Volume 1997 Number 4

UTAH LAW REVIEW

UNIVERSITY OF UTAH COLLEGE OF LAW

UTAH LAW REVIEW

VOLUME 1997 NUMBER 4

EDITORIAL OFFICE: The *Utah Law Review* is published at the University of Utah College of Law, 325 University Street, Salt Lake City, Utah 84112, by the Utah Law Review Society. Periodicals postage paid at Salt Lake City, Utah, and at additional mailing offices. All communications should be sent to the editorial office. Postmaster: Please send form 3579 (change of address) to *Utah Law Review*, University of Utah College of Law, Salt Lake City, Utah 84112.
SUBSCRIPTIONS: The *Utah Law Review* is published quarterly. The subscription rate is $25.00 per year (domestic) and $27.00 per year (foreign). All subscriptions will be renewed automatically unless the subscriber provides notice of cancellation. Notice should be sent to the editorial office.
BACK ISSUES & REPRINTS: Complete volumes and individual issues of the *Utah Law Review* are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209. To order by telephone, call 1-800-828-7571. In New York, call (716) 882-2600.

CITATIONS: Citations in the *Utah Law Review* conform to *The Bluebook: A Uniform System of Citation* (16th ed. 1996).

UNIVERSITY OF UTAH
COLLEGE OF LAW FACULTY & ADMINISTRATION

AARON, RICHARD I. (1966), Professor of Law. A.B., 1959, Harvard Univ.; J.D., 1962, Univ. of Wisconsin.

ADLER, ROBERT W. (1994), Associate Professor of Law. B.A., 1977, Johns Hopkins Univ.; J.D., 1980, Georgetown Univ. Law Center.

AGUILAR, JR., REYES (1992), Assistant Dean for Admission and Financial Aid. B.A., 1988, Texas A&M Univ.; J.D., 1992, Univ. of Utah.

ANGHIE, ANTONY T. (1995), Associate Professor of Law. B.A., 1986, LL.B., 1987, Monash Univ., Melbourne, Australia; S.J.D., 1995, Harvard Law School.

BENNETT, WALLACE R. (1953), Professor Emeritus of Law. B.A., 1948, M.S., 1950, J.D., 1953, Univ. of Utah; LL.M., 1957, Harvard Univ.; LL.M. (Trade Regulations), 1963, New York Univ.

BILLINGS, MARGARET (1995), Director, Program Development. B.A., 1969, Stanford Univ.; J.D., 1977, Univ. of Utah.

BOYCE, RONALD N. (1966), Professor of Law. B.S.L., 1955, J.D., 1957, Univ. of Utah. CASSELL, PAUL G. (1991), Professor of Law. B.A., 1981, J.D., 1984, Stanford Univ.

CICCARELLO, MARY JANE (1996), Assistant Dean for Student Affairs. B.A., 1975, Barnard College; M.A., 1976, M. Phil., 1978, Columbia Univ.; J.D., 1993, Univ. of Utah.

DYER, BOYD KIMBALL (1971), Professor of Law. B.A., 1962, Stanford Univ.; LL.B., 1968, Harvard Univ.

EMERY, ALFRED C. (1947), Distinguished Professor Emeritus of Law and President Emeritus of the Univ. of Utah. B.S., 1940, J.D., 1947, Univ. of Utah.

ENGLE, KAREN L. (1992), Professor of Law. B.A., 1984, Baylor Univ.; J.D., 1989, Harvard Univ.

FIRMAGE, EDWIN B. (1966), Samuel D. Thurman Professor of Law. B.S., 1960, M.S., 1962, Brigham Young Univ.; J.D., 1963, LL.M., 1964, S.J.D., 1964, Univ. of Chicago.

FLORES, ROBERT L. (1990), Professor of Law. B.A., 1978, J.D., 1987, Univ. of Utah.

FLYNN, JOHN JOSEPH (1963), Hugh B. Brown Professor of Law. B.S., 1958, Boston College; LL.B., 1961, Georgetown Univ.; S.J.D., 1967, Univ. of Michigan.

FRANCIS, LESLIE PICKERING (1982), Professor of Law and Professor of Philosophy. B.A., 1967, Wellesley College; Ph.D., 1974, Univ. of Michigan; J.D., 1981, Univ. of Utah.

FRANKEL, LIONEL H. (1966), Professor of Law. B.A., 1953, Ursinus College; LL.B., 1956, Yale Univ.; LL.M., 1962, New York Univ.

GREENWOOD, DANIEL J.H. (1991), Professor of Law. A.B., 1979, Harvard Univ.; J.D., 1984, Yale Univ.

HARRIS, GEORGE C. (1996), Associate Professor of Law. B.A., 1974, Yale Univ.; M.A.T., 1977, Brown Univ.; J.D., 1982, Yale Univ.

KEITER, ROBERT B. (1993), James I. Farr Professor of Law and Director of the Wallace Stegner Center for Land, Resources, and the Environment. B.A., 1968, Washington Univ.; J.D., 1972 Northwestern Univ.

KIMBALL, SPENCER L. (1993), Research Professor Emeritus of Law. B.S., 1940, Univ. of Arizona; B.C.L., 1949, Oxford Univ.; S.J.D., 1958, Univ. of Wisconsin.

KOGAN, TERRY S. (1984), Professor of Law. B.A., 1971, Columbia College; B. Phil., 1973, Oxford Univ.; J.D., 1976, Yale Univ.

LAHEY, KATE (1988), Director, Legal Writing Program and Clinical Professor of Law. B.A., 1975, J.D., 1979, Univ. of Utah.

LASSER, MITCHEL DE S.-O.-L'E. (1995), Associate Professor of Law. B.A., 1986, Yale Univ.; J.D., 1989, Harvard Law School; M.A., 1990, M.Phil., 1992, Ph.D., 1995, Yale Univ.

LOCKHART, WILLIAM J. (1964), Professor of Law. B.A., 1955, J.D., 1961, Univ. of Minnesota.

LUND, THOMAS (1978), Professor of Law. B.A., 1964, Harvard Univ.; LL.B., 1967, Columbia Univ.; Ph.D., 1978, Oxford Univ.

MARTINEZ, JOHN (1984), Associate Dean for Academic Affairs of the College of Law and Professor of Law. B.A., 1973, Occidental College; J.D., 1976, Columbia Univ.

MATHESON, JR., SCOTT M. (1985), Professor of Law. A.B., 1975, Stanford Univ.; M.A., 1977, Oxford Univ.; J.D., 1980, Yale Univ.

MCLEESE, KAREN L. (1969), Director, Alumni Relations and Annual Giving. B.S., 1967, Univ. of Utah.

MCCONNELL, MICHAEL W. (1997), Presidential Professor of Law. B.A., 1976, Michigan State Univ.; J.D., 1979, Univ. of Chicago.

MCCORMACK, WAYNE (1978), Professor of Law and Clinical Program Director. B.A., 1966, Stanford Univ.; J.D., 1969, Univ. of Texas.

MITCHELL, BONNIE L. (1987), Clinical Professor of Law. B.A., 1981, J.D., 1984, Univ. of Utah.

MORRIS, JOHN K. (1979), General Counsel and Professor of Law. B.A., 1966, Univ. of California at Los Angeles; J.D., 1969, Univ. of California at Berkeley.

OBERER, WALTER E. (1975), Professor Emeritus of Law, former Dean of the College of Law. B.A., 1942, Ohio Wesleyan; J.D., 1948, Harvard Univ.

PORRAS, ILEANA M. (1993), Associate Professor of Law. B.A., 1981, Univ. of Leeds, U.K; M. Phil., 1983, Univ. of Cambridge, U.K.; J.D., 1989, Harvard Law School.

POULTER, SUSAN R. (1990), Professor of Law. B.S., 1965, Ph.D., 1969, Univ. of California at Berkeley; J.D., 1983, Univ. of Utah.

REUSCH, RITA T. (1986), Director, S.J. Quinney Law Library and Professor of Law. B.A., 1972, Univ. of Minnesota; J.D., 1975, Univ. of Idaho; M.L.L., 1978, Univ. of Washington.

RICHARDS, WILLIAM R. (1996), Clinical Professor of Law. B.A., 1981, J.D., 1984, Univ. of Utah.

SCHMID, ROBERT L. (1954), Professor Emeritus of Law and former Director of the Center for Energy, Public Lands, and Environmental Law. J.D., 1954, Univ. of Utah; M.L.L., 1956, Univ. of Washington.

SKIBINE, ALEXANDER TALLCHIEF (1989), Professor of Law. B.A. 1973, Tufts Univ.; J.D., 1976, Northwestern Univ.

SMITH, LINDA F. (1984), Professor of Law. B.A., 1973, Ohio State Univ.; J.D., 1976, Yale Univ.

SWENSON, ROBERT W. (1953), James I. Farr Professor Emeritus of Law. B.S.L., 1940, J.D., 1942, Univ. of Minnesota.

TEITELBAUM, LEE EDWARD (1986), Dean of the College of Law and Alfred C. Emery Professor of Law. B.A., 1963, Harvard College; LL.B., 1966, Harvard Univ.; LL.M., 1968, Northwestern Univ.

THREEDY, DEBORA L. (1986), Professor of Law. B.A., 1973, Beloit College; J.D., 1980, Loyola Univ. of Chicago.

WHITE, PATRICIA D. (1994), Professor of Law. B.A., 1971, M.A., 1974, J.D., 1974, Univ. of Michigan.

S. J. QUINNEY LAW LIBRARY FACULTY

MINER, SUZZANE (1990), Computer Services Librarian and Adjunct Professor of Law. B.S., 1983, Univ. of Utah; J.D., 1989, Brigham Young Univ.; M.L.S., 1990, Univ. of Washington School of Librarianship.

OUYANG, ELLEN (1975), Head of Technical Services. B.A., 1966, Taiwan Normal Univ.; M.L.S., 1970, Brigham Young Univ.

STEPHENSON, LINDA (1986), Head of Reference Services and Adjunct Professor of Law. M.A., 1983, Univ. of Missouri at Columbia; J.D., 1987, Univ. of Missouri-Kansas City.

THOMAS, MARSHA (1992), Reference Librarian and Adjunct Professor of Law. B.S., 1988, J.D., 1992, Univ. of Utah.

WARTHEN, LEE (1985), Assistant Director, Public Services Librarian and Adjunct Professor of Law. M.L.S., 1975, M.A., 1983, J.D., 1984, Brigham Young Univ.

UTAH LAW REVIEW

VOLUME 1997 NUMBER 4

1997–98 BOARD OF EDITORS

Erratum

In the spring of 1997, the *Utah Law Review* published a Comment by Barbara A. Brill, entitled *An Experiment in Patient Injury Compensation: Is Utah the Place?* 1996 UTAH L. REV. 987. One of the sources cited throughout the Comment is the "Utah Alliance for Health Care, Inc., Grant Application to the Robert Wood Johnson Foundation, Project Narrative 1 (Sept. 6, 1994)." The first footnote of Ms. Brill's Comment cites to this source and indicates that it is on file with the author. However, due to concern regarding the confidentiality of information contained in the application itself, that source is no longer available for examination.

In the future, the Utah Law Review will not publish any article that relies substantially upon a confidential source. In addition, to facilitate independent review of articles published in the *Utah Law Review*, non-public sources that are the substantial basis for student-written work will be kept on file with the *Utah Law Review*.

UTAH LAW REVIEW

VOLUME 1997 NUMBER 4

TABLE OF CONTENTS

Human Dignity, Privacy, and Personality in German and American Constitutional Law*

*Edward J. Eberle***

TABLE OF CONTENTS

**Professor of Law, Roger Williams University School of Law (B.A. Columbia 1978, J.D. Northwestern 1982).

The author would like to thank Dean Jay Conison of Oklahoma City and Professor Bodo Pieroth of the University of Münster, Germany, for their valuable comments on earlier drafts of this Article. He would also like to thank Theresa Kruczek, who helped prepare this Article, and Eric Schweibenz, for his valuable research assistance. All translations are the author's unless otherwise noted.

I. INTRODUCTION

The quest for human dignity in modern society is a noble but elusive goal. Difficult to define,[1] difficult to realize, personally or socially, dignity nevertheless remains a defining trait of human character, and a preeminent ideal of western society.

From the perspective of an individual, dignity might be thought of as the ability to pursue one's rights, claims, or interests in daily life so that one can fully realize talents, ambitions, or abilities as one would like. That is one path to satisfaction, social recognition, and stature—certainly attributes of dignity. This might be thought of as

---

[1]In western thought, the most definitive elaboration of the concept of human dignity is in the work of Immanuel Kant, especially his seminal FOUNDATIONS OF THE METAPHYSICS OF MORALS 39 (L.W. Beck trans., 2d ed. 1959) ("Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."). Recently, there has been a renaissance in the influence of Kantian thought, as a counterweight to utilitarianism. This is most pronounced in the work of John Rawls. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1971); John Rawls, Political Liberalism (1993).

There are other conceptions of dignity too. Consider, for example, the work of RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (developing theory of human rights as part of dignity) and LAW'S EMPIRE (1986) (examining how judges determine legal rights); or ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974) (arguing from natural law tradition of John Locke).

self-realization, although that is not the only conception of dignity. What matters here is that each person should be free to develop his own personality to the fullest, subject only to restrictions arising from others' pursuit of the same.[2]

Of course, there must be some limit to individual freedom if society is to function in a reasonably orderly manner. Thus, from the standpoint of society, individual aspiration must be measured against the demand for order, peace, and social harmony. This balance between the aspiration of individual freedom and the demands of organized society has been a central quest of modern constitutional law.[3]

Today this balance is harder than ever to achieve. Social demands have escalated, placing elevated pressures on the integrity of human personhood. The rise of the administrative state, for example, has led to omnipresent government and its potential to suffocate personal freedom.[4] Technology now develops so rapidly and pervasively that it risks overwhelming individuality. For example, computers can gather, store, and transmit information so capably that they can access, and even mimic, human functions.[5] Gene technology, artificial insemination, and the ability to prolong and, indeed, end life pose troubling existential questions. How are we coping in this world, both in isolation and in comparison to others?

This Article takes up these themes by exploring the concept of human dignity as reflected in the legal order of two comparable modern western societies: Germany and America. Germany and America are good choices for this comparison because both share similar European intellectual and cultural influences; both are highly developed,

---

[2]It is fundamentally a Kantian thought that all moral agents should develop their talents to the maximum extent compatible with the freedom of others. Note, for example, Kant's influence in RAWLS, A THEORY OF JUSTICE, *supra* note 1, at 60: "[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." Anthony Sampson similarly voiced these thoughts: "'What matters . . . is that each man should be free to develop his own personality to the full; and the only duties which should restrict this freedom are those which are necessary to enable everyone else to do the same.'" ANTHONY SAMPSON, THE CHANGING ANATOMY OF BRITAIN 160 (1982) (quoting Lord Tom Denning, Master of the Rolls). For Kant, the concepts of freedom, development of moral personality, reverence of the moral law, and treating people as the final end are interlinked.

[3]*See, e.g.*, Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.").

[4]While the administrative state in America can be traced to 1887—with the institution of the Interstate Commerce Commission, the first significant administrative agency—the predominant rise of the administrative state occurred during the era of the New Deal and continues today. In Europe, the roots of the administrative state lie in the eighteenth and nineteenth centuries. In Germany, the modern administrative state arose from Frederick the Great, who thought of himself as "the first servant of the state." Edward J. Eberle, *Comparative Public Law: A Time That Has Arrived*, *in* FESTSCHRIFT FOR BERNHARD GROSSFELD 7, 7 n.13 (Werner Ebke ed., forthcoming 1998). In France, Napoleon formed the administrative state through, among other things, a professional civil service. *See id.*

[5]*See, e.g.*, Paul Schwartz, *The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination*, 37 AM. J. COMP. L. 675, 676–77 (1989) (detailing extensive gathering and use of personal information by computers). Consider also the developments in artificial intelligence, such as IBM's recent construction of a computer, Deep Blue, that can capably challenge the world champion in a game of chess. *See* Bruce Weber, *A Mean Chess-Playing Computer Tears at the Meaning of Thought*, N.Y. TIMES, Feb. 19, 1996, at A1. Indeed, Deep Blue can win. *See* Drew McDermott, *Yes, Computers Can Think*, N.Y. TIMES, May 14, 1997, at A21.

advanced industrial societies coping with change and technological revolution; and both value individual freedom in the context of a stable society.

Human dignity is, of course, an elusive concept. For our purposes, we will concentrate on the content given the term by the constitutional law of both countries. In particular, we will explore how persons are free to develop their own personalities. One might choose, for example, to be let alone as master of his realm. Or, one might engage vigorously in the affairs of the day. In Germany, these matters are covered in the right to the free unfolding of personality. In America, this falls under the rubric of privacy rights, including the zone of personal autonomy that emanates therefrom. It makes sense to focus on the constitutional law of these countries because recording in a constitution a culture's highest values is a defining attribute of western society. Certainly this is the case with America and Germany. In Germany, the Basic Law, as interpreted by the Constitutional Court, guides and organizes society. In America, the Supreme Court has long secured the role of declaring out of the fabric of the Constitution certain fundamental values for the social order.

By exploring this concept of human dignity in each constitutional order, insight can be derived as to the quality of the human condition, the reach of individual freedom, and the make up of the social order. The particular traits, activities, or essences valued by each country reveal something important about human personality as it relates to society. Likewise, the limitations on freedom articulated in German and American law are instructive of the social structure each country seeks to create. In short, the balance struck between individual freedom and the social order colors the legal culture.

It makes particular sense to focus on these concepts from a cross-cultural perspective. First, it is important to realize that there are other visions of humanity beyond our own visage that may be ennobling, enriching, or both. Second, it is worthwhile to explore the similarities and differences in constitutional vision and doctrine—both in themselves and as a basis for assessing the transplantation of legal norms. Third, this comparison may yield a set of higher principles of constitutional order or a sounder public law philosophy. Fourth, the foreign legal regime may serve as an alternative standard by which to measure the work of the native court. Fifth, in an increasingly interdependent world, realization of mutual cultural influences may prove beneficial.[6] Sixth, through study of other cultures, we learn, by comparison, something important about ourselves.[7]

To accomplish these goals, some grounding in German constitutional law—particularly its protection of human dignity—is first necessary so that we can see how German law contrasts with American. This is the subject of Part II. Part III provides an overview of human dignity as developed in German personality and American privacy rights. There are two components to German personality law. Freedom of

---

[6]These points are noted in Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 804 (1997) [hereinafter Eberle, *Public Discourse*].

[7]This may be the main mission of comparative law: "For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be." THOMAS MANN, JOSEPH IN EGYPT (1938), *translated in Dedication*, DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1994).

action, elaborated on in Part IV, is outward in focus, including protection of activities like freedom to travel, or to pursue a sport or occupation. German law also guarantees a personal sphere that is inward in orientation. As discussed in Part V, this protection of the personal sphere entails a number of strands, such as privacy, informational self-determination, and control over one's portrayal in society. Parts IV and V are presented against the backdrop of American law in order to discover points of divergence and convergence in the two legal cultures. Part VI explores how both countries approach constitutional issues central to identity, self-determination, and autonomy. This area provides the greatest overlap between German and American law. German law has evolved to protect a search for biological parenthood, sexual identity, and rights to one's name, among other matters. In American law, self-determination has encompassed control over procreation, conception, marriage, and child rearing, to name a few. Part VII discusses the recent convergence in German and American abortion law in the context of these themes. All of this leads to a more comprehensive assessment in Part VIII of the countries' contrasting views of human dignity and the comparative strength of their constitutional visions.

II. THE GERMAN CONSTITUTIONAL ORDER AND ITS PROTECTION OF HUMAN DIGNITY AND PERSONALITY

A. The German Constitutional Order

The adoption of the Basic Law in 1949, following the debacle of World War II, signaled a new constitutional order in Germany. Seeking distance from the horrors of Naziism, the Basic Law made a sharp break from this immediate past, instead drawing deeply upon German tradition to found the legal order on moral and rational idealism, particularly that of Kant.[8] Thus, the Basic Law is a value-oriented constitution that obligates the state to realize a set of objectively ordered principles, rooted in justice and equality, that are designed to restore the centrality of humanity to the social order, and thereby secure a stable democratic society on this basis. These values are not to be sacrificed for the exigencies of the day, as had been the case in Nazi Germany.[9] The *Rechtsstaat* principle, for example, obligates society to adhere to a rule of law, requiring that legal measures have a legal basis and discernible content, provide fair notice, and be necessary and proportional to the ends they seek to accomplish (Proportionality Principle).[10] The principle of the Social State (*Sozialstaatsprinzip*)

---

[8]*See* INGO VON MUENCH, GRUNDGESETZ, KOMMENTAR, Vol. 1, 72–73 (2d ed. 1981); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 47 (1989) [hereinafter CONSTITUTIONAL JURISPRUDENCE]; Peter Badura, *Generalprävention und Würde des Menschen*, 19 JURISTENZEITUNG 337, 339–40 (1964).

[9]*See* George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. ONT. L. REV. 171, 178–79 (1984).

[10]The concept of the *Rechtsstaat* has deep roots in German constitutional theory. Kant is generally considered the formulator of the concept. Its intellectual roots are complex, bound with the idea of a state governed by the rule of law and the idea that state power should be applied rationally, consistent with this autonomous system of law. Despite its similarity with the English concept of the rule of law, the two are not the same. For elaboration of the notion of *Rechtsstaat* in German legal history, see William Ewald,

obligates the state to take necessary social welfare measures so that all citizens will have a dignified existence.[11] The concept of a "militant democracy" (*streitbare Demokratie*) obligates the state to resist any threats to the basic democratic order, thereby assuring that democracy flourishes.[12]

Crucial also to the German social order is commitment to human rights. Many fundamental values are enumerated in the Basic Law's catalogue of rights, including protections of free conscience, faith and creed, free expression, equality, and occupational freedom. The Basic Law is far more specific and comprehensive in its listing of basic freedoms, enumerating at least twenty specific individual liberties, as compared to the relatively sparse enumeration of liberties in the American Constitution.[13]

There are differences in the countries' conceptions of basic rights. Fundamental to the German constitutional scheme is the principle of objective and subjective rights, or positive and negative liberties. The objective or positive dimension of rights obligates the government to create the proper conditions so that rights might be realized.[14] This bestows duties on the state, calling for state activism. For example, the concept of human dignity protected in Article 1 obligates the state to provide a basic minimal existence for citizens.[15] This objective dimension to basic rights is tied to the value-ordered nature of the German constitutional scheme, obligating the government to realize in society the set of objective values embodied in the Basic Law. "This value-system, which centers upon human dignity and the free unfolding of the human personality within the social community, must be looked upon as a fundamental constitutional decision affecting all areas of law, public and private."[16]

By interpreting basic rights as establishing an "objective" ordering of values, centered around human dignity, the Constitutional Court transformed those values into

---

Comparative Jurisprudence (I): What Was It Like to Try a Rat?, 143 U. PA. L. REV. 1889, 2046–55 (1995). *See also* KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 42–43. Today the notion of the *Rechtsstaat* is anchored in Article 20(3), which provides: "Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice." Art. 20(3) Grundgesetz [hereinafter GG]; *see also infra* note 135 and accompanying text.

[11] *See* Art. 20(1) GG. For elaboration of the concept of the Social State, see CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 41–42. For the intellectual origins of the Social State, see Ewald, *supra* note 10, at 2055–61.

[12] *See, e.g.*, *Klass Case*, 30 Entscheidungen des Bundesverfassungsgerichts [hereinafter BVerfGE] 1, 19–20 (1970), *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 230 ("Constitutional provisions must not be interpreted in isolation but rather in a manner consistent with the Basic Law's fundamental principles and its system of values . . . . In the context of this case it is especially significant that the Constitution . . . has decided in favor of [a] 'militant democracy' that does not submit to abuse of basic rights or an attack on the liberal order of the state. Enemies of the Constitution must not be allowed to endanger, impair, or destroy the existence of the state while claiming protection of rights granted by the Basic Law.").

[13] These differences should be expected, as the German charter was drafted in 1949 and the American Bill of Rights was drafted in 1791.

[14] "The concept of an 'objective' ordering of values . . . [is] a central concept in German constitutional doctrine." Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 261 (1989).

[15] This provides the foundation for the social welfare principle, anchored in Article 20(1), that distinguishes Germany.

[16] *Lüth*, 7 BVerfGE 198, 205 (1958).

principles so important that they must exist "objectively"—as an independent force, separate from their specific manifestation in a concrete legal relationship. So conceived, objective rights form part of the legal order, the *ordre public*, thereby taking their place among the governing principles of German society.[17] In this way, the Basic Law acts as a blueprint for society, setting forth the values to be realized, requiring a close fit between its text and society.

By contrast, there is no such objective aspect to the American Constitution. The American Constitution simply provides the outline for government, concentrating on limiting official power. Our Constitution lacks any positive element that requires affirmative government action to enforce our rights.[18]

The second aspect of German basic rights is their subjective or negative dimension. This means that rights play a defensive role, delimiting a sphere of personal liberty beyond governmental control. In German law, this concept of rights is referred to as "subjective," denoting a set of rights individuals may exercise. The essential character of this subjective dimension corresponds to the American concept of fundamental constitutional rights.

In contrast to the American Constitution, the German Basic Law also sets forth certain duties citizens or government must perform. For example, Article 6(2) provides that "the care and upbringing of children shall be a natural right of and a duty primarily incumbent on the parents. The state shall watch over their endeavors in this respect."[19] Moreover, the objective value-order, as worked out by the Court, calibrates the relationships between rights, and among rights and duties. Thus, German citizens have both claims to subjective rights, which they may exercise, and objective rights, which they can call on government to perform, but must also assume duties corollary to such rights.

We can thus see that the contrast between the text and nature of the two constitutions is striking. The German Basic Law is value-oriented and sets forth both rights and duties, whereas the United States Constitution attempts to be value-neutral pursuant to a scheme of negative liberties, specifically enumerating rights government may not infringe, but not stating comparable duties citizens must assume or values government must realize.

Constitutional interpretative techniques also differ in Germany and America. Under American canon, one must consult, in order of importance, constitutional text

---

[17]*See* Eberle, *Public Discourse*, *supra* note 6, at 811. They might even be viewed as "permanent ends of the state," not changeable even by constitutional amendment. Quint, *supra* note 14, at 261 (noting Art. 79(3) GG).

[18]The most that might be said is that, under certain circumstances, American government cannot totally deny a right or a benefit. Usually, such cases are decided under the Equal Protection Clause. *See, e.g.*, Plyer v. Doe, 457 U.S. 202, 230 (1982) (ruling that state may not deny free public education to illegal aliens); Shapiro v. Thompson, 394 U.S. 618, 627, 629–31 (1969) (holding that conditioning receipt of welfare benefits on one-year residency requirement violates right to travel and Equal Protection Clause).

[19]Art. 6(2) GG. In actuality, duties are only sparingly spelled out in the Basic Law, in contrast to the 1918 Weimar Constitution, which elaborated a set of duties. Thus, in contemporary Germany, "duties" arise more from internalization of cultural norms (of how one ought to exercise rights) than from textual enumeration. *See* Eberle, *Public Discourse*, *supra* note 6, at 801 n.6. For elaboration of the Basic Law's concept of duties and how they mirror basic rights, see BODO PIEROTH & BERNHARD SCHLINK, GRUNDRECHTE STAATSRECHT II 55–56 (10th ed. 1994).

(including structure and purpose), precedent, Framers' intent, and then, perhaps, social, economic, or philosophic perspectives prior to reaching a plausible result. By contrast, German law places a premium on the text of the Basic Law and its applicability to social and economic conditions. Beyond textual and structural exegesis, German interpreters also employ historical and teleological analysis, before integrating and harmonizing the whole (*praktische Konkordanz*).[20] Both Courts thus employ a variety of reasoning techniques, including arguments based on text, structure, history and natural law.[21] Functionally, German case law operates like American decisions, setting forth fundamental principles that bind other courts and people in society.[22]

The most pronounced difference between the two modes of interpretation relates to the role of Framers' intent. In Germany, the Constitutional Court treats Framers' intent and history as auxiliary sources of interpretation. While the Court is free to consult them, they generally lend support to a result reached through other interpretative methods, such as the textual, structural, or teleological analysis noted above. Framers' intent is not an independent source of authority.[23] Instead, the Court mainly interprets constitutional text in relationship to the conditions of modern society. This

---

[20]Under German canon, textual analysis consists of analyzing the meaning of words or sentences. This is usually combined with a structural or systematic analysis, where one attempts to clarify the meaning of a word or sentence by comparing it to related language in the legal text. The interpreter strives for a unity of the legal document interpreted. In historical analysis, the interpreter tries to divine the intent of the Framers of the legal text. In teleological analysis, the interpreter glosses over Framers' intent and, instead, searches for the purpose or goal behind the language. Such purposes are generally viewed from a contemporary perspective. These four schools of interpretation constitute the classic catalogue of statutory interpretation in Germany, and the core of constitutional interpretation as well. With the exception of teleological interpretation, these classic methods of interpretation were established in Germany by Friedrich Carl von Savigny in his classic eight volume treatise on Roman law, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (SYSTEM OF MODERN ROMAN LAW) (Scientia Verlag 1981) (1840-1851). *See* Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View*, 42 AM. J. COMP. L. 395, 396–98 (1994); *see also* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 48–49. One can thus see that there is some overlap between American and German methods of textual interpretation.

A difference between German statutory and constitutional interpretation is that, in constitutional interpretation, after employing a combination of the above four techniques, the constitutional interpreter then tries to bring some unity to the overall interpretation. If norms are in conflict with one another, the interpreter tries to reconcile them by interpreting their essences to the maximum extent possible, and then harmonizing the difference. This is the technique of concordance or harmonization (*praktische Konkordanz*). It is easier in theory than in practice. Consider, for example, the Constitutional Court's use of the technique in the context of the clashes between expression and privacy interests, in the *Lebach*, 35 BVerfGE 202 (1973), and *Soraya*, 34 BVerfGE 269 (1973), cases, discussed *infra* notes 337–40, 373–80 and accompanying text, and abortion, discussed *infra* notes 504–07 and accompanying text. The interpreter also tries to integrate the interpretation to achieve interparty and social cohesion. *See* Brugger, *supra*, at 398–99.

[21]*See* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 48–49.

[22]In Germany, there is no formal stare decisis system as there is in America. This follows from the civil law premise that judicial decisions serve only as a gloss on the open development of the law, which is to be found in the rules and principles of the governing text. *See id.* at 48. However, in practice, German courts strive to adhere to precedent, as do American courts. Moreover, Constitutional Court decisions represent binding interpretations of the Basic Law.

[23]*See* Brugger, *supra* note 20, at 400; CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 49. Note, for example, these words of the Constitutional Court: "[T]he original history of a particular provision of the Basic Law has no decisive importance" in constitutional interpretation. *Homosexuality Case*, 6 BVerfGE 389, 431 (1957), *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 49.

is perhaps most pronounced in relation to the Article 1 concept of human dignity, where the Court has stated: "[A]ny decision defining human dignity in concrete terms must be based on our present understanding of it and not on any claim to a conception of timeless validity."[24]

This is a far cry from American law, where text, structure, history, and Framers' intent are thought to lend predictability and stability to the law. Some even forcefully argue that these methods provide an additional guard against judicial activism. Certainly the conservative reaction to the Warren Court has sought limitation of judicial review through a search for originalism.[25] Moreover, in the area of unenumerated rights,[26] the Supreme Court has sought to anchor its decisions in timeless concepts, like justice or natural law, to avoid the appearance of judicial bias or result-orientation.[27] These differences show, almost by definition, that the Constitutional Court tends to be a more activist body than the Supreme Court. They also point out, in a sense, that the Constitutional Court is forward-looking, whereas the Supreme Court is backward in focus.[28]

B. Human Dignity in Germany

Human dignity is the central value of the Basic Law. This determination reflects the conscious intention to elevate modern Germany beyond the inhumanity of Naziism, signaling a new constitutional order. Article 1(1) therefore states that "the dignity of man shall be inviolable." The second paragraph of Article 1 reinforces the centrality of human rights to the concept of human dignity: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."[29]

A core aspect of human dignity is the guarantee of human rights. Indeed, the specific enumeration of basic rights in the Basic Law are themselves tangible manifestations of human dignity. This catalogue of basic rights is systematically ordered, making up a central aspect of the objectively determined set of values that

---

[24]*Life Imprisonment Case*, 45 BVerfGE 187, 229 (1977), *translated in* CURRIE, *supra* note 7, at 315.

[25]*See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA 69–132 (1990) (examining influence of judges' and public's political and moral views upon judicial decisions); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1–20 (1971) (arguing that effective theories and criteria should be established to guide judges in interpreting American Constitution).

[26]By unenumerated rights, I mean the range of fundamental rights beyond those explicitly set forth in the first eight amendments to the Constitution. In this Article, I use the term unenumerated rights synonymously with modern substantive due process or its subset, rights of privacy.

[27]*See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights."); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man [marriage and procreation].").

[28]*Compare*, especially, *Transsexual Case*, 49 BVerfGE 286 (1978) (ruling that as matter of fundamental human dignity, person has right to live according to sex of choice), *with* Bowers v. Hardwick, 478 U.S. 186, 190–94 (1986) (ruling that history and traditions of country do not support recognizing constitutional right to engage in homosexual sodomy), discussed *infra* notes 468–74 and accompanying text.

[29]CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 305. The Basic Law's reliance on human dignity is attributable to Kant. The charter might even be envisioned as an attempt to infuse Kantian morality into the legal order. *See* Fletcher, *supra* note 9, at 178. For elaboration of the Kantian roots of the Basic Law, particularly in Articles 1 and 2, see Ewald, *supra* note 10, at 2063. *See also* sources cited *supra* note 8.

govern German society. In this way, dignity and basic rights have a mutually nourishing effect on one another.[30] But human dignity means more than the specific catalogue of basic rights. Dignity is not merely a focus on individuality. As the central value of the constitution, it infuses the whole constitutional order, obligating the state both to protect and realize it. This includes a communitarian dimension: Requiring respect for others' claims to dignity better assures vindication of the human dignity of all, and fosters a community of mutual cooperation and solidarity.

The first draft of the constitutional convention, the *Herrenchiemsee* conference, stated, "The dignity of man is founded upon eternal rights with which every person is endowed by nature."[31] Christian-Democrats (a Christian-inspired and generally conservative party) sought to link the language "eternal rights" with "God-given rights."[32] But this effort was resisted by the more secular and liberal Social Democrats (a social welfare democratic party) and Free Democrats (a nineteenth-century liberal party). The result was the more neutral language reflected in Article 1(1). There is general consensus that this language means that the guarantee of human dignity is inalienable, being both prior to and a constituent part of the social contract.[33] The American Declaration of Independence seems the closest reflection of this understanding.[34] Human dignity is thus a constituent part of humanity, and its guarantee is the essence of the German social order. In this sense, dignity is the highest legal value in Germany.

The concept of human dignity in the Basic Law reflects the influence of three main schools of thought, although it was not intended to be strictly associated with any one of them. The three influences are Christian natural law, Kantian moral philosophy, and more secular theories of personal autonomy and self-determination.[35] In the dignitarian jurisprudence of the Constitutional Court, however, the Court has mainly followed Kant's theory of moral autonomy. This is evident, for example, in the leading *Life Imprisonment Case*, where the Court attempted to capture the essence of human dignity:

> It is contrary to human dignity to make the individual the mere tool (*blosses Objekt*) of the state. The principle that "each person must always be an end in himself" applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in acknowledging him as an independent personality.[36]

---

[30]*See* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 305.

[31]*Id.* at 308.

[32]*Id.*

[33]For a brief description of this history, see CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 308.

[34]*See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident . . . that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . . .").

[35]Under Christian natural law theories, dignity is a gift of God and, therefore, an inalienable aspect of humanity. Under Kantian philosophy, dignity is an indispensable part of human nature. Under a more secular theory of self-realization, the decisive aspect of human dignity is self-realization of one's identity through exercise of one's talents and abilities. For elaboration of these theories, and their influence on human dignity, see PIEROTH & SCHLINK, *supra* note 19, at 90–91.

[36]*Life Imprisonment Case*, 45 BVerfGE at 228, *translated in* CURRIE, *supra* note 7, at 314.

Still, human dignity is essentially an abstract, normative concept, albeit with a philosophical framework. The Framers sought, and the Court has striven, to keep the term an open one, preferring that it take on concrete meaning through case by case determination. Thus, the main definition of dignity is the meaning given it by the Court in its jurisprudence.

C. Human Personhood and the Polity

The dignitarian jurisprudence of the Constitutional Court is replete with references to the nature of humankind and society.[37] The Court has frequently characterized man as a "spiritual-moral being," reflecting the Christian-natural law influence. The *Life Imprisonment Case* is again a good statement of this:

> The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself.[38]

A strongly Kantian view likewise invests the concept of personhood with rationality and self-determination, but also emphasizes duties and moral bounds. These strands converge to form an integrated, whole person. As envisioned in German law, human beings are spiritual-moral beings who act freely, but their actions are bound by a sense of moral duty. Actions, in other words, are guided by a sense of social need, personal responsibility, and human solidarity.[39]

By comparison, American law has never really sought to define human dignity, nor human personhood or personality. Certainly there have been sketches of these concepts in American law, particularly in procedural due process,[40] substantive due process,[41] and capital punishment[42] cases. Moreover, in recent times, the Warren Court, and particularly Justices Brennan and Marshall, sought to give life to these concepts.[43] More recently, human dignity turns up with some regularity in the Supreme

---

[37] *See* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 312 ("The Constitutional Court's 'dignitarian' jurisprudence contains numerous declarations about the nature of the human person and the polity.").

[38] *Life Imprisonment Case*, 45 BVerfGE at 227, *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 316.

[39] *See* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 313; Ewald, *supra* note 10, at 2000–03, 2059, 2063–64.

[40] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders.").

[41] *See* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) ("[Decisions relating to marriage, procreation, etc.], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

[42] *See* Furman v. Georgia, 408 U.S. 238, 239 (1972).

[43] *See* McClesky v. Kemp, 481 U.S. 279, 336 (1987) (Brennan, J., dissenting) ("Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with [the] concern that an individual be evaluated as a unique human being."); Miranda v. Arizona, 384 U.S. 436, 460

Court's discussions, particularly in the context of autonomy rights, and might even be considered a background theme of American law.[44] Still, American law does not exhibit the same systematic attempt to come to basic definitional certitude as German law.[45]

There is a strong link in German law between the concept of personhood and the social community. The seminal case on artistic freedom, *Mephisto*, captured this thought well: The human person is "an autonomous being developing freely within the social community."[46] The human is not to be "an isolated and self-regarding individual,"[47] as she so often seems to be in the American social scheme. Rather, the human is to be "related to and bound by the community."[48] The *Investment Aid Case* first advanced the concept of the human as a community-bound person:

> The image of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value.[49]

Once again, these statements bear the clear imprint of Kantian moral philosophy. Thus, the community envisioned by the Basic Law is one where individuality and human dignity are to be guaranteed and nourished, but with a sense of social solidarity and responsibility. Rather than being a collection of atomistic individuals, people should be connected to one another. Thus, individual self-determination is offset by concepts of "participation, communication and civility."[50] In short, at the root of the German social vision is the Kantian proposition that humans are to be treated always as ends in themselves, never as means, and that this is to be done within a moral social construct that both empowers and guides individuals.

The *Life Imprisonment Case*, again, gives voice to these ideas:

(1966) ("[T]he constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens."); Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.").

[44]*See Casey*, 505 U.S. at 851 (plurality opinion); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting) ("In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.").

[45]There are several explanations for this. First, dignity is textually mandated in Article 1 of the Basic Law, whereas it is not mentioned in the American Constitution and, instead, must be implied from the promise of liberty in the Due Process Clause. Second, German law reflects the civil law orientation toward abstraction, systemization, and classification, whereas American law reflects the common law orientation toward pragmatism and concreteness.

[46]*Mephisto*, 30 BVerfGE 173, 193 (1971), *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 428.

[47]*Life Imprisonment Case*, 45 BVerfGE at 227, *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 316.

[48]*Id.*

[49]*Investment Aid Case*, 4 BVerfGE 7, 15–16 (1954), *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 313; *accord*, *Klass Case*, 30 BVerfGE at 20; *Conscientious Objector Case I*, 12 BVerfGE 45, 51 (1960).

[50]*See* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 313.

> This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather [that] of a person related to and bound by the community. In the light of this community-boundedness it cannot be "in principle unlimited." The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life; yet the autonomy of the individual has to be protected. This means that [the state] must regard every individual within society with equal worth. It is contrary to human dignity to make persons the mere tools [*blosses Objekt*] of the state. The principle that "each person must shape his own life" applies unreservedly to all areas of law; the intrinsic dignity of each person depends on his status as an independent personality.[51]

The German social vision obviously contrasts starkly with the American one. In the United States, we do not have consensus on core values, like Kantian morality, around which to organize the social order. While we have fundamental agreement on principles like individual freedom and democracy, these principles operate without stabilizing concepts of morality or community. Instead, we as autonomous persons ourselves determine the norms and values that infuse the social order. And these norms and values are almost always in flux. No American principle demonstrates this more than our concept of free speech.[52] Thus, individual freedom in America is somewhat unconnected to any one particular community, whereas in Germany it unfolds within a more shared sense of community. This has dramatic consequences for the two social orders, as we will see.

D. The Concrete Meaning of Human Dignity

Since human dignity is a capacious concept, it is difficult to determine precisely what it means outside the context of a factual setting. As the driving principle of Germany's legal order, however, and as a root of Kantian thought, it possesses a certain fixed content. At a minimum, for example, it means that the social order must reflect recognition of the equality of humankind. This concept is anchored in Article 3 of the Basic Law. Equality means at least that persons are entitled to "equal worth,"[53] and that, accordingly, there can be no slavery or serfdom, racial or ethnic discrimination.[54] Second, dignity means respect of physical identity and integrity, which is textually specified in Article 2(2). This prohibits torture and corporal punishment, and forbids imposing punishment without fault or levying disproportionate penalties.[55] Third, dignity means respect of intellectual and spiritual identity and integrity.[56] This

---

[51] *Life Imprisonment Case*, 45 BVerfGE at 227–28, *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 316. For elaboration, see GRUNDGESETZ, KOMMENTAR 4, 6–8, 11–12 (Theodor Maunz et al. eds., 1993).

[52] *See generally* Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1135–1213 (1994) [hereinafter Eberle, *Hate Speech*] (arguing that through public discourse, we determine who we are as a people).

[53] *See Life Imprisonment Case*, 45 BVerfGE at 228.

[54] *See* PIEROTH & SCHLINK, *supra* note 19, at 93.

[55] *See id.*

[56] *See id.*

is manifested most dramatically in the protection of personality rights, specified in Article 2 and elaborated on in this Article. Fourth, dignity means limitation of official power. This is particularly evident in the guarantee of proportionality, which circumscribes governmental means to legitimate ends, and of procedural due process rights, which allow persons affected by official action to be heard and to be able to influence proceedings which concern them.[57] Finally, dignity means guarantee of individual and social existence. Tangibly, this is manifested in the Article 2(2) right to life and in Germany's social welfare state, textually anchored in Article 20(1).[58]

The main development of dignitarian jurisprudence has occurred in conjunction with the more concrete freedoms of Article 2, which guarantees three specific freedoms. The first of these is the right to free development of personality: "Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or against morality."[59] Article 2(1) thus grants personality rights most like the American concept of privacy rights grounded in the Due Process Clause. Personality rights include protection of informational privacy,[60] a right to have one's paternity established,[61] and a right to have official records reflect a sex change.[62] Parts III-VI will elaborate on these personality rights.

The second of the important Article 2 freedoms is "the right to life and to physical integrity."[63] The right to life clause is the source for the Constitutional Court's conclusion in the abortion cases[64] that the state has a duty to protect life after conception. This conclusion resulted in strict limitations on abortion. The contrasting German and American treatment of abortion will be examined in Part VII. Apart from abortion, the Constitutional Court has not invoked the right to life clause to place wide-ranging duties to protect life on the state. While recognizing a duty to protect life, in other matters, the Court has deferred to government's implementation of it.

---

[57]*See id.* at 94; *see also* Art. 19(4) GG ("Should any person's rights be violated by public authority, recourse to the court shall be open to him.").

[58]*See* PIEROTH & SCHLINK, *supra* note 19, at 94.

[59]Art. 2(1) GG. The notion of free development of personality is fundamentally a Kantian one. *See supra* note 2 and accompanying text. Von Savigny picked up on the idea in elaborating his theory of autonomy, which in turn influenced Otto von Gierke, and the framing of the German Civil Code. Von Gierke emphasized the personal nature of the right of personality. *See* OTTO VON GIERKE, 1 DEUTSCHES PRIVATRECHT 702 (1895). This history is recounted in Ewald, *supra* note 10, at 2000–01, 2034–36, 2045–50, 2055–60, 2063–65. *See also* Harry D. Krause, *The Right to Privacy in Germany—Pointers for American Legislation?*, 1965 DUKE L.J. 481, 485. Despite the theoretical acceptance of a general right of personality, the right did not find a place in the German Civil Code which was codified in 1896. By contrast, the right did find a place in the Swiss Civil Code of 1907, in Article 28. *See* Krause, *supra*, at 485 & n.13. In Germany, it took later developments by the civil law courts for general recognition of a right of personality. Interestingly, the main theoretical development of personality rights in Germany, by von Gierke in the 1890s, paralleled the original development of privacy rights in America. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

[60]*See Census Act Case*, 65 BVerfGE 1, 64 (1983), discussed *infra* notes 241–75 and accompanying text.

[61]*See Right to Heritage II*, 90 BVerfGE 263, 271 (1994); *Right to Heritage I*, 79 BVerfGE 256, 268 (1989), discussed *infra* notes 406–52 and accompanying text.

[62]*See Transsexual Case*, 49 BVerfGE at 298, discussed *infra* notes 460–65 and accompanying text.

[63]Art. 2(2) GG.

[64]*See Abortion II*, 88 BVerfGE 203, 252 (1993); *Abortion I*, 39 BVerfGE 1, 36–37 (1975).

Accordingly, the Court refused to impose affirmative duties upon the state to prevent kidnaping or to rescue its victims,[65] or to guard against threats to the environment from army bases or nuclear plants.[66]

The "physical integrity" clause of Article 2(2) is mainly used as a source to guide criminal procedures, somewhat like American criminal due process jurisprudence.[67] It has also been used to limit invasions of the body that would cause pain, harm, disfigurement, or injury. For example, in the *Spinal Tap Case*,[68] the Court invalidated a court-ordered sampling of a defendant's spinal column to test his involvement in a crime on the ground that this violated his physical integrity. The Court has also invalidated use of polygraph tests to determine a defendant's veracity.[69] Attaching a person to a machine to force the truth, the Court reasoned, is "an inadmissible invasion of a person's innermost self and a violation of human dignity."[70] Man should not be "an object of experimentation," a manifestation by the Court of the Kantian directive to treat people as ends only.[71] Efforts to apply the physical integrity clause outside the criminal context have not, as yet, been successful. Physical inviolability is mainly a concern of criminal law, and therefore will not be addressed in this Article.

The last of the Article 2 freedoms provides that "[t]he liberty of the individual shall be inviolable."[72] This mainly operates in conjunction with the other Article 2(2) freedoms. It will not be extensively considered here.[73]

Not surprisingly, human dignity, alone or in conjunction with the more specific freedoms of Article 2, is a rich source of constitutional litigation, and is widely debated on and off the court.[74] Human dignity in Germany is thus most like the American concept of modern substantive due process, particularly rights of privacy. Both concepts are open-ended and controversial, posing difficult questions for the role of the court within a democracy and the nature of the constitutional order. The remaining part of this Article explores this topic as it relates to the development of human personality in Germany and America.

---

[65]*See Schleyer Kidnaping Case*, 46 BVerfGE 160 (1977).

[66]*Chemical Weapons Case*, 77 BVerfGE 170 (1987) (holding that right to life clause does not prevent state from approving storage of chemical weapons at army bases). In *Mülheim*, 53 BVerfGE 30, 57–69 (1979) and *Kalkar*, 49 BVerfGE 89, 140–44 (1978), the Constitutional Court recognized a state duty to protect life in connection with the threats of a nuclear power plant, but determined that the duty could be met in the manner the government determined.

[67]*See* Art. 2(2) GG, *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 343.

[68]16 BVerfGE 194 (1963); see also *Pneumoencephalography Case*, 17 BVerfGE 108 (1963) (invalidating court-ordered puncture of individual's vertebral canal for purposes of testing personal responsibility for crime).

[69]*See Polygraph Case*, 35 Neue Juristische Wochenschrift [hereinafter NJW] 375 (1982).

[70]*Id.*

[71]CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 344.

[72]Art. 2 GG.

[73]Mainly, this freedom protects free physical movement. It is somewhat akin to the concept of habeas corpus, protecting against arbitrary restraints on physical liberty. *See* PIEROTH & SCHLINK, *supra* note 19, at 110–11.

[74]*See, e.g.*, Badura, *supra* note 8 (examining roots of dignity concept); Christoph Degenhart, *Das allgemeine Persönlichkeitsrecht*, 5 JURISTISCHE SCHULUNG (JUS) 361, 362 (1992) (examining general right of personality); Hasso Hofmann, *Die versprochene Menschenwürde*, 118 ARCHIV DES ÖFFENTLICHEN RECHTS 353 (1993) (exploring capacious concept of human dignity).

In comparison to the relatively specific framing of human dignity and its cognates in the Basic Law, it is striking how devoid of detail the American Constitution is. Since the Supreme Court's determination in 1873 in *The Slaughter-House Cases* that the Fourteenth Amendment Privileges and Immunities Clause only protects a narrow category of national rights,[75] the Privileges and Immunities Clause has effectively been rendered a dead letter for purposes of enumerating basic rights.[76] That leaves only two textual pieces of support for this endeavor: the Due Process Clause and the Ninth Amendment. The Ninth Amendment was not invoked by the Court until 1965 in the famous case, *Griswold v. Connecticut*,[77] and then only to lend support to the Court's extension of a right of privacy beyond the constitutional text.[78] Not surprisingly, therefore, the Court has mainly relied on the Due Process Clause, which provides that no "[s]tate [shall] . . . deprive any person of life, liberty, or property, without due process of law,"[79] to found basic rights.[80] Through Due Process, the Court has interpreted a range of privacy and autonomy rights which protect personal decision making in areas relating to marriage,[81] procreation,[82] contraception,[83] family

---

[75]*See* 83 U.S. (16 Wall.) 36, 79–80 (1873) (recognizing national rights such as peaceable assembly, petition, writ of habeas corpus, and use of navigable waters).

[76]Modern cases have cautiously interpreted a certain range of freedom in the Article IV Privileges and Immunities Clause, being careful not to ground the decision in the Fourteenth Amendment Privileges and Immunities Clause, still viewed ineffective since *Slaughter-House*. *See, e.g.*, United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 221–23 (1984) (protecting national citizenship against set-aside work program imposed by municipality to protect residents); Supreme Court v. Piper, 470 U.S. 274, 282–87 (1985) (holding that rule limiting bar admission to state residents violates Privileges and Immunities Clause); Hicklin v. Orbeck, 437 U.S. 518, 533–34 (1978) (holding that residential hiring preference violates Privileges and Immunities Clause).

[77]381 U.S. 479 (1965).

[78]*See id.* at 484 (relying on Ninth Amendment and other amendments for penumbras emanating from specific guarantees); *see also id.* at 493 (Goldberg, J., concurring) ("[T]he Ninth Amendment . . . lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments . . . is not restricted to rights specifically mentioned in the first eight amendments.").

[79]U.S. CONST. amend. XIV, § 1.

[80]*See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . , as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."). Other cognates of privacy could be found in the prohibition against "quartering troops in any house," U.S. CONST. amend. III, and the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures," U.S. CONST. amend. IV.

[81]*See Griswold*, 381 U.S. at 485 (suggesting that marriage lies "within the zone of privacy created by several fundamental constitutional guarantees").

[82]*See Skinner*, 316 U.S. at 541–43 (holding that statute requiring sterilization of habitual criminals violates Equal Protection Clause as applied to person convicted once of stealing chickens and twice of robbery).

[83]*See* Carey v. Population Servs. Int'l, 431 U.S. 678, 691–99 (1977) (holding blanket prohibition of contraceptive use by minors unconstitutional); Eisenstadt v. Baird, 405 U.S. 438, 446–55 (1972) (holding that statute allowing distribution of contraceptives to married but not unmarried persons violates Equal Protection Clause); *Griswold*, 381 U.S. at 484–86 (holding that prohibiting contraceptive use violates right to marital privacy found in penumbra of specific guarantees of Bill of Rights).

relationships,[84] child rearing, and education.[85] The movement of both Courts thus seems very much in the same general direction, notwithstanding different textual, historical, philosophical, and cultural settings.

III. INTRODUCTION TO GERMAN PERSONALITY RIGHTS

The German Law on the "free unfolding of personality" is comprehensive and multifaceted. Grounded in human dignity and Kantian philosophy, the right is the only one read in conjunction with other rights.[86] In contrast to human dignity, personality is not an objective value and therefore does not generally operate to impose affirmative obligations on the state.

Personality rights come into play, potentially, whenever an action is not protected by a more specific right. Theoretically, all claims or interests have the potential to be so protected. In this way, Article 1 human dignity and Article 2(1) rights interact to form comprehensive protection of human personality and personhood. The Constitutional Court captured the sense of these rights well in the *Eppler Case*:

> They complement as "undefined" freedom the special ("defined") freedoms, like freedom of conscience or expression, equally constitutive elements of personality. Their function is, in the sense of the ultimate constitutional value, human dignity, to preserve the narrow personal life sphere and to maintain its conditions, that are not encompassed by traditional concrete guarantees.[87]

This "catch-all" function of personality rights is especially important in view of "modern developments and the associated threats they pose to the protection of human personality."[88]

Textually, comprehensive rights are not clearly derivable from enumeration of a "right to the free development of personality," although the German text is more supportive of the effort than the American one. Still, the fundamental thrust of the German Constitutional Court has been to enlarge the rights sought to be captured by the language, as compared to confining itself to strict application of the language of the text.[89] German personality law is thus a creature of the Constitutional Court, as rights of privacy are of the Supreme Court.

There are two components to German personality law: freedom of action and guarantee of a personal sphere. Freedom of action is outward in focus. As conceived

---

[84] *See* Moore v. East Cleveland, 431 U.S. 494, 505–06 (1977) (holding that city cannot limit occupancy of dwelling to members of same nuclear family).

[85] *See* Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (holding that state cannot mandate public school attendance when parents desire to send children to private school); Meyer v. Nebraska, 262 U.S. 390, 400–03 (1923) (holding that state cannot mandate teaching of only English in schools).

[86] *See* Interview with Dr. Bodo Pieroth, Professor of Law, University of Münster, Münster, Germany (July 8, 1996).

[87] *Eppler*, 54 BVerfGE 148, 153 (1980).

[88] *Right to Heritage I*, 79 BVerfGE 256, 268 (1989).

[89] *See* Degenhart, *supra* note 74, at 362. In developing personality law, the Constitutional Court relied significantly on developments by the civil law court. Some of these developments are discussed *infra* note 93, and notes 327–37 and accompanying text.

in the seminal *Elfes Case*, freedom of action empowers one to do fundamentally what one desires insofar as it does not interfere with others or the constraints of the social order.[90] Essentially, this aspect of personality allows one to define oneself in relation to society.

As freedom of action is outward in focus, the personal sphere is inward in orientation. The personal sphere delimits an essential sphere of privacy within which one can fundamentally determine who one is and how one should relate to the world, if at all. One may choose to engage actively in the world, and thus avail oneself of freedom of action. Or, one may choose to withdraw from the world, retreating into oneself and concentrating on inner development. The Constitutional Court has actively sought to create an inner, intimate sphere so that a core of personality might be developed and protected. The focus on interiority reflects the underlying vision of man as a "spiritual-moral" being.[91]

The personal sphere is narrower in scope than the range of freedom of action. It protects only against incursions that aim to curtail the personal sphere. Just what this means is better elaborated by case law than definition, although the Court has had some difficulty in fixing the concept.[92] Confidentiality is protected against certain incursions, such as the secret taping of conversations[93] or the attempted use of divorce records in a work disciplinary proceeding.[94] Similarly, inquiry into personal matters is limited, a right developed in the census cases.[95] The Court, in fact, has sought to delineate a range of tangible rights that map out this private sphere in order to lend structure to personality rights. These include the novel concept of informational self-determination; rights to control presentation of oneself in society, including control over one's words, images, portrait, and reputation; and rights of self-determination and knowledge of one's heritage, as elaborated on more fully in Parts V and VI.

American law lacks this focus on the inner self. Our concern is much more with rights of autonomy and self-determination in relation to the world, such as those that relate to marriage, procreation,[96] abortion,[97] or child rearing.[98] This may reflect the American preoccupation with public life, which itself may reflect the influence of the central role democracy (and its emphasis on public participation) plays in our society, historically and today. It may also reflect our Constitution's preoccupation with organizing and limiting government, leaving unspecified areas to individual choice, without elaboration, in contrast to the German enumeration of the parameters of that

---

[90]*See Elfes*, 6 BVerfGE 32, 36 (1957). For elaboration of the concept of free development of personality, see PIEROTH & SCHLINK, *supra* note 19, at 96–104; Degenhart, *supra* note 74, at 362.

[91]*See, e.g., Elfes*, 6 BVerfGE at 36 (essence of man as spiritual-moral person). For establishment of interiority in German law, see *infra* notes 186–95 and accompanying text.

[92]*See Criminal Diary Case*, 80 BVerfGE 367, 373–75 (1989); *see also infra* notes 218–40 and accompanying text.

[93]*See Tape Recording Case*, 34 BVerfGE 238, 245–51 (1973).

[94]*See Divorce Records*, 27 BVerfGE 344, 351–52 (1970), discussed *infra* notes 290–97 and accompanying text.

[95]*See Census Act Case*, 65 BVerfGE 1, 41–42 (1983); *Microcensus*, 27 BVerfGE 1, 6–8 (1969), discussed *infra* notes 193–95, 247–53 and accompanying text.

[96]*See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[97]*See* Roe v. Wade, 410 U.S. 113, 153 (1973).

[98]*See* Pierce v. Society of Sisters, 268 U.S. 510, 536 (1925).

choice. Contrastingly, the German focus on the inner life may reflect the fact that freedom in public life was foreclosed for much of Germany's modern history, leaving the inner realm as the stage for freedom. Certainly a German interior life has deep intellectual and cultural roots. Cultural and artistic manifestations of the human spirit have traditionally been prized in Germany. Before developing these thoughts, however, we must consider the jurisprudence of the Court so that we will have an empirical basis on which to base such observation. The next part of the Article explores the twin inner and outer dimensions of German personality law, with reference to American law, starting with the outer dimension as crystallized around the concept of freedom of action.

IV. FREEDOM OF ACTION: THE OUTER WORLD

A. Elfes *and the General Right of Personality*

German personality law began with the groundbreaking 1957 decision, *Elfes*.[99] The setting seemed an odd one in which to announce a general personality right. Elfes was active in right-wing politics before and after World War II, enjoying some success, including election to Parliament as a member of the Christian Democratic Union.[100] In his political activities, he was a severe critic of West German defense and reunification policies, participating in conferences and demonstrations at home and abroad.[101] Seeking to continue spreading his message abroad, he requested extension of his visa to attend a foreign political conference, but was denied on the ground that his criticism constituted a threat to national security.

Elfes first argued that his activities were protected by Article 11, which guarantees Germans freedom of movement. However, the Court ruled that this

---

[99]6 BVerfGE 32 (1957). An earlier Constitutional Court case, the *Investment Aid Case*, 4 BVerfGE 7 (1954), had first begun the process of attempting to fix the definition of freedom of action. *See infra* notes 105–09 and accompanying text. But the essential development of a right of personality occurred in connection with the interpretation of the German Civil Code (*Bürgerliches Gesetzbuch*, or BGB) by its supreme interpreter, the Federal Supreme Court (*Bundesgerichtshof*, or BGH). For example, in the famous *Schacht Case*, 13 Entscheidungen des Bundesgerichtshofes in Zivilsachen [hereinafter BGHZ] 334 (1954), the BGH derived a right of personality from Articles 1 and 2 of the Basic Law in protecting the contents of a letter sent as commentary to a magazine. *See id.* at 338. Decisions such as these found a favorable audience in the legal literature. *See, e.g.*, Larenz, *Das "allgemeine Persönlichkeitsrecht" im Recht der unerlaubten Handlungen*, 8 NJW 521 (1955); von Gamm, *Zur praktischen Anwendung des allgemeinen Persönlichkeitsrechts*, 8 NJW 1826 (1955). These developments are traced in Degenhart, *supra* note 74, at 362; Krause, *supra* note 59, at 488–89. *See also* notes 328–36 and accompanying text.

Thus, *Elfes* represented the Constitutional Court's approval of these developments of the BGH, thereby constitutionalizing the doctrine of a general right to personality. Interestingly, this period of the 1950s represented one of significant judicial creativity by the Constitutional Court, as the seminal case on freedom of expression, *Lüth*, 7 BVerfGE 198 (1958), was decided one year after *Elfes*. For elaboration of the importance of *Lüth*, see Eberle, *Public Discourse*, *supra* note 6, at 800–33.

[100]*See Elfes*, 6 BVerfGE at 32–33. Elfes had been a member of the central committee of the party before 1933, police commissioner of Krefeld in 1927, and mayor of Mönchen-Gladbach, among other political activities. *See id.*

[101]*See id.* at 33.

provision applied only to travel within Germany, not foreign travel.[102] Thus, if Elfes was to succeed, another argument was necessary: the Article 2 guarantee of personality. The Court determined that, even if foreign travel was not covered by Article 11, it might yet be part of one's personal freedom of action, protected under Article 2(1).[103] This illustrates the catch-all function of Article 2 personality rights; they capture claims not protected by the more specific guarantees in the catalogue of basic rights.[104]

By freedom of action, the Court meant the right to engage in activities necessary to the development and assertion of one's person.[105] Whether traveling abroad constituted freedom of action required resolution of a theoretical dispute regarding the limits to this freedom. This dispute was left open in the *Investment Aid Case,*[106] where the Court laid out two definitions of freedom of action without choosing one over the other:[107] Freedom of action could mean only a "minimal amount of this freedom of action without which an individual would not be able to develop herself as a spiritual-moral person;"[108] or, freedom of action could be interpreted "in a broad, comprehensive sense."[109]

In *Elfes*, the Court decided that a broad interpretation better suited the text and purpose of the Basic Law. First, it seemed inconceivable that a definition limited to the "core area of personality" could ever result in violations of "the rights of others . . . the constitutional order . . . or morality," the textual limitations of personality.[110] It seemed hard to envision how these textual restrictions could then have meaning. A broader interpretation thus seemed more sensible. Second, Article 2 reflects the radiation of human dignity, the ultimate constitutional value, as do all constitutional principles.[111] Thus, a broad interpretation seemed more compatible with a view of persons as morally autonomous beings operating responsibly within the community. Third, an expansive interpretation also seemed more consistent with the

---

[102]*See id.* at 34–35. The Court noted Germany's long history of limiting, for security reasons, the right to travel abroad. *See id.*

[103]*See id.* at 41–42.

[104]*See id.* at 37 ("Insofar as specific life areas are not guaranteed through the specific protection of a basic right, an individual can call on Article 2(1) for protection against incursions into his liberty by officials."). Note the Court's later explanation of Article 2 freedoms in *Eppler*:

> They complement as "undefined" freedom the special ("defined") freedoms, like freedom of conscience or expression, equally constitutive elements of personality. Their function is, in the sense of the ultimate constitutional value, human dignity, to preserve the narrow personal life sphere and to maintain its conditions, that are not encompassed by traditional concrete guarantees.

Eppler, 54 BVerfGE 148, 153 (1980).

[105]*See Elfes*, 6 BVerfGE at 36 ("Seen from a legal perspective, [Article 2(1)] is an independent basic right, that guarantees general human freedom of action.").

[106]4 BVerfGE 7, 15 (1954).

[107]*See id.*

[108]*Elfes*, 6 BVerfGE at 36. This is the so-called Core Theory (*Kernbereich Theorie*), which connotes protection of only a core of personality that involves the essence of individuals as spiritual-moral persons. *See id.* at 37; PIEROTH & SCHLINK, *supra* note 19, at 96.

[109]*Elfes*, 6 BVerfGE at 36.

[110]*Id.*

[111]*See id.* ("Certainly the . . . formulation of Article 2(1) was an emanation of seeing it in the light of Article 1 and to derive therefrom its purpose to embody the vision of humankind.").

Framers, who had originally used the phrase "everyone can do or not do what he or she likes," and had changed it for "linguistic," not legal, considerations.[112]

A broad interpretation of freedom of action has important consequences for the German constitutional order. As intended by the Court, every form of activity related to personality, in principle, is covered by the concept. Restraints on personal freedom will only be imposed when necessary as a condition of the "constitutional order" or other textual limitation.[113] This view thus endows individuals with significant personal freedom, transforming the Basic Law into a very rights-protective charter. One might argue it is consistent with the concept of human dignity that infuses the Basic Law, calling on the state, as it does, "to respect and protect it."[114] In practice, the Court has limited the reach of this freedom to mainly economic and recreational areas, despite the expansive reach of the concept.[115] Yet, the role of Article 2 as the last preserve of individual freedom is an important principle. It serves as a residual vessel of freedom in a way that our Ninth Amendment, as yet, does not.[116] Thus, future developments, perhaps, may expand the scope of freedom of action.

Applying these principles, the Court determined that foreign travel was within freedom of action.[117] This determination did not, of course, end the inquiry. Freedom of action is guaranteed only to the extent it is within the constitutional order, and does not violate third party rights or morality.[118] This thus provided the Court with the occasion to interpret these textual limitations. At issue in *Elfes* was the constitutional

---

[112] *Id.* at 36–37.

[113] *See id.* ("Restraints on the free development of personality come from the constitutional order."); *see also supra* note 105.

[114] Art. 1(1) GG.

[115] *See* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 323. The *Falconry Licensing Case*, 55 BVerfGE 159 (1980), discussed *infra* notes 157–69 and accompanying text, is an example of how the Court has interpreted freedom of action to apply in recreational areas. *See id.*; *accord Rider In Woods*, 80 BVerfGE 137, 164 (1989).

[116] Our Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Despite its seeming authorization of rights beyond those textually enumerated, the Supreme Court did not invoke the Ninth Amendment until *Griswold v. Connecticut*, 381 U.S. 479 (1965). Even in *Griswold*, the Court noted the status of the Ninth Amendment as the "forgotten amendment." *Id.* at 490 (Goldberg, J., concurring) (citing BENNENT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955)). Since *Griswold*, the Ninth Amendment has appeared only rarely in Court opinions. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . , as we feel it is, or, . . . in the Ninth [Amendment] . . . ."). The Ninth Amendment has been a popular topic of scholarly commentary. *Compare* JOHN H. ELY, DEMOCRACY AND DISTRUST 34–38 (1980) ("[t]he conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably to support"), *with* Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 14 (1980) ("In 'retaining' the unenumerated rights, the people reserved to themselves power to add to or subtract from the rights enumerated in the Constitution by the process of amendment. . . . [A]ccording to Madison the ninth amendment itself was 'inserted merely for greater caution.'").

It is interesting, as a matter of comparative law, that Americans have been rather stingy with the concept of liberty, *see, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986) (theorizing end of substantive due process), whereas the Germans have been quite expansive.

[117] *See Elfes*, 6 BVerfGE at 41–42.

[118] This is in the text of Article 2, and is consistent with court interpretation of the article. *See* Art. 2 GG; *Elfes*, 6 BVerfGE at 36–37.

order limitation, since security measures are taken to protect society. This is the most important limitation.

Rights of others entail the rights and claims of third parties.[119] Such claims might justifiably limit individual rights in Germany or in America. In German law, this restriction has been employed to ban arson and trespass, for example.[120] In the context of religious rights, the dignitarian rights of others were used to limit an atheist's attempt to coerce individuals to his view through use of cigarettes as bribery.[121] However, third party rights are ordinarily evidenced in the legal and constitutional order and, thus, are unlikely to act as an independent restraint.[122]

Morality is no more self-defining in German law than American law, although German law relies on more explicitly Christian law notions. Interestingly, for comparative purposes, morality has been used in both Germany and America to ban sodomy and homosexual activities.[123] However, notably, the major German case of 1957 has been held in disrepute for some time,[124] whereas the more recent 1986 decision of *Bowers v. Hardwick* yet remains the law, having only recently been questioned, and then only *sub silentio*.[125] Still, morality is mainly reflected in legal concepts, like "good morals" (*guten Sitten*) or "good faith" (*Treu und Glauben*),[126] that make up the legal order. As such, and especially with its Kantian roots, morality becomes an important background principle for the legal system as a whole. As a practical matter, however, morality itself will not ordinarily restrain freedom of action.[127] This brings us back to the "constitutional order" limitation, the construction of which would determine the contours of freedom of action.

According to the Court, the constitutional order means the general legal order as it conforms to the constitution.[128] One interpretation of this would be that any law consistent with the constitution, at least procedurally, could limit the basic right. While textually plausible, this would effectively render the right meaningless.[129] Since the

---

[119]*See* PIEROTH & SCHLINK, *supra* note 19, at 102.

[120]*See* CURRIE, *supra* note 7, at 317.

[121]*See Tobacco Atheist Case*, 12 BVerfGE 1 (1960).

[122]*See* PIEROTH & SCHLINK, *supra* note 19, at 102.

[123]*Compare Homosexuality*, 6 BVerfGE 389, 433–36 (1957) (relying on Christian law notions and other moral code limitations to find homosexual activity beyond Article 2 protection, although noting that sexual activities are among most intimate of human acts), *with Bowers*, 478 U.S. at 191 (determining that homosexual activity is not part of any protected right of privacy).

[124]*See* PIEROTH & SCHLINK, *supra* note 19, at 103 (noting increasing acceptance of homosexuality since 1969).

[125]*See* Romer v. Evans, 116 S. Ct. 1620 (1996). Ironically, the majority never made mention of *Bowers*, preferring to gloss over the roadblock. *See id.* at 1629 (Scalia, J. dissenting) ("In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, *see* Bowers v. Hardwick, and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.").

[126]Arts. 138(1), 242, 826 BGB. These are some of the famous "general clauses" of the BGB, which contain open language designed to bring the Code into conformity with contemporary needs, as determined by courts and scholars. *See* Eberle, *Public Discourse, supra* note 6, at 800–03.

[127]*See* PIEROTH & SCHLINK, *supra* note 19, at 102.

[128]*See Elfes*, 6 BVerfGE at 37–38.

[129]*See id.* at 40–41. This interpretation was the one in vogue under the 1919 Weimar Constitution. But it seemed inappropriate in view of the value-order constructed in the Basic Law. *See id.*

Federal Republic was founded as a social-democratic state committed to human dignity, this interpretation seemed inappropriate to the *Efles* court.

Rather, since the "Basic Law erected a value-oriented order . . . the independence, self-determination, responsibility and dignity of individuals must be guaranteed in a political community."[130] Thus, for laws to be consistent with the constitution, they must conform to the value-order of the Basic Law. At the top of this value-order is, of course, human dignity, the ultimate constitutional value. In this context, dignity means, at a minimum, that the "intellectual, political and economic freedom of people may not be limited so that the essence of personhood is impaired."[131] From this it follows "that each citizen is afforded a sphere of private development[,] . . . an ultimate inviolable realm of personal freedom, insulated against encroachment by public authorities."[132] Certainly no law impinging on the "inviolable realm" could be consistent with the Basic Law.

Laws must also conform substantively to "unwritten fundamental constitutional principles (of the free-democratic order), as well as the fundamental decisions of the Basic Law, especially the principles of the rule of law [*Rechtsstaat*] and the social welfare principle [*Sozialstaatsprinzip*]."[133] Through this interpretive technique, the Court introduced significant background, and even immanent, if not extratextual, authority.[134] Again, this underscores the Court's proactive interpretive stance and the rich context within which the Basic Law is to be interpreted.The *Rechtsstaat* principle is especially significant in this regard. Under this principle, laws must give fair warning and fair procedure; they must not be retroactive, and they must have a legal basis.[135] Most importantly, the concept of *Rechtsstaat* embodies the Proportionality Principle, which means, in essence, that laws may pursue proper ends only through

---

[130]*Id.* at 40.

[131]*Id.* at 41.

[132]*Id.*

[133]*Id.*

[134]This appears to be a deliberate choice by the Framers and interpreters of the Basic Law. Under the Nazi regime, gross injustice was perpetrated within a state committed to an extreme version of positivism. To avoid such injustice, the Framers sought to distance the legal order from such absolute sovereignty, providing in Article 20(3) that "the executive and the judiciary shall be bound by law and justice." Art. 20(3) GG. Article 20(3) "justice" operates as a free-standing concept, somewhat like natural law. The *Soraya* decision, 34 BVerfGE 269, 286–87 (1973), represents perhaps the farthest extension of this principle, suggesting, as it does, that the fundamental concept of justice, as interpreted by the Court, can trump parliamentary democracy. *See infra* notes 340–58 and accompanying text.

[135]*See* CURRIE, *supra* note 7, at 318–19. By *Rechtsstaat*, the Germans mean a state based on reason and the rule of law. Under this concept, state power must be exercised pursuant to previously established principles that are themselves rational. This is to guard against arbitrary power. *See supra* note 10. The *Rechtsstaat* principle further restricts official power by requiring that any limitation on liberty must have a sufficient legal basis, such as a statute. *See* CURRIE, *supra* note 7, at 318. For this reason, most basic rights provisions contain a reservation of authority to the *Bundestag*. The legislative preserve in Article 2(2) is typical: "Intrusion on these rights may only be made pursuant to a statute." Art. 2(2) GG. From the standpoint of a *Rechtsstaat*, this assures that restrictions on liberty be openly justified as matters of democratic deliberation. *See also* Art. 19(1) GG ("Statutes [restricting rights] shall apply generally and not solely to an individual case . . . [and shall] name the basic right.").

The concept of *Rechtsstaat* can also be said to embody the concept of meaningful judicial review of administrative action. *See* CURRIE, *supra* note 7, at 19.

means that are suitable and "proportional" to the ends sought.[136] The Proportionality Principle is akin to means-end testing in American rights analysis, such as that used in heightened scrutiny methodologies.[137] Both methodologies guard against arbitrary government. Thus, as in America, the true impact of the Proportionality Principle is seen in case law, where it often decides the case, as will be amply shown.

It is thus apparent that the value-oriented nature of the Basic Law influences significantly the nature of the legal order. Laws must conform to this value-order to be part of the "constitutional order." "Constitutional order" is thereby rendered a two-sided limitation. While the "constitutional order" can limit personality rights, this can occur only when laws themselves conform to the German value-order. In essence, the Court implied a limitation from the structure of the Basic Law on the express textual limitation of Article 2(1), itself a notable, but plausible, act of judicial activism.[138] Significantly, this had the effect of transforming plain constitutional language into an open-ended, general clause.[139] Much will always depend on judicial interpretation of Article 2(1).

In *Elfes*, the Court found that Elfes' interests in foreign travel were part of his freedom of action, but that it was outweighed by the state security interests at issue.[140] Certainly state security is a justifiable part of the "constitutional order" which might be used in limitation of basic rights. However, the particular state interests at issue in *Elfes* did not seem particularly well drawn or persuasive. Elfes was an elected official in Germany. His views were well known, at home and abroad. Thus, it seems unreasonable to find that another foreign trip would place the state in jeopardy. Perhaps the government desired to protect its image abroad. Perhaps it yet feared for the fragility of the new German experiment in democracy. Certainly *Elfes* seems to

---

[136]Proportionality is a stringent test, requiring that governmental actions be calculated to further a legitimate purpose, and impose no more than a reasonable burden on basic rights. The essence of a basic right must yet be preserved. *See* Art. 19(2) GG. Sometimes, a least restrictive alternative prong is added. Thus, at bottom, proportionality requires reasonableness. *See* CURRIE, *supra* note 7, at 122. When basic rights are at issue, proportionality translates into intensive review. It has its roots in the law of Frederick the Great, limiting the discretion of the administration. *See id.* at 20. Such proportionality has become standard fare in European law too. *See, e.g.*, Case 178/84, Commission v. Federal Republic of Germany, 1983 E.C.R. 1227, [1987–1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,417 (1987) (applying proportionality to restraints on trade).

[137]*See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987). Under conventional American doctrine, violations of fundamental individual rights trigger strict scrutiny, an inquiry requiring government to justify its regulation as "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Id.*

[138]*See Elfes*, 6 BVerfGE at 37–41.

[139]The technique of the Constitutional Court is thus quite like the techniques of civil courts in interpreting civil codes. For example, German civil courts, operating pursuant to Article 242 (good faith) or Article 826 (good morals) of the BGB, frequently readjust contracts to enforce concepts of fairness to preserve the bargain. An example of this is standard form contracts, which courts invalidate as contrary to good faith if they contain one-sided, unbargained-for terms. See the cases collected and discussed in John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1103–21 (1976). Thus, at bottom, the techniques of the Constitutional Court reflect the civil law orientation of the German legal order, as the jurisprudence of the Supreme Court reflects the common law orientation of our legal system.

[140]*See Elfes*, 6 BVerfGE at 42–43.

reflect the skittishness of cold war times. In this way, *Elfes* is not unlike American cases of this genre.[141]

It is notable that the Court in *Elfes* did not attempt to set out any comprehensive definition of freedom of action. In fact, there is no case where the Court has defined "the full range of personality rights."[142] Instead, the Court has preferred to work out the specifics of what freedom of action means in concrete cases in view of current or developing social conditions.[143] Thus, the exact reach of the zone in which individuals may shape their lives awaits case-by-case development, similar to the evolution of American privacy law.[144]

However, *Elfes* did establish the methodology applied by the Court to judge the reasonableness of governmental action seeking to limit personal interests. As applied in *Elfes*, this methodology is an ad hoc balancing test designed to weigh the personal interest against the strength of the official interest. The Court did not engage in any comprehensive review of the lower court decision, but considered only whether the lower court decision had a basis in law.[145] Certainly the Court was concerned that it not intrude too deeply into the domain of the ordinary courts.[146] It would take later

---

[141]*See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 105 (1961) (upholding, as consistent with First Amendment, registration requirements of Subversive Activities Control Act, requiring registration and disclosure of communist activities); Dennis v. United States, 341 U.S. 494, 516–17 (1951) (ruling that government may enforce Smith Act to prohibit teaching of Marxist-Leninist doctrine); American Communications Ass'n v. Douds, 339 U.S. 382, 415 (1950) (upholding law prohibiting labor representation rights of union whose officers failed to certify they were not communists).

[142] CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 328; *see also Census Act Case*, 65 BVerfGE 1, 41 (1984).

[143]*See id.*; PIEROTH & SCHLINK, *supra* note 19, at 98–99.

[144]Justice Harlan well explained this dynamic of liberty, which resonates in both German and American law:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (citations omitted).

[145]*See Elfes*, 6 BVerfGE at 43–44 (holding that courts should not apply full-range review, but only determine whether specific constitutional provisions have been violated).

[146]Germany, like other European countries rooted in the civil system, has a specialized court system with different tribunals for different areas, such as civil law, and administrative and tax courts. These specialized courts are, of course, expert in their areas. Thus, the Constitutional Court is generally hesitant to intrude into an area in which another court is expert. Moreover, the civil law, founded on Roman law, is the traditional field of German legal thought. Because of the traditional respect and prestige of the civil law, the Constitutional Court might be especially cautious to intervene in favor of the then relatively new constitutional law.

The Constitutional Court, too, is a specialized court, hearing only constitutional claims. In this capacity, the Constitutional Court is the supreme interpreter of the Basic Law. Other German courts refer constitutional questions to the Constitutional Court.

events before the Court would exercise a more intensive review of lower court cases to further fundamental rights.[147]

Elfes is significant in another regard. The techniques employed by the Court illustrate how it has been able to assume its role as guardian of the Constitution and censor of governmental action. The German Constitutional Court thus parallels the role of the Supreme Court over matters that we call substantive due process. In the modern era of human rights, the Supreme Court has judged the reasonableness of official action against the opaque language of "due process of law." Both the German and American Courts have set up legal regimes to anchor such operative terms in more solid ground. In Germany, we have seen how personality rights have become part of a general "freedom of action" limited only by third party rights, morality, or the constitutional order. In the United States, the due process inquiry involves a quest for those "basic values 'implicit in the concept of ordered liberty,'"[148] which itself involves a reasoned judgment "of respect for the liberty of the individual . . . [against] the demands of organized society."[149] In both countries, these decisions are ultimately acts of judicial judgment. We will be in a better position to gauge the quality, range, and validity of those judgments upon further comparison of German and American law.

As in the United States, most measures challenged for violating personal freedoms pass constitutional muster in Germany.[150] As we have seen in *Elfes*, national security interests were held to justify limitations on foreign travel.[151] Likewise, general freedoms of action have been limited by price regulations,[152] and the freedom of action of a horse rider has been limited to assigned bridal paths out of deference to the rights of hikers and bikers to pursue their activities secure from horse traffic.[153]

However, the Court has also invalidated measures for violating the Proportionality Principle. Thus, government cannot prevent persons from trying to arrange drivers for interested riders.[154] Likewise, parents do not have unlimited power to bind their minor children by contract.[155] One of the best examples of the Constitutional Court's

---

[147]The development of German standards of review for rights analysis has occurred mainly in connection with freedoms of expression, as in American law, which is itself notable from a comparative perspective. *See* Eberle, *Public Discourse*, *supra* note 6, at 807–08 (describing evolution of levels of scrutiny in German expression law). The standards developed in law regarding freedom of expression, then, carry over, in most particulars, to other freedoms, such as those of Article 2. The development of intensive, hard-look review occurred in the 1990s. *See, e.g.*, *Stern-Strauss Interview*, 82 BVerfGE 272, 280 (1990). The development of German expression law in the 1990s is covered in depth in Eberle, *Public Discourse*, *supra* note 6, at 852–94. The intense form of scrutiny at work in a case like *Stern-Strauss Interview* seeped also into Article 2 right of personality cases in the 1990s, as most explicitly illustrated in *Right to Heritage II*, 90 BVerfGE 263, 271 (1994), discussed *infra* notes 422–52 and accompanying text.

[148]*Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[149]*Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

[150]*See* CURRIE, *supra* note 7, at 319.

[151]*See Elfes*, 6 BVerfGE at 42.

[152]*See* 8 BVerfGE 274, 327–29 (1958).

[153]*See Rider in Woods*, 80 BVerfGE at 159–60.

[154]*See* 17 BVerfGE 306, 313–18 (1964), *noted in* CURRIE, *supra* note 7, at 319 (cataloguing cases along these lines).

[155]*See* 72 BVerfGE 155, 170–73 (1986).

technique in judging state actions is the *Falconry Licensing Case*, where the Court found governmental regulation unreasonable in requiring those engaging in the sport of falconry to demonstrate competence in the use of firearms.[156]

B. Falconry Licensing Case

At issue in the *Falconry Licensing Case* was a federal hunting law which required prowess in knowledge and operation of weapons, including guns, as a requirement for obtaining a hunting license. The plaintiff engaged in the sport of falconry, which involves use of a falcon to hunt and retrieve prey. Since guns are not used in falconry, the plaintiff objected to being tested for weapon proficiency.[157]

The case provides good insight into the Constitutional Court's evaluation of governmental action circumscribing personality rights. "Article 2 guarantees everyone a general freedom of action insofar as one does not violate the rights of others, the moral order, or the constitutional order," the Court asserted.[158] The requirement of weapon proficiency "violates in an unconstitutional manner Article 2 freedom of action, because denial of the ability to hunt without weapon proficiency contradicts the concept of the rule of law [*Rechtsstaat*]; therefore, the regulation is inconsistent with the constitutional order."[159] Understanding why this is so requires closer examination of the *Rechtsstaat* principle:

> The concept of *Rechtsstaat* demands, when viewed in conjunction with the presumptive zone of freedom Article 2 bestows, that citizens are protected against unnecessary curtailment of their freedoms by official actions. For legal measures to be indispensable, they must use means to establish a legal end that are suitable and that do not excessively burden an individual.[160]

In this manner, the Court demonstrated again its methodology for Article 2 personality claims.

First, a person's general freedom of action is to be broadly understood, consistent with the freedom-protective nature of the Basic Law. Second, such freedom may be limited only by the triad of textual limitations, which themselves are limited by the implied limitation of the "constitutional order."[161] Third, the constitutional order includes "unwritten elementary constitutional principles," most notably the *Rechtsstaat* principle, which itself embodies foundational principles like the Proportionality Principle.[162] Fourth, the Proportionality Principle requires careful scrutiny of freedom-restrictive actions to assure that they are proportional to the ends they seek, that is, that they are justifiable and not excessively onerous. According to the *Falconry Licensing*

---

[156]*See Falconry Licensing Case*, 55 BVerfGE at 165.

[157]*See id.* at 163. The plaintiff was simply not interested in shooting a gun. *See id.*

[158]*Id.* at 165.

[159]*Id.*

[160]*Id.* For elaboration of the concept of *Rechtsstaat*, see *supra* notes 10, 135–36 and accompanying text.

[161]*See supra* notes 138–39 and accompanying text.

[162]*Elfes*, 6 BVerfGE at 41.

Case, proportionality requires that "the means to establish a legal end . . . are suitable . . . and do not excessively burden an individual."[163]

Applying this test, the Court determined in the *Falconry Licensing Case* that "weapon proficiency is incongruous with the legislative goal . . . [of] protection of wildlife and prevention of abuse of hunting birds."[164] These goals could be accomplished "through more precisely drawn measures."[165] The problem here was that "the requirement of weapon proficiency has nothing to do with the maintenance [and preservation] of hunting. . . . It is a violation of proportionality when weapon proficiency is demanded . . . that has no relation to the planned activity."[166] Indeed, discharge of weapons "could frighten the falcons . . . and they might not return to the falconer."[167] Fortifying these conclusions was the Court's observation that few open areas remain where people can engage in falconry. Care must therefore be taken to preserve them.[168] The Court thus carved out a sphere of protected liberty amidst the bustle of the modern world.

In sum, *Elfes* and the *Falconry Licensing Case* evidence the broad range of freedom of action accorded citizens under Article 2, and the care the Court takes to evaluate restriction of that freedom. The *Falconry Licensing Case*, in particular, demonstrates a considerable tightening of the scrutiny employed to incursion of freedom. In this manner, the Court shows again how it has set itself up as a comprehensive censor of the reasonableness of governmental action.

C. American Law

In the United States, by comparison, there is no comprehensive constitutional concept of a general freedom of action, entitling persons to do what they like within the constraints of the social order.[169] This concept is more likely to be handled under general private law concepts like tort, contract, or property, or pursuant to the criminal law. As a whole, therefore, private American law maps out the zone for general freedom of action. Certainly there is a significant difference, in both Germany and America, between constitutionalizing an area, with its accompanying higher status, and treatment pursuant to ordinary law.[170]

---

[163]*Falconry Licensing Case*, 55 BVerfGE at 165.

[164]*Id.* at 165–66.

[165]*Id.* at 166.

[166]*Id.*

[167]*Id.*

[168]*See id.* at 168.

[169]The closest textual authority for such general freedom would be the Ninth Amendment, which, as noted, the Court has refused to so broadly construe. *See supra* note 116.

[170]By ordinary law I mean the general law; that is, all law—civil, criminal, or administrative—other than constitutional law. Thus, the ordinary law is the background against which constitutional law is applied. *See* Eberle, *Public Discourse*, *supra* note 6, at 825 n.119.

The relationship between constitutional and private law is deeply interesting, with strong roots in both history and modern theory. Significantly, the approach in both countries has been to constitutionalize increasingly historical areas of the private law. In Germany, this makes particular sense, since the adoption of the Basic Law signaled a new legal order for the country. *See supra* notes 8–9 and accompanying text. Pursuant to the Basic Law, all law, public and private, must conform to the value-order of the new charter. Thus, the enactment of the Basic Law itself marks a fundamental reconception of German law. The seminal

Moreover, at the constitutional level, the American approach under modern substantive due process has been much more selective, focusing on identifying those personal freedoms thought to be "fundamental,"[171] "implicit in the concept of ordered liberty,"[172] or "deeply rooted in this Nation's history and tradition,"[173] for example. Under these constructs, the Court has deemed "fundamental" those activities relating to control over one's life, such as marriage,[174] procreation,[175] contraception,[176] or child rearing;[177] or control over one's body, such as abortion[178] or the ability to refuse medical treatment.[179] As are the German freedom of action cases, the American cases seem directed outward, focusing on issues of personal autonomy and self-determination in relationship to the world. On the other hand, this aspect of American law differs from German freedom of action in that American "fundamental" rights also partake of an element of personal identity. Marriage, procreation, and contraception, for example, are more personal and more revealing of identity than foreign travel[180] or riding in the woods.[181] In this way, the American law has a certain resonance with the personal sphere of German law, discussed next in Part V.

A second focus of American substantive due process law has been the delineation of a zone of privacy, particularly in shielding disclosure of personal matters. This

---

case is *Lüth*, 7 BVerfGE at 205 (holding that Basic Law's "value system, which centers upon human dignity and free unfolding of the human personality within the social community, must be looked upon as a fundamental constitutional decision affecting all areas of law, public and private . . . . Thus, basic rights obviously influence civil law too."). For extensive treatment of this relationship, see Eberle, *Public Discourse*, *supra* note 6, at 815–16; Quint, *supra* note 14, at 254–58, 261–81.

In America too, the trend of the Supreme Court has been to constitutionalize private law areas, most notably defamation law, through the landmark case, New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) ("[T]he Constitution delimits a State's power to award damages for libel actions brought by public officials against critics of their official conduct."). Note, for example, Justice White's cry: "[U]sing [the First] Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States . . . ." Gertz v. Robert Welch, Inc., 418 U.S. 323, 370 (1974) (White, J., dissenting). "These are radical changes in the law and severe invasions of the prerogatives of the States." *Id.* at 376 (White, J., dissenting).

[171]Snyder v. Massachusetts, 291 U.S. 97, 105 (1933).

[172]Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[173]Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

[174]*See* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

[175]*See* Skinner v. Oklahoma, 316 U.S. 535, 544–55 (1942) (Stone, J., concurring) (holding that Due Process Clause prevents state from imposing sterilization on repeat offenders without demonstrating that individual's criminal tendencies are inheritable).

[176]*See* Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) ("[A] prohibition on contraception per se, violates . . . the Equal Protection Clause of the Fourteenth Amendment.").

[177]*See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that Fourteenth Amendment protects right to raise children).

[178]*See Roe*, 410 U.S. at 153 ("[The] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

[179]*See* Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 278–79 (1990) (holding that competent people have constitutionally protected liberty interest in refusing unwanted medical treatment).

[180]*See Elfes*, 6 BVerfGE at 32; see also *supra* notes 115–16 and accompanying text.

[181]*See Rider in Woods*, 80 BVerfGE at 154–55.

explains the privacy accorded the marriage bedroom[182] and the home[183] in certain contexts. However, as with American autonomy law, rather than establishing any general or comprehensive right, this law too has evolved narrowly, in response to discrete intrusions into individual privacy, usually amidst criminal prosecutions. At bottom, then, American law is episodic—a judicial response to "substantial arbitrary impositions,"[184] whereas German law is more systematic. Undoubtedly, this reflects the American common law methodology, inherited from English law. German systematization, by contrast, reflects the influence of Roman law, especially as transformed in high German legal science (*Rechtswissenschaft*).[185] In the broadest sense, the differing approaches of the law evidence a cultural distinction between common and civil law.

V. INNER FREEDOM IN GERMAN LAW: THE PERSONAL SPHERE

The flip side of freedom of action is a focus on the interior person. Here the Constitutional Court has posited a "private sphere or ultimate domain of inviolability in which a person is free to shape his life as he or she sees fit."[186] This domain includes both the right to retreat from the world, as one likes, captured as the moral-spiritual essence of being, as well as the right to engage actively in the world, as covered by freedom of action. There is not, of course, a clear conceptual line between the inner and outer world. Rather, both are components of an integrated, whole person. Nevertheless, it is notable that German law has accented the interior component of human personality, a focus American law has not, as yet, developed.[187]

---

[182]*See Griswold*, 381 U.S. at 499 (holding that state law prohibiting use of contraceptives by married couples violates Fourteenth Amendment).

[183]*See* Stanley v. Georgia, 394 U.S. 557, 559 (1969) ("[M]ere private possession of obscene matter cannot constitutionally be made a crime.").

[184]*Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points picked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

Id. (Harlan, J., dissenting).

[185]Under German legal science, techniques of careful legal study and investigation were brought to bear on Roman law, attempting to uncover the essence of a system of law, and on German customary law, in order to discover the basis of law itself. This resulted in the drafting of the German Civil Code of 1896, a high achievement of German legal science. Friedrich von Savigny, one of the seminal German legal theoreticians of the Code, described the aims of German legal science: "'[W]e want a national community whose scientific endeavors focus upon one and the same object[,] . . . an organically progressive legal science which may be common to the whole nation.'" Reinhard Zimmerman, *An Introduction to German Legal Culture, in* INTRODUCTION TO GERMAN LAW 1, 4–5 (Werner F. Ebke & Matthew W. Finkin eds., 1996). Savigny's legal historicism became "the fulcrum for the emergence of a national community of scholars." *Id.*

[186]CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 328.

[187]To a significant extent, German law picked up the suggestions by Warren and Brandeis, in their important article *The Right to Privacy*, that there exists a general right of personality based on the notion of "an inviolate personality," including a "more general right to be let alone," *see* Warren & Brandeis, *supra*

A. Establishment of Interiority in German Law

1. Microcensus

Focus on the interior component of human personality in German law began comprehensively with the important *Microcensus* case,[188] which concerned the constitutionality of a federal questionnaire, or "microcensus," designed to elicit a portrait of the German population. The questionnaire sought information concerning personal habits, including vacation practices, occupation, standard of living, and whether mothers worked or remained home to rear children, among other topics.[189] In this context, the Court carved out a private, personal sphere for citizens to inhabit free from incursion.

The fact that the statistical survey sought personal information necessitated inquiry into the domain of personal rights protected within Article 2. Here the Constitutional Court raised the barricade of human dignity, beyond which "the state could take no measure, or enact any law, which would violate . . . or otherwise infringe upon the essence of personal freedom as encompassed within the limits of Article 2."[190] As should now be evident, there can be no greater thunder in the German constellation than invocation of human dignity. The significance of this became immediately clear: "The Basic Law thereby guarantees individual citizens an inviolable area of personal freedom in which one can freely form one's life, the effect of which is to remove all official power [from this realm]."[191] This is the personal sphere in which one is free to determine and structure one's life.[192]

---

note 59, at 205, and "to the immunity of the person—the right to one's personality." *Id.* at 207. Such personality rights would include "legal recognition" of "thoughts, emotions and sensations," *id.* at 195, and also "some retreat from the world" in recognition "that solitude and privacy have become more essential to the individual" given the "intensity and complexity of life attendant upon advancing civilization." *Id.* at 196.

In German law, this right of personality is based on Kant and, more recently, the work of Otto von Gierke, who suggested, during the time of the drafting of the Civil Code, that the law recognize a "general right of personality." Otto von Gierke, 1 DEUTSCHES PRIVATRECHT 702 (1895) *cited in* Krause, *supra* note 59, at 485.

It is interesting, as a matter of comparative law, that this call for a general right of personality, which occurred rather contemporaneously in Germany and America during the influential last decade of the nineteenth century, met with great success in Germany, but with only limited success in America. *See infra* note 386.

[188] *Microcensus*, 27 BVerfGE 1 (1969).

[189] *See id.* at 32.

[190] *Id.* at 6.

[191] *Id.*

[192] *See id.* For this proposition, the Court, significantly, cited *Elfes*, which had theorized both this inner realm of freedom as well as an outer zone. *See Elfes*, 6 BVerfGE 32, 41 (1957). This private, personal sphere of freedom has been developed as a separate strand of German law. *See infra* Part V; *see also, e.g.*, *Right to Heritage I*, 79 BVerfGE 256, 268 (1989) ("The right to free development of personality and human dignity guarantees everyone an autonomous area of private life formation, in which one can develop and protect one's individuality.").

This intimate sphere is a critical part of the human vision that lies at the root of the Basic Law, bestowing self-worth, social value, and respect.[193] This also shows how concepts of human dignity, humanity, and community are interlinked in German law. Through this interaction, dignity takes on a more concrete meaning: "It would be inconsistent with human dignity for the state to force people to register and catalogue their whole personalities, even if done anonymously through a statistical survey, thereby treating man as an object, which is accessible in every manner."[194] Insistence on respect for human dignity is thus instrumental to preservation of human autonomy.

With this background, the Court went on to elaborate the Inner Sphere. "Such a [pervasive] penetration in the personal area through a comprehensive inspection of the personal relationships of a citizen is also denied the state because individuals must have an Inner Space [*Innenraum*] in which to develop freely and self-responsibly their personalities, an Inner Space which they themselves possess and in which they can retreat, banning all entrance to the outer world, in which one can enjoy tranquility and a right to solitude."[195]

The presence of an ascertainable Inner Space in German personality law is a notable achievement, and a dramatic contrast with American law. It is wholly a creation of the Constitutional Court, in pursuit of its perception of the vision underlying the Basic Law. Textually, it is certainly not self-evident that "the dignity of man" or "the right to the free development of his personality" would yield this emphasis.[196] Rather, it reflects the Court's desire to preserve and protect the integrity of human personality, especially in applying the concept of human dignity to meet changing social conditions, such as the development and use of computer technology in *Microcensus*. In this way, human autonomy and capacity are safeguarded and nourished against the challenges posed by modern social, economic, and technological change. The clear desire of the Constitutional Court to keep its constitution "in tune with the times"[197] contrasts with the Supreme Court, which has always sought to anchor fundamental rights in timeless or constant principles such as natural law or inalienable rights, or from verifiable sources like tradition or history, partly as a way of deflecting the argument that the Court is overstepping its bounds.

Considering that law is a reflection of culture, it is interesting to decipher the cultural traits evidenced by this German accent on the interior life. For one thing, this focus is quite compatible with German history and culture, which has placed extraordinary emphasis on the world of the mind and of the artist. Emphasis on culture has predominated over public life through most of German history. This contrasts with American law and American life, which has often emphasized public life over cultural life, a natural outgrowth of the central role played here by our democracy. American substantive due process law reflects this too. The thrust of American cases has either been autonomy in the world or privacy from a prying world. But under American

---

[193]*See Microcensus*, 27 BVerfGE at 6 ("In the light of this image of man at root in the Basic Law, the human achieves social value and respect in society.").

[194]*Id.* These sentiments evidence, unmistakably, the influence of Kant.

[195]*Id.* The Court observed that even the presence of a neutrally devised state inspection scheme could violate the right to personality because it would induce psychological pressure. *See id.* at 6–7.

[196]*Id.* at 6; *see also* Art. 2(1) GG.

[197]Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

privacy, the Court has not sought comprehensively to define or nourish an interior sphere so much as to shield the outside world from invasion of that private zone.[198] The German emphasis on interiority also reflects, again, Kantian thought, and its emphasis on the autonomy of the individual and the unfolding of human capacity.

As a matter of doctrinal law, the Constitutional Court's carving out of a private, intimate sphere has produced distinct strands of personality law. Perhaps most notable is the general control over personal information that has resulted in a right to informational self-determination, discussed in Section B.[199] Related to informational self-determination is the right to control the portrayal of one's person, including rights to one's own image and spoken word, and rights, in some circumstances, not to have false interviews or statements attributed to one's person, as discussed in Section C.[200] But these are all matters meriting separate development. What is significant for our purposes is that the German strand of interior personality has led to a distinct evolution of personality law, one quite different from American law.

In reference to *Microcensus*, the question for the Court was whether this "microcensus" so deeply impinged upon this sphere of intimacy as to violate Article 2 personality rights. Certainly "not every statistical survey of personal data violates personal dignity . . . or disturbs self-determination over the innermost [private] areas of life."[201] Characteristic of the German regime of rights, everything is a question of balance and proportion. No one right is extended to the detriment of other rights as, for example, in the American preferencing of free speech.[202] Thus, personality rights—even over intimate areas—are mediated in relationship to other values of the social order. One's obligations as "community-connected and community-bound" citizens entail a certain cooperation with officials in matters that call for state-planning, like a census.[203]

This inquiry necessitates a closer evaluation of the case. Survey questions principally threaten self-determination rights when they impinge upon the "personal intimate area of life, which by nature is confidential. [For] the modern industrial state, this is a barricade to prevent administrative-technical depersonalization."[204] However, statistical surveys inquiring only into human behavior will not generally violate the intimate realm. This is especially so when anonymity is used, as in the *Microcensus* survey, since this obscures personal connections, and hinders, if not prevents, the cataloguing of human personality.[205]

In *Microcensus*, the key issue turned on inquiry into vacation and recreational habits. While such inquiries implicate the private sphere, they do not "force disclosure of information arising from one's intimate sphere, nor allow the state access to

---

[198] *See, e.g., id.* at 485–86.

[199] *See infra* notes 241–60 and accompanying text.

[200] *See infra* notes 337–40, 387–93 and accompanying text.

[201] *Microcensus*, 27 BVerfGE at 7.

[202] *See* Eberle, *Hate Speech, supra* note 52, at 1213 ("[F]ree speech is the preferred right in our constitutional structure.").

[203] *Microcensus*, 27 BVerfGE at 7.

[204] *Id.*

[205] *See id.* Moreover, as additional precautions, the statute prohibits publication of information gathered and binds census takers to confidentiality. *See id.*

relationships that are ordinarily beyond outside scrutiny or of a confidential nature."[206] This type of information could be obtained from general sources, "although with greater difficulty."[207] Thus, the inquiry did not constitute a constitutional violation. Likewise, resort to the *Rechtsstaat* principle did not yield relief, since the legal norms at issue were sufficiently definite and the measures taken satisfied the Proportionality Principle, being suitable means to accomplish legitimate ends.[208] *Microcensus* therefore illustrates the same methodology used by the Court in the outer-directed freedom of action cases: evaluation of the intensity of the rights violation, followed by testing of the case against *Rechtsstaat* principles, especially that of proportionality.

2. Criminal Diary Case

Determining to construct a sphere of inviolable privacy is one thing. Defining it is another. The best recent attempt to come to grips with these existential questions is the *Criminal Diary Case,* where the Court grappled with the question whether the state could use diaries of a young man accused of murder as evidence in its case.[209] The man was in therapy to help resolve a lifelong problem forming relationships with women. The therapist recommended that he write down his inner struggle in a diary. The diaries revealed his innermost feelings and insecurities over his inability to form relationships with women. During a search of his parents' home, where he lived, the police discovered the diary. The diary entries bore certain similarities to the murder the man later was accused of. Because of their relationship to the crime, the state sought to use the diaries as circumstantial evidence in its case.[210]

The essence of the legal dispute was whether the diary entries were portals into the innermost feelings of the defendant, protected as part of the intimate realm of Article 2 personality. In fact, the Federal Supreme Court (*Bundesgerichtshof* or BGH) believed just this—that the intimate nature of the diaries made them part of the defendant's protected personality rights, but that their use in a criminal trial was justified by the important public interest in solving a serious crime.[211] *Criminal Diary* thus provided the Constitutional Court with a good opportunity to bring some clarity to the personal sphere.

---

[206] *Id.* at 8.

[207] *Id.*

[208] *See id.* at 8.

[209] *See Criminal Diary Case*, 80 BVerfGE 367 (1989).

[210] *See id.* at 368–69.

[211] *See id.* In this respect, the BGH upheld the decision of the lower court. *See id.* at 368–69. On the other hand, one could conclude, as did the quartet of Justices who found a violation of personality rights, that the diary entries were made so many months (17 and 8) before the crime that they lacked any relevance to proof of the crime.

In developing a general right of privacy, the BGH had long held that this right protects against disclosure of confidential information relating to private activities, such as that contained in letters and diaries. The private nature of the information was the key to protection under the Civil Code. Professor Krause traces these developments. *See* Krause, *supra* note 59, at 500. In a case like *Criminal Diary*, the Constitutional Court relied, in essence, on these developments by the BGH. Other strands of this general right of personality were also constitutionalized by the Court, in reliance on the work of the civil courts. These matters are discussed *infra* notes 327–37 and accompanying text.

"The general personality rights anchored in Articles 1 and 2 guarantee . . . control over . . . personal details of one's life,"[212] the Court announced, referring to the fundamental right of informational self-determination established in *Microcensus* and secured in the *Census Act Case*. Yet the "protection is not absolute," but can be limited by "overriding public interest."[213] This follows from individuals' obligations to the community and its members.[214]

Nevertheless, "even overriding public interest" might not justify intrusion into this most intimate sphere.[215] On account of the human dignity anchor, the Court postulated a certain ultimate core of personality from which all official entry is barred.[216] Here it was unnecessary to perform any proportional means-end testing. Certainly, only truly innermost matters would enjoy such protection.

To the extent a personal matter is not characterized as being of the innermost "inviolable area," it might be counted as part of the personal sphere into which the state might be allowed entry upon a showing of "significant public interest."[217] Thus, much depended on how personal matters, like the diary entries, were to be characterized.

The topic of an innermost personal sphere, and how to define it, has been a focus of much controversy.[218] Early on, the Court set forth the Sphere Theory (*Sphärentheorie*), under which human personality interests were calibrated according to the intensity of their intimacy. Different interests were assigned different levels of constitutional protection according to this scheme. For example, the most intimate sphere (*Intimsphäre*) was the "last, inviolable area of human freedom . . . from which all public power was disseized."[219] Aspects of sexual determination, such as one's sex,[220] sex education,[221] or the marriage bedroom[222] are examples of interests held to be within this most intimate sphere. Next in concentric order was a private or confidential sphere (*Privat* or *Geheimsphäre*) that was subject to the textual limitations of Article 2(1).[223] In this sphere, personality rights could be curtailed only in the face of hard proof of their necessity under the Proportionality Principle.

---

[212] *Criminal Diary Case*, 80 BVerfGE at 373. The development of informational self-determination is explored *infra* notes 247–57 and accompanying text. *See also Census Act Case*, 65 BVerfGE 1, 41 (1983).

[213] *Criminal Diary Case*, 80 BVerfGE at 373.

[214] This reflects the German vision of individuals as socially connected and bound. "Limitation of freedom can occur when justified by overriding public interest, because individuals enter into communication with others in the social community, and their conduct affects others and can disturb the personal sphere of others or the interests of the community." *Id.*

[215] *See id.* This follows from Article 19(2) GG, which protects the essence of a right.

[216] *See id.* at 373 ("The Court has recognized a last inviolable area of private life formation from which all public power is disseized.").

[217] Whether this is so or not would depend on means-end testing pursuant to the Proportionality Principle.

[218] *See* PIEROTH & SCHLINK, *supra* note 19, at 100; Degenhart, *supra* note 74, at 363–64.

[219] Degenhart, *supra* note 74, at 363–64 (citing 38 BVerfGE 312, 320 (1975); *Elfes*, 6 BVerfGE at 41).

[220] *See Transsexual Case*, 49 BVerfGE 286 (1978) (finding right to live according to chosen sex).

[221] *See Sex Education Case*, 47 BVerfGE 46, 71 (1977) (noting that sex is among most intimate of human activities and, therefore, parents have right to be informed of sex education in schools).

[222] *See Divorce Records*, 27 BVerfGE 344 (1970).

[223] *See* PIEROTH & SCHLINK, *supra* note 19, at 100.

Vacation and recreational habits[224] were examples of interests grouped in this sphere. The last sphere was an outer or social sphere (*Sozialsphäre*), comprised of interests connected closely to society which had little intimate character. Actions could be taken to curtail exercise of these interests under less exacting standards of proof, for example, to gain information leading to the solution of a crime or disease, such as an epidemic.[225]

Not surprisingly, serious definitional problems arose as to the boundaries of these spheres, and the grouping of interests within them. The spheres could not be adequately distinguished, and people classified interests differently, leading to a certain relativism of the theory.[226] Moreover, the main criterion used by the Constitutional Court—social connectedness—proved unworkable as a legal standard, since legal regulation always involved a considerable social element, whether in conduct, action, or communication.[227]

For these reasons, the Court abandoned the Sphere Theory in the *Census Act Case*.[228] Since that abandonment, however, no satisfactory replacement theory has been forthcoming.[229] In fact, the Sphere Theory continues to provide a certain structure to this inquiry, even if as a background concept, as is evident in the Court's discussion in *Criminal Diary*. This is especially pronounced in matters involving an aspect of retreat from the world, such as the act of writing diaries in *Criminal Diary*. The Court's ventures may ultimately prove to be an example of the limits of Grand Theory, not unlike similar quests in service of the First Amendment.[230]

This brings us back to the *Criminal Diary Case*, which marks the last great attempt of the Court to define an innermost sphere.[231] "Whether a matter is to be characterized as within the core area . . . depends on whether it is of a highly personal nature and the degree and intensity with which it affects the interests of others or the community."[232] If this works, fine. But this standard seems no more self-defining than the old Sphere Theory. Indeed, it seems to call for an ad hoc weighing of personality versus social interests, thus repeating the relativism of the former theory. Because of these difficulties, the Court has renounced Grand Theory, at least for now, preferring

---

[224]*See Microcensus*, 27 BVerfGE at 1.

[225]*See, e.g.*, *Criminal Diary Case*, 80 BVerfGE at 375–77; *Lebach*, 35 BVerfGE 202, 220 (1973) (noting strong state interest in solving crime); *see also* 1 H. VON MANGOLDT ET AL., DAS BONNER GRUNDGESETZ, Art. 2(1), § 64 (3d ed. 1985).

[226]*See* PIEROTH & SCHLINK, *supra* note 19, at 100; Degenhart, *supra* note 74, at 364.

[227]*See* PIEROTH & SCHLINK, *supra* note 19, at 100.

[228]*See Census Act Case*, 65 BVerfGE at 45. The Court ruled that the significance of information can no longer depend on its type or nature. Equally decisive is the use and application of information gathered, including possibilities of dissemination. In this sense, there is no unimportant information.

[229]*See* Letter from Dr. Bodo Pieroth, Professor of Law, University of Münster, Münster, Germany, to Edward J. Eberle (Nov. 13, 1996) (on file with author) [hereinafter Pieroth Letter].

[230]*See* Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 418–25 (1992) (discussing and critiquing scholars' attempts to discover true meaning of First Amendment through set of foundational values).

[231]*See* Pieroth Letter, *supra* note 229.

[232]*Criminal Diary Case*, 80 BVerfGE at 374. This marks a renunciation of focusing solely on "social connectedness" as the distinguishing factor. "The ordering of matters within the inviolable area . . . or the area of private life . . . can no longer depend on the social significance or connection of the matter." *Id.*

to work out what is "personal" or "intimate" on a case-by-case basis.[233] Thus, the extent of the inviolable sphere can only be determined by its delineation in case law. At bottom, then, the German approach is moving in the direction of the American one.[234]

Applying these principles proved no more satisfactory than defining them. The Court split 4-4 on whether the diaries were part of an innermost personal sphere.[235] The quartet of Justices believing the diary entries were not private enough focused on their social connection. Because the diaries helped explain a gruesome crime, the Justices reasoned, they bore a clear connection to societal interests and did not partake of any intimate thought. They were written, and thus discoverable, and the acts were already performed.[236] Moreover, use of the diaries as proof in a serious crime provided a "significant public justification."[237]

The four dissenting Justices, by contrast, believed the diaries to be "highly personal," reflective of the defendant's "real personality structure . . . a dialogue with the real I."[238] Indeed, it is hard to imagine many acts more intimate than recording one's innermost thoughts in a diary, especially when done in the context of a confidential relationship, such as that between doctor and patient. Thus, for these Justices, the diaries should have been protected as within the personal sphere. Moreover, they argued, the crime had happened seventeen and eight months, respectively, before the two diary entries most at issue.[239] Thus, any connection to the real world was remote.

There is an unsatisfactory quality to the Court's analysis. Reliance on the ad hoc balancing test may be too unprincipled, allowing each judge to see personality or community interests as he or she wishes. There would seem to be particular pressure to act on community interests, such as crime, to the detriment of individual interests. Certainly the haphazardness of this case-by-case approach is a danger to legal security. It will take some time before organizing principles are evident around which the law may be structured. In the interim, however, there will be great uncertainty. Because lower courts or other decision makers will not be sure which standards to apply, this carries a risk of curtailing freedoms.

---

[233] *See id.* at 374 ("What type and how intense a matter is . . . cannot be described abstractly, but can be satisfactorily determined only upon a full consideration of all relevant factors in a particular case.").

[234] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (plurality opinion) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.").

[235] Under German law, a tie vote results in the lower court ruling remaining in effect. *See* Gesetz über das Bundesverfassungsgericht (BVerfGG) § 15(3).

[236] *See Criminal Diary Case*, 80 BVerfGE at 376–77. The Court did not find any general protection for diaries. Therefore, much depended on the content of the diaries, and how one valued it.

[237] *Id.* at 377–79.

[238] *Id.* at 381. Accordingly, these Justices believed that the diaries should be "absolutely protected as within the area of private life-formation." *Id.*

[239] *See id.* at 381–82.

B. Informational Self-Determination

The most notable manifestation of the concern for preserving an intimate realm to life, expressed by the Court in *Microcensus,* is the concept of informational self-determination. This means, fundamentally, a right to control access to and dissemination of personal data, including protection against revelation of one's private affairs. It is rooted in a desire to preserve the integrity of human personality against the onslaught of the technological age and of prying eyes. Thus, the Court has sought to carve out an area of inviolable human interiority as a secure haven. In a sense, this represents adjustment of the Kantian ideal of moral autonomy to the conditions of the modern age.

1. Census Act Case

Building on *Microcensus*, the *Census Act Case*[240] strove to preserve the inviolability of human personality amidst revolutionary changes in the computer age.[241] The controversy concerned the Federal Census Act of 1983 (the "Act"), which required the collection of comprehensive data concerning the Federal Republic's demographic and social structure. The Act set the parameters for the country's population count and also required rudimentary personal information, such as name, address, gender, marital status, nature of household occupants, religious affiliation, job occupation, and work setting.[242] The Act also required citizens to fill out detailed questions concerning their sources of income, educational background, mode of transportation to and from work, and use of dwelling, including method of heating and utilities.[243] The Act further allowed information obtained to be transmitted to local government, which could then use the information for purposes of planning, environmental protection, and redistricting. Local government could even compare information to housing registers and, if necessary, correct them.[244]

Over one hundred persons filed suit against the Act, complaining that the Act's intrusiveness threatened their privacy rights.[245] The Court agreed, at least temporarily, and suspended the census until its constitutionality could be determined. The case is thus an example of the rare instance where individuals may directly pursue claims to the Constitutional Court without having to exhaust legal remedies because of an immediate threat to a fundamental right.[246]

---

[240]65 BVerfGE 1 (1983).

[241]*Census Act Case*, 65 BVerfGE at 3.

[242]*See id.* at 4–7, 12–13.

[243]*See id.* at 5.

[244]*See id.* at 7–8.

[245]*See* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 333.

[246]Professor Schwartz records that although it was passed without controversy by the *Bundestag*, the law triggered a storm of protest. Hundreds of citizen initiative groups called for a boycott of the census. Günter Grass, the Nobel Prize winning author, called the law a "monster." Even a high census official admitted that the questionnaire "was written in an exceedingly authoritative style and frightfully unclear language." *See* Schwartz, *supra* note 5, at 688.

Professor Schwartz writes that the *Census Act Case*, and the 1983 Federal law that gave rise to it, did not occur in a legal vacuum. As early as 1970, state laws were enacted to provide for the transmission,

At the heart of *Microcensus* and the *Census Act Case* is the concern that intrusive and comprehensive surveys of the population will yield personality profiles which, with the aid of modern computing techniques, will facilitate the state's ability to access such information at will and use it as it sees fit.[247] From the Kantian perspective, this carries the danger of converting human beings into mere objects of statistical survey, depersonalizing the human element. From the standpoint of human autonomy, the Court feared that gathering, storing, and using personal information would threaten human liberty. The more that is known about a person, the easier the person is to control.[248] As the Court noted, these concerns are especially heightened with the advance of modern computer technology and its capacity to access human habit and capabilities.[249] The amount of personal information stored in and accessible by computers is staggering, including information over credit history, taxes, social security, and travel plans.[250]

The background of German personality law provides the theoretical base for these concerns. Since the "focus of the constitutional order . . . is the value and dignity of the person, who operates in free self-determination as a member of a free society," these values must be sustained "in view of modern developments and their accompanying threats to human personality."[251] Human dignity must be adapted amidst changing economic and social conditions if human personhood is to remain inviolate in modern society. In this way, the Constitutional Court acknowledged that changing social conditions require adaptation in the application of core concepts.

Just this motivation led the Constitutional Court to announce a general right of informational self-determination. Informational self-determination means

---

processing, and protection of data. All states subsequently adopted legal regimes. Later laws were fashioned, at both the federal and state levels, that granted individuals certain rights to be informed of data banks, and to comment and correct false information contained in them. Thus, the 1983 Federal Law arose amidst a legal culture already well accustomed to data protection. Protests, accordingly, reacted against what were well-focused and understood dangers associated with processing of information. *See id.* at 688–89.

[247]For example, the Court in the *Census Act Case* observed that modern computing techniques can gather and store practically limitless information about people that is accessible "in seconds." *Census Act Case*, 65 BVerfGE at 42. This "information . . . can produce a . . . personality profile, which the person affected cannot control . . . and induces psychological pressure on behavior." *Id.*

[248]*See* Schwartz, *supra* note 5, at 676. Once information is available on computer, it could be put to a variety of uses. Thus, control over information could result in political or social power. *See id.* at 678. For example, "use of computerized criminal history records affects both the chances for employment of ex-convicts and the balance of power between defense attorney and prosecution." *Id.* at 678 n.16.

[249]Since the 1969 decision *Microcensus*, the Court observed, the advance of computer technology and capability has changed radically. Before, information was entered manually by keypunch and stored in separate areas, accessible mainly by expert personnel, making it more difficult to fashion together and obtain a personality "portrait." Today, information is entered and retrievable electronically by almost anyone, which facilitates instantaneous access to far-ranging information. *See Census Act Case*, 65 BVerfGE at 4, 17, 42.

[250]*See* Schwartz, *supra* note 5, at 677. Professor Schwartz notes that in the United States, the world's largest computer user, the government "has an average of fifteen files on every citizen." *Id.* at 677 n.12. Germany is the second largest user of computers. *See id.* at 677 n.10.

Professor Schwartz cites authority that in America, "since the federal government's entry into the taxation and social welfare spheres, increasing quantities of information have been elicited from citizens and recorded." *Id.* at 678 n.14 (citation omitted). Many hospitals' resources are "devoted to the task of recording information about patients." *Id.* (citation omitted).

[251]*Census Act Case*, 65 BVerfGE at 41.

> the authority of the individual to decide fundamentally for herself, when and within what limits personal data may be disclosed. . . . [T]his decisional authority requires a special measure of protection under present and future conditions of automatic data processing. [For example,] the technological capability of storing [highly] personalized information concerning specific people is practically unlimited and retrievable in seconds . . . without concern for distance. . . . [T]his information, when connected to other data sources, . . . can produce a complete or partial personality profile, over which the affected individual has no control, and the truth of which he cannot confirm. . . . The possibilities of acquiring information and exerting influence have increased to a degree never previously known.[252]

This rise in technological capability poses severe threats to human personality and human autonomy. "An individual's right to plan and make decisions freely may be severely curtailed, if she does not know or cannot predict adequately what personal data is known or may be disclosed."[253] It is unhealthy for society "when citizens do not know who knows what about them, and when they know it."[254] Not knowing others' knowledge of their affairs may lead citizens to curtail their activities or "refrain from exercising rights . . . like associational rights," or expression, religious, or occupational freedoms. Certainly, official possession of detailed personal information carries a serious threat of abuse, including coercion and manipulation of human autonomy.[255] "This would damage an individual's personal development, and also the common good, because self-determination is an elementary condition of a free democratic society based on citizens' ability to act and to participate."[256] Accordingly, data use that has the potential to influence people must be strictly controlled. "[A]n individual must be protected against unlimited collection, storage, use and transmission of personal data . . . as a consequence of the free development of personality under modern conditions of data processing."[257] In essence, informational self-determination follows from human autonomy; in the modern information age, control of information is power. Thus, control over personal information is the power to control a measure of one's fate. This is indispensable to the free unfolding of personality.

The right to informational self-determination, like all basic rights, is not absolute in the carefully calibrated value-order of the Basic Law.[258] Since persons "develop within the social community . . . personal information is also a reflection of social reality."[259] Thus, there is a social dimension to personal data too, posing a tension between personal and social components to information. Government and other actors in society, such as banks or companies, need information about people to plan and

---

[252] *Id.* at 42. Such use could induce psychological pressure to conform, out of fear of how others might employ such personal information. *See id.*

As the Court noted, the concept of informational self-determination emanated from earlier cases too, such as *Lebach*, 35 BVerfGE at 220; *Divorce Records*, 27 BVerfGE 344, 350 (1970); and *Microcensus*, 27 BVerfGE at 36. *See Census Act Case*, 65 BVerfGE at 42.

[253] *Census Act Case*, 65 BVerfGE at 43.

[254] *Id.*

[255] *See id.*

[256] *Id.*

[257] *Id.*

[258] *See id.*

[259] *Id.* at 44.

serve the public weal. Democracy itself depends on the free flow of information.[260] "The Basic Law . . . has resolved the tension between individuality and society by constituting individuals as community-bound and community-related."[261] Therefore, "individuals must . . . accept limitations on their right to informational self-determination for reasons of overriding public interest (*überwiegenden Allgemeininterresse*)."[262]

Just what an "overriding public interest" is can only be determined by resort to standard German norms. First, the law must have a (constitutional) legal basis, which makes clear the conditions and reach of the limitations on freedom and thereby satisfies the *Rechtsstaat* command that norms be clearly stated.[263] Second, the law must satisfy the Proportionality Principle, which, as we know, mandates that freedom be limited only to the degree necessary to satisfy public interests. Because "of the dangers of automatic data processing . . . the legislature must, more than ever, adopt organizational and procedural safeguards to diminish violations of individual personal rights."[264] Only then can one test the strength of the public interest.

Testing the Act against these principles entailed a detailed and comprehensive analysis, filling seventy-one pages of the official reporter. First, the Court evaluated whether the information was actually necessary by testing legislative ends.[265] The Court concluded that it was legitimate to perform a census for social and economic planning.[266] However, collection and storage of data for other purposes would be constitutionally suspect. The Court "carefully scrutinized the nature of the information collected, the methods of its storage and transmission, and its particular uses" in order to assure that the stated uses properly fell within police powers and did not pose an undue threat to human liberty.[267] Protection of information thus depended on a distinction "between personality-related information that is gathered and processed in an individually nonanonymous manner and data that is census-related."[268] The Court emphasized that persons should not be treated as "mere information-objects," because depersonalizing people as information sources jeopardizes their essence as "spiritual-moral" persons.[269] The Court directed that protective measures be used to assure that personality profiles of individuals could not be obtained. Cloaking information in anonymity was the key safeguard identified by the Court.

---

[260] *See id.*

[261] *Id.*

[262] *Id.*

[263] *See id.*

[264] *Id.*

[265] *See id.* at 44–46.

[266] *See id.* at 47.

[267] *See* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 335. While it was necessary for state purposes to collect information, the Court stipulated that data may be collected only when "suitable as well as necessary." *Census Act Case*, 65 BVerfGE at 46. While recognizing that certain data for statistical purposes, including that necessary for operation of the social welfare state, necessitated a stockpiling of data for future use, limits must still be set concerning such information. Clear goals for use of such information must be identified. *See id.* at 47–48. To better assure confidentiality, surveys could be returned through the mail at government cost. Attributes identifying people were to be deleted as soon as possible and, until then, held confidentially on a need-to-see basis. *See id.* at 60.

[268] *See Census Act Case*, 65 BVerfGE at 45.

[269] *Id.* at 48.

Other protective measures suggested by the Court included confidentiality obligations and a prohibition against employing census takers in locales where they also lived.[270] The Court ultimately sustained most of the Act, although it invalidated several provisions, including one that allowed local officials to "compare census data with local housing registries," on the ground that combining these statistics might allow officials to identify particular persons, thereby violating the core of personality.[271]

In the wake of the *Census Act Case*, it is worth observing what a remarkable act of judicial activism the case represents.[272] First, the Court suspended the Act until its constitutionality could be determined, ultimately requiring the German *Bundestag* (parliament) to amend certain provisions before the census could be carried out. This delayed the census for four years at notable cost.[273] Second, the Court established concretely a right of informational self-determination from the textual authority of Articles 1 and 2. That language, of course, does not self-evidently bestow citizens' control over personal data. Rather, the Court extended the principle animating the provisions to carve out this radiation of autonomy. In this way, the Constitutional Court acted in a manner quite like the Supreme Court in *Griswold v. Connecticut*, in inferring a right of privacy from the Bill of Rights.[274] At the root of the Constitutional Court's decision was the vision that human dignity and autonomy must be preserved against the onslaught of the modern computer age. Thus, measures needed be taken to assure that the collection, storage, and use of personal data is justifiable pursuant to the *Rechtsstaat*, and that this power not be abused.[275]

---

[270]*See id.* at 49–51, 60.

[271]*Id.* at 64. Other deficiencies identified in the law were a lack of clarity in certain provisions, which therefore failed to place citizens on adequate notice of the law; failure to specify clearly projected uses of the information; and failure to obtain permission for transmission to authorities of certain information, such as religious affiliation. *See id.* at 64–66.

[272]Professor Schwartz records that since the *Census Act Case*, government and courts have generally striven to meet the challenges of the case and conform the law to constitutional standards. The German judiciary has invalidated laws that do not adequately spell out projected uses of data or grant citizens satisfactory inspection rights. *See* Schwartz, *supra* note 5, at 698–99. State laws have generally provided for extensive inspection and informational rights, responding to the Constitutional Court's "call for greater involvement of the citizen in his role as data subject." *Id.* at 699. The *Census Act Case*, not surprisingly, also inspired an outpouring of scholarly commentary. *See id.* at 698 n.118 (citing authorities).

Yet, Professor Schwartz notes, there have been setbacks too. *See id.* at 700–01. Legal regulation of data use by police and antiterrorist agencies has been lax, probably on account of the majoritarian pressure to fight crime and terrorism. *See id.* at 700. German authorities responded harshly to protests of the next census, approved by the Constitutional Court after the *Census Act Case*. *See id.* at 700–01.

[273]*See* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 332. After the *Census Act Case*, the government decided to abandon the census. Instead, the *Bundestag* drafted a new census bill, which the Constitutional Court approved. *See, e.g.*, 42 NJW 707 (1989); 40 NJW 2805 (1987).

[274]*See Griswold*, 381 U.S. at 484 ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy." (citation omitted)).

[275]Interestingly, when Germany reevaluated the Basic Law in 1993, the Constitutional Commissioners decided not to codify explicitly informational privacy, seemingly preferring court-created law. *See* CURRIE, *supra* note 7, at 321 n.324. In this way, the Constitutional Commissioners paralleled the course of the drafters of the Civil Code, who decided against codification of a general right of privacy. *See* Krause, *supra* note 59, at 485. Thus, like informational self-determination, a general right of privacy has been a court-created doctrine, in both Germany and America. Indeed, this brings into clear relief the role of German courts as

The American constitutional case which comes closest to addressing the German concept of informational self-determination is *Whalen v. Roe*,[276] which involved a patient-identification requirement in a statute providing for a centralized computer file of all persons who obtained drugs, both legal and illegal, pursuant to a doctor's prescription. Although the Supreme Court, like the Constitutional Court, recognized that there was a "threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files,"[277] the Court nevertheless held that "neither the immediate nor the threatened impact of the patient-identification requirements . . . is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment."[278] The American Court hesitated to declare any substantive right, preferring to wait and see whether case law would present an actual intrusion into privacy rights. In this manner, American law, reflecting common law orientation, represents a tentativeness not characteristic of German law.[279]

It is interesting to speculate why American law has not taken a turn similar to German law, even though the growth of data and data processing in the United States has paralleled and, indeed, eclipsed that in Germany. Thus, the threats that the information age pose to human autonomy in America are at least equal, if not greater, than in Germany. Textually, both the American and German Constitutions provide a basis for recognizing such a right. The First Amendment, for example, plausibly bestows certain rights to knowledge of how information, especially personal information, is to be gathered or used.[280] The Fourth Amendment confers certain rights

---

active participants in the creation of the law. This runs counter to the stereotype of civil courts as blindly applying pre-determined code-law.

[276]429 U.S. 589 (1977).

[277]*Id.* at 605. For example, the "collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed." *Id.*

[278]*Id.* at 603–04. Under German concepts, "the Court should have applied the right of informational self-determination by first asking if the State had decided what it planned to do with the data. Although New York had recorded one hundred thousand prescriptions each month during the twenty months that the law had been in effect, it had used this information in investigations of exactly two persons. . . . [P]rotection of human autonomy . . . require[s] judicial inquiry into the influence on the individual of having his personal information used in a specific system or indefinitely stored for future application." Schwartz, *supra* note 5, at 684.

[279]The position of Justice Brennan most approximates the German one. He observes that an individual has a privacy "'interest in avoiding disclosure of personal matters,'" and that "[b]road dissemination by state officials of such information . . . would clearly implicate constitutionally protected privacy rights." *Whalen*, 429 U.S. at 606 (Brennan, J., concurring) (quoting the majority opinion). Justice Brennan states, moreover, that "[t]he central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology." *Id.* at 607 (Brennan, J., concurring). However, Justice Stewart, responding to Justice Brennan, seems to have articulated the sense of the Court in dampening any recognition of "a general interest in freedom from disclosure of private information." *Id.* at 609 (Stewart, J., concurring).

[280]*See, e.g.*, Roe v. Wade, 410 U.S. 113, 209 (1973) (Douglas, J., concurring) (stating that "'liberty' as used in the Fourteenth Amendment [includes] . . . autonomous control over the development and expression of one's intellect, interests, tastes, and personality"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 112 (1973) (Marshall, J., dissenting) (arguing that, because education affects ability of child to exercise First Amendment rights as receiver of information and ideas, there is intimate relationship between

of privacy against discovery of personal information, especially that in which one has a "reasonable expectation" of privacy.[281] The Due Process Clause protects against arbitrary intrusion into matters of personal security and liberty.[282] Human dignity also has been a theme of the American Bill of Rights, particularly its cognates of self-determination and autonomy.[283] Together, these rights would seem to convey a certain zone of privacy which, it might be argued, covers informational privacy. In this way, a right to informational privacy and self-determination plausibly could exist to safeguard human liberty and self-government in the information age.

---

personal interest and exercise of rights justifying constitutional protection); *Griswold*, 381 U.S. at 482 ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . . .").

[281]*See* Katz v. United States, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring) (explaining that Fourth Amendment protections are based on both subjective and socially reasonable expectations of privacy); Murphy v. Waterfront Comm'r, 378 U.S. 52, 55 (1964) (noting that Fifth Amendment privilege against self-incrimination reflects "respect for the inviolability of the human personality").

[282]*See, e.g.*, *Casey*, 505 U.S. at 851 (plurality opinion) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

[283]*See, e.g.*, *id.* at 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."); National Treas. Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting) ("In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use."); McClesky v. Kemp, 481 U.S. 279, 336 (1987) (Brennan, J., dissenting) ("Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess."); Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."); Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (stating that individual's right to protection of his own good name "reflects . . . our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty").

Yet, American law has not developed along these lines.[284] There are a number of possible explanations for this. The Supreme Court may feel less compelled to address changing social and economic conditions, or more restrained in declaring rights to be fundamental in the absence of clear textual or historical support. The Court may be limited because *Whalen*, like all substantive due process cases, is anchored in privacy, not autonomy as the *Census Act Case*, and privacy confers less power or control than autonomy. Similarly, our Constitution lacks an underlying philosophic base corresponding to the influence of Kantian morality on the German Basic Law, which results in fewer substantive protections. On the other hand, the Supreme Court may simply believe that Congress or state courts or legislatures have sufficiently protected these rights, leaving little need for Court activism.[285] Whatever the reason, as a matter of comparative law, the German Court is addressing this aspect of the computer age in a more rights-protective manner than the Supreme Court.

2. *Confidentiality*

The concept of informational privacy in German law extends beyond data processing. A frequent application of the doctrine has occurred in the context of confidentiality over personal matters. Good examples of this strand of application appear in cases concerning the confidentiality of medical files,[286] general inquiries into

---

[284]Under American law, the privacy on which informational self-determination most logically could be based would be either a matter of constitutional law under the Due Process Clause or a matter of tort law. Under the Due Process analysis of enforcing privacy rights, *Whalen*, discussed *supra* notes 276–79 and accompanying text, is the main case.

Under tort law, the concept would rest on privacy torts. Most states recognize an invasion of privacy action for public disclosure of private facts, through common law or by statute. State definitions of public disclosure torts, covering matters like AIDS, abortion, or mental illness, parallel the Restatement (Second) of Torts § 652D (1977). *See* Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 432–36 (1996).

Some scholars have picked up the charge. *See, e.g.*, Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1000–01 (1964) (arguing that privacy represents freedom from public scrutiny and includes "prohibiting the disclosure of confidential information obtained by government agencies"); Charles Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968) (arguing that "[p]rivacy . . . is control over knowledge about oneself"). *But see* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 408 (1978) ("[W]e have no right, by controlling the information that is known about us[,] to manipulate the opinions that other people hold of us.").

Recently, an emerging tort of "breach of confidence" has been the focus of scholarly attention. *See, e.g.*, Mintz, *supra*, at 465; Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change*, 1890–1990, 80 CAL. L. REV. 1133, 1135 (1992) (defining breach of confidence as "a concept of privacy based on the individual's control of information rather than on generalized social controls on information, and . . . an enforceable obligation of confidentiality for those possessing private information rather than . . . a duty visited on publishers").

[285]The notion of sufficient legislative protection seems to be a basis on which *Whalen* was decided: The Court noted precautions taken by the New York State Department of Health to ensure confidentiality, such as a locked wire fence, alarm system, and storing the computer tapes in locked cabinets. 429 U.S. at 594. However, precautions are only as good as the people who implement them. *See* John Markoff, *Used Computer Bears Old User's Secrets*, N.Y. TIMES, Apr. 4, 1997 (late edition), at A14 (noting that resold computer retained confidential pharmacology files of patients, disclosing sensitive information, such as treatment for AIDS or depression).

[286]*See Medical Records*, 32 BVerfGE 373, 379 (1972).

mental and physical health,[287] and divorce records.[288] These cases are grounded in the theory of German personality law described above: People are spiritual-moral beings who possess an inviolable core of privacy. Entry into the private sphere is barred unless the measure is justified by overriding public need and is proportional to the end sought. In both types of cases, the Court considered the information sought—divorce records and patient files—to be within a person's private sphere, but not the inviolable sphere.[289] Both sets of cases, therefore, required justification pursuant to the *Rechtsstaat* principle of proportionality, but neither of them attained it.[290]

Divorce Records is the more interesting case. Here the Court protected against unauthorized disclosure of divorce records sought by officials for use in a disciplinary hearing against the former husband. Divorce records were, the Court concluded, a record of intimate details of a couple's life together, scrutiny of which ordinarily did not extend beyond participants in the divorce proceeding.[291] In its analysis, the Court demonstrated the Proportionality Principle's bite. "Measures taken in service to a desired end must be necessary and suitable and not disproportionately intrusive in curtailing rights in relationship to the objective sought."[292] The problem was that no adequate proof was offered as to why the documents were needed.[293] At a minimum, officials must demonstrate why private matters are relevant to job performance.[294] Even if the divorce records proved necessary, a less intrusive measure, such as redacted versions, would be more suitable to protection of privacy. Moreover, other avenues of proof should be pursued prior to using the records.[295] Along similar lines, the Court has protected as confidential unauthorized recordings of private conversations.[296] Conversation, like private matters, reflects human personality; therefore, it is not accessible unless consented to or justified on proportionality grounds.

The German focus on rights of privacy has general resonance in American law. Confidentiality rights have historically been the subject of common law privilege (e.g., attorney-client privilege)—or statutory law (e.g., patient-client privacy). However, the Supreme Court, in recent years, has announced certain confidentiality rules as a matter of federal evidence law in a variety of settings, most notably in attorney-client relations,[297] spousal relations,[298] and psychotherapist-patient relations.[299] A difference between the laws is that American law is grounded mainly in privacy, whereas German law is part of human personality. This has significant consequences, since American

---

[287] *See* 20 Europäische Grundrechte Zeitschrift 415, 419 (1993) (BVerfGE).

[288] *See Divorce Records*, 27 BVerfGE at 351–52.

[289] *See Medical Records*, 32 BVerfGE at 379–80; *Divorce Records*, 27 BVerfGE at 351. For a discussion of Sphere Theory, see *supra* notes 218–30 and accompanying text.

[290] *See Medical Records*, 32 BVerfGE at 379–80; *Divorce Records*, 27 BVerfGE at 351.

[291] *See Divorce Records*, 27 BVerfGE at 351–52.

[292] *See id.* at 352.

[293] *See id.* at 353. Proof of the necessity of obtaining the documents would have required notice to and participation by the couple. *See id.*

[294] *See id.* at 354.

[295] *See id.*

[296] *See Tape Recording Case*, 34 BVerfGE 238, 245–51 (1973).

[297] *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[298] *See* Trammel v. United States, 445 U.S. 40, 53 (1980).

[299] *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1928–29 (1996).

privacy protects against official attempts at discovery, whereas personality more broadly protects the individual per se, so that he or she might flourish.[300]

3. Reputational Interest

A more innovative aspect of informational self-determination is that it endows individuals with the right to control the portrayal of the facts and details of their lives, even if uncomfortable or embarrassing. This right empowers persons to shield hurtful truths from public scrutiny in order to safeguard reputation or other personality interests. The right also encompasses protection of personal honor as an outgrowth of personality.[301] As such, these rights can be extended to eclipse other basic rights, including, most notably, Article 5 expression guarantees.

(a) Drunkard Case

A good example of personal control over truthful, but harmful, information is the *Drunkard Case*,[302] where the Court prohibited the public announcement of persons legally determined to be incapacitated because of drunkenness, drug addiction, being a spendthrift, or other such disfavored status.[303] The purpose of such public announcements was protection of the general public, who otherwise might unwittingly transact business with such persons. However, control of the gathering and use of such personal information, including "the act and status of being placed under legal guardianship," is protected.[304] "The right of informational self-determination protects much more . . . than data processing . . . . A public announcement . . . is a special form of official transmission of data."[305]

Applying *Rechtsstaat* principles to the state's chosen method of communication, the Court invalidated the publication mechanism, notwithstanding its observation that "public access to [this] information is necessary to accomplish the statutory purpose" of informing the public of the restoration to full contracting capacity of individuals previously found legally incapacitated.[306] "Because of the anonymity of [modern] life relations, the mobility of the population and the oversaturation of information [in today's age]," it is doubtful that general announcements will reach the intended audience.[307] The choice of communicative methods must be more tightly tailored to achieve desired objectives. Thus, the means chosen failed the Proportionality test. This

---

[300] *See* Fletcher, *supra* note 9, at 179.

[301] There is a long history, going back to the early twentieth century, of civil court protection, through interpretation of the Civil Code, of such privacy rights. Thus, as noted previously, the Constitutional Court has "constitutionalized" most of these developments of the civil court. *See* Krause, *supra* note 59, at 486–87.

[302] 78 BVerfGE 77 (1978).

[303] *See id.* at 78.

[304] *Id.* at 84.

[305] *Id.* (analogizing release of information about one's status to release and use of computerized personal data (citing *Census Act Case*, 65 BVerfGE at 41)).

[306] *Id.* at 86.

[307] *Id.*

line of analysis is familiar enough to readers knowledgeable of American heightened scrutiny methodologies.

A second aspect of the *Drunkard Case* distinguishes German law from American. "[P]ublic notice of being placed under guardianship on account of alcoholism or being a spendthrift is a severe violation of [informational self-determination.]"[308] This "severely impacts the person in her entirety. . . . It places a negative stamp [on reputation,] and complicates application of the Social State Principle [*Sozialstaatprinzip*] oriented support measures [*Hilfsmassnahmen*] designed to assist recovery from addiction and facilitate social reentry."[309] Indeed, such notification impacts the person "at an especially critical phase in his beginning reentry into society."[310]

Reputation and its radiation to human personality are important reflections of the state of the human condition in modern society. Over these matters, *Drunkard* echoes the essential teaching of German law: Human personality and its nurturing are core concerns of the constitutional order. Because of the centrality of personality, adjustments must be made to the legal order to further its facilitation, as in guardianship law in *Drunkard* and expression law in *Lebach* and related cases, as discussed next in Section C.[311] Moreover, the dignitarian radiation of the Basic Law necessitates a reaching out and nurturing of the weaker elements of society, such as rehabilitated criminals or troubled souls. Human dignity, as it were, calls for application of the golden rule: How would you want to be treated if you were in that state? Moreover, the quality of society is to be judged by how it treats its weaker members. Individuals are not just independent contractors; they are "community-bound" and "community-connected." Thus, the community, as a whole, has obligations to these persons, just as individuals are to be responsible as rights-holders. Dignity, in other words, acts as a "higher law" by which individuals and society are judged.

A brief look at American law underscores deep cultural differences over these points. At the constitutional level, the cases most like *Drunkard* are *Wisconsin v. Constantineau*[312] and *Paul v. Davis*,[313] both decided under procedural due process. It is noteworthy that public posting of a disfavored status (such as drunkenness in *Drunkard* and *Wisconsin*, or shoplifting in *Paul*) is treated in American law as raising only a procedural inquiry as to whether the person affected had adequate notice and participatory rights in determining whether the measure was justifiable. There is no

---

[308] *Id.* at 87.

[309] *Id.* In this way, *Drunkard* is similar to the solicitude rendered weaker members of society in *Lebach*, discussed *infra* notes 377–83 and accompanying text, where the Court was concerned about the reentry into society of a rehabilitated felon. The Social State Principle is part of the objective norms of the Basic Law, obligating the state to protect and promote the welfare of the people. *See supra* note 11 and accompanying text.

[310] *Drunkard Case*, 78 BVerfGE at 87. Those who desire that the notification be rendered can so choose, consistent with the idea of control over personal information. *See id.*

[311] *See infra* notes 377–83 and accompanying text.

[312] 400 U.S. 433, 437 (1971) (invalidating statute that allowed posting of sign, without notice or hearing, forbidding sale of liquor to person because such sign impaired person's good name without fair determination).

[313] 424 U.S. 693, 701 (1976) (upholding dismissal of suit challenging police chief's posting sign identifying person as "active shoplifter," despite contrary determination in *Constantineau*).

inquiry into personality rights, phrased in the American scheme as privacy rights, despite the obvious tarnishing of reputation that occurs. This would seem to reflect the lack of focus in American law on the centrality of personality. Certainly there is little solicitude for weaker social members, who might seek to regain some semblance of ordinary life. In this respect, American outcasts encounter a harsh world.[314]

(b) Mephisto

Protection of honor and reputation in Germany is itself a highly valued manifestation of human dignity.[315] No case represents this view better than the famous

---

[314]The difference in treatment between German and American law is attributable also to the difference between positive and negative approaches to the Constitution. *See supra* notes 14–28 and accompanying text. Because the American Constitution ordinarily lacks an objective dimension, there is no corresponding claim to governmental action. No case better illustrates this point than the infamous *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), where the Court refused to require state intervention despite the state social service department's knowledge that one of its minor clients was the subject of such severe child abuse at the hand of the father as to ultimately render the child incapacitated. *Id.* at 196–97. In *DeShaney*, the Court stated:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

Id. at 195–96.

Even under the procedural due process analysis, the treatment of reputation is inconsistent, if not illogical. Despite the similarity of the facts and dates of *Constantineau* and *Paul*, *see supra* notes 312–13, the cases are incompatible. In *Constantineau*, the Court determined that the posting of a sign of Constantineau's excessive drinking injured his reputation, and was therefore unconstitutional because he was not rendered notice and hearing rights to determine the appropriateness of this measure:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

Constantineau, 400 U.S. at 437.

Paul flew in the face of this logic, which seems inexplicable, since *Constantineau* was decided only five years earlier. In *Paul*, the Court found no reputation interest implicated in the placement of Davis's name on a flyer sent to 800 merchants designating him an active shoplifter, even though the charges were dismissed. The Court concluded that reputation alone was not a constitutionally protected liberty interest. *Paul*, 424 U.S. at 701.

The illogic between *Constantineau* and *Paul* shows, at a minimum, the confusion of American law. By comparison, the secure anchoring in German law results in strong protection of personality.

[315]Protection of honor and reputational interests in Germany has a long pedigree. Montesquieu thought that honor was the basis for monarchy, because "it is the nature of honor to aspire to preferments and distinguishing titles . . . and a Monarchial government supposeth . . . preeminences, ranks, and likewise a nobel descent." CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 121–22 (D. W. Carrithers ed., 1977). Thus, honor seems particularly well suited to an aristocratic society, like Germany was for much of its history.

Since the adoption of the German Civil Code, honor and reputation are protected as part of the general right of personality, which is anchored in section 823 of the Civil Code. *See* Krause, *supra* note 59, at 487, 499–500.

The Civil Code reflects Roman law roots, including compensation for mental suffering arising from

Mephisto case, a seminal case of artistic freedom, where the Court split 3-3 in upholding an injunction against publication of Klaus Mann's novel of the same name, on the ground that it defamed the memory of a famous deceased actor who had been quite active in the theater during the Nazi period.[316]

All basic rights, including artistic rights, must be interpreted within the value order of the Basic Law, according to the Court. Since the Basic Law is founded on the view "of the human person as an autonomous being developing freely within the social community," artistic freedom must be measured against Article 1 human dignity, the supreme value.[317] To the extent artistic or communication freedoms conflict with human dignity, they may have to yield, depending on the concrete balancing of the freedoms at issue. For example, in *Mephisto*, it might be argued that the tangible effect of Mann's novel was to tarnish the memory of the deceased actor. Disparagement of the dead could be thought to be inconsistent with human dignity.[318] "[A]n artist's use of personal data about people in his environment can affect their social rights to

---

violation of honor. *See* Warren & Brandeis, *supra* note 59, at 198. These roots have given rise to an extensive body of law, protecting reputation, one's name, and a right to reply in the press, as elaborated here. *See id*; *see also infra* notes 327–37 and accompanying text.

In America, the development was different. For a time the civic Republican emphasis on reputation and virtue animated a strong concept of honor. But eventually the revolutionary idea of equality among all peoples completely upturned any concept of nobility. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 39, 207, 233, 285 (1991). Honor still persists in America as a legal concept, primarily through state defamation laws, but only to the extent not eclipsed by the landmark case, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which redefined the relationship between honor, furthered in state libel law and the First Amendment. *See id.* at 283.

In America today, honor might be thought of as "the personal reflection of the status which society ascribes to [one's] social position." Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 700 (1986).

[316]*See Mephisto*, 30 BVerfGE 173, 174 (1971). The central character of the novel was an actor named Hendrik Höfgen, whom Klaus Mann, the son of the great German writer Thomas Mann, portrayed as having made his name by playing the devil in Goethe's *Faust* during the Nazi period. While other artists were persecuted, Höfgen "betrayed his own political convictions and cast off all ethical and humanitarian restraints to further his career by making a pact with . . . [those in] power in Nazi Germany." *Id.* at 174. The story was based on a real-life actor, Gustaf Gründgens, whose career paralleled the fictitious Höfgen in important respects. *Mephisto* is extensively analyzed by Quint, *supra* note 14, at 290–307, and by Eberle, *Public Discourse*, *supra* note 6, at 834–41.

The suit was brought by Gründgens' son to protect the honor and dignity of the dead, illustrating the extraordinary protection afforded honor in Germany.

[317]*Mephisto*, 30 BVerfGE at 193, *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 428.

[318]*See id.* at 194. "It would be inconsistent with the constitutional guarantee of the inviolability of human dignity . . . if a person's general claim to respect . . . could be degraded or debased even after his death." *Id.* This point became important, because Gründgens died shortly after plans to publish the novel were announced. His son filed the action, proceeding under § 823(1) BGB, a general tort provision, which provides recovery for actions that "intentionally or negligently, and unlawfully, injures the life, body . . . liberty . . . or any other right of another person," seeking redress for harm to the memory of his father. *Id.* This interest was within the concept of dignity, according to the Court. The Court observed, however, that this protection diminishes as memory of the deceased recedes. *See id.*

For discussion of rights of personality extending after death, see H. HUBMANN, DAS PERSÖNLICHKEITSRECHT 265–68, 340–48 (2d ed. 1967). American law generally refuses recovery for reputational harm after death. *See* Quint, *supra* note 14, at 296 n.162.

respect and esteem."[319] To that extent, communication freedoms may have to yield to the superior value of dignity, as manifested in this interest in honor and reputation. In this manner, the Court implied limits on the seemingly boundless guarantee of artistic freedom, as it previously had implied limits to the seemingly express limitation of personality rights in *Elfes*.[320] In both cases, the Court acted on behalf of its vision of human dignity. In *Mephisto*, this vision acted to limit expression rights; in *Elfes*, it limited restriction of freedom of action. Human dignity thus becomes the glue between both rights-enhancing and rights-constricting interpretations. Certainly this illustrates the Constitutional Court's powers of creative interpretation, a skill the Supreme Court too has sometimes displayed.[321]

This reasoning points to a fundamental contrast with American law. Anchoring reputational rights in the malleable concepts of human dignity, and accompanying personality, allowed the Constitutional Court, in essence, to imply a constitutional right to be free from defamation. This could be justified from the "objective" theory of constitutionalism, requiring the state, as it does, to realize the norms of the value order.[322] By contrast, American law is founded on the concept that "public" persons are to be treated as "'men of fortitude, able to live in a hardy climate.'"[323] Accordingly, public men and women in America are expected to endure the insults and abuses common to public life. Based on such thinking, the Supreme Court has widely immunized speakers from defamation claims.[324] Under American principles, Gründgens, the actor protected in *Mephisto*, would qualify as a public figure subject to these immunity rules.[325] In this way, one notices that American individuals are left alone to confront criticism or disparagement, lacking any claim to official protection, whereas German individuals can call on communal support.[326] Constituting community on a core of values makes a big difference.

---

[319]*Mephisto*, 30 BVerfGE at 195. The Court reasoned that a work of art could harm human dignity by misusing facts of a person's life. Whether this is so or not depends on the nature of the portrait drawn, particularly its truth or falsity. Reputational interests must then be balanced against artistic values to see which is weightier in the circumstance. This test involves a "weighing of all circumstances of the case," equivalent to an ad hoc balancing test. *Id.* For evaluation of this general balancing test, see Eberle, *Public Discourse, supra* note 6, at 835-36, 841-42.

[320]*See supra* notes 128–39 and accompanying text.

[321]*See, e.g., Griswold*, 381 U.S. at 483 (deriving right of privacy from penumbras that emanate from specific rights).

[322]*See* Eberle, *Public Discourse, supra* note 6, at 838.

[323]New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964) (quoting Crain v. Hurney, 331 U.S. 367, 376 (1947)).

[324]*See Sullivan*, 376 U.S. at 283.

[325]Gründgens would likely be "an individual . . . [who] achieve[d] such pervasive fame or notoriety that he [has] become [] a public figure for all purposes and in all contexts," meeting the essential test for public figures established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

[326]*See* Eberle, *Public Discourse, supra* note 6, at 838 ("German law has gone part way down the path of American law through the latitude it accords certain polemic communicated in matters of public significance pursuant to both the Counter-Attack Theory (*Gegenschlag*) [which provides that a harsh public attack merits a reply in kind to counter its impact on the formation of public opinion], and by its assumption that public figures must endure sharp scrutiny and critique.").

C. Right to Honor and Rightful Portrayal of Self

Cases like *Drunkard* are grounded in a more general right to control presentation of one's self in the world. This is, of course, an outgrowth of the same theory of informational self-determination discussed in Section B above. However, it is additionally based on a more fundamental right of self-determination over one's position and social standing, a right "fundamentally to decide how to present oneself to third parties or the public, whether and to what extent outsiders can have access to one's personality."[327] In this way, both informational self-determination and this "image self-determination" are grounded in control over one's private, intimate core of personality.

In so interpreting Article 2 personality rights, the Constitutional Court relied upon lines of doctrine developed by the Federal Supreme Court (*Bundesgerichtshof* or BGH), the supreme interpreter of the German Civil Code (*Bürgerliches Gesetzbuch* or BGB). The BGH had developed a jurisprudence of personality rights in connection with interpretation of the BGB. First, the BGH found a general right of personality, derived from the influence of Articles 1 and 2, that carried over into civil law, so that everyone could enforce a certain privacy in their private legal relations.[328] This development allowed people to enforce these personality rights against infringement—by individuals as well as the state—thereby providing comprehensive protection to personality.[329] Over time, the BGH extended such rights to cover specific emanations of personality, including control over distribution of one's own writings, such as personal letters or diaries, or secrecy in relation to medical records, or rights to one's spoken word, developments later confirmed by the Constitutional Court.[330]

---

[327] *Eppler*, 54 BVerfGE 148, 155 (1980).

[328] The path-breaking case was *Schacht-Letter*, 13 BGHZ 334 (1952), where an attorney, on behalf of his client, Dr. Hjalmar Schacht, a former economics minister under Hitler, had written a letter to a newspaper demanding that it correct certain statements it had previously published concerning Schacht. The newspaper published this letter, along with other correspondence, without replying to it or correcting its earlier publication. The attorney successfully complained that the publication of the letter falsely depicted him to the public as making a personal stand, when he actually was acting for his client. Breaking with precedent, the BGH found that a person's letters were protected, even in the absence of copyright, on account of this new-found "general right of personality," rooted in § 823 BGB. *See* Krause, *supra* note 59, at 488. For an English translation of *Schacht-Letter*, see BASIL S. MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORT 191–95 (1986).

The revolutionary change marked by *Schacht-Letter* was attributable to the change in the German legal order marked by the value-ordered nature of the Basic Law, particularly Articles 1 and 2. Prior to the Basic Law, the civil courts had been careful to limit claims for harms based on intangible injury, such as presentation in a false light. *See Soraya*, 34 BVerfGE 269, 270–71 (1973). With *Schacht-Letter*, the influence of the Basic Law as an objective statement of values on the civil law and, indeed, all law has become prominent. Under this theory of Third Party Effect (*Drittwirkung*), a certain content of the Basic Law affects all legal relationships, public or private. For extensive discussion, see Eberle, *Public Discourse*, *supra* note 6, at 813–18; Quint, *supra* note 14, at 262–64, 278–79. A contrast is found in American law, where, ordinarily, the Constitution does not affect private law. *See* Eberle, *Public Discourse*, *supra* note 6, at 814–15.

[329] *See Schacht-Letter*, 13 BGHZ at 338.

[330] *See, e.g.*, *Medical Records*, 32 BVerfGE 373 (1972) (protecting confidentiality of medical records); *Divorce Records*, 27 BVerfGE 344 (1970) (granting protection for confidential information concerning marriage relationships); *Böll*, 54 BVerfGE 208 (1980) (establishing right not to be misquoted). The BGH

The next step of this development was even more revolutionary. In the famous *Herrenreiter Case* of 1958, the BGH interpreted Articles 1 and 2 to command not only a respect for human dignity and personality, but also to provide affirmative protection of personality against incursion.[331] Applying by analogy the German Civil Code remedy provisions, which cover harms to tangible property and physical health,[332] the Court created a damage remedy to redress harm for intangible interests, such as personality.[333] This enabled one individual to seek redress against another individual for a violation of personality rights. The Court's creation of this damage remedy was somewhat startling, since the Civil Code expressly excludes damage liability for most injuries to intangible interests, except when authorized by statute; here, there was no enabling statute.[334] Moreover, money damages are quite rare in Germany, unlike in America; standard German relief is specific performance, not damages.

Through these innovations, the BGH provided comprehensive protection for personality, in recognition of the core value of human dignity.[335] Not surprisingly, these developments engendered significant controversy.[336]

In reliance on this work, the Constitutional Court reversed the process, recasting the private law interests of reputation or privacy into the capacious language of human dignity and personality, thereby constitutionalizing the doctrine. This certainly made for a more secure anchoring of the concepts in the legal order, as the Court recognized.[337] No cases demonstrated the power and reach of these new constitutional developments more than the famous *Soraya* and *Lebach* decisions.

---

widely developed these rights of personality even though codification of them through amendment of the BGB was rejected. *See generally*, Krause, *supra* note 59, at 489, 495, 499–500.

[331]*See Herrenreiter* (Gentleman Rider), 26 BGHZ 349 (1958). In *Herrenreiter*, a picture was taken of an amateur horseman shown jumping in a competition, and the picture was used to advertise a product reputed to improve sexual potency. *See id.* In assessing money damages, the BGH reasoned that the conduct must be appropriately sanctioned to reflect the seriousness of the harm to personality. *See id.* at 356. *Herrenreiter* thus gave rise to the doctrine of compensation for "moral" harms. For an English translation of *Herrenreiter*, see MARKESINIS, *supra* note 328, at 195–201. These developments are also covered in *Soraya*, 34 BVerfGE at 270–73; Degenhart, *supra* note 74, at 362; Quint, *supra* note 14, at 279–80.

[332]*See* § 847 BGB.

[333]*See Herrenreiter*, 26 BGHZ at 349.

[334]*See* CURRIE, *supra* note 7, at 117. Indeed, the defendant had argued that the BGH had disobeyed a limitation of the BGB. Traditionally, relief for injuries to personality were limited to injunction or, where appropriate, a right to reply based on the thought that awarding money for damages to honor cheapened such intangible values. "[A]nyone who would sell his honor for money had no honor." Krause, *supra* note 59, at 511. These beliefs were codified in the BGB, and left unchanged despite attempts to the contrary. *See id.* at 510–12. Thus, *Herrenreiter* represents a very bold judicial step. Today, money damages for intangible harms are more widely accepted in Germany. *See id.* at 515.

[335]A later case, *Fernsehansagerin*, 39 BGHZ 124 (1975), even concluded that, if human dignity was to be the supreme value of the legal system, judges could no longer be bound by the original views of the BGB drafters, since, in the ensuing 70 years, law and society had changed dramatically. *See id.* This illustrates the dynamic, creative interpretation employed by courts under German legal science, which the Constitutional Court too has picked up.

[336]*See Soraya*, 34 BVerfGE at 275–76.

[337]*See id.* at 282.

1. Soraya*: Right to Control Against Attribution of False Statements*

In the famous *Soraya* case, the Court upheld an award of damages for publication in a tabloid of a fictitious interview with the former wife of the Shah of Iran. The fictitious interview fabricated intimate details of her private life. The award was predicated on this newly created constitutional right of personality, derived from the influence of objective constitutional principles on the private law.[338] Recast as constitutional values, privacy, personality, and dignity became obligations that the state must preserve and protect under objective constitutionalism. State organizations, like the Constitutional Court, thereby became obligated to create the proper conditions for their realization.

These values now moved to the very center of the legal order:

> The personality and dignity of an individual, to be freely enjoyed and developed within a societal and communal framework stand at the very center of the value order reflected in the fundamental rights protected by the Constitution. Thus an individual's interest in his personality and dignity must be respected, and must be protected by all organs of the state [*see* Articles 1 and 2 of the Constitution]. Such protection should be extended, above all, to a person's private sphere, i.e., the sphere in which he desires to be left alone, to make . . . his own decisions, and to remain free from any outside interference. Within the area of private law such protection is provided . . . by the legal rules relating to the general right of personality.[339]

This constitutional right of personality entitles a person to be left fundamentally alone, free from unauthorized interference, whether from public or private actors, if so desired. Moreover, this right is enforceable as a private cause of action whereby one private individual could enforce a right to privacy against another private individual. In *Soraya*, these privacy interests operated to limit the publication of the interview by the Axel Springer publishing house, the publisher of the tabloid. "An imaginary interview adds nothing to the formation of real public opinion. As against press utterances of this sort, the protection of privacy takes unconditional priority."[340]

As novel as these results were, even more pathbreaking were the methods used to obtain them. In constitutionalizing the innovations of the BGH discussed above, the Constitutional Court seemed to call into question parliamentary supremacy. Naturally, this would follow from the BGH's approach, since it created a damage remedy for

---

[338]*See id.* at 281.

[339]*Id.*

[340]*Soraya*, 34 BVerfGE at 283–284, *translated in* CURRIE, *supra* note 7, at 198. The reasoning of *Soraya* was later picked up in *Böll*, where the Court determined that false quotations are not protected by Article 5. *See Böll*, 54 BVerfGE at 221. For discussion of *Böll*, see *infra* notes 387-93 and accompanying text. "The degree of care that must be expended to avoid dissemination of an imaginary interview is never too much to expect." *Soraya*, 34 BVerfGE at 286, *translated in* CURRIE, *supra* note 7, at 198 n.95. The German result contrasts dramatically with American law, illustrating the extraordinary protection American law accords speech. *See, e.g.*, Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) (holding that deliberate alteration of quotations did not rise to the level of actual malice falsity required by *New York Times Co. v. Sullivan*, and was therefore protected speech).

intangible interests despite the wording of the Civil Code, which forbade such practice in the absence of an authorizing statute.[341] Responding to this, the Constitutional Court suggested that judges were not wholly bound by statutory law after all.[342] The Basic Law, in Article 20(3), had altered the traditional civilian law limitation of the judge to statutory law, rejecting a "narrow positivism."[343] "Statutes [*Gesetze*] and laws [*Recht*] . . . are not necessarily always identical. . . . Law is not synonymous with the totality of written statutes."[344] Law (*Recht*) can, under some circumstances, include additional norms or concepts, derived from "the constitutional order as a whole," and "functioning as a corrective to the written law."[345] Thus, rather than being "bound by the strict letter of the law, the role of the judge is to realize in case law . . . the values immanent in the constitutional order, [even if] not written or clearly expressed in written law."[346] Judges should so fill statutory gaps based on "practical reason" and "well-founded general community concepts of justice."[347]

However, in the case at hand, there was no real statutory gap to fill, since the Bundestag had expressly rejected a law authorizing damages for intangible harms.[348] Now the Court resorted to the tools of German legal science (*Rechtswissenschaft*) in authorizing this "creative jurisprudence" (*schöpferischer Rechtsfindung*).[349] Social conditions must often take priority over statutory text.[350] Rather than being static, norms reflect the context of social relations in their socio-political milieu; their content varies under these circumstances.[351] This is especially so in the present age, which has witnessed dramatic social and legal change over the course of the twentieth century. In this context, a judge cannot simply consult written law and meet her obligation to declare the law. Instead, the judge "has a free hand" to interpret law in view of "substantive justice" and "changed social conditions."[352]

The Court's interpretation comes close to authorizing judges to determine themselves the applicability of statutory norms. Norms perceived to be outdated or not relevant can seemingly be replaced with a judge's own view of justice. Not surprisingly, this position engendered wide discussion in German legal circles.[353]

---

[341]*See* CURRIE, *supra* note 7, at 117–18. The critique is noted in *Soraya*, 34 BVerfGE at 276, 278. *See also supra* notes 334–35 and accompanying text.

[342]*See Soraya*, 34 BVerfGE at 286.

[343]*Id.*

[344]*Id.* at 286–87.

[345]*Id.* at 287; *see also* CURRIE, *supra* note 7, at 117.

[346]*Soraya*, 34 BVerfGE at 287.

[347]*Id.*

[348]The history is covered in Krause, *supra* note 59, at 488–96.

[349]*See Soraya*, 34 BVerfGE at 287.

[350]*See id.* Civil law is a good example of this. The BGB was adopted in 1900, but is made relevant to current times through the collaborative work of judges and scholars, applying the methods of German legal science. In *Soraya*, the Court noted these techniques, stating, "Interpretation of a statutory norm cannot always be tied to its original meaning." *Id.* at 288. Judges' "freedom to develop law creatively increases" as a codification such as the BGB grows older. *Id.* One must also consider what reasonable function the code language serves at the time of its application.

[351]*See id.* at 288.

[352]*Id.* at 289.

[353]*See* CURRIE, *supra* note 7, at 118 nn.90–91. The seeds of the problem lie in Article 20(3), which binds the executive and judiciary to "law [*Gesetz*] and justice [*Recht*]." Art. 20(3) GG. *Gesetz* ordinarily means statutory law. *Recht* means justice or the totality of law. The Court interpreted *Recht* as written and

If courts are to be bound by "justice" as well as by enacted law, Article 20(3) would seem, by this interpretation, to constitutionalize natural law as a source for rendering decisions.[354] If so, one might argue, judges should reject unjust law.[355] Alternatively, one might say outmoded or misguided law should be corrected by judges striving for just results,[356] as seemed the goal of the *Soraya* Court. Certainly *Soraya* injects a degree of free judicial creativity into constitutional law not seen so explicitly in the United States since, perhaps, *Calder v. Bull*[357] and its famous debate between Justices Chase and Iredell.

Nevertheless, natural law can be a perilous course, as well as an enriching one, as American battles over the theory attest.[358] Recognizing this, the Constitutional Court has mainly sought to cabin the temptation to authorize judicial usurpation of parliamentary supremacy. The *Soraya* Court, in authorizing judges to fill a gap left by the Civil Code, was "careful to couch its reasoning in terms of statutory interpretation, not of any right to defy the legislature."[359] The Court has applied this technique, in reliance on *Soraya*, to other cases as well.[360] But the Court, in still other cases, has been clear in recognizing the obligation of judges to adhere to statutory law, thereby reigning judicial discretion.[361]

Contrasting this creative interpretivism with American law, it is worth observing that American law does not resonate with the language of "creative jurisprudence," as in German law. Our constitutional strategy is couched in the language of interpretivism, even if activist results are thereby reached.[362] Perhaps the German Court is simply more forthright about the judicial enterprise, although we have our moments

---

unwritten law, and even as immanent principles. *See Soraya*, 34 BVerfGE at 286–87. Such immanent principles might, for example, include the roots of Kantian idealism, a decisive influence on the Basic Law. The binding of the executive and court to "*Recht*" is a reaction to the horrors caused by extreme positivism during the Nazi period. *See supra* note 134.

[354]There is some basis for this, since Christian natural law was an important influence on the Basic Law. *See supra* note 35 and accompanying text. However, the debates over the framing of the Basic Law do not reflect this. *See* CURRIE, *supra* note 7, at 119.

[355]*See* CURRIE, *supra* note 7, at 119.

[356]*See id.*

[357]3 U.S. (3 Dall.) 385 (1798). *Compare id.* at 388 (setting forth Justice Chase's natural law foundation: "There are certain vital principles in our free republican governments."), *with id.* at 399 (Iredell, J. dissenting) ("[I]t has been the policy of all the American states, . . . and of the people of the United States, . . . to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. . . . The ideas of natural justice are regulated by no fixed standards . . . .").

[358]*Compare* Lochner v. New York, 198 U.S. 45 (1905) (using notion of freedom of contract to invalidate statute regulating work hours), *with Griswold*, 381 U.S. at 486 (finding "right of privacy older than the Bill of Rights").

[359]CURRIE, *supra* note 7, at 120; *see also Soraya*, 34 BVerfGE at 290 (judges could "thereby fill the gap in codified sanctions that was evident respecting this violation of personality law").

[360]*See, e.g.*, 82 BVerfGE 6, 11–15 (1990) (applying principles of *Soraya* to validate, by analogy, live-in partner's right to assume deceased partner's lease, even though law spoke only of spouses).

[361]*See, e.g.*, 49 BVerfGE 304, 320 (1978), *translated in* CURRIE, *supra* note 7, at 120–21 ("It is not the business of a judge who is bound by the statute and laws to cut back claims for liability that the statutes afford . . . ."). Whether natural law, or its cognates, is a justifiable measure of constitutionality is heavily debated in the scholarly literature. *See* Pieroth Letter, *supra* note 229.

[362]Like the German Basic Law, our Constitution contains many vague words that lend themselves to open interpretation. *See, e.g.*, U.S. CONST. art. I, § 7, cl. 18 ("necessary and proper"); *id.* amends. V, XIV ("due process"); *id.* amend. XIV ("equal protection").

of candor too.[363] Still, as a matter of comparative law, it is worth observing that German constitutionalism advocates a degree of judicial creativity more pronounced than the American variety.

2. Lebach: *Right to Personal Honor and Control Over Presentation of One's Self in Society*

Later in the year, the Constitutional Court, in the *Lebach* decision, concluded that the privacy interests recognized in *Soraya* outweighed any public speech interest in publicizing an individual's role in a crime for which he had already paid the penalty.[364] In *Lebach*, a convicted robber was able to halt a planned television broadcast of a documentary film depicting, accurately, his and others' participation in a notorious armed robbery of an army munitions depot which resulted in the death of four soldiers.[365] The Court grounded its decision in the felon's personality right in being let alone, free from publicity, so that he could concentrate on his reentry into society.[366] This concern took precedence over even highly ranked expression freedoms, just as personality interests had trumped expression in *Soraya*.[367]

At the heart of *Lebach* was the need to preserve the integrity of human personality against the sometimes intrusive influence of the outside world. "The rights to the free development of one's personality and human dignity secure for everyone an autonomous sphere in which to shape one's private life by developing and

---

[363] *See Casey*, 505 U.S. 849 (plurality opinion) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.").

[364] *See Lebach*, 35 BVerfGE 202 (1973), *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 414–17; Markesinis, *supra* note 328, at 205–13.

[365] *See Lebach*, 35 BVerfGE at 204–05.

[366] *See id.* at 220, 233–36.

[367] In the 1970s,

> the Constitutional Court tended to prefer [values of] human dignity and personality rights over communication. [It] did so by relying on Article 5(2), which states that communication rights expressly find their limits in "the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect of personal honor." Under the Reciprocal Effect theory [*Wechselwirkung*], the values of the general law influence interpretation of basic rights, as basic rights influence interpretation of the general law. The courts of the 1970s essentially heightened emphasis of Article 1 human dignity values and Article 2 personality interests to justify their preference of these values over expression rights.

Eberle, *Public Discourse*, *supra* note 6, at 833–34 (footnote omitted). *Mephisto*, *Soraya*, and *Lebach* are emblematic of this approach. *See id.* at 834–43; Quint, *supra* note 14, at 290–318.

Today, the Court attaches far more significance to expression rights, even in relationship to concepts of honor. *See* Eberle, *Public Discourse*, *supra* note 6, at 852–69 (discussing Court's restoration of communication as preferred value). Free expression is itself now viewed as an intrinsic element of human dignity. *See id.* at 817; *see, e.g.*, *Lüth* 7 BVerfGE 198, 208 (1958) (noting that free expression is "the most immediate manifestation of human personality in society"). Still, dignity places limitations on expression that would be out of place in America. *Compare Cripple*, 86 BVerfGE 1 (1992) (holding that one cannot call disabled person a "cripple"), *and Horror Film Case*, 87 BVerfGE 209, 217 (1992) (concluding that presentation of violence, gruesomeness, or cruelty can be violation of human dignity), *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (holding that state may not proscribe "otherwise permitted speech solely on the basis of the subjects the speech addresses"). *See also* Eberle, *Public Discourse*, *supra* note 6, at 892–94.

protecting one's individuality."[368] These values are threatened by public reporting of the crime, which "publicizes [the criminal's] misdeeds and conveys a negative image of his person in the eyes of the public."[369] The film depicted the felon's homosexuality, and the Court was concerned that this would resonate negatively with the public, complicating the felon's reentry into society.[370] The need to anchor personality is so strong, it seemed to the Court, that others could be prevented from examining truthful, but personal, events. Personality rights "include[ ] the right to remain alone, to be oneself within this [autonomous] sphere, and to exclude the intrusion of or the inspection by others."[371]

From here, it is not much of a step to the general right of informational self-determination. Personality rights

> also encompass[ ] the right to one's own likeness and utterances, especially the right to decide what to do with pictures of oneself. In principle, everyone has the right to determine for himself whether and to what extent others may make a public account of either certain incidents from his life or his entire life story.[372]

Of course, these rights ran directly counter to the broadcasters' expression rights, guaranteed in Article 5.[373] Expression rights are highly valued in Germany, as in America, and are themselves reflections of human dignity. Thus, the Court was faced with resolving the conflict between the two fundamental values.

In such cases, the Court strives to achieve concordance (*Konkordanz*) between the values, attempting to interpret both in a manner such that the essence of each can be preserved and, hopefully, optimized.[374] This requires a careful assessment and application of differing values, which seems to work better in theory than in practice. It is not always possible to achieve such harmony in the hard realities of a case. It was not possible in *Lebach*.

The Court chose personality rights over expression rights. Ordinarily, the public has a significant interest in learning of a crime. However, there is an important difference between a crime that is ongoing and one that is past.[375] If the crime is ongoing or yet being prosecuted, the public has a real need to know of the danger it may be in, the need to solve the crime, and the need to bring perpetrators to justice. Such crimes constitute an "overriding" public interest, like medical epidemics[376] or

---

[368] *Lebach*, 35 BVerfGE at 220, *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 414–15.

[369] *Id.* at 226, *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 416.

[370] Because of the effect of mass media and the illusion of reality that a documentary film conveys, the Court worried that the film would reinforce public hostility toward homosexuality. *See id.* at 228–31, 233–35.

[371] *Id.* at 220, *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 415.

[372] *Id.*

[373] Freedom of reporting is expressly guaranteed in Article 5(1), which provides: "Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship." Art. 5(1) GG.

[374] *See supra* note 20. Concordance also follows from the objective ordering of values in the Basic Law, which is calibrated to steer society.

[375] *See Lebach*, 35 BVerfGE at 220–21, 223–31, 233–34.

[376] *See Medical Records*, 32 BVerfGE at 380.

public unrest, that may justify incursions of rights. However, in *Lebach* the crime was past and the felon had paid his price. Thus, the only public interest was in publicizing an event that had already occurred.

From the felon's point of view, his "right to be let alone" increases as the public's interest in receiving current, vital information, decreases.[377] This follows from the Proportionality Principle. "The invasion of the personal sphere is limited to the need to satisfy adequately the [public's] interest in receiving information, while the harm inflicted upon the accused must be proportional to the seriousness of the offense or to its importance otherwise for the public."[378] Consequently, it is not always permissible to "disclose the name, release a picture, or use some other means of identifying the perpetrator."[379] Moreover, crucial to the development of the felon's personality was his reintegration into society so that he might find himself and reach his potential.[380] These factors combined to outweigh the broadcasting rights at issue.

Lebach thus illustrates how the assertion of dignitarian rights can operate to limit other fundamental rights, even especially highly valued ones like expression freedoms. This limiting influence that personality rights may have on other rights is mainly foreign to American law.[381] *Lebach* further illustrates the communitarian bent of German law. The Court's concern for reintegrating the felon into society took precedence over individual and social interests in expression.[382] It is hard to find a more dramatic contrast with American law; it is a contrast which illustrates the strength of dignity and personality in German law and society. Certainly one does not ordinarily find such solicitude for individual welfare in American law.[383] On its face, *Lebach* is also a remarkable act of judicial activism: The Court inferred rights from the textual enumeration of personality rights to eclipse textually secure expression rights.

---

[377] *See Lebach*, 35 BVerfGE at 233–34 ("[O]nce [a] criminal is convicted . . . [the] public ordinarily has no interest in repeated invasion of a criminal's [private] sphere.").

[378] *Id.* at 232, *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 416.

[379] *Id.*

[380] *See id.* at 235–36, *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 417 ("The criminal's vital interest in being reintegrated into society and the interest of the community in restoring him to his social position must generally have precedence over the public's interest in a further discussion of the crime . . . ."). This concern follows from the Social State Principle. *See id.*

[381] A notable exception under American law is trial publicity, a protected free speech activity, which may nevertheless impugn due process. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 335 (1966) (holding that criminal defendant did not receive fair trial consistent with due process because trial judge failed to protect defendant from "massive, pervasive, and prejudicial publicity that attended his prosecution").

[382] *See Lebach*, 35 BVerfGE at 235–36:

> Not only must the reformed felon be prepared to return to free, human society, but also society must be ready to accept him. Constitutionally this follows, self-evidently, from a society in which human dignity stands in the center of its value order and is obligated by the principles of the Social State. As a rights bearer of human dignity, the felon too must have a chance to reintegrate into society.

Id.

[383] *See, e.g.*, *DeShaney*, 489 U.S. at 195 (holding that state has no duty to protect life, liberty, or property against invasion by private citizens). *But cf. Goldberg*, 397 U.S. at 261 ("Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it." (quoting Kelly v. Wyman, 294 F. Supp. 893, 899–900 (1968))).

In assessing *Lebach* against the backdrop of American law, it is quite remarkable how this case empowers individuals to control dissemination of truthful information about their personal affairs.[384] It is astounding from our perspective to think that accurate reporting of an event, especially one with public significance, could be considered an invasion of personality. This goes well beyond any American action for libel or invasion of privacy.[385] The Constitutional Court thus seems to be picking up the call by Warren and Brandeis for a general right to privacy, an argument never fully developed in America.[386] Of course, in America, the positions are reversed: Speech values predominate over dignitarian values.

---

[384]Judge Posner captures the sense of American law well: "[W]e have no right, by controlling the information that is known about us, to manipulate the opinions that other people hold of us." Posner, *supra* note 284, at 408.

[385]Under American law, expression interests would probably predominate in a case like *Lebach*. *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (refusing to allow state to impose liability on newspaper for publishing rape victim's name); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (holding that state may not sanction accurate publication of victim's name listed in public records). *But see* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 43-44 (Cal. 1971) (remanding for determination whether publication of plaintiff's name in connection with criminal activity 11 years after plaintiff's involvement violated right of privacy); Restatement (Second) of Torts § 652D cmt. k (tentative draft no. 22, 1976) (suggesting that lapse of time since event making individual public figure is factor in determining whether publicity unreasonably reveals facts about person who has resumed private and lawful life).

[386]Picking up the call by Professor Cooley for a right "to be let alone," THOMAS M. COOLEY, TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888), Warren and Brandeis argued for a fully developed right to inviolability of personality in their seminal article. *See* Warren & Brandeis, *supra* note 59, at 193, 205, 207. Other prominent scholars have, from time to time, furthered this call. *See* Roscoe Pound, *The Interests of Personality*, 28 HARV. L. REV. 445, 445–46 (1915) (discussing individual interest in honor and reputation).

Despite these strong calls, American privacy law never fully developed as German law has. In significant part, this may be due to conceptual confusion as to what privacy is. As Professor Keeton observes, "To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff [appropriation of, for example, one's name or likeness; unreasonable intrusion; public disclosure of private facts; and false light in the public eye], which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be left alone.'" W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 851 (5th ed. 1984). Conceptually, such privacy is grounded in a mix of concepts: property (appropriation), confidentiality (unreasonable intrusion and public disclosure of private facts), and harm to feelings (false light). In comparison to German law, American privacy lacks an architectonic concept, such as human dignity or personality, which may have facilitated its natural growth.

Today, moreover, First Amendment considerations have eclipsed the tort rights of public disclosure and false light. The tort of appropriation is grounded in the market economy, protecting against unauthorized use for money or profit. Thus, it exists as property, not a personality emanation. That leaves only unreasonable intrusion as a sound protection of the person.

Little remains, therefore, of Warren and Brandeis' original aim. *See* Harry Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 333–39 (1966) (criticizing tort of privacy as vague on basis of liability, theory of damages, and basis for prima facie case); Mintz, *supra* note 284, at 427 (asserting that right to be let alone "is so vague and so broad that it probably does more jurisprudential and philosophical harm than good"); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 362–65 (1983) (arguing that tort of privacy should not be preserved because it encourages litigation and does not identify exchanges of information that deserve protection).

3. Böll: *Right to Personal Honor and One's Own Words—Right Not to be Misquoted*

In *Böll*,[387] a television commentator criticized the Nobel-prize winning author Heinrich Böll for allegedly making statements that aided terrorism, which was, and to an extent still is, an acute problem for Germany.[388] In making his charge, the commentator misquoted Heinrich Böll. Böll asserted that the misquote invaded his sphere of personality. A state supreme court agreed with Böll, but the Federal Supreme Court dismissed the action.[389]

Breaking new ground, the Constitutional Court determined that the dismissal of the suit violated Böll's personality rights because an individual has a constitutional interest in not being misquoted. A misquote

> impair[s a person's] constitutionally guaranteed general right to an intimate sphere. Among other things this right includes personal honor and the right to one's own words; it also protects the bearer of these rights against having statements attributed to him which he did not make and which impair his self-defined claim to social recognition.[390]

The Court went on to say: "The use of a direct quotation as proof of a critical evaluation is . . . a particularly sharp weapon in the battle of opinions and very effective in undermining the personality right of the person being criticized."[391] In essence, a speaker becomes a "witness against himself" in the contest for public opinions.[392] These wounds were particularly grievous because the personal attack was made on television, assuring broad dissemination.[393]

The contrast with American law governing the use of false quotations is dramatic. In the recent Supreme Court case, *Masson v. New Yorker Magazine, Inc.*, the Court determined that the use of deliberately altered quotations in a published interview was protected speech because such conduct did not rise to the standard of proscribable actual malice falsity[394] established in the landmark case *New York Times Co. v. Sullivan*.[395] In the absence of such malice, free speech and the social interest in

---

[387] 54 BVerfGE 208 (1980).

[388] The commentator stated: "Heinrich Böll characterized the liberal state [*Rechtsstaat*]—against which the [terrorists'] violence was directed—as a 'pile of dung', and said that he saw only 'the remnants of decaying power, which are defended with ratlike rage.' He accused the state of pursuing the terrorists 'in a pitiless hunt.'" *Id.* at 209, *translated in* Quint, *supra* note 14, at 332 n.265. There have also been recent terrorist attacks in Germany. For example, Alfred Herrhausen, head of Germany's largest bank, Deutsche Bank, was assassinated in 1989. Detlev Rohwedder, leader of the *Treuhandanstalt*, the agency set up to privatize assets of former East Germany following reunification in 1990, suffered the same fate. *See* Timothy Aeppel, *Murder Heightens Eastern German Crisis*, WALL ST. J., Apr. 3, 1991, at A17.

[389] *See Böll*, 54 BVerfGE at 211–13.

[390] *Id.* at 217, *translated in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 419.

[391] *Id.*

[392] *Id.* at 218.

[393] *See id.* at 216.

[394] *See* 501 U.S. at 517.

[395] 376 U.S. 254 (1964).

"uninhibited, robust and wide-open"[396] public discourse were found more important than privacy.

The contrast between *Böll* and *Masson* thus further illuminates the differing value structures of the two countries. In Germany, at least in the 1970s and early 1980s, personal honor, rooted in Article 1 human dignity and accompanying Article 2 personality rights, outweighed expression rights in certain circumstances.[397] In America, by contrast, such personality interests never outweigh public discourse unless one can prove the speech fits the narrow category of actual malice falsity, or other such enumerated exceptions to protected speech. In this way, human dignity, and its particular radiation of personal honor, seems the ultimate value of the German legal order, whereas free speech seems to enjoy this status in America.

Another aspect of *Böll* illustrates a further contrast with American law. The violation of Böll's personality rights arose from a court's nonaction in foreclosing Böll's right to redress, as compared to the more conventional official action which invades the right. In German law, this could be justified from the positive dimension of rights, which obligates the state to create the conditions in which rights can thrive—here Böll's right to the integrity of his personality. Lacking this positive conception of rights, American law is unlikely to yield an outcome as in *Böll*, where the Constitutional Court found that there was no Article 5 protection for false statements, such as the misquote. Thus, Böll's personality rights, protected in Germany,[398] would not have found protection in America.

VI. IDENTITY, SELF-DETERMINATION, AND AUTONOMY

A final strand of German personality law relates to attributes of identity and personal self-definition. This strand is also grounded in the innermost reach of personhood, as are those other strands emanating from the personal sphere discussed in Part IV. These areas also help define who one is in relationship to the world. They thus entail an element of self-determination and autonomy, as in American law. In fact, this strand of German law has the greatest overlap with American law. Accordingly, German law will be discussed closely against the backdrop of American law, illuminating points of convergence and divergence.

As in American law, there are many themes in German autonomy law. These include the right to know one's parenthood and heritage;[399] the right to determine one's

---

[396] *Id.* at 270.

[397] *See* Eberle, *Public Discourse*, *supra* note 6, at 807–08, 833–41.

[398] *See Böll*, 54 BVerfGE at 217-218; Quint, *supra* note 14, at 333–34.

Eppler, an important case for the theory and reach of the personal sphere, *see supra* note 104, provides an interesting contrast with *Böll*, which was decided on the same day. "Eppler, a well-known politician, sought an injunction prohibiting opponents from repeating their charge that Eppler . . . desire[d] to 'test the endurance of the economy' through his social policies." Quint, *supra* note 14, at 334 n.273. "[T]he statement . . . implied that Eppler was willing to take undue risks with the economy." *Id.* Accordingly, Eppler viewed the statements as an attack on his constitutional right of personality. As in *Böll*, a lower court dismissed the suit. Unlike *Böll*, however, the Constitutional Court found that the remarks did not violate his "private, secret, or intimate sphere," *Eppler*, 54 BVerfGE at 154, and, therefore, were not an infringement of Eppler's constitutional right of personality. *See id.* at 154.

[399] *See Right to Heritage II*, 90 BVerfGE 263 (1994); *Right to Heritage I*, 79 BVerfGE 256 (1989).

sexual identity,[400] including having official records changed to reflect one's chosen gender; and certain rights to choose one's name.[401] Some of these same themes resonate in American law. For example, rights to know one's heritage[402] and sexual autonomy[403] have been major themes in American law. However, the American cases proceed from an assumption of privacy, rather than from dignity or personality, and reach conclusions different from the German cases. Other American privacy themes, such as decisions relating to marriage, procreation, and contraception,[404] are absent from German law. From the German standpoint, however, this may simply reflect the Constitutional Court's lack of opportunity to enumerate these rights. Certainly the Basic Law and case law seem to offer sufficient textual and precedential authority to support this endeavor.[405] These points are best brought out through a comparative look at the two laws, through the lens of German law.

A. Right to Know One's Heritage

The right of a person to know her heritage, including the identity of her biological parents, has been an important theme of German law. Two major cases of the Constitutional Court have addressed this topic, the recent *Right to Heritage II*,[406] and its predecessor, *Right to Heritage I*.[407] Both cases are important. *Right to Heritage I* adds to the range of substantive personality rights by holding that knowledge of one's heritage is integral to healthy personality development and self-identity. *Right to Heritage II* is noteworthy in a number of ways. First, it is among the most recent of the Court's pronouncements on substantive personality rights, confirming the Court's conclusions in *Right to Heritage I*. Second, the Court employed a new methodology in the case to protect substantive personality rights: a tightened means/end analysis under the Proportionality Principle. *Right to Heritage II*, therefore, cements the heightened scrutiny methodology employed by the Court to protect freedom of expression rights in the 1990s.[408] Third, the case lays out the proper role of the Court within a constitutional democracy. Although the Court should strive to respect the legitimate decisions of the majoritarian process, it must intervene to protect important values of the constitutional order.

---

[400] *See Transsexual Case*, 49 BVerfGE 286 (1978).

[401] *See Name Change Case*, 78 BVerfGE 38 (1988).

[402] *Cf.* Michael H. v. Gerald D., 491 U.S. 110, 113 (1989) (plurality opinion) (holding that due process does not require recognition of right of natural father to challenge legitimacy where state statute created presumption that mother's husband was child's father).

[403] *Compare* Bowers v. Hardwick, 478 U.S. 186, 190–96 (1986) (refusing to recognize fundamental right of homosexuals to engage in consensual sodomy), *with* Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (extending fundamental right to use contraceptives to single persons).

[404] *See* authorities discussed *supra* notes 173–78 and accompanying text.

[405] *See supra* notes 53–74 and accompanying text.

[406] *See Right to Heritage II*, 90 BVerfGE 263 (1994).

[407] *See Right to Heritage I*, 79 BVerfGE 256 (1989).

[408] *See* Eberle, *Public Discourse*, *supra* note 6, at 852–59. This heightened scrutiny review is now generally applied in rights analysis.

At issue in both cases were provisions of the family law, book four of the German Civil Code.[409] The concern in *Right to Heritage I* was that these provisions did not allow a child who had recently acquired majority status to pursue judicially a declaration of her legitimacy or illegitimacy so that she could determine her heritage, except when her parents had been divorced or separated for three years.[410] Because these circumstances might not be present, the ability of young people to ascertain their identity might be foreclosed. This constricted their personality rights too severely.

Right to Heritage II dealt with another part of the family law—a two-year statute of limitation period in which to seek a judicial declaration of (il)legitimacy.[411] If judicial process was not sought within this period (perhaps because the young person was not aware of her background or because her legal guardian pursued no process), the young person might lose any opportunity to learn of her origin.

1. Right to Heritage I

In this context, the Court announced a substantive right to learn one's heritage. "It is a violation of general personality rights . . . to limit a majority age child's ability to determine her heritage to the statutorily enumerated circumstance."[412] Relying on the sphere of interiority established in *Microcensus*, the Court observed: "The right to free development of personality and human dignity guarantees all individuals an autonomous area of private life formation in which they can develop and protect their individuality."[413] Yet, "knowledge and development of individuality are closely bound with certain constitutive facts. Among these is included one's heritage."[414] Knowledge of heritage is decisive because it reveals genetic origin and is central to individual identity. It is a "key factor for individual self-discovery and self-understanding."[415] "As an individual character trait, ethnicity and knowledge of heritage offer individuals . . . important connections to understanding and development of their own

---

[409] *See* §§ 1593-96, 1598 BGB.

[410] *See Right to Heritage I*, 79 BVerfGE at 257. Under German law, such (il)legitimacy can only be determined pursuant to judicial proceedings, as in American law. *See* § 1593 BGB. *Cf.* R.I. Gen. Laws § 33-1-8 (1995).

[411] *See Right to Heritage II*, 90 BVerfGE at 265; § 1598 BGB.

[412] *Right to Heritage I*, 79 BVerfGE at 268. Note that questions concerning the determination of one's heritage implicates other constitutional guarantees. Equal protection provides that "[n]o one may be disadvantaged or favored because of his . . . parentage, his race, . . . his homeland and origin." Art. 3(3) GG, *translated in* CURRIE, *supra* note 7, at 344. Article 6 provides for certain marital, family, and parental rights, including parental control of child rearing, *see* Art. 6(2) GG, *translated in* CURRIE, *supra* note 7, at 345, and also that "[i]llegitimate children shall be provided by legislation with the same opportunities for their physical and mental development and for their place in society as are enjoyed by legitimate children." Art. 6(5) GG, *translated in* CURRIE, *supra* note 7, at 345.

The Basic Law thus provides explicitly what the Supreme Court has inferred from the Constitution. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (holding that fundamental freedoms inhere in marriage and family relationships); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (finding liberty of parents to direct upbringing and education of children).

[413] *Right to Heritage I*, 79 BVerfGE at 268.

[414] *Id.*

[415] *Id.* at 269. The Court noted that biological origin is not the only determinant of personality. More "significant are multiple [life] events and experiences." *Id.*

individuality. Therefore, personality rights include knowledge of one's heritage."[416] Yet, because there still might be cases where it would be impossible to determine biological origin, the Court held that "Article 2 in conjunction with Article 1, confers no right to obtain knowledge of one's heritage, rather they protect against the withholding of attainable information."[417] The substantive right recognized by the Court, therefore, was an informational right—a right to obtain all relevant accessible information.

Measured against these requirements, the Court held the family law provisions untenable. The law had been constructed to facilitate family peace, a concern grounded in the Article 6 guarantee of marriage and family, which claims the state's "special protection."[418] Certainly a harmonious family is important, and in cases where a marriage would be destroyed or seriously harmed, children's process rights might justifiably be limited.[419] However, the *Bundesrat* had drawn the measure with too much emphasis on the interest in family peace, overshadowing the interests of the children.[420] It was easy to envision cases in which determination of paternity would not disrupt family peace, particularly when children have reached majority status. For example, both children and their mothers or stepfathers might want to establish paternity. Or the children may already have established relations with their biological fathers, and now want to have this legally determined. For these reasons, the Court ruled that the legislature must craft a solution which would have a less restrictive (*durch mildere, aber gleich wirksame Mittel*) impact on young adults' personality rights.[421]

2. Right to Heritage II

In the second case, *Right to Heritage II*, the Court invalidated the two-year statute of limitations period in which adults newly of age could seek judicial declaration of their biological origin. Since discovery of one's heritage could occur, in most cases, only if a child or her legal guardian (usually the mother) pursued legal process within the relevant time frame, the law might operate to foreclose any possibility for young people to discover their heritage. Out of concern for family tranquility, legal guardians might not act, or might not inform their children that they are illegitimate. Certainly the statute created a conflict between the child's best interests and the family's.[422] If children did not know of their status, they could not know they had the option to pursue legal process. In this way, they might lose all opportunity to learn of their heritage.[423] "The impossibility of clarifying one's own

---

[416]*Id.* The Court saw significance in knowledge of heritage for individual self-discovery beyond what is documented empirically. *See id.*

[417]*Id.*

[418]*Id.* at 270; *see also supra* note 412 and accompanying text.

[419]*See Right to Heritage I*, 79 BVerfGE at 270.

[420]*See id.*

[421]*See id.* at 271–74.

[422]*See id.* at 273.

[423]*See id.* at 272–73.

heritage can be a considerable burden and can undercut one's [inner] security."[424] In view of this, the Court held that the law must be changed, consistent with personality rights, so that a child might learn her identity.

While these conclusions are important, the significance of *Right to Heritage II* lies in the methodology the Court used to reach them. The case evidences a noticeable tightening of the scrutiny employed by the Court to test incursion of personality rights. The Court stated that a law curtailing personality rights is "permissible only when it serves to protect a weighty end, is necessary, and when the end is so significant that it justifies intrusion on personality rights."[425] Such heightened scrutiny represents a distinct tightening of the relationship between means and end, and strikes general resonance with American heightened scrutiny review. In German law, this tightened methodology can be traced to developments in rights analysis generally, particularly free expression rights.[426] It represents a more rights-protective approach, as compared to earlier more deferential methodologies, such as that employed in *Elfes*,[427] or the *Deutschland-Magazin* variable standard of review of the 1970s, employed in cases like *Lebach* or *Böll*.[428]

Applying the methodology demonstrates the bite of tightened proportionality. The statute of limitations provisions at issue in *Right to Heritage II* "serve legal security . . . [which] is an important goal. Certainly it is a considerable burden when those interested must consider who legally is the father of a child. It also serves the public interest" to bring clarity to this.[429] However, the Court found it "questionable whether it is necessary to tie a young adult's possibility of clarifying his origin to this concern for legal security."[430] Less restrictive alternatives could be employed. For example, the *Bundestag* could arrange for a young adult "to clarify his heritage . . . without effect on his relatives."[431] Perhaps young people could learn this in secret or in camera, thereby saving their relatives from disruption. Alternatively, children's knowledge of their status could become the tolling event for the statute.[432] Certainly the legislature had to structure a closer fit between the means and the end.

As written, however, the law "considerably limits the right to know one's own heritage."[433] Consistent with the Proportionality Principle, therefore, "the interest in legal security does not carry so much weight that it can justify this severe incursion of personality rights."[434] Thus, at bottom, there was no justification for so curtailing personality interests.

---

[424] *Id.* at 271.

[425] *Id.*

[426] *See supra* notes 147, 408 and accompanying text.

[427] *See supra* notes 142–47 and accompanying text.

[428] *See supra* notes 364–83, 387–98 and accompanying text. Under *Deutschland-Magazin*, 42 BVerfGE 143 (1976), the Court applied a variable intermediate standard of review. The degree of protection varied with the severity of the rights incursion. *See id.* This led to inconsistency in application. *See* Eberle, *Public Discourse*, *supra* note 6, at 843–52.

[429] *Right to Heritage II*, 90 BVerfGE at 271.

[430] *Id.* at 272.

[431] *Id.*

[432] *See id.* at 276.

[433] *Id.* at 272.

[434] *Id.* at 273.

It is interesting to observe that announcement of this heightened methodology parallels the development of American law. In American law we can trace heightened scrutiny in rights analysis to the early free speech cases[435] and, formally, to the 1942 *Korematsu v. United States*[436] case, if not the famous *Carolene Products*[437] footnote of 1938. Since the 1950s, strict scrutiny has become a standard part of the American legal landscape.[438]

However, in Germany the path has been more circuitous. In Germany, as in America, the origins of heightened scrutiny lie in free expression law. The watershed 1958 *Lüth*[439] case, for example, evidences the Constitutional Court's independent analysis. However, after *Lüth*, expression cases went through several metamorphoses—from a low-level deferential approach of the 1970s, to a variable standard of review in *Deutschland-Magazin*[440] in the 1980s, to, finally, the intensive approach of today.[441] The Court has given personality preference as a seminal value of the legal order since *Microcensus*[442] in 1969, and especially in the 1970s, starting with *Mephisto,* and then *Soraya,* where the Court valued personality rights even over expression rights.[443] Still more intensive scrutiny of personality rights is evident in the 1983 *Census Act Case*[444] and the 1989 *Right to Heritage I*[445] case, for example. Finally, *Right to Heritage II*[446] sets forth a formal statement of "strict" scrutiny, similar to that expressed in America in the 1942 *Korematsu* case. Thus, both Courts have devised similar rationales and methodologies for rights analysis. This is certainly an American export to German soil, even if as by an invisible hand.

These concerns led the Court, in *Right to Heritage II,* to confront more generally its role with respect to the legislature. Certainly the Court must strive to respect the legislature.[447] Where possible, laws should be interpreted in a "constitutionally-conforming" manner.[448] But there are limits to such deference, where, for example, "the text and intent of the legislature are in contradiction," as they were in *Right to*

---

[435] *See, e.g.*, Lovell v. Griffin, 303 U.S. 444, 452 (1938) (invalidating ordinance limiting distribution of leaflets); Near v. Minnesota, 283 U.S. 697, 707–08 (1931) (invalidating as prior restraint statute regulating speech as public nuisance).

[436] 323 U.S. 214, 216 (1944) (upholding internment of American citizens of Japanese descent during World War II).

[437] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (listing categories for which heightened scrutiny might be appropriate).

[438] *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (free expression); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy); Brown v. Board of Educ., 347 U.S. 483 (1954) (equal protection).

[439] 7 BVerfGE 198 (1958); *see* Eberle, *Public Discourse, supra* note 6, at 808–27 (comprehensively examining *Lüth*).

[440] 42 BVerfGE 143 (1976).

[441] *See* Eberle, *Public Discourse, supra* note 6, at 807–08.

[442] 27 BVerfGE 1 (1969); *see supra* notes 188–208 and accompanying text.

[443] *See supra* notes 315–26, 338–40 and accompanying text.

[444] 65 BVerfGE 1, 44–51, 64–66 (1983); *see supra* notes 260–71 and accompanying text.

[445] 79 BVerfGE 174 at 270–73; *see supra* notes 412–21 and accompanying text.

[446] 90 BVerfGE at 271.

[447] *See id.* at 275.

[448] *Id.* This is an example of striving to conform legislation to the higher law of the Basic Law. This involves a process of actualization (*aktualisiert*) of the values of the Basic Law. *See* Brugger, *supra* note 20, at 398; *see also supra* note 20.

Heritage II.[449] In such circumstances, "[r]espect for the democratically legitimate legislature forbids" the Court from rewriting the statute.[450] However, "norms inconsistent with the Basic Law are invalid."[451] The Court thus has no choice: the law must be invalidated, and the Bundestag must remedy the defect, in this case, "by the next legislative session."[452] Such posture mirrors the role of the Supreme Court in our constitutional scheme. Both Courts, it seems, have staked out positions as last preserves of individual liberties, even if the majoritarian process must be supplanted.

The closest American Supreme Court case to the two *Right to Heritage* cases is *Michael H. v. Gerald D.*,[453] which also dealt with the right to determine legitimacy. The issue in the American case was the biological father's rights, rather than the rights of the child, who sought to maintain a relationship with her biological father.[454] In comparison to the solicitude given children by the German Court, Victoria D. got short shrift: The law gave her no chance to establish her origin, and the Supreme Court was wholly unconcerned with this state of affairs.[455]

Rather than establishing a child's right to know her heritage or a natural parent's right to maintain a relationship with his child, the Court valued more highly "the integrity of the marriage union," and the concern that the state might have to "recognize multiple fatherhood [which] has no support in the history or traditions of this country."[456] Viewed from the perspective of the Germans, *Michael H.*, in reaching an opposite outcome, seems to have sacrificed children's welfare for the sake of judicial restraint.[457] In this way, history and tradition operate to straitjacket personality, whereas in Germany personality is free to develop in view of modern conditions.

B. Sex, Sexuality, and Identity

Sex and sexuality are major topics in both German and American law. In German law, sex is viewed as integral to personal self-definition and identity, like other

---

[449] *Right to Heritage II*, 90 BVerfGE at 275. Means/end testing pursuant to the Proportionality Principle will usually uncover this.

[450] *Id.*

[451] *Id.* at 276.

[452] *Id.* at 276–77.

[453] 491 U.S. 110 (1989) (plurality opinion).

[454] *See id.* at 113–15.

[455] *See id.* at 130–31. Michael H. was trying to rebut the presumption of legitimacy that attaches to a child of a married couple and vests parental rights in the married man. *See id.* at 113. Michael H. was the biological father, Victoria D. the product of an adulterous affair. *See id.* at 113–14. Michael H. wished to establish his paternity of Victoria D. *See id.* at 115. Victoria D. also wished to maintain a relationship with her biological father. *See id.*

[456] *Id.* at 131.

[457] *See id.* at 121–23 (explaining that judicial restraint is needed in interpreting reach of substantive due process).

personality rights.[458] In America, sex is conceived as part of privacy, not personality.[459] Thus, acts like procreation, contraception, and abortion are conceptualized as part of autonomy rights.

1. Transsexual Case

Perhaps no German case voices these themes better than the *Transsexual Case*,[460] which, as its name implies, concerned an individual who was born male but desired to live as a female. The plaintiff underwent a sex change operation, which transformed him into a female as far as biologically possible. However, after the sex change, German records still listed her as male. Consequently, she sought official recognition of her acquired sex.

The question of sexual identity "belongs to the most intimate areas of personality, where all official power is removed," the Court observed.[461] Only the most compelling public interest would justify intrusion therein. "Human dignity . . . and free development of personality require . . . that one be allowed to determine what sex one belongs to, according to one's psychological and physical constitution."[462] Physical traits, legal regulation of gender, or sexuality itself is not decisive.[463] Rather, the Court ruled that "the striving toward unity of psyche and body" is decisive.[464] These concerns outweigh any moral or legal limitation of such self-realization,[465] and for these reasons, the Court held that a person is entitled to have his or her chosen sex registered in official records.

2. Transsexual Equal Protection

Based on the *Transsexual Case*, in *Transsexual Equal Protection*,[466] the Court invalidated a requirement that an individual must be twenty-five years old before sex

---

[458]*See Sex Education*, 47 BVerfGE 46, 73 (1977) ("The Basic Law has placed the intimate and sexual domain of human activity under the constitutional protection of Article 2(1) in conjunction with Article 1(1). These provisions of the Basic Law guarantee to individuals the right to determine their own view of sexuality."); *Homosexuality*, 6 BVerfGE 389, 432 (1957) ("This right [of personality] comprises also the free sexual activity of persons.").

[459]*See* Carey v. Population Servs. Int'l, 431 U.S. 678, 685, 688-89 (1977) (describing reach of protection of sexuality under right of privacy). *But see Bowers*, 478 U.S. at 191 (refusing to recognize right to engage in homosexual sodomy).

[460]49 BVerfGE 286 (1978). The plaintiff had married, but the marriage ended in divorce after 11 years. A child came from the marriage, although the plaintiff later learned the child was not his. The plaintiff started to feel increasingly like a woman. These feelings were accelerated when one of his testicles was removed due to an accident; later the other testicle was amputated too. *See id.* at 290.

[461]*Id.* at 298.

[462]*Id.*

[463]The Court canvassed the latest scientific research on sex and identity before settling on the human spirit as the decisive factor.

[464]*Transsexual Case*, 49 BVerfGE at 299. Viewed in this way, the sex change operation would be the "realization of this goal." *Id.*

[465]Even a future marriage to a male would not violate the morality limitation of Article 2(1). *See id.* at 300.

[466]60 BVerfGE 123 (1982).

changes could officially be registered. The Court held that this violated equal protection, since the requirement unjustifiably treated adults under twenty-five differently than older adults. The decisive event was the operation, according to the Court, not the age.[467]

3. American Law

These cases on transsexuality contrast, again dramatically, with American law. The closest American case is *Bowers v. Hardwick*[468] which, of course, dealt with consensual homosexual activity in the privacy of the home. *Bowers* is notable, in the time before *Planned Parenthood v. Casey*, as the second death of substantive due process.[469] Relying again on tradition, as in *Michael H.*, the Court asserted that "[p]roscriptions against . . . [sodomy] have ancient roots;"[470] therefore, homosexual acts could receive no constitutional protection as privacy rights. Chief Justice Burger put the moral point starkly: "Condemnation of . . . [homosexual conduct] is firmly rooted in Judeao-Christian moral and ethical standards."[471]

The role of morality and tradition as a constraint on personality rights thus reveals itself to be a defining trait in both legal orders. American morality seems to be grounded more in convention and mores; German morality reflects deep roots in Kantian idealism: dignity, self-determination, equal worth, and respect. The fate of the 1957 *Homosexuality* case fortifies this conclusion. Here the Constitutional Court applied moral convention to find homosexuality outside morality and, therefore, beyond personality protection. *Homosexuality* thus seems in accord with *Bowers*. However, whereas *Bowers* has only recently been questioned,[472] *Homosexuality*[473] has been held in disrepute for some time.[474] This would seem to underscore the difference in culture. One might say America is backward looking in its tethering of liberty to tradition and convention, whereas Germany seems forward looking, embracing modern social attitudes insofar as they fit concepts of moral autonomy.

---

[467] *See id.* at 133. Under the Article 3 equal protection guarantee, the Constitutional Court has endeavored to achieve more substantive equality than has the Supreme Court under the Fourteenth Amendment. *See* CURRIE, *supra* note 7, at 322–28.

[468] 478 U.S. 186 (1986).

[469] *Compare* Planned Parenthood v. Casey, 505 U.S. 833, 848 (1992) (plurality opinion) ("[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects"), *with Bowers*, 478 U.S. at 194 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

[470] *Bowers*, 478 U.S. at 192.

[471] *Id.* at 196 (Burger, C.J., concurring).

[472] *See generally* Romer v. Evans, 116 S. Ct. 1620 (1996) (holding that state constitutional amendment forbidding protection of homosexuals from discrimination violates Fourteenth Amendment).

[473] 6 BVerfGE 389 (1957).

[474] Professors Pieroth and Schlink observe that *Homosexuality's* proscription has been invalid since 1969. *See* PIEROTH & SCHLINK, *supra* note 19, at 103. The *Transsexual Case's* reconsideration of the morality limitation concerning sexual attitudes is further proof of this. *See Transsexual Case*, 49 BVerfGE at 299–300.

C. Identity: Right to One's Own Name

In a fashion similar to the transsexuality cases, the Constitutional Court has also determined that a person has a right to choose his or her name as a reflection of personality. This conclusion arose in the *Name Change Case,*[475] in which a German national wished to keep his birth name rather than be registered under his Austrian wife's maiden name.[476] The Court recognized that "[a] name protects against anonymity and dissolution of personality in mass, modern industrial society."[477] It is thus part of one's personality rights. However, the Court conversely pointed out that, while personality rights must be respected, such rights are not unlimited, but must be measured within community constraints. Thus, strangely, the Constitutional Court upheld the German customary requirement reflected in the Civil Code that married couples must maintain a common family name, which usually was the husband's.[478] Yet, while that family name must be used for "official" purposes, the Court ruled that a person was free to use the name of her choice in personal settings.[479] One can thus have two names, one for official and one for personal use—certainly an uneasy compromise between freedom and social order.

D. American Law

The direction of American law with respect to identity, self-determination, and autonomy has been quite different than German law. In American law, the root construct for these rights has been privacy, not dignity as in German law. From the privacy construct, the Supreme Court has afforded constitutional protection to a range of personal decisions relating to marriage, procreation, contraception, abortion, and family relationships, among others.[480] Yet, these decisions, being grounded in privacy, facilitate individual freedom from state interference. Thus, their concern is freedom as an individual right, not the particular quality of the choice resulting from that freedom, nor the well-being of the right holder. Unlike German law, there is no real focus on the quality of human personality. Instead, the American focus is on "the right

---

[475]78 BVerfGE 38 (1988).

[476]Under German customary law, as codified in section 1355 of the BGB, a married couple must maintain a common family name. The name chosen for the family can be either the husband's or the wife's. This German customary requirement is not consistent with international practice. *See id.* at 40. In this case, the Austrian wife registered her family name in Austria so that she could preserve it under Austrian Law. German authorities interpreted this to mean that the couple had chosen the wife's name as the common family name. The suit concerned the couple's right to maintain their own names, at least officially.

[477]The right to bear and control one's name has deep roots in German law. *See* §§ 12, 823, 1004 BGB.

[478]*See Name Change Case,* 78 BVerfGE at 38–39, 49 (interpreting § 1355 BGB).

[479]The Court determined that a common family name was a highly valued legal interest, constituting an important public law relationship, and guaranteeing the "unity of the family," which has constitutional dimension under Article 6. Families are a unit, not a collection of individual members, revealing again the communitarian bent of German law. *See id.* at 49. Thus, the German customary norm satisfied the Proportionality Principle. *See id.* at 49–50. Still, since use and choice of name lies within the protection of personality rights, one is free to choose the name used in personal or business relations. *See id.* at 50–52.

[480]*See supra* notes 171–79 and accompanying text.

to be let alone."[481] These privacy rights thus map out how we can be free to be let alone from official interference. As autonomous individuals, Americans are then free to choose the values with which to constitute and govern themselves. These "choices [are] central to personal dignity and autonomy."[482]

However, the two legal orders differ fundamentally on the conception of dignity in this regard. For Americans dignity means the right to choose. Worth and stature follow from respect for choices. Germans share this aspect of self-determination; the difference lies in how self-determination unfolds. In America, personal autonomy is simply the right to choose. Personal autonomy is thus the value itself, an integral part of one's rights. In Germany, by contrast, personal autonomy is an aspect of human dignity. Dignity imposes obligations as well as endows freedom. Thus, personal autonomy is relevant to shaping one's character and personality, but that shaping is to occur, not in isolation, but within a social and moral community. True autonomy, in the German view, is to unfold in a manner consistent with moral obligations, which themselves are reflected in the Basic Law as individual and social duties. The state, official actors like the Constitutional Court, and society are all responsible partners working cooperatively with individuals to achieve this moral vision. One might say the difference between the two cultures is between American "rights-talk"[483] and German Kantian philosopher-kings. Put another way, the difference is over the conception of autonomy, with (German) and without (American) the limiting construct of a workable definition of morality.

VII. ABORTION

No discussion of dignity, privacy, and personality in German and American law would be complete without an evaluation of abortion law. This is particularly the case because abortion has been the subject of heated debate in both countries for over thirty years,[484] starting with the original abortion decisions, issued within two years of each other: The Supreme Court decided *Roe v. Wade*[485] in 1973; the Constitutional Court decided *Abortion I*[486] in 1975. In the 1990s, moreover, both Courts fundamentally rethought both decisions: the Supreme Court in 1992, in *Planned Parenthood v. Casey*;[487] and the Constitutional Court, in 1993, in *Abortion II*.[488] Thus, abortion is a unique opportunity to compare and contrast the constitutional visions of two leading constitutional courts in two important western democracies.

---

[481] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (discussing Fifth Amendment protection against use of evidence gained in violation of Fourth Amendment rights).

[482] *Casey*, 505 U.S. at 851 (plurality opinion).

[483] MARY ANN GLENDON, RIGHTS TALK *passim* (1991).

[484] Even the Courts recognized this. *See Abortion II*, 88 BVerfGE 203, 214 (1993); Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992) (plurality opinion) (recognizing criticism of right to abortion found in Roe v. Wade, 410 U.S. 113 (1973)).

[485] 410 U.S. 113 (1973).

[486] 39 BVerfGE 1 (1975).

[487] 505 U.S. 833 (1992) (plurality opinion).

[488] *Abortion II*, 88 BVerfGE 203 (1993).

Yet, abortion law has been so extensively discussed in both Germany[489] and America[490] that there is little need to discuss its particulars again here. Instead, I shall focus on the conflict between a woman's right of self-determination and a fetus' right to life as specific manifestations of dignity and personality, and as illustrations of the balances drawn between liberty and community in the two legal orders.

The most fascinating phenomenon in this regard has been the recent convergence of the two laws, in *Casey* and *Abortion II*, despite the very different legal premises of the two constitutions. In both cases, the Courts recognized a woman's right to choose concerning abortion, provided that she evaluate the consequences of the act from the perspectives of the fetus, others affected (such as the father, family, or attending medical personnel), and the community—interests made manifest in counseling, waiting periods, and related regulations. Thus, both in Germany and America, society is justified in circumscribing abortion to address these concerns, reflecting balance between individual liberty and community.

A. The Different Premises of German and American Abortion Law

Perhaps the best way to understand abortion in Germany and America is, first, by considering the very different premises of the two constitutions, and then moving to the similarities and differences of the two laws.

1. Germany

In Germany, the explicit textual enumeration of human dignity once again provides the starting point. "Developing life also partakes of the protection of human dignity," the Court asserted in *Abortion I*, since "where human life exists, human dignity attaches."[491] Human dignity thus does not depend "on birth or a developed personality."[492] "Everyone shall have the right to life" echoes the text of Article 2(2), and this guarantee extends to "developing life in the mother's womb" according to the Court.[493] "Everyone" thus includes the yet unborn person; a fetus has a right to life. "Life in the sense of individual existence . . . begins according to undisputed biological and physiological knowledge . . . fourteen days after conception."[494] Once begun, life is "a continuous event, which knows no sharp phases and does not contain

---

[489] *See, e.g.*, PIEROTH & SCHLINK, *supra* note 19, at 108-10; Winfried Brugger, *Abtreibung—ein Grundrecht oder ein Verbrechen?*, 1986 NJW 896; R. Stürner, *Die Unverfügbarkeit ungeborenen menschlichen Lebens und die menschliche Selbstbestimung*, 1990 JURISTISCHE ZEITUNG (JZ) 709; R. Zippelius, *An den Grenzen des Rechts auf Leben*, 1983 JURISTISCHE SCHULUNG (JuS) 659.

[490] *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

[491] *Abortion I*, 39 BVerfGE at 41.

[492] *Abortion II*, 88 BVerfGE at 251.

[493] *Abortion I*, 39 BVerfGE at 41, 46.

[494] *Id.* at 37; *see also Abortion II*, 88 BVerfGE at 251 ("The Basic Law obligates the state to protect human life. The unborn belong to human life. Therefore, they also receive the protection of the state.").

distinct boundaries between the different stages of development."[495] By this reasoning, the Court established that an unborn person is entitled to human dignity, and that the Article 2 guarantee of a right to life is an independent legal value.

In the next step of the development, the Court transformed these provisions, through objective constitutionalism, into positive commands of the German constitutional order; the state became positively charged with the duty to protect life (*Schutzpflict*). "This duty of protection has its basis in Article 1(1),"[496] which, after all, calls on the state "to respect and protect" human dignity as "the duty of all state authority." "The object and scope of this duty is more specifically determined by Article 2(2)," the right to life guarantee.[497] Thus, German protection of fetal life derives from the radiation of human dignity, as reflected in the right to life clause, which then is transformed into a positive command of the state to protect. Certainly this follows both from the Nazi experience, particularly the Holocaust and the Federal Republic's reaction against it, and from the Christian natural law tradition, as made manifest in the Basic Law. Owing to this unique crystallization of values, Germany, as a matter of comparative law, can view with plausible skepticism the experiences of other lands with abortion, especially the United Kingdom and the United States, countries then and now with more liberal abortion schemes.[498]

The duty to protect life is all-encompassing. "The duty to protect the unborn is owed each individual, not just to human life in general."[499] This duty is imposed on all levels of state authority, especially the legislature, which makes the laws.[500] Accordingly, "the legal order must guarantee the appropriate legal foundation for the development of the unborn in relation to its own right to life."[501] How to do this is a matter of legislative discretion. However, the Court directed that, at a minimum, the *Bundestag* must declare abortion to be illegal, and must require that women carry the unborn to term.[502] For these reasons, government has the duty to intervene against forces or people who would terminate life, and to create the proper social and economic conditions for life to thrive. Finally, government must raise public consciousness that the unborn have a right to life, through education, informational campaigns, or other means.[503] Such certainly constitutes a remarkable assertion of proactive governmental power.

---

[495] *Abortion I*, 39 BVerfGE at 37; *see also Abortion II*, 88 BVerfGE at 244 ("From a biological perspective, life is a continuum that begins with the joining of egg and semen and ends with the death of the person.").

[496] *Abortion II*, 88 BVerfGE at 203.

[497] *Id.*

[498] In *Abortion I*, the Court observed that Germany would not be unduly influenced by the abortion experiences of other countries on account of the uniqueness of the German value-order and the country's history with Naziism. *See Abortion I*, 39 BVerfGE at 60.

[499] *Abortion II*, 88 BVerfGE at 203, 252.

[500] *See id.* at 252.

[501] *Id.* at 203.

[502] *See id.* at 203, 253 ("The fundamental prohibition of abortion and the fundamental duty to carry a child to term are two indispensable, inseparable elements of the constitutionally commanded protection.").

[503] *See id.* at 261. "The state also had to reinforce the general public's consciousness of the claim of the unborn to protection—this duty obliged the schools, public information and counseling offices, and both public and private broadcasting." Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 281 (1995).

Yet, Germany is also a country committed to basic human rights, including substantial protection of privacy and personality, as we have seen. Thus, right to life guarantees cannot be applied in isolation.[504] Countering their exercise are a pregnant woman's rights. Her right of human dignity, as radiated in her personality rights, protects her decisional autonomy. Her right to life protects her against undue risk in the pregnancy. And her right to physical integrity, guaranteed also in Article 2(2), safeguards her bodily integrity. Thus, under the German Basic Law, abortion triggers an epic conflict among these foundational values, one certainly not easy to resolve.

In German law, this conflict among constitutional values triggers application of the fundamental principle of Concordance (*Konkordanz*), an attempt to maximize realization of the values at issue.[505] We have seen this before in, for example, the conflict between personality and expression rights, particularly in the 1970s in cases like *Soraya* and *Lebach*.[506] Resolution of the conflict in these cases was difficult at best. In the abortion cases, the conflict is even more severe. Attempting to achieve balance between rights to life and to choose seems theoretically impossible. One cannot honor a woman's choice and yet sustain a fetus' life in all cases. Such was the essential conclusion of the Constitutional Court. In both abortion cases, accordingly, the Court recognized that fetal life must prevail over women's self-determination as a matter of valuation.[507] Therefore, abortion must be treated as wrong, a violation of the values of the legal order. In both cases, however, the Court recognized that respect for the woman's dignity and related Article 2 guarantees necessitated that the duty to bring a fetus to term be excused in certain circumscribed circumstances, such as danger to the mother's life or health, as described more fully below.[508] This balance resulted in women's access to abortion upon justification in Germany.

2. *America*

Abortion in America proceeds from different premises. A woman's right to choose is grounded in the right to privacy, rooted in Fourteenth Amendment liberty established by the Supreme Court in *Griswold v. Connecticut*. "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[509] As a constitutional right, the right to choose is entitled to significant constitutional protection. Under the rights methodology prevailing at the time of *Roe*,

---

[504] *See Abortion II*, 88 BVerfGE at 253-54 ("Protection of life is not absolutely commanded in the sense that it will take precedence without exception over other legal values; the language of Article 2(2) demonstrates this. The obligation to protect does not mean that any measure can be taken in its service. Instead, the idea is that the range of protection is to be determined in view of the importance and need for protection of the underlying legal value—here the unborn human life—in comparison to the legal values in conflict.").

[505] For a description of Concordance, see *supra* note 20 and accompanying text.

[506] *See supra* notes 338–40, 364–80 and accompanying text.

[507] *See Abortion I*, 39 BVerfGE at 42-43; *Abortion II*, 88 BVerfGE at 252–55.

[508] *See Abortion I*, 39 BVerfGE at 49-50; *Abortion II*, 88 BVerfGE at 255–58. The justifications for abortion are considered *infra* notes 522–27, 532–34 and accompanying text.

[509] *Roe*, 410 U.S. at 153.

measures limiting abortion rights were subject to judicial "strict scrutiny."[510] Under this tough standard of review, the Court invalidated numerous state regulations, including requiring abortions to be performed in hospitals, written informed consent provisions, twenty-four-hour waiting periods, and regulations requiring physicians to inform women of the risks attendant in the abortion procedure.[511]

Yet, abortion is not just a matter of exercise of individual liberty, as with other American fundamental rights. There is something "unique" or "sui generis" about abortion, as the *Casey* Court recognized:

> It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.[512]

Yet, unlike in Germany, there is no American fetal right to life after conception, nor is there any state duty to protect life, although the state may act to protect life after the point of viability.[513] Rather, there is a "potentiality of human life" that the state is justified in protecting.[514] Under *Roe* this "grows in substantiality as the woman approaches term and, at a point during pregnancy . . . becomes 'compelling.'"[515] Thus, in *Roe*, the Court balanced the compelling points of abortion rights against the developing fetal rights. Even in *Roe*, the Court recognized that "[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus."[516] The Court fixed this balance pursuant to the trimester scheme: "[T]he abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician" in the first trimester; in the second trimester "the State [can] . . . regulate the abortion procedure in ways that are reasonably related to maternal health," and, finally, the state can "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" in the third trimester.[517]

While the *Casey* Court dispensed with *Roe's* trimester scheme, the Court drew the line circumscribing a woman's autonomy at the same point of fetal viability as the *Roe* Court had, although medical developments, in the ensuing twenty years had

---

[510] *Id.* at 155. "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* Strict scrutiny is, of course, still the prevailing methodology for rights-analysis, although there have been notable departures from it, such as in *Casey*. *See infra* notes 547–50 and accompanying text.

[511] *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 438–50 (1983).

[512] *Casey*, 505 U.S. at 852 (plurality opinion). Even in *Roe*, the Court recognized that abortion was different than other situations involving rights. *See Roe*, 410 U.S. at 159.

[513] The *Roe* Court considered carefully and rejected the notion of a fetal right to life, stating that "the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. at 162.

[514] *Id.* at 164.

[515] *Id.* at 162–63.

[516] *Id.* at 159.

[517] *Id.* at 164–65.

pushed this point back four weeks.[518] Thus, in America, there is only one constitutional right at issue, a woman's autonomy right, as compared to the constellation of rights at stake in Germany. Against autonomy rights is balanced the strength of the interest in fetal life, as exercised by the state pursuant to the trimester scheme of *Roe*, or its replacement, the undue burden standard of *Casey*.[519] The Court in *Casey* was more solicitous of fetal interests than was the *Roe* Court.[520] A closer look at the German and American decisions illustrates how they balanced dignity, personality, and privacy in abortion law.

B. The Abortion Decisions

1. Germany

(a) Abortion I

The 1975 *Abortion I* decision of the Constitutional Court, a long and complicated decision filling ninety-five pages of the official reporter, invalidated a federal statute that would have decriminalized abortion in the first trimester, provided the woman received counseling and medical advice, and the procedure was performed by a licensed physician.[521] After the first trimester, abortion would have been permitted "if the pregnancy threatened the life of the woman or serious damage to her health, and within twenty-two weeks if it appeared that the child would be born with severe birth defects."[522]

The federal statute was a product of the center-left coalition between the Social Democrats and Free Democrats.[523] Acting pursuant to the procedure for abstract judicial review, the conservative Christian Democrats in the *Bundestag* and several *Länder* challenged the statute.[524] The Court held that decriminalization of abortion

---

[518]*See Casey*, 505 U.S. at 870 (plurality opinion). "We conclude the line should be drawn at viability, so that before that time the women has a right to choose to terminate her pregnancy." *Id.*

[519]*See Casey*, 505 U.S. at 877 (plurality opinion). "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*

[520]*See id.* at 869. "The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted." *Id.*

[521]*See* Neuman, *supra* note 503, at 274 (citing *Fünftes Gesetz zur Reform des Strafrechts*, 1974 BGBl. I S.1297; Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y, 1, 6 (1994) (noting that German justices, particularly Justice Ernst Benda, were quite familiar with *Roe* and American constitutionalism, because Justice Benda had been student at University of Wisconsin in the 1950s).

[522]Neuman, *supra* note 503, at 274–75.

[523]*See id.* at 274.

[524]The Constitutional Court may decide questions concerning the interpretation or compatibility of federal or state law with the Basic Law in the "abstract," meaning outside the context of a real legal dispute, at the request of the federal or state government or of one-third of the members of the *Bundestag*. *See* Art. 93(1) GG. In this case, the *Länder* of Bavaria, Baden-Württemberg, Rheinland-Pflaz, Saarland and Schleswig-Holstein filed suit. *See Abortion I*, 39 BVerfGE at 18. Abstract judicial review is thus most like the notion of an advisory opinion in American law, which, since the founding of the Republic, the Supreme

during the first trimester violated the state duty to protect the life of the fetus (*Schutzpflict*), as guaranteed by human dignity and the right to life.[525] The Christian Democrats were thus able to accomplish judicially what they were unable to accomplish politically. As in America, commitment to independent constitutional review necessitates occasional supplanting of the majoritarian process.

According to the Court, the state must apply criminal sanctions to protect fetal life in order to realize the value structure of the Basic Law, at least in the absence of suitable alternative protective measures.[526] Nevertheless, certain exceptional circumstances demanded too much from pregnant women who, after all, also had certain dignitarian and personality rights. In reaching this balance, therefore, the Court approved certain of the "indications" for legal abortion provided for in the statute: threats to women's health or life and severe birth defects. The Court also declared an indication for pregnancy resulting from sex crimes, such as incest or rape, and more broadly, for a "general situation of need" indication when "continuation of the pregnancy would impose extreme hardship on the woman comparable in intensity to the other indications."[527] Otherwise, abortion must be made a crime. "The constitutionally commanded legal disapproval of abortion must clearly be reflected in the legal order."[528]

The *Bundestag* passed a new law that implemented these teachings. In practice, most women could obtain an abortion if they desired under one of the indications, especially the general situation of need. This state of affairs led supporters of *Abortion I* to argue that new, stricter legislation was required. Supporters of abortion rights, by contrast, argued that the resulting legislation was too restrictive of abortion rights.[529] Thus, one might plausibly conclude that *Abortion I* did not settle the abortion controversy in West Germany.

Court has refused to issue, preferring instead to rule only in the context of a real dispute between parties. From the German standpoint, the Court's interpretation of the Basic Law in abstract judicial review facilitates its integration into society. The Court's concern is to assign an objective meaning to the constitutional rule at issue, in keeping with the objective nature of German constitutionalism, as compared to settling the legal dispute between the parties. For elaboration of these points in the context of *Abortion I*, see Kommers, *supra* note 521, at 5–6.

[525] *See Abortion I*, 39 BVerfGE at 42–43.

[526] *See id.* at 45–47. The Court noted that how to protect unborn life was fundamentally a decision for the legislature. *See id.* at 44. However, in the case of abortion, the value of life itself was implicated, a premier value of the legal order, and, therefore, the state must protect it through criminal measures. Abortion is an "act of killing" that the legal order must condemn in strong terms as a way of educating the nation on the value of life. *Id.* at 46.

[527] *Id.* at 49–50.

[528] *Id.* at 53.

[529] *See* Neuman, *supra* note 503, at 276. The implementation of the abortion law also varied by region, "leading women to travel within Germany, as well as to the Netherlands, for abortions." *Id.* In the context of further abortion litigation, the "Court has held that payment for abortion by public medical insurance carriers does not violate any right of fellow beneficiaries, and that the requirement of wage continuation for employees undergoing abortions does not violate the property rights of employers." *Id.* at 276–77 (citations omitted). This contrasts with the American experience. *See* Harris v. McRae, 448 U.S. 297, 326–27 (1980) (upholding Hyde amendment, which prohibited use of federal Medicaid funds for abortion unless life of mother was in danger); Maher v. Roe, 432 U.S. 464, 469–70 (1977) (holding that state regulation may deny funding for nontherapeutic abortions).

(b) Abortion II

The Constitutional Court was presented with a wholly different problem in 1993, when it was asked again to review the constitutionality of abortion as provided in the Pregnancy and Family Assistance Act (1992 Abortion Reform Act).[530] With the unification of the two Germanies came the necessity of reconciling the more restrictive West German abortion law with the more liberal East German one.[531] The 1992 Abortion Reform Act was the product of compromise between the Social Democrats and Christian Democrats of the West and the parties of the East. The new law eliminated the requirement of third-party determination of indications during the first trimester of pregnancy.[532] Abortion, instead, would be "not unlawful" (*nichts rechtswidrig*) if the woman chose to terminate her pregnancy after mandatory counseling designed to induce her to "make her own decision of conscience with awareness of responsibility," and after a three-day waiting period designed to reinforce the importance of choice.[533] After the first trimester, indications excusing the unlawfulness of abortion could only be met upon third-party determination of a serious birth defect or a threat to the woman's own life. Abortion due to birth defects also required counseling, and was not permissible after twenty-two weeks.[534] In essence, the 1992 Abortion Reform Act had converted the criminal provisions of the 1975 Act into mandatory counseling provisions, substituting persuasion for the sanction of the criminal law. Moreover, the 1992 Abortion Reform Act spoke to abortion in the context of broad-ranging social protection of women and children, including provisions providing for day care, vocational training and placement for primary care parents, housing and rent control, and increased welfare benefits for pregnant women and single parents, all measures designed to encourage women to bring their pregnancies to term.[535]

In a 6-2 decision filling 164 pages of the official reporter, the Constitutional Court reaffirmed the essential core of its 1975 *Abortion I*. "Dignity attaches to the physical existence of every human being . . . before as well as after birth. . . . Unborn life is a constitutional value that the state is obligated to protect that attaches to each human life, not life generally."[536] In keeping with this holding, the Court found that the

---

[530]The formal name of the Act was a mouthful: Act for the Protection of Prenatal-Developing Life, for the Promotion of a More Child-Friendly Society, for Assistance in Pregnancy Conflicts and for the Regulation of the Termination of Pregnancy (1992 Abortion Reform Act), 1992 (BGBl. I S.1398) (amending §§ 218–19 of the German Criminal Code or *Strafgesetzbuch* [StGB]). These amended sections constitute the 1992 Abortion Reform Act.

[531]The law of East Germany granted women the right to have an abortion during the first trimester. The Unification Treaty made special provision for abortion, permitting East German law to remain in effect in the East until new, unified German legislation could be worked out. *See* Kommers, *supra* note 521, at 10–11; Neuman, *supra* note 503, at 277. Many expected that the East German law would provide the basis for compromise.

[532]*See* 1992 Abortion Reform Act (codified as amended at § 218(a)(2) StGB).

[533]*Id.* (codified as amended at § 219(1) StGB); *see also Abortion II*, 88 BVerfGE at 299.

[534]*See* 1992 Abortion Reform Act (codified as amended at §§ 218a(2)–(3) StGB). The provisions are discussed in Kommers, *supra* note 521, at 13–14, and Neuman, *supra* note 503, at 277–78.

[535]*See* 1992 Abortion Reform Act, arts. 1–16.

[536]*Abortion II*, 88 BVerfGE at 252.

provisions of the 1992 Abortion Reform Act making all abortions legal during the first trimester were unconstitutional. Consistent with *Abortion I*, the Court further held that the statute must make clear that "as a matter of general principle abortion is, in fact, illegal, and that the pregnant woman has a legal duty, again as a matter of principle, to carry the child to term. The fundamental prohibition of abortion and the fundamental duty to carry the child to term are two inseparably bound elements of the constitutionally commanded duty of protection."[537]

The major change in *Abortion II* was that the state, in fulfilling its duty to protect life (*Schutzpflict*), did not have to criminalize all illegal abortions. Therefore, an abortion, while "illegal," might nevertheless be available, although only upon justification, such as pursuant to the medical, eugenic, or criminal indications. Moreover, an abortion, under what had been the social indication, could be obtained without punishment if the state created a comprehensive counseling system with the goal of convincing the pregnant woman to carry the child to term.[538] The criminal-based system of *Abortion I* had proved ineffectual, creating antagonism among women; the state felt a counseling system would be more effective, appealing to women's sense of responsibility and trust.[539] Thus, the counseling system represented an adjustment of the law to meet changed social conditions. In the ensuing twenty years since *Abortion I*, women had become more assertive and self-deterministic; the law recognized this changed reality.[540]

From an American perspective, this counseling system constituted content-based advocacy, questionable from a First Amendment view, designed to educate women about their maternal responsibilities.[541] Yet, these counseling provisions had the significant effect of recognizing, for the first time in Germany, that a woman could have an abortion during the first trimester of her pregnancy for any reason without fear of criminal punishment:

> [T]he state may validly conclude that in view of the reality of abortion in modern society, the more effective solution to the problem of unwanted pregnancy is to stay the hand of would-be prosecutors, to make an ally and friend of the woman in distress, to forswear threats of punishment, and to induce her to cooperate voluntarily with the state without any fear of retribution or loss of personal integrity.[542]

---

[537] *Id.* at 253.

[538] *See id.* at 257. To be effective, counseling must be backed up with social support measures designed to encourage women to decide against abortion. *See id.* at 258.

[539] *See* Neuman, *supra* note 503, at 282. This had been the position of Justice Rupp von Brünneck in her dissent in *Abortion I*, 39 BVerfGE at 76, 85–86.

[540] *See* Kommers, *supra* note 521, at 19 (noting that social context had changed radically since 1975, evidenced by 1990 opinion polls indicating that most Germans supported easing restrictions on abortion).

[541] The Court noted that counseling could be effective only if the end result remained open. The Court stated that the counseling must be designed to help the woman to resolve her dilemma whether to have the child or not. Yet, "the counseling . . . must necessarily be directed to the protection of unborn life." *Abortion II*, 88 BVerfGE at 282. "The counseling should encourage, not frighten; enhance understanding, not instruct; reinforce responsibility, not patronize." *Id.* at 283.

[542] Kommers, *supra* note 521, at 20 (citing *Abortion II*, 88 BVerfGE at 282).

The Court then scrutinized the counseling provisions to assure that they were sufficiently attentive of the fetus' right to life. Several of the provisions were struck as being insufficient. These provisions were held insufficient because they did not adequately proclaim and protect the right of the fetus to live; they did not describe adequately the social welfare and public support measures that would encourage a woman to bring the fetus to term; they did not guarantee with enough clarity the right of the woman to return to her job after the pregnancy; they did not encourage sufficiently the woman to state her reasons, resolve her conflict, and preserve anonymity; and the provisions did not sufficiently provide for support, or protect against outside pressures of family or friends supporting or militating against pregnancy.[543] Moreover, the counselor, not the woman, had to certify when the counseling was complete.[544] For these reasons, the Court ordered the *Bundestag* to rework the counseling provisions.

2. *America*

From its start, *Roe* was a controversial decision.[545] The ensuing twenty years have done nothing to lessen the controversy.[546] *Casey*, like *Abortion II*, provided the occasion for the Supreme Court to rethink fundamentally its original decision on abortion, which the Court did in a long and complicated opinion of ninety-four pages, echoing the length, if not the complexity, of the German cases. To the surprise of many, the *Casey* Court confirmed the essential holding of *Roe*:

> [1] a recognition of [a woman's right] to choose to have an abortion before viability and to obtain it without undue interference from the State . . . [2] confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health . . . [and 3] the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[547]

Yet, the Court also redefined the balance between women's autonomy rights and fetal rights, as struck by the state. The Court replaced *Roe's* trimester framework with an

---

[543] *See Abortion II*, 88 BVerfGE at 301–09. For detailed discussion of these provisions, see Neuman, *supra* note 503, at 282–84.

The state's obligation to protect unborn life also required it to take measures that prevented situations which would place undue burdens on pregnant women. Thus, the state should protect against educational and job discrimination, compensate through social security law long periods of uncompensated childrearing, and provide family subsidies as a means of preventing abortion, among other measures. In short, the state needed to create a "child-friendly" society. *See Abortion II*, 88 BVerfGE at 258–61; *see also* Neuman, *supra* note 503, at 280–81.

[544] *See Abortion II*, 88 BVerfGE at 286.

[545] *See, e.g.*, Ely, *supra* note 490, at 927 (stating that "difficult questions yield controversial answers"). Like the German abortion cases, *Roe* was long, filling 65 pages in *United States Reports*.

[546] *See Casey*, 505 U.S. at 844 (plurality opinion) ("Liberty finds no refuge in a jurisprudence of doubt. Yet nineteen years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, . . . that definition of liberty is still questioned.").

[547] *Id.* at 846.

"undue burden" test, by which the Court would evaluate interference with women's autonomy to determine if it placed "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[548]

The Court invented the "undue burden" test for *Casey*, uncannily similar to the "unreasonable burden" (*unzumutbar Belastungen*) standard of the Constitutional Court,[549] lending support to the sui generis[550] aspect of abortion, just as the Constitutional Court had invented a state duty of protection of life in the abortion cases. Perhaps abortion is indeed a unique act, or perhaps it is an issue over which it is difficult to think objectively and apply standard rights methodologies. As with the abortion cases, elaboration of the right or rights would depend on their application in concrete circumstances. In *Casey*, this called for application of the undue burden standard.

Applying the undue burden test to the Pennsylvania law at issue, the Court invalidated a spousal notification requirement, but upheld the other four provisions: informed consent, twenty-four hour waiting period, reporting, and parental consent requirements.[551] Of these provisions, informed consent and the twenty-four hour waiting period are noteworthy, since they provide both the most graphic contrast with the *Roe* approach, and the greatest similarity with *Abortion II*.[552]

The informed consent provision requires the physician performing the abortion to inform the woman of the nature of the procedure, the attendant health risks, the gestational age of the fetus; and the availability of state information concerning social welfare programs, such as "information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion."[553] This provision bears an uncanny resemblance to the mandatory counseling provision validated in *Abortion II*.[554] Like that provision, the informed consent requirement in *Casey* is not value-neutral, but is "'designed to influence the woman's informed choice between abortion or childbirth.'"[555] As such, under American free speech principles, it could quite plausibly be considered content-based and, therefore, subject to heavy justification under strict scrutiny analysis. Likewise, if the choice over abortion were

---

[548]*Id.* at 877.

[549]The Court described the test as follows: "Unreasonableness can, to be sure, not arise out of circumstances that remain within the realm of normal pregnancy. Rather, burdens must exist that demand a measure of sacrifice of one's own life values that are not to be expected from women." *Abortion II*, 88 BVerfGE at 257.

[550]*See Casey*, 505 U.S. at 857 (plurality opinion) ("Finally, one could classify *Roe* as *sui generis*.").

[551]*See id.* at 879–900. The spousal notification requirement was invalidated on the basis of equality between the sexes and the belief that its implementation would lead to domestic violence and abuse. *See id.* at 891–98.

[552]*See Akron*, 462 U.S. at 449-51 (invalidating informed consent, 24-hour waiting periods, and other provisions as imposing excessive burdens on access to abortion).

[553]*Casey*, 505 U.S. at 881 (plurality opinion).

[554]*See Abortion II*, 88 BVerfGE at 257–59, 282–84; *see also supra* notes 536–44 and accompanying text.

[555]*Casey*, 505 U.S. at 881 (plurality opinion) (quoting *Akron*, 462 U.S. at 444). Under the provision, the physician "must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion." *Id.*

considered a fundamental right, the provision would ordinarily be subject to strict scrutiny for that reason as well. This, in fact, had been the Supreme Court's conclusion under the *Roe* regime.[556]

A similar analysis applies to the twenty-four hour waiting period. This provision, too, bears striking resemblance to the three-day waiting period validated in *Abortion II*.[557] Significantly, both waiting periods are designed to force the woman to reflect carefully about the consequences of her choice. Combined with the laws' mandatory counseling provisions, the requirements are designed to influence the woman to carry the fetus to term, if at all possible. As was the informed consent provision, waiting periods were previously infirm under the *Roe* approach.[558]

3. Convergence and Divergence in Abortion Law

In assessing modern abortion law in both countries, what seems most remarkable is the growing convergence of the two laws, notwithstanding different constitutional premises and different initial judicial approaches. Both countries provide for qualified access to abortion during the first trimester, if desired, provided that the pregnant woman undergoes mandatory counseling designed to convince her to have the child, and provided that she consider this possibility for a specified period prior to undergoing the abortion procedure. This is a remarkable degree of convergence over abortion.

This seems especially so considering the very different precedents the two Courts confronted in the 1990s. *Abortion I* was a very autonomy-rights restrictive, pro-life protective decision; *Roe* was the opposite. The contrast between *Abortion I* and *Roe* was itself quite fascinating: Both Courts acted quite countermajoritarian in achieving opposite outcomes; they regulated with precision the extent of abortion "rights" and "duties" in a manner that plausibly left them open to attack for overstepping separation of powers by acting "legislatively."[559] Starting from these precedents, the Constitutional Court in *Abortion II* ameliorated some of the harshness of *Abortion I* from the woman's perspective by decriminalizing abortion, and thereby allowing women, for the first time, to have abortions during the first trimester provided they followed the statutory requirements.[560] In *Casey*, the Supreme Court restructured the equation set in *Roe* to address more fully state and community interests in protection of fetal life, similar to the German abortion cases. It might be said that *Casey* thereby recognized

---

[556]*See id.* at 929–30 (Blackmun, J., concurring in part and dissenting in part); *accord* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 760 (1986) (invalidating statute proscribing abortion because it subordinated constitutional privacy interests); *Akron*, 462 U.S. at 442–49.

[557]*See Abortion II*, 88 BVerfGE at 227, 299–300 (construing § 218(a) StGB).

[558]*See, e.g., Akron*, 462 U.S. at 450.

[559]*See* Webster v. Reproductive Health Servs., 492 U.S. 490, 518 (1989) (plurality opinion) (noting "rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms"); Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting) (deploring "exercise of raw judicial power"). The German dissenters echoed these thoughts. *See Abortion I*, 39 BVerfGE at 70 (Rupp von Brünneck & Simon, JJ., dissenting) ("The Court must not . . . assume [legislative functions] . . . and thereby endanger constitutional review.").

[560]*See Abortion II*, 88 BVerfGE at 227. In this way, the Constitutional Court moved in the direction of *Roe*. *See Roe*, 410 U.S. at 164.

the magnitude of a fetal claim to life, and the community's interest therein, for the first time, as the Constitutional Court had done in 1975 in *Abortion I*. In essence, the two Courts split the distance between them.[561]

There are deeper similarities and differences in the two laws. The differences in treatment of abortion illustrates the different rights regimes at issue. In Germany, a constellation of rights apply, and these rights are coupled with duties. On behalf of the fetus, human dignity and the right to life combine to impose on the state an obligation to protect life. This exists in counterpoise to the woman's autonomy rights, as derived from her guarantee of human dignity, and her rights to personality and bodily integrity. Especially when coupled with the affirmative state duty to protect and nurture life, these rights and duties illustrate the twin positive and negative dimensions of German constitutional guarantees. In America, the equation seems simpler: There exists a constitutional right of privacy which confers limited decisional autonomy, and is balanced against the potentiality of life.

The most notable difference in the enumerated values of the two constitutions is the right to life. In Germany this is explicitly enumerated in Article 2(2). The Constitutional Court interpreted this protection, in conjunction with human dignity, to encompass fetal life.[562] By contrast, the American Constitution is silent regarding a right to life generally, including that of a fetus. Moreover, through textual exegesis, the Court in *Roe* determined that rights apply only postnatally.[563]

Germany's pro-life focus is a product, preeminently, of its recent Nazi history, which drove Germans deep into their tradition, notably Kantian morality.[564] For this reason, abortion must be "wrong" in the eyes of society, even though it might be allowed in certain limited circumstances. By contrast, it is simply legal in the United States. In this way, there is more of an educational, or hortatory value to German law,

---

[561]It would seem the two Courts had their eyes on each other. American constitutional law is well known in Germany. Justice Benda, in particular, was quite cognizant of *Roe* in structuring *Abortion I*. *See supra* note 521 and accompanying text. On the current Court, Justice Dr. Dieter Grimm is well versed in American law, especially free speech law. *See* Dieter Grimm, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsrericht*, 48 NJW 1697 (1995). Likewise, Justice Dr. Paul Kirchhof is knowledgeable of American law. *See* PAUL KIRCHHOF & DONALD P. KOMMERS, GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM (1993). It is not uncommon for the Constitutional Court to cite to American cases. *See, e.g.*, *Lüth*, 7 BVerfGE 198 (1958) (citing Palko v. Connecticut, 302 U.S. 319, 327 (1937)).

By contrast, the Supreme Court almost never consults the work of another country's jurisprudence, although recent cases may signal otherwise. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365, 2404–05 (1997) (Breyer, J., dissenting) (analyzing extensive inventory of comparable federal systems, including those of Switzerland, Germany, and the European Union, in seeking illumination of the proper relationship between the American federal and state governments); Washington v. Glucksberg, 117 S. Ct. 2258, 2266–67 (1997) (reviewing other countries' treatment of assisted suicide, especially the Dutch experience, in rejecting constitutional right to die). *But see Printz*, 117 S. Ct. at 2377 n.11 (opinion by Scalia, J.) ("We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.").

[562]*See Abortion I*, 39 BVerfGE at 36–37.

[563]*See Roe*, 410 U.S. at 157–58.

[564]*See Abortion I*, 39 BVerfGE at 36 ("The express inclusion in the Basic Law of a self-evident right to life—different as compared to the Weimar Constitution—is explainable primarily as a reaction against the 'annihilation of life valued unworthy,' of a 'final solution' and 'liquidation' that was pursued as official policy by the Nazi regime.").

than to American law. Consistent with this pro-life stance, the Basic Law also outlaws capital punishment.[565]

Moreover, Article 1 obligates the state "to respect and protect" human dignity. Thus, the essence of the value-order is a commitment to the value of life. Kantian idealism, with its emphasis on the value of each life, fortifies this concept. In this light also is radiated the pro-family and pro-child social welfare provisions coupled around abortion regulation. The 1992 Abortion Reform Act reflects the social state directive and, of course, the pragmatic desire to influence the choice over abortion.[566] Germany thus reveals itself to be consistently pro-life, and deliberately child-friendly.

Another distinguishing trait of the two countries is the objective constitutionalism of German law. Under Article 1, the German state is obligated to respect and protect human dignity. In combination with the right to life, the Constitutional Court, for the first time in *Abortion I*, implied a positive obligation of the state to protect life, anchoring a fetus' right to life. As a matter of interpretation, the implication of this positive state duty represents a stunning act of judicial activism, justifying, presumably, far-reaching state intrusion into society, even if in contravention of majoritarian determination.

A comparative evaluation of other right to life cases puts this activism into bold relief. Apart from abortion, the Constitutional Court has not invoked Article 1 to impose duties on government to protect life. The Court rejected this argument in relation to the prevention of kidnaping or the rescuing of its victims in the *Schleyer Kidnaping Case*.[567] The Court also rejected the argument in relation to an asserted need to guard against threats posed by the storage and transportation of chemical weapons,[568] nuclear reactors,[569] and aircraft noise and highway noise.[570] In these cases, the Constitutional Court seemed quite cautious about extending any claim to governmental obligation to ensure safety or life as a matter of constitutional law, a caution certainly echoed in the American regime. Accordingly, the Court deferred substantially to legislative determinations, in bold contrast to its intensive scrutiny of the parliamentary determinations at issue in the abortion cases.[571] The inconsistent treatment of this duty to protect life might suggest a factual differentiation among these cases, or it may indicate preferred treatment based on the value of fetal life. In view of the *Casey* Court's use of a newly-minted undue burden standard, there is evidence of exaggerated treatment of abortion, from the perspective of rights-methodologies, in both countries. Perhaps this is because of the value of life, including fetal life.

---

[565] *See* Art. 102 GG.

[566] *See supra* notes 541–43 and accompanying text.

[567] 46 BVerfGE 160 (1977) (imposing no duty on state to prevent and solve kidnaping cases).

[568] *See Chemical Weapons Case*, 77 BVerfGE 170 (1987) (rejecting any constitutional claim that storage and transportation of chemical weapons violated Basic Law).

[569] *See Mülheim-Kärlich Nuclear Reactor*, 53 BVerfGE 30, 57–60 (1979).

[570] *See* 56 BVerfGE 54 (1981) (rejecting neighbors' complaint against aircraft noise); 79 BVerfGE 174 (1988) (rejecting complaint that zoning plan insufficiently protected against highway noise).

[571] *See* Neuman, *supra* note 503, at 300.

Considering the American concern for limited government and rejection of affirmative state obligations,[572] it is hard to envision how we could find any positive duty of government to act. The difference in state powers is thus a distinguishing trait in the two legal orders. In our abortion cases, the state acts on behalf of the potentiality of life as part of its police powers. Thus, fetal claims exist as an interest of the social order, not as a constitutional right, as in Germany.

It is worth pointing out, however, that the positive German state obligations help facilitate the communitarian bent of German law, as illustrated in the abortion cases. Rights are not just a matter of individual exercise in the German scheme, but are to unfold in a manner consistent with the value-order of the Basic Law. Rights are thus coupled with responsibilities. By contrast, the American Constitution is silent about these matters.[573] Rights, seemingly, can be exercised outside the context of a value-order or, even, a sense of responsibility, except for the responsibility one chooses to recognize voluntarily. Certainly the two legal orders differ on the concept of community. Germany and America also differ over individuality. From the standpoint of women's autonomy, the German cases seem distrustful and disrespectful of their decisional authority, whereas the American cases are premised on women's self-determination.

VIII. COMPARATIVE OBSERVATIONS

Having evaluated human dignity, personality, and privacy in German and American constitutional law, the similarities and differences in the countries' constitutional visions, doctrines, and techniques become evident. Certainly there is much the two laws have in common. Both developed formatively in the period after World War II, evidencing the emerging phenomenon of human rights, particularly in western legal culture.[574] Both accord broad freedom to individuals to shape their destiny, while balancing individual aspiration against the demands of maintaining social order. Both laws rely on an activist high court to shape these freedoms against the clutches of majoritarian control.

---

[572] *See* DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989), discussed *supra* note 314. If *DeShaney* were decided according to German law, it is probable that the Constitutional Court would value quite highly the young boy's right to life, especially since the state had notice of the abuse he was suffering. Therefore, the Court would likely impose affirmative obligations on the government to scrutinize with care any asserted state interests in juxtaposition to the right to life, as the Court had done in the abortion cases.

[573] In this light, the Court's discussion in *Casey* of the consequences of the abortion act, injecting a communitarian dimension, stands in contrast to much of American law. *See supra* note 512 and accompanying text.

[574] In Germany, personality rights have a long lineage in the private law. *See* Krause, *supra* note 59, at 485–88. However, the modern cases, starting with *Elfes*, 6 BVerfGE 32 (1957), mark the essential development. In the United States, cases like *Meyer v. Nebraska* and *Skinner v. Oklahoma* might be thought of as originating an emphasis on autonomy. *See* Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923) (holding unconstitutional prohibition of teaching German in schools); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding unconstitutional sterilization of habitual criminals). But *Griswold v. Connecticut* is the essential case for this development of American law. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (recognizing that use of contraceptives is individual liberty protected by constitution).

Notwithstanding these similarities, a closer look at the two laws reveals more difference than similarity. First, and foremost, the countries differ over the nature of their constitutional vision, as set out in the text of their basic charters and as amplified by the two high courts. The German vision, set out with reasonable clarity and reflecting the systematization of German legal science, centers around the human person and her dignity—a "spiritual-moral" individual with the ability to realize her potential and with the desire for personal satisfaction. Human values are thus the focal point of the legal order.

By comparison, the American constitutional vision is simpler, if not sketchier. Our focus is preeminently on outlining the limits of government, reflecting our original republican revolution, and securing a basis for the pursuit of liberty and happiness. In keeping with this defensive focus, the American charter does not set forth a comprehensive vision of how liberty or happiness are to be pursued. This is mainly left to individual discretion, in contrast to the circumscription of that choice in the German scheme. Certainly we do not have the core consensus on value structure that the Germans have.

The countries' contrasting value structures may be attributable, in part, to the differing complexion of the populations. America is extremely heterogenous; Germany, by contrast, is relatively homogenous. It stands to reason that the more homogenous the population, the greater possibility there is for consensus. Since America is so pluralistic, it is difficult for the population to agree on core values. Hence, it makes sense to leave value choices to individuals.

However, America's population at the time of the Constitution's framing was, like Germany's, relatively homogenous. Thus, the difference may have more to do with the Courts' approach to interpretation of the basic charters than any original intent. The difference in population complexion would seem to be a significant factor during the last fifty years, the formative period of judicial interpretation of the two laws.

Second, enumeration of rights and responsibilities in the two legal orders follows from these contrasting visions. The German value-order, grounded in the underlying philosophic thought of Kant, reflects a careful calibration of rights and responsibilities, interpreted by the Constitutional Court as an "objective value-order," one that must apply generally in society, affecting all legal relationships. Since human dignity is the apex of this value structure, it naturally radiates throughout the legal system, in both public and private law. An essential part of human dignity are basic rights, and their corresponding obligations.

While basic rights are mainly defensive or subjective in function, connoting a personal sphere of liberty, only rarely is such subjective liberty a matter of complete discretion. Instead, personal liberty is subject to limitation by the constitutional order, textually secured through express reservation or by necessary implication.[575] In this sense, rights are limited by obligations to others, as made manifest through the law. Yet, limitations of liberty are themselves not a matter of parliamentarian discretion or social control. Rather, liberty may be restrained only upon justification pursuant to the

---

[575] *See, e.g.*, Arts. 2, 5 GG.

value order.[576] In this sense, dignitarian morality acts as the "higher law" of German constitutionalism.[577]

German rights also contain an objective or positive dimension, obligating government to effectuate their command. Human dignity makes decisive claims to official action along these lines. Notable examples of this include the Constitutional Court's implication of a zone of privacy to protect individuals from a prying public in the context of fabricated, sensationalistic reporting in *Soraya*, or accurate, but negative, reporting in *Lebach*.[578] The Court's implication of a positive duty to protect fetal life in the abortion cases, even against the dignitarian rights of women to determine their fate, is another notable example of the far-reaching claim to governmental action that can result from such objectivism.[579]

By contrast, Americans share the concept of negative liberties with the Germans, but do not have a corresponding principle of positive rights or duties. Thus, we have little claim to governmental action, even over matters of human dignity.[580] American rights, like privacy, are instead mainly spheres of personal autonomy. Unlike German negative liberties, American rights are not coupled with responsibilities, either through textual reservation or by implication, except those that can be reasonably ferreted out of the legal system itself. Not surprisingly, lacking the context of an underlying philosophic base, American rights have more of an absolutist quality to them; there are few textual or philosophical restraints on individual freedom.

Third, the contrasting visions of the two laws have dramatic consequences for their concepts of human dignity, personality, and privacy. German concepts are reasonably well thought out, constituting an integrated whole, reflecting again the classification and comprehensiveness of German legal science. There is an inner dimension, focusing on humanity's "moral-spiritual" essence, and there is a corresponding outer dimension, reflecting activity in the world.[581] Both dimensions, of course, radiate from the same source of human dignity.

American law, by contrast, mainly reflects a search for personal identity and self-realization. These themes fit uneasily into an inner/outer dichotomy. Personal decision making over topics like procreation, contraception, or child rearing certainly partakes of self-realization in relation to the world, but also bespeaks inner identity.[582] These American rights mainly reflect personal autonomy, pursuant to the negative concept of liberties.

A closer review of the specific enumeration of American privacy and German personality rights illuminates these points. German personality law reflects the broad

---

[576]In all cases, the essence of the right must be preserved. *See* Art. 19(2) GG.

[577]By higher law, I mean that all actions must be judged for conformity with dignity, as the dispositive norm of the Basic Law's value order. Note, for example, the contrasting effect of human dignity in *Elfes* and *Mephisto*. *See Elfes*, 6 BVerfGE 32 (1957); *Mephisto*, 30 BVerfGE 173 (1971); *see also supra* note 306 and accompanying text.

[578]*See supra* notes 338–40, 364–83 and accompanying text.

[579]*See supra* notes 496–508 and accompanying text.

[580]On occasion, dignitarian interests can support a claim for governmental action. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (holding that procedural due process requires an evidentiary hearing before revocation of financial aid benefits).

[581]*See supra* notes 90–97 and accompanying text.

[582]*See supra* notes 96–98, 172–81 and accompanying text.

themes of German law: human dignity and its cognates, including valuation of life as an end in itself, worth and equal worth, and freedom to act within the constraints of the value-order. This accounts for some of its sharpest departures from American law. Foremost among these is the focus on the interior component of human personality, an emanation of the inner striving for freedom. Through its jurisprudence, the Constitutional Court has attempted to capture and preserve the essence of human personhood and personality, and safeguard it amidst the challenges of modern society. Hence, the Constitutional Court seeks to identify and fortify an Inner Space, "in which to develop freely and self-responsibly . . . personalities . . . [into] which [people] can retreat, barring all entrance to the outer world, in which one can enjoy tranquility and a right to solitude."[583] The census cases, by limiting official use of personal information on account of human autonomy, show how such nurturing of human personhood can make a difference with respect to modern social and economic developments.[584]

While the census cases are the most dramatic illustrations of this strand of interiority, the Constitutional Court has carved out related emanations of human personality, limiting political and social forces in service of the inner person. Most notable here is the right to control personal information, crystallized into a general right of informational self-determination. Intimate information reflects human personality, according to the Court, because it is an important component of both the inner person and the public persona. Accordingly, the person participating in this aspect of "life-formation" should have a measure of control over these matters. Based on this reasoning, the Court has extended degrees of protection over personal data,[585] honor, and rights to one's good name;[586] portrayal of self,[587] image,[588] and spoken word.[589]

These doctrines are simply not part of American constitutional law. This may be because the textual support in our constitution is scant as compared to the German constitution. It may be because we lack the certitude of a vision corresponding to the German focus on the centrality of personality. Perhaps this explains why the Supreme Court takes a more cautious approach than the Constitutional Court.

The Supreme Court's cautiousness may also be out of regard for state sovereignty, the value underlying federalism. Most American substantive due process cases involve a second-guessing of state actions, which the Court is hesitant to do.[590] By

---

[583] *Microcensus*, 27 BVerfGE 1, 6 (1969).

[584] *See supra* notes 195–97, 239–42, 251–56 and accompanying text. *Lebach*, with its concern for rehabilitation of an individual, evidences this too. *See Lebach*, 35 BVerfGE 202 (1973); *see also supra* notes 377–82 and accompanying text.

[585] *See, e.g., Census Act Case*, 65 BVerfGE 1 (1983).

[586] *See*, e.g., *Mephisto*, 30 BVerfGE 173 (1971).

[587] *See, e.g., Soraya*, 34 BVerfGE 269 (1973).

[588] *See, e.g., Lebach*, 35 BVerfGE 202 (1973).

[589] *See, e.g., Böll*, 54 BVerfGE 208 (1980).

[590] Note, for example, Justice Harlan's famous formulation:

> Judicial self-restraint . . . will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American

contrast, in Germany, a different federal state,[591] personality cases mainly involve federal law. Hence, any second-guessing is at least with respect to a coordinate branch of government. On such level field, the full steering effect of the Constitutional Court can be exercised, perhaps without the inhibition that faces the Supreme Court. Still, with the integrated German court system, many German cases require the Constitutional Court to second-guess the ordinary courts, which the Court too is hesitant to do.[592] Thus, at bottom, the two Courts are cautious for different reasons attributable to the different federal structures.

The difference in constitutional doctrine may also be because our private law, unlike German law, did not develop these concepts comprehensively, and, thus, unlike German constitutional law, American law had no ready base to stand on.[593] Moreover, American private law does not connect to constitutional law in the more seamless way that it does in Germany. Lacking grounding in personality, other values, most notably free speech, can be exercised without the braking influence of dignitarian concerns.

Even in the area of greatest overlap between the two laws—issues relating to identity, self-determination and autonomy—these differences are still evident. German law is grounded in the philosophy of human capacity and dignity, "factors constitutive for individual self-discovery and self-understanding."[594] These desires yield a "striving toward unity of psyche and body."[595] American autonomy decisions, such as those over contraception or procreation, by contrast, are grounded in privacy rights and self-realization, not dignity and its elevated cognates, like human inviolability.[596] American rights thus do not couple freedom with a concomitant concern for well-being, as do German rights.

These differences in the concept of personality reflect differences in the two legal cultures. The German vision reflects careful ordering of the characteristics of human personhood to facilitate well-being, especially those characteristics called upon in social intercourse. Freedom to develop human capacity is sought, indeed encouraged, to the maximum extent compatible with the freedom of everybody else. Thus, moral

---

freedoms.

Griswold, 381 U.S. at 501 (Harlan, J., concurring).

[591]The German federalist structure differs from the American. The German federal government contains most legislative powers, including all those exercised in the United States. In addition, the German federal government has power over private law, such as contract, tort, or criminal law, areas that in America are traditionally left to the states. Some powers are exclusively federal in Germany; others are shared with the *Länder*. By contrast, federal legislation, interestingly, is mainly carried out by the *Länder*. CURRIE, *supra* note 7, at 34. For description of the nuances of German federalism, see *id.* at 33–101; CONSTITUTIONAL JURISPRUDENCE, *supra* note 8, at 69–120.

[592]*See supra* note 146 and accompanying text.

[593]Despite strong arguments for a law based on the notion of an "inviolate personality," *see, e.g.*, Warren & Brandeis, *supra* note 59, at 205–07; Pound, *supra* note 386, at 445, which may have mirrored the German law, American personality law never fully developed. *See supra* note 386. In part, this is due to the serious conceptual difficulty in American law of private causes of action ordinarily lacking enforcement through the state or through constitutional actions. *See* Quint, *supra* note 14, at 279 n.106. Moreover, since the rise of First Amendment law, signaled most dramatically by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), interests of personality, especially honor and reputation, have been eclipsed by free speech interests.

[594]*Right to Heritage I*, 79 BVerfGE 236, 264 (1989).

[595]*Transsexual Case*, 49 BVerfGE 286, 299 (1978).

[596]*See supra* notes 174–78 and accompanying text.

obligation and respect for others requires that freedom be exercised within the bounds of community. In this view, freedom can truly exist only with provision for well-being, mutual toleration, and respect. It is in this sense that the "human person is an autonomous being developing freely within the social community."[597] She is not "isolated and self-regarding," but "related to and bound by the community."[598] Thus, individual self-determination is offset by responsibility, civility, and participation.

By contrast, American law places tremendous faith on the individual's ability to choose and realize choice. Our root value is personal liberty, more than any moral concept, like dignity. Choosing our fortunes is integral to our system of self-government. In this sense, freedom is more complete in America than in Germany, unbounded by any value constraining liberty, except those that we determine ourselves.

Viewed in this light, the German vision of constitutional democracy serves as an alternative strategy to organize society, one that reflects the benefits, perhaps, of added perspective and experience. There are obvious indigenous influences that led to the erection and make-up of the German value-order, especially values that empower and guide personal decision making. Kantian philosophy and nineteenth century German legal science are decisive theoretical influences. The German experience with anarchy during the Weimar Republic, and the dehumanization during the Nazi period, including severe limitation of human personality and capacity, and even annihilation of life itself, are crucial histories. The erection of the German value-order may, in fact, reflect a desire to channel human behavior out of fear of the evil that might arise (again) from unchained human passion.

Alternatively, however, German constitutionalism might reflect the added wisdom of comparative experiences. For example, much would seem to have been learned from the lessons of more unrestrained majoritarianism, as in France,[599] or even England,[600] and its tendency to limit human capacity. Other lessons might be learned from more unbounded liberty, as in America, and its tendency to encourage excessive

---

[597] *Mephisto*, 30 BVerfGE at 193.

[598] *Life Imprisonment Case*, 45 BVerfGE 187, 227 (1977).

[599] The French Revolution was a pivotal event for Germany and Europe generally. Under the influence of the philosophy of Rousseau, the leaders of the Revolution tried to ascertain the true common good of the political community. Hence, liberty lay with the people as a whole, unrestrained by notions of fundamental rights. This led to significant abuses and horrors.

[600] Since the Puritan Revolution of 1642, England has been ruled by Parliament. With the Glorious Revolution of 1689, the monarchy was restored, but on Parliament's terms. Thus, the rule of Parliament, representing the will of the people, is supreme, unbounded by a written, strong guarantee of fundamental rights.

Even in England today, there is no strong, enforceable set of rights inherent in the people. *See, e.g.*, *Sunday Times Case*, 38 Eur. Ct. H.R. (ser. A) (1980) (finding UK in violation of European Convention on Human Rights for prior restraint on press reports concerning thalidomide disaster); Attorney General v. Guardian Newspapers, Ltd., 3 All E.R. 316, 343 (1987) (upholding prior restraint on publication of book, *Spycatcher*, which discussed memoirs of former officer of British Secret Service, MI5). The book at issue revealed intimate secrets of British intelligence. The book was widely available outside England, but not in England. Ironically, rights in Britain, to a certain extent, rely on enforcement by outside institutions, such as the European Court of Human Rights, as in *Spycatcher*, or the Court of Justice of the European Community. *See, e.g.*, Case 61/81, Commission v. United Kingdom, 1982 E.C.R. 2601, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8853 (1982) (applying principle of comparative worth, equal pay for equal work of men and women).

passion or unleash unbridled social or economic power that might overshadow personal dignity. Against these histories and experiences, emphasis on the inviolability of human personhood becomes a final check against power, official or private, that might operate arbitrarily. That is an important contribution to public philosophy.

The countries' contrasting constitutional visions might explain the different stances of the two constitutional Courts. Both Courts are countermajoritarian institutions, asserting the values of the constitutional order against the excesses of majoritarian rule. As a matter of comparative law, this is itself notable: It is worth recognizing that, outside our borders, the Supreme Court is not the only activist judiciary. In fact, the Constitutional Court is aggressively activist in a way that our Supreme Court is not. The Constitutional Court actively sets out to realize in society the values of the Basic Law, attempting to coordinate constitutional text with social reality. The wholesale rewrite of legislation in the census cases and the abortion cases attests to this. The Constitutional Court thus acts somewhat more like our Supreme Court did in the first third of this century under substantive due process, censoring governmental actions for reasonableness when necessary.

By contrast, the Supreme Court today mainly rules when it must to enforce a limitation of government. It is hard to imagine the Supreme Court creating claims to governmental action to protect constitutional values, as the Constitutional Court did in implying a right to protection of life in the abortion cases or in facilitating redress of privacy and personality claims in *Mephisto, Soraya,* or *Lebach.* In this way, the Basic Law, as interpreted by the Constitutional Court, acts like a blueprint for society, whereas the American Constitution is more like an outline of government.

The approaches of the two Courts mirror their different missions. The German Court places a premium on the text of the Basic Law, its structure and purpose, and its applicability to current social and economic conditions. By comparison, the Supreme Court focuses on text, Framers' intent, and precedent. The Constitutional Court openly makes use of background principles not always clearly set out in constitutional text, such as the rule of law, the Social State Principle, and, of course, the capacious concept of "human dignity." In some cases, most notably in *Soraya*, the Constitutional Court even openly acknowledged that it would employ its perceived notions of justice to rectify wrongs in the written law.[601] The Supreme Court, by contrast, is uncomfortable using extra-textual sources, such as natural law, reflecting its desire to adhere to a stable rule of law founded on a defensible basis.[602] The Constitutional Court actively attempts to maintain the essence of constitutional concepts while keeping constitutional text "in tune with the times."[603] Recall, for example, the Constitutional Court's attempts to preserve the principle of human dignity amidst a changing world in the census cases, in relation to changing computer technology, or the transsexuality cases, in relation to evolving medical and moral

---

[601]*See supra* notes 341–63 and accompanying text; *see also Elfes*, 6 BVerfGE at 41.

[602]*See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986) (looking to history and tradition to limit sexual self-determination).

[603]*Griswold*, 381 U.S. at 522 (Black, J., dissenting) (arguing that privacy is not fundamental right, and that states may therefore constitutionally proscribe contraceptive use).

developments.[604] By contrast, the Supreme Court generally makes adjustments to changing social and economic conditions only gradually, and often amidst great anguish and controversy.[605] American constitutionalism thus seems tied to the past in a way that German law is not. In these ways, the Constitutional Court is forward in focus, whereas the Supreme Court looks backward.[606]

From these differences in constitutional vision, technique, and doctrine, we can extrapolate deeper differences in legal culture. The German prioritization of human dignity raises moral autonomy to the forefront of society; it is the higher law of German constitutionalism. Thus, persons have expansive freedom to act and to develop human ability, but that freedom is coupled with a concern for well-being, including solidifying the inner realm of personality. Moral autonomy, moreover, is not a one-way street; it involves responsibility too, including responsibility to others which individuals must recognize, even if through enforcement of the moral order. Accordingly, freedom is to unfold within the social community, which can both empower and limit human activity, depending on resolution of the conflict between individual and social claims.[607] Rights are thus exercised within a framework of duties and responsibilities, mediated ultimately by the Constitutional Court's interpretation of this higher law.

In American law, by contrast, the focus is on freedom to pursue one's vision of liberty or happiness, unbounded by a strong sense of moral order. We thus tend to exercise rights without a sense of duty or responsibility, except when we have been persuaded to accept duties and responsibilities by influences other than the sanction of the law. Naturally, our rights are more individualistic and absolutist in orientation.

Through examination of these contrasting constitutional visions, we discover alternative conceptions of humanity, personality, and community, as outlined in public law, conceptions that can be enriching, ennobling, or both. Perhaps this is the central purpose of comparative law: We learn, by looking at others, important truths about ourselves, truths which can then be reevaluated or reaffirmed. Certainly there is much to learn about the two laws, much the two laws can learn from each other. For example, the census cases demonstrate a sensible way to preserve the inviolability of personhood and human freedom amidst dramatic technological change. American law might profitably develop similar rights of informational self-determination, a logical evolution of First Amendment law. In addition, if Americans want to pursue a more coherent vision of community, the German method of coupling rights with duties, individually and socially, points the way toward introducing communal values into the social order. Through attempting to secure human dignity for all, we would perhaps

---

[604] *See supra* notes 246–56, 460–65 and accompanying text.

[605] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (signaling end of separate but equal doctrine); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392–94 (1937) (signaling demise of *Lochner*-era substantive due process).

[606] *Compare, e.g., Transsexual Case*, 49 BVerfGE at 299 (rooting sexual identity to sense of well-being), *with Bowers*, 478 U.S. at 194 (relying on history and tradition in declining to recognize fundamental liberty to engage in consensual homosexual sodomy).

[607] *Compare, e.g., Mephisto*, 30 BVerfGE 173 (1971) (stating that human dignity may constrain free expression), *with Transsexual Case*, 49 BVerfGE 286 (1978) (reasoning that human dignity empowers sexual self-identity).

be less preoccupied with securing our own claims. In this way, we might escape our obsession with "rights-talk" and learn to appreciate the value of human solidarity.

Conversely, if dignitarian rights are justifiably viewed as indispensable to German law, then the Constitutional Court might profitably transplant certain of the techniques employed by the Supreme Court to preserve fundamental rights. For example, importation of strict scrutiny analysis would lend a degree of clarity and precision to German rights analysis. To an extent, this already has occurred,[608] evidencing the transplantation of concepts across cultures, albeit with some adjustment. Perhaps pursuit of a mutual cultural influence is not so far off after all.

[608] *See Right to Heritage II*, 90 BVerfGE 263, 271 (1994) (applying heightened, intensive scrutiny).

Revisiting Expungement: Concealing Information in the Information Age

"[P]eona mori potest, culpa perennis erit (punishment can terminate, guilt endures forever)"[1]

--Lord Coke

I. INTRODUCTION

Over four centuries have passed since Lord Coke penned this insightful passage that succinctly defines one of the major problems faced by offenders attempting to reenter society. Having completed official sentences imposed by law, many offenders find the unofficial sanction of public ostracism to be as confining as prison bars and an equally formidable obstacle to reintegration into society.[2] The effect of public ostracism may essentially extend an offender's one-, two-, or three-year sentence into a *de facto* life sentence without the possibility of parole.

In an attempt to alleviate the effects of such ostracism, and to help offenders reenter society, federal and state governments created expungement laws[3] designed to conceal criminal records[4] from the public.[5] The concept of expunging criminal records is referred to by different names,[6] but entails the destruction or sealing of a criminal record when the offender completes certain requirements. The prerequisites for successfully petitioning a court for expungement vary by jurisdiction; however, they generally require the petitioner to demonstrate rehabilitation. Such rehabilitation is evidenced by a petitioner who has reentered society for a prescribed period of time without committing additional offenses.[7]

Whether the criminal record is obliterated or merely sealed, the intent of expungement is to assist offender reintegration into society by prohibiting public

---

[1]Barry M. Portnoy, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 306 (1970) (quoting Brown v. Crashaw, 80 Eng. Rep. 1028 (K.B. 1614)).

[2]*See* Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 148.

[3]*See* BLACK'S LAW DICTIONARY 582 (6th ed. 1990) (defining expunge as "[t]o destroy; blot out; obliterate; erase; . . . [t]he act of physically destroying information—including criminal records—in files, computers, or other depositories"); *see also id.* at 582 (defining "expungement of record" as the "[p]rocess by which record of criminal conviction is destroyed or sealed after expiration of time").

[4]For the purposes of this Comment, a "criminal record" encompasses all records associated with arrest and conviction. In cases where only the arrest record is intended, the term "arrest record" shall be used.

[5]*See infra* notes 11–23 and accompanying text (discussing various state expungement laws).

[6]*See* Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer's Need To Know About Juvenile Misdeeds and An Employee's Need to Keep Them Secret*, 41 WASH. U. J. URB. & CONTEMP. L. 3, 21 (1992) (explaining that "[t]here is no uniform terminology in the world of expungement statutes"). Snow reports that "[t]he process [of concealing criminal records] is variously described as expungement, erasure, destruction, sealing, setting aside, expunction, and purging." *Id.* at 21–22 (citations omitted).

[7]*See, e.g.*, OR. REV. STAT. ANN. § 137.225(1)(a) (Supp. 1996) (providing that for some crimes an offender may petition the court for "entry of an order setting aside the conviction" after three years from date of judgment).

access to certain criminal records.[8] Proponents of expungement affirm that concealing the criminal record not only allows a past offender to become a functional member of society, but also restores "'the regenerate offender['s] . . . *status quo ante*.'"[9] However, the noble attempt to reintegrate offenders by expunging their criminal records must be balanced against the important duty of government to protect its citizens from unrepentant offenders.

The meshing of these two important policy considerations—offender rehabilitation and public protection—is at the core of the expungement debate and the focus of this Comment. First, this Comment discusses how some states have attempted to balance offender rehabilitation with public protection by examining the key elements found in many expungement statutes. This Comment then analyzes the philosophy and policy behind the development of expungement in the United States[10] and briefly describes the various criticisms that have led some jurisdictions to confine the use of expungement to fewer types of offenders. Against this historical and policy background, this Comment will then analyze Utah's expungement statute and make suggestions for reforming Utah's statutory scheme.

II. FUNDAMENTAL ELEMENTS OF EXPUNGEMENT

Although the approaches to expungement are legion, there are four key elements that consistently appear in expungement statutes and impact both the ability of offenders to have their records concealed and the ability of the public to gain access to those records. The four elements include: the extent to which an offender is authorized to deny his expunged record, the types of crimes eligible for expungement, the amount of evidence an offender must produce to demonstrate rehabilitation, and the number of people or organizations that have access to expunged criminal records. The following Sections explore the role of these four elements in determining the nature of an expungement statute.

---

[8]*See* Mark A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 737 (1981) (suggesting alternative forms of government intervention other than expungement). Although Franklin and Johnsen question the effectiveness of expungement, they suggest four justifications for government intervention on behalf of offenders that are applicable to expungement. *See id.* at 737–39. First, they argue that intervention is appropriate to ensure public safety by assisting in rehabilitating the offender and reducing recidivism. *See id.* at 737. Second, they argue that the government should intervene to help rehabilitate the offender for the offender's sake. *See id.* at 737–38. Third, they argue that intervention may be necessary to put an end to unfair punishment that the offender suffers as a result of public opinion. *See id.* at 738. Finally, they argue intervention is appropriate as a reward for the offender who demonstrates rehabilitation. *See id.* at 738–39.

[9]Doe v. Utah Dep't of Pub. Safety, 782 P.2d 489, 491 (Utah 1989) (quoting Gough, *supra* note 2, at 149).

[10]This Comment will deal with adult criminal expungement and will not address the same topic in the juvenile justice system. For an excellent review of expungement in the juvenile justice system, see generally Carrie T. Hollister, Note, *The Impossible Predicament of Gina Grant*, 44 UCLA L. REV. 913 (1997).

A. Denying the Record

The first element of expungement is the extent to which an offender may deny the existence of his record after it has been expunged. This element is based on the premise that an offender may not be fully reintegrated into society unless he is authorized to deny with legal honesty that he ever possessed a criminal record. To this end, most states authorize offenders whose records have been expunged to respond negatively when questioned whether they have been convicted of a crime. In Colorado, for example, an offender with an expunged record is authorized to deny his criminal record ever existed to employers, educational institutions, and state government agencies.[11] The Colorado State Bar, however, is authorized to "make further inquiries" into an expunged record if they learn about the record from an unofficial source.[12]

B. Types of Crimes Eligible for Expungement

The second element that affects expungement is the type of crimes that are eligible for expungement. Often these statutes expressly prohibit courts from expunging serious crimes[13] or records of specific actions in order to better protect the public from certain types of dangerous criminals.[14] In some states like Oregon, many crimes are expungeable,[15] while in others, like Wyoming, the expungement of any criminal record has been expressly prohibited.[16] States like Oklahoma have found a middle ground by expunging only arrest records.[17]

C. Evidence of Rehabilitation

The third element impacting expungement is the evidence that an offender must produce to show he has been rehabilitated and is thus worthy to have his record expunged. Although states demand different requirements, they invariably insist that the offender wait for a specific time period as a demonstration of rehabilitation.[18]

---

[11] *See* COLO. REV. STAT. ANN. § 24-72-308 (1)(II)(f)(I) (West 1997) (providing that offender with sealed record may "state that no such [criminal] action has ever occurred").

[12] *See id.* § 24-72-308(1)(II)(f)(II) (West 1997) (allowing Colorado Bar to make further inquiries into expunged conviction that comes to attention of bar committee from outside source).

[13] *See, e.g.*, KAN. STAT. ANN. § 21-4619(b)(c) (Supp. 1996) (prohibiting expungement for convictions of, inter alia, rape, indecent liberties with child, criminal sodomy, and sexual exploitation of child).

[14] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-907(B) (West Supp. 1997) (forbidding expungement of any crime involving serious physical injury or use of deadly weapon).

[15] *See* OR. REV. STAT. ANN. § 137.225 (Supp. 1996) (outlining long list of expungeable crimes).

[16] *See* WYO. STAT. ANN. § 7-13-307 (Michie 1997) (prohibiting court from expunging "the record of a person charged with or convicted of a criminal offense").

[17] *See* OKLA. STAT. ANN. tit. 22 § 18 (West Supp. 1998) (authorizing expungement of arrest records if person was acquitted, if no charges were made, or if statute of limitations had expired).

[18] *See, e.g.*, FLA. STAT. ANN § 943.0585(2)(h) (West 1996) (insisting on ten-year waiting period for petitioners wishing to expunge criminal records).

Differences in the required time period may depend on the severity of the crime,[19] the age of the offender,[20] or even whether the offender is still alive.[21]

In addition to the waiting period requirement, many states require the offender to demonstrate a more accurate sign of his rehabilitation, namely, a record free of crime subsequent to the crime for which expungement is sought.[22] Related to the "clean record" requirement is the rule followed in some states that only allows a court to grant expungement once.[23] These types of requirements are wise. They allow expungement to benefit only those offenders who have demonstrated rehabilitation, while restricting the availability of expungement to non-rehabilitated persons attempting to manipulate the system.

D. Access to Expunged Records

The fourth element that affects expungement is the number and types of people who have access to the criminal record after it has been expunged. Because expunging the criminal record "will be of little value if anyone acknowledges the record's existence,"[24] most states prohibit government employees who work with expunged records from divulging any information contained in those records.[25]

Many expungement statutes, however, allow limited access to criminal records by certain organizations even though those records have technically been expunged.[26] Groups that are allowed such access generally have a special duty of trust owed to protect the public.[27] Legislatively, the number of such groups with access to expunged records is increasing continually.

---

[19]*See, e.g.*, UTAH CODE ANN. § 77-18-12(2) (Supp. 1997) (establishing minimum time requirements for expungement eligibility). The state cannot consider felony expungement petitions until seven years have passed since petitioner's release from incarceration, parole, or probation, whichever occurs last. However, the minimum time requirement decreases to six years for alcohol related traffic offenses, five years for Class A misdemeanors, and three years for other misdemeanors. *See id.*

[20]*See* 18 PA. CONS. STAT. ANN. § 9122(b)(1) (West 1983) (allowing expungement of criminal information when petitioner reaches age of seventy and "has been free of arrest or prosecution for ten years").

[21]*See id.* § 9122(b)(2) (West 1983) (allowing expungement of criminal information three years after offender dies).

[22]*See* UTAH CODE ANN. § 77-18-12(1)(e) (Supp 1997) (denying expungement if "petitioner was convicted in any jurisdiction, subsequent to the conviction for which expungement is sought").

[23]*See* S.C. CODE ANN. § 22-5-910 (Law. Co-op. Supp. 1996) (prohibiting expungement to any person who has already had record expunged for previous crimes).

[24]James W. Diehm, *Federal Expungement: A Concept In Need Of A Definition*, 66 ST. JOHN'S L. REV. 73, 76 (1992) (describing difficulty of rewriting history by expunging criminal records).

[25]*See, e.g.*, Ambus v. Utah State Bd. of Educ., 800 P.2d 811, 813 (Utah 1990) (holding that persons having access to expunged records may neither bolster their testimony by referring to sealed record, nor recreate record in proceedings after record has been expunged).

[26]*See* Steven K. O'Hern, Note, *Expungement: Lies That Can Hurt You In and Out of Court*, 27 WASHBURN L.J. 574, 584–90 (1988) (claiming that any profession charged with upholding public trust should have access to expunged records of its potential members). O'Hern suggests that licensing bodies have a duty to protect the public and should have access to the expunged records of their licensees in the areas of: health care, nursing, pharmacology, investment advising, accounting, banking, child care, engineering, and architecture. *See id.*

[27]*See, e.g.*, KAN. STAT. ANN. § 21-4619(i) (Supp. 1996) (forbidding access to expunged records except in cases of, *inter alia*, criminal justice agency investigation of potential employee, Kansas lottery, and Kansas Sentencing Commission).

Likewise, the trend is to increase availability of non-expunged criminal records to the public generally. A growing number of states, for example, have made the official chronicle of an offender's past more accessible to the public.[28] Although much of the legislation that provides access to criminal records proposes to protect the community from sex offenders,[29] laws authorizing employers and licensing boards to use criminal histories in making employment and licensing decisions are also becoming more common.[30] In short, access to criminal records, whether expunged or not, is becoming the norm rather than the exception.[31]

Laws increasing public access to criminal records have caused a significant increase in the number of offenders seeking to expunge their records. In 1985, the Utah Bureau of Criminal Identification approved approximately one hundred petitions for expungement.[32] Currently, the number of petitions for expungement has ballooned to over 1,350 petitions annually, nearly 1,000 of which are approved.[33] As the number of offenders seeking expungement rises, states carefully need to examine the effectiveness and propriety of their expungement statutes.

III. POLICY: IMPORTANT AND CONFLICTING VALUES

At the heart of the expungement debate is a classic battle between two important, yet seemingly conflicting, social values.[34] Expungement statutes must carefully balance the goal of helping to rehabilitate offenders by assisting their reintegration into society with the goal of protecting the public from those who seek expungement but

---

[28] *See, e.g., Expungement Policy: Hearings Before the Anomalies Subcomm. of Utah Sentencing Comm'n* (May 12, 1997) [hereinafter *Hearings*] (testimony of Richard Townsend, Chief, Bureau of Criminal Identification, Dep't of Pub. Safety). Chief Townsend reported that "prior to 1989, no one could get criminal history information. It stayed right in the criminal justice community." He explained that now, however, "more and more employers are getting access to this information." *Id.*

[29] *See* Eric Rasmusen, *Stigma and Self-fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 538 (1996) (noting that some states not only allow access, but "convenient access" to criminal records in order to stigmatize sex offenders). As an example of states providing convenient access to criminal records, Rasmusen mentions California, where a "telephone number exists for inquiries about particular individuals by name, street address, or other indexing information." *Id.* Moreover, in Louisiana, the parole board may require certain offenders to display bumper stickers or wear labeled clothing. *See id.*

[30] In Utah, for example, the state legislature has repeatedly given more groups access to criminal records for criminal background checks. *See* UTAH CODE ANN. § 78-30-3.5(2)(a) (1996) (enacted in 1992; authorizing background checks on petitioners for child adoptions); *id.* § 53-5-214(1)(f)(ii) (1995) (enacted in 1993; permitting background checks on employees of private security agencies); *id.* § 76-10-526 (1995) (enacted in 1994; providing for background checks on purchasers of handguns); *id.* § 53-5-214(1)(g) (1995) (enacted in 1995; authorizing background checks by qualifying agencies); *id.* § 61-2-9(1)(d) (Supp. 1997) (allowing background checks on real estate agents).

[31] *See* Rasmusen, *supra* note 29, at 537 n.36 (citing Paul v. Davis, 424 U.S. 693 (1976) (allowing police department to circulate names of those arrested for shoplifting to local merchants even if arrest did not result in conviction)).

[32] *See Hearings*, *supra* note 28, (testimony of Richard Townsend).

[33] *See id.* Of 1,350 petitions for expungement, 978 were approved. *See id.*

[34] *But see* Gough, *supra* note 2, at 161–62 (suggesting that goals of protecting society and helping offenders reenter society are not mutually exclusive). Gough argues that less restrictive expungement laws help reintegrate more rehabilitated offenders, thereby ensuring a safer society. *See id.* at 161–62.

have not been rehabilitated.[35] A statute that disproportionately favors the goal of public protection may perpetuate unfair societal biases against offenders. Conversely, a statute that disproportionately favors offender reintegration may unnecessarily place the public's safety at risk.

A. Rehabilitating the Offender

The underlying philosophy of expungement has always been to rehabilitate prisoners by providing "an accessible or effective means of restoring social status."[36] Expungement is, therefore, deeply rooted in a non-classical variety of utilitarian punishment theory[37] known as the rehabilitation theory.[38] For nearly a century before expungement became a part of the corrections process, the rehabilitation theory was considered to be the "'enlightened' rationale for corrections."[39]

Practitioners of the rehabilitation theory attempt to incorporate its goal of reshaping the offender into a productive member of society by providing care and education.[40] Such an ambitious goal relies on the assumption that an offender may be reformed or cured[41] if the causes of the particular antisocial behavior are accurately diagnosed.[42] Once the causes of the behavior are identified, a proper treatment can be implemented to reform the criminal. According to the rehabilitation theory, a proper treatment should "rehabilitate [the offender] and return him to society so reformed that he will not desire or need to commit further crimes."[43]

---

[35]*See* Floor Debate, Statement of Rep. Michael Waddoups, 54th Utah Leg., Gen. Sess. (Feb. 24, 1994) (House recording no. 2544) [hereinafter 1994 Floor Debate] (explaining that legislature's task was to "ensure a better balance between the public's right to be protected and the offender's opportunity to put mistakes behind him"); *see also* Davidson v. Dill, 503 P.2d 157, 161 (Colo. 1972) (advising that "a court should expunge an arrest record or order its return when the harm to the individual's right of privacy or dangers of . . . adverse consequences outweigh the public interest in retaining the records in police files").

[36]O'Hern, *supra* note 26, at 576 (describing expungement's attempt to rehabilitate offenders by providing a new start in mainstream society) (citations omitted).

[37]*See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 5–6 (Matthew Bender & Co. ed., Legal Text Series 1987) (explaining non-classical origin of rehabilitation as theory of punishment).

[38]*See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 24 (2d ed. 1986) (noting that rehabilitation theory is also known as correction theory or reformation theory); *see also* Gough, *supra* note 2, at 186 n.157 (stating that punishment is for the "purpose of rehabilitation, and not solely to satisfy our urge for vengeance").

[39]Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice*, 38 AM. J. JURIS. 221, 241–44 (1993) (outlining history of rehabilitation theory).

[40]*See* Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 311 (1990).

[41]*See* Tuomala, *supra* note 39, at 241 (explaining that "[c]rime is viewed as pathological, requiring treatment based on a medical model of diagnosis and prescription").

[42]*See* LAFAVE & SCOTT, *supra* note 38, at 24 (describing rehabilitative position that human behavior is "the product of antecedent causes" that may be diagnosed and cured). *But see* STANTON E. SAMENOW, INSIDE THE CRIMINAL MIND 6 (1984) (maintaining that "all the traditional rehabilitative programs in the world will be of no use unless the criminal *changes his thinking*").

[43]*See* LAFAVE & SCOTT, *supra* note 38, at 24.

Expungement, then, may be conceptualized[44] as a natural step in rehabilitation that allows an offender to become sufficiently reformed through reintegration into society. Notwithstanding this theory, the practice of restoring social status[45] to one who has violated society's norms is not easy. A person's record, once tarnished by a criminal conviction, requires a cleanser strong enough to remove the stain thereon such that "the penalties that public opinion imposes on former offenders" will be minimized.[46]

1. Obstacles to Recovery: Dealing with Ex-Offender Status

As noted earlier, the consequences of committing crimes do not end for many offenders when they complete their sentences, are released from prison, or are placed on parole. The informal penalties imposed on offenders by public opinion are well documented.[47] Offenders who are imprisoned experience a legally sanctioned loss of civil liberties.[48] Upon release from prison, offenders attempting to reenter society find that they carry with them a detrimental social stigma[49] that affects their ability to gain housing,[50] credit,[51] admission to certain schools,[52] and meaningful employment.[53]

The social stigma carried by offenders is especially detrimental to an offender's attempts to gain employment. The Utah Supreme Court, in discussing expungement,

---

[44]Expungement is also often conceptualized in Judeo-Christian or other religious terms. *See generally* Tuomala, *supra* note 39 (describing use of Christian concepts in corrections philosophy). *See also* Doe v. Utah Dep't of Pub. Safety, 782 P.2d 489, 496 (Howe, A.C.J., dissenting) (using language connoting religious underpinnings of expungement). Justice Howe explained that "[f]rom as early as the return of the prodigal son as recorded in the New Testament, families and mankind in general have always rejoiced when one who has strayed returns to the fold." *Id.*

[45]*See* United States v. Morgan, 346 U.S. 502, 519 (1954) (Minton, J., dissenting) (asserting that as result of conviction of felony, "[t]he stain on [an offender's] reputation may at any time threaten his social standing or affect his job opportunities").

[46]Portnoy, *supra* note 1, at 314.

[47]*See, e.g.*, Franklin & Johnsen, *supra* note 8, at 736–37 (documenting numerous unofficial sanctions imposed on offenders by society).

[48]*See* Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 967–81 (1970) (detailing impact of criminal conviction on passport rights, rights of aliens, and voting rights).

[49]*See* R. Paul Davis, *Records of Arrest and Conviction: A Comparative Study of Institutional Abuse*, 13 CREIGHTON L. REV. 863, 869 (1980) (stating that "[t]he roots of this problem lie in the natural tendency of employers, police, and others to regard a person with no record at all as 'safer' than one who has been arrested") (citation omitted).

[50]*See* Franklin & Johnsen, *supra* note 8, at 736 (citing Note, *Expungement in California: Legislative Neglect and Judicial Abuse of the Statutory Mitigation of Felony Convictions*, 12 U.S.F. L. REV. 155, 161 (1977)).

[51]*See id.* (citing Gough, *supra* note 2, at 158–59).

[52]*See* Hollister, *supra* note 10, at 913–16 (describing events surrounding Harvard University's decision to revoke invitation to Gina Grant to matriculate with 1995 freshman class). Hollister noted that after Harvard admitted Grant, the admissions board received newspaper clippings that outlined Ms. Grant's role in the murder of her mother. *See id.* at 914–15. Subsequently, Harvard rescinded its admissions offer. *See id.* at 913–16.

[53]*See* Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, 135 (1962) (explaining that employers are leery of applicants with arrest records, whether convicted or not); *see also* Linda S. Buethe, Comment, *Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma*, 58 NEB. L. REV. 1087, 1089–90 (1979).

has noted that employment is "an arena which influences a person's concept of self, self-worth, and the values which guide conduct."[54] Even though finding meaningful employment is recognized as a critical step in the rehabilitation process, employers are justifiably wary about entrusting the proverbial "keys to the store" to an employee with a criminal record.[55] In short, job applicants with criminal records face substantial obstacles in gaining work because of the biases held against them by many employers.

Besides the unofficial sanctions the public imposes on past offenders, an offender may face prejudicially heightened scrutiny from the criminal justice system as well. Despite the philosophy that a completed sentence constitutes the repayment of the debt to society,[56] some commentators have noted that biases against offenders are manifest in many levels of the criminal justice system.[57]

As evidence that offenders with criminal records are subject to the biases of law enforcement, commentators point out that offenders are more likely to become subjects of police investigation than citizens without records.[58] This is true even in cases where the investigation is in regard to a totally unrelated incident.[59] Some law enforcement officers use records to influence their decision on whether to make an arrest,[60] and the state may even use these records in deciding if an offense should be charged.[61] Furthermore, criminal records are used to investigate crimes and, in some jurisdictions, to establish reasonable or probable cause "when the *modus operandi* of a crime is similar to [that] described on a suspect's record."[62]

In the court system, the existence of a criminal record may affect a plea bargain as prosecutors often use the absence of a previous record as a reason for reducing a charge or accepting a plea bargain.[63] Moreover, some judges look to a defendant's criminal record to determine pre-trial release, release on recognizance, or the amount

---

[54]*Doe*, 782 P.2d at 492 (citing Gough, *supra* note 2, at 153).

[55]*See* Stephen B. Higgins, Comment, *The Press and Criminal Record Privacy*, 20 ST. LOUIS U. L.J. 509, 512 (1976) (claiming that type of criminal record is largely irrelevant because society's "prominent belief [is] that an arrest is tantamount to guilt").

[56]*See* Buethe, *supra* note 53, at 1090 (hypothesizing that "when a conviction does occur and the individual has served time and paid a fine, then is it not true that the offender has 'paid his debt to society'?").

[57]*See id.* at 1090–91.

[58]*See* Davidson v. Dill, 503 P.2d 157, 159 (Colo. 1972) (declaring that "it is common knowledge that a man with an arrest record is much more apt to be subject to police scrutiny—the first to be questioned and the last eliminated as a suspect in an investigation"); *see also* Buethe, *supra* note 53, at 1091 (explaining that "those with a previous arrest record stand an extremely good chance of being rearrested some time in their lives"); Menard v. Saxbe 498 F.2d 1017, 1024 (D.C. Cir. 1974) (explaining that people with criminal records are more likely to come under police scrutiny than people with clean record). Menard was a nineteen-year-old college student when he was arrested for prowling. *See id.* at 1019. Although Menard was never charged, convicted, or sentenced, the L.A.P.D. forwarded Menard's fingerprints to the FBI along with a brief explanation that Menard had been arrested for suspicion of burglary and released because the L.A.P.D. was unable to connect him "with any felony or misdemeanor at this time." *Id.* The case arose when both the FBI and L.A.P.D. denied Menard's request to have his arrest record expunged. *See id.* at 1020.

[59]*See* Diehm, *supra* note 24, at 78.

[60]*See* Richard C. Smith et al., *Background Information: Does it Affect the Misdemeanor Arrest?*, 4 J. POLICE SCI. & ADMIN. 111, 111–13 (1976).

[61]*See* Buethe, *supra* note 53, at 1091 (explaining that many prosecutors are more likely to charge person who has criminal record than one who does not).

[62]*Id.* at 1090.

[63]*See id.* at 1091.

of bail. Individuals with criminal records may even face prejudice before the Board of Pardons, which uses arrest records to determine conditions of release and parole.[64]

The challenges of reintegrating into society past offenders who have demonstrated reformation arise from biases both in and out of the criminal justice system. Expungement attempts to facilitate such reintegration, attempting to bridge the gap between society and the rehabilitated offender by concealing evidence of the offender's past.

B. Protecting the Public

Although the goal of rehabilitating criminal members of society is worthy of applaud,[65] government must balance that goal with its indelegable "duty to defend the victim's . . . interest in protection from criminal injury."[66] The duty to protect becomes especially acute when dealing with the safety of vulnerable segments of society.[67]

There is no shortage of evidence indicating that those with criminal records are more likely to commit crime than the general populace.[68] Yet, in spite of the importance of protecting the public, the number of commentators who have addressed expungement in terms of public safety has been "surprisingly" few.[69]

Perhaps the reason that few commentators discuss the dangers expungement poses to society is that expungement only increases the risk of danger to the public indirectly. The average citizen does not have access to criminal records. As a result, there is no increased risk to the average citizen when records are expunged. A typical citizen would not likely take additional precautions when dealing with an offender whose record is expunged because the citizen is usually not aware the criminal record ever existed.

Although under many circumstances the dangers created by expungement are not evident, the peril becomes apparent when the expunged record is concealed from someone who would or should have access to criminal records, such as employers or licensing boards.[70]

---

[64] *See id.* at 1090.

[65] *See* T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REF. 885, 890–901 (1996) (quoting EEOC v. Carolina Freight Carriers Corp., 732 F. Supp. 734, 752–53 (S.D. Fla. 1989) (stating that "this court rejoices along with the angels of God for every sinner that repents").

[66] Kenneth L. Wainstein, *Judicially Initiated Prosecution: A Means of Preventing Victimization in the Event of Prosecutorial Inaction*, 76 CALIF. L. REV. 727, 730 (1988).

[67] *See* Catherine F. Klein & Leslie E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1136 (1993) (complaining that "[d]omestic violence is often hidden from public scrutiny, and if a batterer's record is expunged, it may destroy the one means the public has of assessing the danger he presents to society and other potential victims").

[68] *See, e.g.*, Funk, *supra* note 65, at 927 (reporting that "those with criminal histories have a higher rate of future criminal activity than those who have never been convicted").

[69] *See* O'Hern, *supra* note 26, at 584.

[70] *See id.* at 575. O'Hern offers an excellent hypothetical example of the dangers expungement can pose to the general public. He suggests that a young student convicted of manufacturing and selling methamphetamine can be arrested, serve a short sentence, and have that record expunged after a short period of time. After having his record expunged, the student could receive his pharmacy license, get a job at the

In sum, the goals of rehabilitating past offenders by expunging their criminal records and protecting the public by maintaining such records seem to be mutually exclusive and perhaps even at loggerheads. It may be argued that furtherance of either goal can only be accomplished at the expense of the other. Nevertheless, in order to create a superior expungement statute, these two competing policies must be skillfully balanced.

IV. CRITICISMS OF EXPUNGEMENT STATUTES

For some time after the enactment of the first expungement statutes, the concept of expungement was embraced by the legal society with rather uncritical acceptance.[71] Nevertheless, within three decades from the time expungement statutes were first discussed at the 1956 National Conference on Parole,[72] commentators began critically evaluating expungement's role in aiding an offender's reentry into society,[73] especially in light of the rather high costs of concealing records. Since the 1970s, a number of philosophical and practical criticisms have emerged, causing lawmakers to reconsider their expungement policies.[74] The following Sections discuss the moral and practical criticisms of expungement.

A. Moral Criticism

For some commentators, one of the major drawbacks of expungement is that, at its roots, expungement is an institutionalized lie.[75] In moral terms, this criticism presupposes that government sponsored misrepresentation comes at a tremendous cost to society in terms of the standard it sets for society and the mistrust it breeds among the public.[76] Indeed, as expungement requires concealing past events from the public, expungement requires deception on a number of levels.[77]

Expungement engenders dishonesty by authorizing offenders, government staffs, and, ultimately, elected officials and the bench to lie. Most expungement statutes allow

---

local hospital night shift, and begin dealing drugs again. *See id.*

[71]*See* Bernard Kogon & Donald L. Loughery, Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 378 (1970) ("Record sealing and expungement have been accepted causally and extended uncritically over the years, prospering in the rosy glow of good intentions and expediency, with little attention to evaluation of results.").

[72]*See* Peter D. Pettler & Dale Hilmen, Comment, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CAL. W. L. REV. 121, 124 n.22 (1967).

[73]Some commentators have questioned the effectiveness of rehabilitation philosophy on which expungement laws are based. *See* LAFAVE & SCOTT, *supra* note 38, at 23–24 (citing L. HALL & S. GLUECK, CRIMINAL LAW AND ITS ENFORCEMENT 18 (2nd ed. 1958)). *See also* Rychlak, *supra* note 40, at 311 n.45 ("Some criminologists have expressed doubts about the criminal law system's ability to rehabilitate.").

[74]*See, e.g.*, Kogon & Loughery, *supra* note 71, at 378. As early as 1970, a critic stated that "the widespread practice of sealing or expunging criminal and delinquency records is a failure." *Id.*

[75]*See id.* at 385.

[76]*See id.* at 383–85.

[77]*See* Franklin & Johnsen, *supra* note 8, at 750 ("Dishonesty, whether explicit or implicit . . . is a fundamental aspect of expungement.").

offenders to deceive everyone from future employers to the court itself.[78] The existence of legalized perjury[79] in the halls where honesty is a prized virtue is oxymoronic at best, and certainly sends a confusing message to society and past criminal offenders.[80]

Commentators have noted that widespread, deliberate deception "exact[s] a high moral toll by fostering dishonesty in government officials and in convicts themselves."[81] The dishonesty nurtured by expungement is authorized by expungement statutes, which dictate that elected leaders, public servants, and criminals violate this country's "longstanding and generally unquestioned preference for truth over falsity."[82] For some commentators, a society which not only approves of dishonesty, but encourages it, is a society of questionable moral substance.[83]

B. Practical Criticism

1. Expungement Does Not Provide an Effective "Fresh Start"

Simply stated, expungement's most serious practical criticism is that it fails to fulfill its purpose of reintegrating offenders.[84] For a number of reasons, this argument has merit. First, commentators argue that expungement does not help past offenders with the most important step of reintegration—gaining meaningful employment.[85] In nearly all cases, expungement is not available at the time offenders need it most: when

---

[78]Allowing witnesses to lie to the court causes a myriad of problems and may sometimes result in an unfair verdict. *See, e.g.*, United States v. Ferguson, 776 F.2d 217, 221 (8th Cir. 1985) (detailing account of physician convicted of filing false statements with the Drug Enforcement Administration). In *Ferguson*, the defense attempted to impeach the testimony of defendant's former spouse based on her expunged criminal record, but the court held that a witness may not be impeached based on an expunged conviction. *See id.* at 221–22. Ironically, the former spouse was convicted for fraudulently obtaining controlled substances. *See id.* at 221.

[79]*See* Diehm, *supra* note 24, at 76. Diehm explained, "a person whose criminal record has been expunged must be permitted to lie under oath, even in court proceedings, and to deny that he or she has a criminal history." Diehm further noted that deception in the courts "places the court in the unseemly position of not only authorizing perjury, but also knowingly accepting the perjury as truthful testimony." *Id.*

[80]*See id.* at 96–97. Herein, Diehm relates the story of Mr. Barh, who had been convicted of embezzlement. Barh had his embezzlement conviction expunged and later ran for county commissioner. Under the Oregon expungement statute, Barh was authorized to answer "no" when the local paper asked him if he had ever been convicted of embezzlement. The newspaper reported that Barh had spent time in jail for embezzlement and that he denied this fact during an interview, thus portraying him as an embezzler and a liar. Barh sued the newspaper for defamation, but the court dismissed that action on the ground that truth is an absolute defense. Diehm notes the irony that the court system which authorized Barh to answer that he had never had a criminal record was the same court system that held the newspaper account of this prior conviction was also the truth. *See id.* at 97.

[81]Franklin & Johnsen, *supra* note 8, at 735.

[82]*Id.* at 749. The article also noted that "legal sanctions, ranging from statutory perjury and common law fraud to statutory false-statement provisions, reflect hundreds of years of firm belief in the value of truth over falsity." *Id.* at 750.

[83]*See* O'Hern, *supra* note 26, at 583.

[84]*See* Kogon & Loughery, *supra* note 71, at 378 ("Despite the good intentions of its proponents, [expungement] does not provide the relief intended and actually does harm, frequently, by the hoax it plays upon the ex-offenders and the general public.").

[85]*See* Franklin & Johnsen, *supra* note 8, at 744.

they attempt to reenter society directly after release from prison or parole.[86] Since nearly all statutes require offenders to live crime-free lives for a specific amount of time as proof of rehabilitation,[87] expungement laws are not available to help offenders gain their first jobs when trying to reenter society.[88]

Moreover, there is at least one commentator who recognized the possibility that expungement makes it more difficult for certain groups of people to gain employment.[89] O'Hern suggests that expungement laws may increase racial prejudice among employers who are aware of expungement laws.[90] These employers may discriminate against groups that traditionally have higher conviction rates. Because expungement impedes an employer from determining with confidence whether a potential employee has a criminal record, the employer may choose to avoid groups that are more likely to have criminal records.[91]

Second, expungement is ineffective because it only restricts the flow of official criminal information. There are a number of alternative, unofficial sources[92] of criminal history. Consequently, many attempts to cover up offenders' past crimes are essentially futile. Such unofficial sources[93] may include news media accounts,[94] memories of witnesses, victims, police,[95] police blotters, and information from appellate courts and law enforcement agencies outside the jurisdiction where

---

[86]*See id.* at 739.

[87]*See supra* notes 17–23 and accompanying text.

[88]*See* Franklin & Johnsen, *supra* note 8, at 744 (asserting that "a convict's records are shielded from the public too late to help her find the initial job that will prevent her from returning to crime and too late to eliminate the other unequal treatment by prospective creditors and landlords she may face upon release").

[89]*See* O'Hern, *supra* note 26, at 583.

[90]*See id.* at 583–84 n.75.

[91]*See id.* (reporting that in 1986 the proportion of African-Americans in the population was around 11% while the arrest rate among African Americans was 27%). O'Hern claims that some employers will discriminate against all African-American applicants because they believe that an African-American is more likely to have had a record expunged than other members of the society. *See id.* at 583–84.

[92]*See* Kogon & Loughery, *supra* note 71, at 383–85; *see also* Ambus v. Utah State Bd. of Educ., 800 P.2d 811, 813 (Utah 1990) (explaining that the protections expungement provides offenders are limited to restricting third party access to criminal records and "information from non-record sources regarding a petitioner's reputation or bad acts is not prohibited by the statute").

[93]*See* Ambus, 800 P.2d at 813. In *Ambus*, the court stated that "the intent of the legislature was not to create 'super-citizens' by requiring employers to ignore press releases or prevent them from independently checking the background of employees or future employees simply because the record has been expunged." *Id.* The court further explained that

> [a]lthough court records are sealed, employers or licensing agencies may make independent inquiry into the acts of those who are or will be employed. So long as independent inquiry is not from state agency sources that have received an expungement order, it is the employer's or agency's prerogative to decide whether any information properly received qualifies an individual for employment or licensure.

Id. at 813–14.

[94]*See* Hollister, *supra* note 10, at 914.

[95]*See id.* at 915. Even though the South Carolina statute "rendered sealed and confidential all arrest, court, and probation records associated with her case," Gina Grant was still "a household word at the time of her arrest and hearing [because] Lexington County sheriff James Metts gave Grant's name to the press." *Id.*

expungement occurred.[96] Even a gap in employment creates an obstacle for many ex-convicts. Prisoners with expunged records are oftentimes required to account for the gap in their employment histories.[97] Indeed, in view of all the unofficial sources of information about one's criminal history, the only way for expungement to be totally effective would be to violate the Sixth Amendment right to public trial and close from the news media the entire criminal process, including arrest, trial, and sentencing.[98] Naturally, this is not acceptable.

2. *Expungement Endangers the Public Safety*

In light of the doubts raised by commentators about the effectiveness of expungement in rehabilitating offenders, one questions whether expungement is worth the risk it poses to public safety.

The dangers of concealing criminal histories become clear when viewed in light of the public's dependance on the integrity of licensing boards.[99] The public relies upon various licensing bodies to refuse licenses to those who would place the public in danger. Indeed, most jurisdictions license professionals in areas of investment, accounting, law, medicine, pharmacology, and child care.[100] Jurisdictions that do not allow licensing bodies access to expunged records place the public at risk.[101]

Additionally, expungement may in particular place employers at greater risk because most expungement laws are geared toward allowing ex-offenders to deceive their future employers. Employers, as much as anyone, are interested in the honesty

---

[96]*See* Nilson v. Layton City, 45 F.3d 369 (10th Cir. 1995). In 1981, while a school teacher in the Davis County School District, Nilson pleaded no contest to charges of forcible sexual abuse against some of his students. *See id.* at 370. Although charged in Davis County, Nilson was arrested and booked in the nearby city of Layton. *See id.* In 1990, Nilson had his record expunged by a Davis County Court. However, "the court never filed the expungement order with Layton or any Layton official." *Id.*

After his conviction, but before expungement, Nilson was hired as a teacher in a nearby school district. *See id.* In 1991, after new allegations of sexual abuse arose against Nilson, a Layton city police officer provided information regarding the 1981 arrest and conviction to a news reporter. Nilson sued Layton and the officer, alleging violation of privacy. The trial court found that neither Layton nor the Layton officer knew of the expungement order and therefore did not violate Utah statute or Nilson's right to privacy. The Tenth Circuit affirmed the judgment on the ground that "information readily available to the public is not protected by the constitutional right to privacy." *See id.* at 372.

[97]*See* Franklin & Johnsen, *supra* note 8, at 746.

[98]*See id.* at 747–48. Furthermore, restrictions would have to be placed on those with knowledge of the proceeding, prohibiting those with knowledge from publicizing such information. *See id.*

[99]*See* O'Hern, *supra* note 26, at 590 (acknowledging society's reliance on government to review many professions).

[100]*See* Diehm, *supra* note 24, at 76.

[101]Likewise, anecdotal evidence suggests that organizations with authority to access criminal records place the public at risk when they do not utilize that authority. *See, e.g.*, Ramon Coronado & Emily Bazar, *Rape Charge in Teen's Slaying Could Bring Death Penalty*, SACRAMENTO BEE, June 7, 1997, at B1. Coronado and Bazar relate that Alex Del Thomas, a temporary substitute janitor at Rio Linda High School, was accused of killing a student at the school. Thomas had a criminal history including voluntary manslaughter and other felony convictions. He was hired by the school district, however, "several weeks before his fingerprints were sent to the State Department of Justice for a background check." *Id.*

and trustworthiness of their employees,[102] and must rely on that honesty during the process of selecting future employees. Considering that over thirty percent of business failures occur because of employee theft, the effect that dishonest employees have on businesses is staggering.[103] Furthermore, employers have common law duties to provide a safe working environment for their employees. As a result, they need to know whether prospective employees present risks to other employees.[104]

The need for employers and licensing boards to have access to expunged records does not suggest that society as a whole should have access to those records. Recent history is replete with examples of how society treats past offenders when it learns of their criminal records.[105] Still, the public relies on the government to regulate certain industries. Such reliance depends on at least a minimum amount of protection from proven offenders.[106]

3. The Problem with Plea Bargains

The concern for public safety when a record is expunged is intensified when viewed with the role of the plea bargain. Undoubtedly, the use of plea bargains provides advantages throughout the criminal justice system to defendants, defense counsel, judges, prosecutors, victims, and the public.[107] Plea bargains are an essential tool in prosecuting offenders, accounting for "ninety percent of all criminal convictions in the United States."[108] Nevertheless, when combined with expungement, plea bargains may result in records being concealed that the legislature never intended to obscure.

For example, in an attempt to protect society from certain types of crimes and criminals, states have enacted legislation designed to prevent expungement of specific crimes.[109] Savvy attorneys who have knowledge of expungement laws will, by way of negotiation, avoid entering into plea arrangements for crimes not eligible for expungement, and try to plea down to those crimes that are eligible.[110] In this way, dangerous offenders who have committed serious crimes may be able to enter plea

---

[102]*See* Funk, *supra* note 65, at 926 (doubting that employers desire a more important personality trait than honesty from their prospective employees) (referring to EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 752–53 (S.D. Fla. 1989)).

[103]*See id.* at 929–30.

[104]*See id.* at 928.

[105]*See, e.g.*, Doe v. Pataki, 919 F. Supp. 691 (S.D.N.Y. 1996). The Pataki court noted that sex offenders whose records became public were subjected to vandalism, ostracism from the community, loss of employment, family harassment, and physical abuse. *See id.* at 697.

[106]*See* O'Hern, *supra* note 26, at 590 (noting that government regulation of a profession "does not guarantee the best possible care or service, but [society] expect[s] a licensed professional will sustain a minimum level of competency and character").

[107]*See* Roland Acevedo, Note, *Is A Ban On Plea Bargaining An Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 991 (1995).

[108]*Id.* at 987.

[109]*See, e.g.*, MINN. STAT. ANN. § 609A.02(4) (West Supp. 1997) (prohibiting expungement of criminal records for predatory offenders).

[110]*See, e.g.*, City of Des Moines v. Brooks, 234 N.W.2d 385, 386 (Iowa 1975) (discussing plea bargain where defendants originally charged with public intoxication pleaded guilty to loafing and loitering on condition that their records be expunged after probation).

bargains wherein they admit to crimes that can, after the offender is released from prison or placed on parole, subsequently be expunged from their records.[111]

Illustrative of this, many states prohibit the expungement of criminal records when the crime committed is against a child.[112] This is so because, conceivably, an offender who committed sexual assault against a child, when charged for such, could plead guilty to a lessor crime such as lewdness. In many states, lewdness might be expungeable even though expungement of sexual assault is expressly prohibited.[113] Prohibiting expungement of crimes against children helps reduce situations where offenders charged with non-expungeable crimes plea bargain down to expungeable ones.

A similar concern is the use of a plea bargain as an incentive for a perpetrator to give testimony against a former partner in crime in exchange for a reduced sentence. Under such a scenario, one who commits murder with accomplices may be charged with a much lower crime in exchange for his testimony against those who allegedly acted in complicity with him. The pleaded conviction is then eligible for expungement even though the offender has committed a crime the legislature did not intend to be expunged.[114]

4. Expungement Impairs Law Enforcement and is Difficult to Administrate

Related to the increased risk to public safety is the role that expungement plays in deterring law enforcement from most effectively doing its job. Besides keeping the public uninformed about potential dangers in dealing with past offenders, expungement laws hinder law enforcement officers from doing the best job possible, thus endangering the public. Expungement impedes the work of law enforcement officers in a number of ways. First, criminal records, especially finger prints and descriptions of modus operandi,[115] are critical tools in law enforcement. However, prints collected at the scene of a crime must be analyzed in comparison to prints that law enforcement has on record. If such records are destroyed, or sealed because of expungement, invaluable crime fighting information is kept from the police.

---

[111] *See* Joseph T. McCann, *Obsessive Attachment and the Victimization of Children: Can Antistalking Legislation Provide Protection?*, 19 LAW & PSYCHOL. REV. 93, 108 (1995) ("Evidence of prior sexual crimes against children is often expunged from the record, preventing adequate tracking of cases.").

[112] *See, e.g.*, OR. REV. STAT. ANN. § 137.225 (5)(c) (Supp. 1996) (prohibiting expungement of crimes against children).

[113] A somewhat similar version of this example occurred recently in Utah. *See Hearings, supra* note 28 (statement of Frank Myler, Dep't of Corrections). Myler described a school crossing guard who was convicted of having sex with a minor student. After completing his sentence, the crossing guard was allowed to withdraw his original plea, and pleaded guilty to a new offense of simple lewdness. *See id.* The crossing guard was later able to have the lewdness conviction expunged from his record. *See id.*

[114] Some states have developed an innovative approach to dealing with the plea bargain problem by refusing to grant expungement to those who have been able to plead guilty to a reduced crime in exchange for their testimony in another case. *See, e.g.*, COLO. REV. STAT. ANN. §24-72-308(1)(II) (West 1997) (forbidding expungement where either offense is not charged due to plea agreement in separate case or where dismissal occurs as part of plea agreement in separate case).

[115] *See* Diehm, *supra* note 24, at 77.

Because concealing records can endanger the public, a number of procedural changes have been made to ensure public safety. One such procedural safeguard is to seal only criminal records, leaving on file finger prints and other records to which police can refer in comparing modus operandi of existing crimes.[116] Other states require offenders to reveal their expunged conviction before applying for employment in fields where the public's trust is especially crucial, such as with the police department, other criminal justice agencies, private detective agencies, or admission to the bar.[117] A well-reasoned approach would be to allow courts granting expungement to specify precise conditions under which expunged convictions may be disclosed.[118] This would address shortcomings in the statute in an attempt to protect particular parties or account for particular dangers posed by offenders.

Not only does expungement hinder law enforcement, but some commentators have charged that requirements imposed by expungement statutes are too difficult to manage.[119] Expungement imposes a difficult administrative duty on law enforcement, especially if the criminal records have been sent to a number of different agencies.[120] Such administrative difficulties may be the cause of errors which result in inaccurate or incomplete records.[121]

To summarize, in spite of the good intentions of expungement laws, they have been criticized for encouraging dishonesty in government officials and criminals. Furthermore, the safety of the public is endangered when offenders who have not been rehabilitated obtain expungement, or when offenders who commit non-expungeable offenses plead down to expungeable ones. In addition, police work suffers when fingerprints and other criminal records are destroyed; and expungement laws may not be effective in protecting offenders due to the availability of information about crimes from unofficial sources. Also, expungement may increase prejudice in employment practices against groups that statistically are arrested at higher rates.

Due in part to these criticisms, states have taken steps to avoid some of the problems identified above. The following Section analyzes aspects of Utah law that have been adopted to resolve these conflicts.

---

[116]*See id.* (extolling importance of fingerprints and other criminal records in solving cases with similar modus operandi).

[117]*See, e.g.*, KAN. STAT. ANN. § 21-4619 (Supp. 1996).

[118]*See, e.g.*, Diehm, *supra* note 24, at 93–94 (discussing situations in which it is proper to reveal expunged records).

[119]*See id.* at 74 ("In theory and in practice, it may be anomalous, if not impossible, for the courts to engage in the Orwellian exercise of rewriting history.").

[120]*See id.* at 78 (noting that burden increases when records have been "disseminated to a number of agencies").

[121]*See* Buethe, *supra* note 53, at 1087 n.3 (quoting Robin Pulich, Comment, *The Rights of the Innocent Arrestee: Sealing of Records Under California Penal Code § 851.8*, 28 HASTINGS L.J. 1463, 1465 n.15 (1977)).

V. UTAH LAW ANALYZED

A. Utah History

The concept of expungement in America has its roots in England's monarchy. The King would demonstrate mercy by forgiving his wayward subjects.[122] More recently, expungement gained recognition in the United States when it was first formally introduced for discussion at the 1956 National Conference on Parole.[123]

Soon after the National Conference on Parole, the Utah legislature began experimenting with expungement statutes. By 1978, the predecessors of Utah's current expungement law appeared in the Utah criminal procedure code.[124] Even earlier, in 1963, the legislature ordered a study by its interim committee to undertake the massive chore of redrafting Utah's criminal procedure codes.[125] The interim committee's proposal, which contained a revised expungement statute, was adopted by the Utah Legislature during the 1980 general session.[126]

In comparison to current expungement statutes, having a record expunged in 1980 was easy and was available to many types of offenders. The 1980 statute allowed *any* person to have *any* crime expunged from his record so long as he could demonstrate that he had been rehabilitated.[127] Thus, offenders guilty of such heinous crimes as murder, rape, and child abuse were able to have their records expunged, as were career criminals guilty of committing dozens of various crimes. The offender seeking expungement under the 1980 statute merely needed to show that he had not been charged or convicted of a felony or of a misdemeanor involving moral turpitude[128] subsequent to the crime that he sought to have expunged, and that the required waiting period had passed.[129]

The 1980 expungement statute is also notable for two other differences between that statute and current law. The 1980 version contained explicit language which

---

[122]*See* Isabel Brawer Stark, Comment, *Expungement and Sealing of Arrest and Conviction Records: The New Jersey Response*, 5 SETON HALL L. REV. 864, 865 (1974)

[123]*See* Pettler & Hilmen, *supra* note 72, at 124 n.22.

[124]*See* UTAH CODE ANN. § 77-35-17.5 (1978). Subsection (1)(c) provided: "Upon the entry of the order in those proceedings, the petitioner shall be deemed judicially pardoned and the petitioner may thereafter respond to any inquiries relating to convictions of crimes as though that conviction never occurred." *Id.* § 77-35-17.5(1)(c).

[125]*See* Floor Debate, statement of Sen. Ronald Jeffs, 40th Utah Leg., Gen. Sess. (Jan. 31, 1980) (House recording no. 86) (describing purpose for rewriting criminal code). Senator Jeffs explained, "[i]n 1963, the legislature, through its interim committee process, organized an interim study with regards to our criminal code, which ultimately resulted . . . in a complete revision of the criminal code of the State of Utah." *Id.* Simultaneously, interim committees reviewed and redrafted criminal procedure codes to replace outdated procedures, nearly all of which dated back to original statehood in 1898. *See id.*

[126]*See* UTAH CODE ANN. § 77-18-2(1)(a) (1982).

[127]*See id.* § 77-18-2 ("Any person who has been convicted of any crime within this state may petition the convicting court for a judicial pardon and for sealing of his record in that court. . . . [If] the rehabilitation of petitioner has been attained to the satisfaction of the court, [the court] shall enter an order that all records in petitioner's case . . . be sealed."). Excepted from expungement eligibility was a violation for motor vehicle operation under Title 41. *See id.* UTAH CODE ANN. § 77-18-2(1)(b) (1982).

[128]*See id.* § 77-18-2(1)(b).

[129]*See id.* (requiring petitioners to wait five years to expunge felony or class A misdemeanor convictions, and three years for any other misdemeanor or infraction).

specifically authorized former offenders to deny their expunged records during employment interviews.[130] Furthermore, the waiting period required for the expungement of arrest records was exactly one year, substantially longer than the thirty-day waiting period that the current statute provides.[131]

The 1980 statute remained essentially intact until 1987, when the legislature imposed rigid new requirements in an attempt to keep recidivists[132] from taking unfair advantage of Utah's lenient[133] expungement laws.[134] As legislators faced the reality that some offenders were abusing Utah's expungement statute, they struggled to find a balance between protecting the citizens of the state and helping to rehabilitate the convict.[135] The resulting law, which had the support of several powerful lobbying groups,[136] imposed the first large-scale restriction on the types of crimes that were eligible for expungement. The new statute barred expungement from offenders guilty of committing a "capital felony, first degree felony, or second degree forcible felony."[137] The legislature also required a heightened demonstration of rehabilitation by increasing by two years the time offenders had to wait before certain crimes could be expunged.[138]

---

[130]*See id.* § 77-18-2(3)(1982) ("In the event an employer asks concerning arrests which have been expunged or convictions the records of which have been sealed, the person who has received expungement or arrest or judicial pardon may answer as though the arrest or conviction had not occurred.").

[131]*Compare* UTAH CODE ANN. § 77-18-2(2)(a) (1982) (mandating one-year waiting period before expunging arrest records), *with* UTAH CODE ANN. § 77-18-10(1)(a) (1997) (requiring thirty-day waiting period for the expungement of arrest record).

[132]*See* Floor Debate, statement of Rep. Evans, 47th Utah Leg., Gen Sess. (Feb. 4, 1987) (House recording no. 3) [hereinafter 1987 Floor Debate] (stating that purpose of his proposed amendment was to deny expungement to repeat offenders). Representative Evans claimed that "the best indicator of a person's future behavior is his past behavior. It is very much like a sign out on the desert that says 'pick your rut now, you're in it for the next forty miles.'" *Id.*

[133]*See id.* (statement of Rep. Richards). Representative Richards reported that the Utah statute was "the most lenient in probably all the states in the Union." *Id.*

[134]*See id.* (statement by Rep. Richards). Representative Richards stated that the legislature has "empathy for people who make mistakes. We are sympathetic. But what we are not sympathetic to is the repeat offender. This bill addresses a real problem we have with repeat offenders who get into prison, then get out and perform the same kind of acts again." *Id.* Representative Richards also noted that in 1986, of 380 records that were expunged, nearly 50% were repeat offenders. *See id.*

[135]It was apparent to many that the prior statute shifted the balance too far in favor of the offender. Though Representative Richards expressed sympathy for those who had made mistakes, he recognized the need to restrict access of repeat offenders to expungement. Representative Evans wished to assure that "our law enforcement agencies are empowered to protect citizens." Likewise, Representative Free expressed concern over repeat offenders who, through expungement, are allowed to represent themselves as good citizens. *See* 1987 Floor Debate, *supra* note 132 (statements of Rep. Richards, Rep. Evans, and Rep. Free). Although apparently for different reasons, each of these gentlemen voted for the 1987 bill amending the expungement law.

[136]*See* 1987 Floor Debate, *supra* note 132 (statement by Rep. Evans) (explaining that 1987 expungement statute was endorsed by "state wide prosecutors, the chief of police association, the sheriff's association, the department of corrections, and the criminal association").

[137]*See* UTAH CODE ANN. § 77-18-2(1)(e) (Supp. 1989).

[138]*See id.* § 77-18-2(1)(c)(i). Utah refuses to expunge records unless "the petitioner has not been convicted of a felony or of a misdemeanor for a period of seven years in the case of a felony, six years in the case of an alcohol-related traffic offense under Title 41, or for a period of five years in the case of a class A misdemeanor, or for a period of three years in the case of all other misdemeanors." *Id.*

Not all of the 1987 amendments, however, restricted expungement. Also added that year was an amendment that reduced from twelve months to thirty days the amount of time that a person who was arrested—but not convicted—had to wait for expungement of his arrest record.[139] Moreover, the legislature sought to ensure that information about an expunged record would not be leaked to unauthorized sources by making such actions a class B misdemeanor.[140]

During the 1972 legislative session, Utah lawmakers continued their propensity for limiting expungement by passing two major amendments. First, for the first time in Utah history, the state endeavored to include victims in the expungement process by creating a duty in the Department of Corrections to notify the victims when offenders who committed crimes against them petitioned for expungement.[141] Victims also gained the opportunity to oppose an offender's petition for expungement at a hearing.[142] Second, the legislature removed the possibility of expungement from offenders guilty of committing any sexual act against a minor.[143]

In 1994, the legislature again moved to toughen the expungement statute as the result of a tragic event. Earlier in the year, a Utah elementary school teacher was arrested for fondling some of his students.[144] During the investigation, the teacher's expunged record revealed that he had a previous sex-abuse conviction while teaching at a nearby school district ten years earlier.[145]

The legislature responded by authorizing the Utah Board of Education to access the criminal histories of its potential employees, including expunged records.[146] Access to expunged records was also extended to the Board of Pardons and Parole, The Peace Officer Standards and Training Board, and the Division of Occupational and Professional Licensing.[147] Consequently expunged records became available for background checks on a large number of people.

Moreover, the 1994 statute contained two additional amendments. The first was designed to draw upon judicial experience with offenders by permitting courts to deny expungement, even when the petitioner had received a certificate of eligibility, if "clear and convincing"[148] evidence existed that the expungement was contrary to public interest.[149] This amendment dovetailed nicely with the amendment allowing victim testimony to be considered in making expungement decisions.

The second change introduced in 1994 was the inclusion of redaction, the blotting out of names from police records, as an alternative to sealing the entire

---

[139]*See id.* § 77-18-2(2)(a).

[140]*See id.* § 77-18-2(6).

[141]*See* UTAH CODE ANN. § 77-18-11(5) (Supp. 1994).

[142]*See id.* § 77-18-11(8). If a victim submits a written objection to the court, the court will hold a hearing regarding the requested expungement. *See id.*

[143]*See id.* § 77-18-11(11).

[144]*See* Nilson v. Layton City, 45 F.3d 369, 370–71 (10th Cir. 1995).

[145]*See* Samuel A. Autman, *Bills Aim to Root Out Sex Abusers*, SALT LAKE TRIB., Feb. 28, 1994, at D1.

[146]*See* UTAH CODE ANN. § 77-18-15(3)(e) (Supp. 1994).

[147]*See id.* § 77-18-15(3).

[148]*Id.* § 77-18-13(2) (1995).

[149]*See* Letter from Lisa Watts Baskin, Associate General Counsel, State of Utah Office of Legislative Research & General Counsel, 1 (Feb. 9, 1994) (on file with author) [hereinafter Baskin Letter].

record.[150] The redaction amendment allowed law enforcement to retain essential information on crimes for their own research and statistics.[151]

The most recent modifications to Utah's expungement statute were made in 1996, when the legislature continued to make it more difficult for an offender to have a record expunged. During its 1995 session, the legislature had granted judicial discretion to expunge criminal records even in the absence of a certificate of eligibility. Using this discretion, some judges began to expunge the records of offenders who otherwise would not have been eligible for expungement.[152] The 1996 statute removed the courts' option to waive a certificate of eligibility, thereby making the certificate a prerequisite to obtaining expungement.[153]

In short, from 1978 to the present, the requirements for expungement have grown more arduous, making expungement available to fewer types of crimes and criminals. The trend in Utah law is to limit expungement, both in terms of its availability to offenders and its effectiveness in concealing the record from the public. In 1997, fewer crimes are eligible for expungement and greater requirements are demanded to prove rehabilitation than at any time in the past three decades.

B. Current Utah Law

Utah's current statute provides for two types of expungement, destruction or sealing of the *entire* record,[154] and redacting only the name of the offender while leaving other information in the record intact.[155] Once expungement is granted, all criminal records related to the expunged offense are sealed, including the records of investigation, arrest, finger printing, detention, and conviction.[156]

Sealing and redaction nicely balance the need that an offender has for concealment of his record with the need society has to be protected. Both sealing the

---

[150]*See* 1994 Utah Laws 143.

[151]*See* Baskin Letter, *supra* note 149, at 2. Redaction allows the Division of Criminal Investigation to better maintain its state-wide uniform crime reporting system because, even though the offender's name has been removed, all other relevant information remains. The state-wide reporting system includes statistics concerning general criminal activities and categories concerning crimes which exhibit evidence of prejudice. *See* UTAH CODE ANN. § 53-5-203 (1997) (establishing duties of Division of Criminal Investigation).

[152]*See* Letter from K.D. Simpson, Director, Utah Division of Law Enforcement and Technical Services, to Sen. Eldon Money, Utah State Senator, 1 (August 23, 1995) [hereinafter Simpson Letter] (record on file with the Utah Office of Legislative Research and General Counsel) (stating that legislation making certificate of eligibility discretionary resulted in many individuals being granted unwarranted expungement). As an example, Simpson wrote that the Bureau of Criminal Identification had received an expungement order from four different judges to expunge the record of a convicted multiple felon. *See id.* The expungement orders came despite a clear statement in the expungement statute that "an individual who has been convicted of more than one felony is *not* eligible for expungement"). *Id.*

[153]*Compare* UTAH CODE ANN. § 77-18-11(2) (1995) (stating that court "may" require receipt of certificate of eligibility), *with* UTAH CODE ANN. § 77-18-11(2) (Supp. 1997) (mandating that court "shall" require certificate).

[154]*See* UTAH CODE ANN. § 77-18-9(5) (1994) (defining expungement as "the sealing or destruction of a criminal record, including records of investigation, arrest, detention, or conviction").

[155]*See id.* § 77-18-14(4) (providing that government agencies may "petition the court to modify its order [of expungement] to permit redaction of the petitioner's name to avoid destruction or sealing of the records in whole or in part").

[156]*See id.* § 77-18-9(5).

record and redacting the name from the record are preferable to destruction because the former methods allow future access to the record if necessary. Law enforcement is able to analyze the records for statistical purposes and maintain access to fingerprints and other information that is useful in investigating current crimes.

As noted earlier, in analyzing expungement, it is useful to examine the statute in terms of its four key elements.[157] Thus, the following Sections of this Comment will consider Utah's expungement law in terms of the types of crimes that are eligible to be expunged, the ability of the offender to deny his expunged record, the relative difficulty of demonstrating rehabilitation, and the extent that expunged records are concealed from the public.

1. Crimes Eligible for Expungement

In spite of the possible benefits that expunging a criminal record bestows upon offenders, there are some crimes where concealing the record poses too great a risk to the public's safety.[158] In Utah, these crimes include capital felony, first degree felony, second degree forcible felony, and any sexual act against a minor.[159] Since offenders who commit these crimes are considered significantly dangerous, none of these crimes is eligible for expungement under any circumstances.

Each category of non-expungeable crime manifests Utah's value in protecting society from certain criminals. The refusal to expunge capital felonies and second degree forcible felonies reflects a policy goal to protect the public from those offenders who have committed dangerous personal crimes. Likewise, the refusal to grant expungement for first degree felonies protects the public from offenders who have committed dangerous personal or severe property crimes. Denying expungement to offenders convicted of committing any sexual crime against a minor indicates Utah's desire to protect a vulnerable segment of society against offenders with a proven record of attacking that segment.

In spite of the clarity by which the Utah Code prohibits the expungement of certain crimes, there is some confusion regarding the prohibition of expunging second degree forcible felonies because that category of crime does not exist under the Utah Code. In the absence of legislative guidance, many government agencies, including the Department of Public Safety,[160] rely on the list of forcible felonies that was created specifically for use in Utah's self-defense statute, a list that does not differentiate between first and second degree forcible felonies.[161]

---

[157]*See supra* notes 11–33 and accompanying text.

[158]*See* Interview with Edward McConkie, Director, Utah Sentencing Commission, in Salt Lake City, Utah (June 6, 1997).

[159]*See* UTAH CODE ANN. § 77-18-11(10) (Supp. 1997).

[160]*See Hearings*, *supra* note 28 (statement by Edward McConkie, Director, Utah Sentencing Commission) (noting that Department of Public Safety and some prosecutors utilize UTAH CODE ANN. § 76-2-402(4) for expungement purposes).

[161]*See* UTAH CODE ANN. § 76-2-402(4) (1994) (expressly restricting list of forcible felonies "[f]or the purposes of this section"). This statute provides legal justifications for self defense, and defines a forcible felony as including

> aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a

2. *Denying the Criminal Record's Existence*

A past offender who is allowed to deny the existence of his expunged record can effectively reduce the unofficial sanctions imposed on him by society. In Utah, an offender is enabled by law to respond to inquiries as though the arrest or conviction did not occur.[162] Such inquiries include questions by potential employers, neighbors, and even to questions answered under oath.[163] The only exception to "any inquiry" is if there is another law, like the federal firearm statute,[164] which supersedes the expungement statute.[165]

An expungement statute would have little value if the intent of the law could be superseded by the careless whispers of government employees. Accordingly, Utah takes steps to ensure an expunged record remains concealed from the public. Unauthorized disclosure of expunged information has been found to violate an offender's due process rights to a fair and impartial hearing.[166] Under current law, once the order of expungement has been served on a government agency, employees of that agency who work with expunged records must not disclose the information to anyone unless disclosure is expressly provided for in the statute.[167] A government employee who willfully and illegally discloses information in an expunged record is guilty of a class A misdemeanor.[168]

---

child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, and arson, robbery, and burglary, as defined in Title 76, Chapter 6.

See id. Moreover, the list also includes "[a]ny other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony." *Id.* Burglary of a vehicle "does not constitute a forcible felony except when the vehicle is occupied at the time unlawful entry is made or attempted." *Id.*

[162] *See id.* § 77-18-10(7) (Supp. 1997) (allowing individual with expunged arrest record to deny its existence); *see also id.* § 77-18-13(3) (1997) (providing that individual receiving expungement of conviction may deny its existence).

[163] *See* State v. Jones, 581 P.2d 141, 142 (Utah 1978) (holding that witness may not be impeached for having conviction if record of that conviction has been sealed due to expungement order).

[164] *See* Thompson v. Dep't of Treasury, 557 F. Supp. 158, 164–67 (D. Utah 1982) (holding that expungement does not free offender from firearm restrictions imposed by federal law due to prior conviction).

[165] *See* UTAH CODE ANN. § 77-18-13(3) (Supp. 1997).

[166] *See* Ambus v. Granite Bd. Of Educ., 975 F.2d 1555, 1568 (10th Cir. 1992), *aff'd as modified*, 995 F.2d 992 (10th Cir. 1993) (holding deposition that violated Utah expungement statute triggers procedural due process protections and right to fair, impartial hearing).

[167] *See* UTAH CODE ANN. § 77-18-14(5) (1994); *see also Ambus*, 975 F.2d at 1559 (denying school district's request to present testimony by arresting officer or paid informant at hearing when police department had already received expungement order).

[168] *See* UTAH CODE ANN. § 77-18-16 (1994); *see also* ARIZ. REV. STAT. ANN. § 13-4051(C) (West 1996) (creating private cause of action against person who has notice of expunged record but fails to comply with order).

3. *Evidence of Rehabilitation*

The element of expungement that provides the most demanding barriers to obtaining an expungement order is the requirement that the offender demonstrate rehabilitation. As noted earlier, demonstrating that the offender has been successfully rehabilitated is necessary not only to protect the public, but also to justify the reward of expungement.[169] When analyzing state requirements of rehabilitation, it is imperative to separate the requirements for expunging an arrest record from those records of persons actually convicted of crimes. The separation of these two types of records is necessary because, as a fundamental tenet of our criminal justice system, one is presumed innocent until proven guilty.[170]

Expungement of an arrest record where no conviction occurs is relatively easy because guilt was never established, and thus, there is no burden on the arrestee to demonstrate rehabilitation. An arrest record where no conviction occurred may be granted after thirty days if the court is satisfied that no further charges are pending.[171] Utah codified the situations under which a thirty-day expungement of arrest records is appropriate to include situations where: (1) the petitioner is released without the filing of formal charges; (2) charges are filed but dismissed; (3) charges are filed but the petitioner is later discharged and the government fails to refile the case; and (4) the petitioner was charged but acquitted.[172]

Additionally, Utah provides an exception to the rule which allows a petitioner to bypass the thirty-day waiting period if "extraordinary circumstances" exist, and if doing so would be "in the interest of justice."[173] This statute may be used to protect innocent people who have been falsely arrested from society's unofficial sanctions arising from the arrest record.[174]

While expungement of an arrest record is relatively simple, expungement where a conviction is involved requires a substantial demonstration that rehabilitation has occurred.[175] In Utah, the primary piece of evidence of rehabilitation available to a

---

[169]*See* Franklin & Johnsen, *supra* note 8, at 737.

[170]*See* State v. Murphy, 617 P.2d 399, 402 n.5 (Utah 1980) (asserting that fundamental principle of our system of criminal jurisprudence "is the proposition that a person is presumed innocent until proven guilty").

[171]*See* UTAH CODE ANN. § 77-18-10 (Supp. 1997) (describing requirements for expungement of arrest records).

[172]*See id.* § 77-18-10(1)(c).

[173]*See id.* § 77-18-10(2).

[174]*See* 1994 Floor Debate, *supra* note 35 (statement of Rep. Jones). Representative Jones reported that "James Jones was wrongfully arrested in a rape case and was jailed for over thirty days even though DNA testing proved that he wasn't the person involved." *Id.* After being released, Jones was not able to regain employment because he had an arrest record. Representative Jones concluded that, "in the interest of justice," a statute was needed to provide immediate expungement for "someone who really shouldn't have been in court to begin with." *Id.*

[175]*See* UTAH CODE ANN. § 77-18-11 (Supp. 1997) (outlining requirements for expungement of conviction records). Besides requiring offenders to wait for a specific amount of time before expunging their criminal records, laws requiring offenders to pay retribution to their victims is a well-reasoned prerequisite to demonstrate rehabilitation. Such a measure was proposed during the 1998 Utah legislative session in Senate Bill 65. Senate Bill 65 prohibited expungement for offenders who had not paid fines and retribution to victims. However, an amendment introduced by Senator Hillyard removed the requirement to repay

convict is a certificate of eligibility that is issued by the Department of Public Safety to eligible offenders. Petitioners must obtain the certificate before courts can consider the expungement request.[176]

Requiring petitioners to obtain a certificate of eligibility ensures that only eligible offenders are granted expungement.[177] Before a certificate is issued, a background check is conducted to verify that the offender has waited the required amount of time based on his crime. Utah uses a multi-leveled approach, increasing the length of time that the offender must wait in relation to the severity of the crime committed.[178]

For example, if the offender commits an expungeable felony, he is required to wait seven years before his record may be expunged.[179] Utah displays its disdain for alcohol related traffic offenses and its belief in the difficulty of overcoming alcohol abuse by requiring offenders of those crimes to wait six years for expungement.[180] Misdemeanants guilty of committing class A misdemeanors are required to demonstrate improved behavior for five years.[181] Finally, offenders guilty of any other misdemeanor or infraction must remain free of crime for three years.[182] The time period begins running after the convict is released from incarceration, parole, or probation, which ever happens last.[183]

After verifying that the offender has endured the waiting period, the Bureau of Criminal Identification searches through four different databases to ensure that the offender has not been convicted of a crime subsequent to the offense for which expungement is sought.[184] The data bases include the Utah Computerized Criminal History (UCCH), the Interstate Identification Index (3I), the Statewide Warrants data base, and an in-house data base which contains expungement records.[185]

The computerized searches are necessary to further the Legislature's intent of curtailing abuse of expungement by career offenders. Utah's statute attempts to accomplish that goal in a number of ways. First, the statute denies a certificate of eligibility to an offender whose record contains two or more felonies that are not from the same criminal episode.[186] Second, expungement is denied if the petitioner has

---

victims before granting expungement, but left the requirement to pay court imposed fines. *See* S. JOURNAL 1023 (Utah 1998). The odd message of the Hillyard Amendment is that it does not matter if victims receive restitution so long as the state receives its fines.

[176]*See id.* § 77-18-11(2) (mandating receipt of certificate of eligibility from Division of Law Enforcement and Technical Services Division).

[177]*See id.* § 77-18-12 (describing grounds for denying certificate of eligibility necessary for expungement); *see also Hearings*, *supra* note 28 (statement of Richard Townsend) (comparing process of obtaining certificate of eligibility to officer who prepares pre-sentence investigation). Townsend states, "we go over the parole record and research whether or not the individual has convictions, whether or not the time element has passed, whether or not there has been a previous expungement, whether or not there are other considerations that would make them ineligible." *Id.*

[178]*See supra* note 19.

[179]*See* UTAH CODE ANN. § 77-18-12(2)(a) (Supp. 1997).

[180]*See id.* § 77-18-12(2)(b).

[181]*See id.* § 77-18-12(2)(c).

[182]*See id.* § 77-18-12(2)(d).

[183]*See id.* § 77-18-12(2).

[184]*See* Interview with Richard Townsend, Chief of the Utah Bureau of Criminal Identification, in Salt Lake City, Utah (July 15, 1997).

[185]*See id.*

[186]*See* UTAH CODE ANN. § 77-18-12(1)(b) (Supp. 1997).

already had a felony[187] or two misdemeanors[188] expunged, regardless of the jurisdiction in which the crimes occurred.

Additionally, Utah correctly assumes that an offender has not been rehabilitated if he is convicted of any crime subsequent to the conviction for which expungement is sought. Therefore, an offender who commits a subsequent crime during the expungement waiting period will not be granted a certificate of eligibility.[189] An offender is also prevented from receiving a certificate if he has three or more convictions that do not arise from a single criminal episode.[190] Finally, Utah refuses to grant a certificate if a proceeding involving a crime is pending or being instituted against the petitioner.[191]

In spite of the restrictions above, a certificate may be granted after twenty years to an offender who does not qualify for a certificate for one of the reasons just noted.[192] The twenty-year time period begins when the offender is released from incarceration, parole, or probation from the offender's most recent offense.[193]

Once a certificate of eligibility is granted, the court where expungement is sought will gather information regarding the offender. The certificate is filed with the court and served on the prosecuting attorney and the Department of Corrections.[194] The Department of Corrections has the responsibility to serve notice of the expungement request by first-class mail to the victim's most recent address of record.[195] By statute, the notice must include a copy of the petition, certificate of eligibility, and statutes and rules applicable to the petition.[196]

The court may also request a written evaluation from Adult Parole and Probation.[197] This request for written evaluation becomes mandatory if the conviction sought to be expunged is a sexual offense, a sexual exploitation of children, or any sexual act against a minor.[198] The written evaluation from Adult Parole and Probation must be provided to the petitioner and the prosecuting attorney.

Having gathered information on the petitioner, the court may grant expungement unless the prosecuting attorney or victim objects, in which case the court will hold a hearing.[199] At the hearing, the court reviews the petition, certificate of eligibility, and

---

[187]*See id.* § 77-18-12(1)(c).

[188]*See id.* § 77-18-12(1)(d).

[189]*See id.* § 77-18-12(1)(e).

[190]*See* UTAH CODE ANN. § 77-18-12(f) (1996) (including any three class A or B misdemeanors, or any felony as evidence that rehabilitation has not occurred).

[191]*See id.* § 77-18-12(1)(g).

[192]*See id.* § 77-18-12(3) (providing expungement for those not otherwise eligible to receive certificate unless reason for ineligibility was because convict had been convicted of capital felony, first degree felony, second degree forcible felony, crime against child, or because offender was convicted of crime within time period in which rehabilitation was supposed to be demonstrated).

[193]*See id.*

[194]*See id.* § 77-18-11(3).

[195]*See id.* § 77-18-11(5).

[196]*See id.*

[197]*See id.* § 77-18-11(6).

[198]*See id.* (mandating written report from Adult Parole and Probation if crime for which expungement is sought is sexual act against minor). This requirement appears to be moot and should be removed from the code since sexual acts against minors are not eligible for expungement. *See id.* § 77-18-11(11).

[199]*See id.* § 77-18-11(7).

any written evaluation, testimony, or writing submitted by a victim, prosecuting attorney or any interested party.[200] The court will grant the expungement unless there is "clear and convincing" evidence that so doing would be contrary to public interest.[201]

4. Access to Expunged Records

Expunged records are kept by the Department of Public Safety which is required to index all expunged records of arrests and convictions.[202] In order to protect the offender, Utah prohibits state employees who work with expunged records from divulging any information contained in its index to any person or agency without an order from the court.[203]

Notwithstanding, there are certain agencies that statutorily have access to expunged records because of their duty to protect the public. Utah law specifically allows the Board of Pardons and Parole, the Peace Officer Standards and Training Board, certain federal authorities, the Division of Occupation and Professional Licensing, and the State Office of Education, to have access to the expunged record index kept by the Department.[204] These exempted organizations may freely access the expunged records and use them in making employment and licensing decisions.[205]

Utah recognizes that automatically allowing these groups to have access to expunged records may cause some truly rehabilitated offenders to suffer unintended consequences. To protect the rehabilitated offender whose record is divulged to one of the groups listed above, the offender must be given a reasonable opportunity to challenge and explain any information on the record.[206]

Utah's expungement statute is a model in balancing the conflicting values of offender rehabilitation and public safety. In an attempt to create a statute which harmonizes competing goals, the statute allows offenders to deny the existence of their expunged record in many situations but requires disclosure of the expunged record to licensing bodies. Although the statute has been remarkably successful in finding an appropriate compromise between the conflicting policy goals, improvement is necessary.

V. REFORMING UTAH'S EXPUNGEMENT STATUTE: IN SEARCH OF A BETTER BALANCE

Inasmuch as criticism continues to mount regarding the effectiveness of expungement in aiding the reintegration of an offender into society, the cautious approach to dealing with expungement problems is to take measures designed to

---

[200] *See id.* § 77-18-11(8).

[201] *Id.* § 77-18-13(2) (defining requisite standard of proof that must be met in expungement hearing).

[202] *See id.* § 77-18-15(1) (requiring retention of expunged records by division).

[203] *See id.* § 77-18-15(3).

[204] *See id.*

[205] *See, e.g., id.*, § 53-5-704 (1994) (authorizing use of index to establish "good character" for concealed firearm permit, and for use in judicial sentencing).

[206] *See id.* § 77-18-15(5) (Supp. 1997).

protect the public even at the expense of the offender's progression towards reintegration. In particular, the safety of classes that are especially vulnerable should be guarded from those with proven histories of injuring members of that vulnerable class.[207] This is not to suggest that the rehabilitating qualities of expungement should be ignored. Indeed, the use of expungement in helping offenders become productive members of society is valuable when it functions as designed. With this in mind, the following steps should be taken to better protect Utah's citizens, while maintaining expungement as a tool to help offenders who have truly been rehabilitated.

First, Utah should recognize the impact that plea bargains have on expungement. The current statute denies expungement for sexual crimes committed against a minor,[208] but does nothing to protect minors from sex offenders who are able to plea bargain their crimes down to violations that do not involve children. When such pleas occur, offenders who would not otherwise be eligible for expungement become so, and the intent of the legislature to protect minors may be frustrated by the prosecutor's discretion.

Utah should, therefore, enact an amendment similar to Colorado's statute,[209] which prohibits expungement where the record indicates that a sexual offense committed against a child was either not charged, dismissed, or diminished due to a plea bargain.[210] This amendment retains a prosecutor's ability to negotiate because offenders will still desire the plea bargain in order to receive a shorter sentence. The amendment has the advantage, moreover, of protecting future generations of minors from criminals who have received expungement as a result of negotiation.

Second, Utah should increase the accessibility of expunged records to groups responsible for hiring people who work directly with children. Although the Utah statute already provides criminal histories to the State Board of Education,[211] there are still many employees at the district level who have direct unsupervised contact with children whose employment is made at the district level.[212] Admittedly, this amendment would greatly increase the number of people who have access to supposedly concealed records.[213] However, Utah already has methods in place to ensure that the expunged records are only used as authorized by law.[214]

---

[207]*See* State v. Jordan, 665 P.2d 1280, 1285 (Utah 1983) (providing that "the state has a compelling interest in the healthy development of its youth during the years of their greatest vulnerability").

[208]*See* UTAH CODE ANN. § 77-18-11(10)(d) (Supp. 1997).

[209]*See* COLO REV. STAT. ANN. § 24-72-308(II) (West 1997) (denying expungement for records surrounding offense that is either not charged or dismissed due to plea bargain).

[210]*See id.*

[211]*See* UTAH CODE ANN. § 77-18-15(3) (Supp. 1994).

[212]*See* Interview with Douglas Bates, State Board of Education, in Salt Lake City, Utah (Feb. 19, 1998). Bates noted there are many people hired at the district level who work in close proximity to school children and whose histories are not checked for expunged records. Such people include: volunteers, teachers' aids and assistants, paraprofessional coaches, tutors, bus drivers, and custodians.

[213]*See Hearings, supra* note 28 (statement of Douglas Bates, State Board of Education) (explaining that "one reason for not giving access to expunged records to the [school] districts is because there was concern that someone might let information leak").

[214]*See, e.g.*, UTAH CODE ANN. § 77-18-16 (1994) (providing that any person who willfully violates any prohibition of statute is guilty of class A misdemeanor).

Third, Utah should refuse expungement for all violent crimes, not just violent crimes in the first and second degree. Although the current statute protects society by denying expungement for all capital felonies, first degree felonies, and second degree forcible felonies, it does not protect the public from other violent crimes that are not included in those categories. In terms of the threat that an offender poses to society, there is little practical difference between second degree forcible felonies that are not expungeable and other crimes that qualify for expungement. Under the current statute, for example, offenders who abuse a disabled child,[215] commit negligent homicide,[216] or assault a victim while using a dangerous weapon and causing serious bodily harm,[217] are all eligible for expungement.

Utah should follow Arizona's statute, which focuses more on the type of crime than on the crime's statutory classification. In Arizona, an offender cannot have his record expunged if he is guilty of inflicting serious physical injury or using or exhibiting a deadly weapon.[218] This type of statute better protects the public from offenders with a proven history of dangerous behavior while removing the inconsistencies of allowing expungement for one type of dangerous crime but not another.

Finally, Utah should not ignore the possible benefits of expungement in assisting an offender to become rehabilitated. One of the ways expungement works to rehabilitate offenders is to provide a goal and a reward for accomplishing that goal, in demonstrating rehabilitation.[219] Yet, expungement is rarely analyzed in terms of its ability to act as an incentive to an offender to avoid future crime. Logic suggests, however, that the opportunity to have a clean record may entice some offenders to make correct choices in the future.[220] Assuming that expunging a criminal record may entice an offender to avoid crime, the twenty-year waiting period some offenders must wait for expungement is too long and removes the incentive value of expungement.[221] Reducing the twenty-year waiting period to ten or twelve years increases the likelihood that the opportunity for expungement may entice an offender to behave while at the same time not increasing significantly the risk[222] of danger to the public.

---

[215] *See id.* § 76-5-110(2) (1996) (making abuse of disabled child third degree felony).

[216] *See id.* § 76-5-206(2) (providing offender acting with criminal negligence who commits homicide is guilty of class A misdemeanor).

[217] *See id.* § 76-5-103(1).

[218] *See* ARIZ. REV. STAT. ANN. § 13-907(B) (West 1996).

[219] *See* Franklin & Johnsen, *supra* note 8, at 739. Similar to the concept of expungement as an incentive to rehabilitate is the notion that government intervention in assisting the offender rehabilitate is justified as a reward for the demonstration of rehabilitation. *See id.* Intervention is warranted, the commentators explain, when it "[acknowledges the achievement of rehabilitation, [and] is appropriately awarded only after the convict has demonstrated that he is in fact rehabilitated." *Id.* A "reward" of expunging one's record after subjecting the offender to 20 years of unofficial sanctions seems quite hollow.

[220] 134 CONG. REC. S15, 762 (daily ed. Oct. 13, 1988) (statement of Sen. Kennedy) (noting that as expungement provides offender with clean record, it "can provide an important incentive" for offender to avoid crime in the future).

[221] *See Hearings*, *supra* note 28 (statement of Gary Jorgensen, Alcohol and Drug Rehabilitation Division, University of Utah Medical Center) (approving shortened expungement waiting periods so expungement may be used to "hold out there as a carrot . . . [enticing the offender to] get back into the mainstream of society").

[222] *See* Telephone Interview with Chris Mitchell, Director of Planning and Research, Utah Department of Corrections (July 17, 1997) (claiming that vast majority of parolees who violate parole conditions do so in first three years after release from prison).

VI. CONCLUSION

Expungement requires the balancing of two competing values: the desire to help reintegrate a rehabilitated prisoner into society, and the desire to protect society from offenders who are not rehabilitated. For many years, little incentive existed for past offenders to have their criminal records expunged because access to the records was restricted to the criminal justice community. During the information age, however, criminal data is kept predominately on large, easily accessible data bases. As laws are passed providing greater public access to criminal records, expungement has become extremely desirable to offenders wishing to avoid unofficial public sanctions.

Currently, the legislative trend is to make expungement laws less effective in concealing criminal histories and expungement more difficult for offenders to obtain. In light of these developments, Utah should improve its expungement statute by making four changes. First, Utah should recognize the role that plea bargains play in the criminal justice system and refuse to expunge records where a plea bargain was made to avoid a charge of sex abuse involving a child. Second, Utah should make available to school districts the expunged records of offenders convicted of crimes against children, especially school districts whose employees come into direct contact with children. Third, to protect the public from dangerous offenders, Utah should follow Arizona's example of denying expungement in cases where the use of a weapon, or other clear evidence of violence, is present. Finally, Utah should allow expungement to function as an incentive to offenders by lowering the twenty-year waiting period currently required for some crimes to be expunged.

Such actions will better allow Utah to protect its citizens against dangerous offenders while offering an incentive for some criminals to turn their backs on crime and rejoin society as fully functional members.

MICHAEL D. MAYFIELD

RECENT DEVELOPMENTS IN UTAH LAW

TABLE OF CONTENTS

CASE LAW DEVELOPMENTS

LEGISLATIVE DEVELOPMENTS

RECENT CASE LAW DEVELOPMENTS

The *Recent Case Law Developments* section consists of brief expositions of selected noteworthy cases decided recently by Utah courts. Each Development is self-contained.

I. ADMINISTRATIVE LAW

Bias in Administrative Proceedings[*]

1. Introduction

In *V-1 Oil Company v. Department of Environmental Quality*,[1] the Utah Supreme Court unanimously held that due process is not violated by allowing an administrative agency[2] to appoint an agency employee to preside at a formal hearing to decide whether a petitioner before that agency violated regulations enforced by that agency. The *V-1 Oil* court endorsed the practice of allowing an administrative agency staff attorney to act as an adjudicator in a hearing before that agency when there is an "appropriate and sufficient separation of functions at the individual level."[3]

2. The Case

On August 11, 1994,[4] the Division of Environmental Response and Remediation ("DERR"), an agency within the Department of Environmental Quality ("DEQ"), issued a notice of violation and order to comply to V-1 Oil Company ("V-1") based on an alleged petroleum release from an underground storage tank located at one of V-1's service stations in Salt Lake County.[5] DERR has the responsibility to insure that V-1 and other companies comply with the Underground Storage Tank Act ("USTA").[6] The Solid and Hazardous Waste Control Board ("Board") is the agency head within DEQ for purposes of the USTA.[7]

Pursuant to statute, V-1 then requested a formal adjudicative proceeding under the Administrative Procedures Act.[8] The Board granted this request and appointed

---

[*]Jared R. Faerber, Staff Member, *Utah Law Review*

[1]939 P.2d 1192 (Utah 1997) (opinion by Stewart, J.).

[2]In this case the agency involved is the Solid and Hazardous Waste Control Board. *See* UTAH CODE ANN. § 19-1-106 (establishing Solid and Hazardous Waste Control Board).

[3]*V-1 Oil*, 939 P.2d at 1203.

[4]*See* V-1 Oil v. Dept. of Envtl. Quality, 893 P.2d 1093, 1094 (Utah Ct. App. 1995).

[5]Unless otherwise indicated, the facts are taken from the court's opinion in *V-1 Oil*, 939 P.2d at 1194–95.

[6]*See* UTAH CODE ANN. §§ 19-6-401 to -429 (1995 and Supp. 1997). DERR is subdivided into branches, with the Underground Storage Tank Branch ultimately responsible for investigating and prosecuting violations of the USTA.

[7]*See* UTAH ADMIN. CODE R311-210-6(a) (1996).

[8]*See* UTAH CODE ANN. § 63-46b-3b (1993); UTAH ADMIN. CODE R311-210-4, -7 (1996).

David O. McKnight as the presiding officer. McKnight had previously been hired as a part-time staff attorney for DERR. His responsibilities, however, did not involve any investigative or prosecutorial work conducted by the Underground Storage Tank Branch. Although McKnight's work was confined exclusively to a separate branch within DERR, V-1 moved for his recusal, alleging that McKnight's employment with DERR created a risk of bias in his role as an adjudicatory officer. The Board refused to order McKnight's recusal, and V-1 petitioned the Utah Court of Appeals for an extraordinary writ.[9]

Before the court of appeals, V-1 alleged two reasons for McKnight's recusal: (1) actual bias or prejudice, and (2) presumed bias due to his association with DERR as a staff attorney.[10] The court of appeals first held that V-1 did not demonstrate actual bias or prejudice on the part of McKnight.[11] The court then addressed the question of whether McKnight should be recused based on his association with DERR as a staff attorney, concluding that McKnight's employment with DERR violated "[b]asic considerations of fairness and impartiality in agency proceedings."[12] Finally, the court noted that McKnight's dual role as an adjudicator and a staff attorney created the "appearance of impropriety that erodes confidence in the basic fairness of the hearing process and must be avoided in quasi-judicial proceedings as diligently as in judicial proceedings."[13] V-1 appealed this decision and the Utah Supreme Court reversed.[14]

3. *Background*

In *Bunnell v. Industrial Commission of Utah*,[15] the Utah Supreme Court acknowledged that litigants at a hearing before an administrative agency have "a due process right to receive a fair trial in front of a fair tribunal."[16] The *Bunnell* court found that an administrative law judge had exhibited hostility toward the claimant, and that such an atmosphere violated fundamental principles of due process.[17]

Additionally, the Utah Supreme Court endorsed the practice of internal separation of functions as a way of addressing due process concerns within an agency in the case of *Vali Convalescent & Care Institution v. Industrial Commission*.[18] The *Vali* court held that due process was not denied where an employee of the Industrial Commission of Utah presided over a hearing before that agency to determine whether an employer's unemployment contribution rate should be increased.[19] The court found that the Industrial Commission employees were "not directly responsible for the financial condition of the Commission," and had "no pecuniary reason to penalize

---

[9]*See* V-1 Oil v. Dept. of Envtl. Quality, 893 P.2d 1093, 1094 (Utah Ct. App. 1995).
[10]*See id.* at 1096.
[11]*See id.*
[12]*Id.*
[13]*Id.* at 1097.
[14]*See V-1 Oil*, 939 P.2d at 1204.
[15]740 P.2d 1331 (Utah 1987).
[16]*Id.*
[17]*See id.* at 1334.
[18]649 P.2d 33, 37 (Utah 1982).
[19]*See id.*

delinquent contributors."[20] The *Vali* court found that an agency can act as both prosecutor and judge as long as "those functions, with respect to discretionary matters, are kept separate within the agency."[21]

While these earlier cases addressed the due process issues involved in administrative proceedings, it was not until *V-1 Oil* that the Utah Supreme Court fully synthesized the due process requirements for adjudicative hearings in administrative agencies.

In applying the Utah Code of Judicial Conduct to conclude that McKnight should be recused, the court of appeals in *V-1 Oil* seemed to suggest that the due process requirements in an administrative context were as strict as those in a judicial context.[22] Canon 3 of the Utah Code of Judicial Conduct states, "[a] judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned."[23] Although the court acknowledged that administrative decision makers like McKnight are not held to the "full standard" of the judicial canons, it nevertheless stated that "administrative law judges are required to recuse themselves in proceedings involving agencies by which they are also employed as legal counsel."[24] The court of appeals seemed to construe Canon 3 as a rigid principle of due process fully applicable in administrative decisions.[25] The Utah Supreme Court, however, saw relevant distinctions between administrative and judicial proceedings that were great enough to relax the requirements of due process in some administrative contexts.[26]

4. Analysis

In order to determine whether an agency lawyer may properly sit as an administrative judge, the Utah Supreme Court in *V-1 Oil* examined the ethical rules governing DERR administrative proceedings.[27] The court then applied these ethical rules to the question of whether McKnight was subject to disqualification under principles of due process.[28] Recognizing that the requirements of due process depend on the context in which they are applied, the court addressed those requirements in an administrative adjudicatory setting.[29] Finally, the court sanctioned the agency practice of creating internal separation of functions at the individual level to address due process concerns.[30]

---

[20]*Id.* at 37–38.
[21]*Id.*
[22]*See V-1 Oil*, 893 P.2d at 1097.
[23]*Id.* (quoting UTAH CODE OF JUDICIAL CONDUCT CANON 3 (1994)).
[24]*Id.*
[25]*See V-1 Oil*, 939 P.2d at 1196.
[26]*See id.*
[27]*See id.* at 1192, 1195.
[28]*See id.* at 1196.
[29]*See id.* at 1196–99.
[30]*See id.* at 1199–1203.

(a) The Applicable Ethical Rules

The court began by noting that Rule 315 of the Utah Administrative Code pertained specifically to the operation of agencies charged with regulating solid and hazardous waste.[31] Rule 315 reads in pertinent part:

> A member of the Board or other Presiding Officer shall disqualify him/herself from performing the functions of the Presiding Officer regarding any matter in which:
> (a) He/she [or a closely related] person:
> . . . ;
> (2) Has acted as an attorney in the proceeding or served as an attorney for, or otherwise represented a Party concerning the matter in controversy;
> . . . .
> (b) The Presiding Officer is subject to disqualification under principles of due process and administrative law.[32]

The court concluded that McKnight did not act "as an attorney" or represent "a party concerning the matter in controversy."[33] The court found, however, that McKnight may be subject to disqualification if required by due process or administrative law principles.[34]

The court recognized the requirements of Canon 3 of the Utah Code of Judicial Conduct,[35] but suggested that Canon 3 is not a rigid principle of due process fully applicable in administrative proceedings.[36]

(b) Due Process in Administrative Proceedings

The *V-1 Oil* court then noted that the "requirements of due process depend upon the specific context in which they are applied."[37] Generally, procedural due process applies in adjudicative government contexts and not in legislative ones.[38] The court found that because McKnight made decisions as a presiding officer in the V-1 case, his decisions were clearly adjudicatory in nature and procedural due process applies.[39] The court also noted that particular attention must to paid to due process concerns in accusatory proceedings due to their similarity to formal criminal proceedings.[40] The

---

[31]*See id.* at 1195.

[32]UTAH ADMIN. CODE R315-12-10 (1996).

[33]*V-1 Oil*, 939 P.2d at 1195.

[34]*See id.*

[35]*Id.* at 1196 (quoting UTAH CODE OF JUDICIAL CONDUCT CANON 3 (1994) (requiring a judge to "enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned.")).

[36]*See id.*

[37]*Id.* (citing Cafeteria Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

[38]*See id.* (citing John R. Allison, *Combinations of Decision Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135, 1162.)

[39]*See id.* at 1197.

[40]*See id.*

V-1 hearing was accusatory and adversarial in nature because it concerned serious allegations that V-1 failed to investigate reports of a leaking storage tank.[41] If these allegations were proven, serious sanctions could result.[42]

The court stated that the most fundamental due process requirement in this context is the opportunity to be heard at a "'meaningful time and in a meaningful manner.'"[43] As a necessary corollary to this opportunity, parties must also be assured that they will be heard by an impartial decision maker.[44] A neutral decision maker has been consistently characterized as "'one of the three or four core requirements of a system of fair adjudicatory decision making.'"[45] The court noted that when a party can demonstrate actual bias or an unacceptable risk of bias on the part of the decision maker, the decision maker must be disqualified.[46] Respondent V-1 conceded that they had failed to show actual bias in the hearing before McKnight,[47] so the Utah Supreme Court concerned itself only with the question of whether there was an unacceptable risk of bias.[48]

In analyzing whether there was an unacceptable risk of bias which violated principles of due process, the court recognized that there are different types of bias.[49] The court noted that the court of appeals did not determine which types of bias are so harmful as to necessitate disqualification in the administrative context.[50] In making this determination, the court stated that "[a] clear demonstration of bias on the face of the record, or a showing of a pecuniary interest in the outcome" is enough to disqualify the officer.[51] Other types of bias, such as "an adjudicator's preconceived attitudes on points of law or policy that are topics of dispute before an adjudicator," however, are usually not found to be severe enough to justify disqualification.[52] In McKnight's case, there was no demonstration of bias on the face of the record, or any showing of a direct pecuniary interest in the outcome of the proceeding.[53] The court noted that although McKnight is not personally involved with prosecuting and investigating the cases he adjudicates, he is employed by the same agency that conducts those activities.[54] The court recognized that this agency practice raises due

---

[41] *See id.*

[42] *See id.*

[43] *Id.* (quoting Mathews v. Eldrige, 424 U.S. 319, 333)

[44] *See id.*

[45] *Id.* (quoting KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.8, at 67 (3d ed. 1994)).

[46] *See id.*

[47] *See id.* at 1195 n.2.

[48] *See id.* at 1197.

[49] *See id.*

[50] *See id.*

[51] *Id.* (citing *Bunnell v. Industrial Comm'n of Utah*, 740 P.2d 1331, 1333–34 (Utah 1987)).

[52] *Id.* at 1198. *See generally* DAVIS & PIERCE, *supra* note 45, at 76–81 (explaining that adjudicator's preconceived attitudes on policy and law rarely require disqualification).

[53] *See V-1 Oil*, 939 P.2d at 1195 n. 2. While McKnight may not have had a direct pecuniary interest in the outcome of V-1's case, "many members of agency boards and commissions have some degree of economic interest in the subject they regulate. . . . A general economic interest in the subject matter is [by itself] insufficient to disqualify a decision maker." DAVIS & PIERCE, *supra* note 45, at 73.

[54] *See V-1 Oil*, 939 P.2d at 1199.

process and bias issues related to the institutional combination of prosecutorial and adjudicative functions.[55]

(c) Due Process and the Combination of Functions

The *V-1 Oil* court acknowledged that the potential for impermissible bias is readily apparent when an advocatory function is combined with an adjudicative function, the suspicion being that adjudicators may be disposed to act more favorably toward their employers.[56] The court found this to be especially true in a formal criminal context where "an adjudicator [was also] employed as a part-time prosecutor."[57] Ultimately, however, the *V-1 Oil* court reasoned that the strict separation of functions found in the criminal context is neither desirable or necessary in an administrative context.[58]

The court's reasoning was based, in part, on practical concerns of efficiency and cost control.[59] The strict separation of functions in the criminal context, although extremely expensive and inefficient, may be justified because of the "'extraordinarily high value we place on avoiding the risk of erroneously incarcerating people.'"[60] In the administrative context, however, the expense and administrative burden of such a separation of functions would make it "literally impossible for many . . . agencies to function."[61] The court concluded that the burdens imposed by "complete structural independence of the adjudicator would have disastrous consequences for many essential governmental programs and functions."[62] Thus, limited funding mandates that certain combinations of functions be tolerated within organizations; otherwise, some organizations might have to be eliminated entirely.[63] This lenient treatment of administrative decision making comports with the United States Supreme Coourt's due process analysis,[64] which involves the balancing of private interests with "'the Government's interest, including the function involved and the fiscal and administrative burdens that . . . additional or substitute procedural requirement[s] would entail.'"[65]

In addition, the court noted that institutional combinations of functions can afford certain benefits.[66] For example, "[p]olicy is developed and furthered on a relatively unified front rather than through the sometimes arbitrary and conflicting paths often pursued by organizations that are subject to formal separation of

---

[55]*See id.*
[56]*See id.* (citing Allison, *supra* note 38, at 1167–68.
[57]*Id.* (citing State v. Brown, 853 P.2d 851, 856–57 (Utah 1992)).
[58]*See id.*
[59]*See id.* at 1199–1203.
[60]*Id.* at 1199 (quoting DAVIS & PIERCE, *supra* note 45, at 92).
[61]*Id.* at 1199–1200.
[62]*Id.* at 1200.
[63]See id. (citing Allison, *supra* note 38, at 1171).
[64]*See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
[65]*V-1 Oil*, 939 P.2d at 1199 (quoting *Mathews*, 424 U.S. at 335).
[66]*See id.* at 1200.

legislative, adjudicative, and other functions."[67] The court further suggested that the resulting increase in efficiency could actually foster greater respect for the agency from the parties regulated by it and from the public in general.[68]

Ultimately, the court found that adequate separation of functions can be accomplished internally at the individual level rather than at the institutional level.[69] In other words, an individual cannot both prosecute and decide a case, yet different individuals within the same agency may perform these functions.[70] This separation allows agencies the flexibility to perform multiple functions while simultaneously protecting due process interests.[71] The court noted that separating functions within an agency will reduce the potential for conflicts of interest in adjudicatory proceedings. This is because individuals within an agency tend to identify more with their individual functions than with the agency as a whole.[72]

The *V-1 Oil* court found that McKnight was hired to work as both a staff attorney and an adjudicative officer because there was not a heavy enough case load at DERR for a full time presiding officer.[73] The court believed that the purpose behind assigning McKnight dual roles within the agency was to maximize limited resources.[74] Finding that McKnight's duties as a staff attorney were strictly limited to matters outside the division responsible for investigating and prosecuting underground storage tank violations, the court held that DERR accomplished an appropriate separation of functions at the individual level.[75]

Appellant V-1 argued that McKnight assumed certain fiduciary duties toward the agency by acting as the agency's attorney.[76] The court rejected this argument, stating that the converse was true." The court also found that McKnight had "no duty of partiality to the Underground Storage Tank Branch of DERR," and his position required him to "function as an impartial adjudicator."[77] Therefore, the court reversed the court of appeals' decision and held that McKnight appropriately acted as an adjudicative officer.[78]

---

[67] *Id.*

[68] *See id. But see Interim Study Committee on State and Local Affairs, Report of the Task Force on a Central Panel of Administrative Law Judges in Utah*, 17 (1988) (finding that institutional combinations of functions within agencies actually "foster the belief among citizens that agencies are judge, jury, and executioner").

[69] *See V-Oil*, 939 P.2d at 1200.

[70] *See id.* at 1200–03.

[71] *See id.* at 1201.

[72] *See id.* (citing DAVIS & PIERCE, *supra* note 45, at 94).

[73] *See id.* at 1202.

[74] *See id.*

[75] *See id.* at 1202–03.

[76] *See id.* at 1203.

[77] *Id.*

[78] *See id.* at 1203–04.

5. Conclusion

In *V-1 Oil Company v. Department of Environmental Quality*, the Utah Supreme Court allowed an agency staff attorney to act as an adjudicator in an administrative hearing within another branch of that agency. The court found that the agency sufficiently accomplished an internal separation of functions at the individual level "by segregating [the adjudicator] from contact with the investigative and prosecutorial arm of [the agency]."[79] Therefore, the court concluded that this separation of functions within the agency provided sufficient due process to petitioners seeking formal agency adjudications.

II. APPELLATE REVIEW AND PROCEDURE

A. Judicial Standards of Review Governing Appeals from Arbitration and the Relation Between the Federal and Utah Arbitration Statutes*

1. Introduction

In *Buzas Baseball v. Salt Lake Trappers*,[1] the Utah Supreme Court set forth the appropriate standard of review for trial courts to use in reviewing arbitration awards. The court discussed the different standards as they applied to the grounds for appeal in that case. The Court determined the Utah Arbitration Act ("Utah Act") should be very narrowly applied to the grounds for appeal. The court held that findings of fact outside those established by the arbitration award are usually inappropriate.[2] The court also held that the standard of review for an appellate court to use in ruling on a trial court's proceedings are: (a) the correction-of-error standard for conclusions of law; and (b) the clearly erroneous standard for factual findings.[3] Finally, the court suggested that trial courts compare and analyze the Utah Act and the Federal Arbitration Act ("Federal Act").[4] If a provision of the Utah Act "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," that provision is preempted by the Federal Act.[5]

---

[79] *Id.*

* Vicki M. Baldwin, Staff Member, *Utah Law Review*.

[1] 925 P.2d 941 (Utah 1996) (opinion by Zimmerman, C.J.).

[2] *See id.* at 947–49. A motion to vacate based on impartiality of the arbitrator is an exception. *See id.* at 948–49.

[3] *See id.* at 948.

[4] *See id.* at 952.

[5] *Id.* (quoting Volt Info. Sciences v. Trustees of Leland Stanford Univ., 489 U.S. 468, 477 (1989)).

2. The Case

On October 14, 1992, Salt Lake City reached an agreement with Buzas Baseball[6] in which Buzas Baseball agreed to move to Salt Lake City.[7] The team would become the Salt Lake Buzz starting with the 1994 baseball season. The Salt Lake Trappers ("Trappers") were the baseball team in Salt Lake City at that time and were a member of the Pioneer League.[8]

At the time of the agreement between Buzas Baseball and Salt Lake City, the Trappers and Buzas Baseball were bound by the National Association Agreement ("N.A.A."). Under this agreement, a higher classified team, such as Buzas Baseball, can "draft" the territory of a lower classified team, such as the Trappers.[9] The draft can only occur after the higher classified team obtains permission from the lower classified team to conduct negotiations with the city. The higher classified team also has to pay "just and reasonable compensation" to the lower classified team.[10] This rule allows the lower classified team to mitigate any damages that might arise due to public knowledge of the negotiations.[11] Buzas Baseball neither sought nor obtained the Trappers' consent before engaging in negotiations with Salt Lake City.[12]

On August 31, 1993, Buzas Baseball and the Trappers signed an agreement to arbitrate two issues:

> (i) the amount of just and reasonable compensation owed by Buzas Baseball to the Trappers for the drafting of the Salt Lake territory, and
> (ii) the amount of predraft damages, if any, arising from Buzas Baseball's failure to seek and obtain the Trappers' approval for talks with Salt Lake City exploring the possibility of acquiring the Salt Lake territory.[13]

A panel of five arbitrators "found that Buzas Baseball had violated the terms of the N.A.A. [by] failing to seek and obtain the Trappers' consent" before negotiating with Salt Lake City.[14] The panel awarded the Trappers $400,000 for the value of the lost franchise, $152,152 as lost profits for the 1993 season, and $1.2 million as compensation for the drafting of its territory.[15]

On November 29, 1994, Buzas Baseball filed a complaint in state district court seeking "an order vacating or, in the alternative, modifying the arbitration award."[16]

---

[6]Buzas Baseball was a member of the Triple A Pacific Coast League and was then operating as the Portland Beavers. *See id.* at 945.

[7]The facts are taken from the court's opinion in *Buzas Baseball*, 925 P.2d at 945–47.

[8]The Pioneer League is the lowest level of professional baseball while the Triple A Pacific Coast League is the highest level below the major leagues. *See id.*

[9]*See id.* at 945.

[10]*Id.*

[11]*See id.*

[12]*See id.*

[13]*Id.*

[14]*Id.*

[15]*See id.*

[16]*Id.* at 946.

Buzas Baseball argued that "the arbitrator (i) exceeded his authority, (ii) made an evident material miscalculation, (iii) manifestly disregarded the law, (iv) and made an award which violated public policy."[17] Buzas Baseball argued that the award of $1.2 million dollars compensated the Trappers for the territory and the franchise. It argued that the award of $400,000 for the franchise was a "double recovery."[18]

The district court entered an order on August 8, 1995 reducing the territory award by $400,000.[19] The order included findings of fact and conclusions of law.

The Trappers appealed. It argued that the trial court "erred in reconsidering the merits of the arbitration award" by substituting its judgment for that of the arbitration panel.[20] The Utah Supreme Court agreed and affirmed the arbitration award. Given this, it was unnecessary to reach the merits of the arguments made by Buzas Baseball.[21] However, the court chose to provide guidance and set forth the applicable law as it would apply to the grounds argued by Buzas Baseball.[22]

The court also addressed the issue of attorney fees. The Federal Act does not explicitly provide for attorney fees but the Utah Act does.[23] Buzas Baseball argued that the Federal Act preempted the Utah Act and therefore the award of attorney fees was prohibited.[24] The court analyzed the relation between the two statutes to determine if a conflict existed. The court held that an award of attorney fees furthers Utah's policies in favor of arbitration.[25] Utah's policies are consistent with the policies underlying the Federal Act.[26] Therefore, the court held that an award of attorney fees did not conflict with the Federal Act.[27]

3. Background

The State of Utah has had statutory provisions for arbitration of disputes since 1884.[28] The judiciary has been clarifying those provisions since that time. In *Bivans v. Utah Lake Land, Water & Power Co.*,[29] purchasers of land brought charges against the seller for selling land with water rights that the seller allegedly did not own.[30] All parties signed a stipulation to submit claims to arbitration. Some purchasers were awarded damages and others were not.[31] The seller moved to have the judgment set aside and the district court granted the motion. At that time, chapter 40 of the

---

[17] *Id.* at 949.
[18] *Id.* at 946.
[19] *See id.*
[20] *Id.*
[21] *See id.* at 949.
[22] *See id.*
[23] *See id.* at 952; *see also* UTAH CODE ANN. § 78-31a-16 (1996).
[24] *See Buzas Baseball*, 925 P.2d at 952.
[25] *See id.* at 953.
[26] *See id.*
[27] *See id.*
[28] *See* Robinson & Wells, P.C. v. Warren, 669 P.2d 844, 846 (Utah 1983) (citing Bivans v. Utah Lake Land, Water & Power Co., 174 P. 1126, 1128 (Utah 1918)).
[29] 174 P. 1126 (Utah 1918).
[30] *See id.* at 1127.
[31] *See id.*

Compiled Laws of Utah of 1907 regulated the procedures of arbitration. The court interpreted Chapter 40 as providing for the "manner in which the district court may on motion, annul, modify, or correct the award of the arbitrators."[32] The *Bivans* court held that awards will not generally "be disturbed on account of irregularities or informalities, or because the court does not agree with the award, so long as the proceeding has been fair and honest and the substantial rights of the parties have been respected."[33] However, Chapter 40 gave the trial court authority to set aside the awards based on evidence presented to it. Therefore, the *Bivans* court affirmed the trial court's order.[34]

The Utah Supreme Court continued to clarify provisions for arbitration. In *Giannopulos v. Pappas*,[35] two sheep runners, Giannopulos and Pappas, agreed to arbitrate a dispute. The arbitrators ruled in favor of Pappas, and the district court confirmed the ruling.[36] Upon receiving notice of the confirmation, Giannopulos filed a motion for a new trial and a motion to vacate the award. The district court denied both motions. The question before the court was whether the trial court had sufficient facts to vacate the arbitration award under the provisions of the Uniform Arbitration Act.[37] The court explained that the purpose of the Uniform Arbitration Act was to provide a method to obtain settlement of disputes while avoiding delays associated with legal action.[38] However, the Utah Arbitration Act provided grounds by which an arbitration award could be vacated.[39] The court held only the grounds provided by the statute could be used to vacate.[40] Applying these grounds, the court held there was sufficient evidence to reverse the lower court, grant a new trial, and annul the award.[41]

Finally, in *DeVore v. IHC Hospitals, Inc.*,[42] the Utah Supreme Court determined that the Utah Act required a reasonableness standard to vacate an arbitration award.[43]

---

[32]*Id.* at 1128.

[33]*Id.* at 1130.

[34]*See id.* at 1131.

[35]15 P.2d 353 (Utah 1932).

[36]*See id.* at 355.

[37]*See id.*; *see also* Uniform Arbitration Act, 1927 Laws of Utah ch.62 (current version at UTAH CODE ANN. § 78-31a-14(1) (1996).

[38]*See Giannopulos*, 15 P.2d at 356.

[39]Under the Uniform Arbitration Act, the court shall vacate an award:

> (a) where the award was procured by corruption, fraud or other undue means.
>
> (b) where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.
>
> (d) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award, upon the subject matter submitted was not made.

Uniform Arbitration Act, 1927 Laws of Utah ch.62 § 16 (current version at UTAH CODE ANN. § 78-31a-14(1) (1996)).

[40]*See Giannopulos*, 15 P.2d at 356.

[41]*See id.* at 358.

[42]884 P.2d 1246 (Utah 1994).

[43]*See id.* at 1256. The Utah Act provides:

> Upon motion to the court by any party to the arbitration proceeding for vacation of the award, the court shall vacate the award if it appears:

The Court then applied this standard to determine if the district court erred in denying appellant's motion to vacate an arbitration award. Since this was a question of law, the court reviewed for correctness.[44] The court reviewed the district court's factual findings under a clearly erroneous standard.[45] The *DeVore* court held that the district court had not erred in denying appellant's motion to vacate the award.[46]

The *Buzas Baseball* court followed the previous line of cases to determine the judicial standards of review governing appeals from arbitration.[47] For appellate courts reviewing trial court decisions, that standard is one of correctness for conclusions of law and a clearly erroneous standard for factual findings.[48] The *Buzas Baseball* court also held that trial courts should narrowly apply the Utah Act to the grounds for appeal when reviewing an arbitration award.[49] In this case the trial court had substituted its judgment for that of the arbitrator and erroneously modified the award.[50] Therefore, the *Buzas Baseball* court upheld the arbitration award.

4. Analysis

(a) Standard of Review

The *Buzas Baseball* court set forth the standard of review appellate courts should use to review a trial court's decision relating to arbitration awards.[51] The appropriate standard of review is that a trial court's conclusions of law should be reviewed for correctness. Factual findings should be reviewed under a clearly erroneous standard.[52]

Because the Utah Act is nearly identical to the Federal Act,[53] the Utah Supreme Court looked to the laws of other states and federal case law in defining the standards of review.[54] As initially set forth in *Bivans*, Utah law is supportive of the general

---

(a) the award was procured by corruption, fraud, or other undue means;

(b) an arbitrator, appointed as a neutral, showed partiality, or an arbitrator was guilty of misconduct that prejudiced the rights of any party;

(c) the arbitrators exceeded their powers;

(d) the arbitrators refused to postpone the hearing upon sufficient cause shown, refused to hear evidence material to the controversy, or otherwise conducted the hearing to the substantial prejudice of the rights of a party; or

(e) there was no arbitration agreement between the parties to the arbitration proceeding.

UTAH CODE ANN. § 78-31a-14(1) (1996).

[44]*See DeVore*, 884 P.2d at 1256.

[45]*See id.*

[46]*See id.* at 1257.

[47]*See* Buzas Baseball v. Salt Lake Trappers, 925 P.2d 941, 947–48 (Utah 1996).

[48]*See id.* at 948.

[49]*See id.* at 947.

[50]*See id.*

[51]*See id.* at 948.

[52]*See id.*

[53]*See id.* at 948 n.6. *Compare* UTAH CODE ANN. § 78-31a-15(1) (1996), *with* 9 U.S.C. § 11 (1994).

[54]*See Buzas Baseball*, 925 P.2d. at 947, n.5. The court used federal law for guidance in this case only because the issues and facts warranted such treatment. The court reserved the right to adopt a different construct of the Utah Act if the statute and facts warrant.

principal that the trial court may not substitute its judgment for that of the arbitrator.[55] Therefore, the court held that the trial court's review is limited to the grounds spelled out in the statute.[56] The trial court claimed to have limited itself to the Utah Act. However, the court held that the trial court erred in substituting its judgment for that of the arbitrator.[57] Therefore, it was unnecessary to look at the merits of Buzas Baseball's arguments.

(b) Application of the Standard of Review

The *Buzas Baseball* court provided guidance for courts by going through each argument advanced by Buzas Baseball according to the statutory guidelines.[58] Using this method, the court demonstrated how the award should have been affirmed by the trial court.[59]

Buzas Baseball first argued that the arbitrators exceeded their authority.[60] "The proper test under the exceeding authority ground is 'whether the arbitrator exceeded the powers delegated to him by the parties.'"[61] In order to determine if an arbitrator exceeded his authority, the trial court should review "whether the arbitrator's award covers any areas not contemplated in the [arbitration] agreement."[62] The arbitration agreement between the Trappers and Buzas Baseball contained two issues, one relating to the drafting of the Trappers' territory and the other relating to predraft damages. Therefore, the arbitrators did not exceed their authority[63] in awarding $400,000 for the lost franchise in predraft damages and $1.2 million in compensation for the drafting the Trappers' territory.[64]

---

[55]*See id.* at 947; *see also Bivans*, 174 P. at 1130.

[56]*See Buzas Baseball*, 925 P.2d at 947. Under the Utah Act, the court may modify an arbitration award if it appears:

> (a) there was an evident miscalculation of figures or an evident mistake in the description of any person or property referred to in the award;
>
> (b) the arbitrators' award is based on a matter not submitted to them, if the award can be corrected without affecting the merits of the award upon the issues submitted; or
>
> (c) the award is imperfect as to form.

UTAH CODE ANN. § 78-31a-15(1) (1996).

[57]*See Buzas Baseball*, 925 P.2d at 948.

[58]*See id.* at 949.

[59]*See id.*

[60]*See id.*; *see also* UTAH CODE ANN. § 78-31a-14(1)(c) (1996) (providing that at trial court may vacate award when arbitrators exceed their powers).

[61]*Buzas Baseball*, 925 P.2d at 949 (quoting Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250 (7th Cir. 1994)).

[62]*Id.*

[63]*See id.* at 950. It is assumed that the parties have given authority to the arbitrator to decide their dispute rationally. The court will find arbitrators exceeded their authority where the award is irrational according to a standard of reasonableness. *See id.*

[64]*See id.* at 949–50.

Second, Buzas Baseball argued evident miscalculation by the arbitrator.[65] This statutory ground allows a court to modify an arbitrator's award if the figures are evidently incorrect.[66] The court held that there was nothing on the face of the award in this case that indicated miscalculation.[67]

Third, Buzas Baseball argued the arbitrator manifestly disregarded the law. This is a judicially created doctrine based on prohibiting double recoveries and stems from the statutory ground of exceeding authority.[68] The court explained that "'manifest disregard' is much more than mere error as to the law . . . . The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator."[69] The court held that there was no evidence in the record that the arbitrators knowingly disregarded any aspect of the law, and therefore held the arbitrators did not exceed their authority.[70]

Finally, Buzas Baseball argued that the award of $400,000 in addition to the award of $1.2 million was made in violation of the Utah public policy against double recoveries.[71] This is a judicially created exception for vacating an arbitration award based on public policy.[72] However, this exception must be based on a "'well-defined and dominant' policy against the [described conduct]."[73] The court found that the award in this case did not violate any "well-defined and dominant" public policy of the State of Utah against double recoveries and therefore was not an allowable exception.[74]

The court narrowly analyzed the arguments made by Buzas Baseball according to the Utah Act. In doing this, the court demonstrated how none of the statutory or judicially created grounds should have been used by the trial court to modify or overturn the arbitration award. The trial court's order was therefore set aside and the arbitration award confirmed.[75]

(c) Relation of Federal Statute to State Statute

Buzas Baseball argued that since the Federal Act does not explicitly provide for attorney fees, the attorney fees set forth in the Utah Act are preempted.[76] However,

---

[65]*See id.* at 950. The Utah Act provides: "Upon motion of any party to the arbitrators or upon order of the court pursuant to a motion, the arbitrators may modify the award if: (a) there is an evident miscalculation of figures . . . ." UTAH CODE ANN. § 78-31a-13(1) (1996).

[66]*See Buzas Baseball*, 925 P.2d at 950; *see also* UTAH CODE ANN. § 78-31a-15(1)(a) (1996).

[67]*See Buzas Baseball*, 925 P.2d at 950.

[68]*See id.* at 951.

[69]*Id.* (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986)).

[70]*See id.*

[71]*See id.*

[72]*See id.* at 951 (citing United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987); W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983)).

[73]*Id.* (quoting Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1023 (10th Cir. 1993) (alteration in original)).

[74]*Id.* at 951.

[75]*See id.* at 954.

[76]*See id.* at 952.

since the Federal Act does not have a preemptive provision, the court reasoned that any "state law governing arbitration is preempted only 'to the extent it actually conflicts with federal law . . . [or] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[77] Therefore, the court suggested that in the future courts analyze state and federal statutory relations to determine whether or not a conflict exists.[78] In *Volt,* the United States Supreme Court held that the policies underlying the Federal Act are (a) to force judicial enforcement of agreements to arbitrate and (b) to make agreements to arbitrate equivalent to any other contract.[79] Utah joined several other jurisdictions in interpreting the purpose of granting attorney fees in arbitration review.[80] That purpose is to discourage meritless challenges and encourage prompt payment of valid awards.[81] Since this interpretation is consistent with the policies of the Federal Act, Utah law does not conflict with federal law. Therefore, the court held there was no preemption.[82]

5. Conclusion

In *Buzas Baseball,* the Utah Supreme Court held that in reviewing an arbitration award, a trial court may not substitute its own judgment for that of the arbitrator. A trial court may not modify or vacate an award because it disagrees with the arbitrator's assessment. Instead, the trial court must limit itself to determining whether any of the statutory grounds provided by the Utah Act exist. Additionally, the court held that in reviewing a trial court's decision regarding an arbitration award, an appellate court should use a correction-of-error standard for the conclusions of law and a clearly erroneous standard for any factual findings. Finally, the court held that the award of attorney fees under the Utah Act is not preempted by the Federal Act. The award of fees furthers Utah's policies in favor of arbitration. Because these policies are consistent with the policies underlying the Federal Act, there is no conflict between the two statutes.

---

[77] *Id.* (quoting *Volt,* 489 U.S. at 477).

[78] *See id.*

[79] *See Volt,* 489 U.S. at 478.

[80] *See, e.g.,* Canon Sch. Dist. v. W.E.S. Constr. Co., 882 P.2d 1274, 1279 (Ariz. 1994); County of Clark v. Blanchard Constr. Co., 653 P.2d 1217, 1220 (Nev. 1982); Wachtel v. Shoney's Inc., 830 S.W.2d 905 (Tenn. Ct. App. 1991).

[81] *See Buzas Baseball,* 925 P.2d at 953.

[82] *See id.*

*B. Whether a Responding Party Must File a Cross-Appeal Before Arguing an Alternative Ground for Affirming the Court Below**

1. Introduction

In *State v. South*,[1] the Utah Supreme Court held that in an appeal, the responding party is not required to cross-appeal in order to argue an alternative ground for affirming the lower court, provided that the alternative ground was raised in the court below. The decision reversed the Utah Court of Appeals, which had refused to address an argument raised by the State in its brief because the State had not filed a cross-appeal.[2] Adopting the rationale of the United States Supreme Court in *Langnes v. Green*,[3] the Utah Supreme Court found that a cross-appeal is only necessary when a party seeks to "enlarg[e] their own rights or lessen[] the rights of their opponent."[4]

2. The Case

On March 15, 1992, Logan City Police Detective Dennis Simonson went to the residence of Jeffery and Dianna South to investigate the theft of a cellular phone.[5] When Mr. South answered the door, the detective smelled burnt marijuana coming from inside the home. Shortly thereafter, the detective obtained a search warrant, and, accompanied by three other officers, returned to the home and served the warrant. During the ensuing search of the premises, the officers discovered controlled substances and drug paraphernalia. The Souths were subsequently arrested for possession.

Prior to the beginning of their trial, the Souths moved to suppress the evidence on the grounds that the warrant was defective. The Souths alleged that because the warrant only authorized the search of persons present on the premises,[6] the evidence discovered during the search of the residence was illegally obtained. The trial court agreed with this reasoning, but ruled the evidence admissible under the "plain smell" exception to the Fourth Amendment.[7] The Souths were eventually convicted of possession of a controlled substance.

---

*Jonathan Owens, Staff Member, *Utah Law Review.*

[1]924 P.2d 354 (Utah 1996) (opinion by Stewart, Assoc. C.J.).

[2]*See* State v. South, 885 P.2d 795, 797–98 (Utah Ct. App. 1994) (opinion by Greenwood, J.).

[3]282 U.S. 531 (1931).

[4]*South*, 924 P.2d at 355 (citing *Langnes*, 282 U.S. at 538–39).

[5]The facts and procedural history are taken from the opinions of the Utah Supreme Court and the Utah Court of Appeals, 924 P.2d at 355 and 885 P.2d at 797 respectively.

[6]The warrant limited the search to "the 'persons of Jeffery Earl and Dianna South' and not a search of the premises." *South*, 885 P.2d at 797.

[7]*See id.* The "plain smell" doctrine as outlined in State v. Naisbitt, 827 P.2d 969 (Utah Ct. App. 1992), holds that "[o]bjects in 'plain view' constitute one . . . exception [to the warrant requirement], and may be seized without a warrant if the police officer is lawfully present and the evidence is clearly incriminating. This exception encompasses evidence within 'plain smell.'" *Id.* at 973 (quoting State v. Bartley, 784 P.2d 1231, 1235 (Utah Ct. App. 1989)).

Following their conviction, the Souths appealed the trial court's ruling on the admissibility of the evidence to the Utah Court of Appeals. The State, however, did not cross-appeal the trial court's ruling on the invalidity of the warrant, but instead argued in its responsive brief that the trial court had erred in finding the warrant invalid. The Court of Appeals reversed without reaching this argument. Specifically, that court held the State must first cross-appeal in order to raise the defective warrant issue. The State appealed the Court of Appeals' ruling to the Utah Supreme Court.

3. Background

The rule, which allows a responding party to argue an alternative ground for affirming the court below[8] without first filing a cross-appeal, has its basis in the Utah Rules of Civil Procedure ("Utah Rules").[9] However, as stated earlier, the Utah Supreme Court in *South* relied upon the standard set forth in the Supreme Court case *Langnes v. Green*, rather than explicitly basing its holding on the Utah Rules.[10] Therefore, because of the court's reliance on the federal standard, this section will focus on the evolution of the *Langnes* doctrine.[11]

The federal courts' approach to what rights are retained by a responding party to an appeal has remained consistent for the past 130 years. As early as 1867, the Supreme Court in *The William Bagaley*[12] stated that "[a]ppellees . . . cannot have any greater damages than were assessed in the court of subordinate jurisdiction."[13] Moreover, nine years later in *The Stephen Morgan*[14] the Court declared "[p]arties who do not appeal from a final decree of a circuit court . . . cannot be heard in opposition to the decree when the cause is removed here by the opposite party . . . . [However, t]hey may be heard in support of the decree."[15] Thus, while this line of cases

---

[8]This assumes, of course, that the alternative grounds raised by the respondent were also raised in the court below.

[9]*See* Terry v. Zions Coop. Mercantile Inst., 617 P.2d 700, 701 (Utah 1980) (interpreting that Rules 74(b) and 75(d) of Utah Rules mean "if a respondent desires to attack the judgment and change it in his favor, he must timely file a cross-appeal").

[10]The Court, however, implicitly relied on the Utah Rules standard by citing to *Terry* as support for the rule that "litigants [must] cross-appeal . . . if they wish to attack a judgment of a lower court for the purpose of enlarging their own rights or lessening the rights of their opponent." 924 P.2d at 355–56 (citing *Terry*, 617 P.2d at 701).

[11]It is important to note, however, that the *Terry* court also relied extensively on United States Supreme Court precedent. For example, in *Terry* the court noted:

> [T]he classic statement of the rule [that a responding party need not cross-appeal in order to raise an alternative ground for affirming the court below] is quoted from the opinion of Mr. Justice Brandeis . . . in *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924): "[a] party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view . . . to enlarging his own rights thereunder . . . ."

617 P.2d at 702 n.5.

[12]72 U.S.(5 Wall.) 377 (1866).

[13]*Id.* at 412.

[14]94 U.S. 599 (1876).

[15]*Id.*

identified the general rights of a respondent, it failed to address the specific issue of when a cross-appeal must be filed. It was not until 1923, and again in 1930, that the Court addressed this narrow issue in *United States v. American Railway Express Co.*[16] and *Langnes v. Green*[17] respectively.

In *American Railway*, a procedurally complex case involving the interpretation of the Interstate Commerce Act, the Court addressed the petitioner's argument that an issue "adequately presented in the bill of complaint, cannot be availed of in [an appellate] court, [if it were] overruled by the District Court and . . . a cross-appeal [was not taken]."[18] Writing for the Court, Justice Brandeis rejected this argument as "unsound,"[19] finding that an "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record."[20] Therefore, because the respondent was not "attack[ing], in any respect, the decree entered below," it was unnecessary for a cross-appeal to be filed.[21]

Seven years later, the Court addressed a similar issue in *Langnes* when a shipowner sought relief under a federal statute limiting a vessel owner's liability after an injured employee brought suit in state court.[22] In that case, the federal district court assumed jurisdiction and dismissed the case against the shipowner.[23] On appeal, the employee assailed the decree on two grounds,[24] and the Court of Appeals reversed, rejecting the first ground but accepting the second.[25] The shipowner appealed to the Supreme Court, and the employee responded with both arguments in support of affirming the appellate court. The shipowner objected, noting the employee had not cross-petitioned.[26] However, the Court found the objection to be "without merit,"[27] stating that the employee's "right to [argue in support of the decision below] is beyond successful challenge."[28] The Court then reiterated what it had said in *American Railway*,[29] and declared that "the right . . . of this court to

---

[16]265 U.S. 425 (1924).

[17]282 U.S. 531 (1931).

[18]*American Railway*, 265 U.S. at 435.

[19]*Id.*

[20]*Id.*

[21]*Id.* at 435–36.

[22]*See Langnes*, 282 U.S. at 533.

[23]*See id.* at 534.

[24]Specifically, the grounds were: (1) that, there being but one possible claim and one owner, the shipowner should have sought his remedy for a limitation of liability by proper pleading in the state court; and (2) that the record disclosed the privity and knowledge of the owner in respect of the matters and things by which the injury to the respondent resulted. *Id.*

[25]*See id.*

[26]*See id.* at 535.

[27]*Id.*

[28]*Id.* at 538.

[29]Specifically, the *Langnes* Court stated:

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in

consider . . . additional grounds [for affirming the court below] will n[ot] be affected by their rejection in the court below."[30]

Since the Supreme Court's decisions in *American Railway* and *Langnes*,[31] "[t]he established doctrine governing appeals to all [federal] appellate courts . . . is that a party must cross-appeal if such party seeks to change the judgment below or any part thereof."[32] Additionally, "it is also the general rule that a cross-appeal . . . is not necessary to enable a prevailing party 'to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the [lower c]ourt.'"[33] This, then, was the backdrop against which the Utah Supreme Court decided *South*.

4. Analysis

In his opinion for a unanimous court, Associate Chief Justice Stewart first fashioned a bright-line standard identifying when a party must file a cross-appeal. Next, applying that standard, he reversed the Court of Appeals and remanded the case to that court "for consideration of the State's proffered alternative ground for affirm[ance]."[34]

(a) The Standard

As an initial matter, the court began its discussion of the case by noting that they were not "address[ing] the question of whether an appellee may raise an argument in defense of the lower court's judgment when that argument was not presented in the lower court."[35] Rather, Justice Stewart stated that the sole issue addressed by the court was "whether a responding party must file a cross-appeal . . . to raise an argument *which was also raised below* and which is offered merely as a ground for affirming

---

> support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed.

Id. at 538–39 (quoting *American Railway*, 265 U.S. at 435).

[30] *Id.* at 539.

[31] As the court noted in *South*, the Supreme Court, since deciding *Langnes*, "has articulated a few clarifications or exceptions." 924 P.2d at 356 n.4 (citing ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 364–65 (7th ed. 1993)). These include "claims of improper venue or untimeliness" as well as those "rare occasions when . . . the appellee's argument would . . . require the lower court's decision [to] be modified." *Id.*

[32] ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 363 (7th ed. 1993) (citing Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 560 n.11 (1976); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 119 n.14 (1985)).

[33] *Id.* (quoting Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979)).

[34] *South*, 924 P.2d at 357.

[35] *Id.* at 355 n.3.

the decision below."[36] Therefore, having fixed the narrowness of the question on appeal, the court proceeded to establish an appropriate standard.

Citing to *Plumb v. State*,[37] Justice Stewart first examined the doctrine established in *Langnes v. Green*.[38] Specifically, Justice Stewart stated that "the *Langnes* doctrine requires litigants to cross-appeal . . . if they wish to attack a judgment of a lower court for the purpose of enlarging their own rights or lessening the rights of their opponent."[39] However, under *Langnes*, a cross-appeal is unnecessary "if appellees or respondents merely desire the affirmance of the lower court's judgment."[40] Therefore, finding the *Langnes* doctrine "grounded in fairness, common sense, and judicial efficiency,"[41] the Utah Supreme Court adopted it for the resolution of the issue presented in *South*.[42]

(b) The Application

Applying the *Langnes* doctrine to the facts in *South*, the court first reviewed the reasoning of the Court of Appeals in its rejection of the State's proffered alternative grounds for affirmance. The court noted that "[t]he Court of Appeals ruled that because 'defendants in this case are challenging the legality of the warrantless search—a question quite different than the validity of the warrant,' the State was raising an argument that was not 'related to the ruling being appealed.'"[43] Thus, "[t]he Court of Appeals . . . presumed that the trial court's ruling on the 'plain smell' issue and the validity of the warrant constituted distinct judgments or decisions and the *Langnes* doctrine therefore could not apply."[44]

The Utah Supreme Court rejected this reasoning, finding that the Court of Appeals had become "mired in the semantics of what it labels a 'ruling' as opposed to a 'ground' for decision."[45] Instead, the court stated that the appropriate approach is to look to the "substance of the trial court's decision."[46] Specifically, a court reviewing whether or not a cross- appeal should be filed must focus on the resulting "*outcome* [of the decision] . . . not the reasoning employed to reach the outcome."[47]

In this case, the court noted, the outcome the State and the Souths were seeking was the respective admittance or suppression of the evidence discovered during the search. "To prevail, the Souths had to convince the trial court to reject all the State's

---

[36]*Id.* at 355 (emphasis added).

[37]809 P.2d 734 (Utah 1990) (holding that state courts, while not bound by federal court decisions, are free to adopt federal approaches to problems if approaches are found useful and persuasive).

[38]*South*, 924 P.2d at 355.

[39]*Id.*

[40]*Id.* at 357.

[41]*Id.*

[42]While the Utah Supreme Court never specifically stated that it adopted the *Langnes* doctrine, the court based its opinion on that doctrine in rejecting the holding of the Utah Court of Appeals.

[43]*South*, 924 P.2d at 357 (quoting *South*, 885 P.2d at 798).

[44]924 P.2d at 357.

[45]*Id.*

[46]*Id.*

[47]*Id.*

potential justifications for the search. The State, on the other hand, needed only to demonstrate one valid, independently supportable justification for the search."[48] Thus, the court found, it was of little consequence whether the trial court accepted the "plain smell" argument and rejected the warrant argument. "The result was the same, and in responding to the Souths' appeal, the State was not seeking to change it."[49] Therefore, it was unnecessary for the State to cross-appeal on the warrant issue in order to argue it as an alternative means for affirming the court below.

5. Conclusion

In *South*, the Utah Supreme Court reversed the Utah Court of Appeals by holding that a responding party to an appeal is not required to cross-appeal before they may argue an alternative ground for affirmance which was also raised below. Adopting the rationale of the United States Supreme Court in *Langnes v. Green*, the court held that if the respondent "merely offer[s] another line of reasoning which . . . would result in precisely the same outcome as that originally granted by the trial court," a cross-appeal is unnecessary.[50]

III. CRIMINAL LAW AND PROCEDURE

A. Clarifying and Limiting Use of the Exceptional Circumstances Concept[*]

1. Introduction

State v. Irwin[1] represents the latest statement of the exceptional circumstances concept by the Utah appellate courts. In *Irwin*, the Utah Court of Appeals unanimously concluded that the prosecutor's breach of the plea agreement, coupled with the expiration of the thirty-day time limit to withdraw the plea, did not constitute a sufficiently exceptional circumstance to permit it to hear the case on the merits.[2] The court's holding in *Irwin* limits use of this concept to rare instances of procedural anomalies.[3]

---

[48] *Id.*
[49] *Id.*
[50] *Id.*
[*] Karen M. Doore, Staff Member, *Utah Law Review*.
[1] 924 P.2d 5 (Utah Ct. App. 1996) (opinion by Orme, J.), *cert. denied*, 931 P.2d 146 (Utah 1997).
[2] *See id.* at 11–12.
[3] *See id.* at 11.

2. *The Case*

Steven Irwin was charged with rape.[4] When new charges surfaced against him, he subsequently entered into a plea agreement with the State. Irwin agreed to plead guilty to the lesser charges of forcible sexual assault and unlawful sexual intercourse, so long as the State agreed to file no further charges and to remain silent during his sentencing. The agreement also permitted the prosecutor to provide input to Adult Probation and Parole ("A.P. & P.").

The prosecutor spoke at the initial sentencing hearing, stating that the sentencing report was inadequate. She also provided further prejudicial details about the alleged offense and victim. She justified her breach of the plea agreement by claiming that A.P. & P. never contacted her and thereby denied her the opportunity for sentencing input provided in the plea agreement. Defense counsel did not object.

Further, at the final sentencing hearing, delayed to accommodate a diagnostic evaluation, the substitute prosecutor made a recommendation to the court. Again, defense counsel did not object. The trial court then sentenced the defendant to concurrent terms of one to fifteen years for forcible sexual abuse, and zero to five years for unlawful sexual intercourse.

Represented by new counsel, Irwin brought this appeal, arguing that the breach of the plea agreement represented an exceptional circumstance providing a basis for appeal despite his lack of objection because "the thirty-day time limit for filing a motion to withdraw his guilty plea under Utah Code Ann. § 77-13-6(2)(b) (1995)[5] had elapsed before the prosecution breached its promise to remain silent at sentencing."[6]

However, the court affirmed the decision of the trial court because the defendant did not preserve this issue for appeal by objecting, because there was no plain error nor exceptional circumstances, and finally because the defendant did not raise a claim of ineffective assistance of counsel.

3. *Background*

Courts in Utah have used the exceptional circumstances concept as a "safety device to make certain that manifest injustice does not result from failure to consider an issue on appeal."[7] Despite its use in Utah courts as early as 1963,[8] the exceptional

---

[4]The facts and procedural history are taken from *State v. Irwin*, 924 P.2d 5, 6–7 (Utah Ct. App. 1996), *cert. denied*, 931 P.2d 146 (Utah 1997).

[5]*See* UTAH CODE ANN. § 77-13-6(2)(b) (1995) (providing that "a request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea").

[6]*Irwin*, 924 P.2d at 7 (footnote added).

[7]State v. Archambeau, 820 P.2d 920, 923 (Utah Ct. App. 1991) (holding that liberty interest alone is not sufficient to raise constitutional issue for first time on appeal in case concerning conviction of defendant for possession of dangerous weapon by restricted person).

[8]*See* In Re Woodward, 384 P.2d 110, 111–12 n.2 (Utah 1963) (acknowledging that criminal defendants may raise constitutional issues in certain circumstances).

circumstances concept has lacked clarity and comprehensiveness, prompting the Utah Supreme Court to refer to the concept as "ill-defined."[9]

The exceptional circumstances concept was first addressed, although not directly, by the Utah Supreme Court in *In re Woodward*.[10] In a footnote, the court acknowledged that there were some extenuating circumstances which justified consideration of an issue not preserved for appeal, including when liberty interests were at stake, or when "considerable public interest and concern [is] engendered."[11]

Subsequently, the courts in Utah commonly applied the concept when "liberty" interests were at stake.[12] The court later limited this rule because liberty interests are nearly always at stake in a criminal proceeding. Thus, to create a "per se 'liberty interest' exception to the rule prohibiting the consideration of issues for the first time on appeal would effectively swallow the general rule in criminal appeals."[13] The Utah Supreme Court later approved this reasoning in *State v. Lopez*.[14] The involvement of a liberty interest thus remained a factor in the court's analysis, but was no longer a per se exceptional circumstance.[15]

Appellants have also advanced the interests of judicial economy as sufficient to give rise to exceptional circumstances. Judicial economy seemed to be at least the stated ground supporting the finding of exceptional circumstances in *State v. Gibbons*.[16] Gibbons pleaded guilty to two counts of sexual abuse of a child but alleged on appeal that the court failed to determine whether his guilty plea was made knowingly and voluntarily.[17] Because Gibbons could move to withdraw his plea at any time, and then potentially appeal an unfavorable decision, the court concluded that it was possible that two appeals might result from the same case.[18] The court cited the need to avoid two appeals in the same case as grounds to reach the merits of Gibbons' appeal, apparently motivated by interests of judicial economy.[19]

Conversely, in *State v. Labrum*,[20] an alleged gang member challenged the constitutionality of Utah's gang enhancement statute[21] for the first time on appeal. Because the trial court failed to make written findings as required under Utah law,[22]

---

[9]State v. Dunn, 850 P.2d 1201, 1209 n.3 (Utah 1993) (applying plain error doctrine in case involving improper jury instruction on second-degree murder).

[10]384 P.2d 110 (Utah 1963).

[11]*Id.* at 111–12 n.2.

[12]*See* State v. Jameson, 800 P.2d 798, 802–03 (Utah 1990) (permitting defendant to raise double jeopardy issue for first time on appeal because his liberty was at stake); State v. Breckenridge, 688 P.2d 440, 443 (Utah 1983) ("The general rule that constitutional issues not raised at trial cannot be raised on appeal is excepted to when a person's liberty is at stake.").

[13]*Archambeau*, 820 P.2d at 925.

[14]886 P.2d 1105, 1113 (Utah 1994) (refusing to hear for first time on appeal criminal defendant's claim that identification of witness was impermissibly obtained).

[15]*See Archambeau*, 820 P.2d at 925.

[16]740 P.2d 1309 (Utah 1987) (remanding case to give defendant opportunity to withdraw guilty plea because of exceptional circumstances possibly permitting two appeals in same case).

[17]*See id.* at 1311.

[18]*See id.*

[19]*See id.*

[20]881 P.2d 900 (Utah Ct. App. 1994).

[21]*See* UTAH CODE ANN. § 76-3-203.1 (Supp. 1993).

[22]*See* UTAH CODE ANN. § 76-3-203.1(5)(c) (Supp. 1993).

the alleged gang member argued that the court would have to remand the case for written findings.[23] He further argued that he would raise his constitutional claim on remand and therefore, in the interests of judicial economy, the appellate court should address the merits and provide guidance to the trial court on this issue.[24] The court declined to stray from the rule barring consideration of new issues on appeal because the defendant advanced no authority supporting the idea that "judicial economy is a sufficiently exceptional circumstance to . . . reach the merits of a constitutional claim raised for the first time on appeal."[25]

The apparent contradiction on the issue of judicial economy aside, the exceptional circumstances concept unquestionably retained vitality in cases with unusual procedural twists. *State v. Haston*[26] is a particularly good example of sufficiently unusual procedural circumstances warranting consideration of a new issue on appeal. Haston was convicted of attempted second degree murder under the depraved indifference standard. In a later decision in another case, the Utah Supreme Court determined that there is no crime of depraved indifference attempted murder in Utah.[27] On the basis of this new ruling, Haston appealed his conviction and argued that he could not be incarcerated for a crime not recognized in Utah.[28] While the State objected to a new issue being raised on appeal, the court concluded that under these circumstances it would be "manifestly unjust" to deny Haston his appeal.[29] This manifest injustice fell within the ambit of exceptional circumstances, warranting the appellate court's consideration of the new issue.

Most recently, the Utah Supreme Court concluded that circumstances in *Salt Lake City v. Ohms*[30] concerned an unusual procedural twist sufficient to justify its consideration of new issues on appeal. Ohms, a criminal defendant, consented to have his case heard by a circuit court commissioner, waiving his right to a trial by circuit court judge or jury.[31] He appealed his subsequent conviction, arguing for the first time that the circuit court commissioner lacked authority to decide his case.[32] The court determined that it would proceed to the merits of the appeal, although Ohms had raised a new issue, because raising the issue below would have effectively withdrawn consent to the hearing.[33] As a result, Ohms, and others similarly situated, would not ever be in a position to challenge the constitutionality of the statute empowering commissioners to hear such cases on waiver.[34] The court stated that "[t]his is precisely

---

[23]*See Labrum*, 881 P.2d at 904.

[24]*See id.*

[25]*Id.*

[26]846 P.2d 1276, 1277 (Utah 1993) (holding that jury instruction on crime not recognized in Utah was basis for new trial).

[27]*See* State v. Vigil, 842 P.2d 843, 843–44 (Utah 1993).

[28]*See Haston*, 846 P.2d at 1277.

[29]*See id.*

[30]881 P.2d 844 (Utah 1994).

[31]*See id.* at 846.

[32]*See id.*

[33]*See id.* at 847.

[34]*See id.*

the sort of exceptional circumstance that permits us to review the constitutionality of the provision in question."[35]

4. Analysis

In its analysis, the *Irwin* court first delineated the three different exceptions to the general rule that a defendant must preserve an issue for appeal.[36] The court concluded that Irwin had not made a claim of ineffective assistance of counsel,[37] and had not properly addressed "plain error,"[38] therefore leaving exceptional circumstances as the sole foundation to support his appeal. Thus, the court confined its analysis to whether the prosecutor's breach of the plea agreement constituted exceptional circumstances permitting it to address the breach of the plea agreement upon appeal.[39]

While noting that exceptional circumstances is not so much a substantive doctrine as it is a means for the appellate court to address the merits of an appeal, the court denied that the standard was arbitrary.[40] The court then reviewed those Utah cases that previously applied the exceptional circumstances standard to inform its decision concerning the proper application of this concept.

From the review of earlier decisions, the court concluded that the appellate courts had become more predictable and increasingly conservative in their use of the exceptional circumstances concept.[41] Following the court's earlier decision in *Archambeau* and the subsequent approval of that holding in *Lopez*, the *Irwin* court stated that a liberty interest was not sufficient in itself to bring an appeal on exceptional circumstances grounds.[42] However, the *Irwin* court left open the

---

[35]*Id.*

[36]These exceptions were as follows: plain error, exceptional circumstances, and ineffective assistance of counsel. *See* State v. Irwin, 924 P.2d 5, 7 (Utah Ct. App. 1996), *cert. denied*, 931 P.2d 146 (Utah 1997).

[37]In fact, the court stated that "it may well be that the facts of the instant case would give rise to an ineffective assistance of counsel claim." *Id.* at 11. However, because *Irwin* did not raise that issue, the court declined to address it. *See id.*

[38]A claim for appellate review based upon plain error requires the appellant to "establish that '(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.'" *Id.* at 7 (alteration in original) (quoting State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993)). Irwin failed to prove the last two requirements. *See id.* at 8.

[39]The court appears to make a confusing conclusory leap, reframing the issue as whether Irwin's counsel's failure to object constitutes an exceptional circumstance, rather than whether the breach of plea agreement coupled with the expiration of the thirty-day deadline for withdrawal of his plea amounts to an exceptional circumstance. In so doing, the court's unspoken reasoning appears to reject any use of the exceptional circumstances concept where an objection of counsel *could* have reserved an issue for appeal. Unlike the instances of rare procedural anomalies illustrated in such cases as *State v. Haston*, 846 P.2d 1276 (Utah 1993), and *Salt Lake City v. Ohms*, 881 P.2d 844 (Utah 1994), which may make it impossible for counsel to raise timely objections, Irwin's counsel merely failed to object. *See Irwin*, 924 P.2d at 11.

[40]*See Irwin*, 924 P.2d at 8.

[41]*See id.* at 11.

[42]*See id.*

possibility that "matters of extraordinary importance or widespread interest" may still fall within the ambit of exceptional circumstances.[43]

Further, by harmonizing the *Labrum* and *Gibbons* decisions, the court determined that judicial economy was not sufficient grounds for exceptional circumstances.[44] Because *Labrum* subsequently suggested that judicial economy could not amount to exceptional circumstances, the court suggested that the *Gibbons* court's real and unspoken ground for its decision was the importance of "the perceived need to particularize the voluntariness of guilty pleas in the face of inconsistent trial court practices,"[45] a justification which fell under the substantial public interest grounds for exceptional circumstances.[46] Furthermore, the court determined that use of the exceptional circumstances concept was appropriate only in truly exceptional circumstances involving "rare procedural anomalies,"[47] seizing upon language used by the Utah Supreme Court in *State v. Dunn*.

Finally, the court applied this new understanding of the exceptional circumstances concept to the facts of Irwin's case. On the basis of recent authority, the court determined that there must be more than simply "mere oversight by trial counsel in failing to object to improper remarks made by a prosecutor."[48] Moreover, because it feared the use of the exceptional circumstances concept to bypass the requirements of a Sixth Amendment ineffective assistance of counsel claim,[49] the court stated that it could not sanction the use of the exceptional circumstances concept in this case.[50]

5. *Conclusion*

In *Irwin*, the Court of Appeals continued the trend of limiting the application of the exceptional circumstances concept. It held that the failure of trial counsel to object to the remarks of the prosecutor at sentencing, even in light of the expiration of the thirty-day time limit on motions to withdraw a plea, was "by no means a substantial

---

[43]*Id.*

[44]*See id.*

[45]*Id.* at 10.

[46]Practitioners should note that the Utah Court of Appeals in *Labrum* did not actually state that judicial economy was not sufficient ground for exceptional circumstances, as the *Irwin* court suggested. Rather, the court stated that the "defendant *has advanced no legal authority to support the conclusion* that judicial economy is a sufficient exceptional circumstance to allow us to reach the merits of a constitutional claim raised for the first time on appeal." *Labrum*, 881 P.2d at 904 (emphasis added). Therefore, given appropriate legal authority (such as the Utah Supreme Court's decision in *State v. Gibbons*, 740 P.2d 1309 (Utah 1987)), it may be argued that judicial economy is a valid ground for the application of exceptional circumstances, and that the *Irwin* court misinterpreted precedent.

[47]*Irwin*, 924 P.2d at 11 (quoting *Dunn*, 850 P.2d at 1209 n.3).

[48]*Id.*

[49]The Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right . . . to have effective assistance of counsel." U.S. CONST. amend. VI. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court determined that the elements of a Sixth Amendment ineffective assistance of counsel cliam required a showing that (1) counsel did not render "reasonably effective assistance"; and (2) that counsel's deficient performance resulted in prejudice to the defendant. *Id.* at 687.

[50]*See Irwin*, 924 P.2d at 11.

enough procedural anomaly to invoke the exceptional circumstances concept."[51] The court also left open the possibility that the exceptional circumstances concept may also be used to reach matters of great public importance or public interest.[52] Significantly, this case clarifies use of what the Utah Supreme Court has previously called an "ill-defined"[53] concept, and therefore provides new guidance to practitioners concerning its proper application.

B. Escaped Convict Forfeits Constitutional Right to Appeal Criminal Conviction When Prosecution Would Be Prejudiced by New Trial[*]

1. Introduction

In *State v. Verikokides*,[1] the Utah Supreme Court considered what measures are required to preserve a convicted defendant's constitutional right to appeal. The court held that a convicted defendant who fled the United States for seven years, and, as a result of his absence, could not procure a transcript of his trial to appeal his conviction, was not entitled to a new trial. The court reasoned that if (1) a defendant's escape is partially responsible for the loss of information necessary for a meaningful appeal, and (2) the State would be prejudiced if forced to reprosecute the offense, then the defendant's appeal will be dismissed.[2] This ruling indicates the limits to which a defendant's right to appeal are subject in Utah.

2. The Case

On October 26, 1987, Alex Verikokides ("Verikokides") was convicted of raping and sodomizing his thirteen-year-old stepdaughter.[3] Before sentencing, Verikokides fled to Greece. The trial court issued a bench warrant on November 5, 1987. Seven years later, on June 21, 1994, Verikokides was arrested in Utah and brought before the trial court to be sentenced for his 1987 convictions. During Verikokides' seven-year absence much of the information concerning his criminal trial was either lost or destroyed. First, the court reporter misplaced his notes from the second day of the two-day trial. These notes contained testimony from most of the prosecution's witnesses, including the victim; the defense's witnesses, including the defendant; and the closing arguments. Second, the district court destroyed the trial exhibits in June 1992. Finally, Verikokides' defense counsel died, and his files were

---

[51]State v. Irwin, 924 P.2d 5, 11–12 (Utah Ct. App. 1996), *cert. denied*, 931 P.2d 146 (Utah 1997).
[52]*See id.* at 11.
[53]State v. Dunn, 850 P.2d 1201, 1209 n.3 (Utah 1993).
[*]Jeffrey Stevens, Staff Member, *Utah Law Review*.
[1]925 P.2d 1255 (Utah 1996).
[2]*See id.* at 1256–57.
[3]The facts are taken from the court's opinion in *Verikokides*, 925 P.2d at 1255–56.

destroyed by his firm. Consequently, the only remaining record of the trial was the reporter's notes of the first day of testimony and the motions filed with the court.

Before the trial court imposed sentence, Verikokides moved to arrest judgment. Verikokides argued that, because it was impossible to assemble an adequate record of the trial, he would be deprived of a meaningful appeal.[4] Following an evidentiary hearing, the district court denied the motion and sentenced Verikokides to two consecutive minimum mandatory sentences of ten years to life.[5] Verikokides then moved for a new trial on the grounds that the lack of a trial transcript made appeal impossible.[6] After another evidentiary hearing, the district court denied that motion, holding that Verikokides had "waived" his right to an appeal when he escaped.[7]

Verikokides appealed the denial of a new trial to the Utah Supreme Court. Verikokides argued that the court should vacate his conviction and order a new trial because the absence of a transcript of his conviction effectively denied his right to an appeal guaranteed under the Utah Constitution.[8]

3. Background

The Utah Constitution has guaranteed the right to an appeal since it was adopted in 1896. Article I, section 12 of the Utah Constitution provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and the cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, the *the right to appeal in all cases*.[9]

It is well settled in Utah that an appellate court cannot review, modify, or reverse a trial court's rulings unless there is an adequate record of the proceedings to permit proper consideration of the claims.[10] Accordingly, because a meaningful appeal can only be performed in reference to a record of the proceedings, defendants have a corresponding right to a "record of sufficient completeness to permit proper consideration of [their] claims."[11] If such a record is not available, then the appellate

---

[4]*See id.*

[5]*See id.* at 1256.

[6]*See id.*

[7]*See id.*

[8]*See id.*; UTAH CONST. art. I, § 12.

[9]UTAH CONST. art. I, § 12 (emphasis added).

[10]*See* Sawyers v. Sawyers, 558 P.2d 607, 608 (Utah 1976) (holding that "[a]ppellate review of factual matters can be meaningful, orderly, and intelligent only in juxtaposition to a record by which lower court's rulings and decisions on disputes can be measured.")

[11]State v. Menzies, 845 P.2d 220, 241 (Utah 1992) (alteration in original) (holding that defendant sentenced to death has constitutional right to sufficient record to permit proper consideration of claims) (quoting Draper v. Washington, 372 U.S. 487, 499 (1963)).

court will order a new trial to insure that only convictions and decisions which have been reviewed by an appellate court are enforced.[12]

Finally, the Utah Supreme Court has recognized that it is unconstitutional to automatically dismiss or decline to reinstate a fugitive convict's appeal.[13] In *State v. Tuttle*, a convicted defendant filed an appeal, but before the appeal was heard, the defendant escaped from the jurisdiction, and he remained a fugitive when his case came before the appellate court.[14] The court dismissed the appeal because Tuttle was beyond the reach of the judicial system and any ruling would not be enforceable against him.[15] When Tuttle was recaptured, the Utah Supreme Court reinstated his appeal. The State objected to the reinstatement relying on the ruling reached in *State v. Brady*.[16] In *Brady*, the court held that an appellant abandoned his right to appeal by escaping and remaining at large until he was recaptured.[17] Despite the State's objection, the court recognized that "the drafters of our constitution considered the right of appeal essential to a fair criminal proceeding. Rights guaranteed by our state constitution are to be carefully protected by the courts. We will not permit them to be lightly forfeited."[18]

Additionally, the court reasoned that dismissing Tuttle's appeal "really amounts to imposition by this Court of a punishment for escape."[19] Because the legislature already set the penalties for escape, there were no grounds for the court to impose an additional punishment on Tuttle.[20] Thus, the court overruled its prior holding in *Brady* and held that automatic dismissal or denial to reinstate a fugitive's appeal is unconstitutional in Utah.[21]

4. Analysis

In *Verikokides*, the Utah Supreme Court had only two options. Because there was no possibility of assembling a record of the trial proceedings from either the recorder's notes or a reconstruction proceeding,[22] Verikokides could not obtain an appeal from his conviction without being granted a new trial.[23] Accordingly, the court

---

[12]*See* State v. Taylor, 664 P.2d 439, 447 (Utah 1983) (ordering new trial where record did not document voir dire questions and responses thereby making it impossible to evaluate defendant's claim of improper jury selection and bias).

[13]*See* State v. Tuttle, 713 P.2d 703, 704 (Utah 1985).

[14]Unless otherwise noted, the facts are taken from the court's opinion in *Tuttle*, 713 P.2d at 704–05.

[15]*See id.* at 704 (citing Hardy v. Morris, 636 P.2d 473 (Utah 1981)).

[16]655 P.2d 1132 (Utah 1982).

[17]*See id.* at 1133.

[18]*Tuttle*, 713 P.2d at 704.

[19]*Id.* at 704–05.

[20]*See id.*

[21]*See id.*

[22]The Utah Rules of Appellate Procedure provide that in the absence of a transcript, a settled statement of the record may be created to take its place. *See* UTAH R. APP. P. 11(g) (1996). This option was not practical in this instance because so much time had passed, and Verikokides' counsel had died. *See Verikokides*, 925 P.2d at 1257.

[23]*See Verikokides*, 925 P.2d at 1256.

could either grant a new trial or rule that Verikokides forfeited his right to an appeal.[24] The court concluded that Verikokides forfeited his right to an appeal.[25]

The court gave several reasons for its decision. First, the court recognized that Verikokides was partially responsible for the impossibility of assembling an adequate record of the trial proceedings.[26] Even though Verikokides' flight did not directly cause the reporter to lose his trial notes, or his defense counsel to die, the court reasoned that Verikokides' "failure to request transcription of the reporter's notes increased the risk that they would be lost or damaged by accident or inadvertence."[27] In other words, "[h]ad defendant or his counsel acted vigilantly, the loss could have been discovered earlier and a reconstruction hearing could have been held before defense counsel died, before the trial exhibits and defense counsel's files were destroyed, and before memories faded."[28] Thus, it was clear to the court that Verikokides' long absence significantly contributed to the impossibility of assembling an adequate record of the trial proceedings. In short, "[d]efendants have a responsibility to be vigilant in preserving their appeal rights."[29]

Second, the court realized that the State would be prejudiced if it were forced to reprosecute Verikokides ten years after the original trial.[30] In *Tuttle*, the court held that a "criminal appeal dismissed after escape may be reinstated *unless* the State can show that it has been prejudiced by the defendant's absence and the consequent lapse of time."[31] The court found that Verikokides' case was the type of exception envisioned in *Tuttle*.[32] The court recognized the difficulties the State would face in prosecuting this trial. At the time of this decision, the victim was a twenty-three year-old woman. "[A] jury may respond very differently to the testimony of an adult woman than it would to the same events recounted by a thirteen-year-old girl."[33] Additionally, it would be difficult for the State to locate all of the witnesses who testified in the original trial, and even if the witnesses could be located, their memories of the events would likely be diminished.[34] Hence, the prejudice to the State that would result from such a ruling was abundantly clear to the court.

Third, the court noted several policy considerations that supported their decision. A new trial would in effect reward Verikokides for fleeing the jurisdiction and encourage flight on the part of other convicted criminals.[35] Moreover, Verikokides' flight "which demonstrated contempt and disrespect for the judicial system—should

---

[24]*See id.*

[25]*See id.* at 1258.

[26]*See id.* at 1257.

[27]*Id.*

[28]*Id.* (citing Emig v. Hayward, 703 P.2d 1043, 1049 (Utah 1985) (holding that delays initiated by defense counsel and defendant were responsible for loss of records and subsequent difficulty arising from reconstruction)).

[29]*Id.* at 1258.

[30]*See id.* at 1256–57.

[31]*Tuttle*, 713 P.2d at 705 (emphasis added).

[32]*Verikokides*, 923 P.2d at 1256.

[33]*Id.*

[34]*See id.*

[35]*See id.* at 1258.

not become an excuse for the convicted to begin the process anew at great cost to the state and the crime victim."[36]

Finally, the court noted that decisions in other jurisdictions dealing with similar facts reached the same conclusion.[37] These courts held that where a defendant's escape significantly affects the appellate process, making meaningful appeal impossible, or otherwise disrupts the appellate process, then dismissal of the appeal is an appropriate sanction despite a constitutional guarantee of a right to an appeal. The Utah Supreme Court's ruling is in line with these decisions.

5. Conclusion

In sum, the Utah Supreme Court's decision in *Verikokides* sets forth an unequivocal rule for fugitives whose flight has affected their ability to appeal. The defendant's appeal will be dismissed if the only way to ensure the defendant's right to a meaningful appeal is to grant a new trial, the defendant's absence is partially responsible for the inability to assemble an adequate record of the trial proceedings, and the State would be prejudiced if required to reprosecute the case.

C. Rejecting the Right to Unfettered Peremptory Challenges[*]

1. Introduction

In *State v. Baker*,[1] the Utah Supreme Court held that a convicted defendant is not entitled to reversal on appeal when a trial judge erroneously overrules a for-cause challenge to a juror and the defendant fails to cure the error by exercising a peremptory challenge on that juror.[2] This decision extended the holding of *State v. Menzies*[3] by disallowing reversal in cases where a defendant failed to use a peremptory challenge to remove a biased juror who should have been removed for

---

[36] *Id.*

[37] *See, e.g.*, State v. Brown, 866 P.2d 1172 (N.M. Ct. App. 1993) (affirming denial of new trial and holding where convict's escape interferes with appellate process, dismissal of appeal is appropriate sanction); People v. Valdez, 137 Cal. App. 3d 21 (1982) (affirming denial of motion for new trial and holding but for defendant's flight from jurisdiction his appeal would have been processed and transcript prepared long before authorized destruction of court reporter's notes); Bellows v. State, 871 P.2d 340 (Nev. 1994) (affirming denial of motion for new trial and holding dismissal of appeal is appropriate where defendant's escape significantly interferes with appellate process); State v. Lundahl, 882 P.2d 644 (Or. Ct. App. 1994) (affirming denial of motion for new trial and holding length of defendant's escape prejudiced State and significantly interfered with appellate process to warrant dismissal of appeal); State v. Jones, 643 N.E.2d 547 (Ohio 1994) (affirming denial of motion for new trial and holding criminal defendant must suffer consequences of non-production of appellate record when non-production is caused by defendant's actions).

[*] M. Christina Thomson, Staff Member, *Utah Law Review*.

[1] 935 P.2d 503 (Utah 1997) (opinion by Howe, J.) [hereinafter *Baker II*].

[2] *See id.* at 510.

[3] 889 P.2d 393 (Utah 1994).

cause.[4] Previously, *Menzies* was limited to disallowing reversal where a defendant used a peremptory challenge to remove a biased juror and was unable to prove a biased jury.[5]

Baker II adopts a "cure-or-waive" rule that requires a criminal defendant to exercise a peremptory challenge, if one is available, against the biased juror unsuccessfully challenged for cause.[6]

2. *The Case*

In a May 1991 trial, in the Salt Lake County Third District Court, Mark Joseph Baker, 35, was found guilty of raping and sodomizing his five-year-old stepdaughter during the period of July through October, 1987.[7] During voir dire, Jurors 15, 17, and 19 all indicated that they would be unable to be impartial to evidence concerning sexual abuse of a child. Juror 19 further indicated that his sister had been raped and sodomized when she was eight years old. After the trial judge repeated his inquiry as to whether the jurors could set aside their personal experiences and "give the State and the defendant a fair and impartial trial," Juror 19 withdrew his admission of bias. The court then denied Baker's motion to remove Juror 19 for cause. Subsequently, Baker failed to use a peremptory challenge to remove Juror 19; he used his four available challenges to remove all the female potential jurors.

On appeal, Baker asserted that his conviction should be reversed because he was tried by a biased jury.[8] The State argued that Baker "waived his right to complain of an impartial jury by not peremptorily striking Juror No. 19."[9] The appeals court agreed that Baker was tried by a biased jury and reversed his conviction.[10]

The State was granted certiorari by the Utah Supreme Court to address the issue of "whether a convicted criminal defendant is entitled to reversal on appeal when the trial court erroneously den[ies] a for-cause challenge" against the juror challenged for cause, and the defendant fails to exercise a peremptory challenge to cure the error "but instead use[s] all his peremptory challenges to exclude other potential jurors whom he had not challenged for cause."[11] The State asked the Court to adopt a cure-or-waive rule in which a defendant would have to use a peremptory challenge to cure an erroneous for-cause ruling or be deemed to have waived the error on appeal.[12] Baker argued that such a rule would force him to accept a less favorable jury than he would have if the for-cause challenge had been properly allowed.[13] The Utah Supreme

---

[4]*See Baker II*, 935 P.2d at 510.

[5]*See Menzies*, 889 P.2d at 398.

[6]*See Baker II*, 935 P.2d at 510.

[7]*See* Sheila R. McCann, *Utah Court: Defendants Must Share Duty of Choosing Impartial Juries*, SALT LAKE TRIB., Mar. 25, 1997, at D2. *See also Baker II*, 935 P.2d at 504. Unless otherwise noted, the following summary of facts and procedure is taken from *Baker II*, 935 P.2d at 504–505.

[8]*See* State v. Baker, 884 P.2d 1280, 1281 (Ct. App. Utah 1994) [hereinafter *Baker I*].

[9]*Id.* at 1285.

[10]*See id.* at 1281.

[11]*Baker II*, 935 P.2d at 504.

[12]*See id.* at 505.

[13]*See id.*

Court held that Baker was not entitled to reversal on appeal, and thus reversed the decision of the court of appeals and affirmed the conviction of the trial court.[14]

3. Background

The peremptory challenge appeared in the common law of England.[15] William Blackstone suggested that peremptory challenges arose because defendants might have unaccountable prejudices against potential jurors and the denial of for-cause challenges could result in the juror harboring resentment towards the defendant due to the questioning that accompanies a for-cause challenge.[16]

The United States Supreme Court has stated that although the peremptory challenge is "one of the most important of the rights secured to the accused,"[17] peremptory challenges are "creature[s] of statute and are not required by the Constitution."[18] Further, "it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise."[19]

In the early case of *People v. Hopt*,[20] the Utah Supreme Court refused to require reversal on appeal when a party used a peremptory challenge to remove a juror who should have been removed for cause.[21] In *Hopt*, because two of three challenged jurors did not sit on the jury, and because Hopt did not use all his peremptory challenges that he could have used to remove the remaining objectionable juror, he was not entitled to reversal on appeal.[22]

Hopt was followed in Utah until, without referring to any prior authority, the Utah Supreme Court in *Crawford v. Manning*[23] held that "[a] party is entitled to exercise his three peremptory challenges upon impartial prospective jurors, and he should not be compelled to waste one in order to accomplish that which the trial judge should have done."[24] However, the United States Supreme Court took an opposing view in *Ross v. Oklahoma*.[25]

In *Ross*, the United States Supreme Court held that "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated."[26] Further, the

---

[14]*See id.* at 510.

[15]*See* 4 WILLIAM BLACKSTONE, COMMENTARIES *353.

[16]*See id.*

[17]Pointer v. United States, 151 U.S. 396, 408 (1894).

[18]Ross v. Oklahoma, 487 U.S. 81, 89 (1988).

[19]*Id.* With the exception of the discussion of *Menzies*, the remainder of the background section of this Development has been paraphrased from Jon D. Hertzke, *Recent Developments in Utah Case Law: Forced Use of Peremptory Challenges No Longer Requires Reversal*, 1995 UTAH L. REV. 293.

[20]9 P. 407 (Utah 1886), *aff'd*, 120 U.S. 430 (1887).

[21]*See id.* at 408.

[22]*See id.* at 407–08.

[23]542 P.2d 1091 (Utah 1975).

[24]*Id.* at 1093.

[25]487 U.S. at 83 (1988).

[26]*Id.* at 88 (citing *Hopt*, 120 U.S. at 436; Spies v. Illinois, 123 U.S. 131 (1887)).

Court stated that because peremptory challenges are not constitutionally guaranteed, the state may "define their purpose and manner of their exercise."[27]

In *Menzies*,[28] the Utah Supreme Court overruled the line of cases[29] following *Crawford*.[30] These cases dictated that a defendant was entitled to a new trial when the defendant used one of his peremptory challenges to remove a juror that should have been removed for cause and all of the peremptory challenges were used. The *Menzies* court adopted the majority rule as stated by the United States Supreme Court, that "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the [Constitution] was violated."[31]

4. Analysis

(a) The Peremptory Challenge

The *Baker II* court began its analysis by discussing the nature of peremptory challenges.[32] It noted that peremptory challenges were created by rule in order to aid in the seating of an unbiased jury.[33] "A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to ten peremptory challenges. In other felony cases each side is entitled to four peremptory challenges."[34] The court then observed that neither the United States nor Utah Constitutions provides for a right to peremptory challenges.[35] Also, neither constitution guarantees the most favorable jury to a defendant. The court further pointed out that it had previously recognized the nonconstitutional status of the peremptory challenge in *Menzies*.[36]

In *Menzies*, the court explicitly overruled the holding of *Crawford*,[37] where "reversal [was] required whenever a party [was] compelled 'to exercise a peremptory challenge to remove a panel member who should have been stricken for cause.'"[38] *Menzies* adopted the approach taken by the majority of the states, the federal courts,

---

[27] *Id.* at 89.

[28] 889 P.2d 393 (Utah 1994).

[29] State v. Moore, 562 P.2d 629, 630–31 (Utah 1977); State v. Bailey, 605 P.2d 765, 768 (Utah 1980); Jenkins v. Parrish, 627 P.2d 533, 536–37 (Utah 1981); State v. Brooks, 631 P.2d 878, 883 (Utah 1981); State v. Hewitt, 689 P.2d 22, 25 (Utah 1984); State v. Jones, 734 P.2d 473, 474 (Utah 1987); State v. Bishop, 753 P.2d 439, 451 (Utah 1988); State v. Gotschall, 782 P.2d 459, 461 (Utah 1989); State v. Jullian, 771 P.2d 1061, 1064 (Utah 1989); State v. Carter, 888 P.2d 629, 649 (Utah 1994).

[30] 542 P.2d 1091 (Utah 1975).

[31] *Ross*, 487 U.S. at 88 (citing *Hopt*, 120 U.S. at 436).

[32] *See Baker II*, 935 P.2d at 505.

[33] *See id.*

[34] *Id.* (quoting UTAH R. CRIM. P. 18(d)).

[35] *See id.*

[36] *See* id. at 506 (citing *Menzies*, 889 P.2d 393, 398 (Utah 1994)).

[37] 542 P.2d 1091 (Utah 1975).

[38] *Menzies*, 889 P.2d at 398 (quoting State v. Bishop, 753 P.2d 439, 451 (Utah 1988)).

and the United States Supreme Court by rejecting the notion that the loss of a peremptory challenge is a constitutional violation.[39]

The court in *Baker II* distinguished *Menzies* on its facts. Unlike Menzies, Baker did not use one of his peremptory challenges to remove the biased juror that the trial court had erroneously failed to remove for cause.[40] In applying *Menzies* to the facts in *Baker II*, the court first noted that Baker had a "fair opportunity" to cure the bias by using one of his peremptory challenges.[41] The court reiterated that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one," and that peremptory challenges are not constitutionally guaranteed.[42] Under *Menzies*, if Baker had used a peremptory challenge to remove Juror 19 and was then unable to show on appeal that a biased jury was empaneled as a result of the loss of one of his peremptory challenges, he would not be entitled to reversal on appeal.[43] Extending this notion, the court held that because Baker failed to use a peremptory challenge to remove the biased juror, he waived any objection to the empaneling of the juror.[44] The court applied Justice Stewart's reasoning from his concurring and dissenting opinion from *Menzies:*

> [In *Menzies*,] Justice Stewart reasoned that an automatic assumption of prejudice to a defendant who must use a peremptory strike to remove a juror challenged for cause was irrational. Yet it is equally, if not more, irrational to give the benefit of an assumption of prejudice to a defendant who has not even attempted to protect the impartiality of the jury through the use of peremptory challenges.[45]

The court noted that to hold otherwise would increase the temptation for defendants to sow error.[46] The court also applied the holding of *Hopt*,[47] stating that "'until [the defendant] had exhausted his peremptory challenges, he could not complain' about the composition of the jury."[48] Although Baker did use all of his peremptory challenges, "he had not used any of them when the trial court denied his for-cause challenge of Juror 19."[49] Therefore, under *Hopt*, Baker could not object to the composition of the jury.[50]

In sum, after *Menzies*, the privilege of unfettered peremptory challenges was deemed subordinate to the requirement that a party must make its best efforts to seat an unbiased jury.[51] Finally, the *Baker II* decision dictated that "a defendant whose for-

---

[39] *See id.*

[40] *See Baker II*, 935 P.2d at 506.

[41] *Id.*

[42] *Id.* (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

[43] *See id.*

[44] *See id.*

[45] *Id.* at 507.

[46] *See id.*

[47] 9 P. 407 (Utah 1886), *aff'd*, 120 U.S. 430 (1887).

[48] *Baker II*, 935 P.2d at 507 (quoting *Hopt*, 9 P. at 408 (alterations in original)).

[49] *Id.* In Utah, peremptory challenges are not exercised until after the for-cause rulings are made. UTAH R. CRIM. P. 18(f).

[50] *See id.* at 507–08.

[51] *See id.* at 506.

cause challenge has been denied must exercise a peremptory challenge, if one is available, to achieve a legally impartial jury. If the defendant can later show that the 'loss' of the peremptory challenge resulted in actual prejudice, reversal would be an available and appropriate remedy."[52]

(b) Concurrence

Justice Stewart wrote a concurring opinion pointing out that there may be situations in which the cure-or-waive rule would not assure a fair and impartial jury.[53] Like the dissent, he cautioned that trial judges need to view for-cause challenges liberally because a large number of problematic rulings reach the court.[54] He warned that a for-cause dismissal should be granted not only when a juror is biased, but also when the juror may be perceived as biased.[55] Finally, he commented that the court cannot simply shift its obligation of ensuring an impartial jury to the defense counsel.[56]

(c) Dissent

Chief Justice Zimmerman, joined by Justice Durham, dissented in *Baker II*.[57] The Chief Justice first rejected the State's argument that the cure-or-waive rule would prevent defendants from planting error while hoping for reversal on appeal.[58] He pointed out that the "[d]efense counsel's primary duty is to obtain an acquittal, not a reversible conviction."[59]

Chief Justice Zimmerman next argued that the cure-or-waive rule has the disadvantage of providing incentive to trial judges not to strike challenged jurors for cause.[60] He observed that the rule would allow the trial court to prevent conviction reversals without being responsible for erroneously denying a for-cause challenge when the defendant has one remaining peremptory challenge.[61] He further argued that the cure-or-waive rule would improperly shift the responsibility of empaneling impartial jurors from the trial judge to the defense.[62]

Finally, Chief Justice Zimmerman rejected the State's argument that the cure-or-waive rule would promote symmetry in criminal trials because the State is effectively already subject to the rule.[63] The State had argued that under double jeopardy principles and statutory limitations it cannot seek retrial for a biased jury if the

---

[52]*See Baker II*, 935 P.2d at 507.
[53]*See id.* at 510 (Stewart, J., concurring).
[54]*See id.*
[55]*See id.*
[56]*See id.*
[57]*See id.* (Zimmerman, C.J., dissenting).
[58]*See id.*
[59]*Id.*
[60]*See id.* at 511.
[61]*See id.*
[62]*See id.*
[63]*See id.*

defendant is acquitted. Therefore, the State is essentially compelled to cure an erroneous for-cause challenge using one of its peremptory challenges.[64] The State concluded that a cure-or-waive rule would promote symmetry by putting the defendant in a position closer to that of the State.[65] Countering, the Chief Justice pointed out that, historically, peremptory challenges were not "meant to be an even balance between the State and the defendant."[66] Peremptory challenges have always been a defendant's right, and the prosecution has historically had fewer or no peremptory challenges. Therefore, he found no merit to the State's argument that symmetry should be achieved with respect to peremptory challenges between the prosecution and defense.[67]

5. Conclusion

Baker II was a case of first impression in Utah that clarified and extended the court's earlier holding in *State v. Menzies*. The *Baker II* court held that a convicted defendant is not entitled to reversal on appeal when a trial judge erroneously overrules a for-cause challenge to a juror and the defendant fails to cure the error by exercising a peremptory challenge on that juror.[68] The decision is significant because a defendant may now be entitled to fewer unfettered peremptory challenges than before *Baker II*. The *Baker II* holding at least partially shifts the burden of ensuring an impartial jury to the defense. Finally, in order to obtain reversal on appeal, a defendant must now show actual prejudice in having lost the peremptory challenge that would have otherwise been available in the absence of court error.

D. Voluntary Absence as a Waiver of a Criminal Defendant's Right to Be Present at Sentencing[*]

1. Introduction

In *State v. Anderson*,[1] the Utah Supreme Court held that a criminal defendant, not accused of a capital crime, waives the right to be present at sentencing if the defendant is voluntarily absent from the sentencing proceeding, per Utah Rule of Criminal Procedure 22.[2] The court further held that a criminal defendant's right to allocution is an inseparable component of the right to be present at sentencing, and not an independently vested right.[3] Thus, a criminal defendant's due process rights

---

[64] *See id.*
[65] *See id.*
[66] *Id.*
[67] *See id.*
[68] *See id.* at 510.

[*] Damaris Greatorex, Staff Member, *Utah Law Review*.

[1] 929 P.2d 1107 (Utah 1996) (opinion by Justice Howe).
[2] *See id.* at 1110.
[3] *See id.* at 1111; *see also* UTAH R. CRIM. P. 22.

are not violated when a court proceeds with sentencing *in absentia* when the defendant is voluntarily absent.[4]

2. *The Case*

Joe Reginal Anderson, a transient, was convicted of aggravated sexual assault and interference with a peace officer making a lawful arrest.[5] Prior to conviction, Anderson was charged by information with forcing a female transient into a portable toilet, beating her, and forcing her to perform sexual acts. Anderson was also charged with bolting past the officer attempting Anderson's arrest at the scene and fleeing. Anderson was ultimately apprehended following a chase and search conducted by several officers.

At the pretrial conference, the trial court ordered a continuance because the prosecution could not locate Anderson's victim. Consequently, the trial court released Anderson to pretrial services upon the condition that Anderson waive extradition from any state in the event Anderson fled the jurisdiction. Upon a later motion, the trial court also granted Anderson permission to visit his parents in Las Vegas, Nevada. However, the trial court conditioned the motion for the Nevada visit upon Anderson's agreement that he would be tried *in abstentia* if necessary.

Shortly before the trial, Anderson contacted pretrial services and then disappeared. Per Anderson's agreement, the trial proceeded *in absentia*. The jury convicted Anderson of aggravated sexual assault, a first degree felony, and interference with a police officer making a lawful arrest, a class B misdemeanor.

When the sentencing date arrived, Anderson's location remained unknown. Consequently, the sentencing also took place in Anderson's absence, over the objections of Anderson's counsel. Anderson received the minimum mandatory prison sentence for aggravated sexual assault, ten years to life, and a concurrent six month prison sentence for interfering with a police officer making a lawful arrest. Anderson then appealed his sentence.

Anderson based his appeal on two separate grounds. First, Anderson asserted that the court made an error in a jury instruction. Second, as discussed herein, Anderson argued that his *in absentia* sentencing violated his due process rights and alleged right to allocution.[6] The Utah Supreme Court rejected both of Anderson's arguments on appeal and affirmed Anderson's conviction, judgment, and sentence.

---

[4]*See Anderson*, 929 P.2d at 1110.

[5]Except as otherwise noted, the facts are taken from the court's opinion in *Anderson*. *See id.* at 1108.

[6]Anderson did not challenge the *in absentia* trial proceedings in light of his verbal and written waiver of his right to be present at trial. *See id.* at 1109.

3. Background

Article I, section 12 of the Utah Constitution guarantees criminal defendants "the right to appear and defend in person" against the charges they confront.[7] In the sentencing proceedings context, the Utah Rules of Criminal Procedure secure the right to be present by providing that, "[b]efore imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment."[8]

However, the Utah Rules of Criminal Procedure also provide, "[o]n the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence."[9] Thus, the right to be present at sentencing is not absolute.

At trial, a "defendant's voluntary absence . . . after notice to defendant of the time for trial" does not "prevent the case from being tried and . . . [has] the same effect as if defendant had been present."[10] Therefore, a defendant voluntarily absent from non-capital sentencing proceedings, like the voluntarily absent trial defendant, runs the risk of being sentenced *in absentia.*

In *State v. Wagstaff*,[11] the Utah Court of Appeals addressed the issue of when a defendant's absence effectuates a waiver of the defendant's right to be present at trial.[12] The *Wagstaff* court first held "[the] waiver must be voluntary and involve an intentional relinquishment of a known right."[13] Next, the *Wagstaff* court reasoned, "[a] defendant must have a compelling reason to stay away from the trial. If his absence is deliberate without a sound reason, the trial may start in his absence."[14] Noting that "[v]oluntariness is determined by considering the totality of the

---

[7]UTAH CONST. art. I, § 12. The *Anderson* court did not base any of its due process analysis on the Confrontation Clause of the Sixth Amendment of the United States Constitution, which similarly preserves a defendant's right to be present.

[8]UTAH R. CRIM. P. 22(a). While the right to be present at sentencing involves the right, as set forth in Utah Rule of Criminal Procedure 22, of the defendant to make a statement and present evidence in mitigation of punishment, there is no separate constitutional or statutory right to allocution in Utah.

[9]*Id.* at 22(b).

[10]*Id.* at 17(a)(2). The requirement that a defendant receive notice of a proceeding prior to the commencement of *in absentia* proceedings may be waived in cases where the defendant absconds and falls out of communication with the courts and counsel. *See* Brewer v. Raines, 670 F.2d 117, 119 (9th Cir. 1981) (holding that defendant absent from both trial and sentencing could not appeal proceedings on grounds he was denied right to be present where defendant was informed of his initial trial date and failed to keep abreast of additional dates). *Cf.* State v. Wagstaff, 772 P.2d 987, 991 (Utah Ct. App. 1989) (holding that "[n]otice served upon a party's attorney of record is sufficient to satisfy statutory notice requirements"), *rev'd on other grounds,* 802 P.2d 774 (Utah Ct. App. 1990); United States v. DeValle, 894 F.2d 133, 137 (5th Cir. 1990) (stating that "it has uniformly been held that fugitive status—at least fugitive status commencing before the sentencing proceeding begins—does not justify sentencing *in absentia*") (citations omitted).

[11]772 P.2d at 987.

[12]*See id.* at 989–91.

[13]*Id.* at 990 (citing Maupin v. State, 694 P.2d 720, 722 (Wyo. 1985); State v. Washington, 34 Wash. App. 410, 661 P.2d 605, 607 (1983)).

[14]*Id.* (citing *Maupin*, 694 P.2d at 722).

circumstances,"[15] the *Wagstaff* court also established that "[t]he state carries the burden of showing voluntariness."[16]

Based on the aforementioned principles, the *Wagstaff* court concluded that a defendant who fled the state, allegedly out of fear for his safety, knowing that a date had been set for his trial, was voluntarily absent from the trial.[17] Notwithstanding the fact the defendant had no formal notice of the revised trial date, the *Wagstaff* court concluded that the defendant's absence was voluntary because the defendant shirked his duty to learn the proper trial date from his counsel and the court.[18]

Similarly, the Ninth Circuit held in *Brewer v. Raines*[19] that a defendant, who disappeared after being arraigned on armed robbery charges and informed of his trial date, waived his right to be present at both his trial and sentencing proceedings.[20] The *Brewer* defendant's lack of formal notice of each proceeding, as in *Wagstaff*, did not bar the defendant's *in absentia* conviction and sentencing.[21] In upholding both the *in absentia* conviction and sentencing, the Ninth Circuit observed, "[t]o hold that the Constitution permits a person to be tried and convicted while voluntarily absent, and yet, somehow, precludes the sentencing *in absentia* of the same person would be, at the least, anomalous."[22]

Thus, building on the foundation of *Wagstaff* and *Brewer*, the Utah Supreme Court in *Anderson* held that voluntary absence from sentencing proceedings, like voluntary absence from trial, constitutes a waiver of the defendant's right to be present at sentencing in non-capital cases.[23]

4. Analysis

In *Anderson*, the Utah Supreme Court, led by Justice Howe, approached Anderson's due process and right to allocution claims by analyzing: (a) a criminal defendant's constitutional right to be present, (b) the right to allocution, and (c) the effect of a defendant's voluntary absence on the right to be present.[24] After weighing these issues and related concerns, the court concluded that the right to be present, including the subsidiary right to allocution, is subject to waiver through the defendant's voluntary absence.[25]

---

[15] *Id.* (citing *Washington*, 661 P.2d at 607).

[16] *Id.* (citing *Maupin*, 694 P.2d at 722).

[17] *See id.*

[18] *See id.* at 990–91 (citing State v. Aikers, 87 Utah 507, 51 P.2d 1052, 1056 (1935) ("It is not only the right of the defendant to be present, but is a duty which the statute imposes upon him, and he usually will not be permitted to take advantage of his own misconduct when [he was voluntarily absent]."). The *Wagstaff* court additionally held that notice served on a defendant's attorney satisfied the notice requirement. *See Wagstaff*, 772 P.2d at 991; *see also De Valle*, 894 F.2d at 137.

[19] 670 F.2d 117 (9th Cir. 1981).

[20] *See id.* at 119–20.

[21] *See id.* at 199; *see also DeValle*, 894 F.2d at 137; *Wagstaff*, 772 P.2d at 991.

[22] *Brewer*, 670 F.2d at 119.

[23] *See Anderson*, 929 P.2d at 1110–11. This court's conclusion is also consistent with the plain language of Utah Rule of Criminal Procedure 17.

[24] *See id.* at 1109–12.

[25] *See id.*

(a) The Right to Be Present at Sentencing

In analyzing Anderson's due process and allocution claims, the court initially observed that "Utah Constitution Article I, section 12 guarantees the right of an accused to appear and defend in person against any cause against him."[26] The court then turned to Utah Rule of Criminal Procedure 22 ("Rule 22") which implements the constitutional right to be present in the sentencing proceedings context.[27] Rule 22 provides:

> (a) Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. . . .
> (b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence.[28]

Given that Rule 22 looks to the grounds on which a trial may move forward in a defendant's absence, the court next looked to the language of Utah Rule of Criminal Procedure 17 ("Rule 17") which states:

> In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried . . . .[29]

Thus, in light of Rules 22 and 17, the court came to the preliminary conclusion that "a defendant not accused of a capital crime waives his right to be present at sentencing by voluntary absence."[30]

(b) The Right to Allocution

The court next considered Anderson's claim that the *in absentia* sentencing violated Anderson's right to allocution, a right Anderson asserted was absolute and separate from his right to be present.[31] In analyzing Anderson's allocution claim, the court relied on *Black's Law Dictionary*, which defines allocution as the "court's inquiry of defendant as to whether he has any legal cause to show why judgment should not be pronounced against him . . . or, whether he would like to make a statement . . . and present any information in mitigation of the sentence."[32]

---

[26]*Id.* at 1109–10. This language, found in Article I, section 12 of the Utah Constitution, secures a defendant's right to be present at trial and sentencing. *See* UTAH CONST. art. I, § 12.

[27]*See id.* at 1110.

[28]UTAH R. CRIM. P. 22(a)-(b).

[29]UTAH R. CRIM. P. 17(a)(2).

[30]*Anderson*, 929 P.2d at 1110.

[31]*See id.*

[32]*Id.* (quoting BLACK'S LAW DICTIONARY 76 (6th ed. 1990)).

The court first rejected Anderson's contention that the Utah Supreme Court's decision in *State v. Young*[33] established allocution as an absolute right afforded defendants.[34] The court distinguished *Young* from *Anderson* because *Young* involved a capital defendant present at sentencing whose request to address the jury was denied.[35] Thus, the court reasoned that *Young* did not preclude a holding that voluntary absence waived a defendant's right to allocution.[36]

Moreover, the court ultimately held that the right to allocution is not an independent right vested by the state or federal constitution.[37] Rather, allocution is an inseparable component of the right to be present at sentencing,[38] which in turn is subject to waiver through voluntary absence.[39]

(c) Voluntary Absence

After establishing that the right to be present at sentencing, replete with the right to allocution, is subject to waiver, the court inquired whether Anderson's absence was voluntary.[40] In analyzing this issue, the court looked to the voluntary absence standard applied to trial absences.

The court first observed that the right to be present "must be voluntary and involve an intentional relinquishment of a known right" as set forth in *Wagstaff*.[41] In contrast, however, the court suggested absences "deliberate without sound reason" could also constitute a waiver of the right to be present.[42] Additionally, the court cited authority for the proposition that a defendant must have notice of the proceedings for the absence to be voluntary.[43] Finally, as an aside, the court observed that absences due to incarceration were not waivers of the right to be present.[44]

Looking next to the facts of Anderson's case, Justice Howe noted that Anderson, although absent, received no formal notice of the proceedings.[45] Notice, as mentioned above, generally is a prerequisite to waiver of the right to be present.[46] Thus, the court turned to the Ninth Circuit case *Brewer v. Raines*, which recognized an exception to the notice requirement.[47] In *Brewer*, the Ninth Circuit held that a defendant, who

---

[33]853 P.2d 327 (Utah 1993).

[34]*See Anderson*, 929 P.2d at 1110.

[35]*See id.*

[36]*See id.*

[37]*See id.* at 1111.

[38]*See id.*; *see also* UTAH R. CRIM. P. 22(a).

[39]*See Anderson*, 929 P.2d at 1110-11.

[40]*See id.*

[41]*Id.* at 1110 (quoting *Wagstaff*, 772 P.2d at 990).

[42]*Id.* (quoting *Wagstaff*, 772 P.2d at 990 (citing *Maupin*, 694 P.2d at 722)).

[43]*See Anderson*, 929 P.2d at 1110 (citing United States v. McPherson, 421 F.2d 1127, 1130 (D.C. Cir. 1969)). Again, Utah Rule of Criminal Procedure 17(a) also provides that a defendant's absence constitutes a waiver "after notice to defendant of the time [of the proceeding]." UTAH R. CRIM. P. 17(a)(2).

[44]*See Anderson*, 929 P.2d at 1110. (citing State v. Houtz, 714 P.2d 677, 678 (Utah 1986)).

[45]*See Anderson*, 929 P.2d at 1110.

[46]*See id.* (citing *McPherson*, 421 F.2d at 1130); *see also* UTAH R. CRIM. P. 17(a).

[47]*See Brewer*, 670 F.2d at 119 (9th Cir. 1982) (citing Diaz v. United States, 223 U.S. 442, 457–58 (1912)).

disappeared and failed to keep appraised of the trial and sentencing dates, could not exploit his deliberate ignorance to evade judgment and sentencing.[48]

Likewise, the court held that Anderson could not breach his duty to maintain contact with pretrial services and counsel and subsequently exploit his breached duty and deliberate absence to evade sentencing. Thus, the court concluded that Anderson effectively waived his right to be present at sentencing when he disappeared, irrespective of the fact that Anderson received no formal notice of the sentencing date.[49]

In upholding Anderson's *in absentia* sentencing, the court described a parade of horribles that would ensue from disallowing *in absentia* proceedings where the defendant disappeared and evaded service of notice.[50] For example, the court raised the specter of wasted judicial resources, the potential retirement of the presiding judge, and the potential for the loss or destruction of relevant records[51] as practical considerations weighing in favor of Anderson's *in absentia* sentencing.[52]

As a final note, the court pointed out that a due process challenge to *in absentia* proceedings requires a showing of prejudice.[53] Thus, the court held that Anderson's due process claim failed on the additional ground that Anderson failed to enumerate any damages suffered as a result of the *in absentia* proceeding.[54]

In sum, the *Anderson* court concluded: (a) a criminal defendant's right to be present at sentencing is subject to waiver in non-capital cases, (b) there is no independent, let alone absolute, right to allocution, and (c) in the present case, Anderson's absence was voluntary and effectuated a waiver of his right to be present at sentencing.[55] Further, the court held that Anderson's lack of notice of the sentencing was irrelevant because Anderson breached his duty to maintain contact with pretrial services and counsel. Therefore, Anderson's due process claim failed.[56]

5. Conclusion

In short, *Anderson* stands for the proposition that the right to be present at sentencing is subject to waiver when a defendant is voluntarily absent from the proceeding, per Utah Rule of Criminal Procedure 22.[57] Furthermore, there is no separate, or absolute, right to allocution.[58] Rather, allocution, the right of the defendant to speak on his own behalf, is encompassed in the defendant's right to be

---

[48]*See id.*

[49]*See Anderson*, 929 P.2d at 1111.

[50]*See id.*

[51]*See id.* (citing State v. Verikokides, 925 P.2d 1255, 1258 (Utah 1985) (holding that defendant who disappeared after conviction could not move for new trial when he reappeared even though defense counsel died and trial record was lost, making appeal impossible)).

[52]*See id.*

[53]*See id.* (citing Dasher v. Stripling, 685 F.2d 385, 387–88 (11th Cir. 1982)).

[54]*See id.* at 1111–12

[55]*See id.*

[56]*See id.*

[57]*See Anderson*, 929 P.2d at 1109–11. Again, this rule does not apply to capital defendants.

[58]*See id.* at 1111.

present.[59] Therefore, courts are at liberty to proceed with sentencing *in absentia* when a defendant is voluntarily absent from the proceedings without concern for due process implications in non-capital cases.[60]

IV. EMPLOYMENT LAW

The Clear and Substantial Public Policy Exception to Employment-at-Will Doctrine When an Employee Reports Statutory Violations to Company Management[*]

1. Introduction

In *Fox v. MCI Communications Corp.*,[1] the Utah Supreme Court ruled unanimously that an employer may terminate an employee in retaliation for reporting alleged statutory violations of co-workers to company management.[2] The court confirmed that at-will employees have an actionable wrongful termination claim when the termination implicates a clear and substantial public policy.[3] However, the employee's termination in Fox affected only the private interests of the employer.[4] Therefore, the court upheld the employee's termination because it failed to implicate a clear and substantial public policy of the State of Utah.[5]

2. The Case

Between 1987 and 1992, Bozena C. Fox ("Fox") worked as a sales representative for MCI Telecommunications Corporation ("MCI") at its office in Salt Lake City.[6] Fox observed in 1992 that other MCI employees participated in a practice known as "churning," whereby they made existing customers appear to be new customers, in order to meet their sales goals and gain higher commissions. MCI's company policies and employment agreements forbade such practices.

Fox alleged that although MCI was cognizant that churning was a common practice among employees, MCI still did nothing to enforce the policy against the practice. Fox, who did not participate in the alleged churning practices, reported the churning of her coworkers to MCI management at the Salt Lake City office. There,

---

[59]*See id.*

[60]*See id.* at 1109–11.

[*]Erik A. Olson, Staff Member, *Utah Law Review*.

[1]931 P.2d 857 (Utah 1997) (opinion by Stewart, A.C.J.).

[2]*See id.* at 859.

[3]*See id.* at 859–60.

[4]*See id.* at 861.

[5]*See id.* at 862.

[6]The facts are taken from the court's opinion in Fox v. MCI Communications Corp., 931 P.2d 857, 858–59 (Utah 1997).

she was told to ignore the practices and to "mind her own business."[7] Even after this warning, Fox reported the churning to MCI's Internal Audit Unit, which then visited MCI's Salt Lake City Office and confirmed that such practices were occurring. Less than one week after the Internal Audit Unit completed its investigation, MCI terminated Fox's employment.

Fox filed suit against MCI in the United States District Court for the District of Utah, alleging that MCI wrongfully terminated her employment in violation of Utah public policy. Fox alleged that the churning of customer accounts, along with MCI's failure to correct the ongoing practice, constituted computer-assisted fraud, or acts of fraud and embezzlement, in violation of Utah law.[8] Fox claimed that MCI fired her in retaliation for reporting these statutory violations. Asserting that the violations could injure the interests of MCI shareholders, as well as the general public, Fox alleged that her termination violated public policy.

MCI moved to dismiss Fox's claim, asserting that the termination was lawful, since MCI did not violate a clear and substantial public policy of the State of Utah. The district court granted MCI's motion to dismiss without prejudice. However, Fox filed an amended complaint, alleging the same claim for relief, which MCI again moved to dismiss. The district court then solicited the assistance of the Utah Supreme Court, by way of a certified question,[9] to resolve the issue of whether MCI's termination of Fox implicated a clear and substantial public policy of Utah.[10]

The Utah Supreme Court answered the question in the negative, holding that Fox's termination did not implicate a clear and substantial public policy of Utah.[11] The court held that MCI's actions involved merely private policy, and therefore did not involve the public interest in any significant way.[12] Thus, MCI did not wrongfully terminate Fox's employment.[13]

3. Background

The Utah Supreme Court first adopted the employment-at-will doctrine in *Price v. Western Loan & Savings Co.*,[14] holding that an employment arrangement for an

---

[7]*Id.* at 858.

[8]*See id.* Fox alleged that the prohibited practices, along with MCI's failure to remedy the practices, constituted computer-assisted fraud in violation of sections 76-6-703 and 76-6-705 of the Utah Code, or acts of fraud or embezzlement under sections 76-6-403 and 76-6-405. *See* UTAH CODE ANN. §§ 76-6-403, -405, -705 (1995), -703 (Supp. 1997). Additionally, Fox alleged that MCI was criminally responsible for the prohibited practices under section 76-2-204. *See id.* § 76-2-204.

[9]*See* UTAH R. APP. P. 41.

[10]*See Fox*, 931 P.2d at 858–59. The district court asked the supreme court specifically: "Does the termination of a private sector employee in retaliation for the good faith reporting to company management of the alleged violation by one or more co-workers of UTAH CODE ANN. §§ 76-6-403, 76-6-404 [sic], 76-6-703, or 76-6-705 (1995), implicate a 'clear and substantial public policy' of the State of Utah?" *Id.*

[11]*See id.* at 859.

[12]*See id.* at 861.

[13]*See id.* at 862.

[14]100 P. 677 (Utah 1909) (holding that attorney had no wrongful discharge action against bank since parties agreed bank would retain attorney's services only so long as necessary).

indefinite time is terminable at will by either party.[15] Later, in *Bihlmaier v. Carson*,[16] the court restated the doctrine of at-will employment.[17] The court reasoned that an employment arrangement for an indefinite time gives rise to a presumption of an at-will employment relationship. In an at-will employment relationship, either the employee or the employer may terminate the employment at any time, and for any reason.[18]

However, the court suggested in *Berube v. Fashion Centre, Ltd.*[19] that there are limitations on the presumption of at-will employment.[20] The *Berube* plurality stated in dictum: "[p]erhaps the most logical exception to the at-will rule is based upon public policy."[21] The court refused to define "public policy" precisely in *Berube*, but stated that the court will construe public policies narrowly, as derived from judicial decisions or legislative pronouncements.[22] Furthermore, only "substantial and important" public policies may trigger actionable wrongful termination claims.[23]

In *Hodges v. Gibson Products Co.*,[24] the court recognized that the enforcement of a state's criminal code constitutes an important public policy.[25] In *Hodges*, an employer wrongfully terminated an employee who refused to submit to the employer's extortionate demands, which the employer intended to cover up criminal activity.[26]

Similarly, in *Peterson v. Browning*,[27] the court recognized that Utah has a clear and substantial public policy to prevent employers from discharging employees who refuse to engage in employer-sponsored criminal activity.[28] The *Peterson* court found that an employer wrongfully terminated a customs officer who refused to provide false information on tax forms.[29] The court emphasized that a public policy must be "clear and substantial" to be actionable in a wrongful termination cause of action.[30]

---

[15]*See id.* at 680.

[16]603 P.2d 790 (Utah 1979) (finding that grocery store did not wrongfully discharge employee who was hired on trial basis).

[17]*See id.* at 792.

[18]*See id.*

[19]771 P.2d 1033 (Utah 1989) (plurality opinion by Durham, J.) (holding that at-will employee who refused to take three polygraph tests had asserted actionable wrongful termination claim).

[20]*See id.* at 1041–47. The *Berube* plurality recognized three possible exceptions to the presumption of at-will employment: (1) when an employee is fired for a reason or in a manner that violates public policy; (2) when an express or implied contract binds the employer to terminate the employee for cause alone; or (3) when the employer violates the covenant of good faith and fair dealing. *See id.*

However, the *Berube* court found that the employee only had an actionable wrongful termination claim under either the second or third exception. *See id.* at 1047. The court did not find that any clear and substantial public policy was at issue. *See id.* Therefore, the court's recognition of the public policy exception to at-will employment is dictum.

[21]*Id.* at 1042.

[22]*See id.* at 1043.

[23]*Id.*

[24]811 P.2d 151 (Utah 1991) (plurality opinion by Stewart, A.C.J.).

[25]*See id.* at 165–66.

[26]*See id.* at 166–67.

[27]832 P.2d 1280 (Utah 1992) (opinion by Durham, J.).

[28]*See id.* at 1283.

[29]*See id.*

[30]*Id.*

However, the court stated that not all violations of the law necessarily violate Utah public policy.[31]

In *Heslop v. Bank of Utah*,[32] the court held that a bank may have violated public policy when it terminated an employee who reported violations of state banking regulations to corporate management.[33] The *Heslop* court created a three-part test for employees who cite the public policy exception to employment-at-will doctrine.[34] First, the termination must implicate a clear and substantial public policy of the State of Utah.[35] Second, the employer must require the employee to violate the policy, or the employer must punish the employee for conduct furthering the public policy.[36] Finally, the violation of the public policy must be a substantial factor in the employee's termination.[37]

4. Analysis

Responding to the district court's certified question, the *Fox* court stated that MCI did not violate any clear and substantial public policy of Utah when it terminated Fox's employment.[38] The *Fox* court explained that a wrongful termination claim based upon public policy is only actionable if the employer violates a clear and substantial public policy.[39] In addition, the court stated that Utah public policy does not prevent employers from terminating employees who make internal reports of criminal activity.[40]

---

[31]*See id.* The violation of many "ancient, anachronistic, and unenforced criminal sanctions" would not violate Utah public policy. *Id.* However, the federal statutory violation that the employee alleged in *Peterson* involved "serious misconduct and [that was] in all likelihood a felony." *Id.*; *see* 18 U.S.C. § 542 (1994).

[32]839 P.2d 828 (Utah 1992) (opinion by Hall, C.J.).

[33]*See id.* at 837–38. Heslop alleged that the bank violated certain provisions of Utah's Financial Institutions Act (the "Act"), which requires all banks to make timely call reports regarding their financial status and security to the Department of Financial Institutions. *See* UTAH CODE ANN. § 7-1-318 (1995). The purpose of the Act is to "protect the interests of shareholders, members, depositors, and other customers of financial institutions operating in this state." *Id.* § 7-1-102(1)(b). Further, any failure to make timely reports, or any falsification of reports, constitutes a third-degree felony. *See id.* § 7-1-318(3). Thus, the *Heslop* court reasoned, the Utah legislature has proscribed a clear and substantial public policy to enforce the Act. *See Heslop*, 839 P.2d at 837. In addition, the Act does not merely regulate the relationships between private individuals, such as employer and employee; rather, the act has a strong public purpose. *See id.* Therefore, any violations of the Act implicate a clear and substantial public policy. *See id.*

[34]*See Heslop*, 839 P.2d at 837.

[35]*See id.*

[36]*See id.*

[37]*See id.*

[38]*See Fox*, 931 P.2d at 859. The *Fox* court did not cite the three-part test of *Heslop*, but found MCI's termination of Fox failed to implicate a clear and substantial public policy. *See id.*

[39]*See id.*

[40]*See id.* at 861.

(a) Clear and Substantial Public Policy

The *Fox* court first asserted that Fox was an at-will employee of MCI, since the parties' employment relationship had "no specified term of duration."[41] The court then explained that employees may use the public policy exception to overcome the presumption of at-will employment.[42] However, to overcome the presumption of at-will employment, an employer must violate a clear and substantial public policy.[43] The *Fox* court acknowledged that the phrase "clear and substantial" public policy provides "little by way of specific guidance."[44] Still, the court refused to precisely define its "clear and substantial" standard, assuring that "more precise standards" will be ascertainable in the future.[45]

Nevertheless, using *Hodges*,[46] *Peterson*,[47] and precedents from other states, the *Fox* court attempted to clarify its notion of clear and substantial public policy.[48] The *Fox* court stated that enforcement of Utah's criminal code constitutes a clear and substantial public policy of Utah.[49] The *Hodges* court asserted that employers should not use employment-at-will doctrine to avoid technically violating the law.[50] In addition, under *Peterson*[51] and cases from other jurisdictions,[52] the court reasoned that the law protects employees who are terminated for refusing to engage in illegal activities that implicate clear and substantial public policy.[53]

The *Fox* court declared, however, that MCI did not violate any clear and substantial public policy when it terminated Fox's employment.[54] Unlike the employer

---

[41] *See id.* at 859 (quoting Berube v. Fashion Center, Ltd., 771 P.2d 1033, 1044 (Utah 1989)).

[42] *See id.* at 859–60 (citing Retherford v. AT&T Communications, 844 P.2d 949, 958–59 (Utah 1992); Heslop v. Bank of Utah, 839 P.2d 828, 836–38 (Utah 1992); Peterson v. Browning, 832 P.2d 1280, 1281–82 (Utah 1992); Hodges v. Gibson Prods. Co., 811 P.2d 151, 165 (Utah 1991)).

[43] *See id.*

[44] *Id.* at 860.

[45] *Id.*

[46] *Hodges*, 811 P.2d at 166.

[47] *Peterson*, 832 P.2d at 1283.

[48] *See Fox*, 931 P.2d at 860–61.

[49] *See id.* at 860 (citing *Hodges*, 811 P.2d at 166). The *Fox* court used "clear and substantial" public policy in reference to the 1991 *Hodges* decision. *See id.* However, the supreme court did not adopt "clear and substantial" as a requirement for the public policy exception to employment-at-will doctrine until 1992 with the *Peterson* decision. *See Peterson*, 832 P.2d at 1283.

[50] *See Fox*, 931 P.2d at 860 (quoting *Hodges*, 811 P.2d at 166). In other words, the public policy exception is important because it prevents employers from abusing the immunity that employment-at-will doctrine provides. The public policy exception to employment-at-will doctrine restricts employers from terminating employees as a means of concealing criminal activity.

[51] *Peterson*, 832 P.2d at 1283.

[52] *See* Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (holding that terminated employee who refused to engage in acts prohibited by antitrust laws had cause of action); Petermann v. International Bhd. of Teamsters, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (finding that union business agent was wrongfully discharged when he refused to testify falsely to state legislative committee).

[53] *See Fox*, 931 P.2d at 860–61. In *Peterson*, the employer's coercion of the employee did not implicate any criminal statute of Utah. *See Peterson*, 832 P.2d at 1283. Nonetheless, the court held that it violated a clear and substantial policy to coerce an employee to violate the law, whether a law of Utah, the federal government, or another state. *See id.*

[54] *See Fox*, 931 P.2d at 861.

in *Peterson*, MCI did not require Fox to engage in any criminal activity.[55] The alleged churning of accounts, albeit dishonest, did no harm to MCI's customers.[56] Additionally, since MCI acquiesced in the churning, MCI was not defrauded.[57] The court acknowledged that MCI's conduct was of "questionable legality," but held the account churning involved merely "avoidable inefficiencies," and did not affect the public interest in any significant way.[58] Deferring to "forces in the marketplace," which regulate private policy matters, the court found that MCI's problem was for corporate management—not the law—to resolve.[59] Therefore, MCI's action failed to contravene a clear and substantial public policy of Utah.[60]

(b) Internal Reports of Statutory Violations

However, the *Fox* court declared that the public policies embodied in criminal laws have always encouraged persons to report criminal activity to public authorities.[61] Regardless, Fox reported alleged statutory violations of her co-workers to MCI, rather than to public authorities.[62] While an employee may have a duty to disclose an employer's business to the employer, this duty affects only the private interest, and does not serve the public interest.[63] The *Fox* court stated that "if an employee reports a criminal violation to an employer, rather than to public authorities, and is fired for making such reports, that does not, in our view, contravene a clear and substantial public policy."[64]

---

[55]*Compare id., with Peterson*, 832 P.2d at 1283.

[56]*See Fox*, 931 P.2d at 861.

[57]*See id.*

[58]*Id.* at 861–62.

[59]*Id.*

[60]*See id.* at 862.

[61]*See id.* at 861 (citing *In re* Quarles & Butler, 158 U.S. 532, 533–35 (1895); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1374 (9th Cir. 1984); Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850, 853 (10th Cir. 1972); Palmateer v. International Harvester Co., 421 N.E.2d 876, 879–80 (Ill. 1981)). The *Fox* court also mentioned that section 76-6-705 of the Utah Code expressly requires that anyone with a reason to believe that someone has violated the computer-assisted fraud statute, section 76-6-703, has a duty to report such violations to public authorities, including the attorney general, county attorney, or district attorney. *See Fox*, 931 P.2d at 861 n.5 (citing UTAH CODE ANN. §§ 76-6-705 (1995), 76-6-703 (Supp. 1997)). Fox reported MCI's account churning to her employer rather than to public authorities. *See id.* at 861.

[62]*See Fox*, 931 P.2d at 861.

[63]*See id.*; *see also* Foley v. Interactive Data Corp., 765 P.2d 373, 380 (Cal. 1988) (holding that no substantial public policy prevented employer from firing employee who made internal reports of suspected criminal activity of co-worker).

[64]*Fox*, 931 P.2d at 861. However, the *Heslop* court found that public policy may protect employees who make internal reports of criminal activity. *See Heslop*, 839 P.2d at 837–38. It is clear from *Fox*, however, that Utah public policy will not always protect employees who make internal reports. The *Fox* court did not distinguish its holding from *Heslop*, but it appeared to narrow *Heslop* by refusing to protect an employee who reported statutory violations to an employer, rather than to public authorities. *See Fox*, 931 P.2d at 861–62.

Two essential distinctions may be drawn between *Heslop* and *Fox*. First, the alleged violations in *Fox* lack the vital public impact of the banking regulations that the employer in *Heslop* violated. The Utah Legislature expressed in statutory language a clear and substantial public policy that the employer violated

Although the court recognized that a corporation should welcome an employee's disclosure of significant employee misconduct, the court found no basis for interfering with MCI's decision to terminate Fox.[65] In sum, since Fox's disclosure of statutory violations to MCI did not affect the public interest in any significant way, MCI did not violate a clear and substantial public policy when it terminated Fox's employment.

5. Conclusion

In *Fox*, the Utah Supreme Court found that the termination of a private sector employee for reporting statutory violations of co-workers to company management, rather than to public authorities, does not violate a clear and substantial public policy. The court recognized a clear and substantial public policy to enforce the criminal law, and additionally recognized that Utah law encourages persons to report criminal activity to public authorities. However, the court warned that Utah law will not protect employees who report alleged statutory violations to their employers.

V. GOVERNMENTAL LAW

Restoration of Governmental Immunity: The Assault Exception to Immunity Waivers After Taylor v. Ogden School District*

1. Introduction

In *Taylor v. Ogden School District*,[1] the Utah Supreme Court held that government immunity, which is waived for injuries caused by dangerous or defective public buildings, is restored if the injuries arise out of an assault even if the assault is not the sole cause of the injuries.[2] Additionally, the court reaffirmed its previous

---

in *Heslop*. *See supra* note 32 and accompanying text. Second, Fox failed to substantiate her allegations as definitively as the employee in *Heslop*. The *Heslop* court on the one hand found that the employer violated the alleged provisions of Utah's Financial Institutions Act. *See Heslop*, 839 P.2d at 837–38 (quoting UTAH CODE ANN. § 7-1-102(1)(a) (1988)). In addition, the attorney general's investigation found that the employer in *Heslop* committed the alleged crimes. *See id.* at 831–33. On the other hand, Fox made allegations of "possible criminal conduct," failing to present any convincing evidence of serious criminal wrongdoing. *Fox*, 931 P.2d at 861–62. The *Fox* court noted that MCI's employees did not commit any fraud. *See id.* Further, MCI's dishonest behavior did not harm the public interest.

Thus, under *Fox* and *Heslop*, employees who are terminated for making internal reports of statutory violations may have actionable wrongful termination claims in limited circumstances. Nonetheless, it appears that the court will not allow employers to violate statutes for which the public interest is clear and substantial, even if an employee makes only internal reports of such criminal activity. *See id.*

[65] *See Fox*, 931 P.2d at 862.

*Katherine L. Kendall, Staff Member, *Utah Law Review*.

[1] 927 P.2d 159 (Utah 1996) (opinion by Russon, J.) [hereinafter *Taylor III*]. Prior to *Taylor III*, the Utah Supreme Court issued a separate opinion, 902 P.2d 1234 (Utah 1995) [hereinafter *Taylor II*], reversing the Utah Court of Appeals' opinion, 881 P.2d 907 (Utah Ct. App. 1994) [hereinafter *Taylor I*].

[2] *See Taylor III*, 927 P.2d at 162–64.

holding in *Ledfors v. Emery County School District* that the person committing the assault does not have to be a government employee in order for immunity to be reinstated.[3]

2. *The Case*

On May 18, 1989, Zachary Taylor ("Zachary") and Trenton Leo ("Trenton"), students at Highland Middle School in the Ogden City School District (the "District"), had a fight in a school bathroom.[4] During the fight, Trenton shoved Zachary into a glass window. Although the window broke, it did not violate any building code or safety regulation. Zachary, however, did sustain nerve and tendon damage. Following the fight, a juvenile court found Trenton guilty of assault.

On January 12, 1990, Zachary's mother ("Taylor") filed a complaint against the District.[5] Taylor alleged that the District was negligent because it failed to install either safety glass in the bathroom window or another safety measure that would have prevented Zachary's injuries. Taylor based her suit upon section 63-30-9 of the Utah Code, which stated before its 1991 amendments that "[i]mmunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building . . . . Immunity is not waived for latent defect conditions."[6]

Subsequently, the District moved for summary judgment, arguing that it was immune from suit under section 63-30-10(1)(b) of the Utah Code. At the time of Zachary's accident, this section stated "[i]mmunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury . . . (b) arises out of an assault."[7]

The trial court granted this motion and found the District immune from Taylor's suit on two grounds. First, the court held that the District was immune under the Assault Exception because Zachary's injuries arose out of an assault. Second, it also found that the District was immune under the Discretionary Function Exception found in section 63-30-10(1)(a).[8] The Court reasoned that the District's decision as to the

---

[3]849 P.2d 1163, 1166 (Utah 1993).

[4]The facts are taken from the Utah Supreme Court's opinion in *Taylor III*, 927 P.2d at 160–61.

[5]Although not at issue here, Taylor also asserted a claim against Trenton's mother. *See Taylor III*, 927 P.2d at 160 n.1.

[6]Section 63-30-9 now reads: "*Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10*, immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building . . . ." UTAH CODE ANN. § 63-30-9 (1993) (emphasis added).

[7]*Id.* § 63-30-10(1)(b) (1986) [hereinafter the Assault Exception]. This section, as recently revised, was renumbered as § 63-30-10(2) and reads: "except if the injury *arises out of, in connection with, or results from*: . . . (2) assault." *Id.* § 63-30-10(2) (Supp. 1997) (emphasis added).

[8]When Zachary was injured, section 63-30-10(1)(a) stated:

> Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:
> (a) arises out of the exercise or performance or the failure to exercise or perform a

type of glass installed in the bathroom window was discretionary where no building code mandated that safety glass be installed.

Following the trial court's ruling, Taylor appealed to the Utah Supreme Court, which transferred the case to the Utah Court of Appeals. The court of appeals reversed the trial court, holding that retention of immunity under section 63-30-10 did not apply to the waiver of immunity found in section 63-30-9.[9] The court explained that the exceptions in section 63-30-10 were intended to apply only to injuries proximately caused by negligence, not those caused by dangerous conditions in public buildings.[10]

Thereupon, the District petitioned the Utah Supreme Court for certiorari. After granting certiorari in November, 1994, the Utah Supreme Court decided *Keegan v. State of Utah*,[11] holding that the Discretionary Function Exception applied to cases brought under section 63-30-8,[12] which waives immunity for injuries caused by dangerous or defective conditions on roadways.[13] Relying on *Keegan*, the *Taylor II* court summarily reversed the court of appeals' ruling in *Taylor I* that the exceptions in section 63-30-10 did not apply to the waiver of immunity in section 63-30-9.[14] Additionally, the court directed the parties to brief two issues to clarify whether the Discretionary Function Exception or the Assault Exception applied to the facts of the case.[15] These issues were:

> (1) Whether the injuries allegedly suffered by plaintiff "arose out of" the assault and battery exception to the waiver of immunity in Utah Code Ann. § 63-30-10(2) or whether those injuries arose out of the alleged negligence of defendants having failed to install safety plate glass.
> (2) Whether, assuming that the alleged injuries suffered by plaintiff arose out of defendant's negligence, in whole or in part, rather than out of an assault and battery, defendant's failure to install safety plate glass was a ministerial or a discretionary function under § 63-30-10(1).[16]

Responding to the court's directive, Taylor argued that the Assault Exception should not apply where, as in her case, the injuries had a greater link to a dangerous and defective condition in a public building than to the assault and where the assault was unrelated to the conduct of a government employee.[17] In contrast, the District argued that the Assault Exception should apply because Zachary was injured as a

---

discretionary function whether or not the discretion is abused.

Id. § 63-30-10(1)(a) (1986). The section was slightly revised in 1996, but remains substantively the same. *See* UTAH CODE ANN. § 63-30-10(1) (Supp. 1997) [hereinafter the Discretionary Function Exception].

[9]*See Taylor I*, 881 P.2d at 912.

[10]*See Taylor III*, 927 P.2d at 161 (citing *Taylor I*, 881 P.2d at 911–12).

[11]896 P.2d 618 (Utah 1995).

[12]UTAH CODE ANN. § 63-30-8 (1989).

[13]*See Keegan*, 896 P.2d at 623.

[14]*See Taylor II*, 902 P.2d at 1234.

[15]*See id.*

[16]*Id.*

[17]*See Taylor III*, 927 P.2d at 162.

direct result of Trenton's assault upon him, thus his injuries arose out of an assault as required by section 63-30-10(2).[18]

Ultimately, the court sided with the District, holding that the District was immune from suit under the Assault Exception.[19] Because it held that the Assault Exception applied, the court did not reach the issue of whether the District qualified for immunity under the Discretionary Function Exception.[20]

3. Background

Under the Utah Governmental Immunity Act ("Act"),[21] "governmental entities are immune from suit for any injury which results from the exercise of a governmental function."[22] This immunity can be waived by specific provisions of the Act, such as section 63-30-9, which waives immunity for injuries arising from dangerous or defective public buildings.[23] However, a government entity's immunity can be restored if the Act contains an exception to the waiver provision.[24]

The Utah Supreme Court developed a three-part test to determine whether a government entity is immune from suit in *Ledfors v. Emery County School District*,[25] (the "*Ledfors* test"). The *Ledfors* test asks three questions:

> First, was the activity the entity performed a governmental function and therefore immunized from suit by the general grant of immunity contained in section 63-30-3? Second, if the activity was a governmental function, has some other section of the Act waived that blanket immunity? Third, if the blanket immunity has been waived, does the Act also contain an exception to that waiver which results in a retention of immunity against the particular claim asserted in this case?[26]

(a) The Assault Exception is Triggered by a Non-governmental Actor's Assault

In *Ledfors*, the court held that the Assault Exception applies to the waiver of governmental immunity for government employees' negligent acts,[27] regardless of whether a government employee committed the assault or battery.[28] The plaintiffs in *Ledfors*, parents of a minor student who was beaten by fellow students, argued that the school district's immunity was not reinstated under the Assault Exception because

---

[18]*See id.*

[19]*See id.* at 164.

[20]*See id.*

[21]UTAH CODE ANN. §§ 63-30-1 to -38 (1993 & Supp. 1997).

[22]*Id.* § 63-30-3 (1993).

[23]*See id.* § 63-30-9.

[24]*See, e.g., id.* § 63-30-10 (restoring immunity if injury is result of eighteen different exceptions).

[25]849 P.2d 1162 (Utah 1993).

[26]*Id.* at 1164.

[27]Section 63-30-10 waives immunity for injuries "caused by a negligent act or omission of a [government] employee." UTAH CODE ANN. § 63-30-10 (Supp. 1997).

[28]*See Ledfors*, 849 P.2d at 1166.

a government employee did not commit the assault or battery.[29] The court rejected this argument, declaring that "[o]ur statute clearly states that the employment status of the assailant is irrelevant to the question of immunity."[30] It concluded that the "determinant of immunity is the type of conduct that produces the injury, not the status of the intentional tort-feasor whose conduct is the immediate cause of the injury."[31]

(b) Section 63-30-10 Exceptions Apply to Other Waivers of Immunity

A long line of cases supports the proposition that the exceptions in section 63-30-10 can apply to other immunity waivers in the Act.[32] Most recently, in *Keegan v. State of Utah*,[33] the court concluded that the Discretionary Function Exception applies to the waiver of immunity for defective, unsafe, or dangerous conditions on highways codified in section 63-30-8.[34] In *Keegan*, the plaintiff brought a wrongful death claim against the Utah Department of Transportation ("UDOT") and the State of Utah after her husband was killed when his car climbed a freeway barrier and slammed into a support pillar.[35] She claimed that UDOT and the State were negligent because they failed to raise the barrier after surface overlay projects.[36] After examining the facts, the court declared that although the Act initially made UDOT and the State immune from suit, section 63-30-8 waived this immunity.[37] However, it then decided that UDOT's failure to raise the barrier was an exercise of a discretionary function.[38] Thus, based on its conclusion that the Discretionary Function Exception applies to waivers of immunity under 63-30-8, the court found UDOT and the State immune from the wife's suit.[39]

By holding that the Discretionary Function Exception applies to section 63-30-8, the *Keegan* court rejected its earlier statement in *Sanford v. University of Utah*[40] that the exceptions in section 63-30-10 do not apply to sections 63-30-8 or 63-30-9.[41] *Sanford* involved a nuisance claim against the University for property damage caused by flooding.[42] There, the court found that the University was not immune from Sanford's suit because section 63-30-10 did not reinstate its immunity which was

---

[29]*See id.* at 1163.

[30]*Id.* at 1166.

[31]*Id. See also* Higgins v. Salt Lake County, 855 P.2d 231, 240 (Utah 1993) (holding employment status irrelevant to question of immunity); S.H. v. State, 865 P.2d 1363, 1365 (Utah 1993) (same).

[32]*See, e.g.*, Velasquez v. Union Pac. R.R. Co., 469 P.2d 5, 6 (Utah 1970) (applying section 63-30-10 exceptions to section 63-30-8); Andrus v. State, 541 P.2d 1117, 1120 (Utah 1975) (applying exceptions to section 63-30-9).

[33]896 P.2d 618 (Utah 1995).

[34]*See id.* at 623.

[35]*See id.* at 619.

[36]*See id.*

[37]*See id.* at 620.

[38]*See id.* at 626.

[39]*See id.*

[40]488 P.2d 741 (Utah 1971).

[41]*See id.* at 745.

[42]*See id.* at 741.

waived by section 63-30-9.[43] In *Keegan*, the court stated that its conclusion in *Sanford*—that section 63-30-10 did not apply to sections 63-30-8 and 63-30-9—was merely dictum.[44] It concluded that *Sanford* was readily distinguishable from *Keegan* because *Sanford* was based on a nuisance claim, whereas *Keegan* was based on a negligence claim.[45] Thus, the court seemed to suggest that when a negligence claim is brought against a government entity under either section 63-30-8 or section 63-30-9, the exceptions in section 63-30-10 apply and can reinstate the entity's immunity.

Accordingly, when *Taylor II*—a negligence case brought under section 63-30-9—reached the supreme court, the court relied upon *Keegan* as dispositive authority and reversed *Taylor I*.[46] However, it retained jurisdiction to clarify which exception in section 63-30-10 applied to the facts of the case.[47]

4. Analysis

In *Taylor III*, the Utah Supreme Court applied the *Ledfors* three-part test to determine whether the District was immune from Taylor's negligence suit.[48] At the outset, the court noted that both parties agreed that the District was a government entity and that the maintenance of a school was a government function.[49] Thus, under the test's first part, the District was immune from suit under section 63-30-3 of the Act.[50] Additionally, in reference to the second part of the *Ledfors* test, the court noted that the parties agreed that section 63-30-9 waived the District's blanket immunity.[51] However, when the court reached the third part of the test, it found that there was stark disagreement between the parties about whether the Act provided an exception to the waiver of the District's immunity.[52]

Specifically, the District contended that the Assault Exception applied to the facts of the case because Zachary's injuries were a direct result of Trenton's assault and thus arose out of an assault.[53] In contrast, Taylor contended that the Assault Exception should not apply where, as in her case, the injuries have a greater link to a dangerous and defective condition in a public building than to an assault.[54] Additionally, she contended that the Assault Exception should not apply when the assault is unrelated to the conduct of a government employee.[55] Rejecting both of

---

[43]*See id.*
[44]*See Keegan*, 896 P.2d at 622.
[45]*See id.*
[46]*See Taylor II*, 902 P.2d at 1234.
[47]*See Taylor III*, 927 P.2d at 161.
[48]*See supra* text accompanying note 26 (outlining government immunity test).
[49]*See Taylor III*, 927 P.2d at 162.
[50]*See id.*
[51]*See id.*
[52]*See id.*
[53]*See id.*
[54]*See id.*
[55]*See id.*

Taylor's arguments, the court held that the Assault Exception did apply to the facts of the case.[56]

In response to Taylor's first argument, the court stated that the Assault Exception applied because Zachary's injuries arose out of an assault.[57] Examining other cases, the court found that the phrase "arise out of" was defined as "originating from, growing out of, or flowing from."[58] Additionally, it found that in order for an injury to arise out of an assault, there must be only some causal relationship between the injury and the assault.[59] In other words, the assault does not have to be the sole cause of the injury to exempt a governmental entity from liability for the injury.[60]

Thus, the court concluded that for the District to be immune from liability, Zachary's injuries must have originated from, grown out of, or flowed from an assault.[61] It found this to be true because the uncontroverted facts showed that Zachary's injuries resulted from Trenton's action of pushing Zachary into the window, for which Trenton was convicted of assault.[62] Furthermore, it concluded that even if Zachary's injuries did have a greater link to the dangerous bathroom window than to Trenton's assault, the necessary causal relationship between the injuries and the assault was undoubtedly present.[63]

Moreover, the court rejected Taylor's second argument that the Assault Exception should not apply when the assault is unrelated to a government employee's conduct.[64] Taylor attempted to distinguish prior cases exempting a government entity from liability even though a government employee did not commit the assault.[65] She asserted that in these cases, the negligence of the government employee or entity either caused the assault or resulted in the injury.[66] Because there was no similar allegation made in her case, Taylor argued that the prior cases should not control.[67] The court rejected Taylor's reasoning, stating that the difference between her case and the prior cases was inconsequential because the conduct of the government actor played no part in the court's analyses or conclusions that the government entity was

---

[56]*See id.* at 162–64.

[57]*See id.* at 162–63.

[58]*See id.* at 163 (quoting National Farmers Union Property & Cas. Co. v. Western Cas. & Sur. Co., 577 P.2d 961, 963 (Utah 1978) (internal quotation omitted)).

[59]*See id.*

[60]*See id.*

[61]*See id.*

[62]*See id.*

[63]*See id.*

[64]*See id.* at 164.

[65]*See id.* at 163. Examples of the cases Taylor attempted to distinguish are: Tiede v. State, 915 P.2d 500, 502–503 (holding State immune where convicted felons, who walked away from halfway house, kidnapped and murdered various victims); S.H. v. State, 865 P.2d 1363, 1364–65 (Utah 1993) (holding State immune where cab driver under state contract sexually molested deaf child); and *Ledfors*, 849 P.2d at 1165–67.

[66]*See Taylor III*, 927 P.2d at 163.

[67]*See id.*

immune.[68] Instead, the court focused on the conduct of the assailant and whether this conduct was an assault.[69]

Alternatively, Taylor argued that to the extent the prior decisions could not be distinguished, they should be overturned because section 63-30-10 specifically refers to conduct of government employees, not that of nongovernment employees.[70] However, the court responded that its prior cases made it clear that the Act, "especially section 63-30-10, focuses on the conduct or situation out of which the injury arose, not on the status of the party inflicting the injury."[71]

The court stated that this proposition was supported by particular subsections of 63-30-10 which undoubtedly encompass conduct of nongovernment employees.[72] The court felt that "these subsections demonstrate that although section 63-30-10 does not specifically refer to those not affiliated with the government, the legislature intended to retain immunity for certain injuries arising out of the conduct of such persons."[73]

Furthermore, the court determined that because the Assault Exception did not expressly limit its application to assaults by government employees, the Assault Exception must be interpreted to include assaults by nongovernment assailants.[74] This interpretation harkened back to the court's discussion earlier in the opinion which declared that the Act should be strictly applied to preserve sovereign immunity.[75] Because the court found nothing in the Assault Exception limiting its application to assaults committed by government employees, it concluded that to preserve sovereign immunity, the Assault Exception must include assaults committed by nongovernmental assailants.[76]

Hence, even though Zachary's injuries were inflicted by a nongovernmental assailant and may have been more closely linked to the dangerous bathroom window than to Trenton's assault, the court concluded that the Assault Exception applied to the facts of the case.[77] This conclusion satisfied the third part of the *Ledfors* test concerning whether the Act provides an exception to the waiver of immunity. Thus, because all three parts of the test were met, the court held that the District was immune from suit.[78]

---

[68]*See id.* at 164.

[69]*See id.* (citing *Tiede*, 915 P.2d at 502–03 and *Ledfors*, 849 P.2d at 1166–67).

[70]*See id.*

[71]*See id.* (quoting *S.H.*, 865 P.2d at 1365) (internal citation omitted).

[72]*See id.* Specifically, the court referred to subsections (g) and (j), now codified as subsections (7) and (10), which except liability for injuries arising out of riots, unlawful assemblies, public demonstrations, mob violence, civil disturbances, or out of the incarceration of any person in a state prison, county or city jail, or other place of legal confinement. *See id.*

[73]*See id.*

[74]*See id.*

[75]*See id.* at 162 (citing Holt v. Utah State Road Comm'n, 511 P.2d 1286, 1288 (Utah 1973), *overruled on other grounds,* Colman v. Utah State Land Board, 795 P.2d 622 (Utah 1990)).

[76]*See id.* at 164.

[77]*See id.*

[78]*See id.*

5. Conclusion

In *Taylor v. Ogden School District*, the Utah Supreme Court held that the Assault Exception to the waiver of governmental immunity for injuries arising from dangerous conditions in public buildings applies even if the assault is not the sole cause of the injuries. The court explained that it focused on whether there was some causal relationship between the injuries and the assault, not whether the assault was the sole cause of the injuries. Additionally, the court reiterated that the Assault Exception applies even if a government employee does not commit the assault. Thus, if the plaintiff's injuries arise from an assault, government entities are immune from suit if there is some causal relationship between the injuries and the assault, regardless of whether the assailant is a government employee.

VI. PROFESSIONAL RESPONSIBILITY

A. Placing a Cap on Attorney's Fees*

1. Introduction

Attention: All attorneys practicing in the State of Utah, this is to inform you that anything you say can and *will* be used against you in a court of law.[1] In *Jones, Waldo, Holbrook & McDonough v. Dawson*,[2] the Utah Supreme Court addressed whether an attorney places a cap on the amount of fees he can charge by stating that the client should "count on" fees of not more than $18,000.[3] In holding that the attorney had capped the amount of fees he could charge, the court for the first time applied the rules of interpretation applicable to a written fee agreement to an oral fee agreement.[4]

Additionally, the court in *Dawson* reaffirmed prior holdings. The court held that collateral estoppel did not bar the client from raising the issue of the reasonableness of attorney's fees where the client did not have an opportunity to fully litigate this issue in a previous proceeding.[5] The court also held that the Utah Rules of Civil Procedure allowed the client to generally deny in her answer the plaintiff's claims because she did not attempt to raise a new matter.[6] Finally, the court held that the plaintiff law firm was not entitled to recover its fees in a pro se action because it did not "incur" fees in attempting to collect its original fees.[7] The significant change in

---

*Tyson J. Cichos, Staff Member, *Utah Law Review*.

[1] *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966) (requiring persons in custody to be informed that what they say may be used against them).

[2] 923 P.2d 1366 (Utah 1996) (opinion by Howe, J.).

[3] *Id.* at 1368.

[4] *See id.* at 1372–73.

[5] *See id.* at 1371.

[6] *See id.* at 1373.

[7] *Id.* at 1375.

law announced by the court was that courts are to interpret oral fee agreements like written fee agreements, against the attorney.[8]

2. The Case

On the recommendation of a friend, Jerilyn Shelton Dawson ("Dawson") contacted Michael Shaw ("Shaw") to defend her in a divorce proceeding.[9] Shaw was an attorney for the law firm of Jones, Waldo, Holbrook & McDonough ("Plaintiff") in Salt Lake City, Utah. Shaw had Dawson sign a retainer agreement stating the amount of the retainer ($500), providing for an attorney's lien against the proceeds of the action in case of nonpayment, and stating that Dawson would be responsible for all collection costs "incurred" in enforcing the agreement. Significantly, the retainer agreement did not include Shaw's hourly fee, nor did it include a cap on the amount of fees that Shaw could charge Dawson. In completing the retainer agreement, Shaw informed Dawson that his hourly fee was $100 and that he would request that the divorce court award attorney's fees. Dawson also testified that during the meeting Shaw told her that "the total charges would probably not exceed $10,000 and in no event would be more than $15,000." Dawson retained Shaw and paid the $500 retainer.

After a temporary restraining order hearing, Shaw and Dawson talked about how much his fees would total. Dawson asked Shaw how much this legal action would cost her. Shaw later testified at trial that he replied, "I think you should count on something in the nature of 15,000 to $18,000, assuming we don't get into SVS Corporation."[10] Shaw then corrected his testimony, stating: "I think I misstated that. I believe, my—my good faith estimate is—what I would call it at that time was in the nature of 10,000 to $12,000 to get the case tried. And if we had to get into SVS Corporation, she should expect more like 15,000 to $18,000."

A friend of Dawson, Alta Graham, witnessed this conversation and testified that Shaw told Dawson that "they would have to go back into court" since the parties had not reached a settlement and that the fees "could be as high as five to $10,000 if they had to really struggle," adding that "if we attack the corporation [the fees] could be as high as 15 or 20." Dawson's testimony supported Graham's.

By the time of the divorce trial, Shaw's fees had reached a total of $33,901 and Dawson fell behind on her payments to Shaw. Shaw reiterated that he would seek attorney's fees from Dawson's ex-husband. Though the divorce court found that Shaw's fees of $33,901 were reasonable, it nonetheless awarded Dawson only $18,500 in attorney's fees. The divorce court also awarded Dawson the marital home and rehabilitative alimony of $1,400 per month for two years. Dawson's ex-husband appealed the decision of the divorce court and Shaw began working on the appeal,

---

[8]*See id.* at 1372–73.

[9]*See id.* at 1368–70. The facts, undisputed by the parties, are taken from *Dawson*, 923 P.2d at 1368–70.

[10]At the time of Dawson's divorce, her ex-husband owned an interest in the SVS Corporation, and it was unknown whether that interest would be subject to the divorce proceeding.

which added another $12,586 in fees. Dawson failed to pay Shaw for his legal work rendered and thus Shaw filed a notice of attorney's lien on Dawson's home and upon the alimony payments. Shaw then withdrew from representing Dawson while the appeal was still pending.

Dawson thereafter hired new counsel to defend against her ex-husband's appeal from the divorce court. Meanwhile, the Plaintiff continued to charge interest on the unpaid balance of Dawson's legal bill. Dawson's new counsel successfully defended the appeal. Subsequently, the Plaintiff filed this case against Dawson "seeking judgment for a balance of fees owing of $43,143.48, an order of foreclosure of attorney's liens against Dawson's home, and . . . 'reasonable attorney's fees incurred in the prosecution of this action and through foreclosure, as appropriate.'"

The trial court bifurcated the trial and first determined that Shaw did not place a cap on fees and ruled that the Plaintiff was "entitled to fees of $33,901 for representing Dawson in the divorce trial and $12,856.42 for its work on appeal." The trial court next held that Shaw's fees were reasonable and that collateral estoppel prohibited Dawson from relitigating the amount of Shaw's fees. Finally, the trial court denied the Plaintiff pro se fees for its work to recover the initial fees, but granted the Plaintiff interest on the unpaid balance and granted foreclosure of the Plaintiff's attorney's lien on Dawson's home.

Dawson subsequently appealed from the trial court's judgment, arguing that Shaw had placed a cap on the amount of fees he could charge and that the fees Shaw charged were unreasonable. The Plaintiff cross-appealed, arguing that the trial court erred in denying it pro se attorney fees. Additionally, the Plaintiff argued that Dawson's general denial regarding attorney's fees was insufficient to raise the affirmative defense of the Plaintiff's inability to collect its pro se fees.

On appeal, the Utah Supreme Court first determined that collateral estoppel did not prohibit Dawson from arguing the reasonableness of Shaw's fees.[11] The court set forth four requirements that the Plaintiff had to satisfy to prevent Dawson from litigating the reasonableness of Shaw's fees.[12] First, the Plaintiff had to show that this issue was "identical in the previous action and in the case at hand."[13] Second, the Plaintiff had to prove that the divorce court judgment was a "final judgment."[14] Third, Dawson must have "competently, fully, and fairly litigated" this issue in the divorce court.[15] Finally, Dawson must have been "either a party or privy to a party in the previous action."[16] The court held that collateral estoppel did not prohibit Dawson from litigating the reasonableness of Shaw's attorney's fees because it was not clear "that the reasonableness of attorney fees was fully and fairly litigated in the sense required for issue preclusion."[17]

---

[11] *Dawson*, 923 P.2d at 1371.

[12] *See id.* at 1370 (citing Sevy v. Security Title Co., 902 P.2d 629 (Utah 1995)).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 1371. The court relied on the fact that Dawson's only advocate to argue that Shaw's fees were unreasonable was Shaw himself. *See id.*

The court also held that the Utah Rules of Civil Procedure allowed Dawson to generally deny the Plaintiff's claims in her answer because she did not attempt to raise a new defense.[18] The Plaintiff argued that Rule 8 of the Utah Rules of Civil Procedure[19] required Dawson to affirmatively plead her defense that "the law firm could not claim attorney's fees for its pro se litigation of the collection action."[20] The Plaintiff relied on *Creekview Apartments v. State Farm Insurance*[21] in arguing that Shaw's defense was based on a contractual limitation, thus the Utah Rules of Civil Procedure required Dawson to plead it affirmatively.[22] In *Creekview*, the Utah Court of Appeals stated that a "new matter becomes an 'avoidance' when it suggests that a plaintiff's complaint is invalid for other reasons not embraced by the pleadings."[23] The Utah Supreme Court distinguished *Creekview* from the present facts in that *Creekview* involved a defendant who attempted to "raise a new defense, independent of the allegations in the pleadings."[24] In contrast to *Creekview*, Dawson did not admit the cause of action, rather, she denied the cause of action, and thus her general denial was appropriate.[25]

Moreover, the court reiterated that "the scope of the general denial is very broad."[26] The court noted that the pleading rules must be "looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute."[27] Finally, the court observed that the Plaintiff did not request a continuance or allege that Dawson's failure to affirmatively plead her defense on pro se representation prejudiced or surprised it in anyway.[28]

The court in *Dawson* also reaffirmed prior case law in holding that the Plaintiff was not entitled to recover its pro se attorney's fees incurred in the collection action.[29] The court acknowledged that jurisdictions are split on allowing pro se litigants to recover attorney's fees for successful litigation, but reaffirmed its prior treatment of

---

[18]*See id.* at 1373.

[19]"[A] party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." UTAH R.CIV.P. 8(c).

[20]*Dawson*, 923 P.2d at 1373.

[21]771 P.2d 693, 695 (Utah Ct. App. 1989) (requiring that defense based on contractual limitation be affirmatively pleaded).

[22]*See Dawson*, 923 P.2d at 1373.

[23]*Creekview*, 771 P.2d at 695.

[24]*Dawson*, 923 P.2d at 1373.

[25]*See id.* The Utah Rules of Civil Procedure expressly authorize a defendant to utilize a general denial. UTAH R.CIV.P. 8(b) ("[A] pleader may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but when he does so intend to controvert all its averments, he may do so by a general denial.").

[26]*Id.* at 1374.

[27]*Id.* (quoting Cheney v. Rucker, 381 P.2d 86, 91 (1963)).

[28]*See id.*

[29]*See id.* at 1375.

the issue reasoning that an attorney's "ability to competently present the claim without retained counsel is a sufficient advantage for a lawyer-litigant."[30]

In denying the Plaintiff's request for pro se attorney's fees, the court took note of the public policy reasons buttressing its holding.[31] The court recognized the incentive for attorneys who may recover pro se fees to increase their fees and litigate the claim themselves.[32] This would, in the court's opinion, create "a 'cottage industry' for claimants . . . as a way to generate fees rather than to vindicate personal claims."[33] The court also noted that when an attorney is representing a "paying client," he has an incentive to keep his fee low.[34] The court observed that this policy was particularly applicable to the present facts.[35] Because Dawson could not control the amount of fees the Plaintiffs incurred and because the Plaintiff had no motivation to explore less expensive alternatives,[36] the court did not allow the Plaintiff to recover its pro se fees.[37]

The Plaintiff attempted to distinguish the present facts from previous Utah case law prohibiting the recovery of pro se attorney's fees.[38] The Plaintiff relied on the fact that Dawson had signed a written retainer agreement providing that she was responsible "for attorneys' fees *incurred* in the enforcement of this agreement."[39] The court, however, held that the retainer agreement did not entitle the Plaintiff to recover its pro se attorney fees because "a law firm does not 'incur' fees when it uses its own attorneys in a collection action."[40] Thus, the court continued to deny attorney's recovery for pro se fees.[41]

Finally, and most importantly, the court held that Shaw placed a cap on the amount of fees he could recover by his oral statements to Dawson.[42] As will be analyzed, infra, the court determined that Shaw and Dawson had reached an oral arrangement regarding the amount of fees Shaw could recover; as such, he could only collect $18,000 in attorney's fees.

---

[30]*Id.* at 1374. The court relies on Smith v. Batchelor, 832 P.2d 467, 473–74 (Utah 1992) (prohibiting recovery of pro se attorney fees in part because lay pro se litigants are not compensated; to allow attorney pro se litigants recovery of fees would be discriminatory).

[31]*See id.* at 1375.

[32]*See id.*

[33]*Id.* (quoting Falcone v. Internal Revenue Serv., 714 F.2d 646, 648 (6th Cir. 1983)).

[34]*Id.*

[35]*See id.*

[36]The court noted that Shaw attempted to charge Dawson $900 for his time spent testifying at trial. *See id.*

[37]*See id.*

[38]*See id.*

[39]*Id.* (emphasis added).

[40]*Id.*

[41]*See id.* Consequently, an attorney should draft a retainer agreement making it clear that if she uses attorneys from her firm to recover a delinquent fee, the client will nonetheless be responsible for those fees or, in the alternative, will be responsible for the cost of retaining outside counsel to recover those delinquent fees.

[42]*See id.* at 1373.

3. Background

Dawson was the Utah Supreme Court's first opportunity to interpret an oral fee agreement between an attorney and a client. The court in *Dawson* was, however, guided by prior case law that required courts to ensure that attorneys and clients had entered into fee agreements fairly.[43] Moreover, prior to the court's decision in *Dawson*, Utah courts construed written fee agreements between an attorney and a client according to the terms most favorable to the client.[44]

In 1990, the Utah Court of Appeals interpreted a written contingent fee agreement in *PADD v. Graystone Pines Homeowners*.[45] In *PADD*, the plaintiff attorney and his client entered into a contingent fee agreement giving the attorney sole control over the settlement of the case.[46] After holding that this clause violated ethical rules, the court had to determine the effect of voiding the provision on the parties' remaining fee agreement.[47] The court recognized that if it is unclear whether the parties intended the contingency phrase to be severable from the contract, "any ambiguous term or provision should be construed against the drafter of the attorney fee agreement."[48] The court also quoted with approval the following statement from a Kansas Supreme Court decision: "[I]t is the general rule that in construing a contract between attorney and client, doubts are resolved against the attorney and the construction adopted which is favorable to the client."[49]

Thus, prior to *Dawson*, Utah courts construed written fee agreements between attorneys and clients in favor of the client. The court in *Dawson* extended this interpretation to oral agreements between an attorney and a client such that a court should construe oral representations made by an attorney to a client against the attorney.[50]

4. Analysis

In *Dawson,* the court extended the established method of interpreting written fee agreements against an attorney to oral fee agreements.[51] In its analysis of this issue, the court first noted that agreements between attorneys and clients should be "carefully scrutinized to ensure that they are fair and that they have been entered into without any misrepresentation."[52] The court next stated that, when construing attorney fee contracts, "doubts are resolved against the attorney and the construction adopted

---

[43] *See id.* at 1372 (citing Skeen v. Peterson, 196 P.2d 708, 712 (1948)).

[44] *See generally* PADD v. Graystone Pines Homeowners Ass'n, 789 P.2d 52, 56 (Utah Ct. App. 1990).

[45] 789 P.2d 52 (Utah Ct. App. 1990).

[46] *See id.* at 54.

[47] *See id.* at 54–55.

[48] *Id.* at 56.

[49] *Id.* (quoting Hitchcock v. Skelly Oil Co., 440 P.2d 552, 554 (Kan. 1968)).

[50] *See Dawson*, 923 P.2d at 1372–73.

[51] *See id.*

[52] *Id.* at 1372.

which is favorable to the client."[53] The court further observed that courts generally apply this rule of construction in written fee agreements.[54] Finally, the court noted the prevalent rule of construction, *contra proferentem*, which states that courts should construe ambiguities against the drafter of the document.[55]

After enunciating the above rules, the court then applied them to its fact situation.[56] The court first observed that the written retainer agreement that Dawson signed when she first retained Shaw failed to include a cap on fees and, thus, any potential cap on fees had to be the result of Shaw's oral representations to Dawson.[57] Thus, the court was faced squarely with the task of interpreting an oral fee arrangement. Consequently, the court determined that the rules of interpreting a written fee agreement in favor of the client also apply to oral fee arrangements.[58] The court stated that the "foregoing rules of interpretation [of a fee contract] should apply even though the agreement, *if any*, was orally made."[59]

The court noted further support for holding that Shaw had placed a cap on the amount of fees he could recover. The court acknowledged that the parties had a "professional relationship"; thus, Shaw was required "to be clear in his answers to her inquiry."[60] Additionally, since the retainer agreement Dawson signed failed to include a cap on the amount of Shaw's fees, the court noted that Dawson's inquiry was reasonable regarding the amount of fees Shaw could charge.[61] Moreover, the court noted that the law does not require Shaw to state a cap on the total amount of fees he may charge.[62] As final support for its holding, the court observed that it may hold an attorney to a fee agreement, even though a "greater fee would have been reasonable."[63] The court, therefore, directed that the judgment of the trial court be amended to allow the Plaintiff to recover a total fee of $18,000 for Shaw's representation of Dawson in the divorce action.[64]

Thus, the court in *Dawson* for the first time held applicable the practice of interpreting written fee agreements against the attorney to oral fee agreements.[65] The court relied on the professional relationship between the parties, the reasonableness of Dawson's inquiry as to the total amount of fees that Shaw would charge, and the

---

[53]*Id.* (quoting PADD v. Graystone Pines Homeowners, 789 P.2d 52, 56 (Utah Ct. App. 1990)).

[54]*See id.*

[55]*See id.*

[56]*See id.* at 1372–73.

[57]*See id.* at 1372.

[58]*See id.* at 1372–73.

[59]*Id.* at 1373 (emphasis added). Arguably, the court's inclusion of the term "if any" may be interpreted as evidence that the court did not find that the parties had reached an agreement. Regardless of how this language is construed, it is clear that the court will not hesitate to hold an attorney to any oral statements he makes to his client.

[60]*Id.* at 1373.

[61]*See id.*

[62]*See id.* This is a significant point that practitioners should keep in mind; there is no requirement to state a cap on the amount of fees that an attorney may charge. Indeed, after the *Dawson* decision, attorneys may not want to orally give a client an "estimate" of what the attorney fees may total.

[63]*Id.* (citing Centurian Corp. v. Ryberg, McCoy & Halgreen, 588 P.2d 716 (Utah 1978)).

[64]*See id.*

[65]*See id.*

opportunity for Shaw to refuse to state any amount as a cap on his fees.[66] Thus, if a client queries an attorney as to the total amount of fees that he will charge, and if the attorney is unsure as to an amount, the attorney should refuse to "cap" fees because a court may hold such a cap binding against the attorney.

5. Conclusion

Dawson changes Utah law because Utah courts will now interpret oral fee arrangements between an attorney and a client in the same manner as written fee agreements, against the attorney. Additionally, the court reaffirmed prior holdings by requiring a party to fully litigate an issue before collateral estoppel prohibits relitigation, by allowing a general denial when a party does not raise a new matter, and by not allowing an attorney to recover pro se attorney's fees in a collection action. The significant new direction in Utah law, after *Dawson*, is the interpretation of oral fee agreements against the attorney. Thus, as an attorney, you should recognize that if you make an oral statement to a client regarding the total amount of fees you may charge, "everything you say can and *will* be used against you in a court of law."[67]

B. Substantive and Procedural Requirements in Judicial Discipline: Guidelines for the Judicial Conduct Commission[*]

1. Introduction

In *In re Worthen*,[1] the Utah Supreme Court fleshed out the constitutional and statutory framework under which the Judicial Conduct Commission conducts judicial disciplinary proceedings. The opinion explains the substantive elements of the constitutional grounds for judicial discipline including "willful misconduct in office," "willful and persistent failure to perform judicial duties," and "conduct prejudicial to the administration of justice which brings a judicial office into disrepute."[2]

The court held that "willful misconduct" requires (i) unjudicial conduct (ii) committed in bad faith (iii) by a judge acting in his judicial capacity.[3] "Willful and persistent failure to perform judicial duties" refers to situations where a judge knows of the duty to perform judicial responsibilities but, nevertheless, knowingly and

---

[66] *See id.*

[67] *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966) (emphasis added).

[*] Daniel E. Barnett, Staff Member, *Utah Law Review.*

[1] 926 P.2d 853 (Utah 1996) (opinion by Zimmerman, C.J.).

[2] UTAH CONST. art. VIII, § 13. Article VIII section 13 of the Utah Constitution also provides sanctions for "final conviction of a crime punishable as a felony" and "disability that seriously interferes with the performance of judicial duties." The court addressed these items only briefly finding them self explanatory. *See infra* text accompanying notes 31–34.

[3] *See Worthen*, 926 P.2d at 869.

persistently fails to perform them.[4] "Conduct prejudicial to the administration of justice which brings a judicial office into disrepute" requires unjudicial conduct committed without bad faith in the judicial capacity or willful conduct committed with bad faith but not in the judicial capacity, either of which has the effect of lowering public esteem for the judicial office.[5] The court emphasized that correcting mere legal error fell outside the Commission's purview and that the Commission must only discipline defendants with the requisite culpable mental state.[6]

The court also held that defendants before the Judicial Conduct Commission were entitled to due process[7] and that the Judicial Conduct Commission generally would have to prove its case by a preponderance of the evidence unless it was to recommend interim suspension, in which case it would have to prove its case by clear and convincing evidence.[8] This case clarifies the constitutional and statutory conditions for discipline of the judiciary.

2. Background

Prior to 1971, impeachment[9] and removal from office[10] were the only procedures by which members of the Utah judiciary could be disciplined. As a more effective means of dealing with judicial misconduct, the legislature enacted the Judge's Retirement Act[11] which created the Commission on Judicial Qualifications.[12] This Commission on Judicial Qualifications had the power to remove, suspend, censure, or reprimand judges for misconduct.[13]

---

[4]*See id.* at 869–70.

[5]*See id.* at 870–72.

[6]*See id.* at 870–71.

[7]*See id.* at 876.

[8]*See id.* at 866.

[9]*See* UTAH CONST. art VI, §§ 17–19. The Utah Constitution provides for impeachment of judicial officers for "high crimes, misdemeanor, or malfeasance in office." *Id.* § 19. Impeachment proceedings are initiated by a two-thirds vote of the House. *See id.* § 17. The Senate then conducts a trial that requires a two-thirds vote to impeach. *See id.* § 18.

[10]*See* UTAH CONST. art. VIII, § 11 (repealed 1984) (providing for removal from office for cause by concurrent two-thirds vote of House and Senate).

[11]Judges Retirement Act, ch. 113, 1971 Utah Laws 399 (amended by Judicial Qualifications Commission Act, ch. 92, 1975 Utah Laws 374; repealed by Judicial Qualifications Commission Act, ch. 146, 1977 Utah Laws 637).

[12]*See* Judges Retirement Act, ch. 113 § 38, 1971 Utah Laws 412.

[13]The 1977 Judicial Qualifications Commission Act provided:

> A justice, judge, or justice of the peace of any court of this state in accordance with the procedure described in this section, may be removed from office, suspended, censured, or reprimanded for:
> (a) Willful misconduct in office in any term of office subsequent to the enactment of this section;
> (b) Final conviction of a crime punishable as a felony under state or federal law;
> (c) Persistent failure to perform his duties;
> (d) Habitual use of alcohol or drugs which interferes with the performance of his judicial duties.

Judicial Qualifications Commission Act, ch. 146 § 2, 1977 Utah Laws 637, 638–39. The 1977 Act further empowered the Commission on Judicial Qualifications to retire any justice or judge "for disability

In 1984, Utah amended the Judicial Article of its Constitution to include language similar to the 1977 Judicial Qualifications Commission Act. The amended provision reads:

> A Judicial Conduct Commission is established which shall investigate and conduct confidential hearings regarding complaints against any justice or judge. Following its investigations and hearings, the Judicial Conduct Commission may order the reprimand, censure, suspension, removal, or involuntary retirement of any justice or judge for the following:
>
> (1) action which constitutes willful misconduct in office;
> (2) final conviction of a crime punishable as a felony under state or federal law;
> (3) willful and persistent failure to perform judicial duties;
> (4) disability that seriously interferes with the performance of judicial duties; or
> (5) conduct prejudicial to the administration of justice which brings a judicial office into disrepute.
>
> Prior to the implementation of any commission order, the Supreme Court shall review the commission's proceedings as to both law and fact. . . . After its review, the Supreme Court shall, as it finds just and proper, issue its order implementing, rejecting, or modifying the commission's order.[14]

Statutes promulgated under the authority of this section define the composition of the Judicial Conduct Commission (the "Commission")[15] and prescribe rules and procedures for the Commission's proceedings.[16]

A lack of funding resulted in little activity by the Commission during its first decade.[17] Recent increases in the Commission's budget, though, have led to a higher level of activity by the Commission, and the topic of this Development represents the Commission's first cases to be formally reviewed by the supreme court.[18]

3. The Case.

In re Worthen merges two cases on appeal to the supreme court from Judicial Conduct Commission proceedings. In the first case, a justice court judge was accused of willful misconduct in office and conduct prejudicial to the administration of justice. The allegations leading to these charges were that the judge: (i) exceeded his authority to punish contempt of court with incarceration of no more than five days; (ii) relied on an unsigned, undated information; and (iii) improperly issued an

---

seriously interfering with the performance of his duties which is . . . of a permanent character." *Id.* § 3 at 639. 1977 Judicial Qualifications Commission Act, ch. 146, 1977 Utah Laws 639 § 3.

[14]UTAH CONST. art. VIII, § 13.

[15]*See* UTAH CODE ANN. § 78-7-27 (1996).

[16]*See* UTAH CODE ANN. § 78-7-30 (Supp. 1997).

[17]*See* In re Worthen, 926 P.2d 853, 858 (Utah 1996).

[18]One prior unreported Commission proceeding resulted in a recommendation for sanction by the supreme court, however, the defendant judge in that case did not challenge the sanction. *See id.*

information, warrant, and other official court documents.[19] For example, with the judge's knowledge, the clerk of the court had prepared, signed, and stamped the judge's name to an information.[20] The stamp indicated that the clerk had sworn to the veracity of the information in the presence of the judge, which he had not.[21]

In the second case, a justice court judge was accused of "willful misconduct in office, conduct prejudicial to the administration of justice, and willful and persistent failure to perform his judicial duties."[22] The allegations leading to the charges were that the judge: (i) had failed to report convictions and to forward drivers' licenses to the Utah Drivers License Division; (ii) had improperly held DUI convictions in abeyance; (iii) had reduced charges against a person related to court personnel; and (iv) had maintained an inadequate accounting system.[23] In both cases, the Commission appointed special masters to hear and take evidence.[24] The masters reported findings of fact to the Commission, but in both cases declined to reach the question of whether the judges' conduct constituted "willful misconduct," "prejudicial conduct," or "willful and persistent failure to perform their duties."[25] Without explanation, the Commission adopted the masters' findings of fact and ultimately concluded that the judges' conduct met these constitutional and statutory grounds for discipline.[26] In one case the Commission ordered public censure, in the other, public censure plus a ninety day suspension.[27]

Before the supreme court, neither judge challenged the facts upon which the charges were based.[28] Each judge, however, asserted that his misconduct did not rise to the level of "willful misconduct in office" and that the sanctions were too harsh for "conduct prejudicial to the administration of justice."[29] The court remanded both cases to the Commission for further proceedings consistent with the substantive and procedural rules promulgated in the court's opinion.[30]

---

[19] *See id.* at 859–60.
[20] *See id.* at 859.
[21] *See id.*
[22] *Id.* at 861.
[23] *See id.*
[24] *See id.*
[25] *See id.* at 860–62.
[26] *See id.* at 860–61.
[27] *See id.* at 860, 862.
[28] *See id.* at 861–62.
[29] *See id.*
[30] *See id.* at 878.

4. Analysis

(a) Substantive Issues

Of the five constitutional grounds for judicial discipline, the court noted that, for the second[31] and fourth grounds,[32] the required conduct or omission could be entirely collateral or incidental to the holding of judicial office.[33] Beyond that, the court found these grounds self-explanatory.[34] By contrast, the court noted that "the first, third, and fifth grounds appear specifically connected to the judicial office."[35] The court then proceeded to explain the substance of these three grounds for judicial discipline.

(i) Willful Misconduct in Office

The court found that a facial reading of the first ground for discipline, "willful misconduct in office," requires "(i) one or more acts of misconduct (ii) committed with a culpable mental state (iii) by a judge in connection with the judicial office—in effect, abuse or misuse of the judicial office."[36] "Misconduct" requires "conduct inappropriate for a judge—in short, unjudicial conduct."[37] The court emphasized that mere legal errors did not constitute misconduct. Rather, misconduct "refers to behavior that departs from the ethical norms governing judges" and that "these norms are spelled out in the the canons contained in the Code of Judicial Conduct."[38] The court found that the canons found in the Code of Judicial Conduct provide specific and adequate notice to judges as to what constitutes unjudicial conduct and that unjudicial conduct would therefore be determined by reference to these canons.[39]

The culpable mental state required for the Commission to find a judge afoul of this ground is fairly specific. The Commission must show that the judge "intentionally committed a lawful act for an improper purpose or intentionally committed an unlawful act that the judge knew or should have known to be beyond his or her lawful power and committed the act for an improper purpose."[40] Thus, mere knowledge or constructive knowledge that the judge's act was unlawful will not suffice. Rather, in order to have the requisite mental state, a judge must act in "bad faith," that is, with "a purpose of misuse of the judicial office."[41] The court required this specific mental state to prevent the punishment of judges who act "negligently" but "out of the best

---

[31] *See* UTAH CONST. art. VIII, § 13(2) ("final conviction of a crime punishable as a felony under state or federal law").

[32] *See id.* § 13(4) ("disability that seriously interferes with the performance of judicial duties").

[33] *See* In re Worthen, 926 P.2d 853, 867 (Utah 1996).

[34] *See id.*

[35] *Id.* But note later that the court holds that willful misconduct outside the judicial office may be "prejudicial to the administration of justice." *See infra* text accompanying notes 60–61.

[36] *Worthen*, 926 P.2d at 867.

[37] *Id.* at 867–68.

[38] *Id.* at 868.

[39] *See id.*

[40] *Id.* at 869.

[41] *Id.*

motives"[42] and to keep claims that would more appropriately be handled in the appeal process outside the reach of the Commission.[43]

(ii) Willful and Persistent Failure to Perform Judicial Duties

The "judicial duties" contemplated by "willful and persistent failure to perform judicial duties" include the adjudicative, administrative, disciplinary, and self-disqualification responsibilities listed in canon three of the Utah Code of Judicial Conduct.[44] Judicial discipline is "triggered when a judge has entirely failed to perform one or more of . . . [these] responsibilities."[45] However, the judge must be acting with a particular mental state and the failure must be of a particular persistent quality before discipline is appropriate.[46]

In contrast to "willful misconduct" censured in the first ground, "the 'willful and persistent failure [to perform]' ground refers fundamentally to abdication of responsibility" and therefore does not require a finding of bad faith.[47] The Commission must merely show that the judge "knew of the duty to act and knowingly failed to perform" that duty.[48] Additionally, the failure to perform must be "persistent."[49] The court followed the dictionary definition of persistent, but noted that the reason for failure must be other than disability in order to distinguish this ground from the fourth ground for discipline.[50]

(iii) Conduct Prejudicial to the Administration of Justice

The fifth ground for judicial discipline encompasses "conduct prejudicial to the administration of justice which brings a judicial office into disrepute."[51] Although this ground seems to encompass conduct that is not necessarily misconduct, the court limited this ground to misconduct in order to restrict the Commission's jurisdiction to matters of misconduct, not legal error, and to avoid concerns over vagueness and lack of notice.[52] Thus, this ground requires "unjudicial conduct" earlier defined as "a breach of the ethical canons contained in the Code of Judicial Conduct."[53] "Prejudicial" means "[t]ending to injure or impair; hurtful; damaging; detrimental"[54]

---

[42] *Id.* at 868.

[43] *See id.*

[44] *Id.* at 869.

[45] *Id.*

[46] *See id.* at 870.

[47] *Id.*

[48] *Id.* But note that in this instance the "willful" element requires actual, not imputed knowledge. *See id.*

[49] *See id.*

[50] *See id.* (quoting WEBSTER'S NEW INT'L DICTIONARY 1827 (2d. ed. 1956) (defining persistent as "inclined to persist or insist; tenacious of position or purpose") [hereinafter WEBSTER'S].

[51] *Id.*

[52] *See id.*

[53] *Id.; see also supra* text accompanying notes 37–39.

[54] *Worthen*, 926 P.2d at 868 (quoting WEBSTER'S, *supra* note 50, at 1949).

and "administration of justice . . . connotes the entire range of activities and functions of the legal system."[55]

To sanction prejudicial conduct, the Commission must find that the conduct brought "a judicial office into disrepute," that is, "tend[ed] to lower public esteem for the entire judiciary so as to reduce its effectiveness."[56] Finding conduct prejudicial requires "(i) identifying the relevant 'unjudicial conduct,' and (ii) assessing whether that conduct would appear to an objective observer to prejudice public esteem for the judicial office."[57]

Prejudicial conduct committed in office and bringing about disrepute requires a lesser mental state than willful misconduct. Unlike "willful misconduct," "prejudicial conduct" merely requires a negligent mental state rather than "bad faith."[58] Moreover, the prejudicial conduct need not occur in office.[59] However, to be prejudicial, misconduct committed out of office must be willful.[60] "Thus, 'prejudicial conduct' includes both unjudicial conduct committed in a judicial capacity but without bad faith and willful misconduct committed in bad faith but not in a judicial capacity."[61]

(b) Procedural Matters

In addition to clarifying the substantive grounds for discipline, the court explained several procedural matters including the standard under which the court would review Commission proceedings, the Commission's burden of proof, and due process.

(i) Standard of Review by the Supreme Court

The Utah Constitution provides that "the Supreme Court shall review the commission's proceedings as to both law and fact"[62] but does not specify the standard of review that the court is to apply. After considering the relative merits of the standard that other jurisdictions apply to review of judicial discipline proceedings, the court concluded that it would not overturn the Commission's findings of fact "unless they are arbitrary, capricious, or plainly in error but . . . reserve[d] the right to draw inferences from the basic facts which may differ from the Commission's inferences."[63] The court found the arbitrary and capricious standard appropriate because it applies that standard of review to the attorney discipline process and the supreme court's "relationship to the attorney discipline process approximates its

---

[55]*Id.* (citations omitted).
[56]*Id.* at 871.
[57]*Id.* at 872.
[58]*See id.* at 870–71.
[59]*See id.* at 870.
[60]*See id.* at 870–71.
[61]*Id.* at 871.
[62]UTAH CONST. art. VIII, § 13.
[63]*Worthen*, 926 P.2d at 865.

relationship to Commission proceedings."[64] In both attorney discipline and judicial discipline, the supreme court has the responsibility for determining both the propriety of the conduct in question and the appropriate sanction to be imposed.[65]

Review under the arbitrary and capricious standard accords the Commission's findings less deference than is accorded a regular trial court.[66] The court found less deferential review appropriate "because of the unique nature of disciplinary actions and our knowledge of the nature of the practice of law."[67] An even less deferential review was rejected in order to honor the constitutionally contemplated "significant role" of the Commission in "gathering evidence of judicial misconduct, making determinations of fact, and recommending sanctions" to the supreme court.[68]

Also by analogy to attorney discipline cases, the court declared that it would grant no deference to the Commission's decision as to what constitutes an appropriate sanction.[69] As with attorney discipline, the Utah Constitution grants the supreme court discretion to discipline judges, and the court may do so to the extent that it finds discipline "just and proper."[70]

(ii) The Commission's Burden of Proof

The court determined that the Commission would generally have to prove its case against a justice or judge by a preponderance of the evidence, but would have to do so by clear and convincing evidence when the Commission recommended interim suspension pending a final decision by the supreme court.[71] This standard comports with the standard imposed for attorney disciplinary proceedings[72] and follows the rationale of the California Supreme Court in applying the same burden of proof in both judicial and attorney disciplinary proceedings.[73]

(iii) Due Process

The supreme court found that, although the Commission had promulgated procedural rules that provide sufficient due process, the Commission's implementation of its rules had violated the defendants' due process rights.[74] Utah's due process clause provides: "No person shall be deprived of life, liberty or property, without due process of law."[75] "[W]here notice is ambiguous or inadequate to inform a party of

---

[64] *Id.* at 863.
[65] *See id.*
[66] *See id.*
[67] *Id.* (quoting In re Knowlton, 800 P.2d 806, 808 (Utah 1990)).
[68] *Id.* at 864.
[69] *See id.* at 863, 865 (citing *Knowlton*, 800 P.2d at 808).
[70] *See* UTAH CONST. art. VIII, § 13.
[71] *See Worthen*, 926 P.2d at 866.
[72] *See id.* (citing UTAH R. LAWYER DISCIPLINE AND DISABILITY 17(a)–(b)).
[73] *See id.* at 865–66 (citing Geiler v. Comm'n on Judicial Qualifications, 515 P.2d 1, 4 (Cal. 1973)).
[74] *See id.* at 877–78.
[75] UTAH CONST. art. I, § 7.

the nature of the proceedings against him . . . a party is deprived of due process."[76] "[T]o satisfy due process, a hearing must be prefaced by timely notice which adequately informs the parties of the specific issues they must prepare to meet."[77]

The court held that the notice provided to the defendant judges lacked the requisite specificity "regarding the governing legal and ethical standards and the rules or laws the judges allegedly violated."[78] The Court stated:

> To meet minimum due process requirements, the Commission's notice of formal proceedings must set forth the applicable provisions of the Code of Judicial Conduct alleged to have been violated. Further, in cases such as these where the ethical violation allegedly results from underlying violations of statutes and court rules, the Commission must identify these statutes and rules within the notice.[79]

The court further declared that "the notice must be framed in terms of the elements necessary to prove the charges made in the context of the facts alleged."[80]

5. Conclusion

In *Worthen*, the Utah Supreme Court explained the elements of the Constitutional and statutory grounds for judicial discipline and provided the Judicial Conduct Commission with guidance as to the procedure required to assure due process to judges falling under the scrutiny of the Commission. The court emphasized that mere legal errors, which are properly handled by the appellate process, do not warrant sanction. Rather, the Commission must only discipline defendants who have the requisite guilty mental state.

---

[76] *Worthen*, 926 P.2d at 877 (quoting Nelson v. Jacobsen, 669 P.2d 1207, 1212 (Utah 1983)).

[77] *Id.* (citations and emphasis omitted).

[78] *Id.* at 877–78.

[79] *Id.* at 878.

[80] *Id.* The court also pointed out that the Commission did not follow its own Commission Rule 20 by failing to provide the court with materials that should have been included in the record that the Commission submitted to the supreme court. *See id.* These include, among other things, the original complaint which led to the Commission's investigation, a certificate of notice to the judge, and a transcript of the evidence and the Commission's proceedings. *See id.*

VII. TORT LAW

*The Utah Health Care Malpractice Act and Wrongful Death Actions**

1. Introduction

In *Jensen v. IHC*,[1] the Utah Supreme Court held for the first time that the Utah Health Care Malpractice Act's ("Act")[2] two-year statute of limitations governs wrongful death claims arising out of medical malpractice.[3] The court stated that the Act's statute of limitations began to run when the "patient discovers, or through the use of reasonable diligence should have discovered the injury."[4] The court further explained that where the decedent allowed the statute of limitations to run on her underlying personal injury claim the personal representative or the heirs' ensuing wrongful death claims were also barred.[5]

2. The Case

On December 13, 1989, Dr. Michael Healy ("Dr. Healy"), an obstetrician, performed a cesarean delivery on Shelly Hipwell ("Shelly") at McKay-Dee Hospital ("McKay-Dee").[6] Following the delivery, Shelly experienced various complications and was transferred to the University of Utah Hospital ("University Hospital") for further treatment. During a biopsy procedure at the University Hospital, a resident physician punctured Shelly's heart with a biopsy needle. As a result of the needle puncture, Shelly suffered anoxic brain damage and slipped into a coma. Shelly remained in a coma until her death.

Upon learning of Shelly's condition, Dr. Healy discussed Shelly's case with his brother, attorney Tom Healy. Following their conversation, attorney Healy discussed the matter with Diane DeVries, the Healys' sister. Ms. DeVries knew Shelly's family ("the Hipwells"), and attorney Healy asked Ms. DeVries to recommend medical malpractice attorney Roger Sharp to the family. Following her brother's request, Ms. DeVries recommended Sharp to the Hipwells. However, Ms. DeVries did not reveal to the Hipwells that she was related to the Healy brothers.

On February 10, 1989, the Hipwells retained Sharp to pursue Shelly's medical malpractice case. Shortly thereafter, attorney Healy contacted Sharp to confirm a fee-splitting arrangement. Throughout Sharp's investigation of Shelly's case, he never

---

*Edward T. Vasquez, Staff Member, *Utah Law Review*.

[1]944 P.2d 327 (Utah 1997) (opinion by Zimmerman, C.J.).

[2]UTAH CODE ANN. §§ 78-14-1 to -4 (1996).

[3]*Jensen*, 944 P.2d at 332 (interpreting UTAH CODE ANN. § 78-14-4(1) (1996)).

[4]*Id.* The Act's statute of limitations begins to run unless it has been tolled. *See, e.g.*, UTAH CODE ANN. § 78-14-4(1)(b) (1996) (providing that fraudulent concealment claims toll the Act's statute of limitations).

[5]*See id.*

[6]The facts and procedural history are taken from the court's opinion in *Jensen*, 944 P.2d at 328–31.

received or demanded Shelly's complete medical records from either Dr. Healy or McKay-Dee. At best, Sharp's investigation of Shelly's medical malpractice claim was minimal. Nonetheless, Sharp managed to settle Shelly's medical malpractice claim against the University Hospital for $250,000.

In mid-1989, Shelly was transferred to the Greenery, a rehabilitation facility in the State of Washington. On August 10, 1989, a social worker from the Greenery, Carol Pederson, contacted attorney Simon Forgette and requested that he provide an opinion of the settlement in Shelly's case and evaluate the conduct of Shelly's attorneys. Following Pederson's request, Forgette's memo to what would become Shelly's case file indicated that Shelly's liver had been lacerated during the cesarean delivery at McKay-Dee.

On August 29, 1989, the Hipwells requested that Forgette advise the family on any further legal action. After reviewing Shelly's medical records, which Pederson provided, Forgette requested a meeting with Ms. Jensen, Shelly's mother. Ms. Jensen orally retained Forgette on October 19, 1989.

On October 20, 1989, Forgette requested a copy of Shelly's case file from Sharp. Forgette received a portion of Shelly's case file from Sharp on December 26, 1989, but did not receive the entire file until February 15, 1990. After reviewing the file, Forgette learned of Dr. Healy's involvement in Shelly's case and that Sharp's file did not contain Shelly's complete medical records.[7]

On December 16, 1991, Forgette filed a Notice of Intent to Commence Suit against Dr. Healy and McKay-Dee. On May 27, 1992, Shelly died. Forgette filed the Hipwells' wrongful death action against Dr. Healy and McKay-Dee on July 29, 1992. The trial court, upon completing discovery, granted Dr. Healy's and McKay-Dee's motion for summary judgment. The trial court held that the Act's two-year statute of limitations had run by December of 1991.

On appeal to the Utah Supreme Court, the Hipwells made the following arguments: (1) the wrongful death statute of limitations[8] governed the Hipwells' wrongful death action; (2) alternatively, if the Act's statute of limitations applied to the Hipwells' action, the statute began to run upon Shelly's death; and (3) Dr. Healy's conduct following Shelly's injuries amounted to fraudulent concealment[9] and tolled the Act's statute of limitations.[10] Upon review, the court determined that the Act's

---

[7]*See id.* at 330. After the meeting with Ms. Jensen, Forgette's memo to Shelly's file indicated that he was still under the assumption that Shelly's liver was lacerated while she was at McKay-Dee. *Id.*

[8]UTAH CODE ANN. § 78-12-28(2) (1996).

[9]*See* UTAH CODE ANN. § 74-14-4(1)(b) (1996) (providing that fraudulent concealment claims toll the Act's statute of limitations).

[10]*See id.* The Hipwells also asserted two additional arguments: (1) Shelly's minor children should have been allowed to proceed with their wrongful death claim because their minority tolled the Act's statute of limitations (*see* UTAH CODE ANN. § 78-12-36 (1996)); and (2) the three-year statute of limitations for common law fraud governed their wrongful death action (*see* UTAH CODE ANN. § 78-12-26(3) (1996)). *See also Jensen*, 944 P.2d at 331. The court dismissed the Hipwells' first argument because Shelly had a legal guardian at the time of her death, and section 78-12-36 only applies where the person entitled to bring the action is without a legal guardian. *See Jensen*, 944 P.2d at 335. Finally, the court dismissed the Hipwells' second argument because the Act specifically provides for a fraud claim under the fraudulent concealment provision (*See* UTAH CODE ANN. § 78-14-4(1)(b) (1996)). *See Jensen*, 944

two-year statute of limitations governed the Hipwells' wrongful death action. However, the court remanded the case back to the trial court to decide if the Act's statute of limitations had run or if the Hipwells' fraudulent concealment claim tolled the statute of limitations.

3. Background

Two competing standards exist throughout jurisdictions in the United States concerning which statutes of limitations govern wrongful death actions arising out of medical malpractice.[11] Some courts have asserted that the statute of limitations found in wrongful death statutes governs wrongful death claims arising out of medical malpractice.[12] Other courts have applied the statute of limitations found in medical malpractice provisions to wrongful death claims based upon alleged medical malpractice.[13]

(a) The Wrongful Death Statute

The significance of applying a wrongful death provision's statute of limitations to a wrongful death claim arising out of medical malpractice is that the statute does not begin to run until the patient's death occurs.[14] Therefore, in cases where the decedents allow the statute of limitations to run on their underlying medical malpractice claims, the personal representative and surviving heirs of the decedents may still pursue a wrongful death action.[15]

Courts have identified several reasons for following the aforementioned standard. In *Baysinger v. Hanser*,[16] the Missouri Supreme Court reasoned that "[w]hen the wrong of malpractice . . . results in . . . death the . . . suit and the object of the action is of necessity for and under the wrongful death statute and not for the personal wrong of malpractice."[17] Some courts suggest that a wrongful death action does not derive from the wrong done to the decedent, but "creates a cause of action

---

P.2d at 335–36. Therefore, the Act's provision was more specific than the common law fraud statute and thus, under the rules of statutory interpretation, governed the Hipwells' wrongful death claim. *See id.* at 335–37.

[11]*See* David P. Chapus, Annotation, *Medical Malpractice: Statute of Limitations in Wrongful Death Action Based on Medical Malpractice*, 70 A.L.R. 4th 535, 540 (1990).

[12]*See id.*

[13]*See id.*

[14]*See* Gramlich v. Travelers Ins. Co., 640 S.W.2d 180, 186 (Mo. Ct. App. 1982) (holding "the action for wrongful death is an action separate and distinct from the action for injuries to the decedent. It cannot arise and the statutory beneficiaries can take no action with respect to their claim until after death occurs").

[15]*See id.* at 185. *See, e.g.*, Brosse v. Cumming, 485 N.E.2d 803, 807 (Ohio Ct. App. 1984) (holding that wrongful death statute governs limitation on plaintiff's wrongful death claim arising under medical malpractice, and that all actions for wrongful death shall be commenced within two years after the decedent's death).

[16]199 S.W.2d 644, 647 (Mo. 1947).

[17]*Id.* (citing Bloss v. Dr. C. R. Woodson Sanitarium, 5 S.W.2d 367 (Mo. 1928).

in the surviving spouse for [his or her] loss of consortium and . . . mental anguish."[18] Other courts reason that a wrongful death action is a legislative creation that did not exist at common law; therefore, a wrongful death statute is the only remedy for medical malpractice resulting in death.[19]

In *Taylor v. Giddens*,[20] the Louisiana Supreme Court explained that "[t]hough it may have its genesis in an act of malpractice, a wrongful death action is not a malpractice action."[21] The court indicated that "[f]rom its inception . . . , [a wrongful death] action exists only in favor of the victim's beneficiaries."[22] The court concluded that the state protected the family unit by applying the wrongful death provision's statute of limitations to wrongful death actions based upon alleged malpractice.[23]

(b) The Medical Malpractice Statute

The opposite view followed by some jurisdictions is that the state's medical malpractice provision's statute of limitations applies to wrongful death claims arising out of malpractice.[24] Under the medical malpractice statute of limitations wrongful the statute begins to run at the time the injured party discovers or should have reasonably discovered the underlying injury.[25] Therefore, if the statute of limitations runs on the decedent's underlying personal injury claim, the statute also bars the personal representative and heirs from bringing a wrongful death claim.[26]

Courts following the general rules of statutory construction have explained that a medical malpractice statute that specifically provides for wrongful death actions will prevail over a more general wrongful death statute.[27] In *Reyes v. Kent General Hospital, Inc.*,[28] the Delaware Supreme Court determined that Delaware's medical malpractice statute of limitations barred a surviving spouse's wrongful death action.[29] In *Reyes*, the decedent failed to bring a medical malpractice action for her personal injury prior to the expiration of the medical malpractice statute of limitations.[30] The court indicated that the Delaware medical malpractice provision dictates that "whether the action be one for personal injury or personal injury resulting in death, the Statute

---

[18]Matthews v. Travelers Indem. Ins. Co., 432 S.W.2d 485, 488 (Ark. 1968).

[19]*See* Hachman v. Mayo Clinic, 150 F.Supp. 468, 470 (D. Minn. 1957) (holding that "[t]he negligent acts of a physician or a hospital resulting in death gives rise to only one right of action, the exclusive remedy afforded by the wrongful death statute").

[20]618 So.2d 834 (La. 1993).

[21]*Id.* at 841.

[22]*Id.*

[23]*See id.*

[24]*See* Chapus, *supra* note 11, at 540.

[25]*See, e.g.*, UTAH CODE ANN. § 78-14-4(1) (1996).

[26]*See* Reyes v. Kent Gen. Hosp., Inc., 487 A.2d 1142, 1145 (Del. 1984) (holding that plaintiff's medical malpractice personal injury and wrongful death claims were barred by Delaware medical malpractice statute).

[27]*See* Frady v. Hedgcock, 497 N.E. 2d 620, 622 (Ind. App. 1 Dist. 1986).

[28]487 A.2d 1142 (Del. 1984).

[29]*See id.* at 1143 (interpreting DEL. CODE ANN. tit. 18, § 6856 (1984)).

[30]*See id.*

of Limitations begins to run on the date of the alleged wrongful act or omission."[31] Therefore, the court held that the decedent's failure to file a timely malpractice action for her personal injury also barred her husband's wrongful death action.[32]

(c) Utah's Position

In *Jensen*, the Utah Supreme Court aligned itself with the jurisdictions applying the medical malpractice statute of limitations to wrongful death claims arising out of medical malpractice.[33] While the court addressed this issue for the first time in *Jensen*, the Utah Court of Appeals previously acknowledged that the Act's two-year statute of limitations applied to wrongful death actions.[34]

In *Deschamps v. Pulley*,[35] the Utah Court of Appeals determined that the Act's two-year statute of limitations barred a daughter's ("Deschamps") wrongful death action against her deceased mother's physician.[36] In analyzing the case, the court noted that the Act defined "malpractice actions" to include wrongful death claims.[37] The *Deschamps* court also indicated that the Act's statute of limitations began to run when "the injured person knew or should have known that he had sustained an injury and that injury was caused by a negligent action."[38] The court determined that Deschamps knew or should have known of her legal injury prior to the expiration of the Act's two-year statute of limitations.[39] Therefore, the court held that the Act's statute of limitations barred Deschamps' wrongful death action.[40]

4. Analysis

In *Jensen v. IHC*,[41] the Utah Supreme Court centered its analysis around two prevailing issues. First, the court addressed whether the Act's two-year statute of limitations applied to wrongful death actions arising out of medical malpractice.[42] Next, the court analyzed whether a wrongful death action fails where, prior to the injured party's death, the Act's statute of limitations barred the decedent's personal injury claim.[43] The court's analysis follows.

---

[31] *Id.* at 1145-46.
[32] *See id.* at 1146.
[33] 944 P.2d 327 (Utah 1997).
[34] *See* Deschamps v. Pulley, 784 P.2d 471 (Utah Ct. App. 1989).
[35] *See id.*
[36] *See id.*
[37] *Id.* (citing UTAH CODE ANN. § 78-14-3(12) (1996)).
[38] *Id.* at 473 (citing Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979).
[39] *See id.*
[40] *See id.* at 471.
[41] 944 P.2d 327 (Utah 1997).
[42] *See id.* at 331.
[43] *See id.* at 332.

(a) Statutory Construction

The Utah Supreme Court began its analysis in *Jensen* by determining which statute of limitations applied to the Hipwells' wrongful death action.[44] The court explained that "[w]hen we are faced with two statutes that purport to cover the same subject, we seek to determine the legislature's intent as to which applies."[45] The court noted that the general rules of statutory construction provide that the "best evidence of legislative intent is the plain language of the statute,"[46] and that "'a more specific statute governs over a more general statute.'"[47]

The court explained that the Act specifically provides that "[n]o malpractice action . . . may be brought unless it is commenced within two years after the plaintiff or patient discovers . . . the injury."[48] Furthermore, the court noted that the Act defined "malpractice actions" to include "'any action against a health care provider, whether in . . . *wrongful death* or otherwise'"[49] Based upon the plain language of the statute, the court reasoned that the legislature intended the Act to apply to actions for wrongful death based upon alleged medical malpractice.[50]

Finally, the court noted that the Act was much more specific than the wrongful death statute,[51] which supported the Court's ultimate holding that the Act's two year statute of limitations governed the Hipwells' wrongful death action.[52]

(b) A Personal Representative's or Heir's Wrongful Death Action Fails Where the Decedent Allowed the Statute of Limitations to Run on the Underlying Personal Injury or Malpractice Claim.

The Hipwells argued that if the Act's statute of limitations applied to their wrongful death action, the event that triggered the statute was Shelly's death.[53] The Hipwells maintained that in a wrongful death action, the "injury" is not the medical malpractice, but the injured party's ensuing death.[54] The court rejected the Hipwells' argument.[55]

---

[44] *See id.* at 331–32. The court determined whether section 78-12-28(2) of the Utah Code (the wrongful death statute) or section 78-14-4 of the Utah Code (the Act) governed the Hipwells' action. *Id.*

[45] *Id.* at 331.

[46] *Id.* (citing Sullivan v. Scoular Grain Co., 853 P.2d 877, 879 (Utah 1993) (citing Jensen v. IHC, Inc., 679 P.2d 903, 906 (Utah 1984)).

[47] *Id.* (citing De Baritault v. Salt Lake City Corp., 913 P.2d 743, 748 (Utah 1996) (quoting Pan Energy v. Martin, 813 P.2d 1142, 1145 (Utah 1991)).

[48] *Id.*

[49] *Id.* (quoting UTAH CODE ANN. § 78-14-4 (1996)).

[50] *See id.* at 332.

[51] *See id.*

[52] *See id.*

[53] *See id.*

[54] *See id.*

[55] *See id.*

The court acknowledged that a wrongful death action "is an independent action accruing in the heirs of the deceased."[56] However, the court noted that the heirs' rights were not entirely separated from the decedent's because the heirs' rights largely run to them from the deceased.[57] The court reasoned that a wrongful death claim "is based on the underlying wrong done to the decedent and may only proceed subject to some of the defenses that would have been available against the decedent had she lived to maintain her own action."[58]

Continuing its analysis, the court reasoned that an injured individual "is not merely a conduit for the support of others, he is master of his own claim and he may settle the case or win or lose a judgment on his own injury even though others may be dependent upon him."[59] Furthermore, the court explained that the main purpose of any statute of limitations is to compel exercise of a right within a reasonable time to avoid stale claims, loss of evidence, and faded memories.[60] Therefore, the court reasoned that wrongful death actions fail where the decedent allowed the statute of limitations to run on the underlying personal injury claim.[61]

The court held that the Act's two-year statute of limitation governed the Hipwells' wrongful death action.[62] The court concluded that because Shelly allowed the Act's statute of limitations to run on her underlying personal injury claim, the Hipwells' wrongful death action was barred unless the statute tolled for some reason.[63] The court remanded the case back to the trial court for a factual finding as to whether the Hipwells' fraudulent concealment claim tolled the Act's statute of limitations.[64]

5. Conclusion

The *Jensen* opinion identifies the Act's statute of limitations as the determinative provision governing wrongful death actions arising out of medical malpractice.[65] Furthermore, *Jensen* clarifies that the Act's statute of limitations begins to run on wrongful death actions when "the patient discovers through the use of reasonable diligence, or should have discovered the injury."[66] Therefore, if the decedent allowed the Act's statute of limitations to run on the underlying personal injury claim, the statute of limitations also bars the personal representative's and the heirs' ensuing wrongful death claims.[67]

---

[56] *Id.* (citing Van Wagoner v. Union Pac. R.R., 186 P.2d 293, 303 (Utah 1947)).

[57] *See id.*

[58] *Id.* (citing Kelson v. Salt Lake County, 784 P.2d 1152, 1155 (Utah 1989)).

[59] *Id.* (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 955 (5th ed. 1984)).

[60] *See id.* (citing Horton v. Goldminers Daughter, 785 P.2d 1087, 1091 (Utah 1989)).

[61] *See id.* at 332–33.

[62] *See id.* at 337.

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *Id.* at 332 (quoting UTAH CODE ANN. § 78-14-4(1) (1996).

[67] *See id.*

RECENT LEGISLATIVE DEVELOPMENTS

The *Recent Legislative Developments* section consists of brief expositions of selected statutes enacted by the 1997 Utah Legislature. Each Development is self-contained.

I. ADMINISTRATIVE LAW

A. Retirement Office Amendments: Empowering the Retirement Board With Discretionary Authority[*]

1. Introduction

In 1997 the Utah Legislature enacted House Bill 173 (the "Amendments"),[1] effective July 1, 1997, which revised portions of the Utah State Retirement Act (the "Retirement Act").[2] The Amendments consist of various technical changes to the Retirement Act, and most significantly, they contain language expressly granting the Retirement Board (the "Board") authority to interpret and define the Retirement Act's provisions.[3] Before the Amendments, courts reviewing the Board's interpretations of the Retirement Act applied a "correction-of-error" standard of review, giving no deference to the Board's findings.[4] The new language mandates that reviewing courts defer to the Board's interpretations and apply a reasonableness standard of review, disturbing only those Board interpretations deemed arbitrary and capricious.[5]

2. Background

In 1987, the Utah Legislature recodified the Retirement Act to provide an organized statutory structure for administering the Utah Retirement Systems (the "URS").[6] The Retirement Act required the Board to administer the different retirement systems and plans that provide pension benefits to members of various public employee groups in Utah.[7]

---

[*]Lucy Moreton Hawes, Staff Member, *Utah Law Review.*

[1]Retirement Office Amendments, ch. 31, 1997 Utah Laws 161 (codified as amending UTAH CODE ANN. §§ 49-1-203, -401, -406, -607; 49-2-103, -205; 49-3-103, -206; 49-4-103, -601, -704; 49-4a-103, -704; 49-5-103, -601, -704, 49-6-103 (1994)) (effective July 1, 1997).

[2]*See* UTAH CODE ANN. § 49-1-101 to -701 (1994 & Supp. 1997).

[3]*See* UTAH CODE ANN. § 49-1-203(1)(j) (Supp. 1997).

[4]*See* O'Keefe v. Utah State Retirement Bd., 929 P.2d 1112, 1114 (Utah Ct. App. 1996); *see also* Allred v. Utah State Retirement Bd., 914 P.2d 1172, 1174 (Utah Ct. App. 1996) (holding that courts should apply "correction-of-error" standard of review to Board's interpretations of Retirement Act).

[5]*See* UTAH CODE ANN. § 63-46b-16(4)(h) (1993).

[6]*See* UTAH CODE ANN. § 49-1-102(1) (1994).

[7]The various retirement systems and plans include: Public Employees' Retirement System, Public Employees' Noncontributory Retirement System, Public Safety Retirement System, Public Safety Noncontributory Retirement System, Firefighters' Retirement System, Judges' Retirement System, and the Governor's and Legislative Service Plan. Each retirement system is governed by a separate chapter

The Retirement Act also required the Board to oversee URS operations. The Board's duties include: "act[ing] upon reports covering the operations of the systems, plans, programs, and funds administered by the retirement office; maintain[ing] . . . the systems, plans, and programs on an actuarially sound or approved basis."[8]

In addition, the Retirement Act created an administrative and appellate procedure for retirement benefit disputes. First, a member applies for benefits under the relevant retirement system. URS then calculates the member's benefit. If the member disputes the determined benefits, the member requests a ruling by the administrator of URS, who reviews the member's request.[9] If the administrator and the member are unable to reach a resolution of the complaint, the member "shall request a review of that claim by a hearing officer."[10] The hearing officer, or administrative law judge, conducts a formal hearing pursuant to the Administrative Procedures Act and renders a decision.[11] The Board then reviews all decisions of the hearing officer and accepts, rejects, or modifies the decision.[12] If the member is dissatisfied with the Board's decision, the member may appeal to the Utah Court of Appeals for review of the Board's determination.[13]

Prior to the Amendments, an appellate court sitting in review of the Retirement Board's decision applied a "correction-of-error" standard of review to the Board's interpretations of the Retirement Act.[14] However, Section 49-1-203(1)(j), in effect at the time appellate courts refused to defer to Board interpretations of the Retirement Act, states that the Board has "broad discretion . . . to perform its policymaking functions."[15] This language arguably empowers the Board with sufficient discretionary authority for a reviewing court to defer to Board interpretations of the Retirement Act. Reviewing courts, however, rejected arguments by the Board that this language required deference to Board interpretations, stating that "no explicit or implicit grant of discretion exists, therefore we review the Board's decision for correctness, giving no deference to the Board's interpretation."[16]

Until 1996, courts' analyses under a non-deferential standard of review caused no serious conflict with the Board because courts consistently affirmed the Board's findings.[17] In 1996, the Utah Court of Appeals, in two separate decisions, applied a

---

Title 49. *See* UTAH CODE ANN. § 49-1-101 to -404 (1994 & Supp. 1997).

[8]UTAH CODE ANN. §§ 49-1-203(1)(b), -203(1)(g) (1994) (amended 1997).

[9]*See* UTAH CODE ANN. § 49-1-610(1)(b) (1994).

[10]*Id.* § 49-1-610(1)(c).

[11]*See id.* § 49-1-610(1)(d)(ii).

[12]*See id.* § 49-1-610(2)(b)(ii).

[13]*See id.* § 49-1-610(3); *see also* UTAH CODE ANN. § 63-46b-16 (1993).

[14]*See supra* note 4 and accompanying text.

[15]UTAH CODE ANN. § 49-1-203(1)(j) (1994) (amended 1997).

[16]Horton v. Utah State Retirement Bd., 842 P.2d 928, 931 (Utah Ct. App. 1992) (applying "correction-of-error" standard, court affirmed Board's findings that member should have enrolled in non-contributory retirement system).

[17]*See id.* at 934; *see also* Gottfredson v. Utah State Retirement Bd., 808 P.2d 153, 155 (Utah Ct. App. 1991) (applying "correction-of-error" standard, the court affirmed Board's application of retirement statute).

"correction-of-error" standard of review, giving no deference to the Board's interpretations of the Act.[18]

First, in *Allred v. Utah State Retirement Board*,[19] the court refused to defer to the Board's interpretation of the "final average salary" provision used to calculate retirement benefits.[20] The court stated that "[i]n the absence of an express or implied grant of discretion to an agency to interpret statutory language, [courts review] an agency's statutory construction as a question of law under a 'correction-of-error' standard."[21] Under this standard, the court found against the Board's determination even though the Board's findings were based on professional actuarial analysis.[22]

The Retirement Act's method for calculating retirement benefits relies on the member's "final average salary,"[23] which is "computed by averaging the [member's] highest three years of annual compensation preceding retirement."[24] One limitation to the computation, however, prohibits more than a ten percent increase above the member's previous year's salary, plus a cost-of-living adjustment, in any of the previous year's salary used to calculate benefits, unless the member has been promoted.[25]

The dispute in *Allred* involved whether the calculation of a member's "final average salary" included overtime compensation.[26] Because the member had worked substantial overtime two months prior to retirement, including this payment in his "final average salary" would increase the member's benefits significantly.[27] As a result, the Board limited the salary increase used in the member's benefit calculation to ten percent, ruling that said limitation applied to overtime payments as well as to the member's salary increase from a promotion because the two payments were unrelated.[28] The Board based its interpretation on the necessity of maintaining an actuarially sound retirement system.[29] The Board also asserted that the Retirement Act's grant of "broad discretion and power [to the Board] to perform its policymaking functions" supported the Board's interpretation.[30] However, notwithstanding the Board's reasoning, the court refused to defer to the Board's construction and applied a "correction-of-error" standard, ruling against the Board's interpretation.[31]

---

[18]*See O'Keefe*, 929 P.2d at 1114–15 (applying "correction-of-error" standard of review to interpretation of "overtime" in the Act); *Allred*, 914 P.2d at 1176 (applying "correction-of-error" standard of review to overturn Board's interpretation of "final average salary" in the Act).

[19]914 P.2d 1172 (Utah Ct. App. 1996).

[20]*See id.* at 1176.

[21]*Id.* at 1174.

[22]*See id.* at 1176.

[23]*See id.* at 1174.

[24]UTAH CODE ANN. § 49-3-103(7) (1994) (amended 1997).

[25]*See id.* §§ 49-3-103(7)(a), -103(7)(b)(ii).

[26]*See Allred*, 914 P.2d at 1174.

[27]*See id.* at 1173.

[28]*See id.* at 1173–74.

[29]*See id.* at 1174–75.

[30]Interview with Kevin A. Howard, Independent Counsel for the Board, in Salt Lake City, Utah (Aug. 25, 1997).

[31]*See Allred*, 914 P.2d at 1176.

Likewise, in *O'Keefe v. Utah State Retirement Board*,[32] the Utah Court of Appeals analyzed the Board's interpretation of the Retirement Act's provisions under a "correction-of-error" standard of review.[33] Although the court affirmed the Board's interpretation of "overtime" under the Public Safety Retirement Act (the "PSRA"), the court's refusal to defer to the Board fueled the Board's desire to obtain a specific grant of discretionary authority from the Legislature.[34]

In *O'Keefe*, the dispute concerned the interpretation of "overtime" under PSRA as applied to a peace officer's employment. The officer's employing unit, Ogden City, could require more than forty hours of work per week. The officer had the option of taking payment for up to three extra hours over a forty hour week ("GAP time") as either regular pay, which resulted in contributions to the officer's retirement fund, or as "leave," which did not result in contributions.[35] The effect of the former option increased an officer's retirement allowance by $122.34 to $124.68 per month, depending on the officer's retirement date.[36] The officer in *O'Keefe* opted to use the GAP time for contributions to his retirement fund.[37]

Subsequently, based on an actuarial report, URS determined GAP time contributions from members under PSRA were ineligible for retirement fund purposes and rejected and refunded the contributions.[38] The officer disputed this decision and the parties agreed to request the Board's actuary to determine the actuarial impact from GAP time contributions. When the actuary concluded that the Ogden City compensation of GAP time would increase the employer's contribution rate to the system, URS concluded that GAP time would be considered "overtime and thus ineligible for calculating retirement benefits."[39] On review, the Administrative Hearing Officer affirmed the URS decision, and the member appealed to the court of appeals.[40]

Under a "correction-of-error" standard of review, the court of appeals refused to defer to the Board's ruling.[41] Instead, the court adopted its own interpretation of "overtime" under the PSRA and held that GAP time was overtime, thereby affirming the Board's interpretation.[42]

Although the appellate court affirmed the Board's interpretation, it rejected arguments by the Board that the court should defer to the Board's interpretation.[43] The court's refusal to defer to the Board's interpretation of the Retirement Act alarmed the Board because the Board bases its interpretations on complicated actuarial calculations designed to preserve the financial integrity of the retirement systems.[44]

---

[32]929 P.2d 1112 (Utah Ct. App. 1996).
[33]*See id.* at 1114.
[34]*See supra* note 30.
[35]*See* O'Keefe, 929 P.2d at 1113.
[36]*See id.*
[37]*See id.* at 1113–14.
[38]*See id.* at 1114.
[39]*Id.* at 1114.
[40]*See id.*
[41]*See id.* at 1114–15.
[42]*See id.* at 1116.
[43]*See supra* note 30.
[44]*See id.*

Therefore, the Board sought discretionary power from the legislature that would require reviewing courts to defer to Board interpretations of the Retirement Act.[45]

3. The Amendments

In the 1997 Legislative Session, Representative Raymond W. Short sponsored House Bill 173 on behalf of URS.[46] House Bill 173 proposed various technical amendments to the Retirement Act; but, most importantly, it included language affording the Board discretionary authority to interpret the Retirement Act's provisions.[47] The Amendments added language providing the Board with "the specific authority to interpret and define any provision or term under this title when the board provides written documentation which demonstrates that the interpretation or definition promotes uniformity in the administration of the systems or maintains the actuarial soundness of the systems."[48] The substantive parts of this provision are discussed below.

(a) Express Grant of Discretion to the Board

The amended Retirement Act grants the Board the "*specific authority* to interpret and define" any of the Act's provisions or terms.[49] The Board sought the addition of this language to the Retirement Act because under the previous provision, courts did not grant deference to Board interpretations of the Act.[50]

The Amendments' grant of "specific authority" to the Board empowers the Board with the discretion to interpret and define the Retirement Act's provisions and terms. This grant protects the Board's determinations that are based on fiduciary and actuarial bases from reviewing courts' contrary holdings. Therefore, the Board is able to administer the retirement systems and maintain the financial integrity of the retirement systems. Reviewing courts are still able to review the Board's determinations, but only under a reasonableness standard, reviewing for arbitrariness or capriciousness.[51]

(b) The Requirement of Written Documentation

The Amendments require the Board to "provide written documentation which demonstrates that the [Board's] interpretation or definition promotes uniformity in the administration of the systems or maintains the actuarial soundness of the systems."[52] Drafters of House Bill 173 added this language in order to reach a compromise

---

[45] *See id.*

[46] *See* Floor Debate, Statement of Rep. Raymond W. Short, 52d Utah Leg., Gen. Sess. (Jan. 27, 1997) (House recording no. 1, side A) [hereinafter Short Statement].

[47] *See id.*

[48] UTAH CODE ANN § 49-1-203(1)(j) (Supp. 1997).

[49] *Id.* (emphasis added).

[50] *See supra* note 30.

[51] *See* UTAH CODE ANN. § 63-46b-16(4)(h)(iv) (1993).

[52] UTAH CODE ANN. § 49-1-203(1)(j) (Supp. 1997).

agreement with URS members who were concerned about the grant of authority to the Board.[53] The requirement of supporting documentation limits the Board's authority because the Board must satisfy two standards: (1) that its determination upholds its statutory duties of maintaining uniformity in the retirement systems, and (2) that its interpretation preserves the actuarial soundness of the fund.[54]

Under the first standard, the Board must interpret and apply the Retirement Act's terms so as to maintain uniformity in the retirement systems. This ensures that the Board's interpretations of the Retirement Act are consistent with previous interpretations. The Board's interpretations must also promote uniform administration of the various retirement systems consistent with prior administrative decisions.

Under the second standard, the Board supervises the actuarial soundness of the systems.[55] Performing this duty is a complicated process. The Board employs professional actuaries to ensure the retirement systems remain financially sound while maximizing members' benefits.[56] The actuary insures that members on a whole receive maximum benefits while preserving the financial integrity of the fund.[57] With the actuary's expertise, the Board is able to make determinations in accordance with these goals. However, without deference to the Board's interpretations, reviewing courts could undermine the Board's determinations and actuarial policies. Thus, the Amendments' grant of deference to the Board facilitates the Board's statutory duty of maintaining such actuarial soundness within the system.

4. Conclusion

The Amendments specifically grant the Board discretionary authority to interpret and define the Retirement Act's provisions and terms. Reviewing courts must now defer to the Board's interpretations and definitions.[58] Arguably the Board could abuse such a grant of broad authority; however, the Board's statutory duty is to maximize retirement members' benefits and to act solely on behalf of its beneficiaries.[59] The Amendments' requirement of supportive documentation of the Board's determinations restricts the Board to interpreting the Retirement Act within the parameters of its statutory duties.

Currently, other state retirement funds are statutorily unprotected and subject to court decisions restricting the funds' ability to interpret governing statutes based on fiscal and fiduciary bases. The Amendments described herein set precedent for these funds to seek legislative action for statutory grants of authority to interpret their governing statutes.

---

[53] *See supra* note 30.
[54] *See* UTAH CODE ANN. § 49-1-203(1) (1994 & Supp. 1997).
[55] *See id.*
[56] *See id.* § 49-1-204(9).
[57] *See* UTAH CODE ANN. § 49-1-102 (1994).
[58] *See* UTAH CODE ANN. § 49-1-203(1)(j) (Supp. 1997).
[59] *See id.* § 49-1-203.

*B. Workforce Services and Labor Commission Implementations and Amendments**

1. Introduction

In 1997, the Utah Legislature passed Senate Bill 166 (the "Amendments"),[1] which finalizes the consolidation of job training, family assistance, and employment services into the new Department of Workforce Services. The Amendments consolidate previously separate state departments and allow persons eligible for public assistance to obtain diverse services at one location.[2] Additionally, the Amendments transfer the former Industrial Commission responsibilities into the new Labor Commission.[3] The Amendments organize the Labor Commission into divisions which separate regulatory and adjudicatory functions.[4]

2. Background

In 1996, the Utah Legislature passed House Bill 375 (the "Act"),[5] sponsored by Representative Grant D. Protzman, which created the Department of Workforce Services.[6] The Act consolidated the Industrial Commission, Department of Employment Security, Office of Job Training, Office of Family Support, Office of Child Care,

---

*Britt E. Ide, Staff Member, *Utah Law Review*.

[1]Workforce Services and Labor Commission Implementation and Amendments, ch. 375, 1997 Utah Laws 1438 (codified as amending UTAH CODE ANN. §§ 9-2-413, 10-2-302, 17-5-214, 17-33-10, 23-19-36, 32A-14-101 (Supp. 1997), 51-7-11 and -12.5, 53-7-203 (Supp. 1995), 63A-2-301 (1996), 78-45-7.5 (Supp. 1997) and scattered section of UTAH CODE ANN. tits. 26, 31A, 34, 35A, 40, 53A, 54, 57, 58, 59, 62A, 63, 64, 67, 76; enacting UTAH CODE ANN. §§ 31A-33-103.5, 35A-6-1101, 63-55-234, and scattered sections of UTAH CODE ANN. tit. 34A; repealing and reenacting UTAH CODE ANN. §§ 35A-1-304 and -307; renumbering and amending scattered sections of UTAH CODE ANN. tits. 34A, 35A; and repealing UTAH CODE ANN. § 34-28-11 (1997) and scattered sections of UTAH CODE ANN. tit. 35A) (effective July 1, 1997). This discussion focuses on the creation of the Department of Workforce Services and the reorganization of the Industrial Commission as the Labor Commission, as enacted in sections 34A-1-101 to -106, 34A-1-201 to -205, 34A-1-302 to -304 and in amended sections 35A-1-104 and 35A-1-202 of the Utah Code.

[2]*See* Lisa Carricaburu, *For Residents Looking for a Job, It's One-Stop Shopping in Utah*, SALT LAKE TRIB., Jul. 1, 1997, at B3.

[3]*See* Floor Debate, Statement of Rep. Jeff Alexander, 52d Utah Leg., Gen. Sess. (Mar. 4, 1997) (House recording no. 2, side A) [hereinafter Alexander Statement].

[4]*See* Floor Debate, Statement of Sen. David L. Buhler, 52d Utah Leg., Gen. Sess. (Feb. 28, 1997) (Senate recording no. 37, side A) [hereinafter Buhler Statement]. *See also* UTAH CODE ANN. § 34A-1-202 (Supp. 1997).

[5]Department of Workforce Services, ch. 240, 1996 Utah Laws 893 (codified as amending UTAH CODE ANN. §§ 9-2-413 and -801, 17-33-10 (1996), 32A-14-101, 53-7-203 (1994), 54-11-5 (Supp. 1997), 63A-2-301 (1996), and scattered sections of UTAH CODE ANN. tits. 26, 31A, 34, 40, 51, 53A, 57, 58, 59, 62A, 63, 64, 67, 78; renumbering and amending scattered sections of UTAH CODE ANN. tits. 31A, 35A; and repealing UTAH CODE ANN. §§ 34-35-4 (1994), 40-2-1.2 (1993) and scattered sections of UTAH CODE ANN. tits. 9, 35, 62A) (effective July 1, 1997).

[6]*See* Buhler Statement, *supra* note 4.

and Turning Point[7] into one agency.[8] The Act had a late effective date of July 1, 1997.[9] The Act resulted from efforts by Governor Leavitt and Lieutenant Governor Olene Walker to consolidate government services.[10] Representative Protzman stated: "With expected congressional cuts in job training and welfare funds, along with greater flexibility on the part of states to design their own programs, the Utah proposal seeks to convert the existing 'bureaucratic maze' to an efficient system."[11] Further, the Act's restructuring of state agencies aimed to improve availability of services.[12]

The Act created an acting executive director of the Department of Workforce Services effective July 1, 1996.[13] The Act also created work groups consisting of affected and interested parties[14] to determine details for the agency and for implementing legislation during the 1997 General Session.[15] The work groups made recommendations to the governor and reported to the legislature.[16]

Senator David L. Buhler's original 1997 Senate Bill 166 followed the 1996 House Bill 375 and included the Industrial Commission responsibilities in the new Department of Workforce Services.[17] However, opposition arose to the inclusion of labor issues within the Department of Workforce Services.[18] Business groups proposed placing the Industrial Commission responsibilities under the Commerce Department.[19] Labor unions wanted the Industrial Commission's duties[20] to remain in the Department of Workforce Services because the new department's primary focus is to promote

---

[7]Turning Point is a state program designed to help displaced homemakers through services such as education. *See* Carricaburu, *supra* note 2.

[8]*See* OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL STATE OF UTAH, DIGEST OF LEGISLATION ENACTED IN THE 1996 GENERAL SESSION AND THE 1996 SECOND SPECIAL SESSION BY THE 51ST LEGISLATURE, RESEARCH REPORT NO. 62, at 18 (May 1997).

[9]*See id.*

[10]*See* Telephone Interview with Sen. David L. Buhler, Utah Senate (Aug. 25, 1997) [hereinafter Buhler Interview].

[11]Dan Harrie, *Bill Would Overhaul Unemployment Services in Utah*, SALT LAKE TRIB., Feb. 16, 1996, at B2.

[12]*See* Carricaburu, *supra* note 2. Rep. Protzman said the bill "seeks to improve customer service and save money by reorganizing things in a more logical manner. . . . We wanted to remedy a discouraging situation that too-often found people being bounced all over town from agency to agency." *Id.*

[13]*See* UTAH CODE ANN. § 35A-1-401 (Supp. 1996) (repealed 1997).

[14]The work groups included county governments (who deliver welfare and job services), affected agencies (e.g., Office of Job Training), and interest groups (e.g., labor unions, business groups, and advocacy groups). *See* Buhler Interview, *supra* note 10.

[15]*See* UTAH CODE ANN. § 35A-1-402 (Supp. 1996) (repealed 1997). The Act required the workgroups to study many issues such as personnel assignments, *see id.* § 35A-1-402(2)(a), procedures for appellate review, *see id.* § 35A-1-402(s)(r), administration of federally assisted state programs, *see id.* § 35A-1-402(2)(u), and administrative structure, *see id.* § 35A-1-402(2)(tt).

[16]*See* Buhler Interview, *supra* note 10. The Act required the work groups to "prepare recommendations and guidelines and, when appropriate, legislation for the 1997 Annual General Session of the Legislature, that are necessary to make the department fully operational by July 1, 1997." UTAH CODE ANN. § 35A-1-402(1)(e) (Supp. 1996).

[17]*See* Buhler Statement, *supra* note 4.

[18]*See id.*

[19]Business interests were represented primarily by the Utah Manufacturers Association and the Utah Taxpayers Association. *See* Judy Fahys, *New Labor Agency Causes Deep Split*, SALT LAKE TRIB., Nov. 30, 1996, at A1.

[20]The Commission's duties include preventing job discrimination, overseeing workers' compensation, and enforcing health and safety laws. *See id.*

worker's needs.[21] Representative Jeff Alexander introduced a competing bill, House Bill 321, which provided for a separate Industrial Commission.[22]

After meetings with Governor Leavitt and concessions within the work groups, the legislators reached a compromise resulting in Substitute Senate Bill 166 creating the Labor Commission distinct from the Department of Workforce Services.[23] The bill was "supported by a coalition of twenty-eight business and trade associations."[24] The bill also had the support of the president of the Utah AFL-CIO,[25] Senator Eddie P. Mayne.[26]

3. The Amendments

(a) Department of Workforce Services

The Amendments alter the structure of the Department of Workforce Services by removing the former Industrial Commission duties from the Department of Workforce Services created in 1996. Further, the Amendments create a division structure for the Department of Workforces Services.[27] The implementation of the Department of Workforce Services affects 32 programs and as many as 2000 employees.[28] The existing 106 agency offices will be consolidated to 48 employment centers to improve access to employment, child care, and welfare services.[29] Governor Leavitt said, "I suspect when we look back over this administration that it's unlikely we will have any reorganization of state government more sweeping or philosophic changes more basic than what we're doing with welfare."[30]

---

[21] *See id.*

[22] *See* Buhler Statement, *supra* note 4.

[23] *See id.*

[24] *See id.*

[25] *See* Fahys, *supra* note 19.

[26] *See* Alexander Statement, *supra* note 3.

[27] *See* UTAH CODE ANN. § 35A-1-202 (1997). The divisions include the Division of Workforce Information and Payment Services, the Division of Adjudication, the Workforce Appeals Board, the State Council on Workforce Services, the Employment Security Advisory Council, and the Child Care Advisory Committee. *See id.*

[28] *See* Dan Harrie and Judy Fahys, *Leavitt Gives Legislature Kudos Galore*, SALT LAKE TRIB., Mar. 7, 1997, at A1.

[29] *See* Judy Fahys, *Leavitt OKs Welfare Overhaul*, SALT LAKE TRIB., Mar. 22, 1997, at A1.

[30] Harrie and Fahys, *supra* note 28. For details on welfare changes, see also Family Employment Program, ch. 174, 1997 Utah Laws 576 (codified as amending UTAH CODE ANN. §§ 23-19-36, 26-18-8, 30-3-10.2 (1995), 53A-12-204 (1997), 54-86-10 (1994) and scattered sections of UTAH CODE ANN. tits. 35A, 62A, 76, 78; enacting UTAH CODE ANN. § 62A-1-117 and scattered sections of UTAH CODE ANN. tit. 35A; renumbering and amending scattered sections of UTAH CODE ANN. tit. 35A; and repealing scattered sections of UTAH CODE ANN. tit. 62A) (effective July 1, 1997) [hereinafter Family Employment Program].

(b) Labor Commission

The Amendments create the Labor Commission under a new Title 34A to perform the former Industrial Commission's duties.[31] The Amendments create a new commission structure. The Labor Commission has a Commissioner, appointed by the governor, as the chief administrative officer.[32] The Commissioner coordinates the administration and supervision of the Labor Commission.[33]

The Amendments also create a division structure for the Labor Commission.[34] The division structure separates the regulatory and adjudicatory functions of the Labor Commission by creating a separate Appeals Board.

The Amendments create a statutory procedure for the Appeals Board to hear final administrative appeals from the Division of Adjudication.[35] The Appeals Board is composed of three part-time commissioners.[36] The governor will appoint the commissioners with one representing labor interests and one representing business interests.[37] Additionally, no more than two commissioners can be of the same political party.[38] A claimant can appeal a decision of the Appeals Board to the Utah Court of Appeals.[39]

The Amendments also create a new Labor Relations Board with the Labor Commissioner as the chair of the board.[40] Again, the governor appoints the members with one representative from labor and one representative from business interests.[41]

4. Conclusion

The Amendments achieve a compromise between Governor Leavitt's goal of increasing the efficiency of state government and labor unions' goal of maintaining independence for labor issues under the new Labor Commission. The consolidation of welfare and job placement services should benefit those who use the services by

---

[31] *See* OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL STATE OF UTAH, DIGEST OF LEGISLATION ENACTED IN THE 1997 GENERAL SESSION BY THE 52ND LEGISLATURE, RESEARCH REPORT NO. 64, at 22 (Apr. 1997). All of the former Industrial Commission's duties moved to the Labor Commission except for unemployment insurance, which remained in the Department of Workforce Services.

[32] *See* UTAH CODE ANN. § 34A-1-201 (1997). The Commissioner serves at the pleasure of the governor, *see* Buhler Interview, *supra* note 10, a significant change from the more insulated, three commissioner structure of the former Industrial Commission.

[33] *See* UTAH CODE ANN. § 34A-1-201(4)(a) (1997).

[34] *See id.* § 34A-1-202. The Amendments created the Division of Industrial Accidents, the Division of Occupational Safety and Health, the Division of Safety, the Division of Antidiscrimination and Labor, the Division of Adjudication, the Labor Relations Board, the Appeals Board, the mining certification panel, and advisory councils for workers' compensation, antidiscrimination, and occupational safety and health. *See id.*

[35] *See id.* § 34A-1-303.

[36] *See* UTAH CODE ANN. §§ 34A-1-205(1), -205(4) (1997). The Appeals Board positions were created as part-time to insulate the commissioners from the daily influence of the Labor Commission. *See* Alexander Statement, *supra* note 3.

[37] *See id.* § 34A-1-205(2).

[38] *See id.*

[39] *See id.* § 34A-1-303(6).

[40] *See id.* § 34-20-3.

[41] *See id.* § 34-20-3(1)(c).

allowing easier access to diverse services. With Utah's limit on public assistance, improved job placement will be crucial.[42] Additionally, the shift of focus from welfare to work programs is intended to reduce public assistance costs to taxpayers. Senator Eddie P. Mayne said that this type of change "has not been an easy task" and that the Legislature may have to reevaluate the Amendments as new issues arise.[43]

II. EDUCATION LAW

Hazing and Conduct Related to School Activities[*]

1. Introduction

In the 1997 General Session, the Utah Legislature passed Senate Bill 150 (the "Bill")[1] in response to a number of widely publicized hazing incidents in Utah's public schools,[2] and the perceived inadequacy of existing law.[3] The Bill both provides an efficable tool for prosecutors and helps make Utah's public schools better able to prevent and react to future incidents of hazing. Section 1 of the Bill enacts new legislation (the "Enactment") requiring local school boards to adopt rules with specified prohibitions including hazing.[4] The Enactment also requires school employees and principals to report perceived violations of the mandated rules.[5] Section 2 of the Bill amends prior legislation that defined hazing (the "Hazing Amendments").[6] The Hazing Amendments eliminate caveats in the language of the prior definition that allowed criminal defendants to successfully avoid prosecution.[7]

---

[42]*See* Family Employment Program, *supra* note 30. The Family Employment program limits cash assistance to 36 months. *See id.*

[43]Floor Debate, Statement of Sen. Eddie P. Mayne, 52d Utah Leg., Gen. Sess. (Feb. 28, 1997) (Senate recording no. 37, side A).

[*]Matthew M. Boley, Staff Member, *Utah Law Review.*

[1]Conduct Related to School Activities, ch. 240, 1997 Utah Laws 861 (Section 1 Chapter 240 codified as enacting UTAH CODE ANN. § 53A-11-908 (Supp. 1997); and Section 2 Chapter 240 codified as amending UTAH CODE ANN. § 76-5-107.5 (1995)) (effective May 5, 1997).

[2]*See infra* notes 13–15 and accompanying text.

[3]The Bill's sponsor stated that "Senate Bill 150 is designed to close a major loophole in existing law and make it possible for school and law enforcement officials to deal more effectively with violent and abusive incidents in their schools. The existing laws governing hazing seem to be inadequate because of a serious flaw in the definition of the term hazing." Floor Debate, Statement of Sen. Howard A. Stephenson, 52d Utah Leg., Gen. Sess. (Feb. 20, 1997) (Senate recording no. 25, side A) [hereinafter Stephenson Statement].

[4]*See* UTAH CODE ANN. § 53A-11-908 (Supp. 1997).

[5]*See id.* § 53A-11-908(3).

[6]*See id.* § 76-5-107.5 (Supp. 1997).

[7]*See id.*

2. *Background*

(a) Prohibition of "Hazing"

Prior to the Hazing Amendments, Utah law prohibited hazing.[8] The prior hazing prohibition (the "Original Hazing Prohibition") defined hazing as any action or situation, among those enumerated, occurring "for the purpose of initiation, admission into, affiliation with, or as a condition for continued membership in any organization."[9] The enumerated actions or situations included (i) recklessly or intentionally endangering the health or safety of any person; (ii) willfully destroying or removing property; (iii) situations involving forced physical brutality; (iv) circumstances involving forced consumption of any food, liquor, or drug; (v) situations involving any activity that would subject the individual to extreme mental stress or that could adversely affect the mental health or dignity of the individual; and (vi) circumstances involving cruelty to animals.[10] The Original Hazing Prohibition also imposed criminal sanctions ranging from a class B misdemeanor up to a second degree felony upon "[a]n actor who recklessly, knowingly, or intentionally hazes another."[11]

(i) Caveats

The definition of hazing as it existed prior to the Hazing Amendments created a number of loopholes which could be exploited by defendants in criminal cases.[12] Highly publicized hazing incidents at Sky View High School,[13] Hillcrest High School,[14] and other Utah public schools[15] have demonstrated the inadequacy of the Original Hazing Prohibition.[16]

---

[8]*See id.* § 76-5-107.5 (1995) (amended 1997).

[9]*Id.* § 76-5-107.5(1).

[10]*See id.*

[11]*See id.* § 76-5-107.5(3).

[12]*See supra* note 3 and accompanying text; *infra* notes 18–21 and accompanying text.

[13]Thirty-nine players observed or participated while Brian Seamons, a backup quarterback on Sky View High School's varsity football team, was bound naked to a towel rack in the locker room (athletic tape also applied to his genitals by one player), and his homecoming date dragged in to see him [hereinafter "Sky View incident"]. *See* Samuel Autman & Vince Horiuchi, *Hazing Incident Haunts Sky View High Football Player,* SALT LAKE TRIB., Oct. 21, 1993, at B1; Samuel A. Autman, *Judge Upholds Penalty: No Sky View Football,* SALT LAKE TRIB., Oct. 22, 1993, at D1.

[14]Five members of the football team were expelled for taping two fully clothed teammates to benches in the locker room, spraying water on them with a hose, pouring water from a bottle into the mouth of one victim, and "mooning" the boys from several feet away [hereinafter "Hillcrest incident"]. *See* Jay Drew, *Victim: Incident Is Being Blown Out of Proportion,* SALT LAKE TRIB., Sept. 12, 1996, at D1.

[15]Two East High School seniors were suspended from school and charged with disorderly conduct for allegedly shaving the heads of fellow students. *See 2 East High Students Are Suspended After Head-Shaving Hazings,* SALT LAKE TRIB., Feb. 4, 1994, at D2. Two Roy High School senior football players were kicked off the team after being accused of holding down sophomores while one of the two sat naked on the sophomores' faces or the back of their heads. *See Hazing Report Results in Roy Suspensions,* SALT LAKE TRIB., Aug. 22, 1996, at B2.

[16]Senator Protzman stated regarding the Sky View incident, "I was discouraged when I realized we had drafted it so narrowly it didn't apply." *Incident Spurs Revision of Hazing Law,* SALT LAKE TRIB., Oct. 28, 1993, at B1. "[I]n some of these instances [of hazing] where they've tried to prosecute, they haven't been

The Original Hazing Prohibition prohibited only acts done "for the purpose of initiation, admission into, affiliation with, or as a condition for continued membership in any organization."[17] This language gave rise to a defense that the alleged victims were already members of the organization, and that the hazing was not a condition to continued membership.[18] Therefore, under the Original Hazing Prohibition, persons accused of hazing might have successfully argued that the conduct in question was not a hazing ritual, but rather a prank aimed at the recipient for no particular reason.[19]

Another flaw in the Original Hazing Prohibition was that consent of the victim could be used as a defense with regard to a number of the enumerated actions and situations.[20] This raised the potential for serious problems in prosecutions, because victims are often subject to considerable peer pressure to protect their tormentors from negative repercussions.[21] These two caveats combined to rob the Original Hazing Prohibition of its efficacy.[22]

(b) School Policy and Reporting

Utah law prior to the Enactment granted the State Board of Education and local school boards some authority to create and enforce a hazing policy. Specifically, one statutory provision directed local school boards to "adopt conduct and discipline policies" encouraging students to "show respect for other people."[23] Another statutory provision gave local school boards authority to "limit or deny access to any student organization or club as it determines to be necessary" to protect the physical and emotional well being of students and faculty, "maintain order and discipline," and

---

able to, because they said it wasn't hazing because they were already on these teams." Floor Debate, Statement of Rep. Jeff Alexander, 52d Utah Leg., Gen. Sess. (Mar. 4, 1997) (House recording no. 2, side A).

[17]UTAH CODE ANN. § 76-5-107.5(1) (1995) (amended 1997).

[18]Doug Bates, an attorney for the State Office of Education, noted that a common legal defense in hazing prosecutions has been that the alleged victims were already members of the team. Robert Bryson, *Bill Would Broaden Hazing Law*, SALT LAKE TRIB., Feb. 4, 1997, at D1.

[19]In fact, Chris Griffin, a co-captain for the Sky View football team, made this very argument at the time of the Sky View incident. *See* Autman & Horiuchi, *supra* note 13.

[20]Under the Original Hazing Prohibition, acts or situations involving consumption of food, liquor, and drugs, exclusion from social contact, calisthenics, conduct that could result in extreme embarrassment, or any other activity that could adversely affect the mental health or dignity of the individual would be hazing only if "forced." *See* UTAH CODE ANN. § 76-5-107.5(1) (1995) (amended 1997).

[21]Senator Stephenson said that under the Original Hazing Prohibition it was nearly impossible to prosecute hazing cases when the victim said he or she consented to it. *See* Hilary Groutage, *Bill Seeks to Clarify Hazing Law*, SALT LAKE TRIB., Feb. 11, 1997, at A4. Doug Bates, an attorney for the State Office of Education, explained that victims almost always say they consented to the action, even if they did not. *See id.* The statement of Brian Seamons, victim in the Sky View incident, is an example of such peer pressure: "I walk alone. . . . I don't get any 'hi's' and 'hellos' anymore. A lot of kids used to talk to me for a while. Now I just get glares." Autman & Horiuchi, *supra* note 13.

[22]*See supra* notes 18–21 and accompanying text; *see also* Autman & Horiuchi, *supra* note 13. Cache County Sheriff Sidney Groll said with regard to the Sky View incident: "It was really difficult to prove some of the intent. . . . We couldn't find anything that implied criminal behavior." Autman & Horiuchi, *supra* note 13; *see also* Katherine Kapos, *Educators Doing Homework Before Lawmakers Meet*, SALT LAKE TRIB., Nov. 5, 1996, at B4 (discussing how definition in Original Hazing Prohibition "caused problems recently with an incident involving Hillcrest High School football players").

[23]UTAH CODE ANN. § 53A-11-901(2) (1997).

prevent "material and substantial interference" with the educational activities of schools.[24] The State Board of Education was also given authority to adopt rules in accordance with the same section.[25] Therefore, local school boards and the State Board of Education could probably have created the policies directed by the Enactment under these pre-existing statutes. In fact, some school districts had similar policies prior to the Enactment.[26]

School board decisions based on such policy would likely be respected by the courts. The Utah Supreme Court has stated that school boards should be given considerable deference in determining, applying, and interpreting their own policies.[27] The United States Supreme Court has accorded similar deference to the discretion and judgment of school administrators and school board members.[28] The Court has held that the proper construction of school regulations as well as evidentiary questions arising in school disciplinary proceedings should not be relitigated, absent a violation of specific constitutional guarantees.[29]

Utah law prior to the Enactment also mandated that educators who reasonably believe a student has committed a "prohibited act" report it to a designee, who in turn is required to report the violation to the student's parents and is free to involve law enforcement.[30] These "prohibited acts" involve use, possession, and consumption of alcohol, controlled substances, and drug paraphernalia.[31] Thus, the portion of the Enactment that mandates similar reporting is repetitive. In addition, many school districts previously followed reporting policies similar to those mandated by the Enactment.[32]

3. The Hazing Amendments

The Hazing Amendments eliminate the loopholes exploited under the Original Hazing Prohibition, set guidelines for prosecution and punishment of hazing offenders, and except military training or conduct from the scope of the prohibition.[33] The Hazing Amendments have completely eliminated the qualifying term "forced" from the description of the actions and situations that constitute hazing.[34] Moreover, language

---

[24]*Id.* § 53A-3-419(1).

[25]*See id.* § 53A-3-419(3).

[26]In December of 1996, Davis School District spokesperson Patty Dahl stated that hazing was already covered by the district's Safe Schools rules. *See* Bryson, *supra* note 18.

[27]*See* E.M. Through S.M. v. Briggs, 922 P.2d 754, 757 (Utah 1996) (upholding expulsions upon determination that board's actions were not arbitrary and capricious).

[28]*See* Wood v. Strickland, 420 U.S. 308, 326 (1975) (reversing decision that rejected school board's interpretation of phrase in its regulations).

[29]*See id.*

[30]*See* UTAH CODE ANN. §§ 53A-11-402 to -403 (1997).

[31]*See id.* § 53A-3-501 (1997); 53A-11-401 (1997); 58-37-8 (Supp. 1996); 58-37a-5 (1996).

[32]Davis School District spokesperson Sandra Wilkins said that the enactment is consistent with district policy. *See* Bryson, *supra* note 18.

[33]*Compare* UTAH CODE ANN. § 76-5-107.5 (Supp. 1997), *with id.* § 76-5-107.5 (1995) (amended 1997).

[34]The Hazing Amendments removed the qualifying term "forced" from the prohibitions of calisthenics and consumption of food, liquor, and drugs. *Compare id.* §§ 76-5-107.5(1)(a)(ii) to -107.5(1)(a)(iii) (Supp. 1997), *with id.* §§ 76-5-107.5(1)(c) to -107.5(1)(d) (1995) (amended 1997). "[F]orced exclusion from social

was added that explicitly excludes as a defense the consent or acquiescence of persons under 21 years of age.[35] Thus, the Hazing Amendments have effectively eliminated the consent of the victim as a bar to the prosecution of hazing.

The Hazing Amendments have also eliminated another major caveat in the Original Hazing Prohibition. The Original Hazing Prohibition recognized conduct as hazing only when it was for "initiation, admission into, affiliation with, or as a condition for continued membership in any organization."[36] The Hazing Amendments retain this conditional language as one circumstance under which the delineated conduct becomes prohibited hazing.[37] However, the Hazing Amendments provide an alternative condition that, if satisfied, makes the actor guilty of hazing. This new language imposes criminal liability "if the actor knew that the victim is a member of or candidate for membership with a school team or school organization to which the actor belongs or did belong within the preceding two years."[38] This language makes the hazing prohibition more effective, because prosecutions will no longer be susceptible to the argument that the victim was already a member of the team or organization.[39]

Another significant change incorporated by the Hazing Amendments is that the definition of hazing is extended to a person who "intentionally, knowingly or recklessly commits an act or causes another to commit an act" among those delineated.[40] While the intent language was present in the Original Hazing Prohibition, the imposition of liability upon persons who cause another to commit the act is new.[41] This should allow prosecutors to charge individuals who might have escaped liability under the Original Hazing Prohibition.[42]

---

contact" was replaced with the language "extended isolation from social contact," and "forced conduct that could result in extreme embarrassment, or any other forced activity that could adversely affect the mental health or dignity of the individual" was reworded as "conduct that subjects another to extreme embarrassment, shame, or humiliation." *Compare id.* § 76-5-107.5(1)(a)(iv) (Supp. 1997), *with id.* § 76-5-107.5(1)(e) (1995) (amended 1997).

[35]*Id.* § 76-5-107.5(2) (Supp. 1997). The enactment states that "[i]t is not a defense to prosecution of hazing that a person under 21, against whom the hazing was directed, consented to or acquiesced in the hazing activity." *Id.*

[36]*Id.* § 76-5-107.5(1) (1995) (amended 1997).

[37]*Compare id.* § 76-5-107.5(1)(b)(I) (Supp. 1997), *with id.* § 76-5-107.5(1) (1995) (amended 1997). It should be noted that "holding office" has been included among the aims of conduct that will satisfy this first prong.

[38]*Id.* § 76-5-107.5(1)(b)(ii) (Supp. 1997).

[39]This language also eliminates the possibility of a scienter challenge, though it may leave the legislation susceptible to an equal protection challenge. Michael Wims, Assistant Attorney General for the State of Utah, warned that the language of an early draft of Senate Bill 150 might be susceptible to an equal protection challenge because it only recognizes a victim who is a member of the same team, not an opposing team, and to a scienter challenge because it did not require that "the actor know that the victim is currently a member of the same team the actor used to be on." E-mail from Michael Wims to LEDO-MAIN.LELRGC.JWILSON (Jan. 17, 1997) (on file with the Office of Legislative Research and Development with materials regarding Senate Bill 150).

[40]UTAH CODE ANN. § 76-5-107.5(1) (Supp. 1997).

[41]*Compare id.* § 76-5-107.5 (Supp. 1997), *with id.* § 76-5-107.5 (1995) (amended 1997).

[42]This could encompass (i) persons who do not act per se, but rather convince the victim to commit the act; and (ii) persons, such as a team captain, who convince others to commit acts of hazing against the hazing victims.

The Hazing Amendments also set forth what limits exist in connection with prosecuting and punishing actors under the hazing prohibition. The added language specifies that when a person is charged with hazing, that charge does not bar an additional charge for "(i) any other offense for which the actor may be liable as a party for conduct committed by the person hazed; or (ii) any offense, caused in the course of the hazing, that the actor commits against the person who is hazed."[43]

The Hazing Amendments also clarify that an actor may be separately punished for both the hazing offense and the conduct committed by the person hazed.[44] However, a person cannot be punished for both the hazing and any offense they directly commit in the course of hazing.[45] Rather, they "shall be punished for the offense carrying the greater maximum penalty."[46] Finally, the Hazing Amendments specifically place "military training or other official military activities" beyond the scope of the hazing prohibition.[47]

4. The Enactment

The Enactment requires local school boards to adopt rules prohibiting hazing, the use of foul or abusive language in connection with school related activities, and a number of other activities and behaviors.[48] It also mandates reporting of perceived violations by school employees and principals.[49]

The Enactment begins with some intent language explaining the importance and purpose of the legislation.[50] Following this preliminary language, the Enactment demands that local boards of education "shall" and the State Board of Education "may" adopt rules prohibiting a number of activities.[51] Among the activities enumerated are: "hazing, demeaning, or assaultive behavior, whether consensual or not"; "use of foul, abusive, or profane language while engaged in school related activities"; and "illicit use, possession, or distribution of controlled substances or drug paraphernalia, and . . . tobacco or alcoholic beverages."[52]

This policy mandate is a reaction to recent hazing incidents in Utah's public schools, and the difficulty the schools had in responding appropriately, which may

---

[43]UTAH CODE ANN. § 76-5-107.5(6)(a) (Supp. 1997).

[44]*See id.* § 76-5-107.5(6)(b).

[45]*See id.* § 76-5-107.5(6)(c).

[46]*Id.*

[47]*Id.* § 76-5-107.5(5).

[48]*See id.* § 53A-11-908(2) (Supp. 1997).

[49]*See id.* § 53A-11-908(3).

[50]In the Enactment, the legislature asserted that: (a) "participation in student government and extracurricular activities" is important; (b) the students who participate in these activities and their "adult coaches, advisors, and assistants" are role models; (c) these students and adults "play major roles in establishing standards of acceptable behavior"; and (d) it is very important that these students and adults "comply with all applicable laws and rules of behavior and conduct themselves at all times in a manner befitting their positions and responsibilities." *Id.* § 53A-11-908(1). This preliminary language also states that the Enactment is not intended to create a constitutional right to participate in extracurricular activities. *See id.*

[51]*Id.* § 53A-11-908(2)(a) (Supp. 1997)

[52]*Id.* § 53A-11-908(2)(b) (Supp. 1997)

have been due to a lack of applicable policy.[53] By forcing school boards to adopt rules prohibiting hazing and other delineated conduct, the Enactment prepares them for future incidents. This will further benefit school boards because any disciplinary decisions they make based upon existing policy will be accorded deference by the courts.[54]

The Enactment also sets forth reporting requirements. It requires school employees who reasonably suspect a violation of the mandated rules to "immediately report that belief to the school principal or district superintendent."[55] Principals, in turn, are required to submit a report to the district superintendent or the superintendent's designee within ten working days.[56] This report must detail the alleged incident and what action was taken in response.[57] Failure by a person holding a professional certificate to report as required constitutes an "unprofessional practice,"[58] a designation that requires the State Board of Education to "take appropriate action."[59] However, an educator who in good faith makes such a report is immune from any civil or criminal liability the report might otherwise incur.[60]

5. Conclusion

Senate Bill 150 has made significant changes to Utah law. It revamps the Original Hazing Prohibition, eliminating caveats and increasing the scope of the prohibition. While the Original Hazing Prohibition was almost useless, the Hazing Amendments should give the prohibition greater efficacy and make it a useful tool for prosecutors. The Enactment requires local school boards to adopt rules prohibiting hazing and other conduct and places reporting requirements on school employees. In sum, Senate Bill 150 provides a more effective tool for prosecutors and should make Utah's public schools better able to prevent and react to future incidents of hazing.

---

[53]Senator Stephenson explained that "the bill addresses the need for local school boards to adopt effective policies governing behavior in school related activities." Stephenson Statement, *supra* note 3. No remedial action was taken against the alleged perpetrators involved in the Sky View incident by the school administration, until the district superintendent stepped in to cancel the remainder of the team's football season. *See* Autman & Horiuchi, *supra* note 13. In fact, Mr. Snow, the football coach, told the victim he was barred from playing in any more games when the victim refused to accept the team's apology. *See id.* While five students involved in the Hillcrest incident were expelled, this had to be justified by characterizing their conduct as "dangerous or disruptive," as defined in Jordan School District's code of conduct. *See* Drew, *supra* note 14. Two Roy High School football players involved in hazing were kicked off the team, but no other remedial action was taken. *See Hazing Report Results in Roy Suspensions*, *supra* note 15.

[54]*See* discussion *supra* Part 2.b; *supra* notes 27–29.

[55]UTAH CODE ANN. § 53A-11-908(3)(a) (Supp. 1997).

[56]*See id.* § 53A-11-908(3)(b).

[57]*See id.*

[58]*Id.* § 53A-11-908(3)(c).

[59]The State Board of Education is legislatively mandated to "take appropriate action against any" person holding a professional certificate who exhibits "unprofessional" conduct or who has "committed any other violation of standards of ethical conduct, performance, or professional competence." *Id.* § 53A-6-301(1)(a) (1997).

[60]*See id.* § 53A-11-908(4) (Supp. 1997); § 53A-11-404 (1997).

III. CRIMINAL LAW AND PROCEDURE

*Witness Immunity Amendments**

1. Introduction

In its 1997 General Session, the Utah Legislature passed House Bill 78 (the "Bill"), enacting the Witness Immunity Amendments.[1] The Bill includes the Grants of Immunity Act[2] which changes the provisions for immunity in criminal[3] and quasi-criminal[4] cases from transactional immunity to use immunity. This Bill defines the scope, purpose, and application of use immunity,[5] sets out the scope of the authority of city attorneys,[6] county attorneys,[7] and others[8] to grant immunity, and makes technical and stylistic changes.

2. Background

In general, when a crime has been committed but a prosecutor has insufficient evidence to convict, she may grant a witness immunity in exchange for incriminating testimony that may lead to the arrest of the perpetrator.[9] There are two kinds of immunity: use and transactional.[10]

Before House Bill 78 was passed, the only available immunity in Utah was transactional.[11] If a prosecutor granted a witness transactional immunity, that witness could never be prosecuted for any criminal activity that related to that witness'

---

*Elsie Mata, Staff Member, *Utah Law Review*.

[1]Ch. 296, 1997 Utah Laws 1124 (codified as enacting UTAH CODE ANN. §§ 77-22b-1, -2 (Supp. 1997) (effective May 5, 1997); amending UTAH CODE ANN. §§ 4-32-9 (1995), 10-3-928 (1996), 13-11-16 (1996), 17-18-1.5 (1995), scattered sections of tit. 20A (1995), 31A-2-305 (1994), 34-20-11 (1994), 76-7-101 (1995), 76-8-806 (1995), 77-22-1 (1995) (effective May 5, 1997); amending UTAH CODE ANN. §§ 34A-4-502 (Supp. 1996), 35A-5-104 (Supp. 1996) (effective July 1, 1997); and repealing UTAH CODE ANN. §§ 20A-1-702 (1995), 58-37-16 (1996), 62A-11-318 (1997), 77-22-3 (1995)) (effective May 5, 1997).

[2]UTAH CODE ANN. §§ 77-22b-1, -2 (Supp. 1997).

[3]*See id.* § 77-22b-1(a).

[4]*See id.* § 77-22b-1(2), (6). "Quasi-criminal" proceedings are those that are determined by a court to be so criminal in nature that a defendant has a constitutional right against self-incrimination. *See id.* § 77-22b-1(6).

[5]*See id.* § 77-22b-1.

[6]*See* UTAH CODE ANN. § 10-3-928 (Supp. 1997).

[7]*See id.* §§ 17-18-1.5, 77-22b-1(5).

[8]*See id.* § 77-22b-1(1)(a)(I)–(vi).

[9]*See* Floor Debate, Statement of Sen. Lyle W. Hillyard, 52d Utah Leg., Gen. Sess. (Mar. 5, 1997) (Senate recording no. 42, side 1) [hereinafter Hillyard Statement].

[10]*See id.*

[11]*See Hearings on H.B. 78 Before the Members of the Judiciary Comm.*, 52d Utah Leg., Gen. Sess. (Jan. 31, 1997) (House recording no. 1, side 2) [hereinafter *Hearings*] (statement of Rep. David L. Gladwell); Hillyard Statement, *supra* note 9; Utah Office of Legislative Research and General Counsel, S.B. 188, 47th Leg., Gen. Sess. Legislative Explanatory Note (1988) (on file with Utah Office of Legislative Research and General Counsel) [hereinafter Explanatory Note].

testimony.[12] This type of immunity is troubling because a prosecutor would not know what really happened when making the decision of whether or not to grant an individual immunity.[13] That decision would be made virtually blind and with irrevocable consequences, should the prosecutor be wrong about the witness's relationship to the crime.[14]

The problems with transactional immunity are demonstrated by *State v. Hamilton*.[15] In *Hamilton*, circumstantial evidence linked the defendant and another individual to the sexual assault, mutilation, and murder of a young woman whose dismembered body parts were found along Interstate Highway 15.[16] The prosecutor granted the other individual transactional immunity in exchange for testimony incriminating the defendant.[17] However, after being granted transactional immunity, the individual indicated he sexually abused and mutilated the victim.[18] By granting the individual transactional immunity, the prosecutor immunized one of the killers unwittingly and irrevocably.

Had use immunity been available, independent evidence could have been used to prosecute this individual.[19] For example, suppose someone on vacation had heard on the news that a woman's body had been found dismembered on the side of the freeway.[20] The vacationer had seen something by the roadside off of I-15 but had not recognized its significance.[21] If the immunized witness had been granted use immunity and the vacationer had come forth and provided information independent of that testimony, the immunized criminal could still have been prosecuted.[22] However, use immunity was not available in Utah when *Hamilton* was decided.[23] As a result, the immunized criminal could not be prosecuted.[24]

As *Hamilton* illustrates, transactional immunity is fraught with hazards and may result in great injustice.[25] Straddled with transactional immunity, Utah prosecutors often found themselves impotent in bringing someone to justice because they could not risk giving immunity to someone who would later confess to committing the crime.[26] These problems made House Bill 78 a priority for the statewide Association of

---

[12]*See Hearings, supra* note 11 (statement of Rep. David L. Gladwell); Hillyard Statement, *supra* note 9; Explanatory Note, *supra* note 11.

[13]*See* Explanatory Note, *supra* note 11.

[14]*See id.*

[15]827 P.2d 232 (Utah 1992).

[16]*See id.* at 235; *Hearings, supra* note 11 (statement of Creighton Horton, Assistant Att'y Gen.); Floor Debate, Statement of Rep. David L. Gladwell, 52d Utah Leg., Gen. Sess. (Feb. 18, 1997) (House recording no. 1, side 1) [hereinafter Gladwell Statement].

[17]*See Hamilton*, 827 P.2d at 235.

[18]*See Hearings, supra* note 11 (statement of Creighton Horton, Assistant Att'y Gen.); Gladwell Statement, *supra* note 16.

[19]*See* Gladwell Statement, *supra* note 16.

[20]*See Hearings, supra* note 11 (statement of Creighton Horton, Assistant Att'y Gen.).

[21]*See id.*

[22]*See id.*

[23]*See* Gladwell Statement, *supra* note 16.

[24]*See id.*

[25]*See id.*

[26]*See Hearings, supra* note 11 (statement of Creighton Horton).

Prosecutors and the Attorney General's Office.[27] The Bill also received support from the Utah Law Enforcement Legislative Committee, the Peace Officer's Association, the Utah Sheriff's Association, and the Utah Highway Association.[28] Even the local Legal Defenders' Association raised no objections.[29]

Nationwide, the federal criminal justice system and the majority of state criminal justice systems employ use immunity.[30] As a result, use immunity has been the cornerstone of successful federal efforts aimed at white collar criminals, narcotics traffickers, and organized crime.[31] House Bill 78 introduced use immunity into Utah and placed Utah in line with the majority position on this issue.[32]

3. The Act and the Amendments

House Bill 78, in addition to making a few technical and stylistical corrections, amendments, and deletions, makes two substantial changes to Utah's criminal procedure. First, the Bill changes the scope, purpose, and application of immunity by enacting the Grants of Immunity Act (the "Act"), which changes the provisions for immunity in criminal and quasi-criminal cases from transactional immunity to use immunity.[33] Second, the Bill sets out the scope of the authority to grant immunity for city and county attorneys, the Utah Legislature, and other administrative agencies.[34]

(a) Purpose, Scope, and Application of the Grants of Immunity Act

The Act alleviates the unjust, hazardous, and irrevocable ramifications of transactional immunity. It affects criminal and quasi-criminal cases and is carefully drafted to allow the prerogative of granting use immunity only to those people who deal with these issues on a daily basis and who have experience and expertise.

(i) Criminal Cases

This Act specifically applies to criminal cases.[35] When a witness refuses, or is likely to refuse to testify or provide evidence in a criminal investigation based on the privilege against self-incrimination, that witness may be compelled to testify after being granted use immunity.[36] Neither compelled testimony nor any information directly or indirectly derived from this testimony may be used against the witness in any criminal case, unless it is volunteered or otherwise nonresponsive to a question.[37]

---

[27]*See id.* (statement of Rep. David L. Gladwell).
[28]*See id.*
[29]*See* Gladwell Statement, *supra* note 16.
[30]*See id.*
[31]*See id.*
[32]*See* Hillyard Statement, *supra* note 9.
[33]*See* Grants of Immunity Act, ch. 296, 1997 Utah Laws 1137.
[34]*See id.*
[35]*See* UTAH CODE ANN. § 77-22b-1(1)(a) (Supp. 1997).
[36]*See id.*
[37]*See id.* § 77-22b-1(2).

However, if a prosecutor can clearly establish by a preponderance of the evidence that the testimony being used to prosecute this individual was developed independent of the witness' own statements, then the prosecutor may prosecute while simultaneously honoring the person's Fifth Amendment right against self-incrimination.[38] This is a difficult burden for the prosecution to overcome because the prosecutor must establish that the evidence under which the individual is being prosecuted is wholly independent and separable from the immunized testimony.[39]

To illustrate this difficulty, consider the case of *United States v. North*.[40] Oliver North was granted use immunity and later testified at trial.[41] He was prosecuted criminally, but the conviction was vacated and the case was remanded.[42] Although the prosecutor did not specifically use North's testimony at trial, the court was concerned that the government's witnesses had been exposed to the immunized testimony either independently or through the lawyers' questioning.[43] As a result, the court remanded the case with specific instructions as to what the government needed to prove to meet its burden.[44] Although the prosecutor had not established by a preponderance of the evidence that the testimony used to prosecute Oliver North was developed independent of North's own statement, the prosecutor nevertheless retained the option of prosecuting the immunized witness because North was granted use and not transactional immunity.[45]

(ii) Quasi-Criminal Cases

This Act also applies to quasi-criminal cases.[46] Quasi-criminal cases are those proceedings that are determined by a court to be so criminal in their nature that a defendant has a constitutional right not to incriminate himself.[47] For the purposes of granting use immunity under the Act, quasi-criminal cases are treated like criminal cases.[48]

(b) Who May Grant Use Immunity

Under the Act, only certain individuals have authority to grant use immunity in criminal and quasi-criminal cases.[49] These individuals include the Attorney General, a district attorney, a county attorney in a county not within a prosecution district, a

---

[38]*See* Hillyard Statement, *supra* note 9; Gladwell Statement, *supra* note 16.

[39]*See* Hillyard Statement, *supra* note 9; Gladwell Statement, *supra* note 16.

[40]910 F.2d 843 (D.C. Cir. 1990); *see also Hearings, supra* note 11 (statement of Creighton Horton, Assistant Att'y Gen.) (using *North* as example showing need for use immunity).

[41]*See North*, 910 F.2d at 851.

[42]*See id.* at 851–52.

[43]*See id.* at 872.

[44]*See id.* at 872–73.

[45]*See Hearings, supra* note 11 (statement of Creighton Horton, Assistant Att'y Gen.).

[46]UTAH CODE ANN. § 77-22b-1(6) (Supp. 1997).

[47]*See id.*

[48]*See id.* § 77-22b-1(2).

[49]*See id.* § 77-22b-1(a)(I)–(vi)

special counsel for the grand jury, and a prosecutor pro tempore.[50] In addition, if the Legislature or a legislative committee subpoenas testimony, the legislative general counsel may grant use immunity.[51]

(i) Delegating Authority

Those elected officials who are authorized to grant use immunity under the Act may also deputize and delegate to someone within their office the authority to grant use immunity.[52] The Attorney General, a district attorney, and a county attorney in a county not within a prosecution district may authorize any assistant attorney general, deputy district attorney, or deputy county attorney, respectively, to grant use immunity.[53]

(ii) City and County Attorneys

City and county attorneys, however, may not grant use immunity without coordinating with their local district attorney.[54] Interestingly, they retain their power to grant transactional immunity.[55] For example, a city attorney may grant transactional immunity for violations of city ordinances, infractions, and misdemeanors occurring within the boundaries of their municipality.[56] A county attorney may grant transactional immunity for violations of county ordinances committed within the county.[57]

The city and county attorneys, however, are not authorized to grant use immunity because, as indicated by *Hamilton* and *North*, use immunity is a delicate and dangerous tool to be used with discretion.[58] It is difficult to show that an immunized witness' testimony does not contribute to the case against him.[59] As such, a city and county attorney may only grant a witness transactional immunity for minor issues like violations of city or county ordinances.[60] In cases where more serious crimes are involved, however, the city or county attorneys must coordinate with someone authorized to grant use immunity, a person who is likely to possess more training in criminal matters.[61] She is likely to be a prosecutor who deals with use immunity and serious crimes on a daily basis.[62]

---

[50]*See id.; see also* UTAH CONST. art. VIII, § 16 (providing for appointment of prosecutor pro tempore).
[51]*See* UTAH CODE ANN. § 77-22b-1(a)(vi) (Supp. 1997).
[52]*See id.* § 77-22b-1(a)(I)–(iii).
[53]*See id.*
[54]*See Hearings, supra* note 11 (statement of Creighton Horton, Assistant Att'y Gen.).
[55]*See* UTAH CODE ANN. §§ 10-3-928, 17-18-1.5 (Supp. 1997).
[56]*See id.* § 10-3-928.
[57]*See id.* § 17-18-1.5(1)(b).
[58]*See Hearings, supra* note 11 (statement of Creighton Horton, Assistant Att'y Gen.).
[59]*See id.*
[60]*See id.*
[61]*See id.*
[62]*See id.*

(iii) Legislative Exception

There is a legislative exception to the general policy that only an experienced individual may grant use immunity.[63] When a legislative investigation is serious enough to require that a subpoena be issued, then the decision of whether or not to grant use immunity will be left to the legislative branch and not to the Attorney General.[64] The principle of separation of powers generally precludes the executive branch from deciding when the legislature may compel a witness to testify and when it may not.[65] Although it is important that use immunity be granted with great care, for the Legislature, the issue of separation of powers overrides any concern that use immunity will be granted nonjudiciously.[66]

(iv) Administrative Agencies

Finally, the former right of administrative agencies to grant absolute immunity has been withdrawn.[67] Now administrative agencies are required to coordinate with local prosecutors when they wish to compel testimony through immunity.[68] This insures that a grant of immunity will not compromise a criminal investigation.[69]

4. Conclusion

House Bill 78 changes the provisions for immunity in criminal and quasi-criminal cases from transactional immunity to use immunity. The Bill defines the scope, purpose, and application of use immunity. Additionally, it narrowly limits the authority to grant immunity to the Attorney General, a district attorney, a county attorney in a county not within a prosecution district, a special counsel for a grand jury, a prosecutor pro tempore, and the Legislature.

---

[63]*See id.* (statement of Rep. Harward).
[64]*See id.*
[65]*See id.*
[66]*See id.*
[67]*See* Gladwell Statement, *supra* note 16.
[68]*See id.*
[69]*See id.*

IV. GOVERNMENTAL LAW

*A. Local Taxing Authority**

1. Introduction

In March 1997, the Utah Legislature passed House Bill 98 (the "Act"),[1] which modifies the licensing and taxing authority of a municipality. On the one hand, the Act eliminates, with some specific exceptions, the power of a municipality to impose business license fees so as to raise revenue. This measure has the effect of equalizing the licensing power of municipalities with that of counties, which have traditionally been authorized to introduce business license fees for regulation but not for taxation purposes. On the other hand, the Act grants municipalities additional taxing authority, allowing them to impose a one-quarter percent transient room tax,[2] an additional one-half percent resort communities tax, and a one-quarter percent transit sales tax for rural areas.

Sponsored by Representative John Valentine, the Act was strongly supported by a "politically muscular consortium of business interests"[3] led by the Utah Manufacturers Association, the Utah Taxpayers Association, and the Utah Food Industry Association. It was as strongly opposed by the Utah League of Cities and Towns.

2. Background

Representative Valentine introduced the Act in an effort to take away the "blank check" that municipalities had in imposing license fees on local businesses.[4] The purpose of the Act is to create state oversight of municipalities' licensing power and to produce uniformity among municipalities and between municipalities and counties.[5]

Prior to the Act, Utah law allowed municipalities to raise revenue by levying and collecting license fees or taxes on businesses within their limits.[6] The Utah Supreme Court had traditionally upheld the open-ended authority of a municipality to tax under its licensing power.[7] The only conditions that the court had imposed on municipal

---

*Barbara Bagnasacco, Staff Member, *Utah Law Review*.

[1]Local Taxing Authority, ch. 305, 1997 Utah Laws 1169 (1997) (codified as amending UTAH CODE ANN. §§ 10-1-203, 10-1-307, 59-2-924, 59-12-108, 59-12-302, 59-12-401 (Supp. 1997); and enacting UTAH CODE ANN. §§ 59-12-402, -351 to -354, -1001 to -1002 (Supp. 1997)) (effective Jan. 1, 1998).

[2]This tax can be increased by another one-half percent in cities that already have a one-half percent business license fee.

[3]Dan Harrie, *A Move To Curb Taxing*, SALT LAKE TRIB., Feb. 12, 1997, at A4 [hereinafter Harrie].

[4]Floor Debate, Statement of Rep. John L. Valentine, 52d Utah Leg., Gen. Sess. (Feb. 25, 1997) (House recording no. 2, side A) [hereinafter Valentine Statement].

[5]*See id.*

[6]*See* UTAH CODE ANN. § 10-1-203(2)(a) (1996) (amended 1997). The state must expressly authorize the exercise of licensing power because cities, as well as counties, do not have inherent authority to tax. *See* Consolidation Coal Co. v. Emery County, 702 P.2d 121, 123 (Utah 1985).

[7]*See* Little Am. Hotel Corp. v. Salt Lake City, 785 P.2d 1106, 1109 (Utah 1989) (upholding tax on innkeepers amounting to one percent of gross revenue derived from room rentals); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 891 (Utah 1988) (upholding annual license tax on all suppliers

license taxes were that the tax be not "so excessive as to prohibit or destroy the occupation or business upon which it is imposed,"[8] that it be uniform in respect to the class to which it is applied,[9] and that it bear "some reasonable relationship to the cost of regulating the business so licensed."[10]

The great discretion that municipalities enjoyed in imposing license taxes contrasted sharply with the limited scope of counties' licensing authority. In fact, the Utah Supreme Court has consistently ruled that counties may exercise their statutory right to license businesses[11] as being allowed only for the purpose of regulating the business being charged, but not for the purpose of taxation.[12] Therefore, counties do not have the power to introduce taxes under their licensing authority, and cannot use the revenue generated through license fees for any purpose other than business regulation.

In the recent past, a significant lack of uniformity among municipalities added to the disparity between municipalities and counties. In the attempt to find additional resources to provide increasingly costly services for their communities, municipalities began to use their license authority more and more often in order to impose new taxes.[13] For instance, Moab introduced a quarterly license tax based on retail sales;[14] West Valley City imposed a five dollar monthly fee on owners of apartments[15] so as to finance its police service, since apartment buildings were shown to require more police intervention than houses;[16] and Nephi imposed a fee on retail businesses.[17]

Business organizations expressed their concern that cities would "abuse their powers to impose business license fees by using them as disguised sales taxes"[18] and called for a change in Utah law that would require legislative authorization before a

---

of telephone, gas, or electric service); Davis v. Ogden City, 215 P.2d 616, 624 (Utah 1950) (upholding license tax imposed on business of practicing law).

[8]Ogden City v. Crossman, 53 P. 985, 989 (Utah 1898) (upholding five-dollar license fee on each rented telephone maintained within city), *overruled on other grounds by* Town of Ophir v. Jorgensen, 225 P. 342, 343 (Utah 1924); *see also Consolidation Coal*, 702 P.2d at 124 (invalidating county ordinance imposing sales tax without regulatory purpose).

[9]*See* Continental Bank & Trust v. Farmington City, 599 P.2d 1242, 1245 (Utah 1979) (invalidating municipal license tax levied upon amusement park).

[10]Weber Basin Home Builders Ass'n v. Roy City, 487 P.2d 866, 867 (Utah 1971).

[11]"The governing body of a county may license for the purpose of regulation and revenue any business within the unincorporated areas of the county." UTAH CODE ANN. § 17-5-222(2) (1995). The statute inherited this specific language from its previous versions, upon which the Utah Supreme Court relied in its earlier cases concerning the licensing authority of counties.

[12]*See* Mountain States Tel. & Tel. Co. v. Salt Lake County, 702 P.2d 113, 116 (Utah 1985) (observing that counties, differently from cities, are form of government that state imposes upon its citizens, and that counties' citizens are therefore entitled to expect that counties' taxing authority will be limited by state); Cache County v. Jensen, 61 P. 303, 305 (Utah 1900) (holding that statutory grant of authority to license for purpose of regulation and revenue to counties did not include power to issue licenses only for taxation purposes).

[13]*See* Interview with David Bird, lobbyist attorney, Parsons Behle and Latimer, in Salt Lake City, Utah (Aug. 18, 1997) [hereinafter Bird Interview].

[14]*See* MOAB, UTAH, CODE § 13-27 (1995).

[15]*See* WEST VALLEY, UTAH, CODE § 1-2-103 (1995).

[16]*See* Bird Interview, *supra* note 13.

[17]*See* Nephi, Utah, Ordinance 6-29-95 (June 29, 1995).

[18]Harrie, *supra* note 3, at A4.

city could impose a license tax.[19] Representative Valentine gave voice to the business community's concern and in 1996 introduced House Bill 475,[20] a previous version of House Bill 98. House Bill 475 was materially similar to House Bill 98 in that it restricted the authority of a municipality to impose license fees for the purpose of generating revenue, while allowing a municipality to impose specific new taxes.[21] Because of an irremediable disagreement between the House of Representatives and the Senate over a specific provision, House Bill 475 was never enacted.[22] However, it had the effect of preparing the floor for the enactment of House Bill 98.

3. The Act

The Act affects the licensing and taxing authority of a municipality in two major ways. First, it circumscribes the power of a municipality to impose license taxes to a few specifically identified businesses. Second, it authorizes a municipality to impose a transient room tax, an additional resort tax, and a transit tax in rural areas.[23]

(a) License Fees and Taxes

The Act eliminates the discretion of a municipality in imposing business license fees to raise revenue for general municipal purposes. As of January 1, 1998, municipalities are allowed to impose business licenses merely to service, regulate, and police the business or activity being charged.[24]

---

[19]*See* Interview with Larry D. Bunkall, President of the Utah Mfr. Ass'n, in Salt Lake City, Utah (Aug. 25, 1997) [hereinafter Bunkall Interview]. Several business and taxpayer associations, together with hundreds of individuals and businesses, signed a resolution expressing their belief that tax policy decisions should be decided by the Legislature "in order to ensure fairness, predictability, stability and a healthy business climate throughout Utah." Resolution on the Mun. Bus. License Fee (Jan. 20, 1997) (on file with author). They asked the Utah Legislature "to limit the use of the municipal business license fee to the collection of revenue sufficient to fund the regulation of businesses within city limits, similar to the business license fee authority enjoyed by Utah's Counties." *Id.*

[20]H.B. 475, 51st Leg., Gen. Sess. (Utah 1996).

[21]*See id.*

[22]First Substitute House Bill 475 granted rural cities a one-quarter percent transit tax. The House of Representatives introduced an amendment that would have allowed urban cities (which already had a similar tax) to impose an additional one-eighth percent transit tax. The Senate struck down the amendment so as to avoid a tax increase in urban cities of "twenty-four to twenty-eight millions of dollars." Floor Debate, Statement of Sen. Leonard M. Blackham, 51st Utah Leg., Gen. Sess. (Feb. 28, 1996) (Senate recording no. 57, side A). After a House Conference committee unsuccessfully met with a like Committee from the Senate, the Senate finally struck down the enacting clause of First Substitute House Bill 475 on February 28, 1996. *See* H.R. JOURNAL, Gen. Sess. 1066, 1088 (Utah 1996).

Governor Mike Leavitt acknowledged at the time that the failure of House Bill 475 was also affected by the upcoming political election of November 5, 1996. *See* Dan Harrie, *Local Taxing Plans to Get New Life*, SALT LAKE TRIB., Mar. 22, 1996, at B3.

[23]The Act, therefore, explicitly grants municipalities the power to impose some of the taxes that municipalities began to levy under their previously "unlimited licensing authority," while it "limits the rate and the base of those taxes." Telephone Interview with Rep. John L. Valentine, Utah House of Representatives (Aug. 26, 1997) [hereinafter Valentine Interview].

[24]*See* UTAH CODE ANN. § 10-1-203(2) (Supp. 1997). Using the same language found in the licensing statute dealing with counties, this subsection states that a municipality "may license for the purpose of regulation and revenue" any local business. *Id.* As a general rule, therefore, municipality licensing power and

The Act, however, identifies a few areas in which municipalities may still use licensing to produce revenue. First, the Act allows any tax, license, fee, or similar charge imposed upon a public utility, person, or entity engaged in the business of supplying telephone service.[25] Second, the Act authorizes ordinances introducing license fees or taxes on parking service businesses[26] in an amount that is less than or equal to one dollar per vehicle or two percent of the gross receipts of the business.[27] Third, the Act allows a municipality to impose by ordinance upon a "public assembly facility"[28] a license fee or tax that is less than or equal to one dollar per ticket purchased from the facility.[29] Fourth, under the Act, a municipality may impose by ordinance a license fee or tax upon a business that causes disproportionate costs of municipal services or for which the municipality provides an enhanced level of municipal services.[30] The tax must be reasonably related in amount to the costs of the municipal services provided.[31] Moreover, it is conditioned upon the adoption of an ordinance defining, respectively, "what constitutes disproportionate costs and what amounts are reasonably related to the costs of the municipal services provided by the municipality"[32] or "what constitutes the basic level of municipal services in the municipality and what amounts are reasonably related to the costs of providing an enhanced level of municipal services in the municipality."[33]

(b) Additional Taxing Authority

The Act counterbalances the restriction on business license fees with a new grant of taxing authority. In fact, the Act allows municipalities to raise revenue from three sources: an additional resort communities tax, a municipality transient room tax, and a transit tax.

First, the Act expands the current power of a municipality to impose a resort community tax. As of January 1, 1998, in order for a city or town to impose a one percent sales tax, the city's transient room capacity must be sixty-six percent or more

---

county licensing power are equalized.

[25]*See id.* § 10-1-203(4). The tax must be "based upon the gross revenues of the utility, person, or entity derived from sales or use or both sales and use of the telephone service within the municipality." *Id.*

[26]"Parking service business" is defined as a business that "primarily provides off-street parking services for a public facility that is wholly or partially funded by public moneys," that "provides parking for one or more vehicles," and that "charges a fee for parking." *Id.* § 10-1-203(5)(b)(i).

[27]*See id.* § 10-1-203(5)(a)(i). The parking services exception was conceived as a "specific concession for the Salt Lake City airport." Valentine Interview, *supra* note 23.

[28]A "public assembly facility" is a business operating an assembly facility which is "wholly or partially funded by public moneys" and which "requires a person attending an event at the assembly facility to purchase a ticket." *Id.* § 10-1-203(5)(b)(ii).

[29]*See id.* § 10-1-203(5)(a)(ii).

[30]*See id.* § 10-1-203(5)(a)(iii). The definition of "municipal services" includes public utilities and services for police, fire, storm water runoff, traffic control, parking, transportation, beautification, or snow removal. *See id.* § 10-1-203(5)(b)(iii).

[31]*See id.* § 10-1-203(5)(a)(iii).

[32]*Id.* § 10-1-203(5)(c).

[33]*Id.* § 10-1-203(5)(d).

of the permanent census population,[34] not equivalent to it, as was previously required.[35] Besides the one percent sales tax, a municipality may also impose an additional resort communities sales tax in an amount that is less than or equal to one-half percent,[36] on the condition that it pass a resolution and obtain voter approval,[37] and that it provide for a property tax reduction.[38] An exemption from the voter approval requirement is allowed for municipalities that, on or before January 1, 1996, already imposed a business license fee or tax based on gross receipts,[39] provided that the municipality did not impose that tax on only one class of businesses.[40] A final requirement forces municipalities to approve the additional resort tax by an ordinance providing an effective date for the tax.[41]

Second, the Act grants municipalities the authority to impose a transient room tax on the rents[42] charged to transients[43] occupying public accommodations[44] in an amount that is less than or equal to one percent of the rents charged.[45] The tax must be regulated by ordinance[46] and may be used for general fund purposes.[47] Municipalities may also impose an additional transient room tax that is less than or equal to one-half percent if, before January 1, 1996, they already had a business license fee or tax and if, before January 1, 1997, they dedicated such fee or tax to the payment of bonded or other indebtedness, including lease payments under a lease purchase agreement.[48]

---

[34]*See* UTAH CODE ANN. § 59-12-401(1) (Supp. 1997). With the complete agreement of the cities, the Senate introduced the "sixty-six percent" figure in substitution of the originally proposed "seventy-five percent" figure. *See* Floor Debate, Statement of Sen. Lyle W. Hillyard, 52d Utah Leg., Gen. Sess. (Mar. 4, 1997) (Senate recording no. 40, side A).

[35]*See* UTAH CODE ANN. § 59-12-401(1) (1996) (amended 1997).

[36]*See id.* § 59-12-402(1) (Supp. 1997).

[37]*See id.* § 59-12-402(3)(a)–(b). In order to obtain voter approval, a municipality must hold an election during either a regular or a municipal general election and publish notice of the election at least 15 days before in a newspaper of general circulation in the municipality. *See id.* § 59-12-402(4)(a)–(b).

[38]*See id.* § 59-2-924(2)(d)(i). More specifically, this subsection requires a municipality that has imposed an additional resort sales tax to decrease the municipality certified tax rate "on a one-time basis by the amount necessary to offset the first 12 months of estimated revenue from the additional resort communities sales tax imposed under Section 59-12-402." *Id.* § 59-2-924(2)(f).

[39]*See id.* § 59-12-402(6)(a).

[40]*See id.* § 59-12-402(6)(b).

[41]*See id.* § 59-12-402(5)(a). As for the administration of the additional resort tax, the Act requires municipalities to "collect the tax on the first day of a calendar quarter" and to "notify the commission at least 30 days before the day on which the commission is required to collect the tax." *Id.* § 59-12-402(5)(b).

[42]The term "rents" includes rents and timeshare fees or dues. *See id.* § 59-12-351(2)(a)–(b).

[43]"Transient" is defined as "a person who occupies a public accommodation for 30 consecutive days or less." *Id.* § 59-12-351(3).

[44]"Public accommodation" is defined as "a place providing temporary sleeping accommodations to the public" and includes motels, hotels, motor courts, inns, bed and breakfast establishments, condominiums, and resort homes. *Id.* § 59-12-351(1)(a)–(g).

[45]*See id.* § 59-12-352(1).

[46]*See id.* § 59-12-352(3).

[47]*See id.* § 59-12-352(4).

[48]*See id.* § 59-12-353(1)(a)–(b). The additional municipal transient room tax may be imposed until the sooner of either the day on which the indebtedness or the refunding obligations incurred by the municipality as a result of the indebtedness have been paid in full, or 25 years from the day on which the municipality levied the transient room tax. *See id.* § 59-12-353(2)(a)–(b).

Municipalities are allowed to collect the additional transient room tax[49] and to adopt an ordinance imposing penalties and interest on those who do not remit the tax in a timely manner.[50]

Third, the Act empowers some municipalities to impose a one-quarter percent transit sales and use tax.[51] The tax must be used for the construction and maintenance of highways.[52] Only municipalities located in rural areas may introduce the new transit tax,[53] since urban municipalities under the jurisdiction of the Utah Transit Authority already impose an equivalent tax.[54] The Act requires rural municipalities to pass an ordinance approving the tax and to obtain voter approval.[55] However, municipalities that, on or before January 1, 1996, already imposed a business license fee or tax based on gross receipts are not subject to the voter approval requirement, provided that they did not levy the tax on only one class of businesses.[56] The tax commission must collect and then transfer to the municipality the transit tax,[57] and must charge the municipality a fee for administering the tax.[58]

4. Conclusion

In an attempt to prevent the unsupervised and inconsistent growth of municipal business license taxes, the Utah Legislature enacted the Act, which limits the power of a municipality to impose taxes under its licensing authority. Consequently, with the exception of the specific businesses identified by the Act, municipalities may impose business license fees merely for regulating the business being charged. The Act, however, provides municipalities with an alternative source of revenue by granting

---

[49]*See id.* § 59-12-354(2)(a). Municipalities must collect the additional tax "on the first day of a calendar quarter" and "notify the commission at least 30 days before the day on which the commission is required to collect the tax." *Id.* § 59-12-354(6)(a)–(b).

[50]*See id.* §§ 59-12-354(2)(c)(i)–(ii), 59-12-354(4).

[51]*See id.* § 59-12-1001(1).

[52]*See id.* § 59-12-1001(2).

[53]*See id.* § 59-12-1001(1).

[54]*See id.* § 59-12-501 (1996). This section provides that "any county, city or town within a transit district organized under Title 17A, Chapter 2, Part 10, may impose a sales and use tax of 1/4 of 1% to fund a public transportation system" if it obtains voter approval. *Id.* As of July 1, 1997, additional, though indirect, financing to transportation is available for all municipalities and counties through an increased fund for maintenance of class B and class C roads. *See id.* § 27-12-129 (Supp. 1997). The increase in the fund for B and C roads was one of the reasons why Representative John Valentine opposed the proposal of introducing an additional one-eighth-percent transit tax in urban municipalities. *See* Valentine Statement, *supra* note 4. The business community views the new apportionment of funds available to municipalities for their roads as constituting, together with the Act, a "multi-bill global solution" to the issue of the municipalities' licensing and taxing authority. Bunkall Interview, *supra* note 19.

[55]*See id.* § 59-12-1001(3)(a)–(b). The ordinance must provide an effective date for the tax. *See id.* § 59-12-1001(5). As for voter approval, municipalities must hold the transit tax election during a regular or municipal general election and publish the relevant notice at least 15 days before in a newspaper of general circulation in the municipality. *See id.* § 59-12-1001(4)(a)–(b).

[56]*See id.* § 59-12-1001(7)(a)–(b).

[57]*See id.* § 59-12-1002(1)(a)–(b).

[58]*See id.* § 59-12-1002(2)(a). The fee must cover the costs of administering the tax, but "may not exceed 1-1/2% of the revenues generated in the municipality by the tax." *Id.* § 59-12-1002(2)(b). The fee must ultimately go into the Sales and Use Tax Administrative Fees Account and be used for sales tax administration. *See id.* § 59-12-1002(2)(c)(i)–(ii).

them the authority to impose an additional resort communities tax, a transient room tax, and a transit tax for rural areas.

B. Municipal Law Amendments[*]

1. Introduction

In its Second Special Session held July 16, 1997, the Utah Legislature enacted House Bill 2001 (the "Act"),[1] which modifies amendments the Legislature made to the laws governing municipalities during the 1997 General Session.[2] The Act modifies the process of transforming unincorporated land into a city, the feasibility study criteria, the percentage of property owners required to petition for incorporation, and annexation procedures. It provides for the township planning commission's recommendation on a proposed incorporation or annexation of an area within the township, reinstates most dissolved townships, continues previously established planning districts and township planning districts as townships, modifies township planning commission election and appointment procedures and responsibilities, and makes technical corrections to the previous laws.

2. Background

In order to correct difficulties encountered with the 1996 law that established procedures for the creation of townships,[3] the Utah Legislature passed House Bill 363 during its 1997 General Session.[4] House Bill 363 dissolved fifteen townships that had been established under the 1996 law, designating them as "planning districts" instead.[5]

---

[*]Rosalie Woolshlager, Staff Member, *Utah Law Review*.

[1]Local Government Law Amendments, ch.3, 1997 Utah Laws 1775 (to be codified as amending UTAH CODE ANN. §§ 10-2-101, –103, –105, –106, –107, –109, -110, -403 to -405, -407, 17-27-200.5, -201, -204, -206).

[2]Municipal and County Law Amendments, ch.389, 1997 Utah Laws 1644 (to be codified as amending UTAH CODE ANN. §§ 10-1-104; 10-2-510, -610; 10-3-1203; 10-6-111; 17-27-200.5, -201, -204; enacting UTAH CODE ANN. §§ 10-2-115 to -125; 17-27-206; repealing and reenacting UTAH CODE ANN. §§ 10-2-101 to -114, -401 to -422; and repealing UTAH CODE ANN. §§ 10-2-101.5, -102.1 to -102.4, -102.6, -102.8, -102.10, -102.12, -106.5, -106.8, -108.5, -423 to -424; 17-27a-101 to -105).

[3]*See* UTAH CODE ANN. § 10-2-102.8 (Supp. 1996); *see also* Melissa Rakow, Dev., *Local Government Changes Act*, 1996 UTAH L. REV. 1407 (discussing 1996 legislative enactment of incorporation, annexation, and township statutes and controversy generated thereby); City of South Salt Lake v. Salt Lake County, 925 P.2d 954 (Utah 1996) (arising out of county ordinance passed in response to ambiguity in 1996 law).

[4]*See* Linda Fantin, *Townships Revived With New Limits*, SALT LAKE TRIB., July 17, 1997, at B1 [hereinafter Fantin, *Townships Revived With New Limits*] (discussing House Speaker Mel Brown's position during 1997 General Session that township control over development would violate landowners rights to develop private property and would lead to township activists trying to form "nations" and control such details as water rights and speed limits within township jurisdictions).

[5]*See* UTAH CODE ANN. 17-27-200.5 (Supp. 1998) (amended July 16, 1997); *see also* Linda Fantin, *Bill Would Get Rid of Townships*, SALT LAKE TRIB., Feb. 20, 1997, at B1 [hereinafter Fantin, *Bill Would Get Rid of Townships*] (discussing proposal to dissolve townships and designate them as planning districts instead).

Residents of planning districts retained some say over planning and zoning issues, but planning districts had no power to stop nearby cities from annexing unincorporated land within counties, which was one of the main reasons townships had been established.[6] House Speaker Melvin R. Brown, sponsor of House Bill 363, believed that while it was important for communities to guide development, they should not be able to lock up their boundaries.[7]

The 1997 law however, proved unpopular with voters, particularly with members of the affected townships who felt that their desire to preserve their communities had been ignored by the legislature.[8] Governor Mike Leavitt allowed House Bill 363 to become law without his signature, with the understanding that the issues of annexations and townships would continue to be studied by a legislative interim committee.[9] In May 1997, after supporters of the abolished townships failed to gather enough signatures on petitions to force a statewide referendum on the issue,[10] legislative leaders requested a special session[11] to craft a compromise.[12]

---

[6]*See* Fantin, *Bill Would Get Rid of Townships*, *supra* note 5; Rakow, *supra* note 3, at 1418–20 (discussing protection offered by township status under the 1996 law).

[7]*See* Linda Fantin, *Committee OKs Bill to Eliminate Townships*, SALT LAKE TRIB., Feb. 26, 1997, at B2 (discussing legislative committee approval of House Bill 363).

[8]*See* Monte Whaley, *Citizens Rebel Against Plan To Wipe Out Utah Townships*, SALT LAKE TRIB., MAR. 22, 1997, at A1 (reporting widespread criticism of eliminating townships); Karen Crompton, Letter to the Editor, *Townships Have Support*, SALT LAKE TRIB., Mar. 25, 1997, at A10 (opining that legislature "ignored the clear will of the people" and "essentially disenfranchised the electorate" by abolishing townships); *see also* Linda Fantin, *Legislature Kills Townships*, SALT LAKE TRIB., Mar. 6, 1997, at C1 [hereinafter Fantin, *Legislature Kills Townships*] (noting that House Bill 363 gives renters, nursing home residents and those who have placed property in trust no input in annexation decisions); Linda Fantin, *Township Issue May Get on Ballot*, SALT LAKE TRIB., Mar. 11, 1997, at D1 (discussing support for petition drive launched by township residents challenging legislature's abolition of townships and attempting to force statewide referendum on township issue).

[9]Letter from Michael O. Leavitt, Governor of Utah, to Melvin R. Brown, Speaker of the House of Representatives of Utah, and Lane Beattie, President of the Senate of Utah (Mar. 21, 1997) (on file with the Utah Office of Legislative Research and General Counsel). Governor Leavitt expressed two primary reasons for not signing the bill: first, that citizens had voted overwhelmingly for some townships to be created but the bill had nullified their actions; and second, that the bill may have been weighted too heavily in favor of acreage owned rather than residents. *See id.*

[10]*See* Linda Fantin, *Township Supporters Collecting Signatures At a Difficult Time*, SALT LAKE TRIB., Apr. 13, 1997, at B2; Linda Fantin, *Township Backers Come Up Short of Signatures*, SALT LAKE TRIB., Apr. 15, 1997, at B2. Township supporters failed to gather the needed 67,188 signatures to force a referendum, but their efforts to save the townships they had established under the 1996 law demonstrated their seriousness and contributed to the decision to call a special session. *See* Linda Fantin, *Township Activists Reject Compromise*, SALT LAKE TRIB., May 9, 1997, at C10 [hereinafter Fantin, *Township Activists Reject Compromise*] (reporting that petitioners gathered only 32,811 signatures, but that lawmakers agreed to discuss compromise on township issue); *see also* Linda Fantin, *Township Compromise Discussed With Legislators*, SALT LAKE TRIB., Apr. 25, 1997, at C3 [hereinafter Fantin, *Township Compromise Discussed With Legislators*] (reporting that activists believed that lawmakers had underestimated importance of townships to residents).

[11]Legislators did not settle the township issue at the first special legislative session held June 18, 1997, so a second session was held. *See* Dan Harrie, *Special Session Ducks Two Issues*, SALT LAKE TRIB., June 20, 1997, at A8; *see also* Judy Fahys & Linda Fantin, *Tax, Township Proposals May Be Refined*, SALT LAKE TRIB., July 4, 1997, at B3 (listing provisions of draft bill to be discussed at July 16, 1997 Special Session).

[12]*See Township Backers Push Compromise Bill*, SALT LAKE TRIB., May 8, 1997, at B2; *see also* Fantin, *Township Compromise Discussed With Legislators*, *supra* note 10. After several weeks of negotiations, the township issues were eventually discussed and House Bill 2001 enacted at a second Special

3. The Act

The Act, as passed by the Second Special Session, affects the laws governing municipalities in four ways. First, it reestablishes townships as entities. Second, it requires that township planning commissions be notified of any proposed incorporations or annexations, and establishes procedures for the commissions to review the proposals and make recommendations to the county planning commission. Third, it modifies the standards used in feasibility studies on incorporation, requiring the studies to consider the full cost of providing municipal services to the new city. Finally, it modifies signature requirements for petitions to incorporate an unincorporated area. Each of these changes will be discussed in detail.

(a) Townships

The portion of the Act involving townships contains significant differences from both the 1996 law and the 1997 General Session enactments. During the 1997 Second Special Session, House Speaker Brown reminded lawmakers that a township is "not another level of government, not a political subdivision of any entity, but is merely a function of city government that has the right to local decision-making."[13] The Act reinstates fourteen of fifteen dissolved townships,[14] provides for the creation of future townships,[15] establishes procedures for the administration of townships,[16] and provides for the dissolution of townships.[17] Each of these changes will be discussed in turn.

Session, held July 16, 1997. *See* Fantin, *Townships Revived With New Limits*, *supra* note 4 (reporting on enactment of House Bill 2001 and noting that while Act does not give township supporters as much control over community development as they would like, it does allow them involvement and a voice in planning process); *see also* Editorial, *Townships Redux*, SALT LAKE TRIB., July 13, 1997, at AA1; Fantin, *Township Activists Reject Compromise*, *supra* note 10 (discussing negotiations on compromise bill prior to special session).

[13]Floor Debate, Statement of Rep. Melvin R. Brown, Speaker, Utah Leg., Spec. Sess. (July 16, 1997) (House recording no. 1, side A) [hereinafter Brown Statement]. The *Salt Lake Tribune* explained the differences as follows:

> [T]he townships would function only as planning districts, and they would not have veto power over annexations and incorporations as they did under the ill-conceived 1996 law. . . . [T]ownships would have no legal or political identity separate from county government. They would have no taxing authority. Essentially, township boards simply would serve as planning commissions in their jurisdictions, and their decisions still would be subject to approval by the county government.

Editorial, *Townships Redux*, *supra* note 12; *see also* Fantin, *Townships Revived With New Limits*, *supra* note 4 (reporting that township activist Karen Crompton agreed that townships are just tools to allow residents more input on planning and zoning issues).

[14]*See* UTAH CODE ANN. § 17-27-200.5(2)(e) (Supp. 1998).

[15]*See id.* § 17-27-200.5(2)(a)–(d).

[16]*See id.* § 17-27-201, -204.

[17]*See id.* § 17-27-200.5(4).

(i) Township Reinstatement

The Act provides that townships dissolved by the General Session under Chapter 389, Laws of Utah 1997, are reinstated as townships, so long as the former township consisted of a single, contiguous land area.[18] The reinstated townships keep the same boundaries and names as before their dissolution.[19]

(ii) Township Creation

Under the Act, a township may be created in one of two ways.[20] First, the Act allows a county legislative body ("Body") to enact an ordinance establishing a township within the unincorporated area of a county, or dividing the unincorporated area of a county into various townships, so long as the Body holds a public hearing on the township proposal after providing reasonable advance notice.[21] Alternatively, after following proper procedures for public notice and input, the Body may vote to establish a township pursuant to a petition filed with the Body.[22]

(iii) Township Administration

The Act provides for township planning commissions ("Commissions") to be established to guide community development.[23] Commissions are charged with the duty to prepare and recommend general plans and amendments, recommend zoning ordinances and maps, administer provisions of zoning ordinances, recommend subdivision regulations, recommend approval or denial of subdivision applications, and generally advise the Body as the Body requires.[24]

Although the Act provides for the election of at least three of the seven members of each Commission once an initial Commission has been designated,[25] the method of designating an initial Commission depends on the method used to create the township. For townships established without a petition, the Body may initially assign the administrative duties to the countywide planning commission or may designate a

---

[18]*See id.* § 17-27-200.5(2)(e)(i)(A).

[19]*See id.*

[20]The original procedures for establishing townships, enacted in 1996, required that the county legislative body hold an election to determine township status. UTAH CODE ANN. § 17-27a-104(2) (Supp. 1996) (repealed by H.B. 363, 52d Leg., Gen. Sess. (Utah 1997)). Ambiguity in the wording of section 17-27a-104(2) of the 1996 statute led to significant controversy over the number of votes required to establish a township. *See* Rakow, *supra* note 3, at 1415 (discussing controversy over "supermajority" requirement); City of South Salt Lake v. Salt Lake County, 925 P.2d 954, 959 (Utah 1996) (finding that 1996 statute was unambiguous on its face and did require supermajority).

[21]*See* UTAH CODE ANN. § 17-27-200.5(2)(a)(i)–(ii) (Supp. 1998).

[22]*See id.* § 17-27-200.5(2)(b)(i)–(iii).

[23]*See id.* § 17-27-201(3). Each county is also required to establish a county-wide planning commission for the unincorporated areas of the county not within a township, unless the entire county is included within a combination of already-existing municipalities and townships. *See id.* § 17-27-201(1).

[24]*See id.* § 17-27-204(1).

[25]*See id.* §17-27-201(3)(e).

Commission for the township.[26] For townships established by means of a petition, members of the initial Commission are appointed by the Body.[27]

If the Body appoints a Commission, it must enact an ordinance defining procedures for appointing Commission members, filling vacancies, removing members from office, and other organizational details.[28] Each Commission has seven members, with the initial members appointed by the county executive in counties with separate executive and legislative branches, or by the Body in counties in which the executive and legislative branches are not separate.[29] Commission members serve four-year terms, with the originally appointed commissioners serving terms of staggered duration.[30] Subsequent elections are to coincide with other municipal elections.[31] The Act provides that reinstated townships keep the members of their planning and zoning boards as members of their Commissions.[32] The Act also places residence restrictions on members of Commissions, requiring at least six members of each Commission to be registered voters residing within the township.[33]

(iv) Township Dissolution

The Act provides for the dissolution of townships upon a petition to the Body from twenty percent of the private real property owners, following a properly noticed hearing and vote by the Body.[34] If the Body votes to allow the township to remain in existence, the township may still be dissolved upon the petition of forty percent of private real property owners.[35]

(b) Commission Notification and Involvement in Decision-Making

The Act adds brief but significant changes to the procedures governing the incorporation of a contiguous area of a county. Under the 1996 law, township planning and zoning boards had the power to control planning and zoning activities within the township under rules and procedures established by the Body.[36] In the 1997 General Session, the legislature restricted the power of local communities to control development by taking away this veto privilege over annexation and incorporation from the planning districts that replaced the dissolved townships.[37]

---

[26]*See id.* § 17-27-200.5(3)(a). If the Body does not designate a Commission, the Act provides that a petition signed by 40% of the private real property owners can force the Body to designate one. *See id.* § 17-27-200.5(3)(b).

[27]*See id.* § 17-27-200.5(2)(c).

[28]*See id.* § 17-27-201(3)(a).

[29]*See id.* § 17-27-201(3)(b).

[30]*See id.* § 17-27-201(3)(c).

[31]*See id.* § 17-27-201(3)(e)(ii).

[32]*See id.* § 17-27-201(3)(f)(i)(A).

[33]*See id.* § 17-27-201(3)(d)(i)–(ii), (3)(f)(iii).

[34]*See id.* § 17-27-200.5(4)(a)–(b).

[35]*See id.* § 17-27-200.5(4)(c). In addition, the Act provides for a review of the reinstated townships by the Body after May 1, 2002, to determine their continued feasibility. *See id.* §17-27-200.5(2)(f).

[36]*See* Rakow, *supra* note 3, at 1417.

[37]*See* Fantin, *Legislature Kills Townships*, supra note 8.

The Act requires an affected Commission to be notified of any request for a feasibility study on incorporation or annexation.[38] In addition, the Act empowers a Commission to recommend that the Body in which the area proposed for incorporation is located support or oppose the proposed incorporation.[39] Finally, the Act allows a Commission to recommend that the Body in which the area proposed for annexation is located file a protest against the proposed annexation.[40]

(c) Standard of Services

The Act requires that a feasibility study on incorporation assume that the level and quality of government services to be provided to the proposed city "fairly and reasonably approximate[s]" the level and quality of services at the time of the study.[41] House Speaker Brown justified this requirement on the ground that the Body "would have to consider what is reasonable in terms of a tax base to provide the same level of services that residents need."[42]

(d) Signature Requirements for Incorporation Petitions

The Act reduces the number of signatures required on a petition for incorporation. Each petition must now be signed by "owners of private real property that . . . covers at least 1/3 of the total private land within the area; and is equal in value to at least 1/3 of the value of all private real property within the area."[43]

4. Conclusion

The Act modifies the Utah municipality laws in several ways.[44] First, it reestablishes townships as entities. Second, it requires that notification be given to township planning commissions of any proposed incorporations or annexations, and establishes review and recommendation procedures for the commissions considering such proposals. Third, it modifies the standards used in feasibility studies on incorporation. Finally, it reduces signature requirements for petitions to incorporate

---

[38]*See* UTAH CODE ANN. § 10-2-103(5), 10-2-105(1)(b)(i)(B)(II), 10-2-403(6)(b), 10-2-404(4), 10-2-405(1)(b), (2)(b) (Supp. 1998).

[39]*See id.* § 10-2-105(4).

[40]*See id.* § 10-2-407(1)(b). None of the additions reestablish a township's power to reject incorporation or annexation.

[41]*See id.* § 10-2-106(4)(c).

[42]Brown Statement, *supra* note 13. The Act forces studies to "consider the full cost of providing municipal services to a new city, including overhead." Fantin, *Townships Revived With New Limits*, *supra* note 4.

[43]UTAH CODE ANN. § 10-2-109(2)(a) (Supp. 1998). The law enacted by the 1997 General Session required that the property constitute "a majority" of the land and one-third of the total value of all private real property. H.B. 363, 52d Leg., Gen. Sess. (Utah 1997) (enacted) (amended by H.B. 2001, 52d Leg., 2d Spec. Sess. (Utah 1997) (enacted)). This change makes the process of incorporation easier. *See also* Fantin, *Townships Revived With New Limits*, *supra* note 4.

[44]"I believe this process [of modifying the law] will continue to go on and evolve in the next years in this state because we're in a very fast growth mode right now." Brown Statement, *supra* note 13.

an unincorporated area. Thus, the legislature and township activists reached a compromise that gave township proponents a voice in the political process.

V. TORT LAW

*Dramshop Liability Amendments**

1. Introduction

In February 1997, the Utah Legislature passed the Dramshop Liability Amendments (the "Amendments").[1] The Amendments make two major changes to the Dramshop Liability Act (the "Act").[2] First, the Amendments modify liability under the Act: in noncommercial settings, only adults who directly provide alcohol to a minor can now be held liable by third parties injured by the intoxicated minor.[3] Second, the Amendments increase the statutory cap on liability (the "Cap") under the Act: injured parties may now recover up to $500,000 individually and no more than $1,000,000 in the aggregate.[4]

2. Background

In a 1981 *Utah Law Review* article, Gordon L. Roberts and Charles H. Thronson lamented the lack of dramshop liability in Utah, particularly in situations in which vendors illegally sell alcohol to minors who subsequently injure third persons.[5] That same year, the Utah Legislature passed the Act[6] and has made numerous changes since then. In fact, Utah does not stand alone in maintaining this type of legislation; according to Senator David Buhler, the Amendments' sponsor, forty-three other states and the District of Columbia boast similar dramshop liability legislation.[7]

Prior to the Amendments, the Act accomplished three objectives: it (a) defined liability; (b) limited the amount of damages that could be awarded under the Act; and (c) protected employees who refused to serve alcohol to a patron against any sanction or termination by the employer.

---

*Paul R. Rudof, Staff Member, *Utah Law Review*.

[1]Dramshop Liability Amendments, ch. 94, 1997 Utah Laws 345 (codified as amending UTAH CODE ANN. § 32A-14-101 (Supp. 1997)) (effective Jan. 1, 1998).

[2]*See* UTAH CODE ANN. § 32A-14-101 (Supp. 1997) (amended 1997).

[3]*See id.* § 32A-14-101(2) (effective Jan. 1, 1998).

[4]*See id.* § 32A-14-101(6).

[5]*See* Gordon L. Roberts & Charles H. Thronson, *A New Perspective—Has Utah Entered the Twentieth Century in Tort Law?*, 1981 UTAH L. REV. 495, 514–17. Roberts and Thronson note that some states impose liability "through statutes generically known as Dram Shop Acts," while in other states "criminal sanctions against supplying liquor to individuals within a proscribed class created that duty of care." *Id.* at 514.

[6]*See* 1981 Utah Laws 152 (codified at UTAH CODE ANN. §§ 32-11-1 to -2 (Supp. 1981) (repealed 1985)).

[7]*See Dramshop Liability Amendments: Hearings on Sub. S.B. 112 Before the Bus., Lab., and Econ. Dev. Standing Comm.*, 52d Utah Leg., Gen. Sess. (Feb. 13, 1997) (House recording no. 1, side A) (statement of Sen. David Buhler) [hereinafter Buhler Statement].

(a) Liability

In defining liability, the Act stated:

> (1) Any person who directly gives, sells, or otherwise provides liquor, or at a location allowing consumption on the premises, any alcoholic beverage, to the following persons, and by those actions causes the intoxication of that person, is liable for injuries in person, property, or means of support to any third person, or to the spouse, child, or parent of that third person, resulting from the intoxication:
>
> (a) any person under the age of 21 years;
>
> (b) any person who is apparently under the influence of intoxicating alcoholic beverages or products or drugs;
>
> (c) any person whom the person furnishing the alcoholic beverage knew or should have known from the circumstances was under the influence of intoxicating alcoholic beverages or products or drugs; or
>
> (d) any person who is a known interdicted person.[8]

Until 1997,[9] Utah courts had not attached this liability to noncommercial, social hosts.[10] In *Sneddon v. Graham*,[11] a party injured by a drunk driver sued both the driver and the social host who provided beer to that motorist.[12] The Utah Court of Appeals held that the Act did not apply to individuals who provide beer in a noncommercial setting.[13] However, the *Sneddon* court did recognize that any person could be held liable for providing "liquor," which the Act distinguishes from beer containing less than 4% alcohol by volume.[14]

Six years later, the Utah Supreme Court, in *Stephens v. Bonneville Travel, Inc.*,[15] finally attached liability to a noncommercial, social host.[16] In *Stephens*, the Utah Supreme Court held that the plain language of the Act creates liability for noncommercial, social hosts who provide their guests with "liquor," as defined by the Act.[17] Thus, prior to January 1, 1998, when the Amendments took effect, a social host might have been liable if that host provided the required guest with "liquor," and that guest then injured a third party as a result of intoxication. However, the social host might not have been held liable if that host provided only beer, malt liquor, or a malted beverage containing less than 4% alcohol by volume.[18]

---

[8]UTAH CODE ANN. § 32A-14-101(1) (Supp. 1997) (amended 1997).

[9]*See infra* notes 15–17 and accompanying text.

[10]*See, e.g.*, D.D.Z. v. Molerway Freight Lines, Inc., 880 P.2d 1, 5 (Utah Ct. App. 1994) (holding that Dramshop Act did not apply against employer when employee was assaulted by intoxicated co-employee at company party); Sneddon v. Graham, 821 P.2d 1185, 1188 (Utah Ct. App. 1991).

[11]821 P.2d 1185 (Utah Ct. App. 1991).

[12]*See id.* at 1186.

[13]*See id.* at 1188.

[14]*See id.* at 1187–88.

[15]935 P.2d 518 (Utah 1997).

[16]*See id.* at 522.

[17]*See id.*; *see also* UTAH CODE ANN. § 32A-1-105(24)(b) (1994) (defining "liquor" as any alcoholic beverage containing more than .5% of alcohol by volume, but excluding any "beer, malt liquor, or malted beverage" with alcoholic content of less than 4% alcohol by volume).

[18]*See* Ted Cilwick, *Serve Weak Beer or You May Be Sued*, SALT LAKE TRIB., Mar. 29, 1997, at A1.

(b) The Cap

Among the many states that maintain dramshop liability acts, only Utah and six others place a limit on the amount of money an injured party can recover under the legislation.[19] Under the Act, an individual could only recover damages up to $100,000, "and the aggregate amount which [could] be awarded to all persons injured as a result of one occurrence [was] limited to $300,000."[20] In fact, when Senator Buhler learned that a Utah court enforced this cap against one of Buhler's constituents, Buhler decided to propose amendments to the Act which would eliminate or at least raise the cap.[21] In the case that inspired Buhler, *Adkins v. Uncle Bart's Inc.*,[22] the parents of a high school student killed by a drunk driver sued the commercial establishments that had provided the motorist with alcohol.[23] After a jury returned a verdict in favor of the parents and awarded them $1.8 million in compensatory and punitive damages, the judge reduced the damage award to comply with the statutory cap.[24] When Buhler read of this result in the newspaper, he decided to propose some changes.[25]

(c) Protecting Dramshop Employees

In addition to defining liability and limiting damages, the Act also provided protection for employees of commercial alcohol providers. Under the Act, an employer could not sanction or fire an employee who refused to serve alcohol to any person because the employee sought to avoid the Act's liability.[26] In fact, any employer who sanctions or terminates an employee for refusal to serve alcohol could be penalized under the Utah Antidiscriminatory Act.[27] The Amendments do not alter this section of the Act, and thus, this employee protection will not be discussed below.

3. The Amendments

In response to the *Adkins* and *Stephens* decisions, Senator Buhler sponsored the Amendments. The Amendments establish two important changes to the Act. First, they modify liability under the Act by clearly defining both commercial and social host liability and exempting private vendors of alcohol for off-premise consumption. Second, the Amendments increase the cap on damage awards that can be recovered under the Act. The Amendments, however, do not clarify every application of the Act.

---

[19]*See* Buhler Statement, *supra* note 7.

[20]UTAH CODE ANN. § 32A-14-101(5) (Supp. 1997) (amended 1997).

[21]*See* Buhler Statement, *supra* note 7.

[22]No. 940907146 P.I. (Utah 3d Dist. (judgment on verdict filed Jan. 2, 1997)).

[23]*See id.*

[24]*See* Ted Cilwick, *New Liquor Law Protects Utah Hosts*, SALT LAKE TRIB., Apr. 10, 1997, at A-1.

[25]*See* Telephone Interview with Sen. David Buhler (Aug. 1, 1997).

[26]*See* UTAH CODE ANN. § 32A-14-101(8)(a) (Supp. 1997) (amended 1997).

[27]*See id.* § 32A-14-101(8)(b). The Utah Antidiscriminatory Act, UTAH CODE ANN. §§ 34A-5-101 to -108 (1997), establishes causes of action and procedures for remedying unfair employment practices.

(a) Liability

The Amendments modify liability under the Act in three important ways. First, the Amendments seek to clarify when a commercial provider of alcohol can be liable under the Act. Under the Amendments, "[a] person is liable . . . if . . . the person directly gives, sells, or otherwise provides an alcoholic beverage . . . as part of the commercial sale, storage, service, manufacture, distribution, or consumption of alcoholic products" to particular patrons who then injure third parties as a result of intoxication.[28] This section of the Amendments applies solely to commercial operations. Furthermore, the language in this section does not distinguish between varying strengths of alcoholic beverages. Thus, a commercial provider of alcohol could be held liable regardless of the percentage of alcohol contained in the drink served.

Second, the Amendments also establish liability for a narrow class of noncommercial, social hosts. After the *Stephens* decision, social hosts who served their guests alcoholic beverages faced a double standard for liability if those guests became intoxicated and, as a result, injured a third party: those hosts that served beer, malt liquor, or malted beverages containing less than 4% alcohol could not be held liable to the injured party, while hosts who served stronger beer or liquor could be held liable.[29] The Amendments rectify this disparity: "A person 21 years of age or older . . . is liable . . . if . . . that person directly gives or otherwise provides an alcoholic beverage to an individual who the person knows or should have known is under the age of 21 years."[30]

This section of the Amendments applies strictly to noncommercial, social hosts. Again, the section destroys any relevant distinction between strengths of alcohol by eliminating the use of the word "liquor" and employing the generic term "alcoholic beverage"; thus, any adult who provides any type of alcohol, regardless of strength, to a minor, is potentially liable under this section. However, only those adults who "directly" provide alcohol to minors can be held liable under the Amendments; thus, adults who accidentally leave their liquor cabinet open or whose children throw a party while the adults are away cannot be held liable.[31] Furthermore, social hosts who serve alcohol to other adults, or even to a minor whom the host could not have known was a minor, cannot be held liable.

Third, the Amendments also alter liability under the Act by exempting from liability stores that sell alcohol for off-premise consumption. The Amendments state that "[t]his section does not apply to a general food store or other establishment licensed under Chapter 10, Part 1, to sell beer at retail for off-premise consumption."[32] Senator Buhler included this change "to put the retail beer vendors on the same footing as state liquor stores, which generally are immune from dramshop actions."[33]

---

[28]UTAH CODE ANN. § 32A-14-101(1)(b)(i) (Supp. 1997) (effective Jan. 1, 1998).

[29]This double standard of liability based upon alcoholic content remained in place until January 1, 1998, when the Amendments took effect. *See supra* notes 15–17 and accompanying text.

[30]UTAH CODE ANN. § 32A-14-101(2)(b) (Supp. 1997) (effective Jan. 1, 1998).

[31]*See* Buhler Statement, *supra* note 7.

[32]UTAH CODE ANN. § 32A-14-101(10)(Supp. 1997) (effective Jan. 1, 1998).

[33]Cilwick, *supra* note 24, at A1.

(b) The Cap

In addition to modifying liability, the Amendments also increased the cap on damage awards that an injured party may recover under the Act. Responding to the outcome of the *Adkins* case, Buhler attempted to eliminate the cap entirely; however, faced with some resistance from special interest groups, Buhler agreed to a compromise that simply increased the cap.[34] The Amendments state that "[t]he total amount of damages that may be awarded to any person . . . is limited to $500,000 and the aggregate amount which may be awarded to all persons injured as a result of one occurrence is limited to $1,000,000."[35] Buhler hopes that the increased cap will not only provide more adequate compensation for victims, but will also serve as a more effective deterrent. He stated that "[w]e want to have a high enough penalty so people in the business of selling alcohol take this law seriously and train their employees not to serve intoxicated persons."[36]

(c) Unanswered Question

Despite the clarifications made by the Amendments, one unanswered question about the Act's application still exists. The Amendments do not make clear whether an employer who is not in the business of providing alcohol can be held liable if an employee serves alcohol to a minor in a noncommercial setting. For example, if an employee of an interior design firm serves alcohol to a minor at a company party, and the minor then injures a third party, can the company be held liable for the employee's act? The Amendments do state that while employers are liable for the actions of their employees in the commercial setting, this doctrine of respondeat superior does not apply to social hosts,[37] which is what the company must be considered in this example. On the other hand, one could argue that the company "directly" provided the alcohol if it purchased the alcohol or was aware that alcohol was served at the function. Under such a theory the company might be held liable. Thus, the Amendments do not clearly resolve this potential dispute.

4. Conclusion

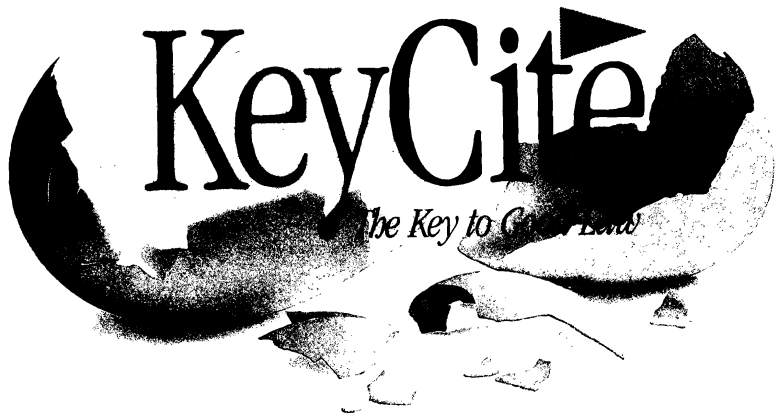
The Amendments clearly define liability both for commercial providers of alcohol and for noncommercial, social hosts. Under the Amendments, to hold a commercial establishment liable, an injured party must prove that (1) the commercial establishment provided alcohol to a patron who was either intoxicated, interdicted, or a minor; (2) the patron then injured a third party; and (3) the injury resulted from the patron's intoxication. To prove liability of a social host under the Act, an injured third party must establish that (1) the social host is twenty-one years of age or older; (2) the social host directly provided alcohol to a person who the host knew or should have

---

[34]*See* Buhler Statement, *supra* note 7.
[35]UTAH CODE ANN. § 32A-14-101(6) (Supp. 1997) (effective Jan. 1, 1998).
[36]Buhler Statement, *supra* note 7.
[37]*See* UTAH CODE ANN. § 32A-14-101(3) (Supp. 1997) (effective Jan. 1, 1998).

known was under twenty-one years of age; (3) the minor then injured a third party; and (4) the injury resulted from the minor's intoxication. In either of these two types of cases, however, the Amendments allow injured parties to recover only $500,000 individually and $1,000,000 in the aggregate.

A powerful new research breakthrough is here.



Introducing KeyCite℠. It's a full citator and case-finder, rolled into one easy-to-use, graphical service.

KeyCite sets a new standard for verifying whether your case is good law, and for quickly identifying cases that support your argument.

For starters, KeyCite is amazingly current. The same day a case is added to WESTLAW, KeyCite gives you its direct history and all citing references from other cases and secondary sources such as ALR® and law reviews.

West legal editors go the extra mile to read each and every case, and assign red and yellow status flags to warn you instantly of negative history.

Innovative depth of treatment stars immediately tell you which cases discuss your case the most. And quotation marks tell you precisely where your case has been quoted.

But what's really revolutionary is KeyCite's case-finding power.

Only KeyCite integrates West-reported case law, the headnote analysis of it, and West Topic and Key Numbers so you can find related cases faster. You can focus on your issue by viewing headnotes in full text. Choose just the headnote you want. Then jump to cases on point!

KeyCite is comprehensive, too. It covers more than one million unreported cases, all reported federal cases, and state cases back to the earliest reported decisions for most states—with more coverage being added weekly.

You've got to see it to believe it!

WEST GROUP

Call 1-800-700-9378 or visit www.westgroup.com/keycite/

*Some restrictions apply. KeyCite is a service mark of West Publishing Company.

 767275

1-522-700-1