[71] Section 5.103(4) of the proposed revision to the UCCC provides:

> (4) If the lender takes possession or voluntarily accepts surrender of goods in which he has a purchase money security interest to secure a debt arising from a consumer loan in which the lender is subject to defenses arising from sales or leases (Section 3.405) and the net proceeds of the loan paid to or for the benefit of the consumer were $1,750 or less, the consumer is not personally liable to the lender for the unpaid balance of the debt arising from that loan and the lender's duty to dispose of the collateral is governed by the provisions on disposition of collateral (Part 5 of Article 9) of the Uniform Commercial Code.

UNIFORM CONSUMER CREDIT CODE § 5.103(4) (Working Redraft No. 5 1973).

Section 3.405(1) subjects a lender to all claims and defenses of the consumer where the lender makes a consumer loan to enable the consumer to buy from a particular seller if:

> (a) the lender knows that the seller or lessor arranged, for a commission, brokerage, or referral fee, for the extension of credit by the lender;
>
> (b) the lender is a person related to the seller or lessor unless the relationship is remote or is not a factor in the transaction;
>
> (c) the seller or lessor guarantees the loan or otherwise assumes the risk of loss by the lender upon the loan;
>
> (d) the lender directly supplies the seller or lessor with the contract document used by the consumer to evidence the loan, and the seller or lessor has knowledge of the credit terms and participates in the preparation of the document;
>
> (e) the loan is conditioned upon the consumer's purchase or lease of the property or services from the particular seller or lessor, but the lender's payment of proceeds of the loan to the seller or lessor does not in itself establish that the loan was so conditioned; or
>
> (f) the lender, before he makes the consumer loan, has knowledge or, from his course of dealing with the particular seller or lessor or his records, notice of substantial complaints by other buyers or lessees of the particular seller's or lessor's failure or refusal to perform his contracts with them and of the particular seller's or lessor's failure to remedy his defaults within a reasonable time after notice to him of the complaints.

Id. § 3.405(1)

A study commission on the UCCC in Connecticut recommended that the lender be subject to all claims and defenses of the consumer where "the lender makes the proceeds of the loan payable to the seller or requires as a condition of making the loan that the proceeds be paid to the seller or the lender takes a purchase money security interest in the goods which are the subject of the sale." THE STUDY COMMISSION ON THE UNIFORM CONSUMER CREDIT CODE AND ITS ADVISORY COMMITTEE, REPORT ON THE UNIFORM CONSUMER CREDIT CODE 31 (Conn. 1970). These two proposed additions to section 3.405(1) should be given adequate consideration by the legislature.

The proposed additions submitted by the National Conference of Commissioners on Uniform State Laws will only put the consumer in a better position to litigate to

be the complete elimination of any distinction between consumer credit sales and consumer loans.[72] If the legislature were to enact the close relationship amendments, much unnecessary litigation would likely be required to define what constitutes a close relationship.[73] In any case, if so-called "consumer legislation" is to protect the consumer some changes are required.

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maintain his rights, while the Connecticut proposals are clear enough to provide the debtor his remedy without litigation. The facts in *Peoples Finance* present a good example. It was not clear whether there was a close relationship between lender and seller, nor was it clear that the loan was conditioned on the consumer making a particular purchase, especially since the fact that the loan proceeds are paid directly to the seller is not conclusive of that issue. Forcing a consumer to litigate to maintain rights granted by statute is little better than providing no rights at all.

[72] *See* notes 30–36, 50 *supra* and accompanying text.

[73] *See* Miller, *supra* note 27, at 439–41. Miller makes the point that it is really not important to the consumer whether or not there is a close connection between the lender and seller. In either case, the consumer's rights against the seller who extended credit are dramatically different than are his rights against the lender who extended credit. *Id.*

Roll v. Larson: The Right to Bail in Capital Cases After *Furman v. Georgia.*

The Utah Constitution provides that all accused criminals shall be allowed bail, except those accused of capital offenses in situations where "the proof is evident or the presumption strong." [1] In *Roll v. Larson,*[2] the accused, who was held without bail pending trial on a charge of first degree murder, sought pretrial release by filing a writ of habeus corpus. Ruling on the writ, the trial court reasoned that, since Utah's capital punishment provision was unconstitutional under the United States Supreme Court's ruling in *Furman v. Georgia,*[3] "capital" offenses no longer existed. The trial court concluded that the accused capital offender was entitled to bail as a matter of right, even where the proof was evident or the presumption of guilt strong. The Utah Supreme Court reversed, holding that for bail purposes the Utah legislature had classified crimes according to their underlying gravity, not according to the punishment to be exacted, and therefore that capital offenses still exist. Plaintiff was denied bail and the capital offense exception to Utah's constitutional right to bail provision was preserved.

I

A. The "Right" to Bail and the Capital Offense Controversy

The United States Constitution expressly prohibits only "excessive bail," [4] and most commentators agree that a general "right" to bail cannot be inferred from the Constitution,[5] despite the argument that a prohibition against excessive bail is meaningless without a guarantee of *some* bail.[6] This controversy is largely moot, however, since most state constitutions provide that an accused is entitled to bail as a matter of right. These constitutions also typically provide an exception to the right in capital cases where the presumption of guilt is strong.[7] This exception has long been viewed as reasonable and constitutional.[8]

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[1] UTAH CONST. art. I, § 8. UTAH CODE ANN. § 77–43–3 (1953) contains the same provisions.

[2] 30 Utah 2d 271, 516 P.2d 1392 (1973).

[3] 408 U.S. 238 (1972).

[4] U.S. CONST. amend. VIII.

[5] D. FREED & P. WALD, BAIL IN THE UNITED STATES 2 (1964); Meyer, *Constitutionality of Pretrial Detention,* 60 GEO. L.J. 1140, 1179 (1972); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 VA. L. REV. 1223, 1224–25 (1969). *Contra,* Foote, *The Coming Constitutional Crisis in Bail,* 113 U. PA. L. REV. 959, 968 (1965).

[6] Carlson v. Landon, 342 U.S. 524, 569 (1952) (Burton, J., dissenting); *cf.* Foote, *supra* note 5, at 970.

[7] Note, *Footnote to Furman: Failing Justification for the Capital Case Exception to the Right to Bail After Abolition of the Death Penalty,* 10 SAN DIEGO L. REV. 349, app. I (1973).

[8] *Id.* at 349; Meyer, *supra* note 5, at 1180.

Prior to *Furman,* several states having the capital crimes exception legislatively abolished the death penalty. Courts in those jurisdictions were in accord in holding that the legislatures, by abolishing the death penalty, had tacitly manifested an intent to extend the right to bail to any accused, including those charged with a crime previously punishable by death.[9] Since *Furman,* however, courts in states where the death penalty was not previously abolished have been split on the bail issue.

Many courts take the position that the abolition of capital punishment destroys the rationale for the capital crimes exception to bail.[10] Adopting the "punishment" theory, these courts have reasoned that a capital crime is one which is punishable by death, and that if there are no crimes punishable by death then there are no "capital" crimes. The accused, therefore, has a right to bail no matter what crime he is charged with committing.

Other courts have disagreed with this analysis and have adopted the "classification" theory.[11] They reason that their state constitutions classified crimes as capital and noncapital because of the gravity of the crime, and that despite the fact that these crimes are no longer punishable by death, the underlying gravity of the crime still exists. Placing great emphasis on the fact that *Furman* is a judicial rather than a legislative abolition of the death penalty, these courts reason further that the legislative determination of the gravity of capital crimes has not been altered and must be respected. A number of these courts have stated that *Furman* cannot be viewed "as abrogating [a state's] fundamental law." [12]

In addition to the bail issue, *Furman* has introduced serious questions concerning procedural safeguards provided by many states in capital cases. In Utah, for example, a person accused of a capital offense is entitled to trial by a jury of twelve, as opposed to the jury of eight provided in all other cases.[13] Where a state's procedure is different in capital and noncapital cases, a court may be faced with a problem analogous to that in *Roll* — whether the *Furman* decision obviates the need for these additional safeguards. This issue is particularly crucial when it arises contemporaneonsly with the bail issue because a court cannot logically preserve

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[9] *In re* Welisch, 18 Ariz. 517, 163 P. 264 (1917); *Ex parte* Ball, 106 Kan. 536, 188 P. 424 (1920); City of Sioux Falls v. Marshall, 48 S.D. 378, 204 N.W. 999 (1925); *In re* Perry, 19 Wis. 676 (1865); *cf.* State v. Johnson, 83 Wash. 1, 144 P. 944 (1914).

[10] State v. Aillon, 295 A.2d 666 (Conn. 1972); Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972); State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972); Edinger v. Metzger, 32 Ohio App. 2d 263, 290 N.E.2d 577 (1972); Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829 (1972); *Ex parte* Contella, 485 S.W.2d 910 (Tex. Crim. App. 1972).

[11] People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972); People *ex rel.* Dunbar v. District Court, 500 P.2d 358 (Colo. 1972); State v. Flood, 263 La. 700, 269 So. 2d 212 (1972); Hudson v. McAdory, 268 So. 2d 916 (Miss. 1972); Jones v. Sheriff, Washoe County, 509 P.2d 824 (Nev. 1973).

[12] State v. Flood, 263 La. 700, 702, 269 So. 2d 212, 214 (1972); Roll v. Larson, 30 Utah 2d 271, 273, 516 P.2d 1392, 1393 (1973); State v. James, 30 Utah 2d 32, 36, 512 P.2d 1031, 1034 (1973).

[13] UTAH CONST. art. I, § 10; UTAH CODE ANN. § 78–46–5 (1953).

the added safeguards under a theory that capital crimes still exist while, at the same time, holding that one accused of a capital crime is entitled to bail under a theory that capital punishment has been abolished. The Louisiana Supreme Court recently faced this problem and resolved it in a consistent manner. First, the court decided that a person charged with a capital crime was still entitled to a larger jury than allowed in non-capital cases.[14] Then, in another case, the court held that the capital crimes exception precluded a right to bail.[15]

These issues arose in exactly the same setting in Utah. In *State v. James*,[16] the defendant was convicted of first degree murder by an eight-man jury. The trial judge ruled, on the ground that *Furman* had done away with the death penalty as imposed in Utah, that murder was no longer a capital offense, and that the defendant was entitled to only eight jurors. The Utah Supreme Court reversed this decision, stating:

> The "classification" theory appears preferable, particularly in light of the additional safeguards provided in the Constitution of Utah to a defendant, charged with a crime so distinct and grave in nature that the legislature has deemed death an appropriate penalty. . . . The Constitution of the state has provided a system of classifying certain serious offenses as capital cases and then mandated a specific procedural structure for the administration of justice based on that classification. Furman v. Georgia cannot be rationally construed as abrogating our fundamental law.[17]

Thus, after recognizing the split of authority between the "punishment" and "classification" theories, the Utah court simply stated that it preferred the "classification" theory.

B. The Purpose For Bail and its Denial in Capital Cases

The traditional purpose for bail in this country is to compel an accused's appearance at trial by economic pressure.[18] The grant of bail is based on the "presumption of innocence" [19] — the principle that one should not be punished or incarcerated until he has been convicted. This concern for the rights of the accused has recently been criticized as ignoring society's interest in protecting itself against dangerous criminals.[20] Arguably, more

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[14] State v. Holmes, 263 La. 685, 269 So. 2d 207 (1972).

[15] State v. Flood, 263 La. 700, 269 So. 2d 212 (1972).

[16] 30 Utah 2d 32, 512 P.2d 1031 (1973).

[17] *Id.* at 35–36, 512 P.2d at 1033–34.

[18] D. FREED & P. WALD, *supra* note 5, at vii; Palermo & Roberts, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 703 (1958); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 970 (1961); Comment, *Constitutional Law — Right to Bail*, 51 MICH. L. REV. 389, 393 (1953); Comment, *Bail — Capital Offense Exception to Constitutional Bail Guarantee Unaffected by Abolition of Death Penalty*, 44 MISS. L.J. 565, 572 (1973).

[19] For the argument that the "presumption of innocence" is merely a rule of evidence and not of substantive law *see* Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1231 (1969).

[20] The balance between the interests of the accused and the interests of society is discussed in M. HUNT, THE MUGGING 149 (1972):

individualized attention should be given the accused prior to his release on bail and, when it appears likely the accused will flee or commit other crimes while out on bail, he should be preventively detained.[21] Despite arguments that preventive detention is unconstitutional,[22] there is much to be said for a scheme which distinguishes between those who should be released prior to trial — with or without bail — and those who are so dangerous that they should be preventively detained. Utah provides for no such scheme, its constitution implying a preference for the due process rights of the accused.[23]

Under Utah law, any person accused of a noncapital offense has a "right" to bail regardless of his recidivist tendencies. The only discretion vested in the trial judge is in setting the amount of bail, which may not be excessive.[24] The Utah Legislature may have intended to implement a system of social protection by providing the capital crimes exception to the right to bail. Statistical studies indicate, however, that murderers are notoriously "safe" in terms of their recidivist tendencies.[25] As a recent

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> Many prosecutors and judges . . . regard the prisoner — especially if he has a record of any sort — as a menace to be kept off the streets, and accordingly they try to set bail high enough to keep him in jail until his trial . . . .
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> In a way, it may seem only reasonable that a person who has a bad record, who is accused of a violent crime, and who seems likely to be a continuing danger to society ought to be confined until tried; this is the basic argument for preventive detention, which is the practice in most foreign countries. But, despite its seeming reasonableness, it is so antithetical to the American concept of justice (and, in particular, to the presumption of innocence), and so grave a threat to civil liberty, that it is bitterly opposed by a wide range of knowledgeable persons and groups . . . .

[21] Mitchell, *supra* note 19, at 1235–42.

[22] *Compare* Meyer, *Constitutionality of Pretrial Detention,* 60 GEO. L.J. 1140 (1972), *with* Foote, *The Coming Constitutional Crisis in Bail,* 113 U. PA. L. REV. 959 (1965).

[23] For a discussion of bail statutes falling within either the "due process" or "crime control" model of criminal law *see generally,* Note, *Bail in Capital Cases After Furman: A Process Question,* 4 RUTGERS — CAMDEN L.J. 326 (1973).

[24] The danger exists in all cases that a judge, through the use of his discretionary power in setting the amount of bail, can preventively detain an accused by simply setting bond at a prohibitive level. This obviously violates the federal constitutional guarantee against excessive bail. *See* HUNT, *supra* note 20, at 148.

[25] It is generally agreed that those who are allowed to return to the community after serving a term of years for a capital crime, behave themselves better than do other criminals similarly released. Ample data to support this statement are found in the *Report of the Royal Commission on Capital Punishment,* Appendix 15 . . . . A few years ago the director of parole of the State Board of Parole of Pennsylvania published the results of a nationwide inquiry concerning capital offenders released on parole. Data were secured from twenty states . . . . [Of] the total of 195 prisoners reported . . . 11 of the prisoners had been returned to prison for new offenses and seven for parole violations of other kinds; 5 had disappeared, 11 had died, 34 had successfully completed parole, and 127 were still on parole. . . .
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> During 1945–1954 a total of 342 California male prisoners were paroled from first degree murder commitments. By the end of June, 1956, thirty-seven of them had been declared parole violators or 10.8 per cent; 6 of them had absconded, 11 had been returned to prison for technical violations, 11 had been returned after having been convicted of a misdemeanor, and 9 had been returned on new sentences for a felony (2 for robbery; 2 for lewd acts with children; 1 for a narcotics offense; 1 for abortion; 1 for sex perversion; 1 for assault to murder; and one for second degree murder).

United Nations study noted: "The data consistently show that murderers as a group are better behaved and less likely to resume criminal conduct than any other category of released or paroled prisoners." [26] Even though these studies have all dealt with the convicted murderer's behavior while on parole rather than prior to trial, the data can arguably be extended to an accused murderer's pretrial release. As applied to accused murderers, the preventive detention rationale is thus empirically unsound since it has been shown that the recidivist tendencies of a rapist or an armed robber are probably greater than those of a murderer. The capital crimes exception to bail must, therefore, have some other basis.

The usual reason for denying bail in capital cases, and no doubt the theory behind Utah's provision, is "fear of flight" — the recognition that as the severity of the possible punishment increases so does the motivation to flee.[27] By denying bail under the exception, the state recognizes the compelling human instinct to survive and expresses the belief that no amount of economic coercion can assure the presence of the accused at trial. When fear of death is removed, however, the "fear of flight" rationale breaks down. When the punishment for murder is no greater than that for other serious crimes, there is no valid reason to distinguish between a person accused of murder and one accused of another crime. For example, a person convicted of aggravated sexual assault may be sentenced to life in prison,[28] and therefore — assuming all other factors are equal — has the same motivation to flee as an accused murderer. While an accused rapist cannot be denied his right to bail, an accused murderer cannot be given bail in most instances. It seems unlikely that the right to bail exception was ever intended to create this incongruous result. At the time the exception was enacted, the death penalty was a viable punishment alternative for many crimes and the exception served a logical purpose. With the abolition of the death penalty, however, the legislative policy behind the exception disappears.

II

In *Roll,* the Utah Supreme Court, relying on its analysis in *James,* held that the legislature had two purposes in classifying offenses by their

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> . . . The corresponding percentage for parolees in other offense categories were: robbery, 20.8 per cent, burglary, 25.6 per cent, forgery, 30.2 per cent, and automobile theft, 31.1 per cent. These comparative figures appear to be quite representative of the situation in other states.
>
> An author writing in 1952, referring to Michigan, stated that "since 1937 when the present Michigan parole board was organized, 68 first degree murder cases have been paroled after serving an average term of 22.5 years. Of these only 2 became parole violators, by receiving sentences for burglary and indecent liberties."

T. SELLIN, THE DEATH PENALTY 76–77 (1959).

[26] UNITED NATIONS, REPORT ON CAPITAL PUNISHMENT BY THE DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS pt. II, ¶ 144, at 119 (1968).

[27] *See* State v. Johnson, 61 N.J. 351, 294 A.2d 245, 250 (1972).

[28] UTAH CODE ANN. § 76–5–405(2) (Supp. 1973); *id.,* § 76–3–203(1).

gravity: 1) to determine the type of punishment to be imposed after conviction of a crime and 2) to set up a scheme to deal with more "serious" crimes.[29] By imputing this dual intent to the legislature, the court reasoned that, even though the punishment purpose for the scheme was no longer valid, the underlying gravity of the offense still remained for purposes of fixing bail. The court also placed great emphasis on the fact that *Furman* was a judicial rather than legislative abrogation of the death penalty and that, therefore, the state legislature had shown no intent to change its policy concerning bail.[30]

III

The *Roll* decision is grounded on the assumption that the denial of bail is based on a legislative recognition of the gravity of the crime involved. Unfortunately, in making this assumption, the Utah court and other courts which have reached the same result [31] have not analyzed the logical validity of the assumption. Closer analysis reveals that the assumption is faulty.

A. The "Classification" Theory

The "classification" theory adopted in *Roll* was first expounded in *People v. Anderson,*[32] a 1972 California case which held that capital punishment was cruel and unusual and, therefore, violative of the state constitution. In its initial discussion of the case, the court did not mention bail, since it was not at issue. Subsequently, in denying the state's motion for rehearing, the court added a footnote which stated that its abolition of the death penalty should not be viewed as affecting the bail scheme [33] — a scheme virtually identical to Utah's.[34] The Utah court in *James* [35]

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[29] Roll v. Larson, 30 Utah 2d 271, 516 P.2d 1392 (1973).

[30] *See* note 12 *supra* and accompanying text.

[31] See cases cited note 11 *supra.*

[32] 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

[33] The footnote in *Anderson* reads in part:

> Although this question was never an issue in this case, we deem it appropriate to note that article I, section 6, of the California Constitution and section 1270 of the Penal Code, dealing with the subject of bail, refer to a category of offenses for which the punishment of death could be imposed and bail should be denied under certain circumstances. The law thus determined the gravity of such offenses both for the purpose of fixing bail before trial and for imposing punishment after conviction. Those offenses, of course, remain the same but under the decision in this case punishment by death cannot constitutionally be exacted. The underlying gravity of those offenses endures and the determination of their gravity for the purpose of bail continues unaffected by this decision.

493 P.2d at 899–900 n.45.

The *Anderson* decision was later completely nullified by an amendment to art. I of the California Constitution. *See* Note, *Footnote to Furman: Failing Justification for the Capital Case Exception to the Right to Bail After Abolition of the Death Penalty,* 10 SAN DIEGO L. REV. 349, 354 n.32 (1973).

[34] The California Constitution provides that "[a]ll persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great." CAL. CONST. art. I, § 6.

[35] 30 Utah 2d 32, 512 P.2d 1031 (1973).

and courts in other jurisdictions adopting the "classification" theory have relied on the reasoning expounded in the *Anderson* footnote.[36] Ironically, a California court has rejected the *Anderson* theory in *People v. Remington,*[37] where the court stated:

> While the guidance offered by the *Anderson* court is entitled to great weight in the determination of the instant case, it is clear that the court there spoke by way of dictum, which does not bind us in our decision. . . .
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> . . . .
>
> . . . The elimination of the death penalty means the extinction of the category of capital offenses. Since the California Constitution in its present wording guarantees release on bail to all except those charged with capital offenses, and since there are presently no capital offenses in this state, it follows that the words of exception constitute dead letter. . . .
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> . . . .
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> The abolition of the death penalty eliminated the great incentive to flight which made the denial of bail in formerly capital cases rational. Regardless of the gravity of the charges, the California Constitution, read in conjunction with the *Anderson* decision, unequivocally assures the accused the right to prepare his defense while enjoying the advantages of release on bail.[38]

Although the *Anderson* theory has been rejected by a California court, other jurisdictions have, with only minimal discussion, accepted its validity.

The "classification" theory fails to recognize that preventive detention and the fear of flight provide the basis for the capital crimes exception. While preventive detention may be a worthwhile policy, it requires a well drafted, seriously considered scheme. It certainly is not a principle which should be employed by the courts on an *ad hoc* basis, nor is it a principle which a legislature can tacitly endorse. Since the Utah Legislature has never seriously considered preventive detention, and because the Utah Constitution, with only one exception, grants an absolute right to bail, it is apparent that the legislative intent was not to deny the right to bail because of the "gravity" of the crime. Even though gravity of a crime may be a factor in determining the *amount* of bail,[39] the obvious reason for Utah's capital crimes exception to bail is "fear of flight." Nowhere in either *Roll* or *James,* however, did the Utah Supreme Court address itself to the "fear of flight" rationale; rather, the court camouflaged its own policy decision with a discussion of "legislative intent."

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[36] The Colorado, Louisiana, Mississippi, and Nevada courts (cases cited note 11 *supra*), as well as the Utah court in *James* and *Roll,* all failed to discuss the rationale behind the capital crimes exception to the right to bail, simply citing *Anderson* as authority for adopting the "classification" theory.

[37] 35 Cal. App. 3d 219, 110 Cal. Rptr. 581 (1973).

[38] *Id.* at 222–23, 110 Cal. Rptr. at 584–85.

[39] Gravity of the offense is of course relevant, for one might reasonably conclude that the incentive to flee will increase proportionately with the possible punishment awaiting the offender. But this factor should not be the only determinant.
Note, *Bail: An Ancient Practice Reexamined,* 70 YALE L.J. 966, 974 (1961).

B. The "Trade-Off" Theory

One justification for the *Roll* holding could be that the accused capital offender has "traded" any added right to bail he might have gained for the retention of greater procedural safeguards. Under *James,* for example, a person accused of a capital offense is still entitled to twelve rather than eight jurors,[40] despite the abolition of the death penalty. Using this reasoning, it is argued that, although the accused capital offender has not gained a right to bail, neither has he lost any of the added procedural safeguards. On closer analysis, however, the "trade-off" justification is demonstrably inadequate.

The obvious rationale for allowing greater procedural safeguards in capital cases is the finality of punishment.[41] The legal determination to extinguish a life must be as procedurally and substantively flawless as possible. But where death is not available as a punishment, there is no logical basis for a distinction between an accused murderer, who is subject to a life sentence, and a person accused of the "noncapital" crime of aggravated sexual assault, who may receive the same sentence.[42] Without the death penalty, the rationale for the added procedural safeguards is absent.

A further flaw in the "trade-off" justification is the fact that the right to bail may be a more meaningful safeguard than an enlarged jury. Indeed, the right to bail can be a crucial factor in determining whether the defendant is ultimately convicted or acquitted. An empirical study in Manhattan has shown that there is a much higher rate of conviction among those detained prior to trial than among those who are released on bail or on their own recognizance.[43] The study offers proof of a causal connection between pretrial detention and conviction.[44] A similar study of the New York penal system found that guilty pleas were fifteen percent higher in cases where individuals were detained prior to trial than

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[40] *See* text accompanying notes 16–17 *supra.*

[41] It was the total irrevocability of the death penalty which led our Legislature to require in such cases indictment by grand jury, strict sequestration of the jury from outside influence, agreement of all jurors in order to return a verdict, more experienced counsel, and right of special appellate review, and to make other exceptional rules. The offense, the nature or the class of the offense, was never the determining factor in laying down these special guidelines. It was the severe and irrevocable consequences which accompanied a verdict of guilty that impelled the Legislature and the courts to afford additional safeguards for the defendant.

State v. Holmes, 263 La. 685, 269 So. 2d 207, 211 (1972) (Barham, J., dissenting).

[42] *See* UTAH CODE ANN. §§ 76–5–405(2), 76–3–203(1) (Supp. 1973).

[43] Rankin, *The Effect of Pretrial Detention,* 39 N.Y.U.L. REV. 641 (1964).

[44] [The] study . . . demonstrated that each of five characteristics — prior record, bail amount, type of counsel, family integration, and employment stability — when considered separately [did] not account for the statistical relationship between detention before adjudication and unfavorable disposition. When the characteristics are considered in combination, they account for only a small part of the relationship.

These findings provide strong support for the notion that a causal relationship exists between detention and unfavorable disposition.

Id. at 655.

where they were released on bail.[45] These studies show that an accused who is released prior to trial has a distinct advantage over one who is detained:

> Incarceration under any circumstances imposes certain disadvantages in defending oneself against the prosecuting machinery of the state. If the defendant had been employed, his income is cut off. . . . The defendant's opportunity to obtain witnesses in his behalf is also greatly restricted. . . . The prisoner's opportunity to communicate with the outside world is trammelled at every turn by prison rules. Confidential communication with his attorney is impaired by the constant presence of a uniformed officer in the counsel room. Furthermore, the frustration and boredom which living under these conditions induces, must have a deteriorative effect on the defendant's morale, which, in turn, may affect his desire properly to defend himself, with his despair in some cases resulting in a loss of faith in the judicial system and the entry of a plea of guilty.[46]

Although these problems were not present in *Roll,* since the defendant spent only a minimal amount of time in jail,[47] other persons accused of capital crimes may not be so fortunate, and pretrial detention could conceivably offer severe handicaps to their defense.

While it has been demonstrated that pretrial release holds a distinct advantage for the accused, it is unclear what substantive advantage a larger jury affords. The obvious advantage is that it is harder to convince twelve persons of guilt than it is to convince eight. But because of the effect that pretrial detention has been shown to have on the outcome of a case, the right to bail is probably of significantly greater value to the accused than a larger jury. If *Roll* is viewed as a trade-off of rights for the benefit of the accused, it appears that the Utah Supreme Court failed to consider the relative value of the rights before making its decision. Unfortunately, it is the accused who will be shortchanged.

C. The "Punishment" Theory

The better-reasoned cases which have considered the right to bail issue after *Furman* have adopted the "punishment" theory.[48] "Punishment" theory cases are better-reasoned not only because the result is more desirable for policy reasons, but also because the cases extending the right to bail to all accused criminals have, rather than simply stating a preference for one theory or another, analyzed the problem in terms of the rationale behind the exception — the legislative recognition that a person subject to the death penalty is less likely to appear for trial if he is released on bail. A particularly good statement of this rationale is contained in the New Jersey case of *State v. Johnson:*

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[45] Palermo & Roberts, *supra* note 18, at 726, Table 15.

[46] *Id.* at 725.

[47] By the time the Utah Supreme Court had reversed the trial court's determination of the bail issue, the defendant had already been tried and acquitted. Defendant actually spent a total of only about two hours in jail.

[48] *See* cases cited note 10 *supra.*

> The underlying motive for denying bail in capital cases was to secure the accused's presence at the trial. In a choice between hazarding his life before a jury and forfeiting his or her sureties' property, the framers of the many State Constitutions felt that an accused would probably prefer the latter. But when life was not at stake and consequently the strong flight-urge not present the framers obviously regarded the right to bail as imperatively present.[49]

Furthermore, the "punishment" theory is consistent with pre-*Furman* bail cases [50] and with the generally accepted definition of "capital" offense — an offense for which the highest punishment is death.[51]

The "punishment" theory is not only the most logical and most in accord with the legislative rationale behind the exception, it is also preferable in terms of public policy. The present bail system centers around the right of an accused to be free from punishment before a formal adjudication of guilt:

> [M]ost state constitutions define bail in terms of a non-discretionary right abridged only for pressing exigencies in capital offenses where the proof is evident or the presumption great. . . . Justification for the denial inhered solely in the severity and irrevocability of the death penalty.[52]

When the death penalty is abolished, sound policy requires an unlimited bail right.

Strong arguments exist for the adoption of a preventive detention scheme which would take into account society's interest in protecting itself, as well as assuring the individual in most cases a right to pretrial freedom.[53] In this regard, several factors should be considered in determining whether a person should be released prior to trial — considerations which should be taken into account in every case, not just capital cases.[54] Factors such as the accused's "roots" in the community, prior

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[49] 61 N.J. 351, 294 A.2d 245, 250 (1972).

[50] *See* cases cited note 9 *supra.*

[51] "Capital offense" apparently has had one meaning and one meaning only in England and in the United States. . . .

> The jurisprudence is replete with the definition of "capital offense," and it is undeviating. . . . [U]nder the consistent definition in statutes and jurisprudence . . . a "capital offense" is one punishable by death.

State v. Flood, 263 La. 700, 269 So. 2d 212, 215–216 (1972) (Barham, J., dissenting). *See also* 6 WORDS & PHRASES, *Capital Offense,* 183–84 (1966).

"In those states where the exception is tied to the death penalty, an opinion continuing the exclusion will necessarily entail a distorted construction of the controlling law, contrary to the plain meaning of the words used therein." Note, *Footnote to Furman: Failing Justification for the Capital Case Exception to the Right to Bail After Abolition of the Death Penalty, supra* note 7, at 376.

[52] Comment, *Bail — Capital Offense Exception to Constitutional Bail Guarantee Unaffected by Abolition of Death Penalty,* 44 MISS. L.J. 565, 572 (1973).

[53] Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 VA. L. REV. 1223 (1969).

[54] ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE, § 4.5(d) (1968) provides:

> The inquiry should be exploratory and may include such factors as:
> (i) the defendant's employment status and history and his financial condition;

criminal activity, and the nature of the crime are common to every accused's decision to either appear at trial or "jump bail." [55] But the adoption of such a scheme is a legislative function, and until it is accomplished the courts should make an effort to lend support to the legislative preference for a right to bail.[56]

IV

Since *Furman* did not categorically abolish capital punishment, Utah could conceivably draft a statute under which a mandatory death sentence would be constitutional. Several states have made such attempts, but their constitutionality remains untested.[57] Naturally, if the death penalty were

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(ii) the nature and extent of his family relationships;
(iii) his past and present residences;
(iv) his character and reputation;
(v) names of persons who agree to assist him in attending court at the proper time;
(vi) the nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty;
(vii) the defendant's prior criminal record, if any and, if he previously has been released pending trial, whether he appeared as required;
(viii) any facts indicating the possibility of violations of law if the defendant is released without restrictions; and
(ix) any other facts tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction.

For another list of factors relevant to pretrial release, *see* Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole,* 38 N.Y.U.L. REV. 67, 72–74 (1963).

[55] Even admitting that there is some incentive to flee in all cases, there are also many "natural" deterrents to flight which operate without the aid of the state. The individual must leave his job, his friends, often his family, and may also be forced to leave some wealth behind. Moreover, modern methods of identification, such as the nationwide exchange of fingerprint and photographic information by police, probably make the lure of other jurisdictions less attractive than in pioneer days.

Note, *Bail: An Ancient Practice Reexamined,* 70 YALE L.J. 966, 973 (1961).

In *Roll,* most of the factors relevant to a pretrial release decision were in defendant's favor. Defendant was a bank employee with family ties (although the killing in the case resulted from a family quarrel) and roots in the community. Apparently, the trial court recognized that there was little likelihood that defendant would flee when bail was set at $10,000.

[56] Since *Roll* involved the killing of a policeman, there was a good deal of public outrage when it was announced that the defendant would be released on bail. Much of this adverse public opinion can probably be attributed to the misunderstanding that bail is some form of parole or permanent release. At any rate, public opinion should not have a bearing on the legal and factual issues relating to pretrial release:

The sole purpose of money bail is to assure the defendant's appearance. Money bail should not be set to punish or frighten the defendant, to placate public opinion or to prevent anticipated criminal conduct.

ABA STANDARDS, *supra* note 54, at § 5.3 (b).

[57] Florida was the first state to redraft its capital punishment statute after the *Furman* decision. N.Y. Times, Dec. 2, 1972, at 21, col. 4. But the constitutionality of the punishment in Florida, as in other states, remains suspect. The Florida statute, for example, calls for the death of anyone convicted of a "capital felony" but still leaves it within the discretion of the jury or the court to make a "recommendation of mercy." FLA. STAT. ANN. § 775.082 (1) (Supp. 1973).

Pennsylvania has become the latest state to revise its capital punishment statute. At last count, the number of states which had revised their statutes was twenty-two. N.Y. Times, Nov. 29, 1973, at 46, col. 2.

The Justice Department contends that there are three approaches to reinstatement of capital punishment:

constitutional, the capital crimes exception would again be justifiable, based on the traditional "fear of flight" rationale. But until such a statute is drafted, a decision which denies the right to bail to one accused of a capital offense is unjustifiable either in terms of logic or policy.

Furman is obviously unpopular with the Utah Supreme Court,[58] and the extent to which this dislike influenced the court's decision in *Roll* is unclear. In its present form, the bail system fails to guarantee a right to pretrial freedom for all. Furthermore, it fails to account for society's right to safety from dangerous criminals, even though murderers are not usually "dangerous" in terms of recidivist tendencies. A more individualized system of determining who should or should not be released prior to trial would certainly be preferable. The protection offered the accused as well as society would certainly justify the additional cost and manpower required for such a system. The court in *Roll,* by ignoring the present purpose behind Utah's bail statute, has effectively established a system of pretrial detention only for those accused of capital crimes. The proper judicial role is to interpret the law in a manner which supports the purpose behind the law. The *Roll* court failed to recognize that, although the purpose for the right to bail still exists, the purpose for the capital crimes exception to the right to bail has been extinguished.

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> [F]irst, to require the death penalty as an automatic consequence of conviction for the offense; second, to provide criteria for the discretionary imposition of the death penalty; and third, a combination of these approaches.

Justice Department Explains Proposed Federal Death Penalty, 13 CRIM. L. RPTR. 2357 (1973).

The Justice Department supports a proposal that sets forth certain aggravating circumstances under which the death penalty must be imposed and which provides certain circumstances under which imposition of the death penalty would be forbidden:

> The decision for or against the death penalty would follow automatically from the findings of the judge or jury as to the existence or non-existence of aggravating or precluding circumstances. "Thus, if one or more of the aggravating circumstances, and no precluding circumstance, were found to exist, the judge would be required to impose the death sentence. By contrast, even if several aggravating circumstances were found to exist, if any precluding circumstance were also found to exist, the defendant could not be sentenced to death."

Id. (comments of Assistant United States Attorney General Robert G. Dixon, Jr.).

[58] The prevailing opinion gives more credit to the case of Furman v. Georgia than it deserves. That case has ten opinions on it, although there are only nine justices. The only thing agreed upon by a majority of the court was that the death penalty was *cruel and unusual.* The reasons given by the concurring justices are devoid of reason, logic or common sense.

State v. James, 30 Utah 2d 32, 36, 512 P.2d 1031, 1034 (1973) (Ellett, J., concurring).

Doe v. Planned Parenthood Association of Utah — The Constitutional Right of Minors to Obtain Contraceptives Without Parental Consent

When the Planned Parenthood Association of Utah refused to give sixteen year old "Jane Doe" birth control advice and supplies because she was neither married nor accompanied by her parents,[1] she brought a class action against Planned Parenthood to enjoin it to make its services available without parental consent to her and to all other single minors in Salt Lake County. The district court granted the injunction, ruling that Planned Parenthood had deprived plaintiff of her constitutional right of privacy and, in giving contraceptives to married children but not to single children, had denied her equal protection of the law.[2] The Utah Supreme Court reversed,[3] declaring that the trial court's decision "ignores entirely the question of the morals of children and of the duty of parents to teach and instruct them," [4] and that a denial of contraceptives "to single minor children is not a denial of the equal protection of the law, as they are not in the same class with married people." [5]

I

A. Privacy, Equal Protection, and Contraceptives

The constitutional right of personal privacy includes a number of specific rights: [6] the right to marry,[7] to procreate,[8] to terminate a pregnancy

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[1] The national Planned Parenthood Association favors liberal distribution of contraceptives to minors. The Utah branch, however, has a policy of giving contraceptives only to minors who obtain their parents' consent. This policy was adopted largely in response to strong public reaction against Planned Parenthood in Bountiful, and Clearfield, Utah. Salt Lake Tribune, Mar. 21, 1972, at 13, col. 5, and Mar. 18, 1972, at B-1, col. 2.

[2] Doe v. Planned Parenthood Ass'n, Civil No. 204803 (Dist. Ct., Aug. 11, 1972). The court also ruled that Planned Parenthood's contracts with three public funding agencies — the Office of Economic Opportunity, the Salt Lake County Community Action Program, and the Utah State Division of Family Services — required it to provide its services to minors from low-income families without a requirement of parental consent. This issue, although significant, will not be treated in this comment.

The fourteenth amendment applies only to state action and not to solely private actions of private corporations, such as Planned Parenthood. Though not discussed by the court, it appears that the involvement of Planned Parenthood with the three public agencies qualified its discrimination against plaintiff as state action. *See generally* McQueen v. Druker, 317 F. Supp. 1122, 1127–28 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971).

[3] Doe v. Planned Parenthood Ass'n, 29 Utah 2d 356, 510 P.2d 75, *stay denied*, 413 U.S. 917 (1973).

[4] *Id.* at 358, 510 P.2d at 76.

[5] *Id.* at 359, 510 P.2d at 76.

[6] *See* Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[7] *Compare* Loving v. Virginia, 388 U.S. 1, 12 (1967), *with* Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[8] *Compare* Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942), *with* Roe v. Wade, 410 U.S. 113, 152–53 (1973).

with an abortion,[9] and probably to decide, by the use or nonuse of contraceptives, whether or not to have children.

In two recent decisions concerning the use of contraceptives, *Griswold v. Connecticut* [10] and *Eisenstadt v. Baird*,[11] the Supreme Court avoided deciding whether such use should be accorded the status of "constitutional right." In *Griswold*, the Court held unconstitutional a Connecticut statute prohibiting the *use* of contraceptives by married persons. The ground for so holding, however, was not that the statute infringed upon a right of married persons to use contraceptives, but that enforcement of the state's prohibition involved the invasion of the constitutional right of privacy surrounding the marriage relationship.[12] In *Eisenstadt*, the Court struck down a Massachusetts statute which allowed distribution of contraceptives to married persons but not to single persons on equal protection grounds, again avoiding the question whether the use of contraceptives is a constitutionally protected right.

Although the Supreme Court has avoided facing the issue squarely, considerable authority supports the proposition that access to contraceptives is a constitutionally protected right. The *Eisenstadt* Court, for example, recognized the fundamental nature of the "decision whether to bear or beget a child," [13] and examined the statute with the scrutiny usually reserved for "fundamental" constitutional rights.[14] Since *Eisenstadt*, several state and federal abortion cases have expressly or implicitly indicated that access to contraceptives is a constitutional right.[15]

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[9] Roe v. Wade, 410 U.S. 113, 153 (1973).

[10] 381 U.S. 479 (1965).

[11] 405 U.S. 438 (1972).

[12] 381 U.S. at 485–86. The Court left open the question whether a state can deny contraceptives to married persons by a statute which does not directly interfere with marital privacy, such as a prohibition against the manufacture or sale of contraceptives.

[13] 405 U.S. at 453. In a footnote, the Court made it clear that its use of equal protection to invalidate the Massachusetts statute was not an implication that the right to use contraceptives is not a fundamental constitutional right:

> Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest. . . .
> But just as in Reed v. Reed, 404 U.S. 71. . . (1971), we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.

Id. at 447 n.7 (citations omitted).

In addition, the Court noted that, if *Griswold* established a constitutional right to contraceptives, the state could not prohibit single persons from receiving contraceptives because, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

[14] *See* Note, *Eisenstadt v. Baird: A Return to the "Lochner" Era of Judicial Intervention?*, 33 U. PITT. L. REV. 853 (1972).

[15] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–53 (1973); Doe v. Scott, 321 F. Supp. 1385, 1389–90 (E.D. Ill. 1971); State v. Munson, 201 N.W.2d 123, 124–25 (S.D. 1972). An argument might also be made that the right to use contraceptives is a fundamental constitutional right because, in deciding not to bear or beget a child, a woman is exercising her constitutional right to life. The right to life is involved because childbirth always involves a risk of death or injury to the health and integrity

B. The Rights of Children

Constitutional protection of access to contraceptives will have little significance for children unless they share equally in that right with adults. Courts have traditionally withheld from children many constitutional and nonconstitutional rights granted to adults,[16] reasoning that children are incompetent to exercise adult rights[17] and must be protected from harming themselves by their own improvident and immature acts.[18] Under this view, a parent's duty is to provide protection for his child,[19] and to this end the parent is given custody and control over his child.[20] Thus, a parent has discretionary power to prevent his child from exercising certain rights, such as the right to marriage,[21] to liberty,[22] to freedom of religion,[23] and to receive certain types of medical treatment,[24] that are constitutionally

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of the body. *See* Munn v. Illinois, 94 U.S. 113, 142 (1876) (Field, J., dissenting); People v. Belous, 71 Cal. 2d 954, 963, 458 P.2d 194, 199, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970); MacMullen v. City of Middletown, 98 N.Y.S. 145, 150 (1906).

[16] *See generally* Forer, *Rights of Children: The Legal Vacuum,* 55 A.B.A.J. 1151 (1969).

[17] *See* Dixon v. United States, 197 F. Supp. 798 (W.D.S.C. 1961), where the court said that "[m]inority . . . is in itself a recognized badge of incompetency of an infant to handle his own affairs." *Id.* at 803. Another judge has taken a similar position:

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child — like someone in a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights — the right to marry, for example, or the right to vote — deprivations that would be constitutionally intolerable for adults.

Ginsberg v. New York, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring).

[18] Dixon v. United States, 197 F. Supp. 798, 803 (W.D.S.C. 1961). *See also* Ginsberg v. New York, 390 U.S. 629, 638–39 (1968); Prince v. Massachusetts, 321 U.S. 158, 168 (1944); *Ex parte* Cromwell, 232 Md. 305, 192 A.2d 775, 777 (1963).

[19] The parents' duty includes providing proper food, shelter, clothing, education, guidance, and moral training for the child. Daily v. Parker, 152 F.2d 174 (7th Cir. 1945). Although the child has a "right" to receive these benefits, he is often unable to enforce that right effectively because parents are generally immune from suit by their children. Note, *Counseling the Counselors: Legal Implications of Counseling Minors Without Parental Consent,* 31 MD. L. REV. 332, 336–37 (1971). Even when children are able to bring suit against their parents, as in the case of willful torts or gross negligence, the child may sue only through a legally appointed adult guardian. *See generally* Pintek v. Superior Court, 78 Ariz. 179, 183–84, 277 P.2d 265, 268 (1954).

[20] *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968); Draus v. International Silver Co., 105 Conn. 145, 135 A. 437, 439 (1926); Rhodes v. State, 76 Ga. App. 667, 47 S.E.2d 293, 295 (1948). *See also In re* Gault, 387 U.S. 1 (1967), where the Supreme Court noted that under the traditional view children are entitled "not to liberty but to custody." *Id.* at 17.

[21] *Compare, e.g.,* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that the right to marry is a constitutional right), *with* UTAH CODE ANN. § 30–1–9 (1969) (providing that children over fourteen must have parental consent to marry).

[22] The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness . . . .

Commonwealth v. Fisher, 213 Pa. 48, 53, 62 A. 198, 200 (1905).

[23] *See* text accompanying notes 40–41 *infra.*

[24] *Compare, e.g.,* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right to an abortion is a constitutional right), *with* UTAH CODE ANN. § 76–7–304(4) (Supp. 1973) (providing that single minor girls must have the consent of their parent or guardian to receive an abortion).

protected for adults. The "natural right" of the parent to control his child's activities is deeply respected by the courts.[25]

This "natural right," however, is not without limits. The state, as *parens patriae,*[26] may restrict parental control when abuse of that control may harm the child's physical or mental health or the public welfare.[27] In setting restrictions on parental control, the state does not create new rights for children; rather, control of the child is transferred from the parent to the state [28] or to a third person.[29] Thus, use of *parens patriae* power is consistent with the traditional notion that only a fully emancipated child may exercise any rights of his own.[30]

In a number of recent decisions courts have looked beyond the strict traditional view of children's rights and questioned whether denial of important constitutional rights is in the best interest of the children and society.[31] In the leading children's rights case, *In re Gault,*[32] the Supreme Court found that the juvenile court system was not effectively serving its original purpose of protecting children from the "rigidities, technicalities, and harshness" of the criminal justice system.[33] Therefore, the Court held that, at least in juvenile court proceedings involving possible loss of

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[25] *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Anguis v. Superior Court, 6 Ariz. App. 68, 429 P.2d 702, 705 (1967).

[26] For a general explanation of the *parens patriae* doctrine, *see In re* Turner, 94 Kan. 115, 145 P. 871, 872 (1915); McIntosh v. Dill, 86 Okla. 1, 205 P. 917, 925 (1922). As *parens patriae,* the state may statutorily prevent parents from permitting their children, who are below a certain age, from engaging in certain activities. *See, e.g.,* Interstate Circuit, Inc. v. City of Dallas, 249 F. Supp. 19 (N.D. Tex. 1965) (watching certain movies); Thistlewood v. Trial Magistrate, 236 Md. 548, 204 A.2d 688 (1964) (remaining on the streets at night); UTAH CODE ANN. § 30–1–2 (1969) (marrying); *id.* § 32–7–15 (Supp. 1973) (drinking alcohol). Courts may exercise *parens patriae* power by removing a child from the control and custody of his parents when they are neglectful, or by forcing parents to do such things as send their child to school or submit their child to medical treatment. *See, e.g., In re* Karwath, 199 N.W.2d 147 (Iowa 1972); State v. Jackson, 71 N.H. 552, 53 A. 1021 (1902); *In re* K—— B——, 7 Utah 2d 398, 326 P.2d 395 (1958).

[27] In *Wisconsin v. Yoder,* 406 U.S. 205, 229–34 (1972), the Supreme Court did not permit the state to exercise its *parens patriae* power because "[t]his case . . . is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Id.* at 230. *See also* Stanley v. Illinois, 405 U.S. 645, 652 (1972); Chandler v. Whatley, 238 Ala. 206, 189 So. 751, 753–54 (1939).

[28] Although the interest and welfare of the child are the controlling questions in proceedings involving children, it is the court, not the child, who decides what is best for the child. *See, e.g., In re* Zerick, 74 Ohio L. Abs. 525, 129 N.E.2d 661, 666 (Juv. Ct. 1955). This is true even when courts take into account the desires of the child. *See, e.g., In re* Snellgrose, 432 Pa. 158, 247 A.2d 596, 599–600 (1968).

[29] *See, e.g.,* Bough v. Bough, 263 S.W.2d 573 (Tex. Civ. App. 1953) (custody of child given to third person where both parents unfit).

[30] *See generally* Katz, Schroeder & Sidman, *Emancipating Our Children — Coming of Legal Age in America,* 7 FAM. L. Q. 211 (1973) (hereinafter cited as Katz).

[31] In cases not involving constitutional rights, the courts have been satisfied to let states deprive children of rights if there is some remote possibility that state purposes of protecting children might be served. *See, e.g.,* Ginsberg v. New York, 390 U.S. 629, 641–43 (1968).

[32] 387 U.S. 1 (1967).

[33] *Id.* at 14–31.

liberty,[34] children are entitled to those due process rights which are necessary to preserve "the essentials of due process and fair treatment." [35] In *Tinker v. Des Moines School District,*[36] the Court, reasoning that free and orderly expression is essential to a good education and is in the best interest of children and society,[37] held that students, as "persons" under the Constitution,[38] have a right to engage in nondisruptive free speech. Thus, despite its comprehensive authority "to prescribe and control conduct in the schools," [39] the state could not regulate that speech.

Significantly, *Gault* and *Tinker* upheld the rights of children against the power of the *state* to regulate conduct or curtail their physical liberty and activities. Courts are more reluctant to broaden the constitutional rights of children where such broadening would limit the *parents'* right to control their children. For example, in *Wisconsin v. Yoder* [40] the Supreme Court held, without considering the right of Amish children to choose for themselves whether to follow that particular faith, that Amish parents have a constitutionally protected right to keep their children out of public schools for religious reasons.[41] In *Bukholz v. Leveille,*[42] the court declared that, although children have a right to bring suit even against their parents' wishes, they may not sue when the subject matter of the suit is "so peculiar to parental control that their consent is necessary." [43]

Legislatures, not courts, have granted children some rights which encroach upon parental control, most notably in the area of medical care.[44] Generally, legislatures have given children rights to medical care

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[34] The Court refused to expand its holding to encompass juvenile court proceedings involving less serious penalties. *Id.* at 13. A number of Supreme Court cases have declared that children have certain rights in criminal or juvenile court proceedings that might lead to a loss of liberty. *See, e.g., In re* Winship, 397 U.S. 358 (1970); Kent v. United States, 383 U.S. 541 (1966); Haley v. Ohio, 332 U.S. 596 (1948).

[35] 387 U.S. at 30. Children are still deprived some due process rights because not all due process rights fall into this category. For example, in *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), the Court held that the right to a jury trial is not a right of children because the "fundamental fairness" of the proceeding could be achieved without it.

[36] 393 U.S. 503 (1969).

[37] *Id.* at 511–14.

[38] *Id.* at 511.

[39] *Id.* at 507. A number of cases have held that as "students," children possess constitutionally protected rights which must be respected by the state. *See, e.g.,* Board of Educ. v. Barnette, 319 U.S. 624 (1943); Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973).

[40] 406 U.S. 205 (1972).

[41] *Id.* at 215–19. *See* Justice Douglas's dissenting opinion in *Yoder. Id.* at 241.

[42] 37 Mich. App. 166, 194 N.W.2d 427 (1971). At least one commentator considers *Bukholz* to be a progressive case in declaring children's rights. Kaimowitz, *Legal Emancipation of Minors in Michigan,* 19 WAYNE L. REV. 23, 36–37 (1972).

[43] 194 N.W.2d at 429.

[44] For an argument that the right to medical care is constitutionally protected because of its close relationship to the fourteenth amendment right to life, *see* Pilpel & Zuckerman, *Abortion and the Rights of Minors,* 23 CASE W. RES. L. REV. 779, 804–05 (1972). *See also* note 15 *supra.*

The common law rule that doctors may not treat children without parental consent is expressed in *Zoski v. Gaines,* 271 Mich. 1, 260 N.W. 99 (1935). Exceptions to this common law rule are the children may be treated without parental consent if they are

only when the treatment needs of children outweigh the parents' interest in controlling their children.[45] Thus, many legislatures have given children the right to receive medical care, even over the objection of their parents, when there is immediate danger of losing life or limb,[46] when parental control is weak,[47] or when children have a serious medical problem, such as venereal disease [48] or pregnancy,[49] which, because it involves a sensitive moral issue which children are not likely to discuss with their parents, might go untreated if parental consent were required.[50] On the issue of children's access to contraceptives, legislatures are divided.[51]

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in need of emergency treatment, if they are emancipated, or if they are mature. These exceptions have not given children any significant rights in derogation of their parents' control; for example, the right to emergency medical treatment generally has been construed very narrowly to include only treatment necessary to save life or limb. Emancipation by its very nature is broad enough to give children the right to receive medical care without parental consent. The "mature minor" rule is not widely enough accepted to give the right to medical care to many children. See Pilpel, *Minors' Rights to Medical Care,* 36 ALBANY L. REV. 462, 464–66 (1972) (hereinafter cited as Pilpel).

[45] Modern statutes granting children rights to medical care fall into three categories. Some statutes codify the exceptions to the common law rule mentioned in note 44 *supra.* A second group of laws allows minors to be treated for specific conditions such as venereal disease or pregnancy. Finally, a few states have enacted comprehensive legislation granting children the right to receive most types of medical care. Pilpel, *supra* note 44, at 467. Each of these types of statutes generally gives children rights to medical care only when the needs of children are greater than parents' right to control their children. *See* notes 46–51 *infra* and accompanying text.

[46] *See, e.g.,* MASS. ANN. LAWS ch. 112, § 12F (Supp. 1972). *See also* Pilpel, *supra* note 44, at 464.

[47] Parental control might be said to be weak or unnecessary in the case of an emancipated or a "mature" child. *See, e.g.,* ARIZ. REV. STAT. ANN. § 44–132 (1967); MISS. CODE ANN. §§ 41–41–3(g), (h) (1972). *See also* Pilpel, *supra* note 44, at 464–66.

[48] All but a handful of states have statutes giving children the right to be treated for venereal disease without parental consent. Katz, *supra* note 30, at 238. Utah's statute giving minors the right to treatment for venereal disease wihout parental consent is found in UTAH CODE ANN. § 26–6–39.1 (Supp. 1973).

[49] Pilpel, *supra* note 44, at 467.

[50] See Foster & Freed, *A Bill of Rights for Children,* 6 FAM. L.Q. 343, 359–60 (1972) (hereinafter cited as Foster). Even those legislatures which have given children comprehensive rights to medical care have been hesitant to give children the right to certain types of medical care involving serious moral questions, when the life or health of the child is not clearly at stake. *See, e.g.,* VA. CODE ANN. § 32–137(7) (Supp. 1974) (originally allowing children to be treated for all medical problems, but amended to exclude the right to sterilization); ORE. REV. STAT. §§ 109.640, 435.435 (1971) (giving children comprehensive medical rights but excluding the right to abortion). *But see* CAL. CIV. CODE § 34.5 (West 1954), which was interpreted in Ballard v. Anderson, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971), as giving minor girls the right to an abortion without parental consent.

[51] To minimize imposition upon parental control and to make contraceptives available only to minors who need them, states which have given children the right to contraceptives have generally given the right only to children who are partly emancipated or who are sexually active. *See, e.g.,* CAL. WELF. & INST'NS CODE § 10053.2 (West Supp. 1972) (allows teenagers from welfare families to receive contraceptives); ILL. ANN. STAT. ch. 91, § 18.7 (Smith-Hurd Supp. 1974) (allows children to receive contraceptives if they are referred by a doctor, a clergyman, or a planned parenthood agency); MINN. STAT. ANN. § 144.341 (Supp. 1973) (allows children to obtain contraceptives if they are living apart from their parents and are financially independent); MINN. STAT. ANN. § 144.342 (Supp. 1973) (allows minors to receive contraceptives if they are already parents). The California statute may be explained by the fact that illegitimacy is extremely common among welfare families. In addition, parental control is often weak in welfare families because the father is absent. *See, e.g., Hearings on*

II

The Utah Supreme Court rejected the argument that children have a constitutional right to contraceptives for two reasons: first, the court felt that extending this right to children would deprive parents of their right and duty to teach, instruct, and watch over their children; second, the court believed that allowing children access to contraceptives would be harmful because it would encourage children to break the law against fornication, thus causing them to become immoral delinquents.

The court also rejected plaintiff's contention that Planned Parenthood had, in providing services for married but not for single children, violated the equal protection clause. Reasoning that the state's fornication law "has never been considered to deny the equal protection of the law to single people who may want to satisfy their lusts on each other," [52] the court concluded that single persons and married persons are not in the same class.

III

A. The Child's Constitutional Right of Access to Contraceptives

Children's constitutional rights are limited in our society because of the policy decision that the best interests of children are served by subordinating their rights to the parents' and the state's desire to control them.[53] A grant of constitutional rights to children presupposes a determination, as in *Tinker* and *Gault*,[54] that the interests of children in exercising the particular right outweigh the interests of parents and the state in restricting that right. In *Doe*, the Utah court failed to find any compelling policy reasons to support an extension of the right to use contraceptives to children. Careful analysis of the effects of withholding the right to contraceptives from children reveals, however, that the opposite result should have been reached.

According to the court, the best interests of children are not served by providing them with contraceptives, since to do so would cause them to become immoral delinquents, perhaps even "strumpets or streetwalkers," infected with venereal disease.[55] This conclusion rests upon the fallacious assumption that fear of pregnancy effectively deters teenagers from engaging in sexual intercourse. On the contrary, a study by the United States

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H.R. 1 (Social Security Amendments of 1971) Before the Senate Comm. on Finance, 92d Cong., 1st Sess., Administration Witnesses, at 91 (1971).

The majority of states, including Utah, have not given children the right to contraceptives. The effect of state inaction is to reinforce the common law rule that minors may not receive medical treatment without parental consent. COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, POPULATION AND THE AMERICAN FUTURE 99 (1972) (hereinafter cited as COMMISSION).

[52] 29 Utah 2d at 359, 510 P.2d at 77.

[53] *See* notes 16–25 *supra* and accompanying text.

[54] *See* notes 31–39 *supra* and accompanying text.

[55] 29 Utah 2d at 357–58, 510 P.2d at 75–76.

Commission on Population Growth and the American Future found that twenty-seven percent of American girls between the ages of fifteen and nineteen have had sexual intercourse at least once and that most have never or only rarely used contraceptives.[56] Another study found that only a small percentage of those teenagers who abstain from sexual intercourse do so because they fear pregnancy.[57]

Pregnancy of unmarried teenage girls causes many physical and emotional difficulties which the Utah court failed to consider. Unwed mothers are less likely to receive adequate prenatal care,[58] and are therefore in greater danger than married mothers of having health complications during pregnancy and at childbirth. The unwed teenage mother encounters serious emotional and social problems as well:

> Adolescent pregnancy offers a generally bleak picture of serious physical, psychological, and social implications for the teenager . . . . Once a teenager becomes pregnant, her chances of enjoying a rewarding, satisfying life are diminished. Pregnancy is the number one cause for school drop-out among females in the United States. The psychological effects of adolescent pregnancy are indicated by a recent study that estimated that teenage mothers have a suicide attempt rate 10 times that of the general population.[59]

The problems faced by unmarried mothers carry over to their children. Illegitimate children have a higher rate of prematurity and infant mortality than do legitimate children, and much of society regards them as being socially, morally, and legally inferior.[60]

One argument against allowing single children access to contraceptives which might have some measure of validity is that children might interpret such action as societal approval of sexual promiscuity.[61] The tremen-

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[56] COMMISSION, *supra* note 51, at 109. The Commission also reported that the number of illegitimate births among teenagers is increasing rapidly. In 1970, it was estimated that 180,000 illegitimate children were born to teenagers. *Id.* at 88.

[57] Among teenagers fifteen to nineteen years old who had had limited experience with sexual activities or who had engaged in sexual intimacies which fell short of intercourse, only twenty-four percent of the boys and only seventeen percent of the girls gave fear of pregnancy as the reason for not having had intercourse. M. SCHOFIELD, THE SEXUAL BEHAVIOR OF YOUNG PEOPLE 129 (1965). Although this study was made in England, it seems likely that the sexual behavior of teenagers in England and the United States is similar. This study also revealed that among teenagers who had experienced sexual intercourse, fifty-one percent of the boys and seventy percent of the girls had feared pregnancy on one or more occasions but had had intercourse anyway. *Id.* at 128.

[58] COMMISSION, *supra* note 51, at 88–89.

[59] *Id.* at 109.

[60] *Id.* at 88–89.

[61] Dr. Gaylin of the Columbia University Psychoanalytic Clinic observed that:

> [Psychiatrists] . . . made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, *i.e.*, disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval — another potent influence on the developing ego.

Gaylin, Book Review, 77 YALE L.J. 579, 594 (1968).

dous problems faced by unwed mothers and the high rate of sexual intercourse among teenagers, however, compel the conclusion that access to contraceptives is in the best interest of children.[62]

The Utah court also feared that allowing children access to contraceptives would seriously impose upon the "duty of parents to teach and instruct" their children.[63] Children do not usually discuss sexual matters with their parents, however, even when serious health problems requiring immediate medical care arise.[64] The Utah Legislature recognized this fact when it gave children the right to be treated for venereal disease without parental consent.[65] Requiring parental consent to obtain contraceptives does not promote family solidarity and parental control; rather, it results in children not obtaining contraceptives, thereby punishing with pregnancy children who are sexually active and who are unable or unwilling to obtain parental consent.

Children need parental guidance and supervision, but their need to obtain contraceptives outweighs any threat to parental control.[66] As one court has noted:

Although speaking of the effect of legalized pornography on children, the similarities between the effect of legalized pornography and legalized contraceptives are readily apparent. To legalize contraceptives may imply "parental approval and even [suggest] seductive encouragement" of premarital sex among teenagers.

[62] Admittedly many sexually active minors, because they do not fear pregnancy and lack self-control, will not use contraceptives even if they have access to them. *See* Dembitz, *Law and Family Planning*, 1 FAM. L.Q. 103, 112 (December, 1967). Many adults also lack these qualities, as evidenced by the fact that more than half the illegitimate births in Utah in 1970 were to adult women who could have avoided the unwanted pregnancy if they had used the contraceptives available to them. STATE OF UTAH DEPARTMENT OF SOCIAL SERVICES, 1970 ANNUAL REPORT OF UTAH VITAL STATISTICS 30 (1973). But as discussed in note 57, *supra,* there is a large group of sexually active teenagers who are afraid of pregnancy. Members of this group who possess the self-control to use contraceptives are the ones who will benefit from access to contraceptives.

[63] 29 Utah 2d at 358, 510 P.2d at 76. The *Doe* court is not alone in its fear that giving children access to contraceptives will encroach upon parental control. For example, in 1972 Governor Reagan of California vetoed for the third straight year a bill which would have permitted sexually active minors to obtain contraceptives without parental consent. In announcing his veto, Governor Reagan called the bill an "unwarranted intrusion into the prerogatives of parents," and stated that "simply because sexual permissiveness may exist among certain people does not mean the state should make it any easier for them." 2 FAMILY PLANNING/POPULATION REP. 17 (1973).

[64] *See generally* Foster, *supra* note 50, at 359–62.

[65] UTAH CODE ANN. § 26–6–39.1 (Supp. 1973).

[66] Statutes are needed to permit minors with health problems to receive medical and professional services, as needed, without parental consent. This does not mean, however, that parental consent should be ignored or by-passed in a normal situation where such consent ordinarily would be given and the parents are expected to pay the bill. Authority to suspend the usual requirement for parental consent is needed for exceptional situations, as where the family no longer is intact or there is a problem which the minor is unwilling or emotionally unable to communicate to the family.

The point is that an assumed parental power of a proprietary character should not operate to the detriment of children, and an individual right to treatment should be recognized for sensitive problems. Pregnancy, contraceptive information, drug abuse, and emotional disturbance are among the sensitive problems where a rule requiring parental consent for treatment may be counter-productive.

Foster, *supra* note 50, at 359.

> [T]he social gain from the deterrence [of sexual promiscuity] achieved is not worth the tragedy of unwanted pregnancy or venereal disease in the cases in which the [law prohibiting the display of contraceptives] fails in that purpose; and to prescribe such pregnancy or disease as punishment for illicit intercourse would be a monstrous thing.[67]

B. Equal Protection

Even if the constitutional right of access to contraceptives is not extended to children, the fact that Planned Parenthood provided contraceptives to married but not single children raises a serious equal protection question. The fourteenth amendment does not deny states the right to discriminate between classes of persons, but it does require that the classification scheme be rationally related to a valid state objective.[68] Further, if the classification rests upon a "suspect criterion" [69] or affects a "fundamental interest," [70] the state must justify the classification scheme by demonstrating a "compelling state interest" for it. Since no cases have held classifications based upon marital status to be inherently suspect, the question is whether Planned Parenthood's classification scheme was rationally related to a valid state objective.

The *Doe* court justified Planned Parenthood's discrimination between married and single children on the grounds that (1) single persons are in a different class than married persons and (2) the law prohibiting premarital sex has never been thought to deny single persons "who may want to satisfy their lusts on each other" equal protection of the law.[71] The court apparently felt that deterrence of premarital sex was the valid state interest served by distinguishing between married and single children.[72] *Eisen-*

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[67] State v. Baird, 50 N.J. 376, 383, 235 A.2d 673, 677 (1967) (Weintraub, C.J., concurring).

[68] Reed v. Reed, 404 U.S. 71, 75–76 (1971). Courts have applied this equal protection test to state discrimination between different classes of adults and to discrimination between classes of children. *See, e.g.,* Levy v. Louisiana, 391 U.S. 68 (1968), where the Court held that the legitimacy or illegitimacy of a child has no rational relation to the right to recover for the wrongful death of the child's mother. *See also* A. v. City of New York, 31 N.Y.2d 83, 286 N.E.2d 432, 434–35 (1972), and Stanton v. Stanton, 30 Utah 2d 315, 517 P.2d 1010 (1974), in which the rational relation test was used in examining state discrimination between male and female teenagers.

[69] *See, e.g.,* Douglas v. California, 372 U.S. 353 (1963), where the Supreme Court applied the strict "compelling state interest" test because the suspect criterion of wealth was involved.

[70] See, e.g., Roe v. Wade, 410 U.S. 113, 155–56 (1973).

[71] 29 Utah 2d at 359, 510 P.2d at 77.

[72] The court's equal protection reasoning is both circular and difficult to understand. For example, in the middle of its equal protection discussion the court stated:

> The law has ever been jealous of the rights of minors; and statutes for their benefit and protection (like the right to rescind a contract) have never been thought of as denying the equal protection of the law to adults.

Id. at 359, 510 P.2d at 76–77.

The court may have felt that its holding was promoting not only morality but also other childhood interests, such as the protection of health or the strengthening of parental control and family solidarity. Neither of these objectives, however, is served by the court's decision. Requiring parental consent to obtain sexually related medical care does not cause children to go to their parents, because children are reluctant to discuss such matters with their parents. *See* note 50 *supra* and accompanying text. *Eisenstadt* rejected promotion of health as a valid state reason for denying single persons contraceptives because married and single women face similar health problems

stadt, however, held that denial of access to contraceptives to single persons is not rationally related to the goal of deterring premarital sex. In *Eisenstadt,* the Court found that the statute which permitted distribution of contraceptives to married but not to single persons was so riddled with exceptions that deterrence of premarital sex could not reasonably be regarded as the aim of the statute.[73] The statute, for example, did not "deter married persons from engaging in illicit sexual relations with unmarried persons";[74] further, the Court felt it was "plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication." [75]

On the basis of the *Eisenstadt* reasoning, which applies equally to both adults and children, Planned Parenthood's denial of contraceptives to single children was not rationally related to the prevention of premarital sex among teenagers and therefore was in violation of the equal protection clause.

IV

In *Doe,* the court faced the extremely difficult question of whether to extend the constitutional right of access to contraceptives to single children. On the one hand, the dramatic recent increase in the number of illegitimate births among teenage girls [76] makes it clear that many single teenagers have decided to violate traditional moral standards and therefore need contraceptives; on the other, free access to contraceptives might encourage some teenagers who otherwise would not to engage in premarital sexual relations. Furthermore, many parents resent the idea of their children receiving contraceptives without their consent.

The Utah court could have reached its conclusion by carefully and objectively weighing the interests of children, parents, and the state. Instead the court resorted to emotionalism and ignored the obvious fact that many teenagers engage in sexual intercourse and thereby incur the risk of unwanted pregnancy.

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if they become pregnant, and because doctors are qualified to treat both married and single persons. 405 U.S. at 450–51. Indeed, denying contraceptives to single teenagers endangers rather than protects their health. *See* notes 58–60 *supra* and accompanying text.

[73] 405 U.S. at 449.

[74] *Id.*

[75] *Id.* at 448.

[76] *See* note 56, *supra.*

Interwest Corp. v. Public Service Commission: Allocation of Future Water Use by a Public Utility

Plaintiff Interwest planned to build condominiums in defendant Terracor's new housing development, but was refused a necessary building permit until it could guarantee sufficient water for its project. Defendant Terra Utilities, a wholly owned subsidiary of Terracor, had obtained a Certificate of Convenience and Necessity to operate as a public utility which required it to supply water for the whole development.[1] Although the utility had a present supply of water sufficient to meet Interwest's needs, it denied Interwest's request for 19,000 gallons of water per day. Because prior commitments [2] forced it to allocate its future water supply on a subdivisional lot by lot basis to Terracor, the utility said, it could provide Interwest only 9,600 gallons of water per day. The Utah Public Service Commission (PSC) approved the utility's future allocation system and denied plaintiff's application.[3] In *Interwest Corp. v. Public Service Commission,*[4] the Utah Supreme Court reversed, holding that the PSC had no authority to approve a system of priorities or allocations based upon the future use of water.[5]

I

A. Utah Water Law

The policy basis of Utah water law is the scarcity of water in the western United States.[6] Since this scarcity limits economic development, western

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[1] Under the Certificate, the utility was required to furnish water for the whole development, which included Interwest's land. Brief for Plaintiff at 4, Interwest Corp. v. Public Serv. Comm'n, 29 Utah 2d 380, 510 P.2d 919 (1973).

[2] These commitments included:

(1) In a required federal property report, Terracor represented that the water supply was sufficient to serve the anticipated population.

(2) In a public subdivision report required by the State of California, Terracor represented that water would be supplied to each lot.

(3) In a Utah subdivision public report, Terracor represented that all water system regulations of the Utah State Board of Health had been complied with and that water would be supplied to each lot.

(4) In its contracts of sale with lot purchasers, Terracor represented that culinary water would be available for each lot. Brief for Defendant at 4, Interwest Corp. v. Public Serv. Comm'n, 29 Utah 2d 380, 510 P.2d 919 (1973).

[3] It seems appropriate to this Commission, in view of the facts and circumstances of this case, and in view of the numerous members of the public who have purchased lots with the hope of one day building thereon . . . that it is in the best public interest . . . [to] conclude that the water source available to Terra Utilities, Inc. was allocated to the various subdivisions . . . . Case No. 6485, Interwest Corp. v. Terra Utilities, Inc., Report and Order 10 (Pub. Serv. Comm'n of Utah, September 6, 1972) [hereinafter cited as Report and Order].

[4] 29 Utah 2d 380, 510 P.2d 919 (1973).

[5] Justice Crockett agreed that the PSC had exceeded its authority, but felt that the decision should not be construed as guaranteeing Interwest 19,000 gallons of water per day, but rather as refusing to allow the PSC to interfere in the management decisions of a utility. *Id.* at 383, 510 P.2d at 921 (Crockett, J., concurring in part, dissenting in part).

[6] Eastern water law, however, is based on the riparian rights doctrine. "The major feature of [the] riparian doctrine is that it gives the owners of land bordering upon a

states have attempted to establish systems which assure certainty for the greatest public benefit.[7] Consequently, under Utah law, all water is the property of the public,[8] and "beneficial use [is] the basis, the measure, and the limit of all rights to the use of water in this state." [9] A prior appropriator is entitled to receive his whole supply before any subsequent appropriator has any right to divert water from a water source,[10] and the prior appropriator's use of the water does not have to be more economical than the junior appropriator's use so long as the prior appropriator puts the water to a beneficial use.[11] The Utah Supreme Court has repeatedly confirmed these principles:

> In the arid region water is precious, and it is the undoubted policy of the law to prevent its waste and promote its largest beneficial use. Water is a bounty of nature, and, while prior rights to its use are obtained by those who first apply it to a beneficial use, those rights are limited to the quantities reasonably necessary for the uses to which it is applied. This is a cardinal principle of law of prior appropriation.[12]

Due to the great difficulty in ascertaining who had prior beneficial rights and because the right to water does not give the owner the right to waste it [13] the Utah Legislature and the legislatures of most western states have adopted permit or application systems [14] to further the policy of economic certainty. Under Utah's system, a permit is given when: (a) there is unappropriated water in the source, (b) the proposed use will not impair existing rights or interfere with a more beneficial use of the water, (c) the proposed plan is physically and economically feasible, and (d) the applicant has the financial ability to complete the proposed project.[15] After

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stream equal rights to the use of the water. . . . [E]ach riparian may make a reasonable use of the water consistent with like uses by the others." F. J. TRELEASE, CASES AND MATERIALS ON WATER LAW 1 (1967).

[7] The allocation of water is critical when the resource is limited. The necessary criteria for proper distribution have been frequently discussed by various commentators. For a good discussion of solutions to the problem of distribution of scarce resources see Levi, *Highest and Best Use: An Economic Goal for Water Law,* 34 MO. L. REV. 165 (1969); Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation,* 5 NATURAL RESOURCES J. 1, 8 (1965); Note, *Towards an Economic Distribution of Water Rights,* 1970 UTAH L. REV. 442, 454–59 (hereinafter cited as *Economic Distribution*).

[8] UTAH CODE ANN. § 73–1–1 (1968).

[9] *Id.* § 73–1–3.

[10] Eardley v. Terry, 94 Utah 367, 376, 77 P.2d 362, 366 (1938); *Economic Distribution, supra* note 7, at 443. Among the advantages to the prior appropriation system is economic certainty; an entrepreneur is more likely to invest capital in land development if he knows that his future water supply is reserved for him.

[11] *Economic Distribution, supra* note 7, at 443.

[12] Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 247, 289 P. 116, 117 (1930).

[13] 2 DIGEST OF UTAH WATER LAW 365 (1948).

[14] Colorado and Montana are the only western states which have not established permit systems. 6 E. CLYDE, WATERS AND WATER RIGHTS § 500, at 3–4 (R. Clark ed. 1972).

[15] UTAH CODE ANN. § 73–3–8 (Supp. 1973), *quoted in* Bullock v. Hanks, 22 Utah 2d 308, 310, 452 P.2d 866, 867 (1969).

these requirements have been met and the permit has been granted, the only requirement to preserve the validity of the right is the appropriator's continued beneficial use of the water.[16] This permit system, along with traditional water law concepts, which have been to a large degree codified in Utah,[17] contemplate *immediate and beneficial use* in order for a person to obtain a right to water. Future allocation is therefore impossible because any user who can put unappropriated water to beneficial use has a right [18] to the use of the water paramount to the right of any person not presently putting water from a particular water source to a beneficial use.

B. Public Utility Allocation

Public utilities, because they are often granted monopolies over limited areas, greatly affect public interests [19] and must therefore serve in the public interest.[20] For example, utilities must serve without discrimination, can charge only reasonable rates, and can reserve only a fair profit for themselves.[21] In Utah, section 54–3–8 of the Utah Code [22] prohibits utilities from granting "any preference or advantage to any person, or subject any person to any prejudice or disadvantage." Another statute requires that utilities provide adequate, efficient, just, and reasonable service.[23]

Section 54–3–8 does not expressly prohibit public utilities from making future water allocations; rather, it requires that the actions of the utility be fair and reasonable so that no one is prejudiced. Thus, since no Utah water or public utility statutes require that the water law concept of beneficial use be applied to public utilities, the question is whether, as a matter of policy, traditional water law principles should govern utilities. Prior to the *Interwest* decision, the Utah Supreme Court had never dealt directly with the issue of future water allocation by a public utility, nor had any other state except Texas.

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[16] The Utah Supreme Court has held that an applicant meeting the statutory standards is entitled as a matter of law to have his application approved. A long line of Utah cases have held that even in situations where the sufficiency of water is questioned, the application should be approved; all that is required is that there be reasonable ground to believe that there is sufficient water. *See* Riordan v. Westwood, 115 Utah 215, 231, 203 P.2d 922, 930 (1949); Whitmore v. Welch, 114 Utah 478, 201 P.2d 954 (1949); Whitmore v. Murray City, 107 Utah 445, 154 P.2d 748 (1944); Tanner v. Humphreys, 87 Utah 164, 48 P.2d 484 (1935).

The permit system adds two advantages with regard to water regulation: (1) states can maintain efficiency and order in the appropriation of water; and (2) they can shape their water policy to a limited extent in favor of applicants who will best serve the public interest. 6 E. CLYDE, *supra* note 14, § 500 at 5.

[17] *See, e.g.*, UTAH CODE ANN. § 73–3–1 (1968).

[18] *Id.* § 73–3–8 (Supp. 1973). The Governor's power to suspend the right to appropriate water from a specific source for a period of time to preserve some other use for the general welfare is a limited exception to the rule prohibiting future planning. *Id.* § 73–6–1 (1968).

[19] "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." Munn v. Illinois, 94 U.S. 113, 126 (1877).

[20] Report and Order, *supra* note 3.

[21] M. FARRIS & R. SAMPSON, PUBLIC UTILITIES REGULATION, MANAGEMENT, AND OWNERSHIP 21 (1973).

[22] UTAH CODE ANN. § 54–3–8 (1974).

[23] *Id.* § 54–3–1.

In the Texas case, *Allen v. Park Place Water, Light & Power Co.*,[24] a corporate land developer subdivided a tract of land located within a town, constructed a water plant to meet the needs of the tract, and began supplying water to the subdivided area. Plaintiffs, owners of land contiguous to the subdivided land and also within the limits of the town, applied for water.[25] The company refused the plaintiffs' application because it was under contract to supply water to only those persons purchasing lots from the subdivider. Moreover, the water company's supply of water was so limited that if it supplied users outside the subdivision, its supply would be insufficient to provide service to some subdivision lots. Despite this, the Texas court held:

> Corporations which undertake to supply water for domestic purposes to any territory are required to do so without discrimination, and to treat all of those similarly situated within such territory alike with reference to service and rates.[26]

The court further reasoned that since the water corporation was quasi-public, it assumed the obligation to supply water to all those within the territory who made reasonable demand for it. The court thus concluded that the water company could not refuse the application merely "because it anticipates that at some future time a supply of water, beyond its present capacity, may be demanded."[27]

Only two Utah Supreme Court cases have dealt even indirectly with the issue of future water allocation. In *North Salt Lake v. St. Joseph Water & Irrigation Co.*,[28] the court held that the PSC had the power to determine the relative rights and obligations of the utility and the consumer, but that "[p]rior users have a right to be protected and those seeking subsequent connections are limited by the amount of water available for use." [29] The court thus implied that, even in the utilities context, it would rely on established water law principles. In *McMullin v. Public Service Commission*,[30] the issue was whether a public water utility could be compelled to provide service for persons outside its established territory. The Utah court ruled that the public utility's responsibility was to reasonably and adequately provide for the present and plan for the future needs of the public in its territory. Thus, since the utility did not have sufficient water to provide for the future needs of its territory, the court did not require the utility to serve outside customers.[31] Neither of these Utah cases directly

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[24] 266 S.W. 219 (Tex. Civ. App. 1924).

[25] *Id.* at 221. The charter of the public utility provided that the utility's purpose was to furnish water and light to all people residing within the town of Park Place who desired to use it.

[26] *Id.* at 222.

[27] *Id.* at 224.

[28] 118 Utah 600, 223 P.2d 577 (1950).

[29] *Id.* at 617, 223 P.2d at 585.

[30] 7 Utah 2d 157, 320 P.2d 1107 (1958).

[31] *Id.* at 159–60, 320 P.2d at 1108.

concerns the issue whether a utility has the power to make future allocation of water. The *North Salt Lake* court, intimating that traditional water law standards apply to public utilities,[32] held that those who have applied for and received service have priority over subsequent users. The *McMullin* court, although stating generally that a public utility has a duty to plan for the future needs of the customers within its territory, in no way sanctioned the use of a future allocation system.

C. Public Service Commission Authority

The PSC is an independent regulatory commission [33] and is responsible for interpreting and maintaining standards for public utility distribution. In practice, independent commissions exercise a combination of legislative, executive, and judicial powers. Section 54–4–18 of the Utah Code provides that, with regard to public water utilities, the PSC has the power to

> ascertain and fix just and reasonable standards, classifications, regulations, practices, measurements or service to be furnished, imposed, observed and followed by all . . . water corporations; to ascertain and fix adequate and serviceable standards for the measurement of quantity, quality . . . or other conditions pertaining to the supply of the product . . . .[34]

In Utah, the PSC has considerable discretion, is presumed to have specialized expertise, and has been shown great deference by the courts.[35] Utah statutes limit supreme court review of PSC rulings to "whether the commission has regularly pursued its authority." [36] Moreover, the PSC's findings and conclusions on reasonableness and discrimination are

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[32] Terra Utilities argued that it was unnecessary to consider water law standards because the water had already been appropriated in a beneficial manner by Terra Utilities' purchase of the water from the city of St. George. Brief for Defendant at 17, Interwest Corp. v. Public Serv. Comm'n, 29 Utah 2d 380, 510 P.2d 919 (1973).

[33] For a discussion of the regulatory processes of such commissions see M. FARRIS & R. SAMPSON, *supra* note 21, at 63–65. These independent regulatory commissions came into being as a result of the governmental practice of granting public franchises to private businesses in order to regulate them. *Id.* at 12, 63–65. For a definition of franchises and their rights and restrictions, see California v. Central Pac. R.R., 127 U.S. 1, 40 (1888).

The history of state regulatory commissions in the United States can be divided into basically three eras. From 1830 to 1870, they were essentially federal and advisory. Strong commissions then developed, encouraged by the Grange movement, and conceived to deal with railroad regulation. At the beginning of this century commissions began to concentrate on regulating all public utilities, with state commissions relieving the federal government of the responsibility. M. FARRIS & R. SAMPSON, *supra* note 21, at 65.

[34] UTAH CODE ANN. § 54–4–18 (1974). When a water company contracts to furnish water subject to PSC regulation, it is "presumed to have contracted with the statutory provisions in mind." North Salt Lake v. St. Joseph Water & Irr. Co., 118 Utah 600, 612, 223 P.2d 577, 583 (1950).

[35] *See generally* Utah Light & Traction Co. v. Public Serv. Comm'n, 101 Utah 99, 118 P.2d 683 (1941).

[36] The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of Utah.
UTAH CODE ANN. § 54–7–16 (1974).

final.[37] Finally, as a general principle of administrative law, the courts may only use their powers of review: (1) to curb an agency when it acts beyond its delegated authority or contrary to the constitution, (2) to insist that factual determinations be supported by substantial evidence, (3) to provide relief against clearly arbitrary or unreasonable administrative acts, and (4) to require agencies to observe minimum standards of fairness and articulate their reasons for their decisions.[38]

II

In the *Interwest* case, the PSC noted its approval of traditional water law concepts, but refused to apply them in its decision because to do so would create "havoc in the orderly development of this State's trade and industry." [39] Relying on what it deemed to be the "best public interest," the PSC concluded that the utility's future allocation was permissible.[40]

On appeal, the Utah Supreme Court did not deal directly with the issue of allocation of water for future use. Instead, the court held that the PSC, in approving the utility's allocation system, had exercised power beyond that specifically granted by the legislature. The court, implying that traditional water law concepts limit the extent of the PSC's regulatory power over public utilities, held that no statute authorized the PSC to "set up a system of priorities or allocations for the use of water on a territorial basis as was done in this case." [41] The court further stated that "[t]he Commission is authorized to regulate water companies and the services of those companies rendered to their customers so that there is no discrimination," [42] implying that commitment of water on a subdivisional basis constitutes discrimination prohibited by water law principles.[43]

III

The *Interwest* facts provided the Utah Supreme Court with an excellent opportunity to resolve the conflict between water law principles and the PSC's statutory obligation to insure an orderly and economical development of public utility resources. The court, by ruling that the PSC had no power to provide for the future allocation of water, failed to deal directly with the inherent conflict between Utah's water law — which prohibits future allocation of water when private persons or businesses

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[37] *Id.*

[38] W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 111 (5th ed. 1970). *See also* Union Pac. R.R. v. Public Serv. Comm'n, 102 Utah 465, 468–69, 132 P.2d 128, 130 (1942).

[39] Report and Order, *supra* note 3, at 10. The PSC reasoned that the water was allocated by the utility to its customers when the Division of Health of the State of Utah approved the water source which Terra Utilities made available to each subdivision. *Id.*

[40] *Id.*

[41] 29 Utah 2d at 382, 510 P.2d at 920.

[42] *Id.* at 382–83, 510 P.2d at 920.

[43] The opinion of the court did not conclusively describe the rights of the parties; consequently, it is unclear whether Terra Utilities must guarantee Interwest a specific

are involved — and section 54–4–18 [44] — which can reasonably be construed as empowering the PSC to permit future allocation by a public utility.

Because an ambiguity arises as to whether the state's codified principles of water law [45] control the PSC's power, the *Interwest* court should have explicitly and thoroughly stated the rationale for the apparent holding that water law principles limit the PSC's power. The court held that it could "find no statute . . . which authorizes the Commission to set up a system of priorities or allocations" [46] and that therefore the PSC had gone beyond its power. Apparently, section 54–4–18, which empowers the PSC "to ascertain and fix just and reasonable standards, classifications, regulations, practices, measurements or service to be furnished" [47] was not asserted by the PSC or other defendants as sufficient authority to support an allocation system. Section 54–4–18, however, in conjunction with other broad statutory powers the PSC can employ,[48] can reasonably be interpreted as empowering the PSC to implement water allocation standards for public utilities which differ from the rules applicable to private uses so long as such standards are in the public interest.[49] Since section 54–4–18 is couched in such broad language, it is largely a matter of statutory construction and public policy to determine the extent of the powers granted to the PSC. The *Interwest* court, however, avoided directly confronting the effect of section 54–4–18 when it held, without discussion, that the PSC was powerless to permit future allocations.

At least some policy arguments may be advanced for allowing the PSC to approve future allocation systems. Future allocation would provide certainty for subdividers of land for residential housing or builders of commercial facilities. Before developers make substantial investments, they need some indication from the utility serving the area that sufficient water will be available.

One commentator [50] has suggested two basic objectives to be followed in planning a satisfactory water distribution system: (1) the system should

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amount of water per day. The PSC must now decide, without exercising powers it does not have, what the court's holding means.

[44] UTAH CODE ANN. § 54–4–18 (1974). *See* notes 34–35 *supra* and accompanying text.

[45] UTAH CODE ANN. §§ 73–1–1 to –19–10 (1968).

[46] 29 Utah 2d at 382, 510 P.2d at 920.

[47] UTAH CODE ANN. § 54–4–18 (1974).

[48] *See* notes 36–38 *supra* and accompanying text.

[49] A possible exception to the Commission's authority to allocate for future use is the Utah statute prohibiting a public utility from granting any preference or advantage or subjecting any person to any prejudice by maintaining unreasonable differences as to service. UTAH CODE ANN. § 54–3–8 (1974). The PSC did not determine that there would be any discrimination inherent in the proposed allocation for future use. Since the PSC has the power to determine any question of fact arising under it, the Utah court's review was limited by that determination. Therefore, unless the supreme court had found that the PSC had acted arbitrarily, capriciously, or unconstitutionally, the PSC's factual determination of no discrimination could not be questioned. *See* notes 36–38 *supra* and accompanying text.

[50] *Economic Distribution, supra* note 7, at 442–43.

provide enough certainty and security to enable and encourage development of projects requiring large expenditures of time and capital, and (2) the system should retain enough flexibility to enable economic forces to change current uses to more economic future uses.[51] A system allowing future allocation conforms more closely to these objectives than do the stricter water law standards. The PSC, while paying lip service to water law principles,[52] opted for these two objectives and for making public utility distributions more dependable. The Commission took into account the amount of money involved and the number of persons who had purchased lots, and refused to strictly apply Utah water law [53] because, although future water allocation planning is contrary to the principles of prior rights and beneficial use of water, it is harmonious with the goals of security and efficiency.

Despite these arguments, the court's holding in *Interwest* has some support. The doctrine of beneficial use, under which no future allocations are possible,[54] is generally fair in its operation. Under the beneficial use doctrine, the first appropriator has a better right than any junior appropriator so long as the prior user puts the water to "beneficial" use. Under a future allocation system, however, some users will be favored over others because their use may be more productive for society although not any more "beneficial" under normal water law standards. A certain amount of arbitrariness and unfairness inevitably occurs when one user must be picked over another. If certain users were granted favored positions under a future allocation system, the system would probably be invalid under section 54–3–8 which prohibits utilities from discriminating against or prejudicing any of their customers. Further, future allocation would serve to tie up the public's water supply for an indeterminate time,[55] even if a more socially desirable or economical use were created. Finally, the only case law directly applicable supports the view that future allocation is impermissible.[56]

Although the facts of *Interwest* presented the court with the opportunity to resolve the conflict between water law and future planning, the court chose to base its decision on a narrow administrative ground, disregarding the PSC's broad statutory power to regulate and control public utility allocations. Although technically supportable, such a resolution ignores the pressing problem of future resource allocation.[57] Allocation of scarce

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[51] *Id.* This note is an excellent summary of the problems inherent in Utah water laws and provides an economic solution for future distribution based on the objectives outlined in Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation,* 5 NATURAL RESOURCES J. 1 (1965).

[52] Report and Order, *supra* note 3, at 10.

[53] *Id.*

[54] *See* note 18 *supra* and accompanying text.

[55] There is, however, the possibility that the legislature could set a specific time limit for consumption of an allotment of water for future use.

[56] See notes 24–27 *supra* and accompanying text.

resources probably requires a legislative choice between several possible uses; nevertheless, given the increasing importance of Utah water and its allocation, the *Interwest* court should have faced the future allocation issue directly and explicitly held either that Utah water law principles of beneficial use and prior appropriation govern public utility allocations or that the PSC has the statutory power to approve a future allocation system.

SHANNON SPERRY

[57] For an analysis of various priority allocation systems, see Wollman, *Economic Priorities for Water Use in Arid Regions,* in LAND AND WATER USE 227 (W. Thorne ed. 1963).

BOOKS RECEIVED

Corporate Law

Conglomerate Enterprise and Public Policy. Jesse W. Markham. Boston: Division of Research, Harvard Business School. 1973. Pp. 218. $9.00. Widespread fear of the powers of the largest corporations led to the birth and development of the antitrust policies and laws now in existence. These policies, however, were adopted long before the unprecedented growth by merger of the large diversified companies of the 1960's. This book examines the conglomerate as a new product of capitalism, not necessarily an evil one. Beginning with the policy issues which surround any large business entity, Markham discusses the new conglomerate's impact upon generally accepted macro- and micro-economic theory and the differences between the new and the old corporation. On the premise that little factual study has been done upon these differences, the author presents detailed and exhaustive analysis of the extent to which growth is achieved through acquisitions, the effect of these acquisitions upon the concentration level of certain industries, the effect which diversified interests have upon managerial decisions, and the antitrust implications of these activities. The book concludes that conglomerate enterprise strongly resembles business as it is conducted by any other corporation, has had little impact upon the economy and, for the most part, can be controlled by present economic and legislative policies.

Public Reporting of Corporate Financial Forecasts. Center for Advanced Study in Accounting and Information Systems, Northwestern University (P. Prakash ed.). Chicago: Commerce Clearing House, Inc. 1974. Pp. 332. $15.00. Corporate financial information is the heart of the disclosure system developed by the Securities and Exchange Commission. Throughout its history, the SEC has remained rigidly opposed to the use of financial forecasts in prospectuses, proxy statements, periodic reports, and other documents filed with the Commission. In February, 1973, however, the SEC reversed this policy with a release which points toward the development of a system of forecasting and putting forecasts into the marketplace. Thereafter, the Center for Advanced Study in Accounting and Information Systems held a conference on the subject of corporate financial forecasts. This volume contains the papers presented by the distinguished speakers at the conference, nine position papers on public forecasts presented at the SEC hearings, and a synthesis of the conference discussion sessions. Thus, this book contains a compilation of recent developments in corporate financial forecasts and the views of noted authorities on the issue of implementing a system of public forecasting around which rules containing the elements suggested in the SEC release will ultimately be elaborated.

THE DEVELOPING LAW OF ENDOWMENT FUNDS: "THE LAW AND THE LORE" REVISITED. William L. Cary & Craig B. Bright. New York: The Ford Foundation. 1974. Pp. vii, 56 (Paperbound). This booklet supplements the 1969 report to the Ford Foundation, "The Law and the Lore of Endowment Funds," by focusing on internal and external delegation of administrative responsibilities for the control of endowment funds. Analogies drawn to corporate and trust law are offered to support the authors' conclusion that administrative delegation fits comfortably within existing legal frameworks. The efficacy and apparent legality of seeking professional guidance in managing complicated endowment portfolios compel the authors to urge both courts and those trustees that do not presently employ investment managers to accept both internal and external delegation. The book refers specifically to recent statutory developments, following a short summary of previous findings recorded in the earlier study. This publication will provide trustees with a synopsis of the law governing endowment funds, thereby assisting them in their increasingly difficult task of managing a fund during rising inflation.

LABOR LAW

JOB POWER — BLUE AND WHITE COLLAR DEMOCRACY. David Jenkins. Baltimore: Penguin Books, Inc. 1974. Pp. 375. $2.25 (Paperbound). The first chapters of this book deal with the historical background and development of industrial democracy. The author then analyzes several unsuccessful attempts at industrial democracy in Israel, Yugoslavia, West Germany, and France. According to the author, the failure of industrial democracy to play an important role in the United States can be attributed to cultural and economic forces present in this country. The final chapters explore the possible alternatives in labor participation and discuss the future of industrial democracy. The book is well documented and contains an extensive bibliography.

MAJOR LABOR-LAW PRINCIPLES ESTABLISHED BY THE NLRB AND THE COURTS. Howard L. Anderson. Washington, D.C.: Bureau of National Affairs, Inc. 1974. Pp. ix, 152. $15.00. (Paperbound). This summary of court and NLRB opinions on the major issues of labor law is arranged alphabetically by major topic with subtopics listed underneath. Case law, NLRB decisions, and pertinent commentary are annotated to each topic heading in columnar form. The book's facility of use and quality of content recommend it highly as a practical addition to every labor lawyer's library.

NEW 1974 MINIMUM WAGE LAW WITH EXPLANATION: FAIR LABOR STANDARDS ACT WITH 1974 AMENDMENTS. Commerce Clearing House, Inc. Chicago: Commerce Clearing House, Inc. 1974. Pp. 112. $3.00

(Paperbound). The 1974 amendments to the Fair Labor Standards Act provide for an increase in the minimum wage to $2.30 an hour and bring within the scope of the Act an additional seven to ten million workers, including employees of federal, state, and local governments, domestics, and employees of agricultural and retail conglomerates. Using excerpts from the 1973 Congressional debate and committee and conference reports, this CCH publication discusses the amendments' impact on wages, overtime compensation, sex discrimination and child labor practices. It also includes the complete text of the Fair Labor Standards Act and the amendments thereto. Although the book is not comprehensive, it provides a concise overview of the Act.

PENSION REFORM ACT OF 1974, LAW AND EXPLANATION. Commerce Clearing House, Inc. Chicago: Commerce Clearing House, Inc. 1974. Pp. 399. $4.50 (Paperbound). This excellent introduction to the Pension Reform Act includes the full text of the Act, an explanation of each section, and important Committee Reports. The Act is a comprehensive reform of pension and employee benefit rules and will affect almost all existing pension and benefit plans. Hence, this volume would be a valuable addition to corporate and tax lawyers' libraries.

EXPLANATION OF PENSION REFORM ACT OF 1974. Commerce Clearing House, Inc. Chicago: Commerce Clearing House, Inc. 1974. Pp. 96. $2.00 (Paperbound). This volume is a shortened version of *Pension Reform Act of 1974, Law and Explanation,* by the same author, and contains an explanation of the Act but does not include the text of the Act or Committee Reports.

LEGAL PROFESSION

NATIONAL SURVEY OF COURT ORGANIZATION. Law Enforcement Assistance Administration, U.S. Dep't of Justice. Washington, D.C.: U.S. Government Printing Office. 1973. Pp. 257. $2.40 (Paperbound). Designed to present an overview of state and local court organization throughout the United States, this publication contains a state by state description of state and local courts, their major subdivisions, and the location of court records. In addition, thirty-one tables present comprehensive and easily understandable statistical data for each state. These tables reveal not only the organization complexity of state court systems, but also such facts as the number of courts hearing various types of cases and the percentage of judge time allocated to these cases. A brief statement and summary of survey findings for courts of appellate, general, limited, and juvenile jurisdiction are also presented by way of introduction. The survey will be of value to the practitioner, court official, or layman who seeks a general, but informative, survey of any state court system for comparative or descriptive purposes.

TO LIFE: THE STORY OF A CHICAGO LAWYER. Elmer Gertz. New York: McGraw-Hill Book Co. 1974. Pp. 252. $7.95. Mr. Gertz's autobiography progresses from his sensitive boyhood into the persons, causes, and courtroom confrontations that shaped the career of a distinguished attorney. This book is not intended to sharpen the legal knowledge of its audience, but rather to give insights into the social, political, and legal forces that shape a law career. Although the style falters at times, the issues to which the author devoted his life and talent are clearly developed through his personal and professional experiences. Of particular interest is Mr. Gertz's participation in the movements to abolish capital punishment in the pre-*Furman* era and to protect the individual's reputation from libelous attack in the pre-*New York Times* era. Mr. Gertz completes his narrative with reflections on his lifetime which leave the reader with a feeling for the man, his accomplishments, his weaknesses, and his enthusiasm for life.

TAXATION

INTERNATIONAL TAX PLANNING. William C. Gifford, Jr. Washington, D.C.: Tax Management, Inc. 1974. Pp. 500. $30.00. This book is the outgrowth of materials assembled for the University of Virginia Law School Course in International Tax Planning. The author attempts to provide a basic law school text as well as a general sourcebook for the practicing attorney. The book accomplishes the former objective much more completely than the latter. The author assumes that the reader has a working knowledge of basic tax law and business organizations, and immediately poses the problems of international taxation in terms of a hypothetical corporation, Optronics, Inc. The volume deals comprehensively with problems involving export operations, manufacturing abroad, repatriation of earnings, and joint ventures in less developed nations. The best source materials are those of an explanatory nature, such as reprints from the Treasury Domestic International Sales Corporation Handbook. The weakest materials are the judicial decisions. Because regulations in the area of international taxation are in a constant state of flux, this book is much less useful as a practitioner's guide than as a student text.

SPECIAL TAX BENEFITS FOR THE SENIOR CITIZEN. Commerce Clearing House, Inc. 1974. Pp. 46. $1.50 (Paperbound). Several provisions in the Internal Revenue Code specifically recognize a taxpayer's age and give special benefits to those over sixty-five. Examples include increased personal exemption, the exemption of social security and retirement benefits, and the retirement income credit. This useful booklet summarizes the rules and special considerations that apply to taxpayers sixty-five or older. It is easy to read and understand and well indexed.

TAX MANAGEMENT PORTFOLIOS. Leonard C. Silverstein, Ed. Washington, D.C.: Bureau of National Affairs. 1974. Each of these portfolios treats a specific, important tax problem area. They provide a valuable source of analysis, references, and other data for the tax practitioner. Portfolios recently received by the *Utah Law Review* include:

CORPORATE ACQUISITIONS — (A) REORGANIZATIONS. 77–3rd. Pp. v, 145.

GIFTS. 154–2nd. Pp. v, 83.

MINERAL PROPERTIES OTHER THAN GAS AND OIL — OPERATION. 90–5th. Pp. iv, 142.

NET OPERATING LOSSES — SECTIONS 381, 382 AND 269. 27–3rd. Pp. v, 112.

REASONABLE COMPENSATION. 202–3rd. Pp. iv, 38.

STOCK DIVIDENDS AND STOCK RIGHTS. 94–4th. Pp. iv, 75.

TAX COURT — FORUM; PLEADINGS. 152–3rd. Pp. iv, 174.

TAX COURT — TRIAL OF CASE. 153–3rd. Pp. v, 86.

VALUATION OF REAL ESTATE. 299. Pp. iv, 57.

MISCELLANEOUS

A HEARTBEAT AWAY: THE INVESTIGATION & RESIGNATION OF VICE PRESIDENT SPIRO T. AGNEW. Richard M. Cohen & Jules Witcover. New York: Bantam Books. 1974. Pp. 363. $10.00. With alacrity typical of Washington Post muckraking, the authors of this book describe the Maryland payola scandals that eventually led to the resignation of Spiro Agnew from the office of Vice President of the United States, tracing the corruption from Baltimore County through the governor's mansion in Annapolis, and finally to the White House itself. Eyewitness accounts, combined with the author's insightful (though sometimes conjectural) analysis, create a fascinating account of an exposé that shook the country.

AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V. Special Constitutional Convention Study Committee, American Bar Association. 1974. Pp. xi, 90. $3.50 (Paperbound). Since the original Constitutional Convention in 1787, there have been numerous unsuccessful attempts to call another. On the assumption that such an attempt may one day succeed, in 1971 the American Bar Association created the Constitutional Convention Study Committee "to analyze and study all questions of law concerned with the calling of a national Constitutional Convention." This comprehensive book is the result of a two-year study by that Committee. In it the

Committee attempts to resolve issues surrounding amendment of the Constitution by the convention method, thus providing guidelines should a constitutional convention ever be called.

BEFORE THE LAW: AN INTRODUCTION TO THE LEGAL PROCESS. John J. Bonsignore, Ethan Katsh, Peter d'Errico, Ronald M. Pipkin & Stephen Arons. Boston: Houghton Mifflin Co. 1974. Pp. 382. $6.95 (Paperbound). The underlying premise of this work is that there is no one best way to explain the legal process. Intended for undergraduate students, this amalgam of legal theory — as seen through the eyes of everyone from Franz Kafka to Charles Reich — perhaps attempts too much. The attitudes of citizen, policeman, lawyer, psychologist, judge, and jury toward what the law does and what it should do are each considered at some length. While this breadth is to be applauded, it risks overwhelming all but the most ambitious undergraduate student, who is also asked to understand the subtle mechanics of analyzing cases with no help from the authors. This is the book's chief flaw, and in subsequent editions, if any, it is suggested that the authors either (1) introduce their material with a brief explanation of how to analyze a case; or (2) summarize, not merely reprint, the cases so as to highlight the points they wish to emphasize.

CASES AND MATERIALS ON FOOD AND DRUG LAW. Thomas W. Christopher & William W. Goodrich, Eds. Chicago: Commerce Clearing House, Inc. 1974 (2d ed.). Pp. 1044. $29.50. Sponsored by the Food and Drug Institute, a public educational organization funded by the food and drug related industries and designed to develop basic research materials on food and drug law, this text is intended to serve the dual function of a casebook for classroom instruction and a one volume reference manual. By examining the activities of the Food and Drug Administration in detail, the book serves as a case study in the laws and procedures of governmental agencies, exploring the nonlegal as well as the legal dimensions of administrative problems, decisions, and policies. The Federal Food, Drug, and Cosmetic Act and related federal and state laws provide the core material for discussions in the general areas of administrative rule making, criminal actions and penalties, injunctions, and inspections, as well as in the more particularized areas of adulteration, misbranding of food, product preclearance, additives and pesticides, imitation foods, seizures, prohibited acts, product safety, and deceptive advertising. Using primarily the "case method" of analysis, the editors have included references to statutes, legislative debates, special reports, scholarly commentary, recent developments, and problems in each of the subtopic areas. In addition, the appendix contains the complete text of the most relevant statutes. This book provides a unique form of instruction in administrative law for the student with a particular interest in food,

drug, and cosmetic regulation and a reference for the practitioner who desires self-instruction in this field.

DISCRETION TO DISOBEY. Mortimer R. Kadish & Sanford H. Kadish. Stanford, California: Stanford University Press. 1973. Pp. x, 241. $8.95. In this analysis of philosophical problems associated with a legal system, the authors explore how departures from legal rules "might under certain circumstances be incorporated into the legal order, and how the ability of the legal order to respond to social conflict and change might be increased beyond the conventional provisions for legal change." The book considers in detail justified departures from rules by citizens and officials and the implications for a legal system that is dependent on the legal obligation of the participants for its vitality. By presenting a variety of selections from writings on justified departures from legal rules, the book seeks to confront the reader with the possibility of reconciliation between commitment to the legal process and social change.

ESTATE PLANNING: QUICK REFERENCE OUTLINE. William R. Spinney. Chicago: Commerce Clearing House, Inc. 1974 (21st ed.). Pp. 144. $3.00 (Paperbound). This outline contains six substantive sections: estate planning procedures, estate analysis methods, estimation of tax liabilities and other transfer costs, planning for conservation of estate assets and minimization of taxes, miscellaneous tax saving methods, and life insurance. The appendix contains a helpful set of tables. This volume is particularly useful for practitioners who are not estate planning specialists because it brings the reader up to date on new tax law provisions, recent court decisions, and rulings — matters of which most estate planning specialists should be well aware. The book's major drawback is its too general index, which diminishes its value as a quick reference outline.

EXAMINATION OF MEDICAL EXPERTS. Louis R. Fumer & Marilyn Minzer, Eds. New York: Matthew Bender. Volume One: Pp. xvii, 579. 1968. Volume Two: Pp. xxii, 540. 1973. The articles in this two volume work were written almost entirely by trial lawyers and physicians. Designed primarily for the plaintiff's bar, this collection of articles contains the necessary information and techniques to counteract the effect of the defendant's doctor, who may be a highly skilled, professional testifier. Sample depositions illustrate effective examination for strain and sprain cases, back injuries, amputation, traumatic neurosis, traumatic epilepsy, whiplash, catheterphobia, cancerophobia, brain damage from a slip and fall, and other common injuries. Examination is also included for malpractice litigation involving wrongful death resulting from tuberculosis, failure to resuscitate a patient from cardiac arrest, and administration of contraindicated drugs.

In addition to sample direct and cross-examination, the articles explain simply such basics as understanding the medical report, translating medical jargon for the jury, medical expert testimony, literature, and charts as viewed in the light of the rules of evidence, preparation of a medical brief, preparation of medical witnesses for trial, discovery, medical causation, and medical and legal certainty. This set can provide valuable assistance to the plaintiff's attorney in thoroughly preparing his case and in anticipating the defendant's strategies and defenses.

FINDING THE LAW: A GUIDE TO LEGAL RESEARCH. David Lloyd. Dobbs Ferry, New York: Oceana Publications, Inc. 1974. Pp. 119. $4.00. This is a concise but thorough introduction to the skills necessary for effective legal research. Although the book is designed to assist first year law students and other novices in the law to use a law library, its usefulness extends beyond that purpose. In addition to providing a general introduction to law and legal research, the author explains how to research in several specific fields of the law and gives citation form for statutes, cases, books, and periodicals.

SELECTION OF THE VICE PRESIDENT. Compiled by Dorothy Campbell Tompkins. Berkeley: The Institute of Governmental Studies. 1974. Pp. vii, 26. $3.75 (Paperbound). This volume is the sixth in a series of "Public Policy Bibliographies." A helpful tool for research, it contains a bibliography of articles and books written during the last decade concerning selection of the Vice President.

THE APPEARANCE OF JUSTICE. John P. MacKenzie. New York: Charles Scribner's Sons. 1974. Pp. 304. $8.95. From the milieu of recent high court impeachments, court packing, Watergate, and courtroom "guerrilla theater" there has emerged a crisis of confidence in the country's judicial process. Citizens, the "source of the court's moral authority," are questioning the impartiality and independence of the judiciary. MacKenzie attributes this credibility loss to courts' failure to maintain an appearance of complete impartiality, regardless of whether justice is done. According to the author, the appearance of bias, whether based on the judge's class or race prejudice, economic self-interest, or political dependency, is the greatest threat to the judiciary. By analyzing current examples of judicial misconduct, such as the Fortas and Haynsworth scandals, in light of contemporary standards of judicial behavior, the author presents an outline of the current conflicts in judicial ethics. Concluding that the American Bar Association and the judiciary have not dealt with these conflicts, the author formulates his own high standard of judicial conduct that reflects his belief that for courts to be able to do justice they must "satisfy the appearance of justice."

WILLISTON ON SALES. Alphonse M. Squillante & John R. Fonseca. Rochester, New York: The Lawyers Co-operative Publishing Co. Fourth edition. 1973. Volume One: Pp. xvi, 515. Volume Two: Pp. xii, 459. Volume Three: Pp. xii, 502. This three volume treatise on the law of sales presents a transitional analysis from the Uniform Sales Act to the Uniform Commercial Code. Designed to assist the attorney in understanding the current state of the law of sales, the analysis traces the historical development of the UCC from the common law, Restatement, and Sales Act, and examines current law under the UCC at length. In traditional treatise style, the text is heavily footnoted and contains numerous sections on practical application, making the set a valuable reference source for the practicing attorney.

WILLS — A DEAD GIVEAWAY. Millie Considine & Ruth Pool. New York: Doubleday & Co. 1974. Pp. 238. $6.95. This light reading book supplies more behind-the-scenes gossip than legal information. The authors discuss the wills of Adolf Hitler, Marilyn Monroe, the Woolworths, William Shakespeare, and hundreds of others, rich and poor, known and unknown. The chapters are short, fast moving, and amusing, describing wills which express everything from love and gratitude to vengeance and graveyard humor.

THE UTAH LAW REVIEW

Printed on campus by the

UNIVERSITY PRINTING SERVICE

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FINANCING LEGAL EDUCATION

A recent workshop on law school financing, which included participants from the ABA, the law schools, and private organizations, concluded that law schools are in serious financial difficulties. Among the suggestions were the following:[1]

- The costs of running a major law school are directly related to the quality and diversity of its program. Law schools offering a wide range of courses, new programs such as clinical work or law firm management, a low student–teacher ratio, and scholarships to assure a wide mix of students, are having difficulty balancing budgets, while less ambitious schools may break even.
- Law schools are least supported from the Univerity's own financial resources.
- Unlike the medical schools, which receive greater support for their programs because society sees in doctors a benefit to society, the law schools somehow do not relate to many people even though the role of social engineer performed by the lawyer is extremely significant.
- The public and Bar's general attitude is that law schools are well off, when exactly the opposite is true. Traditionally, Deans are the only people trying to raise money and they are inherently suspect. Local Bar associations should organize efforts to raise money to meet the critical financial needs of law schools.
- Law schools are still growing, and the growth rate of the cost of running law schools is going to continue to rise for the foreseeable future, and probably at a higher rate than can be anticipated for the growth of law school income.
- Despite cost–benefit analyses of law school operations, faculty salaries are a potential pressure point as the apparently ever widening disparity between what practitioners are making and what law professors earn continues. Salary difficulties are only one problem. There is also the woefully inadequate clerical and secretarial services made available to law professors.

In short, the UTAH LAW REVIEW urges practitioners and other citizens to support your local law school as a sound investment in the future of the legal profession and of society.

[1] 4 COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, No. 3 (1971).